

SUPREME COURT OF QUEENSLAND

CITATION: *AAGT Private Loans Pty Ltd v Ferguson & Anor* [2009] QSC 113

PARTIES: **AAGT PRIVATE LOANS PTY LTD A.C.N. 129 631 410**
(plaintiff)

v

ROBERT JOHN FERGUSON

(first defendant)

DERELLE LISA FERGUSON

(second defendant)

ROBDELL TASMANIA PTY LTD A.C.N. 126 656 988

(first plaintiff by counterclaim)

ROBERT JOHN FERGUSON AND DERELLE LISA FERGUSON

(second plaintiffs by counterclaim)

AAGT PRIVATE LOANS PTY LTD A.C.N. 129 631 410

(first defendant by counterclaim)

GRANT PATRICK THOMPSON

(second defendant by counterclaim)

FILE NO/S: 12058/08

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING COURT: Brisbane

DELIVERED ON: 12 May 2009

DELIVERED AT: Brisbane

HEARING DATE: 30 April 2009, 1 May 2009, 6 May 2009

JUDGE: A Lyons J

ORDER:

CATCHWORDS: REAL PROPERTY – TORRENS TITLE – INSTRUMENTS GENERALLY – ATTESTATION AND EXECUTION – EXECUTION UNDER POWER OF ATTORNEY – where letter of offer expressly excluded the taking of security over property

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – HARSH AND UNCONSCIONABLE CONTRACTS AND STATUTORY REMEDIES – where plaintiff sought to execute Power of Attorney clause over defendants' home

EQUITY – UNCONSCIONABILITY – whether first and second defendant were at a special disadvantage as against the plaintiff – whether the plaintiff had an unfair advantage as against first and second defendant

Australian Securities and Investment Commission Act 2001 (Cth), s 12CB

Evidence Act 1977 (Qld), s 92

Land Title Act 1994 (Qld)

Powers of Attorney Act 1998 (Qld), ss 10, 66

Trade Practices Act 1974 (Cth), ss 51AA, 52, 82

Commercial bank of Australia v Amadio (1983) 151 CLR 447, considered

Equuscorp v Glengallan Investments Pty Ltd 218 CLR 471, considered

Williams v Turner [2008] QSC 327, followed

COUNSEL: Mr P Travis for the plaintiff
Mr S Shearer for the defendants

SOLICITORS: Elliott May Lawyers for the plaintiff
Piper Alderman for the defendants

A LYONS J:

Background

- [1] The first defendant, Robert John Ferguson (Mr Ferguson) and the second defendant, his wife, Derrelle Lisa Ferguson (Mrs Ferguson) were involved in a development of a property at Macrae Street, Ipswich (the Development). The development property had been purchased for \$735,000 in July 2007, by their company Robdell Pty Ltd and their business partner Bob Pierce's company SWSWSW Pty Ltd, as trustees of the Ipswich Innovations Trust. The purchase price of the property had been provided by Robdell, in an amount of \$340,000, with an amount of \$25,500 provided by SWSWSW and a loan of \$421,353, which they had obtained from their mortgage broker Solutions Finance.
- [2] The development was stalled, pending development approval from the Ipswich City Council. Additional funds were also required, to relocate a house and to complete the property subdivision project. The proposed project involved the subdivision of the residential property block from four lots into six, the relocation of the house and then the sale of the subdivided blocks.
- [3] On 21 April 2008, the plaintiff, AAGT Private Loans Pty Ltd (AAGT) sent a letter of offer of short-term bridging finance, to various joint borrowers, including the Fergusons. The loan was essentially a refinancing arrangement, which would enable the borrowers to pay out the existing loan and also obtain the extra funds required for the development.
- [4] The Fergusons are the registered proprietors of a property in which they reside at 99 Huntingdale Drive, Coalfalls (the residence) and another property situated at 74 Huntingdale Drive, Coalfalls, which is an investment property (the investment). The letter of offer required a registered first mortgage over the development property at Macrae Street and a registered second mortgage over the Fergusons' investment and a property owned by Robert Pierce, who was the sole director of SWSWSW. The letter

of offer referred to security documents and advised that AAGT would prepare the “required documents in relation to the Facility”.

- [5] AAGT required all of the borrowers, including the Fergusons, to obtain independent legal advice. AAGT received a signed certificate of independent legal advice, dated 30 April 2008, from the defendants prior to the execution of the Mortgage Memorandum. The Mortgage Memorandum was a 38 page document, which incorporated five documents namely:
1. Mortgage;
 2. Loan;
 3. Power of Attorney;
 4. Guarantee; and
 5. Charge.
- That documentation was signed by all the borrowers on 30 April 2008. A Form 2, mortgage number 711703347, between AAGT and the Fergusons, securing the loan over the land which was the site of the Development, was executed on 30 April 2008 and was registered by Hartwell Lawyers on 5 June 2008. That document referred to the Mortgage Memorandum as containing the standard terms.
- [6] On 12 May 2008, AAGT advanced the amount of \$678,758 to the various borrowers, including the defendants. AAGT is managed and directed by Grant Patrick Thompson (Mr Thompson), who is a licensed financial planner and finance broker. He holds several qualifications, including a Diploma of Financial Planning and a Diploma of Financial Services, majoring in Financial Broking.¹
- [7] The Fergusons defaulted under the mortgage on 12 June 2008 and as a result, AAGT caused the powers of attorney to be registered on 11 August 2008. This was done in accordance with the Powers of Attorney provisions contained in the Mortgage Memorandum. The ‘Requests to Register Power of Attorney’ documents, identified the Fergusons as the donors and Mr Thompson as the donee of the power.
- [8] The borrowers, including the Fergusons, continued in default throughout August 2008. When the borrowers were still in default of the mortgage on 5 September 2008, Mr Thompson, acting as the attorney pursuant to those documents, used the Powers of Attorney to register additional mortgages over the Fergusons’ residence and investment properties at 74 Huntingdale Drive and 99 Huntingdale Drive.
- [9] On 4 October 2008, the Development was sold at auction and the net proceeds were applied to the outstanding principal owed to the lender by the borrowers under the mortgage. As of the date of these proceedings, the borrowers remain in default of the original mortgage and the Fergusons in particular, remain in default of the additional mortgages. The amount of \$286,490 is still outstanding on the original loan.² The defendants remain in possession of the residence and the investment property.

