SUPREME COURT OF QUEENSLAND

CITATION:	*Lee v Australia and New Zealand Banking Group Ltd* [2013] QCA 236
PARTIES:	**CHOL YONG LEE** (appellant) **v** **AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED** ACN 005 357 522 (respondent)
FILE NO/S:	Appeal No 2117 of 2013 SC No 6599 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	1 August 2013
JUDGES:	Fraser JA and Atkinson and Philip McMurdo JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal and set aside that part of the judgment by which the appellant was ordered to pay to the respondent the sum of $227,362.79.** **2. Remit the case to the trial division, to determine the amount for which the respondent should have judgment against the appellant, upon the basis that from 24 September 2008, the appellant's guarantee in relation to Lee N Young Pty Ltd was discharged entirely and his guarantee in relation to God's Mission Group Pty Ltd was discharged as to the liability of that company under its overdraft facility.** **3. Otherwise dismiss the appeal.** **4. The parties have 14 days in which to make written submissions as to the costs in the trial division and on appeal.**
CATCHWORDS:	GUARANTEE AND INDEMNITY – DISCHARGE OF SURETY – CESSER OR SUSPENSION OF PRINCIPAL OBLIGATION – GENERALLY – where appellant was a director and half-owner of two businesses – where respondent provided finance to the appellant's businesses –

where finance consisted of a bank guarantee and business overdraft for each of the two businesses – where appellant gave two guarantees in favour of the respondent securing that finance – where appellant and other shareholder director provided written instructions to the respondent bank – where the instructions provided for the bank guarantee of one business to be cancelled – where the instructions provided for the appellant's guarantee to replaced by a term deposit as security for the other bank guarantee – where the instructions provided for each business overdraft to be cancelled – whether the instructions released the appellant from his guarantees – whether the instructions had the effect of reducing the amount secured under the guarantees

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – OTHER MATTERS – where appellant was a director and half-owner of two businesses – where respondent provided finance to the appellant's businesses – where appellant gave two guarantees in favour of the respondent securing that finance – where appellant attended meeting with the other shareholder director and a representative of the respondent – where appellant and other shareholder director provided written instructions to cancel the finance provided by the respondent to the businesses – where the trial judge found that the appellant had told the respondent to place these instructions on hold – whether the objective facts supported finding that the appellant had placed the instructions on hold

ESTOPPEL – ESTOPPEL BY JUDGMENT – ANSHUN ESTOPPEL – GENERALLY – where appellant brought proceedings in the District Court against the other shareholder director of the businesses – where that case proceeded on the basis that appellant was liable to the respondent under the guarantees – where respondent was not joined to the District Court proceedings – where there is inconsistency between the outcome of the District Court proceedings and the appellant's case in the present appeal – whether it was unreasonable for the appellant to have not joined the respondent to the District Court proceedings – whether the appellant should be estopped from arguing that his securities had been released by the bank

EQUITY – GENERAL PRINCIPLES – EQUITABLE DOCTRINES AND PRESUMPTIONS – ELECTION – GENERALLY – where appellant brought proceedings in the District Court against the other shareholder director of the businesses – where that case proceeded on the basis that the appellant was liable to the respondent under the guarantees – whether appellant had inconsistent rights – whether appellant's proceedings in the District Court amounted to an election between inconsistent rights

PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – OTHER MATTERS – where appellant brought proceedings in the District Court against the other shareholder director of the businesses – where that case proceeded on the basis that appellant was liable to the respondent under the guarantees – where respondent argued the current proceedings constituted an abuse of process – where appellant did not obtain any benefit from the District Court proceedings – whether the lack of any ultimate benefit is relevant – whether the present case is an abuse of process

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570; [2008] HCA 57, applied
Dunworth v Mirvac Queensland Pty Ltd [2012] 1 Qd R 207; [2011] QCA 200, cited
First National Bank Plc v Walker [2001] 1 FCR 21; [2000] EWCA Civ 3015, distinguished
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, applied
Mandurah Enterprises Pty Ltd v Western Australian Planning Commission (2008) 38 WAR 276; [2008] WASCA 211, applied
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589; [1981] HCA 45, applied
Tabtill Pty Ltd v Creswick [2011] QCA 381, applied

COUNSEL: P W Hackett, with A S Katsikalis, for the appellant
S E Brown QC, with J Sewell, for the respondent

SOLICITORS: Sung Do Lawyers for the appellant
Gadens Lawyers for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Philip McMurdo J. I agree with those reasons and with the orders proposed by his Honour.

[2] **ATKINSON J:** I agree with the reasons for judgment of Philip McMurdo J and the orders proposed by his Honour.

[3] **PHILIP McMURDO J:** In 2008, the appellant, Mr Lee, gave two guarantees in favour of the respondent bank, securing finance which the bank provided to two companies of which he was a director and half owner. Later in that year, he sold his shares in the companies to the other shareholder, Mr Park. The appellant and Mr Park then had several meetings with the bank's Mr Lau, to the end of procuring a discharge of the appellant's guarantees and a release of a mortgage which the appellant had granted to secure his performance as a guarantor.

[4] On the appellant's case, by the completion of the last of these meetings, his guarantees had been discharged. The mortgage was not released, but once the guarantees were discharged the mortgage secured no existing or future debt and the bank was obliged to release it.

[5] The bank's case was that there was no discharge of the guarantees and that Mr Lee remained liable for the debts of these companies. In these proceedings, it claimed

payment under the guarantees and after a four day trial, it was given judgment for $227,362.79 and the recovery of possession of the mortgaged property.[1]

[6] Mr Lee appeals against that judgment, arguing that the bank's claim should have been entirely dismissed. Alternatively, he argues that his counterclaim for damages, for what he says was misleading and deceptive conduct by the bank through Mr Lau in those meetings, ought to have been upheld.

[7] As the trial judge reasoned, the case turned upon what was said at the meeting between Mr Lee, Mr Park and Mr Lau on 24 September 2008. He accepted Mr Lau's evidence that he was then asked by Mr Lee and Mr Park to "put on hold" what, to that point, had been their proposal to procure the release of Mr Lee's securities. Mr Lee disputed that any such instruction was given to Mr Lau. He argued that absent such an instruction, the effect of the written instructions which he and Mr Park had then given to the bank, taken together with payments which by then had been made to the bank on the relevant facilities, was to discharge his guarantees and entitle him to a release of his mortgage.

[8] The trial judge did not consider it necessary to discuss what would have been the position, absent the "put on hold" instruction. Nor did his Honour find it necessary to discuss the bank's argument that by his conduct of certain other proceedings, Mr Lee was precluded from maintaining in this case that he was not liable to the bank. They were proceedings which were brought in the District Court by Mr Lee against Mr Park and the companies whose debts Mr Lee had guaranteed. In essence, Mr Lee's case there was that he was indeed liable to the bank. He was successful in that case, and was given orders which required those defendants to do everything necessary to terminate the relevant facilities with the bank.

The relevant debts and documents

[9] The first of the relevant facilities was provided by the bank to God's Mission Group Pty Ltd ("GMG"), and was in two parts. There was an overdraft facility with a limit of $30,000 and a bank guarantee provided to GMG's landlord in the sum of $32,776. It was secured by guarantees by Mr Lee and Mr Park, with Mr Lee's guarantee being secured by the subject mortgage over a house owned by him at Sunnybank.

