SUPREME COURT OF QUEENSLAND

CITATION:	*Solomon-Innes & Innes v Carter-Lannstrom & Carter-Lannstrom* [2017] QSC 49
PARTIES:	**LISA ANNE SOLOMON-INNES** (first applicant) **WAYNE FRANCIS INNES** (second applicant) **v** **MARGARET CARTER-LANNSTROM and ADAM JAMES CARTER-LANNSTROM** (respondents)
FILE NO/S:	No 677 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 April 2017
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2017
JUDGE:	Ann Lyons J
ORDER:	**1. The injunction sought by the applicants is granted.** **2. The applicants pay a commercial rate of interest on the balance outstanding pursuant to the Facility Agreement.** **3. I will hear counsel as to the rate of interest to be paid, the form of the Orders and as to Costs.**
CATCHWORDS:	EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – INJUNCTIONS TO PRESERVE THE STATUS QUO OR PROPERTY PENDING DETERMINATION OF RIGHTS – where in the substantive proceedings the applicants seek to set aside a mortgage and various loan agreements entered into by the parties on the grounds of unconscionability – where the applicants seek an interlocutory injunction to restrain the respondents from exercising or attempting to exercise power of sale pursuant to the mortgage– whether injunction should

be granted

Asia Pacific International Pty Ltd v Dalrymple [2000] 2 Qd R 229
Australian Broadcasting Corporation v O'Neill [2006] HCA 46; (2006) 80 ALJR 1672
Bank of Western Australia Ltd v Abdul [2012] VSC 222

Beecham Group Ltd v Bristol Laboratories Pty Ltd (1968) 118 CLR 618

Clarke v Japan Machines (Australia) Pty Ltd (No 2) [1984] 1 Qd R 421
Commercial Bank of Australia Limited v Amadio (1983) 151 CLR 447
Evans Marshall and Co Ltd v Bertola SA [1973] 1 WLR 349
Garcia v National Australia Bank (1998) 194 CLR 395

Harvey v McWatters [1948] NSWStRp 58; (1948) 49 SR (NSW) 173
Hillston Grove Vineyards Ltd v Lushvale P/L [2000] QSC 001
Inglis v Commonwealth Trading Bank of Australia (1971) 126 CLR 161
Kakavas v Crown Melbourne Ltd (2013) 250 CLR 392; [2013] HCA 25
Takemura v National Australia Bank Ltd & Others[2003] NSWSC 339
Wu v Ling [2016] NSWCA 322

COUNSEL:	BWJ Kidston for the first and second applicants CM Tam for the respondents
SOLICITORS:	ACLG Lawyers for the first and second applicants Hickey Lawyers for the respondents

This application

[1] Since June 2013 various loans have been made by the respondents, as Trustees of a Super Fund or by Margaret Carter-Lannstrom personally, to the applicants. The loans were primarily to enable the second applicant to conduct an earthmoving business 'Landfill Logistics', to pay household expenses and to pay the second applicant's wages. The loans by the Super Fund total in excess of $1.8 million and the personal loans total $690,000.

[2] The applicants allege they have been paying interest to the respondents at a rate which they say has, at times, been as high as "14,666% per annum" and that new loans were being taken out from the respondents for the purpose of repaying interest on existing

loans, including penalties of $5,000 per day on the late payment of an interest instalment of $21,000.

[3] Pursuant to an amended originating application originally filed on 20 January 2017, the applicants seek various orders in the substantive proceedings, including a declaration that the purported Notice of Exercise of Power of Sale dated 19 December 2016 is invalid, and declarations that a series of loan agreements made between October 2015 and 20 September 2016, together with a facility agreement, are void or voidable by reason of the respondents' unconscionable conduct. The respondents are sued in their personal capacity as well as in their representative capacity as trustees of the Margaret Carter-Lannstrom Self-Managed Super Fund.

[4] By way of interlocutory relief, the applicant now seeks an interlocutory injunction that the respondents be restrained from exercising, or attempting to exercise, power of sale pursuant to a mortgage or the retaking of possession of the residential property owned by the first applicant at Cashmere.

Background

[5] The applicant's earthworks business 'Landfill Logistics' failed in late 2016 and went into liquidation on 2 December 2016. The second applicant was a director of that business from June 2010 until it went into liquidation. The first applicant is the sole registered owner of the residential property at Cashmere where she and the second applicant reside with their daughter.

