SUPREME COURT OF QUEENSLAND

CITATION:	*Mineral Resources Engineering Services Pty Ltd v Commonwealth Bank of Australia; Hay v Commonwealth Bank of Australia (No 3)* [2016] QSC 232
PARTIES:	**In SC No 6906 of 2010:** **MINERAL RESOURCES ENGINEERING SERVICES PTY LTD as trustee for MEAKIN INVESTMENT TRUST** (plaintiff/respondent) **v** **COMMONWEALTH BANK OF AUSTRALIA** (defendant/applicant) **In SC No 6907 of 2010:** **PETER ALEXANDER HAY** (plaintiff/respondent) **v** **COMMONWEALTH BANK OF AUSTRALIA** (defendant/applicant)
FILE NO/S:	SC No 6906 of 2010 SC No 6907 of 2010
DIVISION:	Trial Division
PROCEEDING:	Applications to strike out pleadings
DELIVERED ON:	14 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	10 May 2016
JUDGE:	Bond J
ORDER:	**In SC No 6906 of 2010:** **The orders of the Court are that:** **1. The following parts of the plaintiff's third further amended statement of claim are struck out:** **(a) in paragraph 87(d), the words 'or alternatively 12CA';** **(b) in paragraph 87(db), the words 'or 51AA';** **(c) paragraph 87(e); and** **(d) paragraph 6 of the prayer for relief.**

2. I direct that the plaintiff may not further amend its statement of claim without the leave of the Court.

3. The plaintiff must pay the defendant's costs of its application to be assessed.

In SC No 6907 of 2010:

The orders of the Court are that:

1. The following parts of the plaintiff's third further amended statement of claim are struck out:

(a) in paragraph 84(d), the words 'or alternatively 12CA';

(b) in paragraph 84(db), the words 'or 51AA';

(c) paragraph 84(e); and

(d) paragraph 6 of the prayer for relief.

2. I direct that the plaintiff may not further amend its statement of claim without the leave of the Court.

3. The plaintiff must pay the defendant's costs of its application to be assessed.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – where defendant applied to strike out parts of plaintiffs' pleadings relating to claims of unconscionable conduct in equity or under the unwritten law in breach of s 51AA of the *Trade Practices Act* 1975 (Cth) and further, or alternatively, s 12CA of the *Australian Securities and Investments Commission Act* 2001 (Cth) – where parties agreed that properly pleaded claim must establish three elements: (1) special disadvantage; (2) disadvantage affected plaintiff's ability to make a judgment in its own best interests; and (3) the defendant exploited that special disadvantage – where earlier judgment identified problems in an earlier version of the pleadings that remain unaddressed in latest version – where significant portions of the pleading were struck out as a result of those problems – where defendant submitted current pleadings failed to plead material facts which made out any of the elements – where plaintiffs relied on paragraphs in the pleadings that relate to a separate cause of action to establish adequacy of the pleadings – whether pleadings identify elements with sufficient precision to enable the defendant to know and understand the case it has to meet

Australian Securities and Investments Commission Act 2001 (Cth), s 12CA
Trade Practices Act 1975 (Cth), s 51AA
Uniform Civil Procedure Rules 1999 (Qld), r 171

Kakavas v Crown Melbourne Ltd (2013) 250 CLR 392, cited
Lee v Abedian [2016] QSC 92, cited
Mineral Resources Engineering Services Pty Ltd v Commonwealth Bank of Australia; Hay v Commonwealth Bank of Australia [2015] QSC 62, cited
Mineral Resources Engineering Services Pty Ltd v Commonwealth Bank of Australia; Hay v Commonwealth Bank of Australia (No 2) [2015] QSC 288, considered
Robert Bax & Associates v Cavenham Pty Ltd [2011] QCA 53, cited

COUNSEL: **In SC No 6906 of 2010 and SC No 6907 of 2010:**

P J Dunning QC, with P Somers, for the plaintiff/respondent
R S Hollo SC, with P K O'Higgins, for the defendant/applicant

SOLICITORS: **In SC No 6906 of 2010 and SC No 6907 of 2010:**

Russells for the plaintiff/respondent
Clayton Utz for the defendant/applicant

[1] Pursuant to r 171 of the *Uniform Civil Procedure Rules* 1999 (Qld), the Commonwealth Bank of Australia ("the Bank") seeks to strike out parts of the third further amended statements of claim filed 11 April 2016 by the separate plaintiffs in proceedings 6906/10 and 6907/10.

