

DETERMINATION

Complainants: **Ms EW and Mr PN**

Member: **Broker**

Date: **28 May 2007**

I have reached the following Determination in the case of Ms EW and Mr PN ("the Complainants") and the Broker:

DETERMINATION

The Complainants' claim for loss has been made out.

Under the Rules of the Credit Ombudsman Service Limited¹, I propose a Determination Settlement whereby the Broker compensates the Complainants in the sum of \$20,368.50.

Ombudsman's approach

The role of the Ombudsman is to investigate and resolve complaints in accordance with the Rules of the Credit Ombudsman Service ("COS"). In doing so, the Ombudsman is not bound by any legal rules of evidence and may inform itself about the complaint and all matters relating to it in such manner as it considers appropriate. The Ombudsman relies substantially on, and may draw inferences and conclusions from, available written material, particularly material which was created contemporaneously with events.

The approach of the Ombudsman is to consider the available information and determine from that information what is more likely to have happened based on the balance of probabilities.

Chronology

1. In January 2006, the Complainants responded to an advertisement by the Broker and applied for a loan to refinance a home loan they had with Lender A. Lender A was at this time seeking possession of their home in Orange, New South Wales.
2. The Complainants were both unemployed at the time they approached the Broker for the loan and were on Centrelink payments of \$1,160 per fortnight. Their unemployment was noted in the loan application form dated 30 January 2006.
3. The Complainants sought to borrow \$160,000 in total to pay out their existing home loan of \$140,000 with Lender A and borrow a further \$20,000 to convert their garage into a bedroom, as well as to repair and register their car.

4. Mr SM owns the Broker company. He originally indicated to the Complainants that he would arrange finance as follows:
 - \$139,000 to refinance their loan with Lender A;
 - \$26,000 for their own purposes (garage conversion and car expenses); and
 - 6 months' prepaid interest (ie. no repayments for the first six months).
5. On 27 January 2006, the Complainants received two letters of offer which they signed. However, the terms of these offers were subsequently amended unilaterally by Lender B on 17 February 2006, such that the first facility was for \$110,000 secured by a first mortgage, and the second for \$72,750 secured by a second mortgage.
6. The relevant provisions of the first facility were:
 - a. the loan was interest only and the applicable rate was fixed at 8.95% (plus 3% on default);
 - b. the repayments were \$820 per month;
 - c. the term of the loan was for 12 months;
 - d. before the expiry of the 12 month term, the Complainants were to refinance the loan, or sell the their property or payout their loan;
 - e. the loan was stated to be for business and investment purposes (or for both purposes);
 - f. legal costs of \$1,500 were payable irrespective of whether the loan proceeded, and the Complainants were to waive their right to have these costs assessed;
 - g. a non-refundable valuation fee of \$1,500 was payable, but if the valuation fee charged by the valuer was less than this amount, the Complainants were still required to pay the difference;
 - h. a mortgage manager's fee of \$1,000 (including GST) was payable;
 - i. interest was to "commence" 21 days from the date of the letter of offer (rather than by reference to the date of drawdown);
 - j. a caveat (at the cost of \$1,500) was authorised to be lodged on acceptance of the offer by the Complainants (although it is not clear what the caveat was intended to secure as no monies were advanced as at the date of the offer); and
 - k. there was listed in an annexure a number of items to be charged to the Complainants when the loans were settled, including a \$12,000 loan-arranging or brokerage fee and a \$660 consultant fee, both payable to the Broker. The amount of the pre-paid interest was listed as \$10,014, which appears to exceed 6 months' of interest payments.
7. The relevant provisions of the second facility were:
 - a. the loan was interest only and the applicable interest rate was fixed at 23.60%;
 - b. the Complainants were required to make a periodic payment of \$1,430 per month in advance;

- c. the Complainants were required to pay Lender B's legal costs of \$3,030; application fee of \$935 and discharge settlement fee of \$990;
 - d. an accountant's certificate confirming serviceability of the loan was required;
 - e. in the event of early repayment, a minimum of 6 months of interest was payable.
8. The Complainants were concerned that, given that the valuation of their home was less than they expected, they would not receive sufficient funds to renovate their home and repair and register their car. Consequently, the Broker arranged for the loan to be made without the 6 months' prepayment of interest.
9. The Complainants eventually received finance of \$182,317, comprised as follows:
 - first facility for \$110,000;
 - second facility for \$72,317; and
 - no prepaid interest (except one month's prepaid interest for the second loan).
10. From the loan proceeds of \$182,317:
 - \$145,440 was used to repay Lender A;
 - \$30,562 was used to pay a variety of fees and charges, including Lender B's legal fees (\$7,178), broker commissions (\$13,225) and consultant fees (\$660 x 2); and
 - the remaining \$6,315 was paid to the Complainants.
11. The loans settled on 17 February 2006. By March 2006, the Complainants had defaulted on their loans, and Lender B called up its loans.

Complainants' case

1. The Complainants say that Mr SM assured them that they could get a loan even though they were not employed. The loan would pay out the loan from Lender A, provide them with \$26,000 for their own purposes and allow a "repayment holiday" of 6 months.
2. The Broker subsequently advised the Complainants that Lender B required the loan to be structured as two facilities, but they would still receive \$26,000 and would not have to make repayments for 6 months.
3. The Broker asked the Complainants to travel to Sydney to sign the loan documents, but, unable to afford the cost of travel, the Complainants suggested that the loan documents be sent to them to enable them to consult a local solicitor and have the documents executed. The Complainants say that the Broker discouraged them from doing so, indicating that they would otherwise have to pay the costs of two solicitors.

4. The Complainants say that the Broker had the loan documents couriered to them (at a cost of \$495), and that they were asked to sign the documents and hand them back to the courier. This they did. Their signatures were not witnessed. According to the Complainants, they had no opportunity to seek legal advice and only one copy of the loan documents was presented for their signature (and consequently they were not provided with a copy of their own).
5. The loan documents were again sent to the Complainants (this time by post) as the documents had not been completed properly on the previous occasion. The Complainants say that they noticed that their signatures had been purportedly witnessed by someone named "PI". [This appears to be the same PI who witnessed Mr SM's statutory declaration on the caveat lodged against the Complainant's property and the licensee of a conveyancing firm which arranged for the settlement of loans from Lender B.]
6. The Complainants signed the loan documents again despite noticing that the amount of the loan had been reduced from \$26,000 to \$21,000. When they later asked Mr SM about it, they were advised over the phone that "the valuer had made a mistake" and that an amount of only \$21,000 would now be available. He suggested that the lender would forego the prepaid interest (\$14,006) and make that amount available to the Complainants provided they faxed him a letter which the Complainants say Mr SM dictated over the phone:

"TO [NAME OF THE BROKER] (MR SM)
 I EW - I PN OF [ADDRESS]. WISH TO REMOVE THE PREPAID INTEREST OF \$14,006.
 DUE TO OUR PAYOUT FIGURE FROM (NAME OF LENDER A) BEING HIGHER THAN
 WE EXPECTED AND KEPT (SIC) THAT AMOUNT FOR OURSELVES (SIC).
 AFFORDABILITY WON'T BE PROBLEM. WE ALSO CONFIRM THAT IT IS STILL ONLY
 A 12 MONTH LOAN. ALL FEES AND CHARGES HAVE BEEN DISCLOSED TO ME.
 THANKYOU. [SIGNED] EW AND PN. 16-02-06"

7. The Complainants say that they were advised by the Broker that they would receive a hand-written letter assuring them that the Broker would put the Complainants into a "normal loan" without delay and without costing any more. Instead, the Complainants received a fax, dated 16 February 2006, which stated:

DEAR (EW),

WE WOULD LIKE TO CONFIRM THAT UPON RE-FINANCING YOUR EXISTING PROPERTY, IT IS OUR EXPECTATION THAT FEES AND CHARGES WILL BE CONSIDERABLY LESS THAN THE CURRENT FINANCE. [SIGNED] MR NN, SENIOR LOANS CONSULTANT, [NAME OF THE BROKER].

8. A statement from the conveyancing firm indicates that \$7,178.50 was deducted from the loan proceeds for "Lender's legal fees".

Member's case

1. Mr NN, Sales Manager for the Broker, in his letter of 7 June 2006 to the Credit Ombudsman Service Limited, suggested that the loans were not regulated by the Consumer Credit Code. He points out that the Complainants acknowledged that the loans were for investment purposes in the two letters of offer (which were subsequently amended unilaterally) and the business purpose declaration signed by the Complainants on 16 February 2006. In the declaration, the Complainants acknowledged that (a) they were aware that the loan was "non-coded" and that if they failed to refinance the loan at the end of term, they would need to sell their property; (b) that 100% of the loan was for business/investment; (c) that the funds were to be used for investment purposes; and (d) that all fees had been disclosed to them.
2. Mr NN states that the property was valued by a licensed valuer and was found to be worth less than expected. This, as well as the higher than expected payout amount required to discharge the loan from Lender A, resulted in the loan amount available to the Complainants being less than originally anticipated. Mr NN cites the letter from the Complainants dated 16 February 2006 (referred to above in paragraph 6), in which the Complainants acknowledged that Lender A's payout figure was higher than they had expected; that affordability was not be a problem; that the loan was only for a 12 month term; and that all fees and charges had been disclosed.
3. Mr NN contends that the loan documents were couriered to the Complainants at their request as they were keen to receive the loan proceeds as soon as possible. He also asserts that it was the Complainants who asked the courier to remain until the loan documents were signed so the documents could be returned to the Broker via the courier.
4. Mr NN says that the loan documents were again sent to the Complainants (this time by post), so as to afford them the opportunity to obtain legal advice, not because they had not been properly completed on the previous occasion.

Issue and finding

The issue in the present case is whether the Broker's conduct was such as to have caused the Complainants to suffer a loss for which they are entitled to be compensated.

I find that the Broker demonstrated a lack of care, skill and diligence, and was negligent, in the performance of its duties as agent for the Complainants. The Complainants are entitled to be compensated².

Relevant considerations

In making a Determination in accordance with Rule 63 of the Credit Ombudsman Service Limited, I am required to have regard to:

- (a) applicable law;
- (b) the Code of Practice prescribed by the Finance Brokers' Association of Australia ("FBAA");
- (c) good practice in the credit industry; and
- (d) fairness in all the circumstances.

Reasons for decision

The reasons for my decision are set out below:³

Agency relationship

I consider that in arranging for Lender B to make the loans to the Complainants, the Broker acted as an agent for the Complainants, even if the Broker might have also received a commission from Lender B⁴. The fact that the Broker might have completed Lender B's forms, or arranged for the signing of documents, is not conclusive of an agency to Lender B.⁵

According to G E Del Pont,⁶ the reasonable expectation of both the intending borrower and of the lender is that a broker owes a duty to the borrower to act in the borrower's interests, and that as a consequence the lender cannot be liable as principal for defaults of the broker. Only if the broker is engaged by the lender as an agent, and this is made clear to the intending borrower, would it be unreasonable for the borrower to expect the broker to safeguard the borrower's interest.

I note that in his letter of 29 January 2007, Mr SM claims that the Broker was in fact only the "lead referrer", and that the "broker agreement" was not with the Broker. The Fee Agreement, dated 30 January 2006, to which Mr SM referred, is between the Complainants and Mr NN, whom Mr SM describes as an "independent consultant".

The Fee Agreement appoints Mr NN to act as an agent for the Complainants "to seek to arrange on (the Complainants') behalf a loan or loans as applied for". The remainder of the document is concerned with the fees that are payable and the features of the loan sought.

I do not however consider that the Fee Agreement reflects the true legal relationship between the Broker, the Complainants and Mr NN for the following reasons:

- the Complainants say that at all material times they were told that the Broker was arranging the loan, and there is nothing in the information available to me to indicate otherwise;
- Mr NN signed off as "Sales Manager" in a letter to COS dated 7 June 2006 when responding on behalf of Mr SM, and the letter was written on the Broker's letterhead;

- Mr NN, again on the Broker's letterhead, referred to himself in a letter dated 17 February 2006 as "Senior Loans Consultant, [name of Broker]";
- on the information available, Mr NN did not act independently, but as a representative of the Broker⁷;
- in the absence of an express authority to delegate, an agent engaged to perform a service involving personal skill and judgment has no implied authority to delegate its performance⁸. Consequently, if an agent delegates the performance of the agency, or part of it, to a third party without the authority of the principal, the agent is personally liable to the principal for any loss stemming therefrom⁹;
- a duty of care owed by the Broker to the Complainants can extend to an employee of the Broker if that employee comes within the scope of such a duty¹⁰. Therefore, if Mr NN was in fact the Broker's employee, the Broker is vicariously liable to the Complainants for the acts and omissions of Mr NN¹¹;
- the two letters of offer dated 27 January 2006 were signed (in print not under hand) by the Broker;
- it was the Broker, and not Mr NN, that received the brokerage fee of \$13,225. Mr NN and another named person (whose connection with the loan transaction is not apparent) received \$660 each;
- in his email to COS of 28 August 2006, Mr SM states that "As a broker, we do not believe we can provide you with any further information as we have demonstrated we have taken all necessary precautions to confirm our clients' intentions were legitimate"; and
- the authority to obtain credit information, dated 30 January 2006, authorised the Broker to act as the Complainants' agent in seeking access to their consumer credit information in connection with any application for credit and dealing with existing credit providers.