[6] The second applicant deposes that the earthmoving business was contracted in 2013 to perform large earthworks contracts for the Ipswich City Council and Queensland Racing and as such had large trading expenses. The business had a high turnover but a low net profit. The business was the second applicant's only source of income and he states that in about 2013 he began to look for short term funding options to service the trade accounts. He states he was introduced to Michael King, the founder of MFS Group, who told him he could arrange for short term finance loans for businesses in financial difficulty without due diligence or credit checks, but that they would charge high interest. He was told that the person behind the short term loans was the respondent Margaret Carter-Lannstrom who lent the money from her self-managed superannuation fund and that she and her son Adam were trustees of the Super Fund.

[7] The second applicant states that he initially had dealings with Michael King but ultimately dealt with Margaret Carter-Lannstrom directly. He states that he handled all the negotiations and paperwork with Mr King and arranged for the documents to be signed by himself and the first applicant. He states that the respondents lent money from 2013 to 2016 through about 20 different loans to Landfill Logistics, him and his wife, as well as to himself and the first applicant personally. Ms Carter-Lannstrom deposes that the details of those loans are as follows:[1]

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1 Affidavit of Margaret Carter-Lannstrom sworn 3 March 2017 (Court Document 4).

"7. During the period from July 2013 to date, Adam and I as Trustees for the Super Fund entered into the following loan and facility agreements with the First Applicant, the Second Applicant and/or Landfill Logistics:

Agreement Date	**Borrower**	**Loan/Facility Amount (including interest and costs/fees withheld)**
5 July 2013	First Applicant	$225,000
2 June 2014	First Applicant	$225,000
17 February 2015	First and Second Applicants	$242,000
8 April 2015	First and Second Applicants	$95,000
19 June 2015	Landfill Logistics	$203,000
31 July 2015	Landfill Logistics	$197,375
21 September 2015	Landfill Logistics	$326,100
18 November 2015	Landfill Logistics	$300,000
		$1,813,475

(Super Fund Loans)

8. During the period from October 2015 to date, I (in my personal capacity) entered into the following loans with the Second Applicant:

Advance Date	**Advance Amount**
16 October 2015	$40,000
13 November 2105	$15,000
31 March 2016	$80,000
7 April 2016	$120,000
19 May 2016	$50,000

26 May 2016	$100,000
21 July 2016	$170,000
5 August 2016	$115,000
	$690,000

”

[8] In November 2015 there were discussions between the second applicant and Ms Carter-Lannstrom about the Super Fund providing a revolving credit facility and $300,000 was borrowed from the respondents on the terms of a loan agreement entitled ‘Facility Agreement’. That Agreement is dated 15 November 2015 and names the Super Fund as the Lender and Landfill Logistics as the Borrower. It was guaranteed by Landfill Logistics, the second applicant and his wife, the first applicant. The first applicant further secured the loan with a registered second mortgage over the family home.

[9] The applicants ended up in default under the mortgage and in excess of $700,000 is claimed by the respondent mortgagees on the advance of $300,000. The injunction focuses on the exercise of a power of sale under the mortgage granted by the first applicant to the Super Fund.

[10] In the substantive proceedings, the applicants seek to set aside the mortgage and the Facility Agreement and resist the sale of their home. Pursuant to a further amended originating application, the applicants also now challenge the form of the notice of exercise of power of sale.

[11] It would seem that the respondents are being sued in their capacities as trustees of the Super Fund which was the lender under the Facility Agreement. Security under that Facility Agreement included the mortgage, personal securities given by the first applicant and second applicant and by Landfill Logistics also as guarantor. It would appear that Landfill Logistics was the borrower under the Facility Agreement, not the applicants in their personal capacities. As the company is in liquidation it is not participating in these proceedings.

The application for an interlocutory injunction

[12] The law in relation to an interlocutory injunction is well known and in *Australian Broadcasting Corporation v O’Neill*[2] the High Court held that the relevant principles in Australia are those explained in *Beecham Group Ltd v Bristol Laboratories Pty Ltd.*[3] In such applications the court addresses two main issues. The first is whether the plaintiff has made out a prima facie case in the sense that if the evidence remains as it is there is a probability that at trial, the plaintiff will be held entitled to the relief; and the second is whether the inconvenience or injury which the plaintiff would be likely to suffer if the

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2 [2006] HCA 46; (2006) 80 ALJR 1672.

3 (1967-68) 118 CLR 618.

injunction was refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction is granted. It is sufficient that a plaintiff show that there is a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial.

Is there a prima facie case?

[13] In terms then of the first aspect in relation to whether there is a prima facie case and the likelihood of success, the applicants argue that there are two grounds on which a prima facie case can be made out. Both grounds rely on unconscionability. The first ground relates to the Mortgage over the family home as provided by the first applicant. It is argued that, pursuant to the principles in *Garcia v National Australia Bank,*[4] the first applicant has very good prospects of success of setting aside the Mortgage given that the second applicant procured the first applicant's signature on the Mortgage and despite notice of the relationship between the applicants, the Lender did not take steps to ensure the second applicant understood the nature and effect of the Mortgage before signing.