[10] Each part of this facility was to remain in place until the occurrence of a "Review Event" or "an Event of Default" as those terms were defined in the relevant conditions. A Review Event was defined by condition 11(h) to include any change in the ownership or control of GMG's business as well as "a request to change the Security provided in support of [GMG's] Facilities."

[11] Within the conditions of the facility, there were provisions for the termination of each part of the facility as follows:

> "**22. Prepayment - ANZ Business Overdraft and ANZ Business Credit Facility**
>
> You can terminate your ANZ Business Overdraft Facility or ANZ Business Credit Facility at any time by repaying all amounts owing under the facility and notifying ANZ.
>
> …

[1] *Australia and New Zealand Banking Group Limited v Lee* [2013] QSC 3.

> **25 Cancellation of a Bank Guarantee**
>
> You may, at any time, cancel a Bank Guarantee by returning the Bank Guarantee to ANZ and paying any unpaid fees and other amounts in relation to the Bank Guarantee."

[12] The one document contained the guarantees of Mr Lee and Mr Park. It identified the borrower as GMG and against the description "Type & Amount of Facility" was inserted "Business Overdraft facility with $30,000.00 limit and Bank Guarantee of $32,776.00."

[13] The guarantee included these terms:

> "We the abovenamed guarantor(s) jointly and individually guarantee to pay to ANZ immediately on demand in writing at any time on default of the borrower(s) under the terms of the Facility:
>
> (a) the sum of $62,776.00; or
>
> (b) the amount of the Facility,
>
> plus any interest payable and all costs, charges, fees, disbursements, duties and taxes incurred by ANZ in relation to the Facility. This is a continuing guarantee and the obligations under it are absolute and unconditional and may be enforced as principal obligations without any requirement to exhaust any remedy against or security of the borrower(s). I/We may write to ANZ at any time to stop the obligations under the guarantee unless ANZ is obliged to make further advances (I/we are liable for the amount guaranteed at that time) or by paying ANZ the amount guaranteed."

[14] The guarantee expressly incorporated the terms of the Code of Banking Practice. The terms of that Code upon which Mr Lee now relies are as follows:

> "**26 Joint debtors**
>
> …
>
> 26.3 If you are jointly and severally liable under a credit facility, we will allow you to terminate your liability in respect of future advances or financial accommodation on giving us written notice. This right only applies where we can terminate any obligation we have to provide further credit to any other debtor under the same credit facility.
>
> …
>
> **28 Guarantees**
>
> …
>
> 28.9 You may, by written notice to us, limit the amount or nature of the liabilities guaranteed under the Guarantee, except that we do not have to accept such a limit if:
>
> (a) it is below the debtor's liability under the relevant credit contract at the time plus any interest or fees

and charges which may be subsequently incurred in respect of that liability; or

(b) we are obliged to make further advances or would be unable to secure the present value of an asset which is security for the loan (for example, a house under construction).

28.10 You may, at any time, extinguish your liability to us under a Guarantee by paying us the then outstanding liability of the debtor (including any future or contingent liability) or any lesser amount to which your liability is limited by the terms of the Guarantee or by making other arrangements satisfactory to us for the release of the Guarantee."

[15] The other relevant facility was provided by the bank, in June 2008, to Lee N Young Pty Ltd ("LNY"). The terms and conditions of this facility were identical to those of the GMG facility, except that the bank guarantee for its landlord was in the sum of $18,330. The overdraft facility for this company was in the same amount, $30,000. Mr Lee and Mr Park gave guarantees of this facility in identical terms to their guarantees of the GMG facility. Mr Lee's mortgage secured also his liability under this guarantee.

The meetings

[16] It was common ground that there were several meetings between Mr Lee, Mr Park and Mr Lau in which there were discussions with a view to procuring releases and a discharge of Mr Lee's guarantees and his mortgage. The trial judge appears to have accepted Mr Lee's evidence that there were three such meetings, and that they occurred on 10 August, 18 September and 24 September 2008. Mr Lau agreed that there was a meeting in August, but he was unable to recall a specific date. He could not recall the meeting of 18 September, which the primary judge found surprising given that the bank's pleading accepted that there was such a meeting.[2] And both Mr Lee and Mr Lau said that there was a meeting at the Sunnybank branch of the bank on 24 September.

[17] The task for the trial judge, in identifying what was said in these meetings and assessing the effect of the discussions, was made difficult by a number of factors. The first was that Mr Lee does not have English as a first language and gave his evidence, for the most part, through an interpreter. Mr Lee's limited ability to converse in English also meant that he was not an active participant in the discussions at these meetings. The trial judge found that it was Mr Park who did "nearly all of the talking for the two directors" and that "the conversations which took place at these meetings were dominated by Mr Park and that Mr Lau, not unnaturally, directed most of his conversation to Mr Park."[3] Mr Lee's limited language also affected Mr Lee's ability to reliably relate what had been discussed between Mr Lau and Mr Park (in English) in these meetings.

[18] Secondly, as appears from the transcript, Mr Lau's command of English was not perfect. The trial judge remarked that there were occasions in the course of

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2 *Australia and New Zealand Banking Group Limited v Lee* [2013] QSC 3 at [22].

3 *Australia and New Zealand Banking Group Limited v Lee* [2013] QSC 3 at [36].

Mr Lau's evidence in which "[Mr Lau] did not immediately grasp the intent of a question and that this had an effect on both the content and style of some of his answers."[4] There was a further limitation upon Mr Lau's evidence, which was that he did not speak Korean, which was the first language of Mr Lee and Mr Park and the language in which they spoke to each other.

[19] Mr Park did not give evidence.

[20] The primary judge accepted that at the first of these meetings there was a discussion as to what needed to be done to procure a release of the mortgage.

[21] At the second meeting, Mr Lee said that Mr Lau told them that Mr Park should write a letter, the terms of which Mr Lau effectively dictated, to be signed by Mr Lee and Mr Park and addressed to the bank. Mr Lee's evidence was that this letter was written and signed on 18 September and then subsequently amended on or prior to 24 September, to be in the form in which it was left with Mr Lau at the end of the meeting of that day. By then it was as follows:

> "
>
> 24.09.08
>
> To ANZ manager
>
> To Request to Release the morgage (sic) on the property at 32 Altandi st sunnybank QLD 4109.
>
> Because our company Director LEE, CHOL YONG resinged (sic) as a Director and selling all his shareholding in the company ~~TO LEE N. YOUNG P/L YONG BUM~~ LEE N YOUNG P/L TO YONG BUM YOUN PARK.
>
> ~~guarantee~~
>
> ~~Replace the security for the $18.330 bank guarantee by a bank deposit of $18.330 in the name LEE N YOUNG P/L to be held by ANZ Bank~~
>
> Please cancel the Business overdraft $30,000 Limit
> Please cancel the $18.330 Bank Guarantee.
>
> For And on Behalf of LEE N YOUNG P/L (ACN 130098583)"

[22] Mr Lee's evidence was that in its original terms, on 18 September, the second paragraph had not been struck through and the words "Please cancel the $18,300 Bank Guarantee" were not present. It was common ground that this letter, in its amended terms, was left with Mr Lau at the conclusion of the meeting of 24 September.

