FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Fast Access Finance Pty Ltd [2015] FCA 1055

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| Citation: | Australian Securities and Investments Commission v Fast Access Finance Pty Ltd [2015] FCA 1055 |
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| Parties: | **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v FAST ACCESS FINANCE PTY LTD ACN 078 233 084, FAST ACCESS FINANCE (BEENLEIGH) PTY LTD ACN 095 585 292 and FAST ACCESS FINANCE (BURLEIGH HEADS) PTY LTD ACN 104 904 225** |
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| File number: | QUD 489 of 2013 |
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| Judge: | **DOWSETT J** |
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| Date of judgment: | 30 September 2015 |
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| Catchwords: | **CONSUMER LAW** –consumer credit – various contraventions of the statutory regime comprised by the *National Consumer Credit Protection Act 2009* (Cth), the *National Credit Code* and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth) – prohibition on engaging in credit activity without an Australian credit licence – whether the respondents were “credit providers” under a “credit contract” and provided “credit” for which a “charge” was payable and thus engaged in conduct to which the statutory regime applied – whether the impugned transactions were a pretence or sham concealing, in reality, a provision of credit – where the respondents’ business model purportedly involved the sale and purchase of “diamonds” to and from customers. |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 2C  *National Consumer Credit Protection Act 2009* (Cth) ss 5, 6, 10, 29, 35, 36, 37, 166, 169, 180  *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth) Sch 2, Items 4, 6  *National Credit Code* (Cth) ss 3, 4, 5, 17, 34, 76, 77, 204  *Sale of Goods Act 1896* (Qld) ss 19, 24 |
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| Cases cited: | *AG Securities v Vaughan* [1990] 1 AC 417  *Burdis v Livsey* [2003] QB 36  *Carter v Fast Access Finance (Beaudesert) Pty Ltd* [2011] QCAT 525  *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471  *Hadjiloucas v Crean* [1988] 1 WLR 1006  *Hawke v Edwards* (1947) 48 SR (NSW) 21  *Kwik Finance (Sydney) Pty Ltd v Walker* [2014] NSWCA 73  *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516  *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449  *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786  *Street v Mountford* [1985] AC 809  *Walker v Consumer, Trader and Tenancy Tribunal of New South Wales* [2013] NSWSC 1432  *Yorke v Lucas* (1985) 158 CLR 661 |
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| Dates of hearing: | 14 - 18 July 2014,  25 August 2014 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 297 |
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| Counsel for the Applicant: | Mr T Sullivan QC with Mr S Cleary |
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| Solicitor for the Applicant: | Australian Securities and Investments Commission |
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| Counsel for the Respondents: | Mr G Dietz |
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| Solicitor for the Respondents: | Nyst Legal |
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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 489 of 2013 |

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| BETWEEN: | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION  Applicant |
| AND: | FAST ACCESS FINANCE PTY LTD ACN 078 233 084  First Respondent  FAST ACCESS FINANCE (BEENLEIGH) PTY LTD ACN 095 585 292  Second Respondent  FAST ACCESS FINANCE (BURLEIGH HEADS) PTY LTD ACN 104 904 225  Third Respondent |

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| JUDGE: | DOWSETT J |
| DATE OF ORDER: | 30 SEPTEMBER 2015 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. the parties exchange submissions as to the proposed forms of order and file such submissions within 21 days; and
2. there be liberty to apply.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| BETWEEN: | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION  Applicant |
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| JUDGE: | DOWSETT J |
| DATE: | 30 SEPTEMBER 2015 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

# THESE PROCEEDINGS

1. The applicant (“ASIC”) seeks declaratory and other relief pursuant to the *National Consumer Credit Protection Act 2009* (Cth) (the “Credit Protection Act”) and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth) (the “Transitional Act”). It seeks such relief against the first, second and third respondents (respectively “Fast Access Finance”, “FAF Beenleigh” and “FAF Burleigh Heads”). In its amended statement of claim ASIC refers to FAF Beenleigh and FAF Burleigh Heads as “FAF Licensees”. The precise relationship between Fast Access Finance on the one hand, and each of FAF Beenleigh and FAF Burleigh Heads on the other, is far from clear. Where appropriate I shall describe each of those companies as an “FAF entity”. I may also, from time to time, use the expression in referring to other identified or unidentified companies which are similarly connected to Fast Access Finance. Of the other FAF entities only FAF Beaudesert Pty Ltd (“FAF Beaudesert”) has any present relevance.
2. The factual allegations which lie at the heart of ASIC’s case appear at paras 6 – 10 of its amended statement of claim as follows:

6. At all material times, [Fast Access Finance], with FAF Beenleigh and FAF Burleigh Heads … carried on business in accordance with a business model, key features of which were as follows (**FAF Business Model**):

a. prospective customers contacted [the relevant FAF entity] with a view to obtaining a small value loan;

b. the [relevant FAF entity] arranged for the prospective customer to sign a purported contract with it, pursuant to which the customer purportedly purchased a number of diamonds from the [relevant FAF entity] for a fixed price of $250 per diamond (**Sale Agreement**);

c. the Sale Agreement included a term to the effect that the customer repay the amount of the total purported sale price of the diamonds by instalments to the [relevant FAF entity];

d. concurrently with the signing of the Sale Agreement, the [relevant FAF entity] arranged for the customer to sign a second purported contract, with DCH, pursuant to which the customer purportedly sold the same number of diamonds it had purchased from the [relevant FAF entity], to DCH for a fixed price of $125 per diamond (**Purchase Agreement**);

e. the customer then received, by payment into a bank account nominated by the customer, money equivalent to the total sale price of the diamonds purportedly sold to DCH pursuant to the Purchase Agreement;

f. there were never any diamonds the subject of the Sale Agreement and the Purchase Agreement, but rather the Sale Agreement and the Purchase Agreement were mere pretences to obfuscate an underlying loan transaction, and of no effect respectively as sale and purchase contracts for diamonds.

7. The practical effect for customers who entered into transactions in accordance with the Business Model was that:

a. the money received by them referred to at subparagraph 6.e above was the amount of the loan customers had sought from the [relevant FAF entity];

b. customers assumed an obligation to repay to the [relevant FAF entity] an amount equal to twice the amount received by them pursuant to the transaction.

8. [Fast Access Finance]:

a. devised the FAF Business Model;

b. implemented the FAF Business Model;

c. maintained the FAF Business Model.

9. [Fast Access Finance] devised, implemented and maintained the FAF Business Model to circumvent:

a. the 48% annual percentage rate cap applicable to consumer credit contracts, instituted first by the Queensland government pursuant to s 3(1) of the *Consumer Credit (Queensland) Special Provisions Regulation 2008*, and subsequently maintained by s 32 of the *Credit (Commonwealth Powers) Act 2010*… ; and, or alternatively,

b. the provisions of the *Consumer Credit (Queensland) Act 1994*, the Transitional Act and the [Credit Protection Act].

10. At no time did [Fast Access Finance] direct, request or otherwise require either FAF Beenleigh or FAF Burleigh Heads to:

a. register to engage in a credit activity for the purposes of the Transitional Act;

b. apply for an ACL authorising FAF Beenleigh or FAF Burleigh Heads to engage in credit activity;

c. hold an ACL for the purposes of the [Credit Protection Act].

The document referred to as a “Sale Agreement” is actually headed “Sales Agreement”. I shall so refer to it. I shall use the term “Purchase Agreement” in the same way as it is used in the pleading. It may not be convenient to use the term “FAF Business Model”. I shall describe the relevant transactions as having being carried out pursuant to the “diamond model”. Those transactions involved other standard documentation to which I shall refer. The reference to “DCH” is to Diamond Clearing House Pty Ltd, which acronym I shall also adopt. In para 6 of the pleading ASIC pleads that the FAF Business Model (the diamond model) purportedly involved the sale and purchase of diamonds. In para 12 ASIC alleges that:

* DCH was established at the instigation of Mr James Legat, a director of Fast Access Finance; and
* DCH purported to purchase diamonds from customers of FAF entities and to sell diamonds to FAF entities.

1. The reference in the pleadings (and in these reasons) to “ACL” is to an Australian Credit Licence.
2. In para 11 of the pleading ASIC sets out the circumstances upon which it relies in order to demonstrate the relevant relationship between Fast Access Finance and each of FAF Beenleigh and FAF Burleigh Heads. At paras 12 – 13, ASIC pleads facts said to demonstrate that, as pleaded at para 14, “DCH acted as a mere conduit”, for the transfer of money between each of those entities and its customers. At paras 15 – 211, ASIC pleads that FAF Beenleigh entered into one relevant transaction with Mr Eadie and two with Ms Jones, and that FAF Burleigh Heads entered into:

* four such transactions with Mr Sharplin;
* four such transactions with Ms Thompson;
* three such transactions with Ms Thorne; and
* three such transactions with Mr Streat.

1. I shall refer to each of these persons as a “customer”. In the end, none of the parties suggests that any of the impugned transactions is materially different, for present purposes, from any of the others. For this reason, I shall, in these reasons, use Mr Eadie’s transaction as a typical example of the transaction in question.

# STATUTORY PROVISIONS

1. Sections 35 – 37 of the Credit Protection Act provide for the issue of ACLs. Section 35 provides:

(1) An ***Australian credit licence*** is a licence that authorises the licensee to engage in particular credit activities.

(2) The credit activities that the licensee is ***authorised*** to engage in are those credit activities specified in a condition of the licence as the credit activities that the licensee is authorised to engage in.

1. Section 29(1) of the Credit Protection Act provides:

Prohibition on engaging in credit activities without a licence

(1) A person must not engage in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity.

Civil penalty: 2,000 penalty units.

1. The term “credit activity” is defined in s 6 of the Credit Protection Act. Section 6(1) contains a table which provides (inter alia) that a person engages in a credit activity if, “the person is a credit provider under a credit contract”. ASIC’s case is that in each of the relevant transactions, either FAF Beenleigh or FAF Burleigh Heads engaged in a credit activity by providing credit under a credit contract.
2. Section 5 of the Credit Protection Act provides that the term “credit provider” “has the same meaning as in s 204 of the *National Credit Code*, and includes a person who is a credit provider because of section 10”. Section 10 is not presently relevant. The *National Credit Code* (“the Code”) is contained in Sch 1 to the Credit Protection Act. Section 204 of the Code provides:

***Credit provider*** means a person that provides credit, and includes a prospective credit provider.

1. The terms “credit” and “credit contract” have the meanings attributed to them by ss 3, 4 and 5 of the Code which provide:

**3 Meaning of *credit*** *and* ***amount of credit***

**(1)** For the purposes of this Code, ***credit*** is provided if under a contract:

(a) payment of a debt owed by one person (the ***debtor***) to another (the ***credit provider***) is deferred; or

(b) one person (the ***debtor***) incurs a deferred debt to another (the ***credit provider***).

**(2)** For the purposes of this Code, the ***amount of credit*** is the amount of the debt actually deferred. The ***amount of credit*** does not include:

(a) any interest charge under the contract; or

(b) any fee or charge:

(i) that is to be or may be debited after credit is first provided under the contract; and

(ii) that is not payable in connection with the making of the contract or the making of a mortgage or guarantee related to the contract.

**4** **Meaning of *credit contract***

For the purposes of this Code, a ***credit contract*** is a contract under which credit is or may be provided, being the provision of credit to which this Code applies.

**5 Provision of credit to which this Code applies**

(1) This Code applies to the provision of credit (and to the credit contract and related matters) if when the credit contract is entered into or (in the case of precontractual obligations) is proposed to be entered into:

(a) the debtor is a natural person or a strata corporation; and

(b) the credit is provided or intended to be provided wholly or predominantly:

(i) for personal, domestic or household purposes; or

(ii) to purchase, renovate or improve residential property for investment purposes; or

(iii) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes; and

(c) a charge is or may be made for providing the credit; and

(d) the credit provider provides the credit in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.

(2) If this Code applies to the provision of credit (and to the credit contract and related matters):

(a) this Code applies in relation to all transactions or acts under the contract whether or not they take place in this jurisdiction; and

(b) this Code continues to apply even though the credit provider ceases to carry on a business in this jurisdiction.

(3) For the purposes of this section, investment by the debtor is not a personal, domestic or household purpose.

(4) For the purposes of this section, the predominant purpose for which credit is provided is:

(a) the purpose for which more than half of the credit is intended to be used; or

(b) if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used.

Pursuant to s 3(1) the provision of credit is the deferment of payment of a debt or incurrence of a deferred debt. The term “deferred” is not defined, but I infer that the meaning is that payment of the relevant debt has been deferred. Pursuant to s 204 of the Code the term “contract” “includes a series or combination of contracts, or contracts and arrangements”.

1. In paras 30 and 31 of the amended statement of claim ASIC pleads, with respect to the Eadie transaction, that either:

the Eadie Credit was provided under a contract, as that word is defined in section 204 of the Code … terms of which were that:

i. FAF Beenleigh agreed to provide credit of $4000 to Eadie;

ii. FAF Beenleigh charged Eadie a fee or charge of $2000 in connection with the making of the contract … which fee or charge formed part of the credit;

iii. Eadie agreed to repay the credit to FAF Beenleigh in 31 weekly payments of $128 and 1 final payment of the balance owing.

or

the Eadie Credit was provided under a contract, as that word is defined in section 204 of the Code … terms of which were that:

i. FAF Beenleigh agreed to provide credit of $2000 to Eadie;

ii. FAF Beenleigh charged $2000, in the nature of an interest charge, for the provision of credit to Eadie **($2000 Eadie Charge)**;

iii. Eadie agreed to repay the credit and the $2000 Eadie Charge to FAF Beenleigh in 31 weekly payments of $128 and 1 final payment of the balance owing.

1. In its final submissions, ASIC put the case in a somewhat different way. In paras 95 and 96, of its submissions, ASIC submits:

95. The agreement between the consumer and the [relevant FAF entity] comprises the application for finance (written or oral), the Sales Agreement and the Purchase Agreement. As will be explored further below, that trinity of (a) application, (b) Sales Agreement and (c) Purchase Agreement, satisfies the statutory definition of “contract” for the purposes of identifying a credit contract under the National Credit Code.

96. In as much as those documents refer to diamonds, however, those references are a pretence which do not reflect the reality of the transactions.

1. The respondents concede that credit was provided pursuant to each Sales Agreement but deny that any credit was provided pursuant to any of the Purchase Agreements. They submit that whether those agreements are construed as one transaction or as separate transactions, the only provision of credit is that provided by one or other of the FAF entities. The respondents seem not to address the possibility that the relevant contract may be wider than the combination of the two agreements, as ASIC effectively submits.

# EFFECT OF THE TRANSITIONAL ACT

1. Engagement in a credit activity without the relevant licence contravenes s 29 of the Credit Protection Act. However, the statutory scheme is a little more complicated than I have so far disclosed. TheTransitional Act regulated the transition from the pre‑existing legislative regime (pursuant to State legislation) to the regulatory regime prescribed by the Credit Protection Act and the Code. The impugned transactions occurred between August 2010 and February 2012. Over that period, the effect of the Transitional Act is that:

* from 1 July 2010 until 31 December 2010 a person was prohibited from engaging in credit activity unless that person was registered to engage in such activity, or held a licence authorising such engagement;
* from 1 January 2011 until 30 June 2011, a person was prohibited from engaging in credit activity unless that person was registered to engage in such activity and had applied for a licence authorizing such engagement, or held such a licence; and
* since 1 July 2011 a person has been prohibited from engaging in credit activity unless that person holds a licence authorising such engagement.

1. The relevant transactions may be categorized as follows:

## Transactions entered into between 1 July 2010 and 31 December 2010

* the Eadie transaction;
* the first Sharplin transaction; and
* the first Thorne transaction.

(Item 4 of Sch 2 to the Transitional Act)

## Transactions entered into between 1 January 2011 and 30 June 2011

* the first Jones transaction;
* the second Sharplin transaction;
* the third Sharplin transaction;
* the fourth Sharplin transaction;
* the first Thompson transaction;
* the second Thompson transaction;
* the second Thorne transaction; and
* the first Streat transaction.

(Item 6 of Sch 2 to the Transitional Act)

## Transactions entered into since 1 July 2011

* the second Jones transaction;
* the third Thompson transaction;
* the fourth Thompson transaction;
* the third Thorne transaction;
* the second Streat transaction; and
* the third Streat transaction.

(Section 29 of the Credit Protection Act.)

It is common ground that neither FAF Beenleigh nor FAF Burleigh Heads has ever been registered or licensed. Hence the changes in the statutory regime do not have any real effect on these proceedings.

# STATEMENT OF AGREED FACTS, AFFIDAVIT EVIDENCE AND OTHER DOCUMENTARY EVIDENCE

1. The parties have filed a statement of agreed facts. I attach it to these reasons. ASIC has read two affidavits, one by David Leslie Lonton, and the other by Robyn Gay Lyons. Neither deponent was required for cross‑examination. Mr Lonton is employed as a senior investigator by ASIC. His evidence includes corporate history details of a number of companies, including the respondents, and the results of searches of the Australian Credit Licensees Register, the Australian Credit Representatives Register and the Credit Registered Persons Register. Ms Lyons is Senior Legal Counsel for the National Australia Bank. Her evidence concerns bank records. ASIC also relies upon expert evidence from an accountant, Mr David Hockley of the firm Grant Thornton. Mr Hockley says in his report (exhibit 2) at para 2 that his instructions were to:

(a) [c]alculate the annual percentage rate of interest for each of the sets of data provided by ASIC, … in accordance with s 34 of the *Credit (Commercial Powers) Act 2010* (Qld) … ;

(b) [c]alculate whether the annual percentage rate of interest calculated for each of the sets of data would be different if it were calculated using the formula contained in either s 4 of the *Consumer Credit (Queensland) Special Provisions Regulations 2008* (Qld) or s 32B of the [Code]; and

(c) [c]alculate the simple interest rate for each of the sets of data.

(Quote varied for style.)

1. His report deals with those matters. The “sets of data” are the details of the various transactions between the relevant FAF entities and the customers, including the amounts of credit, total repayments, and repayment terms.
2. All of this evidence is virtually undisputed. Other evidence comes from the customers and from persons who were in control of, or associated with Fast Access Finance and/or either or both of the relevant FAF entities, or were otherwise involved in the affairs of one or more of those companies. One witness, Ms Lange, was relevantly involved only to the extent that she was involved in the affairs of DCH.

## EVIDENCE CONCERNING FAST ACCESS FINANCE AND DCH

## *Robert Andrew Corwin Legat*

1. Mr Robert Legat is in-house counsel for Fast Access Finance. He is also a director and the secretary of that company. He has been secretary since 1997, a director since 2011, and in‑house counsel since 2002. He holds a solicitor’s practising certificate. FAF Beenleigh was the first “franchise operation” set up by Fast Access Finance. In about 2001, Fast Access Finance gave FAF Beenleigh a licence to use its intellectual property. It permitted use of the name “Fast Access Finance”, associated procedures, “know-how”, software and documents. FAF Burleigh Heads was incorporated in about 2005. It had a “shareholders’ agreement” which regulated its activities. It did not hold an intellectual property licence. Fast Access Finance provided assistance to FAF Beenleigh and FAF Burleigh Heads in connection with diamond transactions in that it provided the, “connections to other business entities that enabled them to partake”. It made suggestions concerning their operations and identified the documentation which they were required to use if they were to participate in the diamond model. They were to use a particular software programme which kept track of diamond stock numbers and associated matters. They were required to make sure that they did not sell the diamonds for too high a price for, “legal reasons”. They were given directions as to their dealings with DCH. They could only depart from those directions if Fast Access Finance had given its approval.
2. Mr Legat described the business model used by the FAF entities. It provided, “a means for the companies to carry on business”. The entities had a product to sell, namely diamonds. They used documents which had been created by Fast Access Finance. They used its software to record transactions in accordance with procedures prescribed by it. He said that the, “mechanics of the model”, involved a company, FAF Beenleigh, FAF Burleigh Heads or another company, selling a quantity of diamonds to a consumer. Diamonds could be sold on a cash basis or on an instalment basis. If it sold on an instalment basis, payments were made over time. The relevant FAF entity would “manage” the payments.
3. The FAF entity was able, “to act on behalf of the mother entity on instruction called [DCH], and [DCH] had instructed that it would agree to purchase particular specifications of diamonds from customers of the company for a set price, and that it would pay for them at point of sale or immediately thereafter”. This seems to mean that DCH would buy diamonds from customers of the FAF entities at a fixed price, payable at the time of sale, or shortly thereafter.
4. Mr Legat understood that DCH is now deregistered and no longer trades. The sole director of DCH was Joylene Lange. He had known her for a number of years. She was approached in early 2008 to see if she was interested in assisting with the “diamond model” and whether she was prepared to form a business arrangement. She was introduced to Mr Legat by his brother, James. At a meeting early in 2008, they discussed the proposed model. Ms Lange indicated that she was prepared to participate and registered DCH. In the early 2000s Fast Access Finance had engaged a programmer to create proprietary software for use in its consumer credit and business lending activities. The software was a web‑based platform, accessible on the internet. In it were recorded details of borrowers and loan transactions. It could calculate interest, keep loan ledgers, and “that type of thing”. When the diamond model was developed, the same programmer was engaged to modify the software so that it could record the sale of diamonds, track stock, sales figures and history, keep ledgers of instalment sales and balances, record payments “and so on”. The software was known as LMS, standing for “Loan Management System”. The programmer was Mr Shidong Yu.
5. A set of documents had been designed for use in consumer credit lending and/or business lending. Such documents included a credit contract, a continuing credit contract, a Collateral Security Agreement in the form of a bill of sale, an acknowledgment document and, “other legislative requirements”. Mr Legat was shown various of the transactional documents and said that he was the author of most of them, with some input from others. The diamond model started operation on 4 August 2008. The acquisition of diamonds was primarily handled by either James Legat or Graeme Bray. Mr Robert Legat saw diamonds on a number of occasions. On one occasion he saw all of the diamonds at the Fast Access Finance office. He used the words, “various companies in one place at once”. I took this to mean that the diamonds were identified as belonging to particular FAF entities. They were in display cases or in zip‑lock bags. On one occasion he took photographs of the diamonds. The diamond model ceased operation in April 2012, the last transaction occurring on Friday, 13 April 2012. That model had been adopted because of the imposition in 2008, by Queensland legislation, of an interest rate cap on consumer credit lending. The commencement of trading using the diamond model coincided with the commencement of that legislation.
6. In cross‑examination Mr Legat agreed that prior to the adoption of the diamond model, Fast Access Finance and associated companies had been engaged in “micro‑lending”. FAF Beenleigh and Burleigh Heads had been primarily involved in consumer lending. Mr Legat’s evidence in this respect was somewhat vague. However he knew that the FAF entities lent money, and that Fast Access Finance itself earned money from transactions involving those entities. He agreed that prior to 2008, the FAF entities were primarily concerned with consumer credit and business lending, and that consumer lending was by far the greater part of their business. He agreed that the new legislation undermined the profitability of their businesses.
7. He agreed that the effect of the documentation (which he had prepared) was that persons who came in, “to obtain a certain amount of money”, were provided with, “a model by which they could obtain that amount of money”. He agreed that in the majority of cases, the effect of the documents was that the customer had to pay back double the amount borrowed. Each transaction involved the sale by the FAF entity to the customer of a number of diamonds at $250 each, and purchase by DCH of the diamonds at $125 each. Hence the customer would be required to pay to the FAF entity twice the amount which he or she had received from DCH. A customer would not take physical possession of any diamonds unless he or she asked for them. If he or she did so then, presumably, the Purchase Agreement would not be executed, and DCH would not pay the customer anything.
8. Although there is some suggestion in the evidence that on rare occasions, customers had asked to take the diamonds, the case has been conducted on the basis that whilst it may have been theoretically possible for the customer to do so, they did not. Certainly, there is no suggestion that diamonds were ever delivered to a customer by FAF Beenleigh or FAF Burleigh Heads. Mr Legat was not surprised to be told that diamonds were not kept at either the FAF Beenleigh premises or the FAF Burleigh Heads premises. He was asked if he knew that customers were not, in reality, coming to the FAF entities to buy diamonds. He said that he would not agree or disagree with that proposition. He was asked if he asserted that a consumer who required money to pay for a bond loan was intending to buy diamonds. He said that he had no direct involvement with any of the customers, and that any answers to the questions would be hearsay. He agreed that it would not be advantageous to use the diamond model for a loan obtained for business purposes, as the relevant expenses would not be tax deductible.
9. Mr Legat was then taken to a document which is now exhibit 135. It is headed “Finance Application”. He agreed that it was part of a suite of documents used in connection with the diamond model. He said that the document was also designed for use in other models. He agreed that a customer would initially fill out such a document and other documents. The application could be completed and submitted online. He was referred to the part of the document on p 3, which is headed “Funding Request”. He agreed that this part of the document suggested that the customer was seeking funds and not diamonds. However he said again that the form was designed for use in various business models. Mr Legat denied that he understood that the diamond model was merely a pretence, and that, in reality, there was no sale or purchase of diamonds.
10. Mr Legat was referred to a decision of the Queensland Civil & Administrative Tribunal (QCAT) in 2011 (exhibit 7). See *Carter v Fast Access Finance (Beaudesert) Pty Ltd* [2011] QCAT 525. The decision concerned FAF Beaudesert. Mr Legat acted as solicitor for that company in those proceedings. He gave evidence and was otherwise present at the hearing. He distributed the written decision to Mr James Legat and Mr Bray. The Tribunal concluded that the diamond model was, “highly unlikely, improbable and implausible”, so as to constitute a, “complete fiction”. See [27]. Mr Legat said that he communicated this view to the other directors of Fast Access Finance. The model continued to be used until April 2012. The decision was under appeal. Mr Legat did not consider that the model was a “complete fiction”. He agreed that there were no diamonds at the Beenleigh or Miami premises, and that it was no part of the model that specific diamonds be identified in relation to any transaction. He said that a customer could request that the diamonds be provided for identification and for sale. There were no secure storage facilities at the FAF Beenleigh or FAF Burleigh Heads premises. Mr Legat agreed that if the full suite of documents were executed, no diamonds would physically change hands. The diamonds were kept at James Legat’s home.
11. He was then taken to exhibit 131, a Sales Agreement. Item I2 on the front page is headed “Delivery”. That part of the document deals with delivery to a customer of diamonds purchased from an FAF entity. Mr Legat was then taken to exhibit 136, a Purchase Agreement used in the sale of diamonds to DCH by a customer. He agreed that the Purchase Agreement did not identify the diamonds in question as those obtained by the customer from the relevant FAF entity. He agreed that he was not aware of any delivery of diamonds by a customer to DCH. Clause 2 of the Purchase Agreement required such delivery by the customer.
12. Mr Legat was then questioned concerning the recording of transactions in the computer system. He agreed that it was, “nearly an accurate description”, to say that on a given day, the number of funding transactions which had occurred would be entered into the computer and that, as a result, a communication would be sent to a DCH account, directing payment of moneys owing to customers pursuant to transactions on that day. He agreed that usually on the same day, equivalent amounts would be paid into the DCH bank account, either from a Fast Access Finance account or another account controlled by Fast Access Finance. It was put to him that the funds paid out to customers by DCH were derived from, or reimbursed by Fast Access Finance, and that the diamonds supplied by the FAF entity to the customer, and by the customer to DCH, were sold back by DCH to Fast Access Finance. Mr Legat seemed to suggest that Fast Access Finance would only pay for diamonds acquired from DCH, so that DCH was not always reimbursed for moneys paid out to FAF entity customers. He also said that diamonds sold to FAF by DCH may not have been the diamonds sold to FAF entity customers.
13. Mr Legat said that although DCH did not make money on individual transactions, it was paid a fixed fee of $500 per month. He agreed that Ms Lange was the sister of James Legat’s wife. He said that in addition to the $500 monthly payment, she obtained some free accountancy work from Mr James Legat. At some stage Mr Legat was authorized to operate on the DCH account. Mr James Legat and Mr Graeme Bray also had authority to operate on the account.
14. Mr Legat had previously been President of the National Financial Services Federation (Queensland) Incorporated. That organisation was concerned with, “micro‑lending and the pay‑day lending industry”. That industry was involved in small loans. He was familiar with the legislative changes which occurred, and with theCredit Protection Act and the Transitional Act. He was aware of the registration and licensing systems, with pecuniary penalties for non‑compliance. He agreed that neither FAF Beenleigh nor FAF Burleigh Heads was registered or licensed, although FAF Beenleigh was on the “Register of Carried Over Instruments”. This register related to loan contracts entered into before the legislation came into effect. He said that he did not appreciate that the various companies ought to have been licensed or registered under the legislation. He did not realize this, even after the QCAT decision.
15. It is difficult to know what to make of Mr Legat’s evidence. In effect, he asserts that the transactions were genuinely by way of sale and purchase rather than lending and borrowing. It is possible that he honestly holds that view. For the moment, I do not assume to the contrary. However, he was clearly aware that the diamond model was set up to avoid the statutory interest cap. It is also difficult to avoid the conclusion that DCH was not independent of Fast Access Finance, and that he was aware of that fact. As he did not deal with customers, it may be that he did not appreciate the artificiality of any attempt by FAF entity staff to explain the transactions to customers. However with even a small amount of imagination, he would have realized that the typical customer would be looking for cash, not diamonds, and that such a customer would be unlikely to care much about the apparent structure of the documentation.

