
Index

Ackers v Saad Investments Co Ltd

- background, 315
- decision in *Ackers* (No 2), 316-317
- modification of orders, arguments against, 315-316
- protecting local creditors
 - international insolvency, 315-318

Administrative charges

- Japan, 83-84

Agripay Pty Ltd v Byrne

- wife as guarantor for husband, 187-188

Amadio

- third party guarantees, 183-184

Anti money laundering

- New Zealand, 85-90
 - compliance with FATF recommendations, 86-87
 - electronic identity verification, 88
 - risk-based approach, 87
 - technology, impact on, 88
 - territorial scope of legislation, 87-88
 - trusts, and, 88-89

Arbitration

- banking, in, 294-296
 - French case law, 297-298
 - Russian case law, 297
 - unilateral options and, 296-299
 - United Kingdom case law, 298-299
- financial disputes, 174, 179-180
 - arbitral bodies, role of, 180-181
 - practice and procedure, 180

Assets

- mistaken transfer, 23-25
- proprietary interests *see* **Proprietary interests**
- right to borrow and freezing orders, 333-334
- wrongful disposal of, 22-23

Assignment

- absolute, 93, 94-95
- case law, 93-94
 - Austino, 95-96
 - One.Tel, 95
- “silent confirmation”, 129-130

Attachment

- PPSA, under, 5, 209-210
- tracing proceeds, 12-13

Aust Executor Trustees Ltd v Lanmar Pty Ltd

- company directors as guarantors, 195

Authorised Deposit-taking Institutions (ADIs)

- see also* **Banking**
- covered bonds *see* **Covered bonds**
- overview, 29-30
- regulation, 30-32

Banking

- arbitration, 294-296

- French case law, 297-298

- Russian case law, 297

- unilateral options and, 296-299

- United Kingdom case law, 298-299

- bankers’ mandates, 104-105

- breach of trust, 110

- dishonest assistance, 114

- letters of credit, 111

- refusal to follow mandate, threshold for, 111-114

- depositor preference, 35-36

- APRA objections, 36

- covered bonds amending Act, impact on, 38

- domestic and international

- current legal framework, 30-31

- Early Access Facility for Depositors (EAFD), 37

- Financial Claims Scheme, 37-38

- interest rate swaps

- Australian statutory duties, 321-322

- breach of common law duty, 320-321

- breach of statutory duty, 320

- mis-selling, 321

- selling, 319-320, 321

- law

- recent publications, 77, 149, 237, 323

- UCP, interpreting, 220-223

- letters of credit *see* **Letters of credit**

- online currency regulation, 287-90

- Australia, 288-289

- European Union, 290

- United Kingdom, 290

- United States, 289-290

- practice

- recent publications, 79-80, 151, 239, 325

- regulation, 30-32

- Westpac New Zealand Ltd v MAP & Associates*

- analysis of case, 109-118

- background, 105-107

- Court of Appeal decision, 107-108

- High Court Decision, 107

- Supreme Court decision, 108-109

Banking Amendment (Covered Bonds) Act 2011 (Cth)

