COMMERCIAL BANK OF AUSTRALIA LTD v AMADIO and ANOTHER

HIGH COURT OF AUSTRALIA

GIBBS CJ, MASON, WILSON, DEANE and DAWSON JJ

17, 18 August 1982, 12 May 1983 — Canberra

Equity — Unconscionable dealing — Principles — Execution of mortgage guarantee — Whether respondents under special disability — Knowledge of principal creditor — Whether principal creditor took unfair advantage of respondents — Onus of showing transaction was fair, just and reasonable.

Equity — Misrepresentation — Mortgage guarantee — Duty of disclosure of principal creditor — Whether breach of duty — Whether breach amounted to misrepresentation.

The respondents were an elderly Italian couple. Their son was the principal shareholder and managing director of a building business. He asked them to mortgage their land for six months to the bank as security for the company's overdraft. He told them that their liability would be limited to $50,000.

They believed his business to be profitable and they signed the mortgage in the presence of the bank manager without reading it. The bank, but not the respondents, was aware that the company was in financial difficulty and the mortgage included a guarantee by the respondents to secure any existing or future indebtedness of the company and a promise, unlimited as to amount or time, by the respondents to pay the whole of any indebtedness when called upon to do so.

The company went into liquidation and the bank made demand on the respondents. The respondents commenced proceedings to set aside the mortgage and the bank counter-claimed for the amount due. The bank succeeded and obtained judgment for over $239,000. On appeal, the Full Court of the Supreme Court of South Australia set the mortgage aside. The bank appealed.

Held: (i) *Per curiam:* On an application for relief against unconscionable dealing, the court looks to the conduct of the party attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.

(ii) Per Deane J: It is not essential that there be an inadequacy of consideration moving from the stronger party for the court to grant relief against unconscionable dealing.

> *Blomley v Ryan* (1956) 99 CLR 362; *Harrison v National Bank of Australasia Ltd* (1928) 23 Tas LR 1; *Lloyds Bank v Bundy* [1975] 1 QB 326; *Cresswell v Potter* [1978] 1 WLR 255; *Owen and Gutch v Homan* (1853) 4 HL Cas 997; *Bank of Victoria Ltd v Mueller* [1925] VLR 642, referred to.

(iii) Per Mason and Deane JJ (Wilson J concurring; Gibbs CJ and Dawson J dissenting) (a) The respondents were at a special disability in their dealing with the bank

Blomley v Ryan (1956) 99 CLR 362, applied.

(b) The facts as known to the bank were such as to raise in the mind of any reasonable person a very real question as to the respondents' ability to make a judgment as to what was in their own best interests. In those circumstances, the bank was bound to make inquiry and it was unfair and unconscientious of the bank to proceed to procure their signatures on the mortgage without such inquiry.

Owen & Gutch v Homan (1853) 4 HL Cas 997, followed.

(c) The whole transaction should be set aside unconditionally.

(iv) *Per curiam:* A contract of guarantee is not *uberrimae fidei*. However, the principal creditor is under a duty to disclose anything in the transaction between the creditor and the debtor which has the effect that the position of the debtor is different from that which the intending surety would naturally expect, particularly if it affects the nature or degree of the surety's responsibility.

Hamilton v Watson (1845) 12 CL & Fin 109; 8 ER 1339; *Goodwin v National Bank of Australasia Ltd* (1968) 117 CLR 173, followed.

London General Omnibus Co Ltd v Holloway [1912] 2 KB 72; *Wythes v Labouchere* (1859) 3 De G & J 593; 44 ER 1397; *National Provincial Bank of England Ltd v Glanusk* [1913] 3 KB 335; *Cooper v National Provincial Bank Ltd* [1946] KB 1, referred to.

(v) Per Gibbs CJ: The failure to make such a disclosure in those circumstances would amount to an implied misrepresentation that the thing did not exist.

Lee v Jones (1864) 17 CB (NS) 482; 144 ER 194; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72; *Union Bank of Australia Ltd v Puddy* [1949] VLR 242, referred to.

(vi) Per Gibbs CJ (Dawson J dissenting): There were unusual features relating to the account which was to be guaranteed, and the bank was bound to disclose them. The failure to make such disclosure amounted to a material misrepresentation and the respondents should not be bound by the mortgage.

Appeal

This was an appeal from the Full Court of the Supreme Court of South Australia. The Full Court upheld the respondents' appeal from the judgment of the primary judge. The facts appear sufficiently in the judgments of Gibbs CJ and Deane J.

C L Pannam QC, P R Hayes and *J M Wilkinson*, for the appellant.

E F Johnston QC and *N J Hume*, for the respondents.

Cur. adv. vult.

Gibbs CJ. This is an appeal from the Full Court of the Supreme Court of South Australia which allowed an appeal from the judgment of the primary judge (Wells J) and ordered that a memorandum of mortgage executed by the plaintiffs (the present respondents) on or about 25 March 1977 in favour of the appellant bank be set aside, and made certain ancillary orders

At the time when the memorandum of mortgage was executed, the respondents, Mr and Mrs Amadio, were aged 76 and 71 respectively. They had both been born in Italy but had lived in Australia for over 40 years. Neither had received much formal education. Mr Amadio had a limited grasp of written English but could speak it reasonably well; Mrs Amadio had some understanding of spoken English but gave evidence through an interpreter. She had had no business experience, but her husband, who had retired after many years work as a market gardener, had engaged in a number of land transactions, in most of which he had received the assistance of their son, Vincenzo Amadio. The respondents were induced to enter into the transaction now in question by the misrepresentations of Vincenzo Amadio.

Vincenzo Amadio had carried on business as a land developer and builder through a number of companies which he controlled, including V Amadio Builders Pty Ltd (the company). He had been, or had appeared to be, very successful. The annual turnover of his companies amounted to millions of dollars. He lived in an opulent style. As late as Christmas 1976 he held a party which was attended by over 2000 people, including his father, Mr Amadio, and Mr Virgo, who was the manager of the branch of the appellant bank at which the company had its account. His parents had every reason to believe that he was a wealthy and successful man. But the bank had reason to think that appearances might be deceptive. At least by October 1976 the company had proved unable to keep within its overdraft limit (which was then $80,000) and in that month it had applied to increase the limit by $45,000 to enable it to meet the immediate demands of its creditors. The increase was granted on condition that clearance of the further advance was definitely to be effected by 31 December 1976. In fact when 31 December 1976 arrived, the account was in debit in an amount exceeding $130,000. In January 1977 an overdraft limit of $125,000 was temporarily continued but the bank required the overdraft to be reduced to that limit. It was not so reduced; the debit balance fluctuated, but gradually increased and by 17 March the account was in debit in an amount exceeding $193,000. Moreover, from about the beginning of 1977 it had been necessary for the company to arrange with the bank selectively to dishonour cheques drawn on its account and presented for payment. Vincenzo Amadio and Mr Virgo would meet almost daily and would decide which cheques should be paid and which should not. The cheques which were paid were those presented by creditors who, if the cheques had been dishonoured, would have cut off the company's supplies and forced it out of business in a matter of days. Clearly the company could not pay its debts as they became due: it was insolvent.

The bank had special reasons for maintaining a tolerant attitude towards the company. The bank valued highly its connection with Vincenzo Amadio, not only because he was himself an important customer, but also because of the business which he brought to the bank, and because the company was engaged in building houses in a joint venture with General Credits Ltd, a subsidiary of the bank. The company did the building at cost plus 10 per cent which covered no more

than administrative charges; it was intended that any profits on the sale of the buildings should be shared between General Credits Ltd and another company which Vincenzo Amadio controlled.

By about 18 March 1977 the bank realized that it could no longer allow the company's account to be conducted as before. It was decided to stop further operations on the overdraft account, to treat it as a fully drawn advance account, and to dishonour cheques drawn on the account and presented for payment. The company was required to open a second account which was to be kept in credit. On about 24 March 1977 Vincenzo Amadio advised the State manager of the bank that he had opened an account with the Bank of New South Wales, and that he had arranged an overdraft with that bank on the security of an office building owned by his parents. It appears to have been true that he had opened an account with the Bank of New South Wales, but it was untrue to say that he had been granted an overdraft or that his parents had given or agreed to give any security. He informed the State manager that his parents were prepared to give security over the office building to the appellant bank if it would allow him to continue to operate with an increased overdraft limit — that also was untrue, for he had not spoken to his parents on the subject. The bank was anxious to keep his business. The State manager informed him that the bank would take a mortgage over the parents' property, but would hold it unregistered for the time being, and would allow the company to operate on the account which had been frozen, with an overdraft limit of $270,000 until 1 April, when the limit would be reduced to $220,000, with a further reduction to $180,000 by 15 April, and then the entire remaining overdraft would be cleared by a loan which was expected to be made by another company. Nothing was said at this meeting about the question whether the mortgage was to secure the whole indebtedness of the company or some limited amount. The State manager telephoned Mr Virgo and instructed him to implement the decision.

At this time the company's indebtedness to the bank amounted to $189,967, and it appears that cheques to a total of about $44,497 had been presented but had not been paid, for on 25 March, after some at least of the cheques were paid, the debit balance rose to $234,464. The bank already held some security for the overdraft, but regarded it as inadequate. Vincenzo Amadio told the bank that the office property was valued at $200,000, but that, too, appears to have been incorrect. In March 1977 in a schedule of security the bank showed the value of the property to be $170,000 or $153,000 on a forced sale; in April 1979 it was valued at $120,000.

Vincenzo Amadio then called on his parents, probably on the morning of 25 March 1977, to ask them to guarantee the account and to provide the security. The evidence which was accepted by the learned primary judge was that Vincenzo Amadio asked his parents to give a guarantee for around $50,000 and said that it would be for about six months. The learned primary judge found that nothing had been said to Vincenzo Amadio by the manager of the bank from which Vincenzo Amadio could have inferred that the mortgage was to operate for a limited time or was

to be other than for an unlimited amount. Vincenzo Amadio had not seen the memorandum of mortgage. The learned judge did not expressly find that the misrepresentations made by Vincenzo Amadio were fraudulent; and although it is difficult to escape the conclusion that if he did not have a conscious knowledge that what he said was untrue, he was at least reckless as to the truth or falsity of what he said, I would not base my judgment on that conclusion.

