SUPREME COURT OF QUEENSLAND

CITATION:	*AKS Investments Pty Ltd & Anor v National Australia Bank & Anor* [2012] QSC 223
PARTIES:	**AKS INVESTMENTS PTY LTD (ACN 078 821 173) AS TRUSTEE FOR THE SMITH FAMILY TRUST** (first plaintiff) and **AKS INVESTMENTS PTY LTD (ACN 078 821 173) AS TRUSTEE FOR THE GEORGIE SMITH TRUST** (second plaintiff) **v** **NATIONAL AUSTRALIA BANK (ACN 004 044 937)** (first defendant) and **ADAM GAZAL** (second defendant)
FILE NO:	BS8242 of 2009
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	21 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	27-30 March 2012, 2-5 April 2012 and written submissions 27 April 2012, 4 May 2012 and 11 May 2012
JUDGE:	Applegarth J
ORDER:	**1. The first plaintiff's claim is dismissed.** **2. The first plaintiff pay the costs of the first defendant and the costs of the second defendant of and incidental to the proceedings to be assessed on the standard basis.**
CATCHWORDS:	BANKING AND FINANCE – GENERAL – RELATIONSHIP OF BANKER AND CUSTOMER – Other matters – where plaintiff ("AKS") and its director ("Mr Smith") were customers of the first defendant bank ("NAB") – where AKS had a $10M credit facility with NAB ("the $10M facility") – where Smith's wife owned four adjacent beachfront properties, two of which were mortgaged to NAB as security for the $10M facility – where she later purchased a fifth adjacent property – where the Smiths proposed to construct a large house on the properties – where Mr Smith indicated that he wished to have the $10M facility limit

increased to $20M – where NAB approved the facility limit increase, subject to building conditions which did not apply to the $10M facility – where Smith did not agree to building conditions – where, on 27 December 2007, mortgages over two of the five beachfront properties were transferred from Westpac to NAB – whether NAB represented to AKS that it would provide a $20M credit facility that did not contain any additional conditions or restrictions on the purposes to which the additional $10M could be applied – whether NAB represented that on and from 27 December 2007 it had established the proposed $20M facility – whether those representations constitute misleading or deceptive conduct in breach of s 12DA *Australian Securities and Investment Commission Act 2001* (Cth) ("ASIC Act") or unconscionable conduct in breach of ss 12CB or 12CC ASIC Act – whether AKS suffered loss and damage by not selling certain shares and by buying more shares in reliance on those representations

ss 12CB, 12CC, 12DA, 12ED *Australian Securities and Investment Commission Act 2001* (Cth)

COUNSEL: R G Bain QC with P D Tucker and P A Ahern for the plaintiffs
L F Kelly SC with A M Pomerenke for the defendants

SOLICITORS: Merthyr Law for the plaintiffs
Minter Ellison for the defendants

[1] This is a case about credit in more than one sense. The substantial issues are whether the defendants represented in 2007 that the first defendant ("NAB") would provide a proposed $20M credit facility to the first plaintiff ("AKS"), Mr Anthony Kevin Smith and Ms Simone Smith, and whether on and after 27 December 2007 represented that NAB had established the proposed $20M credit facility. The issue of whether or not these representations were made turns largely on the credit of witnesses.

[2] AKS's case depends largely on the credibility of the evidence given by its Managing Director, Mr Smith. Its case is that various communications, culminating in an alleged telephone conversation with NAB's employee, Mr Gazal, on or about 10 December 2007, induced Mr Smith to believe that NAB would provide a $20M facility on the same terms and conditions as to accessibility of funds as an existing NAB $10M facility. AKS's case is that if it had been informed that, in fact, it only had a $10M facility available to it on and from 27 December 2007 then it would have sold $10M worth of shares in MFS Limited ("MFS") and would not have purchased an additional $2M worth of MFS shares on 10 and 11 January 2008.

[3] The defendants' case is that Mr Smith has concocted AKS's case, that he knew that he, his wife and AKS would not have a $20M facility until documentation was signed and that he knew after August 2007 that NAB had proposed conditions about the use to which any $20M facility could be applied. Mr Smith was not prepared to accept those conditions, and was informed on various occasions that the credit limit remained at $10M.

[4] Although AKS's case against the defendants is cast on several legal bases, the parties accept that the determination of those different causes of action turns on the resolution of the same factual issues. These issues are whether the pleaded representations[1] were made and induced AKS to believe and act on the footing that it had available on and from 27 December 2007 a $20M credit facility that did not contain any additional conditions or restrictions on the purposes for which the additional $10M could be applied.

[5] Those essential factual issues require consideration of a large volume of documents. The trial bundle which became Exhibit 1 consists of 374 documents and an additional 68 documents became exhibits during the course of the trial. My determination of disputed questions of fact is assisted by the existence or absence of documents in relation to contentious communications. My findings on disputed questions of fact also turn upon the inherent probability or improbability of the disputed matters in contention. They also depend, in large measure, upon my assessment of the credibility and reliability of the oral evidence given by witnesses. Before turning in greater detail to background facts and dealings between the parties in 2007 and early 2008 it is convenient to identify the significant disputed questions of fact about which I am required to make findings. These may be summarised as follows:

1. What was said by Mr Gazal to Mr Smith in August 2007 about the conditions which NAB's credit department had imposed on the proposed $20M facility. These included conditions on lending for the purpose of constructing a mansion that Mr and Mrs Smith were planning to build on a number of beachside blocks at Hedges Avenue, Mermaid Beach. Existing buildings were to be demolished, and NAB wanted to control drawdowns by the appointment of a quantity surveyor. The defendants say that after Mr Gazal told Mr Smith about these conditions in August 2007 Mr Smith objected to them. Mr Smith says such a conversation did not occur.

2. What was communicated about building conditions in late October 2007.

3. What attention was given by Mr Smith to emails in November 2007 that stated that the facility had a $10M limit, and to bank statements and internet banking portals which also disclosed the $10M limit.

4. Whether Mr Smith did not progress the $20M facility because he was preoccupied by the need to obtain margin lending facilities to pay out certain UBS warrants in respect of MFS shares that matured on 23 November 2007.

5. Whether on 19 November 2007 Mr Gazal and Mr Smith agreed not to progress the $20M facility until after AKS had sold certain MFS shares and the building construction had been completed.

6. Whether on 21 November 2007 Mr Gazal advised Mr Smith that the credit department of NAB had approved his application for a margin loan of $16.5M to pay out the UBS warrants, that it had also reduced the $20M facility approval to $10M, and that it required its security position over the five lots on Hedges Avenue to be addressed. Mr Gazal says that when he told

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[1] Styled in AKS's second further amended statement of claim as "the $20M Facility Representation" and "the $20M Facility Establishment Representation" respectively.

Mr Smith about the credit department's requirement to obtain security over the five lots within two weeks Mr Smith said, "Do what you've got to do to get it fixed". He also says that after he told Mr Smith that the $20M facility approval had been reduced to $10M they discussed that they would revisit the application for a $20M facility once the security was in order over all five lots. AKS denies that Mr Gazal advised Mr Smith of the conditions that NAB's credit department had imposed.

7. Whether Mr Gazal in effect told Mr Smith on or about 10 December 2007 that Mr Gazal could put in place a facility limit increase so as to provide to AKS a single $20M facility on the same terms and conditions as the existing $10M facility. AKS alleges that such a representation was conveyed when Mr Gazal telephoned Mr Smith on or about 10 December 2007 and said in respect of the proposed $20M facility words to the effect, "I can do it all, I can process it". The defendants say that this alleged conversation (which was inserted into AKS's pleading by way of an amendment) was concocted by Mr Smith.

8. Whether steps taken by NAB to obtain the transfer of mortgages held by Westpac over 39 and 41 Hedges Avenue so as to secure NAB over those and adjacent blocks conveyed to Mr Smith (and would have conveyed to a reasonable person in his position) that a $20M facility was about to be established which was not subject to building conditions.

[6] If AKS establishes its case that the alleged representations were made and induced it to believe and act on the footing that it had available a $20M facility on and from 27 December 2007,[2] then additional issues arise as to whether, operating under the inducement of the representations, AKS purchased an additional $2M worth of MFS shares on 10 and 11 January 2008 when, had the representations not been made, it would not have purchased them and would have sold down its MFS shareholding by $10M. Within this causation/inducement issue is a subsidiary factual issue of whether Mr Smith would have issued instructions to his stockbroker to sell $10M worth of MFS shares at any price on 14 January 2008, and whether $10M worth of MFS shares could have been sold on or before Friday, 18 January 2008, which was the last day that MFS shares traded.

Background

[7] Mr Smith is a successful and intelligent businessman. He started his working life at the age of 15 in a bank at Hervey Bay. He worked his way up through the bank and acquired practical skills as a bookkeeper. Those skills continue to be used by him, and in conducting the affairs of AKS in respect of the matters that are in issue in these proceedings he kept track of transactions and queried with bank officers even minor deductions.

[8] In addition to having a bookkeeper's eye for detail, Mr Smith has a talent for developing new businesses.

[9] After working as a police officer and then as a professional footballer for the Sydney Swans, he started his own business. It was then called Sports Break Travel

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[2] Being the date upon which the Westpac mortgages which secured a $10M facility from Westpac were transferred to NAB.

and organised end of season trips for sporting groups. Later the business offered packages for Schoolies Week on the Gold Coast. It proved to be a very successful business, and Mr Smith earned several hundred thousand dollars a year through it. His company, AKS, was the vehicle through which he invested those funds in real estate. It was established as a trustee of various trusts of which he was the guiding mind.

[10] Mr Smith moved his business to the Gold Coast in about May 1996. AKS invested in various properties. However, Mr Smith's principal place of residence from time to time was bought in the name of his wife, Simone Smith. AKS also invested in shares.

[11] Mr Smith, in his personal capacity, became a customer of NAB in 2000 under a $1.645M Flexiplus mortgage agreement, and because of his status as a high worth customer, he was assigned a personal banker. The personal banker acts as the customer's point of contact with the bank and accommodates the customer's needs within certain limits. For example, Mr Smith might ask the personal banker to arrange payment of certain bills, and the personal banker would attend to payment from a particular facility that had been established. However, the establishment of particular banking facilities was attended with greater formality and would involve the execution of documents. At all times Mr Smith understood that the establishment of credit facilities required formal documents to be signed and until the documents were signed the facility had not been created. Based on his experience, Mr Smith also appreciated that the granting of credit facilities was subject to approval by the bank's credit department.

[12] Mr Smith's travel company, which was renamed BreakFree, had business banking facilities with NAB and also to a lesser extent the Commonwealth Bank of Australia. BreakFree became a publicly listed company and in 2005 MFS made a "three-for-one" scrip takeover offer for BreakFree. As a result, AKS acquired approximately ten million MFS shares, and Mr Smith became a director of MFS with particular responsibilities in the tourism side of its business. However, he only remained a director for about six months, and resigned to pursue a new business opportunity. AKS, along with others, invested substantial amounts in an internet-based tourism business named Roamfree. The investment in Roamfree was funded through a warrant facility with UBS in respect of MFS shares.

Banking facilities

[13] In early 2005 Ms Simone Smith settled the purchase of a property at 37 Hedges Avenue, Mermaid Beach. That property was mortgaged in favour of NAB as security for a $5M Flexiplus facility that Mr Smith had established. A property situated at 11 Apollo Avenue, in which Mr Smith's parents resided, also was used as security for this facility.

[14] In August 2006 an associate of Mr and Mrs Smith contracted to purchase a property at 35 Hedges Avenue and this company was named as the purchaser on the contract in order to not disclose that Mrs Smith was the real purchaser.

[15] In September 2006 Mr Smith, in his personal capacity, entered into an Equity Access loan with Westpac. This Equity Access Facility had a credit limit of $10M and is described as a $10M "come and go" line of credit. It was secured by a mortgage over properties situated at 39 and 41 Hedges Avenue. These properties

were owned by Ms Smith and were her and Mr Smith's principal place of residence. With the acquisition of 35 Hedges Avenue, Ms Smith owned four adjacent beachfront blocks.

[16] In October 2006 Mr Gazal, who had become Mr Smith's personal banker, explained to Mr Smith the opportunity to establish a new Portfolio Facility. Mr Gazal completed a submission to the credit department about this facility and, following approval, Mr Smith, Ms Simone Smith and AKS each entered into a Portfolio Facility agreement with NAB for $10M. The properties at 11 Apollo Avenue and 37 Hedges Avenue which had already been mortgaged to NAB, along with the property at 35 Hedges Avenue, were to be security. The purchase of 35 Hedges Avenue completed on 24 November 2006.

[17] As a result, by late 2006 two of the beachfront blocks on Hedges Avenue (39 and 41) that were owned by Ms Smith were mortgaged to Westpac and the other two (35 and 37) were mortgaged to NAB.

The UBS warrant facility

[18] AKS established a warrant facility with UBS in November 2006 in relation to MFS shares received by AKS in the BreakFree takeover. Initially, the UBS warrant facility gave AKS $2.01 per MFS share warrant. Interest on the facility meant that UBS would be owed $2.25 per MFS share on maturation of the warrants.

[19] AKS rolled over the UBS warrant facility in May 2007. At that time MFS shares were trading at $6.07, and UBS was offering $3.33 per MFS share warrant. AKS also had an option to acquire approximately 1,200,000 additional MFS shares at $5.10 per share. In light of MFS's then share price, AKS took up the option.

[20] UBS would be owed $3.50 per share when the MFS warrants matured on 23 November 2007. Any recourse by UBS in due course would only be against the MFS shares.

[21] The UBS warrant facility provided AKS access to approximately $40M by May 2007. In respect of those funds, AKS had placed approximately $10M on term deposit. Another $7M was invested by AKS in Roamfree.

May to October 2007

[22] From about May 2007 onwards, Mr Smith discussed with Mr Gazal a possible increase in the NAB Portfolio facility from $10M to $20M. There are some differences in the recollection of Mr Smith and Mr Gazal about what was discussed. Mr Smith says that he wanted to combine the two undrawn lines of credit with NAB and Westpac because he was planning to build one house across the blocks and that he offered Mr Gazal the opportunity to provide the required facility in preference to Westpac. He says that the extra $10M was sought on the basis that it would be on the same terms and conditions as the existing $10M facility and that he mentioned that the cost of building the new house was $7M. Mr Gazal's recollection is that Mr Smith explained that he wanted the additional facility for the purpose of constructing the house and in addition to mentioning $7M as being the cost of building the house, said that a couple of million dollars would be required for demolition and a million dollars required for gardens and a tennis court. According to Mr Gazal, Mr Smith said that he wanted to move his business from Westpac

because they were "hopeless", and there was no mention that the extra $10M would be on the same terms and conditions as the existing $10M facility. Ultimately, little turns upon these differences of recollection. However, I generally prefer Mr Gazal's evidence where it conflicts with Mr Smith's evidence. In any event, AKS's pleading admits that the proposed $20M facility would be used, inter alia, to pay for the construction of the proposed new residence.

