

THE SUPREME COURT

OF QUEENSLAND

No. 4013 of 1998

BETWEEN:

**NATIONAL AUSTRALIA BANK LIMITED ACN 004 044 937**

Plaintiff

AND:

**LYNTON CHARLES FREEMAN**

Defendant

**REASONS FOR JUDGMENT**

**B.W. Ambrose J.**

**Delivered the Eleventh day of October 2000**

Appearances: R Hanson QC with I Perkins for the plaintiff  
L Bowden for the defendant

Solicitors: Mallesons Stephen Jaques for the plaintiff  
Creswicks Lawyers for the defendant

Hearing date: 25, 26, 27 and 28 September 2000

- [1] The plaintiff sues on a Bill Facility with a limit of \$1,020,000.00 provided to the defendant on 19 December 1997.
- [2] The facility commenced on 19 December 1997 and ended on 6 April 1998. Under clause 19 it was agreed that a number of mortgages over the defendant's rural property "Glasford Vale" together with registered stock mortgages should remain in full force and effect. In essence therefore the bill facility was secured by the mortgage documents itemised in item 13 of the Schedule.
- [3] On the material it is clear that the defendant defaulted in meeting his obligations under the bill facility.
- [4] On 1 May 1998, the plaintiff instituted proceedings for recovery of possession of the land and stock the subject of the securities given by the defendant over the years to which reference was made in clause 19 of the bill facility. The plaintiff sought to recover \$1,029,255.05 plus interest to the date of issue of proceedings with a further claim for interest falling due subsequent to the issue of proceedings.
- [5] The defendant admits default under the bill facility and seeks relief based upon

events alleged to have occurred, representations and promises made, etc during the course of his dealings with the plaintiff from 1992 until the occasion of his executing a Deed of Mediation with the plaintiff subsequent to a Mediation conducted in December 1997.

[6] The bill facility upon which the plaintiff sues was arranged as a consequence of the Deed of Mediation executed by the plaintiff and the defendant on 4 December 1997.

[7] Recital E to that Deed reads:-

“E. As a result of the mediation Freeman has agreed to an offer from the bank to forebear from enforcing the mortgage immediately to allow him to repay the facility indebtedness on the terms and conditions contained in this deed.”

[8] Clause 4.1 provides:-

“4.1 Freeman must use his best endeavours to refinance the debt or to sell the property and to exchange contracts of sale no later than 4 March 1998. Settlement of any sale or refinance must be effected no later than 6 April 1998.

4.2 In the event the refinance is not approved or contracts are not exchanged under clause 4.1 by 4 March 1998, Freeman agrees to deliver to the bank by 6 April 1998 vacant possession of the property to enable the bank to sell the property as mortgagee exercising power of sale.”

[9] Under clause 3.1 it is provided:-

“Freeman acknowledges that the bank is entitled at any time on and from 5 March 1998 to issue to Freeman any demands, notices of exercise of power of sale and any other notices which may be required to enable the bank to exercise its power of sale.”

[10] Under clause 6.1, it is provided:-

“6.1 Freeman acknowledges that clause 4.2 requires Freeman to give the bank vacant possession of the property in the event that such refinance is not approved or contracts are not exchanged in accordance with that clause.”

[11] Clause 7 provides:-

“7.1 In the event that Freeman does not comply with the provisions of the deed, Freeman agrees that the bank is entitled to commence proceedings so that a writ of possession for the property may issue.

7.2 Freeman agrees that he will not take any active part in the proceedings including without limitation the filing of the

defence of the proceedings.”

[12] Clause 8 provides:-

“8.1 Except as otherwise provided in this deed, the bank agrees to forebear from enforcing the mortgages.”

[13] Importantly for this action clause 9 provides:-

“9 RELEASE

9.1 By the execution of this deed Freeman immediately absolutely and unconditionally releases the bank its officers and agents from all claims which Freeman now has or but for this deed might have had against the bank its officers and agents in respect of the facilities the mortgages the proceedings or any other matters referred to in the recitals to the intent that this deed may be pleaded by the bank as a complete and absolute bar to any claims by Freeman in respect of the matters released by this deed.

9.2 Clause 9.1 applies to the bank mutatis mutandis.”

[14] Recitals A, B and C to the deed read as follows:-

- “A. The bank provided certain facilities to Freeman.
- B. The bank holds mortgages to secure the repayments of the facilities.
- C. Freeman has defaulted in the payment of monies due under the facilities which defaults have not been rectified.”

I have already referred to Recital E in para 7.

