FEDERAL COURT OF AUSTRALIA

Wade v J Daniels and Associates Pty Ltd [2020] FCA 1708

File number(s):	VID 153 of 2019
Judgment of:	**O'BRYAN J**
Date of judgment:	27 November 2020
Catchwords:	**CONSUMER LAW** – services supplied to a consumer facing foreclosure on a home loan mortgage – alleged breach of contract and failure to comply with consumer guarantees – alleged misleading and deceptive conduct – alleged unconscionable conduct – nature and scope of services supplied – where the consumer disclosed to the supplier that the purpose of seeking services was to retain her home – whether supplier agreed or represented that its services would provide consumer with a long term solution that would enable the consumer to retain her home – whether supplier agreed or represented that supplier would procure a refinance of the consumer's home loan – whether supplier knew that consumer would be unable to maintain loan repayments and that the supplier's services would not prevent the bank from taking possession of the consumer's home – whether the removal of a credit impairment from the consumer's credit file provided any benefit to the consumer in retaining her home **PRACTICE AND PROCEDURE** – application to re-open case after judgment reserved – applicable principles – application refused **STATUTORY INTERPRETATION** – meaning of the phrase "financial services" in s 12BAB of the *Australian Securities and Investments Commission Act 2001* (Cth) – whether a service involving negotiations with a bank to defer recovery action and to agree temporary reductions in repayments is a financial service
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12AB, 12BAA, 12BAB, 12CB, 12DA, 12ED *Competition and Consumer Act 2010* (Cth) ss 84(2), 130A, 131A, 137B, 139B(2) *Competition and Consumer Act 2010* (Cth) Schedule 2 (Australian Consumer Law) ss 2, 18, 21, 22, 60, 61, 236, 267(3), 268, 275 *Evidence Act 1995* (Cth) s 128

Federal Court of Australia Act 1976 (Cth) ss 37M, 43, 51A(1)(a), 52

Wrongs Act 1958 (Vic)

Federal Court Rules 2011 (Cth) r 39.06

Cases cited:

Ample Source International Ltd v Bonython Metals Group Pty Ltd (No 6) [2011] FCA 1484; 285 ALR 488

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175

Australian Competition and Consumer Commission v Lux Distributors Pty Ltd [2013] FCAFC 90; ATPR 42-447

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2020] FCAFC 130; 381 ALR 507

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited [2019] FCA 1284; 139 ACSR 52

Australian Securities and Investments Commission v Kobelt [2019] HCA 18; 93 ALJR 743

Australian Securities and Investments Commission v Narain (2008) 169 FCR 211

Baltic Shipping Co v Dillon (The Mikhail Lermontov) (1993) 176 CLR 344

Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304

CCP Australian Airships v Primus Telecommunications Pty Ltd [2004] VSCA 232; (2005) ATPR 42-042

David Jones Ltd v Willis (1934) 52 CLR 110

Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31

Effem Foods Ltd v Nicholls [2004] NSWCA 332; ATPR 42-034

F.Y.D Investments Pty Ltd v Promptair Pty Ltd [2017] FCA 1097

Foots v Southern Cross Mine Management Pty Ltd (2007) 234 CLR 52

Grant v Australian Knitting Mills Ltd (1935) 54 CLR 49

International Harvester Company of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Company (1958) 100 CLR 644

Jenyns v Public Curator (Qld) (1953) 90 CLR 113

The "Juliana" (1822) 2 Dods 504

Kelly v The Queen (2004) 218 CLR 216

Kimberley NZI Finance Ltd v Torero Pty Ltd [1989] ATPR (Digest) 53,193

	King (Trustee), in the matter of Zetta Jet Pte Ltd v Linkage Access Limited [2018] FCA 1979 *Let's Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243 *Miller & Associates Insurance Broking Pty Ltd v BMW Australia* (2010) 241 CLR 357 *Moore v Scenic Tours Pty Ltd* [2020] HCA 17; 94 ALJR 481 *O'Grady v Northern Queensland Company Ltd* (1990) 169 CLR 356 *Olson v Keefe (No 3)* [2018] FCA 2001 *Oshlack v Richmond River Council* (1998) 193 CLR 72 *Paciocco v Australia & New Zealand Banking Group Ltd* (2015) 236 FCR 199 *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Services* (1995) 184 CLR 301 *Queensland North Australia Pty Ltd v Takeovers Panel (No 2)* (2015) 236 FCR 370 *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 *Scenic Tours Pty Ltd v Moore* [2018] NSWCA 238; 339 FLR 244 *Smith v New South Wales Bar Association* (1992) 176 CLR 256 *Spotlight Pty Ltd v NCON Australia Ltd* (2012) 46 VR 1 *Trade Practices Commission v Sun Alliance Australia Ltd* (1994) ATPR 41-286 *Walplan Pty Ltd v Wallace* (1986) 8 FCR 27
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	413
Date of hearing:	14, 15, 16, 29 October 2019 and 17 December 2020
Counsel for the Applicant:	C H Truong QC, L F Alampi, M W Guo
Solicitor for the Applicant:	Consumer Action Law Centre
Counsel for the Respondent:	S Clement

Solicitor for the Respondent	Macpherson Kelly

ORDERS

VID 153 of 2019

BETWEEN:	**BRENDA MAREE WADE** Applicant
AND:	**J DANIELS AND ASSOCIATES PTY LTD (ACN 159 769 534)** Respondent

ORDER MADE BY: **O'BRYAN J**

DATE OF ORDER: **27 NOVEMBER 2020**

THE COURT ORDERS THAT:

1. The applicant's interlocutory application dated 10 December 2019 seeking leave to re-open the applicant's case be dismissed.
2. The respondent pay to the applicant the sum of $2,000 plus interest from 10 November 2017 to the date of judgment at the rate specified in Section 2 of the Federal Court Interest on Judgments Practice Note (GPN-INT) (**Judgment Sum**).
3. Interest is payable on the Judgment Sum from the date of judgment to the date of payment at the rate specified in r 39.06 of the *Federal Court Rules 2011* (Cth).
4. The applicant's amended originating application be otherwise dismissed.
5. The applicant pay 50% of the respondent's costs of the proceeding.
6. The parties have leave to apply to the Court by written notice within 14 days to vary paragraph 5 of these orders or seek further orders consequent upon the judgment of the Court.

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

REASONS FOR JUDGMENT

O'BRYAN J:

A. INTRODUCTION

1 Until November 2017, the applicant, Ms Wade, was the owner of a house in the suburb of Craigieburn in the city of Melbourne in Victoria. In 2011, Ms Wade refinanced her home loan with the National Australia Bank (**NAB**), which took a mortgage over the property as security. In the first half of 2016, Ms Wade was in persistent default under her NAB home loan. In mid-July 2016, NAB gave notice to Ms Wade that it intended to issue proceedings for possession of her home and recovery of the home loan.

2 At that time, Ms Wade engaged the respondent, J Daniels and Associates Pty Ltd (**JDA**), to assist her. Three contracts were entered into and certain services were provided in the period from July to December 2016. The scope of JDA's contractual engagement, and the promises made, were in dispute between the parties. Nevertheless, it is uncontroversial that, on behalf of Ms Wade, JDA negotiated a deferral of NAB's foreclosure proceedings and then a temporary adjustment to Ms Wade's repayment obligations with NAB. Ultimately, Ms Wade fell back into arrears and her house was sold in September 2017 by arrangement with NAB to repay the home loan and settlement of the sale occurred on 10 November 2017.

3 The evidence showed that two other companies also provided services to Ms Wade in relation to her financial predicament: Australian Real Estate Group (**AREG**) and National Home Loan Group (**NHLG**). The relationship between JDA, AREG and NHLG and the services each offered and provided were matters of dispute. Ms Wade alleged that AREG was an agent of JDA.

4 JDA charged Ms Wade a total amount of $9,832 for services rendered and costs incurred. JDA also lodged a caveat over Ms Wade's house to secure payment of the amounts charged. When the sale of Ms Wade's home was completed on 10 November 2017, part of the sale proceeds was applied in payment of the amount charged by JDA (and the caveat was discharged).

5 By her amended statement of claim filed on 7 October 2019, Ms Wade alleges that JDA, in providing services to her under and in connection with the three contracts:

(a) breached the terms of the contracts, including the "due care and skill" and "fitness for purpose" warranties implied by s 12ED of the *Australian Securities and Investments*

Commission Act 2001 (Cth) (**ASIC Act**), alternatively failed to comply with the "due care and skill" and "fitness for purpose" consumer guarantees in ss 60 and 61 of the Australian Consumer Law (**ACL**) (being Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**)) (**breach of contract and consumer guarantee claim**);

(b) engaged in misleading or deceptive conduct in contravention of s 18 of ACL and/or s 12DA of the ASIC Act (**misleading conduct claim**); and

(c) engaged in unconscionable conduct in contravention of s 21 of the ACL and/or s 12CB of the ASIC Act (**unconscionable conduct claim**).

6 By her amended originating application filed on 7 October 2019, Ms Wade sought declaratory relief and damages or compensation for the loss caused by that wrongful conduct. The amount of the loss claimed was the amount paid to JDA plus unspecified loss for distress, physical inconvenience and disappointment.

7 The dealings between Ms Wade and JDA were the subject of material dispute. Ms Wade gave *vive voce* evidence of her recollection of the relevant events and communications with representatives of JDA. The communications largely occurred by telephone or by email. The telephone communications were recorded and the recordings and transcripts of the recordings were adduced in evidence. In material respects, Ms Wade's recollection of both telephone and email communications with JDA (and other entities) was shown by the evidence to be inaccurate, partial or incomplete.

8 For the reasons explained below, I have found that, in supplying services under the second contract (involving the removal of a credit impairment from Ms Wade's credit file in October 2016), JDA:

(a) breached its contract with Ms Wade in failing to consult with her;

(b) failed to comply with the consumer guarantee in s 61 of the ACL in that the service was not reasonably fit for the disclosed purpose of assisting Ms Wade to retain her home; and

(c) engaged in unconscionable conduct in contravention of s 21 of the ACL.

9 I otherwise dismiss the claims made by Ms Wade.

10 The monetary amount claimed by Ms Wade in this proceeding is very modest. Ordinarily, such a claim would be brought in a Tribunal (such as the Victorian Civil and Appeals Tribunal) or

a lower court where the legal costs for all parties would be far more modest than a proceeding in the Federal Court. Ms Wade was represented in this proceeding by the Consumer Action Law Centre (**CALC**). CALC brought the proceeding in the Federal Court because it believed that the issues raised in the proceeding have wider application and it was appropriate for the issues to be considered by this Court.

11 I accept that the issues raised in this proceeding potentially have wider application. In its contracts, JDA describes itself as a "specialised consultancy who assist individuals and companies in home loan distress" and "specialised consultants who provide assessment and consulting services in respect of credit reporting". The evidence shows that JDA provides advocacy services to persons who are experiencing financial difficulty with their home loans. In the normal course, it can be expected that other companies provide similar services. It can also be expected that many clients of JDA and similar suppliers will be financially and emotionally vulnerable. Many clients may have limited financial knowledge and limited experience of, or confidence in, negotiating with banks and will be reliant on suppliers such as JDA for advice and assistance. The provisions of Australia's consumer laws are framed to protect consumers in vulnerable circumstances. In particular, the consumer guarantees in ss 60 and 61 of the ACL are designed to ensure that services are supplied with due care and skill and are reasonably fit for the purpose disclosed to the supplier by the consumer. The prohibition of unconscionable conduct in s 21 of the ACL is intended to ensure that suppliers do not exploit, take advantage of or deliberately harm consumers. Those legislative obligations require that companies supplying services to consumers ensure that the services are suitable and appropriate for the consumer. The common law maxim "*caveat emptor*" and contractual limitations and exclusions must give way to the legislative obligations. The statutory consumer laws will be contravened if companies take advantage of vulnerable consumers and supply services that are unsuitable and inappropriate, thereby profiting from the consumer's vulnerability (as opposed to profiting from the provision of needed services).

12 Further, in some circumstances, Australia's consumer laws may require a supplier, dealing with a vulnerable consumer, to enquire about the consumer's needs and investigate the consumer's circumstances. Obligations of that kind may arise under both the "due care and skill" and "fit for purpose" consumer guarantees, and also under the prohibition of unconscionable conduct. However, issues of that kind do not arise in this case. Ms Wade did not allege that JDA failed to comply with the consumer guarantees, or acted unconscionably, by failing to enquire about or investigate Ms Wade's circumstances.

13 In closing submissions, Ms Wade's case was framed simply and directly: it was never realistically possible for Ms Wade to keep her home, refinancing or not, which was her disclosed purpose for engaging the services of JDA, and JDA as a purported expert assisting persons in home loan distress either actually knew, or at least ought to have known, that that was the case. The case so framed went beyond the pleaded case. Ms Wade did not allege that JDA ought to have known that it was never realistically possible for her to keep her home. She only alleged that JDA knew that. Regardless, I have rejected the central contention advanced by Ms Wade on a number of bases. First, the services offered and provided by JDA involved a temporary reprieve from foreclosure by NAB and JDA never offered or promised anything else. The temporary reprieve was to afford Ms Wade an opportunity to explore a refinancing and, when it became apparent that that could not be achieved at that time, to provide Ms Wade with time to consolidate her financial positon with the hope that she would be able to meet her home loan repayments and retain her home. Second, JDA did not know that there was no realistic prospect that Ms Wade could keep her home. Third, and in any event, I am not satisfied on the evidence that there was no realistic prospect that Ms Wade could keep her home. Save in respect of the removal of a credit impairment pursuant to the second contract, the evidence does not establish that JDA supplied services to Ms Wade in circumstances where JDA knew that the services had no benefit for Ms Wade.

B. OVERVIEW OF THE EVIDENCE

14 Most of the evidence adduced in the proceeding was documentary. As noted earlier, that included recordings of telephone communications between Ms Wade and JDA and transcripts of those recordings. All of the evidence was adduced by Ms Wade. JDA elected not to call any additional evidence.

Ms Wade's financial circumstances

15 Testimonial and documentary evidence was adduced by Ms Wade as to her financial circumstances during 2014 to 2016, but the evidence was piecemeal. The documentary evidence principally comprised bank statements for her bank accounts for limited periods of time. The bank accounts were:

(a) the NAB home loan account ending 9898;

(b) an ING transaction account ending 4144; and

(c) an ANZ transaction account ending 7581 (which had an overdraft of $1,000).

16 Ms Wade confirmed in evidence that she had only two accounts (apart from the home loan) which were the ING and ANZ accounts. Ultimately, the statements that were produced provided only a limited picture of Ms Wade's financial circumstances, particularly in relation to her expenditure. As discussed further below, the difficulty in making any findings with respect to Ms Wade's necessary or discretionary spending is exacerbated by the fact that Ms Wade made many cash withdrawals from her accounts using ATM or EFTPOS cash withdrawal facilities. Ms Wade bore the onus of proof and it was within her power to obtain complete banking records and provide a more comprehensive picture of her financial circumstances at the relevant time, but she failed to do so.

Dealings between Ms Wade and JDA, AREG and NHLG

17 Documentary evidence was also adduced by Ms Wade comprising the telephone and email communications between her and each of JDA, AREG and NHLG, as well as internal business records of each of those companies. The business records of JDA were provided to Ms Wade in the course of discovery and the business records of AREG and NHLG were obtained by Ms Wade by the issue of subpoenas.

18 Ms Wade gave *vive voce* evidence in her case and was cross-examined. That evidence is considered below. I find that Ms Wade was not a reliable witness. It is inevitable that an individual's recollection of events and conversations that occurred up to two years prior to giving evidence is unlikely to be completely accurate. However, Ms Wade's testimony about events was frequently contradictory. More significantly, and as discussed below, Ms Wade persisted with evidence about conversations with JDA that were shown to be inaccurate by transcripts of recordings of conversations. Ms Wade also sought to adhere to the case formulated on the pleadings, that her first contact was with JDA and that AREG was an agent (or division) of JDA, when that case was shown to be inconsistent with the documentary evidence.

19 In examination in chief, Ms Wade gave evidence to the effect that:

(a) JDA were the people whom Ms Wade first had contact with;

(b) JDA said that they would obtain refinancing for her loan;

(c) she was not kept up to date about the course of dealings with NAB or about the seeking of alternative finance;

(d) she was never told that it may not be possible for her to refinance her loan;

(e) she did not know that JDA was negotiating with NAB on her behalf or that JDA had negotiated terms with NAB to give Ms Wade time to seek refinancing; and

(f) when the third contract expired, JDA made no further contact with her and refused to return her calls.

20 I reject all of that evidence. It is contradicted by the records of telephone and email communications between JDA and Ms Wade that were in evidence, as discussed below. The evidence shows that each of JDA, AREG and NHLG diligently sought to contact and inform Ms Wade on regular occasions, but frequently they were unable to get through to Ms Wade and Ms Wade did not return messages to call back. Ultimately, I have concluded that many of the statements made by Ms Wade when giving evidence were not merely inaccurate but were also dishonest.

21 Ms Wade was also cross-examined about her appointment as a director of certain insolvent companies in 2019 and the circumstances of her appointment. It appears that Ms Wade was paid for accepting the appointments, but the appointments have now resulted in legal proceedings being issued against her in respect of the appointments and regulatory investigations being undertaken in respect of the persons behind the appointments. Counsel for JDA submitted that the evidence was relevant to Ms Wade's credit. In the course of questioning, I had reason to issue a certificate under s 128 of the *Evidence Act 1995* (Cth) in respect of certain answers given by Ms Wade. In my view, the evidence was of very marginal relevance and I have not placed any reliance upon it. It is unnecessary to refer to it further.

Expert evidence

22 Ms Wade also called an expert witness, Jason Fallscheer, and tendered an expert report from Mr Fallscheer. Mr Fallscheer holds a Bachelor of Business Finance from Deakin University and a Diploma in Finance and Mortgage Broking Management. He worked in business and corporate banking in Australia and England from 1993 to 2018 at a number of different banks. At the time of giving evidence, Mr Fallscheer was employed by Pitcher Partners Finance as Client Director where he advised clients on banking, funding and debt related matters. Mr Fallscheer was asked to express his opinion on certain questions concerning the likelihood of Ms Wade being able to refinance her NAB home loan. The questions were:

> a. Was it reasonably possible for Wade to obtain finance for the purpose of refinancing her Home Loan from another Credit Provider in July 2016 having regard to the market and her personal and financial circumstances as set out in the SoFP (with the assumption that child support payments would cease in

March 2017) as set out above and in the statement of claim?

b. If a person required a loan for $195,061.09 and could afford repayments of $700.00 per month, was there a loan available to meet those requirements in July 2016?

c. If a person required a loan for $195,061.09 and could afford repayments of $900.00 per month, was there a loan available to meet those requirements in July 2016?

d. Whether or not there was a loan available on the market to meet the needs set out in paragraphs b. and c. above, what interest rates and loan term would be applicable for such a loan if the repayments were set at either:

   i. $700.00 per calendar month

   ii. $900.00 per calendar month

e. Would a diligent and prudent lender responsibly provide a loan to a 51 year old with a 20, 25 or 30 year term? If so, what would those repayments be?

23 Mr Fallscheer's report and the evidence given in cross-examination is considered below.

Relationship between JDA, AREG and NHLG

24 An ASIC company extract for JDA showed that the company was incorporated on 3 August 2012. From 13 May 2014 its registered office and principal place of business had been located at Unit 1005, 343 Little Collins Street, Melbourne in Victoria. James Daniels was a director and secretary from the date of incorporation until 28 March 2019. Robert Mancy became an additional director and secretary on 1 July 2014 and, at the time of trial, was the sole director and secretary. The company was originally owned by James Daniels but, at the time of trial, was owned by Robert Mancy.

25 An ASIC company extract for AREG showed that the company was incorporated on 10 August 2010. From 17 May 2014 its registered office and principal place of business had been located at Unit 37, 777 Bell Street, Preston in Victoria. Since 2 March 2011, its sole director, secretary and shareholder was Maclaren Pow Law.

26 An ASIC company extract for NHLG showed that the company was incorporated on 7 April 2014. From 22 March 2018 its registered office and principal place of business had been located at 3 Hossack Avenue, Coburg North in Victoria. Kiara Halley has been a director and secretary and the sole shareholder since incorporation. For a brief period of two months in 2014, Pierre Haddad was also a director.

27 No evidence was adduced of any corporate relationship between JDA, AREG and NHLG. The factual findings sets out below establish that there was a commercial relationship between the companies in that:

(a) AREG referred Ms Wade to JDA to provide services involving negotiating with NAB to defer recovery activity in respect of the home loan; and

(b) AREG referred Ms Wade to NHLG to explore alternative finance options for her home loan.

28 It is not alleged that either AREG or NHLG charged Ms Wade any fees for work done. Only JDA charged fees and the proceeding has been issued solely against JDA. Ms Wade alleges, though, that AREG acted as agent of JDA at all times. The basis for that allegation rested solely on the apparent commercial relationship and dealings between AREG and JDA. However, the fact that AREG and JDA might have a commercial relationship involving the referral of clients and sharing of information does not establish an agency relationship between them. The evidence set out below does not establish any basis for inferring an agency relationship.

C. FACTUAL FINDINGS

Ms Wade's personal and financial circumstances up to June 2016

29 As noted earlier, Ms Wade gave evidence *vive voce* rather than by affidavit. Her evidence in chief did not provide a comprehensive picture of her personal and financial circumstances in the period to June 2016. Ms Wade tendered a range of documents relevant to that question. However, the documents were far from complete and raised many questions about her income and expenses during that period.

30 Ms Wade lived at 4 Winsham Court, Craigieburn in Victoria from 1989 until the house was sold in 2017. She built the house with her former husband, with a joint mortgage loan from Citibank. Ms Wade's two daughters were born and raised in the house.

31 From the time her eldest daughter was born (in 1994), Ms Wade was treated for depression and anxiety. Her treating doctor until the present day has been her general practitioner, Dr Psycharis. Ms Wade has taken anti-depressant medication over time.

32 Ms Wade and her former husband divorced in 2004. Ms Wade became the sole owner of the house in Craigieburn and refinanced the loan through Members Equity.

33 A letter dated 29 June 2011 from Homeside (a division of NAB) to Ms Wade recorded that a drawdown on Ms Wade's credit facility took place on that day in the amount of $190,000 (which is the loan at the centre of this proceeding, being account ending 9898). The monies were applied in a number of ways, including payment of $166,579.11 to Perpetual Limited. It was common ground that that was a repayment of a loan to Perpetual. Ms Wade explained in evidence that the loan from NAB enabled her to consolidate her existing home loan and car loan. The letter recorded an initial interest rate on the loan of 7.1% pa, a minimum monthly repayment of $1,287 with fortnightly repayments of $644 and a loan term of 30 years.

34 At that time, Ms Wade was employed by Bill Kerry Machinery Transport Pty Ltd (**Bill Kerry**) as a clerical assistant and cleaner. Ms Wade commenced that employment in 2003. In cross-examination, Ms Wade stated that she was earning about $530 a fortnight from Bill Kerry as at the time of the commencement of the NAB loan. It is significant to note that that was less than the Centrelink Newstart benefits that Ms Wade was receiving from 2014 when she fell into default under her home loan.

35 Ms Wade gave somewhat inconsistent evidence about her employment in early 2014. At first, Ms Wade said that she finished up at Bill Kerry around 2014. She said that, in early 2014, she fractured her knee in a workplace accident and went on to WorkCover payments. Ms Wade was also treated for anxiety and depression and she began to fall behind in her mortgage repayments. Subsequently, Ms Wade said that she was sacked by Bill Kerry because she did not get along with one of the owners and was suffering depression, and went onto Centrelink. Ms Wade did not state when that occurred, but I infer from her dealings with NAB, referred to below, that it occurred in 2013 or early 2014.

36 On 20 March 2014, NAB wrote to Ms Wade advising that a fortnightly loan repayment of $530.41 sought to be drawn from her ING transaction account ending 4144 by way of direct debit was dishonoured. I will refer to such letters as a dishonour letter. The second page of the dishonour letter explained options available to a borrower if they were experiencing financial difficulty. One of the options was to go to the Financial Services Ombudsman (**FOS**) and have enforcement action put on hold while any complaint was considered. In cross-examination, Ms Wade confirmed that she was aware of that option.

37 On 3 April 2014, Ms Wade received a further dishonour letter from NAB.

38 At about that time, Ms Wade made an application to NAB for financial assistance. A copy of the application, being an online form, was tendered in evidence. The document was undated but a handwritten date of May 2014 appeared at the top and Ms Wade confirmed that the application was made at that time. Ms Wade gave evidence that she gave instructions to NAB for the online form to be completed. The form stated that Ms Wade had had a substantial amount of time off work due to illness and she had run out of sick pay; this resulted in her having time off work without pay, thus not having enough funds to meet expenses; the situation was improving as a result of medication and counselling. In terms of her financial position, the form recorded that:

(a) Ms Wade was employed part time by Bill Kerry as a clerical assistant and had been employed for 3 years or more;

(b) Ms Wade had a Centrelink debt of $5,000;

(c) Ms Wade's fortnightly income after tax was $530 and she also received a fortnightly Centrelink benefit of $690 and received child maintenance of $650; and

(d) Ms Wade's monthly household expenses were around $2,300 per month.

39 As already noted, there is a degree of inconsistency between the oral testimony given by Ms Wade and the financial assistance application. The application refers to Ms Wade receiving fortnightly income of $530, which I infer is a reference to income from Bill Kerry, as well as Centrelink benefits. Ms Wade's bank statements for the period from 1 April 2014, referred to below, show that Ms Wade was receiving the Newstart benefit, which is an unemployment (income support) benefit, and do not show the receipt of any income from Bill Kerry. There is no evidence that suggests that Ms Wade was receiving any form of WorkCover benefits. Despite that, and despite Ms Wade's earlier testimony that she had been sacked by Bill Kerry, when asked about the NAB financial assistance application, Ms Wade said that she was employed by Bill Kerry until she began caring for her father in February 2015. I reject that evidence. The evidence supports the conclusion that, by 1 April 2014, Ms Wade was no longer employed by Bill Kerry and was not receiving income from employment (contrary to what was stated in the financial hardship application), but was receiving Newstart benefits, Family Tax benefits and Child Support payments from her former husband. The application did not provide any breakdown of the estimated monthly household expenses of $2,300. However, a subsequent financial hardship application submitted to NAB at the end of October 2014

provided the same estimate of household expenses, comprising loan repayments of $1,210 and other household expenses of $1,100.

40 On 15 May 2014, Ms Wade received a further dishonour letter from NAB.

41 On 20 May 2014, NAB wrote to Ms Wade and informed her that her application for relief in respect of her home loan had been approved, that she would not be required to make repayments for the next 3 months (expiring 29 August 2014) but interest would continue to accrue on her loan.

42 Ms Wade's bank statement in respect of her ING account ending 4144 for the period 1 April 2014 to 30 June 2014 showed that Ms Wade was receiving a fortnightly Centrelink Newstart benefit (which varied in amounts between $530.78 and $480.78), a fortnightly Family Tax Benefit payments (totalling $160.72) and, in each of April and May, a Child Support payment from her former husband of $1,400. The statement also showed regular payments for various household goods and services such as Woolworths, Council rates, insurances, electricity and gas, home telephony (Optus), mobile phone (Vodafone) and Foxtel. The bank statement also records the dishonour of the attempted loan repayment on 2 April 2014 due to a lack of funds. No loan repayments were made from the account during the period of the statement.

