



[\[Home\]](#) [\[Databases\]](#) [\[WorldLII\]](#) [\[Search\]](#) [\[Feedback\]](#)

# Supreme Court of New South Wales

You are here: [AustLII](#) >> [Databases](#) >> [Supreme Court of New South Wales](#) >> [2010](#) >> [\[2010\] NSWSC 133](#)  
[\[Database Search\]](#) [\[Name Search\]](#) [\[Recent Decisions\]](#) [\[Noteup\]](#) [\[Download\]](#) [\[Help\]](#)

---

## **Brighten Pty Limited & Ors v Bank of Western Australia Limited & Anor [2010] NSWSC 133 (1 March 2010)**

Last Updated: 2 March 2010

NEW SOUTH WALES SUPREME COURT

**CITATION:**

Brighten Pty Limited & Ors v Bank of Western Australia Limited & Anor [\[2010\] NSWSC 133](#)

**JURISDICTION:**

Equity Division  
Commercial List

**FILE NUMBER(S):**

2009/298763

**HEARING DATE(S):**

25/2/10

**JUDGMENT DATE:**

1 March 2010

**PARTIES:**

Brighten Pty Limited (First Plaintiff)  
Noble Growth Investment Limited (Second Plaintiff)  
Michael Wilson Kwok (Third Plaintiff)  
Bank of Western Australia Limited (First Defendant)  
Graeme Veitch (Second Defendant)

**JUDGMENT OF:**

Einstein J

**LOWER COURT JURISDICTION:**

Not Applicable

**LOWER COURT FILE NUMBER(S):**

Not Applicable

LOWER COURT JUDICIAL OFFICER:  
Not Applicable

COUNSEL:  
Mr M Einfeld QC, Mr V Kerr (Plaintiffs)  
Mr P Dowdy (First Defendant)  
Mr J Baird (Second Defendant)

SOLICITORS:  
Websters (Plaintiffs)  
Gadens (First Defendant)  
DLA Phillips Fox (Second Defendant)

CATCHWORDS:  
Equity  
Interlocutory injunctions  
Principles  
Banking law  
Borrower seeks to restrain Lending Bank from appointing receiver  
Bank's powers under transactional documents  
Guarantees  
Whether there was anything unconventional, unconscionable, unfair or unjust in any of the terms in the security documents  
To sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document  
The representation is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents  
Good faith  
Bank mortgages traditionally drawn to cover multitude of possible situations and intended to secure the bank as effectively as possible

LEGISLATION CITED:  
Australian Securities and Investment Commission Act 2001 (Cth)  
[Contracts Review Act 1980](#) (NSW)  
[Conveyancing Act 1919](#) (NSW)  
[Environmental Planning and Assessment Act 1979](#)  
[Real Property Act 1900](#) (NSW)  
Supreme Court Act 1970(NSW)  
[Trade Practices Act 1974](#) (Cth)

CATEGORY:  
Procedural and other rulings

CASES CITED:  
541 Kent Street Pty Ltd v Westpac Banking Corporation [\[2002\] NSWSC 147](#)  
Appleton Papers Inc v Tomasetti Paper Pty Limited [\[1983\] 3 NSWLR 208](#)

Attorney-General of the Commonwealth of Australia v Breckler [\[1999\] HCA 28](#); [\(1999\) 197 CLR 83](#)  
Burger King Corp v Hungry Jack' s Pty Ltd [\[2001\] NSWCA 187](#)  
Burt v Australian and New Zealand Banking Group Ltd [\(1994\) ATPR \(Digest\) 46-123](#)  
Cameron v Qantas Airways Ltd [\[1995\] FCA 1304](#); [\(1995\) 55 FCR 147](#)  
Central Exchange Ltd v Anaconda Nickel Ltd [\(2002\) 26 WAR 33](#)  
CIT Credit Pty Ltd v Keable [\[2006\] NSWCA 130](#)  
Dundee General Hospitals Board of Management v Walker [\[1952\] UKHL 1](#); [\[1952\] 1 All ER 896](#)  
Foreman v Great Western Railway Co [\(1878\) 38 LT 851](#)  
Gisborne v Gisborne [\(1877\) 2 App Cas 300](#)  
Hurley v McDonald' s Australia Ltd [\[1999\] FCA 1728](#); [\(2000\) ATPR 41-741](#)  
Ingliš v Commonwealth Trading Bank of Australia [\[1972\] HCA 74](#); [\(1972\) 126 CLR 161](#)  
Karger v Paul [\[1984\] VR 161](#)  
Kham & Nate's Shoes No 2 Inc v First Bank of Whiting [\[1990\] USCA7 907](#); [\(1990\) 908 F 2d 1351](#)  
L'Estrange v F Graucob Ltd [\[1934\] 2 KB 394](#)  
Lets We Forget Ltd v Westpac Banking Corporation [\(2005\) 56 ACSR 126](#)  
Londonderry's Settlement, Re [\[1965\] Ch 918](#)  
Lutheran Church of Australia South Australia District Inc v Farmers' Co-operative Executors and Trustees Ltd [\[1970\] HCA 12](#); [\(1970\) 121 CLR 628](#)  
Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd [\[2001\] 2 WLR 170](#)  
Meridian Retail Pty Ltd v Australian Unity Retail Network Pty Ltd [\[2006\] VSC 223](#)  
Murphy, Re Bankrupt Estate [\(1996\) 140 ALR 46](#)  
Oceanic Sun Line Special Shipping Co Inc v Fay [\[1988\] HCA 32](#); [\(1988\) 165 CLR 197](#)  
Overlook Management BV v Foxtel Management Pty Ltd [\[2002\] NSWSC 17](#)  
Pan Foods Company Importers and Distributors Pty Ltd & Ors v Australian and New Zealand Banking Group Limited & Ors [\[2000\] HCA 20](#); [\(2000\) 170 ALR 579](#)  
Micarone v Perpetual Trustees Australia Limited [\[1999\] SASC 265](#); [\(1999\) 75 SASR 1](#)  
Parist Holdings Pty Ltd v Perpetual Nominees Ltd [\[2006\] NSWSC 599](#); [\[2000\] HCA 20](#)  
Parker v South Eastern Railway Co [\(1877\) 2 CPD 416](#)  
Pioneer Park Pty Limited (in liq) v Australian and New Zealand Banking Group Limited [\[2006\] NSWSC 883](#)  
Qantas Airways Ltd v Cameron [\[1996\] FCA 1483](#); [\(1996\) 66 FCR 246](#)  
Manistys Settlement, Re [\[1974\] Ch 17](#)  
Paulings Settlement Trusts, In re [\[1964\] Ch 303](#)  
Stollznov v Calvert [\[1980\] 2 NSWLR 749](#)  
Tarzia & Tarzia v National Australia Bank Ltd [\[1995\] ANZ ConvR 159](#)  
Toll (FGCT) Pty Limited v Alphapharm Pty Limited [\[2004\] HCA 52](#); [\(2004\) 219 CLR 165](#)  
Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd [\[1998\] FCA 51](#); [\(1997\) 79 FCR 469](#)  
Wilton v Farnworth [\[1948\] HCA 20](#); [\(1948\) 76 CLR 646](#)

TEXTS CITED:

Meagher, Gummow & Lehane, Equity Doctrines and Remedies, 2nd Edition

DECISION:

Motion to continue interlocutory injunctive regime dismissed.

JUDGMENT:

**IN THE SUPREME COURT  
OF NEW SOUTH WALES  
EQUITY DIVISION  
COMMERCIAL LIST**

**Einstein J**

**Monday 1 March 2010**

**2009/298763 Brighton Pty Ltd & Ors v Bank  
of Western Australia Limited & Anor**

**JUDGMENT**

**The state of these proceedings**

1 The proceedings before the Court commenced by summons filed on 23 October 2009 whereunder the plaintiff [Brighton Pty Ltd] sought a declaration that particular events of default had not occurred under a Facility Agreement and Mortgage: the orders sought would restrain the Bank of Western Australia from appointing a receiver.

