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Supreme Court of Western Australia

PERMANENT MORTGAGES PTY LTD -v- VANDENBERGH [2010] WASC 10 (29 January 2010)

Last Updated: 4 January 2012

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

CITATION : PERMANENT MORTGAGES PTY LTD -v- VANDENBERGH [2010] WASC 10

CORAM : MURPHY J

HEARD : 18-20 AUGUST 2009 & ON THE PAPERS

DELIVERED : 29 JANUARY 2010

FILE NO/S : CIV 1074 of 2007

BETWEEN : PERMANENT MORTGAGES PTY LTD

Plaintiff

AND

JULES JOSEPH VANDENBERGH

MARIA HUBERTINA VANDENBERGH

Defendants

Catchwords:

Equity - Unconscionable conduct - Whether unconscionable for bank to enforce mortgage - Relationship of trust and confidence - Whether 'wife's special equity' applies to elderly mother

Agency - Mortgage aggregator - Whether agent's knowledge imputed to the principal - Agent to know

Indefeasibility - Fraud exception to indefeasibility - Personal equity - Registered mortgage - Joint borrowing by joint tenants

Legislation:

Bankruptcy Act 1966 (Cth), s 153

Trade Practices Act 1974 (Cth), s 51AC, s 87

Transfer of Land Act 1893 (WA), s 68, s 134

Result:

Declaration of unconscionable conduct in favour of the secondnamed defendant

Consequential relief to be subject of further submissions

Category: A

Representation:

Counsel:

Plaintiff : Mr D H Solomon

Defendants : Mr D R Williams QC & Mr A J Camp

Solicitors:

Plaintiff : Solomon Brothers

Defendants : Butcher Paull & Calder

Case(s) referred to in judgment(s):

MURPHY J:

Introduction

1 In these proceedings, the plaintiff (the bank) seeks to enforce a mortgage to secure the payment of a debt due to it at law in respect of moneys advanced to the defendants (the loan) under a loan agreement dated 20 December 2003 (the loan agreement). The mortgage, registered 17 March 2004, is in respect of a unit in a 'residential strata titles seniors' village' in Claremont, Western Australia (the Claremont property). The firstnamed defendant in these proceedings is the son of the secondnamed defendant. I will refer to the firstnamed defendant as 'the son' and the secondnamed defendant as 'the mother'.

2 At the time of the loan and the mortgage, the son was in serious financial difficulty and was involved in a marital breakup from his former wife. The loan was in the sum of $192,000. Most of the money was used by the son for the payment of his creditors and in relation to an associated settlement with his former wife. The balance, approximately $43,000, was used to discharge an existing mortgage on the Claremont property in favour of National Australia Bank Ltd (NAB). The Claremont property is, and at all material times was, the residence of the mother, who was 85 years old at the time. The property was registered in the name of the mother and the son as joint tenants, although the son had not contributed any equity to the property. The mother was a pensioner when the loan was made and the mortgage was granted.

3 The loan was serviced until about July 2006. On 3 November 2006, the bank made formal demand for repayment of the moneys secured by the mortgage. Payment was not forthcoming, the mother refused to deliver up possession, and on 22 January 2007, the bank commenced these proceedings.

4 The son did not appear as a party at the hearing of this action. He did, however, give evidence on behalf of the mother. The mother admitted the loan and the mortgage, but counterclaimed, seeking orders, inter alia, in equity on the basis of alleged unconscionable dealing by the bank, or under s 87 of the *Trade Practices Act 1974* (Cth) pursuant to s 51AC of that Act, that the loan agreement and the mortgage are void and unenforceable. In the alternative, the mother sought a declaration that the moneys secured by the mortgage are limited to $46,000 and for consequential orders in that regard. The mother also sought orders, against the son, to the effect that the son holds his interest as joint tenant in the Claremont property on trust for the mother.

The mother and the Claremont property

5 The mother was born in Holland in 1918. She married in 1943. She had three children born between 1945 and 1950, the youngest of whom is the son in this action. She completed high school, but has no tertiary qualifications. At age 42, she commenced work as a pharmacist's assistant in Holland. She and her family rented their home in Holland.

6 In 1963/64, the family moved to Australia. They lived in rental accommodation in Sydney. After two or three years, the mother commenced employment in Australia, undertaking various office duties.

7 Her husband died in 1995. She then went to live in a unit owned by her eldest son in Sydney. In 1998, she moved to Western Australia to be closer to her daughter and the son. The daughter lived in Perth, but the son lived in the southwest of the State.

8 Just before moving to Perth, the mother received an inheritance from Holland. The money was used to buy the Claremont property, which was then under construction. The daughter helped her to locate this property.

9 In addition, the mother had to borrow approximately $46,000 to complete the purchase. She borrowed the extra $46,000 from NAB (the NAB Claremont loan). The son dealt with NAB in relation to the NAB Claremont loan on behalf of the mother. The son was told by NAB that he needed to 'guarantee' the mother's loan and for that purpose would need to be a coborrower and comortgagor. He said:

> I may have known my name was to go on the title but, if I did, I thought that it was to be as a coborrower or comortgagor, not as a joint owner.

10 He said in his evidence that he was not made aware of that fact until much later. I do not accept that evidence. I find he was aware, in 1998 on registration, that he was on the title as a registered joint proprietor. The mother says that she did not realise that the son was registered as a joint owner with her on the title to the Claremont property (exhibit 9, par 22). I accept that evidence.

11 On 25 March 1998, the mother and the son became registered proprietors of the Claremont property. The son was, in effect, required by NAB to be put on the title in the circumstances referred to above. On the same day, the NAB registered a mortgage over the Claremont property, securing the sum of approximately $46,000 (the NAB Claremont mortgage). The repayments on the NAB Claremont loan and mortgage were deducted directly from the mother's personal cheque account with NAB at its Claremont branch (the mother's cheque account).

12 In late 2003, around the time of the loan offer, the mother was living independently at the Claremont property (she still does). She operated a cheque account. She wrote with a firm and steady hand. She had a driving licence with expiry date November 2004. She said in evidence that she had 'not been able to drive for a number of years', although she did not suggest that she was not still driving when the events the subject of these proceedings occurred, in late 2003 and early 2004.

13 The daughter visited the mother frequently and took her shopping. The mother also took short walks by herself. She was in reasonable health. The son only visited her about once a month, but telephoned her every other day. There is no evidence that the son in Sydney had frequent or close contact with the mother. She had no close friends as confidants in the community. I would add that it is, I think, common knowledge that at that age in life, a person may well find herself with limited social relationships as friends pass away.

14 The mother's first language is Dutch but she spoke English fluently.

15 The Claremont property is a strata title unit. It is in a residential village for people over 55 years of age. It is designed for people who are capable of living independently. It is not a 'retirement village' for the purposes of the *Retirement Villages Act 1992* (WA), and it does not have all the facilities associated therewith.

16 By about 28 August 2003 the NAB had issued a notice of default under the NAB Claremont loan and a notice regarding possible enforcement of the NAB Claremont mortgage, including possession or sale of the Claremont property. The circumstances are referred to in the next section of these reasons.

17 After the NAB Claremont loan, and the NAB Claremont mortgage were discharged, in February 2004, the mortgage payments to the bank were first paid by the son directly, and then deducted from the mother's cheque account. The son paid moneys into the mother's cheque account for the purpose of enabling the periodic deductions to be made to the bank from that account. The mother was unaware of the repayments being made to the bank. All the bank statements for the mortgage were sent to the son's address in Collie. By July 2006, the son was unable to continue to arrange for the servicing of the loan, and default was then made under the loan and the mortgage.

The son, his debts and his divorce

18 In 2002, the son and the wife split up and an acrimonious property dispute ensued.

19 At all material times, prior to 2003, the son was a veterinary surgeon in Collie. He ran the practice through a company owned by himself and his then wife. The practice was located on a property in Lefroy Street, Collie, owned by the son. The son and the wife also owned a farm, as their matrimonial home, in Preston Road, Collie. Both properties were mortgaged to NAB to secure the practice's overdraft. The company operating the practice also had other substantial debts, including a large debt owed to a veterinary drug supplier. This debt, and the other debts of the practice, were secured by personal guarantees from the son.

20 By mid to late 2003, creditors of the practice were pressing for payment. The drug company had obtained judgment against the son on the guarantee for approximately $130,000, and had served a bankruptcy notice on him on 18 August 2003.

21 By about August 2003 the son was in default in the sum of approximately $135,000 under the mortgage over the Lefroy Street property from which the practice operated. This caused NAB to issue a notice of default under the NAB Claremont loan. The notice of default stated in effect that unless the son paid the amount due under the mortgage over the Lefroy Street property, enforcement proceedings may be taken by NAB to recover payment in full under the NAB Claremont loan. There was a corresponding notice under the NAB Claremont mortgage to the effect that if the son did not remedy the default under the Lefroy Street property mortgage, all amounts under the NAB Claremont mortgage would become payable on demand, and if not paid when demanded, NAB may commence enforcement proceedings including taking possession of or selling the Claremont property.

22 By 2003, the son had instructed Mr Michael Meegan of Butlers Solicitors to act for him.

23 Around this time, a proposal emerged for the son to restructure his debts and at the same time settle the dispute with his former wife by undertaking further borrowing. The intention was that he would borrow money to pay off the practice overdraft, and to discharge the mortgage to NAB over the matrimonial home. That would allow the matrimonial home to be transferred to the wife unencumbered. The intention was that the wife would then raise $95,000 on the strength of the matrimonial property. The wife was to raise $95,000 by immediately obtaining a fresh mortgage over the matrimonial property, or by later selling it if necessary, and paying that amount to the son. The $95,000 from the wife was to be used by the son towards repayment of the drug company debt.

24 By this proposal, it was intended that the son would avoid being bankrupted by his creditors, and could also settle with the wife. The proposal was refined over time and not all its details are entirely clear. In substance, however, initially the idea was to borrow only the amount necessary to pay out the Lefroy Street mortgage debt, using any value inherent in the practice, and the Lefroy Street property, as security. That required a financial report on the practice which the son's accountant would not provide. When that proved impossible, the proposal evolved to its final form in which the fresh borrowing was to repay not only the Lefroy Street mortgage debt, but also the NAB Claremont mortgage debt, on the basis that the security for the new borrowing would be the Claremont property.

25 The essential features of the proposal were developed by the son's lawyer Mr Michael Meegan of Butlers, solicitors.

26 In the circumstances described more fully later in these reasons, the son and the mother entered into the loan agreement and granted the mortgage over the Claremont property. After the payment of disbursements and other amounts to certain persons, (including Butlers' fees of $15,000) the advance from the bank was used to refinance the son's debts in accordance with the proposed settlement outlined above.

27 The intended efficacy of the proposal was soon undermined, however, because the wife was unable to raise the $95,000 which had been intended to be used by the son to discharge the debt owing to the drug supplier. Without this additional money, the son could not meet that debt. As a consequence, the debt to the drug supplier remained unpaid and the drug supplier proceeded to bankrupt the son in October 2004.

28 Despite the bankruptcy, the son managed to deposit sufficient moneys into the mother's cheque account with NAB to allow the loan to be serviced until default was made in July 2006.

29 The bank did not prove in the son's bankruptcy. Instead, it relied on its security.

La Trobe - the bank's representative

30 The loan agreement was entered into by La Trobe Home Loans of Australia Pty Ltd (La Trobe) as the 'Credit Providers Representative'. It was common ground in these proceedings that La Trobe was the agent for the bank.

FASA - mortgage aggregator

31 At all materials times, Finance Analysis Services of Australia Pty Ltd (FASA) was a mortgage aggregator. The materials lodged with La Trobe in relation to the loan were lodged on a La Trobe document headed 'La Trobe New Loan Lodgement Form on behalf of FASA'. Mr Richard Curia was the accredited agent or representative for FASA who lodged the form.

32 I consider later in these reasons whether FASA, by Mr Curia, acted as agent for La Trobe in the transaction and whether Mr Curia's knowledge is to be imputed, pursuant to the principles of agency, to La Trobe.

The making of the loan by the bank

33 In 2003 Ms Debbie Kiely and Mr Richard Curia were loans officers employed with Medfin Australia Pty Ltd (Medfin), a financier which specialised in providing credit to the broader medical community including doctors and veterinarians. As noted above, Mr Curia, but not Ms Kiely, was an accredited representative of FASA. (Mr Curia also had a finance broker's licence.)

34 Ms Kiely first met the son in 2003 at a conference for veterinarians at Gloucester Park. In October 2003 she was asked to assist in relation to refinancing the debts of the son's practice and the settlement with his wife. I set out later in these reasons the details of what Ms Kiely knew and of her communications with Mr Curia. In substance, she was told by the son of the proposal to restructure debts of the practice, including the settlement with the son's wife. She was asked by the son initially to seek finance to pay out the practice overdraft on the basis that the security would be the son's assets only (relevantly the practice and the Lefroy Street property), and not the Claremont property. She sought to arrange finance with Medfin. That proposal failed when Ms Kiely could not obtain a financial report on the practice from the son's accountant.

35 Ms Kiely had an adjoining office with Mr Curia. Mr Curia told her that he also worked for FASA which he said was an agent for La Trobe, and that he could help.

36 In about October/November 2003, Mr Curia provided Ms Kiely with La Trobe documentation for a loan application. She filled it out, in consultation with Mr Curia, using the details that had been used for the proposed loan application to Medfin. She posted it to the son in Collie.

37 When the completed loan application documentation was returned to her, Ms Kiely gave it to Mr Curia, who then communicated with La Trobe. Ms Kiely never had any direct communication with either La Trobe or the mother.

38 I describe in more detail subsequently the extent of Mr Curia's knowledge at this time.

39 Upon receiving the completed loan application documentation, Mr Curia filled out another La Trobe standard form document entitled 'La Trobe New Loan Lodgement Form'. He also prepared a diary note. The diary note described the customer as 'Dr and Mrs Van Den Bergh'; it referred to the address of the security property; it referred to a loan amount of $192,000, for a term of 20 years, with a variable interest rate; it described the facility as 'Lite Doc'; and it contained the following comments:

> The clients seek approval to refinance their existing investment property. The equity is required for investment purposes. The LVR [loan to value ratio] is estimated to be 60%. Dr Van Den Bergh is a practising Vet in Collie WA.

40 He also filled out a La Trobe 'Application Checklist'. In that document, he described the 'loan purposes' as 'investment'; in relation to that part of the form dealing with 'Evidence of Income', he ticked the 'Lite Doc' box and he did not tick the box which referred to the existence of 'Rental Income'.

41 On 20 November 2003 Mr Curia faxed to La Trobe the New Loan Lodgement Form, together with:

the diary note;

the La Trobe 'Application Checklist';
an 'Application for Mortgage Finance' signed by the mother and the son - it contained provision for disclosure of monthly income produced by, relevantly, the Claremont property, but this part was left blank;
an authority to obtain credit information signed by the mother and the son;
a schedule with principal and interest details in respect of a 'National Tailored Home Loan';
a onepage proforma Loan Repayment Ability Declaration - this referred to the son as the borrower, it contained no information with respect to the mother, and it was signed by the son only;
a letter from Mr G Hall of RSM Bird Cameron, the son's accountant, dated 20 November 2003, referring to the son as the borrower;
a resident's information booklet about the property as part of the Regent Park Estate;
title searches of the property;
a letter by Mr Meegan of Butlers to Ms Kiely dated 18 November 2003 enclosing the residential booklet and the title searches. The letter from Mr Meegan referred to the son as being Butlers' 'client'. It made no mention of the mother.
The above material was received by Ms Michelle Bannister (nee Worthington), whose position was 'Manager - Underwriting' at La Trobe's office in Victoria.

42 Mr Meegan's letter to Ms Kiely dated 18 November 2003 indicated that although the son was under 55 years there was no legal impediment to him owning an interest in the Claremont property. The residential booklet recorded that lots in the development could only be used, relevantly, as a residence for people capable of independent living aged 55 years or over.

43 Other, unidentified, staff at La Trobe conducted standard credit checks on the mother and son on or about 20 21 November 2003 by obtaining credit reports from Baycorp Advantage Business Information Services Ltd. These reports showed no defaults by the mother or the son.

44 Following consideration of the loan application, Ms Bannister sent a letter by facsimile on 21 November 2003 addressed to the son and the mother care of FASA. It was received by Mr Curia. By this letter La Trobe indicated it was prepared to proceed generally with the application for finance, subject to various conditions of the bank and subject to certain specified conditions, which included, relevantly, an acceptable valuation of the property and evidence of six months' satisfactory financing of the debts to be refinanced. Ms Bannister referred to this communication as a conditional approval of the loan.

45 On 25 November 2003 La Trobe received from Mr Curia a cheque drawn by the mother on the mother's Claremont cheque account with NAB for $300, which was used to pay for the cost of a valuation of the property. The cheque had the appearance of being signed by the mother in a firm and confident hand. La Trobe also received on that day copies of NAB statements in respect of a 'National Tailored Home Loan' addressed to the mother at the Claremont property, on which the account names were recorded as the mother and the son, for the period 25 September 2002 to 24 September 2003. The statements showed the monthly payments on the NAB Claremont loan being made from a nominated account being the same account on which the $300 cheque was drawn, ie the mother's Claremont cheque account.

46 On 27 November 2003 a valuation of the Claremont property was requisitioned.

47 On 12 December 2003 Ms Bannister received a facsimile copy of a valuation of the Claremont property dated 9 December 2003, which valued it at $310,000. The valuation indicated that the 'current use' of the property was 'residential'.

48 On 16 December 2003 another officer at La Trobe conducted a national personal insolvency index database search in relation to the mother and the son. The searches indicated that neither the mother nor the son had previously been insolvent.

49 Ms Bannister was satisfied that all the conditions stipulated in the conditional approval had been satisfied. She was not, however, involved in the decision to approve the loan application.

50 Prior to the loan being offered by the bank, there were a number of alterations made to the signed Application For Mortgage Finance. None of the changes were initialled by the son or the mother. The amendments showed that the existing mortgage of $42,000 was owed to NAB, that that mortgage was to be repaid, that after legal costs of approximately $3,000, a sum of $147,000 was required for 'other' purposes, and that the whole 'transaction cost' of $192,000 was to be funded by

the loan from the bank. The amendments also recorded changes to the 'preferred interest rate' and that it was to be 'variable', and adjusted the reference to the son's 'gross weekly income' of $1,600 per week to $1,538.46 per week.

51 According to Mr Coates, La Trobe's officer in charge of the recovery of the loan who gave evidence, but who had no involvement in the making of the loan, it was possible that the changes were made in the La Trobe office. The changes had found their way into the documentation by the time La Trobe instructed the bank's solicitors in relation to the transaction, on 16 December 2003.

52 The circumstances in which, and the persons by which, the changes were made remained unexplained in the evidence from the bank. I infer that the changes were made at La Trobe's office, by La Trobe officers involved in, or responsible for, the decision for final approval of the loan.

53 By letter dated 16 December 2003, addressed to the son and the mother, La Trobe offered the loan on terms, including a 25 year period for repayment and a variable rate of interest with security over the Claremont property. The offer contained special conditions, including conditions requiring receipt of a copy of a driver's licence for each of the mother and the son, or other 'evidence of identification', and proof of repayment of the 'Existing National Australia Bank Home loan' prior to the loan being drawn down. The letter of offer was also subject to general conditions, which included a provision, in bold type, to the effect that it was recommended that the borrowers obtain independent financial and legal advice. The letter was issued by 'Barry O'Connell, Head of Credit', although it appears to have been signed on his behalf by Ms L Mitchell.

54 The letter of offer dated 16 December 2003 was sent by La Trobe to Mr Curia, who forwarded it to the son in Collie. Mr Curia was asked by La Trobe to deal with La Trobe's solicitors in respect of the special conditions contained in the letter of offer and certain other matters.

55 Also on 16 December 2003, La Trobe sent under the authority of Mr O'Connell, Head of Credit, a letter of instruction to its solicitors. The enclosure to the letter included the amended 'Application for Mortgage Finance'.

56 The bank did not call as a witness Mr O'Connell or the person or persons under his authority who were involved in the final decision to make the offer of loan.

57 On 20 December 2003, each of the mother and the son signed and dated their acceptance of the offer of the loan on the page designated for that purpose in the letter of offer.

58 Around this time the son was given a statutory declaration for signature by himself and the mother. The statutory declaration included statements to the effect that the son and the mother were the registered proprietors of the property. The statutory declaration included the following provisions:

STATUTORY DECLARATION

We, Jules Joseph Vandenbergh of 7/70 Chestnut Court COLLIE WA 6225 and Maria Hubertina Vandenbergh of 7/70 Chestnut Court COLLIE WA 6225 do hereby solemnly & sincerely declare as follows:

1. We are, or about to be, entitled to be the registered proprietor(s) of the land known as 9/80 Mooro Drive, MOUNT CLAREMONT WA 6010 being the whole of the land comprised in Certificate of Title Volume 1885 Folio 009 which will constitute a first security for the loan from Permanent Mortgages Pty Ltd A C N 097176362. ('Bank')
2. On drawdown of the loan, the property will be free from all other encumbrances and the Bank's mortgage will constitute a first security over the property.

...

17. We acknowledge receipt of a copy of the Memorandum of Common Provisions.

...

> **AND WE HEREBY** authorise and direct the Bank's Solicitors to deduct from the loan their disbursements and to date and complete the documents executed by me/us in relation to the loan as may be required to give effect to the agreed terms and conditions of the loan.

> **AND WE HEREBY** authorise and direct the Bank's Solicitors to date and complete the documents executed by me/us in relation to the loan as may be required to give effect to the agreed terms and conditions of the loan.

59 The son and the mother initially signed the declaration before the sister. The son's evidence, which I accept in this regard, was as follows:

> In the case of the first statutory declaration, I initially took my mother to witness it before my sister. Only after we had signed we read and realised it had to be witnessed by a solicitor or someone qualified. I telephoned Butlers office and went to their offices.

60 Consequently, on 30 December 2003, the son and the mother signed the statutory declaration before Mr Butler, the principal of Butlers, solicitors. Mr Butler also signed a certificate that day to the effect that he had witnessed the son's and the mother's execution of the security documents, and that he had identified them. In that regard he ticked the box stating that he had 'sighted driver's licence(s)', and ticked another box in which he wrote 'know as client'. He did not specify in the form who he knew as a client and who he had identified from a driver's licence. The mortgage signed by the son and the mother, and witnessed by Mr Butler that day, gave the address of each of the son and the mother as the son's address in Collie.

61 In his evidence Mr Butler said, in effect, that from his review of the file and from his own limited involvement in his firm acting for the son in this matter, his firm was not acting for the mother in this transaction, and that neither he nor his firm ever advised the mother. In crossexamination, Mr Butler, when asked whether there was any discussion about the mortgage assisting the son from going bankrupt, said that he had no memory of that, but that he could not say 'definitively what happened'. He also said that whilst he only had a vague recollection of this occasion, it was his standard practice to enquire of declarants whether they had read the declaration and declared it to be true to the best of their knowledge, information and belief. He said that he would not have witnessed the statutory declaration had both the mother, and the son, not responded affirmatively. I accept that evidence. I also accept that he subjectively did not see it as his firm's role to advise the mother, and that the mother did not receive any advice from him, and that there was nothing on the file to indicate she had received any advice from his firm.

62 Also, on 30 December 2003, the son and the mother signed a document authorising the surplus funds from the loan to be paid into the son's bank account at Collie. The authority was provided to La Trobe. As indicated below the mother and the son subsequently signed further directions with respect to the application of the loan proceeds prior to settlement.

63 On 31 December 2003, Mr Butler prepared an application to the Land Titles Office to remove a caveat over the Claremont property which had been lodged by the son's wife. The application was signed by the son and the mother.

64 On or about 7 January 2004, La Trobe received the signed acceptance of the letter of offer, signed by the mother and the son. Also on 7 January 2004, Ms J Johnstone, whose title at La Trobe was 'SeniorLending', caused a further letter to be sent to La Trobe's solicitors in relation to the satisfaction of the special conditions of the letter of offer. She subsequently made notations on the bank's copy of the letter of offer as she noted the satisfaction of the special conditions. I infer that Ms Johnstone was responsible, under the authority of Mr O'Connell, for ascertaining that the bank's conditions for lending had

been satisfied and for confirming that, from La Trobe's point of view, everything was otherwise in order to proceed to the settlement of the loan and the taking of the mortgage.