## *James George Robert Legat*

1. Mr James Legat is the accountant for Fast Access Finance and was previously a director. He is also the accountant for FAF Burleigh Heads and was previously a director of that company. He is the accountant for FAF Beenleigh but has never held any other office in that company. As a director his role with Fast Access Finance was to give accounting and financial support. Typically he would attend at the office once a week and give any direction that was required. He has practised as an accountant since 1986. He currently practises at Clear Island Waters on the Gold Coast under the firm name, SB Partners. Previously, it was called Swan & Baker Pty Ltd. He is familiar with the diamond model adopted by Fast Access Finance. He said:

Basically, it was a purchase and sale arrangement whereby the offices would sell particular diamonds to a consumer, and there was a relationship with a third party where the consumer could on‑sell those diamonds.

(ts 358 ll 12-15.)

1. The third party was DCH. The sole director and shareholder of that company was his sister‑in‑law, Ms Lange. He was also the accountant for that company and for Ms Lange. He had no day-to-day involvement in the affairs of DCH. The diamond model was introduced in mid‑2008. Its introduction was brought about by Queensland legislation, introducing an interest cap. It made the existing lending model unviable. He was involved in the implementation of the diamond model to the extent that he was a director at the time. The legal functions were left to his brother, Robert. Mr James Legat dealt with any financial aspects to do with GST reporting. Previously, the “entities” were not subject to GST because of the nature of their lending, but the change to the diamond model involved trading, purchase and sale, raising GST questions.
2. In 2008 Mr Legat had discussions with Ms Lange about the incorporation of DCH. A meeting at Mr Legat’s residence was attended by himself, Ms Lange, Mr Bray and Mr Robert Legat. They discussed the concept of the diamond model and Ms Lange’s involvement in it, whether she would be comfortable with it and whether she was prepared to accept the relevant responsibility. She was prepared to do so and asked that they form the company. Once the model came into effect, Mr Legat did not have any day-to-day involvement in dealings between Fast Access Finance and DCH. He has seen the diamonds associated with the diamond model. They were obtained from one of Swan & Baker’s clients, Diamonds on Broadbeach Pty Ltd, and stored at Mr Legat’s home. However two other suppliers seem to have been involved, Teracast Diamonds and ADTC. In the early stages, Mr Legat dealt with Diamonds on Broadbeach, telling them his requirements. Thereafter, Mr Bray usually dealt with them. Mr Legat did not recall being directly involved in payment for diamonds. He thought that Mr Bray had attended to that matter.
3. The diamonds were kept in a safe at his home. It had initially been acquired to store off‑site backup for his accounting practice. When the diamonds were received, they were in bulk. They would typically come in a packet, wrapped in paper, within a plastic bag, or loose in a plastic bag. He separated them into the respective “offices” (presumably the FAF entities) in the quantities required by each of them. Initially, they were put into plastic containers. In the end Mr Legat ran out of containers and stored the diamonds, “separately per office”, in plastic bags. The expression “per office”, presumably meant that the diamonds belonging to each FAF entity were stored in a bag reserved for that entity’s diamonds. There were a couple of occasions on which he gave diamonds to Mr Bray, because people had purchased them. Otherwise, he did not have any further dealings with the diamonds on a day‑to‑day or weekly basis. The relevant interest cap became effective on 31 July 2008. Trading in diamonds commenced on 4 August 2008. In 2010 he ceased to be a director of Fast Access Finance. He ceased to be a director of FAF Burleigh Heads in 2005 or thereabouts.
4. In cross-examination Mr Legat said that he was a director of Legat Holdings Pty Ltd, a shareholder in Fast Access Finance. He is also a director of Legat Investments Pty Ltd which is, in turn, a shareholder in Legat Holdings Pty Ltd. Legat Investments Pty Ltd is the trustee of a family discretionary trust. Mr Robert Legat is not associated with either Legat Holdings Pty Ltd or Legat Investments Pty Ltd. Mr James Legat and his wife control Legat Investments Pty Ltd. In this indirect way, he and his wife have an interest in Fast Access Finance.
5. Mr Legat agreed that he spoke to Ms Lange about DCH after the diamond model had been more or less designed. At a meeting involving Ms Lange, Mr Robert Legat, Mr James Legat and Mr Bray, the proposal was discussed. It seems that its operation was largely automated, using the Bill Buddy payment system. Ms Lange was initially paid a fee based on volume of activity. Subsequently it was fixed at $500 per month. Some of the cross-examination proceeded on the basis that when there was a sale by a customer to DCH, there would be a payment by that company to the customer of $250 per diamond, and a corresponding payment of a similar amount (from companies associated with Fast Access Finance), presumably to DCH. My understanding of other evidence is that such sales were for $125 per diamond. At the end of each day, the transactions were consolidated, and Fast Access Finance repurchased the stock in bulk from DCH. In summary the cash flow would involve (say) $1,000 going out to the consumer and an equivalent amount coming into a DCH account. In that sense DCH made no money on the transaction, save for the $500 per month fee. There was no written agreement between Fast Access Finance and DCH.
6. Mr Legat asked Ms Lange to be the director of DCH because she had experience as a book‑keeper, was a family member and was looking for more income. In other words he was trying to help her. It was suggested to Mr Legat that in fact, DCH was being used as a cipher whereby Fast Access Finance was lending money to individual customers. He said that he did not believe so. It was suggested that there were, in truth, no diamond sales. He disagreed. He said that the diamonds were all consistent in size, cut and clarity. However they were not separately identified in any way. He would transfer diamonds into bags for the various branches, and then return them to the safe. He did not move diamonds on a daily basis. He understood that diamonds were not kept at the FAF Beenleigh or FAF Burleigh Heads premises.
7. Mr Legat agreed that prior to adoption of the diamond model, Fast Access Finance and the FAF entities had been lending into the consumer market, making small loans for personal use, as opposed to business use. In excess of 90% of the business involved personal loans. Something less than 10% involved business loans. Advertising was aimed at the “smaller” end of the market. He agreed that there were instances of desperate people seeking loans, but said that there was an obligation on, “ourselves and the customers to make sure that [any loan] was affordable”. He believed that nobody was lent money, which loan he or she could not afford to repay.
8. He agreed that he was charging interest at an annualised rate of 240%. However he said that a loan was not generally for a year, so that the figure of 240% was a little misleading. He agreed that he looked for repeat business from customers, but not by use of any improper means. He understood that promotional letters were posted, presumably to customers or potential customers. He had heard that one such letter was described as a “star” letter. He agreed that the 48% interest cap made the lending business unviable. He agreed that he took security from customers where it was available, particularly over motor vehicles. He agreed that people might initially approach an FAF entity to borrow money. He also said that he did not know why they came into the office. He was not familiar with advertising placed after the diamond model was introduced.
9. He assumed that when a person came into an office looking for money, he or she would fill out a financial application. He was not familiar with the standard documents that were used, although he had seen them. He said that a particular application form shown to him had been used prior to the diamond model being introduced. He did not know whether there was ever any change in the form. He agreed that the application form seemed to contemplate that a person was seeking funds. He knew that FAF Beenleigh and FAF Burleigh Heads were catering to customers who were seeking advances of money, that at those places, there were no diamonds on the site, and that all of the diamonds in his safe were the same. It was put to him that the he was not running a jewellery business. He said that he was selling diamonds. He was not aware that after customers came in seeking funds, they would be told whether they had been approved for the funds. He agreed that if they were approved, they would be presented with the relevant documents, and that diamonds would not be physically delivered. However if a customer wanted the diamonds, he or she could have them. The loans were funded from internal cash. About $1.5 m was tied up in diamonds, involving a severe capital cost.
10. Mr Legat agreed that in 2010, he ceased to be a director of Fast Access Finance, and that the Code had come into effect in July 2010. The agreed statement of fact states that he ceased to be a director on 1 August 2010. He said that the commencement of the Code was not the reason for his ceasing to be a director. He had been spending more time at his accounting practice and did not have the time which he needed to dedicate to Fast Access Finance. He understood that credit providers who were engaged in credit activities under the Code needed to be registered and licensed. He knew this prior to his resignation as a director. His brother may have told him of these requirements.
11. He agreed that Fast Access Finance used an automated system which included a software system known as LMS, standing for Loan Management System. It was a proprietary system, owned by Fast Access Finance. The company also maintained a server which operated the programme. FAF Beenleigh and FAF Burleigh Heads were able to access the software from computers located in their offices. They did so with the permission of Fast Access Finance. He was taken to a version of the Sales Agreement which had been developed by Fast Access Finance. On the third page, the statement, “Copyright 2008, Fast Access Finance Pty Ltd” appears. He agreed that other documents in the bundle were also developed by Fast Access Finance and related to the diamond model. Fast Access Finance had intellectual property in these documents and allowed FAF Beenleigh and FAF Burleigh Heads to use them. He said that after he ceased to be a director of Fast Access Finance, he did not participate in decision‑making in connection with that company.
12. He believed that whilst the diamond model was in operation, the diamonds were delivered to customers pursuant to the Sales Agreements by way of “legal delivery”. He seems to have used this term in contradistinction to physical delivery. He considered that customers passed title to DCH by the Sales Agreements. He said that the diamonds were to him, “like buying tennis balls – they are all the same”. He agreed that consumers did not take physical possession but said that they took what he described as “legal possession”. He agreed that the diamonds were at his home in a safe, but said that they were available to whomsoever wanted to see them. They were not ordinarily shown to customers. He denied that each transaction was a pretence, or that the documents merely purported to be for the sale and purchase of diamonds when, in reality, an amount of money was being lent.
13. He said that he broadly knew that under the Code, credit providers who engaged in credit activity would have to be licensed or registered. However he left all legal matters to his brother. The matter was discussed broadly before the relevant legislation came into effect, but they did not believe that it applied to “us”. He agreed that he had “set up” DCH, but did not recall who paid for it. He could not recall whether money was injected into DCH by Fast Access Finance. He agreed that the diamond model did not commence operations until about August 2008. Having looked at bank records, he agreed that significant moneys had been injected into DCH between April and July. He said that the deposits appeared to have come from entities such as FAF Beenleigh and FAF Burleigh Heads. He understood that the money so injected was by way of float capital. He agreed that Ms Lange did not put any money into DCH.
14. Mr Legat was asked about a company, Legat Brothers Pty Ltd, another shareholder in Fast Access Finance. It is Mr Robert Legat’s company. It is not a trustee company, but a corporate trading entity in its own right. Mr Legat was also familiar with the entity, Bill Buddy Pty Ltd which was used for effecting repayments. Each repayment attracted a $2 fee. Mr Legat did not recall how much Bill Buddy had earned from that business. When asked about the overall turnover of the diamond business, he said that FAF Beenleigh, for example, might have a, “typical loan book that might exist for vendor sales of diamonds”, in the region of $200,000. Over the whole of the Fast Access Finance operation, $2 m or $3 m might be involved.

## *Graeme John Bray*

1. Mr Bray is a director of Fast Access Finance, FAF Beenleigh and FAF Burleigh Heads. His duties concerning the diamond model were minimal. He was predominantly responsible for organizing signage, advertising and liaising with staff. He had no day-to-day dealings with either FAF Beenleigh or FAF Burleigh Heads. However he had dealings with the other directors of those companies. The other director of FAF Beenleigh was Michael Maloney. The other director of FAF Burleigh Heads was Graeme Beattie. His communications with them concerned their business operations, including the sale and purchase of diamonds.
2. Mr Bray gave evidence of instructions given to FAF Beenleigh and FAF Burleigh Heads. Pursuant to those instructions, if a customer sought a sum of money, the FAF entity would identify whether it was for a consumer or business purpose. If it was for a consumer purpose, the FAF entity was to inform the customer that it could not offer a loan but had a facility which could provide the required sum. This facility was introduced in August 2008. He knew of DCH, but was not involved in its affairs. He has had no involvement with Ms Lange concerning the affairs of DCH, or its interaction with Fast Access Finance.
3. Concerning the acquisition of diamonds, he said that James Legat had a client who had a diamond business in Broadbeach. Mr Legat arranged the purchase of diamonds from that source. From time to time, he asked Mr Bray to collect such diamonds from the Broadbeach outlet. Mr Bray would organize a cheque in payment, deliver the cheque, pick up the diamonds and deliver them to James Legat. He did this on many occasions. He did not retain any diamonds for himself. He acquired diamonds for both FAF Beenleigh and FAF Burleigh Heads. He would organize payment by the relevant FAF entity to Fast Access Finance. The diamonds would be uploaded into the Fast Access Finance computer system so that the relevant FAF entity could sell them. Each of FAF Beenleigh and FAF Burleigh Heads would have held between 20 and 50 diamonds at any one time. None of the diamonds was returned to him. He received valuation documents from the diamond supplier. They appear at exhibit 140. Diamond sales at both FAF Beenleigh and FAF Burleigh Heads continued until 2012. Neither is now trading. Mr Bray said that the funds for acquiring the diamonds came from a company called Tri Star which is not related to the Fast Access Finance companies.
4. In cross examination Mr Bray said that he did not recall being a signatory on the DCH account. He denied knowing that DCH was being used as a “cipher” to move funds to customers in lending transactions. He was aware that each day, there were electronic transfers of funds from the National Australia Bank to DCH for payments to customers. He said that the money paid to DCH from the Fast Access Finance accounts was, “because the office was restocking on the diamonds that had been sold for that day”. He said that DCH received a facility fee, but made no specific profit on individual transactions. He understood that DCH was owned by Ms Lange, and that she was James Legat’s sister-in-law. He agreed that effectively, DCH did nothing. Fast Access Finance did all of the necessary work. He did not agree that DCH was simply a cipher, that the “construct of diamond sales and diamond purchase” was just a pretence or that the transactions were really by way of loan.
5. He said that prior to the end of June 2008 the predominant business of Fast Access Finance and the FAF entities had been lending money to consumers. At the end of June 2008 a statutory cap was placed on interest for loans to consumers. He agreed that business loans were a very small part of the Fast Access Finance business. He agreed that prior to the imposition of the cap, advertising had focussed upon borrowings for bonds, car registration, “fast money” and “quick cash”. The advertisements were designed to attract consumers who were in urgent need of personal finance. He agreed that many of these people were desperate. The cap, if observed, would have deprived Fast Access Finance of virtually all of its profit. It was important that it continue to operate. Even after the diamond model was introduced, the advertising focussed on borrowing for the purpose of paying residential lease bonds. Mr Bray agreed that the advertising was, even after the commencement of the diamond model, designed to attract customers who were “consumer borrowers”, particularly those looking for money to post residential bonds. It would be fair to say that none of those people came into the office for the purpose of buying diamonds.
6. He agreed that the finance application form asked the customer to identify the purpose for which funds were required. When asked if he agreed that the model did not provide for the delivery of diamonds to the customer, he said that if a customer wanted the diamonds he or she could have them. Notwithstanding the fact that a customer had not come into the office to obtain diamonds, he or she was invariably given a finance application form. If approved, the customer would receive two documents, one purporting to be an agreement for the sale of diamonds to him or her and the other, an agreement for the sale of diamonds by the customer to DCH. The customer was expected to sign both. It was put to Mr Bray that he knew that the customer was not going to receive diamonds. He said that if the customer did not want the diamonds, he or she would not receive them. He knew that no diamonds were kept on the FAF Beenleigh or FAF Burleigh Heads premises, and that specific diamonds were not allocated to particular transactions. He agreed that the customer would receive an amount which he or she would have to repay, together with an equivalent amount which, Mr Bray said, was for the purchase of the diamonds. It was put to him that he knew that the additional amount represented interest or a credit charge. He insisted that it was the cost of the diamonds.
7. Mr Bray said that Mr Robert Legat kept him informed of legislative changes. He knew that under Commonwealth legislation, the Code was to commence on 1 July 2010. He was also aware of the Transitional Act. He knew that such legislation provided that credit providers who were “providing credit activity” had to be registered and, ultimately, licensed. He denied knowing that FAF Beenleigh and FAF Burleigh Heads were providing credit. He knew that they were not registered or licensed under the proposed legislative scheme. He did not know that DCH was neither registered nor licensed. He was aware of the hearing in QCAT involving Fast Access Finance Beaudesert. He was a director of that company. He did not attend the hearings but was informed about them. DCH was also a party. He instructed Mr Robert Legat to appear on behalf of FAF Beaudesert. He did not recall being provided with a copy of QCAT’s reasons (exhibit 7).
8. Mr Bray was advised that QCAT had found that the characterization of the transactions was so highly unlikely, improbable and implausible as to be a complete fiction. He disagreed with the proposition that the sale and purchase of goods comprised a mere pretence to conceal a lending transaction, although he understood that QCAT had so found. He said that “we” did not believe that the FAF entities were providing consumer credit. Mr Bray gave the impression that he wanted to distance himself from operation of the diamond model. My comments concerning Mr Robert Legat’s evidence otherwise apply to his evidence.

## *Joylene Melissa Rae Lange*

1. Ms Lange is Mr James Legat’s sister‑in‑law. She has known him for over 25 years. He has been her accountant since some time before 2007. At the beginning of 2008 Mr Legat approached her, suggesting that she start a company called Diamond Clearing House. The company would sell diamonds to Fast Access Finance. That company would find customers from whom DCH would buy diamonds. In about March 2008, she had a meeting with Mr James Legat, Mr Robert Legat and Mr Graeme Beattie in which more detail was provided concerning the proposed operation. They wanted a company separate from Fast Access Finance. As she knew all three of them, they would have a relationship of trust as well as a business relationship. DCH was to be responsible for selling diamonds to Fast Access Finance offices. Fast Access Finance would work as an agent for DCH, finding customers who wanted to sell diamonds back to it. DCH was to operate under a second‑hand dealer’s licence. Fast Access Finance would deal with day-to-day operations, “paperwork” and documentation. It would organize the purchase by DCH of diamonds and the purchase of diamonds from DCH.
2. DCH was to be the entity which controlled the set up and how it worked and operated, with Ms Lange as director. She was to be responsible for checking that everything was done in accordance with their agreement. For the privilege of its acting as agent for DCH, Fast Access Finance was to pay an agency fee to DCH. At first the fee was calculated on a per diamond basis. That system only operated for a couple of months. It was found to be too cumbersome. A flat fee of $500 per month was negotiated.
3. The proposal was acceptable to Ms Lange, and so DCH was incorporated, with Mr James Legat as its accountant. He also assisted in incorporating it. They set up a business bank account with National Australia Bank. Mr Robert Legat did the paperwork for the second‑hand dealer’s licence and explained to Ms Lange the process of applying for such licence. She was the only director of DCH. Its share capital was $2. She was the only shareholder. It has now been deregistered. When the bank account was established with the National Australia Bank, Ms Lange and Mr James Legat were the signatories. Computer access was granted to Fast Access Finance. It could view the account but not operate on it. Not long after the account was established Mr James Legat was removed as a signatory. Ms Lange was then the only signatory.
4. Ms Lange was shown various documents which related to the establishment of the bank account. She was also shown Excel documents, showing the money paid out of the DCH account to customers on a daily basis. Ms Lange received these documents by email from the Fast Access Finance head office in Nerang. She described a form of agreement by which DCH purchased diamonds. It identified the customer selling the diamonds, the number of diamonds, the relevant amount and bank details. I infer that this was in the form of the Purchase Agreements to which I have referred. The document was drafted by Ms Lange in conjunction with Mr Robert Legat, Mr James Legat and Mr Graeme Beattie.
5. On a day-to-day basis DCH did not really do anything. Ms Lange would check the reports and the bank account, making sure that everything was running smoothly. DCH purchased the first quantity of diamonds to which Mr Bray referred. Ms Lange said that Mr James Legat had sourced a number of diamonds of a specific carat, clarity and size. She received a bank cheque which was delivered to the diamond seller, but Mr James Legat actually attended to the transaction. Ms Lange authorized the payment. The diamonds were stored in a safe. Thereafter, Fast Access Finance, on a day-to-day basis, attended to the purchasing and selling of diamonds. She believed that, save for subsequent purchases from customers, there was only one purchase of diamonds, at the very beginning of the project. Ms Lange did not remember providing another bank cheque. She said that there were two sides to the business. One was selling diamonds to Fast Access Finance. The other was finding clients from whom to buy diamonds, which task was undertaken by Fast Access Finance. Ms Lange was asked whether she sold diamonds to Fast Access Finance, or to the individual FAF entities. She said that payments came from the entities but, “it was all done through the main office at Nerang, so they would actually put in their orders to the main office, and then they organised … the purchase of them”.
6. In cross‑examination Ms Lange agreed that Mr Bray and Mr Robert Legat were also signatories on the DCH account. Mr James Legat decided who were to be signatories. She did not recall Mr Robert Legat or Mr Bray being removed as signatories. Although she had said that Fast Access Finance could not operate on the DCH account, in fact there was a software programme which enabled it to do so. Every day, funds were transferred in accordance with directions from Fast Access Finance. She said that there was an agreement that Fast Access Finance would operate the Fast Access Finance software system so that every day, electronic information relating to consumer transactions would be sent to the bank. The bank would act on that information by paying the customers who had entered into diamond model transactions. Ms Lange said that Fast Access Finance would not necessarily buy all diamonds which DCH had acquired from clients. They would only acquire the number that they needed, or at least that was her understanding. It was suggested to her that DCH was being used as a cipher, to give the appearance that there were diamond sales. She denied this, saying that there were diamond sales. She agreed that DCH did not make money on the sale of diamonds, apart from the fee. It was put to her that the fee of $500 was a payment to her for acting as director and shareholder. She denied this.
7. DCH did not sell diamonds to anybody other than Fast Access Finance. It did not carry on such a business. She did not remember if she had added anything to the drafting of the Purchase Agreement. She said that the information she received on a daily basis was in the form of an attachment to an email.
8. She agreed that the diamond model ceased to operate in 2012, and that a document dated 5 December 2013 (which was shown to her) did not relate to operations for that year. She said that when the company was set up, funds were provided by Fast Access Finance which, “were put in as a bond”. She, herself, did not invest any money in the company. The funds were used to purchase diamonds. She had no prior experience in the diamond industry. There was no written agreement in relation to the arrangement. She did not seek to identify the actual diamonds which were the subject of any particular purchase agreement. She had never previously been a company director.
9. I very much doubt that Ms Lange believed that she was running DCH. I am inclined to infer that she was happy to take a moderate fee in return for the use of her name as a director. I do not accept that she exercised any real control over the company’s affairs or had any real understanding of the diamond model.

## *Shidong Yu*

1. Mr Yu is a software architect, designer and programmer. He is presently a director of Bill Buddy Pty Ltd. That company provides online payment services. Since 2003, he has been designing and programming software for Fast Access Finance. He has designed loan management systems, diamond sales systems and some other customer-related management systems. In providing these services, he was instructed by Messrs Bray and Robert and James Legat. The loan management system kept a record of loan transactions, posting interest and performing other services in connection with the repayments and recording of repayments. The software was owned by Fast Access Finance. It could be accessed from a web browser. Each Fast Access Finance "office" could go to the portal of the system where they would see, "a user name and a password verification screen". A person who sought to enter had to provide the relevant information in order to obtain access. The offices could also enter data into, and obtain reports from the system. Data to be entered might include loans which had been created and other transactions, such as posting fees or entering cash receipts. It also contained data with respect to customers, each of whom had a customer identification. When Fast Access Finance adopted the business model involving diamonds, Mr Yu modified the existing system in order to accommodate the diamond model.
2. He said that:

…when every single sale is being generated by the time when the office – the office user is keying in the data, the real time the diamond stock is being checked, and is the number of diamonds available for sale is on the screen, so they can see that.

(ts 332 ll 8-11.)

1. Each diamond had a unique identifier so that sales could be linked to such identifiers. He said:

So when the sales are being created there is a link that's being established between the sales and these unique identifiers, so we can keep a track of that by the diamond level. And then by checking the history of the time stamp when the sales were created, we can determine that whether the status of the diamond is available for sale or is still in the “on hold” status.

(ts 332 ll 18-23.)

1. By "on hold" Mr Yu meant that a diamond was not available for sale because it had been sold and could not be resold for 10 days after such sale. This evidence may suggest that if necessary, particular diamonds could be identified as having been appropriated to a particular sale. However, in cross-examination, Mr Yu said otherwise. The system interacted with Bill Buddy's online payment system, directly debiting customers' accounts with repayment amounts. It generated a "payment due" report which resulted in a withdrawal from the customer's bank account and, presumably, a corresponding credit to the account of the relevant FAF entity.
2. Bill Buddy allowed small businesses and individuals to utilize a direct debit facility, a BPAY facility or a credit card facility. Bill Buddy required Fast Access Finance to obtain from customers two forms, one called a "Direct Debit Authorization Form" and the other, a "Facility Agreement Form". The first form provided the customer's authorization for the direct debit of instalment amounts against his or her bank account. The second form informed the customer that he or she had agreed to pay the fees involved in such transactions, presumably to Bill Buddy. Mr Yu was then taken through some of the screens available in the system. He had not seen all of the diamonds, although he had seen some.
3. Under cross examination, he agreed that although his system gave a unique number to a theoretical diamond, such numbers were not assigned to specific diamonds held by Fast Access Finance. He agreed that the system contained a facility for directing the National Australia Bank to pay money to customers. At ts 338 ll 20 - 33, this passage appears:

MR SULLIVAN: Did Bill Buddy organise for payments to be made to Diamond Clearing House? --- I understand that, because despite of the question you ask before, I did not know the nature of these transactions. Generally, despite of these transactions, Bill Buddy was in the middle of Fast Access Finance, the customer, and Diamond Clearing House. So literally almost all the money going into the Diamond Clearing House was coming from Bill Buddy at that moment, and all the money coming back from the customer, going back to Fast Access Finance, goes to Bill Buddy and then goes to Fast Access Finance. So I'm not sure which part of the transaction it is, because at the end of the day is if Fast Access - that's what I was aware of - is if Fast Access, sorry, if Diamond Clearing House is selling the diamond back to Fast Access Finance, and Bill Buddy is in charge of direct debiting the money from Fast Access Finance and give it to Diamond Clearing House. This could be the transaction you are referring to, but I - I can't really confirm that because this is first time I see this one and I have to verify with the system.

