Court of Appeal
Supreme Court
New South Wales

Medium Neutral Citation:	**Provident Capital Ltd v Papa [2013] NSWCA 36**
Hearing dates:	29 and 30 November 2012
Decision date:	28 February 2013
Before:	Allsop P at [1] Macfarlan JA at [9] Sackville AJA at [119]
Decision:	(1) Appeal of Provident Capital allowed. (2) Set aside orders 1 and 4 and declarations 2 and 3 made at first instance on 28 October 2011. (3) Judgment for Provident Capital for possession of the land comprised in Certificate of Title Folio Identifier 1/444075 being land at Leichhardt in the State of New South Wales. (4) Dismiss Mrs Papa's cross-claim against Provident Capital. (5) Order Mrs Papa to pay Provident Capital's costs of its proceedings against her at first instance and of Mrs Papa's appeal. (6) Appeal of Mrs Papa against Mr Caramanlis allowed. (7) Set aside orders 5 and 6 made at first instance on 28 October 2011. (8) Judgment in favour of Mrs Papa against Mr Caramanlis for damages in an amount to be determined. (9) If Mrs Papa and Mr Caramanlis are able to agree as to the amount of the damages to be awarded against Mr Caramanlis, direct those

parties to file a form of consent order with the Court within seven days of the date of this judgment.

(10) If those parties are unable to so agree, direct that within 14 days of the date of this judgment Mrs Papa lodge written submissions on that topic, that Mr Caramanlis lodge written submissions in response within a further seven days and that Mrs Papa lodge any reply within a further seven days.

(11) Order Mr Caramanlis to pay Mrs Papa's costs at first instance of Provident Capital's claim against her and her claim against Mr Caramanlis.

(12) Mrs Papa and Mr Caramanlis are to have certificates under the *Suitors' Fund Act* 1951, if qualified.

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Catchwords:

TORTS - negligence - professional persons - solicitors - independent legal advice regarding financier's loan and security documents - whether penumbral duty of care beyond retainer - whether failure to advise of reality of financial risks was a breach of duty - whether failure to advise client to seek independent financial advice was a breach of duty - causation - whether breach of duty caused loss - whether client would have sought independent financial advice if advised to do so

CONTRACTS - Contract Review Act s 7 - whether loan agreements unjust - whether loan introducer an agent of the lender -whether breach of lender's credit manual - significance of asset lending - relevance of requirement for borrower to obtain independent legal advice

Legislation Cited:

Australian Securities and Investments Commission Act 2001 (Cth)
Civil Liability Act 2002
Contracts Review Act 1980

Cases Cited:

Chappel v Hart [1998] HCA 55; 195 CLR 232
Citicorp Australia Ltd v O'Brien (1996) 40 NSWLR

	398 Cousins v Cousins [1991] ANZ Conv R 245 David v David [2009] NSWCA 8 Dominic v Riz [2009] NSWCA 216 Elkofairi v Permanent Trustee Co Ltd [2002] NSWCA 413; 11 BPR 20,841 Fast Fix Loans Pty Ltd v Samardzic [2011] NSWCA 260 Keddie v Stacks/Goudkamp Pty Ltd [2012] NSWCA 254 Kowalczuk v Accom Finance [2008] NSWCA 343; 77 NSWLR 205 Perpetual Trustee Co Ltd v Khoshaba [2006] NSWCA 41; 14 BPR 26,639 Polkinghorne v Holland [1934] HCA 28; 51 CLR 143 Tonto Home Loans Australia Pty Ltd v Tavares [2011] NSWCA 389 Waimond Pty Ltd v Byrne (1989) 18 NSWLR 642
Category:	Principal judgment
Parties:	Provident Capital Ltd (Appellant) Gina Giovanna Bortolin Papa (Respondent/Cross-Appellant) George Caramanlis trading as Daniels Lawyers (Cross-Respondent)
Representation:	Counsel: J Stoljar SC/S Docker (Appellant) C Harris SC (Respondent/Cross-Appellant) G Curtin SC (Cross-Respondent) Solicitors: Henry Davis York (Appellant) John Conti Solicitor (Respondent/Cross-Appellant) Colin Biggers & Paisley (Cross-Respondent)
File Number(s):	CA 2008/287567 and 2012/25187
Decision under appeal	9111
Jurisdiction:	
Citation:	Provident Capital Ltd v Bortolin Papa (No 1) [2011] NSWSC 460
Before:	Fullerton J
File Number(s):	2008/287567

HEADNOTE

[This Headnote is not to be read as part of the judgment]

On 5 April 2007, the respondent, Mrs Gina Bortolin Papa ("Mrs Papa"), mortgaged to the appellant, Provident Capital Ltd, the premises in which she lived and conducted a business selling children's and babies' clothes. She gave the mortgage to secure an advance to her by Provident of $700,000, obtained primarily to assist her son, Mr Peter Bortolin, in relation to equipment and working capital for a gymnasium business recently acquired by Mr Bortolin's company, Luxury Enterprises Pty Ltd. A further advance of $125,000 in April 2008 was also applied to the gymnasium business. In respect of both advances, Provident required Mrs Papa to obtain independent legal advice regarding the loan and security documents. She obtained this from Mr George Caramanlis, a solicitor.

Following the failure of the gymnasium business, Provident brought the present proceedings for possession of Mrs Papa's property. Mrs Papa claimed that the loan agreements were unjust contracts within the meaning of s 7 of the Contracts Review Act 1980 and also cross claimed against Mr Caramanlis, alleging that he had breached his professional duties to her.

At first instance, Fullerton J upheld Mrs Papa's Contracts Review Act contention and reduced Mrs Papa's liability to Provident by the amounts that were applied to the gymnasium business. In doing so, her Honour imputed to Provident the knowledge of its loan introducer. Her Honour dismissed Mrs Papa's cross-claim against Mr Caramanlis.

Provident appealed against the finding against it and Mrs Papa cross-appealed against the dismissal of her cross-claim against Mr Caramanlis.

Held: (allowing the cross-appeal) (1) (per Allsop P; Sackville AJA agreeing) If a solicitor's retainer is to give legal advice, depending on the circumstances, that may (as it did here) extend to explaining the practical consequences of the legal obligations arising from the relevant document in the known circumstances ([2]).

(per Macfarlan JA; Allsop P and Sackville AJA agreeing) While it is well established that solicitors are not ordinarily required to advise upon the wisdom of transactions in relation to which they act, a reasonable solicitor in the position of Mr Caramanlis would have formed the view that Mrs Papa's home, and the business which constituted her livelihood that she conducted from it, would be significantly endangered by her entry into the transactions with Provident and in giving her independent legal advice would have recommended that she obtain financial advice, independent of her son, concerning that business. A solicitor's obligation is not simply to explain the

legal effect of documents but to advise his or her client of the practical implications of the client's entry into a transaction the subject of advice ([75], [80]).

(Per Sackville AJA) Mr Caramanlis should also have explained to Mrs Papa her legal entitlements against Luxury Enterprises, for whom the loan was taken out. This reinforces the conclusion that Mr Caramlanis should have specifically directed Mrs Papa's attention to the need to obtain financial advice from a source independent of her son ([122]).

Held: (allowing the appeal) (1) Whilst Provident's loan introducer was not its agent, its knowledge is still relevant in assessing the conduct of Provident in the context of considering whether the loan contracts were unjust ([99]-[100]).

(2) (Per Macfarlan JA) It can be relevant in the determination of whether a contract is unjust under the Contracts Review Act that the financier has shown no interest in the borrower's ability to service the loan. However the significance of that fact must be assessed in the context of all the circumstances surrounding the loan including the financier's knowledge of the borrower's circumstances, the purpose of the loan and whether the borrower has obtained independent legal advice. Public interest does not necessarily require so-called asset lending to be proscribed, or even deterred. In the present case, Provident was not completely unconcerned about Mrs Papa's ability to service the loans and it stipulated that the respondent must obtain independent legal advice. That the legal advice was inadequate was not Provident's fault ([113]-[114]).

(Per Allsop P; Sackville AJA agreeing) It is unnecessary to make any general remarks about asset lending or "low doc loans". It is sufficient in the present circumstances to agree with the evaluation of Macfarlan JA about a lack of unjustness in the present circumstances ([8]).

JUDGMENT

1 **ALLSOP P**: I have had the advantage of reading the reasons of Macfarlan JA to be delivered. I agree with the orders proposed by his Honour and, subject to the following, which except for [8] is by way of elaboration not qualification, with his reasons.

2 The extent of the responsibility of a solicitor in the provision of independent legal advice will depend on the retainer and the circumstances attending the retainer and its execution. It is therefore unwise to be in any way dogmatic in general terms about what needs to be done in fulfilment of the retainer. It is

for that reason that any mechanical approach that limits independent advice to explaining the content of the legal obligations in the document in question may lead, in any given circumstances, to the provision of inadequate advice. If the retainer is to give legal advice, depending on the circumstances, that may (as it did here) extend to explaining the practical consequences of the legal obligations arising from the relevant document in the known circumstances. It may be apparent, as it was here, that the legal **and** practical consequences **to a client** of entering into a transaction may be significant, but are not such as can be assessed without financial or further financial information or advice. In such circumstances, the solicitor may be obliged to counsel in appropriate terms (perhaps strong terms) about the risks in proceeding without further information or advice. Depending upon the circumstances, such as apparent ties of loyalty, whether of blood or love, the apparent risks may have to be brought home with clarity and force. The giving of independent legal advice for a mortgage transaction (whether certified or not) is not some formality. It generally involves proper and adequate legal advice being given in and about executing a document or entering into a contract or a transaction.

3 Here, no step whatsoever was taken to bring home to Mrs Papa the fact that she was effectively risking the loss of her only substantial asset, being her home and place of business, the avoidance of that risk being dependent upon the success of a business of which she knew absolutely nothing, beyond blandishments from her son.

4 Further, here, in the light of the evident fact that Mrs Papa was providing financial accommodation to her son, the solicitor was also entirely ignorant of the practical worth of any rights of contribution and indemnity out of the business without further financial information.

5 The extent of proper fulfilment of the duty may be debatable in any given case. *Dominic v Riz* [2009] NSWCA 216 was an example of a solicitor properly advising of the need for independent financial advice, being ignored and the client paying the price. As Kirby P said in *Cousins v Cousins* [1991] ANZ Conv R 245 at p 248:

> "Lawyers are trained, and the law of their profession requires them to be vigilant for their clients' interests. They must sometimes step in front of their client. They must provide advice to them against the follies of plans having a legal character, the full legal ramifications of which the client may not understand."

6 I recognise the risk of simplistic encapsulation; but many clients look to and rely on an advising lawyer, not as the expounder of legal doctrine, but as the confidential adviser about the law, and its practical intersection with life. That is why they seek advice. That is why lenders require the interposition of the trained solicitor to give independent advice and, sometimes, to certify same.

