SUPREME COURT OF QUEENSLAND

CITATION:	*Burrawong Investments P/L v Lindsay & Anor* [2002] QSC 082
PARTIES:	**BURRAWONG INVESTMENTS PTY LTD** ACN 000 211 503 **v** **ALBERT HUGH LINDSAY** (first defendant) **DELMA RUTH LINDSAY** (second defendant)
FILE NO:	10981 of 2000
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	26 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	13 and 14 February 2002
JUDGE:	Muir J
ORDER:	**Judgment in the action for the plaintiff.**
CATCHWORDS:	CONTRACT – DEED – SPECIFIC PERFORMANCE – claim for specific performance of deed of loan – where defendant guarantor of loan – whether defendants all can rely on undue influence and misrepresentation – whether rule on *Yerkey v Jones* applicable – whether debtor the agent of the creditor for the purposes of dealings with solicitors – whether solicitors advice independent – ability of creditor to rely on deficient advice by solicitor – whether the deed was "unjust" for the purposes of the Contracts Review Act (NSW) 1980 *Contracts Review Act* (1980) NSW *Real Property Act* (1900) NSW *Trade Practices Act* 1974 *Barclay Bank Plc v O'Brien* [1994] 1 AC 180, *Barclays Bank v Boulter* (1999) 1 WLR 1919, *Blomley v Ryan*(1956) 99 CLR 362, *Commercial Bank of Australia Ltd v Amadio* (1982-1983) 151 CLR 447, *Contractors Bonding Ltd v Snee* (1992) 2 NZLR 157, *Ellison v Vukicevic* (1986) 7 NSWLR 104, *Federal Commissioner of Taxation v Sir Hubert's Island Pty*

Ltd (in liq) (1977-1978) 138 CLR 210
Garcia v National Australia Bank Ltd (1998) 194 CLR 395,
H G & R Nominees Pty Ltd v Fava [1997] 2 VR 368,
Hyde v Sullivan (1956) SR (NSW) 113,
Johnson v Buttress, (1936) 56 CLR 113,
Lisciandra v Official Trustee in Bankruptcy (1996) 69 FCR 180,
Louth v Diprose (1992) 175 CLR 621,
National Australia Bank Ltd v Garcia (1995) 36 NSWLR 577,
Nguyen v Taylor (1992) 27 NSWLR 48,
Re Australian Industrial Relations Commission Ex parte Australian Transport Officers Federation (1990) 171 CLR 216
Rolls v Miller (1884) 27 Ch D 71
Tweddle v Commissioner of Taxation (1942) 180 CLR 1
Wallis v Downard-Pickford (North Queensland) Pty Ltd (1993-1994) 179 CLR 388
West v AGC (Advances) Ltd (1986) 5 NSWLR 610,
Yerkey v Jones (1939) 63 CLR 649,

COUNSEL: J D McKenna for the plaintiff
P W Hackett for the defendants

SOLICITORS: James Conomos Lawyers for the plaintiff
Nyst Lawyers for the defendants

[1] The plaintiff claims against the defendants' specific performance of a deed of loan dated 12 January 2000 (“the deed of loan” or the “the deed”) entered into between the plaintiff as lender, Oceanvalley Pty Ltd as borrower and the defendants and others as guarantors. A term of the deed required the defendants to execute and deliver to the plaintiff a first mortgage over a home unit at Coolangatta (“the Coolangatta property”) to secure moneys payable to the plaintiff under the deed. It also required that first mortgage security be given over real property at Iluka registered in the name of the defendants’ daughter, Ruthie-Anne Gallagher (“the Iluka land”), real property in Murwillumbah registered in Mr Albert Lindsay’s name (“the Murwillumbah land”) and over the Coolangatta property. Moneys were advanced under the deed, Oceanvalley defaulted and the plaintiff called on the guarantors to honour their obligations. In particular, the plaintiff demanded that the defendants execute and deliver the mortgage over the Coolangatta property. The defendants have not met such demands. They deny liability on the basis that they were induced to enter into the deed and other relevant documentation by misrepresentations and undue influence made and exerted by one Christopher Smith. Further it is alleged that it is unconscionable of the plaintiff to attempt to enforce the deed of loan against them. I will come to the detail of the defences later.

The defendants’ background

[2] Mr Lindsay was born in November 1927, Mrs Lindsay in February 1931. They married in 1954 and had six children. Mr Lindsay left school, aged 13, in 1940. After doing various jobs of a labouring nature, he started to work as a carpenter at

about 18 years of age. He then followed that trade until about 1954, when he became a self-employed builder. He retired in about 1991.

[3] Mrs Lindsay left school at 13 years of age and then worked in a shoe store for 10 years until she was married. She has not been employed in the general work force since that time and I infer that she received no further formal education after leaving school. Mrs Lindsay did not involve herself in any detailed way in her and her husband's financial affairs, being content to leave those matters to her husband.

[4] Mr and Mrs Lindsay purchased a number of properties over the years. In about 1975 a house property in Murwillumbah was purchased in Mr Lindsay's name, which was used as the family home until the late 1980s. In the late 1970s, in his daughter Ruthie-Anne's name, he successfully balloted for the Iluka land. Whilst still a builder he constructed a dwelling house on that land. In the early 1980s he purchased a farm near Murwillumbah, which he sold for a substantial profit in 1992. In the early 1980s he purchased land in Tweed Heads for about $30,000, built a house on it and sold it for about $230,000 in 1993. The proceeds of sale were used in the purchase of a new family home at 6 Biral Close, Bilambil. The net proceeds of sale of the farm were used to purchase the defendants' third share in a parcel of land at Drydock Road, Tweed Heads, owned by the Tweed Heads Rowing and Aquatic Club ("the Club land"). That will be discussed in more detail shortly.

[5] In about 1998 he purchased the Coolangatta property for $250,000. He paid a 10% deposit and relied on the expected proceeds of sale of the Club land to provide the balance sale price. When the sale of the Club land did not eventuate, it became necessary to mortgage the Biral Close property in order to secure a loan from his bank of $250,000. That loan was later increased by $50,000.

[6] Whilst Mr Lindsay was a builder, and thereafter, the defendants had accountants and solicitors and commonly made use of their services.

The acquisition and attempted re-sale of the Tweed Heads Rowing and Aquatic Club Land

[7] On 17 December 1996, the defendants, the defendants' former neighbours and a company controlled by a friend of the defendants' former neighbours ("the consortium"), entered into a contract to purchase the Club land for a purchase price of $2,000,000 payable by a deposit of $500,000 (in total) within 28 days of the date of the contract and the balance 20 weeks after the contract date. The consortium proposed to lease the property back to the Tweed Heads Rowing and Aquatic Club, which was then in financial difficulties, and resell it at a profit to the Club after about 12 months. A firm of solicitors acted for all the purchasers and the defendants did not obtain any separate representation. In order to finance the transaction the consortium borrowed $1,200,000 from the State Bank of New South Wales for a term of 12 months under an undated facility agreement.

[8] The proposed lease and resale of the Club land failed to eventuate and other attempts to sell the property were unsuccessful. The defendants found themselves in the position of being unable to pay their third share of the interest under the respective facilities. It was arranged that the other consortium members would pay the defendants' share and be reimbursed when the land was eventually sold.

[9] In late 1999, at a time when the defendants were becoming increasingly anxious about their financial position, Mr Lindsay was introduced to an accountant, Christopher Smith ("Mr Smith"), who expressed interest in acquiring the Club land through Oceanvalley, a company acquired for the purpose, which would construct a multi-unit complex on the land. He interested Mr Lindsay in investing in the project. The price of Mr Lindsay's participation was to be his share of the net proceeds of the Club land, together with a further, then unspecified, contribution. It was discussed that Mr Lindsay's equity in the project could be increased if he "put in some security".

[10] On 6 December 1999, Mr Lindsay and Odyssey Consulting Services Pty Ltd (a company controlled by Mr Smith) entered into an agreement under which Mr Lindsay agreed to keep confidential a broad range of information relating to the proposed project.

[11] Oceanvalley made a written offer on 7 December 1999 to purchase the Club land for $3,100,000. The consortium engaged solicitors to act on their behalf and made a counter offer to sell for a price of $3,300,000, which would be reduced to $3,200,000 if settlement took place prior to 24 December 1999.

