District Court

New South Wales

Case Name:	McFarland & Anor v Common Australia Pty Ltd
Medium Neutral Citation:	[2018] NSWDC 489
Hearing Date(s):	23 – 24, 30 – 31 August 2018; 3 – 7 September 2018
Date of Orders:	7 September 2018
Decision Date:	7 September 2018
Jurisdiction:	Civil
Before:	Neilson DCJ
Decision:	(1) Verdict and judgment for the defendant against the plaintiff on the statement of claim. (2) Verdict for the cross-claimant against the first cross-defendant Mervyn Christopher McFarland in the sum of $71,732.38. (3) Verdict and judgment for the cross-claimant against the second cross-defendant Wendy Ann Miller for $13,406.38.
Catchwords:	CIVIL – CONTRACT – MORTGAGE – VENDOR FINANCE – Defendant sold rural land to the plaintiffs and provided a loan of $100,000 to the plaintiffs to be repaid by three equal annual instalments, secured by a requested first mortgage – Default by plaintiffs – Defendant enters into possession of land – Property offered for sale by public auction Whether plaintiffs had a statutory claim against defendant under Conveyancing Act 1919 section 111A(4) Whether plaintiff's had a statutory claim under the

National Credit Code – Issues discussed:
(a) what was the credit contract;
(b) was the contract for the personal, domestic or household purposes of the plaintiffs;
(c) whether the contract was incidental to any other business of the defendant

Claim by plaintiffs that defendant converted possessions to its own use – Chattels and fixtures left by plaintiffs on the land – No manifestation of any intention of the defendant to keep chattels adversely in defiance of the plaintiffs rights to the chattels

Cross-claim by defendant for losses sustained by the defendant because of default under the mortgage

Cross-claim by defendant for trespass to defendant's sheep – Claim for loss of stock and loss of profit

Legislation Cited:

Civil Liability Act 2002
Conveyancing Act 1919
National Consumer Credit Protection Act 2009
Real Property Act 1900

Cases Cited:

Avery v Saree Holdings Ltd; Lava Ltd v Avery [2012] NSWSC 463
Bank of Queensland Limited v Dutta [2010] NSWSC 574
Cambridge v Anastasopoulos [2012] NSWCA 405
Dale v Nichols Constructions Pty Ltd [2003] QDC 453
Jonsson v Arkway Pty Ltd and Anor [2003] NSWSC 815
Knowles v Victorian Mortgage Investments Ltd & Anor [2011] VSC 611
Kuwait Airways Corporation v The Iraqi Airways Company & Ors [2002] UKHL 19
Lauvan Pty Limited & Anor v Bega & Ors [2018] NSWSC 154
Mattinson v Multiflow [1977] 1 NSWLR 368
Penfolds Wines Pty Limited v Elliott (1946) 74 CLR 204
Pipicella v Stagg (1983) 32 SASR 464
Sanderson v Dunn (1911) 32 ALT (Supp.) 14; 17 ALR (CN) 9
Smith v Cook (1875) 1 QBD 79

Category:	Principal judgment
Parties:	Mervyn Christopher McFarland (First Plaintiff/Cross-Defendant) Wendy Ann Miller (Second Plaintiff/Cross-Defendant) Common Australia Pty Ltd (Defendant/Cross-Claimant)
Representation:	Counsel: Mr A Fronis (Plaintiffs/Cross-Defendants) Mr C Simpson (Defendants/Cross-Claimants) Solicitors: A Ace Solicitors (Plaintiffs/Cross-Defendants) Blue Ocean Law (Defendants/Cross-Claimants)
File Number(s):	2016/310131
Publication Restriction:	Nil

JUDGMENT

The plaintiffs buy rural land

1 HIS HONOUR: On 28 March 2014 the defendant conveyed to the plaintiffs that piece or parcel of land which can be described as Lot 10 DP 751520. The parties have conveniently described Lot 10 DP 751520 as, "Lot 10," and I shall hereafter do so. Some 18 months after that conveyance the land was offered for public auction. For that purpose a number of advertisements were placed in press, as well as online, by a real estate agent, Mr Stephen Alford of Alford & Duff trading as First National Tenterfield.

2 The advertisements describe Lot 10 as being in Roberts Range via Mountain Creek Road, Tenterfield. The substance of each advertisement is this:

> "Tenterfield Creek Lifestyle
>
> • 192.6 hectares (476 acres) of undulating trap rock country with steeper ridges

• Located approximately 50 kilometres West of Tenterfield via the Bruxner Highway

• Permanent water is the key feature with a terrific 2.5 kilometre frontage to Tenterfield Creek, five gullies, springs and alluvial creek flats suitable for cultivation

• Recreational lifestyle block with great fishing holes ideally suited to fishing enthusiasts

• Adjoins the Queensland/New South Wales border and Sundown National Park

• Sound grazing block with a carrying capacity of approximately 35 breeders or 400 dse

• Fenced into one paddock with fencing in fair to good condition

• The motivated vendor wants this property sold!

3 It would appear from the evidence before me that it was the, "recreational lifestyle block," aspect of this property which brought it to the attention of the plaintiffs. Prior to its being conveyed by the defendant to the plaintiffs, Lot 10 had been part of the property owned by the defendant, known as, "Jackals Hide." The defendant company was incorporated on 9 September 2004 by Mr Rodney James Middleton. At all material times Mr Middleton was the sole shareholder, sole director and secretary of the defendant. Jackals Hide was part of a property owned by Mr Middleton's parents which needed to be sold at the passing of his parents so that it could be divided between Mr Middleton and his siblings. I note that according to the ASIC records Mr Middleton's original address was, "Mt Pleasant Station, Darthula Road, Tenterfield." Exhibit RJM-1 to Mr Middleton's affidavit (exhibit 4) shows the position of Lot 10 vis-á-vis Jackals Hide after Lot 10 had been conveyed to the plaintiffs. I note that Mt Pleasant Station is shown on the left-hand side of the plan which is RJM-1 and that was land described by Mr Middleton as belonging to his sister.

4 After Lot 10 was conveyed by the defendant to the plaintiffs, Jackals Hide consisted of at least three, and perhaps more, parcels of land. It comprised Lot 12 in DP 751520 and may have included Lot 11 in that deposited plan. It also comprised Lots 13, 14 and 15 in DP 789006. Lot 10 is on the northern bank of Tenterfield Creek as is Lot 12 in the same deposited plan. Lots 13, 14 and 15 in DP 789006 are all on the southern bank of Tenterfield Creek. The defendant's business was twofold. According to Mr Middleton at all material times one business was the production of mutton and lamb, that is essentially

grazing sheep, and the other business was the provision of a recreational area and services associated with bow hunting, camping and fishing. Those activities can be succinctly described by the acronym, "BCF."

5 A pro forma of the terms and conditions for those using Jackals Hide recreationally is exhibit RJM-4. Hunting on Jackals Hide was restricted to bow hunting but crossbows were not permitted - obviously any form of firearms also not permitted. The conditions of access were these:

> "(a) Hunting parties (one party only at a time) have the entire property (Jackals Hide only) to themselves (no alternative hunting/fishing/camping parties will be booked at the same time as a hunting party).
>
> (b) Fishermen have access only to the river area and should be prepared to share the property with other fishers/campers.
>
> (c) Campers have access only to the campsite and adjacent area however, if they pay the fishing fee this can be extended to the river area in its entirety.
>
> (d) Hunters cannot book if campers and and/or fishers are booked."

It can be seen, accordingly, that if Jackals Hide were used for bow hunting only one party of hunters was permitted to use the property at the time, obviously a safety feature for those who were hunting. To suggest that the - that Jackals Hide may have been, "swarming," with bow hunters at any one time is simple hyperbole but there has been much hyperbole in this case.

6 Exhibit RJM-5 and exhibit 7 are a copy of a map which was given to those using Jackals Hide. The area known as Lot 10 has been marked on that map as, "Lease." A large number of fishing holes and features have been marked on the map. It is clear that any land between Lot 10 and Lot 12 in DP 751520 forms part of Jackals Hide.

7 After a disastrous flood the defendants fell into financial difficulties. Mr Middleton listed the property for sale with Mr Alford in 2012. He set the sale price at a non-negotiable $250,000. According to Mr Middleton's affidavit the

defendant was not desperate to sell the land but was prepared to wait in order to achieve the price desired.

8 In January 2014 the plaintiffs expressed a desire to purchase the property. Before they purchased the property Mr McFarland had visited the property on three occasions and his de facto wife, the second plaintiff, Ms Wendy Ann Miller, had visited the property on one occasion. On two of the three occasions that he visited Lot 10, Mr McFarland did so in company with Mr Middleton. Mr Middleton then introduced Mr McFarland to the real estate agent in Tenterfield. He was not named by Mr McFarland in his evidence but I understand it was the same real estate agent who later auctioned the property in 2015, Mr Alford.

Vendor finance and "lease back"

9 The plaintiffs had difficulty raising the money to purchase Lot 10. According to Mr Middleton, this occurred:

> "23. On 11 January 2014 the Plaintiffs expressed a keen desire to purchase the land. There were two other interested parties at the time attempting to raise finance but the plaintiffs told me they would purchase the land outright and pressed me to make a decision. The other parties could not raise the finance by 20 January 2014 so I, 'shook hands,' with the Plaintiffs.
>
> 24. However, on 21 January 2014 the plaintiffs told me, in words to the effect, that they were (suddenly) unable to extract their funds from a, 'large investment,' that they were, 'tied up,' with and now required to reduce their initial outlay.
>
> 25. I negotiated for the next three days and finally agreed to their request for a short-term vendor finance loan of $100,000. Even though the documents provided for repayment over 36 months, they told me they would pay off the loan before the end of the year so I provided it interest free…"

10 Later the plaintiffs advised Mr Middleton that they needed to reduce their outlay even further. Mr Middleton then discussed the matter with Mr Alford. Mr Alford told tMr Middleton that it was common to offer a lease back option on a farm sale. Mr Alford told Mr Middleton that that assisted the purchaser to buy the property by reducing the sale price and the vendor as although he received a reduced return, it gave the right to the property's continued use for an agreed period of time equivalent to the rate for a lease. There were then negotiations between the plaintiffs and Mr Middleton and eventually Mr Middleton agreed to

reduce the purchase price by $40,000 in return for a five year lease back to enable him to continue grazing sheep on the land. Mr Middleton believed that a yearly rental of $8000 was considered to be generous to the plaintiffs and in his view was more than twice that or the next highest lease value of similar property in the area. In his affidavit at [34] Mr Middleton provided examples of other leases in the area.

11 The evidence does not permit me to find when contracts for the sale of Lot 10 were exchanged. At [40] of his affidavit Mr Middleton told me that the plaintiffs signed the contract on 19 February 2014 and he signed the contract on behalf of the defendant on 28 February 2014. It is common ground that settlement occurred on 28 March 2014. On 31 March 2014 the plaintiffs executed a mortgage under the *Real Property Act 1900* in favour of the defendant.

12 The mortgage was duly registered on the title. There are only three clauses in the mortgage. They are these.

> "1. The mortgagor will repay to the mortgagee the principal sum by three (3) equal instalments each in the sum of THIRTY-THREE THOUSAND THREE HUNDRED AND THIRTY-THREE DOLLARS AND THIRTY CENTS ($33,333.30) the first of which shall be made on the 31 day of December 2014, the second on the 31 day of December 2015, and balance shall be paid on the 31 day of December 2016.
>
> 2. In the event of any instalment not being made on the due date or within twenty-eight (28) days thereof the balance of the principal then outstanding shall become immediately due and payable.
>
> 3. The interest rate is fixed at 8% per annum however this interest will be waivered [sic] as agreed in accordance with Special Condition 22 of the Contract for the Sale of Land dated 28 February 2014 provided that the instalments are made on the due date or within seven (7) days thereof. If not the mortgagee may call for interest upon any late payment computed from the due date to the date of payment in full at the rate of 8% per annum and any moneys paid by the mortgager to the mortgagee will be applied firstly in payment of interest (if any) and secondly in the reduction of the principal."

13 Special Condition 19 of the contract for the sale of the land by the defendant to the plaintiffs concerns "Depasturing of stock." The condition is this:

> "The vendor has the right to stock the property with cattle for a period of five (5) years from the date of settlement."

No formal agreement relating to this provision for agistment was executed at the time of settlement. Subsequently the defendant asked the plaintiffs to execute a formal lease of Lot 10 back to the defendant but they refused to do so and they refused to do so rightly. If the plaintiffs had executed a lease in favour of the defendant, the defendant would have been permitted to exclude the plaintiffs themselves from the land during the period of the lease but that was never the intention of Mr Middleton or Mr McFarland or Ms Miller. However, Mr Middleton could have properly requested the defendants to enter into a written agistment agreement but that was never attempted.

14 The right of agistment given to the defendant by the plaintiffs in the contract for sale of the land must accordingly be governed by the common law rather than any written agreement. Of course the common law will infer terms into the agreement reached for the defendant to agist its stock on the plaintiffs' land. If there be any express provision concerning the defendant's right to depasture stock on Lot 10 after it was conveyed to the plaintiffs, it is contained in a statement made by Mr Middleton to the plaintiffs during the negotiations concerning the reduction in the price of the land in return for the lease back:

> "38. I told the plaintiffs during these negotiations, in words to the effect, that "leasing the land back to me for sheep grazing will restrict what you can do on the land" and "a sheep flock needs a lot of maintenance so you will frequently have me and others coming on to your land to tend the flock". They told me, in words to the effect, that they were "not concerned about that at all"."

