SUPREME COURT OF QUEENSLAND

CITATION:	*Dowdle v Pay Now For Business Pty Ltd & Anor* [2012] QSC 272
PARTIES:	**DERRYN MAREE DOWDLE** **(plaintiff)** **v** **PAY NOW FOR BUSINESS PTY LTD** **(ACN 088 979 533)** **(first defendant)** **DONALD CUNNINGTON** **(second defendant)**
FILE NO:	BS4514 of 2005
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	13 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	14-18 May 2012
JUDGE:	Mullins J
ORDER:	**Adjourn the proceeding to a date to be fixed.**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – UNDUE INFLUENCE AND DURESS – PRESUMPTION OF UNDUE INFLUENCE FROM RELATIONSHIP OF PARTIES – SPOUSES – where the plaintiff's husband requested that she grant a mortgage over her property for a loan from the first defendant – where the first defendant sent a letter of offer to the plaintiff for the loan to her of $50,000 secured on her property – where the funds from the loan were to be used by the plaintiff's husband – where the plaintiff accepted the letter of offer – where the first defendant decided to lend the funds direct to the husband and take a guarantee and mortgage from the plaintiff – where the husband owed an existing large debt to the first defendant – where the first defendant sent a subsequent letter of offer to the plaintiff's husband without advising the plaintiff of the withdrawal of the offer to her – where the plaintiff signed the guarantee and mortgage that made her liable for the loan to her husband of $50,000 and his existing debt to the first defendant – where the plaintiff did not understand the purport and effect of the transaction at the time she signed the guarantee and mortgage because she believed the documents gave effect to the transaction the subject of the letter of offer sent to her – whether the principle in *Yerkey v Jones* (1939)

63 CLR 649 applies

CORPORATIONS – FINANCIAL SERVICES AND MARKETS – MARKET MISCONDUCT AND OTHER PROHIBITED CONDUCT – MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT – where the plaintiff signed an all moneys guarantee and mortgaged her property for the loan of $50,000 to her husband – where the plaintiff signed the guarantee and mortgage believing that they were for the transaction the subject of the letter of offer of a loan to her which she had accepted and would have limited her liability to $50,000 – where the first defendant failed to advise the plaintiff of the change in the structure of the transaction – whether the failure by the first defendant to advise the plaintiff of the change in the structure of the transaction constitutes misleading and deceptive conduct

Australian Securities and Investments Commission Act 2001 (Cth), s 12CB, s 12CC, s 12DA, s 12GF
Corporations Act 2001 (Cth), s 79
Trade Practices Act 1974 (Cth), s 52

Agripay Pty Ltd v Byrne [2011] 2 Qd R 501, considered
ANZ Banking Group Ltd v Alirezai [2004] QCA 6, considered
Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447, considered
Garcia v National Australia Bank Ltd (1998) 194 CLR 395, followed
Goodwin v National Bank of Australasia Ltd (1968) 117 CLR 173, considered
Holdway v Arcuri Lawyers (A Firm) [2008] QCA 218, considered
Vadasz v Pioneer Concrete (SA) Pty Ltd (1995) 184 CLR 102, followed
Vale v Sutherland (2009) 237 CLR 638, considered
Yorke v Lucas (1985) 158 CLR 661, followed

COUNSEL: P J Roney SC and D J Butler for the plaintiff
J W Peden for the defendants

SOLICITORS: Lillas & Loel for the plaintiff
Middletons for the defendants

[1] On 24 February 2003 the plaintiff Mrs Dowdle signed a deed of guarantee and indemnity (the guarantee) in favour of the first defendant in respect of the indebtedness of her husband Mr Dowdle and granted a supporting mortgage over her home at Westbrook (the mortgage). These documents were signed after Mrs Dowdle had on 19 February 2003 been offered by the first defendant and accepted an advance of $50,000 for a term of one year secured by mortgage over the Westbrook property with Mr Dowdle as the guarantor, but instead Mr Dowdle on 24 February 2003 entered into a loan agreement with the first defendant to borrow the

sum of $50,000 on the basis that Mrs Dowdle was the guarantor and provided security over the Westbrook property.

[2] Mrs Dowdle applies to set aside the guarantee and the mortgage on the grounds of misleading and deceptive conduct or unconscionability on the part of the first defendant. Mrs Dowdle claims a refund of the amounts she repaid under the mortgage and also seeks damages for the loss of proceeds on the sale of the Westbrook property and the loss of opportunity to purchase the rural property known as Arcot (the Arcot property). In the alternative, Mrs Dowdle seeks orders that limit her liability under the guarantee and the mortgage to the balance outstanding of the specific loan of $50,000.

[3] The first defendant counterclaims for the sum of $500,000 on the basis that is the total amount of the indebtedness owed by Mr Dowdle to the first defendant that is recoverable against Mrs Dowdle under the guarantee. In the alternative, the first defendant seeks to recover from Mrs Dowdle under the guarantee the balance of the specific loan of $50,000 which it claims was $38,501.45 as at 7 August 2006 plus interest.

Prior dealings between Mr Dowdle and the defendants

[4] Mr Dowdle was the director and shareholder of Outback Cuisine Pty Ltd (Outback) which was registered on 28 September 1998 and operated an abattoir at Rockhampton. Mrs Dowdle was also a shareholder of Outback. Although both Mr and Mrs Dowdle thought Mrs Dowdle was an original director of Outback who had resigned soon after agreeing to be a director, Mrs Dowdle was never a director, according to the ASIC search of Outback. Outback and another company associated with Mr Dowdle, Lynlock Pty Ltd (Lynlock), had dealings with the first defendant in relation to the factoring of debts pursuant to a facility offer letter dated 18 October 2000 (exhibit 27). In October 2000 Mr Dowdle entered into a guarantee and indemnity (Mr Dowdle's guarantee) in favour of the first defendant in relation to the debts of a number of Mr Dowdle's companies, including Outback and Lynlock. The first defendant held the second mortgage over the Rockhampton abattoir property.

[5] Outback had previously borrowed funds from another financier Atlantic 3 Financial Pty Ltd (Atlantic) secured over the Rockhampton abattoir property. In late 2000 Atlantic went into possession of that property and by March 2001 had wound up Outback. Atlantic sold the Rockhampton property at a price that paid out its mortgage, but did not pay any sum in respect of the first defendant's mortgage. Atlantic commenced bankruptcy proceedings against Mr Dowdle which he resisted on the basis of his purchase from the liquidator of Outback of the rights of action of Outback against Atlantic. In addition to the litigation against Atlantic, Mr Dowdle sued Outback's former solicitors for negligent advice. Mr Dowdle had obtained financial assistance from the first defendant for the legal costs to pursue this litigation.

[6] In May 2001 the first defendant served notices of demand on Mr Dowdle and companies associated with him in respect of $311,751.06 owed to the first defendant. Those demands were not met, but the first defendant had not prior to February 2003 taken any further steps to recover this debt. Even after those notices of demand were served, the first defendant provided funds towards legal costs

incurred by Mr Dowdle, such as for the public examination relating to Outback's liquidation, and the second defendant helped Mr Dowdle out with small cash advances.

[7] By early 2003 the second defendant was not willing for the first defendant to provide further financial support to Mr Dowdle without security.

The purchase of the Westbrook property

[8] Mrs Dowdle qualified and practised as an occupational therapist. From about 1986 until the first child of their marriage was born in 1992, Mrs Dowdle worked in the office of Mr Dowdle's construction company undertaking administrative work including bookwork.

[9] In 1998 Mrs Dowdle had been living at Collarenebri with their two young children, when she decided to separate from Mr Dowdle and relocated to Toowoomba to live with their children. They lived at first with Mrs Dowdle's father at Glenvale Road, as Mrs Dowdle's mother had died. Mrs Dowdle then purchased and moved to the Westbrook property for which finance was provided by Suncorp-Metway Limited (Suncorp). The Glenvale Road property had been purchased by Mrs Dowdle's parents, her sister and her. After her mother's death, Mrs Dowdle had a 37.5 per cent interest in that property. Mrs Dowdle also had a half interest in a rural property at Taroom.

[10] When they separated, Mr Dowdle visited the children (and Mrs Dowdle) in Toowoomba for a couple of days in most weeks and the relationship between Mr and Mrs Dowdle remained mostly amicable, although Mrs Dowdle's family and friends were aware of the separation. From Mr Dowdle's perspective, he was working on the relationship.

Mr Dowdle's request to the defendants for further funds

[11] Mr Dowdle's focus from the time that Atlantic took possession of the Rockhampton Abattoir was the litigation that ensued. Although his background was in construction and he occasionally did some consulting in the goat industry, his preoccupation since 2000 has been his litigation.

[12] Mr Dowdle met the second defendant on 7 February 2003 in Brisbane. Mr Dowdle sought to persuade the defendants to lend him further funds and suggested he could approach Mrs Dowdle to provide a mortgage over the Westbrook property as security.

[13] In order to address Mr Dowdle's need for immediate funds, the second defendant went to an automatic teller machine and withdrew $1,000 which he gave to Mr Dowdle.

[14] Solicitors Tucker & Cowen were acting for Mr Dowdle against Atlantic. The importance to Mr Dowdle in obtaining access to further funding for his litigation is borne out by the fact that he informed Mr Griffin of Tucker & Cowen on 7 February 2003 of the proposal that the first defendant would lend Mrs Dowdle money on the security of the Westbrook property, as Mr Griffin telephoned a solicitor at Flower & Hart (the firm of solicitors which did the first defendant's work) to advise of the proposed transaction and that a Toowoomba solicitor would act for Mrs Dowdle

(exhibit 31). Mr Dowdle also rang the same solicitor from Flower & Hart on 7 February 2003 to advise that Cleary & Lee would be the Toowoomba solicitors.

The circumstances in which the guarantee and the mortgage were signed

[15] In February 2003 Mrs Dowdle was working in a doctor's surgery in Toowoomba. It is not clear whether Mr Dowdle approached her before or after he spoke to the second defendant. What Mr Dowdle asked of Mrs Dowdle was whether she was prepared to put up a second mortgage for a facility of $50,000 advanced by the first defendant to enable Mr Dowdle to continue with his litigation against Atlantic (Transcript 1-30 and 2-37). Mrs Dowdle's response was that she was prepared to give a second mortgage, provided the children kept a roof over their heads (Transcript 1-31).

[16] The first defendant sent a letter dated 19 February 2003 to Mrs Dowdle that offered to advance her the sum of $50,000 for a term of one year with interest payable at 20 per cent per annum calculated monthly in arrears on the basis of a guarantee from Mr Dowdle and a supporting mortgage over the Westbrook property. The letter also provided that if the loan was repaid within one year, interest would be recalculated at 15 per cent per annum. The letter detailed the breakdown and purpose of the component advances, including references to payment of outstanding legal fees, an advance to settle the balance of the action purchased from the liquidator of Outback against Atlantic, an interest reserve from which interest would be deducted, and the balance after the total initial drawdown of $25,000 and the interest reserve would be for her own personal purposes. Even though the loan was proposed to be made to Mrs Dowdle, the specified payments related to Mr Dowdle's litigation which was consistent with the reason that Mr Dowdle had approached the second defendant for further funds and what Mr Dowdle had informed Mrs Dowdle was the purpose of the advance. The letter was sent by facsimile to Cleary & Lee. Mrs Dowdle attended at the office of Cleary & Lee on 19 February 2003 to collect the letter. She perused it and accepted the terms of the offer by signing the letter and returned the signed letter of offer by facsimile sent from Cleary & Lee on 19 February 2003.

