SUPREME COURT OF QUEENSLAND

CITATION:	*Westpac Banking Corporation v Zilzie Pty Ltd & Ors* [2016] QSC 238
PARTIES:	**WESTPAC BANKING CORPORATION ABN 33 007 457 141** (plaintiff) v **ZILZIE PTY LTD ACN 102 804 857** (first defendant) and **EMU PARK VILLAGE PTY LTD ACN 117 628 270** (second defendant) and **DONALD EDWARD BARCLAY** (third defendant) and **ANTHONY JOSEPH CRESWICK** (fourth defendant) and **PETER ROBERT MACGREGOR** (fifth defendant)
FILE NO:	BS7488/14
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	21 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2016
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The parties will be heard as to the orders to be made to give effect to these reasons.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS

EARLY – SUMMARY DISPOSAL – GENERALLY – where the plaintiff's loan to the first defendant was secured by a mortgage and guaranteed by the other defendants – where there was a no set-off clause – where the defendants alleged that the plaintiff breached its duty of care under s 85(1) of the *Property Law Act* 1974 (Qld) in exercising the power of sale – where the defendants alleged that the plaintiff's conduct in breaching the equitable duty of care in exercising the power of sale and in making demand for payment of the debts owed without set-off was unconscionable within the meaning of the unwritten law, in contravention of the *Australian Securities and Investments Commission Act* 2001 (Cth) – where if the plaintiff proceeded on the claim without set-off the defendants would be unable to pay and would become insolvent – whether the no set-off clause applied – whether in light of defendants' insolvency the no set-off clause was one that "might have the effect" of relieving the plaintiff of its duty of care under s 85 and so should be struck down – whether an order under s 12GM of the *Australian Securities and Investments Commission Act* 2001 (Cth) to vary the contracts to prevent the plaintiff relying on the no set-off clause would prevent or reduce loss or damage suffered or likely to be suffered

Acts Interpretation Act 1954 (Qld), s 14A(1)
Australian Securities and Investments Commission Act 2001 (Cth), s 12CA, s 12GF, s 12GM
Civil Proceedings Act 2011 (Qld), s 20
Corporations Act 2001 (Cth), s 420A, s 1325
Property Law Act 1974 (Qld), s 85
Trade Practices Act 1974 (Cth), s 87
Uniform Civil Procedure Rules 1999 (Qld), r 173, r 292

ACN 074 971 109 v The National Mutual Life Association of Australasia Ltd (2008) 21 VR 351; [2008] VSCA 247, cited
Attorney-General (NSW) v World Best Holdings Ltd (2005) 63 NSWLR 557; [2005] NSWCA 261, cited
Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd (2003) 214 CLR 51; [2003] HCA 18, cited
Australian Competition and Consumer Commission v Lux Distributors Pty Ltd [2013] FCAFC 90, cited
Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd (2014) 253 CLR 560; [2014] HCA 14, cited
Bitannia Pty Ltd v Parkline Constructions Pty Ltd (2006) 67 NSWLR 9; [2006] NSWCA 238, cited
Boz One Pty Ltd v McLellan (2015) 105 ACSR 325; [2015] VSCA 68, cited
Buckeridge v Mercantile Credits Ltd (1981) 147 CLR 654; [1981] HCA 62, cited
Clairview Developments Pty Ltd v Law Mortgages Gold Coast Pty Ltd [2007] 2 Qd R 501; [2007] QCA 141, cited

Commercial and General Acceptance Ltd v Nixon (1981) 152 CLR 491; [1981] HCA 70, cited
Commonwealth Bank of Australia v Shannon [2013] NSWSC 1076, cited
Crown Money Corporation Ltd v Martin (unreported, NZ High Court, Faire AssJ, 5 September 2008, No 2008-404-000297), cited
Daewoo Australia Pty Ltd v Porter Crane Imports Pty Ltd t/as Betta Machinery Sales [2000] QSC 50, cited
Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2) (1987) 16 FCR 410, cited
Forsyth v Gibbs [2009] 1 Qd R 403; [2008] QCA 103, cited
GE Capital Australia v Davis (2002) 180 FLR 250; [2002] NSWSC 1146, cited
General Credits (Finance) Pty Ltd v Stoyakovich [1975] Qd R 352, cited
Harrison v Australian and New Zealand Banking Group Ltd (unreported, Vic Ct of App, Tadgell, Phillips and Charles JJA, 15 May 1996, No 7606 of 1993), cited
Hausman v Abigroup Contractors Pty Ltd (2009) 29 VR 213; [2009] VSCA 288, cited
Henville v Walker (2001) 206 CLR 459; [2001] HCA 52, cited
Higton Enterprises Pty Ltd v BFC Finance Limited [1997] 1 Qd R 168, cited
Higton Enterprises Pty Ltd v BFC Finance Ltd (unreported, Sup Ct of Qld, Dowsett J, 25 May 1994, No 179 of 1989), distinguished
I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109; [2002] HCA 41, cited
Investec Bank (Australia) Ltd v Glodale Pty Ltd (2009) 24 VR 617; [2009] VSCA 97, cited
Jovanovic v Commonwealth Bank of Australia (2004) 87 SASR 570; [2004] SASC 61, cited
Kizbeau Pty Ltd v WG & B Pty Ltd (1995) 184 CLR 281; [1995] HCA 4, cited
Langford Concrete Pty Ltd v Finlay [1978] 1 NSWLR 14, cited
Marks v GIO Australia Holdings Ltd (1998) 196 CLR 494; [1998] HCA 69, cited
Milchas Investments Pty Ltd v Larkin (1989) 96 FLR 464, cited
Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd (1981) 36 ALR 23, cited
Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited (2015) 256 CLR 104; [2015] HCA 37, applied
Murphy v Overton Investments Pty Ltd (2004) 216 CLR 388; [2004] HCA 3, cited
Norman v FEA Plantations Ltd (2011) 195 FCR 97; [2011] FCAFC 99, cited
O'Brien v Bank of Western Australia Ltd [2013] NSWCA 71,

cited
Oswal v Commonwealth Bank of Australia [2013] WASCA 58, followed
Paciocco v Australia and New Zealand Banking Group Ltd (2016) 333 ALR 569; [2016] HCA 28, cited
Palaniappan v Westpac Banking Corporation [2016] WASCA 72, considered
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, applied
Re Partnership Pacific Securities Ltd [1994] 1 Qd R 410, cited
Roach v Bickle (1915) 20 CLR 663; [1915] HCA 80, cited
Sami v Roads Corporation [2009] VSCA 44, cited
St George Bank v Ingles (unreported, Sup Ct of Qld, Dalton J, 11 December 2012, No 10316 of 2011), distinguished
Ultimate Property Group Pty Ltd v Lord (2004) 60 NSWLR 646; [2004] NSWSC 114, cited
Vadasz v Pioneer Concrete (SA) Pty Ltd (1995) 184 CLR 102; [1995] HCA 14, cited
Violet Home Loans Pty Ltd v Schmidt (2013) 44 VR 202; [2013] VSCA 56, cited
Westpac Banking Corporation v Helicopters Brisbane Pty Ltd [2012] QSC 263, cited
Westpac Banking Corporation v Leckenby [2015] QSC 363, cited
Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410; [1978] HCA 42, applied

COUNSEL: A Pomerenke QC for the plaintiff
S Doyle QC and C Johnstone for the first to fourth defendants

SOLICITORS: Allens for the plaintiff
James Conomos Lawyers for the first to fourth defendants

[1] **Jackson J**: This is an application by the plaintiff bank for summary judgment on the claim against the first, second, third and fourth defendants ("the defendants").[1]

Undisputed facts

[2] For the most part, the facts on the claim are not in dispute. It is appropriate to state them with some care, but essentially the plaintiff's claim is to recover the amounts of debts due upon the first defendant's failure to repay a loan and the other defendants' failures to pay sums guaranteed in respect of the loan.

