Supreme Court

New South Wales

Case Name:	Commonwealth Bank of Australia v Daleport Pty Ltd (in receivership) (No 6)
Medium Neutral Citation:	[2019] NSWSC 958
Hearing Date(s):	27 June 2018 and 19 July 2018
Decision Date:	6 August 2019
Jurisdiction:	Common Law
Before:	McCallum J
Decision:	(1) Pursuant to rule 28.2 of the Uniform Civil Procedure Rules 2005 (NSW) that the following questions be determined separately from any other question in the proceedings, and before any trial in the proceedings: (a) Whether the relief, which the first and/or second defendants would be entitled to claim under section 12GM of the Australian Securities and Investments Commission Act 2001 (Cth) (Act) (or any cognate provision under any other legislation), if it established a contravention of Division 2 of Part 2 of the Act (or its cognates), is limited to: (i) non-monetary relief against the plaintiff; and/or (ii) the amount of the debt claimed by the plaintiff in these proceedings, as due and owing at the time of judgment, against the first defendant. (b) Whether the first and/or second defendants are otherwise precluded from seeking or obtaining judgment for a monetary amount against the plaintiff. (2) In relation to Daleport, that the questions be answered:

(a) As to (a)(i), “no”;
(b) As to (a)(ii), “yes”.

(3) In relation to Mr Walton, that both questions be answered “yes”.
(4) That the bank have leave to discontinue the proceedings on terms that there be no order as to costs.

Catchwords: CIVIL PROCEDURE – separate determination of questions – where appropriate – where parties labouring under different understandings as to the relief able to be claimed by the defendants in their defences – plaintiff contending no monetary remedy available beyond extent of its claim – evidence of defendants’ impecuniosity – whether proceedings futile – whether leave to discontinue should be granted on terms that there be no order as to costs

Legislation Cited:
Australian Security and Investments Commission Act 2001 (Cth), s 12GM
Civil Procedure Act 2005 (NSW), ss 21, 22
Trade Practices Act 1974 (Cth), ss 82, 87
Uniform Civil Procedure Rules 2005 (NSW), r 28.2

Cases Cited:
AWB Limited v Cole (No 2) [2006] FCA 913; (2006) 233 ALR 453
Bank of Western Australia v Daleport [2010] NSWSC 1207
Bank of Western Australia v Daleport Pty Ltd [2011] NSWSC 819
Bass v Permanent Trustee Co Limited (1999) 198 CLR 334; [1999] HCA 9
Bitannia Pty Ltd v Parkline Constructions Pty Ltd [2006] NSWCA 238
Chen v Karandonis [2002] NSWCA 412
Daleport Pty Ltd v Bank of Western Australia Ltd [2012] NSWCA 402
Edwards v Adam [2016] NSWSC 1534
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125; [1964] HCA 69
Genworth Financial Mortgage Insurance Pty Ltd v Hodder Rook & Associates Pty Ltd [2017] NSWSC 640
Kelly v Australian Postal Corporation [2015] FCA 1064
Nichols v NFS Agribusiness Pty Ltd [2018] NSWCA 84

	Rozenblit v Vainer [2018] HCA 23 Younan v Nationwide News Pty Ltd [2013] NSWCA 335
Category:	Procedural and other rulings
Parties:	Commonwealth Bank of Australia (plaintiff) Daleport Pty Ltd (in receivership) (first defendant) Alexander Raymond Walton (second defendant)
Representation:	Counsel: T D Castle (plaintiff) N Obrart (defendants) Solicitors: Gadens Lawyers (plaintiff) Ledger Lawyers (defendants)
File Number(s):	2008/287869
Publication Restriction:	None

JUDGMENT

1 **HER HONOUR:** These proceedings were brought by the Bank of Western Australia (now part of the Commonwealth Bank of Australia) to recover a debt in the order of $14.5 million from Daleport Pty Ltd as borrower and its director, Mr Walton, as guarantor. Daleport is now in receivership and the bank has sold all of the properties it held as security for the facilities in question. The proceeds of those sales have been applied in reduction of the figure claimed which, at the time of argument, stood at around $10 million including interest of almost $4.8 million.

Issues to be determined

2 The proceedings have a complex procedural history which is addressed in detail below. For the purpose of identifying the issues determined in this judgment, it is enough to record that a cross-claim brought by Daleport against the bank seeking relief under the *Trade Practices Act 1974* (Cth) was dismissed after Daleport failed to provide security for the bank's costs in the sum of $60,000: *Bank of Western Australia v Daleport* [2010] NSWSC 1207 (Hislop J). After many further interlocutory contests and an unsuccessful mediation, the bank made an open offer to "walk away" from its claim on the

basis that there would be no order as to costs. That offer was rejected by Daleport. The rejection of that offer made sense only in the light of what follows.

3 It transpired that the parties had, for some considerable time, been operating under different assumptions as to the consequences of the dismissal of the cross-claim. Daleport has been proceeding on the understanding that, notwithstanding the dismissal of the cross-claim, it could still obtain a remedy of compensation from the bank in an amount exceeding the debt claimed by the bank on the basis that the relief sought in the amended cross-claim (which included a prayer for damages under s 82 of the *Trade Practices Act 1974* (Cth)) was also sought in the amended defence of the same date (now pleaded as a claim for relief under s 12GM of the *Australian Security and Investments Commission Act 2001* (Cth)).

4 Conversely, the bank has been proceeding on the understanding that any relief the Court might grant under s 12GM or any cognate provision would be confined to the extent of extinguishing the bank's claim by way of set-off and could not result in judgment for any monetary sum in favour of Daleport.