43 The ING bank statement also showed regular cash withdrawals via ATMs and EFTPOS transactions (the cash withdrawal accompanying an EFTPOS purchase transaction). In April, the cash withdrawals totalled approximately $1,250; in May the cash withdrawals totalled $1,150; in June the cash withdrawals totalled approximately $650. The cash withdrawals showed a somewhat unusual pattern in that multiple withdrawals were often made on the same day. For example, on 10 April 2014, a cash withdrawal of $200 was made with an EFTPOS purchase at Big W Craigieburn, followed by two separate cash withdrawals of $100 and $80 from a Westpac ATM in Craigieburn. On 30 April 2014, a cash withdrawal of $200 was made with an EFTPOS purchase at Woolworths Craigieburn, followed by two separate cash withdrawals of $200 each from ATMs. On 29 May 2014, two separate cash ATM withdrawals of $200 each were made. On 31 May 2014, an EFTPOS cash withdrawal of $200 was made from the Craigieburn Sporting Centre followed by a cash withdrawal of $200 from a nearby ATM. On 19 June 2014, an ATM cash withdrawal of $100 was made followed by an EFTPOS cash withdrawal of $200.

44 Ms Wade's cash expenditure, and particularly her expenditure on gambling activities such as poker machines (colloquially referred to as pokies) was the subject of cross-examination and is considered below.

45 The ING bank statement also showed that Ms Wade made a number of transfers to and from her ANZ account ending 7581, indicating that the ANZ account was in existence during that period. However, no bank statement for that account in that period was adduced in evidence.

46 On 30 July 2014, NAB wrote to Ms Wade reminding her that monthly repayments on her home loan would recommence on 29 August 2014 in an amount of $1,060.82. For reasons that were not explained, on 7 and 21 August 2014, Ms Wade received further dishonour letters from NAB (before repayments were due to recommence on 29 August 2014).

47 Ms Wade's bank statement in respect of her ING account ending 4144 for the period 1 July 2014 to 30 September 2014 showed similar receipts and payments to the previous quarter. Ms Wade received a child support payment of $1,400 on 1 July 2014, which I infer related to the previous month as a further payment of $1,400 was received on 29 July 2014. In August, the child support payments reduced to $700. Ms Wade continued to receive the fortnightly Centrelink Newstart benefit and the fortnightly Family Tax Benefit payments (which by mid-August had increased to around $197). She also received the Schoolkids Bonus of $410 and an Income Support Bonus of $686.10. The statement also showed similar payments for various household goods and services and also a similar pattern of cash withdrawals. In July, the cash withdrawals totalled $3,060; in August, the cash withdrawals totalled $1,640; in September, the cash withdrawals totalled $1,430. The cash withdrawals had a similar pattern to the previous quarter in that multiple withdrawals were often made on the same day. For example, on 1 July 2014, a withdrawal of $500 and a withdrawal of $200 were made from an ATM on the Corner of Craigieburn Road West. On 17 July 2014, an EFTPOS cash withdrawal of $150 at Woolworths Craigieburn was made, as well as an ATM withdrawal at BP Craigieburn of $100 and an ATM withdrawal of $100 at Craigieburn Safeway. On 18 July 2014, an ATM withdrawal of $800 was made as well as an EFTPOS cash withdrawal of $200. That pattern repeated itself many times. No loan repayments were made from the account during the period of the statement.

48 Again, no bank statements for Ms Wade's ANZ account in that period were adduced in evidence.

49 Ms Wade gave evidence that she applied to NAB in September 2014 over the telephone for an extension of the relief from repayments in respect of her home loan, and NAB approved the extension. There was no documentary record of that extension. I accept Ms Wade's evidence, but the extension appears to have been for September 2014 only because Ms Wade continued to receive dishonour letters in October 2014.

50 No bank statements (other than for the home loan) were adduced in evidence for the period from 1 October 2014 until 1 January 2016.

51 In October 2014, Ms Wade lodged a medical certificate with Centrelink signed by Dr Psycharis on 6 October 2014 stating that Ms Wade was suffering from anxiety with depression and would be unfit for work or study for a period of 3 months until 6 January 2015. An objection was taken to the truth of the contents of the document on the ground that the doctor had not been called. Ms Wade gave evidence that she saw Dr Psycharis and received the diagnosis and certificate so that she would not be required to attend work interviews in order to retain Centrelink Newstart benefits. I accept that evidence.

52 On 16 and 30 October 2014, Ms Wade received further dishonour letters from NAB.

53 On 31 October 2014, Ms Wade sent an email to "nabcare@nab.com.au" attaching a written application for variation of her home loan contract due to financial hardship. A copy of the application was tendered in evidence. It was signed by Ms Wade on 23 September 2014. The application contained two statements giving the reason for the application. The first, typewritten, stated (errors in original):

> Was having a substantial amount of time of work due to diagnosed depression & anxiety. medication was helping depression but anxiety was becoming worst as the pressure from my boss about going back to work permanently was mounting, they could no longer accommodate to my absences, so eventually my employment was terminated. I have decided to study a short course in computerised book keeping. then I'm starting my own business. I am only now beginning to control my anxiety & depression with changing doses of medication, councilling & numerous self help journals.

54 The second, which was handwritten, stated (errors in original):

> I would like to apply for extension on hardship till end of December, I have had a return of deppresive illness which set back my plans of studying & opening own book keeping business. I am beginning to now stabilise & am going to enquire on the short course needed to complete my studies & begin recruiting customers. I am very aware that I have already been granted time off from paying repayments & I'm also aware that the principal of the loan is rising, thus being the reason I wish to only apply for hardship till the end of December.

55 The application form also stated that:

(a) Ms Wade's monthly income (after tax) comprised Centrelink benefits of $1,631.50 and child maintenance of $700;

(b) Ms Wades' monthly expenditure comprised loan repayments of $1,210 and other expenditure of $1,100, totalling $2,331.50.

56 A further email was sent by Ms Wade to "nabcare@nab.com.au" on 2 November 2014 again attaching the hardship application.

57 Ms Wade gave evidence that the statements in the hardship application were true and correct. I generally accept that evidence. However, Ms Wade also gave evidence that her anxiety was becoming worse because of the pressure from her "boss", which I understand is a reference to the owner at Bill Kerry with whom Ms Wade had had a falling out. She said that she was being pressured to return to work, but Ms Wade said that she could not face going to work to face her "boss". I reject that evidence for the reasons already given. It is inconsistent with her earlier evidence that she was sacked and that caused her to fall behind in her repayments. It is also inconsistent with the fact that, by this time, Ms Wade had been on the Newstart benefit for at least 6 months. It is also inconsistent with the lodgement of the medical certificate with Centrelink the purpose of which was to exempt her from applying for jobs.

58 On 6 November 2014, NAB wrote to Ms Wade about the arrears on her home loan which then stood at $5,720.66. The letter stated that NAB had been trying to get in touch with Ms Wade but had not been able to reach her. The letter stated that NAB wished to see how they could assist Ms Wade, but required Ms Wade to contact the bank to avoid further collection activities. The letter did not refer to the hardship application. The evidence did not establish whether NAB actually received the hardship application (there was no evidence about the "nabcare" email address used by Ms Wade) or whether NAB responded to it. Nor did the evidence show any further steps taken by Ms Wade either in respect of the hardship application or in response to NAB's letter.

59 On 13 and 27 November 2014, Ms Wade received further dishonour letters from NAB.

60 On 12 December 2014, NAB sent Ms Wade a formal default notice under her home loan contract. At that time, the arrears on the loan were $6,251.07. The letter demanded repayment of that amount within 31 days failing which the whole of the loan would become repayable and foreclosure might then follow. The letter contained standard information about applying to the

bank to vary the contract if Ms Wade was experiencing financial hardship, and the ability to apply to the FOS to review the bank's decision with respect to varying the contract. The letter also stated that Ms Wade could contact a financial counsellor (and provided a free call number) and had the right to ask the bank to postpone any enforcement action. The letter contained hand-written annotations. Ms Wade gave evidence that the annotations were made by her and recorded details from one or more telephone conversations she had at about that time with a representative of NAB and a financial counsellor recommended by NAB. Ms Wade's recollection of the annotations and the telephone conversations was limited, but the annotations indicate that Ms Wade discussed a 6 month variation to her home loan contract to reduce the repayment obligations during that period.

61 On 29 December 2014 and 8 and 22 January 2014, Ms Wade received further dishonour letters from NAB.

62 Ms Wade gave evidence that, in February 2015, her father, John, was diagnosed with cancer and came to live with Ms Wade and her daughters. Ms Wade became a full time carer for her father. Ms Wade began to receive a Centrelink Carer's benefit (instead of Newstart). Ms Wade's father passed away in about February 2016. Ms Wade said that caring for her father at home put a strain on the whole family. As the cancer took hold, her father's disposition changed and made circumstances very difficult for Ms Wade. At some point, which was not specified by Ms Wade, her father went into palliative care. During that period, Ms Wade said that she was trying to maintain her father's business, which was a mobile mechanic business (using a van to deliver specialist hand tools to customers such as motor mechanics). However, Ms Wade conceded that she did not know anything about tools. It became apparent during the course of evidence that Ms Wade never took any real steps to conduct her father's business.

63 On 4 February 2015, Vodafone sent a letter of demand to Ms Wade stating that an amount of $933.69 was overdue and demanding repayment of a total balance of $965.62. The letter stated that Ms Wade had failed to respond to all prior Vodafone communications which had caused Vodafone to demand repayment. The letter asked Ms Wade to make contact within 72 hours, after which recovery action might be taken. The letter contained handwritten annotations. Ms Wade gave evidence that the annotations recorded a telephone conversation with Vodafone in which she agreed to pay $150 per fortnight.

64 On 18 February 2015, Vodafone sent a further letter to Ms Wade stating that it had cancelled her service. The letter contained handwritten annotations. Ms Wade gave evidence that the

annotations recorded amounts that Ms Wade had paid Vodafone (which were less than $150 per fortnight) and a reminder to herself that she needed to pay $150 per fortnight.

65 On 17 March 2015, Australian Debt Recoveries wrote to Ms Wade regarding her outstanding debt to Vodafone in an amount of $1,207.03 and demanding immediate repayment. The letter stated:

> Our client may exercise their right to place a default listing on your credit file if they have not already done so (a default listing will stay on file for up to five years and may impact on your ability to obtain credit in the future) and/or additionally, our client may exercise their right to commence legal action to recover this debt.

66 As set out below, the evidence showed that a credit impairment in respect of the Vodafone debt was recorded on Ms Wade's credit file and was subsequently removed in October 2016 through action taken by JDA on behalf of Ms Wade pursuant to the second contract entered into.

67 On 14 May 2015, Mercantile Legal wrote to Ms Wade on behalf of Australian Debt Recoveries regarding her outstanding debt to Vodafone advising that if the debt was not repaid within 10 days legal proceedings would be commenced.

68 In the first half of 2015, there was very little documentary evidence of communications between Ms Wade and NAB. On 27 April 2015, Ms Wade sent an email to a NAB representative called Adam suggesting that she may be able to apply her superannuation toward repayment of her home loan and asking Adam to confirm whether the bank required a copy of her father's will. On 3 June 2015, Ms Wade again sent an email to Adam stating that she would be paying two instalments that weekend. The email also stated that "unfortunately after 11 years of my ex husband paying Child Support without any problems whatsoever, last month he just decided I was getting to (sic) much so he halved the payments he was sending me". That statement was inaccurate in so far as the reduction had occurred earlier than suggested by Ms Wade. The ING bank statements referred to earlier show that the monthly Child Support payments had reduced from $1,400 to $700 in August 2014, some 10 months earlier. Nevertheless, the reduction in Child Support was formalised in a letter from the Child Support Agency to Ms Wade dated 27 July 2015 which stated that, going forward, the Child Support payments would be $701.33 per month.

69 In respect of the second half of 2015, there was no documentary evidence of communications between Ms Wade and NAB. A bank statement in respect of Ms Wade's loan account ending 9898 for the period 1 July 2015 to 31 December 2015 showed that Ms Wade made irregular

loan repayments during that period. At the beginning of the period, the loan stood at $192,046.56 and, at the end of that period, the loan was slightly higher at $194,311.02.

70 On or about 20 November 2015, Ms Wade entered into a loan contract with Cash Converters to borrow $720 which required fortnightly repayments over the course of the following 12 months commencing 4 December 2015. The loan had an establishment fee of $120 and monthly fees over the course of the loan of $408. Ms Wade gave evidence that she borrowed those monies for day to day expenses.

71 On 25 January 2016, Gadens Lawyers wrote to Ms Wade on behalf of NAB regarding the arrears on her loan which then stood at $15,238.81. The letter referred to a telephone call that had occurred on 13 January 2016 and stated that the NAB shared Ms Wade's willingness to explore possible options to resolve the default. The letter proposed the following arrangements:

> …the Bank is willing to defer its enforcement action and allow you time to remedy the default, subject to your compliance with the following conditions:
>
> 1. By Friday, 29 January 2016, the Bank is to receive in cleared funds into the Account the amount of $250.82 being the difference of the missed minimum monthly repayments for December 2015.
>
> 2. In addition to the payments provided for in paragraph 1, all future repayments are to be made on time and in the amount indicated in the loan agreements.
>
>   The next minimum monthly repayment in the amount of $1,060.82 falls due on 28 January 2016 and on the 29th day of each month thereafter. Based on the payments made to date, a further amount of $250.82 will be required to be paid by 29 January 2016.
>
> 3. There is to be no further and/or other defaults under the terms of the mortgage or loan agreement.
>
> Kindly confirm your acceptance of the above proposal by Friday, 5 February 2016 by signing and returning a copy of the letter.
>
> If you do not comply with all of the above conditions, the Bank will proceed with enforcement action, without further notice.

72 Ms Wade signed the letter on 26 January 2016 signifying her agreement to the conditions. On 5 February 2016, Ms Wade sent a copy of the signed letter to Gadens by email.

73 As stated above, Ms Wade's father, John, died in about February 2016. Ms Wade said in evidence that she was very upset by his death and could not accept that he had died. Ms Wade also gave evidence that, by that time, her father's business was not generating income that Ms Wade could use.

74 The bank statement in respect of Ms Wade's loan account ending 9898 for the period 1 January 2016 to 30 June 2016 showed that, at the beginning of the period, Ms Wade's loan stood at $194,311.02. Ms Wade made loan repayments until 15 April 2016, but no further payments after that. The repayments in January and February were approximately $270 per week, and in March and the first half of April were approximately $250 per week. At the end of the statement period, the balance of the loan stood slightly higher than at the beginning, being $195,061.09. In cross-examination, Ms Wade agreed that during the period of 1 January 2016 to mid-April 2016, she was able to make regular payments to NAB on her home loan. It was put to Ms Wade that she had sufficient monies available to continue to meet her loan repayments on an ongoing basis, and could have done so but for her cash expenditure, particularly from mid-April 2016. Ms Wade's evidence about her cash expenditure is considered below. I found her evidence unsatisfactory. I am not persuaded that Ms Wade was unable to meet her loan repayments during 2016 from her available income. Whether due to a gambling addiction or choices she made about her expenditure, Ms Wade put herself into a position where she had insufficient funds available to make repayments.

75 Bank statements for Ms Wade's ING account for the period from 1 January 2016 to mid-July 2016, and her ANZ account for the period from 15 January 2016 to mid-July 2016, were adduced in evidence.

76 Ms Wade's bank statement in respect of her ING account ending 4144 for the period 1 January 2016 to 31 March 2016 showed that Ms Wade received a weekly Centrelink Carer's benefit in alternating amounts each week of $401.25 and $465.75 and a monthly Child Support payment of $700. An additional Centrelink Carer's benefit of $4,756.05 was paid on 26 February 2016 which I infer was a payment associated with her father's death. Ms Wade also received two payments (on 4 January 2016 and 18 January 2016) of $500 each designated "CBA Loan Land Rates" which were not explained. The statement showed similar payments for various household goods and services as shown in the ING statements in 2014. The statement also showed significant cash withdrawals, although to some extent those withdrawals were offset by receipt of the additional Centrelink Carer's benefit of $4,756.05. The cash withdrawals in January totalled approximately $1,270 but the withdrawals in January were generally smaller amounts and more evenly spaced over time. The withdrawals in February totalled approximately $3,750, however, most of them were made following the receipt of the additional Carer's benefit on 26 February 2016. Two ATM withdrawals of $500 and $600 were made on 26 February 2016; two ATM withdrawals of $200 and $250, as well as an EFTPOS

cash withdrawal of $30 were made on 27 February 2016; three ATM withdrawals of $300, $300 and $400 were made on 28 February 2016; and a further EFTPOS cash withdrawal of $200 was made on 29 February 2016. The withdrawals in March totalled approximately $990, although an additional amount of $550 was spent at the TAB.

77 Ms Wade's bank statement in respect of her ANZ account ending 7581 for the period 15 January 2016 to 15 March 2016 showed that Ms Wade received a fortnightly Family Tax Benefit totalling approximately $196. Ms Wade also received a Centrelink Carer's benefit of $123.50 on 29 January 2016 and 12 February 2016. Ms Wade also received another payment of $500 titled "CBA Loan Land Rates" on 29 January 2016 and a payment of $1,000 titled "CBA Probate Balance" on 14 March 2016. The statement also recorded expenditure on a range of household goods and services such as groceries (Woolworths and Coles), electricity and gas and mobile phone (Virgin). The format of the ANZ account statement did not state whether EFTPOS transactions included a cash withdrawal component (in contrast to the ING statements). Generally, though, the ANZ account showed fewer ATM and EFTPOS transactions in comparison to the ING account statement for the same period. Nevertheless, on 15 February 2016, there was an EFTPOS transaction at the Highlands Hotel for $40 (excluding the $2.50 withdrawal fee) and a further EFTPOS transaction at Woolworths that day.

78 Ms Wade's bank statement in respect of her ANZ account ending 7581 for the period 15 March 2016 to 13 May 2016 showed that Ms Wade continued to receive a fortnightly Family Tax Benefit totalling approximately $196. The statement also recorded other amounts received by Ms Wade on an almost daily basis between 17 March and 18 April for "CBA Wages", "John Wade Pay Outstanding", "CBA Car Maintenance", "Wade", "John Wade", "John Wade Petty Cash", "John Wade Online Probate", "John Wade to pay GST", "John Wade Business Transition". John Wade was Ms Wade's father who passed away in February 2016. Ms Wade gave evidence that those amounts were received by her in connection with the management of his business following his death. The amounts paid totalled $7,325. Coincident with those receipts, the statement shows an increase in ATM and EFTPOS withdrawal transactions, with multiple transactions occurring on the one day and often at the same location (for example multiple EFTPOS transactions at Woolworths Craigieburn on the one day in combination with ATM withdrawals). Many transactions occurred at locations with pokie machines. For example, on 21 March there was an EFTPOS withdrawal of $80 at the First and Last Hotel Fawkner and an ATM withdrawal in Fawkner of $100. There were also three separate EFTPOS transactions at Woolworths Craigieburn that day, as well as Visa debit transactions at

Foodworks and Coles. On 29 March, there were two ATM withdrawals of $250 and $80, as well as an EFTPOS transaction at Woolworths Craigieburn and Visa debit transactions at Safeway Craigieburn and Coles Craigieburn (the latter shown as 31 March but with an effective date of 29 March). On 30 March, there were three EFTPOS withdrawals of $50 each at the Highlands Hotel Craigieburn, as well as two EFTPOS transactions at Woolworths Craigieburn and Coles Craigieburn. On 31 March, there was a further EFTPOS transactions at Woolworths Craigieburn. On 1 April, there was an EFTPOS withdrawal of $200 at the Craigieburn Sporting Club, as well as an EFTPOS transaction at Woolworths Craigieburn and a further Visa debit transaction at Woolworths Craigieburn. On 2 April, there was an EFTPOS withdrawal of $100 at the Craigieburn Sporting Club (recorded on 4 April but with an effective date of 2 April). On 4 April, there was an EFTPOS transaction at Woolworths Craigieburn and a Visa debit transaction at ALDI (recorded on 6 April but with an effective date of 4 April). On 5 April there were two more EFTPOS withdrawals at the Craigieburn Sporting Club of $100 each as well as an EFTPOS withdrawal at Woolworths Craigieburn. On 6 April, there was an ATM withdrawal of $200 as well as an EFTPOS withdrawal at Woolworths Craigieburn. On 8 April, there was an ATM withdrawal of $500. On 18 April, there were three ATM withdrawals totalling $570 and an EFTPOS withdrawal at Woolworths.

79 Ms Wade's bank statement in respect of her ING account ending 4144 for the period 1 April 2016 to 30 June 2016 showed that Ms Wade received a weekly Centrelink Carer's benefit in alternating amounts each week of $404.45 and $469.45 until 16 May 2016. Ms Wade also received a monthly Child Support payment of $700. The statement showed similar payments for various household goods and services as shown in the previous ING statements. Cash withdrawals in April totalled approximately $1,000; in May they totalled approximately $1,200; and in June they totalled approximately $600. In this period, there were fewer instances where multiple cash withdrawal transactions occurred on a single day. However, on 9 May, there were three EFTPOS cash withdrawals of $100 each, the first two both being at Woolworths Craigieburn and the third at Coles Craigieburn. On 14 May, there were two EFTPOS cash withdrawals of $50 each at the First and Last Hotel Fawkner. On 16 May, there were two EFTPOS cash withdrawals of $100 each at the Craigieburn Sporting Club and a further EFTPOS cash withdrawal of $170 at Woolworths Craigieburn. An internet print out for Ms Wade's ING account shows further cash withdrawals after 30 June including a withdrawal of $40 at the Highlands Hotel on 11 July.

80 Ms Wade's bank statement in respect of her ANZ account ending 7581 for the period 13 May 2016 to 15 July 2016 showed that Ms Wade continued to receive a fortnightly Family Tax Benefit totalling approximately $196. On 27 May 2016, Ms Wade began to receive a weekly Centrelink Newstart benefit of approximately $290. On 14 July 2016, Ms Wade received the Schoolkids bonus of $428. Substantial cash withdrawals from the account are shown totalling at least $400 in May, $790 in June and $850 (as noted earlier, the ANZ statement did not specify whether EFTPOS transactions involved cash withdrawals, although in some instances it is possible to infer a cash withdrawal from the standard withdrawal fee of $2.50). The withdrawals included the following. On 3 June 2016, a withdrawal of $40 was made at the Highlands Hotel and $150 was withdrawn from an ATM at the nearby Bridgehaven Stockland. On 10 June 2016, a withdrawal of $50 was made at the Epping Plaza Hotel. On 16 June 2016, $150 was withdrawn at the Westmeadows Tavern and a further $100 was withdrawn from an ATM at the nearby Caltex Greenvale. On 27 June 2016, $100 was withdrawn at the Craigieburn Sporting Club and a further $100 at the nearby Woolworths Craigieburn. On 15 July 2016, $200 was withdrawn at an ATM in Fawkner and a further $300 at an ATM in Craigieburn. An internet print out for Ms Wade's ANZ account shows further cash withdrawals of $500 at an ATM at the Highlands Hotel on 18 July 2016, $300 at an ATM on 19 July 2016 and $50 at the Craigieburn Sporting Club on 21 July 2016.

81 On or about 12 May 2016, Ms Wade entered into a further loan contract with Cash Converters to borrow $322.80 which required 3 fortnightly repayments commencing 27 May 2016. The loan had an establishment fee of $53.80 and monthly fees over the course of the loan of $21.52.

82 On or about 30 May 2016, Gadens Lawyers wrote to Ms Wade on behalf of NAB regarding the arrears on her loan which then stood at $16,258.57 and enforcement expenses of $1,920.61. The letter referred to a telephone call that had occurred on 27 May 2016 and again stated that the NAB shared Ms Wade's willingness to explore possible options to resolve the default. The letter contained an offer in similar form to the offer contained in the Gadens' letter of 25 January 2016 as follows:

> As a further gesture of goodwill, the Bank is willing to defer its enforcement action, for the time being, subject to your strict compliance with the following conditions:
>
> 1. Commencing on 29 June 2016, the Bank is to receive payment of at least your minimum monthly loan repayments into the Account, and on or before the 29th day of each subsequent month.
>
> Your next minimum monthly loan repayment in the amount of $1,124.47 is due on or before 29 June 2016. Please note that your minimum monthly loan

repayments may increase.

2. There is to be no further and/or other defaults under the terms of the mortgage and loan agreement.

If you do not strictly comply with the above conditions (for example, if you fail to pay the full amount of your minimum monthly loan repayments as they fall due on time) the Bank will be unable to assist you any further, and we are instructed to proceed with enforcement action, without further notice.

If you strictly comply with the all (sic) of the above terms for a period of six months, expiring on 29 November 2016 and evidence your ability to service the Account going forward, the Bank will review the matter further after 29 November 2016 with a view to capitalising the Notional Arrears and Enforcement Expenses, that remain owing at that time, onto the Account.

83 The letter invited Ms Wade to accept the offer by signing a copy of the letter. A signed copy was not in evidence. Ms Wade did not recall what she had done with the letter.

84 On 7 June 2016, Cash Converters wrote to Ms Wade notifying that she had defaulted on one of her loan repayments.

85 On 9 June 2016, Dun & Bradstreet (Australia) Pty Ltd wrote to Ms Wade in respect of amounts owing to Lumo Energy totalling $2,494.40. The letter recorded that an agreement had previously been made for Ms Wade to make fortnightly instalments of $50 but that she had defaulted on that agreement. The letter sought payment of the whole of the arrears. On 29 June 2016, Dun & Bradstreet (Australia) Pty Ltd wrote a further letter to Ms Wade acknowledging receipt of an instalment payment, but again seeking payment of the whole of the arrears.

Ms Wade's cash expenditure

86 Ms Wade was cross-examined in respect of the cash withdrawals from her ING and ANZ accounts, particularly in the period from May 2016 when she again fell behind in home loan repayments. Ms Wade agreed that her regular household bills (such as utilities, rates and insurance) were paid by direct debit or BPAY and purchases such as groceries from Woolworths and Coles were paid by EFTPOS transactions and not by cash. It was put to Ms Wade that a considerable portion of the cash withdrawals shown on her bank statements was spent on gaming activities such as pokies and the TAB. Ms Wade agreed that she spent some money at the pokies. She confirmed that the First and Last Hotel Fawkner, the Craigieburn Sporting Club, the Highlands Hotel in Craigieburn and the Epping Plaza Hotel had pokies, although she could not recall whether they also had a TAB, and she agreed that she spent money on the pokies at those venues. Ms Wade also confirmed that Woolworths Craigieburn is only

a short distance from the Craigieburn Sporting Club, a fact confirmed by a Google map that was tendered in evidence.

87 Ms Wade agreed that some of the cash withdrawn from her ING and ANZ accounts was used to gamble at the above-named venues. However, Ms Wade denied that all of the cash withdrawals was spent in that way. When asked how the money was spent, Ms Wade said that some of the cash withdrawn was loaned to friends, stating that "we often loaned money to each other". Ms Wade agreed that the cash withdrawn as part of an EFTPOS transaction at Woolworths or Coles was not spent on groceries, but she maintained that not all of it was spent on pokies and some of it was paid to people she had borrowed money from. Later in her cross-examination, Ms Wade said that some was spent on her late father's business.