Consequently, I do not accept Mr SM's contention that the Broker did not act as a finance broker for the Complainants.

Implied duties of agent

Agency is almost invariably founded on a contract¹² made between principal and agent and like every other contract, the rights and duties of the principal and agent are dependent on the terms of the contract between them, whether express¹³ or implied.¹⁴

Implied into every contract of agency are terms requiring the agent to (a) act in accordance with the instructions contained in its express authority; (b) to act honestly and in good faith; (c) to exercise proper or reasonable care and skill in discharging its duties as agent and (d) to act for the benefit of its principle (fidelity, and the corresponding fiduciary duty).¹⁵ To this end, an agent must inform the principal of all matters material to the agency.¹⁶

If the agent holds himself or herself out to be following a particular trade or profession, the agent must show a degree of care and diligence which is exercised in the ordinary and proper course of the business for which he or she receives payment.¹⁷ The agent must exercise the degree of care, skill and diligence which is reasonably necessary for the due performance of the agency¹⁸. The measure of skill is an objective standard¹⁹.

Duty of care

The relationship of proximity between agent and principal gives rise to the duty of care in tort. This relationship of proximity derives from the agent assuming responsibility for the performance of the agency, and reliance by the principal on the agent to apply its knowledge and skill in the performance of the services.²⁰ In such circumstances, it is reasonably foreseeable that the failure by the agent to attain the standard required in assuming the responsibility may cause loss to its principal.

Duties under the FBAA Code

The Broker is also a member of the Finance Brokers' Association of Australia ("FBAA") and is contractually bound by the express terms of the FBAA's Code of Practice ("FBAA Code"). For the purposes of the FBAA Code, a finance broker is defined as being a person, corporation or partnership that, as an agent, in the course of business negotiates or arranges loans of money or other credit facilities on behalf of clients and is paid for that service either by the client or a credit provider or both.

One of the key objectives of the FBAA Code is to describe standards of good conduct and service to be expected of finance brokers. The objectives of the Code are intended to be achieved, and the provisions of the Code are to be applied, having regard to, among other things, the requirement of finance brokers to meet the standards established at common law and applicable Australian state, territory or federal statutory requirements²¹.

Clause 4.1 of the FBAA Code requires members of the FBAA to:

- (a) discharge their responsibilities and duties competently and with integrity and honesty;
- (b) act in the best interest of their client, but in a manner consistent with the finance broker's appointment document and the Code; and
- (c) exercise reasonable care and skill.

Breach of duty to act with due care and skill

I consider that the Broker breached its duty to act with due care and skill and in the interests of the Complainants for the following reasons:

- (a) Inappropriate finance

The loans from Lender B which the Broker arranged for the Complainants were unsuitable for the Complainants' purposes²². While the Complainants may have been anxious, perhaps desperate, to refinance their loan from Lender A which was in default, and while they were at risk of losing their

home, it does not follow that the Complainants were better off being offered the loans from Lender B.

Indeed, the repayments on the loans from Lender B were more than double those on the loan from Lender A. As a general proposition, if a borrower is in default of a loan because they cannot meet the repayments on their loan, then any refinance requiring repayments of the same or greater amount will not be appropriate for the borrower.

It may be that, given the Complainants' circumstances, no other loan was available, or available on less onerous terms, but I do not consider that that was reason enough for the Broker to have arranged the loans from Lender B for the Complainants. As an agent of the Complainants, the Broker was under an obligation to make enquiries about the Complainants' financial circumstances²³, consider what loans might have been available and assess which, if any, of those loans were suitable for the Complainants. It may be that none would have been suitable, in which case, the Complainants should have been told so.

I note that in a letter to COS, the Broker agreed with the Complainants' assertion that "They [the Broker] didn't even ask what I wanted the extra money for". If the Broker had little or no regard for the purpose of the loan, it is difficult to see how they could have assessed the suitability of the loan or considered what was in the interests of the Complainants.

(b) No reasonable assessment of capacity to pay

The Broker does not appear to have made any reasonable assessment of the Complainant's financial circumstances.

I note that clause 4.2(c) of the FBAA Code requires members of the FBAA to "make all reasonable enquires of the Client as to their income, assets, actual and contingent liabilities, repayment history with other creditors, or credit providers, details of any adverse credit or financial events...".

While the original proposal to provide the Complainants with a six-month "repayment holiday" would have obviated the need for the Complainants to make repayments during this period, there was every likelihood that the Complainants would not have been able to meet the repayments at the end of that six month period. The effect of a six-month repayment holiday is that the loan amount is increased correspondingly, and interest is charged on the increased amount.

I consider that the Broker was at best indifferent to the Complainant's ability to repay the loan.

The fact that the Complainants were unable to meet their repayments on the loan from Lender A should have put the Broker on notice, if they weren't already aware, that the Complainants were even less likely to meet higher repayments on the loans from Lender B, let alone repay the principal at the end of the 12 month loan term.

(c) Loan contracts not in Complainants' interest

In the negotiation of a contract an agent must take all reasonable precautions that may be necessary for the protection of the principal²⁴.

I consider that a finance broker's duty to act in the interests of its client and with due care, skill and diligence, would preclude the finance broker from arranging finance:

- (a) on terms that may be considered unjust within the meaning of the Contracts Review Act (NSW) 1980²⁵; or
- (b) so as to deliberately or purportedly exclude the operation of beneficial legislation (such as the Consumer Credit (NSW) Code) designed to provide some degree of consumer protection.

I have not considered the application of section 70 of Contracts Review Act (NSW) 1980 as Lender B is not a member of the Credit Ombudsman Service. However, on the information available to me, it is arguable that the terms of the loans from Lender B are unjust.

Consumer Credit (NSW) Code

The loans from Lender B were documented as business loans.

Mr SM relies on a business purpose declaration signed by the Complainants on 16 February 2006 which has the effect of, if valid, ousting the application of the Consumer Credit (NSW) Code, which only applies where the credit is for personal, domestic or household purposes²⁶.

A loan is presumed conclusively not to be provided wholly or predominantly for personal, domestic or household purposes if a borrower declares, before entering into the loan contract, that the loan is to be applied wholly or predominantly for business or investment purposes (or for both purposes).²⁷

The Complainants contend that the loan was in fact for personal, domestic or household purposes, but that they signed the business purpose declaration because they were requested by the Broker to do so. I consider that the false declaration may also be attributed to the Complainants' anxiousness to acquire the loan and their weak bargaining position. The fact that the Complainants provided a false declaration is not fatal to their claim²⁸.

The Complainants say that Mr SM knew that loans from Lender B were for personal purposes, given that the loans were intended to refinance the existing loan from Lender A which was secured by a mortgage over their home²⁹.

Mr SM points out that refinancing an existing home loan does not necessarily mean that the loan is for personal, domestic or household purposes. The existing loan may have been used for investment purposes – for example, the purchase of shares or an investment property or to start up a business.