[23] On 9 May 2007, Mr Gazal sent to Mr Smith an email which stated:

> "Tony,
>
> Confirming our discussions;
>
> ...
>
> 3) For $20m Line of Credit Application, we will require the following information:-
>
> i) 2006 Personal Tax Returns for AKS & SS
>
> ii) 2006 Financials (P & L, Balance Sheet) for AKS Investments Pty Ltd
>
> iii) Updated Assets & Liabilities
>
> iv) Shareholding statement / reconciliation of MFS shareholding including dividends received
>
> v) Letter from Accountant summarising annual income projected for 2008 FYE; confirming all taxation is current with no arrears
>
> vi) Copy of Westpac Line of Credit statements for last 6 months
>
> vii) Rates Notice for 39-41 Hedges
>
> viii) Sworn Valuation from HTW for 35-41 'As Is' and 'As If Complete' (as discussed TG is completing)
>
> ix) Evidence of Insurance for 39-41 Hedges
>
> x) Estimate of Construction Budget for proposed residence".

Both this email and the contents of Mr Gazal's credit memorandum dated 16 July 2007 seeking approval for the increase indicate that the increase in the Portfolio Facility from $10M was requested to assist with the construction of a new property across a number of blocks. Mr Gazal was led to believe that $10M was required for the cost of construction ($7M) with the balance of $3M to cover demolition costs, ancillary costs, such as landscaping, and additional cost overruns.

[24] Mr Smith responded to Mr Gazal's request for information. Initially Mr Smith wanted the transaction completed by 30 June 2007 but this urgency disappeared when, on 13 June 2007, Mr Smith told Mr Gazal to "hold off" on transferring the Westpac facility as it might result in a penalty to him. Mr Gazal responded that he

would finalise the application to approval stage and that "you can give us the green light when you are good to go." Mr Smith subsequently advised that he could transfer the Westpac facility on 30 September 2007.

[25] During June 2007, a property at 33 Hedges Avenue was for sale, and Ms Simone Smith purchased it on 1 July 2007 for $6,751,000. Mr Smith informed Mr Gazal of the intention to build across 33-39 Hedges Avenue and, in response, Mr Gazal said that NAB would require security over 33 Hedges Avenue and that it would need to be valued. The valuation was arranged and the updated valuation of the five blocks from 33 to 41 Hedges Avenue was $40M "as if complete" with the construction of a new luxury dwelling over the entire five lots at a cost of $7M. After receiving this valuation, Mr Gazal prepared a memorandum for submission to NAB's credit department. This document, "EBL 7",[3] sought approval for an increase in the limit under the facility agreement to $20M.

[26] On 30 July 2007, NAB's credit officers conditionally approved the application. The approval was subject to:

> "Normal BICOE conditions to apply under the control of a QS with QS appointment and drawdowns supervised by Richard Curtis, Construction & Risk Manager
>
> NAB Legal to peruse the Smith Family Trust Deed to ensure that this transaction may be entered into."

The "BICOE" acronym refers to "building in course of erection" conditions and relates to conditions that are imposed by the bank on lending for the purpose of construction. They have the effect of controlling drawdowns under the facility and, as noted, the NAB credit officers required the drawdown to be under the control of a quantity surveyor to be appointed, and supervised by the bank's Construction and Risk Manager.

[27] Another relevant condition that was contained in Mr Gazal's application was for registered mortgages to be obtained over 33-41 Hedges Avenue.

Did Mr Gazal notify Mr Smith of the conditions?

[28] Mr Gazal says he informed Mr Smith of these conditions by telephone on 10 August 2007. His evidence was to the effect that:

(a) during the discussion, Mr Gazal advised Mr Smith that:
  (i) the $20 million facility had been approved, but there were some conditions attached;
  (ii) there were some building conditions, and a quantity surveyor was required to supervise the drawdowns;

(b) Mr Smith objected to the quantity surveyor condition, saying:
  (i) he did not want to pay for a quantity surveyor;

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[3] The abbreviation "EBL" refers to an Electronic Business Lending Submission.

(ii) he did not want a quantity surveyor involved in the supervision and drawdown of payments to the builder;

(iii) he wanted to draw down funds ahead of construction;

(iv) his builder was sourcing materials at very cheap prices and needed to pay up front for them;

(v) he did not want to pay the additional cost associated with a quantity surveyor;

(c) Mr Gazal replied that he had already spoken with the relevant bank officers and the conditions were final.

[29] Mr Smith denies that this conversation occurred, and says that Mr Gazal "never made such a call". AKS's case is that Mr Gazal correctly assumed that Mr Smith would not accept the conditions imposed by the credit department. These were conditions that Mr Gazal had not recommended in EBL 7 and he was concerned that upon telling Mr Smith of these conditions Mr Smith and AKS would take their banking business to another bank.

[30] I accept Mr Gazal's evidence that such a conversation occurred. I do so because of the adverse view that I have taken of Mr Smith's evidence on contentious matters in general. There are additional reasons to accept Mr Gazal's evidence in preference to Mr Smith's denial that such a conversation occurred. Telephone records indicate that Mr Gazal telephoned Mr Smith that day and spoke to him for about six minutes. The evidence indicates that there was no other important matter for them to discuss that day.

[31] Mr Clarke, who worked in close proximity to Mr Gazal in an open-style office environment, overheard Mr Gazal speaking to Mr Smith and relevantly corroborates Mr Gazal's evidence about what he said. Mr Clarke impressed me as a credible and reliable witness.

[32] That such a conversation occurred is inherently probable. Mr Gazal may have correctly anticipated that Mr Smith would not be pleased with the conditions that the credit department had imposed. However, this was not sufficient reason for him not to inform Mr Smith of those conditions. The issue would have to be addressed and any impasse resolved, if possible.

[33] The substance of what Mr Smith told Mr Gazal when informed of the building conditions corresponds with the views and general approach of Mr Smith in his dealings with the bank. The defendants' submissions accurately describe Mr Smith as being prone to act in an "imperious manner" towards bank officers, and that this was consistent with his view of himself as highly important, very wealthy and highly intelligent. In simple layman's terms, Mr Smith was a "big shot" and was likely to take a combative approach to conditions which he found unacceptable. I consider it likely that Mr Smith objected to the quantity surveyor condition, hoping that he eventually would get his way, or that some compromise would be worked out. He had no immediate need to increase the NAB facility from $10M to $20M.

[34] The AKS case theory that Mr Gazal would deliberately conceal these conditions from his customer is unconvincing. Concealing them would only get himself into trouble when the promised $20M facility did not materialise or, more precisely, materialised in the form of documentation that contained the relevant building conditions.

[35] Mr Gazal did not communicate the conditions in writing. He probably should have done so. Another bank officer, Mr McCann, said that it was normal bank practice for such conditions to be communicated in writing to the customer, even if the customer had already said that he or she would not accept the condition. Mr Gazal's omission to communicate the conditions in writing is consistent with the informal respects in which relations between him and Mr Smith were conducted on occasions.

[36] AKS makes the good point that it is improbable that Mr Smith would not have followed up the matter in an email since it was his practice to follow up important matters by email. It submits that it is "inconceivable that [Mr] Smith would have stayed silent in relation to such adverse news". However, Mr Smith did not stay silent in relation to the conditions that Mr Gazal told him about. He told Mr Gazal of his objections to the quantity surveyor conditions when they spoke on 10 August 2007. If Mr Gazal had gone through the formal process of reiterating what those conditions were in the form of an email, then it is likely that Mr Smith would have responded by email and reiterated his oral objections. But it did not come to that.

[37] The subsequent conduct of the parties, including the omission to attend to matters which would have been attended to had the $20M facility been granted on conditions that AKS/Mr Smith were content to accept, also supports the conclusion that an impasse was reached on 10 August 2007 when Mr Smith advised Mr Gazal that he objected to the quantity surveyor conditions. A mortgage over 33 Hedges Avenue was not obtained. The anticipated date upon which NAB would "take over" Westpac securities, 30 September 2007, came and went. Mr Smith did not enquire at that date or around that time, "What has happened to the $20M facility that we have arranged?", and did not sign the documentation that he knew would be necessary for such a facility to be established.

[38] Bank statements sent to Mr Smith and the internet portal that he accessed for banking purposes continued to refer to a $10M limit, and Mr Smith's evidence that he did not notice the $10M limit when he visited that site is unbelievable.

[39] Steps were taken for NAB's legal department to peruse the Smith Family Trust Deed, which was one of the additional conditions imposed in respect of the $10M facility increase. However, this does not persuade me that the 10 August 2007 conversation did not occur. Having the trust deed perused was something that had been overlooked when the existing facility was granted and was something that the bank required in any event. When Mr Smith later queried a charge for the cost of perusing the deed, Mr Gazal explained to him that the Trust's "guarantee is relied upon to service $20M facility via way of MFS dividend income" and advised that "this fee is included in new loan agreement for the increased limit to $20M". But no new loan agreement was ever signed, and Mr Smith knew this. Mr Smith and Mr Gazal may have anticipated that the impasse over building conditions would be resolved and that a new loan agreement for $20M would be executed. However, as matters transpired no such agreement was executed until 24 January 2008.

[40] Mr Gazal indicated to Mr Smith's lawyers on 29 August 2007 that NAB would be taking security over 33 Hedges Avenue, and Mr Gazal accepted in his evidence that at the time this related to security for an increased $20M Portfolio Facility. This, and other evidence pointed to by AKS in its submissions, is not inconsistent with Mr Gazal having notified Mr Smith on 10 August 2007 of the conditions upon which the Portfolio Facility would be increased to $20M. The fact remains that during this period conditional approval of the $20M Portfolio Facility existed. The $10M Portfolio Facility remained in place. Taking out the $20M facility, which had been approved on 30 July 2007, would require the parties to formally document matters and address the building conditions to which Mr Smith had objected. Mr Gazal's conduct is consistent with an anticipation that these matters would be resolved.

[41] I conclude that Mr Gazal informed Mr Smith on 10 August 2007 of the conditions upon which approval of the $20M facility had been granted.

The NAB Golf Day – 12 October 2007

[42] Mr Smith, Mr Mark Frawley (a close friend and business associate of Mr Smith), Mr Gazal and another invitee attended a NAB Golf Day on 12 October 2007. Play that day was interrupted by rain and towards the end of the day there was some discussion at the clubhouse about the mansion that Mr Smith was constructing at Hedges Avenue. Someone asked Mr Smith how the house was going and Mr Smith responded with words to the effect that four houses were being demolished, NAB had two and Westpac had two and neither bank knew that "we were demolishing their securities". This was probably said by Mr Smith in a light-hearted manner, and could have been interpreted as bragging that he had outsmarted the banks in some way. Mr Gazal responded by saying words to the effect that "there will be an issue with that Tony". Mr Smith gave evidence that the conversation also addressed his line of credit with NAB and that Mr Gazal said words to the effect that he had organised a line of credit for Mr Smith worth $20M and that it could be extended to $25M given the security that Mr Smith had. Mr Gazal denies that he said those things.

[43] Despite the lengthy narrative given in AKS's statement of claim, which was subject to a number of amendments, its pleading did not contain an allegation that Mr Gazal orally represented at the Golf Day that a $20M facility was in place or that a $20M facility had been approved on the same terms and conditions as the existing $10M facility. If Mr Gazal had represented such a thing at the Golf Day and Mr Smith had seriously relied upon it then one might have expected it to form part of the lengthy narrative that was pleaded in support of the alleged "$20M Facility Representation".

[44] In any event, I am not satisfied that Mr Gazal said the things which Mr Smith alleges at the Golf Day. On this and other issues, Mr Gazal impressed me as a reliable historian. His recollection of what occurred at the Golf Day was unaffected by alcohol. Mr Gazal impressed me as a conservative and professional individual. It seems likely that he responded to Mr Smith's remark about demolishing the banks' securities in the measured manner that he did rather than confront the issue and Mr Smith on such an occasion. I do not accept AKS's submissions that Mr Gazal's remark that demolishing securities would be "an issue" is untenable. It is not "repugnant to commonsense" to suggest that Mr Gazal would say such a thing

on such an occasion. It is probable that he would respond in the way that he did, leaving the matter to be properly addressed on another occasion.

[45] Although Mr Gazal had long known that demolition of the relevant properties was proposed, and had organised two progress payments for the building, I accept that he had not properly turned his mind to the legal or security consequences of the demolition proceeding. Mr Smith's remark at the Golf Day about demolishing the banks' securities brought the matter home to him. He then informed his superior, Mr Atkinson, who, in turn, took up the matter with the bank's credit department. Mr Gazal was asked to make a recommendation about it in his next EBL.

[46] I have considered the possibility that Mr Gazal might have been prepared to say that he had organised a $20M line of credit for Mr Smith that could be extended to $25M. It occurred to me that Mr Gazal might have been prepared to pander to Mr Smith's big-noting himself by confirming that Mr Smith had a line of credit worth $20M which placed him amongst some of the biggest customers of NAB in Queensland. After all, it was true that Mr Smith had the benefit of a conditional approval on the $20M facility at the time and the possibility exists that, rather than refer to the conditional nature of that approval in such a context, Mr Gazal would simply state (or confirm Mr Smith's boast) that he had a $20M facility with NAB. On reflection, I am not satisfied that Mr Gazal made such a statement at the Golf Day. I am not satisfied that the conversation occurred as alleged by Mr Smith. One reason is Mr Smith's general lack of credibility on contentious issues of fact.

[47] AKS relies upon the evidence of Mr Frawley who supported Mr Smith's evidence to the effect that Mr Gazal referred to the $20M line of credit. I am not persuaded that Mr Frawley had a reliable recollection of what was said by Mr Gazal on the Golf Day. Mr Frawley did not recall the conversation about the demolition of securities, but I am satisfied that such a thing was said.

