Territory Sheet Metal Pty Ltd & Ors v Australia and New Zealand Banking Group Ltd
[2009] NTSC 31

PARTIES:	TERRITORY SHEET METAL PTY LTD (ACN 009 634 333) DAVID LENNOX SMITH EDWARD CHARLES DEAN SUSAN ELLEN DEAN NICHOLE KERRIAN SMITH v AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD (ACN 005 357 522)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	177 of 2000
DELIVERED:	9 July 2009
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JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

Claims for damages by customers and sureties against bank -- Claims based on asserted breaches of the provisions of s 51A and s 52 of Trade Practices Act(Cth), common law duty of care, fiduciary duty and contract, and by reason of alleged negligent misstatement -- pleas by defendant of contributory negligence -- counterclaims by defendant based on deceit, negligent misrepresentation and alleged breaches of s 52 of Trade Practices Act(Cth) and s 42 Consumer Affairs and Fair Trading Act (NT) -- loan facilities approved by respondent bank to corporate plaintiff -- personal plaintiffs sureties for those facilities -- discussion of principles as to liability in relation to causes of action promoted by respective parties -- expert evidence as to banking practice and

financial aspects reviewed -- breaches of contract by defendant in respect of the processing of two cheques -- other causes of action maintained by parties not made out -- issues of causation discussed -- basis on which damages fall to be assessed -- primary findings published.

REPRESENTATION:

Counsel:

Plaintiff:	D Trim QC and R Sallis
Defendant:	J Kelly SC and D McConnel

Solicitors:

Plaintiff:	Woodcock Solicitors
Defendant:	Cridlands MB

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Territory Sheet Metal Pty Ltd v Australia and New Zealand Banking Group Ltd [2009] NTSC 31
No. 177 of 2000

BETWEEN:

TERRITORY SHEET METAL PTY LTD (ACN 009 634 333)
First Plaintiff

SMITH, DAVID LENNOX
Third Plaintiff

DEAN, EDWARD CHARLES
Fourth Plaintiff

DEAN, SUSAN ELLEN
Fifth Plaintiff

SMITH, NICOLE KERRIAN SMITH
Sixth Plaintiff

AND:

AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD (ACN 005 357 522)
Defendant

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 9 July 2009)

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PART III

A consideration of the causes of action relied on by the plaintiffs:

OLSSON AJ:

Definitions

In the course of these reasons I propose to employ the following expressions:

Expression	**Meaning**
"ANZ":	the defendant
"ATO"	the Australian Taxation Office
"CAFTA":	the Consumer Affairs and Fair Trading Act (NT)
"CBA":	The Commonwealth Bank of Australia
"CRAA":	the Credit Reference Association of Australia
"DLS":	David Lennox Smith
"ECD":	Edward Charles Dean
"LTD":	LTD Constructions (NT) Pty Ltd
"NAB":	National Australia Bank
"NKS":	Nicole Kerrian Smith
"NPG":	Northern Property Group Pty Ltd
"primary proceedings":	the plaintiffs' claims against the defendant as expressed in the statement of claim
"secondary proceedings":	the defendant's claims against DLS and ECD as expressed in its finally amended counterclaim
"SED":	Susan Ellen Dean
"the alleged Godwin properties"	a collective reference to both the Brayshaw Crescent property and the Wells Street property

“the Anula property”:	the property situated and known as 10 Kohinoor Street, Anula, formerly owned by ECD and SED
“the Brayshaw Crescent property”:	the property situated at and known as 7 Brayshaw Crescent, Millner
“the finance agreement”:	the finance agreement defined in paragraph 37 of the statement of claim, as said to have been evidenced by a letter dated 19 November 1997 written by the ANZ to TSM
“the finance application”:	the application made to the ANZ as referred to in paragraph 14 of the statement of claim having the oral and documentary content pleaded, as well as the documents comprising the re-financing proposal, the relevant ANZ Business Credit Application, an associated document titled “Security to be offered” and Personal Statements of Position of DLS, ECD and Lionel Anthony Godwin (“Godwin”) respectively (Exhibit P1 pages 57-66, 83-93)
“the first LTD development project”	the construction by LTD of initial pre-fabricated units at Shearwater Drive, Bakewell, as referred to in paragraph 8.4 of the statement of claim
“the first October meeting”:	the meeting said to have been held on 14 October 1997, as referred to in paragraph 17.3 of the statement of claim

"the first November meeting":	the meeting said to have been held on or about 7 November 1997, as referred to in paragraph 27 of the statement of claim
"the fourth October meeting":	the meeting said to have been held on 29 October 1997, as referred to in paragraph 17.6 of the statement of claim
"the indicative proposal":	the indicative ANZ proposal, being a letter dated 22 October 1997 written by the ANZ to TSM (Exhibit P1 pages 76-82)
"the October meetings":	a collective reference to the first, second, third and fourth October meetings
"the November meetings":	a collective reference to the first November meeting and the second November meeting
"the Raffles Road property":	the property situated at and known as 2 Raffles Road, Palmerston, being the former home of DLS and NKS
"the re-financing proposal":	the written TSM re-financing proposal, a copy of which is reproduced at pages 57 to 67 inclusive of Exhibit P1
"the second LTD development project":	the construction by LTD of eight pre-fabricated units on Lot 5745, Town of Palmerston
"the second October meeting":	the meeting said to have been held on 16 October 1997, as referred to in paragraph 17.4 of the statement of claim
"the second November meeting":	the meeting said to have been held on 13 November 1997, as referred to in paragraph 30 of the statement of claim
"the statement of claim":	the plaintiffs' statement of claim as finally amended in these proceedings

“the third October meeting”:	the meeting said to have been held on 22 October 1997, as referred to in paragraph 17.5 of the statement of claim
“the Territory”:	The Northern Territory of Australia
“the TSM land and workshop premises”:	the property situated at and known as 16 Sadgroves Crescent, Winnellie
“the TSM overdraft account”:	the TSM Account No 015-896 3530-42732 with the ANZ
“the Wells Street property”:	the property situated at and known as 22 Wells Street, Parap (also variously referred to as 22 Wells Street, Darwin and 22 Wells Street, Ludmilla)
“the $570,000 cheque”:	the cheque for that amount dated 2 January 1998 drawn by Flynn Petroleum Pty Ltd on Westpac Banking Corporation in favour of ANZ
“the $460,000 cheque”:	the cheque for that amount dated 24 December 1997 in favour of Godwin drawn on the ANZ against the TSM overdraft account
“TPA”:	the Trade Practices Act, 1974 (Cth)
“TSM”:	Territory Sheet Metal Pty Ltd

For the sake of brevity all witnesses and other natural persons not otherwise included in the foregoing definitions will usually be referred to in these reasons solely by their surnames.

PART I

Introduction and the Narrative Facts

Introduction

[1] In these proceedings the plaintiffs claim damages from the defendant in relation to certain transactions said to have occurred in mid to late 1997 and early 1998. The claim asserts against the defendant breaches of the provisions of s 51A and s 52 of the TPA, breach of common law duty of care, breach of fiduciary duty, negligent misstatement and breaches of contract.

[2] The defendant denies the key assertions made against it and has filed a counterclaim against the third and fourth plaintiffs. This seeks declarations that those plaintiffs are liable to indemnify the ANZ against the costs of the primary proceedings and any amount that it may be ordered to pay to TSM by way of damages, damages in deceit, negligent misrepresentation and in respect of alleged breaches of s 52 of the TPA and s 42 of CAFTA, as well as *Hungerfords v Walker*[1] interest.

[3] At the commencement of the trial Mr Trim, of senior counsel for the plaintiffs, announced that the claims by LTD were to be discontinued. Having regard to the terminology employed in the amended statement of claim I have retained much of the original title of these proceedings and

[1] *Hungerfords v Walker* (1989) 171 CLR 125.

have referred to the various remaining plaintiffs, as set out in that title, by their original numerical designations so as to avoid confusion.

Relevant narrative aspects

Credibility issues

[4] I will, in the course of these reasons, be making comments touching on the accuracy of the evidence and credibility of certain witnesses in context. However, it is desirable that I express my general views as to some key witnesses at the outset. I will, in doing so, indicate the broad basis of those views, but will not pause to conduct a truly exhaustive analysis of all of the relevant evidence at this point. I will simply advert to indicative aspects of it in support of the conclusions expressed.

The third plaintiff – David Lennox Smith

[5] The essential foundation of the plaintiffs' narrative case was laid by the evidence of DLS and the documentary material referred to by or put to him. That documentary material was not under challenge as to its authenticity and forms an important context in which his oral and written testimony fall to be examined.

[6] DLS presented in evidence in chief as a confident and articulate witness, with a seemingly good grasp of the relevant narrative facts. His responses were spontaneous and apparently frank and it was apparent that he had an excellent grasp of technical aspects of the work and activities of TSM and

LTD. He came across as a man who was obviously highly competent and innovative in relation to the work activities of which he spoke.

[7] On the other hand, it rapidly emerged, both from his evidence and the repeated business disasters referred to by him, that he had an unduly trusting and somewhat naïve, if not cavalier, approach to business administration and relationships.

[8] This is clearly illustrated by his lack of due diligence before admitting Godwin into the relevant business activities and ensuring that he was in a position to fulfil his commitment and in fact did so; as well as the unquestioning acceptance by DLS of the various false statements,[2] excuses and promises subsequently made by Godwin; permitting him to make withdrawals from the LTD account for personal purposes on un-kept promises to repay after a brief time, which were never effectively followed up[3] and the unquestioning acceptance of the statement that he had advanced $100,000 in relation to one of the properties purchased for the purposes of development, to which I shall later refer in more detail.

[9] Another illustration is the acceptance (without follow up) of Godwin's statement that he would immediately pay the proceeds of the $460,000 cheque to NPG as directed by DLS, in circumstances to which I will hereafter refer. Sound administration was not, and obviously is not, the forte of DLS.

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[2] cf T664- 671.
[3] cf T 505-506, 517-518.

[10] At trial, DLS was subjected to a searching cross examination that extended over a very lengthy period. At the end of that time, his credibility appeared to some extent tarnished and the accuracy of certain aspects of his testimony was clearly open to question.

[11] I hasten to say that such situation arose in connection with his general evidence of relevant events. His technical evidence was not, generally speaking, the subject of successful challenge.

[12] In the event, I have approached his evidence as to narrative events with considerable caution and have particularly looked to test it against objective documentary evidence or other testimony that I regard as being accurate.

[13] I do not suggest that DLS was necessarily or deliberately giving false testimony. In many situations where issues of accuracy and credibility arose, I consider that these were more probably than not related to either defective memory or, in a number of instances, *ex post facto* reasoning on his part.

[14] The gestation period of these proceedings has been long, difficult and complex. Of necessity it has involved repetitive examination and discussion of a complicated factual history and a vast quantity of documentation. Moreover, most of the relevant events took place in excess of 10 years ago.

[15] It is small wonder that some defects of memory did occur and that some degree of *ex post facto* reasoning did appear to exist, although, by way of

example, it is clear that the assertion of DLS that, post February 1998, TSM was forced to revert merely to the core businesses of general sheet metal work and general jobbing was a demonstrable overstatement, as I later illustrate.

[16] An ineluctable conclusion must also be that, at certain points in the relevant narrative sequence of events, DLS did not hesitate to be party to what were either deliberate misrepresentations to, or at least a deliberate withholding of information from, the ANZ in a manner that does not breed present confidence as to his credibility.

[17] I do not intend to suggest that he was a knowing party to or aware of a variety of falsehoods, misrepresentations and even criminal behaviour perpetrated by the person Godwin, to whom I shall be referring in some detail. Clearly, he was not. He was just as much a victim of them as were the ANZ and others.

[18] I consider that, without in any sense attempting to be fully definitive, some, but not all, of the key pointers to my foregoing conclusions are:

(1) There can, in my view, be no doubt that the document constituting the re-financing proposal, was seriously misleading in a number of major respects to which I will later refer and that DLS must have appreciated that fact.

(2) I am left with the distinct impression that he and his colleagues were in a most difficult financial quandary at the time and did not hesitate to withhold important information from the ANZ, particularly as to the extent of borrowings that had been made to support the LTD activities and a substantial TSM indebtedness to the ATO.

(3) I am of the opinion that it was no accident that the re-financing proposal and application to the ANZ were ultimately pursued in the name and on behalf of TSM, rather than on behalf of LTD – so as to avoid a need for full disclosure of the financial history and dealings of the latter.[4] Accordingly, the LTD financials and banking history were never supplied to the ANZ. The financial accommodation in question would probably never have been forthcoming from the ANZ, had the relevant full and correct information been made known to it.

(5) I found some of the explanations given by DLS in that regard somewhat disingenuous (e.g. concerning the reason for non-disclosure of the financial transactions between LTD and NPG). When given, they smacked of a degree of rationalisation in the thinking of DLS that did not enhance his credit.

(6) Whilst I do not accuse DLS of deliberate falsehood in that regard, I consider that his memory was plainly defective concerning the circumstances when the ANZ relationship manager Baylis first

[4] cf T613, 621, 632.

entered upon the scene and as to who requested the principals of TSM and LTD to complete the Personal Statements of Position.

(7) I will also deal with those topics in more detail in due course, but merely comment at this stage that the present expressed memory of DLS as to these aspects is difficult to align with contemporaneous written records raised by ANZ officers.

(8) DLS sought, throughout his evidence, to portray a minimized detailed knowledge of various financial transactions and, in particular, his state of awareness at times of the extent of TSM and LTD cash flow problems and resultant cheque dishonours. I have great difficulty in accepting that his knowledge was so limited.

(9) Equally, I do not accept that he failed to appreciate the impropriety of certain of the corporate transactions such as the giving of the charge to NPG in breach of the terms of the pre-existing security to the CBA and the giving of security to the ANZ in respect of relevant properties when the NPG charge was already in place.

(10) There is no doubt that he has shifted ground over time as to certain aspects of his narrative history of events. For example, he has vacillated as to whether Godwin was to pay out the Raffles Road

property mortgage as part of, or in addition to, his promised capital contribution of $400,000.[5]

(11) There is also his present evidence that the sum of approximately $110,000 involved was, in effect, to be a short-term loan to be repaid out of unit sales -- a topic that emerged for the first time in the course of his cross examination. It is to be noted that ECD testified that Godwin undertook to find the sum in addition to his promised capital contribution.

(12) There is also an inconsistency between the various versions of what DLS says Godwin represented had been paid to NPG in reduction of its loans. In Exhibit P10 paragraph 211 reference is made to a supposed payment of $400,000, whereas in Exhibit P12 paragraph 125 there is reference to a proposed payment of $460,000, neither of which was, of course, consistent with any recognition that contributions of substance had already been made by Godwin to TSM (albeit that he had drawn back some or all of them).

[19] I will not tarry at this point to recite a further exhaustive chronicle of other matters bearing on the credibility of DLS. There are additional aspects that will readily emerge in the course of my resume of the facts.

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[5] cf Exhibit P10 paragraph 199 and Exhibit P12 paragraphs 94-96.

The fourth plaintiff – Edward Charles Dean

[20] ECD also gave oral evidence in addition to his written statements and was subjected to a substantial cross examination.

[21] He presented as a careful witness who gave considered responses to questions. He impressed as a person who was attempting to give accurate evidence to the best of his recollection. He was not evasive in his answers, nor did he hedge as to matters put to him.

[22] However, it is plain from his evidence that he was no less a party than DLS to the preparation and submission of a re-financing proposal that was patently misleading in respects that I elsewhere identify.

[23] Once again, I think that here was a person who was quite inexperienced and even naive in relation to commercial dealings.

[24] He was constrained to concede that there had been a deliberate omission to reveal the existence of relevant charges to NPG and the CBA and no disclosure of the considerable debt of TSM to the ATO on a basis that, on the face of it, was quite unconvincing.

[25] It is of interest to note that ECD conceded that reference was made in the re-financing proposal to the successful completion by LTD of the relevant development project in circumstances in which he had not even conducted any analysis to ascertain whether a profit had, in fact, been made in respect of it.

[26] It is fair to say that Ms Kelly, of senior counsel for the defendant, sought to strongly attack the credibility of this witness in cross examination, in large measure by reference to the content of entries in his 1997 and 1998 diaries. She also went so far as to suggest to him that he was a knowing party to the supply to the ANZ (in early 1998) of patently bogus contracts for the sale of properties.

[27] I have concluded that this witness was not deliberately dishonest in the evidence that he gave and I am not satisfied that he was a knowing party to the supply to the ANZ of contract documentation that he knew or suspected at the time to be false.

[28] I also conclude that his diary entries not only did not purport to be full or verbatim records of everything that took place, but they merely constituted staccato notes or impressions of the substance of situations and conversations as ECD perceived them to be at the time, in light of his then understanding of the relevant factual background. They did not pretend to constitute a full record of all that occurred.

[29] I acknowledge that his complicity in the preparation of the re-financing proposal does him little credit, but even allowing for that, he came across as a generally honest and reliable witness.

[30] I particularly have regard to the fact that it is apparent that Godwin was a highly plausible, fraudulent confidence person of the first order who,

apparently, had little difficulty in convincing those with whom he dealt of the truth and validity of his many representations.

[31] I have no doubt that ECD and, for that matter, DLS (both of whom had known Godwin and his background for some time and were his social friends) trusted him implicitly until the awful reality of the true situation eventually emerged. Such was Godwin's presentation that he had no difficulty in even deceiving the witness Flynn who, patently, was a shrewd, experienced and successful businessman.

[32] I assess both ECD and DLS as being persons of relatively little sophistication in personal business relationships. What, in the case of persons of more acute intellect and business experience in financial matters, may seem beyond normal acceptance in the commercial world simply did not register with them.

[33] Warning bells did not sound as might have been expected and it is important, in assessing credibility, not to review the narrative events with undue wisdom stemming from hindsight.

[34] One might, for example, have expected a person such as ECD to have seen through Godwin and his representations at the stage when the latter was constantly shifting ground and not honouring his undertakings, but I am convinced that both he and DLS did not. I am persuaded that ECD's testimony ought to be accepted as generally accurate, except where it is in

conflict with objective evidence that refutes it, or as I otherwise indicate in these reasons.

The witness Martin Bradley

[35] This witness was the ANZ business development manager who had initial interaction with DLS, ECD and Godwin. He had held that position for only about 12 months at the relevant time. He had no experience in handling matters of the complexity and magnitude of the TSM re-financing proposal at the time when he became seised of it.[6]

[36] It is clear that he has little present independent memory of the details of what occurred in 1997, is unaware of what happened to his diary for that year and did not make any detailed contemporaneous notes.

[37] He testified that he maintained what he termed a work file, which seems to have been little more than a collection of some miscellaneous documents that he says he eventually passed on to the witness Baylis, when the TSM loans were formally approved. No such file, as a separate identifiable collection of documents, has been produced.

[38] His response to many questions in cross examination was to the effect that he cannot now recall the relevant detail asked of him. It is plain that he has no positive recollection of how many meetings he held with DLS, ECD and Godwin and when, much less exactly what took place at each. Any

[6] See T1535 et seq, 1549.

responses as to what he may have said to them were no more than *ex post facto* rationalisation on his part.

[39] In the event, I have approached his evidence with a distinct lack of confidence in its weight and have found it generally of limited assistance. I certainly could not safely rely on it as controverting any specific evidence of DLS and/or ECD as to what took place and when.

The witness Deane Barnett

[40] This witness was an articulate, intelligent and highly experienced bank officer who has held a variety of senior posts with the ANZ, including that of branch relationship manager. A number of his positions have related to processing credit applications of various types.

[41] Barnett had obviously done his homework prior to giving evidence, reviewing such documentation as now exists. He brought copies with him. I gained the impression that his recollection of detailed events was somewhat superior to that of Bradley -- although there were some facets of the narrative events of which he did not retain any, or a clear, memory.

[42] He was generally a frank, objective and impressive witness, although I had some difficulty in following the logic of certain of his conceptual approaches.[7]

[7] see, for example, T1652-1656.

[43] In general, I accept the accuracy of his factual evidence, to the extent that he professed a clear recollection of the relevant events. The core thrust of that evidence concerned his role as the business underwriter who processed the finance application in Adelaide on receipt of it from Bradley and then reported his recommendation concerning it to his manager (the witness Wellman), as an approving authority.

The witness Darren Meers

[44] This witness was, at the relevant times, employed by the ANZ as a small-business relieving manager. He professes no significant memory of the detail of any of the factual events pertinent to this case in which he may have been involved.

[45] All that he can say is that he generally recalls attending at the TSM premises with Bradley on two occasions in 1997, when the refinancing proposal was canvassed. He thought that, on the second occasion, he participated with Bradley in a visit to what was probably the second LTD development site.

[46] I have not been able to derive definitive assistance from what he had to say.

The witness Brian Pedler

[47] This witness is a highly experienced bank officer, who has had particular experience and expertise in the credit area. At the relevant times, he was in charge of the ANZ Credit Centre for South Australia and the Territory. He

was responsible for overseeing retail credit relationship managers on the front line, as distinct from corporate credit and institutional borrowers.

[48] Pedler had the oversight of six credit managers, of whom the witness Wellman was one.

[49] His memory was that those managers each had a personal discretion up to about $1.5m -- $2m, although it was Pedler's practice, as portion of his overseeing role, to "second look" at various lending decisions on a spot check basis. He thought that he so looked at Wellman's review of the finance application[8] at relevant times.

[50] Wellman's memory was that his discretion at the time was limited to $1m and that, therefore, Pedler's concurrence was required in any event.[9]

[51] Pedler projected as a confident, careful and objective person, although I formed the impression that his primary field of expertise and experience was in the credit area, rather than in front line branch banking procedures.

[52] I found most of his evidence generally impressive, albeit that he came across as being slightly defensive at times. I did not find his evidence concerning front-line branch banking procedures as impressive as that related to his apparent primary field of expertise.

[8] see, for example MFI D51 Tab 24 page 123.
[9] Exhibit D56 para 4.

The witness Michael Flynn

[53] Flynn presented as an articulate and confident business-person, who responded frankly and spontaneously to questions asked of him. He did not profess an independent memory of a number of matters of detail, but was content to rely on a statement that he made to a police officer in about 2000, as accurately expressing his then memory.

[54] Subject to what I hereafter say, I accept his evidence as generally accurate, due allowance being made for his present limitations of memory.

The witness Chris Wellman

[55] This witness presented as a confident, articulate and intelligent bank officer, obviously well experienced in credit management. Unfortunately, he professed no present memory of his involvement in the transactions relevant to these proceedings.

[56] He was able to acknowledge such an involvement only by virtue of his recognition of his signatures and writing on some memoranda, notably the documents appearing under Tabs 24, 26 and 28 of Exhibit D51.

[57] Although he said that a perusal of certain of that documentation stimulated a limited degree of memory, I am not convinced that it did. The whole flavour of his evidence was such that it became clear that any seemingly positive evidence of what had occurred was little more than *ex post facto* rationalisation on his part.

[58] The only real assistance derived from his testimony was with regard to certain conceptual evidence that he gave, to which I will later refer.

The witness John Baylis

[59] This witness has been employed by the ANZ for some 42 years. He has been a relationship manager and the senior officer at the ANZ lending centre at Winnellie since 1992.

[60] Baylis presented as something of an enigma. His professed memory seemingly improved as he went along and appeared to be based largely on documents that he perused. I do not consider that he had any significant independent memory of many events at all and was, in large measure, merely regurgitating what he read in his diary notes and other documentation.

[61] I carefully observed him in the witness box and, at the end of the day, did not find him an impressive witness.

[62] At times he professed a positive recollection of events that I do not consider that he truly had and, as I will later demonstrate, there are inconsistencies between his written statements and his oral evidence. Often, when pressed in cross examination, it was plain that he had no present detailed independent recollection of numerous events and circumstances.

[63] His memory of what meetings he had with the principals of TSM in late 1997 was quite hazy and, I consider, to some extent, inaccurate.[10].

[64] It seemed to me that various aspects of his testimony were little more than reconstruction on his part.

[65] He professed no present memory of the initial dishonour of the $460,000 cheque, no diary note concerning it (of the nature that he referred to) has been found and I simply do not believe him when he asserts that he would have spoken to one of the directors of TSM prior to the dishonour.[11]

[66] There is no evidence to suggest that he did and it is significant that he does not appear to have made a diary note of any such conversation.

[67] He had no definitive memory of how it was that Godwin came to be speaking to him on behalf of TSM,[12] as recorded in his credit memorandum of 18 November 1997.[13]

[68] His sole prior memory of Godwin was being introduced to him as the LTD development project officer on site at Palmerston during one of the initial meetings.[14] His responses in cross examination[15] are also instructive.

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[10] cf his statement of 20 August 2007 reproduced in Trial Book Volume 9 at page 479, where he states that he had no independent recollection of what was said by each of the people present at any of the meetings.
[11] cf T1787-1788.
[12] T1823.
[13] MFI D51 p 144.
[14] T1808.
[15] at T1818, 1822-1823.

[69] Baylis first stated that he could not remember what was said by Godwin to him concerning the NAB mortgages over the alleged Godwin properties, but, shortly after, volunteered in cross examination that Godwin said that any mortgage liability was only for a small amount and he would clear it up[16]. Oddly, this does not seem to have rung any alarm bells with Baylis when it later emerged that very substantial liabilities must have been paid out by means of the $460,000 cheque.

[70] There are other problematic aspects of his evidence to which I shall come in context in due course.

[71] All in all, I have treated his evidence with great caution. I am not prepared to act on it, except where it is supported by other convincing evidence.

The witness Burford

[72] This witness was, at all material times, employed by the ANZ as assistant to the witness Baylis. He is presently working as a finance broker in regional South Australia.

[73] He presented as a frank and honest witness, but professed little detailed memory of relevant events. He recalls some involvement with the TSM transactions and said that he did not have anything to do with them until the point was reached at which the file was handed over to Baylis for management. The two of them shared the one office at the time.

[16] T1828.

[74] This witness was able to identify his own handwriting on certain of the documents reproduced in Exhibit D51. These refreshed his memory that he conducted and/or arranged for various searches, made out formal valuation requests for Baylis to sign and generally attended to or arranged the production of various letters and security documentation. It was he, for example, who drafted the finance agreement and the letters expressing the formal approvals of the ANZ advances.

[75] He was unable, due to lack of memory, to throw much light on the events that took place at the Lands Titles Office, when the witness Ordogh sought to lodge the ANZ security documents for registration on 5 January 1998. His sole memory is that there was a telephone conversation with Ordogh when she was present at the Lands Titles Office and Godwin was apparently also there at the time. He may have actually spoken to her on that day more than once.[17]

[76] For the most part, this witness was unable to contribute more than already emerges from the written documentation. He does not profess positive recollections of most of what is there recorded. At best, he was able to speak of some of his usual practices.

[77] It follows that he was unable to make any really substantial positive contribution to the evidence beyond identification of relevant documentation.

[17] T1896.

General background

Preliminary

[78] What follows, except as otherwise specifically indicated, constitutes my distillation of the relevant narrative facts as I find them to be from the whole of the evidence. A good deal of the narrative history is either common ground or has been extracted from objective sources such as documentation and records, the provenance of which is not in issue.

[79] I have not set out, in these reasons, to discuss every last facet of the vast volume of evidentiary material placed before me, but I have, of course, considered it all. Any failure to refer to specific evidence should not be taken to indicate that I have overlooked or ignored it.

[80] My expressed conclusions are the product of an analysis of the totality of the evidence and are intended as a convenient summary of my relevant findings of narrative fact, except where otherwise specifically indicated. It should be understood that, whenever, in these reasons, I have merely recited a fact or statement without immediate or later express or implied qualification or contrary comment, I have accepted that fact or statement as accurate and as having been proved and/or made on the balance of probabilities.

Relevant history

[81] TSM carried on a sheet metal fabrication business (mainly in the Territory) between 1987 and 2001. As time went by, it became involved in building

development and construction projects in concert with and eventually in succession to LTD, as hereafter appears.

[82] TSM was first registered in 1987. The plant, equipment, goodwill and other assets required for its operations were, save as later appears, vested in it.

[83] The original principals of TSM were DLS and a person named Coleman, who was bought out shortly prior to 1995.

[84] ECD joined DLS in that year as a principal of TSM, indirectly contributing some $260,000 by means of a loan procured through ATSIC, which was serviced by TSM on behalf of ECD. The servicing costs were debited to his loan account with the company.

[85] Thereafter DLS essentially attended to estimating, product development and some floor work, whilst ECD looked after the administrative functions of the business, including the development of computing and promotional aspects.

[86] A liquidation order was made in respect of TSM on 26 June 2001. That was followed by Voluntary Administration on 6 June 2007 and a Deed of Company Arrangement on 16 July of the same year.

[87] The expert witness Martin, who became the administrator of TSM, confirmed that the company records indicate that, when ECD bought into the business, NKS sold her then half share to him. She thereupon lent the purchase price to TSM and the company granted a charge to ATSIC to

guarantee the ECD loan. Shareholdings in TSM were ultimately adjusted so that, in the final result, DLS and NKS each held one share and ECD held two shares.

[88] LTD was incorporated on 28 May 1997 and eventually became the purchaser or registered owner of the property that was the site of the first LTD development project and also that which was the subject of the second LTD development project. It was de-registered on 14 March 2004, but subsequently restored to the register by order of Riley J dated 24 August 2007.

[89] At all material times:

(1) DLS was a director of TSM and LTD;

(2) He was both an owner of the Raffles Road property and a joint owner (with ECD) of the TSM land and workshop premises;

(3) His wife NKS was the other owner of the Raffles Road property;

(4) ECD has also been a director of TSM and LTD;

(5) He was an owner of the Anula property and a joint owner of the TSM land and workshop premises;

(6) His wife SED was the other owner of the Anula property; and

(7) ANZ was a corporate body carrying on a general banking business, inter alia, in the Territory.

[90] It is fair to say that TSM experienced continuous cash flow problems from at least about 1995 onwards. That problem was exacerbated by the fact that

general workflow tended to drop off during the wet season and it was difficult to keep all staff gainfully employed during the wet season months.

[91] It was decided, in 1996, to acquire and move to more commodious premises at 16 Sadgroves Crescent Winnellie (i.e. the TSM land and workshop premises). It is not clear as to precisely when the move took place, but a perusal of Exhibit P35 indicates expenditure in relation to the new premises from about mid 1996 to early 1997.

[92] A total amount of $380,000 was eventually committed to enable the re-location to occur and the acquisition of the site was largely financed by a loan procured from the CBA for $300,000. DLS conceded that its servicing commitment to the CBA on that loan may well have been greater than the rent previously paid by it in respect of the former premises.

[93] As of early 1997 TSM had already sustained losses of the order of $38,000 in relation to a failed tank construction venture in Brisbane, to which I shall refer in due course. It also sustained a loss of $40,000 in having to effect remedial work on a large roofing project at the Royal Darwin Hospital, when its subcontractor had performed defective work and then became insolvent.

[94] The first few months of 1997 proved slow due to the wet season downturn and creditors were pressing. The CBA was unwilling to increase the then TSM overdraft. DLS and ECD were anxious to find some means of infusion of additional working capital.

[95] This situation led to the bringing into being of LTD and the involvement of Godwin.

[96] DLS and ECD had been acquainted with him in a social setting for some years and he came from a well known and respected Darwin family. He expressed interest in being involved in the then proposed business of LTD and agreed to contribute capital funding of $400,000 in relation to it.

[97] DLS and ECD had conceived the idea of TSM prefabricating residential units at the TSM land and workshop premises and of LTD then rapidly erecting the relevant segments on site. This was intended to overcome the wet season downturn in work and also result in cost savings related to travel, taking materials to various sites and co-ordinating the activities of the different trades.

[98] LTD was, accordingly, incorporated at the instance of DLS, ECD and Godwin on the footing that all three were to be directors of and equal shareholders in it.

[99] The evidence indicates that this entity was specifically brought into existence for the purpose of implementing the proposed initiatives already described, by acquiring land, erecting pre-fabricated homes or units (the components of which were to be manufactured by TSM) and then reselling allotments of land and completed dwellings or units on it.

[100] DLS estimated that the total cost of the then proposed first LTD development project, including land acquisition, was likely to be about $750,000. The problem that had to be addressed at the time was how such a project could be funded.

[101] To that end Godwin had become involved in the formation of LTD on his undertaking to make the capital contribution of $400,000, initially in relation to the first LTD development project and subsequently for the purposes of the second LTD development project.

[102] He represented to DLS and ECD that he would be able to do so by selling some shares he held or by borrowing money against the alleged Godwin properties, which he said he owned.

[103] Construction work on the first LTD project commenced close to the time of incorporation of LTD (i.e. about the end of May 1997), at which stage no cash contribution had actually been made by Godwin and no other funding arrangements had been put in place to support the project.

[104] Godwin did make some limited contributions (totalling $81,500) early in June 1997,[18] at which time LTD had still not arranged relevant loan accommodation with the CBA, its then banker.

[18] Exhibit D11.

[105] Further, construction actually got under way before the site acquisition had been finalised and title achieved – which did not occur until mid August 1997.

[106] On or about 11 August 1997 the CBA approved a $350,000 overdraft facility on the personal guarantees of the three LTD directors and the security of a first mortgage over the site of the second LTD development project, as well as a floating charge dated 11 August 1997 over the assets of the company.

[107] By this time the first LTD development project units were close to completion.

[108] Work commenced on the second LTD development project units very shortly after the overdraft facility had been granted, but at a stage when that project remained essentially unfunded and the cost of the first had really absorbed all available funds.

[109] The initial units for the second LTD development project had been constructed and moved to the site by 18 October 1997 and the final units were on site by 9 November 1997.[19]

[110] As appears from Exhibit D13, the CBA overdraft facility was of a short term nature and required the proceeds of sale of the first LTD development project units to be applied in extinguishment of it, repayment in full being required by 15 November 1997.

[19] See relevant entries in Exhibit D 38.

[111] The witness Hammond testified that the CBA actually declined to provide further financing for the second LTD development project because of the unsatisfactory management of the LTD account and, in particular, the substantial number of dishonoured cheques in relation to it.[20]

[112] Exhibit D61 graphically indicates the unsatisfactory situation adverted to by him. In large measure, this was precipitated by various cheques generated by Godwin and/or Traci Lew-Fatt that were dishonoured and a series of false representations that were made by Godwin to Hammond over time.

[113] Hammond's evidence rendered it clear that, had the CBA known the true situation concerning the financial position of TSM, LTD and the three directors of the latter, and having regard to the unsatisfactory dealings with the LTD account in any event, there would have been little likelihood of that bank granting further advances for any purpose.

[114] Indeed, Hammond's evidence left me with the very distinct impression that the CBA was far from displeased to quit the TSM and LTD accounts, as and when that actually occurred.

[115] DLS said that he knew, at the time, that some cheques were being dishonoured, but was by no means aware of the extent of that problem, as revealed by the exhibit to which I have referred.

[20] Exhibit D61, T1962. See also Exhibit D15.

The re-financing proposal

[116] As at about July 1997, Godwin had, in net practical terms, contributed only a relatively small portion of the working capital promised by him and there was a shortfall of funds with which to progress and complete the second LTD development project when it was embarked on in about late August 1997.

[117] TSM and LTD had both been suffering and continued to suffer a chronic shortage of funds.

[118] When challenged by DLS and ECD concerning his failure to produce the promised $400,000 in full, Godwin initially stated that he was getting money from the NAB by mortgaging the alleged Godwin properties, but later stated that, as the bank was messing him around, he would get the funds from his father instead.

[119] In the event, only a portion of the funds originally promised was ever forthcoming and Godwin even made substantial drawings against that for his own purposes. On 26 September 1997 a cheque written by his de facto wife in the sum of $120,000 by way of purported capital injection on his behalf was dishonoured.

[120] Details of the transactions involving Godwin appear from cash book entries recorded in Exhibit P16 and the relevant CBA bank records.[21]

[21] Exhibit D11.

[121] The summary based on details extracted from those sources[22] indicates that the net situation was that, from and after 29 August 1997, Godwin had taken more from LTD than he had contributed. By 7 November 1997, his net contribution was nil and he actually owed LTD slightly in excess of $133,000.

[122] The highest net contribution credit he ever achieved was $91,800 in mid July 1997, but that was steadily extinguished by reason of his drawings thereafter.

[123] It must be borne in mind that the bulk of the short term CBA overdraft facility was not in fact available for satisfaction of general creditors of LTD.

[124] The first LTD development project had gone forward by some arrangement with the vendor of the site for deferred payment and the second LTD development project site had also not been paid for. This resulted in a total amount of $234,685.12 being drawn against the overdraft facility on 11 August 1997 to effect settlements in respect of the two sites.

[125] Sales of the first LTD development project units commenced settling in early October 1997 and, by 15 October, the short term overdraft had virtually been eliminated. Thereafter, the CBA account was generally in debit to a fairly nominal amount until, on or about 24 November, LTD seems to have been granted a further overdraft limit of about $100,000.

[22] Exhibit D65.

[126] In mid 1997 the witness Flynn, a social acquaintance of DLS and ECD, who traded in Darwin through Flynn Petroleum Group (NT) Pty Ltd, agreed to advance money to LTD on a short term basis, to assist in furthering its projects, albeit at a very high rate of interest as what he termed a lender of last resort. He utilised NPG, which initially advanced some money on an unsecured basis, as the vehicle for that purpose.

[127] Flynn's memory is that DLS and ECD introduced Godwin to him as a director of LTD and a person who was looking after the financial side of things, while they were looking after the building work.

[128] That said, the plaintiffs assert that it was DLS who negotiated each of the advances made to LTD with Flynn and received the cheques for them, other than the $570,000 cheque. On the other hand Flynn stated to the police that he was mainly dealing with Godwin.

[129] I prefer the evidence of DLS which is reinforced by that of ECD.[23] I consider that Flynn's memory as to this is suspect and that he was focusing mainly on the later events involving Godwin's fraud.

[130] I will return to consider the dealings with Flynn and NPG in greater detail in due course. As will later emerge, LTD had, by early October, borrowed a total of $800,000 from that source on a short term basis. By the close of 1997 it had an accruing liability for interest payments to NPG of the order of $22,000 per month.

[23] See supplementary statement of the latter, paragraph 42.

[131] LTD was in default with its interest payments to NPG as from about October 1997. For its part, TSM was unable to meet accruing loan payments to ATSIC and was in arrears with its main supplier, Union Steel. TSM was, in effect, attempting to carry substantial debts of LTD.

[132] *Inter alia*, Godwin approached officers of the ANZ at its Winnellie Branch to explore a possible re-financing of the LTD business operations in a manner that would provide additional working capital, both for that company and also TSM, at a lesser rate of interest.

[133] The ANZ was not the TSM or LTD banker at the time, although it had been TSM's banker in the period 1988-1995. The indebtedness of the company in mid 1997 was to the CBA, Esanda Finance, ATSIC and other entities. TSM had originally moved away from the ANZ to obtain a greater level of financing, albeit at higher rates of interest.

[134] Godwin's activities led to the making of the finance application by TSM. That application is said by the plaintiffs to have been partly oral (at the October meetings and the November meetings between DLS, ECD and Godwin, one the one hand, and various officers of the ANZ, on the other) and partly in writing.

[135] The documentary material referred to ultimately consisted of the re-financing proposal,[24] an ANZ Business Credit Application,[25] three Personal

[24] Exhibit P1 p 57 et seq.
[25] Exhibit P1 p 83.

Statements of Position in the names of DLS, ECD and Godwin respectively[26] and some financial statements.

[136] The initial step in the process was the first October meeting, which took place at TSM's then business premises at Winnellie. This meeting involved DLS, ECD, Godwin and an officer of the ANZ (the witness Bradley). There was a general discussion of the activities and needs of TSM. I am satisfied that, in the course of this meeting, Bradley requested the production of what ultimately proved to be the re-financing proposal.

[137] I accept the evidence of DLS in that regard.[27] The evidence of ECD was also to the same effect.[28] I further accept that, in the case of the first October meeting, there was also some reference to the fact that Godwin had become involved in LTD by making a capital contribution that he had only partly paid, but was not involved in the operations of TSM.

[138] Bradley thought that the re-financing proposal was produced at (or possibly even before) the first meeting[29] and that this was the meeting at which the witness Meers was also present. I think that he was mistaken as to this. I prefer the evidence of the plaintiffs' witnesses on this topic. I consider that it was produced at the second October meeting, at which Meers *was* present.

[139] Bradley testified that, at an interview with Detective Polychrone in September 1998 (and when he probably still had his 1997 diary available to

[26] Exhibit P1 p 89 et seq.
[27] (T216).
[28] (T1002).
[29] (T1555).

him), he stated that the meeting at which Meers was present was on 16 October 1997.[30] This seems to be correct.

[140] Bradley stated in cross examination that he could only recall being involved in two meetings, the first being that on 16 October 1997 and the second being one occasion when he and Meers were taken by car to Shearwater Drive to view the LTD development there.[31] This is in discord with ECD's diary entries, as elsewhere appears, and cannot be correct.

[141] The re-financing proposal contains no reference either to the eight units then under construction or the financing that had been provided by NPG, an aspect to which I will later return. DLS said at one point that the reason for this was that he told Bradley that finance had been arranged with a third party in relation to the eight units in question.

[142] His initial evidence at trial was that a sum of $800,000 then owed by LTD to NPG was not referred to because it was a liability to be discharged from the proceeds of sale of the eight units.

[143] He went on to say that, to secure the loan eventually granted by the ANZ to TSM, a mortgage was actually given over the second LTD development project site, because he did not understand that a charge already given to NPG prohibited the giving of a mortgage by TSM over the relevant land.

[30] (T1551).
[31] (T1555).

[144] The sites involved in both the first LTD development project and the second LTD development project were in fact purchased by LTD, as earlier recited.[32]

[145] I accept that, at the first October meeting, Bradley said that he would ultimately come back with a suggestion as to the best way to structure the TSM financing to meet its requirements.[33]

[146] I am also satisfied that he not only requested that TSM prepare the re-financing proposal, so that the security position could be examined, but also stated that the bank would require unencumbered security titles.

[147] I found Bradley's evidence as to what might have been said in that regard quite unconvincing.

[148] I am of the view that the re-financing proposal was prepared after the first October meeting (whenever that may have been held) and prior to the second October meeting. The evidence suggests that ECD was the principal draftsman of it, albeit that he produced the document in concert with DLS and Godwin. It is fair comment to say that the proposal set out to portray the existence of a comfortable excess of assets over liabilities on the part of the companies and the directors, viewed as a single group.

[149] I pause to reiterate that it is beyond question that the re-financing proposal was flawed in a number of respects. It was inaccurate to the point of being

[32] See also the DLS explanation recorded at T228 - 230, which seems to reflect some rather confused thinking on his part.
[33] (T1563).

seriously misleading, bearing in mind that it purported, accurately, to disclose the financial position of the group comprised of TSM, each of the three directors of LTD personally and, impliedly, LTD itself.

[150] Without attempting to be fully definitive as to all issues, major inaccuracies were:

(1) The values attributed to the alleged Godwin properties were substantially over-inflated (by something of the order of $170,000), as was the value of the TSM land and workshop premises (by about $100,000);[34]

(2) The alleged Godwin properties were asserted to be unencumbered assets of Godwin, whereas, in truth, the registered owners were third parties and the properties were, in aggregate, encumbered by first mortgages securing debts of about $460,000 (i.e. up to virtually their full value);[35]

(3) It was represented that security in the form of a $300,000 fixed deposit (said by Godwin to be held by him) would be available, whereas no such monies existed;

(4) The overall liability situation was understated, quite apart from the amount due to NPG, having regard to what was due to all other creditors of TSM/LTD;

[34] (cf T587-588).
[35] (Exhibit P1 page 316).

(5) It was not made clear that the completion of the second LTD development project was, in practical terms, unfunded and that all proceeds of sale of units up to that time had been or would be absorbed in satisfying then existing liabilities. (All proceeds of the NPG borrowings had, by that time, also been expended);

(6) It was represented that the first LTD development project had successfully been completed. The inference was that it had been financially successful, whereas TSM had done no detailed final costing check on it and, particularly when the very high NPG borrowing costs were brought into account, the project could well have been far from financially successful – as, indeed, proved to be the case;

(7) The proposal stated that, although LTD had only been in operation for a short period of time, it had turned over $2.2 million. That statement was simply incorrect;

(8) Generally, the proposal represented the companies as being in good financial shape when, in fact, they were not.

(9) TSM had experienced recurrent difficulties in paying suppliers in 1997[36], was substantially in arrears with its group tax and PPS commitments and it had used its existing CBA accommodation up to the limit.

[36] See, for example, numerous entries in ECD's diary Exhibit D38.

(10) By no later than 24 October 1997, the point was reached whereby CBA commenced actually dishonouring cheques drawn by LTD; and

(11) It is to be observed that, in the spreadsheet included in the re-financing proposal, there is a reference to company tax, but this certainly does not make it apparent that TSM was paying off substantial arrears of group tax and PPS obligations.

[151] The proposal also made no reference to the advances totalling $800,000 that had been made by LTD to NPG, or of a fixed and floating charge given by LTD to NPG on 15 September 1997 to secure that liability.

[152] It was the stance of DLS that these were irrelevant when the proposal was prepared because an arrangement that had been come to for NPG to take over the 8 units in extinguishment of the LTD debt (to which later reference will be made) was then still in force. On the other hand the completion of the units was then unfunded and LTD was in financial difficulty.

[153] There can be little doubt that the representations made and failures to make full disclosure in the re-financing proposal and what appear to have been some associated statements made to Bradley directly impacted on the conclusions eventually come to by Barnett, the ANZ business underwriter who assessed the formal finance application that followed it.

[154] He commented in his diary note summary dated 7 November 1997 that "Customers clearly have shown the ability to repay both their projected and

current debts, in both their personal and company names." This was scarcely an accurate description of the true situation at the time.

[155] It is also said in the same diary note that, when the cash flow was prepared, the customer had intended to borrow to fund the ongoing work of LTD, "thus the interest costs associated on the cash flow". However, the note indicated that a sale of their last project to one buyer at $960,000 had shelved the need for these facilities. There is a further comment that the customers would be funding a majority of the LTD business by their own cash flow.

[156] DLS denied in cross-examination any knowledge of a representation that the second LTD development project was being sold to a single buyer at $960,000. He was at a loss to explain how the bank had arrived at that conclusion. Further, it is clear that none of the principals of LTD could possibly have been in a position to ensure the cash flow funding referred to.

[157] That situation needs ultimately to be considered in concert with the content of the ANZ internal memorandum written by Barnett to the ANZ "State Credit SA & NT" on 11 November,[37] from which two points emerge.

[158] The first is that, on the information that had been provided to the bank, the income margin for 1997 was thought to be $54,218, which was illusory bearing in mind the undisclosed commitment to pay considerable arrears of group tax and PPS at the rate of $1,000 per week.

[37] Exhibit P1 page 209.

[159] The second was the further reference to the supposed single buyer of the second LTD project for $960,000, together with the asserted existence of a $300,000 fixed deposit held as security by the CBA.

[160] Ms Kelly pointed out during cross examination of DLS that there were therefore three misrepresentations emerging from that material. They were respectively:

(1) the assertion of the single buyer for $960,000;

(2) the alleged existence of the $300,000 term deposit; and

(3) the failure to disclose all borrowings that had been made.

[161] It was, *inter alia*, represented by Godwin to DLS, ECD and the ANZ as portion of both the re-financing proposal and the finance application, (both orally and/or in the written re-financing proposal) that he was the owner of the alleged Godwin properties, the market values of which were asserted in the proposal to aggregate $580,000.

[162] The evidence of Bradley[38] illustrates what was conveyed to him. The significance of the falsehood of those representations is discussed by him at T1572, 1573. He accepted that, had he been aware of the true situation, he would have felt obliged to draw it to the attention of DLS and ECD, so that they could consider their position and potentially increased exposure.[39]

[38] T1571, 1572.
[39] T1573.

[163] As already emerges, it was further asserted to Bradley that each of those properties was (or would be) unencumbered and would be available to the ANZ to support any ultimate finance agreement by TSM and LTD with it.[40] Godwin did reveal at the times of the discussions that there was a small mortgage of about $9,000 on one property that would be discharged.

[164] I accept that those representations were re-iterated at subsequent meetings between the individuals referred to and officers of the ANZ.

[165] The directors of TSM also confirmed to the ANZ that there was an existing mortgage of about $110,000 on the home of DLS. Godwin undertook (probably at the second October meeting) to pay this off by way of loan to TSM, in addition to his commitment to contribute the originally agreed sum of $400,000.[41] That undertaking was expressed in the presence of both the directors of TSM and the ANZ bank officers present at the meeting.

[166] DLS says that, when asked by Bradley at one of the meetings (possibly the second October meeting) how he would be able to do so, Godwin responded that he would fund the payment either by selling some shares that he held or from money made available to him by his father, so that the Raffles Road property could be made available to the ANZ as a first mortgage security.

[40] cf paragraph 5 of the re-financing proposal.
[41] See cross-examination as to this at T793-796 and the variance between paragraph 199 of Exhibit P10 and paragraph 96 of Exhibit P12. cf also ECD's initial statement reproduced at Trial Book Volume 1 Tab 2 Par 84 as amended.

[167] Bradley has no present memory of what may have been said concerning the existing mortgage over the Raffles Road property.[42] I have no reason to reject what was said by DLS on this score.

[168] I here pause to comment that it is quite clear that the representations made to Bradley led him to the understanding that, as he reported in his credit memoranda, LTD had no lending history. It is difficult to escape the conclusion that the re-financing proposal was deliberately put forward on the basis of proposed advances to TSM alone, so that the LTD borrowings and general financial history would not have to be disclosed.

[169] The LTD financials and bank statements up to that point were never supplied to the ANZ.

[170] So it was that, in his memorandum reproduced at Exhibit P1 page 178, Bradley reported "All loans to be fully repaid, nothing left". This clearly indicates that he was given to understand that, on the taking up of any ANZ loans, there would be no other relevant liabilities of significance in relation to what was being proposed.

[171] In his cross-examination DLS conceded that Bradley had been told that there would be no borrowings in the group other than the TSM borrowing that was being applied for from the ANZ.[43]

[42] T1569.
[43] T618.

[172] DLS testified that, as a consequence of the arrangement arrived at with NPG for it to take over the units comprised in the second LTD development project (to which I elsewhere refer), there was then no debt due to that company. However, he was constrained to concede that, when that arrangement was rescinded on about 17 November 1997 following discussions at a "retreat" held by relevant TSM and LTD personnel, no attempt was made to convey the changed situation to the ANZ.[44]

[173] A written record was duly made of the decisions taken at the retreat[45] and a copy of this was supplied to Baylis. Amongst other entries in that record was the notation “LTD Units $844k to Flynn - Refinance/recovery of Units/settlement of contract”.

[174] Baylis accepted that he duly received a copy of the record, but asserted that he did not study it in detail.

[175] He claims that he did not register at the time that the notation indicated that $844,000 may have been owed to Flynn (NPG). If such an implication had been derived by him, this would have rung alarm bells.

[176] He said that he would have sought to ascertain how the loan was secured and would have re-examined the Group capacity to repay all of its debts,

[44] T619.
[45] Exhibit P1 page 220.

including any advances made by the ANZ to TSM. However, he claims that such an implication did not occur to him at the time.[46]

[177] The statements contained in the diary note prepared by the witness Barnett on 7 November 1997 (prepared on the basis of information supplied by Bradley and obtained by him from the principals of TSM) to the effect that the customers clearly have shown the ability to repay both their projected and the then current debts, in both their personal and company names, and his generally favourable report in relation to the finance application were undoubtedly the product of a withholding of important relevant information by the directors of TSM, as I have recited.

[178] DLS accepted in cross examination that, had the ANZ been given full information of the true group debt position as at the date on which it finally considered the finance application, it is unlikely that such application would have been favourably reported upon.[47]

[179] The practical effect of the misrepresentations made in and in relation to the re-financing proposal was illustrated by the expert witness Edwards.

[180] As he sought to demonstrate in paragraph 111 of his report,[48] the representations made to Bradley (and thus Barnett) implied that the relevant group had net assets of the order of $1,344,733,[49] whereas the true situation

[46] Statement dated 26 May 2008, paragraphs 2 to 6 inclusive.
[47] T632.
[48] Exhibit D62, amplified and adjusted in certain respects in Exhibit D64.
[49] Report paragraph 42.

was that, as at 31 October 1997, the total net worth was, in the opinion of Edwards, only of the order of $132,550.[50]

[181] That result was calculated on the material supplied to him, principally the relevant TSM financials and LTD cash book entries.[51] He did not profess to have, in effect, audited it in detail.

[182] The last mentioned figure was struck after giving full credit for items such as jewellery and other personal effects as well as asserted superannuation credits, items that are not normally accorded significant value by a lender because of non-accessibility.[52] As I read Table 8 and is reflected in Exhibit P74, those two items total about $240,000, including alleged (but non-existent) superannuation of $170,000 held by Godwin.

[183] Edwards calculated that, by 5 November 1997, when the initial request for finance had escalated to $1,050,000, the net group asset position was of the order of $116,738.[53] As at 19 November 1997 it stood at about $106,214.[54]

[184] These figures need to be considered against the original background of what is said in paragraphs 45, 64 and 69 of Exhibit D62 and the first reworking of calculations as set out in Exhibit D64.

[185] In so reciting the evidence I by no means ignore the fact that, in cross examination, Mr Sallis sought to challenge the accuracy or appropriateness

[50] Exhibit P74.
[51] T2274.
[52] Exhibit D62 paragraph 48.
[53] Exhibit P75.
[54] Exhibit P76.

of Edwards' detailed calculations in certain respects.[55] I also bear in mind the criticism expressed by Mr Sallis as to the asserted error on the part of Edwards in relation to his assumption that there was a liability of $119,485 to the CBA[56] and note that this contention was never put by him to Edwards in cross examination.

[186] Given that there may well be force in certain of the criticisms advanced and, in particular, the question of whether the assumptions that he was asked to make in calculating the losses on the two LTD development projects were entirely accurate, it nevertheless remains apparent on the face of the material before me that, in substance, the key thrust of the points made by Edwards as to the fairly minimal true net asset position of the group at the relevant dates remains valid.

[187] It is of course true, as Mr Sallis stressed to Edwards,[57] that the relevant figures need to be viewed in light of the short lived arrangement with Flynn to take over the second LTD development project in satisfaction of the debt to NPG. Nevertheless, the reality of the situation was that, at all material times, the group financial position was precarious, both in terms of net asset position and also liquidity.

[188] Having so recited the effect of Edwards' evidence in the above regard, there are several points that need to be noted with regard to it.

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[55] T2223 et seq, 2256-2268, 2277 et seq.
[56] See page 174 of his written submissions.
[57] cf T2238-2242.

[189] First, his calculations were based (in part) on a computer produced version of the LTD cash book.[58] There were in fact two versions of that document, namely Exhibit P73 and Exhibit P16, the content of which varied slightly, for a reason that is not readily apparent.

[190] The witness proceeded on the basis of the content of Exhibit P73. Had he proceeded on the basis of Exhibit P16, the resultant figures in (for example) Exhibit P74 would have varied by just over $3,000. The difference is not significant for present purposes.

[191] Second, in so far as the figures arrived at relate to the financial position of Godwin, Edwards derived certain of them from a consideration of the documents MFI P71 and MFI P72, related to criminal proceedings against Godwin,[59] an issue to which I shall later return.

[192] Edwards indicated that, by reference to paragraph 47(e) of his report Exhibit D62, he had, *inter alia*, relied upon the criminal proceedings documentation for the figures set out in items (2), (6) and (7) inclusive in Table 9, totalling $166,000. He testified that, if these were excised as not proven, the total net assets of the group would increase by the last mentioned sum to $298,550.[60] This would not have changed the opinion arrived at by him.[61]

[58] See Exhibit P73.
[59] See Exhibit D62 paragraph 47(e) and T2334.
[60] T2498.
[61] T2499.

[193] Third, and perhaps most importantly, it is clear that the assumptions that Edwards was requested to make concerning the total project costs in respect of the second LTD development project (i.e. that they were likely to be consistent with those for the first LTD development project)[62] were inconsistent with the data set out in the LTD financials for the year ended 30 June 1999.[63]

[194] The assumptions accepted gave rise to a capitalised loss of $369,837, as referred to in Exhibit P74, whereas a capitalised loss derived from Exhibit P77 was a total of only $293,079.

[195] Edwards accepted that, if the figures from the financials were adopted, then the practical consequence was that the net group asset position as at 31 October 1997 would have been increased by the amount of the difference between the two sums.

[196] It is stating the obvious to say that the adoption of figures derived from the financials has the consequence of indicating that, as at 31 October 1997, the net asset position of the relevant group was still quite nominal. This is specifically so when due allowance is made in respect of the non-accessible items referred to in paragraph [182] of these reasons.

[197] Having said that, I note one feature of the cross examination of Edwards.[64] An assumption of the project costs, as made by Edwards, tends to leave

[62] See Exhibit D62 paragraph 74(d).
[63] Exhibit P77.
[64] As recorded at T2328-2332.

unexplained how the total project situation was in fact funded, bearing in mind the figures there discussed. Edwards accepted that this called in question the detailed accuracy of the assumed cost figures that he was asked to adopt.[65]

[198] On the other hand it was certainly also Martin's view that losses were probably sustained on the projects, as I elsewhere recite. I consider that he was correct in so concluding. I further discuss that aspect in the course of reviewing the evidence given by Edwards.

[199] The evidence given by Edwards in re-examination[66] concerning the figures in the relevant LTD financials suggests that, on a review of all available data, the assumptions made and figures arrived at by him were not grossly erroneous.

[200] I return to the chronological narrative sequence of events.

[201] The evidence indicates that the main purpose of the second October meeting was to present the refinancing proposal to Bradley and to briefly discuss at least certain of its contents. He does not profess to recall the precise detail of the discussion that then took place. However, I took him to accept that the outcome of the meeting was that he was to consider the re-financing

[65] T2334.
[66] As recorded at T2495-2497.

proposal and come back with an indicative proposal as to how the ANZ might best meet TSM's business requirements.[67]

[202] I am not satisfied that he gave any undertaking or made any statement to DLS, ECD or Godwin to the effect that the ANZ would check the proposed security properties and their values prior to producing the indicative proposal, or would carry out relevant credit checks at any specific time.

[203] I accept that Bradley probably made it clear that, in due course, the bank would need to carry out checks as to the value of proposed security properties and relevant CRAA checks as a precondition of advancing any monies. It is to be noted that it was not until the indicative proposal was presented to the ANZ that reference was specifically made to the need for the plaintiffs to supply CRAA credit search authorities and also authorities to value the proposed security properties.

[204] Bradley generated the letter containing the indicative proposal to TSM to lend money to it on or about 22 October 1997. This sought various authorities and made certain statements to TSM concerning future business relationships. The letter represented that, by banking with the ANZ, TSM would:

> "… experience
>
> - Professional services provided by bankers with backgrounds in small-business which caters proactively to your individual requirements.

[67] T1563.

- Bankers who always seek to 'add value' to your business through a thorough understanding of your present and future needs.
- Access to the ANZ Global Network, which includes Electronic Banking, ANZ Stockbroking, Esanda, ANZ Funds Management, Global Treasury, and International Services."

[205] I observe that the indicative proposal, in adverting to the ANZ security requirements, contemplated, *inter alia*, taking a first registered mortgage over only one of the alleged Godwin properties, namely the Wells Street property.

[206] The indicative proposal, *inter alia*, rendered it clear that no formal offer of finance was being made at that stage. It said that "*Before an offer to finance can be made to you, ANZ's normal credit process must be satisfied*".

[207] I take that to be a reference to the normal internal ANZ credit appraisal process *for its purposes*, involving, amongst other considerations, a review of securities offered and their values and the results of CRAA credit checks.

[208] I see no convincing evidence that it was represented to any of the plaintiffs that any such processes would be carried out either in *their* interests or even in the joint interests of themselves and the bank. Nor do I construe the relevant wording to simply relate to the review and checks to which I have referred. I consider that it was plainly a reference to the normal prudential, due diligence, assessment conducted by the ANZ as to the overall viability of and risk attendant on *any* proposed lending transaction.

[209] I here pause to note that DLS testified that, although, in the refinancing proposal, TSM had made specific structural requests for financial accommodation, Bradley had given advice about different loan structures and represented that he would choose the best structure to properly set up the company's business.[68]

[210] In giving that evidence DLS conceded that no complaint was made in the statement of claim concerning the structure that was actually proposed by the ANZ.

[211] The diary maintained by ECD[69] does not contain any record of meetings with ANZ bank officers prior to 24 October 1997 i.e. two days subsequent to the date pleaded as that on which the third October meeting was held. On 24 October 1997, ECD recorded in his diary:

> "ANZ blokes attended TSM and discussed proposals, gave us 2 scenarios; looks good at this stage -- will discuss the matter."

[212] This entry suggests that the third October meeting may have been held later than the date pleaded. However, I am satisfied that it was at such a meeting that the indicative proposal was presented by Bradley to DLS, ECD and Godwin and then discussed, at least to some extent.

[68] T893 et seq.
[69] Exhibit D38.

The finance application

[213] The indicative proposal was followed by various further meetings between officers of the ANZ and certain of the plaintiffs.

[214] The first LTD development project had been completed by about the end of October and the second LTD development project was well under way. TSM was then contemplating the purchase of a further property at Margaret Street Stuart Park for the purpose of yet a third project, in relation to which additional finance, beyond that originally contemplated, would be required.

[215] NPG had progressively lent a series of amounts to finance the LTD operations, commencing on 23 July 1997. By 7 October 1997 it had advanced the total of $800,000 to LTD.

[216] I have already recited that, as time went by, re-payment of advances made had, at Flynn's request, been secured by a registered charge over the assets of that company executed on 15 September 1997. This was a situation that was a matter of public record but, for some reason, never disclosed to the ANZ at any stage. The giving of that security was actually in breach of the securities held by the CBA at that point.

[217] Both DLS and ECD thought that Baylis was present at what was said to be the fourth October meeting,[70] although, bearing in mind the content of a credit memorandum dated 18 November 1997[71] and the entries in ECD's

[70] Viz on or about 29 October 1997.
[71] Exhibit P1 p 225.

diary, I think that it is likely that they were mistaken as to that. Indeed I was left with the distinct impression that the memory of DLS in particular as to when Baylis first entered upon the scene was confused.

[218] ECD's diary entries for 13 November 1997 record that three successive meetings were held with ANZ bank officers on that day.[72] Between about 29 October 1997 and 13 November 1997, various internal ANZ credit assessments had occurred, in accordance with the normal bank procedures.

[219] The first two meetings on 13 November 1997 occurred at 10 a.m. and noon respectively and involved the witness Bradley. It is clear that, in the course of them, the possibility of some additional financial accommodation was raised.

[220] The third occurred at 3.00 p.m. and involved Bradley, Baylis and a bank officer referred to as Chris (presumably the witness Burford).

[221] The ECD diary records a discussion as to how accounts would be operated and foreshadowed the signing of necessary documentation to support proposed loan facilities the following week.

[222] Baylis testified that, from his perspective, his meeting with DLS and ECD on 13 November 1997 was essentially of the nature of an informal handover meeting. Prior to that, he had not had any detailed involvement in relation to the finance application, although it seems probable that he may well have

[72] See Exhibit D38.

tendered some advice or given some informal assistance to the then inexperienced Bradley at an earlier stage.[73]

[223] A formal business credit application by TSM had been raised on or about 29 October 1997, as required by the ANZ. It is in Bradley's handwriting and was, at some stage, complemented by separate personal documents, each titled "Personal Statement of Position" (PSP), duly completed and signed by ECD, DLS and NKS, and Godwin respectively. The individual PSPs each bore a date 29 October 1997 and contained a final page in terms reproduced at Exhibit P1 p 93. This expressly authorised the ANZ to obtain information from other agencies concerning the particular signatory and, *inter alia*, to give relevant information to a guarantor or intending guarantor concerning the credit standing and background of the signatory.

[224] The statement completed by Godwin referred only to the Brayshaw Crescent property, which was included under the heading "Family Home". This property was represented as being unencumbered.

[225] The witness Tomazos, an NAB officer, stated that a payout figure was requested by Godwin on 29 October 1997 in respect of a mortgage then in fact registered over the Brayshaw Crescent property in favour of that bank.

[226] She recalls that, not long afterwards, she received two successive telephone calls from a person named Chris at the ANZ, enquiring about a release of the

[73] T1810-1816.

title to the Brayshaw Crescent property. On the second occasion she told him that there was debt outstanding in respect of it.

[227] Bradley accepted that the actual business credit application and also an accompanying list titled "Security to be offered" were in his handwriting and thus must have been raised by him. The list referred, in the body of it, to the Brayshaw Crescent property, but not the Wells Street property.

[228] The list has an endorsement at the bottom of it "Lionel 22 Wells Street Parap $330000", written in a different hand. The explanation for that situation is provided by the documentation related to the assessment of the original proposal by the ANZ credit management section in Adelaide.

[229] This reveals that, on review of the proposed transaction by him, the Manager of that section (the witness Wellman) was by no means enamoured of what was initially put forward and that the Wells Street property was then included in the security to be insisted upon. The witness Barnett acknowledged that the different hand writing on the list was his.

[230] TSM originally sought a bank bill in the amount of $800,000 in the re-financing proposal. The ANZ indicative proposal referred to proposed advances totalling $850,000. At the stage when the business credit application was written out by Bradley the amount sought was $1.05m.

[231] Bradley thought that the increase resulted from discussions had by him with DLS, ECD and Godwin in relation to the indicative proposal.

[232] At the third October meeting, Bradley had discussed that proposal with DLS, ECD and Godwin.

[233] The plaintiffs say that, in the course of the fourth October meeting, officers of the ANZ (either Bradley or Baylis or both and Burford) informed DLS, ECD and Godwin, *inter alia*, that the ANZ would advise TSM and/or LTD whether the assets disclosed by each of them in their respective personal statements of position could be used to secure any firm offer of finance by the ANZ and as to any concerns that it might hold with respect to Godwin's credit worthiness following the conduct of relevant credit checks.

[234] I am not convinced that any statements were made in those terms. However, I consider that it was made quite clear by one or other of the bank officers that loan approval would be dependent on both the provision of adequate security in the form of the properties offered (if the values of them checked out), and the obtaining of satisfactory results from proposed credit checks.

[235] Following completion of the finance application and the associated documentation, this material was sent by Bradley to the witness Barnett, the ANZ underwriter, in Adelaide. It is not clear precisely when this occurred, as certain memoranda subsequently exchanged between the two bank officers are undated.[74]

[74] See documentation behind Tab 10 in Exhibit D51.

[236] It seems likely to have been some time between the end of October and 7 November 1997. By the latter date the proposal appears to have been fully examined by Barnett.[75]

[237] It should be recorded that the documentation in Exhibit D51 is no more than an attempted compilation in date sequence of documentation comprised in Exhibit P1. Due to the somewhat sporadic sequence of documents in the latter exhibit, it will often be more convenient to hereafter refer to the various Tabs in Exhibit D51.

[238] It is clear that Bradley has no present independent memory of precisely what occurred once the relevant documentation had been sent to Barnett. He appears to be almost totally reliant on what written records now exist. I took it that his stance was that all relevant enquiries and checks in relation to the finance application would have been co-ordinated or carried out by Barnett.

[239] That was not the case. The effect of Barnett's evidence was that, whilst he did normally do CRAA credit checks on his computer and also relevant ASIC searches to obtain details of directors and other basic information, it was not part of his function to conduct other enquiries and checks to verify title situations, property values, the existence of company charges and so on.

[240] Barnett's evidence as to what he actually ascertained if he conducted any CRAA searches is far from clear[76] and his document reproduced at Exhibit D51 Tab 20 does little to clarify the position.

[75] See documentation behind Tab 21 of Exhibit D51.

[241] Certainly he professes not to have become aware of Godwin's bankruptcy. Indeed, this witness does not now have any positive memory of having done the CRAA searches and merely infers that he did by reason of the existence of the document at Tab 20.

[242] I entertain grave doubts as to whether the contemplated searches were carried out, or at least efficiently carried out. It is inexplicable, if they were, that no reference was recorded concerning Godwin's bankruptcy, which was readily apparent in other search results such as those that had been obtained by the NAB.

[243] The document at Tab 20 does not positively indicate to me that the credit checks were carried out. I acknowledge that Barnett's memorandum of 7 November 1997 asserts "CRAA completed on all Directors", but there is a total absence of details of the result, given that it was not the practice to retain full search results on file. The Tab 20 document is largely a blank pro forma.

[244] In his written statement[77] Barnett refers to two documents labelled DB11 and DB12 respectively as tending to reinforce his contention that he would have carried out CRAA checks on 31 October 1997. The document DB11 is simply a page containing the text of the authorities included in Godwin's PSP and DB12 is merely the document appearing at Tab 20, to which I have referred.

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[76] T1630 et seq.
[77] Exhibit D52.

