Court of Appeal
Supreme Court

New South Wales

Case Name:	RHG Mortgage Corporation Ltd v Ianni
Medium Neutral Citation:	[2016] NSWCA 270
Hearing Date(s):	13 July 2016
Decision Date:	4 October 2016
Before:	Basten JA at [1]; Meagher JA at [29]; Ward JA at [30]
Decision:	Appeal dismissed with costs.
Catchwords:	EVIDENCE – where matter had been remitted to primary judge to reconsider findings following a successful appeal – whether primary judge erroneously repeated error in relying on certain evidence – whether failure to draw Jones v Dunkel inference adverse to respondents
Legislation Cited:	Australian Securities and Investments Commission Act 2001 (Cth) Contracts Review Act 1980 (NSW), s 6 Real Property Act 1900 (NSW), s 57(2)(b) Trade Practices Act 1974 (Cth)
Cases Cited:	Baira v RHG Mortgage Corporation Ltd [2012] NSWCA 387 Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336 Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 4) [2006] FCA 446; (2006) 229 ALR 136 Commercial Bank of Australia Ltd v Amadio [1983] HCA 14; (1983) 151 CLR 447 Commonwealth of Australia v McLean (Court of Appeal (NSW), 31 December 1996, unrep)

	Coshott v Prentice [2014] FCAFC 88; (2014) 221 FCR 450 Fox v Percy [2003] HCA 22; (2003) 214 CLR 118 Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298 JPQS Pty Ltd v Cosmarnan Constructions Pty Ltd [2003] NSWCA 66 Manly Council v Byrne [2004] NSWCA 123 Payne v Parker [1976] 1 NSWLR 191 RHG Mortgage Corporation Ltd v Baira; RHG Mortgage Corporation Ltd v Ianni [2014] NSWSC 849 RHG Mortgage Corporation Ltd v Ianni [2015] NSWSC 1911 RHG Mortgage Corporation Ltd v Rosa Baira; RHG Mortgage Corporation Ltd v Rosario Ianni [2011] NSWSC 520; [2011] NSWSC 580 RHG Mortgage Ltd v Rosario Ianni [2015] NSWCA 56 Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd [2011] FCAFC 53 Scott Fell v Lloyd [1911] HCA 34; (1911) 13 CLR 230 Shalhoub v Buchanan [2004] NSWSC 99 Steinberg v Commissioner of Taxation (Cth) (1975) 134 CLR 640
Texts Cited:	JD Heydon, Cross on Evidence (10th ed, LexisNexis, 2015)
Category:	Principal judgment
Parties:	RHG Mortgage Corporation Ltd (Appellant) Rosario Ianni as representative of the Estate of the Late Domenica Ianni (First Respondent) Rosario Ianni (Second Respondent)
Representation:	Counsel: M Ashhurst SC with P Newton (Appellant) JC Kelly SC (Respondents) Solicitors: Kemp Strang (Appellant) Uther Webster & Evans (Respondents)
File Number(s):	2016/00003504
Publication Restriction:	Nil

Decision under appeal:

Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Common Law Division
Citation:	[2015] NSWSC 1911
Date of Decision:	16 December 2015
Before:	Davies J
File Number(s):	2008/284857

[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.]

HEADNOTE

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

This judgment relates to an appeal from a decision of a judge of the Common Law Division of the Supreme Court finding that a loan agreement and mortgage between the appellant, RHG Mortgage Corporation Ltd (RHG), as mortgagee, and the second respondent, Rosario Ianni, and his wife, Domenica Ianni (now deceased) (collectively, the Iannis), should be set aside.

The Iannis were retired elderly migrants for whom English was not their first language. They entered into a mortgage over their home in October 2005 pursuant to a home loan agreement in their name, under which $910,000 was advanced by RHG. That amount was applied to discharge indebtedness on the part of the Iannis' son Joe and his wife Sandra. Following the Iannis' default under the loan agreement, RHG commenced proceedings claiming possession of the property. The Iannis resisted the claim, maintaining that Joe had asked Rosario to sign loan documents and that Rosario thought that, rather than entering into a home loan agreement as principal borrowers, he and his wife were merely providing a guarantee in favour of RHG in an amount of $100,000.

The matter was first heard by Grove AJ, who found in RHG's favour in June 2011. An appeal by the Iannis was upheld by the Court of Appeal, which remitted the matter back to the Common Law Division for retrial. The re-hearing of the matter took place before Davies J (the primary judge) in March and May 2014 and proceeded on the agreed basis that the only admissible evidence was to be the evidence (including the oral evidence) given at the first hearing before Grove AJ, provided that the relevant witness was made available for cross-examination at the re-hearing. The primary judge nevertheless relied on the evidence of Joe, who had not given evidence at the second trial, and did not draw an inference adverse to the Iannis, based on *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298, from their failure to call Joe as a witness. RHG appealed the decision on those two bases.

On that appeal, Senior Counsel for the Iannis conceded that the appeal should be allowed and that there should be a new trial on the basis that the primary judge had erroneously referred to Joe's evidence. The matter was remitted to the primary judge to reconsider his findings on the basis of the evidence before him at the earlier trial, not including Joe's evidence, and giving proper regard to the availability of a *Jones v Dunkel* inference.

On the remittal, the primary judge concluded that he would not have come to any different conclusion on the matters in his earlier reasons which the Court of Appeal had identified as matters in respect of which Joe's evidence had had any influence.

The appellant appealed from that decision, challenging the primary judge's determination that Joe's evidence had not been significant in his initial findings and maintaining that his Honour had again erred in not drawing a *Jones v Dunkel* inference from the Iannis' failure to call Joe at the first re-hearing.

Held, dismissing the appeal with costs (Meagher JA agreeing (at [29]) with Ward JA):

(1) by Ward JA (at [140]) (Basten JA (at [28]) agreeing) there is no basis for this Court not to accept the primary judge's explanation of his own reasoning process. His Honour explained the extent to which he had had regard to or

relied upon Joe's evidence and then determined whether he would have reached the same conclusions in its absence.

(2) by Ward JA (at [142]) (Basten JA (at [28]) agreeing) on the evidence as a whole, his Honour was correct when rejecting the proposition that Joe's evidence had been a significant factor in him reaching the decisions that he did; nor was it established that, absent Joe's evidence, no conclusion as to the Iannis' lack of understanding of their entry into the transaction as principal borrowers could confidently be reached.

(3) by Ward JA (at [166]) (Basten JA (at [8]; [28]) agreeing) the contention that because the primary judge was satisfied that Rosario was unreliable in some respects he could not, therefore, be relied upon in other respects should not be accepted. In any event, this was not a case where the only evidence on the issue of the Iannis' understanding of the documents, other than that of Joe which could not be taken into account, was that given by Rosario.

(4) by Ward JA (at [169]-[170]) (Basten JA (at [28]) agreeing) the primary judge did not err in declining to draw a *Jones v Dunkel* inference. His Honour's reasons for his conclusion that it should not be inferred that the Iannis did not understand that they were undertaking liability as principal borrowers were not shown to be wrong.

(5) by Basten JA (at [27]) the primary judge's rejection of the proposition that, excluding Joe's evidence from consideration and taking into account that Rosario was an unreliable witness, the balance of the evidentiary record was equivocal, and his concomitant conclusion that he was satisfied on the balance of probabilities as to relevant matters, was open to him on the basis of the evidence before him and was not shown to be erroneous. To conclude to the contrary would be to impose an unnecessary gloss on the general standard of proof on the probabilities.

JUDGMENT

1 **BASTEN JA**: In a judgment delivered on 1 July 2014, the trial judge (Davies J) concluded that a loan agreement and mortgage between the appellant, RHG Mortgage Corporation Ltd, and two elderly respondents, Mr Rosario Ianni and

Mrs Domenica Ianni, should be set aside and the mortgage in favour of the appellant should be discharged. (Mrs Ianni has since died.)

2 As the trial judge noted, the case was "a little unusual."[1] In part that was because the proceedings constituted a retrial of part of an earlier matter, in which a judgment of Grove AJ had been set aside by this Court. The more important aspect of the proceeding was that the second trial was required (by the parties) to be conducted on the basis of the evidence (including the oral evidence) given before the first trial judge, together with such further evidence as might be called on the second trial. However, it was also agreed that the only evidence from the first trial which would be admissible was of witnesses cross-examined or available to be cross-examined at the second trial.

3 It appeared from the second trial judgment that the trial judge had overlooked the agreement of the parties and relied on the evidence of Mr Joe Ianni, the son of the respondents, in circumstances which were precluded by the agreement between the parties, Mr Joe Ianni, not having given evidence at the second trial. (It is convenient to refer to his father, the respondent Rosario Ianni, as "Mr Ianni Snr".) RHG appealed to this Court.

4 In the course of the appeal, Mr Kelly SC (for the respondents) conceded that the agreement was as the appellant had averred. After a procedural history set out at some length in the second appeal judgement,[2] senior counsel conceded that the judgment should be set aside on the basis of the trial judge's mistake in referring to the evidence of Mr Ianni and, this being the only relief then sought by the appellant, that there should be a new trial. The judgment of this Court continued:[3]

> "However while Mr Kelly appeared to accept that the Court would give a judgment which dealt with the issue of the extent to which use of Joe's evidence was critical to the outcome at trial, he resisted the proposition that the Court should deal with the *Jones v Dunkel* point."

5 The "*Jones v Dunkel* point" referred to a second limb to the appellant's appeal, asserting error on the part of the primary judge in failing to draw an adverse

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1 RHG Mortgage Corporation Ltd v Baira; RHG Mortgage Corporation Ltd v Ianni [2014] NSWSC 849 at [3] ("second trial judgment").

2 RHG Mortgage Ltd v Rosario Ianni [2015] NSWCA 56 at [13]-[32] ("second appeal judgment") (McColl JA, Sackville AJA agreeing and Emmett JA agreeing with additional reasons).

3 Second appeal judgment at [32].

inference from the failure of the respondents to call their son, Joe Ianni, as a witness. Mr Ashhurst SC (for the appellant) pursued the issue in the following manner, as explained in the second appeal judgment at [33]:

> "Mr Ashhurst submitted that the Court's judgment should give his Honour guidance as to which findings of fact his Honour made were materially affected by the erroneous consideration of Joe's evidence. He said RHG did not seek a ruling from this Court that on the new trial the primary judge was bound to draw adverse *Jones v Dunkel* inferences but, rather, sought a ruling as to whether the primary judge erred in concluding … that RHG had not established that it was open to his Honour in the circumstances to draw such inferences."

6 It will be necessary to return to what was said in the second appeal judgment concerning each of these matters. However it is sufficient to note for present purposes that the matter was remitted to the trial judge (Davies J) to reconsider his findings on the basis of the evidence before him at the earlier trial, not including the evidence of Mr Joe Ianni, and giving proper regard to the availability of a *Jones v Dunkel* inference. No further evidence was to be tendered.

The excluded evidence

7 At the third trial (which may be referred to as the "remittal hearing") the trial judge concluded, with respect to the evidence of Mr Ianni Snr:[4]

> "Joe's evidence that I relied upon in my first judgment was never significant evidence. The three areas where it had any influence ... were all matters where there was abundant other evidence to support the findings. Reconsidering those matters without any regard to Joe's evidence does not lead me to a different conclusion for the reasons I have discussed."

8 For the appellant to challenge that finding on the present appeal was an exercise attended by some difficulty. To the extent that the trial judge had relied upon the evidence of Mr Joe Ianni, this Court might have been in as good a position as the trial judge to assess that evidence, Joe Ianni not having given evidence before Davies J. However, to the extent that the trial judge based his findings on the evidence of Mr Ianni Snr, an exercise which inevitably and expressly depended upon careful findings as to credibility and reliability, the opportunity for this Court to intervene is, in accordance with established practice, far more limited. The contention that because the trial judge was satisfied that Mr Ianni Snr was unreliable in some respects he could

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[4] RHG Mortgage Corporation Ltd v Ianni [2015] NSWSC 1911 at [53] ("remittal judgment").

not, therefore, be relied upon in other respects should not be accepted, for the reasons given by Ward JA.

9 Further, the appellants contended that the critical finding made by the trial judge was contrary to a finding made by this Court in the second appeal judgment.[5] It is necessary to deal with the content of the issue raised in this Court, but it should be said at the outset that the suggestion that this Court made a finding of fact at all is implausible. First, the only basis on which the Court addressed this issue at all was to satisfy itself as to the appropriateness of the concession. Secondly, the supposed finding was at [57] of the second appeal judgment, in a summary of the second trial judgment under the heading "the primary judgment"; a section which extends from [40]-[70], *before* the consideration of the issues on the appeal. Thirdly, the Court remitted the matter to the trial judge for a "retrial of the proceedings" on conditions which precluded any further evidence being given, limited the topics to be dealt with in further submissions, but did not limit in any way, the findings which could be made by the trial judge. Such an approach was patently inconsistent with the possibility that the appeal court had made findings which were binding on the trial judge. Fourthly, it is quite unlikely that the Court would have considered making findings with respect to the evidence of Mr Ianni Snr, which involved critical issues of credibility.