[48] It is distinctly possible that Mr Smith told Mr Frawley on the Golf Day, or on some other occasion, that he had organised a line of credit of $20M with NAB. Mr Smith and Mr Frawley were friends and Mr Frawley then owned land on Hedges Avenue. But this does not mean that such a conversation occurred in Mr Gazal's presence on the Golf Day or that Mr Gazal said the things that Mr Smith and Mr Frawley attribute to him. Having considered the relevant evidence, I conclude that Mr Frawley has reconstructed a recollection of Mr Gazal having said things about the $20M facility which were not in fact said by him on the Golf Day. I do not find that Mr Frawley gave evidence which he knew to be false. Instead, I find that his recollection of the contentious part of the conversation is unreliable.

[49] I also have some reservations about the reliability of Mr Frawley's evidence concerning the circumstances under which a new trust was created in April 2008 by a solicitor (who also acted for Mr Smith) to hold 35,000,000 shares in Roamfree that Mr Frawley acquired from Mr Smith for $100. Mr Frawley could not explain why a new trust was set up. His friendship with Mr Smith and the manner in which arrangements were made for Mr Smith to resign as a director of BreakFree, thereby entitling Mr Frawley to acquire the 35,000,000 shares for $100, gives rise to the suspicion that Mr Frawley was prepared to "warehouse" those shares for the benefit of Mr Smith and his family, possibly as a form of asset protection.

[50] Leaving aside the unexplained nature of that transaction, the reliability of Mr Frawley's evidence about what was said on the Golf Day falls to be assessed, in part, by reference to the close association between Mr Smith and Mr Frawley. Mr Frawley is a very good friend of Mr Smith and they have been in business ventures together. Each has relocated to Indonesia where they live a few kilometres apart. Mr Frawley is currently involved in business dealings with Mr Smith in Indonesia. The fact of a close friendship and longstanding relationship is not, in itself, a reason not to accept Mr Frawley's corroboration of Mr Smith's evidence about what Mr Gazal said on the Golf Day. However, it makes Mr Frawley more disposed to reconstruct a recollection of a conversation supportive of Mr Smith than someone who was independent of Mr Smith.

[51] I conclude that on the Golf Day Mr Gazal did not say the thing that Mr Smith attributes to him about the $20M facility and its possible increase to $25M.

October 2007 communications

[52] On 12 October 2007 NAB debited the Flexiplus Facility $11,070 for valuation fees associated with the cost of valuations on the Hedges Avenue properties, and on 18 October 2007 charged $350 for having perused the Trust Deed. On the night of 18 October 2007 Mr Smith emailed Mr Gazal about the $350 charge. On 23 October 2007 he emailed Mr Clarke about the same matter, another charge of $882.29 for interest on a credit card and the valuations fees. Later on 23 October 2007 Mr Gazal responded to Mr Smith as follows:

> "Tony,
>
> Have been away from the office for a couple of days, so apologies for not responding to your last emails.
> In reply;
>
> 1. Ryan is looking into this. According to our system, automatic sweep was set up but obviously did not work for July. Interest will be reversed if this was as a result of sweep not working correctly. Will credit Flexiplus direct and confirm when completed.
>
> 2. As we discussed, HTW valuation fees of $11,070 will be reimbursed to your account via way of Introducer Payment, **on refinance settlement of your Westpac facility. To finalise this**, **I still need the following**:
>
>   - Copy of Building Contract and Progress Schedule (understanding that you will be paying in advance for work being completed)
>   - Details of Builders Quantity Surveyor Process (ie In House QS or external)
>   - Copy of Builders Insurance (Master Builders Insurance)
>   - BSA Insurance (separate insurance paid by you)
>   - Copy of current Westpac Internet Statement – so we can confirm refinance amount

> 3. Trust Deed Perusal Fee is a legal charge for our legal counsel reading of The Smith Family Trust (Trustee company AKS Investments Pty Ltd) which is guarantor to your existing facility for income purposes. We do not hold any charge over the trust, guarantee is relied upon to service $20M facility via way of MFS dividend income. **This fee is included in new loan agreement for the increased limit to $20m**.
>
> Give me a call if you have any queries on the above." (emphasis added)

[53] AKS submits that this correspondence is inconsistent with the defendants' contention that Mr Gazal had informed Mr Smith of credit department approval conditions for the $20M facility and that such matters had been left with Mr Smith. I do not agree. Mr Gazal's reference to "still" needing the matters nominated by him in order to "finalise" the matter suggests that Mr Gazal was following up on conditions that had been previously discussed with Mr Smith. Mr Smith's evidence is that he was astounded by this email because at all times he had been led to believe that everything was in place for the $20M facility. This is not credible because, as I have already found, he was told about these conditions on 10 August 2007 and must have expected the issue to be revisited, as it was in Mr Gazal's email of 23 October 2007. If he was astounded and had been misled, as he alleges, then he probably would have recorded his reaction in strong and simple terms in an email response.

[54] AKS notes in its submissions that the tone of Mr Gazal's correspondence indicates that the $20M facility would proceed. This is so. The essential fact is that Mr Gazal anticipated that the matter would proceed. Mr Gazal was seeking to address conditions that Smith had objected to a few months earlier. The things that he said he still needed to finalise matters did not come as a bolt from the blue for Mr Smith. If this had been the case then one would have expected Mr Smith to respond in an email and protest that this was the first time that he had been told of such matters, and that he had been proceeding on the basis that the $20M facility had been approved on the same conditions as the existing $10M facility. Instead, on 24 October 2007 he sent an email which responded to Mr Gazal's email of 23 October 2007 and which progressed the matters about which Mr Gazal had sought information.

[55] There is no dispute that Mr Gazal and Mr Smith spoke on or about 23 October 2007. I reject Mr Smith's evidence about what was said in that conversation. In particular, I reject Mr Smith's evidence that this was the first time that he was aware of any conditions other than the valuation and that he had expected a line of credit to be in place by 1 October 2007. In fact, Mr Smith had been advised of the building conditions on 10 August 2007 and Mr Gazal's email would have come as no surprise to him.

[56] AKS's plea in paragraph 38A of its pleading that Mr Smith called Mr Gazal on 23 October 2007 "to verify that the proposed $20M facility was in place" is untenable. Apart from having been told on 10 August 2007 of the building conditions, Mr Smith could not have believed that the $20M facility was in place. Mr Smith knew

that such a facility would not be in place until AKS, Ms Smith and he executed documents that were necessary to establish the facility.

[57] The conversations and email exchanges that occurred on 23 and 24 October 2007 indicate that Mr Gazal was trying to resolve the impasse that had been created by Mr Smith's earlier objection to the building conditions. Mr Smith responded to Mr Gazal's reasonable request for information and documents that were still necessary to finalise matters. Mr Smith accepted, rather than protested about, these requests, although Mr Gazal was not provided with all the information that he requested in his email of 23 October 2007. The terms of Mr Gazal's email of 23 October 2007 are consistent with there being an existing approval for a $20M facility which was subject to conditions relating to the building.

[58] Mr Gazal's email of 23 October 2007 made it plain that matters in relation to the building had to be addressed in order to satisfy conditions upon the approval of the $20M facility. If, contrary to my earlier findings, Mr Smith was not told on 10 August 2007 that the $20M facility was subject to conditions relating to the building, as at 23 October 2007 he and AKS were disabused of any belief that all the conditions in relation to the $20M facility had been satisfied and that everything was in place for the $20M facility to be established.

Margin loans

[59] Progress in relation to establishing the $20M facility with NAB was delayed by events which arose in November 2007 in connection with the UBS warrant facility, and the need for AKS to obtain margin loans.

[60] By early November 2007 Mr Smith was informed that UBS was short-selling MFS shares prior to expiry of the UBS warrants. This short-selling by UBS depressed the MFS share price, and to avoid being forced to sell the MFS shares at a time when the market for them was temporarily depressed, Mr Smith proceeded to source margin loans as a matter of urgency. The UBS warrant facility was due to expire on 23 November 2007. On around 8 November 2007 Mr Smith contacted Mr Gazal and raised the possibility of AKS taking out a margin loan with NAB in respect of 6,000,000 MFS shares which, together with margin loans from other financiers in respect of a further 4,000,000 MFS shares, would enable AKS to repay UBS and then continue to hold the shares the subject of the margin loans. Margin loans for almost 2,000,000 MFS shares were arranged by AKS with Macquarie Bank and established on 20 November 2007, and a further margin loan for 2,000,000 MFS shares was established with Leveraged Equities on 23 November 2007.

[61] AKS's request for NAB to provide a margin loan with respect to the additional 6,000,000 MFS shares was a significant matter both for AKS and NAB. Extensive correspondence was exchanged during mid-November in relation to AKS's request and Mr Gazal had the conduct of the application seeking approval for the loan that was requested. This involved a loan of $16.5M from NAB. The intense activity that occurred in November 2007 was prompted by Mr Smith's decision that obtaining large margin loans was a commercially sensible course. He expected the MFS share price to recover. Given the priority that was accorded to securing the margin loans, it is unsurprising that neither Mr Smith nor Mr Gazal took steps to progress the $20M facility at the same time. Correspondence in November between

Mr Smith and Mr Gazal confirmed that the Westpac loan facility of $10M remained in place (and Mr Smith advised that only $100,000 had been drawn against it). On 19 November 2007 Mr Smith addressed a number of questions that had been raised by NAB's credit department. These included the question:

> "Is it your intention to sell down this balance holding (outside NAB) to clear this debt and if so, in what time frame?"

Mr Smith responded:

> "Intention is to sell down 100% of MFS holding between now and August next year (with the preference on now)
> They have signalled major announcement by the 28th of November (private equity deal on Stella Group) which will trigger a re rating of the stock and large volumes of shares being traded."

[62] Mr Smith concluded his email to Mr Gazal as follows:

> "In regards to being able to service NAB Margin Loan (or the other loans) the shares have a forecast dividend of 35 cents fully franked (or 50 cents before tax income) so even isolated they can service a $6 debt per share which will not be the case as my borrowings on NAB shares will be $3.50 between the Margin Loan and the Flexiplus
>
> I really need you to tell me this is locked and loaded otherwise you will put me in the shit big time with the time frame I now have left to sell them
>
> Please call me if you have any questions or let me know asap you have this sorted."

[63] There is no reference to any $20M facility in these exchanges. This is not surprising since the impasse in relation to building conditions had yet to be resolved. Further, there is no suggestion in the communications that occurred in November that AKS intended to rely upon any yet-to-be established $20M facility to meet margin calls. Mr Smith was at pains to point out that the margin loans could be serviced.

The discussion on 19 November 2007

[64] There is no dispute that:

(a) At about this time, Mr Gazal and Mr Smith had a discussion about the prospects of the margin loan application being approved.

(b) During this discussion:

  (i) Mr Smith enquired as to whether Mr Gazal could see any issues with the application.

  (ii) Mr Gazal said words to the effect he could see a potential problem with serviceability.

  (iii) Mr Smith said words to the effect that there won't be an issue about serviceability because:

    A. he was going to sell down part of his shareholding in MFS fairly quickly;

    B. he was not proposing to pay for the house construction from borrowed funds, but rather from the proceeds of sale of these shares, as he did not want a debt against his principal

place of residence nor did he want to incur interest that was non-deductible.

[65] A matter in dispute is whether during their conversation on or about 19 November 2007 Mr Smith and Mr Gazal agreed that:

(a) as Mr Smith was not going to use a $20M facility, the facility would be left at $10M and they would concentrate on the margin loan facility;

(b) once Mr Smith had sold the shares and paid for the house, they would look at the $20M facility again.

[66] Mr Gazal's evidence supports this. Mr Smith's evidence recalls the conversation on 19 November 2007 in which there was a discussion about delaying the increase in the $10M NAB facility to a $20M facility. Under cross-examination Mr Smith accepted that the priority at the time was the margin loan and that once the margin loan was established they would "then get the approval in place" to combine the $10M facility at Westpac and the $10M facility at NAB. I accept Mr Gazal's evidence about this conversation. Mr Smith's evidence is not really inconsistent with it, and the probability is that Mr Smith would have taken the sensible approach of not complicating the bank's consideration of the margin loan application by pressing issues in relation to the basis upon which the existing $10M facility would be increased to $20M.

[67] Mr Gazal's credit memorandum ("EBL 8") in respect of the margin loan application, which was finalised on 20 November 2007, relevantly stated:

> "· We advise that the increase of the facility from $10m to $20m has not yet proceeded due to client not requiring immediate use of these funds for construction of new PPR residence. Existing facility is only drawn to $598k which is being paid out shortly from further sale of MFS shares with an expected surplus credit funds of $3m to be utilised toward the construction of the property. As property is clients PPR and any associated debt 'non deductible' client has elected to sell down part of his MFS holding to fund the construction.
> · In light of new margin lending exposure and clients sale of MFS shares, we consider it prudent to maintain facility back to the original limit of $10m against the land only valuation of 35-37 Hedges Avenue ...
> · In addition security over 11 Apollo Avenue, Mermaid Beach is still held ...
> · On completion of the building improvements in 6-12 months we will submit a new application to ACQ with the sought limit ...".

This memorandum, which was completed the day after his conversation with Mr Smith, makes it likely that Mr Smith agreed not to proceed with the increase in the $10M facility at that stage.

Confirmation that the facility remained at $10M

[68] On 20 November 2007 Mr Gazal sent Mr Smith an email which explained that amounts expended were within "the $10M limit".

[69] On 21 November 2007 NAB credit officers conditionally approved the margin loan application in response to Mr Gazal's EBL 8 submission. The email advising of the approval added the following:

> "Housekeeping
> The Portfolio Facility has been reduced from $20m to $10m. However, as discussed we cannot continue to rely on the security position for the Portfolio Facility as it currently stands given the house will be built over 5 lots with 3 currently mortgaged to nab & 2 to Westpac. Any continuing facility against the property will need to be against all lots. We will allow the draw of $4.5m against the Portfolio Facility to complete this transaction however the security matter is to be resolved within 14 days noting house construction is about to commence. Until then no further draws against the Portfolio Facility is permitted."