[15] Paragraph 43 of the Defence and Counterclaim – after alleging in great detail facts and circumstances to support the proposition that the securities held by the plaintiff (which were referred to in the Deed of Mediation) were presently unenforceable because of misleading and deceptive representations and statements made by bank officers to the defendant and its unconscionable conduct in the course of supplying the financial services to the defendant asserts that the plaintiff is estopped from taking steps to enforce its security. It is further asserted that by reason of its negligent acts and omissions the plaintiff should be prevented from exercising its rights under the various securities listed in the bill facility and is liable in damages to the defendant.

[16] A significant hurdle in the way of the defendant presently agitating all the assertions and allegations contained in his defence and counterclaim is the release contained in clause 9.1 of the Deed of Mediation.

[17] To overcome this obstacle, the defendant in paragraphs 43 – 53 asserts facts said to support the proposition that both the Mediation Deed and the bill facility given pursuant to its terms are voidable and in fact have been avoided by the defendant

either by letter sent to the plaintiff dated 20 March 1998 or alternatively, by the delivery of his defence and counterclaim.

[18] The defendant contends that at the time of the mediation on 4 December 1997 leading to the execution of the mediation deed on that day pursuant to which the bill facility was given:-

1. The defendant was in a poor financial position as a consequence of the matters previously pleaded in that defence and counterclaim.
2. He was in a weak bargaining position.
3. The plaintiff was in a strong financial position and a strong bargaining position.
4. The defendant's legal advisors' preparation for the mediation had been hurried and they were not aware of the strength of his claims.
5. He was under considerable pressure from the plaintiff who threatened to proceed immediately to sell the mortgaged property should some agreement not be reached at the mediation.

[19] The further facts upon which the defendant placed significant reliance was that during the mediation:-

1. He suffered from stress and anxiety.
2. He was mentally unable to cope with the pressures he was under and was unable to think clearly or to understand the documentation shown to him.
3. The plaintiff was or ought to have been aware of matters 1 and 2 above.
4. The plaintiff took advantage of its superior bargaining position during the mediation and "rejected out of hand each of the defendant's proposals for a fair compromise".
5. The plaintiff steadfastly refused to acknowledge that there was any validity whatever in the defendant's asserted claims against it.
6. The plaintiff took the stance that unless the defendant signed the mediation agreement it proposed, there would be no agreement reached and the plaintiff would proceed immediately against the defendant for full and immediate repayment of the monies secured and sell the mortgaged property under its power of sale.
7. It was further pleaded in the defence and counterclaim that the mediation agreement conferred substantial benefits on the plaintiff including:-

- (a) An absolute and unconditional release by the defendant of all and any claims the defendant might have against the plaintiff.
- (b) Committing the defendant to accepting that he was in

default of the monies due under his facilities with the plaintiff.

- (c) Barring the defendant from even defending any subsequent litigation that might arise should the plaintiff commence proceedings to recover possession of “Glasford Vale” and/or its livestock.”

[20] The defendant contends that for the reasons already outlined the plaintiff applied pressure to induce him to sign the mediation agreement and he believed that he had no practical alternative to signing that agreement.

[21] In summary, it was contended that by reason of the matters to which I have referred, both the mediation agreement and the bill facility were obtained by:-

1. Unconscionable conduct on the part of the plaintiff; and
2. Conduct of the plaintiff in contravention of s 51AA and/or s 51AB of the *Trade Practices Act*.

Having regard to the terms of s 51AAB of that Act I give no consideration to those sections.

[22] It was contended at the end of the day that the Mediation Deed and bill facility should both be set aside and it was further contended that the bill facility “entailed the plaintiff unconscionably departing from the arrangement which the plaintiff had induced the defendant to believe he had with the plaintiff”.

[23] It was contended that the mediation agreement and bill facility were avoided by the defendant as I have indicated.

[24] The defendant seeks a declaration that the plaintiff is estopped from enforcing its rights under the mortgages or from even making assertions that he is in default under his loan agreements with the plaintiff. He seeks injunctive relief to restrain the plaintiff from enforcing its contractual rights to repayment of money or from exercising its powers as mortgagee. He seeks an order that the Mediation Deed and bill facility be set aside. He also seeks damages for contravention of s 52 of the *Trade Practices Act* and/or for negligence.

[25] Psychiatric evidence was adduced at the trial from Dr Mulholland whose reports were tendered and who also gave oral evidence. Evidence was also called from Dr Cameron who was a neurologist.

