SUPREME COURT OF QUEENSLAND

CITATION:	*Schultz v Bank of Queensland* [2014] QSC 305
PARTIES:	**KYM ELEANOR SCHULTZ** (plaintiff) v **BANK OF QUEENSLAND LIMITED** ACN 009 656 740 (defendant)
FILE NO:	BS6255/2012
DIVISION:	Trial
PROCEEDING:	Trial
DELIVERED ON:	17 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	28-31 July 2014, 1 August 2014
JUDGE:	Jackson J
ORDERS:	**The judgment of the Court is that:** **1. The plaintiff's claim is dismissed.** **2. The plaintiff deliver possession of the land described as lot 6 on Registered Plan 91396 County of Canning, Parish of Maroochy, Title Reference 13570219 to the defendant within 30 days of this judgment.** **3. The plaintiff deliver possession of the land described as lot 2 on Building Unit Plan 4476 County of Canning, Parish of Mooloolah, Title Reference 16207026 to the defendant within 30 days of this judgment.** **4. Direct that the defendant file and serve an affidavit stating the outstanding balance on the loan made by the plaintiff to Camelon Pty Ltd on or about 11 April 2007 for $773,000 on or before 19 December 2014.** **5. The plaintiff pay the defendant's costs of the proceeding.** **6. Liberty to apply.**
CATCHWORDS:	GUARANTEES AND INDEMNITIES – GUARANTEES – where a guarantee was given by a wife to secure three different loans by her husband and their family trust – where

the final loan was to purchase a property to extend the family home – where final loan was made to the discretionary family trust, of which the wife was a beneficiary – whether the principles in *Yerkey v Jones* are applicable – whether the wife was a volunteer – whether the wife had any relevant misunderstanding about the nature and effect of the guarantee given for the final loan

EQUITY – UNCONSCIONABILITY, UNCONSCIONABLE DEALINGS AND OTHER FORMS OF EQUITABLE FRAUD – SPECIAL DISABILITY – where a guarantee was given by a wife to secure three different loans by her husband and their family trust – where wife argued that she was at a special disadvantage and therefore entitled to relief pursuant to the principles in *Commercial Bank of Australia Ltd v Amadio* or s 12CA of the *Australian Securities and Investment Commission Act* 2001 (Cth) – whether the wife was in a position of special disadvantage

Australian Securities and Investment Commission Act 2001 (Cth), s 12CA
Uniform Civil Procedure Rules 1999, r 166

Agripay Pty Ltd v Estate of Byrne (dec'd) [2010] QSC 189, cited
Agripay Pty Ltd v Estate of Byrne (dec'd) [2011] 2 Qd R 501, considered
Australian Consumer and Competition Commission v Berbatis (2003) 214 CLR 51, cited
Choice Constructions Pty Ltd v Janceski (No 3) [2011] WASC 358, cited
Commonwealth Bank of Australia v Khouri [1998] VR 128, cited
Dubois v Ong [2004] QCA 185, cited
Elkofairi v Permanent Trustee Co Ltd [2002] NSWCA 413, cited
Garcia v National Australia Bank Ltd (1998) 194 CLR 395, considered
Plasterboard Central Pty Ltd v Blain [2009] NSWDC 44, cited
State Bank of New South Wales v Chia (2000) 50 NSWLR 587, cited
Robinson v Watts [2000] NSWSC 584, cited
Yerkey v Jones (1939) 63 CLR 649, considered

COUNSEL: R Cameron for the plaintiff
P O'Higgins for the defendant

SOLICITORS: Hillhouse Burrough McKeown for the plaintiff
Thomson Geer for the defendant

[1] **JACKSON J:** The "*Yerkey v Jones* equity" is an equity raised in favour of a wife who enters into a transaction as surety for the debts of her husband or her husband's company. To some, it might seem an anachronism in a 21st century world. But it was affirmed by the High Court as recently as 1998 in *Garcia v National Australia Bank Ltd* ("*Garcia*").[1] There are dicta which urge that the principle extends beyond the protection of a wife to analogous relationships of trust and confidence,[2] but I am not concerned with that question.

[2] There are two limbs of the *Yerkey v Jones* equity. The first turns on whether the husband actually exercises undue influence affecting the wife's decision to become a surety. The second turns on whether "the wife does not understand the effect of the document or the nature of the transaction of suretyship".[3] Then, if the transaction is one in which the wife is a volunteer, and the creditor has notice that the surety is a wife (and therefore may repose trust and confidence in her husband), the lender is obliged to take steps to explain the transaction of suretyship, unless it appears that an independent third party has done so.[4] If the lender fails to do so, the wife is not bound by the guarantee or indemnity.

[3] This is a second limb case. The plaintiff, Mrs Schultz, relies on the *Yerkey v Jones* equity to claim that she should be relieved of her legal obligation to pay the defendant bank under a guarantee she gave for a loan made to the corporate trustee of a discretionary family trust,[5] controlled by her former husband.

[4] Alternatively, the plaintiff claims the same relief based on unconscionable conduct by the defendant.

Background

[5] Mrs Schultz completed her secondary school education to Grade 12. In about 1983, when she was 24, she bought a home unit at Highgate Hill in Brisbane with a loan from a bank secured on the property. She lived in the unit. At the time, she worked as a scuba diving instructor. In 1991, she purchased another unit at Cotton Tree on the Sunshine Coast. That purchase was funded by a building society and secured by a mortgage over the property. After using it for a time, she has continued to hold the Cotton Tree unit as an investment property. Before her marriage, in her own words, she was "a good saver".

[6] At the time of the marriage in 1999, Mrs Schultz worked for Revlon as a sales representative for a territory extending from the Sunshine Coast to Rockhampton. Mr Schultz had a number of businesses. He described himself as an entrepreneur. He was also a member of the Australian Army Reserve. He held the rank of Major at that time. By the time of the trial, he held the rank of Lieutenant Colonel.

[7] Mr Schultz originally owned vacant land at 50 Kawanna Street, Mudjimba Beach. He had inherited it. They built a house on the land. Mrs Schultz paid for the

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1 (1998) 194 CLR 395.

2 Compare *Kranz v National Australia Bank* (2003) 8 VR 310, 317-323; *ANZ Banking Group Ltd v Alirezai* [2004] ANZ ConvR 54-601, [34]-[40], [79]-[84]; *Agripay Pty Ltd v Byrne* [2011] 2 Qd R 501, 507 [3]-[4]; *McIvor v Westpac Banking Corporation* [2012] QSC 404, [104]-[105].

3 *Yerkey v Jones* (1939) 63 CLR 649, 684.

4 *Garcia v National Australia Bank* (1998) 194 CLR 395, 409.

5 She is a beneficiary of the trust.

construction from her own funds. They moved into the house at the end of 1999. Mrs Schultz said that she contributed approximately $400,000 and that the vacant block was worth about the same. She considered that they each owned half of the house.

[8] On 17 January 2000, they were registered as co-owners. They granted a mortgage to the National Australia Bank dated 29 December 1999. The mortgage was stamped to secure $182,000. The borrowing was for Mr Schultz's businesses. Mrs Schultz does not recall whether she signed a guarantee for those debts as well as the mortgage.

[9] When Mrs Schultz moved into 50 Kawanna Street, she rented the Highgate Hill unit. She was also renting the Cotton Tree unit.