7 The broad evaluation of unjustness under the *Contracts Review Act 1980* (NSW) ss 4, 7 and 9 involves the normative evaluation of the totality of relevant circumstances. Inevitably minds may differ as to conclusions about such questions. Also, it is often not fruitful to compare other cases with the particular circumstances at hand, lest one be deflected from an appropriate overall assessment by focus on particular aspects relevant to any such comparison. Central to the normative evaluation is the recognition that there is a need for the protection of some people in some circumstances, who are not able fully to protect their own interests against factors that may cause injustice. That vulnerability may come from one or more of many circumstances, such as lack of education or of intelligence, from gullibility, from the predation of fraud and greed, and also sometimes from loyalty and love. The characterisation of a contract as unjust and the sheeting home to the other contracting party of the consequences of its unjustness may be a difficult evaluative exercise. At its heart, however, is the recognition of the inadequacy of one party to protect her or his interests in the circumstances. Here, there was no predation. There was no behaviour in which Provident sought to take advantage of Mrs Papa. Her son may have sought to do so, but his exchanges with his mother can be seen as blandishments born of his own optimism. Mrs Papa had a solicitor whose advice was inadequate. It would, in my view, be unjust to visit the blandishments of the son and the inadequacy of fulfilment of retainer by the solicitor on the lender. That conclusion involves a consideration of all the matters referred to by Macfarlan JA, including the fact that Mrs Papa was a capable and intelligent woman, who was in no way misled by the lender in entering into the transaction.

8 Finally, I would prefer not to make any general remarks about "asset lending" or "low doc loans". It is sufficient to say that I agree with the evaluation by Macfarlan JA of a lack of unjustness in the present circumstances.

9 **MACFARLAN JA**:

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SUMMARY OF CASE AND CONCLUSIONS

10 On 5 April 2007 Mrs Gina Bortolin Papa (to whom I shall refer as Mrs Papa) mortgaged to the appellant, Provident Capital Ltd, the premises in which she lived and conducted a business selling children's and babies' clothes. She gave the mortgage to secure an advance to her by Provident of $700,000, obtained primarily to assist her son, Mr Peter Bortolin, in relation to equipment and working capital for a gymnasium business recently acquired by Mr Bortolin's company, Luxury Enterprises Pty Ltd. A further advance of

$125,000 in April 2008 was also applied to the gymnasium business. In respect of both advances, Provident required Mrs Papa to obtain independent legal advice regarding the loan and security documents. She obtained this from Mr George Caramanlis, a solicitor.

11 Following the failure of the gymnasium business, Provident brought the present proceedings for possession of Mrs Papa's property. After a seven day hearing in February 2011 Fullerton J, sitting in the Common Law Division of the Court, upheld Mrs Papa's contention that her loan agreements with Provident were unjust contracts within the meaning of s 7 of the *Contracts Review Act* 1980 and reduced Mrs Papa's liability to Provident by the amounts that were applied to the gym business. Her Honour dismissed Mrs Papa's cross-claim against Mr Caramanlis.

12 For reasons that are given below, I have concluded that Provident's appeal should be allowed but that Mrs Papa's appeal against the dismissal of her claim against Mr Caramanlis for breach of his professional duties should also be allowed.

FACTUAL CIRCUMSTANCES

Mrs Papa's background

13 Mrs Papa, a Sicilian immigrant, was aged 61 at the time of Provident's first advance to her. She came to Australia in 1952 and was married in 1966. Her second child, Peter Bortolin, was born in 1972. In 1973 Mrs Papa opened a small business in Five Dock, selling ladies and children's clothing. She gave evidence that she and her husband had financial difficulties in 1975 which required the sale of their investment property and placed their home at risk. The marriage thereafter failed as a result of what Mrs Papa claimed to be her husband's poor management of the family's financial affairs and his failure to provide for his family over many years (Judgment [31]).

14 Mrs Papa subsequently sold the matrimonial home and purchased the property in Leichhardt which is the subject of these proceedings. Since that time she has lived in the property and conducted her business from it, confining it to the sale of children's and babies' clothing. A mortgage given to secure an advance for the property's purchase was discharged in 2001. Mrs Papa remarried in 1990 but her husband died in 2004. In 1990 Mrs Papa was appointed a Justice of the Peace by the Attorney General's Department.

15 In 2005 Mrs Papa granted a mortgage over her Leichhardt property to secure an advance obtained by her from Sandhurst Trustees Ltd (referred to by the primary judge as Bendigo Bank) to assist her son to purchase a property in Port Douglas, Queensland. The property was purchased in the name of Luxury

Enterprises Pty Ltd.

The gymnasium business

16 In 2005, Luxury Enterprises became a 20 per cent shareholder in Pyrmont Health Club Pty Ltd which conducted the Pyrmont Health and Fitness Club. Mr Bortolin gave evidence that whilst he was not a director of that company, he "regularly took part in discussions with the directors and other shareholders ... concerning the management of that company and ... was familiar with its day-to-day activities and financial circumstances" (Affidavit dated 19 February 2010 at [8]). He said that he became aware in or about 2005/2006 that the company's two directors had borrowed money from people they described as "loan sharks" who were threatening to harm them if they failed to repay. To assist the directors, Mr Bortolin, through Luxury Enterprises, borrowed $50,000 from Hock-A-Car Pty Ltd, secured by caveats on the title to properties at Camperdown and Gosford owned by Luxury Enterprises. The loan was made in February 2006 for a period of three months, at an extraordinarily high interest rate of eight per cent per calendar month, with performance of Luxury Enterprises' obligations being guaranteed by Mr Bortolin. Payments totalling $47,000 were made to Hock-A-Car in the following months but the balance of principal and interest remained outstanding in early 2006 (ibid at [33] - [36]).

17 Mr Bortolin gave evidence that from about the end of 2005 the financial circumstances of the gymnasium business steadily worsened, with revenue falling far short of what was required to meet outgoings (ibid, [13]). An administrator of the company was appointed on 5 June 2006. In November 2006 Luxury Enterprises entered into an agreement with the administrator to purchase the gymnasium business for $140,000. This sum was apparently the consideration for the business' goodwill and member database as the gymnasium equipment and premises were both rented. Mr Bortolin needed further money to purchase new equipment for the gym, to provide working capital and to pay a security bond to the landlord of the premises.

18 With a view to obtaining those funds, Mr Bortolin spoke to Mr Charlie Hill of Community Mortgage Corporation Pty Ltd ("CMC"), a mortgage broker. Mr Bortolin said that he gave Mr Hill "details of my financial situation, the reasons why I needed the money and the background to the gymnasium business" (ibid, [55]). Mr Hill's response was to the effect that the "only way you can get this money is to use your mother's property. You can't support an application for that amount of money using your financials or using the gym" (ibid, [57]). Mr Hill's son, Mr George Hilellis, who also worked for CMC, submitted an application for finance to the National Australia Bank on Mr Bortolin's behalf. The application was conditionally approved but subsequently rejected due to a

difficulty with the zoning of the Leichhardt property. Mr Hill then told Mr Bortolin that the "only lender that will do this loan is Provident Capital" (ibid, [60]).

19 At about this time Mr Bortolin approached his mother, saying:

> "Mum, I need some money for the gym and I want to use the deeds to your property to raise some money. It will be alright and it won't be long before it's all cleared" (ibid, [61]).

20 He said:

> "I did not at any stage tell my mother of the financial difficulties of the Pyrmont Health Club, the appointment of administrators to that company and the defaults that had occurred in that company's obligations to its lessor and other parties. I did not inform my mother of my guarantee obligations under the Hock-A-Car loan which at that stage was still ongoing or the defaults that had occurred in the obligations to [Hock-A-Car]. I did not provide my mother with any financial information concerning the gymnasium either during its conduct by the Pyrmont Health Club or the intended operation of the club by Luxury Enterprises" (ibid, [62]).

21 Mrs Papa's evidence was to similar effect. She said that as far as she was aware the gym was going well as her son never mentioned the gym's financial difficulties, or that "a receiver had been appointed" or anything about the Hock-A-Car loan (Affidavit dated 19 February 2010, at [84] - [86]). When Mrs Papa asked her son whether he could repay the loan from Provident, he replied in the affirmative and said that "[t]he gym is going well" (ibid, [88]).

The application for finance

22 On 1 February 2007 CMC sent Provident an "Application for Light and Easy Residential Mortgage Finance" signed by Mrs Papa and seeking a loan of $700,000 for "Refinance $180,000 + 520,000 for Business use", to be secured over Mrs Papa's Leichhardt property. The application listed Mrs Papa's assets as the Leichhardt property and a car, and her sole liability as the debt to Sandhurst Trustees. It made no reference to her income but contained the following acknowledgment:

> "I am/we are of the opinion that I am/we are able to repay the loan in accordance with its terms and can do so without hardship".

23 Accompanying the application was a loan statement from Sandhurst Trustees for the previous six months, showing an absence of default in respect of the loan by that company, and a copy of the conditional approval letter from the National Australia Bank. CMC's covering facsimile referred to the $520,000 component of the loan as "to be used to further invest in their business". In handwriting on the facsimile, probably placed there by an employee of Provident after receipt of further information from CMC, the $520,000 was divided between $320,000 for the purchase of gym equipment, $120,000 for

payment of a six months' rental bond and $80,000 for working capital.

24 On 6 February 2007, Mrs Papa faxed CMC a signed "Self-Certified Income Declaration" confirming her ability to repay the loan in accordance with its terms and "without hardship". On the same day CMC, for reasons that are not apparent, submitted to Provident a further application for the same advance. The application purported to be signed by Mrs Papa but the primary judge held that this was not in fact the case (Judgment [62]). Unlike the first application, this application was not on a form for a "Low Doc Loan". The form of application said that copies of the applicant's tax returns for the previous two years were required but these were not in fact supplied.

25 Provident thereafter obtained a valuation of the Leichhardt property (at a figure of $1.1 M) and obtained clear responses on credit and business name checks on Mrs Papa and her clothing business. On 16 February 2007 Provident sent Mrs Papa a Letter of Offer for an advance of $700,000 with an interest rate (assuming no default) of 10.99 per cent per annum. The purpose of the advance was described as:

> "Refinance mortgage with Sandhurst Trustees and provide working capital to assist with purchase of equipment for borrowers [sic] gymnasium business" (Letter of Offer, p 2).

The letter stated that the transaction had been referred to Provident by CMC as "your broker" who "is your agent" (Letter of Offer, p 3). It also stated that the borrower would need to complete "an appropriate declaration about having received legal advice" (Letter of Offer, p 2).

26 On 1 March 2007 Mrs Papa met with Mr Caramanlis and in his presence signed the loan, mortgage and associated documents. These included a declaration that the advance was "to be applied wholly or predominantly for business or investment purposes (or for both purposes)" (Borrower's Declaration as to Purpose), a declaration by Mrs Papa that she had "received independent legal advice regarding the loan and security documents", a Direct Debit Authority signed by Mrs Papa authorising Provident to debit funds from the bank account of Pyrmont Health & Fitness Club and a Loan Agreement (the "First Loan Agreement").

27 On 8 March 2007, Mr Caramanlis sent a letter to Mrs Papa setting out details of the loan and security documents and stating:

> "**1.16 Purpose of Loan**
>
> There are two reasons for you taking out this loan. The first is to refinance the mortgage you have with Sandhurst Trustees. The second reason is to provide money to your son Peter Bortolin to assist him with the purchase of equipment for his gymnasium business.
>
> You confirm our instructions that the loan is to be used predominantly for business or investment purposes.

