# DISTRICT COURT OF QUEENSLAND

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| CITATION: | *Richardson v Wagner* [2021] QDC 24 |
| PARTIES: | **Scott Lee Richardson**<br>(Plaintiff)<br><br>v<br><br>**Lesleigh Wagner**<br><br>(Defendant) |
| FILE NO/S: | 4668/19 |
| DIVISION: | Civil |
| PROCEEDING: | Trial |
| DELIVERED ON: | 18 February 2021 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 8, 9 February 2021 |
| JUDGE: | Barlow QC DCJ |
| ORDER: | **Judgment for the plaintiff in the amount of $195,609.17, including interest of $16,755.41.** |
| CATCHWORDS: | GUARANTEE AND INDEMNITY – CONTRACT OF GUARANTEE – WHAT CONSTITUTES – GENERALLY – Plaintiff lent money to company controlled by the defendant's son – Son sought additional funds from plaintiff – Plaintiff agreed to lend the additional money subject to whole of the company's debt being personally guaranteed by son and defendant – Defendant and son each signed document purporting to be guarantee – Son subsequently defaulted and went bankrupt – Whether document amounts to valid guarantee – Whether document guarantees whole of the debt or only the additional funds.<br><br>EQUITY – GENERAL PRINCIPLES – UNCONSCIONABILITY, UNCONSCIONABLE DEALINGS AND OTHER FORMS OF EQUITABLE FRAUD – SPECIAL DISABILITY – Defendant guaranteed debt owed by her son's company to plaintiff – Company |

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| | defaulted and wound up – Whether plaintiff had duty to disclose to defendant certain matters regarding company's business– Whether defendant's relationship with son placed her at a special disadvantage vis-à-vis plaintiff. |
| CASES: | *Behan v Obelon Pty Ltd* [1984] 2 NSWLR 637, cited |
| | *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, considered |
| | *Devaynes v Noble* (1816) 1 Mer 571, 35 ER 781 (*'Clayton's Case'*), distinguished |
| | *Fimiston Investments Pty Ltd (in liq) v Pecker Maroo Pty Ltd* [2011] QSC 356, cited |
| | *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, considered |
| | *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, cited |
| COUNSEL: | JD Byrnes for the plaintiff<br>R Varshney for the defendant |
| SOLICITORS: | Corney & Lind Lawyers for the plaintiff<br>Cranston McEachern Lawyers for the defendant |

## Contents

**Overview**

*Neither a borrower nor a lender be;*
*For loan oft loses both itself and friend,*
*And borrowing dulls the edge of husbandry.*[1]

[1] This is another unfortunate case in which two people, having been taken advantage of by a friend and a son respectively, now battle over who should suffer the loss arising from that person's failure to fulfil his promises. Neither of the parties is at fault, but one must suffer the financial consequences more than the other. I have sympathy for both, but I must decide the issues according to the evidence and the law.

[2] Briefly, Mr Richardson alleges that, in circumstances discussed below, he lent sums totalling $150,000 to a company owned by Mrs Wagner's son, Jason Wagner, the repayment of which Mrs Wagner and Mr Wagner guaranteed. The company is now in liquidation and Mr Wagner is bankrupt. Mr Richardson seeks repayment of the money, including interest, from Mrs Wagner.[2]

[3] Mr Richardson and Jason Wagner had been friends since high school. Mr Richardson and Mrs Wagner had met a few times over the years, but did not know each other well. Mr Richardson said that he had probably met her about 10 times and the last time was about 15 years ago.[3] Mrs Wagner did not think she had met him even 10 times.[4]

[4] Since some time in about 2008, Mr Wagner had a business, which he conducted through a company, JDP Applications Pty Ltd (JDPA), of which he was the sole director. The sole shareholder was another company, JDP Coatings Pty Ltd, of which Mr Wagner was also the sole director. He held 75% and his mother held 25% of the shares in that company.

[5] From about some time in 2014, Mr Richardson started to lend to JDPA various sums of money, for varying relatively short terms. Mr Richardson would transfer the agreed funds to a bank account nominated by Mr Wagner. They agreed that JDPA would pay interest to Mr Richardson at a rate of 5% per month (although the exact amount paid by way of interest would sometimes be rounded up or down). Mr Richardson said that JDPA always repaid those loans and interest.[5]

[6] Mr Richardson claims that, between 5 July 2016 and 4 November 2016, he lent JDPA sums totalling $100,000, at the agreed interest rate of 5% per month. He gave evidence to that effect, pointing out the relevant entries in his bank account statements. Mrs Wagner does not admit that Mr Richardson lent those sums and sought to put him to proof of the amount that claims is owed to him. In some respects his evidence was

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1 W Shakespeare, *Hamlet*, Act 1, scene III. Polonius speaking to Laertes.

2 Mr Wagner and his company were originally defendants, but they were removed after their respective insolvencies.

3 T1-17:45-46; T1-27:32 to T1-28:5.

4 T1-50:28-29; T1-51:18-26.

5 T1-20:43-47. Mr Richardson tended to refer to Mr Wagner as the borrower, but he was really the alter ego of JDPA.

challenged in cross-examination. One issue for my determination is therefore whether Mr Richardson has proved the debt that he claims.

