# UNFAIR CONDUCT IN TAKING GUARANTEES AND THE ROLE OF INDEPENDENT ADVICE

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## I. INTRODUCTION

Increasingly, banks and other lenders are being faced with claims by borrowers, guarantors and mortgagors that their contracts with the lender ought to be set aside on the grounds that the contract or the lender's or borrower's conduct in relation to the contract is unfair. In recent times cases in which sureties have obtained relief from their guarantees or mortgages have proliferated.

Naturally, lenders and their advisers are concerned about this trend and have sought to develop procedures in arranging guarantees and securities which will minimize the risk of those transactions being later set aside or modified by the courts.[1] The hope is that there must be a set of procedural steps which, if

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1 R. Speirs, "Undue Influence and Lending Procedures" (1986) 2 *Banking Law Bulletin* 49.

followed, will make the transaction immune from later challenge. One of the principal elements included in such procedures is that the surety receives independent advice, or at least is urged to take such advice and is given a real opportunity to do so.

It is important to note at the outset that the absence of independent advice does not of itself make a transaction unfair. This article considers whether there can be developed for Australia a procedure to protect a guarantee transaction from the taint of unfairness and in that context consideration is given to the protective or curative properties of the *presence* of independent advice.

Sureties can obtain relief from unfair contracts from several sources. Relief from unfair bargains traditionally has been obtainable in equity, notably through the doctrines of undue influence and unconscionable conduct. Today relief can also be obtained under statutes such as the *Contracts Review Act* 1980 (N.S.W.), s.52A of the *Trade Practices Act* 1974 (Cth) which proscribes engaging in unconscionable conduct, and Part IX of the *Credit Acts*[2] which provides for the re-opening of certain unjust contracts. Section 52 of the *Trade Practices Act* is often used as an alternative source of relief where the unfair conduct is misleading or deceptive. In those States with *Fair Trading Acts* ss.52 and 52A are replicated as State law.[3] In addition the circumstances of a case may permit relief to be obtained on common law grounds such as misrepresentation or mistake.

The typical suretyship arrangements with which this article is concerned involve three parties: lender, debtor and surety. The lender extends financial accommodation to the debtor and the surety (guarantor) typically guarantees the debtor's obligation to the lender. The surety may also provide a security interest in his or her property to secure the guarantee obligation. Alternatively the surety may provide a security interest for the debtor's obligations without entering into a separate guarantee. In many of the cases under consideration the surety has a close family relationship with the debtor (e.g. husband and wife or parent and child) and reposes trust and confidence in the debtor. Alternatively, the debtor may be a company and the surety has a close family relationship with a director or substantial shareholder in the company. It is the close relationship and the trust and confidence which motivate the giving of the guarantee or security and which provide the opportunity for unfair advantage to be taken of the surety.

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2 *Credit Act* 1984 (Vic.), *Credit Act* 1984 (N.S.W.), *Credit Ordinance* 1985 (A.C.T.), *Credit Act* 1985 (W.A.) and the *Credit Act* 1987 (Qld). Part IX deals with the re-opening of credit and related contracts which are unjust. See also s.46 of the *Consumer Credit Act* 1972 (S.A.) and s.22 of the *Consumer Transactions Act* 1972 (S.A.).

3 Thus equivalents of s.52A are found in *Fair Trading Act* 1985 (Vic.) s.11A, *Fair Trading Act* 1987 (N.S.W.) s.43, *Fair Trading Act* 1987 (S.A.) s.57, *Fair Trading Act* 1987 (W.A.) s.11 and *Fair Trading Act* 1989 (Qld) s.39.

Two matters of terminology should be explained at this point. A surety's contract may be one of guarantee or indemnity. In some cases the "surety" is made a co-debtor under the terms of the loan agreement, in others the "surety" is the borrower of record although all parties understand that the proceeds of the loan will be passed as a gift to the "debtor". The terms "debtor" and "surety" will be used in this article to denote the substance of the transaction rather than the form. Thus the debtor is the person who receives the principal and direct benefit of the financial accommodation from the lender and the surety is the person who is liable for the debt although he or she does not receive the direct benefit of the financial accommodation.[4] Also, for the sake of brevity, references to guarantees should be treated as including the variety of suretyship arrangements described above.

Secondly, reference will be made throughout to independent advice without specifying the type of that advice. Traditionally, the independent advice required has been legal advice and almost all the case law concerns independent legal advice. However, as commercial transactions become more sophisticated, a surety may equally need accounting or economic advice to understand the effect of a transaction and the risks involved in it. Although most cases have been and probably will continue to be concerned with legal advice, so as not to exclude other desirable forms of advice from contemplation, the expression "independent advice" will be used.

This article will closely consider, in turn, the application of the equitable doctrines of undue influence and unconscionable conduct and then statutory relief under s.52A of the *Trade Practices Act* to guarantees obtained by unfair conduct. The discussion of s.52A will draw heavily on cases decided under the *Contracts Review Act* 1980 (N.S.W.). In addition some cases under the *Credit Acts* will be considered but there will not be a separate analysis of the provisions of the *Credit Acts* or the *Fair Trading Acts*. Particular emphasis will be given to the role of independent advice in protecting a transaction against the effect of these doctrines and statutory provisions and the qualities of independent advice necessary to afford protection will be discussed. The question whether an invincible procedure for lenders involving independent advice can be developed will be critically examined. A lending procedure that offers maximum protection to guarantees will be proposed and its advantages and disadvantages and the likelihood of its adoption will be canvassed.

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4 The degree to which the surety benefits from the transaction is relevant in assessing whether relief ought to be granted. Thus in cases of undue influence it may be necessary to show that the transaction was manifestly disadvantageous to the surety and in cases of unconscionable conduct a material benefit to the surety may show that the transaction was fair, just and reasonable in all the circumstances.

## II. RELIEF IN EQUITY: UNDUE INFLUENCE

In *Union Bank of Australia Ltd. v. Whitelaw*[5] Hodges J. described undue influence in the following terms:

> Influence 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.[6]

Since the judgment of the Court of Appeal in *Allcard v. Skinner*[7] a distinction has been drawn between two categories of cases of undue influence:[8]

(a) those where influence is presumed from the nature of a pre-existing relationship between the parties to the transaction whereby one is in a position to exercise domination (hereafter referred to as cases of presumed undue influence).[9]
 In cases where undue influence is presumed, the stronger party has the onus of proving that the weaker party did not enter into the transaction as a result of the influence by showing that entering into the transaction was "the voluntary and well-understood act" of the weaker party's own mind.

(b) those where the stronger party's dominance arises not from a pre-existing relationship but from particular circumstances. In such cases there is no presumption of undue influence and the weaker party must prove that the transaction was the result of undue influence exercised by the stronger party (hereafter referred to as cases of actual undue influence).[10]

If it is proved that the transaction was entered into because of undue influence the normal remedy is for the transaction to be set aside and the parties

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5 [1906] VLR 711.

6 *Ibid*, 720.

7 (1887) 36 Ch D 145.

8 *Johnson v. Buttress* (1936) 56 CLR 113, 135-136 per Dixon J.; *Bank of Credit and Commerce International S.A. v. Aboody* [1989] 2 WLR 759.

9 Relationships in which undue influence will be presumed can be divided into two types: relationships within certain established categories where the presumption automatically arises (e.g. doctor and patient, religious superior and inferior) and relationships not within those categories (e.g. husband and wife, bank and customer) where the evidence in the case shows that the particular relationship was one of influence, so as to justify the application of the presumption to the transaction in question.

10 In England, at least, the party complaining of undue influence must also show that the transaction was manifestly disadvantageous to them: *National Westminster Bank v. Morgan* [1985] AC 686 and see *European Asian Bank of Australia v. Kurland* (1985) 8 NSWLR 192 which applied the requirement in Australia, cf. M. Cope, "Undue Influence and Alleged Manifestly Disadvantageous Transactions" (1986) 60 *ALJ* 87, 97.

restored to their original positions. The order to set aside may be made subject to conditions so as to allow justice to be done between the parties.

In most cases concerning undue influence in relation to guarantees, the lender will not have exercised undue influence over the surety directly.[11] Most often it is the debtor who has exercised undue influence, not the lender, and the question is whether the lender is in some way liable for the debtor's conduct. This is an important difference from the doctrine of unconscionable conduct where the lender is usually penalized for its own unconscionable conduct, not that of the debtor. The role of independent advice in unconscionable conduct cases is therefore directed to redressing the effects of the lender's unconscionable conduct. In undue influence cases, independent advice may be directed to redressing the effect of the debtor's undue influence but most often, as shall be seen, it is a device for insulating the lender from liability for the debtor's undue influence.

In *Yerkey v. Jones*[12] Dixon J. analysed the issue of when the lender is affected by the debtor's undue influence by noting that the surety has an equity to set aside the transaction as against the debtor and asking whether that equity in the surety ought to prevail against the claims of the creditor as a possibly innocent third party. More recently Brooking J. in *Budget Nominees Pty Ltd v. Registrar of Titles*[13] echoed this when he put the issue as follows:

> When will an equity to assail a transaction for undue influence prevail as against a third person who has given value?

This broad question of whether the circumstances of the case make it equitable to visit the debtor's misconduct upon the lender is the basal question of principle.[14] In seeking to answer that question the courts have identified common factors which have led to the lender's conscience being bound e.g. (1) *notice* on the part of the lender that undue influence was exerted or that a relationship of undue influence existed between the debtor and the surety, and (2) *reliance* by the lender on the debtor to procure the surety's execution of the guarantee. Other relevant factors are the lender's knowledge of the improvidence of the transaction for the surety[15] and whether the lender believes on reasonable grounds that the surety understood the purport and effect of the

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11 Such cases are rare because the lender usually is not in a relationship of influence with the surety. *Lloyd's Bank v. Bundy* [1975] 1 QB 326 is one case and perhaps the only reported one where a lender exercised direct undue influence over a surety. The relationship of influence arose because the surety was a long-standing customer of the lender.

12 (1939) 63 CLR 649, 684.

13 (1988) V Conv R 63,971, 63,986.

14 In strict theory there are two equities - one binding the debtor's conscience and one binding the lender's conscience - rather than a "transferable equity" as these dicta suggest.

15 *Bawn v. Trade Credits* (1986) NSW Conv R 56,683, 56,691.

transaction.[16] But focussing on such important factors ought not to obscure nor to limit the general nature of the basal question.

It is worth examining the important factors of notice and reliance more closely. Notice is a well established basis for impugning the lender's rights under the guarantee and any security in England and Australia. In *Bainbrigge v. Browne*[17] Fry L.J. stated that the inference of undue influence operated "against the person who is able to exercise the influence ... against every volunteer who claimed under him, and also against every person who claimed under him with notice of the equity thereby created, or with notice of the circumstances from which the court infers the equity".[18] In *Bank of New South Wales v. Rogers*[19] the High Court held that the lender was fixed with notice of the circumstances giving rise to a presumption of undue influence exercised by the debtor and hence it was for the lender to establish that the security given by the surety was "free from undue influence and was the voluntary and well-understood act of her mind".[20] This could have been done by providing a full explanation of the transaction and the circumstances of the debtor's financial position.

Reliance by the lender on the debtor to procure the guarantee has been used to impose upon a lender the consequences of the debtor's undue influence in a number of cases. Reliance as a basis had its roots in two cases early this century which involved a wife guaranteeing her husband's debt. In *Chaplin and Co. Ltd v. Brammall*[21] Vaughan Williams L.J. held that the lender, by leaving it entirely to the husband to procure the wife's signature, had to take the consequences of him having obtained it without explaining the documents to her or her understanding what she was signing.[22] In *Turnbull & Co. v. Duval*[23] the husband exercised undue pressure upon his wife to procure her guarantee. The lender was held liable for the husband's acts because it had "left everything" to the husband.[24] The English cases have described this basis for affecting the lender with the debtor's undue influence as one of "agency". It is submitted that "reliance" is a preferable description for this basis because the better approach is to hold the lender affected on the basis of its *reliance* on the debtor to procure the surety's agreement rather than on the basis that the lender constituted the debtor its agent for that purpose. The question is whether an equity in the guarantor should prevail against the lender and the panoply of agency law is not helpful in deciding whether the lender's conscience is bound

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16 *Yerkey v. Jones* (1939) 63 CLR 649, 686.

17 (1881) 18 Ch D 188.

18 *Id*, 196-197.

19 (1941) 65 CLR 42.

20 *Id*, 55 per Starke J.

21 [1908] 1 KB 233.

22 *Id*, 238.

23 [1902] AC 429.

