SUPREME COURT OF QUEENSLAND

CITATION:	*Groves v Groves & Ors* [2013] QSC 277
PARTIES:	**LE NEVE ANNE GROVES** (plaintiff) v **EDMUND STUART GROVES** (first defendant) **CITIGROUP GLOBAL MARKETS AUSTRALIA PTY LIMITED ACN 003 114 832** (second defendant) **BT SECURITIES LIMITED ACN 000 720 114** (third defendant) **CITIBANK, NA** (fourth defendant)
FILE NO/S:	10662 of 2008
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	13-17, 20-24, 27-31 May 2013, 3-7, 11-14 June 2013
JUDGE:	Martin J
ORDER:	**Claim dismissed**
CATCHWORDS:	EVIDENCE – BURDEN OF PROOF, PRESUMPTIONS, AND WEIGHT AND SUFFICIENCY OF EVIDENCE – GENERALLY – where the plaintiff denies that signatures on a number of documents were written by her – where the plaintiff does not plead that any particular person forged her signatures – where the defendants each adduced evidence from relevant experts – where the experts gave evidence that the signatures in question are those of the plaintiff – where the plaintiff had two other experts examine the relevant documents – where the plaintiff did not call evidence from those experts – where other possible witnesses were not called – where the principle in *Jones v Dunkel* may apply – whether the plaintiff has proved that the signatures on the relevant documents were not signed by her EQUITY – GENERAL PRINCIPLES – UNCONSCIONABILITY, UNCONSCIONABLE DEALINGS AND OTHER FORMS OF EQUITABLE

FRAUD – KNOWLEDGE – where the plaintiff executed guarantees for the debts of her then husband – where all parties were aware of the marriage – where the plaintiff has prior involvement with margin lending transactions — whether the second, third or fourth defendants are excluded from the operation of the second limb of the rule in *Yerkey v Jones*, the 'married woman's equity'

CONTRACTS – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INCORPORATION INTO CONTRACT – KNOWLEDGE – where the contract is on its face an application for a loan facility – where the document is designed to enable both a borrower and guarantor to fill in his or her details and execute it – where the plaintiffs details appear on the form and the box titled 'guarantor' is ticked – where there is no reference on the application form to the identity of the borrower, amount being borrowed or obligations to be guaranteed – where the application form grants a power of attorney – where the plaintiff's knowledge of surrounding circumstances is relevant – whether the application form empowered the attorney to execute the guarantee

GUARANTEE AND INDEMNITY – CONSTRUCTION AND EFFECT – GENERALLY – where the plaintiff alleges that the agreement relied upon by the second and fourth defendants is not a valid guarantee – where the agreement does not identify Mr Groves as the debtor – where the agreement identifies two separate persons, 'you' and 'the guarantor' – where extrinsic evidence is available to assist in identifying the borrower – whether the guarantee is a valid guarantee

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where a deed is entered into between the plaintiff, second and fourth defendant – where the deed was signed by a solicitor on behalf of the plaintiff – where the solicitor gave oral evidence of authority to sign – where the deed contained a clause which effected the plaintiff's right to challenge the relevant guarantee – where there was a handwritten addition to a separate clause – where the plaintiff alleges that the handwritten addition overcame the restrictions on her right to challenge the guarantee – whether the plaintiff is restricted from challenging the guarantee which the deed refers to

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – HARSH AND UNCONSCIONABLE CONTRACTS AND STATUTORY

REMEDIES – where the plaintiff seeks compensation under the unconscionability provisions of the ASIC Act and the TPA – where some of those provisions have an exclusionary cap on the value of the financial services supplied or acquired of $3 million – where the defendants contend that the price for obtaining a guarantee of a loan must include the capital value of the loan – whether the plaintiff is entitled to compensation pursuant to the ASIC Act or the TPA

Australian Securities and Investments Commission Act 2001 (Cth) , ss 12CA, 12CC and 12GF(1)
Trade Practices Act 1974 (Cth) , ss 51AA, 51AC and 82
Evidence Act 1977 (Qld) , s 59

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570; [2008] HCA 57, considered
Agripay Pty Ltd v Byrne [2011] 2 Qd R 501, considered
ASIC v Hellicar (2012) 286 ALR 501; [2012] HCA 17, considered
Attwood v Munnings 99 ER 727 (1827), considered
Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99, considered
Blatch v Archer [1774] Eng R 2; (1774) 1 Cowp 63 at 65 [98 ER 969 at 970], cited
Borg-Warner Acceptance Corporation (Aust) Ltd v Diprose [1988] ANZ ConvR 57, cited
Brandi v Mingot (1976) 12 ALR 551, cited
Brueckner v Satellite Group (Ultimo) Pty Ltd [2002] NSWSC 378, cited
Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337; [1982] HCA 24, cited
Damjanovic v York Agencies Pty Ltd [2003] NSWCA 222, cited
Dowdle v Pay Now For Business Pty Ltd [2012] QSC 272, followed/questioned
FAI Insurance Limited v Australian Hospital Care Pty Ltd (2001) 204 CLR 641; [2001] HCA 38, considered
Fairstate Ltd v General Enterprise & Management Ltd [2010] EWHC 3072, followed
Fitzgerald v Masters (1956) 95 CLR 420, considered
Garcia v National Australia Bank Ltd (1998) 194 CLR 395, considered
Groves v Groves [2011] QSC 411, cited
Harris v Bellemore [2011] NSWCA 196, cited
Hurley v McDonald's Australia Ltd [2000] ATPR 41-741; [1999] FCA 1728, considered
Jeans v Cleary [2006] NSWSC 647, followed
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, applied

Liptak v Commonwealth Bank of Australia (1998) 199 LSJS 322, cited
Maye v Colonial Mutual Life Assurance Society Ltd (1924) 35 CLR 14, considered
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451, considered
Pang v Bydand Holdings Pty Ltd [2010] NSWCA 175, cited
Permanent Mortgages Pty Ltd v Vandenburgh (2010) 41 WAR 353, cited
Platzer v Commonwealth Bank of Australia [1997] 1 Qd R 266, cited
Radin v Commonwealth Bank of Australia [1998] FCA 1361, followed
Romeo v Papalia [2012] NSWCA 221, cited
State Bank of New South Wales v Chia (2000) 50 NSWLR 587, considered
Swain v Waverley Municipal Council (2005) 220 CLR 517; [2005] HCA 4, considered
Tobin v Broadbent (1947) 75 CLR 378, considered
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, considered
Vivlios v Westpac Banking Corporation [2012] QCA 230, cited
Wenczel v Commonwealth Bank of Australia [2006] VSC 324, followed/questioned
West v Government Insurance Office (NSW) (1981) 148 CLR 62, cited
Yerkey v Jones (1939) 63 CLR 649, considered

COUNSEL: P. O'Shea QC and P. Franco for the plaintiff
J Kirk SC, E Goodwin and P Herzfeld for the second and fourth defendants
B. O'Donnell QC, A. Pomerenke and A. Stumer for the third defendant

SOLICITORS: Cooper Grace Ward for the plaintiff
King and Wood Mallesons for the second, third and fourth defendants

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Introduction

[1] ABC Learning Centres Ltd ("ABC") had a short, but spectacular, corporate life. In 1988 its predecessor commenced operating a small childcare centre in Ashgrove. In the two decades that followed, it grew from one small suburban operation to become one of the largest providers of early childhood education services in the world. It collapsed amid reproval and recrimination and, in 2008, was placed into voluntary liquidation.

[2] The two people most concerned with the business of ABC when it started were the plaintiff ("Dr Groves") and her then husband ("Mr Groves"). They saw ABC progress to have a market capitalisation of about $2.5 billion in 2006 and then watched it implode with its shares becoming worthless. For a time during that growth Mr Groves was on a well-known "rich list" published by a financial magazine. He is now bankrupt.[1]

[3] This litigation arises out of actions taken as ABC approached its highest market capitalisation, as that peak was reached, and as it started on its rapid collapse. During that period Mr Groves entered into a number of margin loans. For the purposes of this case, a margin loan can be described as a loan which is advanced so that a borrower may invest in shares. The security provided by the borrower will ordinarily be the existing shares held by the borrower. They can be shares in the company in which further shares are sought (as was the case with Mr Groves and ABC shares) or shares in other companies. The "margin" is the loan to value ratio ("LVR") – the maximum allowable ratio of the borrowed amount in relation to the total investment.

[4] This type of loan can be subject to a "margin call" – as occurred with Mr Groves' loans. A margin call will occur when the LVR is exceeded. The borrower is required to restore the LVR and this can be done by lodging extra security or, more commonly, by repaying the loan in whole or in part.

[5] In February and March 2008, ABC's share price was plummeting and margin calls were made by the second, third and fourth defendants. They could not be satisfied and the shares owned by Mr Groves and held as security were sold. This litigation comes about because the ABC shares owned by Dr Groves were also sold pursuant, the defendants say, to guarantees given by her which secured the loans to Mr Groves.

[6] The documents essential to the defendants' claimed entitlement to sell Dr Groves' shares ("the relevant documents") are:

Second and Fourth Defendants		
(i)	FIF application form	Ex 3
(ii)	Citi NA guarantee	Ex 185
(iii)	Citi NA facility	Ex 184
Third Defendant		
(i)	Third Party Acknowledgement Form	Ex 271
(ii)	Lodging Shares Form	Ex 147

[1] The story of the rise and fall of ABC is now used as a case study by CPA Australia. www.youtube.com/watch?v=YYF6JW9vJKo

[7] There are other documents relied upon by the defendants but the relevant documents are those which are said to have been signed by the plaintiff.

[8] Dr Groves' primary case is that she did not execute any of the relevant documents and is thus entitled to recover the following from:

The second defendant ("CGMA")	$6,706,517.62
The third defendant ("BT")	$13,279,200
The fourth defendant ("Citi NA")	$13,495,477.38.

The First Defendant

[9] The claim against Mr Groves is that he caused an unauthorised sale of over 6,000,000 shares held by Dr Groves in ABC and that he wrongly received and retained a large proportion of the dividends which Dr Groves would otherwise have received pursuant to her holding of ABC shares. Mr Groves was bankrupted in January 2013 and these proceedings against him have been stayed. Notwithstanding that state of affairs, when this trial commenced Mr Groves sought leave to appear on the basis that serious allegations were going to be made against him and he wished to give evidence about them. I refused him leave to appear.

[10] Later in these reasons I make findings about the credibility of Dr Groves. I exclude from that finding the evidence concerning Mr Groves' treatment of Dr Groves. When Dr Groves abandoned the claim about undue influence it was no longer necessary to decide whether such conduct occurred.

The causes of action

[11] When this action was commenced in 2008, the plaintiff's case was quite simple. It was that neither CGMA nor BT had any right to sell the shares she held in ABC or to receive money from the sale of them.[2] They could not sell the shares, she alleged, because she had no margin loans with either bank and she had not guaranteed any loans made by them. The plaintiff sought restitution of identified sums as money had and received.

[12] It is not necessary to recite the complete history of the pleadings in this matter save to say that the plaintiff's case was substantially remoulded when she was given leave to amend and make an alternative claim.[3] The plaintiff still maintained that she had no margin loans and had not guaranteed any loans made by the defendants. Given that the documents relied upon by the defendants appeared to have been executed by the plaintiff, this meant that the plaintiff necessarily asserted that she had not signed such documents. That was made clear in the plaintiff's replies to the defences of the defendants where it is explicitly pleaded that she did not execute any such documents.

[13] The alternative case advanced by her was that, if it were to be found that the plaintiff had executed the documents relied upon by the defendants, then the plaintiff said she was not liable under those documents on these bases:

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2 Citi NA was joined as the fourth defendant later.

3 *Groves v Groves* [2011] QSC 411

- The "married woman's equity"[4]
- Undue influence
- Unconscionability – relying on the *Australian Securities and Investments Commission Act* 2001 ("ASIC Act") and the *Trade Practices Act* 1974 ("TPA")

[14] On the undue influence claim it was specifically pleaded by the plaintiff that the CGMA guarantee was obtained in circumstances which included Mr Groves' having acted in "an abusive, threatening and controlling manner towards Dr Groves for most of their married life" and that "Dr Groves had suffered repeated instances of domestic violence at the hands of Mr Groves". I will refer to these claims later in these reasons. It is sufficient now to note that this part of the plaintiff's case was abandoned on the twenty-third day of a twenty-four day trial.

[15] The various forms of relief now sought against each defendant are pursued in the alternative. They are:

(a) Restitution;
(b) An order setting aside the particular guarantee relied upon and an order for restitution;
(c) Compensation pursuant to s 12GF(1) of the ASIC Act;
(d) Compensation pursuant to s 82(1) of the TPA.

A brief history

[16] The plaintiff and Mr Groves were married in 1986. Prior to their marriage they had bought a local milk run business which Mr Groves ran. At about that time Dr Groves obtained her Diploma of Teaching and started teaching children at a pre-school level.

[17] In 1988 they acquired a shelf company (Kistford Pty Ltd) which was the vehicle they then used to conduct a child care centre at Ashgrove. Dr Groves was a director of that company. She was responsible for the activities relating to the actual care of the children enrolled at the centre while Mr Groves was engaged with the financial side of the business.

[18] From about 1992 Kistford started to acquire other child care centres and build new ones. The division of responsibility remained the same between the Groveses. In 1992, Kistford changed its name to ABC Developmental Learning Centres Pty Ltd ("ABCDLC"). Dr Groves remained a director of that company until it went into liquidation in 2008.

[19] The plaintiff established the ABC Early Childhood Training College in 1995 and became its principal. This was renamed the National Institute of Early Childhood Education in 2001.

[20] Dr Groves and Mr Groves separated permanently in 1998. They were divorced in 2008.

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4 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395

[21] At some time between 1997 and 1999, Dr and Mr Groves acquired ABC Learning Centres Limited ("ABC"). This was an unlisted public company which was used to acquire all the shares in ABCDLC. An initial public offering ("IPO") of the shares in ABC took place in 2001 and ABC became a listed company on the Australian Stock Exchange. Immediately after the IPO, Dr Groves was the registered holder of about 3.25 million shares in ABC.

[22] In April 2001, Dr Groves was appointed a joint managing director of ABC. Mr Groves was the other joint managing director.

[23] In the same year, Dr Groves entered into a loan agreement in order to purchase a property at Hamilton in Brisbane in which she and her daughters were to live.

[24] In March 2004, Mr Groves entered into the first margin loan the subject of these proceedings with CGMA. As borrower, he entered into a Smith Barney Flexible Investment Facility ("FIF").

[25] In November 2004 an application form for a FIF was "signed" by the plaintiff – this is a disputed signature – whereby she granted CGMA a power of attorney to execute all documents in respect of the FIF.

[26] Pursuant to that power of attorney, CGMA executed a written agreement on 25 November 2004 by which, it is alleged, Dr Groves guaranteed the obligations of Mr Groves under the FIF agreement for an amount not exceeding $15,000,000. One of the express terms of the guarantee (clause 11.4) was that Dr Groves agreed to mortgage to CGMA all securities in which she had an interest, or to which she was entitled. This included all the shares then held by Dr Groves in ABC.

[27] In August 2004, Mr Groves executed an application form with BT which authorised BT to execute an agreement in the terms of the BT margin loan facility agreement. He also authorised the transfer of 1,000,000 shares held by him in ABC into a participant sponsored holding under CHESS[5] with BT as the sponsor. A few days after doing that, the BT margin loan facility agreement was executed on behalf of Mr Groves by an authorised officer of BT.

[28] In May and June 2005, Mr Groves took steps to consolidate other margin loans he held with the loan from BT.

[29] BT alleges that, in a meeting on 9 June 2005, Dr Groves executed documents which guaranteed the payment to BT of Mr Groves' total amount owing under BT loans. It also had the effect of transferring into a participant sponsored holding under CHESS the shares held by Dr Groves with BT as the sponsor. Dr Groves says that no such meeting took place.

[30] Further refinancing was undertaken with respect to margin loans. All of these are denied by Dr Groves but they had the same general effect, that is, she was guaranteeing the margin loans advanced to Mr Groves.

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[5] For financial products traded on the Australian Securities Exchange, settlement is effected by a computer system called CHESS, which stands for the Clearing House Electronic Subregister System.

[31] During 2005 and 2006 broadly similar agreements were entered into for margin loans by Mr Groves and, it is alleged, Dr Groves provided guarantees for those loans.

[32] In February 2008 the share price of ABC shares fell dramatically. As a result, margin calls were made by CGMA, BT and Citi NA. Those margin calls were not satisfied and all of Dr Groves' shares in ABC were sold in satisfaction of her obligations under the various guarantees.

[33] This action was commenced in October 2008.

The Issues

[34] Many of the issues which arise in this case are common to all the parties, albeit with some obvious variations. The major matters are as follows:

(a) Should Dr Groves' evidence be accepted?

(b) Did Dr Groves sign the "relevant documents", that is, the documents relied upon by the defendants when Dr Groves' shares were sold?

(c) The proper construction of the CGMA documents.

(d) The married woman's equity issue

(e) Unconscionability

(f) Statutory remedies

(g) Was there a settlement with CGMA?

(h) Ratification, acquiescence and change of position

(i) Did BT sell Dr Groves' shares?

Should Dr Groves' evidence be accepted?

[35] I have come to the conclusion that, in all important respects, Dr Groves' evidence cannot be given credence. In some facets it was exaggerated, in others it was the subject of reconstruction and, in some important matters, it was simply untrue and deliberately so. Dr Groves said that she had spent a considerable amount of time before the trial becoming familiar with the many documents associated with the case. There is nothing wrong with that. It is what any sensible litigant would do if able. It seems, though, that much of that time may have been used by her to create a predominantly specious account of what had occurred.

[36] In her evidence, the plaintiff presented herself in an almost other-worldly fashion. In cross-examination her answers were often rambling. She frequently professed her honesty. On many occasions she sought to put her answer in what she called "context" even when that was clearly irrelevant to the question.

[37] She made much of the length and complexity of the documents which are relied upon by the defendants. Dr Groves frequently claimed that she couldn't have understood the documents relied upon by the defendants and that, even now, she had trouble comprehending their effect. But she was not a neophyte in matters of business.

[38] There a number of issues which have been addressed by the parties relevant to this question. I will deal with some of them immediately and analyse the others when considering other issues.

Financial sophistication

[39] It was the constant refrain of Dr Groves that she left the financial side of the business to Mr Groves. Her presentation in the witness box was of a person who was completely divorced from the harsh realities of conducting a business. She attributed much of this to what she said was the cruel and controlling actions of Mr Groves. He kept the financial matters to himself and, according to the plaintiff, reacted badly if she sought information or questioned what he proposed. A large part of the plaintiff's case, so far as it concerned the primacy of Mr Groves in financial issues, was based upon her lengthy recounting of the mental and physical abuse he visited upon her. Many instances of serious and savage assaults were led from Dr Groves and were frequently referred to by her as explaining why she did not ask her husband about various matters concerning the business. After setting out in detail these allegations in an annexure to her statement of claim and then recounting them in her evidence in considerable detail, there was barely a whisper of them in the plaintiff's final submissions. This may be explained by the realisation that this part of her case was at odds with her consistent evidence that Mr Groves could not have pressured her into signing the "guarantees". It did have the effect, though, of exposing Mr Groves to a series of extremely damaging accusations in circumstances where he was no longer a party to the proceedings.

[40] It is not uncommon for the directors of a company, or the members of a partnership, to bring to an enterprise the individual and different skills of those people. So it was with ABC. Dr Groves' qualifications in early childhood education cannot be gainsaid. After obtaining her Diploma of Teaching she proceeded to earn a Bachelor of Education and a Masters of Education and, finally, she became a Doctor of Philosophy in Education. This indicates, at least, a clear capacity for academic achievement and the ability to comprehend written materials at a high level.

[41] I have noted some of the other positions held by the plaintiff pertinent to this question but it is convenient to list them in one place. The plaintiff held the following relevant positions or appointments:

(a) From 15 August 1997 – a director of ABC.
(b) During the financial years from 2001 to 2003 – joint managing director of ABC.
(c) During the 2004 to 2006 financial years – Chief Executive Officer – Education of ABC.
(d) From 6 August 2003 to the end of the 2006 financial year – a member of ABC's Risk Management Committee.
(e) Chairman of ABC's Risk Management Committee from the middle of 2005 to the end of the 2006 financial year.

