

# SUPREME COURT OF QUEENSLAND

CITATION: *Miller v Gunther & Ors* [2005] QSC 090

PARTIES: **MATTHEW MILLER**  
(applicant)  
v  
**JOHN GUNTHER**  
(first respondent)  
**TALITHA CUMI PTY LTD** ACN 010 320 500  
(second respondent)  
**SUMMA PETERE PTY LTD** ACN 094 280 976  
(third respondent)  
**WARREN MCLAREN**  
(fourth respondent)

FILE NO/S: SC 9978 of 2001

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 27 April 2005

DELIVERED AT: Brisbane

HEARING DATE: 18-20 April 2005

JUDGE: White J

ORDER: **As per minute of order and schedules attached to these reasons**

CATCHWORDS: TRADE AND COMMERCE – TRADE PRACTICES AND RELATED MATTERS – CONSUMER PROTECTION – MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT – PARTICULAR CLASSES OF CONDUCT – REAL ESTATE TRANSACTIONS – real estate agent – representations made by – where complainants of limited English language skills and financial resources – some complainants adherents to Church with which first respondent was associated – any buyer’s doubts assuaged by revelation that first respondent was a Minister in the Church and that the bank would value the property – reliance upon commercial naivety of buyers and their trust in a minister of religion

*Fair Trading Act* 1989 (Qld), s 19, s 21, s 39, s 98, s 100  
*Trade Practices Act* 1974 (Cth), s 51AB

*Commercial Bank of Australia Ltd v Amadio* (1982-1983)  
151 CLR 447, cited

COUNSEL: Mr A Duffy for the applicant  
Mr W Stinchcombe, solicitor, for the solicitors on the record for first, second and third respondents seeking leave to withdraw  
Mr W Stinchcombe, solicitor, for the fourth respondent

SOLICITORS: Crown Solicitor for the applicant  
Worcester & Co solicitors on the record for first, second and third respondents  
Worcester & Co for the fourth respondent

- [1] The applicant is the Commissioner for Fair Trading appointed pursuant to s 19 of the *Fair Trading Act* 1989 (“the Act”). The applicant, subject to the direction of the minister together with other officers appointed to assist the Commissioner, operates the Office of Fair Trading. It is charged with administering the provisions of the Act and, *inter alia*, investigating fraudulent or deceptive practices in relation to matters which affect the interests of consumers of services and taking such action as seems proper to the Commissioner, s 21.
- [2] The applicant brings these proceedings pursuant to s 98 of the Act based on alleged contraventions of s 39 by the respondents. He seeks declarations that the respondents engaged in unconscionable conduct and injunctions restraining them from taking any steps to enforce or otherwise deal with certain mortgages held by the second or third respondents over certain properties and further injunctions preventing the respondents from engaging in certain future conduct. The applicant also seeks compensation on behalf of the complainants for losses suffered by them by reason of the contraventions of the Act pursuant to s 100. Each of the complainants has given written consent for the applicant to seek compensation as required by s 100(2)(b).

*The parties*

- [3] The first respondent (“Gunther”) was the holder of a real estate agent’s licence under the relevant legislation, was the sole director and secretary of the second respondent and held the controlling share interest in that company and was the sole director and secretary of the third respondent.
- [4] The second respondent (“Talitha Cumi”) held a corporation real estate agent’s licence under the relevant legislation and carried on business as an intermediate party in an on-sale purchase scheme for the purchase of residential properties under the name Sunshine Properties (Qld) (“Sunshine Properties”).
- [5] The third respondent, (“Summa Petere”) formerly known as Destiny Pluteo Pty Ltd (“Destiny”), carried on business as an intermediate party in an on-sale purchase scheme for the purchase of residential properties and operated from the same address as Talitha Cumi.

- [6] The fourth respondent (“McLaren”) held a real estate sales person’s certificate of registration under the relevant legislation and was an employee or agent of Talitha Cumi.
- [7] Judith Gunther was the daughter of Gunther and the servant or agent of Talitha Cumi and/or Summa Petere. She is not a party but was involved in some of the transactions.
- [8] Shaun Smith (“Smith”) was the authorised servant or agent of Talitha Cumi and/or Summa Petere. He is not a party but was involved in some of the transactions.

*The allegations*

- [9] The application concerns eight separate transactions for the purchase of houses in which all of the purchasers (“the complainants”) were people in positions of comparative disadvantage vis-à-vis the respondents. In all but one of the transactions the complainants were members of the Samoan community in the south-eastern suburbs of Brisbane. Most were relatively recent arrivals to Australia, English was not their first language and they were not proficient in it. They could be described as commercially naive and, in many cases, were adherents to a Church with which Gunther was associated. Gunther is not Samoan.
- [10] In brief, the scheme devised by Gunther involved either Talitha Cumi or Summa Petere (as Destiny), in effect, taking an option to purchase homes at the low end of the market from the registered proprietors on the basis that the contract would complete if the purchaser could on-sell within a certain number of days; the resale price would not be revealed to the registered proprietor; and the new purchaser’s name would be inserted into the contract.
- [11] The complainants were attracted to Sunshine Properties by advertisements to the effect that housing loans could be arranged without a deposit or only a very modest deposit, or by contacts through the Samoan community. The houses for which the Talitha Cumi and Summa Petere held on-selling contracts would be sold to the complainants at significantly inflated prices over the purchase price. The respondents relied upon the commercial naivety of the complainants and, in many cases, their trust in a minister of religion. They were not told that the selling agent – Sunshine Properties – had an interest in the property being sold. They were led to believe that the purchase price was the true value of the property. In cases when doubts were expressed about the purchase price those doubts were assuaged by revelations that Gunther was a minister in the Church, and that the lending institution (the ANZ Bank) would value the property. The complainants were told they would be sent to an independent solicitor.
- [12] The contracts were signed by the complainants without, in most cases, the contract price being written in. When inserted prior to the loan application being made, the price would be higher than the agreed price. Special conditions to the contract offering, *inter alia*, a reduction in the purchase price for early settlement, and the quantum of the second mortgage to either Talitha Cumi or Summa Petere were not revealed to the Bank. Various documents were executed by the complainants without being informed of their contents or given time to read them. In each case applications for finance were made to the ANZ Bank (“the Bank”) at its Capalaba branch to a particular officer, one Paul Kennedy, through a mortgage broker,

Your Mortgage Shop Pty Ltd (“Your Mortgage Shop”) managed by one David Kenny. Statements of assets of the complainants submitted to the Bank were executed in blank by them or subsequently altered by or at the direction of Gunther showing assets well in excess of those actually held and, in some cases, reduced liabilities. The existence of the mortgage broker was unknown to the complainants.

- [13] The respondents took advantage of the Bank’s policy of not requiring a valuation for the purchase of houses and land in certain circumstances. The Bank’s policy provided that if the land was located in the metropolitan area and involved a contract price of less than \$500,000, was an “on market transaction” in that it was being purchased through a licensed real estate agent, and the parties to the transaction were not related, no valuation would be required. The Bank would lend approximately 80 per cent of the purchase price. Second mortgages were prepared and executed in favour of Talitha Cumi or Summa Petere to secure the balance of the inflated price. The second mortgage was not revealed to the Bank. The complainants rarely, if at all, were aware of a second mortgage until after the contract to purchase had been entered into and the loan approved.
- [14] After the loan was approved the complainants were referred to solicitors nominated by one of the persons associated with Sunshine Properties. This lent an air of independence and rectitude to the transactions. The complainants executed the documents without any or very little attempt being made by the solicitor to explain their meaning and effect. In most transactions, the complainants were eligible for a first home buyer’s grant of \$7,000 which was paid to the second mortgagee.
- [15] After settlement the complainants struggled to make their repayments to the Bank and the second mortgagee. By one means or another they gradually became aware of how they had been duped. The Bank has foreclosed and sold two properties.
- [16] Mr Duffy, who appeared for the applicant, informed the court that these eight transactions were only a sample of transactions of a similar kind in which the respondents were engaged. It is only with the transactions entered into by the complainants mentioned in the pleadings that the court is concerned.
- [17] On these eight transactions the second and third respondents, made a gross profit in the vicinity of \$160,000 calculated by deducting the acquisition price and costs and outlays from the Bank loan monies in respect of each property. Had the complainants continued to make repayments on the second mortgage there would have been greater profits. The applicant seeks orders that the respondents disgorge the moneys received under the second mortgage as compensation.