[7] Mr Richardson gave evidence that Mr Wagner rang him and asked if Mr Richardson would "keep the money in" that Mr Wagner was going to pay back and add another $50,000 to the $100,000 loan if Mr Wagner and Mrs Wagner guaranteed it. Although Mr Richardson did not expressly say it, I infer, from the following additional evidence, that this conversation occurred at some time on 9 November 2016. Mr Richardson said that Mr Wagner later came to his house with a document[6] that he gave to Mr Richardson. Mr Richardson said that he reminded Mr Wagner that this was his life savings and those of his late girlfriend. Mr Wagner told him that Mrs Wagner's house was worth over $900,000 and he had $200,000 worth of work coming in. Mr Richardson said he needed to have the money repaid and Mr Wagner said that was why his mother would guarantee it. They shook hands and Mr Wagner left the document with him.[7]

[8] On 9 November 2016 at 10.25am, Mr Wagner sent the following text message to Mr Richardson:[8]

> *Scoob![9] Have I got a proposal for you! I just came past your place but not home.*
>
> *Ok, we have just won a major job in Cairns. About $200k worth.*
>
> *I need to bank roll it. At the moment you have $100k invested. I would rather deal with you than anyone else so if you want to raise your investment to $150k for a period of 3-4 months at normal interest. At that kind of money both mum and myself will be willing to provide personal guarantees.*
>
> *Your thoughts?*

[9] That led to the following exchange of messages:[10]

> SR[11] to JW[12]*: Im keen mate*
>
> JW to SR*: Cool, what time you home and I will drop PG's in*
>
> SR to JW*: Not till 5.30 mate*
>
> JW to SR*: K I'll drop in then*

[10] Mrs Wagner gave evidence that, on the same day, some time before 12.19pm, Mr Wagner rang her and told her that he was trying to organise a loan for his business from Mr Richardson, who wanted some documentation.[13] Although she did not say

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6 Exhibit 1 (a paginated trial bundle of documents for the trial), p 105.
7 T1-21:25 to T1-22:2.
8 TB37.
9 'Scoob' was Mr Wagner's nickname for Mr Richardson.
10 TB38.
11 Mr Richardson.
12 Mr Wagner.
13 T1-46:15-30.

that Mr Wagner told her that Mr Richardson wanted a guarantee from her, it is clear that he did tell her that, as the following exchange of emails then ensued.[14]

Email from LW[15] to JW at 12.19pm:

*What is Scott's full name*
*Address*
*Amount*
*% per month*
*Length of loan*

Email from LW to JW at 12.31pm:

*Let me know what details to put in*

Email from JW to LW at 12.32pm:

*I'm on my way in*

[11] Attached to Mrs Wagner's email at 12.31pm was a document that Mrs Wagner had drawn, which said:[16]

*This agreement is made between Jason Wagner, acting on behalf of JDP Applications Pty Ltd and Lesleigh Wagner who give personal guarantees for funds advance to JDP Applications Pty Ltd from Scott of*

*This contract is for the amount of for a period of six months.*

*Dated this 9th November, 2016.*

……
*Jason Wagner*

……
*Lesleigh Wagner*

[12] Mrs Wagner said that, after the email exchange, Mr Wagner arrived at her home, put a document in front of her and asked her to sign it.[17] The document, on JDPA letterhead, said:[18]

*Scott Richardson*

*This is to acknowledge that Mr Scott Richardson has invested $150k into JDP Applications for a period of 3-4 months with an option to extend if both parties agree. The investment attracts a 5% monthly interest rate payable monthly.*

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14 TB106, 107, 109.
15 Lesleigh Wagner.
16 TB108.
17 T1-46:32-47; T1-47:1-26.
18 TB105. For simplicity I shall refer to it as the document or the guarantee document, although I have yet to find whether it did amount to a guarantee, or whether it imposes any obligation on Mrs Wagner.

*A personal guarantee from Jason Wagner (Director) and Lesleigh Wagner (Trust Unit Holder*

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| *[signed]* | *[signed]* |
| *Jason Wagner* | *Lesleigh Wagner* |
| *Director* | *Trust Unit Holder* |

[13] Mrs Wagner said that, when Mr Wagner presented the document to her, she read it and understood that, by signing it, she would be providing a guarantee to Mr Richardson. Mr Wagner assured her that JDPA would pay the money back. She signed the document knowing that it was to do with a loan and that she was to be a personal guarantor for the loan, but with full trust in Mr Wagner that he would honour the loan.[19]

[14] As I have already recorded, Mr Wagner took the signed document to Mr Richardson that afternoon and left it with him. Mr Richardson said that he then transferred $50,000 to Mr Wagner in three payments over the following three days, as shown in a bank statement for his account.[20] Mr Richardson said that, in doing so, he relied "100%" on the guarantee provided in the document given to him by Mr Wagner, saying "That's why I held onto that piece of paper like – with my life. It was the only reason."[21]

**The guarantee**

[15] Dr Varshney, appearing for Mrs Wagner, submitted that Mrs Wagner is not bound by the guarantee for a number of reasons.

(a) First, the guarantee document, properly construed, does not purport to provide any guarantee, nor do the circumstances surrounding it give rise to a guarantee, or it is too uncertain in its terms.

(b) Secondly, even if the document purports to give a guarantee, it is not enforceable as it is for no consideration or, at least in part, for past consideration.

(c) Thirdly, if it is a guarantee, it is not for the full $150,000 plus interest, but only for $50,000.

(d) Fourthly, any guarantee was for a limited time only, during which there is no evidence of a default on the part of JDPA, nor did Mr Richardson call on JDPA or the guarantors to pay the debt.