...

> We confirm your instructions that you understand the loan and that you are taking out the refinance to help your son Peter Bortolin with the money to use in his gymnasium business in Pyrmont. We note that all legal documentation was executed by you as a result of your own free will and that no pressure was placed upon you to execute the loan documents".

28 On 5 April 2007 Provident executed the loan and security documents and made the advance to Mrs Papa. The funds were applied in discharging the Sandhurst Trustees' debt and to the gymnasium business.

CMC's Introducer Agreement

29 CMC acted in connection with Provident's advance to Mrs Papa pursuant to the terms of an Introducer Agreement made with Provident on 3 August 2006.

30 That Agreement stated that CMC "agrees to:

- seek out and introduce new prospective commercial clients for Provident;

- provide information about those clients to Provident to enable Provident to assess a commercial loan arrangement with those clients;

- provide a point of contact between Provident and those clients to facilitate communications, execution of documents, the provision of information and other client liaison services associated with the ongoing management of any loan arrangement between Provident and the client, as required by Provident from time to time ... "

31 The agreement also provided:

> "2. Relationship: The Introducer is an independent contractor. The Introducer is not an employee, agent or partner of Provident. The Introducer has no authority to represent that it has any relationship or connection with Provident or to bind Provident or to make any representations on behalf of Provident, in any manner whatsoever, without the prior express written approval of Provident. The arrangements between the Introducer and Provident under this agreement are non-exclusive and each party is free to enter into similar arrangements with other people without notice to or the approval of the other party.
>
> 3. Commission: Provident will pay the Introducer commission for each loan agreed between Provident and a client introduced by the Introducer under this agreement. The commission will be calculated as set out in the commission schedule, as varied by Provident from time to time".

32 It further provided that CMC was to indemnify Provident in respect of any claims against Provident arising out of CMC's conduct and that CMC was to maintain professional indemnity insurance.

Mr Caramanlis' knowledge and role

33 From 2001, Mr Caramanlis practised as a solicitor under the firm name "Daniels Lawyers". In early 2006 he acted for Hock-A-Car Pty Ltd in relation to the loan

of $50,000 to Luxury Enterprises referred to in [9] above. In January 2007 Mr Hilellis of CMC asked Mr Caramanlis' paralegal, Ms Stella Voulgaris, whether Mr Caramanlis could provide independent legal advice to one of his clients, Mrs Papa. Ms Voulgaris gave evidence that she was introduced to Mrs Papa and Mr Bortolin at CMC's premises and was told by Mr Hilellis, in their presence, that "Mrs Papa is refinancing her property to invest in a gym at Pyrmont with her son" (Affidavit of Stella Voulgaris, 7 June 2010, at [15]). Mr Bortolin subsequently told her that he was "being chased by the landlord of the gym for payment of the bond" and, at his request, the firm wrote to the landlord seeking an extension of time for payment. Shortly thereafter, Mr Bortolin informed Ms Voulgaris that the bond had been paid. Mrs Papa then met with Mr Caramanlis on 1 March 2007 for the purpose of obtaining independent legal advice about, and signing, the loan and security documents issued by Provident.

34 Mr Caramanlis gave evidence that the following exchange occurred on that occasion:

> "I said: 'What is the purpose of the loan.'
>
> Ms Papa: 'To refinance a present loan and the rest of the loan is to invest in my son's gym. He is going to buy some flashy new equipment from the States.'
>
> I said: 'What is your involvement in the business?'
>
> Ms Papa: 'Presently I don't have any involvement but I will be taking an interest in the business. My accountant will be dealing with the business and I have already discussed the loan with my accountant.'
>
> I said: 'I still need to discuss the terms of the loan with you.'
>
> Ms Papa: 'I know that if I don't pay the loan I will lose the property.'
>
> I said: 'That's right, that's how all loans work when you use property as security. If you don't make the interest repayments eventually the bank will sell your property to get its money back. The bank would not hesitate to do so especially in your case where you speak fluent English, have taken out loans before and you have been running a commercial business for years.'
>
> Ms Papa: 'I understand'" (Affidavit of George Caramanlis, 7 June 2010, p 5).

35 Mr Caramanlis said that he proceeded to explain the terms of the loan and mortgage documents to Mrs Papa but made no enquiries as to the identity or financial circumstances of the owner of the gymnasium business as "that was not part of my retainer" (ibid, p 7).

36 Ms Voulgaris gave evidence that she overheard the following conversation between Mr Caramanlis and Mrs Papa on that occasion:

> "Ms Papa: 'I'm refinancing my property to invest in the gym with my son. It will make all of the repayments. The money is going to be used to purchase some state of the art training equipment. It's going to make us a lot of money.'
>
> Mr Caramanlis: 'So you do you have an interest in the gym?'

> Ms Papa: 'No, not at the moment, but I will in the future'" (Affidavit of Stella Voulgaris, 7 June 2010, at [35]).

37 In her affidavit of 19 February 2010, Mrs Papa said that she had no interest in the gym business and was never told that she would receive such an interest. She also said, consistently with Mr Caramanlis' evidence, that Mr Caramanlis never mentioned the Hock-A-Car loan, the financial circumstances of the gym business or the fact that the interest rates charged on the loan were well above similar commercial rates. Nor did he enquire about Mrs Papa's financial circumstances and her ability able to service the loan if her son or his company could not do so (Affidavit 19 February 2010, at [83] - [84]).

The Second Advance

38 On 8 August 2007 Mrs Papa sent a letter to Provident authorising her son to discuss account matters with it on her behalf.

39 On 5 November 2007 the direct debit by Provident of an interest charge failed but the missed instalment was nevertheless received by Provident on 26 November 2007. An attempt to debit an interest charge on 5 March 2008 also failed but the position was rectified on 12 March 2008.

40 On 30 November 2007 Provident informed Mr Bortolin, presumably following a request from him, of the fee that it would charge for early repayment of the advance to Mrs Papa. At about that time Mr Bortolin instructed Mr Caramanlis to act for him on the sale of Luxury Enterprises' East Gosford and Camperdown properties and on 17 December 2007, Perpetual Limited ('Perpetual'), the mortgagee of the East Gosford and Camperdown properties, issued a default notice to Luxury Enterprises regarding defaults in monthly repayments due from September to December 2007.

41 In late January 2008 Mr Bortolin approached CMC about a further borrowing but was told to contact Provident directly. By email of 23 January 2008, Provident informed Mr Bortolin that it would be prepared to advance a further $125,000 to Mrs Papa, subject to a re-valuation of the Leichhardt property and Mrs Papa's written confirmation that she sought the further advance.

42 Mr Bortolin gave evidence of a discussion with his mother at about this time:

> "I again approached my mother and said to her words to the effect: *'Mum, I need some more money for the gym'*. She said words to the effect: *'Why have I got to keep signing these documents?'* I said: *'Don't worry Mum, it will be fine'*" (Affidavit of Peter Bortolin, 19 February 2010, [98]).

43 Mrs Papa gave the following evidence:

> "From time to time after Peter had told me he had invested in the Gym I would in conversation say to him *'How are things going at the Gym'* or words to that effect. He would always reply with word[s] to the effect *'It's going well. It's sweet'*. I spoke to him in similar terms at about the time of the first advance. Before the first advance I said to him *'Are you sure you can pay this loan'* and he said to me *'Yes. The gym is going well'* or words to that effect.
>
> Some time later Peter came to me and said ' *Mum I need to use more money for the gym. I need more money so I need to use the deeds again'*.
>
> He did not at this time tell me how much he needed. I didn't ask questions as I thought he knew what he was doing" (Affidavit of Ms Papa, 19 February 2010, [88] - [90]).

44 On 5 February 2008 Provident sent Mrs Papa a Letter of Offer relating to the additional advance of $125,000, the purpose simply being described as "Increase to existing loan facility". Mrs Papa signed a copy of the letter to indicate her acceptance of the offer. The offer was expressed to be subject to Mrs Papa signing a "self-certified income declaration" and "an appropriate declaration about having received legal advice".

45 On 18 February 2008 Daniels Lawyers received a letter addressed to Hock-A-Car Pty Limited from Perpetual's solicitors referring to Perpetual's service in December 2007 of a default notice on Luxury Enterprises (see [40] above). Hock-A-Car, for whom Daniels Lawyers had acted in relation to the $50,000 loan referred to in [16] above, lodged caveats in relation to the Gosford and Camperdown properties.

46 On 3 March 2008 Mr Caramanlis received a letter from Perpetual's solicitors indicating that it had commenced proceedings for possession of the Gosford and Camperdown properties.

47 On 6 March 2008 Mr Caramanlis met with Mrs Papa for her to sign the loan and security documents, including the declarations concerning income and legal advice and the Second Loan Agreement. Mr Caramanlis gave evidence that Mrs Papa told him that the further advance was to "go towards the gym" and that she now had an interest in the business (Affidavit of George Caramanlis, 7 June 2010, p 10). He said that she signed the documents after he indicated that they were similar to those signed on 1 March 2007. On the same date, Mr Caramanlis sent Mrs Papa a letter confirming that "the advice given to you previously both in conference and by letter dated 8 March 2007 regarding the original loan of $700,000 still remains valid".

48 On 4 April 2008 Mr Caramanlis sent a letter to Perpetual's solicitors seeking confirmation that Perpetual would not apply for default judgment in its possession proceedings without giving Luxury Enterprises seven days' notice.

49 Provident made the further advance to Mrs Papa on 5 April 2008.

50 On 27 August 2008 Provident notified Mrs Papa that she had defaulted on the loan of $700,000 dated 5 April 2007 and on 3 October 2008 Provident

commenced the present proceedings for possession.

THE CONTRACTS REVIEW ACT

51 Section 7 of the *Contracts Review Act* 1980 relevantly provides as follows:

> "**7 Principal relief**
>
> (1) Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, do any one or more of the following:
>
> (a) it may decide to refuse to enforce any or all of the provisions of the contract,
>
> (b) it may make an order declaring the contract void, in whole or in part,
>
> (c) it may make an order varying, in whole or in part, any provision of the contract".

52 Section 4(1) defines "unjust" to include "unconscionable, harsh or oppressive" and s 9 is relevantly in the following terms:

> "**9 Matters to be considered by Court**
>
> (1) In determining whether a contract or a provision of a contract is unjust in the circumstances relating to the contract at the time it was made, the Court shall have regard to the public interest and to all the circumstances of the case, including such consequences or results as those arising in the event of:
>
> (a) compliance with any or all of the provisions of the contract, or
>
> (b) non-compliance with, or contravention of, any or all of the provisions of the contract.
>
> (2) Without in any way affecting the generality of subsection (1), the matters to which the Court shall have regard shall, to the extent that they are relevant to the circumstances, include the following:
>
> (a) whether or not there was any material inequality in bargaining power between the parties to the contract,
>
> ...
>
> (d) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the contract,
>
> (e) whether or not:
>
> (i) any party to the contract (other than a corporation) was not reasonably able to protect his or her interests, or
>
> (ii) any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he or she represented,
>
> because of his or her age or the state of his or her physical or mental capacity,
>
> (f) the relative economic circumstances, educational background and literacy of:
>
> (i) the parties to the contract (other than a corporation), and
>
> (ii) any person who represented any of the parties to the contract,
>
> ...
>
> (h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act,

(i) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect,

(j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act:

(i) by any other party to the contract,

(ii) by any person acting or appearing or purporting to act for or on behalf of any other party to the contract, or

(iii) by any person to the knowledge (at the time the contract was made) of any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract,

...