65 On 16 January 2004, Ms Johnstone faxed Mr Curia confirming that she was still awaiting receipt of the mother's driving licence 'or equivalent evidence of identification'. On 19 January 2004, La Trobe received a copy of the driver's licence and passport details of the mother. This fact was noted by Ms Johnstone on the bank's copy of the letter of offer. The mother's driver's licence showed her date of birth, address and her signature. The son's passport showed his date of birth as 1950 and his driver's licence showed his address at Lefroy Street, Collie. On 16 January 2004, La Trobe received the original, signed, application for finance, the faxed copy of which it had first received on 20 November 2003. Ms Johnstone also noted this on the bank's copy of the letter of offer of the loan. It was the version without the alteration to which I have referred in [50] above.

66 Given her role and responsibility in the transaction (see [64] above), I infer that Ms Johnstone, in reviewing the 'evidence of identification' provided by the mother's driver's licence, checked her name, address, date of birth and signature as they appeared on the driving licence, against the details contained on La Trobe's file in the 'Application for Mortgage Finance'. I also infer that she accordingly noticed that the mother's address on the driving licence was the Claremont property and drew Mr O'Connell's attention to that fact.

67 Settlement of the transaction was scheduled for early February 2004. On 5 February 2004, Mr Michael Meegan of Butlers, solicitors, faxed a letter to the solicitors for La Trobe. The letter stated:

> **Settlement for Marie and Jules Joseph Vandenbergh**
>
> We act on behalf of Jules and Marie Vandenbergh in relation to a settlement for a loan our client has obtained from La Trobe Ltd.
>
> Could you please contact Michael Meegan ... urgently to discuss the progress of this matter for the settlement.

68 It is to be inferred that one of the matters Mr Meegan was concerned about was the payment of Butlers' fees for acting for the son in the family law dispute and advising on the transaction to refinance the son's debts. Mr Meegan evidently wanted the firm's fees to be paid from the proceeds of the loan from the bank, and was not content for Butlers to remain an unsecured creditor of the son.

69 On 9 February 2004, Mr Meegan of Butlers, obtained an authority, signed by the son and the mother, authorising the payment of $15,000 from the settlement to Butlers solicitors. There was also another authorisation for the payment of $10,000 to an account with NAB in Victoria. There was no suggestion that this account in Victoria had anything to do with the mother. I infer that it was an account held by the son, or by one of the son's creditors who required payment.

70 Settlement occurred on 9 February 2004. The payment to NAB was $150,000 (not just $43,000).

71 The net amount of $190,105 from the loan was disbursed as follows, according to the bank's ledger card:

TRUST ACCOUNT

Date	*Particulars*	*Folio*	*Debit*	*Credit*	*Balance*
9/02/2004	La Trobe Home Loans Advance			$190,105.00	$190,105.00
17/02/2004	Purcell Partners	EFT	$993.50		$189,111.50

10/02/2004	State Revenue Office	013832	$715.50	$188,396.00
10/02/2004	Land Titles Office	013833	$231.00	$188,165.00
	ASIC		$0.00	$188,165.00
10/02/2004	Bank Cheque: National Australia Bank	DD	$150,000.00	$38,165.00
10/02/2004	Trust Cheque: Butlers, Barristers & Solicitors Trust Account	013879	$15,000.00	$23,165.00
10/02/2004	Trust Chq: National Credit Management Trust Account Victoria	013880	$10,000.00	$13,165.00
10/02/2004	Trust Cheque: J Vandenbergh	013881	$13,165.00	$0.00

72 La Trobe paid Mr Curia, as a representative of FASA, commission for his work in the transaction.

73 No fee or commission was payable, or paid, by the son and mother to Mr Curia.

La Trobe's Mortgage Acceptance Criteria, 'Lite Doc' loans and La Trobe's Starter Kit Mortgage acceptance criteria

74 In 2003/2004 La Trobe provided to mortgage originators what was described as a 'Starter Kit' containing information about, and criteria relevant to, La Trobe's lending practices.

75 The Starter Kit in evidence, tendered by the bank, is dated 23 March 2007. I infer that it is not materially different from the Starter Kit that applied in 2003/2004, given that the bank tendered the document and given that each of the bank's witnesses identified that document as the relevant Starter Kit for the purposes of these proceedings (Mr Coates, exhibit 2, pars 10 11; Ms Bannister, exhibit 3, pars 11 12; Mr Curia, exhibit 4, pars 16 17).

76 In the section headed 'Lending Acceptance' (TB 28 34), La Trobe's 'Mortgage Acceptance Criteria' included the following:

3. Applicants

> ...
>
> Loans will not be approved if the mortgage is in the name of a third party. i.e.. If a loan is to be given to Mr A. Smith, the mortgage cannot be in the name of Mr A. Smith's parent.
>
> ...

7. Verifications

> You must verify, to the satisfaction of La Trobe, debt service capacity, equity and credit standing. This verification must be set out in the loan submission. Please note that casual employment income is not accepted by La Trobe or our Mortgage Insurers.

In relation to 'debt service capacity' mentioned in cl 7 of the criteria, La Trobe had different requirements depending upon the nature of the loan product offered. A product known as a 'Lite Doc' loan had less extensive verification requirements than certain other loan products.

'Lite Doc' loans

77 According to the bank's evidence, a 'Lite Doc' loan is a loan in which the borrower, typically a selfemployed person, does not have available full uptodate financial statements to support the loan application and the lending institution will consider the loan application, based on limited information. The limited information takes the form of a signed declaration by the borrower of their income and their declared capacity to repay, plus a certificate in the form of a letter from the borrower's accountant regarding the borrower's income and expenditure, and ability to repay.

La Trobe's proforma Repayment Certification for 'Lite Doc' loans

78 La Trobe's Starter Kit contained a proforma 'Repayment Certification - Lite Doc'. The document comprised two pages. It contained recommendations of independent legal and financial advice. It also provided, on the first page, for details of borrowers' names to be inserted, for details of the loan, for certification of, inter alia, gross taxable income of the borrowers, and for the page to be signed by 'all Borrowers'. It also contained a provision 'I/We am/are not a pensioner/pensioners ...'. There was also a provision (cl 4) to the effect that La Trobe or its agents or brokers had not provided financial product advice.

79 The second page contained, inter alia, a declaration to the effect that the application for loan had not been submitted to another lender (cl 7), and that the borrower/s had not had prior judgments against them or defaulted on loans or were insolvent (cl 11).

Proforma accountant's letter for 'Lite Doc' loans

80 La Trobe's Starter Kit also contained a proforma letter, setting out the details to be contained in a letter from the borrower's accountant, in respect of 'Lite Doc' loans. It included these terms:

4. I know the Borrower's income and expenditure and based on that knowledge and my understanding of the Borrower's financial position I am of the opinion that the Borrower is able to repay the loan in accordance with its terms and can do so without substantial hardship.
5. I am not aware of any factors which may affect the Borrower's ability to make the repayments or which may cause substantial hardship to the Borrower to make repayments.
6. I confirm that the Borrower is a registered tax payer with the Australian Taxation Office ('ATO') and have lodged their most recent tax return for ATO assessment of income tax.

The loan servicing declaration provided to La Trobe

81 It is convenient to record at this point that La Trobe received a 'Loan Repayment Ability Declaration' that the son signed on 17 November 2003. That document did not, in certain respects, correspond with the format or terms of the proforma 'Repayment Certification - Lite Doc' in the Starter Kit.

82 In this regard, the mother, in this case, drew attention in submissions dated 6 November 2009, to the following differences. First, attention was drawn to the fact that the 2003 declaration document signed by the son did not expressly incorporate a statement to the effect that the borrower/s were not pensioners. Secondly, it was submitted on the mother's behalf that cl 7 and cl 11 on the second page of the Starter Kit proforma document (referred to in [79] above) were omitted. It was said, in effect, that the matters omitted 'reflect the requirements of equity'.

83 Thirdly, attention was drawn to the fact that the 'Loan Repayment Ability Declaration' signed by the son did not include a statement to the effect that the borrowers had not received financial product advice.

84 None of these three points were put to the bank's witnesses for explanation in crossexamination. As to the first point, bearing in mind the standard form, multiple choice nature of the wording, I would not construe it as necessarily reflecting an intention by La Trobe not to lend to pensioners. It may be construed as indicating that if there are multiple borrowers, one at least must have a taxable income and not be a pensioner.

85 As to the mother's second point, the substantive terms of cl 7 and cl 11 of the 2007 document were, in any event, contained in the Application for Mortgage Finance, signed by the mother and the son in 2003.

86 The third point is said to indicate that the bank accepted that brokers may act 'outside the Plaintiff's attempt to prevent the broker being held to be its agent'. I deal with agency later in these reasons, but I do not regard this matter as being of any weight in that analysis.

The accountant's letter provided to La Trobe

87 The letter from the son's accountant received by La Trobe did not conform with the proforma letter in La Trobe's Starter Kit. It was in these terms:

> Dear Sir/Madam,
>
> Jules Joseph Vandenbergh
>
> I am a practising accountant and a member of the Institute of Chartered Accountants in Australia.
>
> I am accountant to Jules Joseph Vandenbergh and his operating entity Eclipse Holdings Pty Ltd as trustee for The Vandenbergh Trust trading as Collie Veterinary Hospital.
>
> I understand that Mr Vandenbergh has applied for a loan of $192,000 through La Trobe Home Loans Australia repayable by monthly installments [sic] of $1460 over 25 years at an interest rate of 7.8% per annum variable interest only.
>
> I know the borrower's income and expenditure over the last few years. Whilst his track record may indicate an ability to repay the loan we can not [sic] give an opinion that the borrower can repay the loan with or without financial hardship.
>
> We are aware that Jules Vandenbergh has practiced [sic] as a veterinarian for 1516 years, and for a significant period of that time has successfully operated a veterinarian practice in Collie.
>
> We can not [sic] give an opinion predicting any factors which may affect the borrowers [sic] ability to make repayments or which may cause substantial hardship to the borrower to make repayments. We are not in the business of providing a warranty on whether the borrower can make the repayments.

88 It is to be noted that the letter did not express an opinion of the kind envisaged by the proforma accountant's letter.

The bank's knowledge without imputation of Mr Curia's knowledge

89 It is common ground that La Trobe's knowledge is the bank's knowledge.

90 This section of the reasons deals with La Trobe's knowledge based on the documents it obtained or was given for the purposes of this transaction. It does not address any issue of whether Mr Curia's knowledge is or should be imputed to La Trobe (and hence to the bank).

Information in the loan application and related documents

91 The documents received and processed by La Trobe for the purposes of entering into the loan agreement and the mortgage, disclosed inter alia, on their face, the following information:

the mother was aged 85 years and single;
the mother had no stated employment history;
the Claremont property was registered in the names of the son and the mother as joint tenants;
the Claremont property was mortgaged to NAB in the sum of approximately $42,000 and was worth approximately $310,000;
the son was a vet living in Collie;
the Claremont property was part of a residential retirement village;
the Claremont property did not produce any income;
the loan was to be used to pay out the NAB Claremont loan and that after settlement fees and the like, the surplus was to be used for 'investment';
the surplus to be used for 'investment' was to be paid to the son;
neither the mother nor the son had any real estate assets other than the Claremont property;
the only other substantial asset was the veterinary business of the son, recorded in the application as being worth $200,000;
according to the son, his gross income as a vet was $80,000 per annum.

92 Integral to the mother's case are allegations to the effect that the bank knew that the borrowers were in the relationship of aged mother/son, that the bank knew that the Claremont property was the mother's home, and that the bank knew that the mother was not being independently advised. It is convenient to set out next my findings at this point on these three fundamental aspects of the mother's claim. I reiterate that I am not dealing here with any question of knowledge imputed to La Trobe via Mr Curia.

Relationship of mother/son

93 I accept the mother's submissions that La Trobe knew that the mother and son were parent and child. That matter was ultimately not put in contest by the bank.

94 In relation to La Trobe's knowledge that the mother and the son were parent and child, that is to be inferred from the identity of their surnames, and the fact that they were joint tenants - combining to indicate a likely family relationship. Also, the information as to their respective ages indicated that the family relationship was more likely than not to be aged mother and son.

The mother's home

95 In relation to whether the bank knew that the Claremont property was the mother's residence, the following matters are relevant. First, Mr Curia in his diary note referred (inexplicably) to a 'refinance of their existing investment property'. On the other hand, the Application Checklist which he completed left blank the box regarding 'Rental Income'. Secondly, the Application for Mortgage Finance referred only to the son's address in Collie, although no provision was made in its layout for separate addresses for different applicants. Also, the son was described as a selfemployed vet in Collie, which could suggest that the residential address provided was that of the son.

96 Thirdly, the statutory declaration and mortgage instrument signed by the mother and the son on 30 December 2003 indicated that their address was the son's Collie address. There is no direct evidence of the provenance of these documents, although I infer that they were created by someone at La Trobe who took the address from the address shown on the Application for Mortgage Finance. That means that documents were drawn up using the one address given. It does not, of itself, necessarily mean that La Trobe did not know that the Claremont property was the mother's residence. As noted above, the form made no provision for separate addresses.

97 Fourthly, the Application for Mortgage Finance indicated the Claremont property was not producing income and that it was not geared to any substantial extent, and, as noted above, the Application Checklist omitted reference to any rental income. These matters would suggest that it was not being used as an investment property. Fifthly, the NAB statements evidencing proof of service of the NAB Claremont mortgage describe the loan account as a 'National Tailored Home Loan' and showed the mother's address as being the Claremont property as at 24 September 2003. The bank's letter of offer dated 16 December 2003 also contained a condition that the 'Existing National Australia Bank Home loan ... be repaid in full'. Mr Coates (the recovery officer who gave evidence) agreed that this suggested that it was a loan to acquire a home, but said it was not 'always' that. I infer from this evidence that, generally speaking, but not necessarily always, a banker would understand a reference to a 'home loan' in a banking document to be a loan used to acquire a home.

98 Sixthly, the Claremont property was known to be a retirement village for residential use of persons over the age of 55 years. The mother fitted that description.

99 I would infer that, in bringing a practical and commercial eye to the transaction, the La Trobe officer responsible for final approval of the loan offer, is at least likely to have suspected that the Claremont property was the mother's residence, in light of the above matters. I find that any doubt about that was subsequently removed prior to the making of the advance and the taking of the mortgage by Ms Johnstone's consideration of the mother's driving licence. The mother's address shown on the driver's licence was the Claremont property. Accordingly, I find that La Trobe, at the time of making the advance and taking the mortgage, understood that the Claremont property was the mother's residence.

The mother's lack of independent advice

100 I infer that La Trobe knew that the mother did not have independent legal advice. La Trobe knew that solicitors were involved for the son and the mother in the settlement of the transaction. It also knew that certain documents signed by the mother and the son had been witnessed by a solicitor. It had also recommended the obtaining of legal advice and could assume that both borrowers had obtained legal advice.

101 It could not, however, have thought that the mother had the benefit of independent advice as there was no indication that the mother was being separately advised from the son. Mr Coates (La Trobe's recovery officer) said in effect in crossexamination that there was nothing to indicate that the mother received independent legal or financial advice (ts 71).

Jones v Dunkel

102 Furthermore, ***Jones v Dunkel*** [1959] HCA 8; (1959) 101 CLR 298 indicates that where a particular inference is fairly available on the evidence, the court may more readily draw the inference by the unexplained failure of a party to call a witness who is likely to have relevant knowledge and may be regarded as having been 'in the camp' of that party: *Cross on Evidence* (looseleaf) [1215]. In my view it is appropriate for me to have regard to the fact that the bank did not call evidence from the person or persons who were responsible at La Trobe for making the final decision to make the loan offer, and who were responsible for ascertaining that the special conditions had been satisfied. I am assisted in drawing the inferences that I have (see [66], [99] [100]) by the bank's failure to call that person or those persons as witnesses, although there is, I think, sufficient evidence to enable the inferences to be properly drawn in any event.

Mr Curia's knowledge

103 Mr Curia and Ms Kiely both worked at Medfin at the relevant time. They had adjoining offices. They spoke about the son and his need for a loan. Mr Curia said he could help.

104 Ms Kiely's evidence, which I accept and which was not challenged in crossexamination in this regard, and which I find accords with the probabilities, was to the following effect regarding what she knew and told Mr Curia.

105 Ms Kiely told Mr Curia 'everything [she] knew including that [the son] was desperate to meet debts and pay out a bank overdraft'.

106 She knew that the son was in negotiations with creditors of his practice. She knew that the son had originally wanted only to put up his vet practice and its premises as security, but that proposal could not proceed because the son's accountant would not provide a financial report on the vet practice. She knew the proposed loan was to pay out a substantial overdraft debt on the son's practice, and to enable the son to transfer the matrimonial home to the wife so that the wife could

in effect facilitate payment of the debt owing to the drug company. Ms Kiely did not know all the details of the debts. There is no suggestion that she knew that NAB had issued a notice of default under the NAB Claremont loan and had issued a corresponding notice under the NAB Claremont mortgage, or that the son had a judgment against him or was the subject of a bankruptcy notice. As I have noted, however, she knew that the son was 'desperate to meet debts and pay out a bank overdraft'.

107 She also knew that the Claremont property was his mother's home, and that the mother had paid for it apart from a $43,000 shortfall for which she obtained a mortgage from NAB, which the son had been required by NAB to 'guarantee'. She understood that the son had been made a joint owner in consequence of the NAB's requirements.

108 She and Mr Curia discussed the Claremont property as a potential source of security for financing for the son, and they agreed that very few lenders, including Medfin, would accept it as security. Mr Curia in chief said in effect that it was understood that 'no other lender would finance this'.

109 Ms Kiely said, in relation to the use of the mother's home as security:

> I did not know, or think of, what might be the significance of this, other than that his mother's property would have to be put as security for any loan from La Trobe if it was to have any chance of success. In the end it was decided she be made a joint borrower and sign the application as well. Richard Curia and I discussed this. I remember the discussion because I had no prior experience of any similar application.

110 Ms Kiely completed the La Trobe loan application documents provided to her by Mr Curia in consultation with Mr Curia (who had familiarity with the La Trobe documents).

111 In substance Mr Curia, through discussions with Ms Kiely, knew that:

(a) the Claremont property was the mother's residence;

(b) the mother had bought it using her money apart from a $43,000 shortfall;

(c) the son had contributed no equity to the Claremont property;

(d) the son was borrowing to refinance the son's practice debts which he was 'desperate' to meet, and to settle with his wife;

(e) the settlement with the wife served the son's broader goal of attempting to deal with the debts of the practice, because the settlement with his wife was intended to facilitate payment of the drug company debt.

112 Mr Curia appeared to me to have generally a poor recollection of events. Overall, his evidence did not appear to me to be materially different from Ms Kiely's evidence except that it was less detailed, and save for the following matter. He said in chief that Ms Kiely told him that the son (not the mother) 'wanted to raise money, although she was not sure what it was for'. He was not directly crossexamined on that part of his evidence. However, I am unable to accept that he was not told what it was for, in light of Ms Kiely's evidence, the fact that he admitted in crossexamination that he discussed the application with her, and his evident lack of memory (ts 94): cf ***Bulstrode v Trimble*** [1970] VicRp 104; [1970] VR 840, 849. He was also somewhat loose in his answers in crossexamination. When asked about the accountant's letter in support of the loan application, he said (ts 98), 'it clearly says his track record indicates an ability to repay the loan'. When it was put to him that the letter did not 'clearly' say that at all, and that it merely said it 'may' indicate an ability to pay, he shrugged off the inconsistency in his answer and simply said, 'yes, that's fine'. To the extent that his evidence may have differed from Ms Kiely's in relation to their communications, I prefer Ms Kiely's evidence. In so finding, I am not unmindful that there was an error in Ms Kiely's witness statement about the transaction involving a reverse mortgage. Nevertheless, as a whole, she struck me as a truthful and reliable witness.

113 I should add here that I make no finding that Mr Curia (or for that matter Ms Kiely) were knowingly a party to any false statements in the application for finance. In this regard, I am mindful that Mr Curia's statement in his diary note that the loan was to 'refinance ... their existing investment property' and that the 'equity' was for 'investment purposes' is, at least arguably, somewhat curious. It might seem unusual, for example, if it was thought that 'investment purposes' covered in a

general sense the refinancing of the son's practice, and that the son's property from which the practice operated could be regarded as an 'investment property', in the context of the application. The Claremont property was itself clearly not an investment property. Nevertheless there was no pleaded issue in the case, and nothing was suggested to Mr Curia (or Ms Kiely) in the witness box, to the effect that he (or she) was involved in making knowingly false statements to La Trobe. That question and any potential explanation were not canvassed in the trial. Accordingly, it is not appropriate to speculate on such matters.

The defendants' evidence The mother's evidence - its nature and observations thereon

114 In relation to the mother's evidence, I make the following observations. First, she did not appear to be physically or mentally frail, although she appeared to be slightly hard of hearing. She arrived in court in a wheelchair, which indicated that she had some difficulty with mobility, but she was able to ascend the steps to the witness box holding on to the rail, and otherwise she gave the appearance of being in reasonably sound health. Also, despite her age, she appeared to be a lively and intelligent woman. Her increasing irritation at the crossexaminer's questions in a particular area of her evidence was evident, and led at one stage to a sotto voce 'oh Christ!', which is not recorded in the transcript.

115 Secondly, she nevertheless appeared to me to be genuinely shocked by, and anxious over, the predicament in which she finds herself as a result of helping her son in 2003. She is greatly vexed by her current situation and, to some extent I think, annoyed at what has occurred. I find that her shock and anxiety has made it very difficult for her to think clearly and objectively about the train of events which led to the execution of the loan agreement and mortgage in late 2003/early 2004, and that in the witness box this has led her to adopt what appeared to be often a reflexive response by which she denied almost everything put to her, including leading questions asked by her counsel and what was contained in her witness statement and in a previous affidavit she had sworn in these proceedings in defence to a summary judgment application.

116 Thirdly, she gave evidenceinchief by witness statement. Her witness statement was obviously drawn with an eye to the legal issues in the case, but it contained important explanations for her conduct to which she could not assent in the witness box in crossexamination (ts 186). I formed the impression that her witness statement was not truly her own account of her recollection of the events and circumstances in question. In this regard, the following exchange which occurred in reexamination is also pertinent:

> Now, Mrs Vandenbergh, you have signed your witness statement?---Yes, I did.
>
> Now, that was prepared for you by your lawyers, wasn't it?---I don't know about it.
>
> You don't know who prepared it?---I don't think so. What is the usual procedure?
>
> Did you talk to your lawyers and tell them what you knew about what had happened with Jules?---I did not. I didn't even know that it was prepared so - - -

This evidence stems, in my view, in part from the reflexive response to which I have referred, and in part because she thought her witness statement was a document prepared from various sources by others, to which her general assent or otherwise was required. I do not think she properly understood that her witness statement was supposed to be her own deliberative and firsthand account of events. I make no serious criticism of the mother in that regard. It is a regrettable feature that can arise in cases where witness statements, prepared by the lawyers, are used as evidenceinchief.

117 She was then asked:

> You've read it over?---Of course I read it over.
>
> And you've said that to the best of your knowledge it's true what is written?---Yes, to the best of my knowledge it's true.

I find that she adopted her statement as true 'to the best of [her] knowledge' in the sense that whilst she could not vouch for all the detail in it, it was true in that it encapsulated a number of broad matters which were true to her knowledge. One was that she acquired the Claremont property using her inheritance money and money borrowed from the bank, and that she did not know that the son was on the title to the property as a joint owner. Another was that she signed papers in 2003/2004 for the son at a time when he was involved in a settlement with his former wife. Another was that she was not familiar with the term 'mortgage'. Another was that she received no advice from the son's solicitors or other advice about what she was signing. Next, at the time that she did so, she thought that he was a successful vet, and she had no understanding that her assistance to the son could lead to the loss of her residence. Also, she never understood, until relatively recently, that the son had not been carrying on a financially successful veterinarian practice, and that he had in fact been made bankrupt.