On the present facts, however, it is more likely than not that the Broker knew or had reason to believe that the loans from Lender B were for personal, domestic or household purposes. Common sense would have suggested that the Complainants, having defaulted on their loan from Lender A; being unemployed with four dependent children and on Centrelink payments, were unlikely to have taken out a loan eight months earlier to purchase an investment portfolio or start up a business.

I therefore consider that the business purpose declaration signed by the Complainants is ineffective (and the Consumer Credit (NSW) Code applies to the loans from Lender B), on the basis that the Broker knew, or had reason to believe, that the loans from Lender B were in fact to be applied wholly or predominantly for personal, domestic or household purposes.³⁰

It is also arguable that the business purpose declaration was not substantially in the form required by the Consumer Credit Regulations and therefore ineffective.³¹ It contained other material not prescribed by the Regulations, including a reference to an expression widely used in the industry: "non-coded"; ie. not regulated by the Consumer Credit Code. I consider the use of this expression in the business purpose declaration is likely to confuse a potential borrower and is not consistent with the intent of section 162 Consumer Credit (NSW) Code which requires a credit contract, mortgage or guarantee or a notice given by a credit provider to be easily legible and clearly expressed³².

Consumer Credit Administration Act 1995

It follows that if the loans from Lender B were subject to the Consumer Credit (NSW) Code, the provisions of the Consumer Credit Administration Act 1995 (NSW) (CCAA) applied to and in respect of the Broker in its capacity as a finance broker³³ engaging in finance broking³⁴.

I consider that the Broker did not comply with the following requirements of the CCAA:

- (a) the Broker did not enter into a written finance broker contract³⁵ with the Complainants³⁶;
- (b) even if the Fee Agreement between Mr NN and the Complainants dated 30 January 2006 constitutes a finance broking contract, it does not set out some of the matters prescribed by the CCAA³⁷; and
- (c) the Complainants did not receive a copy of the finance broking contract³⁸.

Consequently, having failed to comply with the above requirements, the Broker is prohibited from demanding, receiving or accepting any commission from the Complainants³⁹.

(d) Complainants financially worse off

I consider that the Complainants were financially worse off having borrowed from Lender B. To illustrate, the tables below compare the features of the loan from Lender A with those of the loans from Lender B.

Amount borrowed		Interest rate		Monthly repayment	
Lender A	Lender B	Lender A	Lender B	Lender A	Lender B
\$145,440	\$182,317	8.5%	\$110,000 at 8.95% \$72,317 at 23.60%	\$1,038	\$2,250

Term of loan		*Remaining equity in home	
Lender A	Lender B	Lender A	Lender B
360 months	12 months	32%	15%

* based on appraised value of \$215,000 as at 3 March 2006.

(e) No alternative products offered

I also consider that the Broker did not act in accordance with Clause 4.1(q) of the FBAA Code, which requires a finance broker to:

"ADVISE THE CLIENT OF THE TYPES OF LOAN PRODUCTS THAT THE FINANCE BROKER CAN OBTAIN FOR THE CLIENT, EXPLAIN THE DIFFERENCES BETWEEN VARIOUS TYPES OF LOAN PRODUCTS AND INFORM THE CLIENT WHICH CREDIT PROVIDERS THE FINANCE BROKER DEALS WITH"

The Complainants assert that they were not offered alternative finance by the Broker, and that they understood that the finance that was being arranged by the Broker was an ordinary residential mortgage. However, the finance arranged was anything but an ordinary residential mortgage. I consider that the loans from Lender B were of such a nature that the only way the Complainants could have repaid the loans was to sell their home or else (if at all possible) obtain another loan for a larger amount⁴⁰.

There is a view that a non-conforming loan can provide an opportunity for a borrower with, for example, a tarnished credit history, to establish a good credit record with a view to subsequently refinancing the non-conforming loan (which is typically at a higher interest rate) with a loan at a lower interest rate from a "mainstream" lender.

Whatever the merits of this view, I am not persuaded that in the present case the Broker reasonably believed that the Complainants would have been able to meet their obligations under Lender B's loans and refinance into a less expensive loan at a later date.

Yet in a fax dated 16 February 2006, the Broker stated:

"WE WOULD LIKE TO CONFIRM THAT UPON RE-FINANCING YOUR EXISTING PROPERTY, IT IS OUR EXPECTATION THAT FEES AND CHARGES WILL BE CONSIDERABLY LESS THAN THE CURRENT FINANCE. [SIGNED] [MR NN], SENIOR LOANS CONSULTANT, [NAME OF THE BROKER]."

Mr SM, in his letter of 11 October 2006, interpreted the above as saying that "when the Broker re-financed their 1 year mortgage which we were in the process of arranging, we would arrange a 30-year non-coded loan with cheaper establishment fees and charges prior to settlement".

Considering that:

- the Complainants had previously defaulted on their loan with Lender A;
- were unemployed with 4 dependent children and another on the way;
- were on Centrelink payments of \$1,160 per fortnight; and
- were expected to make repayments of \$2,250 per month,

it was highly unlikely, if not impossible, that the Complainants could have made the repayments under Lender B's loans; repaid the principal at the end of the 12 months or refinanced into a less expensive loan at a later date.

Consequently, I am of the view that the Broker's statement of 16 February 2006 was misleading and deceptive or was likely to mislead or deceive⁴¹.

Mr SM, in his letter of October 2006, asserts that "the details or specifics of the existing mortgage to [name of Lender A] have no relevance or bearing on this matter".

By his own admission, however, later in the same letter, Mr SM states that: "Through our discovery, after careful calculation, we can only assume (the Complainants) would have missed nearly every payment in the short time of 8 months with [name of Lender A] to incur a payout figure this high."

I can only conclude that the reason the Broker did not undertake this exercise at the time of arranging the loans from Lender B is because it was indifferent as to whether the Complainants could repay the loans. Indeed, Mr SM asserts that the Broker was not aware that the Complainants were unemployed.

He points to the Mortgage Purchase Application, undated, in which the Complainants are listed as "self-employed". Yet a document in the same hand-writing states that the Complainants were unemployed. This document bears the fax transmission date of 27 January 2006 and appears to predate the Mortgage Purchase Application.

