HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND HEYDON JJ

YOLANDA GATTELLARO & ANOR APPELLANTS

AND

WESTPAC BANKING CORPORATION RESPONDENT

Gattellaro v Westpac Banking Corporation
[2004] HCA 6
11 February 2004
S77/2003

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

G J McVay with D M Loewenstein for the appellants (instructed by Spencer Whitby and Co)

J C Sheahan SC with K A Rees for the respondent (instructed by Henry Davis York)

CATCHWORDS

Gattellaro v Westpac Banking Corporation

Evidence – Judicial notice – Whether judicial notice can be taken that institutions such as the respondent use a standard form of guarantee.

Guarantee – Consequence of person named as co-surety not being shown to have executed guarantee.

Practice and procedure – High Court – Determination of appeal – Appellants' ground of appeal succeeds – Notice of Contention – Whether respondent should have leave to amend contentions sought in motion filed immediately before appeal hearing – Whether outstanding issues should be determined in intermediate appellate court.

Words and Phrases: "judicial notice", "common knowledge".

Contracts Review Act 1980 (NSW).
Evidence Act 1995 (NSW), s 144.
Supreme Court Rules 1970 (NSW), Pt 15 r 13(2).

GLEESON CJ, McHUGH, HAYNE AND HEYDON JJ.

Background of the appeal

1 From the late 1960s Falgat Constructions Pty Ltd ("the company") engaged in the business of acquiring, renovating and selling houses; extending and altering houses; and building houses and home units. Mr and Mrs Gattellaro were its sole directors and shareholders. The company and the Gattellaros had accounts with the Goulburn Street, Sydney branch of the Commercial Bank of Australia Ltd ("CBA").

2 On 17 June 1977 Mr and Mrs Gattellaro executed a mortgage over their home to secure their personal indebtedness to CBA ("the 1977 mortgage"). Following a merger between CBA and Westpac Banking Corporation ("Westpac") in October 1982, a statutory novation took place substituting Westpac for CBA in its contractual relationships with the company and the Gattellaros.

3 By late 1985 officers of Westpac were becoming concerned with the incapacity of the Gattellaros to finance the interest burdens on their loans from income.

4 On 2 June 1986 the accounts of the company and the Gattellaros at the Goulburn Street branch were closed. New accounts were opened at the Westpac Plaza branch. A bill acceptance line of credit in favour of the Gattellaros was arranged. This was used to pay out the indebtedness of the company and the Gattellaros at the Goulburn Street branch. The Gattellaros entered a mortgage over their home to secure the advance of $450,000 ("the 2 June 1986 mortgage"). The 1977 mortgage was discharged.

5 On 30 May 1990 Westpac instituted proceedings under the 2 June 1986 mortgage claiming $197,378.09 and also seeking judgment for possession of the Gattellaros' home.

6 After a trial on 1-3 and 5 November 1999, Hulme J in the Supreme Court of New South Wales delivered reasons for judgment on 11 August 2000 upholding Westpac's claims and rejecting the Gattellaros' defences[1]. On 25 August 2000 he ordered the Gattellaros to pay Westpac $983,339.02 and

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1 *Westpac Banking Corporation v Gattellaro* [2000] NSWSC 775.

ordered them to give up possession of their home. On 6 April 2001 the Court of Appeal dismissed an appeal by the Gattellaros[2].

7 Among the defences advanced by the Gattellaros and rejected by the trial judge was a defence under the *Contracts Review Act* 1980 (NSW). That defence was that the 2 June 1986 mortgage was unjust in that it rendered the Gattellaros personally liable for the indebtedness of the company. It was contended that they had not been personally liable for that indebtedness before; that their home had not been security for that indebtedness; that no adequate explanation had been given about these changes; and that they had not understood that these changes had been effected.

8 Among the answers which Westpac gave to that defence was the contention that the company's indebtedness on the Goulburn Street branch accounts was secured by an unlimited guarantee given by Mr Gattellaro in or about November 1985; that the obligations under that guarantee were secured by the 1977 mortgage of their home; and that the 1977 mortgage made Mrs Gattellaro liable for that indebtedness also. Hence, said Westpac, the 2 June 1986 mortgage was not unjust because it did not make the Gattellaros liable for any company indebtedness they were not previously liable for, and it did not make their home security for any indebtedness for which it was not previously security.