118 Her lack of understanding that her assistance to her son could conceivably lead to the loss of her home is a matter to which I refer later.

119 Fourthly, her witness statement is largely drawn in negative terms. It states what she was not told and what she failed to realise, without providing direct evidence as to what, positively, she was told and what she positively understood (save to the extent mentioned below), when she was signing documents to assist her son. To that extent it lacks some cogency, because a proper appreciation of what she did not understand is, I think, informed by positive evidence as to what she was told and what she did understand.

120 The question of what, positively, the mother was told and what she thought she was signing when responding to her son's request to assist him in settling with his former wife, appears, indirectly only in par 34 of her witness statement:

> I was never told why I was needed or what my involvement actually was. I did not ask because I just trusted [the son] in everything. *I thought that he must need me as a second person to somehow take [the former wife's] place.* (emphasis added)

This explanation in her witness statement, which was given to explain her conduct, namely that she thought she was 'a second person to somehow take [the former wife's] place' was one which she flatly and forthrightly rejected in the witness box.

121 She candidly recognised, in my view, that this explanation proffered for her conduct did not make sense. The result is that her witness statement provided no credible account of what she was positively told by the son as to the level and nature of the assistance he required, and her positive understanding of the nature of the assistance which she was providing.

122 Paragraph 49 of her witness statement was also expressed in the negative in these terms:

> I was never told and never knew or understood that Jules was borrowing about $190,000 *that he might not be able to repay* and that I was agreeing to repay if he couldn't do so. (emphasis added)

123 Having regard to the emphasised words, this paragraph indicates not so much that the mother was unaware that the son was borrowing $190,000, but that he was borrowing that amount in circumstances where he might not be able to repay it.

124 Also, in par 37, she said:

> I would not have known there was any risk of losing my home because I did not know there was any problem. I knew Jules still had his practice and his property in Collie.

125 I refer later to her understanding of what she was agreeing to and what she was signing.

126 Fifthly, I find that the mother has no clear recollection of all the details of what occurred in late 2003/early 2004. I think that is because the transaction had been presented to her by the son in a very benign light at the time as being of no threat or concern to her, and that the events occurred some six years ago. She thought that she was assisting her son and she thought that there was no practical risk of loss to herself or to her residence. Also, as I have said, the stress of her current predicament has, I think, had a debilitating effect on her ability to recall events in a dispassionate and objective way. She said at the start of crossexamination (ts 171), with reference to her statement:

> Yes, Have you looked at it this morning?---Vaguely. No, not really seriously. I've read it at home.
>
> All right. Are you satisfied that from your memory everything that is in there is correct?---As far as I can remember, but it's not many things I can remember.

127 Sixthly, the difficulties with her reliability as a witness also emerged with reference to an affidavit which she swore on 11 June 2007 in defence to a summary judgment application by the plaintiff. This affidavit was tendered in evidence by the plaintiff in these proceedings and the mother was crossexamined on it. She was unable to recall or accept the accuracy of a number of important matters to which she had deposed in that affidavit (ts 168 170, 172, 176 179). I think that the mother had forgotten that she had sworn that affidavit in 2007, that she had not reviewed it before giving evidence in these proceedings, and that, like her witness statement, it contained information which had been drawn from a range of sources and she did not see it as the product of her own deliberative account of events. Her denial of much of its contents stems, in my view, from the fact that she lacked familiarity with it as a document and was unprepared to deal with it, and that, as I have said, her state of mind, influenced I think by feelings of stress and anxiety, contributed to a reflexive response to deny knowledge of matters relating to her execution of the loan agreement and the mortgage.

128 At the time that she swore the affidavit in 2007, I find that, again, she saw it as a document, prepared by others, for which her assent or otherwise was required generally. I find that she swore it to be true at the time on the basis that at the time of swearing the affidavit, she believed it to be true to the best of her knowledge, not so much as to all its detail, but in relation to the broad matters mentioned earlier ([117]).

129 Seventhly, in crossexamination when it was put to her that she was told that the son was borrowing money because he was facing bankruptcy resulting from his marriage breakdown, she agreed with the former part of the proposition but not the latter part, ie as I understood it she accepted that he told her he needed to borrow money, but not that it was due to the fact that he was facing bankruptcy (ts 179).

130 Eighthly, other, objective and uncontested circumstances need to be taken into account when assessing the mother's evidence. There are the following:

(a) The mother was living independently, she had a current driver's licence, and she operated a cheque account;

(b) The Application for Mortgage Finance, which was on its face a La Trobe document, was signed in three places by the mother on 4 November 2003;

(c) The mother drew, in her own handwriting, on her cheque account, a cheque to La Trobe for $300 on 25 November 2003 - the cheque was crossed and marked 'not negotiable' and the words 'or bearer' were crossed through, indicating at least a basic understanding of commercial practices;

(d) The mother signed the loan offer document under the reference to the 'borrower', on 20 December 2003;

(e) The mother signed, twice, the statutory declaration, the text of which referred to the bank, the loan and the mortgage. First she signed it before the daughter, and on the second occasion she signed it before Mr Butler;

(f) The mother must have been told, or otherwise understood, that the declaration before the daughter was insufficient, and that she would need to make the statutory declaration before a solicitor - which would tend to indicate that it was a document of some formality and significance;

(g) The mother gave Mr Butler to understand that she had read the statutory declaration and considered the contents to be true;

(h) The mother signed the authority directing payment of surplus funds to the son on 30 December 2003;

(i) The mother also signed the Mortgage document at the place where it says 'Mortgagor/s sign here', in the presence of Mr Butler;

(j) The mother also signed, in the presence of Mr Butler, the application to remove the caveat lodged by the former wife over the property;

(k) In relation to the documents that she signed in the presence of Mr Butler, the mother was taken to his office, with the son, expressly for the purpose of Mr Butler, as a solicitor, witnessing their signatures, and to that extent it could be expected that she understood that the occasion for her signing the documents was an occasion of some formality, and that the documents had legal significance.

131 Ninthly, there are nevertheless other objective circumstances relevant to her testimony that she did not understand the term 'mortgage'. The potential sources of her knowledge of the term 'mortgage' were first, general life experience, secondly the fact that there had been a mortgage over the Claremont property as part of the acquisition of that property in 1998, thirdly that the son or some other member of the family such as the daughter explained it to her, or fourthly that it was explained to her by the son's solicitor.

132 As to the first of those matters, her life experience had not really equipped her to understand the nature and effect of a mortgage. She had no experience of owning a home until the age of 80 and even then, the acquisition of the Claremont property was managed by the son on her behalf. As to whether she had an understanding in 1998 of what the NAB Claremont mortgage entailed, I think this is unlikely. I accept that the son managed the acquisition and arranged the paperwork in that transaction. She had recently moved from interstate and had no prior experience herself with buying a house. I find it likely that the acquisition proceeded without any real comprehension by her of the significance of the mortgage over the Claremont property.

133 As to whether the nature of her mortgage was explained to her by the son, I think this is unlikely. It was not in his interest to draw out the significance of what the mother was undertaking in late 2003/early 2004. As to other members of the family, it was not suggested to the mother in crossexamination by counsel for the bank that the daughter (or the other son) explained the significance of the mortgage to the mother. No ***Jones v Dunkel*** point was raised by counsel for the bank in relation to the absence of evidence from the daughter (or the other son).

134 With respect to any explanation by the solicitors, I find that the mother's only contact was with Mr Butler. I accept both defendants' evidence, and Mr Butler's evidence, that she did not receive an explanation of the documents or any advice.

135 Tenthly, notwithstanding the difficulties with her evidence which I have mentioned, I thought there was a real ring of verisimilitude in her evidence in the following exchanges in crossexamination (ts 176, 177 178):

> You now know that there's a mortgage over the property that you live in, don't you? You now know that?Now, yes I know that. Yes.

> When did you first find that out?Not long ago. I don't know what date or - maybe that I know it two years, but I'm not sure.

...

All right, so what you said there in 2007 - that you had heard of the term 'mortgage' but you didn't know what it meant other than it was another name for a loan?Yes, I always thought that it was another name for - if I heard it or when I heard it, that it was another name for a loan.

The letter from the mother's solicitors of 9 August 2006

136 After the defendants had defaulted in payment under the loan agreement in July 2006, the mother's present solicitors sent a letter by facsimile to La Trobe on or about 9 August 2006 in these terms:

We advise that we act for Mrs Maria Vandenbergh who is a joint borrower with her bankrupt son against her home at Unit 9/80 Mooro Drive Mt Claremont Western Australia.

Our client is some eightyseven years of age. Our client agreed to enter into a joint borrowing with her son in circumstances in which she received no independent advice and in which any advice given to her was negligent at the very least.

...

In or about mid 2003 our client's son was facing property settlement negotiations pursuant to the pending dissolution of his marriage.

A meeting was held chaired by Mr Geoff Hall of RSM Bird Cameron accountants who had been employed by the wife (Lucia). ...

In attendance at the meeting were Lucia [the wife] and her lawyer and our client's son and his lawyer, one Michael Meegan, of Butlers Family Lawyers.

It was agreed at that meeting that our client's son would take the Collie Veterinary Hospital business and building and all the debts related thereto. Lucia was to take a farm property just out of Collie and would have reasonable time allowed to her to raise $95,000 against the property to advance to Dr Vandenbergh. In addition, Dr Vandenbergh would borrow $149,000 or thereabouts in order to meet outstanding creditors, and so avoid bankruptcy.

Pursuant to this arrangement, Dr Vandenbergh approached our client, his mother, and she agreed to put up her home as security for the proposed borrowing of $149,000 or thereabouts and in addition to consolidate a loan of her own then outstanding in the amount of $46,000 or thereabouts. ...

We are instructed that when Dr Vandenbergh attended on Med Fin finance brokers of Subiaco servicing doctors, dentists and veterinary surgeons. He advised the loans officer:

1. that he was in the process of negotiating a final property settlement with his former wife Lucia and needed to borrow $149,000 or thereabouts to pay out creditors of the Collie Veterinary Hospital which was the business run by him and his wife;
2. the full amount to meet outstanding creditors was $245,000 or thereabouts and the balance was to be received in the event that Lucia was able to borrow and contribute $95,000 towards paying out the outstanding creditors;

100. that the arrangement, and his borrowing through Med Fin, was in order to avoid bankruptcy. Dr Vandenbergh on our instructions clearly recalls being asked the purpose for the loan and replying that the purpose was to enable him to pay out his creditors and avoid bankruptcy;

...

6. that Dr Vandenbergh had lawyers representing him who were able to speak to the officer from Med Fin and explain the full circumstances or answer any questions the Med Fin officer might have.

...

At no time was our client advised that it would be impossible, or likely impossible, that Lucia [the wife] would be unable to raise $95,000 given that she at that time had no record of employment and the farm property was mortgaged to almost its full value.

Dr Vandenbergh's circumstances were such that there was no possibility of him borrowing more than $192,000 or thereabouts and without the contribution of $95,000 from Lucia, he was not going to be able to meet his creditors.

Of course, in these circumstances, we are sure you will agree, it was quite negligent of Dr Vandenbergh's advisors, his lawyers and/or accountant, to not warn him against such a late step, namely to borrow $192,000 or thereabouts from La Trobe, when it was entirely uncertain that Lucia [the wife] might be able to borrow $95,000 and therefore entirely uncertain that Dr Vandenbergh could meet his creditors and thereby avoid bankruptcy. *This core advice given to Dr Vandenbergh is of course not relevant to our client's circumstances. Her circumstances are brought about by the fact that she received no independent advice and if any advice at all was given, it was most certainly grossly negligent.*

> On our instructions the only time that there was an opportunity for our client to be given any advice or met with any lawyer was when she was in the company of her son attended on the offices of Butlers Lawyers, Mr John Butler came into a room and attended on the documentation being signed and did so in a rather hurried fashion and without stopping to discuss the matter with our client or to consider her position and give any advice at all to her.
>
> ...
>
> *The sole reason for our client to put up her home at this very late stage in her life was on the understanding given to her and confirmed by her son's lawyer that his bankruptcy would be prevented. At no time was she ever advised that a real and likely, or at the very least quite possible consequence of the arrangements were that Lucia [the wife] would not be able to raise the money required of her to contribute to the property settlement and our client [sic - the son] would in any event go bankrupt.* (emphasis added)

137 By the time the plaintiff had applied for summary judgment in these proceedings, it appears that the secondnamed defendant's lawyers thought that the above letter, and in particular the last paragraph which I have quoted, might potentially create some difficulty for the mother in relation to the plaintiff's claim for possession. The letter was alluded to, indirectly, in par 27 of the mother's affidavit of 11 June 2007 sworn in opposition to the summary judgment proceedings:

> My lawyer has recently spent a number of hours explaining things to me and my daughter who has been helping me understand what has happened. Previously I think it was more than a year ago, my lawyer spoke to me briefly when he first visited me and was introduced to me by Jules. I did not give any written statement at that time. I understand that Jules was speaking to solicitors on my behalf. I have now had explained to me that a number of earlier letters written by my solicitors to the plaintiff's solicitors say that I knew that Jules was facing bankruptcy and that I knew that my house was at risk. This affidavit is the first written statement provided by me and it sets out my recollection and understanding of events. Any different account of my understanding must either have come from Jules or some other misunderstanding.

138 The reference to this 'affidavit ... [setting] ... out my recollection and understanding of events' is a reference, particularly, to the events deposed to by the mother in pars 16 21 and 25 28. In par 16 the mother had said:

> In or about 2003 Jules said to me that he needed my help. He told me he would bring some documents for me to sign. I knew that he was working out a marriage settlement with his former wife, Lucia. I did not know the details of the settlement or any of the financial circumstances relating to it. I did not even know that Jules had moved out and that Lucia was going to keep their home. I only learnt this later. I recollect Jules mentioning bankruptcy. I understood or assumed he was borrowing money to pay out Lucia and any threat of bankruptcy was coming from her. I guessed that Jules was rearranging his affairs and that was why he wanted me to be involved. I knew that it somehow involved me but I did not know how. I did not know that my home would be put at risk. I agreed to help because he asked me to. I did not think to ask him how I could help or what might be involved. I assumed that he could well afford a loan to pay out Lucia. I didn't really think about it. If I had, I would have thought the bank would not lend him money unless he could repay. It would never have crossed my mind that the bank needed my help in this way.

In par 28 she had said:

> I never at any time gave thought to the possibility that my home might be at risk. I did not understand from anything said to me that anything I signed put my home at risk. Further, I always assumed that Jules could well afford to pay out Lucia and she was the one threatening him. I thought that once he had paid her out he would continue to practice successfully and he would be able to pay any financial obligations he might have.

As noted above [115], a number of these matters were in effect denied by her in crossexamination, although they reflect the broad matters referred to in [117] above which I think she held to be true.

139 The letter sent by facsimile on 9 August 2006 was, according to the evidence of the son and the mother, written on the son's instructions without reference to the mother. The son said in crossexamination that this letter sent to the plaintiff accurately recorded his instructions to the solicitors at the time (ts 139, 140 141). I find that it was not written on the mother's instructions and was written without reference to the mother.

140 The bank has submitted that an adverse inference should be drawn from the mother's failure to call Mr Meegan (particularly having regard to his facsimile of 5 February 2004) and the failure to call Mr Butcher, the solicitor who wrote the letter of 9 August 2006. As to the former, despite his representation to La Trobe's solicitors, in his facsimile of 5 February 2004 that Butlers acted for the mother and the son, I accept the evidence of Mr Butler that there was no indication on the file of any advice to the mother (which in the ordinary course a solicitor would have recorded had advice been given), and I accept the evidence of the mother and the son, to the effect that the mother was not advised by Butlers. Accordingly, even if Mr Meegan's representation shortly prior to settlement that the firm 'acted' for both were accurate in some sense, I nevertheless am satisfied that the mother in fact received no advice regarding the transaction.

141 As to the latter, Mr Butcher had filed and served a statement to the effect that the letter of 9 August 2006 was written without reference to the mother and without her instructions. The statement was not tendered and he was not called. Nevertheless I have accepted the mother's and son's evidence on this point, namely that the letter was not written with reference to her or on her instructions. That accords with the probabilities - it was a letter written a few weeks after the first default, at a time when the son's immediate purpose was to prevent the bank pursuing the mother. Part of its design was, evidently, to avoid the mother becoming aware of, and anxious over, the situation that had arisen, and to nip the potential problem in the bud. It would have been inconsistent with that design to apprise the mother of the problem and take her instructions in relation to it.

The son's evidence and observations thereon

142 The son also gave evidenceinchief by way of witness statement. Much of the evidence in the son's statement was also expressed in the negative. He said, inter alia (pars 19 20):

> When the La Trobe application form arrived from Ms Kiely I took it with me to visit my mother and to ask her for help. I did not want to worry my mother or cause her any concern. I didn't explain to her what I was doing or what I was involving her in ...

> She signed on each occasion without asking any questions. At no time did I ever explain my financial position or the meaning or effect of what I was doing.

143 In pars 21 and 33 of his statement, however, he did provide some positive evidence as to what he says he told the mother:

> At the time of asking my mother to sign I told her she was helping me to remove Lucia from the Collie practice. I told her there was nothing she needed to know or be concerned about.

...

I only ever told my mother about pressure coming from Lucia [the wife]. I may have mentioned bankruptcy in that context. I didn't say anything to my mother about my practice. I simply told her that I needed her help to settle with Lucia [the wife].

144 In crossexamination, the son agreed that he may have mentioned bankruptcy. He said (ts 125):

I may have mentioned it but only as part of if I couldn't get Lucia [the wife] off my back that could be a problem.

145 He was also asked whether he told the mother that he was borrowing money. He initially said he did not, but then went on (ts 131 133):

You didn't tell her they related to borrowing money?---I - it was helping me borrow money, yes.

To help you borrow money?But not for her to borrow money ...

All right. And what did you tell her her role was in helping you to borrow money?I don't think I told her anything specifically about it. I guess I relied on the fact that my mother would just trust me, and I was ...

Did she ask you any questions about why she was being asked to sign documents to help you borrow money? Very little ...

And she didn't ask before you took her to sign the authority to pay Butlers and the other party?---Whatever question she may have asked me, which I don't really know, it was I reassured her that there was not a great deal to worry about and that it was purely to help me and - it's a bit difficult to explain but at that time I oscillated between the absolute darkest depths of despair and completely misplaced optimism that it would all sort itself out.

Later (ts 140) the following exchange occurred:

She was aware that she was participating in a joint borrowing with you to help you avoid bankruptcy, wasn't she?I think she may have assumed that she was guaranteeing something or she may have - she didn't question it. I thought she was, as mothers do, and unfortunately which I took advantage of that with the son in dire straits comes to her and says 'can you sign this for me to really help me?' and she did and I took advantage of her.

146 The son knew that the mother was in frequent contact with his sister. They lived near each other whereas he was some distance away in Collie. There is no suggestion that he asked his mother to conceal his request for assistance from the sister and, accordingly, when seeking the mother's assistance, he would have done so in the knowledge that the request and its nature would likely have been, or at least may well have been, the subject of discussion between the sister and the

mother at some stage. Accordingly, there was no point in the son hiding the fact that he was borrowing money and needed his mother's financial assistance. The involvement by the sister in witnessing the statutory declaration in the terms referred in [58] further indicates that there was no concealment, within the family, that a loan was being taken out and that the Claremont property was being mortgaged.

147 As a general observation, the son gave his evidence in a confusing and at times inconsistent and garbled way. The essential reason for this, I think, is that he had trouble reconciling the differences which appear between the solicitors' facsimile dated 9 August 2006 which recorded his instructions at that time, and his affidavit sworn in opposition to summary judgment, and his witness statement in these proceedings. I formed the impression that he was embarrassed by his conduct and the distress caused to the mother, and that he was prepared at times to say things which he considered might assist the mother in retrieving that situation. His conduct in procuring the mortgage from his mother also casts doubt on his veracity and reliability.

148 In relation to the letter from the solicitors sent by facsimile on 9 August 2006 sent on instructions from the son, I would make the following points. First, it is written without reference to or instructions from the mother. It is not an admission by her. Secondly, I would still not regard it as a complete or accurate statement of the whole truth from the son's perspective because he is likely to have put some reconstruction on certain events which he thought best suited his purposes in dissuading the bank from pursuing his mother. Thirdly, insofar as it deals with his communications with the mother, it reflects his perspective and understanding of the effect of those communications, which may not correspond with the mother's understanding of the effect of those communications. Accordingly, whilst the son's explanation as to why he told the mother's solicitors the things in the last quoted paragraph of that letter (ts 140 141) in my view lacked credibility, it is unsafe to assume that those matters constitute an accurate reflection of what he told her and, moreover, what she consequently understood.

149 The son at one point in crossexamination (ts 137 138) said that his solicitor had 'assured' him that the refinancing would mean that he would avoid bankruptcy, although he then appeared to withdraw that statement. I find that no such assurance was given. It is wholly unlikely that a solicitor would ever give a person in the son's circumstances an 'assurance' of that kind. Thus, I find that the son entered into the transaction without receiving any such 'assurance'. His suggestion of an 'assurance' is, I think, no more than a means for casting blame on others for his own irresponsibility.

150 Notwithstanding my general reservations about the son's evidence I accept so much of the son's evidence referred to in [143] [145], to the effect that he told the mother that he needed her help to settle with his former wife, that he may have mentioned bankruptcy in that context, that he told the mother he was borrowing money, and that he subjectively thought she may have assumed that the documents which she was signing to assist him involved guaranteeing the debt. I have also accepted his evidence to the effect that the mother did not receive legal advice (see [134] above).

Findings on what the mother was told and what she understood

151 Having considered all the evidence as a whole, and despite my reservations about the mother's and the son's evidence, there is a bedrock of evidence which I think appears from their statements, affidavits and answers to crossexamination which I accept, and which, I find, accords with the objective probabilities of what occurred. My findings are set out below.

152 In 2003, acting on the advice of his solicitor, Mr Meegan, the son went about refinancing his debts and settling with his wife.

153 I find that the son told his mother that he needed her assistance to effect a settlement with his former wife. I find that the son indicated to the mother that his former wife was pressing for an urgent settlement and that she threatened to bankrupt him if he could not quickly obtain a bank loan to pay her out.

154 In order to tell her what assistance he was seeking and how she could assist, he would have needed to explain that, in substance, he was seeking additional loan funds from the bank. Also, as noted earlier, the mother accepted in crossexamination that he told her he needed to borrow money.

155 The mother understood that the son was being advised by solicitors, and the son told her, in effect, that there would be no financial risk to her if she helped him out. I also find that he conveyed the impression that his vet practice was then successful and profitable, contrary to the fact.

156 I find that the son misled his mother in pretending that her assistance was only required to settle with his wife. He deliberately concealed the fact that he was under financial pressure from, and in serious default with, his creditors. He also concealed the fact that his defaults had affected her interests, insofar as NAB had issued the default notice with respect to the NAB Claremont loan and the notice with respect to the NAB Claremont mortgage.

157 The mother, quite naturally, wanted to assist her son in sorting out the problems with his former wife. She agreed to assist.

158 I accept her evidence that she did not understand the meaning of the term 'mortgage' itself, or the true nature and effect of a mortgage. I also find, as she said in her affidavit in opposition to summary judgment and as she confirmed in crossexamination, that she thought that the word 'mortgage' was another word for a loan. I also find that she must have known that she was executing a document called a 'mortgage', and that she did so believing it to be a loan for the benefit of the son. I am not persuaded that she did not understand that by signing a legal document which she believed to be a loan for the benefit of the son, she was agreeing to be responsible for the loan at least if the son did not repay it. I do not find that she positively believed that what she was signing created a liability in her for the loan, but rather I am not satisfied that she did not have that belief. I also find that whatever she believed about the nature of the mortgage she was signing, she believed there was no prospect of any default by the son, and no risk to her.

159 I find that the mother failed to appreciate that her home was at risk. Various factors contributed to that lack of understanding. First, a lack of understanding about the true nature of a mortgage meant that the right of the bank to sell her home was not impressed upon her mind at the time as a feature of the transaction. Also, she had no idea of her son's financial difficulties, she trusted the son in the transaction, and she thought the prospect of his default on the loan was inconceivable, as he was, fundamentally, a wealthy vet.