10 Turning to the content of the supposed finding, the issue was whether Mr Ianni Snr understood that the financial accommodation provided by the appellant involved Mr and Mrs Ianni as the borrowers, for their own alleged purposes, rather than being a continuation of their existing status as guarantors of a loan made to their son and his wife, to buy a house. The reasoning of this Court, at [52]-[57], was directed to a passage in the second trial judgment at [131]-[137]. This material was relied upon in part to satisfy the appeal court that the alleged reliance by the primary judge on Joe Ianni's evidence had "critically informed his material findings on the issue of the Iannis' understanding of the RHG transactions" and were "in turn, critical to his ultimate conclusion that those

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[5] Amended notice of appeal, ground 1.1(a).

transactions were unjust and unconscionable."[6] No more was required and no more was undertaken.

11 At the beginning of the passage in the second trial judgment, the trial judge stated, after referring to the evidence of a solicitor, Mr Egisto, as to the advice he had given Mr and Mrs Ianni Snr with respect to the earlier financial arrangements with St George Bank:[7]

> "I am satisfied from the foregoing that, by the time Rosario was asked by Joe to agree to change from St George Bank to RAMS, Rosario knew that he had given a guarantee for Joe and Sandra's borrowing, that he and Domenica had given a mortgage over their property as security for what he had guaranteed and that if Joe and Sandra did not pay what St George asked them to pay Rosario and Domenica would be responsible to pay it up to the full value of the Drummoyne property."

12 This, significantly, constituted acceptance of part only of the evidence given by Mr Ianni Snr. He had further alleged that the guarantee was limited to the sum of $100,000. Evidence to that effect was, as the trial judge noted, given by Mr Ianni Snr and by Mr Joe Ianni. The trial judge continued by noting, at [132], that Mr Joe Ianni said that he had told his father that the guarantee "was up to $100,000". He had also told him in 2005 that he was changing banks and that the appellant (then known as RAMS) required the same guarantee as had St George Bank.

13 The trial judge accepted the evidence given by Mr Joe Ianni, which he said "appears to provide some basis for Rosario's fixation on a guarantee for $100,000".[8] Following his statement, at [135], that he accepted "that evidence" of Mr Joe Ianni, the judge then concluded at [136]:

> "In other circumstances I would have been prepared to infer that Rosario had simply misunderstood what was being asked of him in 2000 to provide a guarantee and a mortgage to secure it. However, in the circumstances of this case there is a reasonably strong likelihood that he and [Domenica] were actually misled by Joe into believing that the limit on the guarantee they were providing was $100,000. Nevertheless, I am satisfied from Mr Egisto's evidence that he informed Rosario and [Domenica] that they could be liable up to the value of their house in the event that Joe and Sandra did not pay."

14 The trial judge then found, at [137], that when they met a solicitor to discuss the loan from the appellant, on 11 October 2005, "Rosario and Domenica went

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6 Second appeal judgment at [70].
7 Second trial judgment at [131].
8 Second trial judgment at [133].

along to that meeting believing, as Joe had told them, that he needed them to guarantee the new loan he was obtaining from RAMS which was at a lower interest rate than the loan from St George." The judge continued:

> "There is no evidence to suggest that Rosario and Domenica had any idea that they were to become principal borrowers from RAMS rather than the existing position being maintained with the new borrower."

15 This Court noted the influence of the evidence given by Mr Joe Ianni at two points in the reasoning of the trial judge. The first was said to derive from the reasoning at [132]-[135] and the conclusion at [136].[9] However, as the trial judge correctly noted in his remittal judgment, and as is self-evident from the findings set out at [136], although he had accepted evidence of Mr Joe Ianni that he had told his parents that the guarantee was limited to an amount of $100,000, the judge had not in fact accepted that Mr and Mrs Ianni believed that to be the case, in circumstances where Mr Egisto, the solicitor, had advised them that it was not so limited. Accordingly, the finding as to Mr Joe Ianni's evidence as to the limit was immaterial.

16 The second matter, identified in the second appeal judgment at [57], focused on the belief of Mr and Mrs Ianni when they saw the second solicitor, Mr Wennerbom, on 11 October 2005, as to which the trial judge expressly referred to what "Joe had told them".

17 The trial judge returned to that issue in the remittal judgment, identifying correctly what had to be determined at [17]-[18] and the matters which satisfied him that, disregarding the evidence of Mr Joe Ianni, Mr Ianni Snr did not understand he was to become a principal borrower.[10] As explained by Ward JA, no error was identified either in that reasoning or in the factual findings.

Reliance on Jones v Dunkel

18 The second appeal judgment upheld a challenge to the reasoning of the trial judge in the second trial judgment, rejecting the appellant's contention that he

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[9] Second appeal judgment at [56].

[10] Remittal judgment at [22] and from [23]-[52].

should draw a particular inference from the failure of Mr Ianni Snr to call Mr Joe Ianni to give evidence at the second trial, based on *Jones v Dunkel*.[11]

19 Referring to *Cross on Evidence*,[12] this Court stated in the second appeal judgment, at [75] that "[t]he rule in *Jones v Dunkel* is that the 'unexplained failure by a party … to call witnesses … may in appropriate circumstances lead to an inference that the uncalled evidence … would not have assisted that party's case'". To describe that proposition as a "rule" implies a consequence where the rule is breached. That language is inapt in relation to the drawing of an inference which "may" be available in "appropriate circumstances". The formulation as a "rule" leads counsel and courts to explore in detail how particular cases have applied the "rule" in different circumstances. This exercise is often unhelpful and usually inappropriate. The "rule" derived from cases in which juries were thought to require direction as to what inferences they might draw from the absence of a particular witness. As stated by Mahoney JA in *Payne v Parker*:[13]

> "In my opinion, it would have been open to his Honour to give an appropriately framed direction to the jury on this question, but he was not obliged to do so. This, in my opinion, derives from the nature of the duty of a judge in the summing-up to a jury. As far as concerns the law, his duty is to give such directions as to the law as are necessary to make the jury understand the law, in so far as it relates to the facts before it…. As far as concerns the facts, it is his duty to ensure that the facts are put to the jury fairly and adequately: cf *Jones v Dunkel*.[14]"

20 Mahoney JA continued:[15]

> "What, in general, must be the relationship between X and Y before Y may be inferred, cannot, I think, be stated in a simple formula. It has been said, for example, that an inference may be drawn where, according to the course of common experience the more probable inference from the circumstances, left unexplained, is that Y exists: See *Holloway v McFeeters*;[16] *Jones v Dunkel*.[17]
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> The inference here in question is, in one sense, of this kind. It is based upon what is described by Professor Wigmore as 'our experience of the operation of human nature'[18]."

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11 (1959) 101 CLR 298.
12 JD Heydon, Cross on Evidence (10th ed, LexisNexis, 2015) at [1215].
13 [1976] 1 NSWLR 191 at p 209.
14 101 CLR at p 314,
15 Payne at p 210.
16 (1956) 94 CLR 470 at pp 480, 481.
17 (1959) 101 CLR at 304, 305, 309 and 310.
18 Wigmore on Evidence (3rd ed,) vol 2, par 265, p 87.

21 This Court concluded on the second appeal that the appellant had "established the conditions necessary for the operation of the rule in *Jones v Dunkel*."[19] However, as the Court continued, "it is not mandatory that his Honour draw a *Jones v Dunkel* inference at the retrial."[20]

22 The trial judge gave careful consideration in respect of each finding as to whether the absence of Mr Joe Ianni from the witness box led him to take any different view of the evidence before him than he was otherwise persuaded to do. He held that it did not.

23 The submissions on appeal suggested that, because there was no reason to be derived from the relationship between the parties as to why Mr Ianni Snr might not have called his son to give evidence, that fact must, in each case in which Mr Joe Ianni might be expected to have knowledge of material facts, lead to the inference that his evidence would not assist his father. That approach, however, misconceives the nature of the "rule": all of the circumstances must be taken into account.

24 In the present case, the circumstances to be taken into account included the fact that Mr Joe Ianni had given evidence at the first trial, although not "the content" of that evidence.[21] In the highly artificial circumstances of the remittal hearing, conducted in circumstances where Mr Joe Ianni could not be called, the judge was required to consider the evidence given at the second trial, when he was not called, but could have been, to consider what inference should be drawn.

25 One critical circumstance in his assessment was that on the basis of the extensive documentary evidence, including what might generically be described as the history of the lending, Mr Joe Ianni was the moving party in using his parents and their otherwise unencumbered house as sureties and security for his own financial benefit. On any view, there was likely to be a large question as to his credibility. That fact alone would have provided an ample reason not to call him, regardless of any expectation as to what he may or may not have said. Such an assessment should properly consider that his evidence

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19 Second appeal judgment at [95].
20 Second appeal judgment at [96], and see [122].
21 Second appeal judgment at [94].

at the first trial might have been (a) favourable or (b) unfavourable to his father's case; if it had been favourable, should it now be assumed to be unfavourable? If so, what credibility would it have? If unfavourable, for example in respect of the false documentation, what credibility would it have?

26 Had this been a jury trial, counsel would have been expected to identify with precision the inferences the jury could be asked to draw. That did not happen on the remittal hearing or on this appeal, so the questions posed above cannot be addressed. They do, however, demonstrate the remoteness from reality ("common experience") of any "rule" about drawing inferences from the absence of a witness, as explained by Mahoney JA in *Payne v Parker*.[22]

27 The submissions, both before the trial judge and in this Court, placed great weight on the proposition that, because Mr Ianni Snr was an unreliable witness, the evidence was therefore "equivocal". The reference to "the balance of the evidentiary record [being] equivocal"[23] was derived from the judgment of the Full Court of the Federal Court in *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd*.[24] The trial judge referred to that passage, but rejected the proposition that the balance of the evidentiary record was equivocal.[25] By that he meant that he was satisfied on the balance of probabilities as to relevant matters, and did not require some further (absent) material to be persuaded. That conclusion was open to him on the basis of the evidence before him and was not shown to be erroneous. No new and special principle requires consideration of whether the other evidence is or is not "equivocal". To conclude to the contrary would be to impose an unnecessary and confusing gloss on the general standard of proof on the probabilities. The drawing of inferences is a common sense process which should not be subjected to layers of sophisticated analysis and characterisation of situations.

Conclusions

28 For these additional reasons, and the reasons given by Ward JA, the appeal should be dismissed with costs.

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22 See at [20] above.
23 Second appeal judgment at [96].
24 [2011] FCAFC 53 at [79] (Besanko, Perram and Katzmann JJ).
25 Remittal judgment at [41].

29 **MEAGHER JA**: I agree with Ward JA that this appeal should be dismissed with costs.

30 **WARD JA**: These proceedings are the latest in a series of proceedings in which the appellant, RHG Mortgage Corporation Ltd (RHG), as mortgagee, has sought to enforce a mortgage granted to it by the second respondent, Rosario Ianni, and his now deceased wife, Domenica Ianni, to whom I will refer collectively as the Iannis, over the Iannis' family home at Drummoyne. The mortgage was granted to secure borrowings under a "low doc" home loan agreement in the name of the Iannis, pursuant to which the sum of $910,000 was advanced by RHG (then known as RAMS Mortgage Corporation Ltd (RAMS)). The amount borrowed was applied in substance to discharge indebtedness on the part of the Iannis' son, Joe, and his wife, Sandra, to St George Bank under other loan arrangements. RHG also brought a claim in those proceedings against Sandra's mother (Mrs Rosa Baira) under a separate guarantee that she had given to it. (The claim against Mrs Baira has since been settled.)

31 The Iannis, who were retired elderly migrants for whom English was not their first language, resisted RHG's claim, raising defences based, *inter alia*, on alleged unconscionable conduct on the part of RHG. Among other things, Rosario maintained that his son, Joe, had asked him to sign loan documents for Joe to change to a bank loan at a cheaper interest rate and that he thought that, rather than entering into a home loan agreement as principal borrowers (which is what he and his wife in fact did), the transaction was one in which he and his wife were providing a guarantee in favour of RHG.

32 The matter was first heard by Grove AJ, who found in RHG's favour in June 2011 (*RHG Mortgage Corporation Ltd v Rosa Baira; RHG Mortgage Corporation Ltd v Rosario Ianni* [2011] NSWSC 520; [2011] NSWSC 580). The Iannis (as also did Mrs Baira) successfully appealed that decision, this Court setting aside his Honour's orders and ordering that there be a retrial of RHG's claims against the respective respondents (*Baira v RHG Mortgage Corporation Ltd* [2012] NSWCA 387). Domenica died shortly after the successful appeal

from Grove AJ. Rosario was then appointed to represent her estate in the proceedings.