24 *Id*, 435 per Lord Lindley.

by that equity. Commonly these reliance cases have involved a wife guaranteeing her husband's debt, but liability on this basis is not confined to the relationship of husband and wife. In *Avon Finance Co. Ltd v. Bridger*[25] the English Court of Appeal held that the "agency" principle ought to be extended to other relationships where it was equally obvious that the possibility of influence existed. In that case the lender bore the consequences of undue influence exercised by a son, a chartered accountant, on his elderly parents. In *Budget Nominees Pty Ltd v. Registrar of Titles*[26] the lender was held to be affected by the undue influence of the sureties' family accountant who induced the sureties to mortgage their properties as security for a loan to a company controlled by the accountant. The accountant attended to all the documentation and was held to be the agent of the lender.

In Australia, cases such as *Turnbull & Co. v. Duval and Chaplin and Co. Ltd v. Brammall* have also led to the development of a separate, special principle for wives who guarantee their husbands' debts.[27] The benefit of this special principle is confined to wives. The special principle for wives developed from the same root as those cases imposing liability on a lender for the undue influence of the debtor husband on the basis of reliance but it goes further than those cases because it affords relief in circumstances where the doctrines of undue influence and unconscionable conduct would not.[28]

## A. THE FACTORS OF NOTICE AND RELIANCE/"AGENCY": CONTRASTING THE ENGLISH AND AUSTRALIAN APPROACHES

Recent English decisions seem to have lost sight of the general nature of the basal question of equity as to when the lender's conscience is bound and have narrowed the general inquiry into two independent tests. The English Court of Appeal in *Bank of Credit and Commerce International S.A.* v. *Aboody*[29] held that a lender could be affected by the debtor's undue influence only on one or other of two independent bases: notice or "agency".

### *1. Notice*

In *Aboody's Case* it was held that if the lender has actual or constructive notice at the time of execution of the documents, that the transaction has been procured by the exercise of undue influence, the lender cannot enforce the transaction. The requisite notice depends on the nature of the undue influence alleged. In a case of actual undue influence, the lender must have notice of the

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25 [1985] 2 All ER 281 (decided in 1979). See also *Coldunell Ltd. v. Gallon* [1986] 1 QB 1184 and *Bank of Baroda v. Shah* [1988] 3 All ER 24 where the extension of the agency principle to other relationships was accepted but agency was not established on the facts.

26 (1988) V Conv R 54,311.

27 *Bank of Victoria Ltd v. Mueller* [1925] VLR 642, *Yerkey v. Jones* (1939) 63 CLR 649.

28 *Yerkey v. Jones* (1939) 63 CLR 649, *Warburton v. Whitely* [1989] NSW Conv R 55,453.

29 [1989] 2 WLR 759.

circumstances alleged to constitute the actual exercise of undue influence. In a case of presumed undue influence, the lender must have notice of the circumstances from which the presumption of undue influence is alleged to arise. This analysis of "notice" is consistent with the Australian cases in which notice of undue influence is the only basis for binding the lender's conscience, although it may be arguable that the Australian courts are more generous in finding that a lender has actual or constructive notice of facts showing actual undue influence or a relationship of influence[30].

*2. Agency: The English View*

In *Bank of Credit and Commerce International S.A. v. Aboody*[31] the Court of Appeal held that if the debtor, while acting on the lender's behalf, exerts (or is presumed to exert) undue influence on the surety, and that undue influence brings about the transaction, then in equity the bank is affected by the wrongful acts of its agent. Although the Court said that in using the word "agent" it was not treating the lender as being vicariously liable for the acts of the debtor, the Court did describe its approach as being "in accord with the approach of the general law of principal and agent in relation to fraudulent misrepresentations made by an agent in carrying out the specific instructions of his principal."[32] There is thus scope for confusing this basis of liability with the common law of principal and agent.[33]

Perhaps because of the use of common law agent and principal terminology, the English courts consider that "agency" liability can be avoided fairly easily. Whether the debtor is the agent of the lender for the purpose of obtaining the surety's execution of the document is a question of fact. In *Bank of Baroda v. Shah*,[34] agency was not established because although the lender's solicitors sent the documents directly to the debtor's solicitors they did so in the honest but mistaken belief that those solicitors were acting for the surety. The mistaken belief meant that there was no intention to leave everything to the debtor and hence no agency liability. In *Coldunell Ltd v. Gallon*[35] the lender's solicitors had sent the documents directly to the surety and in a covering letter urged the surety to take independent advice. The surety never saw the covering letter and only saw the documents when his son, the debtor, presented them for signature. The Court of Appeal held that, although the letter and documents had not

30 *Budget Nominees* (1988) V Conv R 54,311 and *Broadlands Finance v. Sly* (1987) NSW Conv R para. 55-342.

31 [1989] 2 WLR 759.

32 *Bank of Credit and Commerce International S.A. v. Aboody* [1989] 2 WLR 759, 787.

33 In *Budget Nominees* at 63,988 Brooking J. assumed, without deciding, that this reliance basis of liability in equity could arise only where the debtor was acting as the lender's agent according to the common law of principal and agent.

34 [1988] 3 All ER 24.

35 [1986] 1 QB 1184.

followed their intended course, the intention to send them directly to the surety and the urging to take independent advice had removed any basis for saying that the lender had constituted the debtor its agent for the purposes of having the documents executed.

In *Aboody's Case*, agency was not established because the Bank required Mrs. Aboody to attend in person at the bank and execute the documents in the presence of an officer of the bank. This fact meant that the bank had not "left everything" to Mr. Aboody and hence he was not the bank's agent. Similarly, in *Midland Bank v. Perry*[36] the surety's consent was obtained by her husband (the debtor) and the surety attended at the bank to sign the documents. At that time the manager gave her a deficient and negligent explanation of the transaction. The court's analysis relied heavily on whether the bank had equipped the husband with actual or ostensible authority to obtain the wife's signature. It concluded that there was no agency liability.[37]

The decisions in *Aboody's Case* and *Perry's Case* on this point should be contrasted with the decisions in *Avon Finance Co. Ltd v. Bridger*[38] and *Barclays Bank plc v. Kennedy*.[39] In those cases the surety attended at the lender's office, at the behest of the debtor, to execute the documents and no explanation was offered concerning the documents. In both cases it was held that the debtor had acted as the lender's agent in procuring the consent of the surety and the lender was accordingly liable.

It is in this context of avoiding agency liability for undue influence that the English Court of Appeal in *Coldunell Ltd v. Gallon*[40] gladdened lenders' hearts by laying down a protective lending procedure in the following terms:

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36 [1988] 1 Family Law Reports 161.

37 Fox L.J., who delivered the leading judgment, held that the bank was not liable on the basis of agency because there was no ostensible authority (the bank never held out the husband as its agent for any purpose) and no actual authority - the bank merely asked the husband to ascertain whether the wife would be agreeable in principle to the charge. It will be argued below that the Australian approach is quite different (and preferable) in seeking to determine whether the lender's conscience was bound by the debtor's acts. Surely the correct inquiry in a case like *Perry's Case* is not whether the bank has furnished the husband with actual or ostensible authority to procure the wife's consent or signature on the bank's behalf. The correct inquiry is whether the bank has so relied on the husband to obtain the wife's consent and signature that the bank's conscience is bound by the means the husband used to do that. The issue is not whether authority was furnished but whether the bank was content to sit back and let the debtor procure the surety's agreement by any means. The bank can displace liability on the basis of reliance by showing it did not rely only on the debtor but sought to neutralise any undue influence of the debtor by making its own explanations or requiring the surety to take independent advice.

38 [1985] 2 All ER 281.

39 [1988] *New Law Journal (Case Reports)* 334.

40 [1986] 1 QB 1184.

> It may well be that ... the only absolutely sure way of ensuring that a guarantee or charge from a third party is valid is to insist on that party being independently advised. But the fact is that no lender can ever be absolutely sure that a guarantor is not being subject to pressure from the principal debtor, and to require him to do more than properly and fairly point out the desirability of obtaining independent advice, and to require the documents to be executed in the presence of a solicitor, is to put upon commercial lenders a burden which would severely handicap the carrying out of what is, after all, an extremely common transaction of everyday occurrence.[41]

The *Coldunell Case* sets out a three step protective procedure: (i) the lender sends the documents directly to the surety and (ii) urges the surety to take independent advice and (iii) requires that the documents be executed in the presence of a solicitor.

It is clear that in England agency liability will not be established where the lender has communicated directly with the surety and has either itself explained the contents and effect of the documents to the surety or has ensured that the surety obtained independent advice before executing the documents.[42] Even if the lender merely sends the documents direct to the surety, urges that independent advice be taken without checking that it has been and requires that the documents be executed in the presence of a solicitor then, in the absence of any other relevant facts, it would seem no agency exists.[43]

Thus, it can be seen that the English cases have severely limited the scope of the reliance basis of liability originally developed in *Turnbull & Co. v. Duval* and *Chaplin and Co. Ltd v. Brammall.* It may be doubted whether the English limitations on this basis for liability of the lender represent the law in Australia. If they do not, then the *Coldunell* dicta will not apply in Australia even in their particular context of protecting the lender from agency liability for undue influence of the debtor.

### *3. Reliance: The Australian View*

In Australia the most thorough analysis of the circumstances in which the equity of the surety will prevail against the lender is that of Dixon J. in *Yerkey v. Jones.*[44] *Yerkey v. Jones* involved the special principle for wives mentioned above. This principle offers a wider scope for relief to wives than undue influence so that conduct by the husband falling short of undue influence in the

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41 Id, 1201 per Oliver L.J. See also Purchas L.J., 1208-1209.

42 For example by requiring a solicitor's certificate that such advice had been given before the documents were executed.

43 Read in its context, it is apparent that the Coldunell dicta is concerned only with avoiding agency liability for the debtor's undue influence. It is not a general protective procedure for all undue influence liability.

44 (1939) 63 CLR 649, 683-690. For a summary of Dixon J.'s analysis see Cope, note 10 *supra*, 228-230. Dixon J.'s analysis relates to a wife acting as surety for her husband but, as argued above, it is thought the analysis would now apply equally to other relations.

full sense still could give rise to an equity to set aside the transaction.[45] Nevertheless, the question as to when the equity in the guarantor should prevail against the lender arises for both the special principle for wives and the doctrine of undue influence proper and the issues of policy and principle in fixing the lender with the consequences are the same for both. Accordingly it is submitted that the analysis of Dixon J. is equally applicable in this regard to the special principle and to cases of undue influence proper.

Dixon J. described three sets of circumstances in which the interests of surety and lender had to be balanced. In the first instance, the surety understands the nature and effect of the obligation being undertaken but her consent is procured by the debtor's undue influence, affirmatively proved. In this instance, if the lender otherwise leaves it to the debtor to obtain the surety's consent, the fact that the lender deals directly with the debtor and explains the transaction to the debtor will not protect the lender. Nothing but independent advice or relief from the ascendancy of the debtor over the surety's judgment would suffice. Plainly if the surety understands the transaction already, a good explanation of it advances the position no further. It is implicit that the independent advice required by Dixon J. in this instance must go beyond explaining the effect of the transaction to canvass the propriety of the transaction for the surety.

In the second instance the surety does not understand or misunderstands the content or effect of the documents and this is the substantial or only ground for impeaching the transaction. In this instance the lender's liability will turn on the amount of reliance placed by the lender on the debtor to inform the surety of the content and effect of the obligations being undertaken. If the lender takes the responsibility out of the debtor's hands by itself providing an adequate explanation or ensuring that the surety received competent independent advice then it would be highly unlikely that the transaction would be set aside. Given that lack of understanding of the transaction is the problem, a lender which reasonably believes that problem should not exist because it took steps to provide a good explanation will almost always be protected.

The third instance is, perhaps, the most common. Again there is misunderstanding or lack of understanding by the surety but this is caused by or coupled with some pressure, surprise or misrepresentation by the debtor (which, however, falls short of undue influence in the full sense). In this instance the question is whether the lender has reasonable grounds to believe that the document was (i) fairly obtained and (ii) executed by a surety who sufficiently understood the purport and effect of the document.[46] In answering that

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45 In *Yerkey v. Jones* Dixon J. at 683 expressed the principle as follows: "if a married woman's consent to become a surety for her husband's debt is procured by the husband and without understanding its effect in essential respects she executes an instrument of suretyship which the creditor accepts without dealing directly with her personally, she has a prima facie right to have it set aside".

46 (1939) 63 CLR 649, 686.

question, explanations of the transaction by the lender and the presence of independent advice will be highly relevant. The facts in *Yerkey v. Jones* itself were in the nature of the third instance. A wife guaranteed her husband's obligations under a contract for the purchase of land while under some pressure from her husband not amounting to undue influence. The vendor's solicitor gave an adequate and understandable explanation of the contract. Dixon J. held that the vendors and their solicitors believed on reasonable grounds that the wife had understood the substantial effect in all material respects of the obligations she was undertaking. That being so there was no equity to have the transaction set aside as against the vendors.

The three instances described by Dixon J. do not cover the entire range of variations of the factors mentioned. Nevertheless they are helpful in directing attention to the test of whether the lender had reasonable grounds to believe that the document was fairly obtained and executed by a surety who sufficiently understood the purport and effect of the transaction.

