SUPREME COURT OF QUEENSLAND

CITATION:	*Bank of Queensland Limited v Prestige Pools Paving and Landscapes Pty Ltd & Anor* [2016] QSC 197
PARTIES:	**BANK OF QUEENSLAND LIMITED ACN 009 656 740** (plaintiff) **v** **PRESTIGE POOLS PAVING AND LANDSCAPES PTY LTD ACN 063 803 672** (first defendant) **MURRAY CHARLES WILLSON** (second defendant)
FILE NO/S:	Brisbane No 1519 of 2012
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 August 2016
DELIVERED AT:	Brisbane
HEARING DATE:	30, 31 May 2016 and 1, 2, 7 June 2016
JUDGE:	Boddice J
ORDER:	**Judgment for the plaintiff on the defendants' counterclaim.**
CATCHWORDS:	BANKING AND FINANCE – BANKS – DUTIES OF BANKS – GENERAL – where the plaintiff provided an overdraft facility to the first defendant, which was guaranteed by the second defendant – where the plaintiff also provided a joint facility to the second defendant and his ex-wife – where the second defendant alleges the joint facility was a loan to enable his ex-wife to invest in the second defendant's software company – where the first defendant defaulted on the overdraft facility – where the plaintiff sought recovery of the moneys loaned to the first defendant and recovery of possession of certain land – where the plaintiff obtained summary judgment on its claim – where the defendants counterclaimed for recovery of moneys credited by the plaintiff and other loss and damage – where the defendants' counterclaim alleged the plaintiff owed various duties to the second defendant to ensure he received moneys the subject of a binding financial agreement between the second defendant and his ex-wife – where the counterclaim further alleges the plaintiff breached those duties by using money from a settlement, payable to the

credit of the second defendant, to repay the joint facility – whether the plaintiff owed any duties to the second defendant – whether the plaintiff violated those duties

Bank of Western Australia Ltd v Phil Zhanming Luo [2010] NSWSC 733, cited
Raging Thunder Pty Ltd v Bank of Western Australia Ltd [2012] QSC 329, cited

COUNSEL:	MD Martin QC for the plaintiff MC Willson for the first defendant (by leave) The second defendant appeared on his own behalf
SOLICITORS:	Mills Oakley for the plaintiff MC Willson for the first defendant (by leave) The second defendant appeared on his own behalf

[1] By claim and statement of claim filed 18 February 2013, the plaintiff sought recovery of moneys loaned by the plaintiff to the first defendant pursuant to a loan contract made on or about 5 November 2007, the payment of which was guaranteed by the second defendant pursuant to a guarantee and indemnity dated 8 November 2007. The plaintiff also sought recovery of possession of certain land.

[2] The defendant defended the claim on the basis the moneys were not owing and the plaintiff had engaged in misrepresentation, unconscionable conduct and a conflict of interest in failing to credit, in payment of the claimed moneys, an amount paid to the second defendant on or about 22 December 2009. The second defendant counterclaimed for recovery of moneys credited by the bank, together with other loss and damage.

[3] On 23 October 2013, the plaintiff obtained summary judgment against the defendants in respect of its claim and the recovery of possession of the land. A summary judgment application in respect of the defendants' counterclaim was, however, unsuccessful. The defendants' counterclaim remains for determination.

[4] The issues in dispute are whether the defendant breached a duty of care, a fiduciary duty or a duty to act with good faith, or otherwise engaged in conduct contrary to the code of banking conduct, or which was unconscionable, false and misleading or tortious. In the event such conduct is established, there remains to be determined the question of what if any damage was caused by that conduct.

Background

[5] The plaintiff is a banking institution. Both the first defendant and second defendant had been customers of the plaintiff bank for some years prior to the events in dispute. The first defendant operated a pool building business. The second defendant is a businessman and director of the first defendant. As part of the banking relationship, the first defendant obtained the overdraft facility the subject of the claim.

[6] On 28 February 2008, the second defendant and his ex-wife (Barbara) entered into a binding financial agreement for the purposes of dividing the matrimonial property. Relevantly, that agreement provided for a property located at 90 Jutland Street, which was held in Barbara's name, to be sold within a specified time upon the settlement of which Barbara was to pay the second defendant the sum of $312,500. In exchange for the payment of that sum, the second defendant was to transfer a real property in his name located at 96 Jutland Street to Barbara, free of encumbrance.

[7] On 30 October 2008, the second defendant and Barbara jointly applied to the plaintiff for a line of credit in the amount of $500,000. This joint facility was approved and subsequently increased to $660,000. The facility was secured by a mortgage over 90 Jutland Street, which Barbara had entered into a contract to sell for $2 million in 2007.

[8] Settlement of 90 Jutland Street was delayed on a number of occasions. It took place on 22 December 2009. The proceeds of settlement were paid by the purchaser in accordance with the settlement instruction, which recorded that there was to be drawn a $312,000 bank cheque in favour of the plaintiff, credit the second defendant. The balance of the sale proceeds was payable by bank cheque in favour of the plaintiff, credit Barbara.

[9] At settlement, bank cheques in accordance with those instructions were provided to the plaintiff. The plaintiff applied those cheques to repaying the joint facility.