- depositor preference, impact of, 38

- overview, 29-30

Bitcoins

- account-based facilities, 281-283

- banking regulation, 287-290

- Australia, 288-289

- European Union, 290

- United Kingdom, 290

- United States, 289-290

- central registries, use of, 277

- circulating property rights, 279-280
- currency, nature of, 290-292
- decentralised cloud register, 278
- digital cash, nature of, 273
- financial services regulation, 283-287
 - Australia, 283-284
 - European Union, 286-287
 - United Kingdom, 286-287
 - United States, 285-286
- legal status, 279-283
- legal tender, and, 290-292
- nature of, 273-279
- overview, 272-273, 292-293
- recommendations, 292-293
- regulatory status, 283-292
- transactions, 276-278
- virtual currencies, 273
- Bonds**
 - covered *see* **Covered bonds**
- Breach of duty** *see also* **Duty of care**
 - procedural failure and, 157-158
- Breach of trust**
 - bankers' mandates, 110
 - position after *MAP*, 115-116
- Cambridge Gas**
 - foreign judgments in insolvency, 233-236
- Capital exchange markets**
 - recent publications, 79, 150-151, 238-239, 324-325
- Charges**
 - Chateau Constructions, 98-101
 - enforcement, 96-98
 - judicial sale, 99-101
 - procedure, 98-99
 - equitable
 - enforcement, 98
 - mortgage, distinguished, 96-97
- China** *see* **Hong Kong and China**
- CIT Credit P/L v Keable**
 - company directors as guarantors, 194-195
- Class actions**
 - Wingecarribee Shire Council* case, 62
- Clayton's case**
 - rule in, 13-14
- Code of Banking Practice**
 - promises that benefit guarantors, 198
 - protections for guarantors, 199-200
- Collateralised Debt Obligation (CDO)**
 - advisory relationships, 54-56
 - damages measure, 60-61
 - fiduciary relationships, 57-59
 - GFC, impact of, 59
 - mis-selling, 56-57
 - nature of, 52-53
 - risk factors, 53-54
 - synthetic, 52
 - valuation, 61-62
- Commercial law**
 - charges over insurance monies, 69-73
 - proportionate liability, 136-140
 - recent publications, 77-78, 149-150, 238, 323-324
- Consent**
 - unreasonably holding, 158-160
- Consolidated exchange**
 - framework, 81-82
- Consumer protection**
 - national consumer protection, 183-186
 - relief from unconscionable conduct in equity, 185
 - statutory unconscionable conduct, 185-186
- Contracts Review Act**
 - claims under, 135
- Contributory negligence**
 - defence, 63-64
- Corporate governance**
 - listing on Hong Kong Stock Exchange, 341-342
- Covered bonds**
 - advantages, 33, 47-48
 - aggregating entity model, 46
 - diagram, 50
 - arrangements involving several ADIs, 45-47
 - Australia, in, 38-45
 - historical prohibition, 34-35
 - cover pool monitor, 42-43
 - issue, 29-30
 - requirements, 41-42
 - legal structure, 32
 - regulatory oversight, 43-45
 - purpose of regulation, 43-44
 - specific mechanisms, 44-45
 - RMBS structures, comparison to, 49
 - specialised credit institution model, 47
 - diagram, 51
 - SPV model, adoption of, 39-41
 - structure for single ADI, 49
 - what is, 32-33
 - wholesale funding, comparison to, 49
- Credit**
 - credit default swaps (CDS), 175-176
 - deferred *see* **Deferred payment credit**
 - letters *see* **Letters of credit**
 - protecting local creditors
 - international insolvency, 315-318
- Crowdfunding**
 - crowdsourcing, 302
 - donation model, 305
 - regulatory issues, 306
 - equity model, 309
 - regulatory issues, 309-310
 - exemption, 305
 - lending model, 308

