RECENT DEVELOPMENTS

Battling Big Banks - A View from the Trenches

LEE AITKEN

Barrister-at-Law, Sydney

TRANSCRIPT

I deliberately chose what I hope is a reasonably provocative title, but of course when you consider the position involving battling a big bank, if the mortgagor or the borrower is actually going to litigate against the bank, the bank occupies the moral high ground which is always very comforting for us all to perceive when seeking to recover. The reason it occupies the high ground of course, is because most courts and tribunals, particularly in the commercial area in New South Wales at least, operate on the simple construct that if you borrowed the money and you have spent the money there is no real reason why you should not be told peremptorily to repay the money.

Now that means, of course, that in terms of litigating for the bank, they key rule is to get into a convenient court as quickly as possible - and in New South Wales at least that will always involve, if the considerations are met or the requirements are met, issuing some sort of process in the Commercial Division.

The borrower, of course, will always be looking to attack the lender on the blind side of the scrum, if I can use a football metaphor. When you think about the number of contractual defences available to people who have been lent money, you very quickly realise that much of the law you learnt in contracts at law school is completely irrelevant. It is very rare that an insane or a drunk borrower or an honest factum borrower will wander into your chambers and say that they signed the contract and all the documents under some sort of delusion about what was done. That means, of course, that, when seeking to enforce the bank's documents, we may well be looking at some sort of equitable or trade practices based claim. And it is on the blind side of the scrum in the sense that, from a tactical point of view, of course, the bank will not have any real idea, prior to the initial affidavits of documents being filed by the borrower, precisely what defence is being raised. In other words, it will only be on the first return of any documentation that you will perceive what the defences are likely to be.

In terms of tribunals, as I say at point 1(a) in my notes, (and without any disrespect to it) that the Federal Court is a dangerous tribunal for lenders to be in. It is a dangerous tribunal because, in a sense, the judges there are not case-hardened in terms of the sort of banking matters that come before them. You may well unfortunately draw a wild card element (it has been there in several of the recent banking cases), which will mean that the bank suddenly faces a difficulty.

If acting for the bank, of course, the bank will usually expect and require to get immediate judgment. And from the borrower's point of view, the real object, if possible, is to slow down the bank and increase the time value of the money, and also to impose some sort of psychological burden on those who are acting for the bank, because in my dealings with the credit control team they normally expect the judgment to be entered on the first or second return of the summons unless there is some very good reason to be shown otherwise.

It may well appeal to the borrower to attempt some sort of interlocutory or injunctive relief and you will all be familiar with the technical rules that control whether that is available or not. The rules there are quite technical. Ideally the borrower will be able to point to some sort of fundamental flaw in the document itself which will allow him to invoke the auxiliary jurisdiction of the court in equity which will entitle him to an injunction to prevent the actual enforcement of the security documents. Remember, if the court is only looking at the exclusive jurisdiction of the equity division, that is to say some problem with the way in which the receiver or the mortgagee is going to exercise his powers, then there is a very strong impediment to the borrower being able to impede the bank which is of course the usual rule requiring payment in of any moneys on condition of any equitable relief being granted.

Now, apropos of that, you should note the dangerous decision, I think, from the banks' point of view, in *Eltran v Westpac Corporation*.[1] It is a decision of the Full Court of the Federal Court which seems to suggest that the usual rules with respect to payment in, in terms of a Federal Court action against the receiver or mortgagee, do not apply if relief is being sought pursuant to the *Trade Practices Act*. It is not quite clear how that rule is meant to work in the light of the usual rules concerning equitable relief, but it seems that the court regards the *Trade Practices Act* as providing a species of statutory equity, if you like, to which the normal rules do not apply. Also note, fortunately unreported from the banking law point of view, the *National Australia Bank v Zollo*[2] decision, a decision of a rogue Full Court of the Supreme Court of South Australia, which suggests that the mere impecuniosity of the mortgagor is sufficient reason to prevent the appointment of a receiver. A very dangerous doctrine, of course. You, of course, are going to appoint the receiver to cut off the cashflow, you are going to throttle the mortgagor in terms of litigating by preventing money being raised or generated by the running of a business. *National Australia Bank v Zollo*, which as I said is a Full Court decision, seems to suggest that the fact that this is going to have an unfortunate effect on the litigation from the mortgagor's point of view is sufficient reason in itself to allow him to continue to operate. As I said, fortunately that decision is unreported and presumably will remain unreported, but if that doctrine were to gain general currency, costs of recovering would, of course, skyrocket because every mortgagor is able to point to impecuniosity or lack of available funds to conduct litigation as a valid, and often lachrymose reason for the receiver not being appointed.

