New South Wales
Supreme Court

CITATION :	**Kay v National Australia Bank Ltd [2010] NSWSC 1116**
HEARING DATE(S) :	12-15 April 2010, 6 May 2010
JUDGMENT DATE :	30 September 2010
JURISDICTION :	Common Law
JUDGMENT OF :	Rothman J
DECISION :	(i) Judgment for the plaintiffs; (ii) The defendant shall pay damages to the plaintiffs of an amount of $280,000; (iii) The defendant shall calculate the interest payable in accordance with the reasons for judgment and pay the defendants the difference between that which has been paid by the plaintiffs and not refunded and that which should have been paid in accordance with these reasons; (iv) Leave is reserved to the parties to approach on two days' notice on any dispute concerning the calculation referred to in the immediately preceding paragraph; (v) The defendant shall pay the plaintiffs' costs of and incidental to these proceedings, as agreed or assessed; (vi) The parties have liberty to apply for any different or special order for costs or in relation to any arithmetic calculation; (vii) Otherwise the proceedings are dismissed.
CATCHWORDS :	CONTRACT – damages – excess interest charges – Hadley v Baxendale "second limb" – loss of chance damages – damages awarded - DAMAGES – contract – excess interest charges – Hadley v Baxendale "second limb" – loss of chance damages – damages awarded
LEGISLATION CITED :	Trade Practices Act 1974 (Cth)
CATEGORY :	Principal judgment

CASES CITED :	Alexander v Cambridge Credit Corporation Limited (1987) 9 NSWLR 310 Commonwealth v Amann Aviation Pty Ltd [1991] HCA 54; (1992) 174 CLR 64 Gray v Motor Accident Commission [1998] HCA 70; (1998) 196 CLR 1 Hadley v Baxendale (1854) 9 Ex 341; 156 ER 145 McDonald v Dennys Lascelles Ltd [1933] HCA 25; (1933) 48 CLR 457 Robinson v Harman (1848) 1 Ex 850; (1848) 154 ER 363 Robophone Facilities Limited v Blank [1966] 1 WLR 1428 Sellars v Adelaide Petrolium N.L. [1994] HCA 4; (1994) 179 CLR 332
PARTIES :	Mehmet Ali Kay (First Plaintiff) Mehmet Canli (Second Plaintiff) Ozden Inak (Third Plaintiff) National Australia Bank Ltd (Defendant)
FILE NUMBER(S) :	**SC** 2006/267175
COUNSEL :	CJ Dibb (Plaintiffs) J Simpkins (Defendant)
SOLICITORS :	Horowitz & Bilinsky Solicitors (Plaintiffs) Henry Davis York Lawyers (Defendant)

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

ROTHMAN J

30 SEPTEMBER 2010

2006/267175 Mehmet Ali Kay & Ors v National Australia Bank

JUDGMENT

1 HIS HONOUR: Mr Mehmet Ali Kay, Mehmet Canli and Ozden Inak (hereinafter "the plaintiffs") borrowed money from the defendant, National Australia Bank (hereinafter "NAB"), and were allegedly charged interest at a rate higher than was permissible under the lending agreement. The loan was secured by a mortgage. On realising that interest had been charged at a higher rate than the plaintiffs alleged was allowable, NAB refunded the interest to which it was not, on its view, entitled, as a reasonable sum. The plaintiffs contend that their losses were greater than the difference in interest that was repaid and sue for those greater losses.

2 The plaintiffs' action is based on contract, negligence, and unconscionability under both equitable principles and the *Trade Practices Act* 1974 (Cth). Fundamentally, the issue between the parties is the basis upon which damages should be measured and the extent that NAB were aware of the intentions of the plaintiffs such that damage may be calculated on a basis different from that which naturally flows from the contract itself. It is necessary to recite briefly the circumstances giving rise to, and the terms of, the agreement between the parties, then construe the terms of the agreement in order to determine whether breach of contract has occurred, the extent of the loss that flows naturally from the breach of contract, if any, and the extent to which the parties are supposed to have been in contemplation of something more arising from a breach, and/or the extent to which damages, compensation or loss can and should otherwise be awarded.

Facts and contractual terms

3 Each of the plaintiffs was, to a greater or lesser degree, experienced in some aspect of construction and development. Mr Inak had been trained as an electrician and had worked in his own business in installation and repair of electrical wiring. He had been involved with Mr Canli in building numerous architecturally designed houses, townhouses and industrial developments in the period between 2001 and 2006. Mr Canli had worked as a civil engineer for various construction companies, having graduated in civil engineering from the University of Wollongong.

4 Mr Inak and Mr Canli had carried on business together through a company called Emek Building Services and Supplies Pty Ltd. Mr Kay, who had worked, in Turkey, for a building construction company and an international transportation company, had arrived in Australia in 1987 and had conducted a number of businesses, mostly in the food industry, and had worked as a machine operator for Arnott's Biscuits.

5 The plaintiffs first met each other in about 2002 when Mr Kay engaged the other two as contractors to construct his residence. The plaintiffs decided that they would purchase and possibly develop (or, in the alternative, resell) three blocks of land in Auburn in New South Wales. Initially they sought to finance this venture through certain mortgage broking contacts, but eventually approached NAB directly.

6 As is conceded by Mr Rowe, called by NAB, who was the NAB officer with whom the plaintiffs dealt in obtaining the loan, NAB was seeking to be competitive in its offer to the plaintiffs and was aware that the loan was for the purpose of the purchase of three properties, which were to be purchased in order to obtain a development approval for development by the plaintiffs or resale to a developer. Further, NAB offered the plaintiffs a loan at a rate that was cheaper than would ordinarily have been offered for a commercial development loan of that kind.

7 Plainly, from the evidence before the Court, one of the most essential aspects of the loan agreement between the plaintiffs and NAB was the interest rate on which the money was to be provided, in order to maximise the capacity to make a profit on either the development or sale of the property after development approval had been obtained.

8 By letter dated 25 June 2003 ("the indicative letter"), NAB approved, "in principal [sic]", a loan facility for $1,150,000. Relevantly, the terms of that letter recited: an interest rate of 5.89%; that the loan repayments were interest only; that the term of the loan was for one year fixed; and that the terms of the letter were, expressly, indicative only. The prescribed interest rate was subject to a note in the following terms:

> "**Interest Rates**
>
> For information purposes only, we have provided you with indicative percentage rates applicable to your facilities. This means that your annual percentage rates may change prior to you drawing down the loan."

9 A number of other qualifications were expressed in the terms of the aforesaid letter. The costs of the loan, to which reference was made, were said to be "indicative costs" that "will change or vary upon drawdown of the facility." The major qualification was to the following effect:

> "Once these details have been confirmed a formal offer will be forwarded to you. This offer will indicate the terms and conditions that are applicable to the facility.
>
> Please note that funds may not be drawn or borrowed until all of our requirements have been satisfied and the relevant documentation has been executed."

10 The details of a contact officer were provided by NAB and, by letter dated 8 July 2003, NAB provided a Facility Agreement to the plaintiffs, which the plaintiffs duly executed. The terms of that Facility Agreement, or at least some of them, bear reciting. Prior to dealing with the terms of the Facility Agreement, the Court notes that the other two plaintiffs granted a general power of attorney to Mr Canli in order to allow Mr Canli to execute documents.