5 Those different understandings became apparent during the course of an argument as to the costs of a partially successful application by Daleport for discovery. Daleport at that time sought an order for the payment of its costs forthwith on the basis that the contest as to discovery had exhausted its "fighting fund" and that, if those costs were not paid forthwith, its defence of the bank's claim would be stultified. In support of the stultification argument, Daleport and Mr Walton adduced evidence as to their impecuniosity: affidavit, Blayne Ledger, 16 April 2018 at pars 47-52.

6 On the bank's understanding as to the limited remedies available to Daleport under the defence, that evidence prompted the bank to conclude that the proceedings had become futile, the utility of any hearing being confined to determining the question of costs. The bank asserts that the only commercial rationale for its continuing the proceedings is to avoid any further adverse costs orders. In those circumstances, and in light of Daleport's different understanding as to the remedies available to it under the defence, the bank

brought forward an application for the separate determination of a question concerning the availability of those remedies following the dismissal of Daleport's cross-claim. The bank further seeks, if that question is answered in its favour, to have leave to discontinue the proceedings on terms that there be no order as to costs.

7 The orders sought by the bank are:

> "1. Pursuant to rule 28.2 of the Uniform Civil Procedure Rules that the following questions be determined separately from any other question in the proceedings, and before any trial in the proceedings:
>
> (a) Whether the relief, which the first and/or second defendants would be entitled to claim under section 12GM of the *Australian Securities and Investments Commission Act 2001* (Act) (or any cognate provision under any other legislation), if it established a contravention of [Division 2 of Part 2] of the Act (or its cognates), is limited to:
>
> (i) non-monetary relief against the plaintiff; and/or
>
> (ii) the amount of the debt claimed by the plaintiff in these proceedings, as due and owing at the time of judgment, against the first defendant.
>
> (b) Whether the first and/or second defendants are otherwise precluded from seeking or obtaining judgment for a monetary amount against the plaintiff.
>
> 2. If the answer to (a) and/or (b) above is yes, an order that leave be given for the plaintiff under UCPR 12.1 to discontinue these proceedings on terms that there be no order as to costs."

8 While the order for separate questions was opposed by the defendants, it was common ground that the application for that order and (if granted) the determination of the separate questions should be heard concurrently.

9 Separately, Daleport and Mr Walton seek leave to amend their pleadings. That application is also addressed below.

Procedural background

10 The bank made three commercial advances to Daleport in 2003, 2005 and 2008. It also made a home loan advance in 2004 and provided a bank guarantee in 2005. The circumstances of those facilities are set out in detail in the judgment of Davies J in *Bank of Western Australia v Daleport Pty Ltd* [2011] NSWSC 819.

11 The bank commenced proceedings in October 2008 claiming judgment against Daleport in the amount of $14,515,652.89. The statement of claim also sought judgment against Mr Walton in the same amount based on his guarantee of the

facilities. It is not disputed that the facilities were in default at that time and have not been repaid.

12 In August 2009, Daleport filed an amended defence and an amended cross-claim seeking remedies under the *Trade Practices Act 1974* (Cth) (it was subsequently acknowledged that the wrong legislation had been invoked). In addition to seeking orders setting aside the loan facilities and mortgages, the pleadings included a claim for damages under s 82 of the Act and "such further or other order as the Court considers appropriate including an order under s 87 of the *Trade Practices Act*". The basis for those claims, in summary, was the allegation that the bank had made representations that it would finance all three stages of a development at Leura which was the purpose of the second and third commercial advances. Its failure to do so is alleged to have resulted in the failure of the development causing loss to Daleport. According to the judgment of Hislop J concerning the bank's application for security for the costs of the cross-claim, particulars of the claim for damages quantified it in the amount of $87,148,506.72.

13 The order for security for the costs of the amended cross-claim was made by Hislop J on 28 October 2010 and required Daleport to provide security in the sum of $60,000 within 21 days. His Honour reserved liberty to the bank to apply for dismissal of the amended cross-claim in the event that the security was not provided as ordered.

14 The security was not provided. The evidence before me established that was a deliberate choice by Daleport. In his affidavit sworn 25 June 2018, the solicitor for Daleport, Mr Ledger, said at par 8:

> "In respect of paragraph 33 of the plaintiff's submissions, I advise Daleport's cross claim was dismissed by a consent order by Registrar Bradford following the defendants choosing not to provide the security as ordered by Justice Hislop. The security was not provided because the defendants sought relief under section 87 of the Trade Practices Act in their defences. The defendants chose to preserve their money they had available at the time and not provide the security as ordered."

15 The amended cross-claim was dismissed by consent on 15 December 2010.

16 On 19 April 2011, Daleport and Mr Walton each filed further amended defences. In Daleport's defence, a claim that had appeared in the previous

defence and cross-claim for damages under s 82 of the *Trade Practices Act* was deleted but the defence included a claim for relief under s 87 of that Act (without specifying the relief sought). In correspondence between the parties, Daleport confirmed that it did not seek "damages" but otherwise refused to specify the relief sought and refused to confirm that no compensation or other monetary relief was being sought: affidavit, Blayne Ledger, 20 June 2018 annexure BL1).

17 The bank subsequently sought summary judgment against both Daleport and Mr Walton. That application was determined by Davies J in the judgment to which I have already referred: *Bank of Western Australia v Daleport Pty Ltd* [2011] NSWSC 819.