9 A difficulty in Westpac's position was that it could not produce the unlimited guarantee of November 1985 on which its contention depended. It endeavoured to prove its existence by recourse to other materials. Those other materials included an internal Westpac memorandum of 27 November 1985 suggesting that Mr Gattellaro had given a guarantee of the company's indebtedness to the extent of $120,000 which was secured by the 1977 mortgage and that Mrs Gattellaro was also to give a guarantee that week. Other Westpac documents (a diary note of 14 February 1986 and a Westpac memorandum from the Goulburn Street branch to the regional office dated 21 February 1986) suggested that the reference to a guarantee limited to $120,000 was in error.

10 The trial judge found that at the time of the 2 June 1986 mortgage, Westpac had an unlimited guarantee from Mr Gattellaro executed in November 1985 guaranteeing the company's liability, but said that he was not persuaded that Westpac had obtained one from Mrs Gattellaro.

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2 *Gattellaro v Westpac Banking Corporation* [2001] NSWCA 76.

11 The minority judge in the Court of Appeal agreed in relation to both the Gattellaros. The majority of the Court of Appeal agreed in relation to Mr Gattellaro, and said it was not necessary to decide whether Mrs Gattellaro had given a guarantee. No attempt was made in this Court to contend that she had.

12 The Gattellaros conceded to the Court of Appeal that if there were in fact a guarantee of the company's debts unlimited as to amount, and if the obligations of the Gattellaros under that guarantee were secured on their home by the 1977 mortgage, then the 2 June 1986 mortgage was not unjust. The Court of Appeal acted on that concession, modified in light of the fact that only Mr Gattellaro had given an unlimited guarantee of the company's debts: it said that because he had given that guarantee, the 1977 mortgage made Mrs Gattellaro liable in relation to his responsibility under the guarantee and rendered their home security for the company's debts. Though the Gattellaros unsuccessfully argued to the Court of Appeal that the evidence did not support an inference that Mr Gattellaro had signed an unlimited guarantee in November 1985, they had a further argument. They apparently contended that even if Mr Gattellaro had given the unlimited guarantee it could not be operative even against him if it was in the form of a co-guarantee and if Mrs Gattellaro had not signed it. That contention would fail if there were an express clause providing that the guarantee was binding on each person who did sign it notwithstanding that some other person named as guarantor had not. The majority of the Court of Appeal found that there was an express clause of that kind, because they took judicial notice of the fact that Westpac had a standard form guarantee and that it contained an express clause of that kind. The only aspect of the Court of Appeal's reasoning which the Gattellaros challenged was the premise that Mr Gattellaro had given an unlimited guarantee in November 1985, and they challenged it, not on the ground that Mr Gattellaro had not signed it, but on the ground that the reasoning leading to the conclusion that the express clause relied on by the majority of the Court of Appeal was part of the November 1985 guarantee was erroneous.

13 The majority reasoning relevantly contained the following passage:

> "It was submitted that the guarantee given by Mr Gattellaro might not have become operative in the absence of signature by Mrs Gattellaro as co-guarantor. However, the evidence included a guarantee given by a relative of Mr and Mrs Gattellaro in May 1986 in respect of their indebtedness, a Westpac guarantee on a printed form with a print date of 1 October 1984. Judicial notice can be taken of the fact that institutions such as Westpac used a standard form guarantee. It was submitted that this could not be found to have been Westpac's standard form guarantee, and so the form of guarantee which would have been given in November 1985, in the absence of explicit evidence from Westpac. I think that

> unrealistic, and conclude that the guarantee given by Mr Gattellaro in November 1985 was in the same form. It provided that the guarantee was binding on each signatory notwithstanding that one or more of the persons named as guarantor did not execute it."

The "guarantee given by a relative" which was "on a printed form with a print date of 1 October 1984" was a guarantee dated 21 May 1986 given by Mr and Mrs Falcomata to Westpac securing the indebtedness of the Gattellaros to Westpac ("the Falcomata guarantee"). Clause 20 of the Falcomata guarantee provided:

> "THAT this instrument shall bind each of the signatories hereto to the extent aforesaid notwithstanding that one or more of the persons named herein as the Guarantor or the Debtor may never execute the same or that the execution of this instrument by any one or more of such persons (other than the person sought to be made liable hereunder) is or may become void or voidable."

14 The minority judge in the Court of Appeal said that the majority reasoning depended on a view taken by the majority of what was in the guarantee which they inferred Mr Gattellaro had signed. He stated:

> "This view depends upon their taking judicial notice both of the fact that the Bank used a standard form of guarantee and of what was in it.
>
> I do not think judicial notice can safely be taken of either of those matters, for three reasons: in my experience bank forms frequently change – they must, in light of constantly changing economic conditions and legislative provisions, and never ending court decisions around the world about the meaning and effect of bank forms; there are, I believe and there certainly may be, different forms of guarantee within a single bank; and, transaction by transaction, additions and/or deletions may be made to standard forms."