[14] The second ground relied on by the applicants to show a prima face case relates to the Facility Agreement and various other loan agreements entered into by the second applicant. It is argued that the second applicant has reasonable prospects of success in setting aside or varying these agreements on the basis that the terms of the agreements exploited his desperate financial need at the time. The applicants refer to the law as outlined in *Asia Pacific International Pty Ltd v Dalrymple*[5] to support these submissions.

[15] The respondent argues however that the applicants' likelihood of success is faint. Counsel relies on the fact that the essence of the applicants' challenge relates to the alleged unconscionable conduct associated with the making of loans by Ms Carter-Lannstom personally, to the second applicant personally. The Mortgage in fact secured advances under the Facility Agreement and not the personal loans. Furthermore, the first applicant, the mortgagor, was not a party to the personal loans. Counsel for the respondent argues that the dual character of the loans, first the Facility Agreement and the subsequent personal loans, is important because they were made between different parties.

[16] Counsel for the respondent argues that the Facility Agreement was made between the Super Fund and Landfill Logistics while the personal loans were made between Ms Carter-Lannstrom and the second applicant Mr Innes. As such, those loans bore different interest rates. The Facility Agreement had an interest rate of 7 per cent per month at the lower level and 10 per cent per month at the highest, whereas the personal loans varied from around $7,000 interest per day to $10,000 interest per day.

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4 (1998) 194 CLR 395.

5 [2002] 2 Qd R 229.

[17] Counsel for the respondent argues that the Facility Agreement is the issue in question here and that it needs to be looked at separately form the other loans. It would seem that all personal loans except the final two made in July and August 2016 were repaid and the Super Fund accepts that the personal loans were unsecured. Similarly the loans that preceded the Facility Agreement were repaid. Under the Facility Agreement counsel argues that the amounts outstanding are as follows:

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Principal outstanding under the Facility Agreement	$300,000
Interest on the Principal	
19 September 2016 – 18 October 2016 @ 7% per month	$21,000
19 October 2016 – 18 November 2016 @ 10% per month	$30,000
19 November 2016 – 18 December 2016 @ 10% per month	$30,000
19 December 2016 – 18 January 2017 @ 10% per month	$30,000
19 January 2017 – 18 February 2017 @ 10% per month	$30,000
The costs and expenses of preparing and serving the Notice of Default and Demand on 26 October 2016	$2,200
Total	**$443,200**

"

[18] Counsel for the respondent argues that the applicant does not establish to the requisite standard that there is a serious question to be tried. It is argued that there is no evidence that the second applicant was victimised and neither is there the passive acceptance of a benefit by the Super Fund but rather, the second applicant wanted short term finance and was prepared to pay. The second applicant had also borrowed more than $200,000 from another party previously and had used the money to invest on the Stock Exchange. Counsel notes that the second applicant communicated directly with the Super Fund's solicitors and signed consumer credit code declarations.

[19] Counsel argues therefore that the second applicant is commercially sophisticated and that he negotiated the Facility Agreement on Landfill Logistics' behalf. He was invited to receive independent advice and agreed to waive the opportunity to do so by cl 16.14 of the Facility Agreement. In this regard counsel for the respondent relies in particular on the decision of *Wu v Ling*.[6] In *Wu v Ling* Ms Wu was an experienced and astute business woman of considerable wealth. Mr Ling lent $350,000 to Ms Wu for a period of 12 months with an interest rate of 9 per cent per annum rising to 11 per cent in the event of default. That loan was made in 2009 and Ms Wu made no repayments in 2009 or 2010.

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6 [2016] NSWCA 322.

[20] The primary judge was held by the New South Wales Court of Appeal to have erred in relieving Ms Wu from some of her contractual obligations under the loans, namely the second, third, fourth and fifth loans made by Mr Ling to her. It was clear that in each case it was Ms Wu who approached Mr Ling for the further loans and whilst the second loan agreement was drafted by Ms Wu's solicitor, the subsequent loan agreements were drafted by Ms Wu herself and were executed in her accountant's office and witnessed by the accountant. The primary judge found that at least by the time of the fifth loan Mr Ling believed Ms Wu was being defrauded and the trial proceeded on the basis that Ms Wu believed wrongly that she stood to make $16,000,000 if she could provide further funds in the short term. It was found that the entirety of money borrowed by Ms Wu was lost to a Nigerian scam.

