**Select Committee on Lending to Primary Production Customers**

**ANZ Response to submission made by Rodney Culleton**

## Background and Summary

ANZ has had a long standing disagreement with Mr Culleton around the circumstances of his claim against Landmark and ANZ, and despite our best efforts, we have been unable to resolve matters over many years. ANZ has recently advised Mr Culleton that his behaviour to staff was unacceptable and that we are no longer prepared to meet with him.

This matter has been the subject of a number of court decisions. Most recently, the Supreme Court of Western Australia examined the circumstances in which loans to Mr Culleton's company, Elite Grains Pty Ltd, came to be classed as being in default by November 2010. A copy of the judgment and reasons delivered on 5 August 2016 are attached. In commenting on the conduct of ANZ, Justice Martin said: "*In all the circumstances, I am unable to detect a whiff of misconduct, any disregard of conscience, or a degree of moral obloquy…*".

Justice Martin also noted that (based on the chronology of events set out in the judgment), there was "*more than ample time for the* [Culletons] *to have found viable refinancing in* [the 20 month interval between November 2010 and the commencement of recovery litigation by ANZ in August 2012] – *if a refinancing had been commercially attainable.*"

Some key matters we would like to draw to the Select Committee's attention are:

- In June 2009, Mr Culleton's company, Elite Grains Pty Ltd (Elite) first started experiencing cash flow problems due to delays in a supply contract. By early 2010, Elite Grains there were further issues as a result of problems with their expansion model, business partner in New Zealand and management of the business.
- On 15 November 2010, ANZ issued the first Default Notice on Elite. This occurred some 3 years prior to ANZ taking possession of the security properties, giving Mr Culleton considerable time to sort through his financial difficulties.
- On 3 June 2011, ANZ issued a Letter of Offer to the Culletons offering to provide them with an 11 year facility. This offer was declined by the Culletons.
- On 14 December 2012, NAB appointed a Controller over Elite. This was an enforcement by another creditor against the Culletons which had nothing to do with ANZ or Landmark.
- In May 2013, ANZ obtained an Order from Registrar of the Supreme Court of WA that vacant possession of properties be provided. This was some 5 months after NAB had already enforced against the Culletons.
- On 8 November 2013 a Liquidator was appointed to Mr Culleton's company, Elite by 2 other creditors who had not been paid. This action had nothing to do with ANZ or Landmark.

- It was not until December 2013, that ANZ appointed an Agent as Mortgagee in possession to take control of the Culletons' properties and some 3 years after issuing its first Notice of Default.

- Mr Culleton has now been declared a Bankrupt and remains an undischarged Bankrupt. This action was not initiated by ANZ, but by another independent creditor of Mr Culleton.

ANZ notes that Mr Culleton appeared before *the Joint Committee on Corporations and Financial Services Inquiry into the Impairment of Customer Loans* in February 2016 and ANZ subsequently responded to his representations. Based on that response, we have summarised below ANZ interactions with the Culletons (current to March 2016):

- ANZ had been working with Mr Culleton for a number of years without being able to resolve disagreements. The two parties have a different view of a number of the facts relating to Mr Culleton's loan with Landmark which ANZ took over in March 2010.

- ANZ has conducted a number of reviews of the Culleton case. Whilst we acknowledge that bank representatives could on occasion have shown greater sensitivity to the Culletons' circumstances, we believe the bank has acted appropriately.

- Mr Culleton is a Perth-based business man who developed a business through a company called Elite Grains Pty Ltd that provided specialist feed mixes from locally produced grains as animal feed.

- In 2008, Landmark provided Elite Grains with a loan facility of $2.2 million to refinance loans with ANZ. The financial position of Elite Grains indicated that it was able to repay and service that loan. In late 2008, Elite Grains was looking to expand into the eastern states and to New Zealand.

- In early 2009, the company sought a further $1.5 million from Landmark to fund the purchase of another grain producing property near Williams in WA. This was part of its strategy to own farms supplying much of its grain requirement. Elite Grain's cash flow indicated that the business would be able to service the existing and additional facilities. Accordingly, Landmark offered Elite Grains the additional $1.5 million facility taking total financing to $3.7 million.

- By early 2010, Elite Grains was experiencing cash flow issues as a result of problems with their expansion model, their business partner in New Zealand and management of the business. ANZ has conducted two reviews of the Culleton business and remains of the view that the company's cash flow issues were not the result of any inappropriate conduct on the part of Landmark or ANZ.

- When ANZ acquired the Landmark loan book in March 2010 and took over the Elite Grains' loan facilities, the business was in difficulty.

- By late 2010, Elite Grains was significantly in excess of its Overdraft facility limit. When ANZ declined to extend the overdraft facility limit further, Elite Grain stopped servicing its lending. In November 2010, ANZ issued a default notice based on an Overdraft excess and the payment arrears on a term loan.

- During 2011 and 2012, ANZ engaged with the Culletons in an effort to restructure the loan facilities. This included an offer to provide a $3.2 million term loan on interest only terms for 11 years and full repayment by 2022. The offers were conditional upon the Culletons providing financial information to ANZ about its business. That financial information was never provided.

- ANZ was advised that the Culletons did not want to bank with ANZ and refused to acknowledge ANZ's right to recover the loan. This argument was made a number of times before the Courts and was dismissed. Although Mr and Mrs Culleton raised the prospect of refinancing, no refinancing proposal eventuated.

- By late 2012, another Elite Grains creditor, National Australia Bank, appointed FTI Consulting as controller over some of the company's assets. ANZ withdrew its offer to refinance the loan facilities and began action to recover the outstanding debt.

- It is important to note that ANZ was not the first creditor to take insolvency action against the Culletons. NAB appointed a Controller and then other trade creditors petitioned for the appointment of liquidators by Court Order. ANZ's enforcement action in 2013 and 2014 occurred only after the Culletons were in excess of their facilities since 2010.

- During 2013 and 2014, ANZ took possession of and sold the two properties over which it had security. The Culletons responded by taking ANZ to court, however these actions were dismissed by the Courts. After the sale of the two properties, ANZ did not seek payment from the Culletons for the residual balance of approximately $2 million.

- Mrs Culleton has taken ANZ to court to have the amount the Courts have ruled that she owes ANZ, as guarantor, set aside. Mrs Culleton's application was originally due to be heard on 3 February 2016, but it has been adjourned to May 2016. Mrs Culleton is seeking to have her guarantee declared void and to claim damages against ANZ.

- Elite Grains had a number of other creditors who took action. In late 2013, Elite Grains was placed into liquidation by Komatsu Forklifts and Jamieson Farms and in late 2014, Macquarie Leasing obtained bankruptcy orders against Mr Culleton.