[2] The present applications are the third round of such applications, the first two rounds of which have resulted in significant parts of the plaintiffs' pleadings (as then expressed) being struck out. As to this, see:

(a) *Mineral Resources Engineering Services Pty Ltd v Commonwealth Bank of Australia; Hay v Commonwealth Bank of Australia* [2015] QSC 62 (**Mineral Resources (No 1)**); and

(b) *Mineral Resources Engineering Services Pty Ltd v Commonwealth Bank of Australia; Hay v Commonwealth Bank of Australia (No 2)* [2015] QSC 288 (**Mineral Resources (No 2)**).

[3] The separate plaintiffs in proceedings 6906/10 and 6907/10 advance similar causes of action against the Bank and the impugned statements of claim are, relevantly, in similar form. The proceedings are being managed together on the commercial list. It is common ground that the result in the application made in respect of one proceeding will determine the result in the application made in the other proceeding. Accordingly, I will limit my analysis to proceeding 6906/10, in which the plaintiff is Mineral Resource Engineering Services Pty Ltd.

[4] There was no relevant dispute between the parties as to either the substantive law which informed the analysis of the plaintiff's underlying cause of action or the procedural law by which the Bank's applications should be resolved.

[5] As to the substantive law:

(a) The plaintiff claims that the Bank acted unconscionably in equity, or under the unwritten law, and therefore in breach of s 51AA of the *Trade Practices Act* 1975 (Cth) and further, or alternatively, in breach of s 12CA of the *Australian Securities and Investments Commission Act* 2001 (Cth);

(b) The Bank contended - and the plaintiff accepted - that to succeed in its claims, the plaintiff must establish three elements which are necessary for a party in the plaintiff's

position to take advantage of the well-established area of equitable principle concerned with the setting aside of transactions where unconscientious advantage has been taken by one party of the disabling condition of the other, namely:

(i) the plaintiff was at a special disadvantage to the Bank;

(ii) that disadvantage affected its ability to make a judgment as to its own best interests; and

(iii) the Bank exploited that special disadvantage.

(c) As to the importance of the final element:

(i) An impugned transaction must have been procured by one party taking advantage of an inability on the part of a weaker party to make a decision in its own best interests, which inability was sufficiently evident to the other party to render its conduct exploitative: *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at [124] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ; see also *Mineral Resources (No 2)* at [24].

(ii) As the High Court put it in *Kakavas* at [20], [117] and [161] (emphasis added):

> [20] … equitable intervention does not relieve a plaintiff from the consequences of improvident transactions conducted in the ordinary and undistinguished course of a lawful business. A plaintiff who voluntarily engages in risky business has never been able to call upon equitable principles to be redeemed from the coming home of risks inherent in the business. **The plaintiff must be able to point to conduct on the part of the defendant, beyond the ordinary conduct of the business, which makes it just to require the defendant to restore the plaintiff to his or her previous position**.
>
> …
>
> [117] The absence of a reasonable equality of bargaining power by reason of the special disability of one party to a transaction, while not decisive, is important given that **the concern which engages the principle [to relieve against an unconscionable dealing] is to prevent victimisation of the weaker party by the stronger**.
>
> …
>
> [161] **Equitable intervention** to deprive a party of the benefit of its bargain on the basis that it was procured by unfair exploitation of the weakness of the other party **requires proof of a predatory state of mind**. Heedlessness of, or indifference to, the best interests of the other party is not sufficient for this purpose. **The principle is not engaged by mere inadvertence, or even indifference, to the circumstances of the other party to an arm's length commercial transaction. Inadvertence, or indifference, falls short of the victimisation or exploitation with which the principle is concerned**.

[6] As to the procedural law:

(a) The basic function of pleadings is to identify the issues which require the court's decision and determination with sufficient precision to enable the other party to know and understand the case it has to meet.