**Basic facts**

2 In late 2006 Noble Growth Investment Limited applied to the Bank for a loan to purchase the Fairmont Resort at Leura. The Bank approved the loan and advanced \$32,150,000 to Noble for a term of five years to enable the purchase of the *Leura Resort*. The loan was advanced under and secured by, *inter alia*, the following transactional documents:-

(a) Facility Agreement dated 18 December 2006 between the Bank as Noble as borrower and Brighton as guarantor;

(b) First Registered Mortgage given by Brighton as owner of the land upon which the *Leura Resort* is situate dated 18 December 2006;

(c) Registered Equitable Charge given by Brighton over all of its assets dated 18 December 2006.

3 On the evidence there were no particular problems between the Bank and Brighton until 20 April 2009 when Channel 9 transmitted a very critical report of the standard and condition of

the *Leura Resort on A Current Affair* of that date (First ACA Report). The First ACA Report was followed by a further report on *A Current Affair* on 22 April 2009 equally critical (Second ACA Report).

4 From the inception of the interlocutory proceedings the Bank has contended that the first and second ACA Reports have had a major impact on the Leura Resort, its case being that those reports relevantly in themselves, constituted a material adverse change for the purposes of the transactional documents. Its contention has been that the reports were adverse and were material and that they constituted a change from the position at the inception of the transactional documents. Its contention has been that it is irrelevant whether or not the allegations made in the reports were true or not

5 The proceedings have been before the Court on a number of occasions since the summons was filed and it is fair to say that from time to time, the parties have reached accommodations such that a full-blown interlocutory hearing had not been conducted. An important development occurred on 11 December 2009 when the Court made orders appointing Mr David Lombe of Deloitte as a Court Appointed Receiver. The appointment was by agreement, giving the receiver limited powers. The precise terms of the orders were as follows:

1. The receiver will have full access to all financial and other records of the business.
2. Without limiting the generality of order 1 the receiver is to have full access to all record of the business including:

(a) any notices or communications from the Blue Mountains City Council or any other government instrumentality concerning any fire safety issues and shall have power to make decisions and bind the business in relation to compliance with any such requirements upon expert advice, subject to first giving 3 business days written notice of such intention to both parties.

(b) the insurance of the business and the improvements thereon, and has the power to take out policies and make disclosures in relation to the business and the improvements thereon;

(c) all negotiations and proposed agreements between the business and accord or any other future proposed manager/operator of the business and shall be fully advised to the receiver, whose consent in writing to any such agreement must be first obtained.

3. Other than as described above, the day to day operation, control, management and administration of the hotel/business shall remain with Brighten Pty Limited except that there shall be full transparency and supply of information to the Receiver so as to enable him to have as complete an understanding of the business as he thinks is necessary.

4. The receiver is hereby ordered to prepare a report to the Court and the parties concerning his activities as a receiver and in particular the operation, running and future prospects of the business, on or before 22 February 2010.

5. Direct that, in the first instance, all costs of the receiver be payable out of the assets and income of the business with the Court reserving to itself all questions as to who ultimately bears the costs.

6. Grant liberty to the parties and the receiver to apply on 2 days notice for all necessary and appropriate directions or orders and in particular as to who should bear the costs of any work or activity which the receiver considers necessary in relation to any matters otherwise than those set out in paragraph 2 (a) and (b).

7. Both parties are at liberty to fully communicate with receiver, independently or together, concerning the business of the Resort.

8. The matter be listed on 25<sup>th</sup> February 2010 before Einstein J.

6 The receivers report was furnished to the Court on 22 February 2010 and is presently before the Court. A supplementary letter was received by the Court from Deloittes on 23 February 2010 concerning the issue on 12 February 2010 by the Blue Mountains City Council, of an emergency order 6 pursuant to section 121 B of the [\*Environmental Planning and Assessment Act 1979\*](#). The Council had received notification from the contractor who was currently monitoring the fire alarm system at the York Fairmont Resort, Chubb Fire Safety, that they intended to cease monitoring the alarm as of the 11 March 2010 due to non-payment of invoices: notably the name of the Resort had been changed.

7 The position which obtained when the proceedings were called prior to 10 a.m. on 25 February 2010 was that absent an otherwise order, the extant injunction would expire at 5:00 pm. on that day. The Court determined that the respective parties would be heard at a hearing to commence at 3: p.m. on 25 February and this is what occurred.

8 The Bank had made perfectly clear that in the event that the extant injunction was not extended, its intention was to appoint a private receiver, providing that the Court would terminate the appointment of the Court appointed receiver.

9 The position adopted by the plaintiffs was to seek leave to file a notice of motion seeking orders restraining the Bank from taking any action, steps or invoking any of the default provisions or enforcing such provisions of the following paragraphs identified in the notice of motion:

a. The loan agreement between the first plaintiff and the first defendant and Noble Growth Investment Limited dated 18 December 2006.

b. The fixed and floating charge dated 18 December 2006 between the first plaintiff and the first defendant .

c. The mortgage between the first plaintiff and the first defendant dated 18 December 2006 being the mortgage registered number AC837690A over the property known as the Fairmont Resort wholly contained within folio identifiers 1/720795 and 1/7108860.

10 That leave was granted and the matter proceeded as an interlocutory hearing with the plaintiffs addressing first.

11 A large number of affidavits were read by the respective parties and counsel addressed.

### **The principles which inform the Court' s discretion**

12 The two parameters which inform the principled exercise of the Courts discretion to grant interlocutory relief are well-known: the serious question to be tried parameter and the balance of convenience:

13 In approaching the interlocutory application it has seemed to me that the principles which govern the Court's approach to the question are those generally dealt with and set out in *Appleton Papers Inc v Tomasetti Paper Pty Limited* [\[1983\] 3 NSWLR 208](#).

14 In *Appleton*, McLelland J drew attention to the importance of recalling that the Court here deals with a discretionary power conferred on the Court in very general terms, referring to [section 66\(4\)](#) of the *Supreme Court Act*, which provides that the Court may at any stage of proceedings on terms grant an interlocutory injunction in any case in which it appears to the Court to be just or convenient so to do.

15 As McLelland J made plain at page 216 [citing from the judgment of Moffitt P in *Stollznow v Calvert* [\[1980\] 2 NSWLR 749](#)]:

"While useful guidance is provided by the manner of exercise of the discretion in other cases, and by the factors considered in those cases to favour the exercise of the discretion in a particular way, each case must depend upon its own facts. It would be contrary to what I understand to be the accepted law in this country, to confine the exercise of a judicial discretion by judge made rigid formulae."

16 The matter is put shortly by Meagher, Gummow & Lehane, *Equity Doctrines and Remedies*, 2<sup>nd</sup> Edition at para 2168:

"What the plaintiff must prove is that he has a serious, not a speculative, case which has a real possibility of ultimate success and that he has property or other interests which might be jeopardised if no interlocutory relief were granted. Then it becomes a matter of seeing if, in all the circumstances of the case, the Court should nonetheless exercise its discretion by declining to issue an interlocutory injunction."

17 Likewise in Meagher, Gummow and Lehane at paragraph 217 the learned authors say:

"What is meant by saying that the Court must take into account the balance of convenience and the question of hardship is that it must consider carefully what effects the granting of an injunction will have on both parties and in particular whether to grant one would cause hardship to the defendant or to refuse one would cause hardship to the plaintiff."

### **The bank's power under the transactional documents**

18 It is convenient next to deal with the bank's power under the transactions documents.

### **Facility Agreement**

19 Clause 8.2 (f) provides:-

“ The Borrower on the Lender’ s request at any time within 14 days after that request must provide the Lender any information the Lender reasonably requires relating to the business assets and the affairs of the Resort, the Borrower and each Guarantor.”