11 The Facility Agreement refers to a document, being the Facility Agreement General Terms dated March 2000, referred to in the Facility Agreement as the "General Terms", which form part of the loan agreement between the parties. The Facility Agreement expressly incorporates the General Terms. The preamble to the Facility Agreement is in the following terms:

> "**Important** -- the information in these Details is current as at 03/07/2003 (the ***disclosure date***). The amounts and figures marked * are only estimates. They are based on a number of assumptions, including that payments will be made on time, that the interest rate and fees and charges will not change after the *disclosure date* and that you borrow each *loan amount* in full on the *disclosure date*."

12 The Facility Agreement (entitled in the document "Facility Agreement Details" and referred to as "Details" in the body of the Facility Agreement) specifies the facility limit, fees and charges, the loan

amount and that the account is a "Fixed Rate Interest Only Personal / Residential Investment Loan National Choice Package". Further, under the heading "Interest rate", the Facility Agreement states:

> "**Interest rate during the first fixed rate period**
>
> For a fixed rate period of 1 years [sic] commencing from the *settlement date* the annual percentage rate is a **fixed interest rate.** That rate is currently 5.65% per annum.
>
> **Interest rate after the first fixed rate period**
>
> Unless we agree otherwise, at the end of the first and each following fixed rate period your loan automatically continues at a fixed rate for another fixed rate period of the same length as the first fixed rate period (or, if shorter, for a period up to the end of the *loan amount term*). The fixed rate for the new fixed rate period will be the fixed rate being offered by us at the start of the new fixed rate period for a loan of the type of this *account* for a period equivalent to the new fixed rate period."

13 None of the terms relating to interest rates, nor the specification of the rate, are marked with an asterisk. The Facility Agreement refers to the payments being interest only repayments, payable on the last banking day of the month. The Facility Agreement also refers to a "**Rate lock fee**", which is payable whenever a borrower applies to enter into a *rate lock agreement*.

14 While the entirety of the agreement is, necessarily, relevant, it is necessary to repeat only a few other clauses. They are:

> "**Changes without your consent**
>
> Under this agreement, any of the following information which is given above may be changed, and without your consent:
> interest rate
>
> …
>
> However, if your interest rate is fixed for a period, the interest rate cannot be changed during that period.
>
> **Loan amount term**
>
> The *loan amount term* is 1 years [sic].
>
> **Default rate**
>
> The *default rate* for a day is the sum of Term Base Rate plus a margin of 4% per annum
>
> **Other conditions**
>
> Despite any other clause in this agreement, interest charges and the sum of one year's service fees for *account[s]* 1, are payable annually in advance. These amounts are first payable on the *settlement date* for the *account*, or on the date on which the *interest only repayments* first apply to the *account* (whichever is later). Thereafter, they are payable annually on the anniversary

of that date. If a year does not have that date, or that date is not a *banking day*, the payments are due on the preceding or next *banking day*. This provision can apply to an *account* only when it is under a fixed interest rate."

15 Lastly, it is necessary to deal with the terms of the offer and acceptance, as so described in the Facility Agreement. They are in the following terms:

"**OFFER FROM THE NATIONAL**

We offer to lend you the *loan amount* on the terms and conditions set out in this offer and the separate Loan Agreement General Terms booklet dated March 2000.

To accept the offer, you must sign and date this document and return it to us in the envelope provided or to any of our branches.

ACCEPTANCE BY CUSTOMER (up to two customers)

By signing this document (and returning it to us) you (the customer)
1. accept the offer set out in the Facility Agreement Details
2. declare that all the information you have given us is accurate and not misleading and you are aware that we are relying on it; and
3. acknowledge that before signing this document you have read it and **received and read a copy of the Facility Agreement General Terms referred to above**;...

BEFORE YOU SIGN

READ THIS CONTRACT DOCUMENT so that you know exactly what contract you are entering into and what you will have to do under the contract.

You should also read the information statement: "THINGS YOU SHOULD KNOW ABOUT YOUR PROPOSED CREDIT CONTRACT"....

IMPORTANT

THINGS YOU MUST KNOW

Once you sign this contract document, you will be bound by it...."

16 It is also necessary to deal, briefly, with the provisions of the General Terms. Again, the General Terms must be read in its entirety, therefore, all of its provisions are relevant. The more relevant provisions deal with the frequency and type of repayments that are necessary and establish that, on interest only loans, interest is calculated on the sum of any unpaid interest charges due on the second last banking day of the month (clause 5.3). The first such payment is due "as described in the Details" and thereafter, on the last banking day of each following month (clause 6.2). Interest charges accrue from the settlement date (clause 8.2) and the borrower is obliged to pay the interest charges for each day on the balance owing on the account for the end of that day (clause 8.1). Fixed interest rates are dealt with in clause 11 of the General Terms. The fixed interest rate may apply either from the start of the loan amount term or during the loan amount term (clause 11.2). The "loan amount term" is defined and described in clause 24 of the General Terms.

17 The terms of the Facility Agreement fix the rate, as set out above, for the duration of the first fixed loan period (namely, one year) commencing from the settlement date. In the absence of a rate lock agreement, relevantly, the General Terms specifies (in clause 11.4) that

> "… the interest rate stated in the Details for the *loan amount* is the rate applying at the *disclosure date* and is only a guide. The actual rate for the *loan amount* may have changed by the *disclosure date* [sic] and is ... the rate that you and we agree on or before the *settlement date*, or, in the absence of agreement, the rate we set on the *settlement date*."

18 Default interest is dealt with in the General Terms in clause 20.1 and specifies that interest charges apply for each day on any part of the balance owing on the account, which is overdue, and calculated at the default rate. The default rate is that specified in the Facility Agreement, which, in this case, is an additional 4% per annum for each day in default. I assume that the reference in clause 11.4, repeated above, to "disclosure date", where second appearing, is intended to be a reference to "settlement date", and a slip has occurred.

19 The plaintiffs executed the facility agreement on or about 8 July 2003. The monies under the Facility Agreement were drawn on 14 July 2003, and thereafter an interest rate of at least 5.85% was debited to their account, except where NAB considered the plaintiffs to be in default, in which circumstances an interest rate of over 19% was charged. It is possible that the settlement date was 11 July 2003, not 14 July 2003, because certain charges were debited from the account on 11 July 2003. Nothing turns on that three-day difference.

20 NAB contends that the interest rate, on an account of this kind (the "ordinary interest rate"), had varied between the time of the execution of the Facility Agreement (defined as "the disclosure date") and the time of the drawdown of the facility (defined as "the settlement date"). The evidence of that ordinary interest rate variation, with which the Court will deal later, is, at best, skimpy. NAB submits that the Facility Agreement allows the variation in the applicable contractual interest rate, because the ordinary interest rate had varied before the drawdown date.