Later on 25 March, Mr Virgo went to the home of the respondents, and obtained their signatures to the memorandum of mortgage now in question. By that instrument the respondents agreed to pay to the bank on demand all moneys owing or that thereafter became owing by the company to the bank, together with interest, and mortgaged the office property as security for the payment. There was very little discussion before the document was signed. The respondents, who were in the kitchen, did not read the document and Mr Virgo did not explain its effect to them, although he did say that it would not be registered for the time being. The learned primary judge found that Mr Virgo believed, and reasonably believed, that Vincenzo Amadio had sufficiently explained to the respondents the nature of the transaction and the reasons for it, and that no further explanation was necessary. He also found that there was nothing in the behaviour of the respondents that would reasonably have suggested that they were unaware of the substance of the document or of its financial implications for them. However, Mr Amadio did remark that the mortgage was only for six months and Mr Virgo was then at pains to point out that there was no such limitation of time. Notwithstanding this, the learned primary judge found that the respondents, when they signed the document, believed not only that their liability was limited to $50,000, but also that it was limited in point of time. Their belief was induced by what their son had told them, and they would not have signed the document had they known its true effect.

Thereafter the company again operated on the account, but the state of the account continued to deteriorate. In June 1977 the mortgage was registered by the bank. At about the end of 1977 or the beginning of 1978 the company went into liquidation and subsequently Vincenzo Amadio was declared bankrupt. Finally, the bank made demand on the respondents and when that was not met, served on them notice that it would exercise the power of sale under the mortgage. The respondents then instituted the present proceedings. The bank counter-claimed for the amount due by the respondents to the bank under the guarantee contained in the mortgage, and the learned primary judge gave judgment for the bank for $239,830.85 on the counter-claim.

At the trial the respondents, in their attack on the validity of the mortgage, relied on a variety of alternative grounds including the following: that it was an unconscionable bargain; that it was procured by undue influence; and that it was induced by misrepresentation or by the concealment of facts which it was the bank's duty to disclose. The learned primary judge rejected these contentions; he held that on the facts as known to the bank the bargain was an ordinary one, struck in the

usual and regular course of commerce, and that any inequality of bargaining power was not known to the bank, that there was no evidence of undue influence, and that any misrepresentation or concealment was the work of Vincenzo Amadio and not of the bank.

In the Full Court it was held that the bank was under an obligation, which it did not fulfil, to reveal to the respondents the true position in relation to the account, and that the bank was liable for the misrepresentations made by Vincenzo Amadio, and also that the transaction was an unconscionable one of the kind against which equity would give relief.

A contract of guarantee is not *uberrimae fidei*. The principles governing the extent to which a creditor is bound to make disclosure to a surety were stated in *Hamilton v Watson* (1845) 12 Cl & Fin 109; 8 ER 1339. Lord Campbell there said (at 119; 1343-4 of ER) that, unless questions are particularly put by the surety, a creditor taking a guarantee is not bound to make disclosure of material facts. He continued (at 119; 1344 of ER): ". . . I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires."

In other words, a bank which takes a guarantee "is only bound to disclose to the intending surety anything which has taken place between the bank and the principal debtor 'which was not naturally to be expected', or as it was put by Pollock MR in *Lloyds Bank Ltd v Harrison* (1925) (unreported), cited in *Paget's Law of Banking*, 7th ed (1966), p 583 'the necessity for disclosure only goes to the extent of requiring it where there are some unusual features in the particular case relating to the particular account which is to be guaranteed',": *Goodwin v National Bank of Australasia Ltd* (1968) 117 CLR 173 at 175. The reason why a creditor is bound to reveal to an intending surety anything in the transaction between himself and the debtor which the surety would expect not to exist is that a failure to make disclosure in those circumstances would amount to an implied representation that the thing does not exist: see *Lee v Jones* (1864) 17 CB (NS) 482 at 503-4, 506; 144 ER 194 at 202-3, 204; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72 at 77, 79, 87-8; *Union Bank of Australia Ltd v Puddy* [1949] VLR 242 at 247. A surety who guarantees a customer's account with a bank will not expect that the account has not been overdrawn or that the bank is satisfied with the customer's credit, for the probable reason why the bank requires the guarantee is that the customer has been overdrawing his account, and wishes to do so again, and that the bank is not satisfied with his credit cf *London General Omnibus Co Ltd*

v Holloway, supra, at 83. The general rule, therefore, is that a bank is not obliged to disclose to the surety matters affecting the credit of the customer: *Wythes v Labouchere* (1859) 3 De G & J 593 at 609; 44 ER 1397 at 1404. Indeed, a bank might well commit a breach of the duty of confidence which it owes to its customer if it did disclose matters of that kind. It has been held that there is no duty of disclosure even when the customer has been suspected of fraud (*National Provincial Bank of England Ltd v Glanusk* [1913] 3 KB 335) or even when the customer's bankrupt husband was able to draw on her account, and cheques had been drawn on the account but orders had been given by the drawer not to pay them (*Cooper v National Provincial Bank Ltd* [1946] KB 1). In both those cases the court in reaching its decision relied on the fact that there was no contract between the customer and the bank to the effect that the position of the customer should be different from that which the surety might naturally expect. In the opinion of the learned authors of *Rowlatt on the Law of Principal and Surety*, 4th ed (1982), at p 122, the last-mentioned case reached the extreme boundary of the rule, but for present purposes it is unnecessary to consider whether the decision reached in each of these two cases was correct.

The facts that the company was in grave financial difficulties, and was consistently exceeding its overdraft limit, and that its cheques were being dishonoured, in themselves did no more than throw light on the credit of the company. If there were no more to the case than that, in my opinion the bank would not have been bound to make disclosure of those facts. Further, if the only additional circumstance had been that the company had entered into an arrangement with General Credits Ltd, pursuant to which the company was doing building work for no profit, I should still have considered that there was no duty of disclosure. In *Wythes v Labouchere*, Lord Chelmsford LC said (3 De G & J at 610; p 1404 of ER) that all the authorities in which the question of concealment arose "were cases in which it related to the transaction itself, and amounted to a fraud upon the surety". The cases to which I have already referred — *Hamilton v Watson; Goodwin v National Bank of Australasia Ltd; National Provincial Bank of England Ltd v Glanusk* and *Cooper v National Provincial Bank Ltd* — all support the view that at least in the case of banker and customer the duty of disclosure arises only where there is a special arrangement between the bank and the customer of a kind which the surety would not expect. I respectfully doubt the correctness of the dicta of Vaughan Williams LJ in *London General Omnibus Co Ltd v Holloway* (at p 79) in so far as he said that the references by Lord Campbell in *Hamilton v Watson* to an unusual contract between creditor and debtor was "only an example of the general proposition that a creditor must reveal to the surety every fact which under the circumstances the surety would expect not to exist". To require a bank to make disclosure to a surety of the details of all unusual transactions which, to the knowledge of the bank, had taken place between the customer and third parties might prove to be both vexatious and misleading, as well as a breach of confidence In the present case, for example, the full picture would not have been revealed by disclosing

the nature of the arrangements between the company and General Credits Ltd; it would also have been necessary to disclose the arrangements whereby the other company controlled by Vincenzo Amadio was intended to share in the profits of the sale of the houses which were built, and the facts which would show what, if any, profit was to be expected. It would be commercially unreal to suggest that a bank has a duty to reveal to a surety all the facts within its knowledge which relate to the transactions and financial position of a customer in any case where those transactions are out of the ordinary. The obligation is to reveal anything in the transaction between the banker and the customer which has the effect that the position of the customer is different from that which the surety would naturally expect, particularly if it affects the nature or degree of the surety's responsibility.

However, there were other circumstances in the case besides those to which I have just referred. First, and perhaps most important, was the arrangement made between the bank and Vincenzo Amadio on behalf of the company on 24 March. Although pursuant to that arrangement the company was to obtain an immediate overdraft limit of $270,000 (which was about $35,000 more than the sum of its existing overdraft and the amount of the outstanding cheques), it was a condition of the arrangement that the limit would be reduced to $220,000 within a week, with a further reduction to $180,000 within a fortnight. In other words, within three weeks the overdraft limit was to be reduced below the debit balance which already existed. Then it was intended that the entire overdraft should be cleared; the evidence suggests that this was to be done within a short time although it does not precisely appear when the clearance was to be effected. I find it impossible to suppose that a surety who undertook to meet the past and future liabilities of the company, and to give substantial security, would have expected that the arrangement between the bank and the company included such unusual terms, which meant that the company was given merely a temporary respite, whereas the bank improved its existing and inadequate security. Further, there was the circumstance that the bank had not merely dishonoured the cheques, but had made itself a party to their selective dishonour, in an endeavour to maintain the facade of prosperity that the company, although insolvent, had erected — a facade which, the bank should have expected, may well have deceived the respondents, since, as Mr Virgo knew, Mr Amadio was present at his son's ostentatious Christmas party. Cheques held pursuant to those arrangements, and amounting, as I have said, to about $44,000, were held at the time when the guarantee was given. There were indeed unusual features relating to the account which was to be guaranteed, and the bank was, in my opinion, bound to disclose them.

For these reasons I have concluded that the failure by the bank to make disclosure of these circumstances amounted to a misrepresentation (albeit unintended) of a material part of the transaction between the bank and the company, and that the memorandum of mortgage, including, of course, the guarantee which it contains, is not binding on the respondents

In these circumstances it is not necessary for me to reach a concluded decision on the other grounds on which the Full Court upheld the respondents' appeal, but since the matter was fully argued and the case was a difficult one, I shall express my views briefly upon them.