33 The re-hearing of the matter (the first re-hearing) took place before Davies J (the primary judge) over 9 days in March and May 2014. The first re-hearing proceeded on the agreed basis that the evidence given at the first hearing (before Grove AJ) was to be treated as evidence in the re-hearing *provided* that the relevant witness was made available for cross-examination at the re-hearing. (Although presumably this was intended to enable the re-hearing to proceed more cost-effectively, unfortunately therein lie the seeds of much of the subsequent challenges to the primary judge's respective decisions.)

34 RHG argued at the first re-hearing that the primary judge should reject the Iannis' contention that they were misled into entering into the loan and mortgage documentation or that they executed that documentation not understanding its true nature and effect because, among other things, Joe Ianni had not been called to give evidence at that re-hearing. RHG maintained that a *Jones v Dunkel* inference ([1959] HCA 8; (1959) 101 CLR 298) adverse to the Iannis should be drawn in this regard. The primary judge did not accept that submission.

35 Before Davies J, the Iannis (and Mrs Baira) were successful in resisting RHG's claims (*RHG Mortgage Corporation Ltd v Baira; RHG Mortgage Corporation Ltd v Ianni* [2014] NSWSC 849). The primary judge, while accepting that the evidence of Rosario was unreliable and that Rosario was not honest in respect of a number of matters, was nevertheless comfortably satisfied that Rosario did not understand the detail of the financial arrangements he was guaranteeing and that he executed these documents because of the limited explanation that Joe had given him about the transaction. His Honour accepted Rosario's evidence that he understood, at the time he entered into the RHG loan and mortgage documentation, that he was only granting a replacement guarantee for the St George Bank guarantee and mortgage, though he did not accept Rosario's evidence that he understood the guarantee to be one capped at $100,000.

36 RHG appealed from that decision, its principal complaint being that the primary judge had erroneously relied on Joe's evidence at the hearing before Grove AJ when reaching the conclusions he did in favour of the Iannis. On that issue, the Iannis ultimately conceded that there had been a lack of procedural fairness in his Honour having had recourse to Joe's evidence. RHG also complained as to the primary judge's refusal to draw an adverse inference in respect of the Iannis' failure to call evidence from Joe at the first re-hearing.

37 This Court (McColl JA, Emmett JA and Sackville AJA) upheld RHG's appeal (*RHG Mortgage Ltd v Rosario Ianni* [2015] NSWCA 56) and remitted the matter to the primary judge for re-hearing on certain stated conditions (see [93] below). Following that remittal (the second re-hearing), which was determined on the papers, the primary judge confirmed the orders he had earlier made, including for the discharge of the mortgage over the Drummoyne property.

38 RHG sought and obtained a stay of those orders. It now appeals from the decision reached in the second re-hearing (*RHG Mortgage Corporation Ltd v Ianni* [2015] NSWSC 1911). In essence, RHG challenges the primary judge's most recent decision on two bases.

39 First, it maintains that the primary judge repeated the error made in his first judgment in relying on the evidence of Joe for the conclusion that when the Iannis entered into the RHG documentation they did so on the understanding that they were not undertaking obligations as principal borrowers. In that regard, while RHG acknowledges that ordinarily the primary judge would be in the best position to explain his own earlier reasoning process, RHG submits that the primary judge's "finding" in the second re-hearing judgment that Joe's evidence had not been significant in his initial findings must be incorrect. It bases this argument on the proposition that, absent Joe's evidence, there was nothing objectively to corroborate Rosario's (unreliable) evidence.

40 Second, RHG maintains that his Honour again erred in not drawing the *Jones v Dunkel* inference that it had urged him to draw having regard to the failure of the Iannis to call evidence from Joe at the first re-hearing. RHG argues that the evidence of Rosario was not unequivocal on the claim that the Iannis had been

misled by Joe into signing the loan/mortgage documentation as borrowers; and hence submits that an adverse inference should have been drawn.

41 For the reasons set out below, I consider that the appeal should be dismissed with costs.

Background

42 The genesis of this litigious saga was the entry by Joe and Sandra in 2000 into a loan agreement with St George Bank, under which the bank advanced the sum of $550,000 for the purchase of an investment property in Pyrmont. The loan agreement was dated 2 June 2000. It was signed by the Iannis as guarantors.

43 The primary judge held (and there is no challenge to this finding) that the Iannis had received independent legal advice explaining the nature of the guarantee they gave on this occasion. On 13 July 2000, Rosario had had a meeting with Mr Egisto, an Italian speaking solicitor who had previously acted for Rosario in a number of workers' compensation claims in the early 1990s. In that meeting, Mr Egisto explained to Rosario that he was giving a guarantee for all the moneys that Joe and Sandra might owe St George Bank and that he could be liable for their debt up to the value of his house. Another Italian speaking solicitor, Mr Previte, gave separate advice to the same effect to Domenica.

44 The Guarantee and Indemnity dated 20 July 2000 then executed by the Iannis was one under which their liability was limited to the market value of their Drummoyne property. They also executed a mortgage in favour of St George Bank. Rosario and Domenica's signatures were witnessed by Mr Egisto and Mr Previte, respectively. In the proceedings later brought by RHG to enforce the mortgage subsequently granted to RHG, Rosario deposed that he had no recollection of signing a mortgage in favour of St George Bank, though he did recall visiting Mr Egisto and signing some documents. He denied that any of the documents were explained to him by Mr Egisto. The primary judge rejected that evidence.

45 The RHG transaction to which the present proceedings relate was entered into in 2005.

46 According to Rosario, in about September 2005, Joe told him that he had found another bank (RHG) that would give a loan at a cheaper interest rate and that he (Joe) wanted to take a loan with that bank and pay out St George Bank. Rosario deposed that Joe asked him to sign "the documents for the loan" as guarantor (Rosario's affidavit of 5 September 2008 at [8]). Rosario further deposed that he understood that he was to sign the documents for the loan so that Joe's loan with St George Bank could be paid and Rosario's guarantee (which he claimed was for a sum of about $100,000 plus interest) discharged, and that he would then have a new guarantee (with RHG) in relation to the sum of $100,000 (affidavit of 5 September 2008 at [9]).

47 A loan application in the names (and bearing the signatures) of the Iannis was sent to RHG on 14 September 2005. It was sent by a mortgage originator, Mr Famularo, who only the month before had completed a loan application to another bank (NAB) on behalf of Joe and Sandra for finance in the amount of around $3.5 million for the stated purpose of funding for the couple to purchase a property at Dural, to refinance the St George Bank loan and to take out a line of credit.

48 The 14 September 2005 loan application to RHG was for a loan in the lesser sum of $1 million. Its stated purpose was for "refinance and investment". There was no evidence that Rosario had any borrowings to be refinanced (other than a reference in a file note of Mr Famularo which the primary judge found was fabricated) or that the Iannis had any intention of purchasing an investment property or making any kind of investment.

49 In that loan application, Rosario was described as a self-employed investor at a named restaurant (one that was in fact operated by Joe and Sandra) with a taxable income of $85,000 per year and Domenica was described as a self-employed investor in the food industry with a taxable income of $90,000. That information was clearly false. Rosario had retired from his work as a painter and docker in about 1994 and was in receipt of Centrelink benefits at the time. As to Domenica, the primary judge accepted that the medical evidence established that she had not worked at any relevant time. The contact details given for each of the Iannis were the telephone numbers for Joe and Sandra's

restaurant and for Joe. False Australian passport numbers were included for each of the Iannis by way of identification. Domenica had never held an Australian passport.

50 Accompanying the RHG loan application was a copy of the front page of a contract for sale for a property at Dural, purporting to show the purchasers as the Iannis and a purchase price of $500,000. The primary judge found that this was a fraudulent alteration of the actual sale contract (under which the purchasers were Joe and Sandra and the purchase price was $2,223,500). The loan application was also accompanied by a "snapshot of account" for the loan Joe and Sandra had obtained from the St George Bank, showing an outstanding balance of $486,035. The primary judge found that this document was probably a genuine document provided to Domenica and Rosario as guarantors of Joe and Sandra's St George Bank loan.

51 As noted earlier, the RHG loan application was signed by the Iannis and purportedly witnessed by Mr Famularo. Mr Famularo gave evidence, which the primary judge ultimately rejected (see [248] of the first re-hearing judgment; [32] of the second re-hearing judgment), that he had attended a meeting with the Iannis and Joe on 14 September 2005 at which Rosario gave him instructions to make the loan application and the Iannis signed the application. He produced a diary note of that alleged meeting (a transcript of which is reproduced in the first re-hearing judgment at [76]), written on paper that was different from the paper contained in his diary. While RHG obtained a report from a forensic document examiner that confirmed Mr Famularo's claim that the pages on which the note was written were pages that had been inserted to supplement pages missing from the original diary as supplied by the manufacturer, for cogent reasons set out by the primary judge at [208]-[220] his Honour accepted that no such meeting had taken place and that Rosario had never met Mr Famularo.

52 On 16 September 2005, a further copy of the loan application, again signed by the Iannis, was sent to RHG. This version of the loan application made no reference (as the first had done) to a company operated by Joe and Sandra in the name of Jencon. The identification section of the application referring to the

passport numbers was amended. Mr Famularo's evidence (again not accepted by the primary judge) was that this document was executed by the Iannis in his office. Rosario offered no explanation for the fact that his and his wife's signatures were on the respective loan applications (but nor was he cross-examined to suggest that he had knowingly or deliberately signed false loan application documents).

53 On 11 October 2005, Joe took the Iannis to a meeting with Mr Wennerbom, a solicitor in Sydney who spoke only English and whom the Iannis had not previously met. The primary judge noted that Mr Wennerbom was not given the complete background to the transaction. In particular, he did not know about the existing St George Bank loan and guarantee. Mr Wennerbom gave evidence that the meeting took about 54 minutes and that in the meeting he explained to the Iannis that they were entering into a loan for $910,000 that was secured by a mortgage over their home. His evidence was that he was careful to ensure that he spoke slowly and that he checked with the Iannis regularly so as to ensure that they were following and understanding what he was saying. Nevertheless, Mr Wennerbom did not ask the Iannis to confirm to him what it was that they understood they were entering into and did not query with them the purpose of the borrowing.

54 At that meeting, the Iannis signed the RHG loan and mortgage documentation, including a statutory declaration to the effect that each was a borrower of a RAMS Low Doc Home Loan for $910,000; a Borrower's Acknowledgment to the effect that RHG had recommended that they retain a solicitor or conveyancer to represent and advise in relation to obtaining the loan; and declarations to the effect that each had received independent legal advice regarding loan and security documents in favour of RHG. Their signatures were witnessed by Mr Wennerbom.

55 The moneys advanced by RHG were disbursed in large part to St George Bank, which then discharged its first registered mortgage over the Iannis' property (as well as a mortgage over certain other property at Pyrmont that was also security for the loan to Joe and Sandra).

56 Loan repayments on the advance of the $910,000 were made to RHG from October 2005 through to 29 February 2008. On 20 March 2008, following default in the loan repayments, RHG served notice, pursuant to s 57(2)(b) of the *Real Property Act 1900* (NSW), notifying the Iannis of its intention to exercise its power of sale as mortgagee of their property.

57 RHG then commenced proceedings seeking possession of the Drummoyne property. By the time of the hearing, the outstanding debt under the loan agreement was $1,627,138.19.

58 In their Defence and Further Amended Cross Claim, the Iannis claimed, *inter alia*, that they signed the RHG loan agreement in reliance on and induced by representations by Joe that the documents they were executing were to effect a guarantee for a loan from RHG to Joe of $100,000 and that they were induced to execute the mortgage and loan agreement while acting under the influence of Joe. They claimed that the 14 September 2005 loan application was prepared and executed without their knowledge and contained (as it clearly did) incorrect and misleading information about their capacity to repay moneys due under the Loan Agreement. They claimed that, properly advised of the true nature of the transaction, they would not have executed the loan agreement and mortgage.

59 The Iannis maintained that the loan agreement and mortgage were unjust contracts within the meaning of s 6 of the *Contracts Review Act 1980* (NSW) because they executed those documents not understanding the true nature of those transactions and the moneys advanced under those instruments were not advanced for their benefit. They also claimed that RHG had engaged in unconscionable conduct within the meaning of the *Australian Securities and Investments Commission Act 2001* (Cth) and the *Trade Practices Act 1974* (Cth).

