SUPREME COURT OF QUEENSLAND

CITATION:	*McIvor v Westpac Banking Corporation* [2012] QSC 404
PARTIES:	**JANICE ELLEN McIVOR** (plaintiff) **v** **WESTPAC BANKING CORPORATION** **ABN 33 007 457 141** (defendant)
FILE NO:	1676 of 2012
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	14 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	19, 20 & 21 November 2012
JUDGE:	Applegarth J
ORDER:	**1. Judgment for the defendant in the principal proceeding.** **2. Judgment for the defendant on its counterclaim against the plaintiff in the sum of $9,542,484.09 inclusive of interest up to and including 14 December 2012.** **3. The defendant recover vacant possession of the land described as Lot 20 on RP 842700, County of Ward, Parish of Tallebudgera.** **4. The plaintiff pay the defendant's costs of and incidental to the proceeding and the counterclaim to be assessed on the standard basis.**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – UNDUE INFLUENCE AND DURESS – GENERAL PRINICPLES – where the plaintiff granted various guarantees and mortgages to the defendant bank at her son's request – where the plaintiff contends that the guarantees and mortgages were procured by her son's undue influence – where the plaintiff is an elderly parent with little formal education – where the plaintiff's son is a lawyer and moneylender – whether the nature of the antecedent relationship between the plaintiff and her son gave rise to a presumption of undue influence – whether the defendant was on notice of the exercise or possible exercise of undue influence by the plaintiff's son –

whether independent solicitors' certificates received by the defendant and acknowledgements signed by the plaintiff displaced any such notice – whether the defendant reasonably believed that the purport and effect of the documents had been explained to the plaintiff by a competent, independent and disinterested stranger – whether it would be unconscionable for the defendant to enforce the 2003 guarantee and mortgage

Agripay Pty Ltd v Byrne [2011] 2 Qd R 501, cited
ANZ Banking Group Ltd v Alirezai [2004] QCA 6, cited
Banco Exterior Internacional v Mann [1995] 1 All ER 936, cited
Bank of Baroda v Rayarel [1995] 2 Fam Law R 376, cited
Bank of Baroda v Shah [1988] 3 All ER 24, cited
Bridgewater v Leahy (1998) 194 CLR 457, cited
Brusewitz v Brown [1923] NZLR 1106, cited
Burrawong Investments Pty Ltd v Lindsay [2002] QSC 82, cited
Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447, cited
Esanda Finance Corporation Ltd v Tong (1997) 41 NSWLR 482, cited
Garcia v National Australia Bank Ltd (1998) 194 CLR 395, followed
Johnson v Buttress (1936) 56 CLR 113, cited
Kranz v National Australia Bank Ltd (2003) 8 VR 310, followed
Massey v Midland Bank Plc [1995] 1 All ER 929, cited
National Mutual Trustees Ltd v Dedrion Pty Ltd (Hansen J, Supreme Court of Victoria, 18 August 1997, unreported), cited
Permanent Mortgagees Pty Ltd v Vandenbergh (2010) 41 WAR 353, cited
St George Bank Ltd v Dunstan (Hayne J, Supreme Court of Victoria, 10 November 1994, unreported), cited
State Bank of New South Wales v Chia (2000) 50 NSWLR 587, cited
Watkins v Combes (1922) 30 CLR 180, cited
Wilkinson v ASB Bank Ltd [1998] NZLR 674, cited
Yerkey v Jones (1939) 63 CLR 649, followed

COUNSEL: M R Bland for the plaintiff
B D O'Donnell QC with G D Sheahan for the defendant

SOLICITORS: Reichman Laywers for the plaintiff
Allens for the defendant

[1] The plaintiff, Mrs McIvor, is the mother of Mr Mark McIvor, who became a solicitor. He grew tired of law and started in the business of moneylending. He became very successful, and his mother was "in awe of his achievements".

[2] Over time, Mrs McIvor signed various guarantees and mortgages in favour of the defendant ("the bank") at her son's request. These include a guarantee dated 21 October 2002 ("the 2002 guarantee"), a guarantee dated 10 December 2003 ("the 2003 guarantee") and a mortgage over her property at Woodgee Street, Currumbin on the Gold Coast ("the Woodgee Street land"). The 2002 guarantee guaranteed the obligations of MM Holdings Pty Ltd ("MM Holdings") to the bank with a limit of $3,454,000 together with other specified amounts. The 2003 guarantee guaranteed the obligations of MM Holdings and Equititrust Ltd ("Equititrust") to the bank with a limit of $5,260,000 plus other specified amounts.

[3] Mark McIvor had a reversal in his fortunes. MM Holdings and Equititrust, of which he was a director and shareholder, defaulted in their obligations to the bank. The companies failed to meet demands for payment of $12,666,171.99 in November 2011.

[4] On or about 7 February 2012 the bank's solicitors issued a letter of demand to Mrs McIvor pursuant to the 2003 guarantee. On 24 February 2012 she commenced proceedings against the bank seeking:

(a) an injunction to restrain it from enforcing the 2002 guarantee, the 2003 guarantee and the mortgage over the Woodgee Street land;

(b) delivery up and cancellation of the guarantees; and

(c) an order that the bank procure a release of the mortgage over the Woodgee Street land.

[5] Mrs McIvor claims that her execution of the 2002 and 2003 guarantees and the mortgage over the Woodgee Street land was procured "by the undue exercise by Mark McIvor of his influence over her". The essential basis of her pleaded undue influence case is that:

- she is the mother of Mark McIvor;
- Mark McIvor was a law graduate and solicitor who had extensive knowledge of commercial matters and substantial experience and acumen in commercial transactions;
- as a result she reposed "absolute trust and confidence" in him with respect to commercial matters, and Mark McIvor occupied a position of influence over her in such matters.

Her case is that, until recently, the nature of the relationship was such that Mark McIvor was able to cause her to execute any document he chose. After August 1993 she executed a large number of documents at her son's request, and these documents included guarantees of the obligations of his company, MM Holdings, to the bank which extended to many millions of dollars. In those circumstances, Mrs McIvor

submits that the execution of those documents is presumed to have been procured by the undue exercise by Mark McIvor of his influence over her.

[6] Mrs McIvor alleges that by October 2002 the bank had notice that:

- she reposed trust and confidence in Mark McIvor with respect to commercial matters; and
- she was subject to his influence in such matters.

Her pleading alleges that, notwithstanding such notice, the bank did nothing to:

(a) investigate whether her willingness to execute the documents was the result of the undue exercise by Mark McIvor of influence over her;

(b) explain the meaning and effect of those documents to her;

(c) ascertain whether she had received any independent, disinterested advice as to the meaning and effect of those documents; or

(d) otherwise ensure that she was relieved of Mark McIvor's influence.

On that basis, she claims it would be unconscionable for the bank to enforce the 2002 and 2003 guarantees and the mortgage over the Woodgee Street land.

[7] The bank contests these allegations, and submits that Mrs McIvor has failed to establish an entitlement to the relief claimed by her because:

(a) the evidence does not establish that she was under the actual influence of Mark McIvor;

(b) if there was influence, the court should not find that there was *undue* influence by Mark McIvor over her.

It submits that her evidence is to the effect that she freely executed the documents, but was not particularly interested in them. Any failure on her part to read them and understand their import was not the consequence of her will being overborne or the taking of unfair advantage of any position of ascendency that Mark McIvor occupied.

[8] Next, the bank argues that Mrs McIvor's case fails at the hurdle of its alleged knowledge of any relationship of influence. Based on the facts that it knew, the bank was not on notice of the exercise of undue influence.

[9] In addition, the bank submits that it was entitled to rely upon each of the solicitors' certificates provided to it as evidence that Mrs McIvor had received competent, independent and disinterested legal advice as to each of the guarantees and the mortgage she signed. It submits that it took reasonable steps to ensure that she understood and freely entered into the guarantees and mortgage by requiring that she receive advice from a solicitor not acting for either the bank or the borrower before she committed to the transactions. The bank required such advice to be

certified before it would advance funds. It submits that it was entitled to rely on the certificates as confirming to it that Mrs McIvor understood the transactions and was entering into them of her own free will. The bank submits that each solicitor was competent, independent and disinterested. Finally, it submits on the basis of substantial authority that any alleged lack of independence of the solicitors who provided explanations to Mrs McIvor and signed certificates does not disentitle it from relying upon the certificates which it received in good faith without notice of any deficiency in the explanations provided to Mrs McIvor, as certified.

[10] The bank contends that Mrs McIvor has not established the equity relied upon to support her claim, and that it is entitled to succeed on its counterclaim. It seeks judgment on its counterclaim for the sum owing to the bank under the 2003 guarantee, and an order for recovery of vacant possession of the Woodgee Street land.