Orders sought by the plaintiff

- [10] The plaintiff, by its claim filed on 24 November 2008, seeks judgment on the amount outstanding under the AAGT loan, being the sum of \$226,584, for the principal and interest at the rate of 48 per cent per annum and an order for possession with respect to both properties.

¹ Transcript Day 1 p 25 ll 24-27.

² Transcript Day 1 p 37 l 57.

- [11] The plaintiff claims that the lender's interest under the mortgage and additional mortgages on registration is an interest in land, to which the indefeasibility provisions of the *Land Title Act* 1994 apply. The plaintiff submits that, when a mortgagor defaults in the payment of principal or interest owing under a registered mortgage, the law relating to when the mortgagee may obtain possession is relatively clear and that, a mortgagee may obtain possession of the mortgaged lot, by proceeding through a court of competent jurisdiction.

Defence and counterclaim

- [12] By way of defence and counterclaim, the defendants seek to have the additional mortgages set aside on the basis that the exercise of the Powers of Attorney to register those mortgages was in breach of the Attorney's fiduciary duties and was unconscionable. Damages for breach of fiduciary duty, under s 82 of the *Trade Practices Act* are also sought.
- [13] The Fergusons submit that AAGT's claim should fail on two grounds:
- (a) properly construed, the mortgage does not permit AAGT to use the Powers of Attorney to register the additional mortgages over the properties; and
 - (b) AAGT entered into the mortgage in reliance on a representation that Mr Thompson, who is a director of AAGT, would obtain long-term financing which was ultimately never obtained.
- [14] AAGT submit however, that:
- (a) the mortgage allowed it to use the Powers of Attorney to register the additional mortgages, once the Fergusons had defaulted on the loan; and
 - (b) the reliance on the representation of Mr Thompson raises an equitable set-off, which cannot be used to restrain AAGT's right to possession of the properties.

The letter of offer

- [15] In order to understand the various claims which are made, it is necessary to consider in some detail, the letter of offer dated 21 April 2008 and the factual background to the making of the offer.
- [16] The earlier loan agreement, which Mr Ferguson and the other borrowers had previously entered into through their finance broker Solutions Finance, had been with Jheeta Homes Pty Ltd (Jheeta). Mr Thompson was also the "sole Governing Director"³ of Jheeta.⁴ The borrowers, under that loan, had fallen into default essentially because there were delays in obtaining development approval for the Development. The borrowers also had another (first) mortgage with a company called Ascent Home Loans. Mr Thompson was aware of this and stated that the AAGT letter of offer⁵ was to repay Ascent Home Loans' first mortgage, as well as the Jheeta Homes' second mortgage. This seems to be because the borrowers were in default of the Jheeta Homes' mortgage and Mr Thompson deemed it appropriate to refinance the loan. He stated:

³ Transcript Day 1 p 27 l 34.

⁴ Exhibit 14.

⁵ Exhibit 1.

“...from my memory, the management of the Jheeta home loans was suffering - they were in default, they were in arrears. Representations from Bob Pierce were that development approvals were coming through any day on the site.

Rob Ferguson was telling me the same thing. Both parties were also telling me that they had re-finance coming through from their finance broker, Solutions Finance, any day.”

[17] On 21 April 2008, AAGT sent the letter of offer to the following joint-applicants for financing (the borrowers):

- (a) Robert William Pierce
- (b) Maryanne May Morden-Pierce
- (c) SWSWSW Pty Ltd
- (d) Robert John Ferguson
- (e) Derrelle Lisa Ferguson and
- (f) Robdell Tasmania Pty Ltd, of which the Ferguson's are directors.

[18] The letter of offer sets out the terms of the loan and each paragraph is initialled by the borrowers:



Letter of Offer

Monday, 21 April 2008

Robert William Pierce and Maryanne May Morden-Pierce and SWSWSW Pty Ltd I.I.O.R & as Trustee for Pierce Family Trust and Ipswich Innovations Unit Trust Number One and Robert John Ferguson and Derrelle Lisa Ferguson and Robdell Tasmania Pty Ltd I.I.O.R & as Trustee for Ferguson Family Trust and Ipswich Innovations Unit Trust Number One.
C/- 75 Williams Street
Coalfields QLD 4305

Dear Sirs,

“ST sub500” BRIDGING LOAN PRODUCT

Congratulations! We have today received your loan application and are pleased to advise that your application for a Short Term Bridging loan has been approved.

AAGT Private Loans ptl (“AAGT”) will advance to you the sum of Six Hundred and Fifty Thousand Australian Dollars (\$650,000). (The “Offer Amount”).