18 Justice Davies considered each facility separately. At the hearing before me, the bank provided a helpful summary of the position in respect of each facility (MFI 1). The first commercial advance was made in 2003 in the sum of $3 million. The purpose of that facility was to refinance a loan to Daleport from Donovan Oates Hannaford. Justice Davies found no basis in the defence on which it could be argued that the obligations under that facility should be affected by the later conduct alleged against the bank concerning the Leura development. Accordingly, his Honour held that the bank was entitled to summary judgment in relation to that facility: at [48]-[52]. His Honour reached the same conclusion in respect of the home loan advance made in 2004 and the bank guarantee provided in 2005: at [53]-[60].

19 The second and third commercial advances were made for purposes related to the Leura development. Daleport defended the bank's claim in respect of those facilities by reference to the alleged misrepresentations and unconscionable conduct on the part of the bank (the allegations then made by Daleport are summarised at [25] of his Honour's judgment). Justice Davies considered Daleport's case to be "a fairly weak one" (at [69]) but was not satisfied that the case was unarguable and accordingly refused to order summary judgment in respect of that part of the bank's claim. However, his Honour concluded at [80] that Mr Walton had no defence to the claim based on those facilities (notwithstanding the fact that his liability was alleged to arise only as guarantor

of Daleport's liability) and decided that the bank was entitled to summary judgment against him.

20 Justice Davies directed the parties to bring in short minutes of order reflecting his Honour's reasons. Orders were entered on 2 December 2011 including judgment against Mr Walton in the sum of $7,365,502.07. Although his Honour found that the bank was entitled to summary judgment against Daleport in respect of two of the facilities, judgment was not entered against Daleport in any monetary sum at that time (perhaps reflecting the bank's security position or securities that had already been realised).

21 Daleport and Mr Walton sought leave to appeal against Davies J's judgment. The transcript of the hearing in the Court of Appeal was in evidence before me (exhibit B, tab 9). It records that Daleport did not challenge the summary judgment entered against it in respect of the first commercial advance and the home loan. However, as I will explain, Daleport sought to challenge a finding his Honour had made concerning the relief available to Daleport under the defence.

22 Justice Davies had recorded in his judgment that, in the alternative to summary judgment, the bank sought "that any relief to be granted by the Court to Daleport under s 87 [of the *Trade Practices Act*] be confined to non-monetary relief". That part of the application was evidently prompted by Daleport's refusal, in correspondence, to confirm that no compensation or monetary relief was sought by the further amended defence (following the dismissal of the cross-claim). Justice Davies explained the argument as follows at [39]:

> "Because one of the orders available under s 87(1A) is an order directing a person who engaged in the contravention of one of the provisions of part IVA or V to pay the amount of loss or damage suffered, a claim for relief under s 87 contained in the defence, although otherwise allowable (see *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] NSWCA 238 at [11]) would simply be a way of avoiding the requirement to provide security for costs and the consequential striking out of the cross-claim when it was not provided."

23 Justice Davies accepted that argument. His Honour said at [43]:

> "In circumstances where security was not provided for the bringing of a cross-claim, and the cross-claim was dismissed, it would be an abuse of process for a similar claim to be made in a defence. Some of the remedies provided for in s 87 are effectively defensive remedies, but some provide for compensation and damages for contraventions of the Act. The defendants should not be

> deprived of the benefit of any of the defensive remedies but, where security has not been provided when ordered, it is appropriate that an order should be made limiting any relief under s 87 to non-monetary relief."

24 It may be noted that those remarks assume a binary classification of remedies, namely, on the one hand, defensive, "non-monetary" remedies and, on the other hand, remedies that provide for compensation and damages. It will be necessary to return to that issue.

25 In any event, the transcript of argument before the Court of Appeal reveals that, although the short minutes of order submitted to Davies J by the parties included an order intended to give effect to those remarks, no such order was in fact made by his Honour. The bank did not take steps to address that issue under the slip rule or otherwise. Further, although his Honour did not grant leave to Daleport to file an amended defence, the judgment contemplated that Daleport would have an opportunity to seek leave to amend the defence in respect of the second and third facilities: at [81]. That was reflected in the orders made.

26 In May 2012, after those orders were made but before the application for leave to appeal was heard, Daleport served its second further amended defence which included the following prayer for relief:

> "Such further or other order as the Court considers appropriate (other than any order for damages or monetary compensation, or other monetary order that would breach the decision of Davies J of 4 November 2011 or order of Davies J made 2 December 2011)."

27 Part of the purpose of the appeal was to overcome what Daleport perceived to be the burden of that constraint. However, when the matter was argued in the Court of Appeal, the Court indicated its view that, in the absence of any order having been made reflecting his Honour's finding at [43] set out above, the application for leave to appeal in respect of that part of the decision of Davies J was premature. The debate identified the problem that Daleport's existing defence did not adequately articulate the relief sought by way of monetary claim; the Chief Justice suggested that Daleport should exercise the leave granted by Davies J to serve a defence which would allow the point to be argued (Tcpt, 6 September 2012, p 15(10)-(30) (Court of Appeal)).

28 Separately, the appeal challenged the summary judgment entered against Mr Walton. In the face of a kindly hint from the Court to senior counsel for the bank as to the strength of that part of the appeal (Bathurst CJ to Dr Bell SC, as his Honour then was: "we're hardly in the area of a summary judgment are we?"), the bank ultimately consented to have the order for summary judgment against Mr Walton set aside.

