# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Westpac Banking Corporation & Anor v Heslop & Anor (No 2)* [2020] QSC 256 |
| PARTIES: | **WESTPAC BANKING CORPORATION**<br>ACN 007 457 141<br>(first plaintiff)<br>**JULIE ANN WILLIAMS**<br>(second plaintiff)<br>**v**<br>**GRAHAM JOHN HESLOP**<br>(first defendant)<br>**PATRICIA MARGARET HARPER**<br>(second defendant) |
| FILE NO/S: | BS No 9751 of 2015 |
| DIVISION: | Trial Division |
| PROCEEDING: | Trial |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 21 August 2020 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 10 to 14 February and 1 May 2020<br>Further written submissions received on 8 May 2020 |
| JUDGE: | Bradley J |
| ORDER: | **The Order of the Court is that:**<br>**1. The first defendant pay to the first plaintiff the sum of $329,034.48.**<br>**2. The first defendant pay the first plaintiff's costs of the claim on the standard basis.**<br>**3. The counterclaim against plaintiffs is dismissed.**<br>**4. The first defendant pay the plaintiffs' costs of the counterclaim on the standard basis.** |
| CATCHWORDS: | GUARANTEE AND INDEMNITY – CONTRACT OF GUARANTEE – OTHER MATTERS – where the defendants held shares in a company that was indebted to the first plaintiff – where each defendant guaranteed the company's performance of its obligations to the first plaintiff – where the company was in monetary and non-monetary default under facilities the first plaintiff had extended to it – where the first plaintiff appointed the second plaintiff as receiver and manager of certain property of the company – |

where the first plaintiff demanded payment from each defendant pursuant to the guarantees they executed – where the first plaintiff obtained default judgment against the second defendant – where the first defendant filed a defence and counterclaim, in which he alleged various breaches of codes of conduct by each plaintiff – where the first defendant denies he is liable to the first plaintiff under the guarantee on which he is sued on account of the alleged breaches – whether either plaintiff committed any of the alleged breaches so that the guarantee on which the first defendant is sued is unenforceable

*Equititrust Ltd v Gamp Developments Pty Ltd & Ors* [2009] QSC 115, applied
*Jones v Dunkel* (1959) 101 CLR 298, applied
*National Australia Bank Ltd v Troiani* [2002] QCA 196, applied

COUNSEL: G Handran for the plaintiffs
The first defendant appeared on his own behalf

SOLICITORS: Gadens for the plaintiffs
The first defendant appeared on his own behalf

[1] The first plaintiff (**Westpac**) claims $329,034.48 from the first defendant (**Mr Heslop**). Westpac says Mr Heslop is the guarantor of a debt in this amount owed by Lonrae Pty Ltd (**Lonrae**) pursuant to a written guarantee and indemnity Mr Heslop executed on 24 June 2004 (the **Guarantee**).

[2] Lonrae is a company in which Mr Heslop and the second defendant (**Ms Harper**) held shares as trustees. Westpac obtained default judgment against Ms Harper on 16 December 2016 pursuant to a separate guarantee of Lonrae's debt and personal covenants in a mortgage. These reasons do not deal with her personal liability to Westpac.

[3] The second plaintiff (the **Receiver**) was the person Westpac appointed as receiver and manager of certain property of Lonrae (pursuant to a registered mortgage and a registered general security agreement), a residential property owned by Mr Heslop (pursuant to a registered mortgage) and an apartment owned by Ms Harper (pursuant to a registered mortgage). The Receiver made no claim against Mr Heslop in this proceeding.

**Outline of Westpac's claim and Mr Heslop's defence**

[4] In its pleading,[1] Westpac alleged facts that, if proved, would be sufficient to make good its claim against Mr Heslop.

[5] In his defence,[2] Mr Heslop admitted many of the facts alleged by Westpac and, by non-admissions, put Westpac to proof of the balance of its case, save for the final

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1 Further amended statement of claim filed 15 March 2019.

2 Additional further amended defence and additional further amended counterclaim of the first defendant filed 31 July 2019.

conclusionary plea: that Mr Heslop had failed to comply with demands, was in default under the Guarantee and owed Westpac the amounts due and unpaid from Lonrae.

[6] At the trial, Westpac proved the Guarantee by Mr Heslop, the various loans made to Lonrae, and the amount due and owing by Lonrae. By 15 March 2019, the amount owing was $329,034.48.[3] Westpac also proved its demands upon Mr Heslop to perform his obligations under the Guarantee and pay Lonrae's outstanding debt. Mr Heslop did not lead evidence to dispute any of these things.

[7] In his defence, Mr Heslop alleged Westpac had failed to comply with its obligations under various banking codes of practice[4] and that the Receiver had failed to comply with her obligations under receivers codes of professional practice. Mr Heslop denied that he was liable to Westpac under the Guarantee because of this alleged noncompliance. At the outset of the trial, Mr Heslop identified these as the only issues he pursued in the proceeding. His defence included other allegations. These are dealt with, briefly, towards the end of these reasons.

**Mr Heslop's failure to give evidence**

[8] Although Mr Heslop appeared at the trial, cross-examined witnesses called by Westpac and called witnesses in his own case, he gave no evidence himself. In the pre-trial reviews and directions hearings, Mr Heslop had said he would give evidence. This remained his position when he opened his case. It persisted when the court adjourned on the afternoon before he was scheduled to do so. On the day, he did not appear. The trial was adjourned, pending further information as to how he wished to proceed. Directions were made to allow him to provide his evidence in chief in writing and a date was fixed for the trial to resume some weeks later.

[9] Mr Heslop did not provide written evidence and he did not appear when the trial resumed. On 3 April 2020, he advised the court by email, "Moving forward I will not be calling myself to give evidence in this matter and I now rest my case."

[10] No explanation was offered for his failure to testify at the trial. His decision not to do so may lead rationally to an inference that his evidence would not have helped his case[5] and would not have thrown doubt on the correctness of any inference favourable to Westpac and the Receiver that was open on other evidence.[6] The natural inference is that Mr Heslop was afraid to give evidence, and so be exposed to cross-examination, because it would have exposed facts unfavourable to him.[7]

**Mr Heslop's earlier dealings with Westpac**

[11] Mr Heslop's first relevant dealing with Westpac occurred on 11 October 2001, when he accepted a $110,000 loan offer to fund part of the purchase price for the management letting rights (**MLR**) for a 36-unit building at Kangaroo Point known

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3 Under one facility, described later in these reasons as the BBBL, the amount owing was $286.751.94. The amount owing under another facility, described later in these reasons as the IPL, was $42,282.54.

4 There was some confusion on Mr Heslop's part about which version of the code applied: see [24] below.

5 *Jones v Dunkel* (1959) 101 CLR 298 (***Jones v Dunkel***) at 321 (Windeyer J).

6 Ibid at 308 (Kitto J).

7 Ibid at 320 (Windeyer J), quoting with approval John Wigmore, *Wigmore on Evidence* (Little, Brown & Co, 3rd ed, 1940) vol 2 at 162.

as Quinton Cottages. On 5 November 2001, Mr Heslop accepted a separate loan offer of $160,000 to fund part of the purchase price for the manager's unit at Quinton Cottages. Both purchases settled on 9 January 2002. To secure the loans, Mr Heslop granted Westpac a bill of sale over the MLR business and a mortgage over the manager's unit.

[12] Mr Heslop operated the MLR business at Quinton Cottages together with Ms Harper, who at the time was his spouse. Mr Heslop had previously operated a similar business at a building in Annerley known as Redbrick. Before then, going backwards in time, he had managed a hotel-motel accommodation business, been a licensed real estate agent, worked for the Residential Tenancies Authority and worked as a police officer.

**The signing of the Guarantee**

[13] On 24 June 2004, Mr Heslop executed the Guarantee upon which Westpac sues. In doing so, Mr Heslop agreed to guarantee "all liabilities and obligations" of Lonrae "now or in the future" under a business finance agreement dated 23 June 2004 (the **Burke BFA**) or under "any amendment or replacement to" it. He also agreed that the Guarantee would apply to "any other arrangement or obligation" he agreed was covered by it. Mr Heslop's liability under the Guarantee was initially limited to "$550,000 (or any other amount agreed in writing) plus amounts like government duties and charges, fees, costs, expenses and interest".

[14] By signing the Guarantee, Mr Heslop undertook to ensure Lonrae performed its obligations to Westpac, so that if Lonrae breached those obligations, Mr Heslop would breach his undertaking in the Guarantee.[8]

[15] The background to the execution of the Guarantee may be briefly stated.

[16] Lonrae had applied to Westpac for finance on 4 May 2004. Westpac had offered two loans on 9 June 2004. Ms Harper, Francis Everson and Alan Jones, who were the directors of Lonrae, provided personal guarantees to secure Lonrae's borrowing. In the written business finance request, the Quinton Cottages MLR business was listed as an "existing business" of Lonrae and the Quinton Cottages manager's unit as an "asset" of Ms Harper, even though both were owned by Mr Heslop personally. This likely explains why Westpac sought a guarantee from Mr Heslop to secure the loan to Lonrae.

[17] On 23 June 2004, Westpac and Lonrae had entered into the Burke BFA, by which Westpac agreed to make finance facilities worth $550,000 available to Lonrae. The Burke BFA involved two loans: $282,000 as a business development loan with a term of ten years to assist with the purchase of the MLR business for a 33-unit building at South Brisbane known as Burke Apartments; and $268,000 as a business access loan with a term of 25 years to assist with the purchase of the manager's unit in that building.

[18] On 24 June 2004, the day Mr Heslop signed the Guarantee, he also completed and signed a "Form of Acknowledgment" document (the **acknowledgment**) attached to

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8 It was a guarantee of the kind considered by Mason CJ in *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245 at 256.

the Guarantee. In it, he answered questions, by writing "Yes" or inserting a line if the question was not relevant.

[19] According to his answers in the acknowledgment, Mr Heslop understood that if he signed the Guarantee he may have to pay Westpac a lot of money to repay the debts of Lonrae and that, if Lonrae did not pay on time the money it owed to Westpac, then Westpac could demand that he pay the money in place of Lonrae or as well as Lonrae. He knew, if he did not pay that money to Westpac, then Westpac could sue him and enforce a mortgage or other security given by him. He understood Westpac could demand that he pay money to it if Westpac could not recover the money from Lonrae. He understood he should check for himself whether Lonrae would be able to pay its debts and get an accountant to check that for him.

[20] Despite pleading specific allegations about the execution of the Guarantee and of the variations of his liability under it, Mr Heslop gave no evidence about those matters. He also adduced no evidence about those matters from any of the witnesses he called.

[21] The Guarantee and the acknowledgement are the principal pieces of evidence about Mr Heslop's understanding of the effect of the Guarantee. There is also evidence in the form of an interview checklist completed by a Westpac officer, David Krogh, in which he recorded that he met Mr Heslop and personally gave him documents, including the Guarantee and a copy of the terms and conditions of the guaranteed transaction. The letters to Mr Heslop about each subsequent variation of his obligations under the Guarantee are also in evidence. Another Westpac officer, Paul Nesbitt, gave general evidence of compliance with the Banking Code in the execution by Mr Heslop of documents agreeing to variations to his obligations under the Guarantee.

[22] Mr Heslop pleaded that he signed his agreement to each of the variations to his obligations under the Guarantee "at the direction and insistence of" Ms Harper. He adduced no evidence of this.

[23] At some point, probably between 24 July and 24 September 2004, Westpac provided finance to Lonrae pursuant to the Burke BFA to assist with the purchase of the Burke Apartments MLR business and manager's unit. Lonrae used those funds to complete the purchase.

**Execution of the Guarantee and the Banking Code**

[24] In his defence and counterclaim, Mr Heslop referred to the "Banking Code of Practice 2003/2004", the "Code of Banking Practice … 2014" and the "current version 2019". The *Modified Code of Banking Practice 2004* (the **Banking Code**) had been published shortly before Mr Heslop executed the Guarantee. It superseded any former code. It was not superseded until after the last events the subject of his complaints, which occurred in December 2013. The succeeding 2014 code expressly applied only to new banking services provided after it was adopted. No such services are in issue in this proceeding. It follows that the Banking Code is the

relevant code of conduct for the purposes of determining matters raised by Mr Heslop's defence and counterclaim.[9]

[25] In his pleading, Mr Heslop alleged Westpac failed to comply with the Banking Code "regarding the ethical practices endorsed by their actions against" Mr Heslop and Ms Harper. He referred to many clauses, beginning with the introduction, clause 1.1:

> "This **Code** is a voluntary code of conduct which sets standards of good banking practice for **us** to follow when dealing with persons who are, or who may become, **our** individual and **small business** customers and their guarantors."[10]

[26] Mr Heslop then referred to the following parts of clause 2, entitled "Our key commitments to you":

> "2.1 **We** will:
>
> (a) …
>
> (b) promote better informed decisions about **our banking services**:
>
> (i) …
>
> (iii) if **you** ask **us** for advice on **banking services**:
>
> (A) by providing that advice through **our** staff authorise to give such advice;
>
> (B) by referring **you** to appropriate external sources of advice; or
>
> (C) by recommending that **you** seek advice from someone such as **your** legal or financial adviser;
>
> (c) …
>
> (d) provide information to **you** in plain language; …
>
> 2.2 **We** will act fairly and reasonably towards **you** in a consistent and ethical manner. In doing so **we** will consider **your** conduct, **our** conduct and the contract between us.

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9 In *Westpac Banking Corporation & Anor v Heslop & Anor* [2020] QSC 121, Westpac was refused leave to re-open its case to adduce evidence of when it adopted each code of conduct.