First re-hearing judgment ([2014] NSWSC 849)

Domenica

60 As noted earlier, Domenica had died before the first re-hearing. Self-evidently she was not able to be cross-examined in that hearing as to the evidence she had given in the proceedings before Grove AJ. The case appears to have

proceeded in effect on the basis that Rosario's knowledge could be imputed to Domenica. At [13], the primary judge said that the evidence suggested that at all relevant times Domenica did whatever Rosario advised in relation to the signing of documents and in connection with financial matters.

Credit findings

61 Before summarising the relevant findings on the critical issue of the Iannis' knowledge of the financial transactions into which they had entered, I note that Davies J made a number of relevant credit findings in his first judgment in this matter.

62 First, as to Rosario, his Honour found his evidence to be very unsatisfactory in a number of respects ([98]) and unreliable ([121]). His Honour concluded (at [183]) that Rosario did not always tell the truth. In particular, his Honour considered that Rosario was not honest in the evidence he gave as to his ability to understand basic straightforward English (see [98]-[100]), an issue that his Honour said was very significant because of Rosario's claim that he could not understand either Mr Egisto or Mr Wennerbom when they explained important matters about transactions into which he was entering ([98]). Similarly, his Honour rejected Rosario's evidence as to the dialect in which Mr Egisto (the solicitor who had explained the St George Bank guarantee and mortgage to him) had spoken and as to his inability to understand that dialect ([120]). In this regard his Honour considered that Rosario had deliberately tried to avoid answering questions that would expose more knowledge on his part than he was prepared to admit ([124]). Relevantly, his Honour concluded at [125] that:

> It is difficult to know at other times if Rosario was being deliberately untruthful, whether his own honest beliefs about the events have been altered by time, or whether he was just confused. For whatever reason, his evidence is generally unreliable and it must be scrutinised with care.

63 What his Honour did not say (contrary to appeal ground 1(a) of the amended notice of appeal as it was initially framed – though not as ultimately pressed) was that Rosario's evidence could not be relied upon unless corroborated. At [183], the primary judge made clear that, although he had found Rosario to be an unreliable witness who did not always tell the truth, he could not and did not conclude that none of Rosarios's evidence was able to be relied upon. His

Honour went on to say (there speaking of both Rosario and Mrs Baira) that "[i]n the difficult position of having conflicting witnesses who are both unreliable and to some extent dishonest, it is necessary to look to other more objective material to endeavour to see where the truth lies".

64 Second, as to Mr Famularo, the importance of whose evidence was emphasised by the primary judge at [182] on the basis that a very significant issue in the proceedings was the extent of the understanding that the Iannis had about the relevant loan agreement, the primary judge found him to be "a most unsatisfactory witness" ([199]). The primary judge gave detailed reasons for his conclusion that it was difficult to accept much of the evidence Mr Famularo had given. His Honour accepted the proposition put to Mr Famularo by Senior Counsel for the Iannis (and denied by Mr Famularo) to the effect that Mr Famularo was making his evidence up as he went along. His Honour described some of the evidence Mr Famularo gave as being "quite frankly, unbelievable". The primary judge concluded that it was more likely than not that Mr Famularo had fabricated diary notes of the meetings alleged to have been held with the Iannis (and with Mrs Baira). His Honour considered that the information in those diary notes had most likely come from Joe but certainly did not come from the Iannis.

65 At [201], the primary judge noted his conclusion that Mr Famularo's evidence was entirely unreliable and had simply been reconstructed or made up to try to make it consistent with documentary material that Mr Famularo had seen. His Honour further said that, if mistaken in the conclusion that the diary notes were fabricated at a later time, he nevertheless had no doubt that the information in them came from Joe, and that they had been worded to give the appearance that the information came from the Iannis ([276]).

66 At [275] the primary judge said that he was in no doubt that Mr Famularo could not have been telling the truth about a number of matters and considered that other parts of his evidence were so unreliable that other evidence of what occurred is to be preferred. His Honour made clear that, in respect of matters which would call for a greater degree of satisfaction being established in accordance with *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336,

he was “entirely satisfied”, referring by way of support for that conclusion to matters contained in written submissions for the Iannis (at [93] and [98]-[103]).

67 Pausing there, from a linguistic point of view, it seems from his Honour’s reasons that his Honour held a stronger view as to Mr Famularo’s overall untruthfulness than he did as to Rosario’s evidence.

68 Third, as to Mr Wennerbom, his Honour considered him to be an honest witness doing his best to recall events that had taken place almost nine years earlier (see [143]). Nevertheless his Honour also had “the very distinct impression that, to a marked extent, his evidence was based a reconstruction of what he thought had taken place when he looked at the documents that were placed before him”.

69 Finally, as to Joe, the primary judge noted at [132] that Joe had not given evidence before him. His Honour said at [134] that it was hard to know what to make of Joe’s evidence that he did not inform his father in 2005 that Rosario was actually borrowing money nor that what Rosario was doing involved reducing the indebtedness of Joe, Sandra or Jencon. Nevertheless, the primary judge considered at [135] that on balance he should accept that evidence of Joe’s, as it was “largely consistent with other matters that cause[d] [his Honour] to think that Joe used his parents to obtain the loans he wanted…”.

70 Later, in the context of considering the *Jones v Dunkel* submission put by RHG and having pointed to the circumstances that would give Joe a reason not to tell the truth, the primary judge said (at [196]) that a reading of the whole of Joe’s evidence caused him to doubt that Joe was telling the truth in all respects.

Findings as to the Iannis’ knowledge of the RHG transaction

71 As to the critical question of the Iannis’ knowledge of the RHG transaction, at [131] the primary judge said that he was satisfied “from the foregoing” (by which his Honour must have been referring to the evidence given by Mr Egisto of his explanation to Rosario of the St George Bank transaction which had been extracted in the immediately preceding paragraphs) that:

> … by the time Rosario was asked by Joe to agree to change from St George Bank to RAMS, Rosario knew that he had given a guarantee for Joe and Sandra's borrowing, that he and Domenica had given a mortgage over their property as security for what he had guaranteed and that if Joe and Sandra did not pay what St George asked them to pay Rosario and Domenica would be responsible to pay it up to the full value of the Drummoyne property.

72 The primary judge had no doubt that on 11 October 2005 the Iannis went to the meeting with Mr Wennerbom "believing, *as Joe had told them*, that he needed them to guarantee the new loan he was obtaining for RAMS which was at a lower interest rate than the loan from St George" ([137]) (my emphasis). Pausing there, the Iannis submit that the italicised words should be read as an implicit acceptance of Rosario's evidence to that effect, rather than impermissible reliance on Joe's evidence, though I note that they follow the primary judge's consideration, and "on balance" acceptance, of Joe's evidence (recorded at [132]) that Joe had spoken to his father in 2005 regarding changing banks and had told Rosario that his guarantee for $100,000 was required for the change of banks.

73 His Honour added (at [137]) that there was no evidence to suggest that the Iannis "had any idea that they were to become principal borrowers from RAMS rather than the existing position being maintained with the new borrower" [sic; scil, lender].

74 At [138], his Honour noted that Mr Wennerbom had no information suggesting that he knew that that was the Iannis' belief, nor any information that Joe had led the Iannis to believe that they were simply giving a guarantee; and that it was not apparent from the documents provided to Mr Wennerbom that he would have been able to discern that there was to be a change in the status of the Iannis from that of guarantors/mortgagors to borrowers/mortgagors. The primary judge pointed out that it was made clear to Mr Wennerbom that there were more parties involved in the transaction than the Iannis and he noted that Mr Wennerbom knew both that Joe was involved in the transaction and that the mortgage being given by the Iannis was not the only mortgage in the transaction.

75 His Honour concluded, relevantly, at [184] that:

> Whilst, as I have indicated, I am entirely satisfied that both Rosario and Mrs Baira knew that they had provided their properties as security for guarantees

> they had given for Joe, Sandra and Jencon at the time of the applications to RAMS, I am comfortably satisfied that they did not understand the detail of the financial arrangements that existed between Joe, Sandra and Jencon on the one hand and St George Bank on the other. I do not think that either of them knew the extent of the borrowings nor what was being planned and organised by Joe and Mr Famularo from August 2005 and onwards.

76 In explaining that conclusion, his Honour noted (at [185]-[186]) that: Rosario was not a sophisticated person; that Rosario had no understanding of commercial or financial matters beyond basic things such as what a guarantee, a mortgage and a loan was; that Rosario had not worked since he retired from his job at Garden Island in 1994; and that, particularly having regard to the medical evidence, Domenica did not work at any relevant time.

77 The primary judge then expressed (at [187]) his satisfaction that Joe was the "moving party" in relation to the loans. His Honour said (at [188]) that "[w]hilst Rosario was also agreeable to signing documents that Joe asked him to sign, he did so because of the limited understanding that Joe had provided to him for the purpose of obtaining his agreement". His Honour commented that he did not consider that Rosario displayed "the same cavalier attitude to signing documents that Mrs Baira displayed".

78 At [189]-[190], his Honour said:

> Both in respect of Rosario and Mrs Baira I accept that there was a language problem although this was much less the case with regard to Mrs Baira. Whilst I do not accept that Rosario has the very limited understanding and ability with English that he would maintain, *I am satisfied that he had a limited grasp of English particularly when legal and financial documents were being explained to him* …
>
> I also accept that it is likely that there was a great gulf fixed between Rosario on the one hand and any solicitor explaining documents on the other, particularly when it came to Mr Wennerbom. This is because a solicitor may have honestly believed that Rosario and Domenica understood what was being said to them, when in fact they did not sufficiently understand what was being conveyed but believed that they did. It is no surprise from a person of Rosario's background that he might have indicated that he understood matters that were being explained by the solicitor when he did not have at least a full grasp of what was being said. *Nor does it assist if someone like Rosario has a preconceived fixed notion of what he is doing and what is happening although that may not accord with reality.* People sometimes hear what they want to hear and perceive what they expect to see. (my emphasis)

79 At [191], having noted that Mr Wennerbom had not adopted the approach commonly now recommended for solicitors giving the sort of advice that Mr Wennerbom was giving (i.e., that they should, rather than making

statements to their clients and then asking if they understand, ask the clients to tell them in their own words the clients' understanding about the transaction), the primary judge said that:

> … where Mr Wennerbom received no response to significant parts of his advice (see [140] above), I can have no confidence that Mr Wennerbom's explanation was in fact understood by Rosario and Domenica. That conclusion is strengthened by my finding that Joe led them to believe that they were simply going to sign documents to transfer their guarantee from St George to RAMS because of the lower interest rate.

80 The evidence to which the primary judge was there referring, as extracted at [140] of the reasons, was the following exchange in the course of Mr Wennerbom's cross-examination:

> A. I said, "You are borrowing $910,000", pointing at it, and I then said, "It is subject to the terms of this agreement and the others that follow. You have a term of 30 years. You will also be liable to pay some fees like stamp duty". And I pointed out the amount for stamp duty that would be deducted from the loan, and also the insurance fee. I said to them, "Approximately $11,000 will be deducted from the $910,000 you are borrowing, so you will not get $910,000 when the matter settles. There will be 11,000 less".
>
> Q. I'll stop you there. What if anything did Mr and Mrs Ianni say to that, do you recall?
>
> A. No, nothing.
>
> Q. They didn't respond?
>
> A. No. I then highlighted other fees such as a break fee that could be charged by the bank which was set out in this letter, and they should be sure they understood those costs.
>
> Q. What if anything did they say to that?
>
> A. Nothing.

81 Earlier (at [139]), the primary judge had also noted the following exchange in the cross-examination of Mr Wennerbom, after Mr Wennerbom had explained that the Iannis had acknowledged their understanding when he told them to stop him if they did not understand anything (T 272.29):

> Q. Can I stop you there. How did they acknowledge that [their understanding]?
>
> A. I believe Mr Ianni said, "Yes, I will", and Mrs Ianni said, "I understand". I can't be exactly sure, that's it, but I think that's what they said, and I made a point of saying, when I – sorry.

82 The primary judge considered it significant that up to the point in the meeting with Mr Wennerbom where the Iannis fell silent (i.e., the passage extracted at

[140]), they were being told things that they already understood (such as that, if money was not paid to the bank, the bank could take their house and sell it), but that when something new was being said that did not accord with their "pre-existing understanding", such as "you are borrowing $910,000", they fell silent and did not indicate any understanding. (That observation is, of course, predicated on the earlier finding that they went to the meeting not understanding that they were to be principal borrowers.)

83 The primary judge also considered it significant that the solicitor whom Joe had arranged to give the Iannis advice as to the transaction was not an Italian/Calabrian speaker (such as Mr Egisto or Mr Previte) but, rather, was a solicitor who the Iannis did not know, who spoke only English, and who had no background as to what had gone on previously in relation to the arrangements between Joe and Sandra on the one hand and the Iannis on the other. The primary judge was "entirely satisfied" that Rosario had difficulty with English involving legal or technical terms and that his ability to read English was very limited, noting that Rosario would be completely dependent upon what the solicitor was telling him in his non-native language (and that Joe knew that).