[17] The first defendant's business was the provision of finance to businesses and not consumer finance. After obtaining legal advice, the first defendant then changed the structure of the finance that it was prepared to provide to assist Mr Dowdle. The second defendant estimated that in February 2003 the debt under Mr Dowdle's guarantee in favour of the first defendant was between $500,000 and $600,000. On 20 February 2003 the second defendant telephoned Mr Dowdle to advise him that another letter of offer would be sent by the first defendant. The changed structure was reflected in the first defendant's letter dated 21 February 2003 that was addressed to Mr Dowdle and sent by facsimile to the office of Cleary & Lee. Mr Dowdle attended at Cleary & Lee's office to receive the facsimile and signed the acceptance of the offer and returned the signed letter of offer by facsimile sent from Cleary & Lee on 21 February 2003. This letter provided for the borrower to be Mr Dowdle and for Mrs Dowdle to give a guarantee and supporting mortgage, but was otherwise in similar terms to the letter of offer addressed to Mrs Dowdle. The initial drawdown of $25,000 was comprised of the same components and, after allowing for an interest reserve, the balance was specified to be used for Mr Dowdle's business purposes. There was no request made in that letter to Mr Dowdle to advise Mrs Dowdle of the change of borrower.

[18] On that same date Flower & Hart prepared a letter to Mr Dowdle that enclosed the loan agreement, a business purpose declaration, and another copy of the facility letter of offer, for him to sign, but also provided a package of documents that were for Mrs Dowdle to sign. The letter, though addressed to Mr Dowdle, was sent by express post addressed to a paralegal in the employ of Cleary & Lee.

[19] Mr and Mrs Dowdle attended at Cleary & Lee's office on 24 February 2003. It is not apparent how the contents of the envelope sent by Flower & Hart were opened and distributed, but Mr Dowdle took the loan agreement, business purpose declaration and facility letter of offer addressed to him. The balance of the documents that related to Mrs Dowdle were perused by Mr Nunan, a partner at Cleary & Lee, who was the solicitor who proposed to give the advice to Mrs Dowdle that was required in order to satisfy the first defendant's requirements for the execution of the guarantee and the mortgage.

[20] Mr Nunan prepared himself for giving advice to Mrs Dowdle by perusing the proposed guarantee and mortgage. He did not have the letter of offer accepted by Mrs Dowdle on 19 February 2003, any copy of the letter of offer to Mr Dowdle dated 21 February 2003, or the proposed loan agreement between the first defendant and Mr Dowdle.

[21] Mr Nunan made a handwritten note of his attendance on Mrs Dowdle shortly after the interview concluded. That recorded the time spent on the interview as 45 minutes between 1:35pm and 2:20pm. Despite both Mr and Mrs Dowdle recalling that the time that Mrs Dowdle was engaged with Mr Nunan was only about 10 to 15 minutes, I accept that Mr Nunan's recorded time for the interview in the course of his professional practice is accurate. Mr Nunan signed the Queensland Law Society's Independent Solicitor's Certificate in relation to the explanations that he had given Mrs Dowdle about the deed of guarantee and indemnity and the mortgage over the Westbrook property. Mrs Dowdle signed the Queensland Law Society "Form of Acknowledgement Given by the Guarantor/Surety to the Certifying Solicitor." Mrs Dowdle stated (at Transcript 1-38) that it was not until weeks after 24 February 2003 that she became aware that the loan was made to Mr Dowdle and not to her. In cross-examination, Mrs Dowdle explained (at Transcript 1-68 and 1-70) that on 24 February 2003 she had no experience with guarantees and thought that the guarantee that she signed was something linked with the mortgage to do with the security for the sum of $50,000.

[22] Mrs Dowdle then went to the Toowoomba office of accountant Dudley Chimes where Mrs Dowdle saw an accountant Mr Garland for the purpose of obtaining an independent financial certificate. That certificate showed that the accountant was provided with the guarantee and indemnity and the mortgage. Although both Mr and Mrs Dowdle gave evidence that Mr Dowdle had taken Mrs Dowdle to Mr Chimes' office for this interview, they were mistaken. Mr Dowdle had driven to Brisbane that same afternoon (which he estimated took an hour and a half or an hour and three-quarters) to consult with his solicitor Mr Griffin about the execution of the loan documents. Mr Griffin's file memo (the accuracy of which was not challenged) shows that he was engaged with Mr Dowdle between 3:15pm and 4pm. Mrs Dowdle therefore must have made her own way from Mr Nunan's office to Mr Chimes' office. It is not clear how the documents signed by Mrs Dowdle and accompanying certificates were returned to Flower & Hart.

[23] The facility letter of offer was in identical terms to the one that Mr Dowdle had signed on 21 February 2003. Mr Dowdle signed the loan agreement and the facility letter offer in the presence of Mr Griffin. He also signed the business purpose declaration. He then took the documents signed by him to Flower & Hart's office. Mr Dowdle returned to Mr Griffin's office for a conference between 4:30pm and 5:20pm concerning the Atlantic litigation. The loan agreement was subsequently signed by the first defendant and dated 15 May 2003.

[24] The sum of $50,000 was advanced by the first defendant to Mr Dowdle in tranches between February 2003 (with the first advance being recorded as the sum of $1,000 given by the second defendant to Mr Dowdle on 7 February 2003) and 25 March 2004. The quantum of the advances is not disputed.

[25] Mr Dowdle sent a facsimile to the second defendant on 26 March 2003 (exhibit 17) with instructions on how to pay the advances:

> "Attention: Mr Don Cunnington
>
> As discussed could you please organise to
>
> 1) Deposit 10,000 to Tucker & Cowan (*sic*) for last payment for purchase of Outback Cuisine P/L action
> 2) Make provision for 12000 to Tucker & Cowan (*sic*) to show Liquidator funds for Public Examination in place
> 3) Advance
>   1. $3000 to Dellmain CBA Account (ie) same as last 2 transfers
>   2. 6000 to D.M. Dowdle ANZ Account
>
>   (NB)Don: the 3k will get us started and Derryn can feed the balance as is required
> 4) We are working on the Lynlock information & a submission for the other proposals.
>
> Items 1 & 2 can be done next week but can you organise Derryn & my transfers now as Toowoomba show on this week (ie) Block Splitters
> Regards Paul."

[26] By the time this facsimile was sent by Mr Dowdle, the first defendant had recorded the following advances:

Date	Particulars	Amount
07/02/03	Paid Mrs Derryn Maree Dowdle	$1,000.00
19/02/03	Dowdle loan a/c adjustment	2,500.00
19/02/03	Payment	550.00
26/02/03	Surplus Release Paul	1,500.00
03/03/03	Flower & Hart Dowdle Account	1,833.99
28/02/03	Tucker & Cowan (*sic*) on Account	9,000.00
06/03/03	Dellmain Pty Ltd	1,500.00
11/03/03	Mrs Derryn Maree Dowdle	2,000.00
18/03/03	Dellmain Account	1,000.00

[27] I infer therefore that the purpose of the facsimile was to ratify some of the payments that had already been made by the first defendant and to obtain the instructions for future advances.

[28] The submission was made on behalf of the defendants that the fact that Mrs Dowdle was the recipient of some of the advances shows that she obtained a direct benefit from the loan. The arbitrariness of the description of payments made by the first defendant is illustrated by the first entry. The cash of $1,000 was handed to Mr Dowdle, yet the first defendant recorded it as a payment to Mrs Dowdle. Mrs Dowdle did not dispute that the sum of $6,000 may have been paid to her bank account at Mr Dowdle's direction, as recorded by the first defendant on 2 April 2003, but she stated (at Transcript 2-12) that she did not use the funds and they were transferred to her account, so that Mr Dowdle could make use of the funds. She had no specific recollection of any other payments going into her account, although she did not dispute that they did. The weight of the evidence supports the conclusion that the purpose of the loan was to facilitate the funding of Mr Dowdle's litigation and that was the use to which the funds were put, irrespective of the account name to which the funds may have been paid.

Sale of the Westbrook property

[29] Mrs Dowdle re-financed the Westbrook property in about September 2003 with Liberty Funding Pty Ltd (Liberty). For the purpose of the re-financing, Mr Dowdle inquired of the second defendant as to the current balance of the loan secured over the Westbrook property. The second defendant advised Mr Dowdle on 19 September 2003 that the current balance of the loan outstanding was $46,937.66. After the mortgage to Suncorp had been released, the mortgage in favour of the first defendant became the first registered mortgage. In order to facilitate the re-financing, the first defendant entered into a deed of priority with Liberty that gave Liberty priority for the sum of $208,000 plus interest, costs, fees, charges, duties and expenses. From the funds available on re-financing, the sum of $20,153.82 was repaid to the first defendant and that reduced the debit balance of the loan to Mr Dowdle.

[30] The loan from Liberty was advanced on 28 October 2003 for a term of 12 months. Mrs Dowdle defaulted in repayment of the principal. Notice of exercise of power of sale dated 26 November 2004 was given by Liberty to Mrs Dowdle. Mr Dowdle conceded that he was in a difficult financial position by September 2004 when he applied to withdraw $7,000 of his superannuation on the grounds of financial hardship.

[31] In February 2005 Mrs Dowdle entered into a contract to sell the Westbrook property to Mr Rawlins who was a friend of Mr and Mrs Dowdle for $450,000. He described his arrangement to purchase the Westbrook property as a "friendly" situation (at Transcript 3-79). Mr Rawlins had worked as an industrial electrician at the abattoir operated by Outback, but was on a sickness benefit from about 2002 and by February 2005 was on the disability pension. He obtained approval for a loan in the sum of $405,000 from GNI Finance Corporation to purchase the Westbrook property. It was proposed that Mr and Mrs Dowdle would rent the Westbrook property from him and have an option to repurchase the Westbrook property at some unspecified time in the future. Mr Rawlins had no income to pay mortgage payments other than the rent from the Westbrook property. He thought that the rent

that was discussed with Mr and Mrs Dowdle was about $380 per week which is significantly less than the likely monthly interest payable on a loan of $405,000.

[32] In response to a request for a pay out figure for settlement that was being arranged for 29 March 2005, the first defendant's solicitors on 3 March 2005 advised Mrs Dowdle's solicitors that the mortgage was an all moneys mortgage, pursuant to the deed of guarantee dated 24 February 2003 Mrs Dowdle guaranteed payment of all money owing by Mr Dowdle to the first defendant, and Mr Dowdle was currently indebted to the first defendant for $1,330,817.21. The first defendant's solicitors therefore notified Mrs Dowdle's solicitors that at settlement the first defendant would require the balance of the sale proceeds after paying out Liberty. In response Cleary & Lee asserted that the only money owed by Mr Dowdle personally was the current balance of the loan of $50,000 made under the loan agreement dated 15 May 2003. The parties reached an impasse as the first defendant maintained the position of requiring the balance of the sale proceeds of the Westbrook property after Liberty had been paid out and Cleary & Lee adopted the position of having instructions to pay out the amount owing in relation to the loan of $50,000 or, failing advice of that pay out figure, a sum of $35,000. The first defendant's solicitors did not advise the pay out figure for the loan of $50,000.