(e) Fifthly, Mrs Wagner signed the guarantee when she was at a special disadvantage, so that it is unconscionable for Mr Richardson to enforce the guarantee.

[16] I shall now proceed to consider each of these submissions.

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19 T1-47:1-8; T1-55:21-22; T1-63:1-4
20 T1-22:7-14; TB150.
21 T1-22:17-18.

*Is the document a guarantee, or uncertain?*

[17] Dr Varshney submitted that a contract of guarantee, like any contract, must be formed by offer and acceptance with the intention to create legal relations, must be supported by valuable consideration (if not a deed) and its terms must be sufficiently certain and complete to enable the court to give them effect. So much may be accepted.

[18] In this case, she submitted, there was no evidence of any offer of a guarantee by Mrs Wagner, nor acceptance of an offer by Mr Richardson. There was no direct communication between them. There is no evidence that Mr Wagner had any authority to make an offer on her behalf. Mr Richardson did not ask her for a guarantee and she did not offer one. If her signature on the document constituted an offer to provide a guarantee, Mr Richardson did nothing to communicate to her that he accepted the offer. Therefore, no contract was formed between them.

[19] With respect, I disagree. I accept that there is no evidence that Mr Wagner had any authority to make an offer on her behalf. The offer of a guarantee that he made in his text message to Mr Richardson on 9 November 2016 was not made with her authority, but nor was it binding on her.

[20] However, by signing the document that Mr Wagner brought to her that afternoon and permitting Mr Wagner to take it away, clearly in order to give it to Mr Richardson to induce him to make a loan to JDPA, if the terms of the document do in fact offer a guarantee, that offer was jointly by Mrs Wagner and her son.

[21] So was the document an offer of a guarantee? Dr Varshney submitted that its terms are uncertain and do not amount to such an offer. Rather it simply records what it describes as a past "investment" by Mr Richardson into JDPA for the stated term and interest rate. Dr Varshney submitted that a contract of guarantee, subject to any qualifications in it, is a collateral contract to answer for the debt, default or miscarriage of another who is or is contemplated to be or to become liable to the person to whom the guarantee is given.[22] In this case, the document was an acknowledgment of a debt or consideration that had already passed and cannot be said to be a contract to answer for the debt, default or miscarriage of JDPA. The last sentence does not offer a personal guarantee of a loan, but simply a statement to no effect. It is not language that would convey to a reasonable person in Mr Richardson's position a clear and definite decision by Mrs Wagner to be bound by a guarantee. Her signature is not confirmation, nor an offer or promise, of her personal guarantee, but merely conveys her approval of the contents of the document.[23]

[22] With respect, that is a nonsense. The document is addressed to Mr Richardson. It clearly records the terms of a loan (notwithstanding the term "investment," although a loan can clearly constitute an investment), particularly when seen in the context of the facts then known to the parties, that Mr Richardson was to lend a total of $150,000 to JDPA. One term of the loan was that it be guaranteed by the named persons. By

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22 *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, 254.

23 In this latter respect, Dr Varshney cited *Clipper Maritime Ltd v Shirlstar Container Transport Ltd* [1987] 1 Lloyd's Rep 546, 554.

signing the document, those persons offered their personal guarantees. The document cannot sensibly be construed in any other way. The construction that Dr Varshney asks the court to put on it would almost be tantamount to the court applying meanings to the words of it that they do not have, or not applying any meaning to them. That is not how a court will construe a contract. Rather, courts construe a contractual document objectively, using common sense and by reference to its text, context and purpose.[24] Unfortunately for Mrs Wagner, the court does not adopt the Humpty Dumpty method of determining the meaning of words.[25]

[23] Nor is the document uncertain. It was clearly an offer of a guarantee by Mrs Wagner and Mr Wagner of a loan made or to be made by Mr Richardson to JDPA. The document constitutes a written promise to that effect and was signed by Mrs Wagner. It therefore satisfies the criteria necessary for it to be enforceable by civil proceedings.[26]

[24] Therefore, I conclude that Mrs Wagner offered to Mr Richardson her guarantee of the obligation of JDPA to repay to Mr Richardson, within three to four months or any additional period agreed between Mr Richardson and JDPA, a loan of $150,000 plus interest at 5% per month. Indeed, in her evidence Mrs Wagner acknowledged on several occasions that she knew she was signing a guarantee of that debt and she was doing so in order to help her son, although she assumed (and was assured by Mr Wagner) that she would not be called on to pay anything pursuant to her guarantee.[27]

[25] It is not contentious that Mr Wagner provided that guarantee to Mr Richardson that evening, following which Mr Richardson paid sums totalling $50,000 to Mr Wagner for JDPA. As I have recorded above, Mr Richardson relied on the guarantee in making those advances. By doing so, he accepted the offer of the guarantee.

*Consideration*

[26] Dr Varshney submitted that no consideration passed from Mr Richardson to Ms Wagner in exchange for her promise of a guarantee, or alternatively any consideration was past, and therefore any guarantee by her was unenforceable.

[27] Mr Byrnes, appearing for Mr Richardson, submitted that it was unnecessary for Mrs Wagner to receive any personal benefit in order for there to be valuable consideration for her guarantee. While consideration must move from the person to whom the guarantee is given, it need not benefit the guarantor personally. Indeed, particularly in the context of lending it is often that case that a guarantor receives no direct benefit from giving a guarantee, but the benefit flows to the borrower. The consideration to the guarantor is ordinarily the lender acting on the promise of the guarantee to the lender's detriment, such as by not enforcing an existing debt or by lending further money.

