Federal Court of Australia

Stuart v Rabobank Australia Ltd (No 2) [2021] FCA 1626

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| File number(s): |  |
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| Judgment of: | **HALLEY J** |
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| Date of judgment: | 22 December 2021 |
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| Catchwords: | **COSTS** – application for indemnity costs by respondent – where respondent wholly successful in the proceedings and cross-claim – whether special or unusual features present to depart from r 40.01 of the *Federal Court Rules 2011* (Cth) – where credit terms provided contractual entitlement to indemnity costs – whether indemnity costs clauses plainly and unambiguously expressed – where substantial overlap between applicants’ substantive case and the respondent’s cross-claim – whether costs incurred by respondent in defending claims brought by applicants fall within the indemnity costs clauses – application of *ejusdem generis* principle – whether respondent’s costs incurred in the proceedings arose directly or indirectly from entering into Deed with applicants – costs follow the event but not on indemnity basis  |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 43*Federal Court Rules 2011* (Cth) r 40.02  |
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| Cases cited: | *AGC (Advances) Ltd v West* (1984) 5 NSWLR 301*Amlin Corporate Member Ltd v Austcorp Project No 20 Pty Ltd* [2014] FCAFC 78*Bank of Western Australia Ltd v Marsh* [2000] WASC 208*Bendigo and Adelaide Bank Ltd v Grahame (No 2) (Costs Ruling)* [2020] VSC 223*Chen v Kevin McNamara & Son Pty Ltd* [2012] VSCA 229*Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113; [2003] NSWCA 91*Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171*In re Adelphi Hotel (Brighton) Ld; District Bank Ld v Adelphi Hotel (Brighton) Ld* [1953] 1 WLR 955*In re a Solicitor’s Bill of Costs* (1941) 58 WN (NSW) 132*In the matter of an arbitration between Richardsons and M Samuel & Co* [1898] 1 QB 261*Jianshe Southern Pty Ltd (ACN 007 031 905) v Turnbull Cooktown Pty Ltd (ACN 069 894 275) (No 2)* [2007] FCA 903*Kayabram Property Investments Pty Ltd v Murray* [2006] NSWSC 54*Leda Holdings Pty Ltd v Oraka Pty Ltd* [1999] FCA 444*Lend Lease Real Estate Investments Ltd & Anor v GPT RE Ltd* [2006] NSWCA 207*National Australia Bank Limited v Landy Chen-Conway & Anor* [2008] NSWSC 485*Perpetual Trustees Australia Ltd & Ors v Barker* (2004) 232 LSJS 400; [2004] SASC 58*Quadrascan Graphics Pty Ltd as Trustee of the Quad Unit Trust v Crosfield Electronics ANZ Pty Ltd* [1995] FCA 319; BC9507757*Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229; [2001] FCA 1865*R v Regos and Morgan* (1947) 74 CLR 613*Stuart v Rabobank Australia Ltd* [2021] FCA 1388*Swiss Re International Se v LCA Marrickville Pty Limited (Second COVID-19 insurance test cases)* [2021] FCA 1206*The Thames and Mersey Marine Insurance Company, Limited v Hamilton, Fraser & Company* (1887) 12 App Cas 484*Thorman v Dowgate Steamship Company Limited* [1910] 1 KB 410*Walton v National Employers’ Mutual General Insurance Association Ltd* [1973] 2 NSWLR 73*Wong v Hutchinson* (1950) 68 WN (NSW) 55 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 69 |
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| Date of last submission/s: | 24 November 2021 (Respondent / Cross-Claimant) |
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| Date of hearing: | Determined on the papers. |
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| Counsel for the Applicants / Cross-Respondents: | The Applicants did not provide submissions. |
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| Counsel for the Respondent / Cross-Claimant: | Mr S Gray |
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| Solicitor for the Respondent / Cross-Claimant: | Gadens Lawyers |

ORDERS

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|  | NSD471/2021 |
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| BETWEEN: | MARK LINDSAY STUARTFirst ApplicantCATHERINE ENID STUARTSecond Applicant |
| AND: | RABOBANK AUSTRALIA LTDRespondent |
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| AND BETWEEN: | RABOBANK AUSTRALIA LTDCross-Claimant |
| AND: | MARK LINDSAY STUARTFirst Cross-Respondent**CATHERINE ENID STUART**Second Cross-Respondent |

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| order made by: | HALLEY J |
| DATE OF ORDER: | 22 December 2021 |

THE COURT ORDERS THAT:

1. The applicants/cross-respondents pay the respondent’s/cross-claimant’s costs of the proceedings.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

HALLEY J:

# Introduction

1. On 11 November 2021, I delivered judgment in *Stuart v Rabobank Australia Ltd* [2021] FCA 1388.
2. The respondent, Rabobank, was entirely successful in the proceedings but in the course of the final hearing, Mr King, counsel for the applicants Mr and Mrs Stuart, foreshadowed that he would seek an order for indemnity costs in respect of costs thrown away by the alleged late discovery by Rabobank of documents relevant to the resolution of matters in dispute. To permit the parties an opportunity to advance submissions on costs, at the time I delivered judgment I ordered the Stuarts to file and serve written submissions on costs by 18 November 2021, Rabobank to file and serve written submissions on costs by 25 November 2021 and for the Stuarts to file any written submissions in reply by 2 December 2021.
3. The Stuarts did not file any submissions on costs by 18 November 2021 and on 9 December 2021 confirmed that they did not intend to file any submissions on costs.
4. Rabobank filed submissions on costs on 24 November 2021.
5. Rabobank seeks an order under rule 40.02(a) of the *Federal Court Rules 2011* (Cth) (**Rules**) that the Stuarts pay Rabobank’s costs of the proceedings on an indemnity basis. In the alternative, Rabobank submits that costs should follow the event and given that it has been wholly successful, the Stuarts should be ordered to pay Rabobank’s costs of the proceedings.
6. While I accept that costs should follow the event and the Stuarts should pay Rabobank’s costs of the proceedings, for the reasons that follow I am not persuaded that the Stuarts should be ordered to pay Rabobank’s costs on an indemnity basis.