AKS had obtained the margin loan from NAB just in time to meet its obligations to UBS in respect of the warrants. According to Mr Smith, without that margin loan he would have been "in the shit big time". However, at the same time as he received this good news the bank's credit department, by way of housekeeping and in response to Mr Gazal's credit memorandum (in which he had advised that it was prudent to maintain the facility at the original $10M), imposed conditions on the continuation of the $10M facility. The bank required security over all five beachfront allotments and it required the matter to be resolved within 14 days. Mr Smith's boast at the Golf Day that he had demolished NAB's securities had come back to haunt him. This issue would have been addressed by NAB in any event when it considered its security position in relation to the properties upon which Mr and Mrs Smith's mansion was being built.

[70] Mr Gazal telephoned Mr Smith on or about 21 November 2007 and told him the news. There is no dispute that Mr Smith was told in that conversation that the margin loan was approved and that he was elated by news of this "big win". As he explained in his evidence, the NAB margin loan allowed him "to sell on the market without UBS selling them when they expired" and with his view about the positive prospects of MFS he was confident that he had a great strategy in place that gave him the ability to "move forward".

[71] Mr Gazal's evidence is that in addition to telling Mr Smith that the margin loan had been approved (which had made Mr Smith "euphoric") he also told him of the problem that the credit department had raised in relation to the security over the lots and that they had been given two weeks to sort the matter out. In response, Mr Smith said "do you what you've got to do to get it fixed". Mr Smith was also told that the $20M facility approval had been reduced to $10M and Mr Gazal also said to Mr Smith that they would revisit the application once they had got the security over all five lots in order.

[72] Mr Smith denies having been told these things about the facility on 21 November 2007. Again, I prefer Mr Gazal's evidence over that of Mr Smith. It is probable that Mr Gazal would have told Mr Smith of both matters, namely the approval of the margin lending facility and the reduction of the $20M facility approval to $10M with a requirement to obtain security over the five lots, at the same time. It made sense to tell Mr Smith all the news at the same time rather than delay the news about the $10M facility by which time Mr Smith's euphoria may have subsided. It

also made no sense for Mr Gazal to conceal the requirements that had been imposed by his superiors. It made no sense for Mr Gazal to engage in a dishonest frolic of his own by misleading Mr Smith into the belief that approval of a $20M facility remained in place, subject to certain conditions. After all, Mr Gazal had recommended to his superiors that the $20M facility be reduced to $10M and they had acted on his recommendation. There was no sound reason for Mr Gazal not to tell Mr Smith what was required to be done. The outcome of the matter was consistent with the approach which Mr Smith had adopted earlier in November of focusing upon the margin lending transactions and ensuring that they were approved before the 23 November 2007 deadline, and not raising issues in relation to the $20M facility approval that might jeopardise approval of the margin loan facility.

[73] As matters transpired, steps were taken consistent with the outcome that Mr Gazal says he informed Mr Smith about on or about 21 November 2007.

[74] In early December 2007 Mr Clarke had the responsibility of addressing NAB's security position and spoke to Mr Smith by telephone about that matter. I accept Mr Clarke's evidence that he said words to the effect that NAB's credit department were unhappy with the security position for the $10M facility that was currently in place. The matter needed to be corrected by having a mortgage taken out over 33 Hedges Avenue and by, in effect, having the Westpac mortgages transferred to NAB. Mr Smith told Mr Clarke words to the effect "just do what you have to do". Mr Clarke attended to those matters and documents required to arrange the "refinance" from Westpac were signed. Mr Clarke was attending to the "housekeeping" which the bank's credit department had required on 21 November 2007 and which Mr Smith had been informed about shortly afterwards.

The alleged conversation on or about 10 December 2007

[75] An essential part of AKS's case is that on or about 10 December 2007 Mr Gazal telephoned Mr Smith and said to him in respect of the proposed $20M facility words to the effect "I can do it all, I can process it". This allegation was included by way of an amendment and became paragraph 53A of the second further amended statement of claim. The necessity for such a conversation to have occurred arises because on NAB's case (which I accept) Mr Smith was told on 10 August 2007 of the impasse which existed as a result of the conditions which had been imposed on the approval of the $20M facility. Even on AKS's case, he had known since 23 October 2007 that a number of matters in relation to the building contract had to be addressed before Mr Gazal could finalise the matter.

[76] I reject Mr Smith's evidence that Mr Gazal made such a statement on 10 December 2007. Mr Smith is prepared to make false statements to advance his interests and to advance bogus claims. The Ulliana letter of 22 January 2008 and the bogus claim for $56M in these proceedings are two examples. His evidence about the alleged conversation on 10 December 2007 is another.

[77] In addition to my favourable view of Mr Gazal's evidence, it is inherently improbable that he would have made such a statement which conveyed the impression that the $20M facility had been granted on the same conditions as the $10M facility and would be provided once the Westpac $10M facility had been closed. Mr Gazal knew that the $20M facility had not been approved. He was instrumental in having the previous $20M approval withdrawn. He had no basis to

represent that any new $20M facility would be approved on the same conditions as the existing $10M facility. He knew that the NAB credit officers had previously imposed building conditions on the $20M approval and he had no reason to suppose that similar conditions would not be imposed on a new approval. He had no reason to make the representation alleged, the falsity of which would soon be exposed, leaving him to face severe consequences from his employer and an upset customer who had been misled.

[78] It is remarkable that Mr Smith did not record this important development, or even send an email enquiring about the completion of documentation. It was necessary to confirm the terms of the approval and to actually establish the $20M facility.

[79] Mr Smith's evidence about the alleged conversation on or about 10 December 2007 was contrived by him out of a necessity to explain how impasses about which he had earlier been informed came to be resolved. Remarkably, given the importance of the alleged 10 December 2007 conversation, Mr Smith made no reference to it in earlier attempts to describe how the $20M facility came to be in place. On 24 January 2008 he asserted in an email to Mr Clarke that the $20M facility was reflected in email correspondence with Mr Gazal. He explained in his evidence that the reference to the agreement in email correspondence was a reference to Mr Smith's email of 14 January 2008 (to be discussed below). No mention was made to Mr Clarke or anyone else in January 2008 about what Mr Gazal was alleged to have said on 10 December 2007.

[80] The 10 December 2007 alleged conversation was not mentioned in instructions that were given by Mr Smith to his solicitor on 12 March 2008. Significantly, the alleged conversation on or about 10 December 2007 was not pleaded in AKS's original statement of claim which was filed on 31 July 2009.

Events in December 2007

[81] In late November and early December 2007 Mr Smith decided to sell down AKS's shareholding in MFS, and between 23 November and 3 December 2007 sold approximately 2,700,000 shares yielding approximately $13M.

[82] The various sales were in the vicinity of $5 per share, but as he instructed his broker on 27 November 2007 he expected the market to settle and for prices to go back to around $6. On 4 December 2007 he decided to sell 50 per cent of his remaining MFS holding. As he explained in an email to his broker that day:

> "If I do this I'll massively reduce debt and allow myself to get on with other matters and to be able to sit and wait on the other 50% to hopefully go back to the $6 range."

He instructed his broker to sell another 3,118,811 shares at $5 or better and to "take them 100% from the NAB Margin Loan".

[83] On 5 December 2007 Mr Smith emailed Mr Gazal and relevantly stated:

> "I will have sold down 50% of my total MFS holding (12,237,622) by this Friday (less than 1 million to go as I send this email).
>
> As part of doing that I will have sold a total of 4,508,723 shares out of the NAB Margin Loan

> This will leave a total of 1,491,277 shares still in the NAB Margin Loan facility.
>
> Could you please make sure that the NAB Margin Loan guys take 100% of the sale proceeds and offset it against the NAB Margin Loan until its balance is $4 million!!
>
> On this basis and working on the MFS share price of $5 (currently $5.10) I will have total shares to the value of $7,456,385 with debt of $4 million or 53.6% in the NAB Margin Loan (so still within the 55% LVR).
>
> Once the NAB Margin Loan is down to the balance of $4 million 100% of funds received after that are to be paid into my Flexi Plus …
>
> As these funds arrive and I go into credit can you please put them into an I Saver account until I need them!!".

[84] On 17 December 2007 Mrs Smith executed documents in favour of NAB, including a mortgage over 33 Hedges Avenue. Shortly afterwards Mr and Mrs Smith went on holiday to Sydney where they stayed until Mr Smith returned to work on the Gold Coast on 14 January 2008. However, during this period Mr Smith monitored events, including the state of his accounts with NAB and the MFS share price.

[85] On 18 December 2007, with new mortgages having been signed over the two lots in respect of which Westpac had security and a mortgage having been granted over 33 Hedges Avenue, Mr Gazal updated the Credit Manager that settlement with Westpac was scheduled for 27 December 2012. He described the transaction as "simply a transfer of mortgage" and also advised:

> "We will request reinstatement of facility to $20M against security value of $40M via eBL sub 9".

Mr Gazal advised that AKS had sold down shares, cleared the Portfolio Facility and now held $2.44M in surplus credit funds. The balance for the margin loan facility was then $4M and there were cash funds to cover any margin call. On the same day in an email to his broker, Mr Smith advised that he was not stressed about the falling price of MFS shares over the last two days and stated, "We 100% made the right decision for me".

[86] The settlement with Westpac occurred on 27 December 2007, with mortgages over 39 and 41 Hedges Avenue being transferred to NAB. Contrary to earlier expectations, some funds were required to achieve the settlement with Westpac. NAB paid $164,748.14 which was owed to Westpac and drew this from AKS's facility. Strictly speaking, NAB did not terminate or close the $10M Westpac facility. Instead, the security given to Westpac which had supported this facility no longer was provided and the debt on this facility was paid out. Still, AKS pleads that on 27 December 2007 Mr Gazal or Mr Clarke "caused the Westpac $10M facility to be closed" and on the basis of this conduct and the earlier representations about the proposed $20M facility thereby "represented that NAB had established the Proposed $20M facility for AKS Investments, Smith and Simone". This is described in AKS's pleading as the "$20M Facility Establishment Representation".

The alleged representations

[87] The findings of fact that I have made, including my findings about:

(a) what was said by Mr Gazal to Mr Smith on or about 10 August 2007 regarding the conditions that had been imposed on the proposed $20M facility;

(b) subsequent communications about building conditions, and what was communicated between Mr Gazal and Mr Smith on 23 to 25 October 2007;

(c) what was said by Mr Gazal to Mr Smith on or about 21 November 2007 to the effect that the $20M facility approval had been reduced to $10M; and

(d) the fact that Mr Gazal did not say the words attributed to him by Mr Smith on 10 December 2007,

lead me to reject AKS's case that by 10 December 2007 Mr Gazal, on behalf of NAB, represented, expressly or impliedly, that NAB would provide the proposed $20M facility to AKS, Mr Smith and Mrs Smith after the Westpac $10M facility had been closed. This "$20M Facility Representation" was not made. Mr Smith did not understand that a $20M facility would be provided once the Westpac securities were transferred to NAB. On the contrary, he understood, because Mr Gazal had told him on or about 21 November 2007, that the $20M facility approval had been reduced to $10M. Mr Smith also understood that there had been an impasse in establishing a $20M facility due to building conditions imposed by NAB's credit department. He had no reason to believe that this impasse had been overcome. He also understood that the transfer of the Westpac mortgages was being attended to because this was a requirement of NAB's credit department in respect of security for the Portfolio Facility that had been reduced from $20M to $10M. The fact that the bank's credit department was unhappy with the security position for the $10M facility was reiterated to Mr Smith by Mr Clarke in early December 2007. Mr Smith had agreed with Mr Gazal that they would revisit the $20M facility approval once the security was in order over all five lots. The $20M Facility Representation was not conveyed by Mr Gazal or anyone else on behalf of NAB to Mr Smith by 10 December 2007, or on any other relevant date. The $20M Facility Representation was not made and, accordingly, Mr Smith and AKS did not rely upon it in permitting the settlement with Westpac to proceed.

[88] It follows that because the $20M Facility Representation was not made the $20M Facility Establishment Representation also was not made. In settling matters with Westpac on 27 December 2007, employees of NAB did not represent that NAB had established the proposed $20M facility for AKS, Mr Smith and Mrs Smith. The settlement with Westpac occurred, as Mr Smith was told, in order to correct NAB's security position for the $10M facility that was then in place.

Events in January 2008

[89] At all material times Mr Smith had every confidence in the underlying strength of MFS and expected the share price of MFS to recover. By 10 January 2008 AKS had $2.7M in surplus funds. On 10 and 11 January 2008 AKS used these funds to purchase 700,000 additional MFS shares. Mr Smith made these purchases because he believed that the MFS shares were undervalued. However, the market price of

MFS did not improve and by the afternoon of Friday 11 January 2008 Mr Smith received margin calls.

[90] On the morning of Monday 14 January 2008 another large margin call was received. The volatility of the MFS share price and AKS's exposure to margin calls if it deteriorated further prompted Mr Smith to take steps to protect his position and the position of his family. Mr Smith's parents resided in the property at 11 Apollo Avenue. He paid their rent by instructing his accountant to make journal entries. There apparently was no formal lease agreement, as required by law, and if NAB had exercised its security over the property then Mr Smith's parents' legal position in maintaining their place of residence would have been precarious.

[91] On 14 January 2008 Mr Smith and Mr Gazal spoke on the telephone and during this conversation:

(a) Mr Smith said words to the effect that:

(i) he wanted 11 Apollo Avenue released from NAB's security;
(ii) NAB had enough security with 33-41 Hedges Avenue;
(iii) 11 Apollo Avenue was rented by his immediate family, and he did not want it to be mortgaged;

(b) Mr Gazal said words to the effect that he would talk to Credit and let Mr Smith know how he went.

So much is admitted on the pleadings. Mr Smith gave evidence that in this conversation he also requested the release of the property "now that the $20M Flexiplus had been set up". I do not accept that he used these words.

[92] On the afternoon of 14 January 2008 Mr Smith emailed Mr Gazal as follows:

"Subject: Release 11 Apollo Ave from NAB Mortgage

Adam,

As discussed just now could you please do the above – I would like that only the 5 blocks on Hedges be the security for my $20 m Flexi Plus that you have set up for me.

Please confirm that NAB is ok with this and the date that it will be released."