Also I notice I have been reminded by a very learned colleague that *Murphy v Abi-Saab* is now reported (at point 1(d)). The usual rule does require payment in - there must normally be payment in if you are looking to prevent the receiver or the mortgagee from selling on the basis that he is going to do a bad job. And I will not get into the area of mortgagees' liabilities and responsibilities today, but obviously the statute - section 420(a) of the *Corporations Law* - and the case law is constantly evolving there.

When you actually confront the borrower you will no doubt be hit by the boilerplate trifecta, as it is affectionately called, a contracts review claim of whatever sort is available under the relevant State legislation, a section 52 claim and an estoppel claim. And from the banks' point of view it is fortunate that the trifecta exists, because in fact this is the very reason the tribunal has become case-hardened. From the borrowers' point of view, it is very difficult for them, given the usual time constraints, to actually be able to set down very clearly and sympathetically the reasons why particular relief should not be granted. And there is a terrible temptation to which I constantly fall prey myself to simply beat up the computer, beat up the last fifteen cases that have been run, and whack in the relevant clauses. That, of course, means that when the matter comes before a tribunal which has heard these matters time out of mind, you are unlikely to be met with a very

1 (1988) 32 FCR 195, 203 per Spender J.

2 Unreported decision of the Full Court of the Supreme Court of South Australia, 2 March 1995.

sympathetic response because you are in fact simply running the same old defence. Certain of the defences, at least in New South Wales, were affectionately known by the leading case - someone is running an "X" defence or a "Y" defence. You are simply copying the precedent. And that generally is not calculated to gain the sympathy of the court because the key thing in litigating, of course, is to make your case distinctive from every other case which has gone before.

Just on that point 2(c), in terms of contract review, you should note the dangerous decision by Mr Justice Bryson in the recent decision of *Smith v Elders Rural Finance*.[3] I understand the appeal has now been heard in that matter. Some of you will be familiar with this decision. It is a case involving rural borrowers who went in to obtain money from the bank and put before the bank a plan which they thought would be effective to amalgamate a number of properties. Unfortunately, because of the downturn in the rural economy, the deal went very sour for them and the bank moved to seek relief under various mortgages and personal covenants to pay. The defence was then run before Justice Bryson, who is a very distinguished equity judge in New South Wales, that in fact the bank erred here because the bank should have told the borrowers that this was going to be an improvident transaction.

It is little bit hard from a detailed examination of his Honour's judgment to determine precisely where the line is drawn between telling someone that they cannot have the money because it is improvident and actually stepping into the arena of advising as to precisely what they should do. Traditionally, of course, in banking litigation, we have always maintained a very clear division between simply lending the money after seeing a proposal and advising someone in terms (for which we normally charge a fee) as to what exactly their best business opportunities are.

The judgment (which I suppose is subject to the *sub judice* rule, so I should not say too much about it) is a dangerous judgment because what his Honour has done effectively is to elide the two categories. I have given you some quotes at the bottom there, or some conclusions he drew. He says first of all, the fact that someone who is advised by a solicitor seeks detailed legal advice is not conclusive against the contract being unjust or unenforceable - that is point 2(c)(i), which is dangerous in itself. Point 2(c)(ii), the financier is under no duty to advise - well that is what we all know of course, and we are all comforted by that. Point 2(c)(iii), the fact that one party (who of course is going to be the borrower) could not see the commercial implications, may be relevant to the grant of relief - well we are starting to get a little more worried when we read that of course. In point 2(c)(iv), his Honour considered various elements and said that, in terms of the Act, he could not "with rigorous completeness" articulate precisely what was involved in it, but it was an unjust loan and therefore liable to be set aside to a very large extent because the loan should not have been entered into - that is to say the bank itself should have realised, or the finance company should have realised, that it was always going to be fully secured and as proved to be the case, there would be no equity left for the borrower when the deal went sour.

