Supreme Court
New South Wales

Medium Neutral Citation:	**Australia and New Zealand Banking Group Ltd v Evans; Evans v Esanda Finance Corporation Ltd [2016] NSWSC 1742**
Hearing dates:	21 September 2016
Date of orders:	09 December 2016
Decision date:	09 December 2016
Jurisdiction:	Common Law
Before:	Garling J
Decision:	See [164] for Orders
Catchwords:	PRACTICE AND PROCEDURE – civil – Notice of Motion seeking the striking out of pleadings – where pleadings allege that the issuing of promissory notes was sufficient to discharge a debt – whether pleadings disclose a reasonable cause of action – whether pleadings are embarrassing – whether pleadings are an abuse of process PRACTICE AND PROCEDURE – civil – Notice of Motion seeking summary dismissal of proceedings – where proceedings claim damages for breach of contract on the basis of the issuing of promissory notes – whether proceedings are frivolous or vexatious – whether there is a reasonable cause of action – whether the proceedings are an abuse of process PRACTICE AND PROCEDURE – Notice to Attorneys General – s 78B Judiciary Act 1903 – whether the notice discloses a matter arising out of the Constitution or concerning its interpretation
Legislation Cited:	Australian Securities Investments Commission Act 2001 (Cth) Bills of Exchange Act 1909 (Cth) Civil Procedure Act 2005 Contracts Review Act 1980

	Judiciary Act 1903 (Cth) National Consumer Credit Protection Act 2009 (Cth) National Credit Code Uniform Civil Procedure Rules 2005
Cases Cited:	Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd [1999] FCA 1151; (1999) 95 FCR 292 Avetmiss Easy Pty Ltd v Australian Skills Qualification Authority [2014] FCA 507 Banque Commerciale SA v Akhil Holdings Ltd [1990] HCA 11; (1990) 169 CLR 279 Croco v Commonwealth of Australia [2011] FCAFC 25 Dare v Pulham [1982] HCA 70; (1982)148 CLR 658 Dey v Victorian Railways Commissioner [1949] HCA 1; (1949) 78 CLR 62 Fielding and Platt Ltd v Najjar [1969] 2 All ER 150 Glennan v Commissioner of Taxation [2003] HCA 31; (2003) 198 ALR 250 Green v Jones [1979] 2 NSWLR 812 Gunns Ltd v Meagher [2005] VSC 251 Kirby v Sanderson Motors Pty Ltd (2001) 54 NSWLR 135 McGuirk v The University of NSW [2009] NSWSC 1424 Northam v Favelle Favco Holdings Pty Ltd (Bryson J, 7 March 1995, unreported) Potier v State of NSW [2014] NSWCA 359 Rahman v Dubs [2012] NSWSC 1065 Re Finlayson; Ex Parte Finlayson (1997) 72 ALJR 73 Shelton v National Roads and Motorists Association Ltd [2004] FCA 1393 Spencer v The Commonwealth of Australia [2010] HCA 28; (2010) 241 CLR 118 Wickstead v Browne (1992) 30 NSWLR 1 Young v Hones [2013] NSWSC 580
Texts Cited:	Not Applicable
Category:	Procedural and other rulings
Parties:	In proceedings 2016/7453: Australia and New Zealand Banking Group (P/X-D1) Anthony Evans (D1/X-C1) Juana Evans (D2/X-C2) Shane Elliot (X-D2) Craig Martin (X-D3) Sarina Ropollo (X-D4) Kemp Strang (X-D5) In proceedings 2016/98172: Anthony Evans (P1)

	Juana Evans (P2) Esanda Finance Corporation Limited (D1) Esanda Limited (D2) Esanda BN2170458 (D3) Malcolm Tilbrook (D4) Larry Yuan (D5) Australia and New Zealand Banking Group (D6)
Representation:	Counsel: C Bannan (P and X-D1 to X-D5 in proceedings 2016/7453; D1 to D6 in proceedings 2016/98172) Self-represented (P1, P2) Solicitors: Kemp Strang (P and X-D1 to X-D5 in proceedings 2016/7453; D1 to D6 in proceedings 2016/98172)
File Number(s):	2016/7453 (ANZ v Evans)2016/98172 (Evans v Esanda Finance Corp Ltd)
Publication restriction:	Not Applicable

JUDGMENT

1 On 8 January 2016, the Australia and New Zealand Banking Group Ltd ("ANZ") commenced proceedings against Mr Anthony William Evans and Mrs Juana Gaye Evans ("the ANZ proceedings").

2 On 5 February 2016, Mr and Mrs Evans filed a Defence in the ANZ proceedings and, on 31 March 2016, a Cross-Claim against ANZ, three of its employees and the law firm Kemp Strang.

3 On 20 April 2016, Mr and Mrs Evans then commenced proceedings against six defendants, including ANZ ("the Evans proceedings").

4 This judgment deals with three Notices of Motion filed in the ANZ proceedings and the Evans proceedings:

(1) A Notice of Motion filed 22 April 2016 by the plaintiff and cross-defendants in the ANZ proceedings, seeking orders that the Defence 5 February 2016 be struck out and that the Cross-Claim filed on 31 March 2016 be summarily dismissed, or else struck out in whole or in part;

(2) A Notice of Motion filed 22 April 2016 by the defendants in the Evans proceedings, seeking an order that the proceedings be summarily dismissed or, alternatively, that the Statement of Claim be struck out; and

(3) A Notice of Motion filed 19 July 2016 by the plaintiffs in the Evans proceedings, seeking, among other orders, an order that the defendants' Notice of Motion filed 22 April 2016 be summarily dismissed, and orders concerning case management and costs.

5 The Notices of Motion, although filed in different proceedings, were fixed to be heard together because of the commonality of issues which they raised.

6 Shortly before the hearing of the Notices of Motion, Mr Evans served a Notice under s 78B of the *Judiciary Act* 1903 (Cth). Mr Evans asserted that a number of constitutional matters arose from the proceedings and, accordingly, that the Court could not proceed to hear and dispose of the Notices of Motion because appropriate responses had not been received from the Attorneys General of the Commonwealth and each of the States and Territories.

7 Having heard argument with respect to that Notice, I ordered that the hearing of the Notices of Motion proceed because I was not satisfied that any constitutional matter arose. I indicated that I would give reasons for that decision in this judgment. It will be convenient to give those reasons at a later stage in this judgment.

The ANZ Proceedings

8 It is convenient to begin by discussing the background to the ANZ proceedings.

The Claim by ANZ

9 On 8 January 2016, ANZ filed a Statement of Claim naming Mr and Mrs Evans as defendants. It sought orders that Mr and Mrs Evans give ANZ possession of two properties known as the Rials property and the Mawarra property, that Mr Evans give ANZ possession of a property known as the Mannus property, that Mr and Mrs Evans give ANZ possession of two motor vehicles, and that Mr and Mrs Evans pay ANZ a sum of approximately $1.42M.

10 The Statement of Claim alleges that Mr and Mrs Evans became indebted to ANZ as a result of three agreements. The first agreement, made on 14 March 2014, was entered into by ANZ, Mr and Mrs Evans and Glenevan Pty Ltd, a company of which Mr and Mrs Evans were the sole directors and of which Mr Evans was the sole shareholder ("the company"). That agreement provided for various facilities by way of a loan, overdrafts and a credit card facility, which together provided up to $1.035M of finance to Mr and Mrs Evans.

11 The second agreement, made on 7 November 2013, related to an advance of monies to the company of approximately $352,000 to enable it to purchase a truck. The company mortgaged the truck in favour of ANZ.

12 The third agreement, made on 21 November 2013, constituted an advance by ANZ to the company of approximately $40,000 to enable it to purchase a motor vehicle. The company mortgaged the motor vehicle in favour of ANZ.

13 The Statement of Claim alleges that each of Mr and Mrs Evans entered into guarantees dated 19 December 2011, 7 November 2013 and 21 November 2013, pursuant to which they each guaranteed the obligations of the company under the first, second and third agreement to the ANZ, respectively.

14

Further, it is alleged that Mr and Mrs Evans mortgaged to ANZ the two properties which they jointly owned (the Rials and Mawarra properties), and that Mr Evans mortgaged to ANZ the Manus property, of which he was the sole registered proprietor.

15 The Statement of Claim alleges that, on 23 February 2015, the company was placed into liquidation. This constituted an event of default under each of the agreements and, accordingly, on 24 March 2015, ANZ sent a demand to Mr and Mrs Evans to pay ANZ approximately $964,000, being the aggregate outstanding balances on the overdrafts and business loans under the three agreements. In August 2015, further demands were made by ANZ to Mr and Mrs Evans.