[10] At the end of 2003, Mrs Schultz sold the Highgate Hill unit for $287,000. The proceeds of sale were approximately $270,000. On 6 January 2004, she granted a mortgage to the ANZ Bank over the Cotton Tree property. That mortgage may have been given in lieu of a sum previously secured over the Highgate Hill unit before then.

[11] In the first half of 2004, Mr and Mrs Schultz were expecting a child. Mrs Schultz sought professional advice about how to invest the $270,000 proceeds of sale of the Highgate Hill unit. She consulted Mr Callaghan who was Mr Schultz's accountant. He recommended financial advisors or planners named Focus Financial Solutions ("Focus"). Mr and Mrs Schultz were thinking towards the future. They were advised by Mr Callaghan to establish a family trust. Mrs Schultz arranged to do that with Mr Callaghan.

[12] On 14 March 2005, the K&D Schultz Family Trust Deed was settled. The trustee was Camelon Pty Ltd. Mr Schultz was the sole director and shareholder of Camelon. The class of primary beneficiaries were Mr Schultz and also Mrs Schultz, who was included as a spouse of Mr Schultz as the named primary beneficiary. The class of secondary beneficiaries included the children of either of them. Their son William, born on 1 July 2004, was thus the secondary beneficiary.

[13] The $270,000 proceeds of sale of the Highgate Hill unit were lent by Mrs Schultz to Camelon as trustee for the family trust. The funds were invested in a portfolio of securities upon the recommendation of Mr Rowley from Focus. Mrs Schultz thought of it as a way of saving up for William, for schooling and university and to improve the overall family position. Mr Rowley periodically came out and talked about different investments and made recommendations. Mr and Mrs Schultz relied on his advice about what to invest in. To that extent, Mrs Schultz saw her fortunes and the family trust's fortunes as being tied together.

[14] About the same time, Mr Schultz's accountant advised that 50 Kawanna Street should be transferred into Mrs Schultz's name only. The purpose was "asset protection", presumably meaning that if the property were held in Mrs Schultz's name it might be protected from Mr Schultz's separate creditors.

[15] On 29 September 2005, Mrs Schultz, now as sole proprietor of 50 Kawanna Street, granted a mortgage to the National Australia Bank ("NAB"). The mortgage was stamped to secure $300,000. It probably secured Mr Schultz's business borrowings.

Mrs Schultz does not recall whether she signed a guarantee of his debts to NAB. But in Mrs Schultz's mind, half the house was still Mr Schultz's property and she felt he could do whatever he wanted up to half the value.

Dealings with the defendant

[16] On 9 November 2005, Mr and Mrs Schultz first met with Glen Goldspink of the defendant. They described the meeting as a "meet and greet". Mr Schultz was considering changing his bank. Mrs Schultz told Mr Goldspink about her employment with Revlon. Mr Schultz told Mr Goldspink about his affairs. At that time he still had a number of businesses.

[17] As events transpired, Mr Schultz, Camelon and Mrs Schultz obtained loans from the defendant within the following two years. The dispute which remains to be decided is whether Mrs Schultz's guarantee of one of Camelon's loans is binding on her. The loans may be summarised as follows:

[18]

Date	**Borrower**	**Amount**
3 January 2006	Duncan Emery Schultz	$400,000
17 July 2006	Camelon Pty Ltd atf K&D Schultz Family Trust	$444,000
11 April 2007	Camelon Pty Ltd atf K&D Schultz Family Trust	$773,000
11 April 2007	Kym Eleanor Schultz	$77,000

[19] Mrs Schultz guaranteed each of Mr Schultz's and Camelon's loans. The first guarantee was provided on 3 January 2006 for the $400,000 loan to Mr Schultz. Mr Goldspink recorded the purpose of the loan as being to refinance existing loans from another bank (presumably NAB) and to provide approximately $30,000 to assist with renovations to the family home. The land at 50 Kawanna St was provided as security. The relevant security documents were the guarantee of the loan provided by Mrs Schultz and a mortgage granted by Mrs Schultz as registered proprietor of the land securing her liability on the guarantee. As required by the defendant, Mrs Schultz obtained independent legal advice before the guarantee and mortgage were executed and the loan was made.

[20] The second guarantee was provided on 17 July 2006 for the $444,000 loan to Camelon. Mr Goldspink recorded the purpose of the loan as being to assist with investment related transactions with the majority of loan funds to be invested in a range of managed fund investments professionally managed through the customers' financial planners. The existing mortgage also secured Mrs Schultz's liability on the second guarantee.

[21] On this occasion, Mrs Schultz did not obtain independent legal advice. Instead, as required by the defendant, she signed a waiver expressing that she had been offered

the opportunity to seek legal advice upon the guarantee and its implications and had elected to waive that right, before the guarantee was executed and the loan was made.

[22] Although the claim in the proceeding seeks an order setting aside the second guarantee, in the end Mrs Schultz did not press for that relief. By the time of the trial, only a relatively minor balance of the $444,000 loan remained unpaid. I was informed on the morning of 1 August 2014, the last day of the trial, that it had been repaid leaving only the third and last of Mrs Schultz's guarantees to be considered.

[23] The third and last guarantee was provided on 11 April 2007 for the $773,000 loan to Camelon. Mr Goldspink recorded the purpose of the loan as being to assist with the purchase of a vacant block of land at 53 Mudjimba Esplanade, Mudjimba Beach. That block was located directly behind the family home at 50 Kawanna St, would "provide multiple future options in relation to sub division and development" and had direct access via a public walkway to the beach.

[24] Again, Mrs Schultz did not obtain independent legal advice. Instead, and as for the second guarantee, as required by the defendant, she signed a waiver. The waiver provided that she had been told to seek independent legal and financial advice and to have the guarantee and other securities and the transactions contemplated by them explained by an independent lawyer. It provided that she had decided not to seek independent legal or financial advice before the guarantee was executed and the loan was made. It also stated that she understood the practical and legal effect of the loan documents and the transactions contemplated by the loan documents. Finally, it stated that she understood that if the borrower defaulted the defendant would be entitled to sue the guarantor to recover the moneys due to the defendant.

[25] Mrs Schultz's claim is that the waiver does not truly state the position. She says that she did not properly understand the transaction of guarantee and that it was not properly explained to her. Her evidence may be summarised thus. On 11 April 2007, Mr Goldspink came to the family home. Mrs Schultz was there with her husband at the time. Mr Goldspink had around 20 different documents. The documents were signed. The signing occurred on the back deck. There was not much talk about each document beyond "just explaining what the document was". About the guarantee, she said: "He just said that this was the guarantee, that the Bank always recommended that you get legal advice. He was – this was a waiver, that I could sign the waiver. He said it to Duncan and I. And that I would be providing a guarantee on the loan, and I was putting – I would be putting Cotton Tree as collateral for it."

[26] When asked whether there was discussion about the terms of the loan Mrs Schultz said: "Not really, no." When asked as to her understanding of the guarantee, she said: "[Mr Goldspink] said 'Worst case scenario is, you know… by guaranteeing the loan you could be asked to repay the loan if Duncan defaults'." Also, at the time of signing, she knew the amount of the loan being guaranteed was $773,000 as "it was on the front page of the guarantee document."