29 In its reserved decision (which in the result had only to address the question of costs), the Court recorded the position in respect of Daleport as follows: *Daleport Pty Ltd v Bank of Western Australia Ltd* [2012] NSWCA 402 at [4] (Barrett JA; Bathurst CJ and Sackville AJ agreeing at [1] and [15]):

> "In relation to the first of these matters, this Court pointed out, in the course of the hearing (and counsel for Daleport and Mr Walton accepted), that no order had ever been made so as to preclude the ability of Daleport to assert against the bank a claim for monetary compensation under s 87 of the *Trade Practices Act* by way of set-off against whatever Daleport might be found to owe the bank. While that matter had been the subject of comment in the primary judge's reasons and short minutes provided to his Honour had included such an order, the order was not in fact made."

30 As noted above, the remarks of Davies J to which that paragraph refers assumed that "defensive" remedies must be "non-monetary" remedies as distinct from remedies that provide for compensation and damages. The discussion of that issue in the Court of Appeal did not assume the same distinction. Rather, the debate acknowledged the possibility that compensation or damages could be sought by way of defence. However, the exchanges on that issue also contemplated that any remedy of that kind could only operate to the point of extinguishing the bank's claim by way of set-off and could not result in a monetary verdict in favour of Daleport, as reflected in Barrett JA's reference at [4] to compensation "by way of set-off against whatever Daleport might be found to owe the bank".

31 The decision of the Court of Appeal was published on 12 December 2012. As explained at the outset of this judgment, the parties have since proceeded on different understandings as to the availability to Daleport of the remedy of compensation through the process of Daleport's defence to the bank's claim. The bank did not take issue with the proposition that, in accordance with the decision of the Court of Appeal in *Bitannia Pty Ltd v Parkline Constructions Pty*

Ltd [2006] NSWCA 238 referred to by Davies J in the passage set out above, a claim for compensation pursuant to s 12GM of the ASIC Act may be sought in a defence. However, the bank argues that, in the circumstances of this case and for the reasons stated by Davies J, that course is foreclosed to Daleport except to the extent of extinguishing the bank's claim.

32 I should note that, as I read the decision in *Bitannia*, that may be all that was contemplated in any event but it is not necessary to decide that question because the bank was content to proceed on the assumption that the decision is authority for the larger proposition contended for by Daleport.

33 Daleport contends that the assessment of the bank's contention is complicated by the fact that, since commencing the proceedings claiming a debt in the order of $14.5 million, the bank has realised its securities and deducted the proceeds from the amount claimed. In that circumstance, Daleport contends that, even if the bank is right in contending that any compensation Daleport may seek by way of defence is confined to the extent of extinguishing the amount owed to the bank, it is necessary in that calculation in effect to unwind the application of the proceeds of sale of the security properties. However, on that analysis, it would also be necessary to take into account the full amount of the funds advanced by the bank. If Daleport is confined to defensive remedies, I cannot see how, on any view, the proceedings could result in a net judgment in favour of Daleport.

34 On 28 October 2013, Daleport filed its third further amended defence. The contentions made in that defence (which concerns only the second and third commercial advances) were summarised in the bank's written submissions as follows:

> "(a) in 2004 Bankwest represented to it that it would fund stage 1 of the Leura Development to its completion or in the alternative would fund stages 1, 2 and 3 of the Leura Development to its completion (Completion Representations);
>
> (b) in 2005 Bankwest repeated the Completion Representations
>
> (c) in 2006 Bankwest repeated the Completion Representations;
>
> (d) further representations were made in 2007 which were in substance the same as the Completion Representations;

(e) in making the Completion Representations Bankwest contravened section 12DA of the *ASIC Act* and engaged in unconscionable conduct within the meaning of section 12CC of the *ASIC Act*;

(f) Bankwest also represented over the 2005-2007 period that it had sufficient funds to lend to Daleport to assist Daleport to complete the Leura Development (Funds Representation);

(g) in making the Funds Representation Bankwest contravened section 12DA of the *ASIC Act* and engaged in unconscionable conduct within the meaning of section 12CC of the *ASIC Act*.

(h) Bankwest breached an implied contractual term of good faith in relation to the conduct of the Facilities (Contract Claim); and

(i) Bankwest breached a duty of care to Daleport in relation to certain aspects of the conduct of the Facilities (Negligence Claim)."

35 The third further amended defence seeks the following relief:

"(i) equitable compensation or compensation pursuant to s 12GM of the *ASIC Act* in the sum of $7,988,119 or such other amount as the honourable Court deems fit;

(ii) that the money recovered by the plaintiff to date by reason of sale of the security properties be deemed to be in full discharge of all liabilities of the first and second defendants to the plaintiff pursuant to all commercial advance facilities held by the first defendant with the plaintiff;

(iii) a declaration and order pursuant to s 12GM of the *ASIC Act* that the second and third commercial advances of 8 February 2008 offer between the plaintiff and the first defendant are avoided as at 12 December 2, 2007 or alternatively 8 February 2008 or such other date as the honourable Court thinks fit."

36 The amount of $7,988,119 claimed as order (i) is described in the pleading as being the value of the equity in the security properties held by Daleport as at 12 December 2007, being the date after which it is alleged the bank failed to honour the representation that it would fund the Leura development.

37 The circumstances in which that pleading was filed were not addressed in the parties' submissions. It appears that the bank was by then proceeding on the assumption that any monetary compensation obtained by Daleport was confined to the extent of extinguishing any debt found owing to the bank. As already explained, the argument before me proceeded on the basis that the misunderstanding only became apparent during the costs argument in May 2018.