Relevant legal principles

[11] Mrs McIvor's claim that it would be unconscionable for the bank to enforce the 2002 guarantee, the 2003 guarantee and the 2003 mortgage over her property at Woodgee Street invokes both kinds of cases discussed in *Garcia v National Australia Bank Ltd*.[1] The principles discussed by Dixon J in *Yerkey v Jones*[2] and confirmed in *Garcia* are based on the premise that the guarantor is a volunteer, that is, "a person who obtained no financial benefit from the transaction, performance of the obligations of which she agreed to guarantee."[3]

[12] The first kind of case is where there is undue influence. In such a case the guarantor is overborne by another's influence and does not bring a free mind and will to the decision to execute the guarantee. The relevant principle is that "to enforce that voluntary transaction against her when in fact she did not bring a free will to its execution would be unconscionable."[4]

[13] The second kind of case is where there is a failure to adequately explain the guarantee transaction. There may be no undue influence, but the guarantor may not understand the purport and effect of the transaction and it would be unconscionable "if the lender took no steps itself to explain its purport and effect to her or did not reasonably believe that its purport and effect had been explained to her by a competent, independent and disinterested stranger."[5] *Garcia*, like *Yerkey v Jones*, was a case in which a guarantee was signed by a married woman who reposed trust and confidence in her husband. The nature of the relationship gave rise to a presumption of undue influence. In that context, the Court in *Garcia* stated that what makes it unconscionable to enforce the guarantee in the second kind of case:

> "is the combination of circumstances that: (a) in fact the surety did not understand the purport and effect of the transaction; (b) the transaction was voluntary (in the sense that the surety obtained no gain from the contract the performance of which was guaranteed); (c) the lender is to be taken to have understood that, as a wife, the surety may repose trust and confidence in her husband in matters of

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1 (1998) 194 CLR 395.
2 (1939) 63 CLR 649.
3 *Garcia* (supra) at 408.
4 Ibid.
5 Ibid at 408-409.

> business and therefore to have understood that the husband may not fully and accurately explain the purport and effect of the transaction to his wife; and yet (d) the lender did not itself take steps to explain the transaction to the wife or find out that a stranger had explained it to her."[6]

[14] As to the first kind of case, namely undue influence, Mrs McIvor does not assert that the relationship of adult child and elderly parent is a category of relationship recognised by the law as raising a presumption of undue influence. Her position in that regard is understandable in the light of authorities[7] and academic commentaries to the effect that the relationship between adult child and elderly parent does not create a presumption of undue influence. Murphy JA in *Permanent Mortgagees Pty Ltd v Vandenbergh*[8] observed that parents' dispositions to children can be explicable as being the consequence of parental love and affection without any suspicion of confidence abused. The burden of current authority was found by his Honour not to support an extension of the *Garcia* principles by treating the relationship of aged parent/child as, in itself, synonymous with the husband/wife relationship for the purposes of the application of those principles.[9] English authorities were not to be applied insofar as they involved any departure from the decision in *Garcia*, or from the principles of undue influence and unconscionable conduct as recognised and applied in the general law of Australia.[10] The learned author of *Equity and Trusts in Australia* states:

> "The law nonetheless rejects a presumption of undue influence by children over parents, and no presumption arises simply by proof of a normal family relationship in which parents agree to assist their children in their business ventures absent evidence of influence and lack of independent judgment, or evidence of any greater trust or confidence than ordinarily expected between parents and adult children. There is good reason for this approach, as parents' willingness to assist their children can usually be explained by the very nature of the relationship between them. It would be odd, then, for the law to presume children to have influence over their parents, and thus require children to adduce evidence to rebut that presumption. The law is also against presuming undue influence between relatives, absent evidence of ascendancy, dependency, influence or trust beyond that ordinarily expected in a familial relationship."[11]

[15] Rather than argue that the relationship of adult child and elderly parent is a category of relationship that creates a presumption of undue influence, Mrs McIvor seeks to prove that there in fact existed an antecedent relationship between her and her son, the nature of which was that her son was in a position "to exercise dominion, power or ascendency" over her.[12] To quote the words of Sir John Salmond, there is said to

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6 Ibid at 409.

7 The authorities are comprehensively discussed by Murphy JA in *Permanent Mortgagees Pty Ltd v Vandenbergh* (2010) 41 WAR 353 at 388-395 [166] – [205].

8 Supra at 389 [173].

9 Ibid at 393 [197].

10 Ibid at 395 [205].

11 GE Dal Pont *Equity and Trusts in Australia* (5th ed) 2011 para 7.120 (footnotes omitted).

12 Meagher, Heydon and Leeming "*Meagher Gummow and Lehane's Equity: Doctrines and Remedies*" 4th ed (2002) para 15-105.

exist between Mrs McIvor and her son "some special relation of confidence, control, domination, influence, or other form of superiority, such as to render reasonable a presumption that the transaction was procured by [him] through some unconscientious use of his power over [her]".[13]

[16] Mrs McIvor cites the judgment of Dixon J in *Yerkey v Jones*.[14] In respect of a case of presumed undue influence, his Honour explained that the fact that the creditor upon the actual execution of the instrument dealt directly with the wife and explained the effect of the document to her was insufficient to protect it. Dixon J stated:

> "Nothing but independent advice or relief from the ascendency of her husband over her judgment and will would suffice."[15]

Mrs McIvor argues that there is no sound reason why the principle stated in *Yerkey v Jones* should be limited to a wife who guarantees her husband's liabilities. It should apply to other non-commercial relationships of trust and confidence of which the financier is aware.[16]

[17] In *Garcia* the High Court stated, "The principles applied in *Yerkey v Jones* do not depend upon the creditor having, at the time the guarantee is taken, notice of some unconscionable dealing between the husband as borrower and the wife as surety."[17]. Mrs McIvor submits that the reason such notice is considered unnecessary in cases involving husband and wife is that this is one of the presumptive relationships of influence. She submits that the principles in *Yerkey v Jones* can be extended to other relationships but only where the creditor has either actual knowledge of unconscionable dealing or "is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person".[18]

[18] A threshold issue is the nature of the relationship between Mrs McIvor and her son. Is it of a kind that engages a presumption of undue influence because Mark McIvor was in a position "to exercise dominion, power or ascendency" over his mother?

[19] If a presumption of undue influence is not engaged, then Mrs McIvor's submissions do not contend that this is a case of actual undue influence. However, her pleaded case might be so interpreted, and the bank's submissions address the issue of actual undue influence. A relationship of influence is not enough. The influence must have been exercised, and the influence must have been "undue".[19] It must be established that a person in the position of domination has used that position to obtain unfair advantage for himself, and so as to cause injury to the person relying upon his authority.[20] If a relationship of influence has been established and it also is established that the exercise of the influence was "undue", then the person who was

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13 *Brusewitz v Brown* [1923] NZLR 1106 at 1109.

14 Supra at 684.

15 *Yerkey v Jones* (supra) at 684.

16 As to whether the principles in *Garcia* extend to other personal relationships of trust and confidence see *Agripay Pty Ltd v Byrne* [2011] 2 Qd R 501 at 507 [4] per McMurdo P; *Kranz v National Australia Bank Ltd* (2003) 8 VR 310 at 319-322 [24] – [31].

17 Supra at 408.

18 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 467.

19 *Watkins v Combes* (1922) 30 CLR 180 at 193-194 citing Lord Shaw in *Poosathurdi v Kanappa Chettiar* (1919) LR 47 IA 1 (PC).

20 Ibid.

in a position to use his dominating power has the burden of establishing affirmatively that no domination was practised so as to bring about the transaction.[21] Likewise, a presumption of undue influence can be rebutted by showing that the guarantor's act was free from influence.[22] The person who was in a position to exercise influence must satisfy the Court that no advantage was taken and that the transaction was the act of a person in a position to exercise a free judgment.[23]

[20] The facts that might be proved to satisfy the Court that the guarantor was "freed from influence" cannot be stated definitively. The presence or absence of independent advice is a critical factor.[24] Independent advice may rebut a presumption of undue influence and lead to the conclusion that the guarantor has been freed from another's influence. This will be so where the independent advice was both given and had an effect.[25]

[21] The provision of independent advice and the bank's belief that independent advice was given are relevant to whether it had notice of the alleged impropriety. One of the bases upon which the receipt and retention of the benefit of a guarantee by a financier arising from a customer's undue influence over a guarantor will be found to be unconscientious is if the financier had actual or constructive notice of the circumstances giving rise to the impropriety. It may be based on actual knowledge of dealings between the debtor and the guarantor, or knowledge of circumstances which are such as to raise the possibility that a transaction may be the result of undue influence. In a different context, namely in deciding whether a bank took unconscientious advantage of a position of disadvantage, and in considering the knowledge that a bank had of the respondents' situation, Mason J referred to facts known to a bank officer which were such "as to raise in the mind of any reasonable person a very real question as to the respondents' ability to make a judgment as to what was in their own best interest."[26] In the same context his Honour stated that if, instead of having actual knowledge of a situation of special disadvantage, the creditor "is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person, the result will be the same."[27]

[22] In the context of undue influence, a similar principle of constructive knowledge applies where the creditor knows of circumstances that ought to put it upon inquiry that "impropriety might occur".[28] The position was summarised by the New Zealand Court of Appeal in *Wilkinson v ASB Bank Ltd*:

> "When it is said that undue influence has been exercised by the principal debtor on a guarantor (either positively by application of pressure or by taking advantage of the guarantor's dependency) or that the principal debtor has persuaded the guarantor to enter into the transaction by a misrepresentation, the guarantor is not asking the Court to set the transaction aside because of any unconscionable behaviour *by the creditor*. The guarantor does so, rather, because the

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21 Ibid.