[33] On 11 March 2005 the first defendant appointed receivers and managers from the firm Hall Chadwick to Outback.

[34] This proceeding was commenced on 3 June 2005 in which Mrs Dowdle was seeking a declaration that her liability to the first defendant as surety was limited to the amount borrowed by Mr Dowdle of $50,000 and for an order that her obligations under the mortgage and guarantee be discharged upon payment to the first defendant of the sum owing in relation to that loan of $50,000. Mr Nunan acted on behalf of Mrs Dowdle in commencing this proceeding. The parties consented to an order made by the court on 1 July 2005 that incorporated the undertaking of the first defendant to provide a release of the mortgage over the Westbrook property to allow settlement of the contract between Mrs Dowdle and Mr Rawlins and the undertaking of Mrs Dowdle to deposit the balance sale proceeds after paying out Liberty and paying $35,000 to the first defendant and provided for the proceeding to continue as if started by claim and statement of claim.

[35] Settlement of the sale to Mr Rawlins was organised for 4 August 2005, but was delayed as Mr Rawlins' financier had to obtain a new valuation of the Westbrook property. There was no evidence as to whether Mr Rawlins' financier obtained a satisfactory valuation. That contract with Mr Rawlins did not settle and was terminated by Mr Rawlins when Liberty evicted Mrs Dowdle from the Westbrook property in November 2005.

[36] In early 2006 Mrs Dowdle transferred her interest in the Glenvale Road property to her brother-in-law. She transferred her interest in the Taroom property to her brother in 2006. Liberty exercised its power of sale and sold the Westbrook property for $420,000 with settlement on 7 August 2006. After Liberty's mortgage was paid out, the first defendant received $87,231.19 from the sale proceeds. The balance of the loan of $50,000 was calculated as $81,585.99 as at 7 August 2006 (exhibit 28).

[37] On 1 December 2006 Mr Dowdle reached agreement with the first defendant and the receivers and managers of Outback in relation to the assignment of the choses in action by the liquidator of Outback to Mr Dowdle. In addition Mr Dowdle acknowledged that the debts due under the loan facilities made available by the first defendant to Outback and Lynlock exceeded $1.2m and that the first defendant agreed to limit Mr Dowdle's guarantor liability to $500,000.

Proposed purchase of the Arcot property

[38] It was Mr Dowdle's idea to look for a rural property to purchase that would be income producing and also provide a rural experience for his children. Mrs Dowdle was willing to participate in this enterprise. On 16 April 2005 Mr Rawlins, at the instigation of Mr Dowdle, signed a written form of contract as purchaser or on behalf of a nominee for the purchase of the Arcot property for the sum of $700,000. (The offer to purchase was never accepted by the owners of Arcot.) The stipulated deposit of $70,000 was anticipated by Mr and Mrs Dowdle to come from the proceeds from the sale of the Westbrook property to Mr Rawlins. The form of the contract did not provide for it to be conditional on finance. No contract for the purchase of the Arcot property eventuated when the sale of the Westbrook property to Mr Rawlins did not proceed.

[39] The company that did buy the Arcot property (instead of Mr Rawlins) then sold it under contract dated 3 July 2007 for $2.5m of which $800,000 was for chattels and livestock (exhibit 18).

Summary judgment

[40] The first defendant applied for summary judgment in this proceeding that was successful on the construction of the guarantee and the mortgage, where Mrs Dowdle had endeavoured to restrict her liability to the advance of $50,000 less the amount repaid, but unsuccessful in relation to the allegation of misleading or deceptive conduct: *Dowdle v Pay Now For Business Pty Ltd* [2008] QSC 224. In August 2009 Mrs Dowdle changed her solicitors from Cleary & Lee to her current solicitors.

The current relationship of Mr and Mrs Dowdle

[41] At the time of the trial, Mr and Mrs Dowdle remained married. They were residing at the same address.

Grounds relied on for setting aside the guarantee and mortgage

[42] Mrs Dowdle relies on three grounds to set aside the guarantee and mortgage:

(i) On the basis of the trust and confidence between Mr Dowdle and Mrs Dowdle, as husband and wife, and with Mrs Dowdle being a volunteer and mistaken about the effect of the transactions, the first defendant should have appreciated that Mrs Dowdle may receive insufficient explanation for the effect of the transactions from Mr Dowdle, but did not itself provide such an explanation and did not provide sufficient information to the independent solicitor and financial adviser in order that they may provide the necessary explanation. (Counsel for Mrs Dowdle referred to this ground as

Garcia unconscionability, based on *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.)

(ii) The first defendant knew that Mrs Dowdle was in a situation of special disadvantage in relation to the transactions, so that she could not make a judgment as to what was in her interests, or the first defendant knew that possibility might exist or knew of facts that would raise that possibility in the mind of any reasonable person, and it took unfair advantage of its superior position by entering into the transactions. (Counsel for the plaintiff referred to this ground as *Amadio* unconscionability, based on *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.)

(iii) The first defendant obtained the benefit of the guarantee and mortgage by conduct that was misleading and deceptive or was unconscionable conduct under the *Trade Practices Act* 1974 (Cth) (TPA) or the *Australian Securities and Investments Commission Act* 2001 (Cth) (ASIC Act).

Allegations in the statement of claim

[43] The trial was conducted on the basis of the sixth further amended statement of claim which was filed by leave on the first day of the trial. That statement of claim corrected the omission of paragraph 4 from the particulars of paragraph 19, but otherwise reflected the fifth further amended statement of claim filed on 12 August 2011. The statement of claim is cumbersome. The long history of the proceeding had an effect on the development and state of this pleading.

[44] The essence of Mrs Dowdle's claim of unconscionable conduct was opened by Mr Roney of senior counsel (who appeared with Mr Butler of counsel) based on *Garcia* or *Amadio* as follows (at Transcript 1-20):

> "Without going to the documents in detail, eventually the plaintiff signed a mortgage and she signed a guarantee, in the presence of her own solicitor, after she received certain advice about the effect of the documents, but in circumstances in which she did not know and the solicitor did not know, that is the solicitor was advising her - did not know what there was a new deal that the security documents actually referenced.
>
> The plaintiff thought, perhaps you might think reasonably, that what she was signing was security documents that related to the agreement she had made. No-one ever wrote to her or communicated with her and said, 'Oh, that 19th of February agreement that you accepted, that offer that you accepted, became an agreement, isn't the deal any more. That's not what we are going forward with. We are going forward with something else and the new go forward arrangement involves you being guarantor and since you are guarantor, your securities, being all money securities, will therefore make you liable for all of the existing debt and all of the future debt of your husband.' None of that was explained to her because in fact both the plaintiff and her solicitor, and her financial adviser, from whom she also got some brief advice, and certificates were obtained to this effect, didn't understand there to be this parallel arrangement, or side deal if you like, that the first defendant had decided to make with Mr Dowdle."

[45] On a number of occasions during the trial, I observed that the issues that I would be deciding would be those identified in the pleadings. When Mr Peden of counsel for the defendants started cross-examining Mrs Dowdle on whether some of the advances under the loan had been paid to her, I interrupted on the basis that the cross-examination did not appear to be relevant (at Transcript 2-7). Mr Peden responded that the questioning was responding to the evidence of the witness that she was "a volunteer in some sense" and Mr Peden made the point (at Transcript 2-8):

> "Quite, but the defence, as we understand it put forward, is an Amadio/Garcia type defence or at least some elements of those causes of actions have been pleaded and one aspect of that is that the guarantor is a volunteer or whether or not she in fact received moneys from the transaction."

[46] Mr Roney then supported Mr Peden's pursuing his cross-examination, on the basis that it was part of Mrs Dowdle's case that she did not receive any of the moneys which were the subject of the advance and that was implicit in the proposition in paragraph 3 of the statement of claim where it was alleged that she signed a guarantee and mortgage, so that the loan could be made to Mr Dowdle (at Transcript 2-10). Mr Peden pursued his cross-examination that endeavoured to show that some of the advances by the first defendant were paid to Mrs Dowdle's account.

[47] During the address of Mr Peden, I suggested that the misleading and deceptive conduct on the first defendant's part may be not disabusing Mrs Dowdle of the structure of the transaction (as advised to her in the letter of 19 February 2003), or not informing her that it had changed, as it was apparent from Mrs Dowdle's evidence that the impact of the advice that she got from Mr Nunan was affected by the framework in which she was operating which was that she was the recipient of a loan of $50,000. Mr Peden's response was that was not the case pleaded against the defendants.

[48] As can be seen from the comparison with the opening of Mrs Dowdle's case, my formulation of what I saw was the issue reflected how the case was opened in respect of the failure of the first defendant to advise her that the transaction proposed in the letter dated 19 February 2003 was not proceeding and it also reflected Mrs Dowdle's evidence. No objection was taken on behalf of the defendants to the case as opened and the defendants endeavoured to meet the case of unconscionable conduct based on *Garcia* and *Amadio*. Because of Mr Peden's submission that the ultimate case of Mrs Dowdle did not fall within the pleaded case, counsel for Mrs Dowdle during submissions sought leave to file a further amended statement of claim (exhibit 34) to meet the criticism made by the defendants' counsel during submissions, but also made the point that the defendants had participated in allowing Mrs Dowdle's ultimate case to be fully ventilated, taking the opportunities to cross-examine on all the issues and adducing evidence from the second defendant on the issues relevant to Mrs Dowdle's ultimate case. Mr Roney relies on the approach in *Vale v Sutherland* (2009) 237 CLR 638 at [41] that where a case is conducted on an issue that is not clearly raised on the pleadings, the case is determined on the evidence and not the pleadings. A similar approach was taken in *Holdway v Arcuri Lawyers (A Firm)* [2008] QCA 218 at [5] and [63]-[65].

[49] I have decided that it is unnecessary for the plaintiff to make the proposed amendments, either on the basis that the sixth further amended statement of claim is adequate for disclosing the case that was supported by Mrs Dowdle's evidence or, if it were not, the defendants have not been taken by surprise by Mrs Dowdle's evidence of reliance on the letter of offer dated 19 February 2003 and responded to the case that was supported by Mrs Dowdle's evidence. The references in these reasons to the statement of claim are therefore to the sixth further amended statement of claim.

[50] In paragraph 2(a) of the statement of claim Mrs Dowdle alleges that she was the lawful wife of Mr Dowdle. She alleges in paragraph 2(g) of the statement of claim that she had no knowledge of the day to day running or operation of Outback or any of the companies with which Mr Dowdle was involved. The letter of offer dated 19 February 2003 and its acceptance by Mrs Dowdle are the subject of paragraphs 2F and 2G of the statement of claim. The allegation is then made in paragraph 2H of the statement of claim about the letter of offer being sent by the first defendant on 21 February 2003 to Mr Dowdle, but there is no allegation that letter (or its effect) was communicated to Mrs Dowdle prior to her signing the guarantee and mortgage.

