# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Bank of Western Australia Limited v National Australia Bank Limited* [2011] QSC 379 |
| PARTIES: | **BANK OF WESTERN AUSTRALIA LIMITED**<br>**ACN 050 494 454**<br>(Plaintiff)<br><br>v<br><br>**NATIONAL AUSTRALIA BANK LIMITED**<br>**ACN 004 044 937**<br>(First Defendant)<br><br>and<br><br>**CABARITA PACIFIC HOLDINGS PTY LTD (in liquidation)**<br>**ACN 104 025 658**<br>(Second Defendant)<br><br>and<br><br>**TED BRODEL AND LINDA JOYCE BRODEL as trustees under instrument 707281267**<br>(Third Defendant) |
| FILE NO/S: | BS 6790 of 2010 |
| DIVISION: | Trial Division |
| PROCEEDING: | Claim |
| ORIGINATING COURT: | Supreme Court |
| DELIVERED ON: | 12 December 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 19 and 20 September 2011 |
| JUDGE: | McMurdo J |
| ORDER: | **The plaintiff's claim is dismissed.** |
| CATCHWORDS: | CORPORATIONS – CHARGES, DEBENTURES AND OTHER BORROWINGS – GENERALLY – FLOATING CHARGES AND CRYSTALLISATION THEREOF – where the plaintiff loaned monies to the second defendant – where the plaintiff held a fixed and floating charge over the second defendant's assets – where the second defendant subsequently deposited some of those monies loaned to it with the first defendant in term deposits – where the second defendant executed a guarantee to repay monies lent to a third |

party – where the second defendant executed a letter of set-off allowing the first defendant to apply the term deposits to the loan owed by the third party – where the second defendant is in liquidation – whether the plaintiff's charge became fixed over the term deposits – what is the 'ordinary course of business' – whether the first defendant must account to the plaintiff for the term deposits

BANKING AND FINANCE – BANKS – SET-OFF – whether the first defendant's right of set-off is subject to the plaintiff's fixed charge

*Corporations Act 2001* (Cth), s 262, s 265, s 280

*Business Computers Ltd v Anglo-African Leasing Ltd* [1977] [1977] 1 WLR 578, applied
*Fire Nymph Products Ltd v The Heating Centre Pty Ltd (in liq)* (1992) 7 ACSR 365, applied
*George Barker (Transport) Ltd v Eynon* [1974] 1 WLR 462, applied
*K & R Fabrications (Qld) Pty Ltd v M & B Rigging Pty Ltd* [1982] Qd R 585, considered
*Re an application by K & R Fabrications (Qld) Pty Ltd (in liq)* (1980) 32 ALR 183, cited
*Roadshow Entertainment Pty Ltd v (ACN 053 006 269) Pty Ltd Receiver and Manager Appointed* (1997) 42 NSWLR 462, applied
*Rother Iron Works Ltd v Canterbury Precision Engineers Ltd* [1973] 1 All ER 394, applied
*Watson v Mid Wales Railway Co* (1867) LR 2 CP 593, applied

COUNSEL: MT Brady with K McIntyre for the plaintiff
B O'Donnell QC with KA Barlow SC for the first defendant
No appearance for the second or third defendants

SOLICITORS: Blake Dawson for the plaintiff
Clayton Utz for the first defendant
No appearance for the second or third defendants

[1] This is a contest between two banks, the plaintiff ('Bankwest') and the first defendant ('NAB'), about funds deposited with NAB by the second defendant ('Cabarita'). It is in liquidation and does not defend the claim. Nor do the third defendants, who hold a fixed and floating charge over the assets of Cabarita but which is conceded to rank behind Bankwest's security.

[2] Bankwest lent $10.1 million to Cabarita in July 2008. Its security included a fixed and floating charge over Cabarita's assets. Most of the loan was to pay out another lender. There was a substantial balance, most of which Cabarita deposited almost immediately with NAB. The funds were spread over four term deposits which were successively renewed. Bankwest says that its charge became a fixed charge over these deposits and that NAB must account to it for the funds.

[3] Cabarita became indebted to NAB, on account of its guarantee of a loan by NAB to an associated company called Nojoor Road Developments Pty Ltd ('Nojoor'). NAB applied the term deposits towards that debt, by terminating the deposits and applying the proceeds to the Nojoor loan. In 2008, Cabarita had agreed with NAB that the term deposits need not be repaid by NAB whilst Cabarita remained liable as a guarantor and that NAB could set-off the debt under the guarantee against NAB's liability to Cabarita for the term deposits.

