SUPREME COURT OF QUEENSLAND

CITATION:	*McIntosh v Suncorp-Metway Ltd* [2013] QSC 255
PARTIES:	**MORAY MCINTOSH** (first plaintiff/first defendant by counterclaim) **THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE MARIA MCINTOSH, DECEASED** (second plaintiff/second defendant by counterclaim) **v** **SUNCORP-METWAY LTD ACN 010 831 722** (defendant/plaintiff by counterclaim)
FILE NO:	SC No 192 of 2005
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	19 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	11 June 2013 - 14 June 2013
JUDGE:	Henry J
ORDERS:	**1. The plaintiffs' claim is dismissed.** **2. Judgment for the plaintiff by counterclaim (Suncorp-Metway Ltd) in the sum of $439,136.99 plus interest to be determined.** **3. I will hear the parties as to the calculation of interest and as to costs.**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – UNCONSCIONABILITY, UNCONSCIONABLE DEALINGS AND OTHER FORMS OF EQUITABLE FRAUD – GENERALLY – where the plaintiffs claim damages for the defendant's alleged unconscionable conduct in enforcing its commercial rights when the plaintiffs failed to meet their loan repayment obligations in relation to two loan agreements – where the plaintiffs claim they were induced to enter into the loan agreements by a representation that was made by an employee of the defendant – where the plaintiffs claim they would not have entered into the loan agreements but for the representation – where the plaintiffs

claim their requests to capitalise interest repayments were unreasonably refused by the defendant – where the plaintiffs claim they were placed in a position of disadvantage as a result of the alleged representation and the alleged unreasonable refusals to capitalise interest – where the plaintiffs claim the defendant took unconscientious advantage of their disadvantaged position – whether the defendant placed the plaintiffs in a position of disadvantage, took advantage of their position and acted unconscionably

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – DEFENCE AND COUNTERCLAIM – where the defendant contends the plaintiffs are not entitled to relief because their compliant was resolved through a Heads of Agreement which constituted a release or an accord and satisfaction – where the defendant contends the Heads of Agreement constituted a complete defence to the plaintiffs' claim – whether the Heads of Agreement constituted a release or accord and satisfaction and amounted to a complete defence to the plaintiffs' claim

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – DEFENCE AND COUNTERCLAIM – where the defendant counterclaims for unpaid default interest and professional costs associated with the receivership and the sales of the secured properties – whether the defendant's counterclaim should succeed

Australian Securities and Investments Commission Act 2001 (Cth) ss 12CA, 12GF, 12GM

ACCC v CG Berbatis Holdings P/L (2003) 214 CLR 51, considered
Australian Competition and Consumer Commission v Samton Holdings Pty Ltd (2002) 117 FCR 301, cited
Blue Moon Grill Pty Ltd v Yorkey's Knob Boating Club Inc [2006] QCA 253, considered
Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 446, cited
Legione v Hateley (1982-1983) 152 CLR 406, considered
McDermott v Black (1938) 63 CLR 161, cited
Point v Federal Commissioner of Taxation (1970) 119 CLR 453, cited
Scott v English [1947] VLR 445, cited
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596, considered

COUNSEL:	PA Kronberg for the plaintiffs TA Houghton for the defendant
SOLICITORS:	Aitken Wilson Lawyers for the plaintiffs Clayton Utz Lawyers for the defendant

[1] The plaintiffs claim $258,594.85 damages for the allegedly unconscionable conduct of the defendant in exercising its commercial rights following the plaintiffs' failure to meet their loan repayment obligations to the defendant. In consequence of that failure the defendant asserts it is the plaintiffs who owe it money and pleads a set-off and a counterclaim of $455, 213.54.

[2] The dispute has its genesis in the circumstances under which the plaintiffs entered into significant loan transactions with the defendant. In short, the plaintiffs had an overly optimistic view of their capacity to meet their obligations under those arrangements and of the defendant's preparedness to forbear from enforcing those arrangements.

Overview

[3] The plaintiffs in this matter were Moray McIntosh and his wife Maria McIntosh. Mrs McIntosh died prior to the trial. While the personal representative of her estate is now named as the second plaintiff, historical references hereunder to the plaintiffs are references to Mr and Mrs McIntosh.

[4] In 1998 the plaintiffs were very keen to buy the Malanda Lodge Motel. They needed a loan to do so but already had substantial existing borrowings that would need refinancing.

[5] They applied to the defendant for a loan.[1] By correspondence of 9 October 1998 the defendant offered to lend a total of $1,660,000 to the plaintiffs to assist with the purchase of the motel and refinance their existing borrowings. The offer involved two connected loan arrangements.

[6] The first loan arrangement was a term credit facility ("TCF") for ten years up to an approved limit of $1,250,000.[2] Its repayment schedule allowed repayment of interest only during the first 12 months.[3] It also included a condition whereby, with the prior written approval of the defendant, the plaintiffs could defer the interest and repayments of principal for a period or periods not exceeding 12 months in aggregate during the term of the facility.[4] The TCF required security by way of a credit facility deed, a mortgage over the Malanda Lodge Motel, a bill of sale over fixtures, fittings, plant, equipment and the liquor licence for the Malanda Lodge Motel and mortgages over properties in which the plaintiffs had interests, namely a citrus farm near Charters Towers, the Mud Hut Hotel at Richmond and vacant land at Rockhampton.

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1 The applications were actually directed to the Queensland Industry Development Corporation, QIDC, a former division of the defendant.

2 Ex 1 vol 1 tab 2.

3 Ibid [4.1].

4 Ibid [5.1(b)(iii)].

[7] The second loan arrangement was a commercial banking facility ("CBF") for a single advance of $410,000 to be repaid in full by 30 April 1999.[5] The CBF was to be secured by the same securities as the TCF.

[8] Significantly, the condition requiring repayment of the CBF by 30 April 1999 was also incorporated as a condition of the TCF. In both instances the condition was:

> "Facility for $410,000 is to be repaid in full by 30/04/99 from sale of property. The Bank is not prepared to extend the debt beyond this time and full clearance is expected. A subdivision of the Charters Towers property may require the valuation to be reappraised which would be at the expense of the customer."[6] (emphasis added)

[9] The replication of the need to repay the CBF by 30 April 1999 as a condition of both agreements was also implemented by the provisions of the credit facility deed entered into by the plaintiffs to secure the combined total of both loans.[7] The deed provided that at the bank's option on the happening of a default event, which include a failure to comply with any agreement in relation to the moneys secured, the moneys secured shall immediately become payable.[8]

[10] The requirement of both agreements, that the $410,000 advance be repaid by 30 April 1999, reflected the defendant's desire, conveyed to the plaintiffs, that part of their farm be sold within six months "to reduce the debt to provide a better security and debt servicing position".[9]

[11] The plaintiffs met with the defendant's local business banking manager, Christopher Bath, to discuss the loan offers. They plead that Mr Bath represented to them the defendant would not enforce the requirement to repay the CBF by 30 April 1999, provided the plaintiffs placed their farm on the market for sale, as the requirement was a "mere formality".[10] I will refer to this alleged representation as "the Bath representation".