38 In the meantime, the bank made a number of attempts to extricate itself from the proceedings. On 22 July 2016, the bank made an offer to settle its claim on

the basis that the proceedings would be discontinued with each party to bear its or his own costs. The defendants did not accept the offer. In his affidavit sworn 25 June 2018, Mr Ledger explained at par 5:

> "At that point in time, I calculate our client had incurred approximately $630,000 in costs and had paid in approximately $420,000 in costs. Our client at the time had borrowed funds by this point and was in the process of paying them back with interest."

39 The same offer was repeated openly by the bank on 23 April 2018 after an unsuccessful mediation (at that time, with an acknowledgment that the bank would nonetheless pay any costs ordered in Daleport's favour in respect of the discovery application). That offer was also not accepted by Daleport. The bank's mystification as to why those offers were not accepted was explained when the different understandings of the case emerged during the argument concerning the costs of the lengthy discovery dispute.

Application for separate questions

40 In its written submissions, Daleport complained that the bank had foreshadowed bringing a summary dismissal application whereas the motion as filed sought an order for separate determination. Daleport submitted that the application was in substance an application for summary dismissal and accordingly that the issues raised by the motion should be determined in accordance with the test in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; [1964] HCA 69. I do not accept that analysis. It is not correct that the bank foreshadowed an application for summary dismissal; it did foreshadow an application for the separate determination of a question concerning the remedies available to Daleport by way of defence. If the question posed in order 1 of the notice of motion (set out above) is appropriate for separate determination, the determination of that issue is to be undertaken on a final basis on the balance of probabilities, not on an application of the *General Steel* test: *Younan v Nationwide News Pty Ltd* [2013] NSWCA 335 at [20] per Macfarlan JA; Bathurst CJ and Beazley P agreeing at [1] and [2].

41 Separately, Daleport submitted that the questions raised in the motion do not satisfy the principles governing separate determination. Daleport submitted that the "core principle" relating to separate determination was stated by the

majority in *Bass v Permanent Trustee Co Limited* (1999) 198 CLR 334; [1999] HCA 9 at [45]-[46], [49], [50]-[53], [56] and [58]. In particular, Daleport submitted that a judicial determination including that of a separate question must be carried out based on defined facts that are either agreed or determined by reference to the evidence in the case.

42 Daleport also relied on the principles stated by Young J (as his Honour then was) in *AWB Limited v Cole (No 2)* [2006] FCA 913; (2006) 233 ALR 453 at 460-463 which Daleport summarised as follows:

> "(a) As a general rule the starting point is that all issues of fact and law should be determined at the one time;
>
> (b) A party seeking the determination of separate questions must satisfy the court that it is 'just and convenient' for the order to be made.
>
> (c) The order must be made on concrete facts either established or agreed between the parties so as to produce a conclusive or final judicial decision on the issue which is of real importance to the determination of the controversy;
>
> (d) There are special problems where the separate issue involves a mixed question of fact and law so that in those cases care must be taken in precisely formulating the question and specifying the facts upon which it is to be decided;
>
> (e) The court must have all relevant matters before it as a precondition of it being asked to exercise its discretion if the separate question involves declaratory relief;
>
> (f) It may still be appropriate to determine a separate question even if it will not resolve all of the issues provided that certain circumstances are present;
>
> (g) Generally speaking an issue will not be appropriate for separate determination if it is simply one of two or more alternative ways in which an applicant frames its case and its determination would leave other significant issues unresolved;
>
> (h) it is relevant to consider whether the determination of separate questions will:
>
> (i) save time and cost;
>
> (ii) contribute to settlement;
>
> (iii) give rise to significant contested factual issues at the time of hearing of the preliminary question and at the time of trial."

43 It may be accepted that aspects of the bank's written submissions tended to rely on matters that would require the determination of disputed facts, which would indicate that the questions raised were not appropriate for separate determination. In particular, the bank made lengthy written submissions

directed to the alleged weakness of Daleport's and Mr Walton's cross-claims, submitting that:

> "To the extent relevant to the consideration of matters of discretion and s 56 of the *Civil Procedure Act*, the claim on the part of the defendants has limited, if any, prospects of success, and is based on an insecure if not entirely speculative factual foundation and there is real cause to doubt whether Daleport or Mr Walton has any claim for loss even if a cause of action against Bankwest could be established."

44 To a degree, those submissions rehearsed matters put to Davies J when his Honour determined the summary judgment application. While the apparent strength of the cross-claims might be a relevant consideration in the exercise of any discretion, it is extremely difficult on an application of the present kind to make a firm assessment of that issue. Further, as submitted by Daleport, the need to do so would militate against ordering the separate determination of any question that required such an assessment to be made. It may be noted in that context that in the previous summary judgment application Davies J, while observing that the case appeared to be weak, was not persuaded, applying the *General Steel* test, to award summary judgment in favour of the bank in respect of the second and third facilities.

45 However, as the argument was developed, it became clear that the separate questions identified in prayer 1 of the motion, at least so far as Daleport is concerned, raise a discrete and relatively narrow issue which does not require the assessment of contested facts. The critical question concerning Daleport is whether, by reason of the dismissal of the cross-claim or otherwise, Daleport is confined in the relief it can seek to obtaining damages or compensation to the extent necessary to extinguish any debt still owed to the bank.