20 Clause 8.1.2 provides as follows:-

“ The Lender may require a new valuation report for the property in the following instances:-

(a) at least once every 3 years prior to the Termination Date; and

(b) when the Lender considers, at its discretion that the property value has reduced.

Any valuation report required under this clause is to be provided by a valuer and in a form approved by the Lender. The cost of the valuation report is payable by the Borrower.”

21 Clause 11 relating to events of default provides as follows:-

“ If anyone or more of the following occur, an Event of Default at the Lender’ s option will have occurred. The determination of the Lender in its absolute discretion that any one or more has occurred will be final and binding on the Borrower, and the Guarantor. The Borrower must promptly inform the Lender in writing upon the happening of any of the events described in this clause.”

(k) (*material adverse change*)

“ In the Lender’ s opinion there is a material adverse change in an obligor’ s financial condition.”

(r) (*reduction in value*)

“ The Security suffers a material diminution in value or utility or a material part of the Security suffers total loss or destruction or damage beyond repair or damage to an extent which in the opinion of the Lender renders repair impractical or uneconomical.”

22 Clause 12 provides that any time after an event of default and when the Lender in its absolute discretion decides, the Lender may sign anything and do anything the Lender considers appropriate to recover the Debt and deal with the Security.

## **Mortgage**

23 Clause 11 of the Mortgage provides that a person authorized by the Bank may without notice enter at all times on the *Leura Resort* to inspect the condition thereof to investigate the affairs and financial position of Brighten.

24 Clause 12 (g) allows the Lender to enforce the Mortgage if an event or change occurs which could have a Material Adverse Effect on Brighten.

25 Under the Mortgage a material adverse effect is defined to mean a material adverse effect in the opinion of the Bank on the business, property or financial condition of Brighten and Brighten’ s ability to perform its obligation under a Facility Document for the effectiveness or priority of any Security Interest in a Facility Document.

## **Equitable Charge**

26 Clause 17 of the Equitable Charge provides that there is a default if a change occurs in Brighten’ s financial circumstances which may have a Material Adverse Effect on Brighten’ s ability to observe its obligations under the Charge or any other arrangement or if the value of the *Leura Resort* materially decreases.

## **The plaintiffs’ cases**

27 The plaintiffs cases [pleaded by their amended summons filed on 11 December 2009] seek following orders:

As against the First Defendant

1 A Declaration that, in the events which have happened, that:

- (a) no event of default has occurred within the meaning of clause 11 of the Facility Agreement dated 18 December 2006 between the First Defendant as lender, the Second Plaintiff as borrower and the First Plaintiff as guarantor (the Facility Agreement);
- (b) no event has occurred under clause 12.1 of the mortgage dated 18 December 2006 registered no. AC837690 between the First Plaintiff as mortgagor and the First Defendant as mortgagee (the Mortgage) as would permit the First Defendant to exercise its rights under clauses 12, 13 or 14;
- (c) the First Plaintiff is not in default under clause 17 of the Fixed and Floating Charge dated 18 December 2006 between the First Plaintiff as Chargor and the First Defendant as Chargee (the Charge).

2 A declaration that, in the events which happened, the First Defendant is not entitled to:

- (a) appoint a receiver and/or manager to the secured property under the Mortgage; and
- (b) appoint a receiver to the First Plaintiff pursuant to the Charge.

3 An order that the First Defendant be restrained from:

- (a) appointing a receiver and/or manager to the secured property under the Mortgage; and
- (b) appointing a receiver to the First Plaintiff pursuant to the Charge.

4 An order restraining the First Defendant from taking action under the Facility Agreement, the Mortgage, the Charge, the Brighten Guarantee (as defined in paragraph 5) or the Kwok Guarantee (as defined in paragraph 9) on the basis:

- (a) that there has been an event of default under the Facility Agreement;
- (b) that an event has occurred under clause 12.1 of the Mortgage as would entitle the First Defendant to exercise its rights under any of clauses 12, 13 or 14 of the Mortgage;
- (c) that the First Plaintiff was in default under clause 17 of the Charge; and
- (d) of the alleged breaches in letter from the First Defendant' s lawyers, Gadens Lawyers, to the First Plaintiff' s lawyer dated 20 October 2009; and

(e) of the alleged default in letter from the First Defendant' s lawyers to the First Plaintiff dated 22 October 2009.

5 A declaration that, in the events which happened, the Facility Agreement, the Mortgage, the Charge and the guarantee between the First Plaintiff and the First Defendant dated 18 December 2006 (the Brighten Guarantee) were procured by the First Defendant in circumstances that were unconscionable within the meaning of section 51AA and/or 51AC of the *Trade Practices Act 1974* (Cth) (TPA) and/or Section 12CA and/or Section 12CC of the *Australian Securities and Investment Commission Act* (“ the ASIC Act” ).

6 An order pursuant to section 87 of the TPA and/or Section 12GM of the ASIC Act:

(a) clauses 9, 10 and 11 of the Facility Agreement;

(b) any other clause or clauses of the Facility Agreement upon which notices of default issued by the First Defendant to First Plaintiff on 29 June 2009, 20 October 2009 and 22 October 2009 (collectively the Notices of Default) purport to be based;

(c) those provisions of the Mortgage, Charge and Brighten Guarantee that the First Defendant seeks to invoke consequent on issue of the Notices of Default or any of them.

7 In the alternative, an order pursuant to section 87 of the TPA and/or Section 12 GM of the ASIC Act declaring the Facility Agreement, the Mortgage, the Charge and the Brighten Guarantee void.

8 An order under section 80(1) of the TPA and/or under Section 12 GM of the ASIC Act restraining the First Defendant from taking any action under the Facility Agreement, the Mortgage, the Charge or the Brighten Guarantee in reliance upon the Notices of Default or any of them.

9 A declaration that the personal guarantee between the Third plaintiff and the First Defendant dated 18 December 2006 (the Kwok Guarantee) was procured by the First Defendant in circumstances that were:

(a) unconscionable within the meaning of section 51AA or Section 51AC of the TPA and/or Section 12CC of the ASIC Act and/or under the general law; and/or

(b) unjust within the meaning of Section 7(1) of the *Contracts Review Act 1980* (CRA).

10 An order pursuant to section 87 of the TPA and/or Section 12GM of the ASIC Act, alternatively section 7(1)(b) of the CRA, or under the general law, declaring the Kwok Guarantee void.

11 An order under section 80(1) of the TPA and/or Section 12GD of the ASIC Act or under the general law restraining the First Defendant from taking any action under the Kwok Guarantee in reliance upon the Notices of Dispute or any of them.

12 Upon the First and Second Defendants giving the usual undertaking as to damages, an order under section 80(2) of the TPA and/or Section 12GD of the ASIC Act or under the general law:

(a) restraining the First Defendant from taking any action under the Facility Agreement, the Mortgage, the Charge, the Brighten Guarantee or the Kwok Guarantee in reliance upon the Notices of Default or any of them pending determination of these proceedings or until further order;

(b) in terms of orders 3 or 4, pending determination of these proceedings or until further order.

13 Damages pursuant to section 82 of the TPA and/or Section 12GF of the ASIC Act or under the general law.

14 Interest.

15 Costs.

As against the Second Defendant

16 A declaration that, in the events which happened, the Second Defendant breached his duty of care owed to the First, Second and Third Plaintiffs, alternatively the implied term of his retainer to exercise reasonable skill and care in the performance of his services, by procuring the First and Second Plaintiffs to enter into the Facility Agreement, the First Plaintiff to enter into the Mortgage, the Charge and the Brighten Guarantee and the Third Plaintiff to enter into the Kwok Guarantee without having –

(a) given any, or any proper, advice to the Plaintiffs as to the nature and effect of the documents;

(b) arranged for a translator to be available when the Plaintiffs entered into the Facility Agreement, Mortgage, Charge, Brighten Guarantee and Kwok Guarantee to enable them to understand the nature and effect of the documents;

(c) taken any, or any proper, steps to ensure that the Plaintiffs had read and understood the documents prior to executing them.