Mr SM also considers that he was entitled to rely on a fax from the Complainants to the Broker:

TO "[NAME OF BROKER] (MR SM)
I EW - I PN OF [ADDRESS]. WISH TO REMOVE THE PREPAID INTEREST OF \$14,006.
DUE TO OUR PAYOUT FIGURE FROM [NAME OF LENDER A] BEING HIGHER THAN
WE EXPECTED AND KEPT (SIC) THAT AMOUNT FOR OURSELVES (SIC).
AFFORDABILITY WON'T BE PROBLEM. WE ALSO CONFIRM THAT IT IS STILL ONLY
A 12 MONTH LOAN. ALL FEES AND CHARGES HAVE BEEN DISCLOSED TO ME.
THANKYOU. [SIGNED] EW AND PN. 16-02-06"

However, on balance, I prefer the Complainants' version of the circumstances surrounding this fax; that is, that Mr SM dictated these words over the phone. It is more likely than not that a borrower would not volunteer an assurance that the loan was affordable, confirm that the loan was (still) for 12 months and acknowledge that all fees and charges had been disclosed, unless they were asked to do so.

The Broker also claims that the Complainants' accountant provided a letter to the lenders stating that they could afford the loans from Lender B. The amended letter of offer dated 17 February 2006 required the Complainants to provide an "Accountant's Certificate confirmation serviceability and loan details". However, the Broker has failed to provide a copy of this document despite being requested to do so. I find it extremely difficult to accept that a qualified accountant could, having regard to the Complainants' financial circumstances and the required repayments under the loans, attest to the Complainants' ability to afford the loan⁴².

Possible remedies

1. No finance broker agreement

As noted above, if the loans from Lender B were regulated by the Consumer Credit (NSW) Code, as I have suggested, the Broker was prohibited from receiving, demanding or accepting the not insubstantial commissions paid by the Complainants to the Broker and the "consultants".

Under section 4C(4) of the Consumer Credit Administration Act (NSW), the Complainants are entitled to recover these commissions.

2. Suitability of purpose - section 12ED ASIC Act

Lender B's loans were unsuitable for the Complainants' purposes. The Complainants assert that they understood that the finance being arranged by the Broker was an ordinary residential mortgage.

Under section 12ED(1) ASIC Act, in every contract for the supply of financial services⁴³ by a person to a consumer in the course of a business, there is an implied warranty that (a) the services will be rendered with due care and skill; and (b) any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.

Furthermore, under section 12ED(2), if a person supplies financial services to a consumer and the consumer, expressly or by implication, makes known to the person any particular purpose for which the services are required or the result that he or she desires the services to achieve, there is an implied warranty that the services and materials supplied will be reasonably fit for that purpose or are of such a nature or quality that they might reasonably be expected to achieve that result⁴⁴.

Under section 12FF ASIC Act, the Complainants may recover the amount of the loss or damage from the Broker.

3. Misleading and deceptive conduct – Section 12DA ASIC Act

The Broker's statement to the Consumers on 16 February 2006 that, upon the refinance of the loans from Lender B, they expected that the fees and charges of the next loan to be considerably less than those of Lender B, was without foundation in the circumstances, and was misleading and deceptive or was likely to mislead and deceive under section 42 Fair Trading Act (NSW) 1987 and section 12DA(1) ASIC Act 2001.

A person who suffers loss or damage by the conduct of another person in contravention of section 42 Fair Trading Act (NSW) 1987 may recover the amount of the loss or damage.⁴⁵ Where a person is found to have breached section 12DA ASIC Act, a court may order the person to pay damages, and/or make 'other orders', including an order declaring the contract void, varying the contract, or refusing to enforce any of the provisions.

4. Unconscionability - section 12CB ASIC Act

As noted above, if the loans from Lender B were regulated by the Consumer Credit (NSW) Code as I have suggested, I consider that the Broker engaged in conduct that was unconscionable within the meaning of section 12CB ASIC Act.⁴⁶

Under section 12CB(1) ASIC Act 2001⁴⁷, a person must not in connection with the supply or possible supply of financial services,⁴⁸ engage in conduct that is, in all the circumstances, unconscionable⁴⁹.

I consider that the Broker would have been aware that the Complainants (a) were not sophisticated in financial affairs; (b) had defaulted on the loan from Lender A; and (c) were anxious, if not desperate, to avoid losing their home. The Broker was also aware, despite their subsequent protestations, that the Complainants were unemployed and in receipt of Centrelink payments.

I consider that the Broker took unconscientious advantage of its position as their agent by arranging a loan for the Complainants that (a) required repayments of more than double those of the loan from Lender A; (b) that was significantly larger than the loan from Lender A, primarily because of the excessive broker commissions and lenders' fees charged; (c) that significantly reduced the equity in the value of their home; and (d) that was secured over their only asset, their home.

Under section 12GF ASIC Act, the Complainants may recover the amount of the loss or damage from the Broker.

5. Breach of FBAA Code of Practice

The FBAA Code of Practice is contractually binding on the Broker. I am required to have regard to the provisions of that Code in determining if the Broker's conduct was such as to have caused the Complainants to suffer a loss for which they are entitled to be compensated.⁵⁰

As a result of the Broker breaching the FBAA Code, I consider that the Complainants are entitled to compensation based on damages for breach of contract and negligence in tort⁵¹.

6. Disentitlement of commission under general law

There is ample case law to suggest that, in view of its conduct, the Broker is not entitled to the commission it received from the Complainants.

(a) Unless a principal agrees to pay an agent a retainer, the agent must do what the contract of agency requires in order to justify the claim to payment⁵². In other words, an agent's right to payment of commission is contingent on the agent discharging its obligations under the agency.

Where no definitive instructions have been given to the agent, or where the instructions leave a discretion to him or her, the agent must be guided by the honest exercise of his or her own judgment and the interest of the principal.⁵³ If the instructions leave alternative courses open to the agent, no liability will be incurred if the agent acts reasonably and bona fide⁵⁴, but circumstances might give rise to a duty to make further inquiries as to instructions, in breach of which the agent may be liable in negligence.⁵⁵

(b) The Courts have found that an agent may be unable to recover remuneration where the agent:

- (i) breached a duty owed to the principal⁵⁶;
- (ii) was guilty of misconduct⁵⁷;
- (iii) was negligent in the performance of the agent's duties⁵⁸;
- (iv) breached any fiduciary duty⁵⁹;
- (v) was guilty of wilful misconduct⁶⁰; breach of faith (whether or not the principal has suffered loss⁶¹, or breach of duty⁶²; or
- (vi) concluded a transaction which differed substantially from the transaction mandated⁶³.

(c) Furthermore, an agent is not entitled to receive any remuneration in respect of a transaction resulting from the agency which differs substantially from that which the agent was engaged to procure⁶⁴

7. Damages under tort law

The Broker can be described as having been negligent and its liability can be expressed as a tort⁶⁵.

Agents can have concurrent liability in both contract and tort⁶⁶. The most obvious example of dual liability is where the parties have entered into a contract for the rendering of services by one of them. As noted above, in the present case an implied term of the agency agreement between the Broker and the Complainants was that the services would be rendered by the Broker with due care and skill. The FBAA Code also prescribes standards which its members, including the Broker, are contractually bound to comply. As such, negligent breach will ground an action for breach of contract⁶⁷. Such negligence will also ground liability by reference to the tort of negligence.⁶⁸

Liability for negligent performance of a professional task can give rise to a duty on the part of a professional person to exercise reasonable care in carrying out the tasks for which they have been retained so as not to cause the client foreseeable economic loss. The relationship is based on reliance and responsibility⁶⁹.

