Supreme Court

New South Wales

Case Name:	Gooley v NSW Rural Assistance Authority (No 3)
Medium Neutral Citation:	[2019] NSWSC 1314
Hearing Date(s):	1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 23, 24, 29, 30 April 2019; 15 May 2019; 23 July 2019; further written submissions ending 9 August 2019
Date of Orders:	30 September 2019
Decision Date:	30 September 2019
Jurisdiction:	Equity
Before:	Parker J
Decision:	See [724].
Catchwords:	EVIDENCE — records of prior communications concerning FOS complaint – admissibility – hearsay – prior consistent statement. EVIDENCE — Opinion evidence — Expert opinion – economist's opinion about conduct of bank towards customers – admissibility – Makita principles. CONTRACTS – Performance – Variation of Terms – variation of loan repayment terms – need for consideration – assumption of risk that variation may benefit either party. CONTRACTS — Misleading conduct under statute — variation of loan terms purportedly without customer's knowledge and approval – misleading or deceptive conduct - unconscionable conduct - estoppel. BANKING AND FINANCE — Banks – Statutory unconscionability – two year commercial loan – "asset

lending" – breach of term of contract incorporating Banking Code of Practice.

BANKING AND FINANCE — Banks – breach of term of contract incorporating Banking Code of Practice cll 25.2 and 2.2 – requirement under term for co-operation between the customer and Bank – no breach by fixing final date for repayment after period of forbearance.

BANKING AND FINANCE — Banks — Bank accounts — Interest – entitlement to charge interest at contractual rates following expiry of loan – entitlement to interest on amounts paid and set aside for costs – repudiation – termination.

Legislation Cited:

Evidence Act 1898 (NSW), s 14B
Evidence Act 1995 (NSW), ss 55, 59, 60(1), 69, 79 and 135
Farm Debt Mediation Act 1994 (NSW), ss 4 and 6.

Cases Cited:

Comlin Holdings Pty Ltd v Metlej Developments Pty Ltd (No 3) [2019] NSWCA 214
Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64
Dasreef Pty Limited v Hawchar (2011) 243 CLR 588; [2011] HCA 21
Drivas v Jakopovic [2018] NSWSC 1803
DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423; [1978] HCA 12
Elayoubi v Zipser [2008] NSWCA 335
Kowalczuk and Another v Accom Finance Pty Ltd [2008] NSWCA 343
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305
Neville v Lam (No 3) [2014] NSWSC 607
Parslow v NSW Land & Housing Corporation [2018] NSWSC 843
Perpetual Trustee Co Ltd v Khoshaba [2006] NSWCA 41
Ritz Hotel Limited v Charles of the Ritz Limited (Nos 15 and 16) (1988) 14 NSWLR 107
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332; [1994] HCA 4
Tabet v Gett (2010) 240 CLR 537; [2010] HCA 12

	Toll (FGCT) Pty Limited v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52 Trilogy Funds Management Ltd v Sullivan (No 2) (2015) 111 ACSR 1; [2015] FCA 1452 Vanbergen v St Edmunds Properties Ltd [1933] 2 KB 223 W J Alan & Co Ltd v El Nasr Export and Import Co [1972] 2 QB 189; [1972] 2 ALL ER 127 Watson v Foxman (1995) 49 NSWLR 315 Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1972] AC 741; [1972] 2 ALL ER 271
Texts Cited:	G H Treitel, The Law of Contract (11th ed, 2003, Sweet & Maxwell Ltd) J D Heydon, Heydon on Contract: The General Part (5th ed, 2019, Lawbook Co.)
Category:	Principal judgment
Parties:	Paul Gerard Gooley (First Plaintiff/First Cross-Defendant) Susan Jane Gooley (Second Plaintiff/Second Cross-Defendant) Commonwealth Bank of Australia (Defendant/Cross-claimant) Paul Gerard Gooley (First Cross-Claimant) Susan Jane Gooley (Second Cross- Claimant) Commonwealth Bank of Australia (First Cross-Defendant) Bank of Western Australia (Second Cross-Defendant)
Representation:	Counsel: P E King/I Leong (First and Second Plaintiffs/First and Second Cross-Claimants) T D Castle (Defendant/Cross-Claimant) Solicitors: McKell’s Solicitors (First and Second Plaintiffs/First and Second Cross-Claimants) Dentons Australia (Defendant/Cross-Claimant)
File Number(s):	2016/279614

Publication Restriction: Nil

JUDGMENT

1 Paul Gerard Gooley and Susan Jane Gooley are a married couple who used to be farmers near Casino in the Northern Rivers District of New South Wales. About twelve years ago they changed banks, transferring from their former bank to the Bank of Western Australia ("Bankwest"). They proved unable to meet their loan obligations. Their farming properties had to be sold, and they were left with virtually nothing.

2 Bankwest's assets and liabilities were transferred to the Commonwealth Bank of Australia ("CBA"). The transfer occurred, I assume by statute, as from 1 October 2012.

3 In these proceedings, the Gooleys claim compensation from CBA for alleged breaches of contract and contraventions of credit and consumer laws by Bankwest, and then CBA as its successor. In what follows, a reference to "the Bank" is a reference to Bankwest or CBA as the context requires.

4 The Gooleys' farming operations were based at a property near Clovass on the Richmond River, about 15 kilometres east of Casino. The property had been in Mr Gooley's family since the 1920s or thereabouts. Originally it was used mainly for dairying. In mid-2007 the Gooleys ceased dairying operations in favour of a mixed farming business. Over time they concentrated on the fattening of beef cattle.

5 When the Gooleys transferred to Bankwest in December 2007, the Bank provided them three new banking facilities. The largest of those was a $1.2 million fixed interest facility, which is referred to in evidence as a fixed interest commercial loan, or "FICL". The facility term was fifteen years. For the first five years, the Gooleys were only obliged to pay interest and the rate of interest was fixed. After five years, repayments of principal and interest were required and the interest rate was to be a floating one.

6 Not long after the Gooleys moved to Bankwest, they suffered a damaging flood. This was in January 2008. The Gooleys sought assistance from the NSW Rural Assistance Authority ("RAA"). The RAA was prepared to provide

emergency financial accommodation to the Gooleys but wished to take a second mortgage over the Clovass property. The Bank's consent as first mortgagee was required.

7 In July 2008, fresh loan documentation was drawn up and signed. This provided for the variation of the FICL so as to reduce its term to five years. The Gooleys say that they were not aware of this and it is a major aspect of their complaint against the Bank.

8 In July 2011, the Gooleys took on a further property at Dobies Bight, about 15 kilometres north-west of Casino. The property was known as "Dyraaba" and came from Mrs Gooley's family. The purchase was funded with a further loan of $550,000 from Bankwest.

9 The Gooleys' farming operations performed badly over the period from 2008 to 2012 and they accumulated other major creditors apart from the Bank. The most important of these was George & Fuhrmann ("G&F"). G&F was a firm of stock and station agents whose services the Gooleys had used in the past to buy and sell cattle. In March 2011 the Gooleys made a trading arrangement with G&F under which G&F allowed them credit on their purchase account. The Gooleys used this facility to expand their cattle operations. By April 2012, despite applying some of the funds from the Dyraaba facility to the G&F account, the Gooleys owed G&F approximately $400,000.

10 In April 2012, the bank officer handling the Gooleys' account learned of the Gooleys' indebtedness to G&F and other suppliers. The Gooleys sought an extension of their facilities by a further $200,000 but this was not granted. The Bank instead transferred the file to the Credit and Asset Management Department ("CAM"), which was responsible for doubtful debts.

11 December 2012 marked the fifth anniversary of the draw-down of the funds under the FICL. According to the Gooleys, they expected that the interest-only period would come to an end on this date, with principal and interest payments for a further ten year period. But in November they were advised that the whole facility would expire and they would be required to repay the full amount. The Bank urged the Gooleys to refinance the loan, or sell assets so as to repay the debt.

12 Despite this notification, the Bank took no active steps to recover its loans. Instead there was informal moratorium under which the Gooleys paid an agreed sum by way of interest each month. This sum essentially covered the Gooleys' interest payment obligations, but not principal repayments.

13 The Gooleys' attempts after December 2012 to refinance their operations and to sell their properties came to nothing. In June 2014 the Gooleys lodged a complaint against the Bank with the Financial Ombudsman Service ("FOS"). The effect of this was to prevent the Bank from taking any enforcement action until the complaint was resolved. The FOS issued its determination in May 2015, dismissing the complaint.

14 The Gooleys' attempts to negotiate with their other creditors were unsuccessful. Eventually G&F and another supplier brought debt recovery proceedings against them. The G&F proceedings were settled on the basis that the Gooleys would pay a discounted amount within a certain date, but they were unable to make the payment. As a result they suffered default judgment in the sum of approximately $400,000 in November 2015.

15 In February 2016 a mediation took place between the Gooleys and the Bank under the *Farm Debt Mediation Act 1994* (NSW) ("FDMA"). The mediation was unsuccessful. In June 2016 the RAA issued a certificate under the FDMA permitting the Bank to commence proceedings to enforce its securities.

Issues for determination

16 The Gooleys commenced these proceedings in September 2016, naming the RAA as the first defendant and the Bank as the second defendant. Their claim was that the RAA acted wrongfully in issuing the FDMA certificate. They contended that, in consequence, it was not open to the Bank to take enforcement action against them. They sought declaratory relief and orders setting aside the certificate.

17 In response, the Bank filed a cross-claim against the Gooleys. This was the first cross-claim in the proceedings. The Bank sought judgment for the outstanding amount under its facilities, and possession of the Clovass and Dobies Bight properties.

18 The Gooleys then filed a second cross-claim in the proceedings, against the Bank as cross-defendant. In this cross-claim, the Gooleys sought damages or compensation and a "reopening" of their accounts with the Bank.

19 The Gooleys "settled" their claim against the RAA. They did so by abandoning any claim for relief; the proceedings were dismissed as against the RAA with no order as to costs in May 2017. At one point in the hearing before me, counsel for the Gooleys maintained that this did not prevent the Gooleys from continuing to claim, as against the Bank, that the FDMA certificate was invalid. But this contention was not pursued in final submissions.

20 Among the possibilities which the Gooleys had considered in 2012 was selling some or all of their property at Casino and moving to a beef fattening operation on the Northern Slopes or the Northern Tablelands. They made some enquiries about properties near Inverell. They did not ultimately make the move, but the idea later became important for the purposes of this case.

21 The Gooleys claimed that they had been considering moving to the Tablelands (which was defined, for the purpose of this case, as an area in the Armidale, Guyra, Glen Innes and Inverell districts) even before 2012. They said that if the Bank had treated them differently, they would have moved their operations to the Tablelands at an earlier point. They presented mathematical modelling designed to show that if this had happened they would have prospered, avoiding the financial disasters which they suffered from 2008-2009 onwards.

22 When the Gooleys began the proceedings they had sold off two of the five blocks which made up the Clovass property, with the proceeds going to the Bank. In May 2018 they sold the Dobies Bight property and the remainder of the Clovass property. After payment of the debt claimed by the Bank, the RAA, and G&F, there was a surplus of approximately $610,000. Pursuant to a consent order made in the proceedings, the surplus was paid into a controlled monies account. In July, Stevenson J decided that the Bank was entitled to retain out of the surplus its costs incurred in the proceedings to that point, together with a further sum of $300,000 on account of costs to be incurred in the future: *Gooley v NSW Rural Assistance Authority (No 2)* [2018] NSWSC 1049. The Gooleys were left with only $27,000.

23 As a result of the sale of the properties and the discharge of the debts claimed by the Bank, no substantive relief remains for consideration under the Bank's cross-claim. The only question is costs. The substantive issues arise under the Gooleys' cross-claim.

24 The hearing began on 1 April and extended over fifteen days up to 30 April. This was followed by various supplementary written submissions from the Bank. These included submissions on the admissibility of publications tendered by counsel for the Gooleys about the failure of Halifax Bank of Scotland ("HBOS"), of which Bankwest was then a subsidiary.

25 Following a further hearing on 15 May, it was agreed that written submissions in reply would be filed on behalf of the Gooleys in June. The parties were also to agree on which documents in the Court Book were to be in evidence.

26 This led to further issues being identified. In particular, the parties disagreed about the admissibility of documents generated as a result of the FOS complaint process. I deal with this issue below. And when the Gooleys' reply submissions were filed in June (which extended over 109 pages), counsel for the Bank complained that they introduced new arguments which were not confined to reply.

27 These issues made it necessary to have a further hearing which took place on 23 July. At that hearing I decided to admit the FOS correspondence. It was also agreed after some debate that the Gooleys' June submissions would stand, but that the Bank would have a further opportunity to respond, followed by a final reply from the Gooleys. The last of the submissions was lodged on 9 August.

28 The Gooleys' case against the Bank was not easy to discern. As ultimately formulated in final submissions, it complained about four aspects of the Bank's conduct. In chronological order, these are as follows.

29 The Gooleys' first claim is based on the Bank's conduct in (as the Gooleys put it) procuring the variation of the loan documentation so as to change the term of the FICL from fifteen years to five. The change was first made in July 2008,

and was then carried forward in three subsequent sets of loan documentation signed in September 2009, April 2010 and June 2011.

30 The Gooleys' contention is that they were misled by the Bank. They allege breaches of the Banking Code of Practice (incorporated into the loan documentation); misleading and deceptive conduct; and unconscionable conduct under the *Australian Securities and Investments Commission Act*. 2001 (Cth) (see s12BC; I will refer to this as "statutory unconscionability"). The Gooleys also claim that the Bank's conduct gave rise to an estoppel against it.

31 The Gooleys' second claim is based on the Bank's conduct in making the loan for the purchase of Dyraaba in June 2011. The Gooleys' case characterises the loan as an improper form of "asset lending". The Gooleys allege breaches of the Code of Practice and statutory unconscionability.

32 The Gooleys' third complaint is based on the Bank's alleged failure to support them from April 2012 onwards. The Gooleys allege that this was a further breach of the Code of Practice and a further instance of statutory unconscionability.

33 Fourthly, the Gooleys complain about the Bank's conduct in treating the FICL as being repayable in full in December 2012. The Gooleys contend that this was a breach of contract by the Bank, or alternatively that the Bank was estopped from taking the course. They also allege breaches of the Code of Practice and statutory unconscionability.

34 The Gooleys have always maintained as part of their case that, but for the alleged misconduct of the Bank, they would have been able to trade out of their difficulties at Casino. But over the course of the trial the Tablelands option emerged as the Gooleys' preferred damages claim.

35 On the asset lending claim, the Gooleys' primary case is that if the Bank had not made the Dyraaba loan, they would have moved their operations to the Tablelands in 2011. It now seems that on the FICL variation claim the Gooleys' primary case likewise is that, but for the Bank's alleged misconduct, they would have moved their operations to the Tablelands in July 2008 (or, alternatively, at the time of the later variations in 2009, or 2010, or 2011). The Gooleys also

contend that but for the Bank's alleged misconduct in April 2012 they would have moved their operations to the Tablelands at that point.

36 The Gooleys appear to accept that by the time of the conduct which is the subject of the fourth claim against the Bank (December 2012 onwards) it was too late for them to move their operations to the Tablelands. Under this part of the claim, they seek damages on the footing that but for the Bank's misconduct, they would have been able to continue to farm at Casino.

37 As additional relief, the Gooleys sought orders "opening up" their account with the Bank. It seemed to me that, as a matter of substance, the Gooleys were seeking an account from the Bank as mortgagee. In the course of the hearing I required the Gooleys to specify the transaction or transactions that were challenged and the basis for the challenge. Eventually the Summons and Commercial List Statement were amended and particulars were provided.

38 In summary, there are two aspects to the account which the Gooleys challenge. The first is the charging of interest between January 2013 and the sale of the last of the properties in May 2018. The Gooleys contend that the Bank repudiated the banking contract by intimating that the FICL was repayable in December 2012; that they accepted that repudiation, thereby bringing the contract to an end; and that thereafter the Bank was not entitled to charge interest at contractual rates.

39 The second aspect of the Gooleys' challenge is to the amounts paid and set aside for costs. The Gooleys contend that the Bank had no right to recover costs under the terms of the Bank facilities. Alternatively, the amounts claimed were said to be excessive.

40 The Gooleys complained about the Bank's conduct after December 2012 right up to, and including, the FDMA mediation. It was unclear what significance these allegations had, and at the hearing I pressed counsel for the Gooleys on this.

41 In response, counsel appeared to clarify the Gooleys' case. I understood (and counsel for the Bank understood) that no further and independent claim was being pressed concerning the Bank's conduct of its negotiations with the

Gooleys after December 2012. But the written submissions lodged by counsel for the Gooleys after the hearing appeared to go back on this. In particular, it was contended that the Bank's post-December 2012 conduct involved "enforcement action" which was rendered "void" by the FDMA. As I now understand it, it is not contended on behalf of the Gooleys that this gives rise to some further cause of action sounding in damages or compensation, but it provides a further basis on which the Gooleys can recover interest and costs paid after December 2012.

42 As now formulated, the breaches of the Bank upon which are alleged by the Gooleys occurred between 2008 and 2013. The beginning of this period falls more than eight years before the proceedings were commenced. But the Bank did not plead any limitation defence.

43 The Bank denies that it breached its banking contract with the Gooleys, and also denies that it contravened any of the statutory provisions upon which the Gooleys relied. In addition, the Bank makes an issue of causation. Counsel for the Bank submitted that the Court would not be satisfied that, even if breach of duty or contravention is established, the Gooleys have shown that they had suffered any loss as a result.

44 The Bank disputes the Gooleys' contentions on interest. On costs, the Bank's position is that it was entitled to a costs order in its favour and any challenges to individual items of cost should be dealt with by way of assessment. Ultimately it was agreed between the parties that I should deal with the costs issue after delivering judgment on other issues.

Summary and analysis of evidence

Dramatis personae and lay witnesses

45 Both Mr Gooley and Mrs Gooley gave evidence in support of their claims. They were extensively cross-examined, and counsel for the Bank challenged their credit. I deal separately with their evidence below.

46 The Gooleys also called evidence from four other lay witnesses. These witnesses' evidence concerned discrete points on which their evidence was not disputed; in fact, only one of the witnesses was actually called, and his cross-examination did not involve any challenge to his affidavit. I deal with these

witnesses' evidence at the appropriate places in my detailed review of the evidence below.

47 When the Gooleys banked with ANZ, their bank manager was Rodney James Mitchell. In mid-2007 Mr Mitchell left ANZ and went to Bankwest. The Gooleys followed him there. After the move, Mr Mitchell was the Gooleys' Relationship Manager ("RM") until about March 2012 when he left Bankwest.

48 The Bank called evidence from Mr Mitchell and he was cross-examined before me. His credit was attacked by counsel for the Gooleys. I deal separately with his evidence below.

49 In handling the Gooleys' account, Mr Mitchell was assisted by Steven Avery, who was the Assistant Relationship Manager ("ARM") for the account until about March 2010. After Mr Avery left, Anne Campbell was the ARM. She assisted Mr Mitchell until he left in 2012.

50 Mr Mitchell does not appear to have been replaced as RM when he left. Ms Campbell continued to look after the Gooleys' account under the overall supervision of Glenn Triggs who was the Regional Manager for Northern New South Wales. Mr Triggs was responsible for the account when the Gooleys made their unsuccessful application for further loan finance in April/May 2012.

51 The account was referred to CAM in June 2012. There it was handled by Laura Mulligan. Ms Mulligan was the bank officer who notified the Gooleys that the FICL fell due for repayment in December 2012. She relinquished responsibility for the account at some point in 2013, during the informal moratorium. The account was later taken over in December 2013 by Graham Greentree who managed it until the Gooleys made their FOS complaint in June 2014.

52 The Bank served affidavits from Ms Campbell, Mr Triggs and Mr Greentree but in the end did not call any evidence from them. The Bank called no evidence from Mr Avery or Ms Mulligan. It was not suggested that either of them was not available.

Bank documents

53 The initial loan documentation for the Bank's loan to the Gooleys was drawn up and signed in October 2007. Over the period up to July 2011, there were six

variations to the terms of one or other of the facilities. Copies of each set of loan documents were in evidence.

54 The initial granting of the loan, and each of the variations, generated internal applications and approvals. The applications used two types of forms. One was known as a Credit Risk Submission ("CRS"), and the other as a Credit Risk Facility Amendment ("CRFA"). The applications were submitted under the name of the RM (in each case, Mr Mitchell) and the ARM from the Bank's Lismore branch to its Credit Department in Sydney. Approval or otherwise was notified by the Credit Department in a memorandum which was known within the Bank as a "FATE". Most of the relevant applications were in evidence.

55 The Bank's facility terms provided for regular credit reviews. The Gooleys were required to submit financial information for this purpose. The information would then be submitted in the form of a Credit Risk Review ("CRR") by the Lismore branch of the Bank to the Credit Department. The Credit Department would respond by issuing a FATE, although typically this did not involve any change to the loan terms. The FATE would simply "authorise" (in effect, specify) the next review date. Some of the CRRs were also in evidence before me.

56 The Bank had an internal information and record keeping service known as Genesis. The system allowed the bank officers to enter details of the account and copies of communications relating to it. It seems that Mr Mitchell hardly used the system. There are only a handful of Genesis entries in the system created by him.

57 The Gooleys were apparently provided with copies of at least some of the loan documents when those documents were signed. They received copies of other documents, including internal documents of the Bank, through the FOS process. The Gooleys' reply affidavits in these proceedings annexed a lot of the FOS material (which, of course, included documents they would not have seen at the time) and engaged in a detailed and argumentative commentary on it. As a matter of expediency the Bank did not object to this but invited me to treat the commentary as a submission. That is the approach I have followed.

58 In the period leading up to the hearing, the Gooleys' legal representatives raised various questions about the scope and adequacy of the Bank's

discovery. Shortly before the hearing, a Notice of Motion was filed on the Gooleys' behalf seeking, among other things, orders for further and better discovery. The Bank responded by conducting some further searches and providing some further documents. One of the requests was for production of the original file from the Lismore branch. The Bank was unable to produce the file. Affidavits were filed recording the searches which had been made.

59 The questions about discovery became a recurring feature of the first few days of the hearing. Eventually, on 15 April, counsel for the Gooleys formally moved on the Notice of Motion and sought orders for further discovery of a number of categories of documents. This included the original Bank file from the Lismore branch. But I was satisfied that the Bank's evidence demonstrated that reasonable searches had been made for the file and there was insufficient prospect of the file coming to light to justify any further order. I declined to order any further discovery on this issue, or on the other issues on which further discovery was sought.

Publications on failure of HBOS

60 It is common ground that by mid-2008, when the term of the FICL was reduced from fifteen years to five years, HBOS, which had expanded rapidly before the Global Financial Crisis, was perceived to be in financial trouble. Counsel for the Gooleys sought to go further, asserting that Bankwest itself had systemic problems at the time involving failure to comply with appropriate lending standards and procedures.

61 For this purpose, counsel tendered extracts from two publications. The first was a book by Stephen Bell and Andrew Hindmoore entitled *Masters of the Universe, Slaves of the Market*, which was published in 2015. The second was a report of the Bank of England Prudential Regulation Authority on the failure of HBOS, published in November 2015. The extract from the book dealt generally with HBOS' international subsidiaries. The Bank of England report dealt somewhat more specifically with HBOS' Australian operations which included Bankwest among others. Counsel for the Bank objected and the issue was held over for further argument.

62 In support of the tender, counsel for the Gooleys referred to the decision of McLelland J in *Ritz Hotel Limited v Charles of the Ritz Limited (Nos 15 and 16)* (1988) 14 NSWLR 107 and to my decision in *Parslow v NSW Land & Housing Corporation* [2018] NSWSC 843. The *Ritz* case concerned the admissibility of a memoir of Cesar Ritz, the founder of the Ritz Hotel, written by his widow. It had been published in 1938. McLelland J discussed admissibility on two bases. One was under the *Evidence Act 1898* (NSW), s 14B which provided for a previous statement by a person who is not available to be received as evidence despite the hearsay rule (this provision was the precursor to the *Evidence Act* 1995, s 63(2)(b)). The other was under the principles of judicial notice. In *Parslow* I considered the admissibility of a report made by the Ombudsman as a business record (*Evidence Act 1995* (NSW), s 69).

63 In a supplementary written submission, counsel for the Bank contended that none of the extracts tendered in this case was admissible upon any of these bases. Counsel for the Gooleys did not articulate the precise basis or bases of admission of the documents in question and the issue was not taken any further in any subsequent submission.

64 The result of this is that the Court is left with a bare and general assertion that the extracts are admissible on some basis or other. I do not find this satisfactory. The Court should not have to articulate counsel's arguments for the purpose of ruling on them. It is far from clear to me that any of the bases of admission discussed in the *Ritz* or *Parslow* cases are applicable. I would be inclined to reject the tender for that reason alone.

65 But I think there is a further point. The publication extracts are very general in what they say about HBOS' operations. To be of any use in these proceedings the documents would have to give rise, at least arguably, to an inference specific to the way in which the Gooleys' particular loans were handled. I do not think that either publication comes close to this. Even the Bank of England report, which discusses HBOS' Australian operations specifically, does so at a broad level. It is clear from the report that Bankwest had very extensive banking operations all over the country. These included retail as well as business banking. I do not see in the extracts tendered in this case anything

which would enable me to draw any particular inference about the way in which the Gooleys' loans were conducted. Accordingly, I think that the publications are irrelevant; or, if relevant, the relevance is so tangential that they should be excluded under the *Evidence Act*, s 135.

FOS documents

66 Following the hearing, counsel for the Gooleys sought to have included in the documentary tender bundle a selection of documents from the FOS complaint process. These include the initial complaint itself; subsequent correspondence between the Gooleys, the Bank and FOS; and correspondence containing instructions to, and advice from, the Gooley's advocate in the FOS proceedings. Counsel for the Bank opposed the admission of these documents. Counsel argued that the documents were irrelevant (*Evidence Act*, s 55) or hearsay (*Evidence Act*, s 59) or should be excluded under the Court's general discretion to exclude evidence (*Evidence Act*, s 135).

67 As we will see, counsel for the Bank made a wholesale attack on the Gooleys' credit. This attack included the submission that their account of their dealings with the Bank, and their claims that they would have moved their operations to the Tablelands at an earlier point, were inventions made for the purpose of these proceedings. Counsel for the Gooleys submitted that the FOS correspondence was relevant, as tending to rebut the suggestion of recent invention. In my view they were clearly admissible on this basis.

68 I did not follow the Bank's objection based on hearsay. At common law, documents admitted for the purpose of rebutting the suggestion of recent invention were relevant only as evidence of the fact that the statements in question were made; they were not evidence of the truth of such statements. But the effect of the *Evidence Act*, s 60, is that once admitted the documents are now evidence for all purposes: see *Comlin Holdings Pty Ltd v Metlej Developments Pty Ltd (No 3)* [2019] NSWCA 214 at [77].

69 Nor did I think that the prejudicial effect of, if any, receiving the documents as evidence would outweigh their probative value or that the admission of the documents of the evidence would otherwise result in undue waste of time or be misleading or confusing (*Evidence Act*, s 135). Of course it must be borne in

mind that evidence of this type is not contemporaneous and has the usual frailties inherent in recollections, in the context of legal proceedings, after the event: see *Watson v Foxman* discussed at [101] below. But taking these limitations into account, the documents can still have significant probative value. They have the advantage of being more contemporaneous than the Gooleys' affidavits. In fact, as will be seen, the FOS correspondence significantly undermines some aspects of the Gooleys' case as presented in their affidavits. There was no justification for excluding them under s 135.

70 FOS' determination was given on 22 May 2015. Although counsel for the Bank objected to the Court admitting the FOS correspondence, counsel submitted that if that correspondence was admitted the Court should also admit FOS' determination. This was objected to by counsel for the Gooleys.

71 The other FOS documents are relevant because they contain, expressly or by implication, statements by the Gooleys which can be compared with the affidavit accounts given in these proceedings. The FOS determination itself is only FOS' opinion on the evidence presented to it. It is not a statement by the Gooleys and is not relevant to the question of recent invention. In my view it is inadmissible. I uphold the objection.

Dr McGovern's report

72 The Gooleys sought to call opinion evidence on liability issues from Mark McGovern, PhD, an economist who is a Visiting Fellow at the School of Economics and Finance in the Queensland University of Technology ("QUT"). Counsel for the Gooleys tendered a report from Dr McGovern. I rejected the tender, concluding that Dr McGovern's evidence was inadmissible.

73 At the time of rejecting Dr McGovern's evidence, I said that I would give my reasons for doing so in my judgment. I now set out those reasons.

74 Dr McGovern's report was dated March 2019. It was entitled: "The Bankwest – Gooley partnership relationship: issues, analysis and findings". The report contained, as an annexure, what was described as a brief background CV of Dr McGovern and a list of publications.

75 Dr McGovern describes himself as an economist and I assume that his PhD is in this discipline. He was a researcher and lecturer at QUT for twenty-seven years before taking early retirement at the end of 2016. He is currently a Visiting Fellow in Economics and Finance at QUT.

76 According to his CV, Dr McGovern's career in economics has involved academic work (both on his own account and supervising the studies of students); journal publications; writing of reports for governments and industry; attendance at summits and participation in other areas of public discourse; and media commentary. From the brief description provided in the CV, some of these contributions have touched on agriculture and debt.

77 For the purpose of his report, Dr McGovern was provided by the Gooleys' solicitors with copies of the current pleadings as at September 2018. The instructions stated:

> You are instructed to review the pleaded failure of the Bank with respect to the Gooleys' credit arrangements and to comment.
>
> The facts and matters which you should assume are set out in the Affidavits of the Plaintiffs and Defendants and miscellaneous documents enclosed.
>
> …
>
> Several exhibits relating to damages and loss have not been forwarded as in all probability they are not relevant and too voluminous. If you believe relevant after perusing the documents now forwarded, we can provide.

78 The evidence did not identify what were the "miscellaneous documents" which were enclosed. Nor did it identify which of the exhibits were not sent to Dr McGovern or whether he called for any further exhibits apart from those which were sent to him. All the report said on the subject is that the affidavit and current pleadings and other documents were provided in two large boxes of folders.

79 The report was discursive in form. As has been seen, no specific questions were asked of Dr McGovern; he was simply invited to "comment".

80 The report began with a section entitled "Position in outline" which seemed to be an overall summary. Under the subheading "Specific Observations and Deductions" Dr McGovern set out a series of propositions about the dealings

between the Bank and the Gooleys. These propositions were critical of the Bank. Under the sub-heading “Conclusions” the report then stated:

> Evidence of bank and banker incapabilities and associated failures to act fairly and reasonably, particularly in response to adverse external events, with due regard to GP [Gooley Partnership] interests is considerable.
>
> Various combinations of the above points can provide logical explanations for many relationship incidents. They also suggest the nature and area of Breaches of the Code, and more widely.
>
> Impacts from external events were clearly borne asymmetrically borne. Without effective bank efforts at rectification, negative effects from inadequately accommodated incidents had a cumulative negative effect on GP but no obvious negative effect on the bank.
>
> In combination, failures of BW [Bankwest] and associates resulted in a premature termination of the relationship with needless damage and significant losses experience by GP and the Gooley family more broadly.
>
> Premature termination would have been markedly less likely in a relationship with a well-stanced and properly functioning bank that could aptly act to effectively accommodate adversities affecting the relationship.
>
> Presuming such a bank would so act, it seems more than reasonable and fair to conclude that balance sheet strains would have been more promptly recognised, discussed and ameliorated or resolved. After canvassing options, actions to de-stress balance sheets and the wider relationship dynamic should normally follow. Such a relationship would have been successful for both GP and BW.
>
> However, untoward and unconscionable BW "impatience" means there is scant evidence of any real interest, let alone actions, in "working with" a borrower distressed by events beyond its control.
>
> Difficulties occur and no lender or borrower are ever perfect. Nor is the weather, market or world. In the absence of any ability to make effective responses any relationship will struggle.
>
> It is not abstractions, protocols, plans and the like but real persons with an ongoing intent and capability in making a relationship work as best they can who provide the best chance for success. Gains from the relationship are mutual, for not just the immediate parties but also for the wider industries and society.
>
> Specifically, the Gooley Partnership would likely be successfully farming today had their relationship been with a better bank. ANZ arrangements would have been more suitable with a greater likelihood of a mutually successful investment relationship. However, even with BW arrangements a much better outcome should be expected and could have been achieved if bank agents acted in accord with their duties under Law, Code and Convention.

81 The next section of the report was headed “context”. This discussed the financial stresses on Bankwest and on CBA’s approach to the management of Bankwest’s loan portfolio after CBA acquired it. It referred to evidence given to

the Banking Royal Commission by CBA's Chief Risk Officer about Bankwest's credit review process.

82 The next section was headed "unconscionable behaviour". It referred at a general level to legal and economic theories of bargaining and decisionmaking.

83 The next section was headed "specific claims made and my findings". This set out twenty propositions critical of the Bank, which largely corresponded with the "specific observations and deductions" in the "position and outline" section. The twenty "findings" were supported by further detailed discussion in each case in the following section of the report.

84 The final section of the report was headed "conclusions". This consisted of a further set of propositions critical of the Bank's conduct. These are too lengthy to set out in detail but were similar to the conclusions in the "position in outline" section which I have already quoted. The last two paragraphs were:

> It will be up to the Court to ultimately judge the responsibility and fairness of lending, the extent of unconscionable conduct, the importance of such things as uncommunicated variations in the loan mix and the seriousness of repeated breaches of the Code of Banking Practice – as well as their particular and cumulative impacts.
>
> There is much evidence of serious incidents with significant adverse impacts on the Gooley Partnership in all such areas.

85 The difficulties with the report may be illustrated by two examples. One of the "specific observations and deductions" was headed "financial product fitness – not fit for purpose". It stated (footnotes omitted):

> ● Incomes fluctuate in agriculture but regular repayments were deemed due in the product as *Implemented* (61 Mitchell Rod BW, 21 Gooley Paul, and 22 Gooley Susan 2007). This is a product-damning inconsistency unless risk is effectively managed by design.
>
> ● However this was <u>not</u> a problem with *the product as initially approved (Business Edge*, *to 30 years*] (61 Mitchell Rod BW, and 71 Administrator08 BW 2007) as it allowed flexibility in repayments.
>
> ● Automatic drawings from an overdraft account to meet property repayments while common can and do disguise capital positions in ways that disadvantage the borrower.
>
> ● The bank failed to effectively react to difficulties encountered by the borrower that prudently would have been anticipated.
>
> ● Such an asymmetric response to external events that disrupted expected GP income flows would,

- if in a broad policy or organisational stance, deem the offered loan arrangements as not fit for purpose due to foundational design structure
- if a particular policy, deem the offered loan arrangements as not fit for purpose due to a chosen design implementation
- if applied particularly to this partnership, deem the offered loan arrangements as not fit for purpose due to design spirit and unjust relationship expectations.

The financial product set supplied and as managed by BankWest was not fit for purpose.

86 Another of the "specific observations and deductions" was headed "financial risk". It stated:

- Margins charged on a reference rate appear justifiable only as a risk management surcharge.
- Failure to exercise this surcharge in way that helped rectify the borrowers position when risks are realised constitute an ongoing fee for no service.
- The margin on the property loan was less than that of competitors which would indicate a less than usual provision for income shortfalls reducing cash reserve positions and the ability to provide interest payments as scheduled.
- No accommodations were made by BW or parents despite the public through RAA and GP by increasing off farm work income.
- Imposts in the later stages of the relationship needlessly and opportunistically accelerated the losses incurred by GP.
- The relationship was asymmetric in ways the effectively and unethically limited the reasonable prospects of borrower success.

The Gooley Partnership was charged a risk management surcharge. Bank actions do not recognise this, so a "fee for no service" situation exists.

87 The passage I have quoted about lack of fitness for purpose appears to be a reference to the reduction in the term of the FICL. Dr McGovern's argument boiled down to saying that the Gooleys encountered difficulties in making the "regular repayments" which were due and those difficulties should have been anticipated by the Bank, presumably by making some other provision for repayment. This however had not been a problem with the loan "as initially approved", it then having a term of "up to" 30 years.