[26] In arriving at his expert opinion, Dr Mulholland had regard to the matters appearing in paragraph 6 of his affidavit sworn on 1 July 1998 for the purpose of the defendant opposing an application for summary judgment by the plaintiff. That affidavit and his report dated 16 June 1998 is Exhibit 24.

[27] I will refer only to some of the information provided to Dr Mulholland as to behaviour of the defendant etc which would have been readily observable to persons in his presence or company on the day of the mediation. I will not analyse what he informed the doctor as to his emotional condition involving “intense anxiety and depression, fear and frustration”. It may be, I suppose, that he could have had those

reactions to the mediation as it progressed without them being detectable by persons with him.

[28] Part of the material considered by Dr Mulholland included the defendant's account of his condition and behaviour at the mediation which included:-

“--- I was angry at the bank's lawyer and the bank's representatives for belittling my case and threatening to kick me off the property; nobody was listening to me – it was as if they couldn't even hear me;

As a result:-

- (i) I was raising my voice and at times screaming and shouting.
- (ii) I was speaking disjointedly and I believe incoherently.
- (iii) I was unable to express myself properly.
- (iv) ---
- (v) ---
- (vi) I was shaking.
- (vii) I was attacking people at the mediation especially the bank's representatives.
- (viii) My mouth was dry and was sticking so that at times I couldn't talk properly or get my words out.
- (ix) I was foaming at the mouth at some stages and I was constantly wiping the sides of my mouth.
- (x) I was completely exhausted.
- (xi) ---
- (xii) I was extremely agitated.
- (xiii) ---
- (xiv) ---
- (xv) I became so upset that I couldn't see clearly. When I get really upset my vision starts to become blurred and I have to use my second set of glasses. At the meeting, I became so upset that even my second set of glasses was not powerful enough to correct my blurred vision.

(xvi) ---

(xvii) I was sweating so much that the sweat was running all over my glasses which I was continually cleaning.

(xviii) I was constantly mopping my brow with my handkerchief which had become wet as a result.

(xix) I was gesturing in an accentuated way by bringing my hands down on the mediation table and throwing them all over the place.

(xx) ---

(xxi) ---

[29] Dr Mulholland examined the defendant once on 15 June 1998. The examination lasted for 1 hr 20mins. He was later given an extract from the defendant's affidavit used to oppose the summary judgment application.

[30] Importantly, Dr Mulholland confirmed that a person suffering from a "chronic adjustment disorder", a psychiatric disorder involving abnormal thoughts and feelings and emotional turmoil, may be able to keep these thoughts and feelings to himself. The condition may not be detectable at all to persons able to observe that person.

[31] Dr Mulholland confirmed that the only factual base for his opinion was what he had been informed by the defendant.

[32] Dr Mulholland read paragraphs 141 – 154 of the affidavit sworn by the defendant on 1 July 1998 about 2 weeks after he had interviewed him. He agreed that the content of the affidavit demonstrated a detailed recollection of what went on at the mediation and that the fact that he asserted at the mediation that he "needed to get away from the bank" indicated that he was able to speak up for himself.

[33] In particular, Dr Mulholland agreed that when the defendant had a series of discussions with his legal representatives and the mediator and after those discussions instructed the mediator to make an offer to the bank to settle the dispute on the basis that he would pay \$360,000.00 less than the amount he owed to the plaintiff whereupon it would release all securities, the defendant was capable of rational thought. The doctor also agreed that when that first offer was rejected the fact that the defendant had the mediator make a second offer that he pay \$180,000.00 less than the amount owed also indicated that he was then capable of rational thought and had an ability to look after his own interests.

[34] In the course of the mediation, officers of the bank had asked to see a schedule of the breeding cattle which the defendant asserted he had been wrongly forced by the bank to sell. The defendant's case was that he gave bank officers such a schedule which however they declined to accept as evidence of forced sale rather than of sale in the ordinary course of running a cattle property. According to Dr Mulholland even at that stage, the defendant was capable of rational thought in the pursuit of his

own self interest.

[35] It emerged in the evidence that in fact the offer that the defendant made to the bank that it reduce by \$360,000.00 the amount secured was in accord with the terms of a letter his solicitors sent to the plaintiff some 3 months before. What he did at the mediation through his legal representatives was to attempt to negotiate with the bank the same sort of resolution of his dispute as his solicitor had done on his behalf 3 months earlier – and before he commenced the mediation proceeding.

[36] Dr Mulholland expressed the view ultimately that the defendant was functioning satisfactorily at the time when the negotiations upon his instructions were being conducted.