[27] Mrs Schultz gave other evidence to the effect that before she saw the guarantee and signed it she had thought that her guarantee would only be for $100,000 or $150,000 or something of that order. That was because she believed that was the amount of additional security required by the bank for the $773,000 loan to

Camelon to buy 53 Mudjimba Esplanade. But she did not say that she conveyed this view to anyone else, or that there was any reason why Mr Goldspink would have thought she had that understanding.

Was Mrs Schultz a volunteer?

[28] An element of the *Yerkey v Jones* equity is that the wife is a volunteer in the transaction. There is some uncertainty as to the extent of this requirement in a context like the present case.

[29] The $773,000 loan was made to Camelon as trustee for the K&D Schultz Family Trust. Mr Schultz controlled Camelon. Mrs Schultz was a beneficiary of the trust. But because it was a discretionary trust, she had no equitable interest in the trust's assets. She only had a right to the proper administration of the trust. The trustee and Mr Schultz had a power of appointment. It could be used to remove a beneficiary other than Mr Schultz. On its face, and putting to one side any question of improper exercise of power, they could remove Mrs Schultz as a beneficiary.

[30] The plaintiff's counsel submits that these facts show Mrs Schultz's vulnerability as a beneficiary of the trust, her lack of an immediate or direct interest in the trust and, therefore, in the purchase of 53 Mudjimba St made with the $773,000 loan supported by her guarantee.

[31] However, those facts do not paint the full picture. The affairs of the trust were not a separate business investment for Mr Schultz. That was done through other companies or trusts. On the contrary, the trust's investments were to be made to build assets for the benefit of the family, including Mrs Schultz and their son William. Second, Mrs Schultz had lent $270,000 of her own money to the trustee, so that it could be invested on behalf of the trust for that purpose, and had been involved with the consultant advising as to the investments in the first year or so. She was already a significant creditor of the trustee. Third, the purpose of the $773,000 loan was to acquire land then to be be used as a backyard for the family home for the enjoyment of the family, including Mrs Schultz. Fourth, none of the investments made by Camelon as trustee mentioned in this proceeding was made by Mr Schultz without consulting Mrs Schultz and seeking her approval. In each case, her financial contribution through the provision of funds or security was required.

[32] What is required to show (the onus is on the defendant) that Mrs Schultz was not a volunteer? The cases do not speak clearly on this question in similar circumstances.

[33] In *Garcia*, the wife guaranteed the loans made by the bank to her husband's company. The plurality in the High Court held that the wife "obtained no real benefit from her entering the transaction; she was a volunteer".[6] The husband completely controlled the company. That some benefit flowed to the family from the husband's companies from time to time did not repel that finding. A broad view was taken of the facts. That Mrs Garcia was not directly involved in the affairs of the company whose debts she guaranteed, and Mr Garcia had complete control in fact, outweighed that Mrs Garcia, in law, may have been a director and shareholder of the company.

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6 (1998) 194 CLR 395, 411-412 [43].

[34] However, in *Garcia*, the relevant equity was described as arising where there is a "suretyship transaction which the husband seeks to have the wife enter **not for the benefit of the wife but of the husband**"[7] (emphasis added). If the question of voluntariness turns not only on whether the wife does not have a direct or immediate interest but also whether the husband does have a direct or immediate interest, there may well be a problem in reaching that conclusion over a transaction where the trustee of a family trust is the principal debtor supported by guarantees from both the wife and husband. Family trusts in this country are often settled and deployed for family tax planning or asset protection purposes, not to advantage a husband to the detriment of his wife.

[35] In *Commonwealth Bank of Australia v Khouri*,[8] the facts were similar to *Garcia*. Because any benefit gained by the wife was not as of right but a result of the exercise of discretion by the husband, she was a volunteer. In *Robinson v Watts*[9] the wife was a beneficiary under a family trust. The trustee of the trust held shares in the company whose debt the wife supported by a mortgage over her land, but it was held that for practical purposes she should be treated as a volunteer. In *Plasterboard Central Pty Ltd v Blain*,[10] the wife guaranteed the debts of a trading company managed by her husband in which she and her husband held shares for a family trust. She was a trustee and discretionary beneficiary under the trust. It was held that she could not be regarded as a volunteer. In *Choice Constructions Pty Ltd v Janceski (No 3)*,[11] the wife (and husband) who had mortgaged their interest in land for the debt of their son were not relevantly volunteers because they were general beneficiaries under the family trust established by the son.

[36] In *Agripay Pty Ltd v Estate of Byrne (dec'd)*,[12] the wife guaranteed her husband's liabilities for funds borrowed to invest in agricultural investments so as to reduce the husband's taxation liabilities. A part of the borrowed funds was invested in the name of a superannuation fund of which the wife was a member with her husband. It was held at trial that she had no real benefit from the principal transaction, or no direct or immediate gain, so she should be regarded as a volunteer. The Court of Appeal also dealt with the question of voluntariness, at least in part. McMurdo P held that any benefit was likely to be "neither direct nor immediate".[13] White JA said that the issue was "no longer an aspect of the appeal".[14] McMeekin J held that the benefits of the transaction were not "sufficiently significant or proximate to disqualify" the wife from the protection afforded by the equity.[15]

[37] In *Dubois v Ong*,[16] Muir JA held that the legal rights of the parties are not necessarily determinative. However, the point his Honour was making was that a wife may obtain no real benefit for the purposes of the *Yerkey v Jones* equity and be considered a volunteer even though she has rights as a shareholder or director of a

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7 (1998) 194 CLR 395, 404 [23].
8 [1998] VSC 128.
9 [2000] NSWSC 584.
10 [2009] NSWDC 44.
11 [2011] WASC 358.
12 [2010] QSC 189; on appeal [2011] 2 Qd R 501.
13 [2011] 2 Qd R 501, 508 [11].
14 [2011] 2 Qd R 501, 524 [62].
15 [2011] 2 Qd R 501, 528 [78].
16 [2004] QCA 185.

company that may suggest to the contrary, if in fact her husband has control and she is not likely to receive any benefit from her rights.

[38] In the present case, it is difficult to ignore that Mrs Schultz was sole proprietor of 50 Kawanna St so as to protect that asset from Mr Schultz's separate creditors, not because the land was truly hers alone. Second, the family trust was not Mr Schultz's enterprise. It was an investment vehicle for the benefit of the family, including Mrs Schultz and William. Her interest as a beneficiary under a discretionary trust was not a reflection of any reality that the trust was not being conducted for her benefit. Third, the purpose of the acquisition of 53 Mudjimba St was twofold. It was justifiable as an investment, but the intended use was as an addition to the family home for all the family, including Mrs Schultz, to enjoy.

[39] In my view, there is a thread visible through the case law that not all benefits, in a general sense, will be enough to show that a wife is not a volunteer. It would be inapt to describe the equitable interest of a beneficiary of a discretionary trust as a direct or immediate interest or benefit. What is the position where the intention is that the wife enjoy the benefit of use of the property acquired in a transaction of the present kind, although she has no legal entitlement to do so? At least where the husband retains legal or factual control over the property of the trust in question, the view consistent with modern authority may be that she is to be treated as a volunteer for the purposes of the *Yerkey v Jones* equity. That result seems possible even though the equitable interest of the husband in the trust property is the same as the interest of the wife. I will assume, without deciding, in the present case, that Mrs Schultz was a volunteer.