84 Ultimately, his Honour concluded (at [277]) that:

> *Despite the unsatisfactory nature of Rosario's evidence*, I accept his evidence that he thought he was to go to see Mr Wennerbom to sign documents granting a new guarantee for Joe and Sandra's borrowings that were being changed from St George Bank to RAMS. *That evidence receives support from the evidence that Joe gave before Grove AJ*. Although trial judges have been warned of the dangers of placing too much emphasis on demeanour, there can be no doubt that seeing a witness give his or her evidence can assist in an assessment of its veracity. I have not had the opportunity to see Joe give evidence. I have only read his evidence in the transcript of the proceedings before Grove AJ. I have indicated earlier the impression that I obtained from that evidence which was that Joe was attempting to blame others for what had occurred and to paint himself in a good light. (my emphasis)

85 At [283], his Honour expressed his satisfaction that, despite Mr Wennerbom's best efforts with the material that he had, Mr Wennerbom did not succeed in getting the Iannis to understand that they were becoming principal borrowers and not merely giving their house as a guarantee in the limited way that had existed prior to the RHG transaction.

86 As to the drawing of any *Jones v Dunkel* inference, his Honour had earlier said (at [195]):

> The Plaintiff submitted that Joe was in the camp of Rosario and Domenica and, to a lesser extent, in the camp of Mrs Baira, and the failure of those parties to call him to corroborate their evidence should result in an inference that his evidence would not have assisted them. Given the case that was being run by the Defendants, that it was Joe and to a lesser extent Sandra that were responsible for wrongfully bringing about their present liability, it is not immediately apparent that Joe was a witness who it would naturally be expected would be called by the Defendants: *O'Donnell v Reichard* [1975] VR 916 at 929. I do not overlook what Schmidt J said in *Westpac Banking Corporation v Velingos* [2011] NSWSC 607 at [78], but it does not appear that her Honour's attention was drawn to *Fabre v Arenales* (1992) 27 NSWLR 437 at 450 where it was said that a *Jones v Dunkel* (1959) 101 CLR 298 inference may not arise if a witness has a reason for not telling the truth.

87 His Honour commented (at [196]) that *if* Joe's evidence at the hearing before Grove AJ were to be believed, it provided "some support" for Rosario's evidence that he never met Mr Famularo and that Mr Wennerbom did not explain the documents to the Iannis. At [197], the primary judge noted that while Joe had, before Grove AJ, professed a lack of knowledge about some things that he could have been expected to know (such as how his parents came to sign the loan application) and had appeared to want to shift the blame for things onto Mr Famularo, Joe did support Rosario's evidence that Joe had told Rosario that he was simply changing banks to get a lower interest rate for a guarantee from the Iannis of $100,000. (Pausing there, the primary judge clearly did not rely on Joe's evidence to the extent that it supported Rosario's claim that the guarantee was limited to $100,000 since his Honour rejected that proposition.)

88 The primary judge then said:

> Any failure to call Joe appears to me entirely explicable as a result of these matters. It does not seem likely that his evidence would have assisted anyone because of the desire to whitewash his own involvement in the matter. By the time he gave evidence at the earlier hearing he had been made bankrupt. He had no interest in doing other than to support his parents and Mrs Baira, and to blame others for what had happened. I do not think I can draw a *Jones v Dunkel* inference that his evidence would not have assisted Rosario or Mrs Baira. The contrary position is more likely, *but the question would certainly be whether he should be believed for anything he said*. (my emphasis)

89 His Honour concluded at [377] that the Iannis were under a special disability by reason of their age, language, education and economic background; and that

they were at a special disadvantage by reason of their ignorance of the financial position of the persons who the loan agreements were designed to benefit, and the transactional arrangements being put in place to bring about the benefit to those persons. His Honour noted that no consideration effectively moved to the Iannis from the transaction (referring to what was said in *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447 per Deane J at p 475). Hence the finding in favour of the Iannis.

2015 Court of Appeal judgment ([2015] NSWCA 56)

90 On appeal to this Court, McColl JA (with whom Emmett JA and Sackville AJA agreed) considered it apparent that the primary judge's conclusion that Rosario had a limited understanding of the transaction in which the RHG documents were entered into was informed by his Honour's acceptance of Joe's evidence at the first hearing before Grove AJ that he had told his father that the transaction involved a guarantee of "up to $100,000" (see [63] of her Honour's reasons, her Honour there referring to the matters earlier set out at [52] and [58] of those reasons). Her Honour concluded (at [70]) that the primary judge's use of Joe Ianni's evidence at the first hearing had critically informed his material findings on the issue of the Iannis' understanding of the RHG transactions and that those findings were critical to the ultimate conclusion that those transactions were unjust and unconscionable.

91 Her Honour considered that the outcome could have been different if the primary judge had not had regard to Joe's evidence, saying that it was apparent that his Honour would otherwise have entertained serious doubt about Rosario's evidence ([73]). Hence, her Honour found that the procedural injustice complaint of RHG was made good ([74]).

92 As to the complaint that the primary judge had erred by not taking into account the Iannis' failure to call Joe at the re-hearing, McColl JA concluded (contrary to the primary judge's view on this issue) that RHG *had* established the conditions necessary for the operation of the rule in *Jones v Dunkel* ([95]), saying that Joe was the obvious witness who could have corroborated the Iannis' evidence and was a person it could reasonably be expected they would call. However, her Honour went on to note that it was not mandatory that a

Jones v Dunkel inference should be drawn at the retrial. Her Honour noted statements in the authorities to the effect that, generally speaking, such an inference only becomes material where the balance of the evidentiary record is equivocal (see her Honour's reasons at [96]) and that it would be for the primary judge to determine on which side of the line the evidence fell.

93 It is clear from her Honour's reasons (see for example [98]) that what was required on the second re-hearing was that the primary judge reconsider the matter without reliance on Joe's evidence but that it was a matter for the primary judge to determine whether any *Jones v Dunkel* inference should be drawn. The order for a retrial of the proceedings was expressly conditioned, among other things, on the parties being given the opportunity to make submissions to the primary judge both as to how his Honour's reliance on Joe's evidence should affect the conclusions previously reached and as to whether any *Jones v Dunkel* inferences should be drawn consequent upon the Iannis' failure to call Joe at the first re-hearing. Any suggestion that this Court has already determined that such an inference should have been drawn by the primary judge cannot therefore be maintained.

Second re-hearing judgment ([2015] NSWSC 1911)

94 The second re-hearing was conducted solely on the basis of written submissions by the parties, the primary judge having noted the parties' inability to agree on dates for oral submissions within a time his Honour considered to be reasonable ([5]).

95 At [6]-[8], the primary judge identified the errors that this Court had found in his first judgment and the relatively narrow focus for the re-trial. In particular, his Honour noted (and I agree) that this Court did not hold that a *Jones v Dunkel* inference should have been drawn from Joe's absence at the trial ([7]).

96 The primary judge then proceeded (at [10]-[11]) to identify those parts of his first judgment in which he had made reference to evidence given by Joe at the first trial (referring to [132]-[135], [196]-[197], [204] and [277]) or to beliefs held by the Iannis as a result of what Joe had told them (referring to [138], [184], [188], [191] and [369]). Although RHG takes issue with the completeness of the

references back to the earlier judgment, broadly speaking they encompass the substance of the relevant references.

97 The primary judge said (at [12]) that his acceptance of the evidence given by Joe at the first trial had influenced his findings on three matters: that Rosario had never met Mr Famularo ([196] of the first re-hearing judgment); that Joe first met Mr Famularo in July 2005 ([204] of the first re-hearing judgment); and that Rosario believed that he was going to see Mr Wennerbom to sign documents granting a new guarantee for Joe and Sandra's borrowings that were being changed from St George Bank to RAMS ([277] of the first re-hearing judgment).

98 His Honour pointed out (at [13]) that he had not accepted the evidence given by Joe at the hearing before Grove AJ that Mr Wennerbom did not explain the documents to his parents; nor had he accepted Joe's evidence that he told his father in 2005 that his father's guarantee "for $100,000" was required for the change of banks. His Honour also noted that he had not accepted Rosario's evidence to that effect, nor Rosario's evidence that the guarantee was always limited to $100,000.

99 In particular, the primary judge made it clear that he had not accepted all of the evidence given from either Joe (at the hearing before Grove AJ) or from Rosario ([14]), but he accepted that he had treated evidence given by Joe at that first hearing as providing some corroboration of the evidence given by Rosario in the first re-hearing ([16]).

100 The primary judge then proceeded to address the question whether, absent Joe's evidence, his conclusions as to the Iannis' understanding and their involvement in the transaction could stand and, if not, what conclusions should be reached.

101 His Honour accepted RHG's submission that the first critical issue was whether the Iannis had understood the true nature of the loan agreement which they executed before Mr Wennerbom ([17]). His Honour considered that there were two aspects to that issue: first, whether the Iannis knew the true nature of the loan agreement before they saw Mr Wennerbom and, if they did, whether that was because of what Joe told them or because they were, with Joe, the

initiators of the arrangement; and, second, if they did not know the true nature of the arrangement before they saw Mr Wennerbom, whether they then did know it as a result of his explanation ([18]).

102 The primary judge noted (as is apparent from his earlier reasons) that although he considered that Rosario's evidence was unreliable and needed to be scrutinised with care, he had accepted some of Rosario's evidence and had not concluded that none of his evidence could be relied upon ([20]).

103 At [22], his Honour said that the finding (at [184] of his first judgment) that he was comfortably satisfied that Rosario did not understand the detail of the financial arrangements that existed between Joe, Sandra and their company (Jencon) on the one hand and St George Bank on the other, and the extent of the borrowings or what was being planned and organised by Joe and Mr Famularo, found support elsewhere in the evidence. The principal matters his Honour identified in this regard were: the history of the borrowing by Joe and his interests up to and including the application for the RHG loan; the evidence concerning Mr Famularo; the matters concerning Mrs Baira; and what had transpired with Mr Wennerbom. The primary judge then proceeded to address each of those four topics.

104 As to the first, the primary judge said that Joe's borrowing history was significant in that it showed that Joe was not only the moving party behind the loan applications to RHG but also that he was prepared to put forward false information and material regarding both his parents and Mrs Baira ([24]).

105 The primary judge then referred (at [26]) to a number of matters that he considered pointed strongly against the conclusion that the Iannis knew the true position, including that all the contact details on the applications related to Joe; that the solicitor from Phillips Fox who was nominated on the documentation had never been the Iannis' solicitor; and the provision of false passport details for the Iannis (for which there would have been no explanation or need had the Iannis been the true borrowing parties). His Honour rejected any suggestion that the Iannis ever intended to acquire an interest in the Dural property (in respect of which the contract document had been altered).

106 As to the second of the four topics that the primary judge referred to as providing support (quite apart from Joe's evidence) for the conclusions he had reached, namely his assessment of Mr Famularo's evidence, the primary judge made clear his view that it had not been based in any way on Joe's evidence ([30]). Though accepting that he had noted in passing (at [204] of his earlier reasons) Joe's evidence that he had met Mr Famularo from July 2005, the primary judge said that this (passing) statement added nothing to the other evidence he had considered when looking at the question as to when Mr Famularo first met Joe.

107 At [31], the primary judge referred to the detailed reasons he had given for holding that there was no meeting between Mr Famularo and the Iannis and that Mr Famularo's file note was a fabrication. In this regard, his Honour said that while the "generally untruthful and unreliable evidence of Mr Famularo" (referring to [202]-[207] and [221]-[268] of his first judgment) had helped inform his determination that no meeting had occurred and that the diary note had been fabricated, what had brought him to that view were the matters discussed at [208]-[220] and [269]-[275]. Those matters in summary were (as to [208]-[220]) his Honour's assessment of the evidence Mr Famularo had given as to the conversations to which he deposed at the alleged 14 September meeting and (as to [270]-[275]) that: much of the information that was said to have been provided to Mr Famularo was untrue and that the Iannis were not sophisticated enough to provide this information, which must have come from Joe; the unexplained failure by Mr Famularo to produce his diary notes in answer to a subpoena calling for their production (from which the primary judge surmised that this may have been because the file notes did not then exist); and the dating of the file note as being "14/9/09" although the alleged meeting took place in 2005. His Honour stated that it was for those reasons that he had no doubt that there was no meeting between Mr Famularo and Rosario, as Mr Famularo had alleged ([32]).

108 The significance attached by the primary judge to that matter was that it tended to corroborate Rosario's evidence that he was provided with minimal information by Joe and went to the meeting with Mr Wennerbom not understanding that he was to become a principal borrower; and that it tended

to highlight how Joe was using his parents to obtain the loans by putting forward any evidence, true or not, that would bring about that result. His Honour confirmed that his conclusion in that regard came not from any evidence of Joe but by inference from what was put forward by Joe to RHG through Mr Famularo when compared to what was objectively true ([32]).

