SUPREME COURT OF QUEENSLAND

CITATION:	*Dubois v Ong & Anor* [2004] QCA 185
PARTIES:	**PHILIP JAMES DUBOIS** (plaintiff/respondent) **v** **CHEE-TEONG ONG** (first defendant/appellant) **BEE LEE CHEW** (second defendant) **PHILIP JAMES DUBOIS** (plaintiff/appellant) **v** **CHEE-TEONG ONG** (first defendant) **BEE LEE CHEW** (second defendant/respondent)
FILE NOS:	Appeal No 8429 of 2003 Appeal No 11260 of 2003 SC No 5191 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from interlocutory decision General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	29 April 2004
JUDGES:	Williams JA and Muir and Mullins JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In Appeal No 8429 of 2003: Appeal dismissed with costs** **In Appeal No 11260 of 2003: Appeal dismissed with costs**
CATCHWORDS:	TRADE AND COMMERCE – TRADE PRACTICES AND RELATED MATTERS – CONSUMER PROTECTION – MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT – CHARACTER AND ATTRIBUTES OF CONDUCT – REPRESENTATIONS – where the respondent represented to the appellant that they would pursue another before pursuing the appellant in respect of defaults under the lease- whether the representation amounted

to misleading and deceptive conduct pursuant to s 87 of the *Trade Practices Act* 1974 (Cth)

PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – whether the primary judge erred in refusing unconditional leave to defend

EQUITY – GENRAL PRINCIPLES – UNDUE INFLUENCE AND DURESS – PRESUMPTION FROM RELATIONSHIP OF PARTIES – HUSBAND AND WIFE – where the respondent sought to enforce a guarantee against the appellant -whether the appellant was a volunteer- whether it would be unconscionable to enforce the guarantee against the respondent- whether the primary judge erred in giving leave to defend

Corporations Act 2001 (Cth)
Trade Practices Act 1974 (Cth)

Campomar Sociedad, Limitada v Nike International Limited (1999) 202 CLR 45, approved
Commonwealth Bank of Australia v Muirhead [1997] 1 Qd R 567, distinguished
Demogogue Pty Ltd v Ramensky (1992) 39 FCR 31, approved
Garcia v National Australia Bank Ltd (1998) 194 CLR 395, applied
Hunt v Knabe (No 2) (1992) 8 WAR 96, cited
Lam v Austintel Investments Australia Pty Ltd (1989) 97 FLR 458, approved
Moscow-Narodny Bank Ltd v Mosbert Finance (Aust) Pty Ltd [1976] WAR 109, cited
Port of Authority v Anshun Pty Ltd (1981) 147 CLR 589, approved
Wallingford v Mutual Society (1880) 5 App Cas 685, cited
Yerkey v Jones (1939) 63 CLR 649, applied

COUNSEL: D A Savage SC, with L A Jurth for the appellant in Appeal No 8429 of 2003 and for the respondent in Appeal No 11260 of 2003
D J S Jackson QC for the respondent in Appeal No 8429 of 2003 and for the appellant in Appeal No 11260 of 2003

SOLICITORS: Hunt & Hunt Lawyers for the appellant in Appeal No 8429 of 2003 and for the respondent in Appeal No 11260 of 2003
McCullough Robertson for the respondent in Appeal No 8429 of 2003 and for the appellant in Appeal No 11260 of 2003

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Muir J and I agree with what he has set out therein and with the orders he has proposed. However, I wish to add some further observations.

[2] It is clear that Lamistar Pty Ltd ("Lamistar"), the original lessee, and a company controlled by Dr Ong and Mrs Chew, permitted Dr Down through his company Bondloa Pty Ltd to take possession of the subject premises as from 1 July 1999. That is evidenced by a series of agreements bearing the date 30 June 1999. One of the terms of the Schedule of Understanding dealing with the "Sale of Business" provided that Bondloa Pty Ltd "will arrange to indemnify" Lamistar "against all further lease and rental payments from 30 June 1999".