# Rabobank’s submissions

1. Rabobank acknowledges that any agreement between the parties cannot oust the jurisdiction of the Court in relation to the awarding of costs. Nevertheless, it submits that clause P5(a) of the All In One Standard Line of Credit Terms dated September 2008 (**Standard Credit Terms**) providing for indemnity costs should be given effect. That clause provides for the Stuarts to provide an indemnity to Rabobank including the payment of indemnity costs incurred by Rabobank “arising at any time directly or indirectly from: …” the matters set out in sub-paragraphs (i) to (viii) of clause P5(a).
2. Rabobank submits that the approach to issues of this kind is discussed in GE Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) at 485 [15.41] (citations omitted) as follows:

The effect of a clause purporting to entitle a litigant to costs quantified on other than the party and party basis must be understood. As superior courts are vested with a discretion to award costs, the parties cannot oust that discretion by contract. A court that uncritically gives effect to such a term fetters its own discretion. Yet the bulk of authority supports the proposition that, assuming the agreement in question is valid and enforceable, the court ordinarily exercises its costs discretion to give effect to the contractual right. It has been observed, to this end, that ‘it is because contracts are concerned with the allocation of risk that it is appropriate for the court to give effect to the contractual arrangement between the parties’.

1. Rabobank submits that the language of “arising at any time directly or indirectly from” should be given its natural meaning and seeks to rely on how that expression has been interpreted in the context of other commercial arrangements, such as insurance policies. The respondent points expressly to the following examples, submitting that:
2. “arising … from” has been held to be a wider connector than “for” or “based upon”: see *Walton v National Employers’ Mutual General Insurance Association Ltd* [1973] 2 NSWLR 73 at 83 (Bowen JA), cited with approval by Gleeson J (with whom Allsop CJ and Middleton J agreed) in *Amlin Corporate Member Ltd v Austcorp Project No 20 Pty Ltd* [2014] FCAFC 78 at [67]; see also Derrington DK “The Law of Liability Insurance” 3rd ed 2013 at [8.279] and the authorities cited therein;
3. “indirectly” has been held to encompass an expansive causal chain: see *Swiss Re International Se v LCA Marrickville Pty Limited (Second COVID-19 insurance test cases)* [2021] FCA 1206 at [52] (Jagot J).
4. Rabobank submits that its costs arose from, at least indirectly, if not directly:
5. the occurrence of an Event of Default, being the Stuarts’ failure to repay Rabobank (by reference to clause P5(a)(i) of the Standard Credit Terms);
6. Rabobank attempting to exercise its rights arising upon an Event of Default (by reference to P5(a)(i));
7. a claim by the Stuarts that the obligations under the Facility, and the transactions that gave rise to those obligations were void or voidable for the reasons propounded by the Stuarts. Those claims were brought in connection with an amount owing by the Stuarts (by reference to P5(a)(iii));
8. Rabobank entering into the Deed of Forbearance and Acknowledgment in August 2012, being an agreement in connection with the Facility (by reference to P5(a)(vi)).
9. Rabobank contends that the Court should give effect to that contractual arrangement.

# Relevant principles

1. Section 43 of the *Federal Court of Australia Act* *1976* (Cth) confers a broad discretion on the Court to make orders with respect to the payment of the costs of proceedings. It speaks of a jurisdiction to award costs but is to be regarded as a reference to power in aid of jurisdiction rather than a grant of jurisdiction as that term is used in Chapter III of the Constitution: *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229; [2001] FCA 1865 at [9] (Black CJ and French J). In the usual course that discretion would be exercised by an order that costs follow the event and that such costs would be determined on a party and party basis, as agreed or taxed: r 40.01 of the Rules.
2. Although the categories of cases in which indemnity costs may be ordered are not closed, there must be some special or unusual features to be present for a court to depart from the usual practice and make an order for a party to pay costs on an indemnity basis: *Jianshe Southern Pty Ltd (ACN 007 031 905) v Turnbull Cooktown Pty Ltd (ACN 069 894 275) (No 2)* [2007] FCA 903 at [32] (Besanko J).
3. Contractual provisions in documents, including mortgage documents, that provide for the payment of costs on a particular basis have been taken into account in exercising the costs discretion and generally have been given effect: *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171 (***Gomba***) at 194 (Sir Stephen Brown P, Stocker and Scott LJJ).
4. Whether a contract provides a full indemnity for costs, or only an indemnity for costs assessed on a party/party basis, is a question of the proper construction of the relevant provision or provisions. The meaning of any express provision is “a question of interpretation in the particular case”: *Leda Holdings Pty Ltd v Oraka Pty Ltd* [1999] FCA 444 (***Leda Holdings***) at [21] (Burchett J) citing *Re Elders Trustee and Executor Company Limited and E G Reeves Pty Ltd* (unreported, 12 February 1988)(Gummow J)*.*
5. Generally, clauses in mortgage documents providing for mortgagees to be paid their costs are construed *contra proferentem*: GE Dal Pont, *Law of Costs* (LexisNexis Butterworths, 5th ed, 2021) at 558 [15.48]. If parties wish to depart from well-established rules by reason of contractual costs provisions they must express themselves in plain and unequivocal language: *In re Adelphi Hotel (Brighton) Ld; District Bank Ld v Adelphi Hotel (Brighton) Ld* [1953] 1 WLR 955 at 960 (Vaisey J).
6. As Duggan J stated in *Perpetual Trustees Australia Ltd & Ors v Barker* (2004) 232 LSJS 400; [2004] SASC 58 at [22] (with whom Doyle CJ and Anderson J relevantly agreed):

