

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CIVIL

**CITATION** : COMMONWEALTH BANK OF AUSTRALIA -v-  
DUCKWORTH [2012] WASC 476

**CORAM** : MASTER SANDERSON

**HEARD** : 5-6, 8-9, 12-15, 19, 22 & 26 NOVEMBER 2012

**DELIVERED** : 6 DECEMBER 2012

**FILE NO/S** : CIV 2361 of 2009

**BETWEEN** : COMMONWEALTH BANK OF AUSTRALIA  
Plaintiff

AND

NEIL JAMES DUCKWORTH  
First Defendant

FRANCIS ANN DUCKWORTH  
Second Defendant

**FILE NO/S** : CIV 1811 of 2010

**BETWEEN** : COMMONWEALTH BANK OF AUSTRALIA  
Plaintiff

AND

FRANCES ANN DUCKWORTH  
Defendant

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*Catchwords:*

Mortgage action - Claim of undue influence and/or unconscionable conduct by the plaintiff in relation to financial transaction - Turns on own facts

*Legislation:*

Nil

*Result:*

Judgment for the plaintiff in both actions

*Category:* B

**Representation:**

**CIV 2361 of 2009**

*Counsel:*

Plaintiff : Ms C H Thompson  
First Defendant : No appearance  
Second Defendant : In person

*Solicitors:*

Plaintiff : Gadens Lawyers  
First Defendant : No appearance  
Second Defendant : In person

**CIV 1811 of 2010**

*Counsel:*

Plaintiff : Ms C H Thompson  
Defendant : In person

*Solicitors:*

Plaintiff : Gadens Lawyers  
Defendant : In person

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

Aon Risk Services Australia Ltd v Australian National University (2009) 239  
CLR 175  
Attorney General v Bulpit (1821) 9 Price 4  
Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447  
Garcia v National Australia Bank Ltd (1998) 194 CLR 395  
Horbelt v Elliott (Unreported, SASC, 15 November 1995)  
Moore v Registrar of Lambert County Court [1969] 1 All ER 782  
Pendlebury v Colonial Mutual Life Assurance Society Ltd (1912) 13 CLR 676  
R v Briggs (1930) 22 Cr App Rep 68  
Thomson v South Eastern Railway Co (1882) 9 QBD 320  
Tomlinson v Tomlinson [1980] 1 All ER 593  
Union Bank of Australia Ltd v Whitelaw [1906] VLR 711  
Yerkey v Jones (1939) 63 CLR 649

1     **MASTER SANDERSON:** The defence in these two actions was mired  
in dishonesty. No reasonable person in possession of the relevant facts  
could have run the arguments put by Mrs Duckworth. There was not a  
shred of evidence to support her position. The only thing that did emerge  
was at all times the plaintiff acted honestly and with integrity. Although  
Mrs Duckworth attempted to portray the plaintiff as a callous financial  
institution interested in nothing but its own ends, nothing could be further  
from the truth.

2             These two actions were tried together. Mr Duckworth entered  
bankruptcy some time after the proceedings in CIV 2361 of 2009 were  
commenced. He was called as a witness but otherwise took no part in the  
proceedings. Mrs Duckworth represented herself. However the defence  
in CIV 2361 of 2009 was produced while Mrs Duckworth was represented  
and was settled by counsel. The main defences raised by Mrs Duckworth  
are found in that pleading.

**The pleaded cases**

3             Each of these claims is essentially a mortgagee action. Two separate  
properties were the subject of mortgages and hence the two separate sets  
of proceedings. However, the mortgages and accompanying guarantees  
were all part of one overall financial transaction. As there are two  
separate actions and two separate mortgages it is necessary to go through  
the pleaded cases in each action.

**The pleaded case in CIV 2361 of 2009**

***The plaintiff's claim***

4             At all material times the first defendant, Neil James Duckworth, was  
the registered proprietor of land at 5 Clarecastle Retreat, Mindarie (the  
investment property). The second defendant, Frances Ann Duckworth,  
was the registered proprietor of land situated at 9 Clarecastle Retreat,  
Mindarie (the mortgage property). On 4 October 2007 the plaintiff agreed  
to advance to Mr Duckworth the sum of \$2,880,000. This was said to be  
the 'first contract'. The first contract was said to comprise of a loan  
agreement dated 4 October 2007 (the first loan agreement), a registered  
mortgage over the investment property, a mortgage over the mortgage  
property, and a deed of guarantee granted by Mrs Duckworth to the  
plaintiff.

5             On or about 5 October 2007 the plaintiff agreed to advance to  
Mr Duckworth a further amount of \$220,000 (the second loan agreement).

This is referred to as the 'second contract'. This second contract was said to comprise of a further loan agreement dated 5 October 2007, the two mortgages already referred to, and a further deed of guarantee provided by Mrs Duckworth on or about 5 October 2007.

6 The plaintiff provided the funds and in due course it is alleged the defendants were in default of the first loan agreement and the second loan agreement. As was required by these agreements notice of default was given. The default was not remedied. The plaintiff made demands on the second defendant pursuant to the two guarantees. Payment was not made pursuant to the guarantees.

7 The plaintiff sought repayment of the sums outstanding under both loan agreements and possession of both properties.

### *Defence*

8 A proper reading of the defence of Mrs Duckworth shows she does not challenge any of the pleas put by the plaintiff save in one respect. That is to say she does not deny the first loan agreement or the second loan agreement or the existence of the guarantees. She does allege the default notices were not served. She does put a positive case in answer to the plaintiff's claim. This positive case has two aspects.

9 First, Mrs Duckworth says she was not the beneficial owner of the mortgage property. She says the mortgage property was registered in her name as the Trustee of the Duckworth Children's Family Trust. That being so, she says, the plaintiff has no right to proceed against the mortgage property or to enforce the provisions of the mortgage and the second loan agreement.

10 The second aspect of the defence is what might be broadly described as a plea of unconscionability. It is directed squarely at the guarantees. The plea is found in par 5(d) of the defence and comprises 11 elements. I will quote the relevant paragraphs in full:

- (i) the second defendant was at the time she entered into the First Guarantee, and remains, the wife of the first defendant;
- (ii) at the time the second defendant entered into the First Guarantee she had no income and no means of paying back the sums secured by the First Guarantee;
- (iii) the second defendant did not make the application for the First Guarantee;

- (iv) the second defendant did not understand the purport and effect of the First Guarantee;
- (v) the second defendant signed the First Guarantee in reliance on the faith and trust she reposed in her husband who told her that signing the First Guarantee was a formality and there was nothing to worry about as he was guaranteeing the loan the subject of the First Guarantee;
- (vi) neither the plaintiff nor anyone else explained the purport or effect of the First Guarantee to the second defendant;
- (vii) the second defendant was not given the opportunity to and did not read the First Guarantee before she signed it;
- (viii) the second defendant was not told she could obtain independent legal advice before signing the First Guarantee and did not obtain legal advice before doing so;
- (ix) had the second defendant been informed that by signing the First Guarantee she assumed personal responsibility for the amount secured by the First Guarantee she would not have signed the First Guarantee;
- (x) the second defendant obtained no benefit from entering into the First Guarantee;
- (xi) The second defendant was not told by the plaintiff or anyone else that by signing the First Guarantee she was agreeing to provide the Property which was the family home as security for her husband's loan the subject of the present claim and that the plaintiff could take the Property if the loan was not repaid or in arrears. Had the second defendant known or been told that she would not have entered into the First Guarantee.

11 A plea in identical terms is made in relation to the second guarantee. As to the second mortgage Mrs Duckworth repeats the 11 points she made with respect to the first guarantee and adds three extra points. She says she did not wish to sign the second mortgage and only did so because she was ordered to do so by her husband. She did not read and understand the second mortgage and she received no benefit from executing the second mortgage. Mrs Duckworth then counterclaims and seeks the following orders:

- (a) a declaration that the second defendant holds the Property as Trustee for the Duckworth Family Children's Trust [sic];

- (b) a declaration that the First Guarantee and the Second Guarantee and each of them is unenforceable, void and of no effect as against the second defendant;
- (c) a declaration that the Second Mortgage is unenforceable, void and of no effect;
- (d) an order that the plaintiff do forthwith cause to be discharged registered mortgage K408308.

***Reply and defence to counterclaim***

12 The plaintiff essentially joined issue with Mrs Duckworth on the defence and counterclaim. However it is worthy of note the plaintiff actually pleaded that on or about 2 October 2007 Mrs Duckworth was provided with independent legal advice from Mr Ian Clairs of Clairs Keeley. The advice offered by Mr Clairs to Mrs Duckworth is an important aspect of this case and it is worth noting it was drawn to the attention of Mrs Duckworth from the first.

**The pleaded case in CIV 1811 of 2010**

***Statement of claim***

13 The plaintiff pleads that on or about 4 October 2007 it lent Mrs Duckworth an amount of \$2,400,000. The transaction was evidenced by a loan agreement entered into on that date incorporating by reference a document entitled 'Usual Terms and Conditions for Consumer Mortgage Lending'. The plaintiff refers to this document as the 'loan agreement'. There was also a first registered mortgage over the mortgage property. The plaintiff pleads the provisions of the mortgage, Mrs Duckworth's failure to make payments as required by the loan agreement, and service of a default notice. The plaintiff claims judgment for the amount owing under the loan agreement and possession of the mortgage property.

***Defence***

14 The defence in this matter was drawn by Mrs Duckworth. She repeats the claim she is not the beneficial owner of the property saying she holds it as Trustee for the Duckworth Children's Family Trust. She says she is not liable to the plaintiff because the loan is 'an unconscionable loan'. She then goes on to make a number of claims and it is worth repeating these in full. The relevant paragraphs are:

- 15. The Plaintiff by Counterclaim did not have anything to do with the loan application relating to Mortgage K408308.