- regulatory issues, 308-309
- microfinance, 302
- models, 301
- nature and purpose, 300, 302-303
- overview, 300-301
- “peer-to-peer” lending, 308
 - regulatory issues, 308-309
- pre-purchase model, 306-307
 - regulatory issues, 307-308
- regulation, 301, 310
 - Australia, 305-310
 - European Union, 303-304
 - United States, 304-305
- reward model, 306-307
 - regulatory issues, 307-308
- Cyprus**
 - banking failure, 161-167
- Damages**
 - CDOs, in relation to, 60-61
- Debt**
 - collateralised obligations, 175-176
 - rescheduling
 - “material adverse change”, interpretation, 331-332
- Defences**
 - Wingecarribee Shire Council* case, 63-64
- Deferred payment credit**
 - acceptance credits, and, 67
 - Banco Santander SA v Banque Paribas*, 66-67
 - fraud, 66-67
 - nature of, 66
 - rules, 66
 - UCP 600, under, 67-68
- Derivatives**
 - central clearing, 178-179
 - disputes, 179-180
 - arbitral bodies, role of, 180-181
 - practice and procedure, 180
 - legal character, 176-178
 - non-centrally cleared
 - margin requirements, 179
 - over-the-counter (OTC), 174-175, 181
 - central clearing, 178-179
 - purpose, 175
- Disclaimers**
 - advisory versus execution only, 147
 - application of, 147
 - Bathurst* case, 144, 147-148
 - Butcher v Lachlan Elder Realty Pty Ltd*, 145-146
 - client, nature of individual, 147
 - communication of, 143, 147
 - content, 142-143
 - English case law, 146
 - Lehman* case, 142, 147-148
 - background, 141
 - findings, 142-144
 - legal relationships, 142
 - McCullagh v Lane Fox & Partners*, 144-145
 - nature and purpose, 141
 - reference to other documents, 143-144
 - wording, 147
- Disclosure**
 - fiduciary relationship, 57-59
- Dishonest assistance**
 - Australian law, 116-117
 - bankers’ mandate, 114
 - New Zealand law, 117
- Duty of care**
 - breach of professional duty, 132-134
 - fiduciary *see* **Fiduciary duty**
 - interest rate swaps
 - Australian statutory duties, 321-322
 - breach of common law duty, 320-321
 - breach of statutory duty, 320
 - selling, 319-320, 321
 - lender liability, 229-332
 - margin call, failure to meet, 243-244
 - proximity, 230-231
 - solicitor providing advice on financial arrangement, 132-135
 - swap transactions, 319-322
- Electronic fund transfers**
 - tracing, 261-264
- Electronic identity verification**
 - anti money laundering and, 88
- Enforcement**
 - Financial Conduct Authority (FCA), 152-154, 155
 - penalties, calculation of, 154
 - powers, 152-153
 - senior managers, accountability, 154
 - warning notices, early publication of, 153-154
 - Prudential Regulation Authority (PRA), 152, 154-155
- Equitable security**
 - proprietary interests, 27-28
- Equity**
 - married women as guarantors, 184-185
 - relief from unconscionable conduct, 185
 - tracing
 - debts and overdrafts, through, 264-271
- European Union**
 - banking regulation of online currency, 290
 - crowdfunding regulation, 303-304
 - financial services regulation of online currency, 286-287
 - “material adverse change”, interpretation, 331-332

Index

- money laundering directive, 244-245
- right to borrow as asset, 333-334
- Facility agents**
 - business plans, 329
 - default claims, 327-329
 - duties, 326-331
 - exclusion of liability, 330
 - negligent misstatement, 329-330
- Fiduciary duty**
 - advisory relationships, 54-56
 - breaches
 - proprietary interests, 25-27
 - disclosure, 57-59
 - lender liability, 231-232
- Finance law**
 - arbitration, 294-296
 - unilateral options and, 296-299
 - charges over insurance monies, 69-73
 - proportionate liability, 136-140
 - recent publications, 77-78, 149-150, 238, 323-324
- Financial Action Task Force (FATF)**
 - New Zealand, compliance, 86-87
- Financial advice**
 - failure of procedure, impact of, 157-158
- Financial and investment planning**
 - recent publications, 79, 150, 238, 324
- Financial Claims Scheme**
 - protective framework for depositors, 37-38
- Financial Instruments and Exchange Act (Japan)**
 - administrative charges, 83-84
 - electronic trading platforms, 82
 - framework for consolidated exchange, 81-82
 - introduction, 81
- Financial services**
 - advisory relationships, 54-56
 - regulation of online currency, 283-287
 - Australia, 283-284
 - European Union, 286-287
 - United Kingdom, 286-287
 - United States, 285-286
- Foreign exchange markets**
 - recent publications, 79, 150-151, 238-239, 324-325
- Fraud**
 - deferred credit, 66-67
 - proportionate liability, 136-140
- Freezing orders**
 - right to borrow and, 333-334
- Global Financial Crisis (GFC)**
 - Australia, in, 34
 - banking regulation, 30
 - CDOs, impact on, 59
- Greenhill v CBA**
 - "silent confirmation" of credits, 128-131
- Grupo Hotelero Urvasco SA v Carey Value Added SL**, 331-332
- Guarantees**
 - "all monies" guarantees, 241-242
 - facility agreement clause, 227
 - no waiver clause, 227
 - preservation clause, 225
 - enforcement, 227-228
 - operation of, 226
 - refund, 334-335
 - standard clauses
 - application of, 226
 - intrinsic validity, 226
 - O'Brien* case, 224-228
 - suspension clause, 225
 - enforcement, 227-228
 - operation of, 227
 - third party *see* **Third party guarantees**
- Hong Kong and China**
 - listing on Stock Exchange, 336-342
 - compulsory public offer, 340
 - connected transactions, 341
 - corporate governance requirements, 341-342
 - depository receipts, 339-340
 - eligibility requirements, 337-338
 - mineral companies, 340
 - overseas companies, 336-337
 - overview, 336
 - primary versus secondary listing, 339
 - routes for listing, 336
 - waivers for secondary listings, 339
- Indemnities**
 - CDOs, and, 62
- Insider trading**
 - Japan, 83
- Insolvency**
 - "balance sheet insolvency" test, 240-241
 - Cambridge Gas* case, 233-236
 - Cayman Islands, 317-318
 - international
 - protecting local creditors, 315-318
 - jurisdiction, foreign, 233-236
 - Australia, in, 75-76
 - New Cap Reinsurance* case, 75
 - Rubin* case, 74-75
 - mistaken transfer of asset, 23-25
 - proprietary interests
 - classification, 18-19
 - practice, 22-28
 - principles, 19-22
 - recent publications, 78, 150, 238, 324
 - universalism, 74-76
 - wrongful disposal of another's asset, 22-23