There was in this case an express misrepresentation which induced the respondents to enter into the guarantee. The misrepresentation was, however, made not by a servant or agent of the bank but by Vincenzo Amadio. It is clear that the rights of a principal creditor will not be affected by a misrepresentation made by the debtor to the surety unless the creditor knew of or assented to the making of the misrepresentation: see *Stone v Compton* (1838) 5 Bing NC 142 at 156-7; 132 ER 1059 at 1065 and *Spencer v Handley* (1842) 4 Man & G 414; 134 ER 169. However, as Fullagar J said in *Union Bank of Australia Ltd v Puddy* [1949] VLR 242 at 247, "the surety is a 'favoured debtor', and the courts look upon his interests with a jealous eye". It is perhaps for that reason that there has been adopted the principle which was stated by Lord Cranworth LC in *Owen and Gutch v Homan* (1853) 4 HL Cas 997 at 1035; 10 ER 752 at 767, in a passage referred to by Fullagar J in *Union Bank of Australia Ltd v Puddy* (at 247) and by McTiernan J in *Bank of New South Wales v Rogers* (1941) 65 CLR 42 at 60: "Without saying that in every case a creditor is bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, it may safely be stated that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence, he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge. If a person abstains from inquiry because he sees that the result of inquiry will probably be to show that a transaction in which he is engaging is tainted with fraud, his want of knowledge of the fraud will afford no excuse." It will be observed that when Lord Cranworth LC spoke of "wilful ignorance", he appears to have been referring not merely to a case in which circumstances put the creditor on inquiry, but to a case where the creditor does not inquire because he is afraid of what he may discover. In the present case the respondents pleaded that misrepresentations had been made by Mr Virgo, not by Vincenzo Amadio, and it was not suggested in cross-examination to the witnesses who gave evidence on behalf of the bank that they deliberately refrained from inquiring into the question what Vincenzo Amadio had told his parents. It does not seem to me that the issue of "wilful ignorance" was clearly raised at the trial. In those circumstances I do not consider that it is now open to the respondents to rely on the submission that the bank was responsible for the misrepresentations of Vincenzo Amadio.

In my opinion it should not be held that this was the case of an unconscientious bargain of the kind which equity would set aside, even in the absence of fraud, misrepresentation or undue influence. Of course, the bank and the respondents did not meet on equal terms, but that circumstance alone does not call for the intervention of equity, as

Lord Denning MR clearly illustrated in *Lloyds Bank v Bundy* [1975] QB 326 at 336. A transaction will be unconscientious within the meaning of the relevant equitable principles only if the party seeking to enforce the transaction has taken unfair advantage of his own superior bargaining power, or of the position of disadvantage in which the other party was placed. The principle of equity applies "whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands": *Blomley v Ryan* (1956) 99 CLR 362 at 415, per Kitto J, and see (at 405-6) per Fullagar J. In the present case it is true that the respondents were elderly, did not have a complete mastery of the English language and had had no formal education. However, the bank did not take unfair advantage of any of those disabilities, if disabilities they were. The evidence shows, as Wells J found, that the bank relied on Vincenzo Amadio to explain the transaction to his parents, and he in fact persuaded them to enter into it. He was experienced in business matters, and well able to understand and explain the effect of the memorandum of mortgage. Of course, he did not give his parents a true explanation of the effect of the guarantee, and the bank did not disclose those matters which it should have disclosed. If one ignores the effect of the misrepresentation by Vincenzo Amadio and the non-disclosure by the bank there is simply no evidence that the bank made unfair use of its position. In other words, if misrepresentation (whether express or by non-disclosure) is established, there is no need to resort to the rules as to unconscientious bargains, and if misrepresentation is not established the bank made no unfair use of its position.

There is a subsidiary principle which relates to the onus of proof when the party seeking to set aside the transaction is poor and ignorant. It was stated in *Fry v Lane* (1888) 40 Ch D 312 at 322, as follows: "The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction. . . . The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne's words, that the purchase was 'fair, just and reasonable'." There is some difficulty in applying this principle to the case of a guarantee, for the surety rarely if ever receives value from the creditor. There is no evidence that the respondents were poor. In *Cresswell v Potter* [1978] 1 WLR 255 at 257, Megarry J suggested that in this context "poor" should, under modern conditions, be read as "a member of the lower income group" and "ignorant" as "less highly educated". With all respect, I would need to consider further that proposition before completely accepting it. However, the evidence in the present case was not directed to establishing, and did not establish, that the respondents were poor, even in this expanded sense

The appellant should, in my opinion, fail only because of its failure to disclose to the respondents matters which it ought to have disclosed. I would dismiss the appeal.

Mason J. I agree with Deane J's comprehensive statement of the facts and with his conclusion that the respondents are entitled to relief on the ground that the bank was guilty of unconscionable conduct in procuring the execution of the mortgage guarantee by the respondents.

Historically courts have exercised jurisdiction to set aside contracts and other dealings on a variety of equitable grounds. They include fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct. In one sense they all constitute species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience. But relief on the ground of "unconscionable conduct" is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage, eg a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating drink. Although unconscionable conduct in this narrow sense bears some resemblance to the doctrine of undue influence, there is a difference between the two. In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.

There is no reason for thinking that the two remedies are mutually exclusive in the sense that only one of them is available in a particular situation to the exclusion of the other. Relief on the ground of unconscionable conduct will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will be granted when such advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in his best interest.

It goes almost without saying that it is impossible to describe definitively all the situations in which relief will be granted on the ground of unconscionable conduct. As Fullagar J said in *Blomley v Ryan* (1956) 99 CLR 362, at 405: "The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary The common characteristic seems to be that

they have the effect of placing one party at a serious disadvantage *vis-à-vis* the other."

Likewise Kitto J (at 415) spoke of it as "a well-known head of equity" which ". . . applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands".

It is not to be thought that relief will be granted only in the particular situations mentioned by their Honours. It is made plain enough, especially by Fullagar J, that the situations mentioned are no more than particular exemplifications of an underlying general principle which may be invoked whenever one party by reason of some condition or circumstance is placed at a special disadvantage *vis-à-vis* another and unfair or unconscientious advantage is then taken of the opportunity thereby created. I qualify the word "disadvantage" by the adjective "special" in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.

Because times have changed, new situations have arisen in which it may be appropriate to invoke the underlying principle. Take, for example, entry into a standard form of contract dictated by a party whose bargaining power is greatly superior, a relationship which was discussed by Lord Reid and Lord Diplock in *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308 at 1314-5, 1316: see also *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 WLR 61 at 64-5. In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances.

Of course the relationship between the present parties and the transaction into which they entered were by no means novel, viewed as a situation to which the general principle can apply. That the principle might justify the setting aside of a guarantee is established by decisions such as *Owen and Gutch v Homan* (1853) 4 HL Cas 997 at 1034-5; 10 ER 752 at 767, and *Bank of Victoria Ltd v Mueller* [1925] VLR 642 at 649.

To say this involves no contradiction of the well-entrenched proposition that a guarantee is not a contract *uberrimae fidei*, that is, a contract which of itself calls for full disclosure. However, it is accepted that the principal creditor is under a duty ". . . to disclose to the intending surety anything which has taken place between the bank and the principal debtor 'which was not naturally to be expected', or as it was put by Pollock MR in *Lloyd's Bank Ltd v Harrison* (1925) (unreported) cited in *Paget's Law of Banking*, 7th ed (1966), p 583 'the necessity for

disclosure only goes to the extent of requiring it where there are some unusual features in the particular case relating to the particular account which is to be guaranteed' " (*Goodwin v National Bank of Australasia Ltd* (1968) 117 CLR 173 at 175, per Barwick CJ).

It has been said that this duty to disclose does not require a bank to give information as to matters affecting the credit of the debtor or of any circumstances connected with the transaction in which he is about to engage which will render his position more hazardous (*Wythes v Labouchere* (1859) 3 De G & J 593 at 609; 44 ER 1397 at 1404, per Lord Chelmsford LC). No surety is entitled to assume that the debtor has not been overdrawing, the proper presumption being in most instances that he has been doing so and wishes to do so again (*London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72 at 83-4, 87).

But the fact that a bank's duty to make disclosure to its intending surety, arising from the mere relationship between principal creditor and surety, is so limited has no bearing on the availability of equitable relief on the ground of unconscionable conduct. A bank, though not guilty of any breach of its limited duty to make disclosure to the intending surety, may none the less be considered to have engaged in unconscionable conduct in procuring the surety's entry into the contract of guarantee.

It is to be hoped that the respondents' amended statement of claim does not find its way into the precedent books. It leaves much to be desired. It alleges unconscionable conduct and alternatively undue influence on the part of the bank. It does not, as it might have done, allege undue influence on the part of the respondents' son Vincenzo, with notice on the part of the bank. The findings, and indeed the evidence, contradict or fail to support the alleged case of undue influence on the part of the bank. The critical issue then is whether, in accordance with the principle already explained, the respondents are entitled to relief on the ground of unconscionable conduct.

There are a number of factors which go to establish that there was a gross inequality of bargaining power between the bank and the respondents, so much so that the respondents stood in a position of special disadvantage *vis-à-vis* the bank in relation to the proposed mortgage guarantee. By way of contrast to the bank, the respondents' ability to judge whether entry into the transaction was in their own best interests, having due regard to their desire to assist their son, was sadly lacking. The situation of special disadvantage in which the respondents were placed was the outcome of their reliance on and their confidence in their son who, in order to serve his own interests, urged them to provide the mortgage guarantee which the bank required as a condition of increasing the approved overdraft limit of his company, V Amadio Builders Pty Ltd (the company), from $80,000 to $270,000 and misled them as to the financial position of the company. Their reliance on their son was due in no small degree to their infirmities — they were Italians of advanced years, aged 76 and 71 respectively, having a limited command of written English and no experience of business in the field or at the level in which their son and the company engaged. They believed that the company's business was a flourishing and prosperous

enterprise, though temporarily in need of funds. In reality, as the bank well knew, the company was in a perilous financial condition.