17 Damages.

18 Interest.

28 The plaintiff has identified in its commercial list statement the following:

A. Nature of Dispute

1) The plaintiffs challenge the entitlement of the first defendant (the Bank) to enforce certain default provisions of loan facility and security agreements between the parties, including a corporate and personal guarantee (collectively, the Loan and Security Agreements) on the grounds:

a) that the Loan and Security Agreements were taken by the Bank in circumstances which were unconscionable within the meaning of s 51AA and/or [Section 51AC](#) of the [Trade Practices Act 1974](#) (Cth) (TP Act) and/or Section 12CC of the [Australian and Securities and Investments Commission Act](#) (“ the ASIC Act” ) and under the general law;

b) default notices issued by the Bank to the first plaintiff on 20 and 22 October 2009 were not validly issued.

2) The plaintiffs’ main case is that the Bank, well knowing that the third plaintiff, Kwok, was the sole director and shareholder of the first and second plaintiff and that he could neither read, speak nor understand English, procured and/or encouraged Kwok to enter into the Loan and Security Agreements in circumstances where:

a) the Bank knew that it had taken no steps to explain to Kwok the nature and effect of the Loan and Security Agreements, in particular the terms and conditions upon which the Bank now relies, or to satisfy itself that he had read and understood the terms and conditions of the Loan and Security Agreements before executing them;

b) the Bank knew or ought to have known that Kwok had no reasonable opportunity to have the Loan and Security Agreements translated, obtain advice in relation to them, read and understand their effect, or seek to negotiate their terms and conditions before executing them.

3) Had Kwok known about and understood the effect of the terms and conditions upon which the Bank now relies he would not have entered into the Loan and Security Agreements on those terms or would have sought a different lender or would not have completed the purchase of the Fairmont Resort, Katoomba, New South Wales.

4) The plaintiffs claim damages from the second defendant, the plaintiffs' former solicitor, for breaches of his duty of care owed to the plaintiffs, alternatively the implied term of his retainer to exercise reasonable skill and care in the performance of his services, by procuring or encouraging the plaintiffs to enter into the Loan and Security Agreements without having:

- a) given any, or any proper, advice to Kwok as to the nature and effect of the documents;
- b) arranged for a translator to be available when the plaintiffs entered into the loan and security agreements so as to enable Kwok to understand the nature and effect of the documents;
- c) taken any, or any proper, steps to ensure that Kwok had read and understood the documents before signing them.

#### B. Issues likely to arise

1) Whether Kwok was under a special disability in dealing with the Bank in connection with the Loan and Security Agreements.

2) Whether the Bank knew of the special disability.

3) Whether in all the circumstances the Bank took unconscientious advantage of Kwok's special disability by procuring or encouraging the plaintiffs to enter into the Loan and Security Agreements knowing that it had taken no steps to explain to Kwok the nature and effect of the Loan and Security Agreements, or to satisfy itself that he had read and understood the terms and conditions of the Loan and Security Agreements before executing them.

4) Alternatively, whether in all the circumstances the Bank took unconscientious advantage of Kwok's special disability by accepting the benefit of the Loan and Security Agreements without taking any, or any reasonable steps, without ensuring that Kwok had a reasonable opportunity to have the terms

and conditions of the Loan and Security Agreements translated, read and understand their effect and obtain advice in relation to them before entering into the agreements.

5) If so, whether the plaintiffs are entitled to relief under the TP Act or under the ASIC Act or under the general law and the nature of that relief, including any entitlement to an injunction under s 80, damages under s 82 and remedial orders under s 87 of the TP Act and/or in injunction under Section 12GD of the ASIC Act, damages under 12GF of the ASIC Act and remedial orders under Section 12GM of the ASIC Act.

6) Whether the personal guarantee by Mr Kwok was procured in circumstances that were unconscionable within the meaning of s 51AA and/or Section 51AC of the TPA and/or Section 12CA and/or Section 12CC of the ASIC Act or under the general law, or unjust within the meaning of the [\*Contracts Review Act 1980\*](#) (NSW) (CR Act).

7) If so, whether Mr Kwok is entitled to relief under the TP Act, the ASIC Act, CR Act, or under the general law and the nature of that relief.

8) Whether the second defendant was negligent or breached the implied terms of his retainer in acting for the plaintiffs in connection with the transaction with the Bank.

9) If so, whether the plaintiffs are entitled to damages and in what amount.

29 The summary of the plaintiff's contentions read as follows:

#### Background

1) The first plaintiff (Brighten) and the second plaintiff (Noble) are duly incorporated and capable of suing and being sued in their corporate name and style.

2) At all material times the third plaintiff (Kwok) was the sole director and shareholder of Brighten and Noble.

3) At all material times the first defendant (the Bank) carried on business as a bank.

4) In or about September 2006 Kwok was considering the purchase of the Fairmont Resort, Katoomba being the property wholly contained within Certificates of Title, Folio Identifier 1/718860 and Folio Identifier 1/720795 (Fairmont Resort) and for that purpose, acting through a broker, applied to Bankwest for a loan.

5) In or about October 2006 the Bank gave indicative approval to Kwok, through his broker, that it would provide a loan of AUD 32,150,000 to finance the acquisition.

6) In or about October 2006, Brighten exchanged contracts to acquire the Fairmont Resort from Trust Company of Australia Limited.

7) In or about October 2006, the Bank appointed a senior bank officer who spoke Cantonese, Malcolm Ng (Ng), to liaise with Kwok in relation to financial accommodation to be provided by the Bank in connection with the acquisition.

8) At various times during Friday 14 December 2006, the Bank's solicitors provided loan and security documents to the plaintiffs' solicitor, comprising more than 100 pages of terms and conditions, which included:

- a. a facility agreement with the Bank as lender, Noble as borrower and Brighten as guarantor;
- b. a mortgage over the Fairmont Resort incorporating the provisions of memorandum number 9390023 with the Bank as mortgagee and Brighten as mortgagor;
- c. a fixed and floating charge over the assets and business undertaking of Brighten, including the Fairmont Resort, with the Bank as chargee and Brighten as chargor;
- d. a personal guarantee by Kwok (collectively the Loan and Security Agreements).

9) The plaintiffs executed the Loan and Security Agreements on Friday 14 December and Saturday 15 December 2006 which agreements were entered into by the Bank on 18 December 2006..

10) The contract to purchase the Fairmont Resort settled on Monday 18 December 2006.

Unconscionable conduct by the Bank

11) At all material times prior to 18 December 2006 the Bank knew, and it was the fact, that:

- a. Kwok was the sole director and shareholder of Brighten and Noble;
- b. Kwok spoke only Cantonese and neither read, spoke, nor understood English;
- c. Ng had not met Kwok nor had spoken with him about the terms of the Loan and Security Agreements upon which the Bank now seeks to rely;
- d. the Loan and Security Agreements were not made available to Kwok at any time prior to 14 December 2006;
- e. the Bank had taken no steps to explain to Kwok the nature and effect of the Loan and Security Agreements;
- f. the Bank had taken no steps to ensure that Kwok had read and understood the effect of the Loan and Security Agreements or to satisfy itself that he had done so before signing them.

12) The Bank also knew, and it was the fact, that:

- a. the contract to purchase the Fairmont Resort was required to settle on 18 December 2006;
- b. the Bank's solicitors provided the Loan and Security Agreements to the plaintiffs' solicitor at various times on Friday 14 December 2006.