[23] A further handwritten letter was signed by Mr Lee and Mr Park and left with Mr Lau on 24 September, as follows:

> "To ANZ Manager.
>
> We Request ANZ Bank to Release the morgage (sic) on the property at 32 Altandi St sunnybank QLD 4109.

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4 *Australia and New Zealand Banking Group Limited v Lee* [2013] QSC 3 at [14].

> Because our company Director LEE, CHOL YONG Has Resigned as a Director and selling All His shareholding in the company GOD'S MISSION Group Pty Ltd to YONG BUM YOUN PARK.
>
> Please Replace the security for the $32776 Bank Guarantee By A Bank Deposit of $32776 in the Name GOD'S MISSION Group P/L To Be Held By ANZ BANK.
>
> Please cancel the Business overdraft $30000 Limit.
>
> For And on Behalf of God's Mission Group P/L (ACN 121334852)"

Each of these letters was signed by Mr Lee and Mr Park expressly as directors of the relevant company.

[24] On 18 September, Mr Lee ceased to be a director and shareholder of LNY. His shareholding was sold to Mr Park for $120,000, which was paid by Mr Park to Mr Lee on that day. The sale and the payment were recorded within a document signed by them on that day. On 23 September 2008, Mr Lee's authority to operate the account of LNY was revoked by Mr Park and the new director, Mr Kwon, became an authorised signatory. The records of the Australian Securities and Investments Commission record the change in LNY's shareholding as occurring on 19 September 2008 and Mr Kwon being appointed a director on the same day.

[25] The ASIC records for GMG record that Mr Lee ceased to be a director on 26 September 2008 and that Mr Kwon became a director of this company on 25 November 2008. They record that Mr Lee ceased to be a shareholder on 29 September and that Mr Kwon became a shareholder on 27 November 2008.

[26] On or before 24 September 2008, a number of deposits were made to the accounts of the companies upon which the overdraft facilities operated. For LNY, a deposit of $30,000 was made on 15 September and deposits totalling $14,300 were made on 18 September. Those deposits not only brought LNY's overdraft account into credit, but also by an amount which just exceeded the amount of the bank guarantee in favour of LNY's landlord.

[27] On 18 September and 24 September, there were deposits of $10,000 and $34,000 respectively paid to the GMG account, which had the effect of bringing that account into credit by an amount which (again) just exceeded the amount of the bank guarantee in favour of GMG's landlord.

[28] As already noted, the trial judge found it unnecessary to consider whether, absent the "put on hold" instruction which he accepted was given to Mr Lau, the events of these written instructions and payments, of themselves, would have released Mr Lee's guarantees. As will appear, in my view it is necessary to consider that question.

[29] Some of the arguments for Mr Lee about whether he was released were made by reference to the terms of the guarantees or the Code of Banking Practice. One means of being discharged which was provided by the guarantee was by the guarantor "paying ANZ the amount guaranteed." At least in his written submissions, counsel for Mr Lee submitted that Mr Lee did pay the bank the amount guaranteed under each facility. By 24 September 2008, each of the

overdraft accounts had been brought into credit and in an amount which exceeded the amount of the company's contingent liability for the bank guarantee. However, it was necessary for Mr Lee to prove that these deposits to the overdraft accounts were payments by him, as distinct from payments by the company. The point can be explained by simplifying the facts to a case where a guarantee in these terms secures only an overdraft facility. If a payment by the principal debtor of the amount guaranteed could have the effect of discharging the guarantor, it would follow that a temporary credit balance in the overdraft account would automatically put paid to the guarantor's liability and, in a practical sense, to the continued provision of the overdraft facility. To avoid that result in the present case, it is necessary to interpret this guarantee, in its reference to a payment of the amount guaranteed, to a payment made by the guarantor. And that interpretation accords with the ordinary meaning of the words which are used, appearing as they do within a sentence which sets out the various actions which *the guarantor* may take to "stop the obligations under the guarantee." The distinction between a guarantor's payment of the principal debt and its payment by the debtor may be difficult to employ in some factual contexts, but it is well established and has a wider relevance.[5]

[30] The guarantee also permitted the guarantor to write to the bank to "stop" the obligations under the guarantee, unless the bank was obliged to make further advances. In the event that the obligations under the guarantee were stopped, the guarantor was still to be liable "for the amount guaranteed at that time." In the present case, absent an instruction from the debtor company, the bank would have been obliged to make further advances, at least by the ongoing provision of the overdraft facility. And the bank would have remained bound by the guarantee which it had provided to GMG's landlord. Therefore, this provision of the guarantee, of itself, did not assist Mr Lee.

[31] As for the Code of Banking Practice, cl 26 did not apply because Mr Lee was not a joint debtor under a credit facility.

[32] Clause 28.9 of the Code enabled Mr Lee, by a written notice to the bank, to limit the amount or nature of the liabilities which were guaranteed. The documents left with Mr Lau on 24 September requested the *release* of the mortgage and, at least by implication, the *discharge* of Mr Lee's guarantees. And again, absent an instruction from the debtor company, the bank was not obliged to accept a notice under cl 28.9 because it was obliged to make further advances on the overdraft facility.

[33] Clause 28.10 provided that the guarantor could extinguish his liability by paying the bank the outstanding liability of the debtor, including any future or contingent liability. But again, this required Mr Lee to prove that the payments which were made to the overdraft accounts were payments *by him*.

[34] Mr Lee pleaded that these were payments which were made by him. But this was disputed by the bank, which tendered evidence of the source of the funds which were used in making the payments. According to this evidence, which was uncontested, the payment of $34,000 to the overdraft account of GMG on 24 September was made by a cheque drawn upon an account of LNY with the Commonwealth Bank. That was the case also with the payment of $30,000 to the overdraft account of LNY on 15 September and a payment of $11,500 which was

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5 cf *Mahoney v McManus* (1981) 180 CLR 370.

made to the LNY overdraft account on 18 September. The balance of the $14,300 deposited to the LNY account on that day was provided by a cheque for $1,500 drawn by a company called Gospel Seafood Pty Ltd and a cheque for $1,300 drawn by an entity called Bakery Q. The payment required under cl 28.10 was one which represented the then outstanding liability of the debtor, including any future or contingent liability, so that the potential liability to the bank from a call upon the bank guarantee had to be paid as well as any then liability under the overdraft facility. Such payments were made to LNY's account by 18 September and to GMG's account by 24 September. But they appeared to have been payments made partly or wholly by LNY. This argument required Mr Lee to prove that they were payments made by him. The trial judge made no finding about that matter. Upon this appeal, Mr Lee did not press for a finding that the payments had been made by him.

[35] The better arguments for Mr Lee were those which focussed upon the actions of the companies themselves, most importantly the documents which were signed by Mr Lee and Mr Park, expressly as directors, and left with Mr Lau on 24 September. Each company was able to terminate its overdraft facility by repaying all amounts then owing under that facility and notifying the bank, according to condition 22 of the facility.