[40] The view of the law that I have assumed operates to the benefit of a wife and to the detriment of a lender who becomes a creditor of the trustee. Yet it may not be apparent to the lender that the wife is a volunteer, whereas the husband is not, just because an acquisition is to be made through the medium of the trustee of a family trust where the husband in fact controls the trustee. That view places a burden on the creditor to investigate both the legal and factual control of the trust, or to ensure that a sufficient explanation of the transaction is given to a guarantor wife, at the risk of the guarantee being unenforceable. However, in this case, I do not need to consider these difficulties further.

Requirement of misunderstanding

[41] The plaintiff's submissions were that Mrs Schultz did not understand that:

(a) she could limit her liability under the guarantee;
(b) she would be liable for interest and costs as well as the loan amount;
(c) she might be made bankrupt if the amount payable was not paid; and
(d) the mortgage over the Cotton Tree unit secured more than about $150,000.

[42] The plurality judgment in *Garcia* is clear that there must be misunderstanding by the wife. What is a material misunderstanding? From *Yerkey*, it includes that the wife "does not understand the effect of the document or the nature of the transaction",[17] or has a "misunderstanding or want of understanding of its contents

[17] (1939) 63 CLR 649, 684.

or effect",[18] or that there is a "misunderstanding or failure to understand the document or transaction".[19] From *Garcia* it includes that the wife "did not understand the purport and effect of the transaction of suretyship",[20] "did not understand the purport and effect of the transaction",[21] "[was] mistaken about the purport and effect of the transaction",[22] "[is seen] not to have understood the purport and effect of the transaction",[23] and "did not understand the purport or effect of the transaction".[24]

[43] However, in *Yerkey*, Dixon J said that if a wife understood "the general nature and effect of an instrument such as a mortgage… it is no ground for setting it aside that some of its details or its possible consequences or application are not comprehended".[25] The wife in that case understood that "she was to give a mortgage over her house… and that the mortgage would operate as a guarantee, so that the burden would fall on her house if her husband the failed to find the [principal amount]".[26] His Honour's view was that material misunderstandings would have included failure to understand that the mortgage secured interest, made the principal fall due on default and provided for a power of sale in such an event.[27]

[44] In *Garcia*, the wife's misunderstandings were that the guarantee was not limited to the amount of overdraft accommodation to be applied only in the purchase of gold, as the husband had told her, and that the wife's obligations under the guarantee were secured by the mortgage she had given over her home.

[45] In *Agripay Pty Ltd v Estate of Byrne (dec'd)*,[28] the wife understood that she was providing a guarantee and understood in general terms what a guarantee was. Her misunderstandings concerned the qualities of the investment to be made with the loan monies she was to guarantee. She did not know that the investment was an unusual scheme which had very high management fees in the early years and was relatively illiquid. Nor did she know the amount of the loan or the term of the investment. McMurdo P held that they were "essential aspects" of the transaction.[29] Therefore, the wife did not understand the purport and effect of the transaction. White JA and McMeekin J appeared to accept the primary Judge's findings that the material aspects that wife did not know were the amount of the principal debt, the identity of the lender, the term of the loan, the risks related to upfront management fees and the absence of a secondary market for sale of the investment.[30]

[46] In my view, it would have been a material misunderstanding for the purposes of the *Yerkey v Jones* equity, had Mrs Schultz misunderstood:

(a) whether she could limit her liability under the guarantee;

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18 (1939) 63 CLR 649, 685.
19 (1939) 63 CLR 649, 686.
20 (1998) 194 CLR 395, 408 [31].
21 (1998) 194 CLR 395, 409 [31].
22 (1998) 194 CLR 395, 409 [33].
23 (1998) 194 CLR 395, 410 [41].
24 (1998) 194 CLR 395, 411 [42].
25 (1938-1939) 63 CLR 649, 689.
26 (1938-1939) 63 CLR 649, 688.
27 (1938-1939) 63 CLR 649, 689.
28 [2011] 2 Qd R 501.
29 [2011] 2 Qd R 501, 511 [21].
30 [2011] 2 Qd R 501, 522 [56], 526 [67] and 529 [82]-[83].

(b) that her liability was for interest and costs, as well as the loan amount, under the guarantee;
(c) that she might be made bankrupt if the amount payable under the guarantee was not paid; or
(d) that the mortgage over the Cotton Tree unit was not limited to $100,000 or $150,000.

[47] It is unnecessary to consider other matters as they were not pressed by the plaintiff's counsel in submissions.

Mrs Schultz's understanding of the third guarantee

[48] It is relevant to deal with Mrs Schultz's understanding of prior transactions as background to the understanding she had of the dealings over the $773,000 loan and the guarantee (and mortgages) that secured it.

[49] As previously mentioned, before she had any dealings with the defendant, Mrs Schultz had been a party to at least four mortgages to other financial institutions. The last was a mortgage over 50 Kawanna St to NAB. That mortgage was given by her to NAB as sole proprietor of the family home to secure her husband's business borrowings. She didn't remember whether or not she received independent advice in connection with that mortgage. She did not remember whether or not she had guaranteed Mr Schultz's debts to the NAB. She was aware that if her husband defaulted on the loan she would be responsible for the debt. She was aware that one consequence of default was that the mortgage could be enforced and, in the worst case, the property could be sold.

[50] In late 2005 and January 2006, when Mr Schultz transferred his accounts to the defendant and borrowed $400,000 from the defendant in place of his borrowings from the NAB, Mrs Schultz attended the initial meetings with Mr Goldspink. She says there was one at 50 Kawanna St and there were two at different branches of the defendant before the transaction was carried through. The precise number of meetings doesn't matter for present purposes. Mrs Schultz knew from an early point that for the transfer from NAB to the defendant to occur, Mr Schultz was to borrow $400,000 from the defendant and she would be required to guarantee the loan and execute a mortgage over 50 Kawanna St securing it. She did not recall whether or not she received a letter from the defendant enclosing copies of the documents in the month before she signed the guarantee and executed the mortgage.

[51] However, on 3 January 2006, before Mrs Schultz signed the guarantee and executed the mortgage, she attended upon a solicitor, Mr Woolner, who gave her independent advice about the documents and transaction. The defendant required her to do so as a condition of the loan agreement. Mr Woolner certified that he had explained to Mrs Schultz the general nature and effect of the documents, that if the borrower (Mr Schultz) defaulted she would be required to make good the default which could involve all amounts owing by the borrower to the defendant and there was a risk of losing the security property. Mrs Schultz made no suggestion that Mr Woolner's certificate was inaccurate.

[52] In May to July 2006, when Camelon borrowed up to $444,000 from the defendant, Mrs Schultz attended two meetings with her husband and Mr Goldspink. Before the

first meeting, Mrs Schultz had discussed the proposed investment strategy and investments with Mr Schultz and Mr Lee, a representative of Focus Group.