[21] In determining the issue as to whether there is a serious question to be tried, I consider that there is some force in counsel for the applicants' submission that all of the loans must be considered together because all of the loans are in reality intermeshed, given that some of the personal loans were taken out to pay interest on the other loans. In this regard counsel for the applicants argues that the reality of the loans are summarised in the schedules set out below, which were prepared by the applicants as an aide memoire and made exhibits in this proceeding:

"Schedule[7]

RE VARIOUS LOANS AND AMOUNTS REPAID

LOAN	AMOUNT ADVANCED	TERM	INTEREST PAID (Excl Fees)	TOTAL REPAID	INTEREST RATE PER ANNUM
28 March 2014 Loan	$50,000	12 Days	$5,000	$55,000	333%
23 May 2014 Loan	$200,000	4 Weeks	$30,000	$230,000	187%
25 July 2014 Loan	$70,000	21 Days	$15,000	$85,000	357%
22 September 2014 Loan	$50,000	8 Weeks	$15,000	$55,000	243%
Third Mortgage	$225,000	4 Months	$17,000	$242,000	22%

7 Exhibit 1.

8 April 2015 Loan	$75,000	60 Days	$22,030	$97,030	183%
July 2015 Loan	$170,000	42 Days	$55,000	$225,000	120%
September 2015 Loan	$280,000	8 Weeks	$33,600	$313,600	80%
October 2015 Loan	$40,000	10 Days	$20,000	$60,000	1,666%
November 2015 Loan	$15,000	5 Days	$22,000	$37,000	14,666%
Subject Mortgage	$300,000	12 Months	$422,000	$422,000[1]	140%
March 2016 Loan	$80,000	5 Days	$20,000	$100,000	2,500%
April 2016 Loan	$120,000	15 Days	$65,000	$185,000	1,354%
First May 2016 Loan	$50,000	5 Days	$25,000	$75,000	5,000%
Second May 2016 Loan	$100,000	27 Days	$250,000	$350,000	3,571%
Total	**$1,825,000**		**$1,016,630.00**	**$2,531,630.00**	

Note: The above table does not include the First Mortgage or Second Mortgage

[1] NB the advance of $300,000 is not included in this total

Schedule[8]

RE SUBJECT MORTGAGE REPAYMENT SCHEDULE

Initial Advance $300,000 on 18 November 2015

[8] Exhibit 2.

MONTH	INTEREST	PENALTY	TOTAL	REFERENCE WAYNE INNES AFFIDAVIT
December 2015	$21,000	$0.00	$21,000	Paragraph 146
January 2016	$21,000	$3,000	$24,000	Paragraph 148
January 2016	$21,000	$0.00	$21,000	Paragraph 150
February 2016	$21,000	$0.00	$21,000	Paragraph 153
March 2016	$21,000	$0.00	$21,000	Paragraph 156
April 2016	$21,000	$105,000	$126,000	Paragraph 164, 169
May 2016	$21,000	$0.00	$21,000	Paragraph 172
June 2016	$21,000	$0.00	$21,000	Paragraph 177
June 2016			$100,000	Paragraph 176
July 2016	$21,000	$0.00	$21,000	Paragraph 179
August 2016	$21,00	$4,000	$25,000	Paragraph 183
TOTAL	**$210,000**	**$112,000**	**$422,000**	

Period 18/11/15 to 14/03/2017 = 449 days".

[22] Counsel for the applicants states that the respondents have been paid the sum of $422,000 already in respect of the advance of $300,000 which it is alleged is 140% per annum.[9]

[23] In *Wu v Ling* the Court of Appeal confirmed the principle that equitable intervention is based upon a precise examination of the particular facts and a scrutiny of the exact relations and that "…one should not expect to find a bright line separating circumstances which place an impugned transaction inside or outside the reach of equitable principle."[10] Leeming JA noted that the absence of immoral or dishonest motives was not sufficient to preclude equitable intervention nor was it necessary to establish that a defendant actively sought to procure the assent of the other party. He also stated that "Prima facie, a loan made at a high interest rate to a borrower whom the lender believes is being defrauded would not seem to stand clearly outside the scope of

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9 T 1-8-9 ll 35-15; Exhibit 1.

10 At [7].

the equitable jurisdiction."[11] He referred to the reiteration by the High Court in *Kakavas v Crown Melbourne Limited*[12] that there is a species of equitable fraud which prevents a party taking surreptitious advantage of the weakness of another. It was held however that there was nothing surreptitious in Mr Ling's conduct and that people do "foolish" things and that knowledge or belief of a plaintiff's foolishness alone is not sufficient.