In the weeks immediately preceding the execution of the mortgage guarantee the company was unable to pay its debts as they fell due. In this situation the bank had selectively paid cheques drawn by the company in favour of suppliers in order to ensure continuity in the supply of building materials, the company being a building contractor. In this period the bank had regularly and continuously dishonoured other cheques, the payment of which was not essential to the maintenance of the supply of building materials. In pursuing this course and in agreeing to an increase in the company's overdraft limit the bank was substantially influenced by a special consideration. The company was a major customer of the bank, indeed the largest customer at the Glynde branch of the bank, and the company's continuation in business was advantageous to General Credits Ltd, a finance company and subsidiary of the bank. In fact the company built houses for a joint venture comprising General Credits Ltd and another company of Vincenzo at cost plus 10 per cent, this figure being designed to cover building costs and administration charges. It was not intended to yield a profit to the company. General Credits Ltd's share of the joint venture profits was 60 per cent. In addition it provided the bulk of the finance required for the joint venture's operations. The respondents, needless to say, were quite unaware of these circumstances.

The effect of the respondents' execution of the mortgage guarantee was disastrous for them though advantageous to the bank. The bank agreed to increase Vincenzo's overdraft limit in the light of his statement that the property comprising four shops which was the subject of the mortgage guarantee was valued in the vicinity of $200,000. The liability of the respondents under that instrument, assuming its validity, proved to be $239,830.85, that being the amount of the judgment including interest obtained by the bank at first instance. Although the new arrangement made between the bank and Vincenzo which called for the provision of security by the respondents increased the company's approved overdraft limit from $80,000 to $270,000, the company's overdraft substantially exceeded $80,000 before the mortgage guarantee was executed on 25 March 1977. On the day before, the actual overdraft was $189,967, all efforts in the early part of 1977 to reduce the amount of the overdraft substantially having failed. It had been as high as $223,432 on 16 March and had generally increased from $130,000 on 31 December 1976 to $185,000 at the end of February 1977. The consequence was that the bank's security, which was inadequate before 25 March, was significantly improved. If we look to the amount of the bank's increased exposure as measured by the difference between the amount of the actual overdraft on 24 March and the new limit of $270,000, it is evident that the value of the security provided by the mortgage guarantee, as Vincenzo represented it to the bank, exceeded the increase in the bank's exposure. Immediately after execution of the instrument the bank met unpaid cheques amounting to $45,000 approximately Thereafter the company's business quickly deteriorated

No doubt the respondents' age and lack of business experience played a part in their reliance on their son's judgment and in their failure to make any inquiries as to the financial position of the company and their failure to seek advice as to the probable or possible consequences of the transaction into which they entered. Their lack of command of English, especially written English, apart from contributing to their reliance on their son, had an additional importance. Vincenzo had informed them that the bank would present for signature a guarantee and very probably a security of some sort, though the precise nature of that security, ie mortgage or charge, was not specified. He had incorrectly said that the liability would be limited to a period of six months and to an amount of $50,000. Mr Virgo, the bank manager, in the conversation which took place immediately before execution, informed them that their liability under the instrument was unlimited in time, the question having been raised by Mr Amadio Senior. Mr Virgo said nothing on the topic of unlimited liability because the respondents did not mention it.

The primary judge found that if Vincenzo "had disabused his parents' minds of their confidence in him, his parents would not have helped him". The correctness of this finding has not been challenged. Nor could it be, for the simple reason that any rational person knowing the circumstances of the company at the time would not have executed the instrument which they signed.

In deciding whether the bank took unconscientious advantage of the position of disadvantage in which the respondents were placed, we must ask, first, what knowledge did the bank have of the respondents' situation?

Mr Virgo was aware that the respondents were Italians, that they were of advanced years and that they did not have a good command of English. He knew that Vincenzo had procured their agreement to sign the mortgage guarantee. He had no reason to think that they had received advice and guidance from anyone but their son. In cross-examination he conceded that he believed that Vincenzo had acted in the "role of adviser/explainer" in relation to the transaction and referred to him as acting "in his capacity as dominant member of the family". Mr Virgo also knew that, in the light of the then financial condition of the company, it was vital to Vincenzo to secure his parents' signature to the mortgage guarantee so that the company could continue in business. It must have been obvious to Mr Virgo, as to anyone else having knowledge of the facts, that the transaction was improvident from the viewpoint of the respondents. In these circumstances it is inconceivable that the possibility did not occur to Mr Virgo that the respondents' entry into the transaction was due to their inability to make a judgment as to what was in their best interests, owing to their reliance on their son, whose interests would inevitably incline him to urge them to sign the instrument put forward by the bank.

Indeed, the inquiry by Mr Amadio Senior as to the duration of the arrangement should have alerted Mr Virgo to the likelihood that Vincenzo had not adequately or accurately explained the intended

transaction to them, let alone the possible or probable consequences which attended it.

Whether it be correct or incorrect to attribute to Mr Virgo knowledge of this possibility, the facts as known to him were such as to raise in the mind of any reasonable person a very real question as to the respondents' ability to make a judgment as to what was in their own best interests. In *Owen and Gutch v Homan* (4 HL Cas 997 at 1035; 10 ER at 767) Lord Cranworth LC said: ". . . it may safely be stated that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain [the concurrence of the surety], he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge." The principle there stated applies with equal force to this case. The concept of fraud in equity is not limited to common law deceit; it extends to conduct of the kind engaged in by the respondents' son when he took advantage of the confidence and reliance reposed in him to induce his parents to enter into a transaction in order to serve his ends, thereby depriving them of the ability to make a judgment as to what is in their interests.

As we have seen, if A, having actual knowledge that B occupies a situation of special disadvantage in relation to an intended transaction, so that B cannot make a judgment as to what is in his own interests, takes unfair advantage of his (A's) superior bargaining power or position by entering into that transaction, his conduct in so doing is unconscionable. And if, instead of having actual knowledge of that situation, A is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person, the result will be the same.

The knowledge of Mr Virgo was the knowledge of the bank. Whether we treat Mr Virgo as having knowledge of the possibility already discussed or as having knowledge of facts which would raise that possibility in the mind of any reasonable person, the inevitable conclusion is that the bank was guilty of unconscionable conduct by entering into the transaction without disclosing such facts as may have enabled the respondents to form a judgment for themselves and without ensuring that they obtained independent advice.

I agree with Deane J that it matters not that the respondents have not offered to do equity. In the result I am of opinion that the respondents were entitled to an order setting aside the mortgage guarantee and that the appeal to this court should be dismissed.

Wilson J. I have had the advantage of reading the reasons for judgment prepared by Deane J. I agree with his Honour's conclusion and with the reasons advanced in support of that conclusion. I wish merely to add some brief observations.

At the heart of this case is the finding of the learned trial judge that, on the facts as known to the bank, the bargain was an ordinary one

struck in the usual and regular course of commerce. With all respect, such a finding fails to have sufficient regard to the extraordinary features attendant on the transaction. The relationship between the bank and its client Vincenzo Amadio was more than an ordinary business relationship. It was a relationship which embroiled the bank in a conflict of interest which, in the special circumstances of this case, inhibited the proper conduct of its banking business. I refer to the procedure whereby Vincenzo and Mr Virgo conferred daily in the early part of 1977 with a view to the selective payment of cheques drawn on an account with the bank which was already seriously overdrawn beyond the stipulated limit, and in respect of which overdraft the bank held inadequate security. The criterion upon which that selection was based was the agreed objective of maintaining the appearance of a prosperous business capable of paying its way by ensuring that those who supplied materials to the company were paid. If ordinary banking practice had been followed the company would have been facing liquidation in the weeks preceding the giving of the guarantee and mortgage by the respondents. The reason for the bank's patient and generous accommodation of Vincenzo's company was the value to the bank, prior to that time, of the Amadio connection and the fact that the financial fortunes of the bank's wholly owned subsidiary, General Credits Ltd, were closely related to those of Vincenzo.

The learned trial judge found that if the respondents had been fully informed of the company's financial predicament they would not have executed the document. That finding has not been challenged. Indeed, it could not be, having regard to the fact that the immediate effect of its execution was to render their assets liable to be substantially swallowed up in meeting existing liabilities of the company and without any real assurance of benefit to anyone but the bank. The circumstances required that the respondents be acquainted with the true financial position of the company and thereby enabled to make an informed decision. Having regard to the special circumstances surrounding the bank's relationship to Vincenzo, Mr Virgo was obliged either to ensure that his parents understood what they were doing or to advise them to seek independent advice and allow them the opportunity to do so. He was not entitled to assume that Vincenzo would already have informed them adequately.

I would dismiss the appeal.

Deane J. In March 1977, the respondents, Mr Giovanni Amadio and his wife, Mrs Cesira Amadio, were aged respectively 76 and 71 years. They lived at Campbelltown in South Australia. Apart from their home and adjoining orchard, their main asset was a block of four shops on land which they owned as joint tenants in Wicks Avenue, Campbelltown. On 25 March 1977 they executed a document containing a guarantee and a supporting mortgage to secure the existing and future indebtedness to the Commercial Bank of Australia (the bank) of a company associated with one of their sons. At the time they executed the guarantee and mortgage, they mistakenly believed that their potential liability

thereunder was limited to a maximum amount of $50,000. In fact, it was unlimited.

In these proceedings, which were instituted in the Supreme Court of South Australia, Mr and Mrs Amadio sought orders relieving them from their obligations under the guarantee and mortgage. For its part, the bank counter-claimed for declarations of validity and an order that Mr and Mrs Amadio pay to it the amount owed by the guaranteed company. The case was heard at first instance by Wells J who found in favour of the bank and entered judgment in its favour in the amount of $239,830.85. On appeal, the Full Court of the Supreme Court (King CJ, Zelling and Jacobs JJ) reversed that judgment on the ground, *inter alia*, that Mr and Mrs Amadio were entitled to have the transaction nullified pursuant to the equitable principles relating to unconscionable dealing. The Full Court ordered that the guarantee be set aside and that a discharge of the mortgage and the certificate of title to the land be delivered to Mr and Mrs Amadio. The bank now appeals to this court. The underlying facts are, at least for the purposes of the present appeal, largely no longer in dispute. It is, however, necessary to recount them in some detail.

Mr and Mrs Amadio were born and married in Italy. Mr Amadio emigrated to Australia in 1927. Mrs Amadio followed him some four years later. By 1977 Mr Amadio had been retired for some years. He had been a market gardener and had had some business dealings in land. Wells J found that "Mr Amadio understood spoken English quite well and expressed himself with reasonable fluency". Mrs Amadio had not apparently had any business experience. His Honour found that she had "a fair understanding of spoken English, but was not good at expressing herself". Both husband and wife "had a limited grasp of written English".