[53] At the first meeting with Mr Goldspink, Mr Schultz was explaining the proposal to Mr Goldspink while Mrs Schultz was there. She knew that the proposal was for the family trust (Camelon) to borrow a sum of money from the defendant to carry out the proposed investments. She knew that Mr Schultz and Mr Goldspink were discussing how much might be borrowed for the purpose. She was aware that Mr Goldspink said that there would need to be a mortgage or there would need to be collateral. She knew that the defendant would require her to give a guarantee as a condition of the loan. The subject of whether she would be required to obtain independent advice was raised. Mr Goldspink said the defendant always recommends that she should get independent legal advice, but if she didn't the defendant would require her to sign a waiver. By the end of that meeting, she was aware that the amount of the borrowing would be up to $444,000, that she would be required to guarantee the loan amount and that a mortgage by her over 50 Kawanna St would secure the loan.

[54] On 4 July 2006, the defendant sent a letter to Mrs Schultz advising that they would send to her the guarantee and the borrower's credit contract which would include a list of securities shortly. She did not recall it.

[55] On 17 July 2006, at the second meeting, Mr Goldspink explained the lending transaction to Mrs Schultz by reference to a document headed "Facility Details". That document set out the terms of the defendant's offer as accepted and signed by Mr Schultz on behalf of Camelon. Mr Goldspink pointed to the security requirements which included that the loan would be secured by a guarantee from Mrs Schultz and the mortgage over 50 Kawanna St. Mrs Schultz understood that those terms were consistent with what she knew from the previous meeting, including that the loan was to be for up to $444,000 secured over the house.

[56] She signed the second guarantee that day. She has no recollection of reading it but she recalls that Mr Goldspink offered her the opportunity to read it. She acknowledges that the provision in the guarantee that she could refuse to sign the guarantee was consistent with what Mr Goldspink said to her.

[57] She signed a waiver that day in the form of a statutory declaration that was in accordance with her understanding that the defendant recommended she obtain independent legal advice but required her to sign a waiver if she did not. She probably read the waiver. She knew that the mortgage was to secure the loan, without necessarily understanding how that was done by the mortgage securing her liability the guarantee. She knew that, "worst case scenario", the property might have to be sold to pay the defendant back.

[58] Mrs Schultz acknowledges that Mr Goldspink said that the defendant recommended that she obtain independent legal advice, but she does not recall any recommendation that she obtain independent financial advice. But she also acknowledges that she glanced at a statement in the guarantee, that appeared above her signature, that recommended she "should also consider obtaining independent financial advice". She was also aware that the guarantee stated that she could ask for more information about the transaction or the facility related to the guarantee.

[59] Between the last week of December 2006 and April 2007, when Camelon borrowed $773,000 to purchase 53 Mudjimba St, Mrs Schultz attended two meetings with her husband and Mr Goldspink. The proposal was a subject matter that Mrs Schultz understood because, as she said, she understood what property was, as evidenced by her prior purchases and borrowings and sale of the Highgate Hill unit. In fact, her family already used 53 Mudjimba St as if it were part of their backyard. Mr Schultz had raised the possibility of purchasing it with her before either of the meetings with Mr Goldspink. He told her that he believed his business was going well and they could afford it. It was not suggested that at the time his statement of belief was false or unreasonably made.

[60] The first meeting with Mr Goldspink about the purchase of 53 Mudjimba St was in late December 2006. Mrs Schultz was excited about the prospect of purchasing the land. There was a discussion about the security required to support an estimated borrowing of $740,000. The existing borrowing by Camelon was secured, inter alia, by mortgages over 50 Kawanna St and Mr Schultz's Toowoomba property. But together with a mortgage over the land to be purchased they did not provide enough equity to secure the loan required to buy 53 Mudjimba St. They discussed Mrs Schultz granting a mortgage over her Cotton Tree unit to make up the shortfall. Mrs Schultz understood that the extra amount of equity needed was in the order of $100,000 but not over $150,000. They discussed that she would transfer her existing borrowing from another financial institution secured by mortgage over the Cotton Tree unit to the defendant to make things easier.

[61] Mrs Schultz does not recall discussion on that occasion about whether she should obtain independent legal advice.

[62] On 8 March 2007, the defendant sent Mrs Schultz a letter advising that they would send to her the guarantee and the borrower's credit contract which would include a list of securities shortly. She does not recall it.

[63] On 15 March 2007, the defendant prepared a letter to Mrs Schultz referring to her offer to give a guarantee in connection with the loan, enclosing copies of the guarantee, guarantee conditions, the borrower's credit contract and related securities. The letter was hand delivered to Mrs Schultz by a bank officer in an envelope containing a number of documents. The letter and draft guarantee both referred to the amount of the guarantee as $773,000. Both the draft guarantee and guarantee conditions prominently recommended that as proposed guarantor she obtain independent legal and financial advice, stated that there are financial risks in entering into the guarantee, stated that the proposed guarantor can refuse to enter into the guarantee, stated that the proposed guarantor has the right to limit their guarantee and stated that the proposed guarantor can request information. Mrs Schultz says she received the envelope but did not open it or read the documents.

[64] The second meeting was on 11 April 2007. On that day, Mr Goldspink explained the lending transaction to Mrs Schultz by reference to a document entitled "Home Loan Privileges Package Investment Line of Credit Facility Schedule". It set out the terms of the defendant's offer as signed and accepted by Mr Schultz on behalf of Camelon.

[65] Mrs Schultz signed the guarantee of the $773,000 loan on that day. She also executed the loan documents to transfer the loan on the Cotton Tree Unit to the

defendant and the mortgage over that unit to secure that borrowing and any other liabilities she had to the defendant. At the time, she understood or knew that the defendant recommended that she obtain independent legal advice, that there were financial risks, that she could refuse to enter into the guarantee and that she could ask for more financial information. She acknowledged in evidence that Mr Goldspink invited her (and I infer Mr Schultz) to read the documents to be signed but thought that there was not enough time to do so, given the number of documents. However, she agreed that Mr Goldspink was methodical in going through the documents saying (I infer at relevant points): "you need to read that and then sign at the bottom."

[66] Instead of obtaining independent legal advice, she executed the waiver required by the defendant. She quickly read the waiver.

[67] The point which appeared to be most significant to Mrs Schultz when she gave evidence is that she said that had not appreciated that her guarantee was to be for the full amount of the $773,000 loan until she saw the guarantee. That was either when she read it or when Mr Goldspink explained it. In either case, it was before she signed it. Taking that statement at face value, Mrs Schultz does not say that when she signed the guarantee she was still under any misapprehension about the amount of the guarantee. Her point was that she only became aware of the amount when she saw it or it was explained to her, just before she signed it. However, at the time, she did not say anything, either to Mr Goldspink or to Mr Schultz, to indicate that she had not understood the amount until that time.

[68] Mrs Schultz said that she did not understand that she could limit her liability under the guarantee, but she acknowledged she was aware of the statement in the documents that she could do so.

[69] The third guarantee and each of the two prior guarantees signed by Mrs Schultz in favour of the defendant stated prominently on their face that the guarantor could limit the amount of their guarantee. In fact, the amount of the guarantee was limited to the amount of the loan, interest, costs and expenses. Mr Goldspink was not asked in evidence whether there was any discussion about the limiting of any of the guarantees.