I do not know what will happen to that decision - I suspect it will be overturned because it is difficult really to see what distinction there is once you draw that conclusion about the obligation on the lender. It is difficult to see where you stop before imposing a full duty to advise. And of course the full duty to advise is not normally within the ambit of the bank manager or the lender when contemplating entering the transaction.

There is some silver lining, I think, from the lender's point, however, in recent decisions with respect to the section 52 equitable set-off type claim. The section 52 sort of claim involving deceptive conduct on the part of someone will always involve some sort of oral statement made many years before by somebody in authority at the bank to the borrower - a sort of Alan Bond defence, if you have ever read *Bond v Hong Kong Bank*. Someone told me that this loan would not be enforced until my grandmother died and left me a million dollars or something else happened or the crop came in - something like that. It will never be documented of course, but from the bank's point of view it raises horrendous blind side problems, because, of course, it will

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3 Unreported decision, 25 November 1994.

necessitate taking detailed statements from virtually anyone who ever had any dealings with the borrower, ransacking the bank records, producing all sorts of documentation, and then cross-examining somebody who will no doubt evoke the sympathy of even the most case-hardened tribunal when they go into the box and tell a terrible story about just how bad things were. Also of course it will be some memory reconstructed or dredged up from many years before of which there is probably no contemporaneous record kept and of which the relevant bank lending officers will not have any recollection at all - they may not even recall the transaction.

Happily for lenders Mr Justice McLelland is a wake-up, I think, to this line of defence. Once again, perhaps, unhappily at this stage acting for the lender, *Watson v Foxman*[4] is unreported, but it should be reported, I think, because it contains a very significant comment on the credibility of that sort of confection defence. And of course, as I said, any counsel has got nine or ten defences on his machine available to be put in when the facts require - without of course ever making up a defence, I must be clear about that. But we all know that people can come in, not realising that they have got a defence, and suddenly find they have got five defences.

Now Justice McLelland's dictum there is I think a very sinister one for borrowers because it really illustrates that, at least in a professional tribunal used to hearing these sort of defences, there is no real credibility usually to be conferred upon an alleged oral statement unless there is something to back it up. He says:

> "Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken must be proved with a degree of precision sufficient to enable the Court to be reasonably satisfied that they were in fact misleading in the proved circumstances. ... All too often what is actually remembered is little more than impression from which plausible details are then, again often subconsciously, constructed."[5]

Now I think that dictum really could apply to almost every statement which is put on which is not backed up by some written letter of complaint. So, although there is the danger in terms of transaction costs escalating because this defence is very easy to plead (ie that someone misled you or misrepresented the position), this particular approach, if applied across the board, would result, I think, in the longer run, in far fewer claims which lack verisimilitude being advanced. Also, of course, something which people tend to forget all the time, because of the way in which the rules of equity operate in terms of mortgages, the bank always has what I have called the "Gikas advantages" - named after the Court of Appeal decision in *Demetrios v Gikas Dry Cleaning Industries Pty Ltd*,[6] which I mention at point 4.

Usually when someone is trying to unwind one of these transactions they will hope to unwind the whole transaction, so they will be seeking to set aside the debt of $600,000 or $700,000 which has built up over very many years. In fact, of course, assuming it is usually the case that the new money coming in has been used to pay out old debt, the only matter we are ever arguing about is the uplift. The only matter involved is the last say $150,000 or $200,00 when bank "X" was refinanced by bank "Y". And as soon as that is perceived and brought home to the borrower, then it should be really a question simply of negotiating as quickly as possible to obtain possession or payment of whatever moneys are outstanding on the best terms available. In other words, unless the borrower is prepared to try to unwind every transaction into which they have entered, and go right the way back to square 1 - which of course from an evidentiary point of view they can never do - if only the uplift is involved then the rules of equity will require payment in of the underlying amount as it were, the amount which has been paid out, before any relief can be granted.

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4 Unreported decision, 3 August 1996.

5 Per McLelland CJ in Equity in *Watson v Foxman* (unreported 3 August 1995, cited with approval by Rolfe J in *Westpac Banking Corporation v Jury* 21 November 1995).

6 (1991) 22 NSWLR 561.