16. The Plaintiff by Counterclaim claims the loan was organised solely by her husband (Neil James Duckworth).
17. The Plaintiff by Counterclaim had no income of her own and the Bank new [sic] this and is identified by the Plaintiff's Documents that my income was Home Duties.
18. The Plaintiff by Counterclaim verily believes the Plaintiff relied upon her husband's (Neil James Duckworth) Company Group for the repayments.
19. The Plaintiff by Counterclaim claims to have been ordered by my husband to sign the Mortgage.
20. The Plaintiff by counterclaim claims she did not benefit by the Mortgage K408308 and the Mortgage is unenforceable, void and of no effect.

***Request for further and better particulars of defence and counterclaim***

- 15 Optimistically, the plaintiff issued a request for particulars. For the most part Mrs Duckworth studiously avoided answering any of the requests put to her. However there is one request and answer which is of interest. It is request 1(f). The request is directed at the claim by Mrs Duckworth that she holds the property on trust. The request asks her to state the date on which she was appointed Trustee of the Duckworth Children's Family Trust. The answer is 'Joint Trustee 17/6/2005'.

***Reply and defence to counterclaim***

- 16 Once again the plaintiff essentially joined issue on the defence and denied Mrs Duckworth was entitled to the relief sought in the counterclaim. Once again reference was made to advice given by Mr Clairs.

***Mrs Duckworth's position***

- 17 On the pleadings two broad issues were identified by Mrs Duckworth. The first had to do with service of default notices. Second there was the issue of undue influence or unconscionable conduct. The pleading in CIV 2361 of 2009 which I have quoted above makes it relatively easy to identify the material facts which are said to give rise to these two claims. But there was a further matter raised by Mrs Duckworth and dealt with extensively in the evidence.

- 18 It was Mrs Duckworth's position the investment property had been sold by the plaintiff undervalue. This issue is no where mentioned in the



pleadings. However it appears to have been flagged by Mrs Duckworth in pre-trial hearings and certainly the plaintiff was prepared to meet the case as put. Mrs Duckworth did not at any stage quantify the amount of the loss allegedly sustained by the sale at undervalue.

## **The trial**

### **The right to begin**

19 At the commencement of the trial counsel for the plaintiff proposed Mrs Duckworth should lead her evidence first. What she suggested was she open and tender the documents upon which the plaintiff intended to rely and which could be admitted into evidence as business records under s 79C of the *Evidence Act 1906* (WA). Mrs Duckworth would then make an opening statement and call her witnesses. At the conclusion of Mrs Duckworth's case the plaintiff would present its evidence. In closing the plaintiff would address first and Mrs Duckworth would have the last word.

20 Essentially counsel proposed this course of action because there was little or no argument about the plaintiff's case. It was Mrs Duckworth who was putting a positive defence. Counsel submitted it followed as a matter of logic the plaintiff should lead its evidence to answer Mrs Duckworth's claims.

21 Generally speaking the parties regard the right to begin as an advantage. After all the party who begins generally has the last word - always assuming the other party calls evidence. But as Brett LJ said in *Thomson v South Eastern Railway Co* (1882) 9 QBD 320, the overriding consideration is, 'what is the fair mode of trying that which is shown to be the substantial matter'. The position was further complicated here by the fact Mrs Duckworth represented herself. After counsel for the plaintiff made her application I explained to Mrs Duckworth what counsel had proposed and asked whether she was prepared to agree. She did agree. I was satisfied she understood the nature of the process and she was comfortable her rights were being preserved. Accordingly after counsel's opening address Mrs Duckworth led her evidence.

### **Mrs Duckworth's witnesses**

22 At the commencement of her case Mrs Duckworth advised neither she nor Mr Duckworth would be giving evidence. I pointed out to her there might be difficulties in establishing her counterclaim if she in particular did not give evidence. I also mentioned the proper course

would be for her to give her evidence first if she did decide to give evidence. Counsel for the plaintiff indicated she would have no difficulty if Mrs Duckworth, after further reflection, decided she should give evidence and that evidence was given after other witnesses had testified. In the event Mrs Duckworth did give evidence and she gave that evidence after all of her other witnesses.

23 At the request of counsel for the plaintiff I then made an order for witnesses out of court. Mr Duckworth remained in the court. He sat behind Mrs Duckworth and from time to time appeared to offer her advice. He also made a number of comments some of which were directed at counsel for the plaintiff and some of which appeared to be a gratuitous running commentary on the progress of the trial. I had cause to warn Mr Duckworth as to his behaviour on a number of occasions. Counsel for the plaintiff applied at least twice to have Mr Duckworth excluded from the court. I rejected both applications on the grounds it appeared Mrs Duckworth was supported, if not actually assisted, by Mr Duckworth's presence.

24 After calling all of her witnesses Mrs Duckworth announced she would give evidence. She also applied to call Mr Duckworth as a witness. Counsel for the plaintiff objected to his giving evidence on the basis there was an order for witnesses out of court and he had not been out of court. I ruled in the circumstances of the case it would not be appropriate for Mr Duckworth to give evidence. I indicated to the parties I would include in these reasons the grounds of my decision.

25 When it came to writing reasons I found there were few cases dealing with the issue and at least one text was of the view there was no power to refuse to allow a witness to give evidence even when he or she had disobeyed an order for witnesses out of court. I therefore reconvened the case and allowed Mrs Duckworth to call Mr Duckworth as a witness. I did so over the objection of counsel for the plaintiff.

26 In *Cross on Evidence* (8th ed) [17055] the learned author discusses the ordering of witnesses out of court. He then says:

Where a witness disobeys the order, the court has no discretion to exclude the evidence in either civil or criminal cases. The opponent of the party calling the witness is at liberty to comment on the weight of the evidence.

27 This position is supported by a number of English authorities. Reference is made to three old English authorities dating back as far as 1790 and to a more recent case of *Moore v Registrar of Lambert County*

*Court* [1969] 1 All ER 782. This is a decision of the English Court of Appeal. During the course of his judgment Lord Justice Edmund Davies said:

Indeed, if the court rules that witnesses should be out of court and a witness nevertheless remains in court, while the trial judge may well express his grave displeasure over such disobedience, he has no right to refuse to hear the evidence of such a witness who in violation of his order has remained (783).

28 His Lordship does refer to one authority to support that proposition - that being *R v Briggs* (1930) 22 Cr App Rep 68. This is an authority from the criminal jurisdiction and is of little utility. No mention is made of the other three older English cases referred to in *Cross*.

29 *Cross* also refers to two other lines of authority. The first is a line that suggests that evidence of a witness who has disobeyed an order to remain out of court is automatically inadmissible. Only one case is referred to: *Attorney General v Bulpit* (1821) 9 Price 4. The other line of authority suggests it is a matter of discretion for the trial judge. Again two very old cases are referred to and then the decision of *Tomlinson v Tomlinson* [1980] 1 All ER 593. This was an appeal in the Family Division of the English High Court. The President of the Court, Sir John Arnold, said:

Then it seems to me that there is one more matter to be considered: what should happen if a witness remains in court or a person remains in court after an order has been made excluding witnesses and his testimony is then offered to the court? In that case there should it seems to me be, and there is some indication that there already is, a discretion to admit that witness's evidence, notwithstanding that he has remained in court in apparent defiance of a ruling. Of course the magistrates, if they were satisfied that contumacy or deception was involved, would be likely to exercise their discretion by excluding the testimony. But, on the other hand, if the case were one in which the possibility of that person being called as a witness was not apparent at the time when the exclusion order was made and the person remained, then they might well exercise their discretion the other way. But it being a discretion it would have to be exercised in every case in accordance with the merits of the occasion (596 - 597).

30 Counsel's research did produce one Australian authority: *Horbelt v Elliott* (Unreported, SASC, 15 November 1995) (Olsen J). The case concerned a question of whether a magistrate had been correct to refuse to allow a witness to give evidence when that witness had remained in court in defiance of an order witnesses should remain out of court. Olsen J could find no authority on the question and indicated he was happy to

accept the principle articulated by Sir John Arnold in *Tomlinson* which I have set out above. His Honour then went on to say:

[I]t is important to bear in mind that, in the instant case the options which were open to the appellant were made abundantly clear to him at the outset. The attitude expressed by the learned magistrate was entirely reasonable. If Mrs Horbelt was to give evidence on important matters it was quite inappropriate for her to remain in court until she was called. The fact that she was actively assisting her husband to conduct his case necessarily rendered her partisan. The appellant consciously made a specific election and must be held bound to it, as a matter of fairness to the respondents. The exercise of discretion to decline to allow Mrs Horbelt to be called, if that was the situation, was eminently proper in the circumstances and cannot now be impugned [25].

31 In my view there exists a discretion to refuse to admit evidence from a witness who has remained in court despite the order for witnesses out of court. A court must be able to control its own processes. A flagrant breach of an order surely must result in some sanction. Furthermore, management of cases not only pre-trial but during the course of the trial is now an important aspect of litigation. The decision of the High Court in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 was of course a case dealing with pre-trial procedures. But it illustrates how far court control of litigation has come. It would be anomalous if it was found rulings or orders made during the course of a trial could simply be ignored with little or no consequence.

32 Having said that it seemed to me this was a case where I should allow Mr Duckworth to give evidence. If I had been exercising a discretion under what in my view are the applicable principles I would have refused leave. But I accept the point is not free from doubt. It is no slight matter to ignore a definitive statement of principle in a work such as *Cross on Evidence*. Mrs Duckworth was not in a position to argue the point. For that reason I determined Mr Duckworth should be permitted to give evidence.

### ***Antony James Harold Thornton***

33 Mr Thornton is a finance broker and the principal of ATFIN Finance. He is a certified practicing accountant with a commerce degree from the University of Western Australia. In March 2007 he assisted Mr and Mrs Duckworth with an application for finance.

