Story Overview
My case with the Commonwealth Bank relates to 3 core elements of misconduct:

- The defaulting of a Fixed Rate Bills Facility rollover;
- Fraudulent misrepresentation; and
- Mortgagees Power of Sale

Backgrounder and details of the misconduct are described in the File Attachment below.

Story Details**Story Of:** Barry Davis
Bank Involved: CBA
Bank Malpractice Type: Unconscionable Conduct
Other Bad Banking Behaviour
Year Trouble Began: 1995



Bad Banking Experience - Full Story:

For the last 18 years I have been trying to get the bank to acknowledge the documentary evidence which proves the misconduct allegations, however, the bank has dismissed the allegations with reasons which do not match the documentary evidence and contradict the findings of a retired Deputy State Crown Solicitor. From the evidence submitted to the retired Deputy State Crown Solicitor, his conclusion is that the bank was guilty of fraud and gross misconduct.

My case with the Commonwealth Bank goes back many years to the time when the Bank was in transition from Government ownership to full private ownership. Paul Keating was the architect of the transformation. At the time of my problem with Bank the Government of the day (Labor) still had the controlling interest. There may have been a link between the Bank's misconduct at the time and the transition to private ownership, however, I have no evidence to support this. The Chairman, Catherine Livingstone, CEO Matt Comyn and previous CEO, Ian Narev are all aware of my case.
My case relates to 3 core elements of misconduct by the Bank:

- The defaulting of a Bank Bills rollover;
- Fraudulent misrepresentation;
- Mortgagees Power of Sale

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I have all the documentary evidence in support of my allegations and have provided the Bank with this evidence.

The Bank's actions included:

Taking possession of my hotel property through nefarious circumstances;
Appointment of a Receiver/Manager to my 2 companies which each owned 50% of the freehold commercial premises;

Sale of the hotel property

Sale of my home in Hobart;

Supreme Court proceeding for debt against me as Guarantor (CBA was my only creditor)

CBA enforced bankruptcy

BRIEF HISTORY

In March 1988 I bought a hotel in Hobart's CBD for $1.5 million. CBA provided funding of $1.5 million + $50,000 working capital. Funding was via a Fixed Rate Bank Bills Facility for $1.5 million. The Bank's security was the hotel freehold, hotel business and my home in Hobart. I managed and operated the hotel successfully for 7 years and over this time I achieved the following:

Sold a small piece of hotel land to the next door business for $80,000 and used the funds to build a licensed coffee shop on the ground floor of the 4-storey building adjacent to the hotel and part of the hotel property;

Increased turnover from $1.3 million at the time of purchase to $1.9 million within 2 years;

Spent $40,000 refurbishing the restaurant and converting it to a restaurant/cocktail bar;

Sold my home in Taroona and purchased a home in Sandy Bay resulting in $100,000 for the Bank in reduction of debt;

Re-financed the $1.5 million facility in 1992 at a lower fixed interest rate. New facility was Bank Bills $1.2 million and reducing Term Loan of $300,000. I paid a $26,000 penalty to re-finance early. The $326,000 term Loan was repaid in full in 2½ years.

Also over this time, I had paid $1,069,000 in Bank Bills interest, and $135,000 in CBA Line Fees associated with the facility and was never late or in default with any financial obligation to the Bank.

In late 1994 my wife was diagnosed with breast cancer. This was the trigger to lease out the hotel and focus on my wife's health and treatment. My wife subsequently 'passed away' in 2000.

Two of my staff approached me regarding leasing the hotel and as both had worked for me for the 7 years I was owner/operator, I considered that they were the most experienced to run the hotel. One had been my General Manager for a number of years. A lease was created, approved by the CBA and settled 19 April 1995. Rental was $182,000 a year ($3,500 a week). This was more than enough to cover my financial commitment to the Bank which was $120,000 a year. The Commonwealth Development Bank provided $200,000 to the lessees towards the $300,000 ingoing. All my trade creditors were paid by 30 June 1995 so my only financial obligation was to the Commonwealth Bank.

ALLEGATIONS OF MISCONDUCT

1. Fixed Rate Bills Facility Default

On 24 July 1995 the Bank informed me that it had defaulted the rollover due 21 July 1995 citing 'insufficient funds'. In a letter dated 27 July 1995 the Bank acknowledged that on the same day it informed me that it had defaulted the rollover, it acknowledged that there were sufficient funds to have paid the full rollover costs. Bank statements sourced from the Bank's solicitors some years after the events of 1995 confirm that there were sufficient funds to have paid the rollover, however the Bank defaulted it with subsequent serious financial consequences for me and my wife. The Bank's decision to default the rollover and demand immediate repayment of the $1.2 million facility was precipitous and malicious. This was the trigger for all future events.