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24 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [46].

25 Lewis Carroll, *Through the Looking Glass, and What Alice Found There,* chapter 6. See *Liversidge v Anderson* [1942] AC 206, 245; Barlow, *Alice, Humpty Dumpty and the law* (2011) 85 ALJ 365.

26 *Property Law Act* 1974, s56(1).

27 T1-47:1-8; T1-53:12-19; T1-55:21-22; T1-63:1-4.

[28] Alternatively, Mr Byrnes submitted, Mrs Wagner received an indirect benefit because she owned shares in the parent company of JDPA and may stand to receive some benefit if JDPA were profitable.

[29] It is true that a guarantee that is not made by deed must be for valuable consideration. But a vast range of things may constitute consideration. As McMeekin J has said,[28]

> Valuable consideration may been defined as "some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment loss, or responsibility, given or suffered or undertaken by the other at his request".[29] In the context of a guarantee it is almost axiomatic that there will be no necessary advantage to the guarantor. Rather the consideration, which must move from the creditor, will be in the form of "incurring some detriment in reliance on the promise to guarantee".[30]

[30] Many guarantees expressly state that the consideration is the lender lending or agreeing to lend money to the borrower at the request of the guarantor. Compliance with such a request is sufficient consideration. Similarly, a lender's agreement to forebear from enforcing its existing rights against a borrower in exchange for a guarantee from a third person is sufficient consideration for the guarantee to be enforceable. In neither of those common cases does any tangible benefit move directly from the lender to the guarantor. The only "benefit" to the guarantor is that its request is fulfilled.

[31] The guarantee document in this case does not expressly request that Mr Richardson lend money to JDPA. In its terms, it acknowledges that Mr Richardson has already "invested" $150,000 in JDPA. But again, it must be construed in its context. Mr Wagner had told Mrs Wagner that he wanted Mr Richardson to lend money to JDPA, but Mr Richardson needed some documents signed first. It seems clear from Mrs Wagner's subsequent emails to Mr Wagner (with a draft form of guarantee) that Mr Wagner told her that Mr Richardson required a guarantee from Mr and Mrs Wagner. That is, in fact, what Mr Richardson had said, by his acceptance of Mr Wagner's offer of such a guarantee if Mr Richardson would "keep the money in"[31] (which I construe as meaning, extend the existing debt) and lend JDPA a further $50,000, both for three to four months. Knowing what Mr Wagner had told her, Mrs Wagner then signed the guarantee, knowing it was a guarantee personally binding her, and gave it to Mr Wagner for him to give to Mr Richardson. By doing so, Mrs Wagner in effect was asking Mr Richardson to lend a total of $150,000 to JDPA for three to four months at an interest rate of 5% per month and offering to guarantee that debt.

[32] Dr Varshney also submitted that, in its own terms, the guarantee letter demonstrated that Mr Richardson had already lent money ($150,000) to JDPA and therefore the consideration was already provided and, being past consideration, it was no consideration at all for Mrs Wagner's guarantee.

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28 *Fimiston Investments Pty Ltd (in liq) v Pecker Maroo Pty Ltd* [2011] QSC 356, [41] (footnotes below in the original). A more detailed discussion of what can amount to consideration for a guarantee is in Donovan & Phillips, *The Modern Contract of Guarantee* (Thomson Reuters Westlaw), [2.1000].

29 Halsb vol 9 para 310 (4th edn).

30 *The Modern Contract of Guarantee* by Donovan & Phillips at p39.

31 T1-21:26.

[33] Certainly the document refers to Mr Richardson having already "invested" $150,000 in JDPA. But the true fact was, as Mrs Wagner knew, that he had not lent the full amount at the time that Mrs Wagner signed the document, nor when Mr Wagner gave it to Mr Richardson. While $100,000 was already outstanding, Mr Richardson lent additional sums totalling $50,000 over the following three days. He did that in reliance on the guarantee for the entire $150,000 and therefore provided new consideration for Mrs Wagner's guarantee.

[34] The performance by a debtor of an existing obligation to repay a loan is not valuable consideration. Nor is the performance by a creditor of an existing obligation to lend money to a debtor, or to do so for a specified period of time. However, where an existing loan is repayable on demand, the lender's agreement to convert the loan from one payable on demand to one repayable after an agreed period is, in my view, valuable consideration for a guarantee given in exchange for such an agreement.

[35] Therefore, Mr Richardson gave consideration for Mrs Wagner's guarantee both by lending the additional money to JDPA and by agreeing to extend repayment of the existing debt of $100,000[32] for three to four months, both in exchange for the guarantee.

[36] Given this conclusion it is unnecessary to consider Mr Byrnes' submission that, in any event, Mrs Wagner received an indirect benefit due to her ownership of shares in JDPA's parent company. However, I do not agree with the submission. It seeks to ignore the corporate veil and that there is no evidence that Mrs Wagner in fact had ever received any benefit from JDPA through its parent company, nor that she stood to receive any benefit in the future. I reject this basis for asserting that such an alleged benefit was available to her or constituted consideration for her guarantee.

*How much is guaranteed?*

[37] Given my conclusions above, it is clear that Mrs Wagner guaranteed JDPA's obligation to repay the entire sum of $150,000, together with interest on that sum at 5% per month. I do not accept that the guarantee was limited to $50,000 nor (if it were submitted, which is not clear to me) that it was limited to interest for the period of three to four months.