[12] Also that day, a representative of Oceanvalley sent a fax to Miss Rebecca Lindsay, one of the defendants' children who was a conveyancing clerk at Attwood Marshall solicitors, requesting that she fax a copy of the certificate of title for the Coolangatta property to him. The request was in connection with the proposal that the defendants give security by way of contribution to the proposed development project. Miss Lindsay throughout this period was providing some measure of advice and assistance to her father in connection with the subject transactions.

On 9 December, Miss Lindsay sent a facsimile to Oceanvalley asking if the offer from Bolster & Co had been accepted. It had not and negotiations concerning the proposed purchase of the Club land continued but did not reach fruition.

The loan transaction

[13] In December 1999, the plaintiff carried on business as a developer of residential properties. As part of its business it engaged in the short term lending of surplus moneys. That was normally attended to through solicitors known to the plaintiff who made enquiries from time to time about the availability of funds. Mr Lindsay Allsop, a director and, I infer, the controller of the plaintiff, knew a mortgage broker who, in the past, had put proposals of loan to him on behalf of prospective borrowers. On 16 December 1999, the broker sent a written loan proposal in a short letter of that date identifying: Oceanvalley as a proposed borrower; the defendants and other persons as guarantors; the amount of the proposed loan as $450,000, and the Coolangatta, Iluka and Murwillumbah lands valued at $350,000, $225,000 and $235,000 respectively as security for the loan which was to have a term of 12 months. Mr Allsop faxed a copy of the application to his solicitors, Clinch Neville Long, with a handwritten request on the facsimile that he be telephoned about the matter. An employed solicitor was given the carriage of the transaction under the supervision of Mr Neville, a partner.

[14] On 20 December 1999, a day on which the employed solicitor was absent from the office, a person representing Oceanvalley called at the solicitors' offices in York Street, Sydney. He spoke to Mr Neville, informed him of the urgency of the

transaction and asked for the loan documentation. Mr Neville ascertained from a secretary that draft security documents had been prepared. He reviewed them and gave the prospective borrowers' representative a letter dated 20 December 1999 (addressed to the wrong firm of Solicitors) enclosing drafts of, amongst other documents, a deed of loan, and mortgages over the Murwillumbah and Iluka lands.

[15] The letter stated –

> "In regard to the Queensland property lot 204DP106741 we have been instructed by our client that we are to instruct our Brisbane agents to prepare a 1st mortgage and that your client must give an undertaking to sign such Mortgage over the property when this becomes available. In the meantime we are instructed to accept the original certificates of title for this property as evidence of our clients' equitable 1st mortgage over same."

[16] On 22 December 1999, Mr Allsop gave oral confirmation to the plaintiff's solicitors that certificates were to be obtained from a solicitor to the effect that independent advice concerning the proposed guarantees had been given to the proposed guarantors.

[17] There is some doubt about how the requirement for the certificates arose. Mr Allsop's belief was that he raised the matter with the solicitors of his own volition. He said he wanted the certificates because there were to be guarantees and the guarantors did not appear to be "involved directly with Oceanvalley". Mr Neville was not in a position to dispute that from his own recollection, but was of the distinct understanding that he had failed to provide for such certificates through an oversight on his part. He said, and I accept, that the transaction was such that his firm, in the normal course of events, would impose such a requirement without the need for instructions from the plaintiff.

[18] In a letter of 22 December 1999 to the solicitors for Oceanvalley, Penhyn Parker, Clinch Neville Long provided pro forma certificates to be completed by independent solicitors in respect of the six proposed guarantors. The plaintiff and its solicitors were unaware that a solicitor retained for the purpose by Mr Smith had already given advice to the defendants.

The meeting at Mermaid Waters on 21 December 1999

[19] On 21 December 1999, a solicitor practising on the Gold Coast, Mr Cholmondeley Darvall, was approached by a Mr McDermott, an associate of Mr Smith's, to provide independent advice in respect of a loan transaction. On 21 December, Mr Darvall went to Mr Smith's premises on the Pacific Highway at Mermaid Waters. On arrival he waited for about an hour before being taken into a large room in which a number of people were present. There was some controversy about whether the defendants were in the room at the time. Their recollection, which I accept, is that they were not. Mr Darvall has no actual recollection on the point. He does recall being handed copies of the document referred to in the certificates which he subsequently gave, perusing them and then having a discussion with the defendants and Mr A N Smith, Mr Smith's son and a director of Oceanvalley, about them. He recalls that the defendants were seated on the opposite side of a boardroom table to him, but in reasonably close proximity. He has little or no actual recollection of

what he said to the defendants and Mr Smith but gave evidence of having a practice to which he adhered on this occasion.

[20] Mr Darvall's practice involved the following: asking the persons being advised if they were aware of what they were doing; informing them, if they were guarantors providing security, that the property over which security was given could be lost if the borrower defaulted in its obligations to the lender; advising that the guarantors' obligations continued whether or not the lender took action against the borrower or other guarantors; identifying who were the borrowers and who were the guarantors and identifying the amount being guaranteed and the property being provided by way of security. He would then "flick through the documents", read out salient parts and make sure that the guarantors were aware of the contents of the documents.

[21] The certificates given by him stated that the conference took place between 2pm and 3.30pm. Although he did not have an actual recollection of how long the conference took, he doubted that the time stated on the certificates included his waiting time. He accepted though that it might have included the time taken by him to draft and have typed a brief letter dated 21 December 1999 from him to the plaintiff which stated –

> "RE: ADVANCE $450,000 OCEANVALLEY PTY LTD
>
> I have today consulted the following individuals regarding the personal guarantee given by each of them regarding the above advance. Prior to their signing the guarantee documents, I explained the effect of the documents to them and they each advised me that they understood the full meaning and effect of the documents. Prior to signing the documents, I identified each of them and against each of their following names is the number of their driver's licences. …"

I accept the letter's accuracy.

[22] The following documents were given to Mr Darvall on entering the room in which he gave his advice –

1. A statutory declaration to be given by Mr Lindsay declaring, inter alia, that he was the registered proprietor of the Murwillumbah land, the land was unencumbered and was to secure the sum of $450,000 and that the lender would rely on the declaration in deciding "whether to advance to me the sum of $450,000 to be secured by way of a registered first mortgage over the land".
2. A statutory declaration by Ruthie-Anne Lindsay in similar terms to Mr Lindsay's declaration but in respect of the Iluka land.
3. A mortgage to be given by Mr Lindsay as mortgagor in favour of the plaintiff as mortgagee over the Murwillumbah land.
4. A mortgage to be given by Ruthie-Anne Gallagher as mortgagor in favour the plaintiff over the Iluka land. Clause 14 of that mortgage and the attestation clauses were similar to those in the mortgage given by Mr Lindsay with necessary consequential changes. Mr Lindsay signed that document as guarantor.
5. The deed of loan between the plaintiff as lender, Oceanvalley as borrower, and Ruthie Lindsay, Albert Lindsay, Delma Lindsay, J T McCroary, A N Smith as guarantors.

6. A document headed in bold upper case type "ACKNOWLEDGMENT, AUTHORITY, UNDERTAKING AND DIRECTION" addressed to the plaintiff and the plaintiff's solicitors.

[23] The reference on the document last mentioned, also in bold upper case type, was –

> "**BURRAWONG INVESTMENTS PTY LTD ADVANCE TO OCEANVALLEY PTY LTD**
> **SECURITIES: 39 WEST END ST, MURWILLUMBAH AND 27 BALLINA CRESCENT, ILUKA."**

[24] The document then stated that Mrs and Mrs Lindsay, Ruth-Anne Lindsay, Mr McCroary, Mr A N Smith and Oceanvalley –

> "1. Acknowledges that they fully understands (sic) the nature and effect of the deed of loan and mortgage documents."

[25] It was dated 21/12/1999 and signed by each of Oceanvalley and the persons just mentioned, with the exception of Ruthie-Anne Lindsay. Mr Darvall witnessed the Lindsays' signatures and that of Mr A N Smith.

