Court of Appeal
Supreme Court

New South Wales

Case Name:	RHG Mortgage Limited v Rosario Ianni
Medium Neutral Citation:	[2015] NSWCA 56
Hearing Date(s):	4 February 2015
Date of Orders:	18 March 2015
Decision Date:	18 March 2015
Before:	McColl JA at [1]; Emmett JA at [105]; Sackville AJA at [127]
Decision:	(1) Give RHG leave to amend its notice of appeal in the form which appears at Orange 173 as further amended to take into account the settlement of the Baira appeal. (2) Direct RHG to file and serve the notice of appeal as so amended within seven days. (3) Set aside the judgment of Justice Davies given on 1 July 2014 insofar as it concerns the Iannis. (4) Order that there be a retrial of the proceedings between RHG and the Iannis on the following conditions: (a) That the evidence at the trial be the evidence in the new trial without any further examination or cross examination of witnesses or the tender of any further documentary evidence; (b) That the trial judge shall proceed to determine the matter without reference to the evidence of Joe Ianni and, subject to 4(c) and (d), upon such limited further written or oral submissions as the trial judge may direct; (c) That the parties be given the opportunity to make submissions to the trial judge as to how his Honour's reliance on the evidence of Joe Ianni should affect the conclusions his Honour previously reached; and (d) That the parties be given the opportunity to make submissions to the trial judge as to whether his Honour

should draw any Jones v Dunkel inferences consequent upon the Iannis failure to call Joe Ianni.
(5) Costs of the second trial to be at the discretion of Justice Davies.
(6) RHG to pay the costs thrown away by its application to amend the notice of appeal.
(7) Subject to (6), respondents to pay the costs of the appeal.
(8) Respondents to have a certificate under the Suitors Fund Act 1951 (NSW) if otherwise qualified.

Catchwords:

APPEAL – new trial – denial of procedural fairness – second trial of respondents' proceedings seeking to set aside deed of loan and mortgage as unjust and unconscionable – court takes into account material not in evidence without notice to parties – whether substantial wrong or miscarriage of justice requiring new trial –

EVIDENCE – failure to call respondents' son for whose benefit monies advanced – whether appellant established conditions necessary for application of rule in Jones v Dunkel – determination of which party bore onus of calling missing witness –

APPEAL – new trial – scope – what conditions court should impose for purposes of retrial –

PROCEDURE – judgments and orders – power to reopen – error in material matter in determination of case – neither party at fault –

Legislation Cited:

Contracts Review Act 1980 (NSW)
Evidence Act 1995 (NSW)
Suitors Fund Act 1951 (NSW)
Supreme Court Act 1970 (NSW)
Uniform Civil Procedure Rules 2005 (NSW)

Cases Cited:

Autodesk Inc v Dyason (No 2) [1993] HCA 6; (1993) 176 CLR 300
Baira v RHG Mortgage Corporation Limited [2012] NSWCA 387
Cadwallader v Bajco Ltd [2002] NSWCA
Cafe v Australian Portland Cement Pty Ltd (1965) 83 WN (Pt 1) (NSW) 280

Davey v Challenger Managed Investments [2003] NSWCA 172
Earle v Castlemaine District Community Hospital [1974] VR 722
Fabre v Arenales (1992) 27 NSWLR 437
Hall v van der Poel [2009] NSWCA 436
International Finance Trust Co Ltd v New South Wales Crime Commission [2009] HCA 49; (2009) 240 CLR 319
Gala v Preston [1991] HCA 18; (1991) 172 CLR 243
Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298
Jones v National Coal Board [1957] 2 QB 55
Manly Council v Byrne [2004] NSWCA 123
O'Donnell v Reichard [1975] VR 916
Payne v Parker [1976] 1 NSWLR 191
Perpetual Trustee Company Limited v Khoshaba [2006] NSWCA 41; (2005) 14 BPR 26,639
Pittalis v Sherefettin [1986] QB 868
Prepaid Services Pty Ltd v Atradius Credit Insurance NV [2013] NSWCA 252; (2013) 302 ALR 732
Regina v Burdett (1820) 4 Barn & Ald 95; 106 ER 873
Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam [2003] HCA 6; (2003) 214 CLR 1
Rowell v Larter (1986) 6 NSWLR 21
Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd [2011] FCAFC 53
Smith v NSW Bar Association (No 2) [1992] HCA 36; (1992) 176 CLR 256
Smith v Samuels (1976) 12 SASR 573
St George Bank Ltd v Trimarchi [2004] NSWCA 120
Stead v State Government Insurance Commission [1986] HCA 54 (1986) 161 CLR 141
Steele v Mirror Newspapers Ltd [1974] 2 NSWLR 348;
Waterways Authority v Fitzgibbon;
Mosman Municipal Council v Fitzgibbon;
Middle Harbour Yacht Club v Fitzgibbon [2005] HCA 57; (2005) 79 ALJR 1816
Wentworth v Woollahra Municipal Council [1982] HCA 41; (1982) 149 CLR 672
West v Government Insurance Office (NSW) [1981] HCA 38; (1981) 148 CLR 62
Westpac Banking Corporation v Velingos [2011]

	NSWSC 607
Texts Cited:	Cross on Evidence
Category:	Principal judgment
Parties:	RHG Mortgage Corporation Limited (Appellant) Rosa Baira (First Respondent) Rosario Ianni (Second Respondent) The estate of the late Domenica Ianni (Third Respondent)
Representation:	Counsel: M Ashhurst SC and P Newton (Appellants) J Kelly QC (Second and Third Respondent) Solicitors: Kemp Strang (Appellants) Uther Webster & Evans (Second and Third Respondent)
File Number(s):	CA 2014/219748
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Common Law
Citation:	[2014] NSWSC 849
Date of Decision:	1 July 2014
Before:	Davies J
File Number(s):	SC2008/284857; 2008/285539

[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.]

JUDGMENT

1 **McCOLL JA:** The appellant, RHG Mortgage Corporation Limited ("RHG"), appealed from a judgment of his Honour Justice Davies in which he held that a loan agreement made in 2005 between RHG and the second respondent, Rosario Ianni, and the third respondent, the Estate of the Late Domenica Ianni, pursuant to which they borrowed $910,000 from RHG was unjust within the meaning of the *Contracts Review Act 1980* (NSW), and should be set aside and that RHG should discharge a mortgage taken to secure that loan agreement over the second and third respondents' property in Drummoyne. In the same judgment, the primary judge also dealt with a claim by RHG against the first respondent to the appeal, Rosa Baira, and made similar findings in respect of the case against her: *RHG Mortgage Corporation Limited v Baira; RHG Mortgage Corporation Limited v Ianni* [2014] NSWSC 849.

2 RHG's appeal against the judgment in favour of Mrs Baira settled on the day prior to the date fixed for the hearing of the appeal.

3 The proceedings before the primary judge were the second trial of RHG's claims against the respondents. The first trial had been heard by his Honour Acting Justice Grove who found in RHG's favour on 3 June 2011: *RHG Mortgage Corporation Limited v Rosa Baira*; *RHG Mortgage Corporation Limited v Rosario Ianni* [2011] NSWSC 520; *RHG Mortgage Corporation Limited v Rosa (aka Rosa Fioavanti) Baira*; *RHG Mortgage Corporation Limited v Rosario Ianni* [2011] NSWSC 580. The respondents successfully appealed against Grove AJ's decision. On 3 December 2012, the Court of Appeal set aside his Honour's orders and ordered that there be a retrial of RHG's claims against the respondents and Mrs Baira: *Baira v RHG Mortgage Corporation Limited* [2012] NSWCA 387 ("*Baira*").

4 Domenica Ianni died a short time after the Court of Appeal's judgment was delivered. The primary judge appointed Rosario to represent her estate in the proceedings. As his Honour recorded (at [13]), 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". It was common ground between the parties that her case was approached on that basis such

that findings in Rosario's favour about his understanding of the transactions RHG sought to enforce were also applicable to its case against her.

5 In 2005, RHG was known as RAMS Mortgage Corporation Limited ("RAMS"). The primary judge referred to it variably as "RAMS" or "RHG". I have referred to it only as "RHG".

6 Despite Domenica Ianni's demise, it is convenient to refer to the respondents as "the Iannis" in these reasons, but to Rosario alone where the context so requires.

7 For the reasons that follow, the appeal should be allowed and the matter remitted to the primary judge for a retrial.

The second trial

8 The second trial took place in March and May 2014. The primary judgment was delivered on 1 July 2014.

9 The Iannis' essential case was that they were misled by their son, Joe Ianni, to believe at the time they executed the loan agreement and mortgage that those documents refinanced an existing $100,000 guarantee they had provided to St George Bank ("SGB") for a housing loan SGB had advanced to Joe and his wife, Sandra, in 2000. They also relied on the fact that the monies RHG advanced were not for their benefit. They alleged those circumstances (and other matters of which RHG knew, or ought to have known) rendered the transactions unjust and unenforceable.