#### *Course of proceedings*

- [18] As a consequence of complaints made to the Office of Fair Trading undertakings were given on 15 November 2001 by the respondents not to take any steps to enforce or otherwise deal with the second mortgages over the subject properties until 29 November 2001, the return date of the application. On that day the Chief Justice made orders, *inter alia*, restraining the respondents from enforcing the second mortgages until the hearing of the application.
- [19] The application was placed on the Supervised Case List, reviewed from time to time and directions made.

- [20] The applicant filed his statement of claim on 17 April 2002. The defendants filed their defence on 17 May 2002. A reply was filed on 7 May 2003 (an amended reply which made no relevant changes was filed by leave on 8 October 2003).
- [21] The respondents failed to abide orders of the court progressing the proceedings to a hearing. On 21 December 2004 having been informed by Mr Stinchcombe that he held no instructions from the first, second and third respondents and that Gunther had informed him that he was out of the country and did not propose to defend the proceedings, Byrne J ordered
- “1. Pursuant to r 374(5) of the *Uniform Civil Procedure Rules* the respondents’ Notice of Intention to Defend and Defence be struck out.
  2. The applicant be at liberty to apply for judgment in the proceedings as if the First, Second and Third respondents had not appeared or defended.”
- [22] His Honour was informed that Mr Stinchcombe held instructions from McLaren. McLaren was ordered to serve any amended defence by 21 January 2005. There were directions relating to McLaren’s further participation in the proceedings.
- [23] McLaren filed an amended defence on 21 January 2005. When the matter came on for hearing on 18 April, McLaren was represented by Mr Stinchcombe. By consent orders were made declaring that McLaren had engaged in unconscionable conduct in breach of s 39 of the Act with respect to the sale of certain of the properties the subject of the proceedings and restraining him from certain conduct relating to the sale of residential properties.
- [24] Mr Stinchcombe sought to withdraw as solicitor on the record for the first, second and third respondents. He held no instructions from them and had not done so since before his appearance before Byrne J in December 2004. Any problems relating to notice to those respondents by virtue of time constraints which were apparently present then have been resolved by the passage of time. I adjourned any such order until the end of these proceedings.

*Proceedings before the Commercial and Consumer Tribunal*

- [25] The Commercial and Consumer Tribunal constituted by Mr J Gallagher QC and Mrs G Spender heard an application by the Chief Executive, Department of Tourism, Racing and Fair Trading for certain orders against Gunther, Judith Gunther, McLaren and Talitha Cumi. That application was contested. The hearing occupied many days.
- [26] On 10 May 2004 the Commercial and Consumer Tribunal made the following orders
- “1. That John Gunther is not a suitable person to hold a licence.
  2. That Talitha Cumi Pty Ltd is not a suitable person to hold a licence in that John Gunther is not a suitable person to be an executive officer of a corporation that is a licensee.

3. That each of John Gunther and Talitha Cumi Pty Ltd as a licensee has, in carrying on a business or performing an activity, acted in an unprofessional way.
4. That each of Judith Gunther and Warren McLaren as a registered employee has, in performing an activity of a licensee, acted in an unprofessional way.”

Further orders relating to periods of disqualification and fines were made by the Commercial and Consumer Tribunal on 2 August 2004.

- [27] Those orders are not relevant or probative of the matters presently before the court. They are mentioned to give a complete picture of what has happened so far as the respondents are concerned and to provide some possible context for the respondents not contesting these proceedings.

*The evidence*

- [28] Affidavits were filed in support of the injunction detailing the investigations that had been made by the Office of Fair Trading (affidavit of Robert Charles Meissner); the business development manager at the ANZ Bank’s Capalaba branch who approved the loans for the purchase of the properties (affidavit of Paul James Kennedy); the market value of the subject properties at the time of purchase and at the time of the application for the injunctions (affidavit of Michael Iveson and the further affidavit of Michael Iveson and Scott Iveson); and affidavits from the complainants. The defendants set up positive defences and, as a consequence, supplementary affidavits were filed from the complainants responding to those allegations. I was informed by Mr Duffy that Gunther filed an affidavit in support of his defence. Mr Duffy did not read that affidavit as it was not evidence which he wished to put before the court in his case. He drew it to the court’s attention in discharge of his obligation to inform the court fully when a matter proceeds in the absence, even if by choice, of the opposite party. In view of the orders made by Byrne J I have thought it neither necessary nor appropriate to refer to that material but I have had regard to the defence of the first, second and third respondents in order to understand aspects of the further affidavits of the complainants and what occurred insofar as they refer to Your Mortgage Shop, the mortgage broker.
- [29] The applicant read an affidavit from Robert James Bowlen, loans assessment officer at the ANZ Bank in Melbourne in which he discusses the Bank’s lending criteria and whether the Bank would have made the loans to purchase the subject properties had it been appraised of the true state of affairs in respect of each property. There is an affidavit from David Albert Kenny who, at the relevant time, was a director and the manager of Your Mortgage Shop referred to in the defence of the first, second and third defendants which operated a business of finance broking and to whom the respondents sent the applications for loans for submission to the Bank. The applicant has also read an affidavit from Sonja Eleanor Hemsley who, at the relevant time, provided secretarial services to Kenny and who was involved in aspects of the subject transactions.

*The statutory prohibition against unconscionable conduct*

[30] Section 39 is in Part 3 of the Act relating to trade practices. Some of the provisions in Part 3 have analogues in the provisions of the *Trade Practices Act 1974* (Cth). Section 39 (the analogue is s 51AB of the *Trade Practices Act*) provides, relevantly,

“(1) A supplier shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person (the “**customer**”) engage in conduct that is, in all the circumstances, unconscionable.”

The Act does not define “unconscionable”. However s 39(2) provides guidance

“(2) Without limiting the matters to which regard may be had for the purpose of determining whether a supplier has contravened subsection (1) in connection with the supply or possible supply of goods or services, regard may be had to—

(a) the relative strengths of the bargaining positions of the supplier and the customer; and

(b) whether, because of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer (or person acting on behalf of the customer) by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier.”

The reference to “goods or services” is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, s 39(5), and would include services of the kind supplied by the respondents.

[31] Mason J made observations in *Commercial Bank of Australia Ltd v Amadio* (1982-1983) 151 CLR 447 which may assist in an overall understanding of the concept of “unconscionable”. Section 39(2)(a),(c),(d) and (e) reflect, as particular instances, those observations. His Honour said at 461

“Relief on the ground of unconscionable conduct will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will be granted when such advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is

unable to make a worthwhile judgment as to what is in his best interest ...

It goes almost without saying that it is impossible to describe definitively all the situations in which relief will be granted on the ground of unconscionable conduct.”

His Honour further observed at 462

“It is made plain enough, especially by Fullagar J [in *Blomley v Ryan* (1956) 99 CLR 362 at 405] that the situations mentioned are not more than particular exemplifications of an underlying general principle which may be invoked whenever one party by reason of some condition of [sic] circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created. I qualify the word ‘disadvantage’ by the adjective ‘special’ in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.”

*The particular transactions*

*Fasi and Lupetaumafa Ah Sam*

- [32] On or about the 23 August 2000 Talitha Cumi entered into a contract to purchase 3 Veldt Street, Kingston from the registered proprietors for \$88,500 conditional upon Talitha Cumi being required to settle only if it could on-sell the property within 120 days of the date of the contract and the registered proprietors agreeing to sign a transfer by direction in lieu of two transfers if directed and would not refuse to sign notwithstanding that the on-sale price was omitted.
- [33] Mrs Ah Sam contacted Shaun Smith who was employed by Talitha Cumi with her husband’s concurrence in August 2000 in answer to an advertisement concerning the purchase of houses without deposit but a security fee of \$500. Mr and Mrs Ah Sam came from Western Samoa and spoke English as a second language and their understanding then was poor. They were inexperienced in financing real property transactions or, indeed, in understanding commercial transactions generally. In the past they had been assisted in obtaining personal loans by their religious pastor or the car dealer. They were in receipt of very low incomes and were of limited education. They wanted to move out of their rental accommodation because the Queensland Housing Commission was going to raise the rent.
- [34] Smith came to the house where they were living and showed them a number of properties. He told Mr and Mrs Ah Sam that his boss, Gunther, was a minister of the Church. He showed them 3 Veldt Street, Kingston and represented that it was on the market for \$124,000 having been reduced from \$145,000. He told them that

Talitha Cumi would make an application on their behalf for finance to purchase the property and that the Bank would obtain a valuation of the property. He told them that if the property was not worth the asking price the Bank would not lend them the money to buy it.