(b) *A fortiori*, where, as here, the allegation is a most serious kind: *Mineral Resources (No 2)* at [18].

(c) In *Robert Bax & Associates v Cavenham Pty Ltd* [2011] QCA 53, White JA stated at [16] (emphasis added):

> Rule 171 closely resembles the language of former O 22 r 32 *Rules of the Supreme Court* 1991 (Qld) which enabled a judge to strike out or amend any matter in the pleading which tended "to prejudice, embarrass, or delay, the fair trial of the action". The word "embarrass" has not been retained.

> Nonetheless **any pleading which is difficult to follow or objectively ambiguous or creates difficulty for the opposite party insofar as the pleading contains inconsistencies, is liable to strike out because it can be said to have a tendency to prejudice or delay the fair trial of the proceeding** rather than "embarrass" the opposite party.

(d) I put the matter in this way in *Lee v Abedian* [2016] QSC 92 at [38] to [39] (citations omitted):

> All of the applicant defendants accept, as they must, that the power to strike out is to be used sparingly and only in clear cases: *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125 at 129 to 130. The power cannot be exercised "once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it": *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J.
>
> However, they submit, and I agree, that the Court will not shrink from striking out a pleading which is defective because it does not disclose a reasonable cause of action, has a tendency to prejudice or delay a fair trial, contains allegations which are unnecessary, scandalous, vexatious or embarrassing, or which is otherwise an abuse of the processes of the Court.

[7] Essentially, the Bank's case before me was as follows (emphasis added):

> As explained below, in *Mineral Resources (No 2)* the Court struck out in each proceeding those paragraphs which the plaintiffs themselves had identified articulated their claims for unconscionable conduct in equity and the cognate statutory claims under the unwritten law. The plaintiffs have not sought to replead those paragraphs despite being given every opportunity to do so. Consequently the current pleadings do not properly articulate any claim for unconscionable conduct in equity or under the unwritten law **and the defendants are left to guess what the case is or might be in these respects**.

[8] The Bank's first complaint was that McMurdo J had observed that the plaintiff's pleaded case was deficient because the plaintiff had not identified how it was alleged that the Bank exploited a special disadvantage to the detriment of the plaintiff, and the plaintiff have not since then sought to remedy the deficiency.

[9] As far as it went, that complaint was valid.

[10] In *Mineral Resources (No 2)*, McMurdo J struck out [88] and [89] of the plaintiff's pleading. Amongst other things, his Honour observed (emphasis added):

> [23] This alleged imbalance in knowledge is pleaded as a circumstance which is relevant to the characterisation of the defendant's conduct, constituted by one or more of the so called elements (apart from element 7), as unconscionable.
>
> [24] Accepting, of course, for present purposes the factual accuracy of what is pleaded in paragraphs 88 and 89, the relevance of those matters to the unconscionability case is not apparent. **There is no pleading as to how the defendant exploited any advantage from that imbalance of knowledge. The connection between the plaintiff's lack of knowledge of these matters and the plaintiff's ability to make decisions about its loan account is clear enough, and is the subject of other parts of the pleading. But here the complaint is one which involves a comparison between the knowledge of one party and the ignorance of the other and it is not revealed how the defendant was able to and did use that difference to benefit its position to the detriment of the plaintiff.**
>
> [25] That deficiency in the pleading is apparently recognised in the written submissions for the plaintiffs, where their case in this respect is summarised by the submission that the defendant exploited its "superior position" by the conduct which is pleaded as element 5, the conduct of a specific representation on 2 December 2008 which induced Mr Meakin to believe that the defendant would not exercise its power of sale without giving him notice of a margin call and by the defendant continuing the "margin loan relationship with [the plaintiffs]". Nevertheless, the relevance of this imbalance of knowledge or "superior position" enjoyed by the defendant is still not revealed. **The submissions perhaps go further than the plaintiffs' pleadings by alleging that there was an exploitation of the defendant's superior position in this respect by (some of) the conduct which is alleged to have been unconscionable. But the problem remains that the plaintiffs have not identified how the defendant did exploit that superior position to engage in that conduct.**

[11] It may be accepted that the problem which his Honour identified was a failure to plead material facts which satisfied the third element referred to at [5](b)(iii) above, namely exploitation of special disadvantage in a way which the law recognises as unconscionable. His Honour seemed to accept that the pleading asserted a case which arguably established the first two elements.