The Dixonian analysis diverges from the English analysis in two respects. First, Dixon J. did not envisage liability on the basis of reliance being as readily avoided as the English Court of Appeal does. It is apparent that it is the lender's reliance on the debtor to obtain the surety's *agreement to the transaction*, not just the actual *execution* of the document, that is crucial to Dixon J.[47] By contrast the Court of Appeal in *Coldunell* and *Bank of Baroda* stressed the lender's reliance on the debtor to secure the surety's execution of the documents with the consequence that if the documents are sent direct to the surety or the surety's solicitors for execution with an exhortation to get independent advice, there is no agency liability. Now, there may or may not be agency liability in such circumstances but its presence or absence ought not to depend principally on whether the post office or the debtor conveys the documents to the surety. The approach of Dixon J. in focussing on the debtor's role in obtaining the surety's agreement to the transaction seems more sensible. If pressure or misrepresentation is used at that point, direct mailing of the documents for execution will do little to cure it. Similarly, if at the time of execution of the documents the lender deals directly with the surety whose consent to the transaction has been obtained by undue influence of the debtor, that in itself will not cure the undue influence. Some explanation or counsel by the lender to the surety is needed to make a difference. On this point, the decisions in *Avon Finance Co. Ltd v. Bridger*[48] and *Barclays Bank plc v. Kennedy*[49] are to be

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47 For example, in his first instance, Dixon J. would have held the lender to be affected by the debtor's actual undue influence in obtaining the surety's agreement to the transaction even if the lender dealt directly with the wife on the occasion of the execution of the document and fully explained the effect of the document to her. The English approach would consider agency negatived in these circumstances.

48 [1985] 2 All ER 281.

49 [1988] *New Law Journal (Case Reports)* 334.

preferred over the decisions in *Bank of Credit and Commerce International S.A. v. Aboody*[50] and *Midland Bank v. Perry*.[51]

Under the Dixonian approach reliance liability is not necessarily negatived merely by sending the documents direct to the surety for execution, or by the lender dealing directly with the surety at execution, or by the lender merely urging independent advice. The lender must have reasonable grounds to believe the document was fairly obtained from a surety who sufficiently understood the purport and effect of the document. Thus if adequate independent advice was actually obtained, that would negative reliance liability.[52]

The second divergence between the Dixonian analysis and the English analysis is that the Dixonian analysis suggests a more flexible test for liability of the lender. Dixon J. sets out to answer the basal question of principle: when does the equity of the surety to have the transaction set aside as against the debtor prevail against the lender? That is a question of equity and, hence, conscience. In determining whether the lender can, in good conscience, have the advantage of the debtor's misconduct, many factors need to be weighed together. Two important factors are the lender's knowledge of actual undue influence or circumstances indicating the potential for undue influence and the degree of reliance which the lender placed on the debtor in obtaining the guarantee. Other factors such as whether the lender knows of the improvidence of the transaction for the surety and of any lack of understanding of the documents by the surety will also be relevant. The question of when the surety's equity ought to prevail against the lender should be asked and answered as a whole. It is a mistake to pare it down to two independent questions - was there agency or was their notice - and answer these separately. The lender's conscience may be held to be affected by the debtor's conduct by many combinations of reliance and knowledge in different degrees. To move from a wide inquiry that permitted varying combinations of two key elements and other factors and substitute two narrow and independent tests based on those two key

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50 [1989] 2 WLR 759.

51 [1988] 1 Family Law Reports 161.

52 In *Midland Bank v. Perry* [1988] 1 Family Law Reports 161, 169 Lloyd L.J. attempted to reconcile the views of Dixon J. with the approach of the English Court of Appeal. His Lordship quoted Dixon J.'s first instance, which involves adequate understanding by the surety and proved undue influence by the debtor. In Dixon J.'s view the fact that the lender deals directly with the surety at the time of execution of the document and explains the document to her will not save the transaction, only actual independent advice will suffice. Lloyd L.J. said that before this conclusion followed, the surety must be able to show that the debtor was acting as agent of the lender. But on the English view, if the lender deals directly with the surety at the time of execution of the documents and explains the transaction, agency liability can never arise, so that Dixon J.'s first instance is an empty category. Clearly the two approaches are inconsistent and Lloyd L.J.'s attempt to reconcile them is unpersuasive.

elements will produce different results. It is submitted that the English approach has gone too far in preferring certainty to fairness of outcome. By contrast, the Dixonian approach is a more flexible test which is truer to the underlying issue in equity. True, the Dixonian approach does not achieve the same degree of certainty of outcome. But a lesser degree of certainty is the price of equity's insistence on standards of fair dealing. The Dixonian reasoning is much more consistent with equity's concern whether the lender's conscience should be held bound than the approach in *Coldunell* which simply elevates a convenient rule of lending practice into a rule of law.

*4. The Coldunell Dicta in Australia?*

It follows that the three step protective procedure laid down by the Court of Appeal in *Coldunell* cannot be safely relied on by lenders in Australia as a cure-all for undue influence by debtors.

First, it must be noted that even in terms of the English analysis, the *Coldunell* procedure only protects the lender against agency liability. A lender who follows the dicta in *Coldunell* may still have notice of actual undue influence or of circumstances from which undue influence will be presumed and will be tainted by that undue influence. In *Aboody* it was held that there was no agency liability but the bank, through a solicitor it had retained to independently advise Mrs. Aboody about the transaction, had notice of actual undue influence exercised by her husband, the debtor, and so would have been liable to have the transaction set aside but for the absence of manifest disadvantage.

Secondly, it is submitted that the *Coldunell* procedure will not protect the lender, in Australia, against liability imposed on a reliance basis because it is flawed in principle. The analysis underlying the *Coldunell* dicta is inadequate to answer the basal question of principle: when does the equity of the surety to have the transaction set aside as against the debtor prevail against the lender? That question is not apt to be answered by an agency law analysis.

The correct test in Australia is to be drawn from the formulation by Dixon J. in *Yerkey v. Jones*[53]: did the lender have reasonable grounds to believe that the consent to the transaction and the execution of the document were fairly obtained from a surety who sufficiently understood its purport and effect? The test directs attention to the reasonableness of the lender's belief that the surety understood the document and that the surety's consent to it was fairly obtained. Will following the *Coldunell* procedure give grounds for such a belief? If the lender reasonably believed that adequate independent advice was obtained by the surety, that will be sufficient. But to simply urge the obtaining of independent advice would not, of itself, give the lender the requisite reasonable grounds to so believe. If to the urging was added the requirement that the document be executed in the presence of a solicitor, the case is stronger but only because of the *inference* that the witnessing solicitor provided the suggested

53 (1939) 63 CLR 649, 686.

advice. Of course this may not be the case. The procedure suggested in *Coldunell* cannot be relied on to protect the lender from the consequences of the debtor's undue influence. An alternative protective lending procedure, effective in Australia, will be proposed after examining the doctrine of unconscionable transactions.

## III. RELIEF IN EQUITY: UNCONSCIONABLE TRANSACTIONS

The equitable jurisdiction to set aside unconscionable transactions has been long established. It was described by Kitto J. in *Blomley v. Ryan*[54] as applying when two elements are present. First, one party to a transaction is at a special disadvantage in dealing with the other party (for example because of illness, ignorance, unfamiliarity with the language used or financial hardship) and secondly, the other party unconscientiously takes advantage of the opportunity thus placed in his hands. This formulation was approved by the High Court in *Commercial Bank of Australia v. Amadio*[55] where the doctrine was applied to set aside a mortgage and guarantee given in favour of a bank by an elderly migrant couple. Since *Amadio* there have been many claims for relief by guarantors on the basis of unconscionable conduct by the lender, often allied with a claim of misleading conduct under *Trade Practices Act* s.52.[56]

If the transaction is held to be unconscionable, the normal remedy is for the transaction to be set aside in whole or in part and on conditions if necessary to do justice between the parties.

Undue influence and unconscionable transactions (or unconscionable conduct) are related but distinct doctrines of equity. The doctrine of undue influence affords relief where the will of the innocent party is not independent and voluntary because it is overborne. The doctrine of unconscionable conduct provides relief where the will of the innocent party, whether or not independent and voluntary, is the result of the disadvantageous position in which he or she is placed and the unconscientious advantage taken of that position by the stronger party.[57]

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54 (1956) 99 CLR 362, 415.

55 (1983) 151 CLR 447. Mason, Wilson and Deane JJ. set aside the transaction on the ground of unconscionable conduct. Gibbs C.J. did not consider that ground to be made out but held that the transaction should be set aside because the lender did not disclose certain unusual features of the transaction when it was under a duty to do so. Dawson J., dissenting, would have upheld the transaction.

56 E.g. *National Australia Bank v. Nobile and Martelli* (1988) ATPR 40-856 and *Money v. Westpac Banking Corporation* (1988) ATPR 46-034.

57 Per Mason J. in *Commercial Bank of Australia v. Amadio* (1983) 151 CLR 447, 461; per Deane J., 474; cf. I.J. Hardingham, "Unconscionable Dealing" in Finn (ed.) *Essays in Equity* (1985) 17-19.

A distinction has been drawn between two types of unconscionability: procedural and substantive. Procedural unconscionability refers to unfairness in the bargaining process and the method of making the contract. Substantive unconscionability refers to unfair terms in the contract or unjust effects of the operation of the contract. The two types of unconscionability will often be present together because unfairness in the bargaining process often results in one-sided contract terms. The distinction originated in an analysis by Professor Leff of the unconscionability provision in s.2-302 of the *United States Uniform Commercial Code.*[58]

The classic equitable doctrine as described in *Blomley v. Ryan* and *Amadio* is concerned with procedural unconscionability; the methods used to make the contract. Relief from substantive unconscionability normally must be looked for under statute, not in equity. In the United States it appears that equity may grant relief for one type of substantive unconscionability - an overall gross imbalance in the rights and duties of the parties under the contract[59]. In Australia the better view appears to be that inadequate consideration or other unfair terms do not of themselves make a transaction unconscionable but will evidence the relationship of special disadvantage or the unfair taking advantage which constitute procedural unconscionability.[60]

The circumstances which may constitute a special disadvantage may take a wide variety of forms and cannot be exhaustively listed.[61] In *Amadio's Case* the justices had regard to the age of the sureties (76 and 71 years), their limited grasp of written English, their lack of relevant business experience, their misunderstanding of the extent of their liability under the guarantee and their mistaken belief that the debtor company's business (controlled by their son) was flourishing and their reliance on their son's financial advice and judgment.

The unconscientious taking advantage in *Amadio's Case* consisted in the bank manager proceeding with the transaction while knowing of the Amadios' situation of disadvantage and doing nothing to seek to correct it.[62] Indeed, if the manager was aware of a *reasonable possibility* that the Amadios were unable to make a judgment as to what was in their own best interests because of their position of special disadvantage, and still proceeded with the transaction without making inquiry or disclosing necessary facts or counselling them to

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58 Leff, "Unconscionability and the Code - The Emperor's New Clause" (1967) 115 *U Pa L Rev* 485.

59 *Id*, 538.

60 See *Blomley v. Ryan* (1956) 99 CLR 362, 405 per Fullagar J. Of course, the more readily inferences of procedural unconscionability are drawn from apparently unfair outcomes, the closer the courts move to de facto adoption of substantive unconscionability: see Duggan, Begg and Lanyon, *Regulated Credit - the Credit and Security Aspects* (1989) 537-539.

61 Per Deane J. in *Amadio* (1983) 151 CLR 447, 462-463.

62 *Ibid*, 479 per Deane J.

take independent advice, the bank would be guilty of unconscionable conduct.[63] It was held that the manager knew or ought to have known that the Amadios did not understand the extent of their liability under the guarantee and that they had a mistaken belief as to the financial soundness of the debtor company. In fact the bank and the son had been colluding to selectively honour and dishonour cheques to give the company the appearance of solvency, thereby giving credence to the mistaken belief.

Once the two elements of a special disadvantage and an unconscientious taking advantage are established, the transaction will be set aside unless the party seeking to uphold the transaction can prove that the transaction was, in all the circumstances, fair, just and reasonable[64].