[24] Reference was also made by Leeming JA to the High Court decision in *Kakavas v Crown Melbourne Ltd*:[13]

> "[13] Thirdly, in *Kakavas* at [18] the High Court cited the passage from *Louth v Diprose* reproduced above to explain the principle on which equitable intervention was based. The Court said at [117] that "the concern which engages the principle is to prevent victimisation of the weaker party by the stronger". The Court returned at the conclusion of its reasons at [161] to the notion of victimisation:
>
> > "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.""

[25] I accept that the mere fact that there is a high interest rate charged between business people in the conduct of trade and commerce does not necessarily mean that there should be equitable intervention. In this regard I note the discussion by Young CJ in Equity in *Takemura v National Australia Bank Ltd & Others*[14] as follows:

> "[21] In *Barrett v Hartley* (1866) LR 2 Eq 789, 795, Stuart VC said:
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> > "…it is an observation of some importance now that the usury laws are repealed, that one effect of such repeal was to bring into operation, to a greater extent than formerly, another branch of the jurisdiction of this Court which existed long before them – I mean, that the principle of the Court which prevented any oppressive

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11 At [9].

12 (2013) 250 CLR 392.

13 (2013) 250 CLR 392.

14 [2003] NSWSC 339.

> bargain, or any advantage exacted from a man under grievous necessity and want of money, from prevailing against him."

[22] The situations where equity has exercised this power are said to fall into four categories; see Waldock, *Mortgages*, 2nd ed, Stevens & Sons, London, 1950, p 192 and following, which has found its way in a different from into E F Cousins, *Law of Mortgages*, 1st ed, Sweet & Maxwell, London, 1989, p 311 ff. The four classes are:

(1) where the mortgagee stands in a fiduciary relation to the mortgagor;

(2) mortgages of reversionary interests and expectancies;

(3) where the mortgagee has unconscionably exploited the necessitous circumstances of the mortgagor to extort from his exorbitant terms for the loan; and

(4) where the court is given jurisdiction by statute to reopen extortionate credit arrangements.

[23] It is the third of these categories that may be relevant in the present case.

[24] It is usually not sufficient to show that a mortgage falls into the third class to show that the interest rate was much higher than one might expect. What must be shown is that there is unconscionable pressure on the mortgagor to enter into the arrangement. A mortgage given by a business person at a very high rate of interest, if that mortgage was freely and voluntarily given, will not be able to be attacked.

[25] A leading illustration of this principle is *Reading Trust Ltd v Spero* [1930] 1 KB 492. In that case, Spero, a man of 40 years of age, carried on the business of a dealer in objets d'art. His business was a speculative one, he needed to hold on to jewellery etc until the price was right and he had commenced his business without any capital. That meant he had to borrow, and as he had little security, he had to borrow from moneylenders. He borrowed from Reading Trust Ltd at interest rates ranging from 80-96%. The litigation took place in the context of the Moneylenders Act 1927 (NSW). However, the English Court of Appeal held that there being no suggestion that anyone put any pressure on the borrower to borrow at those rates and that he made a business decision to do so, he could not show that the transaction was harsh and unconscionable so that it should be set aside. Rowlatt J found (see at 515) that the business man was:

> "…a man of great intelligence ... carrying on a high class business, simply finding that his business is so speculative that he cannot get finance from the banks, but so profitable in his skilful hands that he can make profits which can pay 60 or 80 per cent interest.""

[26] Accordingly, it would seem necessary to ascertain whether there has been "victimisation or exploitation" of the kind referred to in *Kakavas,* noting of course that Leeming JA considered that there was a "breadth" in the notion and that it can consist of either active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances. I note that in *Wu v Ling* Mr Ling had actively counselled Ms Wu against the loan, she had received independent advice and she was considered to be commercially sophisticated. The primary judge had noted that she was a highly experienced businesswoman who had found significant success in the aged care industry and had built up an impressive property portfolio. She was however victim of a Nigerian fraud and had been thoroughly duped. He concluded that by the time of the first loan she was thoroughly unable to see what would have been apparent to a fully informed objective onlooker; that she had been dragged into a deception and that every sum of money she advanced was simply making things worse.[15]

[27] As I have already indicated, I consider that for the purposes of the current application, all of the loans should be considered together and cannot be looked at in isolation given that the personal loans at the very high rates were indeed taken out for the purpose of paying interest on the other loans. Furthermore, there is no evidence that at any time the second applicant had ever in fact been a successful businessman of the *Wu v Ling* category or even a moderately successful businessman. The second applicant had been a policeman and had started this earthmoving business in 2010. It is notable that within three years of establishing the business he was already endeavouring to source short term loans with high interest rates from lenders who specialised in loans to businesses in financial difficulty. This is clearly not a case where he had any history of running successful businesses and making significant profits.