The terms & conditions of this Facility are:

(A) The Facility shall be secured by a registered first mortgage over the property situated at 28 Macrae Street, Coalfields, QLD 4305, and a registered second mortgage over: 75a Williams Street West, Coalfields, 4305 and 74-80 Huntingdale Drive, Greenbank, 4124 ~~in favour of the Lender. The Lender shall be AAGT Private Loans ptl.~~ *RP. JLF*

(B) The total Principal Sum to be advanced will be \$678,758, which is calculated as follows:

(C)	The Offer Amount	\$650,000
	Loan Approval Fee	\$8,000
	Administration Fee	\$650
	Document preparation fee	\$3,300
	Allowance for Outlays & Searches	\$400
	Allowance for Registration Fee - Mortgage	\$448
	Monthly Interest (First Month is Capitalised)	\$13,258
	Stamp Duty on Mortgage	\$2,704
	TOTAL	\$678,758

(D) The Repayment Date of the Facility shall be six (6) calendar months from the date of the Principal Sum being advanced.

NO EXIT FEES →

(E) In the event you elect to make an early repayment of the Principal Sum, you are required to provide one (1) business days notice to AAGT. Interest paid for any given period in excess of the early repayment date is non-refundable. There are no other interest costs payable in connection with an early repayment.

(F) Your stated purpose for this loan is to provide additional funds to relocate a house and to complete a property subdivision project.

(G) Your stated Exit Strategy for this loan is to revalue and refinance property once you have moved a second house onto the block.

(H) The Interest Rate (Default Rate) on the Facility shall be 4% per Month, but for timely and prompt payment (for example payments made before or on the due date for any month) this will decrease to 2% per Month (“Discount Rate”).

Please initial each box in prove your understanding and acceptance

- [19] The borrowers, including the Fergusons, accepted the letter of offer on 22 April 2008 by initialling, signing and returning the offer to AAGT as indicated above. AAGT submits that by signing and initialling these documents, the Fergusons indicated that they understood and accepted the following terms:
- “(F) Your stated purpose for this loan is to provide additional funds to relocate a house and to complete a property subdivision project;
- (I) We confirm & acknowledge that we are entering into this bridging loan agreement on the express understanding that AAGT and its associated entities, in particular Aaron Tait Mortgage Finance p/l, have NOT promised, guaranteed or implied in any way or manner that they can or will obtain a successful refinance for me/us.”⁶
- [20] The defendants submit that, the black line that is ruled through part of paragraph (A) of the letter of offer⁷ is their clear advice to AAGT that their residence at 99 Huntingdale Drive was never to be used as security under the mortgage.
- [21] The documentation shows that, the Fergusons attended the offices of Morrisons Lawyers on 30 April 2008 and executed a Legal Advice Acknowledgment Certificate,⁸ concerning the nature and effect of both the loan and security documents. AAGT submit that, by attending the solicitor’s office and signing the certificate, the Fergusons understood that the loan would not be made to them, unless they sought independent legal advice, which they clearly obtained from Morrison’s Lawyers. It is accepted that the firm was recommended to them by their business partner, Mr Pierce and the firm was not acting for AAGT in any way.
- [22] Mr and Mrs Ferguson gave evidence at the hearing and stated that they spoke with a solicitor, Graham Morrison, for about 20 to 30 minutes, but that the advice related to interest payments.⁹ They indicated that the solicitor did not explain the mortgage to them in any great detail and completely failed to advise them about the effect of the power of attorney provisions. It is clear that the Fergusons and the other borrowers executed the mortgage, schedule and standard terms on 30 April 2008, which was the same day that they had attended the office of Morrisons Lawyers.

The arguments

- [23] The defendants essentially raise three issues that need to be addressed, namely:
1. Misleading and Deceptive Conduct by AAGT as prohibited by s 52 of the *Trade Practices Act 1974* (Cth).
 2. Unconscionable conduct by AAGT as prohibited by s 51AA of the *Trade Practices Act 1974* (Cth).
 3. Breach of fiduciary duties by Mr Thompson, in the exercise of his powers as an attorney, over the defendants’ financial affairs.

⁶ Exhibit 1 paragraphs (E) & (J).

⁷ Exhibit 1.

⁸ Exhibit 14.

⁹ Transcript Day 2 p 80 l 38.

The misleading and deceptive conduct argument

[24] Section 52 of the *Trade Practices Act* provides as follows:

“52 Misleading or deceptive conduct

- (1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).”

[25] The defendants argue that AAGT, through its agent Mr Thompson, made misleading and deceptive representations, which induced them to enter into the loan as follows:

- (a) the representation to their business partner Mr Pierce, that AAGT would refinance the loan at the standard variable rate, following the approval of the development application- ‘The Cheap Finance Representation’.
- (b) the representation that the defendants’ home would not form part of the security for the loan, by agreeing to the deletion of that property from the list of properties listed as securities on the letter of offer- ‘The Letter of Offer Representation’.
- (c) the representation, made in express terms in mortgage document 711703347 at (k), that there was to be no collateral mortgage and at (p) and (q) that there were to be no damages for early or late repayment- ‘The Documentary Representation’.
- (d) the failure to inform the defendants that Jheeta was in liquidation at the time the funds were paid to Jheeta.

Unconscionable conduct argument

[26] The defendants also submit that they were under a special disability in dealing with Mr Thompson in relation to the loan. They claim that this disability was sufficiently evident to Mr Thompson and as a result the loan should never have been advanced to them.

[27] The defendants rely on the unconscionability doctrine, as outlined in *Commercial Bank of Australia v Armadio*¹⁰, which involved the knowing exploitation by one party of a special disadvantage of another in dealing between them.¹¹

[28] Turning to the relevant provisions of the *Trade Practices Act* 1974 (Cth). Section 51AA provides:

“51AA

Unconscionable conduct within the meaning of the unwritten law of the States and Territories

- (1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.”

¹⁰ (1983) 151 CLR 447.

¹¹ *Commercial Bank of Australia v Armadio* (1983) 151 CLR 447, 461 per Mason J.