- [35] Mr and Mrs Ah Sam gave Smith \$500 in cash and signed a contract to purchase 3 Veldt Street, Kingston. Some days later he brought them a number of papers to sign without explanation. About a week thereafter he told them that the loan had been approved. Unknown to Mr and Mrs Ah Sam the second respondent had made use of the services of a finance broker, Your Mortgage Shop. Smith told them to attend at the offices of a solicitor at Woolloongabba – Lawrence and Associates. In a very rushed fashion without explaining what they were signing a person whom they thought was a solicitor required them to sign numerous documents and told them that they had to repay both the Bank and Sunshine Properties. The identity of the lending bank and the existence of the second mortgage were unknown to Mr and Mrs Ah Sam until then.
- [36] At the time Smith had Mr and Mrs Ah Sam sign the contract document he also had them sign three documents described as “Annexures” expressed to form part of the contract which provided that Mr and Mrs Ah Sam would apply for a first home owners grant of \$7,000 and assign to Talitha Cumi the right to receive that sum; that if Mr and Mrs Ah Sam complied with the terms of the contract Talitha Cumi would on completion accept an amount of \$10,000 less than the contract price; and that Talitha Cumi would contribute \$5,000 towards the banking, legal and stamp duty charges of the purchase.
- [37] The purchase price on the contract was \$141,500. This was not on the document when Mr and Mrs Ah Sam signed it. It was \$53,000 more than the price Talitha Cumi had contracted to pay. When Mr and Mrs Ah Sam signed the contract and the loan application Smith failed to advise or explain to them
- that the purchase price to be shown in the contract was \$141,500 and not the \$124,000 that they had agreed to pay;
  - that the property was not worth \$124,000 or any higher amount;
  - that part of the purchase price would be secured by a second mortgage over the property in favour of Talitha Cumi;
  - that Sunshine Properties, shown as agent on the contract, and Talitha Cumi, shown as the vendor, were one and the same entity;
  - that Talitha Cumi had entered into a contract to buy the subject property for \$88,500;
  - that the Bank would not be obtaining a valuation of the property as part of its loan approval process;
  - knew that Mr and Mrs Ah Sam could not make the mortgage repayments that would be required.

Smith and Talitha Cumi knew that Mr and Mrs Ah Sam would not have entered into the contract had they known of those matters.

[38] When applying for finance to the Bank, Talitha Cumi through its servants or agents

- changed or completed the documents to show the purchase price as \$141,500, not the agreed price of \$124,000;
- amended or completed the application documents to show that Mr and Mrs Ah Sam had more valuable assets than they had advised Smith that they had;
- failed to detail the extent of vendor finance to be provided by Talitha Cumi;
- did not disclose to the Bank the document described as Annexure expressed to form part of the contract which provided that if Mr and Mrs Ah Sam complied with the terms of the contract Talitha Cumi would on completion accept and amount of \$10,000 less than provided for by the contract.

[39] Smith and Talitha Cumi knew that the Bank would not or would have been unlikely to lend money to Mr and Mrs Ah Sam to purchase the property had it known the true state of affairs.

[40] The Bank advanced \$113,200 on first mortgage security to Mr and Mrs Ah Sam. Talitha Cumi took a second mortgage for \$17,800. As at 30 August 2000 the Iveson valuation assessed the value of the property at no more than \$70,000.

[41] Mr and Mrs Ah Sam made a total of \$9,491.50 in payments towards the second mortgage including the \$7,000 first home owners grant.

*Shane and Joanne Glanville*

[42] On or about 23 February 2000 Talitha Cumi entered into a contract for the purchase of 83 Haig Road, Loganlea for \$70,000 from the registered proprietors. It was a condition of the contract that Talitha Cumi was able to on-sell the property within 180 days from the date of the contract.

[43] Mr and Mrs Glanville saw an advertisement in a locally circulating newspaper offering houses for sale without stamp duty, deposit or “legals” and that finance was available. Mr Glanville contacted the advertiser and that afternoon Gunther came to their home. Mr and Mrs Glanville indicated a preference for building over buying but Gunther told them it was impossible on their income. He suggested homes which he could show them that they may be able to afford. As he showed them various houses he told them that he was a pastor of a local Church and invited Mr Glanville to attend one of his sermons. Mr and Mrs Glanville had never owned real property before and had limited understanding of commercial transactions. Mr Glanville, in particular, was commercially very unsophisticated.

[44] Mr and Mrs Glanville saw the house at 83 Haig Road, Loganlea which they liked and were told it was for sale at \$105,000 and that the price was not negotiable.

When they returned to Mr and Mrs Glanville's rental home Gunther told them that they could trust him and pressured them to purchase the house. Gunther told them that he needed whatever they could afford as a deposit. He produced documents pursuant to s 73 of the *Auctioneers and Agents Act 1971* which had already been completed and were signed by Mr and Mrs Glanville. He then produced an REIQ contract for the sale of 83 Haig Street and directed Mr and Mrs Glanville where to initial. They signed various annexures to the contract. When Mrs Glanville attempted to read the balance of the REIQ terms of contract she was directed by Gunther not to concern herself because "it was just standard".

- [45] In early March Mrs Glanville attended Sunshine Properties' office and was asked by Gunther to sign a blank form which had signature blocks at the bottom. She declined to do so and he did not press it further. Mrs Glanville queried using the Capalaba branch of the ANZ Bank rather than the local branch but was reassured by Gunther that it was unnecessary for her to attend at any branch of the Bank. Mrs Glanville was told by Gunther that the Bank would organise its own valuation of the property. Mr and Mrs Glanville were told that the Bank would lend them only \$84,000 but that Talitha Cumi would lend the balance of \$25,000. Mrs Glanville was told by Gunther that Talitha Cumi owned the property but not of its connections with Gunther. He told Mr and Mrs Glanville that one bank had refused them a loan, which was untrue, but that they had eventually been accepted by the ANZ Bank. He told Mrs Glanville that if they were to use their own solicitor it would cost them a lot of money but that he could recommend two solicitors used by Sunshine Properties regularly. Mr and Mrs Glanville agreed to use one John Sherwood.
- [46] Gunther told Mrs Glanville to promise not to tell the Bank about the Talitha Cumi's second mortgage otherwise the Bank would take the home. She said that she was shocked and confused by this request. She was asked to provide no figures, neither were any amounts of figures calculated for her to support the amount of money they were to borrow. They attended at John Sherwood's home at night to sign the documents which were not explained. One of the forms stated that Mr and Mrs Glanville had paid a \$5,000 deposit and had \$15,000 in the bank. They depose that they were reluctant to sign this as they knew it was not true. In response to their protestations Mr Sherwood said not to worry, that "it was standard procedure". Neither Mr nor Mrs Glanville had any experience purchasing real property previously. They had borrowed modest amounts to purchase motor vehicles and the forms had been completed by the dealers. They both had limited education. Had Mr and Mrs Glanville known of the price that Talitha Cumi paid for 83 Haig Road and its value they would not have bought the house.
- [47] When making the application for finance to the Bank Talitha Cumi through its servants or agents amended or completed the documents to show that Mr and Mrs Glanville had more valuable assets than they had advised Gunther they had and failed to detail the extent of vendor finance to be provided by Talitha Cumi. It may be inferred that Talitha Cumi, through Gunther, knew that if the Bank was given accurate information it would not have made the advance of \$84,000 on first mortgage to Mr and Mrs Glanville. That property, according to the Iveson valuation, was worth no more than \$85,000 at 26 February 2000. Mr and Mrs Glanville gave a second mortgage to Talitha Cumi for \$25,000. Mr and Mrs Glanville paid \$2,642.85 under the second mortgage.