- Mr Culleton has also stated that ANZ refused to provide him with payout figures which meant that Elite Grains was unable to obtain a refinance. This is incorrect. Mr Culleton was receiving regular bank statements which showed the amount owing. The Notices of Default dated 24 November 2011 and 1 June 2012 also contained payout figures. In response to a request from Mr Culleton's lawyers, payout figures were provided in letters dated 19 March 2014 and 14 August 2014.

**[2016] WASC 238**

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| **JURISDICTION** | **:** | SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS |
| **CITATION** | **:** | PERMANENT CUSTODIANS LTD -v- ELITE GRAINS PTY LTD [No 2] [2016] WASC 238 |
| **CORAM** | **:** | KENNETH MARTIN J |
| **HEARD** | **:** | 1 JUNE 2016 |
| **DELIVERED** | **:** | 5 AUGUST 2016 |
| **FILE NO/S** | **:** | CIV 2473 of 2012 |
| **BETWEEN** | **:** | PERMANENT CUSTODIANS LTD AS TRUSTEE FOR AND UNDER THE MASTER TRUST DEED ESTABLISHING THE RURAL PROGRAM<br>Plaintiff<br><br>AND<br><br>ELITE GRAINS PTY LTD<br>First Defendant<br><br>RODNEY NORMAN CULLETON<br>Second Defendant<br><br>IOANNA CULLETON<br>Third Defendant |

*Catchwords:*

Practice and procedure - Application to set aside default judgment obtained in default of memorandum of appearance - Judgment subsisting for more than three years - Attempt to ascertain arguable defence - Statutory unconscionability newly alleged - Delay in proceeding to move to set aside default judgment unsatisfactorily explained - Application refused

**[2016] WASC 238**

*Legislation:*

Nil

*Result:*

Application refused

*Category:* B

**Representation:**

*Counsel:*

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| Plaintiff | : | Ms K F Banks-Smith SC & Ms E L Blewett |
| First Defendant | : | No appearance |
| Second Defendant | : | No appearance |
| Third Defendant | : | Mr L A Warnick (Pro Bono) |

*Solicitors:*

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| Plaintiff | : | Corrs Chambers Westgarth |
| First Defendant | : | No appearance |
| Second Defendant | : | In person |
| Third Defendant | : | In person |

**Case(s) referred to in judgment(s):**

Attorney General of New South Wales v World Best Holdings Ltd [2005] NSWCA 261; (2005) 63 NSWLR 557
Australian Competition and Consumer Commission v Allphones Retail Pty Ltd (No 2) [2009] FCA 17; (2009) 253 ALR 324
Carr v Finance Corporation of Australia Ltd (No 1) [1981] HCA 20; (1981) 147 CLR 246
Culleton v Macquarie Leasing Pty Ltd (No 2) [2015] FCA 1478
Director of Consumer Affairs Victoria v Scully [2013] VSCA 292; (2013) 303 ALR 168
Hall v Nominal Defendant [1966] HCA 36; (1966) 117 CLR 423
Macquarie Leasing Pty Ltd v Culleton [2014] FCCA 1714

Paciocco v Australia and New Zealand Banking Group Ltd [2015] FCAFC 50; (2015) 236 FCR 199
Permanent Custodians Ltd v Elite Grains Pty Ltd [2014] WASC 495
Starrs v Retravision (WA) Ltd [2012] WASCA 67

1 **KENNETH MARTIN J**: I am dealing with the third defendant's application by her chamber summons of 15 June 2015, seeking to set aside a default judgment which was obtained against her and against her husband (the second defendant) on 28 May 2013.

2 The judgment against the third defendant (Mrs Culleton) was obtained by leave in a mortgage action, given in default of any memorandum of appearance being filed at court by or on behalf of Mrs Culleton (and the second defendant) within the allocated time under the *Rules of the Supreme Court 1971* (WA) (RSC). See RSC O 13 r 8(1), O 62A r 4, and O 5 r 11. The plaintiff, through its solicitors, proceeded to obtain the default judgment.

3 Judgment by default was obtained by the plaintiff in this action against the first defendant corporation (as the principal debtor) on 4 October 2012. There followed (almost eight months later) the default judgment against Mr and Mrs Culleton as guarantors of the principal debtor corporation's obligations - in default of their memorandum of appearance - on 28 May 2013.

4 The default judgment against Mr and Mrs Culleton was obtained with the leave of the court, which was required under RSC O 62A r 4 and granted by Registrar Whitbread that day.

5 Some background to the present application by Mrs Culleton can be found in my previous reasons: see ***Permanent Custodians Ltd v Elite Grains Pty Ltd*** [2014] WASC 495 (***Elite Grains***) published 18 December 2014.

6 The essential question is whether the default judgment, which has now stood against Mrs Culleton and her husband for over three years (since May 2013), can be set aside on her application on the basis of her argument that she holds a substantive defence of arguable merit which should be allowed to proceed to a trial for evaluation.

7 When the matter was called on for argument before me on 1 June 2016, Mrs Culleton, albeit essentially then acting in person, was assisted by the presence at the bar table of pro bono counsel (Mr Warnick) who had accepted a direct brief at the last minute to assist her in this application. Mrs Culleton was in attendance (with her husband) to instruct.

8 Argument then proceeded from pro bono counsel on Mrs Culleton's behalf on the basis that there was then no affirmative challenge to the

proposition that the default judgment obtained by leave had been regularly entered against Mrs Culleton (and necessarily her husband) on 28 May 2013. Nevertheless, it was the submission of counsel that there remained a capacity for the court to set aside even a regularly entered default judgment against Mrs Culleton, to allow her defence (or counterclaim) to proceed to a trial if arguable merit could be shown. Pro bono counsel commenced by his submission:

> Your Honour, I believe that you are more acutely aware than I am of the tortured history of this matter, but today I propose to focus on one question, and that is whether Mrs Culleton has an arguable defence to the action on the guarantee (ts 27).

9 Although this course is objected to by the plaintiff (as respondent to this application) I am prepared to proceed conceptually upon a basis that such an application to set aside this default judgment remains open to be advanced for Mrs Culleton by the terms of RSC O 13 r 10 which states:

> The court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

10 The contrary argument of the respondent was that the default judgment of 28 May 2013 had been obtained in a 'mortgage action' and under the terms of RSC O 62A r 4 with a grant of leave from the registrar and so was not entered in 'pursuance of' RSC O 13. However, RSC O 62A r 4(1) only provides:

> Notwithstanding anything in Order 13 or Order 22, in a mortgage action begun by writ judgment in default of appearance or in default of defence shall not be entered except with the leave of the Court.