[29] Section 12CB of the *Australian Securities and Investment Commission Act 2001* (Cth) further provides that:

“12CB

Unconscionable conduct

- (1) A person must not, in trade or commerce, in connection with the supply or possible supply of financial services to a person, engage in conduct that is, in all the circumstances, unconscionable.
- (2) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the *supplier*) has contravened subsection (1) in connection with the supply or possible supply of services to a person (the *consumer*), the court may have regard to:
 - (a) the relative strengths of the bargaining positions of the supplier and the consumer; and
 - (b) whether, as a result of conduct engaged in by the supplier, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
 - (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the services; and
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the services; and
 - (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent services from a person other than the supplier.
- (3) A person is not taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of financial services to another person merely because the person:
 - (a) institutes legal proceedings in relation to that supply or possible supply; or
 - (b) refers a dispute or claim in relation to that supply or possible supply to arbitration.
- (4) For the purpose of determining whether a person has contravened subsection (1) in connection with the supply or possible supply of financial services to another person:
 - (a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
 - (b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.
- (5) A reference in this section to financial services is a reference to financial services of a kind ordinarily acquired for personal, domestic or household use.”

[30] The defendants submit that Thompson's conduct was unconscionable in the following respects:

- (1) He registered the power of attorney, in circumstances where the provisions of the Memorandum to the Mortgage were designed to exclude the operation of statute law and were intended solely for the benefit of Mr Thompson as attorney, rather than the defendants as principals.
- (2) The exercise of his powers, under the power of attorney, to register a mortgage over property, which he specifically knew had been excluded by the principals, was a breach of his fiduciary duties and his statutory obligations to act in the best interests of the principals.

Mr Pierce's evidence

[31] Mr Robert Pierce was a co-signatory to the AAGT loan. Mr Pierce stated that he has formal education up to the end of primary school and that he left school when he was 12.¹² He has been primarily a truck driver since he left school and retired from that occupation at around 49 years of age. Following that, Mr Pierce was a real estate salesman and more recently he has been renovating and selling single homes and he stated that he has also completed one other subdivision.¹³ He is also a shareholder and a director of a company called SWSWSW Pty Ltd.

[32] Mr Pierce's evidence was that in all of his previous transactions he had borrowed finance to purchase the houses.¹⁴ However, he stated that although he was provided with mortgage documentation he never read it, nor did he ever seek independent legal advice with regards to signing mortgage documents.¹⁵ He also stated that it was Mr Ferguson who handled the money side of the agreement.

[33] Mr Pierce met the Fergusons in 2006, when Mrs Ferguson cleaned his house.

Mrs Ferguson's evidence

[34] Mrs Ferguson is the second defendant and the wife of Mr Ferguson. She stated that she left school after the end of Year 10 in Tasmania. Mrs Ferguson runs her own cleaning business called "Triple D Cleaning." Whilst she owns and runs her own business which employs other people, she stated that it is her husband Robert who handles all the financial affairs in the family.¹⁶

[35] Mrs Ferguson's testimony was that she did not read any of the documents that she signed and only signed what her husband told her to sign. In fact, she states she does not even remember signing the actual mortgage document at all. She vaguely remembered going to see the solicitor, but could not remember anything that was said at the meeting. However, she recalls being told that Mr Thompson was definitely going to get them another loan with normal bank interest rates.¹⁷

¹² Transcript Day 2 p 31 l 20.

¹³ Transcript Day 2 p 32 l 3-5.

¹⁴ Transcript Day 2 p 32 l 40-45.

¹⁵ Transcript Day 2 p 33 l 1-10.

¹⁶ Transcript Day 2 p 66 ll 11-12.

¹⁷ Transcript Day 2 p 69 ll 38-40.

The evidence of Mr Ferguson

- [36] Mr Ferguson described himself as a truck mechanic/driver. He said he left school in Victoria at the end of Year 9 when he was 16 years old and has been working since then.¹⁸ He said that he had never worked in finance but has owned several houses, including his current home on which mortgages have been placed by other lenders.

Special disadvantage?

- [37] The defendants place particular reliance on the unconscionability doctrine, as outlined in *Commercial Bank of Australia v Armadio*.¹⁹ However, that judgment makes it clear that the disabling circumstances or condition must be ‘special’ in the sense that it “seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstances and of its effect on the innocent party.”²⁰
- [38] Having considered the evidence, I do not consider that the defendants have established that they are under a special disadvantage. Mr and Mrs Ferguson each run their own business and they have both been involved in finance transactions previously. Indeed, Mr Pierce in his evidence indicated that he left all the finances to Mr Ferguson. The evidence also indicates that Mr Ferguson had obtained legal advice prior to the Jheeta loan and that the Jheeta mortgage covenants also contained power of attorney provisions which enabled Mr Thompson to register additional mortgages over any property owned by Mr Ferguson. This was not the first time therefore, that Mr Ferguson had been required to turn his mind to issues of this nature and it was not the first time he had received legal advice in relation to transactions of this nature. Furthermore, legal advice was obtained immediately prior to the execution of the documents and that advice was obtained at the office of a solicitor completely un-associated with the transaction.
- [39] Furthermore, I do not consider that, the fact that the defendants urgently required finance put them under a special disability, as submitted by their counsel. Clearly, Mr and Mrs Ferguson were not financial novices and I do not consider they indeed suffered any special disability or disadvantage as required by the *Amadio* principles. As Gibbs CJ stated:
- “A transaction will be unconscientious within the meaning of the relevant equitable principles only if the party seeking to enforce the transaction has taken unfair advantage of his superior bargaining power, or of the position of disadvantage in which the other party was placed. The principle of equity applies “whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affecting his ability to conserve his own interests and the other party unconscientiously takes advantage of the opportunity thus placed in his hands”: *Blomley v Ryan* per Kitto J.
- [40] Whilst I do not consider the defendants were suffering from a special or particular disadvantage, the alleged conduct may still constitute unconscionable or false and misleading conduct. Before considering whether the conduct of the plaintiff amounts

¹⁸ Transcript Day 2 p 73.

