



## Précis Paper

### When can a guarantee be set aside for unconscionable conduct?

An interesting discussion about a recent case that considered guarantees and *Amadio* unconscionability.

#### Discussion Includes

- Background and material facts
- Proving unconscionable conduct
- The relative positions of the parties
- The importance of independent legal advice
- Considerations for lenders

## Précis Paper

### When can a guarantee be set aside for unconscionable conduct?

1. In this edition of BenchTV, Jim Harrowell AM (Partner, Hunt & Hunt, Sydney) and Andrew Campbell (Partner, Hunt & Hunt, Sydney) discuss the recent decision of the NSW Supreme Court in *Greentown Bellambi Pty Ltd v Wong* [2017] NSWSC 872.

#### Background and Material Facts

2. Greentown made a claim for a sum of approximately \$8 million plus interest under a guarantee given by the second defendant, Mrs Wong, of money payable by her husband, Mr Wong.
3. The debt owed by Mr Wong came about as the result of a deed of settlement entered into in 2006 between Greentown and Mr Wong and his then-business partner. The settlement deed was entered into in respect of proceedings brought in 2005 by Greentown against the other parties to the deed in relation to a joint venture relating to the development of land. The claims against Mr Wong and his business partner were made under guarantees they had given in respect of money lent to the joint venture by Greentown.
4. In the more recent proceedings, there was some confusion as to the circumstances that gave rise to Mrs Wong being named as a guarantor. The trial judge found that Mr Wong asked Greentown that his business partner be released from his guarantee or that the liability under his guarantee be capped. Greentown's position was that it was prepared to accommodate Mr Wong's request to cap his business partner's liability, but only on the condition that Mr Wong provided a substitute guarantee. Ultimately, Mrs Wong was offered as the substitute guarantor.
5. The key issue in the proceeding was whether it was unconscionable for Greentown to accept the guarantee from Mrs Wong. Of relevance was the fact that Greentown had not specifically asked Mrs Wong to act as guarantor, and had suggested that Mr Wong's brother, who understood business, be the guarantor.

#### Unconscionable Conduct

6. Unconscionable conduct under the general law requires a person to knowingly exploit a "special disadvantage" or "special disability" of the other party: *Blomley v Ryan* [1956] HCA 81; 99 CLR 362; *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; 151 CLR 447. As Deane J explained in *Amadio* (at 474), equity offers relief against unconscionable dealing in circumstances in which:

*(i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it.*

7. The threshold of "special" disability requires more than inequality of bargaining power: *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18; 214 CLR 51 at [11] (Gleeson CJ). As Mason explained in *Amadio* (at 462):

*The disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his [or her] own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.*

8. The onus of proving unconscionable conduct falls on the defendant who seeks to avoid their obligations under the guarantee. Often the claim is made by way of a cross-claim, seeking to set aside the guarantee.
9. *Greentown Bellambi v Wong* differed from *Amadio* because whereas in *Amadio*, the bank/lender had sought a guarantee from the Amadios, the guarantee in this case arose as part of the settlement of commercial litigation, and was not the traditional borrower/lender dispute.
10. There was nothing inherently wrong or misguided about Greentown requiring other security before agreeing to release Mr Wong's business partner from his obligations. The key question was whether it was unconscionable to rely upon a guarantor provided by Mrs Wong, who had no assets of her own. Mrs Wong's case was that Mr Wong provided for all their financial needs, that she left all financial dealings to him, that she trusted him and that she was willing to sign whatever documents she was asked to in relation to his business dealings without reading them or knowing their nature or contents. She gave evidence that she did not read the guarantee or understand its effect. She obtained no gain from the guarantee. The trial judge accepted that she was relatively unsophisticated about financial matters and there was no evidence that she participated in any of the business activities of her husband, or that she had any real knowledge of them.
11. A party in Greentown's position does not need to satisfy themselves that the guarantor can pay the debt themselves. However, the bargaining position between the guarantor, as a

volunteer, and the bank is a factor when considering unconscionability. In this case, it could be argued that Greentown was in the dominant position.