The effect of clauses bestowing such rights on mortgagees will depend upon their interpretation in each case and they will not be given effect so as to place mortgagors in a less favourable position than would otherwise be the case unless they are unambiguously expressed.

1. The indemnity, whether a full indemnity or only for party/party costs, covers only costs which were not unreasonable in nature or amount: *AGC (Advances) Ltd v West* (1984) 5 NSWLR 301 at 305-6 (Hodgson J); *Gomba* at 186.
2. Indemnity costs orders were made by reference to contractual provisions that expressly provided for payment of indemnity costs in *In re a Solicitor’s Bill of Costs* (1941) 58 WN (NSW) 132 (moratorium application by mortgagee); *Edlin v Williams* [1999] QCA 7 (proceedings brought by beneficiary of a guarantee seeking enforcement of a guarantee); *Bank of Western Australia Ltd v Marsh* [2000] WASC 208 at [7] (mortgagee proceedings for possession); *Kayabram Property Investments Pty Ltd v Murray* [2006] NSWSC 54 at [15], [18] (application by mortgagee for issue of a new certificate of title to give effect to an order for rectification of a mortgage); *National Australia Bank Limited v Landy Chen-Conway & Anor* [2008] NSWSC 485 (mortgagee proceedings for possession); and *Bendigo and Adelaide Bank Ltd v Grahame (No 2) (Costs Ruling)* [2020] VSC 223 (mortgagee proceedings for possession).
3. In *Quadrascan Graphics Pty Ltd as Trustee of the Quad Unit Trust v Crosfield Electronics ANZ Pty Ltd* [1995] FCA 319; BC9507757 (Carr J) (***Quadrascan***), the first named applicant (**Quadrascan**) sought damages for misleading and deceptive conduct in contravention of s 52 of the *Trade Practices Act 1974* (Cth) (**TPA**). Quadrascan claimed that representations made to it by the first respondent (**Crosfield**) induced it to enter into a lease of computer graphics equipment (**Equipment Lease**) from the second respondent (**Burnhill**). The applicant sought to rely on that conduct to seek relief from any further liability under the Equipment Lease on the basis that Burnhill was knowingly concerned in, and thus a person involved in, the alleged contraventions of the TPA: *Quadrascan* at 133.
4. The misleading and deceptive conduct claims advanced by Quadrascan were unsuccessful and a cross-claim advanced by Burnhill under the Equipment Lease was successful. The Court made orders for the costs of the proceedings having regard to clause 27 of the Lease. As recorded in *Quadrascan* at 166, the clause provided that:

27. The Lessee must pay:

 …

(b) all costs, expenses, duties and outgoings of or incidental to:

(i) any breach or default by the Lessee under this lease; or

(ii) the exercise or attempted exercise of any right, power, privilege, authority or remedy of the Lessor under or by virtue of this lease,

including but not limited to the cost of registration, repairs, maintenance, servicing or storage of the Goods, the fees of all professional consultants reasonably incurred by the Lessor and legal costs on a full indemnity basis.

1. Burnhill sought an order that it was entitled to all of its legal costs “of and incidental to” Quadrascan’s breach of the Equipment Lease on a full indemnity basis. Justice Carr concluded as a matter of construction that the legal costs incurred by Burnhill in defending the principal application brought by Quadrascan fell outside clause 27(b) and it was therefore only entitled to party and party costs on the application: *Quadrascan* at 166-7. His Honour was satisfied, however, that Burnhill’s costs in respect of its cross-claim fell within clause 27(b) and it was entitled to the payment of those costs on a full indemnity basis: *Quadrascan* at 167.
2. A similar claim for indemnity costs was advanced in *Leda Holdings*. The applicants had unsuccessfully brought a claim against the respondents for, *inter alia*, contraventions of s 52 of the TPA in relation to an alleged inducement to enter into a lease of a shop at a new shopping centre. The respondents/cross-claimants sought indemnity costs against the applicant/cross respondent by reference to indemnity costs contractual provisions in clauses 18.6 and 23.1(b) of the lease and clause 8.6 of in the agreement for lease.
3. As explained by Burchett J at [16]:

Cl 8.6 of the agreement for lease reads:

“The Tenant [Oraka]:

(a) indemnifies the Landlord against any liability or loss arising from, and any costs, charges and expenses incurred in connection with:

(i) an Event of Default; or

(ii) the Tenant's non-compliance with its obligations under a Transaction Document; or

(iii) any payment required to be made under a Transaction Document not being made on its due date,

including, without limitation, liability, loss, costs, charges and expenses on account of funds borrowed, contracted for or used to fund any amount payable under any Transaction Document and including in each case, without limitation, legal costs and expenses on a full indemnity basis or solicitor and own client basis, whichever is the higher ...” (the balance of the clause is not said to be relevant).