[3] It is convenient to repeat the summary from the plaintiff's outline of argument. Pursuant to a Business Finance Agreement dated 16 December 2008 between the plaintiff and the first defendant, the plaintiff advanced money to the first defendant.[2]

---

1 *Uniform Civil Procedure Rules* 1999 (Qld), r 292.
2 Statement of claim ("SOC"), par 2; Defence ("D"), par 1. (The advances as particularised were made in February 2009 and totalled $20,533,422.54.)

[4] The terms of the plaintiff's General Conditions Booklet, version 3 dated March 2003, formed part of the Business Finance Agreement.[3]

[5] The Business Finance Agreement was varied on two occasions, but the General Conditions Booklet continued to form part of it.[4]

[6] The terms of the Business Finance Agreement (as varied) included that:

(a) the limit of the loan was $20,533,500;[5]
(b) the term of the loan was to expire on 30 April 2012;[6]
(c) pursuant to cl B1 of the General Conditions Booklet, the first defendant agreed to pay all money which it owed to the plaintiff for any reason;[7]
(d) pursuant to cl B5 of the General Conditions Booklet, the first defendant agreed to pay all amounts owing to the plaintiff on demand (except where the Business Finance Agreement provided otherwise);[8]
(e) pursuant to cl D2 of the General Conditions Booklet, the first defendant agreed that it would be a Default Event under the Business Finance Agreement if the first defendant did not pay the plaintiff any amount due under the Business Finance Agreement;[9] and
(f) pursuant to cl D3 of the General Conditions Booklet, the first defendant agreed that, at any time after the occurrence of an event of default, the plaintiff was entitled to, amongst other things, require the first defendant to pay the plaintiff all principal and all other amounts owed to the plaintiff under the Business Finance Agreement immediately.[10]

[7] By notice dated 16 May 2013, the plaintiff made demand of the first defendant.[11] The amount of the demand was $21,041,537.56.

[8] The first defendant failed to pay all or any part of the sum of $21,041,537.56.[12]

[9] On or about 2 February 2009, the plaintiff and the second defendant (among others) entered into a guarantee and indemnity (described in the pleadings as the Emu Park Guarantee) pursuant to which the second defendant guaranteed all liabilities and obligations of the first defendant.[13]

---

3 SOC, par 3; D, par 1.
4 SOC, pars 7-12; D, par 1.
5 SOC, par 9(a); D, par 1.
6 SOC, par 12(b); D, par 1.
7 SOC, par 4; D, par 1.
8 SOC, par 5; D, par 1.
9 SOC, par 13(a); D, par 1.
10 SOC, par 13(b); D, par 1.
11 SOC, par 15; D, par 3(a). (Although the content of the demand is not admitted, it appears in Mr Meager's first affidavit at "SAM-8", pages 146-149).
12 SOC, par 16; D, par 4.
13 SOC, par 18; D, par 6.

[10] The terms and conditions of the General Conditions Booklet formed part of the Emu Park Guarantee.[14]

[11] By letter dated 1 May 2014, the plaintiff made a demand of the second defendant.[15]

[12] The second defendant failed to pay all or any part of the sum demanded.[16]

[13] On or about 9 September 2005, the plaintiff and the third and fourth defendants (together with the fifth defendant, against whom judgment has already been entered) entered into a guarantee and indemnity (described in the pleadings as the BCM Guarantee) pursuant to which the third and fourth defendants guaranteed all liabilities and obligations of the first defendant up to a limit of $648,250.[17]

[14] The third and fourth defendants agreed to variations including, ultimately, that the limit of their liability under the guarantee was $20,658,737.68 plus amounts like government duties and charges, fees, costs, expenses and interest.[18]

[15] The terms and conditions of the General Conditions Booklet formed part of the BCM Guarantee.[19]

Disputed facts

[16] The disputed facts relate to the defence and counterclaim. They allege a set-off or defend the plaintiff's claim[20] by alleging that the first defendant has or all the defendants have a claim for damages, or compensation, or an account for the receivers' breaches of duty in selling the first defendant's property at an undervalue.

[17] Summarising, the property was secured by mortgage or charge. The defendants allege that the receivers acted as agents of the plaintiff in breaching the duty under s 85(1) of the *Property Law Act* 1974 (Qld) ("PLA") or in contravening s 420A(1) of the *Corporations Act* 2001 (Cth) ("CA"). The defendants also allege contraventions of s 12CA(1) of the *Australian Securities and Investments Commission Act* 2001 (Cth) ("ASIC Act"). The following summary of facts alleged is extracted from the counterclaim.

[18] On 6 March 2014, the plaintiff appointed receivers of certain property of the first defendant collectively referred to as the Zilzie Property.[21]

[19] As at 6 March 2014, the combined market value of the Zilzie Property was not less than $20,728,250.[22]

---

14 SOC, par 23; D, par 6.

15 SOC, par 26; D, par 8(a). (Although the content of the demand is not admitted, it appears in Mr Meager's first affidavit at "SAM-11", pages 159-160. The amount of the demand was $22,406,451.65: see page 160).

16 SOC, par 27; D, par 9.

17 SOC, par 20; D, par 6.

18 SOC, pars 21-22; D, par 6.

19 SOC, par 23; D, par 6. The plaintiff made demands of the third and fourth defendants: SOC, pars 29(a)-(b); D, pars 11(a)-(b). (Although the date and content of the demands are not admitted, the demands appear in Mr Meager's first affidavit at "SAM-16", pages 246-249. The letters are dated 29 July 2014, and the amount of each demand is $20,658,737.68).

20 See D, pars 5, 10 and 13(a).

21 Counterclaim ("C"), par 14.

22 C, par 21.

[20] The counterclaim details several instances of the receivers causing lots to be sold at an undervalue. For example, on 25 September 2014, the receivers caused various lots to be sold to a single purchaser for total price of $2,800,000, an average of $86.30 per square metre.[23] In 2015, the purchaser on-sold only some of the lots (excluding lots with premium ocean views) for a substantially higher return of $2,964,500, an average of $164,547 per square metre.[24]

[21] By undertaking sales set out in the counterclaim, the receivers:

(a) sold particular lots as "multi-sales" rather than individual sales and as a consequence obtained amounts up to 80% less than the purchaser was able to on-sell those lots;
(b) failed to properly market particular lots or offer them for sale at public auction;
(c) sold property referred to as the Recreation Club for 90% less than its market value;
(d) failed to achieve prices for the multi-sale lots at or near either their average market value or the value of the on-sold lots;
(e) reduced the value of remaining lots by not selling the others at or near their market value; and
(f) sold property referred to as the Zilzie Larger Lot for an amount less than 90% of its market value.[25]

[22] The defendants allege that the receivers failed to take reasonable care to sell the property for its market value or otherwise for the best price reasonably obtainable.[26]

[23] The defendants therefore allege that the receivers, acting as agents of the plaintiff, breached s 85(1) of the PLA or contravened s 420A(1) of the CA and that the plaintiff is liable as principal for the breach and the loss and damage suffered.[27] They allege that the first defendant is entitled to set off the damages against the plaintiff's claim,[28] and that cll B6 and D5 do not have the meaning contended by the plaintiff.[29]

[24] The defendants further allege that the plaintiff engaged in conduct in relation to the provision of financial services which is, in all the circumstances, unconscionable within the meaning of s 12CA of the ASIC Act.[30] This was due to the matters pleaded in the counterclaim regarding the receivers' conduct, and also in demanding payment of the debt from the defendants without set-off, in reliance on cll B6 and D5.[31]

[25] Accordingly, the defendants seek an order for damages or an account from the plaintiff.[32]

---

23 C, par 22.
24 C, pars 27 and 28.
25 C, pars 22-28A and 33.
26 C, pars 35-36.
27 C, pars 37-38 and 40-42.
28 C, pars 45-46.
29 C, pars 47-48.
30 C, par 50.
31 C, par 50.
32 C, pars 44-45.