Judicial notice

15 While in the course of the hearing of the special leave application on 14 February 2003 counsel for Westpac did not formally concede that the reasoning advanced by the majority of the Court of Appeal on judicial notice was wrong, he did not defend it. He submitted that no judicial notice question arose and that the Court of Appeal's orders dismissing the appeal could be defended on other grounds. Westpac adopted a similar posture in its Notice of Contention filed on 17 March 2003. On 12 June 2003, in its written submissions, Westpac

accepted "that the doctrine of judicial notice did not permit the majority of the Court of Appeal to find that [Westpac] in 1985 used *a* standard form of guarantee"[3].

16 In these circumstances it is not necessary to deal with the judicial notice question in detail.

17 Below, the matter was dealt with as though the common law applied. In New South Wales there would appear to be no room for the operation of the common law doctrine of judicial notice, strictly so called, since the enactment of the *Evidence Act* 1995 (NSW), s 144. This section provides:

> "(1) Proof is not required about knowledge that is not reasonably open to question and is:
>
> (a) common knowledge in the locality in which the proceeding is being held or generally, or
>
> (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
>
> (2) The judge may acquire knowledge of that kind in any way the judge thinks fit.
>
> (3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.
>
> (4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced."

18 Knowledge of the proposition that institutions such as Westpac use, or at any particular time used, *a* standard form guarantee is not common knowledge, either in Sydney, which is the locality in which the proceeding was held, or generally. Nor is it knowledge capable of verification by reference to a document the authority of which could not reasonably be questioned. Further, it has not been demonstrated that the majority of the Court of Appeal gave the Gattellaros an opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of the knowledge in question as was

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3 The emphasis is Westpac's.

necessary to ensure that they were not unfairly prejudiced. Indeed, counsel for both sides said that the judicial notice issue was raised by the Court of Appeal for the first time in its judgments. For these reasons judicial notice could not be taken in the way the majority of the Court of Appeal did.

19 However, Westpac submitted that the Court of Appeal's dismissal of the appeal could be upheld on one or other of two contentions propounded in its Amended Notice of Contention.

Inference that Mr Gattellaro's guarantee contained cl 20 of the Falcomata guarantee

20 The first of the two contentions propounded in Westpac's Amended Notice of Contention was "that there was sufficient evidence (albeit barely sufficient) to warrant a finding that, more probably than not, the guarantee executed by Mr Gattellaro would have included a term such as cls 20 of the Falcomata guarantee". A brief submission to the same effect had been put to, but not dealt with by, the Court of Appeal. In this Court, Westpac pointed to four circumstances in support of the contention.

21 First, several aspects of the Falcomata guarantee suggested it was a standard form. It had marginal notes giving instructions for execution; and in particular there were instructions relating to execution in different jurisdictions. It referred to "all moratorium legislation and regulations which may now or hereafter be in force". It contained words permitting imposition of a limit on liability which had been struck out.

22 While this reasoning certainly supports the conclusion that the Falcomata guarantee was *a* standard form, it does not justify the conclusion that it was *the only* standard form in use in May 1986, let alone November 1985. There may have been others. And even if the Falcomata guarantee was in the form of the guarantee signed by Mr Gattellaro, just as parts of the Falcomata guarantee were filled in or struck out, so cl 20 may have been struck out of the guarantee signed by Mr Gattellaro.

23 The second circumstance which Westpac relied on was that the form of the Falcomata guarantee was apt to be used for a guarantee by Mr Gattellaro of the company's debts.

24 It is true that its form was not inappropriate for that use. But it does not follow that a guarantee in that form was the only form capable of use for that purpose, or that it was in fact used for that purpose.

25 The third circumstance is that the form of the Falcomata guarantee was used in relation to a transaction to which the Falcomatas were party which was equivalent to that entered by Mr Gattellaro. Even if that is correct, it does not exclude the possibility that other forms were capable of use, particularly since Mr Gattellaro's guarantee was signed at the request of officers of the Goulburn Street branch, while the Falcomata guarantee was signed at the request of officers of the Westpac Plaza branch.

26 The fourth circumstance relied on was that the Falcomata form of guarantee was used in May 1986, only six months after Mr Gattellaro's guarantee was given in November 1985, and the marginal notes referring to 1 October 1984 indicate that the Falcomata form of guarantee was in use from that date.

27 One difficulty with that contention is that the significance of the date was unexplored. Another is that it does not point to the form of the Falcomata guarantee as being the only one in use in November 1985.

28 For these reasons it is necessary to reject the submission that an inference could be drawn that Mr Gattellaro's guarantee contained cl 20 of the Falcomata guarantee.