10 In the Banking Code, defined terms appear in bold. That emphasis is retained in these reasons. **We** means a bank which has adopted the Banking Code and **you** includes "any individual from whom **we** have obtained, or propose to obtain, a **Guarantee**".

2.3 In meeting **our** key commitments to **you**, **we** will have regard to **our** prudential obligations."[11]

[27] Next, Mr Heslop referred to clauses 4, 7 and 24.3 of the Banking Code, which are in these terms:

"**4 Retention of your rights**

In addition to **your** rights under this **Code**, **you** retain any rights **you** may have under Federal laws, especially the Trade Practices Act 1974, the Australian Securities and Investments Commission Act 2001 and Chapter 7 of the Corporations Act 2001, and under State and Territory laws, especially the Uniform Consumer Credit Code and Fair Trading Acts.

…

**7 Staff training and competency**

**We** will ensure **our** staff (and **our** authorised representatives) will be trained so that they:

(a) can competently and efficiently discharge their functions and provide the **banking services** they are authorised to provide; and

(b) have an adequate knowledge of the provisions of this **Code**."

…

"24.3 Even if **you** are in default, **we** will give **you** a statement on a loan account if it is practicable for **us** to do so. However, if it is not practicable (for example, because automatic statement generation is not available on defaulted accounts) **we** will inform **you** about the availability of statements, and the method of requesting them, and **we** will provide **you** with statements on request, in a timely manner."

[28] Mr Heslop pleaded no allegation of conduct in breach of any of these parts of the Banking Code. He adduced no evidence of any such conduct.

[29] Clause 25 deals with lending. Mr Heslop referred to clauses 25.1 and 25.2.[12] Clause 25.1 is in these terms:

"Before **we** offer or give **you** a credit facility (or increase an existing credit facility), **we** will exercise the care and skill of a diligent and prudent banker in selecting and applying **our** credit assessment methods and in forming **our** opinion about **your** ability to repay it."

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11 Mr Heslop's pleading also refers to clauses 2.4, 2.5, 2.6 and 2.7 of the Banking Code. There are no such clauses.

12 He also referred to clause 25.3. The Banking Code contains no such clause.

[30] There was no evidence that Westpac failed to exercise the care and skill of a diligent and prudent banker in its credit assessment of Lonrae or in forming its opinion about Lonrae's ability to repay either loan provided under the Burke BFA. There is no basis to find Westpac breached clause 25.1 of the Banking Code in that respect. Each of the later loans made by Westpac to Lonrae is considered separately in these reasons.

[31] Clause 25.2 is in these terms:

> "With **your** agreement, **we** will try to help **you** overcome **your** financial difficulties with any credit facility **you** have with **us**. **We** could, for example, work with **you** to develop a repayment plan. If, at the time, the hardship variation provisions of the Uniform Consumer Credit Code could apply to **your** circumstances, **we** will inform **you** about them."

[32] This clause deals with financial difficulties under an existing credit facility with Westpac. Lonrae had no prior facility. The Burke BFA was its first. In any event, Mr Heslop pleaded no allegation and led no evidence that Lonrae had any financial difficulties with the Burke BFA, so no issue about Westpac's compliance with clause 25.2 of the Banking Code arises.

[33] Mr Heslop also referred to clause 26, which is as follows:

> "**26 Joint debtors**
>
> 26.1 **We** will not accept **you** as a co-debtor under a credit facility where it is clear, on the facts known to **us**, that **you** will not receive any direct benefit under the facility.
>
> 26.2 **We** will, before signing **you** up as a co-debtor, take all reasonable steps to ensure that **you** understand that **you** may be liable for the full amount of the debt and what **your** rights are under clause 26.3.
>
> 26.3 If **you** are jointly and severally liable under a credit facility, **we** will allow **you** to terminate **your** liability in respect of future advances or financial accommodation on giving **us** written notice. This right only applies where **we** can terminate any obligation **we** have to provide further credit to any other debtor under the same credit facility."

[34] At all material times, Mr Heslop was a guarantor of Lonrae's obligations to Westpac. He was not a co-debtor. Clause 26 of the Banking Code is not relevant to Westpac's dealings with Mr Heslop as a guarantor of Lonrae's debts.

[35] Mr Heslop referred to most of the provisions in clause 28, which deals specifically with guarantees, as clause 28.1 explains:

> "This clause 28 applies to every guarantee and indemnity obtained from **you** (where **you** are an individual at the time the guarantee and indemnity is taken) for the purpose of securing any financial accommodation or facility provided by **us** to another individual or a

> **small business** (called a **"Guarantee"**), except as provided in clauses 28.15 and 28.16."

[36] As a business having fewer than 20 full time (or equivalent) people, Lonrae satisfied the definition of "small business" in the Banking Code. Mr Heslop was neither a commercial asset financing guarantor nor a director guarantor, so clauses 28.15 and 28.16 had no application. It follows that the other parts of clause 28 applied to the Guarantee.

[37] Clause 28.2 is in these terms:

> "**We** may only accept a **Guarantee** if **your** liability:
>
> (a) is limited to, or is in respect of, a specific amount plus other liabilities (such as interest and recovery costs) that are described in the **Guarantee**; or
>
> (b) is limited to the value of a specified security at the time of recovery."

[38] Mr Heslop's liability under the Guarantee was limited to $550,000 plus other liabilities, such as interest and recovery costs described in the Guarantee. Mr Heslop had acknowledged this. I am satisfied Westpac complied with clause 28.2 in accepting the Guarantee.

[39] Clause 28.3 provides:

> "A **Guarantee** must include a statement to the effect that the relevant provisions of this **Code** apply to the **Guarantee** but need not set out those provisions."

[40] The Guarantee had a front cover page. It began with the statement "The relevant provisions of the Code of Banking Practice apply to this Guarantee & Indemnity". This satisfied clause 28.3.

[41] Clause 28.4 of the Banking Code deals with disclosure obligations. In full, it provides:

> "**We** will do the following things before **we** take a **Guarantee** from **you**:
>
> (a) **we** will give **you** a prominent notice that:
>
> (i) **you** should seek independent legal and financial advice on the effect of the **Guarantee**;
>
> (ii) **you** can refuse to enter into the **Guarantee**;
>
> (iii) there are financial risks involved;
>
> (iv) **you** have a right to limit **your** liability in accordance with this **Code** and as allowed by law; and

(v) **you** can request information about the transaction or facility to be guaranteed ("**Facility**") (including any facility with **us** to be refinanced by the **Facility**);

(b) from 1 June 2004 **we** will tell **you**:

(i) about any notice of demand made by **us** on the debtor, and any dishonour on any facility the debtor has (or has had) with **us**, which has occurred within 12 months before **we** tell **you** this, and from 1 June 2005 within 2 years before **we** tell **you** this;

(ii) if there has been an excess or overdrawing of $100 or more on any facility the debtor has (or has had) with **us** which has occurred within 6 months before **we** tell **you** this, and from 1 February 2005 **we** will give **you** a list showing the extent of each of those excesses or overdrawings;

(c) **we** will tell **you** if any existing facility **we** have given the debtor will be cancelled, or if the **Facility** will not be provided, if the **Guarantee** is not provided;

(d) **we** will provide **you** with a copy of:

(i) any related credit contract together with a list of any related security contracts which will include a description of the type of each related security contract and of the property subject to, or proposed to be subject to, the security contract to the extent to which that property is ascertainable and **we** will also give **you** a copy of any related security contract that **you** request;

(ii) the final letter of offer provided to the debtor by **us** together with details of any conditions in an earlier version of that letter of offer that were satisfied before the final letter of offer was issued;

(iii) any related credit report from a credit reporting agency;

(iv) any current **credit-related insurance contract** in **our** possession;

(v) any financial accounts or statement of financial position given to **us** by the debtor for the purposes of the **Facility** within 2 years prior to the day **we** provide **you** with this information;

(vi) the latest statement of account relating to the **Facility** (and any other statement of account for a period during which a notice of demand was made by **us**, or a

dishonour occurred, in relation to which **we** are required to give **you** information under clause 28.4(b)(i)); and

(vii) any unsatisfied notice of demand made by **us** on the debtor in relation to the **Facility** where the notice was given within 2 years prior to the day **we** provide **you** with this information; and

(e) **we** will give **you** other information **we** have about the **Facility** (including any facility with **us** to be refinanced by the **Facility**) that you reasonably request but **we** do not have to give **you our** own internal opinions."

[42] Westpac satisfied the requirement of clause 28.4(a) by including a large box on the front page of the Guarantee, containing this bolded text:

"WARNING: THIS IS A VERY IMPORTANT DOCUMENT

You take a financial risk if you sign it. You may have to pay money owed by the Customer referred to on the next page.

You can refuse to sign it.

It can cover future Guaranteed Obligations as well as present ones.

You have a right to limit your liability in accordance with the Code of Banking Practice and as allowed by law. However, once you sign this document, this right is restricted. In many cases you will not be able to limit your liability any further, or you will still have significant liability. Ask your lawyer about this.

BEFORE YOU SIGN IT:

1. You should read it carefully.

2. You should check for yourself whether the Customer can and will pay its debts.

3. You can ask for information about the Guaranteed Obligations (including any facility with us to be refinanced by the Guaranteed Obligations).

4. You should see your own lawyer and financial adviser for advice on it and give them the information we give you. If you don't, you should wait a day before signing it."

[43] Westpac had not loaned any funds to Lonrae before the Burke BFA loan was advanced. So, before the Guarantee was sent to Mr Heslop, Westpac had not made any demand on Lonrae or dishonoured any facility provided to Lonrae and there had not been any excess or overdrawing by Lonrae on any Westpac facility. It follows there was nothing for Westpac to disclose under clause 28.4(b).

[44] Westpac provided Mr Heslop with a copy of the Burke BFA, which was the credit contract with Lonrae. It listed the related security contracts and the type of each

related security and the property secured or proposed to be secured. Mr Heslop was also given a copy of the final letter of offer to Lonrae. In this way, Westpac complied with clause 28.4(d).

[45] The Burke BFA stated that the new Burke BFA facility would not be provided if Mr Heslop did not give the Guarantee. This disclosure satisfied clause 28.4(c).

[46] There was no evidence that Mr Heslop requested any information from Westpac about the Burke BFA facility, other than that provided by Mr Krogh and the documents he gave Mr Heslop. There was no evidence of any failure to comply with clause 28.4(e).

[47] Clause 28.5 of the Banking Code is in these terms:

> "**We** will not ask **you** to sign a **Guarantee**, or accept it, unless **we** have:
>
> (a) provided **you** with the information described in clause 28.4 to the extent that that information is required by this **Code** to be given to **you**; and
>
> (b) allowed **you** until the next day to consider that information.
>
> **We** do not have to allow **you** the period referred to in clause 28.5(b) if **you** have obtained independent legal advice after having received the information required by clause 28.4."

[48] Mr Heslop acknowledged he had received a letter from Westpac with attached copies of the Burke BFA "and other documents/statements" and all other information he had asked for and other documents or statements he had requested. Mr Krogh recorded in the interview checklist that he pointed out or read to Mr Heslop the warning on the front cover of the Guarantee, recommended that he obtain legal advice and gave him the chance to take the documents away to read the Guarantee and the other documentation. According to the acknowledgment, Mr Heslop had read the Guarantee and the booklet with the "common provisions" carefully, had thought hard about whether to sign the Guarantee and had made his own decision to sign, not just because someone asked him to do so. He acknowledged that he had obtained the independent legal and accounting advice about the Guarantee referred to in the "Warning" box on the front cover. He stated he had waited at least a day to sign the Guarantee after receiving all the information Westpac had provided to him. These matters show there was compliance with clause 28.5.

[49] Clause 28.6 is as follows:

> "**We** will:
>
> (a) not give the **Guarantee** to the debtor, or to someone acting on behalf of the debtor, to arrange the signing (except a legal practitioner or financial adviser who is working for **you**); and
>
> (b) ensure that **you** sign the **Guarantee** in the absence of the debtor where **we** attend the signing of the **Guarantee**."

[50] As noted above, there was evidence Mr Krogh gave the documents directly to Mr Heslop. Mr Heslop's signature was witnessed by Lyndel Jones, who was the spouse of Lonrae director Alan Jones. Ms Harper gave evidence at the trial, but was not asked about the signing of the Guarantee. None of Ms Jones, Mr Jones and Lonrae's other then director, Mr Everson, was called as a witness. There was no evidence that a director of Lonrae was present when Mr Heslop signed the Guarantee.

[51] Ms Harper gave evidence of a meeting with Paul Nesbitt and Mr Heslop at a Woolloongabba coffee shop. Mr Nesbitt was a Westpac relationship manager, with responsibility for Lonrae's portfolio, from about 2006 to September 2013. Ms Harper recalled Mr Nesbitt asking Mr Heslop, "Do you need legal advice?" or "Have you got legal advice?" about some papers Mr Heslop was to sign. According to Ms Harper, Mr Heslop replied, "I get all my advice from Trish", i.e. Ms Harper. These documents cannot have included the Guarantee, as Mr Nesbitt was not the person who arranged for Mr Heslop to sign the Guarantee and he did not become involved in Westpac's dealings with Lonrae, Ms Harper or Mr Heslop until almost two years later.

[52] Mr Heslop called Mr Nesbitt as a witness. He did not recall the coffee shop meeting. Mr Heslop asked Mr Nesbitt whether he suggested Mr Heslop get legal advice before signing any documents, to which Mr Nesbitt answered, "Yes, I believe so." Mr Heslop also asked whether Mr Nesbitt complied with the Banking Code "in financing Lonrae" and Mr Nesbitt answered, "Yes, I believe I did."

