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RECENT DEVELOPMENTS IN BANKING LAW

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It is a pleasure to be here today, considering an interesting area of the law from a trans-Tasman perspective. Addressing you in my own jurisdiction, it is apt that I begin this exploration of recent banking case law with an interesting recent decision of Queensland's Court of Appeal - *David John Finding and Jean Edna Finding v Commonwealth Bank Of Australia* [1999] QConvR 60,370, a case in which the Court made an orthodox response to a number of novel challenges relating to the banker - customer relationship.

Mr and Mrs Finding had been customers of the Commonwealth Bank since 1958 and involved in the operation of commercial enterprises for over forty years. In August 1988 they purchased the Pinkenba Hotel from the Bank, which sold it as mortgagee exercising power of sale. The Bank also financed their purchase, and security for the loan comprised a registered mortgage over the hotel; a bill of sale over plant, stock, fittings and furniture; and a mortgage over the Findings' home, which was subsequently registered.

It was uncontested that, by the time Mr Finding offered to purchase the hotel, he knew it was in receivership, that the Bank was the mortgagee, and that the hotel was trading at a loss and not able to service borrowings. The Bank also knew these things. Internal memoranda contained expressions of concern about recent trading figures and the ability of any applicant for finance to demonstrate a capacity to repay a loan. Although not disclosed to the Findings, the bank held a

valuation of the hotel of $960, 000, a considerably smaller sum than the final purchase price of $1.375 million.

After purchase, the Findings experienced financial difficulties. With their debt to the Bank dramatically increasing, they were unable to discharge mortgage obligations. The Bank brought proceedings for recovery of possession of the mortgaged home and the repayment of the outstanding debt. These claims were resisted on a number of grounds.

The Findings' central argument was that aspects of the relationship between the parties to this particular transaction gave rise to either a fiduciary duty, or some lesser "special" duty, on the part of the Bank. This, it was contended, was a duty either to disclose all relevant information about the transaction, including especially the valuation and the Bank's concern with respect to servicing a loan, or at least to insist that the Findings obtain independent advice before proceeding. Several factors were said to give rise to such a duty, including:

that they were long-standing customers of the Bank;

that the Bank was both the mortgagee exercising power of sale and the financier of the purchaser;

that the Bank did not ask the Findings for a valuation, and so failed to observe its own internal procedures;

that they placed trust in the Bank;

that the Bank knew of the Hotel's poor trading performance;

and that at the time of the transaction the Findings had $1 million on deposit with the Bank.

The Court noted that the relationship of banker and customer, while not recognised by law as an accepted category of fiduciary relationship, nonetheless may exist under particular circumstances unusually giving rise to fiduciary obligations. Such circumstances arose in *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453, where the appellant bank, through its manager, brought the parties together and assumed the role of financial advisor, the customers being dependant. Recall the unsuccessful argument in *Potts v Westpac*.

The present facts were distinguishable, as the Bank had expressly disavowed any role as financial advisor. The agreement to finance this purchase had been conditional upon the Bank's not accepting that the business would trade satisfactorily in the future. The Court also held that the Findings had at no time placed complete faith in the Bank's branch manager, settling the offer based on Mr Finding's own experience and information he had himself acquired.

Finally, the Court noted the decision of Justice Branson in *Truebit Pty Ltd v Westpac Banking Corporation* (Federal Court of Australia, NG 456 of 1996, 27 November 1997), that no fiduciary duty arose out of the dual role played there by Westpac in a sale transaction in which it both financed the purchase of a shopping centre and sold it as mortgagee exercising power of sale. The Court held accordingly that none of the factors relied upon by the Findings gave rise to a fiduciary duty.