[36] The evidence of Mr Lau suggested that he did not regard an overdraft facility as terminated immediately upon the receipt of a notice and a repayment according to condition 22. He suggested that it was necessary first for someone working for the bank in Melbourne to check that all outstanding amounts under an overdraft facility had been paid and to then say whether the overdraft facility "had been cancelled or not." But if that was the bank's practice, it was not recorded within condition 22, according to which the facility would be cancelled once the customer's notice had been given to the bank, as long as all amounts under that facility had been paid.

[37] Each letter provided to Mr Lau was a clear notification of the cancellation of the overdraft facility and was given at a time when the relevant account had a credit balance. The bank did not suggest, at that time or in this case, that any other amount remained outstanding under either overdraft facility. The fact that the instruction was given in the form of a request to cancel the overdraft facility did not mean that there was some discretion in the bank as to whether the facility would remain in place. These instructions had to be understood in the context of the parties' contract and more specifically, condition 22. Absent a "put on hold" instruction, the documents which were given to Mr Lau had the effect of cancelling the overdraft facilities forthwith.

[38] Condition 25 permitted the bank guarantee facility to be cancelled by the return of the bank's guarantee document to the bank and the payment of any unpaid fees and other amounts in relation to it.

[39] The bank guarantee issued for the benefit of LNY was indeed returned to the bank. The trial judge found that it was returned in "late September and was cancelled."[6] Mr Lee's evidence is that this had occurred by the meeting of 24 September. The bank pleaded that it occurred on 27 September. Mr Lau was unable to recall the date on or by which the bank guarantee was returned to the bank. But he did recall the event. He said that Mr Park had told him that the landlord no longer required

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6 *Australia and New Zealand Banking Group Limited v Lee* [2013] QSC 3 at [29].

the bank guarantee and that Mr Park then held the original of the document. To confirm that this was the landlord's position, Mr Lau went with Mr Park to see the manager of the shopping centre and that confirmation was given. Mr Lau then sent the document to an office of the bank in Melbourne.

[40] For Mr Lee, it is said that this explains the changes which were made to the letter of instructions for LNY. What had been an instruction to replace the security for the bank guarantee became an instruction to cancel that facility. But in my view, the letter does not provide compelling proof of the point in time at which the original bank guarantee document was returned to the bank. The trial judge made no finding on this point, save that this occurred in "late September." If this had occurred by the meeting of 24 September, then there was nothing further to be done to cancel the bank guarantee facility for LNY, according to condition 25, save perhaps for the instructions to cancel the facility which were given in the directors' document that day. Alternatively, if the original document was not returned to the bank until after the meeting of 24 September, still it was returned within the following week. Either way the combined effect of the written instruction of 24 September and the return of the original document resulted in the cancellation of that facility. Whatever was the true effect of what was discussed on 24 September, it appears that the instruction to cancel this bank guarantee facility was not put on hold.

[41] In the written instructions, the bank was not asked to cancel the bank guarantee which was given for the benefit of GMG. Rather, it was asked to accept, as a substitute security, a bank deposit in that sum of $32,776. Sufficient funds had been paid to GMG's overdraft account to permit the bank to transfer that amount to a separate deposit, to be held on security for its guarantee. Plainly that was the reason why a deposit in an amount of $34,000 was made on 24 September. But the bank was not obliged to accept this proposal for the substitution of the security. And it appears that this would have required some documentation to be prepared and signed, to ensure that an identified and distinct account would constitute the new security. Therefore, the events up to and including the meeting of 24 September, even on Mr Lee's version, did not entitle Mr Lee to the discharge of his guarantee in respect of the bank guarantee facility for GMG.

[42] Apart from the "put on hold" case, the position was or would have been as follows. The LNY facilities were or would have been terminated in all respects, at least by late September 2008, with the consequence that Mr Lee's guarantee was discharged. And for GMG, Mr Lee's guarantee would have remained to support that company's liability to the bank in respect of the bank guarantee, and the mortgage was to remain in order to secure Mr Lee's liability as a guarantor of that facility.

Events after September 2008

[43] At some point within the next five weeks or so, there was a further meeting between Mr Lee, Mr Park and Mr Lau, which came about in this way. Mr Lee tried to obtain electronic access to an account of one of the companies. When he was unsuccessful, he went to see Mr Lau, who saw that money had been withdrawn "from the overdraft account." This alarmed Mr Lee, which made Mr Lau see fit to call Mr Park and ask him to come to the bank. When Mr Park arrived, there was an argument between Mr Lee and Mr Park, in which Mr Lee was complaining about the withdrawal of money from one or more accounts and Mr Park made some counter accusations that had something to do with the use of a car and perhaps some other money.

[44] Mr Park gave a handwritten note to Mr Lau, dated 29 October 2008, which was as follows:

> "Please do not release the mortgage … given by [Mr Lee], as security for the business overdraft … of [LNY] until I have notified ANZ Bank that mutual agreement has been reached between [Mr Lee] and myself …"

Mr Lau said that this letter was written immediately after the meeting between the three men at the bank. Mr Lee's evidence was that this meeting took place much earlier and not long after the meeting of 24 September. Mr Lau did not explain satisfactorily why this instruction from Mr Park was necessary, if already Mr Lau had been given instructions to put everything on hold.

[45] As I have noted, the LNY overdraft account had been brought into credit by an amount slightly in excess of the bank guarantee for that company of $18,330, on 18 September 2008. From 25 September, there were substantial withdrawals by Mr Park from that account. It became overdrawn on 24 October. By 29 October, it was overdrawn by more than $25,000 as a result of a series of withdrawals (each in an exact number of thousands) totalling $27,000 from 24 October to 29 October. This makes it likely that, as Mr Lau recalled, the meeting occurred on or about 29 October 2008.

[46] On the GMG account, there were substantial withdrawals by Mr Park, beginning on 30 September in amounts totalling $16,400, and on 1 October in amounts totalling $18,000. The account became overdrawn on 10 October 2008. By 29 October, it was overdrawn by more than $24,000.

[47] In April 2009, the bank made demands upon the companies and upon Mr Lee as guarantor. An amount of $30,411.83 was demanded upon the LNY guarantee and an amount of $63,524.55 upon the GMG guarantee. Mr Lee's response was not to deny a liability to the bank. Instead, he asked the bank to take no further steps against him until he had had an opportunity to pursue Mr Park.

[48] In September 2009, Mr Lee's then lawyers wrote to the bank's lawyers offering a payment of $10,000 "in payment of the outstanding amounts in consideration for [the bank's] undertaking not to take any further actions against the mortgaged property." There were further letters from his solicitors in September and October 2009, unambiguously admitting a liability to the bank.