22 *Johnson v Buttress* (1936) 56 CLR 113 at 134.

23 Ibid. See also *Bridgewater v Leahy* (1998) 194 CLR 457 at 491 [18].

24 See Meagher, Gummow and Lehane paras 15-125 to 15-145.

25 Ibid at 15-135.

26 *Commercial Bank of Australia v Amadio* (supra) at 467.

27 Ibid.

28 Meagher, Gummow and Lehane (supra) at 15-150.

> creditor has taken the benefit of the guarantee with actual or constructive knowledge of what has occurred, or is presumed to have occurred, between the principal debtor and the guarantor."[29]

[23] If the circumstances are such as to raise a presumption of undue influence, then the provision of apparently independent advice to the guarantor may remove the suspicion of undue influence. Ample authority supports the proposition that any inadequacy in the advice that was given, if not known to the bank, will not prevent it from assuming that the advice given was independent and appropriate.[30] It is convenient to refer to these authorities when later addressing issues of notice and whether the bank satisfied itself that Mrs McIvor had received advice about the purport and effect of the documents.

[24] In the context of the second kind of case discussed in *Garcia*, the High Court stated:

> "... the creditor may readily avoid the possibility that the surety will later claim not to have understood the purport and effect of the transaction that is proposed. If the creditor itself explains the transaction sufficiently, or knows that the surety has received 'competent, independent and disinterested' advice form a third party, it would not be unconscionable for the creditor to enforce it against the surety even thought the surety is a volunteer and it later emerges that the surety claims to have been mistaken."[31]

This accords with the observation of Dixon J in *Yerkey v Jones* that:

> "... 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".[32]

The issues

[25] The substantial issues may be summarised as follows:

1. Was the antecedent relationship between Mrs McIvor and Mark McIvor one in which he was in a position to exercise dominion, power or ascendency over her?

2. If this was not the case, so that a presumption of undue influence is not raised, were the relevant guarantees and the mortgage given as a result of the exercise of influence by Mark McIvor and, if so, was there *undue* influence exercised by him?

3. Was the provision of independent advice (or other circumstances) sufficient to make the provision of the guarantees and mortgage the free exercise of an independent will (and thereby rebut any presumption of undue influence)?

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29 [1998] NZLR 674 at 689 (italics in original text).
30 *Burrawong Investments Pty Ltd v Lindsay* [2002] QSC 82 at [93] and the cases cited therein.
31 Supra at 411 (citation omitted).
32 Supra at 685.

4. Was the bank on notice of the exercise or possible exercise of undue influence, and if so, was this displaced by the solicitors' certificates it received and by acknowledgments by Mrs McIvor that she understood the purport and effect of the documents?

5. Is it unconscionable for the bank to enforce the guarantees and the mortgage on the second ground considered in *Garcia*[33] on the basis that:

   (a) Mrs McIvor did not understand the purport and effect of the transaction;

   (b) the transaction was voluntary in the sense that she obtained no gain from the contract, the performance of which was guaranteed;

   (c) the circumstances known to the bank were sufficient to make it aware of the possibility that Mrs McIvor might repose trust and confidence in Mark McIvor in matters of business, and that he might not fully and accurately explain the purport and effect of the transactions to her;

   (d) the bank did not satisfy itself that Mrs McIvor had received advice about the purport and effect of the transaction from a solicitor who the bank believed on reasonable grounds to be competent, independent and disinterested.

Contentious issues of fact

[26] Some factual issues are common to each of the bases upon which Mrs McIvor seeks to invoke the principles discussed in *Garcia*. The contentious issues of fact include whether Mrs McIvor received independent advice. Mrs McIvor seeks a finding that she did not receive any advice from any of the solicitors who provided the certificates. She seeks a finding that she did not understand the purport and effect of the guarantees and mortgage that she seeks to restrain the bank from enforcing, or for that matter, earlier guarantees and mortgages that she signed. Simply put, Mrs McIvor's case substantially depends upon an assessment of the credibility and reliability of her evidence and I am required to resolve a contest between her evidence and the evidence of three solicitors who gave evidence.

Background facts

[27] Mrs McIvor was born in 1933. She finished school after Grade 7. She married in 1951 and had four children. Her family moved to the Gold Coast in about 1964, and her husband worked as a bookmaker. She was a homemaker. The marriage was an unhappy one, and she lost all her confidence and self-esteem.

[28] Her children were well-educated, and after completing high school, Mark studied law at university. Mrs McIvor separated from her husband in 1979. Mark was living with her at the time, and continued to live with her until he was 27. They had a good relationship. He looked after her financial affairs, and gave her confidence and companionship. She trusted him completely.

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[33] Assuming the principles discussed therein extend beyond the husband/wife relationship to the relationship of trust and confidence that existed between a mother and son in this case.

[29] Mark completed his articles of clerkship, and became a partner in a law firm at Palm Beach on the Gold Coast. Mrs McIvor explained how he had worked so hard at school, and was always so keen. As she said, she was "in awe of his achievements".

[30] In 1989, on Mark's advice, Mrs McIvor sold her house and purchased land at Woodgee Street. It was a large block, and Mark suggested that it be subdivided, the existing house sold and a new one built on the subdivided lot. This happened, and he made all of the arrangements.

[31] Mrs McIvor worked for a time in a fashion boutique, but the business did not thrive. She had great pain in her back and found it too painful to work. She closed the business. She had little income and Mark arranged for her to have a credit card. He made the repayments on it. He also made arrangements for her to get a pension. He or his office would arrange matters, and Mrs McIvor would sign the necessary documents.

[32] Mrs McIvor gave general evidence about how a young woman who worked for Mark McIvor would bring documents to her home and she would sign them where directed, without reading them. She did so because she trusted her son. She explained that "he asked you to do things and you just did them".

[33] Mark's career was going well. He left legal practice and concentrated on his moneylending business.

[34] Relations between Mrs McIvor and Mark McIvor broke down in about January 2010 when Mrs McIvor was in hospital recovering from major surgery. She had seen a lawyer a few days before going into hospital, and when Mark visited her at the hospital he asked her to sell the Woodgee Street land. She told him that she wanted "Woodgee Street back unencumbered", to which he said, "You'll be f...ing lucky" and slammed the door. This episode at the end of the relationship between Mrs McIvor and her son indicates that Mrs McIvor had received legal advice about the mortgage and guarantee that she had granted, and was aware in early 2010 that the Woodgee Street land was encumbered. Despite this, she agreed in August 2010 as guarantor to a variation of the bank's arrangements with the borrower whose obligations she had guaranteed.

Was the antecedent relationship between Mrs McIvor and Mark McIvor one in which he was in a position to exercise dominion, power or ascendency over her?

[35] This issue does not concern the circumstances under which Mrs McIvor came to sign the guarantees and the mortgage, and whether she read and understood them. It concerns the kind of relationship that existed between Mrs McIvor and Mark McIvor at the time of the relevant transactions in 2002 and 2003. At that time, and for many years prior to it, Mrs McIvor trusted her son. She thought his expertise in commercial matters was "marvellous" and felt unable to discuss commercial matters with him. She trusted him because he was doing well and appeared to know what he was doing. Mrs McIvor had never had an interest in business matters. Mark McIvor, like her other children, had been good to her. His knowledge and experience in legal and commercial matters meant that Mrs McIvor trusted him about such matters. The nature of their relationship was such that Mark McIvor was able to cause her to execute documents at his request. He occupied a position of

influence over Mrs McIvor in commercial matters. He was in a position to exercise dominion, power or ascendency over her.

[36] The special relation of confidence, control, domination or influence that existed makes it reasonable to presume that relevant transactions were procured by Mark McIvor through some "unconscientious use of his power" over his mother.[34] The nature of the relationship might be regarded as "presumptive proof of express influence".[35] If the special relation of influence is not treated as raising a presumption of invalidity, it supports the inference of undue influence.[36]

Actual undue influence

[37] I leave to one side the presumption of undue influence raised by the fact that Mark McIvor was in a position to exercise dominion, power or ascendency over his mother. I turn to the issue of actual undue influence. I have found that Mark McIvor occupied a position of influence over his mother with respect to commercial matters. He exercised his influence to request her to sign documents. The issue is whether the exercise of that influence was "undue" in the sense previously explained.[37] I find that Mark McIvor used his position of domination to obtain an unfair advantage for himself by requesting his mother to give guarantees and mortgages to support the obligations of companies of which he was a director and shareholder. Mrs McIvor thought that signing the documents would be advantageous for Mark and that "the whole family might benefit". Still, assuming personal obligations to guarantee multi-million dollar borrowings was to her disadvantage. This is so even though some of the mortgages which she granted were over land situated at Jefferson Lane, Palm Beach, that was registered in her name. There is no suggestion that these lots were beneficially owned by Mrs McIvor or, if they were, that their value exceeded the amount of the borrowing which she guaranteed.