160 She received no advice from Butlers, or any independent advice, about what she was signing.

The mother's claim in equity - preliminary observations

161 The mother's claim in equity is based on unconscionable dealing of the kind described in ***Commercial Bank of Australia Ltd v Amadio*** [1983] HCA 14; (1983) 151 CLR 447. In this regard, she also relies on what is said to be the trust and confidence in her relationship with the son as an aspect of the broader context in which, it is said, it should be recognised that she was suffering a special disadvantage in the transaction vis-à-vis the bank. The written submissions on her behalf (dated 17 August 2009) said:

5. ... The [mother's] vulnerability to undue influence arises from the confidence and trust in her relationship with the [son]. ... it is this aspect of the relationship (and not undue influence) that is pleaded in paragraph 3 of the Defence.
6. Although it is this aspect of confidence and trust in such a relationship that gives rise to the implied risk of abuse that underlies equity's presumption of undue influence; see ***Rogers***, there is also a risk that the weaker person might sign simply at the other's request without any undue influence, see ***Garcia***. The [mother's] case does not depend on presumed or actual undue influence (which focuses on the [son's] conduct) but on the underlying aspect of confidence and trust which, together with the other matters relied upon, put her in the position of disadvantage.

...

18. The second named Defendant's case may well come down to this:
s entering into and reliance on the mortgage was unconscionable by reason that it was known to Kiely or evident from the

ıip of confidence and trust with the person to whom it was left to procure her agreement;
: she had not received the benefit of the loan funds;
n should she be called upon to do so; and
ɔendent advice had been provided.

162 Accordingly, the mother's case was not that there was any actual undue influence by the bank. Nor was it said to depend upon a claim of actual undue influence by the son, with notice to the bank. Nor was it alleged that there was undue influence arising from a special antecedent relationship of influence between the mother and the son outside of the recognised categories of influence, with notice to the bank.

163 The mother alleged that she was 'in a vulnerable relationship of confidence and trust' with the son and that the bank will be taken to have known of the trust and confidence 'because it arises from equity's wellknown implication or presumption applicable to the aged motherson relationship'. (See par 8 mother's submissions 17 August 2009, ts 30 October 2009, 245 247.)

164 The course of argument by the parties ranged over not only the asserted 'wellknown implication or presumption' applicable to the aged mother/son relationship, but also the principle relating to the grant of a guarantee by a married woman in favour of her husband (***Garcia v National Australia Bank Ltd*** [1998] HCA 48; (1998) 194 CLR 395 (the ***Garcia*** principle)), and suggested 'extensions' of the ***Garcia*** principle, and the topic of 'asset lending'. It is convenient to deal with these three topics next.

165 The first, relating to the alleged 'wellknown implication or presumption', involves a consideration of the principles of undue influence, even though the doctrine of undue influence is not itself relied upon as a basis for relief. The observations below are not intended to be exhaustive but they are relevant to a proper consideration of the mother's claim as it was advanced, and the arguments presented by both parties.

Undue influence

166 The basis of the equitable jurisdiction to set aside an alienation of property on the grounds of undue influence is the prevention of the unconscientious use of any special capacity in or opportunity for the disponee to affect the disponor's will or freedom of judgment in reference to the transaction: ***Johnson v Buttress*** [1936] HCA 41; (1936) 56 CLR 113, 134.

167 The jurisdiction to set aside a transaction procured by undue influence is exercised on two bases. The first is where undue influence is proved as a fact. The second is where undue influence is presumed by reason of the antecedent relationship between the parties, and the presumption has not been rebutted: ***Johnson v Buttress*** (119); ***Union Fidelity Trustee Co of Australia Ltd v Gibson*** [1971] VicRp 69; [1971] VR 573, 575. The former is 'actual' undue influence and the latter is 'presumed' undue influence: ***Powell v Powell*** [2002] WASC 105 [120] [121].

168 Actual undue influence requires proof that the transaction was the outcome of such an actual influence over the mind of the disponor that it cannot be considered to be the free act of the disponor: ***Johnson v Buttress*** (134). The source of power to practise such influence or domination over the disponor may not arise from an antecedent relationship, but may arise in the particular situation, or by the deliberate contrivance of the disponee: ***Johnson v Buttress*** (134).

169 Presumed undue influence arises in two ways. One is where there exists a class of relationship historically recognised by the law as raising a presumption of undue influence. The recognised classes include parent and child, guardian and ward, solicitor and client, doctor and patient, religious adviser and adherent, and trustee and beneficiary: ***Johnson v Buttress*** (119, 134) (cf Meagher RP, Heydon JD & Leeming MJ, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (4th ed, 2002) [15095] as to the last mentioned class).

170 Dispositions from the latter to the former fall within the presumption.

171 The other is where, outside of those recognised categories, the plaintiff positively proves that there in fact existed an antecedent relationship between the parties, the nature of which was that the defendant was in a position to exercise dominion, power, or ascendency over the plaintiff: Meagher, Heydon & Leeming, *Equity: Doctrines & Remedies* [15105].

172 The recognised categories of relationship are marked by the characteristic that it is not natural to expect that 'one party would give property to the other. That is to say, the character of the relation itself is never enough to explain the transaction and to account for it without suspicion of confidence abused': ***Yerkey v Jones*** [1939] HCA 3; (1939) 63 CLR 649, 675.

173 Parents' dispositions to children can be explicable as being the consequence of parental love and affection without any suspicion of confidence abused. Accordingly, the parent/child relationship, insofar as it concerns dispositions from parent to child, is not a presumed relationship of influence. See ***Powell v Powell*** [130]; ***Wilby v St George Bank*** [2001] SASC 388; (2001) 80 SASR 404 [95]; ***Urane v Whipper*** [2001] NSWSC 796 [22]; ***Tessmann v Costello*** [1987] 1 Qd R 283, 293; ***ASB Bank Ltd v Harlick*** [1996] 1 NZLR 655, 660 662.

174 Indeed, in the converse situation, for the purposes of the principle with respect to dispositions by the child in favour of the parent, undue influence is presumed, even though the child be an adult, unless the parent establishes that the child had at the time of the transaction been emancipated from the influence: ***Powell v Powell*** [131]; Meagher, Heydon & Leeming, *Equity: Doctrines & Remedies* [15075].

175 Where a special relationship outside of the traditional categories is set up it is 'necessary to see the extent and nature of the confidence reposed and whether it involved any ascendancy over the will of the person supposedly dependent on the confidence': ***Jenyns v Public Curator (Qld)*** [1953] HCA 2; (1953) 90 CLR 113, 133.

176 The doctrine of undue influence looks to the quality of the consent, or assent, of the weaker party: ***Commercial Bank of Australia v Amadio*** (474); ***Bridgewater v Leahy*** [1998] HCA 66; (1998) 194 CLR 457, 478.

177 Where a third party, who is a volunteer, obtains the benefit of a transaction tainted by the undue influence of the influencer, the volunteer will be affected by the equity (unless the volunteer has taken through some intermediate bona fide purchaser for value without notice): ***Bainbrigge v Browne*** (1881) 18 Ch D 188, 196 197; ***Giarrantano v Smith*** (1985) NSW ConvR 55267.

178 Even where the third party has given value, or provided consideration, the transaction may be voidable by the party the subject of the undue influence. Such cases often involve a guarantee or charge given by the person the subject of the undue influence to a bank to secure the indebtedness of the bank's customer.

179 The receipt and retention of a benefit by a third party bank arising from the customer's undue influence has generally been held to be unconscientious on three principal bases. The first is where it has participated with notice, the second is agency, and the third involves special principles historically developed and applied to married women.

180 As to the first of those, the third party is affected in equity where it participates in the transaction with actual or constructive notice of the circumstances giving rise to the impropriety, ie of the actual undue influence exercised, or of the circumstances from which the presumption of undue influence arises: ***Yerkey v Jones*** (677); ***Bank of New South Wales v Rogers*** [1941] HCA 9; (1941) 65 CLR 42, 55, 70 72, 85 86; ***Commercial Bank of Australia v Amadio*** (464); ***Garcia v National Australia Bank*** (408); ***Budget Nominees Pty Ltd v Registrar of Titles*** (1988) V ConvR 54311, 63988. (But see also [204] below.)

181 Secondly, the third party financier will be affected by the equity if it appoints or holds out the debtor as its agent to procure the security under the ordinary principles of agency: ***Alderton v Prudential Assurance Co Ltd*** [1993] FCA 127; (1993) 41 FCR 435, 444 446; ***Radin v Commonwealth Bank of Australia*** [1998] FCA 1361; ***Platzer v Commonwealth Bank of Australia*** [1997] 1 Qd R 266; ***Bank of Credit & Commerce International SA v Aboody*** [1990] 1 QB 923, 972.

182 Questions will often arise as to how and whether the agency relationship is established. If the financier has entrusted the debtor to the task of obtaining the surety's consent, that may, depending on all the circumstances, be sufficient to make the debtor the agent of the creditor, but it is a question of fact. Alternatively, even if no agency is shown, the fact that the creditor has entrusted the debtor to obtain the guarantee from the surety may, in combination with other factors, provide evidence that the financier was on notice of a relationship of undue influence: See ***Bank of Credit & Commerce v Aboody*** (972 973); ***Contractors Bonding Ltd v Snee*** [1992] 2 NZLR 157, 168 171, 176 183. In this context, the term 'agency' is not always used in its strict legal sense: ***Couper Holdings Pty Ltd (in liq) v Bell*** [1999] WASC 232 [120] (Owen J)

183 If, however, the financier has done no more than stipulate that it requires a guarantee, and the debtor on its own account seeks to procure the support of a surety, it will often be artificial to characterise the debtor as the agent of the financier:

Lisciandro v Official Trustee in Bankruptcy (1996) 69 FCR 180, 187, 193 194; ***Ribchenkov v SuncorpMetway Ltd*** [2000] FCA 835; (2000) 175 ALR 650, 661 662.

184 Thirdly, in relation to a married woman providing a guarantee for the husband's benefit, if strangers such as a bank, 'deal through the husband with the wife' or have 'left it to the husband to obtain his wife's consent' to the suretyship, and in doing so the husband exercises actual undue influence or makes some material misrepresentation of fact, the bank will be treated as taking subject to the invalidating conduct even if it is not 'actually privy to', ie has no notice of such conduct: ***Yerkey v Jones*** (675, 678, 684); ***Garcia v National Australia Bank*** [24] [25], [31]; ***National Australia Bank Ltd v Satchithanantham*** [2009] NSWSC 21 [56]. Accordingly, in such circumstances, notice is not necessary for, or the basis of, the bank's liability to have the guarantee in its favour set aside in equity by the wife.

185 In ***Yerkey v Jones*** Sir Owen Dixon said (684 685):

> If the creditor has left it to the husband to obtain his wife's consent to become surety and no more is done independently of the husband than to ascertain that she understands what she is doing, then, if it turns out that she is in fact acting under the undue influence of her husband, it seems that the transaction will be voidable at her instance as against the creditor ... the basal reason for binding the creditor with equities arising from the conduct of the husband is that in substance, if not technically, the wife is a volunteer conferring an important advantage upon her husband who in virtue of his position has an opportunity of abusing the confidence she may be expected to place in him and the creditor relies upon the person in that position to obtain her agreement to become his surety.

The financier's position, in these circumstances, as the recipient of a substantial benefit from a volunteer, is the consequence of 'what may be called equitable presumptions of an invalidating tendency' in the husband/wife relationship, even though the husband/wife relationship itself is not one of presumed undue influence: ***Yerkey v Jones*** (675).

186 In ***Yerkey v Jones*** (674), Dixon J (as he then was) quoted with approval the following statement from J Story, *Equity Jurisprudence* (1835), s 1395:

> The doctrine is now firmly established in Equity that [a married woman] may bestow her separate property ... upon her husband as well as upon a stranger. But at the same time, Courts of Equity examine every such transaction between husband and wife with an anxious watchfulness and caution, and dread of undue influence.

187 It is also to be noted that Dixon J's observations were made with reference to guarantees. In ***Commercial Bank of Australia v Amadio*** (458) Gibbs CJ approved Fullagar J's statement in ***Union Bank of Australia Ltd v Puddy*** [1949] VicLawRp 46; [1949] VLR 242, 247:

> The surety is a 'favoured debtor' and the courts look upon his interests with a jealous eye.

188 In ***Garcia v National Australia Bank*** [31], the plurality said that ***Yerkey v Jones*** 'begins with the recognition that the surety is a volunteer: a person who obtained no financial benefit from the transaction'.

Married women - *Garcia v National Australia Bank* The principle - married women
189 Beside cases involving actual undue influence, referred to in the section above, it is unconscionable for a financier to enforce against a married woman a guarantee given to secure her husband's debts in circumstances where:

(a) 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, with notice that the surety was then the wife of the debtor, is 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 purpose and effect of the transaction to his wife; and

(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. See ***Garcia v National Australia Bank*** [31], [40].

190 As to the second element, where the transaction is not on its face for the benefit of the wife (such as where she is a surety for another's debts), the onus will lie on the party seeking to enforce the security that the wife was not, relevantly, a volunteer: ***State Bank of New South Wales v Chia*** [2000] NSWSC 552; (2000) 50 NSWLR 587, 601; ***Warburton v Whiteley*** (1989) 5 BPR 11,628, 11,634 (McHugh JA); ***Elkofairi v Permanent Trustee Co Ltd*** [2002] NSWCA 413; (2003) 11 BPR 20,841 [46].

Relationships other than married women

191 Questions have arisen as to whether the above principles have application outside of the married woman/surety context. The plurality presaged the potential for such questions to arise in ***Garcia v National Australia Bank***:

> It may be that the principles applied in ***Yerkey v Jones*** will find application to other relationships more common now than was the case in 1939 - to long term and publicly declared relationships short of marriage between members of the same or of opposite sex - but that is not a question that falls for decision in this case. It may be that those principles will find application where the husband acts as surety for the wife but again that is not a problem that falls for decision here. This case concerns a husband and wife and it is to that relationship that the present decision relates, just as it is concerned only with the circumstance of the wife acting as surety for her husband. The resolution of questions arising in the context of other relationships may well require consideration of other issues. Thus to take one example, if cohabitation is taken as a criterion, what should a lender know or seek to find out about the nature of the relationship between the parties? But those issues did not arise and were not debated on the hearing of this appeal [22].

There appears, from the above passage, to be no direct suggestion, at least, that the ***Garcia*** principle could apply to guarantees by a parent for the benefit of a child.

192 The principles have been held by Bryson J not to apply to a de facto relationship: ***State Bank of New South Wales Ltd v Hibbert*** (2000) 9 BPR 17,543 [60]; ***Hillston v BarMordecai*** [2003] NSWSC 89 [45] [46] (result reversed in part on other grounds: ***BarMordecai v Hillston*** [2004] NSWCA 65); cf ***Liu v Adamson*** [2003] NSWSC 74; (2003) 12 BPR 22,205.

193 They have been applied beyond the married woman context to a guarantee given by the parents and siblings of the borrower in ***State Bank of New South Wales Ltd v Layoun*** [2001] NSW ConvR 55984 [74] [76], although in that case counsel's submissions were adopted without a great deal of elaboration. The principles were, on the other hand, denied any application to parents guaranteeing an adult child's business loans in ***Watt v State Bank of New South Wales Ltd*** [2003] ACTCA 7. In ***Siglin v Choules*** [2002] WASCA 9 the point was regarded by the majority as arguable with respect to its application to elderly parents, although it is to be noted that the decision concerned an appeal from an order for summary judgment.

194 In ***Kranz v National Australia Bank Ltd*** [2003] VSCA 92; (2003) 8 VR 310 Charles JA (Winneke P & Eames JA agreeing), said:

> In the present case it was put to us ... that the judge had correctly confined the application of ***Garcia*** to a relationship of husband and wife, even though allowing for a possible extension to other intimate relationships (the judge elsewhere expressed it as extending to a person 'perhaps involved in a similar long term relationship'). But the formulation in the judgment of the majority of the High Court in ***Garcia*** is not so confined. The principle stated by the High Court in ***Garcia*** would make it unconscionable for a bank to enforce a guarantee given by a volunteer if it has not explained the situation to the guarantor, and does not know that an independent person has done so, if the bank knows that there was a relationship of trust and confidence between the guarantor and the debtor whose debt has been guaranteed. In Australia it remains therefore for the debtor to establish that the bank was aware of a relationship that put the bank on enquiry, such as that of husband and wife or solicitor and client, or that there was a relationship of trust and confidence between the debtor and the third party [31]. (footnotes omitted)

195 Insofar as this statement reflects the current state of the law (cf ***Australian Regional Credit v Mula*** [2009] NSWSC 325; (2009) 14 BPR 26,779 [139]) it remains important, I think, to recall that:

> [T]he expression 'relation of confidence' does not describe a category possessing fixed and uniform characteristics. The expressions 'relation of influence', 'relation of confidence' and 'fiduciary relation' are often used as interchangeable. They are not, however, necessarily the same or coextensive in their application. ***Jenyns v Public Curator*** (132)

See also in this regard ***Bridgewater v Leahy*** [64].

196 Further, as with cases where a special relation of influence outside of the recognised categories is sought to be established, it would remain, I think, important to see the extent and nature of the confidence reposed (cf ***Jenyns v Public Curator*** (133)), and to note that where relief is available, the circumstances will often themselves cast a suspicion 'that active circumvention has been practised': ***Johnson v Buttress*** (135).

197 I would not see the burden of current authority as supporting an extension of the ***Garcia*** principles enunciated in the High Court by treating the relationship of aged parent/child as, in itself, synonymous with the husband/wife relationship for the purposes of the application of those principles.

198 The mother nevertheless in her submissions in this context placed considerable reliance on the English case of ***Avon Finance Co Ltd v Bridger*** [1985] 2 All ER 281, an undue influence case. It is a case which has received limited, if any, treatment in the Australian equity texts.

Avon Finance v Bridger

199 In ***Avon Finance v Bridger***, a son, a 'young accountant in the prime of life' (287) procured, by deception, the execution of a charge by his parents over their home which they had recently acquired. The charge was to secure a loan for £3,500 from the financier to the son. In effect, the son used £2,500 to assist his parents to buy the home, and kept the other £1,000 for his own purposes. As to this aspect of the transaction, Lord Denning said (283):

> When a son puts up a sum of money to help buy a house for his parents, it is like a wife making a contribution to the purchase of a matrimonial home. On putting up £2,500 as an investment in a house, the son would have a share in the house, but he would not have a mortgage on it.

200 The parents were elderly, with limited education, and had previously lived in a council flat all their lives. The home was purchased on the father's retirement. The property had been found by the son, and its purchase was transacted by the son on behalf of the parents, as they had no experience in such matters.

201 In its loan to the son, the financier included in the loan contract an express term to the effect that the son should 'procure' the execution of the charge by his parents (284). Brandon LJ (287) with whom Brightman LJ (288) agreed, referred to the disparities in age and education between the son and the parents and held that the financier, who had expressly appointed the son to procure the charge, could or should have been aware that the son 'could be expected to have some influence over his elderly parents'. The parents were not independently advised. The charge was held to be unenforceable by the financier as against the parents.

202 In ***Barclays Bank plc v O'Brien*** [1993] UKHL 6; [1994] 1 AC 180, 198, Lord BrowneWilkinson referred to ***Avon Finance v Bridger*** and said:

> In my judgment that case was rightly decided: in a case where the creditor is aware that the surety reposes trust and confidence in the principal debtor in relation to his financial affairs, the creditor is put on inquiry in just the same way as it is in relation to husband and wife.

203 In ***National Australia Bank Ltd v Garcia*** (1996) 39 NSWLR 577, Sheller JA said (597):

> I have some difficulty with the propositions Lord Browne-Wilkinson advanced ... which led him ... to identify a number of other special relationships, including that of a son to his elderly parents, which would put a creditor accepting a security from the party assumed to be the weaker, on inquiry.

204 In the High Court, in ***Garcia v National Australia Bank*** [15] the plurality noted that Sheller JA had considered the decision in ***Barclays Bank v O'Brien*** and had found it difficult in several respects. The plurality also referred to New Zealand Court of Appeal authority to the effect that the jurisprudential basis of ***Barclays Bank v O'Brien*** was uncertain. Reference was also made to Sir Anthony Mason's observation that the 'plethora of cases may suggest that all is not well with the ***O'Brien*** principle'. The plurality said that it was unnecessary to enter upon these matters, beyond noting that in ***Barclays Bank v O'Brien***, the House of Lords, had discounted the 'special equity theory' supported by Sir Owen Dixon in ***Yerkey v Jones***. The plurality also said that it would prefer not to adopt the analysis of Lord BrowneWilkinson in ***Barclays Bank v O'Brien*** concerning the identification of notice as the basis for a financier being precluded from relying upon its legal rights [39].

205 In my opinion the principles in ***Barclays Bank v O'Brien*** and ***Avon Finance v Bridger*** ought not be applied insofar as they involve any departure from the decision of the High Court in ***Garcia v National Australia Bank***, or from the principles of undue influence and unconscionable conduct as recognised and applied in the general law of Australia.

Asset lending

206 A number of cases have arisen in New South Wales, particularly with respect to the *Contracts Review Act 1980* (NSW) concerning 'asset lending' and whether it is 'unjust' within the meaning of that statute. In ***Perpetual Trustee Co Ltd v Khoshaba*** [2006] NSWCA 41 [128] Basten JA said:

> To engage in pure asset lending, namely to lend money without regard to the ability of the borrower to repay by instalments under the contract, in the knowledge that adequate security is available in the event of default, is to engage in a potentially fruitless enterprise, simply because there is no risk of loss. At least where the security is the sole residence of the borrower, there is a public interest in treating such contracts as unjust, at least in circumstances where the borrowers can be said to have demonstrated an inability reasonably to protect their own interests, for the purposes of, for example, s 9(2)(e) or (f). That does not mean that the Act will permit intervention merely where the borrower has been foolish, gullible or greedy. Something more is required: see ***Esanda Finance Corp Ltd v Tong*** (1997) 41 NSWLR 482 at 491 (Handley JA) cited with approval in ***Elkofairi*** (above) at [77] by Beazley JA.

207 Also in ***Riz v Perpetual Trustee Australia Ltd*** [2007] NSWSC 1153 (reversed on appeal on other grounds), a case involving a claim for relief under the *Contracts Review Act*, Brereton J said [70]:

> The substantive unfairness is said to be found in the 'asset lending' element. Although asset lending is not necessarily unjust, such contracts have the potential for injustice. The perceived injustice in 'asset lending' is sourced in what is described in ***Khoshaba*** by Basten JA (at [128]) as the futility of the exercise: if the loan is not serviceable, then it is not in substance a loan but an asset sale, in which the lender risks nothing but the borrower risks the asset. Such a transaction involves no risk to the lender, but considerable risk to the borrower, given the likely inability of the borrower to perform and the probability if not certainty of resort to the security, with the lender being in a better position to protect itself against loss. The substantive unfairness lies in the imbalance of risk. Where that is voluntarily accepted, such a transaction may not be unjust. But where in the circumstances in which the transaction is made - particularly where the family home is involved - the borrower has a less than full appreciation of the risks or consequences, or is under some misapprehension or pressure, so as to provide an element of procedural unfairness, such a loan may be unjust.

208 The perceived vice in asset lending as explained above, appears to contain an assumption that the financier has lent on such a conservative loan to asset value ratio, that any fall in the market would not affect the recovery of its loan on a sale of the asset, and, hence, there is commercially 'no risk of loss' to the lender.