[4] NAB says that Bankwest's entitlement to the term deposits could be no greater than that of its chargor, Cabarita, so that it was entitled to so apply the term deposits despite Bankwest's charge. But Bankwest argues that any relevant entitlement of NAB was subject to Bankwest's fixed charge, so that Bankwest was entitled to payment of the amounts deposited.

**The facts**

[5] The facts are not in dispute. In May 2008, Bankwest and Cabarita agreed that Bankwest would lend it money on terms, which included the security of a fixed and floating charge. A deed of charge was executed by Cabarita on 29 May 2008 ('the Deed of Charge').

[6] On 20 June 2008, Bankwest lodged with the Australian Securities & Investments Commission a notification of details of the charge together with a copy of the Deed of Charge. However, the documents lodged with ASIC were not accompanied by a certificate to the effect that they had been duly stamped. In consequence, the charge was provisionally registered, pursuant to s 265(4) of the *Corporations Act 2001* (Cth). That was rectified on 5 August 2008 when the required certificate was lodged with ASIC. As from that date the word "provisional", which had been entered in the register in relation to this charge, was deleted so that, pursuant to s 265(9), the charge was taken to have been registered from and including 20 June 2008. At any time from 20 June 2008, a search of the ASIC register would have revealed the existence of this charge and its terms.

[7] On 29 July 2008, Bankwest advanced $10.1 million to Cabarita under this facility. The date for repayment was at first 12 months from then, but this was subsequently varied to 31 December 2009. Of the funds advanced, a little over $3 million was deposited to an account in Cabarita's name with Bankwest.

[8] On the same day, Cabarita drew a cheque upon Bankwest, payable to itself, for $2.8 million. The directors of Cabarita handed the cheque to NAB's Mr Asmussen at a meeting on that day. This resulted from their discussions on the previous day, concerning a proposal for NAB to lend money to Nojoor to finance a land development by that company and Cabarita as joint venturers. The directors wanted Nojoor to be able to draw funds upon NAB immediately, ahead of NAB's approval and documentation of the facility which it had requested. They offered to deposit up to $3 million with NAB as security for that temporary finance. Mr Asmussen said that NAB would allow Nojoor to draw up to the amount of the deposits, as long as Cabarita had signed the bank's usual forms of a guarantee and a letter of set-off

in relation to the funds on deposit. The delivery of the cheque to Mr Asmussen on 29 July was pursuant to this understanding. But neither NAB nor Bankwest says that there was a concluded contract made in these discussions on 28 or 29 July. The guarantee and letter of set-off were not signed by Cabarita until 1 August 2008.

[9] Cabarita's cheque was banked on 30 July 2008. On the same day, the proceeds were distributed across four term deposits, the terms ranging from 30 days to 12 months.

[10] The guarantee signed by Cabarita on 1 August 2008 was up to a limit of $2.8 million together with interest. The letter signed on that date was headed "Term Deposit Letter of Set-Off". It identified the four term deposits. Under the heading "Financial Facilities" it referred to an account in the name of Nojoor but gave no other details. And it referred to Cabarita's liability to NAB as a guarantor in the amount of $2.8 million. The letter further provided:

> "2. In return for the Bank entering into or continuing the financial facilities shown in the Details at your request, you agree that:
>
> (a) the Bank may set-off at any time, in any way, and without notice (unless required by legislation relating to consumer credit):
>
> (i) any amount from time to time standing to the credit of any term deposit and held in your sole name,
>
> …
>
> against any amount in respect of which from time to time –
>
> …
>
> (iv) you are, solely or separately, contingently liable to the Bank under the guarantee shown in the Details;
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> …
>
> (d) as long as you remain liable to the Bank in respect of a financial facility or the guarantee shown in the Details:
>
> (i) you may not without the Bank's prior consent withdraw, transfer, mortgage, charge or declare a trust in respect of a term deposit held in your sole name or your share in a term deposit held by you with another Depositor, and
>
> (ii) the term deposit will be renewed on each successive maturity date for the same term (unless you or you and your Co-depositor specify a different term) and on the other terms and conditions then applicable to such term deposits;
>
> …