[70] It is necessary to identify with more precision what is meant by limiting a guarantor's liability under the guarantee. I do not find that Mrs Schultz believed she was obliged to sign the guarantee. I infer the she knew that she had the right to decline to sign it but either was aware or would have been aware, if she turned her mind to the question, that if she refused to do so the transaction would not, or probably would not, proceed. What then is meant by the statement that she could limit her guarantee? If Mrs Schultz had any belief about the statement in the guarantee that she could limit her guarantee, she did not understand that she could limit it as to the amount of the loan, interest, costs or expenses except in the sense that she could refuse to sign the guarantee. But that was not a misunderstanding.

[71] Mrs Schultz gave no evidence that she did not understand that she would be liable for interest and costs as well as the amount of the loan under her guarantee or that she might be made bankrupt if the guaranteed amount payable was not paid. In my view, it is not appropriate to infer misunderstanding as to those facts from the evidence otherwise.

[72] Mrs Schultz's liability for interest and costs was provided for in the third guarantee and each of the two prior guarantees she signed in favour of the defendant. Mr Goldspink was not asked whether there was any discussion about whether Mrs Schultz as guarantor would be liable for interest and costs.

[73] There was no mention of possible bankruptcy in the documents provided by the defendant to Mrs Schultz. It does not appear whether it might have been mentioned by Mr Woolner to Mrs Schultz when he gave her independent advice. Mr Goldspink in cross-examination said that he did not mention possible bankruptcy to Mrs Schultz. That was the first time it was raised in the trial.

[74] By the time that Mrs Schultz signed the guarantee, she knew that the guaranteed amount was not limited either to $100,000 or to no more than $150,000. She knew that the guarantee was for the loan of $773,000. She saw the amount in the guarantee.

[75] As well, the amount of the guarantee – namely $773,000 - appeared on the defendant's letter to Mrs Schultz dated 15 March 2007 and on the face of the draft guarantee enclosed with the letter, although Mrs Schultz said she didn't read the letter or enclosures.

[76] However that may be, Mr Goldspink showed the amount to Mrs Schultz on 11 April 2007, when he took her through the documents. It appeared in the facility schedule and on the face of the guarantee. Both were shown to Mrs Schultz and she read the guarantee before she signed it and before she signed the waiver.

[77] The result is that I do not find that Mrs Schultz had any of the alleged material misunderstandings relied upon.

Defendant's explanation of the third guarantee

[78] Although there were some differences in the accounts given by Mrs Schultz, Mr Schultz and Mr Goldspink of the meetings, they were mostly of the kind one might expect given the lapse in time between the events and when they gave evidence. The events involving the defendant occurred between seven and approximately 8.5 years before the trial. The critical events were the conversations that occurred in the first and second meetings relating to the $773,000 loan. Necessarily, each of Mrs Schultz, Mr Schultz and Mr Goldspink, when giving evidence, must have engaged in reconstruction to a greater or lesser degree.

[79] Mr Goldspink gave evidence about his usual practice in explaining loan documents, mortgages and guarantees to customers. For a mortgage he would say that it was a mortgage over the property in question. He might refer to the address of that property. He would say that the property and the mortgage over it were to secure the loan. He would say that in a worst-case scenario, if the loan wasn't repaid or the borrower defaulted on that loan, the defendant could sell that property to recover the loan amount in full.

[80] For a guarantee he would explain to the guarantor that the guarantee secured the full repayment of the loan and that may also include any interest fees or charges that may apply for that loan in the event that the borrower defaulted on the repayments. In addition, he would say that the defendant could also ask the guarantor to make

the repayments on that loan or to pay out that loan in full. If the guarantee was secured by a mortgage, he would say both that the defendant could ask the guarantor to make good on the repayments and make good on full repayment on the loan. He would say that if they couldn't do so, then the defendant had the right under the mortgage to sell the property that was mortgaged to recover its loan.

[81] He would also offer the mortgagor or the guarantor the option to read the document themselves. He would offer them the option that he could leave the documents with them for them to read at a time that was convenient to themselves and he could return at another time. And he would provide them with the option that if they so wished, they could seek their own legal advice in relation to the meaning of the documents.

[82] In general, I accept that this was Mr Goldspink's practice. It is supported to some extent by Mrs Schultz's evidence in relation to the dealings between Mrs and Mr Schultz and Mr Goldspink. Mr Schultz's evidence would support the conclusion that Mr Goldspink had a less methodical approach, but I do not accept that evidence, because my impression is that he had little actual recollection of events. His account suffered from being based on his belief as to what may have happened to a greater extent than Mrs Schultz and Mr Goldspink.

[83] The second meeting in relation to the $773,000 loan took place on 11 April 2007. Mr Goldspink's recollection is that he sat with Mrs Schultz inside the house at 50 Kawanna St while she signed most of the documents before Mr Schultz arrived. Both Mrs Schultz and Mr Schultz say, in effect, that Mr Schultz was there throughout the signing of the documents, but that Mr Schultz was due to leave, so that there was a time pressure. I accept their evidence that Mr Schultz was there throughout or for most of the time when the documents were signed on the back deck, but that does not lead me to reject Mr Goldspink's account of the meeting in general. Mr Goldspink says he followed his practice in explaining the documents to Mrs Schultz. Mrs Schultz's evidence supports that for the most part. In particular, I do not accept Mr Schultz's evidence that the meeting was pretty quick, that there was no discussion about obtaining legal advice or that Mr Goldspink did not explain the documents to Mrs Schultz.

[84] Mr Goldspink went through the Home Loan Privileges Package Investment Line of Credit Facility Schedule. It set out the terms of the defendant's offer for the $773,000 loan. Mr Goldspink explained to Mrs Schultz that the defendant was taking her guarantee in support of this particular loan, together with a mortgage over the vacant block of land that they were purchasing behind the house and also a mortgage over Mrs Schultz's unit at Cotton Tree.

[85] Mr Goldspink explained to Mrs Schultz that if the borrower defaulted on the loan and didn't meet the loan repayments, then the defendant could ask her as a guarantor to make those repayments. He said that if she couldn't, then the defendant had the option to sell the security properties that it held to recover the loan. He said that the guarantee would cover three amounts, being the three loans; the first loan for $400,000, the second loan for $444,000 and the third loan for $773,000. Mrs Schultz did not recall this but on the balance of probabilities I find that it was said.

[86] Mr Goldspink said that the defendant always recommended that a guarantor seek independent legal advice but if he or she didn't wish to do so he would ask him or her to sign a waiver.

[87] Mr Goldspink did not recall feeling under any time pressure at the meeting or that Mrs Schultz said anything about a time pressure. But that is not inconsistent with Mr Schultz having some time pressure that was not mentioned to Mr Goldspink.

[88] Mr Goldspink's belief at the time was that Mrs and Mr Schultz had a normal husband and wife relationship, cared for one another and were doing the transaction for their benefit. He had no feeling or awareness that Mrs Schultz was not aware of what she was doing. He was not aware that she had any misunderstanding that the mortgage over the Cotton Tree unit would secure the full amount of the $773,000 loan, or was not fully aware of what she was doing. I accept this evidence.

[89] Mr Goldspink hadn't dealt with Mrs Schultz or Mr Schultz before the $400,000 loan. So, for that transaction he wanted to make sure that Mrs Schultz did obtain independent advice. For the second transaction, the $444,000 loan, all prior loan repayments were up to date and there was nothing to suggest there were any issues. No issues had emerged about the prior dealings at the time of the $773,000 loan. As well, Mr Goldspink was aware that Mrs Schultz was a signatory on the Camelon account, who could sign cheques and withdraw funds independently of Mr Schultz.