[12] Since delivery of that judgment, the plaintiff has had the opportunity to amend its pleading further and in fact has done so on two occasions. But nothing was done to address the problem identified in his Honour's judgment. And this occurred in the face of an indication which was made at a directions hearing that amendment was intended, amongst other things, to address the criticisms made by his Honour.

[13] In argument before me the plaintiff sought to develop the proposition that a sufficiently arguable case in relation to the third element did in fact exist on the face of the pleading. One problem with that argument was that the paragraphs relied on were not new paragraphs, but were paragraphs which existed when McMurdo J was considering the pleading. The plaintiff's response was that it was not going behind his Honour's judgment, but was just making an argument which was available to be made before his Honour, but which was not made.

[14] This sort of departure is not to be encouraged. Nevertheless, I think it would be undesirable to decide the present application by regarding the plaintiff as bound irrevocably by the way it had argued its case on a previous strike out application. Of course, if otherwise I was satisfied by the plaintiff's present argument, the departure might well justify a costs order against the plaintiff even if the plaintiff had defeated the strike out. The critical question for the disposition of the present application is whether I am satisfied by the Bank that the impugned parts of the pleading in its current form should be struck out.

[15] The Bank's argument was as follows.

[16] First, serious issues of misconduct, such as the present unconscionability case, should be specifically pleaded.

[17] Second, the current form of the pleading does not properly articulate any claim for unconscionable conduct in equity or under the unwritten law and the Bank is left to guess what the case is or might be in these respects.

[18] Third, in particular, there is an absence of any pleading of facts which might establish exploitation of special disadvantage in a way consistent with the law. There was no plea of a special disadvantage, no plea of how the disadvantage was said to affect the plaintiff's ability to make a judgment as to its own best interests and no plea of what the Bank did to exploit the special disadvantage.

[19] Accordingly, the paragraphs which assert the plea (and the related claim for relief) as to the existence of unconscionable conduct in equity or under the unwritten law should be struck out with no leave to re-plead. The particular parts of the pleading which they seek to have struck out are identified by bold print below:

> 87. Further, and in the alternative, the Defendant's conduct in acting as alleged in paragraphs:
>
> (a) 47;
>
> (b) [previously deleted];
>
> (c) 55 to 64;
>
> (ca) [previously deleted];

(cb) 69 to 72;

(cc) [previously deleted];

(cd) 80 to 85;

(ce) [previously deleted];

(cf) [previously deleted]

(both collectively and as individual contraventions) constituted:-

(d) in the premises alleged in paragraphs 1(c), 8, 27, 28, 46, of this Amended Statement of Claim, unconscionable conduct, in contravention of section 12CB **or alternatively 12CA** of the ASIC Act;

(db) in the premises alleged in paragraphs l(c) 8, 27, 28 and 46 of this Amended Statement of Claim, unconscionable conduct, in contravention of sections 51AB, 51AC **or 51AA** of the TPA; and

(e) **in the premises alleged in paragraphs 1(c), 8, 27, 28 and 46 unconscionable conduct in equity**;

…

And the Plaintiff claims

1. Damages for breach of contract, namely a Margin Loan Agreement with the Defendant, in a sum not less than $16,028,526.47;

2. Further and in the alternative, damages for breach of a duty of care owed by the Defendant to the Plaintiff, in a sum not less than $16,028,526.47;

3. Further, and in the alternative, damages in a sum not less than $22,853,579.34 pursuant to s.82 of the *Trade Practices Act* 1974 (Cth);

4. [previously deleted];

5. Further, and in the alternative, damages in a sum not less than $22,853,579.34, for misleading or deceptive conduct and for unconscionable conduct, pursuant to s.12GF of the *Australian Securities and Investments Commission Act* 2001 (Cth);

6. Equitable Compensation in a sum not less than $22,853,579.34;

7. Such further or other orders as may be necessary or appropriate, including orders for accounts and enquiries;

8. Interest up to $13,273,796.48 as at 22 September, 2014 and ongoing on damages and other monies due; and

9. Costs.

[20] In order to evaluate whether the Bank's argument has any merit, it is appropriate to explain the plaintiff's pleaded case in more detail.