[3] Those dealings were apparently entered into without consultation with Dr Dubois as the original lessor. It appears that Dr Dubois became aware of what had occurred on or about 14 July 1999; on that date he wrote to Dr Ong as follows:

> "I have just discovered that you have actually vacated the above premises and that Dr Roger Downs [sic] has 'done the deal' with you.
>
> . . .
>
> Chris I would like to be of assistance to you on this occasion, but all indications are that the assignee of the lease (or the new lessee as the case is to be) is a $2 company and that the only bank guarantee may be available for a limited time. I will therefore not be able to release you but in the event of default would obviously call on any bank guarantee or personal guarantees of the assignee first."

[4] It appears that in organising for Dr Down to take possession of the premises Dr Ong was acting on the advice of his accountant. Subsequently Janssen Mitchell Solicitors were retained on 4 August 1999 to act on behalf of Dr Ong, Mrs Chew and Lamistar. In their initial correspondence with the solicitors for Dr Dubois (for example, letter 27 August 1999) they discussed whether the lease should be formally assigned or whether there should be consent from the landlord to the granting of a sub-lease. In the letter of 27 August 1999 those solicitors mentioned that Dr Ong was overseas.

[5] Then followed the letter from Janssen Mitchell to the solicitors for Dr Dubois of 6 September 1999. It set out that they had been able to speak directly with Dr Ong on 1 September 1999 and he had then given instructions as to matters allegedly discussed between Dr Ong and Dr Dubois at the time the original lease was negotiated. According to the letter those discussions included the question whether Dr Ong could be released from the lease if a new tenant was found. Significantly the letter went on to say:

> "The position appears to be at the moment, that your client is not prepared to release our client from the lease even with a satisfactory personal guarantee and bank guarantee in place.
>
> . . .
>
> Our client finds it disappointing that your client is not agreeable to release him, bearing in mind the difficulties that our client has encountered and the ongoing professional relationship between our respective clients."

[6] That elicited the following reply dated 8 September 1999 from the solicitors for Dr Dubois:

> "The whole reason our client strongly requested Dr Ong to appoint a solicitor was so that Dr Ong could be fully appraised of the normal commercial dealings in matters of this nature.

> As we have discussed previously, it is highly unusual for a lessor to release an assignor or any guarantees under a lease. It is also the usual commercial practice for an assignee (if it is a company) to provide guarantees not only in favour of the lessor but also in favour of the assignor in respect of the assignees [sic] obligations.
>
> Our client is therefore somewhat surprised that your client is again requesting to be released from its obligations especially when Dr Downs [sic] has advised he is unable to give a guarantee in any case.
> . . .
> . . . Our client is not comforted by what appears to be your own clients [sic] lack of confidence in the assignees [sic] ability to perform the obligations under the lease."

[7] That brought an immediate response on the same day from Janssen Mitchell to the following effect:

> "We confirm that our client's instructions are to request consent for assignment of lease and that it be a term of the deed of covenant on consent for assignment that where the assignee breaches the lease our client will also be notified."

[8] In consequence of that, under cover of a letter of 14 September 1999, the solicitors for Dr Dubois forwarded to Janssen Mitchell for execution a Deed of Consent to Assignment of Lease showing Bondloa Pty Ltd as the assignee and Dr Down as the guarantor. On 27 September 1999 Janssen Mitchell advised that the Deed had been forwarded to the solicitor acting for the assignee.

[9] In his affidavit Dr Ong says that there "was a lengthy delay in execution of any documentation in relation to the supposed transfer of the Alleged Lease to Dr Down". He goes on to say that the relevant documents were executed "In around April 2001". The material before the court discloses that the relevant documentation was executed on 3 April 2001. By then the vehicle which Dr Down was using to be the assignee was the company Debendo Pty Ltd; it was incorporated on 13 March 2001 with the then de facto spouse of Dr Down being its sole shareholder and director. That documentation contained a guarantee executed by Dr Down guaranteeing rental payments under the lease to Dr Dubois; but it contained no provision whereby Dr Down indemnified Lamistar, Dr Ong, or Mrs Chew.