*Guarantee limited to four months*

[38] Dr Varshney submitted that, by its terms, the guarantee itself was limited to a period of three to four months unless Mrs Wagner agreed to an extension of the time, which she did not. At the end of the agreed period, Mr Richardson had not called on Mrs Wagner under the guarantee, nor indeed had he made a demand for repayment from JDPA. Therefore, Mrs Wagner's obligation under the guarantee lapsed.

[39] I disagree. The document sets out the terms of the loan to JDPA. It was repayable in three to four months, unless the term of the loan was extended by agreement between

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[32] Which, absent any prior agreement of a loan period, was repayable on demand: *Ogilvie v Adams* [1981] VR 1041, 1043.

Mr Richardson and JDPA. While any amount was outstanding, interest would accrue at 5% per month and JDPA was obliged to pay that interest monthly. Mr and Mrs Wagner guaranteed JDPA's obligations under that loan agreement.

[40] The very nature of a guarantee is that the guarantor agrees that, if the principal debtor does not comply with its obligations under the principal contract, the guarantor will fulfil those obligations. Where the obligations require the debtor to pay a certain amount at a certain time, it would be a nonsense to hold that the guarantor, if not called upon to fulfil those obligations within the very same time, would be free of the guarantee. Unless the guarantee provides otherwise, a guarantor does not become liable unless and until the principal debtor defaults. Such a default may not occur until the very end of the period specified in the principal contract. Thereafter, the guarantor may be called on. There would have to be a very clear term of a guarantee, that it is for an equal or lesser time than the time within which the principal obligations had to be fulfilled, for that not to be the case.

[41] In this case, the guarantee was in respect of a loan for which the interest was payable monthly and the principal was payable in three to four months' time. If the principal debtor did not comply with those obligations, the lender was entitled to call on the guarantors to do so. Such a call could be made at any time after default. There was no limit, under the guarantee, on the time within which such a call could be made. The guarantors' obligations remained after the agreed loan had expired.

*Unconscionable conduct?*

[42] Finally, Mrs Wagner contends that, in signing the guarantee, she was at a special disadvantage and Mr Richardson took unconscionable advantage of her position.

[43] There are two limbs to this contention. First, Dr Varshney submitted that Mr Richardson was under an obligation to disclose to Mrs Wagner, before she gave her guarantee, the financial position of JDPA and, in particular, that Mr Richardson had been making short term loans to it over several years, under which JDPA was then indebted to Mr Richardson in the sum of $100,000.

[44] Dr Varshney relied in particular on the proposition that a lender has an obligation,

> to reveal anything in the transaction between the [lender] and the [borrower] which has the effect that the position of the [borrower] is different from that which the surety would naturally expect, particularly if it affects the nature or degree of the surety's responsibility.[33]

[45] I accept that that is the case, but, as Gibbs CJ also said in *Amadio*,[34]

> the facts that the [borrower] was in grave financial difficulties, and was consistently exceeding its overdraft limit, and that its cheques were being dishonoured, in themselves did no more than throw light on the credit of the company. If there were no more to the

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33 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 457.

34 *Amadio*, 456-457. The latter sentence appears immediately before the passage on which Dr Varshney relied.

> case than that, … the [lender] would not have been bound to make disclosure of those facts. … at least in the case of banker and customer the duty of disclosure arises only where there is a special arrangement between the bank and the customer of a kind which the surety would not expect. … It would be commercially unreal to suggest that a bank has a duty to reveal to a surety all the facts within its knowledge which relate to the transactions and financial position of a customer in any case where those transactions are out of the ordinary.

[46] The circumstances that took *Amadio* out of the ordinary were a very unusual arrangement requiring repayment of the debt in a very short period of time. As Gibbs CJ said, it meant that the company was given merely a temporary respite, whereas the bank improved its existing and inadequate security.

[47] It has since been said, referring to other cases applying the principle in *Amadio*, that:

> all formulations confine it to unexpected facts or unusual features which, unknown to the intending surety, are present in the transaction between creditor and debtor which the surety is to guarantee.[35]

[48] In this case, I do not consider that the fact that Mr Richardson had been making short term loans to JDPA over a period of some years was a matter that ought to have been disclosed to Mrs Wagner by Mr Richardson. The prior loans were not transactions that were out of the ordinary. Indeed, if it were relevant, one might expect it to be of some comfort to Mrs Wagner to know that JDPA had met all its prior obligations. Perhaps the most unusual aspect of the loans was the very high interest rate, but Mrs Wagner was well aware of that.

[49] The second limb of Dr Varshney's submissions that there was some unconscionable conduct by Mr Richardson that should lead to Mrs Wagner being relieved of her obligations under the guarantee, was that Mrs Wagner had full trust and faith in Mr Wagner in matters concerning his (or JDPA's) business and that he was not forthcoming with information about it. His lack of assistance or explanation where such assistance or explanation was necessary placed Mrs Wagner at a serious disadvantage vis-à-vis Mr Wagner and therefore vis-à-vis Mr Richardson. She thought the business was going well and the loan and guarantee were to overcome a "hiccup". She said that she signed the guarantee in full faith that Mr Wagner would honour it:[36]

> I was signing it to help Jason, but Jason assured me that it would be paid back and it would be – there would be no reflection on me at all.[37]

