SUPREME COURT OF QUEENSLAND

CITATION:	*Schultz v Bank of Queensland Ltd* [2015] QCA 208
PARTIES:	**KYM ELEANOR SCHULTZ** (appellant) **v** **BANK OF QUEENSLAND LTD** ACN 009 656 740 (respondent)
FILE NO/S:	Appeal No 616 of 2015 SC No 6255 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2014] QSC 305
DELIVERED ON:	27 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	1 May 2015
JUDGES:	Holmes CJ and Philippides JA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be dismissed.** **2. The appellant pay the respondent's costs of the appeal, to be assessed on a standard basis.**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – UNCONSCIONABILITY, UNCONSCIONABLE DEALINGS AND OTHER FORMS OF EQUITABLE FRAUD – where the appellant purchased properties in Highgate Hill and Cotton Tree, both funded by bank loans and secured by registered mortgages – where the appellant was familiar with bank guarantees – where the appellant's then husband inherited vacant land at Mudjimba Beach – where the appellant funded the building of the family home on that land by selling the Highgate Hill property, and was registered, with her husband, as a co-owner of the Mudjimba Beach property – where the appellant and her husband established a family trust – where the appellant entered into two guarantees, secured by the Cotton Tree and Mudjimba Beach properties, in return for the respondent loaning funds to the trust – where, in respect of those guarantees, the appellant did not receive independent legal advice and signed a waiver of the opportunity to seek and obtain that advice – where each waiver acknowledged the appellant understood the practical legal effect of the documentation and transaction, and the

appellant confirmed she understood that if the borrower defaulted, the respondent would be entitled to sue the appellant, as guarantor, to recover the monies due to the respondent – where the appellant claimed she was a volunteer who did not understand the nature and effect of the transaction she entered into with the respondent – whether the trial Judge erred in dismissing the appellant's claim for relief from her legal obligation to pay the respondent

Australian Securities and Investments Commission Act 2001 (Cth), s 12CA

Agripay Pty Ltd v Byrne [2011] 2 Qd R 501; [2011] QCA 85, applied
Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447; [1983] HCA 14, cited
Garcia v National Australia Bank Ltd (1998) 194 CLR 395; [1998] HCA 48, applied
State Bank of New South Wales Ltd v Chia (2000) 50 NSWLR 587; [2000] NSWSC 552, cited
Yerkey v Jones (1939) 63 CLR 649; [1939] HCA 3, applied

COUNSEL:	K Wilson QC, with R Cameron, for the appellant P A Looney QC, with P K O'Higgins, for the respondent
SOLICITORS:	Hillhouse Burrough McKeown for the appellant Thomson Geer Lawyers for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Boddice J and the orders he proposes.

[2] **PHILIPPIDES JA:** I have had the advantage of reading the draft reasons for judgment of Boddice J. I agree with those reasons and the orders proposed.

[3] **BODDICE J:** On 17 December 2014, the primary Judge dismissed the appellant's claim for relief from her legal obligation to pay the respondent under a guarantee she gave for a loan made to the corporate trustee of a discretionary family trust controlled by her former husband. The claim relied on the equity identified in *Yerkey v Jones*[1] and affirmed in *Garcia v National Australia Bank Limited*[2] and *Agripay Pty Ltd v Byrne*.[3] Alternatively, the claim relied on unconscionable conduct by the respondent, either pursuant to the equity identified in *Commercial Bank of Australia Ltd v Amadio*[4] or a contravention of s 12CA of the *Australian Securities and Investments Commission Act* 2001 (Cth) ("the Act").

[4] The appellant appeals against that dismissal. At issue is whether the primary Judge erred in refusing to draw an inference that the appellant had a material misunderstanding as to the nature and effect of the transaction, and in applying the onus of proof. A separate issue in dispute, raised by notice of contention, is whether the primary Judge erred in finding that any such misunderstanding would have been material in all the circumstances. The appellant also contends the primary Judge erred in failing to find she was at a special disadvantage.

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1 (1939) 63 CLR 649.
2 (1998) 194 CLR 395.
3 [2011] 2 Qd R 501.
4 (1983) 151 CLR 447.