The Court then considered whether some "special" duty nevertheless burdened the Bank. This contention was interestingly based upon a "graduated liability scheme", as articulated by Justice Finn, as His Honour now is, in an essay entitled "Good Faith and Non-disclosure", [in PD Finn (ed) *Essays on Torts*, Law Book Company, Sydney, 1989, discussed in Cockburn and Wiseman,

Disclosure Obligations in Business Relationships, Federation Press, Sydney, 1996 at 9-11]. This scheme would "[impose] graduated disclosure responsibilities as one moves from arms length relationships between independent persons to relationships of `reliance' or of `assumed responsibility', to fiduciary relationships". Responsibilities at each stage of the continuum would fall to be determined by the reasonable expectations of parties in a relationship of that nature.

Addressing any merit of applying such a scheme, the Court suggested it would "[produce] an additional layer of uncertainty in an area of the law whose essential defect is unpredictability of operation" (paragraph 12). In any event, it was held, not surprisingly on the facts, that no special duty arose in these circumstances. There was simply no evidence that the Findings relied on the Bank's advice in relation to the transaction, or expected the Bank would disclose the valuation or other information, or that the Bank had assumed an advisory role. The Court described the parties' relationship as being near to "that part of [Professor Finn's] continuum characterised by independence and circumscribed accountability" (paragraph 13). The contention that the Bank was obliged to disclose the valuation it held, or its concerns about the servicing of a loan, was rejected by the Court.

Dealing with another aspect of the Findings' wide ranging challenge, the Court also rejected arguments that Mrs Finding should have been invited to seek independent advice: the principles in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 and *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 were held inapplicable.

The Findings' final argument was that the Bank's failure to disclose the hotel valuation amounted to misleading or deceptive conduct. As the trial judge, I had held that the factual conclusions

excluding the existence of a fiduciary duty also excluded any basis for a finding of misleading or deceptive conduct. On appeal, the Findings argued that notwithstanding the failure to establish a fiduciary duty, the possibility still existed that the Bank's conduct had been misleading or deceptive.

In examining whether a duty to disclose relevant facts arose, the Court held that "statements which do not include a matter the representee would have expected, whether reasonably or not, to be disclosed, are not necessarily misleading or deceptive on that account ... There is a gap between behaviour which is thought to be unreasonable and that which is unlawful". (Paragraph 18). On this issue it was held the Bank had not disclosed anything which, by virtue of the concurrent non-disclosure of the valuation, became misleading or deceptive.

Having found no misleading or deceptive conduct, and further, no fiduciary or "special" relationship, the Court dismissed the appeal.

Unconscionable conduct, in line with the High Court's prescription in *Commonwealth Bank Of Australia v Amadio* (1983) 151 CLR 447, was found, on the part of a bank, in *National Australia Bank v Petit-Breuilh & Ors* [1999] VSC 368 (5 October 1999).

There a claim was brought before the Victorian Supreme Court under a joint and several guarantee and indemnity executed in favour of the plaintiff Bank as security for advances made to a "Co-operative" of which the defendants were directors. The defendants counter-claimed for declarations that the guarantee was void and unenforceable, and that the bank was estopped from enforcing it.

They were members of a group of Latin Americans who met for social and recreational purposes. From 1986 the group's affairs were organised through an incorporated Association, the registered proprietor of the land on which the group met. Six years later, a Co-operative was formed and registered under statute. Group activities were thereafter organised through that Co-operative. The following year, the Association had executed a mortgage over the land in favour of Westpac Banking Corporation to secure advances made to it. Over time that loan fell into arrears and in August 1992 Westpac threatened to foreclose. Then in September that year the plaintiff National Bank approved a loan to the Co-operative to be secured by a registered mortgage over the (Association's) land and a joint and several guarantee and indemnity from the Co-operative's directors. While the "mortgagor" was the Co-operative, the Association continued to be the registered proprietor of the land, and so the mortgage was incapable of registration. The Bank therefore brought proceedings to recover the debt against the defendants as guarantors.

The defendants, born in Santiago, were described as "ordinary working men". Their native tongue was Spanish. Their counsel sought to have the guarantee set aside on the ground that it was unconscionable. It was argued the case fell within *Amadio:* the Bank had actual knowledge the defendants occupied a situation of special disadvantage in relation to the intended transaction so that they could not judge their own interests, and the Bank took unfair advantage of its superior bargaining power. The Judge found the defendants had executed the guarantee while subject to a special disability arising from limited command of English. The bank was aware of that special disability. The onus was therefore on the bank to show the transaction was fair, just and reasonable.

