bar speak

with Andrew Lyons

widening equity's attacks on **guarantees**

A wider class of guarantors will be able to attack the guarantee that they have given if a recent decision of the Victorian Court of Appeal (CA) is followed. In **Kranz - v - NAB** a 3-0 majority endorsed a wide view of the test as to who could rely upon the equitable principles discussed by the High Court in **Garcia - v - NAB**.

The joint judgement in Garcia said that it would be unconscionable for a lender to enforce a guarantee if:

(a) in fact the surety did not understand the purport and effect of the transaction;

(b) the transaction was voluntary (in the sense that the surety obtained no gain from the contract the performance of which was guaranteed);

(c) the lender is to be taken to have understood that, as a wife, the surety may repose trust and confidence in her husband in matters of business and therefore to have understood that the husband may not fully and accurately explain the purport and effect of the transaction to his wife; and yet

(d) the lender did not itself take steps to explain the transaction to the wife or find out that a stranger had explained it to her."

As can be seen from (c), the joint judgement spoke of the position of wives. Elsewhere the joint judgement left open the extension of these principles to "long term and publicly declared relationships short of marriage between members of the same or opposite sex".

The Victorian CA has now expressed support for an even wider application of the test in (c) saying that the Garcia principles would apply where a surety established "that the bank was aware of a relationship that put the bank on inquiry, such as that of husband and wife or solicitor and client, or that there was a relationship of trust and confidence between the debtor and the third party."

In so holding the CA rejected the primary Judges' view that the Garcia principles were confined to "the most intimate of family relationships". It is also a rejection of the Queensland decision in **ANZ - v - Alirezai** where a single Judge said that the Garcia principles were confined to relationships of a like nature to marriage.

In Kranz, the surety gave a guarantee in support of borrowings from the NAB that were arranged by his brother-in-law who was also his accountant and business adviser. His brother-in-law misled him about the width of the liabilities secured by the guarantee, which the surety did not read. While the wider view taken by the CA opened the door for such facts to satisfy the Garcia criteria, the surety still lost this aspect of the case because the bank did not know, nor should it have assumed, that there was a relationship of trust and confidence between the surety and his brother-in-law.

The decision highlights the importance to creditors of, first, ensuring that prospective sureties have the transaction fully explained to them and, secondly, obtaining acknowledgements to evidence this. Until the matter is tested before the High Court, the safe course for lenders is to assume that the principles canvassed in Garcia are not confined to relationships akin to marriage. Kranz v NAB may flag a widening of the circumstances in which guarantees can be attacked in equity.

Andrew Lyons, LL.B. (Hons), B. Econ. is a Brisbane based barrister.