2. Fraudulent Misrepresentation

The information regarding fraudulent misrepresentation was discovered some years after the events of 1995.

On Monday 28 August 1995 I was contacted by phone by an officer of the Bank informing me that the tenants had 'abandoned' the hotel, implying that the premises were vacant, and requesting my authority to change the locks to secure the premises. I trusted the Bank and accepted that what I'd been told was true and complied with the Bank officer's request faxing a hand-written letter the same day authorising the Bank to change the locks. The Bank confirmed it received my fax at 5.00pm on Monday 28 August 1995.

It was my belief and understanding that I was only authorising the Bank to change the locks for the purposes of securing the hotel that had been abandoned and was vacant. As I was residing in Melbourne and not in a position to respond to the situation myself and as securing the premises immediately seemed prudent, the Bank's request to change the locks seemed to be the sensible thing to do. I accepted, on the basis of the phone call, that the Bank would arrange to change the locks with my authority. A charge of $135.00 to my bank account for the lock change on 31 August 1995 confirms this.

It was my intention only to authorise the Bank to change the locks as I was not in a position to do so. It was most definitely not my intention nor my understanding that when providing the authority to change the locks, as had been requested, I was voluntarily handing over possession of the hotel to the Bank. The Bank officer made no mention of the fact that by giving the Bank my authority to change the locks I was authorising the Bank to take possession of the hotel.

However, it was clear from a letter I received from the Bank's solicitors the next day, 29 August 1995 that the Bank had treated the authority I had given to change the locks as an authority for the Bank to take possession of the hotel.

Some years after this event I discovered facts from the tenants which contradict the information received from the Bank regarding the tenants 'abandoning' the property.

The tenants did not 'abandon' the property. The Bank took possession of the hotel on Sunday evening 27 August 1995. The Bank's representatives entered the hotel on the evening of Sunday 27 August 1995 without notice to me or the tenants, and without my authority, and changed the locks on that date locking out my tenants who were operating the hotel business. The Bank's action prevented the tenants from continuing to operate the business resulting in an immediate shut down of the tenants' hotel business and a termination of the rental payments to me. A sworn Stat. Dec. from one of the tenants describes the events of Sunday evening 27 August 1995. After speaking recently with the other co-tenant, he confirms the facts in the Stat. Dec. and still has a clear recollection of the events at that time.

The phone call I received from the Bank's officer on Monday 28 August 1995 appears to have been a stratagem to legitimise its actions on Sunday 27 August 1995.

The fraudulent and deceitful manner in which the Bank took possession of the hotel tainted the Bank's subsequent conduct as a Mortgagee in Possession and the manner it exercised its power of sale.

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The Bank's conduct in the manner in which it took possession of the hotel constituted an improper interference with the proprietorial rights of the Mortgagor and the tenants.

By deceiving me into unwittingly handing over possession of the hotel the Bank avoided the court processes set out in Section 146 for obtaining a Supreme Court order for possession and the notices and notice periods prescribed in that section which includes written notice to be given to the tenants of the Mortgagor.

Had the true facts surrounding the Bank's actions in taking possession of the hotel been known to me prior to the Bank exercising its power of sale, injunctive relief would have been available to me.

Had I been aware of the true facts at the time of the Bank's Supreme Court proceeding against me, the issue of the Bank's misconduct in the manner of its taking possession of the hotel would have provided a ground to be pleaded in a Defence and Counterclaim.

The Bank refused all my requests for me, the Mortgagor, to be allowed back into the hotel for the purposes of re-opening the hotel business. The Bank's wrongful action in the manner it had taken possession had locked out the Mortgagor as well as the tenants.

The Bank sold the hotel with vacant possession.

The Bank's fraud and deceit on me in the manner in which it took possession of the hotel was not revealed until some years after the event and some 2 years after the Bank's Supreme Court Judgment for debt against me as Guarantor.

It was clear on the evidence of the sworn Statutory Declaration from one of my tenants and other supporting evidence I have, that at the time the Bank entered and took possession of the hotel, it had not been abandoned by the tenants and was not vacant.