[26] The deed comprises five pages of double-spaced typing, not including the attestation provisions. It recites that –

> A. The "lender" has agreed at the request of the "guarantor" to advance to the "borrower" by way of loan the sum of $450,000;
> B. The borrower agrees to repay to the lender the principal sum together with interest;
> C. In consideration of the lender agreeing to advance the principal sum the guarantor has agreed to guarantee the due payment by the borrower to the lender of the principal sum together with interest together with all moneys due or to accrue due to the lender from the borrower in accordance with the deed and to procure the granting of first ranking mortgages over the Iluka Murwillumbah and Coolangatta land to secure due repayment to the lender of all moneys that are or may become payable to the lender pursuant to the guarantee provided for in the deed.

[27] There are seven operative clauses. Clause 1 acknowledges receipt of the principal sum. Clause 2 provides for repayment of the principal sum on a date 12 months after the deed but stipulates that it will become immediately payable in the event of default by the borrower. Clause 3 provides for payment of interest. Clause 4 deals with stamp duty and costs. Clause 5 contains the guarantee under which the guarantors "jointly and severally guarantee(s) the due payment by the borrower to the lender of the principal and all other moneys accrued or to accrue due in respect thereof … (and under which the guarantors) agree(s) to procure execution of and delivery to the lender of the" mortgage referred to in the recitals. Clause 6 makes the applicable law that of New South Wales and clause 7 provides that the deed is collateral to and secures the same advance of $450,000 as the mortgages. The attestation provisions commence with an attestation clause for the plaintiff "as lender" followed by one for Oceanvalley "as guarantor". Then appear attestation

clauses for Mrs Lindsay, Ruthie-Anne Lindsay and A N Smith as "the guarantor", and finally for Mr Lindsay as "the mortgagor". Mr Lindsay was thus expressed to be signing in the capacity of mortgagor after having been identified on the front page of the document as one of "the guarantors".

[28] Each of the above documents needed handwritten completion or alteration in some respects. For example, on Mr Lindsay's statutory declaration, Mr Darvall wrote in Mr Lindsay's residential address on the front page and altered the attestation clause to show execution at Mermaid Beach rather than Sydney. In the mortgage over the Murwillumbah land, Mr Darvall wrote his name and address and altered Mrs Lindsay's name on pages 1, 7 and 8 (page 8 contains attestation clauses) from "Delina Ruth Lindsay" to "Delma Ruth Lindsay". In clause 14(a) he changed "… Lindsay" to "Ruthie-Anne Gallagher".

[29] On the front page of the deed of loan "Delma" was inserted before "Lindsay". "Delma" was substituted for "Delina" in Mrs Lindsay's signing clause. "Delina" was also changed to "Delma" in the form of Acknowledgement Authority, Undertaking and Direction. In each case where Delina was changed to Delma, Mrs Lindsay initialled the alteration.

[30] The Murwillumbah mortgage was signed by Mr Lindsay as mortgagor on the front page and also on page 8, in the latter case, against the words "signed in my presence by the mortgagor Albert Hugh Lindsay who is personally known to me". Mr Darvall witnessed both signatures. The document was also executed by Oceanvalley and Mrs Lindsay. In their case, the attestation clauses stated that they were signing as guarantors. Clause 14, which appeared immediately before the attestation clauses, provided that the mortgage was collateral to and secured the same advance of $450,000: as the deed of loan between Oceanvalley as borrower and Delma Ruth Lindsay, Albert Hugh Lindsay, Ruthie-Anne Gallagher, J McCroary and Aaron Nigel Smith and Oceanvalley as the guarantor, a mortgage between the plaintiff as mortgagee and Ruthie-Anne Lindsay as mortgagor and another mortgage in favour of the plaintiff.

The defendants' version of the events of 21 December 1999

[31] In an affidavit which became an exhibit on the trial, Mr Lindsay gave this account. Mr Smith telephoned him "on or shortly prior to 21 December 1999" and advised "that he had arranged for the security to be put in place to cover my additional contribution, and that my wife and I were required to sign all of the necessary documents". He and Mrs Lindsay attended Mr Smith's office in Mermaid Beach on 21 December 1999 for that purpose. When they were ushered into a small boardroom, Mr Smith, Aaron Smith, John McLean and Mr Darvall were already present. Shortly after arriving in the room Smith said words to the effect, "If you want to finance the deal, you will need to provide mortgages". Shortly afterwards, he and Mrs Lindsay were given a bundle of documents to sign. He was initially reluctant to sign them but his reluctance was overcome when Smith said words to the effect "It is necessary in order for the deal to proceed" and "Don't worry because I will make the loan payments until the sale of the Tweed Heads South property to Oceanvalley is completed". Mr Smith showed him where to sign each of the documents and his signature was witnessed by Mr Darvall who did not provide any legal or other advice. He did not read through the documents because he trusted

Mr Smith's advice and business experience and was comforted by the presence in the room of a solicitor.

[32] On the day of the meeting "and shortly following" that day he believed that he and his wife were providing security for his additional contribution to the investment project at "Club Water Sports" and was not "led to believe that Oceanvalley was borrowing the sum of $450,000".

[33] In a written statement which, together with the affidavit, comprised most of Mr Lindsay's evidence in chief, he gave the following further account of the 21 December meeting –

> "I was also introduced to an older gentleman who I will describe as being in dirty old clothes by the name of Mr Cholm Darvall. I recall that Mr Darvall was introduced by Mr Smith was being a solicitor. … I noticed that Mr Darvall had a large pile of documents in front of him which he proceeded to pick up and read certain sentences from them. … I … found it quite hard to hear what he was saying. I have no specific recollection of what Mr Darvall said other than to say he appeared to be reading certain chosen passages … (he) … spent approximately 10 to 15 minutes leafing through these documents and reading part of them."

[34] It is apparent that there is a degree of inconsistency between the reference in the affidavit to the comfort derived from the presence of a solicitor and the reference in the statement to an old gentlemen in dirty old clothes whom Mr Lindsay had difficulty hearing. He said that Mr Darvall was not introduced to him as his solicitor. In his oral evidence, Mr Lindsay again stated that it was very hard to hear what Mr Darvall was saying. There was no suggestion that he asked Mr Darvall to raise his voice or to repeat anything he said. Also in cross-examination he accepted that, at the meeting, he understood that he was signing documents to mortgage the Iluka, Coolangatta and Murwillumbah properties. He said that the security was provided to make his contribution to the Club land project equal to that of the other "two partners in the deal". He insisted that there was no mention of any amount of money to be borrowed or any specified monetary contribution to the project.

[35] Mrs Lindsay, in an affidavit which became part of her evidence in chief on the trial, swore that the documents she signed at the meeting were not explained to her. She said that she was confident "that my husband and Mr Smith had sorted out all the details, and my husband was agreeable to signing the documents". She said that at no time was she ever told that she and her husband were borrowing money or that they were guaranteeing a loan or that the mortgage would have to be provided over the Coolangatta property. She said that she relied "entirely upon my husband's judgment, and the comforting words of Mr Smith at the meeting when I signed the loan documents". In her oral evidence, Mrs Lindsay said that Mr Darvall was so softly spoken "you couldn't hear him" but that she did not ask him to speak up because she was not interested in what he had to say. She was not interested in the contents of the documents as she left the matter to her husband's judgment. She said that the meeting went on for about half and hour and accepted that Mr Darvall (who was sitting next to her husband at the table) "could've been explaining to my husband", She accepted in cross-examination that when signing the deed of loan she would have noticed that she was signing as guarantor and that she probably noticed

when signing that Oceanvalley was described as borrower and various Lindsays as guarantors.

Further conclusions in relation to the events at the 21 December meeting

[36] I do not accept the defendants' respective accounts of what took place at the meeting on 21 December and, generally, based though it is on account of the practice he adopted in such matters, prefer Mr Darvall's version. He gave his evidence carefully and his credibility was not shaken in any way by cross-examination. There are obvious dangers in relying on evidence of practice or procedures, particularly where "the practice" may be evolving and is likely to vary to some extent depending on the complexity of the subject transaction and the sophistication of those being advised. Nevertheless, there are some matters which assist in reconstructing Mr Darvall's conduct at the meeting. He was retained to give independent advice to the defendants and Mr A N Smith and understood that to be the reason for his presence at the meeting. At the conclusion of discussions at the meeting, he wrote the letter of 21 December which is quoted above. As I have said, I accept its accuracy. Mr Darvall spent at least 15 minutes explaining the subject documents to the defendants and Mr A N Smith, and I think it probable that the time spent was rather longer than that. He was then an experienced solicitor and I have no doubt that he would have attempted to perform his duties diligently. There was no attempt to establish that he was incompetent and the evidence, whilst not suggesting that Mr Darvall paid scrupulous attention to detail or displayed much sophistication in the way he approached his task, did not show him to be incompetent.