Mr and Mrs Amadio had four sons. The second son, Vincenzo, was ostensibly a successful business man. He was, among other things, the principal shareholder in and managing director of V Amadio Builders Pty Ltd (Amadio Builders) which carried on a large building business in South Australia. To the uninformed, Amadio Builders, like its managing director, seemed prosperous and successful. No doubt, his parents were proud of Mr Vincenzo Amadio. They certainly trusted him. He managed the Wicks Avenue property for them. For ease of reference, I shall refer to him as "Vincenzo".

Amadio Builders had, for some two and a half years, been a customer of the bank's Glynde Branch. As at 24 March 1977, its bank account and its finances were in an unsatisfactory state. Its approved overdraft was $80,000. Its actual overdraft was $189,967. According to the euphemism of senior counsel for the bank on the appeal, Amadio Builders was facing "a severe liquidity crisis". Hindsight reveals that the crisis was to be both lingering and terminal. From the beginning of 1977 the company had sought to conceal its lack of cash funds from the public generally and from its suppliers in particular. The bank actively co-operated to achieve that end. Mr Virgo, the manager of the Glynde Branch of the bank, and Vincenzo were consulting on a daily basis to decide which of the cheques

drawn on the company's account should be honoured and which should be dishonoured. Of the cheques that were dishonoured prior to 25 March 1977 some $45,000 worth had been forwarded again to the bank — on what was described as "a non-value collection basis" — to be held against the day when there might be sufficient funds available to meet them. On 18 March 1977 the bank had "frozen" Amadio Builders' overdrawn account and informed Vincenzo that it required the company to open a second account to be kept in credit. In a few days, the second account was also overdrawn. At Vincenzo's request, Mr Virgo arranged an appointment for him with Mr Statton, the State manager of the bank for South Australia.

Vincenzo called at Mr Statton's office at 4.00 pm on 24 March 1977. He informed Mr Statton, as he had already informed Mr Virgo, that Amadio Builders had opened an account at the Tranmere Branch of the Bank of New South Wales. That was true. Vincenzo also told Mr Statton that an overdraft facility had been arranged with the Bank of New South Wales on the basis that his parents would provide security in the form of a mortgage of their Wicks Avenue land. That was untrue. No such overdraft facility had been arranged. Mr Statton was anxious that the Glynde Branch of the bank retain Amadio Builders' account. He informed Vincenzo that the bank was prepared to remove the "stoppage" of the account and increase temporarily to $270,000 the permitted overdraft, provided that Mr and Mrs Amadio were willing, as Vincenzo intimated they would be, to mortgage the Wicks Avenue land to the bank by way of security. If Mr Statton's diary note of the conversation is accepted as complete, nothing at all was said to suggest that Mr and Mrs Amadio would provide, over and above the actual mortgage of the land by way of guarantee, an unlimited guarantee of Amadio Builders' present and future indebtedness to the bank. Vincenzo undertook to Mr Statton that he would ensure that Amadio Builders' overdraft was reduced by stages in the course of the following weeks and intimated that the company would eventually obtain a loan from one of its suppliers and discharge the overdraft altogether. The interview over, Mr Statton informed Mr Virgo by telephone of the new arrangements and instructed him to carry them into effect.

According to Vincenzo, he left the meeting with Mr Statton under a misapprehension as to the proposed terms of the security that the bank required from his parents. In the first place, he claims to have inferred that the security would be required for no more than six months. It is common ground on the present appeal that nothing which Mr Statton said warranted that inference. In the second place, Vincenzo gave evidence that he also inferred that the security would be limited to cover future advances of the order of $50,000 which would be necessary to permit payment of those dishonoured cheques that had been presented for a second and, in some cases, a third time. Mr Statton agreed, under cross-examination, that it was "quite possible" that Vincenzo may have left the interview under such a misapprehension since Vincenzo had been "under a lot of strain at the time"

The grass was not left to grow. On the morning of the next day, 25 March, Vincenzo, in a telephone conversation with Mr Virgo, confirmed that his parents were prepared to mortgage their block of land as arranged with Mr Statton. Such confirmation was somewhat premature in that it was not until Vincenzo had lunch with his parents later that day that he sought, and obtained, their consent to mortgage the land as security for the company's overdraft. In the course of seeking that consent, he told them that their liability would be limited to $50,000 for a maximum period of six months.

Shortly after that lunch, Mr Virgo called briefly at Vincenzo's office. He was armed with a document which had been prepared for execution by Mr and Mrs Amadio. It was headed "Memorandum of Mortgage". In fact, it was more than that. The number and length of its provisions would discourage careful perusal by a trusting person who had it placed before him for immediate signature even if, unlike Mr and Mrs Amadio, he had more than "a limited grasp of written English". Such perusal would have disclosed to a comprehending reader that the document contained both a mortgage of the Wicks Avenue land to secure any existing or future indebtedness of Amadio Builders to the bank and a positive promise, unlimited as to amount or time, by Mr and Mrs Amadio that they would pay the whole of any such indebtedness when called upon so to do. Vincenzo agreed that Mr Virgo should take it for execution by Mr and Mrs Amadio in their home. Mr Virgo forthwith called on Mr and Mrs Amadio who were in their kitchen. He tendered the document for their signature. A short discussion ensued. Neither Mr nor Mrs Amadio read the document. They signed it.

Mr Amadio, who has suffered severe loss of memory since being involved in an accident in 1978, was unable, at the trial, to recall the circumstances in which he and his wife had signed the guarantee/mortgage. The only direct evidence of what took place was that of Mr Virgo and Mrs Amadio. The latter, by her own admission, had been unable properly to understand the conversation in English that took place between Mr Virgo and her husband prior to execution of the document. Largely on the basis of the evidence of Mr Virgo, the learned trial judge made the following findings of primary fact: "Not very much passed between the three persons present in the kitchen. Mr Amadio Senior was, in effect, spokesman for himself and his wife, who nevertheless, in my opinion, comprehended, in a general way, what was happening. Mr Virgo introduced himself; explained briefly why he was there; and tendered the document for signature. There was little discussion. Mr Amadio made one remark that caused Mr Virgo some concern: the former said that this, the mortgage-guarantee, was only for six months. Mr Virgo was at pains to point out to him that there was no such limitation, but Mr Amadio gave no sign that Mr Virgo's explanation alarmed him. Mr Virgo also informed him that for the time being the document would not be registered . . . Mr Virgo, after seeing to the execution, left the house." The document executed and in the bank's possession, Mr Virgo authorized actual payment of the $45,000 worth of cheques that had been presented for payment for a second or

third time. The title deeds to the mortgaged block of land were delivered to the bank from Vincenzo's office where they had been held for safe-keeping. Mr and Mrs Amadio were not provided with a copy of the guarantee/mortgage. They heard no more of it until December 1978 when they received a letter from the bank demanding immediate payment of "all principal, interest and other moneys owed to the said bank by way of overdraft in the name of V Amadio Builders Pty Limited".

The evidence established that the relationship between the bank and Amadio Builders was an unusual one. Notwithstanding its failure to observe overdraft limits, Amadio Builders was regarded, at the Glynde Branch, as by far the branch's most important customer. This was, apparently, both because of Amadio Builders' own business and because of the business which, as a large builder of homes in the area, it introduced. The company also had a special relationship with the bank in that it was associated with General Credits Ltd, a wholly-owned subsidiary of the bank, in a joint venture under which General Credits participated, as financier, in many of Amadio Builders' speculative building projects. The bank's role in seeking Mr and Mrs Amadio's signature to the unlimited guarantee and mortgage was far from a disinterested one. The guarantee and mortgage provided the bank with security in respect of Amadio Builders' existing, as well as future, indebtedness in the event of the ultimate failure of that company: in that regard, it is relevant to mention that, on 8 February 1977, Mr Virgo had written a memorandum in which he stated that he had considered it prudent to honour certain of the company's cheques for the reason that "dishonour would have led immediately to the cutting off of Co's supply of timber and steel, thereby forcing Co out of business in a matter of days". On the other hand, the guarantee/mortgage enabled the Glynde Branch to retain the benefits which it derived from the account of its most valued customer in the event that Amadio Builders managed to survive its "liquidity crisis".

The jurisdiction of courts of equity to relieve against unconscionable dealing developed from the jurisdiction which the Court of Chancery assumed, at a very early period, to set aside transactions in which expectant heirs had dealt with their expectations without being adequately protected against the pressure put upon them by their poverty (see *O'Rorke v Bolingbroke* (1877) 2 App Cas 814 at 822). The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them, and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable: "the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain

the benefit of the contract" (see per Lord Hatherley, *O'Rorke v Bolingbroke*, supra, at 823; *Fry v Lane* (1888) 40 ChD 312 at 322; *Blomley v Ryan* (1956) 99 CLR 362 at 428-9).

The equitable principles relating to relief against unconscionable dealing and the principles relating to undue influence are closely related. The two doctrines are, however, distinct. Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party (see *Union Bank of Australia Ltd v Whitelaw* [1906] VLR 711 at 720; *Watkins v Combes* (1922) 30 CLR 180 at 193-4; *Morrison v Coast Finance Ltd* (1965) 55 DLR (2d) 710 at 713). Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogued. In *Blomley v Ryan* (*supra*, at 405), Fullagar J listed some examples of such disability: "poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary". As Fullagar J remarked, the common characteristic of such adverse circumstances "seems to be that they have the effect of placing one party at a serious disadvantage *vis-à-vis* the other".