*Miliama and Sa Pati Lauvi*

- [48] About 16 September 2000 Destiny (subsequently Summa Petere) purchased 43 Karri Avenue, Woodridge for \$80,500 from the registered proprietors conditional upon on-selling the property within 180 days from the date of the contract and the registered proprietors agreeing to sign a transfer by direction in lieu of two transfers if directed and would not refuse to sign notwithstanding that the on-sale price was omitted.
- [49] After seeing an advertisement in a local paper for the purchase of houses without deposits and after asking Samoan relations who had had dealings with Sunshine Properties Mr and Mrs Lauvi contacted Gunther. They were born and educated in Western Samoa and spoke English as a second language. They were inexperienced about financing real property transactions or indeed in understanding commercial transactions generally. They were on a very low income and of limited education. They were members of the Seventh Day Adventist Church and deeply religious.
- [50] When Mr and Mrs Lauvi first contacted Sunshine Properties Gunther spoke to them about his close commercial relationship with many Samoan families and assisting them to purchase properties. His daughter, Judith, told them that her father was a Minister of the Church of Assembly of God.
- [51] Judith Gunther showed Mr and Mrs Lauvi a number of houses. Mrs Lauvi asked to meet the owners but was told that they resided interstate. Judith Gunther declined to tell them the sale price of the house at 43 Karri Avenue in which they expressed an interest. Mr and Mrs Lauvi said they would have difficulty making weekly repayments above \$140-\$150. Eventually they were told that the purchase price was \$110,000, that Gunther would make application to the Bank for finance, and that the Bank would obtain a valuation of the property as part of the loan process.
- [52] Thereafter either Gunther or Judith Gunther had Mr and Mrs Lauvi sign a contract about 6 October 2000 to purchase the property for \$137,500 which was \$57,000 more than Destiny had paid. The contract document was a standard REIQ/Queensland Law Society contract for Houses and Land with a number of "Annexures" as part of the contract. They provided that if Mr and Mrs Lauvi complied with the terms of the contract Destiny would, on completion, accept \$12,500 less than provided for in the contract; and that Destiny would rebate \$2,500 to supply and lay carpets.
- [53] When Gunther or Judith Gunther caused Mr and Mrs Lauvi to sign the contract and loan application they did not advise or explain to them that
- that the purchase price to be shown on the contract was \$137,500 and not \$110,000 as they had agreed to pay;
  - Sunshine Properties, shown as the agent in the contract and Destiny shown as the vendor were closely related;
  - Destiny had entered into a contract to buy the property for \$80,500;
  - the Bank would not be obtaining a valuation of the property as part of its loan approval process.

They knew that Mr and Mrs Lauvi could not make the mortgage payments required.

- [54] When the application for finance was made to the Bank, Destiny by one of its servants or agents
- changed the documents to show the purchase price as \$137,500 not the agreed price of \$110,000;
  - amended or completed the documents to show that Mr and Mrs Lauvi had more valuable assets than they had advised Gunther or Judith Gunther that they had;
  - failed to detail fully the extent of vendor finance to be provided by Destiny;
  - did not disclose to the Bank the “Annexures” expressed to form part of the contract.
- [55] It may be inferred that Destiny through its servants or agents knew that if the Bank was given accurate information it would not or might not have made the advance that it did.
- [56] In the result the Bank advanced \$110,000 on first mortgage security to Mr and Mrs Lauvi. That was more than the property was worth as assessed by the Iveson valuation of \$64,000 at 6 October 2000. Destiny took a second mortgage for \$19,000.
- [57] Mr and Mrs Lauvi were entitled to a first home owners grant of \$7,000 which was assigned to Destiny. They made payments of \$7,780.40 on the second mortgage.

*Emele Miskopa and Mau Naea*

- [58] On or about 21 September 2000 Destiny entered into a contract with the registered proprietors of 8 George Street Kingston for the purchase of the property for \$85,000.00 conditional on on-selling the property within 120 days of the date of the contract, the registered proprietors agreeing to sign a transfer by direction in lieu of two transfers if requested, and would not refuse to sign that document notwithstanding that the resale price was omitted from the transfer document.
- [59] Mr and Mrs Naea are members of the Church of the Latter Day Saints. Their religion is very important to them. Tiley Seve spoke to Mr Naea at a Church service about buying a house. He told Mr Naea that he worked part time for Sunshine Properties and said that other people from the Church had bought houses from Sunshine Properties. Mr and Mrs Naea were born in Western Samoa and English was their second language in which they were not fluent at the time. They had never purchased real property and had little experience with commercial documents having had small loans over the past few years for a car and personal expenses. Mr Naea had worked in a variety of low paid jobs since coming to Australia.

- [60] The following day McLaren visited them at home and showed them a number of properties which they did not care for. He told them that Sunshine Properties could take care of anything and all that was needed was a \$200.00 deposit.
- [61] Mr and Mrs Naea were regularly contacted by Tiley Seve about purchasing a house. About two weeks later McLaren attended at their home and took them to see 8 George Street Kingston. He told them that the property was on the market for \$113,500.00 and would arrange to make an application on their behalf if they wished to purchase it. Mr Naea did not ask for a lower price, he thought it was the right price for the house. He did not ask who the loan would come from. Mr and Mrs Naea agreed to buy the house. McLaren filled out all the paperwork and asked them to sign a contract of sale for the property. Mr and Mrs Naea said that they would like to read the document before they signed it but McLaren told them that he did not have the time for them to read the papers through. Mrs Naea was often outside the room looking after her three week old baby during the visit and was asked to come in and sign the documents. McLaren recommended a solicitor – Lawrence & Associates – who would assist them with the legal work. McLaren asked for pay slips and a letter from work.
- [62] At the time Mr and Mrs Naea signed the contract to purchase the house they also signed a document described as “Annexure” expressed to form part of the contract which provided that Mr and Mrs Naea would make an application for a first home owner’s grant of \$7,000.00 and assign it to Destiny. A further document described as “Annexure” and expressed to form part of the contract provided that if Mr and Mrs Naea complied with the terms of the contract Destiny would, on completion, accept an amount of \$7,800.00 less than provided for in the contract. A further document described as “Annexure C” and expressed to form part of the contract provided that Destiny would pay the legal, banking, associated charges and stamp duty of the transaction to the value of \$5,000.00.
- [63] When Mr and Mrs Naea signed the contract to purchase the property the purchase price of \$141,500.00 was not included in the document.
- [64] When Mr and Mrs Naea signed the contract and loan application neither McLaren nor any other servant or agent of Destiny:
- advised or explained to them that the purchase price to be shown in the contract was \$141,500.00 and not \$113,500.00 which they had agreed to pay;
  - advised them that part of the purchase price would be secured by a second mortgage over the property in favour of Destiny;
  - advised or explained to them that Sunshine Properties shown as agent in the contract and Destiny shown as vendor were related entities;
  - advised that Destiny had entered into a contract to buy the property for \$85,000.00.
- [65] Destiny through McLaren or other servants or agents

- knew that the property was not worth \$113,500.00 or any higher amount;
- knew that the Bank would not obtain a valuation of the property as part its loan approval process;
- knew that Mr and Mrs Naea could not afford to make the mortgage repayments that would be required;
- that Mr and Mrs Naea would not have entered into the contract if they had been told of these matters.

[66] Destiny made an application to the Bank on behalf of Mr and Mrs Naea using the mortgage broker Your Mortgage Shop. In order to ensure that the Bank would approve the loan, Destiny, by McLaren or some other servant or agent:

- amended or completed the application documents and the contract document to show the contract price for the property as \$141,500.00 rather than the agreed price of \$113,500.00;
- amended or completed the application documents to misstate the value of the assets of Mr and Mrs Naea to show that they had more valuable assets than they had advised McLaren that they had;
- failed to detail in full the vendor finance to be provided by Destiny;
- did not disclose to the Bank the Annexure documents to the contract nor the matters contained in them.

[67] As Mr Bowlen on behalf of the Bank has deposed, had accurate information about the loan and the property been provided to the Bank it would not have lent money to Mr and Mrs Naea for the purchase of that property and McLaren knew this.