[90] In the circumstances relating to the $773,000 loan, Mr Goldspink had no concern about accepting a waiver from Mrs Schultz instead of requiring her to obtain independent legal advice.

[91] In making findings about what happened at the first and second meetings, it would be an error to attempt to parse or analyse the recollections of the witnesses given through their testimony as though they were a complete or precisely accurate account. The evidence paints a picture of the meetings, but only with broad brush strokes.

[92] In this state of affairs, who bears the onus of proof as to the adequacy of the explanation? The requirement of an adequate explanation is raised where the guarantor wife is a volunteer in the sense relevant for this equity, as discussed above. The creditor must have notice that the guarantor is a wife and that she is a volunteer. Those circumstances engage the creditor's duty to explain the transaction, or suffer the risk that the transaction will be unenforceable if the wife has a material misunderstanding. If an adequate explanation is given, a continuing subjective misunderstanding by the wife unknown to the creditor will not operate to the creditor's prejudice.

[93] This form of the equity does not depend on any undue influence or misconduct by the husband. Where there is a relationship of undue influence or circumstances which give rise to unconscionable dealing or conduct on the *Amadio* principle, the onus of proving that the transaction is not unfair, including the extent of disclosure or explanation of the transaction to the plaintiff, lies on the defendant. The considerations that underlie that onus of proof are not the same in the present class of case under the *Yerkey v Jones* equity. The difference was discussed in *State Bank*

of New South Wales v Chia.[31] Einstein J did not find it necessary to reach a concluded view on "this difficult question". I do not think it is necessary to do so in the present case, either. In my view, if the onus of proof was on the defendant, still the evidence justifies the conclusion that Mr Goldspink adequately explained the transaction to Mrs Schultz. Nevertheless, I will deal with the specific misunderstandings relied on by the plaintiff in final submissions.

[94] I do not find that Mr Goldspink explained to Mrs Schultz that she could limit her guarantee. He did explain that she could refuse to go ahead. As previously discussed, the guarantee was limited to the $773,000 loan plus interest and costs. And Mr Goldspink did show at least the front and the execution page of the guarantee to Mrs Schultz before she signed it and she quickly read them. They both stated that the guarantor may be able to limit their liability.

[95] Mr Goldspink's practice was to explain that interest and costs were payable under the guarantee. The statement of claim did not allege that Mr Goldspink failed to explain that interest or costs were payable. Mrs Schultz did not recall that there was any discussion about the terms of the loan that she was guaranteeing, but she was not asked whether there was any mention of interest and costs. In my view, it is more likely than not that Mr Goldspink would have done so.

[96] Mr Goldspink did not say that Mrs Schultz might be made bankrupt if the amount payable under the guarantee was not paid. But he did say that worst case scenario she could be asked to sell the house and repay the loan. Mrs Schultz was aware that both the house and the Cotton Tree unit were being mortgaged and were "on the line".

[97] Mr Goldspink did not say that the mortgage over the Cotton Tree unit was not limited to $100,000 or $150,000. But he had no reason to do so. There is no suggestion that he was or should have been aware that Mrs Schultz may have thought that the guarantee would be for a sum of $100,000 or $150,000. As previously stated, the draft guarantee had been provided to Mrs Schultz under cover of a letter from the defendant. Mr Goldspink had no reason to think that Mrs Schultz had ignored it. In any event, he did show the guarantee to Mrs Schultz at the point where it provided that it was for $773,000. Mrs Schultz saw this. She was surprised by it. But she said nothing either to Mr Goldspink or her husband, although she was not happy about it. The inference is clear that the amount was brought to her attention by Mr Goldspink.

Unconscionable conduct

[98] The plaintiff set up an alternative case of unconscionable conduct based on *Commercial Bank of Australia v Amadio*[32] or contravention of s 12CA of the *Australian Securities and Investment Commission Act* 2001 (Cth).[33]

[99] The plaintiff's counsel submitted that the equity was raised by the following circumstances:

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31 (2000) 50 NSWLR 587.

32 (1983) 151 CLR 447.

33 *Australian Consumer and Competition Commission v Berbatis* (2003) 214 CLR 51.

(a) Mrs Schultz's misunderstanding that the mortgage over the Cotton Tree unit was to be limited to $100,000 or $150,000;
(b) Mrs Schultz's lack of understanding of Mr Schultz's business affairs;
(c) Mrs Schultz's inability to meet the loan repayments from her own income;
(d) Camelon was in default of reporting conditions under the terms of the $444,000 loan; and
(e) Mrs Schultz did not receive independent advice.

[100] Section 12CA is in similar terms to the now replaced s 51AA of the *Trade Practices Act* 1974 (Cth). It prohibits conduct in trade or commerce in relation to financial services "that is unconscionable within the meaning of the meaning of the unwritten law, from time to time, of the States and Territories". Section 20 of the *Australian Consumer Law* is similar, except it is not directed to conduct in relation to financial services.[34]

[101] In *Australian Competition and Consumer Commission v Berbatis*,[35] it was assumed that the scope of s 51AA was the same as the scope of the principles of *Amadio*, *Blomley v Ryan*[36] and *Bridgewater v Leahy*,[37] on the facts of that case. The plaintiff's counsel did the same in the present case. I proceed on that assumption.

[102] In a context like the present, the principles of *Amadio* or *Berbatis* require that the surety is in a position of special disadvantage in relation to her guarantee of the $773,000 loan. It is not a special disadvantage that the surety is a wife who enters into a transaction as surety for the debts of her husband or her husband's company as a volunteer. The special disadvantage, if there is one, must lie in further facts.

[103] In my view, a self-induced misunderstanding that is not known to the creditor is generally unlikely to contribute to a finding of special disadvantage. Thus, if Mrs Schultz did have a misunderstanding that the mortgage over the Cotton Tree unit was to be limited to $100,000 or $150,000 (as well as the transferred amount of her $77,000 borrowing) I do not find that was known or should have been known to the defendant, through Mr Goldspink.

[104] Similarly, I do not find that the defendant, through Mr Goldspink, knew or should have known of any lack of understanding that Mrs Schultz had of her husband's business affairs. It seems plain from Mr Goldspink's internal loan applications that he had a contrary belief. Neither Mr Schultz nor Mrs Schultz gave evidence that they said something to the contrary to Mr Goldspink.

[105] It is not a position of special disadvantage that Mrs Schultz was personally unable to meet the loan repayments for the $773,000. There are cases where "asset lending" has attracted equitable intervention on the *Amadio* principle. For example, in *Elkofairi v Permanent Trustee Co Ltd*[38] it was held that a wife was in a position of special disadvantage where a loan was secured by a large borrowing over her only

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34 Although s 20 refers to the unwritten law it does not contain the reference to that law "of the States and Territories." The distinction is without a difference, since there is but one common law and equity in Australia.
35 (2003) 214 CLR 51, 62-3 [7], 71-2 [40], 74 [46], 78 [60] and 110-1 [166].
36 (1956) 99 CLR 362.
37 (1998) 194 CLR 457.
38 (2002) 11 BPR 20,841, [65].

asset in circumstances where the application form for the loan failed to disclose any income for either the husband or the wife. I do not need to delay on cases such as that. The plaintiff did not conduct her case on the footing that the defendant knew or should have known that Mr Schultz, his companies and Mrs Schultz would not have sufficient income to support the $773,000 loan and I do not find that the defendant either was aware or should have been aware of that when the loan was made.