109 The primary judge described the evidence that Mr Famularo generally was untruthful and unreliable as being very strong ([38]) and said he had no doubt that the person who was driving the refinance was Joe, "ably assisted by Mr Famularo who either knew that the information he was putting forward to [RHG] was false or he turned a blind eye to its lack of truthfulness" ([39]). That being so, his Honour considered that any evidence given by Joe that was unfavourable to Rosario's case would not be credible evidence. His Honour made clear (at [41]) his view that the evidence surrounding Mr Famularo's involvement with Joe was not equivocal and that he was entirely satisfied that Rosario was not part of that involvement. His Honour did not consider that he should infer that Joe's evidence about that aspect of the matter, when assessed in the light of the other evidence, would not have assisted Rosario ([41]).

110 As to the third of the four topics, the findings in relation to Mrs Baira, the primary judge considered that the significant matter to be drawn from her evidence was the lack of information provided to her whenever increased support from her was needed by Joe and Sandra; and that the diary note in relation to Mr Famularo prepared in relation to a conference with her was fabricated and that the information in it must have come from Joe. The primary judge noted that the issue of a *Jones v Dunkel* inference was irrelevant as far as Mrs Baira's evidence went since there was no suggestion that she had dealt with Joe or that the conference Mr Famularo claimed he had with Mrs Baira had included Joe ([45]). (RHG does not cavil with this conclusion.)

111 As to the last of the four topics, the primary judge confirmed that his findings with respect to the conference with Mr Wennerbom were critical to the conclusion he reached that the Iannis never understood that they were becoming principal borrowers and not merely providing their house as a

guarantee to a new financial institution ([46]). His Honour noted that the conclusions he had reached about the evidence of Mr Wennerbom (that Mr Wennerbom had no knowledge or understanding of the prior arrangements between Joe and his interests and the Iannis and was not aware of the wider transaction so as to be able to put into context the documents on which he was asked to advise the Iannis) were unrelated to any evidence Joe had given at the hearing before Grove AJ.

112 His Honour referred to the shortcomings of the meeting between Mr Wennerbom and the Iannis to which he had drawn attention (at [137]-[143] and [189]-[194] of his earlier reasons) ([47]) and said that he considered it significant (as a further indication, independent of Joe's evidence, that Joe was endeavouring to keep his parents in the dark and had succeeded in so doing), that the solicitor that Joe had "undoubtedly arranged" for his parents to see was an English speaking solicitor who did not speak Italian ([48]).

113 The primary judge noted that he had accepted Mr Wennerbom's evidence as to what had transpired at the meeting (referring to his earlier judgment at [139], [140] and [143]) and that he accepted that Rosario had no clear recollection of the meeting ([50]). His Honour then went on to identify the crucial findings concerning the explanation given by Mr Wennerbom (at [190]-[194] of this earlier reasons). His Honour noted that the limited information provided to Mr Wennerbom (and Mr Wennerbom's view that he was not providing commercial or financial advice to the Iannis) meant that Mr Wennerbom was not in a position to explain matters to them which would have given them a proper understanding of how the Iannis' position was being fundamentally altered by entry into the transaction (there also referring to [282]-[283] of his earlier reasons).

114 At [51] (in a passage that the Iannis submit records a finding made in their favour as to the view Rosario had held at the time) the primary judge said:

> The view that the Iannis had that they were simply swapping a guarantee from one bank to another derived from Rosario's own evidence in his affidavit of 23 February 2010 paragraph 27, and from his oral evidence in cross-examination both before Grove AJ and before me. I referred to this evidence at [74]. In evidence before me he confirmed to the cross-examiner when the question was put (at T 32.1) that it was Joe who told him his guarantee was capped at

> $100,000 but he was not cross-examined to suggest that his understanding about swapping banks on the guarantee did not come from Joe. Whilst I discussed Joe's evidence to similar effect given before Grove AJ (at [132]ff) my acceptance of Rosario's evidence in that regard was not dependent on Joe's evidence. I said (at [133]) that it appeared to provide some basis for Rosario's fixation on a guarantee for $100,000 but references (such as at [138], [188], [191] and [369]) to their beliefs about what they were entering into with the Plaintiff came from Rosario's evidence which I accepted.

115 As to the *Jones v Dunkel* issue, the primary judge did not consider that any adverse inference should be drawn from the failure to call Joe in relation to the meeting with Mr Wennerbom ([52]), noting that he had accepted Mr Wennerbom's account in preference to that of Rosario. His Honour emphasised that his conclusion in this regard was that, despite his best efforts, Mr Wennerbom did not manage to have the Iannis understand the obligations they were undertaking and the rights as guarantors they were giving up – because Mr Wennerbom did not know the background to the transaction, and because of the "language difficulty coupled with a pre-conceived notion by the Iannis of what they were doing" ([52]).

116 The primary judge thus concluded that the evidence of Joe (that he accepted he had impermissibly relied upon in the first re-hearing judgment) was not significant evidence in that the three areas where it had any influence (summarised at [97] above) were all matters where there was abundant other evidence to support those matters. Reconsidering those matters without regard to Joe's evidence did not lead the primary judge to any different conclusion ([53]). Implicitly, this is a fresh finding as to those matters.

117 Finally, again addressing the *Jones v Dunkel* inference urged upon him by RHG, the primary judge did not consider that such an inference should be drawn ([54]), reiterating that he had rejected Joe's account (given to Grove AJ) of what occurred at the meeting with Mr Wennerbom and had in any event rejected Rosario's evidence about what he claimed Joe had told him as to the Iannis' liabilities prior to entry into the RHG loans. His Honour considered that, as to the issue of Rosario's involvement in the provision of material to Mr Famularo and RHG, the other evidence about those matters "was not in any sense equivocal that would enable an inference to be drawn that Joe's evidence would not have assisted Rosario" ([55]). His Honour confirmed that he was comfortably satisfied that before the Iannis saw Mr Wennerbom they

did not know the true nature of the loan agreement into which they were to enter ([56]) and confirmed his conclusion that Mr Wennerbom did not succeed in getting the Iannis to understand this.

118 In summarising his conclusion at [74] of the second re-hearing judgment, the primary judge said that Joe's evidence, or its absence, did not ultimately make a difference and that there was "too much other evidence on both sides that made the matter clear".

Appeal

119 By its amended notice of appeal, ground 1 being limited in accordance with oral submissions made at the hearing, RHG raises the following appeal grounds:

> 1. The primary judge erred in finding at [73] ([2015] NSWSC 1911 ("Remitter Judgment") that there is no doubt that Mr and Mrs Ianni (the "Iannis") did not understand the loan contract they were entering into in circumstances where:
>
> (a) the primary Judge had in His Honour's earlier judgement found that Rosario Ianni was an unsatisfactory, untruthful witness whose evidence … was unreliable and could not be relied upon [2014] NSWSC 849 [at 146, 150, 151, 156, and 159] ("Rehearing Judgment");
>
> (b) there was no corroborating evidence … that explained how the Iannis came to sign loan applications to the Appellant not once but twice and the loan documents and associated warranties that clearly stated the Iannis were borrowing $910,000;
>
> (c) the primary Judge accepted Mr Wennerbom's evidence (the solicitor explaining the loan documentation to the Iannis) [at 50] (of the Remitter Judgment) that Mr Wennerbom had explained in clear simple language that the Iannis were borrowing $910,000 (First Judgment at [140]) and that Rosario Ianni had at least an understanding of basic English and could understand things that were said to him in fairly straightforward language (Rehearing Judgment at [120]),
>
> (d) the reason the trial judge gave for dismissing Mr Wennerbom's evidence as demonstrating that the Iannis' did understand the nature of the transaction they were executing was His Honour's finding that Mr Wennerbom was not aware that Joe Ianni had misled his parents into thinking that they were only giving a guarantee (rehearing Judgment at [138] and Remitter Judgment at [52]), however His Honour's understanding that the Iannis had been misled in this manner was based on His Honour's impermissible reliance on the evidence of Joe Ianni.
>
> 1.1 The trial Judge erred in finding at [51] of the Remitter Judgment that His Honour's earlier findings from the (rehearing Judgment) that the Respondents were "simply swapping a guarantee from one bank to another was derived from Rosario's own evidence" where:

(a) the Court of Appeal had made a contrary finding about how the primary judge had reached this conclusion at [57] of *RHG Mortgage Limited v Rosario Ianni* [2015] NSWCA 56;

(b) the trial judge had found (in the Rehearing Judgment) that Rosario Ianni was at the very least unreliable and (in the Remitter Judgment) had probably not told the truth about "going to see Mr Wedderbom [sic] in respect of a guarantee limited to $100.000":

(c) Rosario Ianni had given sworn evidence in cross examination that his son had never asked him to sign a guarantee for the RAMS loan;

1.2 To the extent the primary judge did rely on the evidence of Rosario Ianni to find that the Respondents understood they were "simply swapping a guarantee from one bank to another" when they attended on Mr Wennerbom then the primary judge erred in doing so given that the primary judge had held that the evidence of Rosario Ianni was at the very least unreliable, was contrary to sworn evidence given in cross examination by Rosario Ianni that his son Joe had not asked him to sign a guarantee for the RAMS loan and was uncorroborated by any other witness.

2. In the circumstances His Honour's ultimate finding that the evidence that the Iannis did not understand the nature of the transaction they were entering into was unequivocal was an error.

3. His Honour ought to have found that given the matters described in [1] above:

(a) the evidence that the Iannis did not understand the nature of the $910,00 loan transaction was, at least, equivocal;

(b) in those circumstances His Honour ought to have held that the Iannis' failure to call Joe Ianni on the critical issues of what the Iannis had been told about the loan transaction with the Appellant and how the Iannis came to sign the two loan applications meant that the Iannis had not discharged their onus of establishing that the loan transaction was unjust because they did not understand the nature of the loan transaction they entered into.

120 The respondents filed a notice of contention seeking to affirm his Honour's decision on the following alternative grounds:

1. His Honour should have found that Mr Famularo or alternatively AMBFS was the agent of the Appellant for the purpose of discharging the Appellant's obligations under the Financial Transaction Reports Act 1988 (Cth) in connection with the Loan Agreement and Mortgage made the subject of the present proceedings and the knowledge of Mr Famularo or alternatively the knowledge of AMBFS acquired during the course of discharging the said agency is knowledge which is to be imputed to the Appellant (Judgment [344] to [347]).

2. His Honour should have taken the knowledge of Mr Famularo or alternatively AMBFS into account when determining that the conduct of the Appellant in entering into the said Loan Agreement and Mortgage was unconscionable, including knowledge of the fact that those transactions were for the benefit of Joe Ianni and Sandra Ianni not the Second Respondent and his late wife who were pensioners with no capacity to service a loan in the

> order of $910,000 and whose only asset, namely, their home, would be placed at risk in the event that the Loan Agreement and Mortgage were to proceed.

Appeal grounds 1, 1.1 and 1.2

121 RHG challenges the correctness of the primary judge's assessment of his own earlier reasoning process. In particular, RHG argues that the structure of the first set of reasons demonstrates that it was not until the primary judge referred to Joe's evidence (at [132]-[134]) that his Honour accepted Rosario's claim that his son had asked him to provide a guarantee. In that regard, RHG maintains that there was no direct evidence (nor any indirect circumstantial evidence) about what the Iannis had been told about the RHG transaction prior to (or after) the meeting with Mr Wennerbom (T 8.30).

122 RHG argues that the critical finding at [137], which formed the basis of the finding at [277], was based on Joe's evidence referred to at [132] and [133].

123 While RHG accepts that a number of the findings to which the primary judge pointed as supporting his conclusion as to the Iannis' understanding of the nature of the transaction were open, its recurrent complaint is that the evidence did not provide "unequivocal" support for the Iannis' claims.

124 So, for example, RHG accepts that the findings referred to at [104] and the last sentence of [105] above were open to the primary judge but complains that no reference was made by his Honour to the fact that the Iannis had signed the false loan application documents on two separate occasions and had given no explanation as to the circumstances in which they came to execute those documents. RHG maintains that the fact that Joe was a party to supplying false information regarding his parents' earning capacity is not unequivocal evidence that the Iannis were not also a party to that form of fraud.

125 Similarly, while RHG does not challenge the finding by the primary judge that the 14 September file note was a fabrication by Mr Famularo, it submits that the evidence on this issue was not unequivocal. RHG disputes that the evidence as to the Dural property was unequivocal having regard to: the (fabricated, on his Honour's findings) file note from Mr Famularo; the sham contract attached to the loan application that showed the Iannis as the purchasers for the Dural property; and the fact that there was separate

accommodation at this property which would have been suitable for the Iannis. It further argues that the non-acceptance of the evidence of Mr Famularo does not support the claims of Rosario and that so to conclude is contrary to the principle described in *Scott Fell v Lloyd* [1911] HCA 34; (1911) 13 CLR 230 at 241 and *Steinberg v Commissioner of Taxation (Cth)* (1975) 134 CLR 640 at 694.