13) Further, in the circumstances pleaded in paragraphs 11 and 12, the Bank knew or ought to have known that before signing the Loan and Security Agreements Kwok had no reasonable opportunity to:

- a. have the agreements translated;
- b. read and understand their effect;
- c. obtain advice in relation to them; or
- d. seek to negotiate the terms and conditions sought by the Bank.

14) At the time that he signed the Loan and Security Agreements, Kwok did not know and/or understand the effect of the terms and conditions upon which the Bank now seeks to rely, including clauses 9, 10 and 11 of the Facility Agreement, or the nature and effect of the Charge, or that he had given a personal guarantee.

15) Had Kwok known and/or understood the matters pleaded in paragraph 14 he would not have entered, or allowed Brighten and Noble to enter, into the Loan and Security Agreements on the terms sought by the Bank.

16) By reason of the circumstances pleaded in paragraphs 11 to 13:

a. Kwok was under a special disability in dealing with the Bank in relation to the Loan and Security Agreements;

b. the Bank knew of the special disability;

c. the Bank, in entering into the Loan and Security Agreements and procuring or encouraging the plaintiffs to do so, took unconscientious advantage of Kwok's special disability.

17) In the premises the Bank procured the benefit of Loan and Security Agreements in circumstances that were unconscionable within the meaning of s 51AA and/or Section 51AC of the TPA and/or under the general law.

18) Further and alternatively the Bank procured the Kwok Guarantee in circumstances that were unjust within the meaning of [s 7](#) of the [Contracts Review Act 1980](#) (NSW).

19) In the premises the plaintiffs claim the relief against the Bank sought in the Amended Summons.

#### Negligence of the plaintiffs' former solicitor

20) At all material times the second defendant (Veitch) was a solicitor.

21) In or about October 2006 the plaintiffs retained Veitch to provide legal services in connection with the acquisition and financing of the Fairmont Resort.

22) At all material times Veitch owed a duty at common law and under an implied term of his retainer, to exercise reasonable skill and care in providing legal services to the plaintiffs.

23) At all material times Veitch knew or ought to have known that:

a. Kwok was the sole director and shareholder of Brighten and Noble;

b. Kwok spoke only Cantonese and neither read, spoke, nor understood English;

- c. the contract to purchase the Fairmont Resort was required to settle on 18 December 2006;
- d. the Bank' s solicitors provided the Loan and Security Agreements to Veitch at various times on Friday 14 December 2006;
- e. the Bank had not made the Loan and Security Agreements available to Kwok at any earlier time;
- f. the Bank had taken no steps to explain the nature and effect of the Loan and Security Agreements to Kwok;
- g. before signing the Loan and Security Agreements in the presence of Veitch on 14 and 15 December 2006, Kwok had not read and understood the nature and effect of the Loan and Security Agreements and Veitch had not given advice to Kwok in relation to the nature and effect and material terms and conditions of the Loan and Security Agreements.

24) In breach of his duty to the plaintiffs Veitch procured, encouraged or permitted Kwok to sign the Loan and Security Agreements for himself and for Brighten and Noble, without Veitch having:

- a. given any, or any proper, advice to Kwok as to the nature and effect of the Loan and Security Agreements;
- b. arranged for a translator to be available when Kwok signed the Loan and Security Agreements to enable Kwok to understand their nature and effect;
- c. taken any, or any proper, steps to ensure that Kwok had read and understood the terms and conditions of the Loan and Security Agreements;
- d. explained to Kwok the meaning and effect of the clauses upon which the Bank now seeks to rely, including clauses 9, 10 and 11 of the Facility Agreement.

25) The plaintiffs have suffered damage as a result of Veitch' s breaches of duty.

26) In the premises the plaintiffs claim the relief against Veitch sought in the Amended Summons.

Invalidity of the Bank' s further default notices

27) The plaintiffs refer to and repeat the allegations pleaded in paragraphs C4 to C10 of the Commercial List Statement filed on behalf of Brighten in Case Number 50137 of 2009.

28) By letters dated 20 and 22 October 2009 from the Bank' s solicitors (Gadens) to Brighten' s former solicitor in these proceedings, Phillip A. Biber (Biber), the Bank

gave notice of certain alleged defaults by Brighten in compliance with provisions of the Facility Agreement.

29) Brighten denies the allegations of breach on the grounds particularised in a letter from Biber to Gadens dated 23 October 2009.

30) In the premises the plaintiffs claim the relief against the Bank sought in paragraphs 1 to 4 of the Amended Summons.

### **Overview of the findings from the evidence adduced on the interlocutory hearing**

30 The evidence makes plain that circumstances have arisen which in the opinion of the Bank have had a material adverse effect on the business, assets and financial condition of Brighten and Noble and on their ability to perform their obligations to the Bank. It was entitled to so find in its *absolute discretion*.

31 The particular events of default relied upon by the bank, each supported by particular affidavits before the Court are as follows:

1. Material adverse change in financial condition and material diminution in value of the Resort under clause 11 (k) and (r) by reason of the two ACA Reports and consequent downgrading of the rating and reputation of the Resort. Also a material adverse effect for the purposes of clause 12.1 (g) of the Mortgage and clause 17 (i) and (k) of the Charge [Affidavit of Malcolm NG of 6 November 2009].

2. Breach of clause 8.2 (f) to provide within 14 days any information relating to the business assets and affairs of the Resort and Brighten and Noble: see:-

a) Mr Ng' s request by email of 23 April 2009 to provide year to date trading results including details of occupancy rate, average room rate, a breakdown of operating expenses and continually to provide weekly trading statements including details of occupancy rate and average room rate and a request for a valuation (Tab 5 of affidavit).

b) Mr Ng' s email of 12 May 2009 desperately needing the financial information requested in the email of 23 April 2009 and non-provision with merely a response noting at paragraph 6 of Levingston' s email of 12 May 2009 (Tab 12 of affidavit).

c) Gadens' letter of 1 October 2009 under clause 8.2 and 8.2 (d) (Tab 14 of affidavit).

d) Letter from Gadens of 20 October 2009 to Biber claiming information under clause 8.2 (Tab 16 of affidavit).

[Affidavit of Malcolm NG of 6 November 2009]

3. Breach of clauses 4.3 (b), (l) and (p) of the Mortgage (clauses relate to maintaining the Resort in a good and tenable state of repair and working order and condition and giving to the Bank notices received from governmental agencies about the use or condition of the Resort and duly and promptly complying with all Environmental Laws applicable to the Resort and to produce evidence of compliance with the same to the Bank as requested) and clauses 5.1 and 5.2 of the Charge to keep the Resort in good working order and condition and correct any defect and give copies of notices or orders from any authority and comply with laws and requirements and authorities in relation to the Resort. [Affidavit of Malcolm Ng of 6 November 2009 paras 69 – 70].

4. Events of default by breach of material adverse change in financial condition and material diminution in value of Resort down to \$30,000,000 in breach of clause 11(k) and (r) and breach of clause 9.2 in failing to reduce debt by \$12,655,908.02 to LVR of 65%. [Affidavit of Darren Longmuir of 24 February 2010 & Certificate]

5. Admitted monetary default in breach of clause 6.2 and clause 11 (b). [Affidavit of Amber Suzanne Warren of 21 December 2009 (paragraphs 12 to 24 thereof)]

6. Breach of clause 8.12 in not paying the sum of \$34,259.82 being the cost of the Jones Lang La Sale Valuation. [Affidavit of Amber Suzanne Warren of 24 February 2010 (paragraphs 22 to 24 thereof)].

7. Breach of clause 8.11 of Facility Agreement and clause 9.2 of the Equitable Charge by transferring/ assigning the business “ Fairmont Resort” and “ York Fairmont Resort” to a third party. [Affidavit of Amber Suzanne Warren of 24 February 2010 (paragraphs 27 to 34 inclusive)].