[68] Shortly after 18 October 2000, McLaren advised Mr and Mrs Naea that the Bank had approved the loan application but did not disclose the amount and did not advise that the total of the proposed Bank mortgage and the proposed second mortgage for \$20,500.00 exceeded the agreed purchase price of \$113,500.00. McLaren arranged for Mr and Mrs Naea to attend the office of Lawrence & Associates at Woolloongabba to complete the documents for transfer of the property.

[69] On or about 27 October 2000 Mr and Mrs Naea attended at the office of Lawrence & Associates where they signed the contract, transfer documents and the mortgages. Mr and Mrs Naea signed the documents without having an opportunity to read them and neither were they explained.

[70] Gunther had earlier explained to Mr and Mrs Naea the payments under the second mortgage and the penalties for late payment.

[71] Mr and Mrs Naea moved into the property about 10 or 11 November and for the first time they realised that the purchase price of the house was \$141,500.00 and not

\$113,500.00. They thought they could do nothing since they had already signed the papers and moved in.

[72] Eventually Mr and Mrs Naea were unable to maintain their repayments. The house was repossessed by the Bank and Mr and Mrs Naea were made bankrupt.

[73] They made payments in respect of the second mortgage in the amount of \$7,825.60.

*Tuulima and Sofia Puni*

[74] On or about 21 March 2000 Talitha Cumi entered into a contract with the registered proprietors of 9 Duke Street Kingston for a purchase price of \$86,500.00 conditional upon Talitha Cumi on-selling the property within 90 days of the date of the contract; that the registered proprietors would sign a transfer by direction in lieu of two transfers if requested, and would not refuse to sign the transfer document notwithstanding that the resale price was omitted from the transfer document.

[75] Mr and Mrs Puni wished to buy a house because the Queensland Housing Commission had indicated that the rent they were paying was to be increased and it was uneconomic for them to continue to pay rent. They saw an advertisement in the local newspaper in about June 2000 by Sunshine Properties about loans for houses. Mrs Puni spoke to Judith Gunther and arranged to look at some properties. They initially looked at the property which was the subject of the advertisement but did not like it. Mr and Mrs Puni eventually inspected 9 Duke Street Kingston, liked it, but did not think they could afford it. Judith Gunther told them that it was \$119,000.00 and they told her that they could not afford to buy it because they understood that they would not be eligible for a sufficient loan.

[76] They returned to Sunshine Properties' office and spoke with Gunther. He told them that with two mortgages they would have to pay \$201.00 per week. Mrs Puni, who apparently has more facility in English than her husband, told him that they could not afford the property. Gunther told them that he was a minister in his Church, had a big family and was going that night to preach at the Samoan Seventh Day Adventist Church at Inala. Mr Puni was an elder of the Seventh Day Adventist Church at Woodridge as he had been in New Zealand and Mr and Mrs Puni were very happy to be told this. Gunther also told them that their solicitor was a Seventh Day Adventist member at his Church – John Sherwood. Mrs Puni deposes that she did not know she had a solicitor at that time but she knew that a solicitor would do the paperwork for the house and agreed.

[77] Gunther produced a lot of papers which he required them to sign. They did not read any as Gunther told them he was in a hurry. They were told that some were for the loan application. They were asked for a \$500.00 deposit to secure the house but Mrs Puni said as she had already told Judith Gunther earlier, they had only \$200.00. Gunther said to give him the \$200.00 which would be sufficient.

[78] Mr and Mrs Puni understood they were buying the house from the people who lived in it and that Sunshine Properties was the agent. Both Gunther and Judith Gunther told them they were not to speak to the people in the house but they could drive past and look at it. They were subsequently asked to provide payslips and other documentation.

[79] At the time Gunther had Mr and Mrs Puni sign the contract document he also had them sign a document described as “Annexure” and expressed to form part of the contract which provided that Mr and Mrs Puni would make an application for a first home owner’s grant of \$7,000.00 and assign to Talitha Cumi the right to receive it. They also signed a further document described as “Annexure” expressed to form part of the contract which provided that Talitha Cumi would on completion accept an amount of \$6,000.00 less than provided for by the contract.

[80] At the time that Gunther had Mr and Mrs Puni sign the contract and loan application, he and Talitha Cumi:

- failed to advise or explain to Mr and Mrs Puni that the purchase price shown or to be shown in the contract was \$125,500.00 and not \$119,000.00 as they had agreed to pay;
- failed to explain to Mr and Mrs Puni that part of the purchase price would be secured by a second mortgage over the property in favour of Talitha Cumi;
- knew that the property was not worth \$119,000.00;
- knew that the Bank would not be obtaining a valuation of the property as part its loan approval process;
- knew that Mr and Mrs Puni could not afford to make the mortgage repayments that would be required;
- failed to advise Mr and Mrs Puni that Sunshine Properties shown as agent in the contract and Talitha Cumi shown as vendor were one and the same entity;
- failed to advise Mr and Mrs Puni that Talitha Cumi had entered into a contract to buy the property for \$86,500.00;
- knew that Mr and Mrs Puni would not have entered into the contract if they had been told any of those matters.

[81] On or before 23 June 2000, Talitha Cumi made application to the Bank on behalf of Mr and Mrs Puni through the services of the mortgage broker Your Mortgage Shop. In order to ensure that the Bank would approve the loan, Talitha Cumi by Gunther or some other servant or agent:

- amended or completed the application document and the contract document to show the contract price for the property as \$125,500.00 rather than the agreed price of \$119,000.00;
- amended or completed the application documents to misstate the value of the assets of Mr and Mrs Puni so as to show that they had more valuable assets that they had advised Gunther that they had;
- failed to detail the extent of vendor finance to be provided by Talitha Cumi;

- did not disclose to the Bank the documents described as Annexures to the contract or the matters in them.

[82] Gunther and Talitha Cumi knew that if accurate information about those matters was provide to the Bank it would not or might not lend money to Mr and Mrs Puni for the purchase of the property.

[83] On or about 23 June 2000 Talitha Cumi

- advised Mr and Mrs Puni that the Bank had approved the loan;
- did not disclose the amount approved by the Bank;
- did not advise that the total of the two mortgages of \$120,300.00 exceeded the agreed purchase price of \$119,000.00.

[84] The fair market value of the property as at 1 July 2000 was according to the Iveson valuation, \$65,000.00. Even if the fair market value was \$86,500 but for the conduct of Gunther, Mr and Mrs Puni could have purchased the property for significantly less than they had contracted.

[85] Mr and Mrs Puni paid an amount of \$8,693.80 on the second mortgage including the \$7,000 first home owners grant.

*Tuulemaga Paulo Seufatu and William Faamanu Ioane Taao*

[86] On or about 7 October 2000 Destiny entered into a contract with the registered proprietors of 31 Brandon Street Marsden for the purchase of the property for \$103,500.00 to be completed only if Destiny could on-sell the property within 90 days of the date of the contract; and the registered proprietors would sign a transfer by direction in lieu of two transfers if requested; and would not refuse to sign the document notwithstanding that the resale price was omitted from the transfer document; and that the registered proprietors would keep details of the contract price confidential.

[87] Mr and Mrs Seufatu are from Western Samoa and English is their second language. Mr Seufatu has been employed as a factory hand. He and his family go to the Seventh Day Adventist Church near Woodridge each Saturday. They have never owned real property previously and although they have sought and obtained loans in the past they were for small amounts for items such as motor vehicles.

[88] In early October 2000 after Mr and Mrs Seufatu had contacted Sunshine Properties on the recommendation of a Samoan friend, McLaren visited them and showed them a number of properties. He told them that they need only provide \$200.00 for a deposit. He showed them the property at 31 Brandon Street Marsden and told them it was on the market for \$155,000.00. Mr Seufatu felt certain that they could not afford it but when they returned home McLaren pressured him into signing a document to purchase of the property. When he went to work his employer told him not to sign because he could not afford to pay for the property. It seems that McLaren came to Mr Seufatu's place of work and obtained his signature to a document. Mr Seufatu gave him the \$200.00 deposit in cash.