34 From his examination-in-chief it was clear in March 2007 Mr Thornton attended at 9 Clarecastle Retreat where he met with Mr and

Mrs Duckworth. At the time he was preparing an application for finance with a corporation known as Bluestone Mortgages. He completed the bulk of the application. Most of the information in the application came from Mr Duckworth. His evidence was he was satisfied that while Mrs Duckworth did not take a big part in the discussions she was aware of what was going on. That was the extent of the evidence led from the witness by Mrs Duckworth.

35 As was the case with all of the witnesses called by Mrs Duckworth the detail emerged in cross-examination. Mr Thornton confirmed Mrs Duckworth appeared to understand the nature of the application that was being made. She did not appear confused. The picture which emerged was one where Mr Duckworth provided most of the information but within the hearing of Mrs Duckworth who raised no objection. The application for the Bluestone mortgage is exhibit 418. On page 8 of the document there are certain boxes which have to be ticked and they appear under the subheading 'Declarations'. Mr Thornton said that because of the significance of these declarations it was his practice to have them completed by the applicants. He believed that was done in this case.

36 There was no re-examination of any significance.

37 In my view Mr Thornton was a witness of truth. He gave his evidence, such as it was, succinctly and without elaboration. There was nothing in his evidence to suggest Mr Duckworth adopted an aggressive or overbearing attitude towards Mrs Duckworth. Nor was there anything to suggest that Mrs Duckworth did not understand an application was being made for finance and it would be secured by a mortgage over her property.

38 Having said that Mr Thornton was preparing an application for finance from a lender other than the plaintiff. It would seem there was a relationship between Bluestone Mortgages and the plaintiff. Precisely what that relationship was never emerged from the evidence. In my view Mr Thornton's evidence not only did not support any of the contentions advanced by Mrs Duckworth it ran completely counter to the case she was putting. She was a willing participant who had an understanding of the mortgage lending process.

### ***Tony Joseph Tilenni***

39 Mr Tilenni is a certified practicing accountant and principal of the business Tony Tilenni & Associates. For a number of years he was Mr Duckworth's accountant. He had ceased to be so as at the date of trial.

In examination-in-chief Mr Tilenni was asked to identify a number of documents. These became exhibits 48, 50 and 51. As I understand the line of questioning these documents were prepared by Mr Tilenni on the instructions of Mr Duckworth. These documents appeared to be produced to establish any loan application was supported by financial documents drawn by Mr Tilenni or his firm on the instructions of Mr Duckworth. Mrs Duckworth had no input. I could ascertain no other purpose in calling Mr Tilenni.

40 In cross-examination it emerged one of the companies in what might be referred to as the 'Duckworth Group' was Duck One Holdings Pty Ltd. Mr Tilenni's office had been the registered office of that company. From time to time on behalf of the company Mr Tilenni's firm lodged documents with the Australian Securities and Investments Commission (ASIC). One of the documents lodged with ASIC was a notice of appointment of Mrs Duckworth as a director of Duck One Holdings. The document was dated 13 April 2005 (exhibit 353). Mr Tilenni also lodged a form appointing Mrs Duckworth as secretary of the company (exhibit 352). In 2008 Mr Tilenni lodged further documents pursuant to which Mrs Duckworth ceased to be both director and secretary of Duck One Holdings. It is clear all of these documents were lodged on the instructions of Mr Duckworth but where necessary the documents had been signed by Mrs Duckworth.

41 There was no re-examination of significance.

42 Mr Tilenni was a witness of truth and he impressed as a highly competent professional. It was clear from his evidence his instructions were provided exclusively by Mr Duckworth. He appears to have had no or minimal contact with Mrs Duckworth. Insofar as any financial information was provided to any actual or prospective lender it was provided based upon information from Mr Duckworth and on Mr Duckworth's instructions. There was no input from Mrs Duckworth.

43 It is clear however Mrs Duckworth did sign documents necessary to appoint her, for a period, as a director and secretary of Duck One Holdings. At no time did she raise any objection with Mr Tilenni about her involvement with the company. There was nothing in Mr Tilenni's evidence to suggest Mrs Duckworth was confused or did not understand the nature of the commercial transactions with which she was dealing. There was certainly nothing in Mr Tilenni's evidence to suggest her actions taken in relation to Duck One Holdings were based upon an overbearing attitude by Mr Duckworth.

***Nicholas Ian Phillips***

44 Mr Phillips is an accountant and a director of Tony Tilenni & Associates. Mrs Duckworth asked a series of questions about certain exhibits. Mr Phillips had no involvement with the preparation of the documents and was unable to give any evidence which assisted Mrs Duckworth's case.

45 Nothing of significance emerged either in cross-examination or in re-examination.

***Stephen Jeffery Gascoigne***

46 Mr Gascoigne is a former real estate agent (he relinquished his licence in 2010) who clearly has great familiarity with the Mindarie area in general and Clarecastle Retreat in particular. I assume his evidence was directed at establishing the investment property was sold under value. He was not an expert witness and no attempt was made to qualify him as one. Much of his evidence was a critique of a comparative market analysis report prepared by Mr Peter Duguid in relation to the mortgage property. Mr Duguid was engaged by the plaintiff to sell the property after the plaintiff had taken possession of it. The report listed a number of properties which were either for sale or had recently sold. Mrs Duckworth asked Mr Gascoigne a number of questions about the relevance of these listings and sales to the value of the mortgage property.

47 One fact which did emerge from Mr Gascoigne's evidence was the mortgage property was unique and difficult to value. The property had ocean views and views over the Mindarie Keys Marina. It had its own private jetty access to the marina. Mr Gascoigne described Clarecastle Retreat as 'a very exclusive road, one of the most exclusive in the metropolitan area' (ts 236).

48 The thrust of Mr Gascoigne's evidence was he did not agree with the marketing strategy adopted by the plaintiff through the agency of Mr Duguid. He would have marketed the property over a longer period of time, more extensively and he would have focused on particular purchasers such as mining companies. Without explaining why he offered the opinion the property was worth between \$3.2 million - \$3.5 million (ts 237).

49 Mr Gascoigne was an entirely unsatisfactory witness. As I have indicated he was not an expert, nor was he a licensed valuer. His opinion as to the value of the property carried no weight. More than that

Mr Gascoigne appeared to see himself as an advocate for the Duckworth interests. In cross-examination it was established that Mr Gascoigne had from time to time been a director of companies controlled by Mr Duckworth. In no sense could it be said he was independent. While he was in the witness box he and Mr Duckworth exchanged nods and winks.

50 The main problem with Mr Gascoigne's evidence was that it was irrelevant.

***Frances Ann Duckworth***

51 Mrs Duckworth appeared to be under some misapprehension as to how to approach the giving of her evidence. I explained to her she had the right to put her side of events. What followed was a very limited statement. I will quote it in full:

Some time in October of 07 my husband rang me and told me mortgage documents would be arriving in the post and that I was to take them to Mr Clairs for signing. I told him that I didn't want to do this and as I have previously stated, he was very - he's a very demanding arrogant man and he just yells louder than I can yell. So in the end I always end up doing what he wants me to do as far as that sort of thing goes. So I took those documents to Mr Clairs and I was probably with him for some 15 minutes - I'm not too sure - signed some documents and then delivered those documents back to the bank. Then I was not a party to anything else until approximately June 2009 when Mr Batziolas emailed me - started emailing me over the arrears in the account and then we ended up here. That's virtually all I can say I think (ts 279 - 280).

52 Given the limited nature of what she had had to say I provided Mrs Duckworth with the opportunity to further expand on her statement. She then said:

All I can reiterate is the way that my husband does dominate me as far as - he doesn't physically abuse me but he verbally abuses me and the whole family in fact, and as I say to make life easier we do generally what he requests of us. I mean I will try to stand up for myself but there's only so much shouting and carrying on that you can put up with and this has, you know, been going on for most of our marriage. I don't - I think that's all. I'm not sure what else I can say (ts 280).

53 Before dealing with cross-examination it is worth making a number of points about what Mrs Duckworth did not say. She did not make any mention of the claim that the property was owned by the Duckworth Children's Family Trust. By this stage all documents relevant to the Trust issue had been tendered as exhibits. Mrs Duckworth offered no



explanation as to why she did not at any stage tell the bank the property over which they were taking a mortgage and of which she was the registered proprietor was in fact Trust property.

54 Neither did Mrs Duckworth provide any detail as to what she actually understood of the mortgage transaction. Her evidence was she received the documents from the bank. She did not say whether she read those documents and whether she understood what they meant. She said she took them to Mr Clairs, a lawyer. She said nothing about what Mr Clairs explained to her - this despite the fact Mr Clairs' notes from the meeting had been discovered and made available for inspection.

55 Finally and perhaps most importantly Mrs Duckworth did not address the 11 criteria which it was said in the defence CIV 2361 of 2009 were the reasons why the guarantees and the mortgage were unenforceable. I will return to these matters later in these reasons.

56 In cross-examination Mrs Duckworth was referred to exhibit 5. This document is a transfer of the mortgage property from the sellers Mr and Mrs McQueen to Duck One Holdings. It is dated 20 May 2005 and it is signed by Mrs Duckworth as the sole director/secretary of the company. Mrs Duckworth confirmed she signed the document.

57 Mrs Duckworth was then taken to exhibit 8. That document is a transfer of the same property from Duck One Holdings to Mrs Duckworth. It was executed by Mrs Duckworth as the sole director/secretary of Duck One Holdings and by her in her own right. The document is stamped and the duty payable was \$20.