The nefarious circumstances in which the Bank took possession of the hotel were not known at the time the Bank commenced its Supreme Court of Tasmania proceeding against me and consequently were not raised in the proceeding and decided on by the Judgment.

There are 6 elements to proving 'fraudulent misrepresentation:

1. A representation was made
2. The representation was false
3. The representation, when made, was either known to be false or made recklessly without knowledge of its truth
4. The representation was made with the intention that the other party rely on it
5. The other party did, in fact, rely on the representation, and
6. The other party suffered damages as a result of relying on the representation

All 6 elements are clearly satisfied by the supporting documentation.

All subsequent actions by the Bank must be considered 'tainted' following this act of 'fraudulent misrepresentation'. These subsequent actions by the Bank include:

Appointment of Receiver/Manager on 5 October 1995

Sale of hotel premises

Sale of home at 27 Lipscombe Avenue Sandy Bay

Supreme Court proceeding for debt against me as Guarantor and Judgment

CBA enforced bankruptcy

3. MORTGAGEES POWER OF SALE

The power of sale conferred on a mortgagee by the Land Titles Act 1980 is contained in Section 78(1) of the said act and provides that the mortgagee 'may, in good faith and having regard to the interests of the mortgagor, sell the mortgaged land'.

In the exercise of its powers under the Mortgage upon the default, the Bank had a duty to act in good faith towards the Mortgagor, that is, without fraud and without wilfully and recklessly sacrificing the interests of the Mortgagor.

The Bank exercised its power of sale in breach of the requirements of Section 78(1) of the Land Titles Act 1980 in that the Bank did not sell the mortgaged land being the hotel in good faith, and showed a gross failure to act in good faith or having regard to the interests of the mortgagor which was my company.

The Bank's wrongful conduct in its dealings with the hotel, in breach of its duty to act in good faith, resulted in an outstanding debt following the sale by the Bank of the hotel and my home.

The Bank's duty to act in good faith towards the Mortgagor, in its dealings with the hotel, was also a duty it owed to me as guarantor. My liability as Guarantor was entirely dependent upon the Bank having acted in good faith.

The documentation in support of my allegation that the Bank did not exercise its Power of Sale in 'good faith' clearly proves that by denying me the opportunity to return to Hobart to re-open the business or engage new tenants, who were ready to commence business immediately, the Bank wilfully and recklessly disregarded my interests as the Mortgagor and sacrificed the hotel.

Prior to the tenants being 'locked out' of the premises by the Bank, my real estate agent informed the Bank by fax that as an investment the hotel had a valuation of upwards of $1.8 million, and as an owner/operator they would be confident of achieving a sale price in excess of $1.5 million.

The hotel was sold by the Receiver/Manager on 21 November 1995 for $740,000 and the Bank informed me 5 weeks later. The Bank netted $645,278.92 after $94,721.08 Receiver/Manager fee and selling costs. Two years earlier the Bank requested me to insure the hotel for $2.28 million.

I have a fax dated 5 September from my real estate agent, Ray White Real Estate, informing me that there were 2 potential lessees of the hotel (names provided) who indicated a willingness to commence trading as soon as possible. He also informed me in the fax that closure of operation is not doing the value of the property any good and in fact, he would suggest, devaluing same and attracting 'vultures'.

The terms and conditions proposed were:

1. Ingoing $100,000 plus purchase of stock

2. Annual rental of $140,000 ($11,666.66 per month)

3. Rental fixed for 2 years then CPI review

4. Option to purchase freehold at $1.4 million plus CPI exercisable up to September 1997

The Bank did not respond to this information. It's clear that it's only agenda was to sell the freehold with vacant possession. This was borne out after I spoke with the real estate agent selling the hotel (different from my agent) who told me that his instructions from the Receiver/Manager was to sell the vacant hotel and account to the Receiver/Manager for the proceeds. The Bank had no interest in my re-opening the hotel or engaging new tenants. This is a clear breach of its obligations to act in 'good faith' when exercising its 'Power of Sale'. Evidence of the Bank's agenda is contained in a letter to me from I P Copp, Chief Manager, Credit Management dated 12 January 1998:

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'CBA was under no obligation (and had no interest) in committing further funds for the Receiver/Manager to try and engineer a recommencement of trading'.

A recommencement of trading either by me re-opening the business or engaging new tenants would have restored value to the freehold. Both of these options were denied by the Bank.