[12] On 20 October 1998, the plaintiffs executed their acceptance of the offers of the TCF and CBF and executed the various security documents mentioned above.

[13] The plaintiffs drew down on the loans on 26 October 1998.

[14] The plaintiffs plead that they were induced into executing the documents by the Bath representation[11] and but for that representation they would not have entered into the CBF at all or would not have drawn down on it.[12] Whether the Bath representation occurred as alleged is therefore a significant issue in the case.

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5 Ex 1 vol 1 tab 1.
6 Ibid p 4 [2(d)]; Ex 1 vol 1 tab 2 p 6 [5.4 1.].
7 Ex 1 vol 1 tab 3 (schedule item 7).
8 Ibid (clauses 13.3, 14.1).
9 Ex 1 vol 1 tab 16 p 1 [5].
10 Third Further Amended Statement of Claim ("SOC") [8].
11 SOC [10].
12 Ibid [11].

[15] When the plaintiffs took possession of the motel it was in poor condition and required significant cleaning and repairs.[13] While Mr McIntosh's evidence was to the effect that this did not materially affect their ability to repay the loan, he admitted in a letter to the bank dated 26 February 1999 that because of the poor state of the property at takeover the plaintiffs were forced to spend $20,000 more than they had allowed for. He also said in an earlier letter to Mr Bath, on 4 February 1999:

> "…I think we came in here too short and not knowing the real extent of the damage the [previous owners] did to the business.
>
> By this I have no regrets except as far as being a mug and expecting people to be honest in their dealings. I guess I will never learn. …"[14]

[16] The letter of 4 February 1999 went on to refer to a significant recent reduction in weekly takings and reported there had been no success in the sale of all or part of the citrus farm. To make matters worse a cyclone hit the region in February resulting in flooding, road closures and a low level of occupancy and takings of the motel.[15] The impact of another cyclone in March 1999 perpetuated these problems.[16]

[17] In February 1999, by a telephone request to Mr Bath and a follow up request to him in writing, Mr McIntosh asked to defer an interest payment on the TCF.[17] The plaintiffs' pleadings imply this was actually a request to capitalise interest payments.[18] In a letter dated 24 February 1999, the defendant agreed to allow deferment of the plaintiffs' February loan repayment until 26 March 1999.[19] The plaintiffs' pleadings characterise this as an unreasonable refusal to capitalise interest.[20] It is another important issue in the case.

[18] The defendant's letter of 24 February 1999 also reminded the plaintiffs of the need to sell their farm property by no later than April 1999. Mr McIntosh wrote to the defendant on 26 February 1999 explaining it would be impossible to make the deferred interest payment on 26 March and the next interest payment on 31 March and expected the deferred payment could be made about August.[21] He also advised that they were continuing to try and sell their property.

[19] The plaintiffs failed to pay their February repayment by 26 March 1999.

[20] They were also unable to sell all or part of their farm by 30 April 1999 and as a result could not repay the $410,000 owing under the CBF in full as required under the conditions of both the CBF and the TCF.

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13 T1-16, 17.
14 Ex 1 vol 1 tab 38.
15 T1-18.
16 Ibid.
17 Ex 1 vol 1 tab 38.
18 SOC [15].
19 Ex 1 vol 1 tab 40.
20 SOC [16].
21 Ex 1 vol 1 tab 41.

[21] By correspondence dated 13 May 1999,[22] the defendant advised the plaintiffs they were in default under the CBF for failing to repay it in full and asserted the entire amount of the CBF was due and owing. They also advised the plaintiffs they were in default of the TCF because no further interest payments had been made on it. The letter sought information in order for the bank to assess its options and foreshadowed if the information was not provided that it would have no alternative but to serve a demand for recovery of all amounts owing.

[22] The bank confirmed by a letter to Mr McIntosh of 2 June 1999 that interest on the CBF and TCF would be charged at a higher rate while the former was in default and the latter was in arrears.[23]

[23] On 29 June 1999, the plaintiffs requested a six month extension for the repayment of the CBF in order to allow them additional time to complete the subdivision and sale of blocks at their Charters Towers property.[24]

[24] The defendant offered to extend the repayment of the CBF for a further three months to 30 September 1999 and to only apply a higher rate of interest in the event either of the facilities fell into arrears or default during the period of the extension.[25] This proposal was conditional upon the plaintiffs' acceptance of a number of requirements including that the citrus farm and the vacant land in Rockhampton being actively marketed for sale to reduce the loans and all arrears presently owed being paid in full so that both the TCF and the CBF were reduced to their approved limits.

[25] Mr McIntosh eventually advised that he would speak with his solicitor before agreeing to the bank's conditions. By letter dated 21 July 1999, the plaintiffs' solicitor, Mr Ian Robertson of Thompson Hannan Lawyers, advised the defendant that the plaintiffs had no alternative other than to sign the extension.[26]

[26] The plaintiffs were unable to sell their property by 30 September 1999 and requested the defendant forbear from taking recovery action until 26 October 2000. By correspondence dated 21 September 1999, the defendant offered to accept a reduction of $600,000 in principal debt under the TCF by 30 June 2000 with an additional $200,000 principal repayment being due on 26 October 2000.[27] Agreement to the terms and conditions of the defendant's proposal was to be obtained through the execution of a deed of forbearance. However, despite repeated requests by the defendant for the deed to be signed, and successful requests for the defendant to extend the time in which to do so,[28] the plaintiffs did not execute the deed.[29]

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22 Ex 1 vol 1 tab 42.
23 Ex 1 vol 1 tab 43.
24 Ex 1 vol 1 tab 47.
25 Ex 1 vol 1 tab 48.
26 Ex 1 vol 1 tab 58.
27 Ex 1 vol 1 tab 76.
28 See, eg, ex 1 vol 2 tab 93.
29 T1-29 L44.

[27] In the first few months of 2000 there were another two cyclones adversely affecting the motel's revenue.[30]

[28] On 25 February 2000, the plaintiffs requested the defendant capitalise the interest commitments on their loan facilities for February 2000. The defendant declined the request later that day.[31] The plaintiffs plead that request was unreasonably refused. This is also an important issue in the case.