88 I accept the possibility that some of the cash that was withdrawn was loaned to other people or used to repay amounts Ms Wade had borrowed, but that explanation begs similar questions. In so far as the cash was applied to repay an inter-personal borrowing, how and in what circumstances was the original sum borrowed and where was that sum spent? In so far as the cash was loaned to others, why did Ms Wade prioritise such inter-personal lending over repayment of her home loan? I reject Ms Wade's evidence that the cash was spent on her late father's business. The evidence establishes that that business never operated after her father died. I do not accept that Ms Wade was responsible for any expenses of her late father's business. Ms Wade gave evidence that the van that was used in her late father's business was never transferred into her name, and nor was the accompanying finance lease.

89 Ms Wade said that she was not an addicted gambler. However, she admitted that:

> I just desperately tried to get money, and then go to the pokies, because people did win, and I thought, if I could win, I – I just didn't know what to do.

90 On another occasion when challenged about her evidence that, although she could not recall the cash expenditure in 2016, there would have been a reason that she needed to spend large amounts of cash rather than pay her home loan repayments, Ms Wade responded:

> So sometimes there were issues that I thought were more important; sometimes, yes, pokies, in the hope that I could win, because friends did win, and try and get out of the mess I was in.

91 When asked if she had a gambling problem in 2016, Ms Wade responded:

> Not a gambling problem. I had hope. My – my – my best friend won, like, a lot of money in – in a casino. I've never been – I've been to a casino once. I was desperate.

> …I wasn't doing too well. But I didn't have a gambling problem in such. I'm – I – I don't stop at any – or hang to go to pokies or anything like that. I urge for a relief in any way I could. And, like, there was no other way. No – no bank was going to loan me any more money or anything like that ..... the loans. My friends had won at the pokies. I thought if I could win – you know, anything. Just anything. I felt like I had failed.

92 An examination of Ms Wade's bank statements, both in 2014 and 2016, and Ms Wade's testimony, leads me to conclude that Ms Wade spent a considerable amount of cash on pokies or at the TAB. It is not possible to make specific findings about the amount of money that was spent in that way. However, Ms Wade's testimony confirms that the cash was not used for her regular household expenses, but large quantities of cash were withdrawn. In a case in which Ms Wade's financial circumstances and ability to service a loan are key issues, Ms Wade carried an evidentiary onus to explain how the large cash withdrawals from her account were spent. The failure to provide an adequate explanation supports an inference that a considerable amount was spent on gambling activities. Further, and as discussed below, I am not satisfied that Ms Wade was unable to meet her minimum home loan repayments and regular household expenditure needs from the income she was receiving. Ms Wade's bank statements show that, each month, cash withdrawals which exceeded her home loan repayments were made, but Ms Wade did not show that the cash was spent on her household necessities.

93 Bank statements for Ms Wade's ING and ANZ accounts for August and September 2016 were not in evidence, but Ms Wade said that they would have shown a similar pattern of cash withdrawals. Ms Wade's bank statement in respect of her ING account ending 4144 for the period 1 October 2016 to 31 December 2016 showed that Ms Wade received a monthly Child Support payment of about $650. The statement showed similar payments for various household goods and services as shown in the previous ING statements. The statement also showed large cash withdrawals of $840 in October, $350 in November and $500 in December. Those withdrawals included an ATM withdrawal of $500 and EFTPOS withdrawal of $40 on 4 October 2016; an ATM withdrawal of $200 and EFTPOS withdrawal of $100 on 12 October; two EFTPOS withdrawals at the Craigieburn Sporting Club totalling $60 and an EFTPOS withdrawal at Woolworths Craigieburn of $50 and an EFTPOS withdrawal at Coles Craigieburn of $40 on 8 November; an ATM withdrawal of $200 on 9 November; an ATM withdrawal of $450 and an EFTPOS withdrawal at Woolworths Craigieburn of $30 and an EFTPOS withdrawal at Coles Craigieburn of $20 on 2 December. Ms Wade's bank statement for her ANZ account for the same period was not in evidence.

NAB threatens recovery action from July 2016

94 On 15 July 2016, Gadens Lawyers wrote to Ms Wade on behalf of NAB in relation to her home loan as follows:

> We refer to our letter of 31 May 2016 setting out an arrangement between yourself and our client to enable to remedy (sic) the default under the Account.
>
> As at the time of writing, you have not complied with the conditions set out in that letter including that you have not made the minimum monthly repayment due under the Account, on time, or for the amount required under the Loan Agreement.
>
> In the circumstances, we are instructed to proceed with enforcement action, including commencing proceedings for possession of the Property and recovery of the mortgage debt, without further notice.
>
> Should you wish to make a further proposal, please do so and we will seek the Bank's further instructions. However please be aware that until such time as an agreement is made in writing, enforcement action will continue.

95 The letter suggests that Ms Wade had agreed to the proposal set out in the letter of 31 May 2016 even though a signed copy was not in evidence.

96 Ms Wade gave evidence that, on receiving that letter, she believed that she had no options left, there was no further opportunity to negotiate with NAB and NAB would proceed with recovery action.

97 On 19 July 2016, NAB filed a Writ in the Supreme Court of Victoria seeking possession of the mortgaged property and payment of the home loan with interest.

Ms Wade's dealings with AREG and JDA

98 Ms Wade gave evidence that, shortly after receipt of the letter from Gadens in July 2016, she received a number of promotional letters from businesses offering services such as selling her house or "saving" her house. Ms Wade said that she telephoned one of the businesses who had sent promotional material, but could not remember which one. The promotional material was not adduced in evidence. I infer from the evidence that follows that Ms Wade called AREG.

Thursday, 21 July 2016

99 Internal files notes produced by AREG concerning Ms Wade were tendered in evidence (**AREG file notes**). Two notes were made in relation to 21 July 2016. The first recorded that the note-taker had spoken to Ms Wade by phone; an assessment was completed; NAB had advised that it will be taking her home and Ms Wade had been through her father's passing and was now trying to take over his business. The second recorded that the note-taker had

introduced Ms Wade to JDA; received approval to conduct her credit check and that it was explained to Ms Wade the urgency of the "ET" documents. I infer that ET is shorthand for "extra time" and the ET documents is a reference to the first contract with JDA by which JDA agreed to seek a deferral of NAB's recovery action (referred to below).

100 In evidence was an audio recording and transcript of a telephone call involving Ms Wade, a person called Jody from AREG (which other documents show to be Jody Bou-Karroum) and a person called Kelli from JDA (which other documents show to be Kelli Denton) which occurred on 21 July 2016 commencing about 2.39pm. It is apparent from the opening of the call that Ms Wade had been on a call with Jody and that Jody then called Kelli with Ms Wade still on the call. Jody described Ms Wade as her customer. Jody then recounted her earlier conversation with Ms Wade which was to the effect that:

(a) Ms Wade had received a letter from NAB who was looking at taking her home.

(b) Ms Wade had been mostly out of work for a couple of years due to ill-health.

(c) Ms Wade's father had passed away.

(d) Ms Wade was currently on Centrelink benefits, but she was looking at taking over her father's business.

(e) Ms Wade had just got herself up and running and was trying to get the business started again to get a bit of income but she was worried because she had not been making payments on her home loan for about 15 months and NAB were looking at taking action and taking her home away.

101 Kelli from JDA then asked a series of questions of Ms Wade and Ms Wade informed Kelli that: Ms Wade had not yet received court documents from NAB; the arrears on the loan were approximately $15,000; and Ms Wade had previously applied for hardship assistance on two occasions. Kelli then tells Ms Wade that she would get her manager Helen on the call.

102 In evidence was an audio recording and transcript of the continuation of the telephone call on 21 July 2016 when a person called Helen from JDA also joined the call (so that there were four participants on the call). The information from the previous call with Kelli was conveyed to Helen. Helen advised Ms Wade that it was likely that NAB would issue legal proceedings shortly and explained the legal process associated with foreclosure on the mortgage. Helen recommended that JDA act to put the legal proceedings on hold to avoid legal fees piling up. Helen then asked whether Ms Wade wished to keep her house or sell it, to which Ms Wade

replied, reasonably emphatically, that she wanted to keep it. Helen then stated that JDA usually advised that, in such circumstances where a current lender had taken recovery steps, it was desirable to look at the option of seeking a refinance through another lender. Helen stated that JDA would get the NAB legal proceedings put on hold, and get to know Ms Wade's file a little better, and then speak with her again. Helen stated that there were fees and charges involved, which Kelli would explain to Ms Wade and that documentation would be sent to Ms Wade. Helen then left the call. Kelli then stated:

> So, Brenda, as Helen explained we do need to get these proceedings on hold. We'll get the authority and the agreement out to you. Now, with the agreement there are the fees involved and there are payment options on the agreements. However, if you can't afford to make a payment option at the moment you can opt for a deferred payment to pay at a later date once you've sorted everything out. Okay? So if you do have any questions in relation to the documents do give us a call. All the contact details will be on the email we send across to you.

103 Ms Wade gave evidence about her recollection of the statements made during the call. She said that her recollection of the call was that it was positive and that she was told that JDA could refinance her loan and put the legal proceedings on hold. The evidence was high level and, in light of the recording that was in evidence, inaccurate. I do not accept that Ms Wade had any actual recollection of the phone call and her evidence was a reconstruction. The transcript shows that the service being offered by JDA was to seek to put the NAB legal proceedings on hold, which would then provide an opportunity for Ms Wade to seek a refinancing. JDA did not represent that it would seek or provide a refinancing. JDA only said that it was desirable to look at the option of seeking a refinance.

104 Ms Wade gave inconsistent evidence about whether JDA's fees were discussed. First, she said that she did not recall any discussion about fees during the above call. The transcript shows that fees were discussed, albeit at a high level and without specific figures being mentioned. Subsequently, when taken to the first contract (discussed below), Ms Wade said that she told "them" right from the start (or when she signed the contract) that she could not pay the fees as stated in the contract. Ms Wade said that "they" told her not to worry about it. Ms Wade said that she brought fees up many times and each time JDA said not to worry about the fees and that JDA would put her on a payment plan and that she would not have to pay until she obtained a refinancing. I do not accept any of that evidence. It is not supported by the records of the telephone and email communications. It is contradicted by the events that unfolded and subsequent conversations about fees (at the time of the third contract, as set out below). In my view, Ms Wade has transposed the complaints she ultimately made about JDA following

NAB's foreclosure on her mortgage and reconstructed the conversations that occurred at the time of the contracts being entered into. I consider that, at the time of signing the first contract, Ms Wade disregarded the fees because, at that time, she considered that JDA's services were the only way to prevent NAB foreclosing on her home.

105 The statements made by Kelli about JDA's fees on the telephone conversation were somewhat vague. Kelli told Ms Wade that she could opt for a "deferred payment to pay at a later date once you've sorted everything out". While the statement was vague, it did not convey that the fees were conditional on Ms Wade refinancing her loan. It only conveyed that the fees could be deferred to the resolution of Ms Wade's home loan problem. The resolution of the problem could be achieved in one of three ways: Ms Wade refinancing her loan; Ms Wade regularising her loan defaults with NAB; or the home loan being discharged through the sale of Ms Wade's home. In the end, Ms Wade's home was sold. The evidence shows that JDA did not pursue its fees other than from the proceeds of the sale. Accordingly, despite the vagueness of Kelli's statements about fees, I consider that JDA acted consistently with those statements and did not mislead Ms Wade.

106 Finally, Ms Wade gave evidence that, on the phone call, she communicated that she was only interested in a long term solution to keep her house and she was not interested in a short term solution. The transcript shows that Helen asked Ms Wade whether she wished to keep or sell her house and Ms Wade replied that she wished to keep her house. There is a difference in the tenor of the two statements which becomes material in this case. I accept that Ms Wade communicated to both AREG and JDA that her wish or desire was to retain ownership of her house. I also accept that, so far as it goes, that is a statement of the purpose for which Ms Wade was seeking assistance from AREG and JDA. However, and as discussed below, that purpose is advanced by seeking and obtaining a temporary deferral of legal proceedings to provide time for Ms Wade to explore refinancing options or other means to enable Ms Wade to regularise her home loan. Ms Wade was asked in examination in chief whether she would have retained JDA if she had been told that their services were of a short or temporary nature, to which Ms Wade replied that she would not. The question is simplistic, rendering the answer largely irrelevant. The relevant question is whether JDA's service, which was to defer foreclosure for a period of 60 days or longer in order to provide an opportunity for Ms Wade to seek alternative finance, was a service of benefit to Ms Wade.

107 In evidence was a document, accepted as a file note within JDA's records, titled "Referrer – Summary" where the referrer was identified as AREG. I infer from those facts and the contents of the document that the document contains a file note of information concerning Ms Wade communicated by AREG to JDA. I also infer that the information contained in the document was a record of Ms Wade's initial conversation with Jody from AREG. The document records the following (errors in original):

> One year ago Brenda became sick while working part time - She had depression. Spoke to with applied for hardship, that approved hardship for 6 months where you dont pay anything, they advised the amount will then be added to the loan term and she can pay it later, she still received default letters. She then lost her job a few months later. Nab did not hear from NAB untill she was $10,000 in arrears.
>
> Brendas dad became sick she had to be his carer 2 years ago, then her father passed away in Feb 2016, Brenda is the executive on will and is trying to take over the business only now because she was suffering and mourning. Was on a carers pension.
>
> Currently on new start $560 per fortnight. Brenda is paying for her fathers business expenses as well, its a retail mobile tools business, Brenda goes to service men and sells tools.
>
> Brenda lost her job 2 years ago, has been on CL [Centrelink] ever since. Once the business is up and running and transferred to her name she will be able to able to make a killing.
>
> Moving forward Brenda will be able to make payments if no arrears. Starting to even out now. Brenda advised the one month she could not pay the mortgage her x husband was not able to pay child support payment she fell behind.

108 Ms Wade gave evidence that she did not recall communicating those circumstances to AREG. She also said that not all of it was accurate. For example, her father had become sick one year ago rather than two. Further, Ms Wade agreed that she wanted to learn her father's business, but she was not running it at that stage and had only visited one customer. Ms Wade denied saying to AREG that she would be able to make a "killing" in the business. I reject that part of Ms Wade's evidence. It is highly unlikely that that statement would have been made up by AREG. The statement that "the one month she could not pay the mortgage her x husband was not able to pay child support payment she fell behind" is also incorrect, as the evidence shows that Ms Wade's failure to pay her loan repayments was longstanding. I consider that that was a further false statement made by Ms Wade to AREG.

109 Later that day on 21 July 2016, JDA sent Ms Wade two documents. The first was a single page document titled "Authority to act" and it authorised JDA to act on behalf of Ms Wade in relation to her home loan account 9898. The second was a two page document titled "Costs

Agreement" between JDA and Ms Wade (defined as the "Client") (which becomes the first contract as referred to in the pleadings). The Recitals stated that:

> - JDA is a specialised consultancy who assist individuals and companies in home loan distress;
> - The Client wishes to engage JDA to investigate and implement a solution to avert the immediate legal repossession of the mortgaged property the subject of debt recovery proceedings by the Lender.

110 The Costs Agreement set out the services to be provided by JDA as follows:

> - Compile, lodge and administer formal complaint/s with the Lender and/or relevant regulatory body &/or associations to immediately cease all legal action for repossession of the property in question;
> - This cessation for the fee charged, is to be for no longer than sixty (60) days;
> - In the event the matter has not been resolved and 60 days has expired, an extension agreement and fee will be applicable at the client's discretion;
> - All due care, skill and attention.

111 In relation to fees, the Costs Agreement stated:

> B JDA hereby on execution of this agreement, agree to perform the services as referred to above, for the fixed sum of $3850.00 (inclusive of GST)
>
> C. By signing this agreement, the Client accepts JDA's offer to perform the above services for the fixed sum.
>
> D. Interest is payable on unpaid accounts. The rate being the Reserve Bank of Australia target cash rate (http://www.rba.gov.au/statistics/cash-rate/) plus 10 percentage points.
>
> E. The client/s charges as beneficial owner and trustee of every trust all the client/s land (including land acquired in the future) in favour of JDA to secure the payment of the moneys and the performance and observance of the client/s covenance (sic) under this agreement. Should JDA elect to proceed in any manner in accordance with this clause, the Client/s shall indemnify JDA from and against all JDA's costs and disbursements including legal costs on an indemnity basis.
>
> F. This Agreement will be subject to the laws of the State of Victoria and the parties submit to the jurisdiction of the courts of that State.
>
> IN THE EVENT THAT JDA IS UNSUCCESSFUL IN PERFORMING THE ABOVE SERVICES, NO FEES ARE DUE/AND MONIES PAID WILL BE REFUNDED

112 The annexure to the Costs Agreement (on the second page) stated that the fee payable was $3,850 (inclusive of GST). The annexure provided six payment options. The sixth and final options was expressed as "Deferred Payment of $3,850 – To be paid in full after 60 days". That option had been marked with a cross. Each of the other payment options were expressed as discounts from the fee. For example, the first payment option was expressed as "Immediate

Full Payment of $2,695 – (30% Discount – Saving of $1,155). The other options were various periodic payments. In respect of each, an aggregate amount was calculated and the percentage discount from the full fee was stated.

113 It was common ground that JDA charged Ms Wade the fee of $3,850, but did not charge interest on the overdue amount.

114 By emails sent at 3.58pm and 4.03pm on 21 July 2016, Jody from AREG sent a number of documents to Ms Wade, including a document titled "Finance Brokers Privacy Clause" and a number of documents titled "Authority to act". The former authorised AREG to act as Ms Wade's agent in seeking access to her consumer credit information held by credit reporting agencies in connection with an application for credit. The latter comprised separate authorities to act on behalf of Ms Wade in dealing with ING, ANZ and NAB.

Friday, 22 July 2016

115 In evidence were emails from Ms Wade to each of Kelli at JDA and Jody at AREG on 22 July 2016 returning signed copies of the documents referred to above.

116 One of the documents sent by Ms Wade to AREG was a document containing information concerning her father's business which was called Select Tools. The document included a handwritten note from Ms Wade to AREG stating that the business was still in her father's name, but that she wished to take over the business but she had only just started.

117 The AREG file notes record that, on 22 July 2016, AREG held further telephone conversations with Ms Wade to the following effect:

(a) AREG called Ms Wade to complete an "SOA" and left a voice message and followed up with an SMS and email. I infer that "SOA" means statement of affairs. As discussed below, the evidence includes a document titled "Statement of Position" prepared on JDA letterhead which may be the same document. An email sent by Jody (AREG) to Ms Wade at 11.15am that day stated that Jody had tried to call with an important update and asked Ms Wade to return her call.

(b) Ms Wade called back and the "SOA" was completed. The file note also records that "Brenda will be taking over her Fathers business once it has been transferred into her name. Has BMW finance that was her dads for the work van which she has to now pay for. Advised finance is looking at best option." As noted earlier, Ms Wade was not obligated to pay for the loan for the work van (because neither the van nor the liability

were transferred into her name), although I accept that Ms Wade was only able to retain possession of the van by paying the applicable loan.

(c) AREG introduced Ms Wade to finance, being a person called Rita. Other evidence reveals that Rita's name was Rita Halikiopoulos and she worked at NHLG. Finance options were discussed and Ms Wade indicated she wished to proceed and "Finance documents sent to Brenda".

118 At 2.44pm on 22 July 2016, Jody (AREG) sent an email to Ms Wade attaching a credit report prepared by VEDA (dated 21 July 2016). The report listed one credit default in respect of Ms Wade's Vodafone account (although there was no amount then owing to Vodafone). Jody stated in the email:

> Here is a copy of your credit file for your reference. I have coloured the areas of your credit file that needs some attention. Please have a look at it so we can discuss when we talk next.

119 On that day, Jody (AREG) sent an email to Kelli (JDA) stating "I have Brendas (sic) SOA for you". It does not appear that the SOA was attached to the email. However, the VEDA credit report appears to have been attached.

Monday, 25 July 2016

120 In two emails sent at about 5.40am on 25 July 2016, Ms Wade sent Jody (AREG) documents "Rita requested" (Rita being a representative of NHLG). The documents appeared to be NAB, ANZ and ING bank statements, Centrelink statements, Child Support statements and information concerning the finance arrangements for the work van used in her late father's business.

121 Internal files notes produced by JDA concerning Ms Wade were tendered in evidence (**JDA file notes**). The files notes for 25 July 2016 recorded that:

(a) Kelli lodged documents with NAB. In evidence was an email sent at 9.32am on 25 July from JDA to NAB requesting that NAB stop collections activity on Ms Wade's home loan.

(b) Kelli called someone, I infer Ms Wade, for preliminary documents but received no answer. Kelli sent an email and an SMS. In evidence was an email from Kelli to Ms Wade confirming receipt of "Extra Time" documents and requesting Ms Wade to call back (or Helen if Kelli was unavailable).

(c) Helen spoke to Ms Wade on behalf of Kelli and requested the preliminary documents. Ms Wade stated that she had sent the documents to Jody (AREG) but would also forward them to JDA. Helen advised that JDA had made contact with NAB and JDA expected to hear back in the next few days.

122 In evidence was an audio recording and transcript of the telephone call on 25 July 2016 between Helen (JDA) and Ms Wade. It is apparent from the content that Ms Wade initiated the call in response to a message from Kelli (JDA). Helen informed Ms Wade that documents had been lodged with NAB. However, JDA required supporting documents including bank statements for the last 6 months and proof of income. Ms Wade stated that she had sent such documents to Jody (AREG) but would send them to JDA. Ms Wade asked when JDA would hear back from NAB and whether the response would say whether NAB intended to take Ms Wade to court. Helen responded that she expected to hear within 1 to 2 days and expected NAB to say that they would put recovery action on hold.

123 The AREG file notes record an entry in the name of a person named "Alley" to the effect that, on 25 July 2016, Ms Wade had sent to AREG many documents but various bank statements were missing. Alley unsuccessfully tried to call Ms Wade and sent an email and SMS. At 8.00pm on 25 July 2016, Jody from AREG sent an email to Ms Wade stating: "I have just received some information I need to discuss with you that you will put thousands of $$$$$ in your pocket but you must call me as soon as possible before it is too late and you lose the opportunity". There is no other evidence about the subject matter of that email.

Undated statement of financial position

124 In evidence was a document titled Statement of Financial Position on JDA letterhead. It is undated. Nevertheless, a note at the end of the document records that: "The bank wants to repossess her van for the business by 29 July 2016". That statement indicates that the document was first created prior to 29 July 2016. However, it is not clear whether and to what extent the document was altered on or after that date.

125 The document contains very significant errors. It records the following information:

(a) Ms Wade's occupation is shown as "Mobile Mechanic" (being her late father's business).

(b) Ms Wade's monthly income is shown as $1,460 comprising Centrelink benefits of $560, Family Benefit of $200 and Child Support of $700. That information was

incorrect as the Centrelink Newstart and Family Benefits were fortnightly benefits rather than monthly (and the Newstart benefit was approximately $580 per fortnight). Accordingly, Ms Wade's monthly income should have been recorded as $2,390.

(c) Ms Wade's total monthly expenses were shown as $1,756. However, that was an error. It constituted the aggregate of only a portion of the listed expenses under the heading "Living". The aggregate of all listed expenses was 3,624.33 (including home loan repayments of $1,127 per month).

126 When giving evidence in chief, Ms Wade gave no evidence about those expense figures and, as noted earlier, virtually no evidence was given about Ms Wade's actual or estimated living expenses. Certain of the monthly living expenses listed in the Statement of Financial Position seem higher than might be expected, particularly $125 for home phone/internet and Pay TV, $200 for mobile phone and $670 for sport/entertainment, or almost $1,000 out of the total living expenses (excluding loan repayments) of $2,497.33.

127 The document recorded Ms Wade's indebtedness as comprising a loan to NAB of $195,000, a loan on a van (used in her father's business) of $4,000, a Cash Converters' loan of $400, a Centrelink debt of $5,000 and unpaid rates of $2,000.

128 Ms Wade gave evidence that she spoke to someone about her financial position but cannot remember who. From the course of correspondence, it appears most likely that the information included in the Statement of Financial Position was obtained by AREG and passed on to JDA for compilation. There is no evidence that the document was provided to NAB or any other person.

Tuesday, 26 July 2016

129 The AREG file notes record that, on 26 July 2016, Alley again unsuccessfully tried to call Ms Wade. Subsequently, Ms Wade called back and they discussed outstanding statements that had been requested. The notes record that "LCW" was discussed (the evidence did not reveal what "LCW" meant) and "CR-DN" was discussed. I infer, from the evidence below, that "CR" means Credit Repair and "DN" means Debt Negotiation. Alley told Ms Wade that AREG would forward the "SOA" to JDA and JDA would forward paperwork for Ms Wade to sign and send back immediately. The AREG file note also recorded that Alley sent "CR-DN" email and SMS and contained a note "Assist work complete – COMING TO FINANCE". The latter

note appears to record something of a handover from AREG to NHLG which was exploring a refinancing of the NAB home loan on behalf of Ms Wade.

130 On 26 July 2016, Kelli (JDA) sent an email to Ms Wade as follows:

> Dear Brenda,
>
> Please read and sign these documents and then send them back ASAP, so we can get this resolved before you lose more time and money.
>
> As soon as you get them back to me, I will begin the correspondence with all the relevant parties straight away.
>
> As you would already be aware, time is critical. Do not delay getting them back to me immediately because we have a limited time frame to get this done.
>
> If you have any questions about the documents, please feel free to call me to discuss.

131 Attached to the email were a number of documents titled Creditor's Authority, Debt Negotiation Agreement, Your Debt Loss and Credit Repair Agreement. For the purposes of this proceeding, the first three documents can largely be ignored. Under the Debt Negotiation Agreement (also titled "Costs Agreement"), JDA offered to attempt to negotiate settlements or compromises of Ms Wade's unsecured debts including amounts owing to or in respect of Centrelink, Council rates, various utility service providers and the work van. The fee for the service was 40% of the amount by which each debt was reduced. There was no evidence that those services were supplied by JDA and no fees were charged under the Debt Negotiation Agreement.

132 The fourth document, the Credit Repair Agreement (also titled "Costs Agreement"), is relevant to the proceeding as JDA levied fees under that agreement which Ms Wade is seeking to recover. This document is referred to as the second contract in the pleadings. The agreement was relatively short with the operative parts comprising 1 ½ pages and a short annexure. In the agreement, Ms Wade was defined as the "Client". The recitals to the agreement stated:

> a) JDA and its associated entities are specialised consultants who provide assessment and consulting services in respect to credit reporting;
>
> b) The Client wishes to engage JDA to investigate its credit history and attempt to identify and, with your agreement, implement a solution to remedy any defaults, writs or judgements ("The impairment/s") on your credit history as listed in Annexure A.

133 The annexure to the agreement identified two credit impairments. The first was the NAB home loan. The second was Vodafone to which no amounts were owing but there was a credit default on Ms Wade's credit history.