Background

[5] The appellant was born in 1959. She was educated to Year 12. After some years in the workforce, the appellant purchased a unit at Highgate Hill. The purchase price was largely funded by a bank loan, secured by registered mortgage. Eight years later, the appellant purchased another unit at Cotton Tree on the Sunshine Coast. This purchase was also funded by a bank loan, secured by a registered mortgage.

[6] The appellant married her former husband in 1999. At the time, the appellant was working as a sales representative for a major corporation and retained ownership, in her own name, of the Highgate Hill and Cotton Tree properties. The appellant's husband had multiple businesses and owned a property at Mudjimba Beach which he had inherited as vacant land. The appellant funded the building of the family home on that property. In early 2000, the appellant and her husband were registered as co-owners of the property at Mudjimba Beach.

[7] Some years after their marriage, the appellant and her husband decided to establish a family trust. The class of primary beneficiaries comprised the appellant's husband and the appellant, as his spouse. The class of secondary beneficiaries included their children. Camelon Pty Ltd was established in 2005 as trustee for that family trust. The appellant's husband and the appellant were the directors and shareholders of Camelon Pty Ltd.

[8] Subsequent to the establishment of the family trust, the appellant sold her unit in Highgate Hill. The appellant loaned the proceeds of sale to Camelon Pty Ltd. It invested those funds in a portfolio of securities. At about the same time, the property at Mudjimba Beach was transferred to the appellant's name only. That transaction was to protect the property from the separate creditors of the appellant's husband.

[9] In 2006 and 2007, the appellant and her husband undertook a number of transactions with the respondent. The first transaction was a loan to the appellant's husband. Two subsequent transactions related to Camelon Pty Ltd. There was also a separate transaction pertaining to the appellant alone. The transactions in respect of the appellant's husband and Camelon Pty Ltd were all guaranteed by the appellant. The appellant also granted a mortgage over the family's property at Mudjimba Beach and, later, the appellant's unit at Cotton Tree.

Guarantee

[10] The appellant executed the relevant guarantee on 11 April 2007 in respect of an advance made by the respondent to Camelon Pty Ltd as trustee for the K & D Schultz Family Trust. The amount guaranteed was $773,000. The guarantee was secured by mortgages over the appellant's Mudjimba Beach and Cotton Tree properties.

[11] This guarantee was not the first guarantee entered into by the appellant. In early 2006, the appellant entered into a guarantee in respect of a loan of $400,000 to her then husband for his businesses. Prior to entering into that guarantee, the appellant had sought and obtained legal advice. On 17 July 2006, the appellant entered into a second guarantee for $444,000, in respect of a loan to Camelon Pty Ltd for investment purposes.

[12] The third and relevant guarantee, entered into on 11 April 2007, was in respect of a loan to enable Camelon Pty Ltd to acquire a parcel of land adjacent to the appellant's residence at Mudjimba Beach. That purchase, said to be to allow future options for

development, allowed the appellant and her family direct access to the beach via a public walkway. The appellant and her family used this parcel of land as part of the surrounding grounds to their residence.

[13] In respect of the second and third guarantees, the appellant did not receive independent legal advice. On each occasion, the appellant signed a waiver of the opportunity to seek and obtain that advice. Each waiver confirmed the appellant had been told to seek independent legal and financial advice, but decided not to do so before entering into the guarantee. Each waiver acknowledged the appellant understood the practical legal effect of the documentation and transaction. In particular, the appellant confirmed she understood that if the borrower defaulted, the respondent would be entitled to sue the appellant, as guarantor, to recover the monies due to the respondent.

Claim

[14] The appellant claimed she did not understand the nature and effect of the transaction she entered into with the respondent. Further, the appellant entered into the relevant guarantee as a "volunteer". As the respondent was aware the appellant was a wife providing a surety for a loan to a company controlled by her husband, the respondent had an obligation to explain the nature and effect of the guarantee to her. The respondent did not do so in accordance with its obligations.

[15] At trial, the appellant contended the waiver she signed in respect of the relevant guarantee did not truly state her position. The appellant did not understand the transaction of guarantee. The appellant's understanding of the transaction, as explained by the respondent's representative, was that the worst case scenario was that if Camelon Pty Ltd defaulted, the respondent would sell the secured property to recoup the sum and she would have to repay the loan. The appellant did not understand she could be made bankrupt in the event she could not or would not repay the loan. The appellant also understood the mortgage over her Cotton Tree unit was limited to $150,000.