[29] On 22 March 2000, the defendant issued a notice of demand to the plaintiffs for the amount of $1,710,966.28 plus interest in relation to all moneys payable under the CBF and TCF and the credit facility deed.[32]

[30] Mr McIntosh responded to the defendant's demand on 29 March 2000, disputing the plaintiffs were in default or in arrears.[33] In his letter Mr McIntosh alleged Mr Bath assured the plaintiffs on several occasions that the term of the loans would be extended at the end of the initial term of six months and that there was a clause in the agreement that provided for interest to be deferred to the end of this term. He claimed that had the representation not been made by Mr Bath and had the clause allowing deferment of interest payments not been included in the agreement, the plaintiffs would not have executed the facilities because they knew there would be periods when they would need to defer interest payments as a result of the seasonal nature of the area in which the motel was located.[34]

[31] The plaintiffs lodged a complaint with the Australian Banking Industry Ombudsman.[35] On 9 August 2000, the parties met with a representative of the Ombudsman in Brisbane for a conciliation conference with respect to the dispute. Both parties executed a Heads of Agreement[36] under which the plaintiffs agreed to pay $11,000 per month to the defendant in order to reduce the amount of the facilities and repay all principal and interest to the bank by 28 February 2001. Under the Heads of Agreement the defendant was to reduce the amount owing by the plaintiffs under the facilities by $25,000. The Heads of Agreement provided that if any default occurred under it the defendant would be entitled to enforce its securities.

[32] Mr McIntosh gave evidence the plaintiffs paid the $11,000 per month but failed to pay the balances owing by 28 February 2001.[37] The plaintiffs plead the defendant issued a notice of default to the plaintiffs on 29 March 2001,[38] however, this was not admitted and there is no evidence that such a further notice was issued. There is no doubt though that as at that date the defendant treated the plaintiffs as being in default, for on that day the defendant appointed

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30 T1-31 L7.
31 Ex 1 vol 2 tab 94.
32 Ex 1 vol 2 tab 97.
33 Ex 1 vol 2 tab 98.
34 Ibid.
35 Ex 1 vol 2 tab 117.
36 Ex 1 vol 2 tab 130.
37 T1-33 L30.
38 SOC [18].

receivers and managers in respect of the Malanda Lodge Motel and the Mud Hut Hotel.[39]

[33] The plaintiffs plead that having placed the plaintiffs in a position of disadvantage by reason of the alleged Bath representation and the alleged unreasonable refusals to capitalise interest,[40] the defendant took unconscientious advantage of the plaintiffs' disadvantage by issuing a notice of default and appointing receivers.[41]

[34] In the upshot, the receivers caused the sale of the Malanda Lodge Motel and the Mud Hut Hotel. The plaintiffs sold the citrus farm with the proceeds going to the defendant, and the defendant sold the Rockhampton property as mortgagee in possession.

[35] The plaintiffs claim moneys, which they allege were unconscionably appropriated or accounted in favour of the defendant, being various amounts of default interest and various fees associated with the receivership, in a total sum of $258,594.85.

[36] The amount realised by the sales of the secured properties, for use towards extinguishing the plaintiffs' debt to the defendant, fell considerably short of the alleged debt owing. The amount raised by the sale of the secured properties was close to the amount of the loan capital which remained wholly unpaid, however, there also remained significant unpaid interest and receivership costs.

[37] The defendant denies the claim, claims a set-off and counterclaims for a debt of $455,213.54.

The plaintiffs' case

[38] As the above overview reveals, the plaintiffs place particular emphasis upon the alleged Bath representation[42] and the alleged unreasonable refusals to capitalise interest payments.[43] The plaintiffs plead this conduct put them in a position of disadvantage in three respects, namely:

(a) the economic disadvantage of having to pay interest under the CBF as a result of the allegedly unreasonable refusal to capitalise interest payments in February 1999;

(b) they were at the time of entering into the loans, in reliance on the Bath representation, unable to reasonably sell the citrus farm by 30 April 1999 and thus unable to repay the CBF by that time; and

(c) their ability to negotiate with the defendant concerning payments of interest and repayment of the CBF was impeded by the defendant's assertion the plaintiffs were in default, which default

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39 Ex 1 vol 2 tabs 140, 141.
40 SOC [17].
41 Ibid [17]-[18].
42 Ibid [7]-[11].
43 Ibid [14]-[16].

was caused by the Bath representation and the allegedly unreasonable refusals to capitalise interest payments.[44]

[39] The plaintiffs plead the defendant unconscientiously took advantage of the plaintiffs' disadvantage by:

(a) treating the plaintiffs' failure to repay the CBF in full as a default on 13 May 1999;

(b) imposing penalty interest in respect of interest payments under the CBF and TCF; and

(c) issuing a notice of default and appointing receivers on 29 March 2001 following the plaintiffs' failure to comply with the Heads of Agreement reached with the Ombudsman's assistance.[45]

[40] The plaintiffs claim equitable damages for loss arising from the unconscionable conduct of the defendant and or damages pursuant to s 12GF(1) of the *Australian Securities and Investments Commission Act* 2001 (Cth) for a breach of s 12CA of that Act which relevantly provides:

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

[41] The plaintiffs' allegations of unconscionable conduct are premised upon the plaintiffs being wrongly put in their economically disadvantageous position both by virtue of the alleged Bath representation and the alleged unreasonable refusals to capitalise interest. Whilst both complaints will be considered below, it is really the Bath representation that is critical to the plaintiffs' case, as their counsel conceded.[46] If they fail in respect of that allegation then their position of alleged disadvantage was of their own making and it was not unconscionable for the defendant to enforce its rights subsequent to the plaintiffs' failure to repay the CBF by 30 April 1999.

The Bath representation

[42] Turning to the Bath representation, the history of the development of the loan arrangements that were eventually offered on 9 October 1998 is very relevant to the probability of whether Mr Bath subsequently made the representation in the terms pleaded.

[43] The defendant's senior credit manager, Graham Atkinson, had initially rejected the granting of the loan application. In a memorandum of 14 September 1998 by Mr Atkinson to Mr Bath it was explained that one of the reasons for the rejection was:

> "It is believed that clients won't sell the rural property which would be necessary in part at least to provide for a better security position and clearer debt servicing position, of which the former

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44 Ibid [17].