[21] Having regard to the pleading at [87], the structure of the pleaded case as to the existence of unconscionable conduct in equity or under the unwritten law involves reliance on the facts cross-referred to in subparagraphs [87](a), (c), (cb), (cd) and (e). That case may be summarised in the following way.

[22] Under the heading "Introduction", reliance was placed on the fact pleaded at [1](c), namely the relevant facts concerning the position of Mr Meakin and his relationship to the plaintiff;

[23] Under the heading "The Margin Loan Agreement", reliance was placed on the facts pleaded at [2] to [3], including the allegations that –

(a) the plaintiff's entered into a margin loan agreement with the State Bank of NSW, by which the plaintiff agreed to borrow funds and use those funds to acquire units in certain index funds; and

(b) the terms of the margin loan agreement included provisions for the making of margin calls which could be made on notice by the Bank to the plaintiff.

[24] Under the heading "The Margin Loan is Established", reliance was placed on the facts pleaded at [4] to [6A], including the allegations that –

(a) a margin loan was established; and

(b) the margin loan agreement contained implied terms as to the care and diligence which the Bank would exercise in compiling information published as to the state of the plaintiff's margin loan and an obligation on the Bank to provide notice if the plaintiff's loan went into margin call.

[25] Under the heading "The Provision of Data Regarding the Margin Loan", reliance was placed on the facts pleaded at [7] to [8], but not on the facts pleaded at [9] to [11]. Reliance was placed on allegations that the Bank provided a service of publishing margin loan statements to the plaintiff as to the state of his margin loan account on a quarterly basis.

[26] Under the heading "Defendant's Misleading and Deceptive Conduct", no reliance was placed on the facts pleaded at [12] to [25].

[27] Under the heading "Negligence", reliance was placed on the facts pleaded at [26][1] to [28], but not on the facts pleaded at [29] to [31]. It is appropriate to quote those paragraphs:

> 26. The Defendant knew or ought to have known, that its margin loan customers, including the Plaintiff, would rely on the Data it provided and published for the following purposes:
>
> (a) ascertaining the state of their margin loan accounts;
>
> (b) ascertaining the amount owing under the Margin Loan Agreement;
>
> (c) ascertaining the Defendant's market value of the securities for the Margin Loan;
>
> (d) ascertaining the true realisable market value of the Plaintiff's securities;
>
> (e) ascertaining the current loan to security ratio;
>
> (f) ascertaining the amount by which the market value of the securities exceeded the balance of the Margin Loan;
>
> (g) ascertaining whether to sell their investments acquired using the Margin Loan;
>
> (h) ascertaining whether their margin loan accounts were in, or approaching, buffer;
>
> (i) ascertaining whether their margin loan accounts were in, or approaching, margin call;
>
> (j) ascertaining whether the current loan-to-security ratio exceeded the margin call loan to security ratio;
>
> (k) ascertaining whether to provide additional security for the margin loan;
>
> (i) ascertain whether to execute other transactions in respect of:
>
> (i) the Portfolio and the margin loan for the purpose of managing the Plaintiff's overall financial position;
>
> (ii) other assets or investments which the Plaintiff held that were not part of the security the defendant held for the Margin Loan, for the purpose of managing its overall financial position;
>
> 27. At all material times at which the Defendant provided and published the Data to the Plaintiff, it knew or ought to have known:
>
> (a) the purpose and nature of a margin loan;

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[1] Although [26] was not referred to in [87], it was referred to in [28].