[49] In 2009, Mr Lee brought proceedings against Mr Park, GMG and LNY in the District Court. He claimed specific performance of what he described as the "termination agreement", by which he and Mr Park had agreed to the sale of his interests in the companies. He pleaded that this contract contained terms by which the bank guarantees were to be cancelled, the overdraft accounts closed, his mortgage to the bank released and Mr Park would indemnify him against any liabilities which he had incurred during their business relationship. Somewhat curiously, he pleaded that in order to give business efficacy to this contract, it should be implied that Mr Park had contracted not only for himself but for LNY and GMG. He then pleaded that the defendants were in breach of the termination agreement by failing to cancel the GMG bank guarantee, close the overdraft accounts, ensure that there were not any moneys owing to the bank which were secured by Mr Lee's guarantees and mortgage and make alternative arrangements

with the bank to provide other securities so that those which had been provided by Mr Lee were released. He claimed specific performance of the termination agreement in terms which required the defendants to do the things which he had said had not been done, in breach of the contract.

[50] There was a trial in November 2009 of the District Court proceeding. Mr Lee was represented by counsel and solicitors different from those who represented him in the present matter. The defendants were not legally represented. Mr Park spoke for himself and for the companies. Mr Lee gave evidence about, amongst other things, the two handwritten documents of 24 September 2008. He did not suggest that Mr Lau had been asked to put them on hold. But Mr Lau was called as a witness in Mr Lee's case, and did give that evidence. Mr Park cross-examined each of them, but made no suggestion, one way or the other, as to the "put on hold" point.

[51] In this trial in the District Court, Mr Lee was asked why he had resigned as a director without "cancelling the … overdraft accounts, or the bank guarantees" to which he answered (through an interpreter):

> "First of all, I receive orders purchase price and, secondly, the bank account had enough money to cancel the bank guarantee and, thirdly, [Mr Lau] said it was okay. Also, Mr Park wanted his share of the company when he resigns and in Korea, when - I thought I had as long as I had this card and [PIN], I thought nobody would be able to access the account and Mr Park said it was okay for me to hold the account until all those mortgage of my house, it's cancelled. So I thought I had enough reasons not to cancel the bank guarantee or overdraft account before resigning."

His evidence continued:

> "A week after I resigned, I realised I couldn't access to the account over the Internet banking. After three weeks of my resignation, I didn't hear that the mortgage was released and Mr Park kept telling me to wait, wait and wait. I started having these suspicions so I decided to go see [Mr Lau] myself. When I saw [Mr Lau], he told me that all the process stopped because Mr Park withdrew the money from the overdraft account. …"

This evidence was not consistent only with the "put on hold" case. Mr Lee had resigned as a director before the meeting of 24 September. His evidence, like the District Court case itself, was explicable upon a misunderstanding of the legal effect of what had occurred in the dealings of September 2008.

[52] Subsequently, the trial was adjourned to enable Mr Park to procure the services of an interpreter, although by that stage Mr Park had started to give his evidence. When the matter came back to court, Mr Park did not appear. The trial then concluded and in September 2010, a reserved judgment was delivered in favour of Mr Lee. The defendants were ordered to do everything necessary to close, amongst others, the two overdraft accounts and to do all such things and sign all such documents "to ensure that no moneys are owing to the ANZ Bank in any of the abovementioned accounts forthwith." It was further ordered that "in the alternative the defendants are to do all such things and sign all such documents as to release the plaintiff and the plaintiff's securities provided to the ANZ Bank relating to the abovementioned accounts forthwith." There was no order for the payment of money to Mr Lee, either immediately or to reimburse Mr Lee if he paid the bank.

[53] There was no issue in the District Court proceedings as to whether Mr Lee was indebted to the bank. The trial judge there said that the defence was a denial of any agreement in favour of Mr Lee "against any further use of the accounts upon which the personal guarantee was held" and an assertion by the defendants that Mr Lee had undertaken "to release the guarantees and mortgage himself."

[54] There was no consideration in this judgment of the question of whether the effect of the events up to and including 24 September 2008 had been to cancel all or part of Mr Lee's liability to the bank. It was apparently accepted by those conducting that case for Mr Lee that, as a matter of law, he remained liable after the meeting of 24 September.

[55] Clearly from the present case, Mr Park and the other defendants have not performed the orders made in the District Court. The present case was commenced in June 2010.

The "put on hold" case

[56] The trial judge concluded that Mr Lau was instructed by both Mr Park and Mr Lee to put the instructions, within the two letters which he was given on 24 September, "on hold" until Mr Park had arranged "substitute security." In at least some of the evidence of Mr Lau, there was a basis for this finding. According to Mr Lee's evidence, no "put on hold" instruction was given.

[57] The trial judge gave these reasons for accepting Mr Lau's evidence:

> "[49] Notwithstanding the different ways in which Mr Lau expressed himself, I am satisfied that he was instructed by both Mr Park and Mr Lee to put the letters containing instructions to close the accounts and release the mortgage "on hold" until Mr Park could arrange substitute security. Mr Lee had sold his interest in both businesses to Mr Park and it [is] clear that Mr Park intended to continue to conduct the businesses. Both businesses had required overdrafts and bank guarantees were required for leases. That was not going to change. I consider it to be most unlikely that Mr Park would have agreed to pay Mr Lee for his interests in the company if he was not going to be able to have the opportunity to, in effect, refinance, through making arrangements for replacement security.
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> [50] That conclusion is consistent with the case that Mr [Lee] conducted in the District Court. His claim was based upon an acceptance that he owed ANZ money because of the guarantees. At no point in that trial was it asserted that Mr Lee had been relieved of his obligations and that the ANZ did not have security. It was not until relatively shortly before this trial that Mr Lee advanced the argument that he had been released from the guarantees.
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> [51] It is also of importance that there was no rational explanation for Mr Lau not having complied with what, in Mr Lee's case, the instructions were. There was no reason for Mr Lau not to act and move to have the security released etc except, as I have found, that he was asked not to proceed in order that Mr Park could arrange alternative security."

[58] In the first of those paragraphs, the trial judge found that both businesses had ongoing requirements for overdrafts and bank guarantees. With respect, clearly that was not the case, at least for LNY. As at 24 September, the bank guarantee for its landlord had either been returned or was about to be returned. Its lack of requirement for a bank guarantee was also demonstrated by the handwritten instruction.

[59] As for the overdrafts, there was no evidence for that finding, save for Mr Lau's evidence itself. But against that, there was compelling evidence that neither company had any immediate need for an overdraft facility. Each company had just brought its overdraft account very substantially into credit. There were the documents which Mr Lee and Mr Park signed and left with Mr Lau, by which unconditionally and unambiguously, they gave instructions for the cancellation of the overdraft facilities. There was the evidence of the state of the accounts following this meeting of 24 September. The accounts were later overdrawn, but in each case by a number of large withdrawals in round figures, rather than by something which resembled everyday business transactions. So the fact that they did become overdrawn provided no basis for the finding that each company had, as at 24 September, an ongoing requirement for an overdraft and the trial judge did not say that it did.