[245] Barnett asserted that any additional requisite searches and checks were carried out by others, subsequent to the issue of loan approval -- many of them at the time when security documentation was being or about to be prepared.[78]

[246] Barnett makes mention in his diary note of 7 November 1997 of recent valuations of various of the then proposed security properties. These were said to have been made by Territory Valuation Services ("TVS") for the CBA in late October 1997.

[247] He has no present memory either of the valuations themselves[79] or how he came to receive them.[80] However, it is clear that he utilised those valuations for the purpose of calculating the relevant extended values for security assessment purposes. Baylis did not requisition new valuations until 21 November 1997[81] and these were apparently prepared on or about 25 November.[82]

[248] The TVS valuations included a valuation of the Brayshaw Crescent property. This had attached to it a title search that indicated that a third party (Traci Lew-Fatt) and not Godwin was the registered proprietor and that the property was subject to a registered mortgage.

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[78] T1598, 1602-1603.
[79] Exhibit P63.
[80] T1621-1622.
[81] Exhibit D51 Tab 36.
[82] Tab 39.

[249] The significance of that situation does not appear to have occurred to Barnett. He accepted in evidence that such a situation would normally call for investigation, because third party ownership implied a third party guarantee mortgage, rather than a mortgage from persons directly involved in the proposed transaction. The security requirement was for a first mortgage in any event.[83] He agreed that this might also have important implications for other security providers.

[250] This witness acknowledged that, if searches and enquiries indicated situations contrary to those that had been represented by the loan applicant, this could have an adverse impact on the appropriateness of loan approval. However, it was far from clear to me as to whose responsibility it was to initiate any necessary action if adverse information arose in that way, subsequent to the relevant loan approval. As to this, the content of paragraph (4) on page 2 of Pedler's de-brief memorandum dated 2 March 1998[84] is of significance.

[251] Barnett seems merely to have taken the representations in the finance application and PSPs in the instant case at face value as to the existence of assets and the liability (or lack of liability) situations as represented in the documentation.

[83] See T1626 et seq.
[84] Exhibit P1 p 367.

[252] The relevant valuation requests for the security properties were not raised (by Baylis) until 21 November 1997, after loan approvals had been given by the witness Wellman,[85] albeit subject to confirmation of property values.

[253] There seems to be some confusion on the plaintiffs' case as to when Baylis, as the manager of the ANZ Winnellie Business Centre, first became involved in the dealings between TSM and the ANZ. However, the Credit Memorandum dated 18 November 1997 (to which I have referred) suggests that this *was* on 13 November 1997 as earlier indicated.

[254] That accords with ECD's diary entry and the evidence of Baylis himself. It is the memory of DLS that, somewhere about this time and at a meeting with Bradley and Baylis, they indicated that the necessary credit checks had been completed and that the results had been satisfactory.

[255] There is no record as to when Barnett first received the finance application, but, as earlier recited, he had certainly processed it to the recommendation stage by 7 November 1997.

[256] Barnett then forwarded his recommendation to Wellman. By memorandum dated 11 November 1997,[86] Wellman indicated to Bradley that he was not prepared to approve the proposal in its then present form and had deferred it.

[85] Exhibit D51 Tab 29.
[86] Exhibit D51 Tab 24.

[257] He expressed various concerns, including the extent of directors' drawings and the consequent depletion of working capital - as well as concerns about TSM' s apparent ability to service the proposed advances, cash flow being heavily reliant on the performance of LTD. He identified a number of specific issues to be addressed.

[258] This decision was the subject of a second look by Pedler, who was even more disenchanted with the proposal, for the reasons set out in his diary note reproduced at Exhibit D51 Tab 25.

[259] His view was that the proposal was risky and ought not to proceed without "gilt edged security cover" and a satisfactory plan to manage potential liquidity problems. As he put it, "If LTD can't pay, whole group is in trouble". Pedler elaborated on the bases of his concerns in the course of his oral evidence.[87]

[260] Of course, neither Wellman nor Pedler had any knowledge of the true financial position of LTD at that time, and, in particular, of the history of the substantial high interest borrowings from NPG. They also did not appreciate TSM's history in relation to the ATO, or that Godwin's alleged $300,000 term deposit did not exist.

[261] I took Pedler to indicate that, had the ANZ become aware of the fact that Godwin had misrepresented the situation as to the ownership of the alleged

[87] See T1673-1677.

Godwin properties and the fact that they were unencumbered, that may well have led to the demise of the finance application.[88]

[262] He agreed that it would have been prudent for a bank officer to make enquiries concerning any debts secured by mortgages found to exist over those properties and how it was proposed to fund their discharge.[89] He acceded to the proposition that Godwin's PSP did not reveal a capacity to discharge mortgage liabilities of the order of $400,000.[90]

[263] Barnett, having been in communication with Bradley, was able to report to Wellman on 11 November 1997 that an additional security source was available, resulting in the availability of total extended real estate values of $1,088,900 to support proposed advances of $1,050,000.[91] He also addressed a number of issues concerning repayment capacity.

[264] Bradley has no positive memory as to why the Wells Street property was referred to in the indicative proposal but appears to have dropped out of the finance application when this was initially raised.

[265] DLS said that, on one occasion, he was present at a meeting in Baylis' office when the latter stated that the loan for $1,050,000 had not been approved because of insufficient security. He stated that Godwin, who was at the meeting, drew attention to the fact that the Wells Street property had not

[88] T1691.
[89] T1694 et seq.
[90] T1699.
[91] See memorandum reproduced at MFI D51 Tab 27.

been included in the list of first mortgage securities.[92] That occasion must have been on or about 11 November 1997.[93] I consider that DLS' memory is incorrect in so far as he thought that the meeting on 11 November 1997 was with Baylis. It was plainly with Bradley, because it was not until 13 November 1997 that Baylis took over the file from Bradley.

[266] It is important to note that, in dealing with the finance application, the ANZ proceeded on the specific understanding that LTD did not require funding because it had pre-sold the second LTD development project for $960,000.

[267] It was also given to understand that, particularly with the aid of the supposed $300,000 fixed deposit, the loans to all entities in the Group would be repaid, leaving the proposed debts to the ANZ as the only commitments[94] and residual working capital of about $410,000.[95]

[268] This was an important consideration because, if LTD was to draw on TSM for financial assistance, this could adversely affect the cash flow position and business of the latter.[96] As Barnett expressed the situation, in that regard the ANZ was concerned that the fate of TSM might be in the hands of LTD[97] – a somewhat prophetic summation!

[269] The witness Barnett further commented that, had he known that TSM had a substantial debt for unpaid tax to the ATO, in respect of which it was

[92] T640.
[93] cf Exhibit D51 pages 121 and 134.
[94] See T1590.
[95] T1596.
[96] T1593.
[97] T1608.

obligated to pay $1,000 per week, this would have had an adverse impact on potential loan approval, because the practical result would have been that the servicing of any loan would have to be entirely based on cash flow.[98]

[270] By memorandum dated 12 November 1997, Wellman gave approval to the advances totalling $1,050,000, subject to a series of stated conditions.[99] That approval was concurred in by Pedler.

[271] I have already recorded that Wellman has no present memory of the detailed processing of the finance application. My foregoing summation is necessarily a distillation of Pedler's evidence and the content of relevant documentation.

[272] Wellman confirmed that, had he known of the debt due to the ATO and the arrangements made for its liquidation, he would have declined the finance application on the basis that capacity to service the proposed advances would not have been established.[100]

[273] Equally he would have declined it, had he been aware that the second LTD development project had not in fact been sold for $960,000 or at all, that NPG had advanced $800,000 at 33 percent per annum interest or that no $300,000 term deposit existed.[101]

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[98] T1595.
[99] Exhibit D51 Tab 29.
[100] T1744.
[101] T1745.

[274] This witness accepted in cross-examination that the credibility of an applicant for a loan is important and, if it appeared that the ANZ had been deceived as to security availability, this would be a factor militating against loan approval.

[275] The first LTD development project having been concluded by early November 1997, the second LTD development project was then about 50 percent complete.

[276] DLS says that, some time during November, he informed Baylis (who had then taken over the matter from Bradley because he was to be the ANZ relationship manager who would be dealing with TSM) that TSM wished to increase the amount of finance sought by $500,000 to a total of $1,550,000, to accommodate a proposed new project at Margaret Street, Stuart Park. Baylis was initially dubious about that proposal, but eventually said that it could be possible with the provision of additional security. Both DLS and ECD say that this was a meeting attended by the two of them and Goodwin.

[277] Godwin obviously reiterated this proposal to Baylis on 17 November 1997. The substance of his conversation and the explanation given by Godwin at the time emerges from the ANZ credit memorandum of 18 November 1997.[102]

[102] Exhibit P1 p 225.

[278] It is to be noted that, in the course of the discussion between Godwin and Baylis on 17 November 1997,[103] reference was made to NPG. It was said by Godwin that a proposed deal whereby NPG, itself, was to purchase eight units at Palmerston and then resell them had fallen through.

[279] Godwin said that NPG wished, in effect, to act as selling agent for them, to avoid stamp duty. That company required 120 days in which to effect resale and this would impact adversely on TSM's short-term cash flow situation. It was also reported that the directors proposed to wind up LTD and conduct all future operations through TSM.

[280] These representations by Godwin were essentially false, although DLS said that, at some time in October 1997 which, logically, must have been prior to 14 October 1997 (the asserted date of the first October meeting), an arrangement had been made with Flynn whereby NPG would take over the eight units under construction at cost, thereby extinguishing the $800,000 debt. Flynn's statement to Detective Polychrone[104] indicates that this arrangement took effect as of about 10 October 1997.

[281] This is a reference to an option agreement between LTD and NPG, an undated file copy of which comprises Exhibit P1, page 43 et seq. The relevant circumstances are set out in Flynn's statement.[105]

[103] Exhibit P1 p 225.
[104] Exhibit D55.
[105] Trial Book Volume 9 p 738.

[282] As is elsewhere recited, that arrangement was not eventually proceeded with. DLS testified that, by mutual agreement, the arrangement was cancelled on about 17 November 1997, a few weeks after it had been entered into, because he considered that the units were worth a lot more than $800,000. However, he insisted that it was still in place at the time at which the re-financing proposal was prepared.

[283] Reference to the Wells Street property first appears in formal documentation other than the re-financing proposal and the indicative proposal shortly prior to that time. In an internal ANZ memorandum dated 11 November 1997 written by Barnett to the Credit Manager State SA & NT,[106] there is reference to the fact that "an additional security source is available". This is clearly a reference to the Wells Street property.

[284] The Baylis credit memorandum of 18 November 1997,[107] dealing with the proposed increased loan figure, states that the two additional properties that were offered to support the further $500,000 were Lot 5745 with the eight units under construction, together with a property being purchased at Margaret Street Stuart Park.

[285] The increased advance as sought was approved on 18 November 1997.[108]

[106] Exhibit P1 p 208.
[107] Exhibit D51 Tab 31.
[108] Exhibit D51 Tab 32.

The finance agreement

[286] Baylis wrote a letter dated 19 November 1997 to TSM (the finance agreement) indicating that the ANZ had agreed to extend finance to the latter, as sought. In accordance with the bank's requirement as stipulated in that letter, it was counter-signed by DLS, ECD, Godwin and NKS on the final page, as accepting the terms offered. It was then returned to the ANZ.

[287] I here pause to comment that, in essence, the female plaintiffs merely acceded to what was asked of them by DLS and ECD. SED expressed some concerns in relation to the proposed mortgage over the family home, but asserted in her statement that she was assured by her husband that the ANZ was to check all of the security properties as to their value and that credit reference checks were to be done by it with regard to DLS, ECD and Godwin to make sure that each had a good credit history, before the bank made any loan offer.[109]

[288] In evidence she was adamant that she would not have signed any security documents if she had known that Godwin was lying as to ownership of the alleged Godwin properties, or that they were encumbered.[110]

[289] DLS said in evidence that he was somewhat surprised to learn that the ANZ was prepared to lend the additional $500,000 that had been requested, but

[109] Exhibit P9 p 5.
[110] T169-170.

was certainly content to countersign the letter as requested, because the funds were badly needed.[111]

[290] He accepted that TSM had been experiencing a steady excess of expenditure over receipts for a substantial period and that cash flow was then a continuing chronic problem.[112]

[291] The finance agreement speaks for itself. Specific terms of that agreement included the taking by the ANZ of security in relation to TSM and LTD assets (supported by unlimited guarantees from DLS, ECD, Godwin, and NKS), as well as registered mortgages over eight stipulated properties (including the homes of DLS and NKS and of ECD and SED, as well as the alleged Godwin properties).

[292] Other, quite stringent, terms were set out.[113] As to these, Baylis wrote "*Whilst the above conditions may appear onerous they are necessary in order to be clear from the start what the bank requirements are for lending of this nature*". It is clear from the tone of this letter that, to that point, the essential focus of the bank had been on *its* lending requirements. There is no indication that it had, in any sense, been acting in the commercial interest of any of the plaintiffs, beyond recommending the proposed facility structure.

[111] T828.
[112] cf Exhibits D21 and D28.
[113] As appears in Exhibit D51 p 150.

[293] The agreement expressly stipulated that "*where properties may be owned by third parties we will need their guarantee limited to the value of the property*".

[294] One stated approval condition was that valuation of all relevant security properties was to be satisfied at the expense of TSM. Another was that financial commitments and capital expenditure were to be within the allowances that had been forecast. i.e. other non-forecasted borrowings were not to take place.

[295] On 19 and 20 November 1997 the ANZ wrote to the CBA and ATSIC, separately requesting payout figures in respect of properties over which security was proposed to be taken. As later appears, steps were taken to open the TSM account with the ANZ immediately upon the receipt of credit approval for the loan facilities. The ANZ permitted drawings against it to commence on 20 November 1997.[114]

[296] The witness Burford, who was assistant to Baylis, conducted title searches and an ASIC file search of TSM at some point.[115] Baylis says that an ASIC search was also done by Burford in respect of LTD, but no notes of this appear to be extant.

[297] It has not been established precisely when the title searches were made, but the reference to properties owned by third parties in the finance agreement

[114] Exhibit D18.
[115] Copies of search notes made by him are reproduced at Exhibit D51 Tabs 16 and 17.

implies that they must have occurred at some time on 18 or 19 November, between the receipt of loan approval and the actual despatch to TSM of the letter of 19 November.

[298] The search notes clearly indicated that Traci Lew-Fatt was the registered proprietor of the Brayshaw Crescent property, which was subject to a registered mortgage in favour of the NAB. The notes make no reference to the Wells Street property, although there must have been some subsequent search prior to 21 November that identified the fact that Walter Lew-Fatt was the registered proprietor of it, because he is referred to in a valuation request signed by Baylis on that date.

[299] Baylis accepted that Burford drew his attention to the title situation related to the Brayshaw Crescent property.[116] He was, at that time, aware that Traci Lew-Fatt was Godwin's partner. Burford also drew his attention, at some stage, to the fact that the registered proprietor of the Wells Street property was Walter Lew-Fatt.

[300] Baylis asserts that he contacted Godwin and asked why those persons were the registered proprietors of the Godwin properties. He says that Godwin told him that the Wells Street property was really his wife's, although a formal transfer had not been put through. Baylis asked to see a power of

[116] T1776.

attorney said to have been held by Traci Lew-Fatt from her father and this was later produced to him by her.[117]

[301] It was his evidence that she then orally confirmed what had been said by Godwin[118] and that he accepted those explanations. He felt that it was not unusual for a property to be held in a wife's name.

[302] The foregoing oral evidence of Baylis needs to be considered in conjunction with his written statements.

[303] Baylis said in his initial statement that Godwin was quite open about the Brayshaw Crescent property being in the name of his wife Traci and asserted that it was available as security for the finance being made available to TSM. He further stated that Godwin told him that, although the Wells street property was in the name of his father-in-law, the latter had given that property to Traci, that it had just not been formally transferred at that point, and that she could use the property as security.

[304] Baylis stated that he met Traci at one stage (possibly at the time that she collected the relevant mortgage and guarantee for execution) and she, in effect, then confirmed the overall situation as I have recited it, saying that she had her father's power-of-attorney to deal with the Wells Street property, which power of attorney was later produced to him at his request.

[117] Exhibit D59.
[118] T1776

[305] I note the point made by Mr Sallis that there is no contemporaneous record on the ANZ file of any such discussion with Traci. He also points out that the fax imprint on the copy power of attorney annexed to the Baylis statement bears a date 31 December 1997 and could therefore not have been provided to him prior to that date.

[306] In paragraph 12 of his statement signed on 15 August 2007, Baylis says that he asked to be provided with a copy of the power of attorney before any security documents were signed. He seems to imply that the document bearing the fax imprint to which I have referred was that supplied to him. If so, it could not have been so supplied prior to execution of the security documents as asserted.

[307] This situation further puts in question both the credibility of Baylis and the accuracy of his evidence that I have just summarised. I have grave doubts on that score and consider that his narrative in that regard may well, at best, be the product of *ex post facto* rationalisation.

[308] Baylis conceded that he was aware that the initial title searches conducted by Burford indicated the presence of a registered mortgage over the Brayshaw Crescent property in favour of the NAB. I understood him to say that he raised this matter with Godwin, who said that it was only a small

amount and that he would clear it up.[119] Baylis understood that the liability was of the order of $9,000.[120]

[309] Baylis asserts that it was his attitude at the time that, in those circumstances, there was no need to pursue that aspect further, so long as clear titles were obtained at settlement. He does not appear to have directed his mind to what might have been the implication in relation to the credit assessment if it proved that there were quite substantial liabilities outstanding in relation to the alleged Godwin properties and a corresponding need to procure funds from some source to discharge them -- bearing in mind that, on the face of it, Godwin's PSP did not indicate a capacity to meet any such substantial liabilities.

[310] It is common ground that the approval was given in the context that TSM and LTD were to re-locate all of their banking and business finance from the then existing providers to the ANZ.

[311] The statement of claim pleads a series of what are said to have been implied terms of the finance agreement. I will return to a consideration of them in due course.

[312] On or about 24 November 1997, the ANZ wrote three separate letters to TSM. These respectively confirmed that it had approved:

[119] As to this see the Baylis cross examination at T1827-1828.
[120] T1850.

(1) an overdraft limit of $300,000 on a nominated cheque account (the TSM overdraft account);

(2) a fully drawn advance (FDA) of $500,000, apparently designed to fund progress payments to contractors and the acquisition of the Margaret Street property; and

(3) a so-called business mortgage loan of $750,000.

[313] In his statement of 15 August 2007 Baylis suggests that the letters of 24 November 1997 were presented by him personally to the directors of TSM and the guarantors. He asserts that it was his custom, in presenting an approval letter, to go through it in some detail with any presentees, including security requirements.

[314] I agree with Mr Sallis that it was never put in cross examination to any of the personal plaintiffs that this occurred, nor is there any bank file record that it did.

[315] I conclude that no such process took place and that the content of the statement in that regard necessarily redounds against the credibility of Baylis.

[316] Most of the formal valuations of the proposed security properties were not actually prepared until 25 November 1997, with a separate valuation of the TSM land and workshop premises being completed on 26 November.

[317] Because some of the values were lower than those originally represented, Baylis sought credit approval to proceed notwithstanding, by diary note dated 27 November 1997.[121] This was given on the same day, Baylis' intention being to seek to settle on 28 November. He sought discharges of fixed charges to Esanda on 26 November.

The ANZ security requirements

[318] The approvals given by the ANZ were expressly conditioned, in each instance, upon the giving to it of the various securities and guarantees stipulated in them. These included the giving of unlimited guarantees by DLS, ECD, NKS and Godwin, as envisaged in the finance agreement. The securities required were common to all three approved advances.

[319] It is noteworthy that the specific stated requirements for mortgage and associated securities included the following:

(1) the giving of a "registered first mortgage over" the Brayshaw Crescent property "by T M Lew-Fatt supported by a letter lodging documents";

(2) a guarantee given by T M Lew-Fatt, limited to $235,000;

(3) the giving by W Lew-Fatt of a "registered mortgage over" the Wells Street property[122] "supported by a letter lodging documents"; and

(4) a guarantee given by W Lew-Fatt, limited to $300,000.

[121] Exhibit D51 Tab 36 p 164.
[122] Described at Exhibit P1 p 253 as the property at 22 Wells St. Darwin.

[320] Following receipt of the three letters of approval and by about 25 November 1997, the stipulated securities and other documentation were duly executed by the relevant parties.

[321] Each of the instruments of guarantee that was signed in accordance with the ANZ security requirements included, immediately prior to the attestation clauses, a series of specific formal acknowledgements separately initialled by the persons executing the document. These read as under:

> "I acknowledge that:
>
> I was given the opportunity to read this guarantee
>
> I have had an opportunity to get legal advice from an independent lawyer before agreeing to sign this guarantee
>
> In deciding to enter into this guarantee I did not rely on any promise, statement or information made or given by ANZ or ANZ officers or agents except those set out in this guarantee and those given to me in writing signed by an ANZ officer
>
> It is up to me to find out about the financial position, creditworthiness and honesty of the customer and any other person named as a guarantor
>
> This document contains all the provisions of the guarantee; and
>
> This guarantee cannot be changed except in writing signed by an ANZ officer and the guarantor"

The alleged Godwin properties

[322] It is clear that, by about 25 November 1997, the ANZ was aware that:

(1) Godwin was not the registered owner of the alleged Godwin properties;

(2) Their market values were significantly less than had repeatedly been represented by Godwin;

(3) His personal asset position appeared to be significantly different from that which had repeatedly been maintained by him;

(4) Traci Lew-Fatt was, in fact the registered owner of the Brayshaw Crescent property, which was encumbered by a mortgage securing payment of moneys to the NAB;[123]

(5) Walter Lew-Fatt was, in fact, the registered owner of the Wells Street property, which was encumbered by a mortgage securing payment of moneys to the NAB;[124] and

(6) The titles to the last-mentioned two properties had not been released by the NAB because debts were outstanding.

[323] I took Ms Kelly to argue that it has not been established as a fact that Godwin was not at least the beneficial owner of the alleged Godwin properties. I am unable to accept that proposition. The clear implication arising from the evidence of the witness Tomazos as to the history of the acquisition of the Brayshaw Crescent property (to which I shall shortly refer) and the evidence related to the situation of the Wells Street property and Walter Lew-Fatt's subsequent protestations concerning the dealing with it is that Godwin probably had no beneficial interest in either property.

[324] It eventually proved to be the case that the ultimate payout figures on the NAB mortgages were, in fact, about $256,000 in respect of the Brayshaw

[123] Exhibit P1 p 316.
[124] Exhibit P1 p 316.

Crescent property and about $204,000 in respect of the Wells Street property.

[325] The plaintiffs say that the ANZ did not inform them of its knowledge of what were described as the false representations made by Godwin as to his asset position (and, in particular, not only the actual registered ownership of the alleged Godwin properties but, more importantly, the existence of the above mortgages to the NAB).

[326] I accept the evidence of DLS that the content of the ANZ letters of 24 November 1997 constituted the first indication that he had that the titles of the alleged Godwin properties were not actually in Godwin's name. He was aware of the relationship between Godwin and the Lew-Fatts and assumed that Godwin must, nevertheless, be the beneficial owner of the properties.

[327] I also accept that DLS did not become aware of the existence of the two mortgages over the alleged Godwin properties and the amounts owing under them until well after Godwin's fraudulent conduct had become apparent and when DLS was having a discussion with an officer of the Territory Police.[125]

[328] The situation concerning the Brayshaw Crescent property readily appears from the evidence of and material produced by the witness Tomazos.

[125] T820.

[329] This reveals that the property was purchased in the name of Traci Lew-Fatt in October 1995 with the assistance of a NAB home loan of $160,000. As appears from a NAB letter dated 3 April 1996 reproduced at page 1254 of Trial Book Volume 10,[126] the balance of the purchase price was made up of $20,000 cash plus a further $20,000 said to be a gift from Traci's parents.

[330] A CRAA check made by it at the time indicated to the NAB that Godwin (known to be Traci Lew-Fatt's de facto partner) had then recently been discharged as a bankrupt. However, the bank was told, presumably by Godwin, that this had been the consequence of a failed business partnership and that all debts had subsequently been paid. His explanation was apparently accepted.

[331] The NAB subsequently also advanced $50,000 to Godwin and Traci Lew-Fatt in March 1996, on the security of the same mortgage, coupled with a bill of sale, to purchase a Toyota LandCruiser. This advance was based on a glowing recommendation from one of its personal account managers, who stated that Godwin had been known to him for many years and always honoured his obligations.[127]

[332] The representation that Godwin had cleared all of the debts leading to his bankruptcy is difficult to align with the content of the letter dated 26 March 1996[128] received by the NAB from the Official Receiver and a NAB

[126] Portion of Exhibit D57.
[127] Exhibit D3.
[128] Trial Book Vol 10 p 1255.

memorandum dated 18 June 1995, recording that an enquiry of NT Credit Society (the original petitioning creditor) indicated that its debt had been written off.

[333] The detailed history relating to the Wells Street property does not readily appear from the evidence.

[334] The material before me includes copies of two documents each described as an "ANZ Residential Kerbside Inspection (Price Estimate)" prepared on 25 November 1997 by a valuer retained by Baylis on 21 November 1997.[129] These placed a value of $200,000 on the Wells Street property and a value of $210,000 on the Brayshaw Crescent property. Both of those amounts were substantially below the values that Godwin had attributed to the properties and indicated that there was no equity in them.

[335] Traci Lew-Fatt executed a mortgage in favour of the ANZ in her own right over the Brayshaw Crescent property, as well as a further mortgage in favour of the bank as attorney for her father over the Wells Street property. This occurred on the same date as the valuations were made. Both mortgages were later registered at the Lands Titles Office on 6 January 1998.

[336] She also signed a guarantee of the TSM account with the ANZ, limited to $235,000, in her own right and a second guarantee of it, limited to $300,000,

[129] Exhibit P1 pages 242, 243.

as attorney for Walter Lew-Fatt, pursuant to a power of attorney dated 7 February 1997.

[337] Traci Lew-Fatt and her father were, at the time of execution of the above documents, in default in relation to the credit facilities that had been extended to them by the NAB.

[338] It is clear on the evidence that, apart from what was said in its letter to TSM of 19 November 1997, the ANZ did not ever communicate details of its accruing state of knowledge of the title situation of the alleged Godwin properties, the encumbrances in respect of them, or the actual assessed values of the alleged Godwin properties to any of the plaintiffs prior to ultimate settlement of the TSM loan facilities.

Events leading up to the settlement of the ANZ loans

[339] I have elsewhere made the point that settlement in relation to the TSM re-financing was originally scheduled for 28 November 1997, i.e. shortly after the time at which the various security documents were actually executed. However, Baylis said that it did not proceed on that date because clear title had not been obtained by then in relation both to the Raffles Road property and the alleged Godwin properties.

[340] When Baylis spoke to DLS concerning the former property, he was told to speak to Godwin about it, as the latter had undertaken to fund the discharge of the mortgage over it.[130]

[341] DLS recalls at least two telephone calls from Baylis or Burford (his assistant) concerning the payout of the Raffles Road property mortgage and he was of the impression that this was the only thing holding up settlement.

[342] Nothing was said by Baylis at the time concerning any encumbrances on the alleged Godwin properties or any failure by Godwin to cause them to be discharged. DLS states, and I accept, that, had he known about this, his suspicions would have been aroused about Godwin's bona fides.

[343] Baylis testified that, when various titles had not become available for settlement on 28 November 1997, he spoke to Godwin, who responded that he was arranging some money from his father to pay out Smith's loan and loans on the alleged Godwin properties.[131] It was at that stage that Godwin had first asserted that there was only a small amount owing on the latter properties.

[344] The ANZ was then in receipt of the various security documents that had been executed by TSM, LTD and the other personal parties at that point. It had obtained payout figures from the CBA, Esanda and ATSIC.

[130] T1783.
[131] T1783.

[345] The ANZ actually registered its security over the site of the second LTD development property on 28 November 1997. It had also registered the mortgage debenture over the assets of TSM.

[346] DLS testified that, at about the end of November or the beginning of December 1997, Baylis telephoned him and said that he did not want to see Godwin in his office on his own. He said that he was not happy with him and did not trust him. He wished either DLS or ECD to be in company with Godwin when he came to see Baylis, or that DLS or ECD could come down instead.[132]

[347] DLS says that he was somewhat surprised at this, but agreed. Baylis has no memory of having made such statements and I took him to actually deny having done so.[133] I consider it more probable than not that he did make such a statement, given the circumstances. I arrive at that view notwithstanding the evidence as to a similar attitude said to have been voiced by the witness Flynn at one point.

[348] My conclusion is reinforced by the fact that, in a statement said to have been made by him to Detective Polychrone prior to the commencement of the present proceedings, DLS reported the making of such a statement by Baylis to him, he thought, sometime during early December 1997.[134] That report

[132] T231.
[133] T1848.
[134] T926

was, on the face of it, not self serving because of the then non institution of the present action.

[349] I do not accept Ms Kelly's contention that the statement by DLS that Baylis should speak with Godwin concerning the payout of the Raffles Road mortgage was inconsistent with the making of the above statement. It was in fact quite logical, because it was Godwin who had undertaken to personally attend to this payout and only he could indicate how and when that would be possible.

[350] It is apparent that, by early December 1997, Godwin was desperately endeavouring to clear the mortgages that were holding up settlement with the ANZ.

[351] The evidence of Tomazos was to the effect that Godwin and Traci Lew-Fatt attended at the NAB on 5 December 1997. They stated to her that they would come back with a cheque for $570,000 later that day.

[352] They instructed her to present the cheque on 8 December 1997 and then clear all debts, including a mortgage with the NAB at its Winnellie Branch the details of which had previously been unknown to her. I assume that this was the mortgage over the Wells Street property. She was also told to expect a call from the CBA concerning payment of a mortgage debt of about $108,000 for a Dave and Nicole Smith.

[353] The promised cheque was not in fact received until 8 December 1997. It proved to be a personal cheque drawn by Traci Lew-Fatt on her account with Westpac. Tomazos decided to obtain a special answer on this cheque prior to carrying out the directions given to her. The cheque was dishonoured on doing so and the witness then went on leave for a week.

[354] She ascertained on her return that Godwin's account was overdrawn and that a large number of cheques drawn by him had been dishonoured.

[355] Godwin drew an LTD cheque for $570,000 on 8 December 1997. This was against its CBA account and made payable to Traci Lew-Fatt.[135] He forged signatures of both "signatories". The cheque was presented but dishonoured for lack of funds.

[356] With the benefit of hindsight, it seems obvious that this cheque was intended to be associated with the cheque drawn by Traci Lew-Fatt and to lead to a situation designed to delude Westpac into honouring her cheque.

[357] Baylis permitted TSM to make a drawdown of $250,000 on 27 November 1997 despite the fact that settlement in relation to perfecting all of the required securities had not occurred. This appears to have been a response to a fax from Mary Willis to Burford bearing that date[136] and was immediately absorbed by payments to a variety of creditors whose accounts

[135] Exhibit P1 p 295.
[136] Exhibit D51 Tab 45.

were outstanding at that time, because TSM was then experiencing a serious liquidity crisis.

[358] The witness Martin testified that he was able to confirm that virtually all of the accounts in question were in fact for debts of LTD and that TSM would have had a valid claim against any liquidator of the former in respect of them.[137]

[359] He also confirmed, by reference to Exhibit D27, as updated, that, between 1 and 4 December 1997, TSM also paid just over $282,000 in trade accounts from its CBA overdraft account.

[360] Most of these seem also to have actually been LTD debts. I took him to say that this was at a time when there had been substantial activity in relation to the completion of the second LTD development project and it appears that many of the accounts bore what were then relatively recent dates.

[361] The Stuart Park property was settled for on or about 15 December 1997 at a cost of $252,824, as a consequence of a further permitted drawdown.

[362] The ANZ attended to this settlement on behalf of TSM and that property became part of the mortgage securities taken by the bank to support the extended loan amount, as envisaged in the letters of approval dated 24 November 1997.[138]

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[137] T1347-1349.
[138] See mortgage registered on 15 December 1997 Exhibit D60.

[363] The evidence establishes that, on 24 December 1997, Godwin fraudulently altered a cheque drawn on the TSM overdraft account in favour of himself, by changing the amount of that cheque from $460.00 to $460,000, thereby creating the $460,000 cheque.

[364] This cheque came into being as a result of the raising by Godwin of a blank internal TSM requisition signed by DLS[139] in circumstances to which I will shortly come, but initially, thereafter, filled in by Godwin so as to seek the issue of a cheque for $460.00 payable to himself.

[365] Because of the relatively nominal amount of the cheque, he had no difficulty in persuading the witness Davies, a countersigning employee of TSM, to sign the cheque drawn pursuant to it. He then altered the monetary amount to $460,000.00 in both documents and himself signed the cheque as the second signatory.

[366] Davies testified that he has no memory of seeing the requisition in question and it does not bear his signature or initials. He said that Godwin asked him to countersign four or five cheques for suppliers or subcontractors at a late hour on Christmas Eve and that the process was very rushed.

[367] His evidence was to the effect that the payee of the cheque for $460 may not have been filled in when he signed and he understood that it was in respect of some subcontract payment. He certainly did not register that he was signing a cheque made out in favour of Godwin.

[139] Exhibit P1 p 302.

[368] When Godwin caused the cheque to be presented through the NAB it was dishonoured on 29 December 1997 for lack of funds in the overdraft account to support it. That did not immediately come to the notice of anyone else in TSM, because, at that stage, the mail normally came to Godwin in the first instance and it was the Christmas shut down period.

[369] A credit memorandum written by Baylis on 10 February 1998[140] indicates that Godwin had told "us" (i.e. the ANZ) that this was to repay a loan with Mike Flynn i.e. NPG.

[370] DLS said (and I accept) that, on 24 December 1997, Godwin came into the office and told him that he had finally received a cheque for $570,000 from his father and that this would enable him to make his $400,000 contribution. He requested DLS to sign a blank cheque requisition, so that he could pay Flynn $460,000 in reduction of the debt to NPG and the balance to discharge the mortgage over the Raffles Road property.

[371] Some discussion then ensued as to why there should be a payment of $460,000, by way of contrast with $400,000. DLS signed the blank requisition and this ultimately led to the drawing of the cheque for $460.00 payable to Godwin, which he later altered to $460,000.[141]

[372] The odd feature of this situation was, as Ms Kelly put to DLS, that, bearing in mind net contributions already made by Godwin to TSM, such a

[140] Exhibit P1 p 358.
[141] Exhibit P1 pp 302 – 303.

transaction would have had the effect that, in practical terms, he would be contributing in excess of the capital amount originally promised.

[373] Whilst this may have been so, I am satisfied that the account of DLS as to what was said and done on 24 December is accurate. At the time Godwin was obviously desperate to sort out the settlement stalemate that had occurred in relation to the ANZ loans and was prepared to do or say anything to achieve that end. It is consistent with a diary note made by Baylis on 31 March 1998.[142]

[374] I pause to comment that, in the course of her submissions, Ms Kelly sought to stress that, in his cross examination, DLS conceded that he "*did sign the cheque requisition for $460,000*", believing that $570,000 (being monies said to have been sourced from Godwin's father and the sale of shares) would be available to meet such a cheque and also enable the mortgage on the Raffles Road property to be paid out.[143]

[375] I accept the evidence of DLS that he in fact signed what was the blank cheque requisition form earlier referred to on the understanding that it was to be used, when the funds from Godwin's father and the sale of shares had been paid into the account, to retire $460,000 of the debt due to NPG.

[376] Baylis testified that, on or about 29 December 1997 (at a time when, in fact, TSM had closed down its business for the Christmas break), the $460,000

[142] Exhibit D51 p 375.
[143] T804-805.

cheque, as forged by Godwin, was presented at the Winnellie branch of the ANZ for a special answer. It was brought to him personally and he endorsed it "Refer to Drawer". He conceded that the cheque was plainly not one drawn in the ordinary course of business.[144]

[377] He accepted that, normally, with a cheque of that size, the bank would contact the customer and speak to one of the directors to find out why the cheque was being presented and to advise of the potential dishonour. It would also be normal to record that situation in a diary note. He would have done both.[145]

[378] Baylis accepted that no diary note or other record of doing either of those things can be found. I do not accept that he did in fact take any of the steps asserted by him.

[379] DLS testified that, at some time between Boxing Day and 1 January 1998 Godwin came into the office and said that he had got a cheque in his top pocket for $570,000 from Mike Flynn to help get a bank bill. When DLS challenged him concerning this and asked to see the cheque, Godwin could not produce it. It was not in his pocket when DLS looked and DLS thought that he was just being stupid.

[380] I accept that curious features of the evidence of DLS bearing on this topic are the facts that, in paragraphs 134 and 135 of his supplementary

[144] T1854.
[145] T1853.

statement,[146] he relates that, notwithstanding the fact that he thought that Godwin had (as he said in cross examination) been "having a lend of him", he raised the matter with ECD (who was then on leave) in the course of a business telephone conversation.

[381] DLS stated that he asked ECD if he knew anything about a bank bill from the ANZ on a $570,000 loan from Flynn. ECD said that he did not. DLS related to ECD the substance of his conversation with Godwin and spoke of the incident concerning looking into the latter's pocket. The two men agreed that, if Godwin had such a cheque, it would need to be quarantined in one of the children's bank accounts.

[382] This falls to be contrasted with what is recorded in the statement made by DLS to a police officer on 29 March 2008,[147] to which reference was made in cross examination. That document asserts that, at about the end of December 1997, Godwin said that he had obtained a further loan from Flynn of $570,000 to secure a bank bill from the ANZ.

[383] The statement[148] relevantly reads:

> "I was very concerned that he had the money, on all previous occasions, Mike Flynn had personally handed cheques to me for the arranged company loans. I had no knowledge of what arrangements Lionel had made with Flynn to secure the money. I did not want our businesses to borrow further money from Flynn as his interest payments were high. I asked Lionel to give the $570,000 to me so I could put it into my son's bank account so it could not be touched. I did not want the money touched until I knew what was going on.

[146] Exhibit P12.
[147] Exhibit D25.
[148] The substance of which was put to DLS in cross examination at T807.

> This money was somehow negotiated between Flynn and Lionel, I thought it was a personal thing. Lionel made out that he had the Flynn cheque for the $570,000 in his pocket, he would not give it to me, but said he would put it in a safe place. I do not know if in fact he had the cheque with him. At this time Ted was on holidays in Cairns, I immediately phoned him and told him about Lionel getting $570,000 from Flynn. Ted did not know about the money, Ted and I agreed the money was not to be spent by the companies."

[384] Unsurprisingly, Ms Kelly put to DLS that this indicated that he clearly knew that Godwin had actually received a further loan of $570,000 from NPG and was content to keep the money and use it, albeit that it was, initially, to be quarantined.

[385] It must be accepted that there is some inconsistency in the various versions related by DLS and that this (coupled with the fact that DLS made no effort to check the situation with Flynn) does not assist his general credibility.

[386] However, I accept that any discussion between DLS and ECD was intended solely as a contingency plan and that DLS did actually believe that Godwin was in fact "having a lend of him". ECD's evidence[149] needs to be seen in that context.

[387] I am reinforced in that view by the subsequent content of Exhibit D25 as put to him in cross examination[150] that, consistently with other evidence of DLS, refers to Godwin finally stating that he had received $570,000 from his father.[151] The evidence viewed as a whole does not suggest to me that DLS or ECD ever positively knew or believed that NPG had in fact advanced a

[149] T1144.
[150] T800.
[151] See also the Baylis memorandum of 10 February 1995 (Exhibit D51 p 260).

further $570,000 to TSM or LTD until well after the event, when Godwin's fraudulent conduct had ultimately emerged.

[388] Moreover, it is plain that no cheque for $570,000 existed as at the time when the conversation between DLS and Godwin is said to have taken place. This must have been at some time prior to 31 December 1997, when ECD returned from leave in Queensland.[152]

[389] The $570,000 cheque bears date 2 January 1998 and originally accompanied a letter of the same date addressed by NPG to Baylis.[153] It had been preceded by caveat lodgements on 30 December 1997[154] and an NPG letter addressed to Baylis of 29 December 1997, but never delivered to him.[155]

[390] I conclude that the statement made by DLS to the police officer in March 2000 is an accurate record of the situation as it was recalled by DLS when the relevant events were still fresh in his mind.

[391] Baylis said that he had a conversation with Godwin either on or shortly prior to 2 January 1998 concerning the source of funds for paying out the Smiths' mortgage and the mortgages over the alleged Godwin properties. He asserts that Godwin then told him that they were getting a loan from a good friend of Dave Smith and Ted Dean, which would be sufficient to pay out Smith's

[152] Exhibit D38.
[153] Exhibit P1 p 308.
[154] Exhibit P1 p 306.
[155] Exhibit P1 p 304. cf also the Baylis diary note of 6 February 1998 (Exhibit D51 p 253).

loan and the small debts that were outstanding for the alleged Godwin properties.[156]

[392] Baylis did not pursue the questions of how much was owing or who the good friend was. He was aware that the outstanding mortgage balance in respect of the Raffles Road property was about $110,000.

[393] Baylis alleges that he asked Godwin what security, if any, was going to be given for the loan from the good friend, to which the latter is said to have responded that the friend did not need any security and was prepared to lend them the money on the basis that it would be repaid from the surplus from the sale of the units.[157]

[394] He says that he was unaware of how much was to be borrowed and was unconcerned because the ANZ would have adequate security for its advances. He raised no question concerning the fact that *Godwin* was to have paid out the mortgage balances in respect of both the Raffles Road property and the alleged Godwin properties, yet it was said that the loan was to be made *to TSM* for that very purpose.

[395] Baylis conceded that, at least in hindsight, it came as no surprise that TSM may have borrowed some money from an external lender to complete the second LTD development project. It must have been obvious to him that, given the state of his knowledge at the time, any capacity to repay a further

[156] T1786.
[157] T1786.

substantial external advance from the proceeds of sale of the project was somewhat remote.[158]

[396] Whilst I am prepared to accept the evidence of Baylis that Godwin told him that they were getting a loan from a good friend of DLS and ECD (who Baylis later conceded was identified as Flynn of NPG), I am by no means convinced that his evidence that he was told that it was to be an unsecured loan on the basis just referred to is correct. As Mr Trim pointed out to Baylis, this suggestion emerged for the first time in the course of the examination in chief of this witness. I consider that this portion of Baylis' evidence may well be a fabrication on his part.

[397] On 2 January 1998, Godwin attended at the Winnellie Branch of the ANZ and there presented the $570,000 cheque to Baylis personally.[159] Godwin had obtained it from Flynn the same day, in circumstances to which I shall come in due course.[160]

[398] Godwin requested Baylis to credit the proceeds to the TSM overdraft account. Baylis actioned that request by personally attending with the cheque at the Westpac Bank on which it was drawn and seeking a special answer. He claims that he attended to the matter himself because the branch was short staffed at the time. The cheque was specially cleared and the proceeds immediately credited to TSM accordingly.

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[158] cf T1844.
[159] T1789.
[160] See Exhibit P1 p 310.

[399] The witness Bradley stated that, normally, a junior staff member would attend another bank to obtain a special clearance of a cheque.[161] However, Baylis asserted that he personally made the decision to seek a special answer on the cheque, particularly as he was aware that settlement of the TSM refinancing transaction was long overdue and there was pressure on the ANZ to finalise the loan arrangements.

[400] I am satisfied that he was only too glad to do so to enable the overdue settlement to be completed and that this was his then primary pre-occupation. I consider that he gave little or no thought to the obvious implications arising from the transaction.

[401] Baylis secured three warrants from Westpac totalling $570,000, returned to his own bank and completed a deposit slip crediting TSM with the funds.

[402] DLS asserted that, had he known of the presentation of the cheque from NPG for $570,000 and a proposal to specially clear it, he would have put a stop to the transaction, pending investigation as to what was occurring and spoken to Flynn concerning it. I do not doubt that he would have done so in the circumstances.

[403] Not only did TSM already have a large interest commitment, but DLS was also labouring under the delusion, engendered by Godwin, that the NPG indebtedness had been reduced to about $400,000 by reason of the $460,000

[161] T1574.

re-payment that Godwin had undertaken to make. DLS had certainly not contemplated borrowing a further large sum from NPG at that time.

[404] It is common ground that, on the same day shortly after the clearance of the $570,000 cheque, an officer of the NAB presented at the Winnellie Branch of the ANZ with a request for a special clearance of the $460,000 cheque, which, having previously been dishonoured, had again been presented to it by Godwin for clearance.[162] The ANZ thereupon specially cleared the $460,000 cheque against the TSM overdraft account, a warrant for that sum being handed to the NAB officer.

[405] In his statement of 26 May 2007 Baylis said that he did not have a specific recollection concerning the special clearance request by the NAB. He accepted that branch staff would have brought such a cheque to him for funds clearance, that is, to verify that there were sufficient funds to meet the $460,000 cheque. He conceded that he would have approved the clearance and does not seem, in his statement, to have considered there to have been anything unusual in the transaction.

[406] His statement in that regard falls to be contrasted with that of the witness Barnett.[163] It was the view of the latter that, given the circumstances, he would have been constrained to make inquiries about the transaction of the directors of TSM.

[162] See Exhibit P1 pp 303, 315.
[163] T1644-1645.

[407] However, Baylis' memory seemed to have improved remarkably when he came to give oral evidence. I took him to then recall that the cheque had been brought to him and he admitted that he had noted that it was drawn in favour of Godwin, although he did not register that the signatories were Godwin and another employee of TSM and did not include either DLS or ECD.

[408] He asserted that the presentation of the cheque did not arouse suspicions because he merely assumed that it was part of the process of clearing Smith's debt and the alleged Godwin properties.[164]

[409] I pause to comment that Baylis' evidence and attitude as to the situation is truly inexplicable and another reason for regarding his evidence generally with caution. Quite apart from any consideration of the difference between his statement and his oral evidence, if ever there was a sequence of events that, on the face of it, was unusual (if not outright suspicious) and demanded explanation, it was the overall situation and sequence of events related to the $570,000 cheque and the $460,000 cheque, as above summarised.

[410] I pause at this point to reflect on some key features of the cross examination of Baylis bearing on various of the topics identified to date.

[411] He acknowledged that, prior to 17 October 1997, he was aware that Godwin's only role was to provide security for the refinancing of the TSM debt.[165]

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[164] T1789

[412] At some stage he also became aware that Godwin was to pay out the existing mortgage debt in respect of the Raffles Road property from his own resources.[166]

[413] He accepted that, had he become aware of LTD's debt to NPG, he would have advised Barnett and Bradley immediately, because there would have been a need to reassess the finance application in view of the fact that such a situation would be inconsistent with the position as represented to the ANZ.[167]

[414] He agreed that, when the title searches disclosed the true registered ownership of the alleged Godwin properties and the encumbrances on them, he ought also to have advised them of that situation, for the same reason. He cannot explain why he did not do so, other than that Godwin had stated that there was only a small debt on the properties that would be cleared off fairly quickly.[168]

[415] Baylis acknowledged that, in his debrief to the Regional Manager, NT,[169] he had made the point that his then view was that, with a new deal such as that here under consideration, more background information is necessary and any checks on CRAAs, property searches, testing of SPs etc should be done at the outset, to confirm what the applicants are saying.

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[165] T1839.
[166] T1839.
[167] T1839.
[168] T1840.
[169] Exhibit D51 Tab 68B p 376.

[416] Although he initially denied any knowledge of loan transactions with NPG prior to 2 January 1998, he was constrained to concede that reference was made to this in the record of the retreat meeting on 15 November 1997 to which I have earlier referred.

[417] Nevertheless, he said that his only knowledge, prior to 5 February 1998, of any loan transactions involving NPG was as a result of Godwin approaching him prior to 2 January 1998 and telling him that he (Godwin) was expecting a loan from that source -- a situation that Baylis did not discuss with DLS or ECD.[170] He claimed that he did not know the amount of the loan until the $570,000 cheque was presented to him.[171]

[418] I was far from impressed by his evidence on that score, which detracted substantially from his credibility. As Mr Trim pointed out to him and he accepted, it was plain that TSM would have had to have obtained external funding to complete the second LTD development project, because there was no apparent source of funds to enable it to otherwise do so.[172]

[419] He conceded that, in December 1997, Godwin was telling him a variety of different stories as to why the mortgages over the Raffles Road property and the alleged Godwin properties could not be discharged, to the point that, at one stage, he actually contemplated calling the whole deal off.[173]

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[170] See T1841-1844 and Exhibit P67 p 14.
[171] T1855.
[172] T1843-1844.
[173] T1849.

[420] When asked whether that raised suspicions in his mind about Godwin's credibility, Baylis gave the odd response "Yes and No". He said that Godwin was offering plausible stories and had the "gift of the gab".

[421] When pressed by Mr Trim concerning the circumstances of the receipt of the $570,000 cheque, Baylis asserted that he did not direct his mind to the fact that there was, in reality, no further room for such a major additional borrowing on the financial information supplied to the ANZ.

[422] Baylis thought that he may have queried the amount of the cheque with Godwin and was told that the loan was to be repaid from the sale of the LTD units.[174] He was completely unable to give a satisfactory rationale as to why such an explanation could logically have been accepted as credible in the financial circumstances known to him at the time.[175]

[423] When asked for what purpose TSM could possibly have wanted a loan of $570,000 at the relevant time, Baylis responded that he thought that Godwin had told him that it was to help that entity pay off the mortgages over the Raffles Road property and the alleged Godwin properties, so that they could be released and also to help with creditors.

[424] As Mr Trim demonstrated, that evidence really represents the low water mark of Baylis' credibility. This witness was constrained to concede that:

[174] T1855.
[175] T1856-1859.

(1) It had always been plain that Godwin (and not TSM) was to pay off the relevant mortgages; and

(2) It would have been absurd if TSM, being about to settle very large advances being made by the ANZ to enable it to discharge existing debt and have further working capital, would go further into debt to the tune of $570,000 to pay off the existing third party mortgages to enable the ANZ securities to be put in place.

[425] The lame response of Baylis to that scenario was that the point did not occur to him at the time.[176]

[426] Mr Trim put to him that the evidence of Baylis as to his last mentioned professed understanding was inconsistent with other evidence given by him and which had first emerged at trial.

[427] Baylis had earlier said that his belief was that a maximum of about $130,000 was required to pay out the relevant existing mortgages -- almost $110,000 of which related to the Raffles Road property. Baylis had no logical understanding (bearing in mind his knowledge of TSM situation) where the balance of the $570,000 might be going.[177]

[428] The receipt of the $570,000 was plainly not a transaction in the ordinary course of business, had, on the face of it, important adverse implications in relation to the capacity of TSM to service its debts and, incredibly, was, as I

[176] T1859.
[177] T1860.

have recited, said (also for the first time at trial) to be an advance without any security.[178]

[429] Despite all of those factors Baylis was content to accept and personally decided to specially clear the cheque without any attempt to clarify the situation with the directors of TSM, much less raise any issues concerning it with Wellman or Pedler.

[430] He said, in cross examination, in response to the question "Well the sole reason you sought special clearance ….. was to facilitate an urgent settlement of the outstanding ANZ securities?" "Partly, yes". When invited to indicate what other reason there might have been, he was at a loss to provide any explanation.[179]

[431] Baylis conceded that, when the $460,000 cheque was presented for special clearance shortly after the $570,000 cheque had been cleared, he was not surprised and saw no reason not to clear it. His sole rationale seems to have been that there were then funds in the relevant account and the cheque had been signed by two authorised signatories.

[432] He does not appear to have directed his mind to any other relevant considerations.

[178] T1860-1862.
[179] T1862-1863.

[433] All that can fairly be said concerning the evidence of Baylis[180] as to his lack of suspicion and his thought processes at the time is that it is extraordinary and beggars belief. It is plain that he did not ever contemplate contacting the directors of TSM concerning the matter and did not attempt to do so.

[434] Baylis professes no current memory of how Exhibit D26 (the TSM authority to settle the liability on the Raffles Road property) came into existence or how it was that the mortgage over that property came to be paid out of TSM's account and not by Godwin, as he had undertaken to do.[181]

[435] I return to a consideration of the narrative events.

[436] On 2 January 1998, the NAB actioned the instructions that had been given to it by Godwin and applied the proceeds of the $460,000 cheque in paying out the mortgages then registered on the alleged Godwin properties. A residual balance of $48,286.45 was, Tomazos said, paid to the credit of Godwin's account.

[437] Baylis asserted in his original statement that he was unaware of the existence of those mortgage liabilities until later informed of them by a police officer. This is a statement that is impossible to align with his later statement as to the reason why settlement had been delayed and the evidence generally, as I have recited it.

[180] As recorded at T1865-1866.
[181] T1869-1870.

[438] The circumstances related to the presentation and clearance of the $460,000 cheque must have rendered it patently clear that very substantial debts were being cleared as a prelude to the settlement of the approved ANZ loan facilities.

[439] Ultimately, in cross examination[182] Baylis conceded that, at the time when he specially cleared the $460,000 cheque, he assumed that Godwin, as payee, intended to use the proceeds "*to pay out the mortgages to allow us free title to the properties*".

[440] It is yet another aspect that reflects adversely on the credibility of this witness.

[441] DLS received a telephone call from his wife early in the New Year to the effect that the mortgage on the Raffles Road property had finally been cleared.

[442] On what must have been 8 January 1998, Mary Willis, the TSM bookkeeper, came to DLS in a state of some distress. She questioned a sum of $570,000 that had been deposited into the TSM account and the fact that $460,000 had then been withdrawn. She had spoken to Godwin concerning these transactions and he said that $460,000 had been paid to himself and was to be recorded as a loan to him.[183]

[443] DLS then confronted Godwin and said to him words to the effect:

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[182] T1865.
[183] T813.

> "Lionel, what the hell are you going on about? You got the 570 from your father, you paid out my house mortgage on the Commonwealth Bank and you've taken 460 for yourself when you told me you were paying off Flynn".

Godwin is said to have responded:

> "Oh, I had problems with my family and they were all concerned and I shouldn't have got so much money off dad".

[444] DLS pointed out to Godwin that he had said that he was paying Flynn off and that the cheque had, in fact, been drawn in favour of himself. Godwin responded to the effect that it had been sorted out and that he would pay Flynn the money that day. DLS heard no more and assumed that he had done so, because he trusted Godwin.

[445] The narrative of DLS varies to some extent from that of ECD. The latter's memory of what occurred (reinforced, no doubt, by his diary entry of 8 January 1998)[184] was that, on that date, Mary Willis reported the receipt of $570,000 and the associated withdrawal of $460,000 in a cheque payable to Godwin.

[446] ECD said that this led to a conversation between DLS, ECD and Godwin. ECD's shorthand note of the event reads as follows:

> "D/T spoke to Lionel in regard to shortfall of money -- asked Lionel when we were going to see the rest of the $400K. Lionel stated he had a falling out with his family at Christmas and he would look elsewhere for the money. DS got up Lionel and told him to get the rest of the money and house contracts and to stop fucking around."

[184] Exhibit D46.

[447] ECD did not pretend that such note was a definitive record of all that occurred. He said it was, in part, a reflection of what he had earlier been told by DLS by telephone when ECD was on leave, concerning a proposed payment of $460,000 by Godwin to Flynn.

[448] Much was made by Ms Kelly in cross examination of ECD about the apparent inconsistency between his diary note and his evidence as to what had transpired. However, I am satisfied that the version of events related by DLS and also subscribed to by ECD is an accurate resume of what actually transpired on the occasion in question. I consider that ECD's diary note is simply an incomplete (and perhaps imperfect) short hand record of the thrust of some aspects of the conversation.

[449] The practical effect of Godwin's actions was that, in truth, he had failed, once again, to honour his obligation to produce the promised $400,000 contribution as well as pay out the Raffles Road property mortgage in addition. To that extent the diary note is not inconsistent with such a scenario. I do not regard it as bearing adversely on ECD's credit.

[450] Neither DLS nor ECD were aware of the special clearances of the $570,000 cheque or the $460,000 cheque or of the transactions related to or arising from them, save for the incident when Mary Willis spoke to DLS as above recited.

[451] DLS asserted that, had he become aware of what was occurring, he would have gone to the bank and stopped everything until he saw what was going

on. I took him to contend that he did not knowingly authorise the bank to pay out the mortgage on his home from TSM funds, notwithstanding the content of Exhibit D26. I consider that he did not realise the full implications of the authority when it was signed.

[452] I here pause to note that, in the defendant's written reply at page 74, it appears to be asserted that on or about 5 January 1998, DLS became aware that Godwin had obtained $460,000 by means of a forged cheque in that amount and failed to advise the ANZ of the fact of the forgery. I am unable to accept such propositions.

[453] I am satisfied that DLS was unaware of any forgery until well after the loans had been settled and the circumstances of the $570,000 became known. All that he did know was that Mary Willis told him of the receipt of the $570,000 into the TSM account and the immediate drawing by Godwin of $460,000 against it. I am far from convinced that DLS even appreciated at the time the precise manner in which the withdrawal had been effected and who had authorised it.

Settlement of the ANZ loans

[454] The final settlement of the TSM re-financing transaction actually commenced on 5 January 1998, which was the first working day after the

$460,000 cheque had been cleared. At about that time[185] the CBA and Esanda liabilities were debited by the ANZ to the TSM account.

[455] It is to be noted that the ANZ also debited that account with the monies outstanding on the then existing mortgage over the Raffles Road property that Godwin had undertaken to discharge on behalf of DLS and NKS. This was presumably done pursuant to the authority dated 30 December 1998.[186] said to have been signed by DLS on behalf of TSM.

[456] DLS also seems not to have registered the implications of a letter dated 9 January 1998 written by Baylis to TSM reporting, *inter alia*, the payment out of the Raffles Road property mortgage. One possibility is that he thought that it was Godwin's money that had gone into the TSM account, which was simply being used to effect payment against it.

[457] He was never informed by Baylis that the moneys used to pay out the mortgage had in fact come from the proceeds of the $570,000 cheque. Indeed, apart from what is said in the letter of 9 January 1998 and the earlier conversation had by Baylis with DLS about the delay due to non-finalisation of the Raffles Road mortgage pay out, none of the personal plaintiffs were ever informed by the ANZ of the reasons for the continuing delay in settlement of the approved loan facilities or the source of the funds from which the mortgages over the Raffles Road property or the alleged Godwin properties were paid.

[185] As appears from Exhibit P1 p 322.
[186] Exhibit D26.

[458] I do not accept the proposition that DLS was well aware, prior to the event, of the fact that the relevant mortgage was to be discharged from TSM funds drawn from its account, despite his apparent concession recorded at T809 as to the nature of the D26 document.

[459] I am by no means satisfied that, at the time, he really appreciated the thrust of the relevant question put to him. I took his affirmative answer to Ms Kelly's question to be no more than an acknowledgement that he obviously must have signed the authority, whatever its effect might have been.

[460] The ANZ subsequently settled TSM's liability to ATSIC on 13 January 1998.

[461] Incredibly, despite the TSM financial problems at the time, four expensive new motor vehicles were procured through TSM immediately after the ANZ settlement, one each for DLS, ECD, NKS and Godwin. These are said to have been financed through Esanda.[187]

[462] A cheque for $570,000 was drawn on the TSM account on or about 22 January 1998.[188] It is my understanding that this was made out in favour of NPG. Exhibit D18 indicates that payment of it was stopped and that there were insufficient funds in the TSM account to meet it in any event.

[187] See Defendant's reply p 95.
[188] Exhibit P25.

[463] The full circumstances giving rise to the creation of this cheque and what was done with it do not emerge from the evidence. That cheque purports to have been signed by DLS and ECD. DLS denied that he had in fact signed it.[189]

Caveats on the alleged Godwin properties and their ultimate removal

[464] The ANZ sought to lodge security documents relating to the TSM re-financing transaction for registration at the Lands Titles Office on 5 January 1998. The ANZ settlement clerk (the witness Ordogh) then discovered that caveats dated 24 December 1997 by NPG had been lodged for registration at the Lands Titles Office on 30 December 1997 in respect of two titles relating to land at Palmerston and also each of the alleged Godwin properties.

[465] Unfortunately, the witness Ordogh has little or no present memory of the precise events of 5 January 1998. She is only able to say that the content of a declaration made by her to the police in about late July 1998[190] would have represented her best memory, at that time, of what had taken place.

[466] Ordogh stated to the police that, upon becoming aware of the existence of the caveats, she contacted the ANZ branch at Winnellie and spoke to the witness Burford. She apprised him of the situation and he told her not to settle and to withdraw the documents until the matter was sorted out.[191]

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[189] T259.
[190] Exhibit P46.
[191] Exhibit P46, p 1.

Burford has no present memory of that conversation and Baylis says that he has no memory of the situation having been reported to him.

[467] For some reason that does not now emerge, Ordogh did not carry out the instructions so given to her.

[468] The Lands Titles Office clerk is said to have telephoned Godwin, as the person who lodged the caveats. He then personally attended at that office shortly thereafter, claiming that there had been some mistake.

[469] According to the Ordogh statement, the Lands Title Office clerk told Godwin that she would require something in writing to remove the caveats. Ordogh accepts that she then wrote out a form of withdrawal of the caveats in her handwriting, inserting the names of NPG directors, as supplied by Godwin.

[470] She told him that it would need to be signed by the directors and have the NPG seal affixed. He said that he thought that he might have the seal in his car and they went out to where it was parked. He professed being unable to find the seal. He then told Ordogh that he would take the withdrawal document and get it signed and the seal put in place.

[471] There is a lacuna in Ordogh's evidence as to what followed. All that is recorded in her declaration is that she understood that the ANZ mortgages were in fact processed by the Lands Titles Office the same day. She declared that, on the following day, by chance, she encountered Godwin in

the Mall and he told her that he had had the documents signed and sorted out.

[472] The Flynn caveats were actually noted by the Lands Titles Office, seemingly as withdrawn by virtue of the handwritten letter dated 5 January 1998 addressed to the Registrar-General that had been drafted by Ordogh. This, in terms, purported to be written by or on behalf of Flynn and his wife as directors of NPG and requested withdrawal of the caveats, as having been "lodged in error".

[473] Some light is thrown on the dealings within the Lands Titles Office by declarations made by certain of its staff members.[192]

[474] The office manager (Ms Tak) said that Godwin, who was known to her, came into the Lands Titles Office on 30 December 1997. It is clear that he had previously spoken with a staff member of that office and sought guidance concerning the lodgement of caveats. Ms Kalinowski had supplied him with caveat forms, which he had taken away with him.

[475] When Godwin came to the office on 30 December he presented Ms Swani (a lodgements officer) with four caveats, each with a dealing lodgement form attached in triplicate. This was accompanied by a cheque for the fees payable.

[192] Exhibit P59.

[476] Ms Swani says that she logged the caveats on the computer and wrote the dealing numbers on the caveats and the associated dealing lodgement forms, returning the originals of such forms (with computer impressed endorsements as to payment of fees) to Godwin. The caveats were then passed to Ms Kalinowski to process.

[477] Godwin then said that he did not want to register the caveats at the time -- he was not sure that he had done the right thing. He left saying that he was going to check with his solicitor and would get back to the Lands Titles Office staff.

[478] Accordingly, Ms Kalinowski placed the documents in her pending tray, because Godwin requested that the lodgements be not actually removed at that point. He was told that, if they were to be removed, something in writing would be required.

[479] Godwin came to the Lands Titles Office on the following day and spoke to Ms Tak, because Ms Kalinowski was not there. He asked Ms Tak if the caveats had actually been registered, to which she replied that, pursuant to his request, the requisite processing had not been actioned.

[480] He said that he wanted to withdraw the documentation and that payment of the fees cheque had been stopped. Ms Tak took him to see the cashier about the cheque and was not further involved in the matter.

[481] It appears that the caveats remained in Ms Kalinowski's pending tray until, on 5 January 1998, Ms Ordogh attended and attempted to lodge the ANZ documentation. She was advised that these could not be registered until the caveat situation had been sorted out.

[482] Ms Kalinowski said that she thereupon telephoned Godwin and he attended the office. He said that he wished to withdraw the caveat dealings. She replied that she required that request in writing. Her memory was that the witness Ordogh wrote out a form of letter for Godwin and that this was subsequently handed to her by Ms Ordogh at a time that has not been identified. The caveat dealings were then deleted from the computer.

[483] Like Ms Ordogh, she has no apparent memory of precisely when the letter was returned to the Lands Titles Office, nor was there any clarification of whether it did or did not bear purported signatures of Flynn and his wife. Flynn says that, after Godwin's fraudulent conduct had become known to him, he sighted the letter in question and it did not bear the signatures of himself or his wife.

[484] Be that as it may, Ms Kalinowski states that, upon being handed the letter requesting withdrawal, by Ms Ordogh, she withdrew the caveat dealings from the computer and allowed the ANZ documentation to be processed. As has already been seen, Ms Ordogh has no memory of how the letter came to be returned to the Lands Titles Office or by whom.

[485] Neither Flynn nor NPG had in fact authorized any withdrawal of the caveats and they were unaware of the purported request in that regard.

[486] The official record indicates that the ANZ documents were actually registered as of 6 January 1998. There is no evidence to suggest that the ANZ ever brought the events of 5 January regarding the caveats to the attention of TSM or its directors.

The procurement of the $570,000 cheque

[487] The evidence of the witness Flynn throws some additional light on the circumstances related to the lodgement and withdrawal of the caveats.

[488] He described the history of having agreed to provide finance through NPG to LTD to enable it to develop units in Palmerston for resale. This was made available progressively, with the first instalment being advanced in late July 1997. LTD had eventually executed the mortgage debenture previously referred to in favour of NPG to secure what proved to be ultimate advances up to $800,000.

[489] As I understand Flynn's statement,[193] the monies advanced by NPG were essentially pitched at financing the construction of the eight units comprising the second LTD development project. By 15 September 1997 NPG had advanced a total of $600,000 and Flynn was clearly becoming reluctant to advance further amounts, although a need for up to $800,000 had been foreshadowed.

[193] Exhibit D55.

[490] Flynn said that he had a discussion with the LTD directors on what must have been about 6 October 1997, at which time they supplied him with the list of assets and associated liabilities a copy of which is attached to Exhibit D55.

[491] It is of interest to note that the assets listed included the alleged Godwin properties and the Anula property, each of which was represented as having "nil" encumbrance. On the other hand the CBA mortgage over the Raffles Road property and the debts to Esanda and ATSIC were disclosed.

[492] At any event the final advance of $200,000 (bringing the total advances to $800,000) was made by NPG on 7 October 1997. In the course of his oral evidence,[194] Flynn made it clear that he was not prepared at that point to lend any further money to LTD.

[493] It was at about that time that the possibility of NPG taking over the second LTD development project was actually first mooted.

[494] The Flynn advances carried a high rate of interest. The stipulated monthly rate of 2.75 percent equated to an annual rate of 33 percent, requiring very substantial monthly servicing payments.

[495] Flynn said that, at some point late in 1997, Godwin, who represented himself as attending to financial matters on behalf of LTD, told him that he

[194] T1729.

was negotiating with Baylis at the ANZ to consolidate all loans to both TSM and LTD, so as to free up current mortgages with various lenders.

[496] Godwin stated that he wanted to borrow $570,000 in bridging finance for 14 days for relevant property transfers to take place. This, he said, would supply the bank with collateral for a commercial bill that would pay out all company debts, including that of NPG. By that time, Godwin had produced to Flynn the statement of assets and liabilities that indicated that the alleged Godwin properties were unencumbered.[195]

[497] It was the plaintiffs' case that none of the previous NPG loans had been negotiated by Godwin who had no authority to do so at any time. I took DLS to assert that this process had been and was his sole province. I accept that evidence.

[498] Flynn said that he told Godwin that he wished him to set up a meeting with Baylis, but that this did not eventuate. However, Godwin indicated that he could offer four properties as security for the $570,000, in respect of which caveats could be registered to support the loan, with written authority from the registered proprietors.

[499] Flynn narrated that four caveats were said by Godwin to have been prepared by an employee of TSM or LTD, who had previously worked in a legal office. They were executed under the common seal of NPG.

[195] See Trial Book Vol 9 p 746.

[500] Godwin undertook to lodge them for registration and he did in fact present them at the Lands Titles Office in the circumstances already recited. He subsequently supplied Flynn with what purported to be copies of registered proprietors' consents to the caveats, one of which was dated 27 December 1997.

[501] Flynn wrote a letter dated 29 December 1997 on NPG letterhead addressed to Baylis. This advised the latter that NPG was the holder of an equitable charge over LTD and caveats over the four properties above referred to. It purported to consent to the ANZ taking a mortgage over the properties in question as security for a commercial bill, on condition that NPG received written confirmation that it would be the priority payee from the proceeds of the commercial bill for the full amount owed to it. Somewhat naïvely, Flynn gave that letter to Godwin who undertook to hand it to Baylis. Godwin did not in fact do so.

[502] Godwin handed Flynn four dealing lodgement forms on 30 December 1997. These evidenced the lodgment of the caveats at the Lands Titles Office,[196] as already recited.