16 ANZ claimed in the Statement of Claim that because there had been no repayment by either Mr or Mrs Evans of the sums claimed, the total which it was owed was a little over $1.42M and it was entitled to possession of the three properties, the truck and the motor vehicle.

The Defence and the Cross-Claim

17 On 5 February 2016, Mr and Mrs Evans filed a defence in the ANZ proceedings. It will be necessary to refer to the defence in more detail in due course. However, it does appear that, with the exception of the two loans to the company regarding the truck and the motor vehicle, Mr and Mrs Evans generally admit the existence of the agreements, the terms of the agreements, the entry into the mortgages over the real estate, the entry into the guarantees and the terms of them, and the various demands and events of default. Mr and Mrs Evans assert in their defence that they have discharged any liabilities to ANZ which may have existed.

18 On 31 March 2016, Mr and Mrs Evans filed a Cross-Claim naming ANZ as the first cross-defendant and three identified individuals who were employees of ANZ as the second, third and fourth cross-defendants.

19 The Cross-Claim sought the following relief:

> "1. The mortgage upon which the plaintiff sues be set aside/discharged under the National Consumer Credit Protection Act 2009 [Cth] and the National Credit Code.
>
> 2. Alternatively, mortgage set aside/discharged under the Australian Securities and Investments Commission Act 2001 [Cth].
>
> 3. Alternatively, mortgage be set aside/discharged under the Contracts Review Act [NSW].
>
> 4. Alternatively, mortgage be set aside/discharged under Australian Bills of Exchange Act 1909 [Cth].
>
> 5. The plaintiff's Statement of Claim be struck out or dismissed UCPR NSW 2005 r13 on the basis it is vexatious, an abuse of process, is hopeless and fails to disclose a cause of action upon which relief can be granted.
>
> 6. The first and second cross-claimants be awarded costs.
>
> …
>
> 7. Such further and other order as the nature of the case may require or the Court deems fit."

20

Again, it will be necessary to refer in some detail to the Cross-Claim in due course, but it is sufficient to note that Mr and Mrs Evans repeat the pleadings set out in the Defence, and allege further that the cross-defendants had entered into a conspiracy to evict them from their farms, that the alleged liabilities pursuant to the loan agreements were all discharged by tender of payment, that the tender of payment created a contract, and that the cross-defendants were in breach of that contract. For that breach of contract, Mr and Mrs Evans' claim damages in excess of $7M with interest.

21 Mr and Mrs Evans also claimed that the cross-defendants were in breach of the mortgage contract.

Notice of Motion

22 On 22 April 2016, ANZ filed a Notice of Motion seeking orders that the Defence of 5 February 2016 be struck out and that the Cross-Claim filed on 31 March 2016 be summarily dismissed, or else struck out in whole or in part.

The Evans Proceedings

The Claim by Mr and Mrs Evans

23 By an Amended Statement of Claim filed on 20 April 2016, Mr and Mrs Evans commenced proceedings against six defendants. The first defendant was Esanda Finance Corporation Ltd ("Esanda"), the second and third defendants were Esanda entities, the fourth and fifth defendants were individuals employed by ANZ, and the sixth defendant was ANZ.

24 It will be necessary to refer to the Amended Statement of Claim in more detail in due course.

25 It is sufficient for present purposes to say that the claim made by Mr and Mrs Evans is for a little over $1.76M and is said to arise by reason of contracts entered into between Mr and Mrs Evans and ANZ, the terms of which ANZ had breached. Those contracts were said to have arisen by reason of the use of promissory notes by Mr and Mrs Evans to pay the original loans, when accompanied by a contractual document.

Notices of Motion

26 On 22 April 2016, before filing a defence, the defendants filed a Notice of Motion seeking an order that the proceedings be summarily dismissed or, alternatively, that the Amended Statement of Claim be struck out.

27 On 19 July 2016, Mr and Mrs Evans filed a Notice of Motion seeking various orders, including an order that the defendants' Notice of Motion filed on 22 April 2016 be summarily dismissed, and various orders concerning case management and costs. The final order sought was:

> "An order that an internal investigation be conducted within the Supreme Court of NSW as to why all orders were removed from the plaintiff's Notice of Motion handed up to Christopher Bradford and stamped as received during the directions hearing on 7 July

2016 and then filed, minus all the plaintiff's orders in what appears to be a deliberate attempt to pervert the course of justice."

Mr Evans' Affidavit

28 A common feature of the Defence and Cross-Claim in the ANZ proceedings, and the Statement of Claim in the Evans proceedings, is a contention concerning the delivery of promissory notes by Mr Evans on behalf of himself and his wife to ANZ, which Mr Evans claims discharged all of his liabilities to ANZ and gave rise to a series of other contracts, of which ANZ (and the other defendants or cross-defendants) have been in breach. Shortly put, Mr Evans claims that as a result of the delivery of these promissory notes and contractual documents, the debt of $1.4M which ANZ claims was owed to him, has become a debt of $7.2M owed by ANZ (and other defendants or cross-defendants) to him and his wife.

29 In an affidavit affirmed on 8 June 2016, Mr Evans, who appeared for himself and his former wife at the hearing, and who has been acting for himself and his former wife in both proceedings to date, provides an account of how the promissory notes came into being.

30 In that affidavit, Mr Evans asserts that in response to statements received in September 2015 from ANZ setting out his indebtedness, the following occurred:

> "34. Tender of payment was made by the First cross-claimant pursuant to the principles and tenements of 'honour in – honour out' being that it was initially believed by the First cross-claimant that he had received six 'advances' under the Loan Agreements and therefore he felt compelled to honour the Loan Agreements and discharge the liabilities.
>
> 35. It was disclosed within the First cross-claimant's notice titled 'Default Notice and Demand for Payment of Debt', dated 11 November 2015 that tender of payment 'in no way infers a previous or pre-existing obligation or liability to the alleged lender, the Bank, nor does it imply an admission loans were advanced nor does it waive our rights in any way whatsoever'.
>
> 36. The Butterworths Concise Australian Legal Dictionary Third Edition at page 387 legal definition of satisfaction is 'the discharge of personal obligation by a **different performance, or some other substantive consideration, rather than by strict performance**.
>
> Exhibit 'AWE14' to this affidavit is a true copy of an extract from Butterworths Concise Australian Legal Dictionary 2nd Ed Page 390 defining the word 'satisfaction'.
>
> 37. The Promissory Notes tendered by the First cross-claimant against the liabilities to the First cross-defendant discharged the liabilities by way of different performance.
>
> 38. Four of the Six original 'embossed promissory notes' (hereafter 'the Notes'), each attached by paperclip to their respective accepted and completed NOT NEGOTIABLE Contracts with their respective covering Notice titled 'Notice of Payment', were sent within a sealed, registered mail (sign received) envelope by the First cross-claimant to Craig martin, Team Manager NSW & ACT, Australia & New Zealand Banking Group Limited, 242 Pitt Street Sydney. Exhibit 'AWE15' to this affidavit is a true copy of the 3rd party proof of mailing certificates, signed by Robert Blencowe, Post Master at the Tumbarumba Post Office. Exhibit 'AWE15A' to this affidavit is a true copy of Robert Blencose's affidavit testifying to the veracity of the contents of the envelopes. Exhibit 'AWE 16' to this affidavit is the proof of receipt.
>
> 39. A further two promissory notes (hereafter 'the Notes'), each attached by paperclip to their respective accepted and completed NOT NEGOTIABLE Contracts with their respective covering Notice titled 'Notice of Payment', being for two Esanda Liabilities were sent within a sealed, registered mail (return receipt) envelope by the First cross-claimant to Larry Yuan, C/O Commercial Collections, Australia and New Zealand Banking Group Limited, Level 5, Core B, 833 Collins Street, Docklands, Victoria 300.

> Exhibit ‘AWE17’ to this affidavit is a true copy of the 3rd party proof of mailing certificate, signed by Tracy Morton, an employee at Wodonga Plaza Post Office. Exhibit ‘AWE18’ to this affidavit is the proof of receipt.
>
> 40. ...
>
> 41. The respective Promissory Notes contained sufficient credits in Australian denomination to discharge all alleged liabilities under the Loan Agreements to the First cross-defendant.
>
> 42. The rules of Equity prevails within the Commonwealth of Austrlia and within the state of New South Wales *Law Reform Act 1972 No.28 S5*
>
> Exhibit ‘AWE21’ to this affidavit is a true copy of an extract from the New South Wales *Law Reform Act 1972 No.28 S5.*
>
> 43. Law of contract provides that equity prevails.” (sic)

31 On 16 September 2015, Mr Evans drew up promissory notes, placed a seal upon them, and sent them by letter to ANZ. Although there were six promissory notes in all, it is sufficient to give an example of one of them, since they were all in identical form.