[60] At one point in his examination in chief, Mr Lau gave this evidence:

> "When Mr Lee and Mr Park came in on that day, when they sign this letter I can - I can recall that, yeah, both Mr Lee and Mr Park started off with saying that they want to cancel the overdraft and to replace the security for the bank guarantee which was - at that time was the mortgage from Mr Lee to be replaced by bank deposit as security. And then Mr Park and Mr Lee talk between themselves in Korean language, I think, because I don't know Korean language, but they - they have been conversing like that before, and then - and then Mr Park told me that he still need to negotiate with a new shareholder and, from memory, they mention the name Mr Kwon, K-W-O-N, or something, that Mr Park was negotiating with to become the new shareholder to bring in new security property, and then he ask me what was the procedure and the time required for doing that. Then I explain that then we have to put in an application with the new person to become the shareholder and director and the new security property, to do a valuation and then send on application as supporting down to Melbourne for approval and if this approve then they will sign the mortgage and the director guarantee and then I said the process or whole process may take up to three to four weeks to complete, and then Mr Park was talking to Mr Lee again and then Mr Park ask me that he's going to complete his negotiation with the other new shareholder, then come back and do an application. Exact word of what he said, 'Is it all right' or something, but he was asking me, and then I also asked Mr Lee is - was - is it okay for Mr Park to finalise his negotiation with the shareholder and to give Mr Park reasonable time to do that. And, from memory then Mr Lee did nod his head and say, 'Okay', so then - then we - then I confirmed with them that they want me to put these letters of instruction on hold for time for Mr Park to finalise his

> negotiation and bring in a new shareholder for - to put in an application."

[61] According to that evidence, the only "replacement security" which Mr Park was wanting to arrange was for GMG's bank guarantee. To that end, a deposit was made, on the day of this meeting, in order to bring GMG's account into credit by a little more than the amount of that bank guarantee. Mr Lau had indicated previously that the bank would accept a separate term deposit, in the amount of the bank guarantee as security for it. But Mr Lau did not have authority to bind the bank in that respect.

[62] At paragraph [50], the trial judge relied upon the case which was conducted by Mr Lee in the District Court. The conduct of that case was clearly relevant to the present question. It was consistent with a belief on Mr Lee's part that he remained liable in full under his guarantees. In theory, one explanation for that belief could have been that Mr Lee had always understood that his written instructions of 24 September were to be, in all respects, put on hold. But Mr Lee's evidence to the District Court was also consistent with the absence of a "put on hold" instruction and with a mistaken view, by Mr Lee and those then advising him, of the terms of the bank's documents and the legal effects of the dealings with the bank on and around 24 September 2008.

[63] At paragraph [51], the trial judge said that there was no rational explanation for Mr Lau doing nothing to comply with the written instructions, except that Mr Lau was asked to put them on hold. But the instruction to cancel the LNY bank guarantee was not put on hold. Mr Lau was unable to say that, having been told to put everything on hold on 24 September, he had received some later instruction to proceed to cancel the bank guarantee.

[64] In my view, Mr Lau's failure to act upon the other written instructions could be explained, without his evidence being accepted. It is possible that at the end of the meeting of 24 September or soon afterwards, Mr Park did say to Mr Lau that he would negotiate with a new shareholder for that person to provide substitute security for the facility which was to remain (the GMG bank guarantee facility), and that Mr Lau then thought to wait for further instructions from Mr Park before sending on within the bank all of the instructions for these companies. Mr Lau may not have anticipated any significant delay in receiving those further instructions. But quite possibly he then heard nothing further from Mr Park and overlooked the matter until the occasion of the further meeting between the three men.

[65] The trial judge referred to inconsistencies between Mr Lau's evidence and evidence which Mr Lau had given in the District Court. Still he was persuaded to accept the substance of Mr Lau's testimony, which necessarily involved an assessment of Mr Lau's credibility and reliability. Therefore, the approach of this court must make proper allowance for the advantages of the trial judge.[7] The trial judge did not expressly state that he was advantaged by having seen Mr Lau give his evidence. And a trial judge's advantage in seeing the relevant witness give evidence is not so highly regarded, in some cases at least, as it was once. In *Fox v Percy*, Gleeson CJ, Gummow and Kirby JJ said:[8]

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7 *Fox v Percy* (2003) 214 CLR 118 at 127-129; *Tabtill Pty Ltd v Creswick* [2011] QCA 381 at [37].

8 *Fox v Percy* (2003) 214 CLR 118 at 129 [31].

> "Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical."

[66] In the present case, the fact that the trial judge saw Mr Lee and Mr Lau give their evidence was of relatively little benefit. Mr Lee's evidence was given through an interpreter. Mr Lau's evidence was given in English, but with some difficulty, as the trial judge remarked. This critical question had to be decided according to what other facts and circumstances indicated was probable, and the reasons of the trial judge employed that approach.

[67] There were further circumstances which were relevant in assessing the probability of Mr Lau's version. By 24 September, Mr Lee had ceased to be a director of LNY and an authorised signatory upon its account. That made it unlikely that he would be prepared to be exposed to the risk that through the actions of others, he would be liable for the debts of a company in which he had sold his interest. Similarly, in the case of GMG, he was about to resign as a director and to transfer his shares. This was the third of the meetings which he and Mr Park had arranged in order to procure a release of Mr Lee's guarantees and mortgage. All of those facts added to the improbability that late in the meeting of 24 September, Mr Lee and Mr Park would suddenly countermand their instructions, which they had just completed in writing during the meeting and which, importantly, they still left with Mr Lau.

[68] The trial judge also referred to evidence of Mr Lee that he had agreed with Mr Park that until the mortgage was released, he could continue to have internet access and PIN access to both overdraft accounts and that he was surprised to find that this access was later denied to him. The trial judge thought that this evidence was consistent with the bank's case.[9] In my view, this was relevant but not of great weight. Almost certainly, Mr Lee was not aware of the legal effect of the instructions within the documents which were given to Mr Lau, being that the overdrafts were cancelled forthwith. As I have discussed, it appears that Mr Lau did not regard an overdraft facility as terminated immediately upon the receipt of such instructions, and that view is likely to have affected Mr Lee's understanding. If Mr Lee was promised some access to what had been the overdraft accounts, this did not mean that he had put the instructions to cancel the overdraft facilities on hold. Quite probably, Mr Lee believed that the process to cancel the overdraft facilities was in train, and that he was concerned to check the state of the accounts in the meantime.

[69] In my conclusion, the trial judge erred in accepting Mr Lau's evidence on this critical issue. The evidence of the payments made to the overdraft accounts, on and shortly before 24 September, coupled with the terms of the written instructions

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9 *Australia and New Zealand Banking Group Limited v Lee* [2013] QSC 3 at [48].

which were left with Mr Lau, provided compelling proof that Mr Park and Mr Lee had made up their minds to cancel the facilities, save for the GMG bank guarantee. By the payments, they had taken substantial and considered steps to do so. The letters containing their instructions were clear. They were written or completed at this very meeting on 24 September. The documents were left with Mr Lau, with no note by the directors upon them or by Mr Lau that the instructions were to be in abeyance. The only record of the meeting upon the bank's file were these two documents. The LNY bank guarantee was then, or shortly afterwards, cancelled. And there is the improbability that, at the last moment, Mr Lee would agree that for some indefinite period, the overdraft facilities would remain, in circumstances where he was no longer a participant in the businesses.

[70] Possibly, Mr Park told Mr Lau, at the meeting of 24 September or shortly afterwards, that he was exploring some other security for the GMG bank guarantee, which would explain Mr Lau's inaction in response to the written instructions. But I am persuaded that it should not have been found that the instructions for the other facilities had been effectively countermanded.