Primary decision

[16] The primary Judge assumed, without deciding, that the appellant was a volunteer for the purpose of the *Yerkey v Jones* equity[5]. In doing so, the primary Judge observed that whilst the appellant was only a beneficiary of the trust, and therefore did not have an immediate or direct interest in the purchase made with the loan supported by her guarantee, the trust's investments were made in order to build assets for the benefit of the appellant and her family in circumstances where the appellant was already a significant creditor of the trustee and the loan was for the acquisition of land to be used as a backyard for the family home. Further, all of the investments made by Camelon Pty Ltd were undertaken with the appellant's approval.

[17] The primary Judge found the appellant was aware: the guarantee was for a loan of $773,000; a consequence of default of the loan was that the mortgages given by her could be enforced; she was at risk of losing the secured property; the worst case scenario was that the secured property might have to be sold to pay the respondent. Further, at the time she signed the guarantee, the appellant understood: it was recommended she obtain independent legal advice; there were financial risks; she could refuse to enter into the guarantee; she could ask for more financial information.

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5 AB 865.

[18] The primary Judge found the appellant did not have any material misunderstanding that:

(a) she would 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 $150,000.

[19] The primary Judge found that although the respondent's representative did not advise the appellant that she might be made bankrupt if the amount payable under the guarantee was not paid, he had advised the appellant that the worst case scenario was she could be asked to sell the secured property and repay the loan. The appellant was also aware both the Mudjimba Beach and the Cotton Tree properties were being mortgaged and were "on the line".[6] The primary Judge found that the respondent did not tell the appellant the mortgage over her Cotton Tree unit was not limited to $150,000, but held it had no reason to do so. The appellant knew the guarantee was for $773,000.

[20] As to the alternate claim, the primary Judge found no basis for unconscionable conduct. The appellant was not in a special disadvantage as a wife and the respondent had no reason to know of any misunderstanding by the appellant as to the terms of the mortgage over her Cotton Tree unit or as to her husband's business affairs. Whilst Camelon Pty Ltd had breached the terms of its $444,000 loan facility agreement by not having provided financial statements or a tax return to the respondent within 180 days, that was a "technical point".[7] The first meeting for the $773,000 loan occurred before the 180 day period expired.

[21] The primary Judge further found the appellant at trial had abandoned her pleaded case that the respondent failed to inform her of material financial information about the family trust or her husband and his companies. Further, it was not suggested the appellant's husband had not provided up-to-date financial information to the respondent to enable it to assess whether to agree to lend that money to Camelon Pty Ltd. The failure of Camelon Pty Ltd to provide that financial information in accordance with the terms of the $444,000 loan facility agreement, and the failure of the respondent to inform the appellant of that fact, did not place her in a position of special disadvantage.

Appellant's submissions

[22] The appellant submits the primary Judge erred in failing to draw an inference that there was a misunderstanding by the appellant that if there was default on the loan, she could be pursued for any shortfall and be made bankrupt, and that the mortgage over her Cotton Tree unit secured more than $150,000. The appellant gave evidence that she had no concept of the possibility of bankruptcy if the security was not sufficient to repay the loan, and was not cross-examined on this issue.[8] They were material matters. The onus was on the respondent to prove there was no such misunderstanding. The primary Judge erred in placing that onus on the appellant.

[23] The primary Judge also erred in failing to give adequate reasons. There were no findings as to whether the appellant was a volunteer, on whom lay the onus of establishing

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6 AB 874 at [96].
7 AB 877.
8 AB 166.

the adequacy of the explanation of the transaction, and as to whether the appellant had the requisite misunderstanding. The respondent had the onus of establishing it adequately explained the nature and effect of the guarantee. The respondent did not discharge that onus. The appellant's understanding of the transaction was that her liability was limited to the mortgage. The appellant did not understand she had a personal liability and could be declared bankrupt.

[24] The appellant further submits the primary Judge erred in finding that the appellant was not at a special disadvantage. There was no consideration passing to the appellant. Further, the failure of the respondent to inform the appellant that Camelon Pty Ltd had not provided requisite financial statements or tax returns was not "a technical point". The respondent was in a position where it could, as a consequence of that failure, have terminated the facility and called upon the appellant's guarantee. The respondent deprived the appellant of being able to make a fully informed decision as to what was in her best interests.