1. To the extent that it is relevant, I accept Mr Yu's evidence. There is no reason for doing otherwise.

**EVIDENCE CONCERNING THE FAF BEENLEIGH TRANSACTIONS**

### Steven James Eadie

1. Mr Eadie dealt with FAF Beenleigh in August 2010. Immediately before that time, he and his wife were seeking to rent residential premises and needed to raise sufficient money to cover the amount of the rental bond. They had enough money to pay the rent but not quite enough for the bond. Mr Eadie was seeking about $1,000 for that purpose. He and his wife searched online and found that FAF Beenleigh was conveniently located. His wife telephoned the FAF Beenleigh office to, “find out what paperwork was required”. Once the paperwork had been assembled they went to that office. The “paperwork” included payslips, bank details, bank statements and a vehicle registration document. Some of the relevant documents are in evidence. Mr Eadie was asked to describe the premises at Beenleigh. He said that, “[t]he only thing I can recall is when I went there was a sign saying, ‘Fast Access Finance’, and then as I walked towards the building, it was just – I opened the door and we walked in”.
2. When they entered the premises they found a receptionist’s desk to the rear of the right‑hand wall, and four or five chairs to the left. A corridor led to the back of the building. They remained in the front room. Mr Eadie did not remember whether there was any signage in the room. There were no goods on display. They went to the receptionist’s desk and spoke to a woman who was sitting behind the desk. Her name was something like Loretta or Leanne. He told her that they had a meeting with Michael concerning a rental loan or a bond loan. I infer that “Michael” was Mr Maloney, another witness, and that Loretta was his then wife. Mr Eadie did not remember any discussion concerning the amount to be obtained. They were provided with further “paperwork” to complete. They sat down and did so. One document was exhibit 29, a finance application. It shows the applicant for the loan as being Mr Eadie. The amount requested by way of “funding” is $2,000. He identified most of the handwriting on the second and third pages as being that of his wife. However the figure of $130 in brackets (which appears on the third page, opposite the question: “How much can you afford to pay?”) is not hers. It seems that in answer to that question, Mr Eadie’s wife had inserted the figure of $110 weekly. Somebody else subsequently inserted the figure of $130. They had sought only to obtain $1,000. Mr Eadie did not remember how the substitution of $2,000 for $1,000 had occurred, but understood that somebody had told them that the amount of $2,000 was the minimum amount permitted.
3. After they had completed the application, they waited for a couple of minutes. Michael then entered the room and introduced himself. They were still in the front room. They discussed the purpose for which funds were being sought. At some stage Michael said something, “about diamonds”. Mr Eadie asked, “What’s diamonds got to do with it?” Michael said something like, “It’s just how we put it through. It’s just a way to get around things”. Mr Eadie’s wife said that she was not going to hand over her engagement ring. Michael said that he was not going to take her engagement ring. Michael then went into the back room with the documents. In his absence Mr Eadie and his wife spoke about diamonds, although they were not sure about Michael’s comments. After a couple of minutes Michael returned and asked for paperwork concerning Mr Eadie’s motor vehicle. As a result of that conversation Mr Eadie and his wife went to a nearby Queensland Transport Office where they obtained the relevant paperwork, and then returned to the FAF Beenleigh office. They handed the paperwork to Michael. The document obtained from Queensland Transport appears to have been a vehicle registration renewal notice (exhibit 30). At some stage somebody other than Mr Eadie completed a document described as a Privacy Act consent form. He signed it. That document is exhibit 34.
4. Michael went away and returned with documentation concerning, “the loan of the money or the purchase of the money that we wanted to borrow”. He turned the documents so that they could read them and explained them. Mr Eadie made sure that the personal details were correct. He recalled that on some pages there were references to diamonds. He did not understand those references. He was only seeking a loan. Michael said, “Don’t worry if you see diamonds on the paperwork. It’s just how we put it through to get around things”. Mr Eadie, “shrugged it off”, as they needed the money. When he went to FAF Beenleigh he had not intended to buy or sell diamonds. He was seeking a loan, “of money for rental”. He did not recall seeing any signage about diamonds, nor were any diamonds shown to them. There were no display cabinets. No diamonds were ever provided to them. He did not provide any diamonds to the “Fast Access Finance people” with whom he was dealing.
5. Concerning the documents, he was told to make sure that the personal details were correct. He skipped over the rest of the pages and signed the back page. He was then referred to a document headed “Direct Debit Request” (exhibit 35). He identified his signature on that document. There was no discussion concerning it. He did not recognize the other writing on the document. He was shown exhibit 36, the Sales Agreement. He said that this was the document of which he said that he read the front page but skipped over the balance. Whilst he was reading it, the discussion about diamonds occurred. Mr Eadie said that he had a, “quick glimpse over it”, but did not read it in detail.
6. He was then taken to a document entitled “Purchase Agreement” (exhibit 38). He recognized his signature on it. He was asked to check the details of his address and bank details. He said that he was again told not to worry if he saw references to diamonds in the document. He said that the company, “Diamond Clearing House Pty Ltd”, had not been mentioned to him. He understood that he was dealing with “Fast Access Finance at Beenleigh”. He signed the Purchase Agreement. He was then taken to a document entitled “Tax Invoice”, dated 27 August 2010 (exhibit 39). He remembered seeing that document. He understood it to indicate the amount which he had to pay on a weekly basis. He noted that the amount of the loan was $4,000. He said, “I knew I was going to have to pay some sort of interest back, but didn’t realise it was going to be to this extent”. He was then taken to a document headed “Diamond Sales Forecast Report” dated 27 August 2010 (exhibit 40). He recalled that he had been shown this document. It was explained to him. He said that the dates for payment and the amounts were explained. He was then taken to a document headed, “Westpac Choice eAccount” (exhibit 41). It appears to be a bank statement. Mr Eadie said that the figure of $2,000, shown as a credit on p 7, represented the amount obtained from FAF Beenleigh. He spent it on a bond for a rental property and used some of it to hire a truck to move furniture to the new residence. Exhibit 37 is entitled, “Collateral Security Agreement”. By it Mr Eadie transferred his motor vehicle to FAF Beenleigh to secure performance of his obligations under the Sales Agreement.
7. At some stage during the period over which he was repaying the loan, his employment circumstances changed, so that instead of being paid weekly, he was being paid fortnightly. This caused some temporary difficulty in making repayments. He approached FAF Beenleigh. It agreed to postpone payments until he had reorganized his finances. This accommodation came at a cost. FAF Beenleigh generated a “Sales Agreement” dated 22 October 2010 (exhibit 42), a document headed “Collateral Security Agreement” dated 22 October 2010 (exhibit 43), and a third document headed “Purchase Agreement” dated 22 October 2010 (exhibit 44). These documents evidence the basis upon which such further financial accommodation was extended. He was referred to a document which appears not to be amongst the exhibits. It bore the words, “Instalments will vary to $260.00 … each fortnight commencing 9 November 2010”. He said that at about that time his employer’s payment cycle had changed. He had no intention of dealing in diamonds when he signed these documents. He was then taken to documents described as “Westpac Choice eAccount” (exhibit 45), a series of bank statements. On p 14 of 16 a deposit of $250 appears.
8. At some stage he obtained a bank loan and contacted FAF Beenleigh to obtain a payout figure. The payout figure was $2,900. He paid it. He was taken to a letter headed “Re: Account Finalisation”, dated 29 November 2010 (exhibit 46). It is on the letterhead of FAF Beenleigh and reads:

Thank you for choosing Fast Access Finance. We would welcome the opportunity to provide further assistance to you in the future.

We can confirm that at the date of this letter, your account has been paid in full and the amount currently owing to us is nil. Security held by Fast Access Finance ahs [sic] been released.

…

1. Before turning to the cross‑examination of Mr Eadie I should say a little about the documents to which he was taken in the course of his evidence. They are more or less common to all relevant transactions. Mr Eadie’s Finance Application is exhibit 29. I shall say a little more about it at a later stage. The Sales Agreement (exhibit 36) describes the “Goods” as, “16 x loose modern brilliant cut diamond, 0.10cts, colour “H”, clarity P1”. The “Price of Goods” is shown as “Deposit: $0” and “Balance: $4,000 including GST”. The delivery date is blank. It is followed by the words in brackets, “If blank, 3 business days from the date of this Agreement”. Against the words “Type of Sale” a cross appears in the box opposite the words “Instalment Sale”. The alternative box is “Cash Sale”. Terms of payment are said to be “Cash Sale: In full on Delivery Date” and “Instalment Sale: 31.00 payments of $128.00 each and 1 payment of the balance owing, commencing 08/09/2010 and payable WEEKLY”.
2. There are then two columns. One is headed “Instalment Sale Conditions”. In the document the spelling “Installment” is used. I shall use the spelling “Instalment” as it seems to be more common. The other column is headed “Cash Sale Conditions”. Both deal with the purchase and delivery of the “Goods”, payment, passing of title, ability to deal with goods, payment default, effect of default and consent to the future supply of marketing materials. In the Instalment Sale Conditions column there are also provisions relating to prepayment, security and the circumstances in which the “Seller” is to be entitled to take immediate action to recover the balance owing. Under the heading “Security” at I9, it is said that:

In consideration for entering into this Agreement and agreeing to accept instalments for payment of the Goods, the Buyer agrees to grant the Seller security against the promise to pay by instalments by entering into a Collateral Security Agreement with the Seller. The terms of the Collateral Security Agreement are to be read in conjunction with this Agreement, and default under the Collateral Security Agreement shall be a default under this Agreement.

1. By the Collateral Security Agreement (exhibit 37), Mr Eadie, as grantor, warranted that he was the beneficial owner of the motor vehicle in question and agreed to transfer and assign it to FAF Beenleigh, upon the proviso that the charge would be released, at Mr Eadie’s expense, in the event that he satisfied his obligations pursuant to the Collateral Security Agreement and under the Sales Agreement. It is not, at this stage, necessary to say any more about that document.
2. The Purchase Agreement dated 27 August 2010 (exhibit 38) provided for the purchase from Mr Eadie by DCH of, “16 x loose modern brilliant cut diamond, point 10cts, colour “H”, clarity P1” for $2,000. The conditions of sale are short and are as follows:

1. **Purchase**

The Purchaser agrees to purchase the Diamonds from the Vendor and to pay the full Price of Diamonds on the Date in exchange for the Diamonds.

2. **Delivery**

The Vendor undertakes to deliver the Diamonds, in person or by agent. The Purchaser may elect to pay the Vendor on or before taking delivery, in their sole discretion.

3. **Payment**

The Purchaser shall pay the Price of Diamonds, in full, to the Vendor’s nominated bank account shown above by internet direct deposit. Alternatively, the Purchaser may elect to pay the Vendor in the form of a cheque.

4. **Passing of Title**

Title to the Diamonds shall pass to the Purchaser on Payment.

1. In the tax invoice (exhibit 39), dated 27 August 2010, the diamonds are described in the same way as in the Sales Agreement. The price is shown as $4,000, including GST, and the terms of payment as, “31.00 at full amount and one last payment being for the balance owing”. Each payment was to be in the amount of $130, including a $2 direct debit fee, commencing on 8 August 2010 and payable weekly. In the event that the account was finalized by 29 September 2010 there was to be “a sales discount amount” of $2,400. As far as I can see, none of the other tax invoices in evidence refers to such a discount. There is no reference to it in Mr Eadie’s Sales Agreement. I infer that Mr Eadie did not take advantage of the discount opportunity. He was still repaying the loan on 17 November 2010. The Diamond Sales Forecast Report (exhibit 40) shows amounts of interest to accrue, and payments to be made for the period from 31 August 2010 until 13 April 2011. The documents concerning the renegotiated repayment provisions include a Sales Agreement, a Purchase Agreement and a Collateral Security Agreement.
2. In cross‑examination Mr Eadie said that at the Beenleigh office, he saw the Fast Access Finance sign to which I have previously referred. He did not recall seeing any sign saying “Diamonds Sold Here”. He met Mr Maloney on the occasion on which he first visited the Beenleigh premises. On that first occasion, he was at the premises for approximately half an hour. He and his wife then went to Queensland Transport. About 20 minutes to half an hour later, they returned.
3. It was put to him that:

And the nature of that transaction, as was explained to you, that although it was a purchase and sale, you would at the end of the day receive the funding that you were after. Is that correct?

He replied:

Yes it was. I was going to receive the funds for the rental bond.

(ts 74 ll 1 – 4)

1. He was then asked a number of questions concerning his knowledge of the nature of the transaction, derived from the various documents. He agreed that he would have seen that one document was headed “Sales Agreement”, with details of the seller and of the goods described, together with the price, and that he recognized that it was, “a good[s] sale agreement”. He similarly saw the reference to DCH in the Purchase Agreement, with the price of the diamonds and a description of them. Michael had said that if he saw anything about diamonds on the paperwork, it was, “just how they put it through to get around things”. He also remembered seeing the terms of payment, and the document headed “Tax Invoice”. At ts 75 ll 37 – 39, it was put to him that:

So there was no misunderstanding that there were diamonds involved in this transaction, were there?

He replied:

The diamonds were on there purely because of what Michael said, that’s how they got around things. … I wasn’t going to purchase any diamonds or sell diamonds through Fast Access.

1. He agreed that when he went to FAF Beenleigh, he was interested in obtaining finance. His primary interest was not in the mechanics of the transaction, but to ensure that he got the dollar figure. It did not matter to him, at that stage, whether it involved buying and selling a commodity, diamonds or anything else. He agreed that he did not remember the precise words used by Michael, and that he had, in his evidence, given the substance of his comments concerning diamonds. He did not recall being told that he was able to obtain the $2,000 by buying and selling diamonds. Nor did he recall Mr Maloney saying that if he wanted to buy the diamonds they were real, and that he could show him the diamonds. He did not recall any explanation by Mr Maloney as to how the transaction worked by reference to a refrigerator.
2. He had no specific recollection of Mr Maloney using the word “loan”. However he may have used the words “finance” or “funds”. He did not feel coerced into signing the documents but understood that he had to sign them in order to obtain the funds. It was put to him that Mr Maloney had not said that he should not worry about the diamonds because it was just how they “put it through”, and that he had explained the transaction. Mr Eadie said that he believed that he had been simply told that the transaction was, “how they put it through to get around things”. However he said that he did not have a positive recollection of those words being used. He recalled Mr Maloney saying something about, “getting around things”, and that he need not worry about diamonds if there was such a reference “… on the paperwork. It was just how they got it through”.
3. I see no reason to doubt Mr Eadie’s honesty, nor the substantial accuracy of his account. I accept that he did not have a precise recollection of the words which were used. That is hardly surprising. Mr Eadie’s account of Mr Maloney’s explanation of the references to diamonds reflects the circumstances which in fact, led to the adoption of the diamond model. Mr Maloney did not recall dealing with Mr Eadie. Of course, Mr Eadie, in common with many, perhaps all of the other relevant customers, was not interested in the form of the transactions. Nonetheless, he recalls the transaction, and Mr Maloney does not. Notwithstanding Mr Maloney’s evidence (set out later in these reasons) that he explained the diamond model to potential customers, I accept that Mr Eadie’s version is substantially accurate.
4. The October transaction is not the subject of these proceedings.

## *Jade Kelli Jones*

1. Ms Jones dealt with FAF Beenleigh on two occasions. In May 2011 she needed to obtain a bond loan as she was planning to move, with her children, into shared accommodation. She could not obtain a loan through the bank and had seen the FAF Beenleigh premises with the sign “Fast Access Finance”. There was also a “Cash Converters” office in the same street. She went to FAF Beenleigh rather than to Cash Converters because she thought that the former specialized in finance, whilst the latter were pawnbrokers. The FAF Beenleigh premises had stickers on the windows bearing the words “Fast Access Finance”. There was also a sign above the building. When she entered the premises there was a desk with a computer and a couple of chairs for customers. There were no goods on display. There was another room at the back of the office, but the door was closed. At no time did she go into that room.
2. Ms Jones spoke to a man called Michael. He told her that she should bring in identification, a bank statement, a work pay slip and “something for collateral”. She returned home and collected the documents in question. She returned on the following day, as Michael had suggested. The bank statement, her driver’s licence, car registration certificate and payslip are exhibits 9, 10, 11 and 12. When she returned, Michael was attending to another customer, and so she had to wait. Michael recognized her and had an application form, “ready to go”. She was invited to complete it. The application is exhibit 14. Ms Jones requested an advance of $1,000 but was told that she was only eligible for $875. She inserted the repayment figure of $140 per fortnight. Michael had calculated it. Exhibit 15 is a Privacy Act consent form dated 30 May 2011. Ms Jones signed that document but did not recall filling it out. Michael asked for a more recent bank statement than that which she had produced. The new statement is exhibit 13.
3. By the time she had printed the more recent statement, Michael had returned with the “paperwork”. He asked her to sign the relevant documents. He said that she would get a loan. He spoke about the documents as she was signing them but did not ask her to read them. He pointed to the places at which she should sign. When they came to the repayment details, he said that there would be a direct debit arrangement through “Bill Buddy”, and that if she missed a payment, there would be a $16.60 dishonour fee, and that she could lose her car. Exhibit 16 is a Sales Agreement dated 30 May 2011 which she signed, without reading. She was not asked to read it, nor was she advised to obtain legal advice. Exhibit 17 is a Collateral Security Agreement dated 30 May 2011. She signed it without reading it. Exhibit 18 is a direct debit request form, in favour of Bill Buddy. Again, she signed it without reading it.
4. Exhibit 20 is a Diamond Sales Forecast Report. Exhibit 19 is a Purchase Agreement dated 30 May 2011. As I have previously indicated in connection with Mr Eadie’s evidence, that document refers to DCH. That name was never mentioned to Ms Jones. Nothing was said to her about diamonds. She had not intended to buy diamonds. She understood that she was borrowing money from Fast Access Finance. Exhibit 21 is a bank statement which demonstrates the receipt of $875. At some stage she noticed, in the bank statement, a reference to DCH and, “realised that it was from Fast Access Finance”. She had seen references to diamonds in some of the documents which had been provided to her at FAF Beenleigh. She was never shown any diamonds. When she saw the reference to DCH she wondered whether or not the “finance company” might have been “dodgy”. She saw no reference to diamonds in the office. If Ms Jones received tax invoices, they are not in evidence.
5. In October 2011 she needed a further loan for car registration. The car was not used for any business purpose. No part of either advance was used for business purposes. She asked FAF Beenleigh for a further $500. She spoke to a lady called “Loretta”, Mr Maloney’s former wife. Ms Jones said that she was still paying off the previous loan. Loretta said that she could have a further loan. Ms Jones did not disclose the purpose of the loan. She subsequently signed documents which were produced to her. She was not asked to read them, and Loretta did not suggest that she get independent legal advice. Exhibit 22 is a Sales Agreement dated 24 October 2011. She signed it at the places indicated by Loretta. Loretta held the pages in front of her and facing Ms Jones, so that she could read them if she chose to do so. Exhibit 23 is a Collateral Security Agreement which she signed. It was not suggested that she read it, and it was not suggested that she get independent legal advice.
6. Again, no diamonds were produced to her, and none were visible on the premises. There were no posters or other documentation relating to diamonds. Diamonds were not discussed. She understood that she was borrowing money. She had no intention of purchasing diamonds and did not believe that she had purchased or sold diamonds. Exhibit 25 is a bank statement which shows the receipt of the $500. Exhibits 26 and 27 are default letters. Exhibit 28 is a letter noting that her account had been “finalised”.
7. There appears to have been no finance application for the October transaction. It seems that such an application was only filled out on the first occasion in which a customer sought financial assistance. This matter is significant only in that ASIC, in its submissions, identifies the relevant “contract” as including any application for finance, whether written or oral.
8. In cross‑examination Ms Jones agreed that she did not recall all of the documentation which had been given to her. She was interested only in getting cash in order to pay for, in the case of the first transaction, her bond, and in the case of the second transaction, her car registration. She said that both Michael and Loretta had countersigned at least one document which she had signed. Subsequent to her dealings with Fast Access Finance, she sought finance from Cash Converters. It was a, “pay day advance type loan”. She has been to Cash Converters a couple of times. She was there required to sign a “loan agreement” or a “finance agreement”.
9. On the occasion on which she signed the documents relating to the first transaction with FAF Beenleigh, she was on the premises for 10 to 15 minutes. On the second occasion she was there for a shorter period. When Michael presented the documents for signing, they were “bundled together”, with the application on top. He flipped the documents over as she signed them. In the case of the Sales Agreement, she had not seen the whole signature page because of the way the documents were folded. She did not pay much attention to the paperwork. She was not interested in what she was signing. She was rather interested in borrowing the money. She said, however, that she was listening to Michael as he spoke. He did not say anything about the documents which she was signing. He did not say that DCH would deposit funds into her account. He did not give an example concerning the purchase of a product such as a refrigerator. It was put to her that Michael did not mention the word “loan”, although she had mentioned it to him. Her response to this was: “[t]hat was the name of their business, Fast Access Finance … and I went in for a personal loan”. She said that she had no specific recollection of Michael or Loretta using the word “loan”.
10. Although she was surprised when she saw the reference to DCH in her bank statement, she did not contact FAF Beenleigh. Despite her suspicions, she again dealt with that company upon the basis that it had lent money to her on the first occasion, and so it would do so again. She was not really concerned that it might be “dodgy”. She had chosen to go to FAF Beenleigh, and not Cash Converters because she thought that the latter would be worse than the former, in that she would have had to pay back more money or pay a higher interest rate. However, when she went to Cash Converters, she realized that she could have gone to them instead of Fast Access Finance.
11. At the time of the second transaction, she did not say anything about the reference in her bank statement to DCH. She thought that if she said anything, FAF Beenleigh would not have lent her the money. It was pointed out to her that the documents relating to the first transaction appear to have been signed by Loretta, and those for the second transaction, by Michael. It was suggested to her that the documents correctly reflected the fact that it was Loretta who dealt with the first transaction, and Michael who dealt with the second. Ms Jones denied this.
12. In re‑examination she said that when she dealt with Cash Converters, she had ended up paying back about a quarter more than she borrowed, about $300. With FAF Beenleigh, she paid back double the amount which she had borrowed. On neither occasion on which she dealt with FAF Beenleigh, was she shown diamonds.
13. There is no reason to doubt the general accuracy of Ms Jones’s evidence. Mr Maloney did not remember dealing with her. Loretta was not called to give evidence. Ms Jones conceded uncertainty about some aspects of her evidence, and that she had not read the documents. It is not surprising that in her position she should have signed the documents without reading them, and that she should have been largely unconcerned about the reference in the bank account to DCH.

## *Michael Joseph Maloney*

1. Between 2005 and 2013 Michael Joseph Maloney was a director of FAF Beenleigh. The company provided short term loans, primarily for private purposes. FAF Beenleigh worked, “in association with the Fast Access Finance head office”, in Nerang. Mr Maloney conducted the “front end” of the business at FAF Beenleigh. The head office attended to all of the, “behind scenes matters such as checking credit histories and things like that”. Between 2008 and 2011, Mr Maloney was assisted by his then wife, Loretta Maloney. His duties included general administrative duties, answering telephones, checking emails, answering enquiries from clients (either by telephone or face to face), and assisting them in getting loans. His duties changed over time, reflecting changes in the business, brought about by the introduction of the “Consumer Credit Code”. The new procedures were developed at head office. Instead of, “doing short term loans”, they, “were looking at becoming second‑hand dealers and selling and buying diamonds”. He said at ts 261 ll 39 – 44:

How it worked was a client would come into the office and would look at obtaining funds, and what we – we would do from there is support them, and get them those funds, and that was basically through them purchasing some diamonds and then selling them to another company called the Diamond Clearing House, and the Diamond Clearing House would then deposit the money into their account from there.

1. Mr Maloney said that FAF Beenleigh “possessed” diamonds and that he still possesses some of them. Other evidence in the case suggests that FAF Beenleigh owned, rather than possessed, diamonds. At the time that the model was introduced, FAF Beenleigh did not hold diamonds. It bought about 80 diamonds through head office. They cost either $125 or $250 each, probably $250. Another director of the Beenleigh company was Graeme Bray. However he did not do much at the Beenleigh office. He mainly looked after the head office. Mr Maloney said that Mr Bray and Mr Robert Legat gave him instructions concerning his functions. Such instructions concerned the conduct of the new business method. They were given at the offices of accountants, Swan & Baker. Present were Mr Robert Legat, Mr James Legat and Mr Graeme Bray, as well as Mr Maloney, his ex‑wife and directors of other FAF entities. The meeting was conducted by Mr James Legat, Mr Robert Legat, and Mr Bray.
2. They explained that the business method was to change from the, “lending money model”, to the, “second‑hand dealership of buying and selling diamonds”. This model involved the purchase of diamonds, registration as second‑hand dealers and other changes to the operating system to permit the recording of the daily sale of diamonds. He identified the various documents that were used for these transactions. The documents were all obtained from head office. The change in the business model occurred in 2008. Changes in documentation occurred about a month later. Prior to the documents being provided by head office, there were no diamond transactions. FAF Beenleigh obtained a second‑hand dealer’s licence and displayed it in the office. There was a sign advising that the company was dealing in second‑hand goods, and a sign saying that no diamonds were kept on the premises.
3. Concerning the layout of the office, Mr Maloney said that when a customer entered, the sign relating to diamonds would be next to that person. The second‑hand dealer’s licence was on the front desk. There was a Fast Access Finance sign on the outside of the building, with a telephone number.
4. He did not recall dealing with either Mr Eadie or Ms Jones. He said that if a potential customer asked for a loan he would say that FAF Beenleigh did not “do loans”. He would also say that if the person wanted to get money, he could arrange a way for them to do so. If the customer asked how they were to do business, he would advise the customer that he or she would be buying diamonds, and that another company would be buying them from him or her. I infer from his evidence that if the customer did not ask, he or she would not be told anything about the diamonds. In any event, the customer would be asked to fill out an application for “credit”. If a customer was seeking $500, Mr Maloney would advise him or her that he or she would be paying back $1,000 over a particular period of time, probably six or seven months. He would also tell the customer the amount of each repayment. If the customer was happy with the arrangement, he or she would then complete an application.
5. The first documents to be filled in were the application form and a Privacy Act consent form. These documents would be sent to head office in order to obtain a credit check. Once that had been “approved” the other documentation would be prepared. I take the reference to “approval” to imply a satisfactory credit check. Mr Maloney would first show the customer the Sales Agreement by which the diamonds were to be sold to him or her. He would explain the process of purchasing the diamonds, and then ask the customer to execute the Sales Agreement. He would then produce the Collateral Security Agreement. He had been advised that if a customer was to receive more than $500, he should consider getting security for repayment in the form of a charge over a registered motor vehicle. He would then go to the Purchase Agreement, by which DCH would buy back the diamonds from the customer and pay the sale price into the customer’s bank account. The next document was a tax invoice. Mr Maloney recognized his signature on some of the documents concerning transactions with Mr Eadie. He signed the documents after the client had signed them. He was shown documents relating to Ms Jones and recognized his ex‑wife’s signature on one of the documents.
6. He said that he had never told a customer, when questioned about diamonds, that, “It’s just how we put it through. It’s just a way to get around things”. He also denied ever having said, “Don’t worry if you see diamonds on the paperwork. It’s just how we put it through to get around things”. He said that he did not use expressions such as “top‑up loan” or “loan”, but that clients would often ask, “How many diamonds have I got available to buy”. Mr Maloney suggested that this indicated that the customers were educated to understand that Beenleigh did not, “do loans”, and that they (the customers) were buying and selling diamonds. His attention was drawn to photographs of various screens in the LMS. They included documents which showed the stock of diamonds which FAF Beenleigh had available for sale at any one time, and other information concerning diamonds. It seems that FAF Beenleigh’s capacity to provide funds depended upon how many diamonds it was credited with owning in the records kept at head office, or at least that is my understanding of the evidence. There was a formal limit of $2,000 on the amount that could be paid to a customer, but it seems that Mr Maloney understood that he could, if he wished, provide a greater amount.
7. FAF Beenleigh closed in June 2014. Mr Maloney ceased working there in June 2013. He said that the business was, “more of a partnership”, in which he looked after the front end of the business, and they (head office) looked after all the “behind the scenes” work, including the legal side. When the diamond business ceased, somebody (presumably Mr James Legat) held 215 diamonds. They were distributed. He understood that the diamonds had been kept at the accountants’ office, at Mr James Legat’s residence, or at head office. He saw the diamonds for the first time on the Saturday morning on which the new business model was explained. At no stage were diamonds kept at the FAF Beenleigh premises.
8. In cross‑examination Mr Maloney agreed that he owned shares in a company called Universal Growth Investments Pty Ltd. His former wife also had shares in that company. It was the corporate vehicle which held shares in FAF Beenleigh. Mr Bray was also a shareholder, as was Fast Access Finance. He said that in 2005, he paid $180,000 for his 50% share in FAF Beenleigh. At that time the business predominantly involved lending to small consumers who obtained money for personal purposes such as car registration, living expenses and bonds for rented residential premises. There were some business loans, but they comprised only a very small percentage of overall turnover. Probably 99% of its business involved “consumer loans”. He recalled that in 2008 a legislative cap on interest rates for consumer loans was imposed, the cap being 48% per annum. As the FAF Beenleigh business was based on consumer loans, they considered ways of continuing to do business by adopting different methods, eventually choosing the “diamond model”.
9. Mr Maloney disagreed with the proposition that people came to FAF Beenleigh for the purpose of borrowing money. He said that they came in to get money. He may have seen advertisements placed on behalf of FAF Beenleigh. He did not recall the language used in the advertisements but understood that they had been “redeveloped” after adoption of the diamond model, removing references to loans. His general “spiel” was to say that, “we do not do loans”. It was put to him that he had not said that to Ms Jones. He said that he had probably told her that they did not do loans. If somebody asked for a loan, he would respond in that way. If asked why he was asking for security over property, he would explain that it was similar to going to get credit through GE Money. He said that if he was asked about the diamonds, he would explain the transaction to the customer. He also said that he would explain it in any event. It is a little difficult to follow this aspect of his evidence. I infer that he probably gave such information as he felt the customer required. Mr Maloney said that in deciding upon the amount which he would advance, he would consider a customer’s capacity to make repayments. He would go through the documents, explaining each to the customer as he or she signed it.
10. When a customer entered the office, the sign referring to diamonds was on the back of the door, so that it would be behind that person until he or she turned to close the door. It would then be in front of him or her. It was a sliding door. At no time were diamonds kept on the premises. This was for security reasons. It was put to him that he had not shown diamonds to any customer. He said that he had told customers that he could arrange for the diamonds to be brought to the office. Nobody ever took up the offer. He agreed that he had not shown diamonds to any of the customers. He agreed that he had never produced, or otherwise identified specific diamonds as being the diamonds referred to in a particular transaction. He advised customers that they could raise funds by entering into diamond transactions. Over the period of less than four years, during which the diamond model was operating, he would have provided funds pursuant to that model to hundreds of customers, possibly the high hundreds. From his share in the business, he was earning $2,000 per week. He might see about five customers a week. Customers would usually take four to six diamonds per transaction.
11. Whilst I do not consider that Mr Maloney was generally untruthful, his evidence concerning the process of explaining and executing the various documents seemed to be based on a reconstruction of events. Further, his refusal to accept that customers came to FAF Beenleigh to borrow funds was, to say the least, disingenuous. I do not accept that he regularly explained the diamond transactions to customers. I rather infer that he responded to specific questions, telling them as much as they wanted to know, and that he tried to defuse any concerns about the nature of the transactions. I also do not accept that he invariably avoided use of words such as “loan”, or invariably told customers who sought loans that FAF Beenleigh did not enter into loan transactions. He may have done so from time to time, but only if the customer’s questions required it. It seems unlikely that he would have resisted the temptation to use language which the customer was using, and no doubt understood. He does not recall dealing with either Mr Eadie or Ms Jones. In those circumstances, there is no real reason for preferring his generalized evidence to their specific evidence. As to his evidence concerning signage, I generally accept that at least some of the signage to which he referred was displayed at some time during the period in which FAF Beenleigh was using the diamond model.