15 As I have earlier mentioned the conveyance of Lot 10 to the plaintiffs was completed on 28 March 2014. It was not long until strife arose between the plaintiffs and the defendant. The strife first arose on 4 April 2014.

The plaintiffs caretaker

16 There is another relevant actor in the story underlying the present proceedings. That actor is Mr Paul Giess whose name has often been misspelt as Geiss in the evidence. Mr Giess swore an affidavit on 6 March 2018 which became exhibit C in these proceedings. Mr Giess gave evidence before me on 30 August 2018 and 31 August 2018. In his affidavit Mr Giess referred to himself as, "the caretaker of Lot 10 when it was owned by the plaintiffs." Mr Giess can be described as a, "colourful," character. A photograph of him is exhibit RJM-9.

According to Mr Middleton, Mr McFarland told him that Mr Giess was Mr McFarland's, "best mate." He also told Mr Middleton that Mr McFarland and Mr Giess had, "attended school together in Ipswich." Exhibit RJM-9 is a photograph of Mr Giess bare-chested. He has tattooed above his right mamilla a large swastika. He is bearded and moustached and has long flowing locks coming from underneath a beanie. He is otherwise heavily tattooed. When Mr Giess gave evidence he had clearly visited a barber shortly beforehand and was appropriately coiffed and dressed. He is a tall man, albeit that he appeared to have some spinal difficulty when he entered the witness box. Suffice to say that the man shown on exhibit RJM-9 is a tall man whose presence would be daunting to anybody who confronted him. Paragraph [46] of Mr Middleton's affidavit is this.

> "Mr Giess is a heavy drinker and, 'pot,' smoker and rode a Harley Davidson motorcycle. I have witnessed him indulge in these activities on many occasions."

The admission of that piece of evidence was not objected to.

Credibility

17 At this stage it is necessary for me to say a number of things concerning credibility. Reluctantly I have to state that I found the evidence of Mr McFarland neither reliable nor honest. With more reluctance I had to state that I found some of the evidence of Ms Miller unreliable but that may well be explicable by the grave difficulties which she had in 2014 which clearly would have preoccupied her and may have rendered her memory of some events in early 2015 unreliable. The evidence of Mr Giess was also unreliable and at times dishonest. On the other hand, I have no hesitation in accepting what Mr Middleton has told me. He was intimately concerned with what was going on at and near Jackals Hide. He sold Lot 10 reluctantly, parting with land that had once belonged to his family but he needed to do so in order to maintain the viability of the rest of Jackals Hide and to provide an improvement on the property, a house in which he and his de facto wife could live. They were living at all relevant times in a caravan on Jackals Hide. Mr Middleton had been a sheep grazier for 40 years at the time he gave his evidence.

SHORT ADJOURNMENT

18 I am about to make some observations about the credibility of the witnesses. One will recall that I quoted special condition 19, which gave the defendant a right to stock the property with "cattle." However, the defendant did not have a herd of cows. The property, Jackals Hide, had only been used to graze sheep. That is an historical fact. Mr Middleton told me that the defendant had about six head of cattle but they were dairy cattle, which were kept on his sister's property as his sister had dairy bails so that the dairy cattle could be milked. When asked whether the defendant only had sheep, Mr McFarland said that the defendant had cattle. He also said that Lot 10 was not fenced for sheep.

19 Part of the plaintiffs' original case was that the defendant had no right to agist sheep on the property because the contract referred to "cattle." However, that was inconsistent with an admission made by lawyers formerly acting for the plaintiffs, inconsistent with a letter from Messrs Jennings & Kneipp, Solicitors at Tenterfield, who wrote to the solicitors for the defendant on 22 July 2014 in the following terms:

> "We refer to your letter of 4 July, 2014 and have now received instructions from our clients that they do not agree to enter into a lease agreement with your client.
>
> We confirm that the Agreement between the parties is that the Vendor has the right to stock the property for a period of five (5) years from the date of settlement. We are instructed that your client currently has sheep and cattle on the property in accordance with the Agreement."

20 The point made by Mr McFarland which he had taken in these proceedings represents "bush lawyering". The Shorter Oxford Dictionary, Fifth Edition, establishes that the English word "cattle" is cognate with the English word "chattel" and its primary meaning is merely "property". It has a subsidiary meaning of "personal property" and a subsidiary meaning of "chattel". The second meaning assigned to the word is "livestock" and then a subsidiary meaning of “animals of the genus *Bos*”, but also a subsidiary meaning of “livestock, (in stables) horses”. It also has been used in the past to describe “vermin” and “insects”. The primary meaning of “cattle” is any form of livestock. That is consistent with well-established, albeit now antique, law. There existed

at common law the tort of cattle-trespass. Higgins, Elements of Torts in Australia, 1970, says this under the heading "What are Cattle?":

> "In the context of cattle-trespass, the term 'cattle' is not confined to bulls, oxen and cows but extends to goats, swine, sheep, domestic fowls, geese, ducks, turkeys and even horses and asses."

The learned author goes on to point out that it has been held not to apply to cats, but there is dispute on the case law as to whether it includes dogs. It has been held in England by the English Court of Appeal that it does not apply to dogs but it has been held by the Full Court of the Supreme Court of Victoria that it does apply to dogs. In short, the word “cattle” is apt to describe animals of the genus *Ovis* as well as the genus *Bos*.

21 If Mr McFarland had visited the property on three earlier occasions, he must have known that the defendant ran sheep and not cattle. The evidence that Mr McFarland gave about the defendant having cattle and that the property was not fenced for sheep is just mendacious. Mr McFarland also said on oath that the defendant was trying to sell its sheep at $20 per head. That is also untrue. Indeed, there would be absolutely no reason for the defendant to try to sell sheep at that price as in 2016 the defendant was able to sell its ewes for $90 a head and wethers for $78.60 per head. Indeed, in December 2010 the defendant had paid $180 per head for ewes which were either with lamb or heavily pregnant. The idea of selling such stock for $20 per head is risible. Again, on 30 August 2018, when giving evidence in Sydney, Mr McFarland said that the property was not fenced for sheep or for cattle but it was clearly fenced for sheep.

22 He also said on oath that he was the only person who discharged any firearm on his property, but that is inconsistent with the evidence not only of Mr Middleton but also of another witness, Mr Janson, and is inconsistent with admissions that Mr McFarland made to Mr Middleton about Mr Giess discharging a firearm on or about 4 April 2014.

23 Mr McFarland, when cross-examined, admitted that he had been living at Hatton Vale for four or five years. That was the evidence he gave to me in Lismore on 23 August 2018. However, when giving evidence in Sydney about

the contents of his caravan, the conversion of which is the subject of one of the plaintiffs' claims, he said that, essentially, he had been rendered homeless and had moved all his goods and chattels into the caravan on Lot 10. The two pieces of evidence are quite inconsistent.

24 A further piece of mendacity can be found in Mr McFarland's affidavit. Paragraph [15] of Mr McFarland's affidavit is this:

> "While I was not aware at the time, I have now come to learn that on 17 March 2015 the defendant took possession of my property and sold it on the basis that the mortgage was not paid. I accept that I did not pay the first instalment of $33,333.30 due under the mortgage."

In [18] of the same affidavit Mr McFarland said this:

> "I never received any default notice, was provided no opportunity to rectify the default, nor provided any notice about the exercise of the power of sale or that there was to be an auction."

Exhibited to Mr Middleton's affidavit are default notices addressed to both the first plaintiff, Mr McFarland, and the second plaintiff, Ms Miller. They purport to be given pursuant to s 57(2)(b) of the *Real Property Act 1900* and s 111(2)(b) of the *Conveyancing Act 1919*. Each is addressed to the plaintiffs at Lot 22 Woolshed Creek Road, Hatton Vale, Queensland. That is an address that was supplied to the defendant by the plaintiffs' former lawyers. Each bears the date 10 February 2015, but it appears that one of them was sent on the following day. The relevant part of Mr Middleton's affidavit is this:

> "104. On 10 and 11 February 2015 the first default notices were issued, one to Mr McFarland…and one to Ms Miller…
>
> 105. After on response was received on 26 February 2015, the defendant sent a second round of notices to both Mr McFarland and Ms Miller by registered post to their business/Post Office Box address (signature required). Exhibit RJM-44 is a copy of the screenshot of the Australia Post tracking system showing both notices having been 'delivered' at 13:35pm on 27 February 2015."

Exhibit RJM-44 does establish delivery at the Ipswich Post Office on 27 February 2015 at 13:35.

25 On 17 March 2015 the defendant as mortgagee entered into possession of the land. A notice of entry into possession of land bears date 17 March 2019. The following is stated by Mr Middleton in his affidavit:

> "106. Once again, the plaintiffs ignored the default notices and failed to make any payment to the defendant. On 17 March 2015 the defendant forwarded repossession notices and cover letters to Mr McFarland, Ms Miller and Mr Giess. I placed a notice in Mr Giess's mailbox personally.
>
> 107. I also placed repossession notices on all gateways into the property and on the 'Right of Carriageway' (ROC), a total of six notices, changed the padlocks and notified the neighbours.
>
> (a) Exhibit RJM-45 is a copy of the repossession notice, cover letter and accompanying attachments.
>
> (b) Exhibit RJM-46 is a photograph of the notice taped to the ROW gate at 15:20 on 17 March 2015.
>
> (c) Exhibit RJM-47 is a security camera photograph, of an acquaintance of Mr Giess (while Giess awaits in his vehicle, registration plate 734 REY), removing the possession notice from the gate at 18:59 on 17 March 2015…"

Exhibit RJM-50 to Mr Middleton's affidavit is a letter from A Ace Solicitors of Ashgrove in the State of Queensland, those currently acting for the defendant, bearing date 19 March 2015. It commences thus:

> "We act for Wendy Miller and Mervyn McFarland.
>
> Our clients have just been handed a Notice stating that they are in default of their mortgage repayments to your client.

> Your client would be aware that our client has been chasing bank account details so that they can commence making repayments, since well before Christmas."

For each of Mr McFarland and Ms Miller to state that they had never received a notice is absolute mendacity.

26 Furthermore, the last sentence of that letter which I quoted raises another issue. There are, in evidence, (exhibit RJM-38) a number of screenshots taken from Mr Middleton's telephone. On the left-hand side are communications sent by Mr McFarland and on the right-hand side are the response messages sent by Mr Middleton. Mr McFarland admitted, receiving all of the messages from Mr Middleton but for the last one. The last message sent by Mr McFarland was sent on 4 November 2014 at 2.13pm. It is this:

> "By the way, I need your account details for the payment on the 31st of next month, BSB and Acc number and send them through when ever I will keep them on file."

The response which Mr Middleton said he sent is this:

> "Merv, don't even think about trespassing onto our property brandishing firearms, you will be arrested and your guns seized…Acc name, Common Australian Pty Limited, bsb [provided] ac [provided]."

I accept Mr Middleton's evidence that he sent that message. He sent that on 4 November 2014 at 4.14pm, a minute after Mr McFarland sent his message. It is clear that Mr Middleton had provided the requisite banking details to Mr McFarland and for Mr McFarland to have instructed his solicitors that he had been "chasing bank account details so that they can commence making repayments since well before Christmas," was untrue. He had requested them once, they had been provided, and on Mr McFarland's own admission in evidence, he had made no attempt after 4 November 2014 to obtain the banking details of the defendant. The reason when he did not chase them, as he had told his solicitors, was because Mr Middleton had already provided them to him. In this and many other ways, the evidence of Mr McFarland can be found to be wholly unreliable and at many times, patently dishonest.

27 The evidence of Ms Miller was brief, but also suffers from one defect and that concerns the notices. Paragraph [4] of her affidavit is this:

> "I never received any notices regarding the sale of our land at Lot 10, Mountain Creek Road, Tenterfield NSW…nor any notices that would give us the opportunity to rectify the default but I do remember him putting padlocks onto the gate to restrict our entry onto the Land including a lock on the main carriageway, which is common property that should be accessible to everyone (especially as it is the main fire escape for a number of lots)."

I accept that each of the plaintiffs was served with a default notice and was provided with the notice of entry into possession. Ms Miller did admit that the post office box to which the notices were sent was one that she and Mr McFarland used.

28 The unreliability of Mr Giess's evidence can be clearly seen when one considers the evidence of Mr Ross Janson. Mr Janson is a person who is independent of the parties. He lives at Torquay on Hervey Bay in Queensland. On any rural property, it is necessary to control vermin. In his affidavit, Mr Middleton said this:

> "15. Predator control in the flock is an essential management process. Around the land, the principal predators were:
>
> (a) Wild dogs - canis familiaris (killers of sheep of all ages)
>
> (b) Foxes, European Red (killers of lambs up to three weeks of age)
>
> (c) Feral pigs - sus scrofa (killers of lambs of all ages).
>
> 16. Main methods of control the defendant uses are:
>
> (a) '1080' (poison) meat and ejector capsule baiting;
>
> (b) Human deterrents (presence);
>
> (c) Professional hunting contractors.
>
> Baiting is the least effective method because all predators prefer live kills to cold bait.
>
> 17. More usually, contractors are hired to facilitate flock management, including deterring and despatching (if possible) predators as I am unable to

maintain the workload on my own. Firearms use is prohibited on Jackals Hide so professional hunting contractors are commissioned to do this work.

18. Contractors (and any other willing associate) are also used to maintain a vigil on the flock, report the condition of the flock and create the presence that deters predators."