[28] The financial consequences in relation to the Facility Agreement and the post Facility Agreement personal loans are starkly set out on page two of the document prepared by the respondents:[16]

"**Facility Agreement**

Advance/Payment Date	**Amount Advanced**	**Interest Paid**	**Costs/Fees Paid**	**Additional Interest Paid (Late Payment)**	**Total Repayment (Interest Only)**
18 November 2015	$190,677		-	-	
	$6,500 (Withheld)				

15 At [92].

16 Exhibit 3.

	$6,823 (Withheld)				
	$21,000 (Withheld)				
	$75,000 (Withheld)				
21 January 2016		$21,000	-	$3,000	$24,000
		$21,000 (Pre-payment)	-	-	$21,000
17 February 2016		$21,000	-	-	$21,000
17 March 2016		$21,000	-	-	$21,000
29 April 2016		$21,000	-	-	$21,000
18 May 2016		$21,000	-	-	$21,000
17 June 2016		$21,000	-	-	$21,000
15 July 2016		$21,000	-	-	$21,000
19 August 2016		$21,000	-	$4,000	$25,000
	$190,677	**$189,000**	**-**	**$7,000**	**$196,000**

Post-Facility Agreement Personal Loans

Advance Date	**Amount Advanced**	**Interest Paid**	**Costs/Fees Paid**	**Additional Interest Paid (Late Payment)**	**Total Repayment (Interest Only)**
31 March 2016	$80,000	$20,000	-	-	$100,000
7 April 2016	$120,000	$30,000	-	$140,000	$290,000
19 May 2016	$50,000	$25,000	-	-	$75,000
26 May 2016	$100,000	$37,500	-	$312,500	$450,000
21 July 2016	$170,000	-	-	-	-
5 August 2016	$115,000	-	-	-	-

	$635,000	**$122,500**	**-**	**-$452,500**	**$915,000**

	Total Amount Advanced	**Total Interest Paid**	**Total Costs/Fees Paid**	**Total "Default" Interest Paid**	**Total Amount Repaid**
	$2,420,677	**$513,475**	**$61,841**	**$476,899**	**$2,942,215**

"

[29] Counsel for the applicants argues that this is not simply a case involving high interest rates because the interest rates which are set out in the Schedule in paragraph [9] are in a "different stratosphere"[17] of interest rates. In addition the rates charged are not just an isolated transaction but rather when amounts are not paid "penalties on penalties"[18] are charged. It is argued that this is clearly a case where the second applicant is "financially desperate" and "plainly unable to take care of our own financial circumstances and look after our own affairs".[19] It is argued therefore that the second applicant is able to satisfy the test of special disadvantage and come within that category of unconscionable conduct as discussed in *Asia Pacific International Pty Ltd v Dalrymple*[20] where Shepherdson J referred to the High Court decision of *Commercial Bank of Australia Limited v Amadio.*[21] In *Amadio* Deane J had observed:[22]

> "Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable conduct may take a wide variety of forms and are not susceptible to being comprehensively catalogued."

[30] True it is that the second applicant was the one who approached Ms Carter-Lannstrom for the personal loans, but an examination of some of the text messages between the second applicant and Ms Carter-Lannstrom, in my view, displays a complete naiveté about the reality of the loans and the obvious consequences of the loans requested.[23] He

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17 T 1-16 l 17.

18 T 1-16 l 37.

19 T 1-16 ll 30-42.

20 [2000] 2 Qd R 229.

21 (1983) 151CLR 447.

22 At 474.

23 See Affidavit of M Carter-Lannstrom sworn 3 March 2017 (Court Document 4), Exhibit "MCL" at 41.

did not obtain independent legal advice nor did he obtain financial advice about those personal loans or about the reality of the interest rates he was agreeing to. In particular there is a request in a text message to Mrs Carter-Lannstrom on Friday 5 August 2016 in the following terms:

> "…I need to borrow 115,000 until Wednesday . Repayment close of business Wednesday 10th normal penalties 10 k per day. Fifty thousand interest for the five days. If you can do I will send you my bank details if not can you let me know so I can try and make some other arrangements. I will be in this meeting for awhile so if you can txt back that would be good . Lots of love no matter what the answer Wayne" [sic].