Respondent's submissions

[25] The respondent submits the primary Judge correctly declined to infer any of the alleged misunderstandings. The appellant had never pleaded the alleged misunderstandings, nor opened them as part of her case. There was no evidence of any statement or conduct by the appellant consistent with her having the alleged misunderstanding. Further, the appellant had previously received independent legal advice about a guarantee and mortgage in favour of the respondent.

[26] Alternatively, the respondent submits the primary Judge erred in finding it would have been a material misunderstanding, for the purposes of the *Yerkey v Jones* equity, if the appellant misunderstood that she might be made bankrupt if she did not pay the outstanding amount. Bankruptcy was but one possible course of action if the appellant, as guarantor, did not meet her obligations. It is not an "effect" of the guarantee.

[27] The respondent submits the appellant had experience with mortgages and guarantees, was advised of certain potential consequences of default and did not give evidence that bankruptcy was a worse scenario than that outlined by the respondent, namely, the sale of the properties the subject of the mortgage. The primary Judge made express findings that the appellant did not labour under any of the alleged misunderstandings and gave adequate reasons for those findings.

[28] The respondent submits the primary Judge correctly found that the respondent had discharged its onus of proving the adequacy of the explanation given by it to the appellant as to the effect of the transaction. The respondent explained the general nature and effect of the transaction, including the fact of liability, the extent of liability and the consequences of default. There is no requirement for the respondent to disabuse the appellant of a particular misunderstanding about which the respondent was unaware, provided there had been an explanation of the general purport and effect of the transaction.

[29] The respondent submits that whilst the primary Judge assumed, without deciding, that the appellant was a volunteer, the primary Judge should have found on the evidence that the appellant was not a volunteer. The appellant and her husband had the same interest in the transaction as primary beneficiaries of the family trust, which could only properly be described as an investment vehicle for the family as a whole. Further, the appellant was the only major creditor of that family trust.

[30] Finally, the respondent submits the primary Judge correctly dismissed the alternate case based on unconscionable conduct. The appellant was not in a position of special disadvantage, and there was no evidence the respondent had taken unfair advantage of the appellant in entering into the transaction. It was not a part of the appellant's case that special disadvantage arose because the respondent had not agreed to waive any of its rights in respect of an earlier default under an earlier loan to Camelon Pty Ltd. The substance of the default had been remedied by the provision of financial information at a later date. The primary Judge correctly found there was no basis to conclude that the failure to inform the appellant of this earlier default put her in a position of disadvantage.

Discussion

[31] At its heart, the equity identified in *Yerkey v Jones* protects against vulnerability arising from the spousal relationship.[9] It ensures a banking institution provides full information so as to protect a vulnerable person from pressure arising from the very nature of the relationship. The equity is not dependent upon the bank having notice of unconscionable dealing between spouses.

[32] As was observed by Gaudron, McHugh, Gummow and Hayne JJ in *Garcia*:

> "... *Yerkey v Jones* begins with the recognition that the surety is a volunteer; a person who obtained no financial benefit from the transaction, performance of the obligations of which she agreed to guarantee. … It holds that to enforce it against her if it later emerges that she did not understand the purport and effect of the transaction of suretyship would be unconscionable (even though she is a willing party to it) 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. And what makes it unconscionable to enforce it … 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 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."[10]

[33] In *Garcia*, the majority emphasized that a creditor may readily avoid a surety's claim not to have understood the purport and effect of the transaction if the creditor itself explains the transaction sufficiently. Whilst the particular features of a transaction which should be identified were not enunciated in *Garcia*, in *Yerkey*, Dixon J considered the degree of understanding necessary to avoid the application of the equity:

> "… where the wife agrees to become surety at the instance of her husband though she does not understand the effect of the document or the nature of the transaction, her failure to do so may be the result of

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9 *Yerkey v Jones* (1939) 63 CLR 649 at 685.

10 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at [31].