The Judge found the Bank had not discharged that onus, and catalogued numerous instances of unfairness: the bank took no steps to ascertain whether the defendants could meet the liability under the guarantee without incurring financial hardship; it prepared what it should have known was a defective and unregistrable mortgage; when the appropriate way forward was appreciated, it took no action for over a year; in order to allay the expressed concerns of the defendants, and to obtain the execution of the guarantee, it gave assurances which did not bind it and were not complied with; it completed the guarantee, by the insertion of the names of the guarantors and the warning clause, after its execution by the guarantors; it failed to secure execution of the guarantee by all of the directors, contrary to the agreement for the loan, and did not explain to the defendants any consequences of that failure; it entered into the transaction without disclosing to the defendants the full implications of the guarantee so far as they personally were concerned; it relied on the presence of one Rosati, thought to be acting for the borrower, but certainly not acting for the defendants, as a source of independent financial advice for the defendants, and took no steps to ensure that the defendants obtained true independent legal advice.

Accordingly the guarantee was set aside.

I turn now to *Barclays Bank Plc v Boulter* (1999) 1 WLR 1919, where the House of Lords dealt with the right of a surety to avoid liability through reliance on representations by a debtor or other person not an employee of the creditor, representations which have induced the guarantee. Specifically, need this surety have expressly pleaded the creditor bank had actual or constructive notice of the representation made by her debtor husband?

Mr and Mrs Boulter borrowed from Barclays Bank to purchase a house. They gave the bank a charge which secured repayment of both the loan for the house and all other moneys either or both may owe the bank. Mrs Boulter covenanted personally to repay all such sums. Mr Boulter later borrowed a further sum. The Bank demanded payment of him, and commenced proceedings against him when he failed to pay. The bank obtained a possession order, suspended on condition he repay the money by installments. He again failed to pay, and the Bank obtained a warrant for possession.

Mrs Boulter asked the County Court to set aside that warrant for possession on the ground she had been induced to sign the charge as the result of undue influence and misrepresentation by her husband. Trusting him to deal with their financial affairs, she had accepted his assertion that the charge was to secure only the money borrowed for the house, not all other moneys which might be owed. No one had advised her to the contrary.

Mrs Boulter lost at first instance but succeeded on appeal to a Recorder. He set aside the order for possession, and she served her defence in the action. Her pleading failed to assert expressly that the bank had actual or constructive notice of the misrepresentation and undue influence. Lord Hoffman, with whose reasons the other members of the Court agreed, found that the pleading did allege facts which, if known to the bank, amounted to constructive notice. They were, simply enough, that Mrs Boulter was married to Mr Boulter at the material time, that they lived together as husband and wife, and that the charge was not on its face to her advantage.

While finding the pleadings here were technically adequate, his Lordship noted nevertheless that "[t]he purpose of the pleadings is to define the issues and give the other party fair notice of the

case which he has to meet. Concealed and referential allegations do not perform this function." Ordinarily such allegations - that is, notice - must be pleaded specifically, but the absence of the plea was without moment, because it had been made "quite clear" at an earlier hearing that Mrs Boulter would be relying on constructive notice. The bank was aware of the case to be met, and indeed ready to address the issue of constructive notice.