58 Mrs Duckworth was then taken to exhibit 362. That is a document described as an 'Application Form'. It is described at the top of the form as applying to 'Substituted Purchasers'. In the section entitled 'Original Purchaser(s)', 'Duck One Pty Ltd' is shown. In the section entitled 'Substituted Purchaser(s)', 'Frances Ann Duckworth' is shown. There are then a series of questions some of which are answered and some of which were clearly not relevant. Section 8 is in the following terms:

Is the substituted purchaser holding the property on trust and if so, provide details of the name and nature of the trust relationship?

To that the answer 'No' has been written in. The document is then signed by Mrs Duckworth. She confirmed it was her signature. Moreover there follows in a highlighted box this statement:

IMPORTANT - OFFENCE

A person who in an application or, in furnishing information to the Commissioner, makes a statement which is false in any material particular, commits an offence under the *Taxation Administration Act 2003*. Section 107 of that Act provides for a maximum penalty of \$20,000 plus three times the amount of tax that was or might have been avoided.

59 As might be expected Mrs Duckworth was closely cross-examined about her claim to be a Trustee in light of what was contained in the document. Mrs Duckworth would not give a straight answer. She was evasive and pretended not to understand the issue to which the questions were addressed. She certainly could provide no reasonable explanation as to why she had signed the declaration which was at odds with her case.

60 Mrs Duckworth was cross-examined about documents relating to the Duckworth Children's Family Trust. These documents speak for themselves and I will deal with them in some detail later in these reasons. Suffice it to say for the moment Mrs Duckworth gave no evidence which in any way elucidated or explained how the documents came into existence and their effect.

61 The cross-examination established Mrs Duckworth was, until around July 2008, engaged in home duties and did not undertake any paid employment. Subsequent to July 2008 she worked as a receptionist for a modest income. It is clear her husband provided for her. In other words she enjoyed the benefits of any success in business which came her husband's way. Although reliance on her husband may have been reduced after July 2008 it remained the case he maintained Mrs Duckworth and still maintains Mrs Duckworth.

62 Counsel referred Mrs Duckworth to a number of the relevant documents - the loan contracts, the mortgage and the guarantees. Mrs Duckworth agreed she signed these documents but said she did not read them. Mrs Duckworth was then referred to exhibit 183. This document is headed 'Consumer Credit Contract Schedule'. What the document does is set out in an easy to read and understand way what is being borrowed, what repayments must be made, what costs are being incurred - in short, all the material provisions of the loan agreements and the mortgage. There is at the end of the document a highlighted box. It is headed 'Important'. Under the subheading 'BEFORE YOU SIGN' there are five dot points. They read as follows:

- READ THE CONTRACT DOCUMENTS so that you know exactly what contract you are entering into and what you will have to do under the Contract.
- You should also read the information statement: THINGS YOU SHOULD KNOW ABOUT YOUR PROPOSED CREDIT CONTRACT.
- Fill in or cross out any blank spaces.
- Get a copy of the Contract documents.
- Do not sign this Contract document if there is anything you do not understand.

63 Mrs Duckworth signed the document. Mrs Duckworth said she did not read the document - she just signed it. She also said she did not check to see whether the mortgage property was referred to as a Trust property.

64 Mrs Duckworth was then taken to exhibit 213. This is a statutory declaration made by Mrs Duckworth. In par 1 of the declaration Mrs Duckworth acknowledges she is the Guarantor/Third Party Mortgagor for borrowings by Mr Duckworth from the Commonwealth Bank. The following two paragraphs are in these terms:

2. I have received the independent legal advice regarding the guarantee and mortgage (where applicable) referred to in paragraph 1.
3. After receiving that advice I have freely and voluntarily signed the guarantee and mortgage (where applicable).

65 The document was signed before Mr Clairs. Counsel asked whether the statutory declaration correctly stated the position. Mrs Duckworth was somewhat evasive but then was asked:

Q: You read this statutory declaration before you made it?

A: I don't believe I did. Even if I did, it is actually not correct (ts 298).

66 Prior to counsel referring Mrs Duckworth to the statutory declaration I had drawn to her attention the fact that consequences could flow from her saying the information in the statutory declaration was wrong. I was satisfied she understood the point I was making. Yet in a number of respects she was prepared to say under oath that statements in the statutory declaration were false.

67 Mrs Duckworth was then referred to exhibit 215. This document is a typed version of handwritten notes made by Mr Clairs during the course of his interview with Mrs Duckworth. The document has a series of subheadings and brief notes under each of those subheadings. The first subheading is 'Mortgage'. There then appears the note 'Default - house could be sold'. Under the subheading 'Guarantee' it is noted the guarantee is personal and any liability incurred is a personal liability. Under the subheading 'Guarantee Indemnity' it is noted that if Mr Duckworth fails to pay Mrs Duckworth would be liable to make repayment. Under the subheading 'Considerations' there appears the following 'Could lose your house and other assets', and so it goes on. At the end of the document there appears this note:

Emphasised risk - could lose everything if it all goes wrong. (original emphasis)

68 In response to questioning by counsel Mrs Duckworth did not dispute she was given quite detailed advice about the nature of the transaction by Mr Clairs. Nowhere in answers to questions put by counsel did Mrs Duckworth assert she did not understand what was being explained to her.

69 Mrs Duckworth was then referred to a chain of emails dealing with Mr Clairs' notes of the meeting with Mrs Duckworth. On Wednesday 19 May, a memo was sent from the email address 'dupond' to Mr Clairs. It was accepted by Mrs Duckworth this was an email address used by her and her husband. The email reads as follows:

Dear Ian,

May I have a copy of your notes you made when Frances signed the Commonwealth Bank loan in front of you so she does not get her affidavit incorrect.

Thank you

Neil and Frances Duckworth

70 By this stage the plaintiff had issued proceedings in CIV 1811 of 2010 and had moved for summary judgment. The affidavit referred to was an affidavit which Mrs Duckworth intended to file in answer to the summary judgment application. In answer to the request, Mr Clairs said he would need an authority signed by Mrs Duckworth. He sent an email to that effect on the same day. Exhibit 165 is the authority. It reads:

Attention, Ian Clairs.

Dear Ian would you please send me a copy of your notes regarding the Commonwealth mortgage re 9 Clarecastle retreat Mindarie i signed in your presence.

71 That authority is signed by Mrs Duckworth and in her evidence she confirmed it was her signature. Thereafter the notes were provided. It is important to note these notes were in the possession of Mrs Duckworth when she swore her affidavit in answer to the plaintiff's summary judgment application.

72 Reference was then made to exhibit 397. That document is an affidavit of Mrs Duckworth sworn in opposition to the plaintiff's application for summary judgment. Paragraph 21 of that affidavit is in the following terms:

I do not recall exactly what happened at my meeting with Ian Clairs. I know that documents were signed and that he tried to explain the documents to me. However, I was in a hurry to be somewhere else, and although I tried to listen and tried to understand exactly what was happening, I do not believe I understood the purpose of the documents. I remember feeling nervous after Ian Clairs spoke to me. I did not want to sign the documents, however I felt compelled to sign them because Neil had required me to do that. I have no specific recollection of any amounts of money being mentioned to me by Mr Clairs, or my obligations under the documents.

73 It is extremely difficult to reconcile that statement with the evidence which emerged when Mrs Duckworth was cross-examined about the notes. As I have indicated the notes make it plain Mr Clairs explained in some detail to Mrs Duckworth what was involved with the mortgage and her liability if Mr Duckworth did not pay. Yet there is no reference anywhere in the affidavit to the notes.

74 The affidavit then goes on to discuss the ownership of the property. Paragraph 24 is in the following terms:

Whilst I am shown as the registered proprietor of the Property, the Property was purchased in the name of Duck One Pty Ltd as trustee for the Duckworth Family Children's Trust [sic]. Subsequent to that purchase but prior to registration I became and continue to be the sole trustee of that Trust. Consequently, the Property is not owned by me but is in my name only in my capacity as trustee for the Duckworth Family Children's Trust [sic].

75 For reasons which I will set out below Mrs Duckworth is not the Trustee of the Duckworth Children's Family Trust and never has been. But that is a mistake of law and it is understandable she could have been wrong. But there are errors of facts which are not so easily explained. The paragraph does not accurately reflect the way in which the purchase transaction was conducted. A cursory reference to the transfer documents would have shown what happened.

76 In par 26 Mrs Duckworth says:

I was not told that I was signing a guarantee or for that matter what a guarantee was. I was not told that I was guaranteeing my husband's loan the subject of the bank's claim in action CIV 2361 of 2010 [sic] and I did not understand that to be the case.

That statement is a lie. Mr Clairs explained in detail what the guarantee was and what the results of a failure by Mr Duckworth to make payment of the amounts due under the loan contracts would be. There can be no possible alternative explanation for the statement - it is a straight out untruth.

77 Later in the same paragraph Mrs Duckworth says:

I was not told by him [Mr Clairs] or anyone else, and did not know that by signing the Guarantee I was agreeing to provide the Property as security for my husband's loan, the subject of the bank's claim and the bank could take the Property if the loan was not repaid, or in arrears.

78 Once again that statement was untrue. Then to par 31. It is in the following terms:

I was not given the opportunity to, and did not, read the Guarantee before I signed it.

It may be the case Mrs Duckworth did not read the guarantee before she signed it but she was certainly given the opportunity to do so. Her evidence was to the effect the documents which were to be signed, including the guarantee, were sent by post to her property and collected by her. She had the opportunity to read the documents when she was in Mr Clairs' office, or she could have done it before arriving for the meeting. The statement is a straight out untruth.

79 Paragraph 32 is not only dishonest but bizarre. It is in the following terms:

I was not told I could obtain independent legal advice before signing the Guarantee and consequently I did not seek any legal advice.

80 Earlier in the affidavit Mrs Duckworth refers to Mr Clairs. She does not say in the body of the document that Mr Clairs was a lawyer, but she well knew that to be the case. She had sent an authority to Mr Clairs asking him to release his notes of the meeting. There cannot possibly be any innocent explanation for this factually incorrect statement.