88 Underlying this must have been assumptions about the respective legal responsibilities of the Bank and the Gooleys concerning the repayment terms, and factual assumptions about dealings which took place between the parties in that regard. But the legal assumptions were not articulated and the factual assumptions were not identified, at least explicitly. In general, Dr McGovern

seems to have accepted, uncritically, every factual allegation made by the Gooleys about the Bank, but even so it is unclear whether in this part of the report he was assuming that the loan as originally approved was 30 years, which of course was never the case.

89 Similar observations apply to Dr McGovern's criticisms of the Bank for supposedly charging a "fee for no service". On the one hand Dr McGovern proceeded on the basis that the Bank in some way had to justify charging a margin on the loan above wholesale interest rates. On the other hand he appeared to accept that the margin charge was actually less than that of competitors. Nevertheless the relationship was "asymmetric" and in some way "unethical". Again these conclusions must have depended upon a whole array of unstated premises. But this example illustrates another point. There was no case made before me that the interest rate charged to the Gooleys under the FICL (or indeed any of the other loans) was unconscionably, or in some other way unlawfully, high. This part of the report does not appear to have been directed to any actual issue in the proceedings.

90 In *Drivas v Jakopovic* [2018] NSWSC 1803 I pointed out the problems which can arise where an expert report expresses conclusions on a question of mixed fact and law. On analysis, the conclusions may depend upon assumptions about the applicable legal principles which are incorrect; or they may depend upon acceptance of factual allegations which are contrary to what the Court ultimately finds; or both. In *Drivas* I concluded that the opinions in question did not satisfy the requirements of admissibility under the *Evidence Act*, s 79, because they were not based on relevant experience or expertise: see also *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 743-744 [85]; *Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588 at 603-604 [35]. In *Trilogy Funds Management Ltd v Sullivan (No 2)* [2015] FCA 1452 Wigney J rejected purportedly expert evidence of mortgage fund management practice for substantially the same reasons: see at [724]-[752]. Dr McGovern's report is another prime example.

91 The same conclusion can be expressed in a more fundamental way. The point is that s 79 does not make writings by an expert generally admissible. It is an

exception to the opinion rule which provides that a fact cannot be proved by having someone express an opinion that it exists (s 76(1)). For the exception to operate, it is critical to identify the fact which the opinion is supposed to be evidence of. Until that is done the s 79 enquiry into whether the opinion in question is wholly or substantially based on expert expertise cannot even begin.

92 In the present case, no opinion on any such concrete fact, one way or the other, was asked from Dr McGovern. Dr McGovern's conclusions were expressed at a level of generality that made it impossible even to begin to undertake the s 79 analysis. The statements that the financial relationship between the Gooleys and Bankwest were "inadequate", were, in this context, merely question begging.

93 I doubt that the reference to Bankwest's products not being "fit for purpose" and to a "fee for no service" situation was accidental. This is the language of the headlines generated by the Royal Commission into Banking. But that was a broad-ranging enquiry which looked generally at banking practices from the point of view of other interested parties as well as customers.

94 The Court's task in the present case is quite a different one. The Court must decide, by reference to pleaded allegations and evidence presented before it, whether the Bank breached its legal obligations to the Gooleys, and if so, what legal relief the Gooleys are entitled to as a result. Dr McGovern's report was of no use whatsoever in discharging this task. I find it hard to see why it was presented to the Court in the first place.

Mr Gooley's evidence

95 Mr Gooley was born in December 1957. He was brought up in the Casino area and attended school in Casino. When he left school in 1975 there was not enough room for him in the family farming operation at Clovass. He went into banking, working at bank branches at Tamworth, Casino and Macksville for six and a half years. He also worked as a costing clerk in local government for two and a half years.

96 In 1983 Mr Gooley joined the family farming operation at Clovass. He farmed in partnership with his parents and his two brothers.

97 In December 1994 Mr Gooley was elected to the board of Norco Co-operative Limited ("Norco"), a large dairy co-operative company based on the North Coast of NSW. He held that position until 2001 when he resigned to concentrate on farming.

98 At the time Mr Gooley's dealings with Bankwest began in the second half of 2007, he was forty-nine years old and had twenty-four years' experience of farming on the property at Clovass. He considered, no doubt correctly, that he was experienced in financial matters. This experience came from his work in banking and his time as a director of Norco as well as from farming.

99 Mr Gooley had always been good with numbers. For the purpose of managing the Gooleys' farming operations Mr Gooley developed a spreadsheet-based mathematical model which he referred to as the Activity Based Prediction ("ABP") model. He used this model to budget for income and expenses across the various parts of the mixed farming business which the Gooleys ultimately developed.

100 Mr Gooley used the ABP to produce the regular budgets that he provided to the Bank. The information which Mr Gooley provided was unusually detailed and, according to Mr Gooley, was praised by Mr Mitchell. Mr Gooley also used the model to present calculations relevant to the damages claim in these proceedings, as I will describe in more detail below.

101 The critical aspects of the Gooleys' case depended upon conversations between them and Mr Mitchell between 2007 and 2011. Mr Gooley found himself in the position of giving evidence about those conversations based on his unaided recollection, many years after they had occurred, and in a litigious context. Counsel emphasised the difficulties of proof that this generally creates: *Watson v Foxman* (1995) 49 NSWLR 315 at 318-319.

102 These difficulties of proof manifested themselves in Mr Gooley's evidence. Some of the details in Mr Gooley's affidavit were demonstrably incorrect, or highly implausible, when compared with the contemporaneous documentary evidence. During Mr Gooley's cross-examination, I was left with the impression that he has little real recollection of that detail; and this impression was

confirmed when his evidence was compared with the instructions he earlier gave, in 2014, for the purposes of the FOS proceedings.

103 The evidence before me also revealed that Mr Gooley was somewhat economical with the truth in dealing with his creditors. On the one hand, I conclude that, contrary to Mr Gooley's assertions, he did not reveal the cattle trading arrangements he made with G&F to the Bank until he was forced to do so; his earlier written reports to the Bank failed to mention these dealings. On the other hand, Mr Gooley tried to keep G&F in the dark about the fact that the Gooleys' loans with the Bank had been referred to CAM in 2012. Mr Gooley also falsely claimed to another creditor, Alan Hill, that the Gooleys had the Bank's support. On Mr Gooley's own admission, the tactics he used to keep his creditors at bay were less than truthful.

104 I appreciate that Mr Gooley, in giving evidence before me, was appearing in a court of law and swore to tell the truth. But his earlier tactics in dealing with his creditors are not irrelevant when evaluating the weight to be given to his evidence, and they are certainly relevant in assessing the weight of things Mr Gooley said in the contemporaneous documents. At best, his tactics say little for his candour.

105 But counsel for the Bank went even further. Counsel submitted that the evidence presented by Mr Gooley was an elaborate embroidery designed to support the Gooleys' case in the proceedings, with no basis in fact. I regret to have to say that I think there is force in this submission. At best, these embroidered details represent what Mr Gooley has convinced himself probably happened in his meetings with Mr Mitchell and others. At worst, they are outright inventions.

106 For these reasons, I think that Mr Gooley's evidence on contentious issues in the case is generally unsafe to rely upon. I have treated his evidence with great caution.

Mrs Gooley's evidence

107 Mrs Gooley was born in February 1970. I assume that she was also brought up locally. Her family were dairy farmers on "Dyraaba". Mrs Gooley married Mr Gooley in August 1998. They have two children.

108 After leaving school, Mrs Gooley undertook a Bachelor of Business degree at the University of New England, majoring in accounting and finance and graduating in 1993. In 1997 she obtained work as a senior manager in a local accounting firm known as “Wappetts”. In 1998 she became a full member of the Australian Society of Certified Practicing Accounts (“CPA”).

109 From 2001, Mrs Gooley operated Dyraaba in partnership with her brother. As will be seen, Mrs Gooley and Mr Gooley operated the Clovass property in partnership from 2004 onwards. Although a full partner in both operations, Mrs Gooley left the farming operations to her brother and husband respectively. She continued to work for Wappetts until 2010. From 2010 to 2015 she worked for Southern Cross University in what I assume was an accounting role. She held the position of Manager of Taxation and Transactions.

110 Mrs Gooley was responsible for the book keeping for the Gooley businesses. She used an accounting software package for this purpose. Financial statements and tax returns were done externally, based on Mrs Gooley’s books. As will be seen, Mrs Gooley’s accounts were used in evidence in these proceedings in connection with the assessment of damages.

111 Counsel for the Gooleys submitted that Mrs Gooley was in every respect an equal partner with Mr Gooley in their business. I accept that Mrs Gooley has a strong mind and is an intelligent woman who did not just do what her husband told her. But at the same time I think it is clear that to some extent they operated in different spheres. In particular, it was Mr Gooley who was mainly responsible for finance issues and had most of the dealings with the Bank. Mrs Gooley attended some of the meetings with Mr Mitchell and was required to sign the loan documentation. But she was not present at all of the discussions and not so involved in the detail as Mr Gooley was.

112 Mrs Gooley did give evidence of conversations she had with Mr Gooley about finance issues, and it seems that he regularly reported to her his dealings with Mr Mitchell and others, and discussed major financial decisions with her. But her evidence on these subjects, although admitted as evidence, was second hand. Not surprisingly, there were inconsistencies between it and Mr Gooley’s evidence.

113 Furthermore, the same general comments which apply to the reliability of Mr Gooley's evidence apply also to Mrs Gooley's. As with Mr Gooley, Mrs Gooley was giving evidence based on unaided recollection long after the event and in a litigation context. Regrettably, also, her account included embroidered details, which are highly suspect. As with Mr Gooley, I have approached her evidence with caution.

Mr Mitchell's evidence

114 Mr Mitchell has worked in banking for substantially the whole of his career life. He left school in 1983 and joined ANZ in July 1984. He worked his way up from a teller to a Branch Manager and then to a relationship/lending manager on the north coast of New South Wales. He began work with Bankwest in May 2007 and said that he resigned in about late March 2012 to join St George Bank at Lismore as a relationship manager. He worked there until October 2015 and then joined the Commonwealth Bank in Lismore in November 2015.

115 While employed with Bankwest Mr Mitchell was responsible for loans which typically ranged between about $500,000 and $5 million. By the time he left Bankwest he was working with about sixty customers or customer groups. About half of these customers were agricultural businesses and about half were commercial businesses.

116 Not surprisingly, Mr Mitchell had little, if any, recollection of the details of his dealings with the Gooleys. In his evidence he referred extensively to the loan documentation and the internal bank applications and reviews. Much of his evidence took the form of statements of what he would have done in accordance with his "usual practice". Thus, for instance, he gave accounts of the sorts of things he said he would in his "usual practice" have disclosed to the Gooleys in meetings.

117 Evidence of practice is frequently given in cases such as this. Indeed, for practical purposes it may well be unrealistic for the evidence of bank officers to be given in any other way. But the utility of evidence of business practice varies, depending on the form which it takes.

118 Strictly speaking, it is not admissible for a witness who cannot remember doing something on a particular day to give evidence directly that, in accordance with

his usual practice, he would have done it. What is admissible is evidence of the practice (which can be given by the witness or anyone else having sufficient knowledge of that practice), from which the Court can be invited to infer that the witness did actually so act on the day in question: see *Connor v Blacktown District Hospital* [1971] 1 NSWLR 713 at 721, per Asprey JA, with whom Mason JA agreed; *R v Gordon (No 4)* [2016] NSWSC 312 at [14]-[15], [20].

119 The key point is that the drawing of the inference is ultimately for the court. Whether the court draws the inference depends upon how compelling the evidence makes it. Where the business practice in question involves a step which is a mechanical one and does not involve any discretion, it may readily be possible to draw the inference. But where the usual practice described in the evidence is neither regular nor uniform, the court can have less confidence that the step in question was actually taken on the occasion in question. In such a case, the evidence of "usual practice" may in truth be no more than the witness' reconstruction, or hope, about how he or she would have behaved in the circumstances of the case.

120 This has particular application to the present case where the alleged practice included things which Mr Mitchell said he told his customers. Mr Mitchell's conversations with the Gooleys would have been specific to their circumstances and would have taken place in the context of Mr Mitchell's previous dealings with them. Mr Mitchell's dealings with the Gooleys may, at a broad level, have been similar to Mr Mitchell's dealings with his other customers, but they would not have been exactly the same.

121 Even if Mr Mitchell did generally have topics which he wished to cover in his discussions with customers on particular occasions, it was not suggested that he had a script which he read out to each of them. Rather, the language he used would have varied from customer to customer, depending on the context of Mr Mitchell's previous dealings with the particular customer and the customer's particular circumstances. Furthermore, the conversations Mr Mitchell had with his customers would have been dynamic. Different customers would have reacted differently. Some may have interrupted Mr Mitchell to raise other issues. All of these factors make it difficult for the Court to be satisfied

that the conversations between Mr Mitchell and his customers were sufficiently regular and uniform to support an inference that he would have made particular statements to the Gooleys on particular occasions: see *Elayoubi v Zipser* [2008] NSWCA 335 at [86]; *Neville v Lam (No 3)* [2014] NSWSC 607 at [107].

122 Mr Mitchell's affidavit evidence was extensive and his cross-examination was lengthy. He accepted some of the accounts given by the Gooleys and rejected others. But I was left with the impression that he had little actual recollection of his dealings with the Gooleys. There were a number of aspects of the documentary evidence which Mr Mitchell was unable to explain. One was why the Bank's loan variation documentation for July 2008, although signed by the Gooleys, was not witnessed or dated. This was contrary to Mr Mitchell's practice and inconsistent with all of the other loan documentation for the Gooleys which was in evidence. In my view Mr Mitchell's evidence of things that he would have done in his "usual practice" was of very limited weight.

123 The cross-examination of Mr Mitchell by counsel for the Gooleys was hostile. That hostility was carried forward into counsel's final submissions. Counsel did not hesitate to submit that Mr Mitchell lied in his evidence. Counsel also submitted that Mr Mitchell pushed the Dyraaba loan for his own purposes. Counsel's submissions stated that Mr Mitchell was "a banker in search of a bonus".

124 As already noted, much of Mr Mitchell's evidence was based on what he said was his "usual practice". Most of that evidence I did not find particularly useful. There were also things which Mr Mitchell could not explain, or about which he appeared to be mistaken. But it is only right to say that I did not think that any of his evidence was consciously or deliberately false. Most if not all of the passages in his evidence did not fairly bear the interpretations which counsel put on them for the purpose of attacking Mr Mitchell's credit. In my view the cross-examination went nowhere near establishing that Mr Mitchell was a liar.

125 One of the categories of documents which counsel for the Gooleys sought at the trial by way of supplementary discovery from the Bank was documents recording Mr Mitchell's remuneration arrangements and details of his bonuses (if any). I rejected that part of the application because it was plainly a fishing

expedition. This, of course, would not have prevented counsel from pursuing the issue (including by reagitating the application) if further evidence had emerged at the trial. But none did. On the material before the Court, I can see no justification whatever for counsel's submission that Mr Mitchell was improperly influenced in his dealings with the Gooleys by the expectation of some sort of bonus.

Clovass property

126 There were five parcels of land which, at various times, made up the Gooleys' holding at Clovass. The core holding was a parcel of land known as the "Home Block" which consisted of 80 acres (32.27 hectares). It was bounded on the west by the meandering course of the River Tweed and on the east by the Tomki-Tatham Road which runs from north to south. Located on the land were the dairying complex and associated feed area; a machinery shed; and the family homestead, which had been moved to the site in the 1950s after originally having been built elsewhere in the 1920s.

127 Immediately to the north of the Home Block, and bounded on the west by the River and on the east by the Road, was another block of land consisting of 101 acres (41.02 hectares) and known as "Willowbank" or "Cowans". Located on it was a 1950s cottage.

128 Immediately to the north of Willowbank was another block bounded on the west by the River and on the east by the Road, consisting of 102 acres (41.08 hectares). This was known as "Pattons" or the "Patton land". To the east of the Road were two blocks consisting of 95 acres (38.28 hectares) and 131 acres (53 hectares).

Acquisition of Clovass property and initial operation, October 2004 to February 2007

129 Mr and Mrs Gooley took over the Clovass property (which did not then include the Patton land) from Mr Gooley's parents in October 2004. Previously it had been a mixed farming operation involving contracting and cattle as well as dairying. Under Mr and Mrs Gooley it reverted to being a dairy farm.

130 In his affidavit, Mr Gooley described his philosophy of farming as involving "high intensity agriculture" or "high intensity farm production systems". This is an approach which generally requires a high level of investment in

infrastructure, plant and machinery, with a view to higher levels of production, and resulting in higher levels of gearing (debt) and lower equity. In its application to cattle, the approach seeks to achieve higher growth rates, stocking rates and stock turns. It generally involves intensively irrigated pasture systems and supplementary feeding systems for the animals, and requires active management of their health and nutrition. Mr Gooley contrasted this with most of the beef cattle farmers in the region. He characterised their operations as passively accepting "what the seasons deliver" with commensurately low levels of stocking, requiring lower levels of investment in farming assets with a correspondingly lower level of gearing and higher level of equity.

131 Mr and Mrs Gooley operated their farming business as a partnership. They used the name "Gooley Farms" as a business name for the partnership's farming operations. The Gooleys also used their farm machinery for off-farm contracting work. The Gooleys used the name "Gooley Ag Services" for this part of the business. The Gooley Ag Services business was carried on by a company called Gooley Ag Services Pty Ltd as trustee for a trust called the Gooley Family Trust. It seems that the machinery itself remained on Gooley Farms' books and only income and direct wages associated with the contracting went through Gooley Ag Services.

132 For the purposes of their dealings with the Bank, and the preparation of their internal management accounts, the Gooleys did not distinguish between the two business entities. The same approach will be followed in this judgment.

133 The Gooleys' acquisition of the Clovass property was financed by the ANZ under two thirty-year business loans. These loans refinanced pre-existing loans from the CBA. The ANZ loans carried a fixed interest rate for a period of three years from draw-down in October 2004; the interest rate was to step up after three years with an additional margin of 2.08%.

134 The Patton land was purchased with the assistance of further finance from the ANZ in March 2005. The term of this loan was also thirty years with a fixed interest rate for five years, and with an additional margin of 2.08% applying after the expiry of that period.

135 Before the Gooleys took over the Clovass property there was a severe drought in 2002 and 2003. This resulted in losses of over $300,000 in the 2003 and 2004 financial years.

136 After a respite in 2004 and 2005, which resulted in a small profit of about $20,000 in the 2005 financial year, the drought returned in 2006 and 2007. According to information provided by the Gooleys to the RAA in March 2008, the result for the 2006 financial year (the first full year of the Gooleys' operation of the Clovass property) was a loss of $140,000. The cash result for the 2007 financial year (taken from the Gooleys' management accounts because the financial statements had not yet been finalised) was a loss of $190,000.

Cessation of dairying, March to August 2007

137 In March 2007, the Gooleys decided to cease dairying and shift to a diversified farming operation involving a mix of cattle fattening, cropping, contracting and fodder sales. The rationale for this decision was set out in a memorandum from Mr Gooley to Mr Mitchell (then with ANZ) in March 2007. Mr Gooley's memorandum stated that the dairy industry in the region was "in crisis" as a result of the deregulation of milk prices. The previous four years had seen two drought cycles. The Gooleys wished to move back to the type of diversified operation under which the Clovass property had operated when it had been run by Mr Gooley and other members of his family, before Mr and Mrs Gooley acquired it.

138 Mr Gooley proposed that about a third of the area of the farm would be used for the beef fattening enterprise. The objective was to purchase steers and hold them for around a hundred days, increasing their weight from 250kg to 450kg. Cows were to be purchased if suitable opportunities arose. The Gooleys would look at entering into supply contracts with feed lots or major retail outlets in due course. Opportunistic cattle trading might also be available. The remaining two-thirds of the property would be used for cropping. In contracting, the Gooleys proposed to concentrate on round bale silage production and earthworks (drainage and land levelling).

139 Capital expenditure of $45,000 was required for the cattle operations. This was for cattle feeding, weighing and handling facilities. The Gooleys also wished to

consider purchasing some further equipment in machinery for the cropping, contracting and fodder operations.

140 In response, the ANZ issued a letter of offer to the Gooleys at the end of June 2007. By then Mr Mitchell had left the ANZ; the offer was issued under the name of a different manager. The offer involved the continuation of the existing thirty year loans (the principal amount then outstanding being $1.307 million); a new variable rate business loan for six months ($285,000); and an overdraft with a facility limit of $260,000.

141 Meanwhile, the Gooleys began to implement their plan. They sold their dairy cows in August 2007. For the moment, they retained a herd of heifers.

Change of banks from ANZ to Bankwest

142 The Gooleys approached Mr Mitchell, by then with Bankwest, for a finance offer to consider as an alternative to the ANZ offer. In mid-September 2007 Mr Gooley sent Mr Mitchell his financial statements and budgets. At the time, Bankwest had an agency relationship with an equipment financier, Capital Finance Australia Ltd ("CFAL"). Mr Gooley asked for the offer to include equipment finance for various new and second hand items of equipment which he wished to buy.

143 In October 2007 Bankwest issued its offer. The total facility limit was to be $1.929 million. This was made up of $1.57 million to refinance the Gooleys' debt to the ANZ; finance for equipment purchases of $279,000; and a further $80,000 for upgrading yards and fences and additional working capital.

144 There were four components to Bankwest's finance offer. First, there was the FICL. The principal amount was to be $1.2 million with a fifteen year term. This was to be interest-only for the first five years. Thereafter principal and interest repayments would be required over the remaining ten years. Second, there was a fixed interest loan (known as the Business Edge Loan) for $150,000, repayable as to principal and interest over a period of five years. The third component was an overdraft with a limit of $300,000. The fourth was equipment finance from CFAL of $279,000 for the equipment purchases.

145 The offer was formally accepted by the Gooleys in mid-October 2007. The loans were drawn down, and the term of the FICL began, on 12 December.

Trading for 2007 - 2008

146 In early October 2007, shortly before Bankwest issued its offer, there were damaging storms at Clovass. Hail destroyed 100 acres (40 hectares) of the barley crop and another 100 acres (40 hectares) of fodder, oats and rye pasture.

147 Not long afterwards, between 4 and 7 January 2008, there was a major flood at Clovass. According to Mr Gooley, the flood peak was only 100mm less than the 1954 flood, which had been the worst flood in the previous hundred years. The Gooleys' summer crop was destroyed. The floodwaters also damaged the property.

148 In a later memorandum to Mr Mitchell Mr Gooley assessed the loss of budgeted income, and additional costs, of these natural disasters, at over $450,000. Ultimately the Gooleys made a loss for the year of more than $60,000.

RAA disaster relief and loan

149 The Gooleys applied to the RAA for disaster relief. They obtained an interest subsidy of $104,500 and a relief & recovery grant of $5,000. The RAA also approved a loan of $130,000. This was to be interest-free for a period of two years, after which it was to carry interest at a concessional rate of 2.85%, being repayable over a ten year period in annual instalments of $15,150.

150 The RAA approved the loan in principle in mid-April 2008. But the loan had to be secured. For this purpose the RAA was prepared to accept a second mortgage but required the consent of the Bank as first mortgagee, and a limitation on the Bank's priority of $1.65 million.

First Bankwest variation, July 2008

151 At the end of June 2008 Mr Mitchell submitted an application to the Bank's Credit Department for amendment of the Gooleys' facilities. The application sought the Bank's consent for the grant of the second mortgage to the RAA and the limitation of the Bank's priority under the first mortgage to $1.65 million.

This was sufficient to cover the Bank's facilities apart from the CFAL asset finance, which presumably did not need to be secured on the property.

152 The application also provided for some variations to the facility terms. Most importantly, the FICL was to expire and be repayable at the end of the interest-only period in December 2012; the further ten year period of principal & interest payments was to be removed.

153 The application was approved at the beginning of July. A formal letter of offer containing the varied facility terms was issued and signed by the Gooleys. The letter of offer did not expressly refer to the Bank consenting to the RAA second mortgage; this was separately documented between the RAA and the Bank in August 2008.

Trading for 2008 to 2009

154 The Gooleys' poor results continued in the 2009 financial year. The autumn and winter season in 2008 was abnormally wet, reducing cropping for fodder and sale. Another damaging hailstorm took place in October 2008. Unseasonally wet weather in the first quarter of 2009 was followed by another flood in May. This partly destroyed the Gooleys' crops and reduced yields and prices. Ultimately the loss for 2008-2009 was $166,000.

Sale of Patton land and second Bankwest variation, August to September 2009

155 Following the May 2009 flood, the Gooleys submitted a further disaster relief application to the RAA. They asked for a further concessional loan of $120,000.

156 The Gooleys also decided to sell the Patton land and apply the proceeds to reducing debt. On 21 August Mr Gooley wrote to Mr Mitchell confirming the exchange of contracts. The sale price was $600,000. Mr Gooley proposed that this be applied to reducing debt, in part by paying out equipment leases, and in part by reducing the Bank facilities. Mr Gooley indicated that if the $120,000 was obtained from the RAA, that too would be applied in reduction of the Bank facilities. Pending settlement, Mr Gooley sought a temporary increase in the Gooleys' overdraft from $300,000 to $360,000.

157 The Bank's response took place in two stages. First, Mr Mitchell obtained internal approval to increase the overdraft by $60,000 as requested. This was granted until 31 October, and did not require a formal letter of offer.

158 The Bank then approved the variation of the facilities consequential upon the settlement of the sale. The Business Edge loan (then about $105,000) would be paid out and the principal amount under the FICL reduced by $150,000 from $1.2 million to $1.05 million. The balance could be used to pay off equipment leases.

159 A letter of offer was issued and was accepted by the Gooleys. The sale proceeded and the settlement proceeds used to pay off the Business Edge loan and reduce the principal amount on the FICL by $150,000 in the manner required by the Bank. The remaining sale proceeds were applied to the Gooleys' overdraft (presumably the equipment lease payments were made from that account).

Trading for 2009 to 2010

160 The hangover from the extremely wet conditions in early 2009 continued into the first half of the 2009-2010 financial year. Conditions then reversed, becoming very dry. Then conditions turned again with excessive rain from November 2009 extending right through into the second half of 2010. The result was the loss of yield in cropping. The maize crop was also delayed so that it was not harvested in the 2009-2010 financial year.

161 The Gooleys had hoped to take up the slack with beef fattening operations. They had undertaken extensive works to set up the property to handle cattle. But they lacked the funds to buy cattle on the scale which they had planned.

162 Originally the Gooleys had budgeted to achieve a farm surplus of over $200,000 before overheads, and to break even after deduction of overhead and financing costs. In the result, the farm barely broke even before overheads and the loss soared to $451,000.

Third Bankwest variation, April 2010

163 The Gooleys' application for a further loan of $120,000 from the RAA was declined. But after a review, the RAA approved a $75,000 loan.

164 Early in April 2010, Mr Gooley wrote to Mr Mitchell presenting a comparison of the actual results compared with the 2010 budget, as well as a forecast to 30 June 2010 and the budget for the 2011 financial year. At this point, the $75,000 from the RAA had been approved but not paid. Mr Gooley explained that as a result of the holdup of the RAA funding the Gooleys needed further working capital to increase their cattle numbers. He asked for the Bank to give consideration to granting a facility for this purpose.

165 Mr Mitchell submitted an application which was approved, and accepted by the Gooleys, in mid-April. The Bank approved a new Business Edge term loan of $100,000, to which I will refer as the "Cattle Loan". The loan period was ten years. The first three months were to be interest only, followed by principal and interest repayments.

166 The Bank also agreed to consent to the further RAA loan and to reduce its priority to $1.4 million. This was subsequently documented between the Bank and the RAA.

Fourth Bankwest variation, August 2010

167 The Cattle Loan and the fresh RAA loan did not satisfy the Gooleys' finance requirements. The Bank approved, and the Gooleys accepted, a further variation in August 2010. There was an increase in the overdraft by $100,000 until 31 January 2011, to "assist with short term working capital requirements".

Proposed purchase of Dyraaba

168 In 2001, Mrs Gooley's father had transferred "Dyraaba" to Mrs Gooley and her brother, William James (known as James) Hayward. The property was thereafter operated by them in partnership. The Hayward parents, who had been dairy farmers but were retired, lived at the property. According to the Gooleys, Mrs Hayward senior did not get on with James' wife. It was agreed that Mrs Gooley should buy her brother out of Dyraaba and it should be combined with the Gooleys' Clovass operations. This would allow James to realise his equity in the property. The intention was that the Hayward parents would continue to live at Dyraaba.

169 Dyraaba consisted of approximately 190 acres. The plan also involved buying adjoining land belonging to a man called Bennett which consisted of 50 acres.

James Hayward and his wife would buy another adjoining property which would allow for co-operation between the two family businesses. For this purpose, James and his wife would need to obtain their own finance.

170 In January 2011, Mr Gooley put the proposal to Mr Mitchell. The settlement between Mrs Gooley and James would require a payment to him of $240,000. The Bennett land would cost a further $130,000, and $30,000 would be needed for updating the Hayward parents' house. In addition Mr Gooley sought a further $150,000 to fund cattle purchases. Thus the total to be borrowed would be $550,000. In addition, Mr Gooley asked to have the temporary overdraft limit of $400,000 made permanent.

171 This proposal reflected a further modification of the Gooleys' farming strategy. They believed that they should increase their beef fattening operations which were not so vulnerable to wet conditions. The Dobies Bight properties included hill country and the Gooleys saw this as a way of reducing the risk from flooding. They also planned to undertake baling contracting work with the Haywards. Mr Gooley's proposal referred to a longer-term plan to sell 130 acres of the Clovass property so as to reduce reliance on cropping.

172 Mr Mitchell submitted an application along these lines which was approved, although reluctantly, and subject to conditions, in late January. I will refer to the conditions surrounding the approval in more detail when discussing the disputed factual issues concerning this particular variation. Early in February, Mr Mitchell issued fresh documentation to the Gooleys. That documentation dealt only with the permanent increase in the overdraft limit to $400,000. It was signed, and the increase was effected, by mid-February.

173 The conditions imposed before the Bank would agree to the further loan of $550,000 included the obtaining of fresh property valuations. The Haywards also had to obtain their own finance. This was a protracted process which dragged on for several months.

Trading for 2010 to 2011

174 While all of this was happening, weather conditions remained unfavourable. A La Nina event began in July 2010 and resulted in unseasonally wet conditions over the next eight months. The wet conditions peaked in late 2010 and early

2011. The winter crop planted by the Gooleys failed and they were unable to plant a summer crop. Contracting work was also virtually non-existent.

175 The Gooleys' trading performance in the 2010-2011 financial year was disastrous. There was a shortfall on budgeted revenue of $320,000. Ultimately the Gooleys' surplus from farming operations was only $5,000. After taking into account overheads and financing expenses the loss was $370,000.

Establishment of G&F trading facility, March to June 2011

176 Many of the Gooleys' suppliers were personal friends or acquaintances. Generally, the Gooleys dealt with them on usual 30 day credit terms. The only exception of this was the provision of credit by way of crop accounts. Suppliers such as Norco would provide finance for a crop on the basis that payment would be made when the crop was harvested. Such crop accounts could be outstanding for six months or more and attracted an interest charge.

177 An invoice summary in evidence shows that in January, February and March 2011, the Gooleys were purchasing cattle through three stock & station agents, including G&F. These purchases were carried out on the usual 30 day basis. Purchases were debited and sales were credited to the same account, leaving a balance to be paid either by the customer to the agent or by the agent to the customer.

178 In 2011, the Gooleys' contact with G&F appears to have been through Jasen Somerville, who was one of its directors. Mr Somerville owned land which abutted one of the Clovass cropping land parcels on the eastern side of the Tomki-Tatham Road. The Gooleys were considering the sale of that block (see [171] above) and there had been some discussion between Mr Gooley and Mr Somerville about Mr Somerville buying it.

179 In around March 2011, Mr Gooley negotiated a new trading account arrangement with G&F through Mr Somerville. The Gooleys' existing account was split into two. Purchases continued to be debited to the existing account. Sales proceeds were credited to a separate account and paid out to the Gooleys. The result was that the purchase account operated in effect as a line of credit. G&F charged interest on the outstanding balance. Substantial

purchases took place, peaking at about $148,000 in May. The outcome was a rapid run-up in debt as shown in the following table:

	Charges to G&F A/c before Interest	Interest charged to G&F A/c	Monthly Charges to G&F A/c	Monthly Payments to G&F A/c	Monthly movement in Account	Cumulative Balance
Jan-11	9,080.89		9,080.89	0.00	9,080.89	9,080.89
Feb-11	27,947.96		27,947.96	0.00	27,947.96	37,028.85
Mar-11	49,974.32		49,974.32	0.00	49,974.32	87,003.17

Apr-11	33,547.35	1,041.55	34,588.90	0.00	34,588.90	121,592.07
May-11	148,147.50	2,191.43	150,338.93	-27,987.09	122,351.84	243,943.91
Jun-11	81,769.51	2,735.99	84,505.50	0.00	84,505.50	328,449.41

180 Over the same period, the Gooleys' debt to their grain supplier, Alan Hill Transport Pty Limited ("Alan Hill") increased to $78,000. This was as a result of purchases of grain for cattle feed.

181 Consistently with the Gooleys' farming philosophy, their cattle fattening operations were intended to operate at a higher level of intensity, with greater use of resources and greater turnover, than other cattle fattening operations in the region. Beef cattle prices depended on the condition of the cattle. The Gooleys hoped to take "off-spec" cattle and improve their condition during the course of the fattening operations. In that way they would (assuming a stable market) achieve an increase in price per kilogram as well as increasing the weight of the cattle from feeding them. Mr Gooley graphically described this strategy as buying "everybody's rubbish" and being a "high turnover low margin business".

Fifth variation and purchase of Dyraaba, April to July 2011

182 The Gooleys' finance for the acquisition of the Dobies Bight land was the subject of a further credit submission by Mr Mitchell in mid-April. The Bank approved a loan of $550,000 as requested. This was an interest-only facility repayable after two years. The formal loan offer was issued at the end of May and was signed by the Gooleys early in June. By this stage the Haywards had also obtained their finance.

183 The settlement took place in early July 2011. After payment of James Hayward and Mr Bennett, together with fees, the surplus was approximately $170,000. This was applied to the Gooleys' overdraft account.

Dealings with trade creditors, July 2011 to March 2012

184 On settlement of the Dyraaba loan, the Gooleys paid $120,000 to G&F. They paid a further $75,000 in August. But they also continued to make purchases and by September the amount outstanding was $380,000, an increase of more than $50,000 from 30 June. The Gooleys' account with Alan Hill also remained in arrears.

185 In November, G&F moved to limit the Gooleys' ability to draw on sale proceeds coming into the cattle trading account. G&F required fifty per cent of all sale proceeds to be applied in reduction of the debt. For the moment, this appears to have made little difference, with the amount outstanding increasing to $437,000 by the end of January.

186 In February 2012 Darren Perkins, who appears to have been the general manager of G&F, took further action, requiring 100% of all sale proceeds from cows to be applied to debt reduction. This change left the Gooleys able to draw only on 50% of the sale proceeds from vealers. It did apparently result in some reduction of the Gooleys' outstanding balance, but the debt still stood at $358,000 at the end of March 2012.

Enquiries about move to Tablelands, January to June 2012

187 By the beginning of 2012, the Gooleys had been considering a further restructuring of their business. Notes of Mr Gooley's discussions with Mr Perkins in February record that Mr Gooley was then assessing two options. The first was to sell the cropping land at Clovass and retain Dyraaba. The

second was to sell the Clovass property entirely and move the operation west of Casino to “more balanced country suitable for cattle”. Under this option the Gooleys would probably hold Dyraaba.

188 Starting in about February 2012, the Gooleys made some investigations about the possibility of moving their operations to the Tablelands. They visited the Tablelands on a number of occasions and discussed the idea with a number of people. I describe the investigations in more detail below. In the end, the Gooleys did not find anything which suited them and nothing came of the idea.

Trading for 2011 to 2012

189 The wetter than usual conditions continued into 2011-2012. While the total amount of rainfall was less than in 2010-2011, the number of wet days was the same or even more. Wet weather over summer 2012 reduced both plantings and yields on the Gooleys’ crops (which had been financed with crop accounts) and there was little if any contracting.