(f) Member and chairman of that Risk Management Committee at a time when the committee was responsible for, among other things, ensuring that ABC was able to manage a diverse and complex range of significant risks. (The plaintiff says that these risks were of an operational rather than a financial nature.)
(g) From about 2001 – principal of the National Institute of Early Childhood Education.
(h) For about 10 years from 1993 – an executive member of the Queensland Professional Child Care Centres Association.
(i) In 2001/2002 – Queensland Vice President of the Queensland Professional Child Care Centres Association.
(j) From about 2003 to about the middle of 2006 – Queensland State Director for Young Media Australia.
(k) From about 2004 to the middle of 2006 – a member of the Stronger Families and Communities Partnership established by the Commonwealth Government.
(l) A state finalist in the 1998 Telstra Queensland Business Women's Award.
(m) A state finalist in the 1999 Australian Institute of Management Manager of the Year Award.

[42] The fact that the plaintiff held those positions does not, by itself, lead to a conclusion that she had financial expertise but it does allow a conclusion that, in the ordinary course of events, she would have been exposed to issues concerning the finances of the various bodies with which she was associated.

[43] She did accept that she signed some documents of a financial nature but maintained that she would not have signed anything she didn't understand. The mantra that she would not sign anything she didn't understand was repeated in many forms but most forcefully in this exchange:

> "Your evidence is, isn't it, that you would not sign documents that you did not understand?---That's correct.
>
> And that's so even for financial documents?---I would get further information if they were financial documents.
>
> And you would get further information in order to understand the document before you signed it?---That's correct.
>
> So the bottom line is, you wouldn't sign a document if you didn't understand it?---That's correct.
>
> And no exceptions to that rule?---No, I would go and seek further independent advice if I required it.
>
> Yes. In order to ensure that you understood the document before you signed it?---That's correct.
>
> And that was true throughout the 2000s?---That's correct.

> And, indeed, probably most of your – all of your adult life?---Probably during my corporate life, yes.
>
> Yes. And by your "corporate life", you mean from the start of, what, 1988?---I would say working in a corporate environment from 2001 to 2008, onwards.
>
> But even before 2001, presumably, you were careful about signing documents?---Yes, I was."[6]

[44] With that in mind, an examination of the ABC company seal register shows that Dr Groves signed a wide variety of documents for ABC including: mortgage debentures, assignments of leases, leases and guarantees. On her evidence, she must have understood these documents.

[45] Other matters also paint a picture in which Dr Groves was not free of involvement in her own finances. She maintained a separate bank account into which her wages were paid, notwithstanding Mr Groves' manifest disapproval. When she received dividends on shares other than ABC she maintained oversight of those payments. She also had control of an account into which $4,000,000 was deposited after the sale of some of her ABC shares. There was also the Hamilton property which was controlled by her through the KSD Property Trust and, later, an investment property which was purchased.

[46] The defendants sought to demonstrate that Dr Groves was a person who had a reasonable level of financial sophistication. The plaintiff, on the other hand, sought to demonstrate that she knew nothing and was prevented from knowing anything of substance about the businesses which she and her husband conducted. It was put by the plaintiff in her written submissions that she was "not – and has never been – a financial expert". One does not, though, need to be a financial expert in order that a reasonable understanding can be obtained of the exercises being undertaken with respect to the obtaining of finance and the consequences of that.

[47] I accept that Mr Groves was responsible for the financial side of the operation of ABC and, to a large extent, for the financial matters affecting the Groves family. But at the centre of this case is the relatively simple proposition that Mr Groves was engaged in obtaining loans for large sums of money and was providing security for those loans through his own ABC shares and those of Dr Groves. If Dr Groves did not understand a document which gave rise to the guarantees relied upon by the defendants then, on her own evidence, she would, without exception, have sought advice as to their meaning before she did sign. In the plaintiff's written submissions this concession was described as being "frank but misguided". It was not frank, it was part of the dishonest syllogism she created in order to avoid liability to the defendants. This was one of the ways in which she sought to support her general denial that she signed the relevant documents. Her argument was:

- I would never sign a document I did not understand.
- I did not and could not understand the defendants' documents.
- Therefore, I did not sign those documents.

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[48] In order to maintain that syllogism, it required, among other things, that the plaintiff deny:

(a) that a particular meeting with BT representatives ever took place,
(b) that she had placed ticks on a document which evidenced an understanding of the associated documents,
(c) that she signed other documents (because she had a painful hand),
(d) that she used particular addresses, and
(e) that she received particular financial documents.

All these denials were false.

The plaintiff's addresses

[49] Part of Dr Groves' scheme was to deny that she used certain addresses. This had to be her case, because there were a number of documents relating to the margin loans and the guarantees which had been sent to those addresses. The receipt of such documentation would have been inconsistent with her evidence that she was unaware of the loans until about the time that the margin calls were made.

[50] I do not accept any of her denials that she either did not use or was not aware of those addresses.

◦ 4/75 Macquarie Street

[51] In cross-examination Dr Groves said:

> "You've been asked some questions about the address 4/75 Macquarie Street, Teneriffe?---That's correct.
>
> You gave evidence at T3-52 through to page 53 that in 2004 you weren't aware of that address; is that right?---That's my understanding, yes.
>
> And is it the case that you would not have used that address for any material relating to you?---I have never given out that address as material to be used for me. That doesn't necessarily mean other people haven't given out that address for material related to me, if that makes sense?
>
> Did you sometimes get material that had been sent to that address?---No, I did not.
>
> Never?---Not to my knowledge, no."[7]

[52] That was inconsistent with her 2003 tax return, which she admitted signing and which had 4/75 Macquarie Street as her address. She was asked a series of questions about her tax return which resulted in her agreeing that any page which she saw and signed would have been truthful and accurate. The page which showed her address as 4/75 Macquarie Street had been signed by her. When this was pointed out to her she

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attempted to back track suggesting that she hadn't seen it or "taken the address seriously". She went on:

> "That you might not have read it?---That I may not have noticed it or seen it. If someone's put their hand over the document while you're signing something, I may not have seen it.
>
> You think someone from Harris Black carefully put their hand over this address just whilst you were signing it?---No, Harris Black didn't give me these documents. Mr Groves gave me these documents.
>
> You think Mr Groves carefully put his hand over the address just before you signed?---I'm not certain. I don't know if I've actually seen the entire page. I cannot be certain and I do not want to mislead the court by saying that I definitely saw that because I have never been to that address. I don't know of that address. I wouldn't be able to drive you there now if I had to."[8]

[53] This was also the address used on the Oswego Deed and Mr Le Mass had no recollection of her objecting to its use when he took her through the concepts of the deed.[9]

◦ 1004/100 Bowen Terrace

[54] Of this address Dr Groves said:

> "Can I ask you about the address 1004/100 Bowen, B-o-w-e-n, Terrace, New Farm?---Yes.
>
> Did you get mail from that address from time to time in the 2000s?---Not to my knowledge, no.
>
> You never got mail from that address?---Not to my knowledge, no.
>
> Did you ever choose to use that address for mailing purposes?---I have never given that address out as mailing purposes.
>
> Did you ever choose to use that address for the purposes of other documents being served on you?---I'm not quite certain what you're asking, but, no, I don't believe so.
>
> Your evidence to the court is you would never have used that address as a stand-in for your own place of residence?---No, I do not know where the address is. I have never been to the address. I have no access to the address."[10]

[55] This address was used by her:

(a) in her 2006 and 2007 tax returns,

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(b) in a Westpac loan application and an associated personal guarantee in 2006, and
(c) in a statutory declaration by her relating to the purchase of a home unit at Broadbeach.

[56] In July 2008 Dr Groves took part in a compulsory examination by ASIC about ABC's financial affairs. During it she evinced concern about the use of her actual residential address saying that she had been the subject of threats and was, understandably, concerned about the welfare of her children. In her presence and without any complaint, her representative confirmed that 1004/100 Bowen Terrace was the address she used for service of documents.[11]

[57] The occupant of that address was a witness called by the plaintiff, Frank Zullo. Mr Zullo is married to (but separated from) Mr Groves' sister Lorrie. Mr Zullo gave evidence that he received copious amounts of mail at that address which he would collect and take to his office. It would be picked up every morning by ABC couriers and then dispersed through the ABC mail centre. That mail included letters for both Dr Groves and Mr Groves.

[58] In her evidence Dr Groves said that her mail received at ABC was opened by Lorrie Zullo or other ABC staff.[12] She attempted to say that she had been told by Lorrie Zullo that Mr Groves had instructed that that should happen. Objection was taken to that but it was submitted that it could be admitted solely on the basis that the words were said and not as to their truth. In any event, Ms Zullo was called by the plaintiff and no such evidence was sought to be led from her.

[59] Finally, in her letter of resignation from ABC of 30 September 2008,[13] a letter which she admitted signing, she gave her address as 1004/100 Bowen Terrace.

◦ 866 Beams Road

[60] Dr Groves said she would not have used this address after she ceased living at the house in 1998. It was, though, the address she used for a home loan in 2002 and on the applications for shares in her children's names.

◦ PO Box 2445 Southport

[61] This was a private post office box leased by Mr Groves. Dr Groves said she had "absolutely no access" to it. I accept that, but there was evidence that some mail sent to her at that address did reach her, in particular an invoice from Harris Black.[14]

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11 Ex 51
12 T 4-51
13 Ex 113
14 Ex 80

- Conclusion on addresses

[62] Dr Groves was particularly sensitive about her security and was always concerned not to reveal her residential address. But she did use the Macquarie Terrace, Bowen Terrace and Beams Road addresses for matters concerning ABC and the margin loans. Her denial that she did not use them was false and knowingly so.

Interception of documents

[63] In order to explain how she had not seen any of the many documents sent to her, Dr Groves speculated that some of them must have been intercepted. No evidence was called from anyone whose documents might have been the subject of such an interception or might have played some part in such interception. Nor was anyone called who knew of, or took part in, any interception of the documents regularly collected and sent by Mr Zullo to the ABC offices.

[64] Her theorising was taken up in her written submissions where it is submitted that it is entirely plausible that Mr Groves could have insisted on collecting CHESS statements and documents emanating from Austock Limited. Apart from some evidence from Dr Groves that Mr Groves had arranged for some dividend cheques to be collected this contention was unsupported.

[65] On this point, BT fastened upon one document in particular. It is a CHESS holding statement for December 2004.[15] The statement was issued by ASX Settlement and Transfer Corporation Pty Ltd. It was addressed to Dr Groves at PO Box 267, Hamilton. That PO Box could only be accessed by Dr Groves. The statement showed substantial movements in Dr Groves' shareholding and a final holding less than the 18,300,000 shares she owned at the time.

[66] Even if one assumes that Dr Groves' level of financial sophistication was as low as she asserted, this document would still raise questions in the mind of an intelligent person about her shareholding. To be consistent with the rest of her evidence Dr Groves had to deny knowledge of this document. But it was addressed to a PO Box which only she could use. The solution was this:

> "And so this would tell you that from the share brokers that Austock had sold your shares on that day at that price?---It would if I had seen the document, but I didn't get the document. As you can see down the bottom, it's been provided to you by Mr Groves, not by me.
>
> But if this document is sent to PO box 267, you are the only one with access to that post office box?---I appreciate what you're saying about the PO box, but there were often occasions – my ASX Perpetual documents, also my dividends, were also meant to come to my address, but Mr Groves appeared to get those documents as well. So I can only suggest to you that there were standing instructions to Austock, and I don't know why or how, but I did not get this document from Austock. The first time I saw this was during disclosure. So, I have not seen this until disclosure.

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15 Part of Ex 247

> But if this is sent to PO box 267, you're the only one who could receive it?---If it was sent to PO box 267. I would suggest to you that there had been many documents that perhaps were meant to go to PO box 267, but Mr Groves had a standing instruction with people that he would collect documentation relating to me, and that's the same with my dividends."[16]

[67] This is quite far-fetched and, without evidence that such an arrangement was in place, I am not prepared to infer that ASX Settlement and Transfer Corporation Pty Ltd would allow such documents to be collected by Mr Groves. Dr Groves' speculation about interception is just that and no more. There is evidence to the contrary. The mail addressed to her at the Macquarie Terrace, Bowen Terrace and Beams Road addresses would, in the ordinary course of events, have reached her.

Crown Casino and the Oswego Deed

[68] In December 2004 a deed ("the Oswego Deed"[17]) was entered into between Dr Groves and Mr Groves. The underlying proposal for the deed was that the shares held by each of them could have more influence if combined through a trust structure. The evidence from Dr Groves about this was clearly intended to demonstrate another example of Mr Groves' overbearing, physically abusive behaviour. She said:

> "To the best of your recollection, did you eventually sign any documents relating to such a trust arrangement?---I believe I signed something in December of that year at Crown Casino.
>
> And is that Crown Casino in Melbourne?---That's right, yes.
>
> Why were you – what was the purpose of your visit to Melbourne?---I was taking my children on holidays with my parents while I was also working, because we had centres in Victoria, so it was a bit of a family holiday while I could continue to work, and one of my daughter's took a friend as well, so.
>
> Now, was Mr Groves present at all during this time in Melbourne?---He arrived late one afternoon with some documents to be signed. But, no, he wasn't staying, no.
>
> When did you – you had some interaction Mr Groves; is that correct?---Yes, I did.
>
> When did that occur?---It was late one evening, we were due to go out to tea and we invited him to come with us for tea.
>
> And who did – did you go to tea with him?---What happened, it just ended up in a huge argument so I sent my parents and the three children down to the restaurant so that I could speak to Mr Groves

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16 T 10-19

17 Ex 89

> calmly because he was very agitated and very angry that I wouldn't sign the documents that he'd brought.
>
> So he had documents there and you believed they were something to do with this trust; is that correct?---Yes, that was my belief.
>
> And what did Mr Groves say to you about signing those documents?---He basically said that I had no other decision but to sign them and that it would be a benefit to everybody. I explained I didn't understand that or see it as that and that the independent advice that Bill Le Mass had given me really confirmed that it wasn't the right thing to do and that there was a lot in the deed that I really didn't understand, and nor did I want to do it. I wanted the shares to remain in my name.
>
> Did you end up signing the document that he presented to you?---Yes, I did.
>
> Why did you do that?---It got really hostile and very aggressive and I ended up with my head being shoved in a wall and being punched in the chest and breast area on a number of occasions. There was – it was a beautiful hotel suite with lots of glass sculptures and I can still recall the glass sculpture at the front entranceway, which is where we ended up because I couldn't get out of the hotel room fast enough. Mr Groves carried on and I was deadly serious that I – I feared for my life and there was no way I could contact anybody or get anybody's attention because we were in a far wing suite, and for safety reasons the only thing I thought I could possibly do was to sign it and get him out of there as quickly as possible.
>
> Did you subsequently raise the question with Mr Groves of proceeding with this family trust?---Well, when it finally happened and I left the room and left Mr Groves there, and I'm not quite sure how long he stayed, I actually went downstairs to my parents and told them what I did and I got a – a berating for being so stupid, which I get because I knew and because I was saying, look, 'I know I've sold my soul.' So after getting a very stern talking to from Mum and Dad and I really deserved it, when I got back to Brisbane I did talk to Mr Groves and say, 'Look, you know I signed that under duress. You know I don't agree to it and I'd like it stopped, please.'"[18]

[69] Counsel for the plaintiff correctly point out that Dr Groves does not say that she signed the deed while at the Crown Casino but that she signed something relating to it. What such a document might have been was not explored. It was clearly implied by her in her evidence that she had been forced to sign the deed under duress. No other document was identified as being necessary for the purposes of the deed. On the plaintiff's version she must have known that it had some operative effect because, on her return to Brisbane, she said she asked Mr Groves to have it "stopped".

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[18] T 3-52

[70] In any event she gave the following evidence in cross-examination:

> "Is your evidence, Dr Groves, that you signed the deed under immediate physical threat from Mr Groves?---I signed a document in relation to Oswego. I'm not completely sure what document it was that I signed because I never got a copy. He took it with me [sic] but, yes, it was under physical threat.
>
> But you understood that by signing that document you had, in effect, signed control of your shares away?---Yes, I went downstairs and told my parents, quite hysterically, that I sold my soul to the devil.
>
> Yes. In other words, although you've indicated you weren't quite sure what document it was, whatever it was - - -?---It related to my shares.
>
> - - - it related to your shares and the effect of the signature was to give control to your husband?---That was my understanding, yes.
>
> So quite whatever the document was, it was the critical document for giving effect to the Oswego arrangement?---Yes, it was.
>
> So it was likely to be the deed?---Yes, that's my understanding."[19]

[71] Mr William Le Mass was called by the plaintiff. At the relevant time, Mr Le Mass was the principal of a firm of solicitors. He had acted for Mr Groves for some 10 to 15 years and had known the plaintiff for the same time.

[72] Mr Le Mass was engaged to advise Dr Groves about the deed. As part of that function he wrote a letter to Dr Groves setting out some advice.[20] That letter was dated 7 June 2004. The next involvement of Mr Le Mass was on 7 December 2004 when he had a meeting with Mr Groves. Mr Le Mass' memory of the detail of these matters was not good. That is no criticism. There was nothing in particular which would have caused these matters to remain fresh and detailed in Mr Le Mass' memory. It was similar to many other types of advice he had given and professional work he had done in a busy practice.

[73] He could recall a meeting on 24 December with Mr Groves and Dr Groves. That meeting occurred at the ABC office. A number of documents were signed at that meeting. They all related to the Oswego Trust. There was no evidence led from him to the effect that a document which was either a part of, or required for, the transaction had been previously signed by Dr Groves.

[74] As an aside, evidence was led by Mr O'Shea from Mr Le Mass about a conversation that Mr Le Mass had had with Mr Groves. I allowed it to be led on the basis that I would deal with it later. The evidence concerned the conversations between Mr Groves and Mr Le Mass which led to the cessation of the professional relationship between Mr Groves and Mr Le Mass. The conversation which was led occurred in the absence of

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19 T 7-43

20 Ex 12

Dr Groves. She gave no evidence about being aware of it or that it had any effect on her. It could not have had any influence on her as, on the evidence, she was not aware of it. It was, therefore, irrelevant and inadmissible.

[75] The evidence from Dr Groves that the document signed by her at the Crown Casino was a critical document for giving effect to the Oswego arrangement or that it was likely to be the Deed could not be correct. In a letter of 20 December 2004 from Mr Le Mass, it is clear that the Deed had not been finalised at that time.

[76] If Dr Groves signed a document in the Crown Casino then it was not one relating to the Oswego Deed.

The 9 June 2005 meeting and the "kindy ticks"

[77] This evidence might, if taken alone, appear to be inconsequential, but it was an acute example of the contortions which Dr Groves went through in an attempt to avoid the conclusion that she had signed a relevant document. It was not just a denial that something had happened; it was an invention designed to lend verisimilitude to a dishonest denial.

[78] Celeste Neander ("Ms Neander") was, at the relevant time, an Executive Manager with the Westpac Private Bank. She had had a long business relationship with Mr Groves. On 9 June 2005 she attended at the offices of ABC for the purposes of having Mr Groves and the plaintiff sign a number of documents including one by which Dr Groves agreed to act as a guarantor. Dr Groves said she was not there, that she could not recall the meeting and that she had no record of it.

[79] One of the documents which Ms Neander said she provided to Dr Groves at that meeting was a "Third Party Acknowledgement Form".[21] It is in the form often seen whereby a proposed guarantor answers a series of questions about the guarantor's level of knowledge about the principal loan, whether advice has been received, and so on. Dr Groves repeatedly said that she did not sign this document.

[80] This form, which bears the plaintiff's signature, also has handwritten ticks (✓) which indicate agreement with a preceding statement. The plaintiff was certain that she did not make the ticks. In examination in chief she said:

> "Now, you'll see that this document has a number of ticks on it?---Yes, I do.
>
> Are you able to say whether those ticks are made by you?---No, they have not been made by me.
>
> So, just – are you able to say though? Are you able to look at that tick and say, "Yes, that's made by me", or, "Not made by me"?---Because yes, because my tick doesn't have the little cap. **I have a kindy tick, that's just a little line**."[22]

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21 Part of Ex 271

22 T 4-10

[81] This was consistent with evidence she gave earlier about another document:

> "You'll see that there are various ticks in boxes towards the top?---Yes.
>
> Are you able to say whether you have placed that tick on the document?---No, I'm sorry, they're not my ticks.
>
> So you are able to say whether or not you'd put that tick there?---I did not put those ticks there.
>
> Can you explain why that's the case?---**Because I don't have a little head on the tick. I just do a little line, from all the markings I've done over the years.**
>
> And so have – over the years, have you placed ticks on a lot of documents?---On school documents and early childhood documents and as a lecturer in early childhood, yes."[23]

[82] But there are three documents where the plaintiff has clearly used the same type of tick (✓) as appears in Exhibit 271.