[51] Paragraph 3 of the statement of claim alleges:

> "3. The Plaintiff executed the guarantee and mortgage contract in circumstances which she was requested to do so by the Defendants and Dowdle in order to support a loan of up to $50,000.00 that the First defendant was contemporaneously making to Dowdle and which was made to Dowdle by the First Defendant pursuant to the terms of a Loan Agreement, in circumstances in which she:
>
> (a) was not aware of the financial position of Outback, or of any of the other companies referred to in paragraph 5(a) hereof;
>
> (b) was not made aware either by the Defendants or Dowdle prior to or at the time of execution of the aforesaid documents as set out in paragraph 2(f) hereof:-
>
> (i) (save for the loan of a principal sum of up to $50,000.00 then being made to Dowdle) of any liability or potential liability Dowdle had or may have made to the First Defendant as guarantor of the obligations of Outback or the other companies referred to in paragraph 5(a) hereof;
>
> (ii) the financial position of Outback or the other companies referred to in paragraph 5(a) hereof;
>
> (iii) the solvency of Outback or the other companies referred to in paragraph 5(a) hereof;
>
> (iv) Dowdle's financial position, particularly with respect to his relationship with the First Defendant;
>
> (v) the fact that the change of the First Defendant's proposal from a loan to the Plaintiff to a loan to Dowdle secured by a guarantee and mortgage from the Plaintiff meant that the First Defendant considered the Plaintiff was guaranteeing all the obligations to the First Defendant of Dowdle, Outback and the other companies referred to in paragraph 5(a) hereof;

(c) proceeded on the erroneous assumption that, at the time she executed the guarantee and mortgage contract, the only relevant liability or potential liability of Dowdle to the First Defendant was the principal sum of up to $50,000.00 together with interest and costs referred to in paragraph 3(a) hereof ("the erroneous assumption") and that there existed no other financial agreement between Dowdle and the First Defendant which did or could raise a liability on the part of the Plaintiff under the guarantee and mortgage contract;

(d) would not have entered the guarantee and mortgage contract had she been aware of the matters pleaded in paragraphs 5, 6(f) and 6(g) hereof."

[52] I will use the expression "the erroneous assumption" to refer to the erroneous assumption that Mrs Dowdle pleads in paragraph 3(c) of the statement of claim that she made and acted on when she signed the guarantee and the mortgage. The erroneous assumption does not mirror exactly Mrs Dowdle's evidence that she thought she was borrowing the sum of $50,000 and the guarantee and mortgage related to that transaction. The effect of Mrs Dowdle's evidence is that she was proceeding on the basis that the only relevant liability was the loan to her of $50,000 and there was therefore no other financial agreement between Mr Dowdle and the first defendant which could raise a liability on her part under the guarantee and mortgage. That means that the mistaken belief that Mrs Dowdle had about the transaction at the time she signed the guarantee and mortgage is partly mirrored by the erroneous assumption.

[53] Mrs Dowdle alleges in paragraph 4(b) of the statement of claim that there was an obligation on the part of the first defendant, prior to the execution of the guarantee and the mortgage by Mrs Dowdle, to correct the erroneous assumption. It is then alleged in paragraph 4(c) that the first defendant in breach of such obligation did not disclose the facts referred to in paragraphs 5, 6(f) and 6(g) of the statement of claim to Mrs Dowdle or her advisers. (Disclosing those facts would have had the effect of alerting Mrs Dowdle to the fact that the letter of 19 February 2003 did not govern the transaction.) Mrs Dowdle alleges in paragraph 4(d) of the statement of claim that the defendants were, or should have been, aware that Mrs Dowdle would be unable to assess, and her legal and financial advisers would be unable to advise her properly, on the risks to Mrs Dowdle in providing the guarantee and mortgage to the first defendant.

[54] The allegation in paragraph 5 of the statement of claim is that Mr Dowdle had guaranteed the repayment of a loan to the first defendant by Outback (and other companies of which he was a director) and, as at 24 February 2003, was liable to the first defendant in respect of substantial sums pursuant to the guarantee. Paragraph 6(f) contains the allegation about the notices of demand served on Mr Dowdle by the first defendant (to the knowledge of the second defendant) in May 2001 in respect of the debt of $311,751.06. Mrs Dowdle alleges in paragraph 6(g) of the statement of claim that the first defendant (to the knowledge of the second defendant) had not received payment from Mr Dowdle or any of his companies in response to the notices of demand

[55] Paragraph 7 of the statement of claim alleges:

"The Plaintiff:-

(a) did not at any relevant time know of Dowdle's indebtedness and potential indebtedness to the First defendant under and pursuant to the terms of the any guarantee between Dowdle and the First Defendant;
(aa) did not at any relevant time know of the matters referred to in paragraphs 6(f) and 6(g);
(b) believed she was securing Dowdle's known obligation with respet to a principal sum of up to $50,000.00 together with interest and costs to the First Defendant;
(c) executed the documents on the understanding that the indebtedness of Dowdle to the First Defendant would be discharged;
    (i) upon repayment by Dowdle to the First Defendant of the principal sum of up to $50,000.00 together with interest and costs; or
    (ii) should Dowdle default upon repayment by the Plaintiff of the principal sum of $50,000.00 together with interest and costs."

[56] The allegations in paragraph 7 of the statement of claim do not apply easily to Mrs Dowdle's case based on her belief that the letter of offer of 19 February 2003 governed the transaction for which she signed the guarantee and mortgage. Subparagraphs (b) and (c) have to be read as referring to her belief that she was securing her obligation to the first defendant for the principal sum of up to $50,000 together with interest and costs (or Mr Dowdle's obligation via the loan to her) and that the obligation would be discharged upon payment by Mr Dowdle to the first defendant (via Mrs Dowdle) of the sum of up to $50,000 together with interest and costs.

[57] In response to paragraph 3 of the statement of claim, the defendants allege that Mrs Dowdle had been informed by Mr Dowdle that the first defendant had loaned moneys to Outback and that she was aware that the loan was guaranteed by Mr Dowdle personally. The defendants admit that they did not make Mrs Dowdle aware of the matters set out in paragraph 3(b)(v) of the statement of claim. The defendants allege that Mrs Dowdle entered into the transactions on 24 February 2003 with full knowledge of her potential liability after obtaining the independent legal advice and independent financial advice about the guarantee and the mortgage. The defendants deny there was any such obligation of disclosure, as alleged in paragraph 4(b) of the statement of claim, either on the basis of the facts pleaded by Mrs Dowdle or otherwise as a matter of law.

[58] Mr Peden did attempt to cross-examine Mrs Dowdle on the difference between her evidence and her case as pleaded, but Mr Roney objected to Mr Peden's construction of the pleadings, I distracted Mr Peden from his proposed cross-examination, and the matter of the content and meaning of the statement of claim and paragraph 3(b)(v), in particular, was not pursued (at Transcript 1-67 to 1-68):

> "MR PEDEN: … Mrs Dowdle, the point I am suggesting to you is that you well knew on the 24th of February - by the 24th of February 2003 that the loan that was being made by Pay Now was being made to your husband, Mr Paul Dowdle, with you to be a guarantor of that loan?-- No.

Understand that?-- I understand what you're saying, but what I signed, that acceptance of offer, on the 19th of February, where I was a borrower, Paul was a guarantor and as security, that's what I thought I was executing on the 24th of February.

And, you see, Mrs Dowdle, what I'm suggesting to you is that that is a recent fabrication on your part because what you have just said now and what you gave evidence about this morning is not the case that's been pleaded on your behalf, and-----

HER HONOUR: Well, I think that if you want to ask that question or put that proposition you should put it in a way that is more comprehensible to the witness.

MR PEDEN: I will rephrase it. I am suggesting to you, Mrs Dowdle, that-----

HER HONOUR: If you're going to suggest to the witness she is lying, suggest that. Don't use the word 'fabrication'. Be up front. Say to the witness that she is lying.

MR PEDEN: Thank you, your Honour. Mrs Dowdle, I suggest to you that the story that you have told today in the witness-box both in evidence-in-chief and just now about you not understanding that the loan was to your husband with you to be guarantor is a lie?-- I dispute that. It's not a lie. I - what I signed and what I thought I was signing as occurring is me being the borrower, Paul the guarantor, and the security the second mortgage.

And I suggest to you further that you have either made up the story or it has been suggested to you by somebody else very recently in the course of your final preparation for this trial that that would be a better case for you to mount in this Court rather than the truth which is that you did know that Mr Dowdle was to be the borrower and you to be the guarantor?-- I didn't see that 21st of February letter before the 24th of February.

MR RONEY: And, by the way, I might object. The matter is expressly pleaded in paragraph 4 - sorry, 3(b)(v) which refers to the change and to her absence of knowledge of that matter. I am not sure what it is my learned friend is referring to in putting to the witness it is a recent invention but-----

HER HONOUR: Well, the question about the pleadings ultimately wasn't put.

MR RONEY: No.

HER HONOUR: So you don't need to take the point.

MR RONEY: I didn't want the witness to think though that she had accepted or someone had accepted that that was true and she should be considering the next question on the basis of a false assumption.

MR PEDEN: Well, Mrs Dowdle, you maintain the position therefore that you have always had the understanding from the 24 February 2003 transaction that you were not in fact guaranteeing Mrs - Mr Paul Dowdle's obligation but rather in fact you were the principal debtor. Do you understand what debtor means?-- The borrower.

Yes?-- Is that right? Yes. Sorry.

Perhaps I will repeat the question. Do you maintain that the true position is that you never understood at the time of the 24 February 2003 transaction that you were not in fact the - sorry, that - I will rephrase it.

HER HONOUR: Why don't you start again?

MR PEDEN: Yes.

HER HONOUR: And why don't you put it simply?

MR PEDEN: You see, Mrs Dowdle, the true position is that throughout these proceedings you have made a series of statements in affidavits accepting that Mr Paul Dowdle was the borrower and you were the guarantor; you'd agree with me about that?-- On the 24th of February when I went into Mr Nunan's office and he showed me a mortgage and a guarantee, I - because I have got no experience with guarantees, I thought that was something linked with the mortgage to do with the security for the 50,000. At no stage did I think I was a guarantor because on the 19th of February, the Wednesday before that Monday, what I'd signed was Paul as the guarantor and myself as the borrower."

[59] The allegation in paragraph 3(b)(v) of the statement of claim can be extracted as:

"The plaintiff executed the guarantee and mortgage contract … in circumstances in which she was not made aware either by the Defendants or Dowdle prior to or at the time of execution of the aforesaid documents … the fact that the change of the First Defendant's proposal from a loan to the Plaintiff to a loan to Dowdle secured by a guarantee and mortgage from the Plaintiff meant that the First Defendant considered the Plaintiff was guaranteeing all the obligations to the First Defendant of Dowdle, Outback and the other companies referred to in paragraph 5(a) hereof."

[60] It is difficult to decipher the pleading, as it does not make sense for Mrs Dowdle to allege not being made aware of what the first defendant's view of the transaction had become. Literally the allegation in paragraph 3(b)(v) can mean that Mrs Dowdle was not made aware of the consequences of the change of the structure of the loan or that she was not made aware of the change of structure of the loan and its consequences. The admission in paragraph 3(d)A of the defence that the

defendants "admit not making the Plaintiff aware of the matters set out in paragraph 3(b)(v)" is also equivocal on its own terms. What are the matters that are the subject of the allegation in paragraph 3(b)(v)? Ultimately, the second defendant conceded in cross-examination that he did not ensure that Mrs Dowdle got a copy of the letter of offer of 21 February 2003 (at Transcript 4-32 and 4-36). The defendants' case set out in paragraph 3(d) of the defence was that Mrs Dowdle had been informed by Mr Dowdle that the first defendant had loaned moneys to Outback and that she became aware that the loan was guaranteed by Mr Dowdle personally. In view of the manner in which the case was conducted at the trial, I will treat paragraph 3(b)(v) as alleging that Mrs Dowdle was not made aware of the facility letter to Mr Dowdle of 21 February 2003 and Mr Dowdle's obligations to the first defendant as a director of the companies referred to in paragraph 5(a) of the statement of claim.