46 In my view, that is a question which is appropriate for separate determination. It does not require the determination of any contested question of fact; its determination turns on the procedural history I have outlined, which is objectively established. Further, in light of the course of the litigation up to this point, the exposure of the different understandings of the parties revealed what was termed by Mr Castle, who appeared for the bank, a "fault line" between the two cases. If the bank is right, there is no utility in the proceedings for either the bank or Daleport beyond the determination of questions of costs. In that event,

there is a strong case for allowing the bank to discontinue other than on the usual terms as to costs. If Daleport is right, it would not be fair to allow the proceedings to be brought to an end in that way.

47 In those circumstances, the determination of the separate questions carries the prospect of obviating the need for a lengthy and costly hearing that will occupy a substantial amount of court time. In that way, the order sought by the bank serves the interests of Part 6 of the *Civil Procedure Act 2005* (NSW).

48 The separate questions were framed by reference to both defendants but, of necessity, the argument treated each separately. The position concerning Mr Walton is more complex, for a number of reasons. However, as reflected in his pleadings, Mr Walton's position is inextricably linked with that of Daleport. In that circumstance, in my view it is just and convenient to order the separate determination of the questions as they relate to both defendants.

49 For those reasons, I consider it appropriate to make the order for separate determination of the questions identified in prayer 1 in the bank's notice of motion.

Relief available to Daleport

50 It is convenient first to deal with the position of Daleport. The starting point is to acknowledge what Davies J held in his judgment at [43], which was that "in circumstances where security was not provided for the bringing of a cross-claim, and the cross-claim was dismissed, it would be an abuse of process for a similar claim to be made in a defence". The appeal against that finding was considered to be misconceived because no order had been made reflecting his Honour's conclusion and his Honour had allowed the possibility of amendment. There was accordingly no occasion for the Court of Appeal to make any determination as to the correctness of Davies J's finding. I accept, in that circumstance, that it is an open question in the sense that nothing said in the judgment of the Court of Appeal is binding either way. It is nonetheless significant, in my view, that the focus of the discussion was the correctness of his Honour's finding that Daleport was confined to seeking "non-monetary" remedies. The remarks of Barrett JA set out above assumed that if Daleport was entitled to claim monetary compensation it would be confined to

compensation "by way of set-off against whatever Daleport might be found to owe the bank".

51 As noted by the bank, that observation in the judgment of the Court of Appeal plainly concerned what was available by way of defence, as Daleport's cross-claim had been dismissed by that time. The observation is consistent with what was said during argument. I acknowledge that observations made during argument are not to be taken as expressions of any concluded view: cf *Kelly v Australian Postal Corporation* [2015] FCA 1064 at [51]-[53] (Griffiths J). However, in the circumstances of the present case, the exchanges during argument are important because they shed light on the conduct of the proceedings after that point.

52 The judgment reflected what was said by the Chief Justice during the hearing of the appeal at Tcpt, 6 September 2012, p 5(2)-(18) (Court of Appeal), as follows:

> "BATHURST CJ: Let me put a proposition I would have thought was fairly simple. A defence is what it says, it is a defence to a claim. The best you can get out of a defence is a verdict in favour of the defendant, you don't get money for that, I understand that but the question is – but that maybe could lead to a monetary sum up to and equal to the amount claimed. Justice Davies went a step further than that, he limited it entirely to non-monetary amounts, that was what he said in his judgment but there might be a monetary amount of – I don't know your total claim is but say half of it, to the extent you can use s 87, why wasn't that allowed?
>
> BELL: The monetary amount being sought by way of cross-claim was $87 million …
>
> BATHURST CJ: if there was an order that simply said, s 87 is available as a defence and the defendant proved that he or it had a claim of an amount in excess of your claim, the end result would be absent a cross-claim, verdict for the defendant."

53 Similarly, on a number of other occasions during the hearing, the Chief Justice referred to Daleport's entitlement to obtain relief under the ASIC Act, "to the extent it operates to extinguish the plaintiff's claim": Tcpt, 6 September 2012, pp 7(35), 9(50) (Court of Appeal). None of those exchanges contemplated that it would be open to Daleport to seek relief that would result in a monetary judgment in its favour by means of any amended defence. In fact, the Chief Justice's remarks set out above contradicted that proposition. The point on which the debate took issue with Davies J's finding (and the position evidently

urged by Dr Bell SC during argument) was the proposition that Daleport was confined to “non-monetary remedies”.

54 At the hearing before me, the bank did not pursue the argument that Daleport was confined to non-monetary remedies and instead adopted the position indicated by the Chief Justice’s remarks. The bank sought to provide further support for that position by reference to ss 21 and 22 of the *Civil Procedure Act*, noting that those provisions provide two distinct rights addressing different circumstances and having different consequences. Section 21 addresses the defendant’s right to set-off. Subsection 21(1) provides:

> “If there are mutual debts between a plaintiff and a defendant in any proceedings, the defendant may, by way of defence, set off against the plaintiff's claim any debt that is owed by the plaintiff to the defendant and that was due and payable at the time the defence of set-off was filed, whether or not the mutual debts are different in nature.”

55 Section 22 addresses the defendant’s right to cross-claim. Subsection 22(1) provides:

> “Subject to subsection (2), the court may grant to the defendant in any proceedings ("the first proceedings") such relief against any person (whether or not a plaintiff in the proceedings) as the court might grant against that person in separate proceedings commenced by the defendant for that purpose.”

56 The bank submitted that, if a defence could assert a positive claim for relief other than by way of set-off, there would be no need for s 22 as against the plaintiffs. However, as noted by Daleport, that analysis does not sit comfortably with the recognition that monetary relief under the *Trade Practices Act* may be sought by way of set-off in a defence. Section 21 does not govern that circumstance because the relief claimed is not a debt that was owed by the plaintiff to the defendant that was due and payable at the time the defence of set-off was filed.