[503] On 2 January 1998, Flynn wrote a further letter on NPG letterhead, addressed to Baylis, with whom he had still not met and to whom he had never spoken. That letter had attached to it a cheque for $570,000 drawn in favour of the ANZ (being the $570,000 cheque). It stated that the

[196] Exhibit P1 pp 306 and 307.

cheque proceeds were to be used only to release mortgages over the alleged Godwin properties and only if the amount of $1,394,712 (including the $570,000) due to NPG was to be paid in full on or about 10 January 1998. A signed acknowledgment of that letter was required by Flynn from Baylis.

[504] Flynn stated that Godwin later returned a copy of the letter purporting to bear the signature of Baylis in acknowledgment of receipt of the communication directed to him. Curiously, that signature was said to have been affixed on 31 December 1997. It had been forged by Godwin.

A request to the ANZ for additional finance

[505] DLS, ECD and Godwin met with Baylis on 27 January 1998. They sought an additional advance of $500,000 for working capital to facilitate the purchase of land for house and land packages and cover creditors and subcontracts for the houses completed to date.

[506] In support of that application they foreshadowed the orderly sale of a variety of properties (including the Raffles Road property, the Anula property, the Stuart Park property and the alleged Godwin properties) to inject surplus funds into working capital. It was proposed that the directors would each purchase one of the house and land packages for themselves to be used as display homes and for their own residences, taking out individual housing loans for that purpose.

[507] As appears from the ANZ credit response,[197] the bank was not prepared to advance the full additional $500,000 sought. It approved an additional $200,000 on a bridging basis only, subject to the following express conditions –

> "provision of contracts for houses to be built"
>
> "agreement re purchase of Wells Street to be signed"
>
> "L/-of acknowledgement that all properties will be sold within 3-6 month time frame (market to be met) to clear ANZ debts in full"
>
> "no further funding to be provided by ANZ"

[508] It is clear that these conditions were communicated to the directors of TSM, who accepted them. At that point it had still not formally been disclosed to the ANZ that $800,000 was owing to NPG at a very high interest rate, although Baylis had been given the minutes of the retreat meeting that inferred that some debt may well have been outstanding to that entity.

[509] On 28 January 1998 two separate letters on TSM letterhead were written to Baylis.

[510] The first was signed by DLS, ECD and Godwin. The substance of it read as follows:

> "We the undersigned confirm that properties presently owned by Mrs David Smith, Edward Dean and Lionel Godwin are to be sold, with settlements expected within the next three to six months, and

[197] Exhibit D51 Tab 57.

that all proceeds of such settlements will be applied against outstanding debts of the TSM to the ANZ bank.

We undertake to inform the ANZ of the progress of such sales."

[511] The second was signed by Godwin alone. The body of it reads:

"I confirm that the property situated at 22 Wells Street Ludmilla is to be sold to my father-in-law and that the proceeds of the sale will be applied against the outstanding debt of TSM to the ANZ bank.

I consent to information in respect of these dealings being made available to you should you require further details."

[512] However, the approved proposal was overtaken by the events to which I now come. The additional $200,000 was not in fact made available when the full situation with regard to the various NPG transactions became known.

Godwin's fraudulent conduct is revealed

[513] Flynn stated that, in January 1998, he was pre-occupied with problems arising from flooding in Katherine and had gone there to deal with them.

[514] He related that, on or about 2 or 3 February 1998 whilst in Katherine, he received a telephone call from Godwin to the effect that there was a problem with the ANZ and that it was not going to repay on time. He further testified that, whilst he was still at Katherine, he had a telephone conversation with DLS. In the course of it he told DLS that he had no further confidence in Godwin telling him the truth and that he would only deal with DLS and ECD from then on.

[515] Flynn said that, having returned to Darwin on the preceding evening, he went to see Baylis at the Winnellie Branch of the ANZ on the morning of 5 February. Godwin was present in Baylis' office at that time.

[516] On Flynn producing the copy letter dated 2 January 1998 purporting to bear the signature of Baylis, the latter said that the signature was not his signature and that he had never seen the letter. Godwin then admitted that he had falsified it.

[517] Godwin came to the TSM office at a time which must have been shortly after his confession to Baylis and Flynn on 5 February 1998. He was in a distraught state and spoke with ECD. DLS was absent at Gove at the time, finalising a quote for a major job.

[518] Godwin intimated that Flynn had demanded payment of all monies, totalling $1.3 million, then owing to him. ECD asked Godwin where that figure had come from, because he had understood that only $400,000 was then outstanding. Godwin responded that he had not only not paid the earlier promised sum of $460,000 to Flynn, but that he had also obtained another $570,000 from the latter by forging a letter to Baylis to pay out mortgages over the alleged Godwin properties. Godwin stated that Baylis wished to see DLS, ECD and Godwin the following day.

[519] ECD thereupon telephoned DLS and requested his urgent return to Darwin.

[520] DLS and ECD demanded and obtained Godwin's resignation as a director of LTD on the following day.

The ultimate situation concerning the $570,000 obtained by Godwin from NPG

[521] As already appears, the bulk of the $570,000 was expended, in essence, in clearing titles required by the ANZ as security for its agreed financial accommodation to TSM.

[522] $110,000 was, indirectly, used to clear the existing mortgage liability on the Raffles Road property,[198] whilst most of the balance was applied in the manner set out in Exhibit D37 i.e. principally in clearing existing liabilities in relation to the alleged Godwin properties.

[523] NPG sought, by letter dated 20 February 1998, to hold TSM, LTD, DLS and ECD liable for all monies advanced by it, including the final $570,000.[199] They did not concede liability for that sum. Their attitude at the time was as reflected in a letter dated 26 February 1998 addressed to NPG,[200] although it is not clear whether this was actually sent. Their stance was that Godwin had no actual or ostensible authority to secure an advance of that sum.

[198] cf T900.
[199] Exhibit D36.
[200] Forming portion of Exhibit D36.

[524] The evidence indicates that NPG instituted proceedings to recover the $570,000 from the ANZ and that such claim was ultimately settled on the basis of a payment by ANZ of about $100,000 to NPG.

The ANZ exit strategy

[525] DLS, ECD and Godwin subsequently met with Baylis at his office. Baylis then outlined some aspects of Godwin's fraudulent actions, although it is fair to say that DLS and ECD did not, initially, fully comprehend all that had occurred.

[526] As appears from diary note made by Baylis on 6 February 1998, DLS and ECD were then of the understanding that the NPG debt had been reduced to about $400,000 at that point, whereas it had remained at $800,000, in addition to which Godwin had obtained the $570,000 cheque.[201]

[527] Baylis told DLS and ECD that:

- ANZ would allow TSM to continue to trade;
- TSM's No 1 account had been closed and a new No 2 account had been opened;
- $10,000 had been transferred from the TSM overdraft to the No 2 account as working capital;
- ANZ would not permit the new account to be overdrawn;

[201] Exhibit D51 Tab 60.

- the TSM indebtedness to ANZ was to be reduced to a manageable level by disposing of assets, the sale of which would be applied against the highest interest-bearing facility (i.e. the overdraft); and that
- the business was not to be expanded until matters had been resolved with Flynn.

[528] On 19 February 1998, Baylis wrote to TSM.[202] He formally advised the company of an increase in interest rates on the overdraft and FDA accounts and advised that:

> "All other terms and conditions of both the above facilities remain unchanged, as set out in your original approval letters".

[529] LTD ceased to trade following the meeting of 6 February 1998 and TSM dealt with any outstanding aspects of its business. DLS and ECD approached the major suppliers and creditors of TSM, informed them of its situation and sought their cooperation. However, the business declined over time.

[530] The State Manager of the ANZ Group Credit Management Department wrote to TSM on 6 March 1998. In the letter he noted that TSM had been "*cooperating with the realisation of the sale of various assets in order to clear the debt*" to the ANZ. He said that the purpose of the letter was to

[202] Exhibit D51 pp 270-271.

"*set out the indicative terms on which the ANZ is prepared to agree to continue the facilities, even though they are in default*".

[531] As to that, reference was made to drawings in excess of the approved overdraft limit, a change in its financial position by virtue of a major debt due to a third party (i.e. NPG), unpaid tax liabilities and a claim by Mr W Lew-Fatt that the mortgage over his house had been obtained without his authority, his attorney not having understood the nature of the transaction.

[532] The letter went on to say that, as a result of the alleged defaults, the ANZ was entitled to formally demand immediate payment of all monies due to it. However, it indicated that it was prepared to refrain from doing that for the moment on what it described as the indicative terms set out in the letter.

[533] It is unnecessary to set out those terms in detail at this time. It will suffice to say that the ANZ stipulated that the debt due to it had to be repaid "*within a reasonable period of time…… through the sale of various properties*" and required the submission to it of a proposal concerning such sale within 14 days. It stipulated a number of collateral conditions or requirements concerning the disposal of assets and other matters, whilst expressly reserving its legal rights to initiate formal recovery action to recover the monies due to it.

[534] The ANZ required the written acknowledgement and acceptance of the directors of TSM of the various matters set out in the letter. It indicated

that it also required the consent of each of the guarantors to its indicative terms, except that it acknowledged that Walter Lew-Fatt might not be prepared to give his consent.

[535] The ANZ separately wrote to the various guarantors in terms of the copy letters contained in Exhibit D51 at Tab 70. It sent a copy of its letter to TSM to each of them, stating that it was unable to conclude the proposed arrangements unless it had the consent of all guarantors. *Inter alia*, the letter stated:

> "You should understand that ANZ is still able to proceed against you to recover the debt due under your guarantee and indemnity, and in that regard to proceed to take possession of any real estate that you have given to ANZ. ANZ hopes that it will not need to do this and may not need to do so if asset sales can be completed in line with the forecast of the directors."

[536] It is to be noted that the letter did not purport to call up the various guarantees at that time and, in the event, they were not subsequently called up until, on or about 6 May 1998, the solicitors for the ANZ made formal demands in respect of the balance then due to it.[203]

[537] The letter to each guarantor required that party to give formal written consent to what was proposed in the ANZ letter of 6 March 1998 to TSM. I infer that such consents were duly given, at least by the guarantors other than Walter Lew-Fatt.

[203] Exhibit D51 Tabs 75 and 76.

[538] The plaintiffs say that, in accordance with the terms of the last mentioned letter:

(1) DLS and NKS had to sell the Raffles Road property;

(2) ECD and SED had to sell the Anula road property;

(3) DLS and ECD had to sell the TSM land and workshop premises to realise the equity of approximately $250,000 in it;

(4) TSM had to sell the block of land at Margaret Street Stuart Park;

(5) LTD had to sell a unit involved in the first LTD development project and four of the units involved in the second LTD development project; and

(6) TSM had to sell two other houses that it had built, to raise funds with which to retire debt.

[539] It is not disputed that properties were in fact sold, with the result that, eventually, the total indebtedness of TSM to the ANZ was fully discharged.

[540] The precise details of the full asset realisation programme and its consequences do not clearly emerge from the evidentiary material. However, it is at least said that:

(1) the Raffles Road property was sold on 30 April 1998 for $220,000, with a net figure of about $208,000 being applied in reduction of the balance due to the ANZ,

(2) the Anula property was sold on the same date for $188,000, with a net figure of $177,786 being applied in reduction of the balance due to the ANZ,

(3) the TSM land and workshop premises were sold on 8 September 1998 on a leaseback basis for $450,000, with a net figure of about $430,000 being applied in reduction of the balance due to the ANZ,

(4) the Brayshaw Crescent property was sold on or about 4 June 1998 and the total proceeds of $240,000 paid to TSM. From that sum $120,000 was paid to each of the female plaintiffs who, in turn, lent $60,000 each back to TSM on the security of registered charges over that company, and

(5) Walter Lew-Fatt paid TSM $50,000 in return for the release to him of the Wells Street property.

[541] In summary:

(1) The $500,000 FDA account with the ANZ was retired by 16 March 1998.[204] This was consequent upon the sale of the Margaret Street land on or about 24 February 1998, which settled for an amount of $268,053.99. The balance was liquidated by the sale, on 16 March 1998, of Units 5 and 8 Shearwater Drive, each of which settled for a sum slightly in excess of $116,000.

(2) The so-called business mortgage loan account (which originally stood at $750,000) was finally retired on 14 August 1998, principally

[204] Exhibit D51 p 296.

as a result of the sales of the Anula property, the Raffles Road property and two of the LTD Units.[205]

(3) The TSM overdraft account was finally closed out on or about 8 September 1998, consequent upon settlement being effected in respect of the sale of the TSM land and workshop premises.[206]

[542] There are two comments that must be made concerning the realisation of assets.

[543] First, the various realisations were effected by TSM and its directors, in concert with the guarantors involved as relevant, in what I take to be an orderly fashion. They were *not* effected by the ANZ as default mortgagee sales, although the transactions were certainly processed in the context of the ANZ requirements expressed in its letters of 6 March 1998 to TSM and the guarantors and agreed to by them.

[544] Second, it must be emphasised that, as already recited, the relevant parties had, prior to the discovery of Godwin's fraudulent conduct, resolved on an orderly sale of most of the properties in question in any event, to retire debt to the ANZ and provide much-needed additional working capital to finance proposed ongoing TSM initiatives.

[205] Exhibit D51 Tab 77.
[206] Exhibit D51 Tab 79 and Exhibit D18.

[545] In his credit memorandum dated 27 January 1998, Baylis recorded that the customers had "*changed their business plan considerably since the original submission*" to the ANZ. He reported that:

> "They are now going to do the following:
>
> As well as running the core business of sheet metal work they will concentrate on building elevated houses as 'house and land packages' starting at around $145,000
>
> They will sell off all their residential properties (refer attached) to inject surplus funds into working capital
>
> Directors will purchase one of the 'house and land packages' for themselves to be used as display homes and their own residences, borrowing funds on housing loans individually."

[546] That credit memorandum then proceeded to identify steps already said to have been taken to realise relevant properties at that point. Interestingly, reference was made to the fact that it was said that arrangements had already been concluded to sell the Wells Street property "*back to parents*" for $285,000 "*with settlement in ten day*[s]".

[547] The credit memorandum continued:

> "As a consequence of selling off all their residential properties they will realise the following;
>
> | | |
> |---|---|
> | Gross proceeds as per attached sheet from TSM | $2,365,000 |
> | Less Agents Commissions (4%) | $ 100,000 |
> | Less BML & FDA | $1,140,000 |
> | Less O/D (if we only approve a further $200K) | $ 500,000 |
> | Surplus | $ 625,000 |

> This surplus would be sufficient to cover working capital requirement for their house and land packages and be free of debt. They will also then own their business premises at Sadgroves Cres F'Hold, but may leave a mortgage to the Bank for future requirements."

[548] I take the "*attached sheet*" to be the document a copy of which appears at Exhibit D51 page 241. This contemplated sales of the four house properties, the Margaret Street land and nine units at Shearwater Drive. Of course, the proposal put to Baylis at that time did not reveal the true state of indebtedness of the group and, in particular, the $800,000 owing to NPG and the potential claims of NPG on the proceeds of unit sales.

TSM ceases to trade

[549] TSM suffered what was described as a massive shortage of working capital following the requirement to repay the ANZ loans, and both TSM and LTD had to immediately embark on the asset sales to satisfy its liabilities. Some employees were immediately retrenched and the workforce was progressively reduced thereafter. DLS and ECD were unable to obtain adequate credit to support ongoing desired operations because of what had occurred. This was particularly so in relation to their major steel supplier.

[550] The TSM problems seemed to be widely known. Because of the forced asset sales there was no property with significant equity available to offer as security and the company was refused financial accommodation by a series of potential lenders. DLS and ECD struggled for some time to maintain the TSM business but, in the end, were unable to do so or to

develop what were considered by them to be several potential profit making projects. In 2001 the company was placed in voluntary liquidation.

[551] DLS testified that, following the calling up of the TSM loans, steps were taken to sell the remaining units on completion and any miscellaneous movable assets of LTD were either taken over by TSM or sold to assist in meeting outstanding debts.

[552] The sale of the second LTD development project units took some time to effect.[207] Four units were sold in March, one in June, and others in the months August through to December 1998.

[553] The net proceeds of sale of the secured assets of TSM and of the properties that were the subject of the personal mortgages were sufficient to satisfy the residual ANZ liabilities. The debt due to NPG was ultimately reduced by $350,000. That sum was made up of $300,000, proceeds of sale of LTD units 2, 3 and 7 of the second LTD development project and $50,000 being part of the proceeds from the sale of the TSM land and workshop premises. The evidence does not indicate that NPG recovered any further moneys other than the $100,000 received as a result of its claim against the ANZ.

[554] NPG did not take immediate serious enforcement action to recover what was due to it. Flynn testified that his attitude was that, so long as he could

[207] As appears from the detail recorded in Exhibit P1 at p 423.

see an orderly liquidation of assets by the plaintiffs, he was content to allow that to happen, so that NPG could ultimately be paid.[208]

[555] DLS gave evidence to the effect that TSM reverted to general sheet metal jobbing work involving, in the main, relatively small tasks. It had difficulty in meeting orders of any size, by reason of the fact that it could not obtain credit with which to purchase significant quantities of material. Because it had to buy in materials on a job by job basis, there were delays in meeting orders. DLS and ECD both secured additional night employment to avoid having to draw wages on the TSM account.

[556] DLS said that the credit problems were so acute that TSM was unable to operate the major roll former machine depicted in the annexures to Exhibit P13, because it could not afford to purchase the large coils of sheet steel required. As a consequence, it had to buy in rolled corrugated iron, virtually on a job by job basis, to fill any rain water tank orders.

[557] DLS testified that, whereas it could have rolled its own corrugated iron with coil steel purchased for $9 per square metre, it had to purchase the corrugated product for $23 per square metre – a figure considerably in excess of the total cost at which TSM could have produced the same product.[209]

[208] T1735.
[209] cf DLS cross examination at T873 et seq.

[558] So it was that the roll former stood dormant for some time, after which, seemingly at the instance of its lawyer, TSM entered into a joint venture with another client of that lawyer. This involved the removal of the massive equipment to Timor some time in 1999 with the aim of producing corrugated iron there.

[559] That venture proved to be yet another unmitigated disaster for TSM. The machine was eventually lost to TSM and the company incurred a cost of the order of $35,000 with no apparent benefit to it.

[560] The accuracy of the foregoing situation was, to some extent, verified by the witness Jackson who was an employee of Union Steel and, at the relevant times, had the oversight of the TSM account.

[561] He said that, prior to February 1998, TSM was one of Union Steel's largest customers and had what was said to be an A category credit account with his company. TSM was, by far, the largest sheet metal customer of Union Steel, in particular, and generally had a good credit history. It was, overall, in the top 10 Darwin customers of Union Steel.

[562] This witness said that his company became aware that, in about February 1998, TSM was experiencing financial difficulty. It ceased purchasing coils of steel (as used in the roll former) and commenced purchasing sheet steel on a job by job basis. Average monthly steel purchases eventually dropped from about $40,000-50,000 per month to about 40 percent of that level. TSM eventually became a relatively minor customer.

[563] Arrangements were made, from about February 1998, whereby purchases had to be made by TSM on what was essentially a cash basis albeit that payments were applied by Union Steel to the then oldest invoice remaining unpaid, thereby assisting TSM's credit rating and tending to avoid a need for automatic 90 day debt recovery action in accordance with the company's policy. However, that practice ceased as a matter of policy as of about August 1998 and a direct cash sales requirement was implemented.

[564] Jackson said in cross examination that his memory was that, post-February 1998, Union Steel would have supplied RHS steel for the construction of houses for -- he thought -- about 10 houses in total, apart from any sheet steel orders. This would have been at a cost of about $5,000 per house.

[565] As a consequence of the sale of the TSM land and workshop premises on a leaseback arrangement, TSM was left with only its equipment and little ability to raise working capital.

[566] It terminated its banking arrangements with the ANZ and opened an account with Westpac. However, because it and its directors had no assets of substance to offer by way of security, it could not obtain financial accommodation anywhere, despite strenuous efforts to do so. It had to operate on purely a cash basis. It had no funds of substance with which to advertise.

[567] DLS said that, because of these problems and the then adverse financial reputation of TSM in Darwin, customers dwindled and workflow diminished to the point that staff had to be progressively laid off. The stage was reached at which overheads and other financial commitments consistently exceeded income.

[568] By May 2001, TSM was plainly insolvent and the directors were advised by their accountants to place it in voluntary liquidation. Some $190,000 was owed on Darwin steel accounts at that point and accrued debt to the Australian Taxation Office had escalated to about $300,000.

The situation immediately prior to and post February 1998, as revealed by the cross examination of DLS

[569] Ms Kelly challenged the accuracy of the scenario sought to be portrayed by DLS in various respects.

[570] First, she established that TSM had been pursued in the lower courts in relation to creditors' money claims on a substantial number of occasions between 1993 and 1997 and implied that it had been chronically short of working capital over the whole of that period. DLS stated that, in the main, these claims related to debits that were disputed and he testified that, in all, the claims referred to would have only totalled about $20,000 over the period referred to. No evidence was called to rebut that assertion and I accept it.

[571] Second, Ms Kelly sought to demonstrate that, given the need to sell properties to satisfy the ANZ loans, problems of inadequacy of working capital were, in part at least, the product of the deliberate actions of the plaintiffs themselves.

[572] She invited attention to the arrangements come to between TSM, LTD, Godwin and Traci and Walter Lew-Fatt, whereby the Brayshaw Crescent property was to be sold and LTD and TSM were to be entitled to all of the net proceeds of such sale, in addition to which Walter Lew-Fatt paid $50,000 to TSM as consideration for retaining the Wells Street property.[210] In the event both NKS and SED each received approximately $120,000 from the above sale proceeds, of which they kept about half and each loaned $60,000 back to TSM.

[573] The payments to each of those plaintiffs were said to have been by way of repayment of loan account monies. To the extent that any monies were retained by them, that necessarily operated as a reduction of working capital available to TSM.

[574] Third, DLS accepted that, subsequent to February 1998, TSM was actively constructing houses and in fact built about 14 houses. Ms Kelly sought to demonstrate that such a situation, coupled with the evidence of the giving of numerous estimates and quotations for house construction, was in conflict with the evidence of DLS to the effect that, post February 1998,

[210] T904, Exhibit D31.

TSM was reduced to conducting a core business of general sheet metal work products and general jobbing.

[575] The evidence of DLS and ECD indicated that two of these houses were built for NKS and SED respectively in 1998, one was a substantial new family home for NKS at Bakewell in 2000 and that, except for three houses built in 1998 as a consequence of general promotion, the other houses in question were actually constructed for personal friends or employees or their relatives who tried to support TSM.[211]

[576] DLS testified that "As our sheet metal died off we obviously had to try and do exactly what we could to stay afloat ……". He agreed that, in such a context, numerous quotes for houses were given by TSM.

[577] Exhibit P43 indicates that TSM built five houses in 1998, six houses in 1999, and five houses in 2000. The corresponding approximate total contract prices per annum were $530,000, $647,000 and $636,000 respectively.

[578] Ms Kelly put to DLS that the expenditure and receipts data comprising Exhibits D33 and D35, did not indicate a major downturn in overall business and virtual total lack of credit availability as earlier asserted by him. Rather, it suggested that TSM in fact continued to maintain a not insubstantial level of material purchases post February 1998; and that it

[211] T888.

also continued to maintain a substantial level of business turnover at the same time, at least by virtue of the house construction activity.

[579] Such suggestions are difficult to align not only with the evidence of DLS but also that of ECD. ECD testified that, once existing stocks of material were depleted following the calling in of the ANZ loans, materials could only be purchased on a cash basis and it was impractical for TSM to accept large jobs for that reason.

[580] This problem, coupled with rumours circulating concerning the company's financial difficulties, gave rise to a steady downturn in the core business of TSM to the point that its workforce had been halved by the time that it went out of business and general jobbing work had declined by 70 to 80 percent.[212] It was essentially the house building business that enabled the company to keep operating for as long as it did. The data in Exhibit D35 gives some picture of relative activity over time.

[581] The foregoing scenario, as portrayed by DLS and ECD, is lent support in varying degrees not only by the witnesses Jackson, Jebbink,[213] Van Munster and Kirwin,[214] but also by various other witnesses to whom I have elsewhere referred. In his statement[215] Valastro commented that the business community lost respect for TSM and were suspicious of its ability to pay its debts.

[212] T1011.
[213] Exhibit P41.
[214] Exhibit P45.
[215] Exhibit P34.

Some reflections on the conduct and attitudes of DLS, ECD and Godwin

[582] I pause at this point to record certain important features that arise on the narrative evidence as it unfolded before me. I do so because these are of considerable significance in relation to ultimate conclusions bearing, *inter alia*, on the issue of quantum and also of relevance to some aspects of credibility - in that they touch on the likelihood of factual scenarios as to which one might otherwise be sceptical -- particularly in the case of more sophisticated persons of business.

[583] One important distinction that must be drawn between the evidence of ECD and that of DLS is that, at the material times, the former, for the most part, maintained a contemporaneous diary record of many, but not all, of his activities and certain of his impressions. As he accepted, this was not unlike a type of police running sheet that he had, no doubt, been accustomed to maintaining when a member of the police force, albeit that it did not profess to be a complete record.

[584] It is possible, by reference to this record, to determine with reasonable accuracy not only the relevant sequence of many events, but also ECD's perceptions at the times in question.

[585] Perhaps more importantly, the diary record paints a clear and graphic picture of not only the developing relationship between DLS and ECD on the one hand and Godwin on the other, but also of the manner in which the principals of TSM and LTD were arriving at important business decisions

related to the evolution and implementation of major LTD initiatives in mid 1997 and of the financial problems that were besetting TSM and LTD.

[586] In a practical sense those various aspects were very much interwoven.

[587] The diary entries for late April through to September 1997 starkly indicate a situation in which not only were TSM and LTD experiencing chronic liquidity problems, but also the principals of those companies were making a series of business decisions that were patently ill-advised, if not, in some respects, irresponsible. With the wisdom of hindsight, some of them were little more than acts of foolish desperation.

[588] The foregoing situation can be illustrated by reference to some examples:

(1) DLS and ECD both entered into what was a precipitate decision, in mid and late April 1997, to both consummate a business relationship with Godwin as elsewhere recited and, at about the same time, also committed to the purchase of the site of the first LTD development project -- notwithstanding that there were substantial cash flow problems at the time. Moreover, they did so absent any real pretence at proper due diligence measures concerning either Godwin or the efficacy and profitability of the project in question;

(2) ECD's 1997 diary reveals that a submission to the CBA for increased overdraft accommodation to fund the above project had actually been rejected as of 22 April, yet LTD nevertheless committed itself to

significant implementation expenditure in respect of it. To make matters worse, no plans for the development had been approved, title to the site had not been acquired and DLS and ECD were content to proceed on the basis of Godwin's mere verbal promise to contribute a full $400,000 by way of capital. They, at all times, regarded him as a trusted friend and took him at face value -- naively accepting the many representations and excuses made by him over time;

(3) Godwin made several small contribution amounts totalling about $110,000 by mid June 1997, including a sum of $70,000 on 17 June, promising to find the balance of the $400,000 in the then near future. Amazingly, he sought to draw back various amounts shortly after such contributions, to meet what he said were pressing debts. DLS and ECD simply acceded to that request.

(4) It does not seem that they paused to draw the inferences that obviously and naturally arose as to Godwin’s apparent financial situation and probable lack of capacity to raise his promised capital infusion. When, by 8 August 1997, he contributed another $9,000, his total net contribution was thought by ECD to still have stood at only a little over $100,000;

(5) By mid-July 1997 there was still no finance in place to support the first LTD development project and, notwithstanding many promises, Godwin had not produced the bulk of his promised contribution.

Despite that situation, steps had nevertheless been taken to implement the first LTD development project and discussions were underway concerning a second such project;

(6) The financial position of LTD was becoming critical by mid-July 1997. DLS then negotiated a first loan of $100,000 from NPG at the very high rate of interest to which I have elsewhere referred. It was not until 11 August 1997 that an overdraft limit was approved by the CBA, which enabled LTD to settle for the first LTD development project site the same day;[216]

(7) The cash flow situation of LTD and TSM continued to be a major problem and a review of accounts as at 21 August 1997 failed to reveal any specific reason (such as a possible double payment of accounts as suggested by Godwin) for a major funds shortfall then being experienced. Godwin continued to advance excuses for not being able to complete his capital contribution. In the result, further advances were sought and obtained from NPG at the effective interest rate of 33 percent per annum;

(8) Incredibly, despite the cash flow difficulties and the dishonouring of LTD cheques, Godwin persuaded DLS and ECD, on or about 29 August 1997, to allow him to draw $60,575 to purchase a new Toyota Prado vehicle on a promise to repay within a brief time

[216] Exhibit P1 page 435.

thereafter -- a promise that was never kept and, seemingly, not even seriously followed up. On the face of it, this permission was little short of irresponsible;

(9) Such was the then financial position that LTD was forced to borrow yet a further $200,000 from NPG on 2 September 1997;

(10) As at about 15 September 1997, Godwin said that he had somehow found about $100,000 to settle for the acquisition of the site for the proposed second LTD development project. He asked DLS and ECD to sanction the reimbursement of that sum to him and, amazingly, they agreed to do so;

(11) This was so notwithstanding that he did not ever vouch such a payment and had still not contributed the bulk of the $400,000 promised by him. In truth he had never made any payment in respect of the site in question and his assertion in that regard was completely false.

(12) What is even more incredible is that, having so agreed, DLS was constrained to borrow yet a further $100,000 from NPG on behalf of LTD at 33 percent interest per annum to provide the funds with which to make the requested reimbursement. It will be seen that, in practical terms, the then net result appears to be that TSM/LTD had not, at that point, received the benefit of any ongoing capital infusion

by Godwin after taking into account his draw backs and payments made to him;

(13) As elsewhere appears, work was, in fact, commenced on the second LTD development project prior to the conclusion of the purchase of the relevant site and absent any settled basis of financing for that project. Moreover, no actual detailed costings had been reviewed in relation to the units comprising the first LTD development project to determine what profit, if any, had been made on them and, thus, whether the development projects were in fact financially viable;

(14) On 26 September 1997, LTD paid portion of a deposit to acquire yet a third site (i.e. that at Stuart Park), without first having arranged finance for it or any third development project;

(15) When under pressure from the CBA as to the state of the LTD account, a further $200,000 was borrowed from Flynn on 6 October 1997, to assist in meeting the then cash flow problem. It was at that point, because of the somewhat desperate financial position of LTD, that an agreement was arrived at whereby NPG would purchase eight units then being constructed, at cost; and

(16) Finally, it must be borne in mind that, at the time at which the principals of TSM and LTD signed the acceptance of the ANZ letter of offer dated 19 November 1997, the practical situation was that the provision of the financial accommodation in question was manifestly

insufficient to place the companies in a position, on sale of the relevant units, to both repay the bridging component of the accommodation and also the total amount then due to NPG.

PART III

Expert banking evidence and the evidentiary case as to damages

The expert evidence related to banking procedures and responsibilities

[589] It is convenient at this point to focus on the expert evidence led as to banking procedures and responsibilities.

The witness Brian Guild

[590] The first such witness called before me by the plaintiffs was Guild, who was employed by the CBA from 1965 to 2003. That employment spanned all retail banking facets from telling, accounting, to assistant manager and branch management roles.

[591] Importantly for present purposes, Guild was appointed a relationship manager at the Northern Business Banking Centre in Adelaide and, later, a relationship executive within the corporate banking area in South Australia. His CV establishes a substantial experience in the general commercial banking area -- particularly in relation to small to medium-sized enterprises.

[592] Since leaving the bank, this witness has been self-employed as a management consultant for a number of such enterprises. He is involved in monitoring the financial management of them and in assisting in the preparation and presentation of loan applications to various banks or finance institutions.

[593] The evidence of Guild focused on the issues of whether the conduct of officers of the ANZ had, on the facts made known to him, accorded with prudent banking practice in:

(1) undertaking checks in October/November 1997 in relation to the alleged Godwin properties in support of the finance application;

(2) disclosing outcomes of the ANZ investigations into those properties, either before or after loan approval in November 1997;

(3) undertaking credit reference and other banking inquiries into the credit history of Godwin and disclosing the outcome of those investigations to the plaintiffs;

(4) the conduct of the TSM banking business between November 1997 and March 1998, including the ANZ dealings in relation to the $460,000 cheque and the $570,000 cheque;

(5) payment by the ANZ of $110,000 from the TSM business account in discharge of the mortgage over the Raffles Road property;

(6) the calling in of the TSM loan for the reasons set out in the ANZ letter to TSM of 6 March 1998; and

(7) any other matters considered relevant to the case.

[594] It is convenient to deal with Guild's evidence in that sequence, so far as such a course is feasible. However, prior to so doing, it is necessary to

make some remarks concerning his general presentation as an expert witness.

[595] There can be no doubt about his considerable experience and relevant expertise in relation to the topics addressed by him. He projected as a frank, commonsense and non-partisan witness.

[596] It is unnecessary to traverse his evidence in examination in chief and cross-examination in fine detail. It will suffice if I focus on the net effect of the highlights of what he had to say.

[597] He conceded that, although there was some debate on the topic, the fact that the alleged Godwin properties were subject to substantial mortgages did not, *per se*, diminish the security value of those properties because it was a requirement that the mortgages be paid out at settlement, so as to enable first mortgage security to be given to the ANZ.

[598] He accepted that the bank had required provision of a total first mortgage security situation that, in itself, was of more than sufficient quantum to cover the whole of the proposed loan advances.

[599] However, he took as his commencement point that the ANZ had been faced with a scenario in which Godwin had initially represented that he owned the alleged Godwin properties and that there were no mortgage liabilities on them, as referred to in the relevant documentation.

[600] The ANZ had clearly become aware that he was not the registered proprietor of those properties at some time prior to the valuation requests of 21 November 1997. At a point prior to about 25 November it had also become aware that the title of each of the alleged Godwin properties exhibited a registered first mortgage in favour of the NAB.

[601] Guild made the point that this situation was clearly different to the position originally outlined in the relevant documentation provided to the bank and the representations initially made to it. It begged the question as to who really owed the money on the mortgages and, if it was Godwin, the impact it would have on his overall personal position and what he had stated in his PSP.[217] Other obvious questions were how were the properties to be cleared and where were the funds going to come from?

[602] He stressed that it was not until writing of the letters of 24 November 1997 that the ANZ (in effect) formally advised the plaintiffs of the title situation concerning the alleged Godwin properties.

[603] He also referred to the fact that there was no record at all that the bank ever formally advised them either of the existence of the mortgages to the NAB or of the quantum of such mortgages.

[604] This witness also drew attention to the statements made by Baylis in memoranda written by him between November 1997 and February 1998[218]

[217] T322.
[218] See, for example, Exhibit P2 Tab 1 pp 232, 294-295.

concerning his unease in relation to Godwin and the changing stories told by him.

[605] Memoranda written by Baylis on 10 February 1998 and 31 March 1998 referred to conflicting stories having been told by Godwin about the alleged Godwin properties being freehold when they were still encumbered and spoke of the sale of shares not being through, the father providing money and that the discharge of the mortgages "*will be done 'tomorrow' etc*.", to the point that Baylis stated that "*at one stage I was going to call the whole thing off due to the frustrations of not settling and the different stories offered by Lionel Godwin*."

[606] Guild contended that, against such a background, prudent banking practice and a bank's duty of care call for transparency between it and its client. The true situation regarding Godwin and the alleged Godwin properties ought to have been clarified with TSM and the other security providers in a timely manner prior to actual settlement, that being the critical time up to which TSM or the ANZ could have called a halt to the loan transaction.

[607] Issues particularly arose as to the true beneficial title situation, the source from which the substantial funds due to the NAB were to come and the significance of that situation in relation to Godwin's personal financial position, the reliability and accuracy of his PSP and his capacity to bear a proper share of any potential guarantee liability.

[608] Guild further made the point that the ANZ ought to have been aware from any CRAA check that Godwin had only been discharged from bankruptcy in late 1994 and was aware from group certificates that his combined gross income for the year ended 30 June 1997 was a mere $39,166 -- a sum significantly less than the $65,000 shown on his PSP.

[609] He conceded, in cross-examination, that there was some possibility that the Godwin bankruptcy may, through some error, not have been notified to the ANZ.

[610] This witness stressed that, given knowledge of any bankruptcy, the overall scenario begged obvious questions as to how Godwin had accumulated an asserted $671,000 in wealth in the space of just over three years and the significance of that situation in relation to his representations -- a situation that ought to have been raised with the plaintiffs. Any guarantee given by Godwin beyond the security over the alleged Godwin properties was virtually valueless.

[611] Guild was of the opinion that the foregoing situation demanded that the other persons to the proposed transaction ought to have been given an opportunity to reassess their commitment to the proposed loan in light of a proper knowledge of the true situation concerning the alleged Godwin properties.

[612] Guild's view, in relation to the $460,000 cheque, was that, bearing in mind the timing of the cheque presentation, the exceptionally large amount of

the cheque, the fact that Godwin -- a non director of TSM -- was the payee, the lack of funds to meet it up to that point and the request for its special clearance as and when it was made; as well as the suspicions said to have been held by Baylis by the time of the transaction[219] ought to have caused a prudent banker, at the time, to have contacted the directors of TSM and made specific inquiries as to the situation.

[613] This witness was unequivocal in his assertion that, the second presentation of the same, previously dishonoured, cheque, the prior history of it and the features already referred to ought definitely to have prompted a similar action at the time.

[614] I took Guild to say that it was scarcely in the normal course of banking business for Baylis, personally, to go to the Westpac Bank and seek a special clearance of the $570,000 cheque. That said, he accepted that, absent suspicious circumstances, prudent banking practice would not normally have required that the directors of TSM be contacted and informed of the particular transaction.

[615] However, given Baylis' previous knowledge of the whole of the relevant circumstances related to the proposed TSM loan transaction up to that point, those circumstances ought to have caused a prudent banker to question the person presenting the cheque as to the basis upon which so large an amount came to be sourced from the party named on the cheque.

[219] As expressed by him in later memoranda – Exhibit P1 pp 375-376.

[616] The circumstances postulated obvious questions. Was it through the sale of assets in relation to which the ANZ had proposed to finalize the business loan and which may have been subject to the executed floating charge? Alternatively, was it a loan that would or could have jeopardized the ANZ's ability to hold first ranking securities over the TSM assets, or was it an uncontemplated loan not disclosed to the ANZ that might affect its willingness to proceed with the loan transaction?

[617] Guild was of the view that these issues ought to have caused the ANZ to clarify the situation with a director of TSM, particularly as the bank had been told that a third party (NPG) had previously backed away from a proposed acquisition by it of the second LTD development project units.

[618] I digress to say that I took the witness Barnett, when pressed in cross examination, to substantially accept such a line of reasoning, given that there was some question in his mind as to whom he might direct any enquiry.[220]

[619] The witness Pedler agreed that, when Baylis became aware of the deposit and sought special clearance of the $570,000 cheque (payable to the ANZ), he ought to have raised questions as to why the money was being paid into the TSM account and as to its source -- particularly bearing in mind that

[220] T1639 et seq.

the approved basis of the ANZ loan facilities premised that there were to be no further borrowings.[221]

[620] I must say, however, that I considered Pedler's comments that the approval conditions only operated from the date of settlement[222] both illogical and unconvincing.

[621] It seemed to me that he was hedging at that point and seeking to escape from what was an obvious logical proposition, particularly bearing in mind what was put to him as to the relevant circumstances.[223]

[622] Much the same may be said concerning Pedler's responses to Mr Trim with regard to the $460,000 cheque.[224] He was most reluctant to concede the obvious as to what enquiries the presentation of it ought to have prompted Baylis to make and as to whom they should have been directed. His responses to me[225] did not inspire confidence, nor did his explanations in re-examination.[226]

[623] I return to Guild's evidence.

[624] Guild further questioned the propriety of the payment out by the ANZ, without specific written authority, of the amount of the mortgage over the Raffles Road property from the proceeds of the $570,000 cheque.

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[221] T1707-1708.
[222] As recorded at T1708-1709.
[223] T1709-1713.
[224] T1710-1713.
[225] T1712.
[226] T1722.

[625] This was not contemplated by the finance agreement and, on the face of it, had nothing to do with TSM's business. Rather, it was the satisfaction of a personal liability of two directors and security providers. The ANZ ought not to have effected that transaction without seeking express authority from TSM to do so.

[626] In all fairness to the witness, it should be noted that, in making this point, he may well not have been supplied with a copy of Exhibit D26, which was produced at trial.

[627] Guild drew attention to the fact that, in so far as the ultimate call up demand made by the ANZ was based on asserted drawings in excess of the TSM overdraft limit, this appeared to be the consequence of a technical mistake made by it in erroneously debiting accruing interest to the incorrect account.

[628] He also made the point that there was no evidence that the complaint said to have been made by Mr Lew-Fatt in any way adversely affected the bank's security position. He was unable, due to lack of information, to comment on the assertion of outstanding taxation liabilities.

[629] The foregoing recitation constitutes what I consider to be the key aspects emerging from Guild's evidence. He was cross-examined at some length by Ms Kelly. Much of the ground traversed proved to be of a fairly non controversial nature. It, for example, covered aspects of a bank's approach to credit assessment of security offered, the significance of personal

guarantees where the primary security comprises first mortgages (albeit of a guarantor nature) over real estate of adequate value, a number of aspects of banking practice and certain issues related to the significance of facts coming to the knowledge of the bank.

[630] I have considered and taken into account all of that material, but find it unnecessary to rehearse it in detail in the course of these reasons.

[631] I do, however, note that he was of the opinion that, to the extent that a guarantee was being taken from a person such as Godwin, it was necessary for the bank to know the quantum of any existing mortgages over the alleged Godwin properties and how those mortgages were to be discharged, although he accepted that the primary securities were the proposed first mortgages to the ANZ in respect of them.

[632] This, of course, was fundamentally an issue for the bank itself in relation to its own prudential lending assessment. Nevertheless, he considered that, when it became apparent that the title and encumbrance situations in relation to the alleged Godwin properties were not as represented by Godwin, the ANZ had a duty of care to disclose that situation to the plaintiffs "*to ensure that the transparency of the transaction was quite clear to all the guarantors and all the mortgagors*."

[633] He accepted that it is not uncommon for a home beneficially acquired for a husband and wife to stand in the registered name of only one of the parties.

[634] He agreed that, when a cheque was presented for special clearance, the clearing bank has very limited time within which to arrive at a decision. When pressed, I took him to stand firm on his opinion as to the $460,000 cheque clearance on the knowledge possessed by Baylis, as assumed by Guild for the purposes of his opinion.[227]

[635] Although pressed to the contrary, I took this witness to adhere to the opinion that the action of Baylis personally seeking a special clearance of the $570,000 cheque was not in the normal course of business, particularly given his state of knowledge at the time and, specifically, the dealings said to have taken place with NPG.[228]

The witness Russell Kirkmoe

[636] The second expert witness called by the plaintiffs as to banking aspects was Kirkmoe. This witness also had extensive experience and expertise in banking operations and practice. His CV reveals that he has been engaged in various banking institutions for 35 years. That experience includes managerial roles in the business banking environment.

[637] His most senior appointment in that area was as Senior Manager Business Banking with the CBA. He later accepted an appointment as Area Manager Northern within the Corporate and Commercial Banking Division of BankWest. This witness will shortly be joining the NAB, managing a portfolio of clients in the health industry.

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[227] T352-353.
[228] cf T355-356 with T364.

[638] I considered Kirkmoe to be a frank, objective and very impressive witness, whose evidence ought to be accorded considerable weight.

[639] In essence, the key points made by him were as follow:

(1) The fact that, contrary to Godwin's PSP, third parties were registered as the owners of the alleged Godwin properties would normally be a matter of concern to a lending bank because of the potential for what is known as "*Brand damage"* in the event that a mortgage security might have to be enforced -- there was a potential for adverse publicity, particularly if a mortgagee was elderly or infirm.

(2) The situation that came to light ought to have prompted an inquiry into the true position, specifically with regard to Mr Walter Lew-Fatt. This was particularly so when it later emerged that his daughter proposed to execute security documents as his attorney.

(3) When it became apparent that the alleged Godwin properties were encumbered, a prudent banker would write to the mortgagees concerned notifying an intention of taking security over the relevant properties and requesting payout figures.

(4) This would have rendered it apparent that Godwin's previous assertions were incorrect and should have prompted the making of further inquiries of the persons offering up securities as to how it was intended to pay the debts secured.

(5) The considerable delay in being in a position to effect settlement ought to have prompted a meeting with all parties to the transaction to clarify the position and what was required to complete the transaction.

(6) This should have been done by no later than 7-14 December 1997. At such a meeting a prudent banker would have ensured that all stakeholders were made aware of the discrepancies in Godwin's position, so that they would understand and assess their own risk exposure.

(7) It is normal not to hold CRAA credit check material on file. The ANZ file documents suggest that checks had been completed and nothing untoward had been recorded. Should such a check have revealed Godwin's bankruptcy, that situation would normally ring warning bells and mandate further inquiry into the circumstances.

(8) The ANZ should, in such a situation, have sought Godwin's approval to discuss that aspect with the directors of TSM and no finance proposal ought to have been completed until Godwin's security position was absolutely clear.

(9) Normally, all securities should be perfected at a single settlement, although, in some circumstances, the bank may elect to partially fund a customer on the basis of part securities then held. That is generally

undesirable, but is a commercial decision by the bank concerned. It could have implications for other parties and co-sureties.

(10) On initial presentation, the $460,000 cheque was returned "*refer to drawer*" for lack of funds. That situation warranted the relationship manager making inquiries of TSM as to the reason for the issue of the cheque, given the situation known to Baylis.

(11) When the $570,000 cheque was presented for credit to the TSM account, the ANZ was complying with the drawer's instructions, and it would not be untoward for Baylis to seek a special answer in respect of it.

(12) However, if it was the case that the cheque represented third-party loaned funds, this would be a transaction contrary to the ANZ loan arrangements. Given that situation and the previous dishonour of the $460,000 cheque, inquiry should have been made of the directors of TSM in relation to the transaction.

(13) The debit of the $110,000 against the TSM account in respect of the Raffles Road property mortgage discharge was not supported by any authority to make such a debit and was inappropriate for that reason.[229]

[229] Once again, it may well be the situation that, in so opining, this witness did not have before him a copy of Exhibit D26.

(14) The assertion that TSM had breached bank conditions by virtue of drawings in excess of the relevant overdraft limit was not valid because it was the consequence of an incorrect debit of interest to the overdraft account.

(15) The witness said that he had not had an opportunity of examining the other expressed reasons for calling up the TSM loans.

[640] In the course of his cross examination Kirkmoe accepted the proposition that the date of draw down was the ultimate critical time for consideration of the situation. This was because any party could withdraw from the loan arrangement up until that point.

[641] Moreover, settlement would simply not take place unless and until the ANZ had the stipulated first mortgage securities available to it. The onus was on the relevant security providers to take steps to satisfy any existing encumbrances.

[642] He accepted that, at times, mortgages were left on a title for various reasons, even although little or no residual amounts were still payable pursuant to them.

[643] He also agreed with the proposition that, where what is under consideration is a third-party guarantee mortgage in relation to which the guarantor delays providing security, such a situation does not cause a potential risk to other guarantors or parties liable under collateral securities.

[644] This is because, if settlement eventually does take place, the exposure of other parties will be unchanged from that originally contemplated.

[645] The same practical situation existed if the person providing the security may not personally be a good credit risk, because the loan approval in this case was based on the existence of primary supporting securities to a value of substantially in excess of the proposed advances.

[646] Having acceded to that proposition, Kirkmoe remained adamant that the fact that Godwin may have been a recently discharged bankrupt would be of concern, because it was a pointer to his character that ought to have caused inquiries to be made.

[647] I infer that this opinion was influenced by Godwin's relationship with the principals of TSM and his involvement in the business activities of LTD, whereas it would be a different situation with a mere third-party guarantor where there was adequate mortgage security.

The witness Neil Silver

[648] Silver was called by the ANZ and presented as an articulate, objective, cooperative and frank witness.

[649] He was a career banker from 1961 to 2001 and has held a variety of senior positions in that field. His specialty for many years has been in the corporate and other finance roles.

[650] Whilst with Barclays Bank he held an unrestricted lending discretion up to $2,000,000. He has played a major role in the expansion and development of the lending activities of that bank and also those of the Rock Building Society, as such entities sought to expand their operations in Australia.

[651] Silver did have some experience as a branch manager of bank involved in retail banking, but he said that this was some 35 years ago. He freely volunteered that retail banking was not his direct area of expertise, particularly in more recent banking environments.[230]

[652] The written reports prepared by this witness essentially focus on conceptual issues pertinent to his professed area of expertise.

[653] In the course of his oral evidence, Ms Kelly sought to have him express some opinions related to retail banking issues on an ad hoc basis, having regard to quite voluminous detailed assumptions put to him and as to which he had not previously had occasion to direct his mind.

[654] It seemed to me that, not unreasonably, Silver was struggling somewhat with almost instant information overload and eventually demurred at expressing some opinions, as being outside his field of expertise.

[655] It is no criticism of him to say that certain aspects of his evidence, in so far as they extended beyond the scope of his written reports, need to be viewed with some caution. As to the evidence within the scope of his professed

[230] T2035.

expertise, he was an impressive witness, whose evidence was of assistance to me.

[656] Silver was initially requested by the defendant to prepare expert reports on the basis of certain specific assumed facts put to him. It is important to record the assumptions that he was asked to make.

[657] As appears from the letter of instructions,[231] he was asked to proceed on the following basis:

1. ANZ was approached by a new customer, Territory Sheet Metal Pty Ltd ("TSM"), seeking refinancing of existing business loans.

2. ANZ had dealings with three 'principals' (loosely so-called), David Smith ("Smith"), Edward Dean ("Dean") and Lionel Godwin ("Godwin"). Smith and Dean were the directors of TSM. The shareholders of TSM were Smith, Smith's wife and Dean.

3. Smith, Dean and Godwin were directors of a related company, LTD Construction (NT) Pty Ltd ("LTD"). The businesses of the two companies were closely interrelated. The borrowings were to be in the name of TSM. TSM was essentially funding developments by LTD, and LTD was TSM's major debtor.

4. Smith, Dean and Godwin were all signatories to the TSM cheque account established with ANZ. The bank authority to operate the account provided for any two of the signatories to sign cheques. In addition to Smith, Dean and Godwin two office employees were also signatories.

5. Security was given by TSM in the form of a Registered Mortgage Debenture and real property security.

6. A number of properties were provided as security, including first registered mortgages over the residences of Smith and his wife (owned jointly), Dean and his wife (owned jointly) and

[231] Annexed to Exhibit D66.

Godwin (the registered proprietor of which was Godwin's (de facto) wife).

7. ANZ was not refinancing any existing mortgages over the properties provided as first mortgage securities by the guarantors.

8. Each of Smith, Dean and Godwin (and Smith's wife) guaranteed the loans from ANZ to TSM in one unlimited guarantee. In addition, Dean's wife and Godwin's de facto wife each gave separate, limited guarantees, limited to the value of properties over which they had given security. There was a cross guarantee from LTD.

9. TSM increased the amount of refinancing sought, at which time further security was offered, and taken, over a property owned by LTD, and over a property at 22 Wells Street, the registered proprietor of which was Godwin's (de facto) father in law Walter Lew-Fatt, but which Godwin and his de facto wife told ANZ belonged to Godwin's de facto wife. The mortgage was signed by Godwin's de facto wife under a registered power of attorney. (The bank was given a copy).

10. ANZ gave the guarantees and mortgages to the guarantors and asked them to take the documents to their solicitor and have the execution of the documents witnessed by their solicitor.

11. The guarantees and mortgages were all executed in the presence of a solicitor on the same day."

[658] It is to be noted that the assumed facts did not include reference to any representations said to have been made by or to the ANZ, nor did they include reference to any collateral facts or circumstances beyond the bare transaction details above referred to.

[659] In his initial written report forming portion of Exhibit D66, Silver asserted that, where a property is simply offered by a third-party guarantor as a proposed first mortgage security to support an advance to a principal

borrower, the lending bank would normally not seek to pursue inquiries concerning any amounts currently owing on the property in question.

[660] It would simply accept the statement of position of the proposed guarantor and proceed on the basis that, at settlement, the appropriate title would be made available, together with a discharge of any security then registered on it. In the ordinary course, there would be no reason to investigate the level of indebtedness under any existing mortgage.

[661] On the assumed facts, Silver opined that the focus of the bank would be on the reason for the approach for re-finance and an overall and general assessment of both the deal being offered and knowledge and quality of the persons presenting that deal.

[662] This witness did not consider that the ANZ would have had any obligation to other parties involved in the transaction to undertake inquiries into Godwin's credit worthiness, asset backing reputation, honesty and past history. It was entitled, in the circumstances, to assume that the directors and Godwin each had knowledge of the other's character and business acumen.

[663] He stated that the results of personal credit checks are not usually disclosed, even to the persons on whom they are obtained. If problems are revealed by a check, they would be pursued only with the person or persons directly concerned and not raised with other transaction parties without express authority to do so.

[664] He said that, in the case of a corporate applicant, if an adverse report was received on one of the principals or a guarantor, it would first be discussed with the party concerned and, if this pointed to the lending proposal being either declined or modified, then the proper way forward would be discussed with that person. This might involve seeking approval to canvass the report with the other proposed parties to the transaction. [In this regard, I note that the PSPs signed by the personal plaintiffs conferred express authority on the ANZ to give information to other parties.][232]

[665] It would, he said, be normal for a bank to require all guarantors to attend an independent solicitor to have the due execution of security documents witnessed.

[666] Silver asserted that, in the commercial banking environment, the prime focus is generally on the feasibility and viability of the transaction, rather than the fine details of the assets and liabilities of guarantors disclosed in their statements of position. It would not have been normal banking practice to automatically undertake independent investigations to verify the accuracy of those statements.

[667] If, in the particular circumstances, such verification was considered by the bank to be material in forming a decision on the specific commercial transaction, the additional evidence might be sought from the client.

[232] Exhibit D51 p 90.

[668] In his supplementary written report, he joined issue with Guild's opinion that, on discovery of the undisclosed mortgages over the alleged Godwin properties, a prudent bank ought to have disclosed the fact of the mortgages and any reduction in the value of the securities available to both the customers and other security providers.

[669] He contended that this would only be true if the ANZ was taking a second mortgage. The existence of mortgage liabilities would essentially be irrelevant in circumstances where the deal was based on the giving of first mortgage security at settlement.

[670] Silver commented that, if a CRAA check revealed a previous bankruptcy by one of the guarantors, the situation would be investigated and reported as part of the credit application. It would be a factor to be taken into account in ultimately assessing a credit application, but would not, of itself, necessarily rule out a person's suitability to provide a guarantee or registered mortgage security.

[671] He went on to assert that, if clear titles were to be provided to the bank at settlement, there was no reason to inquire further unless the bank became aware that there was a substantial amount owing on existing mortgages -- information that would not be available to the bank without the consent of the relevant property owners.

[672] So it was that, in response to Kirkmoe's opinion that a prudent banker would have written to the existing mortgagees advising them of the

intention to take security over the relevant properties and requesting payout figures, he asserted that this would only be the case where the bank was proposing to re-finance the existing mortgages.

[673] In the course of his oral evidence in chief this witness was inundated by Ms Kelly with a mass of facts and circumstances not previously known to him. Bearing in mind his professed difficulty in assimilating that material,[233] I attribute little weight to his early responses, prior to the stage at which he was at least taken through a written précis of relevant background circumstances pertinent to the instant case.[234]

[674] This is so despite his later opportunity to absorb the relevant information at greater leisure. I did not consider his later global endorsement of his earlier statements to be really convincing particularly in the light of the final stages of his cross examination. Moreover, I am bound to say that any responses of this witness must be considered in light of the completeness or otherwise of the factual circumstances eventually put before him by counsel at the time of answering. I have grave doubts as to whether the document MFI D67, for example, did adequately represent a fully detailed resume of all relevant background circumstances. I therefore regard his evidence based on it with some caution.

[675] Silver accepted that, if it was the case that Godwin had represented that he owned the alleged Godwin properties and that they were unencumbered,

[233] T2026-2028.
[234] MFI D67.

but searches revealed that he was not a registered proprietor of either and that each property had a registered mortgage over it in favour of the NAB, his reaction would have been "to put the brakes on the transaction" until satisfied as to the bona fides of what was being told to him.

[676] He commented that, when guarantors are involved, full disclosure of everything of an unusual nature is of paramount importance to both the guarantors and the bank.[235]

[677] I took him to concede that any reaction would be very much dependent upon the contextual circumstances known to the bank officer at the time and the trust that such officer was prepared to repose in the person concerned.[236] He concurred in the proposition that, unless he was steeped in the atmosphere of what was going on at a given time, he would need to be cautious as to what reactions he might have had.[237]

[678] I took Silver to be sympathetic to the situation in which Baylis found himself at the time at which the title situation of the alleged Godwin properties came to light, particularly as all parties had signed the acceptance to the ANZ finance agreement.

[679] It was related by Ms Kelly to Silver that settlement of the approved loan had been delayed by a failure to clear the mortgages over the Raffles Road property and the alleged Godwin properties, that Godwin had given a

[235] T2021.
[236] T2022.
[237] T2029.

number of different explanations for the delay and that, on about 2 January 1998, Godwin told Baylis that TSM was borrowing about $570,000 from a good friend of DLS, to provide a clear title to the properties on an unsecured basis. This was said to be on the footing that the loan was to be repaid from the proceeds of sale of the second LTD development project, then nearly complete.

[680] Silver responded to that scenario by saying that, to the extent that the liabilities of TSM were going to be increased by that amount of money, he would be wanting to know the terms and conditions of the proposed loan and how that might impact on the overall viability of the finance agreement.[238]

[681] He was inclined to the view that Baylis might well have been happy to simply rest on the fact that the ANZ was to be fully secured and the friend of DLS would be unsecured, albeit to the tune of $570,000. However, he agreed with me that the scenario nevertheless tended to sound alarm bells as to both the veracity of the whole situation as represented and its viability, particularly bearing in mind the financial details already supplied to the ANZ.[239]

[682] In cross examination, Silver acknowledged that, in producing his initial report, he had not been asked to take into account the information specifically disclosed by the relevant personal parties as to their assets and

[238] T2033.
[239] T2034-2035.

liabilities.[240] Nor was he provided with the PSPs of the personal parties to the transactions.

[683] He agreed that confirmation of stated assets is an important matter, because it goes to the credibility of the application generally and the bona fides of those associated with it.[241] He said that it was unusual for blank PSP forms to be supplied to persons, to be filled in by them. With a commercial transaction, it would be normal for a bank officer to go through the position with each relevant party and orally discuss their asset and liability situation as the form was being filled in.

[684] Silver emphasised that, with a commercial transaction, the first consideration is the persons being dealt with. The second is the assessment of the viability of the proposed transaction coupled with the relevant financial history of the corporate entity involved and the people associated with it. The final consideration is the security issue.[242]

[685] He agreed that, if matters of an unusual nature came to light in the course of the assessment of a proposal, they would need to be investigated. However, his stance was that it was not unusual, by way of example, for security title positions to be different from what was originally stated.[243]

[686] Whilst he accepted that an apparent discrepancy based on a difference in registered proprietor and presence of an undisclosed encumbrance might

[240] T2424.
[241] T2424.
[242] T2426.
[243] T2427.

prompt enquiry, such a situation was not of undue concern to a lending bank in the context of a commercial transaction.

[687] This was because, at the end of the day, the onus was on the loan applicant to produce the required security. If it did not, the deal would not go ahead.[244] If the requisite security was in fact produced, the deal would go ahead if originally approved and all security providers would be in the position, vis-à-vis one another, that was originally contemplated.[245]

[688] If it appeared that security originally contemplated was not in fact available, then the deal would need to be reassessed.

[689] Silver conceded that, if it be accepted that the alleged Godwin properties were to form security to the value of about $570,000 to support a loan transaction of the order of in excess of $1.5 million and it appeared that Godwin was not the registered proprietor of them as originally represented and they were not unencumbered, he, as a bank officer, would "put the brakes on until … [he] … found out what the true position was".[246]

[690] Silver accepted that, if time went by and it appeared that it was not possible to obtain clear title to the alleged Godwin properties when settlement was due, Baylis ought to have gone back to the customer and

[244] T2428.
[245] T2429.
[246] T2431-2433.

expressed concerns to it.[247] He ought to have indicated that the reason for the hold-up was the non-delivery of the relevant unencumbered titles.[248]

[691] Any communication of that type would be via what was understood by the bank to be the appropriate line of communication with the customer.[249] Nevertheless, he said, the onus was ultimately on the customer to "deliver the goods".

[692] Silver testified that, as a banker, if it appeared that any existing encumbrances were of significant amount, he would wish to know how they could be satisfied. Moreover, he accepted that if it transpired that there had been an obvious misrepresentation of personal positions, this would go to the credibility of the persons concerned and he would not waste time doing business with them if not confident as to their bona fides.[250]

[693] It was his view that the bridging loan element made available at about the time of acquisition of the Margaret Street property in advance of the resolution of the clear title situation of both the Raffles Road property and the alleged Godwin properties was not significant either to the bank or any guarantors. This was because adequate security had been put in place to support it.[251]

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[247] T2440.
[248] T2441.
[249] T2447.
[250] T2433.
[251] T2437-2439.

[694] Silver acknowledged that, had a credit check revealed Godwin's prior bankruptcy, this should have prompted an enquiry as to the circumstances related to that bankruptcy and how it was that the bankrupt had thereafter acquired substantial assets.[252]

[695] This witness accepted that, if it desired to inform itself as to the quantum of any existing liabilities over the alleged Godwin properties, the ANZ could have sought an appropriate disclosure authority from Godwin. However, Silver reiterated his view that, in the instant case, he could not see why Baylis would have sought such an authority, because the ANZ was not refinancing the liabilities in question. Thus the onus remained on Godwin to clear the relevant titles.[253]

[696] This was particularly so where, as here, Godwin was representing that the existing liability on the alleged Godwin properties was a relatively nominal amount.[254] He was pressed as to this at some length. In the end, I took him to say that the reaction of the bank officer to a particular scenario would very much depend on the specific circumstances known to the officer, as they unfolded.[255]

[697] So stood the evidence of this witness when, in the course of cross examination, Mr Sallis sought, verbally, to place a considerable series of

[252] T2442.
[253] T2448-2449.
[254] T2450.
[255] T2452.

assumptions before Silver, in extension of those set out in MFI D67.[256] These were designed to apprise him of the full relevant narrative circumstances as they preceded and related to the ultimate processing of the $570,000 cheque and the $460,000 cheque.

[698] Not unsurprisingly, Silver protested that he was, once again, being placed in an impossible information overload situation. His evidence was adjourned to enable Mr Sallis to produce an expanded series of written assumptions and for the witness to be able to digest them.

[699] Those written assumptions found expression in what was later marked as document MFI P83, which was, itself, subject to certain additions in the course of the resumed cross examination of Silver. This took place by video link some considerable time after he had first given evidence.

[700] In my opinion, there was some degree of change of stance (or at least of emphasis) in Silver's testimony after he had absorbed the content of MFI P83, as further amended. Although he had had time to digest the information in MFI P83 prior to the resumption of his cross examination, Mr Sallis took him through aspects of it in some detail, and indicated a number of edits to be made to the text.

[701] I do not find it necessary to remorselessly recite what he had to say in extenso. Once again I will merely identify the key features. In doing so I bear in mind an objection raised by Ms Kelly in the final stages of Silver's

[256] T2459-2464.

cross examination. She contended that certain of the questions put to Silver really invited him to express opinions beyond the boundaries of his professed areas of expertise -- specifically in relation to front-line banking practice touching special clearance aspects.

[702] I accepted the force of that criticism and have borne it well in mind in reviewing certain of the responses given by Silver.

[703] Given that situation, the key additional points arising from the resumed cross examination may be summarised in this fashion:

(1) He confirmed that he had originally proceeded on the assumption that Godwin had represented to Bradley that he was the beneficial owner of the alleged Godwin properties. He was requested to assume that, in fact, the relevant representation had been that Godwin was the registered proprietor of those properties -- specifically, that the initial such representation was in respect of the Brayshaw Crescent property and that it had not been disclosed that this property was subject to a mortgage.[257]

(2) Accepting that this representation had to be seen in the context of the specific statement in the re-financing proposal that the Brayshaw Crescent property was not subject to encumbrance, Silver was of the view that the fact that apparent inconsistencies emerged would

[257] T2775-2776.

require the ANZ to make enquiry concerning them.[258] They were material inconsistencies which, when coupled with later similar inconsistencies concerning the Wells Street property of which Baylis became aware, should have caused him to call for an explanation.

(3) Silver testified that a prudent banker would have called a meeting with the directors of TSM and Godwin to clarify the true position.[259] As he put it, the inconsistencies identified would "certainly require explanation of the highest order" and be looked at very carefully.

(4) Had he been handling the matter, he would have required "all the cards on the table" so that, if the transaction was to proceed, it would do so in a manner transparent to all parties concerned, specifically relating to the title situations, the fact that the titles were encumbered and, also, the fact that it emerged that the represented values of the properties did not square with the ANZ procured valuations.[260]

(5) If necessary, some confirmatory follow-up correspondence to the directors of TSM may well have been appropriate.[261] In so saying, Silver accepted that it is not infrequently the case that loan applicants overvalue proposed security properties when approaching a bank for financial accommodation and, in the case of the Wells

[258] T2776.
[259] T2777.
[260] T2778-2779.
[261] T2780.

Street property, had apparently produced a CBA valuation justifying the figure originally propounded by Godwin in respect of it.[262]

(6) Silver was asked to consider a possible assumption that, at one of the meetings with either Bradley or Baylis, Godwin conceded that there was a small mortgage of about $9,000 over the Brayshaw Crescent property and had also undertaken to pay out the $110,000 mortgage over the Raffles Road property. He testified that, given that additional information, he would have reacted in a similar fashion, to examine the reason for the original inaccurate information.[263]

(7) This witness said that, even if the bank was eventually made aware by Godwin that there were secured liabilities amounting to $19,000 in total over the alleged Godwin properties, this would not, *per se*, have been in the front of the bank officer's mind in the context of proposed advances totalling approximately $1.5 million.

(8) However, when that was coupled with information as to the true title position of the two alleged Godwin properties and that the mortgage to the ANZ over the Wells Street property was signed by Traci Lew-Fatt as her father's attorney (it being said that the property had been gifted to her), Silver agreed that the cumulative situation was entirely out of the ordinary.[264] He said that he would have stopped the

[262] T2781-2782.
[263] T2783-2784.
[264] T2787.

transaction, got the TSM directors and Godwin in and required to know "what's going on".[265]

(9) I took Silver to say that, if the stage was reached at which Baylis had become suspicious of Godwin's bona fides to the point that he no longer trusted him, then the overall situation would need to be clarified and straightened out with both the directors of TSM and Godwin.[266]

(10) A series of questions was put to Silver.[267] These really focused on the narrative sequence of events related to Baylis receiving and electing to specially clear the $570,000 cheque. I largely disregard the responses of this witness as being outside the realm of his demonstrated experience and expertise.

(11) Nevertheless, I note that he felt that, in a circumstance in which such a large cheque was produced to Baylis and he was told that it was a loan from Flynn (who was known to Baylis as being associated with NPG) and appeared to constitute a breach of conditions on which the ANZ had agreed to make advances to TSM, the deposit of such an amount was unusual.

(12) Silver testified that, if it be accepted that the ANZ had been told by Godwin that the $570,000 cheque represented an unsecured loan to TSM by Flynn, an individual known to be associated with NPG, he

[265] T2789.
[266] T2789.
[267] As recorded at T2789-2792.

would, had he been the officer involved, have wanted to know the full conditions of the loan, whether it was in fact unsecured, how it was to be repaid, confirmation that it was interest-free and details of that sort.[268] He would want "to get to the bottom of it" and might need to speak with the directors of TSM.

(13) He was unequivocal in his view that, if Baylis had been told that $110,000 of the $570,000 loan monies was to be used to pay off the mortgage liability over the Raffles Road property rather than moneys sourced by Godwin from elsewhere, then there should have been discussion with the directors of TSM as to what was going on.

(14) He went on to say that if, additionally, Baylis was told that the balance was to be used to clear the titles of the alleged Godwin properties when he had previously been given to understand that the maximum mortgage liability in respect of them was only of the order of $19,000, then Baylis will "be a worried man".[269]

(15) This having been said, the following exchange occurred between Mr Sallis and Silver:[270]

> "Mr Silver, against the background of the concerns which I've asked you to assume that Mr Baylis had by 2 January 1998 regarding the ever changing stories of Mr Godwin and the sources from which he was to obtain funds to enable him to pay off the Smith mortgage and deliver up clear title over his properties, wouldn't that have set off the alarm bells in the mind of any prudent banker? I'd be asking myself -- there are a lot of

[268] T2797.
[269] T2798.
[270] T2799.

> questions outstanding, Mr Sallis. There is no question about that. Alarm bells, yes. Alarm bells."