209 The notion of asset lending has also been regarded as relevant to the equitable doctrine of unconscionable dealing: ***Elkofairi v Permanent Trustee*** [56], [96], [59]. Beazley JA said:

> In my opinion, notwithstanding that the respondent did not have knowledge of the appellant's lack of education and her language and domestic difficulties, her lack of income, in the circumstances of this transaction - that is a large borrowing secured over her only asset, in circumstances where the application form failed to disclose any income for either husband or wife placed her in a special position of disadvantage. Though the full extent of that special position of disadvantage was not known to the respondent, nonetheless the absence of any relevant financial information was sufficient to put the respondent on notice of the appellant's lack of capacity to meet the repayment obligations under the mortgage. That left as the only source of repayment the selling of her only asset, as again the respondent must be taken to have known.
>
> ...
>
> In my opinion, therefore, it was unconscientious for the respondent to lend a large sum of money to a person with no income with full knowledge that if the repayments under the loan were not met, it could sell that person's only asset [56], [59].

210 In ***Kowalczuk v Accom Finance Pty Ltd*** [2008] NSWCA 343; (2008) 252 ALR 55, Campbell JA (Hodgson & McColl JJA agreeing) said:

> It can be accepted that pure asset lending described by Basten JA in ***Khoshaba*** at [128] as being 'to lend money without regard to the ability of the borrower to repay by instalments under the contract, in the knowledge that adequate security is available in the event of default' - is in at least some circumstances unjust within the meaning of the Contracts Review Act, or unconscionable: ***Elkofairi v Perpetual*** [*sic*] ***Trustee Co Ltd*** [2002] NSWCA 413; (2003) 11 BPR 20,841 at [57] [59], [79] per Beazley JA (with whom Santow JA and MW Campbell AJA agreed); ***Khoshaba*** at [92] per Spigelman CJ (with whom Handley JA agreed on this point), [128] per Basten JA. However whether lending on the basis that the loan can adequately be repaid from the security, is in the circumstances of any particular case unconscionable or unjust, depends on other matters as well [96].

211 Also, in ***Kyabram Property Investments Pty Ltd v Murray*** [2005] NSWCA 63, Beazley JA said:

> In ***Elkofairi***, the mortgagors (Mr and Mrs Elkofairi) had no income and no assets, other than the property the subject of the proposed mortgage. It was apparent, therefore, on the face of the loan application, that they had no ability to service the mortgage. *It was also conceded in that case that the mortgagor's only concern was with security. The mortgagor had not been concerned with the borrowers' ability to repay* [24]. (emphasis added)

212 Nevertheless, the question of whether a lender is lending, in effect, only on the value of the asset, and without regard to the customer's ability to service the loan, is ultimately a question of fact. In ***Perpetual Trustees Victoria Ltd v Kirkbride*** [2009] NSWSC 377 [63] [65] a 'Lite Doc' loan was considered and found, on the facts, not to be an instance of pure asset lending.

213 Where the lender ignores its own lending guidelines in the making of the loan, that fact may, depending on all the circumstances, provide some basis for the inference that the lender is lending only on the value of the security: ***Kowalczuk v Accom Finance*** [102]; ***Spina v Permanent Custodians Ltd*** [2009] NSWCA 206 [68].

214 It is, I think, important not to allow an analysis of the overall nature and effect of the 'connected circumstances' (***Jenyns v Public Curator*** (119)) to be reduced to a search for, and rigid application of, formulaic expressions such as 'pure asset lending'. The benefits of entrepreneurial activity and the recognition of an individual's personal and commercial autonomy are important factors to take into account in any consideration of what may, on the face of things, appear to be imprudent or reckless borrowing. Even where, prima facie, there is pure asset lending, the totality of all the circumstances must be examined in assessing the alleged unconscionability of the loan transaction.

Unconscionable dealing Comparison with undue influence

215 Unconscionable conduct, as the term suggests, focuses more on the unconscientious conduct of the defendant in dealing with the party under the special disadvantage, whereas undue influence looks more to the quality of the independence of the consent or assent of the disponor: ***Bridgewater v Leahy*** [72] [75]. In ***Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd*** [2003] HCA 18; (2003) 214 CLR 51 Gummow & Hayne JJ said [46]:

> In such situations ... equity intervenes not necessarily because the complainant has been deprived of an independent judgment and voluntary will, but because that party has been unable to make a worthwhile judgment as to what was in the best interests of that party.

216 The doctrines of undue influence and unconscionable dealing both depend upon a close analysis of the facts of the case. In ***Jenyns v Public Curator*** (118 119), the court said:

> The jurisdiction of a court of equity to set aside a gift or other disposition of property as, actually or presumptively, resulting from undue influence, abuse of confidence or other circumstances affecting the conscience of the donee is governed by principles the application of which calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of the donor. Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition. Indeed no better illustration could be found of Lord Stowell's generalisation concerning the administration of equity: 'A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case'.

217 In ***Tanwar Enterprises Pty Ltd v Cauchi*** [2003] HCA 57; (2003) 217 CLR 315 [23], the plurality, after referring to the above passage in ***Jenyns v Public Curator***, in relation to the application of equitable doctrines and remedies turning upon a close analysis of the facts of each case, said:

> Cases of alleged undue influence and catching bargains are obvious examples; that is because the governing equitable principle in this field is concerned with the production by malign means of an intention to act.

218 The two doctrines are not mutually exclusive and, on occasion, both may apply in the same case: ***Commercial Bank of Australia v Amadio*** (461); ***Bridgewater v Leahy*** [73].

Generally

219 Equity's jurisdiction to set aside a transaction for unconscionable dealing is invoked where one party to the transaction is under a special disadvantage or disability in dealing with the other party, and that special disadvantage or disability was sufficiently evident to the other party to make it prima facie unfair or unconscionable for that other party to accept or retain the benefit of the transaction: ***Commercial Bank of Australia v Amadio***; ***Louth v Diprose*** [1992] HCA 61; (1992) 175 CLR 621, 637.

220 The underlying equitable principle may be invoked 'whenever one party by reason of some condition or circumstance' is placed at a special disadvantage of which unfair and unconscientious advantage is taken by the other party: ***Commercial Bank of Australia v Amadio*** (462).

221 The special disadvantage will be sufficiently evident to the other party if the other party knows facts which would raise the possibility of the special disadvantage in the mind of a reasonable person: ***Commercial Bank of Australia v Amadio*** (467 468, 479).

222 Where such circumstances are shown to exist, the onus is on the other party to establish that the transaction was fair, just and reasonable: ***Commercial Bank of Australia v Amadio*** (474).

223 The special disadvantage need not have been created by the party taking the benefit of the transaction: ***Louth v Diprose*** (629).

224 The special disadvantage alleged must be one 'which seriously affects the ability of the innocent party to make a judgment as to his own best interests'; mere difference in bargaining power is insufficient: ***Commercial Bank of Australia v Amadio*** (462). The 'essence of such weakness is that the party is unable to judge for himself': ***Blomley v Ryan*** [1956] HCA 81; (1956) 99 CLR 362, 392; or 'to conserve his own interests': ***Blomley v Ryan*** (415); ***ACCC v C G Berbatis Holdings*** [12], [46], [55].

225 In this regard care must be taken not to 'eviscerate unconscionability of its meaning': ***NZI Capital Corporation v Fulton*** [1998] FCA 667 Black CJ & Lehane J, quoting Mason CJ in ***Stern v McArthur*** [1988] HCA 51; (1988) 165 CLR 489, 503.

226 In ***ACCC v C G Berbatis Holdings***, Gleeson CJ [14] said:

> Unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence ...

227 In ***ACCC v C G Berbatis Holdings***, Gummow & Hayne JJ [56] also said that even a person in a 'greatly inferior bargaining position' may nevertheless not lack capacity to make a judgment about that person's own best interests.

228 In all cases, the court's equitable jurisdiction is to be exercised according to recognised principles, and the courts are not armed with a general power to set aside transactions which in the eyes of the judges appear unfair, harsh or unconscionable: ***Louth v Diprose*** (654) (Toohey J, although in dissent in the result). See also the observations of Sir Anthony Mason in 'The Impact of Equitable Doctrine on the Law of Contract', (1998) 27 *AngloAmerican Law Review* 1, 12 cited by Debelle & Wicks JJ in ***Micarone v Perpetual Trustees Australia Ltd*** [1999] SASC 265; (1999) 75 SASR 1 [648]:

> There is a strong objection to simply equating the concept to what is unreasonable and unfair. The object of the doctrine is not to protect people from the consequences of their own mistakes. Because our contract law, unlike that of the United States, does not impose a general obligation of good faith and fair dealing, it is preferable to think of unconscionable conduct in terms of that which shocks the conscience, something which is harsh or oppressive in that it involves taking advantage of another's special disability or disadvantage. So understood, the concept is not one which is openended, to be applied according to the subjective whim of the Judge, though like other standards, such as that of 'the reasonable person', borderline applications will require an element of value judgment.

229 In ***Bridgewater v Leahy*** [76], Gaudron, Gummow & Kirby JJ referred with approval to the Privy Council's observations in ***Hart v O'Connor*** [1985] UKPC 1; [1985] AC 1000, in which unconscionable conduct was described as:

> [V]ictimisation, which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.

230 In ***The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]*** [2008] WASC 239; (2008) 225 FLR 1 [4924], Owen J said that it is not enough for there to be unequal bargaining power - the conduct of the stronger party has to be exploitative or oppressive.

231 Whilst the categories of disability are not closed, the requisite special disadvantage often involves poverty, need, sickness, age, infirmity of body or mind, sex, drunkenness, illiteracy, lack of education and lack of assistance or explanation

when assistance or explanation is necessary: ***Blomley v Ryan*** (405, 415); lack of or limited comprehension of the English language: ***Commercial Bank of Australia v Amadio***; impaired intelligence: ***Wilton v Farnworth*** [1948] HCA 20; (1948) 76 CLR 646; or infatuation with or emotional dependence upon another person: ***Louth v Diprose***.

232 Absence of independent legal advice may in a given case be a circumstance of factual importance in determining whether a special disability exists: ***Bridgewater v Leahy*** [41].

233 Physical frailty and enfeeblement, with diminished knowledge by the party in question of that party's property and affairs generally, are not necessary elements of a special disadvantage: ***Bridgewater v Leahy*** [116].

Advanced age

234 Advanced age of itself does not constitute a special disadvantage but may, in combination with other factors, contribute to the condition of being under a special disadvantage: ***Australia & New Zealand Banking Group Ltd v Dzienciol*** [2001] WASC 305 [289] [290].

235 An elderly disponor, with limited education and of reclusive habits, with a strong emotional attachment to and dependence on the disponee, has been held to be under a special disadvantage: ***Bridgewater v Leahy*** [114] [118], [120], [127].

236 It is, however, by no means inevitable that elderly parents, who guarantee and mortgage their home to secure the debts of their childrens' business, will, simply by dint of that fact, be found to have suffered a special disadvantage. For example in ***Davey v Challenger Managed Investments Ltd*** [2003] NSWCA 172 the elderly widowed pensioners guaranteed the debts of their childrens' company and mortgaged their homes to secure the borrowing. They had no capacity to repay the debt from their own incomes and, as the business was a new venture, the children, who needed to borrow capital, were in a similar position. The children also guaranteed the loan but had little chance of repaying the debt if their company failed. The widowed pensioners, who had received the benefit of independent legal advice, failed to set aside the guarantees and mortgages on the basis of unconscionable dealing or under the *Contracts Review Act*. Handley JA (Hodgson JA & Grove J agreeing), said [21], [23] [24], [26]:

> *Independent legal advice was desirable, if not necessary, in this case to ensure that the appellants, who were volunteers, understood the transactions and their implications, and, with an appropriate understanding, executed the security documents freely and voluntarily. They received such advice before they executed the documents*.
>
> ...
>
> *The children should probably never have asked the appellants to hazard their homes in this business venture, but misrepresentation or undue influence on their part have never been alleged. The age and status of the appellants as pensioners did not deprive them of the legal capacity to do what they did. If the business had been successful the children would have been launched on a business career and the mortgages would have been discharged.*
>
> The Court has no way of knowing how many business ventures financed by parents in this way are successful for the benefit of the community and all concerned. Courts only ever see the cases where the business has failed and the mortgages are enforced. The Court might be doing a disservice to the community if it treated age and pensioner status as disabling parents from helping their children in this way. The law has not taken

that step, and under ordinary principles the appellants have no proper claim for relief.

...

If there was any unfairness the lender was not responsible for it, and had no notice, actual or constructive, of that unfairness. (emphasis added)

237 In ***Siglin v Choules*** [7], Anderson J (albeit in dissent in the result) said:

Parental financial assistance to children for their businesses is commonplace.

238 There are authorities in which single, elderly women who have entered into transactions, without independent advice, in favour of a stronger party, have been set aside. In ***Baker v Monk*** [1864] EngR 444; (1864) 4 De GJ&S 388, an elderly woman sold certain property containing dilapidated buildings to a prosperous tradesman who had been mayor of the town. She appeared to wish to be rid of the trouble and expense of repair, and sold the property for an annuity, and a right to occupy one of the cottages.

239 Knight Bruce LJ said:

This is a case in which society is as much interested as are individuals. ...

The question is not merely or alone whether this lady was or was not acquainted with the value of the property. That circumstance standing alone might amount to nothing or next to nothing. But the question is whether - to repeat an expression used in several cases - the parties to the transaction were on equal terms. The purchaser was a substantial tradesman in the town in the station of life which I have mentioned. The vendor was a single woman in humble life, of slender education, between sixty and seventy years of age, unprotected and unaided. After some little chaffering, as I have said, she consented to accept this weekly payment during her life as the purchasemoney of the feesimple subject to another qualification which is so slight that it is not necessary to mention it further. This transaction takes place between this gentleman and this poor woman without the intervention on her part of any other person. She was, as I have said, wholly unassisted, unadvised and unaided; but he placed the matter in the hands of his lawyer. ... The transaction was thus begun and ended without any advice on her behalf. The purchase was wholly completed by the purchaser, who was in the station of life which I have mentioned, and his lawyer.

The purchaser and vendor were in such relative positions as that, according to the known established doctrine of this Court, it lies on the purchaser to shew affirmatively that the price he has given is the value.

The purchaser could not establish that the sale was for fair value, and the transaction was set aside.

240 The case of ***Spina v Permanent Custodians*** involved an elderly mother applying to set aside a loan agreement to which she was a party with her son, and to set aside the mortgage of her home to secure that borrowing. The court held that the transaction involved unconscionable conduct in equity, and was vitiable under the *Contracts Review Act* ([122] [124], [133]). Young JA (Tobias and Campbell JJA agreeing), said [131]:

It is difficult for me to agree that a reasonable person would not see a 'red light' when considering the scenario that the application for finance was being made:

(a) by an 86 year old retired lady;

(b) by her son as her attorney;

(c) in circumstances where the son took a benefit;

(d) over the 86 year old's major asset;

(e) where there was no material to show the lady personally had been given legal advice;

(f) where, if the son died or was unable to repay the loan out of his income, the lady's home was at risk.

241 That case involved 'an elderly person ... putting her most substantial asset on the line for the benefit of her son who [was] also the donee of her power of attorney' [59]. Also, the bank knew that the mother was frail, as was evident from her 'frail' and 'scratchy' signature on a document [85], [112].

242 As noted earlier, however, physical frailty itself is not a necessary element of a special disadvantage.

243 In ***Couper Holdings v Bell*** Owen J set aside a mortgage where the mortgagor was almost 70 years of age, untutored in commercial activities (although his Honour found that she understood the nature of a mortgage and that mortgaged property can be sold if repayments are not made), lacking in independent advice (although she was advised to obtain it but declined to do so), and had entered into the transaction in reliance on a person in whom she reposed trust and confidence, where the confidence was abused. Relief was granted on the bases of undue influence and unconscionable dealing. In that case, Owen J also found, however, that the person in whom the mortgagor reposed the confidence was the agent of the lender for procuring the security.

Inadequacy of consideration

244 In most cases where equity has granted relief against unconscionable dealing, there has been no, or inadequate, consideration moving from the party seeking to retain or uphold the transaction; or where, if consideration was given, the benefit of it moved to some other party, such as under a guarantee, and thus the person alleging the disability was effectively in the position of a volunteer: ***Commercial Bank of Australia v Amadio*** (475).

245 Inadequacy of consideration can be important either as supporting an inference that a special disadvantage existed, or as to tending to show that unfair use was made of the occasion: ***Blomley v Ryan*** (405 406); ***ANZ v Dzienciol*** [293]; Meagher, Heydon & Leeming, *Equity: Doctrines & Remedies* [16020] and the cases there cited.

246 Inadequate consideration is to be distinguished from nominal consideration; in the latter case equity may characterise the transaction as, in substance, a gift or voluntary disposition: ***Costin v Costin*** [1994] NSW ConvR 55715, 60,097 (overturned on appeal in the result: ***Costin v Costin*** [1997] NSW ConvR 55-811).

Voluntary dispositions

247 In ***Wilton v Farnworth***, with specific reference to unconscionable dealings, Rich J said:

> It is for the donor to prove some substantial reason for setting the transaction aside: see ***Henry v Armstrong***. But the jurisdiction of courts of equity is based upon unconscientious dealing. It has always been considered unconscientious to retain the advantage of a voluntary disposition of a large amount of property improvidently made by an alleged donor who did not understand the nature of the transaction and lacked information of material facts such as the nature and extent of the property particularly if made in favour of a donee possessing greater information who nevertheless withheld the facts. In the present case the capacities of the plaintiff and defendant were quite unequal. The plaintiff was sufficiently handicapped by his defect of hearing in gaining an understanding of the facts relating to his wife's property, his interest therein and the transaction into which he was invited to enter. But his intelligence placed him in an even more unequal position in dealing with the defendant in the transaction. To all this the defendant must have been fully alive (655). (footnotes omitted)

248 In ***Corin v Patton*** [1990] HCA 12; (1990) 169 CLR 540, 577 Deane J said:

> In determining whether a party to a transaction has given valuable consideration, equity looks to the substance, not the mere form.

249 In giving consideration to substance over form, particular attention is often paid to whether the disponee provided valuable consideration to the disponor. For example, in ***Yerkey v Jones*** (685), Dixon J described the position of the wife as surety for her husband's debts as 'in substance, if not technically, ... a volunteer'. Similarly, in ***Bank of New South Wales v Rogers*** (54), Starke J said, in an undue influence case, in relation to a niece's mortgage in favour of a bank to support her uncle's borrowings: 'The bank gave what is called "valuable consideration" in the law ... but from a practical view the [niece alleging undue influence] got nothing'. Also in ***Garcia v National Australia Bank*** [43], the wife was described as having 'obtained no real benefit from ... the transaction; she was a volunteer'.

250 Similarly, equity looks to the substance of a transaction to see if an obligor's obligation to repay a loan is in the nature of a guarantee: ***Permanent Trustee Co of New South Wales Ltd v Hinks*** (1934) 34 SR (NSW) 130, 138 140; ***Elkofairi v Permanent Trustee*** [92] [94], [112].

251 Conversely, in ***Crowe v Commonwealth Bank of Australia*** [2005] NSWCA 41, in which the husband and wife were directors and shareholders in the borrowing company, and, as directors, gave guarantees to support their company's debts, the court, in characterising the substance of the transaction, described the guarantors as 'in truth the real borrowers' [73].

252 In ***National Australia Bank v Satchithanantham***, the wife was a joint borrower with the husband of a loan in an amount exceeding that which her husband led her to believe they were borrowing. Nevertheless, a substantial portion of the loan was, objectively, for her benefit, including the discharge of an existing mortgage over the joint matrimonial home which was in default and in respect of which it was known that the existing mortgagee was threatening foreclosure. It was held that the wife could not be regarded as, in substance, a volunteer: [15], [52], [67], [75].

253 In ***Elkofairi v Permanent Trustee***, where the husband and wife jointly borrowed a sum, part of which was used to discharge an existing joint mortgage, and part of which was used for the husband's business, the wife was described as 'partially a volunteer' [49], or a 'volunteer as to a portion of the loan' [96]. That fact, in conjunction with other circumstances, was regarded as relevant in assessing whether enforcement of the transaction was unconscionable for the purposes of the application of the doctrine of unconscionable dealing: [54] [59], [96], [112].

Other matters

254 It is convenient to record here certain other principles the operation of which may affect a consideration of the circumstances in which a claim for unconscionable conduct is made. Two points are mentioned. One is in relation to guarantees, and the other is in relation to the general legal significance attached to the execution of a document.

255 There is no duty on a financier to provide a borrower or guarantor with commercial advice: ***Beneficial Finance Corporation Ltd v Karavas*** (1991) 23 NSWLR 256, 276. Also, the rights of a creditor are not impeached purely on the basis of misrepresentation made by the debtor to the surety unless the creditor knew of or assented to the making of the misrepresentation: ***Commercial Bank of Australia v Amadio*** (458). Nevertheless, the fact that a surety is misled by the debtor may contribute to a condition of special disadvantage in the surety, vis-à-vis the financier: ***Commercial Bank of Australia v Amadio*** (464).

256 In relation to the execution of documents, in ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165, it was observed:

> The importance which, for a very long time, the common law has assigned to the act of signing is not limited to contractual documents. ***Wilton v Farnworth*** was not a contract case. The passage from the judgment of Latham CJ quoted above is preceded by a general statement that, where a man signs a document knowing that it is a legal document relating to an interest in property, he is in general bound by the act of signature. Legal instruments of various kinds take their efficacy from signature or execution. Such instruments are often signed by people who have not read and understood all their terms, but who are nevertheless committed to those terms by the act of signature or execution. It is that commitment which enables third parties to assume the legal efficacy of the instrument. To undermine that assumption would cause serious mischief [47]. (footnotes omitted)

The NAB notices regarding the NAB Claremont loan and the NAB Claremont mortgage

257 The notices referred to in [21] above present a curious forensic feature of this case. The bank did not plead any issue in relation to the notices, it did not adduce itself the evidence of the notices, it did not crossexamine the son or the mother with respect to the notices, and did not draw any attention to such evidence at trial, either in opening or in closing. The notices were tendered on behalf of the mother, but only at the very end of the trial. They were not addressed by either the mother or the son in their witness statements (nor as I have said were they addressed in crossexamination by the bank).

258 The parties only provided submissions with respect to this evidence subsequent to the trial, pursuant to a specific request from the court. In response to that invitation, the bank, in effect, contended that the inference should be drawn that the mother received a copy of the notices, that she read them and understood them, that she understood that there was a risk of her home being sold, and that she was not a volunteer as she had a direct personal interest in the refinancing arranged by the son with the bank. As I have indicated, none of this was put to the mother at trial.

259 The mother, in her submissions, contended that the court should infer that the mother could easily have refinanced the debt of approximately $44,000 herself, or with the support of her daughter and/or the other son in Sydney. It was further contended that other financiers would in any event have been willing to lend the amount of the NAB Claremont loan to the mother by way of refinancing.

260 It is convenient to record my findings with respect to this evidence at this stage. With respect to the bank's contentions, I find the following. First, there was no evidence of any similar notices being addressed to the mother. Secondly, whilst I infer that the notices were sent to both the Lefroy Street Collie property, and the Claremont property, each notice was addressed to the son, and not to the mother. I do not infer that a communication to the son as addressee would have been opened by the mother even though it were sent to the Claremont property. Thirdly, there was no evidence that the mother ever saw, read or heard about the notices. In all the circumstances, I would not infer that she did so.

261 Nevertheless, it could not be said, in my view, that the mother was a volunteer in the sense that she 'obtained no gain from' the transaction: cf ***Garcia v National Australia Bank*** [31]. She did have the NAB Claremont loan refinanced at a time

when it was subject to a notice of default and when there was notice of a potential threat of repossession. The consideration may have been inadequate but it could not be regarded, in substance, as nil.

262 As to the mother's contentions, I am unable to infer, in the absence of direct evidence, that the daughter or the other son had the means and/or the inclination to refinance the loan for the mother.

263 I would infer, however, that some financial accommodation from a financier could have been obtained. There was, eg, evidence at trial, that a 'reverse mortgage' is a product available for retired people where the debt is repaid after the borrower's lifetime. Moreover, the loantoasset value ratio for a loan of $43,000 on an asset worth $310,000 would have been approximately 14%. The evidence was that she could afford to service a loan of that amount, based on a guaranteed source of income, her pension, and that she had a history of reliably servicing a mortgage of that order. If any refinancing required her to be the sole registered proprietor, she could then have asserted and established against the son the trust alleged by her in these proceedings (see [383] below).