[37] Dr Cameron, a consultant neurologist, gave a report dated 2 June 1998 which was also used by the defendant to avoid summary judgment. The defendant informed Dr Cameron that:-

“On 4.12.97 he can distinctly recall that he was feeling very anxious. His head spun. He couldn’t comprehend what had been told to him or what was proceeding. He described the symptoms of acute anxiety to me. He is really still uncertain as to what went on on that day.”

[38] Dr Cameron observed that on what the defendant described to him, he believed he was suffering “a very acute anxiety disturbance at the time he was involved in dealings with the National Bank in early December 1997”. He continued:-

“I believe it is highly probable that this man was compromised by an acute anxiety disturbance at the time he was re-negotiating with the National Bank. It is highly likely I believe he was compromised at the time of the signing of these documents.”

[39] He explained in his oral evidence that he used the term “compromised” to describe a condition where people “may do inappropriate things. They may not understand in fine detail what is going on, therefore their response to questioning is not completely appropriate to the situation”.

[40] In his oral evidence Dr Cameron did not express the view that it was “highly likely” that the defendant was compromised at the relevant time. What he said in evidence was:-

“but from what he was telling me he gave some symptoms which were suggestive he may have been in an anxiety-type or stressed state.”

He said that the defendant had told him that he really felt that he was compromised at the time. He observed:-

“To me, some of those symptoms are suggestive he may have been acutely anxious at that time.”

and that the defendant had informed him that:-

“He felt at some time that he was not able to cope.”

Dr Cameron agreed that the opinion he gave rested entirely on his acceptance of what the defendant had told him.

- [41] The defendant was the only one who gave evidence that he exhibited symptoms of the kind which both Dr Mulholland and Dr Cameron said indicated that he was incapable of protecting his own interest when the Deed of Mediation was agreed and executed. Those symptoms were such as to be observable by any persons who had the opportunity to observe him if and while he was displaying them.
- [42] Evidence was called from the mediator who had the opportunity to observe the defendant during the course of the day on which the mediation was conducted and indeed up until the time of execution of the Mediation Deed. He said he did not observe any of the symptoms of which the defendant gave evidence. The defendant did not call either his counsel or solicitor who attended at the mediation with him and who had the opportunity to observe his condition and symptoms if any, displayed during the day of the mediation.
- [43] The plaintiff’s solicitor and two senior bank officers attended on the mediation and the solicitor and the officer who eventually signed the Deed of Mediation with the defendant, gave evidence that on the occasions when they saw the defendant they observed no symptoms of mental incapacity of the sort he swore he then exhibited.
- [44] The reliability and persuasiveness of the medical evidence called by the defendant depends upon the reliability of the history of symptomatology which the defendant gave to both doctors and which he confirmed in evidence he gave trial.
- [45] The reliability of his evidence upon trial must be assessed in the light of the evidence given by the solicitor for the plaintiff, one of the officers of the plaintiff attending the mediation and the mediator, and in the light of his failure to call either his counsel or solicitor who attended at the mediation and had the opportunity to observe the symptoms which he said he displayed.
- [46] None of the persons who attended the mediation and who gave evidence gave any support whatever to the symptomatology of helplessness, mental instability, anxiety etc to which the defendant swore. In fact, the effect of the evidence was that no such symptomatology was observed by them at any time during the mediation. In particular, the mediator himself who had much more contact with the defendant than did any of the bank officers during the bigger part of the day of the mediation said that he observed no such symptomatology.
- [47] I am unpersuaded on the balance of probabilities that the defendant exhibited any of the indicia of mental incompetence or anxiety which both Dr Mulholland and Dr Cameron said would indicate a psychiatric disorder.
- [48] Whatever condition the plaintiff may have had which may arguably have affected his ability to look after his own affairs in a competent way at the time of the execution of the Deed of Mediation, I am quite unpersuaded that there was any

indication of any abnormality, of the sort he recounted to Dr Mulholland and Dr Cameron and about which he gave evidence observable to the mediator or to the officer of the plaintiff or its solicitor at that time.

[49] In any event, the bill facility upon which the plaintiff brings its action was executed by the defendant in the office of his solicitor at Bundaberg about a fortnight after he executed the Mediation Deed. There is no evidence of any incompetence on his part at that time.

[50] It is clear upon the evidence that the defendant did indeed attempt to negotiate his financial accommodation with another bank in accordance with his undertaking in the Mediation Deed. This attempt however appears to have been unsuccessful.

[51] Exhibit 6 is a 35<sup>1</sup>/<sub>2</sub> page transcript of a tape recording of a discussion between the defendant and his counsel on the afternoon before the day the mediation occurred and the execution of the Deed of Mediation was effected.