10 Joe gave evidence at the first trial in defending a cross claim the Iannis had filed against him and Sandra. Grove AJ dismissed that cross claim which was not pursued at the second trial. Joe was neither called nor available for cross-examination at the second trial.

11 RHG's case was that the primary judge should have rejected the Iannis' evidence for three reasons. First, Rosario was not a witness of truth, secondly, the only witness who could have corroborated their claim that they had been misled was Joe, whose absence from the witness box was unexplained, thus permitting his Honour to draw the inference that his evidence would have been unfavourable to the Iannis, and thirdly, his Honour should have accepted the

evidence of a solicitor, Mr Wennerbom, that he explained the transactions to the Iannis and that they understood that they were borrowing $910,000.

12 In the course of pre-trial hearings and during final submissions, the parties advised the primary judge that they had 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. They provided the primary judge with a list of those witnesses. The list did not include Joe's name. In the course of that discussion counsel for Mrs Baira informed his Honour that, in substance, the only significant person not on the list was "Mr Ianni". It is common ground that that was a reference to Joe.

13 In paragraph [6] of the primary judgment, his Honour said:

> "I was informed by consent that the evidence on which I was to decide the matter was to be the evidence in the statements and affidavits that were before Grove AJ and subject to his evidentiary rulings, the transcript before Grove AJ together with the further oral evidence given before me. I had expected that the evidence would largely be that given before Grove AJ. However, extensive cross-examination took place before me. Nevertheless, it was reiterated that I could and should have regard also to the oral evidence given before Grove AJ. The evidence in each of the proceedings was evidence in the other."

14 As is apparent, the primary judge wrote paragraph [6] without reference to the parties' agreed position that Joe's evidence could not be taken into account. As will appear from what follows, his Honour referred extensively to Joe's evidence at the first trial.

15 RHG's primary complaint on appeal as ultimately formulated was that the primary judge's erroneous use of Joe's evidence was critical to the findings his Honour made in favour of the Iannis. Accordingly, RHG had been denied procedural fairness in circumstances constituting substantial wrong or miscarriage warranting an order for a new trial: Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") 51.53.

16 RHG also submitted that the primary judge should have held that the Iannis' failure to call Joe at the second trial meant his Honour should have drawn adverse inferences in accordance with the principles enunciated in *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298.

17 The Iannis initially resisted the appeal in their written submissions on the basis, relevantly, that although the primary judge erred in having regard to Joe's evidence before Grove AJ, the error was not a material one, and could not impugn the primary judge's finding (at [136]) "that there is a reasonably strong likelihood that [Rosario] and Domenica were actually misled by Joe into believing that the limit on the guarantee they were providing was $100,000."

18 The Iannis' written submissions also contended that RHG had not demonstrated that the erroneous reference to Joe's evidence, while constituting a denial of procedural fairness, deprived it of the possibility of a successful outcome (*Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141 ("*Stead*")) so that the Court could not intervene pursuant to s 75A of the *Supreme Court Act 1970* (NSW). They further contended that RHG had not demonstrated a substantial wrong or miscarriage such as would warrant a new trial order – an order they also initially opposed in the circumstances set out below.

The course of the appeal

19 RHG filed a notice of appeal on 25 July 2014, which challenged both the judgments in favour of Mrs Baira and the Iannis. As Mr Ashhurst acknowledged, there having been two proceedings against those respondents respectively in the Court below, there should in fact have been two notices of appeal.

20 Insofar as the Iannis were concerned, the primary ground of appeal was that Joe's evidence should not have been considered, for the reasons I have earlier outlined, while the second complained about the trial judge's failure to draw a *Jones v Dunkel* inference in respect of the Iannis' failure to call Joe. RHG sought orders allowing the appeal and setting aside the primary judgment, and judgment in its favour, relevantly, for possession of the Drummoyne property and the debt owing under the loan agreement and costs.

21 RHG's written outline of submissions ("AWS") in the Ianni appeal was filed and served on 28 October 2014. Paragraph 10 contended that the primary judge:

> "[F]ell into significant error by having regard to the evidence of Joe Ianni when considering whether the Iannis had discharged their onus of establishing that

> they did not understand the nature and effect of the Loan Agreement and Mortgage".

22 AWS [10] also referred to the agreement that Joe's evidence would not be admissible in the second trial, then contended that the primary judge's error:

> "… constituted a denial of procedural fairness to [RHG] resulting in the necessity of this Court ordering a new trial, unless the Court finds that the consideration of this extraneous material by the trial judge could not possibly have affected the result of the hearing. A finding that [RHG] contends is not available in the present circumstances."

23 AWS [11] also complained his Honour erred in not drawing appropriate inferences from the Iannis' failure to call Joe to corroborate their account of events.

24 Substantially all of the AWS addressed the issues raised in AWS [10] and [11] in support of the proposition that there should be a new trial.

25 On 1 December 2014, in the course of settlement negotiations, RHG's solicitors wrote to the Iannis' solicitors contending, among other matters, that there were "very good prospects that the Court of Appeal would order a retrial of the proceedings."

26 The Iannis' written submissions ("RWS") were filed on 9 December 2014. As I have said, they accepted that the primary judge erred in having regard to the evidence of Joe in the first trial, as it had been the parties' agreed position that that evidence was not admissible. However the RWS also contended that the error was not material and could not impugn the critical findings on which the judgment in their favour was based.

27 RHG filed its reply submissions ("ARWS") on 8 January 2015. Under the heading, "What is not in issue", ARWS [4] noted the Iannis' concession that the primary judge erred in having regard to Joe's evidence. RHG inferred, accordingly, that the Iannis accepted RHG's contention that that erroneous consideration constituted a denial of procedural fairness. RHG also contended (ARWS [6]) that in the circumstances,

> "… it would also not seem to be in issue that once the denial of procedural fairness is established then a new trial should be ordered unless the appellate court finds that a properly conducted trial could not have possibly produced a different result."

28 On 19 January 2015 RHG's solicitors forwarded by email to the Iannis' solicitors a proposed amended notice of appeal and advised RHG would seek leave to move on that document at the hearing of the appeal. The proposed amended notice of appeal deleted the claims for possession of the Drummoyne property and judgment for the debt owing under the loan agreement and sought instead, consequential upon allowing the appeal and the setting aside of the primary judgment, only a retrial of the proceedings between RHG and the Iannis as well as costs of the appeal.

29 On 2 February 2015 the Iannis filed written submissions opposing RHG's foreshadowed application for leave to amend the notice of appeal (the "amendment submissions"). The amendment submissions disputed RHG's contention in ARWS [6]. They argued that contention did not take into account, relevantly, the fact that the original notice of appeal did not seek an order for a new trial, or that before this Court could order a new trial, the requirements of UCPR 51.53 had to be satisfied. They also submitted they would suffer prejudice by reason of the late notice of the proposed amendment.

30 The Iannis also submitted that any new trial should be on the following basis:

> "13 If there is to be a new trial it should be a trial before the same trial judge and upon condition that the evidence at the trial be the evidence in the new trial without any further examination or cross examination of witnesses or the tender of any further documentary evidence to [sic, as in original] the intention that the trial judge shall proceed to determine the matter without reference to the evidence of Joe Ianni and upon such limited further written or oral submissions as the trial judge may direct."

31 RHG forwarded responsive submissions on 3 February 2015 contesting the Iannis' contention that they would suffer prejudice if leave to amend the notice of appeal was granted. RHG argued it had flagged the necessity of this Court ordering a new trial in AWS [10]. As to paragraph [13] of the Iannis' amendment submissions, RHG stated:

> "5 The Appellant does not oppose the form of a new trial described in paragraph 13 of the Respondent's submissions, provided that if the Appeal is successful on both the Appellant's claims that the trial judge impermissibly relied on the evidence of Joe Ianni and that the trial judge failed to draw the appropriate inferences regarding the Respondents' failure to call Joe Ianni; then the new trial that is ordered should allow an opportunity for the Appellant to make submissions to the trial judge on how the correction of these two issues should affect the conclusions previously reached by the trial judge."

32 The hearing of the appeal commenced at 10.15 am on 4 February 2015. Mr Ashhurst of Senior Counsel appeared with Mr P Newton for RHG. Mr J Kelly of Queen's Counsel appeared for the Iannis. Mr Ashhurst addressed before lunch on the issue of the extent to which the primary judge's reliance on Joe's evidence was fundamental to his critical findings in the Iannis' favour. Shortly after he continued those submissions after the lunch adjournment, Mr Kelly informed the Court that the respondents no longer opposed the application to amend the notice of appeal. He also conceded that sufficient had been indicated by RHG to satisfy the UCPR 51.53 threshold required for a new trial order. 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. RHG contended that, notwithstanding the respondents' concession, this Court should determine both issues identified in its paragraph 5 (see [31] above).

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 (at [194] - [198]) that RHG had not established that it was open to his Honour in the circumstances to draw such inferences.