(l) the commercial or other setting, purpose and effect of the contract."

THE JUDGMENT AT FIRST INSTANCE

The gymnasium business

53 The primary judge made the following observations concerning the financial position of the gymnasium business and the extent to which Mrs Papa, Mr Hilellis and Mr Caramanlis knew of it:

"24 It was not in dispute that from late 2006 both Peter Bortolin and Luxury Enterprises were in extremely straightened financial circumstances which progressively worsened up to and including September 2008 when Provident commenced recovery proceedings.

...

42 Peter Bortolin said that his mother did not ask whether he had the capacity to repay the loans to Provident. He said that he always reassured his mother of the financial prosperity of his business even when this was untrue. He said that he did not inform his mother of the appointment of administrators to the gymnasium business in 2006 or of the defaults in rental payments due to the lessor. Neither did he inform her of his ongoing obligations as guarantor in respect of a loan for $50,000 attracting monthly interest of 8% entered into early in 2006 in order to discharge the personal debts of the directors of the company that operated the gymnasium business at that time and to provide some injection of capital to the business before the administrators were appointed. This was referred to in the proceedings as the Hock-A-Car loan. It was common ground that Mr Caramanlis acted for the lender in that transaction, that he met Peter Bortolin in that connection and that he was aware of some aspects of the financial affairs of the gymnasium business at that time, in particular that the directors were being pressured to repay their debts by unscrupulous lenders.

...

> 64 I am left in no doubt that Mr Hilellis was well aware that the applications for finance he submitted to Provident were for Peter Bortolin's benefit and of no commercial advantage to his mother. In the absence of any evidence to the contrary, I also accept Peter Bortolin's evidence that Mr Hilellis was well aware that his mother was borrowing a very significant sum of money secured against her home unaware of his (and Luxury Enterprises') parlous financial circumstances, the limited prospects of the gymnasium business generating an income sufficient to meet the monthly interest repayments and to discharge the capital debt after five years and the associated risk that there would be default under the loan agreements. I am further satisfied that his son, Mr Hill (who the evidence revealed is also associated with CMC), advised Peter Bortolin that Provident should be approached as a lender of last resort and, by inference, that information bearing upon the gymnasium business should be kept from Provident. No doubt this was because CMC was aware that were Provident to have actual knowledge of the true position it would not have advanced the loan to Mrs Bortolin Papa. The question that arises is whether CMC's knowledge of Mrs Bortolin Papa's financial situation, and that the real purpose of the loan was to on-lend to her son, is to be imputed to Provident as principal according to the law of agency. I will return to consider that question later in this judgment."

Provident's lending procedures

54 The primary judge referred to provisions of Provident's Credit Manual current at the date of the April 2007 advance as follows:

> "74 An integral part of the administrative framework by which loans are approved is the production of a document known as a 'Loan Summary'. The Credit Manual provides that this document is to be prepared for submission to the managing director for credit approval in the following way:
>
> > Attached to the Loan Summary will be original information received from or on behalf of the borrower such as financial statements, cash flows, budgets, valuation reports or any other information which may give insight into the credit decision. All information submitted is to be verified by the Loans Manager prior to the Loan Summary being submitted to the MD for approval. This includes verifying income, property ownership, completing ASIC searches, obtaining bank statements and the like. Any queries or requests for further information or clarifications are to be directed by the Loans Manager to the Introducer if the Borrower did not approach us directly. (emphasis added)."

55 Her Honour concluded that no Loan Summary of the type referred to in the Credit Manual was created for the purposes of the advances to Mrs Papa, that Provident's only evidence of Mrs Papa's capacity to service the loans comprised the "Self-Certified Income Declarations" which she signed and that no inquiries were made of Mrs Papa, or anyone else, to verify her income or capacity to meet her loan obligations (Judgment [75]). The primary judge then said:

"77 Mr O'Sullivan [Provident's Managing Director] was cross-examined at length as to how Provident could have been satisfied of Mrs Bortolin Papa's capacity to service the loan in these circumstances. He emphasised that the particular lending product under which finance was advanced to Mrs Bortolin Papa in April 2007, styled as a 'Light and Easy Residential Loan', [was] one of a number of products offered by Provident in 2007 and 2008 known generically as 'Low Doc Loans'. Low Doc Loans are identified in the Credit Manual as a particular lending product where credit is provided to borrowers who cannot provide evidence of loan serviceability, and where the loans are offered at what is described as 'healthy interest rates' to ensure against Provident taking any undue risk with investor funds.

78 The product guide that accompanies the 'Light and Easy Residential Loans' cites the key features as follows:

- Self-certification (noted to be the minimum a borrower is required to complete to address the issue of serviceability)
- loan to value ratios up 85%
- loans up to $5 million
- loan terms up to five years
- fixed rate/interest only loans.
- ...

80 Despite Mr O'Sullivan's evidence, I am of the view that there was no adequate basis upon which Provident could have had any confidence that Mrs Bortolin Papa had any capacity to service either the original advance or the further advance. The briefest of telephone calls to her accountant would have confirmed that to be the case. In considering whether I should regard Provident's business as that of an asset lender I regard Provident's failure to make any adequate inquiries of her capacity to service the loan as critical.

...

96 Despite Mr O'Sullivan's evidence that he complied strictly with Provident's Credit Manual procedures before approving the loans to Mrs Bortolin Papa in April 2007 and April 2008, where the only evidence of serviceability was the provision of a Self-Certified Income Declaration, his approach to and the granting of credit approval constituted a marked departure from a number of provisions in the Credit Manual stipulated by the company to be essential to the loan approval process.

97 The Credit Manual also provides that it is a complete record of the company's credit and lending policy and the procedures for granting credit approval; that any departure from the credit policy provided for in the Credit Manual must be approved by the Board of Directors at a duly convened and constituted meeting and that any changes to the credit policy must be inserted in the Credit Manual. There was no evidence, independent of Mr O'Sullivan, that the Board of Provident (whether on legal advice or otherwise) approved a departure from the serviceability requirements in the Credit Manual when it issued the product guide associated with the Low Doc Loans, or that loans officers were directed that compliance with the Low Doc Products guide displaced or overrode the mandatory requirements in the Credit Manual governing serviceability."

Imputation of CMC's knowledge to Provident

56 The primary judge's conclusions on this topic were as follows:

"113 ... Mrs Bortolin Papa also contends that because of the relationship between CMC and Provident when the question of 'unjustness' under the *Contracts Review Act* is under consideration Provident should be taken to have known that the loan funds were not to be applied for any business or investment purposes of hers but that of her son's. I have already determined that Mr Hilellis knew that Peter Bortolin was the intended recipient of the loan funds for use in his gymnasium business and that Mrs Bortolin Papa had no capacity to service the loan and no interest in doing so. In addition, I have already found that Mr Hilellis approached Provident as a lender of last resort effectively on his behalf. ...

...

121 I am satisfied that in carrying out its obligations under the Introducer Agreement CMC was acting as Provident's agent. In coming to that view I have given considerable weight to the express and primary obligation imposed on CMC under the agreement to provide information about prospective borrowers so as to enable Provident to assess the viability of forging a commercial loan arrangement with borrowers. The possibility of a risk to Provident associated with CMC discharging its obligations under the agreement is expressly provided for in the indemnification clause. While the related obligation imposed on CMC to provide a point of contact to facilitate communication between Provident and a prospective borrower, and to provide for the execution of documents and the provision of information and other client liaison services may inure equally to the benefit of a borrower and to Provident as lender, there is a clear and supervening advantage to Provident in the arrangement and a corresponding disadvantage to a borrower given CMC's obligation to provide information even if adverse to the borrower's interests. In the result I am satisfied that CMC's knowledge of Mrs Bortolin Papa's circumstances as borrower and, in particular, that the sole purpose of the loan was to benefit her son should be attributed to Provident as principal."

Mrs Papa's knowledge and Mr Caramanlis' role

57 The primary judge made the findings set out in the following paragraphs concerning Mrs Papa's knowledge and the advice given to her by Mr Caramanlis:

"172 While I accept that she may not have appreciated that her son was arranging for her to borrow $700,000 for a five year term and at the nominated interest rate of 16.99% (reducing to 10.99% if interest payments were received by the due date) when she signed the loan application in blank on 31 January 2007, or when she signed the Income Declaration a week later, in all the circumstances and after giving appropriate weight to her evidence under cross-examination I find it impossible to accept that she remained unaware of these matters until the loan was in default and proceedings were instituted in September 2008. Despite her protestations to the contrary, I am satisfied that prior to executing the documents in her solicitor's office on 1 March 2007 (even if it was during the conference) she became aware of the extent of the monies she was borrowing and appreciated the extent of her son's obligations to make monthly repayments of $7800 for a five year term. I am also satisfied that because she accepted his assurance that his business could support borrowings of that order she simply gave no thought to the risk [that] she may lose her house were the loan to fall into default.

...

174 In the result, I am satisfied that she gave an untrue account in her evidence of the extent of her knowledge of the detail of the borrowings at the time of signing the loan documents in 2007 and 2008 - no doubt motivated by a desire to advance her cross claim against Provident having come to realise, only in retrospect, how foolish she had been to trust her son".

58 Her Honour expressly rejected Mr Caramanlis' evidence concerning the advice that he claimed that he gave Mrs Papa about the Borrower's Declaration that the loan was for business purposes, and continued:

> "177 His evidence at the hearing concerning the Borrower's Declaration and his understanding of its legal effect was in direct conflict with the his pleaded position filed in the defence to the cross claim. In his evidence he claimed that in both March 2007 and 2008 he was of the belief that if Mrs Bortolin Papa was in fact on-lending the borrowed funds to her son that would have been a loan for a business purpose under [the Consumer Credit (New South Wales) Code] but, since her instructions were that it was for her own investment purposes, the issue did not arise. Incidentally, this was also the position that his counsel urged upon me as the proper construction of s 11 of the Code and which I regard as wrong for the reasons I have set out.
>
> ...
>
> 180 In the absence of any contemporaneous record of what [Mr Caramanlis] claimed was discussed in conference concerning the purpose of the loan, and in the absence of any plausible explanation for there being not just one set of file notes that Mr Caramanlis claims to have prepared and lost, but two sets prepared a year apart, and having regard to the content of the letter of 8 March 2007 where the purpose of the loan was identified in terms at total variance with his evidence, I am not satisfied that he has given a truthful account of his dealings with Mrs Bortolin Papa. Since both Mr Caramanlis and Ms Voulgaris were largely reliant upon their memories in reconstructing what I was invited to regard as detailed oral advice (reproduced by Mr Caramanlis in his evidence in question and answer form and that Ms Voulgaris gave from a casually overheard conversation some three years before she was first asked to recall it) I am also unable to regard their evidence as corroborative or supportive of each other as to the matters discussed in conference such as might give their evidence greater probative weight when contrasted with Mrs Bortolin Papa's and her son's evidence.
>
> 181 In summary, I regard both Mrs Bortolin Papa's evidence and that of her son unacceptable in some respects, equally as I have found Mr Caramanlis' evidence and that of his employee unacceptable in other respects. However, on the limited question of the adequacy of the legal advice she received before entering into the loan agreements for the purpose of relief under the *Contracts Review Act*, I am not persuaded that she was given no advice at all (which is the effect of her evidence and that of her son's) or that she was simply directed by Mr Caramanlis to sign the loan documents without advising her in general terms about the legal character and legal effect of the documents that she was signing. Beyond that and because of the concerns I have about the credibility of each of the witnesses, in particular Mr Caramanlis' account of the course of the conference and the statements he attributed to Mrs Bortolin Papa, I am unable to come to any final view about the precise content of the advice that was given.
>
> 182 To the extent that there is a need to determine whether Mrs Bortolin Papa's cross claim against her solicitor is made out, the fact that I am unable to come to any settled view as to the content of the legal advice she was given leaves exposed the question whether she has discharged the onus of proving a breach of duty to ground the claim against her solicitor for damages."