Statutory duties or obligations

[26] Section 85 of the PLA provides in part:

> "(1) It is the duty of a mortgagee, including as attorney for the mortgagor, or a receiver acting under a power delegated to the receiver by a mortgagee, in the exercise of a power of sale conferred by the instrument of mortgage or by this or any other Act, to take reasonable care to ensure that the property is sold at the market value.
>
> (1A) Also, if the mortgage is a prescribed mortgage, the duty imposed by subsection (1) includes that a mortgagee or receiver must, unless the mortgagee or receiver has a reasonable excuse—
>
> (a) adequately advertise the sale; and
>
> (b) obtain reliable evidence of the property's value; and
>
> (c) maintain the property, including by undertaking any reasonable repairs; and
>
> (d) sell the property by auction, unless it is appropriate to sell it in another way; and
>
> (e) do anything else prescribed under a regulation.
>
> Maximum penalty—
>
> (a) if the contravention of duty relates only to paragraph (e)—20 penalty units; or
>
> (b) otherwise—200 penalty units.
>
> (2) …
>
> (3) The title of the purchaser is not impeachable on the ground that the mortgagee or receiver has committed a breach of any duty imposed by this section, but a person damnified by the breach of duty has a remedy in damages against the mortgagee exercising the power of sale.
>
> (4) A mortgagee who, without reasonable excuse, fails to comply with subsection (2) commits an offence.
>
> Maximum penalty—2 penalty units.
>
> (5) An agreement or stipulation is void to the extent that it purports to relieve, or might have the effect of relieving, a mortgagee or receiver from the duty imposed by this section.
>
> (6) Nothing in this section affects the operation of any rule of law relating to the duty of the mortgagee to account to the mortgagor.
>
> (7) Nothing in sections 83(1)(a), 89(3) and 92(2) affects the duty imposed by this section.
>
> (8) Nothing in this section affects the operation of a law of the Commonwealth, including, for example, the Corporations Act, section 420A…"

[27] Section 420A(1) of the CA provides:

> "(1) In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for:
>
> (a) if, when it is sold, it has a market value—not less than that market value; or
>
> (b) otherwise—the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold."

[28] Section 12CA(1) of the ASIC Act relevantly provides:

> "(1) A person must not, in trade or commerce, engage in conduct in relation to financial services if the conduct is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories."

Importance of set-off

[29] The plaintiff does not dispute that the defendants have a real prospect of success on the counterclaim that there was breach of s 85(1),[33] or contravention of s 420A(1),[34] or contravention of s 12CA(1).[35] The application for summary judgment is made on the footing that even so, success on any of those claims will not operate as a defence to the plaintiff's claim, so that the defendants do not have a real prospect of successfully defending the claim.

[30] There are a number of steps in the argument. First, a breach of the mortgagee's or receivers' duty would entitle the first defendant to a judgment for damages or compensation for the breach. Section 85(3) expressly confers a "remedy in damages" against a mortgagee exercising the power of sale upon a "person damnified" by a breach of duty under s 85(1).

[31] Second, it may be accepted that breach of the mortgagee's or receivers' duty would entitle the second to fifth defendants to a judgment for damages or compensation for the breach. Case law has established that a guarantor is a person damnified by the breach for the purposes of s 85(3).[36]

[32] Third, although there is no express remedy provided for a contravention of s 420A of the CA, case law has accepted that there is a right to damages or compensation or an account in the first defendant as a person giving the security interest, for loss suffered by reason of a contravention.[37]

[33] Fourth, contravention of s 420A does not confer a direct right to damages upon a guarantor.[38] There is authority, however, that where a creditor sacrifices or impairs

---

33 See *Commercial and General Acceptance Ltd v Nixon* (1981) 152 CLR 491.

34 See *Boz One Pty Ltd v McLellan* (2015) 105 ACSR 325, 349-350 [153]-[160] and 352-355 [167]-[177].

35 As to unconscionability in this context, see *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; and *Violet Home Loans Pty Ltd v Schmidt* (2013) 44 VR 202, 219 [58] requiring "moral obloquy".

36 *Higton Enterprises Pty Ltd v BFC Finance Limited* [1997] 1 Qd R 168.

37 *Investec Bank (Australia) Ltd v Glodale Pty Ltd* (2009) 24 VR 617, 639-641 [96]-[104]; compare *Jovanovic v Commonwealth Bank of Australia* (2004) 87 SASR 570, 598-599 [114]-[116].

38 *GE Capital Australia v Davis* (2002) 180 FLR 250, 263-267 [43]-[56].

a security or by neglect or default allows it to be lost or diminished, that will operate by way of reduction of the debt owed by the second to fifth defendants as guarantors.[39]

[34] Fifth, contravention of s 12CA of the ASIC Act may be remedied by an order under s 12GF of the ASIC Act for damages payable by the contravenor to the first defendant as a "person who suffers loss or damage" by the contravention.

[35] Sixth, as to the second to fourth defendants, the plaintiff does not contend on this application that a guarantor could not be a person who suffers loss or damage by contravening conduct under s 12GF of the ASIC Act.

[36] On the assumption of those possible liabilities in damages, the plaintiff submits that none of them can be set-off against the first defendant's liability to the plaintiff as principal debtor or be set-off to reduce the second to fifth defendants' liabilities as guarantors. Set-off is not available because of the plaintiff's agreements with the first defendant as principal debtor and the second to fifth defendants as guarantors that the principal debtor and the guarantor will not raise a set-off in answer to a claim for the plaintiff's debt.

[37] This is the question on which the plaintiff submits that it must succeed at the trial of the proceeding on the claim, so that there is no need for a trial of the claim and the defendants have no real prospect of successfully defending it.

Set-off in Queensland

[38] Leaving bankruptcy or corporate winding up legislation aside, the repeal of the *Statutes of Set Off* in this State by s 7 of the *Imperial Acts Application Act* 1984 (Qld),[40] meant that from 1 July 1999 statutory set-off was regulated solely by the *Uniform Civil Procedure Rules* 1999 (Qld), r 173. Rule 173 provides, in part:

> "A defendant may rely on set-off (whether or not of an ascertained amount) as a defence to all or part of a claim made by the plaintiff…"

[39] However, since the commencement of the *Civil Proceedings Act* 2011 (Qld), statutory set-off is again clearly supported, as provided in s 20 as follows:

> "(1) If there are mutual debts between a plaintiff and a defendant in a proceeding, the defendant may, by way of defence, set off against the plaintiff's claim any debt owed by the plaintiff to the defendant that was due and payable at the time the defence of set-off was filed.
> (2) For subsection (1), it does not matter whether the mutual debts are different in nature.

---

39 *Buckeridge v Mercantile Credits Ltd* (1981) 147 CLR 654, 671 and 675; *Jovanovic v Commonwealth Bank of Australia* (2004) 87 SASR 570, 593 [91] and 598-599 [114]-[116]; *Ultimate Property Group Pty Ltd v Lord* (2004) 60 NSWLR 646, 657-658 [78]-[80]; *Commonwealth Bank of Australia v Shannon* [2013] NSWSC 1076, [258]; *Langford Concrete Pty Ltd v Finlay* [1978] 1 NSWLR 14, 18.

40 The repeal was recognised by the Court of Appeal in *Forsyth v Gibbs* [2009] 1 Qd R 403, 405 fn 1.

> (3) This section extends to a proceeding in which 1 or more of the mutual debts is owed by or to a deceased person who is represented by a personal representative.
> (4) However, this section does not apply to the extent to which a plaintiff and a defendant have agreed that debts, whether generally, or in relation to specific debts, may not be set off against each other.
> (5) This section—
> (a) does not affect other rights of set-off or obligation of a debtor or creditor whether arising in equity or otherwise; and
> (b) applies subject to any express provision in another Act.
> (6) In this section—
> ***debt*** means any liquidated claim."