And so the appeal was dismissed. The matter did not however end there. The Court of Appeal had held Mrs Boulter need not prove the bank had constructive notice - it was for the bank to establish the converse. The Court of Appeal had reasoned by analogy with the defence of a bona fide purchaser for value without notice: it falls to the purchaser to establish lack of notice to defeat a prior equitable estate or interest. Lord Hoffman found it a false analogy. The Bank directly took the charge from Mrs Boulter, who had the necessary title to grant it. In the case of the purchaser for value without notice, there is a pre-existing interest the purchaser seeks to displace. A better analogy is with the case of the purchaser of a chattel whose vendor's title is vitiated by fraud. Unlike the holder of a prior interest, the defrauded owner retains no title, and must prove that the purchaser had actual or constructive knowledge of the fraud. Relying on Lord Browne-Wilkinson's approach in *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200, 210, Lord Hoffman held that for a wife to set aside a legal charge as against a bank for reasons of undue influence, she must establish that "in some way" the bank was "affected" by the wrongdoing of her husband. His Lordship held however that burden is easily discharged. A wife need show only that the bank knew she was a wife living with her husband and that the transaction was not on its face to her financial advantage.

A decision with significant implications for parties entering into contractual arrangements is *Astley v Austrust Limited* (1999) 73 ALJR 403, where the High Court held an award of damages for breach of contract cannot be reduced to reflect a finding of contributory negligence.

Austrust Limited carried on business as a trustee company, acting in deceased and protected estates, settlements, and for persons under disabilities. Having conducted such a business since 1910, it decided in the early 1980s to enter a new field. In August 1983 it wrote to Mr Astley, the senior partner in an Adelaide solicitors' firm, seeking general advice in relation to its acting as trustee of a trading trust set up to establish a piggery. The trust venture subsequently failed, and Austrust suffered substantial losses.

Austrust sued the solicitors alleging they were negligent in failing to advise that Austrust would be liable in dealings with third parties unless it specifically limited its liability under the trust deed to the extent of the trust assets. It further alleged that the solicitors' failure to provide that advice breached their contract of retainer with Austrust. The solicitors denied having been negligent, or that the scope of their retainer required them to provide such advice. They also alleged Austrust contributed to its own loss, in failing to investigate the venture's viability. They sought thereby to have any liability of their own reduced because of Austrust's contributory negligence, under South Australia's apportionment legislation, the *Wrongs Act* 1936 (SA).

The trial Judge found the solicitors negligent in failing to advise Austrust it would be personally liable in dealings with third parties unless it limited its liability to the extent of the trust assets. The Judge went on to find contributory negligence on Austrust's part, entitling the defendant to have the damages reduced "where the duty of care is the same in contract and in tort and both causes

of action are pleaded." Under s27A *Wrongs Act*, the Trial Judge apportioned responsibility equally between the parties. The Full Court upheld Austrust's appeal against the finding of contributory negligence, holding that Austrust did not fail to give due consideration to its own interests because it had no reason to think they were at stake. It could not be concluded that Austrust, acting reasonably, ought to have known of that risk. Further, the risk of personal liability to which Austrust was exposed was the very risk against which Mr Astley, discharging his professional responsibility, should have protected it. The solicitors appealed to the High Court against that exclusion of contributory negligence.

The Chief Justice and Justices McHugh, Gummow and Hayne saw, as the points at issue, whether conceptually the plaintiff could be guilty of contributory negligence where the defendant contractually agreed to protect it from the very loss it suffered as a result of the defendant's breach of duty; and second, whether an award of damages for breach of contract could be reduced under apportionment of liability legislation such as s27A *Wrongs Act* 1936 (SA), because of contributory negligence, where the defendant was concurrently liable in tort and contract for breach of a duty of care.

The majority of Justices (Callinan J dissenting), found that while Austrust was indeed guilty of contributory negligence, it was entitled to recover for the whole of the damage because, having sued in contract, its damages award could not be reduced by reason of conduct constituting contributory negligence for the purposes of the *Wrongs Act*. This conclusion was drawn by the majority having regard to the history, text and purpose of the Act.

Having reviewed the point at common law, the majority Justices found that apportionment legislation would still operate "in respect of the contributory negligence of a plaintiff where the defendant, in breach of its duty, has failed to protect the plaintiff from damage in respect of the very event which gave rise to the defendant's employment." The conduct of the plaintiff is the focus of contributory negligence, the duty owed by the defendant being but one factor to be considered in determining whether a plaintiff has failed to take reasonable care of its own person or property. It was held on the unchallenged findings of the Trial Judge that Austrust was indeed contributorily negligent. The Justices found "not easy to accept" that "the officers of a trustee company in business for over 70 years believed that it could borrow more than a million dollars in its own name without any primary liability to repay the moneys". Austrust's actions failed to satisfy the objective standard of care required of a plaintiff.