Now the banks have not been hard enough to do it yet in any possession that I brought, but I would have thought in terms of possession matters in the common law division, for example, in New South Wales, it could be made a condition of any stay being granted that the underlying debt be paid out before any stay is granted with respect to the debt on top, the uplift debt. I do not know how that would sell with the Master, probably not too well. Also, of course, from a PR point of view, it would probably be bad publicity - it would not look too good if the banks were seen to be doing that. I just note it though as a possibility when dealing with an intransigent borrower. That seems to me always available, no one yet seems to have really taken the point. Equally, of course, it is normally possible to appoint a receiver under most bank facilities, even against personal borrowers, without having to go through all the convoluted procedures under the *Real Property Act* to do with selling; section 57 and whatever. People do not seem to want to appoint receivers for, once again I suppose, good PR reasons.

Now a solicitor's position, of course, is a dangerous one when acting for borrowers. There is an increasing tendency, one might almost say an automatic rule these days, that borrowers join their legal advisers who have in some way misadvised them. The reason of course is to provide a further deep pocket against whom some sort of settlement might be achieved. There is a large number of cases looking at the liabilities there which of course turn on the scope of the contract of retainer entered by the solicitor. I will not go into that area in any detail because there has been a very recent detailed article by Mark Sneddon, which unfortunately I did not type onto my handout, which appears in the last *Australian Business Law Review* which looks in great detail and very acutely at the possible liability of solicitors. I cannot remember the citation and I do not know if Mark is here today, but no doubt he will tell us what the citation is. So I would simply commend that article to you.

Another area of difficulty concerns the operation of the "all monies" mortgage at point 6. We have had a recent spate of cases in this area, many of them flowing from Justice Young, an eminent equity jurist in New South Wales, who by a combination of equitable doctrines and contractual interpretation has reached the conclusion that the mortgage, albeit described as an all monies mortgage, is only apt to cover the precise amount which the parties had in contemplation when entering into the debt. That seems like a reasonably fair thing I suppose, except that it runs directly counter to the precise words of the mortgage itself. The mortgage is expressed to be all monies, and the reason you take an all monies security is to be able to ratchet up the debt as various other facilities are advanced, without the need for further costly documentation. The rules there really now I think are basically rules of construction. The court is really saying, "taking all of the background factors into account, what is the position which the parties contemplated would be covered by this particular finance security?". If it is the borrower itself, or himself or herself, who is involved in the new facility, it seems on the cases more likely than not that the court will require that those fresh advances be covered by the mortgage.

Much more problematic, of course, is the situation involving the third party security provider where someone, usually an aged parent who of course is a very sympathetic defendant, has been beguiled into providing further security because some ne'er-do-well son or daughter has turned up and asked them to pledge the family house as additional security for an advance otherwise caught by an all monies facility. And we have had some recent cases on that, the most recent of which is Justice Santow's decision in *Bourke v State Bank of New South Wales*,[7] which makes chilling reading, I think, for all lending officers and those instructing them (at point 6(d)). This is really the classical case where the son, interested in buying his second half of a real estate agency which he was assured was a sure-fire winner, went to his parents and got them to provide further security with respect to further advances under the existing documents which contained an all monies clause and Justice Santow held that only the initial money which they had understood they were securing was actually caught by the mortgage. The bank had to bear the loss with respect to the money which they were induced to cover and induced to secure by the misrepresentation of the son.

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7 (1995) 37 NSWLR 53.

On that front though there has been a rather disturbing trend from the borrower's point of view represented by *Smith's Case*.[8] In that decision the court has come down very firmly against there being any presumption against monies not being secured by the all monies clause. The President, Justice Kirby, says that the matter is purely one of construction and in that particular case which involved quite sophisticated commercial lenders who were really grasping at straws I think, he held that the all monies clause was adequate to cover the facility, and I do not think anyone could cavil with that decision.