34 Mr Kelly submitted the Court should not rule as to whether the primary judge erred (or otherwise) in failing to draw an adverse *Jones v Dunkel* inference in respect of the failure to call Joe. He contended that the Court should not engage upon any level of fact finding or fact analysis once it was established that the trial miscarried and that to make a ruling on this issue would transgress the restriction on the terms which might be placed on a new trial order articulated in *Waterways Authority v Fitzgibbon*; *Mosman Municipal Council v Fitzgibbon; Middle Harbour Yacht Club v Fitzgibbon* [2005] HCA 57; (2005) 79 ALJR 1816 ("*Waterways*").

35 It was common ground between the parties that whatever this Court ruled on the *Jones v Dunkel* matter, the new trial would not involve the calling of any further witnesses and, I infer, the tender of any further evidence.

36 Although the parties in principle agreed that there should be a new trial, they remained at odds as to the extent to which this Court should consider the *Jones v Dunkel* issue, one of the two critical issues upon which RHG relied to warrant that relief. The Court formed the view that it should consider the question of principle RHG raised in relation to the *Jones v Dunkel* issue. The parties were given the opportunity to make submissions on that issue additional to those in their written submissions.

37 It is also necessary, in my view, that the Court forms its own view as to whether a retrial order is warranted rather than, for example, the court exercising its rehearing powers pursuant to s 75A of the *Supreme Court Act*. The latter course would be more appropriate if the Court could rectify the error: *Hall v van der Poel* [2009] NSWCA 436 (at [58]) per Basten JA. However, as the Iannis effectively conceded, where much turns on the credibility of a critical witness such as Rosario, that is not a course which is open: *Prepaid Services Pty Ltd v Atradius Credit Insurance NV* [2013] NSWCA 252; (2013) 302 ALR 732 (at [52]) per Meagher JA (Macfarlan and Emmett JJA, agreeing). Notwithstanding that issue of credibility, it was common ground that the matter should be remitted for rehearing before the primary judge: cf *Smith v NSW Bar Association (No 2)* [1992] HCA 36; (1992) 176 CLR 256 (at 269) per Brennan, Dawson, Toohey and Gaudron JJ.

38 Accordingly, in my view, the Court should consider the extent to which the primary judge's error in using Joe's evidence was material to the ultimate outcome. The Court's view in this respect is appropriate to indicate why it was prepared to accede to the parties' agreement that a retrial should be ordered. The issue of principle raised by the *Jones v Dunkel* issue should also be determined. As will become apparent, the primary judge referred to Joe's evidence in rejecting RHG's submissions such that it can be seen to be integral to the basis upon which the Iannis ultimately conceded the requirements for a new trial order had been established. Consideration of the issue of principle

would not involve the determination of any factual controversy, and accordingly, would not transgress the limitations on a retrial order indicated in *Waterways* (at [12]) per Gleeson CJ (McHugh, Gummow and Hayne JJ agreeing).

39 Both issues require some consideration of the background to the RHG transactions and the primary judge's critical findings supporting his orders in the Iannis' favour.

The primary judgment

40 In 2000 SGB offered to lend Joe and Sandra Ianni $550,000 to buy an investment property in Pyrmont on security of a guarantee from the Iannis: primary judgment (at [25]). The guarantee was limited to the market value of the Iannis' Drummoyne property (the "SGB transaction"): primary judgment (at [27]). They received legal advice from a solicitor, Mr Egisto, prior to signing the documents in respect of this transaction.

41 In August 2005 Joe and Sandra contracted to buy a property in Dural for $2.2 million: primary judgment (at [38]). The details of the transactions effected to finance that acquisition were set out in the primary judgment (at [43]) in a passage in turn taken from Basten JA's reasons in *Baira* (at [209] – [212]). As is apparent, critical to the restructuring of Joe and Sandra's outstanding debts was the "Iannis 'borrowing' $910,000 from RHG … in exchange for a mortgage over their Drummoyne property": *Baira* (at [211]). It was that loan agreement and the mortgage which secured it which RHG sought to enforce in these proceedings. The details of the steps which were taken which led to the Iannis executing those documents are set out in the primary judgment (at [44] – [79]) in terms it is unnecessary to repeat.

42 As I have said, the Iannis' case at trial was that Joe told them, and they believed, that the extent of their liability under the SGB transaction was limited to $100,000 and that the RHG transaction merely involved swapping their liability under the SGB transaction to RHG albeit at a lower interest rate.

43 Critical to the primary judge's reasoning to his conclusion that the loan agreement (and hence too the mortgage) was unjust (and unconscionable) was what the Iannis knew about their legal responsibilities before entering into

the transaction with RHG: primary judgment (at [97], [182]). This was a matter of considerable controversy, in respect of which RHG substantially challenged Mr Ianni's credit.

44 The primary judge assessed Mr Ianni's evidence in detail. His Honour found it to be "very unsatisfactory in a number of respects" (at [98]) and (at [121]) "unreliable". His Honour concluded (at [183]) that Mr Ianni was "[an] unreliable witness who did not always tell the truth".

45 The first basis for his Honour's doubts about the reliability of Mr Ianni's testimony was the contrast between his evidence at the first and second trials. His Honour formed the view from reading the evidence at the former that Mr Ianni spoke English with a far greater facility than he demonstrated at the latter: primary judgment (at [98] – [100]; [194]). As his Honour said (at [98]), "[t]his was a very significant issue because of [Mr Ianni's] claim that he could not understand either Mr Egisto nor Mr Wennerbom when they explained important matters about transactions into which he was entering."

46 Secondly, Mr Ianni's professed inability to understand basic transactions such as a "loan" stood in stark contrast to the financing transactions he had entered into to purchase his Drummoyne home and his affidavit evidence about paying out "the loan that was taken by me to purchase the house at Drummoyne": primary judgment (at [101]).

47 Thirdly, the primary judge rejected Mr Ianni's evidence that he could not understand Mr Egisto's explanation of the SGB transaction partly because it was inconsistent with his evidence at the first trial. His Honour also found Mr Ianni made "false claims about the dialect that Mr Egisto spoke" and accepted Mr Egisto's evidence that in addition to advising the Iannis on the SGB transaction, he had acted for Mr Ianni on five workers' compensation matters in the early 1990s, had spoken to him in a mixture of Italian, Calabrian and English and that Mr Ianni "had never said to him that he did not understand what Mr Egisto was saying": primary judgment (at [104] – [108]). Further, his Honour concluded that Mr Ianni gave non-responsive answers to questions concerning Mr Egisto's explanation of the SGB transaction which "indicated … that he did not want to answer that question": primary judgment (at [107]).

48 Fourthly, the primary judge found (at [111]) that Mr Ianni's "description of what took place at the meeting [with Mr Wennerbom] bore a striking resemblance to his description of his meeting with Mr Egisto some five years earlier", the result being "Rosario didn't understand what was said, he told the solicitor he didn't understand but the solicitor effectively ignored him." Accordingly, his Honour concluded (at [115]) that he did "not think Rosario has any clear recollection of either meeting … [and to] the extent that he remembers the meetings he appears to have conflated two events".

49 Fifthly, the primary judge referred to evidence Mr Niles, the Iannis' former solicitor, gave at the first trial to the effect that he only spoke to Mr Ianni in English. His Honour implicitly rejected (at [118]) Mr Ianni's evidence at the second trial that "he could only have understood Mr Niles if an interpreter had been present."

50 Accordingly, the primary judge concluded:

> "120 That evidence suggests, and I find, that Rosario does have an understanding of at least basic English and that he can understand when things are said to him using fairly straightforward language. I accept that Rosario is an elderly man and that English is not his native language. I accept also that when people are under pressure (in the witness box, for example) their facility with a second language may diminish. However, Rosario was not honest in his evidence about how much English he could speak and understand from 2000 to the present time. His evidence about the dialect in which Mr Egisto spoke to him was not honest."

51 The primary judge found (at [124]) that Mr Ianni 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." His Honour said:

> "125 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."

52 After referring (at [126] – [130]) to Mr Egisto's evidence about the advice he gave the Iannis in relation to the SGB transaction, the primary judge said (at [131]):

> "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."

53 His Honour then considered (at [132] – [135]) Joe's evidence at the first trial to the effect that he had told his father "the [SGB] guarantee was up to $100,000" and that in 2005 he told his father "his guarantee for $100,000 was required for the change of banks" from SGB to RHG. His Honour observed (at [133]) that Joe's evidence "appears to provide some basis for Rosario's fixation on a guarantee for $100,000". Despite misgivings, the primary judge concluded (at [135]) that he should accept Joe's evidence. This was because it was "largely consistent with other matters" concerning Joe's preparedness to use his parents to obtain the loans he wanted. As appears from what follows, accepting Joe's evidence in this respect was clearly critical to the primary judge's ultimate acceptance of Mr Ianni's otherwise unreliable evidence concerning his lack of understanding of the extent of the Iannis' exposure under the RHG transaction.