29 Mr Janson is a professional hunter. He went to Jackals Hide with his son and Mr Wayne Kruger on Thursday 3 April 2014. This incident which involves Mr Giess has sometimes been described as the “two and a half men” incident. Mr Janson's son was turning 13 and for his birthday wished to accompany his father and his father's friend to Jackals Hide and it is clear that this was an arrangement that was convenient to both Mr Middleton and Mr Janson and Mr Kruger. There was an episode that was usually described in another jurisdiction as "back scratching". Mr Middleton permitted Mr Janson and Mr Kruger and Mr Janson's son to camp on the land and hunt predators in return for their not charging him. He gave a free "holiday" to Mr Janson and Mr Kruger; in return, they hunted predators as part of entertaining Mr Janson's son. Mr Janson's affidavit contains this matter:

"2. On [Friday] 4 April 2014 at about 7.30am we were on the land known as the 'Lease' [Lot 10], where the company’s sheep grazed, by instruction of the manager of Jackals Hide, Rod Middleton.

3. A large man with tattoos approached us in a loud vehicle. I later learned this man's name was Paul Giess.

4. This was intimidating and aggressive. He told us we were trespassing on the property and to 'get off'. He threatened us and said he would 'shoot' us if he saw us there again.

5. We immediately left the land and located Mr Middleton. Mr Middleton telephoned the owner of the land. The owner agreed it was the company's right to be on the 'Lease' so, we returned. [Mr Janson admitted in evidence that the last sentence was hearsay.]

6. At about 9am Mr Giess returned in his vehicle and we saw him commence firing a gun from the vehicle. He discharged the weapon at least five or six times as we fled in fear of harm - my son was only 12 years old.

> 7. We advised Mr Middleton of the incident. He instructed us not to return to the 'Lease' and we did not.
>
> 8. The next morning at about 8am, Mr Giess drove, unwelcomed, into our campsite on Jackals Hide and again informed us that the 'Lease' was private property and to 'stay off'.
>
> 9. We had no intention of returning to the 'Lease' but we were quite distressed by all of this so we packed up and left Jackals Hide at about 10.30am on the morning of 6 April 2014. We have not returned since."

30 Mr Janson was required for cross-examination and gave evidence in Lismore. I have no hesitation whatever in accepting Mr Janson's evidence. It has been criticised by learned counsel for the plaintiffs in that if Mr Janson and Mr Kruger and Mr Janson's son were in fear, why did they stay at Jackals Hide on Saturday 5 April after they were confronted by Mr Giess at about 8am at their campsite? If they were so distressed, they would have left straight away and not waited until the following morning. However, on the 5th, Mr Giess did not threaten to shoot them, nor was there any evidence that he confronted them with a firearm on that occasion. I accept that they would have been camping at any one of a large number of places on Jackals Hide, one of the many campsites identified on exhibit 7. Mr Giess denied discharging the firearm, as deposed to by Mr Janson, but I accept Mr Janson's evidence and reject the denial of Mr Giess.

31 I trust that those remarks are sufficient to draw the attention of both parties, and anyone who reads this judgment once it has been transcribed, as to why I do not accept Mr McFarland and Mr Giess, and although her evidence is limited, why I cannot accept the averment on oath of Ms Miller that she did not receive any notice.

Conflict arises

32 As I said at [15], the relationship between the plaintiffs and the defendants started going amiss on 4 April 2014, shortly after the conveyance was completed.

LUNCHEON ADJOURNMENT

33 The events of 4 April 2014 are also described by Mr Middleton in his affidavit. It is important to note that antecedent to the defendant's conveying Lot 10 to the plaintiffs bad blood had arisen between Mr Middleton and Giess. In his affidavit Mr Middleton said this:

> "48. In March 2014 it was discovered that Mr Giess was stealing equipment from Jackals Hide by inadvertently mentioning during a conversation at a local wedding of friends, being in possession of my de-facto partner's ladder, that had previously and mysteriously gone missing.
>
> 49. On 21 March 2014 I found Mr Giess trespassing on Jackals Hide. My de facto partner was present. We both confronted him about the trespass and also requested return of the stolen equipment. He immediately became aggressive and made excuses; he told me he removed the equipment from the property because he didn't think the equipment belonged to us but rather to some of our, (in his words) 'dickhead mates.'
>
> 50. At that point, the defendant banned Mr Giess from Jackals Hide and ceased any association with him.
>
> 51. Mr Giess threatened us with vengeance and, I believe, has nurtured an enduring grudge ever since."

34 Of the incident 4 April 2014 Mr Middleton said this:

> "53. On 4 April 2014 it was reported to me in person, at about 10am by Ross Janson (professional hunting contractor) that Mr Giess had earlier that morning at about 9am orally harassed and intimidated him and his assistants whilst they were performing a, 'Walk through,' on the land (at my request) checking the welfare of the sheep and looking out for potential predators. He told me that Mr Giess then left the land. At about 9.30am he returned with a firearm and discharged it at or within their vicinity. He told me they had fled in fear of their lives.
>
> 54. I met Mr Giess on his way out of the land and attempted to talk to him but he was very belligerent and, 'raved on,' about his banishment from Jackals Hide. He spat in my face and reeked of alcohol and marijuana and, with one hand on the steering wheel of his vehicle, the other on a long arm gun which was laying on his lap, he said something like,

> 'That's Merv's land and I'm the caretaker and you ain't goin' on it…you cunts keep out, that's private property…Merv's my best mate, I'm looking out for him…you send any cunt on Lot 10, there won't be no talkin', it'll be shoot to kill…'"

35 There was a meeting between the plaintiffs and Mr Middleton and his de facto wife on 20 April 2014 that had been arranged by Mr Middleton. In his affidavit Mr Middleton said that this was the heart of the conversation at that meeting:

> "Mr McFarland said,
>
> '…[Giess] said the bloke who owns the property [McFarland] and his sons and his mates are all shooters and come Easter time there's going to be shells flying around the place so if you know any mates coming down at Easter time, I suggest that you let 'em know because there's gonna be bullets flying around the place everywhere.' … and that's what Paul told me."

The following was also alleged to have said:

> "… cause I said whose gun was it, mate, and he [Giess] said, …
>
> 'because if these people do go to the coppers you're all going to get done for unlicensed firearms and being unlicensed yourselves…'"

36 Mr McFarland also told Mr Middleton that Giess had admitted to him that he had discharged a gun twice at the back of Lot 10 and Mr McFarland admitted that Giess ought not to have done that and Mr McFarland told Mr Middleton that he had told Giess that he should not have done that. In other words, there is a clear admission made by Mr McFarland that Giess had admitted to Mr McFarland discharging the firearm.

37 One of the unsatisfactory things about the evidence of Mr McFarland about this issue is that he would not accept that the defendant retained professional hunters to kill predators using bows. He appears to have an a priori view that that was not how professional hunters acted but that was exactly how Mr Janson and Mr Kruger were acting on 4 April 2015. Furthermore, it is not an objection which he took at the meeting on 20 April 2014. He appears to have accepted that the defendant had retained professional hunters to try to control predatory beasts on the property.

38 The next relevant event which can be fixed in point of time was the attempt by Mr Middleton to have the plaintiffs execute a formal lease. That is referred to in [91] of Mr Middleton's affidavit and in [92] he recites that on Anzac Day 2014 at about midday, as Mr McFarland was leaving the property, he said to Mr Middleton that, "He's ain't goin' nowhere." Apparently, Mr Middleton hoped that by the plaintiffs' executing the lease he could keep Mr Giess off Lot 10 but that it appears to have been one of the reasons that the plaintiffs had for not executing the lease, but, as I have earlier mentioned, they were not obliged to do so in any event.

39 On 13 May 2014 Mr Middleton entered onto Lot 10 in order to mark lambs. Paragraph [67] tells me that on that day at 6am Mr Giess and Mr McFarland were not on Lot 10 so Mr Middleton entered the property, mustered the sheep into the yards for the flock's six week (mid-term) lamb marking operation. According to stock records kept by the defendant 182 lambs were marked at that time. Mr Middleton's affidavit goes on to state this in [64]:

> "I noticed quite a few dead sheep in the paddock while I was mustering stock. Notably, I found a number of sheep lying dead in a group, something I had never seen before. I was unable to explain any of the deaths and foul play never crossed my mind. The dead animals had not been attacked by predators and all appeared otherwise healthy. The carcases were no longer bloated and the fleece had, 'slipped,' but the frames were not yet, 'collapsing,' therefore I had assessed that they had been dead for about a week."

In his oral evidence Mr Middleton told me that he did not approach this group of dead sheep closely, for obvious reasons of hygiene, and obviously because of stench. However the beasts would appear to have been otherwise healthy and all dying in a group might suggest that they had been shot. The cause of death for that group of sheep has not been ascertained.

40 On 30 June 2014 Mr McFarland and Mr Giess were not on Lot 10 so between 6am and 8am Mr Middleton mustered the flock on Lot 10 and brought it into the yards on Jackals Hide. He ensured that there were no, "stragglers," remaining on Lot 10 because this was the time of year in which it was necessary to drench the entire flock of sheep. However the headcount for the total flock was only 195 beasts.

41 Allowing for natural increase as at 30 June 2014 there ought to have been 464 ewes, 182 wethers and 11 rams. At the mustering of the flock there were only 139 ewes, 46 wethers and 10 rams. There were losses of 325 ewes, 136 wethers and 1 ram. Mr McFarland in oral evidence conceded that there would be some, "natural predation," of up to 6% per annum which, over a three month period, would represent 1.5% loss. Allowing for natural predation the defendants' flock had lost 320 ewes, 134 wethers and one ram. In a cross-claim filed by the defendant the defendant claims the loss of stock from the plaintiffs who are also cross-defendants.

42 There are photographic exhibits annexed to Mr Middleton's affidavit which show pictures of dead sheep taken in May and June 2014. They only display, as far as I understand it, 17 dead beasts.

43 One of the reasons why Mr Middleton took the flock from Lot 10 is an event that occurred on 15 June 2014. This is described in [100] of Mr Middleton's affidavit. On 15 June 2014 at 12.10pm there was a conversation between Mr Middleton and Mr McFarland over the telephone. Mr Middleton referred to this as another occasion on which it was reiterated that the defendant through its servants or agents could not enter the property. Mr Middleton said that Mr McFarland told him that he did not have to do anything, that Mr Giess was the plaintiffs' caretaker and he was on the plaintiffs' property to keep, "everyone," out and Mr McFarland pointed out to Mr Middleton that there was no lease and that he did not have “any rights to the land", which is quite inconsistent with the agistment agreement.

Default under the mortgage

44 The next relevant event is the failure of the plaintiffs to pay the instalment of $33,333.30 payable on 31 December 2014. Mr McFarland said that he had explained to Mr Middleton that his de facto, Ms Miller, was gravely ill and that he was in financial straits because of his need to stay out of work and care for Ms Miller. Mr McFarland said in evidence that Mr Middleton told him that it would be all right if he were unable to make the repayment on 31 December 2014 but he would still have to pay the interest accruing on the unpaid instalment. Mr Middleton said that exchange did not occur prior to 31

December 2014 and I accept his evidence in that regard. Furthermore, what Mr McFarland said is inconsistent with his asking Mr Middleton for the banking details to enable payment of the instalment and Mr Middleton's giving him the relevant details in the telephone message exchange of 4 November 2014 to which I have earlier referred. Clearly, at that time, Mr McFarland must have been intending to make the payment.

45 According to Mr Middleton's affidavit the defendant received no communication from either of the plaintiffs at all, so on 16 January 2015 he contacted his then solicitors in Inverell inquiring as to whether payment had been made to them. The solicitor at Stuart, Cook & Braham, Mr Roger Braham sent an email to Mr Middleton on 20 January 2015 at 5.35pm. The email is this:

> "Sorry I haven't replied earlier. I did get your email but as you would probably realise the first couple of weeks after the office has been closed for two and a half weeks is flat out. Notice will have to be given to the mortgagor of intention to repossess et cetera. It is in a position then to pay up with penalty interest if any. If he doesn't then proceedings can be taken."

In other words, this email confirms that antecedent to 20 January, the defendant through Mr Middleton had been in contact with its solicitors concerning the unpaid instalment.

46 The default notices which are dated 10 February 2015 were issued not by Mr Braham but by Messrs Davis Lawyers of Ashgrove in the State of Queensland. It is clear that the notice of entry into possession was posted by that firm to the plaintiffs at their Post Office box in Ipswich, Queensland on 17 March 2015. What never happened was any payment made to or on behalf of either of the plaintiffs to the defendant in satisfaction of the default notices or any attempt to diminish the Plaintiffs' liability to the defendant.

47 That led to the defendant's entering into possession of the land or attempting to do so after 17 March 2015. Notwithstanding the defendant's purported entry into possession, the plaintiffs still attended the property over the Easter weekend in 2015. Good Friday on that year was 3 April 2015 and Easter day was clearly 5 April 2015. The relevant piece of Mr Middleton's affidavit is this:

"116. On 4 April 2015, I watched (and videocaptured) Mr McFarland and others use an electric grinder and portable generator to cut the locks and chains off a gate and 'break in,' to the land. They also ripped off the 'Entry into Possession' notice as they proceeded.

117. I was repairing fences at the time and as they entered, they sped toward me so I fled and contacted the police. Exhibit RJM-51 is a still picture extracted from the video of Mr McFarland cutting off the lock and chain with a grinder and generator. Exhibit RJM-52 is a still picture extracted from the video of Mr McFarland ripping off the possession notice.

118. Mr McFarland and others also trespassed through Lot 17. I telephoned the owner, Stuart Morgan, who told me that he was too fearful to approach them to tell them to 'leave' his land. They 'broke' into the land at the position marked with a blue C in the red circle on the title plan are the portions that made up ‘Jackals Hide’ [Refer exhibit RJM-1].