[40] The set-offs alleged by the defendants in this case are not liquidated claims. However, as s 20 provides, equitable set-off continues to apply where the defence impeaches the plaintiff's entitlement to the legal demand.[41]

[41] A claim by a mortgagor that the mortgagee breached the equitable duty on exercise of the power of sale can be raised by way of equitable set-off against the debt owing or secured under the mortgage.[42] A claim by way of damages payable or recoverable under statute for contravention of a statutory duty of a similar kind should also be capable of equitable set-off.[43]

[42] The set-off or defence claimed by each of the defendants in the present case is, accordingly, an equitable set-off or defence.

No set-off clause

[43] The no set-off clauses relied upon by the plaintiff are contained in cll D5 and B6 of the General Conditions Booklet. Clause D5 provides:

> "If any one or more of you have any money in any account with the Lender or are owed any money by the Lender, the Lender can use it to pay amounts payable … but need not do so…
>
> To the maximum extent allowed by law you give up any right to set off any amounts the Lender owes you (for example credit balances in your accounts or any deposit subject to a Deposit Security) against amounts you owe under the Lender Arrangements.
>
> You will pay money you are required to pay under this document without deducting amounts you claim are owed to you by the Lender or any person (for example, an amount in your deposit account)."

---

41 *Clairview Developments Pty Ltd v Law Mortgages Gold Coast Pty Ltd* [2007] 2 Qd R 501, 509-510 [24]-[25]; *Palaniappan v Westpac Banking Corporation* [2016] WASCA 72, [128]-[129].
42 *General Credits (Finance) Pty Ltd v Stoyakovich* [1975] Qd R 352, 355-365.
43 *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9.

[44] It is unnecessary to set out cl B6 or consider its operation to decide the application.

Effect of a no set-off clause

[45] The plaintiff relies on decisions at first instance as well as intermediate appellate court authority upholding the effectiveness of a clearly expressed no set-off clause.[44] As was said in a recent case in the Court of Appeal of Western Australia:

> "The purpose of such a clause is to prevent the holding up of payments while disputed cross-claims are litigated ... Clauses of this kind are important to financiers and they frequently appear in contracts used in the banking industry, in international financing agreements and in building contracts."[45]

[46] The extent of the exclusion of a right of set-off under such a clause was also dealt with, as follows:

> "The expression 'without set-off' excludes all form of set-off, no matter what jurisprudential basis might exist for the set-off. Thus it excludes statutory set-off and equitable set-off. It excludes all of the four kinds of equitable set-off that the authors of *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, 2002) have detected: see [37-035]."[46]

[47] On that reasoning, which I accept, a clearly expressed no set-off clause will exclude equitable set-off of a claim for damages or compensation, or an account for a breach of s 85 of the PLA, or a contravention of s 420A of the CA, or a contravention of s 12CA of the ASIC Act, or any reduction of the debt of any of the defendants as guarantor by reason of such a set-off.

[48] In addition, the exact clause in the present case was found to operate to exclude set-off by this court in *Westpac Banking Corporation v Leckenby*.[47]

Defendants' construction arguments

[49] Notwithstanding *Leckenby*, the defendants submit that they have a real prospect of succeeding against the plaintiff's claim because cl D5, properly construed, does not exclude the set-offs they rely upon.

[50] The general approach to construction of a commercial contract was recently restated by the High Court in *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited*.[48] In particular:

---

44 *Hausman v Abigroup Contractors Pty Ltd* (2009) 29 VR 213, 219 [24]-[26], but not in answer to a claim for damages for contravening a statutory prohibition against engaging in misleading or deceptive conduct or a claim for equitable rescission: 220 [30].

45 *Oswal v Commonwealth Bank of Australia* [2013] WASCA 58, [45].

46 *Oswal v Commonwealth Bank of Australia* [2013] WASCA 58, [54]; compare *Re Partnership Pacific Securities Ltd* [1994] 1 Qd R 410, 425; doubted in *Norman v FEA Plantations Ltd* (2011) 195 FCR 97, 118-119 [188]-[200].

47 [2015] QSC 363.

48 (2015) 256 CLR 104.

> "The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.
>
> In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract."[49] (footnotes omitted)

[51] First, the defendants submit that their counterclaims are for unliquidated damages or compensation that will not have the character of a debt until final judgment. Therefore, they submit that their counterclaims will not be amounts that the plaintiff "owes" the defendants within the meaning of cl D5 until judgment is given on their claims. This, they submit, means that the no set-off agreement in cl D5 does not apply.

[52] However, the defendants do not submit that their counterclaims for damages are in any way contingent liabilities. They do not identify any commercial purpose that would be served as between the parties to construe the words "amounts the Lender owes you" as excluding an amount owed in respect of a claim for or in the nature of unliquidated damages or compensation.

[53] In my view, in context, there is no reason to read cl D5 as limited to a debt or liquidated amount, as opposed to an amount of unliquidated damages or compensation because cl D5 refers to amounts the plaintiff "owes" rather than amounts recoverable against[50] or amounts payable by the plaintiff.[51] In my view, the amounts that the plaintiff "owes" include any liability for a money amount that may be recoverable by the defendants against the plaintiff or payable by the plaintiff to the defendants.

[54] Second, the second to fourth defendants submit that under cl D5 they as guarantors do not explicitly promise to give up their entitlements to rely on a right of set-off which the first defendant as principal debtor may have against the plaintiff as lender. They submit that this is significant because the right of defence on which they rely is a right to adjust the accounting as between the plaintiff and the first defendant.

[55] I am unable to accept that this point has a real prospect of succeeding as a defence to the plaintiff's claim. In my view, that is not what a reasonable business person in

---

49 (2015) 256 CLR 104, 116 [46]-[47].

50 The form of a common law judgment for a money sum for unliquidated damages was traditionally that the plaintiff "do recover" the sum "against the defendant". See Form 188 of the approved forms under Sch 1 of the *Rules of the Supreme Court* 1900 (Qld).

51 The current form of a judgment for a money sum for unliquidated damages in this court is that the defendant "pay to the plaintiff the amount of $...". See Form 58 of the Approved Forms under the *Uniform Civil Procedure Rules* 1999 (Qld).

the position of either of the parties to the guarantee would have understood cl D5 to mean.

[56] Third, the defendants submit that a no set-off clause will not be effective where a defendant's claim to a set-off overtops the amount of the plaintiff's claim. This submission was made by reference to *Palaniappan v Westpac Banking Corporation*[52] and *O'Brien v Bank of Western Australia Ltd*.[53] I reject that submission as a matter of law. The cases relied on support the proposition that if the contract containing a no set-off clause is rescinded in equity or avoided or altered under a statutory power, the operation of a no set-off clause may be repelled, but there is no principle that such a clause will not operate to preclude a set-off simply because the amount of the set-off exceeds the amount of the claim.

[57] In my view, the plaintiff's submission that, properly construed, the no set-off clause in cl D5 operates to exclude a defence of equitable set-off for the first defendant and a defence of equitable set-off or reduction of liability on the guarantee based on such a set-off for the other defendants must be accepted.

Section 85(5) of the PLA

[58] The defendants' next point is that they have a real prospect of successfully defending the plaintiff's claim by set-off of their claims for damages under s 85(3) of the PLA for breach of duty under s 85(1). This is because s 85(5) avoids cl D5, to the extent that it would defeat a defence of set-off of those claims.

[59] The defendants submit that s 85(5) strikes down a provision that purports to relieve a mortgagee of the duty under s 85(1). I accept that submission. Second, the defendants submit that it seems unlikely Parliament intended that any contract could operate inconsistently with the duty imposed by s 85(1). In my view, that submission should be accepted to the extent that any inconsistency would relieve or might have the effect of relieving the mortgagee of the duty. Third, the defendants submit that the avoiding effect of s 85(5) goes further and extends to an agreement that might have the effect of relieving a mortgagee from the duty under s 85(1). Again, I accept that submission. Fourth, the defendants submit that an agreement by which a person with an entitlement to damages for breach of s 85(1) "gives away" that remedy and their ability to pursue it would have the effect of relieving a mortgagee from the duty under s 85(1). For the purposes of deciding this case, I will assume that submission is correct also.