Cl 18.6 of the lease reads:

“The Tenant indemnifies the Landlord against any liability or loss arising from, and any costs, charges and expenses incurred by Landlord or any employee, officer, agent or contractor of the Landlord in connection with an Event of Default including, without limitation, legal costs and expenses.”

Cl 23.1(b) reads:

“The Tenant must pay or reimburse the Landlord on demand for:

...

(b) the costs, charges and expenses of the Landlord in connection with any consent, approval, exercise or non-exercise of rights, waiver, variation, release, surrender or discharge in connection with any Transaction Document (including, without limitation, those payable to any independent person appointed to evaluate any matter of concern); and

...

including in each case, without limitation, legal costs and expenses on a full indemnity basis or solicitor and own client basis, whichever is the higher.”

1. The indemnity costs provisions in *Leda Holdings* extended to any costs incurred by the lessor in connection with any exercise of rights in connection with any Transaction Document. The term Transaction Document, as explained by Burchett J at [17], was defined in clause 1.1 of the schedule to the lease to be:

this lease, any document giving rise to this lease, any guarantee or guarantee and indemnity given in connection with this lease, any consent given by the Landlord under this lease, any assignment or transfer of this lease, any instrument which the Tenant acknowledges to be a Transaction Document and any other instrument connected with any of them

1. At [21], his Honour observed that the meaning of any express provision is a question for interpretation in the particular case and that might yield a sufficiently clear meaning on its face without having to resort to the “plainly and unambiguously principle”. His Honour then turned to consider the contractual costs provision and the reasoning of Carr J in *Quadrascan.* His Honour concluded at [22] that:

In my opinion, it would be very difficult to distinguish the present clause 8.6 from the cl 27(b) the subject of the decision of Carr J. Each provision is similarly structured, and the elements of each are virtually the same. Each imposes an obligation in respect of costs – “Lessee must pay ... all costs” (cl 27(b); “Tenant ... indemnifies the Landlord against ... any costs” (cl 8.6). The costs are “of or incidental to: (i) any breach or default by the Lessee under this lease; or (ii) the exercise or attempted exercise of any right ... or remedy of the Lessor under or by virtue of this lease” (cl 27(b); or "incurred in connection with (i) an Event of Default; or (ii) the Tenant's non-compliance with its obligations under [the lease]” (cl 8.6). In each case, “a full indemnity basis” is specified. I do not see a relevant distinction in favour of the cross-claimant between costs “of or incidental to ... any breach or default” and costs “in connection with” a breach of one of the kinds comprehended by cl 8.6. The meaning to be attributed to the words “in connection with” depends on the context, and “they do not usually carry the widest possible ambit”, being subject to that context: *Burswood Management Ltd v Attorney-General (Cth)* (1990) 23 FCR 144 at 146, per Lockhart, Wilcox and Hill JJ, citing an earlier statement of Davies J. The context here is that of a provision imposing a liability to indemnity costs, which requires a clear connection, according to the authorities. Returning to the comparison with cl 27(b), it is cl 27(b) which is the wider, for it extends to the exercise or attempted exercise of a right or remedy.

1. His Honour emphasised at [23] that:

The costs of the principal action were not incurred in connection with any non-compliance with obligations *under* the lease, but in connection with a claim of contravention of a statutory protection which related to the circumstances in which the lease came into existence. Nor were the costs incurred in connection with any repudiation of the agreement for lease; the claim for relief in respect of the lease under s 87 did not involve a repudiation of either the agreement for lease or the lease itself, but an appeal to the Court’s statutory power to relieve against a valid document by reason of the alleged misleading conduct lying behind its execution.

1. An unambiguously worded contractual provision providing for the payment of legal costs on a “special” basis is only a factor informing the exercise of the Court’s discretion, it does not require the discretion to be exercised in a particular manner: *Chen v Kevin McNamara & Son Pty Ltd* [2012] VSCA 229 at [8] (Redlich JA, with whom Maxwell P and Robson AJA agreed).

# Consideration

## Contractual provisions relied upon by Rabobank

1. Rabobank seeks to establish its entitlement to indemnity costs on clause P5 of the Standard Credit Terms. That clause relevantly provides that the following indemnities are to be provided to Rabobank:

**P. General Provisions**

…

5. Account Owner’s indemnities

(a) In addition to the Account Owner’s obligations to pay compensation under clauses I(1) or (2), the Account Owner indemnifies Rabobank against all actions, claims, demands, losses, damages, liabilities, costs, charges or expenses of any nature (including legal costs on a full indemnity basis) suffered or incurred at any time actually or contingently by Rabobank arising at any time directly or indirectly from:

(i) the occurrence of any Event of Default or Rabobank exercising or attempting to exercise any right or option arising upon an Event of Default;

…

(iii) a claim or payment, obligation, settlement, transaction, conveyance or transfer in connection with an amount owing by any Relevant Person to Rabobank (or an amount which would be owing if the claim was not invalid) is void or voidable under any Insolvency Provisions or for any other reason;

…

(vi) Rabobank entering into any agreement or transaction in connection with the Account (including the Facility Agreement); …

(b) The Account Owner’s obligations to indemnify Rabobank under this clause P(5) are absolute, irrevocable and unconditional and continue until an express release is given irrespective of closure of the Account or the discharge of any Security. Rabobank may debit the Account with any amount payable under this clause P(5). The Account Owner waives any right or claim which has or may have the effect of denying, reducing or impairing the indemnities given by it.