In most cases where equity courts have granted relief against unconscionable dealing, there has been an inadequacy of consideration moving from the stronger party. It is not, however, essential that that should be so (see *Blomley v Ryan*, *supra*, at 405; *Harrison v National Bank of Australasia Ltd* (1928) 23 Tas LR 1; but cf *Lloyds Bank v Bundy* [1975] 1 QB 326 at 337 and *Cresswell v Potter* [1978] 1 WLR 255 at 257). Notwithstanding that adequate consideration may have moved from the stronger party, a transaction may be unfair, unreasonable and unjust from the view point of the party under the disability. An obvious instance of circumstances in which that may be so is the case where the benefit of the consideration does not move to the party under the disability but moves to some third party involved in the transaction. Thus, it is established that the jurisdiction extends, in an appropriate case, to relieve a guarantor of the burden of a guarantee of existing and future indebtedness (see *Owen and Gutch v Homan* (1853) 4 HL Cas 997 at 1034-5). Such a guarantee is properly to be viewed in the terms enunciated by Cussen J in *Bank of Victoria Ltd v Mueller* [1925] VLR 642 at 649: "In the first place, it is obvious that a large benefit is conferred both on the creditor and the debtor, which, so far as any advantage to the guarantor is concerned, is voluntary, though no doubt 'consideration' exists so far as the creditor is concerned, so soon as forbearance is in fact given or advances are in fact made. It is, I think, to some extent by reference to the rule or to an extension of the rule that, in the case of a large voluntary donation, a gift may be set aside in equity if it appears that the donor did not really understand the transaction, that

such a guarantee may be treated as voidable as between the husband and wife." Cussen J's above analysis was made in the context of a guarantee procured by a husband from his wife in favour of the husband's bank. There is, however, no basis in principle or in policy for confining the process of reasoning therein contained to cases of the relief of female spouses. It is appropriate to the circumstances of the present case.

I turn to consider the question whether, at the time they executed the guarantee/mortgage, Mr and Mrs Amadio were under a relevant disability in dealing with the bank. This question is best approached by a comparison of the relative positions of the bank on the one hand and Mr and Mrs Amadio on the other.

The bank, for its part, was a major national financial institution. It was privy to the business affairs and financial instability of Amadio Builders. It was aware that that company had for some time, been unable to meet its debts as they fell due. It was aware of the state of Amadio Builders' two overdrawn accounts with it and of past failures to observe agreed borrowing limits. It had actually suggested, through Mr Statton, that Mr and Mrs Amadio enter into the mortgage transaction to secure Amadio Builders' indebtedness to it. It was aware of the contents of its own document which Mr Virgo presented to Mr and Mrs Amadio for their signature.

In contrast was the position of Mr and Mrs Amadio. Their personal circumstances have already been mentioned. They were advanced in years. Their grasp of written English was limited. They relied on Vincenzo for the management of their business affairs and believed that he and Amadio Builders were prosperous and successful. They were approached in their kitchen by the bank, acting through Mr Virgo, at a time when Mr Amadio was reading the newspaper after lunch and Mrs Amadio was washing dishes. They were presented with a complicated and lengthy document for their immediate signature. They had received no independent advice in relation to the transaction which that document embodied and about which they had learned only hours earlier from Vincenzo who, it is common ground in the present appeal, had misled them as regards the extent and duration of their potential liability under it. Apart from indicating that the guarantee/mortgage was unlimited in point of time, Mr Virgo made no personal attempt to explain it to them. Foolishly, but — in view of their limited grasp of written English and their knowledge that Mr Virgo came to them with the approval of their son — perhaps understandably, they did not attempt to read the document for themselves. They signed it in the mistaken belief that their potential liability was limited to a maximum of $50,000.

It is apparent that Mr and Mrs Amadio, viewed together, were the weaker party to the transaction between themselves and the bank. Their weakness may be likened to that of the defendant in *Blomley v Ryan, supra*, of whom McTiernan J said (at 392): "His weakness was of the kind spoken of by Lord Hardwicke [in *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125 at 155-6 (28 ER 82 at 100)] in defining the fraud characterized as taking surreptitious advantage of the weakness,

ignorance or necessity of another. The essence of such weakness is that the party is unable to judge for himself." That weakness constituted a special disability of Mr and Mrs Amadio in their dealing with the bank of the type necessary to enliven the equitable principles relating to relief against unconscionable dealing. Put more precisely, the result of the combination of their age, their limited grasp of written English, the circumstances in which the bank presented the document to them for their signature and, most importantly, their lack of knowledge and understanding of the contents of the document was that, to adapt the words of Fullagar J quoted above, they lacked assistance and advice where assistance and advice were plainly necessary if there were to be any reasonable degree of equality between themselves and the bank.

The next question is whether the special disability of Mr and Mrs Amadio was sufficiently evident to the bank to make it prima facie unfair or "unconscientious" of the bank to procure their execution of the document of guarantee and mortgage in the circumstances in which that execution was procured. In procuring it, the bank acted through Mr Virgo: his actions were the actions of the bank and his knowledge was the knowledge of the bank. His evidence indicates that he was not unacquainted with the personal circumstances of Mr and Mrs Amadio and their reliance on Vincenzo whom he described as the "dominant member of the family". He was aware of the inability of Amadio Builders to pay its debts as they fell due and must also have been aware of the potential consequences to Mr and Mrs Amadio of the unlimited guarantee in the document which he tendered to them for their immediate execution.

It has not been argued on behalf of the bank that Mr Virgo was so unaware of the circumstances in which Mr and Mrs Amadio executed the document that he was entitled to believe that the transaction was one where no advice, independent or otherwise, was called for. The argument for the bank has been to the effect that, at relevant times, Mr Virgo honestly and reasonably relied upon a representation made to him, by Vincenzo, that the latter had discussed the transaction with his parents, informed them of its nature and effect, explained it fully to them and duly obtained their consent to it.

The evidence that Vincenzo made any such representation to Mr Virgo is unimpressively sparse. Upon analysis, it consists of Mr Virgo's own evidence that he assumed that Mr and Mrs Amadio's "agreement or offer to give this mortgage was a result of a family conference of some sort". When it was suggested to him that there was nothing upon which he could base that assumption apart from the fact that Vincenzo had told him that he had spoken to his parents about the transaction and that the bank could proceed with it, Mr Virgo answered: "That is right. The whole thing had come to me as a *fait accompli*, not only from the bank's point of view but also having then been informed by Vin Amadio that the matter had been agreed within the family and all that required to be done was for the execution of the document." The references to "a family conference" and to the matter being "agreed within the family" are explained in a later passage in the evidence where Mr Virgo

described an allegedly well-known Italian custom of submitting business propositions to penetrating and exhaustive familial discussion presided over by "the head of the family group". When asked whether he believed that Vincenzo occupied the role of "adviser/explainer" in respect of the transaction between his parents and the bank, Mr Virgo replied: "I suppose you could say that; but really I just assumed that the matter had been discussed. Now, whether any direction had been given by Mr Amadio Jnr in his capacity as dominant member of the family or not, I really have no idea. I certainly was led to believe that the matter was a *fait accompli* and had been discussed."

It must, in fairness, be stressed that there is no suggestion that Mr Virgo or any other officer of the bank has been guilty of dishonesty or moral obliquity in the dealings between Mr and Mrs Amadio and the bank. The evidence does, however, demonstrate that there was no proper basis at all for any assumption that Mr and Mrs Amadio had received adequate advice from Vincenzo as to the effect of the document which Mr Virgo presented to them for their signature. Even if that were not the case, it would be difficult to accept as reasonable a belief that Vincenzo had successfully explained to his parents the content and effect of a document which embodied 18 separate covenants of meticulous and complicated legal wording in circumstances where, to Mr Virgo's knowledge, Vincenzo had himself never seen the document at the time when any such suggested explanation must have taken place. If there were otherwise room for doubt, what transpired when Mr Virgo called on Vincenzo in his office and on Mr and Mrs Amadio in their kitchen makes clear that Mr Virgo simply closed his eyes to the vulnerability of Mr and Mrs Amadio and the disability which adversely affected them.

Mr Virgo gave evidence that Vincenzo did not trouble even to read the document before agreeing that Mr Virgo should take it to Mr and Mrs Amadio for execution. He also gave evidence that Mr and Mrs Amadio did not read it. In other words, in a situation where it was apparent to him that advice and assistance were necessary, he knew that no one who might have rendered such advice and assistance to Mr and Mrs Amadio had even read the document to ascertain whether its terms imposed no greater potential liability upon Mr and Mrs Amadio than that which they were prepared to undertake. In the circumstances, the only comment which either Mr or Mrs Amadio made as to the contents of the guarantee mortgage on the occasion when they executed it, namely Mr Amadio's comment that it was only for six months, was of unmistakable significance. That statement revealed that Mr Amadio and, it must be assumed, Mrs Amadio were seriously misinformed as to a basic term of the transaction. It would, at least by that stage, have been plain to any reasonable person, who was prepared to see and to learn, that he was put on inquiry. The stage had been reached at which the bank, through Mr Virgo, was bound to make a simple inquiry as to whether the transaction had been properly explained to Mr and Mrs Amadio. The bank cannot shelter behind its failure to make that inquiry. The case is one in which "wilful ignorance is not to be distinguished in its equitable consequences from knowledge" (per Lord Cranworth LC, *Owen and Gutch v Homan*,

supra, at 1035). Mr and Mrs Amadio's disability and the inequality between themselves and the bank must be held to have been evident to the bank and, in the circumstances, it was prima facie unfair and "unconscientious" of the bank to proceed to procure their signature on the guarantee/mortgage. With that conclusion, the onus is cast upon the bank to show that the transaction was "in point of fact fair, just, and reasonable" (*Fry v Lane*, *supra*, at 321).

Mr and Mrs Amadio were not wholly misinformed as to the terms and effect of the guarantee/mortgage. The learned trial judge found that they correctly understood that the document which they were signing was a guarantee supported by a mortgage of their Wicks Avenue land. In that regard, it is relevant to mention that the evidence discloses that Mr and Mrs Amadio had, on a number of previous occasions, provided a guarantee, supported by a mortgage of that land, to secure borrowing by a company associated with one or other of their sons. While it is true that Mr and Mrs Amadio were initially led to believe that the guarantee/mortgage was limited in duration to six months, they were disabused of that notion by the clear indication given by Mr Virgo, prior to execution of the document, that the guarantee/mortgage was a "continuing" one and unlimited in point of time. They executed the document to assist their son's company in obtaining credit from the bank. Acting on the basis of that execution, the bank extended Amadio Builders' overdraft limit and advanced further money to that company. If Mr and Mrs Amadio's potential liability had been limited to a maximum of $50,000, and if they had been informed as to the true financial position of Amadio Builders, it would be strongly arguable that the guarantee/mortgage could not properly be said either to have resulted from their special disability or to be other than fair, just and reasonable.