[37] The defendants' initial sworn accounts of the meeting gave the impression that there had been no advice given to them about the contents of the documents. That was plainly wrong. The defendants then sought to avoid the consequences of a likely finding that Mr Darvall had given advice by attempting to create the impression that they could not hear Mr Darvall sufficiently well to follow any explanation he may have given.

[38] Even on Mr Lindsay's version of events, Mr Darvall spoke for 15 minutes or so concerning the content of the documentation. Mr Darvall is softly spoken but the defendants were close to him at the meeting. He was speaking directly to them and Mr A N Smith and I consider it probable that the defendants heard all or virtually all that he had to say. Mr Lindsay does not strike me as the sort of person who would have felt any reticence about asking Mr Darvall to raise his voice if he had thought that necessary.

[39] I consider it probable that Mr Darvall explained, in relation to the deed of loan, amongst other things –

(a) that the document was a loan agreement under which the plaintiff was lending money to Oceanvalley;
(b) the persons identified as "the guarantor" in the introductory part of the deed, were guarantors of the obligations of the borrower;
(c) Oceanvalley was borrowing $450,000 from the plaintiff;
(d) first mortgages over the Iluka, Murwillumbah and Coolangatta land were to be given to secure the repayment of the loan;
(e) in the event of default by the borrower the plaintiff could sell the mortgaged property in order to recover the moneys owing to it;

(f) in the event of default by the borrower the plaintiff could look to the guarantors for payment of the moneys owing to it under the deed.

[40] I find also that Mr Darvall gave an explanation of the mortgage in respect of the Murwillumbah land in the course of which he: identified that it was a mortgage to be provided by way of security as required by the deed of loan, said that the amount secured was $450,000, referred to the payment obligations under clause 2 and explained that in the event of default by the borrower under the loan agreement, the plaintiff could exercise rights under the mortgage by selling the mortgaged property and recovering from the proceeds of sale the moneys owing to it.

[41] Mr Lindsay understood Mr Darvall's explanations and I consider it probable that Mrs Lindsay did also, although she would not have been as interested as Mr Lindsay in assimilating the detail of the transaction. From Mr Darvall's explanation Mr and Mrs Lindsay also appreciated that if the proposed Club land development failed to proceed the defendants could well find themselves in serious financial difficulties. At some stage in the course of Mr Darvall's explanation and probably at or near its conclusion, the defendants orally stated that they understood the full meaning and effect of the documents.

[42] It is relevant that no suggestion of any misunderstanding of the nature and contents of the documents signed on 21 December emerged until Mr and Mrs Lindsay filed affidavits in December 2000 with a view to resisting the plaintiff's application for summary judgment. In his affidavit Mr Lindsay swears that he was not aware that he was providing security in respect of the loan to Oceanvalley, of the existence of the plaintiff or of the loan for that matter, until he "started receiving default notices in approximately March 2000". There is no evidence, however, that he then taxed Smith with having made misrepresentations or that he sought legal advice concerning alleged misrepresentations or that he sought to hold Mr Darvall accountable for inadequate or wrong advice. Nor did he approach the plaintiff with any complaints about the way in which the transaction had been entered into. This is despite the fact that he was in frequent contact with Mr Smith in 2000.

The advance of the loan moneys and subsequent events

[43] On 10 January 2000, the plaintiff's solicitors received a telephone call from Penrhyn Parker requesting that the transaction be settled the next day. Penrhyn Parker faxed to the plaintiff's solicitors copies of the certificates given by Mr Darvall in respect of the defendants and sent the certificate in relation to Mr A N Smith under cover of a letter of 12 January.

[44] The certificates were each signed by Mr Darvall on 11 January 2000. The certificates in respect of the defendants stated that Mr Darvall had attended at a conference with the person specified on 21 December 1999 and that the documents listed in the certificates were produced. They further stated that Mr Darvall had advised "the Guarantor before any of the documents were signed" and that he witnessed the execution of documents numbered 1-6.

[45] Completion took place on 12 January after the plaintiff's solicitors, on instructions, agreed not to insist on the provision of solicitors' certificates in respect of the remaining guarantors and after certain other undertakings were provided.

[46] The mortgage for the Iluka property prepared by the plaintiff's solicitors and provided to Oceanvalley's solicitors showed Ruthie-Anne Lindsay as the mortgagor. The certificate of title however was in the name of Ruthie-Anne Gallagher, her married name. Penrhyn Parker provided written authority dated 12 January 2000 for the plaintiff's solicitors to change the name of the mortgagor on the mortgage documents. I note that Mr Lindsay himself took the mortgage documents to his daughter for signing. It seems, from the letter of 18 January 2000 from the plaintiff's solicitors to Penrhyn Parker that an undertaking was provided by the latter, or its clients, to provide a mortgage re-executed by Mrs Gallagher.

[47] On 23 February 2000, the plaintiff's solicitors wrote to Penrhyn Parker enclosing re-engrossments of documentation in relation to the mortgage over the Coolangatta property. There is no evidence of any response to the letter. Mr Lindsay swore that he became aware that he was required to sign a mortgage over the Coolangatta property in about March 2000.

[48] On 8 March 2000, the plaintiff's solicitors wrote to Mr Lindsay at 106 Broadwater Esplanade, Bilambil Heights alleging default under the mortgage of the Murwillumbah property and enclosing a notice pursuant to section 57(2)(b) of the *Real Property Act* 1900 (NSW). Copies of the letter were sent to Ruthie-Anne Gallagher also at the same address and to Mrs Lindsay at Mr Darvall's post office box. A separate notice was sent to Mrs Lindsay.

[49] A further notice was sent to Mrs Gallagher which made reference to the Iluka property. On 30 March 2000, the Registrar of Titles wrote to Mr Lindsay advising of the lodgement of a caveat by the plaintiff over the Coolangatta property. The caveator's interest was described as being "pursuant to deed dated 12 January 2000". Mr Lindsay received the letter shortly after 30 March. He did not seek to have the caveat removed and there is no evidence that he sought legal advice about it. Its contents caused him no surprise.

[50] On 21 March 2000, Queensland solicitors for the plaintiff wrote to Mr Lindsay at 106 Broadwater Esplanade, Bilambil Heights, advising that they were Queensland agents for the plaintiff's solicitors, notifying default by "the borrower" under the "loan agreement", asserting that Mr Lindsay was "personally liable for the repayment of the loan amount" and calling on him to execute and return the mortgage over the Coolangatta property. In the witness box Mr Lindsay could not recall having received the letter, but a copy of it was in the documents disclosed by the defendants and its presence amongst such documents was not explained. I infer that it was received by Mr Lindsay not long after 21 March. Mr Lindsay expressed doubt about receipt of the other notices addressed to 106 Broadwater Esplanade and I make no findings in that regard.

[51] Demands were made by the plaintiff on the defendants and Ruthie-Anne Gallagher in September 2000. Mr Lindsay wrote to Mr Smith on 27 October 2000 concerning repayment of the loan. Rebecca Lindsay sent a facsimile to Mr Smith on 29 September 2000 in which she sought urgent advice about loan repayments and enclosed a copy of a letter from the plaintiff's solicitors.

[52] After December 1999, Mr Lindsay continued in negotiations with Smith and others concerning the Club land. Mr Lindsay, Mr Smith and two others signed heads of agreement in relation to the proposed development of the Club land dated 22 March

2000. The document recorded Mr Lindsay's agreement "… to use residential properties which are presently unencumbered in order to raise working capital for the venture". The same clause recorded that "the initial sum raised by these means will be $450,000 …". I infer that the clause refers to the Murwillumbah, Iluka and Coolangatta properties and that the $450,000 is a reference to the moneys borrowed by Oceanvalley. The content of the agreement and the events surrounding it, however, were not explored in evidence.

[53] Another document tendered in the plaintiff's case evidences the existence of negotiations in April 2000 between the consortium and Smith on behalf of Hydra Pty Ltd concerning a proposed purchase of the Club land by Hydra.