> the husband's actually misleading her, but in any case it could hardly occur without some impropriety on his part even if that impropriety consisted only in his neglect to inform her of the exact nature of that to which she is willing blindly, ignorantly or mistakenly or assent. But, where the substantial or only ground for impeaching the instrument is misunderstanding or want of understanding of its contents or effect, the amount of reliance placed by the creditor upon the husband for the purpose of informing his wife of what she was about must be of great importance.
>
> If the creditor takes adequate steps to inform her and reasonably supposes that she has an adequate comprehension of the obligations she is undertaking and an understanding of the effect of the transaction, the fact that she has failed to grasp some material part of the document, or, indeed, the significance of what she is doing, cannot, I think, in itself give her an equity to set it aside, notwithstanding that at an earlier stage the creditor relied upon her husband to obtain her consent to enter into the obligation of surety."

[34] In *State Bank of New South Wales Ltd v Chia*[11] Einstein J observed:

> "The explanation given to the appellant in *Yerkey v Jones* was, according to Dixon J, 'simple enough and complete enough to ensure that any woman of average intelligence would understand that she was making herself liable for interest on the £1,000 and that, if it was not paid, the principal might be called up and that she bound herself to pay it so that she might be sued and her property sold'. From this passage the matters Dixon J considered to be within the 'general nature and effect' of the transaction required to be understood by, or explained sufficiently to, a woman supplying a guarantee over her husband's business debts, may be discerned as including, at least, the fact of liability, the general extent of the liability and the consequences to herself of a default by her husband." (citations omitted)

[35] The level of explanation needed to be undertaken by the creditor will depend on the nature of the transaction, the degree of risk associated with the transaction, the sophistication of the vulnerable party and the nature of the relationship that party enjoys with the spouse. The explanation need not disabuse the vulnerable party of all misapprehensions. It must, however, give the creditor reasonable grounds for believing that party does have an adequate understanding of the nature and purport of the transaction.[12]

[36] The question of who has the onus of proving any material misunderstanding, and of who has the onus of proving the adequacy of any explanation of the purport and effect of the transaction, was not expressly adverted to in either *Yerkey* or *Garcia*. However, a consideration of the requirements necessary to establish the equity, as expressed in *Garcia*, supports the conclusion that the bearer of the onus varies depending on the particular requirement.

[37] In order to establish the equity, it is necessary to establish that the vulnerable party "in fact … did not understand the purport and effect of the transaction". Absent that

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11 (2000) 50 NSWLR 587 at 599 [166].

12 *State Bank of New South Wales v Chia* at 587 [169].

requirement being met, the equity cannot arise. The onus of establishing that requirement properly rests with the surety. It is a matter peculiarly within that party's knowledge. The conclusion that the surety has the onus of establishing that there was a material misunderstanding as to the nature and effect of the transaction is consistent with the findings of Martin J in *Groves v Groves*.[13]

[38] Once that matter is established, the creditor is presumed to know, in relation to a transaction where the vulnerable party obtained no gain, that that party, by reason of the relationship, may not have had the purport and effect of the transaction adequately explained by the spouse. The creditor then has the onus of establishing that it took steps to adequately explain the nature and effect of the transaction to the vulnerable party, or to ensure that party had obtained such an explanation from an independent person.

[39] The conclusion that the creditor has the onus of establishing the adequacy of the explanation is consistent with the circumstances at issue in considering that requirement. Only the creditor can say what steps were taken by it to meet its obligations. That being so, the onus is properly on the creditor to establish that those steps were adequate. Again, this conclusion is consistent with the findings of Martin J in *Groves v Groves*.[14]

[40] The conclusion that the creditor carries the onus of establishing the adequacy of the explanation as to the nature and effect of the transaction is also consistent with the observations of Sheller JA in *National Australia Bank Ltd v Garcia*.[15] Whilst Einstein J, in *Chia*, expressed concern those observations conflated the equity in *Garcia* with the method by which a third party creditor becomes fixed with the consequences of the undue influence of the principal debtor, a consideration of a claim relying on undue influence reveals there is a similar separation of the onus of proof. There, proof that the creditor had notice of the fact that the guarantor was the principal debtor's wife, lies on the wife. However, proof that the creditor took reasonable steps to ensure that the consent of the wife to become a guarantor was properly obtained lies on the creditor.[16] There is no good reason the same separation of onus should not apply in relation to the equity identified in *Garcia*.