He agreed with the proposition that, if he had been in the position of Baylis and acting as a prudent banker, he would have considered it to be absolutely obligatory to contact a director of TSM and ask what was going on.[271]

(16) This witness accepted that, if Baylis was told that a substantial portion of the $460,000 cheque was to pay off mortgages over the alleged Godwin properties, then that would have flown in the face of everything that Baylis had been told, to that point, by Godwin in relation to the manner in which those mortgages were to be discharged. Baylis would have been well advised to make some enquiry of DLS or ECD concerning the matter.[272]

(17) In re-examination, Silver said that, in calling any meeting to discuss any perceived discrepancies in what had been represented by Godwin, he would, primarily, have been acting in the bank's interest.[273]

(18) He is also recorded in the transcript as saying that, had he had no reason to mistrust Godwin concerning the borrowing of the $570,000 from Flynn as a friend of DLS, he would have taken the word of Godwin.[274]

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[271] T2800.
[272] T2803.
[273] T2805.
[274] T2806.

(19) I pause to make the point that the proposition postulated in that response begs the question as to what inferences naturally arose from the whole of the circumstances known to Baylis at the relevant time.

The witness McFadden

[704] This witness is a retired bank officer who was employed by Westpac Banking Corporation and its precursor for some 38 years. He was called by the defendant.

[705] He was involved, for much of his career, in management activities associated with bank clearing systems and has considerable expertise in that field.

[706] Although he did occupy a series of positions in front-line banking activities some years ago, these seem to have been for relatively short periods and he was not qualified, by evidence, as a retail banking expert. His primary field of expertise is plainly in the discrete specialised area to which I have referred.

[707] He was an objective, articulate and impressive witness as to the matters within his professed field of expertise.

[708] It should be recorded at the outset that the report and evidence of this witness was essentially pitched at conceptual aspects, directed only to a "bare bones" factual scenario. This essentially identified the cheque

details, the key parties involved, particulars of authorised TSM cheque signatories and the relevant presentations for special clearance.

[709] In cross examination McFadden was asked to refer to the assumptions set out in the document MFI D88, but it is trite to say that the opinion that he expressed in light of them must be considered in the context of the extent to which those assumptions fully reflected all relevant aspects of the proven narrative facts.

[710] Many of the "technical" aspects of the report made by McFadden[275] were uncontentious. They essentially focused on a series of questions posed to the witness against the background of the respective presentations of the $570,000 cheque and the $460,000 cheque for clearance, absent details of any circumstances surrounding or leading up to those presentations and which might lend colour to them.

[711] In expressing his opinions the witness noted that the $570,000 cheque was not crossed and was payable to Westpac Banking Corporation or bearer. The $460,000 cheque was crossed, endorsed not negotiable and was payable to L.A. Godwin or bearer.

[712] This witness was requested to respond to the following six general questions posed by the solicitors for the defendant:

[275] Exhibit D87.

(1) If an un-crossed bearer cheque (for example the Flynn cheque) presented to the bank for deposit into a customer's account is made out, not to the customer, but to the bank, is there any reason why the bank officer receiving the cheque should not pay it into the customer's account?

(2) In those circumstances, is there any requirement to make enquiries of the drawer of the cheque to ascertain whether the customer is actually entitled to the cheque?

(3) In these circumstances, is there a requirement for the bank to contact the directors of a company customer to tell them what has occurred?

(4) If a crossed cheque (such as the TSM cheque) is presented with a request for a special clearance from another bank, and there are sufficient cleared funds in the account, is the bank obliged to specially clear and pay the cheque? (We would appreciate it if you would explain the nature of the decision to be made by the bank and what matters are relevant to that decision.)

(5) Is there anything on the face of the TSM cheque to draw suspicion of a possible defect in title?

(6) Should the bank officer have telephoned Smith or Dean before giving the special answer? (Is there anything in usual banking practice which would have required this?)

[713] McFadden discussed in his report the significance of crossing and/or endorsing a cheque “not negotiable” and of whether it is made payable to bearer or order. I find it unnecessary to recite what he said in detail.

[714] He noted that the $570,000 cheque was technically payable to a third party (namely the ANZ), thus implying that it was the responsibility of a prudent banker to exercise caution and satisfy itself as to valid title prior to accepting it into an account.

[715] However, McFadden commented that the ANZ was a financial services provider and that naming such a provider as payee is not uncommon practice. According to normal banking practice it would therefore not be considered a third-party cheque situation where the cheque was being presented for credit to an account maintained with the ANZ.

[716] This witness pointed out that the basic premise of a cheque is that it constitutes an unconditional written instruction by the drawer to the relevant bank to pay, on demand, a certain sum of money. That demand is made by presenting the cheque for payment. Proper presentment may occur in various ways, one of which is the physical delivery of it to the paying bank with a request for a special answer.

[717] Upon presentation of a cheque for payment, the bank upon which it is drawn must respond by answering the demand (i.e. by either paying or dishonouring it) and communicate its decision, in accordance with the Rules governing banking practice.

[718] McFadden said that, where a special answer is sought by personal presentation, the bank upon which the cheque is drawn is obligated to give an immediate response to that presentation. If paid, an inter-bank warrant is issued where the presentation is by the employee of another bank.

[719] This witness noted that both of the cheques under consideration were the subject of request for special answer by the personal presentation method.

[720] He accepted that the obligation to give an immediate response to such a presentation does not preclude a bank from making further enquiry -- including consultation with any other person(s). However, there would need to be a valid reason for doing so, especially if its effect was to unduly delay a decision in circumstances where a presenting bank officer was waiting for a decision.

[721] In responding to the first question posed to him, McFadden emphasised that an uncrossed bearer cheque is fully negotiable. In absence of some compelling (external) factor indicating the contrary, there would have been no reason for the ANZ to decline to accept a cheque such as the $570,000 cheque or its proceeds into the TSM account. At the time of the writing of his report, this witness was unaware of any cause to make enquiry of another person not associated with the cheque or the drawing of it.

[722] He therefore considered that Baylis acted reasonably in accepting the cheque and paying the resultant proceeds to the credit of the TSM account. Equally, he was unable to perceive any requirement for the ANZ to have

made enquiries of the drawer of the cheque to ascertain whether the depositing customer was entitled to it. In his view the ANZ acted reasonably in not so doing.

[723] In response to the third question posed to him, McFadden pointed out that the person presenting the cheque was known by the ANZ to be a person associated with TSM and, in the normal course, would not have known or been expected to know whether the relevant relationship had been, or was being, compromised in any way.

[724] He therefore expressed the opinion that, in the absence of any compelling (external) factor or prior agreement to the contrary, there was no requirement for the ANZ, as collecting bank, to contact the directors of TSM to tell them of the deposit of the relevant cheque into its account.

[725] McFadden asserted that, upon presentation to it of the $460,000 cheque, the ANZ was, in accordance with the banking practice Rules, obliged to give an immediate answer to the demand for payment.

[726] He said that, in doing so, it had to satisfy itself that:

(1) the cheque was a valid instrument;

(2) it had been drawn in what he described as a “regular” manner;

(3) there were sufficient cleared funds in the relevant account to meet the cheque;

(4) payment had not been countermanded by the drawer; and

(5) there was nothing such as a court order precluding payment.

[727] He pointed out that none of those considerations operated to contra indicate payment in the situation postulated to him.

[728] Further, in response to the fourth question, McFadden concluded that there was nothing irregular on the face of the relevant cheque to arouse reasonable suspicion of any possible defect in title to the cheque at the time of its presentation.

[729] This witness prefaced his response to the final question posed to him by saying that there was nothing particularly exceptional put to him about either the cheque itself or the fact that it was presented to the ANZ for special answer. He had not been made aware of any circumstance amounting to a compelling (external) factor that would mandate the ANZ telephoning any person(s) prior to responding to the demand for a special answer.

[730] In cross examination, McFadden conceded that, in responding to the questions addressed by him, he had not been requested to take into account what had been disclosed to the ANZ by the parties to the original loan application made to it concerning their assets and liabilities. Nor had he been asked to consider what information was possessed by Baylis at the time when the relevant cheques were presented.

[731] He accepted that an important external factor that might bear on the attitude of a bank officer such as Baylis could be knowledge on the part of that person of circumstances that may reasonably have caused him to suspect that all was not well in relation to the particular transaction.[276] It is all a question of degree in particular circumstances.

[732] I took him, initially, to further agree that, if it was clear that the source of the funds arising from the $570,000 cheque indicated a borrowing in breach of an express written agreement by TSM with the ANZ not to make further borrowings beyond those already advanced by it, such a situation might constitute an external compelling factor warranting enquiry as to the transaction.[277]

[733] When pressed on this topic,[278] I felt that McFadden was, to some extent, seeking to avoid giving a direct response to the scenario put to him. In the end, he pleaded that he did not have adequate detailed information as to relevant circumstances to enable him to come up with a definitive response.

[734] He was, however, prepared to accept that, if the ANZ had valid concerns as to Godwin's honesty, then, dependent on the depth and nature of that

[276] T2682-2683.
[277] T2683.
[278] T2683-2684.

concern and what the dishonesty entailed, it would certainly need to be on extreme alert and make appropriate enquiries.[279]

[735] Having been invited in re-examination to consider the assumed circumstances postulated in the document MFI D88, McFadden's response was to the effect that he did not believe that those circumstances would have required Baylis to make enquiry of Smith or Dean when the $570,000 cheque was deposited into the TSM account.

[736] As to this he said:

> "Mr Baylis questions Godwin about the loan, he's given what appears to be a quite satisfactory answer, that they've raised some money from an external source on an unsecured basis. He explains the basis of repayment which is to be repaid from the sale of the units in due course. The bank has adequate security. Mr Godwin is an authorised signatory on the account and authorised to deal with the bank. I don't see that any of that constitutes compelling external factor".[280]

[737] As I will later demonstrate, it seems to me that this summation is somewhat simplistic and I have difficulty in accepting it.

A matter of terminology

[738] It will be observed that, at the end of the day, there were areas of commonality in the opinions ultimately expressed by the foregoing expert witnesses. I will return to a consideration of the net impact of some aspects of those views in the course of discussing the issues arising in relation to the various causes of action relied upon by the parties.

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[279] T2685.
[280] T2688.

[739] However, there is one important general point that should be made at this stage.

[740] It is necessary, in reviewing the expert banking evidence, to draw a clear distinction between two quite different concepts.

[741] In the course of this case much has been said about what a prudent banker ought to have done in given situations.

[742] The expression "*prudent banker*" can potentially be used in two quite different senses.

[743] It is apt to describe the desirable conduct of a bank officer in furthering the interests of his or her bank by engaging in only those types of conduct and committing it to lending transactions that accord with good banking practice and/or established internal bank policies designed to ensure that the bank does not embark upon unprofitable or risky "*deals*".

[744] It may also encompass conduct going to the issue of the express or implied obligation of a bank (through its officers) to exercise reasonable skill and care in relation to the banking affairs of its customer, having regard both to the circumstances attendant upon the specific banker/customer relationship in contemplation and also the applicable banking rules and practices.

[745] The issues in this case necessarily focus on the latter and not the former aspect. It is particularly important to reflect on the evidence of the expert banking witnesses from that perspective and to divine from their evidence

the sense in which they may, from time to time, have used the expression "*prudent*" in relation to any specific topic. I consider that, in giving evidence, those witnesses did not always make clear the important distinction that I have sought to draw. For that reason the transcript of evidence of all of them needs to be read with some care.

The evidentiary case as to damages

General

[746] At its inception TSM focused mainly on general jobbing work such as the building of rainwater tanks, bullnose roofing, flashings and general jobbing work, using various types of metal, including stainless steel.

[747] During the first year or so, the company purchased various types of machinery to enable it to carry out those types of work. At a later time, it actually designed and constructed certain specialised machinery and equipment illustrated, for example, in the photographs reproduced in Exhibit P13 that enabled it to discharge various functions much more rapidly and efficiently, thereby reducing production costs significantly.

[748] I entertain no doubt that DLS and/or ECD (from the point at which the latter joined the former) were very innovative and energetic persons who, over time, developed specific areas of expertise that led to TSM becoming known as a highly proficient operator in the sheet metal working industry in the Territory, capable of performing some types of work that others could not. The witness Kirwin made reference in his statement to the

service given by TSM, the quality of its work and the competitive prices charged. Similar sentiments were expressed, in one form or another, by other witnesses.

[749] In the 1990s, TSM manufactured a wide and diverse range of items. These included cabinets for small electrical installations, cupboards for electrical generators, mud guards, video racks, toolboxes and canopies for four-wheel-drive and commercial vehicles, kitchen exhaust hoods, machine guards for industrial mining equipment, heavy concrete moulds, gun cabinets, trailer equipments and a variety of other items.

[750] As time went by and it acquired or constructed further equipment, TSM developed a number of specialist areas of work, for some of which it ultimately initiated applications for patent rights. The witness Van Munster testified as to his work in conjunction with DLS on these projects and gave some additional insight into the nature of the offsite unit prefabrication concept.

[751] Some of the areas of specialty included:

(1) The design, manufacture and supply of unique metal flashings for use with bullnose roofing;[281]

(2) The capacity to bend sheet metal and plate metal up to 10 mm in thickness to virtually any shape;

[281] Exhibit P23.

(3) The introduction of computer numerically controlled (CNC) equipment to greatly improve the efficiency of various bending and guillotining activities;

(4) The development of what was, at the time, said to be a unique production line rain water tank fabrication system, using specially designed equipment that greatly improved efficiency, speed and quality of production and which also significantly reduced costs;

(5) The development of a unique design and method for production of so-called "*Spectre*" metal window and door awnings that could withstand appropriate cyclone testing;[282]

(6) The design and production of unique battenless and externally screwless roofing or cladding systems capable of withstanding appropriate cyclone testing;[283] and

(7) The design and construction off site of prefabricated steel framed housing and units for rapid installation on building sites.

[752] I will shortly return to a further discussion of some of these innovations in greater detail.

[753] One of the problems inherent in the TSM business was the cyclical nature of workflow, which tended to diminish markedly in the wet season. Partly with a view to overcoming that problem, TSM embarked on the housing

[282] Exhibit P24.
[283] These are illustrated by the video constituting Exhibit P30.

pre-fabrication projects, with prefabricated elements being produced and assembled at the workshop site in circumstances in which, by and large, work could continue unaffected by the weather during the wet season. Completed segments would then be conveyed to the building site for rapid erection.

[754] As at 1996/1997, the turnover for TSM was of the order of $2,000,000 per annum. It employed 22 full-time staff. Once it commenced the first and second LTD development projects, LTD separately employed an additional six full-time staff.

[755] The TSM history had been one of gradual expansion year by year and it had become well-known and respected in the Territory for the quality of its work and its capacity to tackle relatively unique jobs.

[756] DLS estimated that the TSM customer base would have increased, on average, by about 15 percent per annum from 1992 onwards. He said that, at the same time, the size and profitability of jobs steadily increased, specifically as more efficient machinery was employed and methods were implemented.

[757] Particularly as it developed a fully diverse range of operations as above described, TSM commenced suffering from a chronic cash flow and working capital problem as earlier referred to, that was inhibiting its rate of growth. This situation seems to have arisen principally from three causative factors.

[758] The first was the need for working capital to finance not only the acquisition of plant and equipment, but also to provide the cash flow required for ever increasing quantities of materials required for production purposes.

[759] The second was a combination of the expenditure associated with an abortive attempt to relocate the rain water tank production line to Brisbane, to which I will shortly refer, and the later costs associated with the move of the TSM operations to new premises at Winnellie and setting up a new workshop complex there in 1996/1997, including an associated computer upgrade.

[760] The third was the cost of research and development in relation to and setting up for production of new items and processes, including the seeking of relevant patent rights and the promotion of new products.

[761] As at the time of TSM's ultimate demise, a number of potentially valuable patent applications were either in train or about to be initiated and had to be abandoned because of a lack of funds to pursue them to completion, following the events of 6 February 1998. It is to be noted that many, if not most, of these were being pursued in the names of applicants other than TSM itself.[284]

[762] In early 1998, TSM was actively pursuing options for a significant increase in the production and marketing of certain of its products, not only within

[284] T880 et seq.

Australia but also within the United States of America. Indeed, it had lodged a patent application in the United States in respect of its metal awnings. It had, in particular, actively been seeking to expand its production and marketing of rain water tanks outside of the Territory, as has already been referred to.

[763] Evidence was led before me as to the detailed methods of fabrication/ construction adopted by TSM in respect of items such as rain water tanks, flashings for bullnose iron structures and the Spectre model metal awnings. It is unnecessary to traverse this in detail.

[764] It is clear that these were innovative processes that were of high quality and, at least in certain respects, unique at the time. I entertain no doubt that, had it proved possible to adequately promote them, perfect relevant patents and then either produce or join in arrangements for producing and marketing them in volume, they had a real potential to return increased profits, at least in the short to medium terms.

Specific areas of work

Rain water tank production

[765] It is fair to say that, from about 1995 when ECD bought into the business, a major emphasis within the TSM operations was on the development of its production line rain water tank manufacture system. That system is described and illustrated in the documentary material comprising Exhibit P13.

[766] The evidence before me indicates that, up to that time, the traditional method of producing rain water tanks in Australia was both time-consuming and labour-intensive.

[767] I accept that, by 1995/1996, TSM had developed a system for the efficient mass production of rain water tanks using a production line principle. This dramatically reduced the time required to manufacture an individual tank and thus the cost of its production. Moreover, the system had the capacity for high-volume production at very economic cost.

[768] It is true that, as Mr McConnel of counsel for the defendant sought to establish in cross examination, various equipments and processes used by TSM within that system were not, of themselves, novel.

[769] However, some of the equipment *was* purpose designed by TSM and the overall system, as such, *did* exhibit novel features by way of contrast with methods in general use elsewhere. Further, the tank design and mode of construction itself had some particular high quality features.

[770] I entertain no doubt that it was the TSM plan to steadily expand the production system beyond the Territory to larger market areas in the eastern states, as and when it was possible to do so.

[771] To that end it initially entered into a joint venture arrangement in what I take to be late 1996 with a proposed partner in Brisbane. This person was

able to make suitable premises available for the purpose and undertook to contribute $75,000 to the joint venture by way of working capital.

[772] TSM dismantled its assembly line in Darwin at a cost of $20,000, transported it to Brisbane and set it up there. No sooner had that process been completed than the joint venturer became incapacitated by illness and the arrangement fell through. He had not contributed the promised $75,000 and the precise tenure of the relevant premises had not been ascertained by TSM. The project could not proceed.

[773] TSM was then faced with the necessity of again dismantling the assembly line, returning it to Darwin and reassembling it there. DLS estimated that the overall abortive exercise resulted in a direct total expenditure loss to TSM of the order of $38,000. Tank production was resumed in Darwin.

[774] I accept that, due to drought conditions, there was, over time, a steady growth in the demand for rain water tanks and that TSM continued to have the long-term aim of setting up a tank production plant in either Queensland or New South Wales to obtain the benefits of a greater utilisation of the equipment and level of production. However, it was unable to take full advantage of its capacity, owing to the financial limitations experienced by it and/or its inability to secure an alternate joint venture partner.

Curved flashings

[775] One area of TSM specialty was the production of curved corrugated iron for use in bullnose roofing or cladding on verandas and for other industrial/commercial structures, some of which are to be seen in the photographs comprising Exhibit P29.

[776] Historically, because the relevant curved roofing where two surfaces meet can bend in five different ways, ridge capping and hip flashing had traditionally been manufactured from lead, fibreglass or zinc. Indeed, as appears from the documents comprising Exhibit D9, a fibreglass or other type of plastic based product is still promoted by suppliers as a solution for flashings of this type, at least in certain geographic locations.

[777] DLS pointed out that each form of those applications had its problems.

[778] For example, the use of lead could give rise to its toxic properties potentially being absorbed into the water system and, in any event, its aesthetic appearance left something to be desired. Additionally, oxidation through electrolysis made it unsuitable for use with zinc-alume roofing.

[779] Fibreglass moulding required a large number of moulds to make the various curvature characteristics of the roofing joint and, in any event, this product tended to discolour and crack over time when exposed to harsh weather conditions. Further it was difficult to match it with the underlying roof surface -- a feature that is apparent from the documents Exhibit D9. The witness Maschke pointed out that fibreglass flashings are not used in the

Territory, both because of the harsh weather conditions and also wind loading concerns.[285]

[780] TSM therefore designed and commenced to manufacture curved roof flashing in 1995 in the same type of metal as was used in the other roof components. A physical example of this type of flashing comprises Exhibit P23.

[781] This avoided the problems associated with the other alternative applications and had the advantages of producing a neater finish and an exact colour match with the roofing material in use. Moreover, these flashings could readily and conveniently be packed for shipment to the customer. A patent application in respect of this product was in train as at early 1998.

[782] By 1996 and up to 2001, TSM held about 80 percent of the bullnose ridge cap market in Darwin. From 1997 to 2001 TSM also supplied this type of product to Bullnose Roofing Proprietary Limited, a company based in New South Wales.

[783] The witness Hume, a principal of that company, gave evidence both as to the efficacy of the flashings and the general quality of the service provided by TSM. He testified that, after the cessation of business by TSM, he was unable to source similar product elsewhere and has since had to revert to

[285] T1339.

the use of a plastic type of flashing, possessing inferior qualities, particularly as to colour retention and durability.

[784] TSM was unable to seek to extend its market for this product after 1998 by reason of the financial constraints imposed on it, following the withdrawal of finance by the ANZ.

[785] In order to achieve such an extension the company required funds to promote the product in a more extensive fashion throughout both New South Wales and elsewhere outside Darwin. It simply did not have the funds for interstate travel, advertising and attending at and participating in relevant promotional venues for the purpose.

Spectre metal door and window awnings

[786] The genesis of the proposed general production of Spectre window and door awnings was a request by property developers to TSM to produce exterior window awnings for a series of beachfront units at Nightcliff, based on a "one off" set of awnings that TSM had constructed for a property in Lambell Terrace in the Darwin CBD. The developer sought development of a unique curved design suitable for his seafront units.

[787] DLS succeeded in producing a suitable awning design and delayed releasing it until an application was lodged for a provisional patent. The proposed awning design was then satisfactorily cyclone tested and 36 units were produced and supplied to the developer.

[788] It was necessary for TSM to design and manufacture a unique machine to produce the awnings. This included a special joining system which gave the product a unique three way curve and ensured its structural integrity. One of the practical advantages of the design was its capacity to be flat packed for shipping.

[789] Following the successful order for the 36 awnings, further orders were received both from the developer and other customers.

[790] TSM therefore presented and promoted the awnings at the 1996 Darling Harbour Trade Show in Sydney in concert with the witness Hume. Considerable interest was shown in the product and meetings were held with representatives of various other construction companies to explore a possible penetration of potential markets in the United States of America.

[791] A proposed participation, in early 1998, in a Trade Show in the United States to promote the awnings had to be cancelled due to lack of funds.

[792] By 1998, TSM was having difficulty in meeting orders for awnings with its then equipment. It really needed machinery capable of large-scale production to enable the product to be fabricated more economically.

[793] Particularly following the events of February 1998, it became impractical to pursue the proposed exploitation of the design by proceeding to volume production. DLS averred that this meant that TSM was unable to

appropriately price the product to create and meet reasonable market demands.

[794] He stated that, despite that problem, TSM continued to manufacture awnings by hand with the equipment that it had until the close of business in May 2001. The final order was a $60,000 order for 12 units to be installed in the ACT through Bullnose Roofing.

[795] The witness Hume said that his company had also been associated with the marketing and use in New South Wales of the Spectre type awnings, of which he spoke in glowing terms. He testified that these were of particular application to what had been a substantial niche market, specifically in commercial settings. They had, he said, the benefit both of durability and flat pack delivery capacity.

[796] Hume stated that, once again, he was unable to identify any other entity capable of manufacturing this product after TSM went out of business. His evidence was to the effect that, once he had sold all his awning stock on hand, his company had to abandon metal awning sales, to the detriment of its business.

[797] A quote was obtained by TSM at one point for the requisite machinery for high-volume production which would have reduced unit costs from $452 to about $125. That company simply did not have the finance with which to purchase it.

Battenless and Screwless Roofing and Cladding Systems

[798] DLS first commenced developing the concept of the systems some time in 1997. Due to pressure work in that year TSM did not fully develop a prototype of the systems until mid-1998. Patent applications were then lodged and a DVD[286] was produced. That video adequately explains the details of the two systems.

[799] The essential problem was that, at that stage, TSM had no funds with which to promote and exploit the systems. Attempts were made to interest other corporate entities to enter into some form of licensing agreement to produce the products, but these were not initially successful.

[800] Ultimately, DLS and ECD entered into negotiations with a company known as Steel Structures Australia Pty Ltd ("Steel Structures") in Queensland, the principal of which was one Morel. A licensing agreement was entered into by them with Morel on 29 November 1999.[287] This related to the production of the screwless roofing system and steel cladding based on the same concept and provided that the licensors would receive 4 percent of the sale price of any material sold.

[801] Following that agreement, the machinery required for large scale production of the roofing systems was developed by, I assume, Steel Structures. However, yet another disaster occurred.

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[286] Exhibit P30.
[287] Trial Book Vol 5 pages 932-949, Trial Book Vol 7 pp 524-540.

[802] Shortly after production commenced, Steel Structures went into liquidation as a consequence of two of its clients failing to pay accounts to the value of $1.5 million and Morel disappeared.

[803] However, before that occurred, TSM obtained some of the initial product and successfully installed battenless roofing and cladding on four private dwellings in Darwin, shortly prior to itself going into liquidation.

[804] This is said to have prompted many inquiries for both the roofing and cladding systems, but these could not be followed up, due to the failure of Steel Structures and the later cessation of business by TSM.

Prefabricated housing units

[805] As already emerges, there were two facets of the first LTD development project and the second LTD development project that led to their adoption.

[806] The first was that the prefabrication off-site of the various segments comprising the units in a specially set up area of the TSM land and workshop premises and the subsequent conveyance of them for rapid on-site erection were considered by DLS to have produced considerable cost savings and also facilitated a more rapid provision of the final product.

[807] The second was that the system tended to avoid the practical problems associated with the wet season and, at the same time, provided a more even work flow for TSM staff throughout the year.

[808] The cost savings referred to essentially arose from a combination of factors.

[809] First, by use of what was tantamount to a "*template*" approach resulting from the use of fixed construction points in the yard at the rear of the TSM workshop, it was possible to produce standard components in a rapid, repetitive fashion to exact requirements.

[810] Second, all tools, equipment and materials required were immediately to hand.

[811] Third, it was far simpler to coordinate and supervise the various trades and to ensure that, where feasible, the amount of contemporaneous trades work was maximised.

[812] DLS thought that the work related to the LTD projects constituted 4-5 percent of TSM's overall business activities, although the evidence suggests to me that, as time went by, such work seems to have become a dominant aspect of those activities.

[813] As I understand the evidence of DLS, TSM aimed to make a profit of at about $15,000 on each unit sold (including land cost). However, although he claims that he did some initial calculations as to anticipated direct costs of units to be constructed and concluded that those costs and the associated site acquisition costs would be of the order of $100,000 per unit, it rapidly

appeared in cross examination that DLS did not ever carry out any exercise to calculate what the *actual* costs incurred eventually amounted to.

[814] Ms Kelly demonstrated that the figures referred to by DLS made no allowance for financing costs (including the massive interest commitment to NPG that totalled some $22,000 per month once the full $800,000 had been advanced).

[815] Ms Kelly elicited from the witness Martin that, although he had not made a fully definitive study of the cost elements of the first and second LTD development projects, it was his tentative view that an overall loss had been made by LTD, when significant contracting fees charged and/or incurred for work done by TSM on behalf of LTD were taken into account.[288]

[816] He told me that he arrived at this conclusion after also taking into account (*inter alia*) the very high rates of interest incurred in relation to the NPG loans which, he testified, clearly gave rise to a situation that was non sustainable in the long term.

[817] The evidence of the witness Edwards, to which I shall shortly come, is also pertinent to this topic.

[288] T1354.

The plaintiffs' technical experts

The witness Marcroft

[818] I was particularly impressed by the evidence of the witness Marcroft, who gave specific technical evidence concerning both the TSM flashings and innovative roof construction processes. He is a highly experienced roofing contractor who normally sourced rolled bullnose sheets and flashings from TSM. He spoke both of the efficacy of the product and the manner in which TSM provided good customer service.

[819] This witness stated that, when he was originally shown the TSM prototype battenless and screwless systems, he was very impressed by them. In his opinion these had a potential to result in reduced labour costs and an elimination of the chance of leakage. At that point, the prototype had not received cyclone test approval and it was his view that, if this was forthcoming, the system could be both attractive and valuable.

[820] Marcroft stated that, following the emergence of the fraudulent conduct of Godwin, that situation became widely known in Darwin. Rumours spread that TSM might have to close its business.

[821] He said that potential supply difficulties due to the cash flow shortage within TSM caused Marcroft to source supplies of materials that he would normally have obtained from TSM from other suppliers, even although they were less reliable and made more mistakes.

[822] This witness asserted that, prior to the difficulties caused by Godwin, TSM was "*by far the best metal shop in town*".

[823] In cross examination, Marcroft rejected any suggestion that the prototype roofing systems would not accommodate the usual wire mesh and insulation installations under metal roofing. His evidence on that aspect was convincing and I accept it.

The witness Michael Valastro

[824] At trial, the statement of Valastro was tendered by consent.[289] He is the managing director of Premier Aluminium, which was established in Darwin in 1981 and had ongoing business dealings with TSM after Valastro acquired Premier Aluminium in 1991.

[825] His company particularly purchased straight and curved flashings from TSM for use as part of the installation of windows and door frames. It also manufactured some items and provided some services to TSM.

[826] This witness stated that TSM provided excellent service and that its sheet metal work was of a very high standard.

[827] He said, however, that in about 1998 there were many rumours that, as a result of fraudulent activities by a person associated with TSM, it was in financial difficulties and may have to close down. General concerns were

[289] Exhibit P34.

held by himself and the business community concerning trading with TSM and its ability to pay its debts.

[828] Valastro was aware that TSM ceased trading in May 2001. He said that, after that time, his company was not able to find any similar supplier who could provide the quality of products and customer service as TSM, or who could provide relevant products at a similar price.

The witness Harry Maschke

[829] It is fair to say that the evidence of Marcroft and Valastro was strongly supported by that of the expert witness Maschke. He is highly experienced in sheet metal working and the principal of an entity known as Action Sheet Metal (ASM) -- currently the largest sheet metal manufacturer in the Territory.

[830] ASM has specialised in roofing and flashings, the fabrication of external window dressing systems and general heavy sheet metal product fabrication. Maschke has been involved in sheet metal work in Darwin for many years and was well acquainted with the work of TSM and LTD whilst they operated.

[831] This witness has had significant experience in the manufacture of rainwater tanks and was aware of TSM's developed method of production line manufacturing of them from the mid-1990s to 2001. He said that, based on

his observations and general knowledge of the industry, by the early 1990s, TSM became the major supplier of rainwater tanks in the Territory.

[832] Maschke's opinion was that the production system developed by TSM was (and still remains) significantly more advanced than that of the contemporary methods used by others in the Territory, which are much more labour-intensive and costly. The method developed had the effect of reducing labour costs (about 50-60 percent of the price of tanks) by up to 70-80 percent.

[833] This witness stated that the TSM system was able to respond rapidly to surges in demand for tanks. The only negative was that, at times of lesser demand, the relevant plant would not be fully utilised.

[834] It would continue to incur servicing and interest costs and a substantial section of the workshop could possibly be standing idle, although it was capable of being used for other purposes. So also the roll former could, if different profile cartridges were placed in it, be used for other functions.

[835] Maschke further indicated that he has had a substantial involvement in building construction in the Territory and, at the relevant time, became aware of the system developed by TSM/LTD for the fabrication and installation of prefabricated sheet metal houses.

[836] He said that this was unique in Darwin at the time and had a potential for substantial savings, due to the more efficient employment of labour. At the

time when the system was developed he considered that it would have resulted in approximately a 10 per cent price reduction for homes than that applicable to conventional housing of comparable size, style and design.

[837] The aesthetics of the end product were indistinguishable from those of houses built on site in the conventional manner, the type of construction was efficient from a heating and cooling point of view and a great advantage was that construction could be completed within about a quarter of the time ordinarily required when the conventional system was employed.

[838] He did not, however, have any knowledge of the actual detailed production costings for the TSM product and was simply comparing prices that were actually being charged to purchasers. He, nevertheless, emphasised that there were manifest efficiencies in the TSM production method that must have resulted in associated cost savings, for reasons that he expressed.

[839] Moreover, the structure was stronger to withstand transport from the workshop to the site and the product was of high quality, for reasons expressed by Maschke. He referred to other benefits of the system, which it is not necessary to canvass.

[840] Maschke was also familiar with the construction of various types of outdoor awnings and of the pros and cons associated with them. He familiarised himself with the TSM Spectre type product, which he described as a professional advanced design and modern looking unit for the time, which was very easy to install.

[841] This witness commented that, on a handmade basis, the Spectre units were expensive by way of contrast with the more traditional awning structures, although they had a distinct advantage over them. The cost would, he considered, be a strong deterrent although, if they could be produced by a less labour-intensive mass production method, they would become significantly more competitive in the market.

[842] Maschke has had wide, ongoing experience in roofing, guttering and flashing installation, the traditional methods associated with which he described. These are essentially quite labour-intensive.

[843] He familiarised himself with the screwless and battenless systems developed by TSM. He witnessed a demonstration of the system, has seen a house at Palmerston built with the TSM cladding and has also viewed the TSM DVD tendered in evidence.

[844] This witness considered that the TSM systems resulted in visual enhancement, avoided the traditional problems associated with drilling swarf and were superior to the more recent Klip Lok systems that have been developed.

[845] He acknowledged the relatively narrow panel width and accepted that this could, to some extent, act to increase the time required for a given area coverage so as to offset some degree of other cost savings. However, he pointed out that the end result was much stronger than other applications.

[846] He felt that the TSM systems had a potential for significant savings in labour costs. The main negative factor would be the initial capital outlay required for manufacturing plant and equipment, to produce the product.

[847] The witness confirmed that bullnose flashing had always been problematic for roofing manufacturers, for reasons that he expressed. He stated that the curved flashings designed by TSM eliminated the problems associated with other types of flashing on the market and were "*vastly superior*".

[848] In his experience of the Darwin market, between 5-10 percent of residential premises require curved flashing, whilst about 10 percent of commercial complexes require such flashing.

[849] He stated that the TSM product was superior and had significant aesthetic advantages to the alternatives available, but made the point that there was not a large market for curved flashings in the Territory.

[850] Maschke was cross-examined by Mr McConnel at some length as to certain aspects of his evidence. Much of that cross examination bore on the issue of the extent to which this witness was truly in a position to express definitive opinions touching aspects such as the scale of various activities of TSM, its comparative market status *vis-à-vis* other relevant entities in Darwin and the extent to which, if at all, he had knowledge of detailed financial data related to TSM activities, particularly production cost figures.

[851] He was also questioned concerning aspects such as the practical situation that might arise as to either under-utilisation of workshop space and equipment or the impact of having to acquire specialised equipment for mass production of items such as the Spectre awnings.

[852] Mr McConnel sought to establish that, absent definitive knowledge as to all of the above facets, only limited weight can be accorded to much of the evidence given by this witness.

[853] I accept that, for the reasons so advanced, certain aspects of Maschke's evidence must be considered with caution.

[854] However, it must be recognized that he was a highly experienced principal of a major participant in this industry who, in a city of the comparatively modest size of Darwin, plainly had an excellent grasp and knowledge of that industry at the relevant time, and of the nature and scope of the activities of the various participants in it.

[855] He was a careful and convincing witness and I have little difficulty in accepting the general thrust of the highlights of his evidence, as I have attempted to summarise them.

[856] I should note that he was also cross-examined on the subject of cost savings related to the construction of prefabricated units at the workshop site, by way of contrast with the traditional method of full, on site,

construction.[290] I took him to essentially agree with the DLS assertions as I have earlier summarised them in these reasons.

[857] He was unable to make a definitive comment as to the actual TSM costings, in relation to the sale prices fixed by it on disposal of the completed housing units.

The defence technical experts

The witness Sullivan

[858] The defendant called this witness to refute certain of the expert opinions advanced both by DLS and expert witnesses called by the plaintiffs.

[859] It was established that Sullivan has had many years' involvement in the roofing and associated sheet metal industries in New South Wales and Queensland, both as an employee and the principal of a corporate entity.

[860] Although he has a trade qualification as a carpenter and joiner, he has also physically worked on roofing sites in relation to roof fixing and construction. He holds a restricted (roof) plumbing licence and various other post-trade qualifications.

[861] Sullivan's major work activities have involved the planning and management of roofing contracts. Those activities have encompassed quantity surveying and estimating functions, project clerk of works

[290] T1329-1330.

functions and general oversight of mainly industrial/commercial projects -- although he has had some involvement in housing work.

[862] He has a wide knowledge and experience of all types of metal and other materials employed in roofing activities and methods of construction and fixing of roofs. Considerable evidence was led as to that experience.

[863] The curriculum vitae pertaining to this witness was developed at considerable length in the course of his evidence and there is no need to rehearse it in detail at this time.[291]

[864] I accept that his knowledge stems from his supervisory and management activities rather than as a hands on worker. However, it is obvious that his knowledge and experience of many aspects of roofing work is extensive. This is particularly evidenced by his detailed description of the process involved in roof construction commencing at T2561.

[865] It must be said that Sullivan presented as an objective and impressive witness who exuded considerable experience of the matters as to which he gave evidence. He was duly qualified as an expert witness as to his demonstrated fields of experience.

[866] Apart from some general useful background evidence, this witness expressed opinions in relation to a series of discrete topics. I will refer to those topics in the sequence in which he dealt with them.

[291] It is referred to in the transcript at T2523-2543.

[867] In so doing, I note that his experience is mainly limited to the New South Wales market and, to a lesser extent, the situation in Queensland. Further, I bear in mind that his main field of endeavour -- at least for many years -- has been in the industrial/commercial field, rather than the housing environment.

Curved flashings

(1) Sullivan contended that there was a quite small demand for this type of product, principally related to the restoration of older residential properties having curved corrugated verandas. There had, he said, been no growth in the use of bullnose roofing and that a "fad" in that regard had declined in the mid-to late 1990s. This was particularly so with the advent of lower ceiling, mass produced housing.[292]

(2) He asserted that, in his experience, the market preference would be for the "rolled top" fibreglass product, with stiffened edges of the type illustrated by Exhibit D79, rather than the profile associated with the TSM product. The former was available at a cost of about $66 in 1996.

(3) This witness went so far as to argue that the TSM colour bond product "was not an acceptable product in the market" and had not

[292] cf T2552.

been taken up by any other manufacturer in the market. He did, however, describe it as a wonderful piece of sheet metal work.[293]

(4) Having inspected various photographs of TSM flashings installed on buildings in and around Darwin,[294] Sullivan said that he certainly considered them to be of an acceptable standard.

(5) Sullivan agreed that, with the fibreglass product, colour matching and differential fading were problems, but he stated that he had never seen a fibreglass product crack, craze or require replacement as a result of exposure to the elements.

(6) On the other hand, he conceded that his experience was limited to climates such as that in New South Wales and that he had no experience with the use of fibreglass product exposed to more extreme climatic conditions,[295]

(7) I view the foregoing evidence of this witness with some degree of caution. I do so for several reasons.

(8) First, I am satisfied that he has had limited relevant direct experience in the housing market and what experience he has had has also been geographically limited.

[293] T2552.
[294] Exhibit P29.
[295] T2553.

(9) Second, his evidence is difficult to reconcile with that of the witnesses Hume, Clarke and DLS, which was far more convincing and based on relevant direct practical experience.

(10) Third, it must be emphasised that this witness did not profess any detailed knowledge of the Territory market and environment. To the extent that his evidence conflicted with that of and the opinions expressed by Maschke, I prefer and accept the latter.

(11) Sullivan's comments concerning the demand for curved flashings and the use of other materials such as fibreglass is irrelevant to the Territory environment on the bases indicated by Maschke.

Awnings

(1) Once again, it must be remembered that the experience of this witness has predominantly been in industrial/commercial settings, rather than housing, in which the Spectre awnings potentially have the greatest application. Moreover, it is also predominantly limited to the New South Wales environment.

(2) I took Sullivan, having examined Exhibit P24 and some examples of the practical application of the awnings in Darwin, to be complimentary as to the standard of workmanship involved,[296] although he asserted that the method of joining the metal segments and the forming of the ribs of the awning were not unique.

[296] T2555-2556.

(3) This witness felt that the upper metal segments of the awning would tend to collect and retain dirt and grime and that this type of awning would probably not be satisfactory in an area where it was exposed to a marine environment in seaside locations -- particularly on the underside of the units.

(4) Given that evidence, I understood Sullivan to accept in cross examination that the degree of corrosion observed by him on one of the awnings depicted in Exhibit P29 was not acute, although the degree of it was more pronounced at the point where the ribs came down to meet.[297]

(5) This was so, notwithstanding that the awning closely observed by Sullivan was at a block of flats only 100-200 m distant from the sea, with no intervening structures between it and the ocean. It was put to the witness that the awning was about 12 years old.[298]

(6) He considered that one of the major disadvantages of the Spectre awning was that it was not retractable or adjustable to suit various sun angles and its performance as a sun control device was therefore limited.

(7) Based on his New South Wales experience, he felt that there was a very limited market for such awnings and that Hunter Douglas type

[297] T2663.
[298] T2664-2665.

sun control devices and louvre systems were generally the preferred options.

(8) I have approached the evidence of this witness as to market demand and preference with some caution, because of his relatively limited experience in the target market for this type of item.

(9) I also note that the witness Maschke joined issue with Sullivan both as to a variety of technical aspects and also a number of the comments made by him, as to their applicability to the situation in the Territory. In this regard, I note Maschke's statements as to the care with which he has examined practical situations in the Territory and as to the relevance of certain assertions made by Sullivan to a cyclone environment. e.g. his preference for Hunter Douglas type sun control devices. I unhesitatingly accept Maschke's views where they conflict with those of the witness Sullivan.

Battenless and Screwless Roofing Systems

(1) I consider that, having regard to his extensive experience and demonstrated considerable expertise in the roofing field, the evidence given by Sullivan in this regard must be given due consideration.

(2) He reviewed all of the available physical and written materials related to these potential products for the purpose of giving relevant evidence.

(3) Sullivan stressed that, whilst the technology developed by TSM was very impressive,[299] the two systems in question were fraught with practical application and work safety problems that would render them difficult and expensive to use.

(4) I took him to assert that these would render the product non-competitive from a cost viewpoint, even if the installation problems could be resolved. He contended that the promotional DVD[300] was not a realistic indication of a true on-site installation environment. This witness had no experience of seeing a full scale installation of the TSM product.

(5) I find it unnecessary to recite in detail all practical issues that he raised. It will suffice simply to identify them in staccato terms.

(6) As to the battenless roof system, he asserted that:

(a) there would be some difficulty in placing the necessary two screws to fix the roof sheeting to each rafter,[301]

(b) the absence of the normal grid pattern formed by the batons on the trusses would result in little inherent strength,[302]

[299] T2560.
[300] Exhibit P30.
[301] T2560.

(c) it would be difficult and dangerous to handle the roofing segments,[303]

(d) the roof pitch tends to be relatively flat and could give rise to water proofing problems;[304]

(e) the need to lap the product ends would constitute a poor aesthetic result;[305]

(f) considerable practical problems would arise where the roofing abuts a vertical surface such as a parapet wall;[306]

(g) the profile of the product would create considerable problems in inserting any skylight or round penetration item;

(h) the roof profile is such that the product would present difficulties and additional costs in relation to handling and freight of materials;

(i) very considerable practical problems would arise in attempting to install the product on unstable roof trusses that are not braced and held in position by the traditional battens. This would also give rise to significant work safety considerations;

(j) there would be great difficulty in placement of the requisite wire mesh[307] and insulation materials prior to installation of the

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[302] T2561.
[303] T2561
[304] T2561-2562.
[305] T2562-2563.
[306] T2564-2568.
[307] Exhibit D81.

cladding,[308] to the point that this would become an almost impossible task,[309] and

(k) the strip width of the product resulting from its profile could result in an uneconomic use of materials.[310]

[868] As to the screwless roofing product Sullivan expressed these criticisms:

(a) many of the practical difficulties associated with the battenless system are no less applicable to the screwless system;

(b) experience derived from the Brownbuilt product indicates that there is likely to be a significant condensation/corrosion problem associated with the rib profile system;[311]

(c) the profile may well give rise to water entry problems because of the low pitch;[312]

(d) because of span deflection and also tolerance problems and the instability of the roof trusses, as well as the need to lap purlins when Z section material is used, great difficulty would be encountered in fixing the product to the metal purlins. There would be a very real problem in installing the requisite mesh and insulation. Overall, the labour costs would be prohibitive, even if satisfactory fixation could ultimately be achieved;[313]

[308] T2571-2573.
[309] Exhibit D77 paragraph 85.
[310] Exhibit D77 paragraph 101-106 and T2574. cf also T2591-2592.
[311] T2576-2578, Exhibit D77 paragraphs 111-112.
[312] T2578.
[313] Exhibit D77 Paragraph 128.

(e) the system for mesh installation proposed is unworkable and would require mesh segments to be separately cut to the size of each purlin spacing; and

(f) in general, and the TSM product is over-engineered and too complicated -- thereby giving rise to near insoluble alignment and deflection problems.

[869] Sullivan contended that the development of the "high grip" feature on the shank of modern self drilling screws near the top of them has significantly reduced demand for concealed fixed roofs in any event.[314]

[870] This has also, in part, been the product of the fact that the per-square-metre costs of a concealed fixed roof type are generally greater than for pierced fixed roofing. Moreover, the TSM proposed product is more expensive than other available concealed fixed products because of its narrow cover width, resulting in more labour-intensive installation requirements.

[871] Sullivan was cross-examined at length as to the processes of roof construction of a typical house. He demonstrated a reasonably detailed knowledge of those processes. However, it must be said that Mr Sallis was able to demonstrate that a number of the criticisms advanced by this witness raised issues that, in certain respects, were not, in the final analysis, of great force.

[314] Exhibit D77 paragraph 155.

[872] For example, Mr Sallis was able to demonstrate, by reference to Exhibit P85, that, subject to one point made by Sullivan in re-examination, there were no insuperable difficulties in accommodating roof piercing for the purpose of skylights and the like; and that there was little inherent difficulty in achieving proper apron flashing and adequate junction with barge moulding.

[873] Further, whilst I accept that TSM methodology necessarily involves differing installation techniques and the need for appropriate training by roofing installers, I am not convinced that the application and work safety problems asserted by Sullivan would render it unduly difficult and expensive to adopt. This was amply demonstrated by the cross examination. Nor am I satisfied that the product would necessarily be non-competitive from a cost point of view.

[874] Moreover, at the end of the day, Sullivan's cross examination indicated to me that the process of roof construction involved carried with it no greater hazards and resulted in no appreciably demonstrable less strength than was the case with a 'traditional' style of metal roof construction.

[875] As to this I see no profit in remorselessly rehearsing the detail of the cross examination related to the installation of sarking and wire mesh and the progressive stabilisation and bracing of the roof trusses that was canvassed at some length. It seems to me that the evidence merely indicated a need for some changes in detailed technique as between the various modalities.

[876] In so concluding, I specifically accept the views expressed by the witness Maschke on the various topics identified by Sullivan, where those views differ from the conclusions come to by the latter. I bear in mind not only the considerable practical experience of Maschke, but also the fact that he has carefully examined practical examples of the use of the TSM technology in the Territory.

[877] He particularly referred to the use of the battenless roofing system on houses in Palmerston that had been in situ for about eight years. He said that he observed no problems of water penetration or difficulties in flashing. He did not accept the perceived difficulties in roof construction referred to by Sullivan and was of the view that the system was actually safer than conventional systems in its construction, because the tradesman lays the sheet in front of him and works upwards towards the ridge of the roof.

[878] Maschke also rejected the criticisms related to possible moisture entrapment advanced by Sullivan.

[879] Maschke's ripostes to the criticisms made by Sullivan are set out in detail in Exhibit P56 and I accept them.

[880] I conclude that some of Sullivan's criticisms exhibited a degree of lack of comprehension by him as to how the TSM technology could be implemented in practice.

[881] I am of the opinion that more legitimate conclusions that arise from the evidence of Sullivan, considered together with that of the witness Neil Clarke, are that, due to its significantly different technique and aesthetic profile (coupled with the need to train roof installers), there might have been some difficulty in persuading architects and/or building owners to move away from traditional forms of roofing in an environment in which those concerned tend to have fairly conservative attitudes and may be resistant to change. On the other hand the evidence suggests that, following the use of the technology on the Palmerston houses, considerable local interest was generated in relation to it.

[882] It may be that, as was suggested by Sullivan, some more recent technical developments with self drilling screws have, in fact, tended to reduce a potential desire to move towards a demand for concealed fixed roofs, although I note that Maschke does not necessarily accept that point.

[883] Sullivan said, in the course of his cross examination, that, with the return to a phenomenon of a large amount of sub contract work on projects, the attainment of a quality assurance certification by a principal contractor had ceased to be of the importance and significance that it formerly had prior to about 2000-2001.

[884] This was because many, if not most, subcontractors were unlikely to possess such a certification.[315] However, he accepted that it still remained

[315] T2659-2660.

a pre-requisite in some government contract areas and possession of it was an advantage.

[885] This witness indicated that, in general, the labour cost content of roofing tasks ranges between about 35 to 40 percent, dependent on the precise work, the flashing ratio and the materials employed.[316] It is for that reason that the labour requirement for a particular application assumes importance in relation to the issue of cost competitiveness.

The witness Newley

[886] This witness is a principal of a modest size sheet metal and fabrication business located at Gosford on the New South Wales central coast.

[887] He does not profess detailed technical expertise. His co-principal attends to technical aspects of the business, whilst he is principally responsible for sales and administration. He possesses a good general knowledge of what is involved in the conduct of his entity's business, having worked in the general sheet metal industry for some 14 years.

[888] Newley was approached by the witness Sullivan, who is well known to him, to give expert evidence as to some discrete topics in relation to which the latter was not qualified. I found this witness to be a straightforward, forthright and articulate person whose evidence must be accorded due weight as to the matters that he was qualified to discuss.

[316] T2661.

[889] In the event, he was asked many questions (particularly, but not exclusively, in cross examination) that were, in fact, of a technical nature. These ranged considerably beyond his demonstrated areas of expertise and I have viewed the relevant evidence given by him with considerable caution.

[890] A primary thrust of the evidence of this witness concerned his company's involvement in the manufacture and sale of steel rain water tanks. I took him to say that, in late 2005, having acquired what was essentially a general sheet metal jobbing business at Gosford in early 2004, he and his co-principal subsequently purchased the plant, equipment and name of what was the then dominant metal tank and fabricating company on the Central Coast.

[891] Newley said that this purchase was at a time when drought conditions were being experienced in his region. Initially, demand for water tanks was relatively slow.

[892] However, after about six months, the local council commenced offering rebates on water tanks, a requirement to include at least a 5000 litre water tank on all new houses was introduced and there was an extensive public marketing campaign to encourage the installation of such tanks in residential premises.[317]

[317] T2705.

[893] This witness testified that a combination of those factors caused a considerable upsurge in the demand for rain water tanks, thereby causing his company to increase its workforce engaged in the manufacture of them from about 1.5 to 4 persons.

[894] Whereas the production and sale of rainwater tanks had amounted to about 10% of his company's business, it ultimately peaked at about double that percentage.[318] As time went by and rainfall also increased in the region, the figure dropped to about the original 10 percent.

[895] Newley's evidence was of considerable interest in relation to some aspects of that given by the witness Edwards.

[896] He testified that, quite apart from any effect of increased rainfall, the factors that had precipitated the upsurge in demand for tanks caused "a whole lot of other new manufacturers and distributors for water tank products and water tanks" to appear in the market, as was evidenced by a dramatic increase in relevant advertising in the Yellow Pages.[319] Additionally, the manufacturers and distributors of poly-tanks emerged in prolific numbers, to the point at which they had a quite significant impact on the overall water tank market.[320]

[897] This witness said that the practical end result was that the demand for his company's product virtually reverted to about its original level after little

[318] T2740.
[319] T2705-2706.
[320] Exhibit D91 p 13, T2707.

more than what I took to be about one peak season. He testified that the tank market has become very competitive and customers tend to seek competitive quotes.[321]

[898] The foregoing features constitute a type of phenomenon adverted to by Edwards in relation to future sales projections, as I shall later record.

[899] Newley testified that the prices quoted by his company are cheaper than some poly-products and dearer than others. They are about "middle-of-the-road".[322]

[900] This witness was questioned at some length concerning the tank construction technique adopted by his company, by way of contrast with the production line process developed by TSM.[323]

[901] It is fair to say that, whilst some of the technical processes are similar, a basic difference is that Newley's company constructs tanks on an individual order ("jobbing") basis and does so in a substantially less automated or production line fashion than TSM.

[902] The technique employed is more labour-intensive, appears, to some degree, to be less sophisticated than that adopted by TSM and requires a considerably longer construction time.

[321] T2707.
[322] T2708.
[323] cf Exhibit P13.

[903] Newley's company does not do its own roll forming and purchases pre-rolled material already cut to the required lengths.

[904] A detailed comparative cost breakdown related to the two operations does not emerge from the evidence. Newley's company seeks to achieve a gross profit margin of the order of 50 percent on a standard rain water tank manufactured by it.

[905] He testified that, at the time of purchase of the rain water tank the business, approximately 60 percent of his company's business was related to production and/or sale of roofing and roofing accessories such as flashings.[324]

[906] He said that the markets served for flashings ranges from the home handyman to the builder's carpenter, as well as commercial metal roofers, plumbers and roofing contractors. In general, the metal flashings are made to order for specific jobs.

[907] Newley stated that there has been a considerable decline in demand for bullnose roofing and associated components over the years in his market area. His company sells fibreglass flashings for such roofing and currently only sells about 10 of them per annum. He has no knowledge of metal fabricated items such as those that were manufactured by TSM.

[324] T2717.

[908] His company seeks to achieve a gross profit margin of about 40 percent on flashings made by it, but only about 17.5-20 percent on roofing and other roofing accessories sales. The market for the latter is very competitive and the margin represents little more than a handling charge on items that are procured from major suppliers.

[909] This witness testified to a gradual expansion of his company's business since 2004. Initially it had about seven staff. Staffing peaked at about 15 at the height of rainwater tanks sales, but has since dropped back to about 13.

[910] He said that the lead time for production of a standard aqua-plate rain water tank is about 3-4 weeks. This can lengthen at busy times. Sales are usually on a COD basis, although some repeat customers maintain accounts. The current cost of production of such a tank is of the order of $800[325] and the company is involved in fairly limited promotional activities in relation to tank sales.[326]

The witness Neil Clarke

[911] This witness has, for the most part of his professional career, practised in the Territory as a structural engineer. He has managed various major projects in and around Darwin and manages multi-discipline engineering teams. He has also been involved in major housing and infrastructure projects in remote areas.

[325] T2725.
[326] T2739-2740.

[912] Clarke has had specific experience in upgrading buildings to cyclone code. He has had a long experience in “hands on” project management and is well familiar with activities and requirements on building sites.

[913] I was most impressed by this witness. He was objective, articulate and exuded a wealth of knowledge, practical experience and common sense in relation to the matters of which he spoke.

[914] Clarke confirmed that, prior to its demise, TSM was the major manufacturer and supplier of rainwater tanks in Darwin and, in the mid-1990s, also the dominant sheet metal company in that city. He said that he only knows of one entity in Darwin currently engaged in the manufacture of steel rainwater tanks.

[915] He acquainted himself of the detailed TSM rain water tank production process, as reflected in Exhibit P13. This witness felt that it was a very unique and impressive system.[327] It was quite sophisticated in contrast with the traditional methods of making tanks.

[916] Clarke was requested to study the evidence related to the battenless and screwless roofing systems.[328]

[917] He confirmed that these had duly passed the cyclone testing requirements[329] and expressed the view that they were both very innovative and unique.

[327] T2750.
[328] Exhibits P30 and P28.
[329] T2753.

[918] He testified that he had no concerns with its use and installation requirements, given that he would wish to be assured that it had no water proofing issues -- an aspect that he had not been able to check.[330]

[919] Clarke commented that the roofing industry is very conservative and competitive. It is currently dominated in Darwin by the three major suppliers of Custom Orb and Trimdek.

[920] He was of opinion that, leaving aside questions of comparative costs of supply and installation, significant market share would only be achieved if the architectural profession could first be convinced of the worth of the product,[331] a process that might be relatively slow.

[921] Clarke mentioned that there were current moves to mandate the use of scaffolding in all roof construction situations and that, bearing this particularly in mind, he did not perceive any substantial problems in relation to the detailed roof construction processes using the TSM profiles.[332]

[922] He did see some problems associated with inserting items such as skylights into the battenless system[333] due to the narrow panel width, but I take it that he had not had the benefit of seeing the technique demonstrated by Exhibit P85.

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[330] T2753-2756, 2761.
[331] T2756, 2766.
[332] T2754 et seq.
[333] T2755, 2765-2766.

[923] There would, he said, be a need to train workers on the job in the use of the product.[334]

[924] Clarke noted that the TSM roofing and wall cladding systems had not achieved automatic deemed to comply status under the Building Act when used in Darwin in 1997 and 1999 respectively, but *had* been appropriately certified by an authorised building certifier in each instance.[335]

[925] This witness considered that the sun awning market involved comparative cost issues and that the Spectre type awning was an exclusive, upmarket product with a limited potential demand.

[926] He stated that, due to harsh climatic conditions in Darwin, canvas type warnings were virtually never used. He testified that, at the present time, the sun protection market in Darwin was dominated by quite basic units having horizontal members with infill sun breakers. These were relatively inexpensive.

[927] He felt that the Spectre awnings were most suitable for domestic dwellings, but that sun awnings on houses in Darwin were something of a rarity.[336] The TSM product would need to be mass produced at a much lower cost than the prototype to attract interest in the market.

[928] This witness considered that there was only a limited market for curved metal flashings in the Territory, although greater markets might exist in

[334] T2766-2767.
[335] Exhibits D92, D93.
[336] T2758.

other States. He confirmed that fibreglass flashings of this type are unknown in the Territory, because they could not withstand the harsh climatic conditions.[337]

The expert evidence as to quantum

The witness Martin

[929] In these proceedings I had the benefit of both a written report of Martin (including an annexed copy of his report as administrator of TSM pursuant to s 439A of the Corporations Act 2001 (Cth)) and oral evidence given by him.

[930] He was a frank, articulate and objective witness who exuded relevant professional expertise in relation to the matters spoken of by him. However, due allowance must be made, in any assessment of his evidence, for the fact that his initial report for the purposes of these proceedings was prepared under considerable pressure and at relatively short notice.

[931] Further, he had no option but to act on information given to him by the directors of TSM without the opportunity of conducting independent investigations as to some aspects of it and, as appeared in the course of cross examination, certain important historical facts were not known to him at the time at which he formulated his views.

[932] By way of example, these aspects are of specific importance:

[337] T2759.

(1) Martin was not clear as to whether certain funds utilised to finance the acquisition of the sites for the first LTD development project and the second LTD development project had been borrowed from the CBA by DLS and ECD or by one of the corporate entities;

(2) He did not appear to have a definitive knowledge of the financial interactions that may have occurred between LTD and TSM and the exact extent to which the latter had, in effect, supported the former by carrying indebtedness, directly or indirectly, on its behalf; and

(3) He was unaware of the mortgages granted by DLS and ECD over their respective homes to secure the advances ultimately approved by the CBA.

[933] In his report Martin expressed the opinion that, as at 30 June 1997, there appeared to be no reason why TSM could not have continued to trade and prosper in relation to what I take to be its core business.

[934] He, *inter alia*, made the points that, for the fiscal years 1995, 1996 and 1997, TSM had recorded a profit and the profit was increasing, it had secured quality assurance certification and had moved to new, more suitable, premises.

[935] He acknowledged a reduction in working capital in 1997, which had essentially been caused by one-off costs, the principal one of which was related to acquiring and setting up new business premises. However, he

noted that TSM had successfully raised further working capital in the form of the ANZ facilities.

[936] Martin sought to make forward projections of likely profit levels as set out in his report, had TSM continued in business. These were arrived at after making adjustments for what he considered to be one-off expenses related to quality assurance certification, new computer systems, costs of relocation to the new business site, losses in respect of the abortive rain water tank project in Brisbane and the cost of certain research and development projects.

[937] He estimated losses that would have been incurred by DLS and ECD if LTD had been placed in liquidation as at 30 November 1997 and 2 January 1998 respectively.

[938] He also opined that, as at the dates in question, TSM would have been in a better position to accommodate its financial commitments and deficiencies over time rather than on the demand of the ANZ and may have been able to secure alternative financing.

[939] A mathematical summary of his basic approach and final conclusion is to be found in Annexure F to his report. In brief he was of the opinion that over the period 1997/1998 to 2007/2008, the core business of TSM would, after the adjustments referred to by him, have returned a total net profit after tax (NPAT) of the order of $4,350,011.

[940] In his report Martin sought to support his key opinions by reference to a detailed analysis of the TSM financial records and a series of projections made by him.

[941] I took him to be of the opinion that, given the potential losses of LTD, had the ANZ declined to make the advances approved in November 1997, it should have been possible for TSM to continue to trade. It was his expectation that TSM could also have done so had it become aware in January 1998 of Godwin's fraudulent conduct.

[942] He justified those conclusions by reference to a series of financial analyses contained in his report.

[943] Ms. Kelly set out, in her cross examination, to challenge the validity of certain of the approaches adopted in the report.

[944] These points emerged:

(1) Martin's opinion as to the future viability of TSM essentially focused on its prospects in relation to its core business, ignoring its involvement with LTD i.e. based on a scenario that was not taking place.

(2) (a) To the extent that Martin's analysis of the situation if LTD had been placed in liquidation on 30 November 1997 (following the discovery of the anomalies in relation to the finance application) was based on the figures and calculations set out in paragraph 6

of his report, these failed to bring into account the secured amount of $250,000 already advanced by the ANZ and also the CBA remaining debit balance of $74,000, both of which would take precedence over any claim by NPG;

(b) There would thus be a shortfall of $367,446, rather than the figure of $67,479 premised by Martin. The liquidator would also have a demand on behalf of LTD at that time for $250,000, less a setoff in respect of what it then owed to TSM;

(c) Martin accepted that TSM would not have been in a position to meet a statutory demand for the net liability of $195,000, much less be able to satisfy the residual liability to NPG. It would be necessary for the directors to reach some workable accommodation with both the liquidator and NPG;

(d) It was put to Martin that, if NPG in particular had pursued the balance of its debt against DLS and ECD then, by reason of the existing securities over their homes in favour of the CBA and the extant liability under the current mortgage over the TSM land and workshop premises, there was little apparent capacity on the part of TSM or its directors to raise further loan monies;

(e) It was further put to him that, if the three home properties were sold, they would, at best, realise a net sum of about $352,000, less sale costs. This would fall far short of meeting the residual liabilities in question. I took him not to join issue with such a

proposition, but his initial response to what was put to him needs to be viewed in light of what he said in re-examination[338] concerning a potential ability to re-finance the relevant debt situation.

[945] When pressed, Martin conceded that, at the time in question, TSM was technically insolvent, because it was unable to pay its debts as they fell due. Nevertheless, he felt that it was unlikely that the liquidator or NPG would have forced TSM into liquidation, as this would have availed them nothing.

[946] He also made the point in re-examination that, had TSM not absorbed the debts amounting to approximately $250,000 in late 1997 which were properly debts payable by LTD, such debts would not have affected its solvency. He testified that, before the $250,000 was paid, there was no issue from his findings that TSM was insolvent and could not have paid its own debts at the time.[339]

[947] Ms Kelly took Martin through a similar exercise based on a scenario of LTD going into liquidation as of 2 January 1998. She demonstrated that, having regard to the figures set out in Document 3 within Exhibit D20, this would have resulted in a statutory demand by the liquidator of LTD of about $350,000 and an NPG shortfall, at that time, of $603,667.

[338] As recorded at T1352-1353.
[339] T1351.

[948] This is so notwithstanding that TSM then had the additional asset of the Margaret Street property, the sale of which would satisfy all but about $75,000 to $100,000 of the statutory demand or, alternatively, reduce the NPG balance to about $325,0000, which neither TSM nor DLS and ECD would have any realistic means of satisfying.

[949] Martin again stressed that, in situations such as those postulated, it would be most unlikely that a liquidator of LTD would press for liquidation of TSM and that, in the past, NPG had been quite accommodating.

[950] It was put to him that, leaving aside the above considerations, TSM was in very real cash flow difficulty as at both dates in question and, realistically, that there was no likely source of necessary working capital. Certainly, the directors were not in a position to raise further loans.

[951] Martin was taken at some length through an analysis of the relevant cash book data and bank statements of TSM.

[952] He accepted that, given his point concerning the need to amortise one-off expenses, there had undeniably been a steady escalation of a total excess of expenses over receipts throughout 1996 and 1997. There was certainly a cash flow problem in that period. He had not been able to carry out any analysis of the 1998 figures.

[953] Ms Kelly pressed Martin as to forward sales projections made by him. He rejected the proposition that no upward trend of the nature espoused by him was revealed by the relevant figures over the timeframe in question.

[954] Some contention arose as to whether the relevant data, properly applied and construed, revealed an average sales increase over the period 1994/1995 to 1997/1998 of 9.7 percent per annum as calculated by Martin or a figure of 6.1 percent per annum put to him by Ms Kelly as set out in her Exhibit D19.

[955] Be that as it may, Ms Kelly put to Martin and he accepted that an important limiting factor to sales growth was the market size and the share of it already enjoyed by TSM.

[956] Ms Kelly suggested to him that a variety of factors could affect future sales results and that there were limitations on the accuracy of a mere mathematical forward prediction of a present or immediate past situation. She asserted that the approach adopted in the report was neither a legitimate nor realistic forecast of the future -- a proposition with which he disagreed, although he conceded that it could never be 100 percent accurate.

[957] I consider that there is force in Ms Kelly's contention to Martin that the failure of LTD, the negative publicity of Godwin's fraud and the calling up of the ANZ loans in a town the size of Darwin would necessarily have an adverse impact on future sales, at least in the short term -- as would the

spectacle of the directors and TSM selling their assets, coupled with the practical effect of TSM's inability to obtain credit and maintain proper service levels as a consequence.

[958] Some debate occurred as to the proper approach to the forward prediction of operating expenses. Ms Kelly challenged Martin's technique in dealing with the cost inflation factor as, in effect, ignoring the actual increase in costs to be expected over the relevant period. He explained that there were two valid methods of approaching the situation. As he put it:

> "You can either take inflation out and deal with real figures or you can leave inflation in and deal with inflation figures. What I've done is the first one. So I've taken in sales back at 6.13, I've taken the inflation out of the sales figures to come up with real sales and then calculated the increase on that. So I've taken the CPI out of sales. If you wanted me to put inflation into expenses, I'd have to put inflation back into sales. I haven't done that. I've taken inflation out of both so that you can end up with a profit also without inflation and just deal with it at the end. It's either one or other. So I don't agree with your conclusion."

[959] Martin made the point that, in a well-run business, as sales increase, expenses do not increase proportionately because economies of scale usually result in an actual decrease in proportion.

[960] I took him to accept that one possible criticism of his approach to the identification and amortisation of what he considered to be one off expenses was that, in a number of instances, there were in fact ongoing levels of expenditure that, to some extent at least, nullified the "one-off" concept.

[961] For example, continued quality assurance certification involved some level of annual recurrent expenditure and a computer upgrade necessarily had a very finite life that would inevitably mandate periodic further expense of that type, and so on.

[962] Ms Kelly also directed Martin's attention to the fact that research and development was and had been something of an ongoing cost in the case of TSM, rather than a mere one-off expense. Due allowance for this would necessarily result in the need for some upward adjustment of expense levels.

[963] She further elicited from Martin that he had not been in a position to vouch the precise costs associated with the move to the new TSM land and workshop premises and that the TSM allocation figures may not necessarily be fully accurate. She also identified one error in the figures in Annexure E to the Martin report.

[964] Ms Kelly challenged the validity of Martin's projected profit figures tabled at paragraph 6.17 of his report as being unrealistic, because one could never properly assume that a company would increase its profits in a linear fashion in perpetuity and, in any event, historically, that had not occurred with TSM.

[965] Despite Martin's denial that his profit percentages were overly simplistic and unrealistic, it seems to me that there was considerable force in

Ms Kelly's contention - although it is necessary to take into account Martin's evidence in re-examination.[340]

[966] Martin accepted that he had proceeded on the premise that substantial government subsidies that had been received by TSM would, on average, be continued in the future -- a proposition that was questioned by Ms Kelly as unrealistic.

[967] She directed his attention to the rather sporadic past history of TSM in that regard and that, in some years, there had been no subsidies at all. Her point was that it could not confidently be predicted what level of subsidy, if any, might be available in a particular year. It seemed to me that Martin had no substantial answer to that criticism.