[54] On 8 November 2001, Mr Lindsay wrote to the plaintiff in these terms –

> "RE: BURRAWONG INVESTMENTS PTY LTD MORTGAGE FROM OCEANVALLEY PTY LTD
>
> We are aware that this matter has been outstanding from some considerable time due to circumstances beyond our control.
>
> We are however now in a position to make available funds to cover the outstanding sum and propose that this shall be achieved as follows: … (A repayment regime was then set out).
>
> We propose to commence weekly payments within 7 days of your written acceptance of the terms of our agreement …".

[55] The letter does not allude to any of the matters now relied on by the defendants in their defence. Mr Lindsay explained the omission in his oral evidence by saying that, at the time, he was anxious to sell the Iluka property and he had accepted assurances by Mr Smith that once the proposition in the letter (which was drafted by Mr Smith) was accepted he would pay the moneys necessary to secure the release of the mortgage over Iluka.

[56] The proposal was not accepted and on 15 December 2000 the plaintiff commenced proceedings and then made application for summary judgment.

The principle in *Yerkey v Jones*

[57] Mr Hackett, who appeared for the defendants, submitted that the defendants were entitled to have the transaction set aside on the grounds of undue influence, unconscionable conduct and by application of the principle in *Yerkey v Jones.*[1]

[58] Dixon J's statement of principle in *Yerkey v Jones* concerning undue influence encompasses two types of case. The first is one in which there is actual undue influence by a husband over his wife. The second is one in which there is no undue influence, but a failure to explain adequately and accurately the suretyship transaction which the husband seeks to have the wife enter into "for the immediate economic benefit not of the wife but of the husband, or the circumstances in which her liability may arise".

[59] In *Garcia v National Australia Bank Ltd* [2] it was said in the judgment of Gaudron, McHugh, Gummow and Hayne JJ that Dixon J's analysis of the second kind of case

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1 (1939) 63 CLR 649.

does not depend on any presumption of undue influence by the husband over the wife, or upon identifying the husband as the agent for the creditor in procuring the wife's agreement.

> "Rather, it depends upon the surety being a volunteer and mistaken about the purport and effect of the transaction, and the creditor being taken to have appreciated that because of the trust and confidence between surety and debtor the surety may well receive from the debtor no sufficient explanation of the transaction's purport and effect."

[60] Their Honours continued –

> "To enforce the transaction against a mistaken volunteer when the creditor, the party that seeks to take the benefit of the transaction has not itself explained the transaction, and does know that a third party has done so, would be unconscionable."

[61] There were no allegations in the pleadings about any undue influence by Mr Lindsay over Mrs Lindsay, about any failure on Mr Lindsay's part to give appropriate explanations or asserting that the proposed transaction was for Mr Lindsay's and not Mrs Lindsay's benefit. Nor does the evidence demonstrate that Mrs Lindsay was a volunteer. She stood to benefit from the proposed transaction equally with her husband and it was entered into with a view to extricating the defendants from the financial predicament they found themselves in over the Club land. For all of those reasons any defence based on the principle in *Yerkey v Jones* cannot succeed.

Undue influence

[62] The following discussion by Brennan J in *Louth v Diprose*[3] explores the difference between undue influence and unconscionable conduct.

> "In *Commercial Bank of Australia Ltd v Amadio* ((1983) 151 CLR, at p 461), Mason J. distinguished unconscionable conduct from undue influence in these terms:
>
> > 'In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.'
>
> Deane J. (ibid., at p 474.) identified the difference in the nature of the two jurisdictions:
>
> > 'Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party ... Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special

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2 (1998) 194 CLR 395.

3 (1992) 175 CLR 621 at 627.

> disability in circumstances where it is not consistent with equity or good conscience that he should do so.'
>
> Although the two jurisdictions are distinct, they both depend upon the effect of influence (presumed or actual) improperly brought to bear by one party to a relationship on the mind of the other whereby the other disposes of his property."

[63] In *Johnson v Buttress*,[4] Dixon J (as he then was) explained the principles relating to relief arising out of the exercise of undue influence in the following terms–

> "The basis of the equitable jurisdiction to set aside an alienation of property on the ground of undue influence is the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise of (sic) affecting the alienor's will or freedom of judgment in reference to such a matter. The source of power to practise such a domination may be found in an antecedent relation but in a particular situation, or in the deliberate contrivance of the party. If this be so, facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the alienor, that it cannot be considered his free act. But the parties may antecedently stand in a relation that gives to one an authority or influence over the other from the abuse of which it is proper that he should be protected. When they stand in such a relation, the party in the position of influence cannot maintain his beneficial title to property of substantial value made over to him by the other as a gift, unless he satisfies the court that he took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee. This burden is imposed upon one of the parties to certain well-known relations as soon as it appears that the relation existed and that he has obtained a substantial benefit from the other."

[64] The undue influence case pleaded amounts in substance to this. The defendants were elderly, had little education and lacked significant business experience. They depended on, and trusted, Mr Smith and Mr Darvall to ensure that they were acting in a reasonably prudent manner. Smith was Oceanvalley's agent. Because of Smith's professional qualifications and the relationship between him and the defendants, they were dependent on him for advice in relation to raising finance for the proposed development of the Club land. The deed of loan and related documents were unfair to the defendants, advantaged Oceanvalley unduly and exposed the defendants to considerable risk without commensurate benefit. Oceanvalley encouraged the defendants to enter into the documents with knowledge of these matters and without advising the defendants either as to the nature of the documents or as to the risks inherent in entering into the transaction. Furthermore, the relationship between Smith and the defendants was such as to involve an ascendency or influence by Smith over the defendants and trust in and dependence on Smith by the defendants. They were induced to sign the documents whilst under Smith's influence.

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4 (1936) 56 CLR 113 at 134.

[65] The facts do not support such a case. As the defendants were aware, Smith was one of the promoters of the project to develop the Club land. Mr Lindsay understood that Smith was looking to his own interests and that if he wished to be advised about the transaction he would need to look elsewhere.

[66] Smith's qualifications as an accountant are relevant only insofar as they tend to reveal his educational and professional background. There is no evidence, which I accept, that Mr Lindsay viewed Mr Smith in the light of a professional adviser. Nor was there anything in their relationship which might suggest that Mr Smith exerted any particular authority or influence over Mr Lindsay. There is no direct evidence about Smith's personality or as to his powers of persuasion. There is in fact very little evidence about Smith and the nature of the relationship and interaction between him and Mr Lindsay.

[67] No doubt Mr Lindsay was quite impressed by Smith and formed the view that Smith was likely to be able to undertake a successful development of the Club land. Those matters, however, fall short of showing that the will of Mr Lindsay was at any time overborne or that Smith exercised such a degree of authority or influence over Mr Lindsay that his entering into the deed of loan should not be viewed as his free act. Indeed, as I have already mentioned, the evidence does not disclose that Smith exercised any authority or any particular degree of influence over either defendant.

[68] Nor is the evidence such as to enable the conclusion that Smith unconscionably took advantage of a disadvantageous position occupied by the defendants vis-à-vis Smith and Oceanvalley. Very little is known about how Smith and others intended to implement the project, the expenses incurred by them and the risks they were proposing to run. The evidence, or lack thereof, in this regard is discussed in more detail later in connection with the allegations of unconscionable conduct. For the above reasons, I conclude that undue influence has not been established.

Unconscionable conduct

[69] Mr Hackett submits that the allegations earlier recited, if proved, are sufficient to support a finding of unconscionable conduct.

[70] Mr McKenna, who appeared for the plaintiff, putting aside the question of whether the plaintiff could be said to have had notice of any unfair or unconscionable conduct on the part of Smith and Oceanvalley, placed reliance on: Mr Darvall's legal advice; the lack of undue pressure or unfair tactics; the defendants not being volunteers but rather persons hoping to obtain substantial benefits and the simplicity of the deed of loan and other associated documents.

[71] It was submitted also that the defendants' business background, literacy, ability to readily comprehend the substance of the subject transaction and degree of affluence made it unlikely that the defendants suffered from any "special disability".

[72] The existence of a "special disability" on the part of the plaintiff, as the following discussion shows, whilst normally an element of unconscionable conduct, must be determined by reference to the circumstances of the transaction under consideration and may need to take into account the relative strengths and vulnerability of the parties.