[106] At the time of the loan, it appears that Mr Schultz believed his income was increasing and that they could afford the repayments for the proposed interest only loan. Mrs Schultz said that he discussed his ability to fund or pay for the purchase of 53 Mudjimba Esplanade with Mr Goldspink, including that he had become an owner of and was earning good money with Focus. Mr Schultz said that he sent spreadsheets and management accounts to the defendant in support of the application. Mr Goldspink's internal application for the loan set out considerable detail of Mr Schultz's interest in and remuneration from Focus and other sources. He assessed Mr Schultz's ability to service the loan in some detail and with care, on the face of the application. It was not suggested that the defendant knew or had reason to believe that the contrary was true.

[107] Equally, it is not a special disadvantage that Mrs Schultz did not receive independent advice. The defendant was neither aware nor do I find that it ought to have been aware that Mrs Schultz required independent advice to understand the $773,000 loan or her guarantee of it were secured by both 50 Kawanna St and the Cotton Tree Unit, as well as other securities and a mortgage over 53 Mudjimba St itself.

[108] The plaintiff pleads further facts in support of the contention that Mrs Schultz was under a special disadvantage[39] and that the defendant knew or was aware of the special disadvantage.[40] They include the relative experience of Mr Schultz and Mrs Schultz, and their relative positions of power about the affairs of the family trust, the discussion with Mr Goldspink at the first meeting about the $773,000 loan as to the requirement of additional security of $100,000 up to $150,000, that the defendant knew that Camelon had not provided certified copies of its financial statements and tax returns within 180 days of the end of the 2006 financial year as required by the terms of the $444,000 loan facility agreement, that the defendant did not explain the nature and terms of the loan documents or the purport and effect of the guarantee or mortgage to the plaintiff on 11 April 2007 (or before), coupled with Mrs Schultz's lack of knowledge of the financial position of the relevant parties and their inability to meet the loan repayments. As previously stated, in final submissions the plaintiff relied on the failure to provide Camelon's 2006 financial statements and tax returns within 180 days.

[109] I have dealt previously with the rights of Mr and Mrs Schultz in relation to their interests in and Mr Schultz's control of the family trust. The plaintiff made no attempt to prove that Mr Goldspink or the defendant was aware of Mr Schultz's power of control. I do not find that either of them was so aware.

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39 Third further amended statement of claim ("TFAS"), [47C].

40 TFAS, [47D].

[110] Second, I have also dealt previously with the discussion with Mr Goldspink at the first meeting about the $773,000 loan as to the requirement of additional security for $100,000, or up to $150,000, and that I do not find that either Mr Goldspink or the defendant were aware of any misapprehension Mrs Schultz had about that.

[111] Third, the breach of the terms of the $444,000 loan facility agreement relied on is failure to inform the plaintiff that Camelon had not provided financial statements or a tax return to the defendant within 180 days. It is a technical point. The $444,000 loan was made after 17 July 2006. The first meeting for the $773,000 loan occurred before the 180 day period expired. At trial, the plaintiff abandoned her pleaded case that the defendant failed to inform the plaintiff of material financial information about the family trust or Mr Schultz or his companies. It was not suggested that Mr Schultz did not provide up to date financial information to the defendant to enable it to assess whether to agree to lend $773,000 to Camelon supported by the securities that were to be taken.[41] In my view, the failure of Camelon to provide financial statements, or a tax return, as required by the terms of the $444,000 loan facility agreement and the failure of the defendant to inform the plaintiff of that fact did not put Mrs Schultz in a position of special disadvantage.

[112] Fourth, Mrs Schultz's evidence was that Mr Goldspink did explain both the loan contract and the guarantee to her on 11 April 2007 before she signed the guarantee and executed the mortgage over the Cotton Tree unit.

[113] Fifth, it was not suggested to Mr Goldspink that he knew that neither Camelon nor Mr Schultz nor Pacific Governance Pty Ltd as guarantors would be able to meet the loan repayments. The suggestion is counter-intuitive, as there is no reason to think that the defendant would have advanced the $773,000 to Camelon if it were of that view. In any event, I do not find either that Mr Goldspink had that belief or awareness, or that he believed that Mrs Schultz had some lack of knowledge about the financial position of relevant parties or erroneous belief about their ability to meet the loan repayments.

[114] In the circumstances of the present case, I do not find that the plaintiff suffered from a special disadvantage in her dealings with the defendant over the third and last guarantee for the $773,000 loan.

[115] It follows that there is no basis upon which the alternative case based upon the principle of unconscionable conduct as explained in *Amadio* or contained in s 12CA of the *Australian Securities and Investment Commission Act* 2001 (Cth) can succeed.

Conclusion on the claim

[116] The plaintiff's claim must be dismissed. Subject to any contrary submissions that may be made, the costs of the proceeding should follow that event. The plaintiff should be ordered to pay the defendant's costs of the claim.

Counterclaim

[117] Although the defendant's counsel opened the defendant's case on the basis that if the plaintiff's claim is unsuccessful the plaintiff doesn't dispute the defendant's

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41 It is unnecessary to refer to all of the many securities.

entitlement on the counterclaim, I did not note a concession of that from the plaintiff's counsel.

[118] The defendant counterclaims for the outstanding balance of the $444,000 loan and the outstanding balance of the $773,000 loan. At the conclusion of the trial, the parties informed that the balance of the $444,000 loan had been repaid. Accordingly, the defendant's counterclaim is limited to the outstanding balance of the $773,000 loan.

[119] The defendant also counterclaims for possession of both 50 Kawanna St and the Cotton Tree unit.

[120] The plaintiff does not admit the defendant's allegation in the counterclaim that she received a notice of default under the 50 Kawanna St mortgage or the Cotton Tree unit mortgage and did not remedy the default. However, her non-admission is not accompanied by a direct explanation that complies with *Uniform Civil Procedure Rules* 1999, r 166(4). It operates, therefore, as a deemed admission under r 166(5).

[121] The plaintiff does not admit the defendant's allegation in the counterclaim that she received a demand for the total amount owing under the guarantee of the $773,000 loan. However, her non-admission is not accompanied by a direct explanation that complies with *Uniform Civil Procedure Rules* 1999, r 166(4). It also operates, therefore, as a deemed admission under r 166(5).

[122] The plaintiff also does not admit the defendant's allegation in the counterclaim that the balance of the $773,000 loan remains unpaid. However, there was no suggestion that it has been repaid. As at 30 July 2014, the amount was $937,230.21. The amount of the balance as at today is not in evidence, nor is the basis for calculating the current balance, so it may be necessary to update the amount.

[123] Clause 23 of the mortgage conditions of each of the mortgages provides that if a Consumer Credit Code applies to the mortgage clauses 23.1 to 23.4 apply. Clause 23.1 provides that after expiry of the period of grace in the notice of default, the defendant may take possession of the property.

[124] By the counterclaim the defendant demanded possession of 50 Kawanna St and the Cotton Tree unit. It follows that the defendant is entitled to possession of 50 Kawanna St and the Cotton Tree unit.