Pleadings

[10] The defendants rely on multiple bases for their counterclaim. Central to the defendants' counterclaim are the following assertions:

(a) the plaintiff was aware of the terms of the binding financial agreement, including the requirement that Barbara pay to the second defendant $312,500 upon settlement of 90 Jutland Street;

(b) the plaintiff was aware the joint facility was for moneys borrowed by Barbara alone for the purpose of investing in a company Moretonsoft Pty Ltd;

(c) in those circumstances, the plaintiff owed various duties to the second defendant to ensure he received the moneys the subject of the binding financial agreement;

(d) contrary to those duties, the plaintiff used the proceeds from the sale of 90 Jutland Street, payable to the credit of the second defendant, to repay Barbara's line of credit;

(e) the plaintiff's actions occurred in circumstances where the plaintiff's manager knew of specific instructions from the second defendant that the proceeds credited to him from the sale of 90 Jutland Street were to be deposited into the account of the first defendant;

(f) as a consequence of the bank's breach of duty and failure to follow the specific instructions of the second defendant, the first and second defendant suffered loss, namely the sum of $312,000;

(g) the loss of $312,000 prevented the defendants from extinguishing loan accounts in their name, and prevented the second defendant from maintaining the interests of Moretonsoft, resulting in losses in excess of $40 million.

Evidence

[11] The defendant was born on 13 February 1946. He has operated businesses on his own behalf for the majority of his working life. He had successfully operated the first defendant for many years before the events the subject of this claim.

[12] The second defendant married Barbara on 19 December 1993. The relationship hit difficult times approximately 10 years later. Negotiations were commenced for a property settlement. During this period, the second defendant continued to operate the first defendant. The second defendant said it had a significant annual turnover, in the millions of dollars, during that period. Its financial records record a significantly lesser turnover.

[13] In or about 2007, the defendants made application to the plaintiff for business finance. The plaintiff provided the first defendant with an overdraft facility in the sum of $260,000, secured by a guarantee from the second defendant and a first mortgage over the second defendant's property at 96 Jutland Street, Oxley.

[14] On 28 February 2008, a binding financial agreement was executed by the second defendant and Barbara. It provided for the allocation of various assets to each of them in settlement of the matrimonial properties. Relevantly, the agreement provided:-

> "9.1 That within seven days of the date of this agreement being signed by Barbara and [the second defendant], [the second defendant] shall sign all documents and do all things necessary to transfer all of his right, title and interest to and in 92 Jutland Street to Barbara free of encumbrance, and Barbara shall retain that property as her own absolutely.
>
> 9.2 That should the property at 92 Jutland Street be encumbered as at the date of transfer, then [the second defendant] shall do all acts and sign all things necessary to release the mortgage secured by the said property and refinance such debt using alternate property as security.
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> 9.3 That as and from the date of transfer contained in clause 9.1, Barbara shall be responsible for and meet payment of all future rates, land tax and other statutory charges and outgoings in relation to 92 Jutland Street and Barbara shall indemnify and keep indemnified [the second defendant] from all liability howsoever arising in relation to that property.
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> 9.4 That Barbara shall cause the property situated at 90 Jutland Street to be sold.

9.5 That either upon settlement of the sale of 90 Jutland Street or 18 months from the date of this deed (whichever occurs first) Barbara is to pay to [the second defendant] the amount of $312,500.

9.6 That in exchange for receiving the cash adjustment pursuant to clause 9.5 herein, [the second defendant] shall do all acts and things necessary to deliver to Barbara a transfer of all of his right, title and interest in and to 96 Jutland Street to Barbara free of encumbrance, and Barbara shall retain that property as her own absolutely.

9.7 That in the event Barbara fails to pay [the second defendant] the amount referred to at clause 9.5 herein, then [the second defendant] shall cause the property at 96 Jutland Street to be sold, and the proceeds shall be applied as follows:

(a) all legal costs, agent's commissions and expenses of the sale;

(b) the amount of $312,500 to [the second defendant]; and

(c) the balance to Barbara.

9.8 That upon payment of the amount referred to at clause 9.5 herein, the following is to occur:

(a) [the second defendant] and the company are to do all acts and sign all things necessary to cause the company, [the first defendant], to transfer all of their right, title and interest to and in the Volvo to Barbara free of encumbrance; and

(b) Barbara is to pay to the company [the first defendant] the amount of $50,000.

9.9 That as and from the date of transfer contained in clause 9.6, Barbara shall be responsible for and meet payment of all future rates, land tax and other statutory charges and outgoings in relation to 96 Jutland Street and Barbara shall indemnify and keep indemnified [the second defendant] from all liability howsoever arising in relation to that property.

9.10 That until the transfer of the Volvo pursuant to clause 9.8(a) occurs, [the second defendant] and the company are responsible for meeting all costs associated with the maintenance, insurance and registration of the vehicle and will maintain all lease and other payments due and [the second defendant] agrees to indemnify and keep indemnified Barbara from all or any liability arising howsoever in relation to the said motor vehicle.

9.11 That notwithstanding any other provision contained within this deed to the contrary, [the second defendant] and Barbara agree that for the purposes of the transfer referred to at clauses 9.1, 9.6 and 9.8(a) herein:

(a) they shall each bear one half of the cost of preparing the necessary transfer documentation and ancillary documentation; and

(b) [the second defendant] will bear all other costs associated with the transfer, including but not limited to, registration and lodgement fees, and stamp duty.

9.12 That as and from the date of this deed [the second defendant] shall indemnify and keep indemnified Barbara against all liability howsoever arising in relation to [the first defendant], Wilson Enterprises and/or the Wilson Superannuation Fund including but not limited to all actions, claims or demands by the Deputy Commissioner of Taxation in relation to any tax liability (whether income tax, capital gains tax or fringe benefit tax or otherwise) which [the first defendant], Wilson Enterprises and/or the Wilson Superannuation Fund may incur or has incurred by way of assessment, reassessment, penalties or interest on tax, howsoever arising up to and including the date of this deed and beyond.