1. I accept that clause P5 expressly extends to the “payment of legal costs on a full indemnity basis” and that the language of “arising at any time directly or indirectly”, “arising upon an Event of Default” and “in connection with an amount owing” is of wide import. I also accept that contractual provisions in mortgages and leases expressly providing for the payment of indemnity costs generally have been construed as giving rise to an entitlement to an order for the payment of legal costs on an indemnity basis.
2. Here, the relevant questions are *first*, whether clause P5 on its true construction extends to costs incurred by Rabobank in connection with both defending the claims advanced by the Stuarts in the proceedings and in advancing its cross-claim against the Stuarts. *Second*, to the extent that the clause on its true construction does extend to the costs incurred by Rabobank in the proceedings should the Court, nevertheless on public policy grounds or otherwise in the exercise of its discretion, determine not to give effect to it.
3. Rabobank’s submissions proceed on the basis that all the costs that it has incurred in the proceedings fall within clause P5.
4. It is therefore necessary to identify with some precision the issues addressed in the proceedings and the relative significance and nature of the issues raised in the cross-claim compared with the issues raised in the substantive claims advanced by the Stuarts against Rabobank.

## Issues in the proceedings

1. The Stuarts advanced the following substantive claims against Rabobank in the proceedings:
2. Rabobank made representations that were false and thereby misleading or deceptive or likely to mislead or deceive in contravention of s 12DA of the *Australian Securities and Investments Commission Act 2001* (*Cth*) (**ASIC Act**).
3. Rabobank made representations knowing them to be false or they were made recklessly as to their falsity;
4. Rabobank engaged in unconscionable conduct by providing finance to the Stuarts in breach of its lending, credit and valuation policies and that the finance was unsuitable for the Stuarts, unserviceable by them, financially imprudent, comprised asset lending and was not fit for purpose and that Rabobank took advantage of the Stuarts’ inferior bargaining position in contravention of s 12CB(1)(a) of the ASIC Act;
5. Rabobank breached a binding contract or arrangement reached between them in relation to a proposed carbon farming initiative on *Mt Morris*;
6. the Facility should be reopened as an unjust credit transaction pursuant to s 76 of the *National Credit Code* contained in schedule 1 to the *National Consumer Credit Protection Act 2009* (*Cth*) (**National Credit Code**);
7. the Deed of Forbearance entered into following the mediation conducted on 9 August 2012 (**Mediation**): did not bar or release any claims made by them; is invalid and unenforceable as a result of Rabobank’s alleged financial misconduct; was rendered void by Rabobank making unauthorised alterations; was not entered into pursuant to an authorised dispute resolution scheme; and was an unjust transaction within the meaning of s 76 of the National Credit Code;
8. Rabobank falsely represented that it intended to give serious consideration to an offer received from the Stuarts immediately prior to the Mediation to refinance the Stuarts’ indebtedness to the bank and that the representation was thereby misleading or deceptive or likely to mislead or deceive in contravention of s 12DA of the ASIC Act;
9. Rabobank engaged in unconscionable conduct at the Mediation and thereafter, *inter alia*, by placing undue pressure and/or duress upon the Stuarts to sign the Deed of Forbearance in contravention of s 12CB(1)(a) of the ASIC Act; and
10. Rabobank is precluded from relying on the limitation periods advanced by Rabobank in its defence on the grounds that the Stuarts’ claims are based in fraud or deceit or otherwise because each is a cause of action that has been fraudulently concealed, in that each wrongful act was not reasonably discoverable and fully appreciated by the Stuarts prior to June 2018.
11. Rabobank advanced the following claims in its amended statement of cross-claim:
12. the Stuarts are in default under the Facility and that although it has served a valid demand for payment of all amounts outstanding (together with accrued interest), the Stuarts have failed to pay the amounts demanded and Rabobank has thereby suffered loss and damage;
13. Rabobank contends that, independently of the Breach of the Facility claim, the Stuarts are obliged to indemnify Rabobank pursuant to the indemnity contained in the Standard Credit Terms. This includes indemnity against any losses that Rabobank has suffered as a result of the Stuarts’ defaults, Rabobank’s costs of exercising its rights pursuant to those defaults and any losses that Rabobank may suffer as a result of the Stuarts bringing this proceeding; and
14. the Stuarts made misleading or deceptive representations to it in relation to loan applications they made in May 2008 and May 2010, six Rabobank letters of offer between June 2008 and June 2010 and the mortgage that the Stuarts provided to Rabobank over *Mt Morris* in June 2008, and thereby engaged in misleading or deceptive conduct in contravention of s 12DA of the ASIC Act.
15. The hearing of the proceedings occupied 18 sitting days. The majority of the hearing was devoted to the claims advanced by the Stuarts, more particularly, the three alleged representations comprising the misleading and deceptive conduct and deceit causes of action that also gave rise to significant elements of the unconscionability claims. The minimal focus on the cross-claim was highlighted in Rabobank’s closing written submission in which only four out of 255 paragraphs were directed at the cross-claim. Those paragraphs were limited to the following submissions:

**The Bank’s Cross Claim**

*Is the debt claimed under the Cross Claim proved?*

252. The Bank brings a cross-claim in respect of the amount owing to it under the AIO Facility ([1]-[19]) and a claim for contractual indemnity ([20]-[27]) and a claim for misleading or deceptive conduct ([28]-[69]).