[31] In my view this was indeed a case where every loan the second applicant took out simply made matters worse and where it could be argued that he was objectively blind to the financial consequences of the loans he was requesting. Furthermore the mortgage was entered into by the first applicant who is the sole owner of the property and the second applicant's wife. The respondents knew that she was not involved in the actual business or in commerce more generally but rather worked in administration at a school. In addition her signature on the mortgage and the guarantee were obtained through her husband and there is no evidence that she understood the effect of this mortgage, although I note that she had obtained independent legal advice in relation to a previous mortgage in 2013.

[32] There is certainly no documentation before me that the first applicant obtained any independent legal advice about this mortgage and certainly no evidence that she fully understood the terms of the mortgage and the consequences of guarantee at the time the Facility Agreement was put in place in November 2015. In this regard counsel for the applicants relies on the principles in *Garcia v National Australia Bank*[24] and *Bank of Western Australia Ltd v Abdul*.[25]

[33] I also note that in *Dalrymple* relief was granted in circumstances where the transaction between the parties was outlined in the following terms:[26]

> "[57] There is not the slightest doubt that the transaction between the parties was at arm's length and the plaintiffs solicitors were at pains to ensure that the defendants were properly advised as to the terms of the Deed of Loan and understood the consequences to them should there be any default in their obligations under the Deed of Loan. The one provision in the Deed of Loan which I find was oppressive and unreasonable is the provision of capitalisation of interest read in conjunction with the interest rate of 20 per cent per month, albeit with a reduction to 15 per cent per month if the interest were paid on time, but is included in the loan and mortgage

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24 (1998) 194 CLR 395.

25 [2012] VSC 222.

26 2000 2 Qd R 240 at [57].

> documents provisions which entitled it to capitalise unpaid interest. The arithmetical and practical effect has, in the circumstances of this case, been to increase the loan debt astronomically."

[34] Shepherdson J ultimately considered that he had to look at the end result of the transaction "objectively" and held that the agreement to pay interest on unpaid interest had taken advantage of the defendants' special vulnerability because they were in urgent need of a loan. He held that the agreement was unreasonable and oppressive to an extent that affronts minimum standards of fair dealing and continued:[27]

> "This case shows that a lender can be extremely careful to ensure, as far as he can, that the borrower has competent independent advice and understands well the nature of the obligation entered into and its general consequences, yet the contract of loan may amount to an unconscionable dealing."

[35] In my view the fact that Ms Carter-Lannstrom knew in 2013 that the second applicant was in a business which was already experiencing financial difficulty is significant. He was clearly in need of ongoing loans at short notice. She also knew that he had not obtained independent legal advice in relation to the first loans and then had continued to obtain further loans from her at very high interest rates for a period of more than 3 years without any form of independent financial or legal advice. In addition there is no evidence the second applicant actually understood the general consequences of the arrangements he was entering into on an ad hoc basis by email and text message. Furthermore the Facility Agreement was part of an interconnected suite of loans and there is no evidence that his wife, the first applicant, obtained independent financial or legal advice.

[36] The first applicant in fact deposes[28] that whilst she understood in general terms what the documents involved she did not in fact understand that she was arguably liable to repay "other amounts advanced by the respondents without my knowledge", that the home would secure the repayment of other amounts and that she was paying "unusually high rates of interest".

[37] I consider that I also should look at the objective reality of the loans. Given the returns to Ms Carter-Lannstrom and the Super Fund as set out in Exhibit 3, I consider that there is a prima facie case as to whether or not this is a case involving unconscionable conduct and, in particular, whether there has been the "passive acceptance of a benefit" as discussed in *Wu v Ling*. In this regard I note that the High Court in *Australian Broadcasting Corporation v O'Neill* indicated that the term 'prima facie case' did not mean that an applicant had to show that it is more probable than not that at trial they would succeed but rather it was sufficient that an applicant show "a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial."

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27 At [58].

28 Affidavit of L A Solomon-Innes sworn 9 March 2017 (Court Document 6).

[38] The other factors the court needs to consider are referred to in *Australian Broadcasting Corporation v O'Neill* by Gleeson CJ and Crennan J who observed that:

> "[19]….in all applications for an interlocutory injunction, a court will ask whether the plaintiff has shown that there is a serious question to be tried as to the plaintiff's entitlement to relief, has shown that the plaintiff is likely to suffer injury for which damages will not be an adequate remedy, and has shown that the balance of convenience favours the granting of an interlocutory injunction. These are the organising principles, to be applied having regard to the nature and circumstances of the case, under which issues of justice and convenience are addressed."

Where does the balance of convenience lie?

[39] Accordingly whilst I am satisfied in relation to a prima facie case, I must also be satisfied in relation to the second aspect of the test, namely ascertaining where the balance of convenience lies.