Credit of witnesses

[61] There are credit issues in relation to the evidence of Mrs Dowdle, Mr Dowdle and the second defendant.

[62] As the trial of this proceeding took place almost seven years after its commencement, it is not surprising the parties and their lawyers were reliant on documentary evidence to assist in the recollections by the various witnesses of relevant events. It is unfortunate that despite the matter taking so long to come to trial, Mrs Dowdle and her lawyers were taken by surprise by a document that was produced during the cross-examination of Mr Dowdle. It was the letter of offer by the first defendant to Mr Dowdle dated 21 February 2003 that was accepted by Mr Dowdle signing and dating the acceptance on the letter of offer and sending it by facsimile to the first defendant's solicitors on 21 February 2003 (exhibit 15). A copy of that letter that did not include the acceptance dated 21 February 2003 was in the trial bundle, as was another copy of the letter that was accepted by Mr Dowdle on 24 February 2003. There was no disclosure of exhibit 15 by the first defendant that separately identified that document for what it actually was. It was only the acceptance by Mr Dowdle on 24 February 2003 of the letter of offer dated 21 February 2003 that was pleaded in paragraph 2H(aa) of the defence. Mrs Dowdle's preparation for trial (and that of her lawyers) was therefore undertaken in ignorance of the existence of exhibit 15.

[63] Mr Peden made submissions about the general unreliability of Mr and Mrs Dowdle, treating them indiscriminately on the issue of credit. These submissions take no account that in February 2003 they were separated to some degree in relation to their domestic and financial affairs. The respective roles and circumstances of Mrs Dowdle and Mr Dowdle in the events that resulted in the signing of documents by both of them on 24 February 2003 were different. The credit of each of these witnesses must be assessed separately.

[64] Mr Dowdle had omitted to mention in his evidence about his separate trip to the office of Cleary & Lee and acceptance of the letter of offer on 21 February 2003 until exhibit 15 was produced in cross-examination. His failure to recall that he had been telephoned by the second defendant on 20 February 2003, his failure to recall that he received and signed the acceptance on the letter on 21 February 2003, and his assertion (which I do not accept in view of what occurred on 20 and 21 February 2003) that he did not pick up "the switch on the guarantee and the borrower" until he was driving to Brisbane with the loan agreement on 24 February 2003 reflect

adversely on his credit. It is also relevant to evaluating Mr Dowdle's evidence that in February 2003 he was desperate to obtain further funds to pursue his disputes with Atlantic and to ensure that Tucker & Cowen continued to act on his behalf. I therefore have looked for supporting evidence, before accepting the evidence of Mr Dowdle.

[65] I have no such reservation about the evidence in general of Mrs Dowdle. Despite rigorous cross-examination, Mrs Dowdle's evidence remained mostly consistent and was credible in light of her circumstances after relocating to Toowoomba in 1998. I identify a couple of instances where I have not accepted Mrs Dowdle's evidence for reasons that relate to those particular pieces of evidence. The rejection of a small proportion of Mrs Dowdle's evidence has not persuaded me against the acceptance of the balance of her evidence.

[66] The defendants submit that statements made by Mrs Dowdle in affidavits she made for the purpose of interlocutory applications in this proceeding contradict her evidence in this trial, and it follows that she is lying when she said that at the time she signed the documents, she thought they related to a loan to her.

[67] Those affidavits have to be considered in the context that Mr Nunan who was the solicitor acting on behalf of the plaintiff initially in this proceeding had knowledge of the true nature of the documents signed by Mrs Dowdle on 24 February 2003 from his role in advising her prior to the execution of them, Mr Dowdle was involved in giving instructions to Mr Nunan on Mrs Dowdle's behalf (Transcript 2-6), and Mrs Dowdle was originally seeking a declaration based on the construction of the relevant documents to limit her liability to the principal sum of $50,000.

[68] The defendants rely on paragraph 25(a) of Mrs Dowdle's affidavit filed on 12 May 2006 (exhibit 7) which stated:

> "On 21 February 2003 I executed a guarantee in favour of PayNow to secure my husband's debt to PayNow in the sum of $50,000. This was to enable my husband to acquire financial accommodation for his legal expenses in respect of his ongoing litigation with Atlantic 3. Now produced and shown to me and marked with the letters 'DD3' is a true copy of a letter dated 21 February 2003 setting out the correspondence that had been forwarded to my husband and shown to me with respect to this loan that has been secured over my property."

[69] Paragraph 25(a) in that affidavit did not deal specifically with when Mrs Dowdle saw the letter of 21 February 2003.

[70] The defendants rely on paragraphs 16 and 17 of Mrs Dowdle's affidavit filed on 3 June 2005 (exhibit 8) which stated:

> "16. After Paul explained all the circumstances of the liquidation to me I agreed to request to provide security for the loan from the respondent in the sum of $50,000.00.
>
> 17. On the understanding that Paul would pay back the loan to me, I agreed to guarantee that loan which I believed would be repaid from my husband's business ventures promptly."

[71] The language used in paragraph 17 of this affidavit is equivocal. It suggests that the loan was being made to Mrs Dowdle, as she referred to Mr Dowdle paying back the loan to her from his business ventures.

[72] The defendants also rely on paragraph 5 of Mrs Dowdle's affidavit filed on 6 January 2006 (exhibit 9). In the opening sentences of this paragraph, Mrs Dowdle referred to the facts and circumstances of the dispute between the first defendant and her as set out in her affidavit filed on 3 June 2005, Mr Dowdle's affidavit filed on 3 June 2005 (exhibit 14) and an affidavit of the second defendant filed in the proceedings and purports to briefly summarise the facts and circumstances as follows:

> "(a) Sometime prior to my entry into the associated security documentation, my husband Paul Dowdle was involved in a number of companies, one of which was a company involved in the processing of game meat. This company was referred to as Outback Cuisine (referred to as 'Outback') and required a substantial injection of capital for it to be a going and worthwhile concern;
>
> (b) My husband became involved in some litigation after the company was liquidated and accordingly he obtained some money to facilitate the ongoing payment of his legal fees to put into effect the litigation against diverse organisation who he said were responsible for the demise of the company, and his own personal demise, at that time.
>
> (c) Pay Now, the respondent herein, facilitated payment to him of a sum of $50,000 to effect that litigation.
>
> (d) I was aware my husband had dealings with Donald Cunnington, but I did not know the nature or extent of these or any details relating to these,
>
> (e) When my husband approached me for the purpose of execution of the mortgage documentation and guarantee documentation to secure his position insofar as the advance by Pay Now, I accepted that the guarantee and security that I gave operated to protect Pay Now insofar as my husband's liability was concerned for no more than $50,000."

[73] All paragraph 5 of this affidavit purports to do is summarise the facts and circumstances taken from identified affidavits.

[74] I therefore do not consider the paragraphs in Mr Dowdle's affidavits (exhibits 7, 8 and 9) which are relied on by the defendants to support their submission that Mrs Dowdle's evidence when she was signing documents on 24 February 2003 related to a loan to herself was a lie have the impact relied upon by the defendants for challenging Mrs Dowdle's evidence in the trial.

[75] The defendants assert that it is implicit in the allegation in paragraph 3 of the statement of claim that Mrs Dowdle knew that there was a change in the structure of the loan to substitute Mr Dowdle for her as the borrower and for Mrs Dowdle to provide a guarantee, in addition to the mortgage of the Westbrook property, to secure the loan from the first defendant to Mr Dowdle and the pleading of the erroneous assumption also accepts that. The defendants therefore submit that paragraph 3 of the statement of claim contradicts Mrs Dowdle's evidence that she

thought the guarantee and the mortgage she signed related to the letter of offer dated 19 February 2003. Where there appears to be a discrepancy between a plaintiff's evidence and the allegations made in the statement of claim, it is not the mere existence of the discrepancy that affects the credit of the witness, but it is the discrepancy in the light of the witness' explanation for the discrepancy. What Mrs Dowdle understood to be the transaction at the time she signed the guarantee and the mortgage was a matter on which she was cross-examined extensively. Her evidence was firm that she was relying on the letter of offer dated 19 February 2003 which she had accepted.

[76] The pleading does focus on Mrs Dowdle's ignorance of Mr Dowdle's personal indebtedness to the first defendant and her exposure to liability for that indebtedness under the guarantee (which is a consequence of the change in the structure of the transaction), rather than focusing on Mrs Dowdle's ignorance of the change of the structure of the loan when she signed the documents. Again the involvement of Mr Dowdle in giving the instructions to Mr Nunan for the proceeding and Mr Nunan's own perspective from his role on 24 February 2003 cannot be overlooked in the skewed focus of the statement of claim when compared to Mrs Dowdle's evidence. Mrs Dowdle accepts as a fact that she signed the guarantee and mortgage on 24 February 2003. It is a separate issue as to her understanding of the transaction at the time that she signed the documents. I am not persuaded in the circumstances that the deficiencies in pleading her case in the statement of claim affect her credit.

[77] Mr Peden also submitted that Mrs Dowdle's evidence that she did not realise at the time she signed the guarantee and the mortgage that the loan was in fact being made to Mr Dowdle with her as the guarantor was contradicted by her evidence (at Transcript 1-36), where she was asked in chief whether Mr Dowdle told her anything about the reason for going to the office of Cleary & Lee on 24 February 2003 and she responded:

> "I knew we were going to sign the documents for the security for the 50,000, the mortgage for the 50,000, that Don had – was lending him."

[78] That answer has to be considered in the light of the rest of Mrs Dowdle's evidence. Whether the loan was being made to Mrs Dowdle or Mr Dowdle, the purpose of the loan was to provide funds for Mr Dowdle. I took that answer to refer to the transaction as described otherwise consistently by Mrs Dowdle that the funds were being provided by the first defendant to Mr Dowdle, via her.

[79] The second defendant was an unimpressive witness. His evidence was self-serving and he used every opportunity to attempt to justify his role in the events and the position of the first defendant. Without ever having a direct communication with Mrs Dowdle on the issue, or about her knowledge, of Mr Dowdle's guarantee or the details of the financial support given by the first defendant to Outback and Lynlock, the second defendant continually asserted during his evidence that he believed that Mrs Dowdle "was always aware" of Mr Dowdle's indebtedness. For example, the second defendant stated in relation to the demand that had been issued to Mr Dowdle in 2001 for $311,751.06 that "all of this had been delivered to the household in many documents" (at Transcript 4-24). The second defendant explained that loan statements addressed to Mr Dowdle went frequently to the Westbrook property. It was simply conjecture on the second defendant's part that

sending statements to Mr Dowdle resulted in the indebtedness of Mr Dowdle being communicated to Mrs Dowdle.