81 Counsel did not cross-examine Mrs Duckworth at any length in relation to this affidavit. She did not need to do so. She had already established the groundwork necessary to establish that large parts of the affidavit were factually incorrect. However after pointing out a number of incorrect statements Mrs Duckworth did admit at least in some respects the affidavit was wrong (ts 310).

82 Counsel then took Mrs Duckworth through a number of documents which showed Mrs Duckworth had been involved in a number of transactions in relation to the property. She had made applications for finance and had entered into mortgages. Doubtless the purpose of this cross-examination was to establish Mrs Duckworth was no novice in relation to financial transactions and was well aware of what was involved in mortgaging a property. Counsel also established Mrs Duckworth was aware to maintain the loan agreements and the mortgage substantial monthly repayments were required. It was Mrs Duckworth's evidence she was aware the only person who could make these payments was her husband.

83 Mrs Duckworth admitted receipt of the default notice (ts 334). That put an end to that aspect of her defence.

84 Counsel then took Mrs Duckworth through a lengthy exchange of emails passing between Mr Bill Batziolas of the plaintiff and Mrs Duckworth relating to the mortgage arrears. Mr Batziolas was based in Sydney and was in the recovery section of the plaintiff. He was dealing with the default by Mr and Mrs Duckworth. I do not propose to deal with this aspect of the evidence in any detail save with respect to one matter. It is clear bank statements were regularly forwarded to Mr and Mrs Duckworth in relation to the loan transactions. Mrs Duckworth could have, had she wished to do so, kept a close eye on how the mortgages

were being serviced. It is clear she did not take any interest in what was happening.

85 Mrs Duckworth offered no explanation for anything that emerged in cross-examination when offered the opportunity to make a further statement in re-examination.

86 Mrs Duckworth was not a witness of truth. I have already said enough about the affidavit she swore in answer to the summary judgment application. That on its own was enough to destroy her credibility. The other instances of dishonestly I have highlighted only go to reinforce the position. Insofar as Mrs Duckworth's evidence is concerned I would only accept anything she said if it was independently verified.

### ***Neil James Duckworth***

87 Before Mrs Duckworth called her husband I explained as he had remained in court while other witnesses had given their evidence it was open to me to take a negative view of his credibility. Mrs Duckworth, being aware of this position, nonetheless determined her husband should give evidence.

88 Before summarising Mr Duckworth's evidence I should make a further point. There was only one live issue about which Mr Duckworth could give any evidence. That had to do with the claim of undue influence and unconscionable conduct. Mr Duckworth was cast in the role of the villain as Mrs Duckworth put her case. So it was up to Mr Duckworth to confirm he had behaved improperly or at least inappropriately in pressuring or hoodwinking his wife into signing mortgage documents. Extracting such evidence would have been a tricky task even for an experienced barrister. Mr Duckworth could not give evidence in relation to the other two matters. In particular, although he was the owner of the investment property, he could say nothing about its alleged sale at undervalue. So the scope of his evidence was limited.

89 Mrs Duckworth began by taking Mr Duckworth through a number of documents that were either applications for finance or documents supporting such applications. As I understand that thrust of Mrs Duckworth's examination, it was intended to show first that she did not have an independent income and was dependent upon her husband. Applications for finance were made by her husband using information obtained by him without any input from her. Without going through Mr Duckworth's evidence in detail it is sufficient if I say I accept both propositions. At no time did the plaintiff suggest otherwise.



90 There were a number of exchanges which threw some light on to the relationship between Mr and Mrs Duckworth. The following exchange is one example:

**DUCKWORTH, MRS:** Okay. Did you tell the defendant you were going to borrow money for the investment property, 5 Clarecastle Retreat?

**DUCKWORTH, MR:** Told who?

**DUCKWORTH, MRS:** The defendant?

**DUCWORTH MR:** No. No, you knew nothing about it, sorry.

**DUCKWORTH MRS:** Why was that?

**DUCKWORTH MR:** It was none of your business, really. Sorry, I'm being not rude, your Honour. I don't mean that but it's - I don't tell you anything about the business, I just do it. That's the way it is, it's always been done that way. I don't involve my family; you (ts 536).

91 Mr Duckworth was asked a series of questions about the Duckworth Children's Family Trust. However he was not able to give any relevant evidence. He was clearly desperate to establish Mrs Duckworth held the property as a Trustee. Mr Duckworth did give some evidence as to the circumstances of the mortgage property winding up in Mrs Duckworth's name rather than in the name of Duck One Holdings. All that evidence did was show Mr Duckworth saw defrauding the Revenue as an obligation rather than morally reprehensible (see ts 546 - 547).

92 Cross-examination of Mr Duckworth established he had been dishonest in his dealings with a number of parties. For instance he had been declared bankrupt on at least one occasion. Yet when he completed the finance application form presented to him by Mr Thornton he happily signed a declaration to the effect he had never been bankrupt. Mr Duckworth seemed not the least embarrassed by making this false declaration and the idea it might damage his credibility appears not to have crossed his mind. I could go on and detail other instances where Mr Duckworth was dishonest but it is not necessary for me to do so. He was not a witness of truth and I would not accept anything he said unless it was independently verified.

93 Mr Duckworth was taken through quite a number of documents and emails by counsel for the plaintiff. Doubtless counsel felt she had to put

these documents to Mr Duckworth as they had been put into evidence through her witnesses. But really they took the matter no further. Counsel did not have to address any evidence to the effect Mr Duckworth had applied undue influence to his wife or had behaved in such a way his and the defendant's conduct taken together was unconscionable.

94 Particularly early on in his evidence Mr Duckworth appeared determined to match wits with counsel. He was keen to get into a debate. I had occasion to warn him on a number of occasions. As time passed Mr Duckworth appeared to mellow and the further the cross-examination went the more he seemed prepared to answer the questions put to him in a straightforward manner. But there is no doubt in my mind he adopted a highly partisan position. He was there to support Mrs Duckworth's position no matter what and he in his evidence was prepared to say anything to follow through that course.

#### **Assessment of defendant's case**

95 In my view Mrs Duckworth entirely failed to make out any aspect of her defence and counterclaim. At the conclusion of the defendant's evidence I invited counsel for the plaintiff to make a no case submission. She declined to do so. Counsel for the plaintiff clearly wished to lead the evidence she had available in an attempt to appeal-proof this decision. No one could blame her for doing so. Mrs Duckworth announced at pre-trial hearing she intended to appeal any adverse decision. The plaintiff was keen to ensure on any appeal it should be able to file a notice of contention and thus protect its position.

96 Accordingly I will deal with the evidence led by the plaintiff. But it is convenient at this point to dispose of Mrs Duckworth's case and expose it for the sham which it was. Because, in reality, Mrs Duckworth had produced no evidence which supported her position. Certainly, there was nothing to establish the material facts as set out in the defence and counterclaim - particularly in CIV 2361 of 2009. To find against Mrs Duckworth, by placing reliance on evidence led by the plaintiff, would dignify her case in a manner it did not deserve.

#### **Trust issue**

97 It is clear, as a matter of law, Mrs Duckworth could not have owned the property as Trustee of the Duckworth Children's Family Trust. In her closing submissions counsel for the plaintiff put forward a number of grounds upon which the trust argument failed. First, it was said the trust itself failed. A copy of the Trust Deed is exhibit 1. The vesting day in the

schedule is left blank. Counsel submitted this rendered the trust void. For present purposes, it is unnecessary to consider that argument. Mrs Duckworth was, understandably, not equipped to respond to such a submission. So, while acknowledging the submission has merit, I will put it to one side and proceed on the basis the trust is validly constituted.

98           Second, it was said Mrs Duckworth never became trustee of the trust. That is clearly correct. Starting with exhibit 1, it shows Yvonne Frances Frost was the trustee. It would appear an attempt was made in 1998 to change the trustee to Mrs Duckworth. Exhibit 321 is a document entitled 'Deed of Appointment of New Trustee'. The parties to that deed are William George Gamel, the appointor under the Trust Deed, Yvonne Frances Frost, who is described as 'the retiring trustee', and Frances Ann Duckworth, described as 'the new trustee'. The deed by its terms removes Ms Frost as trustee and replaces her with Mrs Duckworth. The problem with the document is that it is not signed by Mr Gamel. So, it is not effective.

99           The parties appear to have appreciated this was the case. Exhibit 24 is a document entitled 'Deed of Appointment of New Trustee of the Duckworth Children's Family Trust'. The deed is between William George Gamel, the appointor and Duck One Holdings. It is undated but stamped 9 March 2006. By its terms, it removes Ms Frost as trustee and appoints Duck One Holdings as the trustee. It is signed by both parties and there is no reason to think it is not an effective deed.

100           Exhibit 25 is a document described as 'Deed of Variation of the Duckworth Children's Family Trust'. The parties to the deed are Mrs Duckworth, who is described as 'the trustee', Mr Gamel, as the appointor, and Duck One Holdings, also described as 'the trustee'. The operative part of the deed appoints Mrs Duckworth as the appointor and guardian of the trust in place of Mr Gamel. It says nothing about appointing Mrs Duckworth as trustee of the trust. No other document was produced. The position would appear to be Duck One Holdings is presently the trustee of the Duckworth Children's Family trust. In any event, Mrs Duckworth is not trustee of the trust.

101           In her closing submissions, Mrs Duckworth referred to the fact she is described as 'the trustee' in exhibit 25. As I understood her argument, it was to the effect the intention of the deed was to appoint her as trustee and that is evidenced by the fact she was so described. That, she said, was sufficient and she is properly regarded as trustee of the trust. With

respect, there is no merit in that argument. The documents simply do not support the proposition she is now, or ever has been, trustee of the trust.