[53] There was no evidence of any non-compliance with clause 28.6.

[54] Clause 28.7 provides:

> "**We** will also provide **you**, on request, with additional copies of any information described in clause 28.4(d) that **we** have given **you** and will do so:
>
> (a) within 14 days, if the original came into existence 1 year or less before the request is given; or
>
> (b) within 30 days, if the original came into existence more than 1 year before the request is given,
>
> except **we** do not need to do so if **we** have given the requested information within 3 months prior to the request."

[55] As there was no request by Mr Heslop for any other information about the Burke BFA facility, there was no failure to comply with clause 28.7.

[56] Clause 28.8 is in these terms:

> "**We** will ensure that a warning notice (substantially in the form required by section 50 of the Uniform Consumer Credit Code, and detailed in Form 4 of the Uniform Consumer Credit Code Regulations and which is consistent with this **Code**) appears directly above the place where **you** sign."

[57] On the execution page of the Guarantee, directly above the place where Mr Heslop signed, there was a further warning notice headed "**IMPORTANT**". It set out warnings in two columns. The first column was headed "**BEFORE YOU SIGN**", and read:

> "READ THIS GUARANTEE DOCUMENT AND THE CREDIT CONTRACT DOCUMENT
>
> You should also read the information we give you.
>
> You should obtain independent legal advice.
>
> You should also consider obtaining independent financial advice.
>
> You should make your own inquiries about the credit worthiness, financial position and honesty of the Customer."

[58] The second column was headed "**THINGS YOU MUST KNOW**", and read:

> "Understand that, by signing this guarantee, you may become personally responsible instead of, or as well as, the Customer to pay the amounts which the Customer owes and among other things, the reasonable expenses of the Lender in enforcing the guarantee.
>
> If the Customer does not pay you must pay. This could mean you lose everything you own including your home.
>
> You may be able to withdraw from this guarantee or limit your liability. Ask your legal adviser about this before you sign this guarantee.
>
> You are not bound by a new credit contract, that increases your liabilities under the guarantee unless you have agreed in writing or it is a replacement or variation of the Guaranteed Obligations."

[59] The warning notice was substantially in the form required by s 50 of the *Consumer Credit (Queensland) Act* 1994 (Qld), by reference to s 20(1) of the *Consumer Credit Regulation* 1995 (Qld). In this way, Westpac complied with clause 28.8.

[60] Clause 28.9 of the Banking Code provides:

> "**You** may, by written notice to **us**, limit the amount or nature of the liabilities guaranteed under the **Guarantee**, except that **we** do not have to accept such a limit if:
>
> (a) it is below the debtor's liability under the relevant credit contract at the time plus any interest or fees and charges which may be subsequently incurred in respect of that liability; or
>
> (b) **we** are obliged to make further advances or would be unable to secure the present value of an asset which is security for the loan (for example, a house under construction)."

[61] There was no evidence that Mr Heslop gave Westpac any written notice limiting the amount or nature of the liabilities he guaranteed under the Guarantee. So, no issue of compliance with clause 28.9 arises. Mr Heslop did not refer to clause 28.9 in his pleading.

[62] Clause 28.10 is in these terms:

> "**You** may, at any time, extinguish **your** liability to **us** under a **Guarantee** by paying **us** the then outstanding liability of the debtor (including any future or contingent liability) or any lesser amount to which **your** liability is limited by the terms of the **Guarantee** or by making other arrangements satisfactory to **us** for the release of the **Guarantee**."

[63] At no point in time did Mr Heslop pay Westpac the outstanding liability of Lonrae or the limit of his liability under the Guarantee, so as to raise any question about Westpac's compliance with clause 28.10. Mr Heslop did not refer to clause 28.10 in his pleading.

[64] Clause 28.11 is as follows:

> "**You** can, by written notice to **us**:
>
> (a) withdraw from the **Guarantee** at any time before the credit is first provided under the relevant credit contract; or
>
> (b) withdraw after credit is first provided, if the credit contract differs in a material respect from the proposed credit contract given to **you** before the **Guarantee** was signed, but only to the extent the **Guarantee** guarantees obligations under the credit contract."

[65] Mr Heslop did not give any written notice to Westpac withdrawing from the Guarantee before the credit was provided to Lonrae. Nor did he contend that the credit contract with Lonrae was materially different from that proposed before he signed the Guarantee. So, no issue about clause 28.11 arises. Mr Heslop did not refer to clause 28.11 in his pleading.

[66] Clause 28.12 concerns the enforceability of a third party mortgage in relation to a future credit contract or future guarantee. No issue of that kind was raised by Mr Heslop in this proceeding. Westpac sought judgment on the Guarantee and not on any mortgage given by Mr Heslop to secure the obligations of Lonrae to Westpac. Mr Heslop did not refer to clause 28.12 in his pleading.

[67] Westpac's compliance with clause 28.13 is considered below, in respect of each of the occasions on which Westpac sought Mr Heslop's agreement to a variation of his obligations under the Guarantee. The clause is in these terms:

> "A **Guarantee** given by **you** will be unenforceable in relation to a future credit contract unless **we** have:
>
> (a) given **you** a copy of the contract document of the future credit contract; and

(b) subsequently obtained **your** written acceptance of the extension of the **Guarantee**,

except to the extent the future credit contract (together with all other existing credit contracts secured by that **Guarantee**), is within a limit previously agreed in writing by **you** and **we** have included in the notice **we** give **you** under clause 28.4(a) a prominent statement that the **Guarantee** can cover a future credit contract in this way."

[68] As Lonrae was a small business, as noted above, clause 28.14 does not apply. Mr Heslop did not refer to clause 28.14 in his pleading.

[69] Clauses 28.15 and 28.16 do not apply, because, also as noted above, Mr Heslop was neither a commercial asset financing guarantor nor a director guarantor.

[70] Mr Heslop referred to clause 29 of the Banking Code. It required Westpac to comply with the Australian Competition and Consumer Commission guideline "Debt Collection and the Trade Practices Act" dated June 1999 when collecting debts. The guideline considered only the collection of debts from individual consumers. It did not deal with collecting business debts, such as those owed by Lonrae.

[71] The guideline contained "conduct principles" with directions on a range of matters from "communicating with the debtor at, or away from, their workplace" to "documentation and information". Mr Heslop made no allegations about any debt collection conduct by Westpac. There is no evidence of any failure by Westpac to comply with clause 29 of the Banking Code.

[72] Mr Heslop also referred to clauses 34 to 37 of the Banking Code.

[73] Clause 34 deals with the monitoring of a bank's conduct by a "Code Compliance Monitoring Committee" and the imposition of sanctions on a bank found to be in breach. Mr Heslop did not allege any conduct by Westpac in relation to that topic. So, there is no issue of any breach by Westpac of that provision.

[74] It appears Westpac had an internal and external dispute resolution system, as required by clauses 35 and 36. The evidence of Mr Heslop's more recent engagement with Westpac about this dispute is dealt with later in these reasons.

[75] Mr Heslop led no evidence about any breach of clause 37, which deals with the availability of evidence about the dispute resolution processes.

**Variations to the Guarantee and the Banking Code**

[76] There were four variations to Mr Heslop's obligations under the Guarantee.

***The first variation to the Guarantee***

[77] On 12 July 2007, Westpac wrote to Mr Heslop seeking his agreement to a variation of his obligations under the Guarantee, such that they would extend to Lonrae's obligations to Westpac under two new agreements: an investment property loan (the **IPL**), by which Westpac would advance $360,000 to Lonrae to assist with the purchase of the manager's unit in the 271-unit complex at Woolloongabba known as

Gabba Central; and a business finance agreement (the **Gabba BFA**), by which Westpac would make facilities worth $2,732,000 available to Lonrae. The Gabba BFA provided for a $2,532,000 commercial bill line for a term of 15 years to assist with the purchase of the MLR for the Gabba Central complex and a $200,000 business loan for a term of three months to cover the GST payable on the purchase of the MLR.

[78] With its letter, Westpac enclosed copies of its offers to Lonrae, dated 11 July 2007, in compliance with clause 28.13(a) of the Banking Code. Westpac advised Mr Heslop that, if he agreed to the variation, the limit of his liability under the Guarantee would be increased to $3,587,000, plus a further 20% to cover any unarranged drawing by Lonrae, plus amounts like government duties and charges, fees, costs, expenses and interest. This complied with cause 28.2 of the Banking Code.

[79] Lonrae had contracted to purchase the Gabba Central MLR some years earlier, before the complex was built. Discussions between Lonrae and Westpac about financing the acquisition had taken place over almost four years. Lonrae had accepted the offers of the IPL and the Gabba BFA.

[80] On 16 July 2007, Mr Heslop signed his agreement to the variation of the obligations he guaranteed under the Guarantee. He signed under a large-print bold heading, "***WARNING: This is a very important document***" and a statement that, "*You should see your own Lawyer and Financial Adviser before signing it.*" By obtaining Mr Heslop's written acceptance of the extension of the Guarantee, Westpac complied with clause 28.13(b) of the Banking Code.

[81] There was no evidence Westpac failed to exercise the care and skill of a diligent and prudent banker in its credit assessment of Lonrae or in forming its opinion about Lonrae's ability to repay the loans provided under the IPL and the Gabba BFA. So, there is no basis for a finding that Westpac breached clause 25.1 of the Banking Code in that respect.

[82] As well as the Guarantee, the IPL and the Gabba BFA were secured by mortgages Lonrae granted to Westpac over the manager's unit and another unit at Gabba Central, a bill of sale Lonrae granted over the Gabba Central MLR, a charge Lonrae granted over all of its assets and uncalled capital, and a guarantee and indemnity by Ms Harper (supported by a mortgage over a unit she owned at Gabba Central).

[83] On 27 July 2007, Westpac advanced $360,000 to Lonrae under the IPL to assist Lonrae with the purchase of the manager's unit in Gabba Central. It appears that at about the same time, Westpac advanced funds under the Gabba BFA to assist with the purchase of the MLR for stages 1 and 2 of Gabba Central and the associated GST. It appears the purchase price for the stage 1 and 2 MLR was $1.926 million. That price may or may not have included an amount on account of GST.

[84] In August 2008, Lonrae sold the MLR for stages 1 and 2 of Gabba Central for $2,840,000.[13] Of the sale proceeds, $600,000 was applied to the purchase of a property at 167 Chatsworth Road, Coorparoo (the **Coorparoo property**) in Mr Heslop's name. Most of the balance was applied to reduce the debt owed by Lonrae to Westpac, with the effect that the limit of the commercial bill line under the Gabba

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13 Lonrae retained its entitlement with respect to the MLR for stage 3 of Gabba Central.

BFA was reduced from $2,532,000 to $300,000. The debt of $360,000 under the IPL remained.

[85] Mr Heslop made no allegation and led no evidence that Lonrae had any financial difficulties with the Gabba BFA, so no issue about Westpac's compliance with clause 25.2 of the Banking Code arises.

***The second variation to the Guarantee***

[86] On 5 November 2008, Westpac wrote to Mr Heslop seeking his agreement to again vary his obligations under the Guarantee. There were two aspects to this variation.

[87] The first would extend Mr Heslop's guaranteed obligations to include Lonrae's obligations under a new business finance agreement (the **Parc BFA**), by which Westpac would make facilities worth $2,360,000 available to Lonrae. The Parc BFA provided for two loans: an increase in the existing commercial bill line (originally created by the Gabba BFA) from $300,000 to $2,190,000, with a term of one year and two months,[14] to assist with the purchase of the MLR business for a building complex on the edge of the Brisbane central business district known as Parc Apartments; and $170,000 as a business loan for three months to assist with the payment of GST on the purchase of the Parc MLR.

[88] The second variation was to extend Mr Heslop's guaranteed obligations to include Lonrae's varied obligations under the IPL. Also on 5 November 2008, Westpac had written to Lonrae to advise that a variation to the IPL had been approved, so that it would be secured by a new mortgage Mr Heslop would grant over the Coorparoo property.

[89] Westpac enclosed copies of the relevant offer of finance and letter of variation, in compliance with clause 28.13(a) of the Banking Code. Mr Heslop was advised that, if he agreed to the proposed variation, the limit of his liability under the Guarantee would be $2,720,000, plus a further 20% to cover any unarranged drawing by Lonrae, plus amounts like government duties and charges, fees, costs, expenses and interest.

[90] On 5 November 2008, Mr Heslop signed his agreement to the variation of the obligations he guaranteed under the Guarantee. Once again, he signed under a large-print bold heading, "***WARNING: This is a very important document***" and a statement that, "*You should see your own Lawyer and Financial Adviser before signing it.*" He did so twice: firstly in respect of the variation to extend to the Parc BFA; and secondly in respect of the changes to the IPL. By obtaining Mr Heslop's written acceptance of the extension of the Guarantee, Westpac complied with clause 28.13(b) of the Banking Code.

[91] There was no evidence that Westpac failed to exercise the care and skill of a diligent and prudent banker in its credit assessment of Lonrae or in forming its opinion about Lonrae's ability to repay the loan provided under the Parc BFA or the varied IPL. So, there is no basis for any finding that Westpac breached clause 25.1 of the Banking Code in this respect.

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14 The commercial bill line was to expire in December 2009.

[92] On 5 November 2008, Lonrae executed the Parc BFA and the letter of variation for the IPL. On 6 November 2008, Lonrae executed a bill of sale over Parc MLR business.