The Contracts Review Act

59 Her Honour made the following findings on this topic:

"187 When considering the question of unjustness, it is necessary to have regard to the public interest (s 9(1) of the *Contracts Review Act*). No detailed submissions were directed to how considerations of public interest were engaged in the present proceedings. I do however take into account the strong public interest in holding parties to their contracts when they were freely entered into, however ill-advised the transaction might be in retrospect and that the *Contracts Review Act* is not designed to regulate investments or to save individuals from the consequence of poor investment decisions. I also give weight to the public interest in promoting market integrity in the provision of credit accepting that a readiness on the part of courts to dispense with the otherwise binding conditions of loan agreements, and to relieve contracting parties of their obligations under such agreements, undermines the capacity of the market to offer credit thereby compromising economic liberty and the free flow of commerce *Smith v Elders Rural Finance Ltd* (NSWSC, Bryson J, 25 November 1994, at 48). On the other hand, there is also a public interest in ensuring the proper protection of consumers of credit and ensuring that lenders both appreciate and are appropriately vigilant to guard against the risk that commercially [naive] or disadvantaged borrowers do not assume levels of debt they cannot service in reliance upon unscrupulous brokers who are motivated by self interest.

188 [Aside] from the bank statements from Bendigo Bank which revealed a demonstrated capacity for Mrs Bortolin Papa to make monthly interest repayments of approximately $1400-$1500 Provident had no information, and made no inquiries, as to her capacity to make monthly repayments of more than four times that amount. In particular, they made no inquiries at all to ascertain the income generated by the retail business selling children's clothes she operated from her home or from any other source and no inquiries as to the capacity of the gymnasium business to generate income. While I do not mean to suggest that Provident had an obligation to inquire into the viability of the gymnasium business to provide the income to service the loan, it is their failure to make any inquiries at all of the issue of serviceability that is critical. In these circumstances, it is impossible to come to any other conclusion but that Provident was indifferent to Mrs Bortolin Papa's ability to fulfil her obligations under the loan agreements and that its principal concern was whether there was adequate security available in the event of default.

...

190 ... Had Provident spoken to Mrs Bortolin Papa directly, or insisted that further inquiries be made of her accountant to confirm the underlying purpose of the loan application and her capacity to meet the loan repayments, it would have learnt that the borrowing was for a highly speculative business endeavour of her son, the details of which she was utterly unaware and in which she had no interest or involvement of any kind.

...

192 The Chief Justice also observed [in *Perpetual Trustee Company Ltd v Khoshaba* [2006] NSWCA 41] at [119] that the power to grant relief under the *Contracts Review Act* may be engaged in circumstances where the unjustness of a contract is shown to be as a result of factors of which the lender was ignorant. That is of particular significance in this case where despite the attribution of CMC's knowledge of Peter Bortolin's affairs to Provident at the time of contract, and despite the suggestion in Mr Walker's dealings with Peter Bortolin that Provident was aware he was the de facto borrower, it had no direct knowledge that Peter Bortolin had exercised extremely poor business judgment in using his mother's home to finance the acquisition of a struggling gymnasium business at very significant cost. Again, this was because it made no inquiries of a kind as would have revealed the highly speculative nature of the investment as evidenced by the total collapse of that business with substantial accumulated debt within the space of less than two years of the original advance and within months of the further advance.

193 An examination of the s 9(2) considerations reinforces my conclusion as to the unjustness of the loan agreements."

60 In connection with s 9(2)(a), (e) and (f) (see [52] above) the primary judge found that Mrs Papa was "subordinate to her son because of her dependence on him after her second husband died" and that:

> " ... It is clear beyond question that her son's determination to put his own needs above those of his mother, and to apply both subtle emotional pressure and at times overt pressure on a "do not ask me any questions - trust me I am your son" basis to achieve his own selfish ends was the only reason she entered into the loan agreements with Provident" (Judgment [195]).
>
> ...
>
> "In this case, in addition to Mrs Bortolin Papa's foolishness and gullibility, the involvement of Mr Hilellis and the steps he took to ensure the loan was processed in effect without reference to her are factors which support a finding that she was in an unequal bargaining position and not able in the particular circumstances to protect [her] own interests" (Judgment [198]).

61 In relation to s 9(2)(d), the primary judge said that he was not able to come to the view that the contractual interest rate was particularly onerous. In relation to s 9(2)(h) and (i), the primary judge said:

> "201 ... I am satisfied that the extent of [Mrs Papa's] knowledge of her son's need for finance was limited to her unquestioning acceptance that he wanted to improve the prospects of a viable gymnasium business which could generate a net monthly income of at least $7800 to enable the interest repayments to be made while the business developed. Clearly enough she had no appreciation of the actual lack of commerciality in the arrangement since Luxury Enterprises' capacity to pay off the loan was wholly contingent upon a gymnasium business (formerly under administration) being successful enough in the short term to carry the debt and to generally improve its capital worth to ensure a sale or refinance at the expiration of five years.
>
> 202 In addition, while I accept that Mr Caramanlis explained in general terms the nature and effect of the loan agreement and the mortgage, and while I am satisfied she understood the amount of the interest repayments and that Provident could sell her house if the loan was not repaid, because I am persuaded that Mr Caramanlis allowed Peter Bortolin to be present during the course of the conference when the loan documents were executed and advice given about them (such as it was), I consider that on the probabilities the standard of independent legal advice fell short of what was warranted in the circumstances. In particular, Mr Caramanlis failed to ensure that she take pause and reflect upon the extent to which entering into the loan agreements at her son's insistence, and on interest only terms, exposed her to the real risk of losing her home and her only asset. By contrast, Provident was an experienced lender which sought and obtained legal advice and the provision of legal services essential to achieve its commercial objectives. I am satisfied that there was material inequality in bargaining power between Mrs Bortolin Papa and Provident for these reasons".

62 In relation to s 9(2)(j), the primary judge said:

> "203 Although I am not prepared to find that the Mrs Bortolin Papa was subject to undue influence by her son, as that term is understood under the general law, she was certainly exposed to pressure from him at various stages in the precontractual period. The fact that he deliberately kept vital information from her is indicative of the extent of his manipulation of her, a strategy which Mr Hilellis employed on her son's behalf and apparently approved of. On the other hand, it was her trust and dependence on her son which totally overwhelmed her judgment."

Conclusion on Contracts Review Act relief

63 For the reasons summarised above, the primary judge concluded that the loan agreements were unjust at the time they were entered into. Her Honour concluded as follows in relation to the grant of relief:

> "206 While, as I have sought to emphasise, it is true that Provident did not have actual knowledge of Mrs Bortolin Papa's financial circumstances or that the borrowed funds were to be committed to a business venture in which she had no interest and over which she exercised no control, that was not because it was misled by her in some way. It was because it made no inquiry as to why a 61 year old retailer of children's clothing would choose to invest her only asset and her home in a gymnasium. I am satisfied that it made no inquiry because it was not concerned about her ability to meet her obligations under the loan agreement should there be default by the company because it had the Leichhardt property as security.
>
> 207 In the circumstances of this case as between Provident and Mrs Bortolin Papa, it is appropriate that the loss of the monies advanced pursuant to the loan agreement should be borne by Provident and not by Mrs Bortolin Papa, save to the extent of her admitted benefit in the discharge of the loan to Bendigo Bank.
>
> 208 I have concluded that Mrs Bortolin Papa is entitled to relief under the *Contracts Review Act*. The balancing of her position against that of Provident by reference to the criteria set out in s 9 of the Act favours a finding in her favour. When Provident entered into the loan agreements there was already a body of case law which identified the dangers for lenders where monies are advanced without regard to the ability of those who put forward security to meet what are often onerous repayment obligations. The strict serviceability requirements and the importance given to the issue in Provident's own Credit Manual was in this case either ignored or treated by Mr O'Sullivan as a consideration he was at liberty to dispense with."

64 Her Honour then rejected a claim, not in issue on appeal, that Provident's conduct was unconscionable within the meaning of ss 12CA - CC of the *Australian Securities and Investments Commission Act* 2001 (Cth).

The cross-claim against Mr Caramanlis

65 The primary judge concluded as follows in relation to this claim:

> "213 At paragraph [179] above [apparently intended to be a reference to paragraph [181] quoted in [58] above], and for the reasons there set out, I found myself unable to come to any settled view about the adequacy of the legal advice Mrs Bortolin Papa was given in conference with her solicitor in either March 2007 or March 2008. For that reason, and despite the fact that I rejected Mr Caramanlis' evidence concerning the advice he gave in regards to the Borrower's Declaration, largely because I was not persuaded that he was being truthful as to his own understanding of the legal effect of the Declarations at the time they were executed, Mrs Bortolin Papa has not discharged the onus of establishing that such advice as he did provide her fell so far short of the standard of care required of a solicitor retained to act on a mortgage as to constitute a breach of the solicitor's duty of care in this case.

> 214 After considering Peter Bortolin's evidence concerning the extent of his dealings with Mr Caramanlis before advising his mother on the loan agreements (including the circumstances in which he claimed that his mother was introduced as a client) and again despite some misgivings as to whether Mr Caramanlis has been entirely truthful in claiming he knew nothing at all of the financial circumstances of the gymnasium business at any relevant time, I am not persuaded that Mrs Bortolin Papa's claim for damages based on breach in this context has been made out. As I have been at pains to make clear, Peter Bortolin is not only a person who has been prepared to lie to his mother to advance his own interests at the expense of his mother but he is also a person whose credibility generally is in question. While there was every indication in the evidence of a relationship between Mr Caramanlis and Peter Bortolin of solicitor and client which would have imposed obligations on Mr Caramanlis when dealing with Peter Bortolin's mother of the kind of which she complains, the true extent of that relationship was not proved to the extent necessary to constitute a breach of duty.
>
> 215 Even assuming breach, Mrs Bortolin Papa failed to discharge the onus of proving facts, either directly or by inference, upon which a finding of causation could be made in her favour such as to ground a claim in damages. For that reason alone her cross claim against the solicitor would fail."