# EVIDENCE CONCERNING THE FAF BURLEIGH HEADS TRANSACTIONS

## *Paul James Sharplin*

1. In November 2010 Mr Sharplin was in financial difficulty. He was in the process of selling his house in order to move into a unit. His credit cards were at their limit. He had already borrowed against the house and against his car. He saw an advertisement in the Gold Coast Bulletin which read, “Need money fast?” or “Need cash fast? Ring this number”. He rang that number and so contacted FAF Burleigh Heads. He spoke to a woman who, as he later discovered, was called Joy. I infer that she was Ms O’Sullivan who also gave evidence. Mr Sharplin wanted to borrow $1,000 to be applied towards a bond and advance rental for a unit in Surfers Paradise, and associated expenses. He proposed to live in the unit with his daughter. He said that he needed a loan of $1,000 for a bond, and that he worked for the Gold Coast City Council. Joy said that it should be “okay”, and that he should come in to discuss the matter. The FAF Burleigh Heads premises were at Miami, in a two‑storey building facing the highway. It contained shops and offices. The FAF Burleigh Heads office was on the upper floor, at the left hand end of the building as one faced it from the front. A sign across the top of the building bore the words “Fast Access Finance”. There was no other signage outside the office. Inside the office there was a high white reception desk and two chairs. There was no, “paraphernalia or advertising or I can’t recall anything else from that”. Joy was in the room when he arrived. She gave him paperwork to complete. He then went into a second room.
2. In that room he explained that he was selling his house and needed money for a bond, that he worked for the Council, that his daughter was coming to live with him and that his two sons were not. He received a “positive” response and was given the document which is now exhibit 145, a finance application. He said that none of the handwriting on the front page was his. All of the writing on the second and third pages was his, save for the reference to “$64 per week” which had been inserted in lieu of the figures, “$40 to $50 per week”, which he had inserted. It appears from the fourth page that Mr Sharplin executed the document on 23 October 2011. However the actual date was 23 October 2010.
3. Exhibit 146 is a Privacy Act consent form. He recalled signing it. He did not recall whether he signed exhibit 146 at the same time as he signed exhibit 145. He believed that he did not do so. After he had signed the application he was asked to produce his payslips. He did not have them with him. He used the internet to show Joy his bank account into which his pay had been deposited regularly. This apparently satisfied her. He was then taken to exhibit 147, a Sales Agreement. Mr Sharplin recalled that documents were given to him on that day, and that he was asked to initial and sign them. He did not pay a lot of attention to them. He was then taken to exhibit 148, a Purchase Agreement. He agreed that he had signed it, although he did not actually remember the document. He believed that he was asked to read it. With some encouragement from counsel, he said that he, “can’t recall verbatim whether I was asked to read the documents”. He also said that he did not pay much attention to them. He remembers nothing being said about diamonds. Exhibit 149 is a bank statement which shows a deposit of $1,000. He said that he understood that he had entered into a transaction for a personal loan. He had not gone to FAF Burleigh Heads to purchase or sell diamonds. He saw no reference to diamonds in the office. Nobody raised with him the possibility of buying and selling diamonds.
4. In January 2011 he sought a further loan of $500 to assist with personal expenses concerning his daughter. He rang FAF Burleigh Heads and spoke to Joy. He said that he needed more money for school fees. She said that it should not be a problem. She checked the records to determine whether he had made his payments on time, informed him that he would receive the additional funds, and that the old loan would be refinanced, with an additional $500 “tacked on”. He could borrow that sum. He went into the Miami office and signed documents. He was taken to exhibit 150, a Sales Agreement and to exhibit 151, a Purchase Agreement. On this occasion there was a discussion about diamonds. He said in evidence:

I was sitting at the office having a conversation regarding what I needed, and I saw on the wall there was a chart which had diamond weights and sizes, carats and value. And I asked Joy I says, “What’s that to do with? Am I buying diamonds? And she said, “No, you’re not buying diamonds. You’re never buying diamonds. That’s just the way we do business.”

(ts 441 ll 38-43.)

1. He understood that he was not buying diamonds. He previously noted that money had gone into his account from DCH. He was curious about whether diamonds had anything to do with what he was doing. Again, he had not gone to FAF Burleigh Heads to buy or sell diamonds. He did not believe that he had entered into any such transaction. He understood that he had obtained a personal loan. He did not read the documents.
2. In May 2011 he again contacted FAF Burleigh Heads by telephone. He spoke to a woman. He did not recall her name. He sought to obtain more money for the purpose of paying the registration fee on his car. He was told that a $500 loan would be available, and that FAF Burleigh Heads would, “have to roll over what you already owe into a new loan and tack another $500 on for you to borrow”. He went to the Miami office and executed further documents. He was taken to exhibit 152, a Sales Agreement, exhibit 153, a Purchase Agreement and exhibit 154, a bank statement. Again, there was no discussion about diamonds. He did not read the documents which he signed. It was, at no stage, suggested that he should get legal advice.
3. In June 2011 he sought a further loan of $1,500 in order to pay living expenses. He had left his job at the Gold Coast City Council. He had been promised a new job in Papua New Guinea, which position he was due to take up in about July. However this appointment did not, in the end, eventuate. Between leaving the Council and starting his new job, he needed a loan in order to pay general living expenses. He again contacted FAF Beenleigh by telephone and spoke to Joy. He explained his situation and said that he needed money. She said that he should come in and talk about it. He did so. He explained his situation and showed Joy the signed contracts for his new employment. One contract was for work in Australia and the other, for work outside Australia, both with quite large salaries, around $170,000 a year. He said that once he started his employment, he would be able to make repayments. He needed $1,500 to get to that point. He again signed documents. He was shown exhibit 155, a Sales Agreement, exhibit 156, a Purchase Agreement and exhibit 157, a bank statement. It seems that exhibit 155 was incorrectly executed, in that Joy signed as buyer and Mr Sharplin signed as seller. Nothing hangs on this. The bank statement shows that the amount of $1,500 was paid into his account. Exhibit 158 is also a bank statement, showing the fourth advance. On that occasion there was no mention of diamonds. He had not gone to the office to buy or sell diamonds. Nobody showed him any diamonds, and he did not see any at the office.
4. In cross‑examination Mr Sharplin said that he had not read the documents before signing them. He was relatively sure that he knew what was in them, including the terms and conditions of repayment and penalties for non‑payment. He had previously had personal loans. He probably had 3 or 4 loans on foot at the same time. They all had similar documentation. Thus he was not overly concerned about the documentation. He was more concerned about receiving the funds. He did not care how the transactions were structured. He was not told that the transactions were unusual for a personal loan, and so he did not pay much attention to what was said to him. He agreed that he had an opportunity to read the documents. He was not pressured or coerced in any way. He did not repay all of the amounts borrowed, apparently because he did not have any income from which he could make the repayments. As a result he became bankrupt on his own petition. He remains an undischarged bankrupt.
5. He said that in the FAF Burleigh Heads office there was a coffee table and two chairs to the left of the entrance and, to the right, the reception desk. Straight ahead was the door into another office. He did not know whether there was any signage on the coffee table. He did not recall any. It was put to him that when he first spoke to Joy, she explained that he was signing an agreement to purchase diamonds. He denied this. It was put to him that she also said, “This is the sales document selling diamonds to a diamond clearing house”, that he should have a look at it, and that she needed an initial on each page and a signature at the bottom. He said that this proposition was incorrect. He agreed that he did not have a positive recollection of the exact conversations which occurred on these occasions. He was then taken to exhibit 151, the Purchase Agreement relating to the second transaction. On that occasion the question of diamonds was discussed. Mr Sharplin did not recall whether he noticed the sign on the wall (to which he referred in his evidence-in-chief) before or after he signed the documents. He did not notice any reference to diamonds in the documents. He said that he may have seen the words “Diamond Clearing House” on exhibit 151, but he did not believe that the diamonds related to him in any way. He did not really look at the documents when he signed them.
6. I see no reason to doubt Mr Sharplin’s honesty or reliability. Ms O’Sullivan recalled her dealings with Mr Sharplin. She recalled information concerning his current employment and proposed future employment. Nonetheless, it was clear from her evidence that she had no real recollection of her conversations with him. Her evidence should generally be understood as asserting that she followed the general practices which she described. She also recalled a discussion with Mr Sharplin concerning early repayment. On balance, I considered that Mr Sharplin’s specific evidence is likely to be more reliable than Ms O’Sullivan’s generalized evidence.

### Nicole Marie Thompson

1. Ms Thompson entered into four transactions with FAF Burleigh Heads. At the time of the first transaction, she was living with her husband and three children aged 8, 15 and 18. They were in a poor financial position. She was looking for alternative accommodation as the rent was too expensive. Ms Thompson had been conducting a café business but had lost the lease and, as a result, had no business to sell. She needed funding for a rental bond. In the Gold Coast Bulletin she saw an advertisement saying something like, “Need fast cash”. It may also have used the words “bond loans”, with a contact telephone number. She rang the number and spoke to a woman called Joy. She explained her needs and asked about the requirements which she would have to satisfy in order to get approval for finance. Joy asked a number of questions and gave her a list of the necessary documents. On 12 April 2011, Ms Thompson faxed the relevant documents to Joy. Those documents concerned her pay, vehicle details, utility bill, bank statement and identification. Ms Thompson did not intend to use any part of the proposed advance for business purposes.
2. She was taken to exhibit 48, an application form, apparently to the email address nerang@fastaccessfinance.com.au on 11 April and on 12 April, passed on from that address to the address burleigh@fastaccessfinance.com.au. The addresses are, I infer, those of Fast Access Finance and FAF Burleigh Heads respectively. Ms Thompson assumed that the document had been prepared by Joy, using the information supplied to her in their telephone conversation, and then sent to her (Ms O’Sullivan). The document shows Ms Thompson as having two dependent children when, in fact, she had three. Her husband’s date of birth is also wrong. The document shows the loan request as being for $2,850. Ms Thompson said that she had asked for $3,000. Her husband was deleted as a borrower, apparently because he was, at that time, in bankruptcy. A figure of $250 is shown as the amount which Ms Thompson could afford to repay per fortnight, apparently a figure fixed by her. She had a second conversation with Joy in which she was told that her loan had been approved, and that her husband could not borrow because of his bankruptcy. Joy told her the amount of the loan and said that Ms Thompson would have to go into the office to sign the paperwork. The funds would be in the bank by 2 pm that day.
3. Ms Thompson went to the premises at Miami. She described it as a building in which about ten small businesses operated. FAF Burleigh Heads had an office above a tattoo parlour. Facing the Gold Coast Highway was a large sign bearing the words, “Fast Access Finance”, possibly with a telephone number. When one entered the building one went up a flight of stairs to the FAF Burleigh Heads office and entered a small room with a desk, a computer and two chairs to the right. There was a door, presumably leading to another room. Ms Thompson never entered that room. When she arrived, Joy was in the front room. She invited Ms Thompson to sit down and produced the relevant paperwork. Joy explained that the repayments were to be $256 a fortnight. She told Ms Thompson to initial each of the pages which she put in front of her, and to sign at the places indicated. Joy did not request that she read them. She did not do so. Ms Thompson was then taken to exhibit 49, a Sales Agreement, exhibit 50, a Collateral Security Agreement, exhibit 51, a Purchase Agreement and exhibit 52, a direct debit request form. She signed all of these documents without reading them. She was then taken to exhibit 53, a tax invoice. She was given a copy of this document but did not read it. At no time was she told anything about diamonds or buying and selling diamonds. She understood that she was entering into a loan for the purpose of funding a bond. She was taken to exhibit 54, a bank statement. It shows that the amount of the advance was deposited into her account. At no stage did she see any signage or other documentation relating to diamonds, nor were any diamonds produced to her, or by her. The loan was repaid.
4. In June 2011 Ms Thompson entered into a second transaction with FAF Burleigh Heads, obtaining about $1,000 for medical expenses. Again, she telephoned FAF Burleigh Heads and spoke to Joy, asking her if she could top up the loan for the purpose of paying medical expenses. She was told that she could have an identified amount. Joy said that she would have to sign further paperwork before the funds could be disbursed. On the following day, Ms Thompson signed the documents. There was no signage at the office concerning diamonds. There was no discussion concerning diamonds. She had not gone to FAF Burleigh Heads to purchase or sell diamonds. She had none to sell. No diamonds were produced. She understood that she was borrowing funds for personal use. Joy again put documents in front of her and asked her to initial and sign them. She did not read the documents before signing them. The documents included exhibit 55, a Sales Agreement, exhibit 56, a Collateral Security Agreement and exhibit 58, a Purchase Agreement. Joy did not advise her to get independent legal advice.
5. Ms Thompson was taken to exhibit 57, a tax invoice showing FAF Burleigh Heads as the seller, and Nicole Thompson as the buyer of, “8 x loose modern brilliant cut diamond, 0.10cts, colour “H”, clarity P1” for $2,000. It also stated that repayments of $288 per fortnight were to commence on 30 June 2011. Ms Thompson said that she was given that document but did not read it. She was not asked to read it. Later, at home, she looked at it and saw the reference to her having bought diamonds. She thought that, “… obviously that’s the way they’re offsetting their funds that they’re distributing – selling diamonds”. She said that she did not believe that she had purchased or sold any diamonds. She was then taken to exhibit 59, a bank statement. It shows that the amount of $1,000 was deposited on 21  June 2011. Ms Thompson understood that the amount came from FAF Burleigh Heads. The entry refers to “Diamond Clearing”. She said that nobody had mentioned to her a company called Diamond Clearing House. She thought that she was getting funds from “some small lender”. She understood that lender to be FAF Burleigh Heads.
6. In October 2011 Ms Thompson obtained a further sum of $1,000 for medical expenses. She applied for the advance by email and received a response by email. She always told Joy the purpose of her borrowing. She went to the FAF Burleigh Heads office and saw Joy who produced the paperwork and asked her to initial and sign it. The relevant documents are exhibit 60, a Sales Agreement, exhibit 61, a Collateral Security Agreement and exhibit 62, a Purchase Agreement. She initialled and signed them without reading them. Again, she understood that she was borrowing funds for personal use. Nothing was said about diamonds. There was no signage concerning diamonds. No diamonds were produced. She did not intend to sell or buy diamonds. Nobody suggested that she should seek independent legal advice or read the documents. Exhibit 63 is a business card for “Fast Access”. Ms Thompson said that it was similar to a card which she had received on the first occasion on which she dealt with FAF Burleigh Heads.
7. In February 2012 Ms Thompson borrowed a further $1,000 in order to purchase a new surfboard for her husband. She again contacted FAF Burleigh Heads by email. She received an email in reply. As a result she went to the Miami premises to sign the relevant documentation. She saw Joy and signed the documents. They are exhibit 64, a Sales Agreement, exhibit 65, a Collateral Security Agreement and exhibit 66, a Purchase Agreement. She initialled and signed these documents but did not read them. There was no discussion about diamonds, nor were any diamonds produced to her, or by her. She had no intention of buying or selling diamonds. She understood that she was obtaining funds for personal use. She received $1,500 as a result of this transaction. Diamonds were not discussed. She repaid all loans.
8. In cross‑examination Ms Thompson agreed that she had given the substance of the conversations which she had with Joy, and not necessarily the precise words. She was taken to exhibit 54, a series of bank statement and to an entry dated 15 April 2011 showing, “transfer Diamond Clearing House $2,000”. The bond was in the amount of $1,980. However she had also to pay two weeks’ rent in advance. It was pointed out to her that in the bank statement, the deposit of $2,000 immediately preceded a debit for $2,000 which was transferred to an ANZ bank account. On 18 April 2011, $1,000 came back into the account by way of ANZ transfer, showing the same account number as had the debit. On the next page there is an entry dated 18 April 2011, showing that $1,000 was transferred to Paradise Realty Trust, apparently in payment of the bond. Ms Thompson thought that the earlier transfers were probably between two of her own accounts. She could not give any reason for having taken $2,000 out of the account, put $1,000 back and paid an amount to the real estate agent. She was then taken to exhibit 59, another series of bank statement. It was pointed out to her that at the time at which an amount of $1,000 was deposited, the account was in debit in the amount of $69.25. There were then credits of $584 and $1,000, and withdrawals, including $475, apparently paid to Paradise Realty Trust. She said that she understood that amount to represent one week’s rent. $645 came in from another source. There were then payments out, apparently to McDonalds and Coles, but no obvious evidence of money going out for medical expenses.
9. Ms Thompson said that she had first telephoned Fast Access Finance from her car whilst parked at the Robina Town Centre where she worked. She had purchased the Gold Coast Bulletin at the supermarket and saw an advertisement. She was taken to exhibit 48, a finance application form. She was asked whether it was possible that her husband had filled out this document. She denied this. She was then taken to the second page of the document and to the paragraph headed “Purpose of Funds/Comments”. It was signed “Regards Nicky”. Ms Thompson said that she believed that she had communicated the information in a telephone call with Joy. She was asked why Joy would have put in the words “Regards Nicky”. It was suggested to her that the document was in fact an online application form which she had completed and submitted. She said that she did not recall that. She only recalled Joy asking her questions over the telephone. She had no recollection of completing an online application. Nonetheless, it seems likely that she did so. This evidence, and that concerning the bank account entries seem, in the end, to have no relevance other than as to the reliability of Ms Thompson’s other evidence.
10. Her attention was then directed to exhibit 49, a Sales Agreement. She was asked why she had not read it before signing it. She said that she needed the funds and wanted to get it all over with, so that the money would be in her bank account by 2 pm. She was interested in getting the funds, however the transaction may have been structured. She was not interested in any explanation given to her concerning the transaction. She was not pressured into signing any of the documents and could have taken the opportunity to read them, had she wanted to. She did not recall Joy explaining the transaction to her. She denied that she had been told that the transaction involved the purchase and sale of diamonds, and that the transaction was not by way of loan. She said that Joy told her on the telephone that her loan had been approved. It was suggested to her that Joy had never used the word “loan”, save to say that FAF Burleigh Heads could not offer a loan, but could offer a means by which she could obtain funds. She denied this. It was also put to her that Joy said:

This is [the] sale document selling diamonds to you. Have a look at it. I need an initial on each page when you’re comfortable with it and I need a signature at the end.

(ts 115 ll 35-37.)

Ms Thompson said that Joy said nothing about diamonds but asked her to initial each page and sign. She was then taken to exhibit 51, a Purchase Agreement. Counsel suggested to her that Joy said that the document was to buy the diamonds from her and would provide her with funds. She denied this. She did not look at any aspect of the document before signing it, even to check that the amount was correct. She only looked at her name. Ms Thompson was shown a document which is not in evidence. She said that the only correct statement in the document was that once the Purchase Agreement was signed, the advance would be paid into her account by direct deposit, and that she would receive it, “as soon as normal bank processing times allow.”

1. In re‑examination Ms Thompson said that in her first conversation with Joy, she was told that the loan would be directly deposited into her bank account, and that the repayments would be debited to her account.
2. Ms O’Sullivan recalled dealing with Ms Thompson, that she came into the office on one occasion with her daughter and that on one occasion, she was seeking money in order to pay for medical expenses. She had no other recollection of their dealings. The thrust of her evidence was that she would have followed her standard practice as described in her evidence. For reasons which I give in considering Ms O’Sullivan’s evidence, I do not accept that she invariably followed such practice. There are inconsistencies in Ms Thompson’s evidence. However I see no reason to doubt that she was essentially an honest witness. I do not discount the possibility that more was said about diamonds than she now recalls. However the point of her evidence is that she never understood that she was involved in agreements for the sale and purchase of diamonds. I accept that evidence. It is, in my view, absurd to suggest that a woman in her position would have had any interest in dealing in diamonds. She wanted money, and she received money. FAF Burleigh Heads wanted the benefit to be derived from providing funds to her, and it received that benefit. I accept Ms Thompson as an honest witness. She was also generally reliable, although not necessarily with respect to all matters of detail.

### Jacqueline Anne Thorne

1. Ms Thorne is a registered midwife. In August 2007 she needed to borrow money. She searched on Google, using search terms such as “payday advance”. She found Cash Converters and then, FAF Burleigh Heads. As the result of a telephone call to FAF Burleigh Heads, she went to the Miami office, taking with her the necessary documentation. There was a sign outside the door to the office, bearing the words “Fast Access Finance”. She did not recall any signs outside of the building. Concerning this first visit, she was directed to exhibit 92, a loan application. She recognized her handwriting on the second and third pages. The purpose of the loan is shown as “Tide over until investment withdrawal cheque comes by 17/9/07. Documents to be provided.” She said that her eldest son’s father had just died. She had been advised by an insurance company that she was to receive an amount under his life insurance policy. Ms Thorne had just had a baby. Her husband was a subcontractor and did not receive holiday pay or parental leave. He had taken six weeks off work to assist with the baby, and so they had no income. She thought that she had faxed the application to FAF Burleigh Heads. She identified other documents relating to the first transaction. When she first went to the Miami office, she dealt with a man named Graeme, presumably the witness, Mr Graeme Beattie. On that day, he was training a new employee called Joy.
2. In September 2008 Ms Thorne received the further amount of $1,375 from FAF Burleigh Heads. She could not remember her purpose in seeking this amount. However she was not then conducting a business, nor was she contributing money to her husband’s business. Hence the loan was for personal purposes. She contacted Joy by telephone, asking “to top up” or “redraw” her loan. On the occasions on which she sought funds from FAF Burleigh Heads, she did not generally identify the purpose for which she required such funds. She was taken to exhibit 98, a Sales Agreement, exhibit 99, a Purchase Agreement and exhibit 100, a Collateral Security Agreement. Ms Thorne said that she received those documents at the Miami office. In the office there was a low desk. Through a door to the left was another office with a large desk. On this occasion she sat on a chair in that office, with Joy sitting opposite her. A computer was on the right. She said the visit was very short. Her husband and children were waiting in the car downstairs. Joy had the paperwork ready and said to her: “You will see here it says all about diamonds and cuts and all of that. It’s just some new legislation, doesn’t change anything. Sign here, initial here, sign here.” (ts 147 ll 6 – 10.) Ms Thorne did not read the documents. She was not asked to read the documents. Joy indicated where she should sign and turned the pages as she did so.
3. Ms Thorne saw no signage concerning diamonds, either outside or inside the office. Diamonds were not produced to her at any stage. She did not, herself, receive or deliver any diamonds. She understood the transaction to be a payday advance, that is a loan to be repaid when she was paid. There was no discussion about instalments. She did not intend to sell or purchase diamonds. She did not really think about Joy’s comments concerning diamonds. She received $1,375 pursuant to this transaction. In due course both advances were repaid.
4. Prior to 7 December 2010, there were other occasions on which she borrowed money from FAF Burleigh Heads. She would initiate the process by telephone call. She dealt with Joy on each occasion. Some, or all of the transactions involved email communications. On no occasion did she read the relevant documents before signing them. She returned the documents by scanning and emailing. Ms Thorne’s attention was drawn to exhibit 101, a bank statement which she identified as hers. None of the transactions entered into by Ms Thorne prior to 7 December 2010 is the subject of these proceedings.
5. On 7 December 2010 she received a sum of $2,000 from FAF Burleigh Heads. She did not recall the reason for obtaining that amount but thought it was probably for normal living expenses. In the period before Christmas, her husband would not have been bringing in any income. The funds were not obtained for business purposes. Ms Thorne was taken to exhibit 102, a motor vehicle registration renewal notice. This was supplied to Joy to demonstrate that the vehicle was still in Ms Thorne’s name, and that it was registered. This transaction was also carried out by email. She was not offered diamonds. She did not seek to purchase or sell diamonds. She understood the transaction to be by way of loan. This loan was also repaid. The Sales Agreement, Purchase Agreement and Collateral Security Agreement are exhibits 103, 105 and 104 respectively.
6. In April 2011 Ms Thorne obtained a further advance. Exhibit 106, is the relevant Sales Agreement, exhibit 107, the relevant tax invoice, and exhibit 108, the Collateral Security Agreement. A Purchase Agreement is not in evidence. However Ms Lyons’ evidence demonstrates that $1,000 was paid by DCH. I infer that a Purchase Agreement was executed. The amount in question was $1,000. Ms Thorne said that she sought the funds for, “just normal expenses such as registration, insurance, school fees and text books.” The money was not obtained for the purpose of carrying on a business, either by herself or by her husband. Again, she initiated the transaction by telephoning FAF Burleigh Heads and speaking to Joy. There was a discussion about the purpose of the loan. The loan was repaid.
7. In January 2012 Ms Thorne obtained the further amount of $250. She did not remember the reason for borrowing the sum of $250. She was not, at that time, running a business, and was attending university. The money was not obtained for any business being conducted by her husband. She was taken to exhibit 109, the relevant Sales Agreement. She had contacted FAF Burleigh Heads by telephone and spoken to Joy. There was no mention of diamonds. The purpose of the loan was to repair the air conditioning in her car. Exhibits 109, 110, 111, 112, 113, 114, 115 and 116 were all sent using an “App” on her telephone. Ms Thorne was directed to exhibit 117, an email from Ms Thorne to Joy, sent on 13 June 2012. It reads as follows:

I know we spoke about this yesterday but I’m still a little confused. My original loan on the 10th of January was for $1750 so I can’t work out how I still owe $1750 even with as you said 5 dishonours. Can I please get you to double check or explain it to me or send me a statement? I just thought it was really close to being paid in full.