57 In any event, in my view, the position contended for by the bank (adopting the remarks of the Chief Justice set out above) is correct. I respectfully agree with Davies J that, the cross-claim having been dismissed as a result of a deliberate choice made by Daleport not to pay the security ordered by Hislop J, it would be an abuse of process to allow Daleport to pursue the same remedies by means of its defence other than defensively. Daleport complained that the bank

had pointed to no authority for that proposition but in my view it is obvious. The abuse lies in the deliberate circumvention of a process calculated to protect the bank's position as to costs. Indeed, had Daleport sought to defend the application for security for costs of the cross-claim on the basis that the order would be futile because it could make the same affirmative claims by way of defence, the order for security would in all likelihood have been extended accordingly. Having allowed the opportunity to prosecute the cross-claim to pass, Daleport is left to pursue any remedy under the ASIC Act as a shield, not a sword.

58 That is not to subvert any principle stated in *Bitannia*. It is the consequence that follows from Daleport's choices in its conduct of the proceedings. That is a proper basis for denying Daleport the entitlement to have its affirmative claims for monetary relief determined in accordance with the principles considered by the High Court in *Rozenblit v Vainer* [2018] HCA 23 at [41]-[43] per Kiefel CJ and Bell J.

59 I respectfully do not agree with Davies J's conclusion that Daleport is therefore confined to "non-monetary" remedies. I see no reason why a monetary remedy could not be obtained and relied on defensively, by way of set-off; so much is recognised in *Bitannia*. However, as contemplated in the exchanges during argument in the Court of Appeal, any monetary remedy is in my view confined to the extent of extinguishing any debt owed by Daleport to the bank by way of set-off.

60 That conclusion provides the answer to the separate question (so far as Daleport is concerned). Question (a) asks whether the relief the defendants would be entitled to claim under section 12GM of the ASIC Act or any cognate provision is limited to:

(i) non-monetary relief; or

(ii) to the amount of the debt claimed by the bank.

61 For the reasons set out above, in the case of Daleport, question (a)(i) should be answered "no" but question (a)(ii) should be answered "yes".

Relief available to Mr Walton

62 The position concerning Mr Walton is more complex. Unlike Daleport, he is not in the position of having had a cross-claim dismissed for failure to pay security for costs. Accordingly, the abuse of process argument does not apply to him and there is, in principle, no impediment to his claiming a monetary remedy under the ASIC Act by way of defence in accordance with the analysis accepted in *Bitannia*. As already noted, it is not clear to me that the decision in *Bitannia* contemplated the course contended for by Daleport in these proceedings but it is not necessary to decide that question. The critical task is to consider the issues raised by Mr Walton on his existing pleadings.

63 On 30 April 2009, Mr Walton filed a cross-claim at a time when he was representing himself. The defendants acknowledge that that pleading has since been overlooked. It was confirmed at the hearing before me that Mr Walton does not now seek to prosecute that claim.

64 The issues identified by the separate questions concerning him are, first, whether he is entitled to seek relief by way of his existing defence that might include judgment in a monetary sum in his favour; and secondly, if not, whether he should have leave to file an amended defence and cross-claim seeking such relief.

65 In an amended defence filed on 5 August 2009, Mr Walton denied that he was liable to the bank (for the amount claimed or at all) on the basis that the guarantee executed by him was liable to be set aside for the reasons articulated in Daleport's amended defence of the same date. At that time, Daleport's defence sought damages under s 82 of the *Trade Practices Act* but Mr Walton's defence did not. The relief sought by him was to have the guarantee set aside and "such further or other order as the Court considers appropriate including an order under s 87 of the [*Trade Practices Act*]".

66 On 19 April 2011, after the dismissal of Daleport's cross-claim, Daleport amended its defence to delete the claim for damages but still sought relief under s 87. Mr Walton filed a further amended defence at the same time that similarly denied liability to the bank and sought to have Mr Walton's guarantee set aside and "such further or other order as the Court considers appropriate

including an order under s 87 of the [*Trade Practices Act*] and/or s 87 of the *Competition and Consumer Act 2010* (Cth)."

67 Neither of those defences articulated a claim for compensation or any relief in favour of Mr Walton other than on the basis of allegations that impugned the loan facilities and the guarantee.

68 In October 2013, at the same time that Daleport filed its third further amended defence considered above, Mr Walton filed his second further defence. Although Daleport at that time sought equitable compensation in the amount of $7,988,119, Mr Walton again sought no relief at that time other than declaratory relief concerning his liability under the guarantee.

69 It follows that, on the existing pleadings, in the case of Mr Walton, the answer to both question (a)(i) and question (a)(ii) should be answered "yes".

70 However, it is necessary to consider the amendment application. By notice of motion filed in court on 27 June 2018, Mr Walton sought leave to file and serve an amended defence and cross-claim in the form of annexures BL2 and BL3 to the affidavit of Blayne Ledger sworn 20 June 2018. The proposed amended pleadings repeat the matters relied upon by Daleport in its existing defence. As already noted, in that pleading, Daleport quantifies its alleged loss in the sum of $7,988,119 being the value of Daleport's equity in the security properties held by the bank as at 12 December 2007 and seeks compensation in that amount. Mr Walton's proposed cross-claim seeks equitable compensation in the same amount. However, I apprehend that is a typographical error. The Court was informed that the proposed cross-claim is intended to replicate the proposed amended defence for Mr Walton. In the proposed amended defence, Mr Walton seeks equitable compensation in the sum of $3,994,059.50 "calculated as being equivalent to 50% of the value of [Mr Walton's shares in Daleport] as at 12 December 2007 being $7,988,119".