As has been said, however, the guarantee/mortgage did not contain any such limit upon potential liability and Mr and Mrs Amadio were under a complete misapprehension as to the financial stability of the company whose indebtedness to the bank they were guaranteeing. The learned trial judge found that had they known of the financial troubles Amadio Builders was then experiencing, they would not have executed the guarantee/mortgage. That finding has not been challenged on the appeal. In the circumstances, the execution of the guarantee/mortgage by Mr and Mrs Amadio flowed from the position of special disability in which they were placed. From Mr and Mrs Amadio's point of view, the great difference between a potential liability of up to $50,000 under a guarantee of a financially successful company and a potential liability under a guarantee of a financially troubled company in whatever amount that company might become indebted to its bank requires little elaboration. The one would have been within their means to incur to assist their son. The other represented their potential financial ruin. In the circumstances in which it was procured, the guarantee/mortgage was unfair, unjust and unreasonable Indeed, in fairness to the bank, I did not understand the contrary to be submitted on its behalf

Relief against unconscionable dealing is a purely equitable remedy. The concept underlying the jurisdiction to grant the relief is that equity intervenes to prevent the stronger party to an unconscionable dealing acting against equity and good conscience by attempting to enforce, or retain the benefit of, that dealing. Equity will not, however, "restrain a defendant from asserting a claim save to the extent that it would be unconscionable for him to do so. If this limitation on the power of equity results in giving to a plaintiff less than what on some general idea of fairness he might be considered entitled to, that cannot be helped" (per Lord Greene MR, Wrottesley and Evershed L JJ, in *Re Diplock* [1948] 1 Ch 465 at 532). Where appropriate, an order will be made which only partly nullifies a transaction liable to be set aside in equity pursuant to the principles of unconscionable dealing (see *Bank of Victoria Ltd v Mueller*, *supra*, at 659 and the cases there cited). Where an order is made setting aside the whole of a transaction on the ground of unconscionable dealing, the order will, in an appropriate case, be made conditional upon the party obtaining relief doing equity.

While the matter was not raised in the bank's notice of appeal, I was, at one stage, inclined to think that the appropriate relief in the present case would be an order setting aside the guarantee/mortgage only to the extent to which it imposed upon Mr and Mrs Amadio a potential liability in excess of $50,000 or that any order wholly setting aside the guaranteej/mortgage should be conditional upon Mr and Mrs Amadio paying to the bank the amount of $50,000 which represents the amount of the potential liability which they intended to undertake. Ultimately, I have come to the view that Mr and Mrs Amadio are entitled to have the whole transaction set aside unconditionally. It is true that it is not ordinarily encumbent upon a bank to bring to the attention of a potential guarantor of a customer's account details of a type which are ordinarily to be expected (see *Goodwin v National Bank of Australasia Ltd* (1968) 117 CLR 173 at 175). In the present case, however, it was, as has been said, evident to the bank that Mr and Mrs Amadio stood in need of advice as to the nature and effect of the transaction into which they were entering. It is apparent that any such advice would have included the importance to a guarantor of ascertaining from the bank the state of the customer's account which was being guaranteed and any unusual features of the account. If such information had been obtained by Mr and Mrs Amadio, they would not, on the evidence and in the light of the learned trial judge's finding, have entered into the guarantee/mortgage at all. The whole transaction should properly be seen as flowing from the special disability which was evident to the bank and as being unfair, unjust and unreasonable.

The appeal should be dismissed with costs.

Dawson J. This appeal is from a judgment of the Full Court of the Supreme Court of South Australia which, reversing the judgment at first instance, set aside a guarantee and mortgage securing the guarantee given by the respondents in favour of the appellant bank The guarantee,

which was unlimited both as to amount and duration, was in respect of a current account which V Amadio Builders Pty Ltd (the company) conducted with the bank at its branch at Glynde. The mortgaged property consisted of four shops at Glynde which together were valued at the relevant time at approximately $200,000. The respondent guarantors were the parents of Vincenzo Amadio who held, together with his wife and children, the issued shares in the company and was its managing director.

The company was engaged in speculative and contract building from the early 1970's. In 1976 a company called SA Footings Ltd was formed by Vincenzo Amadio for the purpose of entering into a joint venture with General Credits Ltd (General Credits), which was a subsidiary company of the bank. The basis of the joint venture was that the company was to construct approximately 30 houses upon land acquired for the purpose and to receive in payment cost plus 10 per cent. The 10 per cent represented overhead expenses and was not intended to include a profit. The money to finance the joint venture was to be provided largely by General Credits, a small initial contribution also being made by SA Footings Ltd. Any profits were to be shared in the proportion of 60 per cent and 40 per cent by General Credits and SA Footings Ltd respectively. Vincenzo Amadio or one or other of his companies had been financed by General Credits apart from the joint venture and there were substantial amounts owing to it as a result.

The company commenced to build houses in pursuance of the joint venture and completed a number. At the same time it was also carrying out its own speculative and contract building work. By late 1976 or early 1977 it was evident to the bank that the company was in financial difficulty.

It is unnecessary to set out in any detail the history of the company's account with the bank. It is sufficient to say that it was often overdrawn beyond the limits fixed by the bank from time to time. During 1976 it was apparent that the company was experiencing difficulty with its liquidity and cash flow, largely, it would seem, as a result of its inability to sell the houses which it had completed. At the beginning of 1977 an overdraft limit of $125,000 was approved by the bank for a limited period. At this time the overdraft was secured by guarantees given by Vincenzo Amadio, mortgages over real property owned by him, including his home, and a joint and several guarantee given by the directors of the company, other than Vincenzo Amadio, and their wives, together with mortgages over real property owned by them.

Whilst the level of the company's overdraft fluctuated widely, it was clear by March 1977 that the company was unable to observe the then current limit of $80,000 set by the bank. Cheques were being dishonoured selectively, the practice being to avoid dishonouring cheques where the consequence would be to interfere with the capacity of the company to continue its building activities. Many cheques which were dishonoured were subsequently forwarded by the payee's bank on a non-value collection basis and were theoretically to receive priority in payment when there were funds available Nevertheless wages and

amounts payable to contractors were paid in preference to the cheques held in this manner. An amount of some $45,000 was eventually represented by these cheques.

On 18 March 1977 the bank froze the company's overdraft making it a fully drawn advance account and required the company to open a second account which was to operate in credit. Within days the second account became overdrawn and cheques drawn upon it were dishonoured.

An interview took place between the State manager of the bank and Vincenzo Amadio at the request of the latter. Amadio told the State manager that he had made arrangements with the Bank of New South Wales to open an account with it and that his parents had agreed to lodge security comprising their shops at Glynde to support an overdraft arrangement with that bank. He said that the other bank was pressing him to transfer the whole of his business from the appellant bank to it. The State manager of the appellant bank then proposed that Amadio's parents should instead guarantee the company's account with the appellant bank, securing the guarantee by mortgaging the block of shops, and that in that event the bank would allow the overdraft to run to $270,000, the amount to be reduced during April and eventually cleared entirely by a private loan which it was hoped a timber company would supply. Amadio apparently agreed with this arrangement and, as a result, the State manager contacted the manager at the Glynde branch of the bank, a man named Virgo, and instructed him to prepare a guarantee and mortgage over the shops owned by Amadio's parents. An arrangement was made by Virgo with Amadio to visit the latter's parents and on 25 March 1977 Virgo went to the parents' home with a completed form of guarantee secured by a mortgage, unlimited as to amount or duration, for signature by the parents. Little conversation took place, but the father mentioned that the guarantee and mortgage was only for six months. Virgo explained to him the continuing nature of the guarantee. Neither of the parents read or sought to read the document constituting the guarantee and mortgage but they signed it.

After the guarantee and mortgage document was signed by the parents a number of the cheques which were being held on a non-value collection basis were paid and, largely as a consequence of this, the overdraft rose from approximately $189,000 to over $270,000 in a matter of days.

Thereafter the company's position deteriorated and its overdraft with the appellant bank was not reduced as had been hoped. A receiver was appointed in respect of the company's business in December 1977 and subsequently the company went into liquidation. At the time the company went into liquidation its overdraft stood at approximately $130,000. In addition to that liability, the company had contingent liabilities to the bank involving a total amount of $20,000 in respect of guarantees given by it.

During the time that the company was experiencing financial difficulties, at least in the initial stages, Vincenzo Amadio was concerned to maintain the impression of prosperity which the company's previous

position had justified. As late as Christmas 1976 he threw a large party for two to three thousand people at which his father was present. The latter, as the trial judge found, "could not have failed to have been impressed by the apparent prosperity of his son and his son's companies".

The respondents issued a writ seeking to set aside the guarantee and mortgage and the appellant bank claimed by way of counter-claim a declaration that the same instrument was binding upon the respondents and the sum of $239,830.85. The trial judge gave judgment on the counter-claim in favour of the bank but the Full Court concluded that the guarantee and mortgage should be set aside and, as I have said, reversed the judgment at first instance.

The respondents did not dispute and, indeed, upon the authorities could not dispute, the basic propositions of law upon which the appellant bank relied. These were, first, that a bank is not under any obligation to disclose to a prospective guarantor facts relating to its customer or the customer's account which are material to the risk being undertaken by the guarantor, subject to the exception that a bank is required to disclose matters between it and the customer which a prospective guarantor might not naturally expect to have taken place in relation to the customer's affairs. So much was established in *Hamilton v Watson* (1845) 12 Cl & Fin 109 (8 ER 1339) in an oft-cited passage in the judgment of Lord Campbell at p 119 (ER at 1343-4), in which his Lordship pointed out that unless questions are put by the prospective surety as to how the customer's account has been conducted, "it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure;" and added: "I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires" (see also *Wythes v Labouchere* (1859) 3 De G & J 593 at 609 (44 ER 1397); *Welton v Somes* (1889) 5 TLR 184; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72; *National Provincial Bank of England Ltd v Glanusk* [1913] 3 KB 335; *Royal Bank of Scotland v Greenshields* [1914] SC 259; *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60; *Cooper v National Provincial Bank Ltd* [1946] 1 KB 1; *Goodwin v National Bank of Australasia Ltd* (1968) 117 CLR 173).