Issues relating to whether the giving of the guarantee by Mr Gattellaro was subject to Mrs Gattellaro executing it

29 Before this Court the Gattellaros contended in their written submissions in chief:

> "[I]f it is a term of the arrangements leading to the execution of a guarantee that there will be another co-surety of the debt, then unless the intended surety who has executed the guarantee consents to the other co-surety not thereafter executing the guarantee, failure of the co-surety to execute the guarantee relieves the intended co-surety of liability under the guarantee despite his execution of it."

30 Arguments relating to this contention were both elaborated and varied in the course of the oral hearing and it will be necessary to trace the course of these arguments in some detail. It is convenient to say at once, however, that they are arguments which, in both their original and varied forms, should fail. Counsel for the Gattellaros conceded that it was for the Gattellaros to prove that Mr Gattellaro was relieved from his obligation under the guarantee. This they did not do. Even if, in the courts below, Westpac did not advance the argument that the Gattellaros bore this onus, it is not debarred from doing so in this Court.

31 In oral argument, counsel for the Gattellaros submitted that the relevant principles were conveniently recorded in *Marston v Charles H Griffith & Co Pty Ltd*[4]. In that case Powell J said:

> "1. if it is a term, whether express or implied, of the arrangements pursuant to which a parol contract of guarantee is executed, that there will be another co-surety or other co-sureties, or that the principal debt, or the guarantee, will be secured in an identified way, then, unless the intended surety who has executed the guarantee consents to the other co-surety or co-sureties not thereafter executing the guarantee … or to the contemplated security not being provided … then the intended surety never becomes liable under the guarantee despite his execution of it – the failure of the other co-surety or co-sureties to execute the guarantee, or the failure to provide the intended security, thus affords the intending surety who executed the guarantee a defence at law to an action on the guarantee;
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> 2. if a parol contract of guarantee which is executed by an intending surety is drawn in a form showing another or others as intended joint and several sureties, it will be presumed, in the absence of acceptable evidence to the contrary, that the execution of that other, or those others, was a condition precedent to the surety who signed the guarantee becoming liable under it, and his, or their, failure to execute the guarantee will afford to the intending surety who executed the guarantee a defence at law to an action on the guarantee;
>
> …" (footnotes omitted)

32 It thus appeared to be a contention of the Gattellaros that if it was a term of Mr Gattellaro's guarantee that Mrs Gattellaro was to be a co-surety, since Westpac had not established that she had become a co-surety, Mr Gattellaro was relieved of liability under the November 1985 guarantee ("the *Marston* contention").

33 At all events, Westpac appeared to understand the Gattellaros' position in this way, because after the Gattellaros had served their written submissions in chief, Westpac formulated a second ground on which it sought to uphold the order of the Court of Appeal dismissing the Gattellaros' appeal to that Court. The second ground was put thus in par 4 of the Amended Notice of Contention:

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4 (1982) 3 NSWLR 294 at 300-301.

> "[T]he decision below should be affirmed on the ground that the [Gattellaros] did not plead or prove that the guarantee given by [Mr Gattellaro] was subject to [Mrs Gattellaro] also giving such a guarantee, or that [Mr Gattellaro] had such a belief, induced by the form of the guarantee, and did not plead or prove that [Mrs Gattellaro] did not give such a guarantee."

The Gattellaros opposed Westpac's application for leave to amend its Notice of Contention to rely on this ground. The written submissions of Westpac in support of the second ground were to the effect that the *Marston* contention had not been pleaded, and that the conduct of both parties at the trial suggested that the *Marston* contention had not been advanced by the Gattellaros.

34 The written submissions of the Gattellaros in reply took the stance that it was not open to Westpac to raise any issue adverse to them about whether it was a term of the arrangements pursuant to which Mr Gattellaro entered the November 1985 guarantee that Mrs Gattellaro should become a co-surety. It was said not to be open to Westpac to do this because of the principles relating to the raising of issues in an appeal which had not been raised at the trial.

35 From the Gattellaros' point of view, the difficulty in that stance is that their success on the judicial notice point did not affect the concurrent findings of the trial judge and the Court of Appeal that Mr Gattellaro gave the guarantee of November 1985 in an unlimited amount. The effect of that guarantee was to make Mr Gattellaro liable for all the company's debts to Westpac, and hence also to make Mrs Gattellaro liable for them, and to make their home security for the company's debts by reason of the 1977 mortgage. That meant that the attack on the 2 June 1986 mortgage would fail since it did not worsen the Gattellaros' position.