- [89] The following day Mr Seufatu spoke to Gunther at Sunshine Properties' office and told him that he did not wish to proceed to buy the property. Gunther told him that it would cost him money to get his deposit back because he had already signed a document to purchase the house. Gunther told Mr Seufatu not to worry because he sold many houses to Samoan people and was the minister of the Pentecostal Church and could be trusted. Mr Seufatu agreed that he would purchase the house.
- [90] Mr Seufatu's son William Taao who was then aged nineteen, was working as a fabric cutter where his father worked and part time at Kentucky Fried Chicken. He was so inexperienced in real property transactions that he thought the documents that he was signing as required by McLaren related to a rental property. He signed the document which was a contract to purchase the property at 31 Brandon Street Marsden jointly with his father because he had respect for his father and his father asked him to sign the document.
- [91] The contract document was comprised of a standard REIQ contract and a document described as "Annexure" which was expressed to form part of the contract and which provided that Mr Seufatu and William would make an application for a first home owners grant of \$7,000.00 and assign to Destiny the right to receive it. A further document described as "Annexure" and expressed to form part of the contract provided that if Mr Seufatu and William complied with the terms of the contract, Destiny would, on completion, accept an amount \$11,000.00 less than provided for in the contract. A further document described as "Annexure C" and expressed to form part of the contract provided that Destiny would pay the legal, banking and associated charges and stamp duty of the transaction to the value of \$5,000.00.
- [92] At the time McLaren had Mr Seufatu and William sign the contract and the loan application he and Destiny:
- failed to advise or explain to them that the purchase price to be shown in the contract was \$155,500.00 and not \$103,500 which Mr Seufatu had agreed to pay;
  - failed to advise Mr Seufatu and William that part of the purchase price would be secured by a second mortgage over the property in favour of Destiny;
  - knew that the property was not worth \$155,500.00;
  - knew that the Bank would not obtain a valuation of the property as part of its loan approval process;
  - knew that Mr Seufatu and William could not afford to make the mortgage repayments that would be required;
  - failed to advise Mr Seufatu and William that Sunshine Properties shown as agent on the contract and Destiny shown as vendor were related entities;
  - failed to advise that Destiny had entered into a contract to buy the property for \$103,500.00;

- knew that Mr Seufatu and William would not enter into the contract if they were told of those matters.

- [93] On or about 16 October 2000 application was made to the Bank on behalf of Mr Seufatu and William. In order to ensure that the Bank would approve a loan to them Destiny, through McLaren or some other servant or agent, failed to explain in appropriate detail to the Bank the extent of vendor finance to be provided by Destiny; did not disclose to the Bank the Annexure documents said to be part of the contract; and amended or completed documents to show that Mr Seufatu and William had more valuable assets than they had advised.
- [94] McLaren and Destiny knew that if accurate information had been provided to the Bank it would not or might not lend money to Mr Seufatu and William for the purchase of the property.
- [95] The Bank advanced \$124,400.00 on first mortgage security. The second mortgage was for \$21,900.00. At the time the property was worth no more than \$85,000.00 according to the Iveson valuation but certainly no more than \$103,500.00, the price Destiny had contracted to purchase it.
- [96] Mr Seufatu made repayments under the second mortgage in the sum of \$7,930.00 including the first home owners grant.

*Naoupa and Florence Talatonu*

- [97] On or about 14 September 2000 Destiny entered into a contract with the registered proprietors of 3 Lindley Street Woodridge for the sale of the property for the purchase price of \$104,500.00 conditional upon the contract being completed only if Destiny could on-sell the property within 114 days of the date of the contract; the registered proprietors would sign a transfer by direction in lieu of two transfers if requested; and would not refuse to sign the document notwithstanding that the resale price was omitted from the transfer document.
- [98] In about September 2000 Mr and Mrs Talatonu responded to an advertisement in a locally circulating newspaper inserted by Sunshine Properties. They were looking for a house to rent and spoke to Gunther. They had five children with a sixth on the way. Mr Talatonu was born in Western Samoa. His wife Florence was born in Auckland but was of Samoan parentage. She is much more fluent in English than her husband for whom it was and remains a second language. They are members of the Uniting Church and religion is very important to them. They are closely involved in Church activities and were brought up to trust Church ministers. They had never owned real property before and their only involvement in commercial transactions was for modest loans to purchase their van and their beds. At the time of the contact with Sunshine Properties Mr Talatonu was employed with J J Richards as a boilermaker but was laid off in January 2001.
- [99] Shaun Smith from Sunshine Properties came to see them. He asked about their income and outstanding bills. A few days later Gunther came to their home and said that he had houses for sale. He told them that he was a pastor and had been involved with a lot of Island people in the Church and had been helping those people and Tongans to get houses. He told them that he had ten children and that

two worked in his business. He mentioned Samoan names and asked if Mr and Mrs Talatonu knew them. This immediately gained Mr and Mrs Talatonu's trust.

[100] Gunther showed them a number of houses including the house at 3 Lindley Street Woodridge which he told them was on the market for \$140,000.00. Mr Talatonu told Gunther that they did not have the \$500.00 to deposit but he suggested they borrow it from family or friends. Mr Talatonu was able to borrow \$250.00 from his mother which he gave to Gunther who said they could pay him the balance \$250.00 later. Gunther then filled out a contract for the purchase of the 3 Lindley Street Woodridge property. Mr Talatonu said that everything happened very fast and they had no opportunity to read any of the paperwork. Gunther showed them where to sign. He told them, in response to Mrs Talatonu's enquiry about going to a Bank to organise a loan, that they did not have to do anything because Sunshine Properties would go through the ANZ Bank as it was more sympathetic to first home buyers.

[101] The contract document comprised a standard REIQ form with annexures which were said to form part of the contract. "Annexure C" provided that Destiny would pay the legal, banking and associated charges and stamp duty on the purchase to the value of \$5,000.00. The document described as "Annexure" expressed to be part of the contract provided that Mr and Mrs Talatonu would make an application for a first home owners grant of \$7,000.00 and assign to Destiny the right to receive it and gave Destiny the right to open and read mail pertaining to the grant. A further document described as "Agreement" recorded that Mr and Mrs Talatonu would "repay" to Destiny an amount of \$32,500.00 which included the amount of \$5,000.00 referred to in Annexure C to the contract.

[102] When Mr and Mrs Talatonu signed the contract and the loan application Gunther and Destiny:

- failed to explain to Mr and Mrs Talatonu that part of the purchase price and the amount of \$5,000.00 referred to Annexure C to the contract would be secured by a second mortgage over the property in favour of Destiny;
- failed to advise Mr and Mrs Talatonu that notwithstanding the contractual promise in Annexure C to the contract the amount of \$5,000.00 was to be added to the amount that they were required to repay to Destiny;
- knew that the property was not worth \$140,000.00;
- knew that the Bank would not obtain a valuation of the property as part of its loan approval process;
- knew that Mr and Mrs Talatonu could not afford to make the mortgage repayments that would be required;
- failed to advise Mr and Mrs Talatonu that Sunshine Properties shown as the agent in the contract and Destiny shown as vendor were related entities;
- failed to advise Mr and Mrs Talatonu that Destiny had entered into a contract to buy the property for \$104,500.00;

- knew that Mr and Mrs Talatonu would not enter into the contract if they had been told of those matters.

[103] To ensure that the Bank would approve a loan to Mr and Mrs Talatonu Destiny by Gunther or some other servant or agent:

- amended or completed the application documents to misstate the value of the assets of Mr and Mrs Talatonu so as to show that they had more valuable assets than they had advised Gunther that they had;
- failed to detail completely the extent of vendor finance to be provided by Destiny;
- did not disclose to the Bank the annexure documents to the contract.

[104] Gunther and Destiny knew that if accurate information was provided to the Bank about the application it would not or might not lend money for the purchase of the property.

[105] On or about 28 September 2000 Gunther advised Mr and Mrs Talatonu that the Bank had approved the loan application but did not advise them that the total of the proposed Bank mortgage and the proposed second mortgage together exceeded the agreed purchase price of \$140,000.00 by \$4,500.00.

[106] Gunther arranged for Mr and Mrs Talatonu to attend at the office of Lawrence & Associates at Woolloongabba to complete the documents for the transfer of the property. They attended on two occasions and signed documents at the counter, the visits being each of five minutes duration. Nobody explained the meaning of any documents to them.

[107] Earlier, Mr and Mrs Talatonu had asked Gunther if they could talk to the people who lived in the house previously about the price but he forbade them to do so.