264 Next, whilst it is not possible to say that the mother received no benefit from the transaction with the bank, it is another matter to determine whether any benefit she received was of sufficient magnitude or character that the transaction, from her perspective, could be regarded as fair, just and reasonable. The mother did need to refinance a $43,000 debt. Prima facie, borrowing a further $149,000 for her son's benefit, which she could not repay, does not appear fair, reasonable and just from her perspective.

265 Indeed, the transaction is so, prima facie, unreasonable, unfair and unjust from her point of view that, properly explained to her, I infer the mother would not have entered into the loan agreement and mortgage with the bank. She also gave evidenceinchief to that effect, which I accept.

The question of FASA's agency Background
266 As noted earlier FASA was a mortgage aggregator. There was no evidence that FASA was itself a mortgage or finance broker. As noted below ([306]) the written agreement between La Trobe and FASA draws a distinction between FASA and a broker.

267 According to the bank's evidenceinchief (Ms Bannister and Mr Curia):

> [M]ortgage aggregators *represent several lenders* to ensure a minimum volume of finance applications per month and thereby provide a panel of lenders to which accredited finance brokers, seeking to obtain finance for their clients, may apply. (emphasis added)

Ms Bannister also said:

> FASA is recognised as a La Trobe Correspondent Originator as FASA entered into an Appointment of Correspondent Originator Agreement with La Trobe ('Correspondent Agreement'). The Correspondent Agreement regulates FASA's *role in the origination of suitable mortgages for La Trobe* ... . (emphasis added)

268 Mr Curia, in crossexamination said:

> What was the role of FASA?FASA is an independent role. I had independently done my broker's licence prior to joining Medfin so I had a broker's licence in any case as a backup should I leave Medfin or any other finance company.
>
> Was FASA your business?No. FASA's an aggregator.
>
> How does an aggregator work?An aggregator is a placement basically so how it works is you've got a group of

individual brokers that sort of aggregate under an umbrella and FASA, for example, would be accredited with 20odd lenders, that places deals to various lenders so much like Aussie Home Loans or similar.

269 Evidently the formation of an aggregator, as a separate entity, provides an opportunity for the establishment of a relationship with lenders, and access to lenders, which individual brokers, acting by themselves, might not otherwise have.

270 The evidence did not disclose the arrangements between FASA and any other lenders.

271 FASA was first appointed a 'Correspondent Originator' by La Trobe on or about 7 February 2000. The appointment included the authority to originate loan applications for 'Lite Doc' loans. The appointment was renewed or confirmed by La Trobe's letter of appointment dated 18 November 2002 to FASA, which was executed by La Trobe and FASA and which set out the terms of FASA's appointment (the La Trobe Appointment Agreement).

272 The Starter Kit provided by La Trobe to mortgage originators is described as 'confidential and a trade secret' (TB 5).

273 The Starter Kit stated (TB 13) that lenders prefer to deal with 'specialist aggregator groups ... rather than many individual mortgage brokers'.

274 The Starter Kit (TB 16) described the La Trobe Appointment Agreement as the document which 'regulates the Correspondent's *role in the origination of suitable mortgages*'.

275 In relation to commissions, the Starter Kit (TB 43 44) provides in effect that 'upfront payments' and 'trailer payments' are payable by La Trobe '[i]n consideration of the Correspondent undertaking to perform their duties and obligations' to La Trobe under the La Trobe Appointment Agreement.

276 The Starter Kit also provides that 'Correspondents' may be instructed to obtain valuations on behalf of La Trobe (TB 32, 56 57).

The terms of appointment
277 The La Trobe Appointment Agreement included the following express provisions:

1. **Appointment of Sponsor Correspondent Originator**

La Trobe appoints you as its Sponsor Correspondent Originator (Correspondent) on the terms and conditions set out in this letter to act on its behalf ... for the purpose ('Authorised Purpose') of negotiating, or acting as intermediary to obtain, a loan ... for persons ('Borrowers'). The loan shall be made by La Trobe or any party nominated to the Borrower by La Trobe, secured by a first mortgage over real property ('Mortgage').

...

2. **Rights of Correspondent**

2.1 Your appointment under this letter gives you the right to negotiate, or act as intermediary to obtain, credit to be provided by La Trobe or a nominated party to a Borrower.

La Trobe will pay to the Correspondent a fee (Commission) calculated as provided in clause 4 in respect of each Qualifying Loan.

... a 'Qualifying Loan' means a ... Loan ... which is approved by La Trobe for a person introduced and referred by the Correspondent as provided in this Agreement ...

2.2 Your appointment under this letter does not:

(a) give you the right to:

(i) enter into any agreement binding on La Trobe ...

or otherwise to bind La Trobe, in any way;

(b) constitute you as a general agent, employee or legal representative of La Trobe; or

(c) authorise you to act or purport to act as the agent of a Borrower or Potential Borrower.

The Correspondent's role is limited to the introduction of prospective borrowers to La Trobe as provided in the Agreement.

The Correspondent must not make any representations to any prospective borrower concerning La Trobe's loan products or loan policies nor take part in the preparation or execution of loan agreements or security documents for loans or any related documents. Any person making enquiries on any of these matters must be directed to La Trobe.

3. **Obligations of Correspondent**

...

3.2 By signing the enclosed copy of this letter, you acknowledge that La Trobe may appoint other Correspondents for the Approved Purpose.

3.3 The Correspondent agrees:

(a) to act as Correspondent of La Trobe for the Approved Purpose and in accordance with procedures confirmed by La Trobe in writing from time to time;

(b) to act in accordance with the instructions you receive from La Trobe and (in the absence of such instructions) to act in the manner which you reasonably consider to be in the best interests of La Trobe, ...

(c) to keep La Trobe informed of any difficulties in relation to any actual or potential Borrower or party to a Mortgage and to bring to La Trobe attention all enquiries which you are unable to resolve yourself;

(d) to furnish to La Trobe at quarterly intervals written reports on your activities as Correspondent under this letter;

(e) to keep proper books of account and records of your activities as Correspondent under this letter and to make those books and records available upon request by La Trobe for inspection by

representatives of La Trobe;

(f) not to make any representations or claims as to a Mortgage or a Loan except as may be expressly authorised by La Trobe;

(g) not to delegate the authority conferred upon you under this agreement;

(h) to indemnify La Trobe against all claims that may at any time be brought against it based upon any act or omission of yours which is:

(i) outside the scope of your authorities and duties under this letter; or

(ii) otherwise in breach of the obligations imposed upon you under this agreement; or

(iii) negligent, dishonest, fraudulent, misleading or deceptive.

(i) to take out and keep in force a Professional Indemnity insurance policy for the sum of not less than $1,000,000 ... to cover such risks as are usually covered ... by persons conducting the business that the Correspondent conducts pursuant to this Agreement ...

(j) to employ or engage in connection with Marketing only such persons as are suitable for same and at the request of La Trobe provide La Trobe with the names and addresses of such persons.

3.4 Preparation of Applications

If an Application relates to an application for a loan received by a broker, the Correspondent must be satisfied that the information contained in the Application is a correct and full disclosure of the borrower's financial position is not misleading in any material respect ...

3.5 Origination of Mortgages

The Correspondent must originate Approved Mortgages in accordance with ... this Agreement, and lending guidelines advised by La Trobe from time to time.

3.6 Knowledge of Untrue Information

If the Correspondent becomes aware at any time after a Loan has been approved by La Trobe but before the Loan is advanced, that a statement contained in the Application to which the Loan relates, was inaccurate when made or has become untrue in any material respect, the Correspondent must immediately notify La Trobe of such inaccuracy.

3.7 The Mortgagor's application has been fully investigated by the Correspondent and, in the best of the Correspondent's knowledge and belief, having exercised all proper care and diligence and having made all such enquiries which a prudent lender would consider to be appropriate in the circumstances to ascertain the genuineness, completeness and accuracy of all information and documents on which the Correspondent may rely under this agreement, all statements and information contained in the Application are true and correct and may be relied upon by La Trobe.

Without limiting the generality of the foregoing, the [sic] covenants with La Trobe;

(a) That there will be no fraud, dishonesty, misrepresentation or negligence on the part of the Correspondent or on the part of any broker in connection with a loan or approved Mortgage;

(b) That where the Correspondent coordinates an approved Valuer to provide a Valuation relating to the approved Mortgage, the valuation will be conducted in accordance with La Trobe's Standing Valuers Instructions and this Agreement;

(c) That the Correspondent will use his best endeavours to ensure that no condition or situation exists with respect to the Mortgage which provides a basis on which the mortgage insurer (if such insurance is a requirement of a loan approval) might refuse a claim or reduce a claim in respect of a loan secured by an Approved Mortgage;

(d) That the letter of offer, the loan approval given to the Mortgagor by the Correspondent and any other correspondence with the Mortgagor comply in all respects with the terms and conditions of the Loan approved by the mortgage insurer and La Trobe and this Agreement;

...

(f) That the Correspondent is not aware of any damage, proposal or change affecting the Property which may reduce the value of that property as indicated in the relevant Valuation or any other matter which could have an adverse effect on the Valuation;

(g) That the rights of La Trobe or nominated Credit Provider under the Mortgage will prevail over the right to possession of every other person except to the extent that the Mortgage is subject to any such rights in possession and in which case the relevant approved valuer took such rights of possession into consideration when preparing his Valuation of the property;

...

4. **Commission**

In consideration for marketing La Trobe products La Trobe will

(a) Pay you a commission on the terms set out in this Agreement ...

(b) Indemnify you against all claims that may be brought against you by the parties or a third party in relation to entry into a Loan or Mortgage except to the extent that the claim arises as a result of behaviour by you which is:

(i) outside the scope of your authorities and duties under this agreement; or

(ii) otherwise in breach of the obligations imposed upon you under this Agreement; or

(iii) negligent, dishonest, fraudulent, misleading or deceptive.

...

4.1 Fees

In consideration of the Correspondent undertaking to perform his duties and obligations under this Agreement, the Correspondent will be entitled to a fee ...

...

4.3 The Correspondent will be able to charge each prospective borrower, and retain for its own benefit absolutely a fee for arranging each Loan. That fee must be determined in accordance with industry practice and any directions given by La Trobe. This will be in addition to any fee payable to La Trobe.

4.4 The Correspondent will disclose to any borrower any fees or commissions required to be disclosed at law.

5. **Termination**

The Agreement may be terminated by either party by serving notice upon the other party at least thirty (30) days prior to the intended termination date. The agreement may be terminated immediately by notice to you in writing by La Trobe if:

(a) you default in the performance of your obligations under this letter; or

...

(c) the Correspondent fails to provide Applications in respect of loans with a face value in aggregate of $10,000,000 in any twelve (12) month period (or such other amount as may be agreed between La Trobe and the Correspondent); or

(d) the approved Mortgages procured by the Correspondent taken as a whole are not performing satisfactorily in the reasonable opinion of La Trobe.

6. **Confidential Information**

(a) You may not at any time before or after the termination of the Agreement constituted under this letter divulge any information in relation to the affairs or business of La Trobe or in relation to the products marketed which is confidential and not in the public domain. Upon termination of the Agreement for any cause you must promptly return to La Trobe all documents which have been provided to you by La Trobe.

(b) La Trobe undertakes to preserve the confidentiality of Clients affairs and will not directly market or approach referred clients other than through the referrer, with exception to procedural information requirements for standard loan management activities.

...

8. **Acknowledgments**

The Correspondent acknowledges that:

(a) It is an independent contractor and acts as a principal; and

(b) It will not directly or indirectly hold out or permit to be held out to anyone by any statement, act, agreement, matter or thing indicating that it is an agent, partner or employee of La Trobe.

The Correspondent must not otherwise engage in conduct which may lead others to believe that it is an agent, partner or employee of La Trobe.

The Correspondent agrees that it will maintain the confidential information regarding La Trobe's computer systems or software used as confidential and secret.

Legal principles - agency

278 In considering whether FASA (or its representatives) acted as agent for La Trobe, the following principles are in my view of particular relevance.

279 The relationship between principal and agent is established by the consent of the principal and agent. They will have consented if they have agreed to what amounts in law to such relationship, even if they did not recognise it themselves, and even if they had professed to disclaim it. The consent must, however, be given by both parties, either expressly or by implication from their words and conduct. Primarily, consideration is given to what they said and did at the time of the alleged creation of the agency, although earlier words and conduct, and even later words and conduct, may have some bearing: ***Garnac Grain Co Inc v HMF Faure & Fairclough Ltd*** [1968] AC 1130, 1137; ***Field v Shoalhaven Transport Pty Ltd*** [1970] 3 NSWR 96, 103; ***Fabry v Commissioner of Taxation of the Commonwealth of Australia*** [2001] FCA 1431; (2001) 48 ATR 130 [21] [24].

280 Whilst the substance of a relationship as a whole is looked at, if the parties have by agreement expressly designated their relationship as either one of agency, or not one of agency, that may be an important, although not determinative, consideration: ***Australian Mutual Providence Society v Chaplin*** (1978) 18 ALR 385, 389 390; ***Micarone v Perpetual Trustees*** [631]; ***Permanent Trustee Co Ltd v O'Donnell*** [2009] NSWSC 902 [342] (a case where the finance broker was held to be the financier's agent).

281 The La Trobe Appointment Agreement, as with any other instrument, is to be construed as a whole: ***Australian Broadcasting Commission v Australasian Performing Right Association Ltd*** [1973] HCA 36; (1973) 129 CLR 99, 109.

282 The meaning of the terms of a contract is to be determined by what a reasonable person would have understood the terms to mean: ***Toll (FGCT) v Alphapharm*** [40].

283 The process of construction normally requires a consideration of not only the text, but also the surrounding circumstances known to the parties, and the purpose and object of the transaction: ***Toll (FGCT) v Alphapharm*** [40]; ***Pacific Carriers Ltd v BNP Paribas*** [2004] HCA 35; (2004) 218 CLR 451 [22]; ***Maggbury Pty Ltd v Hafele Australia Pty Ltd*** [2001] HCA 70; (2001) 210 CLR 181 [11]; ***McCann v Switzerland Insurance Australia Ltd*** [2000] HCA 65; (2000) 203 CLR 579 [22]; ***Codelfa Construction Pty Ltd v State Rail Authority (NSW)*** [1982] HCA 24; (1982) 149 CLR 337, 347 348.

284 A general agent is an agent who has authority to act for the principal in all matters concerning a particular trade or business, or of a particular nature; or to do some act in the ordinary course of its trade, professional business as an agent, on behalf of the principal. The term has been used to describe the scope of the agent's authority, and has been used in contradistinction to 'universal agents' or 'special agents'. These distinctions are of little practical utility given that the scope of the agent's authority will generally be determined by reference to the express or implied terms of the agency agreement. See Reynolds FMB & Graziadei M, *Bowstead and Reynolds on Agency*, (18th ed, 2006) [1035], [3024] [3025]; Dal Pont GE, *Law of Agency*, (2nd ed, 2008) [1.11].

285 Further, to describe a person as an independent contractor is not, necessarily, to deny their role or function as an agent for particular purposes: Dal Pont, *Law of Agency*, [2.21]; Reynolds & Graziadei, *Bowstead and Reynolds on Agency*, [1030]. In ***Colonial Mutual Life Assurance Society Ltd v Producers & Citizens Cooperative Assurance Co of Australia Ltd*** [1931] HCA 53; (1931) 46 CLR 41, 48 49 Dixon J (with whom Rich J agreed), having referred to the general conception that an independent contractor carries out work not as a representative, but as a principal said:

> But a difficulty arises when the function entrusted is that of representing the person who requests its performance in a transaction with others, so that the very service to be performed consists in standing in his place and assuming to act in his right and not in an independent capacity. In this very case the 'agent' has authority to obtain proposals for and on behalf of the appellant; and he has, I have no doubt, authority to accept premiums. When a proposal is made and a premium paid to him, the Company then and there receives them, because it has put him in its place for the purpose. This does not mean that he may conclude a contract of insurance which binds the Company. It may be, and probably is, outside his province to go beyond soliciting and obtaining proposals and receiving premiums; but I think that in performing these services for the Company

> he does not act independently, but as a representative of the Company, which accordingly must be considered as itself conducting the negotiation in his person.

286 In that case the independent contractor, an insurance intermediary, slandered another institution, in breach of the contract which governed the relationship between the independent contractor and the insurance company. The insurance company was held liable for the slander notwithstanding that the liability arose by reason of the contractor doing the very thing it had promised not to do. Dixon J said (50):

> The undertaking contained in his contract not to disparage other institutions is not a limitation of his authority but a promise as to the manner of its exercise.

Gavan Duffy CJ & Starke J said (46 47):

> It is not necessary that the particular act should have been authorised: it is enough that the agent should have been put in a position to do the class of acts complained of ... And if an unlawful act done by an agent be within the scope of his authority, it is immaterial that the principal directed the agent not to do it.

See also ***Scott v Davis*** [2000] HCA 52; (2000) 204 CLR 333 [61] [64], [231], [354]; ***Kooragang Investments Pty Ltd v Richardson & Wrench Ltd*** [1982] AC 462, 472 473, cited in ***Beach Petroleum NL v Johnson*** [1993] FCA 283; (1993) 115 ALR 411, 573 574.

287 Thus, a principal is also liable for the fraud of its agent committed within the scope of the agent's employment whether the fraud is committed for the benefit of the principal or the benefit of the agent: ***Beach Petroleum NL v Abbott Tout Russell Kennedy*** [1999] NSWCA 408; (1999) 48 NSWLR 1 [473]; see also generally Dal Pont, *Law of Agency*, [22.7] [22.10], [22.23] (rescission).

288 The relationship of agency typically involves certain features. One is not to delegate the authority conferred by the principal: Dal Pont, *Law of Agency*, [9.1]. Another is a duty to obey the principal's instructions: Reynolds & Graziadei, *Bowstead and Reynolds on Agency*, [6008]; Dal Pont, *Law of Agency*, [11.5] [11.6]. In circumstances where the agent has retained a discretion as to carrying out the agency, the agent must be 'guided by his own judgment exercised honestly and with due care and skill in what reasonably seems to him in the circumstances to be in the best interest of his principal': ***Jones v Canavan*** [1972] 2 NSWLR 236, 247. Another typical feature is a duty of confidentiality owed by the agent to the principal in respect of the latter's business or affairs: Dal Pont, *Law of Agency*, [12.56] [12.57].

Proper construction of the La Trobe Appointment Agreement

289 The overarching nature of the obligation which FASA undertakes is expressed in cl 1. It uses the language of agency. The subject matter of cl 1 is La Trobe's 'appointment' of FASA. By cl 1 La Trobe appoints FASA 'to act on its behalf' for the purpose of 'negotiating', or for the purpose of being an 'intermediary to obtain' loans to be provided by La Trobe or its nominee for persons, defined as borrowers.

290 Clause 2.1 confirms that FASA has the right to negotiate or act as an intermediary. It goes on to confirm that the right is a valuable right, in that it may lead to the payment of a fee by La Trobe. It was argued by the bank that the right to negotiate in cl 2.1 refers to a right to negotiate 'on behalf of' the borrower or potential borrower. The clause does not say that expressly, nor is it easy to draw such an implication. Whilst the word 'obtain' tends to point in the direction of such an implication, the clause is prefaced with the words 'Your appointment under this letter'. Those words appear to relate to the appointment referred to in cl 1, by which La Trobe appoints FASA 'to act on its behalf'. Thus, the only express reference to acting 'on behalf of' someone in cl 1 and cl 2.1 is in relation to FASA's appointment to act 'on behalf of' La Trobe. Also, as discussed below, the nature of FASA's obligations outlined in the remainder of the agreement are inconsistent with FASA having any autonomy to represent the borrower's interests in the borrower's dealings with La Trobe. Clause 2.1 does not in my view alter the 'Authorised Purpose' of the appointment in cl 1, by which La Trobe appoints FASA to 'act on [La Trobe's] behalf' in performing the intermediary role between La Trobe and a borrower or potential borrower.

291 The express term that FASA is not a general agent (cl 2.2(b)) directs attention more to the scope of FASA's authority rather than to negativing the existence of an agency relationship. The acknowledgment (cl 8(b)) that FASA would not hold itself out as agent of La Trobe is directed to excluding La Trobe's potential liability for acts done by FASA on the basis of apparent or ostensible authority. It is not directed to either the existence, or the scope, of actual authority. The acknowledgment by FASA (cl 8(a)) that it is an independent contractor and acts as principal needs to be read having regard to the provisions of the letter of appointment as a whole.

292 The scope of FASA's authority is principally ascertained by reference to its rights in cl 2, and its obligations in cl 3.

293 Insofar as cl 2.2 provides that FASA's role is limited to introducing prospective borrowers to La Trobe 'as provided in [the La Trobe Appointment] Agreement', it draws attention to the meaning of 'the introduction of prospective borrowers' and to the other provisions in the agreement, including cl 3.5, which deal with FASA's responsibilities in relation to initiating proposals for secured lending for La Trobe's consideration.

294 Clause 3.5 provides that FASA 'must originate Approved Mortgages' in accordance with, inter alia, La Trobe's lending guidelines. The word 'originate' means to initiate. By cl 3.5 FASA 'must' initiate secured lending proposals for La Trobe's consideration in accordance with the La Trobe Appointment Agreement and La Trobe's guidelines. The word 'must' in cl 3.5 needs to be considered in context. FASA has a strong financial incentive for initiating a high volume of proposals for La Trobe's consideration, in that, if FASA fails to provide proposals to a value of $10 million in a 12 month period, La Trobe may terminate the appointment (cl 5(c)).

295 However, as a matter of obligation, FASA is not required to initiate any secured lending proposals for consideration by La Trobe. In that regard it acts with autonomy as an independent contractor and principal (cl 8(a)). If, however, it does initiate a secured lending proposal for La Trobe's consideration, then in initiating the proposal and conveying it to La Trobe for consideration, and in all subsequent negotiations between La Trobe and the borrower, it acts 'on behalf of' La Trobe (cl 1.1), and not on behalf of the borrower. Mortgages approved by La Trobe are referred to as having been 'procured by the Correspondent [FASA]': cl 5(d).

296 As regards its rights, FASA has no right to bind La Trobe to any agreement with the borrower, or otherwise bind La Trobe (cl 2.2). Nor is there a general right in FASA to make representations concerning La Trobe's 'loan' products or 'loan' policies, inquiries in respect of which must be directed to La Trobe (cl 2.2). Whilst it is readily understandable that FASA may not make representations as to La Trobe's lending policies, the prohibition in relation to representations concerning La Trobe's loan 'products' requires further consideration. The prohibition cannot be construed too widely, and must be construed in light of the agreement as a whole. If read too widely, it would preclude, for example, FASA informing potential borrowers that La Trobe provided home loans to approved customers. Taken too literally, it could undermine the commercial purpose of the agreement, which is the origination of secured lending for La Trobe, and the creation of a source of income for FASA. It is also to be noted in this context, that the La Trobe Appointment Agreement contemplates FASA 'Marketing', ie promoting, La Trobe's products (cl 3.3(j) and cl 4 referred to below). It seems to me that properly construed, the prohibition against making representations concerning La Trobe's loan products precludes FASA making representations about the availability, characteristics, benefits or features of the products which go beyond fairly passing on the information in materials and documents provided by La Trobe for the express or implied purpose of enabling FASA to carry out its obligations under the agreement. It would preclude, for example, FASA from offering its own opinion about the intrinsic advantages (or disadvantages) of La Trobe's products. It should also be read in conjunction with cl 3.3(f), which is to similar effect, but with reference to a 'Mortgage' or a 'Loan', which terms, in this context, seem to refer to a particular mortgage or loan, as opposed to loan products generally.

297 Also, the parties to the agreement negatived the possibility of the La Trobe Appointment Agreement being characterised as authorising FASA to act as agent of the borrower or potential borrower (cl 2.2(b)), thereby giving full scope to FASA's obligations to La Trobe under cl 3.