[73] In *Louth v Diprose*,[5] Deane J. said –

> "It has long been established that the jurisdiction of courts of equity to relieve against unconscionable dealing extends generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party to the transaction with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that special disability was sufficiently evident to the other party to make it prima facie unfair or `unconscionable' that the other party procure, accept or retain the benefit of, the disadvantaged party's assent to the imbued transaction in the circumstances in which he or she procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable: `the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain' or retain the benefit of it.
>
> The adverse circumstances, which may constitute a special disability for the purposes of the principle relating to relief against unconscionable dealing, may take a wide variety of forms and are not susceptible of being comprehensibly catalogued. In *Blomley v Ryan* (1956) 99 C.L.R. 362 at 405, Fullagar J. listed some examples of such special disability:
>
> > '… or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.'
>
> As Fullagar J remarked, the common characteristic of such adverse circumstances `seems to me that they have the effect of placing one party at a serious disadvantage vis-à-vis the other."

[74] In *Commercial Bank of Australia Ltd v Amadio*,[6] Mason J, after referring to Kitto J's identification in *Blomley v Ryan*[7] of the types of circumstances in which equity would grant relief on the ground of unconscionable conduct made the point that the situations mentioned were no more than examples of a general principle which applied "whenever one party by reason of some condition of circumstances is placed at a special disadvantage vis-à-vis another unfair or unconscientious advantage is then taken of the opportunity thereby created."

[75] Mason J continued –

> "I qualify the word 'disadvantage' by the adjective 'special' in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or

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5 (1992) 175 CLR 621 at 637.
6 (1982-1983) 151 CLR 447 at 462.
7 (1956) 99 CLR 362 at 415.

> ought to know of the existence of that condition or circumstance and of its effect on the innocent party.
>
> …
>
> In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances."

[76] In *Amadio*, Deane J[8] identified the guarantors' special disability, after reference to a passage of the judgment of McTiernan J and *Blomley v Ryan* in which his Honour said "The essence of such weakness is that the party is unable to judge for himself", as being a weakness which –

> "… constituted a special disability of Mr. and Mrs. Amadio in their dealing with the bank of the type necessary to enliven the equitable principles relating to relief against unconscionable dealing. Put more precisely, the result of the combination of their age, their limited grasp of written English, the circumstances in which the bank presented the document to them for their signature and, most importantly, their lack of knowledge and understanding of the contents of the document was that, to adapt the words of Fullagar J. quoted above, they lacked assistance and advice where assistance and advice were plainly necessary if there were to be any reasonable degree of equality between themselves and the bank."

[77] His Honour then proceeded to consider whether such "special disability" was sufficiently evident to the creditor to make it prima facie unfair or "unconscientious" of the creditor to procure the execution of the subject documents in the circumstances.

[78] Dawson J's approach, explained in the following passage form his judgment, is somewhat different in its emphasis -[9]

> "What is necessary for the application of the principle [that discussed in *Blomley v Ryan*] is exploitation by one party of another's position of disadvantage in such a manner that the former could not in good conscience retain the benefit of the bargain."

[79] The observations made earlier about Mr Smith, the defendants' relationship with him, the circumstances in which they entered into the deed of loan and their understanding of its terms and possible consequences are relevant to the question of whether there was unconscionable conduct on which the defendants can rely. It is necessary, however, to have regard to some other factual considerations.

[80] At the time of contracting Mr and Mrs Lindsay were 71 and 69 respectively. Mr McKenna submits that the defendants' ages are irrelevant as their conduct was not a function of age or of any disability flowing from the aging process. There is some substance in that submission, but I do not accept it completely. Both defendants struck me as reasonably articulate persons possessed of common sense and at least average intelligence. Yet, whilst age, of itself, may not have any particular relevance in the absence of evidence of mental deterioration, Mr Lindsay had been retired for about 8 years when the events in question occurred. Although he had

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8 At 477.

9 At 489 of *Amadio.*

been involved in some transactions of a business nature since his retirement, he had long ceased to be actively engaged in business activities. It is thus likely that his ability to assess business transactions and appreciate the extent of the risks involved in them had become less acute with the passage of time.

[81] A curious feature of the evidence in this case is the obscurity surrounding the dealings between the defendants on the one hand and Oceanvalley and Mr Smith and his associates on the other. In Mr Lindsay's evidence in chief he describes the proposal made by Mr Smith in late 1999. He says that at time he expressed concern to Mr Smith "in relation to the project generally" and his ability to raise finance. He reports Mr Smith as having said that Odyssey (one of Smith's companies) had about $6,000,000 dollars for the venture, that if Mr Lindsay put in some surety he could be given a bigger percentage of "the deal" which would cost about $70,000,000 with a profit of about $12,000,000. He then refers to the events of 21 December. Nothing is said in evidence in chief about why Mr Lindsay did not seek his own legal or business advice. The next reference Mr Lindsay makes to Mr Smith concerns a telephone call to him in around September 2000. He says that he has attempted to meet with Smith on many occasions but has been unsuccessful in so doing. There is no suggestion of any attempt to obtain legal advice in relation to Mr Smith's or Oceanvalley's conduct even after these proceedings were commenced. There is no evidence of Mr Lindsay taxing Mr Smith with fraud, deception or any form of untoward conduct. Nor is there any discussion about how it was that the proposed sale to Oceanvalley did not proceed, why Mr Lindsay came to be involved in later negotiations with Mr Smith and another of his companies or the substance of those negotiations.

[82] The evidence is insufficient to enable me to form a clear impression of the way in which Smith and the directors of Oceanvalley perceived the defendants. In particular, it is not such as to enable me to draw the conclusion that the former ought to have been aware of the existence of a "disabling condition or circumstance" on the part of the defendants. On the evidence before me the defendants would have appeared to Smith to be sensible persons, reasonably experienced in business matters who would have had little difficulty understanding the substance and ramifications of the transaction explained by Mr Darvall. The evidence suggests that Smith would have been aware that the defendants had ready access to legal and accounting advice had they wished to avail themselves of it.

[83] Also unexplored in the evidence is the role and circumstances of A N Smith (Mr Smith's son) and J T McCroarey, two other parties to the deed of loan who guaranteed the obligations of Oceanvalley. I am implicitly invited to conclude that they are persons without financial means, but there is scant evidence of that. As the defendants, as sureties, have rights against these co-sureties, the value of those rights is a relevant consideration.

[84] I am thus invited to make findings of fact favourable to the defendants in something of a factual vacuum and in circumstances in which I am unable to accept important parts of their evidence. Undue influence and the application of illegitimate pressure may be proved by means other than direct evidence. In appropriate circumstances, it may be possible to infer such matters.[10] Here, the nature of the loan transaction

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[10] See the discussion in *Royal Bank of Scotland p/c v Etridge (No 2)* [2001] 3 WLR 1021 at 1030-1031.

provides some assistance to the defendants but, in my view, is insufficient to overcome the difficulties I have mentioned.

[85] In the circumstances, I am unable to find the existence of any special disability on the part of the defendants, awareness by Oceanvalley of any such special disability or that Oceanvalley took unconscientious advantage of any special disability or disabling circumstance affecting the defendants.

The liability of the plaintiff for any undue influence by or unconscionable conduct on the part of Oceanvalley

[86] If I am wrong in my conclusion that undue influence and unconscionable conduct has not been established, it nevertheless does not appear to me that any wrongdoing can be sheeted home to the plaintiff. The defendants contend that the plaintiff, by entrusting Oceanvalley with the task of obtaining the signatures of the defendants on the deed of loan and associated documents, constituted Oceanvalley the plaintiff's agent so that the plaintiff became responsible for any misconduct on the part of Oceanvalley. As authority for this proposition the defendants rely on *Alderton v Prudential Assurance Co*, [11] *Platzer v Commonwealth Bank of Australia*[12] and *Ribchenkov v Suncorp-Metway Limited.*[13] Whilst there are some passages in *Ribchenkov* which taken in isolation might offer support for the plaintiff's proposition, a reading of the whole of the reasons for judgment clearly reveals that Spender J rejected the notion that a debtor was constituted the agent of the creditor bank merely by reason of the fact that the bank left it to the debtor to obtain the signature of a third party guarantor. The defendants' argument is supported by the other authorities relied on but, in the case of *Platzer*, only one member of the Court of Appeal found it necessary to discuss the question of agency and that was in the context of a finding by the primary judge that the debtor was in fact the appellant bank's agent for the purpose of security execution of the subject guarantee. It was thus a decision which, relevantly, turned on its facts.