102 But even if Mrs Duckworth had been the trustee of the trust, there is nothing in the evidence to support the proposition she acquired the property in her capacity as trustee. All the documentation runs the other way. Nothing was said by Mrs Duckworth to Mr Clairs on the issue. A statement was made to the State Revenue to contrary effect. The plaintiff was reassured by signed statements that Mrs Duckworth was not a trustee. The only evidence to support her position is Mrs Duckworth's oral testimony. As I have said, I do not believe a single word she said.

103 There are two further matters which require comment. The first is an analysis of what Mrs Duckworth is actually seeking to do. She represented to the plaintiff she owned this property in her own right and the plaintiff, relying on that assurance, advanced funds. If the assurance was not correct, Mrs Duckworth was obtaining money under false pretences. Doubtless she would argue, the money went to her husband and not directly to her. But the fact remains she assisted in the enterprise by making, what she now says, was a false representation to the plaintiff. So, Mrs Duckworth is seeking to have the court aid and abet her committing a fraud. The outrageous nature of such a proposition appears to have entirely escaped Mrs Duckworth's notice.

104 Second, it is difficult to see how a plea of this sort could have found its way into a pleading. Doubtless counsel was provided with instructions by Mrs Duckworth. But it is reasonable to expect, before in signing a pleading, counsel should have explained to Mrs Duckworth just what was being alleged and the consequences which might follow. Counsel might also have been expected to carefully check the facts to ensure there was some support for the plea. As it is, the plea started a hare and chasing it down has proved time consuming and costly. It would have been altogether better had the matter been more closely investigated and the plea eliminated because it was untenable.

105 In summary then, I am not satisfied Mrs Duckworth holds the property as trustee and there is no defence to the claim on that basis.

**Unconscionable conduct and undue influence**

106 Before dealing with the 11 matters which raised these issues, it is appropriate to say something of the overall nature of such defence. It was not to be expected Mrs Duckworth could present a detailed analysis of cases in what is a difficult area of the law. But it seems clear, in broad

terms, Mrs Duckworth was alleging influence in terms found in *Yerkey v Jones* (1939) 63 CLR 649 and *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395. Insofar as unconscionability is concerned, it draws on the principles set out in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. It is appropriate to examine, in general terms, each of these concepts.

107 There are some relationships where, in relation to certain transactions, the presumption of undue influence arises. But the relationship of husband and wife is not one of those. Dixon J in *Yerkey v Jones* makes that plain. However, his Honour did emphasize that although there was no presumption of undue influence, the marital relationship had never been divested completely of three 'equitable presumptions of an invalidating tendency'. His Honour put the position this way:

In the first place, there is the doctrine, which may now perhaps be regarded as a rule of evidence, that, if a voluntary disposition in favour of the husband is impeached, the burden of establishing that it was not improperly or unfairly procured may be placed upon him by proof of circumstances raising any doubt or suspicion. In the second place, the position of strangers who deal through the husband with the wife in a transaction operating to the husband's advantage may, by that fact alone, be affected by any equity which as between the wife and the husband might arise from his conduct. In the third place, it still is or may be a condition of the validity of a voluntary dealing by the wife for the advantage of her husband that she really obtained an adequate understanding of the actual nature and consequences of the transaction (675 - 676).

108 In Meagher RP, Heydon JD & Leeming MJ, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (4th ed, 2002), the learned authors quote the above passage and continued:

The matters mentioned by Dixon J are of particular importance where the wife, without any recompense, except the advantage to her husband, takes up a liability for his debts by means of a guarantee. This was the situation in *Yerkey v Jones*, the wife having given a mortgage over her property by way of guarantee of her husband's obligations. Dixon J distinguished two kinds of circumstances: first, where there was actual undue influence by the husband, and secondly, where there was a failure to explain adequately the transaction which the husband sought the wife to enter into. In the first case, even if the third party dealt directly with the wife and explained the effect of the transaction, it would still be voidable in the absence of independent advice or relief from the ascendancy of the husband. In the second case, it would be sufficient for the creditor to take adequate steps to inform the wife and reasonably suppose she had an adequate comprehension of the transaction. All of this has been endorsed by the

High Court in *Garcia v National Australia Bank Ltd*, observing that the only question of notice that arose was whether the creditor knew of the marriage, and the underlying principle was whether in all the circumstances enforcement of the third party's contractual rights would be unconscionable. If the third party itself explains the transaction sufficiently, or else knows that the wife has received what Dixon J described as 'competent, independent and disinterested' advice from a third party, then it would not be unconscionable for the creditor to enforce its rights [15-090].

109 An analysis of the unconscionability argument, as raised in *Amadio*, starts with an analysis of the case itself. The facts taken from the head note were as follows:

Two elderly migrants who were unfamiliar with written English were asked by their son to execute a mortgage in favour of a bank over land which they owned to secure the overdraft of a company which the son controlled. The son had told his parents that the mortgage was to be limited to \$50,000.00 and to be for six months. The bank and the company had been selectively dishonouring the company's cheques to preserve the company's appearance of solvency. The bank and the company agreed that the overdraft the mortgage was to secure should be reduced and cleared within a short time, but these matters were not disclosed to the prospective mortgagors. The mortgage instrument which the bank submitted for execution contained a guarantee. The mortgage and the guarantee secured all amounts owing or which might be owing to the bank on the company's account. The mortgagors executed the deed mistakenly believing it to be limited to \$50,000 and to be for six months. The bank was aware that they had been misinformed about the contents of the instrument they were executing.

110 Three members of the High Court, Mason, Wilson and Deane JJ, were prepared to set aside the transaction on the basis it was unconscionable. Deane J put the position as follows (480 - 481):

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 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 & Evershed LJJ, In Re Diplock* (63)).

111 It is important to note Mr and Mrs Amadio were under what is sometimes described as 'a special disability'. They did not read English

well and they were not familiar with commercial transactions. Moreover, the bank knew they did not understand the transaction. They also knew they had been misinformed about the scope of their liability under the mortgage. So, the *Amadio* decision does not stand for some broad principle which allows transactions thought to be 'unfair' to be set aside. There are necessary pre-requisites to relying on the principles the case establishes.

112 It is convenient at this point to return to the 11 points raised by par 5(d) of the pleading in CIV 2361 of 2009. First, it was said Mrs Duckworth was the wife of Mr Duckworth at the relevant time. That is the case. But that does not give rise to a presumption of undue influence. But it does raise, what Dixon J described as, three 'equitable presumptions of an invalidating tendency'.

113 Secondly, it is alleged at the time of entering into the guarantees and the mortgage, Mrs Duckworth had no means of paying back the sum secured. That is so. That suggests she was relying on her husband for income support. As a proved fact, it does not, without more, advance Mrs Duckworth's case.

114 Thirdly, the second defendant did not make the application for the first guarantee. That is correct, but once again more is required to advance Mrs Duckworth's case.

115 Fourthly, it is pleaded the second defendant did not understand the purport and effect of the first guarantee. In my view, that fact has not been proved. The consequence of the guarantee was explained to Mrs Duckworth by Mr Clairs. It is not a complicated concept and the evidence shows she was reasonably familiar with dealing with mortgages and securities. I do not accept her evidence she did not understand the nature of the guarantee. The material fact has not been proved.

116 Fifthly, I do not accept Mrs Duckworth signed the first guarantee because of the faith and trust she reposed in her husband no matter what he told her. Her motives for signing the guarantee never emerged from the evidence. After her discussions with Mr Clairs, Mrs Duckworth knew there was plenty to worry about in relation to the guarantee. She may have signed the guarantee because she was asked to do so by her husband, but it was not a position where she relied on her husband, placed faith in him or trusted him. She gave no evidence to that effect.

117 Sixthly, Mr Clairs explained the effect of the guarantee and the  
mortgage and all of the security documents to Mrs Duckworth. Of that  
there can be no doubt. The material facts alleged are not made out.

118 Seventhly, Mrs Duckworth was given every opportunity to read all  
of the security documentation. She may not have done so, but that was  
her choice. The opportunity was provided to her.

119 Eighthly, Mrs Duckworth did obtain independent legal advice before  
signing the documents. It is difficult to see how a plea to the effect no  
advice was given could have made its way into the defence and  
counterclaim.

120 Ninthly, it is not the case, had Mrs Duckworth been informed, that  
by signing the security documents she assumed personal responsibility for  
the amount secured she would not have signed the documents. She was  
so advised and she signed them.

121 Tenthly, Mrs Duckworth did obtain a benefit from entering into the  
security documents. She did not obtain a direct benefit in the sense no  
sum of money was paid into a bank account controlled by her which she  
could disperse at will. But Mrs Duckworth was maintained by her  
husband. He provided her with the means to obtain the necessities of life  
and quite a few luxuries as well. The money that was advanced was for  
the purpose of Mr Duckworth's businesses. The health of those  
businesses directly affected Mr Duckworth's capacity to maintain  
Mrs Duckworth. So, in a real, if indirect, sense, Mrs Duckworth obtained  
a benefit from the loan advance.

122 Finally, it is clear Mrs Duckworth knew she was putting up the  
family home as security for the loan and if there was default under the  
loan the property could be taken by the plaintiff. The evidence shows  
Mrs Duckworth had entered into a number of mortgage transactions prior  
to her dealings with the plaintiff. I am satisfied she well knew the  
consequences of a failure to maintain the repayments. There is no  
credible evidence to suggest otherwise. Even if, as she alleges,  
Mrs Duckworth did not read all of the mortgage documents, she must  
have known, in broad terms, what was involved. But given I am not  
prepared to accept any of Mrs Duckworth's evidence except where  
independently verified, I am not prepared to accept she did not read and  
understand the documents.