¹⁹ (1983) 151 CLR 447.

²⁰ *Commercial Bank of Australia v Armadio* (1983) 151 CLR 447, 462 per Mason J.

to unconscionable conduct, or whether there was false and misleading conduct on the part of the plaintiff, there are a number of factual matters on which I need to make findings before I can proceed. These findings relate to the various representations, which are alleged to have been made orally, in the letter of offer or in the documents.

The oral representation in relation to finance

[41] In relation to the ‘Cheap Finance Representation’, the circumstances surrounding the AAGT loan and the allegations in relation to refinancing were outlined in the evidence of Mr Thompson. He stated that:

“The agreement was - because the AAGT loan was, in effect, to refinance their existing first mortgagee, Ascent loans, as well as Jheeta, the borrowers, Pierce and Ferguson, represented to me that the payout figure was X dollars for Ascent homes. When we came to settle it transpired that the payout figure I was advised by Bob Pierce was in fact about \$14,000 shortfall. In addition to that, there were other rates that needed to be paid and other costs and sundries that he didn’t account for. That resulted in a shortfall in the AAGT refinance of some \$40,000. So what I did wearing my Jheeta hat was I agreed to accept - to allow settlement proceed on the basis that Jheeta Homes and the borrowers entered into an arrangement such that the \$40,000 was still owed by them to Jheeta but we put – they negotiated a clause in there saying if they paid that loan back within the next two months the outstanding amount of 40,000 would be halved to 20,000. Additionally, if they paid the loan out within the first two months there would be no interest charged at all. So basically Jheeta was saying, ‘Well, look, you owe me 40,000. We’ll give you two months to pay, interest-free, and if you do pay it in two months we’ll halve it to 20,000’. And if I can just say, the two month period was negotiated by them because Bob Pierce was representing to me that, ‘Oh, by then we’ll vary the development approval and, of course, the refinance, so there would be plenty of money to repay everyone’.”

[42] A 208 page Diary Note Report was tendered by the plaintiff’s counsel under s 92(1)(a) of the *Evidence Act 1977 (Qld)*.²¹ Mr Thompson has clearly kept detailed notes of every contact he has had with any of the borrowers. In particular, twice on 10 April 2008 Mr Thompson made notes concerning re-financing the loans. At 9:30 am Mr Thompson told Mr Pierce that he would “send him some documents in relation to possible re-financing”²² and at 3:39 pm he noted that he had spoken to a private lender, Mr Bob Goedhart who said that “he does not have the \$700k required for a refinance.”²³ Again, on the 24 April 2008, Mr Thompson spoke with Mr Pierce about refinancing and noted in his diary, “lets just wait for the approval from Council and then we’ll talk, he said fine”.²⁴ I accept the Diary Notes as a contemporaneous and reliable record of the events which transpired. In addition, Exhibit 19 is a fax from Mr Pierce to Mr Thompson, which was sent in June 2008, after the approval was obtained where he asks, “Could you please advise if refinance is a (*sic*) option with you people.”

²¹ Exhibit 13.

²² Exhibit 13 p 176.

²³ Exhibit 13 p 176.

²⁴ Exhibit 13 p 173.

- [43] On the basis of this evidence, which I accept, I do not consider there is any basis for the allegation that Mr Thompson made representations to the defendants in relation to providing future finance at the variable rate. I consider it is quite clear that further financing was to be considered at some time in the future, after the approval came through. Furthermore, the documentation makes it quite clear that no representations of refinancing had in fact, actually been made, as this is specifically mentioned at clause (I) of the letter of offer.²⁵ That clause provided that the bridging loan agreement was entered into, on the express understanding that AAGT and its associated entities, “have NOT promised; guaranteed or implied in any way or manner that they can or will obtain a successful refinance for me.” This clause was then specifically initialled by Mr Ferguson.
- [44] Neither am I satisfied that, the AAGT loan was entered into on the basis of any future promise. It is quite clear that the AAGT loan was accepted because it was in the borrowers’ interests that the Jheeta loan be refinanced, as it gave them more time for the development approval to come through and it allowed that loan to be paid out and the mortgage to be released.
- [45] I can therefore, find no basis for the defendants’ submission that they were induced to enter into the mortgage, on the basis of representations of refinance made by the plaintiff. I do not consider there is any support for a claim of misleading and deceptive conduct on this basis.

The letter of offer representation

- [46] The defendants submit that, acceptance by the plaintiff of the deletion of their residence as security in the letter of offer, was essentially a representation by the plaintiff that their residence was not to be used as security. In his oral testimony, Mr Thompson stated that he was informed by his employee, Michael Spencer that:
- “Bob Pierce informed him that Rob Ferguson was not happy having his owner/occupier property as security. I informed Michael to advise Mr Pierce that in the circumstances it would be okay for him to cross out that security property and just initial the change. I believe that Michael Spencer then rang Bob Pierce and that this is a result of that conversation.”²⁶
- [47] It is clear that the defendants’ residential property was then deleted from paragraph A of the letter of offer.
- [48] It is also clear that the letter of offer, at paragraph A, referred to ‘registered’ mortgages and made no reference at all to additional mortgages or a power of attorney. The letter, however, indicated that security documents were to be prepared and the final paragraph of the letter stated, “Should the terms & conditions of this offer differ from any security documents, then the terms and conditions of the security documents will prevail”. Mr Thompson also stated that before this loan agreement was executed, he required all the borrowers, including the Fergusons, to seek independent legal advice from a solicitor and provide him with a certificate signed by the solicitor, stating that the terms, nature and risks involved in executing the mortgage with AAGT Private Loans Pty Ltd had been explained to the borrowers.²⁷

²⁵ Exhibit 1.