Insurance monies

- charges over, 69-73
- Feltex proceedings, 70

Japan

- Financial Instruments and Exchange Act*, 81-84

JSC BTA Bank v Ablyazov

- right to borrow and freezing orders, 333-334

Judicial sale

- procedure, 99
- reserve, fixing, 100
- who conducts sale, 100-101

Leases

- rights of lessees, 206

Legal professional privilege

- nature and purpose, 156
- recent case law, 155-157

Letters of credit

- authorisation
 - no authorisation, 127-128
 - without request, 127
- bankers' mandate, and, 111
- confirmation, 126
- implied terms, 130
- negotiation of credits, 127
- nominated bank, 127
- prepayment, 127
- recourse, 130-131
- reimbursement, 130
- "silent confirmation", 126
 - Greenhill v CBA*, 128-131
- UCP, under, 126, 222-223
 - construction, 221-222
 - Fortis* case, 222-223
 - implied terms, 221-222
 - incorporation by reference, 220-221
 - interpretation, 220

Liability

- lender, 229-232
 - assumption of responsibility, 229-230
 - duty to warn, 229
- proportionate, 62-63
 - fraud and negligence, 136-140
 - proximity, 230-231

Liquidation

- Wingecarribee Shire Council* case, 64

Listing on Hong Kong Stock Exchange

- compulsory public offer, 340
- connected transactions, 341
- corporate governance requirements, 341-342
- depository receipts, 339-340
- eligibility requirements, 337-338
- mineral companies, 340
- overseas companies, 336-337

- overview, 336

- primary versus secondary listing, 339

- routes for listing, 336

- waivers for secondary listings, 339

Lowest intermediate balance rule

- tracing proceeds, 13

Maiden Civil case

- interpretation of the PPSA, 205-206

Marshalling

- nature of, 101, 102-103

Misleading conduct

- CDOs, in relation to, 59-60

Money laundering *see also* Anti money**laundering**

- EU directive, 244-245

Mortgages

- advertising "mortgagee sales", 311
- beneficiary principle, 123-124
- charges, distinguished, 96-79
- marshalling, 101, 102-103
- recent publications, 77, 149, 237-238, 323
- relief, 101
 - Naxatu* case, 101
- solicitors' duty of care, 132-135
- "tacking", 101-102

Negligence

- contributory, 63-64
- proportionate liability, 136-140

New Cap Reinsurance Corp (in liq) v AE Grant

- universalism in insolvency jurisdiction, 75

New Zealand

- anti money laundering and countering
- financing of terrorism, 85-90
 - bank failure, managing, 161-167
 - bankers' mandates, 104-118
 - dishonest assistance, 117
 - Open Bank Resolution (OBR) policy, 161-167
 - assessment of, 164-167
 - Reserve Bank
 - legislative framework, 162-164
- tracing *see* **Tracing**
- Westpac New Zealand Ltd v MAP & Associates*
 - analysis of case, 109-118
 - background, 105-107
 - Court of Appeal decision, 107-108
 - High Court Decision, 107
 - Supreme Court decision, 108-109