What is of significance, unfortunately for those borrowing, is the dicta which the court laid down as well. The court said that in this situation, where you have an all monies clause, the clause will usually operate to cover every amount which is advanced under the various facilities, and we do not need to worry so much about there being any special rule to protect the borrower, because we have a large number of other defences by way of statute, which I have already referred to, and at common law, which the borrower can invoke in order to be able to resist payment under the clause. Now of course in a sense, from a tactical point of view, that is now reversing the onus which had been built up quite successfully in the series of other cases I have mentioned above, the earlier cases, where in fact the all monies clause was really being construed quite restrictively against the bank. *Smith's Case* if pressed to its full conclusion, would mean that the bank would always start on the front foot, in a cricketing sense, and it would then be up to the borrower to attempt to demonstrate that there was some other over-reaching conduct on the part of the bank which justified the clause being read down or restricted. And in terms of the tactics or whatever involved, that represents quite a significant psychological disadvantage for the borrower, I think. Once again, that case could be distinguished because, as I said, the borrower in that case was a large company, a company which obviously knew what it was doing and was relying upon these earlier cases with a view to limiting its potential liability.

Now the final point (I will just ignore point 7 - estoppel), point 8, which I have rather bluntly called "loan with wife as surety" (I am glad my wife is not here today, she is here but she is not here!) raises a very controversial and sensitive issue which is probably too early in the day to discuss given the number of women in the audience, which is whether or not there should be any special rule available to protect in equity the wife's interests when she has been induced to act as surety for a transaction entered into ostensibly on behalf of both husband and wife, but mainly with the husband as the guiding hand.

There has been a great battle going on in the courts at present as to whether or not this basic rule of equity still exists which of course vastly improves the position of the wife and in a sense provides a defence against sexually transmitted debt as it is occasionally called. The usual situation being where the wife has been living the high life and then suddenly things go bad, and of course she knows nothing at all about why the business has turned sour.

Mr Justice Cole in the Commercial Division always had a fairly robust approach to those sort of arguments which involved the wife going down with the ship because, having been on board the ship, there was no particular reason why she should be able to get off the ship when it suddenly hit a reef or taking water. I have done a few matters there before where I have just been commanded to put the wife peremptorily into the witness box, but I should not say the wife that way, the lady to go into the witness box. Now *Yerkey v Jones*[9] still has it adherents because of course we are dealing with a pretty aged and, I would say, not a misogynist court, but you are dealing with some old men considering the law here, and a lot of them hearken back to a situation where - I do not know what the positions are like in their own home front - what the husband said goes in terms of financial matters. So although there has been a politically correct sort of push to get rid of *Yerkey v Jones* entirely, led really by Justice Kirby and a few of the other more enlightened judges on the court, there is a deep provisionist streak there, particularly at first instance, which regards the rule as a very necessary and salutary safeguard with respect to the

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8 *Smith v ANZ Banking Group* unreported New South Wales Court of Appeal decision, 5 February 1996.

9 (1940) 63 CLR 649.

woman's position because no matter the level of academic sophistication, many women as a matter of fact still follow their husbands in terms of what they ought to do in a business sense. And this is really being played out even as we speak.

Not so long ago, in February, *Garcia v National Australia Bank*[10] was argued, a case in which I was involved in the Court of Appeal where Justice Young has really provided a pure *Yerkey* point, if I can put it that way. He gave a forty page judgment, he dismissed every conceivable argument, unconscionability, section 52, duress, etc - all knocked down, I can only get the wife up on *Yerkey*. So of course, the National Australia Bank has seized that as an ideal vehicle to carry forward to the Court of Appeal. It has been argued, there is a lot of dicta in the Court of Appeal in some earlier cases which do not really require it to be said that the rule in *Yerkey* is an old one and a dead one, but that is a question I think, a question we must still ask ourselves. I was led by B F Jackson in that case and he put the matter, as he always does, very eloquently to the court and the court has now reserved for quite some time - so it is obviously causing it some difficulty.

Also note, at the very bottom of the page, *Wynne v Teachers Union*, which is a decision of Justice Hunter. That is also going forward to a Court of Appeal and of course in the Court of Appeal the number of judges has changed, or the constitution of the court has changed because Justice Beasley is now on the court, who of course is our first woman Court of Appeal judge. And I understand that this case is coming forward to the court where Justice Beasley will be one of the judges along with someone else who may be more sympathetic in a sense to people borrowing. So it will be very interesting to see. We should know within about five or six months precisely what the result will be from these recent cases, but I think the matter is still too unclear for argument. I think the special position of the wife as surety in equity is still able to be argued and only time, and presumably a High Court decision at some stage, one matter will go forward to the High Court, will resolve the matter one way or the other.