32 The document was headed:

> “PROMISSORY NOTE PROMISSORY NOTE PROMISSORY NOTE
>
> *Destruction mutilation or surrender to maker discharges liability herein*”

33 Mr Evans placed his name upon the promissory note and promised to pay ANZ $920,000. The promissory note was given the number “PNAWE 160920151055”. It was expressed to be:

> “Redeemable on demand at 56 Winton Street, Tumbarumba New South Wales at 10.55 hours without; let, delay, hindrance or ado on the second day of October AD 2015”.

34 Across the bottom of each of the promissory notes was the following:

> “Memo: issued pursuant to P.L.73/10 (see H.J.R. 192 dated June 5, 1933) and/or its Australian equivalent. The Financial Emergencies Acts.”

35 So far as can be ascertained, this is a reference to a piece of US legislation being a 1933 act entitled “Public Law 73-10”, and to a House Joint Resolution of the US Congress passed in 1933, being that numbered 192. There has been no “Financial Emergencies Act” in Australia. That seems to be a reference to a piece of US legislation.

36 At the time the promissory note was delivered it was accompanied by a letter which was headed:

> “TIME SENSITIVE DOCUMENT
>
> ESTOPPEL CONDITIONS APPLY
>
> FOR PUBLIC FILING”

37 The letter was headed “Notice of tender of payment”. In relevant part it said:

> “Greetings,
>
> Find enclosed your undated former inchoate instruments title – ‘Fully drawn advance’ and ‘commercial card account balance’ duly accepted by and completed by the maker. Attached to the completed contracts we deliver in ‘good faith’ payment of two (2) promissory notes numbered … in satisfaction against the outstanding balances of the respective loan accounts listed above. The promissory notes are tendered in good faith pursuant to the tenants (sic) of the Australian Bills of Exchange Act 1909 (Cth).
>
> We take this opportunity to humbly apologise for all previous dishonours, such as any late payment instalments, the current poor Australian economic conditions have caused severe financial stress and hardship upon us. We endeavour to not permit such dishonours to occur again. Please forgive us for all previous delinquencies and dishonours.

> If you are uncertain as to the material contents and implications of the attached documents, we suggest and direct you to forward them to your appropriate and competent legal representatives.
>
> …
>
> If it is claimed our delivered promissory notes are insufficient – deficient to discharge or satisfy the liabilities to the lender, please return the promissory notes to the maker within three (3) days of the date the payee received it with your/complainants accompanying notice of dishonour signed under penalty of perjury. It is our understanding a promissory note is as good as cash and must be treated as such.
>
> Alternatively, if the promissory notes ('the notes') are not returned to maker at the time, date and place stipulated on the promissory notes it shall be deemed by all parties in this matter that the lender has accepted the notes as sufficient consideration to satisfy or discharge all liabilities to Australia and New Zealand Banking Group Limited.
>
> Should Australia and New Zealand Banking Group Limited, via its employees or agents, not return or present the notes to maker for payment as stated above, it make any unsubstantiated claim as to its deficiency or defectiveness, or pursue collections against us or our estate subsequent to taking delivery of the promissory notes, it shall be deemed by all parties to the NOT NEGOTIABLE contracts that Australia and New Zealand Banking Group Limited is in commercial default of the contracts." (sic)

38 ANZ did not attend at the relevant specified date and time. Nor has it at any time presented the promissory notes for payment. It has not accepted explicitly any of the terms and conditions which were said to be imposed by the correspondence. On the contrary, it has sought to collect the outstanding money owed to it by Mr and Mrs Evans in more traditional and conventional ways, namely through these proceedings.

39 However, Mr Evans goes on to assert that because ANZ retained, and did not at any time return, the promissory notes to him or Mrs Evans, there was "*acceptance … by delivery or notification*" according to s 4 of the *Bills of Exchange Act*.

40 Accordingly, Mr Evans asserts that the promissory notes, having been accepted by ANZ, constituted full and final satisfaction of its claimed liabilities. The path to this conclusion was submitted by Mr Evans to be that:

> "(a) the ANZ received the payment instruments – promissory notes;
>
> (b) it took something offered;
>
> (c) it did not return the promissory notes to the maker within 72 hours of receiving them, thereby assenting to keep them in lieu of the liabilities."

41 Mr Evans asserts that the promissory notes, having been received and accepted, were not presented at the time and place specified in them. He submitted that the delivery of the promissory notes and the failure by the ANZ to present the notes for payment:

> "… amounted to discharge … of the alleged liabilities of the first cross-claimant and his former partner/spouse to the first cross-defendant in respect of the loan agreements pursuant to sections 4 and 93(1) of the [Bills of Exchange Act 1909]."

42 As well, Mr Evans went on to allege that the failure by ANZ to accept the promissory notes constituted a *"… commercial default of the NOT NEGOTIABLE contracts*".

43 Mr Evans asserts that ANZ's "commercial default" had significant financial consequences, namely that:

> "Pursuant to the terms and conditions in the default and liability clause and notice of the six not negotiable contracts, the defaulter is liable to the defaultee of an award for breach of contract for the total sum of $7,339,600 Australian as at 5 February 2016 for breach of the NOT NEGOTIABLE contracts." (sic)

44

Mr Evans went on to assert that he had served a Notice of Demand for the payment of the relevant debt which was unanswered. Accordingly, he asserted that the debt of $7.34M is owed.

The Promissory Notes and Consequences of Non-Acceptance

45 In considering the relief sought in the Notices of Motion filed by ANZ, it is convenient to consider two substantive aspects of Mr Evans' defence and Cross-Claim, the first being the satisfaction of his debt by proffering promissory notes to ANZ, and the second being a breach of contract by ANZ, in respect of which Mr Evans claims a large sum in damages.

46 A promissory note, according to s 89(1) of the *Bills of Exchange Act* 1909 (Cth), is:

> "… an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person or to bearer."

47 The essence of this definition, and one which would be commonly understood outside of the statutory context, is that a promissory note is a written promise to pay a sum of money on demand or at a particular time. A promissory note may, in the hands of the holder, be of some value because it may be able to be negotiated by endorsement to a third party. However, that does not mean that the proffering of a promissory note is the equivalent of a payment in cash.

48 Mr Evans relied upon a statement by Lord Denning MR in *Fielding and Platt Ltd v Najjar* [1969] 2 All ER 150. The case was concerned with the contractual position of the parties in circumstances where the contract called for the provision of six promissory notes payable two months apart over the course of about 12 months. Those promissory notes constituted payment to the plaintiff company for the construction and sale of a complex piece of industrial equipment.

49 The first promissory note became due for payment. It was not paid. After a delay of three weeks, during which a number of promises were made about the payment of the promissory note, the company suspended work on the contract to make and deliver the industrial equipment. The issue became whether the company was entitled to payment for the work which it had done. In the context of that dispute, in circumstances where the company was claiming that the promissory note was of value and ought to have been paid, Lord Denning said at 152:

> "Stopping there, it is quite plain to me that the defendant was liable to pay the first of the promissory notes. We have repeatedly said in this court that a bill of exchange or a promissory note is to be treated as cash. It is to be honoured unless there is some good reason to the contrary. It is suggested that on the first note, there was a failure of consideration. That suggestion is quite unfounded. The plaintiffs were getting on with their part of the contract. They were, they say, ordering goods from their suppliers and getting on with the work. At any rate, there is no evidence to the contrary: and unless they were themselves in default, they were clearly entitled to payment of the first note."

50 It is illogical and incorrect as a matter of legal principle to take the statement that a promissory note "*is to be treated as cash*" out of the context in which it appeared, and apply it, as Mr Evans seeks to do here, in circumstances where Mr Evans creates a promissory note, which is not drawn on any reputable or substantial financial institution,

and which is not a recognised form of payment under the loan documentation, and then proffers it entirely voluntarily in circumstances where the ANZ is required to attend at a remote rural village, at a specific time, in order to collect payment. Mr Evans' assertion that, in those circumstances, he is excused from repaying his substantial liability to ANZ is, simply put, a nonsense.