190 The wet conditions restricted the Gooleys’ ability to graze cattle, although the acquisition of Dyraaba did help somewhat. This was not the only problem with the cattle operations. Up until November 2011, the cattle price was rising, to the general benefit of the Gooleys’ cattle strategy. The market then turned.

191 All of this produced another set of poor financial results. Ultimately the Gooleys’ loss for the 2011-2012 financial year was $253,000.

Application for further Bank loan and referral to CAM, April to June 2012

192 The Gooleys’ next credit review with the Bank, for which they were supposed to provide their 2010-2011 results and budgets for 2011-2012, was due at the end of March. Mr Gooley provided the information and covering memorandum to the Bank early in April. By now Mr Gooley was dealing with Ms Campbell at the Bank (Mr Mitchell having left by this point).

193 In the memorandum, Mr Gooley described the dire trading conditions for the previous years and stated that the current year targets would be missed as well. He said that the Gooleys were now considering the divestiture of both of the cropping land parcels to the east of the Tomki-Tatham Road at Clovass.

The memorandum contained various budgets depending on whether and when these divestments took place.

194 Mr Gooley's budgets continued to forecast a return to profitability. They assumed further finance from the Bank in the form of a $200,000 "carry-on" facility to continue with the operation of the business. In subsequent discussions with Ms Campbell, Mr Gooley confirmed this request for further funding.

195 Mr Gooley had provided Ms Campbell with draft financial statements for the 2010-2011 financial year and details of the Gooleys' creditors as at the end of February 2012. These documents revealed a debt to G&F of $335,000 as at 30 June 2011, increasing to $397,000 by the end of February 2012. The February figures also revealed debts of $98,000 to Alan Hill and crop account debt of $54,000.

196 The disclosure of the G&F debt did not of itself reveal the fact that the Gooleys had a cattle trading facility with G&F, or the arrangements which had been put in place to reduce the G&F debt from cattle sale proceeds. Ms Campbell was eventually told about this by Mr Gooley early in May as a result of further enquiries which she made and which I describe in more detail below.

197 Ms Campbell referred the file to Mr Triggs. Mr Triggs and Ms Campbell had a meeting with Mr Gooley on 31 May to discuss his funding request. Mr Triggs advised Mr Gooley that the request would be deferred pending a full review of the file which might include referral to CAM. A few days later, Mr Triggs advised that the file be placed on watch list and referred to CAM for a workout strategy. The formal transfer took place in mid-June. The request for further funding was left in abeyance.

198 Meanwhile, after a reduction in April 2012, which saw the G&F account balance briefly dip below $350,000, the Gooleys made stock purchases in May and June of about $180,000. The account balance reached about $460,000 on 30 June. Over the 2011-2012 year, the interest charged by G&F was $47,000. By 31 May the Gooleys also owed about $110,000 to Alan Hill, over $80,000 of which had been outstanding for more than 90 days.

Dealings with trade creditors, July to November 2012

199 In July 2012 Mr Perkins and Mr Somerville wrote to Mr Gooley on behalf of G&F enclosing a proposed Deed of Loan. The Deed contained an acknowledgement of loan and an agreement to pay interest on the loan at the rate of 12.5%, compounded monthly, and an agreement that the loan be repaid by a specific date and that until repayment all livestock was to be sold through G&F and the proceeds of sale from such livestock was to be applied in reduction of the debt. The Gooleys were also required to acknowledge that no other lender or interested party held any legal interest over any of the livestock owned by them, and to consent to G&F registering a security interest in the cattle.

200 The Gooleys were not prepared to agree to these terms. Providing the security G&F sought would not, of course, have been practicable because Bankwest held a stock mortgage and the grant of security to G&F would have put the Gooleys into default under their Bank facilities.

201 In Mr Gooley's affidavit, he stated that Mr Somerville during one of his weekly visits told him that he would be receiving the letter. At that point he had already in fact received it. Mr Gooley did nothing to enlighten Mr Somerville. He pretended that he had not received the letter and that he would discuss it with Mrs Gooley in due course. By this stage a gap of $200,000 had opened up between the G&F debt and the value of the Gooleys' stock. Mr Gooley repeated his proposal to close the gap by selling the cropping land at Clovass.

202 According to Mr Gooley, Mr Somerville said not to worry about the letter too much and it was just a standard letter being sent to all livestock account holders. I find this evidence impossible to accept. It is true that the letter and deed of loan were in a standardised form. But it is hardly likely that Mr Somerville would have described the letter as a formality. It clearly was not. Indeed G&F itself appears to have been under financial pressure at the time.

203 According to Mr Gooley, he told Mr Somerville that the Gooleys would be in breach of the terms of their mortgage with Bankwest if they signed the deed as they were being asked. The situation drifted on inconclusively.

204 The Gooleys had made further purchases of approximately $60,000 on the G&F account in July 2012, as a result of which the account balance reached $515,000, its highest point. From there, it reduced to $449,000 by the end of October.

205 Meanwhile, the Gooleys still had a large debt to Alan Hill, much of which had been outstanding for more than 90 days. In October, Alan Hill's financial controller wrote to Mr Gooley stating that $108,000 was overdue and seeking to have the account returned to normal trading terms, otherwise continued supply on credit would have to cease. The Gooleys also owed Norco at least $30,000 from a 2011-2012 crop account which had not fully been cleared.

206 Mr Gooley said that on 14 November he saw Mr Somerville at the sale yards and he was asked to come and see Mr Perkins at G&F's office. On attending the office Mr Gooley found four G&F directors were present. Mr Gooley was pressed to enter into the deed of loan which had been sent in July. He said that he was unable to sign it because of the business mortgage with Bankwest.

207 Mr Perkins was not prepared to accept this. He said that G&F had details of the cattle which had been purchased and had an interest in cattle until they were paid for (presumably because of retention of title terms in the trading agreement). Mr Perkins asked who the Gooleys were dealing with at Bankwest.

208 Faced with this awkward question, Mr Gooley dissembled. He did not want to tell those present that the account had been transferred to the CAM. He said that since Mr Mitchell had left he had been dealing with Ms Campbell but was unsure who she was reporting to. Mr Perkins responded by saying that he knew the new manager well, and would give him a call. Mr Gooley was able to shut this down by saying it was his own account with the Bank and he would manage it.

209 Mr Perkins went on to say that the fifty per cent of net sales was not enough and needed to be increased. Mr Perkins proposed that one hundred per cent of sale proceeds be retained. Mr Gooley said his response was "that would make things very hard for us and probably bugger us". The meeting ended without any agreement.

Resumed contact with the Bank, November 2012

210 There is no evidence of any written communication between the Bank and the Gooleys for the five months after the meeting on 31 May 2012. Nor does the evidence indicate when Ms Mulligan first took over the account. According to Mr Gooley, he first received a call from Ms Mulligan in the second half of August asking for him to contact her. He said he returned her call but she was away from work; he had been on the tractor and missed her phone number. Mr Gooley said that around the end of October, he found Ms Mulligan's contact number when going through his diary and called her. He said that about two weeks later she responded.

211 The conversation between Ms Mulligan and Mr Gooley took place on 14 November, coincidentally the very same day as Mr Gooley was summoned to the meeting with the directors of G&F (see [206] above). Following the conversation Ms Mulligan sent an email which stated:

> As I mentioned in our telephone conversation, your fixed interest rate facility (account number XXXXXX) is due to expire on the 12th December 2012.
>
> In the absence of an alternative agreement, the facility must be repaid in full on or before the expiry date as outlined in the loan agreement.

212 After requesting updated financial information, cash flow projections, stock numbers and amounts owed to creditors "including but not limited to" G&F, the email continued:

> Please understand that the Bank will consider, but cannot in any way guarantee, an extension. Approval will require a formal credit approval which may be withheld at the Bank's absolute discretion.
>
> Given the trading history and your ability to meet minimum servicing requirements, I suggest you seriously consider all options available to you. These options are for you to consider however may include, but not limited to, such things as a refinance or sale of assets. Please keep us abreast of your intentions.

Application to Bank for extension, November 2012 to December 2012

213 That same evening Mr Gooley contacted Mr Robin Richardson, a finance broker, to assist in dealing with the Bank and to advise generally. On 22 November Mr Richardson wrote to the Gooleys with a strategy. His email stated:

> I believe over the next 6 months or by the end of current financial year it will be possible to refinance your properties. There is however quite a bit of work to do to achieve this.
>
> The 2 main challenges are:
>
> 1. The LVR is just a fraction high.
>
> 2. Main challenge is profitability. Fixing this will assist with the LVR being a bit high.
>
> Strategy is to keep Bankwest in play as long as possible, I can help you with that. The first thing is to apply for an extension until end FEB 2013. The banks basically shut down in January so this should not be a problem.
>
> The farm strategy needs to be cattle fattening, and move away from Cropping. Banks like diversification with Cropping etc, but this strategy has cost you profits and cash flow, hence you can put a good case to the banks for at least for the next 2 years to stick with cattle.
>
> This will also assist me considerably in getting you refinanced.
>
> First things first is get George and Furhmann agreement in place.
>
> After this is done I can prepare an application to prospective lenders. There are some reasonable priced second tier funders who will look seriously at refinancing your property once we have the cash flows etc in place.
>
> Worst case strategy I do have contacts and experience in protecting properties from being re possessed by banks. However your case is better than most as long as we have cash flows.

214 In accordance with Mr Richardson's advice, Mr Gooley wrote to Ms Mulligan on 26 November:

> I refer to your email of the 14th November, and wish to confirm that we are seeking an extension of 3 months, i .e. effectively until the end of Feb 2013.
>
> We have appointed Robin Richardson, ER Finance Pty Ltd, to provide his consulting services to our business and to assist with the liaison and negotiations with Bankwest.
>
> Mr Richardson has been engaged to assist us during this phase of either rolling over the Bankwest Facility or refinancing the facility.

215 Mr Gooley followed up with updated financial and trading information, and a budget for 2012-2013. On 6 December Ms Mulligan responded by email. She stated:

> I will review the documents you have provided and seek formal credit approval for an extension.
>
> I can not give you a formal assurance at this stage that credit will approve the extension however I will be seeking such an extension.
>
> If the extension is granted at a lower interest rate than the default rates, default interest charged to your account will be reimbursed.

> An application to credit will take approximately three weeks and, with the Christmas shut down, do not expect a formal response until early January 2013.
>
> Please understand that the Bank reserves its rights under your facilities and the above is without prejudice to these rights.

Dealings with trade creditors, November to December 2012

216 Following on from the meeting between Mr Gooley and the four directors of G&F on 14 November, on 20 November Mr Gooley received an email from Mr Perkins seeking a meeting between the Gooleys' accountant and G&F's accountant and then a "general meeting" concerning payment schedules and security. On the following day Mr Gooley responded saying that he was working on a proposal to satisfy G&F's security concerns. He asked for a couple of weeks to get the proposal prepared.

217 On 30 November, Mr Perkins emailed Mr Gooley, copying the email to Mr Richardson. He stated that until the meeting which G&F had sought between the accountants had taken place the banking of fifty per cent of the sale proceeds in the Gooleys' account would be suspended. In effect, G&F would take one hundred per cent of the proceeds.

218 The meeting took place on 6 December, and Mr Gooley did provide information to G&F's accountants, but no agreement was reached. The arrangement under which fifty per cent of the sale proceeds had been released to the Gooleys continued to be suspended, with G&F receiving all of the sale proceeds. The account balance was reduced to $381,000 by the end of November and then to $341,000 by the end of December. But G&F was still seeking further reductions.

219 Meanwhile, the Gooleys were being pressed to get the Alan Hill account in order. Mr Gooley told Mr Hill that the business was being refinanced which would allow a "significant reduction". The Gooleys also still owed Norco $32,000 which Mr Gooley undertook to clear by the end of January as a result of the proposed refinance.

220 The Gooleys were now under extreme financial pressure. Shortly after Ms Mulligan's email of 6 December, they opened a new bank account with a rival

bank, Suncorp. Thereafter any income received was deposited into that account.

221 Later in December, the Gooleys cancelled the automatic payment they had been making out of their Bankwest overdraft account on Mr Gooley's parents' home loan. This was humiliating, as these payments had been part of the family arrangement under which the Gooleys had taken on the Clovass property back in 2004. But, as Mr Gooley explained in his evidence, he considered that they had no choice.

222 Communication with Ms Mulligan resumed on 11 January. On that day she spoke to both Mr Richardson and Mr Gooley. Mr Richardson undertook that in the next few days he would send "a bullet proof outline" for the way forward.

223 On 14 January 2013 Mr Richardson emailed Ms Mulligan. He stated:

> As discussed last week, here is an outline for Gooley Farms.
>
> • I am, with Gooley Farms preparing a plan of action to enable a successful refinancing of the Bankwest facilities.
>
> • First and foremost we are in the process of finalising an agreement with George and Furhmann re the current arrangements.
>
> • We expect to achieve this is by 30th Jan 2013. Please note we are pushing for the final agreement sooner rather than later.
>
> • Please also note this is vital for a refinancing of the Bankwest facilities.
>
> • Subsequently an application will be made to refinance.
>
> • We are examining all options including the sale of the Dyraaba property, plus any assets that could be regarded as excess.
>
> • We will present our plan mid-late February 2013.
>
> • Gooley farms will continue with monthly interest only payment of $7800 during this period.
>
> • I do also note that Bankwest require a finite plan with appropriate milestones.
>
> I will keep you advised re progress and in the first instance the outcome with George and Furhmann.

224 The outline referred to the Gooleys making interest-only payments of $7,800, but arrangements were ultimately made for them to pay $10,500 per month. This consisted of two monthly payments, one of $7,000 to be paid before the 24th of the month on account of the FICL; and one of $3,500 to be paid on or before the 7th of the month on account of the Dyraaba loan. These two

payments represented slightly less than the regular interest accruing on the two facilities. The Bank continued to record and send statements to the Gooleys calculating interest at the higher default rate.

225 The expected agreement with G&F did not materialise. The last purchase on the account took place in January 2013, presumably because G&F thereafter refused to advance further credit. At the end of the month the outstanding balance remained stuck at $342,000.

226 At this point Mr Gooley developed a new business plan, which he documented in a formal memorandum. That plan proposed a two stage restructure. Stage one involved the sale of Clovass and the use of the funds received to reduce borrowings. Mr Gooley acknowledged that the sale might take time as the market was “slow”. Stage two involved the sale of Dyraaba and its operations shifting to the Tablelands. In the meantime a property was to be rented or agisted on the Tablelands.

227 On 18 February Mr Richardson wrote to Ms Mulligan:

> • What I can now advise you is the following:
>
> • Gooley farms have decided to restructure their farm business, first of all by selling the Clovass farm, which has 4 titles.
>
> • The estimated selling price is $2.5 to $2.9 million.
>
> • They are currently finalizing their sales plan and the details of that plan will be sent to you within the next week.
>
> Refinancing:
>
> • I am in the final stages of lodging an application with a second tier funder for both the Clovass and Dryaaba properties. I expect feedback on that process over the next 10 business days, and I will update you when that information comes to hand.
>
> Work in progress;
>
> • Gooley Farms are in the final stages of a longer term business plan, re the further development and possible expansion of their cattle fattening operations.
>
> Paul and Susan Gooley are keen to remove the debt and de risk their operations along with lowering their interest costs as soon as that can practically be achieved.

228 The sales plan was not finalised within a week as Mr Richardson indicated. But on 11 March the Gooleys signed an agency agreement for the sale of the

Clovass property. The property was to be listed at $2.7 million but the estimated selling price was $2.4 million to $2.5 million.

229 On 14 March Mr Richardson wrote to Ms Mulligan attaching a copy of the sales agreement. His email stated:

> Hi Lara, attached is the sales agreement for Gooley Farms. We will be receiving a monthly report as to the enquiries, so to monitor the situation as we move on.

230 Ms Mulligan replied:

> Thank you for your email.
>
> I look forward to hearing how you advance.

Trading for 2012 to 2013

231 Climatic conditions finally improved somewhat in 2012-2013. Conditions had dried out by the end of 2012. Ultimately the Gooleys' farming surplus was over $430,000, and after deduction of overheads and financing costs the net loss narrowed to $12,000.

232 Another piece of good news for the Gooleys was that the electrical transmission authority, Transgrid, wished to obtain an easement over the Gooleys' property, presumably for transmission lines. Discussions took place about compensation and Transgrid offered $100,000 (plus $10,000 GST). This offer was foreshadowed in December 2012 but it stayed on hold for the time being; the transaction did not actually occur until May 2014: see [261] below.

233 Between March and April 2013, the Gooleys conducted some further investigations about moving operations to the Tablelands. They looked at one property at least for rental. But in the end nothing was suitable and they did not proceed any further.

234 Early in March, the Gooleys entered into a contract cattle fattening arrangement with a Tablelands feed lot operator. It seems that by this stage the Gooleys were no longer able to finance purchase of cattle on their own account, and this contracting arrangement gave them some income. But the returns were far less than those from owning their own cattle, and Mr Gooley understood that it was not a sustainable arrangement given the level of the Gooleys' debt.

235 Despite the 2011-2012 crop account still not being paid off, in December 2012 Mr Gooley had persuaded Norco to grant another crop account for 2012-2013. This was for about $55,000. The Gooleys also raised $57,000 from the sale of equipment.

Attempts to refinance or sell, March 2013 to December 2013

236 There is no evidence of what happened about the second tier funder finance application referred to in Mr Richardson's email to Ms Mulligan of 18 February. In the second half of March, Mr Richardson suffered a heart attack which required him to have a pacemaker fitted. According to an email sent by Mr Richardson to Mr Gooley on 21 March, this was a relatively minor procedure which would only keep him out of action for a few days. But it seems that little progress was being made anyway.

237 Early in April, Mr Gooley prepared a revised business strategy document and financial projections for a refinance with Suncorp. Discussions with Suncorp took place early in May but a few weeks later Mr Gooley was advised by Mr Richardson that Suncorp would not be proceeding with the Gooleys' finance application. According to Mr Gooley, he was told by Mr Richardson that Suncorp cited uncertainty and the absence of a written agreement with G&F on the outstanding balance of the G&F account as major obstacles.

238 In mid-2013 the Gooleys put the Dobies Bight property on the market as well. The asking price was $1.2 million.

239 Early in June Mr Richardson advised he had made contact with a private funding intermediary who was prepared to lend up to 70% of the value of the property including water licences. The suggested loan term was two years. An initial fee of $6,600 would be payable together with further fees payable on settlement. According to Mr Gooley, he paid the $6,600 fee but Mr Richardson subsequently told him that the application would not be proceeding.

240 Mr Gooley said he had some further discussions with Mr Richardson about refinancing with private funders but they came to nothing. According to Mr Gooley, fees for such funding were up to $150,000. Also, the market for rural property continued to be very slow.

241 In June 2013, Mr Richardson briefed Harold Bundy, an adviser who specialised in representing borrowers in their dealings with banks and other financial institutions. This seems to have been a precautionary step. But in the second half of 2013 Mr Richardson dropped out of the picture. It seems that there was nothing more he could do to help the Gooleys.

242 By early 2014 the asking price for the Clovass property had been reduced to $2.2 million. For Dyraaba it had been reduced to $1.1 million. There had been hits on the website but no actual enquiries for the properties.

Dealings with trade creditors, March to December 2013

243 As already mentioned, trading had ceased on the G&F account in January, with the balance at the end of January being $342,000. G&F retained a solicitor, Sandra Binney. She wrote to Mr Richardson on 15 February requiring action to repay the G&F debt. Ms Binney offered the Gooleys two choices. Either the current amount was to be repaid within sixty days (16 April 2013), or a machinery sale was to be held. G&F was to conduct the sale and all proceeds of the machinery would be retained by G&F in reduction of the outstanding facility. The sale terms and conditions were to be agreed within fourteen days and the sale to be held within six weeks.

244 Relations between the Gooleys and G&F degenerated further. Mr Gooley wrote an unhelpful response to Ms Binney criticising G&F for taking an adversarial approach and for supposedly failing to act “with co-operation and goodwill”. His letter stated that any litigation would be vigorously defended with a counter claim.

245 By March 2013, the interest on the outstanding balance was approximately $3,500 per month, the same amount as the Gooleys were paying on the Dyraaba loan under the moratorium with the Bank (the principal amount under this loan was $550,000, only fifty per cent more than the outstanding balance of the G&F account).

246 Meanwhile, on 6 February Mr Hill wrote on behalf of his company stating that there was $123,000 overdue and unless arrangements could be made, legal action would have to be taken. Mr Gooley replied stating that the Gooleys had

reviewed their business strategy and wanted to cease farming at Clovass while retaining the property at Dyraaba. He said:

> I have advised you previously that we are in the process of restructuring the financing of the business and reiterate this change in business strategy has been our decision only and we still enjoy the support of our current bankers.

247 Mr Gooley's statement that the Gooleys still enjoyed Bankwest's support was false. In fact, the FICL was in default and the Bank was pressing the Gooleys to sell their properties. After a further approach from Alan Hill's financial controller in April proposing eight monthly instalments between April and November, Mr Gooley forwarded the proposal to Mr Richardson for advice. He said he had been in touch with Mr Hill on a monthly basis and Mr Hill could not understand why the process was taking so long. Mr Gooley added: "Needless to say I have not briefed him other than we are progressing".

248 The amount outstanding to Alan Hill in April was $115,000. It appears that trading ceased on the account on or before that date. The Gooleys were able to make a payment of $20,000 from the sale of their soybean crop in May or June. But they were unable to reduce the debt further. Mr Gooley had proposed to make a payment of $50,000 on the refinance occurring and then monthly repayments of $10,000 from cash flow, but early in July Alan Hill indicated it was no longer prepared to wait for the refinance to occur (and it seems that by then nothing was happening in that regard). Alan Hill retained solicitors in mid-July and Local Court debt recovery proceedings were commenced in August.

249 Another $20,000 from the soybean crop was applied to the outstanding Norco crop account from 2011-2012 and this seems to have been largely paid off by the end of June 2013. But the Gooleys were unable to pay the 2012-2013 crop account when it fell due in July. In December 2013 the amount outstanding was $64,000 with interest being charged of $1,500 per month. The outstanding balance was finally discharged only in October 2014.

250 Negotiations between G&F and the Gooleys continued into the second half of 2013 but with no result. In October G&F began debt recovery proceedings in the District Court and the Statement of Claim was served on the Gooleys in

November. The Gooleys retained a lawyer recommended to them by Mr Bundy and defended the proceedings.

Continued Bank moratorium, April 2013 to December 2013

251 Following Ms Mulligan's email of March 2013 acknowledging that the Gooleys had listed the Clovass property for sale, there was a period of more than nine months during which there is no evidence of any communications between officers of the Bank and the Gooleys. During this period the Dyraaba loan term expired and went into default (8 July). The Gooleys continued to make their monthly payments of $10,500. The Bank's computer systems continued to record the accrual of interest at the default rate.

252 From subsequent correspondence it is clear that the Gooleys did not forward any regular reports to the Bank about the proposed sale of their properties (if they received any). As already noted, there was in fact no interest from prospective purchasers at the price sought by the Gooleys.

253 At some point during the nine month hiatus, the file was passed by Ms Mulligan to another officer of the Bank, Matthew Maxwell. The evidence does not reveal when Ms Mulligan handed the file over, or whether Mr Maxwell took any action on it. In December 2013, the file was transferred from Mr Maxwell to Mr Greentree, who had returned from undertaking some other task within the Bank.

Proposed deed of forbearance, January 2014 to June 2014

254 In January 2014, as a result of ongoing financial pressure, the Gooleys stopped making their monthly interest payments of $10,500 to the Bank. At around this time, they seemed to have formally retained Mr Bundy's services.

255 Earlier in January Mr Greentree had written to Mr Gooley to introduce himself as the new person responsible for the account and to ask for updated information about the Gooleys' financial position and the sale of the properties. There followed two months' delay while the information was provided. Transgrid also wanted to finalise the easement transaction, and an elaborate minuet took place between Mr Gooley and Mr Greentree about what was to happen with the proceeds.

256 Mr Greentree asked Mr Gooley on 17 January to have Transgrid deal directly with the Bank concerning the approval and signing of the easement documents. On 6 February, Mr Gooley wrote to Mr Greentree requesting that Bankwest consent to the registration of the easement in favour of Transgrid. He stated that the compensation payments had to be finalised by 28 March. Mr Gooley went on to propose that the $100,000 from Transgrid be assigned to the Bank as payment of the Gooleys' monthly interest payments of $10,000 (actually $10,500). On this basis it would cover the payments from January to October 2014.

257 On behalf of the Bank Mr Greentree was not prepared to allow the $100,000 from Transgrid to replace the Gooleys' interest payments. Instead he wanted the money to go towards debt reduction.

258 On 26 March Mr Greentree wrote to Mr Gooley confirming a proposal which they had discussed earlier in the day. The proposal was that the Gooleys would recommence their monthly interest payments of $10,500 starting from April; there would be additional interest margin on the loans of 0.8%; sales of a corn crop due approximately July/August (approximately $50,000) was also to be applied by way of debt reduction and the Bank would provide an additional six months, until 30 September 2014, to sell the two properties. If the sales were not affected by that date, the interest margin was to increase by a further 0.5%. In return the Bank would "refund" the default interest which had been recorded on the Gooleys' loan accounts (amounting to approximately $87,800) and "defer/waive" the missed interest payments for the months of January, February and March (total $31,500). If the proposal was acceptable it would be documented by means of a Deed of Forbearance.

259 On 7 April the Gooleys made their regular $3,500 interest payment for the Dyraaba Loan. On 9 April the Bank adjusted its interest statements so as to write off the default interest on the two facilities. This followed a discussion which had taken place between Mr Greentree and Mr Gooley. There is no documentary evidence of that discussion but Mr Greentree later described it as involving an "extension of facilities" to formalise the position. I infer that Mr Greentree was satisfied that the Bank's proposal would be accepted and wrote

off the default interest accordingly. On 11 April, the Bank's solicitors sent to the Gooleys' solicitors a draft Deed of Forbearance reflecting the arrangement.

260 The Gooleys made the next two regular interest payments ($7,000 on the FICL on 24 April and $3,500 on the Dyraaba Loan on 7 May). But they did not sign the Deed of Forbearance. Mr Gooley was repeatedly pressed by Mr Greentree and by the Bank's solicitors. He offered a number of reasons for delay, mainly associated with obtaining advice from unnamed "advisors" (presumably Mr Bundy). In particular, Mr Gooley indicated that the Gooleys' solicitors had instructions to act on the easement matter but not on banking issues.

261 On 9 May the easement transaction settled. Bankwest received $100,000 of the proceeds which it applied in reduction of debt facilities in accordance with the proposal set out in the Deed of Forbearance. The $10,000 representing GST was collected by the Gooleys' solicitors and paid to them.

262 On 23 May the Gooleys still had not signed the Deed of Forbearance and Mr Greentree wrote with an ultimatum requiring that the Deed be finalised and returned by 10 June. Mr Greentree stated that if this was not done the Bank would commence the FDMA process.

263 The Gooleys did make the regular interest payment on the FICL of $7,000 on 24 May. But the evidence does not contain any further communications between the Gooleys and Mr Greentree. Instead on 10 June, the date of the Bank's deadline for signing the Deed of Forbearance, Mr Bundy filed the FOS complaint on the Gooleys' behalf.

Dealings with trade creditors, January to June 2014

264 The Gooleys had not contested the debt recovery proceedings brought by Alan Hill. In May 2014, a writ of levy of property was issued against them. The Gooleys then successfully applied to pay the judgment debt of $111,000 by instalments. The instalments were only $3,000 per month. In March 2015 Alan Hill itself went into liquidation and the Gooleys eventually paid off the balance of the judgment debt at a slight discount by arrangement with the liquidator.

265 Norco continued to chase the Gooleys for the 2012-2013 crop account. This was eventually paid by the Gooleys in October. They asked for a further crop account but were refused.

266 In March 2014 the Gooleys sold their round baler which they had used for cropping and fodder operations. Mr Gooley was reluctant to do this as it would restrict the Gooleys' ability to undertake contracting work. But he felt that there was no choice. The money was applied to paying creditors. Early in July the Gooleys sold their levelling equipment for $110,000 in order to pay their costs of defending the G&F debt recovery proceedings.

Trading for 2013 to 2014

267 In 2013-2014, the Gooleys had a good year from cropping, receiving over $200,000 in income. The farm surplus was $400,000 and after deduction of overheads and financing costs the net profit was $72,000.

268 But these figures were struck on much lower revenue than the Gooleys had achieved in the past. In particular, the proceeds of cattle sales for the year were only $155,000. Presumably this reflects a run-down in the Gooleys' own cattle numbers as a result of their inability to finance further purchases (purchases for the year were only $92,000), and the shift to contract fattening.

FOS proceedings

269 The Gooleys' complaint stated:

> *Details of your dispute*: … The Creditor requires the Debtor to enter into a Deed of Forbearance that would require that all debts be repaid by 30th September 2014. The Debtors are warned that time is of the essence with respect to the arrangement set out in the Deed document. The Creditor acknowledges an amount of $119,244.67 of interest charges that it will refund but only if the Deed is signed and then complied with completely. Clearly a refund (the Creditor's description) indicates that the original charge was an error. The threat to withhold the refund is unethical and is a breach of Sect 2.2 of the Australian Banking Code of Practice. The Creditor now seeks to obtain payment in full for those amounts that it claims are legitimately owed, subject to the Contracts that support the loans. The Creditor knows, or should know, that an announcement of Default interest rates, in the Loan Contracts, is not a license to apply that rate in a situation where all debt is or will be repaid. Regardless of the Contract, Default interest rates that are imposed as a penalty are not collectable. Given the Creditor's novel view of what constitutes legal interest rates, the Debtor cannot agree to be bound by a Deed that is both time sensitive and subject to the Creditor's determination. The Debtor however does recognize that it must seek refinancing and or an orderly sale of its property. The Debtor has made the Creditor aware that it will do this.

> *What do you think is a fair and reasonable resolution to the dispute?*: We say that the Creditor's behaviour is neither ethical nor consistent and as such is in breach of Section 2.2 of the Code of Banking Practice.
>
> We request that the Creditor be directed to abandon its threatened enforcement and to abide by the Code of Banking Practice. The Debtors agree to an orderly repayment of all facilities, which they control, if the Creditor provides sufficient time for a replacement banker to be installed.

270 The complaint did not criticise the Bank's conduct in granting the original loan facilities, or in varying the facilities, or in making the loan for the purchase of Dyraaba. Nor was there any criticism of the Bank's conduct in treating the FICL as having expired in December 2012. The complaint acknowledged that the Gooleys had to repay the amounts outstanding to the Bank and that it was up to the Gooleys to refinance the property or conduct an orderly sale. There was no suggestion that the principal amount of the FICL was not repayable until 2022.

271 The complaint did object to the additional interest which the Bank had debited to the Gooleys' accounts from December 2012 through until 2014. But the criticism was that this additional payment was a penalty. The complaint fastened on the sum of $119,244.67 in interest which the Bank had described as a "refund". The suggestion was that the Bank had charged this amount and was in the wrong because it was seeking to impose conditions on its repayment. In fact this was nonsense. The figure represented interest which the Bank had never required the Gooleys to pay and had already written off, together with $31,500 in "moratorium" interest for January to March 2014 which the Gooleys had not paid and which the Bank had been prepared to forgive.

272 This point had no substance and it is difficult to believe that anyone who knew the facts could have believed that it did. Nevertheless, in accordance with its obligations under the FOS process, the Bank took no action towards enforcement. On 20 June, ten days after the complaint was lodged, the Bank responded to Mr Bundy. The Bank's letter offered to extend the time for repayment of the debt by two months, to 30 November, provided that an unconditional contract of sale or letter of refinance was obtained by 30 September.

273 The Bank's further offer was forwarded to Mr Bundy who responded in mid-July rejecting it as unsuitable. Mr Bundy's letter asserted that the FICL did not expire until December 2022. This is the earliest documentary evidence of that claim being made by the Gooleys. Concerning the way forward, Mr Bundy said:

> Given the clear indication that the [Bank] does not wish to continue its relationship with the Applicants, the specific details of a realistic arrangement, that the Applicants will accept, are:
>
> 1. A complete reconciliation, of all accounts, from June 2011 until the present, with adjustments made to correct errors.
>
> 2. All default interest charges to be reversed.
>
> 3. Monthly interest payments to be made, at the contracted interest base rates.
>
> 4. Expired accounts, not fully paid by 30th November 2014, to incur interest at base rate plus 2% per annum.
>
> 5. All accounts to be kept under their agreed limits.
>
> 6. The Applicants to re-finance with a new funder as soon as possible.

274 This proposal represented a hardening in the Gooleys' position. They were not prepared to accept any deadline for repayment, even for the loans other than the FICL which by then had expired and were due for repayment. Such expired accounts were only to carry an additional 2% interest on base rates. Although the letter suggested that "monthly interest payments" would be made, it seems clear enough in the context that this was an offer to make interest-only payments not principal and interest payments, which on the Gooleys' case would have been the contracted position under the FICL. The Gooleys were in effect seeking a moratorium on repayment to give them an opportunity to refinance, but without any deadline.

275 The Gooleys' proposal was unacceptable to the Bank and FOS decided to proceed to a determination of the complaint. This resulted in Mr Bundy sending a letter on 8 September restating the Gooleys' position on the dispute. Mr Bundy's letter reframed the complaint as one about the Bank "changing" the expiry date of the facility in Ms Mulligan's letter of 14 November 2012. Mr Bundy claimed that the Gooleys believed that the Dyraaba loan facility could not have been extended while the Bank was treating the FICL as being in default, and the Gooleys had also been unable to obtain alternative funding for repayment or refinancing of the Dyraaba loan for this reason. The letter

claimed that the Gooleys' losses could not be calculated with precision but were estimated to be of the order of $300,000.

276 There followed a period during which the Bank responded to the Gooleys' allegations. In the course of this, the Bank produced further documents, including signed Facility Terms from September 2009, April 2010 and June 2011 which recorded the variation. In March 2015, Mr Bundy made a further submission to FOS in response to these documents.

Trading for 2014 to 2015; 2015 to 2016 and 2016 to 2017

277 The Gooleys appear to have ceased regular interest payments to the Bank from about June 2014 when they filed their FOS complaint. While the FOS proceedings continued, they took steps to sell one of the Clovass cropping blocks. A contract was exchanged for the 131 acre block to the east of the Tomki-Tatham Road in mid-October. The contract price was $467,000, and the net proceeds of $443,000 were paid to the Bank pursuant to the security the Bank held over the property. The Gooleys made their last interest payment to the Bank in early 2015.

278 Meanwhile, G&F's District Court debt recovery proceedings came on for hearing. In October 2014, the Gooleys settled with G&F on the steps of the court. They agreed to pay a discounted sum of $268,000 within twelve months. If payment was not made in that time, judgment was to be entered for the full amount of $415,000 less any amount paid down by the Gooleys.

279 As already noted, the FOS determination, which rejected the Gooleys' complaint, was handed down in May 2015. Following this, in June 2015 the Bank made a formal demand for payment. In accordance with the requirements of FDMA, the Bank instituted the mediation procedure in November 2015. The mediation took place in February 2016. It was unsuccessful. The RAA issued a certificate to this effect in June 2016.

280 Meanwhile, the Gooleys had proved unable to make the payment required under their settlement with G&F. G&F obtained judgment for the full amount owing of $400,000 in November 2015. G&F's debt recovery continued to be bitterly fought. G&F issued a garnishee notice against Mrs Gooley's employer for her wages. In March 2016, G&F accepted that it too was required to follow

the FDMA procedure. The mediation took place in August 2016. It too was unsuccessful and a certificate was issued in October 2016. As already noted, in the meantime these proceedings against the RAA and the Bank were commenced in September 2016.

281 The Gooleys' trading results for the 2014-2015, 2015-2016 and 2016-2017 financial years are in evidence. But they show greatly reduced activity. Contracting income continued but there was no cropping income and cattle sales were reduced to $25,000 - $35,000 or so a year. No doubt this reflected the Gooleys' inability to finance cattle purchases or other farm activities, as well as the impact of the sale of most of their farming equipment and the payment of legal and other consultancy costs.

