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The Legal Effects of Incompetent Independent Advice

Michael Robinson, Partner, Simpson Grierson

Incompetent Independent Legal Advice



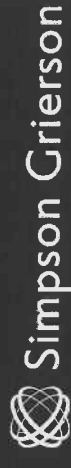
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- Oxymoron or different issues?
- Key difference between judgments
- Correct result?



Mathias



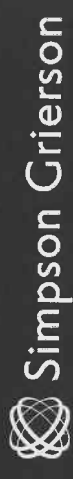
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- Recommended by Blue Chip
- 75% of clients Blue Chip investors
- Never advised against Blue Chip
- Not familiar with documents
- Never advised of legal or commercial risks
- (Inadequately insured)



GE



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- Never knew any of this
- Instructed its own solicitors throughout
- Mathias attended to execution/registration



High Court



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- [304] ... *“Any vulnerability they may have had by virtue of their unfamiliarity with transactions of this kind and any inequality of bargaining power was (or ought to have been) redressed by the availability to them of independent legal advice. The fact that this advice was flawed cannot be relied upon by the Bartles in relation to the issue of unconscionability. GE was entitled to assume that Mr Mathias would provide proper independent legal advice to them since neither AMS nor GE had any reason to suspect that the Bartles were not receiving proper advice.”*

Court of Appeal

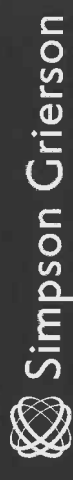


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- Hammond J
“The High Court Judge found as a fact that Mr Mathias was not independent, and there was no cross-appeal against that finding.” (para 94)
- Arnold J
“In short, had Mr Mathias acted as a truly independent adviser it may be that no question of oppression could arise.”
“If the legal adviser does not fulfil role adequately, the oppression remains”.

Supreme Court



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- Advice was independent, notwithstanding incompetence
- GE entitled to assume competence
- No need for further enquiries
- If borrower has independent legal advice, credit contract not oppressive

E W Thomas' Critique



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- Supreme Court's confusion "starkly apparent"
- Independence a matter of fact and degree
- If inadequate, not independent. Oppression remains
- Fact of legal advice relevant to remedy



Thomas' Critique



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- How does lender prevent oppression?
- Remedies?
 - Letting solicitor off lightly?
 - Insurance relevant?
- A just solution?

Other Points



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- Oppressive contracts – strict liability?
- Lenders' duty of care?
- Role of mortgage brokers
- Reform?