51 There is no merit whatsoever in Mr Evans' argument concerning the effect of the promissory notes, either in his defence or in his Cross-Claim.

52 At the time the promissory note was delivered, as set out in [36] above, a further document was served. It included, among other things, conditions which it purported to impose on ANZ, the effect of which was that if ANZ did not return the promissory notes within three days of the date of receipt, Mr Evans would take that failure to act as ANZ's acceptance of the promissory notes and as sufficient consideration to satisfy and discharge his liabilities.

53 Here there is no doubt that ANZ received the promissory notes and did not return them within the specified three days. Silence or inaction on the part of a party cannot, where no consideration passes, transform a unilateral demand into a contract. Even less can it constitute a breach of some self-invented contract by Mr Evans.

54 In those circumstances, the notion that ANZ's silence or inaction results in a debt from ANZ to Mr Evans of $7.4M is again, simply put, a nonsense. There is no substance for such a claim. On any view it is not a reasonable cause of action, and the maintenance of it in the terms in which it is expressed is clearly vexatious and an abuse of this court's process.

Other claims made by Mr Evans

55 Mr Evans' affidavit goes on to detail various other claims which he has made against ANZ, or its employees, which have not been answered. Included in those claims is an assertion that a document entitled "Final Notice":

> "directed the respondents a third and final opportunity to provide him further and better particulars including an opportunity to examine the original completed bona fide wet ink signature loan application in order to establish the respondents of the bona fide creditors, as well as evidence that sustains advances were made to the first cross-claimant and his former partner/spouse and the company or their refusal, failure or neglect to do so was taken to have created and equitable estoppel whereby the respondents waived their right to pursue their claim against the first cross-claimant."

56 As well, the affidavit goes on to include the following paragraphs as constituting justification in whole or in part for the claims which he made:

> "94 By the First cross-defendant proceeding with litigation rather than and before providing the First cross-claimant with evidence that sustains its claim to having reasonable cause and jurisdiction to pursue a claim is a glaring example of the excessive oppression and unconscionable behaviour, bad faith and treatment by the First cross-defendant towards the First cross-claimant.
>
> 95. The First cross-claimant was and is forced to spend excessive long hours replying to the First cross-defendant's legal representatives harassing written communications and demands, as well as preparation of legal paperwork in an effort to defend and protect his property from the First cross-defendant and Esanda Finance, a division of the First cross-defendant.

96. The First cross-claimant contends the behaviour of the First cross-defendant and its agents, by virtue of its aggressive actions via inappropriate Notices of Demand and subsequent litigation proceedings, rather than responding to and providing the First cross-claimant with proof of First cross-defendant's claim pursuant to the First cross-claimant's reasonable and equitable requests, has disclosed its unconscionable conduct as well as its intent to not only evict and dispossess the First cross-claimant but possibly intent to commit genocide and 'intent to deliberately inflict conditions of life calculated to bring about physical destruction'.

97. The First cross-claimant alleges that the First cross-defendant, as a result of its aggressive actions, has breached provisions of the national Credit Act and the banking legislation.

98. The First cross-claimant alleges that the First cross-defendant, as a result of its aggressive actions and failing, refusing or neglecting to provide proof of claim, commits/committed the further offences of debt bondage and slavery, being offences against division 270 and 271 of the Australian Criminal Code Act (Cth) 1995.

99. The First cross-claimant alleges that the First cross-defendant, as a result of its aggressive actions and failing, refusing or neglecting to provide proof of claim, has breached provisions of the National Credit Act and the banking legislation.

100. The total amount of all the liabilities against the First cross-claimant claimed by the First cross-defendant is discharged and the First cross-defendant's claim of a liability against the First cross-claimant has no reasonable cause of action, is invalid, spurious, frivolous, vexatious, is embarrassing, hopeless, is an abuse of the process of the Court, misleads the Court and raises controversies where none previously existed."

57 To the extent that Mr Evans sought relief on the basis of unconscionability, his affidavit set out the claim in this way:

"111. The First cross-claimant currently enjoys peaceful possession and occupancy of his properties.

112. 'Any creditor CANNOT use a property satisfy a debt, CANNOT SEIZE your property in lieu of a debt or obligation, including a Court Order'.

Exhibit 'AWE53' to this affidavit is a true copy of case law MORGAN V FRY AND OTHERS – Lord Denning 1968.

113. The First cross-defendant CANNOT legally use the First cross-claimant's properties to satisfy a debt, CANNOT SEIZE the First cross-claimants properties in lieu of a debt or obligation, including one invoked by a Court order.

114. By virtue of the size of the sums allegedly advanced by the First cross-defendant under the Loan Agreements, the mortgage and loan agreements is in the premises unjust and unconscionable.

115. The mortgage and loan agreements is in the premises unjust and unconscionable by virtue the First cross-claimant's cash flow could never have sustained the level of (alleged) borrowings (allegedly) advanced under the three Loan Agreements.

The First cross-defendant, as the alleged Trustee, is in breach of fiducial duty to the First cross-claimant.

116. The First cross-defendant, as the alleged Trustee, is in breach of fiducial duty to the First cross-claimant by virtue it has acted to cause him harm rather than take necessary steps to protect his/their financial interests as well as protect the estate on his behalf, as the beneficiary.

117. The First cross-defendant, as the alleged Trustee, is in breach of fiducial duty to the First cross-claimant by virtue it recklessly advanced sums (alleged) in excess of the serviceability capacity of the First cross-claimant." (sic)

58 The affidavit also set out how Mr Evans calculated the sum of over $7M, which he claims by way of damages for the breach of the contract.

59 Other defences and claims mounted can be summarised in this way:

(a) ANZ and its lawyers engaged in unconscionable conduct because proceedings had been commenced instead of engaging in a private mediation with Mr and Mrs Evans;

(b)

ANZ, its Chief Executive Officer Mr Shane Elliot, a Manager Mr Craig Martin, and its lawyers had engaged in a "conspiracy" to evict Mr and Mrs Evans from their farms;

(c) ANZ could not succeed in exercising its rights under the mortgage because it was not entitled to obtain possession of the properties without obtaining the consent of the defendants, some of the provisions of the mortgages and the loan agreements were unconscionable and should be set aside, and the mortgage should be set aside on terms permitting Mr and Mrs Evans to refinance with an alternative lender; and

(d) there was no debt owing to ANZ because there were no gold or silver coins in circulation.

60 The last defence relating to the circulation of gold or silver coins seemed, although this was not entirely clear, to be associated with an assertion which was recorded in writing:

> "Any Australian Reserve Bank Note is a promise to pay, thereby qualifying as a promissory note by legal definition. To claim a promissory note can only create a new obligation is to confess to dismissal of or invalidation of the entire Australian currency. Cash, being ONLY a promise to pay, can satisfy a liability. Any denomination of an Australian Reserve Bank Note is a promissory note. A promissory note has the ability to satisfy a liability."

61 In oral submissions, Mr Evans further described this argument in this way:

> "… so the early 70s, we changed over from a gold-backed currency in this country to the Federal Reserve system of the United States. It is not a gold-backed currency. So by virtue, there is no debt but there may have been a liability to the ANZ Bank. And although they have never proved there is a liability, a promissory note cannot fill a liability. We don't have – these Parliament notes that we carry around in our wallets to discharge our liabilities on a day-to-day basis are not a gold-backed currency. That was my argument in that."

62 The defence is at best elusive and not assisted by the submission made orally.

Section 78B – Judiciary Act 1903 (Cth)

63 Before turning to the Notices of Motion, it is necessary, as I foreshadowed earlier, to deal with a document filed by Mr Evans on 12 September 2016, entitled "Notice of Constitutional Matter under s 78B of the Judiciary Act 1903". Mr Evans informed the Court that the document had been served on some, but not all, of the Attorneys-General of each State and the Commonwealth. He submitted that the Court could not proceed to hear and determine the proceedings before hearing back from each of the Attorneys-General.

64 Section 78B of the *Judiciary Act* provides:

> "**78B Notice to Attorneys-General**
>
> (1) where a cause pending in a Federal court including the High Court or in a court of a State or Territory involves a matter arising out of the constitution or involving its interpretation, it is the duty of the Court not to proceed in the cause unless and until the Court is satisfied that the notice of the cause specifying the nature of the matter has been given to the Attorney-General of the Commonwealth and of the States, and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court."