[10] To my mind it is clear, particularly given the correspondence referred to above, that there was no misrepresentation by Dr Dubois with respect to the obligations in law of Dr Ong or Mrs Chew. There is no basis for the submission that Dr Ong proceeded with the assignment on a mistaken understanding, known to Dr Dubois, that Dr Down was agreeing to indemnify Lamistar and Dr Ong with respect to obligations of Debendo Pty Ltd under the lease. A consideration of the correspondence clearly demonstrates that there was no misleading and deceptive conduct on the part of Dr Dubois entitling Dr Ong to relief under the *Trade Practices Act*.

[11] It was asserted by counsel for Dr Ong in the course of argument that on the approach of the learned judge at first instance Dr Ong had no recourse against Dr Down. That is clearly not so. Dr Ong, Mrs Chew and Dr Down were all co-sureties

with respect to the obligation of Debendo Pty Ltd to pay rent under the lease. As such the doctrine of contribution between co-sureties applied to them and at least to that extent Dr Ong and Mrs Chew could enforce a liability against Dr Down personally. Further, on discharging their obligation to Dr Dubois under their guarantees, Dr Ong and Mrs Chew would have been entitled to an assignment from Dr Dubois of his rights against Dr Down. That would provide an avenue for Dr Ong and Mrs Chew to pursue indemnity from Dr Down.

[12] I agree with all that has been said by Muir J on the "first ground of appeal" and there is nothing more that can be said on that contention advanced on Dr Ong's behalf.

[13] I am satisfied that the learned judge at first instance was justified in concluding that Dr Ong had no real prospect of successfully defending the claim of Dr Dubois, and in consequence his appeal must be dismissed.

[14] In my view there is much force in the argument of Mr Jackson QC with respect to the appeal by Dr Dubois against the order granting Mrs Chew leave to defend. However, I agree with Muir J that that argument is dependent upon a certain factual situation existing with respect to Mrs Chew, and it is not sufficiently clear to me that she has no real prospect of successfully arguing that the factual basis upon which Mr Jackson's submission depends is not established by the evidence.

[15] It therefore follows that the order granting Mrs Chew leave to defend should stand.

[16] I agree with the orders proposed by Muir J.

MUIR J:

The background of the litigation

[17] The plaintiff in proceeding SC No 5191 of 2003, Philip Dubois, is the respondent in appeal no 8429 of 2003. He leased premises at Sunnybank to Lamistar Pty Ltd under a lease which commenced on 1 June 1996. The first and second defendants were the sole directors and shareholders of Lamistar at relevant times. In a guarantee forming part of the instrument of lease ("the guarantee"), they guaranteed the performance and observance of the terms of the lease by Lamistar and agreed to indemnify the appellant against any loss or damage suffered by him as a result of any breach of the lease.

[18] The first defendant, the appellant in appeal no 8429 of 2003, is a medical practitioner who, through Lamistar, licensed part of the demised premises for use as an endoscopy clinic and the balance for use as a specialist medical centre. The second defendant, his wife, is not a party to appeal no 8429 of 2003, but is the respondent to appeal no 11260 of 2003. Both appeals were heard together.

[19] Lamistar entered into an agreement dated 30 June 1999 with Bondloa Pty Ltd under which the latter agreed to: acquire the endoscopy clinic; acquire the plant and equipment pertaining to that practice and to take an assignment of Lamistar's interests in the lease. The agreement provided –

> "New will arrange to indemnify Old against all further lease and rental payments from 30th June 1999."

"New" is a reference to Bondloa and "Old" is a reference to "Lamistar".

In this agreement, as in the others about to be mentioned, with one immaterial exception, Lamistar contracted in its capacity as trustee of Ong Family Trust.