298 As with cl 3.5, the other principal obligations of FASA are contained in cl 3.

299 If FASA initiates a lending proposal with respect to a borrower or potential borrower for La Trobe's consideration, in acting as intermediary between the two, FASA is obliged to act in accordance with La Trobe's written procedures, as confirmed by La Trobe from time to time in writing (cl 3.3(a)). These, in my view, would include its Starter Kit. The 'Approved Purpose' in cl 3.3(a) is, in my view, intended to be the same as the 'Authorised Purpose' in cl 1, in which FASA acts 'on behalf' of La Trobe.

300 In its role as initiator and intermediary, FASA must also act in accordance with La Trobe's instructions (cl 3.3(b)), even if the instructions are contrary to the interests of the borrower or potential borrower.

301 Whilst acting in accordance with La Trobe's procedures, instructions and guidelines may generally provide FASA with limited scope for the exercise of its discretion, any residual discretion must be exercised by FASA in La Trobe's best interests, and not in the interests of the borrower or potential borrower (cl 3.3(b)). The obligation to act in La Trobe's best interests would, in my view, for example, preclude it from recommending to a borrower or potential borrower whom it had introduced to La Trobe, that it would not be in the borrower's interests to proceed with a loan offered by La Trobe, or that it would be in the borrower's interests to proceed with a different lender, or to bargain on behalf of the borrower with La Trobe to obtain a better deal for the borrower such as the provision of less security or a lower interest rate or lower bank fees.

302 FASA must also keep La Trobe informed of any 'difficulties' in relation to the borrower or potential borrower (cl 3.3(c)), ie matters which may cause difficulties for La Trobe, whether or not it be in the interests of the borrower or potential borrower to have such matters disclosed to La Trobe. Also by cl 3.3(c), any inquiries which FASA is unable to resolve itself - bearing in mind the obligation to act on La Trobe's instructions and in what FASA considers to be La Trobe's best interests - must be brought to La Trobe's attention for further direction or instruction.

303 It must also provide La Trobe written (and by necessary implication accurate) reports on its 'activities' as 'Correspondent' (cl 3.3(d)), including its activities with borrowers or potential borrowers referred to La Trobe, and to keep proper records and make them available for inspection by La Trobe (cl 3.3(e)).

304 FASA is obliged not to delegate the authority conferred on it by La Trobe (cl 3.3(g)).

305 In 'Marketing' on behalf of La Trobe it must employ or engage suitable personnel and provide their names and addresses to La Trobe on request (cl 3.3(j)). The word 'Marketing' is not defined, but in its ordinary usage includes the action or business of promoting products (Oxford Concise Australian Dictionary). Thus, FASA has an obligation to La Trobe to provide the details of the persons engaged by FASA to promote La Trobe products, and to ensure that they are 'suitable' to La Trobe for that purpose. As noted below the word 'Marketing' is also used in the opening words of cl 4, which refer to the payment of a commission for 'marketing La Trobe's products'. In both provisions the term 'Marketing' is to be read with cl 2.2, discussed above.

306 For the purposes of carrying out its engagement on behalf of La Trobe, FASA has duties of investigation and disclosure of information (cl 3.4, cl 3.7). Clause 3.4 indicates that not all applications to La Trobe by FASA will arise from brokers. The covenant in subclause (a) under cl 3.7 also draws a distinction between La Trobe and a broker.

307 FASA's inquiries must be of a kind which a 'prudent lender would consider to be appropriate in the circumstances' (cl 3.7). There is a continuing obligation upon FASA to disclose, in effect, material information after the approval of a loan by La Trobe and up to the time of the advance (cl 3.6). The duty must be adhered to by FASA even if the result of its performance would be to jeopardise the potential borrower's prospects of successfully obtaining the advance.

308 FASA also has duties of confidentiality with respect to 'any information in relation to the affairs or business of La Trobe' which are confidential and not in the public domain (cl 6(a)). Accordingly, anything of a confidential nature learnt by FASA about La Trobe's business or affairs, including from its Starter Kit, may not be used by FASA to achieve a better deal for a borrower or potential borrower. Although FASA is to disclose to the borrower any fees or commissions required to be disclosed at law (cl 4.4), by virtue of the general obligation of confidentiality it is otherwise required to keep confidential from the borrower its fees from La Trobe, and the nature and scope of its other obligations owed to La Trobe.

309 Under cl 4 the 'marketing' of La Trobe's products for which a commission is payable, involves the promotion of La Trobe's products by the activities which FASA undertakes on behalf of La Trobe, ie to initiate loan proposals for La Trobe's consideration, to act on its behalf as its intermediary with respect to the negotiations concerning such proposals, and to undertake the other duties identified under the appointment. That is made clear by cl 4.1, which provides that La Trobe is to pay a fee in consideration for the performance 'of [FASA's] duties and obligations' to La Trobe under the La Trobe Appointment Agreement.

310 In express relaxation of the usual fiduciary principle regarding profits, FASA is permitted by La Trobe to charge a fee to a borrower, although, even there, the quantum of the fee is ultimately subject to any directions given by La Trobe (cl 4.3).

311 Whilst La Trobe may appoint 'other Correspondents' (cl 3.2), it agrees not to directly market or approach borrowers referred to La Trobe through FASA except in relation to certain procedural matters in relation to the management of loans once a loan has been made (cl 6(b)). On its proper construction or by necessary implication, this would include, I think, a promise by La Trobe to procure the result that its 'other Correspondents' would not approach borrowers referred by FASA to La Trobe. Thus, all communications between La Trobe and a borrower or potential borrower who FASA refers to La Trobe are to be via FASA, prior to the making of the advance. It indicates that FASA is to be the sole representative of La Trobe with respect to borrowers or potential borrowers FASA refers to La Trobe, thereby cementing the efficacy of FASA's fee arrangements: cf Reynolds & Graziadei, *Bowstead and Reynolds on Agency*, [7036]. La Trobe's agreement, in effect, that it would not compete directly with FASA, and would ensure its 'other Correspondents' would not compete with FASA in relation to such persons, tends to indicate that the parties did not intend to stand in an adverse commercial relationship with each other with respect to borrowers or potential borrowers referred by FASA to La Trobe.

312 Although cl 6(b) describes borrowers or potential borrowers as 'clients' of FASA, it does not preclude FASA from conveying to La Trobe the confidential affairs of the borrower or potential borrower. Rather it operates on the basis that any such confidential information of the borrower will be kept confidential by La Trobe, and not used for collateral purposes.

313 In substance, the provisions of the La Trobe Appointment Agreement indicate that it confers a standing authority on FASA, defeasible, inter alia, at La Trobe's option if a certain volume of business is not generated within a specified time, to initiate on La Trobe's behalf, with borrowers or potential borrowers, proposals for secured lending for approval by La Trobe and to act as intermediary on its behalf in all subsequent dealings between La Trobe and the borrower or potential borrower.

314 FASA has La Trobe's authority to use La Trobe's confidential material, including the La Trobe Starter Kit to originate proposals for finance for approval by La Trobe. La Trobe entrusts to FASA the task of making all the necessary investigations and inquiries which a prudent lender would consider to be appropriate in the circumstances to ensure that the information contained in the application is complete and may be relied upon by La Trobe when considering the proposal.

315 As against this, the bank contends that under the general principles of the law of agency, a finance broker is prima facie the agent of the borrower, rather than the lender. See ***Custom Credit Corporation Ltd v Lynch*** [1993] VicRp 86; [1993] 2 VR 469, 486; ***Micarone v Perpetual Trustees*** [632]; ***Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd*** [1986] HCA 14; (1986) 160 CLR 226, 234 (an insurance broker case). It is submitted that the general position that the broker is the agent of the borrower and not the lender is not altered by the fact that the broker may receive a commission from the lender: ***Micarone v Perpetual Trustees*** [632]; ***Morlend Finance Corporation (Vic) Pty Ltd v Westendorp*** [1993] VicRp 72; [1993] 2 VR 284, 308. This is because the commission will be 'merely for directing business in the way of a lender': ***Custom Credit Corporation v Lynch*** (486).

316 In my view, it would be unsafe, in this case, to have resort to the prima facie presumption to which the bank refers, when the presumption applies to brokers, and FASA is not a mortgage broker or finance broker. Although I accept Mr Curia's evidence that an aggregator is an 'umbrella' group for brokers, the fact that a separate company is formed I think directs attention to the details of the precise arrangements which have been set up between the company and the lender. Recourse to a presumption 'may serve only to distract attention from that more basic and important proposition': ***Ermogenous v Greek Orthodox Community of SA Inc*** (2002) 209 CLR 95 [26] [28] (an observation made with reference to presumptions which had been invoked in respect of a dispute as to whether there was an intention to create contractual relations). Also, even where the presumption may properly be applied, it remains important to examine the precise arrangements. For

example, in ***Con-Stan Industries v Norwich Winterthur***, the High Court said that there was in that case an agency relationship between a broker and insurer, but that it had no relevant application to the facts (234 235).

317 The bank submitted also that regard should be had to the evident purpose and object of the arrangements between FASA and La Trobe, having regard to the evidence of the witnesses from the finance industry. The conclusion that FASA is the representative of the bank is, in my view, broadly consistent with the evidence from the bank's witnesses and the background referred to in [266] [276] above.

318 Moreover, the arrangement makes commercial sense from the lender's point of view. The risk for the financier, absent such formal arrangements, is that it will lose business to its competitors. From the financier's point of view, the position is not dissimilar from that described by Isaacs ACJ in relation to the insurance market in ***Western Australian Insurance Co Ltd v Dayton*** [1924] HCA 58; (1924) 35 CLR 355, 376:

> But at the same time it cannot be ignored that insurance companies are avid competitors for business, and, in their eagerness to secure it, are not content to await spontaneous applications but send out gatherers in all directions. They arm these gatherers with some authority. The nature of that authority is to direct in some way the flow of premiums to the coffers of the society, and the extent of the authority varies.

319 The bank also submits that cl 3.4, cl 3.6, and cl 3.7 are designed to provide warranties, the breach of which sound in a claim in damages by La Trobe against FASA, and are consistent with FASA being an independent contractor. That was the argument successfully advanced by the financier in ***Micarone v Perpetual Trustees*** [638] [642]. However, in that case, the relevant entity ('IF & I') was also a broker (***Micarone v Perpetual Trustees*** [532], [632]); the lender or lender's agent did not pay the entity a commission (***Micarone v Perpetual Trustees*** [632], [639]); the relevant instrument there contemplated the entity submitting loan applications 'on behalf of borrowers' (***Micarone v Perpetual Trustees*** [634]); and the instrument specified agency duties, by way of management, which only arose after the borrower had accepted the offer of loan (***Micarone v Perpetual Trustees*** [635]). These distinctions, and the provisions in the La Trobe Appointment Agreement read as a whole to which I have earlier referred, indicate, in my view that, unlike the facts in ***Micarone v Perpetual Trustees***, in this case FASA is an agent of La Trobe with a duty to know and communicate knowledge to La Trobe, and La Trobe may be regarded as a principal 'who purchases the knowledge of his agent': ***Taylor v Yorkshire Insurance Co Ltd*** [1913] 2 IR 1, 20 21.

320 The bank also contends that, in any event, the payment of a fee by La Trobe is 'merely for directing business in the way of the lender' (cf ***Custom Credit Corporation v Lynch***). In my opinion, that submission fails to recognise the scope of the obligations for which the fee is payable, as set out in cl 4.1 of the La Trobe Appointment Agreement.

Knowledge - principles

321 As against a third party, the law imputes to a principal knowledge gained by its agent in the course of, and which is material to, a transaction in which the agent is employed on behalf of the principal, under such circumstances that it is the duty of the agent to communicate it to the principal. Such knowledge is equivalent to the actual personal knowledge of the principal and is not an aspect of constructive notice. See ***Sargent v ASL Developments Ltd*** [1974] HCA 40; (1974) 131 CLR 634, 658 659; ***Ford Excavations Pty Ltd v Do Carmo*** [1981] 2 NSWLR 253, 266 (reversed on other grounds ***Do Carmo v Ford Excavations Pty Ltd*** [1984] HCA 17; (1984) 154 CLR 234); ***Vane v Vane*** (1873) 8 Ch App 383, 398 400.

322 A matter is material if a reasonable agent would consider it material in the ordinary course of business: ***Neeson v Wrightson NMA Ltd*** [1989] ANZ ConvR 605, 609.

323 The attribution of knowledge is not confined to such circumstances. The 'considerations according to which a principal is affected by an agent's knowledge, and the relevance of the circumstances in which the agent acquired the knowledge, depend upon the context in which the problem arises': ***Smits v Roach*** [2006] HCA 36; (2006) 227 CLR 423 [47].

324 Knowledge acquired by an agent antecedently to the existence of the relation of principal/agent will not be imputed 'save in cases (of which many can be supposed ...) in which the principal purchases the previously obtained knowledge of the agent in relation to a particular subject matter, or where the agent is ... "an agent to know"': ***Taylor v Yorkshire Insurance***

(20 21); ***Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd*** [2001] NSWCA 20; (2001) 50 NSWLR 679 [94] [96] (reversed on grounds relating to the proper construction of the *Insurance Contracts Act 1984* (Cth) and on the basis that a finding of fraud was not open to the Court of Appeal in that case: ***Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd (in liq)*** [2003] HCA 25; (2004) 214 CLR 514); ***Micarone v Perpetual Trustees*** [639]; ***Jessett Properties Ltd v UDC Finance Ltd*** [1992] 1 NZLR 138, 143 144. The word 'purchased' in this context is to be understood broadly: ***Jessett Properties v UDC Finance*** (144).

325 Knowledge will not be imputed if the agent is acting 'totally in fraud of' the principal, ie where 'all the [agent's] activities are directed against the interests of the [principal] and not partly for the benefit of the [principal]': ***Beach Petroleum v Johnson*** (574); eg, if the activity is not even in purported pursuance of the principal's interest: ***Spedley Securities Ltd (in liq) v Greater Pacific Investments Pty Ltd (in liq)*** (1992) 30 NSWLR 185, 191. In particular, the fraud of an agent will not be imputed to the principal in a claim by the principal that it has been defrauded, because it 'would be irrational to do so': ***Beach Petroleum NL v Abbott Tout Russell Kennedy*** [474]; see also the discussion by Watts P, 'Imputed Knowledge in Agency Law - Excising the Fraud Exception' (2001) 117 *LQR* 300, 316 318.

326 The mere fact that the agent has not communicated a material fact is not, of itself, evidence of fraud. It must be 'made out that distinct fraud was intended in the very transaction, so as to make it necessary for the [agent] to conceal the facts from his [principal] in order to defraud him'. See ***Rolland v Hart*** (1871) 6 Ch App 678, 682 683.

Imputation of Mr Curia's knowledge

327 The information known to Mr Curia was material because, as Mr Coates in effect said, La Trobe regarded independent advice as appropriate for persons who guarantee the debts of a borrower. The same point, in essence, is encapsulated in cl 3 of La Trobe's 'Mortgage Acceptance Criteria' ([76] above).

328 Whilst not a volunteer, the mother was, in substance, in the position of a guarantor with respect to part of the loan, viz the son's borrowing to pay out his practice's overdraft. See also ***Spina v Permanent Custodians Ltd*** [51].

329 In my view, FASA by Mr Curia, acted as agent for La Trobe in initiating and conveying to La Trobe the application for loan by the mother and the son, and in all subsequent communications. Whilst it was Ms Kiely, and not he, who was the point of initial contact by the son, he knew that Ms Kiely had been unable to source a loan herself. He agreed to make the loan application through FASA to La Trobe. He provided Ms Kiely the basic La Trobe documents to fill out, which she filled out in consultation with him. Ms Kiely sent them to the son to have them executed but when they came back signed, she gave them to Mr Curia. He prepared accompanying documents and provided all the materials to La Trobe. In my view he did all those things as a representative of FASA pursuant to the authority conferred by the La Trobe Appointment Agreement. It was he, not Ms Kiely, who was relevantly the initiator of the secured loan with La Trobe. For the purpose of initiating the mortgage with La Trobe, Mr Curia as representative of FASA, was entrusted by La Trobe to make all the investigations which any prudent lender would consider appropriate to enable La Trobe to consider the proposal. In referring the son and the mother to La Trobe for secured lending, he was an 'agent to know', and the knowledge acquired from Ms Kiely had been 'purchased' by La Trobe.

330 Further, in my view, Mr Curia's activities as FASA's representative in initiating the secured lending for La Trobe could not be characterised as all 'directed against the interests' of La Trobe. He was initiating a loan which, it is to be inferred, was profitable from La Trobe's perspective, otherwise it would have been of no interest to La Trobe. The bank did not plead, in response to the mother's plea of agency, that Mr Curia was committing a fraud against La Trobe or the bank. Nor was it ever suggested at the trial to Mr Curia that he was intending to defraud La Trobe or the bank.

331 In the circumstances, in my view, Mr Curia's knowledge, as FASA's representative, is to be attributed to La Trobe, and thereby to the bank.

The question of a special disadvantage Whether the mother was at a special disadvantage vis-à-vis the bank

332 There are a number of matters which indicate that the mother was labouring under a special disadvantage when dealing with the bank.

333 First, she did not have a proper understanding of the nature and effect of the mortgage as explained earlier [158], nor an understanding of the true commercial setting of the transaction. She had been misled by the son as to the true impetus for and circumstances behind the transaction, which concerned the son's defaults with his creditors. The son concealed both the existence and extent of his indebtedness, particularly to NAB and the drug company. She had no understanding that the son was desperate to meet the debts of his practice. She did not know he had deeper financial problems unrelated to his matrimonial dispute. Secondly, moreover, she had no knowledge that the son's defaults had created a default under her own loan, ie the NAB Claremont loan, and had brought about the possibility of default under her mortgage.

334 Thirdly, she had no capacity to repay a loan of $192,000 and was wholly reliant on her son servicing the loan, yet she had no appreciation that his capacity to do so was under a cloud, in that his practice had hitherto generated insufficient income to meet current liabilities, and his capacity to repay was dependent on the successful financial restructuring of his debts, in which she was unwittingly involved. Fourthly, she had no independent legal or other advice. She needed to understand that this was no time to help out her son in his matrimonial dispute. She needed to understand the effect of the mortgage and that her son's indebtedness had already impinged on her financial security and the security of her home, and that the first and foremost thing she should do is find $44,000 to repay the NAB Claremont loan and immunise herself from the son's financial malaise. In connection with this, she also needed to know that the son had been put on the title to the Claremont property at the time she had acquired the property.

335 Fifthly, the mother was particularly susceptible to the son's duplicity. She was elderly, without a partner, and with no close friends or confidants. Whilst I do not find that the mother was emotionally dependent on the son, nevertheless by dint of her age and circumstances she had few close relationships, and the relationship with the son was important to her and characterised by trust. The son invoked the bonds of that relationship and preyed on that trust to have his mother mortgage her home to accommodate his financial exigencies.

336 In all the circumstances she 'lacked assistance and advice where assistance and advice were plainly necessary if there were to be any reasonable degree of equality between' herself and the bank: cf ***Commercial Bank of Australia v Amadio*** (477).

337 Vis-à-vis the bank, in borrowing $192,000 and mortgaging her interest in the Claremont property, the mother lacked an ability to make any worthwhile judgment as to her own interests or to conserve her own interests.

Whether the special disadvantage was sufficiently evident to the bank - summary

338 I find that the bank knew facts, including by reference to Mr Curia's knowledge, which made the mother's special disability sufficiently evident such that the bank's acceptance and retention of the benefit of the transaction is prima facie unfair or unconscionable.

339 It is necessary, at the outset, to record, however, that but for the knowledge of Mr Curia, the mother's special disability would not, in my view, have been sufficiently evident to La Trobe.

340 Before dealing with the bank's knowledge incorporating Mr Curia's knowledge, it is convenient to summarise first my findings as to what the bank knew without reference to Mr Curia.

The bank's knowledge without imputation of Mr Curia's knowledge

341 I have previously set out my findings as to what the bank knew, without reference to Mr Curia's knowledge.

342 On the one hand, the bank knew that the mother was a single woman of advanced years (aged 85). It knew that the Claremont property was her residence. It knew that the mother had no other assets. It knew that she was taking on a 20year loan and increasing her debt from $42,000 to $192,000. It knew that she had no or insufficient income to service the loan herself. It knew that the application for finance was not supported by a letter from the son's accountant providing an opinion in the form envisaged by its lending criteria. It knew that the relationship between the borrowers was that of elderly mother and son. It also knew that the mother did not receive any independent advice.

343 On the other hand the above matters, in my view, do not of themselves, indicate that the mother's special disadvantage was sufficiently evident to La Trobe to render it unconscientious for the bank to accept or retain the benefit of the

transaction, having regard to the matters referred to below.

Disability not sufficiently evident without imputation of Mr Curia's knowledge

344 The following further matters which arise if Mr Curia's knowledge is not brought to account are significant:

(a) the purpose of the transaction was, on its face, not one to secure the son's existing indebtedness;

(b) it was, on its face, a joint borrowing, by existing mortgagors, and was not in the nature of a guarantee by the mother of the son's borrowings, and the bank had not entrusted the son to procure the mortgage;

(c) the borrowing was not only to discharge an existing joint indebtedness, but was also stated to be for investment purposes - although the bank knew that the surplus was to be paid at settlement to the son, there was no indication to the bank that he would use the money for his own purposes, rather than apply it to a joint incomeproducing investment;

(d) it was secured over jointly owned property, and not property on its face beneficially owned by the mother;

(e) at least to some extent, the mother appeared a proactive and capable participant - she paid for the valuation fee herself, by cheque, drawn with a steady hand and signature;

(f) the bank had no superior knowledge of matters of which the mother was unaware, in relation to the transaction;

(g) La Trobe could assume that the mother (and son) had legal advice, in circumstances where the borrowers were joint borrowers, putting up a joint asset as security, and where the actual conflict between the son's interests in the borrowing and the mother's interests in the borrowing was not apparent. See ***Coldunell Ltd v Gallon*** [1986] QB 1184, 1201; ***Bank of Baroda v Shah*** [1988] 3 All ER 24; and ***Royal Bank of Scotland v Etridge (No 2)*** [1998] 4 All ER 705, 721 [44].

(h) unlike in ***Elkofairi v Permanent Trustee*** (which involved a claim by a married woman), where there was no evidence on the face of the loan application of any income and assets of either borrower, here the application form disclosed that the borrower intending to service the loan was a professional person, whose assets were said to include a $200,000 veterinarian practice, and whose income was declared to be $80,000 per annum. The son's accountant, although not providing the requisite opinion, had stated that the son 'had practised as a veterinarian for 15 16 years, and for a significant period of that time has successfully operated a veterinarian practice in Collie'.

345 Taking an overall view of the matters in [342] and [344] above, I would not find that the mother's disability was sufficiently evident to make it prima facie unfair or unconscientious for the bank to receive or retain the benefit of the transaction.

Disability sufficiently evident having regard to Mr Curia's knowledge

346 Mr Curia's actual knowledge is imputed to La Trobe (and hence the bank). Mr Curia knew:

(a) that the purpose, or a major purpose of the transaction was to provide security for the son's refinancing of the existing indebtedness of his practice;

(b) that, in substance, the mother was rendering herself liable for, and granting a mortgage to secure, the son's borrowings, apart from the refinancing of the NAB Claremont loan;

(c) that the son would use the money (apart from the sum of $43,000) to pay the creditors of the son's practice, rather than apply it to a joint incomeproducing investment;

(d) that the mother was a quiescent party and participated in the transaction to assist the son in his borrowings and at his behest;

(e) of matters, of which the mother was unaware, viz the true or a major purpose of the transaction being the restructuring of the debts of the son's practice, that the son was 'desperate' to meet those debts, and that the son was on the title to her home;

(f) that the mother had acquired the Claremont property using all but $46,000 of her own funds, and that the son had not contributed any equity to it.

347 By reason of the above knowledge it is to be inferred, and I find, that Mr Curia had actual knowledge; alternatively he wilfully shut his eyes to the obvious; or, alternatively, he wilfully and recklessly failed to make such inquiries as an honest and reasonable man would make, with respect to the following:

(a) that on the face of it, the transaction with the bank was an improvident transaction for the mother;

(b) that the mother's interests were not coincident with the son's, and hence there was a need for her to obtain independent advice;

(c) that the mother entered into the transaction on the basis of having reposed trust and confidence in the son.