21 Interest rate variations were notified and noted in the Account Statements, the first as early as 11 July 2003 (by which date loan monies had not been drawn except as referred to above). Interestingly, if the settlement date was 11 July 2003 (i.e. the earlier date) and interest rates did not vary until 11 July, nice questions arise as to the applicable rate. It is unnecessary to consider them. On 29 September 2003, NAB notified an increase in the default rate to 19.15%. Notification of further default interest rates occurred on 10 November 2003 to 19.4%, on 8 December 2003 to 19.65%, on 12 July 2004 to confirm 19.65%, on 28 September 2004 to 20.1%, and on 7 March 2005 to 20.35%. Non-default interest rates moved (after the increase notified on 11 July 2003) to 6.95% on 31 August 2005; to 6.17% on 21 November 2005; to 6.89% on 18 April 2006; to 7.09% on 8 May 2006; to 7.19% on 13 July 2006; to 7.25% on 24 July 2006; to 7.29% on 31 July 2006; to 7.35% on 28 August 2006; to 7.28% on 21 September 2006; to 7.35% on 22 January 2007; to 7.42% on 26 March 2007; to 7.45% on 5 April 2007; to 7.54% on 23 April 2007; to 7.69% on 16 July 2007; to 7.79% on 6 August 2007; to 7.75% on 3 September 2007; to 7.79% on 8 October 2007; to 7.87% on 15 October 2007; to 7.95% on 22 October 2007; to 8.05% on 5 November 2007; to 8.09% on 12 November 2007; to 8.19% on 26 November 2007; to 8.25% on 17 December 2007; to 8.39% on 24 December 2007; to 8.28% on 11 February 2008; to 8.39% on 18 February 2008; to 8.69% on 25 February 2008; to 8.79% on 26 March 2008; to 8.89% on 7 April 2008; to 8.99% on 21 April 2008; to 8.85% on 5 May 2008; to 8.95% on 9 June 2008; to 9.19% on 16 June 2008; and to 9.39% on 7 July 2008.

22 While NAB, like any other bank, is, subject to any contractual term, capable of moving its interest rates otherwise than in accordance with the movements announced by the Reserve Bank Board, the RBA rate increases after January 2003 until 31 December 2007 were: on 5 November 2003 an increase of 0.25%; and further increases of 0.25% on 3 December 2003, 2 March 2005, 3 May 2006, 2 August 2006, 8 November 2006, 8 August 2007, and 7 November 2007. While NAB has tendered

the plaintiffs' bank statements, from which the foregoing increases in the interest rates charged have been gleaned, NAB did not tender or rely upon any advertised interest rates for loan products of the kind provided to the plaintiffs.

23 Whether because the plaintiffs did not realise that they were being charged 0.2% per annum more than they had understood they had agreed, or whether because they accepted the rate charged, the plaintiffs' account was debited by the 5.85% per annum interest rate, on a monthly basis, generally without complaint.

24 On 30 June 2004, the plaintiffs contracted to sell the relevant land to Josam Pty Ltd (hereinafter "Josam"), but the sale to Josam ultimately failed. The Court will return to this issue later.

25 NAB, on the understanding that the loan facility expired and was not automatically extended at the conclusion of the 12-month period, initially charged the plaintiffs default interest in the period immediately following 14 July 2004. NAB, through an internal process, unrelated to any dispute about the interest rates to be applied, extended for a temporary period, the loan facility and refunded the interest rate charged between 12 July 2004 (of 19.65%) and 6.79% for the same period, that being the rate internally determined as being an appropriate rate other than the default rate already charged. This rate continued until the end of September 2004, although there is no record of the "extension" or the lower interest rate in any of the plaintiffs' bank statements of that period. Similarly, on 13 October 2004 the facility was "extended" to the end of December 2004.

26 During all of this time an interest rate significantly higher than 5.65% was being charged. On 19 January 2005, the plaintiffs wrote to NAB alleging that the default rate then being charged (20.1%) appeared "to be very high". NAB responded by letter dated 8 February 2005 and informed the plaintiffs that they were in default, were therefore being charged default interest rates and that they were in default because the facility had not been settled or paid out on or before 31 December 2004.

27 On 15 February 2005, the plaintiffs met with officers of the NAB. The NAB file note records the following conversation:

> "Clients: They requested to take default interest off loan …
>
> Peter: Declined to remove the default rate. … Will hold off issuing the default notice for 3 weeks pending settlement. … There will be no consideration for removing default interest rate. …"

28 By letter dated 25 February 2005, NAB wrote to the plaintiffs' solicitors asserting that in "anticipation of the proposed settlement, the Bank [was] prepared to defer commencement of any legal recovery action … until 16 March 2005" and otherwise reserving all of its rights.

29 On 22 March 2005, the plaintiffs wrote to Josam requiring completion on or before 6 April 2005. Josam did not complete. On 13 April 2005, the plaintiffs purported to terminate the contract of sale to Josam and by letter dated 14 April 2005, NAB informed the plaintiffs, because the settlement had not occurred and as a result of, what NAB alleged were, continuing defaults, of NAB's intention to commence legal recovery action.

30 By letter dated 2 May 2005, NAB served a formal demand on each of the plaintiffs for payment to it of the debit balance owing and by which demand it alleged the failure to maintain a credit balance on the particular account. The amount demanded was $106,160.44 made up of the balance of the account, $100 fee for costs of the preparation of the formal demand itself and a further $200 for the expenses apparently associated with NAB's enforcement action thus far. No attempt was made to justify the assertion as to expenses or the costs for the preparation of the demand.

31 On 3 May 2005, a further meeting occurred at which the issue of the penalty interest rates was discussed. Again, NAB refused to alter the interest rate being charged and asserted (as it had

continued to do) that it was entitled to charge default interest in accordance with the rates notified in the bank statements and referred to above.

32 By letter dated 12 May 2005, NAB once more served a formal demand on each of the plaintiffs, but this time the demand required repayment of the total amount due under the Facility, being an amount of $1,158,383.13, plus a further $300 for the preparation of the demand and costs and expenses associated with enforcement action. Once more, no attempt was made to justify the $300 or its calculation.

33 On 8 June 2005, Josam commenced proceedings in the Supreme Court against the plaintiffs. At this stage, Josam had lodged caveats on the properties and one of the issues in dispute in the Josam proceedings was the maintenance of those caveats.

34 In the Josam proceedings one or more of the plaintiffs swore an affidavit to the effect that the plaintiffs were paying 20% interest to the NAB and that the properties could be refinanced at lower interest rates if the caveats were removed. The caveats remained.

35 Another issue in the Josam proceedings was an alleged failure on the part of the plaintiffs to provide a construction certificate, which, it seems, was a condition precedent to the settlement of the contract of sale. On 4 July 2005, the plaintiffs filed a defence in the Josam proceedings alleging that they had advised Josam to inspect the construction certificate at the Council.

36 On 6 July 2005, Mr Inak, on behalf of the plaintiffs, spoke with officers of NAB, NAB's note of which records that the refinancing of the loan was proceeding but had been delayed due to the Josam proceedings and the existence of the caveats.

37 On 6 July 2005, a director of Josam swore an affidavit to the effect that Josam was in possession of finance sufficient to complete the purchase of the property.

38 On 19 July 2005, ICC Home Loans Bankstown (ABN: 49 108 396 621) wrote to the NAB officer (Mr Peter Hatter), by facsimile, advising that refinance had been approved in principle and that this approval was subject to valuation and the removal of the caveat. The author of the letter opined that the "matter will be concluded and settled within 28 days of this letter".