253. Although the Stuarts’ filed defence to the cross claim, in effect, puts in issue every paragraph within the cross-claim it appears that the heart of the defence are the matters set out in the 2FASOC. As those matters are addressed above they will not be repeated here.

254. As permitted under clause 4.6 and 21 of the AIO Facility conditions of use (A30 1270) (incorporated by the June 2010 LOO (A30 1999)) the Bank has issued a statement of indebtedness (R15). The statement of indebtedness is signed by Mr Ole, a person whose title includes the word “manager”. The statement identifies the debt as being $2,972,705.42 as at 31 March 2021.

255. In light of these matters, it is unnecessary for the Court to determine the claim for contractual indemnity and the claim for misleading or deceptive conduct.

## Potential application of indemnity in clause P5(a)(i)

1. I consider first the reliance by Rabobank on clause P5(a)(i) of the Standard Credit Terms. The clause is relevantly directed at costs arising directly or indirectly from the “occurrence of an Event of Default” and the “exercise or attempted exercise” of any right arising upon an Event of Default.
2. To my mind, consistently with the effect of the reasoning by Carr J in *Quadrascan* at 166-7 and Burchett J in *Leda Holdings* at [23], I consider that there is a fundamental distinction between costs incurred in connection with proceedings to enforce entitlements under a mortgage or a lease, such as proceedings for possession following default, and substantive claims advanced by a mortgagor or a lessee against a mortgagee or lessor for misleading and deceptive conduct, deceit, unconscionable conduct or contraventions of credit legislation.
3. In that context, I consider that the contractual costs provisions in *Quadrascan* and *Leda Holdings* are substantially to the same effect to the contractual costs provisions relied upon by Rabobank in clause P5(a)(i).
4. In *Quadrascan*, clause 27(b) extended to all costs “of and incidental to” either “any breach or default” by the lessee or “the exercise or attempted exercise of any right, power, privilege, authority or remedy of the Lessor under or by virtue of” the lease. It expressly extended to “legal costs on a full indemnity basis”.
5. In *Leda Holdings*:
6. clause 8.6 of the agreement for lease extended to any costs, charges and expenses incurred “in connection with” an Event of Default, non-compliance and payments required to be made, including legal costs and expenses on “a full indemnity basis or solicitor and own client basis, whichever is the higher”;
7. clause 18.6 of the lease extended to “any liability or loss arising from” and any costs, charges or expenses incurred by the lessor “in connection with”, an Event of Default; and
8. clause 23.1(b) of the lease extended to the costs, charges and expenses of the lessor in connection with a broad range of matters “in connection with any Transaction Document” including in each case, without limitation, “legal costs and expenses on a full indemnity basis or solicitor and own client basis, whichever is the higher”.
9. The costs incurred by Rabobank in resisting the claims advanced by the Stuarts in the proceedings were not costs incurred in connection with any non-compliance with the Stuarts’ obligations under the Stuart’s facilities with Rabobank but rather, with the exception of the relatively insignificant carbon farming contractual claim, were incurred in connection with claims concerned with contraventions of statutory protections: see *Leda Holdings* at [23].
10. A further and related difficulty with Rabobank’s unqualified expansive approach to the operation of clause P5(a) is that it would lead to the surprising conclusion that, even if the Stuarts had otherwise succeeded on their principal claims for contraventions of statutory protective provisions and deceit, the parties’ objective intention was that the Stuarts would have to pay Rabobank’s costs on an indemnity basis. Such a result would clearly be contrary to public policy and otherwise lead to an absurd result — that Rabobank would be entitled to rely on its indemnity in clause P5 to recover from the Stuarts any damages, compensation or costs awarded against it on the basis that such amounts arose “at any time directly or indirectly” following an event of default, or from Rabobank seeking to exercise any right or option arising upon an event of default.
11. Clause P5(a)(i) cannot be relied upon by Rabobank to establish an entitlement to an order that its costs incurred in defending the claims advanced by the Stuarts be paid on an indemnity basis. I address subsequently in these reasons the position in relation to the cross-claim.

## Potential application of indemnity in clause P5(a)(iii)

1. Clause P5(a)(iii) encompasses costs incurred in connection with claims that payment obligations are void or voidable under any “Insolvency Provisions” or for “any other reason”. There is no equivalent to this clause in the contractual indemnity costs provisions in *Quadrascan* and *Leda Holdings*.
2. For the reasons that follow I am satisfied that the costs incurred by Rabobank in defending the claims advanced by the Stuarts in the proceedings do not fall within the costs indemnity in clause P5(a)(iii).
3. The rationale for inserting general words into contracts, such as “for any other reason” was explained by Lord McNaghten in the context of the extent of coverage provided by a marine insurance policy in *The Thames and Mersey Marine Insurance Company, Limited v Hamilton, Fraser & Company* (1887) 12 App Cas 484 at 501 as:

The question is, was the loss which resulted from this mishap covered by the policy or not? The policy contained the common clause describing the risks which the underwriters were content to bear. The clause begins in the usual way by specifying certain particular cases,—perils of the seas and other well-known risks,—to which the indemnity was to extend. Then follow general words apparently providing for every conceivable loss or misfortune that could happen to the subject-matter of the insurance.