[38] Later I will consider the circumstances in which Mrs McIvor signed documents and dealt with solicitors who provided independent advice about the purport and effect of the relevant documents. For reasons to be given, I am satisfied that, contrary to Mrs McIvor's evidence, she understood their import, and as a result of advice, was in a position to freely exercise a choice to provide the documents to the bank. On the present issue, I find that Mark McIvor exercised undue influence over Mrs McIvor in requesting her to sign the documents. The fact that she was not particularly interested in the transactions does not alter the fact of an exercise of undue influence. Absent the circumstances to be discussed, Mark McIvor's undue influence would have resulted in the executed documents being given to the bank.

The 1995 guarantee and mortgage

[39] On 29 June 1995 Mrs McIvor executed a guarantee in favour of the bank with respect to the obligations of MM Holdings. Her signature on the guarantee was witnessed by Ms Lyn Coghlan.[38] Ms Coghlan also filled in the answers given to her

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[34] *Brusewitz v Brown* (supra).
[35] *Johnson v Buttress* (supra).
[36] Ibid at 135-136.
[37] Earlier at [21].
[38] Ms Coghlan's name is now Laver, but the pleadings, exhibits and submissions refer to her by her previous name and it is convenient to refer to her as Ms Coghlan.

by Mrs McIvor to questions on a document titled "Form of Acknowledgment", which was signed by Mrs McIvor on 29 June 1995. Ms Coghlan also witnessed Mrs McIvor's signature as mortgagor on the mortgage granted to the bank over a lot situated at Jefferson Lane, Palm Beach.

[40] The front page of the 1995 guarantee contained a warning in large print in the following terms:

> "WARNING: THIS IS A VERY IMPORTANT DOCUMENT.
>
> It means you may have to pay the Bank a lot of money to cover the debts of the Customer referred to above as well as or instead of the Customer.
>
> BEFORE YOU SIGN IT:
>
> ⇒ you should read it carefully;
>
> ⇒ you should check for yourself whether the Customer can pay those debts;
>
> ⇒ and
>
> ⇒ you should see your own lawyer and financial adviser."

The form of acknowledgment which Mrs McIvor signed on 29 June 1995 acknowledged, among other things, that she had read the guarantee carefully and thought hard about whether to sign it. It indicated that she had made her own decision to sign it, and that she understood that, among other things:

- if she signed it she may have to pay the bank a lot of money (sufficient money to repay the debts of MM Holdings);
- if MM Holdings did not pay on time the bank could demand that she pay the money in place of it;
- that if she did not pay the money the bank could sue her and enforce its mortgage, for example, by selling her house.

[41] Mrs McIvor's signature on the mortgage was on a single page headed "Mortgage", and her signature appeared immediately below the words "Mortgagor's Signature". Even without the advice which she was given by Ms Coghlan that day, it would be practically impossible for Mrs McIvor not to have noticed that she was signing a mortgage.

[42] Mrs McIvor gave evidence that she was in Ms Coghlan's office for 10 or 15 minutes, that Ms Coghlan did not tell her anything about the documents she was signing and that she said nothing to Ms Coghlan about the documents. I formed the view during Mrs McIvor's cross-examination that she had little, if any, actual recollection of what was said to her on 29 June 1995 by Ms Coghlan about the documents. As she acknowledged in her evidence, at the time the matter was not a "big event" so far as she was concerned. I am not persuaded by her evidence that she did not see that the guarantee was headed "Guarantee and Indemnity". She could not recall reading the warnings, but this does not persuade me that she did not do so and that she signed the document without even looking at its front page.

[43] The documents, which the bank had prepared, described the guarantor as Janice Katherine McIvor, whereas Mrs McIvor's name is Janice Ellen McIvor. An original signature that included Mrs McIvor's middle initial was crossed out on the signature block of the guarantee, and replaced with the signature "J McIvor". The signature is that of Mrs McIvor in both places. She could not remember the circumstances under which the original signature was crossed out, nor could Ms Coghlan. Mrs McIvor gave evidence that she probably scratched out the original signature. I think it is likely that she did so when she realised that the middle name on the guarantee was not hers. She probably did so in order to facilitate the transaction rather than write her correct middle name on the documents.

[44] I am not persuaded that Mrs McIvor did not appreciate that she was signing a mortgage. I found her evidence about what was said and done that day to be unreliable. The meeting with Ms Coghlan and the execution of documents on 29 June 1995 occurred more than 17 years ago. Mrs McIvor professed to have a recollection about not being told about the documents, not reading them at all and of simply signing them. I do not accept her evidence.

[45] Ms Coghlan had been a member of a solicitors' firm with Mark McIvor until April 1994, when he left the partnership. She had no business association with him after April 1994. Ms Coghlan did not act for Mark McIvor or his new moneylending business. He was not a client of her firm. She did not have any business relationship with him. She spoke to him only occasionally.

[46] In the years prior to June 1995 Ms Coghlan had known Mrs McIvor from social occasions and times when she came into her office. She was on friendly terms with her. While still a solicitor, Ms Coghlan no longer practices law. She has no trouble in her present relationship with Mrs McIvor, and there is no suggestion that Ms Coghlan has any loyalty to Mark McIvor or to the bank.

[47] Ms Coghlan did not profess to have an actual recollection of her dealings with Mrs McIvor on 29 June 1995. Her evidence was based on the documents that she witnessed and the contents of the "Solicitors or Barristers Certificate" that she signed. It was also based upon the practice that she adopted in similar cases of advising individuals prior to issuing a certificate. Because of the passage of time, no file note or file was available to refresh Ms Coghlan's memory. Her diary records an appointment for 11.15 am that day.

[48] Ms Coghlan took seriously the exercise of advising a client like Mrs McIvor and then giving a certificate to the bank. She did so because she understood that an individual in Mrs McIvor's position was exposing herself to significant liabilities and needed to be aware of the nature of the transaction.

[49] The evidence of Ms Coghlan involved some element of guesswork or reconstruction about the length of time that she would have spent with Mrs McIvor that day, and the extent to which she would have explained to Mrs McIvor the effect of various clauses in the guarantee. I am not satisfied that Ms Coghlan gave as detailed an explanation of the provisions of the guarantee as some of her evidence suggested, and I decline to find that the meeting went for as long as an hour. I do accept, however, that Ms Coghlan pointed out the front page of the guarantee, explained its importance and explained that Mrs McIvor was personally guaranteeing the obligations of the borrower. I am satisfied that Ms Coghlan explained to

Mrs McIvor the general nature and effect of the guarantee and the mortgage, and that if MM Holdings defaulted in payment or in other obligations Mrs McIvor would be liable to make good that default, which could involve all amounts owed by MM Holdings and substantial amounts of interest. I am satisfied that Ms Coghlan explained these and other matters contained in the certificate that she signed and that, in the course of explaining those matters, Mrs McIvor said words to the effect that she understood the general nature and effect of the documents and the obligations and the risks involved in signing them. I am also satisfied that she said that she was signing the documents willingly, even if she did not use the precise words "freely, voluntarily and without pressure from the Customer or any other person" which appear on the pre-printed form of certificate.

[50] Ms Coghlan completed the answers on the form of acknowledgment, based upon the answers given by Mrs McIvor in response to the questions posed in that form or on the basis of what was discussed in the course of explaining the guarantee and mortgage. I accept Ms Coghlan's evidence that the form was completed by her, and that the handwriting on it is hers, rather than Mark McIvor's, who was not present at the meeting.

The 2002 guarantee and mortgage

[51] In October 2002 the bank made an offer to MM Holdings to vary its existing finance arrangements. To effect those arrangements it was necessary for Mrs McIvor to obtain legal advice from an independent lawyer, namely a lawyer who was neither the bank nor the borrower's lawyer, who would certify to the bank to the effect that Mrs McIvor fully understood and agreed with the terms of the guarantee. The bank acted upon internal advice that external independent legal advice was to be given to Mrs McIvor. The bank proposed releasing the previous unlimited guarantee and replacing it with a guarantee limited to specific amounts. These arrangements were carried into effect and on 21 October 2002 Mrs McIvor executed a guarantee in favour of the bank in respect of the obligations of MM Holdings with a limit of $3,454,000 plus other specified amounts. She also signed a "Guarantor Acknowledgment" and a mortgage over another lot situated at 51 Jefferson Lane, Palm Beach. Again, the guarantee had warning statements on its first page. Mrs McIvor's signature on the guarantee was witnessed by Mark McIvor.

[52] Mr John Haney of Shakespeare Haney Solicitors signed a certificate dated 21 October 2002 about his interview with Mrs McIvor in relation to the guarantee, mortgage and other documents with which he had been provided.