39 On 23 August 2005, a settlement conference occurred between Josam and the plaintiffs and on 27 August 2005 the plaintiffs wrote to NAB advising that settlement, in relation to the purchase by Josam, was to occur by 30 September 2005, in accordance with the outcome of the settlement conference. The foregoing letter requested NAB to defer any legal action until after 30 September 2005.

40 Prior to 30 September 2005, it became clear that Josam required some delay in the settlement. Initially there was a delay until 6 October 2005, then until 11 October 2005. On 17 November 2005, the plaintiffs were advised that the Josam proceedings had been stood over for further call-over to be held on 15 March 2006. On 22 December 2005, Josam's solicitors wrote to the plaintiffs enclosing a draft deed of settlement.

41 On 17 January 2006, the plaintiffs wrote to NAB asking it to agree to a letter that it was to send to Josam. That letter, which, in turn, enclosed a deed of settlement, proposed a simultaneous exchange by a third party at a purchase price of $1,555,000 (plus GST), withdrawal of the caveats, a bank cheque of $75,000 to the plaintiffs' solicitors from Josam, and, amongst other things, an executed notice of discontinuance of the Josam proceedings.

42 By letter dated 19 January 2006, NAB responded that, because it was not a party to the negotiations or the sale, it was not for it to agree or otherwise to the contents of the letter, but that the bank would attend the proposed settlement and discharge its mortgage, subject to full clearance of the plaintiffs' indebtedness. By this stage NAB were in possession of the properties. No payout figure was

provided.

43 On 31 March 2006, the plaintiffs requested NAB to extend the date for refinancing to 28 April 2006. On 4 April 2006, the plaintiffs, once more, complained that the interest rates being charged by NAB were "exorbitant", but acknowledged that it would be paid "under protest".

44 On 20 April 2006, the properties failed to sell at auction.

45 By letter dated 3 May 2006, NAB's officer wrote to the plaintiffs in a letter that is, or seems to be, somewhat unusual. The letter purports to recite an acknowledgement of the plaintiffs that "the default interest rate was being charged in terms of contractual arrangements". Other than a note that the plaintiffs had not paid interest on their loan accounts for quite some time, there seems to be no other purpose for the letter. The letter of 3 May 2006 purports to be a response to the complaint of 4 April 2006. The acknowledgement, to which the letter of 3 May 2006 refers, purports to be an acknowledgment made at a meeting between the plaintiffs and NAB of 3 May 2005.

46 Each of the plaintiffs assert that at the meeting in or about 3 May 2005 there was no acknowledgment of any contractual right of NAB to charge the default interest rates in question. The Court accepts the evidence of the plaintiffs in this regard. Each of the plaintiffs displayed honesty and accuracy, as well as a genuine attempt to inform the Court of all that was recalled.

47 The Court finds that, at the meeting on 3 May 2005, NAB asserted a contractual right to charge the higher default interest rates. That was (and albeit to a slightly lesser extent, still is) the view of NAB. The plaintiffs, on advice, assumed that NAB were aware of the contract and were not prepared to contest the assertion of NAB as to the default interest rate that was applicable. To the extent that such an acknowledgment by the plaintiffs was an acceptance of the underlying contractual right, the letter of 3 May 2006 accurately reflects the conversation. But, out of context, it is misleading. The Court will return to this issue a little later.

48 On 19 May 2006, OFM Capital (hereinafter "OFM") informed Lighthouse Financial Investments Pty Ltd (hereinafter "Lighthouse") that OFM:

> "is willing to consider providing a construction finance facility with a maximum limit equivalent to 80% of 'on completion' valuation exclusive of GST comprising first mortgage facility limited to 66.67% of 'on completion' valuation exclusive of GST; and the balance of the required finance made up of second mortgage facility."

49 The pricing structure for the aforesaid construction finance facility was a first mortgage facility base rate (variable 90 day bank bills) which was at that time 5.87% per annum and a margin of 3.75% per annum and the second mortgage facility also on a 90 day bank bill rate (also then 5.87%) and also with a margin of 3.75% plus an additional 25% per annum risk fee.

50 On 24 May 2006, OFM wrote again to Lighthouse with a finance structure that included, it seems, the development costs. That structure had an assumed funding basis of $3,416,350, of which the land cost was $1,350,000 (the amount that NAB asserted was owed to it), construction costs of $1,811,850 and the cost of money at $254,500. The underlying assumption was that the construction would take approximately 12 months and that the loan term was 15 months, being 12 months to construct and 3 months to sell and pay back the loan. One condition that was immediately problematic was that the first drawdown (which, presumably, would be used to resolve the debt with NAB) could be no more than 80% of the "as is" land value (i.e. the value before construction), which would be less than the amount that NAB asserted remained owing to it. That shortfall was required to be met by the plaintiffs.

51 By letter dated 25 May 2006, the plaintiffs again complained about the default interest rate. This time, however, their solicitor attached a copy of the Facility Agreement signed on behalf of NAB on 8

July 2003, some terms of which are recited above. Further, the solicitor asserted that the plaintiffs were refinancing and were prepared to pay the principal amount ($1,150,000) plus 5.65% plus a default rate of 4%. The Court, taking a commercial view of the proposal, assumes that the 4% default rate was not applicable for the period during which the plaintiffs were not in default. The relevant period asserted in that letter was, therefore presumably, from no earlier than 11 or 14 July 2004.

52 By letter dated 30 May 2006, NAB responded to the foregoing letter dated 25 May 2006. NAB asserted that, using the Facility Agreement, the default rate should be 13.65% per annum and the payout figure as at 15 June 2006 would be $1,413,202.50. The precise basis, upon which the rate of 13.65% was derived, is unclear from the terms of the letter.

53 On 30 May 2006, the plaintiffs amended the defence in the Josam proceedings. On 2 June 2006, the plaintiffs filed a cross-claim in the Josam proceedings, seeking declarations as to the validity of the termination of the contract of sale.

54 On 3 July 2006, a mortgage broker reported of a meeting with one or more of the plaintiffs in a letter to McGrath Capital Pty Ltd (hereinafter "McGrath"), which recounted, presumably on advice from one or more of the plaintiffs, that the plaintiffs had a facility with NAB that required a payout of $1.35 million, while the valuation on the site (which may be more than three months' old) was at $1.55 million. Mr Inak provided the information given to McGrath at a conference with the mortgage broker.

55 By letter dated 3 July 2006, McGrath wrote to the mortgage broker providing a "preliminary outline" of terms upon which it would be prepared to provide finance. Those terms were intended to finance the development project and the satisfaction of the debt to NAB. McGrath was prepared to lend a total of $3,530,000, of which $1,354,375 was for the purpose of refinancing the loan with NAB. These figures, and the total facility, was based on a total loan equivalent to 85% of Gross Realisation net of GST, of which 70% was on a first mortgage and 15% on a second mortgage.

56 On 6 July 2006, the plaintiffs purported to accept the proposal from McGrath by completing an application therefor. Each of the plaintiffs signed a statement of personal circumstances, which cumulatively disclosed net assets greater than the shortfall, if any, between the amount available under the proposal to lend 85% and the total cost of the project.

57 On 13 July 2006, the Josam proceedings were adjourned after the Court (comprised of his Honour Justice Campbell) was informed that the properties were to be sold.