It was not contended that the mishap in question fell within any of the particular cases enumerated. The argument turned on the effect of the general words. According to the ordinary rules of construction these words must be interpreted with reference to the words which immediately precede them. They were no doubt inserted in order to prevent disputes founded on nice distinctions. Their office is to cover in terms whatever may be within the spirit of the cases previously enumerated, and so they have a greater or less effect as a narrower or broader view is taken of those cases.

1. The term “Insolvency Provision” is defined in the Standard Credit Terms in these terms:

**Insolvency Provision** – means any law relating to insolvency, sequestration, liquidation, or bankruptcy (including any law relating to the avoidance of conveyances in fraud of creditors and of preferences, and any law under which a liquidator or trustee in bankruptcy may set aside or avoid transactions) and any provision of any agreement, arrangement or scheme, formal or informal, relating to the administration of any of the assets of any person;

1. I am satisfied that the definition of “Insolvency Provision” provides a “genus” for the application of the *ejusdem generis* principle and a specific context in which to construe the meaning of “any other reason” in clause P5(a)(iii) of the Standard Credit Terms: see *R v Regos and Morgan* (1947) 74 CLR 613 at 624 (Latham CJ); *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113; [2003] NSWCA 91 at [126] (Spigelman CJ).
2. As Spigelman CJ, with whom McColl and Basten JJA agreed, explained in *Lend Lease Real Estate Investments Ltd & Anor v GPT RE Ltd* [2006] NSWCA 207 at [30]:

The general principle of the law of interpretation that the meaning of a word can be gathered from its associated words – *noscitur a sociis* – has a number of specific sub-principles with respect to the immediate textual context. The most frequently cited such sub-principle is the *ejusdem generis* rule. The relevant sub-principle for the present case is the maxim propounded by Lord Bacon: *copulatio verborum indicat acceptationem in eodem sensu* – the linking of words indicates that they should be understood in the same sense. As Lord Kenyon CJ once put it, where a word “stands with” other words it “must mean something analogous to them”. (*Evans v Stevens* (1791) 4 TR 224; 100 ER 986 at 987. See also W J Byrne (ed) *Broomes Legal Maxim* (9th ed) Sweet and Maxwell, London (1924) pp373-374.)

1. In *Wong v Hutchinson* (1950) 68 WN (NSW) 55 at 57 (Owen J) the relevant provision in a contract for the sale of goods excluded liability for delay or non-delivery:

resulting from restrictions imposed by any Government on the transport of or trade in the commodity or from any other cause beyond the control of the sellers.

1. The Court found that the general words “or from any other cause” should be read as applying to causes *ejusdem generis* with “governmental restrictions on transport or trade”, citing the decisions of *In the matter of an arbitration between Richardsons and M Samuel & Co* [1898] 1 QB 261 (***Richardsons***) (AL Smith, Rigby and Collins LJJ) and *Thorman v Dowgate Steamship Company Limited* [1910] 1 KB 410 (***Thorman***) (Hamilton J).
2. *Richardsons* concerned a ship, the *Nanshan*, that was chartered to load oil from Batoum. The charterparty excepted, among other things, “strikes lock-outs accidents to railway” and “other causes beyond the charterer’s control”. It subsequently transpired that oil could not be brought to Batoum due to floods, and the factory workmen were discharged. When oil was once again supplied, and the workmen brought back in smaller numbers and after some delay, other ships were loaded with oil before *Nanshun*: *Richardsons* at 262-4. The Divisional Court held that the plaintiffs were entitled to recover damages on the footing that the *Nanshun* should have commenced to load the oil on April 17, when a sufficient quantity of oil had arrived at Batoum. On appeal Smith LJ found that, contrary to the submissions of the appellant, the clause in the charterparty could not be “intended to cover all acts of the agent which he has carried out for his own purposes”: at 266. His Lordship noted that “there must be some limitation put upon these words, otherwise the words that precede would be mere surplasage”: at 266. His Lordship found that the clause must be read as “covering exceptions *ejusdem generis* with those that precede it—that is, matters that deal with the impossibility of getting the oil to the port and into the ship” and dismissed the appeal: at 267( Rigby and Collins LJJ agreeing at 267-8).
3. The decision of the Court of Appeal in *Richardsons* was followed in *Thorman*, in which the ship *Aldgate* was charted to load a cargo of coal at Hull within 120 hours on conditions of usual colliery guarantee, including lock-outs and delay on the part of the railway company supplying the coal, or “any other cause beyond the charterer’s control”. The *Aldgate* arrived and gave notice of readiness to load on 23 July, but was not loaded until 1 August due to other ships arriving before her. Justice Hamilton stated that the *ejusdem generis* rule is a canon of construction only, and the object is to find the intention of the parties: *Thorman* at 416. His Honour found that the cause of the delay (loading the other ships first) was not a matter of *ejusdem generis* within the antecedent exceptions and that the charterer was therefore liable for demurrage: at 423-4.
4. To construe “any other reason” as effectively “at large” would on the objective theory of contract impute to the parties an intention that clause P5 would require a mortgagor to pay, and on an indemnity basis, costs incurred by a mortgagee in seeking to resist any claim by the mortgagor that a mortgage was void or voidable, independently of an Insolvency Provision, as defined, or a reason of a similar character.
5. In the absence of clear and unambiguous language from which such an objective intention of the parties could be identified, both the *ejusdem generis* and the *contra proferentem* rule would preclude such a construction. The reference in Clause P5(a)(iii) to “any other reason” must be construed in the context of the matters falling within the definition of “Insolvency Provision”.
6. Clause P5(a)(iii) does not provide a basis for Rabobank to seek the payment of its costs of the proceedings on an indemnity basis.