[52] It is clear from the content of that transcript, which I do not propose analyse in detail, that in the course of his discussion with his counsel, the defendant was fully seized of the strengths and weaknesses of his position at the forthcoming mediation. It is abundantly clear from the points of claim in the mediation (Exhibit "LNCF 64" to the affidavit of the defendant filed on 7 July 1998) that the points he sought to raise in the course of the mediation with the plaintiff included those which he later sought to litigate in his defence and counterclaim to the plaintiff's claim on the bill facility. In particular, point 4 reads:-

"4. In all, three hundred females were lost to the defendant's operation resulting in an estimated loss in sales over a three year period of approximately \$360,000."

[53] In the course of the mediation, the defendant attempted to persuade the plaintiff to allow him to set off the sum of \$360,000.00 allegedly suffered by way of damage as a consequence of the plaintiff's alleged breach of obligation to him.

[54] In the course of mediation discussions he instructed the mediator to make two offers to the plaintiff. The first offer was to reduce his indebtedness by the sum of \$360,000.00 upon his undertaking to then refinance the balance with another institution. The bank officers however refused to agree to that proposal.

[55] Eventually the defendant instructed the mediator to make a second offer to the plaintiff to reduce his indebtedness to it by the sum of \$180,000.00 by way of set off in respect of the alleged breaches of obligation to him.

[56] The mediator duly made this offer to the plaintiff but it was also rejected.

[57] The plaintiff then offered to enter into the mediation agreement which was ultimately executed by the parties. This involved allowing the defendant three months occupancy of his pastoral property to enable him to sell it or part of it or to refinance his indebtedness with another lending institution on condition that over that period of three months he give a bill facility of the sort which he did give and on condition also that the effect of the securities already held by the bank would be

preserved.

- [58] Eventually the defendant accepted this offer, executed the Mediation Deed, and a couple of weeks later in his solicitor's office, executed the bill facility.
- [59] The plaintiff called the mediator who said that the mediation commenced at about 9.45am and continued through the day to evening with a break for lunch. The solicitor for the plaintiff, attended with 2 bank officers and the defendant attended with his barrister and instructing solicitor. The mediator was fully briefed on the ambit of dispute between the plaintiff and the defendant at that time – vide Ex 16.
- [60] The mediator said that it was common ground from the outset that the defendant was in default although he contended that Mr Carlson a bank officer, had promised that the plaintiff would not foreclose on the mortgaged property whilst drought conditions persisted. He said that this contention did not loom very large in the mediation. He said that the defendant complained about the plaintiff forcing him to sell off some of his best breeding stock to meet its demands for payment of money. He said that the defendant made these complaints himself in the presence of the plaintiff's officers.
- [61] The mediator said that at the outset of the mediation, he invited each party to state its position. He said that Mr Werder, one of the bank officers, tried to impress upon the defendant that the debt was owed and that the bank wanted its money but was prepared to give him some latitude with respect to time of payment.
- [62] He said it became clear to him that the mediation was getting nowhere while the parties were together in the one room. He arranged for them to move with their legal advisors to separate rooms. He said that he then spoke to the parties separately. He said he thought that he spoke first to the defendant and his barrister and solicitor.
- [63] He said that there were offers made "to and fro during the day" and that his recollection was that the defendant wanted a resolution which involved him paying a sum of money over a period of time which was less than that owed to the bank. He said that the defendant made it clear that he did not like the bank. He said he had no recollection of Mr Werder calling the defendant "a silver tail" as the defendant had deposed in his affidavit to resist summary judgment. He said that in his view, Mr Werder was a calm but firm person, well aware of the strength of the bank's case.
- [64] Whereas the defendant asserted that the mediator had told the parties that they had given away all their common law rights, he had no recollection of making such a statement at all. He recalled that there was a discussion about whether the defendant's cattle property had been overstocked. He could recall making 2 offers to the plaintiff on instructions from the defendant and his barrister to pay the plaintiff less money than he owed, and he recalled that the bank rejected both offers.
- [65] While the defendant asserted that the mediator had informed him that even if he were successful with his claims against the plaintiff, the most that he could recover would be in the range of from \$100,000.00 to \$150,000.00, the mediator said that he did not recall saying that at all. He said that he informed the defendant that the plaintiff held securities and therefore had the upper hand and that the defendant

appeared to be in default and should settle on the best terms that he could.