54 His Honour 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 Dominica 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 Dominica that they could be liable up to the value of their house in the event that Joe and Sandra did not pay."

55 There is a tension between the primary judge's conclusions at [131] and [136] concerning Rosario's understanding of the SGB transaction. His Honour found (at [131]) that if Joe and Sandra defaulted on the SGB borrowing "Rosario knew … [the Iannis] would be responsible to pay it up to the full value of the Drummoyne property". However, his Honour concluded (at [136], see also [184]) that "in the circumstances of this case there is a reasonably strong likelihood that he and Dominica were actually misled by Joe into believing that the limit on the [SGB] guarantee they were providing was $100,000".

56 Having regard to the structure of the primary judge's reasons, I accept, as Mr Ashhurst submitted, that it was the impermissible consideration of Joe's

evidence in [132] – [135] which led his Honour to the conclusion at [136]. Up until the point where his Honour considered Joe's evidence, it is apparent from [131] that his Honour had reached the point of finding the Iannis knew the extent of their liability under the SGB transaction, a finding which would have had a critical effect on their case concerning their lack of understanding of the RHG transactions.

57 Part of RHG's case at trial was that the Iannis had received independent legal advice in respect of the loan agreement and mortgage at a meeting with Mr Wennerbom. On the basis of his conclusion as to their understanding of the SGB 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 for RAMS which was at a lower interest rate than the loan from [SGB]".

58 The primary judge accepted (at [140], [143]) that one of the matters Mr Wennerbom explained to the Iannis was that they were "borrowing $910,000" and that when he said that, he was pointing at the loan agreement. In the section of his reasons headed "Joe Ianni", the primary judge concluded (at [184]) that the Iannis did not know "the extent of the [RHG] borrowings nor what was being planned and organised by Joe and Mr Famularo from August 2005 and onwards", (at [185]) that Mr Ianni "had no understanding of commercial or financial matters beyond basic things such as what a guarantee, a mortgage and a loan was", (at [187]) "that Joe was the moving party in relation to the loans", (at [188]) that "Rosario was also agreeable to signing documents that Joe asked him to sign … because of the limited understanding that Joe had provided to him for the purpose of obtaining his agreement", (at [189]) that Mr Ianni "had a limited grasp of English particularly when legal and financial documents were being explained to him", (at [190]) that it did not assist in the Iannis' comprehension of Mr Wennerbom's explanation "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", (at [191]) that he could have no confidence that Mr Wennerbom's explanation of the RHG transaction was "in fact understood by Rosario and Domenica", a "conclusion

… strengthened by my finding that Joe led them to believe that they were simply going to sign documents to transfer their guarantee from [SGB] to [RHG] because of the lower interest rate" and (at [194]) that Joe knew Rosario would be "completely dependent upon what the solicitor was telling him in his non-native language".

59 His Honour then turned to RHG's submissions concerning *Jones v Dunkel*, in which respect he said:

> "195 [RHG] 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.
>
> 196 In any event, Joe gave evidence at the hearing before Grove AJ. If that evidence is to be believed, it provides some support for Rosario's evidence that he never met Mr Famularo, that Mr Wennerbom (whom Joe called a liar) did not explain the documents to Rosario and Domenica, and that Mrs Baira could not read English. However, a reading of the whole of his evidence causes me to doubt that he was telling the truth in all respects.
>
> 197 He professed a lack of knowledge about some things that he could have been expected to know including, for example, how his parents came to sign the loan application. He appeared to want to shift the blame for things onto Mr Famularo, portraying himself as an innocent in the matter. For example, he said that he did not ask the NAB for a line of credit of $610,000, nor did he know what business on the NAB application was said to have a value of $10 million. He did, however, support Rosario's evidence that he, Joe, told Rosario that he was simply changing banks to get a lower interest rate for a guarantee from Rosario and Domenica of $100,000.
>
> 198 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."

60 The primary judge concluded (at [199]):

> "..I consider that it is more likely than not that [Mr Famularo] fabricated diary notes of the meetings alleged to have been held with Rosario and Domenica … [and that] …[t]he information in them may have, and most likely did, come from Joe, but it certainly did not come from the [Iannis]".

RHG had submitted at trial that "Mr Famularo should not be disbelieved generally" and that his Honour "should not find that the diary notes were fabricated": primary judgment (at [273]).

61 In this Court, Mr Ashhurst submitted that his Honour would not have reached his conclusion in [199] if he had not relied impermissibly upon Joe's evidence. It is not necessary to reach a concluded view on this matter. It is sufficient to note that it is an available argument which RHG did not have the opportunity to address at trial because it proceeded on the understanding common to the parties that Joe's evidence would not inform his Honour's fact-finding exercise.

62 The primary judge then turned to the Iannis' knowledge about the RHG loans. Critically, his Honour concluded (at [277]):

> "277 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*.
>
> …
>
> 283 I am satisfied that, despite Mr Wennerbom's best efforts with the material that he had, he did not succeed in getting Rosario and Domenica 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 RAMS agreement*." (Emphasis added)

63 As is apparent (see [52] and [58] above), the primary judge's conclusion that Rosario had a limited understanding of the SGB transaction was informed by his acceptance of Joe's evidence that he had told his father that transaction involved a guarantee of "up to $100,000".

64 The primary judge considered (at [295] – [357]) what RHG knew about the Iannis and Mrs Baira and other issues relating to Mr Famularo, none of which

requires consideration for present purposes. He then turned (at [358]) to the question whether the loan agreement and mortgage were unjust.

65 His Honour referred (at [361]) to *Perpetual Trustee Company Limited v Khoshaba* [2006] NSWCA 41; (2005) 14 BPR 26,639 (at [119] where Basten JA posited:

> "[119] Reading *St Clair* and *Karavas* together, the true position may be that a claimant can establish the unjustness of a contract by reliance on factors of which the other party was ignorant when the contract was entered into, but that such ignorance may be relevant in determining whether to grant relief. The fact that the power may be engaged by circumstances which were not known to the other party at the time the contract was made is well-established: see, eg, *St George Bank Ltd v Trimarchi* [2004] NSWCA 120 at [36], Mason P, Sheller JA and Cripps AJA agreeing."

66 The primary judge directed himself (at [368]) that in considering the question whether the loan agreement and mortgage were unjust, relevant factors included:

> "the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect": s 9(e)(i), *Contracts Review Act 1980* (NSW) (the "Contracts Review Act").

67 His Honour distinguished *Davey v Challenger Managed Investments* [2003] NSWCA 172 (at [24]) where Handley JA (with whom Hodgson JA and Grove J agreed) said, in substance, that "age and pensioner status" did not, "under ordinary principles … give [such persons] any claim for relief", saying:

> "369 Whilst it is true that the [Iannis] were all of somewhat advanced years and were pensioners, their background in language, education and business experience alone takes them out of the description of those who would fit within Handley JA's discussion in Davey. *When there is added the fact that the [Iannis] were kept in the dark by Joe about what precisely they were entering into, and were not, through deliberate intent or misfortune, disabused of their preconceived notions by third parties, the unjustness is plain*." (Emphasis added)

68 The primary judge also considered the Iannis' unconscionable contract case even though he accepted (at [374]) that it was not "strictly necessary" to do so. In this respect, his Honour concluded (at [377]):

> "377 In the present case, I consider that the [Iannis] were under a special disability by reason of their age, language, education and economic background. *Further, by reason of their ignorance of the financial position of the persons for whom the loan agreements were designed to benefit*, and the

> transactional arrangements being put in place to bring about the benefit to those persons, they were at a special disadvantage. …" (Emphasis added)

69 The primary judge accepted (at [370]; see also [373]) that,

> "On one view, if none of that had been known to RHG, there may have been difficult questions in granting any, or moulding, the relief that should be accorded to them as a result of these unjust contracts. However, working on the assumption that Mr Famularo was at no time the agent of [RHG] … if [RHG] had followed their guidelines… they would have ascertained quite how improvident the contracts were for the borrowers."

There is a live issue between the parties as to whether the primary judge was referring to superseded guidelines rather than those in force at the time the Ianni transactions were effected. The parties did not ask the Court to resolve that issue prior to the remitter.

70 There were a number of other respects in which Mr Ashhurst submitted that the primary judge impermissibly took Joe's evidence into account in critical respects. What I have set out, however, is sufficient in my view to make good RHG's primary ground of appeal and the Iannis' ultimate proper concession that it had been made good. The primary judge's use of Joe's evidence at the first trial critically informed his material findings on the issue of the Iannis' understanding of the RHG transactions. Those findings were, in turn, critical to his ultimate conclusion that those transactions were unjust and unconscionable.

Consideration

71 Parties to litigation are entitled to a fair trial at which they can put their case properly before the judge: *Jones v National Coal Board* [1957] 2 QB 55 at 67; [1957] 2 All ER 155 (at 161), referred to with approval in *Stead* (at 145).