[108] The sale of the property was completed on or about 14 November 2000. The fair market value of the property as at 16 September 2000 was no more than \$84,000.00 as per the Iveson valuation or no more than the \$104,500.00 paid by Destiny. But for the conduct of Destiny Mr and Mrs Talatonu could have purchased the property for an amount considerably less than they contracted.

[109] Mr and Mrs Talatonu made payments of \$8,393.10 under the second mortgage including the first home owners grant.

*Mene Timoti and Faaletaua Fanueli*

[110] On or about 7 October 2000 Talitha Cumi entered into a contract with the registered proprietors of 60 Snowdon Street Kingston to purchase the property for \$86,000.00 conditional upon Talitha Cumi on-selling the property within 120 days of the date of the contract; and the registered proprietors signing a transfer by direction in lieu of two transfers if requested; would not refuse to sign that document

notwithstanding that the resale price was omitted from the transferred document; and the registered proprietors would keep details of the contract confidential.

- [111] Mr Timoti and his fiancé Ms Fanueli were born in Western Samoa where they were educated. They were taught English at school but Samoan was their first language and the language they spoke at home. When they came to Australia they had a variety of low paid jobs. Mr Timoti was a member of the Seventh Day Adventist Church at Logan which he attended from time to time. He had borrowed sums from finance companies to purchase cars and various household chattels. The sales person filled out the forms for him.
- [112] Ms Fanueli was asked by a co-worker if she was interested in buying a house with her fiancé because the co-worker's husband worked for Sunshine Properties. A few days later one Tile (most likely Tiley Seve) contacted Mr Timoti asking if he wished to buy a house. Mr Timoti told him that it was his dream but that he had so many bills to pay that he did not think he would qualify to buy a house at the moment. Tile said to him that it did not matter and that Sunshine Properties would pay off all the bills and make it one loan.
- [113] The next day McLaren contacted Mr Timoti and showed him a number of houses in the Kingston area. Eventually McLaren showed him the house at 60 Snowdon Street Kingston which was much better than the previous houses and was told that the purchase price was \$118,000.00. Mr Timoti agreed to buy the house and McLaren drove him to the Sunshine Properties' office. McLaren warned him that there was a great deal of paperwork to do. Mr Timoti told him that since he had a lot of bills to pay he did not want to waste McLaren's time doing paperwork if he did not qualify. McLaren said that the paperwork could be done first and sort out whether he qualified later. McLaren asked Mr Timoti how much his bills amounted to and his remuneration at work. McLaren said he wanted to speak to Mr Timoti's fiancé to talk about her bills and what she was paid from Centrelink.
- [114] McLaren calculated all the bills and told Mr Timoti that he qualified for a loan. Mr Timoti said that McLaren asked him if he wanted to read the paperwork before he signed but Mr Timoti said that it would take about two hours to read it. McLaren said he need not do so. Mr Timoti just signed. Mr Timoti's impression was that he was being hurried through the paperwork. He was asked to get a statement about his bills and a group certificate from work and other qualifying documents. Mr Timoti noted that when McLaren was filling out the documents on one of the papers was written "\$147,000.00". He said he did not say anything because he thought that was the price with interest or with his other bills added to the purchase price of the house. On the top of that document were the figures "\$118,000.00".
- [115] McLaren returned him to the house where he was living with his fiancé. He asked them how much money they had in the bank and was told they had nothing at all. Mr Timoti told him that he had two bank accounts and McLaren said that he would write that there was \$300.00 in one account and \$500.00 in the other and "just pretend" that there was some money there. Mr Timoti deposes that he felt it was wrong to do that but did not say anything because he did not want to miss out on the house. McLaren obtained Ms Fanueli's signature to the contract and loan application documents and asked for a \$200.00 deposit to secure the house which Mr Timoti paid in cash. They then visited the house which Ms Fanueli saw for the first time.

[116] The contract document for the sale of the property comprised a standard REIQ form with annexures under the heading "Special Conditions" said to be part of the contract. Those annexures were executed by Mr Timoti and Ms Fanueli. The document described as "Annexure" and expressed to form part of the contract provided that they would make an application for a first home owner's grant of \$7,000.00 and assign to Destiny the right to receive it. Another "Annexure" expressed to form part of the contract provided that if Mr Timoti and Ms Fanueli complied with the terms of the contract Destiny would, on completion, accept \$14,000.00 less than the price provided for in the contract. Another document described as "Annexure C", said to be part of the contract, provided that Destiny would pay the legal, banking and associated charges and stamp duty on the purchase to the value of \$5,000.00.

[117] At the time McLaren had Mr Timoti and Ms Fanueli sign the contract and loan application he:

- failed to explain to them that the purchase price to be shown in the contract was \$147,500.00 and not \$118,000.00 as they had agreed to pay;
- failed to advise them that part of the purchase price would be secured by a second mortgage over the property in favour of Destiny;
- knew that the property was not worth \$118,000.00;
- knew that the Bank would not obtain a valuation of the property as part of its loan approval process;
- knew that they could not afford to make the mortgage repayments that would be required;
- failed to explain to them that Sunshine Properties, shown as agent in the contract, and Destiny, shown as vendor, were related entities;
- failed to advise that Destiny had entered into a contract to buy the property for \$86,000.00;
- knew that Mr Timoti and Ms Fanueli would not have entered into the contract if they had been told of those matters.

[118] On or before 20 October 2000 Destiny through Your Mortgage Shop made application to the Bank on behalf of Mr Timoti and Ms Fanueli for a loan to finance the purchase of the property.

[119] In order to ensure that the Bank would approve the loan Destiny by McLaren or some other servant or agent:

- amended or completed the application documents and the contract document to show the contract price for the property as \$147,500.00 rather than the agreed price of \$118,000.00;

- failed to detail completely the extent of vendor finance to be provided by Destiny;
- did not disclose to the Bank the documents described as annexures or the matters referred to in them.

- [120] When McLaren did this he knew that if accurate information about those matters was provided to the Bank it would not or might not lend money to Mr Timoti and Ms Fanueli to purchase the property.
- [121] On or about 20 October the Bank agreed to lend Mr Timoti and Ms Fanueli \$118,000.00 subject to the Bank's first mortgage over the property. On that day Gunther advised Mr Timoti and Ms Fanueli that the Bank had approved the loan application but did not disclose the amount nor that the total of the proposed Bank mortgage and the proposed second mortgage exceeded the agreed purchase price.
- [122] Sunshine Properties wrote to Mr Timoti and Ms Fanueli directing them to attend at the office of Lawrence & Associates at Woolloongabba to complete all the documents for the transfer of the property. Mr Timoti and Ms Fanueli attended at the solicitor's office on about 27 October 2000. The solicitor attempted some explanation of the documents and asked Mr Timoti to read them. He said that if the information he had been given by the solicitor was "true and right" there was no need for him to read the documents. He was told that it was all "true" and Mr Timoti and his fiancé signed the papers.
- [123] When asked to sign the documents for the second mortgage Mr Timoti asked what it was for. He told the solicitor that he thought the Bank was paying the \$118,000.00 but was told that it was for a part of the loan over the house. He was told that the second mortgage had to be paid off early and that if he got behind or missed a payment the interest rate increase from 10.25 per cent to 15 per cent. Mr Timoti thought that the second mortgage was part of the price of the house.
- [124] On or about 2 November 2000 the sale of the property was completed. As at 12 October 2000 the fair market value of the property was according to the Iveson valuation, no more than \$74,000.00 but not more than \$86,000.00. But for the conduct of the respondents Mr Timoti and his fiancé could have purchased the property for an amount considerably less than they had contracted.
- [125] Mr Timoti and Ms Fanueli made payments in the sum of \$1,760.00 under the second mortgage.

*Gunther's involvement*

- [126] It is alleged that Gunther aided and abetted or alternatively was directly knowingly concerned in the conduct of Talitha Cumi and Summa Petere and knew of and authorised the conduct of McLaren, Smith and Judith Gunther in respect of all of the above transactions. It is clear from the affidavits of the complainants that Gunther was the guiding mind of the business as well as being directly involved in a number of the transactions.