119. Mr McFarland, Mr Giess and others traversed the entire boundary of the land and cut every single lock and chain of every gate they came across. They left behind (in the dwelling) a large pile of broken locks and pieces of chain. They roamed the land spotlighting and shooting all night, every night for three nights and drove in and out of the land all day every day for three days.

120. I sent my de facto partner away from the farm due to the dangerous situation and stayed up all night with every night remaining vigilant.

121. The police maintained, 'it was a civil matter,' and refused to intervene.

122. On 7 April 2015 at 10.30am, Mr McFarland and others vacated the land.

123. On 8 April 2015 at 6am I tentatively entered the land to inspect it. I found quite a few dead sheep and rubbish everywhere. Exhibits RJM-53 and 54 are copies of photographs of some of the dead sheep and rubbish as are exhibits RJM-35 and 36 to which I have previously referred."

This Easter weekend was the last occasion on which the plaintiffs visited Lot 10.

48 As ought be clear from what I said earlier, Mr Alford was retained to sell the land at public auction. Paragraph 36H of the amended statement of claim filed by the plaintiffs is this:

> "Further, or alternatively, the Defendant breached the duty owed to the Plaintiff pursuant to the *Conveyancing Act 1919* s 111A and/or at common law as:
>
> (b) The auction was not advertised to the general public.
>
> (c) The auction was held in a location called, 'TBC Auction Room,' but no address was advertised for this auction room.
>
> (d) The, 'TBC Auction Room,' does [not] exist on any map or internet search engine, even if further defined - even if further defined [sic scil. refined] to Tenterfield, NSW.
>
> (e) The auction was not held in a public place.
>
> (f) The auction was not held on the property so that it could be inspected.
>
> (g) The property was sold to an associate and family friend of Mr Rodney Middleton being Mr Krecic."

I am not here dealing with any legal issues but factual issues. Each of the particulars given under s 36H of the pleading is factually incorrect and that is yet another way in which the evidence of the plaintiffs can be seen as being untruthful.

49 Paragraphs [127] and [128] of Mr Middleton's affidavit are these:

> "127. On 22 May 2015, given the right under the *Real Property Act 1900* section 58, we advised all parties the land would go to auction on 4 July 2015 if the default remained unserviced.

> 128. However, on 26 June 2015 I elected to postpone the auction until 26 September 2015 and allow the plaintiffs an additional three full months to rectify the default."

Mr Middleton was not challenged to say that the notice to which he had referred in [127] in his affidavit was not given.

50 The sale of the property was advertised by Mr Alford in the Tenterfield Star, the Northern Star, the Country Leader and the Southern Downs News Weekly. One hundred brochures were printed. The sale of the property was featured in internet sites, in particular, domain.com and realestate.com. At the commencement of these reasons I used one of the advertisements to describe Lot 10. When the property was advertised inspections were offered by appointment. An advertisement in the Country Leader on 31 August 2015 told those reading the advertisement that the property was to be auctioned on Saturday 26 September 2015 at 10am at the Tenterfield Bowling Club. An advertisement published in the Tenterfield Star on 2 September 2015 indicated that the venue for the auction was the Tenterfield Bowling Club. There are before me a number of other advertisements for the property all indicating it was to be auctioned at the Tenterfield Bowling Club. One advertisement does not have the venue for the auction but it gives the auction day, Saturday 26 September 2015 at 10am and gives details of a "Web ID" and also gives the name of Mr Alford and his mobile telephone number. Any person who wanted to attend the auction could clearly easily find its location. The advertisements can be found as exhibit SA5 to the affidavit of Mr Alford, which is exhibit 2.

51 The public auction was held at the Tenterfield Bowling Club on the advertised date, 26 September 2015, at 10am. Even if there were one advertisement which said that the venue of the auction was to be advised or the like, nearly every advertisement before me does indicate that the auction was to be held at the Tenterfield Bowling Club. The Tenterfield Bowling Club for that purpose was open to members of the public. The auction was not required to be held on the property. The property was open for inspection by anyone wishing to inspect it, by appointment. Holding the inspection on the property would not

have been in anybody's interests because it may have been difficult for some persons to get there if they wished to participate in the auction.

52 It is true that Mr Jason Krecic, the buyer of Lot 10 from the defendant in possession, was known to Mr Middleton but that was because he was a Tenterfield "boy" and, according to Mr Middleton's affidavit, as a matter of coincidence two of his children went to school with Mr Krecic's older sister, Ms Mellissa Krecic, which had been about 15 years earlier and therefore he was familiar with Mr Jason Krecic's sister. He had otherwise never associated with her brother, Mr Jason Krecic. There was no challenge to Mr Middleton's evidence about that. The factual allegation made in the statement of claim is purely incorrect and must arise from mere speculation by the plaintiffs.

The claims of the plaintiff

53 The questions which remain are what is the nature of the plaintiffs' claim and what is the nature of the defendant's cross-claim. At the end of the case, the plaintiffs' claim is for a loss due to the unlawful repossession and sale of Lot 10 based upon an allegation that there had been a breach of the *National Consumer Credit Protection Act 2009* because the defendant failed to provide a default notice pursuant to the *National Credit Code* s 88(2) prior to taking possession and that was a necessary precondition for the defendant's entering into possession and selling the land. In the alternative, the plaintiffs bring an action for damages pursuant to s 111A(4) of the *Conveyancing Act 1919* in the alternative to the claim under the *National Consumer Credit Code* failing.

54 The plaintiffs also claim loss due to the conversion of chattels. The sum claimed for conversion is $19,860, being the total value of the chattels referred to in [28] of Mr McFarland's affidavit, exhibit A, but excluding $12,500 for a caravan, which the plaintiffs now accept was a fixture on the property.

Conversion of goods

55 It is convenient to deal with the claim in conversion first. The first item listed in [28] of exhibit A is a white 18-foot caravan with a silver stripe valued at $12,500. This is what is accepted as being the fixture on the property. The title to a fixture on the property passed on the completion of the sale to Mr Krecic: quicquid solo plantatur, solo cedit.

56 There are then items numbered (b) to (tt). I shall recite a list and indicate the evidence of Mr Middleton about the item:

(b) A fridge in the caravan - $150. Still there.

(c) 15-inch TV - $100. Still there.

(d) Assorted DVDs - $500. About one dozen DVDs still there.

(e) Fold out lounge - $100. Not there.

(f) White storage cupboard - $800. Not there.

(g) One 9-kilogram gas bottle with heater attached - $200. One gas bottle still there.

(h) Assorted linen - $200. Not there.

(i) Assorted cooking utensils - $200. Still there.

(j) Power leads - $100. One power lead there.

(k) One gas barbecue - $100. Still there.

(l) Wooden table and chairs - $300. One wooden table and four chairs still there.

(m) 1 outside lounge - $80. Still on deck of annex to fixture.

(n) 1 twin-cab HiLux ute - $1,500. Still there.

(o) 2 x 1000-litre water pods - $160. Two water pods still on property, one containing water and one containing sewage attached to the toilet.

(p) Four wheelie bins - $80. Two or three broken bins still there.

(q) Assorted building piles - timber, tin steel posts (for constructing a double carport) - $2,000. Some offcuts still there.

(r) Water pump 240 volts - $400. Still there, connected to the fixture on the concrete slab.

(s) One generator - $100. Not there.

(t) One jackhammer - $400. Not there.

(u) Assorted tools, drills, grinders, saws, nuts, bolts, worktables, benches, etc - $1,000. Not there.

(v) One antique display cabinet - $1,000. Not there.

(w) Two wooden bedside tables - $50. In the caravan, maybe part of the caravan, the caravan being a fixture.

(x) One large wooden shoebox - $200. Not there.

(y) Two wooden wardrobes - $400. Not there.

(z) Assortment of vases - $200. Not there.

(aa) Assortment of clothing - $500. Not there.

(bb) Assortment of lamps - $200. Not there.

(cc) Outdoor setting - $100. Not there.

(dd) One large caravan annexe - $1,800. Inside the caravan.

(ee) One flatpack glass shower cubicle, not assembled - $100. Present in back of HiLux.

(ff) 1 6-metre Pantech - $800. Present.

(gg) 1 steel homemade firepit barbecue $50. Present, roughly made.

(hh) 1 twin-tub washing machine still in the box - $400. Not there.

(ii) 3 bed mattresses - $200. Not there.

(jj) 1 double stainless steel outdoor sink - $50. Present.

(kk) Number of photograph albums - priceless. Not there.

(ll) Personal papers - passports, certificates, resumes - $400. Not there.

(mm) 1 rocking chair - $120. Not there.

(nn) Chainsaw - $300. Not there.

(oo) 20-foot ladder - $180. Half a ladder present only.

(pp) Three folding tables - $60. Present.

(qq) Large roll of blue rope - $80. Not there.

(rr) Chains and dogs - $200. Not there, only chains and locks cut by Mr McFarland.

(ss) Assorted jewellery - $200. Not there.

(tt) Personal family keepsakes - photos, books, cards, toys - $200 (photos are priceless). Not there.

57 The first thing to note is that if Mr Middleton said the items were not present, I accept that evidence. The next thing to note is that it would appear to me that the 1000-litre water pods are fixtures, the water pump may also be a fixture. The next thing to note is that at no time prior to the commencement of these proceedings was any demand made by the defendant for the return of any of these items. Indeed, Mr McFarland was cross-examined to the effect that he took most of these items with him when he finally left the property on 7 April 2014.

58 The most recent authoritative exposition, as far as I am aware, of the law of conversion is contained in the decision of the House of Lords in *Kuwait Airways Corporation v The Iraqi Airways Company & Ors* [2002] UKHL 19. The basic features of the tort, according to Lord Nicholls are that the defendant's conduct must be inconsistent with the rights of the owner or other person entitled to possession of the goods, that the conduct must be deliberate and not accidental, and that the conduct must be so extensive an encroachment on the right of the owner or other person entitled to possession as to exclude him or her from the use and possession of the goods.

59 Going back to the well-known case of *Penfolds Wines Pty Limited v Elliott* (1946) 74 CLR 204 Dixon J (as he then was) said that:

> "The essence of conversion is a dealing with a chattel in a manner repugnant to the [actual possession or the] immediate right of possession of the person who has the property or special property in the chattel." (at p 229.)

His Honour then went on to give several examples of interferences with chattels that would amount to a "dealing" sufficient to constitute the tort:

> "it may take the form of a disposal of the goods by way of sale, or pledge or other intended transfer of an interest followed by delivery, of the destruction or change of the nature or character of the thing, as for example, pouring water into wine or cutting the seals from a deed, or of an appropriation evidenced by refusal to deliver or other denial of title."

60 The 10th Edition of *Fleming's Law of Torts* discusses conversion by withholding possession or failing to return goods. The relevant part of the text [4.110] is this:

> "Merely being in possession of another's goods without authority is not tort. If lawfully acquired, possession of goods alone does not become a wrong in the absence of some manifestation of intent to keep them adversely or in defiance of the owner's rights. A bailee who merely holds over may thus be liable for breach of contract, but commits neither conversion nor detinue; and the finder of chattel, not knowing the true owner, commits no wrong by simply keeping it for safe custody.
>
> For the possession or withholding to be conversion, it must be in some way in defiance of the claimant's rights. Normally (though not invariably), this is shown by evidence that the claimant demanded the chattel and that the defendant either refused to comply, or imposed conditions he was not entitled to, as by unlawfully making delivery dependent upon payment or (in the case of a railway) refusing to deliver up until a strike was settled. But even here refusal must be categorical, furthermore, a defendant faced with a demand for goods is normally entitled to a limited time to make inquiries into the rights of the claimant.
>
> Since the reason for normally insisting on a prior demand is to ensure that a defendant be informed of the defect in his title and have the opportunity to deliver without liability, there is some support for dispensing with the requirement when the defendant, with full information, categorically denies the plaintiff's right in some other way so as to show that a prior demand would in any event have been refused.
>
> It should be noted that strictly speaking, a defendant's duty in any case of withholding is strictly just to let the plaintiff collect the goods. The possessor is under no duty actually to deliver them."

61 The defendant lawfully took possession of the land (an issue to which I shall return later). The plaintiffs subsequently entered upon the land on the Easter

weekend 2015 but they failed to remove certain of their goods. They never asked for the goods to be returned to them. There is no evidence that the defendant has done anything to deny the plaintiffs title to any goods in question. The defendant merely exercised its right to sell the property and did so and the plaintiffs had adequate notice of the auction and of the sale of the property. Indeed, there was no actual exchange of contracts at the auction on 26 September 2015. The exchange of contracts did not occur until 15 December 2015 and the conveyance was completed on 12 February 2016. There has been no manifestation of any intention by the defendant, through Mr Middleton, to keep the chattels adversely in defiance of the plaintiffs' rights to the chattels. Rather, everything speaks of the plaintiffs having merely abandoned the chattels.

62 Were the plaintiffs to ask for what remaining chattels there are on the property to be returned to them, I am confident that Mr Middleton would make appropriate arrangements with Mr Krecic for some disinterested person acting on behalf of the plaintiffs to collect the chattels from the property. If there were such a request, I am sure appropriate arrangements would be made. If the defendant then refused to make any arrangements, there might be another allegation of conversion, but on the evidence before me, no property has been converted.

63 Furthermore, there is no evidence of the value of the property other than the values attached to them by Mr McFarland, and the fact that he has not earlier sought them back indicates a number of things. It may indicate that he does not need the chattels, or it may indicate that the chattels are not of any commercial value. In other words, not only has the tort not been made out, but neither has the quantum of the damage been made out. The action in conversion fails.