(g) this letter is to be treated as a continuing security for any liability any of you have to the Bank under a financial facility or the guarantee shown in the Details;

(h) this letter overrides any agreement or dealing to the contrary between you and the Bank and is in addition to any other right or remedy the Bank has;

…"

[11] On 25 August 2008, NAB offered Nojoor a loan, described as a Market Rate Facility, up to a limit of $2.8 million. The facility was to expire on 31 August 2009. The required securities were a guarantee by Cabarita and a term deposit letter of set-off over these deposits. Cabarita signed that guarantee and letter on 29 August 2008. The documents were in materially identical terms to those which it had signed on 1 August 2008.

[12] NAB agreed to this facility and advanced money pursuant to it without actual knowledge of Bankwest's charge. The uncontested evidence is that NAB caused a search to be undertaken on 29 July 2008 but that it did not reveal the Bankwest charge.[1] It was not a search undertaken directly with ASIC: it appears that the information came via an external information provider. As I have noted already, had the ASIC register been searched directly by NAB on that day, the charge would have been revealed and shown as provisionally registered.

[13] Nojoor failed to repay its loan when it fell due on 31 August 2009. In January 2010, administrators were appointed to Cabarita and in the following month, the creditors resolved that it be wound up.

[14] On 1 March 2010, NAB searched Cabarita on the ASIC registry.[2] This search showed Bankwest's charge. The uncontested evidence of NAB's Mr Bamkin, who assumed responsibility for the Nojoor facility in February 2010, was that this was when he became aware of the Bankwest charge. He did not obtain a copy of the Deed of Charge.

[15] On 29 April 2010, NAB gave a notice of demand to Cabarita as a guarantor of the Nojoor facility. The amount demanded was $2,896,390.66.

[16] On 10 May 2010, Mr Bamkin caused the four term deposits in the name of Cabarita to be closed and their proceeds, which totalled $2,808,537.62, to be transferred first to a suspense account operated by NAB and then credited to the loan account in the name of Nojoor. Following those transfers on 10 May 2010, Nojoor remained indebted to NAB in an amount of about $89,000, which included $27,560.61 in respect of the loan which was guaranteed by Cabarita.

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1 Statement of MS Asmussen dated 5 August 2011, exhibit 'MSA-3'.

2 Statement of S Bamkin dated 5 August 2011, exhibit 'SB-2'.

**A fixed charge?**

[17] An essential element of Bankwest's argument is that its charge became in all respects a fixed charge on 1 August 2008, when Cabarita signed the first of the guarantees and letters of set-off in favour of NAB. The relevant terms of Bankwest's Deed of Charge are as follows.

[18] By cl 3.1, the charge was expressed to be fixed over certain property and floating over all the other "charged property" which was defined to mean all Cabarita's "rights, property and undertaking … of whatever kind and wherever situated … whether present or future".[3] Clause 3.3 provided:

> "Where this charge is floating (whether under the terms of this charge or at law), it immediately and automatically becomes fixed:
>
> …
>
> (b) over any *charged property* affected if:
>
> (i) you breach an obligation under clause 9; …
>
> …
>
> (f) over any *charged property* over which this charge is floating that you deal with except in the ordinary course of your business …
>
> …"

[19] Clause 9 provided that:

> "9.1 Without our consent you may not, and may not agree to, do any of the following:
>
> (a) create or allow to exist another *encumbrance* in connection with the *charged property* …
>
> …
>
> 9.2 Without our consent you may not, and may not agree to, do any of the following in respect of *charged property* over which this charge is fixed:
>
> …
>
> (d) allow a set-off or combination of accounts in connection with it …
>
> …

[3] Exhibit 1, Tab 8, cl 37.

> 9.3 Without our consent you may not, and may not agree to, do anything in clause 9.2 in respect of *charged property* over which this charge is floating except in the ordinary course of your business …"

[20] By cl 37, the term "encumbrance" was defined to mean any:

> "• *security interest*; or
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> • right, interest or arrangement which has the effect of giving another person a preference, priority or advantage over creditors including any right of set-off …
>
> or any agreement to create any of them or allow them to exist."

By the same clause, the term "security interest" was defined to mean:

> "… any security for the payment of money or performance of obligations including a mortgage, charge, lien, pledge, trust, power, or title retention or flawed deposit arrangement. *Security interest* also includes a guarantee."