Their Honours then considered the presently more significant issue, whether this contributory negligence required the apportionment of damages where the plaintiff sued in contract in circumstances where it could have sued in tort. Construing s27A of the *Wrongs Act* according to its natural and ordinary meaning, they held the section concerned claims in tort, not contract. This accorded with the history and legislative design of the legislation - "to remedy the evil that the negligence of a plaintiff, no matter how small, which contributed to the suffering of damage, defeated any action in tort in respect of that damage." Finally, turning to matters of policy, they noted that contracts are attributable to parties' wills, the risk under the contract generally being borne by the party whose breach is causally connected to the damage, while tortious liability is imposed regardless of the parties' wills.

The High Court therefore held the damages could not be reduced, and dismissed the appeal.

An interesting decision with implications relevant in the field of banking law is *Australian Hospital Care & Anor V Duggan & Ors* [1999] VSC 96 (31 March 1999). The issue was whether making a copy of a privileged document for a purpose other than obtaining legal advice, or use in legal proceedings, destroyed the privilege. This was the converse situation from that considered by the High Court in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, where it was held that a copy of a non-privileged original document could achieve privileged status where made solely for the purpose of obtaining legal advice or use in legal proceedings.

The case arose out of a dispute over the sale of a diagnostic business. A Mr Beatty was appointed by the defendants to act as facilitator and negotiator in the possible sale. A term in his retainer specified that all information pertaining to the retainer and his clients generally was to remain confidential at all times, to be released to no party without the specific consent of his clients. The defendants provided him with copies of documents containing communications between the defendants and their legal advisers. The plaintiffs secured the issue of a subpoena for the production of these documents. The defendants objected on the ground they were protected by legal professional privilege.

The plaintiffs submitted that because the copy documents were supplied to Mr Beatty for a purpose other than seeking legal advice or use in legal proceedings, they did not themselves satisfy the test for legal professional privilege established by *Grant v Downs* (1976) 135 CLR 674. The plaintiff sought to rely on *Propend Finance,* arguing that the particular document in question

(here the copy) and its communication had to be examined to determine whether or not it was communicated solely for a purpose attracting legal professional privilege.

Justice Gillard held that such an approach was not required by *Propend Finance*. His Honour saw the issue before the High Court as distinguishable, the former commencing with a document not privileged, and concerning the use of its copy, and the latter starting with a protected document and concerning the effect with respect to that privilege of first making a copy and then handing it to another.

His Honour held that merely copying a privileged document does not destroy the privilege which attaches to the original, and that is so regardless of the purpose for which the copy is made. His words follow:

> "Privilege is concerned with communication whether oral or in documentary form. The person who has a document supplied to him by his lawyer in circumstances which makes the communication privileged from production or disclosure is entitled to use the document for his own legitimate purpose. If he makes a copy this does not lose the protection. To hold otherwise would mean emasculating the true object of the rule. In my opinion this conclusion accords with practical common sense giving effect to the policy underlying the privilege."

Justice Gillard found waiver alone would destroy the privilege. The plaintiffs argued that the defendants waived their privilege by providing the documents to Mr Beatty. Pointing out however that they were provided on a confidential basis for him to be fully informed and discharge his

retainer in his clients' best interests, the Judge held no waiver, and the privilege survived unimpaired.

Discussing this case in the *Australian Banking And Finance Law Bulletin* ((1999) 15(2) 35), Mr Richard Leder sounds a note of caution. The decision, he argues, is inconsistent with the underlying principle in *Propend Finance*, in that while different factual questions arose, *Propend* advocated an approach focusing on the purpose of the creation of the copy, not the purpose of the communication contained in the document. *Duggan's* case having been decided on the latter approach, Mr Leder argues care must still be taken when copying privileged documents.