I must say that although it is often said that *Barclays Bank plc v O'Brien*,[11] which is at point 8(c), is the main House of Lords case of course, conclusively demonstrates that there is no particular special position for the wife. Upon detailed analysis which Mr Jackson engaged in in *Garcia*, it is not nearly as clear-cut I do not think. The case of *Barclays Bank* is itself open to attack on a number of grounds which I will not go into now.

Yesterday when I was listening to Barry Metzger's very informative talk I realised the truth with the old aphorism of course that the more money that is involved the less likely the matter is to come to court. I drew a rather sad conclusion as a litigator from what he said that in very large matters where huge sums of money are involved people are very reluctant to get to court. What I have tried to tell you about this morning are situations where people will fight absolutely tooth and nail in court because the amount of money is so small - they are fighting for their livelihood or their house or whatever, and that is likely to produce all sorts of interesting arguments and technical points out of the woodwork as well as all sorts of defences, some that were even contemplated. Thank you for your attention.

SUMMARY OF POINTS IN SPEECH BY LEE AITKEN

1. Tactical Considerations

(a) Choice of tribunal - Supreme Court or Federal Court?

(b) Seeking injunctive relief - does the complaint made against the mortgagee go to the validity of the mortgage itself of does it merely raise an exclusively equitable claim (eg that

10 Judgment reserved.

11 [1993] 3 WLR 789.

the mortgagee/receiver is going to sell for too little?). Justice Bryson, "Restraining sales by Mortgagees and a curial myth" (1993) 11 *Aust Bar Rev* 1.

Compare the position under the *Trade Practices Act* where relief is sought pursuant to section 82/87.

Eltran v Westpac Banking Corporation (1988) 32 FCR 195, 302 per Spender J.

(c) Appointment of a receiver pending hearing - is this an abuse of process: *National Australia Bank v Zollo* (unreported Full Court of the Supreme Court of South Australia, 2 March 1995).

(d) "Payment in" - *Murphy v Abi-Saab* (unreported New South Wales Court of Appeal, 20 July 1995).

2. Confronting the Trifecta - Contracts Review Act, Section 52 and Estoppel

(a) The legislation is to be construed liberally and beneficially: *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, 631.

(b) If the applicant is *sui juris* "the general policy of the law is that people should honour their contracts": *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1, 9.

(c) "The concept of what is unjust is a wide one and stated at large, with indications of what it involves in the matters which the Court is required to consider in determining it and in the kinds of orders which may be made": per Bryson J in *Smith v Elders Rural Finance* 25 November 1994, unreported (under appeal which has been expedited).

(i) access to legal advice is not conclusive against the contract being unjust;

(ii) financier is under no duty to advise;

(iii) but the fact that one party could not see the commercial implications may be relevant to the grant of relief;

(iv) in *Smith* Bryson J considered the various elements but it was not possible to articulate them "with rigorous completeness";

(v) the contract was substantially unjust in the sense that the loan should never have been entered.

3. Meeting the Counter-Attack - The Section 52/Equitable Set-Off/Popular Homes Cross-Claim

"Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the Court to be reasonably satisfied that they were in fact misleading in the proved circumstances. ... All too often what is actually remembered is little more than an impression from which plausible details are then, often subconsciously, constructed.": per McLelland CJ in Equity in *Watson v Foxman* (unreported, 3 August 1995, cited with approval by Rolfe J in *Westpac Banking Corporation v Jury* 21 November 1995).

4. The Gikas "Advantage": (1991) 22 NSWLR 561

It will usually be difficult to seek to "unwind" more than the most recent transaction - accordingly, the only amount in dispute will be the "uplift" not the entire debt since the borrower is required to do equity if the transaction is set aside: *Demetrios v Gikas Dry Cleaning Industries Pty Ltd.*

See, *McNally v GIO Finance* 14 September 1994, per Cohen J; *CBA v Davridge* 9 November 1995, per Giles CJ.

5. The Solicitor's Position

(a) The solicitor may need to consider whether the mortgagor can meet the obligations under the mortgage: Paragraph 4.14 of the *Code of Practice for Sale and Purchase of Residential Property* 1990.

Waimond v Burn (1989) 1 NSWLR 642, 652.