> "[Where a] denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference": *Stead* (at 145)

72 Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice: *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 (at [37]) per Gleeson CJ. Accordingly, where a party is denied a fair trial, a new trial may be ordered unless to do so would be a futility.

73 “[A] court is not entitled to take into account factual material not in evidence without notice to the parties”: *International Finance Trust Co Ltd v New South Wales Crime Commission* [2009] HCA 49; (2009) 240 CLR 319 (at [146]) per Heydon J. That is clearly what has occurred in this case in a manner which can be seen from the foregoing analysis to have materially affected the outcome of the case and led to RHG being denied a fair trial. As the Iannis accept, a new trial is not a futility. The outcome could have been different if the primary judge had not had regard to Joe’s evidence, which his Honour, at the very least, used in critical respects to corroborate aspects of Mr Ianni’s evidence concerning his understanding of the SGB and RHG transactions. It is apparent that his Honour would otherwise have entertained serious doubt about Mr Ianni’s evidence, and on the basis of which his Honour relied in part to reach his conclusion that the loan agreement and mortgage were unjust.

74 Accordingly it is clear that the Court should accept the Iannis’ concession that there has been a want of procedural fairness by his Honour having recourse to Joe’s evidence in circumstances warranting the conclusion that there has been a substantial wrong or miscarriage requiring a retrial.

The Jones v Dunkel point

75 The 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”: Cross on Evidence (“Cross”), LexisNexis (at [1215]). Any “explanation” such as unavailability or absence of recollection for the failure to call the witness must be established by evidence: *West v Government Insurance Office (NSW)* [1981] HCA 38; (1981) 148 CLR 62 (at 70) per Murphy J; *Rowell v Larter* (1986) 6 NSWLR 21 (at 24 – 25) per Young J (as his Honour then was). The “rule cannot be applied to the non-calling of a [non-party] witness unless it would be natural for the party to call the witness, or the party might reasonably be expected to call a witness”: Cross (at [1215]); *O’Donnell v Reichard* (at 729) per Newton and Norris JJ.

76 The circumstances for drawing a *Jones v Dunkel* inference are found where the uncalled witness is “a person presumably able to put the true complexion

on the facts relied on [by a party] as the ground" for any inference favourable to the plaintiff: *Jones v Dunkel* (at 308) per Kitto J; *Australian Securities and Investments Commission (ASIC) v Hellicar* [2012] HCA 17; (2012) 247 CLR 345 ("*ASIC v Hellicar*") (at [168]) per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

77 The Iannis bore the burden of proof on the issue of whether the loan agreement and mortgage were unjust. Accordingly, in deciding whether they had discharged that burden of proof, it was relevant for the primary judge to have regard to their "ability to adduce evidence relevant to the issue and any failure on [RHG's] part … to adduce available evidence in response": *G v H* [1994] HCA 48; (1994) 181 CLR 387 at (391 – 392) per Brennan and McHugh JJ.

78 In *Payne v Parker* [1976] 1 NSWLR 191 (at 201 – 202) Glass JA explained (albeit in a dissenting judgment, but in a passage accepted as correctly stating the relevant principles) when one party rather than the other would be expected to call a missing witness in the following manner:

> "(6) Whether the [*Jones v Dunkel*] principle can or should be applied depends upon whether the conditions for its operation exist. These conditions are three in number: (a) the missing witness would be expected to be called by one party rather than the other, (b) his evidence would elucidate a particular matter, (c) his absence is unexplained.
>
> (7) The first condition is also described as existing where it would be natural for one party to produce the witness: *Wigmore*, par. 286, or the witness would be expected to be available to one party rather than the other: *O'Donnell v Reichard* [1975] VR 916, at p. 921, or where the circumstances excuse one party from calling the witness, but require the other party to call him: ibid. [1975] VR 916, at p. 920, or where he might be regarded as in the camp of one party, so as to make it unrealistic for the other party to call him: ibid. [1975] VR 916, at p. 920, *Regina v Burdett* (1820) 4 Barn & Ald 95; 106 ER 873, or where the witness' knowledge may be regarded as the knowledge of one party rather than the other: *Earle v Castlemaine District Community Hospital* [1974] VR 722, at p. 733, or where his absence should be regarded as adverse to the case of one party rather than the other: ibid. [1974] VR 722, at p. 734. It has been observed that the higher the missing witness stands in the confidence of one party, the more reason there will be for thinking that his knowledge is available to that party rather than to his adversary: ibid. [1974] VR 722, at p. 728. If the witness is equally available to both parties, for example, a police officer, the condition, generally speaking, stands unsatisfied. There is, however, some judicial opinion that this is not necessarily so: ibid. [1974] VR 722, at p. 728. Evidence capable of satisfying this condition has been held to exist in relation to a party's foreman: *Cafe v Australian Portland Cement Pty Ltd* (1965) 83 WN (Pt 1) (NSW) 280; his safety officer: *Earle v*

> *Castlemaine District Community Hospital* [1974] VR 722; his accountant: *Steele v Mirror Newspapers Ltd* [1974] 2 NSWLR 348; his treating doctor*: O'Donnell v Reichard* [1975] VR 916, at p. 921."

79 If those conditions are satisfied, the tribunal of fact may "infer that that person's evidence would not have helped that party's case" and may then use that inference:

> "(a) in deciding whether to accept any particular evidence, which has in fact been given, either for or against that party, and which relates to a matter with respect to which the person not called as a witness could have spoken; and (b) in deciding whether to draw inferences of fact, which are open … upon evidence which has been given, again in relation to matters with respect to which the person not called as a witness could have spoken": *O'Donnell v Reichard* (at 929).

80 The primary judge rejected RHG's submission that the Iannis would be expected to call Joe by reference to *O'Donnell v Reichard* (at 929) and because it was the Iannis' case that, relevantly, it was Joe who had misled them. In my view, with respect, nothing in *O'Donnell v Reichard* detracts from the principles articulated in *Payne v Parker* to which his Honour did not refer.

81 The conditions of which Glass JA wrote in *Payne v Parker* supported the proposition that it could be expected the Iannis would call Joe to support their contention that in the circumstances in which they undertook their obligations to RHG, the loan agreement and mortgage were unjust. First, it could be expected that, as their son, he would be more available to them than to RHG and, for the same reason, that he stood higher in their confidences than he might have in RHG's – he being a complete stranger to the latter. Secondly, on the Iannis' case, his evidence could have been expected to corroborate their contention concerning their limited understanding of the SGB and RHG transactions and thus went to their burden of proof.

82 The primary judge also distinguished *Westpac Banking Corporation v Velingos* [2011] NSWSC 607 (at [78]) ("*Velingos*"). In that case Westpac sought to enforce a loan and mortgage against Mr and Mrs Velingos who were elderly borrowers with limited command of English and no ability themselves to repay the borrowings. Ikey Velingos was their son. Mr and Mrs Velingos defended the proceedings in part by alleging the loan and mortgage were unjust within the meaning of s 9 of the *Contracts Review Act* at least in part because, to Westpac's knowledge, they relied on Ikey to advise them whether to enter into

the transactions and that it was he, rather than they, who received the benefit of the monies advanced.

83 In the passage to which the primary judge referred (at [195]), Schmidt J said:

> "78 Ikey Velingos, the obvious witness who could have corroborated [Mr and Mrs Velingos'] evidence, was also not called. That he was not called because he was the person who had 'ripped off' Mr and Mrs Velingos, is not an adequate explanation for his absence, given their evidence as to his whereabouts and their ongoing relationship. Any difficulties with his evidence could have been dealt with by way of an application under s 38 of the *Evidence Act* 1995. His evidence was relevant to their case against both Westpac and Mr Ghezelbash [a broker]…"

84 On that basis, her Honour (at [79]) drew a *Jones v Dunkel* inference that Ikey's evidence would not have assisted Mr and Mrs Velingos' case. The primary judge distinguished that case because her Honour did not refer to *Fabre v Arenales* (1992) 27 NSWLR 437 ("*Fabre*") ("a leading authority on *Jones v Dunkel*": *ASIC v Hellicar* (at [252]) per Heydon J). In *Fabre*, the plaintiff was injured when travelling in a stolen car driven by Mr Arenales, a defendant (the other defendant being the owner from whom the vehicle was stolen), while being pursued by police to escape capture after they had jointly stolen goods which they had in the vehicle. The plaintiff's claim failed because the trial judge held, applying *Gala v Preston* [1991] HCA 18; (1991) 172 CLR 243, that Mr Arenales did not owe the plaintiff a duty of care because the "two young criminals" had been engaged in a joint criminal enterprise: *Fabre* (at 439 – 440). The plaintiff's case was, essentially, that she was affected by drugs and alcohol and had not been knowingly involved in any criminal enterprise: *Fabre* (at 443). After the accident she had pleaded guilty to a charge of break and enter in terms involving her having been on the premises at the time the goods were stolen: *Fabre* (at 442).