11 In present circumstances the leave of the court to enter a default judgment in a mortgage action against Mr and Mrs Culleton was obtained after the registrar had been satisfied by the plaintiff that the matters identified in RSC O 62A r 2(3) to (10) (and see O 62A r 4(3)) had been properly addressed and met: see ***Elite Grains*** [12] - [16]. But that satisfaction does not alter the residual character of the judgment that was then obtained. It still remains a default judgment, obtained in default of a memorandum of appearance in time under RSC O 13 and once the specified requirements to obtain leave for judgment to be entered were met. A default judgment entered under RSC O 13 or O 22 stands in strong contrast, for instance, to a summary judgment of the court obtained under RSC O 14 or O 16, or with a final judgment given after a substantive trial: see RSC O 34 r 8. As regards the interlocutory character of default judgments, see generally ***Carr v Finance Corporation***

***of Australia Ltd (No 1)*** [1981] HCA 20; (1981) 147 CLR 246, 248 (Gibbs CJ), 256 (Mason J). Ruling that the attempted appeal there to the High Court was incompetent (as the default judgment sought to be appealed against was interlocutory, not final, in character), Sir Harry Gibbs observed at 248:

> … An order refusing to set aside a default judgment does not as a matter of law finally dispose of the rights of the parties, for it is open to the disappointed defendant to apply again to have the judgment set aside.

His Honour was referring to ***Hall v Nominal Defendant*** [1966] HCA 36; (1966) 117 CLR 423, 440.

## Background and context

12 Before dealing with the distilled arguments of pro bono counsel for Mrs Culleton, it is necessary to provide some additional context for the present application. That is appropriate given what has now become a saga, exceeding three years duration.

13 It is convenient to begin by repeating the components of the chronology I set down at par 17 of my reasons in ***Elite Grains*** of 18 December 2014. That took matters to 31 October 2014, when Mrs Culleton's husband (the second defendant), Mr Rodney Culleton, had then been declared bankrupt by the Federal Circuit Court. Mr Culleton appealed against that decision. On 21 December 2015, Perry J in the Federal Court of Australia upheld Mr Culleton's appeal and set aside the bankruptcy orders made against him.

14 I will begin by collecting the events as identified in the period between 29 August 2012 and 31 October 2014 from ***Elite Grains*** at [17].

## Chronology of events up to 31 October 2014

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| 29 August 2012 | Mortgage action (CIV 2473/2012) is commenced by the plaintiff against five named defendants. |
| 4 October 2012 | Default judgment is obtained and entered against only the first defendant, Elite Grains Pty Ltd (default of appearance). |
| 28 May 2013 | Default judgment is obtained by leave against second and third defendants (default of appearance). |

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| 6 February 2014 | A chamber summons is filed on behalf of the second and third defendants, seeking an extension of time for them to appeal and for leave to appeal against the judgment of 28 May 2013. |
| 24 February 2014 | HopgoodGanim became the solicitors of record - then filing appearances for Rodney and Ioanna Culleton as second and third defendants (albeit judgment had then been obtained). |
| 24 February 2014 | Master Sanderson refuses the Culletons' application for an extension of time and for leave to appeal. |
| 3 March 2014 | Appeal notice is filed by Rodney Culleton in the Registry of the Court of Appeal (CACV 26/2014), seeking leave for himself and Ioanna Culleton to appeal against the refusal decision of Master Sanderson. |
| 13 August 2014 | Rodney and Ioanna Culleton's appeal to the Court of Appeal is dismissed by reason of non-compliance with par 2 of the orders of 22 July 2014 earlier made by Newnes and Murphy JJA, striking out the appellants' case and affording Rodney and Ioanna Culleton until 4 August 2014 to file an amended application, failing which their appeal would be dismissed. |
| 10 September 2014 | Interlocutory application by Rodney and Ioanna Culleton's 'summons' seeking a 'Declaration' in this action (CIV 2473 of 2012) that the orders made by Registrar Whitbread on 28 May 2013 are 'void ab initio'. |
| 14 October 2014 | 'Summons' returned before Acting Master Gething in chambers. |
| 31 October 2014 | Mr Culleton declared bankrupt – see reasons for decision of Federal Circuit Court Judge Altobelli in ***Macquarie Leasing Pty Ltd v Culleton*** [2014] FCCA 1714. |

15 Beyond that series of events, I mention and add the following matters as outlined in the plaintiff's chronology filed 31 May 2016:

## Further events past 31 October 2014

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| 27 November 2014 | Dismissal by me of Mr and Mrs Culleton's interlocutory application seeking a 'Declaration' in this action that the orders of Registrar Whitbread of 28 May 2013 were 'void ab initio'. |
| 18 December 2014 | Publication of my reasons for decision (***Elite Grains***) dismissing the 10 September 2014 interlocutory application heard on 27 November 2014. |
| 9 February 2015 | Plaintiff discontinues these proceedings against the fourth and fifth defendants. |
| 15 May 2015 | Summons (general form) filed on behalf of the third defendant only (Mrs Culleton) by John Terence Brown solicitor for the third defendant of McIntyres Lawyers, Taylors Road, Norfolk Island and seeking orders that:<br>1. The default judgment which was entered herein against the second and third defendants on 28 May 2013 be set aside.<br>2. The third defendant file any defence and counterclaim within 28 days.<br>A 'first' affidavit of Ioanna Culleton in support of summons to set aside default judgment is filed. A 'second' affidavit of Ioanna Culleton in support of summons to set aside default judgment is also filed.<br>Also on this day McIntyres Lawyers of Norfolk Island become solicitors of record for Mrs Culleton. (Note: that event had been preceded by HopgoodGanim becoming solicitors of record on 24 February 2014 and entering an appearance for Rodney and Ioanna Culleton. On 10 September 2014 a notice of intention to act in person was filed by Rodney Culleton (wrongly) purporting to act on behalf of all defendants, not just himself in person: see ***Elite Grains*** [10]. Note provisions of RSC O 12 r 5(1), (2).) |
| 15 June 2015 | Mrs Culleton through McIntyres Lawyers files what is referred to as her 'second' affidavit, albeit what is actually |