134 The relevant operative provisions were as follows (errors in original):

> 1) The initial assessment is free of charge;
>
> 2) You grant JDA an exclusive authority in the matter;
>
> 3) Should JDA identify impairment/s that can be removed you agree to pay $2,000.00 ex GST ("*The Fee*) per impairment/s per client;
>
> 4) The Client/s agrees to provide all necessary instructions and co-operation in a timely manner to enable JDA to perform the above services. In the event that such instructions and co-operation is not provided in a timely manner or any interference on your part under this agreement the fee may not be refunded, furthermore JDA takes no responsibility if the client incurs any losses as a result of the aforementioned;
>
> 5) Should JDA be unable to remove the impairment/s, other than as a result of your failure to render reasonable assistance or any interference on your part under this agreement; we will refund the Fee paid by you;
>
> 6) Payment of the Fee is due and payable upon successful removal of the impairment/s, per client/s.
>
> 7) Interest is payable on unpaid accounts. The rate being the Reserve Bank of Australia target cash rate (http://www.rba.gov.au/statistics/cash-rate/) plus 10 percentage points.
>
> 8) The client/s charges as beneficial owner and trustee of every trust all the client/s land (including land acquired in the future) in favour of JDA to secure the payment of the moneys and the performance and observance of the client/s covenance under this agreement. Should JDA elect to proceed in any manner in accordance with this clause, the Client/s shall indemnify JDA from and against all JDA's costs and disbursements including legal costs on an indemnity basis.
>
> 9) If you refinance using the services of the finance advisor or broker names in the schedule or any other finance broker or lending institution, you irrevocably authorise that company to collect the Fee due to JDA at settlement of any refinance of the Property;
>
> 10) In order to remedy any defaults, writs or judgements on your credit history you may be required to pay arrears or other costs incurred, sign documents, adhere to negotiated agreements or otherwise provide such assistance as we may reasonably require. Any disbursements that we incur in the process of removing the impairment/s will be paid by you;

135 Later that day, Ms Wade sent an email to JDA attaching the signed documents. In evidence was a copy of the second contract that had been signed by Ms Wade. During examination in chief, Ms Wade said that she did not read the document but simply signed it and returned it to JDA. Ms Wade was asked during examination in chief whether she was given an explanation as to how removal of credit impairments would improve her refinancing prospects. She replied that she was told that her credit report would look better (if credit impairments were removed). Ms Wade's evidence indicates that a discussion about the second contract occurred and Ms Wade had a reasonable appreciation of the purpose of the agreement.

136 On 26 July 2016, Jody (AREG) also sent an email to Ms Wade advising her that, in order for NHLG to proceed with her application for finance, they required recent copies of her NAB, ING and ANZ bank statements. Ms Wade replied to that letter later that day.

Wednesday, 27 July 2016

137 On the morning of 27 July, Kelli (JDA) sends a follow up email to NAB, requesting a response to her email of 25 July 2016.

Thursday, 28 July 2016

138 On 28 July 2016, Ms Wade sent an email to Jody (AREG) with the following message:

> Just wondering how it's all going, didn't hear from anyone yesterday, starting to get a bit nervous now, the finance company for the van want an answer tomorrow, so im gonna call them today and advise them that im refinancing..Please let me know as soon as u hear anything

Friday, 29 July 2016

139 The JDA file notes record that, on 29 July 2016, Kelli (JDA) undertook the following actions:

(a) Kelli called Ms Wade to request her June and July transaction (banking) statement and told Ms Wade that Kelli was waiting to hear from NAB but would follow them up and call her later that day.

(b) Kelli then called the NAB case manager who told Kelli that he did not have details to give but that he would pass on a message for someone to contact Kelli. The file note refers to the NAB case manager as Daniel but subsequent emails identify the bank manager as Daaneyal Khan.

(c) Kelli received an email from Ms Wade with an updated ANZ bank statement which Kelli forwarded to Jody (AREG) and "Kiara". I infer that "Kiara" is Kiara Halley, the director of NHLG.

(d) Kelli spoke to Daaneyal from NAB who said that the "recoveries team" would be handling the file and they have put a hold on legal action. Daaneyal said that the minimum monthly payment was $1,124.47, arrears were $18,507.51 and the loan balance was $195,061.09.

(e) Kelli then called Ms Wade but received no answer and so sent an email.

140 In evidence was an audio recording and transcript of the telephone call on 29 July 2016 between Kelli (JDA) and Ms Wade. The call was initiated by Kelli. The first part of the telephone call

is consistent with Kelli's file note, referred to above, in which Kelli sought the ANZ account statement since May. As Kelli is about to end the call, the following exchange occurs:

Ms Wade:	And, how long does it take for me, to find out?
Kelli:	About a refinance? Or…
Ms Wade:	About anything, because I'm just freaking out.
Kelli:	Okay, ah, just give me a sec.
Ms Wade:	'Cause the van people, they said today's the last day I've got.
Kelli:	Yep. Alright, let me have a look, um…
Ms Wade:	Just like anything, if I'm going to make it or not or what?
Kelli:	Oh, well it has been lodged with NAB anyway, so they're supposed to be putting legal proceedings on hold immediately, um...`
Ms Wade:	Oh good.
Kelli:	Yep so, I'm going to follow them up today and see how that's all progressing.
Ms Wade:	Okay.
Kelli:	But, um with the refinances, yeah, you'd have to speak to, um, Australian Real Estate Group about timeframes on that, um but yeah, the only thing…
Ms Wade:	That's Jody, that's who I sent all the stuff to I think.
Kelli:	Yep.
Ms Wade:	And she's sent it to Rita, who's at the bank.
Kelli:	Rita, at the National Home Loans Group?
Ms Wade:	Ah, get refinancing for me.
Kelli:	Yeah, yeah National Home Loans Group.
Ms Wade:	So I'll send it again, I'll send it to you too.
Kelli:	Yep, alright, no worries.
Ms Wade:	Okay, and how…when do I find out or?
Kelli:	I'll give you a call probably again this afternoon after I've spoke to NAB again, um…
Ms Wade:	Thank you.
Kelli:	And I'll just give you peace of mind for the weekend.
Ms Wade:	Ah, yes thank you. Thank you
Kelli:	Alright, no worries.
Ms Wade:	Thanks Kelli.

Kelli: Alright, thanks.

Ms Wade: Bye.

Kelli: Bye

141 In that conversation, Kelli reconfirms that JDA is negotiating an extension of time with NAB, and that AREG and NHLG are seeking a refinancing for Ms Wade. Later that day, Ms Wade sent Kelli an email attaching ANZ account statements. Also later that day, Kelli sent Ms Wade an email stating that she had tried to call, but that Kelli had spoken to NAB who confirmed that the recovery proceedings were on hold. Ms Wade replied to that email stating (errors in original):

> Sorry about that, … excellent news that its being put on hold, ive never been so stressed in my life as I sm right now, I just need to know what the chances r of getting refinanced, after this I swear ill never miss a repayment ever again, if u hear anything about getting the new loan, please let me know straight away, via email if thats ok, and thank u so much for all your help, youve all been fantastic.

Saturday, 30 July 2016

142 On 30 July 2016, Kelli replied to Ms Wade's email the previous day stating:

> No worries, I will let you know once I hear anything further, from NAB or Australian Real Estate Group.
>
> In the meantime continue to pay your minimum monthly repayments and I will be in touch next week.

Monday, 1 August 2016

143 On 1 August 2016, Cash Converters sent a notice of default to Ms Wade stating that Ms Wade was in arrears on her loan in an amount of $277.32 and the payout figure for the loan was $321.08.

144 That day, Ms Wade also sent the most recent NAB home loan account statement to Kelli (JDA).

Tuesday, 2 August 2016

145 On 2 August 2016, Ms Wade also sent the most recent NAB home loan account statement to Jody (AREG).

146 That day, Kelli (JDA) sent an email to Daaneyal (NAB) seeking the last 12 months of Ms Wade's home loan statements to assist with Ms Wade's refinancing.

Wednesday, 3 August 2016

147 The AREG file notes record the following telephone and email communications between Jody and Ms Wade on 3 August 2016:

(a) Ms Wade called to discuss the next stage and Jody said that she would look into the file and call back.

(b) Jody called back and left a voice message and sent an email to Ms Wade asking her to call to discuss her NAB home loan.

(c) Ms Wade called back and then Jody joined Rita (NHLG) to the call and indicated that "finance" (which I infer is a reference to NHLG) would take over Ms Wade's file. The file note then continues as follows:

> Discussed with Brenda and Rita that she may not be ready to commence Finance because of her circumstances and may need to wait. Brenda commented that she will just dodgy up the paperwork as she does it all the time which I strongly told her not to do that because it is a Federal Offence and we would not work with her if she did this.

148 I infer from that file note that Rita advised Ms Wade at that time that it may not be possible for her to refinance her home loan.

149 In examination in chief, Ms Wade denied that she made the statements attributed to her in the above file note that she "will just dodgy up the paperwork". She gave evidence that she may have said that she would create invoices for work done in prior periods. I do not accept that evidence. There is no reason for the note-taker, Jody, to include those statements if they were not spoken by Ms Wade. The evidence shows that similar statements were made by Ms Wade on other occasions (in conversations with NHLG on 13 September 2016 and JDA on 15 September 2016, referred to below).

Monday, 8 August 2016

150 On 8 August 2016, Daaneyal Khan of NAB sent an email to Kelli attaching a copy of a letter agreement addressed to Ms Wade to provide Ms Wade with time to refinance her NAB home loan with another lender. I infer that a copy of the letter agreement was sent by NAB to Ms Wade's home address as shown on the letter.

151 The letter agreement recorded the loan balance as $195,811.89, arrears of $19,631.98 and enforcement costs of $3,744.87. By the letter, NAB offered to give Ms Wade until 8 September 2016 to provide NAB with an unconditional approval for refinance with another lender which would be sufficient to payout the account and enforcement costs in full. If that was done, NAB

would allow a further period of 45 days to complete the refinance. If that was not done, NAB would allow a further 7 days to rectify any default, after which NAB would resume recovery action.

152 There is no evidence that Ms Wade signed the letter of agreement.

Tuesday, 9 August 2016

153 Internal files notes produced by NHLG concerning Ms Wade were tendered in evidence (**NHLG file notes**). The files notes for 9 August 2016 recorded that a representative of NHLG designated "T" tried to call Ms Wade but was unsuccessful and followed up with an email. I infer from other documents that "T" is Tamara Moro. An email from Tamara Moro sent that day enclosed copies of a Credit Guide, Authority to Act and Privacy Authorisation and requested Ms Wade to sign the forms and return them. The Credit Guide identified Kiara Halley of NHLG as an authorised credit representative of Australian Finance Group Limited which held an Australian Credit Licence. The Guide represented that NHLG held the necessary mortgage broking experience and qualifications in accordance with the *National Consumer Credit Protection Act 2009* (Cth) to provide Ms Wade with assistance.

Wednesday, 10 August 2016

154 On 10 August, Ms Wade returned the signed forms to Tamara of NHLG. Tamara replied stating that Rita would be in contact within 48 hours to discuss the refinancing. The NHLG file notes record that Tamara transferred the file to Rita and that Rita reviewed the file and began working through NHLG's lending panel.

Thursday 11 August 2016

155 The NHLG file notes record that, on 11 August, 2016, Rita tried to call Ms Wade but was unsuccessful and sent an SMS requesting a call back. The notes record that Ms Wade called back and Rita requested certain documents and "discussed earning potential of late fathers business and general assets of estate. Brenda confirmed she is going through and doing all of this now and will be sending us information as it comes to hand".

Friday 12 August 2016

156 On 12 August 2016, Ms Wade sent an email to Rita (NHLG) enclosing documents that Rita had requested the previous day.

Monday 15 August 2016

157 The JDA file notes record that, on 15 August 2016, Kelli (JDA) unsuccessfully tried to call Ms Wade. Kelli followed up with an email asking Ms Wade to return her call.

Tuesday 16 August 2016

158 The JDA file notes record that, on 16 August 2016, Kelli (JDA) again unsuccessfully tried to call Ms Wade. Kelli followed up with an SMS asking Ms Wade to return her call.

Wednesday 17 August 2016

159 In evidence was an audio recording and transcript of a telephone call on 17 August 2016 between Kelli (JDA) and Ms Wade. The call was initiated by Kelli. Kelli asked Ms Wade how the refinancing was progressing and Ms Wade replied that she was waiting to hear from NHLG. Kelli referred to the offer from NAB to allow a period of 1 month for Ms Wade to obtain refinancing and commented that that period was not long enough. Kelli asked Ms Wade whether Ms Wade was happy for Kelli to negotiate more time from NAB, to which Ms Wade gave her approval.

160 Later that day, Kelli sent an email to Daaneyal Khan of NAB stating that:

> I have discussed your offer of assistance with Ms Wade and she is not agreeable.
>
> She has been liaising with her refinance company and they require further time for the refinance to be approved, therefore Ms Wade would like the agreement to be extended until 8 November to complete the refinance.
>
> Payments will also be maintained during this period.
>
> I await your positive response.

161 The AREG file notes record that, on 17 August 2016, AREG unsuccessfully tried to make contact with Ms Wade, leaving a message on her landline and sending an SMS.

Sunday, 21 August 2016

162 The NHLG file notes record a note from Kiara Halley. It is unclear whether the note records a conversation with Ms Wade. The note is to the effect that the best rate is from Bluestone at 6.49% but with monthly repayments of $1,389. The note records that Ms Wade cannot service those repayments but that Ms Wade has a 22 year old living with her. As a later note indicates, the implication is that Ms Wade's adult daughter, who was working at the time, might be able to assist in servicing the loan.

Monday, 22 August 2016

163 The JDA file notes record that, on 22 August 2016, Kelli received a call from NAB and unsuccessfully tried to return the call.

Tuesday, 23 August 2016

164 The JDA file notes record that, on 23 August 2016, Kelli spoke with a representative of NAB who said that NAB would issue an updated letter giving Ms Wade until 8 November 2016 to refinance her loan.

165 On that day, NAB issued a further letter agreement addressed to Ms Wade which offered the following terms:

(a) NAB would give Ms Wade until 8 November 2016 to provide NAB with one of the following:

(i) Option 1 - an unconditional approval for refinance with another lender which would be sufficient to payout the account and enforcement costs in full.

(ii) Option 2 - an unconditional contract of sale of the security property at fair market value.

(iii) Option 3 - vacant possession of the security property.

(b) If Ms Wade chose option 1 or 2, NAB would provide a further 60 days for settlement.

(c) In the event of default, NAB would provide 7 days to rectify the default after which it would resume recovery action.

166 I infer that the letter was sent to Ms Wade's home address.

Sunday, 28 August 2016

167 On 28 August 2016, Ms Wade sent an email to Kelli (JDA) with the following message:

> I just wanted to know how everything was going on refinance my housing loan, I have a lot of bills that need to be paid that were going to be added onto the housing loan that I am unable to pay until the loan comes through, as they all want the entire outstanding balance finalised straight away, I've told them I'm in the process of refinancing but some of them are now starting to talk of cutting of my utilities, can you please update me on the progress of refinancing so I can pass this onto the suppliers.

Monday, 29 August 2016

168 On 29 August 2016, Daaneyal Khan of NAB sent an email to Kelli (JDA) attach a copy of the further letter agreement dated 23 August 2016. The letter concluded with a statement that Mr Khan was awaiting Kelli's response.

169 The NHLG file notes record that Kiara Halley unsuccessfully tried to call Ms Wade on that day.

Tuesday, 30 August 2016

170 On 30 August 2016, Ms Wade sent an email to Tamara (NHLG) responding to the message left the previous day by Kiara Halley. The email continued:

> I emailed Kellie yesterday asking of the progress of refinancing my home loan, so if you could please email me that information that would be greatly appreciated, sorry for any inconvenience of the missed call yesterday.

171 The email shows that Ms Wade was aware that NHLG was seeking a refinance of her home loan.

172 The NHLG file notes record that Tamara (NHLG) unsuccessfully tried to return Ms Wade's call and sent her an email requesting a call back. The file notes then record that Kiara Halley spoke with Ms Wade and explained the difficulty in servicing a refinanced loan and suggested that Ms Wade's 22 year old daughter who was working full time might be able to assist. Ms Wade agreed to speak to her daughter and then Kiara and Ms Wade would speak again.

Wednesday, 31 August 2016

173 On 31 August 2016, Ms Wade sent an email to Kiara Halley (NHLG) containing the following message (errors in original):

> I thought Id fill you in on what's happening so far, unfortunately my oldest daughter flatly refuses to help her mother keep the house by signing into a loan that she doesn't even have to pay, and she'll get half or more of her car paid off for doing so, so if you have any other suggestions please let me know asap, meanwhile ill keep working on Amanda in a hope that she'll change her mind, I'm actually lost for words, if she doesn't help me in anyway it's going to change our relationship altogether.

174 During cross-examination, Ms Wade said that she did not take kindly to the proposal that her daughter would support the home loan and she did not expect her daughter to agree. That evidence was inconsistent with the email sent by Ms Wade to NHLG on 31 August 2016. Ms Wade gave evidence that what she said in the email was not accurate. It is not necessary to

determine whether the email was inaccurate or Ms Wade's testimony about the events was an inaccurate reconstruction.

175 The JDA file notes record that Helen unsuccessfully tried to call Ms Wade on 31 August 2016 and sent an SMS for Ms Wade to call back. The note also contains the following statement: "SOA shows cannot service and may need to negotiate reduced repayment". I infer that that information was provided to JDA by NHLG as a result of the email sent by Ms Wade to NHLG. The effect of the communication was that Ms Wade did not have the income to support repayments required under a refinanced loan and that it may be necessary to try to re-negotiate the repayments to be made to NAB.

Thursday, 1 September 2016

176 The NHLG files notes record that, on 1 September 2016, Rita received a telephone call from Ms Wade and recorded the following summary:

> Brenda called to advise that her daughter will definitely not go on the loan with her as she does not trust her mother. Advised we could see what else could be done and then discuss further.

177 The JDA file notes record that Heidi spoke to the NAB who agreed to an extension until 9 September 2016 for Ms Wade to return the signed letter of agreement. Other documents reveal that Heidi's name is Heidi Monsant and worked at JDA.

5 September 2016

178 The JDA file notes record that, on 5 September 2016, Heidi unsuccessfully tried to make contact with Ms Wade and sent an SMS. The note records that Heidi wished to discuss NAB's minimum monthly payments and the possibility of negotiating "IO" (which I infer is interest only) repayments.

6 September 2016

179 The AREG file notes record that, on 6 September 2016, AREG unsuccessfully tried to make contact with Ms Wade and sent an SMS.

7 September 2016

180 The JDA file notes record that, on 7 September 2016, Heidi again unsuccessfully tried to make contact with Ms Wade about reduced payments to NAB and sent an SMS.

10 September 2016

181 The JDA file notes record that, on 10 September 2016, Heidi again unsuccessfully tried to make contact with Ms Wade about another arrangement with NAB and sent an SMS and an email. The email stated:

> I have been trying to contact you as we URGENTLY need to make an arrangement with your bank.
>
> Please call me back immediately as we do not have much time left.

182 The file notes also record that Helen advised Heidi to send an email to NAB advising that refinancing is no longer viable for Ms Wade and putting a new proposal. Following those instructions, Heidi sent an email to Daaneyal Khan of NAB which stated the following:

> Following up to my email from Thursday, I can confirm that Ms Wade's refinance is not viable at this time.
>
> As such, the Resolution Agreement sent to us is no longer in my client's best interest.
>
> If possible, my office believes it would be best if we can negotiate for reduced repayments for a period of time.
>
> My proposal for my client is as follows:
>
> - Reduced repayments to the home loan for a period of 3 months
> - Regular repayments for the following 6 months
> - Capitalisation of arrears at the end of this 9 month period.
>
> Could you please review this proposal and advise.

12 September 2016

183 On 12 September 2016, Mr Khan of NAB replied to Heidi's email, thanking her for the proposal and asking what foreseeable changes are evident in Ms Wade's financial situation after the 3 months that would allow her to resume with her monthly repayments.

184 In evidence was an audio recording and transcript of a telephone call on 12 September 2016 between Heidi (JDA) and Ms Wade. The call was initiated by Ms Wade. In the call, Ms Wade confirmed that her daughter had refused to support the refinancing of her home loan and that Ms Wade had not heard anything further from NHLG regarding refinance. Heidi recommended that Ms Wade give NHLG a further call, but said that they needed to come up with another arrangement with NAB to obtain more time. Heidi asked what kind of repayments Ms Wade could make at that time, to which Ms Wade first replied that she could not make any but then said that if it meant keeping her house, she would try to pluck money from anywhere. Heidi then outlined a proposal to be put to NAB. The proposal was what had been put to NAB by

Heidi on 10 September 2016. Heidi did not inform Ms Wade that the proposal had already been put to NAB. I infer that Heidi was reluctant to tell Ms Wade that JDA had already begun a further negotiation with NAB without Ms Wade's express authorisation (as noted above, Heidi had been instructed to put the proposal to NAB by another representative of JDA, Helen). Ultimately, nothing turns on this sequence of events. Ms Wade approved the proposal suggested by JDA. During the conversation, Ms Wade stated that her refinancing was not looking good and asked what would happen if NAB did not accept the proposal. Heidi replied that "we'll have to work out something else". Heidi again recommended that Ms Wade call NHLG.

13 September 2016

185 The AREG file notes record that, on 13 September 2016, AREG sent Ms Wade an email asking her to call back and also sent an SMS.

186 The NHLG file notes record that Rita unsuccessfully tried to call Ms Wade and sent her an SMS and email to call back. The notes record that Ms Wade called back. The notes summarised the conversation as follows:

> Asked Brenda if she had finished probate. She advised no not as yet she didnt really have it in her to work on probate as she thought she was losing her house. Explained not taking action would lead her in that direction. Got Heidi (JDAN) on the phone and completed a conference call. Heidi advised that she was working with NAB to assist Brenda in reducing repayments and capping arrears. Once conference call finished reminded Brenda she had to mobilise so we could help her with finance. She mentioned she could doctor up documents if that would help her loan go through and I told her we will not do loans like that. F/nightly calls to be made to check that she is making her payments.

14 September 2016

187 The JDA file notes record that, on 14 September 2016, Heidi again unsuccessfully tried to make contact with Ms Wade and sent an SMS.

15 September 2016

188 The JDA file notes record that, on 15 September 2016, Heidi again unsuccessfully tried to make contact with Ms Wade about an updated statement of financial position and sent an SMS.

189 Ms Wade called Heidi in response later that day. In evidence was an audio recording and transcript of the telephone call. Heidi explained that NAB had asked whether there was reason to believe that Ms Wade's financial situation would change to enable her to make minimum monthly payments after 3 months. During the call, Heidi explained that, in order to get NAB's

agreement, JDA needed some sort of plan from Ms Wade to show that Ms Wade's income would increase. During the call, Ms Wade provided Heidi with an update of her financial position. It was apparent that, during the call, Heidi was updating figures from an earlier statement of financial position that JDA had on file, which I infer is the document of that title referred to earlier. The update was somewhat rambling. Also, on a few occasions, Ms Wade encouraged Heidi to include "whatever it takes", indicating that Ms Wade wished to include possible sources of income even if there was no realistic prospect of her earning that income. The statements were similar to the statements recorded in file notes of AREG and NHLG, referred to above, by which Ms Wade proposed to create inaccurate statements of income. Nevertheless, in relation to income, Ms Wade stated that:

(a) She was receiving a weekly Centrelink Newstart benefit of $580 per fortnight and the Australian Government Family Tax Benefit of $216 per fortnight.

(b) She had been receiving child maintenance of $650 per month, but that the maintenance ended in March 2017.

(c) Her late father's business was not going well because it had been placed on stop credit.

(d) Her adult daughter was paying board of $75 per week.

(e) She was thinking about renting out her garage for $100 per week for boarding or storage. Heidi said that she would not include that in the statement of financial position.

(f) She was doing a part time book-keeping job as well as hairdressing. Heidi stated that she needed a realistic estimate of cash income, and Ms Wade stated that hairdressing was $100 per week and book keeping was $500 per quarter.

190 In examination in chief, Ms Wade said that, at that time, she was not earning any income from book-keeping or hairdressing. In cross-examination, Ms Wade prevaricated on that question. I have concluded that Ms Wade's evidence in chief was accurate. I also find that Ms Wade deliberately provided false information to JDA about her income from book-keeping and hairdressing.

191 In evidence was a further document titled "Statement of Financial Position" on JDA letterhead. I infer that this document was completed following the telephone call between Heidi and Ms Wade on 15 September 2016, and was an updated version of the earlier version. It recorded total monthly income of $3,624.67 which was the aggregate of the income figures given by Ms Wade to Heidi during the phone call (adjusted to monthly figures) comprising:

(a) $1,256.67 from Centrelink Newstart;

(b) $468 from Family Tax Benefit;

(c) $650 from Child Support;

(d) $325 from her eldest daughter's board payments; and

(e) $600 from hairdressing and book-keeping.

192 The expenses section of the document was unaltered. As noted above, the total expenses figure of $1,765 was incorrect and the total should have been stated as $3,624 (including home loan repayments of $1,127 per month). Thus, Ms Wade's stated income matched her estimated expenses, including her home loan repayment.

193 Toward the end of the telephone call, Heidi told Ms Wade that, for JDA to do anything further on her file, Ms Wade would need to enter into a further agreement for a period of either 30 or 60 days. Heidi also stated that the agreement involved fees of $1,500 for the 30 day period. Ms Wade expressed surprise at the size of the fees and asked about the payment obligation. Heidi described the fees as deferred, and Ms Wade stated that she was under the impression that the fees were taken out "once it was finished". Heidi said no, and explained that the first contract was for 60 days and that an invoice was issued at the end of that period. Heidi also said that, at that time, Ms Wade could work out a payment arrangement with JDA and that JDA were "quite flexible".

194 Ms Wade then asked Heidi whether she would be refinanced at the end of the 60 day period. Heidi asked whether "finance" (which I infer was a reference to NHLG) had been given the updated figures and Ms Wade stated that she did not think so. Heidi said that she would send "finance" an updated statement of financial position.

195 Also on 15 September 2016, Heidi sent an email to Ms Wade with the subject "Extra Time Extension" and attaching a letter agreement. The agreement is the "third contract" referred to in the pleadings. The email referred to their recent discussion and stated that the agreement was required by JDA in order for JDA to continue helping Ms Wade. The email also stated that there was an option for 30 or 60 days and asked Ms Wade to "choose the option you feel most suits your situation". The email asked Ms Wade to sign and return the agreement.

196 The attached one page letter agreement stated as follows:

> As you are aware the 60 day hold on legal action is due to expire.

> You wish this office to continue working on your matter and extend the hold on repossession proceedings for a period of 30 or 60 days.
>
> Please complete the below and return to this office so we may continue to assist you in not losing your property to the Lender.

197 The agreement then set out an option for a 60 day extension (for a fee of $2,500) and an option for a 30 day extension (for a fee of $1,500). Like the first agreement, the agreement offered discounts depending on whether an immediate payment was made, instalment payments were made or a "deferred payment". The expression "deferred payment" was not explained in the agreement. Ms Wade said in cross-examination that she was told that JDA would agree to a payment arrangement in relation to the fees, and that the fees would not need to be paid in full until her loan was refinanced. That evidence is not consistent with the transcript of the telephone call, in which Heidi said that Ms Wade could work out a payment arrangement with JDA and that JDA were "quite flexible". As matters transpired, JDA did not seek payment of the fee until Ms Wade's house had been sold.