45 Ibid [18].

46 T3-78 L40; T3-89 L13.

> is marginal at best, and the latter has no margin when considering the losses on the rural property. ..."[47]

[44] On 15 September 1998, Mr Bath and the defendant's then area manager, Dennis Schaumburg, met with Mr McIntosh. Mr Schaumburg's file note of the events of that day records that in the wake of the rejection of the proposed loan arrangements by Mr Atkinson, a proposal was developed to further consider the application if the plaintiffs' citrus farm could be liquidated to secure a debt reduction of the proposed advances in the order of approximately $400,000 within "no more than 6 months".[48]

[45] Mr Schaumburg's file note of the meeting reveals he advised Mr McIntosh that the plaintiffs' proposed debt load was too high and needed to be reduced by approximately $400,000 by the early sale of a non-income producing asset.[49] The file note records Mr McIntosh spoke of another bank's approval of a similar advance under which it would allow him 12 months to sell his spare land and reduce the debt. The file note records Mr Schaumburg's response as follows:

> "I acknowledged this, however advised that if we were to relent from an immediate sale, it would be for a period of no more than 6 months. I further advised that the bank was committed to a process of sale and debt reduction of $400K approx over this period and would not extend the facility at all."[50]

[46] Mr Bath wrote of this meeting the following day that it had been made very clear to Mr McIntosh that the bank was not prepared to waive the condition requiring the debt reduction within six months.[51] In giving evidence Mr McIntosh accepted this was true[52] and that he had been made aware that the defendant would require repayment of the $410,000 loan within six months with the repayment money being raised through the sale of all or part of the plaintiffs' land.[53] However, he said he did not tell his wife about it because he knew she would not be pleased.[54]

[47] Against this background it is inherently implausible that Mr Bath would have dismissed as a mere formality the very arrangement that had been pivotal to the granting of the loan applications.

[48] Subsequent to the issue of the letters of offer of 9 October 1998, the plaintiffs attended the defendant's office in Townsville and discussed the offers with Mr Bath.

[49] Mrs McIntosh was the first in time to give evidence of what was said at the meeting (her evidence was taken before me on examination because of her ill-

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47 Ex 1 vol 1 tab 15.
48 Ibid.
49 Ex 1 vol 1 tab 17.
50 Ibid.
51 Ex 1 vol 1 tab 19.
52 T1-39 L44.
53 T1-13 L7.
54 T1-13 L16.

health and she had died by the time of trial). Unfortunately, Mr McIntosh was present in court during her evidence in chief. The plaintiffs each testified that when Mrs McIntosh realised the offers required them to sell $400,000 worth of real estate in six months she threw the paper away saying she would not sign something like that.[55] Discussion ensued, during which the Bath representation was allegedly made.

[50] The pleaded version of that representation is:

> "[Mr Bath] represented to the Plaintiffs words to the effect that provided the Plaintiffs placed "Citrus Farm" on the market for sale, the Bank would not enforce the requirement to repay the Commercial Lending Facility by 30 April, 1999, as the requirement was a "mere formality".[56]

[51] Mrs McIntosh gave evidence of an unqualified representation to this effect:

> "…this is only a formality clause anyhow. It makes you sort of want to sell real estate, otherwise you'll sort of drop back and won't sell. …because it's only a formality clause, I'm sure that the bank, after six months, will defer it, and until such time as you sell your real estate."[57]

[52] She initially claimed Mr Bath had guaranteed nothing would come of the clause[58] but later explained Mr Bath did not actually say the word "guarantee" and she only believed that was what was meant.[59] She was unconvincing in rejecting the possibility that Mr Bath had qualified the representation.[60]

[53] In contrast, Mr McIntosh gave evidence of an obviously qualified representation:

> "[Mr Baths'] assurances to her was that it wasn't—it was more a formality clause, that when the time came it would be extended and he felt that there was no worry about having to sell. He said that so long as the motel was going satisfactorily and the accounts were in order that they would extend it to—there was no mention of whether it would be six months, or 12 months, but he said they would not be enforced."[61] (emphasis added)

[54] Mr McIntosh's evidence of Mr Bath's representation is different from the essentially unconditional representation pleaded by the plaintiffs. Furthermore, the qualifications it refers to are also strikingly similar to those recorded by Mr Bath in a file note of 4 August 1999 in which he said what he told the plaintiffs at the meeting:

> "The McIntoshs had the letter of offer explained to them including the special conditions. In particular the condition

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55 E1-7 L6.
56 SOC [8].
57 E1-7 L40.
58 E1-7 L43.
59 E1-8 L20, L30.
60 E1-18 L30.
61 T1-15 L20.

> regarding the sale of the farm within a 6 month period was explained to them. …
>
> The only indication that was given to the McIntoshs that this period of time given to sell the farm may be extended, was if in the event that the Motel was trading profitably and all facilities were in order. It was stressed that the bank wanted the farm sold and this was certainly not the preferred option."[62] (emphasis added)

[55] The striking similarity between the above emphasised passages provides powerful evidence that in fact Mr Bath did not assure Mr and Mrs McIntosh that an extension would be given or that it would be a mere formality. Rather, it is persuasive evidence that they were told consideration would only be given to an extension if the motel was trading profitably and the loan accounts were in order.

[56] It is also evidence that confirms the impression arising in any event from Mrs McIntosh's evidence that her recollection of what was said by Mr Bath was unreliable. That is not to suggest she was dishonest. It would be unsurprising if the accuracy of her recollection, about which she had become dogmatic,[63] was distorted by the prolonged and polarising nature of this dispute.

[57] The plaintiffs' two sons recounted conversations they had with Mr Bath subsequent to the alleged representation when he visited their farm for their parents to sign the acceptance of the loan offers. According to James McIntosh, Mr Bath told him that the plaintiffs would have to sell one of their properties within six months.[64] That Mr Bath said such a thing is inconsistent with him having previously represented to the plaintiffs that they would not have to sell within six months. James McIntosh's evidence of the balance of the conversation is of doubtful accuracy given Mr Bath's knowledge of the transactions to be signed and does not materially assist in determining what Mr Bath had earlier represented to his parents in the meeting at the defendant's office. Peter McIntosh gave evidence that when he challenged Mr Bath about the difficulty of being able to sell the property in time, Mr Bath said it was a formality and he could guarantee it would never be acted upon.[65] I do not accept this was a reliable recollection. It is likely the product of a memory contaminated by discussions with others and, indeed, the witness admitted he had discussed the conversation with his parents.[66] The evidence of the plaintiffs' sons does not assist in determining the content of the Bath representation.

[58] Mr Bath had no independent recollection of the conversation with the plaintiffs during which he made the alleged representation by the time of trial, however, he explained that he did not have any authority to represent that an extension

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62 Ex 1 vol 1 tab 26.
63 E1-18 L19; E1-22 L26.
64 T2-16 L17.
65 T2-21 L44.
66 T2-22 L32.

would be a mere formality and emphasised moreover that there was no reason why he would have said such a thing.[67] I accept that evidence. Mr Bath well knew the pivotal importance to the making of the loan offers of the condition requiring repayment of the CBF within six months.