[21] Bankwest argues that by the execution of the documents of 1 August 2008, Cabarita breached cl 9 of the Deed of Charge. It argues that cl 3.3 was also engaged because that involved a dealing with charged property, specifically the funds deposited on 30 July 2008, otherwise than in the ordinary course of Cabarita's business. NAB argues that cl 3.3 was engaged in neither of those ways. In particular, NAB says that it is not established that the transaction of 1 August 2008 was other than in the ordinary course of Cabarita's business.

[22] So far as the evidence reveals, Cabarita was in the business of land development. The transaction with NAB was in the course of that business. It involved borrowing money from NAB, albeit in the name of Cabarita's joint venturer, to undertake a development by the two companies. Of course the particular documents signed on 1 August 2008 were to protect NAB against the contingencies that Nojoor and Cabarita would become insolvent. But that did not make the transaction outside the ordinary course of Cabarita's business.

[23] The submissions for Bankwest cite *K & R Fabrications (Qld) Pty Ltd v M & B Rigging Pty Ltd*,[4] where the Full Court of this Court, adopting a judgment of Connolly J in another case,[5] interpreted the phrase as "referring to the transaction of business as a known and recognized activity pursued by anybody engaged in an attempt to earn money or living in a systematic or regular way".[6] But that does not mean that the transaction has to be a frequent or everyday one. In *Fire Nymph Products Ltd v The Heating Centre Pty Ltd (in liq)*, a dealing with property "in the

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4 [1982] Qd R 585.

5 *Re an application by K & R Fabrications (Qld) Pty Ltd (in liq)* (1980) 32 ALR 183 at 184-185.

6 [1982] Qd R 585 at 589.

ordinary course of business" was interpreted as a dealing with a view to carrying on a business as a going concern, as opposed to ceasing it. Gleeson CJ said:

> "The learned authors of *Palmer's Company Precedents* 16th ed, Pt III say, at p 51: What, then, is in the 'ordinary course of business'? The answer to this depends on the nature of the particular company's business, but as a general rule the words include sales, leases, mortgages, charges, payment of debts, discharge of liabilities, and other transactions with a view to carrying on the concern."[7]

Gleeson CJ continued:

> "Part of the original idea of a floating charge was the freedom of a debtor company to carry on its business as a going concern and dispose of its assets in the ordinary course of business notwithstanding the existence of the charge. The corollary was that, if the company suspended trading, it should cease to be free to dispose of its assets. This latter proposition requires some refinement in the light of the particular contractual provisions that determine when and how a charge crystallises, but it assists understanding of the concept of the ordinary course of business in this context, and explains the language used in *Palmer* and quoted above."[8]

The judgment of Sheller JA (with whom Handley JA agreed) was to the same effect on this point.[9]

[24] The transaction of 1 August 2008 was for the purpose of Cabarita's continuing its business as a land developer. It was embarking upon a new development rather than looking to cease its business. Bankwest has failed to establish that the transaction was outside the ordinary course of its business. Accordingly Bankwest must establish that the charge became fixed by cl 3.3(b)(i), i.e. by a breach of cl 9. But NAB says that cl 9 was not breached if the transaction was in the ordinary course of Cabarita's business. It argues that this is the effect of cl 9.3, which effectively permitted Cabarita to do any of the things in cl 9.2 if that was done in the ordinary course of its business. One of those things within cl 9.2 was the allowance of a set-off in connection with charged property. In that way, NAB argues, cl 9.3 provided an exception to the prohibition within cl 9.1.

[25] The apparent tension between cl 9.1 and cl 9.3 suggests that the allowance of a set-off in connection with charged property was not intended to be an event within cl 9.1(a). In other words, the allowance of a set-off was not to amount to an "encumbrance" as that term was defined for the charge. But for that consideration, it would be at least fairly arguable that the agreed set-off would constitute a "security for the payment of money" and thereby a "security interest" and "encumbrance" as defined. But this tension between cl 9.1 and cl 9.3 suggests

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7 (1992) 7 ACSR 365 at 370-371.

8 Ibid at 371.

9 Ibid at 379.

otherwise. Therefore, I am inclined to the view that the agreement for a set-off did not involve a "security interest".