Was there a misunderstanding?

[41] Whilst the appellant gave evidence that she did not know the difference between a mortgage and a guarantee, and thought they were the one thing,[17] she knew the relevant guarantee secured a loan of $773,000. The appellant also knew that if the outstanding sum was not repaid she could be asked to repay it and the secured property could be sold.[18] The appellant knew that both the Mudjimba Beach property and her Cotton Tree unit were "on the line".[19] The appellant agreed she had been told by the respondent that this could be the worst case scenario if she signed the guarantee.

[42] Those factual findings, and a consideration of the appellant's evidence as a whole, supported the primary Judge's finding that there was no material misunderstanding by the appellant as to the nature and effect of giving a guarantee and entering into the mortgages. The appellant knew that by giving the guarantee, she could be called upon

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13 [2013] QSC 277 at [198].
14 At [244].
15 (1996) 39 NSWLR 577 at 593.
16 *Barclays Bank PLC v Boulter* [1999] 1 WLR 1919 at 1925.
17 AB148/25.
18 AB158/5.
19 AB158/10.

to repay the loan, should that sum not be repaid in accordance with the loan facility. The appellant also knew the respondent could sell the mortgaged properties in an effort to recover the loan amount.

[43] Whilst the respondent did not expressly advise the appellant that in the event of a shortfall from the sale of those properties she could be made personally bankrupt as part of the process of recovering the remaining outstanding amount for which she was liable, there was no obligation on the respondent to do so. It added nothing to the appellant's understanding of the nature and effect of the transaction, which was that she was liable to repay the entire sum in the event of default. Similarly, there was no obligation to tell the appellant the mortgage over the Cotton Tree unit was not limited to $150,000. The appellant knew her liability to repay was for the total sum. The appellant knew both mortgaged properties could be sold.

[44] The appellant's knowledge of liability for the total sum of the loan transaction in the case of default and that the bank could recover that sum from the appellant, including through selling the mortgaged properties, was as the appellant admitted in evidence, as a consequence of an explanation given to her by the respondent's representative. Additional information as to other steps the bank may take in order to enforce her acknowledged liability to repay the total sum the subject of the guarantee, and that the mortgage over the Cotton Tree unit was not limited, would not have materially added to the appellant's acknowledged understanding of the transaction. There was no misunderstanding as to the purport and effect of the transaction.

[45] The primary Judge gave adequate reasons for the finding that there was no material misunderstanding. The primary Judge expressly found; that the appellant knew the guarantee was for a loan of $773,000;[20] that the appellant gave no evidence she did not understand she would be liable for interest and costs as well as the amount of the loan under the guarantee[21]; that the appellant knew the "worst case scenario" was that the secured property might have to be sold.[22] The primary Judge's reasons set out the basis for each those findings. There was no need for the primary Judge to traverse every aspect of the evidence.

A volunteer?

[46] A volunteer, in the sense identified in *Garcia*, is a party who does not benefit from the transaction the subject of the guarantee. The relevant benefit must be direct or immediate.[23] The benefit in question must also be a real benefit. Einstein J, in *State Bank of New South Wales Ltd v Chia*[24] observed:

> "… It is not sufficient that the wife has received consideration as would be recognised in the law of contract. The consideration for the guarantee must be of 'real benefit' to the wife. Incidental benefit who accrues generally to the family of which the wife is a member is not sufficient benefit to render a transaction which does not otherwise contain a 'real benefit', non-voluntary. Where the wife expects to reap direct profit from the transaction, the transaction cannot be said to be voluntary. Neither can it be said to be voluntary where the moneys

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20 AB871 at [74].
21 AB870 at [71].
22 AB868 at [57].
23 *Agripay Pty Ltd v Byrne* [2011] 2 Qld R 501 at 508 [11]; see also McMeekin J at 528 [78].
24 (2000) 50 NSWLR 587 at 601 [169].