Factual issues concerning dealings between the Gooleys and the Bank

282 In their affidavits, both Mr and Mrs Gooley gave lengthy accounts of their dealings with the Bank. These included detailed versions of conversations they said they recollected with the bank officers. Their accounts also included descriptions of discussions they said they had among themselves.

283 The Gooleys presented their relationship with the Bank (and particularly with Mr Mitchell) as one based on trust. On their version of events, they provided the Bank with voluminous detail about the way their business was going and about their commercial plans and objectives. They presented the Bank as having been fully supportive until 2012 when, as the Gooleys told it, the Bank pulled the rug out from under them following Mr Mitchell's departure.

284 In what follows, I consider the accuracy of this picture. In order to do so, I have needed to go in detail into the key dealings between the Gooleys and the Bank over the period from 2007 to 2012. This has required, in particular, an analysis of the contemporaneous documentary evidence and the FOS correspondence, and a comparison between what those documents show and what the Gooleys say in their affidavits.

Decision to move from ANZ to Bankwest

285 Mr Gooley's evidence was that after receiving the June 2007 letter of offer from ANZ he became aware that Mr Mitchell was with Bankwest and got in contact with him. He said he was told by Mr Mitchell that he was not entitled to contact

any of his former ANZ customers. Mr Gooley said he replied that, as he was making contact with Mr Mitchell, this was not a problem. Mr Mitchell responded by saying that Bankwest had aggressive plans to expand on the east coast of Australia. He said Bankwest had hired some good agribusiness staff, and had very competitive interest rates.

286 Mr Gooley said that he discussed what he had learned with Mrs Gooley and they agreed they should seek an offer from Mr Mitchell to compare with the ANZ offer.

287 As part of his application for financial assistance in February 2008, Mr Gooley sent a memorandum to the RAA describing the background to the application. This included a description of a change in the Gooleys' business model and an account of the refinance with Bankwest. Mr Gooley said:

> While the ANZ Bank had helped us through our enterprise transition the interest rates and charges that applied to our facilities were in our view excessive.
>
> From our perspective, in recent times the ANZ Bank's Business Banking Centre in Lismore left a lot to be desired with regard to their staffing levels, the experience of their personnel and their customer service.
>
> Over time we had been in contact with BankWest regarding their banking services and with their opening of a Business Banking Centre at Lismore we approached them with a view to them refinancing our operations.

288 The memorandum then compared the facility offers. The total available from Bankwest had been $1.65 million and the interest rates had ranged between 8.55% and 9.25%. The ANZ facility amount had been $1.595 million. Of that, $495,000 had carried interest at 8.5% (this was the loan for the purchase of the Patton land, which was to step up in 2010 by 2.08%). The rates on the remaining components had been 11.2% and 11.3%. The memorandum also pointed out that equipment finance had been available through Bankwest and that, while the ANZ offered a similar equipment finance package its interest rates had not been competitive.

289 The memorandum continued:

> One of our business imperatives is that we should manage as many risks as possible not only from a production perspective but financially as well. Towards the end of 2007 there was an emerging expectation that interest rates were on the rise. The subsequent refinance will minimise our exposure to interest rate movements.

> Another advantage of the refinance is that $450,000 of the facility is flexible and we are able to reduce our borrowing if the seasons run with us and redraw on the facility in adverse times.

290 In his affidavit, Mr Gooley covered some of the same ground. He said that he told Mr Mitchell:

> Susan and I would like you to formalise a proposal for our consideration that would take into account our redevelopment plan from dairy to beef. I would like our financing structure to be flexible, maybe interest only for the first period and then revert to a principal and interest structure for the balance of the loan. My proposal requires a large investment in machinery and equipment that would be financed by chattel or lease contracts and I would like to get some of those out of the way before we started to pay back principal.

291 According to Mr Gooley, he also said:

> Not long after I went farming in the 1980's I can still recall interest rates took off and reached as high as 22% and it nearly broke a number of people. We were lucky as we had locked in at around 16% so we were not as exposed as others. One of my requirements is that we enter a funding structure where we have some control on our outgoings particularly with the gearing we are operating at. We understand that the Bank will want some principal reduction over time, but I want to see an upfront interest only period first.

292 Mr Gooley said that after he received the Bankwest letter of offer in mid-October 2007 he had a meeting with Mr Mitchell to discuss it. Mr Gooley said he raised concerns about the fifteen year term but Mr Mitchell argued that Bankwest's interest rates were probably more favourable than ANZ's (Mr Mitchell did not actually know what rates ANZ was offering the Gooleys, but his supposition was correct) and the fixed interest period would give them a lot of flexibility.

293 Mr Gooley said he then discussed the options with Mrs Gooley and they decided to take the Bankwest offer:

> Over the next few days I had many discussions with Susan regarding the ANZ and Bankwest proposals. They were both doable, Under the Bankwest option there would be more cash available in the early years due to the large loan being a fixed rate for the first 5-years so there was no requirement to pay principal in that period. After the initial 5-year period the loan then reverted to principal and interest for the ten remaining years of the loan. At ANZ we were paying principal and interest on some of the borrowings and at higher rates but a real positive was the 30-year loans We also deliberated knowing the ANZ were a long-established Bank in our region but Bankwest was new in town and were not proposing to have a traditional banking shop front and that concerned both Susan and myself. We considered all the pragmatic financial rationale but one thing we were most attracted to was the longer-term relationship we had with Rod Mitchell. We had total trust in him and that client banker relationship

> and the reduction in Bank payments while we established our beef cattle business were the deciding factors why we chose Bankwest.

294 There is no doubt that the five year interest-only period, with a fixed interest rate, was a major attraction for the Gooleys in going to Bankwest. Both factors were specifically mentioned in Mr Gooley's affidavit account, and the latter is confirmed by the RAA memorandum.

295 But Mr Gooley in his affidavit also claimed that personal trust for Mr Mitchell was an important factor. I am not sure that this is correct. It was not mentioned in the RAA memorandum, which instead referred to other factors such as ANZ's perceived deficiencies and the fact that Bankwest's interest rates were lower.

296 In effect, the Gooleys had been able to push the interest-only period on their main borrowings out for five years, and at more favourable interest rates. Bankwest was also prepared to advance more money, which would enable the Gooleys to undertake the capital expenditure which they wished to make. While I accept that Mr Gooley found Mr Mitchell easy to deal with, I think his affidavit probably exaggerates Mr Mitchell's personal importance in the move to Bankwest.

Variation of term of FICL

297 The first major factual dispute between the Gooleys and the Bank which needs to be resolved concerns the variation to the term of the FICL. The Gooleys contend that they never in fact agreed to the FICL being reduced from the term initially agreed, namely fifteen years (five years interest-only and then ten years principal and interest). The Gooleys' case characterises Mr Mitchell's conduct as having been "tricky".

298 **Facility Terms**: The Bank's loan documentation for the original facility, and the five variations, all took the same form. In each case the Bank issued a formal letter of offer under the signature of Mr Mitchell. Attached was a document headed "Facility Terms" which set out particulars and essential terms for the different facilities (or, in the case of some of the variations, only the facilities being varied). The Facility Terms document had space for the Gooleys, as borrowers, to sign in order to accept the offer.

299 The original letter of offer was issued on 16 October 2007. The particulars for the FICL in the Facility Terms included:

> **Facility Limit** $1,200,000.00
>
> **Facility Expiry Date** 15 years from Initial Drawdown date.
>
> **Repayment** 5 years Interest Only and then revert to Principal and Interest over 10 year remaining term.
>
> The Outstanding Amount is repayable on the Facility Expiry Date.

300 The Facility Terms were signed by the Gooleys. Mr Gooley's signature was dated 22 October. Mrs Gooley's signature was dated 23 October. Each signature was witnessed but not by an officer of the Bank.

301 The Bank's letter of offer for the first variation was dated 3 July 2008. The Facility Terms involved a variation of the term of the FICL. The new particulars relevantly stated:

> **Facility Limit** $1,200,000.00
>
> **Facility Expiry Date** 5 years from initial drawdown date.
>
> …
>
> **Repayment** The Outstanding Amount is repayable on the Facility Expiry Date.

302 The Facility Terms document bears the signatures of Mr Gooley and Mrs Gooley, although each signature appears in the place for the other's signature. Neither signature was dated or witnessed.

303 The Gooleys do not deny that they signed the signature page on the July 2008 Facility Terms document. But there is a dispute about whether the document was complete when they signed, and what day they signed. I return to these questions below.

304 The next variation in the Facility Terms took place in September 2009 following the sale of the Patton land. The Bank's formal letter of offer was issued on 17 September. It began by referring to the existing agreement, which it described as "our Offer Letter dated 3 July 2008 and any variation letters". Attached was a revised Facility Terms document. The particulars for the FICL stated:

> **Facility Limit** $1,050,000.00 reduced from $1,200,000.00
>
> **Facility Expiry Date** 60 months after Initial Drawdown date

…

Repayment The Outstanding Amount is repayable on the Facility Expiry Date.

305 The varied Facility Terms were signed by Mr and Mrs Gooley on 18 September. The Gooleys' signatures were witnessed by Mr Mitchell.

306 The next variation to the Facility Terms was in April 2010 when the Gooleys obtained a further Business Edge loan for cattle purchases. The formal offer letter was dated 19 April. The letter did not expressly refer to the most recent variation letter (September 2009) but referred instead to the "letter dated 3 July 2008 and any variation letters". The FICL of $1.05 million was unaffected. The Facility Terms, however, referred to it, setting out the following particulars:

Facility Limit $1,050,000.00

Facility Expire Date 60 months from Original Drawdown date

Repayment The Outstanding Amount is repayable on the Facility Expiry Date

307 The Facility Terms were signed by both Mr and Mrs Gooley on 22 April. Both signatures were witnessed by Mr Mitchell.

308 The next relevant letter of offer was for the Dyraaba loan (revised Facility Terms documents had been signed in August 2010 and January 2011, but they did not refer to the FICL). The letter of offer was issued on 31 May 2011. Curiously, the letter referred back to a letter of offer dated 16 March 2011. There is no such letter in evidence and the reference is unexplained.

309 Again, the terms of the FICL were not affected. But particulars of it appeared in the revised Facility Terms document, which included the following:

Facility Limit $1,050,000.00

Facility Expiry Date 12/12/2012

Repayment The Outstanding Amount is repayable on the Facility Expiry Date

310 The Facility Terms were signed by Mr and Mrs Gooley. Both signatures were dated 3 June 2011. Mr Gooley's was witnessed by Mr Mitchell. Mrs Gooley's was witnessed by Ms Campbell.

311 The Facility Terms documents concerning the expiry date of the FICL thus tell a consistent, and unambiguous, story. In the initial (October 2017) Facility Terms, the expiry date was given as fifteen years after the initial drawdown

date. That was changed in the July 2008 Facility Terms to five years after initial drawdown date, and the same formula was specified in the revised Facility Terms of September 2009, April 2010 and June 2011. Each of these varied Facility Terms documents was signed and accepted by Mr and Mrs Gooley.

312 **Background to July 2008 variation**: The relevant chronology begins with a credit risk review ("CRR") for the Gooleys' account which was submitted by Mr Mitchell on 6 June. The CRR did not refer to any variation of the Gooleys' facilities, or to approval of the second mortgage of the RAA. It was a credit review only.

313 The CRR as lodged by Mr Mitchell contained financial information taken from the Gooleys' financial statements ending 30 June 2007. It did not contain up-to-date figures for the Gooleys' 2007-2008 trading.

314 The loan particulars for the FICL in the CRR stated that the final repayment date was "five years fixed I/O then P/I over ten year remaining term". This was exactly the same wording as had appeared in the original credit application in 2017.

315 On 10 June, Mr Gooley sent a memorandum to Mr Mitchell containing updated cash flow forecasts for the 2007-2008 financial year and a commentary on the Gooleys' trading for the year. By FATE dated 11 June, presumably in response to a request from Mr Mitchell, the Credit Department instructed him to submit an updated CRR by 30 June based on updated cash flow and interim 2007-2008 trading figures.

316 Mr Gooley's memorandum of 10 June also enclosed a copy of the RAA approval letter. In the meantime the RAA had approached the Bank directly about the proposed loan, seeking the Bank's agreement to limit its priority to $1.65 million.

317 Mr Mitchell made his next credit submission on 30 June. It contained an analysis of the updated financial information provided by Mr Gooley. But it was not just an updated CRR. It was a full CRFA which sought the Bank's consent to a second mortgage on the terms proposed by the RAA.

318 Two copies of Mr Mitchell's CRFA of 30 June are in evidence. The main difference appears to be that in one of them the Gooleys' internal bank credit rating was shown as 5+ and in the other the rating had been downgraded to 6-. Both of the CRFAs contained a change in the FICL loan particulars. The repayment date was stated to be "5 years fixed I/O then subject to renegotiation". It was this change in the loan particulars which generated the change in the Facility Terms document which the Gooleys were asked to sign.

319 Mr Mitchell's evidence was that this change was included in the CRFA to comply with requirements imposed by his superiors at Bankwest. He was told that the Bank wanted to reduce the term of the rural loans which it offered.

320 This is consistent with the state of world financial markets at the time. The global financial crisis is generally regarded as having begun as a period of illiquidity in inter-bank lending in 2007. In the first half of 2008 threats to individual institutions began to emerge. It was common ground that I should take judicial notice that following the bail out of Bear Stearns by the New York Federal Reserve in mid-March, rumours swept the markets that HBOS would be next, and its share price fell sharply.

321 By FATE dated 2 July 2008 the Credit Department approved the CRFA. The FATE confirmed the Gooleys' credit rating as 6-. The approval stated that a deed of priority was to be drawn up by the Bank's solicitors to cover priority with the RAA. It also imposed an additional condition that the LVR was to be less than 60%. This was a variation from the original Facility Terms of October 2007, which provided for an LVR of 66%, reducing to 60% by 2012. The variation was included in the varied Facility Terms document along with the variation in the term of the FICL.

322 **Date of signature on July 2008 Facility Terms**: As already noted, the letter of offer for the July 2008 variation was dated 3 July. Both Mr Gooley and Mrs Gooley insisted, however, that the meeting at which they signed the signature page on the Facility Terms took place on 2 July. This was of some significance to the Gooleys' case. The loan documentation now in the Bank's records consists of a covering letter dated 3 July and a Facility Terms document consisting of six pages. The suggestion is that what the Gooleys signed on 2

July was something else, perhaps only the last page of the Facility Terms document.

323 As already noted, there had been direct communications between the RAA and the Bank about the Bank consenting to the proposed second mortgage to the RAA. At 5.35pm on 2 July, Mr Avery sent an email to the RAA attaching what he described as the Bank's letter of consent. The attachment in evidence (which for some reason is dated 8 July) stated:

> This letter is to advise that Bank of Western Australia have approved Priority Agreement not exceeding $1,650,000 and for the NSW RAA taking a subsequent (2nd Registered Mortgage).

324 Counsel for the Gooleys submitted that this email provided contemporaneous documentary support for the Gooleys' contention that the loan variation was effected on 2 July. But I do not think it proves that the Gooleys must have signed on that day. It could just as easily have been referring to the obtaining of internal approval.

325 I accept that Mrs Gooley was at work on 3 and 4 July, as shown by her employment records. But that does not exclude the possibility that the meeting took place at the Gooleys' home after hours.

326 The Facility Terms document was not produced at the Lismore branch of the Bank; it was generated by a specialist section of the Bank responsible for preparing loan and security documents. The request for preparation of the July 2008 variation documents is in evidence and is dated 3 July. I think it is implausible to suppose that Mr Mitchell would have created an informal set of loan documents and signed the Gooleys up the day before. I can see no benefit to the Bank or to Mr Mitchell personally from that course and there was no pressing need.

327 I therefore reject the Gooleys' specific insistence that the meeting took place on 2 July. I see no reason to doubt that the letter of offer and the Facility Terms which contained the variation were generated on 3 July and were signed by the Gooleys on or after that date.

328 **Internal bank documents**: As already noted, the CRFA which resulted in the July 2008 variation particularised the term of the FICL as "five years fixed I/O

then subject to renegotiation". This was consistent with the revised Facility Terms document signed by the Gooleys.

329 But there was a change in the next credit submission lodged by Mr Mitchell. This was a CRR in June 2009. The particulars stated the final repayment date for the FICL as "five years fixed I/O then P/I over ten year remaining term". This was a reversion to the language which had been used in the original credit application in October 2007 and in the CRR dated 6 June 2008.

330 The reversion was carried forward in the next credit application. This was a CRFA dated 3 September 2009 which preceded the temporary increase in the Gooleys' overdraft facility of $60,000. The submission described the final repayment date for the FICL as:

> 5 years fixed I/O then P/I over 10 year remaining term – ***existing unchanged***

331 On the day that the Gooleys signed the September 2009 Facility Terms, Mr Avery wrote to the RAA concerning the RAA's request that Bankwest agree to reduce its priority to $1.4 million to allow the Gooleys' application for a second disaster relief loan to proceed. Mr Avery agreed to the request. He also set out particulars for the Gooleys' facilities with the Bank. This showed the FICL as expiring in December 2022.

332 The next CRFA in evidence, however, changed the wording back again. This was the CRFA which preceded the April 2010 variation. That recorded the final repayment date as "60 months (unchanged)".

333 As we have seen, these changes were not reflected in the actual Facility Terms documents of September 2009 and April 2010, both of which identified the term of the FICL as being five years. But there was a change in the LVR. The September 2009 Facility Terms reverted to the original October 2017 LVR provision, requiring 66% reducing to 60% by 2012. The April 2010 Facility Terms document then provided for the LVR to be 60%, in accordance with the change which had been made in July 2008. The evidence does not contain any explanation for these changes.

334 The final two variations were in 2011. The format for the credit submissions had changed somewhat. The January 2011 approval contained an exposure

and pricing summary which showed the expiry date of the FICL as 12 December 2012 but the term as “60 + 120”. The same notation appeared on further credit submissions in April and May.

335 Counsel for the Bank asked me to infer that the explanation for the description of the term of the FICL in the September 2009 credit application reverting to its pre-July 2008 form was that that description was copied from the June 2008 CRR. That might be possible, so far as it goes. The fact that the pre-July 2008 description of the term appeared in the Bank’s September 2009 letter to the RAA might have a similar explanation. On that inference, the error was presumably discovered and corrected as part of the April 2010 variation. But none of this explains the reference to a total loan term of fifteen years in the 2011 credit applications.

336 Furthermore, the Bank’s letters dated 12 and 13 December 2012 (see [486]-[489] below) also showed the FICL as having a total loan term of fifteen years. Those letters were computer-generated. There was no evidence from anyone responsible for the Bank’s IT systems to explain how the systems worked and how this might have happened.

337 **Mr Gooley’s loan spreadsheet**: The Court Book contained two sets of financial projections prepared by Mr Gooley prior to 2012 of income and expenses (and in particular financing expenses) covering the period after the expiry of the interest only term of the FICL in December 2012. The first of these was included in Mr Gooley’s submission to Mr Mitchell of April 2009 (see [164] above). The second accompanied Mr Gooley’s memorandum to Mr Mitchell of January 2011 (see [168]-[171] above). In each case, Mr Gooley budgeted on the basis that following December 2012 there would be interest-only repayments on the FICL amount, not principal and interest repayments as was provided for in the original Facility Terms of October 2007.

338 Later in the hearing, there was tendered one of the spreadsheet pages from Mr Gooley’s model. This was labelled as the “Commitment Schedule”. It contained repayment calculations for the Gooleys’ various finance facilities. The entry for the FICL showed the expiry date as 12 December 2022, repayable on an interest-only basis. It seems clear that the interest figures which appeared from

April 2009 onwards in Mr Gooley's budgets for 2013 onwards were generated from the "Commitment Schedule".

339 **FOS correspondence**: As already noted, there was no complaint about the variation in the terms of the FICL in the Gooleys' initial complaint to FOS in June 2014. The point was only raised in the second half of July. By that stage the July 2008 Facility Terms which contained the variation had surfaced and were being relied upon by the Bank to say that the Gooleys had agreed to the expiry date being changed from 2022 to 2012. Mr Bundy's response was:

> The Applicants say that this did not happen.
>
> They also point out that there was no reason for them to agree to such a change.
>
> The purported 2008 document has the signatures of the Applicants attached, but in the wrong places. It is not witnessed by any [Bank] executive. It is undated. Every other [Bank] record of an Agreement, entered into between the Applicants and the [Bank], has the Applicant's signatures correctly placed, and is witnessed by an [Bank] executive and is dated.
>
> We say that if there was an Agreement, in 2008, to change the terms of the 2007 Agreement, and if the document that recorded the new Agreement was seriously incomplete, then it would have been reasonable for the [Bank] to have demanded that the Applicants sign fresh documents. There are no fresh documents that reflect the changes that the [Bank] now claims to have taken place, nor does the [Bank] claim to have asked the Applicants to repair the documents.

340 It is notable that Mr Bundy's argument focused on the supposed unlikelihood of a variation agreement having been made in July 2008. Apart from a bare denial ("this did not happen") Mr Bundy made no attempt on the Gooleys' behalf to explain how they had come to sign the July 2008 Facility Terms.

341 In March 2015 Mr Gooley wrote to Mr Bundy to help Mr Bundy prepare the Gooleys' final submission to the Ombudsman. In an email sent in the early hours of 17 March Mr Gooley summarised the original facility terms and the amended terms for four of the five variations (the September 2009 variation was for some reason omitted). He suggested that a typographical error had been made in the July 2008 facility terms where the numeral "1" had been omitted from the facility expiry date so as to change it from fifteen years to five years from initial drawdown date. He continued:

> You will note that the date of the variation was within 9 months of BankWest taking over the funding from the ANZ Bank. Under the terms and conditions of

> our facility we were not obliged to produce any financial information to them till the account review which was 12 months after the funding date so the question is if BankWest believed they had a right to reduce the period of the loan by 10 years what was the criteria they used to do so. Where is the correspondence between the parties? There is none! Why? Because there was no reduction in the term of the loan, only a typo mistake by a bank clerk.

342 Mr Gooley was incorrect to say that the account review had not been due until 12 months after the loan was made. As already noted, the Bank had required a six monthly review, which had initially been due early in June. Clearly Mr Gooley must have forgotten about this by the time he wrote to Mr Bundy. Furthermore, Mr Gooley's assumption about a typographical error having been made is clearly incorrect. The Bank's internal records show that the decision was a considered one on the Bank's part. Mr Gooley's theory was not pursued in these proceedings.

343 Mr Gooley's email to Mr Bundy continued:

> **Lack of Evidence to support the BankWest claim that the facility term was reduced from 15 years to 5 years-**
>
> There is not one piece of correspondence either email or letter that suggests there was any discussion around the reduction in the term of the loan. The reason is because IT NEVER WAS DISCUSSED.
>
> If you look back at the detail I used to provide BankWest of not only our trading results but our future plans there is not even one piece of correspondence of financial projection that provides for the facility to expire on 21/12/2012.
>
> **Discussions of Facility Expiry Date-**
>
> Over the period of the loan and certainly before we entered into the final variation of facility dated 31/5/2011 I did talk to Rod Mitchell regarding the way the facility expiry date was recorded on the documentation. He put that because it was an interest only facility the expiry date of the interest only period was recorded and that the loan was for a 15 year period.

344 Mr Gooley continued:

> **Discussions relate specifically to the meeting of 3/6/2011 with Rod Mitchell (RM)-**
>
> When I met with RM there was considerable discussion around the property purchase and what we were looking to achieve regarding derisking our current Clovass operation from wet weather. I did express my concerns to RM regarding the term of the loan as it was short and was for 2 years only. I put to him that our $1,050K loan was due to end its interest only period and would convert to a principal and interest facility on 12/12/2012 so there would be a need to increase our payments to allow for this.
>
> We talked about the risks of increased debt of $550K and how we would manage if the seasons stayed wet and we didn't meet our projections. I was emphatic that if we couldn't improve our position and generate profits from the

> farm purchase then we would move to divest the farm and concentrate on our Clovass holding. So basically we would have a means to reduce the $550K debt.
>
> We did talk about determining a loan structure between fixed and variable rate interest and my preference to lock in fixed rates as long as we could and given the $1,050 loan was converting to a P&I loan we would need to see how we could structure the borrowings to derisk ourselves of interest rate variations.
>
> At no time did RM state or bring to my attention that the $1,050K loan was expiring in Dec 2012.

345 Mr Gooley supplemented this with a further email sent later in the morning of 17 March:

> On numerous occasions my discussions with Rod Mitchell centred around the interest only period of the $1,050 and the need to enter into a principal and interest arrangement post 12/12/2012 that was manageable. We did discuss the way it was recorded on the loan variation schedules and his response was always to indicate the term of the loan was 15 years and that the facility expiry date only referred to when the interest only facility ceased and converted to P&I. As a non-banking person this explanation seemed OK.

346 Mr Gooley's emails focussed on a discussion he supposedly had with Mr Mitchell about the Facility Terms document signed in June 2011. His reference to similar discussions happening on "numerous" earlier occasions was lacking in detail. Overall, I think that Mr Gooley's instructions suggest that he had little, if any, actual recollection of the earlier variations. He seems to have been mystified about the earlier Facility Terms documents and to have been casting around for some explanation for how he and Mrs Gooley could have come to have signed them.

347 **Gooleys' evidence at trial**: The Gooleys' evidence on the meeting with Mr Mitchell in July 2008 began with Mrs Gooley's affidavit in chief, which was sworn in September 2017. Mrs Gooley said:

> I recall we signed the forms Rod had with him and I remember there was an error, but I cannot recall the nature of the error. In reference to those documents, I recall Rod said words to the following effect:
>
> > this is just to setup the priority for the RAA and will not affect anything else regarding your loans with the bank.

348 Mr Gooley's account appeared in his affidavit in chief, which was sworn in February 2018. Mr Gooley stated that the purpose of the meeting was to review financial information which he had previously sent Mr Mitchell. His evidence continued:

After discussing the budgets, Rod Mitchell said in words to the effect of:

> I know the RAA Flood Loan is still awaiting approval but I have got a form that I will get you to sign today while you are both here together, so we can progress the paper work and maybe get the funding a little quicker. All this will do is register a Priority on your mortgage document, nothing else changes with your loan.

349 Mr Gooley said that Mr Mitchell had "a few different forms" for the Gooleys to sign. He continued:

> I recall that the forms were in loose form and not bound. I recall 2 forms being for the Deed of Priority, something to do with water licences and others I cannot recall. Rod had discussed those matters with us during the meeting and placed no emphasis on any one in particular. Rod said in words to the effect:
>
> > This is a form to register a Deed of Priority and the loan remains the same as it was originally set up.
>
> I can recall that in signing a form for Rod Mitchell that day it was signed incorrectly and either Susan or I brought it to the attention of Rod. Rod said in words to the effect of:
>
> > No worries we can get another one signed later as the RAA Flood Loan has not been approved at this stage.

350 Mr Gooley said that at the meeting Mr Mitchell did not speak in terms of variations at all, and only described the document as a "form to register a deed of priority". Mr Gooley said he signed the document on that understanding.

351 Mrs Gooley addressed the issue further in her reply affidavit sworn in October 2018. By this time Mr Mitchell had sworn his affidavit. Concerning the July 2008 Facility Terms Mrs Gooley stated:

> I have never seen a copy of the letter of variation dated 3 July 2008 until it was included as part of documents supplied by Bankwest to FOS in or around 2014.
>
> I recall signing a single signature page on or before 2 July 2008 which Mr Mitchell advised me was in relation the deed of priority for the RAA loan which Mr Mitchell had with him when he visited our farm.

352 On the Gooleys' account, the purpose of the meeting with Mr Mitchell was to discuss their financial results and most of the time was spent doing this. This seems doubtful. The information had been submitted by Mr Gooley on 10 June and the review had been completed, in accordance with the Bank's internal deadline, before Mr Mitchell's CRFA was submitted on 30 June. There would not seem to have been any point in discussing the Gooleys' financial results on 3 July.

353 Even if this is overlooked, there remains a difficulty with the suggestion that Mr Mitchell confused the Gooleys by telling them that the documents to be signed concerned priority for the RAA. Formal approval from the RAA for the loan had not even been granted at that stage. The RAA had been waiting for notification from Bankwest that it would consent to a second mortgage, and that notification was only provided in Mr Avery's letter of 2 July. The RAA's formal letter of offer to the Gooleys was only issued on 22 July, and the Deed of Priority was not prepared until after that. The Deed of Priority itself does not appear to be in evidence but the one prepared in April 2010 for the second RAA loan is. The Gooleys were not even signatories to that instrument.

354 The difficulty was in part acknowledged in Mr Gooley's affidavit where he attributed to Mr Mitchell a statement that the RAA loan was still awaiting approval. But on Mr Gooley's account, it is hard to understand what the point was of raising the subject. The Gooleys did not identify in the evidence any documents concerning security for the RAA loan which were signed at the meeting with Mr Mitchell.

355 It will be recalled that the next variation in the Facility Terms was in September 2009, as a result of the changes consequent upon the sale of the Patton land. The revised Facility Terms were signed by Mr and Mrs Gooley on 18 September. Mr Gooley stated in his affidavit that he met Mr Mitchell on that date to sign the documents. He said that he immediately noticed on reading the covering letter that it referred to a variation dated 3 July 2008. He said he did not recall any variation and the following exchange ensued with Mr Mitchell:

> P Gooley: Rod, the only variation that has taken place to the original Letter of Offer was the registration of the Deed of Priority that needed to be registered for the RAA Flood Loan.
>
> Mitchell: Yes, that is correct.

356 Mr Gooley said he then noted that the facility agreement limit had been reduced (as had been agreed) but the facility expiry date was sixty months from the initial drawdown date. He said that the following exchange then took place:

> P Gooley: That means that the initial period of the loan is for a 60-month period and after that it reverts to principal and interest for the 10-year term of the loan.

> Mitchell: The loan was set up for a 15-year period and nothing has changed to the loan terms or conditions excepting the registration of the Deed of Priority.
>
> P Gooley: When we came to Bankwest, I sought a loan structure that enabled us to take on a sizeable commitment paying chattels and leases. I think now we are paying $100,000 per year on those alone. Our plan was to have these paid out before the principal payment component of the loan commenced. We are 18 months into the 5-year interest only period and our earnings are a long way behind where we believed we would be. Given we have had such a devastating time with the wet seasons there is going to be a lot of pressure on the business. This property sale will help immensely but we will need things to start going our way if we are to pay the balance of the borrowings off over a 10-year period.

357 Mr Gooley said he went on to sign the document based on his trust for Mr Mitchell even though he could not at that stage remember any letter of offer of July 2008. But he said that after signing he wrote on the left hand side of the page the words "15 year loan term". He drew this to Mr Mitchell's attention and asked Mr Mitchell to send him a copy of the signed document.

358 Mr Gooley said that after the meeting he called Mrs Gooley who had not yet signed the documents. He stated that he told Mrs Gooley:

> … there was one thing that I pointed out to Rod and that was how the loan term was expressed and he assured me that there had been no change to any term and that the loan had been set up for 15 years and the term on the document referred to the interest only period. I made a notation on the document to indicate it was a 15-year loan term. You might be best initialling it as well.

359 In her initial account of signing the September 2009 Facility terms document Mrs Gooley said:

> I recall Rod Mitchell telling me when signing words to the following effect:
>
> > this is to reduce the level of the 15 year loan from $1.2 million to $1.05 million, and payout the principal and interest loan and that everything else remains the same as the original letter of offer.

360 Mrs Gooley stated in her reply affidavit:

> I recall when signing this letter of variation Mr Mitchell assured me that the FICL loan had a 15 year term that the 5 years on the document was just the interest only portion of this term, he added that the loan would then revert to 10 years principal and interest. It was based on this invariable assurance from Mr Mitchell at the time that I signed this document.

361 That night, when Mrs Gooley got home from work, they discussed their separate meetings with Mr Mitchell. According to Mr Gooley the following conversation took place:

> P Gooley: Did you initial where I had made my notation on the form?
>
> S Gooley: No, I didn't, I forgot. We had a really busy day at work and Rod just got me to sign the forms. He said that you had asked him questions and he assured me everything was OK
>
> P Gooley: I suppose one initial will suffice. He was quite adamant that there were no issues, so I think we should trust him

362 Mr Gooley said that he never received a signed copy of the Facility Terms from Mr Mitchell. He did not say whether he had made any further request for it. Mrs Gooley did not mention this matter at all.

363 According to Mr Gooley, the topic came up again when the April 2010 variation took place. He stated that he noticed the particulars in the Facility Terms and the following exchange took place:

> P Gooley: Rod this $1,050,000 loan that we paid $150,000 off last year is for 5-year interest only and then reverts to principal and interest for the 10-year term of the loan.
>
> Mitchell: That is correct.

364 Mr Gooley also said the issue came up when he discussed the Dyraaba loan documentation with Mr Mitchell in June 2011. Mr Gooley said he and Mr Mitchell went through the Facility Terms:

> When we came to the $1,050,000 loan I noted that it had Interest Only in the loan type. I said in words to the effect of:
>
> Rod I know we have discussed this before, but I am going to raise it again. The way that this is expressed is confusing. The only variation we have had to this loan is when we sold the Patton property and we paid a break cost to reduce the balance from $1,200,000 down to $1,050,000. Its term was for a 5-years Interest Only and reverting to a 10-year Principal and interest loan.

365 On Mr Gooley's account, Mr Mitchell confirmed again that this was correct and the conversation then moved on. Mr Gooley said he raised concerns about the Dyraaba purchase, and especially the two year term of the new loan being offered by the Bank. According to Mr Gooley, Mr Mitchell responded:

> I can understand that this is a family transaction and there are lots of issues to consider. However, let's go back to your concerns about the 2-year period for the new loan. When that loan expires I am sure we can come up with a structure that will suit your needs as your $1,050,000 loan will be on a variable rate not fixed and its principal and interest term will have commenced and maybe the new loan could be added to that or even have an interest only component applied as well.

366 According to Mr Gooley, the following exchange then took place:

> P Gooley: Rod I have known you for a long time and we trust you but you have to acknowledge what you have asked us to sign today is not what we expected I have to tell you, a 2 year loan term does scare me a bit. We have already talked about the way the expiry date of the $1,050,000 loan is expressed and you have repeatedly confirmed that it was for a 5 year fixed interest only period and reverts to a 10-year principal and interest loan and that loan has not been varied from the initial offer excepting the $150,000 principal reduction. Back when we sold the Patton property I even made a notation on the agreement to the effect it was a 15-year loan I don't like saying this, but what if something happened to you or you changed employment would the next Bankwest employee view things differently?
>
> Mitchell: I think you are thinking too hard about this. Firstly, I am not going anywhere and secondly the $1,050,000 loan has a 15-year period and that's the way they are in the Banks systems. Regarding the new loan, I apologize for not being able to get the documents to you earlier so you had more time to consider them, particularly with the loan term of 2-years. I understand the impact that the seasons have had on your business and am sure it will all work out. Let's hope it dries up and that will make a world of difference to us all.

367 Mrs Gooley acknowledged that there were further variations in 2010 and early 2011 (which in fact included the April 2010 variation) which stated that the term of the FICL was five years. She did not say anything about the circumstances in which these documents were signed.

368 Mr Gooley was cross-examined on his budget figures which showed the FICL repayments as being interest-only after December 2012, rather than principal & interest in accordance with the October 2007 Facility Terms. He said that it was a mistake.

369 **Conclusions**: On the face of it, the written evidence, in the form of the Facility Terms documents signed by the Gooleys, is strong evidence that they did indeed agree to the variation of the term of the FICL in July 2008 and that that agreement continued thereafter.

370 The original Facility Terms document from July 2008 is in evidence. The pages of the document contain multiple sets of staple holes, no doubt from being copied on various occasions. There is no clear indication that the signature page was signed as a single page and added to the rest of the document later.

371 It is strange that the document was not dated or witnessed as the other Facility Terms documents were. But in the end the Gooleys do not dispute their signatures on the document and there is no reason to doubt that they signed it in July 2008 in the form which is now in evidence.

372 Taken as a whole, the Bank's internal documentation on this issue is confusing. I think it is clear that right up to December 2012 the loan must have been recorded in some part of the Bank's computer systems as having a fifteen year term. There seems no other explanation for the December 2012 letters, and I think this is likely also the explanation of the summary information in the 2011 credit applications.

