ANZ's response to questions from Senator Peter Georgiou

1. What is your understanding of the Landmark Rural Program as a banker?

The "RURAL Program" is a funding structure originally set up to obtain finance for loans provided by Landmark to Australian rural businesses and individuals. The Program was established under a Master Trust Deed dated 15 November 2005 which created two trusts to facilitate the ownership and funding of loans: RURAL Warehouse Trust No. 1 and Rural Loan CP Warehouse Trust.

Permanent Custodians Limited was the Trustee of the two trusts, and Landmark was the 'originator' and 'servicer', which meant that it was responsible for the day to day conduct of the loans, including all communications with customers in respect of their loans.

2. Are ANZ Bank officers or employees authorised to speak on behalf Permanent Custodians Limited (PCL) being the mortgagee to the Landmark Loans in relation to all of the customers loans of the original Landmark Trusts? Yes or No?

Yes. Following ANZ's acquisition of the Landmark loan book, ANZ bank officers and employees were authorized to speak to customers in relation to their loans.

3. And if yes, under what authority?

When ANZ purchased the Landmark loan book, it also replaced Landmark as the servicer of the loans and ANZ and also individual officers of ANZ were granted power of attorney from PCL to act on its behalf regarding the lending, including in relation to enforcement of the loans and any legal proceedings.

We are aware that Mr Culleton continues to claim that ANZ was not entitled to act on behalf of PCL. Mr Culleton has unsuccessfully raised this as a contentious issue on numerous occasions over the past few years including before the Supreme Court of Western Australia.

4. What is your knowledge of the Master Trust deed (MTD) of the Rural Program dated the 15th November 2005?

As noted above, the RURAL Program was established under the Master Trust Deed.

5. Explain what role did ANZ and its ANZ subsidiaries perform in relation to the Landmark Rural Program? If they had a role, then why did Mr Hodges of the ANZ Bank answer NO to the question from Senator O'Neil at the Inquiry into the Impairment of Customer Loans on the 13th November 2015. *Senator O'Neill; page 68. Did ANZ have any ownership or involvement with Landmark before the acquisition? Hodges replies: No.*

Prior to its acquisition of the Landmark loan book, ANZ (and its subsidiaries) were not a party to the Master Trust Deed. The parties to that Deed were: Permanent Custodians Limited (PCL) as Trustee and AWB Services Limited as Manager, with Landmark appointed as Servicer and Originator under separate Supplemental Deeds between PCL and Landmark.

As part of the acquisition, a further Supplemental Deed (dated 25 February 2010) was entered into between PCL and ANZ in its own capacity, and ANZ in its capacity as external funder, servicer and manager.

For completeness, we note that prior to the sale, ANZ was a financier to AWB, and ANZ and Rabobank provided wholesale funding for the AWB/Landmark loan book.

This is referred to in ANZ's Supplementary Submission to the Inquiry into Impaired Loans.

6. Did ANZ physically purchase the securitised loans of Landmark? Could ANZ Bank provide the trust creation notice in relation to the Elite Grains loans and a copy of the stamp duty showing the true purchase of the property loans and the $600,000 that the Culletons as guarantors, advanced by payment to the mortgagee (PCL) on or about January 2013?

We have interpreted the first part of the question to mean: did ANZ "pay money for" the purchase of the Landmark loans? The answer is yes. The purchase price paid by ANZ is referred to in ANZ's Supplementary Submission to the Inquiry into Impaired Loans.

In response to the second part of the question, the Landmark loan book (being the Landmark loans acquired by ANZ, which included the Elite Grains' loan) was transferred from the two Landmark Trusts to a new ANZ trust in accordance with the provisions contained in the Master Trust Deed and the Sale and Purchase Deed dated 8 December 2009 (see clause 6.2).

The customer loans (including the Elite Grains' loan) remained on the same terms and conditions, including in relation to the term/length of the loan, interest rate, fees and the obligation to fund any undrawn committed loans.

7. On the 1st of July 2009, 8 months prior to the take over date of 1st March 2010, ANZ Bank replaced the retiring funder by refinancing all the trust loans held in AWB/Landmark trusts including the securitised loans. If so, why did ANZ Bank only give less than 12 months funding to the AWB?

ANZ disagrees with a number of the statements/inferences made in this question. ANZ rejects any suggestion that decisions in relation to its wholesale lending to AWB were influenced by any decision to purchase the Landmark loan book. The acquisition transaction, including its evaluation and management, was the responsibility of a different business unit in a different ANZ division to the business unit responsible for the wholesale lending provided to AWB..

8. What role did Permanent Custodians LTD have in both the Master Trust Deed and the Supplemental deeds?

In both the Master Trust Deed and the Supplemental Deed dated 25 February 2010, Permanent Custodians Ltd is named as the Trustee. The role/responsibilities of PCL as the Trustee are set out in clause 11 of the Master Trust Deed.

9. Was the trustee Permanent Custodians Ltd the mortgagee for the Rural Program?

We have interpreted this question to mean – was PCL the lender/mortgagee for the Landmark customer loans? The answer is yes.

10. Permanent Custodians Ltd was holding the assets on behalf of third party note holders in the Landmark Rural Program. Was ANZ Bank or any other entity of ANZ Bank one of those third party note holders? Who were the third party note holders and/or the investors that purchased the securitised loans?

The Landmark loans were not purchased by "third party note holders and/or investors"; they were purchased by ANZ.