…"

[15] In 2008, the second defendant, through the first defendant and personally, injected significant moneys into a technology start-up company, Moretonsoft Pty Ltd. The second defendant saw it as providing significant business opportunities. Moretonsoft had, through the use of capital provided by investors, engaged a production team to secure significant contracts. Moretonsoft was seeking further capital to pursue those ventures.

[16] On 6 August 2008, Moretonsoft registered a charge over its assets in favour of the second defendant. At or around the same time, the second defendant said Barbara became interested in investing in Moretonsoft. Barbara had many assets but none were income producing assets. Further, Barbara was expecting a large sum of cash as a result of the sale of 90 Jutland Street.

[17] The second defendant said in September 2008, he suggested Barbara borrow some money against her assets and invest in Moretonsoft. By doing so, Moretonsoft would achieve its capital injection, and Barbara would receive a cash flow by the payment of interest on those moneys. The second defendant said that as a result of his substantial business relationship with the plaintiff's Sherwood branch manager, Anthony Rimon, he approached Rimon in relation to Barbara's proposed investment.

[18] The second defendant said he met with Rimon and Barbara at the plaintiff's Sherwood branch in late September 2008. Rimon was told Barbara would borrow money to invest in Moretonsoft. The second defendant said Rimon suggested the loan be established jointly in the names of Barbara and the second defendant, so as to satisfy the plaintiff's qualification processes. Whilst Barbara had substantial assets she had very little income and would not pass serviceability requirements for the grant of the loan.

[19] Barbara denied the joint facility was for moneys loaned by her to Moretonsoft. She said the joint facility was a loan for the second defendant. The joint facility, approved on 28 October 2008, was entered into after the second defendant asked her to go guarantor for a low doc line of credit for him due to the struggling nature of his business.

[20] Barbara denied she was concerned about a source of income with the delay of the sale of 90 Jutland Street. Barbara was receiving money from the second defendant by way of repayment of loan moneys owed by him. Barbara denied ever discussing with the second defendant the possibility of investing moneys in Moretonsoft in order to produce income for her. Barbara said the second defendant asked her whether she would, with her family, invest in Moretonsoft. She told him that under no circumstances would she invest in something she did not believe in and did not want to become part of.

[21] The second defendant agreed the consumer lending application signed by the second defendant and Barbara prior to the granting of the joint facility described the loan type as "for working capital".[1] The second defendant said the purpose of the loan was working capital for Moretonsoft. He agreed the application form did not refer to Moretonsoft but said Rimon was well aware of the purpose of the loan facility.

[22] A joint facility for $500,000 was approved by the plaintiff. A letter of offer was sent by the plaintiff dated 28 October 2008. On 30 October 2008, Barbara and the second defendant signed the application documents and the facility agreement. Barbara subsequently signed a mortgage in favour of the plaintiff over 90 Jutland Street as security for that advance. The second defendant also signed a guarantee.

[23] The facility was extended to $660,000 in or about April 2009. The second defendant said that as the sale of 90 Jutland Street was delayed, Barbara was unable to advance further funds to Moretonsoft. The second defendant approached Rimon for the extension of the facility in 2009. The second defendant agreed that when the facility was increased from $500,000 to $660,000 on 2 April 2009, the second defendant and Barbara signed a document in which the purpose of the loan was described "for personal purposes".[2]

[24] Barbara denied approaching Rimon for an increase in the loan facility. Barbara said the second defendant had authority over all matters concerning the facility. As he was the person paying back the loan, she did not receive any correspondence in relation to that account.

[25] The second defendant said Barbara entered into an agreement with Moretonsoft whereby she loaned Moretonsoft over $600,000. Barbara denied entering into any such agreement. The second defendant said although the money from the facility was paid into the first defendant's account, at all times it was Barbara's money which was subsequently used to advance capital to Moretonsoft. Barbara was to receive shares in Moretonsoft.

[26] The second defendant said approximately $630,000 was advanced by Barbara to Moretonsoft. At first, Moretonsoft agreed to accept an advance of $100,000, which was ratified by the Board on 25 February 2009. Pursuant to the agreement with Moretonsoft, Barbara was to receive an incentive structure in return for her capital injection. In July 2009, Moretonsoft paid Barbara $15,000 by way of such incentive.

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1 T1-55/40.
2 T1-58/14.

[27] The second defendant was expecting 90 Jutland Street to settle in September 2009. However, he was not receiving information from Barbara as to whether the proposed settlement was to proceed on that date. The second defendant said that around this time his relationship with Barbara changed and Barbara became more aggressive and less communicative. Part of the problem was that their daughter had obtained employment in the sales department at Moretonsoft and had concerns as to her mother's investment in Moretonsoft.

[28] The second defendant said that on or about 18 November 2009, Rimon asked him to attend the bank to sign some paperwork for settlement. Rimon told him settlement was to occur on or around 30 November 2009. The second defendant said he impressed on Rimon that it was imperative the $312,500, to be paid to him pursuant to the binding financial agreement, come to him because, if he did not access to it, it would impact on the first defendant's balance sheet and its ability to meet its licensing obligations to the Queensland Building Services Authority. The second defendant also said he would be unable to continue funding Moretonsoft.

[29] The second defendant said Rimon assured him those funds would be used to rectify the first defendant's overdraft, with the second defendant to receive the balance of those funds. The second defendant said Rimon expressed excitement about Moretonsoft and its progress. The second defendant signed the security release request. He said it was largely blank.