198 In examination in chief, Ms Wade was asked whether she understood the third contract. Ms Wade replied that she believed that the document meant the NAB court proceedings had to be put on hold again because "they" needed more time.

17 September 2016

199 On 17 September 2016, Ms Wade sent an email to Heidi attaching a copy of the signed extension agreement (referred to in pleadings as the third agreement). Ms Wade had selected the 60 day extension option with deferred payment (for a fee of $2,500).

Monday, 19 September 2016

200 The JDA file notes record a communication between NAB and Heidi whereby NAB advised that they were seeking a proposal by the end of the day and that NAB wished to know whether Ms Wade's updated statement of financial position had changed her chances of obtaining a refinance.

Tuesday, 20 September 2016

201 On 20 September 2016, Heidi (JDA) sent an email to NAB as follows:

> I apologise for the late reply; I was unable to send you an update from Ms Wade's finance application yesterday as I was still waiting to hear back from the brokers.
>
> They are currently considering the updated Statement of Financial position that was provided to them, however it appears that they will be unable to process Ms Wade's Finance application until she can build repayment history.

> As such, I would like to request the 3 month reduced repayments, 6 month MMP and capitalisation agreement previously mentioned by myself be reconsidered.
>
> Please advise whether this is going to be viable.

Thursday, 22 September 2016

202 The JDA file notes record that NAB contacted Heidi and advised that the updated statement of financial position showed that Ms Wade was able to service the home loan and that NAB would send a proposal to JDA by Friday afternoon.

Monday, 26 September 2016

203 On 26 September 2016, NAB replied to Heidi's email attaching a revised letter of offer. The letter recorded that the loan balance was $196,661.68, the arrears were $20,756.45, the minimum monthly payment was $1,124.47 and the enforcement costs were $3,744.87. The letter contained the following offer:

(a) Ms Wade would commence monthly repayments of $900.00 ("the reduced repayment period") towards the facility commencing from 29 October 2016 for a period of 3 months (October, November and December 2016).

(b) Following the reduced payment period, Ms Wade would commence a serviceability test for a period of 6 months. During the serviceability test, Ms Wade would need to meet the monthly contractual repayments of $1,124.47 when they became due. The first full monthly repayment would be due on 29 January 2017 and every month thereafter for a period of 6 months.

(c) If Ms Wade complied with the above, NAB would add the enforcement costs to the balance of the facility and capitalise the outstanding arrears back into the facility.

(d) If Ms Wade defaulted, and did not rectify the default within 7 days, NAB would be entitled to resume recovery action.

204 JDA also sent an email to Ms Wade advising that it was trying to negotiate the debt with BMW Finance and requesting Ms Wade to sign an authorisation form in order for JDA to act.

205 The AREG file notes record that, on 26 September 2016, AREG sent Ms Wade an email asking her to call back and also sent an SMS.

Tuesday, 27 September 2016

206 The JDA file notes record that, on 27 September 2016, Heidi unsuccessfully tried to call Ms Wade to discuss NAB's proposal and sent an SMS.

Wednesday, 28 September 2016

207 On 28 September 2016, Ms Wade sent an email to AREG stating that she was unable to pay many bills because the suppliers to her late father's business had put her on stop credit.

208 The JDA file notes record that, on 28 September 2016, Heidi again unsuccessfully tried to call Ms Wade to discuss NAB's proposal and sent an SMS.

Friday, 30 September 2016

209 On 30 September 2016, Heidi (JDA) sent an email to Ms Wade stating that she had tried to contact her numerous times and that she wanted to discuss the offer that had been made by NAB. Heidi asked Ms Wade to call back.

Monday, 3 October 2016

210 By an email from Ms Wade to Heidi (JDA) bearing the date 3 October 2016, Ms Wade returned a signed copy of the letter agreement with NAB (which also included a handwritten date of 3 October 2016). The email concluded:

> Well done on an excellent job of negotiating, that's one huge weight removed now, just have to resolve bill payments now and all will be perfect, I thank you so much for an excellent job done.

211 In cross-examination, Ms Wade said that, at that time, she was not happy with the agreement reached with the NAB because it did not solve her problems and she was seeking a refinancing. I reject that evidence. The email she sent at that time demonstrates that she understood that the further agreement with NAB was the best available option for her at that time to avoid foreclosure.

212 By an email the same day from Heidi to NAB, Heidi forwarded the signed agreement to NAB.

Tuesday, 4 October 2016

213 On 4 October 2016, NAB emailed Heidi (JDA) to confirm receipt of the signed agreement and that it would now be implemented.

Wednesday 5 October 2016

214 The JDA file notes record that on 5 October 2016, Heidi again unsuccessfully tried to call Ms Wade. Heidi sent an SMS to Ms Wade advising that NAB had accepted the agreement and that JDA would touch base fortnightly.

Thursday 13 October 2016

215 On 13 October 2016, Tamara (NHLG) sent an email to Ms Wade asking Ms Wade to return Tamara's call as a matter of urgency.

216 Also on 13 October 2016, JDA sent an email to Ms Wade advising that JDA had successfully removed the Vodafone credit impairment on Ms Wade's VEDA credit file. JDA also issued an invoice to Ms Wade in the amount of $2,000 for the removal of that credit impairment.

Monday 24 October 2016

217 On 24 October 2016, Suzana Cvetkovski of AREG sent an email to Ms Wade stating that she had tried to call to make sure that everything was going well with her finance and that, if Ms Wade needed help, she should call.

Tuesday, 25 October 2016

218 On 25 October 2016, Ms Wade replied to the email from Suzana (AREG) stating (errors in original):

> Hi Suzana, I really don't know how anything is going at the moment, other than my utilities are getting cut off & my first house repayment is due this week & I'm not even sure If I'll b able to make that.

Wednesday 26 October 2016

219 On 26 October 2016, Tamara (NHLG) again sent an email to Ms Wade asking Ms Wade to return Tamara's call as a matter of urgency.

220 The JDA file notes record that, on the same day, Heidi unsuccessfully tried to call Ms Wade and sent an SMS asking her to call back.

Friday, 28 October 2016

221 The NHLG file notes record that, on 28 October 2016, Ms Wade called Tamara and said that her first payment was due to NAB that day but she would not have money until Tuesday. Tamara advised Ms Wade to call JDA to seek a change to the payment date.

222 The JDA file notes record that, on 28 October 2016, Ms Wade returned Heidi's call and stated that she could not afford to make the first payment under the agreement with NAB but that she would be able to make repayments on the 9th of each month moving forward. The notes state that Heidi emailed NAB asking if that change was possible. A copy of that email was not in evidence.

9 November 2016

223 On 9 November 2016, NAB wrote to Ms Wade advising that she was in breach of the Resolution Agreement because payment of $900 due on 29 October 2016 had not been made. The letter advised that if payment was not made within 7 days, it would resume recovery action.

17 November 2016

224 The JDA file notes record that, on 17 November 2016, Heidi unsuccessfully tried to call Ms Wade to see if she had made the payments due to NAB. Heidi sent an SMS asking Ms Wade to call her back.

5 December 2016

225 The JDA file notes record that, on 5 December 2016, Heidi again unsuccessfully tried to call Ms Wade to see if she had made the payments due to NAB. Heidi sent an SMS asking Ms Wade to call her back.

JDA lodges a caveat

226 On 2 December 2016, JDA lodged a caveat on Ms Wade's home to secure payment of amounts owing to JDA. Following the lodgement of the caveat, Ms Wade begins to make complaints about JDA's services.

227 On 14 December 2016, Ms Wade sent an email to Tamara (NHLG) asking why JDA had lodged a caveat on her house. The email stated that Ms Wade was planning to call NHLG to complain about unspecified incidents that had occurred and that, if done differently, would have saved Ms Wade money. On 16 December 2016, Tamara replied to the email advising that Ms Wade would need to contact JDA about that matter. On 22 December 2016, Ms Wade replied to Tamara stating that JDA would not return her call. The email continues with a statement that Ms Wade was intending to ring the ombudsman because she felt that she had been unfairly treated.

228 The JDA file notes record that, on 15 December 2016, Ms Wade called Heidi in order to be put through to the accounts section of JDA. Heidi said to Ms Wade that she had been trying to contact her. Ms Wade responded that she had received "nothing" from Heidi.

229 The JDA file notes record that, on 28 December 2016, Heidi again unsuccessfully tried to call Ms Wade and sent an SMS asking her to call back.

230 On 2 January 2017, Ms Wade sent an email to JDA stating that it was the third time she had tried to contact JDA's office to find out why a caveat had been lodged when Ms Wade had never received notification of any overdue bills. Ms Wade also complained that JDA was no longer servicing her file leaving her unsure of what she should be doing to get her loan refinanced. Ms Wade stated that if she didn't hear from JDA, she would get the ombudsman involved because she seemed to be in more trouble now than when she first came to JDA for help.

231 The JDA file notes record that, on 3 January 2017, Heidi responded to Ms Wade's email and asked her to confirm her phone number as Heidi had been trying to contact her.

232 The JDA file notes record, on 17 January 2017, 6 February 2017, 27 February 2017 and 29 March 2017, Heidi again unsuccessfully tried to call Ms Wade and sent an SMS each time asking her to call back.

233 Ms Wade gave evidence that, while she did not always carry her mobile phone, she always responded to calls made to her. I reject that evidence. The file notes of each of JDA, AREG and NHLG show that on numerous occasions Ms Wade failed to return phone calls, despite an email or SMS being sent asking her to call back.

Further default on home loan and Financial Ombudsman Service involvement

234 On 27 January 2017, NAB wrote to Ms Wade advising that she was in breach of the Resolution Agreement because payments of $900 due on 29 November 2016 and 29 December 2016 had not been made. The letter advised that if payment was not made within 7 days, NAB would resume recovery action.

235 On 1 February 2017, Ms Wade lodged a dispute against NAB with the FOS. Ms Wade received a notice from the FOS advising her of its procedures.

236 On 16 February 2017, Ms Wade signed a statement of financial position for the FOS. The statement contained the following information:

(a) Ms Wade's total monthly income was stated as $2,961.18, comprising Centrelink Newstart benefits, Family Tax Benefits, Child Support and board from her eldest daughter.

(b) Ms Wade's total monthly expenses were stated as $2,101.75, including home loan payments of $1,131.75.

(c) Ms Wade sought a repayment arrangement which mirrored the Resolution Agreement (i.e. payments of $900 for 3 months then monthly contract payments for 6 months, following which arrears to be capitalised).

(d) Ms Wade stated that the existing arrangement was the same as she now sought. Ms Wade asserted that JDA had negotiated that arrangement without her knowledge. The statement was inaccurate as JDA explained the proposal to her and Ms Wade had signed the agreement with NAB in which the proposal was stated clearly.

237 On 2 March 2017, NAB wrote to Ms Wade stating that the FOS had requested NAB to try to reach a resolution directly with her. The letter enclosed a proposed settlement agreement. The settlement agreement recorded that the balance of the home loan was $200.064.72, the arrears were $26,260.55, the minimum monthly payments were $1,131.75 and the enforcement costs were $4,483.85. The terms offered in the agreement were as follows:

(a) NAB would grant a moratorium on payment to the home loan until 29 April 2017.

(b) That the next payment on the home loan would be 29 April 2017 with the instalment amount being $1,131.75 and that, after 6 months of such payments, NAB would capitalise the arrears and enforcement costs into the loan balance.

(c) If Ms Wade defaulted, NAB would give Ms Wade 7 days to rectify the default.

(d) If the default was not rectified, the house had to be listed for sale within 14 days. If that condition was complied with, Ms Wade had 3 months to procure an unconditional sale agreement for the property with 60 days settlement.

238 Ms Wade signed the settlement agreement on 20 March 2017.

239 On 31 May 2017, NAB wrote to Ms Wade notifying her that she had defaulted in making the payment due on 29 May 2017. Handwritten notes on the letter, made by Ms Wade, indicate that Ms Wade spoke to a representative of NAB on 6 June 2016 seeking a week's extension to make the payment. The representative authorised the extension, but stated that the payment was required by 13 June and the subsequent payment was required by 29 June.

240 Ms Wade's house was subsequently sold with settlement occurring on 10 November 2017. A letter from the solicitors for Ms Wade acting on the sale dated 10 November 2017 shows that the sale price was $497,000 and that Ms Wade received the sum of $218,911.30 from the sale (after repayment of the home loan and other expenses of the sale, including JDA's fees).

JDA's invoice for services

241 On 20 February 2017, JDA sent an email to Ms Wade enclosing a copy of its final invoice together with the three contracts that had been entered into. The itemised charges in the invoice were as follows:

Description	Amount
1. ET Costs Agreement Dated 21/07/2016	$3,500.00
2. ETX Costs Agreement Dated 15/09/2016	$2,272.73
3. Credit Repair Costs Agreement Dated 15/09/2016	$2,000.00
4. Fees payable to our lawyer for preparation and lodgement of caveat	$500.00
5. Fees payable to our lawyer for preparation of caveat withdrawal	$590.90
GST	$886.37
Total	$9,829.50

244 The total stated in the invoice was arithmetically incorrect. The sum of the items listed was $9,750.

245 On 31 October 2017, JDA sent a further invoice to Ms Wade which was in the same form as the above, save that it included an additional charge for "Costs for title search and caveat lodgement" in the amount of $82 and stated the total as $9,832.00 (which was arithmetically correct).

246 The amount of $9,832 was paid to JDA out of the proceeds of the sale of Ms Wade's home.

Findings about Ms Wade's financial circumstances as at July 2016

247 The central premise of Ms Wade's case is that she was unable to meet her home loan repayments as at July 2016 given her income and expenditure, and she would be unable to refinance her home loan, and that those matters were known or ought to have been known to JDA. Although not pleaded with precision, it is also implicit in Ms Wade's case that her circumstances were unlikely to change in the near term to enable her to meet her home loan repayments or refinance her home loan. Despite those central premises, surprisingly little evidence was directed to Ms Wade's living expenses at that time, her ability to adjust her

expenditure and her prospects for gaining additional income. It is necessary for me to reach findings about those central premises.

248 It was not in dispute that, until March 2014, Ms Wade was able to meet her home loan repayments. However, following the loss of her job with Bill Kerry, Ms Wade fell behind in her loan repayments. As noted earlier, the evidence indicates that Ms Wade's earned $530 a fortnight from Bill Kerry. Her income from Newstart was similar. Hence, the loss of her employment at Bill Kerry does not explain why Ms Wade went from being able to meet her home loan repayments to being unable to meet them. As at mid-2016, Ms Wade's monthly income from Newstart benefits, Family Tax Benefit payments, Child Support payments and board from her eldest daughter was approximately $3,000 (consistently with the information given to the FOS in February 2017).

249 The evidence relevant to Ms Wade's living expenses comprises her bank statements, described above, and six statements of financial position: two statements provided to NAB as part of her hardship applications; two statements prepared by JDA; and one statement provided to the FOS.

250 The bank statements record regular payments by direct debit or BPAY for rates, utilities, insurances, mobile phone, home phone, internet and Pay TV and regular payments by EFTPOS at grocery stores (Woolworths, Coles and Aldi) and petrol stations. As described above, the bank statements also show very large cash withdrawals, at least some of which Ms Wade admitted was spent on gambling activities and the remainder were unexplained. The evidence showed that the cash withdrawals were frequently larger than her minimum monthly payments on her home loan.

251 Ms Wade's bank statements for the first quarter of 2015 show that she was able to meet her living expenses and meet her home loan repayments.

252 The two statements of financial position provided to NAB in Ms Wade's hardship applications record monthly expenditure of $2,300 including home loan repayments of approximately $1,200.

253 The first JDA Statement of Financial Position prepared prior to 29 July 2016 recorded income of $2,390 and aggregate expenses of $3,624.33 (including home loan repayments of $1,127 per month). However, as noted earlier, some of the monthly expenses included in the Statement

were higher than might be expected, including $125 for home phone/internet and Pay TV, $200 for mobile phone and $670 for sport/entertainment.

254 The second JDA Statement of Financial Position prepared around 15 September 2016 recorded total monthly income of $3,624.67. However, $600 related to claimed income from hairdressing and book-keeping which I have found Ms Wade was not earning. Therefore, her monthly income was approximately $3,000. The expenses section of the document was unaltered.

255 The statement of financial position that Ms Wade provided to the FOS on 16 February 2017 recorded her monthly income as $2,961.18 and her living expenses as $2,101.75, including home loan payments of $1,131.75.

256 The evidence indicates that, as at July 2016, it would have been difficult for Ms Wade to meet necessary living expenses and her home loan repayments from her regular income. Money would always have been tight. However, on the evidence that was presented by Ms Wade (such as it was), I am not satisfied that Ms Wade was unable to meet her home loan repayments by making adjustments to her spending decisions, particularly the large and unexplained cash expenditure. Her bank statements for the first quarter of 2015 show that she was able to do so. That is not to criticise Ms Wade's spending decisions. It is only to recognise that, while Ms Wade told AREG and JDA that she wished to keep her home, her spending decisions were not consistent with that wish.

257 I am also not satisfied that there was no reasonable prospect that Ms Wade's financial circumstances could change in the near term to enable her to meet her home loan repayments or refinance her home loan. The evidence showed that Ms Wade had previously been employed. While Ms Wade gave evidence that she was suffering from depression and anxiety, the evidence fell well short of establishing that she would be unable to work in any capacity in the future. In her dealings with JDA, Ms Wade expressed confidence about her ability to earn income in the future.

258 Accordingly, Ms Wade has failed to establish the central premise on which her case was based.

D. EXPERT EVIDENCE

259 Expert opinion evidence was given by Mr Jason Fallscheer. Mr Fallscheer prepared a written report and was cross-examined. There was no challenge to Mr Fallscheer's expertise.

260 In his report, Mr Fallscheer responded to a series of questions asked of him. The questions were focussed on the likelihood of Ms Wade being able to refinance her home loan with another lender. Mr Fallscheer was not asked about Ms Wade's ability to service her existing loan with NAB. Nor was Mr Fallscheer asked directly about the services and advice provided by JDA to Ms Wade.

261 In answering the questions about the ability to refinance, Mr Fallscheer was provided with the two Statements of Financial Position for Ms Wade that were prepared by JDA (and which have been referred to earlier). Mr Fallscheer was not provided with any documents held by AREG or NHLG.

262 The first question asked of Mr Fallscheer was as follows:

> a. Was it reasonably possible for Wade to obtain finance for the purpose of refinancing her Home Loan from another Credit Provider in July 2016 having regard to the market and her personal and financial circumstances as set out in the SoFP (with the assumption that child support payments would cease in March 2017) as set out above and in the statement of claim?

263 Mr Fallscheer expressed the opinion that it was not reasonable to expect that Ms Wade could obtain finance for the purpose of refinancing her home loan from another credit provider given she had no permanent income and was reliant on government benefits and child support. Mr Fallscheer clarified in oral testimony that, by "permanent income" he meant personal exertion income. Mr Fallscheer observed that the NAB loan statements would have revealed to a credit provider repayments which were irregular and in arrears. Mr Fallscheer expressed the opinion that house sharing or rent from a family member is generally not considered income to be used for debt servicing and, for any other income to be included, the person concerned must be a joint applicant or guarantor.

264 Mr Fallscheer expressed the opinion that, in this case, utilising hardship provisions within Ms Wade's current financial institution (NAB) would appear to have been the best option and JDA should have recommended this. Mr Fallscheer said that, given that Ms Wade was stating that more income was to flow in the future, Ms Wade should have been advised to delay an application to refinance until a minimum of two pay slips had been received with the higher level income.

265 It is apparent from his report, and confirmed in cross-examination, that Mr Fallscheer assumed that Ms Wade informed JDA that she was not earning income other than from Government benefits and Child Support payments, but that she would earn additional income in the near

future. As set out earlier, that is contrary to the findings I have made. Ms Wade told JDA that she was doing a part time book-keeping job earning $500 per quarter as well as hairdressing earning $100 per week, which would generate a monthly income of $600. In expressing his opinions, Mr Fallscheer did not consider Ms Wade's ability to refinance her home loan if she was earning an additional $600 per month from personal exertion income.

266 The second, third and fourth questions asked of Mr Fallscheer addressed the same topic and were as follows:

> b. If a person required a loan for $195,061.09 and could afford repayments of $700.00 per month, was there a loan available to meet those requirements in July 2016?
>
> c. If a person required a loan for $195,061.09 and could afford repayments of $900.00 per month, was there a loan available to meet those requirements in July 2016?
>
> d. Whether or not there was a loan available on the market to meet the needs set out in paragraphs b. and c. above, what interest rates and loan term would be applicable for such a loan if the repayments were set at either:
>
> i. $700.00 per calendar month
>
> ii. $900.00 per calendar month

267 Mr Fallscheer answered questions (b) and (c) in the negative. In relation to question (c), Mr Fallscheer expressed the opinion that, in July 2016, repayments of $700 or $900 were insufficient to support a loan of $195.061.09. Mr Fallscheer expressed the following opinions:

> Given the distress being experienced by the client, evidenced by bank statements showing irregular payment, the lack of genuine regular income or savings, in my experience it is likely that the client would not have been eligible for a standard home loan. The only available option would appear to have been to guide the (sic) Wade towards a low doc product (lower documentation where often accountants verify income not declared via tax returns and can be used for applicants where poor credit history is evident), this would have been at an increased interest rate.
>
> Given the client could not demonstrate serviceability at the stated rates on a standard or Full documentation loan, Wade would have needed to applying (sic) for a higher risk low doc loan at a higher interest rate. In current market the rate differential for full doc v low doc is between 1% to 4% higher. This would have seen the client fail serviceability tests, in my opinion.

Loan amount	$195,061.09	Loan amount	$195,061.09	Loan amount	$195,061.09
Term	20	Term	25	Term	30
Repayment	$1,211	Repayment	$1,060	Repayment	$963
Estimated best possible rate	4.28%	Estimated best possible rate	4.28%	Estimated best possible rate	4.28%
Interest only	$696	Interest only	$696	Interest only	$696

> In my opinion the only possible loan the client could have been capable of maintaining was a home loan on an interest only terms. This would have seen repayment amount increase in future years to a higher level. Importantly however, convention is that interest only is a choice only afforded to those who can actually qualify for the loan on principal and interest terms first, i.e. borrowing capacity must be established first and the interest only is chosen for reasons such as tax planning. Therefore, I conclude that this would not have been able to be approved by a funder at that time.

268 The fifth question asked of Mr Fallscheer was as follows:

> Would a diligent and prudent lender responsibly provide a loan to a 51 year old with a 20, 25 or 30 year term? If so, what would those repayments be?

269 Mr Fallscheer answered that question in the negative. He expressed the opinion that an exit strategy would have to have been required to be detailed by the borrower, or their broker/representative, and this cannot include the sale of the property. In cross-examination, it was pointed out to Mr Fallscheer that NAB had refinanced Ms Wade's home loan on a 30 year loan in 2011 when she was 46. Mr Fallscheer responded that lending criteria had become more stringent between 2011 and 2016.

270 The following matters were raised with Mr Fallscheer in cross-examination.

271 First, Mr Fallscheer was asked to assume that JDA advised Ms Wade to enter into an agreement with NAB for reduced repayments for 3 months and then minimum monthly repayments for 6 months. Mr Fallscheer was asked whether that was an appropriate course for Ms Wade to have been advised. Mr Fallscheer expressed the opinion that that could be seen to be a reasonable recommendation, stating:

> If the applicant's circumstances were clearly going to change, then generally during a hardship process you would give the client the opportunity to work through to the point where their position has improved.

272 Second, Mr Fallscheer was asked whether the presence of credit impairments (on a person's credit file) would impact the person's borrowing classification, and the person would be considered a more risky borrower leading to a higher interest rate being charged. Mr Fallscheer agreed with those propositions. Mr Fallscheer adduced in evidence a Broker Product Guide for LaTrobe Financial which specified different interest rates that would apply depending on whether the borrower's credit file was clear or had credit impairments. The following exchange occurred:

> And you would agree, therefore, that removing credit impairments from somebody's file can improve their prospects of obtaining refinance?---Yes, I would agree.
>
> And the absence of credit impairments might mean that a borrower can obtain a lower interest rate?---Yes.

As compared to the alternative?---Yes.

273 However, in re-examination Mr Fallscheer also gave evidence that the effect of the removal of a credit impairment depended on the amount of the impairment. The effect of Mr Fallscheer's evidence was that, assuming Ms Wade's income consisted of Government benefits and Child Support, she would not be able to refinance her loan regardless of the removal of a credit impairment such as the Vodafone impairment.

E. APPLICATION TO RE-OPEN

Application

274 On 10 December 2019, some 6 weeks after the completion of the trial, Ms Wade filed an interlocutory application seeking leave to re-open her case "for the purposes of receiving evidence from Helen Le in accordance with the matters set out in her affidavit affirmed 10 December 2019". The application was opposed by JDA. I listed the application for hearing on 17 December 2019. The parties filed written submissions on 16 December 2019 and advanced further oral submissions at the hearing of the application.

Evidence on the application

275 The application was supported by an affidavit of Ursula Noye, Special Counsel at CALC, affirmed 10 December 2019. Ms Noye deposed that, on 11 November 2019, CALC was contacted by a person who claimed to have knowledge about JDA, AREG and NHLG. The person did not identify themselves at that stage. Communications were exchanged between CALC and that person and a meeting was ultimately arranged on 5 December 2019. The person making contact was Helen Le. Ms Noye deposed that, while certain documents in CALC's possession mention a person by the name of Helen, until that time CALC was unaware of Helen's second name and no document had identified a person with the surname Le.

276 In support of the application, the Court was provided with an affidavit that had been affirmed by Helen Le. By the application to re-open, Ms Wade sought to read and rely on the affidavit in her case. By way of overview, the affidavit contained statements to the following effect:

(a) Ms Le was first employed as a receptionist at AREG, commencing in 2013, taking phone calls and doing clerical work. Ms Le subsequently worked for JDA as a "Client Manager" and then "Senior Client Manager".

(b) During her employment, employees of JDA, AREG and NHLG all worked from the same office.

(c) Ms Le listened to the recording of the telephone call between Ms Wade, Kelli Denton and a person identified as "Helen" (on 21 July 2016). Ms Le identified herself as the person called Helen. However, Ms Le deposed that she did not have any specific recollection of working on Ms Wade's file.

277 In the affidavit, Ms Le made many generalised statements about the governance and control of JDA, AREG and NHLG and the manner in which those companies conducted business. None of the statements related to Ms Wade's specific dealings with any of the companies, nor any other specific client or customer of the companies. As to governance and control, Ms Le stated that the three companies were set up by Michael Dahdouh, together with Kiara Halley and Robert Mancy and that Mr Dahdouh controlled the companies, even though he was not a formal director for all of them. Ms Le stated that Mr Dahdouh would direct Mr Mancy as to the operations of JDA and would direct Ms Halley as to the operations of AREG. Ms Le's affidavit provided no basis for the foregoing assertions. For that reason, if the statements were admitted into evidence, I would have given them little if any weight.