36 Perhaps because of a perception of that difficulty, in oral argument the Gattellaros appeared to adopt a slightly different posture. They submitted that until notice was given in Westpac's written submissions of what became par 4 of the Amended Notice of Contention, the joint position of the parties was that "if one joint guarantor signed a guarantee form which was expressed to be with others and unless that guarantor who signed the guarantee form agreed, he was not bound if the others did not sign." The Gattellaros conceded that as "a matter of law" they bore the onus on the *Marston* contention; but said that it was not

open to Westpac to rely on that legal rule in this Court in view of Westpac's failure to rely on it below[5].

37 The Gattellaros thus seemed to contend that they could rely on the propositions of law inherent in the *Marston* contention favourable to them (the validity of which, according to them, was common ground at all stages until the oral argument in this Court), but that Westpac could not rely on one of the propositions of law associated with the *Marston* contention favourable to it, namely that the surety seeking to escape liability bore the onus of proving the facts which had to be established if the *Marston* contention were to be made good.

38 It is far from clear whether the *Marston* contention was raised before the trial judge. There are strong indications that it was not.

39 Since the Gattellaros bore the onus of proving that the 2 June 1986 mortgage was unjust, they bore the onus of nullifying the November 1985 guarantee signed by Mr Gattellaro. Their counsel conceded this to be so as a matter of law, as has been noted. That meant that it was for them to prove that there was a clause in that guarantee, or in the arrangements leading to its execution, that Mrs Gattellaro was to be a co-surety.

40 The structure of the pleadings was that Westpac relied on the 2 June 1986 mortgage in its Statement of Claim. The Further Amended Cross Claim filed by the Gattellaros pleaded that the 2 June 1986 mortgage was unjust because, for the first time, it caused them to guarantee the company's debts, and secured them over the Gattellaros' home. Par 5 alleged:

> "By the said mortgage of 2 June 1986 [Westpac] obtained a mortgage over land owned by the [Gattellaros] which had the effect of securing amounts which had previously been advanced to [the company] and which were previously unsecured and which became the debts of the [Gattellaros] after 2 June 1986."

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5 In view of that concession, and in view of the fact that it is possible to decide this appeal by assuming that the law is as stated in *Marston's* case, it is convenient to proceed by assuming, but not deciding, both that the law is as stated in that case and that the Gattellaros bore the onus of establishing facts which would enable them to take advantage of the law so stated.

41 In its Amended Defence to Further Amended Cross Claim, par 10, Westpac responded as follows:

> "In further answer to the allegation made in the Claim to the effect that prior to 2 June 1986 the monies advanced by the Bank to [the company] had been unsecured, the Bank:
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> (a) denies the allegation;
>
> (b) says that by mortgage dated 17 June 1977 and registered number Q283741 ('the 1977 Mortgage') the cross-claimants mortgaged the [Gattellaros' home] to the Bank (by its predecessor [the CBA]) to secure, among other things, all monies that the cross-claimants, or either of them, had then guaranteed to the Bank (or its predecessor) or thereafter guarantee to the Bank (or its predecessor).
>
> Particulars
>
> Paragraphs 2 and 27 of the 1977 Mortgage
>
> (c) says that by a Guarantee made in or about November 1985 the first cross-claimant guaranteed to the Bank payment of all monies owing to the Bank by [the company].
>
> Particulars
>
> The Bank is not able to produce a copy of the Guarantee. Its existence is to be inferred from the entries made in the Bank's diary notes of 27 November 1985 and 21 February 1986 (2) and from item 22 in the defendants' List of Documents dated 7 March 1991 in these proceedings."

By par 10 Westpac was contending that since Mr Gattellaro was liable for the company's debts under the November 1985 guarantee, that Mrs Gattellaro was also liable for them under the 1977 mortgage, and that the Gattellaros' home was security for those debts under the 1977 mortgage.

42 Part 15 r 13(2) of the Supreme Court Rules 1970 (NSW) provides:

> "In a defence or subsequent pleading the party pleading shall plead specifically any matter …
>
> (a) which he alleges makes any claim, defence or other case of the opposite party not maintainable;

(b) which, if not pleaded specifically, may take the opposite party by surprise; or

(c) which raises matters of fact not arising out of the preceding pleading."

43 The *Marston* contention was one which, if sound, would have made par 10 of Westpac's Amended Defence to Further Amended Cross Claim not maintainable, because it would have nullified the November 1985 guarantee. It was also a contention which, if not pleaded specifically, might have taken Westpac by surprise. And the *Marston* contention would have raised matters of fact not arising out of the preceding pleading. If the Gattellaros wished to rely on the *Marston* contention, on which they bore the burden of proof, Pt 15 r 13(2) obliged them to file a reply to Westpac's Amended Defence to Further Amended Cross Claim. This they did not do.