[93] At the time he sent this email Mr Smith had no reasonable grounds to believe that a $20M facility had in fact been "set up" for him. On the contrary, he knew that an existing $10M facility was in place. Moreover, his evidence made clear that he knew that formal documents had to be signed in order to establish such a facility and that until such documentation was signed he did not have a $20M facility. He knew that no such documentation had been signed for a $20M facility. The phrasing of the email that he sent on 14 January 2008 may have been loose, with Mr Smith intending to refer to a pending application to reinstate approval for a $20M facility. The defendants submit that the reference in this email to the "$20M Flexi Plus that you have set up for me" was an attempt to create a lever (by the assertion of a false position) which Mr Smith could later point to in an endeavour to extract more funding from NAB should the need arise. I am not convinced that the

reference to it was so calculated. It may be that it was poorly worded or an optimistic attempt to treat the proposal to revisit the application for a $20M facility approval as something of a fait accompli, given the ample security which NAB would have (previously estimated at $40M) in respect of a $20M facility.

[94] Mr Gazal did not pay any particular attention to the reference in the email to the $20M Flexiplus. His focus was upon the subject of the email, namely the release of 11 Apollo Avenue, and the assertion that a $20M facility had already been set up did not register with him. Mr Gazal did not respond to the email in a form that confirmed that an agreement existed to set up a $20M facility.

[95] At the time Mr Smith wrote the email on 14 January 2008, and at all other material times in December 2007 and January 2008, he could not have honestly or reasonably believed that NAB (or Mr Gazal) had agreed to establish a $20M facility. As noted, he knew that for such a facility to be established formal documentation had to be executed and until such time there was no facility. As at 14 January 2008 no such agreement had even been informally documented in email correspondence between Mr Smith and Mr Gazal or anyone else on behalf of NAB.

[96] Trading in MFS shares was suspended on Wednesday 16 and Thursday 17 January 2008. Friday 18 January 2008 has been described as "Black Friday" for MFS. The share price crashed to 99 cents. Before this happened Mr Smith had told the Gold Coast Bulletin that he supported analysts' valuations which valued MFS shares at $3 and shares in associated company Stella at $3.50. Mr Smith also said that he expected MFS to pay a 45c share dividend delivering a 12 to 13 per cent yield on his latest $3M investment in the company, and thereby encouraged members of the public to support the MFS share price. If Mr Smith did in fact believe what he told the Gold Coast Bulletin then it is consistent with his belief in late 2007 and early January 2008 that the MFS shares were undervalued. It does not assist, and in fact undermines, AKS's case on causation. If he did not believe what he said to the Gold Coast Bulletin (and Mr Smith admitted in evidence of having made misleading statements to the media on other occasions) then it does no credit to him to have made such a statement which was apt to induce members of the public to buy MFS shares and thereby benefit AKS by supporting the MFS share prices.

[97] Margin calls were made by Leveraged Equities and Macquarie Equities on 15 and 16 January 2008, which Mr Smith instructed Mr Clarke to pay from the Portfolio Facility. With the further deterioration in the MFS share price, further margin calls were made by these lenders on Friday 18 January 2008, and similar instructions were given. The MFS share price was the focus of attention of many individuals on the Gold Coast on Friday 18 January 2008, including Mr Smith, Mr Gazal and Mr Atkinson, Managing Partner of the Gold Coast NAB branch. Mr Gazal appreciated that the large margin calls that AKS would receive would take it beyond the limits of its $10M facility, and on the afternoon of 18 January 2008 Mr Gazal contacted NAB's credit officers with a view to obtaining a temporary excess to allow margin calls to be paid. Mr Gazal was due to go on paternity leave for five weeks on Monday 21 January 2008, and before doing so he telephoned Mr Smith on the afternoon of Friday 18 January 2008. He explained to Mr Smith that he had spoken with the credit department and that the margin loans would be paid on Monday, and that in Mr Gazal's absence Mr Smith should deal with Mr Atkinson. Mr Gazal also mentioned to Mr Smith that he was going to finalise the application for the $20M facility over the weekend and that if approval was forthcoming that documentation

would need to be signed, and that he could see Mr Atkinson about that the following week.

[98] I do not accept Mr Smith's evidence that in a conversation at about 6.00pm he told Mr Gazal that it was not necessary for him to see Mr Atkinson because he already had a $20M facility in place. This is another example of an unreliable recollection by Mr Smith. I prefer Mr Gazal's version. Mr Gazal communicated with Mr Smith by email at 5.58pm that day and stated:

> "As discussed earlier, we can confirm that there are available funds in your facility today to cover the stated amount of $2.8m."

Mr Smith responded by email at 6.15pm thanking Mr Gazal and wishing him good luck with the expected arrival of Mr Gazal's child. This exchange is consistent with Mr Gazal's explanation of events that day, and what preceded it. If Mr Smith had asserted at about this time that he already had a $20M facility in place, and if he believed this to be the case, the email exchanges would have been quite different. The margin calls would have been well within a $20M limit.

EBL 9

[99] Although he was supposed to be on paternity leave, Mr Gazal prepared EBL 9 on the weekend of 19 and 20 January 2008, and forwarded it by way of a credit submission to his superiors on the evening of Sunday 20 January 2008. EBL 9 is consistent with Mr Gazal's evidence about what had transpired. I regard it as an accurate account of events. It was sent under a covering email which reported what Mr Gazal had been told by Mr Smith on Friday, 18 January 2008, including the fact that Mr Smith was "holding firm in MFS and firmly believes that the current share price is a result of hedge funds short selling the stock, from an overreaction of its Stella strategy." EBL 9 requested the reinstatement of the facility approval to $20M. It also requested the release of the property at 11 Apollo Avenue.

Monday 21 January 2008

[100] Although he was on paternity leave, Mr Smith telephoned Mr Gazal on Monday 21 January 2008. By that time Mr Gazal had been informed that NAB's credit department had decided to reinstate the approval for the $20M facility (subject to conditions) but not to approve the release of 11 Apollo Avenue. When told that the bank was not prepared to release 11 Apollo Avenue Mr Smith was irate and asked for the decision to be reconsidered. He also told Mr Gazal that he wanted 11 Apollo Avenue released because he intended to provide it to Westpac as security and he said that he was going to use the additional funding for margin calls. This was untrue. Mr Smith did not intend to provide 11 Apollo Avenue as security to Westpac. His request to demand a release of the NAB security over it was part of an asset protection strategy.

The Ulliana letter contrivance

[101] Mr Smith knew throughout the tumultuous week commencing 14 January 2008 that the existing NAB facility was $10M. Although he was advised on Monday 21 January 2008 that there had been an approval for a $20M facility, he knew that such a facility was not in place, that to establish it he would be required to sign formal documentation and that any approval would be likely to be subject to building and

other conditions of the kind that had been placed on the earlier $20M facility approval.

[102] During Mr Gazal's absence on leave, Mr Smith adopted a brazen approach to obtaining his way. He dictated a letter to be signed by his builder, Mr Ulliana, which falsely represented that:

(a) an agreement had been reached with Mr Ulliana that $5.5M would be deposited into a bank account controlled by Mr Smith's sister; and

(b) the deposit was to be held in trust for payments and deposits to cover all construction commitments, supply of goods and services for the Hedges Avenue property.

[103] The letter was false in representing these things, and Mr Smith knew that. No such agreement had been struck. There was no intention for the funds to be held in trust for the stated purpose. Mr Smith's true intention was to gain access to the funds for whatever he pleased, including the payment of margin calls. The Ulliana letter that Mr Smith contrived to produce and later present to the bank was an attempt by him to obtain funds by making false representations. There was no agreement with the builder for $5.5M to be deposited into a bank account. The only agreement that was made with the builder was to pay him approximately $200,000 for his services. The builder may have been concerned about matters but there is no evidence that an agreement of the kind alleged in the letter that Mr Smith dictated was ever made.

[104] Mr Smith's preparedness to procure a letter which falsely stated the facts, including the purpose to which the money would be put, was simply dishonest. It undermines his credibility. It also undermines a foundation of AKS's case. If Mr Smith honestly believed that a $20M facility was in place, subject to the same terms and conditions as the existing $10M facility, then he would not have needed to equip himself with the Ulliana letter in order to obtain the requested $5.5M.

[105] The letter was framed so as to assure the bank that the requested funds would be set aside for the construction of the house. This indicates that Mr Smith was aware of the conditions upon which the earlier $20M facility approval had been granted and the fact that the bank would not be prepared to advance further funds without some assurance that they would be used for the purpose of constructing the mansion. Mr Smith would not needed to have concocted the Ulliana letter if he had been told on 10 December 2007 that the $20M facility had been approved on the same terms and conditions as the existing facility. Mr Smith's resort to the Ulliana letter shows that he knew at all material times that he did not have such a $20M facility, and that the bank's preparedness to increase the existing $10M facility to $20M would depend upon the use of the funds to construct the mansion.

[106] Having equipped himself with the letter on Tuesday 22 January 2008 Mr Smith telephoned Mr Clarke and advised that he was on his way into the bank and wanted a bank cheque for $5.5M. He explained that the $5.5M was to cover the remaining construction of a house. Mr Clarke discussed the matter with Mr Atkinson and Mr Scott, and it was decided that Mr Atkinson and Mr Scott would deal with Mr Smith when he arrived. That occurred. Mr Atkinson explained to Mr Smith that he would not be getting a cheque for $5.5M for the builder. Relevantly, Mr Smith did not complain about this by alleging that he had an agreement for a $20M facility that permitted the withdrawal to take place. Discussions ensued and Mr Atkinson

agreed to provide what was described as a letter of comfort. Mr Atkinson also obtained the approval of credit to the release of 11 Apollo Avenue as security. The discussion between Mr Atkinson and Mr Smith ended amicably. Mr Atkinson had an interest in MFS because of his own investment in that company. They discussed events leading up to the MFS crash. Mr Atkinson clearly recalls that Mr Smith said that he (Mr Smith) had been an idiot, and had held on to "the MFS situation for too long". He also said to Mr Atkinson that he should have had the $20M facility, to which Mr Atkinson responded "well the QS conditions weren't met". Mr Smith did not contest that and the discussion on that topic "just disappeared".

[107] During the conversation that day Mr Atkinson confirmed to Mr Smith that he had only ever had a $10M facility. Mr Smith said that the only reason he transferred his Westpac facility was to create one $20M line of credit. This was not true. The Westpac mortgages were transferred at NAB's request to provide proper security for the $10M facility following what Mr Smith had described on the Golf Day as the destruction of the bank's security when the existing houses were demolished. Mr Smith knew this because he approved this when he spoke to Mr Gazal on 21 November 2007 and again when he spoke to Mr Clarke in early December. On 22 January 2008 Mr Smith did not assert to Mr Atkinson that he had a $20M facility, that he had believed this to be the case or contradict Mr Atkinson, who accurately stated the fact the $20M facility had not come into place because the quantity surveyor conditions were not met.

[108] At some stage Mr Atkinson said that the world had changed and that the bank would work with Mr Smith, but that Mr Smith could not use the facility to pay margin calls. By this, Mr Atkinson was not suggesting that an existing $20M facility was being closed. Instead, as he explained, the $20M facility was not in place because the quantity surveyor conditions had not been met "from the beginning" and that the bank had the right in the changed circumstances, where a house was partially completed, not to lend Mr Smith the additional funds that had been requested. As Mr Atkinson explained, the bank could have walked away and not sought to work with Mr Smith towards increasing the facility from $10M to $20M. The letter of comfort that the bank had agreed to provide was given to Mr Smith and he left.

[109] I reject Mr Smith's evidence that it was only at the meeting with Mr Atkinson and Mr Scott on 22 January 2008 that he found out for the first time that he did not have an unrestricted $20M facility. His evidence that this news gave him the greatest shock that he had ever had in his life, other than news of someone's death, was untrue. His conduct and his words in the presence of Mr Atkinson and Mr Scott did not convey such a shock or the fact that he previously understood that he had an unrestricted $20M facility. As Mr Atkinson pointed out in his evidence, if Mr Smith thought that he had a $20M facility that was relevantly unrestricted as to the purpose for which the funds could be applied then there would have been no need for him to come equipped with the Ulliana letter. He simply would have drawn the $5.5M. Instead, he equipped himself with the letter in order to mislead the bank as to the use to which the funds would be put and to falsely assure them that the funds were needed to honour an agreement which had been reached with Mr Ulliana to deposit $5.5M into a bank account to be held on trust.

Documentation of the increase in the credit limit to $20M

[110] On Thursday 24 January 2008 Mr and Mrs Smith signed the documentation that was necessary to increase the credit limit from $10M to $20M. As previously noted, Mr Smith acknowledged that he knew and believed that formal documentation of this kind had to be signed to obtain a $20M facility and until the documentation was signed he did not have a $20M facility. No such documentation was signed in respect of a $20M facility until 24 January 2008. Accordingly, on Mr Smith's own evidence, he could not have believed that a $20M facility (even one subject to additional conditions) was in place prior to the documentation being signed on 24 January 2008.

Subsequent events

[111] The resolution of disputed issues of facts also turns on conflicting evidence about a meeting that took place on 12 March 2008. AKS relies upon Mr Smith's evidence about an alleged conversation with Mr Gazal that day as containing admissions of wrongdoing.

[112] By February 2008 Mr Smith had embarked upon the process of reinventing events. In an email to Mr Clarke he professed his surprise "that the facility that I had agreed on with Adam was in fact not what was set up". By this time Mr Smith's personal and business relations were deteriorating. Mr Smith was concerned about these matters and sought Mr Gazal's assistance. Mr Gazal gave Mr Smith written advice that he could pass on to Mrs Smith that the margin loan facility held was not tied to the security of 33 to 41 Hedges Avenue. Mr Gazal assured Mr Smith (so that he, in turn, could assure Mrs Smith) that she was not a guarantor of the margin loan. He offered his sympathy to Mr and Mrs Smith for what he understood had been a "more than difficult time" and reaffirmed his support in "getting things back on track". Mr Smith replied with his appreciation of what Mr Gazal had said in his email and stated that there was "no use going backwards and we need to focus on going forwards only!!!!". Mr Gazal responded in the same tone about moving forward in a positive way and advised that he wanted to make amends. AKS submits that there was no cause for Mr Gazal to make amends unless he had done something wrong. However, as Mr Gazal explained in his evidence, Mr Smith had complained about what he regarded as poor or shabby treatment on 22 January 2008 by other bank officers during Mr Gazal's absence on leave. This was the context in which Mr Gazal said that he wanted to make amends.

[113] Mr Smith attended NAB's Southport branch on 12 March 2008 and met Mr Clarke. In his evidence he gave an account of Mr Gazal coming into the meeting room and making a series of damning statements. These were things that Mr Gazal said that he wanted to "get off his chest". Mr Gazal denies that such statements were made. Mr Clarke also gave evidence that the contentious matters were not said. I accept their evidence.