[26] Bankwest argues that there was a security interest also by the provision of Cabarita's guarantee. To fall within cl 9.1(a), the guarantee had to be an encumbrance in connection with the charged property. There was a connection, of course, in that the charged property (the term deposits) was used to support the guarantee and NAB was given particular recourse to them for that purpose. The point is arguable either way, but I accept Bankwest's submission that by the guarantee, there was a breach of cl 9.1. NAB's argument as to the effect of cl 9.3 is not as strong in this respect, because a guarantee in connection with charged property was not a dealing of a kind which was described within cl 9.2. Therefore, cl 9 was breached, with the consequence that the charge became automatically fixed on 1 August 2008.

**A fixed charge – its consequences**

[27] Bankwest argues that the automatic crystallisation occurred contemporaneously with the event which brought it about. That must be accepted. Bankwest then argues that "…NAB takes any right of set-off it may have obtained by the NAB Letter of Set-Off subject to Bankwest's fixed charge over the choses in action comprising the term deposits. That is to say, as between Bankwest and NAB, NAB's interests are subject to Bankwest's fixed charge, notwithstanding the existence of [the agreed conditions of the term deposits]".[10]

[28] The crystallisation of the charge made Bankwest the equitable owner of Cabarita's property, including these term deposits. But what was that property? Was it (relevantly) the property constituted by the term deposits, but subject to the terms of the letter of set-off, which varied the conditions of those deposits?

[29] Bankwest argues that this is a question of priorities. In the written submissions for Bankwest, it was suggested that the set-off agreement could be properly characterised as a charge over a book debt, which was registrable pursuant to s 262(1)(f) of the *Corporations Act*, so that this was a question of which charge had priority, and that Bankwest's charge would have priority according to s 280(1). But that case had not been pleaded or raised prior to the final submissions, and in oral argument, it was not pressed.[11]

[30] Bankwest argues that under the general law, its charge takes priority over what it describes as "NAB's later equitable interest". This is said to follow from what it says was the constructive notice of its charge (by its registration) and the suggestion that NAB's interest was later in time than that of Bankwest. It argues that "by reason of NAB's constructive notice of the terms of Bankwest's prior charge, Bankwest's prior interest will take priority over NAB's later interest".[12]

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10 Plaintiff's written submissions, para 68.

11 T 2-36.

12 Plaintiff's written submissions, para 87(e).

[31] There are, in my view, several difficulties with this argument. One is in the notion that Bankwest's interest, as a fixed chargee, in some way arose prior in time to what is said to have been NAB's interest. It was by the execution of the documents on 1 August 2008 that the charge became fixed. By that same execution, the relevant entitlement of NAB was created. Those two consequences occurred contemporaneously, not sequentially. Another difficulty is in the suggestion that NAB acquired some interest, specifically an equitable interest, in the property of Cabarita. That property comprised the choses in action which were the term deposits, which were the debts owing, but not then payable, by NAB to Cabarita. The notion that NAB acquired an equitable interest in the debts of which it was the debtor is not easy to accept.

[32] Rather than conferring an equitable interest upon NAB, the letter of set-off varied the terms of the contract or contracts by which those debts were payable. They became debts which would not have to be paid whilst Cabarita was liable to NAB under its guarantee and which could be repaid by NAB by crediting the amounts deposited against a debt then payable to NAB by Cabarita.

[33] That agreement between Cabarita and NAB was made by Cabarita in breach of the Deed of Charge. But that circumstance, of itself, would not make it ineffective as a variation of the terms of the debt owed by NAB. It had no actual notice of the Bankwest charge, let alone its restrictive provisions.

[34] The letter of 1 August 2008 was effective in varying the relevant contract or contracts between NAB and Cabarita, pursuant to which the monies had been placed in the term deposits on 30 July 2008. NAB has acted pursuant to the contract or contracts as varied. Between Cabarita and NAB, there could be no doubt that NAB would have a complete answer to a claim for the amount of the term deposits, which is that the debt was extinguished by the set-off to which Cabarita had agreed. The question then is whether equity should intervene, by precluding NAB from raising the same defence against the claim of Cabarita's equitable assignee.