[968] Martin asserted that the mere fact that a company has a continuing excess of expenses over receipts for a substantial period of time does not necessarily reflect whether it is healthy or not. A growing company needs cash and, if it is increasing its expenditure, it will normally be building up its stock, which was the situation with TSM, which actually showed a substantial profit for 1996/1997.

[969] What such a situation *does* demonstrate is a negative cash flow position that will limit growth to money derived from profits or be obtained by infusion from external sources. That was the problem that needed to be addressed in the case of TSM.

[340] As recorded at T1353.

[970] Having said that, Martin was constrained to accept that TSM had not actually been experiencing a significant ongoing increase in sales in the period leading up to the events of early 1998, although he was of the view that this could well have been a product of a one-off disruption, arising from the move to the new premises.

[971] Martin made the point, in the course of his re-examination, that it was important not to look at levels of debt in isolation. As he put it, the mere fact that debt is increasing or decreasing does not necessarily indicate anything useful concerning a company, its prospects or its health.

[972] It is necessary to consider what gives rise to a particular debt. So it is, for example, if a debt is incurred because a company wishes to set up premises, invest in quality assurance, and upgrade a computer system so as to improve productive capacity, then that is good debt.

[973] I have not attempted a fully detailed analysis of every aspect of Martin's evidence, but the foregoing resume will serve to illustrate the key points of it.

[974] That evidence falls to be examined in light of the comments made by the witness Edwards in paragraphs 5 to 18 inclusive of Exhibit D63, many of which are reflected in the points sought to be made by Ms Kelly in her cross examination of Martin.

The witness Clark

[975] I have also had the benefit of oral and written input from the expert witness Trevor Clark. He is a qualified accountant and the principal of the accountancy firm of Clark and Associates.

[976] This witness has been in private practice since 1984 in a wide range of accountancy areas, including those of an investigative and forensic nature. Since 1991 he has specialised in the area of litigation support and given evidence on many occasions in the Family Court and the Supreme and District Courts of South Australia.

[977] Clark presented as an objective, articulate and knowledgeable professional. I found him to be an impressive witness to the extent to which he was able to give evidence relevant to the issues in this case. He did not profess marketing and production expertise and frankly acknowledged that his theses were necessarily based on an acceptance of the DLS evidentiary material in that regard.

[978] Ms Kelly took somewhat belated issue with the format and certain of the content of the original report of this witness dated 10 August 2007 and some aspects of his supplementary report dated 28 September 2007. She contended that it did not satisfy the requirements discussed by Heydon JA (as he then was) in *Makita (Australia) Pty Ltd v Sprowles.*[341]

[341] (2001) 52 NSWLR 705 at 729-745.

[979] After debate with counsel Clark amended his original report with a view to addressing certain of the criticisms advanced. I ultimately received his amended original report, his supplementary report, certain notes made by him in relation to a report of a defendant's expert witness and his oral evidence *de bene esse*.

[980] Ms Kelly persisted with her objections to the receipt of this material, essentially on the bases that there was insufficient factual evidence to support the opinion evidence of Clark, that there was inadequate explanation of the conceptual bases of the opinions advanced and that, to the extent that Clark's evidence was no more than mathematical calculations that anyone could do, it was not really expert evidence at all.

[981] I reject those objections. Clark proceeded on the assumptions of fact testified to by DLS in the context of a consideration of the relevant financials of TSM and an adequate summation of the contextual material referred to in Annexure B to Exhibit P52.

[982] Moreover, his conceptual bases of reasoning readily became apparent on a reading of both of his reports and his oral evidence. His mathematical calculations were simply an expression of the practical effect of his assessment processes.

[983] It is stating the obvious to say that, at the end of the day, the weight that may properly be attached to the opinions expressed by this witness will be a direct reflection of the extent to which I am prepared to accept as valid

the factual material and projections espoused by DLS in his evidence and the documentation in which they are embodied.

[984] I have dealt with Ms Kelly's objections more fully in separate reasons published by me on 15 September 2008 and will not repeat what I there said.

[985] In summary, Clark concluded that, on the factual assumptions implicit in the DLS spreadsheets, as corrected by him for one patent mathematical error[342] and otherwise adjusted, the relevant economic losses incurred by TSM were:

Loss of business income	$37,156,801
Capital loss	$43,838,987

[986] Clark proceeded on the basis of the following specific assumptions in arriving at his final opinions:

(1) That, but for the relevant actions of the ANZ, TSM would have remained solvent and profitable;

(2) That company income tax would have been payable at the relevant statutory rates; and

(3) That profit projections prepared by DLS (as annexed to his report and, in one instance, corrected as above recited) were realistic and also reflected accurate and achievable marketing results.

[342] See Schedule R 2 to Exhibit P 53.

[987] He arrived at estimated valuation calculations using the methodology of capitalisation of future maintainable earnings.[343] In such an exercise, net profit after tax equates to the future maintainable profit.

[988] Clark made no adjustment to or analysis of the relevant financial statements in respect of one-off or extraordinary items. He made the point that the normal valuation process undertaken takes into account any typical adjustments made to net profit that would be of that nature in order to determine future maintainable earnings.

[989] It was his view that price earnings ratios (PERs) of three and four were likely to be the most accurate for the structural and functional properties of TSM and its market and projected profit performance. These equate to the capitalisation of NPAT of 30 percent and 25 percent respectively.

[990] The concept of PERs involves a consideration of what rate of return a prudent investor would seek upon his investment in the particular company or business. This, in turn, involves an act of judgment based on the experience of the valuer, bearing in mind the financial records of the relevant company.

[991] As to this, he adverted to a list of relevant factors to be considered. It is unnecessary to rehearse them at this time. They are set out in paragraph 7.4.3 of his amended initial report.

[343] T1276.

[992] I note that, although Ms Kelly was somewhat critical of his lack of detailed discussion of the application of those factors to the particular circumstances, the defence expert Edwards did not appear to take serious issue with the conceptual appropriateness of the PER approach actually adopted by Clark.[344]

[993] This witness considered that it was appropriate to take as his commencement point the fact that TSM's net profit before tax for the year ended 30 June 1997 was $100,696. In absence of separate, independent data from an expert marketing consultant, he adopted the DLS projected NPAT calculation data.

[994] He considered that, in arriving at a figure for NPAT, it was appropriate to apply a discount factor of 50 percent to allow for contingencies. This produced the ultimate figure of $37,156,801 for that aspect, as above referred to.

[995] His process of arriving at a capital loss figure of $43,838,987 is explained in paragraph 8.2 of Exhibit P52.

[996] In calculating future maintainable earnings, he adopted a figure of $64,445 as representing NPAT. He averaged the net profit after tax for a period of five years from 2003 to 2007, based on the data summarised in Schedule 3

[344] cf Exhibit D63 paragraph 76 (b) and T2207.

to Exhibit P 52, arriving at an average NPAT of $12,589,870 for such period.[345]

[997] Clark concluded that, based on a 30 percent return of NPAT, a PER of 3 would give rise to an increase in value of TSM in the sum of $37,576,274. If a 25 percent return (PER 4) is adopted, the increase would be $50,101,699. In the circumstances he was constrained to adopt the midpoint of $43,838,987 for his loss of capital valuation.

[998] The foregoing summation constitutes a mere "*bare bones*" description of the processes adopted by Clark. It is necessary to go to his supplementary report[346] and also his oral evidence for a more detailed analysis of how he approached his task.

[999] These speak for themselves and I find it unnecessary, for present purposes, to attempt a detailed resume of that material in these reasons.

[1000] I will, however, return to some aspects of Clark's reasoning when considering the expert evidence of the defence witness Edwards.

[1001] I should record that Clark was not cross-examined by Ms Kelly at great length.

[1002] He conceded to her that his figures concerning projected NPAT were simply a reflection of the schedules that had been produced by DLS, as summarised in Schedule 3 to Exhibit P52.

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[345] T1277.
[346] Exhibit P 53.

[1003] He confirmed that, in arriving at his capital loss figures,[347] he did not apply a 50 percent discount for contingencies to the income figures utilised by him.

[1004] Rather, he took an average of the last five years of the DLS projected figures. He sought to make the point that to both discount and apply an average would be to adopt an incorrect methodology that, to some extent, would give rise to a double counting.[348]

[1005] This witness further confirmed that, in approaching his task, he was not in a position to conduct an independent assessment of relevant costings in relation to the various product items referred to in the Schedule prepared by him. He had proceeded upon the basis of the costings prepared by DLS.

[1006] Clark accepted, as a general concept, that the achievement of economies of scale associated with mass production depends very much on the volume actually achieved; and that a balance needs to be struck between economies achievable against the increased costs related to plant, premises, financing, equipment servicing and the like. He did not conduct any comparative studies in that regard.

[1007] Ms Kelly, in effect, suggested to Clark that, in arriving at an ultimate discount factor, there was no logical basis for simply adopting a 50 percent figure. He had no empirical data upon which to select that figure, as

[347] As referred to in paragraph 8.2 of Exhibit P 52.
[348] T1284.

contrasted with any other figure. I took him to accede to that proposition and to assert that his ultimate approach was essentially no more than an act of judgment on his part.

[1008] This witness conceded that, in arriving at a figure for capital loss, it was appropriate to adjust figures to allow for "one off" or extra ordinary items. He agreed that he had not taken into account any changes in the financial position of TSM that occurred in the second half of 1997, but had merely proceeded on the basis of the situation that had existed as at 30 June of that year.

[1009] Clark confirmed that, in producing his supplementary report,[349] he had reviewed the detailed DLS projections in discussion with him, to verify the accuracy and rationale for the projections made. In so doing he had detected and rectified one formula error related to the roofing area.[350]

The witness Craig Edwards

[1010] This witness is a highly qualified and experienced chartered accountant, based in Sydney. He has specialised in the analysis and valuation of corporate entities, particularly for the purposes of or in relation to corporate takeovers, mergers and schemes of arrangement.

[1011] He was an excellent and objective witness who had gone to considerable lengths to analyse the financial information concerning TSM, LTD and the

[349] Exhibit P53.
[350] T1291-1296, Schedule R2 to Exhibit P53.

personal plaintiffs, as provided to him, and presented his digests of it in clear and understandable formats.

[1012] I found his analyses, and particularly his reconstruction of the Group financial position at specific times, of very considerable assistance. His evidence exuded logic and common sense and has to be attributed substantial weight.

[1013] I have already referred to one aspect of the evidence of this witness and will not retrace what I have already said. His reports span a variety of additional topics, including reviews of both the Clark and the Martin reports.

[1014] They contain useful summaries of the financial situations of both TSM and LTD at relevant dates.[351] Edwards also contended that, as at mid November 1997 when TSM sought the additional $500,000, the relevant net worth had further diminished to $260,684.

[1015] In the course of approaching his task this witness commented that it appeared that the plaintiffs sought to assert that, following the withdrawal of funding by the ANZ, they had been forced to sell the various properties referred to in evidence at fire sale prices.

[351] Exhibit D62, paragraphs 26 and 30.

[1016] He argued that this was not accurate and that the relevant valuations suggested that an orderly sale process had actually realised realistic prices for the properties in question.

[1017] Clark accepted, in Exhibit P54, that such was the case, but pointed out that his comparison had been between the sale price in 1998 and the capital appreciation that would have occurred as of 2007.

[1018] In Part III of his initial report[352] Edwards identified what he considered to be the specific defects in the re-financing proposal. His view was essentially in accord with the findings that I have elsewhere expressed in that regard.

[1019] He joined issue with the methodology employed by Clark as being fundamentally flawed.[353]

[1020] Additionally, he sought to make point that the profit and loss and cash flow projections provided for the financial year ended 30 June 1998 were based on what he considered to be overly optimistic assumptions, as were LTD projections.[354]

[1021] This witness emphasised that, as at mid November 1997, TSM had consistently exhibited a high level of gearing and negative working capital. Although TSM was profitable in the financial year ended 30 June 1997, its NPAT and profit margin were very small.

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[352] Exhibit D62.
[353] For reasons expressed by him in paragraphs 21 and 22 and paragraph 83 et seq of Exhibit D62.
[354] For the reasons set out in paragraphs 51 to 54 inclusive of Exhibit D62.

[1022] The average NPAT margin over a four-year period had been 1.1 percent and the NPAT for the year ended 30 June 1997 was a mere $57,497.

[1023] Having earlier in his report indicated that LTD had, as at 30 June 1998, returned both a negative NPAT and a deficiency of assets over liabilities,[355] he sought to demonstrate that, as at 19 November 1997 on the information then available, that entity would have had negative net assets of the order of $241,703. It had liabilities of $1,144,435 as against assets of $902,732.[356]

[1024] He later revised those figures in Exhibit P76 to throw up a result of negative net assets of $396,173.

[1025] Those figures fall to be contrasted with the situation as at 31 October 1997, as of when he initially calculated that there had been negative net assets of $215,367 (resulting from total liabilities of $1,051,172 as against assets of $835,805).[357]

[1026] That figure was also later revised, in Exhibit P74. The resultant revised negative net assets figure was $369,837.

[1027] Of particular interest was his analysis of the probable outcomes of the two LTD development projects.[358] He calculated that LTD sustained a direct

[355] Paragraph 30.
[356] Exhibit D62 paragraph 69 and Annexure G.
[357] Exhibit D62 Appendix E.
[358] T2284-2285.

loss of the order of $135,000 on the first project and a further direct loss of the order of $154,470 on the second.[359]

[1028] He emphasised that those figures did not take into account indirect overheads. He drew attention to the fact that, on his computations, LTD had operating expenses of $80,210 up to 30 October 1997. Edwards pointed out that additional operating expenses would also have been incurred after that date.

[1029] He accepted that the figures produced by him necessarily depended, for their accuracy, on the validity of the assumptions accepted for the purposes of the computations.

[1030] He acknowledged in paragraph 54 of his initial report that the books of LTD only showed a total loss of $247,991 for the year ended 30 June 1998, but said that he was unable to determine how that figure had been arrived at and when any loss had been capitalised for accounting purposes.[360]

[1031] I pause to re-iterate that I am quite satisfied that DLS and ECD did not ever carry out a definitive evaluation of the outcomes of either of the two development projects and, in reality, were totally unaware of what definitive financial results were actually being achieved in relation to them.

[359] Paragraph 75 of Exhibit D62 and Appendix D to that report.
[360] T2286-2287. See also discussion at T2289-2290.

[1032] I consider that the evidence of the witness Edwards as to the extent of project losses sustained is reasonably accurate, at least in indicative terms. I also accept Ms Kelly's submission that it was not until in the course of the trial that DLS ever gained any real insight into the financial outcome of the LTD operations.

[1033] LTD was plainly in a very difficult financial position as at 19 November 1997. It would have been unable to proceed with future development projects on completion of the second LTD development project without external funding or selling assets.[361]

[1034] Edwards sought, in both his written report and his oral evidence, to challenge the validity of the estimates of economic loss said by the plaintiffs to have been sustained by TSM as a consequence of the withdrawal of funds by the ANZ.

[1035] It will suffice for present purposes to focus on key issues identified by this witness, without descending into undue detail referred to by him -- although, of course, I have carefully considered all of his written material and his oral evidence.

[1036] His fundamental thesis was that the spreadsheets utilised by Clark in arriving at his ultimate estimates were, to employ his phraseology, "totally

[361] Exhibit D62, paragraph 79.

unreliable".[362] He set out to illustrate this, initially, by reference to Schedule C1 to Clark's supplementary report dated 28 September 2007.[363]

[1037] That Schedule seeks to encapsulate TSM amended NPAT by product group figures that led Clark to the conclusion that such entity had sustained the total loss of business income of $46,962,564 in respect of the financial years 1998 to 2007 inclusive.

[1038] The first point made by Edwards was that the future projected profit figures relied on bore no resemblance to the historical financial performance of TSM. As he put it:

> "… if you look at the actual results, in 1997 they made 57,000 after tax but the previous years, '94 they lost money, '95 they only made 15,000 and in 1996 they made about 19,000, yet these projections say that by 2007 we were going to make $12.5 million".[364]

[1039] He stressed that the historical net profit margins were very low, yet the projected future profit margins are very high. He emphasised that the projected figures indicate a pre-tax margin of 39.7 percent.

[1040] Edwards elaborated upon this general topic by inviting attention to the figures set out by him in Table 18 contained in paragraph 99 of his report dated 21 April 2008.[365]

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[362] T2001.
[363] Exhibit P53.
[364] T2002.
[365] Exhibit D62.

[1041] In that paragraph, in which he described what he termed the reasonableness test, he had this to say:

> " …… net profit margin was forecast to increase almost 10 times over the ten year period, from 3% in 1997 to 27.8% in 2007.

Table 18 : Actual and projected sales and NPATs of TSM

Year		Sales	NPATs	NPAT Margin
		$	$	%
1994	Actual	1,445,081	(8,650)	- 0.6
1995	Actual	1,834,571	15,055	0.8
1996	Actual	1,909,339	18,677	1.0
1997	Actual	1,809.025	57,497	3.2
1998	Projected	2,666,444	189,042	7.1
1999	Projected	3,720,413	379,581	10.2
2000	Projected	7,104,067	901,753	12.7
2001	Projected	10,983,988	1,813,377	16.5
2002	Projected	15,599,839	2,588,467	16.6
2003	Projected	21,125,964	4,533,709	21.5
2004	Projected	25,920,966	6,225,797	24.0
2005	Projected	31,448,063	7,378,123	23.5
2006	Projected	38,727,992	10,384,033	26.8
2007	Projected	45,247,600	12,568,682	27.8

Source: Actual figures are obtained from the financial statements of TSM, projected figures are obtained from various schedules in the Second Report."

[1042] Edwards raised two issues as to this. The first was that a pre-tax margin of such an order was, on the face of it, unrealistic. The second was that, even if a high margin was attainable, the question must be asked as to whether it could be sustained over the long term.

[1043] He said that, in cases in which companies do generate really high profit margins, this inevitably attracts competitors into the relevant market, with the result that profit margins tend to be eroded to some extent.

[1044] Edwards argued that Clark had, inappropriately, simply relied upon the projections prepared by the management of TSM without verifying underlying assumptions used in them[366] -- a proposition that Clark sought to refute in some detail in his supplementary report.[367]

[1045] Edwards said, in addressing Clark's expressed refutation, that, although the latter had provided detailed explanations of individual items, he had not verified the reasonableness of the most critical assumption in the profit projections, which was TSM budgeted sales.[368]

[1046] The witness elaborated upon what he contended was the lack of realism of the profit projections. He directed attention to the fact that the true TSM

[366] Exhibit D62 paragraph 90.
[367] Exhibit P53.
[368] Exhibit D62 paragraphs 93 and 94.

NPAT in the 1998 year was $37,865, as against the projected figure of $189,042 relied on. He testified that the projections made actually imply a 71.4 percent increase in profit every year -- a huge increase that, in his opinion, bore no resemblance to historical reality.[369]

[1047] He also made the point that the Clark figures incorrectly used a corporate tax rate of 30 percent for the years ended 30 June 2000 and 2001, whereas the correct rates were 36 percent and 34 percent respectively -- a criticism that Clark accepts in Exhibit P54, paragraph 5. The practical effect was to overstate estimated lost profits.[370]

[1048] The second point made by this witness was that the projections relied on assumed that actual sales of $1.8 million in 1997 would escalate to $45.2 million in 2007, which implies a compounding growth of 38 percent per annum.[371] He contrasted such a projected situation with the statement in the re-financing proposal in which it was represented to the ANZ that it was considered that a sales growth rate of 4-5 percent was sustainable.

[1049] The third major point made by Edwards was that he questioned whether the projected figures made adequate allowance in respect of a very large capital expenditure that would necessarily have to be made (assuming that funding for it could in fact be procured) to support the anticipated expanded production involved. [I take Clark to accept that no such

[369] T2004.
[370] Exhibit D62 paragraph 103.
[371] T2003.

predicted expenditure was allowed for in respect of curved flashings or housing, but he said that certain allowances were referred to for other items, in paragraphs 3.2.8 and 5.2.4 of his report.][372]

[1050] As Edwards succinctly put it:

> "If you're going to go from selling $1.8m worth of product to $45m, you're going to have a substantial investment in plant and machinery etc to have the capacity to do it. And there doesn't seem to be any significant allowance in the projections set out in Clark's report for those capital expenditures, or, for that matter, a working capital associated with growing a business".[373]

[1051] Edwards drew attention to the fact that, if a business grows substantially, it has higher receivables, but the entity needs significant additional working capital to reflect the fact that it must fund escalating payments to creditors, bearing in mind that, when product is sold, the proceeds of sale are not received for 30 days or more after sale.

[1052] So it is that "… if sales go up, working capital requirements go up and interest costs go up".[374]

[1053] This witness contended that the Clark projections simply do not indicate adequate allowances for the factors in question. Indeed, it was his

[372] Exhibit P54 paragraph 6.
[373] T2004.
[374] T2005. See also the points made by Edwards in Exhibit D62 paragraphs 104-108, in relation to the impact of retained cash for working capital and the effect of not adequately allowing for it in estimating economic loss.

contention that the Clark figures do not allow for the relevant additional interest expenses at all.[375]

[1054] The next point raised by Edwards was that the predictions, on the face of them, imply unrealistic direct labour cost savings with increased production volumes and, at the same time, do not reflect either significant capital investment associated with the increased production, nor any appropriate allowance for plant replacement over time.[376]

[1055] He invited attention, by way of illustration, to Schedule A2 to Exhibit P53. That schedule implied, in relation to awning production, a 96 percent labour cost reduction per unit in 2001-2002, but only very modest capital investment (CAPEX) costs for the same period.

[1056] This witness raised other, more general, questions bearing on the validity of the projected figures.[377] I do not propose to recite all of them in detail.

[1057] It will suffice to say that many of his general concerns bore on issues of market analysis in respect of the various product items referred to in the Schedule C1 summary.

[1058] He expressed the view that, in so far as items were new or relatively new products, very real issues arose as to whether TSM could manufacture them at the costs postulated. He considered that the costs relied upon were essentially hypothetical and unproven.

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[375] T2006-2007.
[376] T2008-2009.
[377] These are referred to at T2010 et seq and Exhibit D62 paragraph 21.

[1059] Edwards said that, more importantly, it was vital to determine what total market existed for each product in question, who were the competitors in relation to that product and what market share could realistically be achieved and maintained. This, in turn, was linked to issues of costs, achievable selling prices, CAPEX expenditure and financing costs.

[1060] Edwards argued that there was no evidence that any proper market studies/analyses had been done to support the figures propounded and that the straight-line projections portrayed in the Clark spreadsheets were, on the face of them, patently unrealistic. They thus gave rise to quite extra-ordinary assumptions and results.

[1061] He further contended that, quite apart from such aspects, the projections relied on essentially took no account of obvious risks and contingencies [378] -- they were treated as certain outcomes that did not even appear to make due allowance for the time value of money or inflation.[379]

[1062] Edwards asserted that a 10-year future profit projection, even if soundly based on proper analyses of cost and market, could be no more than a forecast, in relation to which "there are a whole bundle of factors which will impact on the outcome".[380]

[1063] I pause to note that, in Exhibit P54 paragraph 1, Clark accepted that no allowance had been made for time value, but he said that this was not

[378] T2346.
[379] T2042.
[380] T2042.

necessary because the losses calculated were past losses for the period 1998 to 2007. I consider that there is weight in that contention.

[1064] I took the "bundle of factors" referred to by Edwards to include aspects such as economic factors and changing technological and other environmental considerations,[381] as well as market requirements, to name but some variable elements. This witness also referred to the potentially destabilising factor of activities of competitors (where relevant) to combat impingements on their market share.[382]

[1065] He further noted, in his report, the further need to take account of the possibility of the unsuccessful management and conduct of the business of TSM, as a business – a not ephemeral consideration in light of the various problems encountered in the past, as I have recited them.

[1066] He also made the point that "Mr Clark assumes that TSM would remain solvent and profitable and would be capable of pursuing its expansion plan which probably would not have been the case, given TSM's historical track record, negative working capital and high gearing ratio as at 30 June 1997".

[1067] So it is, this witness said, that an appropriate discount rate must be applied to any projections, however soundly based they may appear to be. However, Edwards stressed that, if the underlying cash flows cannot be

[381] T2108.
[382] T2107-108.

demonstrated to be realistic, then no discount rate will necessarily allow for the overly optimistic cash flow forecasts.[383]

[1068] This witness argued that, absent any realistic or reliable cash flow projections, the only way the business can be valued is by capitalising the future maintainable earnings that it might generate.

[1069] In such an exercise, one starts with the historical results of the subject business. It is then necessary to take into account the factors that might impact on the profitability in the future, to form a view as to what realistic forecast may be made for one or two years out -- to assess the maintainable earnings of the entity.[384]

[1070] Edwards acknowledged that, in so doing, historical results need to be adjusted for any "one-off" or non-recurring items and consideration needs to be given to the level of remuneration drawn by the principals of the business and whether it is realistic and appropriate.

[1071] However, even given the propriety of "one off" adjustments, he was unable to satisfy himself from any of the relevant accounting records that there was any proper basis for the substantially higher gross profit margins sought to be espoused by the plaintiffs.[385]

[1072] Finally, this witness flagged, as an important matter of general approach, that, in his opinion, it is erroneous to proceed, as Clark appears to have

[383] T2042-2043.
[384] T2043.
[385] T2360.

done, on the assumption that the economic loss sustained by the plaintiffs was entirely due to the ANZ withdrawing funding as and when it did.

[1073] He noted a need to take into account other contributing factors such as the losses incurred by LTD on its development projects and the misappropriation of funds by Godwin.

[1074] I pause to comment that yet another factor that surely needs to have been borne in mind, quite apart from Godwin's defalcations and fraudulent conduct, is the practical impact of his failure to contribute the promised working capital of $400,000 in the context of the committal by the principals of TSM to relevant business initiatives on the faith of the promise made.

[1075] In his supplementary report of 19 September 2008,[386] Edwards sought to review the approach adopted by the witness Martin. He discussed features of the review in the course of his oral evidence.

[1076] Edwards joined issue with the appropriateness of Martin's projection based on an average increase in revenue or sales of 9.7 percent over the period 1993/1994 through to 1997/1998.

[1077] On the basis set out in paragraph 4 of his supplementary report and as adverted to in his oral evidence,[387] he contended that the Martin figures inappropriately included a $280,000 "one-off" property sale. When the

[386] Exhibit D63.
[387] T2044-2045.

relevant figures were adjusted to reflect such a situation the average increase in the relevant period was in fact 6.1 percent.

[1078] This witness directed attention to the fact that the real growth in revenue over the three years ended 30 June 1998 was an average of 1.34 percent per annum, by way of contrast with the figure of 9.7 percent per annum real rate of growth adopted by Martin.

[1079] I took Edwards, in the course of his supplementary report, to opine that, had the ANZ declined funding to TSM in November 1997, there was no evidence that it would have had access to any alternative source of funding. Indeed, it was his opinion that, had the true financial position of the Group been disclosed to the ANZ in the re-financing proposal, it is likely that the funding sought would not have been approved.[388]

[1080] Accordingly, he considered that, absent the fulfilment by Godwin of his promise to contribute $400,000 working capital, it was unlikely that TSM would have been able to pay all of its creditors in the then immediate future. This would, in turn, have had obvious adverse implications as to its ability to continue to trade.

[1081] Edwards joined issue with various calculations made by Martin.[389]

[1082] In essence, he argued that Martin had overlooked certain existing liabilities of LTD, personal guarantees given by DLS, ECD and Godwin, and the

[388] Exhibit D62 paragraph 111.
[389] Exhibit D63 paragraphs 19-34 and Edwards' oral evidence at T2045 et seq.

consequential implications for TSM arising from such situations. He particularly drew attention to the large liability to NPG and the accruing interest in respect of it, as guaranteed by the principals of TSM and Godwin.

[1083] The calculations made by Edwards are set out in paragraph 22 of Exhibit D63 and further elaborated upon at T2047-2048 and T2049-2051. Those figures speak for themselves and there is no need to here reiterate them.

[1084] Edwards concluded that, absent ANZ funding, TSM was technically insolvent in the sense of being unable to pay its debts as they fell due as at November 1997[390] -- a situation that also existed as at 2 January 1998.[391]

[1085] He pointed out that any situations sought to be illustrated by balance sheet figures[392] were really artificial because they assumed an instant realisation of assets, whereas this would not be feasible in practice.[393]

[1086] He rejected the proposition that, in his second report, he was merely referring to what Mr Sallis described as "balance sheet insolvency", an expression that, seemingly, was not meaningful to him.[394]

[1087] Against such a background, Edwards examined the assets owned by TSM and its directors as at 27 November 1997 that might have been resorted to

[390] T2051.
[391] See calculations referred to at T2058.
[392] e.g. those referred to in paragraphs 34 and 49 of Exhibit D63 and Exhibits P80 and P81.
[393] T2400.
[394] T2400 et seq, 2403, 2404-2405.

over time to satisfy debts and enable the business to continue. The net result of the examination is set out in paragraph 34 and 35 of Exhibit D63, as amplified by the oral evidence of Edwards.[395]

[1088] Given due allowance for accruing interest pending settlement of asset sales and the proceeds of the Spencer asset sale referred to (which were not actually received until 23 December 1997), there would, he said, remain the shortfall referred to by Edwards at T2054. Additionally, LTD creditors of about $200,000 would remain unpaid, reflecting very adversely on TSM in the Darwin market, in any event.

[1089] Ms Kelly drew Edwards' attention to the fact that, at the end of November 1997, TSM was in the course of building two houses for erection at Forrest Parade, which were eventually sold at the end of March 1998.[396] I took Edwards to make the point that this was scarcely relevant to the solvency of TSM as at 27 November 1997, some four months earlier. The proceeds were not then readily available.[397] This was at a time when the TSM cash flow was generally negative.

[1090] In paragraphs 40-50 of Exhibit D63 Edwards demonstrated that, as at 2 January 1998, TSM's position had actually worsened.[398]

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[395] T2049-2055.
[396] One was sold to SED for $94,431.78 (T1141) and the other to NKS (for approximately $138,000(T152).
[397] T2055.
[398] T2056-2058.

[1091] He was pressed in cross examination concerning his conclusions as to the financial position of TSM as at late November 1997 and 2 January 1998 respectively,[399] particularly with regard to the issue of its likely capacity to continue to trade in its core business other than housing construction, absent financial support from the ANZ.

[1092] Mr Sallis put financial summaries related to hypothetical asset realisation outcomes to Edwards[400] and explored these in some detail.[401]

[1093] At the end of the day I took Edwards to concede that, on the bases set out in the outcomes, it appeared hypothetically possible that TSM could have continued to trade in its core business at both dates[402] -- given that unsecured creditors of LTD amounting to about $200,000 would have been left unpaid and without recourse to TSM.[403]

[1094] He said that, on an acceptance of the asserted sales figures for the financial year ended 30 June 1997, there might well be an income stream of the order of $46,957 that could, for example, service interest on borrowings.[404]

[1095] The foregoing situation presupposes that it would have been possible to sell the TSM land and workshop premises at the figures stipulated on a satisfactory leaseback basis and also that NPG would have allowed sufficient time for asset realisation to enable the whole of the debt due to it

[399] T2369 et seq.
[400] Exhibits P80 and P81.
[401] T2369 et seq.
[402] T2380, 2387,2394.
[403] T2379.
[404] T2483-2484.

to be repaid. The hypothetical position would also depend on TSM's ability to service current trading debts.[405]

[1096] I pause to emphasise that such scenarios *are* very much of a hypothetical nature. Edwards commented that, in the practical commercial world, the ability of TSM to effectively continue its former core business would have very much depended on its relationship with its creditors, particularly if any of those creditors were common to both TSM and LTD (e.g. steel suppliers).

[1097] The scenarios in question each contemplate that a substantial quantum of LTD creditors' debts would have remained unsatisfied in any event and such a situation might well have resulted in TSM's credit being adversely assessed by suppliers, having regard to its association with LTD.

[1098] TSM may well have been required by suppliers to pay cash or to enjoy only very short term payment conditions -- thereby adversely affecting its cash flow and trading capacity.[406] That situation was exacerbated by the fact that TSM was afflicted by a fairly constant negative cash flow situation.[407]

[1099] Edwards was asked to revisit the content of Exhibit P80 and P81 in re-examination. He expressed the opinion that the figures propounded in those exhibits gave an incomplete (and thus erroneous) view of the true situation. He presented reworked versions of them which, he contended,

[405] T2379.
[406] T2394, 2397-2398.
[407] As demonstrated in Exhibit D75.

portrayed a more accurate resume of the relevant financial outcomes as at 26 November 1997 and 2 January 1998 respectively.[408]

[1100] In essence, he argued that Exhibit P80 omitted to take into account:

(1) Interest accruing, during the projected three-month asset realisation period, in respect of the CBA advances and the loan on the Raffles Road property, as well as real estate realisation costs of $25,800;

(2) TSM creditors totalling $241,000 as at 26 November 1997; and

(3) The fact that the realisable value of the TSM land and workshop premises was only $480,000, rather than 510,000.

[1101] Adjustments to take account of those aspects produced a net deficiency of $37,063, after payment of TSM creditors.

[1102] Edwards further contended that Exhibit P81 suffered from somewhat similar deficiencies, the relevant omissions being:

(1) Interest accruing to the CBA during the three month selling period;

(2) Interest on the initial ANZ advances during the same period;

(3) Allowance for real estate realisation costs.

[1103] He made the point that, as at 2 January 1998, allowance also needed to be made for outstanding TSM creditors, the detail of which he did not have.

[408] Exhibits D73 and D74.

[1104] He made no allowance for the value of the Forrest parade houses under construction, the proceeds of which did come in at a later stage, because, in the meantime, additional outgoings were being incurred and those outgoings exceeded the money coming in.[409]

[1105] On his recalculation, after writing in the full $250,000 manufacturing costs then said to have been incurred by TSM on behalf of LTD,[410] there was a resultant deficiency of $14,494 as at 2 January 1998, to which the then level of TSM indebtedness to creditors needed to be added.

[1106] The detailed explanations of Edwards' reworking of Exhibits P80 and P81 are to be found at T2489 et seq. He summarised his conclusions in relation to Exhibits D73 and D74 by making the point that the contemplated asset sales leading to the ultimate results calculated would significantly constrain TSM's ability to borrow and thus to grow its business.

[1107] He drew attention to the fact that, as at 26 November 1997, TSM was owed $55,000 by LTD. If the latter entity failed TSM would suffer a loss to that extent.[411] It was pointed out that the TSM accounts as at 30 June 1997 indicated that it had net tangible assets of about $21,000, so that, if the $55,000 was written off, there would be a resultant deficiency of assets.

[409] T2491-2493.
[410] T2491.
[411] T2494.

[1108] Moreover, in such a scenario, TSM would presumably also not recover the $250,000 manufacturing costs owing to it. This would clearly have an adverse affect on TSM's capacity to trade.

[1109] Additionally, Edwards said, the TSM projected results for the year ended 30 June 1998[412] included $694,500 projected sales to LTD (i.e. 31.9 percent of its total projected revenue). The loss of such revenue would have a substantial adverse affect on TSM profitability.[413]

[1110] In reviewing the evidence of Edwards it is necessary to have regard to certain other points that emerged in the course of his cross examination. The salient aspects that arose were:

(1) Clark did in fact, as a prelude to the preparation of his second report, pursue detailed enquiries of DLS on a line by line basis, in an attempt to confirm the validity of the cash flow projection figures evolved by the latter.

(2) Edwards accepted that, bearing in mind the experience and expertise of DLS, it was not unreasonable for Clark to have accepted and acted upon certain of the assumptions that had been propounded. e.g. detailed direct production costs of individual items.

[412] Exhibit D51 page 69.
[413] T2495.

(3) However, he argued that this only partly met his criticisms, because the enquiries did not adequately address the sales/market aspects that were key considerations.

(4) Edwards himself had not, in formulating his opinions, pursued specific enquiries that were desirable and appropriate concerning a number of identified topics, as contemplated by the rules of court related to expert witnesses, although that omission did not gainsay his general, conceptual opinions.

(5) On the other hand, this deficiency had the practical effect of rendering his evidence based, for example, on the figures contained in Exhibit P70 of little practical weight.[414]

(6) He conceded that certain of the cash flow projections did contain provision for some future major CAPEX items, but he contended that it was not possible to discern any specific provision for recurrent replacement CAPEX items as plant and equipment became worn out, by way of contrast with provision for routine maintenance and repair costs.[415]

(7) However, he had not pursued detailed enquiries as to the composition of general factory operating expenses and agreed that he therefore did not know whether they contained any element of the types of expenditure referred to by him.

[414] T2135-2140.
[415] cf T2485-2488.

(8) Edwards conceded that, in conducting his review of the cash flow projections, he did not have any knowledge of the production capacity of the existing TSM plant and equipment (e.g. the tank production line and the equipment for production of metal flashings) and therefore had no basis for assessing the need (if any) for additional CAPEX at a given point in time, nor did he have any knowledge of the expected life of any particular equipments.

(9) This witness accepted that the projected move of the tank production line to Queensland would necessarily provide access to a larger demographic market and that aspects such as government rebates and water restrictions in that State were relevant matters for consideration -- as to which he had not sought any detailed information.

(10) He stated that his recent informal enquiries indicated that relevant statistical/marketing information as to tanks in Australian households was available through BIS Shrapnel and the Australian Bureau of Statistics.

(11) He agreed with the proposition that it was to be expected that the introduction of mass production of product would improve future profitability. He accepted that, in undertaking a loss assessment, it

would be appropriate to make an allowance for loss of the opportunity to engage in mass production.[416]

(12) Edwards conceded that, in relation to his criticism of the lack of evidence of adequate allowance for interest and borrowing costs, he had not made any detailed enquiries as to what borrowings might become necessary, the sources of income potentially available to TSM and the extent to which cash flow and negotiated terms of trade might be availed of by that entity.

(13) Edwards indicated that, having been taken through certain of the cash flow projection items on a line by line basis, he was prepared to accept a variety of the costing figures as appropriate, based on the experience of DLS and the detail obtained by Clark as set out in Exhibit P53.

(14) Nevertheless, he emphasised that this did not assuage his main concerns that were directed principally to what he considered to be a combination of a lack of verification of sales/marketing projections and an adequate allowance for CAPEX and interest commitments to support the proposed massive increased levels of production and turnover.

(15) It is a not unfair summation to say that Edwards' truly major concern was that, on the face of the figures presented, there were, in his

[416] T2468.

opinion, patently extravagant forecasts of budgeted sales in particular.

(16) He considered that these had no satisfactory verification or support and did not take adequate account of the relevant commercial risks.[417] He described them as "hockey stick projections" of a type that rendered them plainly unreliable -- they could not survive an overall reasonableness check.[418]

(17) It is essentially on that basis that he asserted that the Clark calculations of loss are grossly overstated. It was his view that, if he was advising a possible purchaser of the business, he would recommend that it would be a waste of time undertaking a review of the relevant projections, because, on the face of them, they were plainly unreliable.[419]

(18) I took Edwards to concede that, due to the lapse of time since relevant events occurred, Clark's assessments were, in reality, calculations of what, in the event, were past and not future losses, so that the concept of time value of money was of little relevance, as contended by Clark.

(19) Mr Sallis pursued a number of other detailed topics, in the course of his cross examination of Edwards, to which I have given due

[417] cf T2192-2195.
[418] T2157-2158.
[419] T2182-2183.

consideration.[420] I find it unnecessary to specifically recite these for present purposes.

[1111] I do, however, note that Mr Sallis established that Edwards had resorted to documentation related to criminal proceedings brought against Godwin as a source for some of the figures used by him for the purposes of his report.[421] The documentation in question was not tendered in evidence. It follows that the product of the use of that material is valid only to the extent that the figures in question derive support from other evidentiary material that was admitted.

The expert evidence as to technical and financial aspects

[1112] I have traversed this evidence in some detail with a view to illustrating where the points of commonality and difference arose as between the relevant expert witnesses. In the course of so doing I have already indicated certain areas of preference. I will, however, proceed to some more specific conclusions both immediately and also in the course of consideration of the various pleaded causes of action.

General conclusions as to the opinions of the financial experts

[1113] Following an analysis of the reports and opinions expressed by the witnesses Martin, Clark and Edwards, I have no hesitation in generally preferring what fell from Edwards (as I have summarised his evidence,

[420] See, for example, T2071-2186, 2106, 2199, 2209, 2212-2214, 2217 et seq, 2248-2252, 2364 et seq, 2366-2368,2395-2396, 2398-2399, 2407-2415, 2469-2470 and so on.
[421] T2294 et seq.

including and giving due recognition to his responses in cross examination), where his views conflict with those of Martin and Clark as to issues of quantum, subject to the qualifications that I have expressed.

[1114] Having attempted a comparative analysis of their evidence as I have just done, it will suffice to say that I have arrived at that conclusion for reasons that I now broadly express.

[1115] A major problem with some aspects of Martin's evidence was that he was compelled to produce his report under considerable pressure and, as I have earlier indicated, he did not have an opportunity of conducting independent investigations as to some aspects and had an imperfect grasp of relevant historical facts as to others.

[1116] I considered that his assessment of the likely future trading results of TSM was unduly optimistic and unrealistic and did not have due regard to the practical problems with which it had been and would have continued to be beset, or the implications of its past financial performance.

[1117] Ms Kelly's cross examination of this witness highlighted some weaknesses in his reasoning and conclusions. It is unnecessary to repeat my summation of it.

[1118] At the end of the day I did not find his forward projections or his opinion as to TSM's ability to achieve very substantial profits at all convincing. They certainly did not make due allowance for both the practical problems

and chronic under capitalisation of TSM, coupled with what I assess to be the relatively poor business acumen and performance of DLS and ECD, as illustrated in my summation of narrative events.

[1119] With all due respect, I found the opinions expressed by the witness Clark as to quantum of loss both utterly unconvincing and unrealistic, largely for the reasons advanced by Edwards, whose criticisms bore the force of patent commonsense.

[1120] To seriously accept, for example, the relevant forward sales projections and act upon them as he did seemed to me to ignore practical reality. Not only was there little or no marketing evidence to support the likely extent of sales premised, but also the projections produced simply do not reflect a key practical problem identified by Edwards, namely, that a massive increase in production implies a need for (and the capacity to generate) a very substantial infusion of capital expenditure and working capital - a capacity that has not been demonstrated. Nor do the projections reflect the reality of some aspects of the marketplace.

[1121] The Clark approach also implies a level of management skill not demonstrated by the principals of TSM.

[1122] In essence, the major assumptions made by Clark to underpin his ultimate opinions were not made good on the evidence as a whole. As Edwards pointed out, the projected profit figures bore no resemblance to the historical performance of TSM and the suggested sustained sales growth

and exponentially increasing NPAT margins were plainly unachievable or unsustainable in the real commercial world, on the face of them. They were, on the evidence in this case, nothing short of fanciful and divorced from reality, for the reasons expressed by Edwards.

[1123] I merely content myself by saying that the analysis of Edwards' criticisms of Clark's results (and, for that matter, those of Martin's) which I have earlier summarised in these reasons speaks for itself. Those criticisms are, manifestly, counsels of patent commonsense and logic.

[1124] Moreover, Edwards' points concerning economic factors, changing technological and other environmental considerations, as well as market requirements and reactions, the activities of competitors and other potential commercial risks derive considerable practical support from the evidence and experience of the witness Newley, as I have already pointed out.

[1125] For those reasons, I found the opinions (and, where relevant, "*hockey stick*" projections) of Martin and Clark respectively as to quantum of limited assistance where they departed from those of Edwards. In so commenting I do, however, recognize that both the Martin and Clark written materials in particular are helpful to the extent that they supply actual relevant data.

[1126] At the risk of some over simplification, I also observe that there were some conceptual aspects of methodology, in particular, where there was no

substantial dispute between the expert witnesses. In the main, disputes arose as to the practical application of various concepts.

PART III

A consideration of the causes of action pleaded by the plaintiffs

Introduction

[1127] I now come to the causes of action pleaded by the parties in both the claim and counterclaim.

[1128] Following closure by the parties of their respective cases, I drew attention to the difficulties confronting me by reason of the rolled up nature of the pleading in the statement of claim and invited Mr Sallis to clarify precisely what it was that the plaintiffs were seeking to propound.

[1129] In the course of his submissions he indicated that, whilst the plaintiffs' claims founded on all other causes of action were essentially based on much the same evidence as their claim for breach of fiduciary duty, that cause of action was relied upon as constituting their primary claim against the ANZ. Nevertheless, all causes of action pleaded were actively pursued.

[1130] This was the first indication that the plaintiffs elected to treat the claim for breach of fiduciary duty as their primary thrust. Up to that point, the trial had gone forward on the implicit basis that the plaintiffs were pressing all causes of action with equal fervour and the statement of claim is expressed in a form consistent with such an approach, each cause of action being

pleaded as alternative to the other with reference to previously expressed particulars.

[1131] It would normally be logical to review the plaintiffs' stated primary claim first and then deal with the other alternative claims sequentially thereafter. However, by reason of the format of the pleadings in this case, it is not feasible to do so in an economical fashion, without undue repetition of matters pleaded.

[1132] The statement of claim deals with the various causes of action in the sequence:

(1) The TPA claim,

(2)(3)The claims based on common law duty of care and breach of fiduciary duty,

(4) The claim based on negligent misstatement, and

(5) The claim based on breach of contract.

The pleadings related to (2) and (3) are substantially intermingled and the two causes of action are not pursued under separate, discrete headings.

[1133] A major problem that arises in relation to what is now identified as the primary claim is that the pleadings in relation to it refer back to those related to the TPA claim in a shorthand fashion and, in part, are identical with those pertaining to the issue of common law duty of care. Moreover, there is an obvious need to deal with certain aspects of the claim based on

common law duty of care in parallel with certain facets of the claims founded on breach of contract.

[1134] As all pleaded causes of action remain alive and on what I perceive to be the most efficient manner of addressing the pleadings, I therefore propose to consider the legal issues arising on the evidence under the headings and in the sequence that follows.

The claim based on the provisions of the TPA

The claim

[1135] The plaintiffs assert that the conduct of the ANZ and representations made by its officers in relation to the matters earlier summarised were misleading and deceptive and did in fact mislead and deceive them, in contravention of s 51A and s 52 of the TPA.

[1136] They specifically plead that the conduct of the ANZ was misleading and deceptive or likely to mislead or deceive the plaintiffs into believing when it was not the case:

(1) That, prior to approving the finance application and/or entering into the finance agreement, the ANZ had undertaken appropriate Lands Title Office searches to ensure that Godwin was in fact the registered and equitable owner of the alleged Godwin properties;

(2) That, if Godwin was not the registered and equitable owner of either or both the alleged Godwin properties, the ANZ would promptly

ascertain those facts and notify them to the plaintiffs, or any of them, prior to -

(a) approving the finance application;

(b) offering to enter into the finance agreement;

(c) requesting the plaintiffs, or any of them, to execute any security documentation the subject of the finance agreement in favour of the ANZ;

(d) opening a business overdraft account for TSM and permitting TSM to draw down funds against that facility;

(3) That, in the event that either or both of the alleged Godwin properties were encumbered, the ANZ would undertake appropriate enquiries to ascertain the full extent of any such encumbrances, and upon ascertaining the same, notify the plaintiffs or any of them of that fact promptly and prior to -

(a) approving the finance application;

(b) offering to enter into the finance agreement; and

(c) requesting the plaintiffs, or any of them, to execute any security documentation the subject of the finance agreement in favour of the ANZ;

(4) That, prior to approving the finance application and/or entering into the finance agreement with TSM -

(a) the ANZ had undertaken appropriate checks to verify the personal asset position, credit record and credit-worthiness of Godwin;

(b) the ANZ had undertaken the credit checks with the CRAA and the NAB to verify the personal asset position, credit record and creditworthiness of Godwin ("the credit checks");

(c) if the CRAA and/or the NAB held information which indicated that Godwin did not have a good credit record or was not a creditworthy individual, the ANZ would notify the plaintiffs, or any of them, of that fact promptly and prior to -

(i) approving the finance application;

(ii) entering into the finance agreement; and

(iii) requesting the plaintiffs, or any of them, to execute security documentation in favour of the ANZ;

(iv) in the event Godwin's personal statement of position was different to that provided to the ANZ, the ANZ would ascertain that fact and notify the plaintiffs, or any of them, promptly of that fact and prior to -

(v) approving the finance application;

(vi) entering into the finance agreement; and

(vii) requesting the plaintiffs, or any of them, to execute any security documentation in favour of the ANZ;

(d) in the event that the ANZ had any concerns regarding Godwin's personal asset position, credit record or credit worthiness, the ANZ would undertake credit checks with the CRAA and promptly notify the plaintiffs of the results thereof; and

(e) that, between November 1997 and the date in January 1998 when the ANZ registered its mortgages over the business and personal assets of the plaintiffs, the ANZ did not have any concerns with regard to Godwin's personal asset position and/or creditworthiness.

[1137] The plaintiffs contend that, as a consequence of the pleaded conduct of the ANZ, TSM was induced to enter into the finance agreement and, thereby, it and the other plaintiffs suffered loss and damage for which the ANZ is liable. The alleged loss and damage is pleaded in some detail and it is unnecessary to recite it at this juncture.

[1138] An immediate problem that arises on the plaintiffs' pleadings is that it is difficult to extract from them in a definitive manner exactly what is said to constitute the "conduct" giving rise to the pleas articulated in paragraph 73 of the statement of claim.

[1139] I agree with Ms Kelly's submission that the pleading in the statement of claim is actually so oblique, in that it simply refers to a large number of prior paragraphs of the statement of claim setting out allegations of

narrative fact, that it is extremely difficult to divine from it precisely what specific conduct of the ANZ is complained of and the manner in which the plaintiffs are said to have been misled or deceived, as above recited, by relevant conduct.

[1140] This is best illustrated by reference to paragraph 73 of the statement of claim, which commences in this fashion:

> "The plaintiffs refer to and repeat any one or more of the matters pleaded at paragraphs 19, 21, 22, 23, 24, 25, 26, 29, 31, 32, 35, 37, 43, 50, 51, 52, 53 and 54 each inclusive herein and in the premises say that any one or more or combination of the statements made, the advice given and/or the conduct by the Bank's offices referred to therein ("the ANZ's Conduct"):
>
> 73.1 was conduct in the course of trade and commerce;
>
> 73.2 amounted to conduct that was misleading and deceptive or likely to mislead or deceive;
>
> 73.3 was conduct which together with the matters pleaded in paragraphs 33-35 herein did in fact mislead and deceive the plaintiffs or any of them;
>
> 73.4 was conduct in contravention of section 52 of the Trade Practices Act 1974;
>
> 73.5 further or alternatively, in so far as the ANZ's conduct constituted one or more representations as to future matters such representations were misleading and deceptive and did in fact mislead and deceive the plaintiffs in contravention of section 51A of the Trade Practices Act 1974."

[1141] I will return to that aspect in due course.

Relevant principles

[1142] Section 52 of the TPA stipulates that a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.

[1143] It is trite to say that, to make good a claim based on a breach of s 52, it must be established that a corporation, in trade or commerce, has "engaged in conduct that is misleading or deceptive or is likely to mislead or deceive", that the claimant relied on the relevant conduct and, as a consequence, suffered loss or damage.

[1144] The published authorities indicate that a very wide meaning has been given to the words employed in the section. The relevant conduct is the doing of or refusing to do an act; and that act may be one of commission or omission.

[1145] Misleading or deceptive conduct often consists of representations, whether express or by silence, but the application of the section is not confined exclusively to circumstances that constitute some form of specific representation.

[1146] Ultimately, in each case, it is necessary to examine the impugned conduct and pose the question whether, as a matter of fact, that conduct, of its

nature, constituted misleading or deceptive conduct or whether the conduct was likely to mislead or deceive.[422]

[1147] The test to be applied is objective[423] and the impugned conduct must be examined as a whole and not isolated parts.[424]

[1148] It has been said that conduct can only have been misleading and deceptive if it conveys a meaning which is inconsistent with the truth and, as a consequence, it induces or is capable of inducing error.[425] It is necessary to determine the likely effect on the type of person likely to be exposed to it and whether the conduct may be expected to lead the appropriate class of persons coming into contact with it being misled or deceived.[426]

[1149] It is well-established on the authorities that silence may be relied on in order to show a breach of s 52 of the TPA, when the circumstances give rise to an obligation to disclose relevant facts (see, for example, the discussion in *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Proprietary Limited*).[427]

[1150] As Hill J commented in *Winterton Constructions Proprietary Limited v Hambros Australia Ltd*,[428] if the circumstances are such that a person is entitled to believe that a relevant matter affecting him or her adversely

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[422] *Henjo Investments Proprietary Limited And Others v Collins Marrickville Proprietary Limited* (1988) 79 ALR 83 at 93).
[423] *FAI General Insurance Co Ltd v RAIA Insurance Brokers Ltd* (1992) 108 ALR 479.
[424] *Butcher v Lachlan Elder Realty Proprietary Limited* (2004) 79 ALJR 308.
[425] *World Series Cricket Proprietary Limited v Parish* (1977) 16 ALR 181.
[426] *McDonald's System of Australia Proprietary Limited v McWilliams Wines Proprietary Limited* (1979) 41 FLR 436.
[427] (1986) 68 ALR 77).
[428] (1992) 111 ALR 649 at 666.

would, if it existed, be communicated, then the failure to so communicate may constitute conduct that is misleading or deceptive. This is because the person who ultimately may act to his or her detriment is entitled to infer from the silence that no danger of detriment existed.

[1151] Whether such a duty exists depends entirely on the circumstances of the case and extends beyond those situations in which the common law would impose a duty of care.

[1152] In the subsequent case of *Warner and Another v Elders Rural Finance Ltd and Others*,[429] Hill J made reference to certain dicta in *Demagogue Proprietary Limited v Ramensky*.[430]

[1153] He expressed the view that his concept of entitlement to expect or entitlement to infer differed little, if at all, from the concept of circumstances giving rise to what was referred to by Black CJ as a reasonable expectation that, if particular matters exist, they will be disclosed.[431]

[1154] It is contended in *Steinwall, Annotated Trade Practices Act 1974, 2008 Edition (Butterworths)* that s 52 may be relied upon in circumstances involving oral discussions between parties that subsequently lead to the consummation of a written agreement. That proposition is undoubtedly

[429] (1993) 113 ALR 517 at 522-523.
[430] (1992) 110 ALR 608.
[431] See also the discussion of this topic by Gummow J in *Demagogue* at 618-619 -- to fall within s 52 it must, he argued, be demonstrated that the circumstances are such as to give rise to the reasonable expectation that, if some relevant fact exists, it would be disclosed. In such a case silence could support the existence of an inference that the relevant fact does not exist.

correct, but it falls to be considered in light of the dicta of Beaumont J in *Seabridge Australia Ltd v JLW (NSW) Proprietary Limited*[432] and, more particularly, Lee J in *Poseidon Ltd v Adelaide Petroleum NL*.[433]

[1155] In the latter case Lee J cited an earlier dictum of Gleeson CJ to the effect that, where parties are dealing at arm's length in a commercial situation in which they have conflicting interests, it will often be the case that one party will be aware of information which, if known to the other, would or might cause that other party to take a different negotiating stance.

[1156] Such a situation does not, of itself, impose any obligation on the first party to bring the information to the attention of the other. It would normally only be if there was an obligation of full disclosure that a different result would follow.

[1157] That might occur, for example, by reason of some feature of the relationship between the parties, or because previous communications between them gave rise to a duty to add to or correct earlier information.

[1158] It is not necessary that the person misled or deceived or likely to be misled or deceived in fact entered into a contract as a result of the conduct. Any loss or damage is to be determined in conformity with tortious liability, not for breach of contract. However, an injured party may sue for breach of contract if the relevant representation is a term of the contract (*Accounting*

[432] (1991) 29 FCR 415.
[433] (1991) 105 ALR 25 at 48.

Systems 2000 (Developments) Proprietary Limited and Another v CCH Australia Ltd and Another).[434]

[1159] The majority in *Butcher* pointed out that, where monetary relief is sought by a plaintiff on an allegation that a particular misrepresentation was made to identified persons, of whom the plaintiff was one, it is necessary to establish a causal link between the impugned conduct and the loss claimed. This involves an examination of the role of the person supplying any misleading information i.e. the character of the conduct complained of in relation to the complainants and the nature of the relevant dealings between the parties.

The basis of the claim made

[1160] The submissions advanced by Mr Sallis do not identify the specific impugned conduct relied upon by the plaintiffs beyond what can be gleaned from the pleadings. I infer that, in essence, reliance is placed on:

(1) What may have been expressly said or inferred by Bradley and/or Baylis at any relevant time concerning the conducting by the ANZ of searches of the titles of the alleged Godwin properties and undertaking necessary enquiries in relation to any encumbrances found to exist,

[434] (1993) 114 ALR 355, 375.

(2) What may have been expressly said or inferred by them, prior to the entry by TSM into the finance agreement, in relation to the ANZ pursuing credit checks through the CRAA and/or the NAB,

(3) What may have been expressly said or inferred by them in relation to the ANZ carrying out appropriate checks to verify the asset position, credit record and creditworthiness of Godwin, and

(4) The failure of the ANZ to inform any of the plaintiffs of its accruing state of knowledge as to the above matters, in so far as that knowledge indicated that Godwin had falsely represented his personal asset position and/or was not creditworthy.

Issues arising

[1161] The assertions made by the plaintiffs as to the manner in which representations made by the bank officers are said to have been misleading and deceptive necessarily imply that those officers (expressly or impliedly) specifically represented to them that the ANZ would, *in their interest*, positively do the various things that are the subject of the complaints of misleading and deceptive conduct above recited; and that it would not approve the finance application or enter into the finance agreement until those processes had been properly completed.

[1162] Indeed, I understand the essence of the plaintiffs' assertions to be that, in effect, Bradley and/or Baylis positively undertook to them that the ANZ would do the things in question *for their benefit*.

[1163] As my findings of narrative fact clearly indicate, the evidence falls far short of establishing such a situation.

[1164] There is no evidence that any bank officer ever made relevant express or implied representations that the ANZ would pursue a particular course of action *in the interest of the plaintiffs, or any of them*. What *was* said by the officers in question amounted to no more than statements by them concerning the requirements of the bank, for *its* purposes, as the prerequisites for proceeding with any proposed loan transaction. I do not accept that there was any reference made by the bank officers to the making of title searches of relevant security properties prior to the issue of loan approval.

[1165] DLS and ECD conceded in cross examination that the key statements made to them focused on what securities could be offered to support the proposed loan facilities,[435] a need for sufficient security in that regard,[436] a requirement for completion of PSPs and appropriate authorisations to

[435] T539.
[436] T1104.

obtain information[437] and the need for the ANZ to verify property values by obtaining its own appropriate valuations.[438]

[1166] These witnesses conceded that what was said to them was, in their experience, what they would have expected to hear as to the bank requirements. Neither of them professed to recall the precise mode of expression of any statements made.

[1167] Further there is singularly little definitive evidence as to what Godwin may have actually represented in relation to the alleged Godwin properties and to whom, beyond what appears in the re-financing proposal and what was later asserted to have been said by him to Baylis concerning the alleged Godwin properties when there were delays in clear title becoming available, at a time when the finance agreement had already been entered into.

[1168] It was common ground that, at the time of the approach to the ANZ, TSM and LTD were desperate for finance.[439] As Ms Kelly expressed the situation, the borrowing of the money from the ANZ had nothing to do with reliance upon any statements made to them about CRAA checks and security availability or valuations, or the like. DLS and ECD willingly acceded to the expressed bank requirements, in order to secure the loan

[437] T1104.
[438] T 541, 1104.
[439] T1106, 528-529.

facilities sought by them. As to this the reasoning in *Sutton* v *AJ Thompson Pty Ltd (in liq)*[440] has relevance.

[1169] In particular, I fail to discern any evidence that the personal plaintiffs were relying on the ANZ to, in effect, check out or verify the asserted asset situation of Godwin on their behalf, or that the bank ever represented or undertook that it would do so. The evidence indicates no more than that the bank simply stipulated *its* pre-requisite conditions for an ultimate credit approval.

[1170] What *is* plain is that DLS and ECD naively (and foolishly) placed implicit trust in Godwin, as I have earlier demonstrated, and were constantly deceived by him over a substantial period, as, for that matter, were also the relevant bank officers.

[1171] NKS and SED simply left all business matters to the male plaintiffs and do not appear to have exercised any separate, independent judgment in relation to the developing situation.[441]

[1172] The foregoing scenario is entirely consistent with the fact that, as I have recited in my findings of narrative fact, each of the personal plaintiffs signed a guarantee in which they expressly acknowledged that they had not entered into that document in reliance on any promise, statement or information made or given by the ANZ or its officers; and that it was up to

[440] (1987) 73 ALR 233 at 240.
[441] cf T140-144, 176, 185-186.

the particular signatory to find out about the financial position, creditworthiness and honesty of any other person named as a guarantor.

[1173] In the circumstances above outlined this claim falls at the first evidentiary hurdle. The plaintiffs have singularly failed to establish any relevant statement or representation or other conduct by the ANZ or its officers that could possibly constitute conduct that was misleading or deceptive in the manner pleaded, or at all.

[1174] To the extent that the plaintiffs rely on the silence of the ANZ in the form of a failure to advise them of the several matters referred to in the pleadings, that silence only becomes relevant if the plaintiffs or any of them can demonstrate on the evidence that the overall conduct of the ANZ (by its officers) was such as to give rise to a reasonable expectation that such matters would be disclosed and that the plaintiffs acted on some contrary factual premise.

[1175] To paraphrase the language of Gleeson CJ cited in *Poseidon*, the evidence does not disclose any special feature of the relationship between the parties or the communications between them that gave rise to a duty to add to or correct earlier information possessed by the plaintiffs.

[1176] As to this, it must be emphasised that the ANZ did not ever positively supply any of the plaintiffs with any information, or promote the existence of any specific factual situation. It was the other way around. When all was said and done, this was no more than a normal arm's-length

commercial transaction in which the plaintiffs sought loan facilities from the ANZ and the latter stipulated its requirements for granting such facilities. The evidence does not indicate that it did anything to engender a reasonable expectation that it would inform the plaintiffs of any matters coming to its attention which adversely bore on Godwin's creditworthiness or veracity.

[1177] Nor was that situation in any way altered by the content of the indicative proposal. That letter merely asserted to its directors that, by banking with the ANZ, TSM would experience both professional services provided by bankers with backgrounds in small business which catered proactively to its individual requirements and bankers who would also seek to add value to its business through a thorough understanding of its present and future needs. i.e. it represented, in effect, that, upon entry into a banker/customer relationship with the ANZ, TSM would be provided with efficient banking services relevant to its needs, including, no doubt, advice as to the credit facilities most suited to those needs.

[1178] It must not be forgotten that, in the ANZ letters of 24 November 1997, TSM and its directors were put on notice that the registered proprietors of the alleged Godwin properties were persons other than Godwin and those persons were specifically identified. This was at a point at which TSM

could have declined to proceed with the relevant loan facilities had it wished to do so.[442]

[1179] The plaintiffs were, at the very least, made aware by the ANZ of a situation that potentially raised a question mark concerning the accuracy of Godwin's previous representations.

[1180] The evidence also indicates that the plaintiffs exhibited no adverse reaction to that intelligence and seemed content with the situation that, whatever was the title position, the ANZ would be given first mortgages over the properties as required by it and supporting guarantees would be executed as collateral to those mortgages, albeit not by Godwin personally.

[1181] That understanding did not prompt the plaintiffs to pursue any independent enquiries of their own or apparently cause them any alarm. The obvious inference is that they acquiesced in that scenario, as it developed. In the event, first mortgages and supporting guarantees *were* obtained by the ANZ over the alleged Godwin properties as envisaged in the finance approval and, from the plaintiffs' perspective, the financing transaction went ahead on a security basis as originally contemplated.

[1182] Moreover, I agree with Ms Kelly that, even if I am wrong as to the foregoing aspects, the claim also necessarily founders on the issue of causation.

[442] As I have found, Barnett had become aware of the title situation related to the Brayshaw Crescent property by reason of the TVS valuation by no later than about 7 November 1997 and Burford conducted his searches on or about 18 on 19 November 1997.

[1183] As she pointed out, this is not a case in which loss is said to have flowed by reason of conduct bearing on some aspect of the loan facilities granted, for example, as a result of inappropriate advice concerning loan structure.

[1184] The loss pleaded is specifically said to have arisen as a result of an inducement -- stemming from the impugned conduct of the ANZ – "*to enter into the finance agreement*" with it.

[1185] Details of that loss (in précis terms) were pleaded to be:

(1) TSM's costs, fees and expenses associated with the re-location of its financial arrangements from the CBA and other financiers to the ANZ,

(2) TSMs loss of benefit of being able to repay the loans from each of those institutions over their respective terms,

(3) the incurring by TSM of fees and other charges by the ANZ associated with the discharge of the loans to the CBA and other financiers, prior to the ANZ settling in respect of its facilities,

(4) the financial impact on the business of TSM of having, ultimately, to liquidate its indebtedness to the ANZ as earlier recited and the associated financial impact on the several personal plaintiffs of having to sell their homes as and when they did, and

(5) the loss to "the plaintiffs" of a business opportunity to source an honest and creditworthy co-guarantor with personal assets to the

value of $630,000 "*to secure the loan the subject of the finance agreement from the ANZ which opportunity would or was likely to have been realised had the truth emerged to the plaintiffs or any of them regarding Godwin's true asset position and/or credit history*".

[1186] The above plea makes little attempt to discretely define and quantify the actual losses said to have been suffered by the personal plaintiffs, by way of contrast with those claimed with regard to TSM.

[1187] I take Mr Sallis, in his submissions, to contend that, on the facts of this case, the correct mode of assessment of damages under s 82 of the TPA is to compare the position in which the plaintiffs might have expected to be, had the asserted misleading conduct not occurred, with the situation that they were in as a result of acting in reliance on it (*Brown and Another v Jam Factory Proprietary Limited*,[443] *Gates v City Mutual Life Assurance Society Ltd.*[444] He argues that the plaintiffs are entitled to expectation damages on that basis, to include the loss of commercial business opportunity i.e. the loss of a chance for TSM to make profits, had the ANZ not breached its obligations under the TPA

[1188] The defence submission is that any loss of the nature referred to (i.e. as a consequence of having borrowed money from the ANZ) was not one caused by the impugned conduct. It is said that the real or effective cause of TSM borrowing money from the ANZ was the decision of DLS, ECD and

[443] (1981) 53 FLR 340.
[444] (1986) 60 ALJR 239.

Godwin to make application to it for finance and/or the further fact that the three of them knowingly misrepresented the group financial position to the bank in order to obtain finance approval.

[1189] Whilst there is force in those contentions, it seems to me that an even more compelling argument is that any losses by the plaintiffs were not the product of entry into the finance agreement and the consummation of it, in the relevant legal sense. Rather, they were the direct result of Godwin's later fraudulent conduct and what inevitably stemmed from it.

[1190] The ultimate position would have been no different had the finance been secured from any alternative provider. TSM was in dire financial straits (particularly, but not solely, due to the unwise borrowing from NPG) and it obtained the finance that it sought. The eventual need for it and the other plaintiffs to liquidate assets became well-nigh inevitable, due to factors having nothing to do with entry into the finance agreement, as such. Godwin's specific conduct merely precipitated events at a particular point in time.

[1191] It should be emphasised that the plaintiffs' case as to TPA liability, as pleaded, is expressly based on conduct said to have occurred prior to (at the latest) execution of the various security documents in respect of the approved loan facilities. Any knowledge subsequently acquired by Baylis in relation to Godwin's situation and conduct is essentially irrelevant.

[1192] In so commenting I note that the pleading in paragraph 73.6.5 of the Statement of claim is somewhat curious. The various sub paragraphs (a) to (f) all follow initial verbiage to the effect "*that prior to approving the Finance Application and/or entering into the Finance Agreement with TSM*", yet subparagraph (f) speaks of a period between November 1997 and January 1998 when mortgages were registered.

[1193] That said, I see no substance in the claims based on the provisions of the TPA.

The claims based on breach of the common law duty of care and breach of contract

General

[1194] I propose, in this segment of my reasons, to focus directly on the issues related to these specific alleged causes of action. I will later separately consider the issues identified with regard to alleged breach of fiduciary duty and negligent misstatement, notwithstanding that the pleadings tend to deal with the alleged breach of fiduciary duty together with the alleged breaches of common law duty of care on something of a "rolled up" basis.

[1195] It is important to reflect separately on the situations of the various individual plaintiffs in so doing, to the extent that any of them rely on the causes of action in question.

[1196] I approach my consideration on the basis that TSM alone was in a relationship of customer/banker with the ANZ at the relevant times. Any

claims by other plaintiffs based on the causes of action presently under consideration must necessarily derive from factual circumstances pertaining to those plaintiffs arising absent such a relationship.