[93] On about 24 November 2008, Westpac provided the funds to Lonrae to purchase the Parc Apartments manager's unit, the Parc MLR and to pay the associated GST.

[94] As well as the Guarantee (supported by the Quinton Cottages securities and the new mortgage Mr Heslop had granted over the Coorparoo property) the Parc BFA and IPL were secured by a mortgage Lonrae granted over the manager's unit at Parc Apartments, bills of sale Lonrae granted over the Parc MLR and over the MLR for stage 3 of Gabba Central (which were under the sale contract that had yet to complete), the charge Lonrae granted over all its assets and uncalled capital, and a guarantee and indemnity granted by Ms Harper (supported by the mortgage over the unit she owned at Gabba Central).

***Nocturne Lane, Quinton Cottages, Boambillee Drive and Stage 3 Gabba Central***

[95] On 5 January 2009, Mr Heslop contracted to purchase a residential property at 15 Nocturne Lane, Coomera (the **Nocturne Lane property**) for $960,000. On 9 January 2009, he applied to Westpac for a personal loan of $1 million to fund the purchase. Westpac offered him the loan as a personal investment loan for one year with interest only repayments. On 28 January 2009, he executed a mortgage over the Nocturne Lane property in favour of Westpac. He also signed a Direct Debit Request / Loan Repayment form instructing Westpac to debit the account of Lonrae for the monthly repayments of the personal loan. On about 4 February 2009, he drew the loan and purchased the Nocturne Lane property.

[96] In March 2009, Mr Heslop sold the Quinton Cottages assets. Westpac must have released securities held over them, but no direct evidence of the sale was led.

[97] It appears Lonrae engaged in a lengthy exchange with the Australian Taxation Office about whether it should have paid any GST on the purchase of the Parc MLR, as it purchased directly from the developer. In any event, in July 2009, Westpac agreed to extend the existing commercial bill line facility under the Parc BFA from $2,190,000 to $2,360,000 and extinguish the $170,000 short-term business loan advanced for the GST.

[98] On 4 March 2010, a solicitor, Mr Neilsen, signed an independent solicitor's certificate addressed to Westpac stating that he had explained to Mr Heslop the general nature of the guarantee and indemnity he was proposing to give Westpac in respect of a loan to Lonrae and two other persons to purchase a property at 42 Boambillee Drive, Coomera (the **Boambillee Drive property**). On 2 March 2010, Westpac had offered Lonrae and the others two variable rate investment property loans worth a total of $600,000 to fund the purchase of the Boambillee Drive property. One loan was $220,000 and the other was $380,000. Mr Heslop gave the guarantee and offered the existing mortgages over the Coorparoo property and the Nocturne Lane property as security.

[99] On about 20 August 2010, the contract for the sale by Lonrae of the MLR for stage 3 of Gabba Central settled. The sale price was $2,500,000.[15] From the sale proceeds, an amount of $600,000 was placed on deposit until 2 September 2010, when it was paid to Mr Heslop's loan account to reduce the $1 million debt he owed Westpac for the purchase of the Nocturne Lane property. Another $55,130.89 was paid into the Lonrae business cheque account and applied as working capital in the operation of the Parc MLR business. It appears the balance of the sale proceeds was directed, at least in part, to reduce Lonrae's debt to Westpac under the commercial bill line facility under the Parc BFA.

[100] On 31 December 2010, Lonrae drew $1.66 million under a Bank Bill Business Loan from Westpac (the **BBBL**). It seems likely this facility was used to discharge the balance owed under the expiring commercial bill line facility under the Parc BFA.

[101] There was no evidence that Westpac failed to exercise the care and skill of a diligent and prudent banker in its credit assessment of Lonrae or in forming its opinion about Lonrae's ability to repay the BBBL facility. So, there is no basis for any finding that Westpac breached clause 25.1 of the Banking Code in this respect.

***The third variation to the Guarantee***

[102] On 29 August 2011, Westpac wrote to Mr Heslop seeking his agreement to a variation of his obligations under the Guarantee, such that they would extend to Lonrae's obligations to Westpac under another business finance agreement with Lonrae (the **Hub BFA**), by which Westpac would loan Lonrae $77,000 as a business loan and increase the limit of the BBBL by $903,034 to $2,596,000.

[103] Westpac enclosed a copy of its offers to Lonrae, in compliance with clause 28.13(a) of the Banking Code. Westpac advised Mr Heslop that, if he agreed to extend his liability under the Guarantee, then the limit of his liability under the Guarantee would be $3,039,378, plus amounts like government duties and charges, fees, costs, expenses and interest. This complied with clause 28.2 of the Banking Code.

[104] Lonrae had applied for the loan facilities on 30 June 2011 to help fund its proposed purchase of the MLR business at a building known as The Hub and the associated manager's unit. The purchase price for both assets was $1,350,000. On 29 August 2011, Westpac had offered the Hub BFA, including the increase to the BBBL, to Lonrae.

[105] On 5 September 2011, Mr Heslop signed his agreement to the variation of the obligations he guaranteed under the Guarantee. He did so, once again, by signing under a large-print bold heading, "***WARNING: This is a very important document***" and a statement that, "*You should see your own Lawyer and Financial Adviser before signing it.*" By obtaining Mr Heslop's written acceptance of the extension of the Guarantee, Westpac complied with clause 28.13(b) of the Banking Code.

[106] There was no evidence that Westpac failed to exercise the care and skill of a diligent and prudent banker in its credit assessment of Lonrae or in forming its opinion about Lonrae's ability to repay either loan provided under the Hub BFA.

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15 In November 2008, Lonrae had signed an unconditional contract to sell the MLR for stage 3 of Gabba Central for $2,500,000. The contract evidently had a rather long settlement period.

So, there is no basis for any finding that Westpac breached clause 25.1 of the Banking Code in this respect.

[107] Lonrae accepted the offer of the Hub BFA and borrowed the funds from Westpac to purchase the Hub MLR and manager's unit.

[108] As well as the Guarantee, which was supported by the mortgages Mr Heslop had granted over the Nocturne Lane property and the Coorparoo property, Westpac took extensive additional security in respect of the Hub BFA:

- a bill of sale granted by Lonrae over the Hub MLR;
- the bill of sale Lonrae granted over the Parc MLR;
- the mortgage Lonrae granted over the manager's unit at Parc Apartments;
- the charge Lonrae granted over all its assets and uncalled capital;
- the guarantee and indemnity granted by Ms Harper, supported by the mortgage over the unit she owned at Gabba Central; and
- a guarantee and indemnity granted by Martin Harper – Ms Harper's son, who was then a director of Lonrae – supported by a mortgage over a unit he owned at The Hub.[16]

[109] Mr Heslop made no allegation and led no evidence that Lonrae had any financial difficulties with the Hub BFA, so no issue about Westpac's compliance with clause 25.2 of the Banking Code arises.

[110] In October 2011, Mr Heslop sold the Coorparoo property.[17] From the proceeds, an amount of $77,000 was applied to reduce the debt owed by Lonrae under the BBBL. A further $408,697.46 was paid to Mr Heslop's loan account to discharge the balance of the debt he owed Westpac for the purchase of the Nocturne Lane property.

***The fourth (and final) variation to the Guarantee***

[111] On 7 December 2012, Westpac wrote to Mr Heslop seeking his agreement to another variation of his obligations under the Guarantee, such that they would extend to Lonrae's varied obligations to Westpac under the BBBL. Westpac enclosed a copy of the letter of variation, in compliance with clause 28.13(a) of the Banking Code. Westpac advised Mr Heslop that, if he agreed to the variation, the limit of his liability under the Guarantee would be $2,772,193, plus amounts like government duties and charges, fees, costs, expenses and interest. This was a reduction from the limit of $3,039,378, plus other amounts, to which he had agreed by the third variation. The limit on his obligation was in accordance with clause 28.2 of the Banking Code.

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16 The Hub BFA was also secured by a guarantee and indemnity granted by Roland Paroz, which is of no relevance to this proceeding. Mr Paroz is a child of Ms Harper and was for a time a director of Lonrae.

17 $600,000 from the proceeds of Lonrae's sale of the MLR for Gabba Central Stage 1 and 2 had been applied to purchase this property.

[112] The background to the fourth variation is as follows.

[113] On 21 November 2012, Lonrae had signed a contract to sell the Hub MLR and manager's unit. The sale price of $1,214,000 was about 10% lower than the $1,350,000 purchase price Lonrae had paid for these assets 14 months earlier. The contract specified a settlement date of 7 December 2012.

[114] On 4 December 2012, Lonrae had provided a copy of the contract to Mr Nesbitt. This seems to be the first notice to Westpac that Lonrae wished Westpac to release the securities it held over The Hub assets. The time available between then and the proposed sale settlement was short.

[115] Lonrae also asked Westpac if it could have $17,000 of the sale proceeds paid to Lonrae's cheque account as working capital to assist in its Parc MLR business, use $13,000 to clear an excess in Mr Heslop's personal account, repay in full an investment property loan to Mr Harper for his unit in the Hub, and retain $55,000 to assist in covering legal costs, break costs and retention costs related to releasing Lonrae from the MLR contract for The Hub. The balance of the sale proceeds were to be applied to partially repay the BBBL loan facility. Mr Nesbitt was told Lonrae was upgrading the furniture for the Parc Apartments units. Lonrae planned to use about $17,000 to assist with the upgrade and establish a major cleaning service for departing tenants. Mr Nesbitt was told that additional income of between $8,000 and $10,000 (per month) would be generated by these measures. Mr Nesbitt recorded this information in a memorandum in the Westpac records.

[116] It is logical to assume Ms Harper was the person who made the request and provided the associated information to Mr Nesbitt. This is consistent with her evidence that she managed all Lonrae's dealings with Westpac and Mr Nesbitt.

[117] At the trial, Ms Harper's evidence was that these new furnishing and cleaning services were not to be provided by Lonrae. She explained that they were to be provided by Mr Heslop trading as GJ Homecare. Ms Harper said she expected the services to generate about $200,000 over 18 months, which Mr Heslop would "invest" back in Lonrae. After that period, she proposed that Lonrae would purchase the GJ Homecare business from Mr Heslop, who would make a "capital gain" on the sale to offset a capital loss he was carrying forward. This detail of the plan to offer furnishing and cleaning services was not revealed to Westpac, which was being asked to release funds to establish them.

[118] Craig Bradford, a commercial credit manager in Westpac's Queensland Commercial Credit team, conducted a credit analysis of Lonrae's request.[18] He recorded his calculations and the basis for his analysis in a credit memo. He considered Westpac's "high appetite list", its interest only policy and its consumer credit policy manual, current at that time. He applied each of these to the securities held by Westpac in respect of the BBBL and the IPL. He calculated the value of each security by applying these instruments and adding other information available at that time. He concluded that Lonrae's total borrowings would be 108% of the value of the security held by Westpac, if the requested sale proceeds were released. On this basis, he could not approve the continuation of interest only repayments on

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[18] Mr Bradford gave his evidence in an affidavit sworn on 20 April 2020. Mr Heslop did not require Mr Bradford for cross-examination. His unchallenged affidavit was tendered as exhibit 4.

Lonrae's BBBL facility. His assessment concluded some repayment of principal would be required to progressively reduce Lonrae's loan-to-valuation ratio.

[119] Mr Bradford approved Lonrae's request, allowing the release of its securities over the manager's unit and the MLR business at The Hub. This allowed the sale to proceed and the sale proceeds to be applied as Lonrae had requested.

[120] The approval was subject to Lonrae agreeing to changes of the terms of the BBBL set out in a letter of variation dated 7 December 2012. The letter made Lonrae aware of several things: the new facility details for the BBBL, including a requirement to make monthly repayments of $24,680 (comprised of principal, interest and fees); that continuation of the BBBL would be subject to a satisfactory review by Westpac of Lonrae's updated financial information for the 2012 financial year, to be provided by 30 November 2012; and that the BBBL would expire on 30 December 2013 unless Westpac agreed to extend it. These were the changes Westpac put to Mr Heslop in its 7 December 2012 letter. An amount of $47,000 was to be withheld by Westpac from the sale proceeds until the variation of the BBBL was executed by Lonrae.

[121] Mr Bradford expected Lonrae to provide its updated financial information within a few weeks, so that the annual review of Lonrae's position would be completed by 31 December 2012. He thought Westpac could make a decision on whether to continue with monthly repayments of principal and interest or reinstate interest only payments in that annual review.

[122] On 11 December 2012, Mr Heslop signed his agreement to the variation of the obligations he guaranteed under the Guarantee. He did so, yet again, by signing under a large-print bold heading, "***WARNING: This is a very important document***" and a statement that, "*You should see your own Lawyer and Financial Adviser before signing it.*" By obtaining Mr Heslop's written acceptance of the extension of the Guarantee, Westpac complied with clause 28.13(b) of the Banking Code.

[123] Also on 11 December 2012, Lonrae signed the letter of variation for the BBBL. That day, the sale contract settled and Lonrae disposed of its interest in The Hub. From the sale proceeds, $634,000 was applied to reduce the debt owed by Lonrae to Westpac under the BBBL. The other sums were applied as Lonrae had requested.

[124] After the sale of The Hub was completed, the only MLR business operated by Lonrae was at Parc Apartments. The only other property in which Lonrae held an interest was the Boambillee Drive property. Mr Heslop remained the owner of the Nocturne Lane property.