Auction of the land

64 I return to the realty. As I have mentioned, the auction was held on 26 September 2015 in the Tenterfield Bowling Club. Antecedent to the auction, the defendant, as lessor in possession, granted to itself a five-year lease commencing on 1 September 2015 and terminating on 1 September 2020. The

lease was dated 28 August 2015. The rental payable by the lessee was $5,500 per annum, plus GST, payable in equal monthly instalments of $458.34, plus GST, in arrears on or before the 28th day of each month. That lease was registered and appeared on the title at the time that it was auctioned.

65 I should indicate that the special conditions of sale of the property included a clause concerning "abandoned chattels and furnishings" and clearly excludes them from the sale of the property. The plaintiffs were aware of the plan to auction the property. One need only go to exhibit SA-4 to the affidavit of Mr Alford, which is exhibit 2. Exhibit SA-4 is a letter from the plaintiff's present solicitors to Mr Alford bearing date 28 May 2015. The first four paragraphs of the letter are these:

> "We represent Mr Mervyn McFarland and Ms Wendy Miller.
>
> We have been instructed to inform you that the abovementioned property is still in the possession of our clients.
>
> As there are pending Court proceedings in relation to this property, it cannot be listed for sale without a Court Order.
>
> We understand that you have agreed to not place the property for sale and/or auction until the matter has been settled."

The current proceedings were not commenced until 18 October 2016, so the "pending Court proceedings" were not the current proceedings. I do not know what Court proceedings the letter refers to, but it appears to contain an erroneous averment of fact that the property could not be listed for sale without an order from a Court. Furthermore, there is no evidence that Mr Alford had agreed not to place the property for sale or auction until whatever the proceedings were had been "settled". The letter from the solicitors appears to be in terrorem.

66 Mr Alford, in a marketing proposal given to Mr Middleton and dated 22 May 2015, estimated that the sale price that could be achieved would be in the

vicinity of $170,000 to $200,000. However, the actual price achieved at the public auction was much less. In his affidavit, Mr Alford said this:

> "21. After I was appointed to sell the Property by public auction, McFarland rang me several times repeatedly asking for us to call off the auction. I advised him to take steps to pay out his loan, and to otherwise talk to his lawyers, and to please stop calling me.
>
> 22. I called a meeting with Rod [Middleton], and we decided to move the date originally planned for the public auction (4 July) to 26 September, in order to give McFarland and Miller approximately three more months to pay out their vendor finance loan."

On 24 September 2015 Mr Alford received a "without prejudice" letter from A Ace Solicitors attaching a copy of a tax invoice and a receipt for the lodgement of a caveat over Lot 10. Exhibit SA-7 to Mr Alford's affidavit is a copy of a tax invoice and lodgement receipt from the Land Titles Office. The lodgement of a caveat, according to Mr Alford, causes a property to sell for less.

67 One of the parties who had expressed interest in the purchase of the property was Mr Graham Eagle of Allora, which is in Queensland, somewhere near Warwick/Toowoomba. On 25 September 2015 Mr Alford rang Mr Eagle to advise him that the caveat had been lodged. In his affidavit, Mr Alford described Mr Eagle thus:

> "Graham had been a very keen prospective purchaser and was positive about the existence of a grazing lease which would produce an income until such time as he was ready to take possession of the Property."

Mr Alford's affidavit goes on to tell me this:

> "26. Very soon after being advised of the caveat, that very afternoon, instead of staying for the auction, Graham Eagle departed Tenterfield and went home to Allora. Exhibit SA-8 to this affidavit is my handwritten file note regarding my interaction with Graham Eagle, after becoming aware of the caveat.
>
> 27. In my view, Graham Eagle had shown keen interest in the property and the absence of the caveat announcement would have stayed on to view and potentially participate in the public auction."

Mr Middleton gave evidence that he had been advised by Mr Eagle that he would have paid $600 per acre for Lot 10, which would have valued it at $285,600. However, that might be unreliable evidence in the sense that one doubts very much whether Mr Eagle would have told Mr Middleton that prior to the auction and when he did not attend the auction, he may have made a statement which would not have been made if he had participated at the auction. I therefore do not think it proper to see the value of the property as being $285,600.

68 The value of the property can only be that estimated by Mr Alford in his marketing advice to the defendant. After the caveat had been lodged, Mr Alford said in his affidavit that he recommenced a reserve price of $120,000. There was also the evidence given by Mr Middleton about discussing the matter with Mr Alford - that is, the question of the reserve price - and it may have been a joint decision or Mr Middleton may have merely asked Mr Alford whether the property might be sold for $120,000 in the circumstances. As Mr Alford is an expert in the field, and based on his 23 years as a real estate agent, most of it in the Tenterfield area, I accept that it is highly likely that Mr Middleton had abided by the advice that was given to him by Mr Alford about the reserve to be placed on the property in light of the caveat which had been lodged by the plaintiffs' solicitors.

69 Mr Middleton appointed Mr Laurie Stenzel to act as the seller's agent. Other registered bidders at the auction were Jason Krecic, David Mills of Grafton and Johanna Yates of Tenterfield. However, after it was announced at the auction that a caveat had been lodged against the property, Ms Yates did not participate in the bidding.

70 The bids made at the auction are shown in a copy of information kept by Mr Alford in the business records of his real estate agency. The opening bid of $50,000 was from Mr Mills. The last bid made on behalf of the defendant was $116,000. Mr Krecic then made a bid for $118,000. There was no further bid. Mr Alford told me, in the witness box, that he then paused for a short while and announced that the reserve price was $120,000. Mr Krecic then put in a bid of $120,000, which was the sum that he eventually paid for Lot 10. It should be

noted that the last bid made by Mr David Mills was for $92,000 and the bidding beyond that time was merely between the defendant's agent and Mr Krecic.

71 One of the issues debated in these proceedings was whether the execution and registration of the five-year lease to Common Australia Pty Ltd devalued the property; that is, that the execution and registration of the lease lowered the price of the property when it was publicly auctioned. It ought be noted that a variation of the lease appears to have been filed with the Land Titles Office on 17 February 2016 - that is, five days after completion of the sale to Mr Krecic – in which the term of the lease was reduced from five years to one year and three months, and 14 days, expiring on 14 December 2016. That, according to Mr Middleton, was at the request of Mr Krecic and the fact that the variation was filed within days of completion is consistent with it being agreed with Mr Krecic to vary the lease to accommodate whatever his intentions were for Lot 10. In other words, the defendant was prepared to negotiate in order to keep a willing purchaser of Lot 10.

72 No expert evidence has been called to establish that the execution and registration of the original lease devalued the property. Indeed, from evidence that I have quoted given by Mr Middleton, that Mr Eagle was a very keen prospective purchaser and was "positive about the existence of a grazing lease which would produce an income until such time as it is ready to take possession of the property," indicates that as far as he was concerned, it may have increased the value of the property. This is a matter in which I cannot be called upon to speculate. In the absence of any expert evidence, I cannot find that the execution of the lease and its registration in favour of the defendant devalued the property.

73 An obvious thing which devalues the property is the sale by mortgagee in possession. However, that is inevitable. The only other evidence to support anything to devalue the property was the lodging of the caveat. The caveat was eventually rejected by the Land Titles Office on 7 December 2015 (see exhibit RJM-62), and very properly so, because the interests of the plaintiffs were protected by their right to exercise the equity of redemption, which the registered proprietor of land under the *Real Property Act 1900* retains. At

common law, a mortgage turned the mortgagee into the legal owner of the land, but the mortgagor was entitled to what became known as the equity of redemption, the equitable right to redeem title by paying out the mortgage. The position of the *Real Property Act 1900* is otherwise the mortgagor retains the legal title, but nevertheless, still has the equity of redemption; hence, the caveat ought not to have been filed and the action of the plaintiffs' current solicitor, in lodging the caveat for filing, is what reduced the value of the property at the auction.

74 The plaintiffs, however, say the auction ought to have been postponed. It is very hard to postpone a public auction on a Thursday prior to the auction, to be held on the following Saturday in a town such as Tenterfield, for rural land, some 50 miles west of that town. I mention a Thursday because the evidence is, from Mr Alford, that he received the communication from the plaintiffs' solicitors on 24 September 2015 and I know that the auction was held on Saturday 26 September 2015.

75 It would appear that Mr Eagle had come to Tenterfield to participate in the auction, but when advised of the caveat, went home. He was not prepared to enter into a legal dispute; nor was Miss Johanna Yates prepared to enter into a legal dispute between the plaintiffs and the defendant. She did not bid at the auction because of the caveat, according to Mr Alford's evidence. The only reason, on the evidence, why the property sold for $120,000 as distinct from within the range of $170,000 to $200,000 was because of the ill-founded caveat that was lodged by the plaintiffs' current solicitors with the Land Titles Office.

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76 HIS HONOUR: It appears to me that it would have been entirely inappropriate to cancel the auction because to do so would have been of great inconvenience to those who had attended the auction with the intention of bidding, namely Mr Krecic and Mr Mills as well as Ms Yates although Ms Yates did not bid when advised of the lodgement of the caveat. The caveat dissuaded Ms Yates from bidding and persuaded Mr Eagle not to attend the auction. To inconvenience both Mr Krecic and Mr Mills, to adjourn the auction sine die may

have only have dissuaded Mr Krecic and Mr Mills from attending another auction, if one were to be fixed.

77 Furthermore delaying the auction would be tantamount to succumbing to the delaying tactics that were adopted by the plaintiffs and their solicitor and would only have encouraged them to persist with their cunctatorial behaviour. I therefore reject the submission that the auction ought to have been cancelled or postponed. I should further add that I am persuaded by evidence I cited yesterday as well as from the observations I am about to make that the dealings between the defendant and ultimate purchaser of lot 10, Mr Jason Krecic were at arm's-length.

78 It has to be recalled that the defendant retained a licensed real estate agent and a registered auctioneer to conduct the auction, had retained a solicitor who drew the contract and that contract contained a large number of special conditions and also annexed a deed of guarantee and indemnity, copies of which documents are exhibit RJM-59 to the affidavit of Mr Middleton which is exhibit 4. Furthermore, it has been borne in mind that Mr Krecic did not sign the contract for the sale of the land until 15 December 2015 and, as I pointed out yesterday, the inference is overwhelming that that was because there were negotiations between the defendant and Mr Krecic to reduce the term of the lease that the defendant had granted to itself so that the lease was decreased from being a 5 year lease to being a lease for one year, three months and 14 days. All of that speaks of negotiation and behaviour occurring at arm's-length, hardly to the benefit of the defendant.

The National Credit Code claim

79 The National Credit Code is the first schedule for the *National Consumer Credit Protection Act 2009* (Cth). The provisions of s 3 to 6 need to be considered:

> "**3 Meaning of *credit* and *amount of credit***
>
> (1) For the purposes of this Code, ***credit*** is provided if under a contract:
>
> (a) payment of a debt owed by one person (the ***debtor***) to another (the ***credit provider***) is deferred; or
>
> (b) one person (the ***debtor***) incurs a deferred debt to another (the ***credit provider***).

(2) For the purposes of this Code, the ***amount of credit*** is the amount of the debt actually deferred. The ***amount of credit*** does not include:

(a) any interest charge under the contract; or

(b) any fee or charge:

(i) that is to be or may be debited after credit is first provided under the contract; and

(ii) that is not payable in connection with the making of the contract or the making of a mortgage or guarantee related to the contract.

4 Meaning of *credit contract*

For the purposes of this Code, a ***credit contract*** is a contract under which credit is or may be provided, being the provision of credit to which this Code applies.

5 Provision of credit to which this Code applies

(1) This Code applies to the provision of credit (and to the credit contract and related matters) if when the credit contract is entered into or (in the case of precontractual obligations) is proposed to be entered into:

(a) the debtor is a natural person or a strata corporation; and

(b) the credit is provided or intended to be provided wholly or predominantly:

(i) for personal, domestic or household purposes; or

(ii) to purchase, renovate or improve residential property for investment purposes; or

(iii) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes; and

(c) a charge is or may be made for providing the credit; and

(d) the credit provider provides the credit in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.

(2) If this Code applies to the provision of credit (and to the credit contract and related matters):

(a) this Code applies in relation to all transactions or acts under the contract whether or not they take place in this jurisdiction; and

(b) this Code continues to apply even though the credit provider ceases to carry on a business in this jurisdiction.

(3) For the purposes of this section, investment by the debtor is not a personal, domestic or household purpose.

(4) For the purposes of this section, the predominant purpose for which credit is provided is:

(a) the purpose for which more than half of the credit is intended to be used; or

(b) if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used.

6 Provision of credit to which this Code does not apply

Short term credit

(1) This Code does not apply to the provision of credit if, under the contract:

(a) the provision of credit is limited to a total period that does not exceed 62 days; and

(b) the maximum amount of credit fees and charges that may be imposed or provided for does not exceed 5% of the amount of credit; and

(c) the maximum amount of interest charges that may be imposed or provided for does not exceed an amount (calculated as if the Code applied to the contract) equal to the amount payable if the annual percentage rate were 24% per annum.

(2) For the purposes of paragraph (1)(b), credit fees and charges imposed or provided for under the contract are taken to include the following, whether or not payable under the contract:

(a) a fee or charge payable by the debtor to any person for an introduction to the credit provider;

(b) a fee or charge payable by the debtor to any person for any service if the person has been introduced to the debtor by the credit provider;

(c) a fee or charge payable by the debtor to the credit provider for any service related to the provision of credit, other than a service mentioned in paragraph (b).