278 As to the manner of conducting business, Ms Le stated that the structure of the companies was that AREG would introduce clients to JDA and refinancing was intended to be organised by NHLG. JDA entered into contracts with the client under which it would be paid and NHLG was remunerated through commissions it received from the finance it obtained for the client (if any). Ms Le stated that, "as far as I know", NHLG did not provide mortgage broking services for any clients other than those of AREG and JDA. Again, given the limited basis of that statement, if it were admitted into evidence I would have given it little if any weight. Ms Le engaged in a general and high level commentary on JDA's business expressing the view that the business model was to sell "products" and instil a sense of urgency into clients. Ms Le stated in her affidavit that she left the employment of JDA in 2017 because of ethical concerns she had with the business. She now runs her own debt management business which seeks to help people in mortgage distress, including negotiating with bank lenders, and charges a fee for those services.

279 The application to re-open was opposed by JDA. That opposition was supported by an affidavit of Michael Harty, JDA's solicitor, sworn 16 December 2019. Mr Harty deposed that, to that date, JDA had incurred legal costs in defending the claim brought by Ms Wade in the amount of over $120,000 (inclusive of counsel's fees and GST). Mr Harty stated that JDA had conducted its defence of the claim, and made the decision that it was unnecessary to lead

evidence from any witnesses, based on the case that was pleaded and conducted by Ms Wade at trial. Mr Harty deposed that, if Ms Wade were permitted to re-open her case, then it would be necessary for JDA to re-consider its position to lead evidence and possibly recall Ms Wade for further cross-examination.

280 Mr Harty also deposed that, since first corresponding with JDA (and its solicitors, Macpherson Kelly) in April 2017, CALC had never asked for details of the employees that communicated with Ms Wade. On 16 December 2019, Mr Harty conducted a Google search using the search terms "Helen + J Daniels & Associates". The first item returned by that search was a website called "Contactout" which allowed any person to obtain Ms Le's full name and contact email address for free.

Applicable principles

281 The Court has an inherent power to re-open a matter for hearing: *Smith v New South Wales Bar Association* (1992) 176 CLR 256. In that case, the majority (Brennan, Dawson, Toohey and Gaudron JJ) observed (at 265) that "the power is discretionary and, although it exists up until the entry of judgment, it is one that is exercised having regard to the public interest in maintaining the finality of litigation" and that (at 266-7, citations omitted):

> If an application is made to re-open on the basis that new or additional evidence is available, it will be relevant, at that stage, to inquire why the evidence was not called at the hearing. If there was a deliberate decision not to call it, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending on whether the case is simply one in which the hearing is complete, or one in which reasons for judgment have been delivered. It is difficult to see why, in the former situation, the primary consideration should not be that of embarrassment or prejudice to the other side. In the latter situation the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to re-open should be exercised.

282 In *Spotlight Pty Ltd v NCON Australia Ltd* (2012) 46 VR 1 (***Spotlight***), the Victorian Court of Appeal observed (at [17] and [18]) that:

> There are good reasons why the circumstances must be exceptional before a court may allow a case, having been closed and judgment reserved, to be re-opened. The need for finality in litigation is one. It is no answer to this point to say that the further evidence sought to be adduced by the respondent in this case is confined to the quantum of damages. Were applications to re-open to be allowed almost as of course, such applications would be regularly made. That would add enormously to inefficiencies in the administration of justice, even if the re-opened hearing was strictly confined. The discipline which ought to attend the conduct of litigation by highly competent litigators would also inevitably decline.
>
> The very strict rule that, subject to any applicable process of appeal or review, the presentation of their cases by parties to litigation must conclude with the end of the

> trial, has another important justification. It is that, very often, the boundaries of the re-opened issues would be hard to define and as difficult to protect. The re-opened hearing would then be bedevilled by arguments about whether one party or the other was seeking to take advantage of the re-opening to polish parts of its case which were more or less within the scope of the re-opened proceeding but not clearly on one side or the other of the prescribed limits.

283 As noted by Robertson J in *Ample Source International Ltd v Bonython Metals Group Pty Ltd (No 6)* [2011] FCA 1484; 285 ALR 488 at [355], the principles referred to by the High Court in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 (***Aon***) will also be relevant to the discretion to give leave to re-open (see also *King (Trustee), in the matter of Zetta Jet Pte Ltd v Linkage Access Limited* [2018] FCA 1979 at [101] (Perram J)). As the plurality in *Aon* (Gummow, Hayne, Crennan, Kiefel and Bell JJ) observed (at [93]), the rules concerning civil litigation are no longer to be considered as directed only to the resolution of the dispute between the parties to a proceeding; the achievement of a just but timely and cost-effective resolution of a dispute has an effect upon the court and upon other litigants. That principle is reflected in s 37M of the *Federal Court of Australia Act 1976* (Cth) which provides that the pursuit of justice between the parties to the dispute according to law must be balanced with other objectives:

(a) the efficient use of the judicial and administrative resources available for the purposes of the Court;

(b) the efficient disposal of the Court's overall caseload;

(c) the disposal of all proceedings in a timely manner; and

(d) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

284 Recently, White J summarised the applicable principles in *F.Y.D Investments Pty Ltd v Promptair Pty Ltd* [2017] FCA 1097 at [30]-[32]:

> 30 The principles upon which the Court acts on applications of the present kind are settled. The overriding principle is the interests of the administration of justice having regard to all the circumstances of the case: *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22 at [24], [26]; *Brown v Petranker* (1991) 22 NSWLR 717 at 728; *Urban Transport Authority of NSW v Nweiser* (1992) 28 NSWLR 471 at 478; *Harrington-Smith (on behalf of the Wongatha People) v Western Australia (No 8)* [2004] FCA 338, (2004) 207 ALR 483 at [121]; *Walsh v Greater Metropolitan Cemeteries Trust (No 2)* [2014] FCA 456, (2014) 243 IR 468 at [48].
>
> 31 In *Bradshaw*, Kenny J identified at [24] four overlapping classes of cases in which a court may grant leave to reopen: fresh evidence; inadvertent error; mistaken apprehension of the facts; and mistaken apprehension of the law. Although it is not necessary to categorise the present case into any of those classes, the second and fourth

seem to be the most apt.

32 The matters bearing on the interests of justice in a case like the present are various. They include:

- the public interest (and the interest of the particular parties) in litigation being conducted efficiently and expeditiously;
- the public interest in the finality of litigation, with the consequent expectation that litigants will present all their evidence and submissions at the one hearing;
- the significance of the proposed new evidence and submissions in the context of the trial;
- the explanation for the evidence not having been led at the trial;
- the likely prejudice to the opposing party if the application is allowed;
- the potential detriment to the applying party if the application is refused, and;
- any delay by an applicant in seeking leave to reopen.

33 Regard should be had generally to the overarching purpose stated in ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth). It is a relevant consideration that evidence was not led, or submissions were not made, at trial because of a tactical decision from which the applying party wishes to resile. It is also relevant that a mistake leading to the matter not having been agitated at trial is attributable to the litigant's legal representatives and not to the litigant personally. However, the circumstance that the evidence was not led, or the submissions were not made, by reason of the negligence of the party or its legal representatives, is not necessarily fatal to an application for reopening being allowed. In *LED Builders Pty Ltd v Eagle Homes Pty Ltd* [1999] FCA 1141 at [34] Lindgren J said:

> Clearly, the fact that a failure to make submissions on a point is, as here, solely attributable to the neglect or default of the party seeking leave will militate against the granting of the application for leave. But it will not necessarily defeat the application in all cases.

The submissions of the applicant

285 In support of the application, Ms Wade advanced the following primary submissions.

286 First, Ms Le's identity only became known to Ms Wade's solicitors after judgment was reserved and no documents discovered by JDA disclosed Ms Le's identity.

287 Second, there was little relevant prejudice to JDA if leave were to be granted. The fresh evidence did not necessitate any amendments to her pleaded case. There were no costs that would be wasted in that none of the steps that had already been taken in the litigation would be rendered redundant.

288 Third, the evidence of Ms Le was highly probative of several key matters in dispute. In that regard, Ms Wade submitted that the evidence was relevant to the following matters in dispute:

(a) whether JDA knew, or ought to have known, that Ms Wade could not have realistically been refinanced given her stated circumstances;

(b) whether any of the pleaded contracts were fit for the purpose that Ms Wade identified, namely, wanting to 'keep' her home for the long term;

(c) whether, in view of JDA's knowledge of Ms Wade's refinancing prospects, its products and scripted sales tactics, it rendered its services with due care and skill;

(d) whether, in view of the nature of the communications between the parties and the sales tactics used by JDA, the purpose alleged by Ms Wade was one that had been communicated to JDA and objectively known or ought to have been known by JDA;

(e) whether JDA and AREG operated independently, or whether AREG was in truth an agent for JDA and therefore whether AREG's conduct and knowledge is deemed to be conduct and knowledge of JDA;

(f) whether the alleged gambling problem was a post-facto construction raised by JDA's lawyers in the context of this litigation; and

(g) whether, in view of its knowledge of the lack of prospect of refinancing or other long term help, its conduct toward Ms Wade including its deliberate strategy of instilling urgency, making sales and reaching sales targets from a financially vulnerable consumer, was unconscionable.

Submissions of the respondent

289 In opposition to the application, JDA advanced the following primary submissions.

290 First, the proposed new evidence was of limited utility. Ms Le had no recollection of working on Ms Wade's file and would not be able to give any direct evidence about the matters in dispute in the proceeding. Rather, the proposed affidavit contained generalised statements which purported to discredit JDA, imbue some tendency about its business practices, state what Ms Le had been told by others and give Ms Le's opinion about the central issues for determination by this Court. The majority, if not all, of Ms Le's evidence was irrelevant and inadmissible.

291 Second, Ms Wade could have called Ms Le as a witness at trial and had failed to adequately explain its failure to do so. Ms Le was involved in what the applicant alleged to be the central telephone discussion in the hearing (on 21 July 2016) and was referred to by name (Helen) in the pleading. There was no evidence as to what steps Ms Wade took to attempt to speak to Ms

Le prior to the trial in this proceeding. Ms Wade never sought the full names and contact details of any of JDA's employees.

292 Third, it was not in the interests of justice to permit the re-opening of Ms Wade's case. The claim is for around $10,000. The trial occupied four sitting days and JDA had incurred costs in the sum of $120,000 in defending the claim. A costs order against Ms Wade cannot overcome the prejudice to JDA in granting leave to re-open because the evidence shows that Ms Wade could not meet a costs order. If Ms Le were permitted to give evidence at trial, then JDA may also need to re-open its case to lead evidence and possibly recall Ms Wade for further cross-examination.

Consideration

293 I refuse leave for Ms Wade to re-open her case to read the affidavit of Ms Le, largely for the reasons advanced by JDA. In that regard, I reject the submissions advanced on behalf of Ms Wade.

294 In my view, it was open to Ms Wade prior to trial to seek the identity of the person named Helen who spoke by telephone with Ms Wade on 21 July 2016. I infer that Ms Wade made a forensic decision not to identify Helen and obtain evidence from her. It is wrong for Ms Wade to suggest that the evidence of Ms Le was not able to be obtained prior to trial in circumstances where no effort was made to obtain it.

295 I also consider that the evidence of Ms Le is of very limited relevance to the proceeding and significant parts of it are of doubtful admissibility. In relation to the seven issues listed by Ms Wade in her submissions (set out above, and responding to each issue in turn):

(a) The evidence shows that JDA had the same knowledge of Ms Wade's financial circumstances as AREG and (I infer) NHLG. The evidence also shows that JDA became aware that Ms Wade was unlikely to be refinanced by another lender at about the same time as that conclusion was reached by NHLG. Ms Le's evidence adds nothing.

(b) The question whether the pleaded contracts were fit for the purpose that Ms Wade identified, namely, wanting to 'keep' her home for the long term, is a question to be answered from an analysis of the terms of the contracts and the benefits they provided Ms Wade, not Ms Le's opinions about JDA's business.

(c) Similarly, the question whether JDA rendered its services with due care and skill is a question to be answered from an analysis of the terms of the contracts and the services JDA provided, not Ms Le's opinions about JDA's business.

(d) The evidence shows that Ms Wade told JDA that she wanted to keep her home. Ms Le's evidence does not add to that. The issue in dispute is whether the service that JDA agreed to provide and provided was fit for purpose in light of Ms Wade's desire to keep her home.

(e) In my view, nothing ultimately turns on whether AREG and JDA operated independently or, in some sense that has never been properly defined by Ms Wade, AREG was the agent of JDA. The evidence shows that the two companies worked cooperatively and, I infer, shared information pertaining to Ms Wade. The relevant communications and activities undertaken by JDA and AREG are the subject of comprehensive evidence set out above. Again, Ms Le's evidence adds nothing of relevance. Indeed, that conclusion is consistent with Ms Wade's closing submissions which stated:

> …although the evidence shows that Australian Real Estate Group (AREG) was acting together with JDA (whether the correct legal descriptor is as 'agent', in concert with, or otherwise), it does not ultimately matter what AREG did. AREG's role is somewhat of a distraction. Indeed, the success of Wade's case does not depend on AREG; it was never realistic for Wade to be refinanced, whether or not AREG was involved, and regardless of what AREG did or did not do.

(f) As to the "alleged gambling problem", I have made findings about Ms Wade's unexplained cash expenditure. I consider the evidence to be relevant to an assessment of Ms Wade's financial circumstances and whether the services provided by JDA were fit for purpose. It is irrelevant whether JDA was aware of the gambling expenditure at the time of providing services to Ms Wade, and there is no evidence to suggest it was. Accordingly, Ms Le's commentary on such matters is wholly irrelevant.

(g) As to unconscionable conduct, Ms Le's evidence about JDA's business practices is too general to be of any assistance. The fact that JDA might be motivated by sales targets and profit is hardly unusual. Again, the objective evidence is before the Court concerning JDA's knowledge of Ms Wade's circumstances and the expressions of urgency that were made to her. It is for the Court to assess whether the conduct was unconscionable in all the circumstances.

296 I reject Ms Wade's submission that there is little prejudice to JDA if leave were to be granted. In my view, the prejudice is considerable in terms of wasted costs. I accept JDA's submission that it would need to reconsider the need to adduce evidence from relevant employees and the need to cross-examine Ms Wade further. I also accept that the legal costs of the proceeding imposed on JDA far outweigh the amount of the claim and will increase materially if leave to re-open were granted. The evidence shows that Ms Wade is unlikely to be able to meet an adverse costs order.

297 The above factors overwhelmingly require a conclusion that leave to re-open should be refused.

F. OVERARCHING ISSUES COMMON TO THE CAUSES OF ACTION

Financial services

298 As set out earlier, Ms Wade's causes of action are based alternatively on provisions of the ACL and similar provisions of the ASIC Act. The relevant provisions have separate fields of operation. Subject to exceptions that are not relevant, the ACL does not apply to the supply, or possible supply, of services that are financial services (see s 131A of the CCA). Conversely, the ASIC Act applies to the supply of financial services. The term "financial services" has the same meaning in both sets of statutory provisions, being defined by s 12BAB of the ASIC Act (see s 130A of the CCA and s 2 of the ACL).

299 While both parties submitted that nothing turns on which provisions applied, it is desirable to be clear about the application of the legislative provisions.

300 Ms Wade relied on the definitions in s 12BAB(1)(a) and (g) and (5) of the ASIC Act which are in the following terms:

> (1) For the purposes of this Division, subject to paragraph (2)(b), a person provides a financial service if they:
>
> (a) provide financial product advice (see subsection (5)); or
>
> …
>
> (g) provide a service … that is otherwise supplied in relation to a financial product;
>
> (5) For the purposes of this section, financial product advice means a recommendation or a statement of opinion, or a report of either of those things, that:
>
> (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or

(b) could reasonably be regarded as being intended to have such an influence;

but does not include anything in:

(c) a document prepared in accordance with requirements of Chapter 7 of the Corporations Act, other than a document of a kind prescribed by regulations made for the purposes of this paragraph; or

(d) any other document of a kind prescribed by regulations made for the purposes of this paragraph.

301 Ms Wade submitted that the specific services and activities engaged in by JDA, whether pursuant to the contracts or otherwise, which amount to the provision of financial services for the purposes of the ASIC Act, were:

(a) the recommendation or statement of opinion by 'Helen' on the initial call of 21 July 2016 that Wade should refinance;

(b) the recommendation or statement of opinion by 'Heidi' to accept NAB's offer of negotiated payment terms in an email dated 30 September 2016; and

(c) the negotiation of delays to NAB's enforcement of its mortgage.

302 Both parties accepted that Ms Wade's home loan was a financial product (at the least, being a credit facility within the meaning of s 12BAA(7)(k) - see also reg 2B of the *Australian Securities and Investments Commission Regulations 2001* (Cth)).

303 The application of the definition of "financial services" in the ASIC Act is often difficult, as the definition is framed in imprecise terms. Nevertheless, I do not consider that the services provided by JDA, as described above, are financial services within the meaning of the statute.

304 In relation to the statements made by representatives of JDA concerning refinancing, I accept that JDA advised Ms Wade to explore that option and that it would be in Ms Wade's interests to pursue that option. However, such a recommendation does not satisfy the statutory description of being a recommendation intended to influence a person in making a decision in relation to a particular financial product or class of financial products. At that point in time, there was no relevant decision to be made. I do not consider that exploring or pursuing the availability of an alternative mortgage loan is a decision in relation to a financial product within the meaning of the statute.

305 In relation to the email of 30 September 2016 concerning an offer from NAB, it is clear from the email that no recommendation was made by Heidi.

306 The more difficult question concerns JDA's services in negotiating with NAB, on behalf of Ms Wade, deferrals of recovery action and temporary reductions in repayments. The question is whether such services are properly to be characterised as services that are "otherwise supplied in relation to a financial product" within the meaning of s 12BAB(1)(g).

307 The phrase "in relation to" has an imprecise meaning. At its most broad, it can refer to any relationship between two things, whether direct or indirect. When used in a statute, the meaning of the phrase is determined by the nature and purpose of the provision in question and the context in which the phrase appears: *O'Grady v Northern Queensland Company Ltd* (1990) 169 CLR 356 at 367 (Dawson J); *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Services* (1995) 184 CLR 301 at 313 (Brennan CJ, Gaudron and McHugh JJ).

308 Section 12BAB is a definitional section which determines the reach of the ASIC Act and, as noted above, marks the boundary between the reach of the ACL and the ASIC Act. The evident legislative purpose is that services that meet the definition of financial services in the ASIC Act are subject to regulation under that Act.

309 A definitional section should not be construed in the abstract and without regard to the operative provisions in which the definition is used in the statute. As observed by McHugh J in *Kelly v The Queen* (2004) 218 CLR 216 at [103]:

> …the function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. There is, of course, always a question whether the definition is expressly or impliedly excluded. But once it is clear that the definition applies, the better – I think the only proper – course is to read the words of the definition into the substantive enactment and then construe the substantive enactment – in its extended or confined sense – in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment.

310 Applying the foregoing observations, it is relevant to note that the phrase "in relation to", or its synonym "in connection with", appears in many of the operative provisions of the ASIC Act. For example, s 12CB provides that a person must not, in trade or commerce, *in connection with* the supply or acquisition of financial services engage in conduct that is, in all the circumstances, unconscionable and s 12DA provides that a person must not, in trade or commerce, engage in conduct *in relation to* financial services that is misleading or deceptive. In *Australian Securities and Investments Commission v Narain* (2008) 169 FCR 211, the Full Court of the Federal Court considered the phrase "in relation to" in a similar context in s 1041H of the *Corporations Act*

2001 (Cth). The Full Court concluded that the phrase, in that context, should not be construed narrowly and that an indirect or less than substantial connection is sufficient: at [9] (Finkelstein J) and [76] (Jacobson and Gordon J). Thus, the range of conduct that falls within many of the operative provisions of the ASIC Act is broad: it is conduct that relates to a financial service where the relationship may be indirect or less than substantial.

311 Turning to the text of s 12BAB(1), it is significant that paragraph (g) refers to a service that is "otherwise supplied in relation to a financial product". The word "otherwise" is a reference to the other paragraphs of s 12BAB(1). The use of that word suggests that the other paragraphs describe services that are themselves supplied in relation to financial products, which in turn gives an indication of the types of relationship contemplated by paragraph (g). Paragraphs (a) (provide financial product advice), (b) (deal in a financial product) and (c) (make a market for a financial product) suggest that, to be a financial service, there must be a substantial or direct relationship between the service and the financial product. Given the careful calibration of the other paragraphs of s 12BAB(1), paragraph (g) should not be given such a broad meaning that it effectively sweeps away those other paragraphs and renders them redundant.

312 I consider that the phrase "in relation to" in the definitional provision, s 12BAB(1)(g), requires a more substantial connection or relationship than required by the operative provisions of the ASIC Act such as s 12CB and 12DA. The purpose of the definitional provision is to mark out the reach of the ASIC Act, applying the operative provisions to services that have the character of financial services. An unduly broad construction of the phrase in s 12BAB(1)(g) would see the operative provisions applied to a range of services that would not be recognised as financial services. In my view, that construction is supported by the text, purpose and context of the statutory provision.

313 I do not consider that a service involving negotiations with a bank to defer recovery action and to agree temporary reductions in repayments is a financial service within the meaning of s 12BAB(1)(g). While applying a broad construction of "in relation to" it can be said that the negotiation services "relate to" a financial product (the home loan), that is only to recognise that the subject matter of the negotiations is the home loan. The negotiation services are properly to be characterised as advocacy services. JDA advocated on behalf of Ms Wade, utilising its knowledge and experience in dealing with banks and its skills in negotiating with banks.

314 For those reasons, I conclude that the applicable provisions are those contained in the ACL rather than those contained in the ASIC Act. However, as noted earlier, it is not apparent that anything turns on which legislative provisions apply.

Was AREG an agent of JDA?

315 Ms Wade alleged that AREG was an agent of JDA within the meaning of s 84(2) of the CCA. Section 84(2) is expressed to apply to the CCA generally, and would therefore appear to be applicable to the ACL. Nevertheless, the matter is put beyond doubt by the effective replication of s 84(2) in s 139B(2) (in Part XI of the CCA) which provides:

> (2) Any conduct engaged in on behalf of a body corporate:
>
> (a) by a director, employee or agent of the body corporate within the scope of the actual or apparent authority of the director, employee or agent; or
>
> (b) by any other person:
>
> (i) at the direction of a director, employee or agent of the body corporate; or
>
> (ii) with the consent or agreement (whether express or implied) of such a director, employee or agent;
>
> if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;
>
> is taken, for the purposes of this Part or the Australian Consumer Law, to have been engaged in also by the body corporate.

316 Relying on statements of Einfeld J in *Trade Practices Commission v Sun Alliance Australia Ltd* (1994) ATPR 41-286, Ms Wade submitted that s 84(2) of the CCA has been interpreted liberally by the courts in the context of consumer protection recognising that the intention of the legislature was to widen the common law principles of agency. Read in context, Einfeld J's observations were to the effect that s 84(2) widens the circumstances in which a principal will be legally responsible for conduct of its agent. In that respect, his Honour referred to the reasons of Lockhart J (with whom Sweeney and Neaves JJ agreed) in *Walplan Pty Ltd v Wallace* (1986) 8 FCR 27 where his Honour concluded at 38:

> Section 84(2) is an enlarging provision of general application under the Act. It extends to proceedings, both civil and criminal, and is designed to eliminate the necessity to apply the various and at times divergent tests of the common law relating to a corporation's responsibility for the acts of its servants or agents. It extends those common law principles in order to facilitate proof of a corporation's responsibility.

317 The above decisions were concerned with the breadth of the expression "on behalf of" in s 84(2). The decisions otherwise proceed on the basis that the word "agent" in s 84(2) takes its

common law meaning, being a person who has the authority or capacity to create legal relations between a person who occupies the position of principal and third parties: *International Harvester Company of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Company* (1958) 100 CLR 644 at 652. Hence, the starting point for the application of s 84(2) and 139B(2) in the present case is whether AREG was an agent of JDA within the common law meaning of that term.

318 Ms Wade's allegation to that effect never rose much higher than assertion. The only evidence relied on in support of the allegation was the cooperation that was evident between AREG and JDA. However, as submitted by JDA, the fact that two companies work cooperatively in providing services to a customer does not render one the agent of the other. As noted above, in closing submissions Ms Wade stated that her case was not dependent on a finding that AREG was an agent for JDA. In my view, the evidence does not support a finding that AREG was an agent of JDA in its dealings with Ms Wade. The evidence only supports a finding that the two companies worked cooperatively, with AREG referring Ms Wade to JDA (and to NHLG). Further, and in any event, I do not consider that any conduct of AREG is materially relevant to the allegations Ms Wade has made against JDA.

The disclosed purpose

319 The evidence shows that, in her first telephone conversations with a representatives of AREG and JDA, Ms Wade said that she wished to retain her home rather than sell it and repay the home loan. I accept that Ms Wade's purpose in seeking assistance from AREG and JDA was to retain her home.

320 However, the evidence also shows that the services offered and supplied by JDA, AREG and NHLG differed. AREG performed an intermediary role, putting Ms Wade in contact with JDA and NHLG and also obtaining relevant information about Ms Wade's personal circumstances. It did not charge fees for those services. JDA negotiated temporary arrangements with NAB, deferring the foreclosure proceedings and negotiating temporary variations to Ms Wade's home loan which lowered her repayment obligations in the short term. It charged fees for those services. NHLG provided mortgage broking services, seeking to obtain alternative finance for Ms Wade. There was no evidence about NHLG's fees, but I infer that, as a broker, NHLG would earn fees from the lender on completion of a loan. The evidence also shows that JDA worked in conjunction with AREG and NHLG, and Ms Wade was aware of the services being

provided by each company to assist her, albeit that at times she became confused as to which company was performing which service.

321 The crux of Ms Wade's case, as stated in closing submissions, is that JDA knew or ought to have known that it was never realistically possible for Ms Wade to keep her home, refinancing or not. Ms Wade says that this ought to have been self-evident from the moment she first spoke to JDA on 21 July 2016. It follows, on that premise, that the services supplied by JDA could never have served Ms Wade's disclosed purpose of engaging JDA.

322 So formulated, Ms Wade's case departs from her pleading. In her pleading, she alleged that JDA knew that her financial position would not allow her to maintain or refinance her home loan (I interpolate, as at June 2016 or in the near future); she did not allege that JDA ought to have known that. I will not permit such a departure from her pleading. The question of what JDA ought to have known is a very different question to what it knew and might have required additional evidence to answer.

323 It is necessary to consider the premise underpinning Ms Wade's case at the points in time that the contracts between JDA and Ms Wade were entered into. For the reasons set out below, I reject the premise at each point in time.

G. BREACH OF CONTRACT AND CONSUMER GUARANTEES

Alleged breaches of contract and consumer guarantees

324 There is no dispute that Ms Wade entered into three contracts with JDA. The dispute between the parties primarily concerns the nature and scope of the services to be supplied by JDA under the contracts and the terms on which the services were to be supplied, and importantly the operation of the consumer guarantees in the ACL in respect of the services to be supplied. In support of her claims for breach of contract and failure to comply with the consumer guarantees, Ms Wade made the following allegations.

325 First, at all material times, Ms Wade's financial position, which JDA knew, did not allow her to:

(a) maintain contractual repayments under her NAB home loan for an extended period;

(b) vary her NAB home loan on repayment terms that she could repay without substantial hardship; or

(c) refinance the NAB home loan on repayment terms that she could afford without hardship.

By reason of those matters, JDA's services were unfit for the disclosed purpose and therefore JDA acted in breach of the contracts entered into and JDA failed to comply with the "fitness for purpose" consumer guarantee.