[53] Mrs McIvor has no recollection of having seen Mr Haney about the matter or of having been given any legal advice. She knew Mr Haney because he went to school with Mark McIvor and they had remained friends. In her evidence she was insistent that she did not see Mr Haney in October 2002. She also gave evidence that she signed the 2002 guarantee and the relevant mortgage without reading them and did not notice that what she was signing was a guarantee and a mortgage. Her evidence is that she could have looked at these documents but did not do so because of lack of interest. When given an opportunity to clarify whether she saw that what she was signing was a mortgage or whether she could not now remember whether she saw it was headed "Mortgage", she said, "I didn't see it". This evidence is unconvincing and I do not accept it. It is highly probable that Mrs McIvor saw the word

"Mortgage" in large print at the head of the single page that she signed on 23 October 2002. She wrote her signature just below the signature block, "Mortgagor's Signature". It may be that she cannot now recall seeing those things in 2002. That is not her evidence, which positively asserted that she did not see that the document was a mortgage, and did not even see the words "Mortgagor's Signature". Mrs McIvor's evidence unreliably asserts matters about which she has no true recollection. For example, she positively asserted that the answers on the acknowledgment were not filled in when she signed it. I do not accept her evidence that she actually remembered that.

[54] I find that Mrs McIvor has a poor recollection of the circumstances under which she signed the 2002 guarantee and the 2002 mortgage and that she cannot recall a meeting that she had with Mr Haney in October 2002. I am satisfied that such a meeting took place.

[55] Mr Haney was a sole practitioner in October 2002. He also was involved in the business of Shakespeare Haney Securities after 1999. He had known Mark McIvor since they were teenagers. He was a director of Equititrust between 2000 and 2010, but was not paid for his work as a director and did not have a financial interest in it. At different times Equititrust and Shakespeare Haney Securities would join together in making loans to an investor. Mr Haney could not recall if there were such joint loans prior to October 2002.

[56] On many occasions prior to October 2002 Mr Haney, in his capacity as a solicitor, had advised individuals who proposed to give a guarantee and a mortgage to a bank, and explained to them the nature of the transaction. He was used to the process of giving such advice and providing a form of certificate of the kind which he gave in respect of advice that he gave to Mrs McIvor.

[57] In giving evidence, Mr Haney was unable to recall his interview with Mrs McIvor. Instead, he gave evidence about his usual practice. Before going through the documentation he would give a brief explanation and ask whether the individual understood that by signing the guarantee they were putting all their assets at risk, may lose the family home and may go bankrupt. He would then go on to the documents and after that ask them whether they felt comfortable in signing the documents with that risk.

[58] As to the mortgage, Mr Haney said that his advice to Mrs McIvor would have been that she was giving a mortgage and that it was a charge over her property. He would have pointed out the limit of her liability under the guarantee. Mr Haney did not think that he would have charged a fee to Mrs McIvor for giving the advice because she was an old acquaintance.

[59] I accept Mr Haney's evidence that he would not have signed the certificate if he had not given the advice stated in it. He was not acting for the bank or MM Holdings when he gave that advice. He explained to Mrs McIvor, in the absence of Mark McIvor, the general nature and effects of the documents and the consequences for her if MM Holdings defaulted in payment or in other obligations that it owed to the bank. Mrs McIvor indicated that she understood the general nature and effect of the documents and the obligations and risks involved, and also indicated that she had signed the documents without pressure from any other person.

The 2003 guarantee and mortgage

[60] On 10 December 2003 Mrs McIvor signed a guarantee in favour of the bank which guaranteed the obligations of MM Holdings in respect of a Business Finance Agreement dated 13 November 2003. The limit on the amount to be paid under this guarantee was $5,260,000, together with amounts that included government charges, expenses and interest. On the same day she signed a mortgage over two properties, one of which is the Woodgee Street land. Her signature on both documents was witnessed by a Justice of the Peace, Jodie Ann Markovitch of 67 Thomas Drive, Chevron Island. Ms Markovitch's identity was not established in the evidence, but I am prepared to assume that the execution of these documents was arranged by Mark McIvor. The execution of these documents was not sufficient to complete the proposed transactions since the documents were not returned to the bank. Instead, they were provided to a solicitor, Mr Welch, who advised Mrs McIvor about them at a meeting on 16 January 2004.

[61] Mrs McIvor did not give any specific evidence about the circumstances under which she came to sign the 2003 guarantee and mortgage. She recalled, however, being taken by one of Mark McIvor's staff to the offices of Hickey Lawyers at Bundall, where she met Mr Welch. She particularly recalled Mr Welch saying on three different occasions words to the effect, "Are you sure you know what you're doing?", to which she answered on each occasion, "I trust my son implicitly". She recalled that he had various documents on his desk. She could not recall Mr Welch saying anything else about the documents, and she did not ask him any questions. She thought the meeting lasted no more than 15 or 20 minutes. No other person was present at the meeting. Mrs McIvor understood that she was signing documents for the bank.

[62] I do not accept her evidence that Mr Welch did not explain anything. I prefer his evidence, which is supported by contemporaneous documents indicating that he did explain matters in relation to the documents.

[63] Mrs McIvor's evidence did not adequately explain why, on her account, on each occasion that Mr Welch asked her whether she was sure she knew what she was doing she answered, in effect, that she did, and that she trusted her son implicitly. I think it likely that she gave responses to this effect because she understood what she was doing, and understood this as a result of Mr Welch's explanations. In addition, she wanted Mark McIvor to obtain whatever he had requested from the bank, and was prepared to provide the bank with another guarantee and mortgage notwithstanding the advice given by Mr Welch about these documents and their implications.

[64] Unlike Ms Coghlan and Mr Haney, whose evidence was based entirely upon their usual practice in advising about such matters before signing a certificate, Mr Welch had a recollection of the occasion he met Mrs McIvor. I found his recollection and also his evidence about his usual practice to be reliable.

[65] In addition to the guarantee and the mortgage which were executed by Mrs McIvor on 10 December 2003, she also executed an acknowledgment and her signature is dated 16 January 2004, the day that she met Mr Welch. Mr Welch thought that the handwriting on that document, in particular the "yes" or "no" answers and the date

beside Mrs McIvor's signature were his, but could not be certain about this and thought the probability that it was his handwriting was 50 per cent.

[66] As to his discussions with Mrs McIvor, Mr Welch remembered going through the documents in the usual way, and that there was nothing remarkable. Nothing suggested that Mrs McIvor did not know what she was doing. Mr Welch's practice is to take a person through each document and at the end of the process say words to the effect, "You realise this is a personal guarantee so you are personally liable? You know, people can bankrupt you and/or take your house".

[67] In the course of taking Mrs McIvor through the documents Mr Welch placed ticks beside various parts of the "Independent Solicitors Certificate". These confirm that he explained to Mrs McIvor the nature and effect of the guarantee and the mortgage, and her potential liability, including the fact that giving the guarantee involved considerable risk, such as the risk of losing her property. No tick appears beside Part D of the certificate. It certifies that following the provision of the explanation set out in Part B and the fact that Mr Welch was not advising on the viability of the borrowing transaction, the borrower's ability to make the required payments or the guarantor's ability to make the required payments, Mrs McIvor had stated to him words to the effect that:

- she had read the documents and understood the general nature and effect of them;
- his advice as to the obligations and risks involved in signing the documents was understood; and
- the documents were "signed freely, voluntarily and without pressure from the Borrower or any other person".

The absence of a tick beside Part D was explained by Mr Welch on the basis that he would ask a question relating to each of these points. The guarantor would then give an indication that they accepted that proposition. I accept Mr Welch's evidence that if Mrs McIvor had indicated that she did not understand the documents, or said that she had signed them because of pressure from her son Mark McIvor, then Mr Welch would not have signed the certificate.

[68] As to the separate Guarantor Acknowledgment signed by Mrs McIvor and dated 16 January 2004, which Mr Welch thought was in his handwriting, he explained that to the best of his recollection this document was completed while Mrs McIvor was with him at the interview and that normally he would ask each question and then actually write in the answer based upon the response that he had been given. This included the response at question 7:

> "Are you making your own decision to sign the Guarantee and Indemnity, not just because someone asked you to?"

[69] It is unnecessary for the bank to prove that the handwriting on this document is Mr Welch's. The bank might have called Mark McIvor to confirm or deny that the handwriting was his. It was not incumbent upon Mrs McIvor to call her son on this issue. Mrs McIvor is estranged from her son and I do not consider that Mark McIvor would be expected to be called by one party rather than the other. I am not persuaded that his evidence about the handwriting on the document would elucidate

that matter. I am not persuaded that the handwriting on the Guarantor's Acknowledgment is Mark McIvor's. Mrs McIvor did not give evidence of seeing her son that day. Mark McIvor spoke to her by telephone, and arranged for a member of his staff to pick her up. Mrs McIvor did not give evidence about signing the Guarantor's Acknowledgment at the request of her son on 16 January 2004. Her evidence and other evidence does not provide a secure basis upon which to conclude that the Guarantor's Acknowledgment was completed by Mark McIvor and dated by him 16 January 2004. Mrs McIvor did not give evidence that the woman named Coralie asked her to sign the acknowledgment that day. I think it probable that the document was completed by Mr Welch in Mrs McIvor's presence. Her recollection of being asked on three separate occasions whether she was sure she knew what she was doing, and Mr Welch's evidence about the meeting, makes it more probable than not that Mr Welch obtained the answers which he recorded on the Guarantor Acknowledgment.