(b) the terms of the Margin Loan Agreement;

(c) the securities it permitted customers to provide as security for the margin loan, included units in index funds, including the Funds, that were unlisted on the ASX;

(d) it had thousands of margin lending customers;

(e) the Index Funds had thousands of members;

(f) given the large numbers of the Defendant's margin loan customers and the large numbers of members of the Funds, it was impossible, alternatively impractical, for the Defendant's margin loan customers, including the Plaintiff, to obtain information from the Responsible Entities or managers of the Funds as to the value of their units in the Funds the market value of the securities, and the weighting the Defendant assigned to the securities, so as to enable its customers each day to ascertain the state of their margin loan accounts;

(g) the Plaintiff could only ascertain from the Defendant the market value for the security and the current loan to security ratio;

(h) that it was impractical for the Defendant's customers, including the Plaintiff, to replicate the true market value of the Funds or the Data provided by the Defendant, as they would have had to:

(i) source and keep updated the number of units and shares held, and any cash held, as security by the Defendant under the Margin Loan Agreement;

(ii) source and keep updated the unit and share prices for those units and shares;

(iii) calculate the base loan to security ratio for the portfolio being "the weighted average of the total amount we [CGI] will lend you against each security and the total market value of that secured property, expressed as a percentage".

28. In the premises of the matters pleaded in paragraphs 26 and 27 hereof, the Plaintiff was:

(a) dependent upon the Defendant providing accurate Data;

(b) where the Data was not accurate, up to date and reliable, dependant on the Defendant informing the Plaintiff

(i) that the Data was not accurate and not up to date; and

(ii) of the Data Qualification[2];

(c) vulnerable in the event the Defendant:

(i) provided data without the exercise of reasonable care and diligence;

(ii) alternatively, failed to provide the Data Qualification.

[28] Under the heading "The Defendant's Negligent Conduct", no reliance was placed on the facts pleaded at [32] to [39].

[29] Under the heading "The Defendant's breach of the Margin Loan Agreement", no reliance was placed on the facts pleaded at [40] to [42].

[30] Under the heading "The Loss and Damage suffered by the Plaintiff", no reliance was placed on the facts pleaded at [43] to [45].

[31] Under the heading "Unconscionable Conduct in Business Transactions (s 12CC of the ASIC Act) and Further Misleading or Deceptive Conduct":

(a) reliance was placed on the fact pleaded at [46], namely that the Bank must be taken to have provided a financial service when it altered the borrowing limits of securities

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[2] "Data qualification" was a term defined at [9] as "the means by which the Plaintiff could, at the time of reading the Statements determine (i) the true realisable market value of the securities; and (ii) the true state of the Margin Loan".

which the Bank held for the margin loan and communicated with Storm regarding the margin loan;

(b) under the subheading "Unconscionable Conduct Element 1 - Continuing to provide Incorrect Data", reliance was placed on the fact pleaded at [47], namely that the Bank took no, or no proper steps to make the Data accurate or current, or to warn its customers, including the plaintiff, of its inaccuracy;

(c) under the subheading "Unconscionable Conduct Element 3 - Continued Approval of High Gearing Against Funds", reliance was placed on the facts pleaded at [55] to [64] namely that the Bank acting reasonably and knowing the matters it knew or ought to have known in relation to the plaintiff's margin loan and the prevailing market conditions, ought to have decreased the loan to security ratio limit from 80% to 70% at certain times in certain pre-determined circumstances.

(d) under the subheading "Unconscionable Conduct Element 5 – Advice of Margin Calls", no reliance was placed on the fact pleaded at [75], but reliance was placed on the facts pleaded at [69] to [72] namely that the Bank, contrary to its standard practice or the practice of a reasonable person in the position of the Bank, failed to advise that the plaintiff's margin loan was in margin call, when in fact, it was in margin call.

(e) under the subheading "Unconscionable Conduct Element 8 – Defendant's conduct misleads or deceives Plaintiff", reliance was placed on the facts pleaded at [80] to [85] namely that the Bank represented that it would give notice of a margin call to the plaintiff and would not sell the plaintiff's securities before such notice was given.