[60] Fifth, the defendants submit that a clear means of providing relief from the duty under s 85(1) is "to abrogate or affect [the mortgagee's] liability for failing to perform the duty". I accept that submission also, for the purposes of this application, subject to what follows. Last, the defendants submit that to "contract out of the ability to pursue (either at all or until after full payment of the full debt) the statutory provided means of enforcing the duty, is to relieve (in whole of part [sic]) the mortgagee of that duty." I also accept that submission for the purposes of deciding this application, although I do not need to decide it.

[61] In my view, as carefully framed as these submissions are, they do not grapple with the essential point that a no set-off clause in the form of cl D5 does not alter the

---

52 [2016] WASCA 72.

53 [2013] NSWCA 71, [12], [14], [16] and [110]-[112].

right to damages that a person has under s 85(3) for a breach of duty under s 85(1). It does not suspend the liability of the mortgagee who breaches the duty under s 85(1) or the correlative right of the person who has such a claim to recover judgment. It only precludes or prevents a person who has such a right from setting up the claim to it as a defence by way of set-off against the lender's claim.

[62] The question for decision is whether the defendants have a real prospect of successfully defending the plaintiff's claim on the ground that a clause which operates in that way purports to relieve the mortgagee or might have the effect of relieving the mortgagee from the duty imposed by s 85(1).

[63] The defendants submit that in construing s 85(5), the statute is to be afforded a purposive construction. I accept that the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.[54] But in deciding the limits of the operation of a statutory provision it does not always follow that a wider operation is to be preferred.

[64] The defendants also submit that s 85 is obviously remedial and protective of mortgagors and guarantors. I accept that submission. The initial remedial purpose of s 85 was to settle in Queensland the debate as to the extent of the duty owed by a mortgagee exercising a power of sale. That purpose was later extended by the extension of the duty to a sale by a receiver appointed as the agent of the mortgagor.[55] The remedy provided for a breach of the duty was a right to damages.[56] The right to damages extends to a guarantor as a person damnified. It is entrenched by a provision that avoids agreements or stipulations that relieve or might have the effect of relieving the mortgagor or receiver of the duty. But identifying these protections and remedies does not answer the present question.

[65] The defendants submit that the court should have regard to the actual effect of the operation of the no set-off clause in the present case. They rely on an affidavit to the effect that the defendants will be unable to pay the plaintiff's claim. In my view, that submission should be rejected. The particular facts of the present case cannot affect the proper construction of s 85(5). In my view, it is not relevant that as matters have turned out the defendants may not be able to pay the plaintiff's claim before they can obtain judgment on their counterclaims. In my view, to the extent that s 85(5) refers to an agreement that "might have the effect" of relieving a mortgagee from the duty imposed by s 85(1), it is not referring to relief from that "effect" by reason of a defendant's insolvency. The plaintiff will remain liable for damages for breach of the duty.

[66] In my view, the surest guide to the operation of s 85(5) is to be found in the text. As a matter of ordinary meaning, cl D5 is not an agreement that relieves a lender who is a mortgagee from the duty to take reasonable care in the exercise of a power of sale under s 85(1). Nor does it have that effect by relieving the mortgagee from the remedy in damages that a person damnified by a breach of that duty has under s 85(3).

---

54 *Acts Interpretation Act* 1954 (Qld), s 14A(1).
55 *Property Law (Mortgagor Protection) Amendment Act* 2008 (Qld), s 4.
56 *Property Law Act* 1974 (Qld), s 85(3).

[67] Clause D5 has the effect of "prevent[ing] the holding up of payments while disputed cross-claims are litigated."[57] As well, "[c]lauses of this kind are important to financiers and they frequently appear in contracts used in the banking industry".[58] In my view, that is not because they relieve a mortgagee of the duty under s 85(1), but because they transfer the risk of insolvency in relation to the promised payments by requiring them to be made promptly notwithstanding a cross-demand. The purpose of s 85(5) is to be determined having regard to the language of the relevant provision and the scope and the object of the whole statute.[59] In my view, it is not a clear purpose of s 85(5) that the risk of insolvency of the mortgagor or guarantor should be passed to the mortgagee while a claimant's right to damages under s 85(3) is ascertained.

[68] If there were no question of the defendants' solvency, recovery by a plaintiff mortgagee of an amount owing upon a mortgage debt would not in any way reduce the plaintiff's liability as mortgagee for damages under s 85(3) for breach of duty under s 85(1). A no set-off clause does not reduce the mortgagee's liability. It does not impose a condition before a party who been damnified by a breach of the duty under s 85(1) may make a claim to recover the loss.

[69] During oral argument, the defendants submitted that s 85(5) operated at the time when a demand is made for the mortgage debt. In a practical sense that may be so. It is likely to be the time when the question whether the agreement or stipulation in question is avoided will be considered. However, I am unable to accept the defendants' submission that the answer to the question as to whether the agreement in cl D5 is void can vary depending on the facts as to a defendant's solvency at the time of the demand.

[70] Although invalidity must turn on the statute in question, a more logical approach is reflected in the joint judgment of Isaacs and Duffy JJ in *Roach v Bickle*:[60]

> "Where a Statute prohibits a transaction either expressly or by implication, no such transaction can be validly created.
>
> The law which forbids its existence cannot consistently recognize it as ever having any binding force. Its existence in fact may be recognized for the purpose of punishing those who disobey the law, but the parties who are both transgressors cannot assert any right under it. It is lifeless from the beginning."

[71] In my view, the part of the text of s 85(5) that avoids an agreement or stipulation that "might have the effect" of relieving from the duty under s 85(1) is forward looking, so that the avoidance of the provision is effected when the agreement is made, not at some later time. This is an unusual, although not unique, use of the verb "might have" in legislation in this State.[61]

---

57 *Oswal v Commonwealth Bank of Australia* [2013] WASCA 58, [45].

58 *Oswal v Commonwealth Bank of Australia* [2013] WASCA 58, [45].

59 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 390-391 [93].

60 (1915) 20 CLR 663, 671.

61 Compare, for example, *Petroleum and Gas (Production and Safety) Regulation* 2004 (Qld), s 3(2)(a) and provisions that refer to the impact something "might have", such as the *Industrial Relations Act* 1999 (Qld), s 29D(1)(b) and the *Wet Tropics Management Plan* 1998 (Qld), s 47(5)(a).

[72] In my view, there is no reason to consider that s 85(5) is intended to operate so that an agreement or stipulation might be valid when made but be avoided at some later time because of facts that have arisen later. I reject the notion that cl D5 might be valid at the time when an agreement is made but is avoided if at the time when demand is made the financial position of the party promising not to raise a set-off in answer to the plaintiff's claim has deteriorated so that there is a likelihood of insolvency.

[73] There is nothing in the history of s 85(5) that cuts across the meaning that I would otherwise ascribe to the text of sub-s (5) in the context of the rest of s 85 and the PLA. Section 85 was drawn from a provision recommended in Northern Ireland.[62] The Northern Irish provision was contained in s 126 of the of a draft *Property Bill (Northern Ireland)*, from which it can be seen that the text of s 185(5) is unchanged from that draft, except for the addition of the words "or stipulation".[63] As events transpired, the Northern Ireland Parliament did not enact the draft Bill before dissolution and it has not been enacted since.

[74] Although there is a comparator provision in New South Wales the text is substantially different.[64]

[75] The determination of whether a contract is invalid by reason of the operation of a statute often turns on the proper construction of the statute as to the extent of the operation of the statutory provisions.[65] When the question is based on the application of general language, it is not unusual for minds to differ as to the limit of the operation. Well known examples of that kind may be seen in the many cases about the extent of the operation of the statutory provisions making contracts not in writing unenforceable in different contexts.[66]

[76] The defendants rely on several cases either as supporting or as not inconsistent with their contention that cl D5 is avoided. In *Higton Enterprises Pty Ltd v BFC Finance Ltd*[67] the guarantee provided that the guarantors agreed not to enforce any claim pursuant to s 85 until such time as they had discharged the principal debt. Dowsett J said:

> "In my view, such an agreement would, or might relieve the mortgagee from the duty imposed by s 85 and is therefore void pursuant to subs (5)."