(3) For the purposes of paragraphs (2)(a) and (b), it does not matter whether or not there is an association between the person and the credit provider.

Credit without express prior agreement

(4) This Code does not apply to the provision of credit if, before the credit was provided, there was no express agreement between the credit provider and the debtor for the provision of credit. For example, when a cheque account becomes overdrawn but there is no expressly agreed overdraft facility or when a savings account falls into debit.

Credit for which only account charge payable

(5) This Code does not apply to the provision of credit under a continuing credit contract if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided. However, this Code applies if the charge is of a nature prescribed by the regulations for the purposes of this subsection or if the charge exceeds the maximum charge (if any) so prescribed.

Joint credit and debit facilities

(6) This Code does not apply to any part of a credit contract under which both credit and debit facilities are available to the extent that the contract or any amount payable or other matter arising out of it relates only to the debit facility.

Bill facilities

(7) This Code applies to the provision of credit arising out of a bill facility, that is, a facility under which the credit provider provides credit by accepting, drawing, discounting or endorsing a bill of exchange or promissory note. However, it does not apply if:

> (a) the credit is provided by an authorised deposit-taking institution (within the meaning of subsection 5(1) of the *Banking Act 1959*); or
>
> (b) the regulations provide that the Code does not apply to the provision of all or any credit arising out of such a facility.

Insurance premiums by instalments

(8) This Code does not apply to the provision of credit by an insurer for the purpose of the payment to the insurer of an insurance premium by instalments, even though the instalments exceed the total of the premium that would be payable if the premium were paid in a lump sum, if on cancellation the insured would have no liability to make further payments under the contract.

Pawnbrokers

(9) This Code does not apply to the provision of credit on the security of pawned or pledged goods by a pawnbroker in the ordinary course of a pawnbroker's business (being a business which is being lawfully conducted by the pawnbroker) as long as it is the case that, if the debtor is in default, the pawnbroker's only recourse is against the goods provided as security for the provision of the credit. However, sections 76 to 81 (Court may reopen unjust transactions) apply to any such provision of credit.

Trustees of estates

(10) This Code does not apply to the provision of credit by the trustee of the estate of a deceased person by way of an advance to a beneficiary or prospective beneficiary of the estate. However, sections 76 to 81 (Court may reopen unjust transactions) apply to any such provision of credit.

Employee loans

(11) This Code (other than this Part, Part 4, Division 3 of Part 5, Divisions 4 and 5 of Part 7 and Parts 12, 13 and 14) does not apply to the provision of credit by an employer, or a related body corporate within the meaning of the *Corporations Act 2001* of an employer, to an employee or former employee (whether or not it is provided to the employee or former employee with another person). However, for a credit provider that provides credit to which this Code applies in the course of a business of providing credit to which this Code applies to employees or former employees and to others, this subsection applies only to the provision of credit on terms that are more favourable to the debtor than the terms on which the credit provider provides credit to persons who are not employees or former employees of the credit provider or a related body corporate.

Margin loans

(12) This Code does not apply to the provision of credit by way of a margin loan (within the meaning of subsection 761EA(1) of the *Corporations Act 2001*).

Regulations may exclude credit

(13) The regulations may exclude, from the application of this Code, the provision of credit of a class specified in the regulations. In particular (but without limiting the generality of the foregoing), the regulations may so exclude the provision of credit if the amount of the credit exceeds or may exceed a specified amount or if the credit is provided by a credit provider of a specified class.

ASIC may exclude credit

(14) ASIC may exclude, from the application of this Code, a provision of credit specified by ASIC.

(15) Without limiting subsection (14), ASIC may exclude a provision of credit if:

(a) the amount of the credit exceeds, or may exceed, a specified amount; or

(b) the credit is provided by a specified credit provider.

(16) An exemption under subsection (14) is not a legislative instrument.

(17) ASIC may, by legislative instrument, exclude from the application of this Code, the provision of credit of a class specified in the instrument.

(18) Without limiting subsection (17), ASIC may exclude a provision of credit if:

(a) the amount of the credit exceeds, or may exceed, a specified amount; or

(b) the credit is provided by a specified credit provider, or a class of credit providers.

Definitions

(19) In this section:

fee or charge does not include a government fee, charge or duty of any kind.

security, of pawned or pledged goods, means security by way of bailment of the goods under which the title to the goods does not pass, conditionally or unconditionally, to the bailee."

The provisions of s 13 also need to be considered:

"**13 Presumptions relating to application of Code**

(1) In any proceedings (whether brought under this Code or not) in which a party claims that a credit contract, mortgage or guarantee is one to which this Code applies, it is presumed to be such unless the contrary is established.

(2) It is presumed for the purposes of this Code that credit is not provided or intended to be provided under a contract wholly or predominantly for any or all of the following purposes (a ***Code purpose***):

(a) for personal, domestic or household purposes;

(b) to purchase, renovate or improve residential property for investment purposes;

(c) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes;

if the debtor declares, before entering the contract, that the credit is to be applied wholly or predominantly for a purpose that is not a Code purpose, unless the contrary is established.

(3) However, the declaration is ineffective if, when the declaration was made, the credit provider or a person (the ***prescribed person***) of a kind prescribed by the regulations:

(a) knew, or had reason to believe; or

(b) would have known, or had reason to believe, if the credit provider or prescribed person had made reasonable inquiries about the purpose for which the credit was provided, or intended to be provided, under the contract;

that the credit was in fact to be applied wholly or predominantly for a Code purpose.

(4) If the declaration is ineffective under subsection (3), paragraph 5(1)(b) is taken to be satisfied in relation to the contract.

(5) A declaration under this section is to be substantially in the form (if any) required by the regulations and is ineffective for the purposes of this section if it is not.

(6) A person commits an offence if:

(a) the person engages in conduct; and

(b) the conduct induces a debtor to make a declaration under this section that is false or misleading in a material particular; and

(c) the declaration is false or misleading in a material particular.

Criminal penalty: 100 penalty units, or 2 years imprisonment, or both.

(7) Strict liability applies to paragraph (6)(c).

Note: For strict liability, see section 6.1 of the Criminal Code."

The first point to observe is the definition of, "Credit contract," in s 4 of the Code.

80 A question which arises in this case is what is the credit contract? The credit contract is not the contract for the sale of land. The credit contract is the mortgage. True it is that special condition 22 of the contract for sale of land provides this:

"22 VENDOR FINANCE

The Vendor has agreed to assist the purchaser in completion of this sale by lending to the purchaser the sum of one hundred thousand dollars ($100,000.00) on security of a registerable mortgage prepared by the Vendor's

> Solicitors at the cost of the Purchaser over the property for a term of three (3) years being interest at the rate of 8% by way of three (3) equal instalments of $33,333.30 each payable at the end of each calendar year from the date of settlement. Interest will be waived provided that payments are made on the due date or within seven (7) days thereof."

However, clearly that is recording an agreement whereby moneys would be, "lent," to the plaintiffs secured by a mortgage and in effect delay certain payments being made to the defendant. The provision in that contract does not make the contract for the sale of land a credit contract, because had the sale not been completed the mortgage would never have been executed because the plaintiffs would not have obtained title to the land. Special condition 22 is similar to special condition 19 which provided the vendor with a right to depasture stock on the property for a period of five years, "from the date of settlement." The right to depasture the stock arose only when the sale was completed. That amounts to a separate contract for agistment. In other words, it has to be borne in mind that the credit contract here involved is the mortgage and not the contract for sale of land.

81 Here the debtors are the plaintiffs who are natural persons. Under s 5(1)(b)(i), the credit is provided or intended to be provided wholly or predominantly "for personal, domestic or household purposes". There is a dispute between the parties as to whether the credit contract here in question satisfies that provision. There are clearly competing considerations. The first is that we are here dealing with a credit contract for the purchase of 476 acres of rural land 50 kilometres west of Tenterfield. This was no suburban, residential piece of property.

82 The defendant draws my attention to the first page of the contract for sale of land in which "Tax information" is provided. After that heading, "Tax information," the contract contains this matter:

> "(The parties promise this is correct as far as each party is aware.)"

The relevant box that has been marked thereunder is this:

> "GST-free because the sale is subdivided farmland or farmland supplied for farming under Subdivision 38-O."

One could say rhetorically, "Well, they would say that," because no one wished to pay GST on the sale price of the land in question. In many cases the parties would be held to that averment but when one considers the nature of the National Credit Code to hold the parties to that averment would be to defeat the beneficial effect of the provisions of the National Credit Code which all the authorities point out must be construed beneficially for the consumer of credit.

83 The words, the words, "for personal, domestic or household purposes," have been very widely interpreted. For example, in *Jonsson v Arkway Pty Ltd and Anor* [2003] NSWSC 815 Shaw J pointed out the CTTT had interpreted the words by applying the eiusdem generis rule and *Mattinson v Multiflow* [1977] 1 NSWLR 368 at 375. At [21] his Honour said this:

> "However, it seems to me that the plaintiff is correct in suggesting that there is a dichotomy in the Code between two classes of purpose for the provision of credit, that is, business or investment purposes on the one hand and, 'Personal, household or domestic,' purposes on the other."

84 His Honour went on to say this:

> "23. There is a distinction between consumer transactions, to which the Code is principally directed, and business transactions. I would apply the observation of the Full Court of the Supreme Court of Victoria in *Minchello v Ford Motor Co of Australia Ltd* [1988] VR 251, when dealing with a question whether the *Trade Practices Act 1975* (Cth) applied to the purchase of a prime mover, said:
>
> > 'Although the words ' domestic or household ' have a similar connotation, ' personal ' use is clearly intended to cover a wider field, but the primary contrast intended to be drawn is with commercial or business use, whatever other personal activities a vehicle may be used for.'
>
> 24. However, if a tribunal is satisfied that a transaction is not an investment or business purpose that may not be the end of the matter. A wrong finding in this respect is amenable to review. It is therefore also necessary for the tribunal to consider whether it is satisfied that the credit was provided for a '*personal, domestic or household*' purpose.

> 25. The word '*personal*' means '*pertaining to the person*': *Le Cras v Perpetual Trustee Co Ltd* [1967] 2 NSWR 706 at 715. What pertains to something includes matters which are accessory to it, and appropriate or which have reference or relation to it: Shorter Oxford Dictionary (5th Ed). Pertaining to means '*belonging to*' or '*within the sphere of*': *R v Kelly; Ex parte Victoria* (1950) 81 CLR 64. It is a concept of extension and should, in my view, be construed broadly.
>
> …
>
> 27. In my opinion, the adjective '*personal*' in the context of beneficial legislation has separate and independent work to do, that is to say, connotations distinguishable from the other concepts contained in the same section of '*domestic*' or '*household*' purposes. Each of the adjectives in that section should be given their full meaning and, in my opinion, something can be said to be characterised as '*personal*' if it involves a transaction designed to benefit the person by providing for her parents."

His Honour then considered conflicting authorities arising from decisions in the District Court of Queensland and a decision of Harrison M (as she then was) and then continued thus:

> "31. I accept the plaintiff's submission that where credit is obtained both for personal purposes and an investment purpose the Code will apply if more than half of the credit is used for personal purposes.
>
> 32. The contemporary principle of statutory interpretation is to apply a purposive approach to ascertain the meaning of the statute: see *Mandalidis v Artline* (1999) 47 NSWLR 568 at 585 per Austin J. The Code should not, in my opinion, be interpreted so that it excludes non-business and non-investment borrowing to purchase a home and hold it on trust for one's parents. The position may be different if the trust had a business or investment objective, as distinct from the provision of a benefit for a close family member.
>
> 33. However, it has been noted:
>
> > '…the trust was not in its origin and perhaps never has been primarily a device of commerce. It was from earlier times and has continued to be an instrument of family settlement.'
> >
> > Meagher and Gummow, Jacobs' Law of Trusts in Australia (6th Ed) Butterworths Sydney (1997) at *lxxxvii*.

> 34. It seems to me that the accommodation of one's parents can reasonably be characterised as belonging to or within the sphere of personal matters, especially within the context of a statute which should be construed beneficially, that is, in favour of a jurisdiction conferring rights of access to courts and tribunals."

His Honour therefore permitted the word, "personal," to be interpreted to include the provision of accommodation for one's parents by assisting them in purchasing a property at Broadbeach Waters which I understand is in the State of Queensland. Therefore the relevant terms of Code must include a property bought for somebody other than the applicant for credit.

85 Furthermore one must bear in mind the decision of Croft J in *Knowles v Victorian Mortgage Investments Ltd & Anor* [2011] VSC 611. At [6] his Honour described the property in question thus:

> "The Property has a number of separate addresses and consists of:
>
> (a) a residence (in which the plaintiff and her family reside);
>
> (b) two factories;
>
> (c) a cool-store transport refrigeration warehouse building; and
>
> (d) land leased[sic] to a primary producer.
>
> The Property is subject to four leases from which the plaintiff receives rental."

Nevertheless his Honour held that the National Credit Code applied to the property because, inter alia, the plaintiff's house was on the property which was the subject of the finance. In other words it would appear that even though the residence may have only been a small part of a much larger property the small part being the borrower's residence brought the the whole of the property within the National Credit Code because it still involved the provision of credit for a personal, domestic or household purpose.

86 There is a definition of land in s 204 but it only provides this,

> "'Land' includes any interest in land."

The Code does not distinguish between a large land holding or a small land holding. The Act does extend to credit for the purchase of residential property. Furthermore, the Act does not distinguish between the nature of the residents. For example in *Jonsson*, Shaw J held that it would extend to a property purchased by the borrower to be the residence for her elderly parents. She might go there from time to time. She might even stay overnight but it was not for her personal residence but a residence for her family. In those circumstances a residence need only be a part-time or temporary residence such as a weekender or holiday home.