[114] There was a discussion about what had transpired, including how Mr Gazal could not believe when he found out that the AKS account had gone from $2.77M in credit to $13.5M drawn on 18 January 2008. There was a discussion about the requirements that the credit department had imposed. Discussion also turned to Mr Smith's sudden loss of weight due to stress and how Mrs Smith was petrified that she was going to become a bankrupt. As to the $20M facility, Mr Smith said words

to the effect that he had believed that a $20M facility had been set up on 27 December 2007, to which Mr Gazal responded that this was not the case because he had not advised Mr Smith that a $20M facility was approved, let alone set up, by that time. Mr Gazal said to Mr Smith that he could see how Mr Smith was anticipating the $20M facility would be set up. Mr Smith said "thank you very much for being honest" to which Mr Gazal responded, "I don't know what you're talking about Tony".

[115] There was no discussion about litigation. If there had been, Mr Gazal and Mr Clarke would have notified their superiors.

[116] Mr Gazal did not make any admissions of wrongdoing. As was his nature, he made sympathetic remarks to Mr Smith who had experienced a major reversal in his fortunes. Part of their discussion was in the nature of a post-mortem about the collapse of MFS and how rapidly this meant the facility had gone from credit to a $13.5M debit. Mr Gazal was stating a fact. Mr Gazal made no confession of wrongdoing. He did not say that he had led Mr Smith to believe that he had a $20M facility. He certainly did not say that he wanted to "get things off his chest".

[117] In certain police circles in a bygone era evidence of the character given by Mr Smith would be described as a "verbal", namely an alleged oral confession of wrongdoing by someone who wanted to "get things off his chest". But no such confession took place.

[118] The evidence given by Mr Gazal and by Mr Clarke about what was said at this meeting is not precisely the same. I would have been concerned if it had been. The bank's witnesses were careful not to speak to each other about the evidence that they were to give. Mr Gazal and Mr Clarke each gave their honest recollection of what was said. Mr Clarke was not personally friendly with Mr Gazal at the time. If the damning admissions which Mr Smith attributes to Mr Gazal were made at the meeting on 12 March 2008, then Mr Clarke would have recalled them. He would have given evidence to that effect. Equally importantly, if these things had been said then Mr Clarke would have been obliged to report them to his superiors, and I am confident that he would have done so. He had no reason not to. He had nothing to gain and much to lose by concealing such alleged wrongdoing and the admissions allegedly made by Mr Gazal. There is no suggestion that Mr Gazal asked him to do so. There is a good reason why Mr Gazal did not ask Mr Clarke not to report that Mr Gazal had made the alleged admissions. No such admissions were made.

[119] It is noteworthy that Mr Smith did not send an email to Mr Gazal confirming these alleged admissions. He did not write to anyone else in the bank recording the admissions that Mr Gazal allegedly made.

Events after 12 March 2008

[120] The properties at Hedges Avenue were sold by Mrs Smith and settlements of these sales occurred in April 2008. The proceeds of sale allowed AKS's margin loans to be paid out and for almost $8M to be paid to the NAB Portfolio Facility. All of AKS's accounts with NAB were closed on 28 April 2008.

The bogus Roamfree claim

[121] Mr Smith was in a poor physical and psychological state in March-April 2008, and following discussions with his friend and fellow director, Mr Frawley, he tendered his resignation from the Board of Roamfree. Mr Frawley's evidence is that Mr Smith resigned voluntarily. No one required him to tender his resignation. Mr Smith confirmed in his evidence that he resigned voluntarily after Mr Frawley said that it would be better for Mr Smith personally and also better for the company that he resign and leave the company. Upon that happening, Mr Frawley was able to acquire the shares held by AKS in Roamfree by the exercise of an option under a Share Sale Agreement and did so after the payment of $100. The shares held by AKS were held in its capacity as trustee for the Georgie Smith Trust, which is the second plaintiff in these proceedings. The second plaintiff's claim has been discontinued. The second plaintiff made an extraordinary claim for $56M and the making of the claim attracted publicity in the media. It probably was intended by Mr Smith and AKS to exert pressure upon the defendants to settle. It did not have that effect. The claim is based on the contention that Roamfree's Board requested Mr Smith's resignation as a director. There is no evidence that the Board made such a request. There are no documents recording such a request and I find that Mr Smith resigned voluntarily without being requested to do so by the Board. The plaintiffs' pleading alleged that as at the date that the second plaintiff's shares in Roamfree were acquired and Mr Frawley exercised his option (10 April 2008) they had a value of $56M.

[122] This is nonsense, and Mr Smith must have known this to be the case when the claim was launched and publicised. Under cross-examination he accepted that in April 2008 the shares in Roamfree were worthless. He acknowledged that the assertion in AKS's pleading that they were worth $56M was a false allegation because, as he said, "At that point they were worth nothing". Yet Mr Smith instructed his lawyers to make such a claim and this exaggerated, indeed bogus, claim was persisted in for well over a year, despite other pleading amendments being made on 13 July 2010.

[123] The preparedness of Mr Smith to have AKS institute and persist in such an unmeritorious and exaggerated claim is to his discredit.

[124] The bank called his bluff and the second plaintiff's claim was discontinued. However, Mr Smith's preparedness to advance such a claim suggests a preparedness to make claims without a proper basis. I am persuaded that the claims in which he has persisted are of such a kind.

Assessment of witnesses

Mr Smith

[125] Mr Smith presented as a highly intelligent and well-prepared witness. However, I have formed an adverse view of the credibility and reliability of his evidence on disputed questions of fact.

[126] In his dealings with the bank he was prepared to resort to untruths to get his way and to secure an advantage. A prime example is the Ulliana letter which he contrived. Another was the false statement that he made to Mr Gazal to the effect that he needed a release of NAB security over 11 Apollo Avenue so it could be used as security for Westpac. The backdated transfer of this property (backdated to 21

January 2008) stated that the consideration was $1M. This was an understatement of its value which Mr Smith had ascribed as $1.5M on 23 January 2008.

[127] Mr Smith was prepared to advance an unmeritorious and exaggerated claim for $56M in these proceedings. Such an exaggerated claim gives me no confidence that he respects the truth in court proceedings.

[128] Having considered his evidence and the extensive submissions made by the parties in their written submissions, I have reached the conclusion that Mr Smith contrived both that $56M claim and the claim in which he has persisted. His evidence on contested issues of fact is inconsistent with witnesses whose evidence commands respect. The case theory that Mr Smith developed and persisted in required him to give evidence about conversations that did not occur, namely the alleged conversation of 10 December 2007 and the alleged confession of Mr Gazal on 12 March 2008.

Mr Frawley

[129] For the reasons given in discussing Mr Frawley's evidence about the Golf Day, I found his recollection of the conversation that occurred that day to be unreliable.

Mr Gazal

[130] Mr Gazal was a very impressive witness. Although some of his evidence was not supported by contemporaneous file notes this is because his practice was not to keep file notes. His evidence was supported in most respects by near-contemporaneous documents, including the various EBL submissions that he prepared and which summarised matters, including his discussions with Mr Smith. Mr Gazal impressed as a diligent, competent and honest bank officer, who had advanced in his career by honest hard work.

[131] His evidence, and the manner in which he gave it, leads me to conclude that he is a reliable historian of events and conversations. He did not seek to embellish or exaggerate.

Mr Clarke

[132] Mr Clarke also was an impressive witness. He is a relatively young man and, like Mr Gazal, gave his evidence in a measured and thoughtful way.

[133] I reject AKS's submission that I should not accept his evidence. His evidence of overhearing Mr Gazal's telephone conversation on 10 August 2007 was convincing. So too was his evidence about what he told Mr Smith on 4 December 2007.

[134] There is no suggestion that Mr Clarke colluded with Mr Gazal in giving evidence. Minor differences in their accounts of what occurred on 12 March 2008 suggest that they did not. Moreover, Mr Clarke is not a personal friend of Mr Gazal. They did not socialise together. They no longer work together.

Mr Scott

[135] Mr Scott's evidence should be accepted. His account of events during the meeting on 22 January 2008 was reliable. His inability to recall matters of some detail was understandable.

Mr McCann

[136] Mr McCann's evidence also was reliable.

Mr Atkinson

[137] The final witness was Mr Atkinson. He has retired from the bank. His recollection of events was good. I was particularly impressed by his recollection of the discussions that he had with Mr Smith on 22 January 2008.

Other witnesses

[138] It is unnecessary to address other witnesses whose credibility was not an issue.

[139] Remarkably, AKS did not call Mr Smith's broker, Mr O'Dwyer, whose evidence in relation to Mr Smith's strategy and intentions with respect to the sale of MFS shares at relevant times would have been informative, especially if Mr Smith had told Mr O'Dwyer at the relevant time that he believed that he had a $20M facility on the same terms and conditions as the earlier $10M facility. If Mr Smith had said such a thing to Mr O'Dwyer, Ms Simone Smith or anyone else at the relevant time then one would have expected AKS to call those witnesses to support Mr Smith's evidence about the state of his belief. The inference is that these witnesses could not have assisted AKS's case in that regard, and that Mr Smith did not report to those individuals that he had such a belief.

The improbability of AKS's case

[140] Apart from largely resting on the evidence of Mr Smith, whose evidence on disputed questions of fact I found to be not credible, AKS's case that Mr Smith was induced to believe and act on the footing that AKS had a $20M facility available to it on and from 27 December 2007 is improbable. Even more improbable is its case that Mr Smith laboured under the misapprehension for many months in late 2007 that a $20M facility had been approved without additional conditions to those imposed on the $10M facility. If such an approval existed then Mr Smith probably would have queried why matters did not proceed in September-October 2007 for the facility to be documented and security attended to. He must have wondered why the bank continued to refer to a $10M facility. It is improbable that Mr Smith would not have queried these matters with the bank, given his attention to detail. The more probable explanation is that he knew that the $20M approval had been granted subject to conditions to which he objected.

[141] Another matter which makes AKS's case improbable is that it advances what the defendants' submissions describe as "a one man conspiracy". This is that Mr Gazal concealed matters from Mr Smith and his employer in order to keep Mr Smith as a customer. This extended to deceiving Mr Smith on 10 December 2007 into believing that the $20M facility had been processed and concealing from his fellow employees the truth in relation to his dealings with Mr Smith. This theory is unconvincing, and not supported by the evidence. Mr Gazal did not conceal the conditions that had been imposed on 30 July 2007 by the NAB credit department. He told Mr Smith about them, and Mr Clarke overheard the conversation. He also told Mr Atkinson that Mr Smith did not accept them. The issue of building conditions was again addressed in October 2007.

[142] If, as AKS's case theory would have it, Mr Gazal had dishonestly gone out on a limb in order to keep Mr Smith as a client, then Mr Gazal's conduct would have been quite different. He would have promoted the granting of a $20M facility in his later submissions to his superiors and actively sought to have removed the building conditions and any other conditions to which Mr Smith objected. Rather than do this, Mr Gazal actually recommended to his superiors that NAB reduce the approved facility to $10M from $20M. This conduct is inconsistent with the AKS case theory. It is simply improbable that someone who was motivated to obtain and maintain a $20M facility that was not subject to conditions to which Mr Smith objected would do such a thing. Instead, he would have been recommending that the $20M limit remain and advocating conditions that suited Mr Smith.

[143] Incidentally, if Mr Smith had requested and expected both the margin loan facility and a $20M facility, then this would have been reflected in EBL 8 which was completed on 20 November 2007. Instead, it reflected the discussions that occurred on 19 November 2007, and contained Mr Gazal's recommendation that it was "prudent to maintain facility back to original limit of $10M". It is simply improbable that Mr Gazal would make such a recommendation if he had adopted the strategy of misleading Mr Smith into believing that a $20M facility was to be established.

[144] It is also improbable that on 10 December 2007 Mr Gazal would have led Mr Smith to believe that NAB would provide the proposed $20M facility once the "refinance" with Westpac was completed, and said to Mr Smith in that context, "I can do it all, I can process it". That such a $20M facility had not then been approved would soon have been found out. Mr Smith would have expected such a $20M facility to be documented and signed by him, his wife and AKS, and for a revised $20M limit to appear on bank statements and on internet banking reports. Mr Gazal had no reason to make such a statement on 10 December 2007 and it is improbable that he did. Such a frolic would have exposed him to serious consequences with his employer, and he had no good reason to make such a statement to Mr Smith about a non-existent $20M facility. Mr Smith was not pressing for it to be established and, notably, did not request any document that was required to establish such a facility to be prepared and signed by him, his wife and AKS before he left the Gold Coast on holidays shortly before Christmas.

[145] On the issue of probabilities, AKS in opening its case raised the rhetorical question of why Mr Smith would agree to transfer the mortgages over 39 and 41 Hedges Avenue from Westpac to NAB (and thereby bring an end to the $10M Westpac facility) without believing that there had been a corresponding increase of $10M in the limit on the NAB facility. The defendants answered this rhetorical question in their submissions. They contend that this is a question of timing, and that Mr Smith had no need to immediately increase the limit of the NAB facility to $20M. He was prepared to relinquish the Westpac facility without having an additional $10M facility in place at NAB. This was not a priority at the time. In December 2007 he was not under any kind of pressure which made this contemporaneous dealing a priority for him. If he had felt under any such pressure then he would have ensured that the $20M facility with NAB was executed at the same time as he closed the Westpac facility. I accept the defendants' submissions. It came as a surprise to Mr Smith (and to others including Mr Gazal) that the MFS share price would decline, and do so so rapidly. For the reasons to be discussed in my consideration of the issue of causation, Mr Smith remained optimistic about a future increase in

the MFS share price, and had no immediate need for the additional $10M facility to be established.