## A. DIRECT AND INDIRECT LIABILITY FOR UNCONSCIONABLE CONDUCT

In cases of guarantees obtained by unconscionable conduct, the liability of the lender has almost always been for its own unconscionable conduct, not for unconscionable conduct by the debtor. In *Borg-Warner Acceptance Corporation (Australia) Ltd v. Diprose*[65] the lender was held liable for the "inequitable acts" of the debtor (their inequity was determined under the doctrine of unconscionable conduct) on the basis that the lender had left it to the debtor to obtain the signature of the surety (the debtor's wife) without taking proper safeguards. That is, liability was imposed on the lender on a reliance basis. In *Broadlands International Finance Ltd v. Sly*[66] the lender was held liable for conduct by the debtor, which could have qualified as undue influence or unconscionable conduct, on the basis that the lender's solicitors had constructive notice of the equitable fraud perpetrated by the debtor on the surety. Here liability was imposed on the lender by virtue of constructive notice to the lender's solicitors. Whether the introduction of indirect liability of a lender for a debtor's unconscionable conduct will much extend the scope of a lender's liability is questionable. It may be that most such cases would be already covered by the direct liability of lenders for their own unconscionable conduct and the indirect liability of lenders for the debtor's undue influence.[67]

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63 *Ibid*, 466-468 per Mason J.

64 *Fry v. Lane* (1888) 40 Ch D 312, 321; *Amadio* (1983) 151 CLR 447, 474 and 479 per Deane J.

65 (1987) NSW Conv R para. 55-364, 57,276-57,277.

66 (1987) NSW Conv R para. 55-342.

67 D. Kirk, *Liability for Guarantees Given Without Sufficient Understanding or Consent*. (Unpublished LL.M. Thesis submitted to Faculty of Law, Monash University, April 1990) suggests that the creation of lender's liability for the debtor's unconscionable conduct is unnecessary for this reason (at 100). My own view is that the creation of such liability involves no great leap of principle, being wholly analogous to indirect liability for undue influence.

However that may be, the ensuing discussion of the role of independent advice in relation to unconscionable conduct will be limited to the lender's own unconscionable conduct. The role of independent advice in relation to indirect liability for the debtor's unconscionable conduct would be analogous to its role in cases of indirect liability for undue influence discussed above.

## B. THE ROLE OF INDEPENDENT ADVICE IN UNCONSCIONABLE CONDUCT CASES.

Usually, independent advice will be relevant at two points in the analysis of an unconscionable conduct case. First, actual, adequate independent advice could negative an alleged special disadvantage.[68] Secondly, independent advice could negative an alleged unconscientious taking of advantage. This will be particularly relevant where the unconscientious advantage consists in proceeding with the transaction knowing or suspecting that the guarantor has a deficient understanding of the transaction[69]. A requirement by the lender that independent advice be taken by the guarantor before executing the documents may remove any unconscientious element in the lender proceeding with the transaction.

In theory, independent advice could be relevant at a third point - where the transaction is shown to be prima facie unconscionable and the onus shifts to the lender to show that it was fair, just and reasonable in all the circumstances. In practice, however, the role of independent advice at the third point would seem to involve no additional features to those canvassed at the first and second points. It is difficult to see how independent advice could rebut a prima facie showing of unconscionability other than by showing that the special disadvantage had been redressed by the advice or that the lender's knowledge that adequate advice had been given to the guarantor removed any unconscientious element in the lender proceeding with the transaction.[70]

At the first point there must be actual independent advice to negative a special disadvantage. A relationship of special disadvantage will remain unaffected where the lender merely urges that advice be taken and affords a

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68 In *Amadio's Case*, Deane J. referred to the absence of independent advice as one factor establishing a special disadvantage: (1983) 151 CLR 447, 476.

69 In *Amadio's Case*, Mason J. held that the bank was guilty of unconscionable conduct by entering into the transaction without disclosing relevant facts to the guarantors to enable them to form their own judgment and without ensuring that they obtained independent advice: *ibid*, 468.

70 Of course, other evidence, not relating to independent advice, could be brought to show that the transaction was fair, just and reasonable in all the circumstances e.g. that the surety received a substantial material benefit as a result of the lender financing the debtor. This would be analogous to the requirement of manifest disadvantage in undue influence cases, see *European Asian Bank of Australia v. Kurland* (1985) 8 NSWLR 192.

reasonable opportunity to take it but no advice is in fact taken. The advice also must be adequate to redress the disadvantage.

At the second point, the effect of independent advice, actually given or merely urged, will depend upon the nature and adequacy of the advice given and the basis for alleging an unconscientious taking advantage by the lender. Commonly, (as in *Amadio*) the taking advantage would consist in the lender proceeding with the transaction knowing or suspecting a deficient understanding of the documents on the part of the guarantor. If the lender knew the guarantor had taken independent advice which adequately explained the nature and effect of the transaction, there would not seem to be any unconscientious advantage in the lender proceeding with the transaction. The same would be true if the lender *reasonably believed* that the guarantor had taken the advice and the advice gave an adequate explanation because it would not be unconscientious to proceed with such a belief. But this analysis assumes the problem is one of defective understanding only, and that the advice is adequate. The nature of adequate independent advice requires further consideration.[71]

## IV. WHAT IS ADEQUATE INDEPENDENT ADVICE?

The advice must be independent of the interests of the debtor and lender. Thus in *Powell v. Powell*[72] it was held that the advising solicitor must be independent of the stronger party to the transaction in fact as well as in name and hence cannot act for both parties. Indeed the professional responsibilities of solicitors are clear.[73] In *McNamara v. Commonwealth Trading Bank*[74] King C.J. discussed the position of a solicitor acting for an intending surety[75]:

> It is essential that the solicitor act and be understood to act solely for the prospective surety ... Sound professional practice requires also that the solicitor be and be seen to be free to advise the prospective surety unencumbered by any ties to the principal debtor. The solicitor, moreover, should be at pains to ensure that his client's decision is as free of the influence of the debtor as he can arrange ...

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71 It should be remembered that independent advice is not essential to cure a transaction of the taint of unconscionability. If the problem is one of deficient understanding, the lender could remedy that by giving an adequate explanation and making any necessary disclosure. But independent advice is likely to prove a safer foundation for a protective procedure.

72 [1990] 1 Ch 243, 246-247 (an undue influence case)

73 It is an open question as to how far these rules govern advice given by non-legal advisors.

74 (1984) 37 SASR 232.

75 Although this case involved the statutory requirement in s.44 of the *Consumer Transactions Act* 1972 (S.A.) that certain guarantees be executed in the presence of a legal practitioner "instructed and employed independently of the credit provider", his Honour's statements as to the responsibility of a solicitor advising a guarantor are put on the basis of the requirements of professional practice quite apart from the requirements of s.44.

> Sound professional practice requires that the debtor should not be present when the solicitor is advising the client and receiving his instructions.[76]

It is likely that advice which does not conform to these standards of professional practice will not be considered independent for the purposes of curing a transaction tainted by undue influence or unconscionable conduct. In *Collier v. Morlend Finance Corporation (Vic) Pty Ltd*,[77] a case under the *Contracts Review Act* 1980 (N.S.W.), the N.S.W. Court of Appeal held that the fact that a solicitor is nominated by the stronger party to advise the weaker party does not of itself debar the solicitor from being independent.[78]

Apart from the requirement of independence, the adequacy of the advice will be determined by the problems suffered by the surety. A clear and understandable explanation of the terms of the documents and the effects of the transaction (e.g. that the surety's home may be sold to meet the debt) would remedy a deficient understanding. But adequate independent advice would normally need to go further to canvass the propriety of the transaction for the surety.[79] This will require an assessment of the extent of the risk that the surety is undertaking as measured against the resources of the surety.

In *Inche Noriah v. Shaik Allie Bin Omar* the Privy Council stated that the independent advice must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the weaker party.[80]

In *McNamara v. Commonwealth Trading Bank*[81] King C.J. also discussed the professional responsibility of a solicitor in relation to the nature of the advice that ought to be given to an intending surety. The solicitor's duty extends beyond explaining the true purport and effect of the agreement to the prudence of entering into the transaction. Unless the client instructs the solicitor that he or she doesn't want advice on that matter, the solicitor should advise on the wisdom of entering into the transaction from a practical point of view. "The state of the financial affairs of the principal debtor should be discussed as well as the extent of the assets of the client. A client whose assets

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76 (1984) 37 SASR 232, 241. An example of an ineffective attempt to ensure independent advice was given is *Nolan v. Westpac Banking Corporation* (1989) ATPR 40-982.

77 (1989) ASC #55-716.

78 Cf. *Nolan v. Westpac Banking Corporation* (1989) ATPR 40-982 where the solicitor was chosen by the bank and advised the surety in the presence of the bank officer and the debtor.

79 This is clear in the case of undue influence: see *Inche Noriah v. Shaik Allie Bin Omar* [1929] AC 127, 135-136; *Bester v. Public Trustee Co. Ltd* [1970] 3 NSWR 30; and it is also implicit in the judgment of Dixon J. in *Yerkey v. Jones* (1939) 63 CLR 649, 684. With respect to unconscionable conduct the requirement for a discussion of propriety can be seen in the judgment of Deane J. in *Amadio's Case* and in *Guthrie v. A.N.Z. Banking Group Ltd* (1989) NSW Conv R para. 55-463.

80 [1929] AC 127, 135-136.

81 (1984) 37 SASR 232.

are few and who will be putting the whole of his assets, perhaps including his home, at risk obviously needs careful and perhaps quite forthright advice. The need is even greater where, as is often the case, the affairs of the principal debtor are precarious."[82]

In *Guthrie v. A.N.Z. Banking Group Ltd*[83] the bank manager referred the surety to an independent solicitor for advice about a proposed mortgage of the family home to secure a loan to the surety's husband for the purchase of a boat. However the manager did not inform the surety or the solicitor that three days earlier the husband had guaranteed the debts of a company of which he was a director. The mortgage secured all debts of the husband to the bank, including those arising under the guarantee. In the absence of that information, independent advice did not cure the transaction of unconscionability. Cohen J. held:

> [The manager] knew he was dealing with a person who required independent advice and he acted accordingly but not to the full extent to which the bank was required to act, namely to advise Mrs. Guthrie, or cause her to be advised, of a significant potential debt which the mortgage over her house would secure ... the bank had a duty in the circumstances which it failed to exercise and to that extent it acted unconscionably in allowing the plaintiff to execute the mortgage without ensuring that she was told of this significant fact.[84]

The extent of the risk which the surety is undertaking will be determined in part by the terms of the document, e.g. whether the guarantee extends to past as well as future advances to the debtor, whether it covers other indebtedness of the debtor (such as a guarantee of a third person's debt given by the debtor to the lender) and whether there is a ceiling on liability under the guarantee. But the document will seldom reveal the actual amount of the various liabilities being guaranteed. Furthermore the extent of the risk also turns upon the financial soundness of the debtor and his or her ability to repay. This information will be available to the debtor and the lender but may not be available to the surety and its independent adviser. Must independent advice take into account this information in order to be adequate? To so require as a general rule would be to impose in effect a duty of disclosure on the lender (at least in transactions with potential for unconscionable conduct or undue influence) which the common law has thus far eschewed.

The common law requires a lender to disclose to an intending guarantor only matters that would not naturally be expected to arise in relation to the particular account to be guaranteed[85] but equity would seem to demand more extensive disclosure if independent advice is to protect a lender from having a guarantee set aside. For example, in *Goodwin v. National Bank of Australasia Ltd*[86] it

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82 *Id*, 241.

83 (1989) NSW Conv R para. 55-463.

84 *Id*, 58,357.

85 *Hamilton v. Watson* (1845) 12 Cl & Fin 109 (8 ER 1339).

86 (1968) 117 CLR 173.

was held that the common law duty did not oblige the bank to disclose to the surety that the debtor had guaranteed a third party's liability one week earlier.[87] But in *Guthrie's Case* the independent advice was held to be inadequate because the fact of the husband's additional, contingent liability for the guarantee given three days earlier was not disclosed to the surety or the adviser. Cohen J. in the latter case held that the limits of the common law duty of disclosure did not apply where a claim of unconscionable conduct is involved.[88] With respect, this seems correct. In resolving any inconsistency between cases on lenders' duty of disclosure and cases of unconscionable conduct (or undue influence), it is reasonable to expect a lender to shoulder a greater burden of disclosure where it knows the potential for unconscionable conduct or undue influence exists.[89]

In *Amadio*, Deane J. briefly considered the nature of the advice which the Amadios needed to cure the transaction. His Honour said:

> Mr. and Mrs. Amadio stood in need of advice as to the nature and effect of the transaction into which they were entering. It is apparent that any such advice would have included the importance to a guarantor of ascertaining from the bank the state of the customer's account which was being guaranteed and any unusual features of the account.[90]

His Honour did not go on to consider whether the independent advice would have been adequate if the information was not sought from the lender but other cases suggest the advice is not adequate unless that information is provided and therefore it would seem that the adviser is under a professional duty to seek it. Had the Amadios or their advisers sought that information, it seems clear enough that the bank would have been obliged to provide that information if it wished to save the transaction from impeachment, notwithstanding that the required information exceeded that which the common law required a lender to disclose.[91] Failure to provide the required information would have rendered the independent advice ineffective to cure the transaction.