85 Mr Arenales was present at court and could have given evidence: *Fabre* (at 440, 443). The Government Insurance Office, which had conduct of the proceedings, could have called him, but did not, a circumstance which provided the basis for a *Jones v Dunkel* inference and which the trial judge purported to take into account: *Fabre* (at 443) per Mahoney JA (with whom Priestley and Sheller JJA agreed). On appeal the plaintiff challenged the basis upon which his Honour did so. Mahoney JA accepted (at 443) that Mr Arenales could have

given evidence on “at least three matters of importance”. His Honour then considered (at 444ff) the exercise of drawing inferences in the course of the fact-finding process, explaining (at 445) that “the inference will or may be drawn if general human experience (plain common sense) will not be contradicted if the inference be drawn”. His Honour explained (at 445 – 446) that it was “necessary to be clear as to what is the [*Jones v Dunkel*] inference to be drawn”, and that “a *Jones v Dunkel* inference will not be drawn if there are facts which provide an explanation of why the witness was not called or which show that the reason for not calling him was not that the party ‘fears to do so’.”

86 The primary judge had rejected the submission that a *Jones v Dunkel* inference should be drawn from Mr Arenales’ absence on the basis that other evidence the Government Insurance Office called was sufficient to establish its defence: *Fabre* (at 447). However, Mahoney JA held (at 449 – 450) that “the assumption [underlying that decision] that an inference was properly to be drawn from the fact that Mr Arenales was not called … [was] not correct” explaining:

> “The significance to be attributed to the fact that a witness did not give evidence will in the end depend upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. But there are circumstances in which it has been recognised that such an inference is not available or, if available, is of little significance. The party may not be in a position to call the witness. He may not be sufficiently aware of what the witness would say to warrant the inference that, in the relevant sense, he feared to call him. The reason why the witness is not called may have no relevant relationship to the fact in issue: it may be related to, for example, the fact that the party simply does not know what the witness will say. A party is not, under pain of a detrimental inference, required to call a witness ‘blind’.
>
> ... *A* Jones v Dunkel *inference may not arise if, for example, a witness has a reason for not telling the truth or refusing to assist and the party who may call him is aware of this*.” (Emphasis added)

The primary judge in this case referred to the passage I have emphasised.

87 Mahoney JA went on to explain (at 450) that if the Government Insurance Office had been the party and Mr Arenales merely a witness, it was “at least arguable that no inference would be drawn from the fact that he was not called for the defendant”. If he had been called, his Honour said:

> “… he would have been asked in effect to admit a crime of some seriousness. If he did, he might be liable to reimburse the Government Insurance Office for

> or in respect of the amount recovered by the plaintiff. And, perhaps, it might be doubted that he would cooperate, by way of prior consultation, proof of evidence, or the like. It may be that his character or criminal record would affect these matters. These were, in my opinion, matters which the learned judge would have been required to 'address' had the *Jones v Dunkel* inference been of significance in his consideration of the plaintiff's credibility."

88 RHG submitted that the primary judge erred in not following *Velingos* because Schmidt J in that case did not refer to *Fabre*. RHG contended that *Fabre* was itself distinguishable as that case involved the absent witness potentially being exposed to possible criminal proceedings, whereas there was no suggestion of such action in the present case. Even if there had been such a suggestion, RHG submitted that Joe could have been protected from any possible criminal proceedings by his Honour giving him a certificate under s 128 of the *Evidence Act 1995* (NSW). RHG also submitted that Joe did not have any reason not to tell the truth at the second trial as there could be no civil consequences for him as he was bankrupt by that time and, in any event, the Iannis had not persisted with their cross claim against him. Accordingly RHG contended the primary judge ought to have drawn an inference that Joe's evidence "would have been generally unfavourable to" the Iannis.

89 The Iannis submitted that it was RHG which ought to have, but failed, to call Joe. They contended that even though Joe was bankrupt by the time of the second trial, the Iannis were defending RHG's claim on the basis that Joe misled and induced them to go into a transaction they did not understand, putting them at risk of losing their home. Accordingly, they submitted that he was not a witness it would naturally be expected that they would call. Rather, as RHG embraced Mr Famularo's evidence, it could be expected that it would call Joe to support Mr Famularo's version of events.

90 A number of things may be said about the application of *Fabre* to the present case. First, it could not be said the Iannis were not in a position to call Joe. At the conclusion of Rosario's evidence, Mr Ashhurst asked whether the Iannis' case was closed, to which Mr Kelly responded that he might or might not call Joe Ianni in reply on a cross claim, but made it clear he had given no indication that he was going to call Joe. In cross-examination concerning his evidence that "Joe did not tell him that he needed him to sign a guarantee", Mr Ianni was asked if he knew "any reason why [Joe] can't come to this court and give …

evidence that he (Joe) never said to Mr Ianni I want you to sign a guarantee for the RAMS loan." Mr Ianni said, "if you call him he will certainly come": primary judgment (at [123]). That answer in my view indicated that Joe and his parents were not at odds despite the RHG transactions. Secondly, it could not be said the Iannis might not be "sufficiently aware of what [Joe] would say to warrant the inference". They knew what evidence he could be expected to give from his evidence at the first trial. In my view his Honour could refer to the fact Joe had given evidence at the first trial (without referring to its contents, as discussed below) both to infer that the Iannis would know what evidence he would give and, too, to conclude that Joe had no reason not to give evidence. Thirdly, the precondition for not drawing a *Jones v Dunkel* inference where a witness has a reason for not telling the truth upon which the primary judge relied (at [195]) also depends on the party who may call him being aware of that reason: *West* (at 70), *Fabre* (at 450). Mr Ianni did not give any evidence to that effect. Thus the failure to call Joe remained unexplained. Fourthly, as Schmidt J held in *Velingos*, s 38 of the *Evidence Act 1995* (NSW) (the "Evidence Act") could be prayed in aid if Joe had become "unfavourable" once called. Further, as RHG submitted, if there was a concern that Joe might have a potential criminal exposure, that could have been dealt with pursuant to s 128 of the Evidence Act.

91 The Iannis' submission that it could be expected that RHG would call Joe cannot be accepted. Its failure to do so can be explained by the fact he was the Iannis' son: see *Smith v Samuels* (1976) 12 SASR 573 (at 581) per Bray CJ; *Cadwallader v Bajco Ltd* [2002] NSWCA 328 (at [97]) per Heydon JA, (Santow JA and Gzell J agreeing).

92 Accordingly, in my view the primary judge erred in his first reason for holding that the conditions for the operation of *Jones v Dunkel* had not been established.

93 Ironically, the second reason the primary judge gave (at [196] – [198]) for rejecting RHG's *Jones v Dunkel* submission involved him considering Joe's evidence at the first trial. He concluded from that review that Joe's evidence "provide[d] some support for Rosario's evidence", even on the critical issue of

telling Rosario, in substance, that the SGB and RHG transactions were limited to $100,000, although in other respects he "professed a lack of knowledge" and "appeared to want to shift the blame for things onto Mr Famularo". His Honour concluded (at [198]):

> "198 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*." (Emphasis added)

94 Elsewhere as earlier discussed, of course, his Honour had accepted Joe's evidence on matters critical to establishing the Iannis' case. Be that as it may, the primary judge was not permitted to have regard to the content of Joe's evidence at the second trial for any purpose. As it is apparent that his consideration of that evidence was integral to the second basis on which his Honour rejected RHG's *Jones v Dunkel* submission, his decision is in this respect also flawed.

95 In my view RHG established the conditions necessary for the operation of the rule in *Jones v Dunkel.* Like Ikey in *Velingos*, Joe was "the obvious witness who could have corroborated [the Iannis'] evidence and was a person it could reasonably be expected they would call".

96 It should be noted of course, that having reached that conclusion, it is not mandatory that his Honour draw a *Jones v Dunkel* inference at the retrial. "[G]enerally speaking … [such an inference] only become[s] material where the balance of the evidentiary record is equivocal": *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* [2011] FCAFC 53 (at [78] – [79]); *Paul's Retail Pty Ltd v Sporte Leisure Pty Ltd* [2012] FCAFC 51; (2012) 202 FCR 286 (at [88]); see also *Manly Council v Byrne* [2004] NSWCA 123 (at [54]) per Campbell JA (Beazley JA and Pearlman AJA agreeing). As the Iannis submitted, and RHG accepted, it will be a matter for the primary judge to determine on which side of the line the evidence falls.