[70] I accept Mr Welch's evidence about the explanations that he gave to Mrs McIvor about the guarantee and the mortgage. It is probable that he mentioned the limit of $5,260,000 contained in the guarantee. I find that Mr Welch said words to the effect, "If you can't repay that, then you could lose your house and go bankrupt." He was convincing in his explanation that that is his "standard layman's way of explaining these documents to people".

[71] Mr Welch accepted that he did not take Mrs McIvor through the detail of Memorandum Registered No 706487974 (being the bank's standard registered mortgage) and said that he would normally mention the nature of the Memorandum, offer to read it, explain that it was a standard form of document and that the bank would be unlikely to negotiate a variation of it. The certificate stated that Mrs McIvor had read and understood all of the documents, including the Memorandum. To that extent it was inaccurate. The certificate also stated:

> "During my interview with the Guarantor including giving advice as specified in Part B and when I witnessed the Documents Borrower was not present."

The certificate was in a pre-printed form to be used in circumstances in which explanation and advice was given before the guarantor signed any of the documents. Mr Welch nevertheless used it and explained that he did so on the basis that the documents were not yet binding. They had not gone back to the bank. It had not accepted the loan. If Mrs McIvor had a problem with any of those documents then he would have advised her not to proceed with them. Mr Welch did not think the matter was significant enough to amend the documents to note that he had not witnessed the guarantee and the mortgage. Those documents clearly recorded that they had been witnessed by someone else. These minor inaccuracies in the certificate do not alter the fact that Mr Welch gave the advice and explanations certified by him, and that Mrs McIvor understood the purport and effect of the guarantee and the mortgage. Mark McIvor was not present when Mr Welch reviewed the documents and advised Mrs McIvor about them. She indicated to Mr Welch that the documents had been signed by her without pressure from MM Holdings or any other person. I accept Mr Welch's evidence that during the course of his meeting he assessed Mrs McIvor's responses to his questions. Based upon his discussion with her, Mr Welch formed the impression that Mrs McIvor understood what she was doing. He did not gain any other impression.

Letters of variation

[72] On a number of occasions after January 2004 Mrs McIvor signed letters of variation by which she agreed to stated variations in the arrangements between the bank and borrowers. Each letter was a simple document and, importantly, above the space in which she gave her signature recording her agreement to such variations were the following words in large print:

> "***WARNING: This is a very important document.***
>
> *You should see your own Lawyer and Financial Adviser before signing it."*

Even accepting Mrs McIvor's evidence of her habit of signing documents at Mark McIvor's request, it is unbelievable that she did not notice this warning. It is improbable that Mrs McIvor did not notice the opening words of at least one of these letters which commenced, "We write to you as Guarantor under a guarantee ...". Even a cursory glance at one of the single-page documents would have detected the stated limit of Mrs McIvor's liability. A number of them stated the limit of her liability to be $8,270,000.

[73] Even if one was to assume that Mrs McIvor did not notice that she was signing each of these letters as a guarantor, and that she was agreeing to variations in a multi-million dollar loan facility that she had guaranteed, the position altered in 2010. Early in 2010, before she went into hospital, Mrs McIvor consulted a lawyer. She then had a falling out with her son. I find that she knew well prior to seeing a lawyer in early 2010 that she had guaranteed the substantial obligations of her son's companies. She knew this because of the advice that she had been given by, among others, Mr Welch. The fact that she had guaranteed the borrowings and had mortgaged the Woodgee Street land was well-known to her at the time she had a falling out with her son in early 2010. Despite this, and despite having obtained legal advice in early 2010, Mrs McIvor signed another letter of variation on 2 August 2010 which agreed to a variation of the bank's arrangements with MM Holdings Pty Ltd and Equititrust Ltd.

Did Mrs McIvor understand the purport and effect of the transactions?

[74] According to Dixon J in *Yerkey v Jones*, to avoid the application of the equity the creditor must reasonably suppose that the guarantor "has an adequate comprehension of the obligations she is undertaking and an understanding of the effect of the transaction".[39] In *State Bank of New South Wales v Chia*,[40] Einstein J stated that an understanding of the "purport and effect" of the transaction includes at least an understanding of the fact of liability, the general extent of liability and possible consequences of default. This decision has been followed in later cases, including by the Court of Appeal in *Agripay Pty Ltd v Byrne*.[41]

[75] I am satisfied that Mrs McIvor had an adequate comprehension of the obligations she was undertaking and an understanding of the effect of each transaction. She understood the purport and effect of the 2002 guarantee and mortgage because these

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39 Supra at 685.

40 (2000) 50 NSWLR 587 at 600-601 [169].

41 Supra at 511 [20], 522-524 [57] – [61], 530-531 [92] – [101].

things were explained to her by Mr Haney, and also because she had been earlier advised by Ms Coghlan about such matters.

[76] She also understood the purport and effect of the 2003 guarantee and mortgage. These things were explained to her by Mr Welch before those documents were provided to the bank.

Was the advice independent?

[77] The requirement for "independent advice" relates to advice from someone who is independent of the borrower and independent of the bank. Ms Coghlan, Mr Haney and Mr Welch were each independent in this regard. None of these solicitors was acting for the bank or the borrower. As was observed by the New Zealand Court of Appeal in *Wilkinson v ASB Bank Ltd*:

> "It is not to be assumed because a solicitor has had some involvement with the principal debtor, that he or she is unable to function independently in advising a guarantor. Depending upon the circumstances, which include of course questions of confidentiality, the solicitor may be in a better position than a stranger to give balanced advice and to assess whether its significance has been appreciated by the guarantor; and the guarantor may be more relaxed and better able to absorb the advice when it comes from a familiar face."[42]

[78] Ms Coghlan's past association with Mark McIvor did not mean that she was not able to provide independent advice to Mrs McIvor or failed to do so.

[79] Mr Haney certified, as was the fact, that he was not acting for MM Holdings or the bank. His association with Mark McIvor and Equititrust did not mean that he was unable to give independent advice to Mrs McIvor or failed to do so. ASIC records state that he was a director of MM Holdings between May 1987 and September 1994. He could not recall this and could not recall playing any active role in the company which was then known as Jefferson Holdings Pty Ltd.

[80] Mr Welch acted for MM Properties Pty Ltd, MM Holdings and/or Boscorp No 1 Pty Ltd in relation to certain real estate transactions in the first half of 2003. I accept his evidence that he did not feel that this past involvement was a problem. I conclude that the advice which he gave Mrs McIvor on 16 January 2004 was independent advice. Mr Welch did not act for either the borrower or the bank in respect of the transaction. He understood that his duty was to Mrs McIvor. The possibility exists that Hickey Lawyers had other matters on foot at the time that Mr Welch advised Mrs McIvor. However, there is no evidence of this, and the property-related transactions particularised by Mrs McIvor and about which Mr Welch was cross-examined had concluded well prior to January 2004.

Was the provision of independent advice (or other circumstances) sufficient to make the provision of the guarantees and mortgage the free exercise of an independent will?

[81] Contrary to Mrs McIvor's evidence, she received advice from Ms Coghlan, Mr Haney and Mr Welch. Mrs McIvor was not knowingly giving false evidence

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[42] Supra at 694.

when she asserted that she did not receive any advice from any of these solicitors. I find that she has no proper recollection of the advice that she was given and has, instead, reconstructed matters. It is possible that she has simply forgotten what was said so long ago and, based on her present predicament, convinced herself that she could not have been given the advice which each solicitor certified was given. Presently she is in no position to meet the demands that have been made by the bank. It seems that she was never in a position to meet the multi-million obligations that she guaranteed. But this did not stop her from doing so. Some parts of Mrs McIvor's evidence were to the effect that she would never have guaranteed to pay such large amounts because she did not have the financial capacity to do so. However, this after-the-fact rationalisation does not persuade me that she gave the guarantees and mortgages which she did without understanding their purport and effect. She had an adequate understanding of them. She was advised of the purport and effect of each transaction. She was advised in very simple terms, which she was able to understand, that she was guaranteeing the relevant borrowings and that she might go bankrupt or lose her house. She received independent advice about these transactions. She also understood it. The risks that were pointed out to her were risks that she was prepared to take. She believed that Mark McIvor knew what he was doing. She was prepared to commit to the relevant transactions after receiving independent advice because she believed that the transactions would be advantageous to her son and, to some extent, that the whole family might benefit.

[82] Mrs McIvor's commitment in providing the guarantees and mortgages which she did can be explained as being the product of parental love and affection.