As the Broker held itself out as having a particular skill then it should be judged by the standard of those people who possess that skill⁷⁰ or the standards prescribed by the FBAA Code. I consider that the Broker failed to meet the requisite standard. In determining whether or not a breach of duty has occurred, I am of the view that the risk that the Complainants would suffer economic loss was significant (and certainly not far fetched or fanciful⁷¹), but not so obvious as to have excused the Broker from warning the complainants of the risk⁷². The loss or damage to the Complainants was directly caused by the Broker's breach of duty and the Complainants were financially worse off as a result.⁷³

For damages to be recovered, the Broker does not have to have foreseen the precise extent of the damage.⁷⁴ It is sufficient if damage of the kind which occurred could have been foreseen in a general way.⁷⁵ In the present case the loss was foreseeable and the factual causal connection is self-evident.

8. Damages under contract law

The Complainants are entitled to damages for loss suffered as a result of the Broker not having acted with skill, care and diligence.⁷⁶ The Broker's liability can be expressed as a breach of contract⁷⁷.

I consider that the Complainants should not be denied damages simply because the possibility of them finding alternative affordable finance at the time they applied for the loans was remote, speculative or not ascertainable.⁷⁸ Losses directly incurred provide a legitimate basis for compensation.

The High Court has stated that the sole object of contract damages is to put the plaintiff in the position as if the contract had been performed;⁷⁹ that is, as if the breach had not occurred. (The present rule is that there is no

restitutionary remedy unless there has been a “total” failure of consideration.⁸⁰⁾

Under the rule in *Hadley v Baxendale*⁸¹, the Complainants can recover damages for losses that (a) flow ‘naturally’ or ‘according to the usual course of things’ as a result of the breach of contract, or (b) such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach.

The practical effect of the first limb of *Hadley v Baxendale* is that where the Broker has breached its contract with the Complainants and has caused the Complainants loss, the Complainants are able to recover that loss where a reasonable person would have expected such a loss to flow from the Broker’s breach.

The assessment of damages in contract is “a pragmatic subject ..(which) does not lend itself to hard-and-fast rules”.⁸² For this reason, a Court will have to go back to the very broad *Robinson v Harman* principle,⁸³ and use its “common sense”.⁸⁴ The “real question” is always: “what damage has the plaintiff really suffered from the breach?”.⁸⁵

Losses can take an infinite variety of forms. In the present case it is appropriate to assess damages on the basis of wasted expenditure rather than promised benefits.⁸⁶ I consider that compensation should be awarded to the Complainants for expenditure reasonably incurred in performing their part of the bargain (“reliance damages”). Generally damages are not recoverable for any disappointment, distress, injured feelings or mere inconvenience.⁸⁷

The following is a list of disbursements that were deducted from the proceeds of the loans from Lender B at the time of settlement.

I consider that not all of these can be refunded to the Complainants on the basis that (a) they were paid to third parties⁸⁸ or (b) they would have nonetheless been incurred by the Complainants had they applied for a different loan, or (c) the Complainants had the benefit of them.

Description:	Amount:
Lender B’s Legal Fees	\$7,178.50
Lender B’s Stationer’s Fees	\$110.00
Lender B’s registration fees	\$309.00
Mortgage Duty	\$630.00
Title Insurance Fee	\$143.88
Lender B’s settlement attendance fees	\$200.00
Water Rates	\$104.94
Council Rates	\$909.38
One Month in advance on 2 nd facility	\$1,514.33
Lender B’s application fee	\$175.00
Lender A’s pay out	\$145,440.27
Discharging mortgagee’s solicitors fees	\$2,800.06
Bank Cheque Fees	\$unascertainable
[Name of Broker] – Broker commission	\$13,225.00 (comprising a commission of \$12,000, courier fee of \$495, and part payment for valuation \$730)
Mr NN (Consultant’s fee)	\$660.00

Ms EM (Consultant's fee)	\$660.00
Valuers	\$500.00
FR Accounting and Taxation Services	\$375.00
Agency Fee	\$132.54
Title Search Fee	\$9.90
Conveyancing firm	\$924.00

I propose that the Broker compensate the Complainants for the following costs:

1.	The Broker's commission and "consultant" fees to Mr NN and Ms EM - \$14,545, less part payment of valuation fee of \$730	\$13, 815.00
2.	Lender B's legal fees: \$7,178.50, less estimate of reasonable legal fees, \$1,000	\$6,178.50
3.	FR Accounting and Taxation Services	\$375.00
		\$20,368.50

Dated May 2007

Raj Venga
Credit Ombudsman

¹ This is a reference to the *Second Edition of the Rules of the Credit Ombudsman Service Limited, dated 1 January 2006*. Under COS Rule 57, the Credit Ombudsman can propose a Determination Settlement on terms which appear to the Credit Ombudsman to be fair to both the Complainant and the Member. A Determination Settlement may include a requirement that the Member pay the Complainant compensation for any direct loss the Credit Ombudsman determines the Complainant has suffered up to a maximum of \$100,000 (or other limit set by the Board). The amount of compensation will be what the Credit Ombudsman believes is sufficient but not more than is required to compensate the Complainant for their direct loss. Under COS Rule 58, a Determination Settlement may also include an order that the Member do or refrain from doing some act in relation to the subject matter of the complaint. Under COS 68, the Credit Ombudsman may make any orders he or she thinks are appropriate to give full effect to the Determination Settlement.

² *Heywood v Wellers (a firm) (1976) 1 All ER 300 at 307*, per Lord Denning.

³ Under COS Rule 65, any Determination Settlement is required to be in writing and include a statement of reasons.

⁴ In *Con-Stan Industries of Australia Pty Limited v Norwich Winterthur Insurance (Australia) Limited (1986) 160 CLR 226 No. F.C. 86/012*, the High Court said (at 234): " under the general principles of the law of agency, a broker is the agent of the assured, not the insurer. There will be rare circumstances in which a broker may also be an agent of the insurer, but the courts will not readily infer such a relationship because a broker so placed faces a clear conflict of interest between his duty to the assured on the one hand and to the insurer on the

other." That was said in the context of an insurance broker, but it has been applied to a finance broker: see, for example, *Custom Credit Corporation Ltd v Lynch* [1993] 2 VR 469 and *Octapont Pty Ltd v Esanda Finance Corporation Ltd*, unreported; SCT of NSW (Cole J); 3 February 1989.

⁵ *Brainwhite v Worcester Works Finance Ltd* (1969) 1 AC 552 at 577, per Lord Upjohn.