126 RHG also challenges the proposition (see [107] above) that there was "no doubt" as to the conclusion that there was no meeting between Mr Famularo and Rosario. RHG accepts that the reasons given by the primary judge (at [208]-[220] of his first judgment) go to the unlikelihood of Rosario (rather than Joe) providing Mr Famularo with critical information at the alleged meeting with the Iannis but submits that it is not positive evidence that such a meeting never took place. While RHG concedes that it is "quite possible, even probable" that Mr Famularo's evidence was coloured so as to give Rosario a far greater role in providing information to Mr Famularo than he actually had, again it submits that this is not unequivocal evidence that the meeting recorded in the file note never occurred. RHG does not dispute that it is most likely that the information in the Famularo file note came from Joe; but it does dispute that the entirety of this evidence demonstrates unequivocally that the Iannis never met with Mr Famularo so as to excuse them from calling evidence from Joe ("the one witness who was in a position to confirm their claims").

127 RHG argues that the execution by the Iannis of documents submitted with the two loan applications arranged by Mr Famularo is powerful evidence that the Iannis did have some involvement with Mr Famularo. It submits that the primary judge erred in focussing on whether his findings about the credibility of Mr Famularo's evidence were unequivocal.

128 RHG argues that, in circumstances where: the primary judge had found that both Mr Famularo and Rosario were not witnesses of truth; there was a file note that recorded the Iannis meeting with Mr Famularo; and the Iannis had signed the two loan applications prepared by Mr Famularo, the evidence on the issue as to whether the meeting with Mr Famularo had taken place could not be described as unequivocal.

129 RHG also challenges the correctness of his Honour's statement that his earlier conclusions relating to Mr Wennerbom were unrelated to any evidence Joe gave at the first hearing (see [111] above). First, RHG submits that this is contrary to a finding by this Court (at [57] per McColl JA) that Joe's evidence did affect the conclusion at [137] of his Honour's earlier reasons, i.e., her Honour's statement that:

> … On the basis of his conclusion as to their understanding of the [St George Bank] transaction, influenced, as I have explained, by his acceptance of Joe's evidence, the primary judge found at ([137]) that "they went along to that meeting believing, as Joe had told them, that he needed them to guarantee the new loan he was obtaining from RAMS which was at a lower interest rate than the loan from [St George Bank]".

130 RHG submits that Joe's evidence must have affected this conclusion because the only other source of this evidence was Rosario's evidence, which his Honour considered to be at the very least unreliable. It is submitted that the finding that the Iannis attended the meeting with Mr Wennerbom with a pre-existing understanding, based on a misrepresentation by Joe, that they were providing a guarantee was critical to the primary judge's findings that Mr Wennerbom's explanation to the Iannis was ineffective; and that to the extent that the primary judge found to the contrary (at [46] of the second re-hearing judgment) this is a significant error.

131 Similarly, RHG submits that the statement (at [51]) that the primary judge's view that the Iannis' belief that they were simply swapping a guarantee from one bank to another was derived from Rosario's own evidence, and not dependent on Joe's evidence, is contrary to this Court's finding on this issue and must be incorrect.

132 RHG notes that at [74] of the first re-hearing judgment his Honour did not say that he accepted Rosario's evidence on this issue and points to the finding at [120] (that Rosario did have an understanding of at least basic English and could understand when things were said to him using fairly straightforward language) and the observation at [124] (in the context of Rosario's denial that Joe had ever asked him to sign a guarantee for the new RAMS loan) that "Rosario was deliberately trying to avoid answering questions, particularly

questions the answer to which would expose more knowledge on his part than he was prepared to admit".

133 RHG accepts that there would seem to be an implicit finding (at [131] of the first re-hearing judgment) by the primary judge that Joe had asked Rosario to change his guarantee from St George Bank to RAMS but says that this finding could only have been made by relying (impermissibly) on Joe's evidence (described at [132] of those reasons) because, by this stage of the analysis of Rosario's evidence, the primary judge had found that: Rosario had lied about his ability to speak English; Rosario's evidence was "at the very least, unreliable"; contrary to Rosario's sworn evidence, he did understand that he had guaranteed the borrowings of Joe and Sandra to St George Bank had provided a mortgage (to the value of his home) to secure that guarantee; and Rosario had given sworn evidence that Joe had never asked him to guarantee the RAMS mortgage.

134 To the extent that the primary judge referred (at [51] of the second re-hearing judgment) to the fact that Rosario was "not cross examined to suggest that his understanding about swapping banks on the guarantee did not come from Joe", RHG submits that this is explicable by the fact that, when cross-examined on this issue, Rosario had denied ever being asked by Joe to sign a guarantee for the loan.

135 As to the reference by the primary judge to the "preconceived notion" or "fixed understanding" the Iannis had when they met Mr Wennerbom, RHG argues that (other than Rosario) Joe was the only source of evidence that the Iannis had been misled by Joe about the loan and mortgage before they attended the meeting with Mr Wennerbom. RHG complains that this evidence could not be described as unequivocal, especially as Rosario had eschewed in the witness box any claim that Joe had asked him to sign a RAMS guarantee. It is thus submitted that it was not open to the primary judge to conclude that the evidence on this issue was unequivocal.

136 RHG also challenges the proposition (see the extracted passage at [114] above) that references to the Iannis' beliefs as to the transaction came from Rosario's evidence.

137 The Iannis contend that ground 1 (as do the subgrounds 1.1 and 1.2) overlooks the fact that the primary judge carefully considered the evidence of Rosario, and made adverse credit findings in relation to some matters, but nevertheless accepted what Rosario said in other respects; and overlooks the other evidence on which the primary judge relied when satisfying himself that the Iannis did not understand the loan contract (that being the evidence addressed by the primary judge at [23]-[52] of the second re-hearing judgment).

138 The Iannis maintain that there is no error in the primary judge's finding (at [51]) that the view that the Iannis were simply swapping a guarantee from one bank to another was derived from Rosario's own evidence (in his affidavit of 23 February 2010) and from his oral evidence in cross examination both before Grove AJ and before the primary judge. They also point to Rosario's evidence at [24] of his affidavit of 23 February 2010, that:

> In or about September 2005, Joe, my son, informed me that ... he had found another Bank, Rams, that will give a loan at a cheaper interest. He told me that he wanted to ... payout St George. He asked me whether I would sign the documents for the loan as the guarantor. I said that if it is a cheaper interest that's good.

139 The Iannis note that, when cross-examined before Grove AJ, it was not put in issue that Joe told Rosario that he had a new loan at a lower interest rate, referring to the following exchange (T 156.17):

> Q. ... In 2005 when Giuseppe [Joe] said he had a new loan at a lower interest rate - do you remember that?
>
> A. WITNESS: Yes, low interest rate
>
> A. INTERPRETER: 2005, Lower interest rate. How do you say it.
>
> Q. At that time Mr Ianni, at that time the only person who told you your guarantee was only for $100,000 was Giuseppe [Joe]?
>
> A. INTERPRETER: Yes, he - yes. Yes, there was someone else there, him and someone else from St George. I can't remember who.

and to the exchange at the first re-hearing at T 32.1, where it was put to Rosario that "It is your evidence that your son said that your guarantee would be capped at a $100,000, isn't it?" and he answered, "Yes". The Iannis point out that Rosario was cross-examined at length on the veracity of his belief that the guarantee was capped at $100,000 but not as to whether his son was the

source of that belief nor was it put to him that he was told by his son that he would become a borrower, as distinct from giving a guarantee to a new lender.

Determination

140 The primary judge carefully revisited and explained his earlier reasoning process by reference to what he had identified as the critical issues to be determined and what he considered had supported his conclusions as to those issues. He explained the extent to which he had had regard to or relied upon Joe's evidence and then expressly approached the matter on the basis that he consciously put out of his mind Joe's evidence when determining whether he would have reached the same conclusion in its absence. I see no basis for this Court not to accept his Honour's explanation of his own reasoning process.

141 In that regard, I do not accept that any "finding" was made in the earlier appeal proceedings as to what the primary judge must be held to have decided on particular issues. Rather, what the Court on the previous appeal must be understood as saying was that the reference to Joe's evidence materially contributed to or relevantly informed the earlier conclusions his Honour had reached so as to require his Honour to re-address those conclusions.

142 I am not persuaded that, on the evidence as a whole, the primary judge must have been incorrect when rejecting the proposition that Joe's evidence had been a significant factor in him reaching the decisions that he did. Nor was it established that, absent Joe's evidence, no conclusion as to the Iannis' lack of understanding of their entry into the transaction as principal borrowers could confidently be reached. The emphasis that RHG puts on the sequence in which his Honour's reasoning progressed overlooks the reference made by his Honour to the objective evidence that his Honour considered supported his conclusions.

143 True it is, that the primary judge considered Rosario to be a generally unreliable witness, whose evidence was required to be scrutinised with care, and found that he was capable of understanding basic English, but I do not accept that there was no evidence from which the primary judge could comfortably conclude that Rosario (and through him Domenica) did not understand that they were entering the relevant transaction as principal

borrowers (and thought, instead, that they were simply swapping one bank guarantee for another).

144 Significant in that respect is the history of Joe and Sandra's borrowings, particularly the fact that the September application followed the August loan application (whether that was unsuccessful or simply not pursued is unclear) completed by Mr Famularo. There was nothing to suggest that Rosario knew or had any involvement in the preparation of the August application.

145 Nor was there anything to suggest that the Iannis had any need for refinance or (once it is appreciated that Mr Famularo's evidence was wholly discredited) that they wished to invest in any other property at that time. The false information in the September loan application documents points strongly against the Iannis having given any information to Mr Famularo in connection with the RHG transaction. Had they been the intended borrowers it is inconceivable, for example, that the identification details would have been falsified in the loan applications.

146 I do not accept that the primary judge wrongly treated the discrediting of Mr Famularo's evidence as "positive" evidence that the Iannis were misled. Rather, his Honour considered, as it was open to him to do, that the fabricated file note of the 14 September meeting and false evidence of Mr Famularo in relation to that meeting provided corroboration for Rosario's denial that he had understood he was entering into the RHG transaction as principal borrower.

147 Faced with the undoubtedly false information in the September loan application, and the fact that the application was prepared by Mr Famularo who had recently (in August of that same year) prepared a similar loan application for Joe and Sandra and therefore was clearly on notice at that stage that Joe and Sandra were the proposed purchasers of the Dural property for a much greater amount, it was open to his Honour to be satisfied that the Iannis were not responsible for the preparation of the loan applications. The only other person with an obvious interest in pursuing the applications and with the ability to provide information in respect of the Iannis for the purposes of the loan application was Joe. To conclude that Joe was responsible for the information in the false loan applications is therefore hardly a stretch. In the absence of any

allegation that the Iannis had fraudulently signed the loan applications, there was clearly an available inference that Joe was the moving party behind the loan and that, as Rosario said, had asked them to provide a guarantee for that purpose (not to enter into the borrowing arrangements as principals).

148 In those circumstances, the absence of an explanation as to how the Iannis' signature came to be on the September loan application documents does not in my opinion carry the significance RHG seeks to attach to it. Rosario's evidence was that his son asked him to sign "documents for the loan". For someone with only a basic understanding of finance transactions, albeit a basic understanding of English, the most likely explanation for the appendage of the Iannis' signature on the documents is that their son simply asked them to sign the documents without explanation of their contents or as "documents for the loan". The Iannis had, it appears from the chronology of events set out earlier, signed the St George Bank loan agreement as guarantors before any independent advice was obtained as to its contents, presumably also at the request of their son, which suggests that they were prepared to sign documents before any advice was provided to them about those documents.

149 Mr Wennerbom's evidence does not assist RHG to establish knowledge or understanding by the Iannis of the nature of the loan transaction after the 11 October 2005 meeting because Mr Wennerbom did not test the Iannis' understanding by asking them pertinent questions. To say that he "pointed" to certain things in the documents is not sufficient. The documentation was some 30 or so pages long. The Iannis were required to sign every page. As the primary judge effectively found, silence when faced with an explanation (however basic that explanation) by the solicitor of the transaction is not a sure foundation for a finding that the Iannis left that meeting with the understanding that they had entered into a substantial loan transaction (solely for the benefit, it would seem, of their son). One feature of the explanation given to the Iannis that highlights this in my opinion is the reference to "break costs". What such costs were (or where the obligation to pay them was to be found in the documents to which Mr Wennerbom pointed) is not made clear in the evidence given by Mr Wennerbom as to the advice that he gave (and that his Honour accepted had been given).