As noted above, ANZ's purchase of the Landmark loan book involved the transfer of the customer loans from the two Landmark Trusts to a new ANZ Trust in accordance with the provisions contained in the Master Trust Deed and the Sale and Purchase Deed. The beneficial interest in the ANZ Trust was structured as one (1) Ordinary Unit which was held by ANZ.

11. What role did AWB Services /Landmark Operations LTD undertake post 8th December 2009 in relation to being the Manager and servicer?

Between the date of the Sale and Purchase Deed (8 December 2009) and the completion date for the sale (1 March 2010), AWB and Landmark continued in their roles as Manager and servicer.

12. Who is Mr David Hisco and where does he reside?

At the time of ANZ's acquisition of the Landmark loan book, Mr David Hisco was the ANZ Group Managing Director Commercial Banking.

It is not appropriate for ANZ to disclose Mr Hisco's private residential address.

13. Were Landmark Operations Limited, Landmark Qld Limited and/or Landmark Financial Services in anyway or at all an entity related or owned by ANZ Bank or one of ANZ subsidiaries?

Prior to the acquisition, ANZ and its subsidiaries did not own Landmark Operations Limited, Landmark Qld Limited or the Landmark Financial Services business.

14. Please explain the functions and the ownership of Landmark Financial Services in relation to the Rural Program. Who is Landmark Financial Service?

Landmark Financial Services was a division of Landmark (part of AWB's rural services), which at the time of ANZ's acquisition, provided financial services to approximately 10,000 agribusiness customers. The Landmark Financial Services loan book was funded by the RURAL Program.

15. What role did AWB Services LTD perform in the Landmark Rural Program?

Based on the Master Trust Deed which established the RURAL Program, AWB Services Limited was the Manager and the Arranger. The principal role/responsibilities of the Manager and the Arranger are set out in clauses 12 and 13 of the Master Trust Deed, respectively.

16. Was AWB a distressed company, given that AWB and ANZ Bank at the time was embroiled in the oil for food scandal and AWB was listed as a troubled company prior 2006? Was ANZ Bank as funder of the Landmark Rural Program concerned with the AWB ability to pay the facility?

ANZ rejects any suggestion that its decision to purchase the Landmark loan book was as a result of ANZ's exposure to AWB. ANZ has previously commented on this in its Supplementary Submission to the Inquiry into Impaired Loans.

17. Did AWB and/or Landmark including all entities, under-perform or default in the Rural Program in any way?

As ANZ was not a party to the Master Trust Deed, ANZ is unable to comment on whether AWB/Landmark performed their roles/responsibilities in respect of the RURAL Program.

18. Why did ANZ Bank allow AWB as Manager to continue to manage the trust when the Manager may have been trading insolvent and if called upon could AWB pay back its facilities at call?

Between the date of any sale of a business and the date of completion of the sale (which can often be subject to a number of conditions/approvals), it is common and standard practice for the incumbent business manager/owner to continue in that role up until completion.

ANZ otherwise disagrees with the statements/inferences made in this question.

19. Did AWB Commercial Funding own any loans in relation to a Landmark customer loan book prior to ANZ's purchase of the loan book?

ANZ's acquisition involved the purchase of Landmark customer loans which were owned by two Landmark trusts: RURAL Warehouse Trust No. 1 and Rural Loan CP Warehouse Trust. ANZ is not aware of whether, at any time prior to 8 December 2009, AWB Commercial Funding owned any Landmark customer loans.

20. Retrospectively, at the time when Landmark Operations Limited sold the loan book to ANZ Bank, on the 8th December 2009, we have been advised that ANZ Bank was already the sole Funder of the existing Rural Program, pursuant to the Funding Purchase Agreement Dated 1 July 2009. Please explain the ANZ Bank's purchases including the excluded loans and/or securities?

ANZ's commercial rationale for the purchase of the Landmark Financial Services business is set out in its Supplementary Submission to the Inquiry into Impaired Loans.

The terms and conditions of the purchase are set out in the Sale and Purchase Deed dated 8 November 2009 between Landmark Operations Limited and ANZ. Under the Deed, ANZ purchased the "Loan Book", the related "Security" and the "Other Assets". These terms are defined in the Deed.

The Deed also includes a definition of the term "Excluded Loans" which were not purchased by ANZ as part of the acquisition. Excluded Loans included particular types of financing (eg. hire purchase, credit cards), a number of specific customer loans, any loans that had already been fully paid out or written off, and any new loans above a certain limit (unless ANZ consented to those new loans).

21. Could a grower physically pay out Permanent Custodian Ltd as the mortgagee to discharge the loan? Please explain your answer?

All day to day dealings in relation to Landmark loans were between Landmark/ANZ as the 'servicer' of the loans and the customer. PCL was the lender/mortgagee but did not have direct/ongoing communication with the customers. Therefore if a customer wished to pay out their loan, they could have discussed and arranged this with Landmark or, post-acquisition, ANZ.

We are aware that one of Mr Culleton's claims is that shortly after the ANZ acquisition, he was prevented from arranging a refinancing of Elite Grains' loan because PCL/ANZ refused to provide him with loan payout figures. ANZ disputes that claim. Mr Culleton was receiving regular bank statements which showed the amount owing. Notices of Default dated 24 November 2011 and 1 June 2012 issued by ANZ also contained payout figures. In response to a request from Mr Culleton's lawyers, payout figures were also provided in letters dated 19 March 2014 and 14 August 2014.