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| | her third affidavit in support of her application to set aside the 28 May 2013 default judgment. This affidavit annexes a defence in draft to the statement of claim on behalf of Mrs Culleton, purported to be settled by a new barrister, Mr Peter E King of Queens Square Chambers, Macquarie Street, Sydney. |
| 16 June 2015 | Hearing before Master Sanderson. Mr King of counsel appears on behalf of Mrs Culleton. A recusal application is made concerning the Master. The hearing is otherwise adjourned. A further affidavit of Mrs Culleton in support of the application to set aside is filed and served (fourth affidavit). |
| 18 June 2015 | Master Sanderson dismisses the application seeking his recusal - costs of that application are reserved. |
| 29 July 2015 | Consent orders made programming Mrs Culleton's application to set aside the default judgment to a hearing at a special appointment. |
| 2 November 2015 | Application made by Mrs Culleton to adjourn the looming 12 November 2015 special appointment hearing by Mrs Culleton. Further affidavit of Mrs Culleton in support of application to set aside default judgment (fifth affidavit) is filed. |
| 3 November 2015 | Another affidavit of Mrs Culleton (her sixth) is filed. |
| 4 November 2015 | The affidavit of Ms Stephanie Carmichael of solicitors Levitt Robinson of Goulburn Street, Sydney (East) sworn 3 November 2015 is filed. |
| 5 November 2015 | Hearing before Acting Master Gething on the adjournment application. Mrs Culleton appears in person. Her application to vacate the special appointment hearing on 12 November 2015 is granted.<br><br>This same day, NSW local lawyers Levitt Robinson become solicitors of record for Mrs Culleton. A so-called 'third' affidavit is filed - but in fact it is the seventh affidavit of Mrs Culleton in support of her application to set aside the default judgment. This affidavit appends a transcript of proceedings before Magistrate T Watt in the |

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| | Magistrates Court of Western Australia at Narrogin of 3 September 2015 between a Matthew Ronald Ford and Rodney Norman Culleton. |
| 1 December 2015 | Matter referred to hearing at a special appointment before me at fixed hearing appointment for 3 February 2016. |
| 21 December 2015 | Reasons for decision of Perry J in Federal Court of Australia are published: see ***Culleton v Macquarie Leasing Pty Ltd (No 2)*** [2015] FCA 1478 upholding Mr Culleton's appeal and setting aside the bankruptcy orders of the Federal Circuit Court of 31 October 2014 made against him. |
| 1 February 2016 | Mrs Culleton's further affidavit of three paragraphs is filed (in sequence her eighth affidavit on the present application) containing another draft defence pleading on her behalf, responding to the plaintiff's statement of claim. |
| 2 February 2016 | Further affidavit of Mrs Culleton is filed (her ninth affidavit in sequence to support this application) with a delay explanation for the period after the published reasons for decision of 18 December 2014 until the filing of her summons to set aside default judgment (in general form of 15 May 2015), said to be by reference to an insufficiency of funds to meet fees of her then lawyer, 'Mr Brown'.<br><br>Memorandum of consent orders filed between the parties seeking to adjourn the special appointment hearing listed for 3 February 2016 on the basis of the late filing of orders, made as asked in Mrs Culleton's eighth and ninth affidavits.<br><br>Matter eventually relisted for special appointment convenient to all counsel on 1 June 2016, with directions:<br><br>1. Mrs Culleton to file and serve any submissions in support of her application by 26 February 2016.<br><br>2. The plaintiff to file and serve any evidence and written submissions in opposition to Mrs Culleton's application by 25 March 2016. |
| 26 February 2016 | No submissions filed by Mrs Culleton. No explanation |

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| | provided. |
| 28 April 2016 | Directions hearing before me. Mr and Mrs Culleton attend in person. Orders made:<br>1. Mrs Culleton may file and serve any further affidavit materials and any further written submissions by 4.00 pm on Monday 9 May 2016.<br>2. The plaintiff (respondent) to file any responsive affidavits and further submissions by 4.00 pm on Thursday 26 May 2016. |
| 9 May 2016 | No materials received from Mrs Culleton in accord with directions of 26 April 2016. No explanation provided. |
| 26 May 2016 | Plaintiff (respondent) unilaterally files a second supplementary outline of written submissions opposing the application by Mrs Culleton to set aside the default judgment. |
| 27 May 2016 | Mrs Culleton (acting in person) files a further affidavit (her 10th) in support of the application to set aside the default judgment. No explanation provided for the delay and her non-compliance with directions of 28 April 2016.<br>Mrs Culleton files a further affidavit sworn 27 May 2016 (her 11th). This affidavit of 37 paragraphs attempts to cross-reference annexure pages C1 through C188 containing multiple documents (without leave) and is objected to by the respondent. |
| 1 June 2016 | Hearing proceeds with Mrs Culleton represented by pro bono counsel. Plaintiff (respondent) is given leave to file supplementary answering materials by 10 June 2016. |
| 2 June 2016 | Mrs Culleton files a notice to act for herself in person as per RSC O 8 r 5A. |
| 10 June 2016 | Plaintiff (respondent) files affidavit of Marcus Ryan Brookes appending bank statements and correspondence with Mrs Culleton.<br>Plaintiff's fourth outline of written submissions in response to Mrs Culleton's application is also filed, as well as a schedule of objections to the last affidavits of |

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| | Mrs Culleton. |
| 17 June 2016 | Written submissions document is filed personally by Mrs Culleton entitled 'Second Submissions of Ioanna Culleton dated 16 June 2016 in Reply to Plaintiff's fourth submissions dated 10 June 2016' - the document is incorrectly dated 17 May 2016. These written submissions are signed by Mrs Culleton personally. Apparent (and confirmed) submissions were not prepared or settled by the pro bono counsel who had assisted Mrs Culleton at the 1 June 2016 hearing. |

**Whether it is open to Mrs Culleton to apply to set aside the judgment in default of appearance obtained against her on 28 May 2013 under the leave granted by Registrar Whitbread that day pursuant to O 62A r 4(1)**

16 For reasons I canvassed in part in my previous decision, I am of the view that RSC O 62A operates as an overlaid protective provision for mortgage actions where a mortgagee seeks to enter and obtain a default judgment, either to exercise that right in default of a memorandum of appearance being filed in time by the defendant(s), or the filing of a defence pleading in time - on the part of a defendant mortgagor or guarantor to the obligations of a principal debtor who is a mortgagor.

17 Nevertheless, a requirement to obtain leave under O 62A as a precondition to obtaining default judgment in situations favouring an applicant mortgagee does not alter the fundamental underlying character of what is and remains a default judgment, as is ultimately entered and obtained. As I have earlier said, the character of such a judgment was explained by the High Court in ***Carr v Finance Corporation of Australia Ltd (No 1)***: it is that of an interlocutory judgment, albeit for all practical purposes it may carry with it all the qualities of being a final judgment as against a defendant. The legal reality, however, is that there has not been any underlying substantive merits determination by a curial officer if there is a default judgment that is entered in default of a memorandum of appearance, or in default of a defence pleading being filed on time. So, the default judgment standing against Mr and Mrs Culleton from 28 May 2013 remains theoretically open to the present application made under RSC O 13 r 10 for the judgment to be set aside.