65 The Notice of Constitutional Matter specified four matters. They were:

> "1. The first constitutional issue which is said to arise relates to land which is the principal subject of this dispute. The Gunditjmara sovereign people have absolute ownership and title over the aforesaid subject land to the exclusion of all others including the Crown, in all its capacities and guises.
>
> 2. The second constitutional issue which is said to arise relates to the interpretation of and decisions of fact and law concerning the Commonwealth Act 'Bills of Exchange Act' 1909 (Cth), specifically section 51 of the Constitution relating to bills of exchange and promissory notes as the result of tender of payment of promissory notes in full and final satisfaction of alleged loan liabilities, whereby the elite secured loans are secured by mortgage or chattels whereas other loans are unsecured.
>
> 3. The third constitutional issue which is said to arise relates to the question of the jurisdiction and authority of the Supreme Court of NSW to interpret and make decisions of fact and law concerning the Commonwealth Act 'the Australian Bills of Exchange Act 1909 (Cth)'.
>
> 4. The fourth constitutional issue which is said to arise relates to the question of whether the Supreme Court of NSW is a properly constituted court."

66 At the conclusion of the argument on the notice under s 78B, I informed the parties that I was not satisfied that the notice raised any matter which precluded the Court from proceeding to hear and determine the three Notices of Motion which were listed. I indicated that I would give reasons in my final judgment for that conclusion. These are my reasons.

67 It is appropriate to commence with Toohey J's observation in *Re Finlayson; Ex Parte Finlayson* (1997) 72 ALJR 73 at [74]:

> "In terms of s 78B, a cause does not 'involve' a matter arising under the constitution or involving its interpretation merely because someone asserts that it does. That is not to say that the strength or weakness of the proposition is critical. But it must be established that the challenge does involve a matter arising under the constitution."

68 A statement to similar effect had been made by Hunt J in *Green v Jones* [1979] 2 NSWLR 812 at 817:

> "I'm not here concerned with the strength or weakness of the challenge itself. If the challenge is made, and that challenge involves a matter arising under the Constitution, it does not matter in this court whether that challenge is likely to succeed or fail, provided, it seems, that the challenge is bona fide or genuinely made. The issue here, however, is whether the challenge, weak or strong, bona fide or otherwise, involves a matter arising under the constitution."

69 The High Court considered what Toohey J said in *Glennan v Commissioner of Taxation* [2003] HCA 31; (2003) 198 ALR 250 at [14]. There, Gummow, Hayne, and Callinan JJ specifically endorsed the statement of Toohey J to which I have earlier referred.

70 In *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* [1999] FCA 1151; (1999) 95 FCR 292 at [14], French J (as he then was) said:

> "Section 78B does not impose on the Court a duty not to proceed pending the issue of a notice, no matter how trivial, unarguable or concluded the constitutional point may be. If the asserted constitutional point is frivolous or vexatious or raised as an abuse of process, it will not attach to the matter in which it is raised the character of a matter arising under the constitution or involving its interpretation."

71 French J went on to agree with what Toohey J had said in *Finlayson*, saying that:

> "Assertion or non-assertion of a constitutional question is not determinative of the character of the matter."

72 As his Honour said:

> "The mere assertion that there is a constitutional point will not establish that the matter is one arising under the constitution or involving its interpretation."

73

Leeming JA expressed a similar view in *Potier v State of NSW* [2014] NSWCA 359 at [23]:

> "Although ultimately, on one view, Mr Potier's submission amounts to a matter arising under the constitution, there is no obligation to issue notices in accordance with s 78B of the *Judiciary Act* 1903 (Cth). No disrespect is intended, but the assertion of a hopeless point, even if characterised as constitutional, does not attract the operation of s 78B …"

74 Pagone J came to a similar view in *Avetmiss Easy Pty Ltd v Australian Skills Qualification Authority* [2014] FCA 507 at [3], where he said:

> "Section 78B 'only operates when the circumstances it postulates are made to appear to the Court: it does not operate simply because a party asserts those circumstances': *Narain v Parnell* (1986) 9 FCR 479, 489 …"

75 As well, as the Full Court of the Federal Court of Australia said in *Croco v Commonwealth of Australia* [2011] FCAFC 25 at [30]:

> "A constitutional issue does not arise in a proceeding simply because a party contends that it does. It must appear to the Court that a question arising out of the Constitution or involving its interpretation is involved … The constitutional question, identified in a notice given for the purpose of s 78B of the *Judiciary Act* must be framed with 'a reasonably high degree of specificity' …"

76 I formed the view that the first constitutional issue involving an assertion that the land, the subject of the proceedings, was owned by the Gunditjmarra people was not a matter which was capable of being seen as arising under the Constitution. Mr Evans informed the Court that no claim had ever been made to the land by the local indigenous people. He knew of no claim being made or to be made. I am satisfied that this assertion of a constitutional matter is not well-founded.

77 The second constitutional matter dealt with the fact that a court hearing the proceedings was to be called upon to interpret and make a decision about the *Bills of Exchange Act*. No issue arose as to whether the *Bills of Exchange Act* was a valid act of the Commonwealth Parliament. It was not suggested by Mr Evans, or by the ANZ, that the Act was beyond the legislative power or authority of the Commonwealth Parliament.

78 Upon exploration with Mr Evans at the hearing, it appeared that he intended to rely upon the Act to persuade the Court that the documents which he had described as promissory notes were in fact promissory notes within the meaning of the Act. In other words, he was proposing to call in aid the sections of the Act and invite the Court to apply them. Merely seeking the application of an otherwise valid piece of Commonwealth legislation does not, without more, constitute, within the meaning of s 78B of the *Judiciary Act*:

> "a matter arising under the Constitution or involving its interpretation."

79 Courts all around Australia are called upon every day to interpret and apply provisions of Commonwealth statutes. It happens both in civil and criminal proceedings. It is frivolous to suggest that the mere application of an otherwise valid Commonwealth Act by a court involves a matter arising under the Constitution or involving its interpretation. I am not satisfied that this matter is properly raised.

80

The third constitutional matter raised by Mr Evans was whether the Supreme Court of NSW had jurisdiction and authority to make decisions of fact and law concerning the *Bills of Exchange Act*. It cannot be doubted that State Supreme Courts are invested with Federal jurisdiction: see *Judiciary Act* s 39.

81 Accordingly, the capacity of State Supreme Courts to apply a Commonwealth Act is beyond dispute. No constitutional matter arises in this respect.

82 The fourth constitutional matter raises a question as to whether the Supreme Court of NSW is a properly constituted court. The Supreme Court of NSW is constituted under the 1823 Charter of Justice. Any suggestion that it is not a properly constituted court is vexatious. A vexatious contention such as this does not raise a matter under the Constitution.

83 It was for these reasons that I determined that the Court was not obliged to adjourn the matter pursuant to the provisions of s 78B of the *Judiciary Act*, but was able to proceed to a hearing of the substantive dispute.

Striking out and Summary Dismissal – Legal Principles

84 In light of the orders sought in the Notices of Motion filed in these proceedings, it is necessary to set out the applicable legal principles to the striking out of pleadings and the summary dismissal of proceedings.

85 I have elsewhere set out these principles when considering whether to strike out pleadings or to summarily dismiss proceedings. It is useful here to repeat what I have written in, among other judgments, *Young v Hones* [2013] NSWSC 580 at [78] ff and *Rahman v Dubs* [2012] NSWSC 1065 at [36] ff.

Striking Out of Pleadings

86 Rule 14.28 of the Uniform Civil Procedure Rules 2005 ("the UCPR") provides that the Court may strike out a pleading if it discloses no reasonable cause of action or defence, has a tendency to cause prejudice, embarrassment or delay in the proceedings, or is otherwise an abuse of the process of the Court.

87 The function of pleadings is to state with sufficient clarity the case that must be met by a defendant. In this way, pleadings serve to define the issues for decision and ensure procedural fairness by informing a party of the case they must meet: *Banque Commerciale SA v Akhil Holdings Ltd* [1990] HCA 11; (1990) 169 CLR 279 at 286, 296, 302-3. As well, the issues defined in the pleadings provide the basis upon which evidence may be ruled admissible or inadmissible at trial upon the ground of relevance: *Dare v Pulham* [1982] HCA 70; (1982)148 CLR 658 at 664.

88 Proper pleading is of fundamental importance in assisting courts to achieve the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings: s 56 *Civil Procedure Act* 2005; *McGuirk v The University of NSW* [2009] NSWSC 1424 at [24] per Johnson J.