## Potential application of indemnity in clause P5(a)(vi)

1. Clause P5(a)(vi) of the Standard Credit Terms is relevantly directed at “any agreement” that Rabobank entered into “in connection with” the Stuarts’ facility. In *Leda Holdings*, the cost indemnity included costs in relation to “Transaction Documents” and clause 1.1 of the schedule to the lease provided that the term extended to “any other instrument connected with any of them”.
2. Unlike the positon in *Leda Holdings*, clause P5(a)(vi) is concerned with “entering into” an agreement rather than the “exercise of rights” in relation to an agreement. I do not consider, however, that in substance there is any meaningful difference between the two expressions. Costs incurred in exercising rights *under* an agreement would appear to be readily capable of being characterised as costs arising *from* entering into an agreement. In both cases there must be an extant agreement.
3. Rabobank seeks to support its claim for indemnity costs by submitting that the Deed of Forbearance is an agreement that falls within clause P5(a)(vi).
4. I accept that the Deed of Forbearance would constitute an agreement “in connection” with the Stuarts’ Facility. The more relevant question, however, is whether Rabobank’s costs that it has incurred in the proceedings arose directly or indirectly from it entering into the Deed of Forbearance.
5. Rabobank sought to rely on the release in the Deed of Forbearance as an answer to the claims advanced by the Stuarts in the proceedings. As explained above, the Stuarts sought to challenge the releases on the basis that: the Deed of Forbearance was invalid and unenforceable as a result of Rabobank’s alleged financial misconduct; was rendered void by Rabobank making unauthorised alterations; was not entered into pursuant to an authorised dispute resolution scheme; and was an unjust transaction within the meaning of s 76 of the National Credit Code.
6. In substance, the proceedings were concerned with disentitling conduct that preceded entry into the Deed of Forbearance rather than costs incurred by Rabobank following entry into the deed. I consider the approach and reasoning outlined above in *Quadrascan* and *Leda Holdings* is equally applicable to the attempt by Rabobank to seek indemnity costs by relying on its entry into the Deed of Forbearance and clause P5(a)(vi).
7. Rabobank’s reliance on clause P5(a)(vi) is misplaced. It cannot support its claim for indemnity costs.

## Costs of the cross-claim

1. I turn now to consider the costs incurred by Rabobank in connection with the cross-claim.
2. The proceedings were principally concerned with the claims advanced by the Stuarts. As acknowledged by Rabobank in its written closing submissions, at the “heart of the Stuarts’ defence to the cross claim” were the issues that they raised in the application and statement of claim. The principal evidence in support of the cross-claim was the statement of indebtedness, the only potential challenge being whether the senior officer who had signed the statement was a “manager”, which was addressed by the tender of a revised statement of indebtedness from an officer of Rabobank with the formal title of manger. No substantive attention was devoted to the alleged misleading conduct on the part of the Stuarts pleaded in the cross-claim and the only other issue raised in the cross-claim, independently of the matters raised in the Second Further Amended Statement of Claim, was the contractual claim for indemnity, relevantly now limited to the costs of the proceedings.
3. I accept that in the ordinary course and consistently with the approach taken by Burchett J in *Leda Holdings* at [27] with respect to provisions in a lease, the Court would give effect to a plainly and unambiguously expressed contractual provision in mortgage documentation providing for the payment of indemnity costs, but this is not such a case. Here, given the extent of the interrelationship between the claims advanced by the Stuarts and their defence to the cross-claim, an order that the Stuarts pay Rabobank’s costs with respect to the cross-claim would be inherently problematic. Any attempt to isolate anything other than relatively insignificant costs incurred in respect of the cross-claim would be artificial and fail to do justice between the parties. The reality is, these proceedings were concerned with the substantive claims raised by the Stuarts. If the Stuarts failed to establish those claims then it would necessarily follow that Rabobank would succeed on its cross-claim.

## Stuarts’ foreshadowed late discovery indemnity costs claim

1. The Stuarts have not advanced any submissions in support of their foreshadowed application for indemnity costs in respect of the alleged late discovery of material documents. The Stuarts were expressly given an opportunity to advance the claim but chose not to make any submissions on costs.

# Disposition

1. Rabobank has been successful on all issues in the proceedings and is entitled to an order that the Stuarts pay its costs of the proceedings but for the reasons outlined above, not on an indemnity basis.

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| I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Halley. |

Associate:

Dated: 22 December 2021