⁶ G E Dal Pont *Law of Agency* Butterworths 2001.

⁷ In *Scott v Davis* (2000) 204 CLR and *Hollis v Vabu* (2001) 207 CLR 21, McHugh J instead of relying on the traditional distinction between employees and independent contractors to found liability, considered that the principal was vicariously liable for the acts of its agent.

⁸ *Powell & Thomas v Evan Jones & Co* 91905) 1 KB 11 at 22, per Mathew LJ.

⁹ G E Dal Pont cites *Christe v McCann* (1972) 27 DLR (3rd) 544 at 547 per Evans J in the Ontario Court of Appeal.

¹⁰ *Roots v Oentory Pty Limited* (1983) 2 Qd R 745; *Stewart v Hooker* (1988) 2 NZBLC 103, 446; and *Sykes v Colson* (1988) ANZ Conv R 250 at 254 per Thomas J.

¹¹ According to G E Dal Pont, the tortious duty to the principal can extend to an employee of an agent if that employee comes within the legal boundaries of such a duty, in which case the agent is vicariously liable to the principal for the acts or omissions of its employee - *Sykes v Colson* (1988) ANZ Conv R 250 at 255 per Thomas J. However, the authors of *Bowstead and Reynolds on Agency* take a narrower view. Whilst they acknowledge that the principal is liable for tortious conduct of the agent when he or she was acting in the course of his or her employment, they limit this to cases where the agent is *also* a servant. Where the agent is not also a servant, liability will only ensue: (a) when the principal authorised or ratified the tortious conduct; (b) when the principal has breached a non-delegable duty of care; or (c) (perhaps) in the case of a statement made in the course of representing the principal, made within the actual or apparent authority of the agent.

¹² But agency need not be contractual – the notion of fiduciary obligation stems from equity and is independent of contract. According to *Re Goldcorp Exchange Limited* (1995) 1 A.C.74 at 98 per Lord Mustill, the essence of a fiduciary obligation is that it creates obligations of a different character from those deriving from contract itself.

¹³ Express agency is created where the principal, or some person authorised by the principal, by express agreement appoints the agent, either by deed, by writing under hand or by parol – *Burton v Regina City Policemen’s Association, Local No. 155* (1945) 3 DLR 437 at 456, per MacDonald JA, Saskatchewan Court of Appeal.

¹⁴ *Kelly v Cooper* (1993)A.C. 205 at 213-214, per Lord Browne-Wilkinson.

¹⁵ *Samper v Hade* (1889) 10 LR (NSW) L 270 at 273 per Daley CJ; *Lysaght Bros & Co Ltd v Falk* (1905) 2 CLR 421 at 439 per O’Connor J; *Lister & Romford Ice and Cold Storage Ltd* (1957) AC 555 at 572 – 3 per Viscount Simonds, at 586-7 per Lord Radcliffe; and *Ipp J in Heytesbury Pty Ltd v Kelly SC(WA)*, Ipp J, No 1629 of 1993, 15 April 1997, unreported.

¹⁶ *Samper v Hade* (1889) 10 LR (NSW) L 270 at 273 per Daley CJ.

¹⁷ *Beal v South Devon Railway Co* (1864) 3 H & C337 at 342; *Ali v Hartley Poyton Ltd* (2002) 20 ACLC 1006.

¹⁸ *Claude Ogden v Reliance Fire Sprinkle Co* (1973) 2 NSWLR 7.

¹⁹ *Commonwealth Bank of Australia v Friedrich* (1991) 5 ASCR 115 at 126 per Tadgaell J.

²⁰ *Hawkins v Clayton* (1988) 164 CLR 539 at 578 per Deane J; *Waimond Pty Limited v Bryne* (1989) 18 NSWLR 642 at 653 per Kirby P.

²¹ <http://www.fbaa.com.au/code-of-practice-1.php#Outline>

²² Under section 12ED ASIC Act, in every contract for the supply of financial services by a person to a consumer in the course of a business, there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.

²³ Clause 4.2(c) FBAA Code of Practice.

²⁴ *Heys v Tindall* (1861) 1 B & S 296; 121 AER 724; *Smith v Barton* (12866) 15 LT 294.

²⁵ Section 7 Contracts Review Act (NSW) 1980 was applied recently in *Perpetual Trustees Co Ltd v Khoshaba* (2006) NSWSC 41; and see section 70(2)(l) of the Consumer Credit (NSW) Code, as applied recently in *Permanent Mortgages v Cook* [2006] NSWSC 1104, if the business

purpose declaration obtained from the Complainants by the Broker is ineffective under section 11(3) of the Consumer Credit (NSW) Code.

²⁶ Section 6(1)(b) Consumer Credit (NSW) Code.

²⁷ Section 11(2) Consumer Credit (NSW) Code.

²⁸ Permanent Mortgages v Cook [2006] NSWSC 1104

²⁹ Gillard J in Linkenholt Pty Limited v Quirk (2000) VSC 166 was of the view that it was appropriate to consider what the money was used for in order to determine the purpose of the loan.

³⁰ Under section 11(3) Consumer Credit (NSW) Code, a declaration is ineffective if the credit provider or a person associated with the credit provider or a finance broker (or a person acting for a finance broker) knew, or had reason to believe, at the time the declaration was made that the credit was in fact to be applied wholly or predominantly for personal, domestic or household purposes.

³¹ Section 11 (4) Consumer Credit (NSW) Code; Regulation 10 Consumer Credit Regulations 1995

³² Although the business purpose declaration is not *given by the credit provider*, the fact remains that the declaration is prepared by the credit provider, and ought, so far as possible, be consistent with the intent of section 162 Consumer Credit (NSW) Code.

³³ Section 4B CCAA.

³⁴ Under section 3(3) CCAA, a person "engages in finance broking" if the person ("the intermediary") acts, or purports to act, as an intermediary to negotiate and obtain consumer credit for a person in return for a commission or financial benefit, whether payable to the intermediary by the person, the credit provider or any other person or body.

³⁵ Under section 3 CCAA "finance broking contract" means a contract between a finance broker and a client under which the finance broker agrees to engage in finance broking on behalf of the client.

³⁶ Section 4C(1)(a) CCAA.

³⁷ Sections 4C(1)(c) and 4C(3)(f)(g) and (h) CCAA.

³⁸ Section 4C(1)(d) CCAA.

³⁹ Section 4C(4) CCAA.

⁴⁰ Permanent Mortgages v Cook [2006] NSWSC 1104

⁴¹ Section 42 Fair Trading Act (NSW) 1987; section 12DA(1) ASIC Act 2001.