An intriguing case involving the enforcement of a notice requiring disclosure of documents held by a Maltese bank in Malta, notwithstanding arguments that to do so would contravene Maltese law, was heard on appeal by the Full Court of the Federal Court in *Bank of Valletta Plc v National Crime Authority* [1999] FCA 1099 (13 August 1999). The Bank, incorporated in Malta, operated four offices in Sydney, at which it carried on liaison activities including the receipt of moneys and their remission to Malta. Financial records of Australian transactions were retained only briefly here then dispatched to Malta. A notice was served on the Bank under s29(1) *National Crime Authority Act* 1984, requiring the production of financial records, as part of an investigation into certain transactions. The Bank claimed that while the described documents were in its possession in Malta, to comply with the notice would have contravened Maltese law and exposed it to the possibilities of criminal prosecution and banking licence restrictions. The Bank sought prohibition and *certiorari*, and a declaration that it had reasonable excuse for failure to comply with the notice.

At trial, expert evidence was given of the relevant Maltese law. On appeal, the Court noted from the trial Judge's reasons some skepticism about the suggestion that compliance would breach Maltese law. But that Judge had approached the matter on the basis that it would have done so. Even so, he held the Bank failed to establish a reasonable excuse for non-compliance.

The Full Court endorsed Justice Hely's approach to determining whether the possibility of breach of foreign law constituted reasonable excuse for failing to comply with such a notice. His Honour had adverted to numerous decided cases from various jurisdictions, which while factually different provided some assistance. They essentially suggested that while it was not a sufficient excuse, to say that document production would or might constitute a breach of a foreign law, nonetheless a court would weigh the effect of compliance on the person in determining whether or not to insist upon it.

Justice Hely described the "balancing exercise" he was required to undertake as follows:

> "The most important factor, in any balancing exercise, is that the documents called for by the Notice relate to transactions undertaken by, or in relation to, the Bank in Australia, with persons in Australia, where the records which once existed in Australia relating to those transactions have either been destroyed, or removed, to Malta because it was convenient for the Bank to proceed in that way... In those circumstances, a reasonable person would conclude ... that the Australian public interest in the investigation of criminal activity in Australia ... outweighs any public or private interest in the maintenance of banker/customer confidentiality under the laws of Malta. This is particularly so when those laws themselves recognise that the confidentiality of that relationship is, in some

circumstances, to be displaced in favour of the investigation and prosecution of particular criminal activity..."

This was approved by the Full Court, rejecting counsel's contentions that the primary Judge had failed to give sufficient weight to relevant considerations such as Malta's sovereignty and the principle that a State should ordinarily refrain from demanding obedience to its authority by foreigners in respect of their conduct abroad.

The South Australian Supreme Court decision in *Perkins v National Australia Bank Ltd* (1999) 30 ACSR 256 warns lending officers carefully to review loan facility documentation, in particular a borrower's constitution.

The action concerned whether two security documents were validly executed, available to be relied on by the defendant Bank to establish an entitlement as secured creditor. The plaintiff was the liquidator of the company Sparrow Green Pty Ltd. The company had borrowed substantial sums from the Bank under a loan agreement. At that time, the Bank required the execution of a number of documents. This included a debenture, which created a charge over all of the assets and property and undertaking of the company as security for the Bank's advances, and a Debtor Finance Facility Agreement.

The Liquidator attempted to set aside the loan agreement, contending those transactions were inoperative because the documents were not executed as required by the company's Articles of Association. The company's common seal was affixed to each document, but in the presence of

but one director, where the signatures of two directors, or one director and the secretary were needed.

The company was incorporated with two directors, Sparrow and Green. In April 1997 it was agreed that Sparrow resign as director. But while he resigned as an employee on 30 June 1997, he did not resign as a director until 12 February 1998. In the interim period the company had two directors, but only one managed and controlled it. The relevant documents were executed in that period.