[83] Exhibit 119 is a document created in 1996. It is some ten years older than Exhibit 271 but the answers by Dr Groves with respect to it indicate her lack of honesty on this point. She at first said that all the writing on the document was hers save for the name "Sarah Balch". Later when confronted with her earlier evidence about kindy ticks, the Acknowledgement form and the ticks on Exhibit 119 she said that the ticks were not hers: "I don't believe the ticks are mine. I believe the college manager's ticked what she wanted me to sign off on and I've done the rest."[24] That answer (and the rest of her evidence on this document) was particularly unconvincing.

[84] The second and third documents were the "Mental Health History" and "Social and Recreational Activities" forms she filled out for Dr Chalk[25] which were completed after her interview with Dr Chalk. They contain both ticks of the same type as those in Exhibit 271 and Exhibit 119 and ticks without a cap. The handwriting in it appears to be the same as the plaintiff's admitted handwriting in other documents. Evidence from one of Dr Chalk's secretaries was received in an affidavit.[26] She said she saw Dr Groves fill out the forms. This evidence was unchallenged.

[85] Dr Groves did place the ticks on the Third Party Acknowledgement Form. Her evidence to the contrary was a fabrication.

The 9 June 2005 meeting and the painful hand

[86] Another fiction designed to support her claim that she could not have signed documents on 9 June concerned her right hand. In examination in chief she said:

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23 T 3-59
24 T 11-62
25 Part of Ex 312
26 Ex 323

> "All right. Now, as at the 9th of June, do you recall that there was anything which affected your signing documents?---I had been to the hand surgeon, Dr Gilpin, two days earlier on the 7th of June, and I'm not good on doctors so it took a lot for me to go to a hand surgeon but I was having trouble writing and driving. So I went to the hand surgeon and learnt that I would need surgery to correct some torn tendons in the bottom of my right index finger.
>
> And did you – did you have the operation on the 7th of June?---No, I had it on the 15th of June.
>
> Now, what effect did – I think you mentioned writing and driving. What was the – did this injury affect both of those things?---It did. I was having trouble driving and I was also having difficulty writing. It was causing me pain because my pen kind of sat right on the spot that was very uncomfortable, and – and painful. So I limited what I was signing.
>
> Were you in fact able to sign documents at about this time as you can recall?---I do recall signing documents because I can remember taking forever to sign them because it was so painful so I tried to limit them by what I had to do for legislative reasons."[27]

[87] Later, she said:

> "Can you make any comment on whether you would have signed this document on the 9th of June?---I do not believe I'd sign it on the 9th of June. I was very late for work that day because I was being naughty trying to embarrass my daughter, and I did definitely go into work that day but it was a busy day and we just continued with other things. I didn't meet with Mr Groves on that day to fill out any documents, nor with anybody from any banking institution whatsoever.
>
> Did the injury to your hand have any effect on your ability or willingness to sign documents on that day?---I know after I'd been to the hand surgeon I was really, really, really angry that I would have to go and get surgery from an injury because I'd always been very careful in the past to protect myself from injuries, and so if I had been told that this document needed to be signed for Mr Groves I would have just said, "No way." I probably would have used a profanity, in fact, and I apologise for that."[28]

[88] Dr Groves did not see Dr Gilpin on 7 June. She did not consult him until 14 June. She said she had pain in her index finger but the problem was a ganglion cyst at the base of her middle finger. She said that the pen sat on the spot that was very uncomfortable. According to Dr Gilpin the cyst was nowhere near where a pen would sit.

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27 T 4-6

28 T 4-7

[89] In cross-examination on this point she gave evidence which was, in the true meaning of the word, incredible:

> "Now, in your evidence to my learned friend Mr O'Shea, you said that you wouldn't have been able to sign these documents on the 9th of June 2005 because you had a problem with your right hand?---Yes, I did say that.
>
> And you said you had torn tendons "in the bottom of my right index finger"?---That's correct.
>
> For which you subsequently needed surgery?---That's correct.
>
> That would have been a problem in you signing or printing anything on that day, the 9th?---Yes, it was very painful to sign anything before I had the hand surgery.
>
> I suggest it was not torn tendons at all that was the problem if your hand?---I beg your pardon?
>
> It was not torn tendons at all - - -?---Right.
> - - that was the problem in your hand?---Well, how the doctor first explained it to me was they were torn tendons and over time it had built up and calcified.
>
> And it was not in your right index finger?---It was there. **That's what I call my index finger, the third finger in the middle**."[29]

[90] I do not accept that a person of Dr Groves' age, intelligence and education would call her middle finger her index finger. This was another example of Dr Groves saying anything in an attempt to evade the inevitable consequence of her earlier invention.

The 9 June 2005 meeting and other signatures

[91] Dr Groves said that she was not signing any documents apart from those required by legislation at this time because of the pain in her hand. This was also false. On 9 June she signed a withdrawal form for a Westpac account.

[92] I conclude that Dr Groves was deliberately untruthful with respect to her participation in the meeting of 9 June. It was not just one lie, but a series of lies which had been concocted by her for the purposes of deception. She did sign the documents at the meeting and did fill in the forms.

A margin loan with Suncorp?

[93] In evidence in chief Dr Groves was shown a document[30] and asked:

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29 T 11-48

30 BTS.002.003.0064 which became Ex 271

> "Now, in 2005 were you aware of a margin loan with Suncorp?---I was absolutely not aware of a margin loan with Suncorp, no.
>
> Were you aware in 2005 of a proposed margin loan with BT?---No, I was not aware of that proposal, no."[31]

[94] This document is dated 9 June 2005 and was one of the documents Dr Groves signed on that day.

[95] The document is headed "Loan Transfer". Under that heading these words appeared:

> "Please complete this form if you would like to transfer your loan from another margin lender to BT Margin Lending."

[96] Under that, this appeared:

> "Name of existing margin lender
>
> *Suncorp*[32]
>
> Name stock is registered in:
>
> *Edmund Stuart Groves*
>
> *Le Neve Ann Groves*"[33]

[97] The document goes on to record that the named persons authorise Suncorp to provide information to BT Margin Lending and for Suncorp to transfer identified securities. Underneath those provisions are what appear to be the signatures of Mr Groves and Dr Groves. For the reasons I have already given and those which follow, I find that Dr Groves did sign that document.

[98] In cross-examination, Dr Groves said that she would have needed help in 2005 to understand the document. I do not accept that. The document is simple. It sets out a small number of facts which are inconsistent with Dr Groves' assertion about not knowing of a Suncorp margin loan or a proposal to take a margin loan with BT.

The Hawaiian Documents

[99] In December 2007 Dr Groves was on holiday with her daughters in Hawaii. While there she received an e-mail from Sarah Lucek-Rowley from "Citi Smith Barney". In it Ms Lucek-Rowley asked the plaintiff to sign some draft letters (which were attached) addressed to Mr Phillips at Citi Smith Barney in which Dr Groves authorised the transfer of ABC shares to "Citi Private Bank". On her case, Dr Groves had never heard of those two persons, had no reason to have any involvement with Citi Smith Barney,

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31 T 4-11

32 This was handwritten.

33 Both names were handwritten.

and had no reason to transfer any of her shares. Yet she signed them and made substantial efforts to ensure that the signed letters reached destination. She telephoned Citibank, then emailed Citibank and then sent the signed letters by facsimile to Citibank.

[100] On this issue, Dr Groves said that she panicked; that she did not read the documents and that she was concerned not to anger Mr Groves by delaying the return of the documents.

[101] I do not accept any of her evidence concerning her motivation for signing these letters. The email from Ms Lucek-Rowley was concise and clear. It would have taken no more than a minute or two to read it and understand it. Mr Groves was not in Hawaii and there could have been no immediate threat to her. Dr Groves' evidence was another concoction to avoid the consequences of a situation where it could be clearly demonstrated that Mr Groves was not in Hawaii at the time and therefore could not have forged her signatures.

[102] Dr Groves signed the letters because she understood what they meant and they were consistent with the arrangements she knew were being put in place.

Psychiatric/Psychological Evidence

[103] At one stage of the development of Dr Groves' case – a time at which she still relied upon her allegations about Mr Groves' mistreatment of her – it was contended that she suffered from a post traumatic stress disorder. Mr Bernard Healey, a clinical psychologist, assessed Dr Groves and concluded that she was afflicted by what he described as "Battered Woman Syndrome". In his report[34], he said that as a result of the claimed abuse of her by Mr Groves:

> "(1) Dr Groves would have been likely to agree (submit) to a course of action proposed by Mr Groves relating to financial matters without having regard to the effect of the proposed course on her own interests.
>
> (2) If presented with a document of execution such as a guarantee of Mr Groves' liability, or in the presence of Mr Groves
>
> (a) Dr Groves would not, on balance of probability, have been likely to bring a free mind and will to the decision of whether to sign the document
>
> (b) Given (a), her understanding of the document would have been substantially impaired, consistent with post traumatic stress disorder and the subtype Battered Woman Syndrome where … persistent symptoms of increased arousal, concentration becomes variable and memory for some specific events of post traumatic traumata can be absent,

[34] Ex 310

likewise memory for apparently unrelated events can be faulty or absent.

(c) In view of (a) and (b) her ability to make a judgment in her own best interests would have been quite adversely affected."

[104] In response to that, the defendants engaged their own experts. CGMA and Citi NA engaged Dr Lisa Brown, a psychiatrist.[35] BT engaged Dr John Chalk, a psychiatrist.[36]

[105] Pursuant to a direction of the Court, the evidence of these three experts was given concurrently and they each contributed to a joint report.[37] The following appears in the joint report:

> "At the outset Mr Healy indicated that in the light of the further material and having received and considered the reports of Drs Brown and Chalk, he no longer held the view this lady suffered from post traumatic stress disorder.
>
> …
>
> Indeed all practitioners agreed that Dr Groves had shown over the years, a degree of significant resilience in her personality and all concurred that she had a number of significant personality strengths. All agreed that in the relevant time frames between 2004 and 2008, there was no evidence of any significant impairment of her capacities or her memory in relation to the events. This, in the view of all of the experts, relates to the relevant documents signed in the period between 2004 and 2008."

[106] It was suggested by Mr O'Shea QC that one of the reasons that Dr Groves might have been unwilling to accept that certain signatures had been written by her was because of "hypervigilance". Dr Brown referred to hypervigilance in her report but with respect to personal safety both during and after the marital separation, not the issue of the identification of signatures on documents. Dr Brown said that: "This type of complaint in domestic violence relationships usually presents a reality based fear of being subject to further violence, rather than being an unexpected psychological response to the anticipation of violence."

[107] Dr Brown also gave evidence about whether Dr Groves would be unable to recollect the act of signing various documents and whether she would form a positive belief that the signatures did not belong to her and were forged.

[108] Dr Brown's opinion was:

> "Dr Groves did not allege a lack of memory for any financial documents she has allegedly signed, or full or partial amnesia for other events occurring in her life. This issue is of relevance to consider in that some traumatised individuals experience dissociative symptoms, in which they feel disconnected from themselves or the

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35 Her report is Ex 311.

36 His report is Ex 312.

37 Ex 313

> world or experience hazy recall or periods of total amnesia for events, which may occur either during a traumatic incident or subsequent to reminders. In this regard, a high level of emotional arousal, either at the time of the trauma or secondary to reminders, can interrupt the normal laying down of continuous memory.
>
> However, Dr Groves' belief that the signatures on various of the documents are not hers and have been fraudulently signed is unlikely to be explained on the basis of any dissociative type memory difficulties. Not only did Dr Groves report insufficient in the way of post traumatic stress type symptoms, or any history of impaired memory recall/amnesia, any symptoms of anxiety she experienced did not affect her capacity to recall events in a normal everyday sense. **It is therefore unlikely that Dr Groves would have formed the belief that the signatures did not belong to her and were forged**.
>
> …
>
> With respect to whether Dr Groves would have remained silent about her belief of these signatures being forged during the February to March 2008 period whilst the shares were being sold to meet margin calls, her behaviour during this period of time has been less able to be understood on the basis of the current assessment. **Had Dr Groves become aware at this stage of events that she had become guarantor but had not previously realised these commitments, it is my opinion that she would have been vocal about denying her involvement**." (emphasis added)

[109] Dr Chalk, in his report, said:

> "There is no evidence to suggest that during this time, she suffered from significant periods of dissociation which might have impaired her memory and certainly no evidence to suggest that she was suffering from any significant psychiatric illness, to substantially impair her memory or capacity to understand the nature and the effect of documents that she might be signing.
>
> I do not think there is any compelling evidence to suggest that she would have been unable to read and understand documents with which she was provided."

[110] These opinions, which were not effectively challenged, support the view I have taken of Dr Groves' credibility.

Did Dr Groves sign the relevant documents?

[111] Dr Groves' case was that her signature had been forged and although it was not pleaded, the clear implication was that Mr Groves was the forger. In a gallant effort to deflect the weight of evidence against that proposition, the plaintiff's final submissions contained the following observation:

> "136. Their evidence [referring to the defendants' handwriting experts] also establishes, on the balance of probability, that someone other than the plaintiff was signing her name (although not on documents which are central to the case)."

[112] Before considering the evidence on this topic I will consider the legal background against which the evidence must be tested.

[113] Section 59 of the *Evidence Act* 1977 provides:

> "**Comparison of disputed writing**
>
> (1) Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses and such writings and the evidence of witnesses respecting the same may be submitted as evidence of the genuineness or otherwise of the writing in dispute.
>
> (2) A court may compare a disputed writing with any writing that is genuine and act upon its own conclusions in relation thereto."

[114] The comparison allowed by s 59 was conducted by two experts who gave evidence – Christopher Anderson (called by CGMA and Citi NA), and Neil Holland (called by BT).

[115] The plaintiff also had the documents examined by two experts but neither was called. This raises the issue of what, if any, inference may be drawn by the failure to call those experts. There were also other possible witnesses about whom the well known principle in *Jones v Dunkel*[38] was said to apply. It will be convenient to consider that principle at this point.

[116] This principle can be traced back some 240 years to a dictum of Lord Mansfield in *Blatch v Archer*[39]. It was referred to by Gleeson CJ in *Swain v Waverley Municipal Council*[40] in this way:

> "[17] More than 200 years ago, Lord Mansfield said that 'all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.' This basic principle of adversarial litigation is not a matter of esoteric legal knowledge; it accords with common sense and ordinary human experience."

[117] This basic principle was considered in *Jones v Dunkel* where the High Court was concerned with the circumstances in which a jury might find negligence and the direction which should be given when a relevant witness was not called. In dealing with the latter point, Menzies J said that a proper direction would have been:

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38 (1959) 101 CLR 298; [1959] HCA 8

39 [1774] Eng R 2; (1774) 1 Cowp 63 at 65 [98 ER 969 at 970]

40 (2005) 220 CLR 517; [2005] HCA 4

> "(i) that the absence of the defendant … as a witness cannot be used to make up any deficiency of evidence; (ii) that evidence which might have been contradicted by the defendant can be accepted the more readily if the defendant fails to give evidence; (iii) that **where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference**."[41]

[118] To similar effect was Kitto J:

> "His Honour told the jury that the fact that Hegedus had not gone into the box left them in this position, that they could accept the facts given by the plaintiff as proved, and that the question for them then was whether they thought that from the proved facts an inference of negligence ought to be drawn. It was right enough to point out, in effect, that the evidence given might be the more readily accepted because it had been left uncontradicted, and that the omission to call Hegedus as a witness could not properly be treated as supplying any gap which the evidence adduced for the plaintiff left untouched. But what should have been added, and not being added was in the circumstances as good as denied, was that **any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence**. The jury should at least have been told that it would be proper for them to conclude that if Hegedus had gone into the witness-box his evidence would not have assisted the defendants by throwing doubt on the correctness of the inference which, as I have explained, I consider was open on the plaintiff's evidence. In my opinion what his Honour said on the point amounted to a misdirection."[42]

[119] Those two passages were approved in *West v Government Insurance Office (NSW).*[43]

[120] The consideration of these principles in *ASIC v Hellicar*[44] has reinforced the limited manner in which the failure to call particular evidence may be used. In that case the New South Wales Court of Appeal had concluded that ASIC's failure to call a particular witness had "consequences for the cogency of ASIC's case". With respect to that proposition the following was said:

> "[165] **Disputed questions of fact must be decided by a court according to the evidence that the parties adduce, not**

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41 Ibid at (CLR) 312
42 Ibid at (CLR) 308
43 (1981) 148 CLR 62 at 69
44 (2012) 286 ALR 501; [2012] HCA 17

> **according to some speculation about what other evidence might possibly have been led**. Principles governing the onus and standard of proof must faithfully be applied. **And there are cases where demonstration that other evidence could have been, but was not, called may properly be taken to account in determining whether a party has proved its case to the requisite standard. But both the circumstances in which that may be done and the way in which the absence of evidence may be taken to account are confined by known and accepted principles** which do not permit the course taken by the Court of Appeal of discounting the cogency of the evidence tendered by ASIC."[45]

[121] Thus, where it is known that expert evidence[46] was available to be called by the plaintiff (and there was no suggestion that the two experts were unavailable) but was not called then I am entitled to take that into account when considering whether the plaintiff has proved her case to the requisite standard on this point.

[122] The onus is on Dr Groves to establish that the signatures in question are not hers.[47] What, then, is the requisite standard? With respect to each of the documents relied upon by the defendants the plaintiff pleads that the signature appearing on the document, which purports to be that of Dr Groves, was not written by Dr Groves. While there is no pleading as to who, on the plaintiff's case, might have written those signatures it is obvious that Dr Groves contends that her signature on those documents was forged. As has been noted above the strong flavour of Dr Groves' evidence was that the "forger" was Mr Groves. But that was not pleaded and Mr O'Shea QC admitted that there was not a sufficient basis to plead that. Nevertheless, it is an allegation of forgery by some unidentified person or persons. As such, it engages the requirement summarised in *Jeans v Cleary*[48]. In that case, it was alleged that the defendant had forged the plaintiff's signature on a personal guarantee. I respectfully agree with what Johnson J said when he dealt with the appropriate standard of proof:

> "[28] … the standard of proof to be applied is the civil standard, proof on the balance of probabilities, being qualified having regard to the gravity of the questions to be determined. The test has been said to be whether the issue has been proved to the reasonable satisfaction of the Court, such satisfaction not being produced by inexact proofs, indefinite testimony or indirect inferences: *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; *Helton v Allen* (1940) 63 CLR 691 at 701; *Rejfek v McElroy* (1965) 112 CLR 517 at 521. The Court should be comfortably satisfied on the balance of probabilities before such a finding is made: *Bannister v Walton* (1993) 30 NSWLR 699 at 711–712.
> [29] The rationale for this approach was explained in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 where

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45 Per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ

46 This principle applies to expert evidence: *Brandi v Mingot* (1976) 12 ALR 551, *Harris v Bellemore* [2011] NSWCA 196 at [140]

47 *Damjanovic v York Agencies Pty Ltd* [2003] NSWCA 222 at [25], [80]

48 [2006] NSWSC 647

Mason CJ, Brennan, Deane and Gaudron JJ said at 170–171 (footnotes excluded):

> 'The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involved criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.'"

[123] I will now consider Dr Groves' evidence on this issue. In her reply to the defences of CGMA and Citi NA[49] she pleads that the signatures on the FIF application form and the signatures on the Citi NA documents were "not written by Dr Groves". The same pleading was made with respect to the BT documents. That certainty was degraded by the approach taken by her in evidence. There were a number of occasions when she said she did not think she signed a document and her belief, as she explained, was premised on the contents or type of document. The overall effect, though, was that she had not signed the relevant documents.

[124] I turn now to the expert evidence. Both experts were provided with samples which were acknowledged to be of Dr Groves' signatures and handwriting ("the Groves samples").

Evidence called by CGMA and Citi NA

[125] Mr Anderson provided three reports[50] – an initial report of 4 October 2011, and two supplementary reports of 29 May 2013 and 31 May 2013.

[126] In the initial report Mr Anderson's opinion was that the person who wrote the signatures of Dr Groves on the FIF application form, Citi NA guarantee and some other Citi NA documents were written by the same person who wrote the signatures in the Groves samples. In his report Mr Anderson used a sliding scale to indicate the degree of confidence he had in a particular conclusion. With respect to those findings his degree of confidence was at the highest level.

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49 Amended Reply to the Further Amended Defence of the Second Defendant and the amended Defence of the Fourth Respondent.