Some important legal principles

[1197] There is a need, as appropriate, to separately consider the events leading up to the eventual consummation of the relationship of banker and customer as between the ANZ and TSM and those occurring subsequent to that point, as to any legal issues arising from or in relation to them. In so doing it is particularly important to bear in mind the authorities bearing on the incidents of such a relationship, once created.

[1198] It is well settled that, generally speaking, the duties of a banker towards its customer lie in contract alone (*National Australia Bank Limited v Nemur Varity Pty Ltd*[445] *("Nemur Varity")*). In the course of their opinion in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*[446] ("*Tai Hing*") their Lordships commented that they did not consider that there was any thing to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship.

[1199] The point was made that, although it is possible, as a matter of legal semantics, to conduct an analysis of the rights and duties inherent in some contractual relationships (including that of banker and customer) either as a matter of contract law when the question will be what, if any, terms are

[445] (2002) 4 VR 252 at 271.
[446] [1986] AC 80.

to be implied *or* as a matter of tort law when the task will be to identify a duty arising from proximity and the character of the relationship between the parties, it is correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis.

[1200] This was said to particularly be so where that relationship is of a commercial, contractual nature: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other and also for the avoidance of confusion, because different consequences follow according to whether liability arises from contract or tort.

[1201] In *Tai Hing* (which concerned an issue as to what was the extent of the duty of care of a customer to its banker) their Lordships declined to embark on an investigation as to whether, in the relationship of banker and customer, it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other.

[1202] They rejected the proposition that the parties' mutual obligations in tort could be any greater than those to be found, expressly or by necessary implication, in their contract.

[1203] It is to be noted that such an approach had earlier been adopted in Australia by McGarvie J in the well-known case of *Ryan v Bank of New South Wales*

[447] ("*Ryan*"), which concerned a claim that a bank had wrongfully paid certain cheques against other un-cleared cheques drawn on a solicitor's trust account that were ultimately dishonoured.

[1204] McGarvie J accepted or enunciated the following propositions in the course of his reasons:

(1) If there is a liability for negligence on the part of a bank it is a liability that arises from the contract between banker and customer and not a liability in tort;

(2) The core incidents of the contract between banker and customer are those described by Atkin LJ in *Joachimson v Swiss Bank Corporation,*[448] but, in addressing any mandate of the customer (e.g. to pay on a cheque), it has a duty of care arising by implication from the compound contract between the parties;[449]

(3) That duty of care is not, for example, necessarily satisfied by a mere literal compliance with the customer's mandate.

(4) A bank may well be entitled, in the absence of other circumstances, to comply with the strict mandate of the customer (e.g. by paying on a cheque), without incurring any liability.

(5) However, knowledge by the bank of circumstances not known to the customer could change that situation.

[447] [1978] VR 555.
[448] [1921] 3 KB 110, 127.
[449] (*Ryan v Bank of New South Wales* [1978] VR 555 at 579).

(6) As McGarvie J put it "[the bank]… *would act unreasonably in complying with the orders of*… [the customers]… *contained in cheques, if a reasonable banker properly applying his mind to the situation would know that the…* [customers]… *would not desire their orders to be carried out if they were aware of the circumstances known to the bank. If the*… [bank]… *acted unreasonably in this way by complying with the*… [customers']… *orders it would be liable*" to them (*Ryan,* 581);

(7) It was established in *Selangor United Rubber Estates Ltd v Cradock (No 3)*[450] ("*Selangor*") that:

> "As between the company and the bank, the mandate… operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty, on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff company, and not to the authorised signatories. Moreover, it extends over the whole range of the banking business within that contract. So the duty of skill and care applies to interpreting, ascertaining, and acting in accordance with the instructions of a customer, and that must mean his really intended instructions as contrasted with the instructions to act on signatures misused to defeat the customer's real intentions. Of course, omnia praesumunter rite esse acta, and a bank should normally act in accordance with the mandate -- but not if reasonable skill and care indicate a different course". [Emphasis added]

(8) It was further said in *Selangor* that -

> "…… the bank has a duty under its contract with its customer to exercise 'reasonable care and skill' in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard

[450] [1968] 1WLR 1555.

applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or *out of the ordinary course of business……".*

(9) If a banker applies his mind to the particular circumstances and acts honestly and reasonably in a scenario in which it could fairly be said that it is uncertain what the customer would or would not desire in those circumstances, the liability would not arise. McGarvie J's view was that, to establish a breach of duty of care by the bank, circumstances must be shown in which a reasonable banker, properly applying his mind to the situation, would know that, if the customer knew the circumstances known to the banker, the customer would not desire the relevant action to be taken.[451]

(10) The duty owed by the bank to its customer is one to be determined objectively. It is necessary to consider what a reasonable banker, in the position and circumstances of the relevant banker at the relevant times and possessing the knowledge of that person, would have done[452] i.e. what is essentially in contemplation is a consideration of prudent and skilled banking practice in the particular circumstances.

[1205] The principles that I have sought to extract from the above authorities are, in my view, essentially in accordance with the approach of the New South

[451] *Ryan v Bank of New South Wales* [1978] VR 555 at 582.
[452] *Ryan v Bank of New South Wales* [1978] VR 555 at 583.

Wales Court of Appeal in *National Australia Bank Ltd v Hokit Pty Ltd and Others*[453] ("*Hokit*") and also the dicta to be found in *Nemur Varity*.

[1206] In applying the principles espoused in *London Joint Stock Bank Ltd v Macmillan and Arthur,*[454] as affirmed in *Tai Hing,*[455] the Court of Appeal made the point that, when the word "*negligence*" has been used with regard to the banker/customer relationship, it has been used in a somewhat extended sense and not as implying that the obligations of such parties are founded in the tort of negligence.[456] Any such obligations lie in contract, the existence of which will depend on the implications necessary to the efficacy of the banker/customer relationship and any specific terms of that relationship.

[1207] *Hokit* arose from a situation in which an employee of several companies used to sign her employer's name, with his knowledge, on various cheques issued for company purposes. She also signed his name, without his knowledge, on cheques for her own benefit. The bank denied liability to the plaintiffs in respect of the latter cheques on the bases of the conduct of the employer in permitting the employee to sign cheques and the failure of the companies to properly check their accounts.

[1208] In *Hokit*, Clarke JA stressed that the principles to which reference has been made have long been endorsed by the highest courts of various

[453] [1996] 39 NSWLR 377.
[454] [1918] AC 777.
[455] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80.
[456] [1996] 39 NSWLR 377 at 388.

Commonwealth countries. He cited with approval a dictum of Macarthur J in the decision of the New Zealand Court of Appeal in *National Bank of New Zealand Ltd v Walpole and Patterson Ltd*[457] to the following effect:

> "… what is suggested is that a duty of care should be constructed in order to defeat a settled cause of action in a non-tort situation. It is difficult to equate the expansion of the duty of care in tort with the importation of such a duty, by way of an implied term, into a commercial contract. Moreover, there are no policy reasons for such a change. Banking is conducted on the basis of long established rules and customs, and there is no evidence of any need for dramatic change".

[1209] It follows from the authorities to which I have referred and on the state of the evidence in this case that, to the extent that the plaintiffs claim damages for alleged breach of duties arising out of the banker/customer relationship, the only relevant customer was TSM and the relevant duties owed by the ANZ to it, arising out of that relationship, were contractual duties of the nature of those enunciated in the authorities to which I have referred.

[1210] It is of interest to note that such authorities essentially accord with the views expressed by the learned author of *Tyree, Banking Law in Australia 6th Edn (Butterworths)*, when he makes the point[458] that there are circumstances which should alert a bank to the fact that a customer's interest could be prejudiced by certain transactions. It is said that the duty of the bank in such circumstances is, at the minimum, to make enquiries to

[457] [1975] 2 NZLR 7 at 22.
[458] At paragraph 5.74 of his text.

clarify the customer's wishes. The duty may, the learned author contends, extend to questioning an apparently proper mandate from the customer.

[1211] Those opinions are essentially based on the reasoning in *Selangor* and also that in the case of *Karak Rubber Co Ltd v Burden (No 2).*[459] The learned author points out that:

> " in both cases the court emphasised that, although the bank was obliged to pay a cheque which was in proper form and backed by adequate funds, it did not follow that the duty was an unqualified duty to pay without enquiry. The bank is under a contractual duty to exercise such care and skill as would be exercised by a reasonable banker, a duty which included a duty to make enquiries in appropriate circumstances. In both cases, the court indicated that the circumstances surrounding the drawing of the cheque were so out of the ordinary course of business that a reasonable banker would have been placed on notice."

[1212] I consider that the learned author correctly states the impact of the relevant authorities when he expresses the opinion that the general rule is probably that a banker should clearly question a mandate when a reasonable and honest banker with knowledge of the relevant facts would consider that there was a serious possibility that the customer was being defrauded or that the funds were being misappropriated.[460]

[1213] I also agree with him that the precise scope of a banker's duty stemming from the authorities to which he refers may not be entirely clear. Certainly, at the very least, a banker should make enquiries if asked to pay cheques drawn on a company account if there is any suspicion that the

[459] [1972] 1WLR 602.
[460] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, see also *Barclays Bank plc v Quincecare Ltd and Another* [1992] 4 All ER 363 at 376.

money is to be channelled to uses other than those for which the signatories are authorised (As to this see also the discussion by Macfarlan J in *Varker v Commercial Banking Co of Sydney Ltd*).[461]

[1214] It is to be noted that most of the definitive authorities arise from circumstances related to a bank's reaction to express mandates in the form of presentation of cheques for payment. The relevant principles related to the duty of a bank to exercise reasonable care and skill are, of course, of general application and attach to *all* facets of banking activities related to a specific customer (cf the approach of Batt JA in *Nemur Varity*).[462]

[1215] In so saying I am conscious of the point made by Macfarlan J in *Varker*[463] to the effect that a realistic approach must be adopted by the Courts and that the bar must not be set at an unrealistically high level.

[1216] To paraphrase his language, proper regard must be had to the exigencies of modern banking business. I respectfully agree with his comment that, in ordinary circumstances, banking and commerce would grind to a standstill if a bank had to stop to consider and weigh carefully the actual or probable circumstances related to individual, apparently routine, transactions. But the question to be posed and answered, apropos of a particular fact situation, is whether that situation *is* similar to those which ordinarily

[461] [1972] 2 NSWLR 967, 976-978 ("*Varker*").
[462] *National Australia Bank Limited v Nemur Varity Pty Ltd* (2002) 4 VR 252 at 271.
[463] *Varker v Commercial Banking Co of Sydney Ltd* [1972] 2 NSWLR 967 at 976-978.

occur (i.e. of a routine nature) or is, in the known circumstances or on the face of it, patently unusual.[464]

[1217] This concept will be of particular relevance to the dealings with the $570,000 cheque and the $460,000 cheque, to which I will return in due course.

[1218] Before moving to a consideration of the detailed legal issues arising between the parties on the evidence in this case it is desirable also to reflect upon some legal principles applicable to the situation of a bank vis-à-vis parties who guarantee the debts of its customer.

[1219] It is well established that a lending bank does not have a general duty of disclosure to a proposed guarantor.

[1220] As Barwick CJ pointed out in *Goodwin v National Bank of Australasia Ltd*[465] ("*Goodwin*"), a bare transaction in which a person undertakes to guarantee the indebtedness of a primary debtor to a bank is not of a class calling for the fullest disclosure -- it is not *uberrimae fidei*. In such a situation the bank is only bound to disclose to an intending surety any thing that has taken place between the bank and the principal debtor which was not naturally to be expected.

[1221] The Chief Justice cited Pollock MR in the case of *Lloyds Bank Ltd v Harrison* as saying that:

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[464] *Varker v Commercial Banking Co of Sydney Ltd* [1972] 2 NSWLR 967 at 978.
[465] *Goodwin v National Bank of Australasia Ltd* [1968] 117 CLR 173 at 175.

> " the necessity for disclosure only goes to the extent of requiring it where there are some unusual features in the particular case relating to the particular account which is to be guaranteed "[466]

[1222] In his unreported decision in *Radin v Commonwealth Bank of Australia*[467] Lindgren J is recorded as holding that a creditor must disclose to an intending guarantor any unusual matter or arrangement between the creditor and the debtor which the intending guarantor would not naturally expect to find, particularly where the nature or degree of the guarantor's responsibility is affected.[468] However, that does not constitute a duty to disclose to the intending guarantor: "*Everything it is material for the guarantor to know*" (*London General Omnibus Company, Ltd v Holloway*.)[469]

[1223] In *Holloway*[470] Kennedy LJ sought to draw a distinction between what he termed intrinsic, by way of contrast with extrinsic, circumstances.

[1224] He accepted that the former bore on the very ingredients of the relevant contract, whereas the latter were only accidentally connected with it, so as to enhance or diminish the price of the subject matter or to operate as a motive to make or decline the contract.[471]

[1225] So it was that, in the case of an employee fidelity bond, a failure to disclose previous defalcations of the relevant employee that were known to

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[466] *Goodwin v National Bank of Australasia Ltd* [1968] 117 CLR 173 at 175.
[467] Federal Court of Australia, 23 October 1998.
[468] cf Lord Campbell in *Hamilton v Watson* (1845) 12 Cl & F 109, 119.
[469] (1912) 2 KB 72 at 83.
[470] *London General Omnibus Company, Ltd v Holloway* (1912) 2 KB 72 at 83.
[471] *London General Omnibus Company, Ltd v Holloway* (1912) 2 KB 72 at 85.

the employer was an intrinsic circumstance that amounted to an implied representation by the proposed employer that the proposed employee, the subject of the bond, was a person believed by the proposed employer to be honest, and not someone who was a known thief.[472]

[1226] On the other hand, a failure to disclose potentially adverse financial details of previous pecuniary dealings between the creditor and the principal debtor to a proposed guarantor was said by Kennedy LJ to constitute only extrinsic circumstances that could not invalidate the relevant guarantee.[473]

[1227] As he expressed the proposition, the bank cannot reasonably be taken as affirming, by mere silence respecting earlier dealings, the financial ability of the person whom the proposed surety is asked to guarantee.[474] His Lordship commented that the law will rightly refuse to find, in mere silence, an implied representation to the surety, in circumstances where the surety cannot reasonably contend that he inferred, in the absence of any statement to the contrary, that a particular state of facts existed different from that which did in truth exist.

[1228] It is stating the obvious to say that, in some factual scenarios, it may be no simple task to determine the category to which the relevant circumstances ought properly to be assigned, absent any suggestion of fraud.

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[472] *London General Omnibus Company, Ltd v Holloway* (1912) 2 KB 72 at 82.
[473] *London General Omnibus Company, Ltd v Holloway* (1912) 2 KB 72 at 87.
[474] cf *Cooper v National Provincial Bank* (1945) 2 All ER 641, 645.

[1229] Nevertheless, at the end of the day, the key issue is whether it may fairly be said that a non-disclosure sought to be impugned constitutes an implied misrepresentation by reason of a non-disclosed fact that is inconsistent with a presumed basis of the contract of suretyship.[475]

[1230] The conclusion to be drawn must, in every instance, be dependent on the nature of the transaction and the implied basis upon which it is entered into.[476] Any relevant non-disclosure need not necessarily be wilful.[477]

Some preliminary considerations

[1231] I accept Ms Kelly's submission that, in reviewing the situation of TSM, it is necessary to consider whether that plaintiff has, on the evidence, established that the ANZ at any stage during the existence of the relevant banker/customer relationship adopted a role, in addition to that relationship, which imposed on it a tortious duty of care towards TSM. As I have already demonstrated, absent such a situation, any relevant duties owed by the ANZ to TSM necessarily arose in contract alone.

[1232] There is a need, as Ms Kelly submitted, to identify with some precision what it is that the ANZ is alleged to have said or done that is said to have taken the situation outside the strict confines of the banker/customer relationship. Like her, I do not perceive any specific pleading in the

[475] *London General Omnibus Company, Ltd v Holloway* (1912) 2 KB 72 at 83 cf Vaughan Williams LJ in *Holloway* at 77.
[476] (cf Blackburn J in *Lee v Jones* (1864) 17 C.B. (NS) 482, 506).
[477] *London General Omnibus Company, Ltd v Holloway* (1912) 2 KB 72 at 79.

statement of claim that seeks to establish such a scenario. I did not take Mr Sallis to assert to the contrary.

[1233] The situation in the present case, as revealed by the evidence, is not one in which a separate tortious duty of care can be said to arise by virtue of the fact that the ANZ adopted some additional role beyond that of mere banker/customer, at least post 19 November 1997.

[1234] To the extent that the TSM claims are, on the evidence, restricted to those arising as a matter of contract in the context of a customer/banker relationship, I will approach them on the basis of legal principle that I have already summarised, specifically as to the nature and extent of the duty owed by the ANZ to TSM as its customer.

[1235] That said, it is necessary to separately identify what it is that the plaintiffs allege in relation to TSM in the pre-banker/customer relationship period or the other plaintiffs at any stage, as constituting the existence of a common law duty the breach of which is said to properly found a claim by any of them against the ANZ.

[1236] As a prelude to embarking on a consideration of the plaintiffs' claims based on breach of common law duty of care there is an important aspect of legal principle to be borne in mind.

[1237] I take the several plaintiffs to assert direct economic loss not consequential on some other damage, such as damage to property. That being so, it must

be noted that there is, in general, no legally recognized duty of care outside certain types of case in which the Courts have recognized the existence of a duty of care not to cause economic loss, of which the present case, *prima facie*, does not appear to be one.[478]

[1238] The circumstances that arose in *Perre* are instructive for present purposes.

[1239] As Gaudron J pointed out,[479] that case focused on a classic situation of direct, pure economic loss. The loss claimed did not result from any physical injury to the claimant's property. It arose by reason of the outbreak of bacterial wilt on property that had been contracted to the defendant, as a result of the use of uncertified potato seed on that property, on the defendant's direction. By reason of that outbreak near neighbouring properties were not permitted to use their land to grow potatoes for sale in a specific market, as a result of which they suffered economic loss.

[1240] It must be said that it is not a simple task to extract a common expression of relevant principle from the individual judgments in *Perre*.[480]

[1241] Kirby J advocated a three stage test based on the approach of the English Courts, involving the elements of foreseeability, relationship ("proximity") and a consideration of policy to determine whether, in the circumstances, it was fair, just and reasonable to impose the duty of care in question -- essentially an adherence to the approach espoused by him in *Pyrenees*

[478] cf *Perre v Apand Pty Ltd* [1999] 198 CLR 180.
[479] At 197.
[480] *Perre v Apand Pty Ltd* [1999] 198 CLR 180, cf McHugh J at 210.

Shire Council v Day.[481] However, I take the other judges to have preferred an incremental development of this area of the law.

[1242] One general category of cases accepted to date is, of course, that related to negligent misstatements. Another identified by Gaudron J was what she described as the category of protection of legal rights, as illustrated by cases such as *Bennett v Minister of Community Welfare,*[482] *Hawkins v Clayton* [483] and *Hill v Van Erp* [484].

[1243] She considered that, in each of those cases, a core feature was the exercise, or non-exercise, of a form of power vested in the defendant that bore on the rights (or what McHugh J, in his judgment, termed "the expectation interest") of another person who was, in effect, in a situation of at least *de facto* dependence on the defendant.

[1244] This was said by Gaudron J to give rise to a special relationship of "proximity" or "neighbourhood" such that the law would impose liability upon the person with control, if his or her negligent act or omission resulted in the loss or impairment of the relevant right of another person and was, thereby, productive of economic loss.

[1245] Thus, in what she considered to be the analogous case of *Perre*, the "right" in question was the right to market potatoes in a particular market that had been impaired by the defendant's actions. The "control" was the taking of

[481] (1998) 192 CLR 330 at 419-420.
[482] (1992) 176 CLR 408.
[483] (1988) 164 CLR 539.
[484] (1997) 188 CLR 159

particular unilateral action that the defendant knew or should have known had a potential to deny the exercise of the right or interest in question.

[1246] So it was that Gaudron J articulated the principle as being that, where a person knows or ought to know that his or her acts or omissions may cause the loss or impairment of legal rights possessed, enjoyed or exercised by another, whether as an individual or as a member of a class, and that that latter person is in no position to protect his or her own interests, there is a relationship such that the law will impose a duty of care on the former to take reasonable steps to avoid a foreseeable risk of economic loss resulting from the loss or impairment of those rights.

[1247] As McHugh J pointed out, the expression "rights", in such a context, does not merely extend to precise legal rights but also encompasses legitimate expectation interests. He was of the opinion that key considerations were the extent of vulnerability of the plaintiff to the defendant's conduct and the actual knowledge of the defendant concerning the relevant risk and its magnitude. Those were, he said, important features in *Caltex Oil (Australia) Proprietary Limited v The Dredge "Willemstad"*.[485]

[1248] I take Gummow J to have considered that the concept of vulnerability included consideration of the extent to which the plaintiff may have

[485] (1976) 136 CLR 529, see Stephen J at 578.

appreciated the existence of the relevant risk and also to which it might have had some avenue of protecting itself.[486]

[1249] For the reasons already indicated, it is necessary to consider the claims advanced by TSM in relation to two separate time-frames, namely the period prior to the bringing into being of the relationship of customer and banker as between it and the ANZ and the period subsequent to the creation of that relationship.

When did the relationship of banker/customer come into existence?

[1250] An initial point taken by the defendant in relation to the plaintiffs' pleading is that the letter of 19 November 1997 which DLS, NKS, ECD and Godwin were called upon by the ANZ to sign did not constitute any legally concluded finance agreement or contract between the relevant parties at all. I infer that it is also suggested that a concluded relationship of banker/customer as between the ANZ and TSM may not have been established at that stage.

[1251] The defendant asserts that the letter of 19 November was no more than a notification by the bank to the directors of TSM of the conditions on which the ANZ was prepared to lend money to TSM and an acknowledgement was merely sought from the signatories to the endorsement at the foot of the letter that they agreed to the conditions expressed and desired to proceed further with the proposed lending transactions. It was asserted by counsel

[486] *Perre v Apand Pty Ltd* [1999] 198 CLR 180 at 259.

for the defendant that the letter of 19 November imposed "*no obligations on anyone*".

[1252] The defendant contends that, at that point, there was no commitment by the bank to lend the relevant monies, no commitment by TSM to borrow such monies, and, by implication, no firm arrangement for the ANZ to become the TSM banker.

[1253] It was argued on behalf of the defendant that there were in fact three separate loan agreements or contracts between the ANZ and TSM, being the three separate lendings the subject of the ultimate formal letters of approval written by the ANZ to TSM on 24 November 1997, which spelt out some more detailed terms pertinent to each element of the overall loan transaction and attracted "*the terms implied by banking custom*" by virtue of the banker/customer relationship.

[1254] It is to be remembered that the letter of 19 November 1997 was the product of the formal Business Credit Application made by TSM (as later varied) and the assessment of it (and the material supporting it) by the relevant bank credit delegate. At the stage at which the letter of 19 November was written, approval of the loan had been issued by Wellman with Pedler's concurrence, albeit subject to certain stipulations.

[1255] The letter of 19 November unequivocally states that "*the ANZ bank has agreed to the following finance for the Company*" and spells out the basic terms upon which that agreement has been arrived at, albeit that these did

not descend to certain of the fine administrative detail that was subsequently outlined in the later letters of 24 November 1997. I take that detail, essentially, to comprise the normal and usual documented stipulations routinely attached by it to *all* facilities of the nature in question.

[1256] It is to be observed that the letter of 19 November speaks globally of an agreement to provide overall finance, having three different components. The first was a business mortgage loan, the second was a business overdraft facility and the third was a fully drawn advance by way of bridging loan. The letter quite specifically spells out the quantum of each facet of the finance and the core terms upon which it was being made available.

[1257] Furthermore, it must be remembered that this letter was the culmination of a single, composite application for finance made by TSM to the ANZ following Bradley's indicative proposal dated 22 October 1997 in which, *inter alia*, he represented that key benefits of banking with the ANZ would be the provision of professional service by bankers with backgrounds in small-business "*which caters proactively to"* the customer's individual requirements, and also the availability of bankers who would always seek to add value to the customer's business through a thorough understanding of the TSM present and future needs.

[1258] In real terms the letter of 19 November was the expression by the ANZ of an offer to enter into what was essentially a single, composite loan transaction (structured into its three various components) to appropriately cater for the perceived needs of TSM, as originally represented in the indicative proposal. The three components were not (and not intended to evidence) separate, independent contracts. They were simply elements of a single financing transaction within the banker/customer relationship then in course of being consummated between the parties. All facilities required the provision of common security.

[1259] That letter concluded by requesting each of the nominated signatories to sign a copy of it "*as your acknowledgement of the stipulated approval conditions".* It indicated that separate "*formal approval*" letters for each of the three individual facilities constituting the overall financing package would "*issue shortly*", hence the later letters of 24 November 1997. In my opinion, the details in those letters were no more than the usual terms of lending by the bank for advances of the type in question, as implied in the letter of 19 November.

[1260] No written acknowledgement or acceptance of the detailed content of the letters of 24 November was sought or given. They were apparently treated by the parties as being simply of a confirmatory nature.

[1261] It is of significance that administrative steps to implement the loans were initiated within the bank immediately after the nominated persons had

signed the acknowledgement at the foot of the copy letter of 19 November and before the formal letters of 24 November had been sent out.[487] These included letters seeking payout figures from the CBA and ATSIC that included authorities drafted and procured by the ANZ from relevant plaintiffs confirming that the bank had approved finance to TSM.

[1262] Importantly, the ANZ actually opened the TSM business cheque account as of 17 November 1997[488] and the first debit against it was recorded as at 20 November 1997. There can be no doubt, in those circumstances, that the concluded relationship of banker/customer had been established between the ANZ and TSM by no later than 19 November 1997 and, probably, as of the 17th. Baylis testified that he permitted TSM to begin overdrawing the account almost immediately and prior to the settlement of the loans "probably as a sign of good faith", the security documents having been signed but not processed at that point.[489]

[1263] I reiterate that, although none of the approval letters specifically referred to the ANZ taking over the TSM general banking business, the transactions between the parties at all times clearly went forward on that basis and were part and parcel of the arrangements associated with it. Such a situation had, of course, been foreshadowed in the indicative proposal.

[487] Ex D51 tabs 34 to 36 inclusive.
[488] As appears from Exhibit D18.
[489] (T1782).

[1264] I construe the letter of 19 November 1997, and the signed acceptance of its terms, as constituting a firm, concluded agreement, as between the ANZ and TSM, for the provision and acceptance of composite finance on the basis stipulated in it, subject to fulfilment of the conditions set out and including those implied terms necessary as a matter of business efficacy. The more detailed letters of 24 November merely constitute a confirmatory amalgam of the express core transaction terms together with the detail of those additional logistic aspects required as a matter of business efficacy. I take them to be virtually standard lending conditions for loans of the relevant types.

[1265] The offer and acceptance of such finance necessarily took place within and as part of the then established relationship of banker and customer and as a specific, contemplated incident of it, reflecting, in effect, the advice of the ANZ to TSM as to the best structural form designed to meet the latter's requirements.

[1266] This is so notwithstanding that it was clearly an implied term of the contract that the ANZ retained the capacity to terminate it in the event of non fulfilment by TSM or the mandated guarantors of the conditions expressed or that TSM was entitled to withdraw from the proposed loan transactions in the event that it was unable to meet all of those conditions.[490]

[490] cf *Perri v Coolangatta Investments Proprietary Limited* [1982] 56 ALJR 445.

[1267] It is against such a backdrop that the issues arising between the parties fall to be considered.

Claims based on of breach of common law duty of care

The claims as pleaded

[1268] The authorities to which I have referred indicate that any claim based on breach of a common law duty of care owed by the ANZ to TSM, is necessarily confined to the period prior to about 19 November 1997 when no concluded relationship of banker/customer existed between the two entities. As I have pointed out, the evidence does not establish any scope for separate liability for breach of common law duty of care arising from conduct within the customer/banker relationship as to the subsequent period.

[1269] As to the pre-19 November period, the plaintiffs contend in the statement of claim that, in the circumstances pleaded, the ANZ owed a duty of care (and for that matter, also a fiduciary duty) to each of them by the end of the second October meeting and thereafter.

[1270] It is asserted that the duty in question was owed to TSM as both a potential and actual customer and security provider in circumstances set out in extensive particulars contained in the statement of claim, whereby TSM was entitled to believe that the ANZ would act in that plaintiff's interest. I will not recite the very lengthy particulars at this time.

[1271] It is further averred that a similar duty was also owed by the ANZ to the other plaintiffs as both potential and actual security providers to the ANZ in circumstances where those plaintiffs were also entitled to believe that the ANZ would act in their interests. Once again, the plaintiffs rely on extensive pleaded particulars of the alleged circumstances as set out in the statement of claim.

[1272] I pause to make the point that a considerable difficulty that arises on a consideration of the statement of claim stems from the rolled up form of pleading adopted and the almost constant reference to "*the plaintiffs*" or "*the plaintiffs or any of them*", without seeking to define what separate duties were said to have been owed to an individual plaintiff or group of plaintiffs and on what specific basis.

[1273] This is coupled with the further difficulty that, in many instances, pleas advanced do not differentiate between the claims based on a duty of care, by way of contrast to those said to have arisen by virtue of breaches of fiduciary duty. They are said to relate to both.

[1274] So it is, for example, that paragraph 75 of the statement of claim pleads that, in the alternative to the cause of action based on the provisions of the TPA, the ANZ owed a duty of care and/or a fiduciary duty to each of the plaintiffs by the end of the second October meeting and thereafter by reason of matters particularised.

[1275] In paragraph 76 of the statement of claim, the plaintiffs express particulars of the duty of care said to have been owed by the ANZ to them. These essentially reflect the substance of the details of misleading and deceptive conduct pleaded in paragraph 73.6 of the pleading and already traversed. It is unnecessary, at this stage, to repeat them *in extenso*.

[1276] The plaintiffs also globally plead[491] the existence of duties of care to them or any of them:

(1) to advise the plaintiffs between November 1997 and prior to the drawdown of funds in January 1998 when the ANZ registered its mortgages over the business and personal assets of the plaintiffs that it had significant concerns with regard to Godwin's real and personal asset position and/or creditworthiness;

(2) to make proper inquiries of the directors of TSM before paying any cheques that it had reasonable grounds to believe might not have been drawn in conformity with the actual instructions and intent of TSM;

(3) to inform the plaintiffs of any interest noted on the titles of the alleged Godwin properties that was inconsistent with the representations made by Godwin that those properties were unencumbered;

(4) to notify TSM and seek its authority for the intended payment of the $108,395 to the CBA in order to secure the discharge of the mortgage

[491] In paragraphs 76.6 to 76.10 inclusive of the statement of claim.

over the Raffles Road property by payment out of an account of TSM with the ANZ;

(5) to warn the plaintiffs if there was any potential or actual conflict between a course of conduct which the ANZ was proposing to take in its own interests and the interests of the plaintiffs or any of them; and

(6) not to prefer its interests to that of the plaintiffs.

[1277] They aver that the ANZ had acted in breach of its common law duty of care (and/or the fiduciary duties) owed by it to the plaintiffs, or any of them, by failing:

(1) to make the inquiries referred to in paragraph 76 of the statement of claim;

(2) to notify the plaintiffs, or any of them, that it had not undertaken those inquiries; and

(3) to inform the plaintiffs of the true circumstances related to the alleged Godwin properties, as they became known to it.

[1278] Additionally, they assert that, given what were said to be relevant circumstances as pleaded, the ANZ was in breach of its duty of care and/or fiduciary duties to the plaintiffs, or any of them, in specially clearing the $570,000 cheque and the $460,000 cheque respectively.

[1279] They globally plead that, had the ANZ not acted in breach of its duty of care:

(1) TSM and LTD would not have relocated their banking and business finance activities to the ANZ;

(2) TSM would not have begun to draw down funds against the loan facilities provided to it by the ANZ pursuant to the finance agreement;

(3) the plaintiffs would not have executed various agreements adverted to;

(4) LTD would have ceased to trade and its assets would have been realised;

(5) TSM would have continued its sheet metal business excluding the mass production of prefabricated units; and

(6) the plaintiffs would have secured an alternate security provider in order to obtain a loan from the ANZ or other financial institution, commensurate with the ANZ loan.

[1280] The plaintiffs assert that, by virtue of the breaches of duty by the ANZ, they suffered loss and damage as particularised in the statement of claim.

[1281] It will once be seen that, in pleading the foregoing aspect of the causes of action, the plaintiffs do not, as I have said, differentiate between the situations of any of them as individual parties. Further, some of the matters referred to plainly relate to times at which the relationship of banker/customer had come into existence as between the ANZ and TSM.

[1282] In his final submissions, Mr Sallis indicated that the claims in tort are primarily prosecuted on the core bases that:

(1) The ANZ had duties of care in the circumstances pleaded to accurately report to the plaintiffs the results of what he terms a competent investigation into the asset position and credit worthiness of Godwin, and

(2) Its failure to do so prior to the commencement of its loan on 20 November 1997[492] amounted to a misrepresentation by silence upon which all plaintiffs jointly and severally relied and, consequently, constituted a breach of its duty to each of them. In so contending he stressed that the issue had to be approached in light of the aggregate knowledge of all officers of the ANZ at any relevant time.[493]

[1283] He further sought to submit that tortious liability also arose, both to TSM and the personal plaintiffs, in relation to the processing by the ANZ of the $460,000 cheque and the $570,000 cheque on bases to which I will return.

Issues arising

[1284] The initial duties alleged by all of the plaintiffs against the ANZ were that it should have ascertained whether Godwin was the registered and equitable owner of the alleged Godwin properties and, if not, promptly

[492] Which I take to be a reference to the first drawing against the new overdraft account just prior to the initial FDA drawdown on 27 November 1997.
[493] *The Bell Group Ltd Inc (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239, *National Bank of Australia v Morris* (1992) AC 287.

notified the plaintiffs or any of them of that fact or notified them of it prior to:

(1) approving the finance application,

(2) offering to enter into the finance agreement,

(3) requesting the plaintiffs or any of them to execute any security documentation the subject of the finance agreement or any security documentation in favour of the ANZ,

(4) opening a business overdraft account for TSM and permitting it to draw down funds against that facility.

[1285] The defence riposte to those assertions is that, at the times identified (or at least most of them), TSM was not in any contractual relationship with the ANZ and all parties were simply engaged in commercial arms length negotiations for certain loan facilities.

[1286] In such a context, it was said, the ANZ was acting solely in its own interest in seeking information from the other parties on which to make an assessment of the proposal put to it. The evidence indicates that the bank assessment largely proceeded on an initial acceptance of information supplied to it by DLS, ECD and Godwin, given that it did use certain valuations that had been made for the CBA -- although the evidence is by no means clear as to how these came into the possession of the ANZ. It is also said by the ANZ that Barnett made a CRAA search.

[1287] In my opinion that is an accurate summation of the situation. No basis has been established for the alleged duty leading to the asserted economic loss. Consequently, no common law duty additional to any later contractual duties arose in favour of TSM.

[1288] If I am wrong as to that, then I consider that, given the state of the evidence, the plaintiffs have not established the existence of any relevant "expectation interest", so as to entitle them to maintain a tortious claim for economic loss. The bank had made no relevant factual representations to any of the plaintiffs, nor had the negotiations between the parties proceeded on any basis whereby the bank was party to some implied factual situation giving rise to an obligation to reveal contrary information coming to its knowledge.

[1289] No basis for a common law duty of care to the guarantors has been demonstrated conformably with the authorities to which reference has already been made.

[1290] Certainly no express, or even implied, representation was made by the ANZ that it would conduct the relevant investigation in the interest of any of the personal plaintiffs.

[1291] I agree that, having regard to the content of paragraph 78 of the statement of claim, the plaintiffs' plea really amounts to an implicit suggestion that the ANZ should have ascertained the falsehood of Godwin's

representations and was thus under a duty to TSM not to do business with that entity!

[1292] Equally, no basis has been demonstrated to support the existence of a duty of care to the plaintiff guarantors to ascertain the title situation in relation to the alleged Godwin properties, prior to the execution of the security documentation.

[1293] At that time, of course, those guarantors had been made well aware that Godwin was not the registered proprietor of the alleged Godwin properties and that Traci Lew-Fatt and Walter Lew-Fatt respectively were actually shown as the registered proprietors.[494] They took no steps to query such a situation or the possible implications of it.

[1294] So far as the guarantors other than Godwin and the Lew-Fatts were concerned their relative situation, as co-guarantors, after the execution of the security documents and settlement of the loan facilities, was exactly as envisaged in the loan approval -- each had given the contemplated first mortgage security that adequately secured the bank loans, to the point that any individual liability on the separate guarantee instruments themselves was somewhat academic.

[1295] There were no special circumstances attracting a duty of care not to cause economic loss as adverted to in the applicable authorities, nor did the situation constitute a relevant intrinsic circumstance within the meaning of

[494] Exhibit D51 Tabs 37(a), (b) and (c).

Holloway. At no stage had the bank expressly or impliedly promoted the existence of any relevant factual situation.

[1296] Additionally, there is force in Ms Kelly's point that there was actually no direct, positive evidence led at trial which definitively established the precise beneficial ownership of either of the alleged Godwin properties in any event.

[1297] The next point promoted by the plaintiffs was that the ANZ had a duty of care to ascertain whether either or both of the alleged Godwin properties was encumbered and, if it was, to notify the plaintiffs or any of them of that fact and of the extent of the encumbrances (in money terms) prior to the same times as were pleaded in relation to the ownership issue.

[1298] Quite apart from the fact that, when the ANZ conducted its searches, the relationship of banker/customer had already come into existence between TSM and it (so that any issues between those parties arose solely in contract), the plaintiffs' assertions overlook the point that the evidence indicates that any searches carried out by the ANZ were conducted in *its* sole interest and not in that of the plaintiffs or any of them.

[1299] There was no duty or undertaking to make relevant enquiries in the interest of the plaintiffs, particularly in a situation in which the loan facilities would not be settled unless and until the ANZ received the first mortgage securities stipulated to support them -- which it ultimately did.

[1300] As was said by Gibbs CJ, as a general rule failure to act is not negligent unless there is a duty to act.[495] No such duty could or did arise in the circumstances. In the end, the loan transactions went through on the terms on which they were approved. The encumbrances were paid out and first mortgages taken. How and why they were paid out is another matter and did not give rise to any relevant issue for present purposes.

[1301] The plaintiffs assert in paragraph 76.5 of the statement of claim that the ANZ owed a duty to them all to undertake checks to verify the personal asset position, credit record and creditworthiness of Godwin with the CRAA and the NAB and, in the event that either held information indicating that he did not have a good credit record or was not a creditworthy individual or that his PSP was different to that provided by Godwin to the ANZ, to notify the plaintiffs or any of them of the relevant facts.

[1302] Leaving aside the question whether any, or any effective, CRAA searches were carried out, this plea also relates to a time subsequent to the creation of the contractual banker/customer relationship and, for reasons already discussed, the only duties owed by the ANZ to TSM were pursuant to that contract.

[1303] The critical considerations were that Godwin only participated in the loan facility transaction to provide security as a guarantor and his

[495] *Heyman*, 571 ??

creditworthiness did not have any significant bearing on the security that he was required to give and which was ultimately given.

[1304] True it is that it may have been pertinent to the worth of his formal, separate instrument of guarantee, but that was, in practical terms, of little more than academic interest.

[1305] No separate duty arose in favour of the plaintiff guarantors, for the same reason as earlier discussed as to the issue concerning the ownership of the alleged Godwin properties.

[1306] I turn to the plea in paragraph 76.5A to the effect that, between November 1997 and prior to draw down of funds in January 1998, the ANZ had a duty to notify the plaintiffs that it had significant concerns with regard to Godwin's real and personal asset position and/or credit worthiness.

[1307] This plea also focuses on time subsequent to the creation of the contractual banker/customer relationship between the ANZ and TSM.

[1308] An issue arises on the evidence as to the nature and extent of any concerns that were entertained by Baylis, but that is not to the point. This plea necessarily fails because no circumstances have been demonstrated that would give rise to a common law duty of care to TSM beyond any duty that arose from the implied terms of the contract.

[1309] Whether or not it had the alleged concerns, the ANZ did not have any relevant duty to the guarantors, for the same reasons that have already been expressed in connection with other foregoing plea issues.

[1310] I do not find it necessary to traverse each of the alleged failures pleaded in paragraph 76.6 to 76.10 of the statement of claim, the substance of which has already been summarised in these reasons.

[1311] It will suffice to say that each of them impermissibly seek to erect tortious duties in relation to matters arising out of the contractual banker/customer relationship between the relevant parties.

[1312] Furthermore, as to the plaintiff guarantors, they also seek, in part, to aver an independent tortious duty to them said to have given rise to economic loss in relation to what is essentially a contractual duty by a bank to its customer.

[1313] There is no basis for imposing on a bank a duty in tort to comply with its contractual obligations to its customer, particularly a duty that is potentially wider than that owed to the customer itself.

[1314] I agree with Ms Kelly that the pleas related to alleged conflict of interest are essentially pertinent to fiduciary duties, rather than those arising in tort.

[1315] There is no substance in the pleas based on the alleged failures in question.

[1316] Having regard to my conclusion that the evidence does not support the existence of any common law duty of care conformably with the relevant legal principles, it is unnecessary to dilate on the plaintiffs' pleas as to the alleged breaches of such duties and the loss said to flow from them. The factual situation as to those alleged breaches in any event appears from my findings expressed elsewhere in these reasons.

[1317] The claims in respect of the clearance of the $570,000 cheque and the $460,000 cheque are based on assertions that, given the state of knowledge Baylis at the time and what were said to be the significant concerns that he harboured as to the honesty of Godwin, his actions in relation to each of the clearances constituted a breach of common law duty to all plaintiffs to take care in participating in or approving the special clearances in question.

[1318] Such a plea necessarily fails insofar as it relates to TSM. I have already pointed out that, at the relevant times, by virtue of the then existing relationship of banker/customer, no separate and independent common law duty arose vis-à-vis that entity. I will, in due course, separately discuss the topic of the two cheques in relation to the contractual duty that arose by virtue of that relationship.

[1319] As I understand his argument, Mr Sallis contends that, by reason of the ANZ requirement that the personal plaintiffs stand as mandatory co-

guarantors and sureties of the proposed loan facilities, there attached to it a common law duty to take care in, as he put it:

> " .. approving those particular special clearances of cheques", which were 'so obviously unusual and in temporal proximity to and intended effect upon the ability of Godwin to proceed with the proposed settlement of the registered securities for the ANZ that a prudent banker would not have enabled their clearances without referral to the directors of TSM'".

[1320] This contention appears to be founded on the general plea in paragraph 76.6 of the Statement of claim that "*in the premises*" the ANZ owed the plaintiffs "or one or more of them", *inter alia*, a duty to make proper enquiries of the Directors of TSM before paying any cheques that it had reasonable grounds to believe might not have been drawn in conformity with the actual instructions and intent of TSM. I do not discern any separate, relevant plea concerning any specific duty that was said to have arisen in relation to the receipt and collection of the $570,000 cheque.

[1321] There is no plea, nor was there any evidence to establish, that as a basis for this cause of action, any of the plaintiffs stood in any special relationship to the ANZ beyond that of stipulated contractual guarantor of the loan facilities sought by TSM.

[1322] My attention was not invited to any decided authority supportive of the proposition that, in such circumstances, a common law duty of the type asserted could arise, in addition to any contractual duty arising under the relevant instruments of guarantee.

[1323] Absent some special relationship not here pleaded, the rights and liabilities of parties to an instrument of guarantee are, necessarily, purely contractual.

[1324] Where a contract of guarantee is brought into existence, there is no liability on the guarantor unless and until the principal debtor fails to meet its obligation (*Turner Manufacturing Co Proprietary Limited v Senes).*[496]

[1325] A contract of guarantee may also be avoided by certain types of pre-contractual circumstances not here relevant[497] or, subject to the express terms of the contract of guarantee, as a consequence of certain post-contractual actions by the creditor, not consented to by the guarantor e.g. a unilateral variation of the principal contract of indebtedness, the granting of an extension of time or other indulgence to the debtor, the release of the debtor or of securities given by the debtor or of co-sureties and the like.

[1326] As a matter of logic, the liability of a guarantor is co--extensive with that of the debtor, absent some specific limitation of liability under the instrument of guarantee.[498] A guarantor does not owe a primary liability, as under an indemnity, that exists independently of the liability of the principal debtor.[499]

[1327] My attention has not been drawn to any authority to the effect that there is an implied term in the contract of guarantee that the creditor will duly discharge any duty of care owed to the principal debtor. If the net liability

[496] [1964] NSW 692.
[497] cf *Tyree, Banking Law in Australia* paragraph 11.210.
[498] cf *Turner* at 695 and discussion in *Quincecare* at 372.
[499] *Yeoman Credit Ltd v Latter* [1961] 1 WLR 828.

of a principal debtor is reduced by reason of some breach of contract on the part of the creditor, then liability of the guarantor will abate accordingly.

[1328] But all of those considerations arise exclusively in contract and usually in the context of commercial dealings between parties. There is, in the normal course and in the instant case, simply no scope for the existence of some additional duty of care of the nature asserted by Mr Sallis, vis-à-vis the personal plaintiffs.[500]

Claims based in contract

The claims as pleaded

[1329] There are a number of facets of these claims. In addressing them it is important to bear in mind the pleading contained in paragraph 37 of the finally amended statement of claim. This asserts that, by letter dated 19 November 1997 from Baylis of the ANZ addressed to TSM, which letter was signed and returned to the ANZ by Smith, Dean, Godwin and [NKS] ("the 19 November letter"), the ANZ advised in writing that it had agreed to extend finance to TSM ("the finance agreement").

[1330] That pleading does not assert that the 19 November letter alone constituted or evidenced the full terms of the so-called finance agreement. Rather, paragraph 38 of the statement of claim avers that the terms of the finance agreement were partly written and partly to be implied.

[500] See reasoning of Steyn J in *Quincecare* at 383-384.

[1331] It is pleaded that, in so far as the terms of the finance agreement were written, they were contained in the 19 November letter and included the following material terms, namely that:

(1) the ANZ would provide TSM with –

(a) a business mortgage loan of $750,000 at 6.95 percent interest, repayable over 15 years;

(b) a business overdraft facility of $300,000 at 9.25 percent interest, to be applied to TSM's basic working requirements; and

(c) a bridging loan (fully drawn advance) of $500,000 at 9.25 percent interest for six months, to be fully repaid from the sale of units comprising the first LTD development project.

(2) The agreement was conditioned on the ANZ taking security over various nominated properties, including the alleged Godwin properties.

(3) TSM was to pay the costs and expenses associated with the procurement of valuations of the properties offered as security in support of the finance agreement and the finance application preceding it.

(4) TSM was to enter into a registered mortgage debenture in favour of the ANZ.

(5) TSM and LTD were to execute cross guarantees in favour of the ANZ.

(6) TSM was to pay ANZ loan approval fees of $2000.

(7) TSM was to further pay the ANZ $2000 for document, title search and settlement fees.

(8) TSM was also to pay all government charges and the cost of preparation and registration of the mortgage debenture.

(9) TSM was to provide the ANZ with a written acknowledgement that no dividends or fund withdrawals would be undertaken without first meeting TSM's loan and known working capital requirements.

(10) The personal plaintiffs and Godwin were to execute unlimited personal guarantees in favour of the ANZ (as previously discussed with relevant bank officers and/or as envisaged in the original proposal to the ANZ).

(11) The unlimited guarantees were to be supported by a registered first mortgages over the alleged Godwin properties.

[1332] I pause to comment that a perusal of the 19 November letter indicates that certain of the alleged specific terms pleaded (e.g. requirement to pay certain bank and government fees and a requirement to apply the proceeds of sale of units from the first development project in repayment of the bridging loan) are not in fact referred to in that letter.

[1333] The plaintiffs further plead that a series of additional terms were implied in the finance agreement by reason of a series of specific identified events

leading up to 19 November 1997, the ANZ security requirements, banking business custom and practice and in order to give business efficacy to the agreement.

[1334] These were said to include the following:

(1) that TSM and LTD would relocate all of their banking and business finance from other stipulated entities to the ANZ;

(2) that the ANZ would conduct itself with a reasonable skill and care-

(a) in obtaining first registered mortgages over the alleged Godwin properties; and/or

(b) in the transacting of any business of or behalf of TSM with which it was involved;

(3) that the ANZ would make all reasonable and proper enquiries to ensure that the business transacted through the bank accounts the subject of the finance agreement was transacted in accordance with the written terms of the finance agreement;

(4) that the ANZ would not transact any banking business of TSM outside the terms of the finance agreement;

(5) that, when conducting its business with TSM, the bank would –

(a) conduct itself in a professional manner;

(b) proactively cater for TSM's individual business requirements;

(c) transact TSM's banking business with a thorough understanding of TSM's present and future needs;

(6) that the ANZ would make all proper enquiries with the directors of TSM in relation to any cheques presented to it outside the ordinary course of business;

(7) that the ANZ would promptly bring to the attention of the plaintiffs or any of them any significant concerns it had in relation to the conduct of TSM's banking business in so far as the same –

(a) arose from the operation or transacting of TSM and/or LTD's banking business;

(b) arose from any other concerns that the ANZ had regarding the transacting of business between the ANZ, TSM and/or LTD;

(8) that the ANZ would make all due and proper enquiries prior to clearing cheques as against funds in the TSM account in circumstances where the same appeared to be outside the ordinary course of TSM and/or LTD's business;

(9) that the ANZ would make due and proper enquiries so as to check the accuracy of instructions received from or on behalf of TSM in order to ascertain whether those instructions were really from TSM and/or LTD;

(10) that the ANZ would draw any suspicious or irregular transactions in relation to TSM's accounts with the ANZ to the attention of the directors of TSM;

(11) that the ANZ would make all proper enquiries in relation to any banking transaction involving TSM which came to its officers' attention which was outside the ordinary course of TSM's business;

(12) that the ANZ would promptly bring to the attention of the plaintiffs or any of them any alterations or concerns the ANZ had in relation to the securities offered to the ANZ in support of the finance agreement;

(13) that the ANZ would promptly bring to the attention of the plaintiffs or any of them any material alteration to the securities offered by Godwin in support of the finance application and/or the finance agreement promptly upon becoming aware of such alterations;

(14) that, in the event the ANZ formed the view that the alleged Godwin properties were not available as securities to support the finance agreement, it would immediately advise the plaintiffs or any of them that this was the case;

(15) that, prior to the alteration of any securities in support of the finance application, the ANZ would notify the plaintiffs or any of them;

(16) that the ANZ would make all reasonable and proper enquiries to ensure that business transacted by it in relation to the TSM finance facilities the subject of the finance agreement was transacted in accordance with the implied terms of the finance agreement.

[1335] The plaintiffs contend that the ANZ breached the terms of the finance agreement in various respects.

[1336] First, it is asserted that the ANZ acted in breach of the written terms of the finance agreement in that it failed:

(1) to take security over the alleged Godwin properties prior to the entry by TSM into the finance agreement and the commencement by it of drawing down funds pursuant to that agreement;

(2) to obtain unlimited personal guarantees from Godwin securing the loan the subject of the finance agreement to the extent of $630,000; and

(3) to obtain registered first mortgages over the alleged Godwin properties within a reasonable period after the entry by TSM into the finance agreement.

[1337] Second, it is contended that the ANZ acted in breach of the implied terms of the finance agreement in that it failed:

(1) to exercise reasonable skill and care in obtaining enforceable first registered mortgages over the alleged Godwin properties prior to or within a reasonable time after entry into the finance agreement; and

(2) to advise the plaintiffs or any of them of the matters relied upon as particulars of duties of care pleaded in paragraphs 76.1 to 76.5 and 84 of the Statement of claim, said to have been owed by the ANZ to the plaintiffs or of the matters relied upon as constituting breaches of the written terms of the finance agreement above referred to.

[1338] Third, it is said that, in specially clearing the $570,000 cheque into the TSM overdraft account, the ANZ acted in breach of the finance agreement.

[1339] As to this, it is asserted that, in contravention of the written and/or implied terms of the finance agreement:

(1) the ANZ failed to make reasonable and proper inquiries to ensure that the special clearance of the cheque was transacted in accordance with the terms of the finance agreement and the instructions of TSM;

(2) it failed to notify the directors of TSM of the transaction prior to specially clearing the relevant cheque;

(3) it failed to make reasonable and proper inquiries in relation to the special clearance of the relevant cheque, including inquiries with DLS and ECD to confirm the instructions of TSM regarding it;

(4) it specially cleared the relevant cheque without confirming the instructions of TSM regarding it, in circumstances where the special clearance was outside the ordinary course of TSM's business, as known to the ANZ;

(5) it specially cleared the relevant cheque in circumstances where it knew or ought to have known that the borrowing by TSM of monies from Flynn Petroleum Proprietary Limited was contrary to the terms of the finance agreement;

(6) it specially cleared the relevant cheque without any regard to the understanding by the ANZ of the business of TSM and LTD as

imparted to it by DLS and ECD at relevant meetings and the documents comprising the finance application;

(7) it specially cleared the relevant cheque without bringing the Godwin request to the attention of DLS, ECD, SED, and NKS or any of them; and

(8) it specially cleared the relevant cheque in accordance with the Godwin request in circumstances where it was incumbent upon Baylis to make reasonable and proper inquiries of TSM in light of suspicions that he harboured regarding the Godwin request, at the time that he complied with it.

[1340] Fourth, it is said that, in specially clearing the $460,000 cheque in favour of Godwin against the TSM overdraft account, the ANZ acted in breach of the express and/or implied terms of the finance agreement in that:

(1) it failed to make reasonable and proper inquiries of the directors of TSM to ensure that the special clearance request was being processed in accordance with their instructions;

(2) it specially cleared the relevant cheque without making any inquiries of the directors of TSM in circumstances in which the special clearance request was outside the ordinary course of the business of TSM;

(3) it specially cleared the relevant cheque without any regard to the individual business requirements of TSM;

(4) it specially cleared the relevant cheque without any regard to the understanding of ANZ of the business requirements of TSM;

(5) it specially cleared the relevant cheque without any regard to the understanding imparted to it by DLS and ECD concerning the management, equity and financial structure and the capital and finance needs of TSM;

(6) it specially cleared the relevant cheque without any regard to the business requirements of TSM and/or LTD, as imparted to it in the finance application;

(7) it specially cleared the relevant cheque without bringing the transaction requested by the NAB officer to the attention of DLS, ECD, SED, and NKS or any of them;

(8) it specially cleared the relevant cheque in accordance with a request of the NAB officer at a time when Baylis harboured suspicions regarding the Godwin request; and

(9) it specially cleared the relevant cheque in circumstances when, as was known to Baylis, there were NAB mortgages over the alleged Godwin properties.

[1341] Fifth, the plaintiffs say that, in drawing the sum of $108,395 to discharge the mortgage over the Raffles Road property, the ANZ acted in breach of the finance agreement and/or in breach of its fiduciary, contractual and common-law duties of care to the plaintiffs, in that such sum was debited in whole or in part to the TSM overdraft account and/or business mortgage

loan account with the ANZ in contravention of the terms of the finance agreement:

(1) without any notification or authorisation from the plaintiffs;

(2) in circumstances where the ANZ was aware, by virtue of the discussions between Bradley, Baylis and Burford at the second October meeting and the second November meeting that the mortgage was to be paid out by Godwin and not by the plaintiffs or any of them; and

(3) in circumstances where the discharge of the relevant mortgage resulted in an improved security position for the ANZ to the detriment of the plaintiffs.

[1342] Sixth, the plaintiffs plead that the calling in of the monies loaned to TSM and the writing of the letter from the ANZ dated 6 March 1998 was in breach of the finance agreement and/or the February variation of it.

[1343] As to this, the plaintiffs detail the alleged breach in these terms:

(1) as at 6 March 1998 there were, in fact, no drawings by TSM in excess of its overdraft limit;

(2) as at that date, a sum of $1.37 million was not owed by TSM to the Northern Property Group Proprietary Limited as asserted by the ANZ;

(3) as at such date there was only a relatively small amount of unpaid group and prescribed payment system tax outstanding to the

Australian Tax Office which TSM and/or LTD were in a position to pay, upon certification of the amounts being the correct amount payable, from their working capital and/or other readily realisable cash assets;

(4) the ANZ ought not to have, but did in fact purport to rely upon, concerns regarding the obtaining of an authorised mortgage over the property of Mr Lew-Fatt, as the ANZ had held those concerns from in or about November 1997 and had failed to communicate any such concerns to the plaintiffs prior to calling in the loan;

(5) it applied the proceeds paid to it from the sale of the plaintiffs' properties in reduction of the TSM loan contrary to the terms of the February variation, by not applying funds received to the highest interest-bearing accounts of TSM;

(6) contrary to what Baylis had agreed with DLS and ECD pursuant to the February variation, the ANZ subsequently took action and threatened to foreclose and take immediate action to sell the plaintiffs' assets if steps to sell the plaintiffs' secured assets were not taken by the plaintiffs or any of them.

[1344] Seventh, the plaintiffs contend that the ANZ acted in breach of the terms of the finance agreement and/or breached its fiduciary and/or common law duty of care to the plaintiffs or any of them by failing to inform the plaintiffs that, to its knowledge:

(1) it had, by 5 January 1998, become aware of caveats over the alleged Godwin properties, as well as the properties owned by LTD;

(2) Godwin had both lodged the caveats and arranged for them to be removed;

(3) he had very belatedly paid out mortgages over the alleged Godwin properties that he had always represented to DLS and ECD in the presence of officers of the ANZ at the October meetings and the November meetings and/or in the finance application as being unencumbered;

(4) that the $460,000 cheque was a TSM cheque actually paid into the NAB account partly for Godwin's benefit, but mainly to pay out the NAB mortgages over the alleged Godwin properties;

(5) Godwin's asset position was questionable and had never been verified by the ANZ;

(6) Godwin obtained a further $570,000 from sources then unknown to the ANZ without further assets to secure a loan for that sum; and

(7) in January 1998 the ANZ, through one or more of its employees, had committed and/or unwittingly assisted Godwin to uplift the caveats previously referred to.

[1345] The plaintiffs assert that, by virtue of the breaches of contract relied upon by them, they have suffered loss and damage as particularised in the statement of claim.

Issues arising

[1346] Various issues arose between the parties as to what detailed terms ought properly to be implied into the contractual relationship between TSM and the ANZ both as a matter of general law and having regard to the specific evidence in this case.

[1347] I see no profit in seeking to canvass that topic in global terms beyond the expression of the principles to which I have already referred. It will suffice merely to address each of the alleged breaches of contract pleaded in context.

[1348] I will first review the allegations of breaches of what were asserted to be the written terms of the finance agreement.

[1349] The first such breach pleaded (i.e. the asserted failure to take security over the alleged Godwin properties prior to the entry by TSM into the finance agreement and the commencement of funds drawdown pursuant to it) is, read literally, something of a contradiction in terms, in that the pleading seems to assert a breach by virtue of a failure to do something prior to the consummation of the contract.

[1350] However, I take the intended plea to allege a failure to take security, by way of registered first mortgages over the subject properties, within a reasonable time after consummation of the contract and, in any event, prior to funds drawdown. This is coupled with the plea of a failure to obtain

unlimited personal guarantees from Godwin to the extent of $630,000 -- once again, an apparent contradiction in terms.

[1351] The short riposte to these suggestions is that the letter of 19 November 1997 does not contain any term that imposes on the ANZ an obligation to take any of the steps complained of. It does no more than specify the security that the bank requires to support the approved loan facilities.

[1352] Further, that letter and the subsequent confirmatory letters of 24 November 1997 are quite silent as to any specific time at which the mortgages and guarantees in question will be taken and make no mention of a guarantee for $630,000 to be given by Godwin.

[1353] The ANZ did in fact obtain an unlimited guarantee (inter alia) from Godwin, which was executed on 25 November 1997.[501]

[1354] The plea in the statement of claim that further asserts that the ANZ also acted in breach of the implied terms of the finance agreement in failing to exercise reasonable skill and care in obtaining enforceable first registered mortgages over the alleged Godwin properties prior to or within a reasonable time after entry into the finance agreement necessarily attracts responses akin to those concerning the somewhat similar plea in relation to breaches of asserted written terms.

[501] Exhibit D51 pages 188-191.

[1355] In obtaining the relevant mortgages the ANZ was not transacting any business of or on behalf of TSM within the meaning of paragraph 40.2(ii) of the statement of claim. It was acting solely in its own legitimate commercial interest. Ultimately, of course, the ANZ did obtain registered first mortgages over the alleged Godwin properties when the loan facilities were finally settled.

[1356] In so far as the plaintiffs' pleas are based on an what is said to be failure to inform the plaintiffs of a variety of matters, it is to be noted that relevant paragraphs of the statement of claim assert that the ANZ had a duty to ascertain whether Godwin was the registered and equitable owner of the alleged Godwin properties and inform the plaintiffs about it; to ascertain whether the alleged Godwin properties were encumbered and, if so, the full extent of those encumbrances and to tell the plaintiffs about that; to investigate the personal asset position, credit record and creditworthiness of Godwin and report to the plaintiffs about that; and to advise the plaintiffs if it had any significant concerns about Godwin's real and personal asset position, credit record and creditworthiness.

[1357] None of those matters constituted the "*transacting of business of or on behalf of TSM*" as referred to in paragraph 40.2(ii) of the statement of claim. Once again the matters referred to all constitute potential activities of the ANZ in attending to its own prudential requirements in relation to the granting of loan facilities to TSM.

[1358] Moreover, neither of the "breaches" complained of by the plaintiffs in paragraph 85 of the statement of claim match the earlier pleas in paragraph 40.2 of that pleading as to terms implied in the finance agreement.

[1359] I note that the pleading concerning these last mentioned matters avers that, by virtue of the alleged breaches, the *plaintiffs* suffered loss. There is no evidence that any of the plaintiffs other than TSM was a direct party to the finance agreement. The ANZ did not in fact owe any relevant contractual obligations to those parties.

[1360] I next come to the content of paragraph 88 of the statement of claim, the substance of which I have already summarised.

[1361] In essence, this contends that the actions of Baylis, in receiving the $570,000 cheque from Godwin, obtaining a special clearance of it and paying the resultant proceeds to the credit of the TSM account, constituted a breach of the implied contractual duty of the ANZ to TSM as its customer to exercise such care and skill in relation to the banking transactions on its account as would be exercised by a reasonable banker in similar circumstances.

[1362] I have already traversed the detailed particulars expressed by the plaintiffs as to the manner in which it is said that the ANZ breached that duty.

[1363] The fundamental stance adopted by TSM is that, by any test, the presentation of the cheque to Baylis, in the manner and circumstances of

that presentation (including the detailed knowledge that he had at that point in time), constituted an atypical transaction quite outside of any routine banking operation on the relevant account. It was one that was so out of the ordinary course of business that it should have sounded clear alarm bells with him.

[1364] As to this, the particular features emerging from the narrative facts and relied on by TSM may be summarised in this fashion:

(1) By virtue of the various negotiations leading to the eventual finance approval of 19 November 1997 and the documentation and credit memoranda associated with them, Baylis was well aware of the financial position of TSM and the asserted respective asset and liability positions of the personal plaintiffs,

(2) In particular, it was, or must have been, apparent to him that TSM was suffering chronic, ongoing cash flow problems and that the personal plaintiffs had no apparent assets of substance beyond those that were already to be committed to secure the approved finance facilities,

(3) He was acutely aware that it had proved impossible, over a significant period, to effect settlement of the approved facilities due to the failure or inability of Godwin to clear existing debts to the CBA and the NAB on certain stipulated security properties,

(4) He was aware that, on or about 29 December 1997, he had dishonoured a cheque drawn by Godwin on the TSM overdraft account for $460,000 for lack of funds to support it,

(5) He knew that, from a credit management aspect, the loan approval given to TSM was premised upon no further borrowings being made,[502] quite apart from the specific stipulation in the approved terms that no dividends were to be paid or fund withdrawals made by TSM without first meeting the loan and known working capital commitments of TSM,

(6) He was aware that the supposed NPG purchase of the second TSM development project units had fallen through and that bridging finance had been required pending the orderly disposal of the eight units involved,

(7) The amount of the cheque in question was very large, having regard to the normal activities of TSM/LTD, and it was made payable to the ANZ. It was presented to him personally by Godwin, with the request that it be credited to the TSM overdraft account,

(8) The cheque was drawn on the account of Flynn Petroleum and, on the face of it, thus appeared to constitute the unsecured loan by NPG that had been allegedly foreshadowed by Godwin in his earlier discussions with Baylis,

[502] cf evidence of Pedler at T1708,1713.

(9) Baylis had been supplied with the minutes of the retreat meeting of 15 November that referred to a substantial pre-existing debt due to NPG,

(10) He had been told a series of conflicting stories by Godwin concerning why settlement of the loan facilities could not be completed in a timely manner, to the point that he had seriously considered calling the whole deal off,

(11) Even if it be accepted that he had been told by Godwin that the amount of the cheque was to be an unsecured loan to be repaid out of the proceeds of sale of units, such explanation and the assertion of how it was to fund the payment of existing encumbrances was patently non-credible at the time on the face of it, as earlier recited,

(12) For the reasons put to Baylis by Mr Trim, Godwin's explanation to Baylis of the purpose of the alleged loan was manifestly absurd. It made no sense at all that, being about to settle very large advances being made by the ANZ to enable it to discharge existing debt and have further working capital, TSM would go further into debt to the extent of almost half of the amount being borrowed from the ANZ to pay off existing third-party mortgage debts in order that the ANZ securities could be put in place.[503]

(13) Pedler acceded to the proposition that the whole concept was plainly irregular in the context of the ANZ loan approval.[504]

[503] T1859.
[504] T1709.

(14) It was contrary to the clear understanding of Baylis that it was the obligation of Godwin (and not that of TSM) to clear the relevant mortgage liabilities. Further, the asserted borrowing was utterly inconsistent with Godwin's statement that there was only a small mortgage liability in respect of the alleged Godwin properties, and

(15) By that time, Baylis was extremely anxious to settle the approved loan facilities and only too glad to seek a special clearance of the cheque to enable him to do so. It is plain that he simply did not pause to turn his mind to the significance of the foregoing circumstances and the obvious implications of the proposed transaction.

[1365] It will be recalled that the expert witness Guild testified that the known circumstances surrounding the presentation of the $570,000 cheque raised obvious questions and should have caused a prudent banker to have clarified the situation with a director of TSM prior to processing that cheque -- a point that was, eventually, substantially conceded by Barnett and Pedler.

[1366] On becoming aware of details of the full relevant background evidence, the witness Silver testified that he would have wanted to get to the bottom of the situation and might have needed to speak with the directors of TSM.

[1367] Whilst I by no means ignore contrary views of the witnesses Kirkmoe and McFadden, it seems to me that what was said by the other witnesses has a strong appeal of common sense and I prefer their evidence.

[1368] At the end of the day, the inevitable conclusions to be drawn are that the presentation of the $570,000 cheque, in the circumstances to which I have adverted, was not only outside of any routine banking transaction on the account of TSM, but was also one that cried aloud for proper clarification with the directors of that company -- especially as it was a cheque drawn in favour of the ANZ and not direct to TSM itself. To adopt the phraseology of Steyn J in *Quincecare*,[505] the circumstances were such as to put the ANZ on inquiry in the sense that Baylis had reasonable grounds (although not necessarily proof) for believing that the transaction was irregular, unauthorised and not for the proper purposes and benefit of TSM.

[1369] In so saying, I note Ms Kelly's points that Godwin was a signatory on the TSM account and had ostensible authority to attend to banking business. In her submissions she instanced the part played by Godwin in the initial approaches to the ANZ, his other attempts to secure finance for TSM and LTD and his roles in seeking the additional $500,000 bridging finance on 18 November 1997 and in securing early draw downs to meet pressing commitments and to conclude the acquisition of the Margaret Street property.

[505] *Quincecare* [1992] 4 All ER 363 at 376.

[1370] She further made reference to the fact that Baylis was also aware of the company's desire to effect settlement of the approved facilities at the earliest possible date. He had been told by DLS to speak with Godwin concerning the latter's undertaking to clear the mortgage on the Raffles Road property and what had been said to be a small amount owing on the alleged Godwin properties.

[1371] I also note her contention that Baylis had no suspicions at the time regarding Godwin's honesty or bona fides. I have some difficulty with that proposition. Baylis had certainly been told a series of differing stories by Godwin, to the point that, at one stage, he was "*going to call the whole thing off*." His expressed reasons for not doing so was due to "…… *the work already done by everybody and the size of the deal with pressures of gaining business lending we continued to put up with it …*"

[1372] He certainly had every reason to be wary, if not downright suspicious, as to the accuracy of alleged scenarios being put to him by Godwin. My assessment of his performance in the witness box, coupled with what he later wrote referring in retrospect to his dealings with Godwin, indicates to me that he did, indeed, harbour serious misgivings about Godwin's veracity, at the time.