[146] Overall, I consider that it is probable that Mr Smith acted as the defendants allege that he did, and said the things that he is alleged to have said, and that it is improbable that the defendants acted as Mr Smith alleges they did. Mr Smith and his company may have been an important client, but the desire to keep him as a client provides an inadequate explanation as to why Mr Gazal would embark on a reckless course of action in misleading Mr Smith and Mr Gazal's employer in ways that would be bound to be discovered. Instead, Mr Gazal's understandable desire to keep Mr Smith as a client explains why he acted as he did after May 2007 in first seeking approval for a $20M facility, later addressed building conditions and other issues and then gave priority to obtaining a $16.5M margin loan which Mr Smith urgently requested in order to get out of a hole. The prospects of obtaining that margin call facility were advanced by not supporting maintenance of the $20M approval and recommending, instead, that the approval be reduced to $10M. That helped deliver the win that Mr Smith achieved on 21 November 2007. Mr Gazal's interest in keeping Mr Smith as a client was advanced by his doing the right thing, and keeping Mr Smith informed of developments. It would not have been advanced by a course of deceit which surely would be exposed with severe consequences for him. The theory that Mr Gazal, who had a promising career in the bank, would jeopardise it by embarking upon a course of dishonesty is unconvincing and improbable. It is more probable that he did the right thing, told his client and his employer the truth and, in doing so, advanced their mutual interests.

Documents

[147] The $20M Facility Representation and the $20M Facility Establishment Representation are not reflected in documents coming from NAB or Mr Gazal which represented that NAB would provide the proposed $20M facility on the same terms and conditions as the $10M facility, even subject to the condition that the Westpac securities be transferred. If the defendants represented that a $20M facility would be provided without restrictions on the manner in which, or the purposes for which, the additional $10M could be drawn, then one would expect this to have been documented, even informally in an email which advised or confirmed that issues in relation to the building and quantity surveying had been resolved and that the $20M facility was going to be available on the same terms and conditions as the existing $10M facility. Even the highly contentious alleged statement on 10 December 2007 in which Mr Gazal is alleged to have said, "I can do it all, I can process it", would not have amounted to a statement that the conditions that had been discussed in August and October 2007 in relation to building had been waived. AKS's case in this regard relies upon implication, and there is no contemporaneous documents that support AKS's case about the contents of that alleged conversation.

[148] The various Credit Memoranda/EBLs that Mr Gazal prepared are a reasonably contemporaneous record of dealings between Mr Smith and the defendants. They were compiled by Mr Gazal from various sources, including statements made by Mr Smith about his intentions. Any inaccuracies contained in these documents were not included deliberately by Mr Gazal. These documents generally support the defendants' case.

[149] One document, which I have previously considered, namely the Monday 14 January 2008 email on the subject "release of 11 Apollo Ave from NAB Mortgage" contains a passing reference to the "$20M Flexiplus that you have set up for me". However, as discussed, this reference, if not cunningly inserted by Mr Smith in order to improve his position, was a loosely-worded reference to the $20M facility that Mr Smith expected to be established in the near future. He may have expected issues in relation to building conditions and the like to be resolved, but he still knew that documentation was required in order to set up such a facility.

[150] Overall, the relevant documents in the case tend to support the defence, and the absence of documents when one would have expected them to exist if Mr Smith's evidence is to be believed undermines AKS's case.

Findings of fact in relation to liability

[151] Based on my assessment of the credit of witnesses, the documents which were the subject of examination and cross-examination and the probability of the competing versions of events, I make the following findings of fact in relation to the significant issues that are in dispute:

1. On 10 August 2007, Mr Gazal told Mr Smith about the conditions attached to the credit department's approval of the application, and Mr Smith objected to the building conditions.
2. AKS, through Mr Smith, was aware at all material times that the NAB facility still had a limit of $10M. This was recorded in bank statements and on internet banking facilities that Mr Smith regularly accessed. It is unbelievable that he did not notice these things in the second half of 2007 and in January 2008. It is also unbelievable that in the second half of 2007 he did not query why the $20M facility had not been processed, since he knew that formal documentation had to be executed to establish it, and that until the documentation was executed he did not have a $20M facility.
3. In November 2007 a high priority was given to obtaining the $16.5M margin loan, and Mr Smith agreed not to press the issue in relation to the $20M facility at that time.
4. On 21 November 2007, Mr Smith was told that the $16.5M margin loan facility had been approved. He also was told that the bank's credit department had reduced the $20M facility approval to $10M, and required security over all five lots to be sorted out in two weeks. Mr Smith accepted these things and the conversation concluded on the basis that he and Mr Gazal would revisit the application for a $20M facility after the security over the five blocks was in order. Mr Smith was prepared to accept this position. He must have known that NAB (or any alternative financier) would require security over all of the lots upon which the mansion was to be built, and that NAB would require the security position to be addressed in order to maintain the existing $10M facility and to approve, at a later stage, a new application to increase the facility to $20M.
5. It was against that background that steps were taken in early December 2007 for the security position to be addressed and Mr Smith was told by Mr Clarke in early December 2007 that the credit department was unhappy with the security position for the $10M facility that was currently in place and that it needed to be corrected.
6. The conversation that Mr Smith alleges occurred on or about 10 December 2007 with Mr Gazal in respect of a proposed $20M facility in which

Mr Gazal is alleged to have said words to the effect "I can do it all, I can process it" did not occur.

7. As at 10 December 2007, Mr Smith and AKS had no immediate need to increase the $10M facility to $20M. Mr Smith did not want or need the extra $10M to pay for the construction of the mansion. He was expecting that he would have not drawn on the $10M facility with NAB and would have surplus cash in excess of $2.7M. He expected the MFS shares that he retained to increase in price and to yield a multi-million dollar dividend in the first half of 2008. Mr Smith did not immediately pursue approval of an increase in the NAB facility to $20M on the same conditions as a $10M facility.
8. The defendants did not represent by 10 December 2007 that NAB would provide a $20M facility to AKS, Mr Smith and Mrs Smith on the same terms and conditions as the existing $10M facility, subject only to the provision of additional security upon the transfer of Westpac's mortgages over 39 and 41 Hedges Avenue.
9. Mr Smith and AKS knew in December 2007 and until 24 January 2008 that the NAB facility had a limit of $10M. At all material times Mr Smith knew that approval of the proposed $20M facility was to be revisited in early 2008 when a new application for it would be made.
10. The communications with Mr Smith in November and December 2007 in relation to the transfer of the mortgage over 39 and 41 Hedges Avenue related to the existing $10M facility. He was told as much. He did not understand, and a reasonable person in his position would not have understood, that the transfer of those mortgages meant that NAB had established a $20M facility on the same terms and conditions as the $10M facility.
11. Mr Smith knew that a $20M facility would not be established until formal documentation had been executed. He knew in December 2007 and January 2008 that no such documentation had been signed. No such documentation was signed until 24 January 2008.
12. Mr Smith also knew at all material times in the second half of 2007 and in January 2008 that NAB required conditions to be addressed in relation to the manner in which, and the purposes for which, an additional $10M facility would be applied. It was for this reason that he equipped himself on or about 22 January 2008 with the Ulliana letter as a means of assuring NAB that the additional $5.5M that he sought that day would be applied towards the construction of a home on the lots over which NAB held security.
13. The course of dealings between the defendants and AKS after mid-July 2007, including the matters specifically pleaded in AKS's pleading, did not convey the $20M Facility Representation. The $20M Facility Representation was not conveyed to Mr Smith and a reasonable person in his position, who had been told the things that he had been told, would have known that NAB was not prepared to provide AKS with a $20M facility on the same terms and conditions as the $10M facility.
14. The defendants' conduct did not convey either the $20M Facility Representation or the $20M Facility Establishment Representation.

Conclusions on liability

[152] The findings of fact that I have made, including my conclusion that the pleaded representations were not made, effectively disposes of AKS's claim, which was cast

on several legal bases. It is unnecessary to address all of the points of law raised by the defendants which advanced additional reasons as to why each cause of action should fail. It is sufficient to briefly state my conclusions in relation to each cause of action.

Breach of contract

[153] AKS's primary submission is that the contract between NAB and AKS to provide credit facilities was varied to include an obligation upon NAB to provide a $20M facility. AKS acknowledges that this is essentially a question of fact. For the reasons given, NAB did not make the representations alleged to the effect that it would provide a $20M facility on the same terms and conditions as the $10M facility, and that such a facility had been established after the settlement with Westpac on 27 December 2007. This makes it unnecessary to consider whether the alleged representations were promissory and gave rise to the term alleged in paragraph 107 of the second further amended statement of claim.

[154] AKS further submits that it was an implied term of the Credit Facility Agreement that NAB would act with the reasonable care and skill to be expected of a prudent banker, and accordingly, would:

> "(a) not act in any manner such as to deny AKS, Smith and Mrs Smith the benefit of the Credit Facility Agreement ('the Full Benefit term'); and
>
> (b) provide expeditiously any information known to NAB that was relevant to AKS (and [Mr] Smith and Mrs Smith) accessing funds supplied by the NAB under the agreement, including the ability to access such funds ('the Information Term')."

[155] These terms are said to be implied as an ordinary incident of a contract between banker and customer and because of the inclusion of such obligations in the Code of Banking Practice. AKS relies upon a number of circumstances, including AKS's possible reliance upon its lines of credit with NAB to pay margin calls. NAB, through Mr Gazal, may have appreciated that the existing $10M facility might be used to pay margin calls. The same cannot be said of the proposed $20M facility. AKS also asserts that Mr Gazal "always knew that [Mr] Smith expected the Portfolio Facility to be operated without any conditions upon access to funds". Again, this may be so in relation to the $10M facility, but this is not so in respect of the proposed $20M facility. In the circumstances, the factual foundation for the alleged obligation to inform Mr Smith that no $20M facility was in place is not established. Mr Smith knew that no $20M facility had been established and there was no breach of the alleged Information Term. It is unnecessary to address the defendants' submission that the alleged term does not satisfy the requirements for implication identified in the leading authorities.

[156] As to the alleged Full Benefit Term, AKS poses the following rhetorical question: How could AKS properly enjoy the benefits of the Portfolio Facility if AKS is labouring under a misapprehension induced (even arising innocently) in relation to the amount of funds available and the ability to access them, and NAB alone knows what the true limits of the Portfolio Facility are, and whether there are any steps afoot to alter the limits of the Portfolio Facility? The short answer to this question

is that AKS was not labouring under such a misapprehension. NAB had not agreed to provide a $20M facility without any conditions upon access to funds, and Mr Smith was not labouring under a misapprehension that it had done so. The reasons why NAB did not breach the alleged Full Benefit Term appear more fully in the following submissions of the defendants, which I accept:

"352. ... the essential problem for AKS here is that, as explained by PD McMurdo J in *Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd* [2006] QCA 126 at [51]:

> '... the duty to do what is necessary to enable the other party to have the benefit of the contract is limited to acts which are necessary to the performance of obligations under the contract. To assess the scope of the duty in a particular case, it is first necessary to define the relevant obligations, and in particular, to define the circumstances in which the parties have agreed that a certain obligation must be performed. It is not a duty upon one party to act so as to enhance the commercial value to the other party of the contract.'

353. In *Australis Media Holdings Pty Ltd v Telstra Corporation Ltd* (1998) 43 NSWLR 104 at 124-125, Mason P, Beazley and Stein JJA held (italics in original):

> '... leaving aside fiduciary obligations ..., there cannot be a duty to cooperate in bringing about something which the contract does not *require* to happen ...
>
> ... A contract may 'contemplate' many benefits for the respective parties, but each can only call on the other to provide, or co-operate in the providing of, benefits promised by that party.'

354. See also *Questband Pty Ltd v Macquarie Bank Limited* [2009] QCA 266 at [11]-[12].

355. If NAB was never obliged under the Facility Agreement to make an unrestricted $20 million facility available to AKS (as was the case), then the Full Benefit Term cannot be invoked so as to secure that outcome. The benefit sought to be gained by the term represents a commercial advantage beyond that which NAB promised to provide, and thus beyond the benefit of the contract actually made by the parties.

356. The point may also be made in another way. Under the facility agreement the parties had agreed that it would be within the power of NAB to refuse to make credit available at any time and for any reason.

357. In particular, cl. 5 in Part 2 of the Terms and Conditions provided:

> 5. Cancellation of the facility and Annual Reviews
>
> 5.1 We may cancel this facility at any time whether or not you are in breach of this agreement. Where the facility is cancelled:
>
> (a) we will give you notice of the cancellation as soon as practicable;
>
> (b) the portfolio limit and any sub account limit will reduce to zero; and
>
> (c) you must repay any unpaid balance in an (sic) linked sub account and any other money owing under this agreement immediately.
>
> 5.2 If each of you agree, you may cancel the facility at any time by cancelling the portfolio limit or giving us notice. If you cancel the facility you must immediately pay out any unpaid balance in any linked sub account and any other money owing under this agreement.
>
> 5.3 If any of you agree to cancel your Customer Agreement, we may cancel this facility and the provisions in this clause will apply.
>
> 5.4 We may conduct an annual review of your operation of the facility and your financial position. It will be conducted prior to or on the annual review date shown in the Details.'

358. And this provision is to be read in light of cl. 16 in Part 3 of the Terms and Conditions, which makes it clear that NAB could exercise its rights in any way it considers appropriate.

359. By these provisions, the parties had agreed that it would be within the power of NAB to refuse to make credit available at any time and for any reason.

360. The suggested content of the Full Benefit Term would thus impermissibly require NAB to provide access to monies which, on the true construction of the facility agreement, NAB was at liberty to withhold. In *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1999] 1 Ll L Rep 483 at 492, Waller LJ (with whom Roch and Ward LJJ agreed) put it this way:

> 'But the duty to cooperate cannot be imposed on a party so as to compel him to do something which the contract on its true construction relieved him from doing ...'".

[157] AKS also relies on s 12ED of the *Australian Securities and Investment Commission Act* ("the ASIC Act") which implies certain warranties in a contract for the supply of "financial services" to a "consumer" and also implies warranties in certain circumstances where financial services are supplied to a consumer in the course of a business and the consumer makes known to that person:

(a) any particular purpose for which the services are required; or

(b) the result that he or she desires the services to achieve.

[158] AKS submits that in the circumstances there were implied warranties that the Credit Facility Agreement (as varied) would:

> "(a) be fit for the purpose of meeting, up to a limit of $20M, any margin calls or other demands made on AKS under the Margin Loans; and
>
> (b) alternatively, be of a nature and quality sufficient to enable AKS to meet, up to a limit of $20M any margin calls or other demands made on AKS under the Margin Loans."