50 Ex 306

[127] In his supplementary report of 31 May 2013 he expressed the opinion that the entry "24/11/04" and the handwritten version of Dr Groves' name on the FIF application had been written by the same person who had written the handwriting in the Groves samples.

[128] Mr Anderson was subjected to some searching and effective cross-examination about his report of 29 May 2013. He was taken to a number of signatures and questioned closely about the conclusions he had reached and, in particular, the degree of certainty he had attached to those conclusions. He was cross-examined over two days and, during an adjournment, he reconsidered some of his findings and assigned lower degrees of confidence to them. It is reasonable to conclude that he had not approached his task with respect to those signatures with the diligence which might be expected.

[129] The conclusion which the plaintiff says I should draw from this evidence is that someone other than the plaintiff was signing her name during the period 2003 to 2006. That conclusion, even if drawn, does not assist the plaintiff. While it might be said that Mr Anderson had been less than precise in his report of 29 May there was no cross-examination which would justify that finding with respect to his other reports. It was not put to him that any of the matters upon which he was questioned or the amendment made to his 29 May report had any effect on his other reports. He was not challenged about his findings with respect to either the signatures or the handwriting on the relevant documents.

24 November 2004

[130] Exhibit 3 was executed on 24 November 2004. Dr Groves said she was too busy with the ABC Annual General Meeting (which was taking place on that day) to have had the time to sign Exhibit 3. It became clear during evidence that she had nearly an hour between the end of an ABC Board meeting and the commencement of the AGM. When that was pointed out to her in cross-examination she said that she had gone for a walk during that time. This was particularly unconvincing and reeked of desperation. I do not accept her evidence on this point.

Evidence called by BT

[131] Mr Holland provided a number of reports and BT relies on three of them – 25 November 2011, 5 June 2013 and 8 June 2013.[51]

[132] The effect of these reports is that, in his opinion, a large number of disputed signatures were written by the same person who wrote the Groves sample signatures – including those on the relevant documents.

[133] Mr Holland was cross-examined in great detail by Mr O'Shea QC and in the process exposed the lax approach which Mr Holland had taken with respect to a number of the comparisons he had made. His attention to detail in some respects was not of the standard required of an expert witness and his attempts to explain these shortcomings were, at times, simply evasive. But, even with the concessions which

[51] Ex 319

were wrung out of him, the evidence he gave with respect to the signatures on the relevant documents was largely unaffected.

Evidence of Neander and Huppert

[134] I have already dealt, in part, with the meeting on 9 June 2005.

[135] In August 2004 Mr Groves was granted a BT Securities Margin Loan.[52] At that time Dr Groves was not involved. In May 2005 Mr Groves sought an extension to that loan[53] and one of the conditions of granting that extension was that Dr Groves had to become a third party guarantor and pledge her ABC shares as security.[54]

[136] Ms Neander gave evidence that she met with Dr Groves and Mr Groves on 9 June in the boardroom of the ABC headquarters in Murarrie. Ms Neander's evidence about the meeting and what occurred at the meeting was attacked by the plaintiff in her written submissions. In particular, it was said that Ms Neander was reconstructing what occurred on the basis of the documents she had seen after the event. I do not accept this. I found Ms Neander to be a thoughtful and careful witness. It is true that the meeting took place about eight years ago and that it took place during a busy time for banks and financial institutions generally. Ms Neander said that she took some handwritten notes and later (some five weeks later) entered them into the bank's electronic system. That is not unusual. It is reasonable that an institution the size of the third defendant and Westpac should have a system whereby handwritten notes are replaced by electronic records. The record made by Ms Neander is consistent with the mileage log she created for the purposes of taxation information which showed that she made a trip to Murarrie on that date.

[137] The meeting itself only took a short period of time. It was said that her evidence differed from the manner in which the circumstances of the meeting were put to Dr Groves. That is so. There were some minor differences in the order of events but nothing to suggest that there had been the reconstruction contended for by the plaintiff.

[138] At that meeting the acknowledgement form which is the basis of the liability the plaintiff has to BT, was executed by Dr Groves and, as I have noted above, she ticked each of the boxes set out on that form and indicated her state of knowledge of the arrangement.

[139] Ms Neander was asked in chief whether she went into a detailed explanation for Dr Groves about what was involved in the transaction.[55] She said she did not for a number of reasons. First, she said that Dr Groves had indicated that she had seen a financial adviser. Secondly, Ms Neander was aware that BT was taking over an existing facility (formerly held by Suncorp). Thirdly, Dr Groves was an experienced business woman. Ms Neander said that she presumed that she would be well aware of a guarantee. It was submitted for the plaintiff that the evidence about the

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52 Ex 264
53 Ex 265
54 Ex 266
55 T 17-70

indication by Dr Groves that she had seen a financial adviser could only have come about after the form was filled in by Dr Groves. That is correct, but all the circumstances leading up to 9 June were sufficient to have led a reasonable person to form the view that financial advice would have been sought about the nature of the transaction. The communications between Mr Groves and Ms Neander from the end of May until 9 June 2005 set out the essential terms of the arrangement. There was no reason for Ms Neander not to believe that these matters would have been discussed by Dr Groves and Mr Groves. In any event, Ms Neander did not agree with the suggestion put to her that it was unlikely that Dr Groves would have sought advice before the meeting on 9 June. As she said: "If I was entering into a transaction worth this sort of money, I'd be getting advice."

[140] A person in the position of Ms Neander is entitled to take into account all the surrounding circumstances of which she is aware or about which she might reasonably have formed a view.

[141] I formed the view that Ms Neander was telling the truth about the meeting and that the documents relating to the meeting supported her evidence. I am satisfied that the meeting took place in substantially the manner described by Ms Neander and that she did see Dr Groves sign the relevant document and that she did, properly, witness that signature.

[142] A further meeting took place in January 2006 when Dr Groves attended at the offices at Westpac at 260 Queen Street, Brisbane. Ms Neander was at that meeting as was Mr Huppert. He gave evidence that the three of them met in a room in the Westpac offices and that he told Dr Groves that he had the form which she needed to sign in order to lodge her shares as security for Mr Groves' loan. He said that he saw Dr Groves sign the form and give it back to him. Although this was the first occasion on which he had met Dr Groves he was able to recognise her in the courtroom during the trial.

[143] Ms Neander was present at that meeting and gave broadly similar evidence as to what occurred.

[144] With respect to both Ms Neander and Mr Huppert and with respect to both the meetings of 9 June 2005 and 11 January 2006, it was put to both witnesses that they had engaged in thousands of meetings since that time and had seen many people sign many documents. Both the witnesses agreed with those broad contentions. That was, in part, relied upon by the plaintiff as a means of weakening the evidence that they gave about the meetings. I do not by any means intend to be discourteous by the comment I now make, but Dr Groves could well be regarded by many people as having a striking appearance and one which would be easy to recall. I do not base my findings on that factor, rather it is part of the general material upon which I rely to find that both the meetings took place in broadly the same terms as described by the witnesses, that Dr Groves did sign documents at those meetings, and that the witnesses did see Dr Groves sign them.

The "incompetent" forger

[145] Apart from the physical or pictorial similarities of the signatures, the contention that these signatures were forged in order that Dr Groves would be bound by the relevant documents – but not become aware of them – defies belief. The forger was no Professor Moriarty. This hypothetical forger made mistake after mistake:

(a) Many of the documents with the "forged signature" contained the telephone number of ABC. Any one seeking to speak to Dr Groves about such a document would, on calling that number, have been put through to her.[56]

(b) Dr Groves' personal email address was used on the FIF application form and it was provided to Citi NA. Once again, a message to that address would have reached her.

(c) There is handwriting on pages 6 and 11 of the FIF application form which appears to be that of Dr Groves. Many of the other documents which were signed by Dr Groves had some sections filled in by other people. There was no reason for a forger to copy her handwriting. I find that it is Dr Groves' handwriting (for the reasons above).

(d) In Exhibit 249 Mr Groves' name has been written (beneath his signature) in Dr Groves' handwriting. There was no need for a forger to do this.

(e) On a BT application form[57] Dr Groves' mobile telephone number has been written in a way which she described as similar to her handwriting. There was no need for a forger to do this.

(f) Other matters such as the change of address on the FIF application form and whiting out the tick on that form in the "Mrs" box and inserting a tick in the "Dr" box are consistent with Dr Groves' behaviour and were unnecessary for any forgery.

Conclusion on signatures

[146] The evidence from the experts was convincing, as was the evidence from Ms Neander and Mr Huppert. I also examined the signatures admitted by Dr Groves to be hers and compared them with those on the relevant documents. To my eye they appear to have been written by Dr Groves. Further, the plaintiff retained two experts to compare the signatures etc but did not call them. I am entitled to draw upon that,[58] and I do, to support my conclusion that the plaintiff did not discharge the onus upon her with respect to those signatures.

[147] In light of all the evidence I have referred to I find that:

(a) Dr Groves did sign the relevant documents,

(b) She did recall and was aware of those documents, and

(c) In an effort to forestall the making of those findings constructed a series of falsehoods.

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56 T 5-40

57 T 11-41

58 It was conceded that a *Jones v Dunkel* inference could be drawn – T 24-13

The proper construction of the CGMA documents

[148] Dr Groves was given leave on two occasions to amend her pleadings in order to argue that:

(a) The FIF application form (Ex 3) did not authorise the entry (of the plaintiff) into the document headed "Terms and Conditions of the Smith Barney Flexible Investment Facility" (Ex 2) – which I will refer to as the "CGMA guarantee".
(b) The CGMA guarantee is not a guarantee of the debts of Mr Groves.
(c) The CGMA guarantee is an agreement between CGMA and a principal debtor.
(d) The agreement between CGMA and Mr Groves for a FIF does not identify Dr Groves as a guarantor or at all.

The FIF Application Form

[149] The document appears to have been drawn so that either or both a borrower and a guarantor may fill out the one document. After its title it contains, on the first page, these words: "I/We wish to apply for Smith Barney Flexible Investment Facility." There is then a section for personal details to be inserted and, importantly, two boxes: one marked "Borrower" and one marked "Guarantor". Dr Groves ticked the box marked "Guarantor".

[150] There are then sections for the details of: an authorised representative, the loan facility, and a tax file number. None of these were filled in.

[151] There are then two sections containing terms and information: "Section 7 Power of Attorney" and "Section 8 Declarations and Risk Disclosure".

[152] Section 7 ("Power of Attorney") provides, so far as is relevant:

> "(1) Each person described on page 1 of the Application Form … as the guarantor ('you') for valuable consideration appoints Smith Barney Citigroup Australia Pty Limited and each of its related bodies corporate … and each of their respective directors … as its true and lawful attorneys.
>
> (2) The attorneys may do in your name everything necessary or expedient to:
>
> (a) do all things required to sign and deliver on your behalf all of the documents in respect of the Flexible Investment Facility, including the mortgage;
> (b) do all such things that are required for the conversion of any of your approved securities to the CHESS system; and
> (c) …
> (d) date and to complete any blanks which may be left in any documents; and
> (e) do anything which you can do or are obliged to do as owner of the mortgaged property (including completing any blanks in any of those documents,

executing agreements, signing off any market transfer, authorising, instructing or requesting the amendment of your details as necessary, authorising and instructing a person to accept directions in respect of the mortgaged property) or do anything which you can do in respect of the transactions contemplated by those documents; and

(f) do all things necessary to sign and deliver on your behalf all of the documents needed to enter into a new Flexible Investment Facility."

[153] Section 8 provides, among other things, that the applicant:

(a) declares that she has "read the Flexible Investment Facility and all documents associated with it",

(b) understands that, if her application is approved, she has appointed an attorney to sign the FIF and that she mortgages any securities placed in her CHESS account with Smith Barney, and

(c) has read the risk disclosure statement in Part C of the form and is prepared to accept the risk.

[154] Section 12 is entitled "Signatures executed as a deed". Dr Groves signed that section as a guarantor. It is dated 24 November 2005.

[155] Part C is headed "Risk Disclosure Statement". This part consists of some 15 paragraphs and sets out in detail many of the risks associated with borrowing against the value of securities and securing that borrowing with those securities. The statement is described as being intended to highlight some of the more significant risks associated with a margin lending facility. Reference is made to market volatility and margin calls on margin loans. This part also contains advice about the need to monitor a loan and the amount owing at all times. Paragraph 14 of this part is headed "Guarantee" and provides:

> "If you plan to be a guarantor, you should consider carefully whether guaranteeing the performance of the obligations of the borrower is appropriate to you and your particular financial circumstances. Smith Barney usually requires and independent solicitor's certificate from guarantors.
>
> As a guarantor, you should be aware of the following before deciding to provide a guarantee:
>
> (a) the borrower is exposed to the risks of the volatility of the share market if they take a margin loan. Your obligations as guarantor are also subject to the borrower's risks.
>
> (b) your obligations as guarantor of the borrower's obligations and Smith Barney's rights to deal with the securities you mortgage are subject to the terms of the guarantee set out in the Flexible Investment Facility agreement. You should read this agreement carefully. In particular, you should consider carefully the consequences for you of the borrower drawing against the value of the securities which you have

> mortgaged and in some cases the borrower's right to trade in your securities.
>
> (c) Smith Barney may sell the securities without notice to the borrower or guarantor. If the borrower is required to make up any shortfall in security, Smith Barney may exercise its rights against any security held for it whether or not you, as guarantor, have received notice of the shortfall."

[156] Also contained within the document is a page entitled: "Authorisation to transfer securities/margin loan to Smith Barney Margin Lending." It contains two parts: "A" – Transfer Details and "B" – Authorisation.

[157] Part A contains the plaintiff's full name (as a guarantor) and her private PO Box. It identifies the "sponsoring broker" as Austock. Under the entry "IF YOU WISH TO TRANSFER INDIVIDUAL SECURITIES TO SMITH BARNEY, PLEASE LIST BELOW" the following details appear: the ASX code ABS, the name of the security – ABC Learning, the number of shares – 2,600,000, and the name the shares are held in – Dr Le Neve Groves.

[158] Part B consists of a statement of authorisation and then a number of boxes of which two are ticked. It reads:

> I/We authorise the lender/sponsoring participant named in Part A above to:
>
> □ Provide Smith Barney with any and all information regarding my/our CHESS Sponsored account and/or margin lending/protected loan facility
>
> □ Transfer my/our (above stock) to Smith Barney Citigroup Australia Pty Limited (part only)

[159] The plaintiff argues that the form is deficient in that there is nothing to indicate the "Flexible Investment Facility" to which it relates. There is, for example, no reference to the identity of any borrower or the amount being borrowed. It does not identify the obligations that are said to be guaranteed, and does not identify the terms and conditions of the guarantee. The plaintiff argues that the document does not permit the entry into the CGMA guarantee by an attorney on behalf of Dr Groves.

[160] In the written submissions for the second defendant, a convenient and uncontroversial list of some of the general principles of contractual interpretation is set out and I repeat it here in the same terms:

> "The relevant general principles of contractual interpretation are as follows:
>
> (a) a contract must be read as a whole;[59]

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[59] *Maye v Colonial Mutual Life Assurance Society Ltd* (1924) 35 CLR 14 at 22 per Isaacs ACJ with whom Rich J generally agreed.

(b) where a contract incorporates by reference other documents, all must be read and construed together;[60]

(c) the substantive effect of the contract can be determined only by examination of the contract as a whole;[61]

(d) the meaning of commercial contracts is determined objectively;[62]

(e) the common intention of the parties to a contract is determined by asking what a reasonable person would understand by the language in which the parties have expressed their agreement;[63]

(f) 'evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning';[64]

(g) to be admissible the surrounding circumstance must be known to both parties or be so notorious that knowledge will be presumed;[65]

(h) the objective, commercial purpose of a commercial contract is admissible;[66]

(i) commercial contracts should be given a fair and broad reading without being astute or subtle to find defects or deficiency;[67]

(j) 'words may generally be supplied, omitted or corrected in an instrument when it is clearly necessary in order to avoid absurdity or inconsistency';[68]

(k) 'if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, "even though the construction adopted is not the most obvious, or the most grammatically accurate"',[69] and

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60 *Maye* at 22.

61 *FAI Insurance Limited v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641 at [33] per McHugh, Gummow and Hayne JJ.

62 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22] per Gleeson C J, Gummow, Hayne, Callinan and Heydon JJ.

63 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

64 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352 per Mason J.

65 *Codelfa* at 352 per Mason J.

66 *Codelfa* at 350 per Mason J; *Pacific Carriers* at [22] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

67 *Australian Broadcasting Commission v Australasian Performing Right Assn Ltd* (1973) 129 CLR 99 at 109-110 per Gibbs J.

68 *Fitzgerald v Masters* (1956) 95 CLR 420 at 426-7 per Dixon CJ and Fullagar J.

69 *Australian Broadcasting Commission* at 109 per Gibbs J.

> (l) post-contractual conduct is generally not admissible as an aid to interpretation.[70]"

[161] The argument for Dr Groves, simply put, is that the FIF application form is ill-suited to achieve the purpose claimed by CGMA, namely to allow CGMA to act as Dr Groves' attorney. By itself the document tells the reader very little. That is not fatal if the necessary information can legitimately be incorporated in some other way.

[162] The document is obviously designed to be used in a way that would allow both a borrower and a guarantor to fill in all the details and execute it. It could also be used solely by a guarantor. CGMA submits that the FIF application form must be read as a whole **and** be read together with the CGMA guarantee which is an FIF agreement.

[163] The FIF application form does not, if it is otherwise effective, constitute a guarantee. CGMA relies on it only as creating a power of attorney. The guarantee relied upon by CGMA was executed by Adrian Hanley who signed as attorney for Dr Groves.

[164] The document satisfies the formalities usually regarded as necessary to constitute a power of attorney: it is in writing, it is expressed to be a deed, and it identifies both the principal and the attorney. The issue which arises is whether the powers granted in section 7 are sufficient to allow the signing of the guarantee. It has long been acknowledged that the terms of a power of attorney are to be construed strictly.[71] And that remains the rule.[72]

[165] In order to determine whether the document empowered the attorney to execute the guarantee it is necessary to consider all the powers conferred by the document the context in which they appear, and the wider context known to the plaintiff. With respect to the latter consideration the principle enunciated in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*[73] provides controlling guidance as to the principle of objectivity by which the rights and liabilities of the parties to a contract are determined:

> "It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. **References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have**

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70 *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [35] per Gummow, Hayne and Kiefel JJ

71 *Attwood v Munnings* 99 ER 727 (1827)

72 *Tobin v Broadbent* (1947) 75 CLR 378 at 390

73 (2004) 219 CLR 165

> **understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction**."[74] (emphasis added)

[166] I turn to the wider context. The document was signed by Dr Groves in November 2004. At that time Dr Groves knew that Mr Groves was going to organise the purchase in her name of a significant number of shares in ABC as part of raising capital to fund the purchase of the Peppercorn child care business.[75] She also knew that Mr Groves was going to purchase a similar number of shares. At that time there was insufficient money in their joint account to fund any large purchases. Dr Groves did accept that there was no one other than Mr Groves who would have asked her to act as a guarantor for him at that time.[76]

[167] I do not accept Dr Groves' denial that she did not sign Exhibit 3 and that she did not see it until 2008. At the time she signed it she knew that there was a reason for Mr Groves to borrow money and that by doing so she would benefit through the acquisition of more shares. CGMA obviously was aware of the proposal for the loan. I am satisfied that Dr Groves was aware of the terms and effect of Exhibit 3 and that when she signed it in November 2004 she knew that it was for purposes which included the appointment of an attorney to sign documents, including a guarantee, relating to a loan to Mr Groves from CGMA.

The CGMA Guarantee

[168] It is argued for Dr Groves that:

(a) the document relied upon by CGMA (Exhibit 2) is not a guarantee by her of Mr Groves' debts, and

(b) nowhere in the agreement is the debtor whose obligations are being guaranteed identified.

[169] The document is entitled: "Terms and Conditions of the Smith Barney Flexible Investment Facility". It is in eight parts, of which only three – "Part A: Loan Agreement", "Part G: Definitions" and "The Schedule" – are relevant. It is not the acme of clear expression. It contains within Part A terms which relate solely to a borrower, terms which relate solely to a guarantor and terms which relate to both.[77]

[170] The agreement commences:

> "1. The Loan
>
> 1.1 We agree to make a facility and **loan available to you** on the terms of this Agreement, including the terms set out in the confirmation letter.
>
> 1.2 You may use the facility and loan from time to time in accordance with the terms of this Agreement

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74 Ibid at [40]

75 T 7-67

76 T 7-78

77 While inelegant, this combination is not unknown, see *Vivlios v Westpac Banking Corporation* [2012] QCA 230 at [7]

1.3 The loan and facility will only be **made available to you**, if you, **and if relevant, the guarantor**, have:

(a) given us any approval, document or information which we reasonably requested from you by the time specified; and

(b) paid us any fees we require; and

(c) opened a deposit account, in accordance with clause 24.