Nil balance rule

- tracing proceeds, 13

Online currency *see* Bitcoins**Pari passu distribution**

- tracing proceeds, 14

Payment clearing systems

tracing, 252-261

Permanent Mortgages v Vandenberg

parents as guarantors for loans to children, 190-192

***Personal Property Securities Act 2009* (PPSA)**

“attachment”, concept of, 5

commencement, 3

implementation, 3-4

international legislation, sources from, 203-204

interpretation of legislation, 204-205

language of Act, 204

Maiden Civil case, 205-206

overview, 4-7, 16-17

perfection of an interest, 5-6

principles, 203

priority rules, 6

purchase money security interest, 6-7

registration of security interests

application to extend time, 311-314

security interests, 4

“deemed” interests, 4-5

statutory preservation of general law, 15-16

transitional provisions, 7

Personal Property Securities Register (PPS Register)

technical complications, 3

Professional opinion

defence, as, 63

Proprietary interests

insolvency, in

classification, 18-19

practice, 22-28

principles, 19-22

Provident Capital Ltd v Papa

duty of care, 132-135

Quistclose trusts

beneficiary principle, 123-124

circumstances where arising, 119-121

Elizabethan Theatre, 119-120, 125

express trust formulation, 121-123

intention, relevance of, 124-125

resulting trust formulation, 121-123

Twinsectra, 119, 125

Reasonableness

withholding consent, and, 158-60

Reliance Financial Services NSW P/L v Sobbi

parents as guarantors for loans to children, 189

Replenishment

tracing proceeds, 14

Reporting entities

New Zealand, 85

Rescission

transfer of assets, 23-24

Rubin v Eurofinance

universalism in insolvency jurisdiction, 74-75

Sea-Cargo Skips AS v State Bank of India

refund guarantees, 334-335

Securities

duty of care, 132-135

guarantees *see* **Guarantees**

margin call, failure to meet, 243-244

recent publications, 77, 149, 237-238, 323

Security interests

attachment, 209-210

change of grantor, following, 216

concept of, 5

tracing, 12-13

characterisation, 7-11

case law, 8-10

practical considerations, 11-12

collateral, as, 208, 219

dealt with without consent, 207-217

“taking free” rules, 208-209

consent, implied qualification, 208

“deemed” interests, 4-5

defects in registration, 214-215

definition, 4

effective registration, 214

enforceability against third parties, 210-214

change of identity of grantor, 213-214, 216

original grantor, 211-213

equitable, 27-28

lessees, rights of, 206

perfection of an interest, 5-6, 219

change of identity of grantor, 216

collateral dealt with without consent, 207-

217

comparison, by, 11

lease, transfer by way of lease, 216-217

registration, by, 214-215

re-perfection by registration following

change of grantor, 216-217

requirements, 209

temporary, 215-216

PPSA, under, 4, 203-219, 312-314

drafting uncertainties, 217

reform, suggestions for, 218

priority rules, 6

purchase money, 6-7

registration

application to extend time, 311-314

tracing *see* **Tracing**

Solicitors

breach of professional duty, 132-134

contractual obligations, 134-135

Spina v Conran Assocs Pty Ltd

wife as guarantor for husband, 188

Spina v Permanent Custodians Ltd

parents as guarantors for loans to children, 189-190

Stamp duty

recent publications, 77, 149, 237, 323

Steigrad v Bridgecorp

charges over insurance monies, 69-73
 appeal judgment, 72-73
 background, 69-70
 competing appeal arguments, 71-72
 High Court judgment, 70-71