It is submitted that the law casts an onus on a lender who seeks to cure a transaction of potential unconscionability by referring the surety to independent advisers, to take reasonable steps to ensure that the surety or adviser is informed of those matters concerning the debtor and its accounts with the lender which

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87 So held because the surety's mortgage specifically included the indebtedness of the debtor arising out of any guarantee to the bank. There was an equivalent provision in *Guthrie's Case*.

88 Cohen J. cited *Amadio* per Mason J, 463 and per Deane J., 481.

89 This also appears to be the view of Deane J. in *Amadio* (1983) 151 CLR 447, 481. In *Bank of New South Wales v. Rogers* (1941) 65 CLR 42 (an undue influence case) Starke J. (at 55) and Williams J. (at 87) were of the view that independent advice should have canvassed the financial soundness of the debtor and that accordingly, a knowledge of the debtor's financial position was material.

90 (1983) 151 CLR 447, 481.

91 *Ibid.* That is not to say that the bank would have been under an enforceable legal duty to disclose the information.

are necessary for the independent adviser to adequately advise the surety as to the propriety of entering into the transaction. The nature of the information to be disclosed has not been precisely defined. It is submitted that the surety and adviser need to know at least the following: the nature of all liabilities being guaranteed (e.g. loan accounts, guarantees of a third party's liability), the current state of those liabilities and any applicable limits, and any unusual features of the account or the debtor's relationship with the lender which are material to the risk of the guarantee being called upon.

In many cases where guarantee transactions are challenged as unfair the nub of the problem is lack of disclosure to the surety about the nature and degree of the risk involved. To some extent the need for the equitable doctrines providing relief for unfair conduct is occasioned by the narrowness of the common law duty of disclosure. It may be that the operation of the law would be more certain, more guarantees would be upheld and guarantors would be better protected if the common law duty of disclosure was expanded.[92] If a wider disclosure obligation is developed under these equitable doctrines in determining what is adequate independent advice, this might lead in time to a corresponding expansion of the common law duty of disclosure.

To summarize: independent advice which is adequate to cure a transaction from the taint of unconscionability must be truly independent of the lender and the debtor as explained above. It will normally include a clear explanation of the terms of the documents, the effects of the transaction on the surety and the propriety of the surety entering into the transaction. The propriety of the transaction must be evaluated in the light of the surety's financial resources and the extent of the risk which the surety is undertaking. In some cases the propriety of the transaction cannot be adequately evaluated and the independent advice will not be adequate unless the surety and adviser are informed of special factors material to the risk of the guarantee being called upon. (All references to "adequate independent advice" from this point on mean the type of advice defined above.)

## A. INDEPENDENT ADVICE AND UNCONSCIONABLE CONDUCT: IS MERELY URGING ADVICE SUFFICIENT?

The procedure laid down by the Court of Appeal in *Coldunell* suggests that merely urging the surety to take independent advice can be sufficient to protect the lender. It has been argued above in the context of protecting lenders from liability for the debtor's undue influence that mere urging will not suffice. In Australia the lender must have reasonable grounds to believe the document was fairly obtained from a surety who sufficiently understood its purport and effect.

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92 For further development of the argument that extending the duty of disclosure on lenders would be a more effective way of protecting guarantors than the doctrines of undue influence and unconscionable conduct: see Kirk, D. note 67 *supra*. See also British Columbia Law Reform Commission, *Report on Guarantees of Consumer Debts* (1979).

Merely urging that advice be taken without more will not ground a reasonable belief. Does the same conclusion apply to cases of unconscionable conduct?

It was suggested that independent advice may save a transaction tainted by unconscionable conduct in two ways: by redressing the special disadvantage or by removing the unconscientious taking advantage in the lender proceeding with the transaction. As to the first, to merely urge independent advice which is not taken in fact cannot redress a special disadvantage. As to the second, urging independent advice without more would not necessarily negative an unconscientious taking advantage. But if a lender urges independent advice and the lender has reasonable grounds for believing that the surety took independent advice which was adequate to redress the surety's special disadvantage, the lender could proceed with the transaction with a clear conscience, even if no advice was taken in fact or the advice was inadequate. Obviously it will be a question of fact as to whether the lender had the necessary reasonable belief.

This conclusion is similar to that reached for cases of undue influence. If the lender has reasonable grounds to believe that the surety took independent advice which was adequate to remedy the surety's special disadvantage, to free the surety from any undue influence and to explain the purport and effect of the transaction, then, in most cases, the lender will not be taking unconscientious advantage of the surety in proceeding with the transaction nor will the lender be liable for any undue influence of the debtor.

## V. A PROTECTIVE LENDING PROCEDURE FOR AUSTRALIA BASED ON ADEQUATE INDEPENDENT ADVICE

The simplest way to establish the necessary reasonable belief is for the adequate independent advice to be certified to the lender by the adviser. The lender ought to obtain a certificate from the solicitor that the surety had been advised about the purport and effect of the transaction and the propriety of entering into it. It would be strange to stop short, as the suggested procedure in *Coldunell* does, at a requirement of an independent solicitor witness when a certification of advice would plainly give the lender reasonable grounds for the requisite belief. If the lender obtains such a certificate, it would normally be free of reliance liability for any undue influence by the debtor. It also would normally be free of liability imposed on the basis of notice obtained prior to the time the certified advice was given, because the lender would have reasonable grounds for believing that the vitiating circumstances of which it had notice had been cured by the certified advice. The lender also would normally be free of liability for unconscionable conduct because, even if there was a relationship of special disadvantage, the lender could reasonably believe on the basis of the certified advice that the special disadvantage had been redressed and there would be no unconscientious taking advantage in the transaction proceeding.

The protection afforded by certified adequate independent advice is contingent on the advice being adequate independent advice. As argued above the advice would need to consider the propriety of the transaction for the surety and the certificate would include a statement that the surety had been advised as to the propriety of the entering into the transaction. Further the advice may be rendered inadequate if the surety and adviser do not have access to information necessary to evaluate the nature and extent of the risk to the surety.

Even certified adequate independent advice will not protect all guarantee transactions. A number of examples will illustrate this. First, apparently adequate advice may not address the disability suffered by the surety. The unconscionable nature of the transaction might consist in economic or other duress which independent legal advice does not alleviate. Being coerced to sign documents which have been fully explained and to enter into a transaction in which all the risks have been evaluated is no less unfair than being coerced to sign documents without the explanation and evaluation. For example, in *St. Clair v. Petricevic*[93] (a case under the *Contracts Review Act*) a vendor of land sought to have the contract of sale set aside because, inter alia, she had been influenced by the threat of the real estate agent that if she did not sell at the stipulated price, the intending purchaser (her nextdoor neighbour) would exercise his rights over an existing right of way on her property by demolishing part of her home which allegedly encroached on the right of way. The threat was made with the knowledge and approval of the purchaser. The vendor was independently advised about the transaction and the right of way by her solicitor. However that advice did not save the transaction because it did nothing to diminish the effect of this threat. Hope J.A. (with whom Clarke J.A. agreed) said: "The fact that she had independent legal advice available to her is of course an important matter, but it is necessary to consider what advice she got and whether it diminished or removed the effect of the circumstances upon which she relied. In my opinion it did not ... There is no evidence that any legal advice lessened the effect of the threat. Indeed, even though unwittingly, what legal advice she got might have increased her fears".[94]

Secondly, the independent advice may be against proceeding with the transaction. In undue influence cases, if the weaker party proceeds with the transaction against independent advice, it may be difficult for the dominant party to show that the weaker party acted free of the dominant party's influence.[95] In an unconscionable conduct case the fact that the weaker party

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93 (1988) ASC #55-688, a case under the *Contracts Review Act* 1980 (N.S.W.).

94 *Id*, 58,207-58,209.

95 *Powell v. Powell* [1900] 1 Ch 243, 246 discussed in Meagher, Gummow and Lehane, *Equity - Doctrines and Remedies* (2nd ed., 1984) 381-382.

proceeds contrary to independent advice may also indicate that the special disadvantage has not been redressed by the advice.[96]

Thirdly, if the lender has notice of other circumstances which would make it unfair to proceed with the transaction, notwithstanding that independent legal advice has been taken, there may still be an unconscientious taking of advantage by the lender. This is analogous to the undue influence case where the lender arranges for independent legal advice to be taken but then receives notice of actual undue influence by the debtor. Here the lender may be liable.[97]

It is important to remember that independent advice is not always necessary to cure a transaction of unfairness. The focus of this discussion is on how to use it to maximise protection. In some cases the lender itself could cure the transaction. For example in *Amadio* the guarantors suffered from, inter alia, a defective understanding of the documents (in particular a mistaken belief that the guarantee was limited to $50,000 when it was in fact unlimited) and a mistaken belief as to the financial soundness of the debtor company. Deane J. considered that if the Amadios had received a true explanation of the guarantee documents and the extent of the liability they were incurring and they had been informed as to the true financial position of the debtor before they executed the guarantee "it would be strongly arguable that the guarantee/mortage could not properly be said either to have resulted from their special disability or to be other than fair, just and reasonable."[98] This explanation and information could have come from the lender without involving an independent adviser. Thus if the lender were willing to take on the task of explanation and necessary disclosure some transactions could be saved without resort to independent advice. But this course of action carries obvious risks for the lender. The potential exists for the lender to make misrepresentations or to engage in false and misleading conduct and a relationship of trust and reliance could arise sufficient to support a fiduciary duty on the lender. The fact that independent advice may not be needed in some cases suggests that the protective procedure proposed is more suited to a discriminating than a blanket use.

In summary, lenders can avoid liability for undue influence and unconscionable conduct in most cases if they have reasonable grounds to believe that the relevant vitiating factors operating on the surety have been

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96 No doubt some lenders might prefer not to know that the surety was acting against independent advice but a scrupulous adviser may indicate the fact in the certificate or the surety might reveal it.

97 *Bank of Credit and Commerce International S.A. v. Aboody* [1989] 2 WLR 759. In this case the bank retained a solicitor to give the surety independent advice and in the course of doing so the solicitor witnessed the debtor threaten the surety (the debtor's wife). It was held that the bank was fixed with the solicitor's knowledge of the debtor's undue influence. However the transaction was not set aside as it was not established that it was to the wife's manifest disadvantage.

98 (1983) 151 CLR 447, 480.

cured. Adequate independent advice as defined above is likely to have this curative effect in most cases. Therefore a reasonable belief that the surety obtained adequate independent advice will protect the lender in most cases. Merely urging that this advice be taken will not ground such a belief but if the advice was certified to the lender by the independent adviser that would justify the necessary reasonable belief. It remains to be considered whether lenders would adopt such a system in appropriate cases but that discussion is deferred while liability under s.52A of the *Trade Practices Act* 1974 (Cth) and the effect of independent advice thereon is analysed.

## VI. STATUTORY RELIEF: SECTION 52A *TRADE PRACTICES ACT*

Section 52A was introduced into the *Trade Practices Act* 1974 (Cth) in 1986.[99] The amendment recognized that s.52 which proscribes misleading and deceptive conduct, did not cover all types of unfair dealing, such as undue influence and unconscionable transactions. Section 52A is a general proscription of unconscionable conduct but it is confined to essentially consumer transactions. In its policy and drafting it owes much to the inspiration of the *Contracts Review Act* 1980 (N.S.W.).[100]

The proscription is contained in sub-s.52A(1) which provides:

> A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

Sub-section (2) then provides a non-exhaustive list of factors to which the court may have regard in determining whether there has been a breach of sub-section (1). Some of the factors are: the relative bargaining strength of the corporation and the consumer;[101] whether as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation; whether the consumer was able to understand any documents relating to the supply of the goods or services; and whether any undue influence or pressure was exerted on the consumer.

Section 52A is not simply a statutory version of the doctrine of unconscionable transactions. Paragraph 52A(2)(d), which provides that one of the factors to which the court may have regard in determining whether a

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99 S.22 of the *Trade Practices Revision Act* 1986. This followed recommendations in the report of the Trade Practices Act Review Committee 1976 paras 9.59ff. Section 52A is in large part inspired by the provisions of the *Contracts Review Act* 1980 (N.S.W.).

100 J. Goldring, "Certainty in Contracts, Unconscionability and the Trade Practices Act: the Effect of Section 52A" (1988) 11 *Sydney L Rev* 514.

101 Sub-s.(2) designates the person who has been or may be supplied by the corporation as "the consumer".

corporation breached s.2A is whether any undue influence or pressure was exerted on the consumer, seems to import all the undue influence jurisprudence into the section.[102] The section proscribes unconscionable *conduct*,[103] which is broader than the equitable doctrine (and the *Contracts Review Act* which affords relief for unjust *contracts*) in that it seems to extend to pre-contractual activity such as advertising or sales techniques and to post-contractual activity such as the exercise of options or discretions under the contract and some activities directed towards enforcement.[104] Further, it will be argued that the section also permits relief for cases of substantive unfairness in the terms of the contract as well as unfairness in the methods of making the contract.