…"

[171] While this is not a particularly graceful way of distinguishing those who might be bound, it does identify two separate entities: "you" (who must be the borrower) and the "guarantor".

[172] This is made plain in clause 10 which deals with default:

"10.1 **You, and the guarantor**, are in default if:

(i) **you, or the guarantor**, do not pay on time all amounts payable under this Agreement: or

…"

[173] Clause 11 provides:

"Guarantee and Indemnity

11. Guarantee

11.1 The **guarantor** unconditionally and irrevocably guarantees the payment to us of the guaranteed money.

11.2 **If you do not pay** the guaranteed money on time and in accordance with the terms of this Agreement, **the guarantor** agrees to pay the guaranteed money to us on demand from us.

11.3 We need not make a demand upon you to pay us or take action to enforce our rights against you before we claim from the guarantor.

11.4 The guarantor gives a mortgage, makes the same declarations and enters into the same Agreement with us as if the guarantor was named in clause 7 "Mortgage" and clause 14 "Declarations and Undertakings" instead of you.

11.5 The guarantee in this clause is a continuing obligation and extends to all of the guaranteed money."

[174] Clause 12 provides:

"12. Indemnity

12.1 The **guarantor** unconditionally and irrevocably indemnifies us and must therefore pay us on demand for any loss or costs we suffer or incur if:

(a) **you** do not, are not obliged to, or are unable to, pay us the guaranteed money In accordance with this Agreement; or

> (b) the guarantor is not obliged to pay us an amount under clause 11 above; or
> (c) we are obliged, or we agree, to pay an amount to a trustee in bankruptcy, liquidator or controller (as defined in the Corporations Act) (or to a bankrupt person or insolvent company) in connection with a payment by the guarantor or you. (For example, we may have to or may agree to pay interest on the amount)."

[175] The plaintiff submits that these provisions – and the document as a whole – appear to be addressed to the principal debtor rather than the guarantor. That is not so. "Guarantor" is defined in Part G to mean "a person (if any) whose name is shown as such on the Application Form and any person who subsequently becomes guarantor of your obligations in respect of a loan. …". An "application form" is defined as meaning "the form for applying for a loan required by us from time to time." The FIF Client Application Form (Exhibit 3) describes Dr Groves as a guarantor. She is also the person identified in the schedule to Exhibit 2 as the "First Guarantor".

[176] It is an agreement which can be with either a borrower or a guarantor or both depending upon the manner in which it is completed. This much is clear from clause 22.10 which clearly recognises that a person can become a guarantor under this agreement:

> "22.10 **By agreeing to become a guarantor under this Agreement**, the guarantor appoints you its authorised representative to give us instructions and to receive notice from us or to do anything that you and the guarantor are entitled to do under the Agreement."

[177] That leaves the point that the borrower is not identified in the document. While it will ordinarily be the case that the debtor will be identified in the guarantee it is not essential. But it must be ascertainable.[78] Extrinsic evidence of the kind referred to above with respect to the power of attorney (Exhibit 3) is likewise able to be used in these circumstances. The accepted way of determining this point was described in *Fairstate Ltd v General Enterprise & Management Ltd*[79] in this way:

> " … the modern approach is to apply to contracts of guarantee the same principles of construction as would be applied to any other commercial contract. There is nothing in the policy underlying the *Statute of Frauds* which prevents the application of these modern principles of construction, or which requires them to be modified (except in one respect) in their application to guarantees. In accordance with these principles (and in a suitable case), extrinsic evidence may be relied upon to identify the guarantor, the creditor, the principal debtor or the obligation to be guaranteed, where any of these have been inadequately or ambiguously described in the relevant document. Where the evidence is sufficiently convincing

78 *Pang v Bydand Holdings Pty Ltd* [2010] NSWCA 175
79 [2010] EWHC 3072 at [75]

> (and the other conditions are met) for an order for rectification to be made, such evidence may even be used to supply a missing name or obligation."

[178] By applying those principles, and relying on the evidence referred to above concerning the power of attorney, I conclude that the borrower referred to in the guarantee is Mr Groves and that Dr Groves knew that.

Reliance on the rule in *Yerkey v Jones*

[179] The plaintiff's case, as pleaded, relied upon the two limbs of the rule in *Yerkey v Jones.*[80] The first limb requires that undue influence be established, the second does not.

[180] This is a pleading in the alternative which is only available if Dr Groves signed the relevant documents. As I have found that she did, it is necessary to consider this matter.

The first limb – the undue influence case

[181] Where:

(a) a husband applies undue influence to his wife and, as result,
(b) the wife provides security for the debts of her husband, then
(c) a creditor who knows that they are married
(d) will be affected by the husband's undue influence, and
(e) will be unable to enforce the security unless
(f) the creditor can show that the wife had independent advice or was free from the ascendancy of her husband.

[182] It was pleaded against each defendant that the guarantees were obtained in circumstances where Dr Groves was at a special disadvantage in relation to her dealings with Mr Groves and further or alternatively Mr Groves was in a special relationship of undue influence over Dr Groves by reason of the many matters alleged against Mr Groves including physical and mental abuse. This case was advanced through the evidence of Dr Groves and was not abandoned until final addresses began.

[183] In the submissions for BT it is argued:

> "Her evidence wasn't that Mr Groves put pressure on her to sign these documents and she did sign them because she succumbed to that pressure, and when she signed them, she wasn't doing it of her own free will. Her evidence is he kept them from her. He concealed the documents from her. She didn't give evidence of any pressure by him to sign these documents. Her evidence was the exact opposite. So, in our submission, the undue influence case is just hopeless."

---

80 (1939) 63 CLR 649

[184] Had the plaintiff pressed her claim under this limb of *Yerkey v Jones* then I would have made a finding in terms similar to BT's submission.

The second limb – the married woman's equity case

[185] The principal matters for consideration may be drawn from the High Court's decision in *Garcia v National Australia Bank Ltd.*[81] In that case the following findings had been made at trial

(a) The wife had given four guarantees over debts owing by the company through which her husband conducted business.

(b) The wife did not understand that:

(i) her liability under the guarantee extended to all the moneys owing by her husband's company from time-to-time, and

(ii) that the guarantee was secured by a mortgage granted over her home.

(c) The wife believed that the business was "risk proof".

[186] In dealing with that set of facts the High Court considered the principles expounded in *Yerkey v Jones* and, in the joint judgment of Gaudron, McHugh, Gummow and Hayne JJ, those principles were considered:

> "[31] 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**

[81] (1998) 194 CLR 395

> **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.**
>
> [32] To hold, as *Yerkey v Jones* did, that in those circumstances the enforcement of the guarantee would be unconscionable represents no departure from accepted principle. Rather, it "conforms to the fundamental principle according to which equity acts, namely that a party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct".
>
> [33] It will be seen that **the analysis of the second kind of case identified in *Yerkey v Jones* is not one which depends upon any presumption of undue influence by the husband over the wife**. As we have said, undue influence is dealt with separately and differently. Nor does the analysis depend upon identifying the husband as acting as agent for the creditor in procuring the wife's agreement to the transaction. 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." (emphasis added)

[187] In order to succeed on this point, the plaintiff must demonstrate each of the following:

(a) Dr Groves gave a guarantee of debts incurred or to be incurred by Mr Groves.
(b) Each of the defendants knew that Dr and Mr Groves were married.
(c) Dr Groves did not understand the effect of the guarantees or the nature of the transactions.
(d) Dr Groves was a volunteer in that she obtained no "real financial benefit" from the transactions.

[188] A failure to establish one or more of the matters set out above will mean that the "married woman's equity" can not apply.

Guarantee of debts?

[189] I have found that the first element has been established – not by Dr Groves – by the defendants.

Knowledge of marriage?

[190] It was conceded by BT that it knew of the marriage but the fact of separation was said to be relevant to the question of influence. CGMA and Citi NA accepted that they were married. In the majority judgment in *Garcia* it is said:

> "[40] We consider that the only question of notice that arises is whether the creditor knew at the time of the taking of the guarantee that the surety was then married to the creditor. Other questions of notice do not intrude."

[191] I was referred to *Wenczel v Commonwealth Bank of Australia*[82] and *Dowdle v Pay Now For Business Pty Ltd*[83] which suggest that the doctrine applies to a woman who, while still married, has separated from her husband. I was not asked to depart from the application of principle in this case but I do confess to some doubt about its applicability in cases of long separation.

Understanding of the purport and effect of the guarantees?

[192] So far as CGMA and Citi NA are concerned it is not contended by them that they explained to Dr Groves the purport and effect of the guarantee. No attempt was made to do so. BT is in a different situation and I will deal with it later.

[193] It is at this point that the twists and turns of the plaintiff's concocted case create an impediment for her. Her unwavering evidence was that she did not sign the relevant documents and that, with equal robustness, she would not sign any document she did not understand. Not surprisingly, the defendants light upon the latter evidence as the necessary proof of her understanding. In response, Dr Groves' counsel submit: "This submission is unrealistic. If the plaintiff's evidence about not signing the documents is not accepted, then her evidence about only signing documents if she understood them must be doubted."

[194] It was also argued for the plaintiff that:

> "The defendants' argument is also inconsistent with the theory of the case they propounded, which was that the plaintiff signed the various documents but left the running of matters to Mr Groves. In final address, Mr Kirk acknowledged that Mr Groves had the substantial running of the finances, that he did most of the organisation and that he was 'the driver'. Her involvement on that hypothesis was limited to signing off on the relevant documents. That hypothesis does not involve any knowledge on her part of how margin loans worked; on the contrary it involves a lack of such knowledge.
> In those circumstances, even if it is found that the plaintiff did sign the relevant documentation, there is no evidence that she understood how margin loans worked, or that the key details of this particular margin loan were made known to her."

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82 [2006] VSC 324
83 [2012] QSC 272

[195] This raises the issue of whether the onus lies on the "wife" or the "creditor" in these circumstances. In the Further Amended Statement of Claim the following is pleaded[84] with respect to each set of the relevant documents relied upon by the defendants:

> "Dr Groves did not understand the purport and effect of the transaction constituted by the provision of the [particular defendants' guarantee or documents]
>
> Particulars
>
> That Dr Groves did not understand the purport and effect of the transaction constituted by the provision of the [particular defendants' guarantee or documents] is to be inferred from the matters pleaded above and from the fact that Dr Groves has no recollection of the [particular defendants' guarantee or documents]."

[196] So far as "the matters pleaded above" are concerned, the only matters in paragraph 8B[85] which might support the allegation are:

> "(j) Dr Groves deferred to Mr Groves in respect of financial matters;
> (k) Mr Groves did not keep Dr Groves informed in respect of financial matters;
> (l) Citigroup did not explain the Citigroup Guarantee to Dr Groves;
> (m) no-one explained the Citigroup Guarantee to Dr Groves;"

[197] In each case the defendants deny that allegation. CGMA and Citi NA both plead that Dr Groves did understand the purport and effect of the relevant documents. BT also denied the allegation and pleaded further that Dr Groves had represented that she had read and understood the nature and effect of the BT relevant documents.[86]

[198] It is for Dr Groves to demonstrate that she did not understand the relevant transaction.[87] In her evidence in chief she said that, in 2004 and 2005, she did not understand what margin loans were or the effect of the guarantees relied upon. I do not accept that. I regard that evidence as being entirely self-serving and as false as most of her testimony.

[199] But, regardless of where the onus lies, there is evidence to support a finding that she did understand the documents – and at least to the level required.

[200] The level required is an understanding of the effect of the transaction "in essential respects".[88] Those respects are: the existence of the liability, the extent of the liability, and the consequences of default.

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84 Paras 8B(n), 12B(m) and 18B(m)
85 The other pleadings are relevantly the same.
86 Further Amended Defence of BT, para 28B(e)(ii)
87 *Liptak v Commonwealth Bank of Australia* (1998) 199 LSJS 322
88 *Yerkey v Jones* at 683 per Dixon J

[201] These aspects have been referred to in a number of ways, for example, in *Yerkey* Dixon J referred to the wife being "alive to the nature and effect of the obligation".[89] Later, he said: "if the general nature and effect of an instrument such as a mortgage executed by a married woman is understood or on reasonable grounds the creditor or other party or his agents believes it to have been understood, it is no ground for setting it aside that some of its details or its possible consequences or applications are not comprehended …".[90]

[202] In *State Bank of New South Wales v Chia*,[91] Einstein J expressed it in these terms:

> "An understanding of the "purport and effect" of the transaction includes, at least, an understanding of the **fact of liability**, the **general extent of liability** and the **possible consequences of default**: *Yerkey v Jones* (at 689). However, it is **not productive of an equity** that the wife misunderstood or **failed to appreciate the degree of risk** associated in the transaction, or the improvidence or unwisdom of the uses to which the money so secured will be put: *Yerkey v Jones* (at 686)."(emphasis added)

[203] The plaintiff argues that the reference to "degree of risk" in Einstein J's reasons is an oversimplification and is not wholly supported by authority. I do not agree. This particular paragraph was adopted by Campbell J (as he then was) in *Brueckner v Satellite Group (Ultimo) Pty Ltd*.[92] It was also considered by White JA in *Agripay Pty Ltd v Byrne*[93] where, at [58], she said:

> "There was … nothing, with respect, insufficient in Einstein J's shorthand description which misstated the effect of Dixon J's *dictum*."

[204] In this case the plaintiff said that she would not have understood the relevant documents at the time they were executed. In the submissions on her behalf it was argued that her evidence about only signing documents if she understood them "must be doubted". In other words, Dr Groves could not be accepted on that issue.

[205] In the absence of direct evidence, the extent of any understanding can only (as Dr Groves' pleading recognises) be demonstrated by inference. I will consider the evidence in four categories:[94]

(a) The inherent ability of Dr Groves to understand the documents she was signing.
(b) The history of Dr Groves' involvement in margin lending transactions, from which it may be inferred that she understood how margin loans operated.
(c) The events at the time Dr Groves signed the margin lending documents, including the terms of the documents that were signed.

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89 *Yerkey v Jones* at 684
90 *Yerkey v Jones* at 689
91 (2000) 50 NSWLR 587 at 600
92 [2002] NSWSC 378 at [185]
93 [2011] 2 Qd R 501
94 These are some of the categories suggested by BT in its submissions.

(d) The tax returns of Dr Groves in which deductions are claimed for interest on loans.

The inherent ability of Dr Groves to understand the documents she was signing.

[206] From both *Garcia v National Australia Bank Ltd* and *Agripay Pty Ltd v Byrne* it can be accepted that a lack of understanding can be found even where the wife is an intelligent, successful entrepreneur. But, in both those cases the wife gave evidence of her lack of understanding at the time. And, the qualifications and experience of the wife are factors which will make it less likely that the necessary comprehension of the transaction was absent. As McMurdo P said in *Agripay Pty Ltd v Byrne*:[95]

> "[13] It is true, as the appellant contends, that there are various aspects of this case which militate against his Honour's conclusion that the respondent did not understand the purport and effect of her guarantee. As Callinan J observed in Garcia, wives, especially those like the respondent, a well-educated, intelligent medical practitioner, may find it difficult to satisfy a court that they have succumbed to pressure or been misled by their husbands in financial matters. …
>
> [14] Although these matters favour the appellant's contention, they do not preclude a conclusion that the respondent did not understand the purport and effect of her guarantee. …"

[207] I have already dealt with the high level of Dr Groves' academic achievements and with her involvement with other entities at both an organisational and financial level. I do not doubt that Dr Groves had the intellectual ability to understand the relevant documents.

The history of Dr Groves' involvement in margin lending transactions

[208] Dr Groves' consistent evidence was that she had had no knowing involvement in margin lending and had not used her shares to secure a loan. As with so much of what she said, these statements do not bear close scrutiny. There was evidence from the handwriting experts that the signatures on many documents connected with margin lending and dated before 2005 had been written by the author of the sample signatures. I accept that evidence and conclude that Dr Groves did sign the documents I will refer to below.

[209] These documents are referred to in Annexure A to the submissions of BT and I will not repeat them here in the same degree of detail. They demonstrate that, at least on the balance of probabilities, Dr Groves had been engaged in margin lending before 2004 and, in some cases, had been the principal borrower. I consider later in these reasons the issue of whether Dr Groves was a volunteer with respect to the relevant documents but I am satisfied that many of the transactions conducted before 2004 were ones in which she had an obvious interest because they were used to fund further purchases of ABC shares for her.

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95 At [13]-[14]

[210] In 2002 Suncorp-Metway Ltd wrote to Dr Groves and Mr Groves telling them that their application for a Suncorp margin lending facility had been conditionally approved. By a later letter, it was confirmed that margin lending facility No 004130134 had been approved. The account name was "Edmund Stuart Groves & Le Neve Anne Groves". No evidence was produced with respect to any application form, but the evidence, to which I will now refer, leads to the rational inference that such an application had been made by Dr Groves and Mr Groves for a margin lending facility.

[211] The other evidence which supports the finding referred to in the paragraph above is as follows:

(a) A letter from the Australian Stock Exchange to Dr Groves showing that Metway Credit Corporation Limited had registered her in the CHESS as her sponsor.

(b) The Australian Stock Exchange sent a CHESS holding statement to Dr Groves recording that 350,000 of her ABC Learning shares had been moved onto the Sponsor ID for Metway.

(c) A margin lending account statement from Suncorp for June 2002 shows that the security for the loan was 350,000 in the name of Dr Groves and the same in the name of Mr Groves and that there had been a withdrawal from the facility in the amount of $2,747,034.

(d) Dr Groves and Mr Groves signed a letter requesting the withdrawal of the amount referred to above from the Suncorp facility and the deposit of that amount into a Westpac account. That letter was headed "Margin lending facility".

(e) In June 2002 Dr Groves exercised an option to purchase 200,000 ABC shares.

(f) The Suncorp margin loan is the most likely source of the money used to purchase those shares.

(g) In each of July 2002 and February 2003 Dr Groves signed a letter authorising withdrawal of money from the Suncorp margin loan.

(h) A CHESS holding statement was issued to Dr Groves in about November 2004 showing the movement of shares from the Metway Credit Corporation to Austock Limited.

(i) In December 2004 Dr Groves wrote to ASX Perpetual requesting the transfer of a certain number of ABC Learning shares. The number sought to be transferred was the same as the number moved from Metway Credit to Austock in November 2004.

[212] Finally, the loan transfer form[96] used to transfer the Suncorp margin loan to BT Securities was signed in June 2005. As has been noted, that form listed "Suncorp" as the "existing margin lender". That document was signed on 9 June 2005 and Dr Groves did not ask any questions about it. The reason for her not asking any questions was that she knew then, and had known for some years, that some of her shares had been pledged as security for the Suncorp margin loan.

[213] In 2002 Westpac wrote to Mr Groves and Dr Groves informing them that their request for finance had been approved and that a business finance agreement needed to be completed in order to accept the offer of finance.

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96 Ex 271

[214] That finance agreement was stated to be for the purpose of assisting with the purchase of shares in ABC Learning Centres, the limit of the facility was $5,500,000, and the security offered was a deed of mortgage over 1,200,000 shares in ABC Learning Centres owned by Mr Groves and Dr Groves.

[215] In October 2002 an acknowledgement and acceptance form was signed by Dr Groves and she signed a document headed "Deed of Mortgage over securities" later that month. Her signature on that document was witnessed by a solicitor, Richard Wyman.

[216] Any person of reasonable intelligence, and Dr Groves is of a higher level than that, would easily understand that a mortgage over ABC Learning shares in her name was being used as security for the loan.

[217] A letter signed on the same day as the deed of mortgage by Dr Groves requested Austock Brokers to release 600,000 shares in ABC Learning Centres to the control of Westpac Custodian Nominees Ltd.

[218] This was clearly an occasion on which Dr Groves pledged her own shares as security for a loan. The purpose of the loan was fulfilled in November 2002 when Dr Groves purchased 261,053 shares in ABC Learning at a cost of approximately $2.8 million.

[219] Dr Groves did deny that she knew that the purchase of those shares was funded from a loan, but I do not accept that. The signatures on the Westpac documents are hers and their meaning is clear.

[220] Later transactions were undertaken with respect to that facility and involved an extension to the facility which required a transfer of more shares as security and various other steps were taken in which Dr Groves was aware that her shares, or at least some of them, were being used as security for a loan designed to allow further acquisition of ABC shares.