See ***Baden v Societe Generale Pour Favoriser Le Developpement du Commerce et de L'Industrie en France SA*** [1993] 1 WLR 509, 575 576; ***Farah Constructions Pty Ltd v Say-Dee Pty Ltd*** [2007] HCA 22; (2007) 230 CLR 89 [174].

348 Mr Curia also knew that the Claremont property was the mother's residence, although I have found La Trobe knew that in any event.

349 These matters, in combination with the matters in [342] above, in my view, made it sufficiently evident that, or were sufficient to raise in the mind of La Trobe the possibility that, the mother was at a special disadvantage in her dealing with the bank in relation to this transaction.

350 The bank's dealing with the mother in these circumstances involved unconscientious conduct by the bank.

The onus on the bank to establish that the transaction was fair, just and reasonable

351 The onus then moves to the bank to show that the transaction with the mother was fair, just and reasonable.

352 The bank did not attempt that exercise. The bank did not contend, or show, that the transaction, from the mother's viewpoint was fair, just and reasonable. It has failed to discharge the burden of proof upon it.

A *Garcia* claim?

353 It was not clear to me from the mother's submissions whether, in addition, or in the alternative, the mother advanced a case based exclusively on the ***Garcia*** principles. I should record my findings on the assumption that such a case was intended to be advanced.

354 In summary, I find that the ***Garcia*** principles have no application for the following reasons. First, assuming (without deciding) that the principles apply beyond guarantees, the mother was not a volunteer. Secondly, the aged parent/child relationship is not of itself to be treated as equivalent to the wife/husband relationship for the purposes of that doctrine. Furthermore, even if the mother could be considered a volunteer by virtue of being designated a 'partial volunteer', and the principles apply to any relationship of trust and confidence, a claim based on ***Garcia*** does not improve the mother's position in these proceedings beyond her claim for unconscionable dealing, because without Mr Curia's knowledge, the bank had no notice that the mother reposed trust and confidence in the son in the transaction.

Section 51AC of the *Trade Practices Act 1974* (Cth)

355 The mother also alleges that she is entitled to relief under s 87 of the *Trade Practices Act* by reason of the bank having allegedly contravened s 51AC of the *Trade Practices Act*.

356 In s 51AC of the *Trade Practices Act*, the word 'unconscionable' is not limited to unconscionable behaviour under the general law or s 51AA of the *Trade Practices Act*: ***Australian Competition & Consumer Commission v 4WD Systems Pty Ltd*** [2003] FCA 850; (2003) 200 ALR 491 [183] [185].

357 Like s 12CC of the *Australian Securities & Investments Commission Act 2001* (Cth), it is intended to build upon, and not be constrained by, the general law: ***Australian Securities & Investments Commission v National Exchange Pty Ltd*** [2005] FCAFC 226; (2005) 56 ACSR 131 [30].

358 The word 'unconscionable' should be given its natural and ordinary meaning, ie 'doing what should not be done in good conscience': ***ASIC v National Exchange*** [33], [39].

359 It is necessary to show more than unreasonableness, unfairness or simply misleading or deceptive conduct: ***ACCC v 4WD Systems*** [185]. The term imports a perjorative moral judgment or moral obloquy: ***Hurley v McDonald's Australia Pty Ltd*** [1999] FCA 1728; [2000] ATPR 41741, 40,585; ***ASIC v National Exchange*** [43].

360 It requires a consideration of whether the conduct is 'contrary to the norm of conscientious behaviour' or 'offends against basic notions of good conscience and fair play': ***ASIC v National Exchange*** [44].

361 Section 51AC(3) provides that the 12 factors referred to therein are factors to which the court may have regard 'without in any way limiting' the matters to which the court may have regard for the purpose of determining whether a contravention of s 51AC has occurred: ***Australian Competition & Consumer Commission v Oceana Commercial Pty Ltd*** [2004] FCAFC 174; [181]. Further, in considering the potential application of s 51AC, it is not permissible to 'search through the twelve criteria set out ... find one that seems to fit the case in hand, and then move to a conclusion of unconscionable conduct': ***ACCC v Oceana*** [181]. All of the circumstances must be considered.

362 For there to be a contravention of s 51AC, the alleged unconscionable conduct must occur 'in connection with', the supply or possible supply 'of goods or services': s 51AC(1). The words 'in connection with' require the impugned conduct to go with, accompany, or be involved in the supply of goods or services: ***Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants (Aust)*** [2001] FCA 1056; (2001) ATPR (Digest) 46212 [260].

363 For the purposes of s 51AC, the word 'services', which is defined in s 4, includes, in effect, the provision of bank loans. The loan here was, in substance, to refinance debts associated with the son's practice. There was no contention raised in this case that the loan was not 'for the purpose of trade or commerce' within the meaning of s 51AC(7).

364 I have found that, with the imputation of Mr Curia's knowledge, the bank was involved in unconscientious conduct in dealing with the mother in relation to the loan and mortgage, for the purposes of the equitable doctrine of unconscionable dealing. In my view, the same considerations indicate that the bank engaged in conduct in contravention of s 51AC. It did what should not be done in good conscience.

365 Conduct in which a bank lends $192,000 to an elderly lady (aged 85) with no income apart from her pension and no assets apart from her home, who the bank knows has no resources herself to service the loan, and where the bank knows the following - that the property offered for security is her home, that the loan has been orchestrated by a third party (the son) to pay the third party's indebtedness to his creditors who are pressing for payment, that the elderly lady entered into the arrangement on the basis of trust in the third party and without any independent advice, and that the third party, although on the title to the property to be taken as security, contributed no equity to it, does, I think, 'offend basic notions of good conscience and fair play'. Such conduct involves moral obloquy.

Indefeasibility of title

366 The issue of indefeasibility arises in two ways. First, the bank alleges that it has indefeasible title as registered mortgagee, and that its registered interest cannot be disturbed by the mother's claim for unconscionable dealing. Secondly, it arises in connection with the mother's claim for a resulting trust, discussed below. At the outset, it is appropriate to note the relevant principles.

Principles

367 Section 68 and s 134 of the *Transfer of Land Act 1893* (WA) contain the indefeasibility of title provisions in respect of Torrens Title Land in Western Australia.

368 Subject to the terms of those provisions, the effect of registration is to destroy prior unregistered interests which would have conflicted with, or encumbered, the registered proprietor's interest. It also allows the registered proprietor to transfer a title, free from such unregistered interests. See ***Leros Pty Ltd v Terara Pty Ltd*** [1992] HCA 22; (1992) 174 CLR 407, 418 420; ***J & H Just (Holdings) Pty Ltd v Bank of New South Wales*** [1969] 2 NSWR 318, 325 326 (affirmed on other grounds in ***J & H Just (Holdings) Pty Ltd v Bank of New South Wales*** [1971] HCA 57; (1971) 125 CLR 546).

369 For the purposes of the fraud exception in s 68 and s 134, fraud means actual fraud, personal dishonesty or moral turpitude: ***Farah Constructions v SayDee*** [192]; ***LHK Nominees Pty Ltd v Kenworthy*** [2002] WASCA 291; (2002) 26

WAR 517 [268].

370 In ***Ardrey v Bartlett*** [2004] WASCA 256, Murray ACJ, Steytler & Templeman JJ agreeing, said in reference to ***LHK Nominees v Kenworthy***:

> The effect of those provisions and the limits of the concept of indefeasibility were recently discussed by this Court in ***LHK Nominees Pty Ltd v Kenworthy*** [2002] WASCA 291; (2002) 26 WAR 517. That was a case concerned with the concept of fraud in this context or, putting it otherwise, the case was concerned with the extent to which indefeasibility of title which would normally flow from the act of registration would be defeated or prevented from occurring by conduct of the registered proprietor or the party to the transaction upon whom indefeasible title would be conferred. Upon the authorities, the court held that indefeasible title would be prevented by fraudulent conduct, conduct which might be described as involving dishonesty or unconscionability sufficient to render it unconscientious that the person concerned and those taking through that person should enjoy the entirety of the rights in the property. In such a case, the court did not doubt that its power to make a restitutionary order, by way of the declaration of a remedial constructive trust or otherwise, was not to be overcome by calling in aid statutory indefeasibility of title. If the conclusion of the court was of the kind mentioned above, then the effect would be to deny indefeasibility, in terms on the face of the statute [26].

371 A registered proprietor who merely acquires title with notice of an existing unregistered interest, or takes a transfer with knowledge that its registration will defeat such an interest, is not guilty of fraud for the purposes of s 68 and s 134: ***LHK Nominees v Kenworthy*** [268].

372 The fraud must be a fraud against the plaintiff: ***Bank of South Australia Ltd v Ferguson*** [1998] HCA 12; (1998) 192 CLR 248.

373 Not all species of fraud which attract equitable remedies will amount to fraud in the statutory sense. Fraud in the statutory sense embraces less, not more than the species of fraud which would ground relief under the general law: ***Bank of South Australia v Ferguson*** [10] [11].

374 The principle of indefeasibility does not, however, deny the right of a plaintiff to bring a claim in personam, against a registered proprietor, arising out of the acts of the registered proprietor itself: ***Bahr v Nicolay (No 2)*** [1988] HCA 16; (1988) 164 CLR 604, 613. The registered proprietor may create rights in personam after registration and, even before registration, providing, in the latter case, that the recognition and enforcement of those rights would involve no conflict with the statutory indefeasibility provisions: ***Bahr v Nicolay*** (613); ***Conlan v Registrar of Titles*** [2001] WASC 201; (2001) 24 WAR 299 [173] [174]. The claim in personam must be one 'founded in law or in equity, for such relief as a court acting *in personam* may grant': ***Frazer v Walker*** [1967] 1 AC 569.

375 The expression 'personal equity' is meant to cover 'known legal ... and known equitable causes of action (for example undue influence)': ***Garofano v Reliance Finance Corporation Ltd*** [1992] NSW ConvR 59,659, 59,662.

376 As noted previously, the equitable principle governing the doctrines of undue influence and unconscionable dealing is concerned with the production by malign means of an intention to act. Unconscionable dealing involves victimisation either by the active extortion of the benefit or the passive acceptance of a benefit in unconscionable circumstances. It involves conduct which is exploitative or oppressive.

377 In my view unconscionable dealing, at least as it applies in this case, is appropriately characterised as involving moral obloquy (see [365] above).

378 In a case where unconscionable dealing is established, the defendant, in my view, is properly regarded as the 'primary wrongdoer', and not someone 'who merely had notice of an earlier interest or notice of third party fraud': cf ***LHK Nominees v Kenworthy*** [289]; ***Farah Constructions v SayDee*** [195]. (See also the helpful discussion by Butt P, 'Equity, restitution and in personam claims under the Torrens system', (1998) 72 *ALJ* 258, 262.)

379 In ***Spina v Conran Associates Pty Ltd*** [2008] NSWSC 326; (2008) 13 BPR 25,435, Austin J held that, in the case of a certain mortgage, which was registered, the plaintiff had a personal equity entitling her to an order for removal of the mortgage from the Register. Austin J stated:

> It follows that if the holder of the registered interest has engaged in unconscionable or unconscientious conduct 'personally' (including conduct through an agent) which gives rise to a cause of action in equity, then that equity may be asserted against the registered interest holder. For reasons set out below, my view is that Conran Associates has engaged in unconscionable conduct giving the plaintiff a remedy in equity. That conduct gives the plaintiff a personal equity permitting her to set the Conran Associates mortgage aside notwithstanding that it has been registered [98].

The mother's claim of unconscionable dealing

380 It follows, in my view, that the principles of indefeasibility do not deny the mother's claim in personam against the bank for unconscionable dealing. The full scope of relief, nevertheless, remains to be considered.

The mother's claim to a resulting trust

381 The mother claimed in these proceedings that the son held his interest under a resulting trust. The mother and the son also signed a memorandum of consent orders as follows:

1. The whole of the interest he holds as a registered proprietor in Lot 2, Strata Plan 20282 being the whole of the land in Certificate of Title Volume 1885 Folio 9 is held on a resulting trust for the Second Named Defendant, and
2. The First Named Defendant forthwith upon the extraction of this Order complete a transfer of the said interest to the Second Named Defendant.

382 The resulting trust is said to arise from the mother's purchase of the Claremont property to which the son made no contribution in the payment of the purchase price.

383 Having regard to my findings in [9] [11] above, I infer, on the balance of probabilities, that the mother did not intend the son to have a beneficial interest in the Claremont property, and it may be presumed that the son held his interest on a resulting trust for the mother: ***Calverley v Green*** [1984] HCA 81; (1984) 155 CLR 242, 251; ***Draper v Official Trustee in Bankruptcy*** [2006] FCAFC 157; (2006) 156 FCR 53 [83].

384 It is another question whether the bank is bound by the mother's equitable interest under the trust. That question is relevant to the grant of relief as against the bank. I now turn to that issue.

Relief Principles

385 The nature of the case will determine the appropriate remedy for selection by a plaintiff: ***Maguire v Makaronis*** [1997] HCA 23; (1997) 188 CLR 449, 467.

386 The mother's claim under the general law is in the court's exclusive jurisdiction of equity, in which rescission is an order of the court: Meagher, Heydon & Leeming, *Equity: Doctrines & Remedies* [24085].

387 The scope of the equity for rescission may be determined by the nature and extent of the conduct giving rise to the equity for rescission: ***Maguire v Makaronis*** (472).

388 In ***Commercial Bank of Australia v Amadio*** (480 481), Deane J said:

> Relief against unconscionable dealing is a purely equitable remedy. The concept underlying the jurisdiction to grant the relief is that equity intervenes to prevent the stronger party to an unconscionable dealing acting against equity and good conscience by attempting to enforce, or retain the benefit of, that dealing. *Equity will not, however, 'restrain a defendant from asserting a claim save to the extent that it would be unconscionable for him to do so.* If this limitation on the power of equity results in giving to a plaintiff less than what on some general idea of fairness he might be considered entitled to, that cannot be helped' (per Lord Greene MR, Wrottesley and Evershed L JJ, ***In Re Diplock*** [1948] 1 Ch 465 at 532). Where appropriate, an order will be

made which only partly nullifies a transaction liable to be set aside in equity pursuant to the principles of unconscionable dealing (see ***Bank of Victoria Ltd v Mueller***, supra, at 659 and the cases there cited). Where an order is made setting aside the whole of a transaction on the ground of unconscionable dealing, the order will, in an appropriate case, be made conditional upon the party obtaining relief doing equity.

While the matter was not raised in the bank's notice of appeal, I was, at one stage, inclined to think that the appropriate relief in the present case would be an order setting aside the guarantee/mortgage only to the extent to which it imposed upon Mr and Mrs Amadio a potential liability in excess of $50,000 or that any order wholly setting aside the guarantee/mortgage should be conditional upon Mr and Mrs Amadio paying to the bank the amount of $50,000 which represents the amount of the potential liability which they intended to undertake. Ultimately, I have come to the view that Mr and Mrs Amadio are entitled to have the whole transaction set aside unconditionally. ... In the present case, however, it was, as has been said, evident to the bank that Mr and Mrs Amadio stood in need of advice as to the nature and effect of the transaction into which they were entering. It is apparent that any such advice would have included the importance to a guarantor of ascertaining from the bank the state of the customer's account which was being guaranteed and any unusual features of the account. If such information had been obtained by Mr and Mrs Amadio, they would not, on the evidence and in the light of the learned trial judge's finding, have entered into the guarantee/mortgage at all. The whole transaction should properly be seen as flowing from the special disability which was evident to the bank and as being unfair, unjust and unreasonable. (Emphasis added)

389 In ***Bridgewater v Leahy***, Gaudron, Gummow & Kirby JJ said [124] [127]:

In some cases, the equity that arises by reason of an unconscientious or unconscionable dealing of the nature with which this appeal is concerned may be satisfied only by setting aside that dealing in its entirety. The dealing may be embodied in the one instrument which contains several provisions or in several instruments. In other circumstances, of which this case is an example, the equity may be satisfied by orders setting aside some but not all of these instruments or some but not all of the provisions thereof.

... In the circumstances of this case and consistently with the framing of relief which, in Lord Blackburn's phrase, is 'practically just', the appellants, as representatives of Bill's estate, properly may elect that only the Deed itself be set aside. However, in seeking equity, the estate must be prepared to do equity. In particular, weight has to be given to the testator's wish significantly to benefit his nephew which was expressed in cl 4 of the will.

In the course of argument on this appeal, there was discussion as to the appropriate form of equitable relief if the appeal was successful. In accordance with the authority referred to above, counsel for the respondents stressed the requirements of 'practical justice'. Reference was made to ***Vadasz v Pioneer Concrete (SA) Pty Ltd*** to emphasise the importance of the consideration that in the particular circumstances of a case the equity may be satisfied by orders having the effect of setting aside no more than so much of a disposition as prevents the moving party 'obtaining an unwarranted benefit at the expense of the other'. ...

Once a court has determined upon the existence of a necessary equity to attract relief, the framing, or, as it is

> often expressed, the moulding, of relief may produce a final result not exactly representing what either side would have wished. However, that is a consequence of the balancing of competing interests to which, in the particular circumstances, weight is to be given.

The reference to Lord Blackburn's phrase 'practically just' in the above passage is a reference to ***Erlanger v New Sombrero Phosphate Co*** (1878) 3 App Cas 1218, 1278 1279:

> [T]he practice has always been for a Court of Equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract.

390 In ***Vadasz v Pioneer Concrete (SA) Pty Ltd*** [1995] HCA 14; (1995) 184 CLR 102, 115 the court said:

> The concern of equity, in moulding relief between the parties is to prevent, nullify, or provide compensation for, wrongful injury. If it appears that the other party would not have entered into the contract at all if the true position were known, the contract may be set aside in its entirety as in ***Amadio***.

391 In seeking rescission, a plaintiff must do equity. This requires that a plaintiff should not 'be left with the fruits of the transaction of which [it] complain[s]': ***Maguire v Makaronis*** (475). In the case of a secured loan, the party seeking rescission should do equity by repaying the money it received, secured by the mortgage, plus interest: ***Maguire v Makaronis*** (474 477).

392 Section 87(2) of the *Trade Practices Act* creates new remedies which have an affinity to the equitable remedies of rescission and rectification. The principles regulating the administration of equitable remedies afford guidance for, but do not dictate, the exercise of the statutory discretion conferred by s 87. Orders under the provisions of s 87(2) which vary the contracts or declare them void ab initio or as and from some other time, may be granted on terms. See ***Marks v GIO Australia Holdings Ltd*** [1998] HCA 69; (1998) 196 CLR 494, [116]. No narrow construction of the Act should be adopted: ***Marks v GIO Australia*** [56].

Discussion

393 In my view, at a minimum, equity would not allow the bank to enforce the loan agreement or the mortgage against the mother, subject to her doing equity. In relation to doing equity, the bank contends that, in reliance on ***Maguire v Makaronis***, if the loan and mortgage transactions are to be set aside, the mother should pay to the bank the whole of the principal outstanding under the loan together with interest. The bank also contends that the mother is estopped by deed, by virtue of the terms of the mortgage, from denying that she is a borrower of the whole amount.

394 ***Maguire v Makaronis*** was a case where the borrowers were the true beneficiaries of the whole lending. Here, the mother was in truth not the beneficiary of the whole lending of $192,000. Also, the alleged estoppel at law cannot avail the bank against the mother if the instrument is not binding on her in equity.

395 The practical justice of the situation requires, in my view, a proper recognition of the financial benefit which the mother received under the transaction. This would not exceed the sum of approximately $43,000 which was used to discharge the NAB Claremont mortgage, together with interest. In ***Elkofairi v Permanent Trust***, I note that the court regarded the benefit to the wife of the impugned transaction as being not the whole of the previous mortgage debt which was discharged, but only 50% of that sum, reflecting, in effect, her half interest as joint mortgagor with respect to that debt: ***Elkofairi v Permanent Trust*** [85], [111]. In that case, however, there was no suggestion of a resulting trust in favour of the wife as the party asserting the claim for relief, which might arguably be a relevant point of distinction.

396 Other and related questions arise as to the scope of relief including whether there should be an injunction or rescission, and if rescission, whether there should be rescission of the mortgage confined to the mother's interest as registered joint tenant, or whether there should also be rescission of the whole, involving also the son's interest as registered joint tenant of the Claremont property.

397 The latter question assumes particular significance given that, as I have found, the son had purely a legal interest as a joint tenant in the Claremont property, without beneficial ownership.

398 If the transaction were set aside only with respect to the mother's interest, the bank would still have an enforceable security as against the son. The law recognises a mortgage by one joint tenant of his interest in the property: ***Guthrie v Australia and New Zealand Banking Group Ltd*** (1991) 23 NSWLR 672, 679. Accordingly the bank could enforce its mortgage against the son, if it were not set aside in full. The bank in that event would be entitled to its remedies in respect of the son's interest in the property, which might affect the mother's enjoyment of her full beneficial interest in the property. As regards a mortgage by one joint tenant, see Tyler E, Young P & Croft C: *Fisher & Lightwood's: Law of Mortgage* (2nd Australian ed 2005), [11.4].

399 Cases in which there has been a consideration of the appropriate relief in circumstances in which one joint tenant establishes a right to set aside a registered mortgage include: ***National Commercial Banking Corporation of Australia Ltd v Hedley*** (1984) 3 BPR 9477, 9482 9483; ***Flourentzou v Commonwealth Bank of Australia*** [1998] ANZ ConvR 188 (McClelland CJ in Eq) and ***Elkofairi v Permanent Trustee***. In the firstmentioned case, the effect of setting aside the registration of the mortgage was considered in relation to equitable priorities if the unregistered instrument continued to operate as an equitable mortgage. If relevant, any analysis of competing equities here would involve consideration of the mother's equitable interest under the resulting trust. See generally Meagher, Heydon & Leeming, *Equity: Doctrines & Remedies* [8030] [8,065].

400 Questions would also arise as to whether giving recognition to the mother's equitable interest under the resulting trust, as against the bank, would serve to elevate impermissibly her unregistered interest over the bank's registered mortgage, or whether it would be properly regarded as a consequence of the court's readiness 'to pull a transaction to pieces' where rescission is ordered in cases involving moral obliquity: ***Spence v Crawford*** [1939] 3 All ER 271, 288.

401 In circumstances where I have found that the mother would not have entered into the transaction in the first place had she been properly advised, and thereby the bank would not have obtained the benefit of the transaction, it would, at least arguably, be inappropriate if her tenure and interest could be adversely affected by the bank exercising rights under the transaction in relation to the interest in the property held by the son, on trust for the mother.

402 As against the son, there is no reason why the loan agreement, if it subsists, should be set aside so as to allow him to avoid liability. However, if the son has been discharged from bankruptcy, then there is an issue which arises concerning whether the debt he incurred under the loan agreement has been discharged by reason of his discharge from bankruptcy except to the extent that the debt is secured and the security is being enforced: s 153(1) and (3) of the *Bankruptcy Act 1966* (Cth). That matter may also arguably be relevant in the exercise of discretion and moulding relief.

403 The case appears to have been conducted on the implicit assumption that if the mother succeeded in her counterclaim, the mortgage and loan transactions would be set aside entirely. There was no debate on the issue of any differential treatment between the mother and the son and any consequential effect on the mother in the context of her claim for relief against the bank.

404 The above considerations and cases were not the subject of any, or at least any full or proper debate, at trial. No debate was directed to the 'smorgasbord' of remedies available under s 87(2) of the *Trade Practices Act*: ***Marks v GIO Australia*** [137].

405 Further submissions on final relief will be required.

Conclusion

406 In light of the foregoing, I would make the following order at this stage:

A declaration that:

(a) the loan agreement between the plaintiff and defendants executed by the defendants on 20 December 2003, and

(b) the mortgage number I822249, registered on 17 March 2004 over the property known as Lot 2, Strata Plan 20282 being the whole of the land in Certificate of Title Volume 1885 Folio 9 (the property) executed by the defendants in favour of the plaintiff,

were obtained from the secondnamed defendant by the plaintiff by unconscionable dealing and conduct and/or in contravention of s 51AC of the *Trade Practices Act*.

407 I will give the parties an opportunity to consider and make submissions on what final consequential orders should be made in light of these reasons.