[59] The probability is that the plaintiffs were not happy with the need for them to sell property in order to repay the CBF within six months but they badly wanted to obtain the loans so they could buy the motel. They obviously regarded securing a demanding loan arrangement as preferable to not having a loan at all. That they saw their choice in this light is borne out by Mr McIntosh's letter of 29 June 1999 to Michael Congram of the defendant's secured management asset division in which Mr McIntosh, in seeking an extension of the CBF loan for a further six months, said:

> "We felt and really knew from the word go that it would be almost impossible to sell the property in the time stated but were faced with the choice of accepting the proposal or losing the deal."[68] (emphasis added)

[60] The strong impression arising from the evidence is that as the McIntoshs came to regret their acquisition of the motel, and the financial problems it caused them, they increasingly came to blame the bank rather than their own poor judgement for the position in which they found themselves.

[61] It is noteworthy that in Mr McIntosh's letter to Mr Congram of 29 June 1999 he did not claim there had been any assurance given by Mr Bath that an extension would be given or that an extension would be a mere formality. Rather, he claimed only to have been given to understand that favourable consideration would be given to an extension if genuine efforts were made to sell.[69] This is entirely consistent with Mr Bath's version of events. In a similar vein, the plaintiffs' solicitor wrote on 13 July 1999 to the defendant claiming only that Mr Bath had represented that the defendant "would look favourably at an extension".[70] However, by the time of his letter to the Banking Ombudsman of 7 August 1999, Mr McIntosh recounted the representation as if it was entirely unconditional, claiming Mr Bath had said "the clause was not a problem and that at the end of six months the term would be extended without any problems".[71]

[62] While Mr McIntosh did at least acknowledge in his testimony at trial that Mr Bath's representation was conditional, he too was dogmatic about the accuracy of his memory.[72] As with his wife, it appeared his memory had likely been contaminated by discussions between them over the years.[73] I did not accept his account of the alleged representation as reliable in all respects. In particular, I did not accept as reliable his assertion that Mr Bath said the requirement was a mere formality clause, that it would be extended and that it would not be

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67 T2-36 L42.
68 Ex 1 vol 1 tab 47.
69 Ibid.
70 Ex 3.
71 Ex 1 vol 2 tab 117.
72 T1-36 L35; T1-41 L30.
73 T1-36 L40 to T1-37 L5; T2-22 L32.

enforced if the motel was going satisfactorily and the accounts were in order. For the reasons already explained, Mr Bath would not have dismissed the clause as a mere formality and would likely only have gone as far as saying the period may (not would) be extended if the conditions mentioned were met. The latter conclusion also is supported by Mr McIntosh's above-mentioned allusion to favourable consideration in his letter to Mr Congram.

[63] The plaintiffs attached particular weight in alleged support of their case to the following passage appearing in an internal memorandum of the defendant of 9 September 1999:

> "Branch have advised that they advised the customers that consideration to extend the term of this facility would be given if the accounts were kept in order, genuine efforts to sell certain property had been made and customers were to achieve improved profitability of their various businesses."[74]

[64] The plaintiffs' counsel attached significance to the word "would" in the above passage as impliedly admitting Mr Bath had represented the defendant would not enforce the requirement to repay by 30 April 1999.[75] However, that submission ignores the presence in the above passage of the word "if". That is, the submission ignores the qualifications on the representation that the accounts would have to be kept in order, genuine efforts to sell certain property would need to be made and the plaintiffs would need to achieve improved profitability of their various businesses. Moreover, as the above passage demonstrates, the defendant only represented that "consideration…would be given" to an extension, not that an extension would be given. On no view could this be regarded as an assurance.

[65] In substance the above passage is not significantly different from Mr Bath's own file note on the topic.[76]

[66] I find the Bath representation did not occur as pleaded. I find Mr Bath told Mr and Mrs McIntosh that the bank would only consider an extension of the six month period for repayment of the CBF if they were attempting to sell their property and the motel was trading profitably and the loan accounts were in order.

[67] Counsel for the plaintiffs contended, relying on reasoning in *Legione v Hateley*,[77] that even if the representation accorded with Mr Bath's file note record and was not intended as an assurance, it was still capable of being understood as an assurance that the period would be extended and the McIntoshs acted on it with that understanding. That is, it was submitted the McIntoshs had been "lulled" into believing it would not be necessary to sell the property to repay the CBF within six months.

[68] The plaintiffs went on to submit that the lulling effect of the representation put them in a position of situational disadvantage. The plaintiffs' counsel submitted

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74 Ex 1 vol 1 tab 70 p 2.
75 T3-47 L20.
76 Ex 1 vol 1 tab 26.
77 (1982-1983) 152 CLR 406, 449-450.

they were lulled into believing the clause did not make it necessary to sell by 30 April and thus entered into a situation where they were unable to act to conserve their own interests.[78]

[69] In *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd*[79] the Federal Court observed that under the rubric of unconscionable conduct equity will:

> "Set aside a contract or disposition resulting from the knowing exploitation by one party of the special disadvantage of another. The special disadvantage may be constitutional, deriving from age, illness, poverty, inexperience or lack of education—*Commercial Bank of Australia Ltd v Amadio*.[80] Or it may be situational, deriving from particular features of a relationship between actors in a transaction such as the emotional dependence of one on the other—*Louth v Diprose*;[81] *Bridgewater v Leahy*[82]."

[70] The latter type of case was described in *ACCC v CG Berbatis Holdings P/L*[83] as one "where unconscientious advantage has been taken by one party of the disabling condition or circumstances of the other."

[71] However, as was explained by Mason J in *Commercial Bank of Australia Ltd v Amadio*[84] it is necessary that the innocent party be at a "special disadvantage" of which unfair or unconscientious advantage is then taken. Mere disadvantage in the bargaining power of the parties is not enough. The adjective "special" is used "to emphasise that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests".[85]

[72] The plaintiffs' counsel submitted the disabling condition or circumstance that the defendant here knew of was that it was not possible for the plaintiffs to sell their property within six months.[86] The plaintiffs have failed to establish, however, that the defendant had any such knowledge either at the time of the making of the alleged representation or in the six months following it. The bare fact that the plaintiffs failed to sell the property within six months is not evidence that it was impossible, or that the defendant knew it was impossible, to sell the property within that period. Moreover, this is not a case in which the plaintiffs led evidence of a concerted sales campaign marketing the property at a price at which it should readily have sold but did not sell due to unforseen circumstances. Such evidence as there was on the topic merely indicated that the plaintiffs had engaged an agent to sell the property and that the only offers received had been markedly below the sale price set by the plaintiffs. The fact

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78 T3-55 L35-42.
79 (2002) 117 FCR 301, 318.
80 (1983) 151 CLR 446.
81 (1992) 175 CLR 621.
82 (1998) 194 CLR 457.
83 (2003) 214 CLR 51, 74.
84 (1983) 151 CLR 446, 462.
85 Ibid; as was emphasised by Gummow and Hayne JJ in *ACCC v CG Berbatis Holdings P/L* (2003) 214 CLR 51, 77.
86 T3-57 L20.

that the property ultimately sold for a price substantially below that figure strongly suggests that during the relevant six month period the McIntoshs had not priced the property at a level likely to promote a prompt sale.