There are as yet very few reported cases which have applied s.52A or the *Fair Trading Act* equivalents.[105]

## A. PROCEDURAL AND SUBSTANTIVE UNCONSCIONABILITY

Whereas the equitable doctrines of undue influence and unconscionable conduct afford relief for procedural unfairness in the making of the contract, statutes can afford relief for both procedural unfairness and for substantive unfairness in the transaction (such as the terms of the contract or its operation). For example, in the United States, s.2-302 of the *Uniform Commercial Code* has been read to embrace both procedural and substantive unconscionability. Section 7 of the *Contracts Review Act* 1980 (N.S.W.) empowers the court to give relief where the court finds the contract to have been "unjust in the circumstances relating to the contract at the time it was made".[106] In *West v. AGC (Advances) Ltd* McHugh J.A. said of section 7:

> a contract may be unjust under the Act because its terms, consequences or effects are unjust. This is substantive injustice. Or a contract may be unjust because of the unfairness of the methods used to make it. This is procedural injustice. Most

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102 This was the intention according to the Explanatory Memorandum to the Trade Practices Revision Bill 1986, 22.

103 Engaging in conduct includes doing or refusing to do any act, including the making of, or the giving effect to a contract arrangement or understanding: *Trade Practices Act* s.4(2).

104 Note that sub-s.52A(3) provides that the institution of legal proceedings by the corporation in relation to the supply of goods or services does not of itself constitute unconscionable conduct. In *Zoneff v. Elcom Credit Union Ltd.* (1990) ATPR #41-009 Hill J. held that making a demand in anticipation of legal proceedings also could not constitute unconscionable conduct. However, debt collection activities involving intimidation and harassment do not share this immunity and would seem to fall within s.52A.

105 *Zoneff v. Elcom Credit Union Ltd* (1990) ATPR #41-009, *Comco Constructions Pty Ltd v. Westminster Properties Pty Ltd* (unreported, Supreme Court of Western Australia, 2 May 1990, noted [1990] ACLD 595).

106 The reference to the time the contract was made does not limit the section to procedural unfairness.

> unjust contracts will be the product of both procedural and substantive injustice.[107]

Later on his Honour indicated that one form of substantive injustice alone would be sufficient to make a contract unjust:

> In an appropriate case gross disparity between the price of goods or services and their value may render the contract unjust in the circumstances ...[108]

It is suggested that the same reasoning can be applied to s.52A of the *Trade Practices Act* 1974 (Cth). The section does not contain a reference to the time the contract was made and would seem to apply to both substantive and procedural unconscionability. This interpretation is strengthened by para. 52A(2)(c) directing the court's attention to the price and terms on which the goods or services could have been obtained elsewhere.[109]

This issue is important. If the section proscribes the entering into contracts which are substantively unconscionable (with no or very little procedural unconscionability involved), then lenders' standard form documents may be subject to challenge under s.52A. There has already been forewarning of such a development under the *Contracts Review Act*. In *Westpac Banking Corporation v. Sugden*[110] four clauses in Westpac's standard form of guarantee were held to be unjust in the circumstances of the case where the sureties were commercially unsophisticated, were asked to sign without explanation and were providing a mortgage over their home to support the debts of a business. The clauses provided (a) that if the bank released or lost any security it held or failed to recover any of the moneys secured then the sureties would remain fully liable (b) that a bank officer's certificate as to the amount owing was conclusive evidence of that amount and (c) that the guarantee was fully binding upon the sureties for the full amount notwithstanding the failure of other contemplated sureties to sign later. Brownie J. held that the clauses were not reasonably necessary for the protection of the legitimate interest of the bank, a factor mentioned in s.52A(2)(b). The decision involved a combination of procedural and substantive unconscionability and it would seem that only a small amount of procedural unconscionability (if any) is necessary to lead to a conclusion of injustice if the provisions of the contract are substantively unconscionable.[111]

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107 (1986) 5 NSWLR 610, 620.

108 *Ibid*, 621.

109 It might be argued, by analogy to equitable principle, that the courts should only use unfair price and terms as a basis for inferring procedural unconscionability rather than as directly justifying relief on the basis of substantive unconscionability. However, it can be argued in reply that para. 52A(2)(b) specifically mandates this process of inference and its omission from para. 52A(2)(e) suggests the court can have regard purely to the substantive terms of the contract.

110 (1988) NSW Conv R 55-377.

111 In Duggan, Begg and Lanyon, note 60 *supra*, chapter 10, it is pointed out that unfair contracts statutes (*Credit Acts* Part IX, *Contracts Review Act* and section 52A of the *Trade*

## B APPLICATION OF SECTION 52A TO CONDUCT IN RELATION TO GUARANTEES

There is a preliminary question as to whether s.52A covers unconscionable conduct by lenders in relation to sureties. The issue arises because of a dysfunction between sub-ss.52A(1) and (2).

In sub-s.52A(2) the person to whom the goods or services are or may be supplied by the corporation is designated "the consumer" and in the list of factors in sub-s.(2) to which the court may have regard in determining whether there has been unconscionable conduct, the focus is on the position of the consumer vis a vis the corporation. The implicit assumption in sub-s.(2) is that the consumer (i.e. the person supplied) is the one who may have been dealt with unconscionably. Thus, sub-s.(2) presumes a two party transaction between consumer and corporation, not a tripartite situation such as a guarantee. No difficulties arise with the application of s.52A to a lender providing financial accommodation to the principal debtor. Clearly this is a case of a corporation supplying services to a person and that person can use the section to remedy unconscionable conduct by the lender.

But more difficult questions arise in the application of s.52A to guarantees and securities given by third party sureties to the lender to induce the lender to extend financial accommodation to the debtor or to induce the lender to waive a default of the principal debtor. Section 52A(1) speaks of unconscionable conduct *in connection with* the supply of services. If the lender engages in unconscionable conduct vis a vis the third party surety, that conduct could be caught by s.52A(1) on two theories:

(a) the taking of the guarantee or security is a supply of services by the lender to the surety so that the surety is treated as the person supplied ("the consumer") under s.52A(2); or

(b) assuming there is no supply of services to the surety, unconscionable conduct relating to taking the guarantee or security may be conduct "in

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*Practices Act*) make no explicit reference to the procedural/substantive dichotomy in their drafting, merely providing a check list of factors some of which go to process and some to substantive outcomes. The authors consider it to be unclear whether these provisions authorise relief for substantive unconscionability alone and they argue that to provide such relief is fraught with difficulties of principle which the courts have avoided under the equitable doctrine by confining their attention to procedural unconscionability. On the other hand, as they point out, the intention of Professor Peden, from whose recommendations the *Contracts Review Act* is derived, was to effect substantial reforms to the law of unfair contracts, not to codify the existing judicial doctrines. The effect of s.52A(2)(e) and *Westpac Banking Corporation v. Sugden* also need to be considered. My own view is that s.52A is a sufficiently clear legislative mandate to the courts to provide relief for purely substantive unfairness. The wisdom of the courts so doing will no doubt remain a matter of contention.

connection with" the supply of services (financial accommodation) to the debtor.

The first theory views the taking of a third party guarantee as a supply of services by the lender to the surety. "Services" is defined very widely in s.4(1) to include any rights, benefits, privileges or facilities provided, granted or conferred in trade or commerce and in particular those provided, granted or conferred under, inter alia, a contract between a banker and a customer and any contract for or in relation to the lending of moneys. A contract of guarantee would seem to be comprehended in para. (d) of the definition of "services" - "any contract for or in relation to the lending of moneys" but it is difficult to see that any rights, benefits, privileges or facilities are provided, granted or conferred under such a contract by the lender to the surety. Even if a nominal consideration were provided to the surety, the substance of the matter is that the guarantor is effectively a volunteer. In a guarantee arrangement the real "consumer" under s.52A is the debtor.

The second theory recognizes that the supply of services (the benefit of financial accommodation) is to the debtor but argues that conduct in relation to the taking of the guarantee is conduct "in connection with the supply" of services to the debtor. This is certainly a tenable construction of s.52A(1) standing alone. Some difficulty may be occasioned by the assumption implicit in s.52A(2) that it is the effect of the lender's conduct on the person supplied (on this view the debtor) which is relevant to determining whether the lender's conduct is unconscionable. Thus if a lender is alleged to have acted unconscionably in taking a guarantee from an elderly migrant couple with poor English who were unfairly pressured by their son the principal debtor, s.52A(2) would only direct attention to the questions whether the son understood the documents or was unfairly pressured. However, the list of matters to which the court may have regard in s.52A(2) is expressed not to limit the court from considering any other matters. The court could therefore look at the effect of the lender's conduct on the surety to determine whether the conduct was unconscionable and simply treat the assumption implicit in the list in s.52A(2) as irrelevant in the case of a third party surety. This would be a result consistent with the generality inherent in sub-s.52A(1) and the opening words of sub-s.52A(2). It would also be the interpretation which promoted the purpose of the section. The explanatory memorandum to the *Trade Practices Revision Bill* 1986 which introduced s.52A into the Act states that the section is designed to cover conduct of the kind involved in *Amadio* which of course involved unconscionable conduct in relation to a guarantor.[112] It would therefore seem likely that s.52A covers conduct in relation to the taking of guarantees on the basis that this is conduct in connection with the supply of financial accommodation to the principal debtor.[113] More difficult questions might arise

112 Trade Practices Revision Bill 1986 Explanatory Memorandum, 22.

113 For a view arguing in favour of the first theory see Kirk note 67 *supra*, 211-212.

when the guarantee is not taken to secure an original or further advance but to induce the lender to forbear from exercising its remedies upon a default. It is submitted that a forbearance to sue for moneys owing is a supply of services within the very broad definition of "services" in s.4(1), being a benefit or privilege granted or conferred in trade or commerce. Thus taking a guarantee to support such a forbearance would be conduct in connection with the supply of services being the forbearance. Alternatively, the taking of a guarantee to support such a forbearance might be treated as conduct in connection with a prior supply of services to the debtor such as the original advance.[114]

## C. THE "CONSUMER" LIMIT IN SECTION 52A

Section 52A is limited to conduct in connection with the supply of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption: s.52A(5).[115] This "consumer" limit does not apply to the equitable doctrines or to s.52 liability for misleading and deceptive conduct. The definition of "services" is wide enough to include most forms of financial accommodation provided by lenders and certainly includes loans but the application of the consumer limit in sub-s.(5) to loans and guarantees is not clear.[116] Following the analysis above, the supply of services is to the debtor and therefore it must be asked whether the services provided in the form of a loan to the debtor are of a kind ordinarily acquired by the debtor for personal, domestic or household use or consumption. The answer to this question depends on the level of abstraction at which the kind of services is determined. One approach is to treat the kind of service being supplied as loans of money. On this approach loans of money are services of a kind ordinarily acquired for personal, domestic or household use or consumption. The fact that a particular loan is borrowed for business purposes does not alter this characterisation. Thus all loans would be within the scope of s.52A. That approach does not seem to produce the kind of limitation which sub-s.(5) intends.[117] Another

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114 If it is necessary to link the guarantee back to the original advance because a forbearance was not accepted as a new supply of services, it could be argued that there was not a sufficiently close connection between the guarantee and the original advance. Like all issues of remoteness ultimately this would be a judicial policy choice, however, I would suggest that a remedial statute of this nature ought to be liberally interpreted to give the court jurisdiction to review conduct in relation to such guarantees.

115 Cf. the consumer limitation in the *Contracts Review Act* s.6(2): "A person may not be granted relief under this Act in relation to a contract so far as the contract was entered into in the course of or for the purpose of a trade, business or profession carried on by him ..."

116 Sub-s.52A(6) also excludes from the ambit of the section the supply of goods for the purpose of resupply or transformation in trade or commerce. In the context of lenders providing financial services rather than goods this sub-section will generally have no relevance.

117 In *Comco Constructions Pty Ltd v. Westminster Properties Pty Ltd*, *supra* note 105 (noted [1990] ACLD 595), Brinsden J. held that the services involved in building an office

approach is to distinguish between different types of loans by looking to the purpose for which the debtor obtains the loan. Thus personal loans to buy a car, a swimming pool, a home for owner occupation or to pay for home extensions would be covered but loans for business purposes would not. Loans for mixed business and domestic purposes would present difficulty, for example loans for a residential investment property which the family might later occupy and loans to the family company which operates a business employing several family members and providing most of the family income.