373 But the critical documents are those surrounding the July 2008 Facility Terms variation. In particular, there is the 30 June CRFA that specified a repayment date of five years to be followed by renegotiation. This is quite explicit and is consistent with the Bank's loan documentation from July 2008. It is a contemporaneous record of what Mr Mitchell considered the terms to be.

374 Mr Mitchell's evidence that the change was imposed on him by his superiors at the Bank because of problems within HBOS associated with the global financial crisis was not challenged by counsel for the Gooleys. Rather, it was the reverse; counsel emphasised the Bank's change in direction at every opportunity.

375 The circumstances are certainly unflattering to the Bank. It was opportunistic in using the Gooleys' wish to obtain a concessional loan from the RAA as a way of shortening, for its own purposes, the commitments it had previously taken on. But there is no doubt that that is what the Bank intended to do, and that it obtained signed loan documentation from the Gooleys agreeing to it.

376 As against this the only contemporaneous documentary evidence to which the Gooleys can point is Mr Gooley's commitment schedule which showed the expiry date of the FICL as being December 2022. The earliest spreadsheet model reflecting this dates from April 2009, which was not that long after the July 2008 variation and pre-dated the next variation which took place in September 2009.

377 But while the commitment schedule showed the expiry date of the FICL as being December 2022, the interest calculations showed interest-only repayments whereas the Gooleys' case in these proceedings would have required repayments of both principal and interest. I found Mr Gooley's attempt to explain this as a "mistake" unconvincing. It is hard to accept that if Mr

Gooley truly had in mind that he would be making principal and interest repayments after December 2012 he could have made such an egregious, and persistent, error in his budgeting. The spreadsheet evidence cuts both ways.

378 This leaves the Gooleys with their unaided recollection, as expressed in the evidence they gave in their affidavits and at trial. I have already pointed out the difficulty with the Gooleys' accounts of the July 2008 variation so far as those accounts involved the supposed presentation of documents for signature concerning priority over the RAA. But there is a more fundamental problem.

379 If Mr Gooley's affidavit account truly represented a recollection of what had happened in July 2008, one would expect to have seen it reflected in the FOS correspondence. It was not. Indeed, as I have said, I think Mr Gooley's correspondence with Mr Bundy suggests that by that stage he had no real recollection of the events of July 2008 at all. Certainly by then he had forgotten that he had been required to submit financial information in June, and incorrectly reconstructed that the provision of that information was not required until twelve months after the date of the loan. Overall, I am not satisfied that the Gooleys' account in their affidavits and at trial is reliable.

380 The Gooleys' case also has to confront the further three signed versions of the Facility Terms document which showed the FICL as expiring in December 2012. Mr Gooley might have claimed that he did not notice this. But he did not. He presented himself in his evidence as an astute and careful businessman. On his own account, he noticed the five year term in each of the subsequent variations which he signed in September 2009, April 2010 and June 2011. It therefore becomes necessary to consider the credibility of that account.

381 I did not find Mr Gooley's affidavit account of these conversations, overall, to carry much conviction. The conversations, as recorded, do not sound like what one would expect where a customer was seeking further financial accommodation from his banker. The references to prior consistent statements (on Mr Gooley's part) and the concessions (by Mr Mitchell) seem too good to be true. The same observation applies to Mrs Gooley's evidence of her conversations with Mr Mitchell.

382 There is no documentary corroboration for Mr Gooley's assertion that he wrote "15 year term" against the FICL when he signed the revised Facility Terms document in September 2009. The Bank's copy of the document from its records did not contain any such notation. The original was not produced, and counsel for the Gooleys submitted that the Bank's copy showed signs of whiting-out. I do not accept this, and I am not satisfied that there is anything sinister in the failure to produce the original.

383 I think Mr Gooley's evidence on this subject is implausible. Mr Gooley was well aware that Mr Mitchell was only an employee of the Bank. As such, he might leave the Bank at any time in the future. Mr Gooley must have been aware of the importance of ensuring that the Bank's documentation was accurate and did not depend on any separate oral understanding between himself and Mr Mitchell. That would have been the whole point in making the supposed annotation on the document, but on Mr Gooley's account he never insisted that Mr Mitchell formally acknowledge it on the Bank's behalf. It is also notable that Mrs Gooley did not corroborate what Mr Gooley said about her supposed mistake in not initialling it at her later meeting with Mr Mitchell.

384 Mr Gooley's account of the conversation he had with Mr Mitchell when signing the Facility Terms document for the Dyraaba loan in June 2011 also referred back to the supposed annotation. This only reinforces the problem. According to Mr Gooley, he made the common-sense point that an oral understanding between himself and Mr Mitchell would be no use if Mr Mitchell left the Bank and the next manager saw things differently. On Mr Gooley's account the only response from Mr Mitchell was that he was not going anywhere. On Mr Gooley's version of events, this was no answer at all. I find the whole account from Mr Gooley unbelievable.

385 There is also the fact that the September 2009 letter of offer expressly referred back to a variation in July 2008. I do not find the way in which Mr Gooley dealt with that at all convincing. He acknowledged that he saw the reference, and indeed questioned Mr Mitchell about it. On his version of events, he then signed without being aware of any actual change in the Facility Terms in July 2008, out of supposed trust in Mr Mitchell. I think that this does not make much

sense. It is more plausible to suppose that Mr Gooley passed over the reference, either because he remembered that he and Mrs Gooley had signed revised Facility Terms in July 2008, or because by that point he had already put the variation out of his mind.

386 It is curious that the offer letter of April 2010 did not refer to the September 2009 offer letter as the most recent one and instead referred back to the July 2008 letter of variation. But this does not help the Gooleys on the present issue. If Mr Gooley read the reference at the beginning of the April 2010 letter at all, it would only have served as a further reminder of the July 2008 variation. The reference to an offer letter of 16 March 2011 in the Bank's letter of offer of 31 May 2011 is a curious and unexplained detail, but has no bearing on the current controversy.

387 There is no contemporaneous evidence from November or December 2012 of any protest by the Gooleys about the term of the FICL, nor was any such protest recorded in the initial complaint to the FOS in June 2014. Mr Gooley did claim in his affidavit that when contacted by Ms Mulligan in November 2012, his initial reaction was to tell her that the FICL did not expire until 2022 and he knew nothing of any variation. But as I explain below, I do not find this evidence persuasive.

388 The FOS correspondence also includes statements by Mr Gooley that he was told by Mr Mitchell that the five year term for the FICL in the Facility Terms documents was a reference to the interest-only period and did not affect the originally agreed remaining ten years of principal and interest repayments. But this has its difficulties. One is that the Facility Terms documents state in black and white that the FICL was to expire at the end of five years. Another is that Mr Gooley's statements in the FOS correspondence differ from the account he gave in his affidavit. In my view these statements come too late, and raise too many unanswered questions, to be convincing. They may be no more than an imperfectly remembered conclusion about what Mr Mitchell in fact said.

389 I also reject Mrs Gooley's evidence in her reply affidavit. She spoke repeatedly of assurances being made by Mr Mitchell but this is not consistent with her first affidavit nor, in my view, with probabilities. Like Mr Gooley, Mrs Gooley is an

intelligent person. She would readily have appreciated that it was essential to ensure that the Bank documentation accurately reflected the agreement between the parties and it would be insufficient to rely on some sort of oral understanding with Mr Mitchell.

390 The Gooleys' case on this point, as presented in their affidavits, is not something they could have been mistaken about. I am driven to the conclusion that the Gooleys tailored their evidence so as to create the impression that in some way the Facility Terms were misrepresented to them.

391 I also think it probable that Mr and Mrs Gooley both exaggerated the significance of the fifteen year loan term in their evidence. The most likely explanation for the lack of reference in Mr Gooley's budgets to principal and interest repayments after December 2012 is that Mr Gooley knew that the loan term would expire in December 2012 but thought he would be able to refinance the debt for a further term, hopefully on an interest-only basis. He had, of course, refinanced the ANZ debt in a similar way with Bankwest in 2007. That would explain the apparent lack of protest by Mr Gooley about the removal of the ten year principal and interest repayment period. It was just not that important to him.

392 It is easy to imagine that Bankwest's decision to reduce the term of its loans, coming so soon after Mr Mitchell had left ANZ and encouraged customers such as the Gooleys to join him, would have embarrassed him. But I am not prepared to accept that Mr Mitchell misrepresented matters to the Gooleys. After all, the change was there in black and white in the documents. I think the most likely hypothesis, although neither Mr Mitchell nor Mr Gooley actually said this, is that Mr Mitchell smoothed the change over by referring to the likelihood of the loan being refinanced. This would be consistent with the description of the facility in the CRFA of 30 June 2008 as being "five years fixed I/O then subject to renegotiation".

393 Whether or not I am right in these suppositions does not in the end matter. It is enough to say that I do not accept the Gooleys' allegations on this issue. I am not satisfied that the Gooleys did not agree to the variation reducing the term of the FICL to five years. Although the Gooleys may have expected, and Mr

Mitchell may have expected, that it would be possible to refinance the loan, no case is made by the Gooleys of any promise to that effect. There was no commitment by the Bank to the Gooleys that the loan would be extended beyond December 2012, whether on repayment of principal and interest, or any other, terms.

The Dyraaba loan

394 The second major area for factual investigation is the circumstances in which the Dyraaba loan was made. This does not just involve looking at the disputed dealings between the Bank and the Gooleys. It is necessary, in order to deal with the "asset lending" case, to look at the Bank's internal deliberations.

395 **Bank concerns in 2009 and 2010 about Gooleys' level of debt**: It will be recalled that Mr Gooley's proposal concerning the sale of the Patton land in 2009 involved using some of the proceeds to pay out equipment leases. Mr Gooley proposed this because he wanted to reduce the level of monthly finance costs. This was reflected in the CRFA lodged by Mr Mitchell. The proposal was that after the clearance of the temporary overdraft limit, it would remain at $300,000 until reduced by the $120,000 which had been sought from the RAA.

396 The Credit Department of the Bank would have preferred a more conservative approach, involving a reduction in the Gooleys' overdraft limit, or perhaps a further reduction of the FICL principal. The officer of the Credit Department handling the application, Daniel Hensman, commented:

> Paying out HP contracts at the expense of bank debt is not considered ideal. However given the circumstances willing to support.

397 Mr Hensman approved the application but on condition that the Bank overdraft be reduced on settlement of the sale to $185,000, not the $300,000 sought. He was, however, persuaded not to insist on this and to agree for the overdraft limit to remain at $300,000 after settlement. This was to be subject to a review of that limit for possible reduction at the next annual review, which was due at the end of March 2010. It was also agreed that the loan proceeds of $120,000 from the RAA, would, subject to the RAA's approval, be used as a permanent overdraft debt reduction.

398 As already noted, the Gooleys did not ultimately receive the expected $120,000 from the RAA. They only received $75,000. And when the next review took place, after what had been another poor season, the Gooleys were asking for a further $100,000 loan; the idea of a reduction in the overdraft was out of the question.

399 Nevertheless Mr Hensman approved the further loan in April 2010. He imposed an additional condition in doing so, namely that comparisons of budget to actual results were to be monitored on a six monthly basis and a variance of plus or minus 20% was to be reported to the Credit Department. In his comments he said:

> Overall the risk is considered to be acceptable due to experience of the operator, abundance of pasture/the fact that adequate feed is held on farm, off farm income of S Gooley to supplement income, varied nature of security and the ability of customer to make monthly principal reduction. However the current level of overall debt is of concern and customer should be advised accordingly.

400 Mr Mitchell said that, in accordance with his usual practice, he would have advised the Gooleys of Mr Hensman's concern, although he could not actually remember doing so. He was challenged on this in cross-examination but adhered to his evidence. On balance, I see no reason to doubt that Mr Hensman's instruction was followed.

401 **Bank decision to grant Dyraaba facility**: As already noted, in January 2011 Mr Gooley put a proposal to the Bank for funding the purchase of Dyraaba, which was associated with a change of business strategy involving more of a focus on cattle. Mr Gooley also sought "at least" an extension of the temporary overdraft limit of $400,000 (granted in August 2010) beyond 31 January. Mr Gooley's memorandum was dated 14 January.

402 Mr Mitchell's CRS was dated 27 January. The CRS sought approval for making the temporary overdraft limit of $400,000 permanent, and for a loan of $550,000 to purchase Dyraaba. The loan was to be a fixed interest commercial loan with a two year term. Mr Mitchell argued that the Gooleys had a sound asset position because of the value of their water licences and their cattle.

403 Mr Hensman responded with an email commenting on the application. His comments included:

…

● Projections seem very ambitious and hard to quantify based on historical results.

● ICR [Interest Cover Ratio] & DSR [Debt Servicing Ratio] is below acceptable levels based on limited financials and projections. I am not sure of this entity's ability to repay debt without asset sales.

…

● Water is considered to be makeshift/supplementary security. We would only extend 60% for high security water to boost safety assessment and not use same for primary reliance. In today's market this asset has no value due to limited/poor sales.

…

● Based on the above comments our gearing would be 65% on landed assets.

404 Mr Hensman concluded by saying:

> I also draw your attention to the previous FATE which highlighted some of the above issues.
>
> In conclusion not comfortable to support increase in debt for this connection.

405 The CRS was resubmitted on 3 February and the FATE issued on 4 February. Mr Hensman granted an immediate permanent increase in the overdraft to $400,000. The $550,000 loan to purchase Dyraaba was approved but only if a number of conditions could be satisfied. In particular: a stock mortgage was to be taken over the cattle; stock numbers were to be provided on a monthly basis; facilities were to be reviewed on a half yearly rather than a yearly basis; all security property was to be revalued to confirm the value stated in the loan application; and the facility to be subject to a maximum loan value ratio (LVR) of sixty per cent calculated on land only (that is, excluding the value of the water rights or the cattle).

406 Mr Hensman explained:

• Comments on history and experience are noted. However it is disappointing that the customer has not delivered on budget/forecast for the previous years.

• Extensive forecasts for 2011/2012 and 2012/2013 to hand indicate enterprise to return to profitability based on mixed farming. It is important to closely monitor the forecasts to actual to ensure progress. Hence half yearly monitoring.

• Please advise customer that the current level of funding is at the upper level of bank's appetite and as such the bank would not support any further increase or amendment

- Based on forecasts to hand the customer will not achieve planned growth without the current level of assistance. Hence the current $100K temporary increase has been confirmed as permanent increase to OD.

407 As already noted, revised Facility Terms were issued on 8 February and signed on 11 February by Mr and Mrs Gooley. This related only to the overdraft. The fresh valuations of the security property had to be obtained before the Dyraaba loan could proceed.

408 Mr Mitchell's evidence was that on or prior to 11 February, he told the Gooleys that the loan for Dyraaba had been approved but the Bank had reached its limit of accommodating them, as he had been instructed to do by Mr Hensman.

409 On 15 March, the Bank instructed a local real estate agency firm to conduct the necessary valuations. The valuer was given Mr Gooley and Mrs Gooley as the contact. The inspection took place on 21 March and the report for Clovass was completed as at that date.

410 On 13 April a further CRS was lodged noting that the valuation for security products had been obtained. The valuations resulted in an LVR of 62.6%, more than the 60% which was one of the conditions in the February approval. Nevertheless the application was approved with a variation that the LVR (based on land only) should not exceed 67%. The FATE is not in evidence, so the reason for this variation is unknown.

411 The 27 January CRS contained calculations of debt servicing cover, based on capacity to repay. These were calculated by reference to cash available for debt servicing (CAFDS). Figures were presented at three points. These were 30 June 2010; 30 June 2011; and 30 June 2013. CAFDS was calculated based on the farm budgets submitted by Mr Gooley and adding on Mrs Gooley's budgeted income from Wappetts. Servicing costs were included both for the bank facilities and the Gooleys' equipment leases.

412 The figures were as follows:

	30/6/10	30/6/11	30/6/13
CAFDS	$296	$207.6	$556

Bank payments	$183.7	$183.7	$248.9
HP/Lease payments	$71.9	$61.8	$12.3
Total debt service	$255.6	$245.5	$261.2
Debt service ratio	1.2x	0.85x	2.1x

413 These figures may not have been those upon which the Bank made its ultimate decision to approve the loan. It is not clear whether the 27 January CRS in evidence is the original or resubmitted version. Nor is it clear whether the figures were redone for the purpose of the 13 April CRS which was apparently the basis for final approval. Nor is it clear where the RAA repayments fitted into these figures.

414 What is clear is that the Bank payments which were provided for included repayments of principal as well as interest. The principal repayments were based on repayment by instalments over fifteen years. This was despite the fact that the FICL at that stage had less than two years to run and the term proposed for the Dyraaba loan was also only two years.

415 These calculations apparently reflected the Bank's usual practice. According to Mr Mitchell, when the Bank stopped making loans for fifteen years, it nevertheless continued to calculate debt service ratios based on a notional repayment period of fifteen years.

416 There was no evidence from anyone in the Credit Department of the Bank to explain or justify this practice. Nor was there any expert evidence on the subject. It was not suggested that the Bank disclosed these calculations, or the basis for them, to the Gooleys.

417 **The Gooleys' decision to proceed with Dyraaba loan**: As already noted, the FATE approving the loan in response to the 13 April CRS is not in evidence, so the date of approval is unknown. Nor is there any evidence of further action being taken to implement the approval until the second half of May.

Presumably this was because of the hold-ups with James Hayward and his wife obtaining finance.

418 Nevertheless the Gooleys continued with their plans. I have already referred to the fact that increased cattle purchases under the new trading arrangement with G&F started in April. An article on the Gooleys' farming activities was published in a journal called Queensland Country Life at the end of May 2011. The article was based on an interview with the Gooleys at the beginning of the month. The article trumpeted the supposed success of the Gooleys' diversified farming model. It described the Gooleys and the Haywards as "hand-picking markets to find the best margins in a move that is underpinning impressive expansion plans at Clovass, near Lismore, NSW". It referred to Dyraaba as a part of the Gooley operations, describing it as "just purchased".

419 In evidence is an archive copy from the Bank of an email from Mr Mitchell addressed to Mr Gooley dated 23 May 2011. The email stated:

> It has been some time since the loan of $550K was originally discussed.
>
> The facility was approved as a 2 year Fixed Interest Loan.
>
> > In order for us to prepare our Letter of Offer could you please confirm if this is still suitable.

The email went on to quote the Bank's current interest rates for different terms.

420 On 30 May Mr Carl Spence of Walters Solicitors, who were acting for the Gooleys, wrote to Ms Campbell. He referred to an earlier conversation on Thursday 19 May, and stated that, as discussed, the plan was to exchange contracts and settle the purchase of the Dobies Bight properties on Friday 10 June.

421 As already noted, the Bank's formal letter of offer was issued on 31 May, and the Facility Terms document was signed by the Gooleys on 3 June. As it happened, however, the settlement did not occur until early July.

422 **Mr Gooley's account at trial**: Mr Gooley acknowledged that he and Mrs Gooley signed the revised Facility Terms which permanently increased the overdraft facility from $300,000 to $400,000 on 11 February. In his affidavit he gave an account of the conversation with Mr Mitchell which took place on that occasion.

423 Mr Gooley said that he and Mr Mitchell discussed how unfavourable the season had been. Mr Gooley denied that Mr Mitchell said anything about approval of the Dyraaba loan. Mrs Gooley's evidence was somewhat different. She said there was a discussion on 11 February about how poor the season was but that Mr Mitchell told the Gooleys that the loan had been refused.

424 Mr Gooley said that "about early March" he received a phone call from Mr Mitchell and they had a conversation to the following effect:

> Mitchell: I have received some good news today, your application for funding to buy Dyraaba, it looks like it has been approved. It has taken a bit longer than I had expected.
>
> P Gooley: That's great news, what are the loan terms?
>
> Mitchell: I am still working through that.

425 Mr Gooley said that for the next two months or so the ball remained in Mr Mitchell's court. At the same time Mr Gooley said he was aware that the Haywards' finance application still needed to be approved.

426 Both Mr and Mrs Gooley denied that Mr Mitchell ever told them about the Bank having reached its limit.

427 Mr Gooley denied having received Mr Mitchell's email of 23 May. He said instead that on or around 31 May Mr Mitchell contacted him to arrange an urgent meeting on 3 June to sign the documentation.

428 Mr Gooley said he attended the meeting as arranged on 3 June. Mrs Gooley was unable to attend because of work commitments. Mr Gooley said he was presented with the covering letter and the Facility Terms document. He said he had not seen these prior to the meeting, nor had Mr Mitchell told him anything about what they would contain.

429 Mr Gooley stated that on reading the covering letter he noticed that it referred to an earlier letter of offer dated 16 March (which, as we have seen, is unexplained). He said he asked Mr Mitchell about this and Mr Mitchell told him the original offer had been changed and was no longer relevant. According to Mr Gooley, he accepted this because of his trust for Mr Mitchell.

430 Mr Gooley stated that he then reviewed the Facility Terms document and was "shocked" to read that the expiry date for the new loan was only 24 months from drawn-down date. An exchange to the following effect ensued:

> P Gooley: You are kidding aren't you, why didn't you tell me this before the meeting? How do you expect us to pay the money back in 2 years? Farming isn't just that good, particularly with the disastrous seasons we have been having.
>
> Mitchell: That is the best the Bank will do. They aren't giving out longer term loans at present.
>
> P Gooley: When Susan and I came over to Bankwest I expressed my concerns to you that Bankwest was asking me to walk away from 30-year loans. Now you put a proposal to me that is for 2-years only. Susan and my expectation was for similar loans to what we have now i.e. 5-year interest only reverting to 10-year principal and interest. I did not even contemplate this.

431 Mr Gooley stated that Mr Mitchell tried to calm him down and suggested that they continue to go through the Facility Terms document. I have already set out Mr Gooley's account of this at [364]-[366] above.

432 According to Mr Gooley, after going through the Facility Terms document, Mr Mitchell praised the Gooleys' financial reporting and said that there were other farmers in the district in a similar financial position, or worse. He said that the Gooleys had done as well as could be expected. Mr Gooley said that he took from this that he thought the Gooleys' farming strategy had merit and had Bankwest's support. They then discussed the funding structure. On Mr Gooley's account he said:

> When Susan and I came to Bankwest we ensured the majority of our borrowings were covered under the $1,200,000 loan which was a 5-year period of interest only at a fixed rate and then reverted to a 10-years principal and interest loan We structured the loans so that we could accommodate a large investment in farming plant and equipment. Our commitment to HP and Chattels has been approx. $95,000/year and toward the end of 2012 and in early 2013 we have to payout the Balloons that are approx. $90,000, so there is going to be a lot of pressure on cash flow. Added to that, principal payments start at the beginning of the 2013 year. I have known all this and as such I have given it due consideration in formulating the current business strategy that I have presented to you, but I did not contemplate a 2-year loan, I expected a 15-year loan.

433 Mr Gooley said that the conversation continued:

> P Gooley: You know the planning and thinking I put into my business planning and strategy, the least I would have expected is that you would have kept me informed. A shorter-term loan just adds a layer of risk that I really did not contemplate You advised us back in March sometime of the Bank's

approval so has there been a change in the lending policy of the Bank or does the Bank have a problem with our account?

Mitchell: No, not at all, it's just that they are not doing longer term loans at the present.

Mitchell: Purchasing the Dyraaba property should give you the capacity to increase your earnings and underpin your beef strategy.

P Gooley: That is fine if it stops raining. I don't know how long these abnormally wet seasons will continue.

434 According to Mr Gooley, he made the following points:

> If Susan and I proceed with the proposal and our worst fears eventuate and we cannot make this work within a 2-year period, the very unpalatable option that may confront us is that we will have no other option but to sell the Hayward family property. Why unpalatable, Susan's parents live there and they have a life tenancy agreement of which you are aware. If we had to sell the property we would have been seen to fail her parents and kick them out of the family home and that was something Susan or I wished not to contemplate. We would be best not proceeding with the purchase than to have that happen.
>
> …
>
> On the other hand, if we do not proceed with the proposal, there are implications for Susan's brother James and his family. This proposal involves the partnership dissolution between Susan and James and his wife Sharon as well as the purchase of the Dyraaba family farm. James has already signed a contract to purchase his new property and he has had early access, so he has that all that capital at risk.

435 Mr Gooley said that Mr Mitchell then urged him, in the terms quoted at [366] above, not to overthink matters. Mr Gooley said that at the end of the meeting he signed the documents but confirmed with Mr Mitchell that they would not be binding until and unless Mrs Gooley signed them. He then phoned Mrs Gooley and they discussed whether to go ahead. According to Mr Gooley they had a conversation in the following terms:

> P Gooley: I will quickly run through the issues we talked about. Really, excepting the shorter loan term issue, nothing should change on the operational activities or the financial performance of our business excepting we will have to submit a formal loan application to roll over the new loan of $550,000. Regarding the existing $1,050,000 loan. I have reconfirmed that the way we view it is correct. He said it is a 5-year fixed rate interest only loan which reverts to a 10-year principal and interest loan and he says that is the way it was set up in the Banks system whatever that means. He says that when the new $550,000 loan expires he is sure we can come up with a structure that will suit our needs as our $1,050,000 loan will be on a variable rate not fixed and its principal and interest term will have commenced and maybe the new loan could be added to that or even have an interest only component applied as well.

> I also talked to him regarding the risk to your Mum and Dad's life tenancy agreement. If our plans don't work out then the Bank could put pressure on us to sell the property. Regarding your brother James if we don't sign then he will blow his deposit and more. You know how keen they are about their new farm. We are really going to be in the bad books with him.
>
> S Gooley: Over time we have had a lot of discussion about family matters and we don't want to put them at risk.
>
> P Gooley: What I have done is signed the loan agreement and I have confirmed that if after your consideration you do not sign then it won't be a legally binding agreement.

436 Mrs Gooley's evidence was that, when the time came to sign the variation for the Dyraaba loan in June 2011, she received a telephone call from Mr Mitchell in which he said:

> I have to go out and will not be in the office when you come into sign, Paul has signed and has said he's very disappointed and unhappy at the 2-year term, but don't worry when the $1.05 million loan goes onto the variable rate principal and interest 10-year stage, we will be able to refinance it all together then for longer, it's OK to sign.

437 Mrs Gooley said that she then visited the Bankwest offices and signed the Facility Terms document with Ms Campbell as a witness. She said no further explanation was given and no further discussion took place.

438 **Conclusions**: The Bank's internal documentary records demonstrate a clear and understandable sequence of events: the Dyraaba loan was approved on 3 February, conditionally upon a fresh valuation being obtained; the Bank obtained fresh valuation on 21 March; and final approval was sought on 13 April and thereafter obtained.

439 Given this sequence of events, the Gooleys' account of their dealings with Mr Mitchell is inherently unlikely. There was no evidence of an approval being given early in March as Mr Gooley suggested. It is improbable that the Gooleys were unaware of the valuation carried out in March, or the reason for that valuation. There was no reason for Mr Mitchell not to have told the Gooleys about this at the meeting on 11 February. The valuer would have visited Clovass, and presumably contacted the Gooleys, whose contact details he had been given by the Bank, to arrange access.

440 The documentary evidence also shows that on 3 February Mr Mitchell was instructed to tell the Gooleys the Bank had reached the end of its lending

tolerance. There was no apparent reason for Mr Mitchell to disobey this instruction.

441 The Gooleys' decision to enter into the cattle trading facility with G&F in March 2011 is also relevant. It would have made no sense to borrow from G&F if the Gooleys could have borrowed from the Bank. I think this further supports the conclusion that Mr Mitchell did indeed tell the Gooleys in February that the Bank had reached the end of its tether. Their reaction was to borrow the money elsewhere and more expensively.

442 There is no actual evidence that Mr Gooley received the Bank's email of 23 May. It is conceivable that the email was prepared by Mr Mitchell but for some reason he did not send it. But the email is consistent in its timing and content with the other documentary evidence, and in particular with Mr Spence's approach to Ms Campbell on 19 May. I accept that, even if Mr Gooley did not receive the 23 May email (which I am not persuaded of) it was created by Mr Mitchell at the time and reflected his prior dealings with Mr Gooley.

443 On Mr Gooley's affidavit account, it was Mr Mitchell who was trying to persuade Mr Gooley to borrow the money to take on the purchase of Dyraaba. I do not accept this. It is quite clear from the Queensland Country Life article that the Gooleys saw the purchase of Dyraaba (the loan for which, at that time, had not been signed) as a "done deal", and were very enthusiastic about the success of their new business model, before it had even been tested.

444 Mr Gooley's account is full of references to the FICL supposedly continuing, on a principal and interest basis, for 10 years after December 2012. I have found that the variation agreement was made with the Gooleys' knowledge in July 2008, and reconfirmed twice in September 2009 and April 2010. On those findings, no such statements can have been made. In particular, the "current business strategy" which Mr Gooley had presented to the Bank, which must be a reference to his January 2011 memorandum, did not involve principal repayments commencing from 2013. The budget which accompanied it in fact assumed a continuation of interest-only payments (see [337] above). For similar reasons, I do not accept Mrs Gooley's evidence that Mr Mitchell referred

in his conversation with her to a principal & interest repayment period after December 2012.

445 I think it unlikely that the two year term was sprung on Mr Gooley as he claimed. The documentary evidence shows that from the very beginning of the Bank's consideration of the application, in January 2011, it was proposed as a two year loan. It is very unlikely that this was not mentioned to Mr Gooley at the time. Furthermore, Mr Spence's email to Ms Campbell of 30 May suggests that the timing of the loan documentation was driven by the Gooleys' wish to settle the transaction, not by any deadline imposed by Mr Mitchell.

446 In the end, however, when the two year term was disclosed is of little significance. On Mr Gooley's own account, the family dynamics created an awkward situation for him, which was not the Bank's responsibility. It is clear from Mr Gooley's account that the Gooleys made up their mind to go into the transaction knowing and understanding that the Dyraaba loan was for only two years. This is also clear in the description of the meeting with Mr Mitchell in the FOS correspondence quoted above.

447 Mr Mitchell may have thought that after two years the Gooleys would be able to refinance the loan, and the Gooleys may have thought the same thing. Mr Mitchell may even have said something to this effect, just as he may have said something to similar effect when the variation was first made to the term of the FICL in July 2008. But this does not alter the position. There is no pleaded case of any undertaking to refinance the Dyraaba loan, and I am not satisfied that any concrete promise was made. Both parties would have understood that when the time came it would be up to the Gooleys to satisfy the Bank's requirements, or to obtain refinancing from another source.

Entry into G&F cattle trading facility and disclosure to Bank

448 It is clear that the Gooleys used the G&F account as a means of making a large scale increase in their cattle operations, starting in March 2011. Their case was that Mr Mitchell was aware, or should have been aware, that this was happening, and raised no objection to it. This is the next factual issue to be considered.

449 **Documentary evidence**: In mid-October 2011 Mr Gooley sent a memorandum to the Bank for the purposes of the Gooleys' semi-annual financial review. The memorandum contained details of actual and budget income and expenditure for the year ended 30 June 2011 and provided a commentary on the variances.

450 Most of the commentary addressed the shortfalls in cropping and contracting income which resulted from the bad weather and which Mr Gooley described as "devastating". The memorandum nowhere referred to the Gooleys' decision to move all of their cattle purchasing to G&F or to the credit arrangements which the Gooleys had adopted with G&F in March 2011.

451 The commentary noted a shortfall in beef income which it explained as a result of a change in buying strategy from backgrounding steers to fattening feeder calves, or vealers. The commentary noted that purchases were about $100,000 more than had been budgeted for but provided no other information apart from referring to the change in buying strategy. There was no mention of the G&F facility: indeed, the memorandum stated:

> One of our major constraints to purchasing more cattle through this trading year was the lack of available working capital.

452 The memorandum noted that financing expenses were approximately $97,000 above budget. Presumably some of this would have been accounted for by the new credit facility with G&F, but there was no specific mention of this. All the commentary stated was:

> With the size of the shortfall in Income our overdraft balance and creditor balances have been well in excess of those budgeted. Also interest rates are tracking higher than when they budget was set.
>
> … Many of the older farmers have said they have not seen or experienced a year like it.

453 The actual and budget figures referred to income and expenditure only. Balance sheet figures showing assets and liabilities were not included. Presumably as a result of the increased cattle purchases, Mr Mitchell sought a livestock trading summary, which was provided in a further memorandum from Mr Gooley to Mr Mitchell on 8 November. This contained cattle trading figures and stock numbers for the year ended 30 June 2011 but no other balance sheet information.

454 On 29 December Mr Mitchell submitted a CRS for the semi-annual review to the credit department. The CRS incorporated the income and expenditure figures, and resulting cash flow figures, based on the information supplied by the Gooleys. It also provided a commentary which reflected the commentary contained in the Gooleys' memorandum. In the description of the Gooleys' operations this stated:

> Customers predominately source their cattle from local auctions (Ramsey & Bulmer or George & Fuhrmann) and re-sell the same way.

455 I have already referred to the communications which took place between Mr Gooley and Ms Campbell in April 2012 based on the Gooleys' financial statements for the year ended 30 June 2011 and their year to date figures up to 29 February 2012. It appears that a meeting took place on 4 April at which Mr Gooley handed over an "information pack" of the financial data. Following that meeting, Mr Gooley prepared a commentary in the form of a memorandum. This included an operational review. The review said nothing about the cattle trading facility with G&F.

456 On 26 April Ms Campbell emailed Mr Gooley requesting a list of debtor and creditor balances showing ageing details. Mr Gooley provided this on 1 May. In doing so, he referred back to the information package which had previously been provided.

457 Although the figures may have been provided on 4 April, it appears that it was only after 1 May that Ms Campbell analysed the creditor balances for G&F and compared them with the stock on hand figures. She discovered that, although the debt to G&F had increased between 30 June 2011 and 29 February 2012 the stock on hand had reduced. This did not make sense so she asked Mr Gooley and was told about the arrangement with G&F under which the proceeds of cattle sales were being applied to reduce the outstanding balance on the trading account. Ms Campbell reported this to Mr Triggs by email on 7 May.

458 By this stage Mr Gooley was telling the bank officers that he had disclosed the G&F cattle trading account to Mr Mitchell. Such a statement appears in the Bank's record of the meeting between Mr Triggs, Ms Campbell and Mr Gooley on 31 May 2012.

459 **FOS documents**: On 23 August 2014 Mr Gooley sent an email to Mr Bundy. This was part of Mr Bundy's preparation of submissions for the FOS determination phase. It followed a discussion which took place the previous day. Mr Gooley said:

> In referring back to our discussion yesterday afternoon in particular when and how did we communicate that we were in financial difficulty I believe I communicated this to Rod Mitchell at the meeting of 16/10/11. I again raised it with the bank at the subsequent meeting of 10/4/12, 6/5/12 and 30/5/12. There was no written response to our request.

460 In an email of 8 September 2014 Mr Gooley said to Mr Bundy:

> We spent $158,860 from cash flow on cattle handling and feeding capacity from July 2011 to November 2011. Rod Mitchell visited the farm as part of his half yearly review on 16/10/2011 and he was informed regarding our G&F account, the level of creditors that existed and he inspected the cattle handling and feeding capacity items we had invested in. If our major facility was to expire we would not have made these investments and I would have expected Rod to at least raise some concern. From the viewing of the Bankwest documentation there were no file notes.

461 **Gooley affidavit account**: According to Mr Gooley, in "early March 2011" Mr Somerville was regularly visiting the Gooleys at Clovass. Mr Gooley said he had a conversation with Mr Somerville to the following effect:

> P Gooley: I am going to stop buying calves because of our cash flow constraints.
>
> J Somerville: Would you consider operating a livestock trading account through G&F? The account would initially be for $150,000 and be primarily for cattle purchases but if you needed to put a few loads of grain or something else on it would be OK. In return G&F would expect that cattle would be sold through them as you are currently doing and that you could pay for them when it suited you. This should suit your situation and allow you to keep buying cattle.

462 Mr Gooley said that he was surprised that credit was available on such easy terms, without even a formal account application. He said he decided to proceed believing that the Dyraaba loan application, which would include $100,000 for cattle purchases, had been approved (he also mentioned the supposed continuation of the FICL after December 2012 as a relevant factor).