89

As Hodgson JA (with whom Mason P and Handley JA agreed) said in *Kirby v Sanderson Motors Pty Ltd (*2001) 54 NSWLR 135 at 142-143:

> "The requirement for a pleading to state material facts which is to be found in the Rules includes the cause or causes of action which are relied upon. Materiality of facts means how those facts are material to a cause of action."

90 Bongiorno J said in *Gunns Ltd v Meagher* [2005] VSC 251 at 57, in a passage with which, if I may say with respect, I entirely agree:

> "Not only must the pleading inform the defendants of the case they must meet now, but it must clearly set out the facts which the plaintiffs must assert to make good their claim with sufficient particularity to enable any eventual trial to be conducted fairly to all parties. Vague allegations on very significant matters may conceal claims which are merely speculative. If this be not the case, the plaintiffs must put their allegations clearly."

91 As his Honour went on to say,

> "A pleading is embarrassing where it is unintelligible, ambiguous, vague or too general."

92 In *Shelton v National Roads and Motorists Association Ltd* [2004] FCA 1393 at [18], Tamberlin J dealt with the concept of embarrassment, with respect to a pleading, in this way:

> "Embarrassment in this context refers to a pleading that is susceptible to various meanings, or contains inconsistent allegations, or in which alternatives are confusingly intermixed, or in which irrelevant allegations are made that tend to increase expense. ..."

93 As Bryson J (as he then was) recognised in *Northam v Favelle Favco Holdings Pty Ltd* (7 March 1995, unreported), a pleading may be embarrassing if the material facts alleged are couched in expressions which leave difficulties or doubts about recognising or piecing together what is referred to.

Summary Dismissal

94 Rule 13.4 of the UCPR provides that the Court may summarily dismiss proceedings if the proceedings are frivolous or vexatious, no reasonable cause of action of action is disclosed on the pleadings, or the proceedings are an abuse of the process of the Court.

95 In *Dey v Victorian Railways Commissioner* [1949] HCA 1; (1949) 78 CLR 62 at [13], Dixon J said:

> "The application is really made in the inherent jurisdiction of the Court to stop the abuse of its process when it is employed for groundless claims. The principles upon which that jurisdiction is exercisable are well-settled. The case must be very clear indeed to justify the summary intervention of the Court to prevent a plaintiff submitting his case for determination in the appointed manner by the Court ... But once it appears that there is a real question to be determined, whether of fact or law, and that the rights of the parties depend upon it, then it is not competent for the Court to dismiss the action as frivolous and vexatious and an abuse of process."

96 Most recently, in the High Court of Australia, French CJ and Gummow J in *Spencer v The Commonwealth of Australia* [2010] HCA 28; (2010) 241 CLR 118 said at [24]:

> "The exercise of powers to summarily terminate proceedings must always be attended with caution. That is so whether such disposition is sought on the basis that the pleadings fail to disclose a reasonable cause of action or on the basis the action is frivolous or vexatious or an abuse of process. The same applies where such disposition is sought in the summary judgment application supported by evidence ..."

ANZ's Notice of Motion in the ANZ proceedings

97 It is convenient first to deal with the Notice of Motion filed on 22 April 2016 by ANZ in the ANZ proceedings. The principal orders sought in this Notice of Motion are that the Defence filed on 5 February 2016 be struck out, a document entitled "Notice of Payment" filed on 19 February 2016 be struck out, and that the Cross-Claim in these proceedings be summarily dismissed or else struck out. Alternative relief was also sought.

98 It is convenient first to consider Mr Evans' Defence. The first paragraph of the Defence admits the facts and allegations set out in identified, numbered paragraphs of ANZ's Statement of Claim. In respect of paragraph 16 of ANZ's Statement of Claim, those admissions are conditioned. There is nothing objectionable about this paragraph.

99 In paragraph 2 of the Defence, the defendants do not admit three numbered paragraphs of the Statement of Claim. Standing alone, there is nothing objectionable about that pleading. However, particulars are appended to this non-admission which are unnecessary and otiose. They ought be struck out.

100 Paragraph 3 of the Defence, in the first three lines, admits the contents of paragraph 22 of the Statement of Claim, which contains a pleading that default occurred under the three agreements to which earlier reference has been made. Insofar as that paragraph makes such an admission, it is a properly pleaded paragraph. The paragraph goes on, however, to raise the issue of the satisfaction of the debts and discharge of liabilities by the tender of promissory notes.

101 As I have already discussed above at [45]-[54], a promissory note, which is a promise to pay, does not satisfy, let alone extinguish, a debt which exists, even when the promissory note is not accepted. The contents of paragraph 3 of the Defence from the word "… *however, the liabilities of the company …*" to the end of the paragraph do not plead a defence which is known to the law.

102 The argument advanced by Mr Evans that the issuing of three promissory notes to ANZ, which were not returned, constituted repayment of all the outstanding monies to ANZ, being about $1.4M, is plainly absurd. It is a nonsense. There is no principle of law which would permit a person to deliver a promissory note of the kind delivered by Mr Evans in discharge of his liabilities.

103 The second part of paragraph 3 of the Defence is, within the meaning of r 14.28 of the UCPR, a part of a pleading which does not disclose any reasonable defence, and has a tendency to cause embarrassment in the proceedings. It is also an abuse of the process of the Court. This part of paragraph 3 must be struck out.

104 The fourth paragraph of the Defence disputes allegations in identified paragraphs. I take the meaning of the word "disputes" to be the equivalent of a denial. There is nothing objectionable about this paragraph.

105 Paragraph 5 purports to provide particulars of that dispute which includes reference to the tendering of payment by way of promissory notes. For the reasons which I have already given, I am of the opinion that such a proposition is a legal nonsense.

Paragraph 5 should be struck out.

106 Paragraphs 6 and 7 of the Defence deal with the proposition that there are no debts owed by the plaintiff to ANZ because there were no gold or silver coins in common circulation, and that the tender of a promissory note had discharged any liability. These paragraphs do not plead a reasonable defence, are embarrassing and an abuse of the Court's process. They must be struck out.

107 Paragraphs 8, 10, 11, 12, 13, 14, 15, 16, 17 and 24 of the Defence all raise pleadings based upon the promissory note issue with which I have earlier dealt. For the same reasons as I have earlier expressed, none of these paragraphs raise a proper defence and must be struck out.

108 Paragraph 9 of the Defence pleads that the Statement of Claim is deficient and defective. Its manner of expression and the contents of it do not raise a proper defence and are embarrassing. It should be struck out.

109 Paragraphs 18 to 22 inclusive purport to raise defences about the inadequacy of the plaintiff's pleading, and to advance a proposition relating to notices delivered by Mr Evans to ANZ. These paragraphs do not raise any defence known to the law. They have a tendency to cause delay or embarrassment in the proceedings and ought be struck out.

110 Paragraph 23 of the Defence asserts that the plaintiff's claim is vexatious, frivolous and an abuse of the process of the Court. The particulars which support this pleading again rely upon the so-called notices issued by Mr Evans to the Bank. Mr Evans in his particulars says, inter alia:

> "Despite the first defendant directing the plaintiff in writing by way of notices … to provide him evidence to sustain the plaintiff's claim that it was credited to the alleged advances – loans pursuant to the [agreements], in particular that provide an opportunity to examine the original bona fide completed wet ink signature loan applications, the plaintiff failed, refused or neglected to do so."

111 The particulars went on to assert that because ANZ was no longer in possession of the original and completed loan agreements, it is not the defendant's creditor.

112 The particulars do not raise any proper defence. They are embarrassing and ought be struck out.

113 Finally, paragraph 25 of the Defence asserts, as a defence, that ANZ's conduct is unconscionable and in breach of provisions of the "*National Credit Act*" (sic), and banking legislation. The particulars of this defence include:

> "The plaintiff failed, refused or neglected to co-operate and mediate – negotiate privately, but instead immediately sought litigation with relief orders disclosing unconscionable intent to take immediate possession of the first defendant and second defendant's farms and evict them into the street, potentially a commonwealth crime of 'genocide' and 'intent to deliberately inflict conditions of life calculated to bring about physical destruction'."

114 There is no legal obligation standing apart from contract, in the circumstances here, which would oblige ANZ to "*… come to the party with private mediation …*" as is pleaded. This paragraph pleads a defence unknown to the law and by its terms is embarrassing and an abuse of process. It ought be struck out.

115 Given that only a small number of the existing paragraphs withstand scrutiny, it is appropriate that the whole of the Defence be struck out, but that the plaintiff have leave to plead a further Defence limited to the defences raised in paragraphs 1, 2, 3 and 4, to the extent that I have indicated they are permissible, and any other legitimate defence known to the law.