Conclusion

97 Finally I observe that it is a matter of regret that the parties expended the considerable resources on an appeal founded on an error about which both agreed, rather than ask the primary judge to reopen the hearing prior to the entry of judgment. The jurisdiction to do so was clearly available as his Honour had used Joe's evidence in a manner indicating he had "erred in a material matter in his approach to the case" (*Pittalis v Sherefettin* [1986] QB 868 (at 880)), and thus "proceeded on a misapprehension as to the facts", a misapprehension which could not be laid at the feet of either party: *Autodesk Inc v Dyason (No 2)* [1993] HCA 6; (1993) 176 CLR 300 (at 302 – 303) per Mason CJ (in dissent as to the outcome but whose statements of principle accorded with the plurality); see also *Wentworth v Woollahra Municipal Council* [1982] HCA 41; (1982) 149 CLR 672 (at 684). The nature and extent of the review on the reopening would depend on the error or omission which led to the reopening: *Smith v NSW Bar Association (No 2)* (at 265) per Brennan, Dawson, Toohey and Gaudron JJ. However, as RHG's case is that reliance on Joe's evidence was fundamental to the ruling in the Iannis' favour, any reopening would, as will now occur, have at least included considering the issues without reference to the content of Joe's evidence at the first trial.

98 In this case the scope of the reopening will be finally determined by the primary judge to the extent to which it may be affected by the requirement that his Honour reconsider his reasons without having regard to Joe's evidence, any *Jones v Dunkel* inference he may draw and any related issues.

Costs

99 RHG accepted that it should pay any costs thrown away by its application to amend the notice of appeal. However, it argued that it should otherwise have an order that the Iannis pay the costs of the appeal as they had been on notice since the AWS that a new trial order was the substantive relief sought and had ultimately conceded that order was appropriate. The Iannis opposed a costs order in RHG's favour reflecting RHG's success on the appeal having regard to what they contended was the late abandonment of the original relief sought in the notice of appeal when the proposed amended notice of appeal was forwarded in January 2015.

100 In my view it was apparent from the time the AWS were filed and served that the real relief RHG sought was that a new trial should be ordered. The AWS substantially addressed new trial issues and the prospects of a retrial being ordered were flagged in December 2015. It was extremely tardy of RHG not to file and serve an amended notice of appeal or, indeed, flag the new trial order in the original notice of appeal. That omission was explained by RHG's solicitor as having arisen from a hasty drafting of a notice of appeal to support an application for a stay of the primary judgment. He said, in effect, that it was an oversight that the notice of appeal did not seek a retrial.

101 In my view from October 2014 the respondents could have been in no doubt as to the true nature of the relief RHG sought on appeal. Their December written submissions clearly addressed those issues in seeking to persuade the Court that the conditions supporting the grant of a new trial had not been established.

102 The Iannis' concession that in the circumstances a new trial was warranted was one which, in my view, could have been made on the basis of RHG's written submissions. Further, the Iannis contested the proposition that this Court should decide the issue of principle on the *Jones v Dunkel* ground of appeal. They have failed in that respect too. Mr Kelly flagged the possibility that the Court would not make a decision on the issue of costs, but rather, that such submissions might be made when the Court's reasons on the *Jones v Dunkel* issue were available to the parties. In my view, the preferable course is to outline my reasons for ordering the Iannis to pay the costs of the appeal. They can, should they wish, seek leave within the time limited by the UCPR as noted on the coversheet of this judgment, to apply to vary that order.

Orders

103 When the Court orders a new trial, it may impose conditions on any party for the purposes of the new trial: UCPR 51.53(5)(a). I would impose conditions consistent with the parties' agreement as recorded in their exchange of written submissions (see [30] – [31]) above and oral submissions (see [35]).

104 I propose the following orders:

(1) Give RHG leave to amend its notice of appeal in the form which appears at Orange 173 as further amended to take into account the settlement of the Baira appeal.

(2) Direct RHG to file and serve the notice of appeal as so amended within seven days.

(3) Set aside the judgment of Justice Davies given on 1 July 2014 insofar as it concerns the Iannis.

(4) Order that there be a retrial of the proceedings between RHG and the Iannis on the following conditions:

(a) That the evidence at the trial be the evidence in the new trial without any further examination or cross examination of witnesses or the tender of any further documentary evidence;

(b) That the trial judge shall proceed to determine the matter without reference to the evidence of Joe Ianni and, subject to 4(c) and (d), upon such limited further written or oral submissions as the trial judge may direct;

(c) That the parties be given the opportunity to make submissions to the trial judge as to how his Honour's reliance on the evidence of Joe Ianni should affect the conclusions his Honour previously reached; and

(d) That the parties be given the opportunity to make submissions to the trial judge as to whether his Honour should draw any *Jones v Dunkel* inferences consequent upon the Iannis failure to call Joe Ianni.

(5) Costs of the second trial to be at the discretion of Justice Davies.

(6) RHG to pay the costs thrown away by its application to amend the notice of appeal.

(7) Subject to (6), respondents to pay the costs of the appeal.

(8) Respondents to have a certificate under the *Suitors Fund Act 1951* (NSW) if otherwise qualified.

105 **EMMETT JA:** This appeal is concerned with a claim by Rosario Ianni and the late Domenica Ianni for relief under the *Contracts Review Act 1980* (NSW) (**the Review Act**), the *Consumer Credit Code*, the *Australian Securities and Investments Commission Act 2001* (Cth) (**the ASIC Act**) or the *Trade Practices Act 1974* (Cth). Mr and Mrs Ianni claim relief in respect of a loan agreement that they entered into on 11 October 2005 (**the Loan Agreement**) as borrowers with the appellant, RHG Mortgage Corporation Ltd (**RHG**), as lender and a mortgage (**the Mortgage**) given by them on 14 October 2005 in favour of

RHG over land situated at Drummoyne (**the Drummoyne Property**) as security for their liability under the Loan Agreement.

106 RHG commenced proceedings in the Common Law Division for recovery of possession of the Drummoyne Property and for judgment in respect of the amount owing under the Loan Agreement. By cross-claim filed in those proceedings, Mr and Mrs Ianni sought to have the Loan Agreement and the Mortgage declared void or alternatively set aside.

107 On 4 July 2014, for reasons published on 1 July 2014, a judge of the Common Law Division (**the primary judge**) directed the entry of a verdict and judgment for Mr and Mrs Ianni on RHG's claim. His Honour made orders under the Review Act that the Loan Agreement and the Mortgage be set aside and ordered RHG to pay Mr and Mrs Ianni's costs of the proceedings. By notice of appeal filed on 25 July 2014, RHG appealed from the orders made by the primary judge.

108 In separate proceedings brought by RHG against Ms Rosa Baira in the Common Law Division, RHG also sought to enforce a loan agreement entered into with Ms Baira and a mortgage granted over land owned by Ms Baira to secure her liability under that loan agreement. Ms Baira also filed a cross-claim against RHG seeking similar relief to that claimed by Mr and Mrs Ianni. The proceedings against Ms Baira and Mr and Mrs Ianni were heard by the primary judge together. His Honour granted relief to Ms Baira similar to that granted to Mr and Mrs Ianni. Curiously, the notice of appeal filed on 25 July 2014 purported to appeal from the orders made in both proceedings. However, the appeal as between RHG and Ms Baira was subsequently settled and, thereafter, the appeal by RHG against the orders made in favour of Mr and Mrs Ianni proceeded in the ordinary course.

109 In the course of the hearing of the appeal, senior counsel for Mr and Mrs Ianni indicated to the Court that they were prepared to make significant concessions in relation to the grounds of appeal relied on by RHG. However, those concessions were proffered on terms that the only relief claimed in the appeal by RHG would be a new trial. In order to put into context the significance of the

proffered concessions and the terms, it is necessary to say something about the issues in the proceedings between RHG and Mr and Mrs Ianni.

Issues in the proceedings

110 The allegations made by Mr and Mrs Ianni in their cross-claim against RHG may be summarised as follows:

- Mr Ianni was born in Italy in 1935, left school at the age of 14, speaks Italian as his first language, speaks broken English and can read and write only a little English;
- Mrs Ianni was born in Italy in 1937, left school at the age of 10 and had no formal schooling thereafter, speaks Italian as her first language and can understand and speak a little English, but, save for signing her name, can neither read nor write English;
- Mr and Mrs Ianni purchased the Drummoyne Property in 1972 and, apart from personal effects, a motor vehicle and small term deposits, the Drummoyne Property is their only asset;
- Mr and Mrs Ianni's son, Joseph Ianni, and his wife, Sandra, borrowed money from St George Bank and Mr and Mrs Ianni guaranteed their liability under the loan and granted a mortgage over the Drummoyne Property as security for their liability under the guarantee;
- As at September 2005, Joseph and Sandra Ianni owed approximately $485,000 to St George Bank under that loan;
- In September 2005, Joseph informed Mr Ianni that he intended to refinance his loan from St George Bank by an advance from RHG (then known as RAMS Mortgage Corporation Ltd);
- In September and October 2005, Mr and Mrs Ianni signed a series of documents relating to a proposed advance to Mr and Mrs Ianni by RHG of the sum of $910,000;
- Mr and Mrs Ianni then signed the Loan Agreement and the Mortgage, whereupon the sum of $910,000 was advanced by RHG;
- The advance made by RHG was applied partially to discharge the indebtedness of Joseph and Sandra Ianni to St George Bank and the balance was applied as directed by Joseph and Sandra Ianni;
- No part of the advance made by RHG was received by Mr and Mrs Ianni, who received no benefit from the advance.