Green purported to sign as "sole Director and Company Secretary". Justice Debelle found Green did so believing he had the authority to act as a sole director, and intending to bind the company. However following the approach of Brennan J in *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 171, and the observations of Diplock LJ in *Freeman And Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 503-5, approved by the High Court in *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 33 CLR 72 at 78, his Honour found Green had no actual authority to act on behalf of the company. Neither had he ostensible authority.

At the time the Bank entered into the lending transaction, it had knowledge of the company's Articles of Association. It knew that a minimum of two directors was required, and that the company seal was to be affixed in the presence of two directors or of one director and the company secretary. The Bank was held to have known that although Sparrow had intended to resign, he was still a company director along with Green. Referring to *Bank Of New Zealand v Fiberi Pty Ltd* (1993) 14 ACSR 736 per Priestly JA at 751, the Judge found that even if the Bank

did not have actual knowledge that Green lacked authority to act as sole director, its connection with the company was such that it ought to have known.

At the time of this transaction, s164(4) of the *Corporations Law* provided that where persons are entitled to make certain assumptions when dealing with a company, those assumptions cannot be made where the person has "actual knowledge" that the basis for the assumption is incorrect. Having found the Bank had actual knowledge of the Articles of Association, the "indoor management rule" therefore could not apply.

Accordingly, the debenture and Debtor Finance Facility Agreement were held not to have been validly executed, and so the company was not bound by them.

I conclude with a case which may offer some relief to lenders. In *Stergiou v Citibank Savings Ltd* [1999] FCA 1321 (24 September 1999), the Full Court of the Federal Court dismissed an appeal against an order for summary judgment in favour of the defendant Bank, in an action for damages for nervous shock, mental anguish, varied economic loss and medical and legal expenses allegedly incurred following the Bank's negligently debiting the first and second plaintiffs' bank account, consequently commencing legal proceedings, and taking possession of the first and second plaintiffs' property pursuant to a Court order. These two plaintiffs, who had mortgaged their property to the Bank, along with third, fourth and fifth plaintiffs who were other family members, and sixth to eleventh plaintiffs being related companies, sought to recover damages for a variety of psychological damage and economic loss, and contended the mortgage was discharged through the wrongful debits.

As the trial became protracted, summary judgment was sought by the Bank pursuant to court rules. Leave was granted to make this application, and summary judgment was entered. The trial Judge's discretion in granting an extension of time within which to bring the application was challenged on appeal, but no basis was seen for concluding the discretion to extend time had miscarried. The Court then examined the judgment with respect to each of the claims.

The trial Judge found neither the pleadings nor the evidence disclosed a cause of action at the suit of the third to eleventh appellants, the family members, and their appeals were dismissed. The first and second appellants' claim in connection with chattels, lost income and profits was also held unsupported by the evidence. The claim for a discharge of the mortgage failed on the basis it was simply not a remedy available to a mortgagor whose account has been incorrectly debited by a mortgagee. The trial Judge refused claims for damages for removal expenses, accommodation and the like, but invited the first and second appellants to re-plead their claims, noting that a claim to restitution might succeed. The Full Court upheld each of those rulings.

Significantly for the present, it was concluded at trial that whereas reasonable forseeability of psychiatric injury was an indispensable requirement of a successful claim for damages for nervous shock, "making wrongful debits or even instituting and maintaining the proceedings to recover possession of the property" could not give rise to such a foreseeable risk. The Court on appeal agreed, and held further that it was doubtful whether taking possession of property pursuant to a court order could give rise to a foreseeable risk of nervous shock. While the term "physical stress" had been used in the pleadings, it was accepted the plaintiffs sought to claim damages for psychological stress, but again not giving rise to a legitimate claim as it fell short of actual physical

or psychiatric injury. "Damage to credit and social rating" was also found irrecoverable in an action in negligence, and in the absence of any allegation of actionable physical or psychiatric injury, medical expenses claimed were found not to be necessitated by actionable misconduct on the part of the Bank.

Having found no merit in the myriad of claims, the appeal was dismissed.