[83] The fact that Mrs McIvor trusted her son and had confidence that he would continue to succeed in business does not mean that providing the relevant guarantees and mortgages to the bank was not the free exercise of an independent will. The relevant guarantees and mortgages were only provided to the bank after Mrs McIvor had received independent advice. She also acknowledged, before the guarantees and mortgages were provided, that she was doing so as a result of making her own decision and not just because she had been asked to sign them.

[84] Although Mrs McIvor had limited formal education and little business experience, she had an adequate comprehension of the obligations she was undertaking and an understanding of the effect of the transactions.

[85] Any presumption of undue influence has been rebutted. The provision of independent advice and Mrs McIvor's understanding of the nature and effect of the proposed transactions enabled her to make a choice about whether to provide the relevant guarantees and mortgages to the bank. Her choice was affected by the trust and confidence which she reposed in her son and her expectation that he would continue to be successful in his business exploits. This does not mean that her will was overborne by Mark McIvor's influence and that she did not bring a free mind and will to the matter. Having received and appreciated the independent advice that she was given about the transactions and the risks that they presented to her, she chose to commit to them. She did not commit to those transactions as a result of the presumed or actual undue influence of her son. The provision of independent advice, and other circumstances including the past provision of advice to similar effect, meant that the relevant guarantees and mortgages were the free exercise of an independent will.

The bank's knowledge of possible undue influence

[86] The fourth substantial issue is whether or not the bank was on notice of the exercise or possible exercise of undue influence, and if so, was this displaced by the solicitors' certificates it received and by acknowledgments by Mrs McIvor that she understood the purport and effect of the documents. Two different time periods require consideration. The first is the period before Mrs McIvor received independent legal advice and solicitors gave certificates to the bank. The second is after the bank received the certificates. The certificate that it received dated 16 January 2004 was not simply an "Independent Solicitors Certificate", by which Mr Welch certified about the advice that he had given Mrs McIvor during his interview with her. In addition, Mrs McIvor certified that she had been handed a copy of the certificate, read it and that the information stated in it was true.

[87] Mrs McIvor submits that certain facts of which the bank was aware were sufficient to raise in the mind of any reasonable person the possibility that she was subject to Mark McIvor's undue influence. These include the admitted fact that the bank knew that Mrs McIvor was Mark McIvor's mother and that Mark McIvor was qualified in law and admitted as a solicitor. The bank's knowledge of Mark McIvor's experience and acumen in commercial matters is recorded in bank documents which refer to his track record as a capable investor and his involvement in lending through Equititrust. The bank knew that Mrs McIvor was not an office-holder in the borrowers or involved in the day-to-day running of their businesses. On this basis in October 2002 it decided that she was entitled to protection under the Code of Banking Practice and should receive external independent legal advice.

[88] The bank submits on the issue of notice that Mrs McIvor does not allege nor establish on the evidence that any person on its behalf knew anything about the relationship between Mrs McIvor and her son other than the fact that they stood in the relationship of adult child and parent. The mere fact that she may not have received any benefit from the execution of the guarantees is said to not take the case outside of any other case in which a guarantee is provided because of love and affection. The bank is not alleged to have known that Mrs McIvor was suffering from any disability nor particular dependency on her son. The facts known to it are said by the bank to not give rise to any presumption of influence nor any unique feature to the usual relationship between mother and son. The bank did not know or have reason to suspect that she was in a vulnerable position. The matters known to it are submitted to be consistent with supporting her son and his business out of love and affection.

[89] The information known to the bank left open the possibility that Mrs McIvor was free of her son's influence. However, it also created the possibility that Mark McIvor, as a solicitor and experienced businessman, was in a position to exercise undue influence over his mother. This possibility was such as to raise in the mind of any reasonable person a very real question as to undue influence.

[90] In those circumstances, the bank acted prudently in requiring independent legal advice and that solicitors certified certain matters before it would provide the requested facilities to the borrower.

[91] The critical issue is whether notice of possible undue influence was displaced by the solicitors' certificates or other circumstances.

[92] The bank did not rely only on solicitors' certificates. In addition, Mrs McIvor executed acknowledgments which contained affirmative responses to various questions about her understanding of the importance of obtaining independent advice, that she had obtained advice from her own lawyer, that she understood the risk of the transaction and that she understood her potential liability. The acknowledgment contained a number of other matters, including an acknowledgment that she was making her own decision to sign the guarantee, and not just because someone asked her to do so. However, particular reliance is placed by the bank upon the fact that it obtained certificates on each occasion from independent solicitors.

The bank's reliance on solicitors' certificates

[93] Courts have considered reliance by financiers on solicitors' certificates in a variety of legal contexts. The issue which emerges from these authorities is whether the financier was possessed of any knowledge that could preclude reliance on the solicitors' certificates. In the context of setting aside a mortgage as unjust pursuant to the *Contracts Review Act* 1980 (NSW), it has been said that where a party is informed that independent legal advice was obtained by the other party, it is not obliged "to interrogate the adviser and the advisee to ensure that not only that the advice was given but that it was understood."[43] It would be strange if the certificate of advice, which *prima facie* established that advice had been given which was not in any way impugned by other information furnished to the financier, would merely be "the starting point for further enquiries, in effect asking the solicitor whether he 'really and truly' gave the advice."[44] Absent circumstances where a party is put on notice that the advice has not been given, has not been given properly or has not been understood, the party seeking to enforce the contract is entitled to rely upon the certificate.[45]

[94] The bank in this case was entitled to assume that the relevant solicitor would act honestly and give proper advice to Mrs McIvor.[46] It was reasonable for the bank to expect Ms Coghlan, Mr Haney and Mr Welch respectively to owe a professional duty to Mrs McIvor alone in performing the tasks of interviewing her and explaining the relevant transaction to her. In *Banco Exterior Internacional v Mann*, Lord Bingham, then the Master of the Rolls, stated:

> "If the certifying solicitor did his job with reasonable competence, as the bank was entitled to expect, Mrs Mann would appreciate quite clearly that if the worst happened she could lose her rights in the house and that it was for her to decide whether she was willing to take that risk or not. It was no part of the solicitor's duty to advise her not to sign. It was enough if she would receive such advice as would leave her in no doubt of her right to decide whether she was

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43 *Esanda Finance Corporation Ltd v Tong* (1997) 41 NSWLR 482 at 491, citing with approval *St George Commercial Credit Corporation Ltd v Collins Wallis Properties Pty Ltd* (Rolfe J, New South Wales Supreme Court, 11 February 1994, unreported).

44 Ibid.

45 Ibid.

46 *Massey v Midland Bank Plc* [1995] 1 All ER 929 at 935; *Bank of Baroda v Shah* [1988] 3 All ER 24 at 29.

> willing in all the circumstances to take a risk which had been explained to her." [47]

If a prospective surety deals with a bank through a solicitor, the bank is entitled to assume that the solicitor has given her appropriate advice. If there is a possibility of a conflict of interest, then the bank is entitled to assume that the solicitor will have told the prospective surety that she is entitled to take independent advice. The bank is not obliged to inform the solicitor of his or her professional duties.[48]

[95] The extent of the solicitor's advice is a matter for the solicitor's professional judgment, and the bank is not generally involved in the nature and extent of the solicitor's advice.[49]

[96] It is not the law that independent legal advice can only be given by a person with no connection to the borrower.[50] The fact that the solicitor may have acted in the past for the borrower, or has some connection with the borrower, does not mean that the bank is not entitled to assume that the solicitor is telling the truth in a certificate, particularly where it is well-known that to fail to tell the truth on a material matter would be an act of professional misconduct imperilling the solicitor's professional future.[51]

[97] This is not a case in which any of the solicitors who gave a certificate were acting for the borrower. Each was in a position to give independent advice. In agreeing to interview and advise Mrs McIvor, each owed legal and professional duties to her. The bank was entitled to assume that each solicitor observed these duties. It was not for the bank to tell the solicitor how to perform his or her duties or, save for exceptional circumstances, to inquire about the independence of the solicitor or the adequacy of the advice that had been given.[52] The fact that a solicitor had some involvement with Mark McIvor or his companies did not mean that he or she was unable to function independently in advising Mrs McIvor as guarantor.[53]

[98] Ordinarily, a solicitor's assumption of legal and professional responsibilities provides sufficient assurance that he or she will give the requisite advice independently, competently and in a disinterested manner. The provision of a solicitor's certificate does not wholly eliminate the risk of undue influence or misrepresentation. But it does provide a bank with a degree of assurance, depending upon the contents of the certificate, that the party to whom the independent advice has been given understands the purport and effect of the transaction, including its risks, and is in a position to make a free choice about proceeding with the transaction, knowing those risks. Although the risk of undue influence is not wholly eliminated by such a certificate, it usually will be sufficient to put to rest what otherwise would have been a suspicion of undue influence.[54]

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47 [1995] 1 All ER 936 at 950.