[35] In *Company Charges*, the right of a debtor to raise a set-off, defence or counterclaim, against the assignee of the debt was described by Gough as follows:

> "[T]he debtor may raise and assert against the assignee any set-off, defence or counterclaim arising against the assignor:
>
> (1) prior to receipt of notice of the assignment; or
>
> (2) subsequent to receipt of notice of the assignment, where that right or equity arises out of, so as to be closely or inseparably connected with, a contract dealing or transaction entered into or effected prior to notice of the assignment.
>
> …
>
> The general law has been applied to equitable assignments by way of floating charge with the necessary adaptation that notice is effective

> to prevent further equities arising only after crystallisation of the floating charge."[13]

That statement is supported at least by the judgment of Templeman J (as he then was) in *Business Computers Ltd v Anglo-African Leasing Ltd*, who said:

> "The result of the relevant authorities is that a debt which accrues due before notice of an assignment is received, whether or not it is payable before that date, or a debt which arises out of the same contract as that which gives rise to the assigned debt, or is closely connected with that contract, may be set off against the assignee. But a debt which is neither accrued nor connected may not be set off even though it arises from a contract made before the assignment."[14]

[36] The basis for these principles is explained in *Derham on the Law of Set-Off*.[15] Before the Judicature Acts, an assignee of a debt could not enforce the debt in a common law action brought in its own name. The action to enforce the debt was regarded as that of the assignor with the consequence that any defence available to the debtor against the assignor could be raised. But equity would intervene, at the request of the equitable owner of the debt, to enjoin the debtor from raising defences which accrued after the debtor had notice of the assignment, because it was considered unconscionable for the debtor to diminish the assignee's rights after receiving notice of them. Debts can now be assigned at law, entitling the assignee to sue in its own name. And with the fusion of courts of law and equity, an equitable assignee may sue in its own name, although usually subject to the requirement that it joins the assignor as a party to the action. Nevertheless, the basis for distinguishing between defences of the debtor, according to whether they accrued before or after notice of the assignment, remains.

[37] In *Derham on the Law of Set-Off*, it is said that there must be an existing debt owing by the assignor to the debtor before notice of the assignment and that it is not sufficient for a set-off that a debt accrues in favour of the debtor from the assignor after notice as a result of a contract entered into before notice.[16] Templeman J accepted that proposition in *Business Computers Limited v Anglo-African Leasing Limited*, but subject to the exception that a post notice debt arising out of a pre-notice contract can be set off if it arises out of the same contract which gives rise to the assigned debt, or is closely connected with that contract. As to that qualification, Templeman J set out this passage from *Watson v Mid Wales Railway Co* in which Bovill CJ said:

> "No case has been cited to us where equity has allowed against the assignee of an equitable chose in action a set-off of a debt arising between the original parties subsequently to the notice of assignment, out of matters not connected with the debt claimed, nor in any way referring to it … In all the cases cited … some qualification occurred in the original contract, or the two transactions were in some way

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13 William James Gough, *Company Charges* (2nd ed, 1996) at pp 281-282.

14 [1977] 1 WLR 578 at 585.

15 Rory Derham, *Derham on the Law of Set-Off* (4th ed, 2010) at 16.03.

16 Ibid at 17.15.

> connected together, so as to lead the Court to the conclusion that they were made with reference to one another."[17]

Templeman J also referred to *Rother Iron Works Ltd v Canterbury Precision Engineers Ltd*.[18]

[38] NAB's Mr Bamkin became aware of the Bankwest charge on 1 March 2010. But he did not obtain a copy of the Deed of Charge and it appears that he was not aware of its terms at any time prior to NAB's payment of the term deposits towards the Nojoor debt. Mr Bamkin was then the NAB officer responsible for these accounts, and it may be inferred that NAB had not become aware of the terms of the charge from the fact of his limited knowledge. Importantly, Bankwest did not seek to prove that NAB had actual notice, as distinct from constructive notice, of the terms of its charge and of the fact that the charge had become fixed over, amongst other property, the term deposits. Nor did Bankwest argue that there was an onus upon NAB to prove the absence of actual notice. Accordingly, NAB exercised its right of set-off without notice of the assignment to Bankwest. But the position would be no different had NAB received actual notice of the assignment before exercising its right of set-off, or even prior to its cause of action against Cabarita accruing by its demand upon Cabarita under the guarantee.[19] In essence, this is because the actions of NAB in 2010 did not diminish Bankwest's rights as the assignee. Rather, those rights were always limited to the debts, constituted by the term deposits, according to the conditions agreed between the debtor and Bankwest's assignor on 1 August 2008.