116 It is necessary to consider the orders sought with respect to the Cross-Claim. The Cross-Claim repeats all of the contents of the Defence. It then goes on to articulate the following causes of action:

(a) conspiracy to evict Mr and Mrs Evans and "*deliberate infliction of conditions of life calculated to bring about physical destruction*";

(b) breach of six subsequent not-negotiable contracts;

(c) further breach of mortgage contracts;

(d) unjust and unconscionable contracts; and

(e) accord and satisfaction.

117 It is to be observed that the Cross-Claim pleads the causes of action against ANZ as the first cross-defendant, against three individuals as the second, third and fourth cross-defendants, and against Kemp Strang Lawyers as the fifth cross-defendant. The first individual cross-defendant is the Chief Executive Officer of ANZ, the second individual cross-defendant is a senior officer of ANZ Bank, and the third individual cross-defendant is the solicitor acting for ANZ employed by Kemp Strang, the fifth cross-defendant. Insofar as the Cross-Claim repeats sections of the Defence, the conclusions I have reached with respect to the Defence apply equally to that paragraph of the Cross-Claim.

118 The first cause of action is a form of conspiracy. It is said that each of the cross-defendants engaged in a conspiracy to evict Mr and Mrs Evans from their farms. Particulars are appended to that assertion. The particulars do not support the existence of a conspiracy. The particulars assert that tax liabilities arose which caused the company, Glenevan Pty Ltd, to be placed into liquidation because of its inability to meet them. It is said that the liquidation deprived the plaintiffs of the cash-flow necessary to meet Mr and Mrs Evans' liabilities to ANZ.

119 Even if all of the particulars were proved, they would not be capable of being considered overt acts of a kind sufficient to give rise to the conspiracy pleaded. The pleadings dealing with this cause of action ought be struck out.

120 The next pleading in the Cross-Claim is one which alleged that Mr and Mrs Evans' debts to ANZ were discharged by the proffering of promissory notes. It asserts that ANZ was in breach of a so-called "*not negotiable contract*" with the result that it owed Mr and Mrs Evans a sum in excess of $7M for breach of contract.

121

For the reasons which I have previously articulated, these claims are not a valid cause of action. Their inclusion in this Cross-Claim has a tendency to cause significant delay in the proceedings and, in my view, constitutes an abuse of the court's process. The pleadings for these causes of action should be summarily dismissed because no reasonable cause of action is disclosed: r 13.4 UCPR.

122 The third cause of action is headed "Further breach of the mortgage contracts". This pleading asserts that it would be a breach of the mortgage contracts to evict Mr and Mrs Evans from their properties, and that to evict an allegedly defaulting borrower into the street is "*a breach of the mortgage loan contract, thereby creating a tort*".

123 The pleading goes on to assert that even if default on the mortgages could be proved, ANZ is not entitled to legally enforce the removal of Mr and Mrs Evans from their properties without prior consent from them. The pleading pleads a tort resulting from what is said to be an unlawful or illegal seizure of property for an outstanding debt.

124 The fundamental difficulty with these allegations is that the filed Memorandum of Terms and Conditions of the mortgage discloses that, in the event of a default, ANZ may take possession of any property, manage the property, sell or lease it or do anything which, as the owner of the property, it would be entitled to do.

125 In those circumstances, the mortgagors, here Mr and Mrs Evans, in the event of a default, may be required to give possession of the properties to ANZ. This necessarily means that they would be evicted from possession of the property.

126 The further proposition that ANZ is required to obtain Mr and Mrs Evans consent prior to obtaining possession of the properties is not supported by any principle of law, and it is contrary to the express terms of the Memorandum of the mortgage.

127 This part of the Cross-Claim is legally untenable. There is a clear contract. The terms are not capable of supporting the proposition contended for by Mr and Mrs Evans. Insofar as these causes of action are concerned, they ought be summarily dismissed because no reasonable cause of action is disclosed: r 13.4 UCPR.

128 Paragraphs 24 to 28 inclusive of the Cross-Claim seem to advance various claims pursuant to the *Contracts Review Act* 1980, the *Australian Securities Investments Commission Act* 2001 (Cth), the *National Consumer Credit Protection Act* 2009 (Cth) and the *National Credit Code*. It is put, speaking generally, that the contracts by which ANZ loaned various monies to Mr and Mrs Evans are unjust and unconscionable. The proposition which seems to be the principal basis upon which such allegation is made is that it was known to ANZ by its officers that the amount of the monthly loan repayments for the mortgages required to be made by Mr and Mrs Evans:

> "… was beyond the reasonable financial capacity of [Mr and Mrs Evans] to meet, having regard to the purpose and terms of the loans as the loans were to make available recovery of the cash flow of the farm."

129 It is further put that, as the loans were "*… based only or predominantly on the market value of the properties being and was based thereon …*", it would be unfair or unconscionable to enforce the loans.

130 A further piece of unconscionable conduct that is pleaded is that ANZ elected to pursue litigation against Mr and Mrs Evans rather than engage in mediation or some other form of dispute resolution.

131 These paragraphs raise a potentially available cause of action, namely a pleading of unconscionability or an unjust contract pursuant to the *Contracts Review Act*.

132 The pleadings are unsatisfactory, but I am not prepared to say that there is no possibility that there cannot be a properly pleaded cause of action of this kind. This part of the Cross-Claim should be struck out.

133 Nowhere in the Cross-Claim is there disclosed any proper basis for any claim against the second to fifth cross-defendants, being the individuals, and the law firm Kemp Strang. The pleadings do not articulate adequately, or at all, how those individuals and the law firm have conducted themselves in any way which gives rise to any reasonable cause of action against them.

134 In those circumstances, the Cross-Claim against those four cross-defendants should be summarily dismissed.

135 In summary, with the exception of a possible viable claim by Mr and Mrs Evans against ANZ for relief from unconscionability, or from an unjust contract, the balance of the Cross-Claim does not reveal any reasonable cause of action and ought be summarily dismissed. Insofar as the Cross-Claim seeks to plead a cause of action relating to unconscionability, the pleading is wholly inadequate and ought be struck out.

ANZ's Notice of Motion in the Evans proceeding

136 The Notice of Motion filed by ANZ in the Evans proceedings seeks an order that the proceedings be summarily dismissed or, alternatively, an order that the Amended Statement of Claim filed on 20 April 2016 be struck out. It seeks consequential orders. In considering the relief sought, it is necessary to consider in greater detail the plaintiff's Amended Statement of Claim.

The Amended Statement of Claim

137 The Amended Statement of Claim names the Esanda Finance Corporation Ltd and two other companies in the Esanda Group as defendants. The fourth and fifth defendants are two individuals who are apparently employees of ANZ, and the sixth defendant is ANZ itself.

138 The Statement of Claim pleads the delivery on or about 29 September 2015, of two promissory notes which related to, apparently, the sums of $40,000 and $380,000.

139 The Statement of Claim goes on to plead a cause of action arising out of the "*first contract*". It pleads that accompanying the delivered promissory note was a "*not negotiable contract*". It goes on to plead:

> "7. By agreement in writing settled on 18 September 2015 (first contract) between the plaintiffs and the defendants, the plaintiffs agreed to discharge its liability to the third defendant by delivered a promissory note to the third defendant bearing a sum certain

amount in Australian dollars sufficient to discharge and satisfy the liability.

In consideration of which defendants agreed, as the defaulting parties to the first contract (the defaulters) to:

(a) accept promissory notes in full and final satisfaction against the plaintiff's liability to it such that the liabilities are discharged;

(b) the liabilities are discharged and it relinquishes any further claim against the plaintiffs;

(c) issue within seven days of the date of receiving the first contract a loan release form to the plaintiffs;

(d) deliver to the first plaintiff within 21 days of receiving the tender of payment of the promissory note (tender of payment) from the first plaintiff, an updated current account showing a zero balance as confirmation that the contract loan account is settled in full.

…

(h) pay the plaintiffs an award for its breach of the first contract within seven days of the date of the breach of the contract.

…

(j) pay the plaintiffs (defaultees) an award for breach of contract of a sum certain of $160,000 Australian exactly payable within seven days of such certified default.

…" (sic)

140 The pleading particularises the first contract as a written contract dated 18 December 2015, containing terms and conditions titled "Note" and "Default and Liability Clause and Notice".

141 The pleading goes on to allege a second contract. This pleading is in identical form to that with respect to the first contract, except that the sum claimed for breach of the second contract is $1.525M, and the promissory note which was delivered was in the sum of $380,000.