[50] Dr Varshney submitted that Mr Richardson had, in effect, a duty to tell Mrs Wagner everything about the loan and his relationship with Mr Wagner and JDPA. As a reasonable person, he ought to have been put on notice, due to her age, her relationship to Mr Wagner and the interest rate of 60% per annum, that he should make enquiries about her ability to repay the loan and ensure that she understood her obligations under the guarantee. He should not just have relied on Mr Wagner to explain it to her. He should have understood that she may be susceptible to Mr Wagner's undue persuasion

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35 *Behan v Obelon Pty Ltd* [1984] 2 NSWLR 637, 638E.
36 T1-63:1-4.
37 T1-47:6-8.

that she become a guarantor. Mr Richardson's failure personally to deal with Mrs Wagner and to discuss with her matters concerning the loan, including her position, Mr Wagner's position and that of JDPA, means that it is unconscionable for him to enforce the guarantee against her.

[51] In *Amadio*, Gibbs CJ described the circumstances in which a transaction will be unconscientious:[38]

> A transaction will be unconscientious within the meaning of the relevant equitable principles only if the party seeking to enforce the transaction has taken unfair advantage of his own superior bargaining power, or of the position of disadvantage in which the other party was placed. The principle of equity applies "whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hand."

[52] Mr Byrnes cited that passage and went on to rely on the following more recent passage from an unanimous judgment of the High Court:[39]

> Equitable intervention to deprive a party of the benefit of its bargain on the basis that it was procured by unfair exploitation of the weakness of the other party requires proof of a predatory state of mind. Heedlessness of, or indifference to, the best interests of the other party is not sufficient for this purpose. The principle is not engaged by mere inadvertence, or even indifference, to the circumstances of the other party to an arm's length commercial transaction. Inadvertence, or indifference, falls short of the victimisation or exploitation with which the principle is concerned.

[53] Mr Byrnes submitted, and I agree, that there was nothing in the relationship between Mr and Mrs Wagner that placed Mrs Wagner at a special disadvantage to either Mr Wagner or Mr Richardson. Furthermore, there was nothing known to Mr Richardson that ought to have alerted him to the possibility or the likelihood of any such disadvantage. Constructive notice has no part to play in the doctrine of unconscionability.[40]

[54] Putting aside my conclusion that Mrs Wagner was not at a special disadvantage, even if she had been there was nothing that in my view would have been so obvious to Mr Richardson that his failure to enquire further was wilful blindness.

[55] Therefore, I do not consider that Mr Richardson behaved in any way unconscionably. Nor is his enforcement of the guarantee against Mrs Wagner unconscionable, either under the *Australian Securities and Investments Commission Act* 2001 or in equity, as claimed in the defence.

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38 *Amadio,* 459, quoting *Blomley v Ryan* (1956) 99 CLR 362, 415.
39 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, [161].
40 *Kakavas*, [150]-[162].

*Conclusion – the guarantee is enforceable*

[56] Obviously, having regard to all my findings above, I conclude that the document that Mrs Wagner signed on 9 November 2016 was a guarantee of JDPA's debt to Mr Richardson and that she is bound by that guarantee. Therefore, she is liable to Mr Richardson for the amount owed to him by JDPA.[41]

**The alleged debt**

[57] It is now necessary to determine what loans were made by Mr Richardson and what repayments of principal or payments of interest were made to him. In particular, Dr Varshney challenged Mr Richardson on whether there had been additional payments made to him in respect of this loan that he has not credited toward the loan.

[58] For that purpose, it is necessary to consider each payment to or from Mr Richardson that has been identified as being to or from JDPA during the relevant period.

*Payments by Mr Richardson*

[59] Mr Richardson said that he made several short term loans to Mr Wagner's company that were supposed to have been paid back as at 9 November 2016. When asked to clarify who the loans were to, he replied, "To the businesses of JDP Applications and Coatings, was my understanding."[42] He said that the amount of $100,000 due as at 9 November 2016 constituted several short term loans that he had made. Each was at an interest rate of 5% a month. Whoever the loans were ultimately directed to is not in issue.

[60] Mr Richardson then identified the payments from his bank account that he said were made into the bank account nominated by Mr Wagner and constituted the loans that he had made to Mr Wagner for his businesses, which he is now seeking to recover from Mrs Wagner. The amounts he identified were $20,000 on 5 July 2016, $20,000 on 6 July 2016, $15,000 on 7 July 2016, $20,000 on 27 July 2016, $20,000 on 3 November 2016 and $5,000 on 4 November 2016.[43] He went on to identify the entries for the three additional payments that he made on 9, 10 and 11 November, respectively for $20,000, $20,000 and $10,000.[44]

*Payments to Mr Richardson*

[61] Mr Richardson also identified all the payments into his account that he said were interest (totalling $81,900) that Mr Wagner or JDPA transferred into his account after 9

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41 She can, of course, seek contribution from her co-guarantor, Mr Wagner, although to do so she may have to lodge a proof of debt in his bankrupt estate. Without deciding the point, it seems arguable that Mr Wagner's obligation to contribute to Mrs Wagner is a pre-bankruptcy debt. However, it is also arguable that, although his obligation to Mr Richardson is such a debt, he will only become obliged to pay Mrs Wagner when she pays out the debt, which will be after his bankruptcy. If that is the case, Mrs Wagner will be entitled to seek contribution from Mr Wagner any time within six years of the date she pays Mr Richardson. Of course, I need not consider or determine these matters.