87 The evidence given by Ms Miller in para 5 of her affidavit is this:

> "The purpose of the Land in the short-term for the Land was for a retreat and a place to get away. I eventually planned to retire down there eventually with the first plaintiff [Mr McFarland]. I wanted it as a place for our kids and grandchildren to come and holiday in the type of environment the land offered. I have a disabled daughter, Jodie, and, and [she] comes and stays with us. This is why we had a second caravan on the Land, that was for Jodie. This was a place to spend quality time with the whole family as I wanted my grandsons to ride their motorbikes down there and go fishing. We were having these family events when we first got the Land."

Similar things were said by Mr McFarland but it is clear that I do not accept him on any contested issue. However I am happy to accept that evidence given by Ms Miller, about which she was not cross-examined. I therefore accept that the purpose of buying the land was one personal to the plaintiffs, that is they intended to use the land to erect at first a temporary and later a permanent structure to be used as a weekender and eventually as a home in which to spend their retirement. I therefore accept that the credit was provided by the defendant and was wholly or predominantly for the personal, domestic and household purposes of the plaintiffs.

88 The real issue, in my view, is whether this case falls within the provisions of s 5(1)(d) of the Code, that is, whether the defendant:

> "provides the credit in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction."

No argument has been put that the defendant was in the business of providing credit. The argument is that the defendant, as part of or incidental to its business of grazing sheep, provided credit to the plaintiffs.

The issue is not without authority. A seminal case is the decision of McGill DCJ in *Dale v Nichols Constructions Pty Ltd* [2003] QDC 453. His Honour's decision is referred to in the explanatory notes to the *National Consumer Credit Protection Bill 2009* which of course became the *National Consumer Credit Protection Act 2009*. The reference to his Honour's decision is found in para 8.35 of the explanatory notes. The explanatory note says this:

> "Whether or not the credit provider provides credit as part of or incidentally to any other business of the credit provider is to be determined according to the connection between the, 'other business,' and the provision of credit. For example, in Dale v Nichols Constructions Pty Ltd [2003] QDC 453 the connection was established because the working capital of a construction business, when available, was used as the source of funds for credit."

More recently his Honour's decision was cited with approval by Davies J [as he then was] in *Bank of Queensland Limited v Dutta* [2010] NSWSC 574 at [123]. It was also cited with approval by Croft J in *Knowles v Victorian Mortgage Investments Ltd* [2011] VSC 611 at [42].

89 In *Dale*, McGill DCJ said this:

> "[60] I will make precautionary findings about the applicability of the second and third limbs of this part of the definition. I do not think that loans made by the respondent were made as part of another business. Although it had another business, the making of loans was not part of that business. I think that what was contemplated by that provision was a situation where, in the course of one particular business, the credit provider also provided credit. For example, a retailer who provided credit to customers as part of the business of selling products would be providing credit as part of a business: *Reid's Brewery Co Ltd v Male* [1891] 2 QB 1. That was not the situation here.

> [61] As to the third limb, it was submitted on behalf of the third party that this meant an activity which inseparably depended on or appertained to the business of the respondent. The difficulty with that approach is that it would seem to cover the same ground as what I understand to be credit provided as part of the other business. The example given by counsel for the third party, a trader who provided credit to customers on an isolated or sporadic basis, would in my opinion be still a provision of credit as part of another business. Something else, and in my opinion something less, is required by way of a connection to another business by this aspect of the test. It must have been

> intended by the legislature to cover situations which were distinct from the provision of credit to customers of the other business. But there has to be some connecting factor such that the provision of credit could be said to be incidental to the other business.
>
> [62] If the activities of the respondent were not sufficiently commercial, systematic and repetitious to qualify as a business of lending money for profit, in my opinion the circumstance that what was being lent was the working capital of the ordinary business of the respondent, when that working capital was not immediately required for that business, would in my opinion provide a sufficient connection for those loans to be said to be made incidentally to the construction business carried on by the respondent.
>
> [63] Again I am conscious of the fact that this is consumer protection legislation, and that therefore it is likely that the legislature intended a fairly wide definition to apply in these circumstances, so that the protection of the Code would be extended to more rather than fewer borrowers. The use of a threefold alternative test also seems to me to be an attempt by the legislature to cast the net wide. The expression is much wider than “carrying on the business of money lending”, the expression used in earlier legislation providing some consumer protection in this field, and it is difficult to believe that the change was not deliberate. In my opinion no narrow or restrictive construction should be applied to s 6(1)(d) of the Code, and adopting that approach in my opinion the activities of the respondent fall comfortably within that paragraph.
>
> [64] It follows that all of the requirements of s 6(1) of the Code applied to both of these loans, and both were therefore subject to the operation of the Code”

Of *Dale's* case what is said in the explanatory memorandum which I have quoted is correct. The only thing that ought further be noted is that the construction company had a large amount of surplus capital. It could have declared a dividend or invested on the share market but instead it gave its money to solicitors who would, on behalf of the construction company, lend the money to property purchasers and secure the money by way of a mortgage.

90 In *Avery v Saree Holdings Ltd; Lava Ltd v Avery* [2012] NSWSC 463, Slattery J said at [93]:

> “The words in Code, s 6(1)(d) "incidental to" are expression of wide import but there must be some connection between, in this case, the business of the credit provider and the particular loan that provides the credit, which in turn does involve the questions of degree: *R v Holmes; Ex parte Public Service Association (NSW)* (1977) 140 CLR 63 at 77 per Gibbs J. Here the Lava loan

> is directly contemplated by the terms of the Call Option Deed: cf the definition of "Loan Agreement" and Clause 4(1)(b) in the Call Option Deed. The Call Option Deed explains Lava's acquisition and holding of the subject shares, functions that are within its ordinary business. The Lava loan is incidental to that business."

The provision has also been considered by Gleeson JA seen at first instance, *Lauvan Pty Limited & Anor v Bega & Ors* [2018] NSWSC 154. To explain what was involved in that case one should consider the opening comments by his Honour:

> "[1] On 2 April 2015 the first and second plaintiffs, Lauvan Pty Limited (***Lauvan***) and Mittabell Pty Limited (***Mittabell***), entered into a facility agreement with the first defendant, Mrs Helen Bega as borrower, and the second and third defendants, Mr Aidan Bega and his company, AB Veritas Pty Limited (***AB Veritas***), and also South Townsville Developments Pty Ltd (***STD***) as guarantors. Mrs Bega also gave security over a property owned by her at Denham Court, near Campbelltown. It is not in dispute that Mrs Bega and the guarantors entered into the facility agreement, or that Mrs Bega gave a mortgage over the Denham Court property. STD is not a party to this proceeding; it was placed into creditors' voluntary winding up on 20 November 2015.
>
> [2] Recital A to the facility agreement recorded that Mrs Bega had requested the plaintiffs to provide the facility to her for the purpose of "assisting with short-term on-lending to family members for proposed commercial investment opportunities in the sum of $1,000,000". That purpose was also reflected in the terms of cl 2.2(a) of the facility agreement which provided that Mrs Bega must use the net proceeds of all advances provided under the facility for the "Purpose", which was defined in cl 1.1 as "assisting with short-term on-lending to family members for proposed commercial investment opportunities"."

Relevantly his Honour went on to say this:

> "[264] The words "incidentally to" in s 5(1)(d) may be taken to be an expression of wide import but there must be some connection between another business of the credit provider and the particular loan that provides the credit which, in turn, involves questions of degree: *Avery v Saree Holdings Ltd; Lava Ltd v Avery* [2012] NSWSC 463 (***Avery v Saree Holdings***) at [93], citing *R v Holmes; Ex parte Public Service Association* (NSW) (1977) 140 CLR 63 at 77 (Gibbs J); [1977] HCA 70.
>
> [265] In *Mills v Commissioner of Taxation* (2012) 250 CLR 171; [2012] HCA 51, a case involving s 177EA(3)(e) of the Income Tax Assessment Act, Gageler J (with whom French CJ, Hayne, Kiefel and Bell JJ agreed)

considered the meaning of “an incidental purpose” in the context of the statutory taxation regime. His Honour said at [66] that “[p]urpose is a matter for inference and incidentality is a matter of degree”.

[266] In the present case, the evidence establishes that Lauvan’s primary business is that of hotels through ARQ Nightclub in Darlinghurst. Mittabell is the trustee of a superannuation fund with property and share investments. On Mr Danesi’s evidence, the plaintiffs have made six loans. All the loans were made to parties known to Mr Danesi or referred by parties known to him. One loan for $50,000 was made to Mr Danesi’s ex-partner, Ms Naomi Travers, as she “needed some money”; and another loan was made to owners of the boarding house, next-door to a boarding house owned by a friend of Mr Danesi. The loans to the Bega family comprised a $700,000 loan for refurbishment of the South Townsville Tavern; a $700,000 loan secured by a mortgage to Camiera Nominees in respect of a property at Buckland Street, Alexandria; the construction loan to STD; and the loan to Mrs Bega.

[267] The plaintiffs submitted that they were not in any business together. That may be accepted, albeit the construction loan to STD was made jointly by the plaintiffs and the evidence of Mr Danesi can be understood as indicating that the position in relation to the other loans was the same.

[268] As to the first limb of s 5(1)(d), I do not consider that the activities of the plaintiffs were sufficiently systematic, continuous or repetitious to be characterised as a course of business of providing credit: *Williams v ATM & CPA Projects Pty Ltd* at [70]; *Hyde v Sullivan* at 119; *Shakespeare Haney Securities Limited v Crawford* at [43]. The loans provided to Mr Danesi’s ex-partner and the boarding house owner may be taken as being made on an isolated and sporadic basis. Occasional and discrete loans made as a result of some personal relationship or an introduction by persons known to the credit provider do not have the character of a system or repetition or continuity to be characterised as a business. The same may be said of the loans to the Bega family interests, which were a result of the introduction by Mr Stathakis, a mutual friend, of Peter Bega to Mr Danesi.

[269] As to the second limb of s 5(1)(d), I do not consider that the credit provided by the plaintiffs was made as part of another business of the plaintiffs, such as hotels or property development or share investment. The loans in question were unrelated to those businesses. The position in this case may be distinguished from the type of case where a retailer provides credit to customers as part of the business of selling goods to the customer.”

I approach this matter using the same approach adopted by his Honour. I also bear in mind the presumption or deeming provision contained in s 13 of the Code.

91 The relevant contract is the mortgage agreement. There was the contract for sale of land which was completed. As a result of the completion of the contract for sale of land, there arose a separate right of agistment, which right not being in any way expressed in writing will be governed by any oral term and the common law. There also arose the credit contract, the mortgage. I accept that the agistment agreement was incidental to the defendant's business of grazing sheep. However, I do not accept that the mortgage granted by the defendant to the plaintiffs was incidental to that business. The loan in question was unrelated either to the sheep grazing business or the BCF business conducted by the defendant. There is no evidence that at any time before 31 March 2014, the date of the mortgage, that the defendant had ever lent money to anybody, nor is there any evidence that the defendant lent money to any person after 31 March 2014. It was not part of either of the defendant's businesses to lend money to anybody. It is not incidental to the business at all. I therefore hold that the National Credit Code did not apply to the mortgage entered into by the defendant. The first major claim of the plaintiffs fails.

Conveyancing Act claim

92 The next issue is the plaintiffs' actions for damages pursuant to s 111A(4) of the *Conveyancing Act 1919*. The relevant part of the amended statement of claim is:

> "36G. The Defendant in granting itself the Lease and Variation of Lease prior to the sale of the property breached its duty to the Plaintiff pursuant to the *Conveyancing Act 1919* s 11A and at common law and as a result the Defendant suffered loss and damage.
>
> **Particulars of paragraph 36G**
>
> A. The Defendant sold the land to Mr Krecic on or about 12 February 2016.
>
> B. The lease devalued the property because the purchaser had to take the land subject to a lease. The lease that the purchaser took the land

> subject to was a lease granting free rent from 12 February 2016 to 14 December 2016 and therefore the purchaser lost the use and enjoyment of the land for the period as well as any rental income.
>
> 36H. Further, or alternatively, the Defendant breached the duty owed to the Plaintiff pursuant to the *Conveyancing Act 1919* s 111A and/or at common law as:
>
> …
>
> **Particulars to Paragaph 36H(g)**
>
> A. Mr Rodney Middleton, his sister Heather Middleton, his daughter Brook Middleton and his son Nick Middleton are all friends with the daughter of Mr Krecic, Ms Melissa Krecic. It is this basis in which it is alleged there is an association between them and that Mr Krecic is a family friend."

In essence, I have already dealt with the factual issues pleaded in par 36G. I pointed out that there was no evidence to support the argument that the lease devalued the property because the purchaser had to take the land subject to the lease. Yesterday, I also dealt with the particulars under s 36H and found that none of them was a relevant consideration. Accordingly, the plaintiffs' claim under s 111A(4) of the *Conveyancing Act 1919* must fail as well. In those circumstances, the defendant is entitled to judgment in its favour on the statement of claim.

The cross-claim

93 I now turn to the issues raised by the cross-claim. The cross-claimant claims the sums now particularised in exhibit 6.1. Paragraph 25 of the cross-claim is this:

> "The nett amount realised on the sale was less than the total indebtedness owing by the cross-defendants in respect of their breach of special condition 22 of the contract and the mortgage as particularised below and the cross-claimant claims the amount of the deficiency."