[66] He said the parties were separated within the first hour of the commencement of the mediation and his recollection was that he spent the day conveying messages, offers etc “backwards and forwards”. He said he had a clear recollection of the events of the day:-

“It became clear to me pretty early on that the bank was prepared to give him some latitude but not in terms of a reduction of the debt. He also, from his point of view, would only make an arrangement which involved paying less than the amount the bank claimed.”

He said that he thought that on one occasion he let the parties stay together without lawyers and without him being present. He said he wasn't sure about this but his recollection was that the defendant wanted to talk to the bank people himself. He said that finally agreement was reached late in the afternoon when the solicitor for the plaintiff produced a draft or pro forma agreement. He said that by the time agreement was reached, the defendant was sitting with his barrister and that his solicitor had probably gone by that stage. He said that during most of the day the parties had occupied separate rooms with their legal advisors.

[67] The mediator said that he recalled the actual signing of the Deed of Mediation. He said that Mr Werder's attitude had not changed during the day throughout which he had remained “very poker faced”. He said the defendant became “a bit agitated from time to time during the day”. He said that the defendant clearly did not like the plaintiff and thought that he had been treated badly. He said that his recollection was that the defendant ultimately agreed to the extension of time, during which a lower rate of interest would be payable, within which to pay the monies he owed to the plaintiff. He said that this had been the plaintiff's attitude from the very start of the mediation. He said that his impression was that the defendant seemed relieved when he signed the Deed of Mediation that “he had some time to get his house in order”.

[68] When asked of the observable behaviour of the defendant as itemised in his affidavit, the mediator said he did not observe that sort of behaviour at all. He said from time to time the defendant raised his voice but he did not scream or shout. He said that although he became upset at times, the defendant did not speak disjointedly or incoherently. He said that while the defendant insisted that he had an arrangement with Mr Carlson about not foreclosing while drought conditions prevailed he also complained that good breeding stock had to be sold to meet the plaintiff's demand. He said that the only agitation he observed was when the defendant demonstrated his dislike for the plaintiff and its officers. He said that while the defendant may have thumped the table once or twice to emphasise a point, he did not observe any of the other indicia of mental or psychiatric disability the sort about which the defendant deposed in his affidavit, informed Dr Mulholland and Dr Cameron, and gave evidence upon trial.

[69] He said that there may have been more than one draft Deed of Mediation but certainly time elapsed between the final Deed of Mediation being produced and the defendant signing it. The mediator denied the defendant's assertion that he had told

the defendant that he should sign the deed. He said that he did not say any such thing to the defendant. The mediator agreed that at some stage he informed the defendant that if some resolution of the dispute could not be achieved in the course of the mediation the plaintiff would almost certainly sell his property.

[70] The mediator said that one of the defendant's complaints was that the plaintiff had not properly dealt with an application he had made for an interest subsidy available to persons on the land affected by drought.

[71] Eventually, in the course of cross examination, the mediator summed up the strategy adopted by the parties to the mediation in these terms:-

“It really came down to a situation where Mr Freeman wanted to negotiate his way out as best he could, that is, by paying less than the debt the bank claimed. Ultimately, the bank would not come into that. He complained that the actions of the bank “cost him money” by reason of his forced sale of part of his herd and his failure to obtain an interest subsidy and “he wanted some tally up for that”.”

[72] The mediator rejected the defendant's contention that he became more agitated and his condition deteriorated as the afternoon progressed.

[73] The mediator who had extensive experience in conducting mediations said that at no stage did it occur to him that the defendant may not be in a fit state to make a rational decision on the mediation. He said that the defendant's barrister did not suggest to him at any stage or even discuss with him the possibility that the defendant may not be able to make a rational decision in the mediation. The mediator said that at no stage did the defendant express any doubt as to whether he should sign the Deed of Mediation. He said that at no stage during the day was there anything in the behaviour of the defendant that might suggest the mediation should be adjourned or that he should give him a break to compose himself.

[74] Mr Werder who attended the mediation with another bank officer named Mr Luck and with the bank's solicitor denied that the defendant exhibited any of the indicia listed in his affidavit upon which Dr Mulholland based his opinion.

[75] According to Mr Werder, towards the end of the day the plaintiff through the mediator made an offer to the defendant and his legal representatives that it would allow time for a sale or refinance of the property obligations and that it would probably allow some interest concessions during the period of extension. He said that eventually the defendant suggested that the plaintiff's offer be put together in a deed. The plaintiff's solicitor had a precedent of some sort and the mediator's staff made a copy which was given to the defendant and his legal representatives. He said that there was “some fine tuning of that as to time and as to interest rates and responsibilities of the parties” and that eventually the defendant and his legal representatives indicated that the deed was acceptable. He said that it was signed by all parties in the boardroom which had been occupied during the day by the defendant and his legal advisors.