[125] Lonrae's operation of the Parc MLR business was the subject of evidence at the trial. Documents were tendered and Ms Harper gave oral evidence about it. Ms Harper worked in the business. It is not clear whether Mr Heslop played any particular role in the business. Mr Heslop provided some ancillary services under the business name "GJ Homecare", which Ms Harper said she had set up. The conduct of that business forms part of the relevant background to Westpac's appointment of the Receiver to the Parc Apartments assets on 19 December 2013. Mr Heslop feels aggrieved by Westpac's appointment of the Receiver and by certain aspects of the Receiver's conduct when she took possession of the Parc MLR business. Before turning to these issues, it is convenient to set out the circumstances preceding the Receiver's appointment.

**Lonrae's breaches of the BBBL**

[126] On 30 November 2011, Ms Harper committed her first of 30 breaches of the *Property Agents and Motor Dealers Act* 2000 (Qld) (**PAMDA**) in respect of the trust account Lonrae held with Westpac for the Parc Apartments MLR business. The full extent of Ms Harper's breaches was discovered after 17 February 2014, when the Office of Fair Trading (the **OFT**) appointed receivers over the trust property of Lonrae. The OFT-appointed receivers identified a $49,869.13 shortfall in the trust account. Ms Harper repaid this amount on 17 July 2014.

[127] The OFT also commenced disciplinary proceedings against Ms Harper in the Queensland Civil and Administrative Tribunal (**QCAT**). On 25 January 2018, QCAT ordered that Ms Harper be reprimanded, pay an $8,000 fine and be disqualified from holding or obtaining a licence or certificate of registration under the *Property Occupations Act* 2014 (Qld) for a period of 10 years. Member Cranwell summarised Ms Harper's breaches of PAMDA as follows:[19]

> "(a) Between 30 May 2013 and 23 September 2013, seven bonds totalling $10,386 were paid by tenants into the trust account after having signed a lease to rent a unit within the Parc Apartments. The amounts were not paid to the Residential Tenancies Authority from the trust account as required by s 385(4) of [PAMDA].
>
> (b) On four occasions between 7 June 2013 and 30 July 2013, bond amounts in the form of cash totalling $7,040 were paid by tenants to Ms Harper after having signed a lease to rent a unit within the Parc Apartments. The amounts were not paid into the trust account as required by s 379 of PAMDA.
>
> (c) On 17 occasions between 30 November 2011 and 31 January 2013 Ms Harper made an entry into a trust account record, namely a trust account receipt, knowing it to be false in breach of s 583(3) of PAMDA. The entry falsely recorded an amount of rent being paid for a unit leased by [Lonrae]. The effect of the falsehood was to ensure the owner of the unit would be paid their rent due as part of their monthly disbursements despite the rent not having been paid. The 17 entries totalled $33,410.
>
> (d) On 14 October 2013, Ms Harper paid two amounts totalling $2,627.97 from the trust account in a manner contrary to s 384(2) of PAMDA. The amounts were for payments of a rates notice and water charges for a property owned by her partner, Mr Heslop. The property was not part of the [Lonrae] management portfolio."

[128] The reasons explained that Ms Harper "acknowledged that she had not adhered to PAMDA and accepted full responsibility" for the breaches in (a) to (c) above. In respect of the breaches in (d), Ms Harper "could see no fault in making the payments" but did not file any material to support her position in the QCAT

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19 *Chief Executive, Department of Justice and Attorney-General v Harper* [2018] QCAT 22 at [4].

proceeding. The Tribunal was satisfied Ms Harper committed all the breaches. It found her actions were unprofessional conduct and she was not a suitable person to hold a licence.[20]

[129] Pursuant to the BBBL, Lonrae had agreed to, inter alia, "keep proper accounts and records" and "comply with the law". Ms Harper was, at all material times, a director of Lonrae and the principal licensee through whom Lonrae carried on the Parc Apartments MLR business and operated the related trust account. It follows that Lonrae was in default under the BBBL from 30 November 2011, when Ms Harper made the first false entry in the trust account records. Although Westpac was unaware of Ms Harper's breaches of PAMDA when it appointed the Receiver, it is nonetheless entitled to rely upon them.[21] Those breaches continued and were not remedied until, at earliest, 17 July 2014, when Ms Harper repaid the $49,869.13 shortfall in the trust account.

[130] As well, after June 2012, Lonrae ceased lodging business activity statement (**BAS**) returns. This constituted another event of default by Lonrae under the BBBL.

[131] Among the specific conditions applying to the BBBL was the following:

> "Continuation of all facilities is subject to a satisfactory annual review by Westpac of your financials for each year, due approximately 31 December. These include your current statement of position, taxation returns, profit & loss / balance sheet accounts and any other relevant information requested by Westpac. You must provide this information to Westpac before 30 November in each year. All financial information is to be signed by the directors."

[132] Lonrae failed to provide Westpac with financial information for the financial year ending 30 June 2012 by the 30 November 2012 date. This breach continued. It caused Mr Nesbitt to conduct a "behavioural review" of Lonrae on 26 February 2013.

[133] Mr Nesbitt spoke with Ms Harper for the purpose of this review. Ms Harper told Mr Nesbitt that the financial information had not been provided due to issues with Lonrae's accountant. She assured him Lonrae had retained a new accountant, who had been provided with all relevant information and would be able to complete the financial statements within three or four weeks.

[134] When Mr Nesbitt conducted the review, Lonrae was not in monetary default with Westpac. Lonrae had made its first two monthly repayments of $24,680 in respect of the BBBL, in January and February of 2013. The only default then known to Westpac was Lonrae's failure to provide a current statement of position, taxation returns, profit & loss and balance sheet accounts to Westpac for review. Those documents were about three months overdue.

[135] At the time, Mr Nesbitt understood that if a Westpac customer was not able to afford its repayments and provided Westpac with financial data showing that to be

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20 Ibid at [9]-[10].

21 *National Australia Bank Ltd v Troiani* [2002] QCA 196 at [25] (Fryberg J, McPherson JA and Helman J agreeing).

the case, then it was prudent practice to discuss with the customer whether they were experiencing hardship and whether Westpac could make some accommodation for that hardship. At the trial, he was asked whether he had such a discussion with Ms Harper in 2012. He said he could not "fully recall". He said he did remember asking for financial information, but could not recall whether it was forthcoming. Ms Harper was not asked about any discussion of hardship with Mr Nesbitt and she volunteered no evidence about the topic.

[136] Lonrae continued making monthly payments until July 2013, reducing the amount it owed under the BBBL from $1,897,149.83 to $1,784,215.19.

[137] This evidence does not support a finding that Westpac breached clause 25.2 of the Banking Code while Mr Nesbitt was the relevant relationship manager.

[138] Lonrae made no payment to Westpac on the BBBL in August or September 2013.

[139] In October 2013, Paul Chiu took over the role of relationship manager for Lonrae from Mr Nesbitt. He noticed that Lonrae had not provided the financial statements promised within three or four weeks of the 26 February 2013 review. The statements, and the other financial information pertaining to the 2012 financial year, were by this time overdue by almost 10 months. Mr Chiu may also have been alarmed by the fact that Lonrae had not made a monthly repayment in respect of the BBBL since 19 July 2013.

[140] On 22 October 2013, Mr Chiu met with Ms Harper and Mr Heslop. Mr Chiu noted the BBBL facility was in arrears by three payments. Ms Harper and Mr Heslop told Mr Chiu they were "having difficulty with cashflow as over the past 12-18 months they have made some incorrect business decisions".[22] They wanted to return to interest only payments under the BBBL. Mr Chiu told them Westpac may be prepared to permit Lonrae to make interest only repayments for a period of three months, provided certain conditions were met. He advised Ms Harper and Mr Heslop of the conditions during the meeting and also set them out in an email he sent to Ms Harper on the afternoon of the meeting:

> "Just to recap on what we discussed this morning:
>
> - 2012 accountant prepared financials due 31/10/13
> - ATO Tax Portal (12 months running) due 31/10/13
> - 2013 management accounts due 31/10/13
> - Statement of Position (attached) due 31/10/13
> - $25k repayment into the business loan by tomorrow 23/10/13."

[141] Mr Chiu was responding to an email sent to him by Ms Harper shortly after the meeting, in which Ms Harper had assured Mr Chiu that she had spoken to Lonrae's accountant, who thought "she can get it done in time". Mr Chiu's actions were consistent with Westpac's obligation under clause 25.2 of the Banking Code.

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22 The tendered documents refer to an investment in an ice cream business, but this was not explored in any oral evidence.

[142] Mr Heslop disputes being present at the meeting, despite Mr Chiu's notation in a diary memo dated 22 October 2013 that he "met with Graham Heslop and Trish [Harper]". At 11:19 am that day, Mr Heslop sent an email to Mr Chiu, copied to the Lonrae accountant and Ms Harper, introducing Mr Chiu to the accountant. The email is consistent with Mr Heslop having been at the meeting. Mr Heslop gave no evidence. Ms Harper was not asked about his presence at the meeting. I accept Mr Chiu's contemporaneous record of the meeting as accurate.

[143] Lonrae did not make the payment of $25,000 in respect of the BBBL by 23 October 2013. It failed to provide Westpac with any of the required financial information by 31 October 2013.

[144] A payment of $24,680 was made on 30 October 2013.

[145] On 8 about November 2013, Westpac conducted an internal review of Lonrae's borrowing. Westpac's contemporaneous internal notes record:

> "RM[23] contacted accountant as the reports haven't been finalised. New timeframe/strategy:
>
> - Breach letter to be issued by Monday 11/11/13
> - Completed 2012 financials by 15/11/13
> - Completed BAS by 22/11/13
> - Completed 2013 [financials] by 6/12/13
> - Client is auctioning Coomera property at Boambillee Drv on 30/11/13
> - Loan maturity on 31/12/13.
> - We will be able to assess Bank's position at the time. It is impossible to know the cashflow position as well as bank's security position unless the financials are finalised.
>
> …
>
> - Continued cooperation from client is paramount.
> - If the Financial Reports proves that the cashflow is impossible to meet ongoing commitment, RM will advise customer the situation and request their strategy going forward including selling the business or the properties by 15/01/14.
> - If all fails, recommend the connection to be transferred to LMU[24] – 31/01/14."

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23 This is a reference to the Westpac relationship manager, Mr Chiu.

24 This is a reference to the Westpac Loans Management Unit.

[146] On 14 November 2013, Lonrae provided incomplete 2011/2012 financial statements to Westpac.

[147] On 19 November 2013, in an email to Lonrae's accountant and Ms Harper, Mr Chiu sought clarification of three payments recorded in the 2011/2012 financial statements: $34,660 for consultant fees; $36,400 for legal fees; and "rent on land/buildings". He also asked for confirmation that 18 months of outstanding BAS returns "will all be finalised by the end of this week and we should be able to have FY13 figures by end of next week as per our discussion".

[148] Lonrae provided no further information, statements or figures to Westpac. The outstanding BAS returns were yet to be prepared or lodged.

[149] On 25 November 2013, Lonrae made a payment of $10,939.64 to Westpac. This did not make up the amount outstanding for the payments missed in August and September 2013.

[150] On 26 November 2013, Westpac wrote a letter (the **breach letter**) to Lonrae, advising it was in monetary default by $63,089 and demanding repayment of that amount by 16 December 2013. Westpac put Lonrae on notice that a failure to repay could result in Westpac "enforcing its rights under its securities".

[151] In the breach letter, Westpac also reminded Lonrae that the BBBL was to expire on 30 December 2013, regardless of whether or not the monetary default was rectified before then. Westpac advised that for it to assess an extension of the BBBL beyond 30 December 2013, the following needed to occur by 16 December 2013:

> "● Rectification of the monetary default.
>
> ● Final accountant prepared financials for the financial year ended 30 June, 2013 (including balance sheet, profit & loss, taxation returns etc) to be provided to Westpac.
>
> ● 12 month running ATO Tax Portal to be provided to Westpac.
>
> ● Updated statement of position of the Directors/Guarantors to be provided to Westpac.
>
> ● Valuation of security (including the management rights business at Parc Apartments) to be completed by Westpac at your expense."

[152] The breach letter quoted the condition about providing a current statement of position, taxation returns, profit & loss and balance sheet accounts by 30 November each year. It then warned that if Lonrae failed to provide the requested information, Westpac would view that "as a breach of loan conditions".

[153] Ms Harper requested a meeting with Mr Chiu's supervisor, Nishant Kedia, who was a relationship director at Westpac.

[154] On 2 December 2013, Mr Kedia met with Ms Harper, Mr Heslop and Mr Harper at Parc Apartments. Ms Harper told Mr Kedia she was unhappy with Mr Chiu

requesting financial information and asking how their business was running. She also said she was unhappy with the breach letter.

[155] Ms Harper told Mr Kedia that Lonrae's 2011/2012 financial information was only recently completed, its 2012/2013 financial information had not been done, it had not lodged a BAS return for 18 months and it had engaged a new accountant and new solicitors. Ms Harper asked Mr Kedia for "more breathing space". She said they wished to change the BBBL to an interest only facility until they could sort out the issues they had with Lonrae's business. Ms Harper also told Mr Kedia the Boambillee Drive property had been passed in at auction on a bid of $450,000. She said they were still negotiating on the sale and would use the proceeds to clear the debt on the property and "the overdrawn position on the business loan." She said they would consider selling other properties at the Gold Coast in the New Year.

[156] Mr Kedia told Ms Harper, Mr Heslop and Mr Harper that he was happy to look at extending an interest only arrangement, but he would require Lonrae's financial position updated to 30 June 2013 before he could do so. He proposed that Westpac deal directly with Lonrae's accountant to obtain the information. Ms Harper refused to authorise Westpac to do so. She also declined to commit to providing the required information by any particular time.