[77] Unfortunately, the precise text of the clause in that case is not available. However, there is a significant difference between an agreement that defers any right to make a claim until the principal debt is paid and an agreement that only provides that one claim may not be set-off against another. In the second case, there is no moratorium against making the claim until an event has occurred that may never occur. The

---

62 Queensland Law Reform Commission, *Report of the Law Reform Commission on a Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, No 16 (1973) p 68.

63 Section 126 of the draft Northern Irish Bill was itself taken to a significant extent from s 36 of the *Building Societies Act (Northern Ireland)* 1967 (NI).

64 *Conveyancing Act* 1919 (NSW), s 111A(5).

65 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, 413-414.

66 For an example, see *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 where the decision in *Schwarstein v Watson* (1985) 3 NSWLR 134 was reversed.

67 (unreported, Sup Ct of Qld, Dowsett J, 25 May 1994, No 179 of 1989).

effect of the agreement is that payment of the debt does not await establishment of the potential off-setting claim but a party who is entitled to damages for breach of s 85(3) may make that claim whether or not the principal debt has been paid.

[78] Other cases that touched on this question were *Higton Enterprises Pty Ltd v BFC Finance Limited*,[68] *Harrison v Australian and New Zealand Banking Group Ltd*[69] and *Westpac Banking Corporation v Helicopters Brisbane Pty Ltd*.[70] However, none of them decides the question.

[79] In *St George Bank v Ingles*,[71] the guarantee contained clauses by which the defendant promised to pay the guaranteed money without set-off and without claiming that the guarantor or another person had a right of set-off. Dalton J summarised a submission made, as follows:

> "[The defendants say that] the dicta of Dowsett J in *Higton* support a wider proposition [that the clauses in the present case] might have the effect of permanently relieving a mortgagee of the consequences of his section 85 duties because it can be reasonably expected that they will have the practical operation that the consequences of the mortgagees' duties will never be visited upon the mortgagee because of the devastating financial effect which payment of the guaranteed amount without due allowance for set-off or counterclaim it might be expected to have".

[80] Her Honour said:

> "I am not expressing a final view on the matter but it seems to me that [the defendant] is right in saying that the dicta of Dowsett J do support this wider argument."

[81] It is apparent that her Honour did not finally determine that question. For the reasons set out above, I do not support that view on the facts of this case.

[82] Lastly, a cognate question about the operation of New Zealand legislation, which is in different terms, was considered but not decided in *Crown Money Corporation Ltd v Martin*.[72] I do not find it of assistance.

[83] Although this is a summary judgment application and not the trial of the proceeding, there is no factual or other consideration which I can ascertain that might affect the proper construction of the operation of s 85(5) in relation to cl D5 that requires a trial. The question was argued in detail by way of thorough written and oral submissions.

[84] In my view, there is no reason to defer decision as to the meaning and operation of s 85(5). The defendants do not have a real prospect of succeeding in their defences of the plaintiff's claim because s 85(5) avoids cl D5.

---

68 [1997] 1 Qd R 168, 180.
69 (unreported, Vic Ct of App, Tadgell, Phillips and Charles JJA, 15 May 1996, No 7606 of 1993) 4.
70 [2012] QSC 263, [19].
71 (unreported, Sup Ct of Qld, Dalton J, 11 December 2012, No 10316 of 2011).
72 (unreported, NZ High Court, Faire AssJ, 5 September 2008, No 2008-404-000297) [78].

Section 1325 of the CA

[85] The defendants plead that the first defendant is entitled to an order for an account or damages by way of compensation under s 1325 of the CA. That section provides, by s 1325(2) that:

> "The Court may, on the application of a person who has suffered, or is likely to suffer, loss or damage because of conduct of another person that was engaged in in contravention of subsection 201P(1), Chapter 5C, 6CA or 6D, subsection 798H(1) or Part 7.10 … make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (5)) if the Court considers that the order or orders concerned will compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage, or will prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person."

[86] But the conduct complained of in the counterclaim is not that the receivers engaged in a contravention under any of those provisions. Section 420A of the CA is in Ch 5 of the CA, to which s 1325(2) does not extend.

[87] None of the defendants is entitled to relief under s 1325.

Unconscionable conduct

[88] Lastly, the defendants rely on unconscionable conduct under s 12CA of the ASIC Act.

[89] For the purposes of this application, it may be assumed that sale of mortgaged property by a mortgagee exercising its power of sale in breach if the mortgagee's equitable duty may be unconscionable conduct within the meaning of the unwritten law. There is some support for that view. For example, in *Palaniappan* Corboy J said:

> "I have assumed that the appellant could bring a claim against the respondent for unconscionable conduct. In *Ultimate Property Group Pty Ltd v Lord*, Young CJ in Eq held that a breach of the equitable duty owed by a mortgagee in exercising a power of sale could be expressed in terms of unconscionability."[73] (citation omitted)

[90] However, the duties under s 85(1) of the PLA and s 420A of the CA are not equitable duties. They are statutory duties. Breaches of those duties would not be unconscionable within the meaning of the unwritten law.

[91] As well, the defendants allege that it is unconscionable for the plaintiff to demand payment of the debt without set-off in reliance on cl D5 (and cl B8). They rely on the alleged facts as to the sales at undervalues by the plaintiff's agent.

---

73 [2016] WASCA 72, [149].

[92] Section 12CA of the ASIC Act is derived from s 51AA of the TPA, introduced in 1992. The meaning of "unconscionable conduct within the meaning of the unwritten law" was discussed in depth by the High Court in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd*.[74] The meaning is not at large and calls for the identification of equitable principles in many different areas of the law. As Gummow and Hayne JJ said:

> "The reference by his Honour to the use in s 51AA of the term 'conduct that is unconscionable within the meaning of the unwritten law' as identifying particular categories of case should be accepted as indicating the proper construction of s 51AA … However, there then arises the question as to which particular manifestations of equity's concern with unconscientious or unconscionable conduct are reached by s 51AA. The issue is an important one because s 51AA does more than re-enact for application in trade and commerce the general law principles concerned. Contravention of s 51AA attracts particular remedies under the Act which may not otherwise be available..."[75]

[93] The variable meanings of unconscionable conduct have drawn both judicial[76] and academic[77] comment. Since the law of present relevance is the unwritten law, it is possible to pass by the debate that has emerged as to whether there is a requirement of "moral obloquy" before there can be "statutory" unconscionability under cognate provisions.[78]

[94] It is unnecessary to go further to decide this application. The starting assumption is that in some circumstances breach of the mortgagee's equitable duty of care in exercising a power of sale may constitute unconscionable conduct under s 12CA.

[95] As previously mentioned, the defendants claim damages under s 12GF of the ASIC Act. It is a condition of the power to award damages under s 12GF that there is "conduct by another person that contravenes a provision of Subdivision C (sections 12CA to 12CC) or Subdivision D (sections 12DA to 12DN)". It is recognised that a claim of that kind does not operate outside the scope of a no set-off clause,[79] at least where, as here, it is set up as a claim for damages. So far, the defendants' unconscionable conduct claim would not fall outside the operation of cl D5.

[96] However, the defendants also submit that an order varying the relevant contracts to avoid the loss suffered from the unconscionable conduct might be made under s 12GM of the ASIC Act. No claim of that kind is presently pleaded specifically and no relief under s 12GM is presently sought by the counterclaim. To remedy this omission, at the hearing of the application, the defendants sought leave to amend the counterclaim to add claims for relief under s 12GM as follows:

---

74 (2003) 214 CLR 51.

75 (2003) 214 CLR 51, 71-72 [40].