**Dealing with the matter**

32 While the Court does not determine disputed questions of fact on the hearing of an interlocutory injunction application, the principled exercise of the discretion requires that the Court look closely at the materials which are adduced by the respective parties.

33 To that end the following observations are pertinent:

i. There is evidence that Mr Kwok is an extremely experienced businessman. The Bank has adduced evidence of some seven or thereabouts mortgages that are registered with the Registrar General which indicate that Mr Kwok has given personal guarantees of very large facilities that have been linked to other of his companies. There is evidence that he advised the Bank that he lived in a home at Telegraph Road Pymble worth \$10,000,000 and that he has net assets of \$168,000,000 and investments throughout the world.

ii. The clear inference is that Mr Kwok is an extremely experienced business person. The Bank's contention is that the suggestion that somehow he did not know that he was giving a guarantee or did not realise what sorts of provisions it would contain is laughable having regard to the evidence presently before the Court. There is considerable substance in that contention, treating of course with no more than the evidence adduced on the interlocutory hearing.

34 As the Bank has contended:

i. It is significant to note that the borrower being Noble is a company incorporated in the British Virgin Islands and is not a company registered within Australia as a foreign corporation or otherwise and Mr Kwok is the sole shareholder of Noble.

ii. In these circumstances it would be extraordinary that a bank or financial institution lending over \$32,000,000 to any private company, let alone a foreign private company, would not obtain as security a mortgage over the relevant real property together with a fixed and floating charge over all the assets of a relevant borrower(s) and a personal guarantee from the individual(s) standing behind the corporate borrower(s).

iii. Accordingly, the security and transactional documentation obtained by the Bank in this case is utterly conventional and common, as was pointed out by Spigelman CJ in a judgment relating to a guarantee agreed in by Giles JA and Gzell J in *CIT Credit Pty Ltd v Keable* [2006] NSWCA 130 (25 May 2006) where the Chief Justice said a paragraph 42:-

“ 42 The obtaining of guarantees from directors is a common transaction in Australian commercial practice. It is a product of the combined effect of limited liability and of tax incentives to incorporate small businesses or to operate through family trusts with corporate trustees. The general nature of what a guarantee entails is part of the usual knowledge of the overwhelming majority of persons who become company directors, particularly since the removal of the requirement that all companies must have two directors. In the present case, this knowledge is reinforced by the plain English statement on the front page of the Guarantee, identifying the nature of the obligations assumed and the importance of reading and understanding the terms and conditions.”

iv. Further, the terms and conditions of the transactional documents in this case are completely standard and conventional. Complaint seems to be made of the non-monetary default provisions in the relevant mortgage and the Facility Agreement but all mortgages, including and particularly commercial mortgages, contain such provisions. [Section 57\(2\)\(b\)](#) of the *Real Property Act 1900* (NSW) itself recognizes the distinction between monetary default as to the payment of principal, interest, annuity or other money and breach of non-monetary provisions in a mortgage. [Section 81](#) of the *Conveyancing Act 1919* (NSW) provides for the importation into mortgages by way of short firm reference of non-monetary defaults relating to the mortgagor keeping all buildings and other improvements in repair and to insure the relevant property in the name of mortgagee.

v. Further, Mortgage Memorandum Q860000 composed by the Registrar-General himself

pursuant to section 80A [Real Property Act 1900](#) (NSW) contains non-monetary provisions.

vi. Further, in commercial mortgages “ material adverse change” provisions are almost universal. [I considered “ material adverse effect” conditions in *Pioneer Park Pty Limited v ANZ Banking Group Limited* [\[2006\] NSWSC 883](#). Barrett J considered such provisions in *Lets We Forget Ltd v Westpac Banking Corporation* [\(2005\) 56 ACSR 126](#). See also Bergin J in *541 Kent Street v Westpac Banking Corporation* [\[2002\] NSWSC 147](#)]

vii. In other words, there is nothing unconventional, unconscionable, unfair or unjust in any of the terms in the security documents. As Hill J confirmed in *Re Bankrupt Estate of Murphy* [\(1996\) 140 ALR 46](#) at 54:-

“ A bank mortgage is traditionally drawn to cover a multitude of possible situations and intended to secure the bank as effectively as possible.”

To similar effect Gleeson CJ, McHugh and Hayne JJ pointed out in *Pan Foods v ANZ Banking Group* [\[2000\] HCA 20; \(2000\) 170 ALR 579](#) at 581 in respect to loan documentation that:-

“ Lenders may wear both belt and braces.”

viii. Mr Kwok's contention that he was under a special disability is extraordinarily difficult to accept in terms of the materials used during the interlocutory hearing.. He is a large scale investor who has signed many mortgages in the past containing almost exactly the same sort of default provisions of which he now seeks to make complaint. It is highly implausible that a man living in Australia since the early 1990s and being an Australian Citizen since 2001 does not have some understanding of the English language but in any event it for him to ensure that he gets advice and understands documents he signs and there is no legal obligation on the Bank to explain the commercial transactional documents it proffers to him in return for the advance of a significant amount of money. If the loan documents were not given to him in time

sufficient for him to reach an understanding of them then he simply had to decline the loan.

ix. In the majority judgment in *Micarone v Perpetual Trustees Australia Limited* [1999] SASC 265; (1999) 75 SASR 1 in the Full Court of the Supreme Court of South Australia the following was said at paragraph 587:-

“ The mere existence of disabling factors does not, standing alone, necessarily result in one party being at a special disability vis-à-vis the other, although, of course, the existence of those factors will be relevant factors in determining that question. This is an important issue when considering the obligations of a lender in a money-lending transaction where, as here, there is no allegation that the actual terms of the money-lending transaction itself are unconscientious. For example, an applicant for a loan may have a poor command of English, may lack a proper education, may not understand all of the terms of the document evidencing the transaction, and may be under financial pressure giving rise to the need for the loan. These are characteristics shared by many members of the community. As the Federal Court pointed out in *Tarzia v National Australia Bank Ltd* [1995] ANZ ConvR 159 par 48:

‘ It was not suggested in *Amadio*, and it cannot be the position, that a combination of ignorance of English, age and lack of business experience necessarily puts a person at a special disadvantage in dealings with a Bank on a guarantee. For one thing, the description presumably covers a great number of astute and capable Australians’ .”

x. The High Court of Australia has recently re-affirmed the importance of the act of signing a contractual document. In *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* [2004] HCA 52; (2004) 219 CLR 165 at 180 – 181, after having approved the objective approach to the determination of rights and liabilities of contracting parties, the Court comprised of Gleeson CJ and Gummow, Haynes, Callinan and Heydon JJ said at paragraph 42 – 46:

“ [42] Consistent with this objective approach to the determination of the rights and liabilities of contracting parties is the significance which the law attaches to the signature (or execution) of a contractual document. In *Parker v South Eastern*

*Railway Co* ([1877](#)) [2 CPD 416](#) at 421, Mellish LJ drew a significant distinction as follows:

‘ In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents. The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it.’

[43] More recently, in words that are apposite to the present case, in *Wilton v Farnworth* [[1948](#)] [HCA 20](#); ([1948](#)) [76 CLR 646](#) at 649 Latham CJ said:

‘ In the absence of fraud or some other of the special circumstances of the character mentioned, a man cannot escape the consequences of signing a document by saying, and proving, that he did not understand it. Unless he was prepared to take the chance of being bound by the terms of the document, whatever they might be, it was for him to protect himself by abstaining from signing the document until he understood it and was satisfied with it. Any weakening of these principles would make chaos of every-day business transactions.’

[44] In *Oceanic Sun Line Special Shipping Co Inc v Fay* [[1988](#)] [HCA 32](#); ([1988](#)) [165 CLR 197](#) at 228 , Brennan J said:

‘ If a passenger signs and thereby binds himself to the terms of a contract of carriage containing a clause exempting the carrier from liability for loss arising out of the carriage, it is immaterial that the passenger did not trouble to discover the contents of the contract.’