[80] Prior to the first defendant entering into the facility with Outback and Lynlock in October 2000, the second defendant met Mrs Dowdle in Toowoomba with Mr Dowdle and his friend Mr Devine. The second defendant asserted (at Transcript 3-88) that on that occasion he inquired whether Mrs Dowdle would be working in the business and that she responded that she would be working in the business undertaking the day to day accounting and bookkeeping. He said that he quizzed her about the nature of the business at the Bourke abattoir and whether she supported what Mr Dowdle was doing and that her response was "I've always supported Paul in everything he did." The detail of this conversation had not been put to Mrs Dowdle or Mr Dowdle in cross-examination. Apart from the fact that it was a meeting that was over two years prior to the signing of the guarantee and the mortgage, it was unconvincing in its terms and was endeavouring to suggest a closeness of involvement by Mrs Dowdle in Mr Dowdle's business affairs after she relocated to Toowoomba that was unsupported by other evidence.

[81] Another respect in which the second defendant attempted to justify the taking of the guarantee and mortgage from Mrs Dowdle was his assertion that Mr Dowdle had informed him that he had lent Mrs Dowdle money to buy the Westbrook property and therefore claimed a proprietary interest, even though the Westbrook property was registered in Mrs Dowdle's name (at Transcript 3-93). This was not a matter on which Mr Dowdle was cross-examined. The second defendant's statement (at Transcript 5-10) that he therefore believed that Mr Dowdle was able to speak for his wife and himself in relation to this security because of his proprietary interest was surprising and unconvincing in view of the terms of the letter of offer to Mrs Dowdle dated 19 February 2003 and the reason otherwise given for changing the structure of the loan after the first defendant obtained legal advice on 20 February 2003.

[82] Despite the second defendant's evidence-in-chief that he telephoned Mr Dowdle on 20 February 2003 to advise that he was "pulling" the facility from 19 February 2003, but would continue to lend to Mr Dowdle, and that he did not make any attempt to contact Mrs Dowdle at that time (Transcript 3-93), he then asserted in cross-examination (at Transcript 4-33 and 4-35) that he asked Mr Dowdle to tell Mrs Dowdle that the first defendant was not going ahead with the offer to her in the letter of 19 February 2003. It had not been suggested to Mr Dowdle in cross-examination that he had been asked by the second defendant to communicate to Mrs Dowdle about the change in the borrower. This evidence of the second defendant appeared to be an attempt to show that he had instigated some sort of notice to Mrs Dowdle that the letter of offer of 19 February 2003 was no longer operative. The second defendant's evidence of his request to Mr Dowdle was not supported by any other evidence whatsoever and, in the circumstances, should be rejected. That aspect of the second defendant's evidence was not pressed by counsel for the defendants (at Transcript 5-33).

[83] The findings that follow about what Mrs Dowdle knew when she signed the guarantee and the mortgage reflect the evidence of Mrs Dowdle which I largely accept.

Findings about what Mrs Dowdle knew when she signed the guarantee and the mortgage

[84] Mrs Dowdle did not know of Mr Dowdle's prior existing personal indebtedness to the first defendant in February 2003. Mrs Dowdle was not privy to the details of Mr Dowdle's business dealings and financial position, at least from the time she moved to Toowoomba. She had prior to February 2003 been informed by Mr Dowdle that Outback had been liquidated by Atlantic, he was in litigation with Atlantic over that liquidation and the second defendant or his companies were assisting Mr Dowdle (and Lynlock) in his dispute with Atlantic. Mrs Dowdle did not know the detail or extent of the second defendant's assistance or that Mr Dowdle was personally indebted to the first defendant.

[85] In February 2003 Mrs Dowdle was prepared to assist Mr Dowdle to obtain funds for his litigation by allowing the Westbrook property to be security for a loan from the first defendant in the sum of $50,000. She told Mr Dowdle that she would give a second mortgage over the Westbrook property, "as long as the children don't lose the roof over their head." Her willingness to do so is also reflected in her countersigning the letter of offer from the first defendant dated 19 February 2003 in relation to an advance to her of $50,000 secured by second mortgage over the Westbrook property with a guarantee from Mr Dowdle. The offer that was made to her in that letter had the effect of limiting her liability to the first defendant to the amount of the advance proposed to be made to her to enable her to provide Mr Dowdle with the funds he was urgently seeking for his litigation.

[86] Mrs Dowdle was not informed by Mr Dowdle (at the time when these events occurred) of the telephone call he had from the second defendant on 20 February 2003, the offer made to him by the first defendant in the letter of 21 February 2003, or that the first defendant had changed the structure of and security for the loan from that advised to her in the letter of 19 February 2003. Mrs Dowdle did not see the first defendant's letter of 21 February 2003 addressed to Mr Dowdle on either 21 or 24 February 2003.

[87] Mr Nunan spent 25 minutes perusing the guarantee and the mortgage, before he attended on Mrs Dowdle. Mr Nunan's handwritten notes of his interview with Mrs Dowdle recorded:

> "Derryn provided me with the following:
> 1. Mortgage
> 2. Guarantee
> 3. Legal Advice Certificate
>
> I advised her that as she did not provide me with a copy of the Loan Agreement or Letter of Offer, I was unable to advise her of the details of the proposed loan to her husband and the terms of that loan.
>
> She advised that Pay Now was lending her husband $50,000.00 on security over her house at … Westbrook.
>
> I advised her that I couldn't give her any legal advice about the Loan Agreement, but only the Mortgage and Guarantee. She was happy with this and wanted to proceed.

> I pointed out to her that the Guarantee and the Mortgage were not limited to the $50,000.00, and that the Guarantee and Mortgage was for all money owing to Pay Now by her husband, either now or in the future. She advised that as far as she knew, the only amount owing by her husband to Pay Now is the amount of this loan.
>
> I pointed out to her Clause 2.1(a)(i) of the Guarantee and the definition of 'moneys secured' and Clause 2 of the Mortgage. She said that she understood the meaning of these clauses and I then explained the general nature and effect of the documents and all the other matters referred to in the Independent Solicitor's Certificate.
>
> She advised that she was satisfied with the explanation and was happy to sign the documents of her own free will.
>
> She signed the Guarantee and Mortgage in my presence and I witnessed the documents.
>
> Derryn took the documents with her as she was going to get the Financial Advice Certificate completed and return the documents to Pay Now's solicitors herself."

[88] Mr Nunan's notes are comprehensive and relatively contemporaneous with his interview with Mrs Dowdle. When giving evidence some nine years later, Mr Nunan frankly acknowledged that, apart from recalling that he talked to Mrs Dowdle in the office boardroom and what is recorded in his diary note, he cannot amplify the terms of the conversation between them. At the time that Mr Nunan had this interview with Mrs Dowdle, it would not have been in the contemplation of either of them that the circumstances in which Mrs Dowdle signed the guarantee and the mortgage would be scrutinised minutely, as it has been in this litigation. Mr Nunan was satisfied that his diary note accurately recorded the discussion that occurred in the interview. I have no reservation about accepting Mr Nunan's record of the interview as accurate, recording what he conveyed to Mrs Dowdle and his interpretation of what Mrs Dowdle advised to him.

[89] There is no reference anywhere in the guarantee or the mortgage to the loan amount of $50,000, consistent with the advice given by Mr Nunan to the effect that the guarantee and the mortgage were not limited to $50,000. Clause 2.1(a)(i) of the guarantee sets out that Mrs Dowdle guaranteed to the first defendant payment by Mr Dowdle "of all moneys the Borrower owes the Beneficiary at any time" including all amounts that the first defendant had paid to or on behalf of Mr Dowdle or at the express or implied request of Mr Dowdle. The definition of "Moneys Secured" in the mortgage is "all the moneys and interest referred to in clause 2 and all other moneys and interest which may be or become owing by the Mortgagor to the Mortgagee under this Mortgage." Under clause 2 of the mortgage, Mrs Dowdle agreed to pay to the first defendant on demand all moneys and interest "now or in the future" to become owing or payable by Mrs Dowdle to the first defendant by virtue of the guarantee. The certificate signed by Mr Nunan set out the explanations and advices given by him, including that Mrs Dowdle should carefully consider the financial risks involved in giving the guarantee and, in particular, that she should make inquiries about the possible extent of any default which she may have to meet and the adequacy of any security given by Mr Dowdle or others and the likely level

of her exposure. Mr Nunan's practice was to paraphrase the terms of the advice and explanations he gave, rather than reading out verbatim the wording on the certificate. Mrs Dowdle also signed the certificate to certify that she had been given a copy of it and had read it.

[90] The independent financial certificate records that the explanations and advice were given by the certifying accountant in the absence of the borrower and before the guarantor signed any of the documents. That certificate was incorrect in relation to the execution of the documents, as Mrs Dowdle had signed them in Mr Nunan's presence, before she attended on the accountant. The certificate referred to the advice given by the accountant that the guarantor should make inquiries about specified matters, including the risk of default by the borrower and the possible extent of any default which the guarantor may have to meet.

[91] It would have been apparent to Mr Nunan from his perusal of the guarantee and the mortgage that the borrower was Mr Dowdle. No doubt when he questioned Mrs Dowdle about the amount of the loan, the amount of $50,000 was mentioned by Mrs Dowdle (which was the figure that was foremost in her mind about the proposed transaction). Mrs Dowdle was adamant that her understanding that she was providing security over her Westbrook property to borrow $50,000 from the first defendant to give to Mr Dowdle to assist in his litigation with Atlantic was not altered by the advice given by Mr Nunan. I accept that she did not have much experience of guarantees and assumed that the guarantee was linked to the mortgage. It is possible to rationalise Mr Nunan's evidence and Mrs Dowdle's understanding on the basis that, as Mr Nunan gave the advice about the structure of the transaction which he has recorded in his diary note, Mrs Dowdle synthesised that advice to conform with her understanding of that transaction that was shaped by her reading of the letter of offer dated 19 February 2003 which she had accepted and understood as governing the transaction that she was entering into.

[92] When it comes to Mrs Dowdle's evidence, however, that she signed the documents after Mr Nunan assured her that they were security for only $50,000, I do not accept that Mr Nunan gave that assurance. That is inconsistent with Mr Nunan's view of the documents and the statement he expressly recorded in his diary note that the guarantee and the mortgage were not limited to the sum of $50,000. I accept Mrs Dowdle's evidence that she signed the documents affected by what she had read in the letter dated 19 February 2003 and believed that her liability was limited to the principal sum of $50,000, but she is mistaken about an assurance from Mr Nunan that the documents were security for only the sum of $50,000. Mrs Dowdle was willing, however, to grant a mortgage over the Westbrook property to secure a loan limited to $50,000 for the purpose of Mr Dowdle's litigation. She acknowledged that even if she had known that Mr Dowdle was indebted to the first defendant for more than $300,000, she would still have given the second mortgage over the Westbrook property to secure a loan of up to $50,000 (at Transcript 1-32).

Was the first defendant obliged to disclose to Mrs Dowdle the extent of Mr Dowdle's existing personal indebtedness to the first defendant?