[87] The clear trend of authority is against the proposition relied on on behalf of the defendants. It has been rejected by the House of Lords in *Barclay Bank PLC v O'Brien* [14] and *Barclays Bank v Boulter,* [15] by the Court of Appeal in New South Wales in *National Australia Bank Ltd v Garcia,*[16] by the Full Court of the Federal Court in *Lisciandra v Official Trustee in Bankruptcy,*[17] by the Supreme Court of Victoria in *H G & R Nominees Pty Ltd v Fava* [18] and by the High Court in the New Zealand case of *Contractors Bonding Ltd v Snee.*[19] In both *Lisciandra* and *Garcia* (in the Court of Appeal) the point under consideration was the subject of express and detailed consideration by intermediate appellate courts which, in both cases, unanimously rejected the argument on which the defendants rely. Although the decision of the Court of Appeal in *Garcia* was overturned by the High Court, no member of the Court found it necessary to address the question now under consideration. I accept, with respect, the reasoning in those decisions. As there is

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11 (1993) 41 FCR 435 at 444.
12 [1997] 1 Qd R 266.
13 (2000) 175 ALR 600.
14 [1994] 1 AC 180 at 195.
15 (1999) 1 WLR 1919.
16 (1995) 36 NSWLR 577 at 596.
17 (1996) 69 FCR 180 at 193-194.
18 [1997] 2 VR 368 at 401.
19 (1992) 2 NZLR 157 at 175, 183.

otherwise no evidence to support a finding of agency, I conclude that Oceanvalley was not the agent of the plaintiff at any relevant time.

[88] The finding that there was no agency does not, of itself, necessitate a finding that the plaintiff cannot be fixed with responsibility for Oceanvalley's misconduct.

[89] In *Amadio*, Mason J attributed knowledge of relevant facts to the creditor by reference to the judgment of Lord Cranworth LC in *Owen and Gutch v Homan*[20] as did Dawson J[21] who quoted the following passage from Lord Cranworth's reasons –

> "Without saying that in every case a creditor is bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, it may safely be stated that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence, he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge. If a person abstains from inquiry because he sees that the result of inquiry will probably be to show that a transaction in which he is engaging is tainted with fraud, his want of knowledge of the fraud will afford no excuse."

[90] In *Barclays Bank Plc v O'Brien*[22] Lord Brown-Wilkinson, after identifying the issue as one of competing equities, said –

> "Therefore where a wife has agreed to stand surety for her husband's debts as a result of undue influence or misrepresentation, the creditor will take subject to the wife's equity to set aside the transaction if the circumstances are such as to put the creditor on inquiry as to the circumstances in which she agreed to stand surety."

[91] That approach was rejected in the joint judgment in *Garcia* [23] on the basis that the role of constructive notice was not to ascertain whether a transaction about to be entered into was impeachable but "so as to fix a person who acquires an interest in the property with knowledge of an antecedent interest in the property".

[92] The circumstances of the subject transaction were not such as to lead a reasonable person to conclude that fraud had been used in order to obtain the defendants' participation. It was noteworthy and unusual that the borrower was providing no security and that the only providers of mortgage security were the Lindsay interests. The amount of money borrowed, however, was not large in relation to the value of the security offered and what was done was hardly incapable of explanation on commercial grounds.

[93] It is also necessary to take into account the circumstances of the plaintiff. It took the precaution of insisting that the defendants be provided with independent legal advice. Any inadequacy in, and in respect of, that advice was not a matter known to

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20 (1853) 4 HLC, at p 1035 910 ER at p 767.
21 At 486.
22 [1994] 1 AC 179 at 185-196.
23 At 410-411.

the plaintiff and it was entitled to assume that the advice given was independent and appropriate.[24] The circumstances were not such that it was put on enquiry.

Misleading and deceptive conduct and unconscionable conduct under the *Trade Practices Act* 1974

[94] It was alleged in the defence that Oceanvalley engaged in conduct which was misleading and deceptive and unconscionable within the meaning of section 52 and 51A respectively of the *Trade Practices Act* 1974. Mr Hackett, although not formally abandoning the allegations, did not address on them. The evidence also failed to establish the facts which would support the allegations.

***Contracts Review Act* (1980) NSW**

[95] The deed of loan, by operation of clause 6, is governed by the law of New South Wales and the defendants seek relief under section 7 of the *Contracts Review Act* (1980) NSW. The grounds upon which relief is sought are –

> "41. As at 21 December 1999:
>
> (a) undue pressure and unfair tactics were exerted against the defendants by Oceanvalley;
> (b) the defendants were unable to protect their own interests by reason of age;
> (c) the defendants did not understand the effect of the Deed of Loan;
> (d) the Deed of Loan was not the subject of negotiation with the defendants;
> (e) the defendants were disadvantaged by relatively poor economic circumstances, educational background and literacy;
> (f) the Deed of Loan was unjust within the meaning of section 7 of the *Contracts Review Act* (NSW) 1980 ("the CRA")."

[96] The provisions of the Act relevant for present purposes are sections 6, 7 and 9. Sections 7 and 9 relevantly provide -

> **"7 Principal relief**
>
> (1) Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, do any one or more of the following:
>
> (a) it may decide to refuse to enforce any or all of the provisions of the contract,
> (b) it may make an order declaring the contract void, in whole or in part,

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[24] *Micarone v Perpetual Trustees Australia Limited* (1999) 75 SASR 1 at 130; *Bank of Baroda v Shah* [1988] 3 All ER 24, (CA) per Dillon LJ at 29; *St George Bank Ltd v Dunstan* (unreported Supreme Court of Vic, Hayne J 10.11.94) and *National Mutual Trustees Ltd v Dedrion Pty Ltd* (unreported, Supreme Court of Vic, Hansen J, 18.8.97).

(c) it may make an order varying, in whole or in part, any provision of the contract,

…

9 Matters to be considered by Court

(1) In determining whether a contract or a provision of a contract is unjust in the circumstances relating to the contract at the time it was made, the Court shall have regard to the public interest and to all the circumstances of the case, including such consequences or results as those arising in the event of:

(a) compliance with any or all of the provisions of the contract, or

(b) non-compliance with, or contravention of, any or all of the provisions of the contract.

(2) Without in any way affecting the generality of subsection (1), the matters to which the Court shall have regard shall, to the extent that they are relevant to the circumstances, include the following:

(a) whether or not there was any material inequality in bargaining power between the parties to the contract,

(b) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation,

(c) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract,

…

(e) whether or not:

(i) any party to the contract (other than a corporation) was not reasonably able to protect his or her interests, or …

(f) the relative economic circumstances, educational background and literacy of:

(i) the parties to the contract (other than a corporation), …

(g) where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed,

(h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act,

(i) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect,

> (j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act: …
> (l) the commercial or other setting, purpose and effect of the contract."

[97] "Unjust" is defined in section 4 of the Act to include "unconscionable, harsh or oppressive".

[98] Mr Hackett submits that the loan agreement was "unconscionable, harsh or oppressive" having regard to the matters alleged in paragraph 41 of the defence and :

> (a) the superior bargaining position of the plaintiff which failed to exercise any care or to make even elementary enquiries;
> (b) the absence of negotiations concerning the content of the plaintiff's security documents; the fact that the documents are in part contradictory and contrary to the advice which Mr Darvall said he provided;
> (c) the absence of independent legal advice; and
> (d) the undue influence of Smith.

[99] The first argument advanced by Mr McKenna on behalf of the plaintiff is that the Act has no operation in the circumstances under consideration because of section 6(2) which provides –

> (2) A person may not be granted relief under this Act in relation to a contract so far as the contract was entered into in the course of or for the purpose of a … business .. carried on by the person or proposed to be carried on by the person …"

[100] It is submitted that the deed of loan was for the purpose of a business venture to be carried on by the defendants concerning the development of the Club land. Furthermore, it is said that the entering into of the deed was part of a business of property investment. In support of that argument, Mr McKenna pointed to the use of borrowed funds in relation to the acquisition of the Coolangatta property and the defendants' share in the Club land and the fact that the investment in the development of the Club land was to be financed by the provision of mortgage securities and further borrowings.