Recently, the Supreme Court of Western Australia has examined the circumstances in which the Elite Grains' loans came to be classed as being in default by November 2010. In the judgment, Justice Martin said (based on the chronology of events set out in the judgement) – "there was more than ample time for the [Culletons] to have found viable refinancing in [the 20 month interval between November 2010

and commencement of recovery litigation] – if a refinancing had been commercially attainable".

22. Was Permanent Custodians Limited involved in the new trust in ANZ Bank Rural Trust No 1?

Yes. PCL is the Trustee of the new ANZ Trust.

23. What role was did ANZ Bank perform in relation to the New Trust, ANZ Bank Rural Trust No 1 and is that trust current and operational as of today?

In relation to ANZ's role, we refer to our response to question 5 and 10 above. The ANZ Trust is still in existence today.

24. What authority did ANZ Bank have in place in order to deal on behalf of original Landmark Customers under the old trust prior to the 1 March 2010?

ANZ did not deal with Landmark customers prior to completion of the sale on 1 March 2010. ANZ's role as the new servicer of the acquired Landmark loans commenced on completion of the purchase transaction on 1 March 2010.

25. Why did ANZ Bank wait until the 31st March 2010 to establish a Power of Attorney for the New Trust, ANZ Trust No 1, dated the 25th February 2010, when on the 5th March 2010, Mr David Hand as ANZ Manager writes to Landmark customers titles as "Welcome to ANZ". The letter further stated "Landmark can no longer accept deposits and there will be new terms and conditions along with changes to your accounts"?

ANZ confirms that PCL as Trustee signed a Power of Attorney dated 31 March 2010 in respect of the Landmark loans acquired by the new ANZ Trust. As noted above, ANZ's role as the new servicer commenced on completion of the purchase transaction on 1 March 2010.

ANZ also confirms that ANZ (by Mr Mark Hand, General Manager ANZ Regional Commercial Banking) sent a letter dated 5 March 2010 to former Landmark loan customers with the title "Welcome to ANZ". A copy of that letter is attached.

ANZ otherwise disagrees with the statements/inferences made in this question.

26. Why did ANZ Bank wait until farmers were on summer leave before posting the approved ANZ notice as defined in section 5.8 of the Sale Purchase Deed,(SPD) dated the 8th December 2009 headed *Communication to Landmark Customers? Could you also please explain, the ethos of the bank employees and agents" must do anything "as defined clause 8.5(b) (SPD) as above?*

Clause 5.8(b) of the Sale and Purchase Deed is set out below:

"*ANZ and Landmark (acting reasonably) must agree the form of a letter to Landmark Customers for the purpose of notifying them that the transfer of the Loan Book has occurred and describing the arrangements in respect of the Notes and identifying any transitional arrangements. ANZ (or if the parties agree, Landmark) must send this letter to all Landmark Customers as soon as reasonably practicable after Completion*."

Completion of the purchase transaction occurred on 1 March 2010 and the ANZ "Welcome letter" was sent on 5 March 2010. ANZ believes it has complied with clause 5.8(b) of the Deed, an agreement between ANZ and Landmark.

As previously submitted to the Inquiry into Impaired Loans, ANZ acknowledges that a number of former Landmark customers did experience difficulties in operating their accounts during the transitional period, but we believe that these issues were rectified. ANZ also accepts that some Landmark customers could have benefited from further and more detailed communication explaining what ANZ's acquisition of the

loan portfolio meant to them and outlining what changes they should expect in the management of their accounts by ANZ.

There is no clause 8.5(b) in the Sale and Purchase Deed, so ANZ is unable to answer the second part of this question.

ANZ otherwise disagrees with the statements/inferences made in this question.

27. On the 8th December 2009, AWB Services ceased to be the 'Manager' and Landmark ceased to be the 'Servicer' and released all customer documents and records to ANZ Bank without the consent of the borrower as required under (15.15) of the Landmark terms and conditions. If so, how could a grower pay out his loan if the Servicer and Manager had left before being put on notice?

ANZ does not agree that AWB Services ceased to be the Manager and Landmark ceased to be the Servicer on 8 December 2009.

Clause 15.15 of the Landmark terms and conditions which were operative at the relevant time deal with the appointment of attorneys by borrowers, not the release of documents, so ANZ is unable to answer the second part of this question.

A Landmark customer was able to pay out their loan at all times. We refer to our response to question 21 above.

28. Was the Elite Grains facilities in credit Management with Landmark prior to ANZ bank purchasing Elite Grains Loans which included their securities?

Based on ANZ's review of the Landmark files, ANZ does not believe that the Elite Grains' loan was being managed by a specialist "credit management" unit at Landmark.

The Landmark files do record that 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. The Landmark file records that Landmark officers had cautioned the customer to allow the expansion into the Eastern States to mature before expanding further and that Elite Grains had been unable to reduce the excess on its Overdraft account, which was outside of arrangements.

While we understand that Mr Culleton is now claiming that Elite Grains was at all times a very successful business, in a 2013 court proceeding between Dakin Farms and Elite Grains in relation to a property dispute, it appears that Mr Culleton informed Dakin Farms in early 2010 that he/the Elite Grains business was experiencing cash flow difficulties: *Dakin Farms v Elite Grains* [No 2] [2013] WADC 1060.