[93] The first defendant relies on *Goodwin v National Bank of Australasia Ltd* (1968) 117 CLR 173 for the proposition that a lender is under no obligation to an intending surety of a customer in respect of the customer's present and future indebtedness to the lender about the existence and extent of liability of the customer by reason of

existing suretyship of that customer in respect of the debts of a third person. The appellant in that case executed a mortgage to secure the repayment to the bank of the indebtedness to it of the appellant's son and daughter-in-law. A week before the execution of the mortgage, the appellant's son had become surety to the bank of the account of a third party. The appellant executed the mortgage unaware of the suretyship obligations of her son to the bank. The terms of the mortgage, however, expressly contemplated that it secured the debts owing to the bank by the appellant's son and daughter-in-law either as principal or surety. Barwick CJ (with whom the other members of the court agreed) stated at 175:

> "The transaction between the appellant and the respondent was not of a class calling for the fullest disclosure – it was not uberrimae fidei. But it is settled law that a bank in the position which the respondent occupied in relation to the appellant is only bound to disclose to the intending surety anything which has taken place between the bank and the principal debtor 'which was not naturally to be expected', or as it was put by Pollock M.R., in *Lloyd's Bank Ltd.* v *Harrison* cited in *Paget's Law of Banking*, 7th ed. (1966), p. 583 'the necessity for disclosure only goes to the extent of requiring it where there are some unusual features in the particular case relating to the particular account which is to be guaranteed.'
>
> …
>
> The question then is whether in entering into that transaction the respondent was bound to disclose the existence of the current contract of guarantee signed by the appellant's son. Could it be said that the existence of such a contract was not something which a person in the position of the appellant, in relation to the transaction which I have outlined, would not naturally expect? In my opinion, that cannot be said. Just as the fact that the principal debtor is already indebted to the bank need not be volunteered by a bank to an intending surety of the account, so it seems to me that the present existence of a guarantee by the principal debtor where the intended guarantee includes the indebtedness of the principal debtor arising out of any guarantee to the bank need not be volunteered by the bank to the intending surety." *(footnote omitted)*

[94] *Goodwin* remains authoritative, but its application may be affected when the circumstances in which the guarantee is given to the creditor make it unconscionable (or misleading or deceptive) for the creditor to rely on the fact that there is generally no duty on the creditor to disclose all facts relating to its dealings with the principal debtor or affecting the debtor's credit when the surety executes the guarantee. This is illustrated by *Amadio* where, despite recognition of the general approach in *Goodwin* (at 456 and 463), Mr and Mrs Amadio succeeded in having the mortgage (which contained a guarantee) they granted to the bank in respect of the overdraft of their son's company set aside.

[95] Mr and Mrs Amadio were elderly migrants with limited written English skills whose son asked them to mortgage their property in favour of the bank where his company's overdraft was in excess of its limit and required the bank cooperating with him selectively to dishonour cheques drawn on the account. The son asked his parents to give the guarantee for an amount of $50,000 for about six months. The bank manager went to Mr and Mrs Amadio's home to have them sign the mortgage.

Mr and Mrs Amadio did not read the document. The bank manager did not explain the mortgage, because he believed that the son had explained the transaction and the reasons for it. When Mr Amadio remarked that the mortgage was only for six months, the manager pointed out that there was no limitation of time, but Mr and Mrs Amadio still believed that the liability was limited to $50,000 for six months, as a result of what their son had told them. The bank, in fact, had arranged with the son that the overdraft limit of $270,000 was to be reduced by $50,000 in a week with a further reduction of $180,000 within a fortnight and with the entire overdraft cleared in a short time. The company was being given a temporary respite only while the bank improved its existing and inadequate security by obtaining the mortgage from Mr and Mrs Amadio.

[96] The majority of the High Court confirmed that Mr and Mrs Amadio's mortgage should be set aside unconditionally. Gibbs CJ (at 458) considered that there were unusual features relating to the account which was to be guaranteed, the bank was bound to disclose them, and the failure to do so was an express misrepresentation which induced Mr and Mrs Amadio to enter into the guarantee. The other members of the majority (Mason, Wilson and Deane JJ) found that Mr and Mrs Amadio were under a special disability when they executed the mortgage which was sufficiently evident to the bank to make it unfair or unconscientious for the bank to rely on the guarantee. After citing *Goodwin*, Mason J stated (at 463):

> "But the fact that a bank's duty to make disclosure to its intending surety, arising from the mere relationship between principal creditor and surety, is so limited has no bearing on the availability of equitable relief on the ground of unconscionable conduct."

[97] The question of the extent of disclosure required of the first defendant to Mrs Dowdle about Mr Dowdle's existing personal indebtedness to the first defendant should be addressed after considering whether the first defendant's conduct leading to Mrs Dowdle's execution of the guarantee and the mortgage was unconscionable or misleading or deceptive.

Was the first defendant's conduct unconscionable or misleading or deceptive?

[98] The focus of *Garcia* was whether the principles in *Yerkey v Jones* (1939) 63 CLR 649 were still good law. The appellant in *Garcia* and her husband executed a mortgage in favour of the bank which secured all moneys which they might owe the bank including moneys owing under future guarantees given by either of them. The appellant's husband conducted a number of businesses through companies which were indebted to the bank. The appellant signed four guarantees in favour of the bank in respect of the debts of those companies. Subsequently the appellant and her husband separated and divorced. The appellant commenced proceedings seeking declarations that the mortgage and the guarantees were of no force and effect and the bank sought to enforce one of the guarantees and claimed possession of the mortgaged property. The trial judge granted relief to the applicant on the basis of *Yerkey v Jones*, but the New South Wales Court of Appeal held that it was not bound to follow *Yerkey v Jones*. The High Court followed *Yerkey v Jones* and reinstated the orders of the trial judge.

[99] The joint judgment of Gaudron, McHugh, Gummow and Hayne JJ at [31] explained the application of *Yerkey v Jones*:

> "The principles applied in *Yerkey v Jones* do not depend upon the creditor having, at the time the guarantee is taken, notice of some unconscionable dealing between the husband as borrower and the wife as surety. *Yerkey v Jones* begins with the recognition that the surety is a volunteer: a person who obtained no financial benefit from the transaction, performance of the obligations of which she agreed to guarantee. It holds, in what we have called the first kind of case, that to enforce that voluntary transaction against her when in fact she did not bring a free will to its execution would be unconscionable. It holds further, in the second kind of case, that to enforce it against her if it later emerges that she did not understand the purport and effect of the transaction of suretyship would be unconscionable (even though she is a willing party to it) if the lender took no steps itself to explain its purport and effect to her or did not reasonably believe that its purport and effect had been explained to her by a competent, independent and disinterested stranger. And what makes it unconscionable to enforce it in the second kind of case is the combination of circumstances that: (a) in fact the surety did not understand the purport and effect of the transaction; (b) the transaction was voluntary (in the sense that the surety obtained no gain from the contract the performance of which was guaranteed); (c) the lender is to be taken to have understood that, as a wife, the surety may repose trust and confidence in her husband in matters of business and therefore to have understood that the husband may not fully and accurately explain the purport and effect of the transaction to his wife; and yet; (d) the lender did not itself take steps to explain the transaction to the wife or find out that a stranger had explained it to her."

[100] The judgment then explained that the analysis of the kind of case identified in *Yerkey v Jones* where there was a failure to explain adequately and accurately the suretyship transaction which the husband sought from the wife for the immediate economic benefit of the husband did not depend on any presumption of undue influence by the husband over the wife, and stated at [33]:

> "Rather, it depends upon the surety being a volunteer and mistaken about the purport and effect of the transaction, and the creditor being taken to have appreciated that because of the trust and confidence between surety and debtor the surety may well receive from the debtor no sufficient explanation of the transaction's purport and effect. To enforce the transaction against a mistaken volunteer when the creditor, the party that seeks to take the benefit of the transaction, has not itself explained the transaction, and does not know that a third party has done so, would be unconscionable."

[101] Even though Mrs Dowdle and Mr Dowdle were separated when Mrs Dowdle signed the guarantee and mortgage, they were still married and it was by reason of that relationship that Mr Dowdle was able to make the request successfully of Mrs Dowdle to mortgage the Westbrook property as security for a loan of $50,000 from the first defendant with minimal information being given by Mr Dowdle of his prior financial dealings with the first defendant or his current financial position. In order to establish *Garcia* unconscionability in this proceeding there are therefore four other elements to be proved:

(i) Mrs Dowdle did not understand the purport and effect of the transaction;
(ii) The transaction was voluntary;
(iii) The first defendant understood that Mrs Dowdle reposed trust and confidence in her husband of business matters and therefore might not have explained the transaction fully to her; and
(iv) That the first defendant took no steps to explain the transaction to Mrs Dowdle itself or ensure that a third party explained it to her.

[102] With respect to the first element, Mrs Dowdle did not understand the purport and effect of the transaction at the time she signed the guarantee and the mortgage, because she was operating on the basis that the documents put into effect the transaction outlined in the first defendant's letter of offer dated 19 February 2003 which she had accepted and in respect of which she was given no notice that the first defendant had withdrawn that proposed transaction.

[103] The transaction was voluntary, as the purpose of the loan to Mr Dowdle was to fund his further litigation. Any funds deposited to Mrs Dowdle's account were not for her purposes, but were for Mr Dowdle. Mrs Dowdle did not receive a direct and immediate benefit from the loan to Mr Dowdle: *Agripay Pty Ltd v Byrne* [2011] 2 Qd R 501 at [11].

[104] With respect to the third element, the first defendant knew that Mrs Dowdle and Mr Dowdle were married. It follows as a matter of inference that the first defendant understood that Mrs Dowdle reposed trust and confidence in her husband in relation to business matters and that Mr Dowdle might not have explained the transaction fully to her.

[105] Despite the first defendant's solicitors' request of Mr Dowdle to arrange the independent legal and financial advice to Mrs Dowdle in relation to the transaction, those steps were undermined by the failure of the first defendant to notify Mrs Dowdle of the change to the structure of the transaction. As is apparent from the findings that I have made in relation to Mrs Dowdle's understanding at the time she signed the guarantee and the mortgage, the independent legal and financial advice that was the subject of the certificates given to the first defendant did not have the intended effect as the first defendant had not let Mrs Dowdle know that its letter of offer dated 19 February 2003 no longer applied to the transaction.

[106] The first defendant relies on clause 5.1(n) of the guarantee that was an express acknowledgment by Mrs Dowdle that there was no obligation on the first defendant to disclose to Mrs Dowdle anything relating to Mr Dowdle's affairs or transactions with the first defendant. The first defendant's unconscionable conduct that taints the transaction embodied in the guarantee and mortgage must also preclude the first defendant from relying on provisions in the guarantee such as clause 5.1(n).

[107] Mrs Dowdle has therefore succeeded in establishing *Garcia* unconscionability.

[108] Mrs Dowdle also alleges that the first defendant's conduct that resulted in Mrs Dowdle signing the guarantee and mortgage without notifying her of the change to the structure of the transaction was unconscionable conduct within the meaning of s 12CB or s 12CC of the ASIC Act. As s 12CB, as at 24 February 2003, applied only to conduct in connection with the supply of financial services acquired for personal, domestic or household use which did not apply to the loan to Mr Dowdle,

it is s 12CC of the ASIC Act which is relevant. The parties did not make any detailed submissions about the possible application of s 12CC of the ASIC Act to the first defendant's unconscionable conduct based on *Garcia*. *Prima facie* a finding against the first defendant based on *Garcia* unconscionability is conduct that is also proscribed by s 12CC(1)(a) of the ASIC Act. As I am proposing to give the parties an opportunity to make further submissions on other aspects of this matter, I will extend that to the application of s 12CC(1) to the findings on *Garcia* unconscionability.

[109] Although the focus of Mrs Dowdle's pleading in relation to misleading or deceptive conduct was also on the failure of the first defendant to inform her of the precise financial circumstances of Mr Dowdle and his companies and his personal liability to the first defendant under Mr Dowdle's guarantee, the nub of the case from the evidence as presented against the first defendant was obtaining the guarantee and mortgage from Mrs Dowdle without informing her of the change to the structure of the transaction and, in particular, failing to withdraw the letter of offer of 19 February 2003 which Mrs Dowdle had accepted.