[101] The expression "for the purpose" in section 6(2) means that the relevant contract is "entered into as an ordinary incident of the carrying of a … business … then being carried or proposed to be carried on".[25]

[102] "Business" is a word which is capable of having a broad meaning. In *Rolls v Miller*,[26] in a passage referred to with approval by Williams J in *Tweddle v Commissioner of* Taxation,[27] Lindley LJ said –

> "The words means almost anything which is an occupation, as distinguished from a pleasure – anything which is an occupation or duty which requires attention as a business."

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25 *Ellison v Vukicevic* (1986) 7 NSWLR 104 at 111 approved in *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1993-1994) 179 CLR 388 at 400.
26 (1884) 27 Ch D 71 at 88.
27 (1942) 180 CLR 1 at 5.

[103] However as Mason CJ, Gaudron and McHugh JJ said in *Re Australian Industrial Relations Commission Ex parte Australian Transport Officers Federation*[28] "of all words, the word 'business' is notorious for taking it colour and its content from its surroundings …".

[104] In section 6(2) "business" is used in conjunction with "trade" and "profession" and qualifies "carried on" or "proposed to be carried on". The concept of business thus appears to me to be that encapsulated in the following passage from the judgment of Street CJ, Roper CJ in Eq and Herron J in *Hyde v Sullivan* - [29]

> "Speaking generally, the phrase 'to carry on a business' means to conduct some form of commercial enterprise, systematically and regularly, with a view to profit and implicit in this idea are the features of continuity and system."

[105] It is possible that a business may be carried on by means of a "one-off" transaction without repeated acts of buying and selling if what is done is of sufficient substance and of such a character as to identify it as a trading operation.[30]

[106] The facts of this case, however, do not suggest to me that the defendants were carrying on or proposing to carry on a business. The acquisition by them over a period of years, in their retirement, of two seaside properties are not suggestive of the carrying on of a commercial enterprise, even when coupled with the venture they entered into as part of the consortium in respect of the Club land. Nor do I consider that their attempt to extricate themselves from their poor investment in the Club land is sufficient to transform the character of their dealings. The substance of the venture proposed to be entered into with Oceanvalley was one in which the defendants would contribute their share of the proceeds of sale of the Club land and some further security for borrowings in order to obtain equity in the venture. The defendants were in no sense promoters or developers. Although the details of the venture had not been finalised, their intended role was essentially that of the holder of shares in a company which was to carry out the activity of acquiring and developing the Club land. If a business was to be carried on it would be by that company and not by the persons who took shares in it.

[107] Mr McKenna contends also that if, contrary to his submission, the Act applies, the loan agreement was not unjust. He referred to the following passage from the reasons for judgment of McHugh JA, with whom Hope JA agreed, in *West v AGC (Advances) Ltd* [31] -

> "It is important to bear in mind that it is the contract or its provisions which must be unjust. As Professor Lang has pointed out 'it is not the transaction but the contract which must be initially examined.'…
>
> If a defendant has not been engaged in conduct depriving the claimant of a real or informed choice to enter into a contract and the terms of the contract are reasonable as between the parties, I do not see how that contract can be considered unjust simply because it was

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28 (1990) 171 CLR 216 at 226.

29 (1956) SR (NSW) 113 at 119.

30 *Federal Commissioner of Taxation v Sir Hubert's Island Pty Ltd (in liq)* (1977-1978) 138 CLR 210 at 237-238 per Jacobs J.

31 (1986) 5 NSWLR 610 at 621.

not in the interest of the claimant to make the contract or because she had no independent advice."

[108] His Honour had earlier observed[32] in a passage referred to with approval by Sheller JA in *Nguyen v Taylor* - [33]

> "**The operation of the Contracts Review Act:**
> Under s 7(1) a contract may be unjust in the circumstances existing when it was made because of the way it operates in relation to the claimant or because of the way in which it was made or both. Thus a contractual provision may be unjust simply because it imposes an unreasonable burden on the claimant when it was not reasonably necessary for the protection of the legitimate interests of the party seeking to enforce the provision: cf s 9(2)(d) In other cases the contract may not be unjust per se but may be unjust because in the circumstances the claimant did not have the capacity or opportunity to make an informed or real choice as to whether he should enter into the contract: cf s 9(2)(a), 9(2)(e), 9(2)(f), 9(2)(f), 9(2)(i), 9(2)(j). More often, it will be a combination of the operation of the contract and the manner in which it was made that renders the contract or one of its provisions unjust in the circumstances. Thus a contract may be unjust under the Act because its terms, consequences or effects are unjust. This is substantive injustice. Or a contract may be unjust because of the unfairness of the methods used to make it. This is procedural injustice. Most unjust contracts will be the product of both procedural and substantive injustice."

[109] I do not intend to canvass in great deal detail the application of the facts to each of the matters to which courts are required by section 9(2) of the Act to have regard. The matters to which reference has been made in relation to the allegations of undue influence and unconscionable conduct show that the defendants have not established that the loan agreement is "unconscionable harsh or oppressive". I am thus unable to give the plaintiffs relief under the Contracts Review Act.

[110] Although it is true that the defendants were beyond normal retirement age and not immersed in day-to-day business activities, they were nevertheless sensible, intelligent people with a business background. It was not shown that they lacked understanding of the subject transaction or that they fell under the influence of Mr Smith so that they were incapable of exercising an independent judgment.

[111] There were no negotiations concerning the content of the loan agreement and related documents but the concepts enshrined in the documents are simple enough. They were understood by the defendants who were prepared to proceed with the transaction documented by the loan agreement on the basis of Mr Lindsay's judgment that do so was to the defendants' financial advantage. The documents are not as well expressed as they might be and parts of them are contradictory. Nevertheless, it was plain to the defendants that Oceanvalley was borrowing $450,000, that they were guarantors of its obligations under the deed of loan and, that the Iluka, Murwillumbah and Coolangatta properties were being provided as security and that neither Oceanvalley nor the other guarantors were providing

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32 At p 620.

33 (1992) 27 NSWLR 48 at 68.

security. The defendants were not pressured into signing the deed of loan and had the opportunity of obtaining independent advice from persons of their choice had they wished to do so.

[112] The advice which Mr Darvall gave was independent of the plaintiff and also of Oceanvalley. The advice was challenged on the grounds that it was provided to Mr A N Smith, a director of Oceanvalley, as well as the defendants, because representatives of Oceanvalley were present whilst it was being given and because it failed to properly quantify and explore the risks which the defendants would run if they executed the deed of loan. It was certainly ill-advised of Mr Darvall to provide his advice to the defendants in the presence of representatives of Oceanvalley. It is perhaps arguable that the fact that he provided advice to Mr A N Smith at the same time did not mean that his advice was not "independent". He was not acting for the plaintiff or Oceanvalley. I do not propose to spend much time on this issue though because the more critical considerations must be the substance of the advice proffered, whether there were circumstances which might serve to detract from its efficacy, and whether it was understood and accepted.

[113] I have found that Mr Darvall did give advice about the substance of the deed of loan and associated documents which was understood. The evidence does not enable me to find that Mr Darvall explained that his role was to give advice independent of the plaintiff and Oceanvalley. I consider it probable though that Mr Darvall did not launch into an explanation of the subject documents without making some introductory remarks. It is likely that he said something to the effect that he was retained to advise the defendants and Mr H A Smith concerning the subject documents. Mr Darvall did give some explanation of the risks which would face the defendants if Oceanvalley failed to proceed with the prospective purchase. Whether he was able to go further and quantify that risk may be doubted. It is unlikely that, in the circumstances in which he found himself, he was acquainted with the full background to the proposed development of the Club land and Oceanvalley's financial position. That is something which I have taken into account.

[114] I have also taken into account the circumstances of the plaintiff and its ability to rely on Mr Darvall's certificates. Those matters were discussed earlier.

Conclusion

[115] For the above reasons there will be judgment in the action for the plaintiff. I will hear submissions as to the appropriate orders to be made and as to costs.