[221] Dr Groves denied receiving many of these documents on the basis that they were sent to addresses, which she said she either did not use, or to which she was denied access, or that Mr Groves would have intercepted that mail. None of that was credible and I have already rejected it.

[222] In June 2003 ANZ Margin Lending wrote to Dr Groves telling her that her recent application for ANZ margin lending had been approved. No such application has been tendered in evidence, but I accept that it is a rational inference from that letter that Dr Groves made such an application. The letter noted a facility limit of $1,000,000. This facility, together with other facilities such as a Tricom margin loan, demonstrates that Dr Groves was involved with margin lending on a number of occasions. Her denial of this involvement was deliberately untrue.

[223] The history set out above demonstrates that she had a substantial background in this field of finance before entering into the documents the subject of this action.

The events at the time Dr Groves signed the margin lending documents

[224] There is no evidence about the particular circumstances which obtained when Dr Groves signed the CGMA and Citi NA documents. The contrary is the case with the BT documents.

[225] I have already referred to the meeting of 9 June 2005. It is now appropriate to consider it in greater detail. For the reasons I have given above, I accept Ms Neander's account of what occurred.

[226] Ms Neander described the way in which Dr Groves dealt with the documents she was asked to sign:

> "And were you able to observe Le Neve looking at these documents? ---Yes.
>
> Can you describe what you saw, how long she spent or did she concentrate on particular documents?---Well, it wasn't rushed. She spent quite a lot of time over one document that required "yes" and "no" answers. I think it's headed Third Party Acknowledgment Form. It acts as a guarantee but it's headed Third Party Acknowledgment Form so she - - -
>
> All right. I'll show you that document before you go on. Could the witness see, please, exhibit BJ[97], the originals. Are you able to identify the document she spent a good deal of time looking at?---Yes, I saw it here a moment ago. Yes. I don't know how I show you that, but it has number 53 at the bottom and 5910NWJUN04 in the bottom right-hand corner.
>
> The internal page number is good for me. 53, is it?---Okay.
>
> I interrupted you. You began to say she spent some time looking at that page?---Yes.
>
> And you were going on to say something else, I think, before I interrupted?---No, I just thought she spent quite a lot of time reading it, being quite thorough.
>
> Do you recall if she asked any questions of you about that page?---I don't recall her asking me many questions at all, any questions actually.
>
> And do you have a recollection of who placed the ticks on that page?---Yes. It was Le Neve.
>
> And you saw her?---I clearly remember her doing it.
>
> And at the foot of that page there's a signature?---Yes.

[97] This became Ex 271

> The did you see that signature being written?---Yes, I did.
>
> And who wrote the signature?---Le Neve.
>
> In front of you?---Yes.
> …
>
> You said when you presented the documents to Eddy and Le Neve that there was a letter on top of the pile of documents?---Yes.
>
> Is that the letter?---Yes, it is.
>
> And did you see Le Neve looking at that letter?---Yes, I did.
>
> Did she ask any questions of you about the letter?---No, she didn't.
>
> Did she ask, "What is this margin loan facility?"?---Pardon.
>
> Did she ask anything to the effect, "What is this margin loan facility?"?---No."[98]

[227] Exhibit 271 contained a third party acknowledgment form in which a guarantor is asked to answer "yes" or "no" to a series of questions. Dr Groves answered "yes" to each of these questions:

1. Have you read the Guarantee carefully?
2. Do you understand the general nature and effect of the Guarantee, including that, among other things:
   (a) If you sign the Guarantee you may have to pay BTS all the money the Borrower owes to BTS? This could be a lot of money.
   (b) If the Borrower does not pay on time money he or she owes to BTS, BTS can demand that you pay the money in place of the Borrower or as well as the Borrower?
   (c) If you do not pay that money to BTS, then among other things:
   - BTS can enforce the mortgage contained in the Guarantee (which would allow it to sell the securities owned by you that are subject to that mortgage and use the proceeds to repay money that the Borrower owes to BTS)? You could lose all those securities, and/or
   - BTS can sue you.

   BTS can do either or both of these things at the same time or at different times. It can do them whether or not it takes action against the Borrower, or makes a demand on any other person who signs the Guarantee or gives another guarantee or security, or enforces other security.

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98 T 17-62

(d) BTS can demand that you pay money to BTS if for some reason it cannot recover the money from the Borrower? (For example, this might happen because the Borrower dies or becomes insolvent or might not have full legal capacity because he or she is under 18. Also, if this happens, you may not have a right to claim from the Borrower the money you pay to BTS.)

3. Do you understand that:
The Guarantee covers all money which the Borrower owes BTS in relation to the BT Margin Loan Agreement plus amounts like government charges, expenses and interest?
4. Have you made your own decision to sign the Guarantee (not just because someone asked you to or has pressured you to
5. Do you understand how margin loans work?
6. Do you understand that you should check for yourself whether the Borrower understands how margin loans work and will be able to pay his, her or its debts?
7. Do you understand that even if BTS tells you something you should still check it for yourself and get your financial adviser to check it for you, and not rely on BTS to tell you about the Borrower?
8. Before you sign the Guarantee you should get advice from your own lawyer and from your own financial adviser.

…

(b) You got that advice from your own financial adviser.

[228] With respect to the manner in which Dr Groves filled in that form, Ms Neander said:

> "I do recall Le Neve spending a lot of time signing the third party acknowledgment. In fact, I remember thinking, "She's almost treating it like an exam", because she was being so thorough about reading the questions and answering."[99]

[229] The document which was provided to Dr Groves made her obligations clear. She had previously executed guarantees and had entered into margin lending. She is an intelligent person easily capable of understanding the terms of the acknowledgment form. I find that she knew and understood:

(a) That she was entering into a guarantee and what a guarantee entailed.
(b) That the debt being guaranteed was $20,000,000.
(c) That the debt was the consequence of a margin loan to Mr Groves.
(d) That her shares were being used as security for that loan.

[230] Dr Groves also signed a Lodging Shares Form. That took place on 11 January 2006. I have touched upon it earlier in these reasons. The form contained a direction to BT Securities to "Lodge the following issuer sponsored shares" and nominated 2,375,000 shares with Dr Groves as the holder. Had Dr Groves no knowledge of the need for, or no understanding of the effect of, such a form it would be reasonable to

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99 T 18-48

expect her to ask questions about the form. She did not. And she did not because she knew that the form was required for her shares to be lodged as security for the BT margin loan.

The Tax Returns

[231] In the tax years 2003 to 2007 Dr Groves claimed deductions in her tax returns for interest incurred on loans used to fund the purchase of shares. So far as the accuracy of those returns and her knowledge of their contents were concerned, she gave the following evidence:

> "You signed your tax returns in the period 2001 through to 2008?---Yes, I believe I did.
>
> You understood it is very important that you be honest and truthful in tax returns?---Yes, that's correct.
>
> Indeed, it can potentially be a criminal offence to be dishonest in tax returns?---That's correct.
>
> And you understood that in the 2000s?---Yes, I did.
>
> And you sought to ensure that the material in your tax returns was correct?---To the best of my ability, if I hadn't been given the full document then that would have been impossible to check.
>
> And you've given some evidence about the 2007 tax return and we'll come back and deal with that. Leaving that aside, otherwise, as far as you were concerned, your tax returns from the period 2001 through to, say, 2006 were truthful and accurate?---I – sorry, could you ask the question again?
>
> Certainly. Your tax returns from 2001 through to 2006, so far as you can recall, were truthful and accurate?---I believe the pages that I saw in those returns were truthful and accurate. I cannot be assured from hindsight now and from understanding the situation that I may have even seen all of the pages or the full page in itself in some of the documents.
>
> Because you wouldn't have signed a page if it wasn't truthful and accurate?---That's correct.
>
> And you wouldn't have signed it if you didn't understand it?---Perhaps I – with the tax returns, I would have to say that there were some circumstances where I did take the word of my husband – my now ex-husband, because I believed that the ATO had far more power than he did and – and wanted to make sure that I did the right thing under the law.

> You believed the ATO had more power than your husband, your ex-husband, and so you might sign a tax return which was inaccurate because of what your ex-husband said - - -?---No, I'm not - - -
>
> - - - is that your evidence?---No, I'm not saying that. I'm saying that I – I have signed it knowing that we had to sign an ATO document because by law we do have to submit our ATO lodgments. What I'm suggesting to you is I may not have received the whole entire document. So I don't want to mislead the court by saying that, yes, everything on the document was truthful if I haven't seen the whole entire document. I just want you to understand that I am concerned that I haven't seen the whole entire document of all of those documents in that period of time.
>
> But any page that you did see and that you signed would have been truthful and accurate?---That is true.
>
> You wouldn't have signed it if you didn't understand it?---I would have asked questions if I had the opportunity and – and if I had been given and seen the whole, entire document, and I am concerned that, perhaps, I haven't been shown the whole, entire document in periods of that time.
>
> You would have asked questions in order to understand it?---Yes, I would have.
>
> And you wouldn't have signed it unless you understood it?---That's correct, but you're changing my words a wee bit."[100]

[232] In the return for the 2004 tax year, for example, a deduction was claimed for "Interest on Margin Loan to Purchase Shares". Similar claims were made for the other years. It is further evidence of her knowledge of these arrangements in and about the time of executing the relevant documents.

[233] I conclude that the defendants have demonstrated, to the requisite standard, that Dr Groves did, at the relevant times, understand:

(a) that she was liable for the debts of Mr Groves under the margin loans,
(b) the general extent of that liability, and
(c) the possible consequences for her should Mr Groves default on those loans.

[234] CGMA and Citi NA also rely upon discussions that Dr Groves had with Mr Nestel at about the time of the sale of her shares as further evidence of her state of knowledge. I do not rely upon that for my finding on this point but, as will appear later in these reasons, her conduct when the margin calls were made was consistent with an earlier knowledge, at least, of the consequences of default.

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100 T 5-49

Reasonable steps to ensure understanding

[235] The operation of the "married woman's equity" may be avoided if a lender takes certain actions. Both CGMA and Citi NA correctly acknowledged that they could not argue this point as neither could satisfy the necessary test. BT, on the other hand, did take steps which, it says, excludes them from the operation of the equity.

[236] In *Yerkey*, Dixon J said the following about the way in which a lender might avoid operation of the equity:

> "If the creditor takes **adequate steps** to inform her and **reasonably supposes** that she has an adequate comprehension of the obligations she is undertaking and an understanding of the effect of the transaction, the fact that she has failed to grasp some material part of the document, or indeed, the significance of what she is doing, cannot, I think, in itself give her an equity to set it aside, notwithstanding that at an earlier stage the creditor relied upon her husband to obtain her consent to enter into the obligation of surety. **The creditor may have done enough by superintending himself the execution of the document and by attempting to assure himself by means of questions or explanation that she knows to what she is committing herself**. The sufficiency of this must depend on circumstances, as, for example, the ramifications and complexities of the transaction, the amount of deception practised by the husband upon his wife and the **intelligence and business understanding of the woman."**[101] (emphasis added)

[237] This was restated in the following way in *Garcia v National Australia Bank Ltd* where Gaudron, McHugh, Gummow and Hayne JJ said that the equity of "failure to understand" cases:

> "holds…that to enforce [the guarantee] 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 [the guarantee's] purport and effect had been explained to her by a competent, independent and disinterested stranger.**" [102] (emphasis added)

[238] BT argues that it did enough in circumstances where it reasonably supposed that Dr Groves had an adequate comprehension of the obligations to avoid the operation of the married woman's equity.

[239] The steps taken by BT did not include providing a detailed oral explanation to Dr Groves of what was involved in the transaction or what the risks attached to that transaction might be. BT relies upon the forms read by and signed by Dr Groves

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101 (1939) 63 CLR 649 at 685

102 (1998) 194 CLR 395 at [31]

which explained the nature of the transactions and the liabilities. In particular, BT relies upon Dixon J's statement that a creditor may do enough by superintending the execution of the document and by attempting to assure itself by means of questions or explanations that the guarantor knows what she is engaging in. It will usually be insufficient if all that can be demonstrated is that a prospective guarantor signs a document indicating that she understands the transaction. This was the case in *Agripay Pty Ltd v Byrne*.[103] These circumstances differ from those which obtained in that case. Dr Groves was presented with a series of questions quite specifically drawing attention to various aspects of the proposed arrangements and the consequences. She answered each of those questions in a way which would indicate to a prospect lender that there was an understanding of the proposed transaction. In particular, Dr Groves, by placing a tick against question 8(b), represented to BT that she had taken independent advice from a financial adviser.

Were the steps taken by BT "adequate"?

[240] The adequacy of any steps taken needs to be assessed against the background of the person with whom a lender is dealing. Mr Neander said that: "I knew that she had not only a degree but she had a PhD in that area. She was CEO of the education side of ABC. …She's obviously a very successful business woman, co-founder of an ASX listed company."[104]

[241] Ms Neander was asked:

> "Were there other reasons that you didn't go into a detailed explanation? --- Well, I was aware that we were taking over an existing facility and that she was an experienced business woman, and I just presumed that she would be well aware of a guarantee and possibly may have needed to furnish one in her early years of owning childcare centres before they became listed."[105]

[242] Ms Neander also gave evidence that she knew that both Dr Groves and Mr Groves had pledged 1,325,000 shares as security for the Suncorp loan. She went on to say that one of the reasons she did not provide a detailed oral explanation to Dr Groves is that she knew that the BT facility was being used to take over an existing facility. Ms Neander was also aware that Dr Groves had taken out a Westpac commercial bill facility and had pledged her shares as security for that loan.

[243] In circumstances where Ms Neander had that knowledge and where Dr Groves, through the Third Party Acknowledgement Form, represented that she had obtained her own financial advice, it was reasonable to suppose that Dr Groves understood the transaction. Further, in light of all that information, the steps taken by BT in requiring that Dr Groves answer the questions on the Third Party Acknowledgement Form constituted adequate steps.

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103 [2011] 2 Qd R 501

104 T 17-69

105 T 17-70

[244] I am satisfied that BT has demonstrated that the exception to the operation of the married woman's equity referred to by Dixon J in *Yerkey*[106] operates with respect to Dr Groves in this case.

Was Dr Groves a volunteer?

[245] Where a lender seeks to enforce a security in circumstances where the married woman's equity would otherwise apply and where the transaction is not on its face for the benefit of the wife, the lender has the onus of establishing that the wife was not a volunteer.[107] This is one of the factors which must exist.

[246] In *State Bank of New South Wales v Chia*,[108] Einstein J summarised some of the general principles which apply:

> "(2) The second requirement is that the wife is a volunteer. It is not sufficient that the wife has received consideration as would be recognised in the law of contract: *Bank of Victoria Ltd v Mueller* (at 649). The consideration for the guarantee must be of "real benefit" to the wife: *Garcia* (at 412). Incidental benefit which accrues generally to the family of which the wife is a member is not sufficient benefit to render a transaction which does not otherwise contain a "real benefit", non-voluntary: *Armstrong v Commonwealth Bank of Australia* (1999) 9 BPR 17,035; [2000] ANZ ConvR 470; *Cranfield Pty Ltd v Commonwealth Bank of Australia* (Supreme Court of Victoria, Mandie J, 20 November 1998, unreported). Where the wife expects to reap direct profit from the transaction, the transaction cannot be said to be voluntary: *State Bank of New South Wales Ltd v Vecchio* (Kirby J, 10 November 1998, unreported). Neither can it be said to be voluntary where the moneys secured by the guarantee are used to purchase an asset in which the wife is equally interested with her husband: *Commonwealth Bank of Australia v Khouri* (Supreme Court of Victoria, Harper J, 4 November 1998, unreported). However, where the interest of the wife is a shareholding in the company through which her husband conducted his business and in which she has no real involvement, then a guarantee given by the wife over that company's debts will be voluntary: *Commonwealth Bank of Australia v Khouri*. But where the wife has an active and substantial interest in the conduct of, and the fortunes of, the business run by her husband, she will not be a volunteer in relation to any guarantee over the debts of that business: *Radin v Commonwealth Bank of Australia* (Federal Court of Australia, Lindgren J, 23 October 1998, unreported). Where the transaction is not ex facie for the benefit of the wife, then the onus will lie on the party seeking to enforce the security to show that the wife was not, relevantly, a volunteer: *Warburton v Whiteley* [1989] NSW ConvR

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106 (1939) 63 CLR 649 at 685

107 *Permanent Mortgages Pty Ltd v Vandenburgh* (2010) 41 WAR 353 at [190]

108 (2000) 50 NSWLR 587 at [169]

> ¶55-453 at 58,288; (1989) 5 BPR 11,628 at 11,634, per McHugh JA."

[247] All defendants rely upon the expert evidence of Antony Samuel and the reports which he provided.[109] The list of benefits upon which CGMA and Citi NA rely are contained in Exhibit 295.

[248] Mr Samuel's reports were extensive and extremely detailed. They evidenced an immense amount of careful work in which the flow of funds in to and out of various accounts was identified. He was asked by CGMA and Citi NA to proceed upon the basis that certain payments were for the benefit of Dr Groves. They are set out in his report as follows:

> "(a) (**Westpac Joint Bank Account**) Payments of funds drawn from either the CGMA Margin Lending Facility or the Citi Singapore STL Facilities made into the Westpac Banking corporation bank account in the joint names of Mr Groves and Dr Groves (business cheque account 034 002/57-8231) (Westpac Joint Bank Account) were payments for the benefit of Dr Groves;
>
> (b) (**Dr Groves Platinum Amex**) Payments of funds drawn from either the CGMA Margin Lending Facility or the Citi Singapore STL Facilities made into the Dr Groves Platinum Amex were payments for the benefit of Dr Groves;
>
> (c) (**Dr Groves Westpac Classic Account 55-1159**) Payments of funds drawn from either the CGMA Margin Lending Facility or the Citi Singapore STL Facilities made into the Dr Groves Westpac Classic Account 55-1159 were payments for the benefit of Dr Groves;
>
> (d) (**Dr Groves Westpac Classic Account 56-6502**) Payments of funds drawn from either the CGMA Margin Lending Facility or the Citi Singapore STL Facilities made into the Dr Groves Westpac Classic Account 56-6502 were payments for the benefit of Dr Groves;
>
> (e) (**Miscellaneous Accounts in the name of Dr Groves**) Payments of funds drawn from either the CGMA Margin Lending Facility or the Citi Singapore STL Facilities made into any other bank account in the name of Dr Groves (solely or jointly with any other person) were payments for the benefit of Dr Groves;
>
> (f) (**Dr Groves' ABC Shares**) Payments of funds drawn from either the CGMA Margin Lending Facility or the Citi Singapore STL Facilities for shares in ABC Learning Centres Limited (ACB 079 736 664) (ABC) held by Dr Groves (either solely or jointly) or for fees, charges or brokerage in respect of those share purchases were payments for the benefit of Dr Groves;
>
> (g) (**KSD Property Trust**) Payments of funds drawn from either the CGMA Margin Lending Facility or the Citi

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109 Exhibits 294 and 296

Singapore STL Facilities in respect of the assets of the KSD Property Trust, including payments made in respect of the KSD Property Trust IPL, were payments for the benefit of Dr Groves;

(h) (**Dr Groves' ATO Liability**) Payments of funds drawn from either the CGMA Margin Lending Facility or the Citi Singapore STL Facilities made with respect to tax file number 485341470 or EFT code "4853414709459" were payments made to the Australian Tax Office in respect of Dr Groves' personal tax liability and were payments made for the benefit of Dr Groves;

(i) (**Dr Groves' Existing Liabilities**) Payments of funds drawn from either the CGMA Margin Lending Facility or the Citi Singapore STL Facilities made to discharge other banking facilities or margin lending facilities either in the name of Dr Groves (solely or jointly with any other person), which were guaranteed by Dr Groves or in respect of which she lodged third party collateral were payments made for the benefit of Dr Groves. On the basis of the documents produced to date, facilities in this category include;

a. the Westpac Bill Facilities;
b. the Dr Groves ANZ Margin Loan;
c. the Dr Groves Macquarie Margin Loan;
d. the Dr Groves Tricom Loan;
e. the Suncorp Joint Margin Loan;
f. the KSD Property Trust IPL; and
g. the Mr Groves Macquarie Margin Loan;

(j) (**Payments to Quantum Food Services Pty Limited**) Payments of funds drawn from either the CGMA Margin Lending Facility or the Citi Singapore STL Facilities to Quantum Food Services Pty Limited (in respect of which Dr Groves was an ultimate beneficial owner) were payments made for the benefit of Dr Groves;

(k) (**Payments to ELMM Pty Limited**) Payments of funds drawn from either the CGMA Margin Lending Facility or the Citi Singapore STL Facilities to ELMM Pty Limited (in respect of which Dr Groves was a shareholder) were payments made for the benefit of Dr Groves;

(l) (**Payments to ABC Investments (No 1) Pty Ltd**) Payments of funds drawn from either the CGMA Margin Lending Facility or the Citi Singapore STL Facilities to ABC Investments (No 1) Pty Ltd (in respect of which Dr Groves was a shareholder) were payments made for the benefit of Dr Groves);

(m) (**Payments to ABC Finance (Aust.) Pty Ltd**) Payments of funds drawn from either the CGMA Margin Lending Facility or the Citi Singapore STL Facilities to ABC Finance (Aust.) Pty Ltd (in respect of which Dr Groves was a shareholder) were payments made for the benefit of Dr Groves); and

(n) A notation of "LG", "LAG" or "LNG" is a reference to Dr Groves."