Suncorp Metway Ltd v Nam Property Holdings Pty Ltd

company directors as guarantors, 194

“Tacking”

nature of, 101
 rule in *Hopkinson v Rolt*, 101-102

Taxation

recent publications, 77, 149, 237, 323

Terrorism

financing
 New Zealand legislation, 85-90

Third party guarantees

additional protections, 197-201
Amadio case, 182
 case law, 186
Agripay Pty Ltd v Byrne, 187-188
Aust Executor Trustees Ltd v Lanmar Pty Ltd, 195
CIT Credit P/L v Keable, 194-5
 Code of Banking Practice, relevance of, 200-201
 key issues, 195-197
Permanent Mortgages v Vandenberg, 190-192
Reliance Financial Services NSW P/L v Sobbi, 189
Spina v Conran Assocs Pty Ltd, 188
Spina v Permanent Custodians Ltd, 189-190
Suncorp Metway Ltd v Nam Property Holdings Pty Ltd, 194
Walter v National Australia Bank Ltd, 194
Wenczel v Commonwealth Bank, 186-187
 Code of Banking Practice, 197-201
 case law, relevance to recent, 200-201
 promises that benefit guarantors, 198
 protections for guarantors, 199-200
 company director giving guarantee of loan to company, 193-195
 debt of a stranger, 192-193
 married women’s equity, 184-185
 national consumer protection, 183-186
 relief from unconscionable conduct in equity, 185

statutory unconscionable conduct, 185-186
 overview, 182-183, 201-202
 parents as guarantors for loans to children, 188-192
 wife as guarantor for debts of husband, 186-188

Title

retaining, 23

Torre Asset Funding Ltd v The Royal Bank of***Scotland Plc***

claims, 327
 comment, 330-331
 decision, 327-330
 facts, 326-327
 summary, 326

Tracing

“backwards”, 268
 claiming, distinguished, 250
 common law, at
 clearing and settlement processes, distinguished, 257-259
 debts and overdrafts, through, 264-271
 electronic fund transfers, through, 261-264
 legal consistency, achieving, 255-257
 “mixing”, effect of, 259-261
 payment clearing systems, through, 252-261
 equity, in
 debts and overdrafts, through, 264-271
 liability, as source of, 251
 methods, 13-15
 Clayton’s case, rule in, 13-14
 hybrid approaches, 14
 lowest intermediate balance rule, 13
 nil balance rule, 13
 pari passu distribution, 14
 replenishment, 14
 New Zealand, in, 252-271
 overview, 249-252, 271
 PPSA, under, 12-13, 14-15

Trading

electronic platforms, 82-83

Transfer of assets

mistaken, 23-25
 rescission, 23-24
 retaining title, 23

Trusts

anti money laundering legislation, 88-89
 express trust formulation, 121-123
 intention, relevance of, 124-125
Quistclose *see* **Quistclose trusts**
 resulting trust formulation, 121-123
 terrorism, financing, 88-89
 transfer of assets, 24-25

Index

Unconscionable conduct

relief in equity, 185
statutory, 185-186

Uniform Customs and Practices for Documentary Credits (UCP)

letters of credit under, 126, 222-223
construction, 221-222
Fortis case, 222-223
implied terms, 221-222
incorporation by reference, 220-221
interpretation, 220

United Kingdom

“all monies” guarantees, 241-242
“balance sheet insolvency” test, 240-241
banking regulation of online currency, 290
EU money laundering directive, impact of, 245
facility agent duties, 326-231
Financial Conduct Authority (FCA), 152-154, 155
financial services regulation of online currency, 286-287
Prudential Regulation Authority (PRA), 152, 154-155
refund guarantees, 334-335

United States of America

banking regulation of online currency, 289-290
crowdfunding regulation, 304-305
financial services regulation of online currency, 285-286

Valuation

CDOs, 61-62

Walter v National Australia Bank Ltd

company directors as guarantors, 194

Wenczel v Commonwealth Bank

wife as guarantor for husband, 186-187

Westpac New Zealand Ltd v MAP & Associates

analysis of case, 109-118
background, 105-107
Court of Appeal decision, 107-108
High Court Decision, 107
Supreme Court decision, 108-109

Wingecarribee Shire Council v Lehman Brothers

Australia Ltd (in liq)

advisory relationships, 54-56
case note, 52-65
class action, 62
court findings, 64-65
defences, 63-64
disclaimers, and, 142, 147-148
background, 141
findings, 142-144
legal relationships, 142
disclosure, 57-59
GFC, impact of, 59
indemnities, 62

liquidation, 64

misleading conduct, 59-60

mis-selling, 56-57

proportionate liability, 62-63

valuation of SCDOs, 61-62