[20] Bondloa is a company with which Dr Roger Down, a medical specialist who worked in the endoscopy clinic had some association. The first defendant understood that he controlled Bondloa.

[21] Lamistar and Bondloa entered into a similar agreement in respect of the medical centre. On 30 June 1999 Dr Down and the first defendant on behalf of Lamistar entered into other agreements under which Dr Down agreed to purchase the plant and equipment and the fit-out of the medical centre and endoscopy clinic from Lamistar and to indemnify Lamistar against all further rental payments in respect of previously leased equipment.

[22] Pursuant to these agreements, possession of the real and personal property was given and taken on 1 July 1999. By a deed of consent and assignment of lease dated 3 April 2001 entered into between the respondent, Lamistar, Debendo Pty Ltd and Dr Down, Lamistar assigned to Debendo its interest in the lease and the respondent consented to the assignment. Under the deed, Lamistar agreed that the assignment would not constitute a release of Lamistar from "any continuing liability" under the lease and Dr Down agreed to guarantee Debendo's obligations to the respondent under the lease and the deed.

[23] Debendo, now in liquidation, was incorporated on 13 March 2001. Dr Down caused his then de facto spouse to become its sole shareholder and director and caused it to conduct an endoscopy clinic and day surgery in the demised premises.

[24] Debendo defaulted in its obligations to pay rent and other outgoings under the lease and the respondent, on 9 December 2002, accepted Debendo's repudiatory conduct, terminated the lease and re-entered the demised premises. Debendo went into liquidation pursuant to a creditor's voluntary winding-up on 14 January 2003.

Proceedings at first instance

[25] The respondent commenced these proceedings on 12 June 2003 against the appellant and second defendant claiming moneys owing under their guarantee, interest and costs. A notice of intention to defend and defence were filed by the appellant and the second defendant. The respondent was then successful in obtaining summary judgment on 27 August 2003 against the appellant for the sum of $17,596.16, together with interest of $2,256.17 and for damages to be assessed in respect of the period subsequent to 10 December 2002. The appellant was ordered to pay the respondent's costs of and incidental to the action. The application against the second defendant was dismissed and she was given leave to defend.

[26] The appellant appealed against the orders made on 27 August 2003 and the respondent appealed against that part of the order giving the second defendant leave to defend.

Grounds of appeal no 8429 of 2003

[27] The grounds relied on by the appellant on the hearing of the appeal were as follows –

1. The respondent represented to the appellant after the giving and taking of possession, and without any apparent reasonable basis, that the respondent would pursue Dr Down (a person of apparent substance) before ever pursuing the appellant in respect of defaults under the lease, thereby misleading the appellant into giving up possession in favour of Dr Down. Had the appellant not given up possession, Lamistar could have continued to conduct its businesses profitably or secured another person to do so "under proper indemnity terms."
2. The appellant, to the knowledge of the respondent, understood that Dr Down had agreed to indemnify him and Lamistar against the obligations to the respondent of the assignee as and from the taking of possession of the demised premises by the assignee. The appellant proceeded with the assignment on the mistaken understanding, known to the respondent, that Dr Down was agreeing to indemnify him and Lamistar against such obligations. Those matters constitute an arguable case of misleading and deceptive conduct by the respondent entitling the appellant to relief under s 87 of the *Trade Practices Act*.
3. Even if, contrary to the appellant's submission, the primary judge did not err in giving summary judgment, he erred in not giving the appellant unconditional leave to defend.

[28] On the hearing of the appeal the appellant abandoned his ground of appeal based on the alleged unlawfulness of the lease through lack of the subdivisional approval allegedly required by operation of the *Local Government (Planning & Environment) Act* 1990.