111 The proceedings first came on for hearing before Grove AJ, who gave judgment on 3 June 2011 in favour of RHG (see *RHG Mortgage Corporation*

Ltd v Rosa Baira; RHG Mortgage Corporation Ltd v Rosario Ianni [2011] NSWSC 520). Mr and Mrs Ianni appealed. The Court of Appeal allowed the appeal and remitted the matter for retrial (see *Baira v RHG Mortgage Corporation Ltd* [2012] NSWCA 387). The retrial thereafter commenced before the primary judge.

112 The parties agreed, and informed the primary judge, that the evidence upon which the primary judge was to decide the matter was to be the evidence in the statements and affidavits that were before Grove AJ (subject to the evidentiary rulings of Grove AJ), the transcript before Grove AJ, and any further oral evidence given before the primary judge. However, importantly, the primary judge was not to have regard to the evidence of any witness before Grove AJ unless that witness was also called to give evidence and be available for cross-examination before the primary judge. In fact, extensive cross-examination took place before the primary judge. Critically for present purposes, although Joseph Ianni gave evidence and was cross-examined before Grove AJ, he was not called to give evidence before the primary judge. Accordingly, his evidence before Grove AJ should not have been taken into account by the primary judge.

113 Nevertheless, apparently as a result of an oversight on the part of the primary judge, in his reasons of 1 July 2014, his Honour, to a considerable degree, referred to and had regard to the evidence given by Joseph Ianni before Grove AJ. That is the primary ground of appeal relied upon by RHG in this appeal. In addition, RHG contended that the primary judge also erred in failing to draw an inference from the fact that Joseph Ianni was not called to give evidence before him that Joseph Ianni's evidence would not have assisted Mr and Mrs Ianni's case.

114 In the notice of appeal filed on 25 July 2014, RHG sought orders that the appeal be allowed, that the judgment of the primary judge be set aside, and that judgment be entered in its favour for possession of the Drummoyne Property and for the debt owing by Mr and Mrs Ianni under the Loan Agreement. However, in its submissions in reply of 8 January 2015, RHG observed that Mr and Mrs Ianni had conceded that the primary judge erred in

having regard to the evidence of Joseph Ianni that was before Grove AJ. RHG contended that, once it was accepted that the primary judge had had regard to evidence that was not properly before him, there was a denial of procedural fairness and that, once the denial of procedural fairness was established, a new trial should be ordered unless this Court found that a properly conducted trial could not have possibly produced a different result.

115 RHG then filed a notice of motion seeking leave to file an amended notice of appeal in which it sought a retrial in lieu of its claim for judgment for possession and debt. Initially, the application for leave to file an amended notice of appeal was resisted by Mr and Mrs Ianni. However, in submissions filed in response to the application for leave to amend on 2 February 2015, Mr and Mrs Ianni said that, if there was to be a retrial, it should be a trial before the primary judge on the condition that the evidence in the original trial before the primary judge be the evidence in the new trial without any further examination or cross-examination of witnesses or the tender of any further documentary evidence, with the intention that the primary judge would proceed to determine the matter without reference to the evidence of Joseph Ianni and upon such limited further written or oral submissions as the primary judge may direct.

116 In its written submissions in response filed on 3 February 2015, RHG indicated that it did not oppose the form of a new trial thus proposed by Mr and Mrs Ianni provided that, if the appeal were to be allowed, both on the basis that the primary judge impermissibly relied on the evidence of Joseph Ianni and on the basis that his Honour failed to draw the appropriate inferences regarding the failure to call Joseph Ianni, RHG should be allowed the opportunity at the new trial to make submissions to the primary judge on how the correction of those two issues should affect the conclusions previously reached by his Honour.

117 When the appeal was called on for hearing on 4 February 2015, the parties intimated to the Court the possibility that the appeal may be shortened by reason of the exchange briefly described above. At that stage, no formal concession was made on behalf of Mr and Mrs Ianni. However, after senior counsel for RHG had addressed at some length on the factual background to the dispute, and had dealt at length with the ground of appeal that the primary

judge erred in having regard to the evidence of Joseph Ianni, senior counsel for Mr and Mrs Ianni proffered a concession.

118 The concession proffered was that they would no longer oppose the amendment of the notice of appeal to seek a new trial and would consent to the appeal being allowed on the ground that there had been a denial of procedural fairness by reason of the fact that the primary judge took into account the evidence of Joseph Ianni. However, that concession was proffered on the basis that any new trial would be conducted as indicated in Mr and Mrs Ianni's submissions of 2 February 2015. Senior counsel for RHG intimated that RHG would not oppose a new trial in that form so long as the provisos indicated in its submissions of 3 February 2015 were imposed.

119 I am satisfied that the primary judge erred in so far as his Honour took into account the evidence of Joseph Ianni and that error constituted a denial of procedural fairness to RHG. Accordingly, the appeal should be allowed on that ground. That, in effect, leaves two questions for the Court. The first question is whether the primary judge erred in failing to draw appropriate inferences by reason of the failure by Mr and Mrs Ianni to call Joseph Ianni to give evidence. The second question is whether any order should be made as to the costs of the appeal and, if so, what order should be made.

Inferences

120 Where a person who is able to put the true complexion on facts in dispute is not called to give evidence, and there is no sufficient explanation for the absence of that person as a witness, an inference may be drawn that the evidence of that person would not help a party's case, so long as the person is one who would be expected to be called by that party. In such circumstances, an inference can be drawn that counsel had concluded that the client's case is more likely to succeed without the evidence of that person (*Jones v Dunkel* [1959] HCA 8; 101 CLR 298 at 312 and 321-322).

121 Joseph Ianni had previously given evidence in the trial before Grove AJ. That evidence was apparently favourable to the case advanced by Mr and Mrs Ianni, as appears from the reliance placed on it by the primary judge. Mr Ianni gave evidence before the primary judge that there was no reason why Joseph

Ianni would not have given evidence had he been called to do so. Further, the transcript of the hearing before the primary judge indicates that a conscious forensic decision was made by counsel for Mr and Mrs Ianni not to call Joseph Ianni. That is to say, when first asked by his Honour whether Joseph Ianni would be called, counsel indicated that a decision had not yet been made. Nevertheless, the primary judge concluded that it was not immediately apparent that Joseph Ianni was a witness who would naturally be expected to be called by Mr and Mrs Ianni. That appears to be because his Honour considered that Joseph Ianni was responsible for wrongfully bringing about the liability of Mr and Mrs Ianni to RHG. In circumstances where Joseph Ianni was available and counsel had not immediately made a decision whether or not to call him, an inference can be drawn that counsel concluded that Mr and Mrs Ianni were more likely to succeed without his evidence.

122 No suggestion was advanced on behalf of Mr and Mrs Ianni to the primary judge that Joseph Ianni was reluctant to give evidence because it may constitute an admission by him of wrongful conduct of some sort. He had previously given evidence. Since the trial before Grove AJ, Joseph Ianni had become bankrupt so that there was no prospect of any increased liability. If there was some suggestion of criminal conduct on his part, it would have been open to seek a certificate under s 128 of the *Evidence Act 1995* (NSW). I consider that the primary judge erred in failing to draw an inference that counsel for Mr and Mrs Ianni had concluded that they were more likely to succeed without Joseph Ianni's evidence. Whether that ultimately matters would be a question for the primary judge on the retrial.

Costs

123 Senior counsel for RHG proffered an explanation for the failure to claim a new trial in the original notice of appeal, although no evidence was given as to that failure. On the other hand, no evidence was given on behalf of Mr and Mrs Ianni that, if the original notice of appeal had sought a new trial, they would have consented to the appeal being allowed and the grant of that relief. Rather, they resisted the appeal. Their written submissions took issue in considerable detail with the contentions advanced on behalf of RHG as to the significance of Joseph Ianni's evidence in the conclusion reached by the primary judge.

124 It was not until senior counsel for RHG had almost finished his oral submissions to this Court that senior counsel for Mr and Mrs Ianni proffered the concessions referred to above. There was ample opportunity for Mr and Mrs Ianni to make a concession about the error on the part of the primary judge that they now concede occurred. That concession was made in their written submissions of 9 December 2014, although no concession was made that the appeal should be allowed as a consequence. It was not suggested that, had the original notice of appeal sought a new trial, they would have consented to the appeal being allowed.

125 In all of the circumstances, a fair conclusion is that RHG has been successful in the appeal. Some costs may have been thrown away by reason of the amendment. RHG should bear those costs. Subject to that matter, the appropriate order would be to require Mr and Mrs Ianni to pay RHG's costs of the appeal. They should have a certificate under the *Suitors' Fund Act 1951* (NSW) if they are otherwise entitled to one.

Conclusion

126 I have had the advantage of reading in draft form the proposed reasons of McColl JA. I agree with the orders proposed by her Honour and with the reasons she proposes.

127 **SACKVILLE AJA:** I agree with McColl JA.

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