42 T1-19:5-34.

43 T1-19:43 to T1-21:20; TB146-150.

44 T1-22:4-14; TB150.

November 2016. Those payments are identified in paragraph 12 of the second further amended statement of claim. The first was on 28 November 2016 and the last on 12 March 2019.[45] Most of the payments had, in Mr Richardson's bank statement, a description accompanying it, which was either "srinterest" or "jdpinterest". On one occasion (31 May 2018), the description for a payment of $2,500 was "Jdpapplications"[46] and on another occasion (12 March 2019) a payment of $1,500 was described as "Srloan Payment".[47]

[62] Three other payments that Mr Richardson, in his statement of claim, credits toward the JDPA loan were differently described. On 8 March 2017 an amount of $15,500 was described as "Sr Pi repayment". On 3 December 2018 the description for a payment of $4,000 was "Sr Pi loan repay". On 14 January 2019 the description for a payment of $4,000 was "Srichardsonpi".[48] The important distinction between these and the others is that they include the letters "pi". I take that to mean "principal and interest," suggesting that it was Mr Wagner's intention that each be applied partially to a repayment of the principal of the loan. As the interest rate is a simple rate and is not capitalised, reduction of the principal would reduce the amount of interest accruing on the loan. However, the two latter payments are of no real consequence in this case, because Mr Richardson in fact has applied them against the amount that he claims for the total of principal and interest owed to him as at 11 February 2018. He does not claim any interest between that date and 12 March 2019, so whether the latter two payments are treated as principal or interest makes no difference to the amount he alleges is owed.

[63] The amount of $15,500 credited to Mr Richardson's account on 8 March 2017 is different. In his statement of claim, Mr Richardson credits it toward payment of interest on the $150,000 debt. However, on the same page of the account statement, only 6 days earlier – on 2 March 2017 – there is a debit entry for $15,000 described as "Scott Richardson", which is how Mr Richardson said he described his loans to JDPA. On 7 March 2017, Mr Wagner sent Mr Richardson a text message saying, "Gidday mate. $15,500 put back into your account. Thank you."[49] That amount was credited to Mr Richardson's account on 8 March 2017. It is obvious (and I find) that this payment to Mr Richardson was in fact repayment (with interest) of a further loan of $15,000, rather than of any portion of the loan the subject of this proceeding. In his evidence, Mr Richardson agreed with this proposition.[50]

[64] However, notwithstanding that evidence, Mr Richardson has credited that payment in reduction of the loan now claimed. It is therefore appropriate to act accordingly. In this respect, Mrs Wagner receives a benefit to which she is not strictly entitled, but it is not appropriate to treat it as a reduction of the principal of the loan as at that date. But even if it were treated in that manner, it is unlikely to make a substantial difference to the amount claimed as interest on the outstanding principal, particularly given that no

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45 T1-22:25 to T1-25:1; TB152-204.
46 TB187.
47 TB204.
48 These entries are respectively at TB158, 198 and 200.
49 TB47-48.
50 T1-23:10-19.

interest is sought for the period between February 2018 and March 2019. It is sufficient to treat it as a general credit in Mrs Wagner's favour.

[65] Mr Richardson was tested in cross-examination on other payments that were shown in his bank statements as being interest, or principal and interest, received from JDPA.[51] They were payments of $2,750 on 5 August 2016, $2,750 on 8 September 2016, $1,000 on 23 September 2016, $2,750 on 3 October 2016 and $21,000 on 19 December 2016.[52] In her written outline of submissions, Dr Varshney did not refer to the payment on 8 September 2016, but did refer to another payment, of $1,000 on 24 October 2016.[53] She did not refer, either in cross-examination or in her submissions, to a payment of $1,000 on 25 August described as "jdpinterest".[54]

[66] At first, Mr Richardson said it must have been an oversight not to credit the payments to which he was referred by Dr Varshney in favour of the defendant. Later in the cross-examination on these payments, he said they were for the "short terms, not the 150." He said, "I'm just confused because all those loans were paid back. They were all loans that he paid back, those ones you've just talked about. .. the short terms."[55]

[67] In his re-examination, Mr Richardson said that the amounts paid to him before 9 November were all payments in respect of short term loans that Mr Wagner had fully paid back. He did not think that they were attributed to the outstanding debt and they did not affect his evidence about the amount outstanding as at 9 November 2016.[56]

[68] Mr Richardson did not keep any loan ledgers or journals recording the many loans and repayments made to and by JDPA. He said that he kept track of them by the entries on his bank statements. Dr Varshney submitted that the absence of any such records means that the true amount outstanding has not been proved satisfactorily. Given that he made so many loans over the years, including during this period, I find it difficult to accept that he was able to keep an accurate track. Neither he nor Mr Wagner identified what loans the interest payments were for. While I have tried to marry up payments each way with the text messages in exhibit 1, I have not been able to do so in all cases. In the cases of these particular payments, I have not been able to determine whether they were for other loans and Mr Richardson did not do so with any particularity in his evidence.

[69] I am not satisfied with his explanation of the additional sums. In the absence of clear evidence that any of these payments was not in respect of the loans comprising the principal amount claimed, and as there is clear evidence of the payments having been made during the terms of these loans, I consider that these payments must be taken to have been made in respect of these loans. Indeed, a chronological analysis of the text messages exchanged between Mr Richardson and Mr Wagner and the payments into and out of Mr Richardson's account shows that, before the payment on 5 July 2016, Mr Wagner had repaid all the loans that Mr Richardson had made at his request. The

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51 T1-36:1 to T1-37:35.
52 Respectively at TB148, 138, 136, 136 again and 153.
53 Defendant's outline, [17(d)]; TB150.
54 TB138.
55 T1-37:21-29.
56 T1-41:46 to T1-42:6.

payments made during the balance of 2016 were all in respect of the loans amounting to $100,000 that is part of the sum that Mr Richardson is now seeking to recover.