[71] If the overdraft facilities were not to be put on hold, then Mr Lee was discharged from his guarantee for LNY and the GMG guarantee became one only for its bank guarantee facility. That guarantee continued, whether or not Mr Lau had been requested to put the request for substitution of the security for that facility on hold and whether or not Mr Lee had agreed to that course. Absent any "put on hold" instruction, Mr Lee remained liable unless and until the bank agreed to accept a term deposit or some other security in lieu of his guarantee and mortgage. The bank was not obliged to so agree.

[72] Subject to the arguments discussed below, the outcome at the trial should have been that Mr Lee's liability was limited to the GMG bank guarantee facility. If so, the bank was given judgment for an excessive sum. From the evidence it is not possible to identify the outstanding debt upon the bank guarantee facility alone. But the mortgage would still secure that debt and the bank was entitled to its judgment for recovery of possession.

The District Court case

[73] The bank argues that by obtaining the relief granted in the District Court proceedings brought by Mr Lee, he became precluded from disputing the bank's case that he was indebted to the bank, as it alleged, pursuant to the guarantees. This contention had a number of suggested legal bases. It was said that Mr Lee had made a binding election, that he was bound by an estoppel of the kind in *Port of Melbourne Authority v Anshun Pty Ltd*[10] or that to defend the bank's case, having obtained a judgment in those terms in the District Court, constituted an abuse of process.

[74] These arguments emphasise the inconsistency between the orders which were there made in relation to the overdraft accounts and the relevant securities and Mr Lee's denial here that he was indebted to the bank.

[75] As to a binding election, the bank argues that Mr Lee had to choose between inconsistent rights, which it describes as "a right to claim there was a release of the

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10 (1981) 147 CLR 589.

guarantees and mortgage by the ANZ on 24 September 2008 or to allege a breach of agreement on the basis steps had not been taken by the defendants to the District Court proceedings to effect such a release."[11] Mr Lee, it is said, unequivocally and irrevocably elected not to pursue the former by pursuing the latter to the point of obtaining a judgment.

[76] To bring this case within the common law principle of election, the bank must demonstrate that Mr Lee held alternative rights or remedies.[12] The bank's argument describes Mr Lee as having alternative rights, not so much in the nature of substantive rights, but rights to claim or contend for a certain position. Its argument refers to his "right to claim", as he did in these proceedings, that there was a release of the guarantees and a right to "allege" a case which he did against the defendants in the District Court.

[77] In truth, he did not have inconsistent rights or (relevantly) alternative remedies. Between Mr Lee and the bank there was but one true position, which is that he was either indebted in a certain respect or he was not. In the District Court proceedings, there were alternative remedies open to him. But they were remedies against the defendants in those proceedings, and more particularly the remedies of specific performance and damages for breach of contract. As against the bank, he had no alternative rights or remedies. Consistently with my judgment, he should not have claimed in the District Court that his guarantees were still binding and that he was still liable for the overdrafts of the companies. But by making those unmeritorious allegations and obtaining a judgment upon them, he was not electing between inconsistent rights as against the bank.

[78] As for an *Anshun* estoppel, the starting point is that the bank was not a party to the District Court proceedings. But the bank argues that it could and should have been joined in those proceedings, with Mr Lee making a case against it there, alternatively to that made against Mr Park and the companies, that his securities had been released by the bank. I accept that it was open to Mr Lee to seek declaratory relief of that kind against the bank by joining the bank in the District Court case. The question is whether Mr Lee became estopped from making that case against the bank, even in defence to proceedings brought by the bank, because he did not do so. In this context, the inconsistency between the present judgment in the District Court and the judgment sought by Mr Lee in these proceedings is undoubtedly important. But it is not determinative. What must also be considered is whether it was unreasonable for Mr Lee not to have taken that course in the District Court. In *Port of Melbourne Authority v Anshun Pty Ltd*, Gibbs CJ, Mason and Aickin JJ said:[13]

> "In this situation we would prefer to say that there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding. In this respect, we need to recall that there are

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11 Submissions of the respondent in support of the respondent's notice of contention, [4].

12 *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 588-589 [56]-[59].

13 (1981) 147 CLR 589 at 602-603.

> a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings eg expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few. See the illustrations given in *Cromwell v County of Sac*."

In that case, the judgment which the Port Authority sought to obtain was regarded by their Honours as one which would conflict with the existing judgment between the parties. Nevertheless, they considered many other factors as relevant before holding that there was an estoppel.[14]

[79] In my view, the non-joinder of the bank to Mr Lee's proceedings in the District Court was not unreasonable. The joinder of the bank would have very considerably increased the scope, length and expense of that litigation. It is relevant that the defendants in that case did not contend that Mr Lee had been released by the bank. And Mr Lee was under pressure from the bank to meet its demands. It is unlikely that the bank would have been prepared to delay enforcement of its securities, whilst Mr Lee sought to shift the burden to Mr Park and the companies, had Mr Lee joined the bank in the same case.

[80] As for the inconsistency between the District Court judgment and the outcome sought by Mr Lee in this case, there are two important considerations which are adverse to the bank's argument. The first is that there is not the feature here of a benefit from the earlier judgment. In the District Court, Mr Lee obtained no judgment for the payment to him of money in relation to these accounts. (There was another order made in those proceedings by which the defendants were to pay to Mr Lee the amount of his liability to one or both of the landlords.) The orders in relation to Mr Lee's position with the bank were that the defendants specifically perform what was found to have been their contract with Mr Lee, by doing everything necessary to close the accounts and to ensure that no moneys were owing to the bank in relation to them. And in any case Mr Lee has not obtained any benefit from those orders because they have not been observed. In other words, success for Mr Lee in the present appeal will not see him better off than he would be without the District Court judgment. Secondly, the District Court judgment being for specific performance, it is within the power of the District Court to vary or set aside such a decree to allow for events occurring after the decree which have affected the plaintiff's position.[15]

[81] The bank's suggested third basis for precluding a defence of its claim was put by reference to an abuse of process, for which its argument seems to place particular reliance upon the decision of the English Court of Appeal in *First National Bank Plc v Walker*,[16] although there were many grounds identified in the judgments for the result in that case. In that case, the respondent and her then husband had executed a legal charge over the family home to secure a loan in favour of the appellant bank. The proceeds of the loan were used for the husband's business. Subsequently, the respondent and her husband divorced. A property adjustment order was made in her favour, ordering the husband to convey his interest in the property to her expressly subject to the appellant's mortgage. Until that point, the

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14 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 604.