However, the failure of the draftsman to consider multipartite transactions leads us to a strange result if this second path is followed. A loan may be for the debtor's business purposes but the guarantor will often act out of personal or family loyalty with no interest in the business outcome. If the application of s.52A turns on the debtor's purposes in obtaining the financial services and not the guarantor's motives, the Amadios may have been unable to use the section because the loan they guaranteed was for the son's construction business! In the context of guarantees there is much to be said for the view that it is the surety's purposes and motivation which ought to govern the application of the consumer limitation. However this method of analysis seems to be precluded if the only supply of services is to the debtor.[118]

## D. LIABILITY UNDER SECTION 52A FOR DEBTOR'S UNFAIR CONDUCT?

Can the lender be liable to remedies because of the debtor's unfair conduct? Is there liability on the basis of reliance on the debtor or notice of the debtor's unfair conduct as in cases of undue influence? Section 52A is a prohibition on a corporation engaging in unconscionable conduct in connection with the supply of goods or services. The section is not addressed to corporations whose conscience equity would consider bound by the conduct of a debtor. There would seem to be no scope for importing notice and reliance liability from the doctrines of undue influence and unconscionable conduct.

However, corporations are made vicariously liable by the Act for the conduct of their agents within the scope of the agent's actual or apparent authority.[119]

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development were not services of a kind ordinarily acquired for personal, domestic or household use or consumption. It was argued that, because building services generally were of a kind acquired for domestic or household use or consumption, building an office involved the same kind of services. His Honour rejected the argument.

118 Kirk is able to use this analysis but only by construing a guarantee as involving a supply of services by the lender to the surety so that the surety's motivation becomes crucial to characterising the type of service supplied. On her view section 52A would cover all guarantees of personal and business loans where the surety provided the guarantee from personal or family motives but not for example where the surety was in the business of providing guarantees for reward. Kirk note 67 *supra*, 200-201.

119 s.84(2).

Further, para. 52A(2)(d) allows the court to have regard to whether undue influence was used by a person "acting on behalf of the corporation". Here is an opportunity for the common law of principal and agent to have free reign untrammelled by notions of good conscience and equity. If the debtor were the lender's agent and, within the scope of his or her actual or ostensible authority, engaged in unconscionable conduct within the meaning of s.52A vis a vis the surety, then the lender will be liable under s.52A.

*E. Remedies under 52A*

Conduct in contravention of s.52A does not constitute a criminal offence under s.79 nor does it give rise to a liability under s.82 to compensate a person who suffers loss or damage as a result of the conduct.

The principal remedy available for a breach of s.52A is an order under s.87(1A). Such an order could set aside or vary a contract, refuse to enforce provisions of the contract or direct a person involved in the contravention to pay compensation to a person who suffered loss or damage as a result of the contravention: s.87(2). Injunctive relief is also available under s.80. This may be appropriate where a lender is moving to realize the surety's security. Note that the Trade Practices Commission may also seek an injunction under s.80 and may make an application under s.87(1A) on behalf of persons who have suffered or are likely to suffer loss or damage by virtue of the unconscionable conduct.

Section 87(1CA) provides that an application under s.87(1A) for relief based on a contravention of s.52A must be commenced within two years of the cause of action accruing. This short limitation period reduces the utility of the section for plaintiffs by forcing them to find conduct within the limitation period to which they can attribute their loss.[120]

*F. The Role of Independent Advice in Section 52A*

Cases decided under the *Contracts Review Act* 1980 provide useful guidance to the interpretation of s.52A on this point. The *Contracts Review Act* contains a detailed list of factors in s.9(2) to which the courts must have regard in determining whether a provision of a contract is unjust. One of the factors is whether or not and when independent legal or other expert advice was obtained

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120 In *Zoneff v. Elcom Credit Union Ltd.* (1990) ATPR #41-009 the plaintiff was misled by a brochure about the coverage provided by an accident insurance policy offered by his credit union. He was injured and the payments made by the insurer on his home loan terminated earlier than he had been led to believe. He sued the credit union under s. 52A. The unconscionable conduct alleged was not the misleading brochure, which he had relied on more than two years earlier, but the credit union's action in seeking to enforce the loan in a manner inconsistent with the representations as to the insurance benefits. It was held that the plaintiff's loss was suffered at the latest at the time when the accident occurred. The action of calling up the loans brought about no further loss.

by the party seeking relief under the Act: para. 9(2)(h). Independent advice will also be relevant to several of the other paragraphs, notably para. (i) which considers whether the provisions of the contract and their legal and practical effect were accurately explained to the party seeking relief and whether that party understood the provisions and their effect and para. (j) which considers whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief.

The inclusive list of factors in s.52A(2) of the *Trade Practices Act* does not specifically mention the presence or absence of independent advice in determining whether conduct is unconscionable but the court may have regard to whether the consumer was able to understand the relevant documents (para. 52A(2)(c)) and whether any undue influence or pressure was exerted on or any unfair tactics were used against the consumer (para. 52A(2)(d)). Independent advice will be relevant to these factors because it will afford evidence that the consumer understood the documents and that the effect of any undue influence or pressure or unfair tactics was neutralised.

Cases under the *Contracts Review Act* suggest that the presence of independent advice may save a contract but the absence of independent advice will rarely, of itself, damn a contract. In *West v. AGC Advances* Kirby P. suggested in obiter dicta that although the absence of independent advice for the borrower under a contract of loan will not necessarily make the contract unjust, the lender runs the risk of such a conclusion if the court should think that the circumstance suggested that independent advice ought to have been insisted upon.[121] It has been suggested that this dictum may amount to a rebuttable presumption of injustice if there is no independent advice.[122] But later cases appear to have rejected such a presumption. As McHugh J.A. said in the same case, if the contract is not otherwise unfair or unreasonable, it is hard to see how a lack of independent advice could render the contract unjust. It may be, however, that in a particular case where the lender has notice of certain facts (for example a surety's special disadvantage), it may be unfair for the lender not to insist on advice being obtained. One is left with the impression that these cases will be rare.[123] Moreover, the absence of independent advice will not of itself amount to a vitiating factor if the weaker party's alleged disadvantage consists of deficient understanding but the weaker party has received a sufficient explanation (for example from the lender) and has a clear

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121 (1986) 5 NSWLR 610, 613.

122 Goldring, note 100 *supra*, 533.

123 *Esanda Finance Corporation v. Murphy* (1989) ASC 55-703, 58,355-356, a case under Part IX of the *Credit Act* 1984 (N.S.W.) involving an application to re-open an unjust contract, where the Supreme Court of New South Wales rejected a finding by the Commercial Tribunal that the absence of independent advice was decisive of injustice.

understanding of the transaction.[124] Thus although independent legal advice is highly relevant to a finding of injustice there is no magic in the fact of its absence.

Neither is there magic in the fact of its presence. Where advice has been given, the courts will assess its adequacy. The factors in para. 9(2)(i) of the *Contracts Review Act* 1980 as to whether the provisions of the contract were accurately explained to the party seeking relief and whether that person understood the provisions of the contract and their effect, are to be tested objectively. Thus an inadequate explanation, even by an independent adviser, will not satisfy the requirements of the paragraph: *Collier v. Morlend Finance Corporation (Vic.) Pty Ltd*[125] In that case the finance broker referred the Colliers to a solicitor nominated by the broker. The advice given did not refer to the possibility of the borrower defaulting and the lender foreclosing on the Collier's home. There was no discussion as to the prospects of the loan being repaid, either by the debtor or the Colliers, and Meagher J.A. said the advice seemed somewhat deficient. The solicitor had sought to limit his retainer to give something less than adequate independent advice by getting the clients to sign an appropriate statement of instructions but, because the test in para. 9(2)(i) is an objective one, it was held that the adequacy of the explanation and understanding was not affected by a limitation in the solicitor's retainer. The same conclusion would seem to follow under para. 52A(2)(c) of the *Trade Practices Act.*

However, no relief was given in *Collier's Case* because the lender was ignorant of the actions of the finance broker and the inadequacy of the advice given. The court held that it is *not* necessary to establish knowledge by the lender of the vitiating factors to entitle a plaintiff to relief but lack of knowledge by the lender is relevant to the court's exercise of its discretion whether or not to grant relief. Here the lender was considered an innocent party and it would not have been just to deprive it of the benefit of its contract.

Under both the *Contracts Review Act* and s.52A the court must make an overall determination as to whether a contract is unfair or conduct unconscionable. The presence or absence of independent advice is one factor in the calculus. Some general principles about the role of independent advice under these provisions can be stated:

(a) The absence of independent advice will rarely of itself be a vitiating factor but, given other vitiating factors, the absence of independent advice may make the court lean in favour of granting relief.

(b) Independent advice is most often relevant for its curative effect. If independent advice is to be effective to "cure" a transaction, it must

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124 *White v. Ormsby* (1988) ASC #55-665 (Supreme Court of New South Wales); see also *Commonwealth Bank of Australia v. Cohen* (1988) ASC #55-681 (Supreme Court of New South Wales).

125 (1989) ASC #55-716 (New South Wales Court of Appeal).

address the vitiating factor and be adequate to redress that factor. The most common factors to which independent advice will be relevant in s.52A are whether the consumer understood the documents and whether undue influence or unfair tactics led to the consumer entering into the contract. The factors in sub-s.52A(2) seem to require objective evaluation. Thus the issue is whether the consumer actually understood the documents after the advice or whether the advice actually redressed the undue influence, not whether the lender reasonably believed this to be the case.

(c) It is not clear whether the ultimate assessment of whether the conduct is unconscionable is purely objective or involves a consideration of the state of the lender's mind. It is submitted that if a *contract* can be objectively assessed as unjust under the *Contracts Review Act* then the lender's *conduct* can be objectively assessed as unconscionable under s.52A.

(d) However, even where, on an objective analysis, there are vitiating factors and the advice is inadequate to redress them so that the conduct is objectively unconscionable, the court may, in the exercise of its discretion, refuse to grant relief against a lender who can show that it did not know of those factors and the inadequacy of the advice.

It will be apparent by now that, as with undue influence and the doctrine of unconscionable transactions, no lending procedure can be constructed using independent advice so as to provide complete immunity from claims under s.52A. It is also clear that independent advice is not required in all cases to avoid a finding of unconscionable conduct. It will depend upon the vitiating factors involved. How can independent advice be used to maximise protection from s.52A for the transaction? The most effective protection from s.52A will be provided by the system of adequate independent advice certified to the lender by the adviser. Adequate independent advice will cure many vitiating factors and even if it does not, the certificate of the adviser will often give the lender reasonable grounds to believe that any vitiating factors have been remedied. That reasonable belief would normally influence the court against granting relief in the exercise of its discretion even if the vitiating factors were not in fact cured.

## VII. REFORMS TO LENDING PROCEDURES

It has been argued above that if the lender requires the surety to obtain adequate independent advice and this advice is certified by the adviser to the lender, the lender will be protected in most (but not all) cases from attack under the equitable doctrines of undue influence and unconscionable conduct and s.52A. For this purpose, adequate independent advice is advice which is truly independent of the lender and the debtor. It will normally include a clear

explanation of the terms of the documents, the effects of the transaction on the surety and the propriety of the surety entering into the suretyship transaction.

The propriety of the transaction must be evaluated in the light of the surety's financial resources and the extent of the risk which the surety is undertaking. Two important factors in assessing the risk of the surety being called upon to pay are the likelihood of the debtor defaulting and the adequacy of any other security provided by the debtor or other parties to cover a default. If the loan being guaranteed is for a business venture and it is expected that the repayments will be covered by the cash flow of the business then some evaluation of the viability of the business venture would be necessary to give sound advice on the propriety of entering into the suretyship transaction. The lender may need to disclose various features of the account being guaranteed and the debtor's relationship with the lender for the surety's risk to be properly evaluated.[126]

Most lenders do not require sureties to obtain adequate independent advice as defined above. Indeed many lenders do not *require* that any advice be obtained although in some cases they may recommend this. In cases where advice is required or recommended, lenders expect sureties to be advised of the terms of the guarantee document and the effect of the transaction.[127] This was the tenor of the certificate required by the lender in *Aboody's Case*:

> I hereby confirm that prior to the execution of this document I fully explained the contents and effect thereof to [the surety] who seemed to me and informed me that she perfectly understood the same.[128]

Usually no advice as to the propriety of the transaction is envisaged and hence the adviser does not enquire as to the extent of the risk being undertaken (beyond the terms of the document) or the resources of the surety. No disclosure of information by the lender is envisaged.

Advice which is limited to explaining the terms of the document and the effects of the transaction will not give the transaction the same high degree of protection as adequate independent advice. Of course, such advice may be useful in that it could remedy a surety's deficient understanding of the transaction and remove that as a vitiating factor. But such advice did not suffice in *Guthrie's Case* nor would it generally be sufficient in the view of King C.J. in *McNamara's Case* nor would it have sufficed in *Amadio's Case* or in any other case where the problem was not purely one of defective understanding of the documents.

Independent advice which is limited to explaining the terms of the document and the effects of the transaction cannot be the linchpin in a protective procedure for taking guarantees. Adequate independent advice which is certified to the lender by the adviser can serve as that linchpin.

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126 In this regard see *Beneficial Finance Corporation Ltd v. Adams*, unreported, Supreme Court of NSW, Giles J., 19 May 1989.