123 It would seem one element of what is pleaded by Mrs Duckworth is a  
direct claim of undue influence. It is probably raised by the fifth of the



eleven matters to which I have referred. Undue influence was defined by Hodges J in *Union Bank of Australia Ltd v Whitelaw* [1906] VLR 711 in the following terms:

'Influence', as I understand the term in this connection, is the ascendancy acquired by one person over another. 'Undue influence' is the improper use by the ascendant person of such ascendancy for the benefit of himself or someone else, so that the acts of the person influenced are not, in the fullest sense of the word, his free, voluntary acts (720).

124 The only evidence of undue influence in this case is Mrs Duckworth's evidence her husband was prone to shouting. To avoid such shouting matches, she tended to do what he wished. In my view, that is a long way short of what would be required to establish undue influence.

125 But the killer point in this case is the fact of independent legal advice. The principles set out in *Yerkey v Jones* and *Garcia* and in *Amadio* are not some sort of cheat's charter; nor are they a safe harbour for individuals who are wilfully blind and simply refuse to read relevant documents when they are encouraged to do so. The principles are designed to protect the vulnerable. The best way to protect the vulnerable is to make available to them disinterested independent legal advice. That is what has happened here and Mrs Duckworth can have no complaint.

### **The service of default notices issue**

126 The evidence given by Mrs Duckworth eventually disposed of this issue. She admitted receiving the default notices.

### **Sale of 5 Clarecastle Retreat at undervalue**

127 There was simply no evidence the investment property had been sold at undervalue. Mr Gascoigne was not an expert. Moreover, his evidence really was to the effect he would have marketed the property differently. No evidence was produced to suggest any alternative marketing strategy would have made any difference to the ultimate sale price. A mortgagee selling a property must advertise the property and the advertisement should properly describe the property. The mortgagee should act bona fide, but the mortgagee does not owe the mortgagor any duty of care. The obligation of the mortgagee is not to sacrifice the property: see, generally, *Pendlebury v Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676. There is no evidence here of any failing on the part of the mortgagee.

128 It should also be borne in mind, if any complaint as to the sale of the investment property had been made out, it would have been necessary to quantify what loss had been suffered and the amount of the loss could then have been deducted from any judgment sum otherwise owing by Mrs Duckworth to the bank. The securities themselves remain unaffected. No quantification of any loss was attempted.

### **The plaintiff's case**

129 The plaintiff directed its evidence at three main points. First, to establish the sale process for the mortgage property was, in all respects, proper and appropriate and obtained the best price. Second, the fact Mrs Duckworth obtained independent legal advice. This was done by calling Mr Clairs. Finally, and to clarify the one point put against its case in the pleadings, to establish the default notices were properly served. I will go through and deal with each of the witnesses called by the plaintiff, but before I do, I should say something generally about the process by which the investment property was sold.

130 The investment property was owned by Mr Duckworth in his own right. It was purchased as an investment, probably with the intention it would be subdivided. Mr and Mrs Duckworth and their family lived and continue to live at the mortgage property. The investment property was never, at the relevant times, occupied. After Mr Duckworth's default, the plaintiff took possession of the property. That was late in 2009. The plaintiff then moved to sell the property. The sale was handled by Mr Batziolas. Mr Batziolas contacted Mr Peter Duguid, who was a licensee and partner of a real estate agency known as Oceanside First National Real Estate Agency. Mr Batziolas engaged Mr Duguid to make an assessment of the property and propose a marketing strategy. This was done. Mr Duguid ventured his opinion as to the value of the property - in keeping with what one would expect from a real estate agent.

131 Mr Batziolas then engaged two independent firms of valuers to put a value on the property. One of the valuers was Mr Christopher Ian Mackay of Egan Valuers. The other was Mr Andrew James Rasmussen of the Hegney Property Group. Both valuers prepared written valuations which were submitted to Mr Batziolas, but which were not shown to Mr Duguid. Marketing of the property took place in January 2010. It ran for four weeks. The plaintiff engaged an independent auctioneer, Mr Robert John Druitt, to conduct the auction. The morning of the auction, just prior to its commencement, a sealed envelope was handed to the auctioneer with the reserve price. The price was \$1,800,000. This

was the higher of the two valuations which had been obtained. The auction was conducted by Mr Druitt. The property was knocked down to Mr Brett William Meredith, who had no connection with the bank and had no association with anyone connected with the sale.

132 This puts the sale process in perspective. I will now deal with the evidence of each of these witnesses.

### **Bill Batziolas**

133 Mr Batziolas began dealing with the Duckworths late in 2008. Thereafter he spoke with Mr Duckworth from time to time and corresponded with him by email. He says he did not speak with Mrs Duckworth by telephone but he did have some email contact with her. Counsel took Mr Batziolas through an extensive chain of emails commencing around 21 October 2008. Presumably counsel wished to show the course of dealing between the Duckworths and the plaintiff. But for present purposes it is unnecessary to detail the exchanges. It is sufficient if I say the Duckworths were at the commencement of the exchange in default under the loan agreements and remained in default thereafter. From time to time various promises of payment were made by Mr Duckworth. In fact the arrears were never completely cleared.

134 By October 2009 the plaintiff had taken possession of the 5 Clarecastle Retreat property (the investment property) and had decided to sell it. Mr Batziolas asked the Perth office of the plaintiff who they would recommend as an agent (exhibit 252). Two local agents were put forward and Mr Batziolas chose Oceanside First National Real Estate Agency. Mr Batziolas then rang and spoke to Mr Duguid. Thereafter there followed a chain of emails between Mr Batziolas and Mr Duguid. Mr Batziolas asked Mr Duguid for a marketing strategy and Mr Duguid complied. Thereafter matters took the course I have outlined above and eventually the property was sold at auction. The only point I need make along the way is Mr Batziolas confirmed the valuers chosen were selected at random using a computer programme which threw up valuers who were on a panel of valuers used by the plaintiff (ts 374).

135 Mr Duguid did provide Mr Batziolas with a number of photographs taken of the 5 Clarecastle Retreat property (exhibit 476). It shows the property in a run down condition. Mr Batziolas did authorise Mr Duguid to undertake some maintenance to the property including cutting the lawns and returning the green swimming pool to its proper condition. All of this maintenance was paid for by the plaintiff.

136 The only other matter touched upon by Mr Batziolas was a streamline account held in the name of Mrs Duckworth. The statements on this account are exhibit 410. Mr Batziolas indicated at one time a direct debit was set up in relation to payments due to the bank on this account. Mr Batziolas confirmed Mrs Duckworth or someone authorised by her were the only persons who could operate this account.

137 In cross-examination Mr Batziolas confirmed he had no contact with Mrs Duckworth other than by email. His negotiations were in the main with Mr Duckworth. A number of questions were put to Mr Batziolas by Mrs Duckworth in relation to the sale of the property. Nothing of significance resulted from that or any other aspect of the cross-examination.

**Peter Duguid**

138 Mr Duguid confirmed that at all relevant times he was one of four directors of Oceanside First National Real Estate Agency. The agency is based in Mullaloo but operates all up the coast of the northern suburbs. He confirmed he was contacted by Mr Batziolas about the sale of the property at 5 Clarecastle Retreat. He obtained the keys to the property, inspected it and prepared a marketing report. He confirmed the property was in a very bad state of repair. He says the gardens were overgrown, there was graffiti on the internal walls and rubbish lying about. Mr Duguid's 'Comparative Market Analysis Report' is exhibit 474.

139 It is as well to bear in mind just what this document represents. It is not a valuation of the subject property - Mr Duguid is not a valuer. Having inspected the property Mr Duguid produced a series of reports taken from the resources provided by the Real Estate Institute of Western Australia (REIWA). These REIWA reports were generated by entering the address of the subject property (5 Clarecastle Retreat, Mindarie). They were not used by Mr Duguid for any purpose other than to provide general information of what was available and what had been sold in the Mindarie area. There were a number of charts produced and then there was a marketing strategy suggested. All of this material was designed to alert Mr Batziolas as to how Mr Duguid would go about selling the property. The comparative market analysis had no bearing on the ultimate sale price of the property, but it did set out a marketing strategy.

140 Mr Duguid explained how he went about effecting some repairs on the property, how the property was marketed and how he approached the auction. He says he determined an independent auctioneer ought be engaged (Mr Duguid not being a licensed auctioneer) and he suggested

Mr Druitt. He was satisfied Mr Druitt was the right man for the job and he was also satisfied he had performed the task of auctioning the property extremely well.

141 Nothing of significance emerged in cross-examination of Mr Duguid. Some questions were put to him about the prospect of marketing the property to potential buyers overseas. Mr Duguid made the point the property was listed on the internet and suggested potential purchasers residence outside Western Australia could have viewed the property on the appropriate website. Otherwise nothing emerged from cross-examination which would suggest Mr Duguid conducted his marketing of the property in anything other than an exemplary fashion.

142 Mr Duguid was an impressive witness. He came across as a thorough professional who looked upon it as his duty to obtain the best possible price for the property. Whenever there was a question as to how he should conduct the marketing - for instance when Mr Duckworth told Mr Duguid he was trying to negotiate settlement to be made on the property - he reverted to Mr Batziolas for instructions. In fact he took no step that was in any way unauthorised. As it was the price achieved suggests his marketing campaign was successful.

### **Robert John Druitt**

143 Mr Druitt is a licensed auctioneer with an impressive pedigree. He was engaged by Mr Duguid on behalf of the plaintiff to conduct the auction of the property. He confirmed he attended at the property and just prior to the time set for the auction and he was given a sealed envelope which contained within it the reserved price. He noted quite a number of persons were present at the auction and a number of bidders. Eventually it came down to two competing bidders who between them forced up the price beyond the reserve - the reserve Mr Druitt had initially thought might have been difficult to reach. He did not know the purchaser and had not met him before the auction. He did witness the sale documents. He was paid his usual fee for conducting the auction.