[157] Mr Kedia asked Ms Harper, Mr Heslop and Mr Harper to provide an update by the end of the week (6 December 2013) and to advise Westpac of some time frames for the provision of the financial information, so that Westpac could consider both the extension of the BBBL facility beyond its 30 December 2013 expiry and the request for a short term interest only arrangement.

[158] Mr Kedia's actions were consistent with Westpac's obligation under clause 25.2 of the Banking Code. At the time, Ms Harper did not assert that Lonrae was in hardship. She sought to attribute Lonrae's failure to honour its reporting obligations to Lonrae's former accountant and was not forthcoming about the "issues" with Lonrae's business, other than to infer they were in the past.

[159] Mr Heslop's submission that Westpac failed to advise him of the state of the "Lonrae loan Facility" is rejected. He was present at the 22 October 2013 meeting with Mr Chiu and the 2 December 2013 meeting with Mr Kedia. The outstanding payments under the BBBL were itemised and discussed at both meetings.

[160] The required information and advice was not provided by Ms Harper or anyone else on Lonrae's behalf by 6 December 2013, or at all.

[161] On 11 December 2013, Mr Kedia recommended the loan be downgraded to "G10" and referred Lonrae to Westpac's Loans Management Unit. He advised Ms Harper of the referral on the same day. He explained the classification "G10" is Westpac's "internal risk grading" for a loan that is over 90 days or three months in arrears and in default of a written demand. He asked Ms Harper if she had any questions and was told she did not.

[162] Lonrae remained in monetary and non-monetary default under the BBBL. No action was taken to rectify the monetary default by 16 December 2013, the date specified in the breach letter. In a written submission, Mr Heslop asserted he "had at his disposal $70k Superannuation with instant liquidation". He adduced no

evidence of this. If the funds were immediately available to him, he did not to apply them to remedy Lonrae's monetary default.

[163] Mr Heslop also submitted that Westpac "engineered" Lonrae's default. There is no evidence to support that submission. The net effect of the December 2012 variations had been to reduce Lonrae's debt to Westpac and reduce the limit of Mr Heslop's obligation under the Guarantee. Mr Bradford had required Lonrae to make principal repayments from January 2013 as a condition of allowing Lonrae to release proceeds from the sale of The Hub assets to clear Mr Heslop's personal account debt, to finance Mr Heslop's GJ Homecare business, and to discharge Mr Harper's debt on his unit in The Hub. The purpose of those repayments was to further reduce Lonrae's debt and the risk associated with that borrowing.

**Westpac's appointment of the Receiver and the Banking Code**

[164] Whether Westpac acted fairly and reasonably in appointing the Receiver requires an objective examination of the bank's actions in light of the relevant circumstances. In discharging its obligation under clause 2.2 of the Banking Code, Westpac was entitled to take into account Lonrae's conduct to that date.

[165] Lonrae was in breach of its monetary and non-monetary obligations to Westpac. Westpac had given warnings to Lonrae about its monetary defaults by the breach letter sent by Mr Chiu. A more senior Westpac officer, Mr Kedia, had met with Ms Harper, Mr Heslop and Mr Harper to discuss their dissatisfaction with the warning in the breach letter. He had listened to their request for a temporary change in their obligations to Westpac and had told them the bank needed updated financial information to consider. Ms Harper (a director of Lonrae) had refused to provide the information. Notwithstanding this, Mr Kedia had asked that they provide some information and a date by which the remainder would be provided. Lonrae failed to comply with this request. It was not unreasonable for Westpac to request that financial information. Mr Heslop and Ms Harper (for Lonrae) must have appreciated that, by not providing the requested information, they were preventing Westpac from acceding to their request for an adjustment of Lonrae's payment obligations.

[166] At the meeting with Mr Kedia, Ms Harper had not disclosed the true financial position of Lonrae to Westpac. I am satisfied that Ms Harper was attempting to minimise Lonrae's difficulties by suggesting it required only a temporary change to interest only repayments. Ms Harper knew that Lonrae had not been trading sufficiently well to pay the rent on the unit she was occupying at Parc Apartments. She must have known that Lonrae was in considerable financial trouble. It is unlikely she would have engaged in the unprofessional conduct with the trust account had the financial position been otherwise. Those dealings predated the switch to principal and interest repayments by more than 12 months.

[167] When the requested information was not provided, Mr Kedia notified Lonrae that the lending had been referred to the Loans Management Unit.

[168] In addition to the monetary default in payment of monthly instalments, Lonrae was to pay Westpac the $1,797,370.15 which would fall due when the BBBL expired on 30 December 2013. In the absence of an alternative source of funds or further indulgence from Westpac, Lonrae would have had to realise its assets to remedy its

existing monetary default and also reduce its indebtedness to Westpac. Aside from the Parc MLR business, those assets were real property. Attempts by Mr Heslop to sell the Nocturne Lane property in November 2013 had not been successful. It would take additional time to sell sufficient property to make substantial reductions in the debt. Westpac was under no obligation to allow Lonrae to do so at its own pace, but could appoint a receiver and manager to undertake that process or exercise its rights as a mortgagee.

[169] Mr Heslop submits that Westpac's appointment of a receiver "five days before Christmas" caused "distress and despair". The distress is understandable. The despair may simply reflect the fact that the receivership meant those involved in Lonrae, including Mr Heslop, could no longer avoid facing the fact that it was not only trading poorly, but was unable to meet its legal and financial obligations.

[170] Westpac's appointment of the Receiver followed five months of monetary breaches by Lonrae, 12 months of known non-monetary breaches, the breach letter, the failure of Lonrae to remedy the breaches, and a failure to provide information and financial documents to Westpac that would have allowed Westpac to consider whether to take any alternative action.

[171] If Lonrae had provided the financial information in a timely manner – by 30 November 2012 when it was due, in March 2013 when Ms Harper promised it to Mr Nesbitt, in October 2013 when Mr Chiu requested it, or in November 2013 when Ms Harper told Mr Kedia the accountant would provide it – matters may have come to the same conclusion, but well short of Christmas Day 2013. The timing of the appointment of the Receiver was the result of the decisions of Ms Harper, as director of Lonrae, to delay, dismiss and ignore these important earlier requests.

[172] The appointment was consistent with Westpac's dealings with Lonrae. It was ethical, given the imminent risk of further substantial financial failure by Lonrae with the expiry of the BBBL facility. In the circumstances, the appointment was not unfair or unreasonable.

[173] It transpired that the appointment was also appropriate. It ended the misconduct by Ms Harper (as a director of Lonrae) in making false entries in the Parc Apartments trust account records and the associated misappropriation of funds by Lonrae, and it enabled the disclosure and remedy of that misconduct. Once Westpac learned of these non-financial breaches by Lonrae, which involved dishonest and unlawful conduct by Ms Harper, it was unlikely Westpac would have agreed to leave the Parc MLR business and the sale of Lonrae's assets in the hands of the directors of Lonrae. Mr Nesbitt gave evidence that breaches of trust account obligations and a failure to lodge BAS returns were both highly relevant considerations for Westpac in deciding whether to continue or extend facilities for a borrower.

[174] The evidence does not support a finding that Westpac acted other than fairly and reasonably towards Lonrae and Mr Heslop in respect of its decision to appoint the Receiver. The decision was consistent with the information Westpac had provided to Ms Harper and Mr Heslop about what could occur if the requested financial information was not provided. There was nothing unethical about it.

**Demands on Mr Heslop**

[175] Mr Heslop's obligation to pay Westpac any amount due and owing by Lonrae (and unpaid) did not arise until Westpac made a demand on him for payment.[25]

[176] On 17 March 2015, Westpac made a demand on Mr Heslop, pursuant to the Guarantee, to pay the amount then due and owing under the BBBL by 25 March 2015. He did not do so.

[177] On 5 May 2015, Westpac made another demand pursuant to the Guarantee that Mr Heslop pay the amount due and owing by Lonrae under the BBBL. Again, he did not do so.

[178] On 7 April 2016, Westpac made a demand on Mr Heslop to pay the amount outstanding under the IPL. He did not do so.

**Dispute resolution attempts**

[179] Adrian Ahern, Westpac's customer advocate, gave some evidence about his dealings with Mr Heslop and Ms Harper to resolve their dispute. As his evidence principally concerned the use Ms Harper and Mr Heslop made of the dispute resolution process after the appointment of the Receiver, it is convenient to consider that evidence later in these reasons.

[180] On 11 and 12 October 2018, Mr Heslop sent emails to Brian Hartzer, the CEO of Westpac, asking to meet with him to discuss concerns as an "ex-customer" of Westpac. He signed the emails on behalf of himself, Ms Harper and Mr Harper.

[181] On 12 October 2018, Mr Hartzer's chief of staff replied to Mr Heslop, proposing a meeting in Sydney on 23 October 2018 and offering to fund his travel costs. The same day, Mr Ahern sent Mr Heslop an email offering to call Mr Heslop and Ms Harper "to give you my thoughts on the proposed meeting".

[182] In an email of 14 October 2018, Mr Heslop accepted the invitation to meet Mr Hartzer and the offer to fund travel by himself and Ms Harper to attend the meeting. He nominated the following as the "only" things in which he and Ms Harper were interested "going forward":

> "***Fair Restitution and compensation*** by Westpac and ***Fair Compensation*** from Ms Julie WILLIAMS
>
> ***Apology*** from Westpac and Ms Julie WILLIAMS. (Without prejudice)"

[183] On 23 October 2018, Mr Heslop and Ms Harper met with Mr Hartzer and Mr Ahern. Mr Ahern made a note of the meeting. Mr Ahern, by reference to his note, gave evidence, without objection, of what Mr Hartzer said at the meeting:

> "He said that sometimes the bank can be insensitive. The bank needs to consider how it treats people. Sometimes the bank can be callous even if justified in its action. There is, sometimes, a power

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25 *Equititrust Ltd v Gamp Developments Pty Ltd & Ors* [2009] QSC 115 at [19] (McMurdo J), citing James O'Donovan and John Phillips, *The Modern Contract of Guarantee* (Lawbook, 4th ed, 2004) at [10.1710].

> imbalance, and there can be a lack of empathy and care. And then Mr Hartzer went on to say; but it was a challenging business that Ms Harper and Mr Heslop had undertaken. They took risks, they took on debt. And if loans are made, they must be repaid. Having said that, Mr Hartzer said, he wanted the relationship to last, that people should be treated fairly, that the bank should be empathetic and respectful. And receivers were appointed, so a receivership should be allowed to play out. …
>
> …He said he'd like the matter to be resolved, so Ms Harper and Mr Heslop can get on with their life. He said, however, it's not all the bank's fault; and I think he was speaking in general terms at that stage. That Mr Hartzer [reviewed] lots of matters, but [it's] not always the bank's fault. And it was important that, whether it's AFCA or a court, that it should be examined what part each party played."

[184] Mr Heslop led no evidence himself about his dealings with Westpac's internal dispute resolution process. He did not ask Ms Harper about that topic. There was no evidence of any breach by Westpac of the Banking Code provisions about dispute resolution.

**Ms Harper's version of events**

[185] Ms Harper impressed as an intelligent witness, embittered by the failure of Lonrae's business. She was overwhelmingly concerned to avoid any personal responsibility for that outcome. In her view, Lonrae's failure was due to Westpac insisting Lonrae make the payments due under the BBBL. In particular, it was her view that the monthly payments of principal and interest to Westpac from January to July 2013 had led to Lonrae's demise.

[186] Ms Harper had prepared a lengthy set of questions for Mr Heslop to ask her to elicit her evidence in chief. She had plainly thought carefully about what she could say. Mr Heslop failed to ask most of the prepared questions. He was entitled to ask her any relevant and unobjectionable question and was under no obligation to follow her script.

[187] Ms Harper gave extensive evidence of her dealings with Westpac, both in her personal capacity and on behalf of Lonrae, dating back to at least 2001. She narrated that history without Mr Heslop interrupting by addressing a question to her.

[188] It was Ms Harper's evidence that she ran the Parc MLR business and, as director of Lonrae, dealt with all of its business decisions. Generally speaking, she sought to characterise as minor the breaches of the BBBL by Lonrae from 2011 onwards.

[189] Mr Heslop does not seek to avoid liability under the Guarantee on the basis that Lonrae was not in default under the BBBL, or that Westpac was not entitled to appoint the Receiver. The relevance of much of Ms Harper's evidence is unclear.

[190] In any event, Ms Harper's explanations for her conduct were entirely unsatisfactory. I do not accept her evidence that computer software "glitches" and the delayed receipt of financial reports caused her to fail to pay tenants' bonds to the Residential Tenancies Authority and to fail to deposit other tenants' payments into the Lonrae

trust account. Nor do I accept these matters as an explanation for the 17 false entries she made in the trust account records for fictitious rent payments by Lonrae.

[191] On 20 December 2013, when the Receiver asked Ms Harper whether the trust account balances were "out", Ms Harper had told the Receiver that the trust account balanced "from month to month" but the "3-way balance is out ... but [I] don't know where it is out." I am satisfied this was a deliberate falsehood, intended to conceal from the Receiver Ms Harper's false trust account entries for payment of rent by Lonrae to a unit owner. Ms Harper knew that Lonrae had not paid its rent. These entries allowed her to pay money from the trust account to the owner of the unit leased by Lonrae, using moneys paid into the trust account by other tenants for the benefit of other owners. By the false entries, Ms Harper hid Lonrae's default under its lease for the unit and facilitated the misappropriation of trust money to cover up that default.