[70] However, all except the $21,000 payment (with which I shall deal shortly) were made before 9 November 2016. In this proceeding Mr Richardson is not claiming interest for any period before that date. Therefore, unless JDPA made overpayments of interest during that period, any payments of interest made before that date need not be credited toward the amount now being claimed.

[71] The question then is whether any of those payments was in fact a payment in reduction of the principal then outstanding. I do not consider that to be the case, as all the evidence (including the text messages and the "guarantee" document relied on by Mr Richardson) record that, as at 9 November 2016, JDPA owed Mr Richardson $100,000. Also, given the amounts paid and, in most cases, the text messages exchanged around the date of each payment, they were clearly for interest, not principal. Given that preponderance of evidence, I am satisfied that that was the case. As I have said, Mr Richardson does not claim any interest that accrued before then. There is no suggestion that interest on the principal sum was paid up to date as at 9 November 2016. Payments of interest made before then are therefore irrelevant.

[72] As for the $21,000 paid to Mr Richardson on 19 December 2016, it is clearly repayment (with interest) of a separate loan of $20,000 made on 9 December 2016. This is supported by text messages between Mr Richardson and Mr Wagner on 9 December[57] and the description of the transfer as "Sr loan P and I." It is irrelevant to the amount now claimed.

*Conclusion on payments*

[73] I find that Mr Richardson did lend JDPA sums totalling $150,000 and that JDPA paid him $81,900 in respect of those loans.

*Payments of principal or interest*

[74] The next issue is whether the payments by Mr Wagner or JDPA after 9 November 2016 ought to have been credited to the principal sums owing rather than to interest due on the principal.

[75] Dr Varshney submitted that the payments ought to have been applied in reduction of the principal rather than interest, in accordance with the rule in *Clayton's Case*,[58] because the payments of principal by Mr Richardson preceded in time the accrual of interest on that principal.

[76] The rule in *Clayton's Case* was to the effect that, where payments are made into and out of a running or current account, payments in should be credited to the payments out in the order that the latter were made. As the Master of the Rolls said, "It is the first item on the debit side of the account, that is discharged, or reduced, by the first item on the credit side." Later he added that, "If the usual course of dealing was, for any

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57 TB40-42.

58 *Devaynes v Noble* (1816) 1 Mer 571, 35 ER 781 (*'Clayton's Case'*).

reason, to be inverted, it was surely incumbent on the creditor to signify that such was his intention."[59] The rule has been described by the High Court as presuming "that payments made in reduction of a debt are intended to be applied consecutively in discharge of the items making up the debt."[60]

[77] This general "rule" is a presumption that normally applies to the relationship of banker and customer and in the absence of an agreement or arrangement to the contrary. Dr Varshney accepted this, but submitted that any other appropriation of a payment (for example, to interest instead of principal) must be clearly communicated between the parties. She submitted that there was no evidence of any agreement to appropriate Mr Wagner's payments other than in the usual way and therefore they must be credited to the principal. The effect, of course, would be to reduce the principal now owing as well as the interest that has accrued on that principal.

[78] Accepting both the rule and that payments should be applied in that manner unless some other method of appropriation of the payment is agreed, Mrs Wagner's problem in this case is that, in almost all instances, when making a payment to Mr Richardson, Mr Wagner expressly described it as "jdpinterest" or "srinterest".[61] That is a clear direction by him to Mr Richardson to apply the payment to interest, rather than in reduction of the principal. Also, even where he described a payment as "pi" or "loan payment", a review of the text messages exchanged between him and Mr Richardson at about the times of each payment shows that Mr Richardson was asking for, and Mr Wagner was promising, payment of interest, not principal. Furthermore, even where he described a payment as "pi", in the absence of communication by him of how much was for principal and how much for interest, I consider that he left it to Mr Richardson to determine how to apply the payment. Mr Richardson applied them all to interest.

[79] I find that each payment in respect of this loan that was made by JDPA was a payment of interest only.

**Result**

[80] In the result, I find that:

(a) Mrs Wagner is liable to Mr Richardson as guarantor of JPDA's debt to Mr Richardson;

(b) the amount of the debt, as at the date of Mr Wagner's last payment to Mr Richardson on 12 March 2019, was the amount claimed by Mr Richardson, namely $178,853.76.

[81] Mr Richardson claims interest on that amount from that date to judgment, but not at the contractual rate. Rather, he claims interest under s 58 of the *Civil Proceedings Act* 2011, at the rates allowed by the Court from time to time for default judgments. Of course, interest rates under that section are in the Court's discretion. I consider it

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59 *Clayton's Case*, at 608, 793 and 610, 793.
60 *Sibbles v Highfern Pty Ltd* (1987) 164 CLR 214, 222.
61 See paragraphs [61] and [62] above.

appropriate to allow interest at those rates for the entire period claimed. Dr Varshney did not submit to the contrary.

[82] Accordingly, I shall give judgment for the plaintiff in the amount of $195,609.17, which includes interest in the sum of $16,755.41.