⁴² King Mortgages v. Satchithanatham [2006] NSWSC 1303, where the accountant certified that she knew Mrs Satchithanatham's income and expenditure and was satisfied that Mrs Satchithanatham could repay the loan without substantial hardship. The judge rejected the efficacy of the accountant's certificate on the basis it was adapted from a form supplied by the lender and that the accountant did not actually make enquiries relating to the Satchithanatham's employment.

⁴³ Under section 12BAB(1)(g) ASIC Act 2001, a person provides a financial service if it is supplied in relation to a financial product. Under section 12BAA(7), a financial product includes a credit facility, as defined in regulations 2B(1)(a) and 3(a) ASIC Regulations 2001.

⁴⁴ except if circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the person's skill or judgment.

⁴⁵ Section 68 Fair Trading Act (NSW) 1987.

⁴⁶ In Hurley v McDonald's Australia Ltd (2000) ATPR 41-741 at 4,585, the Full Court of the Federal Court, in an oft-quoted passage, said in relation to s 51AC Trade Practices Act: "For conduct to be regarded as unconscionable, serious misconduct or something clearly unfair or unreasonable, must be demonstrated ... whatever unconscionable means in s 51AB and s 51AC, the term carries the meaning given by the Shorter Oxford Dictionary, namely, actions showing no regard for conscience, or that are irreconcilable with what is right or reasonable ... The various synonyms used in relation to the term 'unconscionable' import a pejorative moral judgment ..."

⁴⁷ Section 12CB ASIC Act only applies where the financial services were of a kind ordinarily acquired for personal domestic and household purposes – section 12CB(5).

⁴⁸ See footnote 43.

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- ⁴⁹ Section 12CB(2) ASIC Act sets out some of the matters that a Court may have regard to when determining if there has been a contravention of section 12CB(1). The Court is not precluded from having regard to other matters that may be relevant.
- ⁵⁰ Rule 63 of the Credit Ombudsman Service Limited
- ⁵¹ *Hudson v Wiseman* (1986) WAR 156.
- ⁵² *Luxor (Eastbourne) Ltd v Cooper* (1941) AC 108.
- ⁵³ *Chown v Parrot* (1863) 14 CBNS 74; 143 ER 372.
- ⁵⁴ *Thirnley v Tilley* (1925) 36 CLR 1 at 12; 31 ALR 291.
- ⁵⁵ *Velijkovic v Vrybergen* (1985) VR 419 at 424-5.
- ⁵⁶ *Columbus v Williamson & Co* (1969) NZLR 708.
- ⁵⁷ *Mailer v Forge* (1927) 27 SR (NSW) 69.
- ⁵⁸ *Dalton v Irwin* (1830) 4 Car & P 289; 172 ER 708.
- ⁵⁹ *LS Harris Trustees Ltd (t/as LS Harris & Co) v Power Packing Services (Hermit Road) Ltd* (1970) 2 Loyd's Rep 65 (QB); *Salomans v Pender* (1865) 3 H&C 639; 159 ER 682.
- ⁶⁰ *Lunghi v Sinclair* (1966) WAR 172.
- ⁶¹ *Salomons v Pender* (1865) 3 H & C 639.
- ⁶² *Erikson v Carr* (1946) 46 SR (NSW) 9 at 14-15 per Jordon CJ.
- ⁶³ *Blocksidge & Ferguson Ltd v Campbell* (1947) St R Qld 22; *Lord v Trippe* (1977) 14 ALR 129; ALJR 574.
- ⁶⁴ *Toulmin v Millar* (1887) LR 12 App Cas 746, HL
- ⁶⁵ *Kendall v Doutrebande* (1891) 12LR (NSW) 51.
- ⁶⁶ *Hawkins v Clayton* (1988) 164 CLR 539, 78 ALR 69. See also J Swanton, "The Convergence of Tort and Contract" (1989) 12 Syd. LR 40). A tortious duty, to exist concurrently with a contractual obligation, "must not be so inconsistent with the applicable contract that....the parties must have taken to have agreed that the tortious remedy is to be limited or excluded".(*Henderson v Merrit Syndicates Ltd* (1995) 2 AC 145 (HL).
- ⁶⁷ *Hudson v Wiseman* (1986) WAR 156.
- ⁶⁸ Unless the law excludes such resort and confines the plaintiff to a contractual remedy.
- ⁶⁹ *Hawkins v Clayton* (1988) 164 CLR 539.
- ⁷⁰ *Nettleship v Weston* [1971] 2 QB 691
- ⁷¹ *Wyong v Hertfordshire CC* (1954) 146 CLR 40.
- ⁷² *Wood v Multi-Sport Holding Pty Ltd* (2002) 208 CLR 460.
- ⁷³ In establishing causation, the traditional test, applied in both contract and tort, is the 'but for' test. This test requires a court to be satisfied that the loss would not have occurred but for the breach of contract or tort. The issue of causation is a question of fact.
- ⁷⁴ *March v Stramare (E. and M.H.) Pty. Ltd.* [1991] HCA 12; (1991) 171 CLR 506 F.C. 91/010 (1991) 9 BCL 215 (24 April 1991).
- ⁷⁵ *Hughes v. Lord Advocate* (1963) AC 837.
- ⁷⁶ *Money Penny v Hartland* (1824) 1 C. & P. 352
- ⁷⁷ *Heytesbury Pty Ltd v Kelly* (SC(WA) No 1629 of 1993, 15 April 1997, unreported).
- ⁷⁸ *Holt v United Security Life Ins. And Trust Co.* (1909) 72 Atlantic Reporter 301, at pp 305-306.
- ⁷⁹ *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.
- ⁸⁰ *McRae v Commonwealth Disposals Commn* (1951) 84 CLR 377. Indeed, following *Baltic Shipping v Dillon* (1993) 176 CLR at 350, 375, 389, it appears that recovery of restitution loss must proceed under the law of restitution rather than for damages for breach of contract.
- ⁸¹ *Hadley v Baxendale* (1854) 9 Ex 341
- ⁸² *Takaro Properties Ltd v Rowling* (1986) 1 NZLR 22, per Cook J at p 69.
- ⁸³ *Robinson v Harman* (1848) 1 Ex 850 at 855, per Parke B – damages are compensatory only and are to be assessed on the basis that the aggrieved party is to be put in the same position which he or she would have enjoyed had the contract been (fully) performed.
- ⁸⁴ per Oliver J in *Radford v De Froberville* (1977) 1 WLR 1262 at 1272.
- ⁸⁵ per Denning LJ in *Duke of Westminster v Swinton* (1948) 1 KB 524 at 534).
- ⁸⁶ *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, per Mason CJ and Dawson J at 86.
- ⁸⁷ *Falko v James McEwan & Co* (1977) VR 447.

⁸⁸ however, where the disbursements are not reasonable or evidence of the service has not been provided as requested, the disbursements should be refunded to the Complainants, or should be refunded to the extent that they are not reasonable.