44 Counsel for the Gattellaros complained about the alleged failure of Westpac to make it clear at the trial that it saw the Gattellaros as bearing the onus of proof in relation to the *Marston* contention, and said that his clients were prejudiced because the passage of nearly four years from the trial caused him not to be able to remember the details of what had happened at the trial and what informal accommodations he may have come to with his opponent during the trial. This complaint, however, cannot affect the question of what ought to have been pleaded. The Amended Defence to Further Amended Cross Claim was served before the trial.

45 The failure of the Gattellaros to plead the facts necessary to make good the *Marston* contention was not necessarily fatal to any intention they had of relying on it. It was open to the parties by their conduct of the trial to consent to a widening or narrowing of the issues defined by the pleadings. Demonstration to an appellate court of how a trial was conducted depends on proof by affidavit, or on an admission, or on clear evidence in the transcript or in some other part of the record of the proceedings, or on an inference from the record. Here there was no affidavit. There was no admission: neither of the counsel for Westpac who appeared before this Court had appeared at the trial, and though leading counsel for the Gattellaros had, he could not recall what had happened more than three and a half years earlier. There is no clear evidence in the transcript. It may be possible to draw inferences from passages in the reasons for judgment of the trial judge and of the majority of the Court of Appeal, and in various written submissions, that the *Marston* contention had been in issue. Even if it was in issue, it was not dealt with by either the trial judge or the Court of Appeal. There is no utility in this Court remitting the matter to one of the courts below for the *Marston* contention to be decided, since if it has to be decided, this Court is in as

good a position as they were. It is not necessary to reach a conclusion on whether the *Marston* contention was in issue, since even if it was, the Gattellaros must fail.

46 If the crucial question were whether, assuming that the Gattellaros bore an onus of making good the *Marston* contention in the different forms in which they described it, they satisfied it – and the parties wavered on whether that was the question – the answer would be that they did not. The onus on the Gattellaros would have been to prove:

(a) that there was a term, express or implied, of the arrangements pursuant to which the November 1985 guarantee was executed, that Mrs Gattellaro was to be a co-surety; or
(b) that the November 1985 guarantee was drawn in a form showing Mrs Gattellaro as an intended joint and several surety.

47 The Gattellaros did not prove proposition (b). That is because Westpac lost its copy of the guarantee, and because although the Gattellaros may have given discovery of the guarantee (which their solicitor denied was in signed form), they too lost their copy. Since the form of the guarantee is not in evidence, no inference can be drawn from it.

48 Further, the Gattellaros did not prove proposition (a). The internal Westpac documents reveal that Westpac expected Mrs Gattellaro to sign a guarantee; but they do not prove any relevant term of the arrangements.

49 But at the end of the day the parties appeared to be inviting this Court to decide a different question – not whether the Gattellaros satisfied an onus borne by them of making good the *Marston* contention, but whether Westpac bore the onus of disproving the *Marston* contention, and whether Westpac was disentitled from taking the point in this Court that the onus lay on the Gattellaros. The Gattellaros argued that even if, as a matter of law, they would otherwise have borne the onus of establishing the matters of fact necessary to make good the *Marston* contention, Westpac had not taken that point below, concentrating instead on the issue, not raised by the pleadings but introduced by the parties during the trial, of whether Mrs Gattellaro had signed the guarantee. Hence, they argued, Westpac could not rely on any contention now that the Gattellaros bore the onus. In effect the Gattellaros argued that while there was a gap in proof in relation to the *Marston* contention, and while cases containing gaps in proof ought to be decided by recourse to the onus of proof, since Westpac took no point at the trial that the onus of proof lay on the Gattellaros, it was debarred from relying on that location of the onus in this Court, and hence had to fail.

50 One difficulty in this argument is that just as it is difficult to conclude that the *Marston* contention was advanced at trial because of the absence of any relevant affidavit, admission, express indication in the record or inference from the record, for the same reasons it is difficult to conclude that the validity of the *Marston* contention was common ground, or to conclude that the question of the burden of proof in relation to the *Marston* contention was not argued at trial or was assumed by Westpac.