The first ground of appeal

[29] The argument advanced on appeal was advanced at first instance but not accepted. The learned primary judge concluded that the representation, as a matter of construction, did not bear the meaning attributed to it by the appellant. The alleged representation or promise is contained in a letter of 14 July 1999 from the respondent to the appellant, which relevantly states –

> "I have just discovered that you have actually vacated the above premises and that Dr Roger Downs [sic] has 'done the deal' with you.
>
> You should be aware that you continue to be liable under the lease and technically speaking by allowing someone else into possession you are in breach of the lease.
>
> My solicitor, Annie O'Connor has been speaking to Norm Weeks the accountant for Dr Downs [sic] who has advised that you have agreed, subject to my consent of course, that the lease of the premises will be assigned to a company related to Mr Weeks and/or Dr Downs [sic] and that you are to be released from all obligations under the existing lease.
>
> Chris I would like to be of assistance to you on this occasion, but all indications are that the assignee of the lease (or the new lessee as the case is to be) is a $2 company and that the only bank guarantee may be available for a limited time. I will therefore not be able to release

> you but *in the event of default would obviously call on any bank guarantee or personal guarantees of the assignee first …*". (emphasis added)

[30] At the date of the letter, possession of the demised premises had already been given to the intended assignee Bondloa or, perhaps, Dr Down. It may thus be doubted that the appellant was in a position to reverse the transactions with Bondloa and Dr Down and, in consequence, that the representation had any causative effect.

[31] But, in my view, the primary judge's construction of the letter was correct. A statement that a creditor will "call on" a particular guarantee or guarantor ("the first guarantor") before pursuing another guarantor of the debtor's obligations in normal parlance means that demand will be made on the first guarantor under its guarantee before any demand is made on the other guarantor under its guarantee.

[32] It may be arguable, perhaps, that it is implicit in the words that an appropriate time will be allowed for that guarantor to make payment, but I can see no justification for construing the words as meaning "make demand on and pursue to judgment and execution". It was not suggested that the subject words had a special meaning because of the particular context in which they were used.

[33] It was submitted, however, that the primary judge erred in construing the words objectively rather than treating the alleged misrepresentation as "an entirely subjective question". No authority for this proposition was cited and it is inconsistent with authority. The test to be applied is objective but regard must be had to what a reasonable person in the representee's circumstances and with the representee's education and relevant experience would understand by the representation.[1]

[34] Even if, which I do not accept, the words under consideration could be understood to mean that the respondent, before recovering against the appellant, would commence and pursue to judgment proceedings against Dr Down, the appellant has no basis for claiming relief. Judgment was given against Dr Down on his guarantee in favour of the respondent prior to the hearing of the respondent's summary judgment application against the appellant. It is thus difficult to see what remedy a court could have given the appellant even if there had been a finding of misleading and deceptive conduct.

The second ground of appeal

[35] This ground also suffers from the difficulty that Lamistar, having entered into the agreements with Dr Down and Bondloa described above, may not have been in a position to avoid proceeding with the assignment of lease despite a refusal by Dr Down to provide a guarantee of the assignee's obligations. More importantly though, there is no evidence that the respondent was aware that the appellant proceeded with the assignment of lease in the mistaken belief that Dr Down had provided an indemnity. The respondent had solicitors acting for him in the subject transactions. Lamistar also had legal representation and it may be inferred that this was known to the respondent. The measures the appellant might take to protect his interests were of no concern to the respondent and there is no reason why the

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[1] Cf *Campomar Sociedad, Limitada v Nike International Limited* (1999) 202 CLR 45 at 83-87 and the authorities there discussed.

respondent would have averted to such matters. On the appellant's own case, he was unaware that Dr Down had not provided an indemnity until he changed solicitors after the assignment had been effected. That assists in illustrating the tenuous nature of the appellant's contentions in this regard.

[36] In order to infer knowledge on the part of the respondent that the appellant was proceeding on the understanding that an indemnity had been given by Dr Down, Mr Savage SC, who appeared for the appellant, referred to the following paragraph in a letter dated 8 September 1999 from the respondent's solicitors to Lamistar's solicitors –

> "As we have discussed previously, it is highly unusual for a lessor to release an assignor or any guarantees under a lease. It is also the usual commercial practice for an assignee (if it is a company) to provide guarantees not only in favour of the lessor but also in favour of the assignor in respect of the assignees obligations."