[39] In *Rother Iron Works Ltd*, the plaintiff gave a floating charge over its assets to a bank. Two months later, the bank appointed a receiver and manager. Prior to that appointment the plaintiff had contracted to sell goods to the defendant for £159, whilst already owing the defendant £124 under a previous contract. The goods were delivered after the receiver's appointment. The defendant set off the plaintiff's debt against the outstanding price, and paid the balance of £35 to the receiver. The plaintiff failed in its claim for the balance. The defendant was entitled to a set-off, although one of the debts arose after notice of the equitable assignment of the other. Unlike the present case, the post assignment debt was one which was owed *by* rather than *to* the defendant.[20] Nevertheless, the reasoning is relevant to the present case. Russell LJ said:

> "It is true that the right of the plaintiff company to sue for the debt due from the defendant company was embraced, when it arose, by the debenture charge. But if this was because the chose in action consisting of the rights under the contract became subject of the charge on the appointment of the receiver, then the debenture holder could not be in a better position to assert those rights than had been

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17 (1867) LR 2 CP 593 at 598 as set out in *Business Computers Limited v Anglo-African Leasing Ltd* [1977] 1 WLR 583.

18 [1973] 1 All ER 394.

19 By cl 6.2 of the guarantee, Cabarita was obliged to pay upon the demand of NAB. A demand was essential because this was a sum of money payable under a collateral agreement, so that NAB's cause of action did not arise until the demand was made: see Phillips & O'Donovan, *The Modern Contract of Guarantee* (4th ed, 2004) at 10.1710 and the cases there cited.

20 [1973] 1 All ER 394 at 395.

> the assignor plaintiff company. And if the obligation of the defendant to pay £159 be regarded as a chose in action on its own it never in our view came into existence except subject to a right to set off the £124 as in effect payment in advance. That which became subject to the debenture charge was not £159, but the net claim sustainable by the plaintiff company of £35.[21]

[40] That passage was cited by the New South Wales Court of Appeal (Gleeson CJ, Handley JA and Brownie A-JA) in *Roadshow Entertainment Pty Ltd v (ACN 053 006 269) Pty Ltd Receiver and Manager Appointed*, where it was said to be one of several authorities which establish that "a receiver is in the same position as the secured creditor who appointed him".[22] The Court also cited *George Barker (Transport) Ltd v Eynon* and set out this passage from what was there said by Wilmer LJ:

> "The debenture holders were therefore in no different position from any other assignee to whom the benefit of the contract might have been assigned. I find it impossible to see how such an assignee could take the benefit of the contract without at the same time accepting the liabilities arising thereunder. He could not be in any better position … than the company itself …"[23]

[41] Those passages indicate the essential problem for this plaintiff's case. Bankwest seeks to recover debts but inconsistently with the contract by which those debts were to be paid. Those contracts were varied by the letter of set-off on 1 August 2008. From that point, the debts were not payable by NAB unless and until Cabarita was in some way discharged as a guarantor, whether by payment of the principal debt or otherwise. And also from that point, the debts constituted by the term deposits could be paid by NAB by its paying the relevant amounts in discharge of the guaranteed debt. Bankwest now seeks to place itself in the position which it would enjoy if it had held a fixed charge over the term deposits *prior to* the transaction of 1 August 2008. But it cannot do so because the crystallisation of its charge occurred as a result of and contemporaneously with that transaction.

[42] Bankwest seeks to present this case as a competition between competing equitable claimants to the same property. But instead, the case turns upon the content of the property of which Bankwest became the equitable owner. That property was the chose or choses in action constituted by the term deposits, according to the contract made between NAB and Cabarita of 1 August 2008. Bankwest cannot claim the effect of that contract as the source of its own entitlement without at the same time acknowledging that its entitlement is otherwise according to that contract. Because NAB has paid its debt, according to the agreed conditions of the term deposits, it is not unconscionable for it to defend this claim as it does.

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21 Ibid at 396.

22 (1997) 42 NSWLR 462 at 483.

23 [1974] 1 WLR 462 at 475, set out in *Roadshow Entertainment Pty Ltd v (ACN 053 006 269) Pty Ltd Receiver and Manager Appointed* (1997) 42 NSWLR 462 at 483.

[43] The plaintiff's claim must be dismissed. I will hear the parties as to any other orders, including costs.