The deficiency is now being particularised as amounting to $13,406.38 and there is documentary proof of each of the amounts listed in exhibit 6.1. For that amount, the plaintiffs are jointly and severally liable. The liability of each of the cross-defendants for that amount of money is not caught by the proportionate liability provisions contained in Pt 4 of the *Civil Liability Act 2002*.

94 The cross-claimant's remaining claims are in respect of the stock losses that I pointed out yesterday and for a loss of profits caused by the loss of the stock. The loss of profits has been calculated in this fashion. There were 320 ewes lost and the lambing rate per annum - that is the number of lambs which survived till marking - was 91% per annum. That means that there were 291 lambs lost in each year over a period of four years. The natural predation rate was 6%, which reduced the number of lambs to 274 per annum. The lambs have been valued at an average of $100 per head. The loss of 274 lambs at $100 per head over a period of four years amounts to $109,600. However, the cost of raising the lambs is 30%, so that reduces the total value of the lambs lost to $76,720. Different methodology was used by Mr Middleton, but that made the mathematics far too difficult for me and for counsel. Mr Middleton only sold approximately two-thirds of his lambs and kept the other third of his lambs to reach breeding age to increase the flock. That would cause an increase in number, a compounding number of lambs to rise in subsequent years. Counsel agreed that the easiest way of valuing the loss was merely to look at the number of lambs lost, assuming they all went to market in each of the four years concerned.

95 The question which arises is what caused the loss? There are a number of factual considerations which need to be made. Mr Middleton, in cross-examination, conceded that stock could stray from Lot 10 onto other properties. However, that concession was one of possibility, not of probability. I know from exhibit RJM-1 and exhibit 7 and also from exhibit RJM-2, an old plan of Lot 10 made on 28 December 1903, that the western boundary of Lot 10 is mainly along the Queensland border. The eastern boundary is to Tenterfield Creek. The northern boundary is with the defendant's present holding. Part of the western boundary is within New South Wales but I cannot tell from exhibit RJM1 who might own that land. It is possible that it belongs to Mt Pleasant

Station. If so, it belongs to Mr Middleton's sister, with whom he is obviously on good terms because she keeps his dairy cows for him.

96 The boundary along Tenterfield Creek is shared with the defendant's current holding, with the property owned by Mr Gary Avery, and another part of the southern boundary along the creek is a boundary shared with Mr Stewart Morgan. The evidence I quoted yesterday from par 118 of Mr Middleton's affidavit indicates to me that the plaintiff was on good terms with Mr Stewart Morgan, whom the plaintiff telephoned on 4 April 2015 to discuss the intrusion of the plaintiffs onto Lot 17 and Mr Morgan is the owner of Lot 17 in Deposited Plan 789006.

97 There is no evidence of the nature of the relationship between Mr Middleton and Mr Gary Avery, who is the owner of Lot 16. It might be recalled that part of Jackals Hide are Lots 13, 14 and 15 in Deposited Plan 789006. If there is a good relationship between Mr Morgan and Mr Middleton and they do share a common boundary between Lot 17 and part of Lot 13 and Lot 14 along Jackals Hide. One would expect Mr Morgan to return any straying sheep to the cross-claimant. One would also expect the owner of Mt Pleasant Station, Mr Middleton's sister, to return any stock that may stray onto her property from Lot 10.

98 As I pointed out yesterday, Mr Middleton has been a sheep grazier for 40 years. One would not expect a person with his background not to be aware of straying stock and not to be able to round up any stock that strayed. My only familiarity with sheep is when their product appears on the dinner table. I do not know whether sheep are mob animals or not, but they always appear to move around in flocks or, as a flock of sheep is more commonly known in this country, as a mob of sheep. My only familiarity with bellwethers is at each federal election when Mr Antony Green, on the ABC, tells one what is happening in the federal electorate of Eden-Monaro. However, I do know what a bellwether is - it is an animal designed to lead a flock around - but whether there was any particular bellwether appointed by Mr Middleton to the defendant's flock is not a question covered by the evidence. I do not know of any particular propensity for sheep to break away from the flock or leave the

mob and stray into other properties. If 462 sheep had gone missing, then that would be an extraordinarily large rate for straying sheep that were not returned to their owner. Furthermore, sheep are marked as lambs - that is, they have attachments made to, I understand it, their ears - indicating to whom they belong. The idea that 462 sheep or lambs, including a ram, would go missing by straying in a three-month period is extraordinary.

99 Mr Middleton also conceded that it was possible that the sheep may have been afflicted by a virus or a bacillus or the like, but if such were an explanation for the loss of 462 beasts, one would expect the virus or bacillus or the like to have gone through the whole flock and Mr Middleton found no evidence of any affliction of the whole flock. He made it clear that he was able to diagnose many problems and could inject his own flock; if he could not diagnose a problem, he would call in the services of a veterinary surgeon. The idea that this amount of stock was lost due to some unknown illness that no one identified strikes me as unlikely.

100 What there is evidence of is the sheep being shot. Mr Middleton told me that those sheep that he could identify as having been shot were shot with firearms and not with bows. Alas, it is necessary for farmers and graziers in Australia to keep firearms to put down injured or damaged stock and to try to destroy predators and other vermin on their property. I say "alas" because I, for one, do not care for the use of firearms and spend a considerable amount of time sentencing people for firearm offences. I would expect Mr Middleton, who has been a sheep grazier for 40 years, and who has clearly been running Jackals Hide for, inter alia, bow hunters for a number of years to be able to differentiate between a bullet wound and a bow wound. He made it quite clear in his evidence that he could and I accept that evidence. The likelihood is that these sheep were lost or mainly lost because they were shot.

101 The submission put on behalf of the plaintiffs is, "Well, only 17 carcasses have been proved by photographic evidence and if such a large number of sheep had been shot, where are the carcasses or skeletal remains?" The answer to that is they could perhaps be anywhere in the 476 acres which comprise Lot 10. As Mr Middleton pointed out, it would be necessary to search the whole of

Lot 10 looking for remains of sheep and Mr Middleton was not in a position to search every nook and cranny of 476 acres. Mr McFarland told me on oath that the only person who used a firearm on Lot 10 when he was in possession of it was himself, but that, like much of his other evidence, was untrue. The evidence persuades me that others on the property, including Mr Giess, used firearms and Mr Middleton said in par 97 of his affidavit this:

> "I witnessed shooting, four-wheel driving and all-night parties by Mr McFarland and Mr Giess and others on many occasions throughout 2014 and the early part of 2015. I lodged a number of complaints with the New South Wales Police Force and 'Crime Stoppers', however, these activities continued:
>
> (a) RJM-33 is a photograph of McFarland and Giess (and Giess's vehicle) with the deer they had shot and killed between 3 and 4 October 2014;
>
> (b) RJM-34 is a photo compilation of a few of the many kangaroos and wallabies McFarland and Giess shot and killed between 5 and 8 November 2014;
>
> (c) RJM-35 and RJM36 is a series of photographs of some of the sheep McFarland, Miller and Giess killed during their break and enter of 4 April 2015, 7 April 2015 (after repossession) that I refer to below."

The only thing I would say about that piece of Mr Middleton's evidence is that there is no hard evidence that Ms Miller ever wielded a firearm on Lot 10. I am not persuaded that she would have shot any sheep.

102 The problem here is one of pleading. There is no pleading in bailment. The Second Edition of *Palmer on Bailment* (1991) tells me this at p 811:

> "An agister will be liable if he puts an animal in a place inhabited by others of a dangerous disposition, if it is foreseeable that injury will result. In a recent case, the Jockey Club were held liable for keeping a racehorse in a box containing straw, as a result of which the horse ate the straw and contracted a cough."

There are a number of cases cited to support that proposition made by the author. They are *Smith v Cook* (1875) 1 QBD 79, *Sanderson v Dunn* (1911) 32

ALT (Supp.) 14; 17 ALR (CN) 9, *Pipicella v Stagg* (1983) 32 SASR 464. At p 813, the learned author of the text which I am citing said this:

> "An agister must take reasonable steps to ensure that his land is safe for animals to roam upon, and will be liable for any direct loss which results from a breach of this duty. Thus, he must use ordinary diligence to ensure that there are adequate fences and to see that the place is free from hazardous conditions in which such animals are likely to fall or otherwise become injured."

For that proposition, the author cites *Halestrap v Gregory* [1895] 1 QB 561, *Turner v Stallibrass* [1898] 1 QB 56, *Grubb v The Cascade Brewery Co Ltd* (1903) 2 N & S (Tas) 133, as well as cross-referencing other cases. The index to the work refers to learning on p 863. It is not in particular about agistment but it is a principle that must be borne in mind:

> "We submit liability in respect of such events [deliberate damage, destruction or misuse] should follow the principles dictating liability for unlawful misappropriation. Accordingly, the bailee should be answerable for a deliberate injury to bailed goods which is committed by any servant, agent or independent contractor to whom the bailee has delegated the whole or any part of his duty of care in relation to those goods, but he should not be answerable if such injury is committed by an employee or delegate whose employment merely affords him an opportunity of injuring the goods without involving any actual entrustment of them to him."

Finally, it should be noted that on p 877 the following is said about agisters and, although I am not concerned with a lien in this case, another principle of law is stated:

> "The common law rules that an agister has no particular lien over animals bailed to him is upheld by substantial authority in England, Australia and New Zealand. The justification is that, 'unless the bailee can establish improvement, he has no lien'. An agister does not normally improve animals agisted to him but merely provides for their day to day maintenance and survival."

In other words, the duty of the agister is to provide for the day to day maintenance and survival of animals bailed to his care. However, as I said, there is no pleading in bailment.

103 The relevant pleadings are these:

"10. From about April 2014, the cross-defendant, in breach of the Contract, refused the cross-claimant, by its servant and agents, access to the Land for the purposes of tending to the sheep depastured on the Land.

PARTICULARS

(a) On or about 4 April 2014, Paul Alan Giess, a servant or agent of the cross-defendants, discharged a firearm in the direction of the cross-claimant's servants and agents (R. Janson, W. Kruger and B. Kruger) while they were tending the flock, causing them to flee the Land in fear for their lives;

(b) From that date, Mr Giess also regularly trespassed on Jackals Hide land to harass and intimidate the cross-claimant's servants and agents and to prevent them accessing the Land.

11. By reason of the said breach, the cross-claimants suffered substantial stock losses (as particularised below) due to predation on the flock by foxes, wild pigs and wild dogs and lack of care for the flock.

12. Further, during the period from 4 April 2014 to 30 June 2014 the cross-defendants destroyed a number of the cross-claimant's sheep by shooting the sheep with rifles and shotguns."

104 The losses claimed are alleged to have been caused by predation by foxes, wild dogs and wild pigs and by the shooting of sheep, not by Mr McFarland and Mr Giess and Mr McFarland's friends, but merely by the cross-defendants, Mr McFarland and Ms Miller. As I said, I am not persuaded that Ms Miller shot any sheep, but I am persuaded by the evidence that sheep were shot by Mr McFarland, Mr Giess and Mr McFarland's friends, those he admitted onto the property.

105 The pleading does not state that the cross-defendants suffered, permitted or allowed others, including Mr Giess, to shoot the defendant's sheep on the plaintiff's land. An attempt was made by the cross-claimant to amend the cross-claim to make the allegation, but that was successfully opposed by Mr Fronis, who appears for the plaintiffs/cross-defendants. He referred me to the decision of *Cambridge v Anastasopoulos* [2012] NSWCA 405 in which the leading

judgment was given by Meagher JA with whom Barrett JA and Sackville AJA agreed. Commencing at [51], his Honour pointed out that the claims there involved consecutive tortfeasors and concurrent tortfeasors and were concerned with a bailment and a sub-bailment and the provisions of s 34(1)(a) of the *Civil Liability Act 2002*. It became clear to me when reading the judgment during the course of argument on Wednesday that if I allowed the amendment to the cross-claim, the cross-defendants would be entitled to amend their defence, raising the question of an apportionable claim and inviting the Court to apportion liability between each person who may have shot the sheep on the property, and might involve the joining of Mr Giess as a party in these proceedings as on another cross-claim by either the current cross-claimant or by the cross-defendants themselves. In other words, making an amendment would have opened the proverbial, "can of worms," and for those reasons I refused the amendment.

106 However I do accept that Mr McFarland excluded the cross-claimant from the property. That issue has been discussed. That led to an increase in natural predation on Lot 10. I also accept that Mr McFarland himself shot some of the sheep and I also accept that he permitted others to shoot some of the sheep but he cannot be held liable in these proceedings for such losses there is no claim raised in bailment and the cross claim does not allege trespass to the sheep by anybody other than the cross-defendants themselves. I have reached the view, however, that in light of the - Mr McFarland's excluding Mr Middleton from the property that there was an increase in predation and I also accept that Mr McFarland shot a large number of sheep himself. The appropriate position to adopt, in my view of the evidence, is to place liability for half the losses on Mr McFarland.

107 Now half of the loss of stock is $19,966 and half the loss of profit is $38,360. Those sums plus the loss pleaded under par 25 of the cross-claim amounts in total to $71,732.38.

108 For those reasons I make the following orders:

(1) Verdict and judgment for the defendant against the plaintiff on the statement of claim.

(2) Verdict for the cross-claimant against the first cross-defendant Mervyn Christopher McFarland in the sum of $71,732.38.

(3) Verdict and judgment for the cross-claimant against the second cross-defendant Wendy Ann Miller for $13,406.38.

****

Amendments

21 March 2019 - 1. Typographical correction in "Catchwords"

2. Typographical correction in [63].