²⁶ Transcript Day 1 p 33 ll 41-47.

²⁷ Exhibit 12.

- [49] Mr Thompson also stated that he required the borrowers to sign a document, called a Borrowers Certificate.²⁸ This certificate is signed by all the borrowers and is in evidence. In essence, it states that the borrowers understand the terms, nature and risks involved in the mortgage. The last paragraph also states that, in their opinion, they think the terms of the mortgage are “fair and conscionable and not unfair and unconscionable.” A Solicitors Certificate²⁹ is also in evidence and it states that the solicitor for the borrower certifies that he gave, “clear and understandable legal advice to the borrowers, as to the nature and effect of the loan agreement, the mortgage and other documents forming the terms of the loan from the lender named in the Loan Agreement.” The solicitor also certified that the borrowers were signing the documents “freely and voluntarily and without any pressure from any person or entity.”³⁰
- [50] Essentially, the defendants state that they did not know that their residence could be used as security and they did not realise that they had appointed the lender as their attorney, pursuant to a power of attorney, which had been incorporated into the security documents.
- [51] A fair reading of paragraph A however really indicates that a *registered* second mortgage was not required over the property. The letter is indeed silent in relation to additional security but the Mortgage Memorandum sets out in unequivocal terms that additional mortgages could be obtained upon default.
- [52] Furthermore, the Mortgage Memorandum clearly indicated that the document specifically “incorporates” five documents and those documents were individually described. This included a reference to a “Power of Attorney.” The borrowers signed directly below that section, indicating that they had received a copy of the documentation. The relevant provisions of the Power of Attorney are as follows:

POWER OF ATTORNEY PROVISIONS

WHEREAS:

- A. The LENDER has agreed to loan money to the BORROWER secured by the AGREEMENTS to which the DEBTORS are all parties.

IT IS AGREED as follows:

160. The DEBTORS irrevocably nominates, make, appoint and constitute the LENDER and every person for the time being filling the offices of directors of the LENDER and every Receiver appointed by the LENDER severally to be the lawful Attorney or Attorneys of the DEBTOR for the sole benefit of the LENDER (“the ATTORNEY”).
161. Neither the LENDER nor the Attorneys shall be obliged to give notice to the DEBTORS of the exercise of any powers exercised or proposed to be exercised by the ATTORNEY.
162. The ATTORNEY shall have the power to:
- (a) to do all such acts and things and sign and execute all such deeds, transfers, securities, plans, documents the DEBTORS have covenanted to or are otherwise required to do, sign or execute;
 - (b) to do, sign or execute all such deeds, transfers, securities, plans, documents as may be necessary or desirable or expedient for the purpose of effectually carrying out and exercising the all the powers conferred upon the LENDER or upon the Receiver by the AGREEMENTS or by statute or the General Law;
 - (c) to issue any demand, institute proceedings, defend proceedings, appeal judgements or take any action in relation to the any of the SECURITIES;
 - (d) to carry on and manage the DEBTORS business;
 - (e) to prosecute, conduct, settle and compromise any Insurance claim or other claim;

²⁸ Exhibit 9.

²⁹ Exhibit 12.

³⁰ Exhibit 12.

- (f) to execute a contract of sale, conveyance and transfer (including a conveyance and transfer of both the legal and beneficial estate), option to purchase, lease, surrender of lease or surrender of any land forming part of the SECURITIES and execute any other document relating to the sale, use, occupancy, free holding, conversion of title, subdivision, preservation or enhancement of any part of the SECURITIES;
 - (g) to give effectual releases and receipts for money received by the DEBTORS;
 - (h) to settle accounts between the DEBTORS and any person claiming an interest in the SECURITIES or on any account;
 - (i) to take proceedings at law or in equity or in bankruptcy to recover money owing to the DEBTORS or to enforce the covenants in any contract or deed to which the DEBTORS are a party;
 - (j) to appoint a substitute attorney;
 - (k) to do anything which the Mortgagor may lawfully authorise an attorney to do in connection with the AGREEMENTS; and
 - (l) to mortgage or otherwise encumber the SECURITIES.
163. No purchaser, mortgagor, mortgagee or other person dealing with the ATTORNEY shall be concerned to enquire whether the power exercised or purported to be exercised has become exercisable or whether any of the DEBT remains due. Such dealings shall be deemed so far as regards the safety and protection of such purchaser, mortgagor or mortgagee or other person to be within the powers hereby conferred and to be valid and effectual accordingly and the remedy of the DEBTORS and its assigns in respect of any impropriety or irregularity whatsoever in the execution of such powers shall be in damages only.
164. The ATTORNEY may exercise its powers notwithstanding that the exercise of the powers constitutes a conflict of interest or duty.
165. The DEBTORS will upon demand and at all times ratify any exercise of a power by the ATTORNEY
166. The DEBTORS indemnify the LENDER and any ATTORNEY or receiver from and against any expense, loss, loss of profit, damage or liability which the DEBTORS, the LENDER, the ATTORNEYS or any third party may suffer or incur as a consequence of the exercise of the powers of the ATTORNEY.