[73] In truth, the plaintiffs were not in a position of "special" disadvantage at all. They were well experienced in commerce.[87] At worst they were in an inferior bargaining position in the sense that they were so keen to obtain finance in order to buy the motel but their financial position was so weak that they could not secure finance on generous terms. Here, as with the respondents in *ACCC v CG Berbatis Holdings P/L*, the fact that the plaintiffs were in an inferior bargaining position did not mean they lacked the capacity to make a judgment about their own best interests and they were not under any disabling condition which affected their ability to make a judgment as to their own best interests.

[74] Furthermore, the plaintiffs had not been lulled into believing from what Mr Bath had said that the six month period would be extended. They well knew the importance to the whole loan arrangement of the timely repayment of the CBF and that what Mr Bath had said fell substantially short of an assurance that an extension would be given. A representation that the defendant would be prepared to give consideration to an extension is considerably different from a representation that an extension would be given. The plaintiffs also well knew from what Mr Bath had said that to have any prospect of an extension they would not only have to attempt to sell their property but would have to have the loan facilities in order and be able to demonstrate the motel was trading profitably.

[75] In the circumstances it is unnecessary to analyse the significance of a point made by the defendant's counsel that the bank actually did extend the six month period notwithstanding the problems with the motel's trading profitability and consequential problems in meeting repayments under the loan facilities.

[76] The plaintiffs have failed to prove the Bath representation as pleaded and failed to prove that any representation by Mr Bath put them in a position of disadvantage of which the defendant unconscientiously took advantage.

Unreasonable refusals to capitalise interest repayments

[77] Turning to the other complaint - that the defendant twice unreasonably refused to capitalise interest repayments - clause 5.1(d)(iii) of the TCF states:

> "Provided you obtain the prior written approval of the Bank you may defer the payment of interest and repayments of principal for a period or periods not exceeding twelve (12) months in aggregate during the term of the Facility. At the expiry of any such period:
>
> - interest which has accrued will be capitalised and added to the outstanding principal;
> - the term of the Facility will be automatically extended by the length of such period; and

[87] T1-9 & 10; T1-35 L35; Ex 1 vol 1 tab 14.

- the repayment schedule shall be recalculated without cost to you."[88]

[78] The defendant submitted clause 5.1(d)(iii) only had potential application to requests to capitalise interest "and" principal, not requests to only capitalise interest. I reject that submission. The context of the clause and the broader agreement suggests the clause had potential application to requests in respect of interest, in respect of capital and in respect of both interest and capital.

[79] The plaintiffs plead they sought relief from interest payments in reliance upon that clause in or about February 1999 by oral request by telephone to Mr Bath and in or about February 2000 by letter of 25 February 2000 to Mr Congram.[89] In each instance they characterise the request as a request to capitalise interest and plead the request was unreasonably refused.[90]

The first request

[80] As to the first request, Mr McIntosh explained that in February 1999 in the wake of the motel's significant reduction in income because of the impact of a cyclone, he telephoned Mr Bath indicating he wanted to use clause 5.1(d)(iii) to defer the payment of the interest that would be due at the end of the month.[91] The terms of that request were reiterated in a follow up undated letter as follows:

> "As explained over the phone I would like to defer our interest payment due at the end of the month as per Page 5 item (d)(iii) Letter of Approval 22/9/98."[92]

[81] That reference to a letter of approval of 22 September 1998 was presumably a reference to a letter of offer dated 22 September 1998, which was replaced by the letter of offer of 9 October 1998.[93] In any event it is tolerably clear Mr McIntosh was referring to clause 5.1(d)(iii).

[82] The defendant did not give approval, in writing or otherwise, to the above request. The plaintiffs' contention that the refusal of that request was unreasonable is unsustainable. Given the loan arrangements had only been underway for about three months the defendant's decision not to approve that request was unremarkable.

[83] However, whilst the defendant did not grant an approval of the kind contemplated by clause 5.1(d)(iii), whereby interest would be deferred and capitalised and added to the outstanding principal, it did defer the deadline for the payment of the February interest. It did this by a letter to the plaintiffs of 24 February 1999 in which it wrote:

> "Due to the recent establishment of the account, Suncorp-Metway would only be prepared to defer the February repayment

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88 Ex 1 vol 1 tab 2 p 5.
89 SOC [14].
90 Ibid [15]-[16].
91 T1-18 L38, T1-20 L17.
92 Ex 1 vol 1 tab 38.
93 Ex 1 vol 1 tab 2.

> until 26 March at which time we would need to review your trading position to consider further deferral.
>
> I would also remind you of the need to have your farming property sold no later than April 1999, in line with our original approval."[94]

[84] The plaintiffs submitted for an inference that the intention of the parties as manifested by the contract itself was that the defendant was obliged to approve a request made pursuant to clause 5.1(d)(iii).[95] Reliance was placed upon *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*[96] where Mason J, when referring to the general rule of contractual construction that the parties agree by implication to do all such things as are necessary to secure performance of the contract, observed:

> "It is easy to imply a duty to cooperate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a duty to cooperate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself."

[85] In the present case, far from manifesting an intention that the plaintiffs had an entitlement to defer and capitalise interest, the contract manifested an intention that the plaintiffs should make monthly repayments of either interest or interest and capital when due.[97] That intention was manifest not only from the stipulation as to monthly repayments but from the condition that failure to pay interest in full by the due date would attract interest accruing at 3 per cent higher than the interest rate otherwise payable.[98]

[86] The arrangement contemplated by clause 5.1(d)(iii) was an exception to the norm. The clause specifically required the defendant's prior written approval. It was the defendant, not the clause, which determined whether the benefit of a deferral and capitalising of interest would occur. That is unsurprising. A financial institution would be unlikely to intentionally expose itself to an obligation to automatically grant client requests to defer and capitalise interest payments. By ensuring that the decision whether or not to defer and capitalise

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94 Ex 1 vol 1 tab 40.
95 T3-64 L10.
96 (1979) 144 CLR 596, 607-608.
97 Ex 1 vol 2 tab 2 [4.1].
98 Ex 1 vol 2 tab 2 [3.4].

interest payments was one reserved to the defendant, that is, by requiring the defendant's written approval, the contract allowed the defendant to exercise its own discretion dependent upon the prevailing circumstances. Here it is obvious the fact that the request was made so early in the life of the loan was a circumstance which weighed determinatively, and reasonably so, against the granting of the request for approval pursuant to clause 5.1(d)(iii).[99]

[87] The plaintiffs have not established that the first request was unreasonably refused.