127 Speirs, note 1 *supra*, 51.

128 *Bank of Credit and Commerce International S.A. v. Aboody* [1989] 2 WLR 759.

However, considerations of time and cost and institutional inflexibility may lead lenders to continue with the system of independent advice currently practised. To require certified adequate independent advice for all guarantees or a broad class of guarantees would very likely be unworkable because it would cost too much to preserve the relatively small number of transactions that are tainted by unfair conduct. Because of the added costs of a system of certified adequate independent advice, it would be reasonable to limit its use to high risk cases such as a wife guaranteeing a husband's debts or parents their adult child's. A large number of personal guarantees are given by directors of proprietary companies. These cases would not normally require certified adequate independent advice unless one of the directors is non-active and is in a high risk category, such as a wife who takes no part in the running of the family company.

Lending institutions could reasonably expect of their lending officers and procedures the discrimination and flexibility necessary to identify high risk guarantees and require the higher standard of adequate independent advice for them. Procedure manuals could be drafted to alert lending officers to those transactions where the relationship between the surety and the debtor and the characteristics of the surety are such that there is a substantial risk of undue influence or unconscionable conduct. This could be done by constructing a profile of likely high risk cases based on a number of factors such as: particular relationships between surety and debtor e.g. the surety is the debtor's wife or the debtor's parent, the surety's age, illness, lack of fluency in English and lack of business experience. Whether a lending institution would take these steps is of course a commercial decision for the institution. The incentives for institutions to adopt a system of certified adequate independent advice are canvassed below.

## A. IMPLICATIONS FOR DISCLOSURE BY LENDERS

One advantage of certified adequate independent advice over an independent explanation of the transaction is that the surety is advised as to the propriety of entering into the transaction and, for that purpose, the lender is required to disclose facts about the state of the accounts being guaranteed and any unusual features of the account material to the risk of the guarantee being called upon. Kirk has argued that most of the difficulties with guarantee transactions stem from a lack of appreciation of the risk on the part of sureties and she argues that lenders should be required by legislation to disclose (in the case of guarantees of consumer debts) all facts known to the lender which are material to the risk of the guarantee being called upon and (in the case of commercial debts) all facts known to the lender which indicate that there is a greater than average risk of the guarantee being called upon.[129]

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129 Kirk, note 67 *supra*, 280, 285. Kirk's recommendations draw extensively on the British Columbia Law Reform Commission, *Report on Guarantees of Consumer Debts* (1979).

The British Columbia Law Reform Commission proposed that lenders provide a disclosure statement to the surety a reasonable time before the documents are presented for signature. The statement would disclose whether the surety was liable for an unlimited or limited amount, whether for past debts and, if so, in what amount, whether for future debts and, if so, the right to revoke the guarantee in relation to future debts. In addition it was recommended (in relation to guarantees of consumer debts[130]) that lenders be under a general duty to disclose all matters known to the lender which are material to the guarantor's risk.

The courts in Australia may be moving towards requiring more disclosure by lenders although not to the degree recommended by the Commission; as suggested above equity would seem to require (if lenders are to rely on the protective effect of adequate independent advice) disclosure of any unusual features of the account or the debtor's relationship with the lender which are material to the risk of the guarantee being called upon.

My own view is that a sensible disclosure requirement (whether statutory or case law) would prevent many of the situations in which the equitable doctrines and statutory remedies discussed above now pick up the pieces. For cost-benefit reasons, any such disclosure requirement ought to be targeted at guarantees in high risk categories as explained above. A system of voluntary disclosure by lenders in high risk cases is a possible alternative to a system of certified adequate independent advice. Although it would not afford the same degree of protection as certified adequate independent advice, it would still afford some protection and would presumably be less costly.

### B. INCENTIVES FOR ADOPTING CERTIFIED ADEQUATE INDEPENDENT ADVICE

Absent legislative coercion, will lenders adopt a system of requiring some or all sureties to obtain adequate independent advice and to have that advice certified to the lender by the adviser with any disclosure obligations that may entail? It is suggested that there are several incentives for lenders to adopt such a system, at least for high-risk transactions.

First, a system of certified adequate independent advice, although more complex and costly, will afford far more protection than the half-baked independent advice that is now contemplated. Adequate independent advice might actually warn off an unsuspecting surety or ensure that he or she goes on in full knowledge of the risks involved whereas an explanation of the terms of the document and a brief statement of the nature of the transaction will rarely do either. It will give teeth to the independent advice and corresponding protection to the transaction if the surety does go ahead. It will be very difficult for the surety to have the transaction set aside for unfair conduct if the lender is in

130 Arguably, this is the wrong distinction between types of guarantees; the degree of disclosure afforded to the guarantor should turn upon the guarantor's status, not the debtor's.

possession of a certificate that an independent adviser has explained the documents and the transaction, discussed the risks involved and advised the surety of the propriety of entering into the transaction. This is as near as equity can come to the certainty that the commercial world demands.[131] For the lender, certified adequate independent advice gives the maximum degree of protection to its guarantees.

A second incentive for lenders may arise indirectly from the duties the law imposes on solicitors. A solicitor who undertakes to give independent advice to a surety, whether at the behest of surety or lender, is under a professional obligation to advise as to the propriety of entering into the transaction[132] and, therefore, to ensure that the surety or the adviser has adequate information as to the risk of the guarantee being called upon. The most reliable source of that information is the lender.[133] Failure by the solicitor to seek that information if not already known or failure to advise adequately as to the propriety of the transaction because the information was lacking would seem to be professional negligence.

Once solicitors realise this (and it could be a successful negligence action by a disgruntled surety that will put them on notice), solicitors advising sureties will be diligent to seek information from lenders about the loan and the debtor. It is not too fanciful to suggest a series of requisitions to lenders in appropriate cases. Failure by the lender to comply with reasonable requests for information will usually mean that the solicitor cannot give (or certify) adequate independent advice and the transaction is then vulnerable to being set aside for unfair conduct.

If solicitors begin to take their responsibilities seriously, lenders may find themselves facing a multitude of different requisitions for information. If that occurred it would be considerably easier for lenders to devise their own pro forma disclosure statement to be issued to sureties or their advisers in high risk cases. This statement would not require any information not already in the debtor's file and an administrative procedure for preparing such a form could be

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131 Absolute certainty may of course be had by not taking a guarantee at all.

132 For undue influence see *Inche Noriah v. Shaik Allie Bin Omar* [1929] AC 127, 135-136; *Bank of N.S.W. v. Rogers* (1941) 65 CLR 42 per Starke J., 55 and Williams J., 87; it is also implicit in the judgment of Dixon J. in *Yerkey v. Jones* (1939) 63 CLR 649, 684; *Bester v. Public Trustee Co. Ltd* [1970] 3 NSWR 30; with respect to unconscionable conduct the requirement for a discussion of propriety can be seen in the judgment of Deane J. in *Amadio's Case* and in *Guthrie v. A.N.Z. Banking Group Ltd* (1989) NSW Conv R. para. 55-463 and in relation to statutory requirements and professional obligations of solicitors see *McNamara v. Commonwealth Trading Bank* (1984) 37 SASR 232 and *Collier v. Morlend Finance Corporation (Vic.) Pty Ltd* (1989) ASC #55-716.

133 The debtor would have the information but may have very substantial reasons for not providing it. A principal purpose of this procedure is, after all, to guard against the possibility of undue influence or unconscionable conduct by the debtor.

added to lenders' procedure manuals. There may thus arise an incentive for lenders to adopt a standardised disclosure system to avoid the cost of complying with a multitude of forms of requisitions and, if such a system were in place the cost of lenders requiring certified adequate independent advice would be greatly reduced.

A final incentive for lenders of a system of certified independent advice is that it could lead to loss sharing with the adviser for some guarantees which were later set aside for unfair conduct notwithstanding certified independent advice. Some such guarantees would be set aside because the risks were not brought home to the surety or the advice did not address the source of unfairness. The lender could have a claim in tort because the certificate is requested by the lender in circumstances where it is clear that the lender relies on the statement as to the advice given or, more rarely, in contract (if the lender retained the solicitor to advise the surety).

How would solicitors respond to such a system of certified adequate independent advice? There are two issues for solicitors: adequate independent advice requires considerably more of solicitors than the current practice and the requirement of a certificate will expose the solicitor to possible claims by the lender. As to the first issue, current practice in giving independent advice must change to conform to the standards required by the courts or advisers run the risk of professional negligence claims by sureties. The second issue is that solicitors would incur an exposure to lenders through the certificate. In the past when lenders have sought solicitor's certificates, solicitors' bodies have objected that the solicitor incurs a potential liability to the lender while acting for and being remunerated by the surety.[134] One aspect of this concern may be that the solicitor is not remunerated for the additional risk undertaken. There are two answers to this. First, the solicitor is obliged to do much more when giving adequate independent advice than under current practice and could justifiably charge his or her client more for the service. Secondly, if the lender is to benefit from the provision of the certificate, the solicitor should charge the lender an additional sum for the certificate. Another aspect of concern is the possibility of conflict of interest where the solicitor appears to act for surety and lender. If the service provided to the lender is strictly limited to certifying the advice that was in fact given to the surety, and the surety knows this is happening, it is hard to see how a conflict situation could arise. A pro forma certificate could be agreed. If the solicitor could certify in the terms of the certificate, the lender would pay a fee[135] and receive the certificate. If the solicitor could not certify in those terms or some acceptable modification, no certificate would be supplied and no fee would be paid. There would be a conflict situation and the independent nature of the advice would be undermined if lenders were able to pressure solicitors to give a favourable certificate regardless of the advice they

134 Speirs, note 1 *supra*, 51.

135 This expense would presumably be charged to the debtor.

tendered. This could arise where lenders paid the solicitor's fees for advising and made it known that payment (or future employment) was contingent on a satisfactory certificate. The answer to such fears is that it is necessary to trust that solicitors' professional independence will resist any pressure from lenders of that kind.

A suggested form of certificate by the independent adviser is as follows:

> Prior to the execution of this document I explained the nature and effect of the transaction documented herein and the principal features of the document to [the surety] who seemed to me and informed me that he/she understood the same. I have advised him/her as to the propriety of entering into this transaction given his/her financial resources and the risks involved [I have/have not been supplied by the [surety]/[debtor]/[lender] with information as to the liabilities being guaranteed and the capacity of the debtor to meet those liabilities]. [The surety] informs me and I believe that he/she has executed this document of his/her own free will and not because of pressure or influence from any other person to do so.

If the lender fulfilled its disclosure responsibilities outlined above and obtained such a certificate, it would be a rare case in which the guarantee was later impeached. This system protects sureties by giving them adequate warning of the risks involved and neutralizing as far as possible the operation of undue influence or unconscionable conduct upon them. The system protects lenders by giving maximum protection to the transaction from impeachment and by allowing for loss caused by impeached transactions to be shifted to or shared with the independent adviser in certain cases. The system benefits solicitors by giving them a much more effective role in preventing undue influence and unconscionable conduct; admittedly more difficult work but for which they can be better remunerated.

## VIII. CONCLUSION

This article has closely examined three legal bases on which guarantees may be set aside or modified because of unfair conduct in the taking of the guarantee: the equitable doctrines of undue influence and unconscionable conduct and legislation directed at unfair contracts or conduct, particularly s.52A of the *Trade Practices Act* (illuminated by the *Contracts Review Act* 1980 (N.S.W.)). The role of independent advice as a means of protecting guarantees from attack has been examined in relation to each of these and it was concluded that no invincible procedure which would protect the guarantee in every case could be devised. The procedure suggested by the Court of Appeal in *Coldunell v. Gallon*, which involved only a recommendation that the surety obtain independent advice, was seen on analysis to be limited to agency liability for the debtor's undue influence. Even in that limited context, it was suggested that the dicta in that case did not represent the law in Australia, partly because it was contrary to the High Court's decision in *Yerkey v. Jones* and partly because its narrow focus on the common law of agent and principal was inconsistent with

the basic equitable question whether the lender's conscience was bound in the circumstances.

It was suggested that current ideas of what constitutes independent advice are inadequate to form the basis of an effective protective procedure. Adequate independent advice is truly independent informed advice which not only explains the transaction and its implications but also evaluates the risks involved and advises whether the surety should enter into the transaction. If a lender requires a surety to take adequate independent advice and that advice is certified to the surety by the adviser, the transaction will withstand later attack in the great majority of cases. Such a system would be more costly than the half-way house now used but it would be much more effective in achieving its aims. It was suggested that both lenders and solicitors as independent advisers have substantial incentives to adopt such a system. Cost-benefit considerations might lead lenders to use a system of certified adequate independent advice only in "high risk" cases, such as wives guaranteeing husband's debts and parents their children's debts. That would be a worthwhile reform of lending procedures and, from the lender's point of view, it might stave off a broader and more costly statutory alternative.