The reference to “my original loan” is to the loan in January 2012. Joy’s response is exhibit 118. In it she set out the various repayments and dishonour fees.

1. In cross-examination Ms Thorne agreed that when she sought funds, Joy would email documents to her as attachments. Ms Thorne would print, sign and return them to Joy in the same way. Ms Thorne was then taken to exhibit 3, an email chain between her and Joy, commencing on Friday 15 April 2011. Joy wrote: “Documents as discussed (for $1,000). Please initial each page and sign where I have indicated with an x”. Ms Thorne responded on the same day saying, “Didn’t we say $1,200?”. In a subsequent email (apparently after the documents had been returned) Joy said, “[Y]ou’ve missed the diamond sales agreement, can you please initial and sign for forward”. Ms Thorne responded: “No worries! Hopefully it’s all there this time”. Ms Thorne did not remember receiving either the email relating to the Sales Agreement, or her subsequent reply, the subject of which is identified as “Diamond Purchase Agreement”. However she accepted that the emails were sent and received.
2. Ms Thorne agreed that she had only a vague recollection of the documents which she saw on the first occasion when she dealt with Graeme. She did not recall either Graeme or Joy witnessing documents which she had signed, on either the first or second occasion on which she dealt with FAF Burleigh Heads. Those transactions are not the subject of these proceedings. She was taken to exhibit 98, a Sales Agreement, exhibit 99, a Purchase Agreement and exhibit 100, a Collateral Security Agreement. These documents relate to a transaction in September 2008. She identified her signature at the bottom of p 4 of exhibit 100. The signature, “Graeme J Beattie” is also on the documents. She could offer no explanation for Mr Beattie’s signature being on the documents as this was the occasion on which she claimed that Joy had attended to her. She agreed that the documents which she signed on this occasion were different from those which she had signed on the first occasion. It was suggested to her that Joy had explained to her that there had been a change in the documentation, and that this explanation addressed the sale and purchase of diamonds. Ms Thorne did not agree. However the suggestion does not really differ from Ms Thorne’s evidence concerning that transaction at ts 147 ll 6 – 10 (See [141]).
3. Although the evidence was a little confused, it was eventually put to Ms Thorne that on the second occasion, “when Joy explained this document, … she said to you that this was a sales document, and that it was selling diamonds to you, and that she needed an initial on each page and a signature at the end. Do you accept that she told you that?” (ts 160 ll 1-4). Ms Thorne rejected the proposition. Similar suggestions were made with respect to the Purchase Agreement and the Collateral Security Agreement. Again Ms Thorne disagreed.
4. On subsequent occasions when Ms Thorne obtained advances, she did not bother to read the documents. She simply printed and signed them. On the one occasion on which she went into the office to deal with Joy, she had not read the documents. She did not accept that, on that occasion, she could have read the documents, had she wanted to do so. She said that Joy knew that she had a four week old baby and her husband in the car downstairs, and that it was just a quick visit. She agreed that she was not pressed into signing the documents, and that she did not feel coerced into signing them. She signed them willingly, and was happy to sign them without reading them. This was at least partly attributable to the fact that she simply wanted the funding. She also felt that she knew Joy and could trust her, and that she was simply saying, “This is new. Don’t worry about it”.
5. Ms Thorne was shown exhibit 6, the photographs of signage. She did not see any such signs at the Miami office.
6. Mr Beattie did not recall dealing with Ms Thorne. Ms O’Sullivan recalled meeting her at the Miami office on one occasion, and that she had a “dodgy printer”. Whilst Ms Thorne, in her cross‑examination, appeared a little evasive concerning Ms O’Sullivan’s explanation of the Sales and Purchase Agreements, her evidence was otherwise quite straightforward. Ms O’Sullivan’s evidence, which I discuss below, was generally as to her practice rather than actual dealings with individual customers. I accept Ms Thorne’s evidence as being generally both honest and reliable.

### Troy Morgan Streat

1. Mr Streat first approached FAF Burleigh Heads in January 2009. Although he was employed at the time, he required a loan for the purpose of posting a bond in connection with his residential accommodation. Effectively, he was to pay six weeks’ rent in advance. He had conducted a Google search for, “bond loans Gold Coast”, which search produced the result “Fast Access Finance”, together with other institutions such as “Ezi Finance” and “Cash Now”. He went to the Fast Access Finance website and filled out an application form online. Mr Streat requested a loan in the amount of $3,000. He needed $2,700 for the bond. He proposed to use the balance for general expenses. No part of the amount was intended for business use. He was, at that stage, employed as a sales representative. He identified the purpose of the loan as “personal”, choosing this description from a “drop down” menu. He submitted the application electronically. The handwriting on the document (exhibit 68) is not his. He was taken to exhibit 69, a Privacy Act consent form. On the second page the “loan type” is said to be “business”. Mr Streat said that he made an error in filling out this form. It was also submitted electronically.
2. On the following day he was telephoned by a woman called Joy. She introduced herself as being from FAF Burleigh Heads, and advised him that she had received his application for a loan. They made an appointment for him to attend at the Miami office. He described the building in much the same way as other witnesses. There was a “Fast Access Finance” sign on the outside of the building. He could not recall any internal signage. He took to the office his driver’s licence, a Medicare card, bank statements and vehicle registration papers. Exhibit 73 contains these documents. Exhibit 74 is another bank statement.
3. When he entered the office he noticed a counter at the front with a bell on it, and a sign saying, “Please ring the bell and take a seat”. There was nobody else in the office. He rang the bell and sat down. A woman emerged from another room and introduced herself as Joy. She took him into the other room and invited him to sit down. In that room there was a small desk, a printer, a computer desk with a computer, a chair for Joy and a single chair for a customer. There were no display cabinets in either room.
4. They discussed his needs. He advised her that the loan was for a bond. She printed out documents which must have been prepared following the receipt of his online application. He was then taken to exhibits 70, 71 and 72, all of which are signed and initialled by him. He did not read the documents before signing and initialling them. The question of diamonds was not raised on this occasion. He was not asked to read the documents. He understood that he was entering into a bond loan. He did not intend to buy or sell diamonds. No diamonds were produced to him on this occasion, or on any other occasion. At no time did he produce diamonds. He used the money for a bond and repaid it.
5. The next transaction occurred in June 2009. The only relevant document is exhibit 75, a Sales Agreement. On this occasion he was seeking money to pay for car repairs. The motor vehicle was a personal vehicle, not a business vehicle. He went to FAF Burleigh Heads because he had previously dealt with them. He telephoned and spoke to Joy, asking if he could top up his loan for car repairs. She said that she would find out how much he could borrow and let him know. Subsequently, when they were going through the paperwork, he read the documentation and noticed references to “Diamond Clearing House” and to diamonds. He asked, “What are diamonds for? Got no diamonds to give”. Joy said that, “the diamonds were a virtual diamond – I am loaning against the diamonds”. He laughed and said, “Do I get the diamonds back at the end of the transaction?”. They both laughed, and Joy said, “No”. He did not think that he was buying diamonds. He was not selling diamonds. He needed money for car repairs. He understood that he was entering into a cash loan. A diamond clearing house had not previously been mentioned. He received the funds for the car repairs and repaid them in full.
6. There were further dealings between him and Fast Access Finance. Such dealings would usually take the same form. He would ring and ask if he could top up his loan. Joy would usually call him back on the following day, saying that he could do so and identifying the available amount. On other occasions prior to May 2011, he signed documents similar to those which he signed in connection with the first two transactions. Nothing was said about diamonds. He did not intend to buy or sell diamonds. He did not believe that he was obtaining or selling diamonds. He understood the transactions to be by way of cash loan. No diamonds were produced. There was no signage on the premises concerning diamonds. None of these transactions is the subject of the current proceedings.
7. Mr Streat was then taken to exhibit 76, an email dated 11 May 2011 from “Marilyn” to him. He had contacted Fast Access Finance for a loan. Joy was away, and so he dealt with Marilyn. Attached to the email were a Privacy Act consent form and a loan application (not a finance application). The documents attached to the email (exhibit 76) have not been executed. Mr Streat said that he had, in fact, completed both documents. The loan was for modifications to a private motor vehicle. He informed Marilyn of this. In her email Marilyn said that she needed a “vehicle slip” with a registration slip attached. This document is exhibit 77. Other documents also form part of that exhibit. Mr Streat eventually attended at the office of FAF Burleigh Heads and spoke to Joy. He had sent her the various documents electronically but took copies with him to the office. She asked the purpose of the loan. He told her that it was for vehicle modification. He signed the documentation and was advised that on the next day, the money would be in his account.
8. He was taken to exhibit 78, a Sales Agreement, exhibit 79, a Collateral Security Agreement and exhibit 80, a Purchase Agreement, all of which bear his signature and initials. He did not read the documents before signing them. He was not asked to do so. On no occasion was it suggested that he should get independent legal advice. He did not go to FAF Burleigh Heads in order to purchase or sell diamonds. No diamonds were shown to him. There was no signage at the office concerning diamonds, nor any further discussion about diamonds. There was no discussion with Marilyn about diamonds. He understood that he was entering into a personal loan transaction. Exhibit 81 is a tax invoice of which he received a copy. He received a loan of $2,000 and used it for vehicle modifications, duly repaying it. He was then taken to exhibit 82 which indicates that at one stage, he was in breach of one of the clauses of the Sales Agreement. He understood that he had defaulted on a payment and had rectified the default.
9. The next transaction occurred in August 2011. He borrowed $1,000 in order to take a holiday with his girlfriend. He rang FAF Burleigh Heads and spoke to Joy, asking originally for $1,500. However he could only get $1,000. He did not send in a new application form. No appointment was made. He did not go to the FAF Burleigh Heads office to sign any documents. It was all done by email. He was taken to exhibit 83, a Sales Agreement, exhibit 84, a tax invoice, exhibit 85, a Collateral Security Agreement and exhibit 86, a Purchase Agreement, all of which he had signed and initialled. He submitted them electronically. In the telephone conversation there was no mention of diamonds. He had no intention to buy or sell diamonds. He was not invited to view any diamonds. He received the $1,000, spent it on his holiday and, in due course, repaid it.
10. In February 2012 there was a further transaction. He telephoned FAF Burleigh Heads, seeking $1,500 to replace the shock absorbers on his car. It was a private vehicle, not used for business purposes. He spoke to Joy, asking for a loan in that amount. She said that it should not be a problem and asked him to send through the documentation for the vehicle. He was taken to exhibit 87, a Collateral Security Agreement which had been sent to him. He had returned it to Joy. He thought that the documentation was emailed to him, and that he returned it by fax. He did not recall going to the FAF Burleigh Heads office on this occasion. He was then asked to look at exhibit 91 which is a “Product Disclosure Card”. He did not recall reading it in February 2012, but he recalled having seen it at some stage, probably towards the end of his first meeting with Joy. It was a laminated piece of paper with the heading “Product Disclosure Card” in bold print. He did not read it at that time, nor were the contents of it explained to him at any time by Joy. He obtained the advance of $1,500 for his shock absorbers and, in due course, repaid it. He had no further dealings with FAF Burleigh Heads.
11. In cross‑examination he was taken to exhibit 91. He said that Joy had handed it to him but had not asked him to read it. She simply said that it was a product disclosure card. He said that he read it and gave it back to her. He agreed that it seemed a little odd that she should have given it to him, but he denied that she had said that she wanted him to read it. He did not accept that she intended that he read it. However he could offer no other explanation. He said that he did not recall when she gave it to him. He said that it was not in February 2012, although it could have been. Obviously, his evidence was a little uncertain in this regard.
12. He was then taken to exhibit 70, the Sales Agreement for the January 2009 transaction. He said that he had not read it, but he had noted the reference to a “Sales Agreement”. He was taken to exhibit 71, the Purchase Agreement for that transaction. He recalled noting that it was such a document. He agreed that the documents had been handed to him in a way which enabled him to identify them. He had not taken the trouble to read them. He said that he had no particular reason for not reading them, save that he was in a “rush”. He agreed that he was not particularly concerned about the documents. He was more concerned about obtaining the funds. He did not check exhibit 71 to see whether or not he was getting the correct amount. He simply relied on Joy. He was then referred to exhibit 75, a Sales Agreement concerning the June 2009 transaction. He agreed that he had, on that occasion, read the document and asked about the reference to diamonds. He was asked if he had noticed that it was a Sales Agreement, purporting to sell diamonds. He said, “Not really sell”. He had asked what the diamonds were for because he did not have diamonds and was not receiving any diamonds. He understood that the document concerned the sale of goods. It was this perception which provoked his question. Initially, he said that on the first occasion on which he visited the office, the documents were not explained. Subsequently, he agreed that Joy may have explained them.
13. He was asked about the purpose of his second application for finance in June 2009. He said that it was for car maintenance. On this occasion he looked at the documents, identified the reference to diamonds and raised the matter with Joy. He agreed that he could not recall whether Joy had used the word “virtual” in connection with diamonds. It was put to him that she had explained that the transaction was by way of sale and purchase of diamonds. He disagreed. It was put to him that she had also referred to the tax invoice, and pointed out that payment was to be made for diamonds. He denied that. He was not satisfied with Joy’s explanation concerning the diamonds but proceeded with the transaction because he needed the money. The nature of the transaction did not really concern him. He had previously dealt with FAF Burleigh Heads, and the funding had arrived. In later transactions he was not concerned as to the nature of the transaction, or how it was structured. His interest was in getting the relevant advance. He was comforted by his previous dealings and was satisfied with the service which he had received. He agreed that on subsequent occasions, he had not read the documents because he was so satisfied. However he also claimed that on subsequent occasions, he had not had the opportunity to read the documents. He agreed that he was not coerced into signing them. He entered freely into the transactions. He did not feel pressured at any stage. He said that on the occasion on which he sought funds for a holiday, he might also have sought funds to obtain text books for his university studies.
14. In re‑examination he was asked about the use of the word “virtual”. He said that when he used the word, he meant that he did not have any diamonds to sell to Fast Access Finance. He was asked if Joy had said, “anything in the nature of virtual diamonds - those exact words or something similar?”. He said that he used the word “virtual” because there were no diamonds, “being transacted”. He was neither buying nor supplying diamonds. Joy communicated that to him, but he could not remember her actual words.
15. Ms O’Sullivan recalled dealing with Mr Streat. She recalled that he would often text or telephone the Miami office, seeking funding. He would also frequently come to the office. She, “did several sales to him”, but could not remember the details. Mr Streat’s evidence was a little inconsistent but such inconsistency can no doubt be explained by the fact that considerable time has elapsed since the relevant events. Further, as with many of the other customers who gave evidence, his interest was in obtaining the funds not the mechanism to be adopted. Again, Ms O’Sullivan’s evidence does not disclose any recollection of actual transactions. I generally accept Mr Streat’s evidence as honest and reliable.

## *Graeme John Beattie*

1. Mr Beattie is a director of FAF Burleigh Heads. Another of his companies, Accommodation Unlimited Pty Ltd, holds 50% of the shares in that company. He was involved in the affairs of FAF Burleigh Heads on a day‑to‑day basis from the time it commenced its business as a short term lender. At first he, alone, ran the business. Over time, his responsibilities changed. In about 2008, shortly after FAF Burleigh Heads moved from premises in James Street, Burleigh Heads to Miami, he employed Joy O’Sullivan to run the office on a day‑to‑day basis. At about that time there was also a change in the company’s business model, arising out of the legislative imposition of a cap on interest payable on short term loans. There was “liaison” between FAF Burleigh Heads and “head office”, (presumably Fast Access Finance) as to how they should respond. The legislative changes would have led to the business being hardly viable. The “head office accountants”, Swan & Baker proposed an “instalment plan program”.
2. The programme was a “buy and sell”, involving the sale by FAF Burleigh Heads to the customer of something on an instalment plan. That “thing” would be purchased back by another company at a lesser price, which price would be paid to the customer. That proposition, itself, suggests the artificiality of the proposed transaction. It is difficult to see how it could generate the funds sought by the customer. Mr Beattie said that FAF Burleigh Heads purchased a number of diamonds from head office for about $6,500. For security reasons they were not held at the FAF Burleigh Heads office. If a client wanted to see the diamonds, or take the diamonds, they could be couriered over to the Miami office. Subsequently, FAF Burleigh Heads acquired extra diamonds in order to satisfy “demand”.
3. Graeme Bray was also a director of FAF Burleigh Heads. He provided liaison services concerning the diamond model and its implementation at head office. He had no day-to-day involvement in the running of FAF Burleigh Heads.
4. Mr Beattie was, at that time, involved in other businesses, and so he decided to employ somebody to assist him in the Miami office. Following advertisement, he employed Joy O’Sullivan. He had known her previously through the Real Estate Institute of Queensland and had telephoned her. She told him that she had been laid off. He invited her for an interview. He had no hesitation in employing her. Mr Beattie explained the system to her and advised her about the computer programme. He showed her the forms that were used, and how the process worked. During her training, she was present when he spoke to clients, and he was present when she did so. Another woman, Marilyn, was working in the office. She worked there when both Mr Beattie and Ms O’Sullivan were absent. He said that once he had handed over to Ms O’Sullivan, he would be at the office at least once a week, possibly on a day when Ms O’Sullivan was not working. He would take the opportunity to look through the files to see what she had done and, “keep on top of things”. Mr Beattie has no present contact with Marilyn who was not called as a witness.
5. He recalled the name, Jacqueline Thorne, but could not remember anything else concerning her. He recognized his signature on some of the documents used in Ms Thorne’s transactions. There appear to be two copies of a Collateral Security Agreement, one signed by him, and one signed by Joy O’Sullivan (exhibit 100). He was unable to explain why there would be two such documents, other than that one may have come in by fax.
6. The Miami building was set back from the road, with car parks in front of it. There was a staircase going up to the first level where the FAF Burleigh Heads office was located. It was the first suite of offices on the left hand side as one went up the stairs. At the front of the building there were glass office windows with signage above and below. As one went up the stairs one turned left to go to the office entrance. There was a sign saying, “Fast Access Finance”, with office hours and other information. On the windows there were signs saying “Fast Access Finance”, “Office Hours” and “No Cash on Premises”. There was also a sign on the window facing the road which said, “Diamonds Sold Here”. He was referred to exhibit 6. It shows one sign bearing the words, “Diamonds Sold Here” and “No Diamonds or Cash Kept on Premises”. It shows another sign bearing the words, “Fast Access Finance (Townsville) Pty Ltd” and “Licensed Dealer in Second‑Hand Property Associate: Graeme Bray”. He said that, “both signs were displayed at Miami”. The “bottom” sign, bearing the company name and the reference to licensed dealership, was on the window track and was visible from the road. The sign saying, “Diamonds Sold Here” and “No Diamonds or Cash Kept on Premises” was on the front glass window so that it could be seen from the road. It was later brought into the office and put on a coffee table, against the wall, inside the reception area. Presumably, the second sign referred to FAF Burleigh Heads and, perhaps, to Mr Beattie, rather than to FAF Townsville and Mr Bray.
7. FAF Burleigh Heads ceased to use the diamond model when head office became involved in a case at Beaudesert. It lost, and the model was abandoned. At present FAF Burleigh Heads does not trade in any capacity. It stopped trading in late December 2012.
8. In cross‑examination Mr Beattie said that in the Miami premises, there were a number of shops downstairs. The office was upstairs. The sign saying “Diamonds Sold Here” was approximately 1 m in length and about ½ m high. He agreed that it was in a window at a level above ground level. The Fast Access Finance sign was on the top of the building. It was a large fluoro sign, probably 2 m x ½ m. One sign, which was, at some stage, located on a coffee table, was a cardboard Corflute sign. It had stood in the track of the window, but he remembered seeing it on the coffee table, resting against the wall. I understand “Corflute” to be some kind of proprietary material. A person, who entered the office and sat down, would be looking at the sign. It was not a fixture. He had never seen it fall down. It was on the coffee table for only a brief time.
9. He agreed that prior to the implementation of the diamond model, FAF Burleigh Heads had been carrying on business as a lender to customers for personal, as opposed to business use. It also provided business loans, but that business was probably less than 10% of its total business. The diamond model came into operation in mid‑2008. Previously, advertisements had been placed in the local newspaper using expressions such as “fast cash” or “quick cash”. There were also references to “bonds” and “cash”. After the diamond model commenced, advertising continued in newspapers and on buses. He denied that, after commencement of the diamond model, FAF Burleigh Heads advertised the availability of loans, bonds, funds or cash. He was shown a document. He then conceded that there may have been a slight “overlap”, presumably between the commencement of trading using the diamond model, and changes in the advertising content. Head office had instructed that loans were not to be mentioned at all. Mr Beattie did not recall any advertisements for bonds after the changeover.
10. He denied that he became aware, in September 2009, that Ms O’Sullivan was using words such as “loans” and “lending” in talking to customers, or that she was saying, “We don’t charge interest, but there is something equal to about 20%”. He was shown another document. It was again put to him that in September 2009, head office had informed him that Ms O’Sullivan was using such language. He said that he believed that he had seen the document. He then said that he did not remember seeing the “documents”, but that he had a conversation to that effect with Mr Bray. He said that he had never seen anything which mentioned “loans” or “20%” in connection with FAF Burleigh Heads. He said that Mr Bray had not drawn to his attention any suggestion that Ms O’Sullivan was using the words “loan” and “lending” in speaking to customers. He was asked if he had informed Mr Bray that FAF Burleigh Heads was, “advertising for loans, bonds, funds, cash etc”, and that he had said that he was not sure how else they could describe what they were doing. Mr Beattie said that all advertising had to go through head office. He denied having any such conversation with Mr Bray. His attention was drawn to the same documents and the question was asked again. At that stage he said “If that’s what I said, that’s what I said. I certainly don’t recall that”.
11. He was taken to documents concerning Ms Thorne. He had no independent recollection of a particular document which bore his signature. He agreed that he had not witnessed Ms Thorne’s signature on the document as an “independent witness”. However it did not follow that he was not there when she signed the documents. The documents were not signed after the event. It was not the case that Ms O’Sullivan would produce a document for signature by a customer which he would sign later. He denied that a document which had been signed, but not witnessed by him was consistent with his not being there when the document was signed by the customer. He said that he may have inadvertently missed witnessing a document.
12. He was then taken to documents concerning Ms Jones. Mr Beattie was not involved in her transactions. She dealt with FAF Beenleigh. He agreed that, on the first occasion on which a customer came into the office, he or she would sign a finance application. The application form enquired as to the purpose for which the customer was seeking funds. It was put to him that after commencement of the diamond model, “… effectively the predominant business you were doing was consumers looking for loans for money?”. He replied, “Yes. People came in looking for money.” He agreed that he would ask such a customer to complete an application form and a Privacy Act form. He or she would be asked to produce documents such as a driver’s licence, utility bill, bank statement and evidence of employment. A credit check would be done by head office, and a decision would then be made as to whether provision of funds to the customer would be approved. He would communicate that decision to the customer. A successful customer would come in to sign the documents.
13. He was taken to a Sales Agreement and a Purchase Agreement. He agreed that diamonds were never produced or delivered pursuant to the Sales Agreement. He also agreed that customers never delivered diamonds pursuant to the Purchase Agreement. He agreed that there was no reference in the Purchase Agreement to any prior Sales Agreement. The Purchase Agreement required delivery of the subject diamonds by the customer to DCH, but Mr Beattie agreed that no customer had ever delivered diamonds to him or to anybody else.
14. Mr Beattie agreed that customers came in looking for funds, frequently in order to post a bond. He agreed that if such a customer came in for a “bond loan” of $1,000, he or she would receive that amount, if his or her application were approved. Such a customer would have to repay double the amount advanced. It was put to him that in reality, the transaction was simply a loan of $1,000 and a repayment of that capital amount, plus an amount representing an interest charge. He denied this, saying that it was a “buy‑sell” arrangement on an instalment plan. It was put to him that diamonds were never bought or sold in these transactions. He disagreed with this. It was put to him that there were never any diamonds specifically identified to a customer as being the subject of the transaction. He said that, “In the descriptions there were, yes.” He agreed that such descriptions were only “generic”. It was put to him that there was never any identification of specific diamonds which matched the description in a contract, and were the subject matter of that contract. He said that he did not know how one would label diamonds, and that the diamonds were “inventoried”. He was asked what he meant by the word “inventory” and said that, “the computer program that was used at head office to buy and sell the diamonds, kept track of the diamonds, so that if we had 10 diamonds in stock, for example, we couldn’t see 12.”
15. Mr Beattie said that he did not know what happened with the diamonds at head office, but that FAF Burleigh Heads was strictly accountable for the number of diamonds that it could sell. If it did not have enough, it had to purchase more. He was not suggesting that the diamonds were, “pushed … around on a table”. The computer programme dealt with the matter. The programme did not identify a specific diamond, or appropriate it to a contract, but the number of diamonds held by FAF Burleigh Heads was in the inventory. He assumed that the diamonds, shown on the screen as held by FAF Burleigh Heads, were held somewhere. He was asked about the volume of business. He said that over a week, he probably saw three to five customers, each of whom would buy, on average, about eight diamonds or perhaps fewer, probably six to eight. He seems to have agreed that about $10,000 to $15,000 per month was received by way of “gross sales”, based on the figure of $2,000 per advance. He thought that the turnover per week was between $3,000 and $5,000, perhaps at the upper end of that range, over the period during which the diamond model operated.
16. He was not entirely sure of the time at which he became aware that the Code was to come into operation. He was informed by head office. He was aware that under the Code, a person engaging in credit activity had to be licensed or registered. As far as he knew FAF Burleigh Heads was neither registered nor licensed. He said that he would have been guided by head office in that regard. It was put to him that using the bond loan example, FAF Burleigh Heads was engaging in the provision of credit, lending $1,000 for the bond loan and requiring payment back of that $1,000 together with another $1,000. His response was, “We were selling diamonds”. It was put to him that the purchase and sale of diamonds was a pretence, and that FAF Burleigh Heads was really lending. He denied this and said again that they were selling diamonds.
17. Clearly, Mr Beattie understood that the diamond model was adopted in order to avoid the interest cap. It is also clear that FAF Burleigh Heads, using the diamond model, continued to seek to satisfy the same customer demand as had previously been satisfied by a lending model. His awareness of the need to avoid use of lending terminology suggests that in using the diamond model, he was seeking to satisfy a continuing demand for loans in a way which did not infringe the legislation imposing the interest cap. That he changed his evidence upon being shown documents suggests a degree of unreliability, for whatever reason.
18. It may be that Mr Beattie, and other witnesses called by the respondents, believed that the diamond business model was a genuine way of avoiding the interest cap. However it is hard to see how they could seriously have expected that customers, seeking small loans for short periods to meet pressing personal needs, would buy diamonds. It is more likely that Mr Beattie and those other witnesses expected that the likely customers would simply seek transactions which resulted in their receiving cash. The diamond model seems to have been set up on that basis.
19. Mr Beattie appeared to have no present recollection of any of the relevant transactions.