144 There was no significant cross-examination.

145 Mr Druitt was again an impressive witness who gave evidence of limited value. Perhaps all that can be said is he was able to confirm the auction was conducted in a proper and appropriate way.

**Brett William Meredith**

146 Mr Meredith was the purchaser of the property. He says he learned sometime prior to the property being listed that a house in Clarecastle Retreat might be subject to a mortgagee sale. He said it was easy to identify the house because of its run down condition. He then approached Mr Duckworth direct. Mr Duckworth showed him through the property and he had some discussion about the possibility of a deal being done between himself and Mr Duckworth. Eventually nothing came of these negotiations. He inspected the property when it was open and he attended at the auction. Prior to the auction he had no idea of the reserve price. His was the winning bid and he signed the purchaser papers which were witnessed by Mr DrUITT.

147 Nothing of significance emerged in the cross-examination. Some questions were put to Mr Meredith about his interaction with Mr Duckworth. None of these questions had any relevance to the matters at issue.

**Christopher Ian Mackay**

148 Mr Mackay is a licensed valuer who was at the relevant time employed by Egan Valuers. Egan Valuers were retained by the plaintiff to provide a valuation of the property prior to auction. Mr Mackay drew up the valuation (exhibit 264). He concluded the value of the property was \$1,750,000. His methodology for reaching that figure is apparent from the body of his report. Beyond saying the report undertook the valuation in the conventional manner, and it appears in all respects thorough, no further comment is required.

149 Mr Mackay was asked about the zoning of the property. He confirmed the zoning was R20 - that is the property could be subdivided into two lots. He noted that would require demolishing the present dwelling on the property. He did indicate he took this zoning into account when reaching his valuation.

150 In cross-examination Mrs Duckworth took Mr Mackay to various properties he had used as comparisons when settling upon his value. Mr Mackay acknowledged the 5 Clarecastle Retreat property was unique. He also pointed out very few properties had both ocean and marina views and that was a factor he took into account. In re-examination Mr Mackay emphasised although the property was subdivisible he thought its highest and best use was as a single residential dwelling. That was the basis upon which he valued the property.

151 Mr Mackay was a thorough professional. He was well across his material and the applicable valuation principles. Nothing emerged to suggest there was any error in his valuation.

**Andrew James Rasmussen**

152 Mr Rasmussen is a licensed valuer and employed by the Hegney Property Group. He had 32 years experience. He produced a valuation which is exhibit 271. He put a value on the property of \$1.8 million. He confirmed the property was in poor condition but was in an excellent location.

153 In cross-examination Mr Rasmussen confirmed the difficulty in valuing the property. He was referred to the following sentence in his report:

There is a lack of directly comparable sales to that of the subject property and there are limited number of properties having direct access to the Mindarie Marina.

He confirmed this was correct. However in no sense did he resile from his valuation.

154 As with Mr Mackay, Mr Rasmussen came across as a thorough professional. Very experienced and with a firm grasp of valuation principles his evidence was not to be doubted.

**Benjamin Murray Archibald**

155 Mr Archibald is a certified practicing valuer employed by the firm Glendinning & Associates. His firm was asked to value the property not by the plaintiff but by a firm known as Debt Crisis Solutions. Mr Archibald's evidence was Debt Crisis Solutions are an organisation for assisting clients to finance their way out of financial hardship. After undertaking the valuation Mr Archibald valued the property at \$2,300,000. He did say on a forced sale basis the sale price was more likely to be \$2 million. His report is exhibit 458. Mr Archibald confirmed he undertook some investigations as to the potential to subdivide the property and took that into account when reaching his valuation.

156 Nothing emerged from cross-examination.

157 Once again Mr Archibald was an impressive witness and, as it turns out, his valuation was closer to the eventual selling price. But all that

does is seek to reinforce the extent to which the selling price was commensurate with what the valuers had to say.

### **Ian Pitt Clairs**

158 Mr Clairs is a legal practitioner who was admitted to practice in 1979. He is a principal of the firm Clairs Keeley. Mr Clairs was first asked to identify the Trust Deed for the Duckworth Children's Family Trust and the document which appointed Duck One Holdings as a new Trustee (exhibit 24). Mr Clairs confirmed he prepared that document. Mr Clairs also confirmed he prepared a further document which was intended to amend the Trust Deed (exhibit 25). Mr Clairs' attention was directed to the fact Mrs Duckworth was described in that document as 'the Trustee'. Mr Clairs expressed the view that description was an error.

159 Mr Clairs confirmed he gave advice to Mrs Duckworth. He was referred to his notes which are exhibit 216 (a typed version is exhibit 215). Mr Clairs confirmed the notes were accurate. He also confirmed by reference to the entry at the top right hand corner of the notes the meeting lasted 36 minutes - six units of six minutes each. Mr Clairs said he did not have a precise recollection of the meeting with Mrs Duckworth. He did say he followed his usual practice and explained the documents in general terms to Mrs Duckworth. In particular he mentioned to her the risks involved in signing the documents. He said (ts 416):

Yes, I made a number of comments. Firstly, in the event of default under the mortgage the house could be sold. I also made a note in my comment that I wasn't giving financial advice and wasn't commenting on the viability of the transaction or Mr Duckworth's ability to pay, and I have made a note that it's risky to enter into these documents (ts 416).

160 Mr Clairs was then taken through the process by which the transferor of 9 Clarecastle Retreat was changed from Duck One Holdings to Mrs Duckworth. Mr Clairs was taken through all of the relevant documents he had prepared and confirmed his involvement.

161 There was one matter which emerged in cross-examination which is of note. Mr Clairs noted under the subheading 'Risky' the following, 'Signed Guarantee and Mortgage'.

162 In fact it emerged Mr Clairs had not witnessed Mrs Duckworth's signature on the guarantees. Her signature was witnessed by one Amanda Higgs. However at no stage did Mrs Duckworth deny signing the guarantees - indeed it is admitted in the pleadings. In my view this error



in Mr Clairs' notes did not in any way compromise his evidence. Indeed having made the point there was an error Mrs Duckworth did not advance any proposition that any other aspect of the notes was incorrect or that Mr Clairs' evidence he had given legal advice to Mrs Duckworth was wrong.

163 Mr Clairs came across as a highly experienced and thoroughly professional solicitor. I am satisfied both from the contents of his evidence and his demeanour in the witness box he took the task of providing independent legal advice very seriously. This was not a complicated transaction. It did involve risks just the same way every finance transaction involves risks. Mr Clairs clearly and carefully explained the risks to Mrs Duckworth. There is no suggestion she appeared agitated or gave any indication she was unable to understand the nature of the transactions being explained to her. The interview took 36 minutes and given the nature of the transactions that seems about right. There was nothing at all in Mr Clairs' evidence to suggest Mrs Duckworth did not receive disinterested careful legal advice which addressed matters of concern to a person in Mrs Duckworth's position.

### **Georgina Annette Shaw**

164 Ms Shaw is a legal assistant at the Commonwealth Bank. It was her job to post out the notices of demand. This she did. She identified her signature on the 'Registered Post - Customer Receipt' form.

165 Ms Shaw was not asked any questions in cross-examination. Given Mrs Duckworth had acknowledged her signature on the postal receipts for the notices of demand the evidence of Ms Shaw did nothing other than confirm what actually occurred.

### **Conclusion**

166 As I have indicated above the plaintiff did not have to lead evidence to establish its case. But any doubts that may have lingered were cleared up by the evidence that was led. In particular the evidence of Mr Clairs put to rest any suggestion Mrs Duckworth did not receive independent legal advice. Mrs Duckworth can have no complaints about this transaction.

167 During the course of her summing up counsel for the plaintiff tendered a document which is headed 'Finding of Fact Contended For'. The document runs to 75 paragraphs. It would have been open to me to make findings of fact consistent with this document. However some of

the findings are unnecessary because they were simply not in issue between the parties. Selecting one fact at random will illustrate the point. At par 21 counsel urges I should make the following finding of fact:

Mrs Duckworth's loan first defaulted in December 2007.

168 That is correct but it is not a matter which was at issue between the parties. The pleadings never challenged the fact Mrs Duckworth's loan was in default. Save for the one minor point as to service of the demands the plaintiff's claims were effectively conceded. So although I have not gone through each of these potential findings of fact and ruled on each one that is not to say I have not given them careful consideration. In fact I would have been prepared to make each one of the findings contended for had it been necessary. However I am satisfied these reasons detail why I have reached the conclusions I have.

169 Based upon a notice produced in closing I am satisfied as at 12 November 2012 the debt owed by Mrs Duckworth under the mortgage was \$2,924,434.15, with interest accruing at the rate of \$528.90 per day. I am also satisfied that as at the same date the debt owed by Mrs Duckworth under the guarantee of her husband's mortgage was \$1,312,606.61, with interest accruing of \$201.39 per day. The plaintiff is entitled to possession of the property at 9 Clarecastle Retreat. Vacant possession of that property should be given within 14 days. Mrs Duckworth should be liable for the costs of the plaintiff. An order for costs may not strictly be necessary as the plaintiff is entitled under the terms of the loan agreement to recover is reasonable costs in pursuing recovery.

170 This is a matter which really should have been disposed of by a summary judgment application. The plaintiff initiated such an application but decided not to pursue it when Mrs Duckworth produced her affidavit (exhibit 397). The plaintiff's position was understandable. Faced with that affidavit and the presumption its contents were true it was most unlikely summary judgment would have been granted. Therein lies the mischief of the affidavit. It led directly to a trial which ran over three weeks, cost a large amount of money and wasted an inordinate amount of time. The affidavit was false in so many respects. For that reason I intend to refer the affidavit and a copy of these reasons to the Western Australian Police Service for further action.

171 The plaintiff should provide a short minute of orders which reflects these reasons.