58 On 6 September 2006, the plaintiffs (or two of them on behalf of all of them) met with an officer of NAB. The NAB file note, which is in evidence, records that the officer of NAB "had received a copy of the original loan contract from [the plaintiffs'] solicitor and it appears the Bank had in fact charged default interest at a higher rate than stated in the loan contract". NAB apologised and informed the plaintiffs that, as a consequence, there had been a net interest refund of approximately $136,000. It seems that, notwithstanding that the contract documents emanated from NAB, NAB did not have on the plaintiffs' file a copy of the original contract documents and, during the whole of the dispute about interest rates, had at no stage referred to the contract documents. The Court has already noted the evidence, which it accepts, that, notwithstanding the foregoing, NAB had represented that it was entitled, under the contract (which it had not for that purpose examined), to charge the interest rates about which the complaint had been made.

59 The meeting on 6 September 2006 also discussed a means by which the plaintiffs could obtain finance from another bank, or lender, to complete the development and the bank would agree to a proposal to forego some part of the amount necessary to discharge the mortgage with it until a later time. This proposal emanated from NAB.

60 On 18 September 2006, the Josam proceedings were settled. On 21 September 2006, as a result of the settlement, Josam discontinued the proceedings.

61 The proposal from NAB to forego the repayment of some part of the amounts owing was not accepted, nor it seems, the subject of further discussion between the parties. On 3 October 2006, NAB sent the revised account statements to the plaintiffs, disclosing the lower interest deductions calculated by it and on 13 November 2007 NAB sold the land.

The proper construction of the contract

62 The parties are in dispute as to the rate of interest that may be charged under the contract. Central to that dispute is the contention of NAB that the indicative letter formed part of the contract, or, more accurately, that the terms of the contract were required to be understood in the context of the indicative letter and bearing in mind its terms.

63 The indicative letter, expressly, makes clear it is not a contractual document and does not purport to be an offer that may be accepted. Nor is it anywhere described as part of the offer. The Facility Agreement does not refer to it in such terms or in any relevant way. Further, the Facility Agreement (including, in this regard, the General Terms) does not at any stage referred to the indicative letter. NAB, in sending the Facility Agreement, expressly referred to the Facility Agreement as the "contract document", the signing of which gave rise to a binding obligation. Moreover, the Facility Agreement makes specific provision for those terms that may be varied, or were indicative only, by marking such terms with an asterisk. There was no such marking on the interest rate that had been prescribed in the Facility Agreement.

64 On the other hand, the indicative letter was a letter approving a loan in principle only and subject to formal offer and acceptance. The Facility Agreement was drafted and executed on 8 July 2003 and other than the charges purportedly recorded by NAB on the plaintiffs' bank statements, there is no evidence of a movement in interest rates that would account for the difference between 5.65% (the amount recorded in the Facility Agreement) and 5.85% (the interest rate charged).

65 The agreement between the parties was an agreement, as evidenced by the Facility Agreement, for a fixed interest rate commencing at the start of the loan amount term requiring the payment of interest only. As a consequence, and given that the disclosure date is the date upon which the Facility Agreement was provided to the plaintiffs and the settlement date is the date of the drawdown of the loan money, clause 11.4 of the General Terms, consistently with the terms of the Facility Agreement, provides (see clause 11.4(b) of the General Terms) that the agreement made before the settlement date is the rate by which the parties are bound and which will be charged to the plaintiffs.

66 In other words, at or shortly after the disclosure date, the parties agreed on an interest rate of 5.65% and that was an agreement made on or before the settlement date. By operation of clause 11.4(b) of the General Terms, it is that agreed interest rate that is applicable to the fixed interest loan.

67 The fact that the indicative letter suggested (or expressed) the view that interest rates would vary is of little or no consequence. First, the indicative letter is not a contractual document. The Facility Agreement, recited above, in its "offer" refers as a contractual document only to the Facility Agreement (and by reference the General Terms). Second, the indicative letter itself makes clear that it is not a contractual document. Third, that the interest rates may be the subject of variation is a self-fulfilling statement of no moment. The interest rates did vary. They moved from a proposed 5.89% in the indicative letter to 5.65% in the Facility Agreement.

68 Further, clause 11.4(a) of the General Terms does not apply to the agreement between the parties, in this case, as it is applicable only to loans requiring the repayment of principal and interest. The alternative envisaged by the General Terms to the operation of 5.65% interest is an interest rate set by NAB on the settlement date, because there is no agreement as to the rate fixed during the loan period.

69 The other aspect that is relevant to the determination of the issues between the parties is what, under the contract, is intended to occur at the conclusion of the loan term. NAB submits that the full amount of principal, together with any unpaid interest, was due and payable at the conclusion of the

12 months. It is that view that occasioned NAB requiring settlement, and charging default rates, at the conclusion of the year.

70 There are two aspects to this part of the dispute. First, the term of the loan commences on the settlement date, which is defined as the date upon which the money (or any part of it) is lent. Relevantly, that was either 11 or 14 July 2003 and the initial loan term expired on 10 or 13 July 2004. Second, the section of the Facility Agreement that referred to interest rate fixed the rate for a "period of 1 years [sic] from the settlement date". The interest rate is not fixed for the entirety of the agreement, or the entirety of the loan period. Third, the loan amount term is defined as "1 years [sic]", but is not defined or described as 1 year only, or words to that effect. Fourth, the General Terms, while specifying that a fixed rate loan period may not extend beyond the end of the loan amount term (clause 11.1), also provides that unless otherwise agreed the loan amount automatically converts to the variable interest rate at the conclusion of the fixed rate period (clause 11.6). More importantly, the Facility Agreement expressly deals with the situation after the end of the loan term. As a consequence, for the purpose of clause 11.6 of the General Terms, the parties have otherwise agreed.

71 The Facility Agreement provides that at the end of the first fixed rate period (i.e. after the 1 year described in the Facility Agreement) and each subsequent fixed rate period, the loan automatically continues at a fixed rate for another period of the same length as the first. The fixed rate that is applicable is the rate offered by NAB for a loan of the same type at the time that the agreement is renewed. The evidence before the Court is that interest rates were at 5.89% at the date of the indicative letter. There is no evidence of a decrease in interest rates between that date and the date of the Facility Agreement. There is evidence of a decrease in interest rates from 5.89% to 5.85% on 11 July 2003. The next movement was that interest rates rose to 6.95% on 31 August 2005. Thus, at the first and second renewal of the loan term, there had been no relevant increase in interest rates and the agreed 5.65% would apply until, at least, 11 or 13 July 2006. Any renewal that occurred on 14 July 2006 would, it seems, be at an interest rate of 6.99% per annum, being 0.2% lower than the advertised rate, which is the rate for a loan of the type of this account, as initially agreed. No account has been taken in the foregoing of any default.

72 If there were any default, then, in accordance with the Facility Agreement, an additional 4% per annum could be charged. The Court will deal with default shortly.

73 As a consequence of the foregoing, NAB was, and is, in breach of the contract with the plaintiffs. Further, notwithstanding the reimbursement of some of the interest payments, the amount reimbursed was not calculated on the basis of the correct construction of the contract between the parties. NAB is required to recalculate the amount owing.

Were the plaintiffs in default?