15 See eg *Dunworth v Mirvac Queensland Pty Ltd* [2012] 1 Qd R 207 at 223-225 [54]-[57].

16 [2001] 1 FCR 21.

respondent had managed to delay the bank's proceedings against her and her husband for possession of the house, upon default on the loan repayments. But after obtaining the conveyance in her favour, the respondent amended her case against the bank, alleging that the charge was voidable as against her because of the bank's actual or constructive notice of her husband's undue influence over her in procuring its execution. The bank argued that the respondent was precluded from seeking a remedy to set aside the charge when she had affirmed, ratified or elected to confirm the loan transaction and had obtained a conveyance to her upon the express basis that it was subject to the appellant's charge. The Court of Appeal accepted that argument. Sir Andrew Morritt V-C concluded that the respondent had become precluded from asserting that the charge was voidable when she accepted that the conveyance which was expressed to be subject to it.[17] He was also critical of the respondent's conduct in bringing proceedings against her husband for relief on the footing that the charge was valid but then defending the appellant's claim for possession on the footing that it was voidable.[18] Chadwick LJ held that the respondent could not defend the appellant's possession proceedings in a way which was inconsistent with the basis upon which the order in matrimonial proceedings had been made, and that it would be an abuse of the process of the court to permit her to pursue that inconsistent case in the possession proceedings.[19] Rix LJ agreed with the other judgments and said that the respondent had been put to her election "as to the course down which she wished to proceed."[20] In his view, the respondent "could not in good conscience maintain both those positions."[21]

[82] That last observation by Rix LJ is of some importance, because it emphasises the equitable nature of the relief which the respondent there sought in order to avoid the charge. And more generally, it can be seen that the prior judgment and its consequent conveyance had conferred a distinct benefit upon her. The present case, as I have discussed, does not have that feature.

[83] The relevance of this lack of benefit appears also from another case cited in the bank's argument, which is a decision of the Court of Appeal of Western Australia in *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission*.[22] The appellants there had brought proceedings seeking a declaration that an order for the compulsory acquisition of their land was invalid. One of the respondent's arguments was that the appellants were precluded from making that contention, because they had already received some of the compensation to which they would be entitled if the acquisition had been valid. McLure JA (with the agreement of Buss JA and Murray AJA) rejected that argument for the respondent. Her Honour extensively reviewed authorities on the doctrine of election between inconsistent rights and what she said was an independent doctrine of approbation and reprobation. She held that there was no inconsistency of rights in that case because an invalid acquisition order could not be the basis of a right to compensation.[23] (In that respect, the case was analogous to the present one.) Her Honour then considered the possible operation of this doctrine of approbation and reprobation

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17 *First National Bank Plc v Walker* [2001] 1 FCR 21 at [55].
18 *First National Bank Plc v Walker* [2001] 1 FCR 21 at [57].
19 *First National Bank Plc v Walker* [2001] 1 FCR 21 at [77].
20 *First National Bank Plc v Walker* [2001] 1 FCR 21 at [81].
21 *First National Bank Plc v Walker* [2001] 1 FCR 21 at [82].
22 *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276.
23 *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276 at 300 [118].

which she traced to initially part of the law of Scotland and having an equivalent in England as the doctrine of equitable election between estates.[24] She cited the judgment of Brennan J in *Commonwealth v Verwayen*, where this was said:[25]

> "A doctrine closely related to election, and sometimes treated as a species of election, is the doctrine of approbation and reprobation. This doctrine precludes a person who has exercised a right from exercising another right which is alternative to and inconsistent with the right he exercised as, eg, where a person 'having accepted a benefit given him by a judgment, cannot allege the invalidity of the judgment which conferred the benefit': *Evans v Bartlam* [1937] 2 All ER 646 at 652."

McLure JA endorsed this statement in Halsbury's Laws of Australia, vol 190 [190-35] as follows:

> "A person may not 'approbate and reprobate', meaning that a person, having a choice between two inconsistent courses of conduct and having chosen one, is treated as having made an election from which he or she cannot resile once he or she has taken some benefit from the chosen course."[26]

She held that the doctrine of approbation and reprobation did not preclude the appellants' challenge to the validity of the acquisition, because the appellants had received no ultimate benefit by having received an interim payment of compensation. That advance payment was liable to be forfeited on the ground that the acquisition was invalid, and the appellants had made no claim to be able to retain it in that event.[27]

[84] Again, in the present case there is no relevant benefit to Mr Lee from the District Court judgment. No amount is to be paid to him pursuant to that judgment. In my conclusion, there was no basis by which Mr Lee was precluded by the District Court case from contesting, in whole or in part, the bank's case here.

Misleading and deceptive conduct

[85] Mr Lee alleged that Mr Lau made statements which were misleading and deceptive in contravention of s 12DA of the *Australian Securities and Investments Commission Act* 2001 (Cth). This was based upon alleged statements by Mr Lau that the bank would release Mr Lee from the guarantees and the mortgage, provided that the GMG and LNY overdraft accounts were repaid or in credit and there was other security for the bank guarantees. They were said to be statements as to future matters and made without reasonable grounds, thereby engaging s 12BB of that Act. But Mr Lee did not plead that the statements, if made, lacked reasonable grounds.

[86] As to this counterclaim, the trial judge found it unnecessary to make any finding except that "[t]he request not to take action on the cancellation acts to defuse the effect of the alleged representations [and that] the cause of the Mr Lee's loss is the

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24 *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276 at 297 [108].

25 (1990) 170 CLR 394 at 421.

26 *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276 at 297 [109].

27 *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276 at 300-301 [124].

conduct of Mr Park in not complying with his obligations after having been paid by Mr Lee."[28]

[87] The allegation that Mr Lau made statements or representations, such as Mr Lee alleged, had substantial support in the evidence. It was then incumbent upon the bank to prove that there were reasonable grounds for those statements. But there was substantial support for the bank on that point, because it seems likely that had Mr Lau taken steps to implement the directors' written instructions, the bank would have agreed to the substitution of a term deposit as security for the remaining facility and released Mr Lee from his guarantees and the mortgage. The fact that these things did not happen does not mean that there was no reasonable ground for Mr Lau's statements.

[88] There was also a problem in this case for Mr Lee, in relation to the damage of which he complained, namely that he had "been exposed to the within proceedings and claims."[29] His damage could have been no more than his liability for the remaining bank guarantee facility. But he had no right to be released from that guarantee, because it was within the bank's discretion to refuse the request for the substitution of new security. Had he not been made to believe that this new security would be acceptable to the bank, how would he have been better off? His case did not address that question.

[89] For these reasons, his counterclaim was correctly dismissed.

Orders

[90] Of the bank's money judgment, which was for $227,362.79, it would appear that $75,077.18 was attributable to the LNY overdraft. But here it cannot be determined how much of the balance was attributable to the GMG overdraft. That is unlikely to be controversial. There was no challenge to the bank's calculations at the trial. I would order as follows:

1. Allow the appeal and set aside that part of the judgment by which the appellant was ordered to pay to the respondent the sum of $227,362.79.
2. Remit the case to the trial division, to determine the amount for which the respondent should have judgment against the appellant, upon the basis that from 24 September 2008, the appellant's guarantee in relation to Lee N Young Pty Ltd was discharged entirely and his guarantee in relation to God's Mission Group Pty Ltd was discharged as to the liability of that company under its overdraft facility.
3. Otherwise dismiss the appeal.

[91] Because the appellant would have only partial success, the parties should be allowed 14 days in which to make written submissions as to the costs in the trial division and on appeal.

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28 *Australia and New Zealand Banking Group Limited v Lee* [2013] QSC 3 at [53].

29 Further Amended Defence and Counterclaim, para. 13F(b)(ii).