[30] The second defendant said prior to signing the security release request, he asked Rimon why it was necessary as he had not signed such a document in the past. Rimon said it was necessary if the second defendant was to receive the funds at settlement. He again assured the second defendant the proceeds would be deposited into the first defendant's account and his own personal account. As a consequence of that assurance, the second defendant signed the document. Rimon denies giving any such assurance.

[31] The second defendant said he did not attend the settlement of 90 Jutland Street on 22 December 2009 because he did not know the date of settlement. In January 2010, he learned that settlement had taken place. He found that the first defendant's overdraft had not been reduced in accordance with his instructions to Rimon. Enquiries revealed the $312,000 paid to him had been deposited into the joint facility account and used to pay down the joint facility.

[32] The second defendant said he telephoned Rimon on 18 January 2010 to express his dissatisfaction at this conduct. He asserted Rimon had acted contrary to his instructions and had abused his trust. The second defendant said Rimon said the cheques had been paid in accordance with the release authority, signed by the second defendant. Rimon refused to tell him who had altered that authority. Rimon said he had contacted the plaintiff's legal department and they could not recover the money from Barbara. The second defendant said Rimon offered to do all he could do to assist the second defendant. Rimon denies making any such offer.

[33] The second defendant said he attended Rimon's office the following day. He noticed the security document release request had handwritten modifications to it. The second

defendant said they were not present on the document when he signed that release. Those handwritten amendments included an account number, and a mark pointing to a notation reading, "As detailed by a personal representative at settlement or collection".

[34] The second defendant said that on 19 January 2010 he wrote to Barbara demanding payment of the $312,000 due to him pursuant to the binding financial agreement. On 18 February 2010, the second defendant received a letter from Barbara's solicitor saying he had received payment of the $312,000. It was banked into an account in his name and he was required to comply with his obligations under the binding financial agreement to transfer assets to Barbara.

[35] The second defendant said in or about March 2010, Rimon sent him a new security release document. It purported to authorise the deposit of $312,000 into the joint account. That was contrary to his instructions. He declined to sign the document. The second defendant agreed in cross-examination the document was actually a letter to Barbara.[3]

[36] The second defendant said as a result of not receiving the $312,000 in accordance with his instructions, the first defendant could not comply with certain requirements of the Queensland Building Services Authority. As a consequence, he was only able to operate the first defendant on a very limited basis, severely impacting on its net profit. He was also unable to continue to fund Moretonsoft, as a consequence of which Moretonsoft was unable to pursue its business plan and ultimately failed. That business plan, the second defendant said, showed he would have received millions of dollars as a consequence of the success of Moretonsoft.

[37] The second defendant said he had invested more than $3 million in Moretonsoft by way of bank loans and acquiring shares between 2008 and 2009. He had been issued over 96 million shares in Moretonsoft. Upon the failure of the company they became worthless. Prior to its failure, Moretonsoft was considering an initial public offering for listing on the Australian Stock Exchange.

[38] The second defendant agreed Barbara commenced proceedings against him to compel him to perform his obligations under the binding financial agreement. He had resisted those proceedings on the basis Barbara had not paid him the $312,500 in accordance with the agreement. He agreed he "lost" that proceeding, as the Federal Magistrate found he had been paid that sum in accordance with the agreement.[4]

[39] The second defendant also agreed the first defendant was advised by the QBSA that it proposed to suspend or cancel its licence on 20 May 2011, as a consequence of the financial information provided by the company's accountant for the year ended 31 December 2010. He agreed the QBSA had taken no action in 2009 but said the QBSA had raised concerns at that time. He agreed he had no correspondence to support the assertion. He agreed the QBSA had not imposed any restriction on his licence prior to 2010. He also agreed that in his response to the QBSA he had said that the way he

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3 See Exhibit 7.
4 T1-59/1.

operated the first defendant "has never been a concern regarding your licensing requirements".[5] He did not consider this was inconsistent with his evidence.[6]

[40] The second defendant agreed the first defendant's overdraft facility, taken out in 2007, was at its limit of $260,000 in 2010 when the QBSA took action. The second defendant said no action would have been taken by the QBSA had the $312,000 been paid by the plaintiff in accordance with this instructions in December 2009. The overdraft would have been discharged by that date. The second defendant said Rimon was aware of the need for that overdraft to be paid out by the first defendant.

[41] The second defendant agreed the accounts for the first defendant revealed it had made substantial loans to Moretonsoft, but said the loan made to Moretonsoft subsequent to the establishment of the joint facility was by Barbara, not him. The second defendant denied the only money Moretonsoft ever agreed to borrow from Barbara was $100,000, as evidenced by the resolution of the Board, dated 25 February 2009.[7] The second defendant said the Board had agreed to a loan of $500,000 from Barbara in 2008.

[42] The second defendant agreed the bank statements revealed that after the joint facility was opened, various sums were transferred from the facility into the first defendant's account. The second defendant said it was money advanced by Barbara. The money was paid into the first defendant's account and transferred to Moretonsoft, as and when Moretonsoft required the money.[8] The second defendant said he could not give Moretonsoft all of the money at once. He was assisting Barbara, and looking after her interests, by making sure the money did not go directly to Moretonsoft.[9]

[43] The second defendant agreed the first defendant had the advantage of the money whilst it remained in its account prior to being transferred to Moretonsoft. The second defendant said it was a way to protect Barbara. Barbara knew he was paying the money in this way. He denied the facility was for the first defendant to provide funds to Moretonsoft. He denied he was using it as part of the first defendant's business.[10]

[44] The second defendant denied that when he spoke to Rimon at the time of signing the security release document in late 2009, Rimon had raised that the first defendant's overdraft was over its limit and needed to be fixed up. The second defendant did not believe the overdraft was over its limit until later. The second defendant denied Rimon told him that, if the cheque from the sale of 90 Jutland Street arrives payable to him personally, he could bring the cheque down to the Sherwood branch and they would bank the cheque into the first defendant's account.