51 If in truth Westpac did not take the onus of proof point below, that points to the conclusion that the *Marston* contention was not put below by the Gattellaros and hence cannot be relied on now. In any event, the question of where the onus of proof on the *Marston* contention lies (as distinct from the question whether it was satisfied) is an issue of pure law. If the Gattellaros wished to rely on the *Marston* contention at any stage, it was in their interests to ensure that evidence was called to support it, wherever the onus lay. Either the *Marston* contention was advanced at trial or it was not. If it was, the Gattellaros had an opportunity to call evidence about it, but failed to do so to a degree sufficient to permit them to discharge their onus of proof. If the Gattellaros did not advance the *Marston* contention at trial, but wished to do so for the first time in the Court of Appeal or this Court, it was for them to make it good on the existing evidentiary material: any deficiency in the evidentiary material flows from their failure to call more evidence about it at trial. The Gattellaros did not call one item of evidence which it was within their power to call, namely evidence from Mr Gattellaro, including evidence as to his state of mind, as to any relevant term in the arrangements. And the Gattellaros did not cross-examine a relevant witness called by Westpac in that regard.

52 The Gattellaros' contention that Westpac cannot now rely on the rule of law which places the onus of establishing the facts relevant to the *Marston* contention on the surety must be rejected. If the *Marston* contention was never raised below and is not raised now by the Gattellaros, then the location of the onus is immaterial: par 10 of the Amended Defence to Further Amended Cross Claim will have been made out. If the *Marston* contention was raised at trial or is now raised, then the onus lay or now lies on the Gattellaros, unless Westpac assumed the onus. Since counsel for the Gattellaros lacked any recollection about the specific conduct of the trial, there were only two circumstances to which the Gattellaros pointed as a sign that Westpac assumed, or had abandoned any point about, the onus. The first circumstance was that Westpac made several attempts to procure an admission from Mrs Gattellaro in cross-examination that she had signed the guarantee even though Westpac had not alleged in its Amended Defence to the Further Amended Cross Claim that she had. These attempts wholly failed, but Westpac's conduct in trying to elicit this admission does not point to any assumption of an onus or abandonment of any point about

onus on its part. Westpac's conduct is readily explicable in other ways: had Westpac established that Mrs Gattellaro had signed the guarantee, it would have made Westpac's overall task easier, and it would have tended to weaken various allegations in the Further Amended Cross Claim that she was unaware that the 2 June 1986 mortgage worsened her position. The other circumstance to which the Gattellaros pointed was that counsel for Westpac on the special leave application said that it was common ground that the general principle was that in the absence of contrary language, "if a guarantee is drawn up for two guarantors, and one only signs, then [that] one is not bound, because the only promise he made was to join with the other to guarantee, and if the other does not join, then he is not bound". But counsel for Westpac made no concession about the onus of proof or about how the trial had been conducted in that regard. Hence there is nothing to suggest that Westpac did assume the onus. Even if Westpac remained silent about the onus, there was no reason why the Gattellaros should have assumed that the onus lay anywhere but where the law placed it, namely, on them. Accordingly, Westpac is not debarred from relying on the fact that the onus of pleading and proof rests on the Gattellaros and from pointing out that the evidence called at trial does not satisfy the onus of proof.

53 Leave to amend the Notice of Contention to include ground 4 should be granted, and the ground should be upheld.

Conclusion

54 It follows that Mr Gattellaro's contention that he is not bound by the November 1985 guarantee fails. Since it obliged him to pay to Westpac the debts owed by the company, the 1977 mortgage applied. The 1977 mortgage made Mrs Gattellaro liable for, and secured against the Gattellaros' home, all monies for which Mr Gattellaro might be liable to Westpac. In consequence the 2 June 1986 mortgage did not increase the Gattellaros' liability, and the appeal to this Court must be dismissed.

55 What should be done about costs? Special leave to appeal was granted to determine an important point concerning judicial notice. The Court of Appeal of New South Wales had rejected the appellants' appeal because it held that courts could take judicial notice that banks such as Westpac used *a* standard form of guarantee and that it could be inferred that the appellants had signed Westpac's standard form. That was a far-reaching proposition of great practical importance in the conduct of commercial litigation. Special leave was granted to test the correctness of that ruling.

56 In Westpac's written submissions, however, it conceded "that the doctrine of judicial notice did not permit the majority of the Court of Appeal to find that

[Westpac] in 1985 used *a* standard form of guarantee." It had made no such concession on the special leave hearing. After conceding that the Court of Appeal had erred in relying on the doctrine of judicial notice, Westpac sought to uphold the Court of Appeal's decision on certain factual grounds.

57 Thus, by reason of Westpac's concession concerning judicial notice, the Court of Appeal's decision could not stand unless Westpac made good one or both of the two grounds in its Notice of Contention. From this Court's point of view, the better course would have been to allow the appeal and remit the Notice of Contention to the Court of Appeal. That course would, however, have put the parties to further expense and delay. In the circumstances, the interests of justice have been best served by this Court determining the factual and procedural questions, questions of a kind with which ordinarily it should have no concern. For the reasons given above, the second of the grounds relied on by Westpac must succeed and the appeal must be dismissed.