142 It is further pleaded that the event of default under each of the two contracts was:

> "… when the first plaintiff received written notification from Sarina Roppolo of Kemp Strang, legal advisors for the third defendant on 6 October 2015, that the delivered promissory notes were not accepted by the third defendant in settlement of the outstanding liabilities, and that the pre-existing loans remained outstanding."

143 The plaintiff went on to plead that he issued a demand and that the defendants "*failed or neglected to comply with the Demand*".

144 Evidence of the first contract was provided. The alleged contract is a five page document. The first page is on the letterhead of Esanda, Commercial Collections department, and is addressed to Mr Evans. The subject of the notice is "PAY OUT". It provides details of the customer, the account number, the goods which in this respect was a Mazda sedan motor vehicle, and the payout figure of $34,190.80.

145 The document includes the following statement:

> "Above payout is calculated on the current outstanding balance and is subject to clearance of any funds received in the last seven days. We will have no further interest in these goods upon clearance of payout funds."

146 The details of ANZ are provided for the purpose of payment. The forms of payment permitted are BPAY, payment in person at any ANZ Branch, direct debit on the payment due date and, finally, sending a cheque or money order. That single page document

has been altered by handwritten notes, the placing of stamps and various signatures or initials being placed on it, apparently by Mr Evans. Many of the alterations make no sense at all. Stamped prominently at the top of the page are the words:

> "NOT NEGOTIABLE
>
> NON-TRANSFERABLE
>
> WITHOUT RECOURSE"

147 Further, after the sender's details is the following handwritten statement:

> "ACKNOWLEDGED STATEMENT OF THE TRANSACTION GIVING RISE TO PAYMENT AND ACKNOWLEDGE OFFER TO CONTRACT BETWEEN THE PARTIES DISCLOSED"

148 Attached to this single letter setting out the payout figure for the Mazda motor vehicle are a number of pages of typed terms and conditions. These are all printed, they all bear the same "NOT NEGOTIABLE" stamp to which I have made reference, and include such conditions as:

> "2. Esanda accepts bills of exchange, promissory notes and cheques as payment of debts by different performance such that delivery of such payments instruments discharges all liability against the drawer, maker or signor to the lender.
>
> 3. Upon receiving payment in the form of cash, cheque, promissory note or bill of exchange, Esanda admits to and agrees the liabilities are discharged and it relinquishes any further claim against Glenevan Pty Ltd and Anthony William Evans."

149 The two page document entitled "DEFAULT AND LIABILITY CLAUSE & NOTICE" includes such gibberish as:

> "Due to the original presentment of this legal or formal document in writing not being non-negotiable, (nevertheless drawn up and intended to be executed in technical form or process) it being a statement of the transaction giving rise to the intent of an executed payment being sought, (Public Act 1909 No.27 s8(1-1(c)): and
>
> Notwithstanding the attachment instrument having been begun but apparently not completed (missing several material particulars, including some or all of the Parties being expressed in a representative capacity), this presentment having been accepted for valuable consideration as per the tenor of such terms and indorsements so expressed (*subsequently issued complete with any negativing or limiting one's liability by such indorsements*), as being an 'unqualified offer to Contract between the Parties' so name thereon.
>
> Should this now issued and completed contract with any expiry date of no sooner than the sixteenth day of September AD2065, indorsed 'not negotiable', 'non-transferable', 'without recourse to the maker/Draw/Indorser', sufficiently constituting a simple Contract between the below named Parties '('Contract') subsequently be dishonoured by any of the signatory party hereto named herein, …" (sic)

150 The document concludes on the final page with a rubber stamp above Mr Evans' signature which reads as follows:

> "ACCEPTED FOR VALUE
>
> NOT NEGOTIABLE
>
> NOT-TRANSFERABLE
>
> WITHOUT RECOURSE"

151 An almost identical document exists with respect to the second contract except that it relates to the payout figure for a Kenworth T659 Prime Mover of $293,987.38.

152 It is upon these two documents, neither of which was executed by ANZ, Esanda or either of the individuals named in the proceedings, that the whole of the proceedings commenced by Mr Evans are based.

Discernment

153 I have earlier made reference to the principles concerning summary judgment. I am conscious that summary dismissal of proceedings should only occur in the clearest of cases. That is because a litigant is being denied a full hearing. On the other hand, the commencement of proceedings is not a game to be engaged in without a proper cause of action, and an intention to vindicate a legal right.

154 The entirety of the Statement of Claim in the Evans proceedings is based on an irrational and legally untenable premise. The irrational premise is that a person or party can unilaterally impose a contract upon one or more other parties by producing a five page written document, full of gibberish and legal nonsense, sending it to the other party or parties and then asserting that when the recipients ignore the document, they fall to be bound by its terms.

155 This process of imposing a contract, in the absence of consideration, let alone any conduct on the part of the recipient parties indicating acceptance, is not founded on any principle of law. It is not open to a person in the position of Mr Evans to impose a contract, and contractual terms, on other parties in the way he asserts. The document itself is meaningless.

156 In short, the whole of the Statement of Claim is misconceived, nonsensical, and a waste of the limited public resources invested in the judicial system.

157 On any view, the proceedings commenced by this Statement of Claim meet the description of frivolous or vexatious proceedings, proceedings in which no reasonable cause of action is disclosed, and proceedings which are an abuse of the process of the Court. Accordingly, this Court has ample power under r 13.4 of the UCPR to summarily dismiss these proceedings. That is the only appropriate relief.

The Evans Proceedings: Notice of Motion of Mr Evans

158 In light of the conclusions to which I have come with respect to ANZ's Motions, Mr Evans' Motion does not succeed and ought be dismissed.

159 I note that Mr Evans' Motion sought an order for an "internal investigation" to be conducted within the Supreme Court: see [27]. Even assuming that I have the power to make such an order, no evidence was put before me at the hearing to justify making such an order.

Summary

160 In relation to the Defence in the ANZ proceedings, I have concluded that the Defence ought be struck out in its entirety, but that the defendants be granted leave to re-plead the defences raised in paragraphs 1 to 4 inclusive and any other defence legally available to them, but not any of the defences which have been struck out.

161

In relation to the Cross-Claim in the ANZ proceedings, I have concluded that insofar as the Cross-Claim makes a claim based on the doctrine of unconscionability or the Contracts Review Act, the pleading ought be struck out and the plaintiff be granted leave to re-plead. I have concluded that the balance of the Cross-Claim ought be summarily dismissed. I have further concluded that the Cross-Claim ought be summarily dismissed in its entirety as against the second to fifth cross-defendants.

162 In relation to the Amended Statement of Claim in the Evans proceedings, I have concluded that the only appropriate relief is to summarily dismiss the proceedings.

Costs

163 ANZ has succeeded on both of its Notices of Motion, resulting in Mr and Mrs Evans' pleadings being struck out or summarily dismissed. Accordingly, Mr and Mrs Evans' are to pay ANZ's costs of the Notices of Motion.

Orders

164 I make the following orders:

(1) In proceedings 2016/7453:

(a) Defence filed 5 February 2016 is struck out;

(b) Note that, subject to (g) below, the defendants may re-plead the defences raised in paragraphs 1-4 inclusive of the Defence and any other defence legally available to them, but not any of the defences which have been struck out;

(c) Cross-Claim filed 31 March 2016 is summarily dismissed as against the second to fifth cross-defendants;

(d) As against the first cross-defendant, the Cross-Claim is summarily dismissed save for the claims based on the doctrine of unconscionability or the Contracts Review Act, which are struck out;

(e) Note that, subject to (g) below, the cross-claimants may re-plead the claims referred to in (d);

(f) Defendants/cross-claimants to pay the plaintiffs'/cross-defendants' costs of the Notice of Motion filed 22 April 2016.

(g) Any application for leave to file an Amended Defence or an Amended Cross-Claim is to be made by Notice of Motion which is to be filed and served no later than 4pm on Friday 17 February 2017.

(h) Any such motion is to be accompanied by an affidavit of one or both of the defendants setting out all of the facts, matters and circumstances upon which they rely to support their Amended Defence and/or Amended Cross-Claim.

(2) In proceedings 2016/98172:

(a) Amended Statement of Claim filed 20 April 2016 is summarily dismissed;

(b) Plaintiffs to pay the defendants' costs of the Notice of Motion filed 22 April 2016;

(c) Plaintiffs' Notice of Motion filed 19 July 2016 is dismissed.

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Decision last updated: 12 December 2016