See also Judgment [202] quoted in [61] above.

Orders

66 The primary judge noted that Mrs Papa accepted that she should not be granted relief in relation to the sum of $180,000, forming part of the first advance, which was applied to discharge the existing mortgage she had granted over the Leichhardt property for her son's purchase of the Port Douglas property. Accordingly her Honour varied the amount owing under the First Loan Agreement to the amount of $180,000, plus interest on that sum, and set aside the Second Loan Agreement.

RESOLUTION OF THE APPEAL

67 The nature of the independent advice that a solicitor should give to a borrower, and that a lender could therefore reasonably expect a borrower to be given when required to obtain independent legal advice, is relevant to the issues arising under the *Contracts Review Act*. It is convenient to consider these questions in the context of the claim against Mr Caramanlis before considering the *Contracts Review Act* issues.

THE CLAIM AGAINST MR CARAMANLIS

Breach of duty in relation to the First Advance

68 Mrs Papa contended, first, that Mr Caramanlis had knowledge of material facts which he should have conveyed to her and, secondly, that his advice to her concerning the loan and mortgage transactions was inadequate because he did not convey to her the reality of the risks that she was assuming, or recommend that she obtain independent financial advice about the state and

prospects of the gymnasium business.

69 As to the first contention, I do not consider that Mrs Papa established that in relation to the First Advance Mr Caramanlis had knowledge of any material facts of which he was obliged to inform her. Mrs Papa focused in her argument, both at first instance and on appeal, on the fact that Mr Caramanlis had acted for Hock-A-Car early in 2006 in relation to Mr Bortolin's borrowing of $50,000 from that company (see [16] above). That loan certainly carried an extremely high rate of interest (8% per month), but it was apparently not made, at least not directly, to advance Mr Bortolin's business interests. Rather, he borrowed the money to assist the two directors of the company that then operated the gymnasium business. The loan was for a short period and was largely repaid during 2006. There was no evidence that Mr Caramanlis knew that a limited part of the loan remained outstanding in March 2007. In my view, Mr Caramanlis' limited knowledge of the Hock-A-Car loan could not reasonably be regarded as sufficiently material to Mrs Papa's decision to enter into the First Loan Agreement and the mortgage to require that he disclose it to her. Nevertheless, the fact that Mr Caramanlis had this knowledge (and that referred to in the next paragraph) is relevant to the nature of the advice that he should have given Mrs Papa (see [80] below).

70 Furthermore, I do not consider that Mr Caramanlis' knowledge that the landlord of the gymnasium was pressing for payment of a rental bond in early 2007 was material in that context. Payment of that bond was one of the purposes of the First Advance sought from Provident and its non-payment by Mr Bortolin at that stage did not of itself reflect adversely on the prospects of the business succeeding under his management.

71 Whilst Mr Caramanlis accepted in cross-examination that it was possible "that it was clear to him" that Mr Bortolin was having some financial difficulties (Transcript pp 308 - 9), there was no evidence that he in fact had knowledge of any specific difficulties that he should have disclosed to Mrs Papa.

72 Turning to Mrs Papa's second contention, the principal question is whether it was sufficient for Mr Caramanlis to explain to Mrs Papa the legal effect of the documents she was to sign. Undoubtedly he did this and Mrs Papa was aware when she signed the documents that Provident could sell her property if interest was not paid, or the loan was not repaid according to its terms. Mr Caramanlis did not assert that he gave Mrs Papa any further advice, for example, that she should obtain independent financial advice due to the obvious dependency of her ability to meet her commitments to Provident on the success of the gymnasium business. Indeed, Mr Caramanlis' evidence was that Mrs Papa said that her accountant would be "dealing with the business" and that she had already discussed the loan with the accountant (see [34] above).

73 The primary judge did not find whether Mrs Papa said this. Her Honour expressly rejected one aspect of Mr Caramanlis' evidence concerning his discussion with Mrs Papa on 1 March 2007 and expressed doubts generally about Mr Caramanlis' account of the course of their conference (see [58] above). On the other hand her Honour also found Mrs Papa's evidence unacceptable in some respects (ibid). Her Honour concluded that she was "unable to come to any final view about the precise content" of the advice given by Mr Caramanlis but did not refer to what Mr Caramanlis said he was told by Mrs Papa concerning her accountant (ibid).

74 In my view it is clear from the findings that her Honour made concerning Mrs Papa's circumstances and her conversations from time to time with her son that Mrs Papa did not in fact consult an accountant concerning her agreement to borrow from Provident or to grant it a mortgage to secure the borrowing. In light, first, of the absence of any apparent reason why Mrs Papa would have told Mr Caramanlis (as he claimed) that she had consulted, or would consult, an accountant when that was not the case, secondly, Mr Caramanlis' lack of any notes of his discussions with Mrs Papa and, thirdly, the doubts that the primary judge expressed concerning the reliability of Mr Caramanlis' evidence generally, I conclude, on the balance of probabilities, that Mrs Papa did not tell Mr Caramanlis that she had consulted or would consult an accountant.

75 It is well established that solicitors are not ordinarily required to advise upon the wisdom of transactions in relation to which they act (*Polkinghorne v Holland* [1934] HCA 28; 51 CLR 143 at 158; *Citicorp Australia Ltd v O'Brien* (1996) 40 NSWLR 398 at 418). Further, the correctness of the view expressed in *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642 that a solicitor may have a duty of care extending beyond the ambit of the solicitor's retainer (a so-called penumbral duty) remains a matter of debate (*Kowalczuk v Accom Finance* [2008] NSWCA 343; 77 NSWLR 205 at [267] - [294]; *Dominic v Riz* [2009] NSWCA 216 at [89] - [90]; *Keddie v Stacks/Goudkamp Pty Ltd* [2012] NSWCA 254 at [86] - [104]). However proper execution of a retainer to give independent legal advice concerning a loan and mortgage transaction may, depending upon the circumstances known to the solicitor, require more than an explanation of the legal effect of the documents to be executed. As Allsop P (with whom Hodgson JA and Handley AJA agreed) said in *David v David* [2009] NSWCA 8 at [76], after referring to the existence of a "penumbral" duty being doubtful:

> "If, however, the solicitor during the execution of his or her retainer learns of facts which put him or her on notice that the client's interests are endangered or at risk unless further steps beyond the limits of the retainer are carried out, depending on the circumstances, the solicitor may be obliged to speak in order to bring to the attention of the client the aspect of concern and to advise of the need for further advice either from the solicitor or from a third party".

76 In *Dominic v Riz* at [90] - [91] his Honour (with the concurrence of Hodgson and McColl JJA) referred to that statement as follows:

> "[The statement] was intended to do no more than posit the possibility that the performance of the retainer, and what is learnt during it, may affect how the retainer is properly discharged".

77 Allsop P's statements were endorsed by Beazley JA (with the concurrence of Barrett JA and Sackville AJA) in *Keddie v Stacks/Goudkamp* at [104].

78 In these circumstances it is necessary to consider Mr Caramanlis' knowledge when he advised Mrs Papa on 1 March 2007.

79 In essence, this was as follows:

- Mrs Papa was a mature lady who owned a property in Leichhardt where she resided on her own and from which she conducted a small business.
- Her only other asset was a car.
- She was proposing to borrow $700,000 to assist her son with a gymnasium business and to repay an earlier debt.
- The loan was to be used in part to buy "some flashy new equipment from the States" (see [34] above).
- She did not have any involvement in the gymnasium business but, on Mr Caramanlis' evidence of what she said to him, would be acquiring such an interest (see [34] above).
- Mr Bortolin would be making the repayments of the loan out of the income of the gymnasium business.
- The previous year Mr Caramanlis had acted for Hock-A-Car in relation to a loan to Mr Bortolin at an interest rate of eight per cent per calendar month.
- In early 2007 Mr Caramanlis wrote a letter on behalf of Mr Bortolin to the landlord of the gymnasium seeking an extension of time for payment of the rental bond.
- As the loan by Provident was a "Low Doc" loan, the lender did not require identification or verification of the means of repayment of the loan and payment of interest.
- Whilst Mr Caramanlis gave evidence that he did not know that the business had been in administration (Affidavit [90] and Transcript p 334), he did know that the business was a new acquisition by Mr Bortolin.

80 In my view, a reasonable solicitor in the position of Mr Caramanlis would have formed the view that Mrs Papa's home, and the business which constituted her livelihood that she conducted from it, would be significantly endangered by her entry into the transactions with Provident. A reasonable solicitor giving her independent legal advice in relation to the transactions would not in my view have failed to draw to Mrs Papa's attention, in strong terms, that her home and livelihood was dependent upon the viability and prospects of the gymnasium, specifically on the ability and willingness of her son to make the loan repayments out of the income from the business, and to recommend,

again in strong terms, that she obtain financial advice, independent of her son, concerning the capacity of the business to service the loan. A solicitor's obligation is not simply to explain the legal effect of documents but to advise his or her client of the obvious practical implications of the client's entry into a transaction the subject of advice. The prospect of the subject transaction wreaking havoc on Mrs Papa's life was glaring, given the by no means remote prospect that the business would be unable to support the loan repayments.

81 There is a marked contrast between the present factual situation and that in *Dominic v Riz* in which a solicitor who was retained to advise on mortgage and loan documents was found not to have breached her duty. In that case:

> "[The solicitor] told her clients clearly to obtain independent financial advice and that it was necessary for them to do so. She thought they understood the need for it and that they would act on her advice" (at [93]).

82 As Mr Caramanlis did not give the advice to which I have referred I consider that he breached his professional duties as a solicitor. It follows that I disagree with the primary judge's conclusion that Mrs Papa did not discharge her onus of proving a breach of duty by Mr Caramanlis (see [58] above).

Causation in relation to the First Advance

83 The next question is whether Mr Caramanlis' breach of duty caused any loss. The question that must be addressed is whether it should be concluded, on the balance of probabilities, that if Mr Caramanlis had given the required advice Mrs Papa would have taken it, and whether the financial advice she would have obtained would have deterred her from entering into the transaction.

84 Mrs Papa gave evidence that she would have taken such advice if it had been given by Mr Caramanlis but this evidence was inadmissible (s 5D(3) of the *Civil Liability Act* 2002) and, even if admissible, would have been of little weight (see for example *Chappel v Hart* [1998] HCA 55; 195 CLR 232 at [32] and footnote (64) per McHugh J). The issue is therefore to be determined by reference to the circumstances proved in evidence.

85 On balance I conclude that Mrs Papa would have taken the advice. It is true that the evidence suggested that she had considerable (and unjustified) faith in her son's ability to conduct the business and his truthfulness. Nonetheless, Mrs Papa had in the past experienced severe financial difficulties as a result of what she believed was her husband's poor management of the family's financial affairs (see [13] above). If the reality of the risk she was taking in the transaction with Provident had been brought home to her by Mr Caramanlis, I think that the probabilities are that she would have followed his advice.

86 The next issue is what advice an independent financial advisor would have

given to Mrs Papa if she had sought it. This involves consideration of the gymnasium business' viability and prospects at the relevant time.