The second proposition of law which was not disputed was that if a guarantor has, short of *non est factum*, been induced to give a guarantee to a bank as a result of some misrepresentation or other impropriety by its customer or a third party, then the validity of the guarantee is not affected so far as the bank is concerned unless the bank had notice of the

impropriety or ought to have been put upon inquiry that impropriety might occur. It may be added that a contract of suretyship is not a contract *uberrimae fidei* but it may be set aside on the ground of misrepresentation. However, it is settled law that mere non-disclosure of a material fact does not invalidate such a contract: see *Union Bank of Australia Ltd v Puddy* [1949] VLR 242 at 247, per Fullagar J. Indeed, in *Hamilton v Watson* non-disclosure by the bank of previous transactions between it and the debtor did not invalidate a guarantee. The extent to which non-disclosure might amount to misrepresentation is set out in *Owen and Gutch v Homan* (1853) 4 HL Cas 997 at 1034-5 (10 ER 752 at 767), by Lord St Leonards: "Without saying that in every case a creditor is bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, it may safely be stated that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence, he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge. If a person abstains from inquiry because he sees that the result of inquiry will probably be to show that a transaction in which he is engaging is tainted with fraud, his want of knowledge of the fraud will afford no excuse."

Special considerations apply in cases where a husband procures his wife to become surety for his debt and the cases dealing with these circumstances may be put to one side: see *Bank of Victoria Ltd v Mueller* [1925] VLR 642; *Yerkey v Jones* (1939) 63 CLR 649.

It was against this background that counsel for the respondents submitted that there were unusual features in the dealings between the company and the bank which the bank in breach of its duty failed to disclose, that the bank was guilty of misrepresentation to the respondents and that the contract of suretyship was an unconscionable bargain which ought to have been set aside.

The chief features of the relationship between the bank and the company which were said to be unusual and to call for disclosure were the company's critical financial position, the value of the company's account to the bank because of the collateral advantages which it brought and the relationship of the bank to the company's joint venturer, General Credits. It was also suggested that the practice of selectively paying cheques drawn on the company's account, leaving a number of cheques worth a total of approximately $45,000 to be met when the bank extended the company's overdraft on the faith of the guarantee and mortgage, called for disclosure.

As has been frequently pointed out, the fact that a bank requires a guarantee of its customer's account is of itself an indication that the customer's financial resources are insufficient in the bank's view to secure its position. Moreover, the requirement of a guarantee points to the fact that the account to be guaranteed is, or is likely to be, overdrawn, because there is no purpose to be served by a guarantee of

an account which is always required to be in credit: see, eg, *London General Omnibus Co Ltd v Holloway*, *supra*, at 83. But, it was said, the respondents could not have anticipated the extent of the company's need for credit; it was, so far as they were concerned, a successful company sharing the apparent prosperity of their son. Be that as it may, it amounts to no more than an assertion that the amount of the indebtedness of the bank's customer was, or was shortly to be, rather more than the circumstances suggested to the intending guarantors.

Whether or not the respondents would have been justified in taking such a view of the company's position, the mere fact that the amount by which the company was overdrawn or was to become overdrawn exceeded the respondents' expectations, did not amount to a concealment of anything which the bank was bound to reveal. It would, of course, have been prudent for the respondents to have made specific inquiries concerning the level of the company's overdraft, actual and proposed, before executing the guarantee and mortgage, and, had such inquiries been made, the bank would have been bound to answer them. But the bank was not bound to volunteer the information and mere silence on its part did not in any way suggest that its arrangements with the company were other than they actually were. Any outward appearance of the continued prosperity of the company must have been belied to an appreciable extent by its need for the respondents' guarantee and the magnitude of the company's previous operations must have suggested that the credit required by it may not have been inconsiderable. What is of importance is that if the respondents failed to appreciate the position of the company and the consequent obligations which their guarantee imposed upon them, there was no failure to appreciate the nature of the relationship between the bank and the company which bore no unusual features.

It would, I think, make no difference to the nature of the arrangements between the company and the bank that the bank valued the company's account because of the other business which it attracted and was anxious to retain it. Perhaps the bank was more ready to extend credit than it may have been with a customer who did not bring these advantages, but the contractual relationship between the bank and the company remained the same and it has never been the obligation of a bank to inform an intending surety of matters affecting the credit of a customer: see *Wythes v Labouchere*, *supra*, at 609. The same may be said of the fact that the company's joint venturer, General Credits, was a subsidiary company of the bank. If the bank was affected by this relationship it could only be in its desire to ensure that the company overcame its financial difficulties. Whilst this may have led to a more anxious approach to the credit requirements of the company it could not have affected the nature of the relationship between the bank and the company and have constituted an unusual feature of the arrangement between them.

The fact that the bank held cheques for a substantial amount which it met, and intended to meet, on the faith of the guarantee and mortgage

given by the respondents indicated no more than a need on the part of the company for further credit to meet its obligations and a readiness on the part of the bank to extend that credit when adequate security was provided. In the context of the bank's requirement that the company obtain a further guarantee, such a situation did not amount to an unusual arrangement between the bank and the company: see *Welton v Somes* and *Cooper v National Provincial Bank Ltd*, *supra*.

The misrepresentation relied upon by the respondents was that of Vincenzo Amadio made in the absence of the bank but for which, it was said, the bank must shoulder responsibility because it must have realized that there had been, at best, only a partial presentation of the facts to the respondents for them to have executed the guarantee and mortgage. The misrepresentation relied upon, which is to be found in the evidence of Vincenzo Amadio, was to the effect that the guarantee was to be for around $50,000 and for about six months. So far as the duration of the mortgage is concerned there can have been no misrepresentation by the bank by silence, no "wilful ignorance", because Virgo on behalf of the bank corrected a misconception on the part of the male respondent before he signed the guarantee and mortgage. This, it was said, should have put the bank upon notice that the respondents may have also misconceived or been misinformed about the amount of the guarantee, but the one is unconnected with the other and the fact that the respondents were apparently prepared to accept the unlimited duration of the guarantee when it was explained to them would not suggest that they had been misled by their son into signing a guarantee which they believed was limited to "about $50,000". There is no basis in the evidence for any suggestion that the bank abstained from inquiry of the respondents in order to avoid learning of their misapprehension, if any. The circumstances of themselves do not suggest that the respondents must have been misled. The relationship between Vincenzo Amadio and his parents provided a reason which was unlikely to be financially based for their readiness to assist their son. Even if they had believed in their son's prosperity and business abilities, it was at least clear that he was asking for financial assistance to obtain credit or further credit from the bank. The trial judge found that Virgo and the other bank officers believed that no explanations were necessary because Vincenzo Amadio had sufficiently explained to the respondents the nature of the transaction and the reasons for it. The evidence provides no reason for disturbing that finding.

The respondents sought to invoke the equitable jurisdiction which is raised "whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands": *Blomley v Ryan* (1956) 99 CLR 362 at 415, per Kitto J. In that case, Fullagar J (at 405) said that the circumstances adversely affecting a party which may induce a court of equity to set aside a transaction are various and

cannot be satisfactorily classified. To those mentioned by Kitto J he added age, sex and lack of assistance or explanation where assistance or explanation is necessary. Perhaps in the context of this case should be added unfamiliarity with the English language: see *Carello v Jordan* [1935] St R Qd 294. What is necessary for the application of the principle is exploitation by one party of another's position of disadvantage in such a manner that the former could not in good conscience retain the benefit of the bargain.

The trial judge found that the respondents, who migrated to Australia in the 1930's, had a limited grasp of written English but that the female respondent, although not good at expressing herself, had a fair understanding of spoken English. He found that the male respondent understood spoken English quite well and expressed himself with reasonable fluency. He also found that the female respondent knew little, but the male respondent was far from ignorant, of business transactions and the latter had been active in promoting many land transactions before his retirement. Moreover, he found that nothing said or done by Vincenzo Amadio or by his parents gave, or was reasonably capable of giving, to any bank officer the impression that the plaintiffs were so ignorant, decrepit, senile or ill-informed that some bank officer ought, in all honesty, to have explained the substance and the effect of the principal document. The trial judge was unable to find that in March 1977 the male respondent was incapable of sufficiently appreciating the nature and consequences of the document he executed at that time. There was no suggestion that the female respondent would have done other than follow her husband's lead and there is no basis for treating her position differently for the purpose of the application of the relevant principle.

Those findings afford no foundation for the conclusion that the respondents were in any position of disadvantage which was used by the bank for its benefit. The age of the respondents did not amount to an infirmity and the fact that English was not their first language did not signify any incapacity to understand sufficiently. True it was that they had nothing to gain financially by executing the guarantee and mortgage, but that will ordinarily be the case with the guarantee of a current bank account; it affords no evidence that a position of disadvantage existed or that an unfair use was made of the occasion as may be the case in other circumstances where there is inadequate consideration. There is no evidence that the respondents relied upon the bank for advice: cf *Lloyd's Bank Ltd v Bundy* [1975] 1 QB 326. Nevertheless, when it was apparent that clarification was needed as to the duration of the guarantee, it was supplied by the bank. It was not a situation in which assistance or explanation was so evidently needed by the respondents that the bank could be said to have taken advantage of them. The respondents had evidently discussed the matter of the guarantee with their son who was fluent in both Italian and English and upon whom they relied for advice. If that reliance was misplaced that does not convert the occasion into one of exploitation on the part of the bank

For the foregoing reasons it is my view that the appellant bank was not guilty of any non-disclosure amounting to a breach of duty on its part, was not guilty of any misrepresentation to the respondents and was not guilty of any unconscionable dealing. I would allow the appeal.

Order

Appeal dismissed with costs.

Solicitors for the appellant: *Wilkinson Townsend*.

Solicitors for the respondents: *Griffin, Hume, Taylor & Co*.

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