150 To the extent that the primary judge's findings involved a credit assessment of not only Rosario but also of Mr Famularo and Mr Wennerbom, RHG is also faced with difficulty in making such a challenge (*Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118). I am not persuaded that the findings made by the primary judge were glaringly improbable or inconsistent with incontrovertible evidence.

151 Grounds 1, 1.1 and 1.2 are not made good.

Appeal grounds 2 and 3

152 RHG maintains that the primary judge should have held that the failure of the Iannis to call Joe to give evidence in relation to: the execution of the loan applications; the alleged meeting with Mr Famularo recorded in Mr Famularo's file note; the reference in Mr Famularo's file note to "*needs only $486K ?? live with Son*"; the claim that the Iannis signed the RHG loan agreement and mortgage in reliance on and induced by representations by Joe that the documents they were executing were to effect a guarantee for a loan from the appellant to Joe of $100,000; and also whether the explanation given by Mr Wennerbom was ineffective in causing them to understand that they were borrowing $910,000 against the security of their home; meant that the Iannis had not discharged their onus in establishing that the loan agreement and mortgage were unjust contracts.

153 RHG relies on the statement of principle by the Full Federal Court in *Coshott v Prentice* [2014] FCAFC 88; (2014) 221 FCR 450 at [81] that:

> … where the evidence relied upon by a party bearing the onus of proof does not itself clearly discharge that onus, the failure by that party to call or give evidence that could cast light on a matter in dispute is relevant to determining whether the onus is being discharged: *Hampton Court Ltd v Crooks* (1957) 97 CLR 367 at 371 per Dixon CJ; *Shalhoub v Buchanan* [2004] NSWSC 99 at [71] per Campbell J this principle is therefore wider than that in *Jones v Dunkel* (1959) 101 CLR 298. As Austin J in *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1 explained at [440], "[w]hereas *Jones v Dunkel* reinforces an inference drawn against the party who has not called evidence, to the effect that the evidence would not have assisted that party's case, *Blatch v Archer* leads either to the drawing of such an inference, or to some other assessment of the weight of evidence, unfavourable to the party against whom the principle is applied."

and the statement by Campbell J in *Shalhoub v Buchanan* [2004] NSWSC 99 (referred to in *Coshott*) that:

> ....failure of a party who bears an onus of proof to call an available witness who could cast light on some matters in dispute can be taken into account in deciding whether that onus is discharged, in circumstances where such evidence as has been called does not itself clearly discharge the onus. This is an application of Lord Mansfield's maxim that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted" (*Blatch v Archer* (1774) 1 Cowp 63 at 65; recently quoted with approval by Gleeson CJ in *Azzopardi v R* (2001) 205 CLR 50 at 59).

154 The Iannis submit that the appellant's argument on the *Jones v Dunkel* issue is fundamentally misconceived. They argue that the primary judge was affirmatively satisfied, on the evidence before him, that the Iannis did not understand that they were changing their position from that of guarantors of borrowings by Joe from St George Bank to that of principal borrowers of $910,000 from RHG. They maintain that since his Honour considered there to be abundant and clear evidence in support of that finding (referring to [53] and [55]) there was no occasion for the primary judge to consider drawing a *Jones v Dunkel* inference.

155 The Iannis note the primary judge's reference (at [35]-[37] of the second re-hearing judgment) to what was said by Campbell J (with whom Beazley JA, as her Honour then was, and Pearlman AJA agreed) in *Manly Council v Byrne* [2004] NSWCA 123 at [72]-[75], including the extract from *JPQS Pty Ltd v Cosmarnan Constructions Pty Ltd* [2003] NSWCA 66, where Meagher JA (with whom Beazley JA agreed, and Mason P substantially agreed) said at [24]:

> … when a finding of fact has been made in a party's favour by a judge, the fact that an absent witness's evidence, if it were given, would not support that finding, cannot disturb the finding actually made.

156 The Iannis submit that this is the case here, even if it be assumed that nothing Joe might have to say would assist his parents' case. They also note what was said by the Full Court of the Federal Court (Besanko, Perram and Katzmann JJ) in *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* [2011] FCAFC 53 at [79]:

> By itself that inference is frequently somewhat barren, for knowing that the evidence of a witness would not have assisted tells one nothing about what the witness's evidence affirmatively would have been. Often more directly useful is the allied principle that in such a case the trier of fact may more confidently draw any inference unfavourable to the party that failed to call that witness if that witness appears to be in a position to cast light on whether the inference should be drawn: *Jones v Dunkel* at 308 per Kitto J, 312 per

> Menzies J, and 320-321 per Windeyer J. *Neither inference is mandatory and, generally speaking, these inferences only become material where the balance of the evidentiary record is equivocal.* (my emphasis)

157 In circumstances where his Honour considered there to be powerful evidence suggesting that the conference of 14 September 2005 did not occur and the diary note of Mr Famularo was fabricated ([38]), and where the evidence left the primary judge in no doubt that the moving party on the refinance was Joe ([39]), the Iannis submit that no resort to inferences of the kind urged by RHG was necessary.

158 The Iannis submit that RHG fails to distinguish between Rosario's evidence about the existence of a limit of $100,000 on his guarantee, on the one hand, and him not being a guarantor at all but a principal, on the other. It is submitted that the evidence of Rosario identified Joe as the source of the misinformation; it did not involve any impermissible reliance on Joe's evidence or contradict any finding of fact by the Court of Appeal.

159 RHG in its reply submissions acknowledges that the evidence of Joe's involvement with Mr Famularo was not equivocal but submits that this does not address the nature of the evidence as to Rosario's knowledge of the loan transaction. It argues that the Iannis' submissions conflate any finding against Mr Famularo on any issue with a finding in favour of them on the question of what they knew about the transactions.

Determination

160 It is well known that a *Jones v Dunkel* inference is open where there is an unexplained failure to call evidence as to a matter which calls for explanation from a person whom it could reasonably be expected would be called to give such evidence. The rule in such a case permits evidence in relation to that matter to be given greater weight, and an inference or inferences to be more readily drawn, when the party who might have called evidence to the contrary has chosen not to do so. In Commonwealth of Australia v McLean (Court of Appeal (NSW), 31 December 1996, unrep), Handley JA and Beazley JA, as her Honour then was, said that "[t]he rule typically applies to strengthen or weaken an inference otherwise available on the evidence for the benefit of the party not in default".

161 RHG accepts that a *Jones v Dunkel* inference, if one does arise, can do no more than permit the court to infer that the uncalled evidence or missing material would not have assisted the relevant party's case; it does not permit the court to infer that the uncalled evidence would have been positively damaging to that case. Thus, it allows for the more ready acceptance of evidence which might have been contradicted but which was not. What a *Jones v Dunkel* inference does not permit is a choice between two guesses or conjectures, nor does it supply missing gaps in evidence (*Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* (No 4) [2006] FCA 446; (2006) 229 ALR 136 at [50]).

162 Relevantly, in the present case, the particular adverse inference that RHG says the primary judge should have drawn was not consistently articulated in submissions. At first, in oral argument, RHG sought to adopt that which had been said at [122] of this Court's earlier decision per Emmett JA (see T 29). However, in the course of oral argument, Senior Counsel for RHG accepted that any *Jones v Dunkel* inference that might be drawn would not be as to what might have been in the mind of Counsel. Rather, it was submitted that the inference that should have been drawn was that Joe's evidence would not have assisted the Iannis on three factual issues (T 34ff): first, as to the signing of the loan documents; second, as to the evidence of Rosario that Joe had misled him and had not properly informed him as to the nature of the transaction (i.e., that the Iannis were to become the principal borrowers and were not simply "swapping" a new guarantee for the existing guarantee); and, third, as to whether or not the Iannis had met with Mr Famularo.

163 RHG submits that Joe's evidence at the first hearing cannot be looked at for the purpose of assessing what evidence he would have been likely to give had he in fact been called; and further submits that reference to that evidence cannot be used to argue that, if Joe was not likely to be a credible witness (as his Honour considered was the case), then there was an available explanation or reason why he might not have been called.

164 The rather unusual aspect of the present case is that, though regard cannot be had to it, this is not a case where there is no way of knowing what evidence the

missing witness might have given. Joe had given evidence and had been cross-examined at the hearing before Grove AJ. What is however not known is whether, had he been cross-examined at the first re-hearing on that earlier evidence, he would have adhered to his earlier evidence or parts of it, or given different or other evidence or, perhaps, would (conveniently or otherwise) have "forgotten" matters about which he had earlier given evidence. At the time of the hearing before Grove AJ the Iannis had cross-claimed against Joe. Hence the comments by the primary judge in the first re-hearing as to whether it was in or against Joe's own interests to give evidence supportive of his parents' case that he had kept them in the dark or had positively misled them. Moreover, insofar as the primary judge expressed the opinion that Joe's evidence was unlikely to have assisted anyone (see first re-hearing judgment at [198]), it is apparent that his Honour was not proceeding on the assumption that Joe's evidence would have assisted the Iannis (other than on the three issues where his Honour said it supported the conclusion that he had drawn). In the first re-hearing judgment the primary judge had expressly discounted Joe's evidence, for reasons there set out, which accords with his Honour's assessment of his own reasoning process as being one in which he did not place much weight on that evidence.

165 It is important to keep in mind that the "rule" in *Jones v Dunkel* is not mandatory (as McColl JA noted in the earlier judgment of this Court and as the primary judge noted in his judgment following the remittal). If a judge is comfortably satisfied on the evidence (circumstantial or otherwise) that a particular inference favourable to the party in question should be drawn, as the primary judge here was, then the rule does not mandate that an adverse inference should instead be drawn by reason of that party's failure to call a witness who might reasonably be expected to be able to shed light on that particular issue.

166 In the present case, the force of the Iannis' case lay, in his Honour's eyes, in matters relating to the history of the loan transactions, the falsification of the loan applications, the falsity of Mr Famularo's evidence of the meetings with the Iannis and the fact that Mr Wennerbom did not elicit from the Iannis a response that indicated they understood that they were now undertaking

obligations as principal borrowers, not merely undertaking obligations as guarantors. This was not a case where the only evidence on the issue (other than that of Joe which could not be taken into account) as to the Iannis' understanding of the documents was that given by Rosario. Yes, the primary judge considered that his evidence was generally unreliable and needed to be scrutinised with care. However, that does not mean that his Honour was obliged to conclude that, taking into account other matters such as the fabricated file note of Mr Famularo and his discredited evidence, Rosario's evidence should not be accepted on the limited issue as to whether he had understood, whether before or after the meeting with Mr Wennerbom, that he and his wife were borrowing a substantial sum of money (based on falsified loan application documents) rather than simply signing "documents for the loan" as guarantor.

167 The significance of Mr Famularo's evidence of the 14 September meeting having been discredited, taken with the fraudulently altered sales contract which accompanied the loan application and the provision of false information in that loan application, is that it points clearly to the conclusion the primary judge reached that Joe was the "moving party" behind the borrowing. Had the Iannis been the moving parties behind that application then at the very least it would be expected that the correct passport information would be included with the application. The weight now placed by RHG on the lack of an explanation by the Iannis as to how the loan application forms came to be signed if (as his Honour found) there was no meeting with Mr Famularo does not give rise to a compelling competing inference as to the understanding of the Iannis in the face of the inaccurate information in the loan documents themselves, such as to warrant an adverse *Jones v Dunkel* inference to be drawn.

168 As to it being Joe who had asked his parents to enter into the RHG transaction, bearing in mind there was no allegation of fraud on the Iannis' part, this is the obvious inference to be drawn from the following facts: that (a) the use made of the loan was to discharge his and his wife's borrowings; (b) the Dural property was the subject of a sale contract in Joe and Sandra's names; and (c) the additional involvement of Mrs Baira as guarantor in respect of the relevant transaction.

169 His Honour had the opportunity to observe each of the witnesses (other than Joe and Domenica) in the witness box. His Honour's credit findings against Mr Famularo are not the subject of challenge. The fact that the primary judge accepted Mr Wennerbom as an honest witness does not assist RHG to overcome his Honour's assessment that, on the evidence, it should be inferred that (contrary to Mr Wennerbom's belief) the Iannis did not understand that they were undertaking liability as principal borrowers. His Honour gave cogent reasons for this. They have not been shown to be wrong.

170 I do not accept that his Honour erred in declining to draw a *Jones v Dunkel* inference such as to warrant a conclusion that the Iannis did not discharge their onus on the critical issue as to their undertaking of the transaction.

171 Grounds 2 and 3 are not made good

Conclusion

172 I would dismiss the appeal with costs. In those circumstances, it is not necessary to address the Iannis' notice of contention, in respect of which no submissions were addressed either orally or in writing.

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