[76] Mr Werder's recollection was that the defendant spoke personally in the course of the mediation. His barrister also spoke on his behalf.

[77] Mr Werder said that no discussion of the schedule which the defendant gave to the mediator to give to the plaintiff's officers concerning this sale of cattle took place in the defendant's presence. Indeed, he said that when he had obtained the schedule from the mediator he and Mr Luck examined it together. He said that after he and Mr Luck had analysed the document he asked the mediator to convey to the defendant that in the view of the plaintiff, the cattle sales evidenced in the handwritten schedule indicated that he had only sold sufficient cattle to provide for the normal operation of the property. I accept the evidence of Mr Werder.

[78] Looking at the evidence given by persons who attended the mediation and considering the terms of the lengthy discussion the defendant had with his legal representative the day before the mediation which is recorded in Exhibit 6, and considering the negotiations that took place at the instance of defendant at the mediation and the fact that he signed the required bill facility a fortnight later in the office of his solicitor, I am unpersuaded upon the whole of the evidence that:-

1. The defendant did have any incapacity or had a reduced capacity to protect his own interests or to understand the effect of the agreement he made reflected in the Deed of Mediation which resulted from mental abnormality whether or not due to anxiety or undue pressure brought to bear upon him by the plaintiff in an unconscionable way or indeed that any such pressure was brought to bear upon him at any material time.
2. That he gave any observable indication whatever to the mediator, the officers of the bank, or to anybody else for that matter who attended upon the mediation that he had any such incapacity or reduced capacity. In *Imperial Loan Co v Stone* [1892] 1 QB 599 Lopes LJ pointed out at 603:-

“A defendant who seeks to avoid a contract on the ground of his insanity must plead and prove not merely his incapacity but also the plaintiff's knowledge of that fact and unless he proves these two things he cannot succeed.”

[79] In my view, the defendant has simply failed to establish any facts whatever which could justify a finding that the Mediation Deed and/or the bill facility which he signed as a consequence of that agreement was voidable at his option.

[80] In my view, upon the evidence, the bill facility is perfectly valid and enforceable and the matters raised by way of defence to it, have not been established.

[81] As a consequence of the enforceability of the mediation deed (Exhibit “LNCF 65” to the affidavit of the defendant filed 7 July 1998) it operates to release the plaintiff from all the claims which the defendant seeks to pursue in his action on the basis that the mediation deed be set aside, because he to the knowledge of the plaintiff was mentally incapable of protecting his own interests at the time he executed it.

[82] Some days were spent upon trial canvassing the various allegations contained in the first half of the defence and counterclaim. In the light of the conclusion to which I have come that the mediation deed and the bill facility pursuant to its terms were and remain legally effective and impose the obligations on the defendant which the bank seeks to enforce in its action, it is unnecessary for me to deal in detail with the

matters upon which the defendant sought to rely to avoid his obligation under the various facilities made available to him by the plaintiff. I will not therefore analyse in detail the factual matters canvassed at length upon the trial but will summarise briefly the nature of the matters upon which the defendant sought to rely.

[83] In 1992, the defendant refinanced with the plaintiff certain obligations he owed to other institutions with respect to advances made for and indebtedness incurred with respect to his pastoral activities.

[84] At that time, he dealt with a bank officer of the plaintiff named Carlson who was then stationed at Bundaberg.

[85] It was the case for the defendant that there was a representation made from the earliest association he had with Mr Carlson that the plaintiff would “carry” him upon the mortgages it took over his land and property until his cattle, timber and mineral sales reached \$240,000.00 per annum and/or the drought which commenced in about 1993, ceased. It was his case that relying upon this representational promise by Mr Carlson he increased borrowings and spent money purchasing cattle, improving pastures and securing and installing certain irrigation equipment on his property.

[86] On the other hand, Mr Carlson said that there was never any such agreement or representation. He said that in the course of discussions with the defendant, the two of them worked out that the defendant would need to bring in gross proceeds of \$240,000.00 per annum to “break even” – ie. to meet his bank interest payments and pay the operational overheads etc involved in conducting his pastoral activities.