[45] It should not be overlooked that to sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents, as Latham CJ put it, whatever they might be. That representation is even stronger where the signature appears below a perfectly legible written request to read the document before signing it.

[46] The statements in the above authorities accord with the well-known principle stated by Scrutton LJ in *L'Estrange v F Graucob Ltd* [[1934](#)] [2 KB 394](#) at 403 that

"[w]hen a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not". Scrutton LJ, in turn, was repeating the substance of what had been said by Mellish LJ in *Parker v South Eastern Railway Co* (1877) 2 CPD 416 at 421. The principle was applied in *Foreman v Great Western Railway Co* (1878) 38 LT 851. A consignor of cattle sent them for transportation by a railway company. They were put in the charge of a drover, who could not read. The drover signed a contract of carriage which contained an exclusion clause. The drover's employer was held to be bound by the clause. The Exchequer Division said that "the plaintiff who sends the [illiterate] servant to sign the document is in no better or worse position than if he had signed it himself without reading it" *Foreman* (1878) 38 LT 851 at 853. In his lecture published as "*Form and Substance in Legal Reasoning: The Case of Contract*" (MacCormick and Birks (eds), *The Legal Mind: Essays for Tony Honore* (1986), Ch 2, 19, at p 34) Professor Atiyah posed, with reference to *L'Estrange v Graucob*, the question why signatures are, within established limits, regarded as conclusive. He answered:

‘ A signature is, and is widely recognized even by the general public as being a formal device, and its value would be greatly reduced if it could not be treated as a conclusive ground of contractual liability at least in all ordinary circumstances.’ ”

## Good Faith

35 The Bank further submitted as follows:

i. There can be no reasonable suggestion in the factual matrix before the Court that the Bank is acting in bad faith. Einstein J repeated in *Pioneer Park* (supra) the statement of Barrett J in *Overlook v Foxtel* [2002] NSWSC 17 at paragraph 68 which was as follows:-

“ [68] In many ways, the implied obligation of good faith is best regarded as an obligation to eschew bad faith. This is borne out by the following succinct statement by Lord Scott of Foscote in *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2001] 2 WLR 170, a case concerning the duty of good faith in the insurance context:

‘ Unless the assured has acted in bad faith, he cannot, in my opinion, be in breach of a duty of good faith, utmost or otherwise.’ ”

ii. To similar effect Dodds-Streeton J in *Meridian Retail v Australian Unity Retail Network* [2006] VSC 223 at paragraphs 184 to 186 inclusive said as follows:

[184] It has been recognised that such an implied term would have to be consistent with the express terms of the agreement. In *Burger King Corp v Hungry Jack’s Pty Ltd* [2001] NSWCA 187 the Court of Appeal accepted that ‘ an implied covenant will only aid and further the explicit terms of the agreement and will never impose an obligation which would be inconsistent with other terms of the contractual relationship.’ (at 173)

[185] In *Central Exchange Ltd v Anaconda Nickel Ltd* (2002) 26 WAR 33, the Western Australian Court of Appeal accepted that the principles of good faith could not block the use of terms that actually appear in the contract.

[186] Both in *Central Exchange Ltd v Anaconda Nickel Ltd* and *Burger King*, the statement of Easterbrook J in *Kham & Nate’s Shoes No 2 Inc v First Bank of Whiting* [1990] USCA7 907; (1990) 908 F 2d 1351) was approved. Easterbrook J there stated:

Firms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading parties without being mulcted for lack of ‘ good faith’ . Although courts often refer to the obligation of good faith that exists in every contractual relation ... this is not an invitation to the court to decide whether one party ought to have exercised privileges expressly reserved in the document ... knowledge that literal enforcement means some mismatch between the parties’ expectation and the outcome does not imply a general duty of ‘ kindness’ in performance, or judicial oversight into whether a party had ‘ good cause’ to act as it did. Parties to a contract are not each other’ s fiduciaries, they are not bound to treat customers with the same consideration reserved for their families.”

## **Unconscionability**

36 There is no evidence which supports a *prima facie* case of the defendant acting unconscionably. As the Full Court of the Federal Court pointed out in *Hurley v McDonald’s Australia Ltd* [1999] FCA 1728; (2000) ATPR 41-741 at paragraph 22:

‘ For conduct to be regarded as unconscionable, serious misconduct or something clearly unfair or unreasonable must be demonstrated – *Cameron v Qantas Airways Ltd* [1995] FCA 1304; (1995) 55 FCR 147 at 179. Whatever ‘ unconscionable’ means in s 51AB and s 51AC the term carries the meaning given by the *Shorter Oxford English Dictionary*, namely, actions showing no regard for conscience, or that are irreconcilable with what is right or reasonable – *Qantas Airways Ltd v Cameron* [1996] FCA 1483; (1996) 66 FCR 246 at 262. The various synonyms used in relation to the term ‘ unconscionable’ import a ‘ pejorative moral

judgment’ – *Qantas Airways Ltd v Cameron* [1996] FCA 1483; (1996) 66 FCR 246 at 283-4 and 298.’

37 Unconscionability is something which shows no regard for conscience or is irreconcilable with what is right or reasonable. Further, unconscionability is not to be lightly found. As Bryson J (as he then was) said in *Burt v ANZ Banking Group Ltd* (1994) ATPR 46-123:

The ordinary means of establishing in honesty and fair dealing that a person with whom one is dealing knows the nature and terms of a document which one proposes should be signed is to put the document before that person for signature. The opportunity to find out what is in the document is there, available to that person, who can use the opportunity in whatever manner is thought right. Unless the person with whom one is dealing is known to be at some special disadvantage, this is as much as conscience requires. There is no reason why it is unconscionable *per se* to deal with and take a guarantee from a person who is closely related to or otherwise well disposed towards a customer; indeed that is the ordinary case in which a guarantee is available. Unconscionability is not a slight matter, and behaviour is only unconscionable where there is some real and substantial ground based on conscience for preventing a person from relying on what are, in terms of the general law, that person’s legal rights. Previous judicial experience and established grounds on which reliance on legal rights would be unconscionable are reliable bases on which to act and the Court is not authorised to take idiosyncratic approaches.”

38 Notably the immediate above paragraph from *Burt* was approved by the New South Wales Court of Appeal in *CIT Credit supra* at paragraphs 75 and 76.

### **Valuation of the resort**

39 There is evidence before the Court given by Mr Longmuir [the Director-Hospitality, Commercial Banking for the Bank whom since approximately August 2009, has had the responsibility for the day to day management of the Facility] which bears on the valuation issue.

40 That evidence includes the following:

- i. On 26 November 2009, in accordance with the Consent Orders, the first defendant’s agent, Jones Lang LaSalle, carried out an inspection of the Resort for the purpose of valuing the Resort.
- ii. On or about 18 January 2010, Jones Lang LaSalle provided the first defendant with a

valuation of the Resort dated 26 November 2009 (JLL Valuation).

iii. Mr Longmuir read the JLL Valuation and, after considering its content and conclusions, came to the view that the Resort had a market value of \$30,000,000.

iv. This concerned him for a number of reasons, including because:

(a) the Facility debt exceeds the value of the Resort by at least \$2,200,000;

(b) when the first plaintiff purchased the Resort in December 2006, as part of advancing the facility, the first defendant obtained a valuation from Knight Frank, who valued the Resort at \$47,000,000 (Knight Frank Valuation); and

(c) the Facility debt exceeded the maximum permitted LVR of 65% set out in clause 9.2 of the Facility Agreement.

v. As a consequence of the JLL Valuation, he came to the view that there had been a material adverse change in the financial condition of the first plaintiff and that the Resort as security for the Facility had suffered a material diminution in value and utility.

vi. On or about 18 January 2010, he instructed Gadens to serve a notice of event of default and demand on the first plaintiff and the second plaintiff, requiring the first plaintiff and the second plaintiff to pay the first defendant the amount of \$12,655,908.02 by 3 February 2010, so as to reduce the Facility debt to an amount which did not exceed the maximum permitted LVR of 65% (LVR Demand).

vii. The first plaintiff and the second plaintiff have failed to comply with the LVR Demand.