18 Nevertheless, the pragmatic consequences of the O 62A protective regime must be realised. Leave to enter default judgment was obtained

from a registrar, carrying with it the intended close scrutiny of the underlying circumstances. Scrutiny by a high level administrative official of the court is a protection against irregularities in the administrative process of obtaining such an unopposed judgment outcome and which otherwise might go undetected in the process of obtaining and entering a default judgment by a plaintiff in a mortgage action. This is for circumstances where effectively, absent a memorandum of appearance or absent a defence pleading (within the times allowed by the rules of court), there is no affirmative resistance offered by the defendant that is otherwise vulnerable to such a default judgment. The practical consequence of scrutiny, usually, is that the scope for irregularities to arise in the administrative process of obtaining the default judgment is considerably narrowed, if not wholly eliminated. Underlying and presenting irregularities would likely be detected and dealt with under the protective process laid down for a mortgage action as specified by O 62A - as a precursor to obtaining the leave necessary to enter the default judgment sought by a mortgagee plaintiff.

19 But the O 62A protective process in a mortgage action is not directed towards evaluating the potential merits of defence arguments, which have not to that point, axiomatically, been articulated by a non-participatory defendant. Order 62A is directed towards ensuring that the administrative process of obtaining default judgment in a mortgage action does not miscarry.

20 In the present case I am untroubled in rejecting the multiple arguments of Mrs Culleton which have slowly emerged across her various affidavits since 15 May 2015, contending for an irregularity in the 28 May 2013 default judgment that was obtained against her and her husband. There is no such irregularity detectable. No such arguments were advanced on her behalf by pro bono counsel on 1 June 2016, and on my assessment, rightly so, as they would all be untenable.

21 The character of what is still a default judgment subsisting against Mrs Culleton and her husband since 28 May 2013, regular and efficacious as it is, and fully enforceable (until set aside by a subsequent order of this court), still retains its character as a default judgment obtained and entered under RSC O 13. The judgment was obtained by leave, in default of a memorandum of appearance document being filed on behalf of Mrs Culleton within time as allowed by the court's rules. Consequently, I am of the view that it remains conceptually open for the present application to be advanced under O 13 r 10 (or under the inherent

jurisdiction of the court), albeit the default judgment was, in my assessment, regularly obtained.

22 Upon an application to set aside, the court exercises a discretion, applied primarily by reference to two key governing considerations. In short, the court looks towards ascertaining whether there is:

(a) A satisfactory explanation provided for the delay in failing to enter the memorandum of appearance on time and then to bringing and pursuing the application to set aside the default judgment. In the present circumstances the period of time now expired since the default judgment was obtained on 28 May 2013 exceeds three years. It is a considerable understatement to observe that matters have not progressed timeously or satisfactorily in terms of the advancement of the present application to a hearing.

(b) Even more important than factor (a) above, is the residual need to identify a respectably arguable defence and/or counterclaim by the applicant/defendant, the potential merits of which can support the setting aside of what - until that event happens - is otherwise a fully efficacious and regular judgment, and then, with a view to allowing a potentially meritorious defence or counterclaim argument as is sought to be raised, to be evaluated at a trial.

23 In considering the present application to set aside what I assess is a regularly obtained default judgment, I first pause to note the observations of the Court of Appeal in ***Starrs v Retravision (WA) Ltd*** [2012] WASCA 67. Allanson J (with whom Pullin and Murphy JJA agreed) said at [36]:

> Under O 13 r 10 of the *Rules of the Supreme Court 1971* (WA) the court may set aside or vary a judgment entered in default of appearance, on such terms as it thinks just. That discretion is not qualified: ***Evans v Bartlam*** [1937] AC 473; and see ***Hall v Hall*** [2007] WASC 198. But as a general rule, a judgment regularly entered will not be set aside unless the court is satisfied that there is a defence on the merits. That rule may be departed from in 'rare but appropriate cases': ***Palmer v Prince*** [1980] WAR 61, 63; ***Evans v Bartlam*** (480).

See also his Honour's observations at [51].

24 For present circumstances, Mrs Culleton's failure to cause a memorandum of appearance document to be filed by 28 May 2013 still remains, on my assessment, inadequately explained. Moreover, the circumstances in which the present application has been glacially advanced have been less than satisfactory. In particular, the last two

affidavits from Mrs Culleton were filed late - expressly violating timing directions I had given after arguments in her presence on 28 April 2016. That day I made it explicitly clear to Mrs Culleton that she had failed to comply with previous directions, and that 4.00 pm on 9 May 2016 would be a last opportunity for her to file any more materials - otherwise the plaintiff (respondent) would likely be prejudiced for the looming appointment on 1 June 2016 (as it had been for the February 2016 appointment).

25 Had it not been for the helpful assistance of pro bono counsel for Mrs Culleton on 1 June 2016, I would likely have declined then to allow her to make any reference to the late materials in her last two affidavits. However, given what that day became a crisp and narrow basis for which pro bono counsel explained the material would be used (particularly documents found annexed to Mrs Culleton's last affidavit), then my assessment was that, unsatisfactory as the late materials position became, I was in a position to deal with her arguments put through pro bono counsel. The opportunity I then afforded the respondent to file responding materials after the hearing would cater, I thought, for any prejudice arising from Mrs Culleton's failure to comply with my directions for her to file a last tranche of materials.

26 Accordingly, I will proceed to evaluate the merits argument put on Mrs Culleton's behalf by pro bono counsel. In doing so I should immediately note that, as the earlier chronology reveals, Mrs Culleton has now filed some so-called responsive written submissions after the 1 June 2016 hearing - by a document misdated 17 May 2016 (actually received from her on 17 June 2016). This submissions document was not prepared by pro bono counsel. In large parts it is not at all responsive to the plaintiff's (respondent's) written submissions of 10 June 2016. Regrettably, it largely seeks to reargue or re-ventilate at many places issues or arguments which were (wisely) not raised on 1 June 2016 by pro bono counsel. To that extent it is largely unhelpful.

27 In illustration of the otherwise rather unhelpful character of this last document I need only mention par 2.2 which says in part:

> The defendants have banished ANZ from ever interfering with their loans with the plaintiffs and ANZ should never have come back purporting to act as manager, servicer, subordinated funder, external funder and facilitator, arranger, of a new created trust (ANZ Rural Trust Number 1) to create a special purpose vehicle and use that trust as a special purpose vehicle to asset strip and commence legal action on paper instructing the Trustee to

> advance purported powers over trust that were not related to the Defendants.