[53] The defendants therefore, entered into a written agreement with the plaintiff, which was explained to them by a solicitor and they were given a copy of the documents. The relevant principles have been set out in a number of decisions and in *Equuscorp v Glengallan Investments Pty Ltd*³¹ the High Court held:

“The parole evidence rule, the limited operation of the defence of non est factum and the development of the equitable remedy of rectification all proceed from the premise that a party executing a written agreement is bound by it.”³²

[54] In the present case, there is clear evidence that the defendants obtained independent legal advice, given the signed certificates from both the defendants and the solicitor. Furthermore, the terms of the documents are clear. The defendants are bound by the terms of the written Mortgage Memorandum, despite what they say they subjectively believed or intended.

The documentary representations

[55] In relation to the documentary representations, the defendants argue that the mortgage deletes all of the additional security provisions because no collateral mortgage is actually identified in the Schedule to the signed mortgage document number 711703347. It is clear however, that there is no substance to this argument, as by definition ‘Collateral Mortgage’ means land contained in the folio, identified in the Schedule. Accordingly, within the meaning of the specific AAGT mortgage, there was no collateral mortgage as defined by that document. There were however, other defined forms of security, including the additional security referred to in clauses 101 and 102 of the Mortgage Memorandum as follows:

³¹ 218 CLR 471

³² *Equuscorp v Glengallan Investments Pty Ltd* 218 CLR 471 at 483.

Additional security

101. The DEBTORS do hereby mortgage to the LENDER all their estate title & interest in any real property they currently own or partly own as surety for the DEBT ("OTHER SECURITY"). The terms of the mortgage over the OTHER SECURITY will be the same as those laid out in the MORTGAGE. The LENDER undertakes not to protect its priority in relation to the OTHER SECURITY by registering a caveat or mortgage over the title of the OTHER SECURITY except if DEBTORS default under any of the AGREEMENTS. Regardless of whether a default is rectified the LENDER will not be obliged to remove any caveats placed on the title of the OTHER SECURITY until the MORTGAGE is discharged. The DEBTORS are free to deal with the OTHER SECURITY without regard to the LENDER so long as they do not default under any of the AGREEMENTS. In the event of a default under any of the AGREEMENTS the LENDER will have the right to take possession of the OTHER SECURITY and exercise power of sale and/or foreclosure to recover the DEBT and the DEBTORS will surrender possession of the OTHER SECURITY to the LENDER.

102. The DEBTORS do hereby mortgage to the LENDER all their interest in any real or personal property in which they hold an equitable or legal interest in now or in the future as surety for the DEBT (CHARGE SECURITY). The terms of the charge over the CHARGE SECURITY will be the same as those laid out in the AGREEMENTS. The LENDER undertakes not to protect its priority in relation to the CHARGE SECURITY by registering a caveat over the title of any real property comprising it except if the DEBTORS default under any of the AGREEMENTS. Regardless of whether a default is rectified the LENDER will not be obliged to remove any caveats placed on the title of the CHARGE SECURITY until the MORTGAGE is discharged. The DEBTORS are free to deal with the CHARGE SECURITY without regard to the LENDER so long as they do not default under any of the AGREEMENTS. In the event of a default under any of the AGREEMENTS the LENDER will have the right to take possession of the CHARGE SECURITY and exercise power of sale and/or foreclosure to recover the DEBT and the DEBTORS will surrender possession of the CHARGE SECURITY to the LENDER.

Conclusion in relation to deceptive and misleading conduct and unconscionable conduct by the lender

- [56] On the basis of these findings, I am not satisfied that Mr Thompson has engaged in conduct constituting misleading or deceptive conduct, within the meaning of s 52 of the *Trade Practices Act 1974*.
- [57] I am also not satisfied, that Mr Thompson has engaged in unconscionable conduct, within the meaning of s 51AA of the *Trade Practices Act 1974*.

Has there been a breach of fiduciary duty by the attorney?

- [58] The defendants also argue that they are entitled to a declaration that the purported exercise of the Powers of Attorney by Mr Thompson, to register a mortgage over the defendants' residence, was in breach of his fiduciary duties. A further declaration that the mortgages are void and should be set aside is also sought. Damages are also sought for the breach of fiduciary duty.
- [59] The defendants also allege that the attorney has failed to comply with s 66 of the *Powers of Attorney Act 1998*, which provides that an attorney is required to act honestly and with reasonable diligence. Section 66 (1) further provides that the Court may order an attorney to compensate the principal for any loss caused by the attorney's failure.

[60] The argument of counsel for the defendants in this regard was summarised by counsel for the plaintiff and I adopt that summary as follows:

“Mr Thompson’s exercise of powers under those Powers of Attorney to register a mortgage over the Defendants’ home’ was a ‘breach of his fiduciary duties and statutory obligations’ in that:

- (a) Mr Thompson knew that the home ‘had been specifically excluded as a property being offered as security for the AAGT Loan’;
- (b) The registration of the mortgage over the home was an act in ‘conflict with the Principal’s interests’;
- (c) Mr Thompson was not to act in conflict with the Principal’s interests ‘unless expressly authorised to do so by the Principal’; and
- (d) Mr Thompson knew he was not ‘expressly authorised by either Principal to execute a mortgage over their home.’³³

[61] In relation to the issue of acting in conflict to the known wishes of the principal, submissions were made in relation to the statements of principle contained in *Williams v Turner*.³⁴ In particular Wilson J’s statement³⁵ as follows:

“Powers of attorney are strictly construed, and an act of an attorney outside the scope of the authority granted by a power of attorney is ultra vires and void. An attorney’s use of a power of attorney contrary to the known wishes and directions of the donor is a breach of trust. In *Powell v Thompson* [[1991] 1 NZLR 597 at 605], Thomas J said –

‘Powers of attorney are specifically directed at the management of the principle’s affairs; it is not open to attorneys to either obtain an advantage for themselves or to act in a way which is contrary to the interests of their principals.’”