[40] In this regard the respondents argue that no undertaking as to damages is offered and even if one were offered it would be insufficient.

[41] In this case the applicants argue that there is an additional consideration which arises in relation to the usual rule that a mortgagor must pay the disputed amount into court as the price of obtaining injunctive relief as per the principles enunciated in *Inglis v Commonwealth Trading Bank of Australia.*[29] Counsel for the applicants however argue that there are well recognised exceptions to the general rule and relies on the decision of Sugerman J in *Harvey v McWatters:*[30]

> "There is a distinction between what I have called the ordinary case and the case in which the existence of the power of sale or the question whether it is exercisable at all is in question. The present case is of the second class. What is called the ordinary rule applies to cases of the first class, and to those cases only. This flows from the principles and reasoning on which that rule depends. Cases of the second class are, as regards interlocutory applications, governed by a rule of a similar type. But it is a rule resting on different principles and reasoning. These permit of a greater flexibility. They do not require that in every case the whole amount claimed or sworn to by the mortgagee or seen from the terms of the instrument to be the greatest amount that could be due should be paid in. The terms may be moulded so as to require payment in of so much only as suffices to give adequate protection to the mortgagee."

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29 (1971) 126 CLR 161 at 164.

30 [1948] NSWStR p 58; (1948) 49 SR (NSW) 173 at 178.

[42] That was followed by Williams J in *Clarke v Japan Machines (Australia) Pty Ltd (No 2)* [31] who held that "the rule is a general but not inflexible one". I also note that in *Hillston Grove Vineyards Ltd v Lushvale P/L*,[32] Chesterman J refused a demand for payment into court stating:

> "[25] … If the plaintiff is right it should not yet have to pay the money. If the defendant is right it will be entitled to enforce the security after the trial. In the meantime its position is protected by the payment of interest. To require the plaintiff to pay the money would be to defeat its claim at the outset. It would deprive the proceedings of any utility."

[43] I accept the proposition that a court of equity has the power to do complete justice between the parties. In this regard the applicants have indicated through their counsel that they would pay interest at commercial rates whilst holding the mortgagee out from exercising its rights.

[44] In relation to the issue as to whether damages would be an adequate remedy the applicants argue that the injunction concerns real property which is the family home and therefore it is unique and damages would be inadequate. In any event the applicant argues that the proper test is not whether damages would provide the plaintiff with an adequate remedy, but rather the test as was formulated by Sachs LJ in *Evans Marshall and Co Ltd v Bertola SA*[33] is whether as follows: "Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?" Accordingly, the applicant argues that the fact that damages might be an adequate remedy does not necessarily disentitle an applicant to an injunction.

[45] Counsel for the applicants also relies on the Notice of Exercise of Power of Sale[34] dated 19 December 2016. The Notice demands payment of $753,070.76 as being the amount owing under the Mortgage when in fact the only amount owing under the Facility Agreement is $465,870.76, being $300,000 principal and $165,870.76 interest. The further amounts relate to further advances of $170,000 on 21 July 2016 and $115,000 on 5 August 2016, together with costs of $2,200. The difficulty is that the first applicant was totally unaware of the further advances in July and August 2016 and accordingly, the Notice was defective in that it did not set out clearly the amounts that were owing under the mortgage.

[46] Counsel for the respondents argues however that the undertaking as to damages is of no value as the respondents are the second registered mortgagees of the property after the Bank of Queensland. Counsel also argues that, taking into account the fact that the

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31 [1984] 1 Qd R 421.

32 [2000] QSC 001.

33 [1973] 1 WLR 349 at 379.

34 Affidavit of Margaret Carter-Lannstrom sworn 3 March 2017 (Court Document 4) at 46.

balance of the mortgage is $396,000 and that the property is worth in the order of $700,000, the security is worth next to nothing. Counsel also argues that this is a case where damages would be an adequate remedy and the fact that the security is the applicants' home does not elevate it to a special category.

[47] In terms of an amount which should be paid into court, counsel for the respondent argues that at the very least the entire amount of $109,000 should be paid into court as the second applicant acknowledges that an amount of less than $109,000 is due and payable under the Facility Agreement.

[48] Having considered the material I am satisfied that the applicants have established that there is indeed a prima facie case and that the balance of convenience favours the grant of an injunction. I consider therefore that the injunction should be granted generally in the terms set out in paragraphs 1 and 2 of the Draft Order handed up by counsel at the hearing of this Application on 14 March 2017. The applicants however should pay a commercial rate of interest on the balance outstanding pursuant to the Facility Agreement. I shall hear counsel as to the rate of interest to be paid, the form of the Orders and as to Costs.