[45] The second defendant also denied he told Rimon he would either be at the settlement himself or would have someone at the settlement. The second defendant relied on Rimon, who said he would look after it for him, to make sure the cheque went into the account.[11]

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5 T1-63/5.
6 T1-63/1.
7 T2-5/20.
8 T2-8/20.
9 T2-8/25; T2-11/45.
10 T2-14/10.
11 T2-26/40.

The second defendant said Rimon knew the money had to go into the first defendant's account to reduce the overdraft.[12] The second defendant had told Rimon of the trouble with the QBSA in respect of its loan ratios.

[46] The second defendant denied that Moretonsoft would have failed even if it had been able to receive the $50,000 he said he would have advanced, had the settlement moneys been paid in accordance with his instructions.[13] He agreed he had previously sworn in the Federal Magistrates Court that Moretonsoft had failed because it could not gain enough capital to complete its product.[14]

[47] Barbara denied discussing with Rimon that the facility would be used to invest in Moretonsoft. Barbara understood it to be the second defendant's loan for which she was going guarantor. Barbara denied ever receiving a letter from the bank in relation to the loan. Barbara said the money went into the first defendant's account. The second defendant drew it down. The second defendant gave her "a certain amount of what [the second defendant] called goodwill money from my own account".[15]

[48] Barbara said the second defendant asked her to give him $125,000 for Moretonsoft, which he said he would pay back within the month. Unbeknown to her that $125,000 was the extra part of the money from the facility. The second defendant never paid it back. Barbara denied ever signing any acknowledgment in relation to those moneys. Barbara received an amount by way of interest but said this was provided by the second defendant to prove Moretonsoft had funds coming in of that amount within the month to pay her back.[16] Barbara loaned the money to the second defendant, not to Moretonsoft.

[49] Barbara denied "hatching" a plan with her lawyers to ensure the second defendant did not receive the $312,500 he was entitled to upon the sale of 90 Jutland Street. At settlement, a bank cheque was drawn for the Bank of Queensland, credit the second defendant, for $312,000. The actual amount in the binding financial agreement was $312,500. She later wrote out a cheque for $500 for the difference. The second defendant never banked it.

[50] Barbara agreed settlement of 90 Jutland Street was delayed from 30 November 2009 to 22 December 2009. She said she did not want settlement on her birthday, as a lasting memory. The settlement date change was organised by the second defendant.[17] Barbara denied telling the purchaser of 90 Jutland Street not to tell the second defendant about the settlement date. Barbara said she asked the purchaser to stop discussing her private business with the second defendant and to stop causing trouble.

[51] Barbara knew the facility had to be paid out at settlement of the property but denied discussing the payout with Rimon. Barbara had nothing much to do with Rimon. The only time they had something to do with each other was when she went in to sign a

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12 T2-27/20.
13 T2-29/30.
14 T2-31/35.
15 T2-45/30.
16 T2-47/15.
17 T2-50/30.

document to release the mortgage. She denied Rimon told her it would be tricky for them to get the second defendant to sign a release authority.

[52] Barbara agreed she opened an account with the plaintiff on 20 November 2009. Rimon had told her if she deposited the proceeds from the settlement into an account in the same bank, she would have access to the funds that same day. She opened the account for that reason only.

[53] Barbara said she sought confirmation from the plaintiff in about March that she had been released from her previous guarantee. She denied having contact with Rimon about that matter. Any contact was through her solicitors.[18] Barbara did contact Rimon on 15 March 2010 to ask for the payout on the first defendant's overdraft. She required those details for her Court proceedings.

[54] Sharon Dingwell, a paralegal at Barbara's solicitors in 2009, was involved in the settlement of 90 Jutland Street, Oxley. She recalled a number of extensions were sought by the purchaser in respect of settlement. Dingwell said settlement was originally to be on 30 November 2009. Settlement documents were prepared for that date but settlement was delayed to 22 December 2009.

[55] Dingwell said Barbara would have completed settlement instructions and returned them to her solicitors prior to settlement. Dingwell also spoke to Rimon in relation to arranging settlement. Dingwell spoke to Rimon about the settlement figures as there was a release of mortgage at settlement. At settlement, their agents were required to collect four cheques from the purchaser's solicitors and to hand two cheques to the Bank of Queensland. She understood their agents performed those instructions.

[56] Luke Hudson, a property developer, purchased 90 Jutland Street through two companies. The purchase was subject to development approval. It took some two years to obtain that approval. Hudson initially dealt with the second defendant, who he knew through extended family. Hudson had effectively adopted the second defendant's grandchildren. Hudson's wife was the ex-wife of the second defendant's son.

[57] Hudson said Barbara became very emotional throughout the sale process. Initially, they had a good, strong relationship. As the extensions continued, the atmosphere changed altogether. In the final three months leading to the sale, Barbara was erratic.[19] At one point Barbara told him she had invested a lot of money in Moretonsoft and was regretful that she did it. He thought it was in the vicinity of $600,000.[20] Hudson said Barbara made the last extension very difficult. She was considering taking the development approval itself and terminating the contract.