[110] The claim for misleading or deceptive conduct relies on either s 52 of the TPA or s 12DA of the ASIC Act. As at 24 February 2003, misleading or deceptive conduct in relation to financial services was regulated under s 12DA of the ASIC Act and not s 52 of the TPA.

[111] In view of the findings that I have made in Mrs Dowdle's favour, that conduct of the first defendant by which it, in effect, misrepresented the nature of the transaction at the time the guarantee and mortgage were signed by Mrs Dowdle amounted to misleading or deceptive conduct. The observation of McMurdo P in *ANZ Banking Group Ltd v Alirezai* [2004] QCA 6 at [38] is apposite. For the same reason that the matters raised by way of defence to the claim of *Garcia* unconscionability cannot displace the effect of that unconscionability on the transaction, those matters which are also relied on by the defendants to defend the claim for misleading or deceptive conduct cannot prevent the first defendant's conduct at the time that Mrs Dowdle signed the guarantee and mortgage from being characterised as misleading or deceptive conduct.

[112] In view of the nature of the first defendant's conduct that I have found to be unconscionable, in accordance with *Garcia,* or misleading or deceptive, it is not necessary to answer the question about the need for and the extent of any disclosure by the first defendant to Mrs Dowdle about Mr Dowdle's personal indebtedness to the first defendant under Mr Dowdle's guarantee.

[113] Although Mrs Dowdle relies on *Amadio* unconscionability as a further and independent basis on which to set aside the guarantee and mortgage, there are no facts alleged that enable the threshold issue to be determined in Mrs Dowdle's favour that she was in a position of special disadvantage by reason of condition or circumstance (as referred to in *Amadio* at 461-462 and 474) for the purpose of invoking the equitable doctrine of unconscionability that was applied in *Amadio*. Mrs Dowdle therefore cannot succeed in establishing *Amadio* unconscionability.

Was the second defendant knowingly concerned in the first defendant's contravention of the ASIC Act?

[114] Mrs Dowdle seeks to hold the second defendant personally liable for the loss and damage she claims she suffered from the first defendant's contravention of s 12DA (and possibly s 12CC) of the ASIC Act on the basis of s 79 of the *Corporations Act* 2001 (Cth). It is alleged in paragraph 20A of the statement of claim that, at all material times, the second defendant was the controlling mind and principal representative of the first defendant in all its dealings with Mrs Dowdle and was knowingly concerned in the contravention of the ASIC Act alleged in paragraphs 19 and 20 of the statement of claim.

[115] To be liable under s 79(c) of the *Corporations Act* 2001 (Cth), the second defendant did not need to know that the first defendant was contravening the ASIC Act, but did need to have knowledge of the essential facts constituting the contravention: *Yorke v Lucas* (1985) 158 CLR 661, 670. The second defendant knew that Mr and Mrs Dowdle were married and knew of the existence of the debt owed by Mr Dowdle to the first defendant under Mr Dowdle's guarantee, the letter of offer dated 19 February 2003 sent to Mrs Dowdle and accepted by her, that the first defendant decided to change the structure of the loan, and the first defendant did not inform Mrs Dowdle of the change in the structure of the loan before she signed the guarantee and mortgage which had the effect of extending her liability to Mr Dowdle's considerable debt under Mr Dowdle's guarantee. The second defendant was therefore knowingly concerned in the first defendant's contravention of s 12DA of the ASIC Act. There is also the possibility of liability for the first defendant's contravention of s 12CC of the ASIC Act, subject to the further submissions to be made on that issue.

[116] Any damages ordered in favour of Mrs Dowdle against the first defendant under s 12GF of the ASIC Act will also be recoverable against the second defendant.

Should the guarantee and mortgage be set aside?

[117] It is submitted on behalf of Mrs Dowdle that the relief available to a wife who is surety for her husband's debt who does not understand its effect is the *prima facie* right to have the transaction set aside. Reliance is placed on the approach to the issue of relief in *Amadio*.

[118] Deane J (with whom Mason and Wilson JJ agreed in *Amadio* on the equitable relief to address the unconscionability of the bank) started from the position that an appropriate order may be setting aside the mortgage only to the extent to which it imposed upon Mr and Mrs Amadio a potential liability in excess of $50,000 which represented the limit of the potential liability they intended to undertake. Deane J concluded, however, that the whole transaction should be set aside unconditionally, stating at 481:

> "In the present case however, it was, as has been said, evident to the bank that Mr and Mrs Amadio stood in need of advice as to the nature and effect of the transaction into which they were entering. It is apparent that any such advice would have included the importance to a guarantor of ascertaining from the bank the state of the customer's account which was being guaranteed and any unusual features of the account. If such information had been obtained by Mr and Mrs Amadio, they would not, on the evidence and in the light of the learned trial judge's findings, have entered into the guarantee/mortgage at all. The whole transaction should properly be

seen as flowing from the special disability which was evident to the bank and as being unfair, unjust and unreasonable."

[119] Because Mrs Dowdle was willing to mortgage the Westbrook property to secure the loan of $50,000 for the purposes of Mr Dowdle's litigation and the funds were provided for that purpose, the transaction should not be set aside in its entirety, but the operation of the guarantee should be modified, so that it is subject to conditions that impose the limitation on liability that Mrs Dowdle anticipated would apply to the mortgage over the Westbrook property when she signed the document.

[120] This is consistent with the approach applied to equitable relief in *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 at 112-114 in order to achieve what is practically just. The guarantor in that case had been willing to give a guarantee for his company's future indebtedness to the creditor to ensure a continued supply of goods for the company's business. There was a misrepresentation by the creditor that the form of guarantee presented to the guarantor (and which was signed by the guarantor) was only for the future debts of the company. The creditor was unsuccessful in enforcing the guarantee for the past debts, but it was held (at 115) that the guarantee should be enforced to the extent of the future debts, as that was what the guarantor had been prepared to undertake in order to obtain the continued supplies for his company.

[121] As Mrs Dowdle became aware a few weeks after signing the guarantee and the mortgage that the transaction had altered from that which she contemplated, but was willing to continue with the arrangement while the loan account was conducted on the basis that the loan was limited to $50,000, there is no reason not to hold Mrs Dowdle to the obligation to repay the successive amounts advanced in relation to that loan. Because Mrs Dowdle repaid the sum of $20,153.82 on 28 October 2003 from the Liberty refinancing amount, a further advance of $10,000 was made by the first defendant that was paid on 10 November 2003 to Tucker & Cowen and sundry small advances were made between January and March 2004 totalling the sum of $6,450. Excluding interest, the principal of the loan remained under $50,000.

The first defendant's claim for legal costs

[122] In paragraph 15(aa) of the defence, the first defendant alleges that as at 3 August 2006 it had incurred legal costs in the sum of $44,146.65 that it claims were payable by Mrs Dowdle pursuant to clause 8.1 of the guarantee and clause 3.1 of the mortgage arising from the recovery or attempted recovery of moneys overdue for payment by her to the first defendant, the protection or enforcement of the first defendant's rights under the guarantee and the mortgage, the release of the mortgage and the exercise or enforcement or attempted exercise or enforcement of the first defendant's rights under the mortgage or which the first defendant incurred in consequence of the failure of Mrs Dowdle to pay to the first defendant the amounts claimed by the first defendant.

[123] The tax invoices for the professional costs and disbursements of the first defendant's solicitors that comprise the amount of $44,146.65 were tendered as exhibit 30. The descriptions of the professional work undertaken by the solicitors included in the tax invoices suggest some of the work related to the recovery of that part of the amount claimed by the first defendant against Mrs Dowdle that is attributable to Mr Dowdle's indebtedness under Mr Dowdle's guarantee. It follows

from the relief proposed to be granted in respect of Mrs Dowdle's guarantee to limit her liability to the loan of $50,000 that legal costs incurred by the first defendant for the attempted recovery of amounts that are not recoverable from Mrs Dowdle should also not be recoverable against Mrs Dowdle. This question of the apportionment or otherwise of the legal costs claimed by the first defendant was not addressed at the trial. I will give the parties an opportunity to make further submissions on this aspect of the matter.

What damages flow from varying the guarantee?

[124] Apart from the first defendant's claim for legal costs, the amount of $87,231.19 paid to the first defendant from the sale of the Westbrook property exceeded the balance of the loan of $50,000 by $5,642.20 and that excess must be repaid to Mrs Dowdle.

[125] Under s 12GF of the ASIC Act the loss or damage claimed to have been suffered by Mrs Dowdle must be by the conduct of the first defendant that was in breach of the ASIC Act. The first component of Mrs Dowdle's claim for damages is that which arises from the failure of the first defendant to release of its mortgage to enable the sale of the Westbrook property to settle on 29 March 2005. On the basis that all the first defendant was entitled to recover under the mortgage was the amount owing in respect of the loan of $50,000 to Mr Dowdle, the balance of that loan as at 29 March 2005 (according to exhibit 28) was about $62,000. When the contract for the sale of the Westbrook property did not settle on 29 March 2005 because of the impasse reached between Mrs Dowdle and the first defendant about the disposition of the balance of the proceeds of the sale, the contract remained in existence and arrangements were then in place by 1 July 2005 for the settlement to proceed. If the only reason for the failure to settle earlier had been the dispute as to the amount to be paid to the first defendant which was claiming in excess of what it was owed in respect of the loan of $50,000, the loss sustained by Mrs Dowdle was limited to the costs of the delay. The further delay ostensibly to allow Mr Rawlins' financier to obtain a new valuation does not explain why the contract then did not settle after 1 July 2005 and before Liberty evicted Mr and Mrs Dowdle. An underlying consideration was the default under the Liberty mortgage that had continued since late 2004. In the circumstances, Mrs Dowdle has not shown that the loss of the sale to Mr Rawlins was caused by the conduct of the first defendant which has been found to be unconscionable and misleading or deceptive. .

[126] Mrs Dowdle also seeks damages for the lost commercial opportunity to purchase the Arcot property and realise a capital gain upon its resale. Mrs Dowdle bears the onus of proving that this component of her claimed damages was caused by the first defendant's conduct. Even accepting that Mr Rawlins was acting on Mrs Dowdle's behalf in negotiating to purchase the Arcot property, Mrs Dowdle has not established on the evidence that she had the financial capacity to acquire the Arcot property for $700,000. By September 2004 Mr Dowdle was in difficult financial circumstances and was therefore not a source of funds. Mr Rawlins was not a source of funds. Mrs Dowdle was in default under the Liberty mortgage. Even allowing for the fact that she could use her equity in her other real property interests that she still held at that stage, that does not support a conclusion that she would have been able to borrow sufficient funds to enable her to purchase the Arcot property. Mrs Dowdle fails in showing that the first defendant caused her to suffer the loss of opportunity to purchase the Arcot property.

Further submissions

[127] After publication of these reasons, I invite the parties to make further submissions on the application of s 12CC(1) of the ASIC Act, what should happen with the first defendant's claim for legal costs, the form of orders that should be made, and the costs of the proceeding.

[128] Pending the agreement of the parties on a timetable for further submissions, the only formal order that I will make is to adjourn the proceeding to a date to be fixed.