29. Landmark Rural Managers left the Landmark Branches with no notice to their customers. How could ANZ immediately understand the Landmark customers as defined in the Landmark Credit Manual as the vast majority of growers were put on new terms with the ANZ Bank with no relationships/rapport established, particularly in understanding their enterprises/business? Please explain how ANZ Bank could then have immediately have the 'new' client defaulted and put on notice of default when the ANZ did have not have any prior relationship, knowledge or understanding of their former landmark customer?

ANZ disagrees with the statement that Landmark Rural Managers left the Landmark Branches with no notice to their customers. As noted in ANZ's Submissions to the Inquiry into Impaired Loans, the transition of former Landmark customers and their accounts to ANZ and its systems commenced in March 2010 and continued through to early 2011. The transitioning arrangements and integration of customers from Landmark to ANZ were the subject of discussions between ANZ managers and their customers, and were also set out in a number of written communications, eg. the "Welcome letter" referred to in our response to question 26.

As part of the acquisition, many Landmark staff accepted roles with ANZ which meant that those managers, who already knew and understood the customers' businesses, were still available to support those customers. In addition, ANZ also had a dedicated support team set up to assist with any queries from former Landmark customers.

ANZ also disagrees with the general statements/inferences made in the second part of the question. If there are any specific instances that the Committee is aware of, it would be helpful if the Committee could identify the customers affected and the manner in which it is said they were affected, and we will look into any specific issues raised.

30. Why did ANZ Bank allow unauthorised agents to provide the written notice accompanied with frequently asked questions to simply sign over a 22 year interest only loan and be sold up within 2 months on new terms from ANZ Bank.?

In the time available and without any further detail, ANZ has been unable to identify the "written notice accompanied with frequently asked questions" referred to in this question.

ANZ does not otherwise understand the reference to "unauthorized agents" or the reference to "sign[ing] over a 22 year interest only loan and be sold up within 2 months on new terms from ANZ Bank".

In the case of Mr Culleton, when ANZ acquired the Landmark loan book in March 2010 and took over the Elite Grains' loan facilities, the business was in difficulty. ANZ was informed by Mr Culleton that they did not want to bank with ANZ and that Elite Grains had opened an account with NAB and was directing all of its business receipts into that account.

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

From late 2010 until late 2011, ANZ remained willing to work with Elite Grains and the Culletons and ANZ engaged with the Culletons in an effort to restructure the loan facilities (which were still on Landmark terms and conditions). This included an offer to provide a $3.2m interest only long term loan (expiring 2022) to help provide certainty and long term solvency to that company. The offers were conditional upon the Culletons providing up to date financial information to ANZ about the business. That financial information was never provided and Elite Grains continued to direct its business deposits into a NAB account rather than servicing its loan facilities. The Culletons continued to advise that they did not want to bank with ANZ and while the prospect of refinancing with another lender was raised, no refinancing proposal ever eventuated.

Over the period late 2011 until early 2013, ANZ continued to provide Elite Grains and the Culletons more time to repay the debt either through a refinance or sale of property. This is also referred to in our response to question 21 above.

31. Is it true that the Culletons and their companies purchased a farm in 2009 financed by Landmark, whereby Landmark approached the Culletons to become a joint venture partner with Landmark in June 2009, but were purportedly declined finance with ANZ Bank? Could ANZ Bank supply the finance application that was submitted to ANZ Bank for the Culleton's to refinance?

Based on the Landmark loan files, it appears that in early 2009 Mr and Mrs Culleton signed a contract of sale dated 15 January 2009 to purchase a property in Western Australia, known as "Lesters property", and that Landmark procured that PCL finance the property purchase by providing funding to Elite Grains on the terms and conditions set out in a Landmark letter of offer dated 17 February 2009.

ANZ's acquisition in March 2010 was in relation to the Landmark loan and deposit books, which included the Elite Grains' loan. ANZ is unable to comment or answer questions in relation to any approach by Landmark in June 2009 to become a "joint venture partner".

ANZ is not aware of any finance application submitted to it in June 2009 by the Culletons.

32. Could you explain why ANZ Bank purported to be Culleton's Mortgagee and why ANZ Bank claims publicly that ANZ Bank has won in court on a number of actions against the Culleton's and/or their companies?

ANZ is aware that Mr Culleton continues to raise the issue of the transition of Elite Grain's loan from Landmark to ANZ and the standing/right of ANZ to bring a claim against Elite Grains and its guarantors, Mr and Mrs Culleton.

As noted above, PCL is the lender and mortgagee in respect of the loans. Upon the acquisition by ANZ, ANZ replaced Landmark as the servicer of the loans (including the Elite Grains' loan) responsible for all day to day dealings with customers. ANZ has at all times been authorized to act on behalf of PCL in relation to the Elite Grains' lending.

This has been raised as a contentious issue on numerous occasions over the past few years including before the Supreme Court of Western Australia.

33. Please explain why ANZ Bank did not refer to the Landmark Financial Service credit manual policy dated the 8th December 2009, during and the transition period?

ANZ does not understand the reference to the Landmark Financial Service "credit manual policy dated the 8th December 2009".

The agreement/arrangements as between ANZ and Landmark during the transition period (8 December 2009 to 1 March 2010) are set out in the Sale and Purchase Deed. ANZ's role as the new servicer of the Landmark loans commenced on 1 March 2010.

34. Were Landmark Rural Managers were authorized to approve by discretion under "Buffer Limits" to allow pre approval and informal overdraft increases at their discretion?

ANZ is unable to comment or answer general questions on the authority or discretions of Landmark Rural Managers from time to time.

35. Why did ANZ Bank give growers less than 2 days to get of properties and have armies of police to take possession of farms without court orders?