463 According to Mr Gooley, "around or about mid-March 2011" he contacted Mr Mitchell to discuss the Haywards' finance application and "some operational issues" concerning Gooley Farms. He said they had a conversation to the following effect:

> P Gooley: We are buying some calves at the moment through our agent and we have come to an account arrangement with them so we can start accumulating numbers and pay for them when we start receiving cash flow them.
>
> Mitchell: Ok.
>
> P Gooley: Have you got a copy of the Letter of Offer as yet?
>
> Mitchell: It is still coming.

464 Concerning the establishment of the G&F facility Mrs Gooley said that she and Mr Gooley had a conversation to the following effect:

> P Gooley: George and Furhmann have offered us a cattle trading facility, what do you think?
>
> S Gooley: I didn't know they offered these things, I guess this will be OK but we should check this with Rod.
>
> P Gooley: I'll give him a call and discuss.

465 Mrs Gooley had given an earlier account of the decision to enter into the G&F facility. This was in an affidavit sworn in October 2014 for the purposes of the proceedings brought by G&F against the Gooleys. In that affidavit she said:

> In or around March 2011, I had a conversation with Paul as follows:
>
> P Gooley: I approached Jasen Somerville. I told him we're waiting for Dyraaba to settle and asked him if we can have some time to pay our accounts. Jasen has offered the partnership a trading account. The initial value of the trading account would be $150,000. We can use it for whatever basically. There doesn't appear to be any closure date to the facility – we can just pay it back when we are able. The interest is 12.5%. We need to sell our cattle through George & Fuhrmann.
>
> S Gooley: That's quite generous. Given our financial circumstances, we should enter into that agreement, even though the interest rate is higher than a bank.

466 Mrs Gooley said that she and Mr Gooley discussed the new G&F trading terms on the basis that Mr Mitchell's advice would be sought before entering into the G&F facility, but Mr Gooley presented the discussion with Mr Mitchell as having taken place after the deal was done. Nor did Mrs Gooley's affidavit in the G&F proceedings refer to the G&F trading terms as having been subject to discussion with Mr Mitchell.

467 According to Mr Gooley, Mr Mitchell visited the Gooleys at the Clovass property on about 17 October as part of the annual review. Both Mr Gooley and Mrs Gooley said that Mr Mitchell mentioned that CBA was taking over the

Bankwest business. They said he appeared distracted and concerned about this.

468 Mr Gooley said that he discussed his profit and loss and live-stock trading figures with Mr Mitchell. Mr Gooley said he said words to the following effect:

> This year we have shifted our focus from backgrounders to feeder calves, as we buy two calves for the price of a backgrounder. At the moment, we have approx. 920 calves between Clovass and Dyraaba. We have been getting pretty good feedback regarding the presentation of the cattle at the saleyards and George and Fuhrmann are very happy with the job we are doing on them.

469 According to Mr Gooley, he and Mrs Gooley showed Mr Mitchell the yards and fencing they had built for their cattle and the cattle feeding system they were installing. Mr Gooley said that Mr Mitchell commented:

> I think your strategy of shifting from cropping to cattle is sound and with the addition of the Dyraaba property you will be able to reduce the impact of wet weather. You certainly have made some improvements to infrastructure and surely the seasons will return to normal and when they do you will be well placed to take advantage of that.

470 **Conclusions**: I do not think that the Gooleys' account of the way in which the G&F facility was established, and their thinking at the time, is complete. The evidence shows that the Gooleys used the line of credit provided by G&F to fund an aggressive expansion in their cattle holdings between March and June 2011. The total debt they ran up was $350,000, far more than the $150,000 supposedly mentioned by Mr Somerville and far more than the amount which they were hoping to get out of the Dyraaba facility. They must have known that they were in effect taking out a fresh loan at a rate of interest higher than that charged by the Bank. All of these facts were glossed over in their evidence in these proceedings.

471 Turning to Mr Gooley's evidence that he told Mr Mitchell about the cattle trading account with G&F, in my view the documentary material which I have summarised speaks for itself. Mr Gooley had ample opportunity in his memoranda to the Bank to disclose the arrangement but never did so. The level of indebtedness was disclosed in the figures provided by Mr Gooley to Ms Campbell as part of the information pack in April 2012, but this was unavoidable and Mr Gooley apparently did nothing to draw attention to it. Instead he left it to Ms Campbell to work it out for herself and then to ask the

further questions in early May which finally led her to an understanding of the facility and the fact that, by that stage, G&F was in effect impounding most of the proceeds of the sale of the Gooleys' cattle.

472 Mr Mitchell made no reference to the G&F trading agreement in his review of December 2011. His evidence was that had he known about the G&F facility at the time it would have been unacceptable to the Bank. I have no doubt, in the light of the concerns expressed by Mr Hensman, that that is true. It is also consistent with the Bank's reaction when it finally learned the full picture in May 2012. As will be seen below, the Bank took the view that the G&F arrangement impermissibly cut across the Bank's security entitlements over the Gooleys' cattle.

473 It is true that the increased cattle purchases in 2011 would have been evident from the figures being supplied by Mr Gooley, and Mr Mitchell might have asked how these purchases were being financed. But on Mr Mitchell's evidence he did not ask and Mr Gooley did not tell him. Mr Mitchell also said that he would have reported the trading arrangement to his superiors had he known about it. Mr Mitchell was unshaken on this evidence in cross-examination and I see no reason not to accept it.

474 It is also true that Mr Gooley told Ms Campbell and Mr Triggs in April 2012 that he had disclosed the G&F trading arrangements to Mr Mitchell (and he also gave instructions to Mr Bundy to this effect in August/September 2014). But I think this carries little conviction. It was an easy allegation to make once Mr Mitchell had left the Bank. The statement contained no detail and certainly did not corroborate a disclosure as early as March 2011 as Mr Gooley claimed in his affidavit.

475 In these circumstances, I do not accept Mr Gooley's evidence about disclosing the G&F trading account to Mr Mitchell. In fact Mr Gooley appears to have deliberately kept Mr Mitchell in the dark about it. I likewise reject Mrs Gooley's evidence that the Gooleys took up the line of credit from G&F following some sort of consultation with Mr Mitchell. Not even Mr Gooley supported this evidence, and I think it is fanciful.

Request for further loan in May 2012

476 As already noted, Mr Gooley confirmed with Ms Campbell in April 2012 that the Gooleys were seeking a further loan of $200,000. Ms Campbell lodged a CRS for this amount (together with a further $90,000 which is not referred to in the evidence) on 3 May. The CRS attached Mr Gooley's budgets and stated that in addition to the income included in the budget the Gooleys were proposing to sell specified items of equipment for $80,000. It continued:

> Borrower has also indicated they will voluntary place farm properties on the market and re-locate to the Tablelands District – however this will take time to arrange marketing and orderly sale of property. In the meantime customer wishes to continue trading and needs to pay Creditors.

477 On the following day Mr Hensman responded:

> It is disappointing to note the current financial/trading position of the customer. Also note the urgent need for additional funding to keep the entity viable.
>
> The up-beat budgets provided are noted. However this business has in the past not met its trading forecasts and there is no evidence that the new budgets would be achievable. Also note the high level of unpaid creditors.
>
> Urgent sale of assets is considered the only way out for this entity. The sale needs to include
>
> - The [equipment] assets [identified by Mr Gooley for sale]
> - Sale of cattle
> - Placement of landed assets for sale
>
> Please advise customer
>
> - That all sale proceeds needs to be used to reduce bank debt &
> - Creditors need to be paid via trading/operating income
> - No further credit to be obtained/entered into without prior approval from the bank
>
> Please also advise customer that all paper issued outside current arrangements would be returned.
>
> In the absence of the customer's ability to demonstrate the above we would need to exit this connection.

478 In referring the file to Mr Triggs, Ms Campbell included Mr Hensman's comments. Apparently it was only after receiving those comments that Ms Campbell learned of the G&F trading account (see [196] above). She wrote in her email to Mr Triggs:

> … it appears Paul Gooley has "painted himself into a corner" and I'm having difficulties trying to find a way out.

479 Ms Campbell referred to the debt owed to G&F. She also noted that there was approximately $98,000 owed to Alan Hill and $54,000 owed to Norco and BGA for crop accounts. She continued:

> Customer has assured us there is no stock lien held by G&F – this was asked as we hold the Stock Mortgage.

480 Following the meeting between Mr Gooley, Mr Triggs and Ms Campbell on 31 May, Mr Triggs reported to Mr Hensman:

> Client has advised that stock firm debt to George and Fuhrman ("G&H") had been secured to assist with cattle purchases. Currently livestock sales are progressed through the same firm with approx. 100% of cows proceeds and 50% of feeder calves proceeds held by firm. This is not a contracted arrangement, nor do G&H appear to have any registered interest in cattle (**noting Bankwest had 1st ranking charge over livestock*).

481 Mr Gooley gave a lengthy description of his discussions with Ms Campbell and her superiors starting from April 2012, and his reports back to Mrs Gooley about those discussions. But it is unnecessary to consider this evidence in any detail. Mr Gooley did not suggest that the Bank's officers made any promise or gave any undertaking to provide further accommodation.

482 I have disbelieved Mr Gooley's assertion that he told Mr Mitchell about the G&F cattle trading account, and Mr Triggs and Ms Campbell may not have believed him either. But whether that is so or not, it is clear from Mr Hensman's comments to Ms Campbell that the Bank had concluded that the Gooleys' farming operation was no longer financially viable. Mr Gooley's budgets had run out of credibility. The subsequent discovery of the G&F trading agreement only made things worse.

483 It may be that those responsible for the file at CAM were slack in their handling of it. Certainly they never seemed to have formally responded to the Gooleys' application for the further $200,000. But Mr Gooley can have been in no doubt about the outcome. The fact that in May and June 2012 he made further substantial borrowings on the G&F cattle trading account suggests that he did not expect to receive further funding from the Bank.

Dealings with Bankwest from November 2012

484 I have already set out the correspondence between Ms Mulligan and Mr Gooley about the date for repayment of the FICL which started with Ms

Mulligan's email of 14 November. Ms Mulligan consistently took the position that the FICL was repayable in full on 12 December. Mr Gooley did not, in any written correspondence, contradict this. But both the Gooleys said that at the time they did not accept it, and Mr Gooley said that he protested to Ms Mulligan orally.

485 **Other documentary evidence**: It will be recalled that Mr Gooley contacted Mr Richardson on the evening of 14 November. This was after, on the same day, Mr Gooley had been summoned to the meeting with the four directors of G&F and he had spoken to Ms Mulligan. On 16 November, in response to Mr Richardson's request, Mr Gooley wrote attaching a copy of Ms Mulligan's email of 14 November. He gave a brief description of his dealings with the Bank going back to April and said that the 14 November email was the only correspondence the Gooleys had received from Bankwest. He did not suggest that it was inaccurate.

486 As at December 2012, the interest rate on the FICL was 8.695%, resulting in a monthly interest-only payment of approximately $7,500. On 12 December, the Bank's computer system generated a letter notifying the Gooleys that the "reduced repayment option on your account" expired on that day. Although bearing the signature of Bankwest's "Head of Operations" the letter was clearly computer-generated, as it gave Mr Mitchell as the contact address and he had left the Bank at least nine months before.

487 The letter enclosed an account position statement which contained a new periodical payment of $13,200 per month. The interest rate of 8.695% was unchanged but the term to run on the loan was specified as one hundred and twenty months (ten years). The increase in periodical payments was apparently attributable to instalments of principal.

488 On the following day, the Bank's computer generated a further letter. This likewise stated that the term to run on the loan was ten years. The periodical payment was increased to $16,400 per month. This was as a result of an increase in the interest rate to 14.12%, which appears to have been the default rate.

489 The evidence does not identify when these letters were actually sent. They were not received by the Gooleys until between Christmas and the New Year. At around the same time, Mr Gooley found a reference on the overdraft account statement to a charge for legal fees of $2,600 on 21 December.

490 On 27 December, after receiving the computer-generated letters about interest on the FICL, Mr Gooley wrote to Mr Richardson as follows:

> Some of the issues that arise-
>
> • Correspondence dated 12/12/12 states that the reduced repayment option on our account expired on 12/12/12. Regarding the account position statement please note TERM TO RUN (months) is stated as 120 months that conflicts with the position Lara has stated in her e-mail dated 14/11/12. Please also note that we are being advised to contact Rod Mitchell who was the bank's relationship manager who left BankWest at the start of 2012.
>
> • The change to the repayment amount I assume would moving from interest only to principal and interest.
>
> • Correspondence dated 13/12/12 states that the limit on our account expired on 13/12/12 and has now been rolled over to a new limit for 120months but the interest rate increased from 8.695% to 14.12% which is the same as the excess rate detailed on page 2 of the $1,050K loan statement.

491 Mr Gooley noted the conflict between the Bank's letter of 12 December and Ms Mulligan's email of 14 November. But again he did not suggest that the email was incorrect. In particular, he did not say anything to Mr Richardson about the supposed promises by Mr Mitchell.

492 On 31 December Mr Gooley wrote to Ms Mulligan enquiring about the charge for legal fees. But he did not ask her about the term of the FICL in the light of letters and statements of 12 and 13 December.

493 Ms Mulligan responded to Mr Gooley on 11 January. She said that the legal fees were for undertaking a security review of the Gooleys' loans (which apparently had been undertaken in October) and "for taking action as a result of the defaults under your facility". She stated that these costs were payable by the Gooleys in accordance with the Facility Terms.

494 On the same day, Ms Mulligan spoke to Mr Richardson. Mr Richardson also sent her copies of the 12 and 13 December letters. Ms Mulligan responded with an email stating that the FICL had expired and would not be extended.

495 **FOS correspondence**: As already noted, the Gooleys' FOS complaint did not refer to the reduction in the term of the FICL. The point was first raised by Mr Bundy in reply to the Bank's response to the complaint in July 2014 in the following terms:

> Though they argued for the agreed loan period of fifteen years, the Applicants finally accepted that they would be required to replace the $1,050,000 on 12th December 2012. They are now sure that [the FICL] does not expire until 12th December 2022.

496 In his letter to the FOS of 8 September restating the Gooleys' complaint, Mr Bundy said that it was a "misinterpretation" to say that the Gooleys were misled about "the nature of the term of the facilities". He said:

> They were not misled about the facility; they were misled by the letter from Lara Mulligan of the [Bank] who, on 14th November 2012, announced that the facility would expire on 12th December 2012. The Debtors were in no doubt about the facility but they believed that they would be powerless to oppose the [Bank] if it chose to reject the real facility.

497 These statements from Mr Bundy on the Gooleys' behalf raise their own questions. The first quoted passage started by expressly stating that there was a debate about the term of the FICL albeit that the Gooleys "finally accepted" that it would expire in December 2012. What the "argument" was about, and what led the Gooleys to the "final acceptance" was not specified. The statement about the Gooleys "now" being sure that the FICL did not expire suggests incomplete information rather than some sort of dispute. Certainly there was no mention of the supposed conversations with Mr Mitchell.

498 The beginning of the second quoted passage, which talked about the Gooleys being misled by Ms Mulligan's letter, again suggests lack of full knowledge rather than some sort of dispute. But the next sentence suggested that the Gooleys were overborne. This however just gives rise to further questions. Why would the Gooleys, if they knew that the "real facility" had been agreed at fifteen years, simply have accepted from Ms Mulligan (who was only working from the Bank's records and had had no personal involvement) that the Bank was "rejecting the real facility"?

499 **Mr Gooley's evidence at trial**: Mr Gooley gave another version of his dealings with Ms Mulligan in his affidavit. According to Mr Gooley, when he heard back

from Ms Mulligan on 14 November they had a conversation to the following effect:

> Mulligan: I am contacting you today to advise that your loan of $1,050,000 is due to expire on 12 December 2012 and you will need to have the balance paid in full on or before that date as per your loan agreements. If you fail to comply with this the Bank will move to enact its rights under the mortgage.
>
> P Gooley: Hold on a minute we have a 15-year loan, the loan reverts to principal and interest for a further 10 years. How is that the case. There must be a mistake?
>
> Mulligan: I am telling you that the loan documents that I have say that the loan is expiring on 12 December 2012, there is no mistake.
>
> P Gooley: There has got to be a mistake. Rod Mitchell was our relationship manager at Bankwest Lismore and I had asked Rod on a number of occasions and he reaffirmed that there were no variations that materially affected the term of the loan and the conditions remained the same as the original letter of offer back in 2007. The only variation was in the balance of the loan when we broke it back in 2009 when we sold a property and a Deed of Priority was issued in favour of Bankwest these facts I know.
>
> Mulligan: Look, as I understand it Rod Mitchell is no longer with Bankwest and I really don't care what you claim Rod Mitchell said, I am in charge of the file now and I am telling you the loan expires on 12 December 2012 and you better be prepared to payout the loan or you will be in default and the bank will enact its rights under the mortgage.
>
> P Gooley: You have got to be kidding me, I met with the staff in Lismore at the end of May this year and I was advised that a decision on the assistance that we sought was being deferred and that our file was being transferred to Bankwest Credit Management in Sydney for their decision and that they would be seeking an urgent meeting with me the following week. Five and a half months later you now ring me up and tell me that we need to find $1,050,000 within one month to pay out a loan that was not due for another 10 years. The Bankwest Lismore office advised me that I was to contact your office through them and you would get back to me. We have done that on at least 5 to 6 occasions and your office has refused to call me back and discuss our matters. That is unbelievable.
>
> Mulligan: That is what I am telling you.
>
> P Gooley: And how do you think we are going to do that?
>
> Mulligan: The loan is due to expire next month. You should have prepared for that. I have not got the answer for you. You should consider all your options whether they be refinance or sell property to payout Bankwest through the sale of your property.

500 According to Mrs Gooley, when Mr Gooley reported this conversation to her she said that what Ms Mulligan had said was nonsense and referred to the explanation supposedly given by Mr Mitchell. Mr Gooley said that he raised this again in a later telephone conversation with Ms Mulligan but was again given the brush-off.

501 **Conclusions**: I acknowledge that Ms Mulligan was not called to contradict Mr Gooley's account of his conversations with her. But that does not mean that I must necessarily accept them in all their details.

502 Clearly Ms Mulligan would have told Mr Gooley that the loan was expiring on 12 December. So much is confirmed by the email she wrote afterwards. Ms Mulligan would also have emphasised that the Gooleys needed to refinance or sell. Again that appears from subsequent correspondence.

503 But I am not satisfied that Mr Gooley made a protest about the repayability of the FICL in the terms alleged in the affidavit. In particular, I am not satisfied that Mr Gooley claimed that Mr Mitchell had said there had been no variations affecting the term of the loan. There is no sign of that statement in any of the contemporaneous correspondence; indeed, there is no mention of it in the initial FOS complaint.

504 In his affidavit of 13 February Mr Gooley said that he was advised by Mr Richardson not to get involved in litigation with the Bank. The implication was that he should not kick up a fuss about the term of the FICL. But this is not very persuasive. As I have already pointed out, if promises had truly been made to the Gooleys by Mr Mitchell it would seem strange to have accepted Ms Mulligan's brush-off when she had no direct knowledge of the matter. While I have no doubt that Mr Richardson advised the Gooleys not to get involved in litigation against the Bank if they could help it, it was clear from Mr Richardson's own initial strategy advice to the Gooleys (see [213] above) that litigation or some other form of dispute resolution was contemplated as an alternative if the Bank was not prepared to give the Gooleys some time.

505 An affidavit from Mr Richardson was filed as part of the Gooleys' case at the hearing. The Bank successfully objected to some parts of Mr Richardson's affidavit. Having succeeded in those objections, counsel for the Bank did not cross-examine Mr Richardson. Mr Richardson's affidavit did not say anything about Mr Gooley complaining about the term of the FICL being reduced, or the assurances supposedly given by Mr Mitchell.

506 The absence of corroborating evidence from Mr Richardson is a further reason to doubt Mr Gooley's evidence on this point. In saying this, I do not overlook

that Mr Gooley asserted in cross-examination that he discussed the supposed further ten year term with Mr Richardson. Counsel for the Bank asked Mr Gooley a question which proceeded on the basis that he had not had any such discussion. I disallowed the question and observed that counsel would have to ask Mr Richardson. What I said was poorly expressed. I meant to convey to counsel that any questions he asked of Mr Gooley would have to accept that Mr Gooley had made the claim that he told Mr Richardson. I was not in some way ruling that counsel could not challenge that claim without requiring Mr Richardson to be called.

507 In any case it is clear that the Gooleys had their own reasons for not pressing the issue. Mr Richardson's whole strategy hinged on buying time from the Bank. Mr Richardson thought (rightly as it turned out) that the Bank could be persuaded to defer taking any action while he and the Gooleys worked on the more immediate problem of reaching agreement with G&F. And the Gooleys were in no position to begin principal repayments on the FICL in December 2012. Asserting an obligation to do this would have been the last thing they would have wanted.

508 Mr Gooley may now have convinced himself that Mr Mitchell told him the FICL continue until 2022, but I am not satisfied that he made a complaint about that at the time. In any event, it does not matter. The FOS correspondence concedes that the upshot of the discussion was that the Gooleys accepted that the loan was repayable.

Summary of Gooleys' trading results and debt position

509 Spreadsheets prepared by Mrs Gooley setting out the Gooleys' trading results were in evidence. The summaries covered the financial years from 2009 to 2017 inclusive. The critical years for present purposes are the 2009 to 2013 financial years. The first variation to the Gooleys' facility terms, which saw the term of the FICL reduced to five years, took place at the very beginning of the 2009 financial year. The 2013 financial year saw the expiry of the FICL, the beginning of the moratorium arrangement with the Bank, and the end of the trading relationship between the Gooleys and G&F.

510 Mrs Gooley's spreadsheets analyse the income into cropping, contracting, beef cattle and other income. The costs are broken down between variable costs (allocated to beef feed, cattle costs, cropping production, contracting and other variable costs) and overhead costs, consisting of fixed costs (including administration, maintenance, vehicles, rates etc) and labour costs. Deducting the variable and overhead costs from the operating farm income results in earnings before interest and tax (EBIT). Deduction of the financing expenses results in a figure for profit or loss from operations (the Gooleys appear to have paid no tax during the years in question because of the losses which they had accumulated).

511 Set out below is a table showing the cropping and contracting income and expenses:

Description	**08-09**	**09-10**	**10-11**	**11-12**	**12-13**	**Total**
Cropping	84	144	49	46	83	406
Contracting	63	37	19	1	105	225
Hay/silage	125	77	52	52	52	358
Total income	**272**	**258**	**120**	**99**	**240**	**989**
Cropping production costs	(166)	(127)	(39)	(62)	(58)	(452)
Contracting production	(9)	(7)	-	-	-	(16)

costs						
Total expenses	**(175)**	**(134)**	**(39)**	**(62)**	**(58)**	**(368)**
Margin	**97**	**124**	**81**	**37**	**182**	**621**

512 The cattle income and expenses were as follows:

Description	**08-09**	**09-10**	**10-11**	**11-12**	**12-13**	**Total**
Cattle sales	227	35	706	1291	633	2892
Cost of cattle	(47)	(104)	(545)	(731)	(157)	(1584)
Total	**180**	**(69)**	**161**	**560**	**476**	**1308**
Cattle feed	(52)	(97)	(243)	(320)	(216)	(928)
Cattle costs	(10)	(12)	(74)	(159)	(66)	(321)
Total expenses	**(62)**	**(109)**	**(317)**	**(479)**	**(282)**	**(1249)**
Margin	**118**	**(178)**	**(156)**	**81**	**194**	**59**

513 The results in summary were as follows:

Description	08-09	09-10	10-11	11-12	12-13	Total
Operating income	477	258	305	758	790	2,588
Variable costs	(244)	(254)	(364)	(556)	(356)	(1774)
Overheads	(129)	(246)	(159)	(153)	(155)	(842)
EBIT	**103**	**(242)**	**(218)**	**50**	**281**	**(26)**
Financing costs	(270)	(209)	(216)	(303)	(278)	(1,276)
Profit (Loss)	**(166)**	**(451)**	**(434)**	**(253)**	**(12)**	**(1,316)**

514 These losses were tax deductible and Mrs Gooley's off-farm income was set off against them. Nevertheless, losses on this scale had to come from somewhere and Mr Gooley himself estimated that the Gooleys had "burned" $1.5 million in equity by 2012 as a result of losses on their farming ventures.

515 Some of these losses were met from the sale of the Patton land. The Gooleys also sold their shares in Norco. But they appear to have had no other surplus assets to sell, and there was a run-up in the Gooleys' loans and trade creditors, particularly in 2010-2011 and 2011-2012 years:

Description	01/07/08	01/07/09	01/07/10	01/07/11	01/07/12
FICL	1,200	1,200	1,050	1,050	1,050

Business Edge	138	112			
Cattle Loan			100	94	87
Dyraaba Loan					550
Overdraft	260	242	331	402	355
Bankwest Total	**1598**	**1554**	**1481**	**1546**	**2042**
G&F				336	458
Other trade creditors	77	76	76	145	210
Trade creditors	**77**	**76**	**76**	**481**	**668**
RAA		**130**	**205**	**190**	**178**
Total	**1675**	**1760**	**1762**	**2217**	**2888**

Losses claimed by Gooleys in FOS proceedings

516 As we have seen, the Gooleys' initial position in their dealings with the Bank, and with the FOS, was that all they wanted was more time to refinance their loans. When Mr Bundy first raised the issue about the expiry date of the FICL being brought forward, in July 2014, that position continued. Mr Bundy said:

> The Applicants say that they were misled by the claims made by the [Bank] and the current collective state of their loans would have been quite different

> had they realized that their replacement target was only 25% of that which the [Bank] promoted.

517 The reference to 25% was apparently to the Dyraaba loan which made up slightly more than a quarter of the amount which the Gooleys had borrowed. I have already set out (at [339] above) the revised claim which Mr Bundy put forward on the Gooleys' behalf. The claim was confined to a reversal of default interest and an opportunity for time to refinance. There was no claim for compensation.

518 Mr Gooley's email of 23 August 2014, which was written for the purpose of addressing the issues raised for determination by FOS, was the first reference to financial losses from the Bank's conduct. Mr Gooley said:

> Regarding what losses did we suffer as a consequence of the Banks conduct? If the matter was before the courts I'm sure we could mount a case regarding the stress and duress on our person and the damage to our trading name however in this instance would probably restricted to the Banks charges against our accounts being it interest of fees. Even now I don't have the records of how the Bank charged the interest and subsequently refunded overcharged interest against what accounts. There has also been legal charges that have not been substantiated. Looking back through what statements we do have the Bank ceased to forward statements for the so called expired facilities as they expired.
>
> The calculation of interest has been done by the bank only so we should be seeking for them to provide a reconciliation.

519 The difficulty with claiming against the Bank for "stress" and damage to the Gooleys' reputation was that these arose long before November 2012 when the Bank claimed, supposedly for the first time, that the FICL was repayable in December 2012. The Gooleys' problems with their creditors went back to 2011 when they had allowed their indebtedness to G&F and to Alan Hill to get out of control. They were in severe difficulties by April 2012 and their desperate position in December 2012 cannot realistically be blamed on the Bank. Even after December 2012 they were unable to manage their creditors despite the Bank taking no action against them.

520 Mr Gooley provided further detail in an email to Mr Bundy of 8 September. Under the heading "Personal and emotional damage" he stated:

> In deeming that the facilities had expired when they obviously hadn't has caused the owners much stress and duress since BankWest deemed the facilities had expired on 12/12/2012.

> The Gooley Farms trading name has been irreparably damaged as a consequence of the bank's actions to deem the facilities expired when they actually weren't. We live in a regional community and because of the cash flow restrictions the [Bank's] actions has created which has impeded our ability to pay our creditors many businesses have withdrawn their trading terms.

521 Under the heading "Financial damage" Mr Gooley stated:

> If the $1,050,000 facility was to expire at 12/12/2012 we wouldn't have pursued the purchase of the Dyraaba property and taken on another $550,000 of debt within 18 months of our major facility expiring as this would have created a risk we would not have taken particularly when the funding for the property loan was only 2 years. Rod Mitchell was well aware of our financial position with a failed winter crop in 2010 and no summer crop for 2011 and cash flow was very tight. We just wouldn't have taken the risk in buying more land and taking on a bigger debt.
>
> If we didn't buy the Dyraaba property we would not have pursued the cattle trading account with G&F hence we would not have the outstanding balance we have today.

522 It is notable that in these instructions to Mr Bundy, Mr Gooley did not claim that, had the Dyraaba loan not been granted, the Gooleys would have moved to the Tablelands in 2011. Mr Gooley's supposition at that point was that he would instead have stayed at Clovass but not entered into the trading account with G&F.

523 But that is far from clear. The evidence shows that by 2010-2011 the Gooleys were disillusioned with the effect of the endless wet conditions on their cropping and contracting operations. They saw cattle fattening operations as the answer to this. Although such operations were also adversely effected by the wet conditions at Clovass, the Gooleys seemed to have considered the effect was not so severe, especially if the Clovass property could be combined with hill country to which the cattle could be moved. That was the business rationale for the Dyraaba loan in the first place. I do not think it can simply be assumed that if the loan for the Dyraaba property had been refused the Gooleys would not have pursued their cattle fattening operations, and the G&F finance which went with it.

524 Mr Gooley continued:

> Bank West advised us that the major facility was to cease on 12/12/2012. One of our major considerations at that time was for our summer cropping program. With grain prices increasing similar to the 2007 cycle and the previous wet seasons where soybeans were significantly affected by the wet seasons and disease it was decided that we would plant 203 acres of maize for the summer

> crop. We were devastated when we heard from BankWest that our facility was to expire so we had to take immediate action to ensure we had adequate cash coming into the business. The maize crop would not be harvested to September and cash flow would not happen to October 2013. We deemed this too long a period and moved to plant soybeans again as cash flow would happen from them in May 2013. The shortfall in earnings is estimated at $138,668.
>
> With the receipt of the cash flow from maize we would have been in a position to start up our irrigation system and irrigate the ryegrass pastures planted on the Clovass and Dyraaba properties. At that time we had very few cattle and
>
> had 152 acres of ryegrass planted. Over summer our millet area of 37 acres failed due to drought but if irrigated would have produced considerable silage. The Dyraaba property area of 35 acres wasn't planted over the summer
>
> period. I estimate that if we had the cashflow from our maize crop we would have generated an extra $173,510 of net earnings from forage sales.
>
> When cash flows were received from maize sales we would have progressed to purchase cattle. An estimated net earnings from 700 cattle that we traded would have equated to $141,000.

525 After referring to the costs of retaining Mr Richardson and Mr Bundy, Mr Gooley continued:

> Harold there are other costs that I am sure we could include if we had more time, but these are well in excess of what I think FOS would consider but we should make it perfectly clear that if we have to produce a full blown economic loss claim through the courts the numbers will be larger than these.

526 This reasoning by Mr Gooley was clearly hindsight, and may have involved a degree of wishful thinking. Mr Gooley's instructions to Mr Bundy took no account of the fact that, at the time the soybean crop was planted, the Gooleys were under extreme financial pressure from their creditors. As already noted, a substantial proportion of the proceeds of that crop were promised to Alan Hill and Norco and had to be paid when the crop was harvested in May or June 2013. It is by no means clear that the Gooleys' creditors would have been prepared to wait for a further period of time for them to harvest a supposedly more profitable maize crop. Furthermore, there is no basis for the assumption that the whole of the proceeds of such a crop would have been available for cattle purchases. At the time the Gooleys were heavily indebted not only to Alan Hill and Norco but also to G&F, to say nothing of the Bank.

Gooley damages calculations: general

527 The Gooleys' damages case developed over the course of the proceedings. It did not assume its final form until part-way through the trial, when it was

summarised in an affidavit sworn by Mrs Gooley on 10 April 2019. Mrs Gooley presented the calculations on four different bases.

528 Basis 1 assumed that the Gooleys, on becoming aware of the reduction in the term of the FICL to five years in July 2008, moved their operations to the Tablelands at that point. Mrs Gooley calculated the damages on this basis as being $13.0 million.

529 Basis 3 assumed that in 2011 Bankwest refused to grant the Gooleys the facility which they used to purchase Dyraaba, (or, on Mrs Gooley's account, the Bank offered to grant the Loan but warned that it would not lend any further monies). The hypothesis was that, in that event, the Gooleys would have sold the Clovass property and moved their operations to the Tablelands, starting in July 2011. Mrs Gooley calculated the damages on this basis as being $10.4 million.

530 Basis 4 assumed that the Bank did allow the FICL to continue after December 2012 as a P/I loan for a further ten years (as, on the Gooleys' case, it was contractually obliged to do). The hypothesis was that the Gooleys would have retained the Clovass property and Dyraaba but would have been able to trade out of trouble. Mrs Gooley calculated the damages on this basis as being $8.3 million.

531 Basis 2, also referred to in the course of submissions as the "no transaction" case, assumed that the Gooleys did not take up the loan from Bankwest in October 2007. It is unnecessary to consider this scenario any further as no case was pleaded or presented at trial alleging any breach by Bankwest in the making of the initial loan.

532 Mrs Gooley's calculations of damages reflected the difference between the Gooleys' actual trading results and the trading results it was assumed they would have achieved in the scenarios under consideration. The hypothetical trading results were taken from spreadsheets prepared by Mr Gooley using his ABP farming model. The spreadsheets for the hypothetical move to the Tablelands, together with supporting documents, were known as PG5. These were used for Mrs Gooley's Bases 1 and 3. The spreadsheets and supporting

documents for staying put at Casino (Mrs Gooley's Basis 4) were known as PG4.

533 The calculations in PG5 and PG4 covered only farm income and expenditure (both direct and overhead). The bottom line figures thus represented the farm surplus before taking account of financing charges. The calculations also took no account of the Gooleys' asset and liability position. As will be seen below, the Gooleys' case prior to trial was that it was unnecessary to take interest in to account for the purposes of assessing damages. Nevertheless, Mrs Gooley sought in the calculations she presented in her affidavit of 10 April to fill this gap, and to address the Gooleys' asset and liability position.

534 For this purpose Mrs Gooley assumed that a property suitable for the Gooleys' requirements could have been purchased in the Tablelands for $1.2 million, and that the cost of moving the Gooleys' operations would have been $40,000. She also assumed certain equipment would have been retained for the operations at the Tablelands, and the rest would have been sold. Based on these assumptions, she calculated, based on the assumed sale price of the Clovass property, that the Gooleys would have had sufficient equity in July 2008 (Basis 1) to enable them to sell the Clovass property, pay out the Bank and their other creditors, and have enough left over to purchase the property in the Tablelands. In 2011 (Basis 3) their equity position had deteriorated, and Mrs Gooley calculated that they would need a new loan of $360,000 of complete the purchase of the Tablelands property. She incorporated interest payments on a loan in that amount into her calculations of loss.

535 Under the scenario where the Gooleys stayed at Casino (Basis 4) Mrs Goolely presented a series of spreadsheets with interest calculations and debt repayment figures which, she said, showed that the Gooleys would have been able to trade out of their financial difficulties and meet their obligations to the Bank, the RAA, G&F and other creditors.

Mr Wade's evidence

536 The Gooleys called expert evidence from James Andrew Wade. Mr Wade is a consultant agricultural advisor, specialising in animal nutrition. He has been operating his own consultancy business since 2003.

537 Mr Wade had a lengthy business relationship with Mr Gooley. He acted as consultant nutritionist to the Gooleys from 2003 to 2014. From 2014 to 2016 when Mr Gooley was operating a consultancy business, they worked in tandem on some projects. Mr Wade has not worked with Mr Gooley since then. Mr Wade's report was prepared in conventional expert report form, and incorporated the reference to the Expert Witness Code of Conduct. His expertise was not challenged.

538 Mr Wade has been involved for a long time in the development of mathematical models for predicting livestock weight gain. In about 2007 he provided Mr Gooley with some basic models that he had created. Mr Gooley used Mr Wade's models to develop his ABP model. Mr Wade's experience is that, given correct inputs, such models are accurate at predicting livestock weight gains.

539 Mr Wade's report of November 2018 commented on the figures in PG4 and PG5. Mr Wade described how Mr Gooley's ABP model worked, going through each of the component spreadsheets. He expressed opinions that a number of the figures generated by Mr Gooley's model were in his opinion "reasonable". He identified certain pasture production volumes and stocking rates as "achievable". In other cases, Mr Wade simply stated that the calculations were "correct" which I assume meant mathematically correct.