The second request

[88] As to the second alleged unreasonable refusal to capitalise interest, Mr McIntosh gave evidence that by a letter of 25 February 2000 the plaintiffs requested the capitalising of interest.[100] The plaintiffs plead the letter "sought relief from interest payments in reliance upon clause 5.1(d)(iii) of the Letter of Offer".[101] The letter was not exhibited at trial and the defendant's pleading admitted the existence of the letter but not its terms. However, a letter of response by the defendant described the request in these terms:

> "We refer to your facsimile received 25 February 2000 requesting the Bank to capitalise interest commitments on your facilities for February 2000."[102]

[89] The defendant's letter declined the request. The plaintiffs contend their request was unreasonably refused.

[90] Approaching the matter on the basis the request was a request for approval pursuant to clause 5.1(d)(iii) the issues in respect of the alleged unreasonableness of this refusal are not materially different to those already canvassed in respect of the first refusal.

[91] The request was made about a year after the first request, so it was not as alarmingly early in the life of the loan as the first request. However, by that time the plaintiffs had failed to sell their property by the deadline of 30 April 1999 and by the extended deadline of 30 September 1999. Despite the defendant having offered the plaintiffs a proposal for debt reduction, including the capitalising of arrears,[103] in return for not taking recovery action and being released from any claims, the plaintiffs had not executed the deed of forbearance relating to that proposal. In fact, the same letter that declined the request to capitalise interest repayments contained a reminder that the plaintiffs should execute the deed of forbearance.[104] It was hardly unreasonable that the defendant would decline the request given matters had reached the stage where, despite extensions, the plaintiffs had not complied with the condition of both loan agreements that the CBF be repaid in full and had not agreed to the defendant's proposal for debt reduction.

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99 Ex 1 vol 2 tab 40 p 262.
100 T1-31 L10.
101 SOC [14].
102 Ex 1 vol 2 tab 94.
103 Per clause 7.3 of the Deed of Forbearance ex 1 vol 2 tab 83.
104 Ex 1 vol 2 tab 94.

[92] The plaintiffs have not established that the second request was unreasonably refused.

Failure of claim

[93] It follows that none of the defendant's conduct put the plaintiffs in a position of disadvantage in the way pleaded and that the defendant did not unconscientiously take advantage of such disadvantage. The plaintiffs' claim must fail.

[94] It is therefore unnecessary to determine arguments of the defendant that if it were liable in damages no damages should be awarded because no loss actually arose out of its conduct because the plaintiffs were in any event in default under the TCF prior to the conduct complained of and because the plaintiffs' claim fails to take into account the principal still owed to the defendant.

Accord and Satisfaction?

[95] Despite the failure of the plaintiffs' claim it is prudent to briefly address an argument of the defendant that the plaintiffs were not entitled to relief in any event because of the resolution of their complaint to the Ombudsman in the form of the Heads of Agreement[105] constituted a release or an accord and satisfaction and is thus a complete defence to the plaintiffs' claim.

[96] The essence of accord and satisfaction is the acceptance by a potential plaintiff of something in place of a potential cause of action.[106] It is necessary to construe the agreement in issue to see whether its effect is to discharge the potential cause of action absolutely so that the potential plaintiff can never sue on it.[107] As was emphasised in *Blue Moon Grill Pty Ltd v Yorkey's Knob Boating Club Inc*[108] it is important to focus on that which the parties have agreed. In that matter, in contrast to the present, there was a clause expressly referring to settlement of existing proceedings and discharge and release from any actions, claims or demands.

[97] The defendant's argument confronts the formidable difficulty that the Heads of Agreement contained no words conveying an acceptance that it was in substitution of other rights such as a cause of action against the bank over its allegedly unconscionable conduct. There were no words to the effect that the agreement was entered into in satisfaction of any dispute between the parties arising out of their conduct in connection with the CBF and TCF.

[98] The defendant raised the idea of a full release being entered into with Mrs McIntosh and her lawyer in a meeting on 14 September 1999, almost a year before the Heads of Agreement was entered into. At that meeting there was an attempt to negotiate a proposal for debt reduction. The defendant also sought confirmation the plaintiffs would withdraw their claims raised with the Ombudsman. A memorandum of the defendant about that meeting notes:

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105 Ex 1 vol 2 tab 130.

106 *McDermott v Black* (1938) 63 CLR 161, 183.

107 *Scott v English* [1947] VLR 445, 453.

108 [2006] QCA 253 [20].

> "It was explained that the Bank would require a full release from all present and future claims and that any further negotiations would be incorporated in a formal Deed of Forbearance."[109]

[99] The defendant, a major financial institution, was no commercial novice. As the above memorandum illustrates it well knew the value of a full release and it is inherently unlikely one would not later have been expressly included in the Heads of Agreement had mutual agreement been reached. On the other hand the defendant would have appreciated the absence of such an agreement did not render the agreement of no use. The defendant would have been hopeful of least resolving the complaint to the Ombudsman and would also have hoped to gain a timely and orderly separation from its commercial involvement with the plaintiffs through the Heads of Agreement.

[100] Against this background and having regard to the words of the agreement there was no term implied by the Heads of Agreement that it constituted a release or accord and satisfaction. It therefore would not have constituted a successful defence if the plaintiffs' claim been established.

Set-off and counterclaim

[101] The defendant pleads that by set-off or counterclaim the plaintiffs are indebted to it. Given the failure of the plaintiffs' claim, the disposition of this feature of the case is appropriately dealt with as a potential award by counterclaim rather than a set-off.

[102] The plaintiffs resisted the set-off and counterclaim on essentially two bases. The first is that an order should be made pursuant to s 12GM(7)(c) of the *Australian Securities and Investments Commission Act* 2001 (Cth) which empowers the court to refuse to enforce a contract to prevent or reduce the loss or damage suffered by a contravention of the division dealing with unconscionable conduct. However, the plaintiffs are not entitled to such an order for the same reasons that their claim has failed – there was no unconscionability.