ANZ disagrees with the statement/inference made in this question.

If there is a specific instance that the Committee is aware of, it would be helpful if the Committee could identify the customer and the circumstances, and we will look into the issues raised.

36. Why did ANZ Bank give back the properties to farmers and securities to guarantors?

ANZ is unable to answer this general question.

37. Why did the Mortgagee of the Rural Loan Book wait to default Elite Grains facilities for "stagnant nature" on ANZ Bank accounts in June 2012, when

the directors of the company state that those ANZ accounts have never been actioned and don't exist and the directors and/or guarantors had not signed ANZ Banks new terms and conditions?

As noted in our response to question 30, when ANZ acquired the Landmark loan book in March 2010 and took over the management of 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 Grains stopped servicing its lending.

In November 2010, ANZ issued a default notice based on an overdraft excess and payment arrears on a term loan. This was the first default notice issued by ANZ. The Overdraft remained in excess of its limit as a result of Mr Culleton's decision to stop making payments on the loan facilities.

ANZ remained willing to work with the Culletons after the issue of the first default notice and did not take enforcement action against Elite Grains or the Culletons until 2013 and only after it had stopped servicing the loans and other creditors had already taken action.

The Supreme Court of Western Australia has recently examined the circumstances in which the loans to Elite Grains 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.

ANZ otherwise disagrees with the statements/inferences made in this question.

38. Did the Culletons Mortgagee sell the properties along with value adding enterprise on a walk-in, walk-out sale through VNW Real Estate which had a gross value in the vicinity of $12 million for about $1.6 million in total?

No. ANZ disagrees that the security properties had "a gross value in the vicinity of $12 million". FTI Consulting were appointed as receivers over the security properties in December 2013 and after conducting a sales process, sold the security properties in 2014. The property held as security known as "the Williams property" was sold for approximately $1.634m and the property held as security known as "the Lesters property" was sold for approximately $850,000.

39. Did the Mortgagee hold any other securities other than the land granted by the guarantors being the Culleton's, including grain stock, silos, plant and machinery, chattel mortgages and IP and personal items of value all of the Culleton's and its associated companies?

The securities held in respect of the loan facilities provided by Landmark to Elite Grains are set out in the attached Letter of Offer dated 17 February 2009, which was accepted by the borrower and guarantors on 6 March 2009.

40. Is it true that the Culleton's took all reasonable steps in notifying all parties including the buyers that the sale must be stopped as the property is not for sale?

ANZ is unable to comment on or answer this general question.

ANZ is aware that Mr Culleton took a number of steps in 2013 and 2014 (eg. lodging caveats and applying to the Court for an injunction) seeking to prevent the sale of the security properties held in respect of the Elite Grains' loan. These steps included writing letters to the purchasers of the properties. Upon request, ANZ can provide further details to the Committee in relation to these matters.

41. Is it true that in the matter of 2473/2012, legal action commenced in the Western Australia Supreme Court on behalf of PCL as Mortgagee, to whereby the ANZ Bank manager at the time a Mr Roland Davis did not have legal authority to commence such action on behalf of Permanent Custodians Ltd (PCL) as mortgagee to the Elite Grains loans secured by the Culletons?

No, this is untrue.

42. As a result of Roland Davis's action, is it true that Culleton have never been able to get into court to argue their case on its merits based on a three day court appeal window?

No, this is untrue.

43. Could you provide the committee the valuation of the Culleton's properties which includes the value of the value adding enterprise?

In November 2013, PPB was appointed Liquidators of Elite Grains following court action by two other creditors of Elite Grains. The Liquidator of Elite Grains may be able to answer any questions in relation to the "enterprise value" of the business.

As noted in our response to question 38, FTI Consulting were appointed as receivers in December 2013 over the Williams and Lester properties which were owned by Mr and Mrs Culleton, and sold those properties in 2014. Copies of valuations for the Williams and Lester properties can be provided upon request. The receivers were not appointed to the business/enterprise of Elite Grains.

44. Is it true that ANZ Bank has applied aggressive tactics in preventing any discovery and/or Landmark case from ever finishing in the courts prior to settling?

No, this is untrue.

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5 March 2010

Welcome to ANZ

On 1 March 2010, ANZ acquired Landmark's Financial Services loan and deposit book. We have made this investment because we believe strongly in the future of agribusiness in Australia. ANZ has been banking businesses just like yours for more than 150 years and we plan to continue to work with you for many years to come.

As a result of the acquisition, your deposits are with ANZ and your lending accounts are now managed by ANZ. In addition, many of Landmark's Financial Services staff accepted roles with ANZ. That means the people who know and understand your business will still be available to support you. While your Landmark Rural Finance Manager (RFM) will now be known as an ANZ Agribusiness Manager, they will continue to visit you and to work closely with the Landmark network.

Your Agribusiness Manager will be in touch soon, however if you need any assistance before then, you can reach them on the same mobile number as you always have. The support team in Perth is also available to answer your questions on 1800 622 015.

Dedicated agribusiness finance specialists
We are combining the best of Landmark Financial Services with ANZ to create a national network of professionals committed to supporting rural and regional Australia. This means you retain a relationship team who have a deep understanding of your business, and also gain access to a wide range of enhanced benefits.

You can now withdraw cash from any ANZ ATM any time with no charge.