[87] In the course of discussions etc between the defendant and Mr Carlson, Mr Carlson advised the defendant that he might be entitled to an interest subsidy while the drought persisted. I will not analyse the lengthy evidence given on that point. One of the arguments advanced by the defendant was that when Mr Carlson was replaced by another bank officer Mr Alder, Mr Alder declined to fill in an application form for the interest subsidy or indeed to indicate that the bank would undertake not to take recovery proceedings for monies due under its mortgage over the ensuing period of twelve months to which the interest subsidy would relate.

[88] It was the defendant’s case that when Mr Alder replaced Mr Carlson about mid-1996, he required that the defendant reduce an indebtedness for \$120,000.00 in one of the outstanding accounts to \$90,000.00. The defendant gave evidence that to make the required payment he had to sell a number of cattle which affected adversely the potential of his grazing block to maintain a breeding herd sufficient to exploit adequately its carrying capacity.

[89] In spite of all the evidence that was given no contemporaneous sales dockets or other such documentary evidence was led by the defendant to support his oral evidence that he sold the 300 head of cattle or breeders to which the points of claim upon the mediation referred. Indeed, some of the material he relied upon indicated that no breeders whatever were sold in the 12 month period after September 1996.

[90] In the course of his pre-mediation conference with his counsel on the afternoon of 3 December 1997 he said that in fact he had sold \$60,000 worth of heifers or

breeding stock because he was at the time of sale carrying too many. It later emerged that he had not reduced the loan facility by the sum of \$30,000 as required by Mr Alder or indeed by any sum, whatever the proceeds of sale may have been of any cattle which in fact he did sell - whether \$30,000 or \$60,000.

[91] There is much contemporaneous correspondence between the plaintiff and the defendant and/or the defendant's then legal representative in which no reference is made to the matters raised in the defence and counterclaim to support a claim under the *Trade Practices Act* or to raise matters of estoppel. These matters seem largely to have emerged and evolved subsequent to the execution of the Deed of Mediation. As I have indicated, there is no persuasive evidence that any cattle were in fact sold by the defendant in the period from late 1996 to late 1997 for the purpose only of meeting the bank's demands – which on the evidence were not met in any event. Moreover the evidence adduced by the defendant himself with a view to calculating the effect on the profitability and viability of his cattle breeding operation of the sale of such breeding stock in the year commencing September 1996 does not reveal that any breeders were sold in that period of time.

[92] On the whole of the material, I am quite unpersuaded that the defendant made out the case or cases pleaded on the assumption that he would succeed in avoiding the effect of the Deed of Mediation and the bill facility which he executed pursuant to its terms. This conclusion gives me comfort in reaching my ultimate conclusion that the defendant was capable of deciding that execution of the Deed of Mediation was arguably at least in his best intent.

[93] I found the evidence of both Mr Carlson and Mr Alder persuasive and supported in essence by the content of contemporaneous correspondence.

[94] I take the view that it would be most improbable that bank officers of their experience and holding the offices that they did, would make representations and give undertakings of the sort which the defendant gave evidence about – particularly when making such representations and giving such undertakings would be quite inconsistent with the terms of the contemporaneous correspondence passing between the bank and the defendant.

[95] I found the defendant's evidence less persuasive than that of Mr Carlson and Mr Alder and inconsistent with the terms of contemporaneous correspondence and indeed, inconsistent (by omission) with the content of the letter he had his legal representative write to the plaintiff on 23 September 1997 only a couple of months before the mediation held on 4 December 1997 (vide Ex 16 at p 26) in which no mention was made of matters pleaded to support his case based upon breach of obligation under s 52 of the *Trade Practices Act* or upon promissory estoppel but was confined really to the matters ventilated on the mediation.

[96] At the end of the day, I am unpersuaded that the defendant had any real prospects of success upon the various causes of action pleaded in his defence and counterclaim had clause 9 of the Deed of Mediation not absolutely barred those causes of action. However, in the light of the conclusion to which I have come on the enforceability of both the Mediation Deed and the bill facility upon which the plaintiff relies, it is unnecessary for me to analyse in more detail the evidence canvassed upon those causes of action.

- [97] I give judgment for the plaintiff for recovery of possession of the property itemised in clause 19 of the bill facility dated 19 December 1997 and for the sum to which it is currently entitled pursuant to that bill facility. Counsel indicated that the precise sum would be advised when reasons for judgment were delivered. It will obviously be in excess of the \$1,029,255.00 plus interest which was the sum claimed to owing on 1 May 1998.
- [98] I dismiss the defendant's counterclaim and his claim to set off any sum against the plaintiff's claim.
- [99] I order that the defendant pay the plaintiff's costs of and incidental to the action (including reserved costs, if any) to be assessed.