326 Second, in respect of the first and third contracts:

(a) JDA did not provide a long-term solution by which Ms Wade was not required to sell her home to repay the NAB loan;

(b) JDA did not advise Ms Wade that a long term solution to her inability to maintain contractual payments under the NAB home loan was unlikely to be achieved;

(c) JDA did not advise Ms Wade that it was unlikely that she would not be required to sell her home due to her financial circumstances; and

(d) JDA did not advise that it was unlikely that Ms Wade would be able to refinance the NAB home loan on terms that were affordable.

By reason of those matters, JDA did not act with due care and skill under the first and third contracts and therefore JDA acted in breach of those contracts and JDA failed to comply with the "due care and skill" consumer guarantee.

327 Third, in respect of the second contract, JDA did not advise Ms Wade that the removal of any credit impairments for small amounts were unlikely to result in a sufficient improvement of her circumstances to allow her to obtain a loan to refinance the NAB home loan. By reason of the foregoing, JDA did not act with due care and skill under the second contract and therefore JDA acted in breach of that contract and JDA failed to comply with the "due care and skill" consumer guarantee.

Applicable legal principles

328 The consumer guarantees relied on by Ms Wade were those contained in ss 60 and 61 of the ACL. Relevantly, they provide as follows:

> **60 Guarantee as to due care and skill**
>
> If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.
>
> **61 Guarantees as to fitness for a particular purpose etc.**
>
> (1) If:

(a) a person (the supplier) supplies, in trade or commerce, services to a consumer; and

(b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;

there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.

329 Those provisions were the subject of detailed consideration by the NSW Court of Appeal (Payne JA, Sackville and Barrett AJJA) in *Scenic Tours Pty Ltd v Moore* [2018] NSWCA 238; 339 FLR 244 (***Scenic Tours NSWCA***). One aspect of that decision, concerning the operation of s 275 of the ACL and s 16 of the *Civil Liability Act 2002* (NSW), was overturned by the High Court: see *Moore v Scenic Tours Pty Ltd* [2020] HCA 17; 94 ALJR 481. However, the NSW Court of Appeal's consideration of ss 60 and 61 of the ACL was not the subject of the appeal.

330 Sackville AJA, with whom Payne JA and Barrett AJA agreed, concluded that the services that are the subject of the consumer guarantees in ss 60 and 61 are not confined to services supplied pursuant to a contract, and the fact that there is a contract between the parties does not compel a conclusion that the guarantees only apply to services that are co-extensive with the supplier's contractual obligations (at [174]-[175]). His Honour observed (at [176]-[177]):

> 176 The threshold inquiry mandated by each of the Consumer Guarantees is to identify (relevantly for present purposes) the benefits and facilities the supplier is to provide to the consumer. This requires an objective assessment of the dealings between the supplier and the consumer to determine the benefits or facilities the consumer can reasonably expect the supplier to provide in return for the consumer's payment. The assessment is not confined to the terms of any contract between the supplier and the consumer. Nor is it foreclosed or limited by any contractual limitations on the supplier's ability for failing to provide the services for which the consumer has paid.
>
> 177 Depending on the circumstances, the terms of any contract may be a relevant consideration, particularly if the terms have been freely negotiated between the parties. But the benefits or facilities a consumer can reasonably expect the supplier to provide are not to be delimited by exclusion terms in a contract drafted by a supplier primarily to protect its interests. To adopt this approach would be to render the Consumer Guarantees effectively nugatory. Such an intention cannot be imputed to Parliament.

331 Sackville AJA further observed that the consumer guarantees in ss 60 and 61 are integral components of the statutory scheme designed to afford protection to consumers who do not receive the services they reasonably expect to receive from a supplier (at [182]). Nevertheless, the legislation does not seek to impose impossible burdens on service providers; the guarantees require that the supplier will provide services with *due* care and skill and that services are *reasonably* fit for the purpose made known by the consumer (at [183]).

332 The phrase "due care and skill" in s 60 of the ACL is equivalent to the common law duty to take reasonable care: *Let's Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243 at [6] (Basten and Gleeson JJA).

333 The phrase "particular purpose" in s 61 of the ACL has been construed broadly in the predecessor provisions in legislation governing the sale of goods. A particular purpose is a definite purpose that has been expressly or impliedly communicated, but it need not be a purpose that is special or individual to the consumer concerned: *David Jones Ltd v Willis* (1934) 52 CLR 110 at 121 (Starke J); and at 128 (McTiernan J); *Grant v Australian Knitting Mills Ltd* (1935) 54 CLR 49 at 60 (Lord Wright).

334 Section 61(3) provides an exception to the "fitness for purpose" consumer guarantee where the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier. The respondent bears the onus on that issue: *Effem Foods Ltd v Nicholls* [2004] NSWCA 332; ATPR 42-034.

335 Ms Wade's pleading did not clearly distinguish between the nature and scope of the services to be supplied by JDA as defined by the contracts entered into and the services that were alleged to be the operation of the consumer guarantees in the ACL. The pleading elided those matters which has a tendency to cause confusion about the quite separate causes of action based in contract and under the ACL. Despite the difficulty created by the pleading, I consider that it is appropriate to read Ms Wade's allegations concerning the services supplied under the contracts as also an allegation of services supplied for the purposes of the consumer guarantees. In my view, JDA was attentive to that issue and sought to meet that case.

The first contract and the consumer guarantees

336 There is no dispute that Ms Wade entered into the first contract with JDA on 21 July 2016. The dispute between the parties concerns the scope of the services to be supplied by JDA under the first contract and the terms on which the services were to be supplied.

337 Ms Wade alleged that, under the first contract, the services to be supplied by JDA were to "implement a long-term solution to prevent NAB taking possession of" her home. Ms Wade further alleged that the first contract contained the following terms:

(a) the services supplied by JDA would be reasonably fit for the disclosed purpose;

(b) JDA would act with due care and skill;

(c) JDA would take an equitable interest by way of a charge over Ms Wade's home;

(d) JDA would investigate and implement a solution to avert the immediate legal repossession for Ms Wade's home;

(e) JDA would compile, lodge and administer formal complaint/s with the lender and/or relevant regulatory body &/or associations to immediately cease all legal action for repossession of the property in question;

(f) no fees would be due where JDA was unsuccessful in performing the services and monies paid would be refunded;

(g) JDA would seek to provide a long term solution to prevent NAB taking possession of Ms Wade's home; and

(h) JDA would assist Ms Wade to refinance the NAB home loan with another lender on affordable terms so as to prevent NAB from taking possession of her home.

338 The terms in paragraphs (b) to (f) above were express terms of the first contract. The term in paragraph (a) was not a term of the first contract, but was a statutory guarantee under the ACL.

339 The evidence shows that, in the telephone conversation of 21 July 2016, the service being offered by JDA to Ms Wade was to seek to put the NAB legal proceedings on hold, which would then provide an opportunity for Ms Wade to seek a refinancing. JDA did not represent or promise that JDA would seek to provide a long term solution to prevent NAB taking possession of Ms Wade's home; nor did JDA represent or promise that it would assist Ms Wade to refinance her NAB home loan with another lender on affordable terms so as to prevent NAB from taking possession of her home. Ms Wade's submissions emphasised individual words or phrases from the telephone conversation on 21 July 2016, divorced from their context, to create a strained an erroneous interpretation of the conversation.

340 The written terms of the first contract are consistent with the statements made by Helen on behalf of JDA in the telephone conversation on 21 July 2016. The contract was short. The services to be provided by JDA were effectively stated in the recitals to the contract, which stated that JDA was a specialised consultancy which assisted individuals and companies in home loan distress and that Ms Wade wished to engage JDA to investigate and implement a solution to avert the immediate legal repossession of the mortgaged property.

341 I therefore reject the allegation that the services to be supplied by JDA under the first contract were to implement a long-term solution to prevent NAB taking possession of Ms Wade's home.

It follows that I also reject the allegation that the terms set out in paragraphs (g) and (h) above were terms of the first contract.

342 I also reject the implicit contention that the service supplied by JDA to Ms Wade, for the purposes of applying the consumer guarantees, was a service to implement a long-term solution to prevent NAB taking possession of Ms Wade's home. Such a service was never promised by JDA, and was not within the scope of what JDA undertook to do for Ms Wade. Ms Wade's allegation appears to be based on the premise that the disclosed purpose for seeking assistance, to keep her home, defined the scope of services to be supplied by JDA. I reject that premise. It will often be the case that a consumer seeks to fulfil a particular purpose or objective, and a supplier will provide services that assist the consumer in fulfilling the purpose or objective but only in part. To complete the purpose or objective, the consumer will also require services from another supplier. There is nothing unusual in a consumer's needs being met by more than one supplier. The consumer guarantees do not require a consumer's purpose to be met by a single supplier merely because the consumer communicates his or her purpose to that supplier. As stated by Sackville J in *Scenic Tours NSWCA*, what is required is an objective assessment of the dealings between the supplier and the consumer to determine the benefits or facilities the consumer can reasonably expect the supplier to provide in return for the consumer's payment.

343 In the present case, the dealings between JDA and Ms Wade show that the services supplied by JDA were largely co-extensive with the terms of the first contract and were twofold: first, to investigate and implement a solution to avert the immediate legal repossession of Ms Wade's home; and second, to assist Ms Wade in relation to her home loan distress. The two services were interconnected in that the first was directed to, and was a component of, the second. In other words, the object of averting foreclosure of the mortgage was to provide assistance to Ms Wade in addressing her underlying home loan problem. The scope of the second service is somewhat imprecise. As I have said, I reject Ms Wade's contention that the service involved implementing a long term solution and procuring a refinance. However, I also reject JDA's contention that the service was confined to deferring foreclosure. The service supplied by JDA lay between those two extremes. It involved liaising with Ms Wade to direct her toward refinancing if that be feasible and, if that not be feasible, confronting her home loan distress with an alternative realistic solution (or advising that there was no alternative realistic solution).

344 As at 21 July 2016, and in the weeks that followed, JDA had limited knowledge about Ms Wade's financial circumstances. The circumstances in which Ms Wade first sought assistance

were attended by urgency, as Ms Wade had been notified of legal action being taken by NAB to foreclose on the mortgage over her home. While the information conveyed by Ms Wade to JDA at that time showed that Ms Wade's financial position with respect to her mortgage was difficult, I do not accept Ms Wade's submission that the information demonstrated that her position was hopeless and that she could not avoid foreclosure in the long run. It is to be expected that a person seeking assistance to avert mortgage foreclosure will be in a precarious financial position. However, the fact that a person has fallen into difficult circumstances does not mean that the position cannot be rectified. Deferring recovery action by a bank and putting such a person in touch with a finance broker, or otherwise seeking to address the position of arrears, may assist a person to find a way out of their difficulties and enable them to keep their family home.

345 In my view, the services provided by JDA from 21 July 2016 and in the weeks that followed were provided with due skill and care and were reasonably fit for the disclosed purpose. The services that were provided in return for the contractual fee of $3,850 included:

(a) in July 2016, arranging for NAB to put a stop to collections activity;

(b) in early August 2016, liaising with NAB in relation to an agreement that would provide Ms Wade with time (until 8 September 2016) to refinance her NAB home loan with another lender;

(c) in mid-August 2016, seeking and obtaining from NAB an agreement to provide Ms Wade with further time (until 8 November 2016) to refinance her NAB home loan with another lender; and

(d) in mid-September 2016, negotiating an alternative arrangement with NAB that involved reduced repayments to the home loan for a period of 3 months, followed by regular repayments for the following 6 months and capitalisation of arrears at the end of the 9 month period.

346 In my view, given the urgency of the circumstances facing Ms Wade and her strongly stated desire to keep her family home, the services supplied by JDA were fit for purpose. As stated earlier, I am not satisfied on the evidence that it was never possible for Ms Wade to avoid foreclosure. In any event, I am not satisfied that JDA knew (or ought to have known) that from 21 July 2016 and the weeks that followed. Given that Ms Wade had owned her home for a long time and had apparently been able to meet her loan repayments for a considerable period, there was a reasonable basis for JDA to believe that Ms Wade may be able to rectify her defaults.

347 For those reasons, I dismiss Ms Wade's claims that JDA breached the first contract or failed to comply with the consumer guarantees in ss 60 and 61 in respect of the services supplied in connection with the first contract.

The third contract and consumer guarantees

348 As the third contract is an extension of the first contract, it is convenient to consider it prior to the second contract.

349 Again, there is no dispute that Ms Wade entered into the third contract with JDA on 15 September 2016. Ms Wade alleged that, under the third contract, the first contract was varied by extending its term by a further 60-days "to implement a long-term solution to prevent NAB taking possession of" Ms Wade's home.

350 My conclusions as to the terms of the third contract, and the services supplied by JDA for the purposes of the consumer guarantees in ss 60 and 61 of the ACL, are materially the same as with respect to the first contract. As stated above, the dealings between JDA and Ms Wade, and the terms of the first contract as extended by the third, show that the services supplied by JDA were to investigate and implement a solution to avert the legal repossession of Ms Wade's home and to assist Ms Wade in relation to her home loan distress. If the prospects of refinancing were poor, the service required JDA to advise Ms Wade as to her realistic options including, if necessary, advising her that there were no such options. It would have been inconsistent with the consumer guarantees for JDA to have charged fees for negotiating with NAB to defer recovery action under the home loan if there was no realistic prospect of Ms Wade retaining her home and JDA failed to advise Ms Wade of that fact.

351 The evidence shows that, as at 15 September 2016, Ms Wade and JDA knew that there was no immediate prospect of Ms Wade refinancing her home loan. The evidence shows that:

(a) On 3 August 2016, AREG and NHLG told Ms Wade that she may not be ready to be refinanced because of her circumstances and she may need to wait.

(b) On 11 August 2016, NHLG discussed with Ms Wade the earning potential of her late father's business and the assets of his estate.

(c) On 30 August 2016, NHLG advised Ms Wade of her difficulty in being able to service a refinanced loan and suggested that Ms Wade's 22 year old daughter might be able to assist.

(d) On 31 August 2016, Ms Wade told NHLG by email that her daughter refused to assist in supporting a refinanced loan. NHLG passed that information on to JDA such that JDA understood that Ms Wade did not have the income to support repayments required under a refinanced loan and that it may be necessary to try to re-negotiate the repayments to be made to NAB. JDA tried to contact Ms Wade without success.

(e) JDA tried to contact Ms Wade on 5, 7 and 10 September 2016 without success.

352 Two important discussions then occurred between JDA and Ms Wade on 12 and 15 September 2016. On 12 September 2016, Ms Wade confirmed that her daughter had refused to support the refinancing of her home loan, that Ms Wade had not heard anything further from NHLG regarding refinance and conceded that her refinancing was not looking good. JDA (Heidi) recommended that they come up with another arrangement with NAB to obtain more time. In fact, such a proposal had already been put to NAB by JDA on 10 September 2016 when JDA had been unable to make contact with Ms Wade. The proposal was for Ms Wade to make lower repayments for a period of 3 months, then return to minimum monthly repayments for 6 months and then the arrears would be capitalised into the loan. On 15 September 2016, a second discussion occurred. JDA advised that NAB had asked whether there was reason to believe that Ms Wade's financial situation would change to enable her to make minimum monthly payments after 3 months. Ms Wade provided JDA (Heidi) with an update of her financial position. The update was not truthful. She referred to the Government benefits and Child Support she was receiving and stated that her adult daughter was paying board (all of which I find to be true), but also stated that she was doing a part time book-keeping job as well as hairdressing (which I find to be false). JDA updated Ms Wade's Statement of Financial Position with that information. The updated Statement of Financial Position showed that Ms Wade's income matched her estimated expenses, including her monthly home loan repayment.

353 It was at that point that JDA and Ms Wade entered into the third contract, extending the first contract for a period of 60 days. JDA told Ms Wade that it would not continue to assist her in relation to the home loan without the extension. Ms Wade signed and returned the third contract on 17 September 2016.

354 The services that were provided by JDA to Ms Wade in return for the contractual fee of $2,500 included:

(a) JDA liaised with NAB in relation to Ms Wade's updated Statement of Financial Position and varied loan repayment terms on 19, 20 and 22 September 2016.

(b) On 26 September 2016, NAB offered varied loan repayments terms in line with what had been sought by JDA.

(c) On 27 and 26 September 2016, JDA unsuccessfully tried to contact Ms Wade to discuss NAB's proposal. On 30 September 2016, JDA sent an email to that effect.

(d) On 3 October 2016, Ms Wade returned a signed copy of the NAB variation agreement and expressed her gratitude for the varied terms. By an email the same day, JDA forwarded the signed agreement to NAB.

(e) On 4 October 2016, NAB emailed JDA to confirm receipt of the signed agreement.

(f) On 5 October 2016, JDA again unsuccessfully tried to call Ms Wade and sent an SMS advising that NAB had accepted the agreement and that JDA would touch base fortnightly.

(g) On 26 October 2016, JDA again unsuccessfully tried to call Ms Wade and left an SMS message.

(h) On 28 October 2016, Ms Wade informed JDA that she could not afford to make the first payment under the agreement with NAB but that she would be able to make repayments on the 9th of each month moving forward. JDA emailed NAB asking if that change was possible.

(i) On 17 November and 5 December 2016, JDA unsuccessfully tried to call Ms Wade and left SMS messages.

355 In his evidence, Mr Fallscheer assumed that Ms Wade had informed JDA that her income would increase in the future (which is contrary to my finding that Ms Wade told JDA that her income was higher, from "cash" sources, than she had previously disclosed). On that assumption, Mr Fallscheer's opinion was that Ms Wade should have been advised by JDA to delay an application to refinance until a minimum of two pay slips had been received with the higher level income. Mr Fallscheer also expressed the opinion that, if Ms Wade's circumstances were going to change, the agreement negotiated by JDA with NAB was a reasonable approach to provide Ms Wade with time to work through to the point where her position had improved.

356 In my view, the services provided by JDA under and in connection with the third contract were provided with due skill and care and were reasonably fit for the disclosed purpose, if it is assumed that Ms Wade's statements about her income were correct or that there was a prospect of Ms Wade increasing her income to that level. If those assumptions are made, the services

provided by JDA gave Ms Wade an opportunity to consolidate her financial position and maintain her home loan with NAB.

357 Ms Wade's claim is based on the proposition that there was never a prospect that she could meet her repayments under the home loan, and JDA knew that to be the case. However, that proposition requires a finding that JDA knew that Ms Wade lied about her income on 15 September 2016, and had no prospect of earning income apart from Government benefits and Child Support going forward. The evidence does not support that finding.

358 A question might arise whether, in all the circumstances, the consumer guarantees of due care and skill and fitness for purpose required JDA to investigate and verify Ms Wade's statements about her income (and her expenditure). It is unnecessary to consider or answer that question, as no such allegation was made in the Amended Statement of Claim.

359 It follows that, in my view, Ms Wade has not established that the services provided by JDA under and in connection with the third contract were provided in breach of contract or breach of the consumer guarantees that the services would be supplied with due skill and care and were reasonably fit for the disclosed purpose. Ms Wade has failed to prove that JDA knew as at September 2016 that she could not afford her home loan. Ms Wade provided information to JDA that indicated the contrary. On the basis of that information, JDA acted reasonably and appropriately to support Ms Wade retain her home by negotiating further deferral arrangements with NAB. Those arrangements afforded Ms Wade with an opportunity to improve and consolidate her financial position, with the future prospect of being able to meet her future repayment obligations with NAB or obtain alternative finance.

The second contract and consumer guarantees

360 There is no dispute that Ms Wade entered into the second contract with JDA on 26 July 2016. Ms Wade alleged that, under the second contract, the services to be supplied by JDA were to remedy any defaults, writs or judgments (credit impairments) on her credit file for a fee of $2,000 for each credit impairment that was removed. Ms Wade further alleged that the second contract contained the following terms:

(a) the services supplied by JDA would be reasonably fit for the disclosed purpose;

(b) JDA would act with due care and skill;

(c) JDA would investigate Ms Wade's credit history and attempt to identify and implement a solution to remedy any defaults, writs or judgments on her credit history;

(d) the initial assessment would be free of charge;

(e) should JDA identify any credit impairment that could be removed, Ms Wade agreed to pay $2,000 for each such impairment; and

(f) the payment of the fee was payable upon successful removal of each credit impairment.

361 The services to be supplied by JDA under the second contract were in one sense broader, and in one sense narrower, than alleged by Ms Wade. Again, the services were largely defined by the recitals to the agreement which stated JDA and its associated entities are specialised consultants who provide assessment and consulting services in respect to credit reporting and Ms Wade wished to engage JDA to investigate its credit history and attempt to identify and, with Ms Wade's agreement, implement a solution to remedy any defaults, writs or judgments on Ms Wade's credit history as listed in the annexure to the agreement. The annexure identified two credit impairments: the first was the NAB home loan and the second was Vodafone. The agreement did not identify who JDA's "associated entities" were.

362 The services to be provided by JDA under the agreement were not merely to remove credit impairments. JDA described itself as providing assessment and consulting services and undertook to investigate Ms Wade's credit history and attempt to identify and, with Ms Wade's agreement, implement a solution to remedy credit impairments. Assessment and consultation were central parts of the services promised. The annexure to the agreement confined the services to two relevant impairments: NAB and Vodafone.

363 The evidence does not show any discussions between Ms Wade and JDA about the services to be supplied under or in connection with the second contract. On 26 July 2016, Kelli from JDA sent a copy of the second contract to Ms Wade and asked her to sign and return it as a matter of urgency. Given those circumstances, I do not consider that there is any material difference between the services to be supplied by JDA under the second contract and the services supplied within the meaning of the consumer guarantee in s 60 of the ACL. I also conclude that the consumer guarantee in s 61 is applicable to those services. Ms Wade had made known to JDA that she was seeking its assistance for the purpose of keeping her home. The services offered under the second contract were offered for that purpose.

364 The evidence shows that, on 13 October 2016, JDA sent an email to Ms Wade advising that JDA had successfully removed the Vodafone credit impairment on Ms Wade's credit file and JDA issued an invoice to Ms Wade in the amount of $2,000 for the removal of that credit impairment.

365 In my view, there are two deficiencies in JDA's supply of services under the second contract which are interrelated. First, there was no consultation or agreement with Ms Wade about the removal of that credit impairment, which was a contractual requirement. The services promised by JDA under the second agreement required JDA, at the least, to advise Ms Wade of the significance of the credit impairment to her then financial predicament and obtain her agreement to seek its removal for the fee charged. Second, the evidence establishes that, as at October 2016, the removal of the Vodafone credit impairment would not have had any practical benefit for Ms Wade in respect of her disclosed purpose of retaining her home loan.

366 The expert evidence of Mr Fallscheer established that the removal of credit impairments from a person's credit file improves their risk classification to lenders and can improve their prospects of obtaining a home loan and a lower interest rate. However, Mr Fallscheer also gave evidence that the effect of the removal of a credit impairment depended on the amount of the impairment. The effect of Mr Fallscheer's evidence was that, assuming Ms Wade's income consisted of Government benefits and Child Support, she would not be able to refinance her loan and the removal of the Vodafone credit impairment would not have assisted.

367 By October 2016, it was apparent that Ms Wade had no prospects in the short term to refinance her home loan. The plan at that stage was to provide Ms Wade with time to consolidate her financial position and make loan repayments to NAB, with the possibility of obtaining refinance down the track if Ms Wade could establish an income and repayment history. In those circumstances, I consider that the removal of the Vodafone credit impairment, at that point in time, provided no tangible benefit toward Ms Wade's disclosed purpose. It may be accepted that Ms Wade's circumstances might have changed in the future such that removal of the Vodafone credit impairment would subsequently became beneficial to her. However, the evidence shows that it was not beneficial in or around October 2016 and, accordingly, at that time the service was not reasonably fit for purpose. In all the circumstances, the appropriate course was for JDA to consult with Ms Wade about the benefits of removing the Vodafone credit impairment at that point in time, and likely hold off providing services under the second contract until such time as the services would provide a benefit to Ms Wade in furtherance of the disclosed purpose of retaining her home.

368 In my view, the failure to consult with Ms Wade, and seek her agreement, to the removal of the Vodafone credit impairment was a breach of contract. The same failure involved a failure to comply with the consumer guarantees in s 60. I also find that the removal of the Vodafone

credit impairment was a service supplied by JDA that was not reasonably fit for the disclosed purpose at the time that the service was supplied (I infer in or around October 2016), and JDA therefore failed to comply with the consumer guarantee in s 61. I am satisfied on the basis of the expert evidence of Mr Fallscheer, which was not answered by JDA, that the removal of the Vodafone credit impairment at that time afforded no benefit to Ms Wade in keeping her home because refinancing would not be pursued in the short term.

Section 61(3)

369 JDA placed reliance on s 61(3), submitting that Ms Wade did not rely on the skill and judgment of JDA in relation to the refinancing of her home loan and providing a "long term solution" to her home loan difficulties. The submission has become superfluous because I have found that JDA's services did not encompass arranging alternative finance for Ms Wade's home and did not promise a "long term solution". Section 61(3) is no answer to JDA's failure to comply with the "fitness for purpose" consumer guarantee in respect of the services supplied under the second contract. To the extent it is necessary, I find that Ms Wade did rely on the skill and judgment of JDA in respect of those services, and it was reasonable for her to do so.

Conclusion

370 In conclusion, I dismiss Ms Wade's claims that JDA breached the first and third contracts and failed to comply with the consumer guarantees in ss 60 and 61 in respect of the services supplied in connection with the first and third contracts. However, I accept Ms Wade's claim that JDA breached the second contract and failed to comply with the consumer guarantees in ss 60 and 61 in respect of the services supplied in connection with the second contract.

H. MISLEADING AND DECEPTIVE CONDUCT

Alleged misleading conduct

371 Ms Wade alleges that JDA engaged in misleading and deceptive conduct contrary to s 18 of the ACL by representing to Ms Wade, on and from about 21 July 2016, that her home could realistically be saved from repossession by NAB through refinancing of her home loan with another lender. Ms Wade alleges that that representation was misleading or deceptive because:

(a) JDA's services were, at best, a temporary or short-term measure to prevent immediate foreclosure by NAB;

(b) it was not realistically possible that JDA's services would prevent NAB from taking possession of Wade's home in the longer term; and

(c) it was not realistically possible that JDA's services would result in Wade varying her NAB home loan on repayment terms that she could repay without substantial hardship or refinancing her NAB home loan on repayment terms that she could reasonably afford.

372 Ms Wade also alleges, in the alternative, that JDA engaged in misleading and deceptive conduct by failing to inform her of the matters referred to in the preceding paragraph, in circumstances where there was a reasonable expectation that Wade would be informed of those matters.

Applicable legal principles

373 Section 18(1) of the ACL provides as follows:

> A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

374 The legal principles governing the application of s 18 are well known and were not in dispute between the parties. The principles were recently summarised by the Full Court of the Federal Court in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2020] FCAFC 130; 381 ALR 507 at [22]. The following principles, referred to by the Full Court, are central to the application of the section:

(a) First, the primary question is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error - that is, to form an erroneous assumption or conclusion about some fact or matter.

(b) Second, conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so.

(c) Third, it is not necessary to prove an intention to mislead or deceive.

(d) Fourth, it is unnecessary to prove that the conduct in question actually deceived or misled anyone.

(e) Fifth, it is not sufficient if the conduct merely causes confusion.