76 For example *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 618-619 [140].

77 G Dal Pont, 'The Varying Shades of "Unconscionable" Conduct – Same Term, Different Meaning', (2000) 19 *Aust Bar Rev* 135.

78 *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 333 ALR 569, 609-610 [188]; *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90, [41]; *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121].

79 *Palaniappan v Westpac Banking Corporation* [2016] WASCA 72, [147]-[149].

"(a) for the first defendant "an order … pursuant to section 12GM of the ASIC Act varying the Business Finance Agreement (with effect ab initio or at such other date as the court determines) so that it provides that … the first defendant is entitled to set off against any liability to the bank any claim for loss arising from the conduct of the bank in contravention of s 12CA of the ASIC Act"; and

(b) for the other defendants "a declaration … pursuant to s 12GM of the ASIC Act an order varying the guarantees (to take effect ab initio or at such other date as the court determines) so that they provide to [the] effect" that any liability is reduced by such amount as the plaintiff is liable to pay to the first defendant pursuant to the counterclaim."

[97] I will refer to those orders as the proposed s 12GM orders. Section 12GM provides, in part, as follows:

"(2) … the Court may, on the application of:

(a) a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of a provision of this Division; or

(b) …

make such order or orders as the Court thinks appropriate against the person who engaged in the conduct … (including all or any of the orders mentioned in subsection (7)) if the Court considers that the order or orders concerned will:

(c) compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage; or

(d) prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person or persons.

(3) …

(4) An application may be made under subsection (2) in relation to a contravention of this Division notwithstanding that a proceeding has not been instituted under another provision of this Part in relation to that contravention.

(5) …

(6) For the purpose of determining whether to make an order under this section in relation to a contravention of Subdivision C (sections 12CA to 12CC), the Court may have regard to the conduct of parties to the proceeding since the contravention occurred.

(7) Without limiting the generality of subsections (1) and (2), the orders referred to in those subsections include the following:

(a) an order declaring the whole or any part of a contract made between the person who suffered, or

> is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void ab initio or at all times on and after a date before the date on which the order is made;
>
> (b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after a date before the date on which the order is made;
>
> (c) an order refusing to enforce any or all of the provisions of such a contract;
>
> (d) an order directing the person who engaged in the conduct … to refund money or return property to the person who suffered the loss or damage;
>
> (e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage;
>
> (f) …"

[98] Section 12GM is derived from s 87 of the *Trade Practices Act* 1974 (Cth) ("TPA"). The defendants' reliance on s 12GM in relation to a contravention of s 12CA may be summarised as reliance on a power to vary a contract (including retrospectively) for conduct that is unconscionable within the meaning of the unwritten law.

[99] The effect of making the proposed s 12GM orders would be that the varied contractual terms would prevent the plaintiff from relying on cl D5 to repel the defendants' claims of set-off or reduction of liability.

[100] Surprisingly, perhaps, there are relatively few cases of orders made varying a contract, either under s 12GM or its direct comparators stemming from s 87 of the TPA. In 1989, for example, Young J said in *Milchas Investments Pty Ltd v Larkin*:[80]

> "… as I said in *Vakele Pty Ltd v Assender* (unreported, 30 March 1989) it is significant that there is not one reported case that I have found where even an order varying a contract has been made under the *Trade Practices Act*, *Fair Trading Act* 1987 (NSW), *Contracts Review Act* 1980 (NSW) or s 88F of the *Industrial Arbitration Act*. I have not found any such case since, nor has Mr Aitkin in his recent review of the *Trade Practices Act* remedies in 1989 1 Bond Law Review 107 at 117-118. The only case that the industry of counsel was able to find in the instant case that has altered the position is a statement made in P Hall *Unconscionable Contracts*

---

80 (1989) 96 FLR 464.

> *& Economical Duress* (CCH 1985), p 137 that Cahill J had said in *Mannix v Oakward Holdings Pty Ltd* (unreported, 18 May 1984) that an application to adjust the purchase price under a contract was unusual, but there was no jurisdictional bar to that course being taken in a proper case. The book does not relate whether his Honour thought that in that or in any other case that the order should be made. It is rather unusual then that after so many years of courts having power to vary contracts or to make an order in the nature of specific performance none has ever been made in any reported decision. Mr Gyles QC puts that this is at least partly due to the conservatism of judges and the legal profession, but I think a better answer is that ordinarily the courts find that damages or setting aside contracts is the appropriate remedy or possibly a restraining injunction and it is only in very rare circumstances that the court will think that one of the other discretionary remedies is appropriate."[81]

[101] An early case where an order varying a contract was considered is *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd*.[82]

[102] In 1995, in *Kizbeau Pty Ltd v WG & B Pty Ltd*,[83] the High Court of Australia varied a lease under the power in s 87(2), saying:

> "Section 87 of the Act confers a wide discretionary power on courts to make remedial orders in appropriate cases to ensure a fair result. Section 87(2) sets out the orders a court can make including an order varying any contract or arrangement in such a manner and from such a date as the court thinks fit: s 87(2)(b)."[84]

[103] In 2004, in *Murphy v Overton Investments Pty Ltd*,[85] the High Court said:

> "What kinds of detriment constitute loss or damage, when a detriment is to be identified as occurring or likely to occur, and what remedies are to be awarded, may all raise further difficult questions. Especially is that so when it is recalled that remedies may be awarded to compensate, prevent or reduce loss or damage that has been or is likely to be suffered by conduct in contravention of the Act."[86]

[104] The context that an order under s 12GM is sought for unconscionable conduct within the meaning of the unwritten law does not relieve the difficulty of analysis as to whether relief varying the contract to prevent reliance on cl D5 can be granted. Equity would grant rescission for unconscionable conduct in different contexts. It would not vary a contract or grant rescission of an individual term.[87] Nevertheless,

---

81 (1989) 96 FLR 464, 476-477.
82 (1981) 36 ALR 23, 55-56 and 60.
83 (1995) 184 CLR 281.
84 (1995) 184 CLR 281, 298.
85 (2004) 216 CLR 388.
86 (2004) 216 CLR 388, 407 [45].
87 See the discussion in Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, (5th Ed, 2015) 905-906 [25-130] and *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102, 110-116.

the question of present interest is the operation of s 12GM when it is engaged by contravening conduct consisting of unconscionable conduct within the meaning of the unwritten law. That operation does not depend upon equitable principles.

[105] Beginning with the statutory language, there are two interrelated express conditions upon the power to make an order under s 12GM. First, the relevant defendant must be a person who "has suffered or is likely to suffer loss or damage" by the conduct of the plaintiff that was unconscionable within the meaning of the unwritten law. Second, the court must consider that the order to be made "will compensate the person… or prevent or reduce the loss or damage suffered or likely to be suffered".

[106] As was said in *Marks v GIO Australia Holdings Ltd*:[88]

> "Proof of loss or damage (actual or potential) is therefore the gateway to the s 87 remedies. **But the identification of loss or damage is important in the operation of s 87 not only for this reason but also because the power to make orders under s 87 is limited to making orders 'if the Court considers that the order or orders concerned will compensate … in whole or in part for the loss or damage or will prevent or reduce the loss or damage …'.** That is, the court can make orders under s 87 only in so far as those orders will compensate (or will prevent or reduce) the loss or damage that is identified."[89] (emphasis added)

[107] As previously stated, the unconscionable conduct by the plaintiff alleged in the counterclaim includes making demand for payment of the debts owed without set-off.

[108] Although the defendants propose to amend the counterclaim to add the proposed s 12GM orders, the only loss alleged in the counterclaim is the loss suffered on the sale of the first defendant's property by the receivers acting as the plaintiff's agents. That loss is a loss already suffered by the defendants. It is not loss to be suffered in the future. For the purposes of s 12GM(1), that loss does not engage the condition that the defendants are "likely to suffer" that loss. The proposed s 12GM orders are not orders that will prevent or reduce that loss as a future loss.