### Joy O’Sullivan

1. Ms O’Sullivan’s employment with FAF Beenleigh Heads resulted from her seeing an advertisement to which she responded. At that time she was unemployed. She had previously worked at the Real Estate Institute of Queensland as the manager of its training facility on the Gold Coast. When she responded to the advertisement she was interviewed by Mr Graeme Beattie and obtained the position. She commenced at the Miami premises on 22 September 2008. She was employed to interview customers, to perform general office work, such as keeping banking records, and to approve and process funding. She would greet each customer, ask about his or her requirements and then process any applications for funding. Mr Beattie, who was running the office, trained her for a couple of days. She understood that she was to replace him. She observed the way in which he dealt with customers and was taken through the basic steps in the process, including the “pro forma work”. He showed her how to operate a software package.
2. When a customer came to the office he or she would generally tell her what they were looking for, usually funding of some description, or a loan. She said that they had two “facilities”. One involved the sale of diamonds. The other offered business finance. The first step was to determine which of these models was to be used. The customer would then fill in an application and Privacy Act form so that credit checks could be performed. The customer was also required to provide a copy of a driver’s licence, proof of income and various other supporting documents. The customer might then leave the office whilst Ms O’Sullivan processed the application and performed the credit checks, so that she could respond to the customer’s request within an hour. Customers could also apply online. When an application was made online, Ms O’Sullivan would generally call the customer to see whether he or she wanted to come in with the relevant documentation. Some customers would telephone in order to initiate a transaction. She said that when a customer came in, she would ask about the purpose for which the funding was sought, in order to determine whether it was required for a business purpose. If it was not, then the customer would be told that there was a facility which was not a loan, but was based on the sale of diamonds.
3. Ms O’Sullivan would fax the Privacy Act consent form to the head office in Nerang and wait for a response to the credit check. When the credit check was returned she would work through the application, looking at the budget and the bank statement. She would then assess the viability of the proposal and, in particular, whether it would fit the criteria for the customer to be, “given the funding or be sold the diamonds or whether they were doing the business loan”. She would then call the customer and advise the outcome. In the event that the application was successful, she would invite the customer to come back to the office in order to complete the paperwork. She would insert the relevant information into the computer programme. It would generate the relevant documentation, including the contract for the sale of diamonds, “which was the Purchase Agreement”. She would form a “stack” of paperwork which the customer was to sign, and another “stack” which she would keep for her files. In the case of a transaction involving diamonds, she would first show the customer the Sales Agreement. She would ask the customer to read through it, initial each page and sign on the back page. She said that she would say, “Just have a look at it and when you’re happy with it – if you’ve got any questions – this is the document that sells the diamonds to you”. After the customer had signed and initialled the document, she would move to the next document and say, “This is the document that sells the diamonds back again”.
4. In the following extract from the transcript, Ms O’Sullivan gave an account of the process which she adopted in having the documents executed:

… the sales one, which was selling them the diamonds, was the first form that they would be given, which I always did put in front of them, upside down to myself, so that I would to say to them, “Read through this. I need an initial on each page” – I think it was a three page document – “initial on each page and a signature on the back page.” And I said, “Just have a look at it and when you’re happy with it – if you’ve got any questions – this is the document that sells the diamonds to you.” So when they had looked at that and initialled on each page and signed the back one, I would move on to the next one. And I would say to them, “This is the document that sells the diamonds back again.” So - - -

Do you recall – sorry to interrupt. Do you recall what the name of that particular document was? This would have been the second in the pile; is that correct? ‑ ‑ ‑ Second in the pile. I can’t recall off the top of the head – my head but I know it’s the one that said – this is where – “You will see that it says vendor, which means you’re selling the diamonds back.” So they would look at that. Then I would move on to the next document, which would be – if it was secured, it would be the collateral security agreement document, which secured the vehicle for the duration of the funding until it was paid out. So they would sign those three lots of documents and they would be – on those documents, they would be given a tax invoice. This is what I would give them to take away: tax invoice, a Bill Buddy information – that was another form that they had to sign – the direct debit agreement as well. So that was all signed then I would give them a document that was a tax invoice and the information on Bill Buddy and I would point out to them that they were paying an instalment and that it was so many payments over approximately 31 weeks. And that’s what they go away with, with my business card clipped in the top. “If you’ve got any questions, just give me a call.”

(ts 198 ll 6-31.)

1. With reference to the documents concerning Ms Thompson, Ms O’Sullivan’s attention was drawn to exhibit 49, a Sales Agreement, exhibit 50, a Collateral Security Agreement, exhibit 51, a Purchase Agreement, exhibit 52, a direct debit request and exhibit 53, a tax invoice. Ms O’Sullivan identified the documents as examples of those to which she had been referring. Ms O’Sullivan remembered dealing with Ms Thompson, but had no specific recollection of such dealings. Ms O’Sullivan was asked about her explanations to the customer of the various documents. Concerning the Sales Agreement, she said that she would say to the customer, who would be sitting opposite her that:

“This is the sales agreement that sells the diamonds to you. If you just have a look here you will see that we’re selling you diamonds. Have a look at it. When you’re happy with it, initial down the bottom. Have a read through that. When you’re happy, initial down the bottom. And at the end of it we will need a signature from you.” And I would identify where they needed to sign.

(ts 201 ll 6 – 10.)

Concerning the Purchase Agreement she would say:

“This is the purchase agreement where you’re selling the documents back. So have a look at this. You will see it identified here, what’s on here, but you will notice that in this case you’re the vendor, so you’re selling the diamonds back. When you’re happy with it, sign it.”

(ts 201 ll 26 – 29.)

Concerning the Collateral Security Agreement, she would say:

If it was secured, this – I would explain to the client that this is the collateral security agreement that – what’s the word – that encumbers your vehicle for the duration of the term of the instalment plan, which means that it’s held in our file. It only becomes an issue if there’s a problem with the repayments of the instalment plan. It’s released as soon as the account is finalised. And again, I would go through and have them initial each page. And I used to actually turn the pages for them so that they could be looking, and encouraging them to have a look at it, signature on the back two pages.

(ts 201 ll 34 – 41.)

1. The last document was exhibit 52, the direct debit request. Again she would invite the customer to look at it, and explain that it allowed a direct debit to the customer’s bank account. She would then ask him or her to sign it.
2. Ms O’Sullivan was then taken to exhibit 53, the tax invoice. She was asked how it fitted into the overall scheme. Ms O’Sullivan said that it was given to the customer. She would point out that there would be a certain number of payments, at a certain amount per fortnight, from the commencement date, so that the first direct debit would come out of the account on a particular date. She said that the customer would take away the tax invoice, a “Bill Buddy transaction [document] and a Bill Buddy fee advising document as well”. Those documents seem to have been at the back of the “pile” of documents. All of the documents were stapled together, with a business card in the top left‑hand corner of the front page of the bundle. The business card was that of Fast Access Finance.
3. Ms O’Sullivan was also referred to exhibits 119, 120 and 121. Exhibits 119 and 120 were the Bill Buddy documents. Exhibit 121 is a product disclosure card, presumably similar to exhibit 91. Ms O’Sullivan said that sometimes she would read the product disclosure card to a customer, and sometimes she would give it to the customer to read. It would be given to him or her prior to the signing of the documents. Ms O’Sullivan said that FAF Burleigh Heads had started using the card, “later in the piece”. She said, concerning the product disclosure card, that when a customer came in to sign the paperwork:

I would say to them, “You need to read this, or I can read it to you, whatever would be your preference, but I’ve got to let you know about this PDS”. It only was there for a short time. I only had that – in the time I worked there, I think this only actually came into being in about the last five months.

(ts 203 ll 22 – 26.)

1. The customer did not keep the card. It was retained in the file. She thought that the document was used from some time late in 2011. After the customer had read it, or she had explained it, she would sign and date it.
2. Ms O’Sullivan said that she was “fairly specific” in what she said to customers because they had to see what they were signing, and that, “You can’t get them to sign something with diamonds all over it if they don’t know what they’re signing. They won’t sign it.” See ts 204 ll 41 – 42. That statement is quite significant. I shall discuss it at a later stage. She said that her explanation did not differ as between customers, although she would be more specific with new customers. To customers who had returned on several occasions to buy diamonds, she might say, “This is the … paperwork”. However she would still, “do it the same way, turn it around, you need an initial here’”. She was asked whether customers made inquiries or questioned her about diamonds. She said that sometimes, clients would ask if they could have the diamonds. She would say, “Sure, you can have the diamonds if that’s what you want”. The customers did not ever want the diamonds. They rather wanted money. They might ask if the diamonds were held on the premises. She would say that they were not. There might be general conversation about diamonds. No customer ever asked questions about why diamonds were referred to in the documentation. Had a customer done so, the matter would have been explained to him or her. In the four years that Ms O’Sullivan worked at FAF Burleigh Heads, nobody ever complained about the fact that the funding was done through diamonds. Nobody expressed any concern about entering into such a transaction.
3. Ms O’Sullivan was again taken to exhibit 49, a Sales Agreement involving Ms Thompson. Her attention was directed to the third page of the document, and to the handwriting on that page. She recognized her signature above her name. She said that she had signed that document after the customer had signed it, and whilst the customer was still there. She did not recall signing this particular document. Her practice was to sign each document immediately after the customer had signed. Ms O’Sullivan was then taken to exhibit 50, a Collateral Security Agreement. On p 4 she identified her handwriting opposite the words, “Signed by the Grantor Nicole Thompson in the presence of”. On p 5 she identified her signature, opposite the name “Nicole Thompson”. She said again that she would sign immediately after the customer had signed each document. She was taken to exhibit 51, a Purchase Agreement. Ms O’Sullivan recognized her signature on the right of the page. Her practice was to sign each such document after the customer had signed it and whilst the customer was still present. This evidence also seems to be of no ultimate relevance.
4. Customers frequently used the words “top up funds”. She, herself, did not use that expression. When she was asked to explain how diamonds were involved in the transaction, she would explain that the diamonds were sold to the customer and then purchased back from him or her. There was never any request to see the diamonds. At no time did she say to a customer that the diamonds were not real. She believed that they were real, although she had never seen them. She had been told that they were real and had no reason to believe that they were not. She had seen the database where the sales of diamonds were recorded. She said that, “… as we sold diamonds they would count down the number of diamonds that were available. And we did use [sic] to run out of them”. See ts 208 ll 22 – 23. The “specifics” concerning the diamonds would be explained when the customer came in to sign the paperwork. Once it became obvious that the customer was going to have, “a consumer type funding”, he or she would be told that there was a facility whereby FAF Burleigh Heads could offer funding through the sale of diamonds. The matter would be addressed more specifically when the customer was signing the documents. Ms O’Sullivan did not use the phrase “virtual diamonds”. I infer that if any explanation was given, it was given only after the customer had indicated that he or she intended to accept the offered funding and perhaps, had commenced to execute the documents.
5. Ms O’Sullivan recalled dealing with customers prior to the adoption of the diamond model and thereafter. A particular customer of that kind was Ms Thorne. She met Ms Thorne on only one occasion. Her transactions were always done by email. She had a “dodgy” printer. They met once in person, but Ms O’Sullivan could not remembered when it was, “in the scheme of things”. The meeting took place at the Miami office. She said that when she dealt with such a customer:

They would have to be explained to that we no longer could offer the previous funding arrangement but we did had a – have a new facility whereby – which was done through diamond – through the sale of diamonds. So they would be explained to as if they were a brand new client.”

(ts 209 ll 31 – 35.)

She told such a customer that the reason for the change was a change in legislation. She had never said that the references to diamonds had no meaning.

1. She recalled Mr Streat, and that he would often text or telephone the office, saying that he required funds. He was an established client. She did “several sales” to Mr Streat but could not remember the details. She knew a person called “Marilyn” who had been employed to relieve her when she was on leave. At one stage Marilyn acted in her place on Fridays. Ms O’Sullivan also recalled Mr Sharplin. She said that when he made an application, she thought that he was an unlikely client. He had obtained employment after working at the council and had a contract in Papua New Guinea. He showed her the contract as, “substantiation of his ability to repay the instalment”.
2. Ms O’Sullivan was asked to describe the Miami premises. She said that they were in a building which comprised a group of about seven shops. The office was upstairs and to the left of the building. It had a reception area and a few little offices, mainly used for storage, a small kitchen and her office beside the reception area. There was a sign at the front of the building, bearing the words “Fast Access Finance”. There was a similar sign on the door into the office. There was a sign which said, “Diamonds Sold Here” and, “No Diamonds Kept on the Premises”. There was also a notice identifying the hours of trade. Ms O’Sullivan was shown a document which is now exhibit 6. She said that there was a sign similar to the sign at the bottom of the photograph, except that it said, “Fast Access Finance (Burleigh Heads) Pty Ltd”, rather than “Fast Access Finance (Townsville) Pty Ltd”. It was affixed to the front door of the office. The sign “Diamonds Sold Here” was just inside the door. It may have been sitting on a coffee table, propped against the wall.
3. Ms O’Sullivan was then taken to a number of computer “screenshots”. She identified exhibit 122, as being a “screen dump of the LMS”. Exhibit 123 is headed “Create New Sales”. One of the entries opposite the word “quantity” is “out of stock”. Apparently this indicates that there were no diamonds to sell. Exhibit 124 is a similar screenshot. It shows that a quantity of diamonds was available for sale. Using this screen, one could identify the required number of diamonds for a proposed transaction. One could then enter the date for the first repayment, the minimum repayment amount and whether it was weekly or fortnightly. Exhibit 125 shows a “drop down” box, displaying the number of diamonds for sale. Ms O’Sullivan was shown exhibit 126 which is headed “Stone Stock Status”. It showed the number of diamonds available for sale at any particular time. Exhibit 127 is headed “Stones Sales History”. It showed the number of diamonds sold and the number available. Ms O’Sullivan was taken to a document which seems to be part of exhibit 3. Although that email appears to be from her to Ms Thorne, she did not remember sending it.
4. In cross‑examination Ms O’Sullivan said that she worked at FAF Burleigh Heads for four years. During that time she saw no diamonds and showed no diamonds to customers. She would have seen hundreds of people in that time. None, “bought a physical diamond”. She understood that Fast Access Finance advertisements included terms such as “fast cash”, “quick funds” and “bond loans”, although later evidence suggests that she had not, herself, seen the advertisements. She had sometimes heard general comments about advertising in the Gold Coast Bulletin. She understood the term “bond loan” to refer to a loan for the purpose of providing a residential leasing bond for four weeks’ rent plus two weeks’ rent in advance. People commonly sought funds from FAF Burleigh Heads for that purpose. The diamond model ceased operation around April 2012. Ms O’Sullivan continued in her employment until the end of 2012. She understood that bond loans were always a personal, rather than a business use of funds.
5. If a person telephoned seeking a loan, Ms O’Sullivan would say that “they” had a “facility”, but would not necessarily go into detail as to how funding was effected. She would provide such details when the customer came into the office. On the telephone she used the term “facility” rather than “loan”. She had been told not to use the word “loan”, but customers used it. She denied using the words “loan” or “lending” to customers. She was asked whether she agreed that she had used the terms “loan” and “lending”. She said that she did not recall. She said that “we” were told not to use the word “loan”. She agreed that she may possibly have used such a term, but she did not recall doing so. She insisted that the customers were always told that it was a “diamond transaction”. She agreed that she probably did not say to customers who used the word “loan”, that they were not getting loans.
6. Exhibit 4 is a letter headed “Fast Access Finance” and dated 8 May 2009. It is from Ms O’Sullivan to a Mr Chenery. The subject matter is said to be “Field Call”. The letter purports to authorize Mr Chenery, on behalf of FAF Burleigh Heads, “for a field call to the following borrower”. That borrower was Ms Thorne. Attached are “details of arrears”. Exhibit 5 is a letter dated 8 May 2009 to Mr Chenery. The exhibit consists of only one page, with no signature. It seems that there may have been at least one other page. This letter also relates to Ms Thorne. It refers on numerous occasions to the “borrower”, presumably Ms Thorne. Ms O’Sullivan said, concerning this letter, “It’s a form letter. I wouldn’t have actually made that error myself. It’s a form letter”. She said, however, that she had access to it, and that it was on her computer. She did not know who had prepared the document. It came out of “head office”.
7. Exhibit 49 is a Sales Agreement with Ms Thompson. Ms O’Sullivan recognized her own signature on the third page. She did not recall the particular transaction. She agreed that she would have understood any reference to a loan for a bond to be a loan to enable payment of a bond for the rental of residential premises. She agreed that she would have told Ms Thompson of the documentary information which she would have to supply. She regularly gave such advice over the telephone. She cannot recall whether Ms Thompson made an online application. Ms O’Sullivan did not think that she would, herself, have filled in the application form on the basis of information provided over the telephone.
8. In exhibit 48, an application form, at the foot of p 2, there is a comment to the effect that, “You can set up periodic payments to come out of our bank”. Ms O’Sullivan was asked if, “that sounded similar to the advice that she would give to customers”. Ms O’Sullivan said that the document had come from an online application and that the borrower, Ms Thompson, had written that statement. She agreed, however, that she might well have told customers that they would pay by direct debit on a weekly or fortnightly basis. She said that the document had not been completed by her, and that it was an online application. She said, however, that the writing on the front page had been written by her after Ms Thompson had visited the Miami premises and whilst Ms O’Sullivan was assessing the application. Her handwriting also appears on p 2, including the figures “$256 fn” meaning “$256 per fortnight”. The application form had originally shown the fortnightly repayment as being in the amount of $250. It seems that $256 was the standard amount. Ms O’Sullivan could not recall contacting Ms Thompson to tell her that her loan had been approved, and that her husband could not, “go on the loan because of bankruptcy”. She may have said that he would be ineligible to apply.
9. Ms O’Sullivan said that upon receiving such an application, she would generally have called the customer and told him or her of the sorts of documents which she would require, such as “utility bill, bank statement, identification, car …”, (presumably car registration). She agreed that she would have said as much to Ms Thompson. On occasions she may have provided her fax number so that the customer could fax documents to her.
10. She was taken to exhibit 47 which contains the documents supplied to Ms O’Sullivan by Ms Thompson. Some of the faxed documents bear markings which show the originating addresses of the fax transmissions. The finance application, exhibit 48, has been amended by deleting reference to Ms Thompson’s husband. Ms O’Sullivan agreed that it would be inappropriate to sell diamonds to a person who was bankrupt. It would also be inappropriate to advance funds to such a person. She could not recall when she had discovered that Mr Thompson was bankrupt and had amended the application. Ms O’Sullivan said that funds would not be credited to a customer’s account on the same day. Rather, they were credited overnight. She may have pre-printed the relevant documents before Ms Thompson came into the office. She would have explained that the repayments were to be $256 per fortnight, asked her to initial each page and indicated where she should sign the document. She disagreed with the proposition that she had not told Ms Thompson to read the document. She seemed also to assert that she discussed diamonds with her. She would have done so whilst going through the paperwork. During 2009, all offices were being encouraged to sell more diamonds. There was, however, a specific complaint that FAF Burleigh Heads was not processing enough transactions. She said that for a company which was using a diamond business model, and did its funding through the sale of diamonds, there was nothing strange or unusual about such transactions.
11. Ms O’Sullivan agreed that customers came into the office to borrow money and used the language of “loan” and “topping up a loan”. She did not correct customers who used such language but went through the paperwork with them. She said that she told every customer who entered into such a transaction that there was a contract for the sale of diamonds. She was taken to a number of documents concerning Ms Thompson, of which exhibit 55, a Sales Agreement dated 21 June 2011, is one. It was put to her that prior to the printing of those documents, she had received a telephone call from Ms Thompson, asking for a “top up” of an existing loan to meet medical expenses. Ms O’Sullivan recalled that Ms Thompson had sought funds for medical expenses at some stage, but did not recall whether it was on this occasion. She did not recall any request for a “top up”. However she agreed that Ms Thompson may have made such a request. It was put to her that she replied: “I need to look at what you paid to see if we can do it, to distribute more funds”. She replied: “Doesn’t sound like what I would say but I would have needed to look at the status of her account before I could consider selling her any more diamonds”. It was put to her that Ms Thompson had asked for an amount in excess of $1,000, and that Ms O’Sullivan had indicated that she could only have $1,000. Ms O’Sullivan said that this proposition might be correct. She was asked if she had said, “Come in and sign the paperwork and the money will be in your account by 2 pm the next day”. She said that she would have used the expression “overnight”. It was put to her that when Ms Thompson came in on the second occasion, she produced the documents and indicated to her where she should sign and initial them, but that she did not explain that the transaction involved diamonds. She replied that, “Well, that would be a breach from my normal protocol where I said to her, ‘This is the sales agreement selling you the diamonds’”. She also said: “Well, I don’t recall specifics but that was what I normally said to people”.
12. A number of other matters were put to Ms O’Sullivan concerning conversations with Ms Thompson. However she was only able to describe her normal practice. She had no real recollection of the conversations. She agreed that some customers communicated with her by email, and that she may have communicated with Ms Thompson in that way. She agreed that there may have been other transactions involving Ms Thompson. Ms O’Sullivan was then taken to exhibit 121 a product disclosure card. She said that a document in this form was in the office but was not laminated. It was on A4 paper.
13. Ms O’Sullivan recalled dealing with Ms Thorne. When Ms O’Sullivan met her she was already an existing customer of Fast Access Finance. She could not say exactly when they met. Exhibit 98 is a Sales Agreement dated 18 September 2008. Ms O’Sullivan started at FAF Burleigh Heads on 22 September 2008. Ms O’Sullivan was then taken to exhibit 100, a Collateral Security Agreement dated 18 September 2008. Her attention was drawn to p 5. In the material there are a number of versions of this document, but at least one of them appears to be signed by Ms O’Sullivan. She agreed that it was her signature. She initially agreed that 18 September 2008 may have been one of the days on which she was being trained, but then said that her training occurred after she commenced her employment on 22 September 2008. She could not explain how her signature came to be on a document dated 18 September 2008. She thought that Mr Beattie may have started the transaction and that she had finished it off. She cannot remember whether she met Ms Thorne in connection with that transaction or with some other.
14. She agreed that Ms Thorne may have rung her at some stage, asking for a “top up”, and that she may have then come into the office. Ms O’Sullivan agreed that Ms Thorne would not have needed to produce identification and associated documentation as she was an established customer. It was put to her that on the occasion on which she met Ms Thorne, she had presented her with the documents and said that, “You will see here it says all about diamonds and cuts and all that. It’s just some new legislation. It doesn’t change anything”, and that she then told Ms Thorne where to sign and where to initial. Ms O’Sullivan said that she had not made that statement. She had never spoken to anybody about cuts. She did not remember such terminology. At the time of the transaction on 18 September 2008 Ms Thorne had already purchased diamonds. Ms O’Sullivan agreed that Ms Thorne had come to the office on one occasion and that the other transactions were primarily by email. It was put to her that she had been involved in three transactions with Ms Thorne, on 7 December 2010, 15 April 2011 and 10 January 2012, and that in each case, Ms O’Sullivan responded by email to an inquiry by Ms Thorne. She said that Ms Thorne had come into the office on one occasion.
15. Ms O’Sullivan said that Ms Thorne had a faulty scanner and agreed that some of the loan documents in evidence appeared to have been poorly reproduced, suggesting that they had been sent by email. It was put to her that if a transaction was effected by email, she would not have given Ms Thorne the product disclosure statement. Ms O’Sullivan said that she may have mailed the product disclosure card to Ms Thorne. She agreed that she had been instructed not to give the card to customers. It was for office use only. She did not recall sending a copy of the document to Ms Thorne. If she had sent it, she still could have initialled it and put it on the file. She agreed that she did not, as a matter of course, provide copies of the product disclosure card to customers. She could not recall any occasion on which she had done so. She simply read it to the customer or allowed the customer to read it, initialled it and put it in the file. She said that she dealt with very few customers online and could not recall how she proceeded with customers of that kind. She agreed that she may not have posted the card to such customers. There are some obvious curiosities about this evidence.
16. Ms O’Sullivan was taken to documents concerning Mr Streat’s transactions. Exhibit 68 is an application form dated 3 January 2009, apparently submitted online. At least some of the handwriting on the document is that of Ms O’Sullivan. Opposite the words “purpose of loan” the word “personal” appears, apparently one of the drop down boxes on the computer programme. On the document Ms O’Sullivan has written the word “bond”. She said that after speaking to Mr Streat, she would have known that the loan was not a business loan. She probably called Mr Streat in response to his application, telling him that she had received it, and inviting him to come in to discuss the matter. She understood the term “bond” to refer to a rental bond for residential premises. She recalled meeting Mr Streat on several occasions but could not recall the first occasion. Exhibit 69 is a Privacy Act consent form dated 3 January 2009. She said that once she had seen his payslips and the other documentation she would have made a determination as to whether he was a viable applicant. She could prepare the loan documents in advance of such a decision. It was put to her that when she first dealt with Mr Streat, there was no explanation concerning the sale of diamonds. She disagreed with this. She said that she had given such an explanation.
17. Ms O’Sullivan was asked whether, on the next occasion on which Mr Streat contacted her, on 2 June 2009, he had asked for a “top up” loan for car registration. She could not recall but agreed that it was possible. She denied having told him that she would see how much she could lend. She would probably have said that she would look at the database and, “see where we’re at with your instalments”. She was asked whether there was a time, whilst the diamond model was being used at FAF Burleigh Heads, when she used the words “lend” and “loan” in relation to diamond transactions. She said that she could have done that early in the piece. She could not remember when the “head office” directed that the word “loan” not be used. She did not recall actually using that word herself. The customers used it constantly. She did not recall Mr Streat asking about the purpose of the diamonds, or saying that he had no diamonds to give. She did not say anything about virtual diamonds. She did not believe that the diamonds were virtual diamonds. She believed that they were real diamonds. She had never seen them. She had never shown diamonds to a customer. Nobody had ever bought or received a physical diamond from her.
18. She understood that the diamonds were held offsite. She said that she was instructed that if anybody ever asked to buy diamonds she was to contact “head office”, so that they could procure the diamonds in order to have them there. She was told that customers could buy diamonds if they wished. She agreed that many of the customers desperately needed the funds that they were seeking. She agreed that they did not come in to buy diamonds, but to seek loans, and that the funding was done through the sale and purchase of diamonds. She said that she did not think that customers cared about the source of the funding. She agreed that customers thought that they were getting loans. She did not recall a conversation in which Mr Streat asked whether he would get the diamonds back at the end of the transaction.
19. Counsel suggested to Ms O’Sullivan that in May 2011, Mr Streat might have dealt with Marilyn. Ms O’Sullivan said that she (Ms O’Sullivan) may have been “in the States” at that time. She was then taken to exhibit 78, a Sales Agreement dated 24 May 2011, apparently signed by her. She said that by that date, she had returned to Australia. She did not recall whether, on this occasion, she had asked Mr Streat the purpose of the loan, or whether he had said that it was for vehicle modification. It was put to her that she had not offered any explanation concerning diamonds, or invited him to read the documents carefully. She said that she adopted that procedure with all customers. She may not have been as specific when dealing with a past customer, but she always said, “This is a sales agreement, have a look at it, initial it at the bottom and sign it on the back page”. She would always say that it was a Sales Agreement for buying diamonds.
20. Ms O’Sullivan was then taken to exhibit 87, a Collateral Security Agreement dated 13 February 2012. She was asked if at that time, she was dealing with Mr Streat via email. She said that it looked as if that was the case, but that she did not recall. She agreed that Mr Streat may have telephoned, asking for a loan of $1,500, and that she replied, “That shouldn’t be a problem. Just send through the documentation for the new vehicle”. She agreed that she would probably have said as much, if he had paid his previous instalment. Ms O’Sullivan also said that the “encumbrance” would have been released. She seems to have meant that Mr Streat had fully repaid an earlier advance, and that the Collateral Security Agreement had been discharged. Her attention was drawn to the marking on header of the exhibit. She agreed that it seemed that the document had been faxed after execution. She has signed the document on the fourth page. It was suggested to her that she may have signed that document before Mr Streat had signed it. She said that this was not possible. She was then taken to exhibit 88, a Sales Agreement dated 13 February 2012. Ms O’Sullivan has signed it on the third page.
21. Exhibit 89 is a tax invoice, apparently sent to Mr Streat and returned by him. It was pointed out to Ms O’Sullivan that this was not a document which he needed to return. Ms O’Sullivan was then taken to exhibit 90, a Purchase Agreement dated 13 February 2012. It appears also to have been faxed to her. She agreed that it seemed that this was not an occasion on which she dealt with Mr Streat face to face. She was then taken to exhibit 91, a product disclosure card. Mr Streat had not initialled it, and there were no fax markings on it. She said that she could not recall what she had done with it. She agreed that had she emailed it to Mr Streat, it would have been contrary to the instructions which she had been given. She did not recall reading the document to Mr Streat or showing it to him. She had not seen him on that particular occasion.
22. Ms O’Sullivan remembered Mr Sharplin. At the time she thought that he had a good job and had been in that employment for some time. She was taken to exhibit 145, a finance application. Ms O’Sullivan’s handwriting appears on the front page. There is reference to “borrower ID” and “loan ID”, language used internally within Fast Access Finance to refer to customers involved in diamond transactions. On the third page, under the heading “Funding Request”, the purpose is said to be “bond loan”. She understood this to be a request for an amount for four weeks’ rent plus two weeks’ rent in advance, or part thereof. She could not remember when Mr Sharplin came to the office. However she believed that she saw him on the first occasion that he visited, and would have given him documents to complete. It was put to her that at some time prior to 23 November 2010, Mr Sharplin contacted her, asking for $2,500 to $3,500. Ms O’Sullivan said that he may have done. However she did not recall it. It was put to her that she said, “We can loan you the money, and you can choose three or six months to pay it back?”. She denied this, saying that funding was “set up” over approximately 31 weeks. There was no such thing as a three month “thing”. She agreed that she would have told him that they would show him how much the repayments would be.
23. On the same page, opposite the heading, “How much can you afford to pay?” the range of $40 - $50 has been written and then struck out. The amount of $64 per week has been inserted, apparently in Ms O’Sullivan’s handwriting. Ms O’Sullivan agreed that she had asked Mr Sharplin to provide documents such as payslips, car registration, a utility bill and a driver’s licence. She did not know at that stage how much money he could get, but she understood that he had requested $1,000. That amount is written in his handwriting under the heading “Funding Request”. She said that she explained to him that, “This is a sales agreement selling you the diamonds”. She also identified to him the Purchase Agreement by which diamonds were purchased back.
24. Ms O’Sullivan agreed that Mr Sharplin came in on two or three occasions. Exhibit 150 is a Sales Agreement dated 17 January 2011. She was asked if there had been a chart on the wall in the office, showing diamonds and the monetary value of diamonds. She agreed that there was such a chart. She accepted that Mr Sharplin may have seen it on the second occasion on which he came to the office. It was suggested to Ms O’Sullivan that he asked about the chart. She did not recall. It was put to her that she had said, “That’s got nothing to do with you. Don’t worry about that, it’s just how we do it. That’s how we do business. You’re not actually buying any diamonds”. She denied this suggestion. She said that there was no reason why she would, on this occasion, have not followed her usual practice of explaining the documents which were being signed.
25. Ms O’Sullivan agreed that in April/May 2011 Marilyn would have been in the office in her place. Her attention was then directed to a fourth transaction, said to have occurred on or about 7 June 2011, after she had returned from the United States. It was put to her that Mr Sharplin had said on that occasion, “I may pay this loan out early, as I am expecting to earn good money”. She recalled an occasion on which he had shown her a contract indicating that he had procured a job in Papua New Guinea. She thought that it may have been the final occasion on which she dealt with him. She agreed that he said that he might pay out the loan early. It was put to her that she said that there was no point in doing so, as he would not get a discount. She agreed. She disagreed with the suggestion that she had not, on this occasion, explained the Sale and Purchase Agreements.
26. Ms O’Sullivan was questioned concerning signage. She said that the sign on the door was a sticker. There was a second-hand dealer’s licence on the reception desk. There was also a sign saying, “Diamonds Sold Here. No Diamonds or Cash Kept on the Premises”. She was asked questions concerning a photograph showing signage which is exhibit 6. The sticker “Fast Access Finance” was on the door. The sign concerning diamonds was on the coffee table inside the office, leaning against the wall. She said that all of the signs were in the office but she could not remember where they were. When one entered the premises one looked directly at the coffee table. The reception desk was to the right of the door.
27. Ms O’Sullivan was then taken to exhibit 147, a Sales Agreement. It shows, opposite the word “Goods”, the statement “8 x loose modern brilliant cut diamond, 0.10cts, colour “H”, clarity P1”. She said that this description appeared on all of the documents, although the number might vary. She took no steps to identify specific diamonds to be sold to Mr Sharplin. She did not produce any diamonds. There were no photographs displaying the diamonds or, in particular the “exact diamonds”. They were only identified in the database. She never saw them, and the customer never saw the computer. Her attention was then directed to clause I2 headed “Delivery”. The delivery date is in blank. A default provision provides for delivery, “3 business days from the date of this agreement”. She said that had the customer requested the delivery of the diamonds, she would have gone “further up the chain”, to have them delivered. She pointed out that although the document provided for delivery within three days, the diamonds would have been “sold back” by that time, presumably to DCH.
28. Concerning exhibit 148, a Purchase Agreement dated 24 November 2010, Ms O’Sullivan said that her understanding was that one document involved the sale of diamonds to the customer, and the second document involved the sale of those diamonds by the customer to DCH. She agreed that nothing in the Purchase Agreement indicated that the diamonds being sold were those acquired pursuant to the relevant Sales Agreement. She said that she had not looked at the transactional documents carefully. She understood how the scheme worked. Ms O’Sullivan agreed that customers came to the office, looking to borrow money, and that they believed that they were getting loans. There was never an occasion on which she delivered diamonds to a customer. Nonetheless, she said that if a customer requested that they be delivered, her understanding was that they would have been delivered. She agreed that customers were after money for personal expenditure, and that there was never any real prospect that they would request that the diamonds be delivered to them. Finally, it was put to her that on no occasion did she give Mr Sharplin any explanation of the diamond transactions. Ms O’Sullivan responded that she did so with every one of her customers, explaining the Sales Agreement, the Purchase Agreement and the Collateral Security Agreement.
29. There are a number of curiosities in Ms O’Sullivan’s evidence. First, there is her concern that the references to diamond purchases and sales in the documents would be likely to discourage customers from signing unless they clearly understood the nature of the transaction. This view seems not to take into account the difficult circumstances in which many customers approached FAF Burleigh Heads. One wonders what purpose Ms O’Sullivan was seeking to fulfil in giving detailed explanations to such people when she knew that they were only interested in obtaining money. She may well have accepted, at face value, that the diamond model was a legitimate business model. Nonetheless, in view of the pointlessness of any explanation of the transaction, at least from the customer’s point of view, it is likely that she was less than fully thorough in such an explanation. She might be forgiven for having thought that the less said the better. It was not in the interests of FAF Burleigh Heads to communicate information which might deter customers from borrowing, and the customers were not likely to listen anyway. Further, at some stage FAF Burleigh Heads was under pressure to “sell more diamonds”.
30. No doubt “head office” insisted that terms like “loan” not be used in order to ensure that each transaction looked as much like an unconditional sale as possible. However it seems unlikely that Ms O’Sullivan would have been particularly careful or consistent in her explanations. It seems more likely that, as ASIC’s evidence suggests, she sometimes mentioned the purchase and sale of diamonds, and sometimes not, probably depending upon whether the particular customer had noticed references to diamonds in the documents or otherwise raised the issue with her. It may also be that when the diamond model was first adopted, she was more consistent in her explanations than she was subsequently.
31. Another difficulty with her evidence is her equivocation about the product disclosure statement which, she suggested, may have been posted to Ms Thorne, notwithstanding that she had been directed not to allow the document to leave the premises. For these reasons, I generally prefer the evidence of the various customers where their evidence conflicts with Ms O’Sullivan’s evidence.