87 The primary judge referred to Mr Bortolin and Luxury Enterprises as being "in extremely straightened financial circumstances" from late 2006 and to their "parlous circumstances at that time" (Judgment [24] and [64] quoted in [53] above). However the evidence about the business' financial position in late 2006 and early 2007 was limited. Clearly the business had significant trading difficulties, leading to its administration, in the period prior to Luxury Enterprises' purchase of it in late 2006. However, unsurprisingly given he decided to buy it, Mr Bortolin had high hopes that its position would be different under his management. Whether those expectations were justified would not have been easy for an independent financial advisor to determine. Much would have depended upon the reasons for the previous failure of the business and the changes that Mr Bortolin proposed to make. Whether it could have been discerned in March or April 2007 that Mr Bortolin's hopes were insupportable or had already been dashed is doubtful. Mr O'Sullivan of Provident was cross-examined about accounts for the first quarter of 2007. These were not tendered, but appeared from Mr O'Sullivan's answers to show only a minimal loss for the three month period (Transcript p 63). Draft accounts for the year ended 30 June 2007 showed a large loss for the year but these were not produced until March 2008 and it is in any event unclear to what extent that loss was attributable to the period of the year before Mr Bortolin purchased the business.

88 The position, so far as it was revealed by the evidence, that an independent financial advisor would have discerned in March 2007 would in my view likely have been, first, that Mrs Papa's retention of her home and business was dependent upon the viability and prospects of a business that had failed in the recent past but had come under new management which had not yet had the opportunity to establish its credentials. Secondly, the advisor would have concluded that the viability and prospects of the business were uncertain, with the lesson from the past being an unfavourable one. It would have been difficult for the advisor to avoid the conclusion that the gymnasium business was, as the primary judge put it (Judgment [190]), "a highly speculative business endeavour".

89 In these circumstances, any reasonable independent financial advisor would have had to advise Mrs Papa that she was facing a high risk of disaster in entering into the transaction. In my view, as the primary judge apparently viewed her as an intelligent and sensible person, the probabilities are that this advice would have deterred her from entering into the transaction. The advice would at least have to have resulted in a considerable loss of confidence of Mrs Papa in her son, as Mr Bortolin had told her that the gym was "going well"

(see [21] above). In fact it had not gone well in the past and, whilst it might have turned around in the future, there was no apparent basis for concluding that it was already "going well" in early 2007.

90 For these reasons I consider that Mrs Papa proved that Mr Caramanlis' breach of duty caused her the loss that she suffered by taking the First Advance from Provident and securing it by a mortgage over her Leichhardt property. It follows that I disagree with the primary judge's briefly expressed conclusion that she did not (see [58] above).

The Second Advance

91 Similar conclusions are appropriate in relation to the Second Advance.

92 By the time of his advice to Mrs Papa on 6 March 2008 concerning this advance, Mr Caramanlis had acquired further knowledge. First, he was aware by then that Mr Bortolin and Luxury Enterprises had defaulted in relation to the Hock-A-Car loan (see [45] above). Secondly, he was aware that Luxury Enterprises had defaulted in relation to the loan secured over its Gosford and Camperdown properties and that the lender had commenced proceedings for possession (see [46] above).

93 It is unnecessary to form a view as to whether these were material facts known to Mr Caramanlis that he should have disclosed to Mrs Papa. Whether or not he disclosed them to Mrs Papa, they were facts that should have emphasised to him the danger to Mrs Papa in the transactions and should, together with the knowledge that he had earlier acquired, have led him to advise Mrs Papa, in strong terms, of that risk and the need to obtain independent financial advice.

94 The draft financial accounts to which I have earlier referred (see [87] above) would have been available to an independent financial advisor at least by 5 April 2008 when the Second Advance was made to Mrs Papa. These would have at least confirmed the assessment referred to above of the business' doubtful viability and prospects. More likely, they would have rendered that assessment considerably bleaker.

95 Again, I conclude that Mrs Papa would have sought independent financial advice if advised to do so and would not have proceeded with the transaction in the face of adverse advice. Mr Caramanlis' breach of duty thus caused Mrs Papa's loss arising out of the Second Advance, leading to his liability to pay damages to compensate her for that loss.

THE CONTRACTS REVIEW ACT

Whether CMC was Provident's agent

96 It is relevant at the outset to determine whether the primary judge was correct in imputing to Provident such knowledge as CMC had.

97 In *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 "mortgage originators", performing roles not unlike that of CMC in the present case, were found not to be agents of the lenders. Allsop P (with the concurrence of Bathurst CJ and Campbell JA) said:

> "Agency is a consensual relationship, generally (if not always) bearing a fiduciary character, in which by its terms A acts on behalf of (and in the interest of) P and with a necessary degree of control requisite for the purpose of the role. Central is the concept of identity or representation of the principal ... it is sufficient to recognise that the essential characteristic [of agency] is that one party (A) acts on the others' (P's) behalf" (at [177]).

98 Notwithstanding that "S Loans" (one of the mortgage originators in that case) was obliged to endeavour to introduce borrowers to Tonto HL and to provide it with information about them, the Court held that "[t]aken as a whole, the Introduction Deed and the other agreed arrangements did not provide for an arrangement under which S Loans would act on behalf, and in the interests of Tonto HL ... " such as to render it Tonto HL's agent (at [191]).

99 I do not consider that there are any material differences between the arrangement in that case and those in the present case that serve to distinguish the decision. It follows that I disagree with the primary judge's conclusion that CMC was Provident's agent. I note that in reaching that conclusion her Honour did not have the guidance of *Tonto Home Loans v Tavares* as that decision post-dated her Honour's judgment.

100 The decision in *Tonto Home Loans* does not mean that, when assessing Provident's position in the present case, knowledge of CMC that was not conveyed by CMC to Provident must be disregarded. The following further reasoning in *Tonto Home Loans* is relevant in this regard:

> "255 That S Loans was not in law the agent of Tonto HL does not mean that for the purpose of evaluating the operation of the [*Contracts Review Act*], the position of Streetwise [S Loans], how it came to take its place in the overall enterprises of the lending programmes and the objective perceptible risk of fraud arising from its position should not be considered.
>
> ...

> 265 ... Looking at these events as brought about primarily by the fraud of Streetwise, a fair assessment is that the business structure put in place by the lenders [and] how it operated was significantly responsible for the preying upon these people by Streetwise. That is not to ignore the basis upon which the trial and appeal proceeded, that 'Lo Doc Lending' per se was not unjust. Nor is it to introduce an enterprise concept of agency; rather it is to recognise that a sub-contracted lending structure of the kind here, in which persons such as Streetwise are 'chased' to become the introductory agents, should have guidelines enforced with real vigour to deal with the obvious objective risks of fraud and deception. No one criticised these guidelines. Their operation was loose, and affected by the attitude found by his Honour. It is only fair and just to recognise the significant responsibility of the lenders in these circumstances".

101 The facts referred to in these observations differ from those in the present case but the thrust of Allsop P's observations is still relevant: if by interposing mortgage originators a lender has established a business structure that distances the lender from communications with a prospective borrower who is misled or taken advantage of, it may be relevant for the purpose of considering unjustness under the *Contracts Review Act* to have regard to a mortgage originator's knowledge which it has not passed on to the lender.

102 CMC's knowledge which the primary judge, because of her Honour's finding as to agency, imputed to Provident was of Mrs Papa's "circumstances as borrower and, in particular, that the sole purpose of the loan was to benefit her son" (Judgment [121] quoted at [56] above). Mrs Papa's circumstances to which her Honour referred were that she "had no capacity to service the loan and had no interest in doing so" (Judgment [113] quoted in [56] above). That knowledge indicated that the present was a not-unfamiliar situation in which a parent, with an asset but no substantial income, mortgaged the asset to assist an adult child's business interests.

103 It is unnecessary to reach a final view as to whether the *Contracts Review Act* analysis should proceed on the basis that Provident had this knowledge as my ultimate conclusion in the case is favourable to Provident even on the assumption that it should. For the purposes of the analysis, I accordingly assume that it had that knowledge.

Provident's Credit Manual

104 The primary judge considered that Provident had breached its internal credit requirements, particularly the "strict serviceability requirements" contained in the Credit Manual and that this was significant in considering whether relief under the Act should be granted (Judgment [208] quoted in [63] above). Her Honour did not accept that the "Low Doc" lending product first offered by Provident in early 2007, including to Mrs Papa, constituted an authorised exception to the Manual's requirements that borrowers provide evidence to substantiate that the loan was able to be serviced (beyond a declaration by the borrower).

105 Her Honour considered that Provident had not proved that the Credit Manual had been amended (as required by the Manual) with approval of the board of Directors given at a duly convened and constituted meeting (Judgment [77] and [97] quoted in [55] above). However the following evidence given by Mr O'Sullivan, the managing director of Provident, was in my view sufficient to indicate that the procedure that Provident adopted in relation to the lending to Mrs Papa did not depart from its approved internal requirements:

> "Q. You had product guides in the market?
>
> A. That had been designed by the business, approved by legal counsel and put to the board and conveyed to the rest of the business by a training, releases, et cetera. So the business, the manual may not have caught up but the business, the board, legal counsel, everybody was aware. So there is not, it is not a deviation from this policy in that I just unilaterally decided that we would do X, Y and Z on this loan.
>
> Q. Are you intending to convey by that answer, Mr O'Sullivan, that the relevant product guide, namely the Light and Easy product guide was the subject of consideration by the board of directors on the advice of legal counsel who was either a member of the board or invited to speak to the board, and that a change to the credit policy as reflected in the new product guide was endorsed by the board?
>
> A. Correct" (Black 59).

106 Whether the board of directors' deliberations were focussed on amendments of the Manual is not of consequence. The requirements of the Manual were not imposed from outside the company. They were internal guidelines and could be departed from, whether expressly or impliedly, in any way the board of directors saw fit.

Asset lending

107 Of prime importance to the primary judge's reasoning were her Honour's conclusions that Provident failed to make any inquiries about the serviceability of the advances to Mrs Papa, was indifferent to her ability to fulfil her obligations under the loan agreements, and that Provident's principal concern was whether there was adequate security available in the event of default (Judgment [188] quoted in [59] above). In these circumstances, it is convenient to refer to the most important of the decisions touching on the issue of asset lending which is, in effect, what the primary judge found Provident to have undertaken.

108 In *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413; 11 BPR 20,841 the appellant and her husband gave a mortgage over their jointly-owned property to a financier in part to fund the husband's business activities. The appellant was in a special position of disadvantage but this was unknown to the financier. This Court found that the transaction was unjust under the *Contracts Review Act* in light of two significant features of the transaction. The first was that the loan was a substantial one, the security for which was the appellant's

only asset, and the second was that the respondent knew that the appellant had no income or other assets and that repayment of interest was intended to be made by Mr Elkofairi. The absence in that case of any verification of Mr Elkofairi's income indicated that the financier was content to lend on the value of the security alone. That was not a case, like the present, where the financier required the borrower to obtain independent legal advice and to receive the borrower's assurance that that had occurred.