[1373] It seems to me that the short answer to Ms Kelly's submissions is that, even given any ostensible authority possessed by Godwin, such was the magnitude of the transaction, the atypical nature of it, the differing stories

told by Godwin over time and the patent absurdity of the supposed transaction as exposed by Mr Trim in his cross examination of Baylis, that the presentation of the cheque necessarily begged serious questions as to whether the transaction was within the ostensible authority and for the purposes of TSM's business to the point that the situation demanded clarification with the directors of TSM, of whom Godwin was not one.

[1374] As Guild said, the transaction was not, on the face of it, in the normal course of business, involving, as it did, Baylis personally seeking the special clearance and given the circumstances known to him.

[1375] I consider that, in the particular circumstances, the failure to seek such clarification constituted a failure by the ANZ to exercise the standard of care and skill of a reasonable banker in transacting its customer's business and thus a breach of the implied terms of the contract between TSM and itself, as discussed in *Selangor*.

[1376] I will return to a consideration of the consequence of that breach in due course.

[1377] I now move on to a consideration of the breach of contract pleaded in paragraph 89 of the statement of claim.

[1378] I have earlier summarised the narrative circumstances pertaining to the bringing of the $460,000 cheque into existence and the subsequent special

answer given by Baylis when it was presented by the NAB for clearance. I will not, unnecessarily, retrace that detail.

[1379] In summary, the relevant key points were:

(1) The cheque was presented for special clearance on the same day as the $570,000 cheque was presented and shortly after the latter cheque had, in fact, been cleared,

(2) Baylis professed no surprise at this occurrence and seems only to have reflected on funds availability in the account and the fact that the cheque had been signed by two authorised signatories and nothing else,

(3) He did not, at the time, attach significance to –

a. the prior history of the dishonour of the same cheque;

b. the fact that it was, patently, not a cheque drawn in the normal course of business;

c. that it was for a large amount and, as Baylis appreciated at the time, payable to Godwin personally, who was not a director or shareholder of TSM;[506]

d. that Godwin was a signatory to, as well as the payee of, the cheque and the co-signatory was not a director of the company;[507]

[506] In response to a question put to him by me, Baylis accepted that the fact that the cheque was drawn in favour of Godwin and was being cleared into his account necessarily gave rise to the inference that the relevant monies were about to be applied for *his* purposes and not those of the company (T1866).
[507] Indeed Baylis did not even note that fact at the time (T1854).

e. that he assumed, at the time, that the funds were to be applied in clearing the titles to the alleged Godwin properties and he must have appreciated that the amount of the cheque far exceeded what Baylis had been given by Godwin to understand was needed to clear the supposed nominal amount of the existing mortgages on the alleged Godwin properties, even if they were, for some proper reason, to be cleared by funds passing through the TSM account;[508]

f. that, on the face of the situation, TSM monies were clearly being expended to discharge liabilities known by Baylis to be the responsibility of Godwin and/or for his own purposes unrelated to the business activities of TSM; and

g. the fact that this transaction was also taking place in the context of the significantly differing stories that had been told by Godwin and the unease that the whole situation had previously engendered in Baylis.

(4) The request for special clearance was being made by the NAB and was, patently, the prelude to a settlement of the ANZ loan facilities clearly indicated that, contrary to what Baylis had been given to understand by Godwin, it was probable that very substantial mortgage liabilities indeed in respect of the alleged Godwin

[508] The Raffles Road property mortgage was, of course, separately paid out of the TSM account by the ANZ itself. As already emerges, the evidence simply does not establish how or in what circumstances the TSM authority to settle the liability on the Raffles Road property (Exhibit D26) came into existence. Nor does it appear why the mortgage over that property was discharged with funds drawn on the TSM account and not by Godwin, in accordance with his undertaking to do so.

properties were about to be discharged. There was no other logical interpretation to be placed on what was occurring.[509]

[1380] It is the plaintiffs' case that the circumstances, as I have outlined them, clearly indicated at the time that the issue of the $460,000 cheque was highly suspect as to its legitimacy and propriety and demanded that Baylis make due enquiry of the directors of TSM as to the propriety of the transaction.[510]

[1381] Further, this was the unequivocal opinion of the expert witness Guild. I took it to be shared by Kirkmoe and, ultimately, Silver.

[1382] I do not take the opinions expressed by McFadden to necessarily run counter to the above conclusion. In expressing his opinions he simply did not have before him any factual information on which he could properly make an assessment of whether or not there was any compelling external factor operative at the time that would mandate the need for due enquiry prior to answering the NAB request for special clearance. The evidence reveals that, manifestly, there was such a factor.

[1383] The circumstances as I have outlined them necessarily constituted a compelling external factor that cried aloud for the making of due enquiry of the directors of TSM.

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[509] cf T1865.
[510] That was also a view shared by the witness Barnett (T1644).

[1384] I therefore also conclude that the plaintiffs have established that the clearance by Baylis of the $460,000 cheque, in the relevant circumstances, constituted a further breach by the ANZ of the implied terms of the contract between TSM and itself. The failure to seek verification of the propriety of the transaction in the form of due enquiry of the directors of TSM amounted to a failure by the bank to exercise the care and skill of a reasonable banker in transacting its customer's business.

[1385] Once again, this is not answered by relying on what was said to have been Godwin's ostensible authority in relation to TSM banking transactions. Such authority could not reasonably be construed as extending to extraordinary transactions, plainly outside the normal course of business and which, on the face of them, appeared to be for his benefit and not that of TSM.

[1386] In so concluding, I acknowledge the point made by Ms Kelly that when a cheque is presented for payment to a paying bank with a request for a special answer, the paying bank is obliged to either accept and pay the cheque or dishonour it within a reasonable time. That said there is no evidence to suggest that, if an enquiry ought to have been made, it could not, in the normal course, have been made of either DLS or ECD within a matter of minutes.

[1387] The fifth alleged breach pleaded by the plaintiffs is that set out in paragraph 89A of the statement of claim. It basically amounts to an

assertion that the ANZ had no authority to draw the sum of $108,395 from TSM funds and then apply it in satisfaction of the mortgage liability over the Raffles Road property.

[1388] Given that there is no evidence as to how and why that document came into existence, the plain fact of the matter is that, during the trial, the ANZ was able to produce from its records the document ultimately tendered as Exhibit D26. That document is expressed to be an authority dated 30 December 1997 that purports to be signed by DLS on behalf of TSM.

[1389] In effect, it expressly authorises the ANZ to take delivery of the certificate of title to the Raffles Road property and a discharged mortgage over it from the CBA, against payment of $108,500 approximately plus all charges, to be debited to the TSM account.

[1390] It is to be remembered that, on 9 January 1998, Baylis wrote to TSM reporting that it had paid out the Raffles Road mortgage with funds debited to the company's business mortgage loan account. TSM appears to have taken no exception to that communication at the time.

[1391] It follows that the plea in paragraph 89A of the statement of claim has not been made good.

[1392] Paragraph 90 of the statement of claim asserts, as a breach of contract, that the calling in by the ANZ letter of 6 March 1998 of the moneys loaned to TSM was not in accordance with the provisions of the finance agreement or

what is termed the February variation of it. It is asserted that the breach arose by reason of various stipulated circumstances.

[1393] The ANZ raises the issue as to whether, on the evidence, it can properly be said that there was a binding and enforceable February variation agreement at all. That aside, I take the primary assertion of the plaintiffs to be that any calling in was not warranted, because the facts did not legally justify it e.g. there were no drawings in excess of the overdraft limit, the amount stipulated as owing by TSM to NPG was not correct, only a small balance was due to the ATO and any contention advanced by Mr Walter Lew-Fatt could not, logically, have justified any calling in.

[1394] Subsidiary issues were raised as to whether proceeds of sale of assets had properly been applied when the ANZ eventually took what is described as foreclosure action.

[1395] In my opinion the assertions made in paragraph 90 are without substance.

[1396] At the outset, it is to be observed that the letter of 6 March 1998 does not purport to call in the loan facilities at all. Rather, it indicates that, whilst the ANZ considered that it was entitled to formally demand repayment of all moneys, the letter stated that the bank expressly refrained from doing so, provided that the orderly realisation of properties to which the plaintiffs had already committed themselves continued in accordance with guidelines set out in the letter.

[1397] Further, whilst one might cavil at the accuracy of some matters relied on by the ANZ, it was undoubtedly the case that the facilities had been extended to TSM on the basis of a default provision that entitled the bank to call that facility in if any event or circumstance arose which, in the opinion of the bank, caused a material adverse change in the financial condition of TSM or any guarantor - such as was (in the opinion of the bank) likely to prejudice TSM's ability or the ability of any guarantor to meet relevant obligations under the facility or any security for it.

[1398] As Ms Kelly demonstrated, the ANZ had been able to point to multiple circumstances giving rise to adverse changes of the nature contemplated. There is no need to dilate on these *in extenso*, but they included the calling up by NPG of the moneys due to it, the assertion by Mr Walter Lew-Fatt that the security over his house had been given without his authority and was unenforceable against him, that Godwin's asset position was not as represented and that the TSM and LTD cash flows had not lived up to forecast -- to identify but some.

[1399] It follows that this aspect of the plaintiffs' complaints has not been made good. In any event, the issues raised had potential application only to TSM. They had no application to the guarantors, who were not direct parties to any banker/customer contract.

[1400] Finally, in paragraph 91 of the statement of claim, the plaintiffs assert breaches of contract in that it is said that the ANZ failed to inform them of a series of alleged factual situations of which it had or received knowledge.

[1401] These have already been recited in detail and related to aspects such as the lodgement and removal of the NPG caveats, the belated discharge by Godwin of mortgages over what had been said to be unencumbered properties, the transaction involving the payment of the $460,000 cheque, what was said to be Godwin's unchecked, questionable actual asset position and the asserted obtaining by Godwin of a third-party, unsecured loan of $570,000.

[1402] Complaint was also made of a failure to inform the plaintiffs of the assistance rendered by an ANZ employee in uplifting the NPG caveats.

[1403] I agree with Ms Kelly that the breaches pleaded in paragraph 91 appear to be based on earlier pleas that the banker/customer relationship between TSM and the ANZ contained implied terms to the effect that:

(1) the bank would promptly bring to the attention of the plaintiffs or any of them any significant concerns it had in relation to the conduct of TSM’s banking business in so far as the same –

(a) arose from the operation or transacting of TSM and/or LTDs banking business, and

(b) arose from any other concerns that the ANZ had regarding the transacting of business between the ANZ, TSM and/or LTD

and:

(2) the ANZ would draw any suspicious or irregular transactions in relation to TSM's accounts with the ANZ to the attention of the directors of TSM.

[1404] I accept her contention that there is nothing in the authorities or in the particular circumstances attaching to this case that supports the necessary inclusion of the implied terms asserted into the compound banker/customer contract here under consideration.

[1405] If the matters complained of are to be sustained it can only be by virtue of a duty arising, in the relevant circumstances, to do so in exercise of the standard of care and skill of a reasonable banker transacting its customer's business.

[1406] A particular problem with this paragraph of the statement of claim is that, to some extent at least, it misrepresents what are said to be facts.

[1407] No caveats were ever registered over any properties. The relevant documents were lodged, but they were withdrawn prior to actual registration. The ANZ employee concerned merely assisted Godwin to formulate a letter of withdrawal.

[1408] Although it was represented in the re-financing proposal that the alleged Godwin properties were unencumbered, it is common ground that, during negotiations prior to the approval of the loan facilities, Godwin

volunteered that one of the properties had a small mortgage liability registered on it.

[1409] Further, the evidence indicates that Baylis did have an understanding of the source of the $570,000 cheque when it was presented by Godwin to him.

[1410] I have already traversed the situation concerning the $570,000 cheque and the $460,000 cheque.

[1411] The other matters essentially go to aspects that relate to the situation of the bank in perfecting its security position in its own interest, rather than being relevant to any relevant positive duty to TSM. For reasons already discussed, no relevant contractual duty arose in relation to the guarantors as to such matters.

[1412] In summary, I uphold the plea by TSM that the actions of the ANZ in respectively processing the $570,000 cheque and the $460,000 cheque constituted breaches of an implied term of the banker/customer contract between those parties. I am not satisfied that the plaintiffs have proven any other breaches of contractual duty.

Issues arising in relation to parties other than TSM in respect of the banker/customer relationship period

[1413] I do not take Mr Sallis, in his submissions, to assert any relevant separate breaches of contract vis-à-vis the personal plaintiffs in respect of this period, over and above topics that have already been canvassed in these reasons.

Claims based on breach of fiduciary duty

The basis of the claims

[1414] The statement of claim asserts that the ANZ owed a fiduciary duty to all plaintiffs.

[1415] It is contended, in paragraph 75.1 of that pleading, that, as in the case of the claims based on common law duty of care, the fiduciary duty arose in relation to TSM both as a potential and actual customer and security provider in circumstances in which, it is said, TSM was entitled to believe that the ANZ would act in the former's interests.

[1416] It is further asserted in paragraph 75.1.3 that such a duty was also owed to the other plaintiffs as potential and actual security providers, in circumstances where, it is said, those plaintiffs were entitled to believe that the ANZ would act in their interests.

[1417] Particulars of the circumstances said to give rise to the alleged duty, apropos all plaintiffs, are pleaded. They are the same as those related to the plea of the existence of the asserted common law duty of care. They essentially focus on what is alleged to have been said and done in the course of the October meetings and the November meetings.

[1418] In common with Ms Kelly, I infer that reliance is placed on potential relationships up to certain dates and actual relationships thereafter.

[1419] The losses pleaded are the same as those claimed to have been suffered as a consequence of the alleged breaches of contract.

[1420] The specific fiduciary duties said to have been owed by the ANZ to the plaintiffs are identical to those pleaded in respect of the alleged common law duty of care also said to be owed to such parties, as I have already recited them.

[1421] Save as hereafter appears and by virtue of the rolled up form of pleading, the breaches of fiduciary duty alleged in the statement of claim are also identical to those pleaded in relation to the claim based on common law duty of care.

[1422] Additionally it is further averred, in paragraph 77.4 of the statement of claim, that the ANZ breached its fiduciary duties to them by taking one or more of certain actions specifically referred to without advising the plaintiffs:

(1) as to the potential and/or actual advantages of such actions to the ANZ as compared to that which would have resulted from the implementation of the loans in accordance with the facts disclosed in the October meetings, the November meetings and in the finance application;

(2) as to the potential and/or actual advantages of such actions to the ANZ as a consequence of the ANZ's failure to comply with the terms of the finance agreement;

(3) as to the potential and/or actual detriment to the financial positions of the plaintiffs as compared to that which would have resulted from the implementation of the loans in accordance with the facts disclosed in the October meetings and in the finance application; and

(4) as to the potential and/or actual detriment to the financial positions of the plaintiffs as a consequence of the ANZ's failure to comply with the terms of the finance agreement.

[1423] The actions referred to were:

(1) The activities of the witness Ordogh in facilitating the withdrawal of the NPG caveat and in then registering the ANZ mortgages over the alleged Godwin properties and the site of the second LTD development project;

(2) Complying with Godwin's request to process the $570,000 cheque to the credit of the relevant TSM account and also clearing the $460,000 cheque;

(3) Opening the TSM business mortgage loan account and debiting it with the payouts to the CBA, Esanda, and ATSIC;

(4) Debiting $1845 to the TSM overdraft account for fees and charges in relation to final settlement of the ANZ loan facilities; and

(5) Registering the several securities taken to secure those loan facilities.

[1424] It is said by Mr Sallis that the plaintiffs elect as the primary thrust of the case to rely on breach of fiduciary duty as being the "highest duty" owed by the ANZ to them, on the footing that there should be "restitutionary equitable compensation rather than a fault-based contract or tort damages assessment". He argued that they were entitled to seek monetary awards designed to put them as far as possible in positions now as if they had been informed of Godwin's lies as at 20 November 1997 or 2 January 1998 and the lending, wrongful special clearances of the cheques and registrations of securities by the ANZ had not taken place.

Relevant general principles

[1425] As Gibbs CJ pointed out in *Hospital Products Ltd v United States Surgical Corporation and Others*[511] *("Hospital Products")*, the authorities do not provide any comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship may be established.

[1426] Certainly, there are some specific types of relationship that have been held to necessarily fall within the category of fiduciary relationship. Classic amongst those are the situations of trustees, partners, principal and agent and solicitor and client, to identify but a few. However, the categories are not closed.[512] Gibbs CJ made the point that it is not fruitful to attempt to make a general statement of the circumstances in which fiduciary

[511] *Hospital Products Ltd v United States Surgical Corporation and Others* (1984) 156 CLR 41 at 68.
[512] *Hospital Products Ltd v United States Surgical Corporation and Others* (1984) 156 CLR 41 at 68, 96.

relationships will be found to exist. This is because such relationships are of different types, carrying different obligations.

[1427] In general, the facts that an arrangement between parties is of a purely commercial kind and those parties had dealt at arms length and on an equal footing has consistently been regarded as important, but not decisive, in indicating that no fiduciary duty arises.[513] On the other hand, it is clear that contractual and fiduciary relationships may co-exist and that the latter may actually stem from a contractual relationship.[514]

[1428] Further, where fiduciary relationships arise in a contractual setting, such relationships, with their attendant obligations, may, and ordinarily will, exist between the prospective parties before the coming into existence of the relevant formal agreement.[515]

[1429] The High Court in *Hospital Products* was of the view that the relevant principle (at least as applicable to the circumstances of that case) was that a fiduciary relationship exists where the facts of the case in hand establish that, in a particular matter, a person has undertaken to act in the interests of another and not in his own. It was said that it is not inconsistent with

[513] *Hospital Products Ltd v United States Surgical Corporation and Others* (1984) 156 CLR 41 at 68 at 70, 118-119.
[514] *Hospital Products Ltd v United States Surgical Corporation and Others* (1984) 156 CLR 41 at 68 at 97.
[515] *United Dominions Corporation Ltd v Brian Proprietary Limited and Others* (1985) 157 CLR 1.

that principle that a fiduciary may retain that character, although he is entitled to have regard to his own interest in particular matters.[516]

[1430] Where a fiduciary relationship is found to exist then, as to matters to which that duty attaches, it is said that the fiduciary must not place himself in a situation in which his duty and his interest conflict.[517]

[1431] In the course of his reasons in *Hospital Products* at 142, Dawson J commented that the notion underlying all the cases of fiduciary obligation is that, inherent in the nature of the relationship itself, is a position of either disadvantage or vulnerability on the part of one of the parties that causes that party to place reliance upon the other and requires the protection of equity acting on the conscience of that other.

[1432] This is consistent with the view of Mason J in the same case when he said that the critical feature of fiduciary relationships is that the fiduciary undertakes or agrees to act for or on behalf of, or in the interests of, another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.

[1433] The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person, who is, accordingly, vulnerable to abuse by the fiduciary of the latter's position.

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[516] *Hospital Products Ltd v United States Surgical Corporation and Others* (1984) 156 CLR 41 at 68 at 69.
[517] (*Consul Development Proprietary Limited v DPC Estates Proprietary Limited* (1975) 132 CLR 373 at 393).

[1434] The relationship of banker and customer is not one that automatically gives rise to fiduciary duties, although it must be accepted that there will be cases where a bank could owe a fiduciary duty to a customer. Nevertheless, it is certainly not every transaction into which a bank enters with a customer that will constitute it a fiduciary.[518]

[1435] In *Golby* Hill J pointed out that it is not a critical feature of a banker/customer relationship that the bank undertakes or agrees to act for or on behalf of, or in the interests of, its customer in the exercise of some power or discretion affecting the interests of the customer in a legal or practical sense.

[1436] When a customer defaults in repayment of a mortgage, a banker is entitled to exercise the powers in the mortgage for the banker's own interest, at least so long as the banker acts in good faith in exercising the power of sale. Absent, therefore, some special feature, such as the giving of advice, there is no reason to erect a fiduciary relationship between banker and customer when that relationship is essentially one founded in contract.

[1437] In that regard the decision of the Full Federal Court in *Commonwealth Bank of Australia and Another v Smith and Another*[519] is instructive. It was there held that, where a bank creates in its customer an expectation that it will advise in the customer's interest, it may become a fiduciary and

[518] *Golby and Another v Commonwealth Bank Of Australia* (1996) 72 FCR 134, 136.
[519] *Commonwealth Bank of Australia and Another v Smith and Another* (1991) 42 FCR 390.

occupy the position of an investment adviser. Such a situation may also found a common law duty of care.

[1438] In the course of its joint judgment the court had this to say (at 391):

> "In many cases, and the present is one of them, the bank as financier will have a manifest personal interest of its own in the matter. The question then becomes one of ascertaining when, given the apparent commercial self-interest of the bank, the bank also may be taken to have assumed a fiduciary responsibility towards the customer in question……
>
> A bank may be expected to act in its own interests in ensuring the security of its position as lender to its customer, but it may have created in the customer the expectation that, nevertheless, it will advise in the customer's interests as to the wisdom of a proposed investment. This may be the case where the customer may fairly take it that, to a significant extent, his interest is consistent with that of the bank in financing the customer for a prudent business venture. In such a way the bank may become a fiduciary and occupy the position of what Brennan J has called "an investment adviser (*Daly v Sydney Stock Exchange Ltd"*.[520]

[1439] In his reasons in the last-mentioned case Brennan J referred to relevant dicta in *Tate v Williamson*[521] *("Tate")* and *Lloyds Bank v Bundy*[522] *("Bundy").*

[1440] He accepted the proposition expressed by the Lord Chancellor in *Tate* that, wherever two persons stand in a relationship that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense

[520] (1986) 160 CLR 371 at 384-385.
[521] (1866) 2 L. R. Ch. App. 55 at 61.
[522] [1975] 1 QB 326 at 341.

of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relationship existed.

[1441] He further cited with approval a dictum of Sir Eric Sachs in *Bundy* to the effect that cases giving rise to a fiduciary duty tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person upon whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in that transaction being concluded. In addition, there must, of course, be shown to exist a vital element which, for convenience, was referred to as confidentiality.[523]

[1442] That said, I agree with the submission of Ms Kelly that, where a fiduciary duty does arise in relation to a banker/customer scenario, the scope of the duty will be determined by (and will vary with) the circumstances that generate the relationship. As she expressed the concept, a fiduciary duty arising out of the giving of financial advice by a bank may well impose on the bank a duty to avoid conflicts of interest in the giving of that advice. However, the scope of the fiduciary duty in such circumstances would not extend, for example, to a duty not to profit, in a proper manner, from the relationship.

[523] In the sense adverted to in *Tate*.

Issues arising

[1443] The first question to be addressed is whether the evidence in this case establishes that, at any stage, a relevant fiduciary duty was owed by the ANZ to TSM, or to any of the other plaintiffs.

[1444] I approach that question on the basis that, whilst TSM and its directors were plainly anxious to secure finance from the ANZ to support its business operations, equally, the evidence indicates that, at the time in question, the bank was conducting its operations in a competitive business environment and was equally keen to conclude some prudent "deal" with TSM, if possible.

[1445] Such an inference draws strong support from the manner in which the proposal was pursued by Bradley (and later Baylis as to variations of it) through the credit assessment and approvals process and the fact that Baylis persevered with it even although he had formed doubts or concerns as previously recited when it proved impossible to settle the loans in a timely manner.[524]

[1446] Further, it must be borne in mind that, in its indicative proposal arising out of the various meetings had by Bradley with DLS, ECD and Godwin, the ANZ represented to TSM that, by banking with it, the latter would receive professional services provided by bankers with backgrounds in small-business which would cater proactively to its individual requirements; and

[524] cf Ex D51 Tab 68B p 2.

would be dealing with bankers who always sought to “add value” to its business, through a thorough understanding of TSM’s present and future needs.

[1447] There can be no doubt that TSM specifically relied on the bank for advice and guidance as to the best structural financing approach to meet its indicated needs and, to that extent, a relevant confidentiality (in the *Tate* sense) could, potentially, have arisen in that regard. However there is no plea and was no evidence that a fiduciary duty arose by reason of any such advice given. Indeed, there has been no criticism of the structural advice that was in fact given.

[1448] It is by no means clear on the pleadings precisely what it is that the plaintiffs say constituted the ANZ a fiduciary in relation to them. That problem is compounded by the fact that the pleadings appear to assert that the alleged fiduciary relationship existed as between the ANZ and all of the plaintiffs.

[1449] Be that as it may, I take the plaintiffs’ case as to breach of fiduciary duty to consist of two broad prongs.

[1450] First, I took Mr Sallis, in his submissions, to argue that the following circumstances constituted the ANZ a fiduciary in relation to the plaintiffs:

(1) In order to develop its relationship with the plaintiffs and for its own commercial advantage the ANZ *undertook* to TSM in October and November 1997, that it would –

(a) investigate the securities proffered by the plaintiffs and by Godwin and not proceed with the loan facilities unless the securities available were found to be as stated,

(b) structure and administer the documentation and implementation of the loans to the best mutual advantage of itself and the plaintiffs, and

(c) provide competent banking services *in the interests of the plaintiffs*, to be carried out by informed bankers knowledgeable of their needs.

(2) Those undertakings were communicated to DLS and ECD as directors of TSM and potential security providers and as representatives of NKS and SED as potential security providers,

(3) The ANZ undertakings and assumption of those tasks placed it in the role of investigator/financial adviser and created the pre-conditions for the existence of fiduciary to duties by the ANZ to the plaintiffs,

(4) The ANZ controlled the legal relationships by writing letters, making oral statements, providing oral advice, preparing the necessary documentation, registering necessary securities and initiating the lending process once approved,

(5) The ANZ voluntarily assumed sole responsibility for the verification of the information supplied to it by the plaintiffs and Godwin in support of the finance application, an activity that the plaintiffs reasonably believed was being carried out by the ANZ in the joint interests of itself and the plaintiffs,

(6) The ANZ, from the beginning, took and maintained control of the details of the legal relationships between itself and the plaintiffs,

(7) It advanced money to TSM on 20 November 1997 without qualification or notification to the plaintiffs of the discrepancies between the information that had been given by Godwin and as revealed by its searches on or before 20 November 1997 when first actually advancing monies to TSM, thereby creating a reasonable belief in each of the plaintiffs that it had both undertaken all of the prudent credit and security checks and had not ascertained information that was unsatisfactory in the joint interests of itself and the plaintiffs,[525]

(8) That belief was material to the decisions of the plaintiffs to proceed with the ANZ loans to TSM, and

(9) When the ANZ advanced money to TSM on 20 November 1997 it did so in anticipation that the securities that had been offered by the plaintiffs and by Godwin would be registered and thereby made itself

[525] Specifically concerning the financial position of Godwin and any equity possessed by him in the alleged Godwin properties.

vulnerable to default by TSM because it did not have registered securities from the proposed guarantors at that time.

[1451] There are two immediate comments to be made as to those submissions.

[1452] It is not clear to me what is really intended by the suggestion that the ANZ took and maintained control of the details of the legal relationships between itself and the plaintiffs. In one sense that is correct. However, the relevant control was no more than the practical result of a process by the bank of making a normal business decision as to whether or not it was prepared to accede to the application made to it for relevant loan facilities.

[1453] The submission relating to the advance of monies to TSM on 20 November 1997 was, in itself, no more than a commercial decision based upon the fact that credit approval had already been given to the relevant loan facilities, subject to verification of security property values. It is difficult to perceive how that action, considered together with the ANZ letter to TSM of 19 November 1997, could fairly lead to a creation of the belief asserted by Mr Sallis.

[1454] Given the foregoing background and submissions, it is impossible to spell out of the evidence any specific circumstances associated with the negotiations leading to the finance agreement that could fairly be said to give rise to a relevant fiduciary relationship between ANZ and TSM or, for that matter, any other plaintiff.

[1455] I repeat that, distilled to the essence, what transpired amounted to no more than a normal, arm's-length, commercial banking transaction between the parties, whereby:

(1) TSM sought finance from the ANZ for its business operations on the basis that, if such finance was granted, the ANZ would become its banker and would provide competent and relevant banking services;

(2) The ANZ tendered advice as to the most appropriate structure for such finance if finally approved, the appropriateness of which has never been challenged;

(3) TSM then made a formal application to the ANZ for that finance and supplied financial information to it as to both the company and persons associated with it as potential security providers, which information included the proffering of various properties by way of proposed first mortgage security;

(4) The ANZ approved finance in a structural form that was appropriate and also acceptable to TSM, subject to the provision of stipulated security, to include the giving of first mortgage security over properties nominated by it, including properties owned by proposed third-party guarantors; and

(5) The offer of finance was accepted by TSM and its proposed sureties, the required security was ultimately made available to the bank and the approved finance was provided (including some additional finance sought after the initial application).

[1456] It seems to me that, in propounding a claim based on breach of fiduciary relationship based on the negotiations to which I have referred, TSM and, for that matter, the other plaintiffs are seeking to spell out of what were relatively routine commercial contractual arrangements a level of confidentiality (in the *Tate* sense) and alleged representation that the evidence simply does not support.

[1457] I consider that most of the particulars pleaded, whereby it is contended that the duties to each of the plaintiffs were owed in circumstances in which it is said that they were entitled to believe that the ANZ would act in their interests, do not rise above a bare recitation of what may be described as routine historical narrative facts related to the making of an unremarkable application for finance and the ultimate granting of it.

[1458] In part, I consider that the particulars, to some extent, seek to distort the proven facts. Moreover, they fail to differentiate between aspects which essentially relate to routine steps that the ANZ proposed to take in *its* own proper interest (either as due diligence measures or to positively secure any loan facility granted by it), on the one hand, and what could properly be categorised as positive representations to the plaintiffs as to steps that would be taken in the interests of the latter, on the other.

[1459] By way of example, as I have earlier found, I do not accept that, at any stage, either Bradley or Baylis represented to the plaintiffs, or any of them, that the bank would perform any checks or investigations other than in the

interest of the bank itself. They merely made it clear that, from the perspective of the ANZ, loan approval and implementation would be dependent on the provision of the stipulated security properties, a verification of the values of them, and the obtaining of satisfactory credit check results.

[1460] In my opinion, both the particulars pleaded and the evidence led at trial fall far short of making good any assertion that circumstances arose whereby any of the plaintiffs could fairly have been entitled to believe that the ANZ ever relevantly undertook to act in their interests in a manner that gave rise to a fiduciary duty to them.

[1461] Equally, there is no evidence that the relationships between the ANZ and the various plaintiffs involved either the exercise of some pertinent power or discretion by it that could affect their respective interests in a relevant legal or practical sense or that, inherent in any of the relationships, there was some relevant position of disadvantage or vulnerability on the part of the plaintiffs that caused them to place reliance on the ANZ in the necessary sense.

[1462] In so far as the pleadings seek to aver the creation of any relationship of fiduciary on the part of the ANZ in respect of the personal plaintiffs, by way of contrast with TSM, there is no evidence that could possibly found such a relationship. In conducting negotiations with the ANZ DLS and ECD were acting in their capacity as directors of TSM. That aside, the

sole relationship between the personal plaintiffs and the ANZ was merely that of required guarantors and principal creditor.

[1463] I agree with the submission by Ms Kelly that the claims made must be viewed in the context that the ANZ was a banking institution that made profits from lending money to business customers. As she expressed the situation:

> "It was in the bank's interest to insist on adequate security for any loans. It would have been in TSM's interest to have an unsecured loan at the same interest rate (or no interest). It was in the bank's interest to have the guarantors guarantee the loans to TSM. It was in no sense in the interest of the guarantors -- except very indirectly in that they presumably wanted TSM to get the loans and ANZ was not going to lend the money without requiring guarantees. It is of the essence of a commercial transaction of this kind that both parties are acting in their own interests."

[1464] I would merely add that it must never be forgotten that the relevant negotiations with the ANZ went forward in the context that:

(1) DLS, ECD and Godwin unilaterally approached the bank on behalf of TSM for the requisite re-financing facilities, in circumstances in which the ANZ was fairly entitled to assume that each well knew and trusted the others. Godwin was presented to the ANZ as a director of LTD and, in fact, had made the initial contact with the bank on behalf of it and TSM,

(2) It was those plaintiffs who prepared, or were complicit in the preparation of, what proved to be a substantially misleading re-

financing proposal to the ANZ, at least as to important aspects apart from the true title situation to the alleged Godwin properties,

(3) It was also they who, collectively, presented the ANZ with asserted details of the security properties being offered and the group financial position, on the basis of which the ANZ was invited to assess their application,

(4) The bank credit assessment was essentially made, as the plaintiffs must have appreciated, in the circumstances as I have found them to be, on the information provided by them. This was contingent upon ultimate verification by the bank of values of the proposed security assets and their actual availability by way of first mortgage security,

(5) During the assessment process the bank ascertained the true registered proprietor situation of the alleged Godwin properties, which was in fact notified to TSM in the letters of 24 November 1997, and

(6) At least up to the point at which the dealings took place in relation to the $570,000 cheque and the $460,000 cheque, the ANZ was fairly entitled to proceed on the understanding that the relevant security titles would in fact be cleared by Godwin at or by settlement.

[1465] Such a scenario is scarcely consistent with the existence of the undertaking and reliance on it asserted by the plaintiffs, or of the creation of any fiduciary relationship, as alleged.

[1466] The second prong of the submissions advanced by Mr Sallis was to the effect that, even if the events leading up to the consummation of the finance agreement did not give rise to any fiduciary duty on the part of the ANZ to any of the plaintiffs, certain events that transpired thereafter did.

[1467] The principal features of his submissions in that regard were based on the following assertions:

(1) By 2 January 1998 the ANZ was acting as the primary banker for TSM, with a contractual obligation to do so through bankers with backgrounds in small-business and having a thorough understanding of its present and future needs,

(2) It was then already exposed as a lender to some extent because it had, as at 20 November 1997, permitted TSM to draw down some monies on its then newly opened overdraft account,[526]

(3) It was to the advantage of the ANZ, in furthering its own interests, to obtain a special clearance of the $570,000 cheque and credit the proceeds to the TSM account, thereby either reducing the then unsecured borrowings of TSM from the ANZ and/or increasing the amount of security it held,

(4) It was also to the advantage of the ANZ to give a special clearance of the $460,000 cheque, thereby facilitating the final settlement of the approved loan facilities, well appreciating that the proceeds of the cheque would enable the encumbrances over the alleged Godwin

[526] Exhibit D18.

properties to be discharged, albeit by use of TSM funds rather than funds emanating from Godwin, and

(5) Had proper disclosure of either of those transactions been made to the directors of TSM, the full loan facilities would not have been proceeded with, albeit that some drawings by TSM had already been permitted.

[1468] Mr Sallis contended that, in the circumstances above summarised, a clear conflict of interest arose that gave rise to a fiduciary duty on the part of the ANZ not to prefer its own interest to that of TSM. This, he said, arose not from the mere existence of a conflict of interest but, rather, from the pursuit of personal interest by the ANZ in actually entering into transactions (i.e. advancing money on 20 November 1997, specially clearing the impugned cheques and registering its securities) in relation to which the relevant conflict existed.

[1469] The first obvious riposte to that submission is that it is based on an imperfect recitation of the facts. Whilst, as has been seen, Baylis did permit some minor unsecured drawings on the TSM overdraft account immediately after the loan approval had been given, the security situation had changed significantly by 2 January 1998.

[1470] As I have earlier recorded, all requisite security documents had been executed by about 25 November 1997. The ANZ had actually registered its security over the site of the second LTD development project and also

registered a mortgage debenture over the assets of TSM by 28 November 1997, the day following a permitted total drawdown of $250,000 that was credited to the TSM overdraft account.

[1471] The subsequent drawdown of about the same amount (making up the full approved $500,000 FDA component of the loan facilities) was permitted on 15 December 1997 against a first mortgage over the Margaret Street, Stuart Park property, to the purchase of which that drawdown was applied.

[1472] It follows that, as at 2 January 1998, the ANZ actually held registered securities covering the draw-downs that it had permitted. It was not, in fact, exposed in the manner suggested by Mr Sallis.

[1473] In practical terms, the only advantage accruing to the ANZ from the two cheque transactions was that they facilitated full settlement of the approved loan facilities that was long overdue. There was no advantage to the ANZ beyond that which would have accrued to it had that settlement taken place on 28 November 1997, as originally contemplated.

[1474] It was, in effect, pointed out in *Smith* and *Golby* that the nature of the banker/customer relationship is such that, within proper bounds, it is in the normal order of things that the bank, as lender to its customer, will be entitled to further its own interests in taking appropriate security, making a profit from its lending transaction and enforcing due compliance by the customer with relevant loan conditions.

[1475] Absent some special feature of the dealings between the parties and provided that the bank acts in good faith, the only duties that arise are in contract. It is only when a true conflict of interest arises whereby, in the relevant circumstances, the duty of the bank to its customer and the pursuit of its own interest necessarily collide, that a fiduciary responsibility exists.

[1476] The factual situation in the present case, properly understood, was not one in which the bank possessed a special opportunity to exercise its discretion to the detriment of TSM, which was vulnerable to abuse by the ANZ, nor could it be said that, in processing TSM banking activities, the bank agreed to act for or on behalf of or in the interests of TSM in the sense embraced by Mason J in *Hospital Products*.[527]

[1477] In the final analysis, what is in contemplation are two separate, but successive, banking transactions that occurred in circumstances attracting contractual, rather than fiduciary, duties.

[1478] In so concluding I by no means ignore the submission of Mr Sallis, said to be founded on the concept espoused in *Harrison v National Bank of Australasia Ltd*[528] *("Harrison")* and *Bank of New South Wales v Scarcella*[529] *("Scarcella")*, that, dependent on the circumstances, a bank may have a fiduciary duty where it is in a position to be aware of a customer's mode of trading and where the withholding of information can

[527] *Hospital Products Ltd v United States Surgical Corporation and Others* (1984) 156 CLR 41 at 68.
[528] [1928] Tas LR 1.
[529] (1983) 107LSJS 306.

operate adversely to a person who is in the position of guarantor for the account.

[1479] A perusal of those authorities instantly reveals that the facts upon which they were based were such as to render them of little assistance for present purposes.

[1480] *Harrison* was a case in which an elderly, unsophisticated woman was persuaded (without independent advice) to pledge her property title to the bank to secure an advance to a third party, it being said that the bank officer involved well knew of a pre-existing debt situation of the third-party that he did not reveal to the woman.

[1481] The decision in that case was based on the reasoning in *Baker v Monk*.[530] It was held that the woman was entitled to be relieved from an improvident contract by reason of the lack of independent advice -- given the "*difference between the position of the plaintiff and the [bank] manager*."

[1482] *Scarcella* was a case in which the issue was whether there was a fiduciary duty on a bank to disclose to one of two persons in partnership obtaining financial accommodation the existence of certain debt situations of the other known to it.

[1483] It is to be noted that Legoe J rejected the existence of a fiduciary duty and accepted (p 331) that –

[530] (1864) 4 De G.J. & Sm 388.

> "… in the absence of a specific request for advice the duties of a lending bank are confined to the mere provision of such facility as [was] agreed upon. The fact that the applicant for the loan was a businessman of full age and competence was sufficient to ensure that the commercial advisability of his taking the loan was to be his own decision. Scarcella having asked for a loan and not for advice leaves the bank in the position that they do not owe any such duty as is suggested….. in my judgment the bank's approval of an application for an overdraft in the circumstances of the case at bar does not carry with it an implied representation that the proposed expenditure is a commercially sound one."

[1484] In the course of his submissions Mr Sallis sought to raise several matters that were not pleaded. These are referred to in paragraphs 72 to 76 of the defendant's submissions by way of reply. They were not in issue on the pleadings and it is inappropriate to now seek to ventilate them. In any event I do not consider that they are of substance, essentially for the reasons expressed by the defence.

[1485] In the foregoing circumstances, any claims made on the basis of an alleged breach of fiduciary duty necessarily fail. There is no need to embark upon a detailed consideration of the breaches or losses alleged in the statement of claim in relation to this cause of action.

Claims based on negligent misstatement

The basis of the claims

[1486] The plaintiffs further claim that various statements made to them by officers of the ANZ in relation to matters relevant to these proceedings were either false or made to DLS and ECD in circumstances where, at the

time of their making, the ANZ knew or ought reasonably to have known they were false.

[1487] In précis terms, the impugned statements were said to be as follows:

(1) By Bradley to DLS, ECD and Godwin at the first October meeting that

(a) the ANZ would undertake appropriate checks to verify Smith, Dean and Godwin's respective personal asset positions, including the ownership of the alleged Godwin properties;

(b) the ANZ would undertake appropriate checks to verify the creditworthiness of Smith, Dean and Godwin;

(c) the ANZ would not approve any finance application unless TSM, LTD, Smith, Dean and Godwin had good credit records as verified with the CRAA; and

(d) the ANZ would not approve any finance application unless each of them TSM, LTD, Smith, Dean and Godwin had sufficient assets to secure the full amount of any loan offered by the ANZ.

(2) By Bradley to DLS, ECD and Godwin at the second October meeting that

(a) the ANZ would not approve the finance application unless Smith, Dean and Godwin were able to provide adequate securities to secure the full amount of any loan by the ANZ;

(b) the ANZ would undertake appropriate checks into TSM, LTD, Smith, Dean and Godwin's respective assets positions; and

(c) the ANZ would undertake appropriate checks to verify that each of TSM, LTD, Smith, Dean and Godwin had good credit records.

(3) By Bradley to DLS, ECD and Godwin at the third October meeting that

(a) the ANZ would not approve the finance application on the terms contained in the indicative proposal –

(i) unless the ANZ was satisfied it was in a position to obtain first registered mortgages, *inter alia*, over the alleged Godwin properties; and

(ii) until the ANZ had undertaken both credit reference searches with the CRAA to establish that each of Smith, Dean and Godwin were creditworthy individuals with good credit records and also valuations of the securities offered by Smith, Dean and Godwin, including the alleged Godwin properties.

(b) Each of Smith, Dean and Godwin were required to complete and provide CRAA search authorities to the ANZ to enable it to undertake enquiries into the credit records and creditworthiness of each of them, before an offer of finance would be made by the ANZ.

(4) By Baylis and/or Burford to Smith, Dean and Godwin together at the fourth October meeting that:

(a) they were to complete, sign and return the PSPs and credit check forms to the ANZ;

(b) the purpose of the credit check forms was to authorise the ANZ to enquire into their respective creditworthiness;

(c) the purpose of the PSPs was to identify the assets available to the ANZ by way of security for any subsequent offer of finance to TSM and/or LTD;

(d) the ANZ would verify the information contained in the PSPs and credit check forms to determine their respective asset positions and credit worthiness;

(e) the ANZ would advise TSM and/or LTD after carrying out appropriate investigations whether the assets as disclosed by each of them in their respective PSPs could be used to secure any subsequent offer of finance by the ANZ;

(f) the ANZ would advise TSM and/or LTD as to any concerns it held with respect to Godwin's creditworthiness after carrying out credit checks as authorised by the credit check forms.

(g) upon receipt by the ANZ of the PSPs, the ANZ would carefully consider the asset position and credit records of each of them in order to enable the ANZ to decide whether it would approve the finance application;

(h) the PSPs of each of them would be checked by the ANZ to ensure that the information contained in the finance application, including that with respect to the alleged Godwin properties and Godwin's asset position, was thoroughly checked and verified by the ANZ;

(i) further or in the alternative to (g) above, the PSPs were required to enable the ANZ to check the credit records of each of Smith, Dean and Godwin to enable it to decide whether to approve the finance application in line with Smith and Dean's previous dealings on behalf of TSM with it.

(5) By Baylis to Smith, Dean and Godwin together at the first November meeting that the ANZ would not approve the finance application unless:

(a) the financial details provided by Smith, Dean and Godwin in the finance application were true;

(b) the ANZ was in a position to obtain registered first mortgages over, *inter alia*, the alleged Godwin properties; and

(c) the securities offered by each of Smith, Dean and Godwin in support of the finance application were capable of securing the $1,550,000 amount the subject of the finance application.

and:

(6) By Baylis to Smith, Dean and Godwin together at the second November meeting that, prior to extending finance to TSM pursuant to the finance application, the ANZ would, *inter alia*, verify:

(a) the information provided by Godwin that in relation to the alleged Godwin properties;

(b) the credit record and creditworthiness of each of them; and

(c) the personal asset position as disclosed by each of them.

[1488] The plaintiffs plead that, notwithstanding the statements made by the officers of the ANZ to TSM, LTD, DLS and ECD at the October meetings and the November meetings, the ANZ:

(1) did not undertake appropriate checks to verify Godwin's respective personal asset position;

(2) did not undertake appropriate checks to verify that Godwin was the owner, beneficial or otherwise, of the alleged Godwin properties;

(3) approved the finance application and/or the finance agreement prior to ensuring that Godwin had sufficient assets to secure any claim by the ANZ for the sum of or about $630,000;

(4) did not undertake any or appropriate checks to verify Godwin's credit worthiness;

(5) approved the finance application and/or the finance agreement without undertaking any checks to ascertain whether Godwin had a good credit record with any banks that he banked with and/or with the CRAA;

(6) approved the finance application and/or the finance agreement without ascertaining whether DLS, ECD and Godwin together were able to provide adequate securities to secure the full amount of any loan by the ANZ and prior to satisfying itself that it was in a position to obtain first registered mortgages over the alleged Godwin properties;

(7) did not verify the information contained in Godwin's personal statements of position and credit check forms or determine Godwin's respective asset position or creditworthiness; and

(8) did not notify TSM and/or LTD as to any concerns it held with respect to Godwin's creditworthiness when deciding to approve the finance application and/or enter into the finance agreement.

[1489] It is said that the relevant statements were made in circumstances in which the ANZ owed to TSM and LTD a duty to take care in the making of such statements by virtue of the respective business relationships of those parties; and that they were made in circumstances in which the ANZ owed to DLS, ECD, SED, and NKS a duty to take care in the making of the relevant statements by virtue of the fact that the ANZ was seeking guarantees over the personal assets and first registered mortgages over the home properties of those plaintiffs.

[1490] The plaintiffs contend that the statements in question were made in breach of the duty of care owed by the ANZ to the plaintiffs not to make statements that were untrue; that the statements were made in the course of

trade or business; that they were relied on by the plaintiffs or any of them; and that they constituted negligent misstatements of fact at common law.

[1491] Particulars of reliance were stated to be as under:

As to TSM, LTD, DLS and ECD-

(1) such parties relied on the relevant statements in making their respective decisions to accept the ANZ loan, enter into the finance agreement and/or execute the guarantees and mortgages over their home properties in favour of the ANZ pursuant to the terms of the finance agreement;

And, as to SED and NKS -

(2) those parties relied on the relevant statements, as communicated to them by DLS and ECD, in making their respective decisions to agree to grant personal guarantees as well as to sign and permit the ANZ to register first mortgages over their home and business properties.

[1492] The plaintiffs assert that, as a consequence of the breach of duty of care owed by ANZ to them in making the relevant statements, they suffered loss and damage as particularised in the statement of claim.

Relevant principles

[1493] The law related to negligent misstatement was first definitively discussed by the House of Lords in *Hedley Byrne v Heller*[531] *("Hedley Byrne*"), later,

[531] [1964] AC 465.

by the High Court in *The Mutual Life & Citizens Assurance Co Ltd and Another v Evatt*[532] *("Evatt")* and then by the Privy Council in *The Mutual Life & Citizens Assurance Co Ltd and Another v Evatt.*[533]

[1494] In *Evatt* the High Court confirmed that an action will lie at common law for negligence in the giving of information or advice.

[1495] This is so notwithstanding that there is no relevant contractual right or obligation between the relevant parties, nor any consideration provided, nor any profession on the part of the informant or advisor, nor any element of deceit.

[1496] However, having regard to the various modes of expression employed in the judgments contained in those authorities, it is, with respect, no easy task to extract some relevant clear and definitive statements of principle from them. That said there are various propositions that can be stated with confidence.

[1497] First, in general, an innocent but negligent misrepresentation does not, *per se*, found a cause of action. There must be more than a mere misstatement.[534]

[1498] Second, to found a cause of action, it must be shown that the relevant misstatement arose in the context of what was referred to by Kitto J in

[532] (1968) 122 CLR 556.
[533] (1970) 122 CLR 628.
[534] *Hedley Byrne v Heller* [1964] AC 465 at 483.

Evatt[535] as a special relationship exhibiting the features necessary to raise a duty of care.

[1499] Third, although that necessary relationship was discussed and described by their Lordships and their Honours in the above authorities in a variety of ways, there seems to be a general acceptance of the proposition that relationships in which the legal duty of care in the giving of information and advice cannot reasonably be held to be incurred are of infinite variety.

[1500] Nevertheless, it can fairly be said that a relationship that *does* give rise to such a duty will exist where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the enquirer was relying on him.[536]

[1501] Fourth, to adopt the words of Kitto J in *Evatt* at p 586, the requirements of each of the speeches delivered in …… [*Hedley Byrne*]…… are satisfied if, in the circumstances alleged, the defendant ought reasonably to have appreciated that the answers given to the plaintiff's enquiry would be understood by that party as made with the appearance of responsibility that would have been implicit if the information and advice were being paid for.

[535] *The Mutual Life & Citizens Assurance Co Ltd and Another v Evatt* (1968) 122 CLR 556 at 586.
[536] cf Kitto J in *Evatt* at 583.

[1502] In other words it must be shown that the defendant is engaged in communication on a business level, intending to stand behind what is said with the same accountability for the consequences of any lack of care or skill in checking facts or forming judgments as if that party was being paid. Such an approach is consistent with what fell from Barwick CJ in *Evatt*,[537] where the learned Chief Justice said:

> "…… I think the circumstances must be such as to have caused the speaker or be calculated to cause a reasonable person in the position of the speaker to realise that he is being trusted by the recipient of the information or advice to give information which the recipient believes the speaker to possess or to which the recipient believes the speaker to have access or to give advice, about a matter upon or in respect of which the recipient believes the speaker to possess a capacity or opportunity for judgment, in either case the subject matter of the information or advice being of a serious or business nature. It seems to me that it is this element of trust which the one has of the other which is at the heart of the relevant relationship. I should think that in general this element will arise out of an unequal position of the parties which the recipient reasonably believed to exist. The recipient will believe that the speaker has superior information, either in hand or at hand with respect to the subject matter or that the speaker has greater capacity or opportunity for judgment than the recipient. But I do not think it can be said that this must always be so, that inequality in these respects must necessarily in fact be present or be thought to be present if the special relationship is to exist.
>
> Then the speaker must realise all the circumstances must be such that he ought to have realised that the recipient intends to act upon the information or advice in respect of his property or of himself in connection with some matter of business or serious consequence…."

[1503] Fifth, where a duty exists the obligation of the speaker is to use reasonable care in the circumstances. That person does not warrant the accuracy of

[537] *The Mutual Life & Citizens Assurance Co Ltd and Another v Evatt* (1968) 122 CLR 556 at 571.

what is said. The obligation is to exercise reasonable care in preparing to give the information and in the adopted mode of expression.[538]

[1504] Sixth, as to causation, whether the relevant words are properly to be described as a cause of the asserted loss depends on their potency as an influence upon the decision of the recipient of the information to follow the alleged injurious course of conduct.

[1505] Seventh, liability for loss will only arise for that loss which is caused by actual reliance on the accuracy of the information or correctness of the advice given i.e. where the recipient of the information or advice has acted on the faith of it.[539]

[1506] As to this I note the point made by Barwick CJ in *Evatt* at p 571 that the circumstances must be such that it is reasonable in all the circumstances for the recipient to seek, or to accept, and to rely upon the information or advice provided. In making a judgment as to that, the nature of the subject matter, the occasion of the interchange and the identity and relative position of the parties as regards knowledge, actual or potential, and relevant capacity to form or exercise judgment will be pertinent considerations.

[538] *The Mutual Life & Citizens Assurance Co Ltd and Another v Evatt* (1968) 122 CLR 556 at 573.
[539] cf *Holmes v Jones* (1907) 4 CLR 1692 at 1706.

Issues arising

[1507] The defendant submits that, in so far as there is an assertion that statements were made to TSM prior to the actual establishment of the banker/customer relationship, this is unsustainable because, at that stage, no formal business relationship existed.

[1508] Whilst the pleading in the statement of claim may not be entirely felicitous, I do not consider that this criticism is of substance.

[1509] As already appears, the authorities do not mandate that a duty arises only when a concluded business relationship of some type has actually been brought into existence. Rather, to adopt the approach in *Evatt*,[540] it must be shown that the defendant was, at the relevant time, engaged in communication *on a business level*. I take the plaintiffs' pleading to seek to convey that concept.

[1510] There can be little doubt that any initial interchanges between the parties took place in such a context. They were serious, preliminary discussions aimed at securing finance approval from the bank, including the requirement to submit what ultimately proved to be the re-financing proposal.

[1511] Ms Kelly also joined issue with the plea that a relevant duty necessarily arose in relation to the plaintiffs other than TSM "by virtue of the fact that the ANZ was seeking guarantees over the personal assets and first

[540] *The Mutual Life & Citizens Assurance Co Ltd and Another v Evatt* (1968) 122 CLR 556.

registered mortgages over the home property of the" plaintiffs in question. Her submission was that there is nothing in either authority or reason which would require the imposition of a duty of care in relation to every utterance made by bank to an intending guarantor -- particularly statements in relation to its own requirements.

[1512] I agree with her point that the duty does not arise simply because a person is an intending guarantor and it does not apply to *all* utterances made in the course of *every* conversation between bank and intending guarantor. It may well be otherwise if an intending guarantor raises specific questions concerning (say) the conduct of a principal debtor's account and is given false or inaccurate responses to those questions. This is not such a case.

[1513] I consider that, on the plaintiffs' case as pleaded and also on the evidence as led at trial, no basis has been shown to support the existence of a relevant duty of care in relation to this cause of action.

[1514] In the first place I am by no means convinced that, even if the substance of the pleaded statements was conveyed by bank officers to DLS, ECD and Godwin, it was so conveyed in the precise manner and in the context asserted by the plaintiffs.

[1515] I entertain no doubt that one or more of the bank officers did from time to time make it clear to DLS, ECD and Godwin that:

(1) details of the personal asset positions of those parties would be required and appropriate checks would be carried out as to the respective asset positions of those parties and TSM and the values of properties offered as security for the proposed finance;

(2) CRAA credit checks would be conducted in relation to them and appropriate authorities were required for that purpose and, by inference, that satisfactory search results would be necessary before finance would be approved; and

(3) The granting of finance facilities would be dependent on the provision of adequate first mortgage security to the satisfaction of the bank to support them and that, by inference, DLS, ECD and Godwin would be told if the bank was not so satisfied.

[1516] I consider that, in so informing them, the bank officers in question made it quite clear to DLS, ECD and Godwin, that those were the requirements of the ANZ for *its* purposes. I am not satisfied that they ever conveyed to those persons, either expressly or by implication, that such requirements were for any other purpose.

[1517] Further,

(1) the parties were engaged in arms length, commercial negotiations for a loan facility in which it would be presumed by all participants that each party was looking out for its own interests;

(2) any statements said to have been made related to the bank's own due diligence requirements and did not constitute information or advice provided by it at the request of the plaintiffs and intended for use by any of them;

(3) the relevant statements, even if made in the terms pleaded, were not conveyed to Smith and Dean in particular, in circumstances in which it was apparent that they were trusting the ANZ to exercise care and skill in telling them what enquiries it proposed to make in processing the loan application;

(4) there was simply no reasonable basis on which DLS and ECD could have placed reliance on what the ANZ said to them as being some form of undertaking that it would (for example) investigate the asset position and creditworthiness of Godwin *in their interest or that of TSM*; and

(5) the circumstances were not such that the ANZ would or should have appreciated that those parties were placing reliance on what was said by its officers for some purpose other than the bank's own internal due diligence prudential activities. As to this, it is important to bear in mind that the evidence renders it abundantly clear that, perhaps foolishly, DLS and ECD at all material times completely trusted Godwin and in no sense relied on the ANZ to, in effect, vet him on their behalf.

[1518] I took both DLS and ECD, in effect, to have conceded in cross examination that they would have proceeded with the loan application even if the question of valuation of securities and CRAA checks had not been raised. They badly needed the proposed financial accommodation at the time.

[1519] I agree with Ms Kelly that the evidence compellingly indicates that TSM and the personal plaintiffs made their own ultimate decisions to enter into the relevant loan transactions (including the requisite guarantees and mortgage securities) with the ANZ. They did not do so in reliance on any statements by officers of the ANZ of the nature pleaded.

[1520] So far as NKS and SED were concerned, it is clear that they were content to leave the various business decisions to their husbands. From their respective perspectives, both of their homes were already mortgaged to underpin previous advances. The proposed ANZ transactions merely involved substituting new securities to that entity, in lieu of those then existing, albeit to secure differing amounts. There is no persuasive evidence that their respective husbands communicated to them the precise details of what discussions had been held by those persons with the ANZ.

[1521] In summary then, quite apart from my conclusion that any statements made were not forthcoming in the manner and actual terms asserted by the plaintiffs, it has not been shown that any of them were false or misleading. They were not made in circumstances that gave rise to any duty to any of the plaintiffs to take reasonable care to ensure that they were accurate.

[1522] Nor has it been demonstrated either that any of the plaintiffs relied upon statements such as those averred in entering into the relevant loan transactions with the ANZ.

[1523] Quite apart from those considerations, I do not see any evidence that any of the plaintiffs suffered damage causally related to reliance on any relevant statements that may have been made on behalf of the ANZ.

The issues as to damages claimed by the plaintiffs

Introduction

[1524] I have found against the plaintiffs on all causes of action save in respect of certain aspects of TSM's claim in contract. I have concluded that the defendant breached an implied term of the contract between itself and TSM arising out of the creation of the banker/customer relationship in the processing of the $570,000 cheque and also the $460,000 cheque. I therefore now turn to a consideration of the consequences of those breaches.

[1525] In his opening, Mr Trim did not embark upon a detailed analysis of the pleaded case as to damages and was not invited to do so. He merely adverted briefly to the situation of TSM. He indicated that, in essence, that plaintiff based the core thrust of its claim to damages on the principles

espoused by the High Court in *Sellars v Adelaide Petroleum NL and Others*[541] *("Sellars").*

[1526] As he put it, the TSM claim was "*essentially … a claim … for … loss of the opportunity of TSM to pursue that which lay ahead of it in respect of the marketing and exploitation of a range of superior, and, in some cases, unique products …*".

The principles to be applied

[1527] I consider that, with respect, a most useful commencement point for a consideration of the issues as to damages arising in this case is the judgment of Batt JA in *Nemur Varity*.[542]

[1528] In the course of it, with admirable clarity, he drew the necessary distinction between the basis of assessment of damages for breach of common law duty of care in tort, on the one hand, and for breach of contract, on the other.

[1529] It is trite to say that the original classic formulation of relevant principle was that, to be recoverable, damages for breach of contract were those that might fairly and reasonably be considered as either arising naturally (i.e. according to the usual course of things) from such breach of contract itself, or such as might reasonably be supposed to have been in the contemplation

[541] [1992-1994] 179 CLR 332.
[542] *National Australia Bank Limited v Nemur Varity Pty Ltd* (2002) 4 VR 252.

of both parties, at the time they made the contract, as the probable result of the breach of it (*Hadley v Baxendale*).[543]

[1530] However, as Batt JA pointed out, that formulation has been considered, elaborated and applied in a series of more recent decisions to which he made reference (*Nemur Varity*)[544]. As he put it, "it may be that what seemed to be two branches of the principle stated in *Hadley v Baxendale*[545] are nowadays to be treated as one, amalgamating imputed and actual knowledge".

[1531] He went on to refer to the formulation of Lord Reid in *C Czarnikow Ltd v Koufos*[546] to the effect that:

> "The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."

(See also *Wenham and Another v Ella*[547] ("Wenham"), *The Commonwealth of Australia v Amann Aviation Proprietary Limited*[548] ("Amann") and *Baltic Shipping Company v Dillon.*[549])

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[543] (1854) 9 Exch 341 at 354.
[544] *National Australia Bank Limited v Nemur Varity Pty Ltd* (2002) 4 VR 252 at 269 notes 34, 35, 36.
[545] *Hadley v Baxendale* (1854) 9 Exch 341.
[546] [1969] 1 AC 350 at 385.
[547] (1972) 127 CLR 454 at 471.
[548] (1991) 174 CLR 64 at 99.
[549] (1993) 176 CLR 344 at 368).

[1532] Batt JA made reference to the judgment of Walsh J in *Wenham* at 466 and commented that, in contract cases, the rules as to remoteness are not rigid rules of universal application but, rather, *prima facie* rules that may be displaced or modified as necessary to achieve an appropriately balanced result (*Nemur Varity*).[550]

[1533] He further emphasised that, although the principle stemming from *Hadley v Baxendale*[551] established that the contemplation of the parties that falls for consideration is contemplation as at the date of the making of the relevant contract, a particular difficulty arises in its application to contracts such as those between banker and customer. The nature of such a contract is that it is capable of lasting for many years, during which period many changes in the customer's circumstances might occur. Indeed, the nature of the customer's business could change entirely.

[1534] Batt JA was of opinion that, where the contract arose from the relationship of banker and customer and was therefore one to be performed from time to time, it seemed appropriate to take into account the knowledge that the relevant bank may have acquired in the course of executing the contract.

[1535] So it was, in the case of *Nemur Varity*,[552] that he considered that the proper question was whether, at the times of the impugned transactions, the bank should reasonably, on the information then available, have contemplated

[550] *National Australia Bank Limited v Nemur Varity Pty Ltd* (2002) 4 VR 252 at 270.
[551] *Hadley v Baxendale* (1854) 9 Exch 341.
[552] *National Australia Bank Limited v Nemur Varity Pty Ltd* (2002) 4 VR 252.

that loss of the kind in question would probably occur (in the sense that it was not unlikely to occur) as a result of the breach of its relevant contractual duty of care.

[1536] I gratefully adopt the foregoing expressions of principle.

[1537] In approaching the issue of damages, the distinction between proof of causation and damages must be kept firmly in mind.

[1538] In *Sellars*[553] the High Court accepted that the first issue to be determined is that of causation. The relevant plaintiff must prove, on the balance of probabilities, that such party has sustained *some* loss of a commercial opportunity which had *some* value, not being of negligible quantum.

[1539] Once liability is established, the assessment of that loss may proceed, taking into account any reductions arising from the uncertainty of future events.

[1540] When the issue of causation turns on what the plaintiffs would have done, there is no particular reason for departing from proof on the balance of probabilities, notwithstanding that the question is hypothetical.

[1541] That said, in approaching the issue of damages, it must be accepted that characterising a claim in terms of loss of opportunity, when the kind of loss and its cause are known, cannot circumvent the principles of causation

[553] *Sellars v Adelaide Petroleum NL and Others* [1992-1994] 179 CLR 332 at 353, 355.

and remoteness, whether formulated in terms of the scope of the duty or foreseeability.

[1542] It is not the situation that, where a particular loss is too remote, it can nevertheless be recovered because there has been a loss of opportunity to avoid it. Such an approach would be "*to reintroduce the 'but for' test for liability in another guise*" (*Bank of New Zealand v NZ Guardian Trust Co.*[554]

[1543] The decisions in *Amann* and in *Glenmont Investments Pty Ltd v O'Loughlin and Others (No2)*[555] both related to situations in which there was proof of an actual loss (e.g. loss of a contract, destruction of a chattel) in which damages were awarded for lost opportunity that was consequent upon the primary loss.

[1544] By way of contrast, the case of *Sellars* focused on a situation in which the actual thing said to have been lost was a future opportunity i.e. where the defendant's breach was said to be a direct cause of the loss of the opportunity in question (in *Sellars*[556] a breach of contract that directly resulted in loss of an alternative favourable basis of contract).

[1545] As I understand the TSM claim, the essential basis of it is an assertion that, by reason, *inter alia*, of the breaches by the ANZ of its duty to TSM and the sequelae of them (including the necessary sale of assets and/or the

[554] [1999] 1 NZLR 644.
[555] (1999) 79 SASR 185.
[556] *Sellars v Adelaide Petroleum NL and Others* [1992-1994] 179 CLR 332.

ultimate loss of its business), it suffered a serious diminution in the value of its business and was also denied the opportunity of continuing and developing that business, including pursuing a profitable exploitation of a range of identified initiatives.

Damages issues as debated by the parties

General

[1546] I first proceed to consider the effect of the evidence concerning the circumstances arising from the processing of the $570,000 cheque.

[1547] As at 2 January 1998, what was the state of knowledge of Baylis concerning the TSM business activities and future plans?

[1548] At that time whilst, obviously, he was generally conscious of the fact that TSM was continuing its general sheet metal jobbing work, Baylis was particularly aware that its then major preoccupation, in concert with LTD, was with the conduct and expansion of the prefabricated house or unit construction projects. He well knew that it continued to suffer a chronic shortage of working capital to support those projects and also associated serious ongoing cash flow problems.

[1549] There is no evidence that he had any special or specific knowledge of the activities or proposed activities of TSM related to rain water tank production, or the large-scale production of metal awnings or flashings or the development of metal screwless or battenless roofing or cladding systems.

[1550] Baylis was also aware by 2 January 1998 that the stage had been reached at which TSM and/or Godwin had been unable to make the Raffles Road property and the alleged Godwin properties available by way of first mortgage security. He appreciated that this situation had arisen because of debts secured over those properties that Godwin had apparently been unable to retire over a considerable period, despite many promises to do so.

[1551] He well appreciated, or should have appreciated, that, if the $570,000 cheque represented a repayable loan, even if it was on an unsecured basis, there was no apparent capacity of either TSM or of any of the personal plaintiffs to repay it out of the proceeds of sale of the second TSM development project unit sales or their own assets; and that it constituted a borrowing contrary to the understood basis upon which the TSM loan facilities had been approved by the ANZ credit officers.

[1552] It must have been apparent to him that, had the $570,000 cheque not been cleared and credited to the TSM account, the ANZ loan facilities other than the then drawn down FDA component could not have been proceeded with and that TSM and its directors would have had to seek other means of raising working capital to satisfy any existing or currently accruing debts, let alone embark on further building projects.

[1553] Baylis must have equally appreciated (if he gave any thought to the known situation at all) that, if the $570,000 cheque was processed in the manner that actually occurred, then it was more probable than not that, having

regard to what he already knew of TSM's overall financial position, its problems would have seriously been exacerbated because it, and not Godwin, was going further into debt to the extent of $570,000 in order to pay off existing third party debt, simply to be able to settle very large ANZ advances.

[1554] Against that background, the next question to be posed is what would have occurred had Baylis spoken to either DLS or ECD as directors of TSM concerning the presentation of the $570,000 cheque from Flynn Petroleum (NPG) for credit to the TSM account?

[1555] Having regard to the whole of the evidence, I am satisfied, on the balance of probabilities, that Baylis would have been instructed not to process the cheque as requested by Godwin. I entertain no doubt that one of the directors of TSM would have spoken with Flynn, with the consequence that Godwin's fraudulent behaviour would immediately have become apparent.

[1556] As DLS said in the course of his statement to Detective Polychrone, he did not want to borrow further money from NPG because of the high rate of interest payable. The witness Martin agreed that it was an unsustainable commitment.

[1557] The net result of that situation would, I consider, have been that, not only would DLS and ECD have terminated their relationship with Godwin, but also that the ANZ would have withdrawn its approval of the then undrawn credit facilities proposed to be made available to TSM, upon becoming

aware of the nature and extent of the hitherto undisclosed transactions with NPG and the circumstances generally. Certainly, in any event, it would have been impossible for TSM to have satisfied the security requirements mandated by the ANZ loan approval in respect of the facilities other than the $500,000 FDA already drawn down in November/December 1997.

[1558] It would, on the evidence, be most unlikely that TSM could have been able to procure an alternate guarantor or source additional loan monies from the CBA or any other lending institution beyond the loans already extant, at least in the short term. Considerable prior efforts in that regard had been singularly unsuccessful. The CBA had declined to advance further monies and the evidence indicates that it was far from satisfied with the conduct of the TSM account.

[1559] To employ an expression used by Ms Kelly, TSM and LTD were plainly overextended financially at that time -- a situation that DLS and ECD themselves eventually recognized when they later approached Baylis for additional finance on or about 27 January 1998.[557]

[1560] In this regard I found the evidence of the expert witness Edwards, as I have summarised it, compelling. I accept that, as at 2 January 1998, TSM was technically insolvent, given the contention put to him in cross examination that there was a small theoretical surplus of assets over liabilities.

[557] Exhibit D51 pp 245-248.

[1561] I use the word "insolvent" in the sense discussed in authorities such as *Powell v Fryer,*[558] *Southern Cross Interiors Proprietary Limited and Another v Deputy Commissioner of Taxation and Others,*[559] *Bank of Australasia v Hall*[560] and *Rees v Bank of New South Wales.*[561] *TSM* had not, in fact, been paying its trade creditors in full as they fell due and had been unable to do so for some time.

[1562] It was not, in my view, in a position to rapidly realise assets or borrow against them beyond borrowings already made to meet any creditor demands, if forthcoming, and the evidence strongly suggests to me that it was only a matter of time before the patience of creditors was likely to be exhausted -- particularly as there had been a history of CBA dishonouring TSM cheques and the interest payments to NPG were in arrear. Moreover, the need to maintain agreed payments to the ATO and to honour obligations to NPG clearly inhibited its ability to meet current trading commitments.