[37] The letter, however, when read in its entirety is far from supportive of the appellant's position. It asserts that the respondent "strongly requested" the appellant to appoint a solicitor so that the appellant "could be fully appraised of the normal commercial dealings in matters of this nature". It expresses surprise that Lamistar should be requesting a release from its obligations "especially when Dr Downs [sic] has advised he is unable to give a guarantee in any case". Furthermore, it reaffirms the respondent's position that if Lamistar "wishes to assign its interests in the lease" it "must bear the risk".

[38] The appellant swears that his solicitor did not discuss "these matters" with him. That appears to be a reference to the lengthy passage from the letter of 8 September quoted above. But as Mr Savage conceded in argument, the respondent could hardly be expected to know of the lack of communication between the appellant and his solicitors.

[39] Another matter relied on by the appellant is the respondent's alleged knowledge of the term in the business sales documents that "New will arrange to indemnify Old against all further lease and rental payments from 30th June 1999". The argument proceeds on the assumption that "New" includes reference to Dr Down. But "New" is defined in the documents as "Bondloa". It is difficult to see why the respondent should have understood from these documents, assuming he ever saw them, which is doubtful, that the appellant understood that Dr Down was providing an indemnity to Lamistar. The letter of 8 September indicates to the contrary.

[40] In the normal course of commercial dealings at arms length, such as those under consideration where lessor and lessee have separate legal representation and conflicting interests, it may be thought unusual that one party would have an expectation that the other would alert it to any legal deficiencies or weaknesses which the other party may perceive in the first mentioned party's documentation. Nor would a party normally come under an obligation to disclose any such information or perception.[2]

[41] In this case, even if the respondent had become aware of the full extent of the dealings between Dr Down and the appellant, no facts exist which would have given rise to a reasonable expectation on the part of the appellant that the respondent

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[2] See eg. *Lam v Austintel Investments Australia Pty Ltd* (1989) 97 FLR 458 per Gleeson CJ at 475.

would alert the appellant to a deficiency in the appellant's documentation of the nature of that under consideration. Nor do the facts point to any obligation on the respondent to make disclosure. It is thus difficult to see how failure to alert the appellant to the non-existence of the guarantee could be misleading or deceptive.[3] Apart from any other consideration, the respondent was entitled to conclude that the appellant's solicitors were well aware of the full legal and factual position and were acting in a considered manner.

The third ground of appeal

[42] It was contended that the primary judge erred in not giving unconditional leave to defend "such as to protect the defendant's right to pursue not only his counterclaim but any such amended claim as he might has been [sic] able to formulate".

[43] At first instance and on the hearing of the appeal, the appellant identified the matters relied on to ground his defence as being the only matters relied on to support his counterclaim. Consequently, a finding (in effect) that there was no real prospect of successfully defending all or part of the respondent's claim and that there was no need for a trial of the claim or part of it made it inappropriate that the defendant be given leave to defend. The giving of leave would have been inconsistent with the finding. Mr Savage referred to *Commonwealth Bank of Australia v Muirhead*.[4] In it the Court of Appeal upheld an order at first instance giving summary judgment but gave the appellant defendants leave to amend their defence. It does not emerge from the reasons why this course was taken but there is, perhaps, an indication in the reasons of McPherson JA[5] that he wished to leave it open to the appellants to properly formulate and pursue a claim against the respondent mortgagee for sale of the subject mortgaged premises at under value. Nothing in his reasons or in the reasons of other members of the court, however, casts doubt on the proposition that where on the hearing of a summary judgment application, the court is satisfied in terms of r 293(2) of the *Uniform Civil Procedure Rules* and gives summary judgment which disposes of the whole of the claim, the giving of leave to defend would normally be unjustifiable.