# findings of fact

1. Apart from the statement of agreed facts (which is attached to these reasons), various other factual matters have been expressly agreed or are clearly not in dispute. The respondents accept that each customer entered into a Sales Agreement, a Purchase Agreement and a Collateral Security Agreement, as alleged in the amended statement of claim. They submit that the matters remaining in contention are:

* whether entering into a Sales and Purchase Agreement (taken separately or together) amounted to engaging in a credit activity as defined in s 6 of Credit Protection Act; and
* more specifically, whether any credit, as defined in s 3(1) of the Code, provided pursuant to such agreements (taken separately or together) was credit to which the Code applied, given that no charge was made for providing such credit.

In their written submissions, the respondents indicate that they, “do not contest that the other elements of s 5(1)(c)of the [Code] are satisfied”. The reference to “s 5(1)(c)” should, I believe, be to “s 5(1)” or perhaps “s 5”. As I understand it, the respondents submit that the matter remaining in dispute is whether a charge was, or might have been made for the provision of credit as required by s 5(1)(c).

1. The parties seem to accept that there is no relevant distinction between the documents and circumstances of any particular transaction, and those of any other transaction. It follows that ASIC will either succeed on the s 5(1)(c) point with respect to all relevant transactions, or fail with respect to all of them. Similarly, it will succeed on the pretence (or sham) point with respect to all transactions, or fail with respect to all of them.
2. I adopt the following submissions by ASIC as reflecting matters which are not in dispute. I have made slight amendments in order to adopt the terminology used elsewhere in these reasons. One error in the submissions is the reference in footnote 109 to p 363 of the transcript. It should refer to p 362. Another error occurs at the end of para 78. I deal with it by way of comment. At paras 80-82, certain factual matters are asserted, but such assertions appear to be mingled with submissions. For that reason I have not included those paragraphs. Where I have made comments, they are so designated. I have also made some grammatical changes.

52. It is not in dispute that the diamond model was devised by [Fast Access Finance] and its then directors, R Legat, J Legat and Bray.

53. [Fast Access Finance] provided template documents to the FAF [entities] to use for consumer transactions, most if not all of those documents having been drafted by R Legat. They included the following:

1. Fast Access Finance Application;
2. Privacy Act consent form;
3. A document headed “Sales Agreement”;
4. A document headed “Collateral Security Agreement”;
5. A document headed “Purchase Agreement”;
6. A Direct Debit Request form relating to Bill Buddy; and
7. A document headed “Tax Invoice”.

54. It is not in dispute that [Fast Access Finance] established and operated a website as a means of attracting business to the FAF [entities] (and other FAF [entities]) from the public, and operated the proprietary software system to facilitate transactions between [FAF entities] and consumers, as discussed below.

55. It is also not in dispute that [Fast Access Finance] performed a number of activities on a day-to-day basis as part of the diamond scheme. Those activities included undertaking searches and registrations … on behalf of the FAF [entities] and making inquiries of a credit reference agency in respect of prospective customers of the FAF [entities], and performing activities in relation to DCH as set out at paragraph 72 below.

56. As to the specific transactions the subject of this proceeding, [Fast Access Finance] facilitated the payment of funds on each occasion from the DCH bank account to each of the six identified consumers by the operation of the systems it had put in place, and having provided [DCH’s bank] with information about the consumers which would enable those payments to be made.

*The Existence of Diamonds*

57. The [r]espondents say that some physical diamonds had been purchased by DCH from a wholesaler. J Legat gave evidence that he sourced suppliers. Diamonds were purchased, and then stored in a safe at J Legat's house. The diamonds were not uniquely identified. They did not have separate identification markings on them.

58. Once stored in that safe they did not leave that safe. J Legat did not deal with those physical diamonds on day-to-day, or weekly basis. They were not moved around on a daily basis to reflect what purported to be the individual purchase and sale of diamonds by consumers.

COMMENT: Mr James Legat said that from time to time, he would move diamonds from one FAF entity's notional “possession”, or “ownership” to another’s. I otherwise accept the above summary of the evidence as accurate. I also accept the evidence in question as being reliable.

59. No diamonds were ever kept at the FAF [entities’] premises.

*[Fast Access Finance’s] Computer Software*

60. [Fast Access Finance] owned proprietary software that supported the transactions entered into pursuant to the diamond model. The original “loan management system” (described by its initials as LMS) which operated prior to the introduction of the diamond model was modified by Mr Shidong Yu to refer to diamonds. The system supported the purported sale and purchase of diamonds by FAF [entities]. The FAF [entities] used the system, including the staff from those offices who inputted data from the template documents signed by consumers.

61. The LMS system interacted with an external online payment system operated by Bill Buddy, which facilitated the transfer of funds that occurred in connection with the diamond model, as discussed below.

62. Importantly, the system did not operate to accord a unique identity for each physical diamond stored in J Legat's safe.

*Bill Buddy Pty Ltd*

63. Bill Buddy was the name given to the online payment system that facilitated the electronic transfer of funds that occurred within the diamond model, including:

1. Payments from DCH's [bank] account to consumers’ bank accounts of the funds provided to consumers (purportedly for the purchase by DCH of diamonds from consumers);
2. the direct debiting of consumers' bank accounts of their repayment instalments (whether weekly or fortnightly) to FAF [entities];
3. the transfer of funds from FAF [entities’] accounts to DCH for the purported sale of diamonds by DCH back to FAF [entities].

64. Bill Buddy Pty Ltd earned $2 per electronic consumer repayment.

*Diamond Clearing House Pty Ltd*

65. The establishment of DCH was [proposed] by J Legat, R Legat and Bray, and brought to Joyleen Lange after the model had been largely designed. J Legat, R Legat and Bray were all directors of [Fast Access Finance] at the time. Lange was J Legat’s sister-in-law, and he had known her for over 25 years.

66. The diamond model was established in response to the imminent imposition of the 48% interest rate cap by the Queensland government on 31 July 2008.

67. DCH was incorporated on 8 April 2008. Its sole director and shareholder was Ms Joyleen Lange. Lange had never been a director of a company beforehand, and had no experience in the diamond industry prior to her involvement with DCH.

68. The practicalities of its establishment were managed by J Legat, who helped Lange establish DCH as a company, went with Lange to [DCH’s bank] to open an account … , told her [whom] to put as signatories on the account, and directed her to later remove him as a signatory. J Legat arranged for the initial purchase, by DCH, of diamonds.

69. Lange did not put any money into the company at any stage. Rather, all of the FAF [entities] put funds into DCH, so that when DCH initially bought diamonds, it did so [using] money [which] had come from those [entities]. In this respect, in the period from April to July 2008, funds totalling over $150,000.00 were injected into DCH’s [bank] account from all of the FAF [entities].

70. There was no written agreement between DCH and [Fast Access Finance] or any of [the FAF entities] in relation to its operations or role within the diamond model.

71. DCH played no day-to-day role in the operation of the diamond model. All the work was done by the FAF entities [including Fast Access Finance]. In this respect it is not in dispute on the pleadings that [Fast Access Finance] undertook DCH's day-to-day book-keeping to the extent that booking-keeping related to dealings between DCH and the FAF [entities]; it processed the payment of the sale price of diamonds purportedly sold by customers to DCH pursuant to the Purchase Agreement, from the DCH [bank] account (in respect of which Lange had made J Legat, Bray and R Legat signatories) to a nominated bank account of that customer on the day of, or the day after, the customer signed the Purchase Agreement; it created what were said to be invoices from DCH to the FAF [entities]; it processed the payment of funds from the FAF [entities] to DCH; it arranged the transfer of funds from the FAF [entities] to DCH, for day-to-day transactions.

72. DCH made no money on any individual sale or purchase of diamonds. After the first 2 months of its operation, its only income was from a flat monthly $500 fee it received from [Fast Access Finance].

COMMENT: Some other amounts may have been received in the first two months of operation.

73. DCH was deregistered on 7 November 2012, after the diamond model ceased operating.

*The Passage of Funds through DCH's* [Bank] *Account Relevant to the Six Consumers*

74. The DCH [bank] account was the account from which the funds to consumers were paid.

75. [Fast Action Finance] would electronically provide information to the NAB at the end of each day which included the names, bank account details and amounts to be paid in respect of those consumers who had entered into transactions with an FAF [entity] that day. On the basis of that information, the NAB would then disburse multiple electronic payments to those consumers, from the DCH [bank] account, at the same time. The effect of this was that each consumer would receive their funding amount into their nominated bank account. The Affidavit of Robyn Gay Lyons, an officer of [DCH’s bank], filed 15 July 2014, exhibits from RGL-4 to RGL-20, copies of [documents] described as “Direct Entry System Reports” … which show all the payments made to the six [customers] (among other [customers]) from the DCH [bank] account. By way of example, the payments to Eadie of $2,000 pursuant to the transaction he entered into the FAF Beenleigh on 27 August 2010, was part of a bulk payment of $18,375.00 that came from the DCH [bank] account on that day.

76. The statements of account of the DCH [bank] account covering the period 26 June 2010 to 16 March 2012 are exhibited to the Lyons Affidavit at RGL-1 and RGL-3. Each of the bulk payment amounts shown in … RGL-4 to … RGL 20 are shown as debits on the DCH [bank] account statements.

77. By way of example, the $18,375.00 bulk payment amount is a debit of that amount on 27 August 2010 in the statement, located on p 23 of … RGL-1.

78. On 27 August 2010 there was also an equivalent amount of $18,375.00 credited to the DCH [bank] Account. The same pattern of equivalent debits and credits from the DCH [bank] account occurred in respect of other bulk payment amounts which included a payment to one of the [six customers] here. These credit amounts were said to represent the purchase by FAF [entities] of diamonds from DCH. They were described as reflecting the “restocking” of the diamonds the FAF [entity] had “sold” that day. The amount which the FAF [entity] notionally “paid” per diamond it purchased from DCH was $125.00. This was the same [as the] amount [at which] DCH purportedly sold diamonds to [customers].

COMMENT: The reference, in the last two lines, to DCH purportedly selling diamonds to customers, should be to its buying diamonds from customers.

COMMENT: Ms Lange indicated that the diamonds bought from the FAF entities’ customers might not all be bought by Fast Access Finance. It is also not clear whether Fast Access Finance bought such diamonds on its own behalf, or on behalf of the FAF entities. Probably, they were bought on behalf of the FAF entities. No purpose would have been served by Fast Access Finance buying them from DCH and then selling them to the FAF entities.

79. Accordingly, the flow of funds into, and out of DCH’s [bank] account operated [so] that in the event [that] there was a debit of funds at the end of the day to [customers] (for those funds obtained by [the customer] pursuant to [his or her] transaction with an FAF [entity]), an equivalent amount was usually transferred into DCH’s account [on] the same day.

…

*Knowledge of Licensing Requirements*

83. The [r]espondents knew of the registration and licencing obligations [imposed upon persons engaging in credit activity] [from] the commencement on 1 July 2010 of the relevant Commonwealth legislation … .

(Footnotes omitted.)

1. At para 129 of its submissions, ASIC seeks further findings of fact. I am willing to make the following findings in respect of each transaction entered into between the six customers who have given evidence and the relevant FAF entities:

* that each customer applied to the relevant FAF entity for finance;
* that in each transaction, the relevant FAF entity knew that the customer was seeking finance;
* that the relevant FAF entity approved each such application;
* that after such approval, the FAF entity presented a suite of documents, all of which were signed, more or less contemporaneously.

None of these matters is in contention. Based upon the evidence of the customers I also accept that by entering into each transaction, and signing the suite of documents provided by the relevant FAF entity, the customer did not intend to buy or sell diamonds.

1. As to para 129(e) of ASIC’s submissions, there is no explicit statement that the entire suite of documents had to be signed in order that the advance be made. However Mr Bray effectively said as much at ts 353 l 39 to ts 354 l 1. There is no evidence as to the true value of the diamonds. They were either grossly overvalued for the purposes of the Sales Agreement or grossly undervalued for the purposes of the Purchase Agreement. Further, each FAF entity knew that the customer needed the advance, in many cases urgently, and was therefore unlikely to quibble about the documentation or want the diamonds. I infer that funds would not have been advanced unless the entire suite of documents had been executed. That is not to exclude the possibility of a negotiated sale of diamonds, but that possibility is not relevant for present purposes.
2. As to para 129(g), I am satisfied that the diamond model was designed to enable the FAF entities to continue to respond to applications for small advances over relatively short periods of time. Their “profits” were derived from the difference between the price at which diamonds were “sold” to the customers and the price at which DCH “purchased” them from the customers. That difference was not produced by acquiring the diamonds at prices which would enable resale at a profit. Nor was it produced by marketing techniques designed to attract customers who might want to buy diamonds. The difference was generated solely by the fact that the FAF entities offered small amounts of finance to needy people, in return for their purporting to enter into transactions which had nothing to do with their reasons for needing financial accommodation, which transactions the customers probably did not understand.
3. It seems unlikely that any of the rights generally associated with the ownership of chattels actually passed from the relevant FAF entity to the customer in question, or from the customer to DCH, or that there was any intention that such rights pass. Although the legal title purportedly passed on execution of the Sales Agreement, no diamonds were ever appropriated to the contract. Section 19 of the *Sale of Goods Act 1896* (Qld) (the “Sale of Goods Act”) provides that in the case of a contract for the sale of unascertained goods, property does not pass unless and until the goods are ascertained. The goods must be ascertained in a way which binds both parties. See *Jansz v G.M.B. Imports Pty Ltd* [1979] VR 581 at 586 and 588. The respondents’ submission concerning s 24 of the Sale of Goods Act is misconceived. That section does not qualify or limit the operation of s 19. As the diamonds were, at no stage, appropriated to any one contract, title never passed from the FAF entity to the customer, or from the customer to DCH. Hence DCH could not transfer title to Fast Access Finance or any FAF entity. The title always remained with the relevant FAF entity. It seems likely that the Sale and Purchase Agreements were eventually abandoned, at least insofar as concerned the passage of title to the diamonds. Neither DCH, nor Fast Access Finance, nor the FAF entities insisted upon ascertainment of the goods so that title would pass.
4. The customer also did not receive possession of the diamonds. Assuming that no delivery date was inserted into the relevant Sales Agreement (as seems to have been the case), the Delivery Date was notionally three business days after the date of the Agreement. However cl I2 rendered that provision illusory. As the FAF entity was never in possession of the diamonds, it could always defer the delivery of possession. Only if such delivery were deferred for more than seven days after the original delivery date, could the customer cancel the sale. As the customer had immediately sold the diamonds to DCH, I infer that delivery of possession was never intended.
5. Once it is accepted that the Sales and Purchase Agreements were part of a wider transaction which also included the preliminary dealings between the FAF entity and the customer, (the “s 204 Contract”), it becomes clear that neither Fast Access Finance nor the relevant FAF entity intended to sell diamonds to the customer. Rather it was intended that DCH pay the agreed amount to the customer, in exchange for his or her promise to pay to the relevant FAF entity, the so-called price according to the Sales Agreement. All other incidents of each transaction were merely adjustments as between DCH and the FAF entity, such adjustments being made by Fast Access Finance.
6. As to para 129(h), I am not sure that a finding involving the word “cipher” would be of much assistance for any purpose. According to the Oxford English Dictionary (2nd ed) a “cipher” is, “[a] person who fills a place but is of no importance or worth, a nonentity, a ‘mere nothing’”. According to the Macquarie Dictionary (6th ed), a “cipher” is “something of no value or importance”; “a person of no influence; a nonentity”.
7. I find that DCH operated, using funding provided by FAF entities, and possibly, by Fast Access Finance. None of those companies had any expectation of benefiting from profits generated by DCH’s trading in diamonds. Any return was to be from the businesses of the FAF entities and that of Fast Access Finance. I infer that the role of DCH was to create the perception that diamonds were acquired by the customer from an FAF entity and sold to DCH. I am willing to make declarations to that effect.

# A PROVISION OF CREDIT

1. The respondents accept that there was a provision of credit pursuant to each Sales Agreement, by virtue of the fact that payment of the “price” was deferred. That provision of credit was either:

* by deferment, under the Sales Agreement, of payment of a pre-existing debt which arose under a contract between the FAF entity and the customer, as a result of the request for a loan, and the FAF entity’s indication that it would provide funds in exchange for a promise to repay twice the amount provided; or
* by a debt arising under the Sales Agreement, the payment of which was deferred.

1. These alternatives reflect paras (a) and (b) of s 3(1) of the Code. There is really no clear evidence of any legally enforceable agreement arising prior to the execution of the Sales Agreement, although it is possible that, in some or all cases, such an agreement was reached. The parties have not sought to establish any such agreement. In my view, the relevant fact situation is regulated by s 3(1)(b). Pursuant to each Sales Agreement, the relevant customer incurred a deferred debt owed to the relevant FAF entity.

# the credit contract

1. Section 4 of the Code provides that a credit contract is a contract:

* under which credit is or may be provided; and
* to which provision of credit the Code applies.

1. Section 5 prescribes the circumstances in which the Code applies to the provision of credit (and to the credit contract and related matters).
2. ASIC submits that each customer entered into a contract with the relevant FAF entity, such contract being of the extended kind contemplated by s 204 of the Code. In addition to the Sales and Purchase Agreements (or parts of each) ASIC submits that the relevant contract included the customer’s request for a loan and the FAF entity’s agreement to provide the amount requested. I have previously referred to that extended “contract” as the “s 204 Contract”, which description I shall continue to use. I have previously set out the relevant paragraphs of the amended statement of claim and ASIC’s submissions. The respondents, on the other hand, look only to the Sales and Purchase Agreements:

* accepting that pursuant to the former, there was a provision of credit, but not otherwise;
* submitting that such provision was not a provision to which the Code applied, by virtue of the fact that it has not been shown that a charge was, or may have been made for such provision.

1. I understand the compound verb “may be made” in s 5(1)(c) to mean that at the relevant time, the credit provider had a legal right to make a charge, which right had not yet been exercised.
2. The parties have made no submissions concerning the proper construction of the definition of the word “contract” in s 204 of the Code. Clearly, the word “arrangement”, includes some sort of consensus between the parties which falls, or may fall short of having contractual effect.
3. The word “combination” is defined in the New Shorter Oxford Dictionary as, “[t]he action of combining two or more things”. The word “combine” is defined as to: “[u]nite, join together; associate (persons etc.) in a joint action, feeling, etc”; [c]ause to coalesce or form one body”; [u]nite together for a common purpose”.
4. The word “series” is relevantly defined as: “[a] number of things of one kind (freq. immaterial, as events, actions, conditions, periods of time) following one another in time or in logical order”; “[a] succession, sequence or continued course (of action, time, life, etc.)”.
5. In dealing with the s 204 Contract, the word “combination” may be more appropriate than the word “series”. A combination may involve entities of different kinds, whilst a series will generally be compromised of similar entities. For the purposes of s 204, a contract or contracts and/or an arrangement or arrangements will be a combination if they are associated in a joint action, or united together for a common purpose. Mr Eadie approached FAF Beenleigh, seeking a loan. It indicated that it would provide an amount to him, whether or not such indication resulted in a binding contract. Those parties then entered into the Sales Agreement, and Mr Eadie and DCH entered into the Purchase Agreement. Clearly, the preliminary arrangements, the Sales Agreement and the Purchase Agreement were united together for a common purpose, or associated in a joint action. It might be argued that as FAF Beenleigh was not a party to the Purchase Agreement, that agreement could not be combined, pursuant to s 204, with the Sales Agreement and the preliminary arrangement between FAF Beenleigh and Mr Eadie. However s 204 does not require that, in order to constitute a combination, contracts and/or arrangements be made by the same parties. Such an approach would unjustifiably narrow the definition. Further, in this case, it is clear that members of FAF Beenleigh’s staff were authorised to enter into Purchase Agreements on behalf of DCH, and did so. It has not been suggested that anybody other than such staff members was involved in dealing with Mr Eadie. In particular, there has been no suggestion that Ms Lange, on behalf of DCH, or anybody from Fast Access Finance made the final decision concerning the execution of the Purchase Agreement.
6. I conclude that there was a relevant contract in the extended sense contemplated by s 204 of the Code, comprising the preliminary dealings between Mr Eadie and FAF Beenleigh, the Sales Agreement and the Purchase Agreement. There can be no doubt that the provision of credit was under the s 204 Contract. It may be that, for other purposes, such provision was under the Sales Agreement, or the Sales and Purchase Agreements. It does not matter. For present purposes, ASIC pleads, and seeks to establish that such provision occurred under the s 204 Contract. It has done so.