[192] In his written closing submissions, Mr Heslop expressed his "view" in this way:

> "Ms HARPER had been placed in such a financial position by Westpac that she was forced to do anything she could to stay within the repayments guideline. This included the actions she had to resort to for which she has paid for.
>
> Without her creative accounting Lonrae would have not lasted 1 month. Bravos to Trish Harper."

[193] Ms Harper did not suggest that any conduct by Westpac forced her to commit the PAMDA offences, which were also breaches by Lonrae of the BBBL. Those offences commenced with the first false record of Lonrae paying rent on 30 November 2011, more than a year before the higher monthly payments under the BBBL commenced. Her evidence was that she was dismissive of Westpac's requests for financial information. She chose not to comply with them.

[194] I reject Ms Harper's explanation that she did not comply with Mr Chiu's requests for basic financial information because he was "incompetent" and he did not understand how the ATO tax portal operated or the way company income tax returns were completed and submitted. Mr Chiu's requests were logical and appropriate. She was plainly unhappy that Mr Chiu was insisting that Lonrae comply with its reporting obligations under the BBBL. I infer that she expected to be able to evade such compliance by delay, as she had during the time that Mr Nesbitt was the relationship manager.

[195] By the end of the meeting with Mr Kedia, on 2 December 2013, Ms Harper knew that Lonrae could not obtain any relief from its payment obligations to Westpac without producing the financial information Mr Chiu had requested. Ms Harper must also have known that producing such information would likely lead Westpac to refuse any further accommodation, to foreclose on the loan and to look to its security. The only logical explanation for Ms Harper's refusal to provide the financial information is a desire to conceal from Westpac the true financial position of Lonrae. This conduct is consistent with the false entries she made in the Parc Apartments trust records to conceal from its landlord Lonrae's inability to pay its rent.

[196] Ms Harper gave no evidence Lonrae sought to arrange other finance to discharge its debt to Westpac.

**The Receiver and the ARITA Code**

[197] On 19 December 2013, Westpac and the Receiver executed a document entitled Deed of Appointment of Receiver and Manager (the **Deed of Appointment**), by which Westpac appointed the Receiver to the Parc MLR business and the manager's unit.

[198] Mr Heslop contended he had a claim against the Receiver for breach of the "Receivers Code of Professional Practice, May 2008 and January 2014". This seems to be the Code of Professional Practice published by the Australian Restructuring Insolvency & Turnaround Association. The second edition of that code (the **ARITA Code**) applied from 1 January 2011 until 31 December 2013. The ARITA Code described its application in section 1.6 in this way:

> "The Code applies to all Members of the IPA insofar as they conduct or are involved in the administration of insolvencies, formal and informal. The Code therefore applies not only to liquidators and trustees, but also to lawyers, accountants, financiers and others who are Members of the IPA. These obligations are stated in the Code when it refers to 'Members'. The Code applies to insolvency practitioners in so far as they are appointed to, or contemplating appointment to, any formal appointment under the Corporations Act or the Bankruptcy Act. These obligations are addressed in the Code to '*Practitioners*'."

[199] The appointment of the Receiver as receiver and manager of the Parc MLR business and the manager's unit was pursuant to the bill of sale Lonrae had granted Westpac on 5 November 2008 over the MLR and the registered mortgage Lonrae had granted Westpac over the manager's unit. It was not a "formal appointment" of the kind that brings an insolvency practitioner, such as the Receiver, within the scope of the provisions in the ARITA Code that apply to practitioners undertaking administrations of the estates of bankrupt individuals or insolvent corporations. Mr Heslop's references to parts of the ARITA Code that apply only to such persons in such situations may be disregarded.[26]

[200] Certain provisions of the ARITA Code applied to members of the Insolvency Practitioners Association of Australia (**IPA**). The conduct principles identified by Mr Heslop that apply to IPA members are principles 4 to 8.

***Principle 4 – communications at the time of taking possession***

[201] Mr Heslop submitted that the Receiver had failed to comply with principle 4 in taking possession of the business of Lonrae. It is in these terms:

> "Members must take care to communicate with affected parties in a manner that is accurate, honest, open, clear, succinct and timely in

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[26] These are his references to conduct principles 1 to 3 and 6 (and the related guidance in sections 5 and 6), remuneration principles 10 to 12, and practice management principle 13.

> order to ensure the effective understanding of the processes, and their rights and obligations."

[202] On 19 December 2013, the day of her appointment, the Receiver's solicitors delivered a letter to Lonrae at the Parc Apartments business office. A copy of the Deed of Appointment was enclosed. These documents were read by Ms Harper and Mr Heslop. The letter stated:

> "The Receiver is entitled to immediate possession of the assets the subject of her appointment.
>
> On behalf of the Receiver, we hereby make demand on you to deliver up to the Receiver immediate possession of all of Lonrae's management, caretaking and letting rights in respect of the management and letting business carried on by Lonrae at 'Parc Apartments', Community Titles Scheme 35948 at 6 Exford Street, Brisbane in the State of Queensland including the books, records and trust account records of the business.
>
> In the event that you do not comply with this demand for possession by **12 noon on Friday, 20 December 2013,** we are instructed to bring an urgent application to the Court to seek to recover possession of the property set out above. A copy of this letter will be produced to the Court in support of that application should it become necessary to do so."

[203] Upon receipt of the letter and the copy of the Deed, Lonrae became aware that the Receiver had been appointed, as did Mr Heslop.

[204] The Receiver and her staff attended the Parc Apartments building at about 11:30 am on 19 December 2013 to take possession of the Lonrae business. Mr Heslop introduced himself to them and instructed them they had to leave the premises. He had no lawful authority to do so, being only a trustee shareholder in Lonrae. When they asked to speak with Ms Harper or Mr Harper, they were told Mr Harper was not there and they would have to make an appointment to speak with Ms Harper. They left. The Receiver then called Ms Harper by telephone and arranged to see her at the Parc Apartments premises the next day. The Receiver said she could meet Ms Harper at any time on 20 December 2013, except for between 10:45 am and 12:30 pm. Ms Harper said the only time she could see the Receiver was at 11:00 am.

[205] At about 10:30 am on 20 December 2013, Ms Harper called the Receiver by telephone and asked whether there was any misunderstanding about a meeting at 10:30 am. The Receiver recounted the previous day's telephone exchange. Ms Harper responded that "yesterday was a blur". The Receiver asked whether Ms Harper was ready to hand over control of the Lonrae assets. Ms Harper said, "Yes." The Receiver said she could be at the premises again at 12:30 pm. Ms Harper said this was "OK". The Receiver asked, specifically, "So you will hand over everything we need to operate the trust account and the business?" Ms Harper replied, "Yes."

[206] At about 12:30 pm on 20 December 2013, the Receiver and her staff came to the Parc Apartments premises for the arranged meeting with Ms Harper. Ms Harper and Mr Harper invited the Receiver and her staff to meet in unit 701. Once they

were seated, the Receiver explained to Ms Harper and Mr Harper how her appointment as a receiver and manager worked, with her taking control of the assets to which she had been appointed.

[207] The Receiver then asked Ms Harper whether the trust account was in order. Ms Harper told the Receiver that the trust account balanced "from month to month" but the "3-way balance is out." She told the Receiver the trust account had been "re-entered and audited" for the period to February 2013, but since then "we are out by roughly $50k but don't know where it is out". Ms Harper said the trust account balance problem was due to a problem with the computer system in February 2013. She told the Receiver Lonrae had no printed end of month reports or receipts for the trust account.

[208] The Receiver asked about employees and contractors. Ms Harper said there were none. Ms Harper then asked whether the Receiver would be employing Mr Harper, Mr Heslop and herself. The Receiver said she was sorry, but she would not be employing any of them. She said she would employ a new manager.

[209] The Receiver then told Ms Harper that she would not be asked to vacate the unit in the building at present, as the receiver understood it to be Ms Harper's principal residence, but, "in due course you will be given notice to leave." The Receiver indicated that Ms Harper would be given some weeks' notice to vacate.

[210] Ms Harper walked out of the discussion with the Receiver, saying "At least my insurance is up to date. … I have $2.3million on my head and a bag full of pills downstairs, and that's one thing you can't take from me." The Receiver suggested to Mr Harper that he follow Ms Harper to make sure she was alright.

[211] The discussion in unit 701 had lasted about 40 minutes.

[212] The Receiver came downstairs to the office. There, Mr Heslop was disconnecting computers and removing them, together with cheque books and deposit books, from the Lonrae office. He instructed Mr Harper to remove the telephones, chairs and some other computers. He refused the Receiver's requests to stop.

[213] The police were called. When the police arrived to deal with Mr Heslop, he told them Ms Harper was having a heart attack. The police called for an ambulance. When the ambulance officers arrived, they attended Ms Harper but concluded she did not require hospital attention.

[214] The police took Mr Heslop into custody, briefly. In custody, he insisted he was seriously unwell and was taken to a hospital. His written submissions include complaints about the conduct of the police officers, but he led no evidence of this and offered no explanation as to how the conduct of the police could amount to a breach by Westpac of the Banking Code or by the Receiver of the ARITA Code.

[215] From the tenor of his cross-examination and his written submissions, it appears Mr Heslop considers the Receiver should have obtained a warrant or an order from a court before taking possession of the Parc MLR business. Mr Heslop seems to have misunderstood the passage in the letter from the Receiver's solicitors to the effect they would make an urgent application to the Court to recover possession if Lonrae did not comply with the demand to deliver up immediate possession of the Lonrae assets.

[216] Having been appointed by Westpac, pursuant to the rights Lonrae granted Westpac under the bill of sale over the Parc MLR business, the Receiver was the agent of Lonrae. She was entitled to take possession and control of the assets to which she had been appointed. There was no need for the Receiver to incur the costs or delay likely to be involved in seeking a warrant or court order, unless it should prove necessary; say if Lonrae's directors refused to hand over control of the assets.

[217] On 20 December 2013, Ms Harper, as a director of Lonrae, agreed to hand over control of the Lonrae business to the Receiver. No court application was required.

[218] The conduct of Mr Heslop and Ms Harper on 19 and 20 December 2013 caused Lonrae to incur additional costs for the time of the Receiver and her staff. It also wasted the resources of the police and emergency services.

[219] There was no evidence that the Receiver failed to comply with principle 4 of the ARITA Code at the time she took possession of the Lonrae property.

***Principle 5 – timely progression of the receivership***

[220] Mr Heslop submitted that the Receiver had failed to comply with principle 5 in not progressing the receivership in a timely fashion.

[221] Principle 5 is "Members must attend to their duties in a timely way."

[222] The Receiver was appointed on 19 December 2013. Her attempt to take possession of the Lonrae MLR business that day was thwarted by the unavailability of Ms Harper and Mr Harper and the unlawful demands of Mr Heslop that the Receiver and her staff leave the Parc Apartments premises. The Receiver succeeded in obtaining control over the Lonrae MLR business the following day, notwithstanding the interference by Mr Heslop.

[223] Mr Heslop adduced no evidence of events after that time. The documents tendered by the plaintiffs indicate the following.

[224] On 18 March 2015, Lonrae, by the Receiver, contracted to sell the manager's unit at Parc Apartments for $650,000 and the Parc MLR business for $900,000.

[225] On 4 May 2015, the proceeds of that sale were used to reduce Lonrae's principal debt to Westpac under the BBBL from $1,838,625.95 to $886,818.56 and the balance of the settlement proceeds, $559,898.94, was applied to pay costs, interest and fees due to Westpac.

[226] On 12 May 2015, Mr Heslop and Ms Harper wrote to Westpac's solicitor advising:

> "It is our intention to go to court with Westpac to contest any claim they make in regards to all and any property owned by HESLOP/ HARPER which the Bank may have in mind."

[227] On 16 June 2015, Westpac and the Receiver executed a deed appointing the Receiver as receiver and manager of the Nocturne Lane property owned by Mr Heslop and of the registered mortgage held by Westpac over it. That day, the Receiver wrote to Mr Heslop requiring vacant possession of the Nocturne Lane

property within 14 days. There does not appear to have been any cooperation on the part of Mr Heslop. The Receiver obtained possession of the Nocturne Lane property, using an agent and a locksmith, on 24 September 2015.

[228] On 27 February 2016, the Receiver contracted to sell the Nocturne Lane property for $800,000. On 29 March 2016, $780,249, the entire net proceeds of the sale of the Nocturne Lane property, was used to reduce Lonrae's debt under the BBBL further from $886,818.56 to $106,569.56.

[229] On 9 January 2018, the Receiver sold a unit in Gabba Central owned by Ms Harper. From the proceeds, $371,123.06 was paid to reduce Lonrae's debt to Westpac under the IPL. The balance of $34,266.62 was applied to discharge the Receiver's overdraft.

[230] Given the lack of cooperation on the part of the Lonrae directors, the misinformation about the Parc Apartments trust account, and the threatened and actual interference by Mr Heslop, I am not satisfied that the Receiver failed to comply with the timeliness principle in the ARITA Code.

***Principles 7 and 8 – promotion and dealing with other IPA Members***

[231] Next, Mr Heslop submits the Receiver failed to comply with principles 7 and 8, which are in these terms:

> "Principle 7: When promoting themselves, or their Firm, or when competing for work, Members must act with integrity and must not bring the profession into disrepute.
>
> Principle 8: When dealing with other Members in transitioning or parallel appointments, Members must be professional and co-operative, without compromising the obligations of the Member in their own particular appointment."