Once you transfer to a standard ANZ deposit product you will also enjoy:

- Access to information and banking services 24 hours a day
- Improved telephone, internet banking and mobile phone banking to make it easier for you to manage your finances anytime, anywhere; and
- Access to the entire ANZ branch network.

Important information you need to know
We have worked hard to minimise changes to the way you operate your accounts, however there are three main changes that we want to let you know about:

Deposits

1. As Landmark branches can no longer accept deposits, you will now be able to process your cash and cheques at any ANZ branch. To do this, please complete your existing Landmark deposit slip and take it to any ANZ branch. You also have the option to make deposits at your current bank branch as you have done previously.

2. Last week we let you know that starting 1 March 2010, a new ANZ Interim Account would be set up for you. We will send you the full Terms and Conditions for your ANZ Interim Account shortly.

   Please note that your new ANZ Interim Account will receive the benefit of the Australian Government Guarantee on Bank deposits for deposits with balances up to and including $1 million in aggregate held with ANZ*

Account maintenance

3. The Landmark website has been updated and from 15 March 2010 you will see links to key documents on anz.com. If you need copies of any of these forms sooner, the support team in Perth will be able to provide them to you.

We'll be in touch again soon

Your ANZ Agribusiness team will be able to explain in detail how we will move your accounts to ANZ systems. In the meantime, it's business as usual.

If you have questions your Agribusiness Manager will be available on the same mobile number. Alternatively, please call the support team in Perth on **1800 622 015**.

We are working to make this transition as smooth for you as we can and are committed to ensuring that we continue to provide you with the support you need.

We look forward to working with you to satisfy all your financial needs, both business and personal.

Yours sincerely

Mark Hand
General Manager
ANZ Regional Commercial Banking

* Deposits up to and including A$1 million, whether deposited in one ANZ account or a number of ANZ accounts, will continue to be automatically guaranteed without charge.

LANDMARK

look to us

Landmark Operations Limited
ABN 73 008 743 217

17 February 2009

The Directors
Elite Grains Pty Ltd

Dear Sirs,

Landmark Advantage Package Letter of Offer

We are pleased to advise that Landmark, on behalf of the Lender, has agreed to provide you a Landmark Advantage Package.

Features:

1. Package Limit

The Package Limit is the total amount of credit available to you:

The Package Limit	**$3,700,000.00**

2. You can choose from the following Facilities

Within the Package Limit, you may choose any one or more of the following facilities:

Facility Type
Line of Credit Facility
Term Loan Facility – Variable Interest Rate
Term Loan Facility – Fixed Interest Rate

Facility Limits/Amounts (excluding fixed interest rate Facilities), and the Facility Type, can be changed within the Package Limit prior to Settlement. For more information, please contact me.

The Borrower and the Lender are:

"Borrower" (also referred to as "you")	ELITE GRAINS PTY LTD ACN 091 599 941
"Lender"	Permanent Custodians Limited ACN 001 426 384 as Trustee under the Master Trust Deed establishing the RURAL Program

In addition to the above, this Letter of Offer comprises the following:

Details	**Section**
Details for each Facility	Section One
Conditions Precedent, Special Conditions and Notices	Section Two
Security details	Section Three

Fees	Section Four
Signature / Acceptance / Guarantor's Acceptance	Section Five
General Terms & Conditions	Enclosed

Please keep the enclosed copy of this Letter of Offer and the General Terms and Conditions.

Thank you for looking to Landmark for your finance requirements. Should you have any queries in relation to this Letter of Offer, please do not hesitate to contact me.

Yours sincerely,

Jeff Wootton
Rural Finance Manager
15 Wilson Rd BUNBURY WA 6230
Ph. 08 9725 4155; Mob. 0427 015 213;
Fax. 08 9726 2266; Email. jeff.wootton@landmark.com.au
for and on behalf of the Lender.

Landmark acts as the Servicer and Originator pursuant to the RURAL Program

SECTION ONE - FACILITY DETAILS

Line of Credit Facility	
Type of Facility:	Working Capital Facility
Purpose:	Existing
Facility Limit:	$500,000.00
Final Repayment Date:	28th February 2010
Annual Review Date:	28th February
Indicative Variable Interest Rate: 4.60% + 2.55% = 7.15%	A Variable Interest Rate comprising: A. Landmark's variable Base Rate. The Base Rate is variable from time to time. Please refer to the Landmark website (www.landmark.com.au) or contact your representative for further details; **plus** B. a Margin (which may include an interest payment frequency loading). The Margin may vary from time to time. As at the date of this letter, the Margin is 2.55% per annum. The Indicative Variable Interest Rate is 7.85% per annum as at the date of this letter.
Interest Payment Details:	Charged monthly, payable in arrears and debited to your account on the last day of each month.
Facility Specific Conditions:	If you comply with the terms and conditions of this Line of Credit Facility, it will renew on the Annual Review Date on the same terms as contained in this Letter of Offer. This renewal will take effect on the Annual Review Date and will extend for 12 months. The Line of Credit Facility will continue to renew in this way until we notify you otherwise.
Default Interest Rate:	For the purposes of clause 8.1(a) of the General Terms and Conditions, the Default Interest Rate is the sum of the Variable Interest Rate plus, as at the date of this letter, 4.00% per annum