### **The Court-appointed receivers report**

41 This reasonably extensive report made clear that the receiver's investigations in respect of all of the matters referred to in his report had 'been restricted by Brighton's general lack of cooperation'. Whilst he had received cooperation from the company in the early stages of the receivership, the receiver advised that he had 'received little cooperation from them since his attendance at the resort on 18 December 2009. The fact that that the first defendant's attempts to obtain information about the position of the Resort are said by the receiver, to

have been frustrated by a lack of cooperation by the first plaintiff is also a factor which obviously can be taken into account on the interlocutory hearing.

42 The receiver's complaints about lack of cooperation included the following:

i. The court-appointed receiver's complaints about lack of cooperation included the following:

a. Brighten's failure to provide further documentation, or confirm they had provided all documentation in their possession, in relation to various fire safety issues: report at [5.4], [5.13], [5.16].

b. Brighten's failure to provide documentation and other information in relation to the insurance of the resort: report at [6.3], [6.5].

c. Brighten's failure to provide information regarding negotiations with Accor as to the operation and management of the hotel: report at [7.3], [7.9].

d. Brighten's failure, despite numerous letters, visits to the Resort and requests for meetings by the court-appointed receiver, to provide sufficient financial information to enable the court-appointed receiver to form a view as to the future prospects of the business: report at [10.16] In this regard, the court-appointed receiver made various specific complaints in his report: see [9.6]-[9.7], [9.9], [9.13.2], [10.4]-[10.15].

ii. In relation to a letter from Websters Solicitors dated 18 February 2010, which the court appointed receiver said dealt with some of the issues he had raised in specified letters, the court-appointed receiver dealt with various specific issues and maintained his general position that Brighten had consistently failed to cooperate with his request for information: report at [11.1]-[11.10].

43 It is strictly unnecessary to travel further into the report save to observe that the supplementary report raised very real questions concerning the Council's belief that the circumstances constitute a serious risk to health or safety or an emergency. Likewise the report itself in treating with questions relating to cooling towers not operating effectively dealt with *potentially extremely significant* public health issues.

44 Whilst the plaintiff's evidence was that it had responded to each of the 25 orders contained in the Council's Fire Order of 23 May 2008 and that subsequent orders had been or were being complied, with the clear inference is that the company has woefully and over a considerable period of time neglected to operate the resort in a competent fashion.

## **Conclusion**

45 Having regard to the evidence which has been adduced by the respective parties it is quite plain that the plaintiff's failed dismally in their efforts to show that they have a serious, not a speculative case which has a real possibility of ultimate success. Likewise the plaintiffs failed dismally in their efforts to show that the balance of convenience is in favour of continuing the extant interlocutory orders up to a final hearing.

46 The evidence makes plain that circumstances have arisen which in the opinion of the bank have had a material adverse effect on the business, assets and financial condition of Brighten and Noble and on their ability to perform their obligations to the Bank. It was entitled to so find in its *absolute discretion*.

47 Analogously to the position of trustees such a discretion cannot be attacked otherwise than in conformity with the reasoning of the High Court in *Attorney-General (Cth) v Breckler* [1999] HCA 28; (1999) 197 CLR 83 at 99 – 100 paragraph 7:-

“ [7] In *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd* [59], Heerey J set out a passage in which the primary judge in that case (Northrop J) summarised the effect of decisions defining the scope for challenges in courts of equity to the exercise of discretions reposed in the trustee of a settlement. In this Court, the accuracy of that summary was not disputed. It is as follows:

‘ Where a trustee exercises a discretion, it may be impugned on a number of different bases such as that it was exercised in bad faith, arbitrarily, capriciously (*In re Pauling's Settlement Trusts* [1964] Ch 303 at 333), wantonly, irresponsibly (*Lutheran Church of Australia South Australia District Inc v Farmers' Co-operative Executors and Trustees Ltd* [1970] HCA 12; (1970) 121 CLR 628 at 639), mischievously or irrelevantly to any sensible expectation of the settler (*In re Manisty's Settlement* [1974] Ch 17), or without giving a real or genuine consideration to the exercise of the discretion (*Karger v Paul* [1984] VR 161). The exercise of a discretion by trustees cannot of course be impugned upon the basis that their decision was unfair or unreasonable (*Dundee General Hospitals Board of Management v Walker* [1952] UKHL 1; [1952] 1 All ER 896) or unwise (*Gisborne v Gisborne* (1877) 2 App Cas 300 at 307). Where a discretion is expressed to be absolute it may be that bad faith needs to be shown (*Gisborne v Gisborne* (1877) 2 App Cas 300 at 305). The soundness of the exercise of a discretion can be examined where reasons have been given, but the test is not fairness or reasonableness (*In re Londonderry's Settlement* [1965] Ch 918 at 928-929; *Karger v Paul* [1984] VR 161 at 165-166) ’ .”

48 The Bank's rights in this case are to be viewed fairly and commercially. In a similar case Bergin J in *541 Kent Street v Westpac Banking Corporation* [2002] NSWSC 147 applied this approach in stating:-

“ 40 It seems to me that such a construction is not available. The defendant relied upon the High Court's decision in *Pan Foods Company Importers and Distributors Pty Ltd & Ors v Australian and New Zealand Banking Group Limited & Ors* [2000] HCA 20; (2000) 170 ALR 579. In that case the evidence

had demonstrated that circumstances had arisen which, in the opinion of the Bank, had a material adverse effect on the business and assets of Pan Foods. That entitled the Bank to give notice and demand payment of all moneys owing by Pan Foods. A receiver was subsequently appointed. Gleeson CJ, McHugh and Hayne JJ said at 581:

‘ Some confusion seems to have arisen in argument because there were other provisions pursuant to which the Bank might also have been or considered itself, entitled to act. That is not unusual. Lenders may wear both belt and braces. When the Bank appointed a receiver, it was entitled to rely on all powers which enabled it to do so.’

41 In dealing with the principle to be applied in the construction of commercial documents comprising agreements for loan Kirby J said that such documents should be approached fairly and broadly, without being too astute or subtle in finding defects (at 583). His Honour also said that the General Conditions should be construed practically, so as to give effect to their presumed commercial purposes and so as not to defeat the achievement of such purposes by an excessively narrow and artificially restricted construction (at 584).”

49 The finding at an interlocutory level is that there is no *prima facie* case or serious question to be tried that the Bank has acted outside its rights or capriciously or with an ulterior purpose. It was reasonably open to the Bank to come to the view that there had been materially adverse changes and it remains the right of the Bank in the future to come to that view if circumstances point in that direction and there are accordingly no grounds for any interlocutory relief.

50 Further, in accordance with the general rule confirmed by the High Court in *Inglis v Commonwealth Trading Bank of Australia* [1972] HCA 74; (1972) 126 CLR 161, an injunction is not to be granted restraining a mortgagee from exercising powers conferred by a mortgage unless the amount of the mortgage debt is paid. This principle was recently applied by Hamilton J in *Parist Holdings Pty Ltd v Perpetual Nominees Ltd* [2006] NSWSC 599.

## **Decision**

51 For the above reasons the Court at the end of the hearing which took place in the late afternoon on 25 February 2010 dismissed the application by the defendants to extend the interlocutory regime.

\*\*\*\*\*

LAST UPDATED:  
1 March 2010

---

**AustLII:** [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)  
URL: <http://www.austlii.edu.au/au/cases/nsw/NWSC/2010/133.html>