[44] The prospect that the order at first instance might give rise to an estoppel of the type discussed in *Port of Authority v Anshun Pty Ltd*,[6] could hardly justify the giving of leave to defend. It had been found that the defences were without substance and the possibility that, given time, the respondent might hit upon a better argument did not improve his position. On the hearing of a summary judgment application, it is incumbent on the respondent who wishes to raise a ground of defence to demonstrate "a real prospect of succeeding" on it or that, in relation to it, there is "need for a trial".

[45] As a general proposition, a defendant must "condescend upon particulars" in order to demonstrate the arguability of the defence advanced.[7] Plainly, a respondent to a summary judgment application cannot, as the respondent seeks to do, show the need

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3 Cf *Demogogue Pty Ltd v Ramensky* (1992) 39 CLR 31 at 40, 41.
4 [1997] 1 Qd R 567.
5 At 579.
6 (1981) 147 CLR 589.
7 *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 704; *Moscow-Narodny Bank Ltd v Mosbert Finance (Aust) Pty Ltd* [1976] WAR 109; and *Hunt v Knabe (No 2)* (1992) 8 WAR 96 at 102, 103.

for a trial or real prospects of succeeding on all or part of the applicant's claim by speculating about the possibility of a defence emerging.

[46] For the above reasons, the appellant has failed to show any error in the primary judge's exercise of discretion and I would order that the appeal be dismissed with costs.

Appeal no 11260 of 2003

[47] The primary judge, reluctantly, found the existence of a triable issue on the part of the respondent on her contention that it would be unconscionable to enforce the guarantee against her by application of the principles enunciated in *Garcia v National Australia Bank Ltd.*[8]

[48] The argument advanced by Mr Jackson QC, on behalf of the appellant plaintiff in this appeal was that, having regard to the particular facts of the case, there was no obligation on the appellant to either explain the terms of the guarantee or to be satisfied that appropriate explanation of such terms had been given.

[49] In *Garcia,* following *Yerkey v Jones*[9] the Court considered the circumstances in which it would be unconscionable for a creditor to enforce a guarantee against a wife where the wife was, in fact, a volunteer and the execution of the guarantee was procured by her husband.

[50] Dixon J, in *Yerkey v Jones*, discussed two types of case. The first is one in which there is actual undue influence by a husband over the wife, "in that the wife, lacking economic or other power, is overborne by her husband and goes surety for her husband's debts when she does not bring a free mind and will to the decision".[10] 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".[11] The latter type of case, it was said, is not so much concerned with imbalances of power as with lack of proper information about the purported effect of the transaction.

[51] In respect of the second class of case, Dixon J said - [12]

> "In the second case, that where the wife agrees to become surety at the instance of her husband though she does not understand the effect of the document or the nature of the transaction, her failure to do so may be the result of the husband's actually misleading her, but in any case it could hardly occur without some impropriety on his part even if that impropriety consisted only in his neglect to inform her of the exact nature of that to which she is willing blindly, ignorantly or mistakenly to assent. But, where the substantial or only ground for impeaching the instrument is misunderstanding or want of understanding of its contents or effect, the amount of reliance placed by the creditor upon the husband for the purpose of informing his wife of what she was about must be of great importance.

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8 (1998) 194 CLR 395.
9 (1939) 63 CLR 649.
10 *Garcia v National Australia Bank Ltd (supra)* at 405.
11 *Garcia v National Australia Bank Ltd (supra)* at 404.
12 At 685-686.