74 There is no suggestion that during the first year of the loan the principal sum owing ever rose above the amount initially drawn down. Therefore, the amount of interest charged must have been paid. Further, as a consequence of the finding as to the proper construction of the contract and the amount of interest that could be charged thereunder, the plaintiffs had paid more than they were required to have paid under the contract. There is no claim that NAB should be required to pay interest to the plaintiffs for the money it improperly withheld.

75 From day one of the contract, NAB was in breach (or more accurately when it first debited interest at the end of the first month). NAB continued in breach for the duration of the contract. The rate of interest was an essential term of the contract or NAB's conduct was a sufficiently serious breach of an intermediate term. In either alternative, the plaintiffs had a right to elect either to rescind the contract (and sue for damages), or continue the contract on foot and sue for damages arising from the breach.

76 When, eventually, the plaintiffs were in default by refusing to pay interest at the rates being charged by NAB, that refusal was a direct consequence of the breach by NAB and the dispute between the parties as to the payments to which NAB was entitled. It is, in those circumstances,

inappropriate, and inconsistent with the terms of the contract between the parties, to refer to the plaintiffs as being in default. It follows that NAB should never have applied the default rate and any calculation based upon the applicability of the default rate is, by virtue of the proper construction of the contract and the facts as the Court has found them, incorrect. If there ever were a period during which the default rate were to apply, NAB were entitled, for that period, only to charge an additional 4% to the otherwise applicable interest rate.

Hadley v Baxendale

77 A general principle and purpose of damages for breach of contract is to restore the plaintiff, so far as one can, to the same position as the plaintiff would have been if the contract could have been performed. Ordinarily, such a purpose is not concerned with consequential profit or loss arising from the breach. I will return to this in more detail later. Thus, where goods are bought and sold and not delivered, the damages are the difference between the contracted price of the goods and the replacement cost or market value. Whether or not the goods were to be on-sold at an exorbitant profit is generally irrelevant in the determination of damages.

78 The foregoing does not affect the principle that the plaintiff is to be put in the same position as if the contract had been performed. However, the issues associated with the remoteness of damage must qualify the principle relating to the assessment of damage. It is this latter qualification that is central to the dispute between the parties before the Court in the current matter.

79 Remoteness of damage in contract is, as a matter of principle, well settled. However, it often causes difficulties in application. The principle of remoteness is governed by the well-known passage in *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145. In *Hadley v Baxendale*, Baron Alderson stated the principle (at 355; 152) in the following terms:

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

80 Under what has been described as the first limb of damages in *Hadley v Baxendale*, supra, general damages are applicable and are usually described as that which naturally flows from the contract itself. In that sense, the terms of the contract define the limits of the damages that arise. Ordinarily, a case involving money lending and overcharging of interest rates would result in the damages being confined to the return of the interest that was overcharged. Such damage arises as a natural consequence of the terms of the contract itself.

81 The rationale for such an approach is obvious. If money lender A breaches its contract and declines to lend money on the terms contracted, borrower B is capable of obtaining the finance from another money lender, presumably forthwith, and the damage is the additional cost of the finance, if any. In such circumstances, it is unnecessary to investigate what B was to have done with the money once obtained. B can obtain any extraordinary profit by procuring the finance from another source and obtaining in damages the difference between the cost of the finance as contracted and as otherwise obtained.

82 The exception is where the parties to the contract contemplate losses that would probably result from a breach, or a particular breach. In that case, the contemplated losses of that kind are a special damage that overtakes (or adds to) the simple calculation that would otherwise apply. This is often referred to as the second limb of *Hadley v Baxendale*. Although there is much force in the argument that there are not two limbs, it is unnecessary for the Court to involve itself in that debate. Whatever be the basis for the calculation of damage, or defining the damage that flows from a particular breach,

the plaintiff bears the onus of proving that a loss has been incurred. Otherwise, only nominal damages would be granted.

83 As is conceded by Mr Rowe, NAB were aware that the plaintiffs were seeking to finance the purchase of the relevant properties, the grant of a development approval and either a subsequent sale or development by the plaintiffs. The plaintiffs informed NAB of these matters. The cost of the finance was a fundamental criterion to both the plaintiffs and NAB. NAB, for its part, considered it essential (and important to it) that it was competitive in the provision of finance for the plaintiffs. From the plaintiffs' perspective, the cost of the finance was an essential, and probably the most essential, element in their scheme to obtain a profit by re selling or developing the properties.

84 In those circumstances, the inability of the plaintiffs (if that be proved to be so) to resell or to develop the properties because of the breach by NAB must give rise to the kind of loss that the parties contemplated would arise from such a breach. There does not need to be an express acceptance of the risk of damages of that kind in the terms of the contract. It has been said:

> "The basis of the defendant's liability... is his implied undertaking to the plaintiff to bear it. His actual knowledge of the special circumstances is relevant as *one* of the factors from which his understanding can be implied. The second factor is also necessary, viz., that he should have acquired this knowledge from the plaintiff, or at least that he should know that the plaintiff knew that he was possessed of it at the time the contract was entered into and so could reasonably foresee at that time that an enhanced loss was liable to result from a breach. Where both these factors are present, the defendant's conduct in entering into the contract without disclaiming liability for the enhanced loss which he can foresee gives rise to the implication that he undertakes to bear it." (*Robophone Facilities Limited v Blank* [1966] 1 WLR 1428 at 1448, per Diplock LJ; see also *Alexander v Cambridge Credit Corporation Limited* (1987) 9 NSWLR 310, 363-364, per McHugh J.)

85 Central to the consideration of all parties in entering into the loan agreements was that the money obtained would be utilised in the manner already outlined. If NAB were, by breach, to prevent the utilisation of the money to facilitate the development (in whole or in part), then the loss that arises from the inability to use the money in that way must be a loss contemplated by the parties and arising from the breach.

86 Further, the plaintiffs claim damages under the *Trade Practices Act*. To the extent that a contravention of the *Trade Practices Act* is established, different tests for the remoteness of damage may arise.

87 The evidence before the Court, as already stated, discloses that NAB represented that it was entitled to charge the interest rate that it was charging under the contract between it and the plaintiffs. That representation was false and misleading. Further, NAB had no reasonable basis for that representation.

88 There is evidence to suggest that the terms of the contract were not on the file. That alone would suggest NAB had no basis for the representation that it made. But NAB was the author of the contract and, as a corporation, had actual or ostensible knowledge of the terms of the contract. There is no evidence that NAB does not have, or did not have prior to 25 May 2006, a copy of the contract. That the contract was not placed on the file does not mean that NAB does not have a copy of the contract. Whatever be the position, it had engaged in misleading and deceptive conduct as to its rights under the contract.

89 The plaintiffs and/or their agents relied upon the representation by NAB of its rights under the contract, as a consequence of which the plaintiffs did not, for some substantial period of time, dispute the amount being deducted or move to rescind the contract or sue for its breach. If the plaintiffs were

able to prove loss arising from their inability (if that be the case) to re sell or to develop the properties, such loss arises from the misrepresentation. "Remoteness" and "causation", which are necessarily interrelated, may have quite different implications under the *Trade Practices Act* than under contract. Because of the conclusion to which the Court has arrived in relation to the second limb of *Hadley v Baxendale*, it is unnecessary to develop this aspect any further.

Was there a loss?