[103] The second basis pleaded to resist the set-off and counterclaim was the delay in the defendant's assertion of it. Leave was previously given allowing the defendant to amend its pleadings to permit the pleading of the set-off and counterclaim, a development prompted by a very significant change in the plaintiffs' own pleadings. It is not appropriate in this decision to in effect review the propriety of that earlier decision in the life of this litigation. Ultimately, the plaintiffs' counsel did not press this aspect of his pleading in submissions.[110]

[104] It follows the defendant is entitled to succeed in laying claim to such debt as was proved to be owing to it by the plaintiffs. Care is required in identifying the evidentiary foundation for the calculation of that debt.

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109 Ex 1 vol 1 tab 73 p 1.

110 T4-24 L8.

[105] Dealing firstly with the liquidation of the secured properties, it is apparent from admissions made on day three of the trial[111] that the gross proceeds of sale:

(a) of the citrus farm was $550,000;
(b) of the Malanda Lodge Motel was $545,000; and
(c) of the Mud Hut Hotel was $520,000.

Further, it is apparent from exhibit 2 that the gross proceeds of sale of the Rockhampton property was $18,500.112

[106] Whilst the plaintiffs only had two-fifth shares in both the Mud Hut Hotel and the Rockhampton property,[113] the other owners guaranteed the remaining three-fifths and the defendant pleaded its own case conceding it gained the entire benefit of the sales of the secured properties. Thus, the gross sale proceeds raised by the defendant from the secured properties was $1,633,500, being the total of the above four figures.

[107] It was admitted at trial that the sale costs for the properties totalled $21,626.[114] Therefore, the net sale proceeds raised by the defendant from the secured properties was $1,611,874 ($1,633,500 - $21,626).

[108] As to the amounts proved to be owing to the defendant, it is tolerably clear from exhibit 8, a monetary schedule of the loan transactions tendered by consent, albeit without evidentiary explanation,[115] that none of the total loan capital of $1,660,000 advanced to the plaintiffs was ever repaid. The evidence shows the defendant wrote some parts of that amount off, however, that is irrelevant for present purposes as the writing off obviously occurred as part of the defendant's own accounting and financial reporting processes. The writing off of a debt for accounting purposes does not operate to extinguish the liability of the debtor – the former is legally distinct from the latter.[116]

[109] It was admitted at trial that the total unpaid non-default standard interest under the TCF and CBF was $173,008.78.[117]

[110] The defendant's counterclaim also includes a claim for "unpaid default interest in the sum of $27,855.71".[118] There was no admission at trial as to the total interest owing under the default interest rate. However, it was admitted in the pleadings that default interest was accounted in favour of the defendant during the course of the receivership in respect of the TCF loan in the amount of $27,855.71.[119] A schedule annexed to the plaintiffs' pleadings in this context contains information, most of which was proved through the tender of exhibit 8. That exhibit, considered in conjunction with the matters admitted in the pleadings and in the light of the defendant's entitlement to default interest as proved by the exhibited loan documents, establishes on the balance of

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111 T3-6.
112 Ex 2 tab 10.
113 T3-7 L35-42.
114 T3-7 L11.
115 T3-5 L19.
116 *Point v Federal Commissioner of Taxation* (1970) 119 CLR 453.
117 T3-7 L6.
118 Third Amended Defence of the Defendant ("DEF") [29].
119 SOC [25]; DEF [25].

probabilities that there is unpaid default interest owing of at least the amount claimed by the defendant.

[111] The calculation of the counterclaim also includes an amount of $209,125.15 for professional costs of the receivership. The defendant was entitled pursuant to the credit facility deed[120] to be indemnified by the plaintiffs for all losses incurred in the exercise of its powers under the deed and in respect of its dealings in relation to the mortgaged properties. It was prima facie entitled to payment by the plaintiffs of professional fees incurred by it in consequence of the receivership.

[112] There was no admission at trial as to the solicitor's and receiver's fees incurred by the defendant in connection with the receivership. The source of the pleaded amount commences in the plaintiffs' pleading to this effect:

> "25. In the premises, the Plaintiffs have suffered loss and damage being:
>
> Those moneys as appropriated or accounted in favour of the Defendant, as pleaded in paragraph 24 and ought to have been repaid as pleaded in paragraph 24B: …
>
> (c) (i) Receivers fees (as per attached schedule marked 'C') - $146,005.26
>
> (ii) Clayton Utz fees in respect of the receivership as per attached schedule marked 'D' - $39,635.70
>
> (iii) Miscellaneous fees (as set out in schedule 'E') - $23,484.19
>
> Total 25(c)(i), (ii) and (iii) $209,125.15 …)"[121]

Schedules C, D and E identified GST reductions totalling $18,978.66 which with rounding would reduce the above total to $190,146.50.

[113] The defendant's response was to plead:

> "25. As to paragraph 25 of the Second Further Amended Statement of Claim, the Defendant: …
>
> (c) admits the Receivers fees, Clayton Utz fees in respect of the Receivership, miscellaneous fees of the Receivership, less GST recoveries totals $190,146.50 ("Professional Costs") …"[122]

[114] By the above pleadings it was not established that the professional costs had been validly incurred. However, the Second Amended Reply admitted that the legal and other professional fees were validly incurred, reserving for dispute the

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120 Ex 1 vol 1 tab 3
121 SOC [25].
122 DEF [25].

argument that they were unconscientiously claimed by reason of the matters raised in the plaintiffs' claim.[123] That argument has failed but the admission the fees were validly incurred ensures the success of this feature of the counterclaim. That admission, in respect of such a large amount, would not have been made lightly. It relieved the defendant from the burden, cost and time of proving an important but apparently uncontentious fact.

[115] The upshot is that the defendant is on the balance of probabilities entitled to reimbursement from the plaintiffs of the above professional costs of the process triggered by the plaintiffs' default. I am fortified in reaching that conclusion by the plaintiffs' counsel's concession in the course of submissions that the quantum of the counterclaim "seems to be correct".[124]

[116] The defendant is owed $2,051,010.99, consisting of:

(a) $1,660,000 unpaid loan capital;
(b) $173,008.78 unpaid standard interest;
(c) $27,855.71 unpaid default interest; and
(d) $190,146.50 professional costs;

less $1,611,874 net sale proceeds.

[117] That is, the defendant is owed a total of $439,136.99 ($2,051,010.99 - $1,611,874).

Orders

[118] In the course of submissions it was contemplated that the parties would be given an opportunity to be heard further as to the calculation of interest on any judgment given and as to costs.

[119] My orders are:

1. The plaintiffs' claim is dismissed.

2. Judgment for the plaintiff by counterclaim (Suncorp-Metway Ltd) in the sum of $439,136.99 plus interest to be determined.

3. I will hear the parties as to the calculation of interest and as to costs.

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123 Second Amended Reply [7].
124 T4-20 L45.