> secured by the guarantee are used to purchase an asset in which the wife is equally interested with her husband. However, where the interest of the wife is a shareholding in the company through which her husband conducted his business and in which she has no real involvement, then a guarantee given by the wife over that company's debts will be voluntary. But where the wife has an active and substantial interest in the conduct of, and the fortunes of, the business run by her husband, she will not be a volunteer in relation to any guarantee over the debts of that business. Where the transaction is not ex facie for the benefit of the wife, then the onus will lie on the party seeking to enforce the security to show that the wife was not, relevantly, a volunteer." (Citations omitted)

[47] Whilst the primary Judge expressed concern as to whether the transaction, which involved the purchase by the trustee of a family trust of land adjacent to the family home which was to be used by the appellant and her family personally, in circumstances where the appellant was a major creditor of that trustee company, excluded the appellant from properly being characterised as a volunteer, the primary Judge ultimately assumed the appellant was a volunteer.

[48] That assumption was favourable to the appellant. It was also consistent with a conclusion that the benefit to the appellant from the transaction was not of such a direct and immediate nature as to preclude the appellant from being a volunteer within the meaning of the equity identified in *Garcia*. In the circumstances, the failure to make an express finding, on the question of volunteer, did not affect the correctness of the primary judge's ultimate conclusions.

Onus of proof

[49] Whilst the primary Judge did not reach a concluded view in relation to where the onus of proof lay, the primary Judge expressly determined the question of the adequacy of the respondent's explanation of the transaction on the basis the respondent carried the onus on that issue. The primary Judge found the respondent's representative had adequately explained the transaction to the appellant.

[50] The evidence, accepted by the primary Judge, supported that conclusion. The appellant acknowledged the respondent had informed her the guarantee related to a total sum of $773,000, that the Mudjimba Beach property and the Cotton Tree unit were on the line, and that, in the event of default, she was liable to repay the outstanding loan. The failure to make an express finding as to where the onus of proof lay did not affect the correctness of the primary Judge's ultimate conclusion.

Unconscionability

[51] Relief pursuant to the equity in *Amadio*, or in reliance on s 12CA of the Act, is dependent upon the establishment of a special disadvantage which adversely affected the appellant's "ability to make a judgment as to [her] own best interests".[25] A further requirement is that the special disadvantage be sufficiently evident to the creditor, and that the creditor has taken unfair advantage of it in entering into the transaction. The equity requires proof of a predatory state of mind by the creditor. Inadvertence or indifference is insufficient.[26]

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25 *Commercial Bank of Australia v Amadio* at 462. See *also Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 64 per Gleeson CJ at 64 [12]-[13] and Gummow and Hayne JJ at 77 [55].

26 *Kakavas v Crown Melbourne Limited* (2013) 250 CLR 392 at 426-427 [142].

[52] At trial, the appellant contended she was under a special disadvantage in all of the circumstances. Relevantly, for the purposes of the appeal, those circumstances included that she was not informed that Camelon Pty Ltd was in default of the terms of the $444,000 loan previously provided to it by failing to provide financial documentation within 180 days as required by the terms of the facility. The appellant contends the default was more than "a technical point", as found by the primary Judge. The respondent was in a position where it could terminate the facility and call upon the appellant's security. The respondent did not have to first exercise any right of recovery against Camelon Pty Ltd before exercising its rights under the guarantee or mortgages.

[53] However, the primary Judge's finding that the breach of the facility was "a technical point"[27] must be viewed in the context of the remaining findings. Those findings included that the first meeting for the $773,000 loan occurred before there had been any such breach; that the appellant at trial had abandoned her pleaded case that the respondent had failed to inform her of material financial information; and that there was no suggestion the appellant's husband did not provide the up-to-date financial information to the respondent bank to enable a proper assessment of whether it ought to grant the facility of $773,000. Each of those findings was open on the evidence. Together, they supported the primary Judge's conclusion that the failure of the respondent to inform the appellant of the non-provision of the financial information within the 188 day period did not place the appellant in a position of special disadvantage.

Conclusions

[54] There was ample evidence to support the primary Judge's findings that the appellant was not under any material misunderstanding as to the nature and effect of the transaction, that the respondent had provided an adequate explanation of the nature and effect of that transaction and that the appellant was not under any special disadvantage such as to support her claim on the grounds of unconscionable conduct. None of the grounds of appeal have been made out. In the circumstances, it is unnecessary to consider the Notice of Contention.

Orders

[55] I would order:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of the appeal, to be assessed on a standard basis.

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27 AB877 at [111].