SECTION ONE - FACILITY DETAILS

Term Loan Facility – General	
Type of Facility:	Term Loan
Purpose:	Increase to purchase property
Term Loan Amount:	$3,200,000.00 To be agreed prior to settlement, but not more than the Package Limit less the Line of Credit Facility Limit. The Term Loan Amount comprises: A. the Variable Rate Amount (if any); plus B. the Fixed Rate Amount (if any).
Annual Review Date:	28th February
Final Repayment Date:	28th February 2022
Last date for initial drawdown:	90 days from the date of this letter
Interest Rate:	The interest rate for the Facility may be a: • variable interest rate; • fixed interest rate; or • combination of a variable interest rate and a fixed interest rate. The following pages provide details of these interest rate options and how you may select one or more of these.
Principal Repayments:	Interest only and then to be reviewed for amortisation programme
Interest Payment Details:	Charged monthly, payable in arrears and debited to your account on the last day of each month.
Nominated Account:	Working Capital Facility – Line of Credit Facility

Term Loan Facility – Variable Interest Rate	
Variable Rate Amount:	You can choose the amount of the Variable Rate Amount. You can do this by notifying Landmark of the Variable Rate Amount by Notice. The Variable Rate Amount must be for no more than the Term Loan Amount less the Fixed Rate Amount (if any).
Indicative Variable Interest Rate:	A Variable Interest Rate comprising: **A.** Landmark's variable Base Rate. The Base Rate is variable from time to time. Please refer to the Landmark website (www.landmark.com.au) or contact your representative for further details; **plus** **B.** a Margin (which may include an interest payment frequency loading). The Margin may vary from time to time. As at the date of this letter, the Margin is 2.25% per annum. The Indicative Variable Interest Rate is 7.55% per annum as at the date of this letter.
Facility Specific Conditions:	• You may make additional payments to the Term Loan – Variable Interest Rate at any time. If you make additional payments, you may apply to us to re-draw those amounts that exceed the total of your Repayments. We may accept or reject your application to re-draw at our discretion. If we agree, the minimum re-draw amount is $10,000.
Default Interest Rate:	For the purposes of clause 8.1(a) of the General Terms and Conditions, the Default Interest Rate is the sum of the Variable Interest Rate plus, as at the date of this letter, 4.00% per annum.
Term Loan Facility – Fixed Interest Rate	
Fixed Rate Amount:	You can choose the amount of the Fixed Rate Amount. You can do this by notifying Landmark of the Fixed Rate Amount by Notice. The Fixed Rate Amount must be for no more than the Term Loan Amount less the Variable Rate Amount (if any).
Fixed Rate Period:	Fixed rate periods can be from 1 to 5 years. Once you are sure of your intentions, contact your Rural Finance Manager who will assist you with your requirements.
Fixed Interest Rate:	Once you are sure of your intentions, contact your Rural Finance Manager who will assist you with your requirements.
Facility Specific Conditions:	The interest rate will convert to a Variable Interest Rate at the end of the Fixed Rate Period. We will notify you of the Indicative Variable Interest Rate and your Indicative Repayments before the end of the Fixed Rate Period. At that time, you may also apply for a new Fixed Rate Period.
Default Interest Rate:	For the purposes of clause 8.1(a) of the General Terms and Conditions, the Default Interest Rate is the sum of the Fixed Interest Rate plus, as at the date of this letter, 4.00% per annum.

SECTION TWO – CONDITIONS AND NOTICES

Conditions Precedent	In addition to any other requirements, the following Conditions Precedent must be satisfied to the Lender's satisfaction before the Lender is able to make any of the Facilities available.
	1. The Security being provided to the Lender to its satisfaction and to the satisfaction of the Lender's solicitors. 2. Completion of any other necessary requirements.

Special Conditions	You must comply with the following Special Conditions at all times or, if a specified time is stated, during that specified time.
	None apply

Notices	Landmark Operations Limited, Post Office Box 6067 Parramatta BC, NSW 2150

SECTION THREE - SECURITY DETAILS

Securities - for all facilities	The Securities listed below secure all of the Facilities. Landmark must receive these Securities, fully and properly executed, before the Lender will provide any of the Facilities.
	Listed Securities 1. Unlimited Guarantee and Indemnity dated 25 November 2008 from: • RODNEY NORMAN CULLETON • IOANNA CULLETON Supported by: • First-ranking Registered Property Mortgage dated 6 November 2008 over property known as "Williams" WA consisting of approximately 534.4611 hectares. • First-ranking Registered Property Mortgage over property known as "Lot 350 Williams Location 13968" WA consisting of approximately 306 hectares 2. Unlimited Guarantee and Indemnity dated 25 November 2008 from: • LESLEY DIANNE CULLETON Supported by: • First-ranking Registered Property Mortgage dated 6 November 2008 over property situated at 3. Unlimited Guarantee and Indemnity dated 25 November 2008 from: • RONALD NORMAN CULLETON 4. First-ranking Registered Fixed and Floating Charge over all the property, undertaking and rights presently or in the future held by you (including uncalled capital, any goodwill and any property, undertaking or rights held by you in your personal capacity or as trustee). NB: If the assets which are to be subject to the lender's security are in a name or entity other than the name of the proposed Borrower, then a Guarantee and Indemnity will be required from the security provider.