109 In *Perpetual Trustee Co Ltd v Khoshaba* [2006] NSWCA 41; 14 BPR 26,639 the financier advanced money to pensioners whose daughter applied the funds to a pyramid investment scheme which collapsed. Spigelman CJ (with whom Handley AJA relevantly agreed) concluded as follows:

> "82 I have set out above in the extract from his Honour's findings on the [Lender's] Guidelines issue each of the respects in which the Appellant failed to observe its own Guidelines. Of these failures the most significant, in my opinion, is the fact that the section of the standard form application about the purpose of the loan was left blank. This indicates that, as in *Elkofairi* supra at [79], the Appellant 'was content to lend on the value of the security'. In my opinion, that approach is entitled to significant weight in the determination of unjustness. (I note that nothing like this occurred in *West* where the purpose of the loan was known.)
>
> ...
>
> 92 The conflicting considerations are finely balanced. Had the Appellant or its representatives made any inquiries about the purpose of the loan I would have allowed the appeal. I do not mean to suggest that the Appellant had to determine that the proposed investment was reasonable and capable of servicing the loan. It is the indifference, suggesting that the Appellant was content to proceed on the basis of enforcing the security, which I find determinative".

110 Basten JA's judgment included the following:

> "128 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* (supra) at [77] by Beazley JA".

111 In *Kowalczuk v Accom Finance* [2008] NSWCA 343; 77 NSWLR 205, a fraudster induced the appellant to mortgage his properties to provide funds for the fraudster to invest. Having said that it "can be accepted that pure asset lending ... is in at least some circumstances unjust within the meaning of the *Contracts Review Act*", Campbell JA (with whom Hodgson and McColl JJA agreed), concluded:

"99 I would accept that in some circumstances knowledge of a high degree of risk that there might be a default in payment of interest or principal so that a mortgagee sale would result, could be unjust lending, even though it could not be said that the lender knows that there will be default. However I do not accept that a lender is always bound to carry out a detailed investigation of the practicality of an intending borrower actually being able to carry through the plan the borrower says he or she has for repayment of the loan. In the present case, Kowalczuk stated to Accom that he proposed to pay the Berowra loan out through bank refinance, and the Haberfield loan through refinancing with FirstLoan (the same brokers through whom Kowalczuk was able successfully to refinance the Berowra loan) and there was no occasion for Accom to doubt that he would be able to do so. Thus, even if Mr Conti is right in saying that there can be pure asset lending if the lender knew that there was a high risk that the intended means of repayment might fail, in the present case Accom did not have knowledge of that type".

112 In *Fast Fix Loans Pty Ltd v Samardzic* [2011] NSWCA 260 the respondents mortgaged their property to secure a loan to enable their son's company to purchase a development property at Forster. The primary judge found that the financier was aware that the company was in a precarious financial position and that there was a real likelihood that, as a consequence, there would be default in relation to the loan which the parents' property secured. The judgment of Allsop P (with whom Bathurst CJ and Campbell JA agreed) included the following:

"43 The complaint about 'asset lending' tended to raise a debate over semantics. 'Asset lending' is not a label or a legal frame of reference. It is a convenient expression, used in cases such as *Perpetual Trustee Co Ltd v Khoshaba* [2006] NSWCA 41; 14 BPR 26,639 and *Spina* to describe a form of lending where the lender has little, if any, regard for the capacity of the borrower to repay and rests satisfied with the security to protect itself. As Campbell JA made clear in *Kowalczuk* at [96]-[99], the conclusion of 'unjust' for the [purposes of the] Act, ss 7 and 9 depends on all the circumstances and not on labels. There is no reason why considerations such as those here cannot lead to the conclusion that a contract of guarantee is unjust if entered into by a lender who is uncaring of a guarantor's capacity to repay where there is a real and significant possibility of default by the borrower and the guarantor takes no benefit under the borrowing. This is particularly so in all the other circumstances of this case - most particularly the recognition by the appellant of the only two likely sources of repayment, one (successful refinancing) having a real risk to it. The appellant lent at a significant interest rate, reflecting the underlying commercial risk, appreciating the position the parents had been placed in, without any basis to consider that the parents appreciated the commercial risk or that they could afford to take that risk.

...

50 ... Here, the relevant circumstances giving rise to the conclusion of unjustness and the granting of relief included the misapprehension by the parents that their obligations would cease after three months, the fact that the parents lacked the capacity to understand the deed of loan and mortgage and did not appreciate the significance of the interest rate even with the benefit of limited legal advice, that Milan (albeit not the appellant) was exerting considerable pressure upon the parents to enter the agreements immediately, that the appellant failed to make enquiries as to the financial circumstances of the parents in circumstances where the appellant appreciated the significant risk of the transaction, being one which it was not prepared to take at the significant rate of interest without the parents' 'clean' security".

113 It is apparent from these authorities that it can be relevant in the determination of whether a contract is unjust, and whether relief should be granted against a financier, under the *Contracts Review Act* that the financier has shown no interest in the borrower's ability to service the loan. However the significance of that fact must be assessed in the context of all the circumstances surrounding the loan. In my opinion, of particular significance will be the financier's knowledge of the borrower's circumstances, the purpose of the loan and whether the borrower has obtained independent legal advice. Public interest does not necessarily require so-called asset lending to be proscribed, or even deterred. It may advance the interests of the parties to many transactions, and facilitate commerce generally, for financiers to be able to lend on a "low doc" basis without requiring the expenditure of time and effort in ascertaining and verifying the ability of borrowers to service loans. In any event, that exercise will often be difficult. For example if Provident had sought to undertake it in the present case, it would have had to make a difficult business judgment about the viability and prospects of the gymnasium business, a topic about which even well-informed minds could undoubtedly have differed. Financiers should not be required to make such assessments if they do not wish to do so. If, instead, a financier is satisfied that a borrower is able to make the decision for him or herself or has received appropriate advice, the public interest reflected in the *Contracts Review Act* will ordinarily have been satisfied.

Whether the loan agreements were unjust

114 In the present case, Provident made "low doc" loans to Mrs Papa. It was not completely unconcerned about her ability to service the loans because it required her assurance (by signed Declaration) that she could do so and undertook credit checks. Importantly also, unlike the lenders in the cases to which I have referred, it stipulated that Mrs Papa must obtain independent legal advice and confirm that she had done so. She did both. That the legal advice was inadequate was not Provident's fault. It was the fault of Mr Caramanlis who bears legal responsibility for the consequences of his breach of duty. Provident was in my view entitled to assume, and proceed on the basis, that Mrs Papa had obtained advice of the type that a reasonably prudent solicitor would have given and to which I referred earlier (see [80] above).

115 That advice would have ensured that she was well aware that her retention of her home and workplace was dependent on the viability and prospects of the gymnasium business, and would have led to her receiving advice from a financial advisor that the business could not fairly be described, as it was by Mr Bortolin to Mrs Papa, as "going well" and that its prospects were at best uncertain.

116 As Provident was not aware of any disability under which Mrs Papa laboured (and there was in fact none), Provident could not reasonably have been expected to do more. Its conduct was not therefore such as to make the loan contracts unjust.

117 In these circumstances I disagree with the primary judge's conclusion that the loan agreements between Provident and Mrs Papa were unjust and that relief should be granted under the *Contracts Review Act*. The conclusions I have reached are equally applicable to the First and Second Advances although Provident's position is even stronger in respect of the Second Advance as, by the time it was made, Mrs Papa had a history of satisfactory payments to Provident over the previous year in respect of the First Advance.

ORDERS

118 For the reasons I have given, I propose the following orders:

(1) Appeal of Provident Capital allowed.

(2) Set aside orders 1 and 4 and declarations 2 and 3 made at first instance on 28 October 2011.

(3) Judgment for Provident Capital for possession of the land comprised in Certificate of Title Folio Identifier 1/444075 being land at Leichhardt in the State of New South Wales.

(4) Dismiss Mrs Papa's cross-claim against Provident Capital.

(5) Order Mrs Papa to pay Provident Capital's costs of its proceedings against her at first instance and of Mrs Papa's appeal.

(6) Appeal of Mrs Papa against Mr Caramanlis allowed.

(7) Set aside orders 5 and 6 made at first instance on 28 October 2011.

(8) Judgment in favour of Mrs Papa against Mr Caramanlis for damages in an amount to be determined.

(9) If Mrs Papa and Mr Caramanlis are able to agree as to the amount of the damages to be awarded against Mr Caramanlis, direct those parties to file a form of consent order with the Court within seven days of the date of this judgment.

(10) If those parties are unable to so agree, direct that within 14 days of the date of this judgment Mrs Papa lodge written submissions on that topic, that Mr Caramanlis lodge written submissions in response within a further seven days and that Mrs Papa lodge any reply within a further seven days.

(11) Order Mr Caramanlis to pay Mrs Papa's costs at first instance of Provident Capital's claim against her and her claim against Mr Caramanlis.

(12) Mrs Papa and Mr Caramanlis are to have certificates under the *Suitors' Fund Act* 1951, if qualified.

119 **SACKVILLE AJA**: I agree with the orders proposed by Macfarlan JA and, subject to my agreement with the additional observations of Allsop P, with his Honour's reasons. I wish to associate myself with the comments of Allsop P, including [8] of his Honour's judgment.

120 I wish to add one observation about the duty of care owed to Mrs Papa by the solicitor, Mr Caramanlis. When Mrs Papa sought advice from Mr Caramanlis, he should have appreciated, had he acted with the care and skill to be expected of a solicitor in his position, that the proposed loan to Mrs Papa would have created legal rights and duties not merely between Provident Capital Pty Ltd (the lender) and Mrs Papa (the borrower), but between Mrs Papa and Mr Bortolin or his company, Luxury Enterprises Pty Ltd (the operator of the gymnasium business for whose benefit Mrs Papa was taking out the loan).

121 Mr Caramanlis knew that the purpose of the loan was to invest in the gymnasium business, in particular to finance the purchase of equipment. At this point, so far as Mr Caramanlis was aware, Mrs Papa had no interest in the business. Had Mr Caramanlis turned his mind to the legal relationship between Mrs Papa and Luxury Enterprises he would have appreciated that she was effectively on-lending the borrowed money to the company. From a legal perspective, in the absence of anything further (such as a partnership or share purchase agreement), Mr Caramanlis should have realised that Mrs Papa's financial security depended wholly on her ability to enforce her rights against Luxury Enterprises. Without any security, the value of those rights depended entirely on the ability and willingness of Luxury Enterprises to pay the loan instalments as they fell due or to reimburse Mrs Papa for any losses sustained by her.

122 Mr Caramanlis should have explained to Mrs Papa her legal entitlements against Luxury Enterprises. Had he done so, it must have brought home to him the need to advise Mrs Papa that independent advice was essential to determine whether her right of indemnity or other entitlements against Luxury Enterprises had any commercial value or provided any worthwhile protection to her. In my opinion, this reinforces the conclusion that Mr Caramanlis should have specifically directed Mrs Papa's attention to the need to obtain advice from a source independent of her son as to whether Luxury Enterprises was likely to be able and willing to service the loan and thus discharge its legal liability to Mrs Papa.

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Amendments

01 September 2014 - Typographical error corrected
Amended paragraphs: [97]

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Decision last updated: 01 September 2014