28 This sentence displays a reversion to the unhelpful, unfocussed rhetoric which, without any underlying facts, cannot and does not assist the position of Mrs Culleton towards showing a defence or counterclaim of arguable merit to warrant a disturbance of the present status quo - to allow such a defence or counterclaim to proceed to be evaluated at a trial.

29 However, par 9 of that document, under the heading 'Our Argument on Unconscionable Conduct', presents as being arguably responsive. Therefore, from this document I will consider par 9.1 through to par 9.4 in determining the application.

**The crystallised 'merits' argument for Mrs Culleton as advanced on 1 June 2016 by pro bono counsel**

30 I will collect the submissions put on behalf of Mrs Culleton at various points by pro bono counsel, on 1 June 2016.

31 I begin with the following passage:

> In terms of which affidavits are needed, I propose to focus on the period before default, and so most of that is in the affidavits of the plaintiff …
>
> The - that chronological material in affidavit number 11 [ie Mrs Culleton's last affidavit] is open to all kinds of objections, and I only say that I haven't settled that material. I appreciate my learned friend's objection to that material, but it's really the documents in the affidavit that I'm seeking to rely on in talking about the story leading up to default (ts 39).

(Senior counsel for the respondent objected to the admissibility of many of the documents as identified at the foot of ts 39.)

32 Referring to a draft defence pleading appended to Mrs Culleton's eighth affidavit of 1 February 2016 (noted as being prepared by Stewart Allan Levitt on 1 February 2016), the following observations were made:

> … The defence, which I think, my learned friend has conveniently called the Second Culleton Defence, and I've taken instructions from Mr and Mrs Culleton. It appears to me that while the Culletons have various concerns about what happens [sic] since November 2010, the root cause of their feeling of injustice lies in events between the time when ANZ first became involved in their banking relationship and sometime in the second half of 2009, then I think the exact date would only be established by evidence at trial, through to the time when ANZ declared their facilities to be in default, and that was 15 November 2010 (ts 41 - 42).

33 Next were the observations culminating in this submission:

> Now, Mr and Mrs Culleton are proposing to plead in the second Culleton defence at paragraph 37, that Elite Grains was not in fact in default (ts 44 - 45).

34 That submission occasioned the observation by me concerning the ongoing subsistence of the earlier default judgment obtained against Elite Grains Pty Ltd (the principal debtor) - having remained in place, at all times undisturbed since 4 October 2012 (that corporation was subsequently put into liquidation).

35 There followed the submission that the Culletons were not seeking to challenge that default judgment, as against the principal debtor corporation. It was said they were instead seeking to challenge 'the conduct of ANZ leading to the claim on their guarantees' (ts 46).

36 Mrs Culleton's position was summarised by pro bono counsel in these terms:

> In short, your Honour, the Culletons say that, in the confusing and disruptive context, or the unwanted transmission of their banking relationship from Landmark to ANZ, the conduct of ANZ in rushing them into default was unreasonable and unconscionable (ts 49).

37 I next pointed out that, although reference was being made to events concerning a default by Elite Grains as principal debtor in November 2010, chronologically speaking, legal proceedings were not actually issued against that corporation (and against Mr and Mrs Culleton as its guarantors) until 29 August 2012 - when the writ commencing this action was filed. As to that almost two year hiatus before action was commenced, counsel submitted:

> That's correct, your Honour, so enforcement action didn't begin for some time. And I think all that I can say about that is that I take you back to that submission I made about the tipping point in a lending relationship. Once default is declared, you're really at the mercy of the lender unless you're able to organise refinancing for the full amount. So they were, in a sense, placed in a position of enormous disadvantage by that letter of 15 November [2010] because they had no expectation of being able to repay the $4 million. The amount was constantly increasing.
>
> They have a litany of complaints about the conduct of the negotiations that occurred after November 2010, but I don't propose to go through those today, your Honour. I say only that the significant shift, the damage that was done to their financial position was done by the declaration of default,

> forced them to seek refinance at a disadvantage, which they were unable to do (ts 49 - 50).

38 Objection was raised (unsurprisingly) by senior counsel for the plaintiff (respondent) concerning the further submission about an (allegedly destructive) intent of ANZ Bank (remembering, of course, that the plaintiff in this action and the party who has obtained judgment is actually not ANZ Bank, but Permanent Custodians Ltd) for a purpose of 'purging the purchase loan book of all questionable loans, and that that policy was carried through without regard to the individual circumstances of borrowers' (ts 50).

39 In response to the objection by senior counsel it was accepted by pro bono counsel for Mrs Culleton that evidence was not before the court at this point to support the submission that ANZ Bank had hostile intent.

40 Senior counsel for the plaintiff (respondent) pointed out (correctly) that such a submission (which had been put for Mrs Culleton on the basis that this issue was a matter for the trial to pursue), had not even been part of Mrs Culleton's draft pleaded defence (the so called Second Culleton draft defence document of 1 February 2016). Pro bono counsel referred me to that draft defence, particularly to pars 22 - 27 and 41. It was submitted:

> … That takes us back to 22 to 27 and that is not what I'm talking about your Honour. I've got to admit that. I would only say, with respect to this defence, I don't think this defence can run. I think the defence that can run is the defence that I'm describing to you, which focusses on one part of this, which is really the denial of the defaults, and then the plea of statutory unconscionability, which is referred to in paragraph 41(d) (ts 50 - 51).

41 I then offered my assessment of the relevantly pleaded paragraph in the draft defence at par 41, saying that it looked to me to be framed as a plea of alleged accessorial liability under misleading and deceptive conduct - advanced by reference to earlier matters referred to in pars 22 to 27. I said:

> KENNETH MARTIN J: … I must say the direction that's now taking, in terms of an unconscionability in terms of making demand, so to speak, against - I have to take it as the guarantors rather than the principal debtor because the principal debtor is the subject of a judgment that hasn't been set aside.
>
> MR WARNICK: Well, again, your Honour, I would say the conduct of the lender with respect to the borrower has an effect on the guarantor, and

> that's the basis that we put it on. The conduct with respect to the default was unconscionable.
>
> KENNETH MARTIN J: See, there can't be a collateral attack on the judgment against Elite Grains.
>
> MR WARNICK: Well, contracts that are unconscionable stand until they're challenged. There's no attack on that judgment. The attack is on the guarantee, and the medium for that would be a counterclaim (ts 51).