> If the creditor takes adequate steps to inform her and reasonably supposes that she has an adequate comprehension of the obligations she is undertaking and an understanding of the effect of the transaction, the fact that she has failed to grasp some material part of the document, or, indeed, the significance of what she is doing, cannot, I think, in itself give her an equity to set it aside, notwithstanding that at an earlier stage the creditor relied upon her husband to obtain her consent to enter into the obligation of surety. The creditor may have done enough by superintending himself the execution of the document and by attempting to assure himself by means of questions or explanation that she knows to what she is committing herself. The sufficiency of this must depend on circumstances, as, for example, the ramifications and complexities of the transaction, the amount of deception practised by the husband upon his wife and the intelligence and business understanding of the woman. But, if the wife has been in receipt of the advice of a stranger whom the creditor believes on reasonable grounds to be competent, independent and disinterested, then the circumstances would need to be very exceptional before the creditor could be held bound by any equity which otherwise might arise from the husband's conduct and his wife's actual failure to understand the transaction. If undue influence in the full sense is not made out but the elements of pressure, surprise, misrepresentation or some or one of them combine with or cause a misunderstanding or failure to understand the document or transaction, the final question must be whether the grounds upon which the creditor believed that the document was fairly obtained and executed by a woman sufficiently understanding its purport and effect were such that it would be inequitable to fix the creditor with the consequences of the husband's improper or unfair dealing with his wife."

[52] The joint judgment in *Garcia*[13] points out that Dixon J's analysis of the second kind of case 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."

[53] Their Honours then explain how unconscionability occurs –

> "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 not know that a third party has done so, would be unconscionable."

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13 At 409.

[54] In the second class of case, the only question of notice that arises is whether the creditor knew at the time of the taking of the guarantee that the surety was then married to the debtor. In such cases, the majority concluded by reference to *Yerkey v Jones* –

> "If the creditor itself explains the transaction sufficiently, or knows that the surety has received 'competent, independent and disinterested' advice from a third party, it would not be unconscionable for the creditor to enforce it against the surety even though the surety is a volunteer and it later emerges that the surety claims to have been mistaken."[14]

[55] Mr Jackson QC argued that in this case "no equity [to set aside the transaction] is raised" and the appellant creditor had no obligation to be satisfied that the guarantee had been appropriately explained. The foundation of the argument was that the respondent, being a director and shareholder of Lamistar, was not a volunteer and that one of the necessary bases of unconscionability under the principles stated in *Garcia* was therefore lacking. This point does not appear to have been argued at first instance. There, the counsel who appeared for the appellant argued that the appellant had a reasonable basis for believing that the defendants were the recipients of competent independent legal advice. That line of argument was not pursued on appeal, owing no doubt to its lack of evidentiary support.

[56] But the question of whether a guarantor is a volunteer is not, necessarily, determined conclusively by the examination of legal rights and interests. In *Garcia*, for example, the plaintiff guarantor, together with her husband, was a director and shareholder of the debtor company. The trial judge found that the company was the creation of the plaintiff's husband who exercised complete control of it. The finding that the plaintiff was, in consequence, a volunteer was not disturbed by the High Court.

[57] The respondent swore that she was: of Asian descent, Chinese speaking and unfamiliar with documents of the nature of those under consideration. She also swore that she did not read the subject documents; that they were not explained to her; and that she received no advice about them. She also gave the following evidence –

> "I am not aware of gaining any personal benefit by signing the Documents. I have been informed by my husband and verily believe that the documents relate to the Specialist Centre Business which was a failure. But whether it failed or not I gained no advantage from the business."

[58] She had earlier sworn that she was not involved in the Specialist Centre Business, that it was her husband's venture and that he looked after it without reference to her. The first defendant swore that his wife was not involved with the medical centre and endoscopy clinic.

[59] That evidence, if accepted and charitably construed, might support a finding that the respondent was a volunteer. Moreover, the application of the principles under discussion is best decided on the basis of facts found after appropriate examination and analysis of relevant facts, circumstances and relationships.

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[14] *Garcia* at 411.

[60] In order to succeed, the appellant must show that the primary judge's exercise of his discretion miscarried. Plainly, it did not on the arguments advanced to him. I am not persuaded either that the new argument advanced on appeal on behalf of the appellant discloses an error in the exercise of the primary judge's discretion or the absence of a real prospect of defending the respondent's claims.

[61] I would dismiss the appeal with costs.

[62] **MULLINS J:** I agree with the reasons for judgment of Muir J and that both appeals should be dismissed with costs.