[249] Those assumptions were subject to cross-examination and, in the final submissions, criticism. Mr Samuel did not purport to categorise the payments set out above as "benefits" to Dr Groves – he was asked to assume that – his task was to trace funds from account to account and so on in an attempt to identify the source of those payments.

[250] Three assumptions were used by Mr Samuel when analysing the movements of money: the matching assumption, the first-in, first-out assumption, and the pooling assumption. In his report, he said the following about those assumptions:

"(a) if there was a withdrawal (or more than one withdrawal) from one account that is the exact amount or very close to the amount of a deposit, and the withdrawal (or withdrawals) and deposit occurred within twenty-six days, then the deposit funded the withdrawal (or withdrawals) (**the Matching Assumption**);

(b) in all other instances the deposits fund withdrawals on a first in first out basis. In other words, I have assumed the first deposit into an account, funded the first withdrawals from that account until the amount of that deposit is exhausted, and then the next deposit funds the next set of withdrawals and so on (**the FIFO Assumption**). The FIFO Assumption has also been adopted when tracing Dr Groves' ABC shareholdings; and

(c) if more than one deposit was made on a particular day, then the total of those deposits fund the relevant withdrawals. For example, if three deposits of various amounts were made on a particular day totalling $1 million, comprising $0.200 million from Bank A, $0.300 million from Bank B and $0.500 million from Bank C, and those deposits collectively funded a withdrawal of $0.800 million, then I have assumed 20%, 30% and 50% of that withdrawal was funded by Bank A, Bank B and Bank C respectively (**the Pooling Assumption**)."

[251] He described these assumptions further in cross-examination:

" … all the flow of funds I've – I've determined on the basis of three assumptions. The first is what I've called the matching assumption, that is if I can see specific amounts that have gone in to an account and come out of an account within an approximate period, I've assumed that the deposit was specifically intended to match the withdrawal on that account. The best example of that matching principle is – is on, I think, two of the loan accounts, the interest was being settled every month from a joint account in one instance and from the 5355 account in another. So every month you see a very precise figure for interest being charged and then a very precise figure come into the account to clear the interest. So in those 15

> instances I've matched them directly and so that was the purpose of the – the funds. The second and key assumption here is what I've called the FIFO assumption and we've applied this in all of these instances, which is that the first funds in are used – assumed to be relevant to the first funds out, and – and that has the consequence, as this table shows, that sometimes the funds moves forward and sometimes they move backwards, depending on whether it's in overdraft or it's in positive position. The third slightly variation on assumption – sorry, the third assumption is a variation on the FIFO assumption which says that if we have multiple deposits on one day, we will pull [pool] those and treat them as being deposited at the same time. So I call that the pooling assumption. And then we allocate based on that by applying the FIFO assumption again."[110]

[252] CGMA and Citi NA drew upon Mr Samuel's report to create a table of benefits which they allege were received by Dr Groves. One of them, the dividends on ABC shares, cannot be regarded as directly arising from the use of margin loans. At best, it is an indirect effect and, as such, I do not take it into account.[111] Their submission can be summarised in this way:

	Benefit	**Total**	**CGMA (Second Def)**	**Citi NA (Fourth Def)**
1	**Purchase of ABC Shares**	$7,707,896	$1,720,560	$5,987,336
2	**KSD Property Trust**	$1,337,401		$1,337,401
3	**Dividends on ABC shares**	$1,287,719		
4	**Dr Groves' ANZ Margin Loan**	$1,005,879	$1,005,879	
5	**Westpac Bill Facility**	$1,000,000	$1,000,000	
6	**Franking credits on ABC shares**	$553,719		
7	**Interest on Flexible Investment Facility (Second Defendant)**	$411,079	$411,079	
8	**Interest on STL facilities (Fourth Defendant)**	$420,226		$420,226
9	**Dr Groves' personal tax liability**	$303,940	$287,281	$16,659
10	**Interest on Tricom Loan**	$119,054		$119,054
11	**AMEX**	$71,411	$64,224	$7,187
	TOTAL	**$14,218,324**		

[253] Mr Samuel's report was criticised by the plaintiff in a number of ways. It was said that it was a technical tracing exercise which made no attempt to determine whether

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110 T 19-21

111 Any consideration received must be direct or immediate. *Agripay* at [11]

funds in the joint account or in Mr Groves' personal Westpac account came from assets owned or part-owned by the plaintiff. He was cross-examined in some detail about the proper characterisation of various funds and how they might have been used or not used. One line of questioning which was pursued at some length has been referred to as the "blue money/red money" approach. This approach was accurately described in the CGMA and Citi NA submissions in this way:

> "In the cross-examination of Mr Samuel, the plaintiff raised an alternative methodology of how the benefits relied on by CGMA and Citi NA could have been accounted for (referred to as the Red Money / Blue Money Theory).
>
> Under this alternative methodology, income derived from Dr Groves' assets (for example income from sales of, and dividends earned on, Dr Groves' ABC shares) was referred to as Blue Money. All other income streams were referred to as Red Money. Instead of using the Matching Assumption, the FIFO Assumption and the Pooling Assumption, which rely on a temporal nexus between a withdrawal and a deposit (or vice versa), the alternative was to review transactions (in which Dr Groves acquired benefits) over a defined, or at least a longer, period of time. If over that defined period of time, the Blue Money was greater that the collective benefits acquired by Dr Groves then any benefits acquired by Dr Groves could be attributed to Blue Money. On this analysis, any benefits acquired by Dr Groves are therefore not funded by Red Money."

[254] Dr Groves did not call any expert evidence on this area. No one was called to support the "blue money/red money" approach as a relevant or reasonable means of assessing the way in which funds were used and how they might or might not have benefitted Dr Groves. Examples using this assumption were put to Mr Samuel and it led to me asking these questions of Mr Samuel:

> "What do you say about that assumption? Is it a reasonable assumption to make, because this is what this is revolving round?---I think I'd struggle with that, your Honour, because the – the funds are merged and mixed with so many other funds. That's not an approach that I would take. It's an assumption that could be made. It's open to be made. But it's not – it's not an assumption that strikes me – it's actually one I never even thought of applying, so it's not one that struck me as being the obvious or reasonable assumption to adopt.
>
> And why is it not reasonable in these circumstances?---I think it wouldn't – it's not reasonable because you would be – you would find that money that's come in from Dr Groves has been spent or otherwise utilised before it's been available to spend on the assets that have gone to her benefit. Perhaps if I give an example? So if – and I haven't done this exercise, but this is the problem I see with it. If, say, Dr Groves – $4 million of Dr Groves' money comes in from dividends and goes into the joint account and, for argument's sake, that's then paid to the cheque account in order to clear an overdraft in the cheque account, then the money is gone; it's been spent. It

> wouldn't be available to then spend on Dr Groves' assets. That's the problem I'd have with it. It's the caveat I gave earlier, which is I – I can't see how it would work if the funds had been utilised already. Which would bring me back to doing a FIFO calculation, as I did in the first place."[112]

[255] There are other problems with the blue money/red money approach. It does not take into account the actual funds which are available in any particular account or fund. It is used by the plaintiff on the basis that it should be assumed that all monies paid out of the joint account were for Mr Groves' benefit except where it can be demonstrated that a payment was made for Dr Groves' benefit. Further, if the assumption was applied to a scenario where money was used to purchase an asset for which Dr Groves received no apparent benefit (if, say, Mr Groves purchased some real property in his own name using funds from the joint account) then it takes no account of the probability that Dr Groves would, at least, have some beneficial ownership of the property.

[256] I am satisfied that Mr Samuel's three assumptions were justifiable, appropriate and in accordance with accepted methods of accounting. The effect of his report is that those moneys identified in the table above did flow to Dr Groves. As such, they were of benefit to her by, for example, allowing her to accumulate more ABC shares or to have a house bought for her benefit through a trust. Similarly, the payout of the ANZ margin loan was to her benefit.

[257] BT advances two arguments. First, it says that particular benefits can be identified. Secondly, it says that one should take into account the whole purpose of wealth creation engaged in by both Dr Groves and Mr Groves.

[258] So far as particular benefits are concerned, I am satisfied that the BT loan was used, at least, to:

(a) pay out the Suncorp margin loan under which Dr Groves was a principal debtor and through which she had obtained ABC shares, and
(b) pay Dr Groves' tax liability of approximately $1,000,000.

[259] The other argument advanced by BT applies to all defendants, that is, that the margin loans were a means by which Dr Groves' wealth would be increased, by reason of the continuation of a history of wealth accumulation for both Dr Groves and Mr Groves through the use of margin loans, some taken out by Mr Groves, some taken out by Dr Groves, and some obtained jointly. These were not isolated instances of Mr Groves or Dr Groves seeking a loan and providing security. Dr Groves was concerned to ensure that her interest in ABC was not diminished more than was necessary. She accepted that this would occur through the growth of ABC but it was something she was keen to avoid:

> "A necessary effect of issuing new shares was to dilute your proportion of ownership?---That's correct.
>
> And that of Mr Groves, of course?---That's correct, I guess, yes.

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[112] T 19-47 – T 19-48

> And whilst you accepted that that was a practical reality, you also didn't want to dilute your proportion of ownership too much?---That's correct.
>
> At any time during the 2000s?---That's pretty true, yes."[113]

[260] Her interest, not unnaturally, was to preserve or, if possible, increase her wealth and this could be done through the mechanisms employed by Mr Groves. Where a wife, separated or not, has engaged in a series of transactions with her husband which were designed to maintain or increase the wealth of each of them, then it will require evidence of a clear departure from that history before a new transaction will fall outside the description of voluntary. Lindgren J said as much in *Radin v Commonwealth Bank of Australia.*[114] In that case, a wife sought to have various mortgages over her properties set aside under the married woman's equity. Lindgren J held that she was not a volunteer in respect of the loans which were secured by the mortgages. The reason for that was:

> "The mortgages secured, not only financial accommodation provided to [the husband] to support his practice; they also supported the provision of accommodation to [the husband and the wife] to support the building up of their real estate portfolio. In any event, [the wife] also obtained substantial benefits from the loans that were made in connection with [the husband's] practice."

[261] Lindgren J went on to say:

> "... during the period over which the properties were acquired, [the husband's] and [the wife's] money was derived from borrowings from the Bank and from [the husband's] practice, and that the equity in all the properties in respect of the mortgages over which relief is sought by [the wife] can be traced back to the Bank in one of three ways: there were loans from the Bank at the time of purchase; there were loans from other financiers at the time of purchase which were later refinanced by the Bank; and funds came from [the husband's] practice, the sole or main financier of which was the Bank."

[262] Like the wife in *Radin,* Dr Groves had an active interest in the loans and their purposes which, in many cases, produced benefits for her. Her entry into the guarantees the subject of this action was a continuation of that activity. As such, she cannot be regarded as a volunteer.

Was there a settlement?

[263] This issue relates only to CGMA and Citi NA.

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113 T 9-63

114 [1998] FCA 1361

[264] It will assist in understanding the origins of the "settlement deed" pleaded by CGMA and Citi NA to consider the events leading up to it.

[265] Jeremy Nestel worked for Citi NA from 1989 to 2010 when he retired. From 2005 he was the Managing Director of the Citigroup Private Bank Australia/New Zealand an entity within Citi NA. Citi NA was often referred to in his work as the private bank. He was not employed by CGMA but, as part of his job with Citi NA, he was engaged in actions on CGMA's behalf. For his purposes, CGMA was the investment bank. Smith Barney was the retail brokerage arm of CGMA.

[266] Citi NA was very selective about the number of clients it had. It had no more than 100 clients when Mr Nestel was in charge. In 2003 Mr Nestel met Mr Groves for the purposes of seeing whether they could do business and, at about the same time, was introduced to Dr Groves.

[267] On 26 February 2008 Mr Nestel became aware of a problem with the loans to Mr Groves – the price of ABC shares had dropped significantly and the "exposure was insufficient to cover the margin requirement under the terms of the facility letter."[115] He was aware that both Mr Groves and Dr Groves had provided security for the loans in the form of ABC shares. The total exposure for CGMA and Citi NA was approximately $26,000,000. Mr Nestel was given the task of managing the recovery of both the CGMA and Citi NA loans.[116]

[268] Before Mr Nestel became involved in the recovery process the shares proffered by Dr Groves to secure the CGMA/Smith Barney loans had been sold but the proceeds did not exhaust the liabilities. There was a shortfall of about $3,600,000.

[269] On and after 26 February Mr Nestel engaged in a number of telephone conversations with Mr Groves and Dr Groves among others. Some of these calls were recorded. Some were the subject of contemporaneous notes made by Mr Nestel which were later transferred to a single document.[117]

[270] He had three telephone calls with Dr Groves on 26 and 27 February. At about 3.30pm on 26 February Dr Groves returned a call Mr Nestel had made earlier that day.[118] This conversation was recorded.[119]

[271] In that conversation the following was said:

Jeremy Nestel	Jeremy Nestel speaking, can I help you?
Dr Groves	Yes Jeremy its Le Neve Groves. Sorry for missing your call
Jeremy Nestel	No, that's okay. I'm sorry to have to impart this news with you but there has been a material adverse change in your and Eddy's financial position…

115 T 14-69
116 T 14-70
117 Ex 186
118 He had left a voicemail message identifying himself as being "from Citigroup" and asking her to call him.
119 Ex 98

Dr Groves	Mm hmm
Jeremy Nestel	…and we are going to have to call the loan in full unless either of you can provide sufficient collateral to our satisfaction or payment in full.
Dr Groves	Okay, so you have spoken to Eddy?
Jeremy Nestel	Spoken to Eddy and we just wanted to put you on notice that we will be starting to, the process of selling the stock
Dr Groves	Right
Jeremy Nestel	..unless there are...
Dr Groves	So have you taken advice from Eddy in relation to this?
Jeremy Nestel	Yes.
Dr Groves	Cos currently he is on conference calls with the media and people like yourself.
Jeremy Nestel	Yes, we are going to hopefully catch up with him at 4 o'clock or 5
Dr Groves	Right
Jeremy Nestel	and have a chat with him then.
Dr Groves	**Okay, so now the price has jumped back to $2.20 at least.**
Jeremy Nestel	That's right.
Dr Groves	**So no-one is trying to sell at $1.15 or $1.17**.
Jeremy Nestel	That's right, that's right
Dr Groves	**You're not selling at this stage**.
Jeremy Nestel	We haven't started to sell at this stage but what… we can't give any commitment not tosell and we will of course reserve our right to sell at any time.
Dr Groves	Fine. **So will you let us know once that commences**?
Jeremy Nestel	Yes. Le Neve can I… I'm going to forward this to you formally in a letter by email, together with the default notice on Eddy's facility and I'll also fax it to you just to make sure you've got it but I don't have your fax number.
Dr Groves	It's […]
	…
Jeremy Nestel	What about a fax?
Dr Groves	No I don't want it coming through on fax today thank you.
Jeremy Nestel	Have you got a fax at home?
Dr Groves	No, no I'll just have it through email.
Jeremy Nestel	Okay. Okay.
Dr Groves	You have definitely spoken to Eddy. **Can you tell me how many of my shares are at risk?**
Jeremy Nestel	Ah all of them.
Dr Groves	Okay.
Jeremy Nestel	Yeah. I have spoken to Eddy yes, I've spoken to Eddy twice.
Dr Groves	Okay.

Jeremy Nestel	Okay and uh well hopefully will catch up with him again later this afternoon.
Dr Groves	Okay so I understand it's 4 o'clock your time, but where are you calling from, what state?
Jeremy Nestel	Melbourne, good question. It's 3.30 here now.
Dr Groves	Okay, so...
Jeremy Nestel	And he's in Melbourne.
Dr Groves	Yes so you're expecting that within the next half hour after he finishes on where…what I am listening to now, on the other phone, you will speak to him then at 4 o'clock.
Jeremy Nestel	Yeah, and we'll …we'll be able to fix a time for him to come in and talk to us.
Dr Groves	Okay.
Jeremy Nestel	Okay.
Dr Groves	**Okay so just what is the procedure, I'm not trying to be difficult because I know you're in a difficult situation**
Jeremy Nestel	Yeah
Dr Groves	**What is the procedure as you start to sell, do you let us know or you don't let us know**.
Jeremy Nestel	We don't generally let you know. We give an order to a trader…
Dr Groves	Uh huh
Jeremy Nestel	to …to sell the shares …
Dr Groves	Right…
Jeremy Nestel	on a best efforts basis ...
Dr Groves	Okay
Jeremy Nestel	...and...
Dr Groves	And that's been done already?
Jeremy Nestel	No, not on the private bank facility it hasn't. We haven't started that process yet.
Dr Groves	**Okay, so you will be discussing it with him at 4 o'clock**
Jeremy Nestel	Yeah
Dr Groves	**Is there any way I could be linked into that conference call with him?**
Jeremy Nestel	Certainly.
Dr Groves	Okay. So...
Jeremy Nestel	What number do you want me to call you on?
Dr Groves	If you call my PA first just so I can be tracked down although I promise I will be close to the phone …
Jeremy Nestel	Thanks Le Neve,
Dr Groves	Thank you I appreciate your call. I know it's not easy.
Jeremy Nestel	Likewise.
Dr Groves	Thank you.

[272] Dr Groves' voice did not display any of the characteristics often associated with someone who is confused or who does not understand what is going on. She

sounded calm and her questions made sense. Her questions disclosed knowledge of: the subject matter of the call, the current price of ABC shares, and the fact that her shares were at risk. Her questions about the sale process were those of a person who knew what was happening generally and wanted further details. There can be no doubt that 26 February was an extremely hectic day for Dr Groves. She was dealing with many inquiries about the status of ABC, not least from concerned parents about the situation concerning children at the various centres. The calmness of her voice and the questions she asked might appear at odds with the pressure she no doubt felt during that day, but I do not accept her evidence that this was simply due to a dawning realisation on her part that her own shares might be involved. As I have found she knew of that involvement and the questions she asked were consistent with that knowledge. Her attempt to explain her participation in this call was laboured and incredible.

[273] At 6pm that day there was a conference call involving Mr Nestel, Mr Groves and Dr Groves and others. Dr Groves did not recall taking part in that call – all she could remember was a telephone conversation with Mr Groves at about that time. I accept Mr Nestel's account of what occurred. It was submitted for Dr Groves that I should not accept his evidence because, among other things, it was not recorded and no note was made of it. While that is the case, Mr Nestel was a very impressive witness who was ready to accept he could be wrong with respect to his memory of some things; but otherwise he gave clear and detailed accounts of what occurred. It was of particular importance to Mr Nestel that he speak to Dr Groves. As he said in the 3.30pm conversation, he had to send her a notice of default and he had to ensure that she had received it. This was critical to Citi NA's ability to sell the ABC shares it held as security. It was during this call that Dr Groves confirmed that she had received the notice.

[274] On the following day, the 27th, Mr Nestel had another telephone conversation with Dr Groves. This was recorded. The contents of Dr Groves' side of the conversation are consistent with her knowledge of the subject matter of the call, that is, the disposal of her shares.

[275] There are other matters concerning the interaction between Dr Groves and Mr Nestel which reflect upon Dr Groves' credibility and support the version of events advanced by CGMA and Citi NA. At about 5 pm on 26 February Mr Nestel sent an email to Dr Groves which recited:

> "I refer to our telephone conversation earlier today, and enclose formal notice of demand under the terms of the Guarantee and Charge, together with a copy of the notice of default under the terms of the secured credit facility to Edmund Groves."