[1563] I also accept Edwards' view that, in the practical commercial world, the ability of TSM to effectively continue its business operations very much depended on its relationship with creditors -- an opinion that was borne out by what actually happened post 2 January 1998.

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[558] (2000) SASC 97
[559] (2001) 53 NSWLR 213
[560] (1907) 4 CLR 1514.
[561] (1964) 111 CLR 210.

[1564] It must be emphasised that the hypothetical calculations put to Edwards in the form of exhibits P80 and P81 were essentially founded on a best case realisation basis. They contemplated the rapid liquidation of available real estate assets of TSM, LTD and the personal plaintiffs at full valuation prices, as well as a willingness of those plaintiffs to commit full net realisation proceeds to the settlement of relevant debts and to fund ongoing business operations. The relevant calculations need to be read in conjunction with the content of Exhibits D73 and D74.

[1565] It cannot escape comment that, having regard to the events that actually happened, the likelihood of such a situation may have been questionable, if not improbable. It will be remembered that NKS and SED in particular were eventually not prepared to make a commitment of that nature, albeit in the circumstances that actually developed, including the realisation of the alleged Godwin properties.

[1566] I consider that, in the foregoing circumstances, the most probable scenario would have been that, upon discovery of Godwin's conduct as at 2 January 1998 and the likely events stemming from it, DLS and ECD would have had little option but to adopt the course upon which they actually resolved as at 27 January 1998 i.e. to embark on an orderly disposal of assets, of the nature proposed to Baylis, to retire indebtedness and provide some working capital, and to endeavour to keep their creditors at bay whilst that occurred.

[1567] In so commenting I by no means ignore the suggestion made by Mr Sallis to the effect that the strategy proposed to Baylis was said to have involved an upgrade in the standard of housing to be occupied by the personal plaintiffs and Godwin. However, a vital thrust of the proposal was to produce badly needed working capital.

[1568] The existing situation was, of course, exacerbated by Godwin's failure to contribute his promised $400,000 and the fact that he had actually drawn money out and was indebted to TSM.

[1569] The evidence indicates to me that, given the limited funds available to TSM for working purposes and the likely reactions of creditors to the non-adherence of that entity to trading terms of payment that had actually been taking place and was likely (at least in the short term) to worsen rather than improve, its ability to engage in future building projects in particular was very restricted.

[1570] To put the situation in another way, what actually transpired (in trading terms) in the period from late January 1998 to May 2001, was indicative as to what may have occurred, at least to some extent, had the ANZ loan transaction not been settled, albeit that creditors may not have been immediately quite so adversely reactive as they were when news of Godwin's fraud circulated and TSM's cash flow and asset position may have been slightly better.

Specific heads of claim

[1571] As I understand the content of the statement of claim, the plaintiffs plead the same loss and damage as resulting from all causes of action. Paragraph 92.1, which asserts the details of the alleged loss and damage said to arise from breaches of common law duty of care, contract, fiduciary duty and negligent misstatement, also incorporates, by reference back, the same details of loss and damage as are said, in paragraph 74, to have flowed from the alleged breach of s 52 of the TPA.

[1572] The latter paragraph expresses the loss and damage in these terms:

> "74.1 TSM incurred the costs fees and expenses associated with the relocation of its financial arrangements from the CBA, Esanda Finance and ATSIC to the ANZ,
>
> 74.2 TSM lost the benefit of being able to repay each of the CBA, Esanda Finance and ATSIC loans over their respective terms,
>
> 74.3 TSM incurred the fees and other charges by the ANZ associated with the discharge of each of the CBA, Esanda Finance and ATSIC loans as required by the ANZ prior to advancing the full amount of its loan to TSM,
>
> 74.4 the plaintiffs from March 1998 until repayment in full of the ANZ in November 1998 were required to repay the amount of $940,858.82 to the ANZ bank on account of money applied by the ANZ in January 1998 and drawn against ANZ loan, to satisfy the plaintiffs' liabilities to the CBA, Esanda and ATSIC,
>
> 74.5 in order to comply with the ANZ's requirement at 74.4 the plaintiffs were required to sell their homes and business properties as pleaded in paragraph 72 as a consequence of which the first plaintiff had insufficient assets available to it against which it could borrow monies to fund its ongoing working and business development capital requirements thereby causing first plaintiff to suffer:

(i) a reduction in its gross and net income,

(ii) a reduction in its gross and net profits,

(iii) a diminution of its capital value,

(iv) ongoing loss as a consequence of TSMs inability to exploit its unique methods of manufacturing/producing –

(a) rain water tanks,

(d) its screwless and battenless roofing system was in the process of being patented in Australia prior to being patented internationally,

(e) its patented sheet metal and outdoor awnings which had been patented in Australia and were subject to a patents pending in the USA,

(f) its curved and bullnose flashings which had been patented in Australia.

74.6 The third to sixth plaintiffs were required to sell their home and business properties as pleaded in paragraph 72 herein losing the capital value and the appreciation of the capital value of those assets,

74.7 in the alternative the third to sixth plaintiffs lost the opportunity to apply the proceeds of sale of their home properties to the benefit of TSM and/or to their own benefit,

74.8 the plaintiffs lost the business opportunity to source an honest and creditworthy co-guarantor with personal assets to the value of $630,000 to secure the loan the subject of the finance agreement from the ANZ which opportunity would or was likely to have been realised had the truth emerged to the plaintiffs or any of them regarding Godwin's true asset position and/or credit history."

[1573] In paragraph 92 of the statement of claim, having incorporated those earlier pleas, the plaintiffs assert:

"92.2 Further, or in the alternative to paragraph 92.1, the plaintiffs say if not for the ANZ's above breach of duty –

(i) Godwin's successful attempts to perpetrate fraud against Flynn would have been prevented,

(ii) TSM would not have permitted Godwin to remain associated with its business interests thereby avoiding the losses occasioned by the collapse of its business after the fraud against Flynn was discovered and the ANZ loan was called in,

(iii) the plaintiffs would have prevented the registration of mortgages and other securities to the ANZ over their assets.

92.3 Further, or in the alternative to 92.1 and 92.2, the plaintiffs say that had the truth emerged –

(i) with respect to Godwin's true asset position prior to TSM’s entry into the finance agreement, the first plaintiff would have excluded Godwin from its business activities immediately thereby preventing any loss or damage to its business interests as pleaded herein,

(ii) with respect to the specific concerns held by the ANZ regarding Godwin after TSM entered into the finance agreement, the first plaintiff would have take immediate steps to exclude Godwin from its business activities thereby avoiding loss and damage consequent thereon,

(iii) with respect to the knowledge of the ANZ regarding the $570,000 and $460,000 cheque transactions, the first, third and fourth plaintiffs would have taken immediate steps to exclude Godwin from their business activities and prevented the registration of mortgages over the business and home properties thereby affording them the opportunity to secure finance from alternate sources and avoid the loss and damage which flowed as a consequence of the ANZ's requirement that they sell their assets and repay the ANZ loan,

(iv) TSM would have and/or would have had the opportunity to resist the ANZ's demand to call in the full amount of its loan to avoid or mitigate the loss flowing therefrom.

92.4 As a consequence of the withdrawal of finance by the ANZ and the adverse publicity associated therewith:

(i) suppliers ceased to supply materials to TSM other than on a cash only basis,

(ii) contracts by TSM for the sale and purchase of sheet metal homes and others sheet metal products diminished dramatically,

(iii) TSM was unable to secure finance to meet its work and capital requirements at all and/or at affordable and competitive market rates,

(iv) TSM's business continued to diminish between 1998 and May 2001 when the directors were forced to place TSM into voluntary liquidation.

[1574] The statement of claim then formally claims damages by way of what was said to be loss on value of properties sold, capital growth on property sold, real estate fees on sale, future developments, future developments of TSM, on patents and on core business, as well as interest and costs.

[1575] It will at once be seen that the rolled up form of pleading adopted in this case also presents difficulty in reviewing the plaintiffs' claims as to damages. It is difficult to extract from the pleadings precisely what it is that the plaintiffs are seeking to contend with respect to TSM, on the one hand, and the individual personal plaintiffs, on the other as to each alleged breach.

[1576] Against that background I turn to the specific heads of loss asserted by the plaintiffs.

[1577] I first address the paragraph 92.1 claims which, in turn, seek to incorporate the heads of loss or damage asserted in paragraph 74 of the pleading in relation to the alleged breaches of the provisions of s52 of the TPA.

[1578] I accept that, had the balance of the ANZ loan transaction not proceeded, certain costs, fees and expenses associated with the re-financing of the TSM indebtedness (including relevant fees and other charges raised by the ANZ in connection with the payout of the CBA, Esanda Finance and ATSIC loans) would not have been incurred and that such a direct loss to TSM was of a type that should have been in Baylis' contemplation. At this stage I have not been taken by the parties through the detailed figures involved.

[1579] By paragraph 74.5 of the statement of claim the plaintiffs assert loss of opportunity to exploit the specific products referred to, by reason of what is said to have been a requirement by the ANZ to sell their homes and business properties in order to comply with the demand by the bank to repay to it, *inter alia*, $940,858.82 drawn against its loan facility to pay out the liabilities to the CBA, Esanda Finance and ATSIC. In paragraph 74.6 it is pleaded that the relevant sales resulted in a loss of capital value or of appreciation of capital value in relation to the properties in question.

[1580] The defendant contends that this claim necessarily fails because not only were the relevant properties not the subject of forced sale, but also that any

requirement to sell was not shown to have been caused by any breach of contract on the part of the bank.

[1581] Ms Kelly's riposte to the plaintiffs' plea is that it falsely rests on the proposition that the plaintiffs were required to sell the relevant properties as a consequence of the discovery of Godwin's fraudulent conduct, absent which that situation would not have arisen.

[1582] She submits that the evidence establishes that the requirement to conduct an orderly realisation of assets was, causally, quite unrelated to any fraudulent conduct of Godwin. It was, she said, a requirement that emerged prior to the discovery of that conduct, when the approach for further bridging finance was made to Baylis on or about 27 January 1998. The credit approval in relation to the additional $200,000 bridging finance was specifically conditioned on the sale of all properties within a three to six month time frame "to clear ANZ's debts in full".[562] That requirement was imposed even absent any knowledge by the ANZ of the indebtedness to NPG. It also reflected a realisation by DLS and ECD that they and TSM were overextended.

[1583] She argued that, in reality, nothing subsequently changed when Godwin's fraud was discovered. The ANZ permitted the plaintiffs to continue with the planned orderly sale of assets, to which they had already committed.

[562] Exhibit D51 p 249.

[1584] That contention is, of course, founded on events that occurred post 2 January 1998, which would not have taken place had the ANZ breaches of contractual duty in relation to the two impugned cheque transactions not have been committed. Nevertheless, what actually transpired to some extent illustrates the financial and practical situation with which the plaintiffs were confronted as at the beginning of 1998.

[1585] The evidence overwhelmingly indicates that, quite apart from its inability at the relevant times to secure funding from any source other than the ANZ, TSM was, as at 2 January 1998, faced with the problem that, not only was it unable to pay its existing trade liabilities as they fell due according to normal terms of trading, but, it was also committed to find $800,000 plus any accrued interest to satisfy its obligations to NPG, as well as the $500,000 FDA due to the ANZ - allegedly from the proceeds of sale of the second LTD development project. The terms of the FDA required repayment within six months of drawdown. TSM also had its continuing substantial obligations to the ATO.

[1586] The calculations made by the witness Edwards and the information provided by the Martin reports and TSM's relevant financial statements combine to indicate that, realistically, the only way in which it could have satisfied its then liabilities and possibly generated some working capital would have been by asset sales of the nature of those that DLS and ECD actually agreed with Baylis on 27 January 1998. I so find. The need for

realisation of assets has not been shown to be causally related to either breach on 2 January 1998.

[1587] It must be said that, in any event, the contention in paragraph 74.6, that the sale of the homes of the personal plaintiffs resulted in a loss of capital value and of the appreciation of the capital value of those assets, necessarily founders on several bases.

[1588] The pleading presupposes that there was a forced sale of the homes in question at a time and in a manner that denied the obtaining of full value for them or otherwise denied the possibility of capital appreciation.

[1589] As I have already concluded, there was no forced sale in the relevant sense of that expression. The sales were effected on an orderly basis and achieved fair market value. They were sales that were, in any event, virtually inevitable at or about the time that they occurred.

[1590] There is no persuasive evidence that the timing of the sales was such that they took place in an unusually depressed market. Nor is there any evidence of substance that indicates what appreciation of capital value (if any) might have occurred over any specific relevant period.

[1591] What the evidence *does* disclose is that the Anula property was eventually sold for $188,000 (against a valuation of $170,000 as at 25 November 1997), whilst the Raffles Road property was sold for $220,000 (as against a valuation of $210,000 as at the same date).

[1592] It is not to be forgotten that ECD and SED obtained the benefits of the full discharge of their ATSIC loan ($219,796.06) and that SED also received $120,000 from the sale of the Brayshaw Crescent property, of which she retained $60,000.

[1593] Monies drawn on the TSM account were employed to pay out the mortgage liability of DLS and NKS to the CBA quite apart from the receipt of the $120,000 to which I have referred.

[1594] The basis on which DLS and NKS each purchased a display house has already been referred to. The evidence reveals that, subsequently, NKS was able to trade up to a much more substantial and valuable home.

[1595] For the sake of completeness I note that the TSM land and workshop premises were sold at a market value of $450,000, as against a valuation of $480,000 made on 25 November 1997.

[1596] In paragraph 74.7 of the statement of claim it is, in the alternative, averred that the personal plaintiffs lost the opportunity of applying the proceeds of sale of their home properties to the benefit of TSM or to their own benefit.

[1597] It is by no means clear to me how the plaintiffs seek to base this claim. Leaving aside the question of whether such a loss of opportunity could, in law, constitute a relevant loss of opportunity of the nature contemplated by the authorities to which I have referred, the evidence indicates that the proceeds of sale *were* applied for the benefit of TSM and LTD. Part went

in reduction of the TSM balance due to the ANZ and part was applied in reduction of the liability to NPG.

[1598] Paragraph 74.8 of the statement of claim pleads a loss of business opportunity to source an honest and creditworthy co-guarantor with personal assets to the value of $630,000, to secure the loan the subject of the finance agreement.

[1599] This assertion is based on the proposition that such an opportunity "*would or was likely to have been realised had the truth emerged to the plaintiffs or any of them regarding Godwin's true asset position and/or credit history*".

[1600] As pleaded, this head of claim appears to have no direct nexus with the circumstances related to the processing of either the $570,000 cheque or the $460,000 cheque. It essentially complains of the consequences of a failure by the ANZ to disclose information obtained by it prior to the settling of the loan facilities -- a situation that I have held did not constitute a breach of contract.

[1601] Even if this was not the case the plaintiffs have not established that the relevant opportunity existed at the time of breach, that they would have pursued that opportunity and that the opportunity would have given rise to a different outcome.

[1602] The evidence singularly fails to disclose the availability of any alternative co-guarantor or funding source as at January 1998. TSM had previously tried and failed to procure either, other than the ANZ.

[1603] It must be remembered that the CBA had refused TSM additional financial accommodation on several occasions; Flynn had refused to enter into partnership in relation to the development projects; as at the beginning of 1998 he was plainly very reluctant to lend further money via NPG (as appears from the conditions imposed by him when approached by Godwin as to the $570,000 cheque); and applications for finance from various bank and non-bank lenders had been unsuccessful. There is no positive evidence indicating the existence of any lending source or likely co-guarantor to whom TSM or the other plaintiffs could confidently resort at the time in question.

[1604] It is fair comment to say that the ANZ had only been persuaded to approve loan facilities as a result of a deliberate misrepresentation to the bank by the group of its true financial position.

[1605] Even had it been otherwise, that was most unlikely to have altered the ultimate course of events, whereby (as DLS and ECD had seemingly failed to appreciate) LTD was trading at a loss. The group had been compelled to raise a large sum of money from NPG at a non sustainable, very high rate of interest to keep the relevant projects going.

[1606] This head of claim necessarily fails.

[1607] Paragraph 92.2 of the statement of claim contains what is, with respect, a curious pleading.

[1608] It contends that, but for the ANZ's "*above*" breach of duty, Godwin's successful fraud against Flynn would have been prevented; TSM would not have permitted him to remain associated with its business, thereby avoiding the losses associated with the collapse of that business after the fraud had been discovered and the loans called in; and that the plaintiffs would have prevented the registration by the ANZ of the mortgages and other securities over their assets.

[1609] It is by no means clear what is meant by the "*above*" breach of duty as, in fact, multiple breaches are referred to in the preceding phraseology.

[1610] I take the substance of the plea -- relevantly for present purposes -- to be an assertion that, had the ANZ made due enquiry of a director of TSM concerning the $570,000 cheque and/or the $460,000 cheque, Godwin's relationship with TSM would, inevitably, have been terminated, the ANZ loan transaction other than in respect of the already drawn FDA would not have gone ahead, the then unregistered ANZ securities would not have been registered over the relevant properties and the TSM business would have continued on a profitable basis and not have collapsed.

[1611] The loss said to have flowed is the "*losses occasioned by the collapse of... [TSM's]... business after the fraud against Flynn was discovered*". This appears to be a plea related to a suggested loss of capital value of TSM and

of the opportunity to continue to conduct the business of TSM and to generate a substantial profit in so doing.

[1612] The practical situation at the relevant time was rendered more complex by the earlier decision of the ANZ to make available the $500,000 FDA by means of one drawdown of $250,000 on 27 November 1997 and the second of approximately the same amount on or about 15 December of that year, notwithstanding that the security situation in relation to the Raffles Road property and the alleged Godwin properties had not been resolved.

[1613] That FDA was, of course, by way of the short-term bridging finance to which I have referred, to be repaid in full within six months of the sale of the units comprising the second LTD development project. As earlier recited, it was provided on the basis of mortgage security registered over the units in question and (later) the Margaret Street property itself.

[1614] Any discovery of Godwin's fraudulent conduct could have had no bearing on the FDA transaction, which had already been carried into effect. The funds were urgently needed at the time and the evidence abundantly satisfies me that there was little or no chance of them being available from any other source. Certainly the CBA had declined to provide any additional credit facility.

[1615] The effect of any discovery of Godwin's fraud on 2 January 1998 would have been to effectively prevent a settlement of the other approved ANZ

loan facilities and leave TSM/LTD in a continuing difficult situation with its creditors.

[1616] I have already made the point that the most likely scenario -- indeed, on the expert financial evidence, the only viable option -- would have been for the plaintiffs to adopt the strategy that they actually resolved to embark on in late January 1998. i.e. to effect an orderly sale of the relevant assets on the type of basis agreed with Baylis.

[1617] I consider that, in practical terms, discovery of Godwin's fraudulent conduct apropos Flynn (NPG) and its likely sequelae would not materially have changed that situation, given that the incurring of any additional debt to NPG (if TSM became legally liable for it) would have greatly exacerbated existing financial difficulties.

[1618] Due, no doubt, to a combination of the already incurred crushing high interest debt to NPG, Godwin's failure to contribute the capital promised by him and his actual negative drawings from TSM, that entity and LTD were over extended and LTD was incurring continuing losses and cash flow deficiencies.

[1619] I repeat that, quite apart from any effect of the $570,000 cheque transaction and what followed it, the expert financial evidence convinces me that, if TSM was to survive, the only option was to do what the plaintiffs ultimately essentially agreed to do -- retire as much debt as possible by means of asset sales, cease the operations of LTD, and then

attempt to trade on with what modest working capital and/or credit they could muster.

[1620] Ms Kelly contended that it cannot properly be said that the events of January 1998 brought about or led to the eventual collapse of TSM some three years later. She submitted that the plaintiffs have not been able to prove, on the balance of probabilities, that any breach of contract by the ANZ caused TSM to fail at that time.

[1621] I am unable to accept those propositions.

[1622] The evidence indicates that what essentially brought TSM to its knees, albeit in the context of the difficult financial situation with which it was confronted in any event, was the impact of the public knowledge that Godwin had committed a serious fraud on TSM and which, in turn, generated a general fear by trade suppliers and potential customers that the company may not be able to pay its debts and/or fulfil substantial orders, if placed with it.

[1623] The graphic evidence of DLS as to the manner in which continuing credit was almost immediately declined by trade suppliers and how TSM was unable to accept substantial orders is lent strong support by the evidence of the various trade and technical witnesses that I have already recited.

[1624] That evidence also verified the unwillingness of those persons to entrust work to TSM because they feared that they might be let down.

[1625] The figures extracted by the witness Clark indicated that TSM's sales dropped 31 percent in the 1999 financial year, whilst net profit declined massively in the 1997-1999 period.

[1626] Whilst it is true that TSM did limp along for about three years after Godwin's fraud became apparent, the evidence renders it apparent that, from that time, it went into an almost immediate and thereafter constant financial decline. The material before me indicates that it was in a state of escalating debt and negative cash flow.

[1627] It is truly remarkable that DLS and ECD were able to continue the TSM operations for as long as they did. I accept that this was probably a consequence of both of them obtaining separate night employment, so that they, personally, could survive without drawing income from TSM.

[1628] In so saying I by no means ignore the fact that such a situation did generate in a context in which, for other reasons, TSM was already in a difficult financial situation of its own making, to which I have referred.

[1629] As I have recited, DLS and ECD embarked on major projects without any financing in place or in real prospect; they did so without having procured any security of title to the sites; they did not conduct any truly definitive costings of the unit development projects and did not later appreciate that the LTD projects, for a variety of reasons, were running at a loss and thereby further eroding their financial position; they desperately committed themselves to the NPG lending of last resort with its ruinous interest rate;

they did not take effective steps to ensure that Godwin contributed his promised $400,000 in a timely manner and, in fact, allowed him to make substantial drawings which he never repaid; and they embarked on unwise expenditures in respect of four expensive vehicles for individual plaintiffs at a time when TSM/LTD were in desperate need of working capital. Added to that, of course, was the impact of the abortive Queensland venture and expenditure on developmental projects that were unlikely to produce (and did not produce) any substantial immediate return.

[1630] An extraordinary feature of the lack of appreciation by the principals of TSM and LTD as to the true financial outcomes of the two LTD development projects is reflected by the fact that DLS instructed the expert witness Clark to assume, as the basis for certain of his calculations that LTD had been making or would have made a 12.5 percent profit on each of the unit development projects, whereas those projects had, on the evidence, both returned a significant loss.

[1631] In truth, by 2 January 1998, the Rubicon had well and truly been crossed. The plaintiffs, as a total group, were certainly in financial difficulty.

[1632] That situation was, no doubt, exacerbated by TSM endeavouring to continue with house building projects and to develop the various special initiatives when, realistically, it did not have the working capital to render all that it was attempting financially viable and was not in a financial

position to effectively market products or proposed products developed by it.

[1633] Had DLS and ECD thereafter merely reverted to a primary focus on their previous core sheet metal work, they would have had a better long-term chance of survival. I think it probable that, had the relevant breaches not been committed by the ANZ, they may well have had little option but to do so.

[1634] However, notwithstanding that scenario, I consider that the major factor in the ultimate demise of TSM was the immediate, direct and clearly foreseeable factor to which I have referred. It became virtually impossible, by reason of lack of credit facilities with trade suppliers engendered by the knowledge of Godwin's fraud and its sequelae, for TSM to conduct its business on other than a hand to mouth and certainly not on a truly profitable basis.

[1635] Notwithstanding the somewhat pessimistic views of Edwards as to the ability of TSM to have continued trading profitably in any event, I consider that the plaintiffs have proved a causal connection between the relevant breaches and the ultimate loss of the TSM business. The difficult task is a quantification of that loss, after making due allowance for relevant contingencies. I will return to that aspect in due course.

[1636] Paragraph 92.3 of the statement of claim contains pleas said to be alternative to those set out in paragraphs 92.1 and 92.2. The first two of

those pleas complain of breaches of duty to inform the plaintiffs of matters as to which I have already concluded that no such duty existed. The third is based on what I have held to be breaches of duty in relation to the $570,000 cheque and the $460,000 cheque.

[1637] This alternative paragraph, the full terms of which are set out above, essentially repeats an assertion with regard to the third plea that the effect of any breaches was to deny the plaintiffs the opportunity of securing finance from alternate sources and of avoiding loss said to have flowed from the ANZ requirement that assets be sold and its loan facility be repaid. It is asserted that TSM would have had an opportunity of resisting the ANZ demand calling in the full amount of the ANZ loan facility and of avoiding or mitigating loss flowing from it.

[1638] I have already explored the likely scenario that would have arisen, leaving aside the ANZ's breach of duty in relation to the $570,000 cheque. There is no need to retrace the same ground.

[1639] As I have indicated, the likelihood of the plaintiffs obtaining alternative finance was questionable and, in the circumstances, an almost immediate sale of the relevant assets was well nigh inevitable.

[1640] It is impossible, on the evidence as it stands, to perceive how any disadvantage flowed from the actions of the ANZ when it required repayment of its loan facilities, beyond that which was bound to flow from the situation that would have arisen if the plaintiffs had become aware of

the true situation as at 2 January 1998 and/or following the agreement in relation to bridging finance made on or about 27 January 1998.

[1641] The final head of claim relied on by the plaintiffs is that pleaded in paragraph 92.4 of the statement of claim.

[1642] This, in effect, asserts that the [wrongful] withdrawal of finance by the ANZ, and what was said to be the adverse publicity associated with it, caused the eventual demise of TSM.

[1643] There are several points that need to be made concerning that plea.

[1644] The evidence does not establish that any express or implicit requirement for loan repayment was wrongful. True it is that, unsurprisingly, the additional bridging finance of $200,000 approved on 27 January 1998 was not proceeded with. Beyond that, however, the ANZ was, at least in the short term, content to sit back and permit the orderly sale of assets that had already been mutually agreed on between the parties on 27 January 1998.

[1645] Moreover, there is no persuasive evidence that there was adverse publicity associated with the withdrawal of finance by the ANZ, as such. The evidence of witnesses such as Valastro, Marcroft and others was that there were rumours that, as a result of fraudulent activities by a person associated with TSM, it was in financial difficulties and might have to close down. There were general concerns about TSM's ability to pay its debts due to the fraudulent activities in question.

[1646] In reviewing the pleadings as to loss and damage to this point, I have not directed detailed attention to the issue of what separate loss (if any) may have stemmed from the ANZ breach of duty in relation to the clearance of the $460,000 cheque. As I have indicated, a practical problem arises from the rolled up form of pleading in the statement of claim and a failure to separately identify and plead what heads of loss and damage are said to have arisen by reason of specific breaches of duty, such as that associated with the cheque in question.

[1647] In all fairness it must be conceded that, in attempting a review of the evidence on the basis mandated in *Sellars*,[563] it is both convenient and necessary to view the impact, as to any issue of causation, of both impugned cheque transactions considered together. Those transactions occurred on the same day within a very short space of time and were, in a practical sense inextricably interlinked.

[1648] As already appears, the bulk of the $460,000 was applied in extinguishment of the amounts due under the mortgages over the alleged Godwin properties in favour of the NAB. It is not clear to me how the residual balance of $48,286.25 paid to the credit of Godwin's account with the NAB was expended. I infer that he probably applied it for his own purposes.[564]

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[563] *Sellars v Adelaide Petroleum NL and Others* [1992-1994] 179 CLR 332.
[564] The balance of the original $570,000 paid to the credit of the TSM account with the ANZ was, of course, utilised to discharge the mortgage to the CBA over the Raffles Road property. It was shown in the TSM financials as an advance to DLS and NKS.

[1649] I understood Ms Kelly to argue that any breach on the part of the ANZ in clearing the $460,000 cheque did not result in loss to any of the plaintiffs because TSM obtained a benefit of like value, in that the titles to the alleged Godwin properties became available to provide first mortgage security to support the ANZ loan facilities and those securities were ultimately so dealt with as, in effect, to realise full value to TSM and/or the other plaintiffs.

[1650] The Brayshaw Crescent property was sold for $240,000, the whole of the proceeds being paid to TSM. Those proceeds were then disbursed, as to $120,000 each, to NKS and SED respectively, and applied by them as elsewhere discussed. It is said by the defence that the payment of the proceeds of sale remained a benefit to TSM, because the monies paid to NKS and SED represented a reimbursement of liabilities of the company to the ANZ that they had met.

[1651] The situation concerning the Wells Street property was a little more complex. As I understand the evidence, Walter Lew-Fatt retained ownership of this property on payment of $50,000 to TSM. The precise ramifications concerning that property and its ultimate disposition are not entirely clear to me. I assume that Walter Lew-Fatt retained it as beneficial owner.

[1652] What then was the practical effect of the breaches of contract committed by the ANZ?

[1653] Those breaches clearly enabled Godwin to commit the fraud on TSM and NPG which would otherwise not have occurred.

[1654] That fraud gave rise to a *prima facie* increase in the indebtedness of TSM (as recipient of that sum) to NPG of $570,000, given that all but $48,286.25 was applied in retiring indebtedness over properties that then became available by way of security for TSM's purposes, and on the disposal of which that entity received the benefit of the relevant proceeds of sale.

[1655] Had the two cheque transactions not have been processed and Godwin's association with TSM/LTD been terminated, as almost inevitably it would have been, TSM would, as of 2 January 1998, have been in the situation referred to in my analysis of the evidence of Edwards. That is to say, subject to some degree of forbearance on the part of its creditors, it would have continued to labour under a chronic shortage of working capital, but may well have been able, by virtue of an orderly sale of assets, to continue its core business -- at least on a modest scale. TSM has suffered financial loss as a consequence of the loss of opportunity to do so in the environment that would have existed but for the ANZ breaches.

[1656] Importantly, its situation would probably not have attracted the almost immediate severe credit restrictions that were imposed on TSM by trade suppliers, due to the rumours of Godwin's fraud with the resultant impact on TSM that, in the long-term, so adversely affected its capacity to trade.

An orderly sale absent public knowledge of the actual commission of fraud was likely to have improved its cash flow and also its working capital situation to some extent.

[1657] As I have pointed out, the practical effect of what actually occurred was to seriously inhibit the ability of TSM to conduct its core business and certainly its housing and unit construction initiative. The crippling inability to obtain credit from trade suppliers must have been a situation in the reasonable contemplation of Baylis as a possible outcome, had he directed his mind to the probable consequences of his actions.

[1658] I consider that, had the breaches not occurred and had the resultant consequences to which I have referred not taken place, DLS and ECD would have been compelled by the circumstances with which they were then faced, to reappraise (and would have reappraised) their priorities and focus on TSM's core business, absent adequate working capital to do otherwise.

[1659] TSM may well have been able, in that context, to continue a modest degree of building construction on a job by job basis, but would not, at least in the short term, have had the capacity to engage in further major development projects. Given the extreme problems that they faced at the time, in the context that actually occurred, that is exactly what it sought to do.

[1660] It is difficult to see how, at least in the short term, DLS and ECD would have been able to significantly progress their desired expansion of

activities in the development of major production in the specific areas of specialty to which earlier reference has been made.

[1661] On the other hand, some allowance needs to be made for the possibility that they may, in time, have been able to engage with a co-venturer outside the Territory in a wider production of rain water tanks and, perhaps, flashings and awnings.

[1662] I am not so convinced in relation to the areas of battenless and screwless cladding. The evidence strongly indicates the market dominance of existing suppliers of competing products and the inherent conservatism of those engaged in or having resort to the relevant market.

[1663] Given the foregoing situation, the evidence leads me to the conclusion that any possible escalation and/or expansion of the activities of TSM would have had to have been incremental over a substantial period of time and certainly not exponential. The figures espoused by Martin and Clark are, for the reasons I have already expressed, quite divorced from reality.

[1664] Having regard to my foregoing findings and conclusions I find it unnecessary to embark upon a further detailed, in depth discussion of the evidence given by the expert financial witnesses. I have recited the highlights of that evidence and concluded that the calculations of Martin and Clark simply cannot provide any reliable basis for assessment of damages by way of loss of opportunity to make future profits via the

business of TSM that may be compensable in accordance with the relevant authorities.

[1665] I content myself with reiterating that I generally prefer the views expressed by Edwards as to quantum wherever those conflict with the evidence of the other expert witnesses, given any concessions that Edwards was prepared to make.

[1666] The plurality judgment in a *Sellars*[565] made the point that, where there has been a breach of contract giving rise to "actual loss of some sort", the common law does not permit evidentiary or other difficulties of estimating that loss in money to defeat an award of damages. Those damages must then be ascertained by reference to the degree of probabilities, or probabilities, inherent in the plaintiffs realising the relevant commercial advantage had the plaintiff been given the chance that it would otherwise have had. The Court is required to assess the degree of probability that a relevant event would have occurred, or might occur, and adjust any award of damages to reflect the degree of probability (*Sellars*).[566]

[1667] The plurality in *Sellars*[567] therefore concluded that the acceptance of the principle enunciated in *Malec v J. C. Hutton Proprietary Limited*[568] requires that damages for deprivation of a commercial opportunity should

[565] *Sellars v Adelaide Petroleum NL and Others* [1992-1994] 179 CLR 332.
[566] *Sellars v Adelaide Petroleum NL and Others* [1992-1994] 179 CLR 332 at 350.
[567] *Sellars v Adelaide Petroleum NL and Others* [1992-1994] 179 CLR 332 at 355.
[568] (1990) 169 CLR 638.

be ascertained by reference to the Court's assessment of the prospects of success of that opportunity had it been pursued.

[1668] In a case such as that now before me there can be little pretence at precision, because of the need to address a hypothetical situation that is itself fraught with many considerations and contingencies.

[1669] I take as my commencement point for consideration the evidence of Edwards that, in the year ended 30 June 1997 the actual NPAT of TSM was 3.2 percent, generated by sales of the order of $1.8 million. I also accept Martin's evidence that such a result may well have been adversely affected by "one off" type factors such as disruption associated with acquiring and setting up new business premises and some, but not all, of the "one off" expenses identified by him -- an aspect that I did not take Edwards to challenge, save as to the extent to which such expenses ought to be written back.

[1670] I also note that the Martin report (Exhibit P37) indicates that TSM recorded sales for the year ended 30 June 1998 were $2,282,122. That figure is consistent with the point that I have just made.

[1671] I also proceed on the basis that, historically and bearing in mind the disruption factor that just referred to, it would not be unreasonable to have expected an annual sales increase approaching 6 percent.

[1672] Nevertheless, some allowance ultimately needs to be made for the contingency that, incrementally, it may have been possible for TSM to have both escalated that rate of increase to a modest extent and also improved its NPAT percentage by reason of greater levels of production and sales, at least in relation to rain water tanks and flashings.

[1673] I further consider that, on such a basis, it would be not unreasonable as a fairly conservative starting point calculation to adopt an overall average percentage annual increase in sales of 6 percent over (say) a 10 year period and an average NPAT of the order of 3.5 percent. In so concluding I do not pretend to any degree of precision, because of the obvious imponderables involved, but I have had particular regard to the various figures referred to in the expert reports and evidence and the prior historical situation. Of course, that approach does not reflect any possible incremental improvement in the NPAT performance of TSM over time.

[1674] Even acknowledging the disruptive situations impacting on both the 1996/1997 and 1997/1998 I am of the view that it is appropriate (on a conservative basis) to adopt, as a baseline, the actual sales in respect of the year ended 30 June 1998 of the order of $2,282,100 (being the rounded off actual sales figure for the year ended 30 June 1998 referred to in Exhibit P37 p 11).

[1675] On such a basis, if TSM had successfully continued to trade on the basis that I have identified, the figures adopted by me would have given rise to

the following approximate results over a 10 year period as espoused by the financial experts:

Year	**Sales($)**	**Margin(%)**	**NPAT($)**
1998	2,282,100	3.5	79,873
1999	2,419,000	3.5	84,665
2000	2,564,100	3.5	89,743
2001	2,717,900	3.5	95,126
2002	2,881,000	3.5	100,835
2003	3,053,900	3.5	106,886
2004	3,237,100	3.5	113,298
2005	3,431,300	3.5	120,095
2006	3,637,200	3.5	127,302
2007	3,855,400	3.5	134,939
		Total	$ 1,052,762

(All sales figures have been rounded off).

[1676] As against those figures, there are no offsets for profits actually earned by TSM in respect of any period post 6 February 1998. As appears from Exhibit P79, unsurprisingly, TSM made a small operating loss for the year ended 30 June 1998 and a substantial loss in the year ended 30 June 1999. Given the obviously chaotic situation that arose immediately after 6 February 1998 it would be somewhat amazing if it were otherwise.

[1677] No financial statements are available for any subsequent period but, on the evidence, it is safe to infer that losses would have continued until TSM actually ceased operations. It was faced with diminishing really profitable sales and an escalating debt situation.

[1678] There are several comments that must be made concerning the above calculations.

[1679] First, they assume competent and effective management by DLS and ECD in what would have been a difficult financial environment, at least in the first year or so of the selected period. That is an assumption that may, on the historical record, be overoptimistic. It would, in part, have been a question of what they may have learnt from their hypothetical then near escape from a major fraud by Godwin.

[1680] Second, the figures selected do not allow for any early emergence of a joint-venture partner to facilitate a greater production of the specialist items to which I have referred, or of some person prepared to invest venture capital into the business in lieu of Godwin. I am of the opinion that, if TSM could have successfully continued to trade and incrementally improve its performance over the first two or three years, the possibility of either or both of those occurrences would not have been beyond the realm of possibility.

[1681] Third, it must be conceded that the NPAT figure for the year ended 30 June 1998 may well be optimistic. Given that the immediate problems with

which TSM would have been confronted as a consequence of Godwin's departure and the need to cope with the debt situation existing at that time (particularly that due to NPG) it could well have taken some time to get the business on an even keel again in financial terms. I have taken that aspect into consideration in arriving at a final discount for contingencies.

[1682] Fourth, no allowance has been made in those figures for what was referred to by Edwards as the bundle of factors such as the impact of economic conditions from time to time and changing technological, environmental and market aspects and also the activities of market competitors.

[1683] All of the foregoing considerations combine to mandate a very substantial discount of the above computed total to allow for contingencies when arriving at a final bottom-line figure to allow for loss of commercial opportunity. Such is the combined magnitude of all factors to be considered that I consider that a discount of 50 percent must be applied, even allowing for the positive contingencies to which I have referred, including a possible incremental improvement of sales and NPAT.

[1684] A resultant assessment of loss of income is therefore of the order of $526,381.

[1685] I did not take Edwards to seriously challenge Clark's concept of capitalisation of future maintainable earnings (CFME) as an appropriate approach to the assessment of capital loss, nor was he critical of the selection of a PER multiplier of three. His primary criticisms were

directed towards the validity of the projected NPAT figures adopted and as to the topics referred to at paragraphs 85-89 of Exhibit D62.

[1686] Applying the CFME concept adopted by Clark to an NPAT of $57,497 as at 30 June 1997, produces a value of the order of $172,491. For the year ended 30 June 2007 an average of the projected NPAT over the five years immediately preceding that date (i.e. for the financial years 2003-2007) amounts to $120,503. It follows that on adoption of a multiplier of three to that figure there is a resultant value as at 30 June 2007 of $361,509. An application of those results gives rise to a capital loss of the order of $189,018.

[1687] That said, I accept Edwards' point that a substantial discounting then needs to be applied in recognition of the contingencies to which reference has already been made and, as a consequence, to allow for:

(1) whether the future profits would have been earned at all,

(2) if so, in what quantum,

(3) if so, in what time periods, and

(4) after allowing for the probability of loss years.

[1688] Once again, I consider that on the evidence in this case the discount to be applied must be considerable. Here also a 50 percent reduction is warranted, thereby giving rise to a calculated capital loss of the order of $94,509.

The defendant's plea of contributory negligence

[1689] In paragraph 45 of its defence the defendant specifically pleads that, if it is held to have breached any duty of care which it owed to any of the plaintiffs, and if the plaintiffs suffered any consequential loss or damage, that loss and damage was caused or contributed to by the negligence of the plaintiffs.

[1690] There are three separate prongs of that contention. They respectively relate to certain inaccuracies in the re-financing proposal, certain actions of TSM, DLS and ECD that are said to have armed Godwin with the means of committing fraud and the failure by DLS and ECD to disclose the borrowings by LTD from NPG.

[1691] In paragraph 45 the ANZ particularises the following matters said to constitute contributory negligence:

(a) that DLS, ECD and Godwin presented the ANZ with the re-financing proposal which represented to the ANZ that one of the directors was the beneficial owner of the alleged Godwin properties, that such properties were unencumbered and that they were of a value stipulated, without taking any reasonable steps to satisfy themselves of the truth or accuracy of that information.

(b) That TSM, DLS and ECD armed Godwin with the means of committing fraud by

- making him a signatory to the TSM account,
- allowing him to speak to the ANZ on behalf of TSM and DLS and to act as agent for TSM in applying for the $500,000 FDA bridging loan,
- when Baylis had made enquiries concerning the discharge of mortgages over the Raffles Road property, referring him to Godwin to deal with such queries,
- placing Godwin in a managerial position and a position of trust within the businesses operated by LTD and TSM without making any enquiries concerning his creditworthiness, asset backing, reputation for honesty or past history,
- failing to implement sufficiently secure and effective office procedures in relation to the drawing, signing and authorising of cheques and checking bank statements,
- through TSM's officer, Davies, signing a cheque for $460 which was written with blank spaces so as to facilitate operation to $460,000, failing to contact Flynn when DLS and ECD discovered that Godwin had borrowed $570,000 from him without their authority, and
- failing to contact the ANZ when they discovered that Godwin had drawn a cheque for $460,000 on TSM’s account payable to himself without their authority,

and

(c) That DLS and ECD failed to disclose to the ANZ LTD's borrowings totalling $800,000 from NPG (secured by a fixed and floating charge over the assets of LTD), did not disclose outstanding group tax debt to the ATO which was being paid off at the rate of $1000 per week and made active representations of the net asset/liability position of the group and expected outgoings for the then ensuing 12 months that falsely did not include those commitments.

[1692] It is to be observed that the plea of contributory negligence is expressed in global terms and does not seek to attach to any specific cause of action or breach relied upon by the plaintiffs, as such. Further, it is, in terms, averred against the plaintiffs generally.

[1693] Although not expressly pleaded, I assume that, as to the breaches of contractual duty as found, the ANZ relies on s 15 of the Law Reform (Miscellaneous Provisions) Act, 2007 (NT) and, specifically, subparagraph (b) of the definition of "wrong" contained in that section.

[1694] That definition includes an act or omission that amounts to "*a breach of a contractual duty of care that is concurrent with a duty of care in tort*". The section is designed to overcome (in part at least) problems perceived

to have arisen from the decision of the High Court in *Astley v Austrust Ltd*[569] *("Astley")*.

[1695] I take the phrase "*concurrent duty of care*" to stem from the discussion, in the plurality judgment in *Astley*,[570] of the resurgence of a recognised right to sue in both contract and tort in relation to liability arising in certain circumstances.

[1696] The provisions of s 15 of the statute beg the question as to when a duty of care in tort arises concurrently with a relevant contractual duty of care. In *Astley* the Court accepted the reasoning of the House of Lords in *Henderson v Merritt Syndicates Ltd* [571] that an action could be brought for professional negligence both in contract and in tort, except where the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principles, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded.

[1697] Interesting issues will, no doubt, surface as to when concurrent duties of care arise as a matter of law with regard to contractual relationships other than those that can fairly be categorised as giving rise to "professional negligence" considerations. However, it seems to me that any reliance on s 15 in a situation in which the relevant relationship at the time of the alleged breach of duty is that of banker/customer necessarily founders on

[569] (1999) 197 CLR 1.
[570] *Astley v Austrust Ltd* (1999) 197 CLR 1 at 20-23.
[571] [1995] 2 AC 145.

the principle espoused in the cases of *Tai Hing*,[572] *Nemur Varity*[573]and *Hokit*.[574]

[1698] As between banker and customer, any relevant duties of care are founded in contract and not in tort. It is difficult to see how any relevant situation of concurrency can arise, other than in relation to possible activities of the parties that extend beyond the normal banker/customer relationship.

[1699] In the instant case, in so far as the subject matter of the plea of contributory negligence falls fairly and squarely in the category of those activities arising within the normal banker/customer relationship, it is impossible to see how the section can have any operation.

[1700] Quite apart from that situation, it is to be borne in mind that, when s 15 of the *Law Reform (Miscellaneous Provisions) Act* was enacted in its present form, it had no application to wrongs in respect of which proceedings had already been commenced. That being so, it can have no application vis-à-vis any party in relation to events that, as here, occurred prior to that time.

[1701] However, to the extent that my views may be considered erroneous and, because some of the matters pleaded relate to aspects not encompassed within the period of TSM's banker/customer relationship with the ANZ and other plaintiffs do not fall within such a relationship, it is desirable to briefly consider the defendant's pleading on its merits.

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[572] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80.
[573] *National Australia Bank Limited v Nemur Varity Pty Ltd* (2002) 4 VR 252.
[574] *National Australia Bank Ltd v Hokit Pty Ltd and Others* [1996] 39 NSWLR 377.

[1702] In so doing it is important to bear in mind what fell from their Lordships in *Tai Hing*[575] and was reiterated in *Hokit*.[576] Any mutual obligations of parties in tort cannot be any greater than those to be found expressly or by necessary implication in their contractual relationship of banker/customer. No party can rely on the law of tort to provide them with greater protection than that for which they have contracted, either expressly or impliedly.

[1703] It follows then, that, in so far as the $460,000 cheque was in fact a forgery by virtue of the alterations made to it by Godwin, then, relevantly, TSM had a duty to take usual and reasonable precautions in drawing it to prevent a fraudulent alteration of the document that might occasion loss to the bank. Interestingly, the statement of claim does not contain any express plea that the $460,000 cheque was in fact a forgery, or that the monies paid on it constituted the proceeds of forged instrument. Nor was this aspect pursued at trial. It is therefore not a live issue in these proceedings.

[1704] Be that as it may, I turn to the detailed particulars of alleged contributory negligence, bearing in mind that no duty of the plaintiffs to the ANZ can be more extensive than that implied in the banker/customer relationship.

[1705] As I understand the defendant's pleading, it is averred that, but for the express and implicit false representations in the re-financing proposal (i.e. the asserted positive misrepresentations as to the alleged Godwin properties and the failures to disclose the borrowings from NPG and the

[575] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 107.
[576] *National Australia Bank Ltd v Hokit Pty Ltd and Others* [1996] 39 NSWLR 377.

liability to and arrangement made with the ATO), the ANZ would not have approved the facilities made available to TSM.

[1706] Accordingly, it is said that the damage which the plaintiffs claim was suffered as a result of TSM borrowing that money would have been avoided.

[1707] The second prong of the ANZ plea essentially asserts that, in so far as loss was occasioned as a result of fraudulent conduct on the part of Godwin, then, by reason of the matters particularised in the defence, the plaintiffs TSM, DLS and ECD armed Godwin with the means of committing fraud and, by implication, were the authors of their own misfortune.

[1708] It must be said that not a great deal was put to me in submissions in elaboration of or response to the question of alleged contributory negligence.

[1709] I accept that, but for the false representations referred to and/or the failure to disclose the existence of relevant debt, the ANZ would not have approved the relevant credit facilities and thus not have been faced with the present proceedings.

[1710] I do not accept that the particulars relied on by the ANZ with regard to the suggestion that certain of the plaintiffs negligently armed Godwin with the means of committing fraud realistically express the practical situation. Further, it is difficult to reconcile the pleaded assertions with the dicta in

the authorities such as *Hokit*,[577] *National Australia Bank Limited v Meeke*[578] and *Voss and Another v Davidson and Other*,[579] referred to by Mr Sallis.

[1711] As to these I would make the following comments:

(1) There was nothing unusual in making Godwin a signatory to the TSM account. He was a trusted senior member of the group administrative staff and a director of the associated company LTD;

(2) Part of his function within the group structure related to the seeking of finance with which to pursue group activities, including some degree of liaison with financial entities and, in particular, the ANZ. The $500,000 FDA bridging loan was, on the face of it, a sensible and necessary transaction, given the difficult cash flow situation that had arisen and the directors of TSM concurred with it. It was not unreasonable to leave the detail to Godwin to organise;

(3) Nor was it negligent or unreasonable to refer Baylis to Godwin in relation to the discharge of the Raffles Road property mortgage, in the context that, to the knowledge of the bank officers, Godwin had specifically undertaken to all parties that he, personally, would fund the discharge of that liability;

(4) The complaint that TSM, DLS and ECD ought to have pursued enquiries as to Godwin's creditworthiness, asset backing, honesty or past history smacks of undue wisdom after the event. He had been

[577] *National Australia Bank Ltd v Hokit Pty Ltd and Others* [1996] 39 NSWLR 377.
[578] (2007) WASC 11.
[579] [2002] QSC 316.

socially known to them for some time and was also known to them to have come from a reputable family background. He was in apparent regular employment elsewhere at the time he joined the group. He had a highly plausible personality and had agreed to make a substantial capital contribution as part and parcel of his entry into the group.

(5) The evidence does not really indicate what precise extent of knowledge DLS or ECD had of Godwin or what they did in fact do. The ANZ did not establish circumstances that indicated, on the balance of probabilities, that the investigations referred to ought to have been pursued prior to Godwin's engagement;

(6) The ANZ has simply not established what office procedures, beyond those that existed, should have been implemented. TSM had employed an experienced bookkeeper who had, it seems, implemented a number of new procedures. There was a cheque requisition procedure in place and Godwin himself was apparently involved, to some extent, in financial processes of the group. His fraudulent activities were clever and opportunistic and, once again, the plea seems largely based on wisdom after the event;

(7) No doubt, once again with wisdom born of hindsight, Davies might have scrutinised the format of the cheque presented to him in greater detail, but, given both the circumstances of that presentation and the apparently small amount of the cheque, the associated requisition and

the apparent authority position occupied by Goodwin within the group, there was nothing to overtly invite his suspicion of the transaction; and

(8) At the time when the $460,000 cheque was presented for ultimate clearance and the titles of the alleged Godwin properties were cleared, it is fair to say that neither DLS nor ECD appreciated how the funds had been processed. When Mary Willis raised the issue with DLS as to the passage of the two large cheques, he was told an apparently plausible story by Godwin as to the circumstances and believed him. If there was any default on the part of DLS it was in failing to check to see that Godwin had actually honoured his promise that Flynn would be paid $460,000 the same day, but merely accepted Godwin's assurance that he had the situation "sorted out". On what DLS was told and accepted, there was no occasion to raise any relevant issue with the ANZ.

[1712] I do not consider that there is any substance on merit in the defendant's claims by way of answer to the breaches found on the basis of contributory negligence, other than in relation to the failures to disclose that are relied on, which are not causally relevant for present purposes.

The defendant's counterclaim

The pleaded basis of the counterclaim

[1713] The defence in these proceedings includes a counterclaim against DLS and ECD. As earlier recited, this prosecutes claims against them in deceit, negligent misrepresentation and breaches of the TPA and CAFTA.

[1714] Those claims are essentially based on what are said to be a series of specific false representations made by DLS and ECD to the ANZ. In brief, the representations pleaded, as having been made in the re-financing application, were:

> "(1) that the re-financing proposal represented that the total assets of TSM , LTD and DLS, ECD and Godwin (collectively referred to as "the Group") amounted to $2.917m;
>
> (2) that the total liabilities of the Group amounted to $521, 888.97;
>
> (3) that one of the three directors of LTD owned a property at 22 Wells Street, Parap, which was unencumbered;
>
> (4) that one of the three directors of LTD owned a property at 7 Brayshaw Crescent, Millner, which was unencumbered;
>
> (5) that the value of the Anula property was $175,000;
>
> (6) that the value of the Raffles Road property was $205,000;
>
> (7) that the value of the Brayshaw Crescent property was $250,000;
>
> (8) that the value of the TSM land and workshop premises was $510,000;
>
> (9) that the value of the property at 3/61 Shearwater Drive, Bakewell was $125,000;
>
> (10) that the last mentioned property was unencumbered;

(11) that LTD had successfully completed the first LTD development project;

(12) that LTD required a short term bank bill facility of $800,000 to fund future developments; and

(13) that the Group could offer a security over a fixed term deposit of $300,000 in cash."

These are collectively referred to in the counterclaim as the written representations.

[1715] It is further averred that implied representations made by the re-financing proposal were that members of the Group had no borrowings other than those disclosed and had given no securities other than those disclosed.

[1716] These are referred to as the implied representations.

[1717] The counterclaim further asserts that, in or about October and November 1997, after delivering the re-financing proposal to the ANZ, DLS and ECD on their own behalf and on behalf of TSM and LTD represented that:

"(1) the funds were to be borrowed by TSM only;

(2) TSM wished to borrow $1,050,000; and

(3) LTD had previously intended to borrow to fund ongoing projects but had sold the second LTD development project to one buyer for $960,000, which had avoided the need to borrow."

These were referred to in the pleading as the further representations.

[1718] The counterclaim asserts that the written representations, the implied representations and the further representations were false. It then proceeds

to set out detailed particulars of the falsity, which it is unnecessary to here repeat *in extenso*.

[1719] The counterclaim goes on to plead that, on or about 17 November 1997 TSM, LTD, DLS, ECD and Godwin made further representations to the ANZ for the purpose of obtaining an additional $500,000 of finance, particulars of which representations were said to be that:

> "(1) LTD had an agreement or arrangement with NPG to purchase all eight units in the LTD second development project, which NPG would retain;
>
> (2) NPG no longer wished to retain the units but, instead, desired to on-sell them before their transfer to NPG;
>
> (3) there would be a time delay of 120 days in which LTD would not receive the $960,000 it had expected in early December 1997;
>
> (4) LTD would be wound up by the directors with all future developments to be conducted by TSM, and as such borrowing for the further $500,000 would also be by TSM, not LTD; and
>
> (5) the further $500,000 was a fully drawn advance for up to six months and would be paid from the proceeds of the sale of the units in the second LTD development project."

These are referred to as the second further representations and are said to have been false.

[1720] The counterclaim further avers that DLS and ECD made the various representations to the ANZ to which I have made reference, intending it to rely on them in determining whether or not to provide finance to TSM without which:

> "(1) TSM, LTD, DLS and ECD could not have repaid NPG;

(2) they could not have completed the second LTD development project;

(3) LTD would have become insolvent and could not have paid its debts, including to TSM; and

(4) TSM would have become insolvent and could not have continued to trade."

[1721] It is asserted that, in reliance on all of the representations pleaded, the ANZ entered into agreements for finance with TSM.

Specific counterclaims

[1722] As to the claim based in deceit the ANZ asserts that TSM, LTD, DLS and ECD knew that the relevant representations were false.

[1723] As to that based on negligent misrepresentation it is pleaded that those plaintiffs owed the ANZ a duty to take reasonable care to ensure that the information contained in the re-financing proposal and the various representations was accurate, a duty that was said to have been breached as particularised.

[1724] As to that based on a breach of the TPA and CAFTA it is pleaded that the plaintiffs in question made the relevant representations in trade or commerce and that they were misleading or deceptive. Particulars of alleged loss and damage said to have been sustained by the ANZ are set out in the pleading.

[1725] The counterclaim expressly relies upon the acknowledgements made by the those parties who executed instruments of guarantee in favour of the ANZ, as earlier recited.

[1726] It seeks a declaration that the first to fourth plaintiffs are liable to indemnify the defendant against the costs incurred in defending these proceedings and any amount that it may be ordered to pay to any of the plaintiffs by way of damages.

[1727] It seeks an order that the first to fourth plaintiffs indemnify the defendant against those costs and any amount that it may be ordered to pay to only the plaintiffs by way of damages.

[1728] It further seeks an order that the first and fourth plaintiffs pay to the defendant the amounts referred to in the preceding paragraph hereof by way of damages, either at common law or pursuant to s 82 of the TPA and/or s 91 of CAFTA and interest.

The final basis upon which the counterclaim was ultimately pursued

[1729] In the event, the defendant sought to actually prosecute its counterclaim on a basis somewhat narrower than was originally pleaded.

[1730] As I understand the defendant's final position it amounted to the following propositions:

(1) Any representations made by DLS, ECD and Godwin together, or by Godwin alone, also attached to TSM as their principal in relation to negotiations with the ANZ to provide loan facilities to TSM;

(2) The re-financing proposal, to the knowledge of DLS, ECD and Godwin or some or one of them, contained specific representations that were untrue, namely that –

(a) the total relevant group assets amounted to $2,917,000,

(b) the total liabilities of the group amounted to $521,888.97,

(c) one of the directors of LTD *[viz Godwin]* owned an unencumbered property at 22 Wells St, Parap *[being the Wells Street property]*,

(d) one of those directors *[also Godwin]* owned an unencumbered property at 7 Brayshaw Crescent, Millner *[being the Brayshaw Crescent property]*,

(e) one of those directors*[namely Dean]* owned an unencumbered property at 10 Kohinoor Street, Anula *[being the Anula property]*,

(f) the property the subject of the first LTD development project (3/61 Shearwater Drive, Bakewell) was unencumbered,

(g) LTD had successfully completed the first LTD development project, and

(h) The group could offer a security over a fixed term cash deposit of $300,000.

(3) The clear implication in the re-financing proposal was that the members of the group had no borrowings and had given no securities other than those disclosed *[namely, $110,000 in respect of the Raffles Road property and $270,000 to the CBA in respect of the TSM land and workshop premises]*.

(4) Following receipt of the re-financing proposal, the witness Bradley requested further financial information from TSM and was supplied by the plaintiffs with certain financial reports of TSM and cash flow and profit forecasts for both TSM and LTD. The documentation so supplied did not disclose the $1,000 per week payments that TSM was committed to pay to the Australian Taxation Office to meet substantial arrears of group tax owing to that office.

(5) At the request of the witness Barnett, Bradley further sought information from TSM as to all existing loans/leases/hire purchase that was not to form part of the new ANZ loans. Bradley was informed by DLS, ECD or Godwin that all loans were to be fully repaid and that nothing would be left – and that the second LTD development property consisting of eight units had been sold for $960,000. Bradley was further told that LTD did not have any borrowings; that it had intended to borrow to fund the ongoing work, but that it no longer needed to do so because of the above sale.

(6) Contrary to the foregoing representations, the true situation at the time of the making of the representations was that:

(a) LTD had borrowings of $800,000 from NPG, which had not been disclosed in the proposal,

(b) Those borrowings had been secured by a fixed and floating charge over the assets of LTD (including the first LTD development project site),

(c) LTD had borrowed $350,000 from the CBA, had regularly exceeded its overdraft limit and had had numerous cheques dishonoured,

(d) The CBA facility was secured by a fixed and floating charge over the assets of LTD (including the first LTD development project site),

(e) The group did not have $300,000 in cash to offer as security,

(f) LTD had made a loss on the first LTD development project,

(g) LTD had not sold the second LTD development project to one buyer for $960,000,

(h) The Brayshaw Crescent property and the Wells Street property were both mortgaged to the NAB,

(i) the Anula property was mortgaged to the CBA,

(j) As a consequence of the fixed and floating charges referred to above, the first LTD development project was in fact encumbered, and

(k) TSM was indebted to the Australian Taxation Office for unpaid group tax dating back to 1995, which it was repaying at the rate of $1000 per week.

(7) It followed that the representations concerning the total assets and liabilities of the group were grossly incorrect. The true situation was as analysed by the witness Edwards.

Issues arising

[1731] On the foregoing basis the defendant contends that the making of the representations in the context of an application by a Company for a business loan (i.e. the re-financing proposal) patently amounts to misleading or deceptive conduct within the meaning of s 52 of the TPA. It is said that the evidence establishes that the ANZ relied on those representations in deciding to approve the initial TSM application for advances totalling $1.05 million, as appears from Barnett's diary notes.[580]

[1732] Barnett, Wellman and Pedler all testified that, had the ANZ known of the debt to NPG and/or that to the ATO (and the arrangement for repayment of the latter), the loan approval would never have been forthcoming.

[1733] Ms Kelly argues that the ANZ has suffered damage by reason of the cost of these proceedings, because TSM contends that the settlement of the loans in January 1998 was the cause of the damage that it claims to have suffered.

[580] Exhibit D51 pages 110-118, 134-136.

[1734] She further submits that, if the ANZ becomes liable to TSM in these proceedings, then the other damage that will be suffered by the ANZ as a consequence of the entry into the loan agreements will be a liability to compensate TSM for entering into them. The evidence renders it clear, she says, that the ANZ would not have entered into those agreements had the misleading and deceptive conduct of Smith and Dean not occurred.

[1735] A like result would, it is said, flow if the ANZ becomes liable in damages to any of the other plaintiffs.

[1736] The detail of what is claimed is set out in Ms Kelly's written submissions at paragraphs 384-393 as amplified in the defendant's written reply.

[1737] The ANZ argues that the situation concerning the further facility of $500,000, by way of a fully drawn short-term bridging advance, raises separate issues.

[1738] As to this Ms Kelly points to the representations made by Godwin to Baylis on 17 November 1997 as earlier recited by me. It will be recalled that these concerned the alleged falling through of the arrangement with NPG to purchase the LTD second development project and a consequential need for bridging finance until the proceeds of sale of the units comprising that development became available and an expressed intention to wind up LTD. On 19 November 1997 DLS, ECD and Godwin committed themselves to that representation by signing the acknowledgement of the ANZ letter of that date, which specifically referred to the bridging loan and the terms of

it, being "*for six months to be repaid in full from sale of units at lot 5745 Shearwater Drive*".

[1739] It is the ANZ case on the counterclaim that the representations so made to the ANZ were false and made with the intention of inducing it to make the bridging loan.

[1740] Ms Kelly submits that the alleged falsity of the representations has never been refuted. It lay in the facts that:

(1) the alleged arrangement had never existed;

(2) LTD owed Flynn and/or NPG in excess of $844,000, which should have been repaid from the proceeds of the first LTD development project, but was not;

(3) DLS, ECD and Godwin had in fact agreed to repay NPG the money owing by LTD from the proceeds of sale of the second LTD development project;

(4) LTD and TSM had no realistic prospect of repaying both the money owing to NPG and the $500,000 bridging loan from the proceeds of sale of units in the second LTD development project;

(5) DLS, ECD and Godwin in fact had no intention of winding up LTD at that stage;

(6) It must be inferred that the representation that LTD would be wound up was made with the object of inducing the ANZ to providing the

bridging loan to TSM for LTD's purposes without the true financial position of the latter having to be revealed to the ANZ;

(7) NPG had, at that time, a fixed and floating charge over all of the assets comprising the second LTD development project; and

(8) DLS, ECD and Godwin knew that LTD would not be in a position to repay NPG without obtaining additional finance either from the ANZ or some third-party and would be unable to complete the second LTD development project without additional funding.

[1741] The ANZ case is that it relied on those representations in approving the bridging loan.

[1742] The defence contends that, to the extent that there is any claim that TSM suffered damage as a result of entering into the bridging loan (as distinct from the other two facilities advanced in January 1998), then the ANZ is entitled to damages by way of indemnity against TSM, DLS and ECD to the extent of any liability that it may be found to have in relation to such damage.

[1743] Finally, the defendant argues that, as an independent basis of counterclaim, the ANZ is entitled to rely on the acknowledgements in the guarantees signed by the several guarantors, as I have previously recited the text of them. It is contended that, in signing such acknowledgements, the several guarantors represented to the ANZ that the matters acknowledged by them

were true and that they did not in fact rely on any oral statements made by any ANZ officers.

[1744] The ANZ argues that because the personal guarantors now claim that this was untrue and that they did rely on statements by Bradley, as earlier traversed, the signing of the written acknowledgements to the contrary amounted to misleading or deceptive conduct within the meaning of s 52 of the TPA.

[1745] It is said that the ANZ relied on the written acknowledgements. Had not the several guarantors specifically subscribed to the acknowledgements, the ANZ would not have advanced the relevant money to TSM. Accordingly, the ANZ contends that it is entitled to claim the cost of the present proceedings against each of the guarantors, together with an order that each of them indemnify it against any liability that it may have to TSM or any of the other guarantors.

[1746] The plaintiffs' answer to the counterclaim is essentially based on three propositions, namely:

(1) Any misrepresentations or negligence on the part of DLS and ECD had no causative relationship with the losses alleged. The ANZ undertook its own checks, which included financial statements from the TSM accountants that pointed up obvious inconsistencies

between those statements and the content of the refinancing proposal.[581]

(2) Even if the conduct of DLS and ECD was misleading, deceptive or negligent and that conduct led to the consummation of the finance agreement, the ANZ, nevertheless, profited from the transaction. The monies loaned were repaid in full, together with fees and interest; and

(3) Any damages awarded to the plaintiffs will be as a consequence of the ANZ's own conduct in contravention of its obligations to the plaintiffs. The conduct sought to be impugned was not relevantly causative.

[1747] In support of his contentions Mr Sallis invited attention to the case of *Enzed Holdings Ltd and Others v Wynthea Pty Ltd and Others*[582] that it is not enough for a claimant merely to show wrongful conduct by the party claimed against. Liability applies only when the court finds that relevant loss or damage has been caused by that conduct.

[1748] In amplification of his first point, Mr Sallis stressed that, prior to any drawdown or settlement, the ANZ had become well aware of the true situation concerning various of the misrepresentations asserted.[583] Bradley had also been authorised to obtain any pertinent information from the TSM accountant. It was, Mr Sallis said, or should also have been apparent to the

[581] T2237.
[582] (1984) 57 ALR 167 at 182-183.
[583] e.g. the title situations of the alleged Godwin properties and the existence of encumbrances registered on them.

ANZ by about 17 November 1997 that the alleged sale of the second LTD development project to NPG was not proceeding.

[1749] I pause to comment that, whilst that may be so, the bank was certainly in ignorance of the various detailed dealings with NPG and the true situation concerning the indebtedness of TSM to the ATO and the arrangements for payment of the balance due to it, although it must be accepted that the TSM financials did make reference to a debt due to the ATO.

[1750] Mr Sallis further contended that the ANZ plea that it would not have suffered the loss alleged had the impugned conduct of DLS and ECD not occurred, is unduly simplistic. He argued that the loss asserted was of a very different kind to that which was a foreseeable consequence of such conduct. Further, he contended that the breaching conduct of the ANZ necessarily operated as a *novus actus interveniens*[584] destroying the chain of causation.

[1751] It is undeniable that, despite any of the impugned conduct of DLS, ECD and Godwin, the ANZ suffered no direct financial loss as a result. Further, the only causes of action upheld against it are in contract, arising from the processing of the $570,000 cheque and the $460,000 cheque.

[1752] I accept that, had the ANZ been aware of the true situation in relation to the NPG loans and/or the situation of TSM, vis-à-vis the ATO and its

[584] *Mahony v J. Kruschich (Demolitions) Proprietary Limited and Another (1985) 156 CLR 522, Haber v Walker [1963] VR 339.*

practical implications, it would never have approved and/or settled the relevant loan facilities.

[1753] Can it properly be said that the entry by the ANZ into the finance agreement and the settlement of it (including the initial FDA loan) was relevantly causative of the damage that it now claims?

[1754] That damage is said to be:

(1) The costs of the present proceedings,

(2) The amount of any liability to compensate TSM for entering into the finance agreement (including any liability related to the FDA transaction), and

(3) The amount of any liability to compensate any of the other plaintiffs as a consequence of TSM entering into that agreement.

[1755] The critical feature for present purposes is that the present proceedings were essentially the product of the fraudulent conduct of Godwin that was facilitated by the ANZ's breaches of duty in relation to the impugned cheques. Had those breaches not occurred, the balance of the approved loan facilities would not have been settled and the present action would not have been instituted.

[1756] Furthermore, no liability could possibly have arisen as between to the ANZ and any of the plaintiffs in such circumstances. Whether the secured FDA loan would have continued on is really beside the point.

[1757] The inevitable conclusion to be drawn is that the sole, direct precipitating cause of these proceedings and any consequent liability of the ANZ was not any of the representations and conduct of the plaintiffs as pleaded, but of the ANZ's own breaches of contract.

[1758] As was said in *March v E. & MH Stramare Proprietary Limited and Another*[585] *("March")*, causation is essentially a question of fact to be answered by reference to commonsense and experience.

[1759] Certainly, it may properly be said that, but for the entry into the finance agreement (and what led to that event), none of the subsequent events would have occurred. But, as Mason J pointed out in *March,*[586] that is not the test, it is merely a negative criterion.

[1760] In the instant case, the immediate and real cause of any liability that arises in favour of any of the plaintiffs was not the entry into the finance agreement *per se*, but, rather, the direct result of the ANZ's breaches of contract. As has been demonstrated, no loss was sustained by entry into the finance agreement as such. On the contrary, the ANZ profited from that agreement.

[1761] It follows that the ANZ has not made good its counterclaim because it has failed on the issue of causation.

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[585] [1991] 171 CLR 506.
[586] *March v E. & MH Stramare Proprietary Limited and Another* [1991] 171 CLR 506.

Conclusion

[1762] As indicated to the parties I will hear counsel as to the orders that ought to be made in these proceedings as a consequence of the findings that I have expressed.

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