48 *Bank of Baroda v Rayarel* [1995] 2 Fam Law R 376 at 386.

49 *Massey v Midland Bank Plc* (supra) at 934-935.

50 *National Mutual Trustees Ltd v Dedrion Pty Ltd* (Hansen J, Supreme Court of Victoria, 18 August 1997, unreported).

51 *St George Bank Ltd v Dunstan* (Hayne J, Supreme Court of Victoria, 10 November 1994, unreported at p 20).

52 *Wilkinson v ASB Bank Ltd* (supra) at 692.

53 Ibid at 694.

54 *St George Bank Ltd v Dunstan* (supra) at 21.

[99] In this matter, the solicitor probably was arranged by Mark McIvor. This is unremarkable, and does not mean that the advice given was not independent or that the bank was not entitled to rely upon the solicitor's certificate. The certificate required the solicitor to say that he or she was not acting for the bank or the borrower in the relevant transaction. In addition, for the reasons given in the case law that I have considered, the bank was entitled to assume, that each solicitor was acting in accordance with legal and professional obligations owed to Mrs McIvor in explaining documents and advising her, and in doing so was providing independent advice.

[100] The fact that documents had been signed by Mrs McIvor before she saw Mr Haney or Mr Welch does not mean that the bank was not entitled to rely on the certificates given by each of those solicitors on matters of substance. These were that each solicitor had explained the nature and effect of the documents and the risks involved in the transactions, and been assured that Mrs McIvor wished to proceed with the transactions, and had signed the documents freely, voluntarily and without pressure from the borrower or any other person.

[101] The evidence which I accept does not provide a basis to conclude that the advice given to Mrs McIvor by each solicitor was inadequate. I have rejected Mrs McIvor's evidence that she was not advised by each solicitor. Each solicitor's evidence and the certificate that each signed indicate that she was adequately advised.

[102] The present point, however, is not whether the advice she was given was inadequate. Any inadequacy in the advice was not a matter known to the bank and it was entitled to assume that the advice given was independent and appropriate.[55] The certificate given by Ms Coghlan is of historical interest since no issue arises in these proceedings about the enforcement of the 1995 guarantee or the mortgage executed by Mrs McIvor on 29 June 1995. The certificates given by Mr Haney in 2002 and by Mr Welch in 2003 were sufficient to displace any suspicion of undue influence.

[103] The bank received the executed guarantees and the 2003 mortgage after Mrs McIvor had received independent advice. Having received those certificates, and in circumstances in which it was entitled to assume that Mrs McIvor had taken independent and appropriate advice, the bank was no longer on notice of the exercise or possible exercise of undue influence.

Do the principles in *Garcia* apply to the present relationship?

[104] As earlier noted, Mrs McIvor submits there is no sound reason why the principle stated in *Yerkey v Jones* and confirmed in *Garcia* should be limited to a wife who guarantees her husband's liabilities. She submits that it should apply to other non-commercial relationships of trust and confidence of which the financier is aware. As McMurdo P observed in *obiter* in *Agripay Pty Ltd v Byrne*[56] there "seems to be no sound reason why these principles should be limited to wives entering into guarantees of their husbands' liabilities." The Victorian Court of Appeal in *Kranz v National Australia Bank Ltd*[57] concluded that the application of

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55 *Burrawong Investments Pty Ltd v Lindsay* (supra) at [93].

56 Supra at 507 [4].

57 Supra at 319-320 [24].

Garcia is not limited to the most intimate of family relationships. I respectfully follow those observations. Margaret Wilson J adopted a similar view in *ANZ Banking Group Ltd v Alirezai* whilst observing that the "diversity of relationships encompassed by the *Garcia* principle is ultimately a question for determination in an appropriate case by the High Court."[58]

[105] It is unnecessary for me to decide whether the principles stated in *Garcia* apply to a relationship of trust and confidence of the kind that existed between mother and son at the time Mrs McIvor provided the guarantees and the mortgage which are challenged by her. On the assumption that the principles in *Garcia* apply to such a relationship, Mrs McIvor has not proven that the guarantees and the mortgage were provided as a result of undue influence, or that the bank had either actual or constructive notice of the alleged undue influence. She has not proven her claim of undue influence so as to make it unconscionable for the bank to enforce the 2002 guarantee, the 2003 guarantee or the mortgage.

Is it unconscionable for the bank to enforce the guarantees and the mortgage on the second ground considered in *Garcia*?

[106] As previewed, Mrs McIvor relies on the second ground considered in *Garcia*, and submits that it would be unconscionable for the bank to enforce the guarantees and the mortgage because it did not reasonably believe that their purport and effect had been explained to her by a competent, independent and disinterested stranger. She relies on four matters which, in combination, are said to make it unconscionable to enforce the guarantees and mortgage.

[107] The first matter alleged by her is that she did not understand the purport and effect of the transactions. For the reasons which I have given, she has not proven this fact. She had an adequate comprehension of the obligations she was undertaking and an understanding of the effect of each transaction.

[108] The second matter is that the transaction was voluntary, in the sense that she obtained no financial benefit from the transaction and performance of the obligations of which she agreed to guarantee. This element is not contested.

[109] The third allegation is that the circumstances known to the bank were sufficient to make it aware of the possibility that Mrs McIvor might repose trust and confidence in Mark McIvor in matters of business, and that he might not fully and accurately explain the purport and effect of the transactions to her. For the reasons that I have given, the bank was aware of this possibility.

[110] The fourth matter alleged by Mrs McIvor is that the bank did not satisfy itself that she had received advice about the purport and effect of the transaction from a solicitor who the bank believed on reasonable grounds to be competent, independent and disinterested. For the reasons that I have given, this allegation cannot be sustained. The bank requested and obtained certificates which satisfied it that Mrs McIvor had received advice about the purport and effect of the transaction from a solicitor. The bank was entitled to rely upon each certificate and to believe, on reasonable grounds, that Mrs McIvor had received advice from a solicitor who was competent, independent and disinterested.

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58 [2004] QCA 6 at [115].

[111] Mrs McIvor has failed to establish the factual basis relied upon by her to allege that it is unconscionable for the bank to enforce the guarantees and the mortgage on the second ground considered in *Garcia*.

The bank's counterclaim

[112] Because the bank is entitled to enforce the 2003 guarantee and the mortgage over the Woodgee Street land, and because there is no defence to the counterclaim apart from the equity asserted in support of Mrs McIvor's claim, the bank is entitled to judgment on its counterclaim. The factual matters outlined by the bank in its submissions on the counterclaim are not contested. As at 19 November 2012 the amount owing to the bank by Mrs McIvor was $9,417,041.45. This consisted of the limit of Mrs McIvor's liability under the guarantee of $8,270,000, together with interest from 23 February 2012 to 19 November 2012 at the "Unarranged Lending Rate" which is currently 18.30 per cent. Additional interest of $125,842.63 has accrued to the date of judgment. Accordingly, there will be judgment for the defendant on its counterclaim in the amount of $9,542,484.09.

[113] The defendant is also entitled to an order for recovery of vacant possession of the Woodgee Street land, being the land described as Lot 20 on RP 842700, County of Ward, Parish of Tallebudgera.

[114] I will hear the parties about the date by which vacant possession should be given, and the question of costs.

Conclusion

[115] Mrs McIvor placed trust and confidence in her son at the time she provided guarantees and mortgages to the bank in 1995, 2002 and 2003. It was not simply the trust and confidence that a loving mother places in a son who has been good to her and made his way in the world. It was the trust and confidence of a parent who had little formal education and business experience. By comparison, Mark McIvor was a solicitor who had made a success in his business as a moneylender. Mrs McIvor was in awe of his achievements, and he was in a position to exercise dominion, power or ascendency over her.

[116] Their relationship gave rise to a presumption that the relevant guarantees and the mortgage were given as a result of the exercise of influence by Mark McIvor.

[117] Mark McIvor in fact exercised undue influence in requesting that his mother give the guarantees and the mortgage to secure new borrowing facilities for his companies. However, on each occasion, and at the bank's insistence, Mrs McIvor received independent advice from a solicitor about the relevant guarantee and the mortgage. She was told about the proposed transactions and the risks of guaranteeing the obligations which the borrower proposed to assume. She was told by independent solicitors that she might go bankrupt and lose her home.

[118] The receipt of such advice meant that her will was not overborne. The independent advice that she received and understood leads me to conclude that the guarantees and the mortgage were provided in the free exercise of an independent will.

[119] In addition, any suspicion by the bank of a possible exercise of undue influence was displaced by the solicitors' certificates it received, being certificates upon which the

bank was entitled to rely in conjunction with acknowledgments signed by Mrs McIvor.

[120] Mrs McIvor has not established her claim of undue influence. Also, she has not established the second ground considered in *Garcia*. This is because:

(a) she understood the purport and effect of each transaction; and

(b) the bank satisfied itself that she had received advice about the purport and effect of the transaction from a solicitor who the bank believed on reasonable grounds to be competent, independent and disinterested.

[121] Her proceeding will be dismissed.