[62] In this regard, the issue under consideration was whether an attorney commits a breach of trust if the attorney purports to exercise powers under powers of attorney, contrary to the ‘known wishes and directions of the donor.’ I agree with the plaintiff’s submission that in the circumstances of this case, the borrowers’ ‘wishes and directions’ are expressly contained in the Powers of Attorney provisions within the AAGT mortgage. The borrowers have never sought to rectify these provisions and have admitted in their pleadings³⁶ that they are bound by the terms of the AAGT mortgage’s standard terms, which contain the Powers of Attorney provisions.

[63] Furthermore, there is no dispute that in this case, the Powers of Attorney are powers of attorney given as security within the meaning of s 10 of the Act, and that the powers of attorney are *irrevocable*. Whilst normally the revocation of a power of attorney is a unilateral act by the donor, s 10 of the Act overlaps with the common law (that a power

³³ Defendants’ closing submissions, p 3(b).

³⁴ [2008] QSC 327.

³⁵ *Williams v Turner* [2008] QSC 327 [23].

³⁶ Defendants’ closing submissions p 5.

of attorney coupled with an interest is irrevocable while that interest subsists)³⁷ and provides that a power of attorney given as security under the Act is irrevocable. Section 10 of the Act further provides that:

- “(2) **Despite chapter 2, part 3**, a power of attorney given as security is **incapable of revocation** except with the consent of the attorney while –
- (a) the attorney has the proprietary interest, or persons deriving title to the interest under the attorney the proprietary interest, secured by the power of attorney; or
 - (b) the obligation, the performance of which is secured by the power of attorney, remains undischarged.
-
- (6) The power of a registered proprietor under the *Land Title Act 1994* to revoke a power of attorney is subject to this *section*.”

- [64] As there is no dispute that the obligation secured by the power of attorney has not been discharged, the Powers of Attorney are clearly *irrevocable*, even by resort to the *Land Titles Act 1994*.
- [65] Accordingly, the Powers of Attorney may only be revoked under the circumstances provided for under s 10(2) of the Act. These exceptions do not include communication of a wish or direction by the principal to the attorney that the attorney avoids acting in accordance with the express written terms of the powers of attorney.
- [66] Therefore, even if the Fergusons sought to revoke the Powers of Attorney at the time that they were being exercised to register the additional mortgages, the Powers of Attorney remained in full force and effect. Mr Thompson remained entitled to use those Powers of Attorney in accordance with their express terms. I agree therefore, with counsel for the plaintiff’s submission, that the only relevant wishes and directions are those expressed in the written instrument, granting the powers of attorney.
- [67] To the extent to which a conflict of duty arises, because Mr Thompson is placed in a position of conflict of interest, his interest, as director of AAGT, in mortgaging the residence, and the Ferguson’s interest in him *not* mortgaging the residence, then the problem is addressed by the Powers of Attorney provisions in the Mortgage Memorandum, in a manner that complies with s 73 of the Act. Section 73 reads:
- “An attorney for a financial matter may enter into a conflict transaction only if the principal authorises the transaction, conflict transactions of that type or conflict transactions generally.”
- [68] The Powers of Attorney document at paragraphs 162 and 164 expressly provide authority for ‘conflict transactions generally’ and ‘conflict transactions of that type’.
- [69] To the extent to which the ‘known wishes and directions’ might be raised to impugn the Powers of Attorney in the period before the Powers of Attorney were granted, it is clear that Mr Thompson was not at that time in a fiduciary relationship with the

³⁷ Defendants’ closing submissions at [7-12] (citing *Walsh v Whitcomb* (1797) 2 Esp. 565).

Fergusons. AAGT was a lender, negotiating a new bridging loan with the borrowers and through the negotiations obtained:

1. a release of the Jheeta mortgage (even though \$40,000 remained outstanding and the forgiveness of \$20,000 of this amount, if \$20,000 was tendered by an agreed date);
2. a reduction in total interest payments below that which they were paying, in combination, to Jheeta and Ascent; and
3. an amendment to the letter of offer, deleting a reference to the Residence from the properties over which there *shall be a registered* second mortgage.

[70] Accordingly, I am not satisfied that there has been a breach of the fiduciary duty by the attorney. Neither am I satisfied that the conduct of the attorney breaches the provisions of s 66 of the Act.

[71] It is clear therefore, that the lender advanced \$678,785 to the borrowers, including the defendants, pursuant to the terms of the AAGT mortgage.

[72] The advance was secured by the AAGT mortgage.

[73] The borrowers defaulted under the mortgage.

[74] After the default, the lender exercised a power of attorney to register additional mortgages over the defendants' residence and investment property.

[75] The borrowers continued in default of the AAGT mortgage and the defendants continued in default of the additional mortgages.

[76] The Facility Statement³⁸ indicates that a monthly interest payment of \$13,256 was received by AAGT on 12 May 2008, but there were no further payments until 12 October 2008. On that date, the net proceeds of the sale of the Development of \$584,974 was applied, to pay down the principal owed under the mortgage. This brought the amount owing down to \$226,584. Following that, the monthly interest payments reduced to \$4,532.00, however, the borrowers have never made any of these further interest payments and the amount owing has been increasing, at the higher interest rate, each month since then. The plaintiff claims that the amount owing as at 29 April is \$286,490 and that interest continues to accrue at 4 per cent per month.

[77] The defendants remain in possession of the residence and the investment property.

Orders

[78] In all the circumstances therefore, the plaintiff is entitled to relief sought. There should be judgment for the plaintiff in the sum of \$286,490 together with interest. There should also be an order for possession of the properties.

[79] I will invite submissions as to the form of the Order and as to Costs.

³⁸

Exhibit 10.