[159] I am not persuaded that AKS made known to NAB that the increased facility was required for the purpose of enabling AKS to meet margin calls under its margin loans, and that this was the result that it desired to achieve by obtaining the increased facility. The fact is that Mr Smith wanted the $20M facility for whatever purpose he chose, and NAB was not prepared to agree to provide such a facility. Another reason why the claim under s 12ED should fail is that the implied warranty referred to in s 12ED(2) does not arise if the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the person's skill or judgment. Mr Smith and AKS did not rely upon NAB for advice about whether a particular facility suited the purposes of AKS, Mr Smith and Mrs Smith. Mr Smith knew what he wanted, and knew how such a facility operated. In the circumstances, it was unreasonable for AKS to rely on NAB's skill or judgment in choosing a facility that might suit AKS's purposes. Accordingly, I conclude that the warranties alleged by AKS did not form part of its contract with NAB.

[160] AKS adds to its breach of contract claim the allegation that by making the $20M Facility Establishment Representation on and after 27 December 2007, NAB contravened the Australian Bankers' Association Code of Banking Practice and, having regard to the contents of that document "contravened" the Credit Facility Agreement. My finding that the $20M Facility Establishment Representation was not made is sufficient to dispose of this additional aspect of AKS's claim for breach of contract. This makes it unnecessary to address the additional substantial arguments advanced by NAB that:

(a) the particular terms of the Code relied upon were not incorporated into the Facility Agreement because, amongst other things, AKS was not a "small business customer" (as defined by the Code);

(b) the Code does not impose any obligation upon NAB beyond an obligation to act in good faith towards AKS;

(c) upon the proper construction of the Facility Agreement and the Code, a breach the relevant term of the Code did not give rise to a claim for damages but would be subject to the remedial regime set out in the Code itself.

Negligence

[161] AKS pleads that under the general law NAB owed it a duty of care:

> "(a) to provide expeditiously any information known to NAB that was relevant to AKS accessing funds supplied by NAB under the Credit Facility Agreement;
>
> (b) not to induce AKS to believe that the monies available to it under the Credit Facility Agreement (as varied), and the terms on which such monies would be made available, or otherwise than NAB had agreed or represented previously to AKS in circumstances where to do so may give rise to loss or damage on the part of AKS."[4]

NAB advances substantial arguments as to why it did not owe AKS such a duty of care under the general law, and cites substantial authority to the effect that the relationship between banker and customer is founded in contract and will not ordinarily give rise to a duty of care. Other matters are raised including the terms of the contract by which NAB was free to refuse AKS's request for an increase in the credit limit at any time, for any reason and without volunteering any information. The duty of care contended for would conflict with NAB's contractual rights in this regard. It is unnecessary to reach a conclusion about these substantial arguments. This is because the factual foundation for the alleged breach of the duty of care is not established. For the reasons that I have given, AKS knew the limit of the facility that had been established. It knew what monies it had available to it under the facility.

Misleading or deceptive conduct

[162] AKS's failure to establish the two representations upon which its case is founded means that its claim for a contravention of s 12DA of the ASIC Act on the grounds that NAB engaged in conduct that was misleading or deceptive or likely to mislead or deceive must fail. AKS has failed to establish its case that the conduct of NAB was misleading or deceptive or likely to mislead or deceive, and that Mr Gazal was knowingly concerned in such a contravention.

Unconscionable conduct

[163] AKS alleges that the defendants engaged in unconscionable conduct within the meaning of s 12CB or s 12CC of the ASIC Act. Again, legal issues arise as to whether s 12CC is engaged and whether AKS was a small business within the meaning of the ASIC Act. It is unnecessary to address those points because AKS's case of unconscionable conduct as pleaded in paragraphs 128 and 128A of its pleading rests upon the two representations that I have found were not established and the so called "Continuing Facility Representation". AKS adds that the defendants' conduct extends beyond representations that it had a $20M facility. It took an additional $20M worth of security over property at Hedges Avenue on the

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4 Second further amended statement of claim para 114.

strength of a representation that there would be a $20M facility and Mr Gazal is alleged to have not told Mr Smith that NAB required this additional security merely to continue to make the $10M Portfolio Facility. I have rejected these factual contentions. Mr Gazal told Mr Smith that the additional security was required in respect of the existing $10M Portfolio Facility, and Mr Clarke reiterated this.

[164] AKS has failed to establish the unconscionable conduct alleged by it under either s 12CB or s 12CC of the ASIC Act.

Causation and alleged loss

[165] The first substantial issue identified at the start of these reasons has been resolved against AKS. The defendants did not induce AKS to believe and act on the footing that it had available to it a $20M facility on and from 27 December 2007 that was not subject to conditions about the manner in which, or the purposes for which, the additional $10M could be drawn down. AKS did not purchase an additional $2M worth of MFS shares on 10 and 11 January 2008 in reliance upon the alleged representations and believing that it had an additional $10M that could be drawn upon for whatever purpose it may choose.

[166] AKS retained the ownership of the shares that it held as at 27 December 2007, and purchased an additional $2M worth of MFS shares on 10 and 11 January 2008 because of Mr Smith's judgment about the MFS shares and their prospects. He knew at the time that a $20M facility had yet to be established. He did not perceive that he had an immediate need for an additional $10M facility. In November and December 2007, and in January 2008, he continued to believe that MFS shares were undervalued. He made the strategic decision earlier noted to sell half of his shareholding in early December 2007. He went on holidays in December 2007 content with the strategy that he had adopted, having received the proceeds of sale of the MFS shares that he sold and with a surplus of funds. There was no pressure upon him to immediately increase the NAB facility to $20M. He expected that such a facility would be established and, on his own evidence, his expectations in that regard would have been met if a $20M facility had been established when he returned from holidays on 14 January 2011. He purchased the additional shares on 10 and 11 January 2008 when he knew that a $20M facility had yet to be established. He saw the acquisition of the additional shares as a significant "buying opportunity", and this was because of his confidence that the share price would recover to his target of $6 per share. He did so knowing that AKS had a $10M facility available to it on and from 27 December 2007.

[167] It is strictly unnecessary to answer the question of what AKS would have done if the defendants had informed it that it had a $10M facility available to it on and from 27 December 2007. AKS knew this to be the fact. If, however, for argument's sake, it did not know this and the defendants had informed it of this fact then I am not persuaded that it would have acted any differently to the manner in which it acted in January 2008. I consider it likely that Mr Smith would still have purchased the additional shares on 10 and 11 January 2008 from the surplus funds that AKS had at its disposal, knowing that it had an additional $10M line of credit available to it. It would not have sold down the MFS shares that it had. It would have retained them, expecting them to increase in value and to provide substantial income by way of dividend.

[168] In summary, AKS has not established its case on causation.

[169] I am certainly not persuaded that Mr Smith, upon being told on 14 January 2008 that the $20M facility had not been established and that AKS only had a $10M facility would have instructed his broker to sell down another $10M worth of shares. It is most unlikely that Mr Smith would have issued an instruction that day to sell them down at any price. As he told the *Gold Coast Bulletin* a few days later, he believed that MFS shares were undervalued. It is unnecessary to address the detailed evidence given in relation to the issue of whether AKS could have sold $10M worth of MFS shares prior to 18 January 2008 if instructions had been given to sell $10M worth of shares because Mr Smith would not have given instructions on 14 January to sell another $10M worth of shares at any price. Given his perception of the share price and the $10M facility from NAB that was available to him, it did not make any sense to do so. He believed that once a half yearly announcement was made the shares would recover their price and that the $6 price that he was hoping for would be achieved.

[170] Shortly stated, the expert evidence of Mr Graves is that to sell $10M worth of MFS shares:

(a) the last possible moment a sell order could have been instigated before 18 January would have been prior to the commencement of trading on 15 January 2008; and

(b) the order would have been for "very aggressive" selling, in effect to sell at any price.

In other words, even on AKS's case, there was only a narrow time period within which Mr Smith would have had the opportunity to give instructions to sell the MFS shares at any price upon being told on the afternoon of 14 January 2008 that AKS only had a $10M facility available to it. I find that at no material time would Mr Smith have issued instructions to quickly sell $10M worth of MFS shares. His optimism about their likely increase in value makes it highly improbable that he would have given such an order on 14 or 15 January 2008, or at any other time.

[171] Another issue confronts AKS's case on issues of loss and damage. On its case, if it had not believed that it had a $20M facility available to it then it would have sold $10M worth of MFS shares. The $20M facility was characterised as a kind of insurance against the possibility of adverse margin calls. However, as the defendants submit, a problem with this argument is that if the MFS shares had crashed (as they did) and if Mr Smith was seriously counting on a $20M facility to protect him from margin loans (which he was not), then what would have happened was more or less what in fact happened. The MFS shares became valueless and the margin loans would have used up the $20M facility. Incidentally, the margin loans were secured only against the MFS shares, not the properties owned by Mrs Smith against which the $10M facility and any $20M facility were secured. But if a $20M facility had been available sooner than the $20M facility that was established on or about 24 January 2008, then NAB would have required the facility to be repaid. The course of events would have been much the same as they transpired. Mrs Smith would have been forced to sell the properties on Hedges Avenue which secured the facility. This is what happened. This was not what Mr Smith or Mrs Smith contemplated when the margin loans were taken out, but it would have occurred had a $20M facility been put in place sooner.

[172] As the defendants point out, in this sense, the security of the $20M facility to pay out margin calls was a "false security because it was not cash owned by Mr Smith or AKS. It would be paying out one borrowing by making another borrowing which in turn had to be paid out."

[173] I conclude that AKS has failed to establish its case on causation and loss. Had it established liability against the defendants it would have failed to establish that the defendants caused it to suffer the loss and damage alleged by it.

Conclusion

[174] AKS has failed to prove the representations that are the foundation of its case. Each of its claimed causes of action fails because AKS has failed to make out the factual basis for those claims. It was not induced to believe and act on the footing that it had a $20M facility available to it on and from 27 December 2007 that was subject to the same terms and conditions as the existing $10M facility.

[175] Mr Smith was not prepared to accept the conditions that the NAB credit department imposed upon its approval for a $20M facility. When he was told about these conditions by Mr Gazal in August 2007 he objected to them. Mr Smith knew during the later part of 2007 that AKS did not have a $20M facility available to it. He also knew that it would not have a $20M facility available to it until documentation was signed, and this did not occur until 24 January 2008. He knew, because he was told by the defendants throughout the relevant period, that the credit limit remained at $10M.

[176] The establishment of a $20M facility was not progressed during the later months of 2007 because of Mr Smith's imperious refusal to accept the conditions that had been communicated to him and because, commencing in November 2007, his and the bank's focus was upon urgently obtaining a $16.5M margin loan facility that suited his commercial objectives. In November 2007 Mr Smith was content to leave progressing the $20M facility on hold. On 21 November 2007 he was elated when told that NAB had approved the $16.5M margin loan facility.

[177] The approval relieved a difficult situation that had arisen with the pending expiry of the UBS warrant facility. He also received the news that the NAB credit department had reduced the $20M facility approval to $10M and required security in respect of the existing $10M facility over all five lots on Hedges Avenue. He instructed Mr Gazal and later Mr Clarke to do what was necessary to address this security issue. He understood that the bank required security over all five lots in order to address the destruction of the bank's security about which he had bragged at the Golf Day on 12 October 2007.

[178] In late 2007 and January 2008 Mr Smith did not believe, and a reasonable person in his position would not have believed, that once the Westpac securities were transferred to NAB, AKS had, in effect, a $20M facility that was not subject to any restrictions about the manner in which or the purposes for which the additional $10M facility could be used.

[179] Mr Smith may have anticipated that the facility would be increased to $20M when a further application was considered by the NAB credit department in 2008. He went on leave shortly before Christmas in 2007 anticipating that this matter would be addressed in the new year. There was no sense of urgency on his part in ensuring

that the $20M facility was established as soon as the Westpac securities were transferred. Following the sale of a large number of MFS shares he had a surplus of cash and large margin calls were not expected by him because of his abiding optimism that MFS shares would increase in price.

[180] In December 2007 and early January 2008 Mr Smith may have expected a $20M facility to be provided on the strength of the security on offer, and in late January 2008 it was, subject to conditions. But he always knew that the bank would require some assurance that the additional funds would be applied to the construction of his planned mansion on Hedges Avenue. It was for this reason that he contrived the false statements in the Ulliana letter and, equipped with it, went to NAB on 22 January 2008 in a bold attempt to obtain the additional $5.5M that he sought that day.

[181] On that day Mr Smith was reminded (not that he needed reminding) that the $20M facility had not been established because Mr Smith would not accept certain quantity surveying conditions. Still, Mr Atkinson and other bank officers who were relevantly misled by the Ulliana letter were accommodating towards Mr Smith that day.

[182] On 22 January 2008 Mr Smith frankly told Mr Atkinson that he had been a fool to hold on to the MFS shares for so long. He blamed himself, not the bank. However, Mr Smith soon attempted to shift the blame. He reconstructed history to convert an expectation that a $20M facility would be established into a contrived case that the bank had represented that a $20M facility would be established once the Westpac securities were transferred to it, that such a facility would be on the same terms and conditions as the existing $10M facility and that, further, the bank represented that such a facility was established when the Westpac securities were transferred on 27 December 2007.

[183] To win these proceedings Mr Smith was prepared:

(a) to deny conversations that took place, particularly the conversation on 10 August 2007 when Mr Gazal told him about the conditions that the bank's credit department had imposed;

(b) to invent a conversation on 10 December 2007 that did not occur in order to fill a gap in AKS's case;

(c) to distort Mr Gazal's expression of sympathy and support on 12 March 2008 into a confession of wrongdoing;

(d) to advance an improbable theory that Mr Gazal did not tell him about conditions on the $20M facility approval, and that Mr Gazal concealed matters from his employer when, in fact, Mr Gazal told Mr Smith about these conditions and reported to his employer (as was the fact) that Mr Smith had rejected them; and

(e) to make a bogus claim of $56M against the defendants in respect of the Roamfree shares.

[184] Mr Smith's evidence on contentious matters lacked credibility. By contrast, Mr Gazal, Mr Clarke, Mr Atkinson and other witnesses called by the defendants gave

credible and reliable evidence about their dealings with Mr Smith. Mr Gazal dealt with Mr Smith professionally. He was sympathetic and supportive of Mr Smith after Mr Smith's reversal of fortunes in early 2008. In return, Mr Smith subjected Mr Gazal and Mr Gazal's employer to false allegations in these proceedings.

[185] The first plaintiff's claim is dismissed. The first plaintiff is ordered to pay the costs of the first defendant and the costs of the second defendant of and incidental to the proceedings to be assessed on the standard basis. I will hear the parties in relation to any further orders, including any orders that may be necessary for the defendants to access the security which was ordered to be given in respect of their costs.