42 There was also relevant discussion through ts 52. At that point there was a request for a short adjournment for instructions, then a request for a further adjournment.

43 After the lunch adjournment, argument resumed and pro bono counsel then submitted:

> MR WARNICK: What the third defendant [ie Mrs Culleton] is seeking to do was not to challenge those facts, [ie the subsisting judgment against the principal debtor Elite Grains Pty Ltd] which it's unable to do, but to present an argument about the circumstances giving rise to those facts in relation to the judgment against Mrs Culleton, the third defendant. So, your Honour, I would say that the default judgment against Elite Grains does not estop the third defendant from pleading unconscionability in relation to the circumstances within which those defaults occurred.
>
> I think the second issue that your Honour left with me was the issue of surprise, that this argument of unconscionability relating specifically to the default process had not been raised in the second Culleton defence. Your Honour, that is true. Paragraph 37 puts the defaults in issue, or at least, that's what it was proposing to do, subject to the other argument about blocking.
>
> So the defendants are on notice that the defaults themselves are in issue. What is missing - and there is a pleading of unconscionable conduct, but it's particularised by reference to something else. So what is missing is any link between unconscionable conduct and the defaults. And, your Honour, I must concede that is the case. All I can say in relation to that is that, if necessary, the matter can be adjourned, to allow the plaintiffs an opportunity to respond to that. And the only thing I would add to that is to say that there is a great deal at stake here for Mrs Culleton (ts 55 - 56).

44 These exchanges followed:

> KENNETH MARTIN J: Just in terms of the argument of statutory unconscionability from Mrs Culleton's perspective, do I have it right that the facts relied upon as grounding that are the circumstances in which the lending institution chose to make the loan to Elite Grains in default and, derivately, the obligations of guarantors in respect of the principal debtor,

> and it was unconscionable because it's not so much argued that, as a matter of strict law the loan was not in default but, rather, in terms of the argument, is it that the relationship was such that it was harsh and unfair to effectively make all the repayments due at that time?
>
> MR WARNICK: That's correct, your Honour.
>
> KENNETH MARTIN J: I just want to make sure that I've understood that correctly.
>
> MR WARNICK: That is correct.
>
> KENNETH MARTIN J: I understand. All right Mr Warnick.
>
> MR WARNICK: Your Honour, I don't think I need to go through the basis, the process for statutory unconscionability. It's under 12CB or 12CC of the ASIC Act. It would be a counterclaim rather than a defence. It would require an application under s 12GM. I'm referring to the sections as they stood in 2010. I'm not sure if they're still the same now, but I think the relevant version of the Act as it was back then …
>
> And the counterclaim would say that [the plaintiff] engaged in the conduct directly through ANZ as its agent or, alternatively, was a person involved in the contravention by ANZ, in that it cloaked ANZ with authority to act on its behalf in this way. And the orders that the court can make under those provisions of the ASIC Act include an order refusing to enforce all or any of the provisions of a contract. And the relevant contract here would be Mrs Culleton's guarantee. I didn't wish to add anything to that your Honour, unless you wanted to question me about something (ts 56 - 57).

45 Those collected passages from the transcript effectively display Mrs Culleton's distilled argument towards showing an arguable counterclaim. From a temporal perspective the arguments are directed, as was made clear, at the underlying circumstances at the time when the two loans to the principal debtor, Elite Grains Pty Ltd, were notified as being in default - at or around November 2010.

46 Mrs Culleton's written responsive submissions of 17 June 2016 now say at par 9 (submitted without pro bono counsel's assistance):

> 9. Our argument on unconscionable conduct is:
>
> 9.1 unconscionable conduct factor 1 - as in force 2010 section 12CC(2)(a): ANZ put Elite Grains and the guarantors in a position of complete weakness by suddenly calling up the loan facilities. From being able to service the facilities, we suddenly went into a position of having to repay in full within a month. After being put in default

by ANZ we had little hope of refinancing with any other bank.

9.2 unconscionable conduct factor 2 - ASIC Act section 12CCC(2)(g): ANZ did not observe the requirements of the Code of Banking Practice 2004. Specifically ANZ did not observe clause 2.1(b)(i) effective disclosure of information, clause 2.2 reacting fairly and reasonably towards us in a consistent and ethical manner, clause 25.2 re trying to help us overcome our financial difficulties with the facilities, or clause 35.1 re internal dispute process.

9.3 unconscionable conduct factor 3 - ASIC Act section 12CC(2)(i): ANZ did not disclose to us their intended conduct that would affect our interests. They suddenly declared default, which had a disastrous affect on our interests as guarantors.

9.4 unconscionable conduct factor 4 - ASIC Act section 12CC(2)(k): ANZ did not act in good faith towards us as customers of Landmark/PCL. ANZ bought the loan book of Landmark for their own reasons, which we would seek to expose by evidence at trial, then recovered as much of their money as possibly by opportunistically calling up the loans. The opportunity to declare default was created (at least on our case) by ANZ's own mismanagement and lack of communication, resulting in a period of confusion over the first three quarters of 2010. For example, we believed Elite Grains still had a line of credit of $1,282,000, based on the statement we received from ANZ for October 2010, page see - 61 in my affidavit of 27 May 2016).

47 Factors 9.1 and 9.3 above, appear to be broadly consistent with the submissions of pro bono counsel for Mrs Culleton. Factor 9.2 is plainly not. It is essentially an assertion of bland rhetoric without any substantive underlying facts. Factor 9.4 descends into pejorative rhetoric and is also unhelpful. Again there are no facts provided to support the assertion as to an opportunistic calling up of loans - a position that had been properly accepted by pro bono counsel at the 1 June 2016 hearing.

48 The question for me then is whether there is now detectable some potentially meritorious argument as to this plaintiff's (respondent's) unconscionable conduct that is open to Mrs Culleton to pursue, surrounding the circumstances in which the lending facilities to Elite Grains Pty Ltd as the principal debtor were treated as in default at around November 2010.

49 The plaintiff's (respondent's) submissions of 10 June 2016 contend for three basic obstacles to the distilled argument of statutory unconscionability which has emerged. In essence it submits:

(a) the newly emerged defence argument does constitute a collateral attack against the subsisting judgment obtained against Elite Grains, which has stood since before October 2012;

(b) carefully analysed by reference to facts before the court on the application, there is no basis for any argument of unconscionability in relation to the circumstances in which the plaintiffs' two loans made to Elite Grains came to be classed as being in default by November 2010;

(c) Mrs Culleton's delays in terms of advancing this new line of defence, which has only emerged at the hearing on 1 June 2016, despite 11 prior affidavits by Mrs Culleton filed in support of her application, across a prior 12 month period, reflects the underlying lack of potential merit in the new argument.