[109] In accordance with the text of s 12GM and what was said in *Marks*, an order that the defendants can seek under s 12GM(1) is one that "will compensate" the loss suffered on the sale of the first defendant's property by the plaintiff as mortgagee as that is the loss "that is identified".

[110] However, the proposed s 12GM orders will not affect the loss suffered on the sale or compensate for that loss. The orders that will compensate for that loss or damage are the orders for damages or compensation for loss sought on the counterclaim as loss that a person "has suffered" under s 12GF (or s 12GM). If the defendants' counterclaims were able to be decided at the same time as the plaintiff's claim there would be separate judgments for the amounts on the claim and counterclaim. The absence of an order for set-off of those amounts in a single judgment would not affect the defendants' loss as alleged in the counterclaim.

---

88 (1998) 196 CLR 494.

89 (1998) 196 CLR 494, 513 [43]; see *ACN 074 971 109 v The National Mutual Life Association of Australasia Ltd* (2008) 21 VR 351, 405-406 [238].

[111] The defendants' claims for the proposed orders under s 12GM are spurred by a different potential species of loss, namely loss from the risk or likelihood that they will be made insolvent before their counterclaims can be heard. There are possible factual assumptions that should be noted before loss of that kind would be suffered. First, there is a possible assumption that they would be unable to obtain a stay of the plaintiff's judgment pending the resolution of the counterclaim. That assumption may or may not be justified.[90] Second, there is a possible assumption that the plaintiff will move to have them made insolvent before the counterclaims can be heard.

[112] Let those assumptions be made. The loss or damage is that which will occur upon a winding up order being made against the first defendant or a sequestration order being made against each other defendant. However, such an order does not reduce any entitlement to damages or compensation that the defendants might have. It is likely to reduce the ability of the defendants to prosecute their claims joined in the counterclaim. The power to conduct the proceeding would be vested in the first defendant's liquidator and the other defendants' trustees in bankruptcy. There may not be funds to prosecute the counterclaim. There may be other losses caused by insolvency of the defendants. At present, the defendants do not allege in the counterclaim that any such losses are loss or damage that the defendants are likely to suffer by the plaintiff's alleged unconscionable conduct.

[113] If such loss or damage is loss or damage within the meaning of s 12GM(1) that the defendants are likely to suffer "by" [91] the alleged unconscionable conduct, the court would consider whether the proposed orders under s 12GM are orders that will prevent that loss.

[114] The plaintiff relied on *Palaniappan* as supporting the conclusion that the defendants are not able to raise a real prospect of a successful defence by set-off or reduction of the debt by relying upon ss 12CA and 12GM. In that case, the appellant was a guarantor of a debt owed by the principal debtor to the respondent. The debt had been secured by a fixed and floating charge and real property mortgages given by the principal debtor to the respondent. The respondent appointed receivers who sold the secured properties. In answer to the respondent's claim upon the guarantee for the outstanding balance of the debt, the appellant alleged that the respondent had "interfered and directed" the receivers' conduct of the receivership to the appellant's prejudice. The appellant sought to add allegations that the assets of the principal debtor were undersold "entitling the appellant to seek relief pursuant to section 87 of the *Competition and Consumer Act* including … orders varying … [or] refusing to enforce … clause 9 … of the guarantee."[92]

---

90 *Daewoo Australia Pty Ltd v Porter Crane Imports Pty Ltd t/as Betta Machinery Sales* [2000] QSC 50, [22]-[23]; see *Sami v Roads Corporation* [2009] VSCA 44, [24]-[33]. Note, however, *Uniform Civil procedure Rules* 1999 (Qld), r 185.

91 Compare *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 115-121 [12]-[33]; *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)* (1987) 16 FCR 410, 418-419; *Henville v Walker* (2001) 206 CLR 459, 504 [136]; and *Marks v GIO Holdings Australia Ltd* (1998) 196 CLR 494, 509 [34].

92 *Palaniappan v Westpac Banking Corporation* [2016] WASCA 72, [43] and [105]. As at 1 January 2011, s 87 of the TPA had been repealed. After that, a relevant provision was s 243 of the *Australian Consumer Law*. However, from 1998, s 51AAB provided that s 51AA of the TPA did not apply to conduct engaged in in relation to financial services and later the *Competition and Consumer Act* 2010 (Cth) s 131A provided that Div 2 of Pt XI of the Act does not apply to the supply of financial

[115] Clause 9 provided that the appellant would not reduce his liability under the guarantee by claiming that he or the customer or any other person has a right of set-off or counterclaim against the respondent. The appellant alleged by his defence that the receivers owed duties in equity, at common law and under s 420A of the CA in selling the mortgaged land. He alleged that the receivers had acted as the respondent's agents in selling the land and had breached the duties. He alleged that the respondent had given instructions as to the sales contrary to advice and the land had been sold at less than market value or best available price. As a result of those facts he alleged that the respondent as a matter of equity was not entitled to enforce the guarantee.

[116] Corboy J (with whom Martin CJ agreed) disposed of the unconscionable conduct claim for an order refusing to enforce the no set-off clause thus:

> "However, in my view none of the allegations made by appellant establish an arguable case, or a case that ought to be investigated, that he would be entitled to relief under s 237 and s 243 of the *Australian Consumer Law* to vary the terms of the Guarantee, including cl 3 and cl 9, or for an order restraining the respondent from enforcing the Guarantee or any of its provisions. The conduct alleged does not concern the making of the contract of guarantee. Rather, the respondent is alleged to have acted unconscionably in giving instructions to the Receivers in respect of the sale of the Estate Land for the purpose of benefitting itself and another party. As such, the allegation merely enlarges the claim that the Receivers acted in breach of their duties in disposing of the Estate Land with the result (on the appellant's case) that the land was sold at an undervalue.
>
> In my view, the allegation of unconscionable conduct stands on no different footing to the allegations of breach of duty when considering the effect of cl 9 and cl 13.1 of the Guarantee. Each set of allegations concerns the exercise of rights under the securities given by [the principal debtor] and both the respondent's unconscionable conduct and the Receivers' breach of duty are alleged to have resulted in the Estate Land being sold at an undervalue. As such, the allegations of unconscionable conduct and breach of duty constitute claims that merely offset or reduce the appellant's liability under the Guarantee. The allegations do not give rise to an affirmative defence. Clause 9 and cl 13.1 apply so that the appellant is required to pay the guaranteed money before he can pursue the claim that the respondent engaged in unconscionable conduct in relation to the sale of the Estate Land."[93]

[117] The similarity between this case and *Palaniappan* is clear. The defendants submit that there are differences. First, in this case the amount of the damages or reduction claimed by the defendants exceeds the amount of the plaintiff's claim. Despite the careful and determined efforts of the defendants' counsel to persuade me otherwise,

---

services. Hence reliance in a case like this usually has been placed on ss 12CA and 12GM of the ASIC Act.

93 [2016] WASCA 72, [146]-[147].

I am unable to understand why that should make a difference to whether the proposed s 12GM orders would provide a basis for concluding that they have a real prospect of defending the plaintiff's claim.

[118] The second difference is the defendants' evidence and argument that they will become insolvent if the plaintiff's claim proceeds to judgment without set-off or reduction thereby causing them loss. There is substantial evidence that they have filed in support of their inability to pay the amount of the plaintiff's claims against them. In my view, that difference means that it is possible to distinguish this case from *Palaniappan*, as the insolvency of the appellant does not appear to have been considered in that case as a potential source of loss or damage under s 243 of the ACL. If there were no loss or damage likely to be suffered because of insolvency in the present case, my own analysis otherwise would have supported the conclusion that there is no loss or damage that might support the proposed s 12GM orders.

Conclusion

[119] It follows, in my view, that the plaintiff's application should not succeed at this stage. The defendants should have the opportunity to plead any loss or damage which might engage the power of the court to make the proposed s 12GM orders.

[120] I will hear the parties as to the order to be made in the light of these reasons.