[58] Hudson was not at the settlement. He was away on holidays. His lawyer acted on his behalf. His lawyers dealt with the settlement dates and figures. He recalled it settled on or about 22 December 2009. He did not tell the second defendant when settlement was

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[18] T2-61/30.
[19] T3-11/17.
[20] T3-12/2.

to take place. Barbara made it very clear he was not to inform anyone.[21] His solicitors dealt with the extensions prior to settlement.

[59] Anthony Rimon, the owner/manager of the plaintiff's branch at Sherwood for approximately 16 years, dealt with the defendants for a number of years. In 2008, 2009 and 2010 he assisted the second defendant with various applications for finance. Other staff were involved in the completion of that documentation. Rimon recalled discussing Moretonsoft with the second defendant.

[60] Rimon said at one point Barbara and the second defendant opened a joint facility secured by a mortgage over 90 Jutland Street. Rimon was not involved in opening the joint facility. That was done by other staff. Rimon believed the joint facility was primarily for the assistance of the second defendant in his investments.[22] Rimon subsequently found out an increase in the joint facility was approved but was not personally involved in that approval. Rimon denied ever telling the second defendant he had to be a party to the joint facility.

[61] Rimon said in November 2009, he spoke to the second defendant about the first defendant's overdrawn overdraft facility. He recalled reminding the second defendant he needed to sign the settlement instructions for 90 Jutland Street. At that stage, Barbara had signed those instructions. Rimon said when the second defendant came in to sign the release, the second defendant queried why he had to sign the release document. Rimon explained to the second defendant that as the joint facility was in two names all people involved in the security and/or loan had to sign the release form.[23]

[62] Rimon said the settlement instructions signed by the second defendant and Barbara for the sale of 90 Jutland Street contained the amounts to be received at settlement. Rimon said the second defendant made it clear he was going to attend settlement to collect the cheque. That was why an account number was not put in the form in the first place.[24] The second defendant said he wanted to control the amount paid to him. Rimon told the second defendant to bring the cheque back to him so that he could authorise payment into the account of his choice. Rimon never attended that settlement or any other settlement.

[63] Rimon had no concerns about the execution of the security release document which he believed was executed in accordance with instructions. Rimon agreed the release authority was subsequently altered to add an account number next to the second defendant's name. Rimon did not enter the account number. He has been unable to ascertain who physically wrote the number onto the form. Rimon said he wrote the handwritten words "as detailed by personal representative at settlement or collection" on the release. Those words were written to clarify for the settlement section.[25] It was likely he added those words when the second defendant told him the second defendant was going to attend settlement and collect the cheque.[26]

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[21] T3-17/15.
[22] T3-23/45.
[23] T3-31/1.
[24] T3-31/25.
[25] T4-6/10.
[26] T4-6/35.

[64] Rimon did not recall any discussion about Moretonsoft at or around the time of settlement. Moretonsoft had been discussed in the past, as part of an overview of the second defendant's investments. Rimon had never heard of any issue between the first defendant and the Queensland Building Services Authority. Rimon understood the second defendant was going to use the settlement funds payable to him from the sale of 90 Jutland Street to repay the first defendant's overdraft.

[65] Rimon said there were two release documents the second defendant was asked to sign. The first related to the release of the mortgage on 90 Jutland Street. The subsequent one, in March 2010, related to the release of Barbara's personal guarantee.

[66] Rimon assisted Barbara to open an account with the plaintiff close to the settlement time. Barbara had originally nominated a bank account with another bank. Rimon questioned that as she would not have access to the funds straight away on the day of settlement.

[67] Rimon did not recall any dealings with Dingwell. He accepted he had discussions with various people in respect of settlement. The cheques were drawn in accordance with the instructions at settlement. All settlement funds came to the plaintiff, with one cheque payable to the plaintiff, to the account of the second defendant, and the balance payable to the plaintiff, to the account of Barbara.

[68] Rimon agreed the separate cheques payable to the plaintiff on account of the second defendant and Barbara were used to repay the joint facility. The discussion Rimon had with the second defendant was that Rimon would pay the cheque for $312,000 into the first defendant's account if the second defendant came into the branch with the actual cheque after the settlement. Rimon did not undertake to look after the payment of that cheque to the first defendant. He denied the second defendant signed the release authority in blank. The only details added after the signing of the form was the account number beside the second defendant's name.[27]

[69] Rimon agreed that after the second defendant complained about the way the cheque for $312,000 had been dealt with he undertook to telephone Barbara. However, he denied ever saying he would retrieve the money back from Barbara. Rimon subsequently had discussions with the plaintiff's legal department. As a consequence, he had to collect documents to create a file for the legal department.

[70] Russell Walker, who was introduced to the Moretonsoft product in about 2008, invested approximately $300,000 into the company between 2008 and 2010. He was a background investor. He was in regular contact with the directors. He was aware the second defendant was also an investor in the company. The second defendant was getting things moving so that they could get the product out to the world. Walker lost all of his investment in Moretonsoft.

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[27] T3-33/45.

Defendants' submissions

[71] The defendants submit the plaintiff, in crediting the cheque for $312,000 payable to the second defendant in repayment of the joint facility, failed in its duty to the defendants and acted unconscionably. The joint facility was a loan obtained by Barbara for investment in Moretonsoft. The second defendant had no obligation to repay any part of that loan.

[72] The defendants further submit the plaintiff had no authority to credit those funds in payment of the joint facility. The authority signed by the second defendant was altered after he signed it, to nominate an account which was contrary to his express instructions.