[232] There was no evidence of any conduct by the Receiver in respect of the subject matter of principle 7 or 8. It follows that no finding can be made that the Receiver failed to comply with either of those principles or with the related guidance in section 11.3 to which Mr Heslop also referred.[27]

***Principles 14 to 17 – practice management***

[233] Mr Heslop also referred to the following practice management principles that apply to IPA members:

> Principle 14: Members must implement policies, procedures and systems to ensure effective quality assurance.
>
> Principle 15: Members must implement policies, procedures and systems to ensure effective compliance management.

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[27] This guidance concerns the termination of follow up communication, including by call centres and third parties at the request of recipients, and so does not appear to have any relevance in any event.

Principle 16: Members must implement policies, procedures and systems to ensure effective risk management.

Principle 17: Members must implement policies, procedures and systems to ensure effective complaints management."

[234] The only guidance related to any of these principles to which Mr Heslop referred was that in section 21, dealing with complaints management under principle 17. That guidance is in these terms:

> "The nature of insolvency work means that Practitioners and their Firms are likely to receive complaints from stakeholders in Insolvency Administrations during the course of their career. In the experience of the IPA, many complaints arise from a lack of knowledge or understanding of the insolvency regime by stakeholders, and/or inadequate attention to the importance of communicating effectively by Practitioners. Notwithstanding this, all complaints must be taken seriously and handled effectively.
>
> An effective complaints management system will ensure that all complaints are properly handled and provides an opportunity to obtain feedback on the quality of work done and if used effectively it is a useful diagnostic for quality assurance.
>
> The failure to effectively manage complaints may result in their escalation to regulatory authorities and professional bodies which can be costly and time consuming to manage and may damage reputation unnecessarily.
>
> The Australian Standard for Complaints Management AS-ISO-10002-2006 provides a useful reference for Members when establishing an appropriate complaints management system.
>
> Key points for an effective complaints management system should include:
>
> - a statement about how stakeholders in an Administration can contact the Firm with queries;
> - a clear process for staff to follow when a complaint is received;
> - a process to deal with minor complaints by Appointee or Administration staff (providing guidance on what would be a minor complaint);
> - a process for escalating complaints or dealing with complaints that are not of a minor nature;
> - delegation of an appropriate person ("complaints manager") not involved in the conduct of the Administration to be responsible for handling the complaint. This may be one person in a large firm who is no longer practicing in

insolvency (ie Chief Operating Officer) or may rotate to a partner not appointed to the Administration in a small firm;

- establishment and maintenance of a complaints register;
- a process to be followed by the complaints manager in respect of all complaints referred to him or her;
- a process for ensuring that the outcome of complaints are used to improve the Firm policies, procedures and systems; and
- a set of Firm principles relating to complaints handling."

[235] Mr Heslop adduced no evidence about the practice management systems of the Receiver or about any interaction he or Lonrae had with the Receiver that might have involved any of those systems. He adduced no evidence of any complaint made to the Receiver. It is not open to the court to make any finding that the Receiver failed to comply with any of the practice management principles.

[236] Mr Heslop called Venetia Storry as a witness. He explained that the Receiver had been appointed as receiver and manager of an MLR business formerly operated by Ms Storry. Mr Handran, who appeared for Westpac and the Receiver, objected to some of Mr Heslop's questions in chief on the ground they were not relevant. The objections were upheld. Mr Heslop did not persist in questioning Ms Storry. There was no cross-examination.

[237] It follows that Mr Heslop has failed to make out any part of his defence or counterclaim that the Receiver failed to comply with the ARITA Code.

**Consideration of the other matters pleaded in the defence and counterclaim**

[238] At the trial, Mr Heslop informed the Court he only wished to pursue his allegations of breaches of the Banking Code by Westpac and of the ARITA Code by the Receiver. For completeness' sake, these reasons deal briefly with some of the other allegations pleaded by Mr Heslop.

***National Consumer Credit Protection Act allegations***

[239] In his defence, Mr Heslop pleaded that Westpac breached ss 128, 129, 130, 131 and 132 of the *National Consumer Credit Protection Act* 2009 (Cth) (the **NCCPA**) in respect of the loans made to Lonrae in 2004, 2007, 2008 and 2012. He made no oral or written submissions about these allegations.

[240] In short, these provisions prohibit a credit provider from entering into a credit contract with a consumer (or increasing the consumer's credit limit) unless the credit provider has made an assessment of whether the credit contract will be unsuitable for the consumer if it is entered into or if the credit limit is increased. The assessment must have been made within 90 days of the contract or the increase. The credit provider must make reasonable enquiries and take reasonable and prescribed steps before making the assessment.

[241] Mr Heslop's allegations must be rejected.

[242] The operative provisions of the NCCPA, including the National Credit Code, commenced on 1 April 2010. They did not apply in June 2004, when Westpac and Lonrae entered into the Burke BFA, in July 2007, when they entered into the IPL and the Gabba BFA, in November 2008, when they entered into the Parc BFA and varied the IPL, or in March 2010, when Westpac offered the investment property loans for the Boambillee Drive property. The NCCPA was in force in December 2010 when the BBBL was first drawn, in September 2011 when the Hub BFA was signed, and in December 2012 when the BBBL facility was changed.

[243] These NCCPA provisions apply to credit contracts where the debtor is a natural person or a strata corporation and where the credit is wholly or predominantly for personal, domestic or household purposes or to purchase, renovate or improve residential property for investment purposes.[28] A debtor is the person liable to pay or repay the credit, but does not include a guarantor like Mr Heslop. In each of these Westpac loans, the debtor was Lonrae. It was not a natural person or a strata corporation. The credit was provided for commercial purposes, to acquire and to provide working capital for MLR businesses, and not wholly or predominantly for purposes that would bring the lending within the scope of these provisions.

***Human Rights allegations***

[244] Mr Heslop pleaded that Westpac and the Receiver:

> "breached Article 12 of the Human Rights Act by engineering the default and subsequent events which led to assault and unlawful detention of [Mr Heslop] and the sequential loss to both [Mr Heslop] and [Ms Harper] by forcefully and unlawfully taking possession of [the Parc MLR business]. This breach resulted in the loss of dignity by both [Mr Heslop] and [Ms Harper]."

[245] Mr Heslop's reference to the Human Rights Act is unclear. The *Human Rights Act* 2019 (Qld) commenced on 1 January 2020. It had not been enacted and so did not apply in December 2013 when the Receiver took control of the Lonrae assets to which she had been appointed, including the Parc Apartments MLR business.

[246] It is more likely Mr Heslop was referring to article 12 of the Universal Declaration of Human Rights:

> "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

[247] This does not clarify the statutory basis of the contention raised by Mr Heslop.

[248] As for the factual basis of this allegation, there is none. No evidence was adduced that Mr Heslop was assaulted or unlawfully detained. The evidence of the manner in which the Receiver took possession of the Lonrae assets establishes that the Receiver and her staff acted firmly, but lawfully and politely. The Receiver took possession of the Lonrae business only after Ms Harper, a Lonrae director, had told the Receiver she was prepared to hand over control.

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28 *National Credit Code* (Cth), ss 4, 5.

[249] The only evidence of injury to the dignity of Mr Heslop or Ms Harper is of that occasioned by their own conduct on 20 December 2013.[29]

[250] In his counterclaim, Mr Heslop relied on the matters alleged in the defence and pleaded some additional matters.

***GJ Homecare business allegations***

[251] Mr Heslop adduced no evidence to prove an alleged agreement between Lonrae and himself about his conduct of the GJ Homecare business or any legal obligation of that nature that he alleged the Receiver "refused to honour". He adduced no evidence that the Receiver's decision not to offer GJ Homecare's services to Parc Apartments' tenants and landlords (as Lonrae had done) was unlawful.

[252] Mr Heslop did not lead evidence that the Receiver refused to release "goods and chattels" of the GJ Homecare business for about two years.

[253] I am satisfied, on the evidence of Mr Nesbitt and Ms Harper noted above, that Westpac was induced to allow Lonrae to retain some of the proceeds of the sale of the Hub assets to establish the GJ Homecare business on the basis that it would result in Lonrae earning additional revenue. In the circumstances, it was prudent of the Receiver to make careful enquiries about whether the GJ Homecare "goods and chattels" were the property of Lonrae or Mr Heslop.

[254] Once those enquiries were completed, Mr Heslop was advised he could collect the relevant items. His long delay in doing so is not attributable to any conduct of the Receiver.

***Nocturne Lane property allegations***

[255] Mr Heslop's plea that he was "precluded from earning an income" from the property is undoubtedly correct. It is no basis for any claim against the Receiver.

[256] The Receiver took possession of the Nocturne Lane property in September 2015, more than three months after Mr Heslop received notice of her appointment and her request for vacant possession. On becoming receiver and manager of the property, the Receiver became entitled to any income earned from it.

[257] There was no evidence to support Mr Heslop's plea that the Receiver had not kept the property in a secure state.

[258] Mr Heslop's allegation that the Receiver failed to act diligently and with appropriate timing to sell the property was not shown. Nor was there any evidence that the Receiver "did not maximise the potential sale price" for the Parc MLR, as Mr Heslop pleaded.

[259] Mr Heslop's colourful submissions (at various times oral and written) alleging "unlawful", "deceitful" and "maleficent" conduct by Westpac are not evidence. They are simply exercises in hyperbole.

**Conclusion on code allegations**

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[29] This is the oral evidence of Ms Harper and Mr Harper, the Receiver's transcript of her interview with Ms Harper on that day, and the notes made by the Receiver's staff of what they observed.

[260] Mr Heslop cross-examined a number of witnesses called by Westpac. In the course of doing so, he did not adduce evidence of a breach of the Banking Code by Westpac in relation to the loans made to Lonrae or the Guarantee or any breach by the Receiver of the ARITA Code. Ms Harper gave no evidence of any such breach. Nor did Mr Harper.

**[261]** In the circumstances, Mr Heslop's defence to Westpac's claim under the Guarantee fails. His counterclaim also fails.

**Costs**

[262] The plaintiffs seek an order that Mr Heslop pay their costs on an indemnity basis.

[263] Pursuant to the BBBL, Lonrae agreed to pay Westpac all amounts which it reasonably incurs in relation to the exercise of its rights under any of its securities, including its "legal fees and costs of a full indemnity basis (even if a court does not specifically award costs on that basis)". The plaintiffs submit this "plainly and unambiguously" provides for the award of costs other than on the standard basis.[30]

[264] The additional terms and conditions of the IPL included the following, under the heading "Expenses":

> "All reasonable amounts that the Bank spends or incur … in relation to the enforcement or exercise of its powers may be debited by the Bank to the loan account. You will pay interest on each of those amounts at the interest rate that applies to the loan account at the time of debiting … The Bank may debit that interest to the loan account."

[265] These provisions would be sufficient to entitle Westpac to recover its reasonable costs of its claim against Mr Heslop and of defending Mr Heslop's related counterclaim on an indemnity basis from Lonrae. There is no such contractual basis for an indemnity costs order in favour of the Receiver, but to the extent that those costs are incurred by Westpac, they may fall within the sums Westpac is entitled to recover from Lonrae.

[266] Lonrae is not a party to the proceeding.

[267] Mr Heslop's obligation under the Guarantee is to ensure Lonrae discharges its obligation to Westpac, up to the limit of his liability, which was last varied to become $2,772,193, plus 20% on account of expenses and other matters. As noted above, that liability arises on demand by Westpac.

[268] In its claim and pleading, Westpac and the Receiver sought to recover "costs" from Mr Heslop. Neither document amounts to a demand that Mr Heslop pay Westpac's costs on an indemnity basis under the Guarantee. No evidence was adduced of any other such demand.

[269] The plaintiffs put an alternative submission that Mr Heslop should pay their costs on an indemnity basis, because he "made serious claims of breach of duty and misconduct which were not borne out by the evidence and lacked any arguable

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30 See *Jamieson v Cosigil Pty Ltd* [1983] 2 Qd R 117 at 120-121 (Williams J).

foundation". The plaintiffs rely on the decision in C*olgate Palmolive Co v Cussons Pty Ltd*.[31]

[270] There is great difficulty identifying the claims actually asserted by Mr Heslop in the proceeding. His pleading, his written material and his oral remarks were not attended by any particular order or organisation. Undoubtedly, this made the plaintiffs' task much more difficult than it ought to have been. However, his allegations were expressed in such broad, general and overblown terms as to leave an observer quite uncertain of their true import.

[271] Westpac held considerable security for Lonrae's debt and, with the assistance of the Receiver, realised it independently of this proceeding. Early in that process, Westpac chose to sue Mr Heslop and so to incur the associated costs. Given the security Westpac held over Mr Heslop's real property, there was always a prospect that the suit would be less than rewarding for Westpac, in the financial sense.

[272] As late as October 2018, about three years into the proceeding, Mr Hartzer had told Mr Heslop and Ms Harper it was important that the court should examine the part played by Westpac and each of them to decide whether or not it was the bank's fault. I accept this comment was in the context of encouraging Mr Heslop and Ms Harper to resolve the dispute and "get on with their life". However, it indicated a desire on the part of Westpac to obtain some form of vindication through the court process. It has achieved that goal.

[273] In the circumstances, Mr Heslop should be ordered to pay Westpac's costs on the standard basis.

**Final disposition**

[274] Westpac should have judgment against Mr Heslop on its claim for $329,034.48 and costs, to be assessed on the standard basis.

[275] Mr Heslop's counterclaim against Westpac and the Receiver should be dismissed. Mr Heslop should pay the plaintiffs' costs of the counterclaim on the standard basis.

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31 (1993) 46 FCR 225 at 233 (Sheppard J).