O'Brien v Hooker Homes Pty Ltd (unreported, Bryson J, 4 June 1993).

Hogan v Howard Finance (1987) ASC 55-594.

Rabelais v Cameron (Hodgson J, unreported, 8 February 1993).

St George Commercial Credit Corporation Ltd v Collins Wallis Properties Pty Ltd (Rolfe J, unreported, 11 February 1994).

(b) Recent cases on the solicitor's certificate:

Monte Paschi Australia v Faro (Rolfe J, 29 April 1993, unreported).

"There is an increasing tendency in litigation in this Division, particularly in cases ... where there was a claim under a guarantee and a claim under a mortgage, for defendants to seek to join solicitors who have given certificates of independent advice. There is also an equally consistent tendency in a number of cases for such claims to be litigated in full."

Pyramid Building Society (in liq) v Walker (Rolfe J, 1 December 1993, unreported).

AGC v Gay (unreported, 20 April 1993, Rolfe J).

(c) "False certificates":

Does not necessarily avoid the insurance policy.

Comino v Manettas (unreported, Court of Appeal, 5 March 1993).

It may be possible for the mortgagee to argue that it is "innocent and ignorant" of the solicitor's default"

Nguyen v Taylor (1992) 27 NSWLR 48, 71.

BFC v Karavas (1991) 23 NSWLR 256, 276-277.

Collier v Morlend Finance Corporation (Vic) Pty Ltd (1989) ASC 55-716; 58,433.

6. The "All Monies" Mortgage - What Does It Cover?

(a) "If there is an all money mortgage the Bank will not be able to claim it is secured to a debt that neither party could sensibly say as at the date of the time the mortgage was taken it was contemplated should be included in the wide words": per Young J in *Williams v State Bank* (7 April 1993, unreported).

(b) It may be necessary to confine the words "by reference to the context in which they appear and by reference to the commercial purpose which they were intended to serve": per Gleeson CJ at 6, 7 in *Fountain v Bank of America National Trust and Savings Association* (unreported, 23 October 1992).

(c) The use of "dragnet clauses": construed narrowly against the mortgagee.

Therefore, only debts of the same type or character as the original debt are secured by the mortgage: *Estoril Investments Ltd v Westpac Bank* (Young J, unreported, 23 June 1993).

Compare other jurisdictions:

Re Rudd and Son Ltd (1986) 2 BCC 98,955.

Catley Farms Ltd v ANZ Banking Group (NZ) Ltd [1992] 1 NZLR 430.

(d) Recent authority:

Re Modular Design Group Pty Ltd (1994) 35 NSWLR 96.

Bourke v State Bank of New South Wales (1995) 37 NSWLR 53.

Smith v ANZ Banking Group (5 February 1996, Court of Appeal, unreported).

NAB v Shenouda (13 December 1995, Master Greenwood, unreported).

7. The Estoppel Argument

Re Ferdinando; Ex parte ANZ Bank (1993) 42 FCR 243.

8. Loan with the Wife as Surety

(a) The bank may be estopped from enforcing the claim against the wife for a further advance made by the bank to the husband without her notice: *Whittel v State Bank of NSW* (Rolfe J, unreported, 16 July 1991).

(b) If the bank gets no substantial benefit then the evidentiary onus moves to the bank to show why the transaction should be enforced against her: *Yerkey v Jones* (1940) 63 CLR 649.

Is this approach paternalistic today?

Warburton v Whiteley [1989] NSW Conv R 55-453, 58,287.

Hall v Westpac Banking Corp (unreported, 8 September 1987).

(c) The English position:

Barclays Bank plc v O'Brien [1993] 3 WLR 789.

CIBC Mortgages plc v Pitt [1993] 3 WLR 802.

(d) The local authority:

European Asian Pty Ltd v Kurland (1985) 8 NSWLR 192, 200.

National Australia Bank Ltd v Casting [1991] ACL WA 1.

European Asian Pty Ltd v Lazich (1987) ASC 57.

Beneficial Finance Corp v Karavas (1991) 233 NSWLR 256.

Moray v Scandinavian Pacific Limited (unreported, Rolfe J, 3 December 1992).

Garcia v national Australia Bank (judgment reserved).

Wynne v Teachers Union (about to be argued).