[73] The defendants submit the second defendant suffered loss as a consequence of the plaintiff's breaches. He was unable to operate the first defendant to the same level as previously. He was unable to continue to fund Moretonsoft, as a consequence of which, it failed. These losses were reasonably foreseeable having regard to Rimon's knowledge of all of the surrounding circumstances.

Plaintiff's submissions

[74] The plaintiff submits the defendants' case must fail, as it was not supported by the witnesses called in the defendants' own case. Those witnesses established the joint facility was obtained by the second defendant for his own benefit and, in particular, for investment by him in Moretonsoft. Barbara did not loan Moretonsoft any moneys on her own account. This conclusion is supported by the documentary evidence, which established that the majority of the funds drawn down from the joint facility were paid to the first defendant's account and subsequently to Moretonsoft.

[75] The plaintiff submits that whilst there is evidence Barbara was paid interest by Moretonsoft, Barbara loaned the second defendant $100,000 so that he could loan the money to Moretonsoft. The payment of interest was in relation to that transaction. The contemporaneous documentation supported Barbara's account.

[76] The plaintiff further submits that as the second defendant and Barbara were jointly and severally liable to repay the joint facility, it is unsurprising the funds from the sale of 90 Jutland Street were used jointly to discharge that debt. The loan was secured by a mortgage over 90 Jutland Street. Whilst the security release document had an account number added to it after the document was signed by the second defendant, Rimon had explained the circumstances of that addition.

[77] Until shortly prior to settlement, it was the second defendant's specific instructions he would be attending settlement to collect the cheque on his account. Once that did not happen and the bank cheque, which was payable to Bank of Queensland account of the second defendant, was received by the plaintiff, it was appropriate for the plaintiff to use it to discharge the second defendant's share of the joint facility. Such conduct did not involve a breach of duty, a breach of the banking code or any unconscionability.

[78] Finally, the plaintiff submits there is no causal connection between the alleged damage claimed by the defendants and any breach by the plaintiff. The evidence establishes that Moretonsoft failed as a result of an inability to fund its expansion. That inability was not as a consequence of any action taken by the plaintiff. Similarly, the contemporaneous documentation revealed the QBSA's concerns in relation to the first defendant only arose well after the transaction the subject of this claim.

Findings

Generally

[79] The second defendant did not impress me as credible or reliable. His evidence contained supposition and suspicion, with little factual support. Much of his evidence was contrary to the contents of contemporaneously made documents. The evidence called in his case, almost without exception, was contrary to his pleaded case.

[80] By contrast, I found Barbara's evidence, and that of Rimon, highly persuasive. Their evidence was logically consistent with the established facts. It was, in large measure, supported by the surrounding contemporaneous documentation.

Joint Facility

[81] I accept the facility entered into jointly by the second defendant and Barbara, in or about October 2008, was entered into by them at the second defendant's request, for the purposes of obtaining funds for his own investment purposes. I accept Barbara's evidence the loan was taken out at the second defendant's suggestion and not at her request. I reject the second defendant's evidence to the contrary.

[82] Barbara's evidence that it was the second defendant, not her, who required the loan so as to invest in Moretonsoft, is supported by the initiating documentation for the facility. The application for the joint facility listed the second defendant as the primary applicant. Further, the purpose of the loan was "working capital".

[83] The transactions entered into after the joint facility was created also support a finding that the loan was for the second defendant's investment. Apart from specified sums, the joint facility was drawn down by the second defendant transferring monies from the joint facility to the account of the first defendant. Thereafter, those monies were advanced by the first defendant to Moretonsoft. The first defendant recorded large loans by it to Moretonsoft in its financial accounts.

[84] Such transactions are consistent with the joint facility being for the second defendant's benefit, in order to advance his investment in Moretonsoft. There is no legitimate reason for the funds to have been paid to the first defendant's account if, as the second defendant contends, the loan was for Barbara to invest in Moretonsoft. I do not accept as truthful the second defendant's explanation that this process was adopted by him to protect Barbara's interests.

[85] The second defendant sought to rely on receipts from Barbara for specified sums to support his contention the joint facility was in truth a loan for Barbara so that she could invest in Moretonsoft. However, consideration of that documentation does not support the second defendant's contention.

[86] First, the receipt from Barbara dated 18 June 2010, for $2,000, specifically refers to the payment being "in part repayment of principle on loan provided on 26 April 2008". That loan pre-dates the creation of the joint facility. Second, the minutes of the Board Meeting of Moretonsoft dated 25 February 2009 refer to the company borrowing "short-term funds" from Barbara, with the loan to be repaid within months. That resolution is consistent with Barbara's evidence that the second defendant asked her to loan him $100,000 for Moretonsoft. It is not consistent with the contention that Barbara was loaning Moretonsoft large sums for capital expansion.

[87] Significantly, the letter from Moretonsoft to Barbara dated 24 July 2009, which appears to have been sent as a consequence of Moretonsoft's failure to comply with the terms of the short-term loan previously referred to, referred to a payment of $15,000 to Barbara, "as a goodwill gesture" and that the Board had decided to make the payment "as per your existing agreements with Murray whereby you receive a set-up fee for loans and interest is paid directly by Murray to the bank". That document is consistent with the loans being on behalf of the second defendant.

Settlement

[88] Settlement of 90 Jutland Street was originally set for late November 2009. I accept that in the lead-up to that settlement, Dingwell contacted Rimon in relation to settlement figures. I also accept Rimon had Barbara and the second defendant execute a security release document in respect of the mortgage over 90 Jutland Street.