90 Before dealing with the existence or otherwise of a loss and the award of damages, it is appropriate to recite somewhat trite principles relating to the award of damages in contract. Some have already been stated in simple terms. A breach of contract brings about damages and, even in the case where no loss is occasioned, nominal damages will be awarded. Nevertheless, generally damages are compensatory and not a process which is intended to punish or deter: *Gray v Motor Accident Commission* [1998] HCA 70; (1998) 196 CLR 1 at 6-7.

91 Further, where loss is sustained and damages are awarded, contractual damages are intended to place the innocent contractual party in the same situation as if the contract had been performed: *Robinson v Harman* (1848) 1 Ex 850; (1848) 154 ER 363 at 365, per Parke B; *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; (1992) 174 CLR 64 at 80; and the award of damages for breach of contract protects a plaintiff's expectation of receiving the defendant's performance: *Commonwealth v Amann Aviation Pty Ltd*, supra.

92 Lastly in terms of principles, it is necessary to discuss "loss of chance" damages, which, ultimately, is the major claim of the plaintiffs. Loss of chance damages are awarded for the loss of the opportunity to engage in events that may or may not have occurred, referred to as hypothetical events. It matters not whether the occurrence of the event is at the election or discretion of the plaintiffs or the defendants, the event is still hypothetical, but there must be a basis upon which the Court can hold that the event would or might happen. Notwithstanding earlier dicta to slightly different effect, the High Court has determined that the approach to loss of chance damages in contract ought to be the same as it is in tort.

93 In *Commonwealth v Amann Aviation Pty Ltd*, supra, the damages of the respondent were based upon the chance of obtaining a commercial benefit, being the extension or renewal of a contract with the Commonwealth. The High Court dealt with loss of chance damages again in *Sellars v Adelaide Petrolium N.L.* [1994] HCA 4; (1994) 179 CLR 332. The last mentioned matter was a matter which dealt with a claim for misleading and deceptive conduct.

94 In *Sellars*, supra, the Court (Mason CJ, Dawson, Toohey and Gaudron JJ), at 350, said:

> "In *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638, this Court drew a distinction between, on the one hand, proof of historical facts -- what has happened -- and, on the other hand, proof of future possibilities and past hypothetical situations. The civil standard of proof applies to the first category but not to the second, particularly when it is necessary to determine future possibilities and past hypothetical situations for the purpose of assessing damages.
>
> In *Malec*, Deane, Gaudron and McHugh JJ explained the way in which the matter is to be approached in these terms:
>
> > 'If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. ... But unless the chance is so low as to be regarded as speculative -- say less than 1 per cent -- or so high as to be practically certain -- say over 99 per

> cent -- the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability.'"

In the same judgment, the Court later said:

> "Notwithstanding the observations of this Court in *Norwest*, we consider that acceptance of the principle enunciated in *Malec* requires that damages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of breach of contract, tort or contravention of s 52(1), should be ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued. The principle recognized in *Malec* was based on a consideration of the peculiar difficulties associated with the proof and evaluation of future possibilities and past hypothetical fact situations, as contrasted with proof of historical facts. Once that is accepted, there is no secure foundation for confining the principle to cases of any particular kind.
>
> On the other hand, the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. Hence the applicant must prove on the balance of probabilities that he or she has sustained *some* loss or damage. However, in a case such as the present, the applicant shows *some* loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had *some* value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities. It is no answer to that way of viewing an applicant's case to say that the commercial opportunity was valueless on the balance of probabilities because to say that is to value the commercial opportunity by reference to a standard of proof which is inapplicable." (*Sellars*, supra, at 355.)

95 It is these principles which, if loss has been occasioned, will be applied to the determination and quantification of that loss.

96 The first aspect of the determination of whether the plaintiffs have suffered damage concerns the proper determination of the effect of the Josam purchase and/or proceedings. As already stated, on 30 June 2004, Josam agreed to purchase the three properties for $1,750,000. A deposit of $11,666.66 was paid on each of the properties, i.e. a total deposit on the three properties of $35,000. Josam did not complete the contract in the required time. The purchaser, Josam, formally raised allegations, and the plaintiffs raised counter-allegations, which raised as an issue the requirement for delivery to the purchasers of a Construction Certificate prior to, and as a condition precedent to, completion, and the validity of the plaintiffs' rescission of the contract.

97 An examination of the various documents arising in the Josam proceedings discloses that, apart from the formality of the matter in dispute, at the heart of the dispute was an issue relating to whether Josam was required to pay a further $75,000, notwithstanding the rescission of the contract. The plaintiffs alleged that the $75,000 was the remainder of the unpaid deposit for purchase and payable even though the purchase was not completed. It is unnecessary to determine whether, as a matter of law, that was so and it depends on whether it was an acquired right that survived the rescission of the

contract: see *McDonald v Dennys Lascelles Ltd* [1933] HCA 25; (1933) 48 CLR 457.

98 The documents reveal that Josam consented to the registration of the consolidation of the properties, notwithstanding the existence of a caveat in its favour. Further, the ultimate settlement of the proceedings involved the forgiving of the aforesaid $75,000, in exchange for the lifting of the caveats. The irresistible inference is that the plaintiffs could have resolved their dispute with Josam at any stage by forgoing the claim for that amount. That is the evidence of the plaintiffs and it is a view that is not only open, but plainly correct. The Court holds that the Josam proceedings, and the existence of the caveats in favour of Josam, was not a practical hurdle to the refinancing of the loan, or the sale or development of the properties.

99 No damage or loss is claimed by virtue of the failure to resolve the Josam proceedings, at least as is understood by the Court. It is therefore unnecessary for the Court to determine whether the breach by NAB impeded the resolution of the Josam controversy.

100 The circumstances surrounding the plaintiffs' attempts to refinance with a view to selling or developing the properties are detailed above. On at least two occasions, the plaintiffs failed in attempts to obtain finance, the effect of which would have been to extricate the plaintiffs from their arrangement with NAB.

101 Further, the alternate finance was, at least to some degree, sufficient to allow the plaintiffs to develop the project themselves. In each case the offer of funds from alternative lenders was insufficient to cover the amount being claimed by NAB, but would have been sufficient were it not for the additional debt that NAB claimed by virtue of imposing an interest rate higher than it was contractually permitted.

102 The sale to Josam was a sale in circumstances where Josam was to engage the plaintiffs to develop the project (townhouses). Thus, the plaintiffs would have profited from the sale and from the development. But I do not understand that any conduct or breach by NAB occasioned the failure of the arrangement with Josam.

103 The other two arrangements were in a different situation. Following the failure of the Josam sale, the plaintiffs decided to develop the project themselves. Nevertheless, the plaintiffs left open the option of a sale in the appropriate circumstances. As earlier stated, the capacity to re sell or to develop depended upon NAB releasing the plaintiffs from its mortgage, which, in turn, depended upon the satisfaction of an amount owing that was calculated in breach of contract. The amounts on offer in each proposal for alternative finance were sufficient, it seems on the evidence, to satisfy that which, in accordance with the contract with NAB, was truly owed.

104 The breach of contract by NAB prevented the plaintiffs refinancing for sale or development, which refinancing was more than a mere possibility, as indicated by the circumstances of the offers recited above.