SECTION FOUR – FEES AND CHARGES

A. Fees and Charges payable on your acceptance of this Letter of Offer:	
Unless otherwise stated, this section provides details of the fees and charges that are payable by you immediately on your acceptance of this Letter of Offer.	
Fee or Charge	**Amount**
Establishment Fee	$2,250.00
Annual Management Fee	$275.00

B. Fees and charges that may become payable after acceptance of this Letter of Offer:	
This section details fees and charges that will be payable only in the circumstances indicated. The amounts quoted are as at the date of this letter and may change from time to time. We may debit your Nominated Account with additional fees as notified to you from time to time.	
Fee or Charge	**Amount**
Annual management fee This fee is payable yearly in arrears, on or about the 15th of June, for the management and maintenance of the Package and its underlying Facility. If the Package is closed at the time before the 15th of June in any year, the full fee remains payable	$600.00
Re-documentation fee Payable each time a temporary increase in the Package Limit is provided, but excluding where there is a permanent change in the Package, such as to the Package Limit, in which case a further Establishment Fee will apply.	$250.00
Stamping Fee This fee applies where it is necessary to up-stamp Securities to cover additional borrowings. The fee is in addition to any mortgage or other duty payable.	$50.00
Term loan re-draw fee Loan repayments made in addition to the scheduled repayments may be re-drawn. The minimum re-draw amount is $10,000 per individual transaction.	$500.00
Securities fee This fee is payable each time. • you apply for any partial or full release of any Security; • you apply for any Lender consent to subdivisions or to any subsequent mortgages; • there are any transactions dealing with a Security.	$150.00
Settlement Fee This fee applies where a Facility is refinanced to another financial institution.	$250.00

C. Fees and charges that may become payable to others after acceptance of this Agreement:	
This section details fees and charges that will be payable to others (such as government regulators and departments and persons who undertake work on behalf of the Lender) in the circumstances indicated below. The amounts may change from to time. We may debit your Nominated Account with these fees and charges as notified to you from time to time.	
Fee or Charge	**Amount**
Agency fees This fee is payable for: A. solicitors for preparation of, advice upon, and discharge of, loan, security and associated documents, including trust deed reviews and corporate structures; B. valuers, where a valuation of any security is required; C. other agents to undertake work on the Lender's or Landmark's behalf, such as attending settlements and conducting searches of parties or securities; D. others, where the work undertaken for the Lender or for Landmark is not otherwise included above.	The amount payable is the amount charged (including disbursements and GST) to the Lender, or Landmark, as the case may be.
Regulator fees This fee is payable for: A. Titles Office fees for lodgement, registration, discharge of or searching for any security or other associated document at a State or Territory titles office (howsoever called); B. Registrar General fees, for lodgement, registration, discharge of or searching for any security or other associated document at a State or Territory Registrar General's office (howsoever called); C ASIC, for lodgement, registration or discharge of any security or other associated document at the Australian Securities and Investments Commission (or its successor); D. other regulators or government departments, where fees are charged or chargeable to the Lender or to Landmark and is not otherwise included above.	The amount payable is the amount charged (including disbursements and GST) to the Lender, or Landmark, as the case may be.
Stamp duty and other duties This is payable where a document or transaction is subject to the payment of stamp, or other, duty (such as mortgage duty).	The amount payable is the amount charged (including disbursements and GST) to the Lender, or Landmark, as the case may be.

SECTION FIVE – ACCEPTANCE

BORROWER'S ACCEPTANCE

To accept this offer, you must sign the acceptance below. You may accept this offer **within 21 days** of the date of this letter.

We may withdraw this offer if:

- it is not accepted by all of you within that period; or
- the Conditions Precedent required prior to settlement are not met; or
- the initial withdrawal does not occur within 90 days from the date of this letter.

By signing this Acceptance, you each accept the terms as contained in this letter and in the General Terms and Conditions and acknowledge receiving a copy of the General Terms and Conditions which form part of this offer.

Dated: 6/3/09

By Company Borrowers

ELITE GRAINS PTY LTD ACN 091 599 941

Executed by the Borrower Company in accordance with Section 127 of the Corporations Act 2001 (Cth)

Signature
Rodney Norman Culleton
Full Name (BLOCK LETTERS)
DIRECTOR OR SOLE DIRECTOR AND COMPANY SECRETARY

Signature
Ronald Norman Culleton
Full Name (BLOCK LETTERS)
DIRECTOR OR SECRETARY

SECTION FIVE – ACCEPTANCE

GUARANTORS ACCEPTANCE

By signing this Acceptance, the Guarantors confirm that:

- they have each received a copy of the Letter of Offer (including the General Terms and Conditions);
- they each agree that any guarantee (and related security) previously given in favour of the Lender continues and extends to the obligations of the Borrower in respect to the facilities being offered; and
- they each agree to guarantee, and indemnify, the Lender for any losses suffered in respect of the facilities being offered.

Dated: 06/03/09

By Individual Guarantors

RONALD NORMAN CULLETON

RODNEY NORMAN CULLETON

IOANNA CULLETON

LESLEY DIANNE CULLETON

[2016] WASC 238

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 Plaintiff AND ELITE GRAINS PTY LTD First Defendant RODNEY NORMAN CULLETON Second Defendant IOANNA CULLETON 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

Legislation:

Nil

Result:

Application refused

Category: B

Representation:

Counsel:

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:

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

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).

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

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: 1. The default judgment which was entered herein against the second and third defendants on 28 May 2013 be set aside. 2. The third defendant file any defence and counterclaim within 28 days. 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. 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

	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. 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

	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'. 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. Matter eventually relisted for special appointment convenient to all counsel on 1 June 2016, with directions: 1. Mrs Culleton to file and serve any submissions in support of her application by 26 February 2016. 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

	provided.
28 April 2016	Directions hearing before me. Mr and Mrs Culleton attend in person. Orders made: 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. 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. 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. 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

	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.