[89] Whilst I accept that Barbara told Hudson not to discuss her business with the second defendant, I do not accept the second defendant was unaware of the ultimate settlement date, 22 December 2009. The second defendant had been involved in the process of the sale of 90 Jutland Street from the entering into of the contract with the purchaser. The purchaser was in a relationship with the second defendant's ex-daughter-in-law. The second defendant was keenly interested in obtaining $312,500 from the sale of the property. Against that background, I do not accept the second defendant's evidence that he was unaware of the settlement date.

[90] I also do not accept the second defendant's evidence that he arranged for Rimon to attend settlement on his behalf. First, it is implausible that Rimon, as manager of the plaintiff's Sherwood branch, would attend the settlement. Second, Rimon's notes and addition to the security release document are supportive of Rimon's account of that conversation.

[91] I accept that the second defendant, when signing the security release document, informed Rimon he would be attending settlement to collect the cheque in his favour. The addition of the handwritten words "as detailed by personal representative at settlement (or collection)" beside the amount payable to MC Willson in the security release documentation is entirely consistent with Rimon's evidence that the second defendant

told Rimon he would collect the cheque at settlement and bring it to the bank to be paid into the account of the first defendant. I accept Rimon's account of this conversation.

[92] I accept the settlement authority signed by Barbara and the second defendant was altered after each had signed it, to nominate the account number 20787258 beside the second defendant's name. The inclusion of that account number is, however, hardly surprising in circumstances where the second defendant did not attend settlement and the cheque presented at settlement to the plaintiff was payable to the plaintiff, credit the second defendant.

[93] I do not accept that Barbara's opening of an account with the plaintiff, prior to settlement, was part of a conspiracy. There was good reason for Barbara to pay the proceeds of settlement into an account with the plaintiff. If she did not do so, she did not have access to the proceeds for some days. There was nothing out of the ordinary in the advice given by Rimon in this respect.

[94] I do not accept the plaintiff failed to act in good faith in depositing the cheque for $312,000 into the joint facility account. Such action was not out of the ordinary course of banking practice. The terms of the joint facility authorised the plaintiff to use funds it received in payment of that facility. Clause 27.1 expressly allowed the plaintiff to use money in any of the second defendant's accounts to pay out the joint facility.

[95] Further, the joint facility was, to Rimon's knowledge, a facility primarily for the second defendant. It was not in breach of any duty, or the Code of Practice to allocate those funds in part repayment of the joint facility. It was also not unconscionable for the plaintiff to do so. There is also no basis to contend the plaintiff breached any duty as bailee. The cheque was payable to the plaintiff.

[96] In considering the question of breach of duty, it is important to have regard to the nature of the circumstances in which a duty may arise between banker and customer. Generally, a bank does not owe a duty of care to a customer. A duty may, however, arise when a bank undertakes the role of providing advice beyond the mere provision of finance.[28] No such circumstance arises in the present case. In any event, there is no factual basis for the conclusion there was a breach of any such duty.

[97] The second defendant relied on subsequent notes by Rimon and the forwarding of a further security release request in March 2010 to support his claim that the plaintiff had acted in breach of duty and unconscionably. However, Rimon's notes are consistent with his evidence, namely, that after settlement and the complaint of the second defendant, the plaintiff took steps to seek advice from its legal department, as a consequence of which Rimon was required to recover relevant documentation which he sent as a "file". Further, the subsequent security release request related to Barbara's personal guarantee in respect of the joint facility. It had nothing to do with the release of the mortgage on 90 Jutland Street, which occurred at settlement.

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[28] *Raging Thunder Pty Ltd v Bank of Western Australia Ltd* [2012] QSC 329 at [95]; *Bank of Western Australia Ltd v Phil Zhanming Luo* [2010] NSWSC 733 at [71]-[74].

Conclusions

[98] The factual findings do not support any basis for a finding that the plaintiff engaged in misleading conduct, breach of fiduciary duty, breach of any statutory provision, breach of the Banking Code of Conduct, or any unconscionable conduct.

[99] The defendants have failed to establish any of the pleaded causes of action against the plaintiff. The defendants' counterclaim is dismissed.

Damages

[100] Whilst it is unnecessary to consider the question of damages in view of my conclusions, I shall briefly summarise my conclusions on damages in the event it becomes relevant.

[101] The second defendant's evidence on damages was also based on supposition. His claim in respect of the losses associated with the first defendant was premised on the first defendant having a turnover of $2 million to $3 million prior to these events. The first defendant's financial records do not establish any such turnover. Further, the action taken by the QBSA, arose well after the events the subject of this claim. The second defendant's assertion that problems had been raised by the QBSA at an earlier time. That assertion was completely inconsistent with the second defendant's response to the QBSA on 30 May 2011, wherein he expressly stated the conduct of the first defendant up to that time had "never been a concern".

[102] Similarly, the second defendant's claimed losses in respect of Moretonsoft were not supported by the surrounding documentation. Moretonsoft was a start-up company, with a product it was struggling to fund into the open market. Moretonsoft was having difficulty meeting the terms of the loans it entered into with the second defendant many months before the events the subject of this action. There is no basis to conclude Moretonsoft would have been successful but for the fact that the second defendant could not advance a further $50,000 to assist its continuation. I do not accept the second defendant's account as to the circumstances of the demise of Moretonsoft.

[103] The second defendant has failed to establish any causal link between the losses allegedly suffered by him and the plaintiff's conduct in relation to the cheque for $312,000 from the proceeds of settlement on 90 Jutland Street.

Orders

[104] I give judgment for the plaintiff on the defendants' counterclaim. I shall hear the parties as to any other orders and costs.