375 It has long been established that conduct that contravenes s 18 may involve, but need not involve, the making of a false or misleading representation: *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [102] per Gummow, Hayne, Heydon and Kiefel JJ, referring with approval to *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [103] per McHugh J. Thus, in certain circumstances, non-disclosure or "silence" may constitute misleading and deceptive conduct. Section 2(2) of the ACL defines "conduct" to include the

doing or the refusing to do any act, and defines "refusing to do an act" as refraining, otherwise than inadvertently, from doing that act. However, there is appellate authority that non-disclosure may be a contravention of s 18 of the ACL even if it is not intentional: *CCP Australian Airships v Primus Telecommunications Pty Ltd* [2004] VSCA 232; [2005] ATPR 42-042 at [34] (Nettle JA, as a judge of the Victorian Court of Appeal, with whom Batt and Vincent JJA agreed).

376 It remains common to plead, in support of an allegation of misleading conduct by silence, that the plaintiff had a reasonable expectation of certain information being disclosed. The language of "reasonable expectation" derives from a statement of Gummow J in *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, quoting French J in *Kimberley NZI Finance Ltd v Torero Pty Ltd* [1989] ATPR (Digest) 53,193 at 53,195, that "unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist" (at 41). That statement, and the circumstances in which non-disclosure of information may constitute misleading or deceptive conduct within s 18, were considered by the High Court in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia* (2010) 241 CLR 357 (***Miller***). French CJ and Kiefel J stated (at [20]) that characterisation of conduct as misleading or deceptive must be undertaken by reference to its circumstances and context where silence is one circumstance to be considered, together with other factors such as the knowledge of the person to whom the conduct is directed and common assumptions and practices in the relevant area of commerce. In relation to the concept of a reasonable expectation of disclosure, their Honours observed at [19] (citations omitted):

> The language of reasonable expectation is not statutory. It indicates an approach which can be taken to the characterisation, for the purposes of s 52, of conduct consisting of, or including, non-disclosure of information. That approach may differ in its application according to whether the conduct is said to be misleading or deceptive to members of the public, or whether it arises between entities in commercial negotiations.

and at [21]:

> To invoke the existence of a reasonable expectation that if a fact exists it will be disclosed is to do no more than direct attention to the effect or likely effect of non-disclosure unmediated by antecedent erroneous assumptions or beliefs or high moral expectations held by one person of another which exceed the requirements of the general law and the prohibition imposed by the statute.

377 Similarly, Heydon, Crennan and Bell JJ stated that determination of whether non-disclosure amounts to misleading conduct requires "close analysis of all of the circumstances of the transaction" (at [91]).

378 As the judgments in *Miller* make clear, relevant circumstances to be taken into account in assessing whether non-disclosure constitutes misleading conduct within s 18 include the characteristics of the parties to the relevant dealings, particularly whether the parties are both commercial entities involved in a commercial negotiation (which was the case in *Miller*) or one of the parties is a consumer. As a general proposition, non-disclosure in a commercial setting, where each party keeps their own counsel and their "cards close to their chests", is less likely to constitute misleading conduct (see at [21]-[22] per French CJ and Kiefel J and at [91] per Heydon, Crennan and Bell JJ).

Consideration

379 I reject the allegation that JDA represented to Ms Wade, on and from about 21 July 2016, that her home could realistically be saved from repossession by NAB through refinancing of her home loan with another lender. No such representation was conveyed by the telephone conversation held on 21 July 2016.

380 The transcript of the telephone conversation on 21 July 2016 shows that Ms Wade told JDA that she wished to keep her home. The effect of JDA's statements on the telephone call were that JDA could assist her in that objective. But JDA did not represent that the objective would be achieved, and that she would definitely be able to retain her home. As set out earlier, on that call a representative of JDA, Helen, told Ms Wade that JDA usually advised that, in such circumstances where a current lender had taken recovery steps, it was desirable to look at the option of seeking a refinance through another lender. Helen stated that JDA would get the NAB legal proceedings put on hold, and get to know Ms Wade's file a little better, and then speak with her again. JDA referred to seeking refinance. It did not represent that refinance could be obtained. There is nothing in the surrounding circumstances that would have led a reasonable person in the position of Ms Wade to believe that JDA represented that a long term solution would definitely be found to her home loan problem. While Ms Wade gave evidence that her recollection of the call was that she was told that JDA could refinance her loan, I have found that that evidence was a reconstruction. Even if Ms Wade formed that impression from the telephone call, it was not the impression that a reasonable person would form.

381 I also reject the allegation that JDA engaged in misleading and deceptive conduct by failing to inform Ms Wade that JDA's services were a short-term measure to prevent immediate foreclosure by NAB and that it was not realistically possible that JDA's services would enable Ms Wade to refinance her home loan, or achieve repayment terms, that would prevent NAB

from taking possession of Ms Wade's home. It is necessary to consider this allegation at different times in the course of dealings between JDA and Ms Wade, but particularly at the inception of their dealings on 21 July 2016 and at the renewal of the contract in mid-September 2016.

382 On 21 July 2016, JDA did not know, and could not have known, whether or not Ms Wade would be able to retain her home by either refinancing the loan or otherwise consolidating her financial position so as to be able to meet her NAB home loan repayments. The services offered by JDA were to avert immediate foreclosure to provide Ms Wade with an opportunity to investigate the availability of alternative refinance. In my view, JDA adequately communicated the nature of its services to Ms Wade as at 21 July 2016 and in the weeks that followed. A reasonable person in the position of Ms Wade would have understood that JDA's services were directed to assisting her, but were not a promise that foreclosure would never occur. It follows that JDA did not fail to disclose information to Ms Wade and did not engage in misleading conduct.

383 By mid to late August 2016, Ms Wade and JDA knew that there was no immediate prospect of Ms Wade refinancing her home loan. That was driven home when, on 30 August 2016, NHLG advised Ms Wade of her difficulty in being able to service a refinanced loan and suggested that her daughter might assist and on 31 August 2016 when Ms Wade told NHLG that her daughter refused to assist. It was further confirmed in discussions between Ms Wade and JDA on 12 and 15 September 2016. On 12 September 2016, Ms Wade confirmed that her refinancing was not looking good. On 15 September 2016, JDA and Ms Wade looked again at her sources of income, with the aim of persuading NAB to enter into an arrangement that would provide a period of 9 months in which to stabilise her financial position, with the possibility of then maintaining her NAB home loan or obtaining refinance. As set out earlier, Ms Wade gave JDA false information about her income at that time. The false information indicated that Ms Wade was able to meet her expenses including her home loan repayments. Given the circumstances, I am not satisfied that JDA knew, as at 15 September 2016, that Ms Wade's position was hopeless and she would not be able to retain her home. It follows that JDA did not fail to disclose information to Ms Wade and did not engage in misleading conduct.

Conclusion

384 In conclusion, I dismiss Ms Wade's claim that JDA engaged in misleading or deceptive conduct.

I. UNCONSCIONABLE CONDUCT

Alleged unconscionable conduct

385 Ms Wade alleged that JDA engaged in unconscionable conduct in contravention of s 21 of the ACL. Ms Wade's allegation of unconscionable conduct was pleaded in the following manner:

> By reason of the matters alleged in paragraphs 9 to 39, JDA engaged in conduct, in trade or commerce, that was in all the circumstances, unconscionable in contravention of section 21 of the ACL and/or section 12CB of the ASIC Act.

386 That form of pleading of unconscionable conduct is to be discouraged. As stated by Bromwich J in *Olson v Keefe (No 3)* [2018] FCA 2001 at [22]-[23], in a claim alleging unconscionable conduct, it is not enough to plead a set of facts and a bare conclusion that what has taken place is unconscionable; it is necessary to plead what particular conduct or part of the conduct is said to be unconscionable and why. As Allsop CJ explained in *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 1284; 139 ACSR 52 (in the context of a concise statement) at [4]: "In a coherent way, anchored in the facts, the plaintiff should explain why the facts stated lead to the conclusion contended for. This may require a degree of reasoned or argued articulation."

387 The effect of Ms Wade's pleading is to allege that the totality of JDA's conduct in supplying services to Ms Wade was unconscionable, without identifying which aspects of the conduct are alleged to be unconscionable and why. Nevertheless, no challenge was taken to the form of the pleading. To some extent the pleading is consistent with Ms Wade's overriding contention that JDA should have declined to assist her on the basis that her financial position was hopeless, and it was unconscionable for JDA to provide services in those circumstances. In support of that overriding contention, Ms Wade alleged that JDA's services to Ms Wade under the contracts were provided in circumstances where:

(a) JDA had breached contractual and statutory obligations to Ms Wade and had misled and deceived Ms Wade (on the basis of the allegations considered above);

(b) Ms Wade was in a lesser bargaining position than JDA;

(c) JDA did not explain, or not adequately explain, that:

  (i) the contracts were, at best, a temporary or short term measure;

  (ii) that a long-term solution to Ms Wade's inability to maintain contractual payments under the NAB home loan was unlikely to be achieved;

(d) Ms Wade did not receive, and was not recommended by JDA to obtain, independent legal and/or financial advice;

(e) Ms Wade was not given the opportunity by JDA to obtain independent legal and/or financial advice;

(f) Ms Wade was in a precarious financial position;

(g) Ms Wade suffered from anxiety and depression;

(h) Ms Wade's father had passed away in February 2016;

(i) JDA imposed an onerous security over Ms Wade's property; and

(j) JDA knew of the matters referred to in paragraphs (a) to (i) above.

Applicable legal principles

388 Section 21 of the ACL relevantly provides as follows:

> (1) A person must not, in trade or commerce, in connection with:
>
> (a) the supply or possible supply of goods or services to a person; or
>
> (b) the acquisition or possible acquisition of goods or services from a person;
>
> engage in conduct that is, in all the circumstances, unconscionable.
>
> …
>
> (4) It is the intention of the Parliament that:
>
> (a) this section is not limited by the unwritten law relating to unconscionable conduct; and
>
> (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and
>
> (c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:
>
> (i) the terms of the contract; and
>
> (ii) the manner in which and the extent to which the contract is carried out;
>
> and is not limited to consideration of the circumstances relating to formation of the contract.

389 Section 22 sets out a list of matters that a court may have regard to for the purposes of applying s 21. Subsection 22(1) is directed to circumstances where it is alleged that a supplier of services has engaged in unconscionable conduct. Subsection 22(1) provides as follows:

(1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the ***supplier***) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the ***customer***), the court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the customer; and

(b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the customer:

(i) any intended conduct of the supplier that might affect the interests of the customer; and

(ii) any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and

(j) if there is a contract between the supplier and the customer for the supply of the goods or services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier

and the customer for the supply of the goods or services; and

(l) the extent to which the supplier and the customer acted in good faith.

390 Section 21 of the ACL and its statutory analogue, s 12CB of the ASIC Act, have been the subject of consideration in a number of appellate decisions including by the Full Court of the Federal Court in *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90; ATPR 42-447, *Paciocco v Australia & New Zealand Banking Group Ltd* (2015) 236 FCR 199 (***Paciocco FCAFC***) and by the High Court in *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 (***Paciocco HCA***) (affirming the decision of the Full Court) and most recently in *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; 93 ALJR 743 (***Kobelt***). While *Kobelt* involved a 4:3 majority decision (the majority comprising Kiefel CJ, Bell, Gageler and Keane JJ, the minority comprising Nettle, Gordon and Edelman JJ), the difference in outcome is largely attributable to different characterisations of the underlying facts (based on the manner in which the case was presented at trial). The following principles governing the application of the statutory prohibition of unconscionable conduct, which have been established over time, were affirmed by the High Court:

(a) First, the prohibition of unconscionable conduct in s 12CB of the ASIC Act (and its analogue s 21 of the ACL) is not confined to conduct that is unconscionable within the meaning of the general law and remediable on that basis by a court exercising jurisdiction in equity (in contrast to s 12CA of the ASIC Act and its analogue s 20 of the ACL): at [83] (Gageler J), [119] (Keane J), [144] (Nettle and Gordon JJ) and [311] (Edelman J).

(b) Second, the term "unconscionable" is to be understood as bearing its ordinary meaning, being conduct that objectively answers the description of being against conscience: at [14] (Kiefel CJ and Bell J), [92] (Gageler J) and [119] (Keane J).

(c) Third, the values that inform the standard of conscience fixed by the statutory prohibition include those identified in *Paciocco FCAFC* at [296], being certainty in commercial transactions, honesty, the absence of trickery or sharp practice, fairness when dealing with customers, the faithful performance of bargains and promises freely made, and the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage: at [14] (Kiefel CJ and Bell J) and [234] (Nettle and Gordon J).

(d) Fourth, the conclusion that a supplier has engaged in conduct that contravenes the statutory norm of conscience is an evaluative judgment: at [47] (Kiefel CJ and Bell J), [120] (Keane J) and [153] (Nettle and Gordon JJ).

(e) Fifth, conduct may be unconscionable in the absence of dishonesty, but the absence of dishonesty or other moral taint is a relevant consideration: at [59] (Kiefel CJ and Bell J) and [257] (Nettle and Gordon JJ).

391 In applying s 21 of the ACL, all of the factors referred to in s 22 that are relevant must be taken into account and it is wrong to focus on only some of those factors: *Paciocco HCA* at [188]-[189] (Gageler J), [294] (Keane J). The approach to the application of the prohibition in s 21 which is required by s 22 is analogous to the approach of a court of equity which takes a "more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case": *The "Juliana"* (1822) 2 Dods 504 at 521; 165 ER 1560 at 1567 and *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 118-119, referred to by Allsop CJ in *Paciocco FCAFC* at [271] and in *Kobelt* by Keane J at [120] and Nettle and Gordon JJ at [150].

Consideration

392 In applying s 21 to the facts of this case, it is necessary to consider the circumstances relied on by Ms Wade, and all other relevant factors referred to in s 22 of the ACL. It is convenient to consider the services supplied under the first and third contracts before considering the services supplied under the second contract.

Services supplied under the first and third contracts

393 Ms Wade's allegation of unconscionability is heavily dependent on the alleged contraventions of contractual obligations, failures to comply with the consumer guarantees and misleading and deceptive conduct of JDA. I have found that JDA did not breach its contractual obligations, fail to comply with the consumer guarantees or engage in misleading or deceptive conduct in respect of the services supplied under and in connection with the first and third contracts.

394 In the absence of those circumstances, the allegation of unconscionable conduct in respect of the services supplied under and in connection with the first and third contracts has almost no foundation. It can be accepted that:

(a) Ms Wade was in a lesser bargaining position than JDA;

(b) Ms Wade did not receive, and was not recommended by JDA to obtain, independent legal and/or financial advice;

(c) Ms Wade was in a precarious financial position;

(d) Ms Wade suffered from anxiety and depression;

(e) Ms Wade's father had passed away in February 2016; and

(f) JDA knew of the matters referred to in paragraphs (a) to (e) above.

395 However, those circumstances do not identify any conduct of JDA that is unconscionable. They merely describe the reasons that Ms Wade needed assistance in dealing with her home loan problem, and establish that Ms Wade was in a vulnerable position when dealing with JDA. Ms Wade's allegation of unconscionable conduct required her to demonstrate that the services supplied by JDA, in the circumstances that they were supplied and with the knowledge of JDA at the time, involved a sufficient degree of unfairness, unreasonableness, trickery or sharp practice that JDA's conduct could be described as being against conscience. For the reasons explained above, I do not consider that the services supplied by JDA under the first and third contracts involved unfairness or unreasonableness. The services had the potential to assist Ms Wade. I reach that conclusion having regard to both the information held by JDA as well as Ms Wade's actual circumstances. Ms Wade has not persuaded me that her position was financially hopeless, let alone persuaded me that that was known by JDA (or ought to have been known by JDA).

396 Ms Wade also alleged that JDA imposed an onerous security over Ms Wade's property, being the caveat in support of the payment of JDA's invoices. That allegation was not developed in argument. It is not clear what "onerous" means in the circumstances. The caveat did not cause Ms Wade to sell her home; nor did it impede the ultimate sale of her home. The effect of the caveat was, if and when Ms Wade sold her house, JDA would have a form of security for amounts owing to it. In circumstances where I have concluded that fees were lawfully payable to JDA for services rendered, I do not consider that the act of taking security for payment of the fees is unconscionable.

397 The above findings address the factors in paragraphs (a), (i) and (j) of s 22(1). Turning to the other statutory factors in s 22(1), I make the following findings:

(a) As to paragraph (b), the only condition that Ms Wade was required to comply with was the payment of JDA's fees. I do not consider that the fee was such that it could be

concluded that it was not reasonably necessary for the protection of the legitimate interests of JDA.

(b) As to paragraph (c), no evidence was led from Ms Wade that she was not able to understand the first and third contracts sent to her. While Ms Wade gave evidence that she believed that JDA represented or promised to procure a refinancing, I consider that that evidence involved a reconstruction. In any event, nothing that JDA said, nor anything written in the contracts, would have led a reasonable person to form that view.

(c) As to paragraph (d), the evidence shows that no undue influence or pressure was exerted on, or any unfair tactics were used against, Ms Wade. The evidence shows that JDA had difficulties in contacting Ms Wade and frequently had to send emails or text messages asking Ms Wade to contact them. The predicament facing Ms Wade required urgent attention and it was reasonable and appropriate for JDA to try to contact Ms Wade regularly in an effort to assist her.

(d) As to paragraph (e), no evidence was adduced as to the amount for which, and the circumstances under which, Ms Wade could have acquired identical or equivalent services from a person other than JDA.

(e) As to paragraph (f), no evidence was adduced as to the extent to which JDA's conduct towards Ms Wade was consistent with JDA's conduct in similar transactions between it and other like customers.

(f) As to paragraphs (g) and (h), no evidence was adduced as to the existence of any applicable industry code.

(g) As to paragraph (l), the evidence does not establish that JDA acted with a lack of good faith in respect of the first and third contracts. Conversely, the evidence shows that Ms Wade was frequently not frank or honest in her dealings with JDA. Specifically, she was dishonest as to the income she was earning. In my view, she was also not frank with JDA about her expenditure. As set out earlier, each month Ms Wade had significant cash expenditure that was unexplained, a significant part of which was likely spent on gambling, and which was likely to be a significant cause of her financial difficulties. In the circumstances in which Ms Wade sought assistance from JDA, I consider Ms Wade's lack of candour and dishonesty showed a lack of good faith in her dealings with JDA.

398 Taking all relevant circumstances into account, I do not consider that JDA's conduct in relation to the services supplied pursuant to the first and third contracts was unconscionable.

Services supplied under the second contract (credit impairment)

399 The services supplied under the second contract raise different considerations. I have found that, in removing the Vodafone credit impairment from Ms Wade's credit file in about October 2016, JDA breached its contractual obligations by failing to consult with Ms Wade and seek her agreement. I have also found that the same conduct involved a failure to comply with the "due care and skill" consumer guarantee in s 60. I have also found that the removal of the Vodafone credit impairment was a service supplied by JDA that was not reasonably fit for the disclosed purpose at the time that the service was supplied because it afforded no benefit to Ms Wade in keeping her home, and therefore involved a failure to comply with the "fit for purpose" consumer guarantee in s 61 of the ACL.

400 Those findings, in combination with the other circumstances relied on by Ms Wade, also support a conclusion that, in supplying that service and charging a fee for the service in October 2016 with no practical benefit for Ms Wade, JDA engaged in unconscionable conduct. The relevant circumstances were that:

(a) Ms Wade was in a precarious financial position;

(b) Ms Wade suffered from anxiety and depression; and

(c) Ms Wade was relying on JDA's expertise,

each of which was known to JDA.

401 Section 21 of the ACL requires companies supplying services to consumers to act ethically and not exploit or take advantage of a consumer's vulnerability. Ms Wade was in a vulnerable position because of her financial difficulties and her mental health problems. Regardless of contractual rights, it is unconscionable to charge a consumer such as Ms Wade a significant sum of money, $2,000, to remove a credit impairment for her credit file which had no immediate benefit for her and might never have any benefit for her. At the time that JDA removed the credit impairment, it was not feasible for Ms Wade to seek refinance in the short term. In the circumstances, JDA should have held off, explaining to Ms Wade that it would not act under the second contract at that time because it would afford no benefits to her. If circumstances changed, and an improvement to her credit file might have made a practical

difference to her prospects of being refinanced, it would then have been appropriate for JDA to consult with Ms Wade and, with her agreement, undertake the services promised.

402 In the present case, Ms Wade's dependence on JDA's expertise was apparent. JDA sent the second contract to Ms Wade with little in the way of explanation of the potential benefits for her. Ms Wade signed and returned the second contract. Ms Wade was not in a position to exercise any judgment about the benefits afforded by the second contract, and that was apparent to JDA. While the expert evidence of Mr Fallscheer confirmed that the removal of credit impairments has the potential to assist a person in refinancing a loan, Mr Fallscheer made clear that that depends on the circumstances. It was unethical for JDA to procure Ms Wade's agreement to the second contract without adequate explanation of the reasons and circumstances in which it may benefit her, and then proceed to provide the service under the second contract at a time that it would not have any immediate benefit for her and may never have any benefit for her. In all the circumstances, I consider that the conduct of JDA answers the statutory description of being unconscionable.

Conclusion

403 In conclusion, I dismiss Ms Wade's claim that JDA engaged in unconscionable conduct in supplying services under the first and third contracts, but I uphold her claim that JDA engaged in unconscionable conduct in supplying services under the second contract.

J. RELIEF

404 In conclusion, I have found that, in supplying services under the second contract by removing the Vodafone credit impairment from Ms Wade's credit file in October 2016, JDA:

(a) breached its contract with Ms Wade;

(b) failed to comply with the consumer guarantees in ss 60 and 61 of the ACL; and

(c) engaged in unconscionable conduct in contravention of s 21 of the ACL.

405 I otherwise dismiss the claims made by Ms Wade.

406 I find that the above breaches of the law resulted in there being a total failure of consideration under the second contract. The removal of the Vodafone credit impairment from Ms Wade's credit file in October 2016 provided no benefit to Ms Wade and it follows that the consideration for the payment of $2,000 for the service failed. Ms Wade is entitled to recover the payment of $2,000 under each of the following bases:

(a) First, Ms Wade is entitled to recover the sum in restitution (on the basis of a total failure of consideration) as the payment was made for the removal of the Vodafone credit impairment which was a severable part of JDA's contractual services: see *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1993) 176 CLR 344.

(b) Second, Ms Wade is entitled to recover the sum under s 236 of the ACL by reason of the contravention of s 21 of the ACL. In circumstances where the service afforded no benefit to Ms Wade, her loss is the full amount of the fee paid to JDA.

(c) Third, Ms Wade is entitled to recover the sum under s 267(3) of the ACL by reason of the failure to comply with the consumer guarantees in ss 60 and 61 of the ACL. It follows from my findings that the failure is a major failure as defined in s 268 because a reasonable consumer would not have acquired the service knowing that, at the time it was acquired, it afforded no practical benefit. Under s 267(3), Ms Wade is entitled to recover compensation for any reduction in the value of the services below the price paid. As there was no value of the service to Ms Wade, she is entitle to recover the whole of the fee paid.

407 Section 51A(1)(a) of the *Federal Court of Australia Act 1976* (Cth) empowers the Court to order that there be included in the sum for which judgment is given interest at such rate as the Court thinks fit for the period between the date that the cause of action arose and the date of judgment. I consider that it is appropriate to order interest at the rate specified in section 2 of the Federal Court Interest on Judgments Practice Note (GPN-INT). Interest is to apply from the date that the fee was paid by Ms Wade, which was 10 November 2017 (the date of settlement of the sale of her house). Section 52 provides that interest is payable on the judgment sum from the date of judgment at the rate stipulated in r 39.06 of the *Federal Court Rules 2011* (Cth) or such lower rate as the Court determines. There is no reason to apply a different rate to that specified in r 39.06.

408 JDA submitted that the damages awarded to Ms Wade ought to be reduced by reason of Ms Wade's share in the responsibility for the loss and damage suffered. JDA did not develop the statutory basis for the reduction, although presumably it sought to rely on Part V of the *Wrongs Act 1958* (Vic) in respect of the allegations of breach of contract and failure to comply with the consumer guarantees (by virtue of s 275 of the ACL) and s 137B of the CCA in respect of the allegations of contravention of s 18. Regardless, I do not consider that Ms Wade has any

responsibility for the loss sustained in connection with the service supplied by JDA under the second contract.

409 Ms Wade also sought unspecified damages or compensation for distress, physical inconvenience and disappointment. In support of that claim, Ms Wade gave evidence that she was "gutted" by the sale of her home, she felt that she had lost everything and that she let her children down. While I accept that evidence, in my view Ms Wade's distress and disappointment were not caused by JDA's breaches of the law. On the findings I have made, JDA's breaches (in relation to the second contract) did not cause the loss of Ms Wade's home and did not exacerbate her feelings of distress and disappointment that came from losing her home. Accordingly, I dismiss the claim for damages or compensation for distress, physical inconvenience and disappointment.

410 Ms Wade also sought declaratory relief. No submissions were addressed to that form of relief. I am not persuaded that declaratory relief will provide any tangible benefits to Ms Wade over and above the award of damages. Accordingly, I decline to make declarations of contravention.

411 In relation to costs, the Court's discretion to award costs under s 43 of the *Federal Court of Australia Act 1976* (Cth) is broad. Usually, the discretion is exercised in favour of a successful party: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [35] per Gaudron and Gummow JJ, [66]-[67] per McHugh J and [134] per Kirby J; *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at [25] per Gleeson CJ, Gummow, Hayne and Crennan JJ. Nevertheless, a successful party may be deprived of a proportion of its costs, or even required to pay costs to the other party, if the successful party succeeded only upon a portion of its claim, or failed on issues that were not reasonably pursued, or where the result of the litigation might be described as mixed: *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at [11]ff per Black CJ and French J; *Queensland North Australia Pty Ltd v Takeovers Panel (No 2)* (2015) 236 FCR 370 at [11] per Dowsett, Middleton and Gilmour JJ.

412 The result in the proceeding is mixed, with JDA enjoying far greater success than Ms Wade. Ms Wade has succeeded on one aspect of her claims, but failed on all other aspects. The aspect of the claim on which Ms Wade succeeded was the smaller part of the claim, both in monetary terms and in evidentiary terms. It required Ms Wade to establish that, at the time that services were supplied by JDA under the second contract, the removal of the Vodafone credit impairment afforded her no tangible benefit in achieving her goal of retaining her home. While such a case required evidence to be adduced to establish the relevant context in which the

services were supplied and to establish that they were of no practical utility at the time they were supplied, in my view the evidence required for that claim was far less than the evidence adduced at the hearing. The claims on which Ms Wade failed were significantly larger in monetary and evidentiary terms. Ms Wade set out to prove that all aspects of JDA's dealings with her involved breaches of the consumer law. Ms Wade also failed on her application to re-open her case and adduce further evidence.

413 In the circumstances, I consider that the appropriate order is for Ms Wade to pay 50% of JDA's costs. However, I will give the parties leave to notify the Court within 14 days if they seek an opportunity to vary that costs order or seek further orders consequent upon these reasons and which have not been addressed by these reasons. If such a notification is made, the parties will be given an opportunity to file submissions and evidence in support of a different costs order or further orders.

I certify that the preceding four hundred and thirteen (413) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan.

Associate: 

Dated: 27 November 2020