[32] In oral argument senior counsel for the plaintiff contended that I should be satisfied as to the adequacy of the pleading of first two elements of unconscionability (namely that the plaintiff was at a special disadvantage to the Bank and that disadvantage affected its ability to make a judgment as to its own best interests) because McMurdo J had been so satisfied. In this regard the plaintiff relied on his Honour's judgment at [24], which I have quoted at [10] above. Senior counsel then, having drawn my attention to the pleading at [27] and [28], explained that the plaintiff's case in relation to the third element was that:

> Well, they've exploited it in this way. They've entered into – or they are a party to a transaction that gives them certain rights over the security that the plaintiff has given and they have access to certain information that is important as to whether they will exercise some rights in respect of that security. They know it's inaccurate. They know the plaintiff is vulnerable to them, or they know that the plaintiff's exposed to the risk of the inaccuracy of that data and they don't tell them it's inaccurate or warn them of the risks of its inaccuracy and then go on to exercise their rights under that agreement.

[33] In my view the plaintiff's argument as to the adequacy of the pleading cannot be accepted.

[34] First, I am entirely unpersuaded by the reliance on the judgment of McMurdo J at [24] in relation to the adequacy of the way in which the pleading addresses the requisite first two elements of the unconscionability case. His Honour was relying on matters which were mentioned in paragraphs which, because of the problem with the third element, he ultimately struck out. Once those paragraphs are gone, precisely where are the elements to be found? The plaintiff submits that the special disadvantage "arises" from the facts pleaded in [27] and [28] of the plaintiff's pleading, which, notably, are allegations made in relation to the negligence case. In my view in a case such as this, the Bank is entitled to greater precision than this. I think the Bank is entitled to have specifically pleaded under requisite headings exactly what constituted the special disadvantage for the purpose of the unconscionability

case and exactly how it was that that special disadvantage affected the ability of the plaintiff to make decisions in its own best interests.

[35] Second, and so far as the third element of the unconscionability case is concerned, the problem identified by McMurdo J still exists. I observe:

(a) The case as explained orally seems to involve these broad propositions. First, the Bank entered into a transaction which gave it specific rights over security given by the plaintiff. Second, the special disadvantage of the plaintiff which was sufficiently evident to the Bank was the imbalance of knowledge concerning the data which the Bank provided. Third, the Bank exploited that disadvantage by exercising its rights over security given by the plaintiff against the background of what it did and did not do in relation to data.

(b) But was the exploitation entering into the transactions in the first place? Or was it limited to specific things done by the Bank in reliance on contractual rights which it had properly obtained in the first place? If the latter, precisely what did it do which involved exploitation?

(c) The theory seems to be that the exploitation involves particular conduct of the Bank in acting on particular security arrangements in a particular way, but there is simply nothing in the pleading which identifies that conduct. The Bank is entitled to the precision which it contends would be found in a proper plea of unconscionable conduct in equity or under the unwritten law.

(d) In light of the procedural history of the matter, that failure is passing strange.

[36] In my view the Bank is entitled to have struck out the paragraphs in the pleading which are identified on the face of its application and which I have identified at [19] above. I am not minded to state that the paragraphs are struck out without leave to amend. However, given the procedural history of the matter, if the plaintiff wishes to amend its pleading further (whether to reintroduce a properly pleaded claim founded on unconscionability in equity or the unwritten law, or otherwise) the plaintiff ought to be required to seek leave to do so. Costs should follow the event.

[37] The Bank's application in relation to proceeding 6907/10 should be resolved in the same way.

[38] The orders I make in proceeding 6906/10 are as follows:

(a) The following parts of the plaintiff's third further amended statement of claim are struck out:

(i) in paragraph 87(d), the words 'or alternatively 12CA';

(ii) in paragraph 87(db), the words 'or 51AA';

(iii) paragraph 87(e); and

(iv) paragraph 6 of the prayer for relief.

(b) I direct that the plaintiff may not further amend its statement of claim without the leave of the Court.

(c) The plaintiff must pay the defendant's costs of its application to be assessed.

[39] The orders I make in proceeding 6907/10 are as follows:

(a) The following parts of the plaintiff's third further amended statement of claim are struck out:

(i) in paragraph 84(d), the words 'or alternatively 12CA';

(ii) in paragraph 84(db), the words 'or 51AA';

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(iv) paragraph 6 of the prayer for relief.

(b) I direct that the plaintiff may not further amend its statement of claim without the leave of the Court.

(c) The plaintiff must pay the defendant's costs of its application to be assessed.