50 There is considerable merit in the first and third points above, raised by the respondent. But at this point it is more straightforward for me to grapple with the essential arguments put about unconscionability as they have emerged. By reference to the facts as they now present there is no merit in these arguments.

51 As at 17 February 2009, Elite Grains held with the plaintiff:

(a) a working capital facility with a limit of $500,000, with a repayment date of 28 February 2010; and

(b) a term loan that had been increased to $3.2 million and which was repayable on 28 February 2022, with interest payable on that loan monthly.

52 The working capital facility was numbered S11-613754. The term loan facility was numbered S14-613754: see Roland Alan Davis' first affidavit (sworn 27 March 2013) relied upon by the plaintiff (respondent) on this application. (All affidavits read and relied upon by the respondent were identified by senior counsel at ts 28 - 32, being eight affidavits including from Mr Davis, as well as exhibit A, being a bundle of corporate search documents, and a further document that became exhibit B, see ts 32 and 64.)

53 On 22 December 2009 the working capital facility of $500,000 was extended to 30 June 2010. Its limit was returned to $500,000 after a prior written variation: see documents RD12 - 15 in Mr Davis' first affidavit.

54 Some time from December 2009 through to March 2010, Elite Grains as principal debtor was advised of the proposed acquisition of the loan book and management role of ANZ Bank. Elite Grains was advised, 'your lending facilities remain unchanged, although management of these facilities will transfer to ANZ Bank in early 2010': see second affidavit of Mr Davis (sworn 20 August 2015) at RD-4 (FAQs at page 38).

55 By 31 July 2010, the working capital facility of $500,000 to Elite Grains, which had been extended to 30 June 2010, had clearly expired. At that time no renewal had been agreed to for that facility. The loan from that point was in default, as regards Elite Grains.

56 Communications followed between Elite Grains and a Mr Marston of ANZ Bank concerning farm budgets and the like being provided.

57 On 21 September 2010, Elite Grains was notified of a transition to the ANZ IT frame for their accounts as from 16 September 2010. Elite Grains was informed of new names and numbers of their accounts. They were renumbered with the names as part of that administration framework through ANZ Bank. The working capital facility for $500,000 became overdraft account 9054-62453. The $3.2 million term loan became designated as an Agri finance loan account number 371708315 (see second affidavit of Mr Davis and attachment RD-5). ANZ Bank was now managing the two loans, replacing Landmark in that management role, although the lender was unchanged (RD-5 page 44).

58 On 27 October 2010 (see affidavit of Marcus Brookes (sworn 10 June 2016) and attachment MRB-6) there was a written rejection of the finance application which had been made on the part of Elite Grains. The communication from ANZ Bank of that day, addressed to the directors of Elite Grains and signed by Mr Marston as Agribusiness Manager, read:

> Dear Mr and Mrs Culleton
>
> FINANCE APPLICATION
>
> On 17th September we requested further information from yourselves to assist in assessing your request for continued and increased finance. As we have not received any further information, after careful consideration, we hereby advise that we are unable to assist with your recent application for finance.

59 There was a letter sent by a Mr Foreman of ANZ Bank on behalf of the plaintiff (respondent) on 15 November 2010. The letter informed the directors of Elite Grains that Mr Davis had taken over control of their accounts, by reason of (amongst other things) the state of loan arrears. A default notice was attached: see the second affidavit of Mr Davis at RD-6 (the default notice) and Mrs Culleton's eleventh affidavit (sworn 27 May 2016), pages C63 - C64. That 15 November 2010 notice advised that an event of default had occurred. Time was offered until 13 December 2010 for a repayment or a satisfactory repayment strategy.

60 As regards the position of the Culletons as guarantors of the obligations of Elite Grains as the principal debtor, it was not until almost 18 months later, on 1 June 2012, that a notice of demand and a default notice was issued to the guarantors. Notice was sent by solicitors acting on behalf of the plaintiff (respondent). See RD-22 and RD-23 to Mr Davis' first affidavit.

61 Non-compliance by the guarantors with that demand led to the present proceedings. They were commenced by writ against all defendants (including Elite Grains and Mr and Mrs Culleton) on 29 August 2012.

62 The almost 20 month interval between the 15 November 2010 default notice to Elite Grains and a commencement of recovery litigation at the end of August 2012 is noteworthy in its duration. Certainly there was no rush to begin litigation.

63 Essentially, the argument made for Mrs Culleton as to the alleged statutory unconscionability seeks to raise allegations as to the harsh or overbearing nature of this plaintiff's (respondent's) exercise of legal rights through its agent, ANZ Bank, in the face of obviously then delinquent loans - which at the time exceeded $4 million.

64 By reference to this chronology of unfolding events, it is obvious that there was more than ample time for the defendants to have found viable refinancing in that period and before these proceedings issued - if a refinancing had been commercially attainable.

65 In all the circumstances, I am unable to detect a whiff of misconduct, any disregard of conscience, or a degree of moral obloquy to provide a sufficient basis for an argument by Mrs Culleton to take to a trial, to support the setting aside of what was a regularly obtained default judgment standing against her: see generally, as to unconscionability indicia, ***Attorney General of New South Wales v World Best Holdings***

***Ltd*** [2005] NSWCA 261; (2005) 63 NSWLR 557, 583; ***Australian Competition and Consumer Commission v Allphones Retail Pty Ltd (No 2)*** [2009] FCA 17; (2009) 253 ALR 324, 346 - 347; ***Director of Consumer Affairs Victoria v Scully*** [2013] VSCA 292; (2013) 303 ALR 168, 183; and ***Paciocco v Australia and New Zealand Banking Group Ltd*** [2015] FCAFC 50; (2015) 236 FCR 199, 265 - 266.

66 On what is before me the newly foreshadowed statutory unconditional argument stands no prospects of success at a trial.

67 In the circumstances then, the present application cannot succeed and must be dismissed. An award of taxed costs should follow that event favouring the plaintiff (respondent) as the successful party upon the application.

68 I should add by way of postscript that, in evaluating the present application, I found it unnecessary at the end to render formal determinations concerning the multiple admissibility objections raised against the documents attached to Mrs Culleton's last two affidavits. Most of that material on my prima facie assessment does appear to be irrelevant, save only for the documents numbered in Mrs Culleton's last affidavit as C47, C58, C59, C62, C63 and C64. I have allowed those documentary materials to be referred to for the purposes of evaluating the present arguments on the highest theoretical basis favouring Mrs Culleton. But as is now seen in the end result, that renders no assistance to Mrs Culleton in the ultimate outcome.