Following the sale of the hotel, there was a residual debt. The Bank then sought possession of my family home in Hobart. The Bank wrote to me on 12 January 1998:

'The sale of 27 Lipscombe Avenue, Sandy bay required legal action by the Bank to gain possession of the property. Further legal action was necessary after the auction to satisfy any prospective purchaser that a clear title was available (which led to further litigation by Mrs. Davis)'.

I arranged the legal action to try to keep the roof over my wife's head while she was receiving treatment for breast cancer.

After enduring months of harassment by the Bank, she was evicted from our home and within 2 years she was dead.

All of the documentary evidence relating to my allegations has been reviewed by a retired Deputy State Crown Solicitor and his opinion is that the allegations are well founded and the Bank is guilty of misconduct. Catherine Livingstone, Chairman re-opened the case in March 2018 and I have provided the Bank with all of the documentary evidence. The Bank has dismissed the allegations, however, the Bank's reasons conflict with the evidence and the findings of the retired Deputy State Crown Solicitor. The person designated to review the case has made statements that are inaccurate and her findings do not match the evidence.

Advice from the Bank's Customer Advocate is that the Advocacy is not in a position to complete a review of my complaint as the issues raised have already been previously decided by an External Dispute Resolution body (Supreme Court of Tasmania) and the Customer Advocate does not review issues that have been decided on by an EDR body.

I wrote to the Customer Advocate following this comment and pointed out his errors.

Considering that the critical issue of 'fraudulent misrepresentation' wasn't discovered until some 2 years after the Supreme Court Judgment, I find this comment strange. The other 2 allegations were not part of the Supreme Court proceeding so to say that the allegations have previously been decided on by an EDR is inaccurate. The Supreme Court documentation was provided to the Customer Advocate. I asked the Customer Advocate to show me in the Supreme Court papers where the allegations had been decided on, however, I never received an answer to this question and no further communication was received from the CA.

The Bank is refusing to answer questions or communicate any further, and has not returned photos which I requested to be returned, one of which is of my wife. My latest letters to Catherine Livingstone dated 12 June 2018 and 27 August 2018 remain unanswered.

I'd like to finish off with some comments from Ian Narev, ex CEO during his opening remarks to the House of Representatives Standing Committee on Economics, Review of the Four Major Banks 4 October 2016:'As we do this work I expect there will be cases of more poor customer outcomes. And there will be more announcements regarding compensation due to our customers, which will include some significant monetary amounts given the scale of our business and the length of time we will go back to make things right. Critics will paint these as signs of ongoing problems. Actually, they're signs of how serious we are about fairness'.

It's these comments which prompted me to write to Ian Narev 24 October 2016. The matter has been ongoing since this date, however, the Bank has now informed me that the matter is closed and there will be no further correspondence from the Bank. Any correspondence from me will not be answered.

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In my letter to Catherine Livingstone 12 June 2018 I said that this is history repeating itself. After learning the true facts from the tenants in 2000, I tried to get answers from the Bank relating to the call I received from the Bank that the tenants had 'abandoned' the premises. On 27 November 2000 I received a letter from Ken Moran, Relieving Case Manager (Lending):

'The bank will not be responding to you further in relation to the questions raised in your letters and **will enter into no further correspondence with you**'

The words 'will enter into no further correspondence with you' were typed in bold. This response was both arrogant and offensive. The Bank is now telling me the same thing, so nothing's changed in 18 years! I suggested that if she has time to join the dots, and the documentary evidence provided will do this, then she will see that the Bank at the time had only one agenda – that was to exit the relationship at any cost. That cost included financial as well as human.

How My Life Has Been Affected:

The bank's actions included:

- Taking possession of my hotel property (I was the landlord) through nefarious circumstances;
- Appointment of a Receiver/Manager to my 2 companies which each owned 50% of the freehold commercial premises;
- Sale of hotel property;
- Sale of my home in Hobart;
- Supreme Court proceeding for debt against me as Guarantor (CBA was my only creditor);
- CBA enforced bankruptcy

In late 1994 my wife was diagnosed with breast cancer which was the trigger to lease out the hotel and focus on my wife's health and treatment. After the bank sold the hotel there was a shortfall to meet the debt repayment. I had moved to Melbourne and my wife stayed in Hobart to continue with her treatment. Our home in Hobart was debt free but collateral security for the Fixed Rate Bill Facility. After enduring months of harassment by the bank, my wife was evicted from our home in Hobart and within 2 years she was dead. We had been married for 24 years. I have never recovered from this traumatic event and have never remarried.

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