12. The judge considered that the real question in this case was whether Greentown took adequate steps to ensure that the significance of the guarantee was explained to Mrs Wong. A key factor in the judge's determination was the fact that Greentown's representative made it clear that Mrs Wong needed to get independent legal advice. Ultimately, the judge found that Greentown had acted appropriately, finding:

*41. In my opinion, there was no reason in this case for Greentown to doubt what it was told by Mr Wong concerning the question of independent advice for his wife. From the start, Greentown had made it clear that it required Mrs Wong to obtain independent advice in relation to the guarantee. The correspondence between Mr Teo and Hunt & Hunt proceeded on that basis. Greentown was told that the reason that Mrs Wong did not sign the guarantee at the time the Settlement Deed was signed was because she had not obtained independent advice.*

*42. In June 2008, Greentown, through Hunt & Hunt, again made it clear that Mrs Wong's signature would need to be witnessed by an independent solicitor who explained the document to her. Mr Wong replied that, because of time constraints, Mrs Wong's signature would be witnessed and the explanation would be given by Ms Kok who was an in-house counsel with Mr Wong's companies. Ms Kok, in fact, witnessed Mrs Wong's signature. There was no reason in those circumstances and having regard to the history of the matter for Greentown to doubt that Ms Kok had also explained the guarantee to Mrs Wong.*

13. The case therefore indicates that a party is entitled to rely on a representation that someone will get independent legal advice. Moreover, the law will not set aside a guarantee simply because the guarantor entered into an imprudent transaction. A critical factor in this case was the number of occasions on which the Greentown representative and the solicitors for the plaintiff raised the need for Mrs Wong to have independent legal advice. In the end, Greentown had a reasonable belief that Mrs Wong would get and did get independent legal advice. In addition, Greentown was not required to form a judgment about whether the transaction was prudent for Mrs Wong.
14. Finally, Mrs Wong sought initially to argue that Greentown should bear some responsibility if she was overborne or influenced to a detriment by her husband. However, unconscionable conduct must be by the lender, or the party seeking to enforce the guarantee, and case law makes clear that unconscionability by a third party will not be relevant.

## Conclusion

15. The case is important for lenders or for other parties in Greentown's position. It is best for lenders if the party signing a guarantee is legally represented and a certificate can be procured indicating that the guarantor has been properly advised. In the alternative, lenders should ensure that there is a good document trail showing that they have pressed for the guarantor to obtain independent legal advice.

## **BIOGRAPHY**

### Jim Harrowell AM

Partner, Hunt & Hunt, Sydney

Jim practices as a successful litigation and dispute resolution lawyer often appearing as Counsel, specialising in commercial and insolvency law. Jim acts for clients both domestically and internationally in matters ranging from negotiating joint ventures, resolving disputes, mediation, litigation and arbitration. In 2006, Jim was appointed a Member of the Order of Australia for services to international relations, particularly the development of legal and business links with China. Jim holds a Bachelor of Commerce and Bachelor of Laws from the University of New South Wales and was awarded a Doctor of Law honoris causa by UNSW in 2012.

### Andrew Campbell

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Andrew practices as a litigation lawyer, primarily providing advice and representation to government clients in regulatory matters. Andrew also advises and appears for private and corporate clients across a broad range of civil and criminal matters. Andrew holds a Bachelor of Arts from the University of Sydney and a Juris Doctor from the University of Technology, Sydney.

## **BIBLIOGRAPHY**

### Focus Case

*Greentown Bellambi Pty Ltd v Wong* [2017] NSWSC 872

### Benchmark Link

[https://benchmarkinc.com.au/benchmark/banking/benchmark\\_05-07-2017\\_banking.pdf](https://benchmarkinc.com.au/benchmark/banking/benchmark_05-07-2017_banking.pdf)

### Judgment Link

<https://www.caselaw.nsw.gov.au/decision/59546940e4b058596cba8195>

### Cases

*Blomley v Ryan* [1956] HCA 81; 99 CLR 362

*Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; 151 CLR 447

*Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18; 214 CLR 51

### Legislation

*Contracts Review Act 1980* (NSW)