# APPLICATION OF THE CODE

1. The combination of Mr Eadie’s finance application, FAF Beenleigh’s agreement to provide him with funds, his incurrence under the Sales Agreement of a deferred debt and the payment made to him by DCH are relevant to two other issues which arise under s 5, namely:

* identification of the purpose for which credit was provided; and
* whether FAF Beenleigh made a charge for such provision.

1. As to the first matter, the combination of the application for an advance of $2,000 and the ultimate receipt of that sum, and only that sum, provides a basis for inferring that the credit was provided, or intended to be provided for the purpose for which Mr Eadie sought it, rather than for any other purpose which may appear from the documentation or elsewhere. In the present case, the respondents admit that the credit was wholly or predominantly provided for personal, domestic or household purposes. See ts 459 ll 21 - 29 and ts 460 ll 3 - 6.
2. As to the second matter, once it is accepted that Mr Eadie had obtained $2,000 for such purposes, one must ask why he incurred a debt of $4,000 in order to obtain the amount of $2,000. The obvious explanation is that a charge was made for providing the credit. The respondents submit that there must be a “causal connection” between the charge and the provision of credit and that, in this case, there is no such casual connection. This approach is derived from the decision of Hall J in *Walker v Consumer, Trader and Tenancy Tribunal of New South Wales* [2013] NSWSC 1432. The decision concerned a similar provision in New South Wales legislation which was subsequently repealed. His Honour held, at [143]-[146] and [190], that the term “for providing” denotes a causal relationship between the charge and the provision of credit. In so deciding, his Honour focussed primarily upon the meaning of the word “for”. Leave to appeal was refused on the ground that the construction question could have no general significance because of the legislative changes. See *Kwik Finance (Sydney) Pty Ltd v Walker* [2014] NSWCA 73. Whilst not challenging the correctness of his Honour’s approach insofar as it concerned the circumstances with which he was concerned, I find it difficult to accept that the word “for” in s 5(1)(c) necessarily means that there must be a causal connection between the charge and the provision of credit.
3. The Oxford English Dictionary (2nd ed) defines the word “for” as including: “[o]f payment, purchase, sale, etc. = *in exchange for*” (original emphasis); “[i]ntroducing the thing bought or sold, etc.: as the price of, or the penalty on account of”. The Macquarie Dictionary (6th ed) defines the word in that context as: “in order to obtain”; “in consideration of, or in return for”.
4. Section 5(1)(c) clearly involves the notion of exchange, the charge being made in exchange for the provision of credit. In such a transaction, it is a little difficult to see how the charge can be the cause of the provision or vice versa. Rather, under the s 204 Contract, the advance was made in exchange for the promise to pay contained in the Sales Agreement.
5. The first step in determining the application of s 5(1)(c) must be identification of a charge. The respondents submit that the difference between the amount to be paid to FAF Beenleigh by Mr Eadie and the amount received by him from DCH was not a charge made for providing the credit, because there was no causal link between that amount and such provision. They also submit that the DCH payment cannot be part of the “credit”. The flaw in this submission is that it fails to take account of the fact that ASIC relies upon the s 204 Contract, and not the Sales Agreement or the combination of the Sales and Purchase Agreements.
6. The New Shorter Oxford Dictionary defines the word “charge” to mean: “[p]ecuniary burden, cost”; “expense”; “[a] price required or demanded for services rendered or goods supplied”. The Macquarie Dictionary (6th ed) defines the word as: “expense or cost”; “a sum or price charged”; “a pecuniary burden, encumbrance, tax, or lien; cost; expense; liability to pay.”
7. At one level, it might be said that the promise to pay $4,000 was the charge made for providing the amount of $2,000 sought by Mr Eadie. However it would be somewhat unrealistic were I not to recognize that the sum of $4,000 included the sum sought, and that the balance must have been for something else. At another level, it might be said that the additional amount of $2,000 was the charge for the advance of $2,000. This approach effectively assumes that the sum of $4,000 is to be treated as two debts, one being the amount sought, and the other, the charge, both being deferred. On that analysis, there would be a charge for the deferral of repayment of the amount sought, but not for the deferral of the payment of the charge. A third possibility is a variation on the second. It may be that the charge of $2,000 includes a charge for deferring repayment of both the amount sought and payment of that charge.
8. The provision of credit is not the advance of money, but the deferment of an existing debt or the creation of a new deferred debt. As I have said, the better view, in this case, is that a new, deferred debt was created pursuant to the s 204 Contract. I see no conceptual or evidentiary difficulty in concluding that the so-called price of $4,000 included two components, one being the amount sought by Mr Eadie, and the other, the amount of charge for providing deferment of repayment of that amount. Mr Eadie sought and received $2,000. I infer that the balance was a charge for the provision of credit. There can be little doubt that both FAF Beenleigh and Mr Eadie saw it in that way. Some part of the charge may relate to deferment of payment of the charge, as I have suggested. However it is more likely that the charge was the price at which FAF Beenleigh was willing to make the relevant advance to Mr Eadie, and that the additional amount of $2,000 included the total cost to FAF Beenleigh of making the advance, plus a profit margin. As I understand it, ASIC advances this view of the transaction. I accept that view.
9. It may be that s 3(2) of the Code has, to some extent, encouraged the respondents in making their submissions. A cursory reading of that subsection might suggest that there is some reason for distinguishing between the “amount of credit” (a term not used in s 3(1)), and the amount of any interest charge, fee or other charge (terms also not used in s 3(1)). As far as I can see, the term “amount of credit” is relevant only for the purposes of sections 17 and 34 of the Code, with which this case is not concerned. Further, s 3(2) has no application in this case, because there was no provision in the s 204 Contract for an interest charge, although the sum of $2,000 no doubt included an amount in lieu of interest. Further, there was no provision for a fee or charge to be debited after credit was first provided. Hence, s 3(2) cannot be engaged.
10. I find that the deferred debt of $4,000, created by the Sales Agreement as part of the s 204 Contract, contained both the amount of $2,000 sought by Mr Eadie, which amount FAF Beenleigh agreed to provide, and an amount by way of charge for the provision of credit to Mr Eadie. Hence there was a provision of credit to which the Code applied.

# OUTCOME

1. It follows that in entering into the s 204 Contract, FAF Beenleigh engaged in a credit activity in contravention of s 29 of the Credit Protection Act.

# pretence or sham

1. To this point, I have not found it necessary to rely on the concept of pretence or sham. In my view the definition of the word “contract” in s 204 of the Code makes such reliance unnecessary. Were the relevant contract the Sales Agreement, or a combination of the Sales Agreement and the Purchase Agreement, the general law of contract may have compelled reliance on that concept in order to avoid the need to give effect to the express contractual terms. However inclusion of the preliminary arrangements in the s 204 Contract avoids that problem. The true nature of the arrangements and contracts between the parties is exposed, at least for the purposes of the Credit Protection Act and the Code. That exposure demonstrates that the parties’ true purpose and intention was to satisfy Mr Eadie’s need for cash, and FAF Beenleigh’s desire to profit from meeting such need. The provisions for the sale and resale of diamonds added nothing to the transaction.
2. The exercise required pursuant to ss 3, 4 and 5 of the Code involves:

* identifying the deferred payment of a debt, or the incurrence of a deferred debt under the s 204 Contract; and
* determining whether, for the purposes of s 4, the requirements of s 5 have been established.

1. Given my findings, the only way in which FAF Beenleigh could have escaped the prohibition in s 29 of Credit Protection Act would have been by demonstrating to me that ASIC had not established that the credit was provided for personal, domestic or household purposes. For good reason the respondents have not sought to do so. The evidence simply does not support such an approach. However, lest I am in error, I shall say something about the concept of pretence or sham.
2. In *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516 at 531 Gleeson CJ, Gummow and Crennan JJ said at [33] - [36]:

[33] … In various situations, the court may take an agreement or other instrument, such as a settlement on trust, as not fully disclosing the legal rights and entitlements for which it provides on its face. If that be so, the parol evidence rule in Australia … does not apply.

[34] One such case is where other evidence of the intentions of the relevant actors shows that the document was brought into existence “as a mere piece of machinery” for serving some purpose other than that of constituting the whole of the arrangement. That, in essence, is the respondent’s case with respect to the alleged existence of the “present entitlement” of the trustee … .

[35] The term “sham” may be employed here, but as Lockhart J emphasised in *Sharrment* … the term is ambiguous and uncertainty surrounds its meaning and application. With reference to remarks of Diplock LJ in *Snook* … , Mustill LJ later identified as one of several situations where an agreement may be taken otherwise than on its face value, that where there was a “sham”; the term, when “(c)orrectly employed”, denotes an objective of deliberate deception of third parties.

[36] The presence of an objective of deliberate deception indicates fraud. This suggests the need for caution in adoption of the description “sham”. …

(Footnotes omitted.)

1. In *Raftland*, the majority cited numerous earlier authorities. I should refer briefly to some of them. In *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at [46] the High Court (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ) said:

Each of these transactions was legally effective. None of the transactions that took place on … could be said to be a sham. The primary judge was wrong to characterise them, as he did by his reference to “artifice”, “façade” and “charade”, as shams. “Sham” is an expression which has a well-understood legal meaning. It refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences.

(Footnotes omitted.)

1. In *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802 Diplock LJ (as his Lordship then was) said:

As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a “sham”, it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the “sham” which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co v Maclure* and *Stoneleigh Finance Ltd v Phillips*), that for acts or documents to be a “sham”, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a “shammer” affect the rights of a party whom he deceived. There is an express finding in this case that the defendants were not parties to the alleged “sham”. So this contention fails.

(Footnotes omitted.)

1. I note that his Lordship considered that it was necessary that there be a common intention that the acts or documents not create the legal rights and obligations which they gave the appearance of creating. His Lordship did not say that there must be a common intention to mislead a third party. However, in *Hadjiloucas v Crean* [1988] 1 WLR 1006 at 1019 Mustill LJ (as his Lordship then was) said:

By way of preface it is necessary to distinguish between three situations in which, aside from any question of rectification, the court may take an agreement otherwise than at its face value. The first exists where the surrounding circumstances show that the arrangement between the parties was never intended to create any legally enforceable obligation. The second is the case of the “sham” in the sense in which that word has been used in numerous cases including *Snook* … . Correctly employed, this term denotes an agreement or series of agreements which are deliberately framed with the object of deceiving third parties as to the true nature and effect of the legal relations between the parties. The third situation is one in which the document does precisely reflect the true agreement between the parties, but where the language of the document (and in particular its title or description) superficially indicates that it falls into one legal category, whereas when properly analysed in the light of surrounding circumstances it can be seen to fall into another.

1. In *Hawke v Edwards* (1947) 48 SR (NSW) 21 at 23, Jordan CJ addressed the circumstances in which the parol evidence rule may not apply. His Honour said that:

Oral evidence may also be given that the document is a sham – that it was never intended by the parties to be operative according to its tenor at all, but was meant to cloak another and different transaction: … . For example, extrinsic oral evidence may be received from a party to show that the real transaction is illegal: in this class of case it is admitted, not for the benefit of either party and not to vary or add to the terms of the record of the transaction, but to vindicate the law and to enable the Court to carry out the will of Parliament that no judicial aid should be given to a prohibited transaction: … .

His Honour seems not to have required that there be a shared intention to deceive.

1. In *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449 at 453, Lockhart J said:

“Sham” is a word which, although not infrequently having attracted the attention of the courts usually hovers on the periphery of cases. Here it is at the heart of the case. It is a word which first appeared as slang in the seventeenth century and the dictionaries describe it as being of obscure origin. It is indeed a pity that it cannot be relegated to its earlier obscurity because of the ambiguity and uncertainty that surrounds its meaning and application. Ambiguous though its meaning is, it is an ambiguity that has attended the word for centuries: “Let the plot-mungers stay behind, whose art can truth to sham, and sham to truth convert”: … ; “The laws of sham and semblance which are called the ‘devil’s laws’”: … .

The meaning of the word “sham” has been considered in many cases. In *Scott v Commissioner of Taxation (Cth) (No 2)* (1966) 40 ALJR 265 Windeyer J said (at 279):

“On the other hand, if the scheme, including the deed, was intended to be a mere facade behind which activities might be carried on which were not to be really directed to the stated purposes but to other ends, the words of the deed should be disregarded … A disguise as a real thing: it may be an elaborate and carefully prepared thing; but it is nevertheless a disguise. The difficult and debatable philosophic questions of the meaning and relationship of reality, substance and form are for the purposes of our law generally resolved by asking did the parties who entered into the ostensible transaction mean it to be, and in fact use it as, merely a disguise, a facade, a sham, a false front – all these words have been metaphorically used – concealing their real transaction … ”

Lockhart J then referred to the passage from *Snook* which I have set out above.

1. Finally, in *Raftland* the High Court approved the statement of Lord Templeman in *AG Securities v Vaughan* [1990] 1 AC 417 at 462 – 463. That case involved attempts to grant the right to occupy residential premises by way of licence, so that tenancies were not created, thus avoiding legislative restrictions. His Lordship said, referring to his own earlier decision in *Street v Mountford* [1985] AC 809 at 825:

In *Street v. Mountford* … I said:

“Although the Rent Acts must not be allowed to alter or influence the construction of an agreement, the court should, in my opinion, be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and to evade the Rent Acts.”

It would have been more accurate and less liable to give rise to misunderstandings if I had substituted the word “pretence” for the references to “sham devices” and “artificial transactions.” *Street v. Mountford* was not a case which involved a pretence concerning exclusive possession. The agreement did not mention exclusive possession and the owner conceded that the occupier enjoyed exclusive possession.

…

*Street v. Mountford* reasserted three principles. First, parties to an agreement cannot contract out of the Rent Acts. Secondly, in the absence of special circumstances, not here relevant, the enjoyment of exclusive occupation for a term in consideration of periodic payments creates a tenancy. Thirdly, where the language of licence contradicts the reality of lease, the facts must prevail. The facts must prevail over the language in order that the parties may not contract out of the Rent Acts. In the present case clause 16 was a pretence.

1. As counsel for ASIC submits, the High Court cited *Vaughan* as authority for the proposition that part of an instrument may be a “pretence”. ASIC submits that Vaughan is also authority for the proposition that complicity by all parties is not required in order that a transaction be a pretence or sham. Lord Templeman observed at 458:

Since parties to an agreement cannot contract out of the Rent Act, a document which expresses the intention, genuine or bogus, of both parties or of one party to create a licence will nevertheless create a tenancy if the rights and obligations enjoyed and imposed satisfy the legal requirements of a tenancy.

1. That passage, and others in his Lordship’s speech certainly suggest that ASIC’s submission is correct. The Court of Appeal said as much in *Burdis v Livsey* [2003] QB 36 at [32]. I propose to proceed on that basis.
2. I conclude that the arrangements for the sale of diamonds to Mr Eadie, and by him to DCH, comprised a pretence or sham, brought into existence as a mere piece of machinery, to conceal the true nature of the transaction, which was the provision of credit. Neither side intended that the Sales Agreement should create the relationship of vendor and purchaser as between FAF Beenleigh and Mr Eadie. Neither Mr Eadie nor DCH intended that the Purchase Agreement should create that relationship between them. I find that FAF Beenleigh intended to conceal the true nature of the transaction from those responsible for enforcing the interest cap. I doubt whether Mr Eadie had any such intention, but his involvement was no greater and no less than that of the successful tenants in the second appeal in *Vaughan*.

# Conclusions

1. The effect of these findings is that Mr Eadie promised to pay $4,000 in exchange for a payment to him of $2,000. The provisions in the Sales and Purchase Agreements, concerning the sale and purchase of diamonds, were a pretence. The Credit Protection Act and the Code apply to the real transactions between FAF Beenleigh and Mr Eadie, and between him and DCH, with the consequence that in entering into the s 204 Contract, FAF Beenleigh engaged in a credit activity as alleged in the amended statement of claim and contrary to the statutory regime there alleged.

# other customers’ transactions

1. It follows that in entering into each of two similar transactions with Ms Jones, FAF Beenleigh similarly engaged in a credit activity as alleged in the amended statement of claim and contrary to the statutory regime. It also follows that in entering into each of the transactions with the other customers, FAF Burleigh Heads engaged in a credit activity as alleged in the amended statement of claim and contrary to the statutory regime.

# Fast Access Finance – INVOLVEMENT IN THE CONTRAVENTIONS

1. At paras 221 to 225 of the amended statement of claim, ASIC pleads that Fast Access Finance was involved in the various contraventions by FAF Beenleigh and FAF Burleigh Heads, and thereby also contravened the relevant provisions. Section 169 of the Credit Protection Act provides as follows:

A person who is involved in a contravention of a civil penalty provision is taken to have contravened that provision.

1. It is not suggested that the contraventions were other than that of civil penalty provisions. Pursuant to s 2C(1) of the *Acts Interpretation Act 1901* (Cth), the word “person” includes a body corporate. The term “involved in” is defined in s 5 of the Credit Protection Act as follows:

A person is ***involved in*** a contravention of a provision of legislation if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

Similar formulae are commonly used in Commonwealth legislation in order to extend liability for a statutory breach to include persons other than the person who actually commits the relevant acts. Since the decision of the High Court in *Yorke v Lucas* (1985) 158 CLR 661 it has been settled that actual knowledge is necessary in order to engage such a provision. The matter is addressed by the majority (Mason ACJ, Wilson, Deane and Dawson JJ) at 666 – 670. At 667 their Honours concluded that as the wording of para (a) had been borrowed from the criminal law, it should be construed in the same way as it had been construed in that area. At 667 their Honours observed:

Both in the case of felonies where the principal offender and the secondary participant commit separate offences, and in a case of misdemeanours where no distinction is drawn between the two, a person will be guilty of the offences of aiding or abetting or counselling and procuring the commission of an offence only if he intentionally participates in it. To form the requisite intent he must have knowledge of the essential matters which go to make up the offence whether or not he knows that those matters amount to a crime.

In this case ASIC does not rely upon para (a) but upon para (c). Concerning para (c), the majority said in *Yorke* at 669 – 670 that, “a person cannot be knowingly concerned in a contravention unless he has knowledge of the essential facts constituting the contravention”. Their Honours pointed out that the word “knowingly” qualifies only the words “concerned in”, the term “party to”, itself necessarily indicating that a person could only be a party to an offence if that person’s participation occurs in the context of knowledge of the essential facts constituting the contravention in question. At 670 their Honours concluded that paras (b) and (d) also “both clearly require intent based upon knowledge”.

1. ASIC alleges that Fast Access Finance was knowingly concerned in each of the contraventions. In *Yorke* the Court was primarily concerned with the required degree of knowledge, but knowledge alone is not sufficient to engage s 169. The person must be, by act or omission, knowingly concerned in the contravention. The words “by act or omission” were not present in the legislation which was considered in *Yorke*. In its submissions, ASIC focuses upon knowledge. See para 161. However it identifies acts or omissions from which such knowledge may be inferred. Presumably, ASIC relies upon those acts and omissions as, with the relevant knowledge, satisfying the requirements of para (c) of the definition.
2. Section 169 requires involvement in a contravention, not merely in a business model pursuant to which the contravention occurs. Although Fast Access Finance was clearly involved in setting up the FAF entities and in the development and implementation of the diamond model, ASIC must show that it was involved in the individual transactions which constituted the FAF entities’ contraventions. I accept that Fast Access Finance developed the diamond model, prepared the standard form documentation and had the LMS computer programme designed and adapted. I accept that access to these resources was provided to FAF Beenleigh and FAF Burleigh Heads on a contractual basis. Fast Access Finance was a shareholder in FAF Beenleigh and FAF Burleigh Heads. Mr Maloney seemed to consider that FAF Beenleigh and Fast Access Finance were jointly carrying on business. Mr Bray was a director of all three companies. It seems that Fast Access Finance decided to convert to the diamond model and instructed FAF Beenleigh and FAF Burleigh Heads accordingly. Mr Robert Legat said that Fast Access Finance was aware that both companies were, prior to such conversion, involved primarily in consumer lending, a term which seems to be largely synonymous with the lending of small amounts for short periods of time, usually to people in difficult financial circumstances.
3. ASIC submits that I should, in considering whether Fast Access Finance was knowingly concerned in the contraventions, take account of the assertion that FAF Beenleigh and FAF Burleigh Heads were “licensees” of Fast Access Finance. The relationship between each FAF entity and Fast Access Finance is not clear. I do not derive any assistance from the mere attachment of that tag to such relationships. The tag says nothing about the terms of any licence. The only licences appear to have been for the use of the computer programme, documentation and similar matters. The existence of such licences, without more, would not necessarily lead to the conclusion that Fast access Finance was involved in each transaction. However, because the FAF entities utilized the Fast Access Finance computer programme, it had access to their records. As much appears from the evidence of Mr Yu and that of Ms Lange. ASIC submits that Fast Access Finance knew that customers went to the FAF entities to obtain finance, and not to buy diamonds. I accept that Fast Access Finance knew that most, probably all customers were looking for finance. In para 161(e) of the submissions, ASIC submits that Fast Access Finance was involved in the day-to-day operations of each FAF entity, including its dealings with each of the relevant customers. It seems to me that any day-to-day involvement was limited to the performance of credit checks, maintenance of the computer records, generating payments by DCH to customers and reimbursement to DCH.
4. As to the credit checks, the respondents assert in their defence that FAF Burleigh Heads did some of its own credit checking. Whether that be so or not, all of the relevant customers, other than Ms Thompson signed Privacy Act consent forms, authorizing Fast Access Finance to carry out credit checks. I infer that in the case of each of these customers, it did so. The customers had not authorized any other person to carry out those checks. As to Ms Thompson, Ms O’Sullivan’s practice was to send the Privacy Act consent forms to “head office”, a reference to Fast Access Finance. There was no suggestion that she had done otherwise in connexion with Ms Thompson. I infer that Ms Thompson’s credit check was also carried out by Fast Access Finance. The business model was such that Fast Access Finance would have known that a credit check was being sought because the relevant customer had applied for finance and that, if the credit check produced a positive outcome, funds would be advanced, using the diamond model.
5. Finally, ASIC submits that I should take into account the fact that Fast Access Finance did not request either of the FAF entities to register as a person engaged in credit activities, or to apply for, or hold an ACL. Fast Access Finance bore no obligation to do so. Perhaps it should have, itself, registered or applied for a licence, but the case is not being conducted on that basis.
6. In summary, I am satisfied that Fast Access Finance well understood the transactions using the diamond model which were being undertaken by each FAF entity. It was also aware that neither FAF entity was registered, had applied for an ACL or held such a licence. Fast Access Finance was in the same position. Against that background, Fast Access Finance carried out credit checks for the relevant customers, allowed its forms to be used in connexion with the subsequent transactions, kept records of those transactions and thereby triggered the payment of money by DCH to each customer. I infer that in one way or another, it ensured that DCH was reimbursed for such payment. In those circumstances I infer that Fast Access Finance was, by its acts, knowingly concerned in each relevant transaction.

# RELIEF

1. I am willing to make declarations pursuant to s 166. The parties should bring in appropriate forms of order. I shall hear submissions as to pecuniary penalties, the prayer for re-opening of the transactions and the prayer for injunctive relief. I propose to make orders pursuant to s 180 of the Credit Protection Act. Section 180(1) provides:

(1) If:

(a) a person (the[***credit provider***]) engages in a credit activity in relation to another person (the [***customer***]); and

(b) the engaging in the activity contravenes any of the following:

(i) section 29 (which requires the holding of a licence);

(ii) section 124A (which prohibits the provision of credit assistance in relation to short-term credit contracts);

(iii) section 133CA (which prohibits credit providers from entering into short-term credit contracts etc.);

the court may make such order as the court considers appropriate against the [credit provider]:

(c) to prevent the [credit provider] from profiting from the [customer] by engaging in that activity; or

(d) to compensate the [customer], in whole or in part, for any loss or damage suffered as a result of the [credit provider] engaging in that activity; or

(e) to prevent or reduce the loss or damage suffered, or likely to be suffered, by the [customer] as a result of the [credit provider] engaging in that activity.

1. ASIC submits that I should order that the relevant FAF entity refund to each customer, the difference between the amount paid to the customer by DCH and the amount paid to the FAF entity by the customer. Where a customer has fully repaid the debt, such an order would mean that in effect, he or she received an interest-free loan. In the case of a customer who had not fully repaid the debt, a customer who had paid more than the amount of the DCH payment would recover the excess. A customer who had not paid more than the amount of the DCH payment would receive nothing. However, in the latter two cases, the outstanding balance of the debt would still be recoverable by the FAF entity. There is presently no cross-claim by either of them, but it does not follow that they will not, in the future, seek to recover those outstanding amounts. To allow a customer an interest free loan goes beyond the three objectives identified in s 180(1). It should be kept in mind that punishment is to be inflicted by the imposition of pecuniary penalties. Although s 180(1)(c) might suggest a punitive intention, (deprivation of any profit), it requires only that the Court prevent the credit provider from profiting from the customer. Like subss 180(1)(d) and (e), subs 180(1)(c) is concerned with compensation.
2. Each customer has had the benefit of the advance or advances. He or she should pay the price for it, to the extent that the law allows. In this case, any orders pursuant to s 180 should ensure that no customer has paid, or will pay more to the relevant FAF entity than the sum of the amount paid to that customer by DCH plus interest at the maximum rate permitted by law. The evidence suggests that these transactions would have been unprofitable if an interest rate of 48% per annum were charged. That proposition might be a reasonable guide to the appropriate interest rate. However it may be that not all of the customers could have borrowed at that rate. There is no evidence indicating the rates at which other borrowers were lending, nor as to their lending policies. Nonetheless, I am willing to infer that it is more probable than not that each customer could have borrowed elsewhere at the maximum lawful interest rate.

Where the amount payable by a customer pursuant to the relevant transaction has been paid in full, there will be an order for compensation in the amount derived by:

* calculating the total amount paid by the customer to the relevant FAF entity;
* deducting from that amount the total of the amount paid to the customer by DCH and the maximum amount of interest which could lawfully have been made payable under the relevant s 204 Contract, taking into account instalments paid; and
* adding to the resulting amount, interest at 5% per annum from the date of the final payment by the customer to the date of judgment.

1. Where the amount payable by a customer pursuant to the relevant transaction has not been paid in full, there will be an order for compensation in the amount derived by :

* calculating the total amount paid by the customer to the relevant FAF entity;
* adding to the amount paid to the customer by DCH, the maximum amount of interest which could lawfully have been made payable under the relevant s 204 Contract, taking into account instalments paid, such interest to be calculated up until the date of judgment;
* if the resulting amount is less than the total amount paid by the customer, deducting the lesser amount from the greater amount; and
* adding to the difference, interest at 5% per annum from the date of the last payment made by the customer to the date of judgment.

1. Where the amount paid by a customer is less that the total of the relevant DCH payment and the amount of interest calculated as above, there will be no compensation order. However, where a customer has not paid the full amount payable pursuant to the Sales Agreement, there should be an order which protects the customer from exposure to overall liability to the relevant FAF entity in an amount which exceeds the amount of the DCH payment plus lawful interest. That issue could be dealt with in one of three ways. I might order that the FAF entity pay to the customer the outstanding amount, such amount to be paid only in the event of any future claim by the FAF entity. The amounts could then be set off, one against the other. Alternatively, I might re-open reach relevant transaction pursuant to s 76 of the Code, in order to make appropriate orders under s 77(b). Another solution might be that the FAF entity voluntarily discharges the outstanding debts or, if I have power, I could so order.
2. There will also be orders for payment of the compensation awards within a stipulated period of time. Each amount will be payable jointly by Fast Access Finance and the relevant FAF entity. I shall allow the parties to make submissions concerning these proposed orders. I am happy to reconsider all aspects, including any assumptions which may underlie them.

# INJUNCTIVE RELIEF

1. If ASIC wishes to pursue its prayer for injunctive relief, I shall receive submissions, particularly as to the purpose to be achieved and the proposed system for ensuring compliance.

# COSTS

1. I shall receive submissions as to costs.

# orders

1. I order that the parties exchange submissions as to the proposed forms of order and file such submissions within 21 days.
2. I grant liberty to apply.

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| I certify that the preceding two hundred and ninety-seven (297) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett. |

Associate:

Dated: 30 September 2015