105 In answer to the high probability that refinancing was available, and that NAB prevented the plaintiffs from achieving a profit because of the breach, NAB submits that the assets of the plaintiffs were such that they were not, in truth, prevented from undertaking the development or obtaining the finance. As already recounted, the net assets of the plaintiffs were such that the shortfall in funds that would be available were less than the total net assets of the plaintiffs. It is not clear, from the evidence, that those net assets were sufficiently liquid to enable the shortfall to be met. More importantly, the submission of NAB in this regard is misplaced.

106 NAB's submission elides proof of loss and the principles of mitigation. It is for the plaintiffs to prove that finance for the development was available to them and that finance would have enabled the development to occur, if it were not for the insistence of NAB to be paid, in satisfaction of the mortgage, amounts to which it was not entitled. It is for NAB to prove that the plaintiffs did not take all reasonable steps to mitigate their loss. The capacity of the plaintiffs, if there were such capacity, to

undertake the development notwithstanding the insistence of NAB to an amount to which it was not entitled, is a matter going to the mitigation of the loss that would otherwise be incurred. It is for NAB to prove that the plaintiffs had that capacity and, relevantly, in the current context, that the shortfall in funding finance was reasonably capable of being satisfied by the independent assets or resources of the plaintiffs and that the provision by the plaintiffs of additional private funding was a reasonable step that should have been undertaken. NAB has failed to satisfy that onus.

107 That it may have been possible for the plaintiffs independently to provide additional private assets and capital that would have enabled the development to occur is not to the point. Each of the plaintiffs were entitled to take the view that as much as was reasonable of their own resources and assets had been committed and that further private resources would not be used to fund the development project.

108 As a consequence of the foregoing, the plaintiffs' capacity to refinance and/or to develop the site was rendered impossible by the insistence of NAB on payments of amounts to which it was not entitled. By far, the most likely eventuality was that the plaintiffs would develop the site themselves, if it were not for the inability to refinance. I accept the evidence of the plaintiffs that they had decided, after the failure of the Josam sale was obvious, to develop the site themselves and it was for that reason that they held an amount of money to obtain construction certificates. I also accept that, if there were difficulties in undertaking or completing that development, they would have resold the property for someone else to develop.

109 But the decision to develop was in some respects a natural consequence of the overall effect of the Josam arrangement under which Josam was to have purchased the property and contracted the plaintiffs to construct the project. Necessarily flowing from the foregoing is that the Court finds that the site could have been refinanced, and would have been refinanced, but for the requirement of NAB for payment beyond that to which they were entitled. The material relating to the discussions and/or negotiations with OFM and/or with McGrath make any other finding inconsistent with the overwhelming evidence before the Court.

110 A more difficult consideration is, assuming that the plaintiffs developed the site, as they intended, would a profit have been forthcoming? The material before the Court on this question is a little confusing. There is expert opinion from Macquarie Bell on the question of the valuation of the property, which contains total construction costs figures. Also before the Court, as outlined above, are the estimates used for the purpose of the refinancing proposal from OFM and McGrath.

111 NAB, which commissioned the Macquarie Bell report rely on it for the purpose of showing that the site could not have been developed profitably. Further, NAB relies on the report to show, consequentially, that it could not have been sold prior to development for any amount which would result in a profit to the plaintiffs.

112 The Macquarie Bell report estimates the total sale of the 10 townhouses that were to have been built at $4,100,000, from which one would need to deduct hypothetical selling costs being agents' fees of 2%, the lenders' legal fees of 0.5% and advertising of approximately $8,000. Macquarie Bell also allow an interest rate of 8% (higher than the rates that would have been applicable were NAB to have conducted itself in a manner that was consistent with the contract), a selling period of 8 months and a construction time of 12 months. Macquarie Bell allows a full construction cost of $2,000,000 (exclusive of GST). This is consistent with the figure used by OFM of $1,800,000. Macquarie Bell comes to the conclusion on the basis of the figures assumed by it that the remaining value after construction was less than the amount the plaintiffs paid for the property. On the Macquarie Bell analysis, the property should have cost $720,000 in order for the plaintiffs to have made a profit.

113 The difficulty with that result is that Macquarie Bell allows a profit for the developer of 20% and include in the construction costs the profit on construction. Assuming, as I must, that the plaintiffs would subcontract the direct provision of building work and therefore ignoring as a consequence any

profit in undertaking the building work itself, there still remains the developers profit of 20%, on the Macquarie Bell hypothesis, to which the plaintiffs would be entitled. Since the cost of the money (interest rates) was factored into the ultimate value derived by Macquarie Bell, the land cost for which account must be made is the original $1,150,000.

114 The OFM estimate, which in most respects is consistent with the Macquarie Bell valuation figures, factors land costs at $1,350,000, construction costs at $1,811,850 and finance costs at $254,500, making a total cost of $3,416,350. I accept this total cost as an estimate, as close to total development costs as one could obtain, and assume the provision of private equity of $327,000. There are some obvious conservative estimates in the foregoing. On a proper analysis the land costs should be $1,150,000 (but OFM has taken account of the additional monies required by NAB). That would reduce the private equity aspect to $127,000, but assuming the accuracy of the sale price estimates of Macquarie Bell would still leave a profit of between $356,650 and $556,650 (the difference being the additional $200,000 for cost of land to be paid to NAB).

115 Further, if the plaintiffs had resold instead of developing and were not burdened with the inappropriate charges of NAB, and assuming Macquarie Bell estimates were correct, they could have sold at or about $1,400,000 at a time when the cost would have been $1,150,000. The foregoing does not include interest, but the interest has, and would have already, been paid. Again, this would result in a profit of approximately $250,000.

116 The difficulty is that, to some degree, the Court is dealing with uncertainties. I consider that the likelihood of refinance and subsequent development is 80% and I apply that percentage, in accordance with the principles above, to the likely loss incurred. I take a conservative view of the loss, bearing in mind the profit that could have been made on sale and the range that may have eventuated on development and use as a basis $350,000. I would therefore award the plaintiffs damages, in this respect, of $280,000.

Conclusion

117 For the foregoing reasons, the Court finds that NAB have acted in breach of the contract with the plaintiffs and have caused loss, and damages should be awarded. It is unnecessary as a consequence to deal with the claims under the principles of unconscionability and/or contravention of the *Trade Practices Act*. Further, the Court does not have the capacity to calculate the interest that should have been paid in order to determine how much interest has been overpaid. This requires a calculation of daily interest rates which the defendant can easily calculate, but which the Court cannot.

118 The Court makes the following orders:

(i) Judgment for the plaintiffs;

(ii) The defendant shall pay damages to the plaintiffs of an amount of $280,000;

(iii) The defendant shall calculate the interest payable in accordance with the reasons for judgment and pay the defendants the difference between that which has been paid by the plaintiffs and not refunded and that which should have been paid in accordance with these reasons;

(iv) Leave is reserved to the parties to approach on two days' notice on any dispute concerning the calculation referred to in the immediately preceding paragraph;

(v) The defendant shall pay the plaintiffs' costs of and incidental to these proceedings, as agreed or assessed;

(vi) The parties have liberty to apply for any different or special order for costs or in relation to any arithmetic calculation;

(vii) Otherwise the proceedings are dismissed.

****

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Crown Copyright ©

Hosted by NSW Justice & Attorney General

Last Modified: 01/10/2010