71 The bank opposed leave to file the proposed amended defence and cross-claim on two grounds. First, Mr Castle submitted that Mr Walton is not a proper plaintiff to claim what is called "reflect[ive] loss", relying on the decision of the Court of Appeal in *Chen v Karandonis* [2002] NSWCA 412 at [40]-[42]. Secondly, he submitted that the proposed claim is out of time.

72 In my view, it is clear from the form of the proposed cross-claim that what is sought is a reflective loss. No separate loss is specified by Mr Walton that does not fall within those losses in respect of which only the company may sue in accordance with the principles discussed in *Chen*.

73 Ms Obrart, who appeared for the defendant, contended that the principles considered in *Chen* would not preclude an action by a shareholder for loss of value of the shareholders' shareholding. She said at Tcpt, 27 June 2018, p 53(34):

> "Mr Walton who owned an asset being his shareholding in Daleport which owns substantial property, by virtue of the fact that Daleport now, all those properties are sold by virtue of the bank, Mr Walton is a person who has suffered loss and damage within [section 12GH of the *ASIC Act*)."

74 On my understanding of the relevant principles, that is exactly the kind of loss a shareholder cannot recover, for the reasons explained in *Chen*.

75 Accordingly, in summary, the position is as follows:

(a) Daleport might have been entitled to seek a monetary remedy under the ASIC Act in excess of any debt it is found to owe to the bank. However, it relinquished that entitlement by choosing not to pay the security for costs of the cross-claim ordered by Hislop J;

(b) accordingly, assuming (without deciding) that the decision in *Bitannia* supports the proposition that a monetary remedy in excess of the debt claimed by the bank could otherwise have been claimed by way of defence, Daleport is, in the circumstances, limited to the extent of extinguishing any amount it is held to owe to the bank by way of set-off;

(c) Mr Walton is not constrained by the dismissal of a cross-claim and would not be amenable to an order for security for costs. However, upon analysis, his existing pleading makes no such claim and his proposed amended claims (both defence and cross claim) identify only reflective loss and cannot be maintained.

Discontinuance

76 In the circumstances I am satisfied, as contended by the bank, that, in light of the evidence that the defendants are both impecunious, the proceedings have in effect become futile. The bank submitted that it should accordingly be granted leave to discontinue the proceedings on terms that there be no further order as to costs. In making that application, the bank did not seek to be excused from the costs ordered against it in respect of the discovery motion.

77 The bank relied in that context on two cases where such leave was granted in circumstances where the proceedings became futile due to sequestration orders entered against defendants: *Genworth Financial Mortgage Insurance Pty Ltd v Hodder Rook & Associates Pty Ltd* [2017] NSWSC 640 (Black J) and *Edwards v Adam* [2016] NSWSC 1534 (Slattery J). In each of those cases, the basis for granting leave to discontinue other than on the usual term requiring payment of the defendant's costs was that the proceedings were assessed to have become futile in light of the position of the defendant.

78 Ms Obrart submitted that the present case does not fall within those principles because the alleged futility is unilateral and that discontinuance on the terms sought would serve only the interests of the bank. The defendants led evidence to support their contention that they have expended considerable costs in the litigation to the end of obtaining the relief sought by them on the grounds of the bank's allegedly unconscionable conduct. However, that argument was premised on the defendants' contentions as to the relief available to them under the defences and Mr Walton's proposed amended cross-claim. To incur such costs in the face of two offers from the bank to "walk away" made sense only on that premise. It was more or less acknowledged during argument that, if the bank's contentions concerning the separate questions were right, the only remaining concern of the proceedings is the question of costs.

79 The classes of cases in which the court might see fit to make an order of the kind made in *Genworth* should not be regarded as closed or rigidly confined by past labels. The court must make an assessment of each individual case having regard to the considerations identified in Part 6 of the *Civil Procedure Act*. On the conclusions I have reached, the proceedings may be seen to fall within the class of cases described by Basten JA in *Nichols v NFS Agribusiness Pty Ltd* [2018] NSWCA 84 at [1] of litigation that has begun to "feed on itself". I consider it appropriate to grant leave to the bank to discontinue on the terms sought so as to bring the litigation to an end.

80 For those reasons, I make the following orders:

(1) Pursuant to rule 28.2 of the Uniform Civil Procedure Rules 2005 (NSW) that the following questions be determined separately from any other question in the proceedings, and before any trial in the proceedings:

(a) Whether the relief, which the first and/or second defendants would be entitled to claim under section 12GM of the *Australian Securities and Investments Commission Act 2001* (Cth) (Act) (or any cognate provision under any other legislation), if it established a contravention of Division 2 of Part 2 of the Act (or its cognates), is limited to:

(i) non-monetary relief against the plaintiff; and/or

(ii) the amount of the debt claimed by the plaintiff in these proceedings, as due and owing at the time of judgment, against the first defendant.

(b) Whether the first and/or second defendants are otherwise precluded from seeking or obtaining judgment for a monetary amount against the plaintiff.

(2) In relation to Daleport, that the questions be answered:

(a) As to (a)(i), “no”;

(b) As to (a)(ii), “yes”.

(3) In relation to Mr Walton, that both questions be answered “yes”.

(4) That the bank have leave to discontinue the proceedings on terms that there be no order as to costs.

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