540 The Bank qualified its own expert in this area but did not call that expert as a witness. Mr Wade's report was tendered without objection and he was not cross-examined.

Expert accounting evidence

541 The Gooleys also called expert evidence from Darel Ferguson Hughes. Mr Hughes is an accountant. In November 2018 he produced a report quantifying the losses claimed by the Gooleys. He calculated the damages on two scenarios, one being that the Gooleys remained at Casino and the other being that they moved to the Tablelands. For this purpose he used the calculations by Mr Gooley in PG4 and PG5.

542 As already noted, Mr Gooley's calculations were undertaken without taking into account interest. They also did not take account of depreciation or taxation. Mr Hughes expressed the view that earnings before interest depreciation and

taxation ("EBIDT") was "an appropriate methodology" for calculating the relevant loss. His loss figures were approximately $3.5 million for the Casino scenario and $8.1 million for the Tablelands scenario. These in effect represented Mr Gooley's figures from PG4 and PG5.

543 The Bank relied on expert evidence from an accountant, Terence Michael Potter, on the calculation of the damages claimed by the Gooleys. Mr Potter produced a report in which he addressed eight questions which were asked of him of the Bank's solicitors. These eight questions, and Mr Potter's answers, concerned specific causation issues. Mr Potter was not asked to respond to Mr Hughes' damages figures, either generally or as to any specific part of the calculations.

544 Mr Hughes then prepared a report in reply in which he responded to the points made by Mr Potter. At the trial, both Mr Hughes and Mr Potter were briefly cross-examined on these issues.

545 The effect of what happened was to reverse the roles of Mr Hughes and Mr Potter. Mr Hughes' report in chief was not addressed by Mr Potter and there was no debate about it. Instead, the debate centred on Mr Potter's answers to the specific causation questions that had been asked. Mr Potter was advancing the argument and Mr Hughes was responding to him.

546 It is not necessary to refer at this stage to the points made by Mr Potter in his report. I will mention them to the extent necessary in due course.

547 Because Mr Potter did not comment on Mr Hughes' overall damages figures they were not explicitly challenged. But it is common ground that Mr Hughes has no relevant expertise in farming or agricultural science, and simply used Mr Gooley's figures without bringing any independent expertise to bear on whether they were accurate. This is not a criticism, as any such assessment fell outside Mr Hughes' professional expertise. In any event, Mr Hughes' calculations were for practical purposes superseded by Mrs Gooley's. The critical question remains whether Mr Gooley's figures are a reliable basis for awarding damages.

Move to Tablelands

548 I now consider whether, assuming the Bank had acted as the Gooleys contend it should have, that would have resulted in the Gooleys moving their farming operations to the Tablelands.

549 **Documentary evidence from 2012 and 2013**: In evidence are notes by Mr Gooley from mid-January 2012 which record his calculations about a restructure involving the sale of Clovass, the retention of Dyraaba and the purchase of a new property in the Tablelands. A possible future option was to sell Dyraaba (after providing for accommodation for the Hayward parents) so as to reduce debt further.

550 Further notes of Mr Gooley show that at the end of February he put together a contact list of people to consult in the Tablelands area and had discussions (presumably by telephone) with some of them about the feasibility of purchasing a property there for cattle operations. Among the people he consulted was Noel Alan (known as “Bob”) Jamieson. Mr Jamieson was a stock and station agent based at Inverell who owned a property in the area and had extensive contacts in the cattle industry. He at first met the Gooleys in 2009 or 2010 and had been involved in marketing their cattle. Mr Jamieson recommended the purchase of a property of 1800 to 2000 acres (720 to 800 hectares).

551 Mr Gooley’s notes then record a road trip for four or five days, starting on 20 April, during which he and Mrs Gooley visited a number of their contacts in the Tablelands, including Mr Jamieson, and looked at some properties there. A note of a conversation with Mr Jamieson on 29 April records that he advised the Gooleys to sell their property on the coast at a discount as they would buy very well in the Tablelands and now was the time to move.

552 At this point the notes peter out, apart from one further discussion early in June. The Gooleys do not appear to have taken the idea of buying a property in the Tablelands any further.

553 There are further emails in evidence between Mr Jamieson and Mr Gooley starting in February 2013. Mr Gooley sent a spreadsheet model for a cattle business to operate on a leased or agisted property to Mr Jamieson for his

comment. In April Mr Gooley emailed Mr Jamieson again about the idea of leasing or agisting a property. He and Mrs Gooley had been talking to a couple in the Tablelands called Edwards with a view to leasing their property but had decided not to proceed because it was not suitable. The Edwards' property was west of Inverell. Mr Gooley in his email referred to the possibility of getting land east of Inverell. But nothing ultimately came of this.

554 **Gooleys' evidence**: The first mention in the evidence before the Court of a hypothetical earlier move to the Tablelands came in an affidavit sworn by Mr Gooley in February 2018. Mr Gooley said that had he been aware of the reduction in the loan term in July 2008 to five years from fifteen years:

> … I would have taken some or all of the following steps:
>
> a. moved to seek legal advice and taking the appropriate actions dependent on that advice;
>
> b. approached the ANZ and other financial service providers to provide us with a loan, including accommodating the RAA hardship loan amount; or
>
> c. taken steps to move our farming operation to the Tablelands region.

555 This statement, with its reference to taking "some or all" of the relevant steps, and the reference in alternative (a) to taking "appropriate actions dependent on" advice where neither the actions nor the advice were specified, was quite vague. But only three paragraphs later Mr Gooley stated:

> If I had known of the proposed changes to our facility in July 2008 I would have not signed the document on 2 July 2008 and Susan and I would have immediately commenced detailed investigation into moving our farming operation to the Tablelands area.

556 Mr Gooley then referred to the circumstances surrounding the sale of the Patton land in August 2009. He said he was told by Mr McMahon that there would be no difficulty selling the rest of the Clovass property given the state of the market. He said that he and Mrs Gooley "gave a lot of consideration" to relocating the farming operations to the Tablelands. At the time of the sale the Gooleys completed a net worth statement for the Bank. This recorded their net equity as being approximately $2.28 million with an LVR of 58.93%. Mr Gooley said:

> Based on the figures at page 4 of the Net Worth statement I thought at the time that we would be able to refinance the Clovass property if we wished to remain in the area. But if we moved our operation to the Tablelands area we

> would have reduced our gearing and increased our equity ratio to around 75% meaning we could up-scale our business and reduce debt.
>
> If we were advised that the loan term had been reduced from 15-years to 5-years we would have certainly sought legal advice as to our rights and would have definitely relocated our operation to the Tablelands area.

557 Mr Gooley next referred to the loan the Gooleys obtained from the Bank for the purchase of Dyraaba in June 2011. He said:

> If, at the time, I had the knowledge that Bankwest had reduced the term of the $1,050,000 loan from 15-years to 5-years and would expire in less than two years Susan and I would not have taken on a further $550,000 of debt and purchased the Dyraaba property. … Had we been aware that there remained only 2 years on our loans with Bankwest we would we would have had sought a cash payout from Susan's brother James for her share of the Eden Pine Farm partnership and we would have paid down with the equity which was estimate at approx. $705,000. We then would have either:
>
> a. Consistent with our decision to reduce our cropping and increased our cattle, sold the 130acres for $495,000 but retained the 174 acres and the 102 acres as we own today. Added to the $495,000 for the Clovass cropping property sale we would have reduced debt by $1.2mill to leave $741,778 in liabilities with an equity of $2,515,433 an equity percentage of 77% and a loan to value ratio of 21%; or
>
> b. Sold all of the property at Clovass and transferred our operations to the Tablelands region and reduced our financial gearing.

558 At the end of March 2018, Mr Gooley swore a supplementary affidavit. He said:

> Had my wife and I known in 2008, 2009, 2010 or 2012 that the loan was to be repayable in 2012 expiring on 12 December 2012 and not as agreed with the Bank expiring on 12 December 2022, then our farming operation would have been transferred by us to the Tablelands by selling the coastal properties and acquiring lands on the Tablelands and conducting our farming operations there.

559 Mr Gooley referred to Mr Jamieson's April 2012 advice that the Gooleys sell their coastal properties at a discount and move their operations to the Tablelands. Mr Gooley said that by the time he found out in November 2012 about the requirement to repay the FICL in December there was too little time to move. He did not however say why he did not move earlier in accordance with Mr Jamieson's advice.

560 In a further affidavit in May 2018, Mr Gooley gave further background detail about the possibility of moving the operations to the Tablelands. He said that as a director of Norco from 1994 to 2001 he visited the Tablelands once or twice a year ("and sometimes more"). Based on this experience he considered that the region ideally suited beef and dairy operations. He said that at the time

of preparing his proposal to the ANZ in early 2007 he spoke about the Tablelands with Mrs Gooley:

> I can recall Susan and I had a discussion to the effect of:
>
> P Gooley: If we are going to relinquish dairying we should consider all our options. We have spoken of our liking for the Tablelands and Slopes area so we should not discount that as we could set up a mixed farming operation at a much larger scale than the Coast and the area is well suited to the type of operation we are proposing for Clovass.
>
> S Gooley: I haven't been to that area as much as you, but I do think it is well suited to the mixed farming operation we are proposing. We certainly could run a much larger operation than we can on the Coast.

561 In his affidavit of October 2018 in reply to the Bank's witnesses Mr Gooley said that at the time of the sale of the Patton land (July/August 2009) he had a discussion with a real estate agent in Casino, Mr Kel Gunther. According to Mr Gooley, the conversation was to the following effect:

> P Gooley: Susan and I have decided to sell our Patton property and we were assessing our future farming options. It is coming on 2 years since we ceased dairying and I understand there is still fair interest for dairy farms. When dairying, the property had a BJD (Bovine Johannes Disease) status but when we sold the adult cows we received a clean declaration from the Department. We are assessing 4 options for our future:
>
> a) Downsize and run a smaller operation with less debt.
>
> b) Purchase a hill/runoff paddock that can give our existing operation some flexibility in these wetter seasons.
>
> c) Reduce our Bank debt and relocate to country west of Casino that is less impacted by these wet seasons where we can basically run the types of enterprises we run at Clovass.
>
> d) Or relocate our operations to the Northern Tablelands/Slopes area.
>
> Gunther: We have some properties listed that you may have interest in. Given the operation you run at Clovass the Tablelands/Slopes area is ideally suited to you. I grew up on the Tablelands around Glenn Innes and my family still farms there, so I know that area well and if you have any questions I am sure I can assist you. You could run a much larger operation there with the same capital as land is cheaper there. As a real estate agent, I don't cover that area but I do know people there. I will put together a few options for you.

562 Mr Gooley said that at the time he looked for properties in the Tablelands in newspapers and also visited the website listing for one particular property at Inverell in August/September 2009.

563 Mrs Gooley first referred to this issue in her reply affidavit, sworn in October 2018. Concerning the July 2008 variation of the Facility Terms she said:

> I recall that Mr Mitchell continued to reassure me that the FICL had a term of 15 years (being 5 years interest only and 10 years principal and interest). I recall it was based on this invariable assurance from Mr Mitchell that I continued my ongoing dealings with Bankwest. Had I been informed, I would have reassessed our business strategy.
>
> One of these strategies was a relocation to the tablelands. Following the natural disasters of 2007 and early 2008 flood I recall we discussed the need for a hill to balance our farm which was predominantly flat. I recall the relocation topic was further discussed when we sold the Patton property in 2009. I recall saying that if we were to relocate I would prefer to do so while the children were still young enough to make the transition easily.

564 In connection with the September 2009 variation following the sale of the Patton land, Mrs Gooley said:

> I recall we had just gone through a number of excessively wet seasons and 4 natural disasters and that knowledge that our main facility with Bankwest had changed would have been significant to my future. I would not have done nothing, particularly when … the opportunity to sell and relocation was a real possibility.
>
> …
>
> I do not recall Mr Mitchell ever expressing to me that proposed distribution of the settlement proceeds of the sale of [the Patton land] as being as issue for Bankwest. Had Mr Mitchell expressed Bankwest's concern at the time I would have been able to address any issue and also reassess my business strategy.

565 Mrs Gooley added:

> I recall at the time the real estate agent, Mr John McMahon who sold [the Patton land], expressing to both Paul and me that he would be able to sell that balance of our Clovass land easily as demand for property was high. I recall Paul and I had been discussing relocation options again. Had Mr Mitchell expressed to me at the time the bank's concern, I am certain that Paul and I would have choose to sell Clovass and relocate west.

566 In her April 2019 affidavit Mrs Gooley said that from "at least 2009" she had in mind moving to the New England part of the Tablelands (covering Armidale, Inverell and up to Tenterfield) where, she said her best friend, whom she met at the University of New England, lived, and Mr Jamieson also lived. She said that she and Mr Gooley went on five road trips to visit Tablelands properties in "2010 and 2012". She said:

> If Bank West had informed the Gooley partnership, at the time of any of the five (5) letters of variation abovementioned, that the 15 [5 + 10] year FICL had changed to a 5 year term with repayment on 12 December 2012, we would have sold our existing properties and moved the Gooley partnership to a new farm in the NSW Tablelands.
>
> …

Had I been told that the 15 years Bankwest FICL was only 5 years in July 2008, I would have brought forward our plans to move to the Tablelands from that time.

567 Mrs Gooley was pressed about this evidence in cross-examination. She later gave the following evidence in answer to questions by me:

Q. Did you believe at the time that you would be better off on the Tablelands?

A. Yes, I did, your Honour.

Q. Why didn't you move?

A. We also believed that we could be successful on the coast and we believed that the seasons could work themselves out, we'd been through dry, 2002 was a dry season, you know, you - you get the seasons normalised a bit after that but no one would have ever expected a prolonged wet season, so we believe that we could have farmed successfully on the coast as well but the - the wet seasons and the cropping basically--

Q. I asked you whether you thought you would be better on in the Tablelands, I think you said yes?

A. Yes - yes.

Q. Is that the case?

A. I think we would have been better off--

Q. Did you actually think that you would be better off in the Tablelands--

A. Yeah.

Q. --than the coast?

A. I think - I think from when I answered that, I thought I would have been better off on the Tablelands from our family's point of view, so as far as our - our children and - and ourselves--

Q. How about financially?

A. Financially, yes, I - I - I do believe that we would have been better off and--

Q. Not what you believe now, I'm asking about what you believed at the time.

A. I always liked the area, so I was attracted t the area--

Q. Did you believe at the time that you would be better off financially if you moved?

A. Yes, when it was raining, yes, definitely, we would have been better off on the Tablelands back at that time and we - we discussed that--

Q. ..(not transcribable)..I'll ask you again, if you thought you would be better off financially on the Tablelands and you thought that your children would like it more, why didn't you move?

A. Well, we were still - yeah, we were still there and I guess we thought that the coast would come good, yeah, I - I guess there's a whole pile of factors, you know, that was - I was still involved with my brother's property or my - my - in the business with my brother and being closer, that was a factor as well,

> yeah. I wish I had have done it, to be honest, we wouldn't be here today, your Honour.

568 **Corroborating evidence**: There is no doubt that in 2012 Mr Gooley looked at undertaking at least some of his farming operations on the Tablelands. That is established by his contemporaneous notes, to which I have already referred. But the Gooleys pointed to only two documents which pre-date 2012 in support of their claim that they were considering moving to the Tablelands at an earlier date.

569 The first of those documents is an email from Mr Wade to Mr Gooley in April 2009. The email set out the names of four "cattle contacts" who could help Mr Gooley with "marketing ideas", and provided contact details for each of them. The first was Mr Jamieson. Two of the other contacts were in Queensland and the third was a dairy farmer (address unspecified) whose brother and father were butchers.

570 The email contained no other details but the reference to "marketing ideas" suggests that, at that stage, what Mr Gooley had asked for was details of people who could assist in selling the Gooleys' cattle. The email contains no hint that Mr Gooley was contemplating moving his cattle operations to the Tablelands; the fact that Mr Jamieson lived at the Tablelands seems to have been coincidental.

571 The second document was an email sent by Mr Gunther following his 2009 conversation with Mr Gooley about property requirements. The email is dated July 2009 and attached flyers for five properties which Mr Gunther said he felt "fitted close to your requirements". All of the properties appear to have been in the Casino area and the letter does not refer to the Tablelands.

572 Mr Gunther did not give evidence, but three other lay witnesses did. They were Mr Jamieson, Paul Freeman and John Terence McMahon.

573 In Mr Jamieson's affidavit, which was sworn in March 2019, he said that he first met the Gooleys in mid-2010. This was a year or so after Mr Wade gave Mr Gooley Mr Jamieson's contact details. Mr Jamieson said that he clearly remembered visiting the Gooleys at Clovass to present a marketing plan to them. He said that the Gooleys' operations and their cattle were impressive. He

did not refer to any discussions with Mr Gooley about the Gooleys moving to the Tablelands at that time.

574 Mr Jamieson confirmed that, with his encouragement, the Gooleys made several trips to the Tablelands to inspect farms. He also confirmed that in his view Inverell country was under-priced and would have suited the Gooleys well. But this evidence clearly related to the period from 2012 onwards.

575 Mr Jamieson was cross-examined but the cross-examination focused on what was required for a successful cattle farming operation in the Tablelands area. Mr Jamieson did not mention anything about the Gooleys moving their operations in 2011 or earlier.

576 Mr McMahon is a farmer who formerly operated a stock & station and real estate agency at Casino. He gave evidence about his dealings with the Gooleys in selling part of the Clovass property in July 2009, and the saleability of the balance of the property should the Gooleys have wished to move to the Tablelands.

577 In his affidavit, Mr McMahon said that the Patton land sold very quickly. He stated:

> I can recall Paul saying words to the effect of:
>
> > If you sold the property in one week, do you think you can find a buyer for the whole farm as Susan and I are sick of these wet seasons and would like to assess the option of moving west.
>
> I can recall a discussion with Susan and she said:
>
> > I think that's a great idea. The kids are still young enough and I have always liked that area.

578 Mr McMahon stated that about twelve months later he had a discussion with Mr Gooley about the proposal for the Gooleys to take over Dyraaba. The conversation was to the following effect:

> P Gooley: Susan's brother has approached her and he is wanting to buy the farm next door, but he will need to sell her his share in the home farm to be able to do so. The seasons are staying pretty wet and Susan is assessing whether she wants to stay involved there. We have revisited whether we move west and were wondering whether there is still good interest in our Clovass farms and the likelihood of selling the farms.
>
> McMahon: Paul, the market is still very strong especially for good quality grazing and cropping land. River bank farms are still very hard to find and if

> they come onto the market they sell at premium prices and I think it would not take long to find buyers and I think it would not take long to find buyer. I don't think I would have any problem getting the same sort of value as the Patton Farm I would say you would get your 5 or 6 grand an acre plus your improvements an extra for your water licenses.

579 Mr McMahon was not cross-examined. There is no reason not to accept his evidence, so far as it goes.

580 Mr Freeman is a veterinary surgeon working in the Casino and Kyogle areas of the Northern Rivers. He gave evidence of his experience of dealing with the Gooleys when they operated the Clovass property as a dairy farm, and in particular of the quality of their operations. His affidavit was read without objection and he was not cross-examined.

581 Mr Freeman said that he first met the Gooley family in 1988. He said that the Gooleys had been very successful dairy farmers. Mr Gooley had skill and acumen. Mr Freeman said that these skills gave the Gooleys an edge when they changed to a mixed farming operation.

582 Whatever the weight of this evidence, it concerned the Gooleys' farming skills generally. It is not relevant for present purposes.

583 On Mr McMahon's evidence, the Gooleys were considering the sale of the Clovass property and "moving west" at the time of the sale of the Patton land in about July 2009, and again about a year later when the option of buying Dyraaba came up. That, however, is as far as the corroboration from documents and independent witnesses goes.

584 There is no independent evidence that the Gooleys were even considering a move to the Tablelands before the decision to sell the Patton land in mid-2009. And apart from what the Gooleys say, there is no evidence of any actual enquiries of stock & station agents, or any road trips being undertaken, before February 2012 (the first documented road trip was in April). Nor is there evidence of any financial assessment being undertaken by Mr Gooley before 2012.

585 In this regard, the lack of evidence from Mr Jamieson is significant. He did not say that there was any discussion about the possibility of moving to the Tablelands when he visited the Gooleys in the second half of 2010. In fact he

gave no evidence of discussions on the subject before 2012. Mr Jamieson was a stock & station agent in the area, and someone with whom the Gooleys later discussed both the acquisition of property and the logistics of a Tablelands cattle farming business. If the Gooleys did not ask him about moving, that is presumably because they were not seriously considering it at the time.

586 **Conclusions**: I found the Gooleys' evidence on this subject generally unpersuasive. Their affidavits started by saying that if the Bank had behaved differently so far as the fifteen year term and the Dyraaba loan were concerned, they would have sought advice and considered the options. The move to the Tablelands was then introduced as an option. As the case went on the statements that the Gooleys would have taken it became increasingly definite. At the end, the move to the Tablelands was asserted as a certainty. The pattern is one of hindsight analysis.

587 As already noted, Mr Gooley's farming philosophy was based on "intensive farming" funded by debt. The whole pattern of the Gooleys' dealings with their bankers (first ANZ, then Bankwest) from the time they took over the Clovass property from Mr Gooley's parents in 2004 was one of heavy and increasing reliance on debt finance in the face of poor trading results. The only exception to this was the reduction in debt which accompanied the sale of the Patton land in August 2009. But according to Mr Gooley's memorandum to Mr Mitchell of 14 January 2011, even in August 2009 he had been thinking of purchasing further hill country to assist with the cattle operations, and his affidavit account of his conversation with Mr Gunther is to similar effect.

588 The Gooleys also borrowed money from the RAA; in fact they were so keen to do so that they successfully sought a review when their application for a second loan was refused in 2009. No doubt the terms of the RAA loans were favourable, but they still had to be repaid.

589 I have rejected the Gooleys' evidence that they were unaware of the reduction of the term in the FICL to five years from July 2008 onwards. I also reject the suggestion that they were planning to repay the FICL by instalments of principal after December 2012. Mr Gooley's own spreadsheet models show

that this was not the case. I do not believe that Mr Gooley ever in fact had a concrete plan to repay the principal.

590 When the Gooleys reached the end of what the Bank would lend in 2011, they did not stop borrowing. Instead they turned to the G&F cattle trading account. When, in April 2012, they could not satisfy their trade creditors, their reaction was to try to borrow more money from the Bank to do so. When that failed, they increased their borrowings on the G&F account still further. The process only ended when the Gooleys ran out of people prepared to advance money to them.

591 As we have seen, the evidence contained a number of testimonials to the Gooleys' skills as farmers. It is not necessary for the purpose of these proceedings to decide how accurate this was. What is clear is that the Gooleys ultimately failed to keep control of their debt. In particular, they failed to manage their trade creditor accounts adequately. In retrospect it can be seen that this was the downfall of their business.

592 Mrs Gooley portrayed herself as having no ties to the North Coast area, and as being just as happy, if not happier, on the Tablelands. I think this evidence is exaggerated. In fact there were powerful family reasons for the Gooleys to take on the Dyraaba property. I think that there were similar emotional pressures towards retaining the Clovass property, or at least the core part of the holding. It was plain in the course of the hearing that the loss of the two family properties has been a source of anguish and humiliation for the Gooleys. I do not think they would lightly have given up the Clovass property (or the Dyraaba property, once acquired) and moved away from the Casino area.

593 Finding a property on the Tablelands, and then moving their operations there, would have been a major logistical effort for the Gooleys. It would have been a leap in the dark. In my view, the Gooleys would not actually have made such a move unless something had happened to make them realise that they were badly over-extended and that there was a real likelihood of financial ruin if they continued their operations at Casino.

594 The only mention in the evidence of the possibility of moving to the Tablelands as early as July 2008 is the conversation which Mr Gooley said he had with

Mrs Gooley when they were developing the plan to cease dairying in 2007. There is no independent confirmation of this conversation (which was in vague and preliminary terms anyway) and I do not accept it. I see nothing in the evidence to establish that the Gooleys would even have seriously considered moving to the Tablelands as early as 2007 or 2008 if (contrary to my finding that they were already aware of it) the five year term on the FICL had been revealed to them at that time.

595 On Mr McGovern's evidence, a possible move to the Tablelands was something which was discussed around in July or August 2009 when the Patton land was sold, shortly before the September 2009 variation of the Facility Terms. But on Mr Gooley's own evidence, this was only one of a number of possibilities. Others involved the acquisition of additional hill country near Casino, or in the Tablelands, while retaining the Clovass property. There is no independent evidence that moving to the Tablelands was anything more than an idea at the time. I am not satisfied that revelation of the fact that the FICL was to expire in December 2012 would have been sufficiently important to make the idea a compelling one. Similar observations apply to the April 2010 variation of the Facility Terms which resulted from the Gooleys taking out the Cattle Loan.

596 Admittedly, the hypothesis to be considered in 2011 contains an additional element. On the Gooleys' "asset lending" case the Dyraaba loan would never have been made at all. But this is the very hypothesis which Mr Gooley considered in his instructions to Mr Bundy in 2014. Mr Gooley told Mr Bundy that if the loan had not have been made the Gooleys would not have purchased Dyraaba and they would not have taken out the trading account with G&F. Mr Gooley said nothing at all about moving to the Tablelands.

597 I have already pointed out that there are some difficulties with the assumption that had the Gooleys not undertaken the Dyraaba loan, they would not have proceeded with the cattle trading with G&F. But it is not necessary to consider that hypothesis any further. The Gooleys did not make a damages case based on it.

598 On balance, I am not satisfied that the refusal of the loan to purchase Dyraaba would have led the Gooleys to move to the Tablelands. It is apparent that at the time the Gooleys were not sufficiently worried about their level of debt to be taking active steps to reduce it. They still believed that their model of intensive farming, and cattle production in particular, was the answer. Moving to the Tablelands would have resulted in a less intensive type of farming, involving lesser levels of crop production and fewer stock turns than on the more fertile country at Clovass. I do not accept that, faced with the refusal of a loan to purchase Dyraaba, the Gooleys would necessarily have reacted by lowering their ambitions and scaling back their operations.

599 It remains to consider the Gooleys' allegation that, had the Bank treated them differently in April 2012 they would have moved to the Tablelands at that stage. The answer to this is two-fold. First, the Gooleys did in fact consider purchasing a property at the time but did not do so. Presumably that was because they found nothing suitable to their requirements. This was despite the fact that Mr Jamieson was strongly advising them to do so. The actual events of the first half of 2012 contradict the Gooleys' hypothesis.

600 The second point is that what the Gooleys wanted from the Bank in April/May 2012 was a further loan of $200,000. This loan had nothing to do with any move to the Tablelands. It was to pay off the Gooleys' trade creditors. Had the Gooleys received the money they sought, paying off their creditors is presumably the very thing they would have done with it.

601 As already mentioned, the hypothesis about moving to the Tablelands only surfaced in 2018. In my view the true position is shown by the evidence Mrs Gooley gave at the end of her cross-examination which I have quoted above. With the benefit of hindsight, the Gooleys regret having stayed at Casino and wish they had moved to the Tablelands. But this does not prove that if the Bank had behaved differently between 2008 and 2011 they would in fact have moved there. I am not satisfied that they would have.

The Gooleys' damages assessments

602 In his second February 2018 affidavit in chief, Mr Gooley described in general terms his ABP model and the various elements to it. The model was extremely

complicated. It involved calculations based, among other things, on assumed crop yields, crop prices, cattle growth rates, fodder requirements, and costs, both direct and overhead. The calculations extended over more than twenty separate spreadsheet pages.

603 It appears from Mr Gooley's description of the model that some of the inputs, such as historical rainfall and cattle market prices, were matters of public record. Other assumptions, such as crop yields per hectare, or cattle growth rates, may have been available from public sources, or from persons such as Mr Wade (or even Mr Gooley himself) having sufficient experience. But these were not all the variables in the model. It had to include assumptions about what area was to be planted and with what crop, how many cattle would be bought and sold (and when), and the like. These were all decisions which would have been made by Mr Gooley. Over the period which is relevant for the purpose of the damages calculations in this case, there would have been scores of such decisions.

604 In his affidavit, Mr Gooley described some calculations he did with the benefit of his ABP model in the first half of 2013. These calculations were for the purposes of the possible Tablelands operation under consideration at that time. Mr Gooley called this the "Tablelands Beef Enterprise". He also made some brief comments on the farming operations which he said the Gooleys "would have pursued had the banking relationship continued as we had believed was the agreed contractual position". These comments referred to actual rainfall and market conditions from 2012-2013 to 2016-2017. But Mr Gooley did not present any figures generated by the model to cover the damages scenarios in this case.

605 Instead, such figures were provided in PG4 and PG5. As already noted, PG4 and PG5 were originally prepared and given to Mr Hughes in March 2018. But no affidavit from Mr Gooley verifying PG4 and PG5 appears to have been prepared at the time. PG4 and PG5 were included in the Court Book for the hearing but, as counsel for the Bank pointed out, they were not business records and the evidentiary basis for their admission had not been laid in the affidavit evidence.

606 Eventually on 11 April, the ninth day of the trial, a supplementary affidavit was filed from Mr Gooley concerning PG5. He said the calculations in PG5 were based on the acquisition of a property in the Tablelands of 2000 acres (800 hectares) of which 1800 acres (720 hectares) were to be used for running beef cattle and 200 acres (80 hectares) for cropping. The calculations further assumed that in the 2011 year the Gooleys would have leased a further thousand acres (400 hectares) of land for beef cattle operations.

607 Mr Gooley said that he prepared PG5 “over several months from late 2017”. He did not give any more details about the process.

608 No similar exercise was undertaken for PG4. There was no description at all in the evidence of how Mr Gooley prepared PG4.

609 The result of this was a lack of explicit identification and explanation of the assumptions in PG4 and PG5 to the extent they depended upon decisions which would have been made by Mr Gooley.

610 In his first February 2018 affidavit Mr Gooley said that he initially budgeted to plant 123 acres of soybeans and 103 acres of maize. The season turned out to be drier and he proposed to shift to planting all maize as it was more profitable. But he said that as a result of being told by Ms Mulligan the loan was to expire he decided to plant all soybeans as the crop proceeds would be received earlier and there was less outlay.

611 This evidence reflected what Mr Gooley had told Mr Bundy in 2014. As I have noted, it is far from clear that what Ms Mulligan said could have made any practical difference given the pressure the Gooleys were under from their trade creditors. But there is a more important point for present purposes.

612 It is not clear from Mr Gooley’s affidavit evidence that the calculations in PG4 assumed that the Gooleys would have planted maize in 2012-2013. But if they did, that was the only such assumption, out of the scores in PG4 and PG5, which was explained in the evidence. Otherwise the Court was left with what could be deduced from PG4 and PG5 themselves.

613 Counsel for the Gooleys contended that this did not matter. He submitted that Mr Wade's evidence supported the calculations in PG4 and PG5, and noted that the Bank did not lead evidence from its own expert to the contrary.

614 Implicitly, counsel for the Gooleys was saying that, if the Bank wished to resist the claims based on PG4 and PG5, it was up to the Bank's counsel to challenge Mr Gooley in cross-examination. I have some reservations about this. There is a limit to how far a party facing conclusory assertions of fact or opinion can be required to conduct a cross-examination in the dark for the purposes of unpacking those assertions and then challenging them: cf *Makita* at 731 [62].

615 One area where counsel for the Bank did mount a challenge to Mr Gooley was the viability of the cattle operations assumed in PG4 and PG5. Counsel's contention was that the Gooleys' cattle trading operations were highly speculative and risky; in a rising market they might be profitable but in adverse market conditions they could lead to large losses.

616 Some of the opinions expressed by Mr Potter in his report were directed towards this contention. Counsel also sought to support it through extensive cross-examination of Mr Gooley. In particular, counsel contrasted the actual operations carried out by the Gooleys at Casino with the sort of operation Mr Jamieson had in mind when he advised the Gooleys in April 2012 to move to the Tablelands. In cross-examination, counsel put to Mr Jamieson that to buy and sell cattle without forward protection from price movements in the form of contracts with feed lots or abattoirs was risky. Mr Jamieson replied that he thought it was "crazy".

617 A further, and partly related, allegation put to Mr Gooley was that the calculations in PG4 and PG5 were produced with the benefit of hindsight. The suggestion was that Mr Gooley chose the inputs into his model knowing what the weather and other market conditions had been and thus guaranteeing a favourable result. Again the cross-examination was developed at length. At one point Mr Gooley appeared to accept the accuracy of what counsel was putting to him, but I think in the end he denied the suggestion.

618 **Move to Tablelands**: I have already explained why I am not satisfied that if the Bank had treated the Gooleys differently, they would have moved to the Tablelands in 2008, 2009, 2010, 2011 or 2012. But even if I were so satisfied, that would not be enough. It is necessary for the Gooleys to prove on the balance of probabilities that had they moved to the Tablelands they would have been financially better off than staying at Casino, and by how much.

619 As already noted, the affidavits filed by the Gooleys before the trial did not contain any verification of the figures presented in PG5. Nor did they identify any particular property which the Gooleys would have acquired had they moved to the Tablelands between 2008 and 2012.

620 At the trial, Mr Jamieson was asked about Mr Gooley's mention, in his April 2013 email, of the possibility of taking land east of Inverell. Mr Jamieson said that at the time he identified a property there called "Clare" as being potentially suitable.

621 This evidence was given by Mr Jamieson in cross-examination on 8 April. When Mr Gooley swore his affidavit of 11 April providing further details of PG5 he said:

> ……It assumes the purchase of land in the Tablelands area with criteria above 700 ml rainfall and above 700 metres of elevation. An example of such a property which I had in mind was a property 2000 acres in size but I also would have purchased a smaller property of approximately 1200 acres such as "Clare" near Bob Jamieson's place east of Inverell, which suited the above criteria, although smaller in size, had the Bank told us at any time prior to December 2012 that the FICL had changed or been altered by it from 15 years to 5 years.

622 In her affidavit of 10 April Mrs Gooley said, following the passage I have quoted at [566] above:

> After meeting Mr Bob Jamieson in mid-2010 I had particular land in mind land near him including a place called "Clare". However I have always known about the Tablelands and its country since I was a child.

623 The Gooleys' concentration on Clare is surprising. It was only 1,200 acres and therefore did not fit the assumptions in PG5. Mr Gooley acknowledged as much in cross-examination. And in April 2013 Mr Gooley's idea was to obtain acreage in the Tablelands so as to earn quick money from cattle trading in

order to pay his creditors. The main focus was on leasing or agisting a property; purchasing was only a possible future contingency.

624 Furthermore, Clare eventually sold in 2017 for $2 million, which was far more than the assumed purchase price of the Tablelands property for the purposes of Mrs Gooley's financing calculations. Admittedly, that sale price was struck six years or so after the date of the Gooleys' hypothesised move, but there was no evidence about the movement of prices in the meantime. In fact there was no evidence that Clare would have been available for purchase between 2008 and 2012 at all.

625 The Gooleys' evidence about Clare at the trial wears the appearance of having been introduced opportunistically so as to give the impression that their damages claim was supported by the evidence of an independent witness, Mr Jamieson. When properly analysed, I do not think Mr Jamieson's evidence did support the Gooleys' case. In particular, there was nothing to support Mrs Gooley's claim that she had been interested in Clare since discussions with Mr Jamieson in 2010. I disbelieve her evidence on this point.

626 In the end, the Gooleys' evidence never actually demonstrated that there was a property in the Tablelands area having the characteristics (2000 acres, and at least 700 metres above sea level) assumed in PG5 and which would have been available for purchase for $1.2 million at the time when, on the hypotheses in their case, they were to have moved. And while I do not doubt that Mr Jamieson has a great deal of experience, there was no expert evidence in proper form to establish that such properties were generally available on the market at the relevant price at the different times which were relevant for the purposes of the Gooleys' case.

627 In these circumstances, the fundamental assumptions underlying PG5 and Mrs Gooley's financing calculations have not been established. The Gooleys have not proved that, even if the farming profits in PG5 were theoretically available, they would actually have been in a position to reap those profits.