[276] Dr Groves gave evidence that she did not read the email until some days after 26 February and that she may not have read the attachment at all. I do not accept that. Dr Groves told Mr Nestel in the conference call on the evening of 26 February that she had received the notice.

[277] She also said that she had not read the emails sent to her and Mr Groves on 27 and 28 February. I do not accept her evidence on that point. She had been concerned

enough about the sale process to make enquiries of Mr Nestel on 26 February. On 27 February she personally approved the required "3Y" disclosure for the Australian Stock Exchange in respect of the sale of her shares. Her completion of that form was sufficiently important for her that she noted it in her filofax.

[278] Dr Groves was forced into the position of having to say that she was not motivated to read any emails because Mr Groves had told her that the Citi calls had nothing to do with her, that she should not have been contacted by Citi, and that he was dealing with it. While this is consistent with her other evidence about Mr Groves' position on this type of issue, I do not accept that it was as Dr Groves describes it. Mr Nestel gave evidence that he was told by Mr Groves that he expected Dr Groves to be a part of the conference call on the evening of 26 February. It is also contradicted by a call earlier the same day, which was recorded, in which Mr Nestel told Mr Groves that Dr Groves wanted to be in that conference call. Mr Groves raised no objection to that taking place. By the time these events occurred, Dr Groves had been separated from Mr Groves for about a decade. Whatever his influence over her had been, she was sufficiently confident to give evidence on separate occasions that she would not have signed documents brought to her by Mr Groves unless she was satisfied that she understood them. She also gave evidence, which I do accept, that she regarded ABC as being like a child to her. Her shares in ABC were of significant importance and I do not accept that she would have quietly allowed her shares to be sold off unless she realised that the circumstances were such that she had no say in the matter.

[279] In the days at the end of February and the beginning of March Mr Groves was heavily engaged in an effort to save ABC or, at least, to preserve what he could. He was under pressure to satisfy his creditors but the asset he relied upon, shares in ABC, was diminishing in value. He also held a parcel of shares in a company called Austock Group Limited and he proposed that they be sold so that he could meet the demands being made. Austock, though, was a company in which the shares were tightly held, that is, they were not traded often. Mr Groves thought that if he could be given some time, he could sell the shares at a higher price than if they were the subject of a "fire sale".

[280] Mr Groves arranged for his Austock shares to be held by Citi NA. There was a difference of opinion over the terms under which those shares were held. Citi NA said it could sell them when it wished, while Mr Groves said that there was no right to sell them until he had been given 30 days in which to sell them himself. In the week of 3 March 2008 Mr Groves threatened to take action to protect what he saw as his rights concerning the Austock shares.

[281] The dispute which was generated was settled by a deed entered into by Mr Groves, Dr Groves, CGMA (referred to as Citigroup in the deed), CitiSmith Barney Pty Ltd and Citi NA (referred to as CitiBank in the deed). The recitals of the Deed were:

> "A. Mr Groves and Mrs Groves are indebted to Citigroup as at 27 February 2008 in the amount of $3,6[6]70,88.56 plus costs and interest pursuant to a Smith Barney Flexible Investment Facility ("Facility") dated 23 March 2004[120] entered into by Mr Groves and a guarantee and indemnity dated 25

[120] The reference to "March 2004" is an obvious error able to be corrected through construction.

March 2004 entered into by Mrs Groves guaranteeing Mr Groves' obligations under the Facility ("Guarantee").

B. Mr Groves is indebted to Citibank as at 3 March 2008 in the amount of $4,973,327.80 plus costs and interest pursuant to an agreement entered into between Mr Groves and Citibank between 30 September 2005 to 1 June 2006 ("Secured Agreement")

C. On 27 February 2008, Mr Groves authorised the deposit with CitiSmith for the benefit of Citibank and Citigroup, of 5 million shares in Austock Group Limited ACN 087 334 370 ("Shares").

D. Mr Groves alleges that Citibank, Citismith and Citigroup are not able to sell the Shares prior to 31 March 2008. Citbank, Citismith and Citigroup dispute that there is any restriction upon them selling the Shares ("Dispute").

E. The parties have agreed to enter into this settlement deed to compromise the Dispute."

[282] Clause 2.2 of the Deed provides:

"Mrs Groves acknowledges and agrees that:

(a) there is now due and payable by her to Citigroup the sum of $3,667,088.56 plus costs (as defined in the Guarantee) and interest that has accrued from 28 February 2008;
(b) the Facility and Guarantee are valid and enforceable;
(c) by entering into this deed, neither Citibank nor Citigroup waives any defaults or events of default (howsoever described) which have or may have occurred in respect of the Facility or the Guarantee;
(d) she has received valuable consideration for entering into this deed;
(e) she has entered into this deed willingly;
(f) she has received independent legal advice in relation to this deed; and
(g) nothing in this Deed prejudices the rights of Citigroup."

[283] Clause 4.1 contains a handwritten amendment (initialled by those who executed the Deed) to the printed version. The handwritten amendment is in italics:

"*Without prejudice to the rights of Mr Groves and or Mrs Groves to bring any action, suit or claim against any party to this Deed or any party for whose benefit a clause in this Deed is provided* Mr Groves and Mrs Groves agree:

(a) not to defend any proceedings issued by Citigroup or Citibank to recover the monies due and owing by Mr Groves and Mrs Groves to Citigroup and Citibank under the Facility, Guarantee and Secured Agreement;

(b) to indemnify Citismith, Citibank and Citigroup against any liability, loss or costs arising from a breach of clause 4.1(a), and

> (c) to ensure that any person with whom it is associated in any way does not do any of the things referred to in clause 4.1 (a)."

[284] CGMA and Citi NA rely on this deed in the event that their submissions on Dr Groves' liability are otherwise unsuccessful or that the guarantee to CGMA was ineffective on the construction argument.

[285] Dr Groves did not execute the Deed. Paul Venus, a solicitor, purported to do so on her behalf. Mr Venus commenced practice in 1995 and in March 2008 was employed at Holding Redlich. His area of practice was a mix of commercial and litigious work with experience as a mediator.

[286] Dr Groves denies that Mr Venus had her authority to execute the deed.

[287] On 2 March Mr Groves sent an email,[121] copied to Dr Groves, to Mr Venus. He sets out some of the history concerning the margin loans and asks Mr Venus "to act for me and Le Neve". Mr Venus replied by email saying he would call that afternoon. And Dr Groves also replied to both saying:

> "I am sitting in my office at work if you want me involved in the discussion - 07 […]"

[288] Mr Venus gave evidence of having a conversation on the telephone with Dr Groves and Mr Groves:

> "And then I had a – I got Eddy and Le Neve on the telephone. Eddy said – Eddy, basically, went through what was in his email again. **He asked me to act on behalf of him and Le Neve and I asked Le Neve to confirm that and she did.** Then Eddy asked if I'd seen the email that he sent through with the demands, which I said I had. He explained to me that it was essential that they didn't – sorry, that – that the banks didn't get a chance to sell the Austock shares because he thought there would be a couple of million – or 2 or $3 million which would be a shortfall. He thought that if he had time to sell the Austock shares he could have sold those shares off-market, because they were thinly traded and he thought he knew some people in Austock who would be interested in the parcel at a higher price. **He was concerned about the – he was concerned about two things, I think. One was that these were shares which had initially been issued when the float had occurred for Austock. So there was some capital gains tax implication that bothered him, but the main thing that concerned him was that they were in a – from what I gathered, Le Neve and Eddy weren't in a position to be able to pay 2 or $3 million on the spot to cover the shortfall and the real concern was at that point in time, I think there was a lot of difficulties going on with ABC and they didn't want to first – they didn't want to be in a position where they had the banks coming after them and trying to bankrupt them over that**

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121 Ex 36

> **amount of money. We had some discussion about the facility and guarantee documents.** I can't remember precisely what was said. Eddy did say that he said that there was – you know, he'd acknowledged the debt to Jeremy Nestel, and I do know that he had a view that the banks were being aggressive in their pursuit of the money."[122] (emphasis added)
>
> "**The issue of acting for Dr Groves was raised near the beginning of the call, was it**?---Yes, that's right.
>
> And just doing the best you can, do you recall what words you used and what words were used in response, or the effect of those words?---I think **Eddy said something along the lines of, "I want you to act for both Le Neve and myself", and she said, "Yes, that's right"**, something along those lines. That's not the exact words because I just can't remember the exact words now.
>
> Okay. Were there any discussions during this phone call as to whom was to give you instructions in relation to the conduct of the matter?---Yes.
>
> And what was said in that regard?---You should take instructions – **Eddy said, "Take instructions from me", and Le Neve confirmed that.**
>
> **How did she confirm that, using words to the effect as best you can?---Words to the effect of, "Take instructions from Eddy."**"[123] (emphasis added)

[289] Mr Venus received a draft deed from the solicitors for CGMA and Citi NA. He recalls sending it on to Mr Groves but cannot recall sending it Dr Groves and doubts that he would have. Dr Groves denied having seen a draft of the deed although she did, in an affidavit used in Federal Court proceedings, swear that she had.[124] I do not accept, as was contended by Dr Groves, that she was confused and was referring to another document when she swore that affidavit. The reference a few paragraphs later to clause 4 of the deed (and its effect) identifies it as the settlement deed.

[290] I accept Mr Venus' evidence as to the conversation he had with Dr Groves and Mr Groves. He is entirely independent of the parties, so much so that he declined to provide a statement to, or confer with, the solicitors for CGMA and Citi NA. His memory had been refreshed by a recent examination of the relevant file and when he did not remember or could not be certain he made that obvious.

[291] The effect of his evidence is:

(a) Dr Groves asked Mr Venus to act for her,

(b) Dr Groves gave Mr Groves authority to instruct Mr Venus on her behalf,

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122 T 16-22

123 T 16-30

124 Ex 99 at [133]-[136]

(c) Mr Groves instructed Mr Venus to execute the deed for both of them.

[292] That is sufficient to establish actual authority on Mr Venus' part to execute the deed.[125]

[293] It was pleaded, but not argued, for Dr Groves that the deed cannot take effect because the requirement in s 45(1) of the *Property Law Act* 1974, namely, that the party to the deed sign it personally, was not satisfied. Whether that is the true effect of s 45 need not be determined. The document also takes effect as a simple contract. Consideration did pass and this was explained by Mr Venus in the following way:

> "So I suggest to you that as at the 4th of March your focus was on restraining the sale of shares and that questions in relation to personal liability of Mr Groves and Dr Groves were of much less important significance?---The – yes and no. Yes in the sense that the most important thing was the restraining of the sale of the shares, but the reason for that was if the shares were sold they would have been sold for less than the amount owing, and if they were sold for less than the amount owing, there would have been an amount owing which Le Neve and Eddy had to pay back under those demands. And as it was explained to me, whilst they had assets, they weren't cash assets that would enable them to pay off moneys within a period of time after a defence was put on and maybe summary judgment was sought, and if judgment was obtained, a bankruptcy notice. And what they also wanted to avoid was a situation as much as possible where they were being sued because of being directors of publicly listed company."[126]

[294] The effect of the Deed is that Dr Groves cannot challenge the CGMA guarantee because any capacity she had to do that was traded as part of the compromise. In order to obtain the time to sell the Austock shares (which, if successful, would have been to the benefit of Dr Groves) she has conceded that the FIF agreement and the guarantee were "valid and enforceable". Thus, she cannot maintain an argument on any ground, be it forgery, absence of authority or the construction of the guarantee, that she is not bound by the guarantee.

[295] It was pleaded[127] that the handwritten addition to clause 4 had the effect of overcoming clause 2.2(b) and that she was allowed, by it, to challenge the guarantee. The proper method of construing a deed is correctly described in *Halsbury's Laws of Australia* as follows:

> "[140-530] Instrument to be construed as a whole. A written instrument must be construed as a whole and not by reference to parts of it alone. An instrument must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be interpreted so as to bring them into harmony

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125 For a similar circumstance, see *Romeo v Papalia* [2012] NSWCA 221

126 T 16-55

127 Amended Reply para 20(d)(iv)(F)

> with the other provisions of the deed, provided that interpretation does no violence to their natural meaning.
> An instrument must not be construed in such a way that one part would contradict another part, and effect must be given to each and every word and clause within the instrument." (authorities omitted)

[296] That method of construction leads to the conclusion that the addition to clause 4 should not be read as allowing a challenge to the guarantee contrary to clause 2.2 but, rather, to allowing the parties to take other action such as, for example, claiming that shares were sold at an undervalue.

[297] Dr Groves is bound by the settlement. If, contrary to my decision above, the guarantee is unenforceable, the settlement prevents Dr Groves from succeeding on that point.

Ratification, acquiescence and change of position

[298] In light of the findings above, I need not consider this point.

Statutory Remedies

[299] The plaintiff seeks compensation for a breach of the "Unconscionability" provisions of the ASIC Act (ss 12CA and 12CC) and the TPA (ss 51AA and 51AC).[128]

[300] So far as is relevant, s 12CA of the ASIC Act provides:

> "(1) A person must not, in trade or commerce, engage in conduct in relation to financial services if the conduct is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories."

[301] Section 12CC, as it applied at the relevant time, provided:

> "(1) A person must not, in trade or commerce, in connection with:
>
> (a) the supply or possible supply of financial services (see subsection (6)) to another person (other than a listed public company); or
>
> (b) the acquisition or possible acquisition of financial services (see subsection (7)) from another person (other than a listed public company);
>
> engage in conduct that is, in all the circumstances, unconscionable.
>
> (2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a person (the supplier) has contravened subsection (1) in connection with the supply or possible supply of financial

[128] The TPA continues to apply to acts or omissions that occurred before 1 January 2011.

services to another person (the service recipient), the Court may have regard to:

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

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

(c) whether the service recipient was able to understand any documents relating to the supply or possible supply of the financial services; and

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

(8) A reference in this section to the supply or possible supply of financial services does not include a reference to the supply or possible supply of financial services at a price in excess of $3,000,000, or such higher amount as is prescribed.

(9) A reference in this section to the acquisition or possible acquisition of financial services does not include a reference to the acquisition or possible acquisition of financial services at a price in excess of $3,000,000, or such higher amount as is prescribed.

(10) For the purposes of subsections (8) and (9):

(a) subject to paragraphs (b), (c), (d) and (e), the price for:

(i) the supply or possible supply of financial services to a person; or

(ii) the acquisition or possible acquisition of financial services by a person;

is taken to be the amount paid or payable by the person for the financial services; and

…"

[302] Section 51AC of the TPA provided:

> "(1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.
>
> (2) This section does not apply to conduct that is prohibited by section 51AB or 51AC."

[303] The provisions of s 51CC of the TPA were similar, in many respects to s 12CC of the ASIC Act.

[304] The plaintiff submitted that the factual basis for the unconscionability claim under the sections set out above was that which was dealt with in those parts of her submissions which covered the married woman's equity claim (Part H of the written submissions) and other assertions of conduct in Part E of those submissions. It was further submitted:

(a) "that the conduct of Citigroup in taking and enforcing tens of millions of dollars worth of security in these circumstances – and subsequently refusing to refund the proceeds of sale - was not only unreasonable, but was unconscionable", and

(b) The fact "that Citigroup left it to Mr Groves to obtain his wife's signature on the guarantee is a factor that has been afforded weight in cases such as *Platzer v Commonwealth Bank of Australia* [1997] 1 Qd R 266 at 291-2 per McPherson JA and *Borg-Warner Acceptance Corporation (Aust) Ltd v Diprose* [1988] ANZ Conv R 57 per Cohen J. It may be used to provide the necessary 'link' between the knowledge of the bank and the knowledge of the principal debtor."

[305] So far as the provisions of s 12CC of the ASIC Act and s 51AC of the TPA are concerned, each defendant relied upon the exclusionary provisions which set a cap ($3,000,000) on the value of the financial services supplied or acquired. If that cap is exceeded, then the relevant section does not apply.

[306] CGMA, Citi NA and BT submit that they each supplied Dr Groves with financial services at a price in excess of $3,000,000. They contend that the price for obtaining a guarantee of a loan must include the capital value of the loan which, in the case of each defendant, exceeded the cap. If that was not accepted then, in the case of third party guarantees, there would be no restriction on the application of the section and the balance of the section does not justify that construction. In both situations, the guarantee was a part of a greater financial arrangement. To dissect the arrangement as the plaintiff would have the court do would be to deny the reality of the whole transaction for, without the guarantee, Mr Groves would not have been given the loan and, in the absence of the loan, there would be no need for the guarantee.

[307] A similar argument applies to the alternate case put for Dr Groves, namely, that the acquisition by each defendant of a guarantee from Dr Groves was itself the provision of a financial service. In the case of each defendant the price for the giving of a guarantee was either the granting or the extension of a loan which, in each case, was for an amount over $3,000,000.

[308] If, as I have found, the conduct of the parties was conduct engaged in in relation to financial services, then s 51AA of the TPA is excluded by s 51AB – "Section 51AA does not apply to conduct engaged in in relation to financial services."

[309] Similarly, s 51 AC does not apply because the same cap is imposed on the operation of that section.

[310] Thus, these provisions do not apply to the circumstances. But, if they had, then the question of whether there had been unconscionable conduct in terms of each of the statutory provisions would have arisen. Much has been written about the meaning of "unconscionable" in both s 12CA of the ASIC Act and s 51AC of the TPA.

[311] In *Hurley v McDonald's Australia Ltd*,[129] the Full Court of the Federal Court said:

> "For conduct to be regarded as unconscionable, serious misconduct or something **clearly unfair or unreasonable**, must be demonstrated – *Cameron v Qantas Airways Ltd* (1994) 55 FCR 147 at 179. Whatever "unconscionable" means in sections 51AB and 51AC, the term carries the meaning given by the Shorter Oxford English Dictionary, namely, actions **showing no regard for conscience**, or that are **irreconcilable with what is right or reasonable** – *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 262. The various synonyms used in relation to the term "unconscionable" import a **pejorative moral judgment** – *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 283-4 and 298."

[312] In her pleadings Dr Groves relies upon a number of matters. Those based upon Mr Groves' alleged treatment of her are no longer pressed. In any event, the plaintiff concentrated her case on this point upon the same general evidence she used with respect to the married woman's equity case. Where, as here, a person is found to have entered into transactions with the knowledge: that she was doing so to assist her husband to obtain or enlarge a loan, that she would be liable for those loans if there was default, of the general extent of the liability, and of the consequences of default, then the other matters relied upon do not demonstrate that element of real unfairness necessary to establish unconscionability.

Did BT sell Dr Groves' shares?

[313] It is pleaded[130] by Dr Groves that BT (through its agent Austock) sold her 6,000,000 shares and that the basis for that sale was the guarantee relied upon by BT.

[314] The plaintiff then goes on to plead that she has avoided, or by her pleading avoids, the BT guarantee. In the alternative she seeks an order setting aside that guarantee and an order that she receive the proceeds of sale on the basis that BT had been unjustly enriched at her expense.

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129 [2000] ATPR 41-741; [1999] FCA 1728 at [22]

130 ASOC para 15

[315] BT argues that the claim must fail because it did not sell Dr Groves' shares. BT was asked by Mr Groves for permission to sell the shares through his own broker and BT did not object to that.[131] The shares were sold by Mr Groves' broker on 6 March 2008. There was no challenge to that evidence nor was there any attempt made to contradict it.

[316] Dr Groves submits that it does not matter whether BT sold the shares through its own broker or allowed Mr Groves to sell the shares through his. The true issue, she says, is not the mechanics of the shares sale but whether or not BT was entitled to retain the proceeds of sale. That submission, though, is inconsistent with Dr Groves' pleading. It is an essential element of her pleading that the sale of the shares was conducted by BT. Further arguments were advanced by each side with respect to the importance or lack of importance of the actions by Mr Groves' broker. BT argues that it received the money in satisfaction of the debt owed by Mr Groves by the money in discharge of that debt. It did not receive any notice from Dr Groves that it could not do that.

[317] BT also relies on a "change of position" defence. Essentially, the argument was that had BT not received the proceeds of sale of Dr Groves' shares then it would have been left with a debt owing by Mr Groves and would have pursued him for payment of that debt. Upon receiving the proceeds of sale of Dr Groves' shares, BT did not need to pursue Mr Groves and, thus, the change of position is established.

[318] In any event, the determination of this otherwise interesting point need not be taken to its conclusion, because I have found that BT was entitled to enforce its guarantee and, whether it sold Dr Groves' shares or someone else sold them, it was entitled to the proceeds.

Conclusion

[319] The plaintiff has failed in all aspects of her claim. Her claim is dismissed.

[320] I will hear the parties on costs.

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131 T 15-7, T 15-5, T 15-6.