*Conclusion*

- [127] I am satisfied that the respondents took advantage of the complainants' commercial inexperience and simplicity, their relatively modest educational attainments and, in all cases except that of Mr and Mrs Glanville, their lack of facility in the English language, and in most of the cases, the trust and confidence which Samoan people have in Church pastors, to dupe them into entering into disadvantageous contracts.
- [128] The scheme – for it clearly was a scheme – would not have been possible without the ANZ Bank's own lending guidelines and a "cooperative" bank officer who did not seek to satisfy himself on behalf of the Bank that these applicants understood the transactions. If there was any sinister role played by Your Mortgage Shop it is not apparent on the material.
- [129] The solicitors lent an air of assurance to the transactions. They were selected by the respondents. So far as the material reveals, they made no or little attempt to ascertain if the complainants understood the financial commitment they were making and how it was structured.
- [130] In two of the transactions (those of Glanville and Timoti) the complainants were aware of untrue statements about their financial worth in the loan application. Uncomfortable as they were, they were assured that this was what was done and, had they insisted on the correct amounts being inserted, it is plain that the respondents would have changed or had changed the figures prior to sending the application to the Bank. The conduct may have been deceitful so far as the Bank was concerned but the complainants are not seeking relief from the Bank's mortgage. The second mortgagee – either Talitha Cumi or Summa Petere – was complicit in the deception.
- [131] There can be no doubt that the conduct engaged in by the respondents through the activities of Gunther, Judith Gunter, Smith and McLaren and possibly other employees not identified was, in all the circumstances, unconscionable.
- [132] Declarations to that effect will be made and other injunctive orders together with order for relief from the second mortgages and for compensation as per the minute of order attached to these reasons.

THE JUDGMENT OF THE COURT IS THAT:

1. It is declared that the First to Third Respondents have engaged in unconscionable conduct in breach of section 39 of the *Fair Trading Act 1989* with respect to the sale of the properties referred to in Schedule 1.
2. The First to Third Respondents by themselves, their employees, servants and/or agents, and/or representatives be restrained permanently from taking any steps to enforce or otherwise deal with mortgages (“the mortgages”) held by either the Second or Third Respondents over the properties referred to in Schedule 1 excluding properties numbered 4 and 7.
3. Pursuant to section 100 of the *Fair Trading Act 1989*
  - (a) the First to Third Respondents pay to persons who have suffered loss and damage by reason of the contraventions of the *Fair Trading Act 1989*, the amount of such loss and damage, being the persons and the amounts referred to in Schedule 2 together with interest as calculated in Exhibit 3 which is attached to this order;
  - (b) the mortgages be avoided.
4. The Second and Third Respondents shall within 14 days of the service of these orders on them prepare and lodge the necessary documents in the Land Titles Office which will remove any reference to the mortgages from the titles of the properties referred to in paragraph 2, excluding properties numbered 4 and 7, and any other relevant encumbrances. Service of these orders and the reasons for Judgment on the First Respondent may be effected by forwarding a sealed copy of the Judgment by pre-paid post to 42 Anakie Drive Cornubia Queensland being the First Respondent’s last known address and to Worcester & Co solicitors on the record for the First, Second and Third respondents.
5. If the First to Third Respondents do not comply with the order referred to in paragraph 4, the Registrar of the Supreme Court is authorised to sign the necessary documents which will remove any reference to the mortgages from the titles of the properties referred to in paragraph 2, excluding properties 4 and 7, and any other relevant encumbrances, and the Crown Solicitor is authorized to lodge these documents in the Land Titles Office.
6. The First to Third Respondents by themselves, their employees, servants and/or agents, and/or representatives be restrained permanently from engaging in the course of conduct whereby one or all of the said First to Third Respondents:
  - (a) enter into an agreement with a party to purchase a residential property on the basis that the First, Second or Third Respondents can on-sell that property within a defined period;
  - (b) advertise property for sale to the general public, stating such property is available for purchase without payment of a deposit;

- (c) assist purchasers of properties in obtaining finance from lending institutions;
  - (d) assist purchasers in obtaining legal representation for the conveyance of the property;
  - (e) take a second mortgage over the property the subject of the sale; and
  - (f) enforce mortgages obtained through any such course of conduct.
7. The First to Third Respondent pay the Applicant's costs of and incidental to these proceedings to be assessed on a standard basis, including the costs referred to in the orders of Mullins J dated 7 October 2003, and Byrne J dated 21 December 2004.
  8. Worcester & Co have ceased to act for the First, Second and Third respondents seven (7) days from the date of judgment on 27 April 2005.

**SCHEDULE 1**  
**Property**

1.	3 Veldt St, Kingston, being Lot 284 on RP 136008, County of Stanley, Parish of Yeerongpilly
2.	83 Haig Rd, Loganlea, being Lot 1 on RP 146422, County of Stanley, Parish of Mackenzie
3.	43 Karri Avenue, Woodridge, being Lot 242 on RP 118040, County of Stanley, Parish of Yeerongpilly
4.	8-10 George Street, Kingston, being Lots 220 and 221 on RP 38148, County of Stanley, Parish of Yeerongpilly
5.	9 Duke Street, Kingston, being Lot 3 on RP 178466, County of Stanley, Parish of Yeerongpilly
6.	31 Brandon Street, Marsden, being Lot 17 on RP 851179, County of Stanley, Parish of Mackenzie
7.	3 Lindley St, Woodridge, being Lot 70 on RP 10497831, County of Stanley, Parish of Yeerongpilly
8.	60 Snowdon St, Kingston, being Lot 112 on RP 130324, County of Stanley, Parish of Yeerongpilly

**SCHEDULE 2**  
**COMPENSATION**

Lupe and Fasi Ah Sam	<b>\$9,491.50</b>
Shane and Joanne Glanville	<b>\$2,342.85</b>
Miliama and Sa Pati Lauvi	<b>\$7,780.40</b>
Emele Miskopa Naea and Mau Naea	<b>\$7,825.60</b>
Tuulima and Sofia Puni	<b>\$8,693.80</b>
Tuulemaga Paulo Seufatu and William Faamanu Ioane Taao	<b>\$7,930.00</b>
Naoupu Talatonu and Florence Talatonu	<b>\$8,393.10</b>
Mene Timoti and Faaletaua Fanueli	<b>\$1,760.00</b>

### EXHIBIT 3

Ex. 3

#### INTEREST CALCULATIONS PURSUANT TO SECTION 47 OF THE SUPREME COURT ACT 1995

Claimant	Amount of Compensation Claim	Period over which mortgage payments were made	Interest Period Claimed (Half way to 18/04/05)	Number of days	Percentage Rate	Total
Lupe and Tasi Ah Sam	\$9,491.50	09/03/00 to 07/05/01	06/03/01 to 18/04/05	4 yrs 37 days (4.1 yrs)	9%	\$3,502.38
Shane and Joanne Glanville	\$2,642.85	20/06/00 to 20/08/01	20/01/01 to 18/04/05	4 yrs 98 days (4.27 yrs)	9%	\$1,015.66
Mihama and Sa Pafi Lauvi	\$7,780.40	17/11/00 to 27/04/01	01/02/01 to 18/04/05	4 yrs 76 days (4.21 yrs)	9%	\$2,948.01
Imele Miskapa Naea and Mau Naea	\$7,825.60	29/11/00 to 18/04/01	05/02/01 to 18/04/05	4 yrs 71 days (4.19 yrs)	9%	\$2,951.92
Tualima and Sevin Puni	\$8,693.80	31/07/00 to 03/05/01	15/12/00 to 18/04/05	4 yrs 125 days (4.34 yrs)	9%	\$3,395.79
Tuilemaga Paulo Seufatu and William Faamau Ioane Tacc	\$7,930.00	07/11/00 to 27/02/01	02/01/01 to 18/04/05	4 yrs 106 days (4.29 yrs)	9%	\$3,061.77
Nacupa Lalatoru and Florence Lalatoru	\$8,393.10	23/01/00 to 05/03/01	04/02/01 to 18/04/05	4 yrs 73 days (4.20 yrs)	9%	\$3,172.00
Mene Timoti and Pauletava Furevel	\$1,760.00	16/12/00 to 25/07/01	04/04/01 to 18/04/05	4 yrs 14 days (4.04 yrs)	9%	\$639.94
<b>TOTAL</b>	<b>854,517.25</b>					<b>\$20,687.17</b>