628 **Stay put at Casino**: The Gooleys of course did try to stay put and trade profitably at Casino, but failed to do so. The immediate reason was their inability to satisfy their trade creditors. In these circumstances, they must

explain why, had the Bank behaved differently, the outcome would have been different.

629 In his second February 2018 affidavit, Mr Gooley addressed how he would have dealt with G&F if the Bank had honoured (as he would have put it) the full fifteen year term of the FICL. He said:

> I intended to speak with Bankwest and come to some acceptable arrangement in respect of the G&F liability that would result in a security arrangement with G&F with a Caveat or 2nd Mortgage over a parcel of land as a security for all trading account debt. The agreement would likely have included an arrangement whereby old debt would be quarantined with a principal reduction down to $200K by 30/6/2013 and further reductions over time thereafter. New purchases of cattle would be funded by G&F and the debt on those cattle extinguished on sale.

630 I think this evidence begs the question. It assumes a concession from the Bank in the form of consent to a further mortgage (it would in fact have been a third mortgage because there was already a second mortgage in favour of the RAA), which the Bank had no obligation to agree to. Even if the bank had been prepared to agree to a subsequent security, Mr Gooley's idea also required a concession from G&F. G&F had to agree to defer repayment of $200,000 of the Gooleys' debt and to continue to make credit available for further purchases in the meantime. There is no reason to think that G&F would have been prepared to this. G&F had run out of patience with the Gooleys long before December 2012.

631 Similar observations apply to Mrs Gooley's Basis 4. Given the farm surplus in PG4, Mrs Gooley's debt servicing figures portray a scenario in which there would have been sufficient income to meet repayments. But some of the assumptions which Mrs Gooley made are questionable.

632 Mrs Gooley's calculations assume that as at 31 December the debt to G&F would have been $389,000. They also assume that other creditors would have increased over the month by $90,000, to $289,000. In fact, as at the end of December G&F had insisted on impounding all of the proceedings from the Gooleys' cattle sale operations, and had thereby reduced the debt to $342,000. It is clear that G&F wanted to reduce it still further. There is no reason to think that G&F would have tolerated an increase in debt at that time.

633 Nor is there any reason to think that other trade creditors would have been prepared to advance a further $90,000 to the Gooleys in December 2012. According to Mr Gooley's own evidence, his delay in paying creditors was damaging his reputation at the time and he was already well overdue on the Alan Hill and Norco crop accounts.

634 Mrs Gooley's calculations show principal and interest payment on the FICL from the beginning of January 2013, in accordance with what the Gooleys say the contractual position was. They also show a principal and interest repayment on the Dyraaba loan starting at the same date. But this did not reflect the Gooleys' loan arrangements with the Bank. The Dyraaba loan was an interest-only loan until July 2013 but it was repayable in full on that date. There is no reason to think that the Bank would have been prepared to allow the Gooleys to repay the Dyraaba loan over a ten year period.

635 Everything that happened from 2012 onwards suggests that Mr Hensman was right in May 2012 ([477] above) in concluding that the Gooleys could not trade out of their debt problems, and sale of their properties was the only answer. Even if this was too negative, Mr Richardson was surely correct in late 2012 and early 2013 in seeing an immediate agreement with G&F as the essential first step to salvaging the Gooleys' financial position. The Gooleys failed to achieve such an agreement, immediately or at all. During this period, the Bank effectively held its hand; it did not in any way interfere in the Gooleys' negotiations with their trade creditors or with their attempts to refinance. The Gooleys' case at trial simply failed to explain why the Bank's alleged misconduct made any difference.

636 **Conclusions**: For these reasons, I think the Gooleys have not proved their case for damages on either of the scenarios in the case. For the Tablelands scenario they have not proved that there was a property available to meet the assumptions in PG5. For the Casino scenario they have not proved that even if they had achieved the farm surplus calculated in PG4, they would have been able to meet their liabilities as those liabilities fell due.

637 These conclusions makes it unnecessary to consider the submissions by counsel for the Bank that the Gooleys' hypothesised cattle trading would not

necessarily have been profitable and that the calculations in PG4 and PG5 were based on hindsight. It is also unnecessary to consider any wider question about the lack of identification and explanation of all of the assumptions underlying PG4 and PG5.

Variation of the term of the FICL

Contractual effectiveness of variation

638 On my findings, Mr Gooley was consciously aware when he signed each of the Facility Terms documents in July 2008, September 2009, April 2010 and June 2011 that the Terms provided for the FICL to be repayable on 12 December 2012. I have also rejected Mrs Gooley's evidence of the circumstances in which the documents were signed. Even if Mrs Gooley was not consciously aware that the revised Facility Terms provided for the repayment of the FICL in December 2012, she signed each of the documents knowing that it set out the terms of the Bank's offer and she is bound by those terms whether she read them or not: *Toll (FGCT) Pty Limited v Alphapharm Pty Ltd* (2004) 219 CLR 165.

639 In its List Response the Bank alleged that the Gooleys did indeed agree, in July 2008, September 2009, April 2010 and June 2011, to vary the term of the FICL from fifteen to five years, and set out detailed contentions of fact in support of those allegations. Counsel for the Gooleys, in final submissions, argued that the Bank had failed to establish its "defence" in this regard. But in my view, to state the matter in that way involves a reversal of the onus. The Bank did not have to prove affirmatively that it did not mislead the Gooleys. It was for the Gooleys to prove, on the probabilities, misleading or deceptive conduct by the Bank. On my findings, the Gooleys failed to do so. The allegations of unconscionable conduct and breach of the Code of Practice fail for the same reason.

640 Counsel for the Gooleys, however, took another point. The submission was that the variation in July 2008 was a "one-sided promise" which did not involve contractual consideration. Counsel argued that the Bank's consent to permitting the RAA to obtain a second mortgage, pleaded in the Bank's List

Response, was “mere latitude” which was not a quid pro quo for the reduction in the term.

641 There is no doubt that commercially, the Bank saw its consent to the RAA mortgage as part of the variation. The Bank’s internal documents make that clear.

642 But the only reference to the RAA mortgage in the Facility Terms was in the section dealing with security. That provided that the Bank required a Deed of Priority with the RAA before providing any of the facilities to the Gooleys. But in fact the parties seem to have treated the Facility Terms as a variation which was immediately binding; to the extent that the Bank did not in fact obtain the Deed of Priority until afterwards, all this means is that the condition was waived. The Bank did not in the Facility Terms actually undertake to consent to the RAA mortgage.

643 Some legal consideration from the Bank was required but consent to the RAA mortgage was not the only candidate. The loan repayment terms were changed. The Bank agreed to accept immediate repayment in December 2012 rather than repayment by means of principal reductions over the period from 2012 to 2022.

644 On this point counsel for the Gooleys relied upon the rule of contract law that the purported variation of a contract under which one party makes a fresh promise in return for the other party performing its existing obligations is not valid: see G H Treitel, *The Law of Contract* (11th ed, 2003, Sweet & Maxwell Ltd) at p 94-95; J D Heydon, *Heydon on Contract: The General Part* (5th ed, 2019, Lawbook Co.) at [5.280]. Counsel argued that the shortening of the loan term fell within this rule, as the Bank would simply be getting its money back earlier than it had already agreed to receive it.

645 The rule, however, does not generally apply where the variation involves some change in the nature of performance which results in the performing party doing something different from what was originally promised. For that reason, an agreement, before the time for payment has been reached, to change the currency of payment, is contractually effective: *W J Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189; *Woodhouse AC Israel Cocoa Ltd SA v*

Nigerian Produce Marketing Co Ltd [1972] AC 741. Each party is taking a risk that the exchange rate may move against it, and the assumption of that risk is good consideration.

646 In my view the early repayment of a bank loan is similar. In general it might be said that to shorten the term of a loan favours the lender. But this is not invariably so. If a bank gets its money back, it must find someone else to lend it to, and interest rates may have moved in the meantime. The bank may have been better off if the borrower had paid the loan back by instalments over a period of time.

647 It is said that if the variation of performance, while in theory benefitting either party, is in fact made for the sole benefit of one of them, then the rule that the variation is invalid continues to apply. This proposition is illustrated by *Vanbergen v St Edmunds Properties Ltd* [1933] 2 KB 223 where a debtor who was bound to pay a certain amount in London agreed to pay a reduced amount at a bank branch in Eastbourne. The bank branch was selected because the debtor was going to Eastbourne on the day in question on other business. The English Court of Appeal held that the variation of the place for payment was simply for the convenience of the debtor and was not valid consideration.

648 Ordinarily the law of contract is concerned with an objective analysis of the parties' promises, rather than their subjective motivations. This may be difficult to reconcile with the proposition that what would objectively be a sufficient variation loses that quality if in fact it is for one party's convenience. But it is not necessary to explore this further for the purposes of the present case.

649 At the time the variation was made, in July 2008, the repayment date lay years in the future. No-one could know whether in fact it would prove to be for the Bank's benefit. I do not think the variation could be said to have in fact been made solely for the Bank's convenience.

650 If I am wrong in this view, then subsequent versions of the Facility Terms in September 2009, April 2010 and June 2011 undoubtedly involved the provision of good consideration by the Bank. Those Facility Terms contained obligations on the Bank to provide additional accommodation to the Gooleys, which it did.

651 For these reasons, I reject counsel's submissions. The variation making the FICL repayable in December 2012 was contractually effective.

Misrepresentation and estoppel

652 The Gooleys' alternative contention was that the Bank so conducted itself so as to lead the Gooleys to believe that the original fifteen year term of the FICL was unchanged. Counsel alleged that Mr Mitchell misrepresented the nature of the Facility Terms documents which were signed, or at the least was "tricky" about them. Counsel contended that, as a result, the Bank was estopped from denying that the FICL loan term continued until 2022 in accordance with the October 2007 Facility Terms. Alternatively, relief was claimed on the basis of misleading and deceptive, or unconscionable, conduct.

653 These contentions fail because of my findings on the facts. As I have already pointed out, the terms of the various Facility Terms variations were quite unambiguous. It is true that the Bank's internal documents (and its communications with the RAA) were to some extent inconsistent with the Facility Terms, but the Gooleys did not see those internal documents or communications at the time; they only got them through the FOS process. The only documents issued by the Bank to the Gooleys after 2008 which showed the FICL having a term extending until 2022 were the computer-generated letters which the Gooleys received after Christmas 2012, when the FICL had expired (see [486] above).

654 I have rejected the Gooleys' evidence that Mr Mitchell misled them during the course of signing the July 2008 Facility Terms document, and their evidence that Mr Mitchell told them thereafter that the loan would extend to 2022. In my finding, no misrepresentation was made by the Bank.

655 Nor am I satisfied that the Gooleys actually believed at the time that the Facility Terms from October 2007 had not been varied. As we have seen, while the commitment schedule prepared by Mr Gooley was based on the term continuing until 2022, it was not based on principal and interest repayments after that date. I have rejected the Gooleys' assertions that their subjective belief was that the loan was repayable on a principal and interest basis over the 10 years from 2012 to 2022.

The making of the Dyraaba loan

656 As already noted, counsel for the Gooleys characterised the Dyraaba loan as a form of "asset lending". Counsel contended that the Bank made the loan without any real belief that, or at least without any proper enquiry as to whether, the Gooleys would be able to repay it, on the basis that in any event there would have sufficient security to cover the loan.

657 The term "asset lending" has been used in a number of Court of Appeal decisions under the *Contracts Review Act 1980* (NSW). In *Perpetual Trustee Co Ltd v Khoshaba* [2006] NSWCA 41, Basten JA said at [128]:

> To engage in pure asset lending, namely to lend money without regard to the ability of the borrower to repay by instalments under the contract, in the knowledge that adequate security is available in the event of default, is to engage in a potentially fruitless enterprise, simply because there is no risk of loss. At least where the security is the sole residence of the borrower, there is a public interest in treating such contracts as unjust, at least in circumstances where the borrowers can be said to have demonstrated an inability reasonably to protect their own interests, for the purposes of, for example, s 9(2)(e) or (f).

658 In the present case, there is no claim under the *Contracts Review Act*, but "asset lending" may also involve statutory unconscionability. However, not all lending where the lender looks to repayment from the sale of the security is necessarily wrongful. In *Kowalczuk and Another v Accom Finance Pty Ltd* [2008] NSWCA 343, Campbell JA quoted with approval the statement by Windeyer J at first instance that decisions such as *Khoshaba*:

> … are not authority for some general proposition that a lender of money on security of real estate to a borrower who has no ability through his own income or assets to repay the loan, is guilty of taking part in some unconscionable and predatory conduct. That may be the position if there is no means disclosed for payment of interest, but a good proportion of borrowers for fixed terms in any mortgage situation would be proceeding on the basis that the principal debt would be repaid by new borrowings or by sale of the mortgaged land. The position is of course different if the lender knows that there will be default in payment of the interest or principal so that mortgagee sale will be the inevitable result. This latter conduct is the type of pure asset lending that has been found unconscionable; the former is not.

659 On my findings the Bank was a reluctant lender. Mr Mitchell was a supporter of the proposal, but the originator was Mr Gooley. It was Mr Gooley who produced the budgets which underpinned the application. It was also Mr Gooley who failed to disclose to the Bank his credit arrangements with G&F. And it was the Gooleys together who decided to press on with the purchase of

Dyraaba following another disastrous season and despite the delays in the Haywards' finance.

660 The Bank's officers, and Mr Mitchell in particular, may have been guilty of errors of judgment in failing to treat the Gooleys' application, and the budgets on which it was based, with more scepticism. But there was nothing predatory about the Bank's behaviour. The Gooleys' case comes down to saying that the Bank should have saved them from themselves.

661 The Gooleys were well aware that the loan was repayable in two years. Neither they, nor the Bank, can possibly have thought that they would be able to repay the principal out of earnings over the two year term. Both the Gooleys and the Bank must have appreciated that the loan could only be repaid out of a refinancing or the sale of the property. Indeed on Mr Gooley's own evidence, the plan was to give the Dyraaba acquisition two years to work, and if it did not it would be sold. Mr Gooley and Mr Mitchell may both have expected that if the venture was a success the Gooleys would be able to refinance with the Bank. But no undertaking was given by the Bank in this regard. It would, or at least should, have been obvious to the Gooleys that they bore the refinancing risk.

662 Mr Gooley was an apparently experienced and competent farmer. The Bank had no reason to think that default was inevitable. In my view there was no unconscionable conduct by the Bank in proceeding with the loan.

663 But this still leaves the Banking Code of Practice, which was picked up by Bankwest's General Terms for Business Lending. Those General Terms were incorporated into the Gooleys' banking contract under the terms of the Bank's formal letters of offer. The version of the Code at the time of the Dyraaba loan dealt in cl 25 with the provision of credit. Clause 25.1 provided:

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

664 This clause is worded so as to impose an obligation on the Bank before it enters into a credit facility with a putative customer. As we will see, the proper discharge of the obligation may require the Bank not to enter into the facility in question. Where the contract only comes into existence as a result of a breach

of the obligation, there may be a logical problem in treating a breach of the obligation as a breach that self-same contract.

665 Counsel for the Bank initially contended, as I understood him, that cl 25.1 did not have contractual effect. But that contention was abandoned. It is now accepted that the Bank did owe a contractual obligation to the Gooleys in the terms of the clause. The potential paradox to which I have referred was not raised as an issue. In any event, at the time of the Dyraaba loan the Gooleys were already party to a banking contract with Bankwest which incorporated the Code, so the problem does not arise.

666 The clause does not expressly say what the Bank was obliged to do if it formed the opinion that the customer would be unable to repay the loan. One alternative is that the Bank would have to advise the customer of its opinion, leaving it to the customer to decide whether to proceed. The other is that the Bank would have to go further and decline to make the loan at all.

667 As we will see, it is not necessary in this case to form a final view on this issue. I will proceed on the basis that the more stringent alternative is the correct one. There are a number of considerations which support this. Clause 25.1 itself imposes the obligation before the Bank "offers or gives" the loan. The obligation is therefore not limited only to an offer; it applies wherever the Bank gives the loan by entering into the credit facility. It must also be remembered that the Code itself applies to lending generally. The language of the Code is not confined to business customers, it is equally applicable to ordinary residential mortgage lending. The better view may well be, in that context, that cl 25.1 is a promise not to make the loan if, applying the care and skill of a diligent and prudent banker, the bank forms the opinion that customer will be unable to repay it.

668 As already noted, the evidence in this case shows that in evaluating the Gooleys' loan application, the Bank assumed repayment of interest and principal over a fifteen year term. In fact the contractual term was only two years.

669 Counsel for the Bank emphasised that, as I have found, the Gooleys were well aware that the loan was repayable in two years. They had no plan to repay the

principal, or any part of it, out of earnings over the two year term. It would, or at least should, have been obvious to them that they bore the refinancing risk.

670 But while these factors mean that the Bank's conduct was not unconscionable, they are not an answer to a claim for breach of cl 25.1. The Bank's obligation was to conduct its own inquiry into the Gooleys' ability to repay, and to act accordingly. The Bank was not excused from its contractual obligation just because the Gooleys may not have appeared to need the Bank to comply with it.

671 Counsel for the Bank also pointed out that the Gooleys did not disclose their borrowing arrangements with G&F before the loan was granted. On my findings, this is correct. But I do not think it is a complete answer to a claim under cl 25.1. Under cl 25.1 the bank is only required to conduct its credit assessment based on information it has or is reasonably obliged to obtain. Thus a customer's failure to disclose relevant financial information limits the bank's standard of care in the particular case. It may also be relevant to assessing causation if the bank breaches its obligation. But it does not excuse the bank from assessing the customer's ability to repay as best it can.

672 The failure to disclose the Gooleys' borrowings from G&F could arguably have given rise to a defence of contributory negligence. Indeed, the Bank might have pleaded such a defence based on other conduct by the Gooleys as well. For instance, Mr Gooley's budgets might have been criticised for being unreasonably optimistic. But no contributory negligence defence was pleaded by the Bank.

673 When cl 25.1 speaks about the borrower's ability to repay a loan, it is speaking of the borrower's ability to make repayment of the principal in accordance with the terms of that loan (together, of course, with interest repayments over the life of the loan). In this instance what cl 25.1 required the Bank to form an opinion on was whether the Gooleys would be able to sustain the interest-only repayments for the two year life of the Dyraaba loan and then be able to repay the principal at maturity in July 2013.

674 In the present case, there was another factor to take into account. The FICL was due for repayment in December 2012, about six months or so before the

maturity of the Dyraaba loan. Default in repaying the FICL would have made the Dyraaba loan immediately repayable even if the Gooleys had been able to sustain the interest payments on it. An analysis of whether the Dyraaba loan could be repaid at maturity therefore needed to take into account the Gooleys' ability to repay the FICL in December 2012.

675 The Bank's practice of assessing repayability over fifteen years irrespective of the term of the loan is difficult to understand. Even if had some value as a rule of thumb, it was applied quite arbitrarily in the Gooleys' case.

676 In my view, whatever value the fifteen year assessment may have had to the Bank, it did not discharge the Bank's obligation under cl 25.1. The Bank's analysis established that the Gooleys would be able to make the interest payments (indeed it more than established this, because the Bank's assumptions included two years of principal instalment repayments as well). But there is simply no evidence that the Bank asked itself whether the Gooleys would be able to repay the principal (or the remainder of the principal, on the Bank's assumption) on maturity. The fact that the Bank was unaware of the Gooleys' trading account with G&F does not affect this.

677 The Gooleys have therefore established that the bank breached its obligation under cl 25.1 by failing to consider whether they would be able to repay the Dyraaba loan. But the analysis does not end there. The Gooleys must establish that the Bank breached its contract in making the loan. For that purpose they must establish that, had the analysis been properly undertaken, the Bank would have concluded that the Gooleys could not repay it.

678 It is quite clear on the evidence that in early July 2011 the Gooleys could not have hoped to repay the principal of the Dyraaba loan from earnings over the two year period of the loan, let alone to repay the principal of the FICL as well. But I do not think the question was as restricted as that. Campbell JA (above at [659]) seems to have accepted in *Kowalczuk* that it is reasonable for a bank, in considering the borrower's ability to repay principal in the future, to take account of the possibility of refinancing, and possibly outright sale as well, as a source of the funds. I think the same applies under cl 25.1. Furthermore, *Kowalczuk* was a residential mortgage case. The quoted observations about

repayment by way of refinance or sale apply more strongly still to farm lending, where the security is an income-generating asset.

679 But the Gooleys did not present their case in a way which allowed this to be addressed. There was no evidence before the Court about the likelihood, looking forward as at July 2011, of the Gooleys being able either to refinance each of the FICL and the Dyraaba loan at the end of its term, or to repay them from the sale of the properties. Counsel for the Gooleys did not cross-examine Mr Mitchell on this at all. Nor did counsel present any submissions on the question.

680 When the possibility of refinancing (to say nothing of sale) is taken into account, it is not self-evident that the Bank should have concluded that default was inevitable. Mr Hensman may have ruled out increasing the Bank's exposure any further, but that did not necessarily mean that a refinance of the existing loan amounts on maturity would have been unavailable. Even if the Bank had set its face against a refinance, it would have been necessary to consider whether refinancing might have been available from other lenders.

681 The Gooleys' failure to disclose the G&F trading facility was of particular significance on this point. It seems that the debt to G&F was the critical factor which prevented the Gooleys from refinancing in and after December 2012. The Bank could not be blamed for failing to foresee this in July 2011.

682 For these reasons, I think the Gooleys have failed to establish that the Bank breached its obligations by making the Dyraaba loan. I have expressed my conclusion in terms of breach but if it is expressed in terms of causation the answer is the same (except that the Gooleys would be entitled to nominal damages). The claim with respect to the Dyraaba loan fails.

The Bank's conduct from 2012 onwards

683 Counsel for the Gooleys submitted that from 2012 onwards the Bank did nothing to help the Gooleys with their financial problems. Counsel asserted that if only the Bank had provided better support to the Gooleys, they would have been able to overcome their financial difficulties. Counsel described the Bank's conduct as having "turned a difficult situation into a hopeless one".

684 Counsel for the Gooleys relied on cl 25.2 of the Code of Practice, which provides:

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

685 Counsel also relied on cl 2.2 which provides:

> **We** will act fairly and reasonably towards **you** in a consistent and ethical manner. In doing so **we** will consider **your** conduct, **our** conduct and the contract between us.

686 In their evidence, the Gooleys complained in general terms about the Bank's lack of support from April 2012 onwards. They asserted that their problems resulted from the Bank's failure to "engage". But their complaints were short on explaining what their problems with their trade creditors, and their later difficulties in refinancing or selling the properties, specifically had to do with the Bank.

687 It was not in the end clear to me whether the Gooleys were actually contending that the Bank's failure to make the further $200,000 loan they sought in April/May 2012 was a breach of the bank's obligation under cl 25.2 of the Code. If that was the Gooleys' contention, I do not think that it is sustainable. The Bank may have been discourteous in failing to respond formally. But on my findings the loan was out of the question, and the Gooleys can have been under no illusion about that.

688 The Bank's referral of the Gooleys' account to CAM was, as the Gooleys recognised, potentially damaging to the Gooleys' commercial reputation. That is why Mr Gooley did not want to reveal it to G&F. But criticism of the Bank's decision to make the referral does not withstand analysis. The Bank had formed the view that the debt was a doubtful one and there would have to be a "work out" process involving the reduction of debt and, probably, asset sales. On the evidence, the Bank appears to have been correct in this analysis. But whether it was or not ultimately does not matter. Clearly the Bank's conclusion was one which it reached in good faith. The Bank's obligations under the Code

cannot have required it to extend further financial accommodation to the Gooleys against the Bank's own better judgment.

689 A bank's obligation to assist its customer under cl 25.2 of the Code is an obligation which is expressly subject to the customer's agreement. It obviously carries with it a requirement of co-operation on the customer's part. It does not impose an obligation on the bank to act unilaterally whenever it thinks the customer's interests might require that action.

690 In effect, after April 2012 the Bank left it to the Gooleys to deal with their trade creditors. The Gooleys did not ask the Bank to do otherwise. In fact, as Mr Gooley's conduct towards G&F shows, the last thing the Gooleys wanted was for the Bank to be put in touch with the Gooleys' creditors. This would have revealed the full depth of the Gooleys' financial misfortunes, and led, in Mr Gooley's word, to "panic". Mr Richardson clearly recognised that the first step in any strategy was to deal with G&F. His approach was to keep the Bank on hold while this happened. In effect, the Bank obliged. The Bank took no action with the expiry of the term and in effect allowed a moratorium to go on for more than twelve months. The Gooleys' case never identified what else the Bank should have done during this period.

691 Part of the Gooleys' complaint under this head was that the Bank took the position that the FICL was repayable in December 2012. In the light of my conclusions that the variation was contractually effective and that no estoppel or misleading and deceptive conduct arose as a result of what the Bank did, this complaint falls away. On my finding, Mr Gooley must have been well aware as 2012 wore on that the FICL was approaching maturity. Being reminded of this by Ms Mulligan in November 2012 cannot have been pleasant for him; but on my findings, it can hardly have been a surprise.

692 It is notable that neither Mr Gooley, nor Mr Richardson on the Gooleys' behalf, ever tried to hold the Bank to he ten year principal and interest payment regime specified in the Bank's letter dated 12 December 2012. The reason for this is plain. The Gooleys were desperately short of money. Asserting an obligation to make further payments by way of principal would have been the last thing they wanted to do.

693 The Gooleys' affidavits continued to criticise the Bank's conduct from January 2014 onwards, and in particular they criticised the terms of the proposed Deed of Forbearance. As I understood it, no claim is now made that this conduct amounted to some fresh breach of the Bank's obligations. But for completeness I will deal briefly with the criticism.

694 In January 2014, the Bank had already allowed the Gooleys a long period of time to sell the property. It was not obliged to wait forever. In my view, there was nothing unreasonable in the Bank seeking to fix a final date by which the Gooleys had to repay their debt. In the end, the Gooleys never tried to negotiate around a fixed date. Instead, they responded by making the FOS complaint. Misconceived as I think that complaint was, it required the Bank not to engage in any enforcement action. The Bank complied and the effect was that the Gooleys obtained for themselves a further period of grace which eventually extended until May 2015. Still they proved unable or unwilling to meet their obligations to the Bank. The Bank cannot fairly be blamed for that.

695 For these reasons, there was no failure or refusal by the Bank to comply with its obligation to assist the Gooleys. Nor, for similar reasons, did the Bank behave unconscionably. The Gooleys' case on this point fails.

Causation and damages

696 In view of the conclusions I have reached, the Gooleys' claims all fail on liability grounds. For completeness, however, I will consider whether the Gooleys would have made out an entitlement to damages if breach of the Bank's obligations had been established.

Move to Tablelands

697 For reasons I have given, I am not satisfied on the probabilities that, if the Gooleys had not been (as they claimed) misled about the variation of the term of the FICL, they would have moved their operations to the Tablelands. Nor am I satisfied that they would have moved to the Tablelands if the Bank had not made the Dyraaba loan at all. Nor am I satisfied that a move to the Tablelands would have resulted in the Gooleys earning the revenue claimed in PG5. On the face of it, the Gooleys' claim for damages based on a move to the Tablelands fails.

698 Counsel for the Gooleys, however, put forward an alternative claim designed to head off these findings. The alternative claim was characterised as one for damages for the loss of a chance. Counsel argued that the Bank's misconduct deprived the Gooleys of an opportunity to move to the Tablelands, and that substantial damages should be awarded based on the Court's assessment of the likelihood that the move would have been profitable. Counsel relied on the High Court decisions in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 and *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

699 Both *Amann* and *Sellars* involve characterising the loss of a chance as a "valuable commercial opportunity". In *Sellars* it was an opportunity to negotiate the sale of shares to a third party. The plaintiff was induced to break off the communications by the misleading conduct of the defendant. In *Amann*, it was the opportunity to complete the performance of a contract, and possibly to obtain the renewal of the contract, which had been lost as a result of the defendant's wrongful repudiation.

700 I am not sure that this case is really comparable. A move to the Tablelands was not some sort of independent venture. The "chance" was not a right like an option which had an existence independent of the underlying asset. Nor was it an opportunity which could have been hived off and exploited separately while the Gooleys continued with their farming operations at Clovass. It was just one of many choices the Gooleys could have made in the conduct of their business.

701 Had I concluded that the probability of a move to the Tablelands, but for the alleged misconduct of the Bank, was 51%, the Gooleys would have received an award of 100% of the lost profit on the basis that they had proved their claim on the balance of probabilities. But if I had concluded that the probability was 49%, instead of getting nothing, the Gooleys would get 49% of the damages for the "loss of a chance". This appears incongruous.

702 If the rule that the plaintiff must prove damage on the balance of probabilities can be evaded by characterising the present claim as one for the loss of a chance, why cannot any misleading conduct claim, where it is said the plaintiff might have acted differently if not misled, be so characterised? But it is not necessary to pursue this thought further to resolve the present case.

703 It is clear that the *Sellars* principle only applies where it can be demonstrated that a valuable commercial opportunity has in fact been lost. This must be proved on the balance of probabilities. Until and unless the Gooleys proved, on the balance of probabilities, that they would have moved to the Tablelands and been better off there, they could not be said to have established that they suffered damage at all. On my findings the Gooleys failed at the first step.

704 In passing, I should refer to another problem with the Gooleys' claim for damages on this basis. My analysis of the Gooleys' damages case left me quite unsatisfied that there was any particular property they would have acquired, had they moved to the Tablelands, which would have yielded the results set out in PG5. Not being satisfied on the probabilities where they would have moved, I would find it impossible to make any assessment of the value of the "chance" of profits made from moving. How would that be assessed? Would it be ten per cent of the amount claimed in PG5? Or five per cent? Or one per cent? Or would the assessment ignore PG5 entirely in favour of some other calculation, and if so, what calculation? This would all just be guesswork: cf *Tabet v Gett* at 573-574 [95]-[96] per Heydon J.

705 I therefore reject the Gooleys' contention that they can recover damages for the loss of a chance that they would have moved to the Tablelands. The Gooleys' claims for damages on the Tablelands scenario would fail even if the Gooleys had established breach against the Bank.

Stay put at Casino

706 I am not satisfied that if the Bank had acted differently, then the Gooleys, had they tried to stay on at Casino, would have earned the profits claimed in PG4. On this finding, the Gooleys' claim for damages on the stay-put scenario would fail even if I had concluded that the Bank's conduct was wrongful.

The Bank's entitlement to charge interest at contractual rates

707 The Gooleys' contention that the Bank was not entitled to charge the contractual rate of interest on the loan had three steps. The first step was that the FICL did not mature in December 2012, and the Bank's assertion that it did so was a repudiation of the contract. The second was that the Gooleys accepted this repudiation thereby bringing the facility contract to an end. The

third step was that once the contract had come to an end, all the Bank was entitled to was repayment of the principal. Counsel for the Gooleys accepted that this would carry interest at court rates but submitted that the Bank should repay the difference between interest at court rates and interest at the (higher) contractual rates in fact charged.

708 I have already concluded that the variation to the term of the FICL was contractually effective. Accordingly, the Bank was within its rights to tell the Gooleys that the debt was repayable. The Gooleys claim fails on this ground alone.

709 But there are other difficulties with the claim. Had the variation not been contractually effective, the Bank would have had no legal entitlement to demand payment of the principal. Any enforcement action taken on the basis that the amount was repayable would have been of no legal effect. But the Bank did not take any such action. All it did was say that the loan was repayable and send statements to the Gooleys calculating interest on that basis. It did not seek to enforce repayment of the principal or the default interest.

710 Merely to assert an interpretation of a contract which proves to be incorrect is not necessarily a repudiation. A party may assert a construction of the contract which later proves to be incorrect but if that party is prepared to accept an authoritative decision to the contrary then the conduct will not be repudiatory. It is only where the party intimates that it will not abide by the terms of the contract as ultimately determined that it repudiates its obligations: *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423.

711 For this reason, even if the term of the FICL had not been effectively reduced from fifteen years to five, the Bank's conduct in and after December 2012 was not a repudiation of its obligations. But there is yet another point to consider.

712 Counsel for the Gooleys submitted that they accepted the Bank's "repudiation" in December 2016. Counsel pointed to their opening of a new bank account with Suncorp, and their attempts to refinance.

713 But these steps were not inconsistent with the Gooleys' obligations under their banking contract. There was nothing which required them to hold all their bank accounts with the Bank, and the Bank never claimed that there was. Nor was there anything in their banking contract which prevented them from making approaches to other financiers. The Bank actively encouraged them to do so.

714 On my findings, the Gooleys never asserted in response to the Bank that the loan term had not expired. They in fact sought, and obtained, a moratorium from the Bank. This was consistent, not inconsistent, with the Bank's interpretation of the terms of the facility.

715 Had the Gooleys wished to act consistently with the terms of the facility as they now claim them to have been, they should have made principal and interest repayments on the FICL after 12 December. And on the supposed acceptance by the Gooleys of the Bank's supposed repudiation, the contract would have been terminated and the whole of the unpaid principal would have been repayable. This was the very thing the Gooleys were determined to avoid. Even if, contrary to my views, the Bank repudiated its obligations to the Gooleys, the Gooleys did not accept the repudiation.

716 Finally, counsel for the Gooleys criticised the Bank's conduct in pressing for the proposed Deed of Forbearance. This was said to be contrary to the provisions of the FDMA. As I understood it, the contention was that in some way this prevented the Bank from charging interest after that date.

717 FDMA s 6 provides:

> **Enforcement action in contravention of Act void**
>
> Enforcement action taken by a creditor to whom this Act applies otherwise than in compliance with this Act is void.

718 FDMA s 4 defines "enforcement action" as follows:

> enforcement action, in relation to a farm mortgage, means taking possession of property under the mortgage or any other action to enforce the mortgage, including the giving of any statutory enforcement notice, or the continuation of any action to that end already commenced, but does not include:
>
> (a) the completion of the sale of property held under the mortgage in respect of which contracts were exchanged before the commencement of this Act, or
>
> (b) the enforcement of a judgment that was obtained before the commencement of this Act.

719 In my view, the term “enforcement action” connotes some sort of unilateral action by the lender. All the Bank did was ask the Gooleys to enter into a contractual commitment to dispose of the properties by 30 September and repay the debt. The Bank could not unilaterally require the Gooleys to agree to this and they did not. In my view, the Bank’s conduct in asking for the Gooleys to sign a deed of forbearance was not “enforcement” for the purposes of the FDMA.

720 This conclusion is reinforced by the fact that the FDMA does no more than render enforcement action “void”. It deprives the action of legal effect. No doubt if the Bank were to seize property by way of enforcement the Bank would have to restore that property if the enforcement action contravened the FDMA. That would be a consequence of the action being “void”. But in this case, there is no action which the FDMA can render void. The Bank asked the Gooleys to agree to a sale and they declined to do so. The FDMA has no role to play.

721 For these reasons, the Bank’s right to interest at contractual rates continued after December 2012 and was not affected by its obligations under the FDMA. The Gooleys’ contention that the Bank was only entitled to charge interest at contractual rates fails.

Conclusions and orders

722 I have concluded that:

(1) the variation in the Facility Terms made in July 2008, and confirmed in September 2009, April 2010 and June 2011, which rendered the principal amount advanced under the FICL repayable in December 2012, was contractually effective;

(2) the Bank’s conduct in effecting the variation did not give rise to an estoppel, nor was it misleading or deceptive or unconscionable;

(3) the Bank’s conduct in making the Dyraaba loan did not involve any breach of the Banking Code of Practice nor was it unconscionable;

(4) nor did the Bank’s conduct from 2012 onwards involve a breach of the Code of Practice or unconscionable conduct;

(5) in any event, the Gooleys have failed, on the probabilities, to make out an entitlement to damages for the Bank's alleged breaches;

(6) the Bank was entitled to charge interest at contractual rates after December 2012 and no interest refund is due to the Gooleys.

723 It follows that the Gooleys' claims fail and their cross-claim must be dismissed. I will hear the parties on costs (including the question of the Bank's entitlement to retain amounts withheld from the proceeds of settlement of the security properties), if orders cannot be agreed.

724 The orders of the Court are:

1. Order that the second cross-claim be dismissed.

2. Stand the proceedings over for further submissions and if necessary hearing on the question of costs in accordance with arrangements to be made with my Associate.

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