58 But in our opinion, Westpac should not have the costs of the appeal in this Court. Its dilatoriness in conceding that the Court of Appeal had erred caused the appellants to incur the expense of filing a notice of appeal, preparing appeal books, briefing counsel and preparing written submissions. This expense could have been avoided if Westpac had conceded at the special leave application that the Court of Appeal had erred. If it had, this Court could have allowed the appeal *instanter* and remitted the matter to the Court of Appeal to determine *at least* the first ground in the Notice of Contention which had been raised in the Court of Appeal but not decided. Whether on a remitter Westpac could have raised the second ground of the Notice of Contention – the ground on which it succeeds in this Court – may be debatable. In this Court, it was entitled to support the decision in its favour on that ground, even if the point was being raised for the first time, because it involved a question of law that could not be affected by further evidence[6]. If the matter had been remitted to the Court of Appeal, however, the public interest in the finality of litigation might have induced that Court in its discretion to refuse to allow the second ground to be argued, if it had not been raised on the first hearing of the appeal. Thus, Westpac may have gained a considerable advantage in not making its concession earlier than it did.

59 In these circumstances, Westpac should not have its costs. Indeed, there is much to be said for ordering Westpac to pay the costs of the appeal even though

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6 *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at 480; *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438.

it succeeds in having the appeal dismissed. However, on balance, the justice of the case is served by not making a costs order in favour of either side.

60 KIRBY J. This appeal[7] began as one concerned with the law of judicial notice. It was for that purpose that special leave to appeal was granted to the appellants. However, whilst it was before this Court, the case took a different turning. It has ended, essentially, as a trial before this Court of an issue relating to the liability of co-sureties under an alleged guarantee. As I shall show, that issue arose at a very late stage in the contest between the parties. Indeed, it could hardly have arisen later.

The facts and issues

61 To discover how this Court became involved in such a trial (effectively deciding the point in issue for the first time), it is necessary to read the reasons of Gleeson CJ, McHugh, Hayne and Heydon JJ ("the joint reasons"). Because the facts and course of the litigation are described there, those reasons relieve me of the obligation to repeat most of the material.

62 As shown[8], Westpac Banking Corporation ("Westpac") instituted proceedings as long ago as 1990 against the appellants, Mr and Mrs Gattellaro ("the Gattellaros"). The proceedings were based on Westpac's rights under a mortgage which the Gattellaros had executed over their home. The mortgage secured an advance from Westpac to re-finance the debts of a company in which the Gattellaros were interested, Falgat Constructions Pty Ltd ("Falgat"). There was no dispute that the Gattellaros executed that mortgage in 1986. Relevantly, the way they sought to escape their liability as mortgagors was to invoke relief under the *Contracts Review Act* 1980 (NSW). Their complaint was that they had been unfairly led by Westpac into personal liability for the debts of Falgat. Proof of that complaint depended upon the Gattellaros being able to establish that, by entering the 1986 mortgage, they had materially changed their personal positions, to their joint and several disadvantage. They asserted that they had. They claimed that the 1986 mortgage extended liability to them personally for Falgat's debts and did so for the first time.

63 For its part, Westpac argued that the Gattellaros had not changed their position to their disadvantage. If Westpac could make good that assertion, it would knock away any hope that the Gattellaros could obtain relief under a defence based on the *Contracts Review Act*. So much was accepted by the Gattellaros. Westpac submitted that, in November 1985, Mr Gattellaro had already executed an unlimited personal guarantee in favour of Westpac for the debts of Falgat. Westpac's evidentiary problem in making this submission good

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7 From the Court of Appeal of the Supreme Court of New South Wales: *Gattellaro v Westpac Banking Corporation* [2001] NSWCA 76.

8 Joint reasons at [5].

was that it could not produce the contract of guarantee. This was so although reference was made in Westpac's contemporary records to the fact that the guarantee had been given by Mr Gattellaro and that it was also to be executed by Mrs Gattellaro.

Identifying the burden of proof

64 Forensically, where there was a dispute over such a matter, and where the fact contested was legally relevant to the *Contracts Review Act* issue, one would normally have expected Westpac to bear the burden of proving, by the best evidence available to it, the giving of the guarantee by Mr Gattellaro and the terms of the guarantee. Normally, it would be inferred that security documents of such a kind would not be mislaid; that they would typically be kept by a bank in a safe place, available for proof when needed; and that Westpac would have forms and systems to govern such cases.

65 No procedure of human records is perfect. Documents and files get lost. In earlier times of paper records the larger the organisation, in a sense, the greater the risk of loss. Now, with electronic records, the risks are different but no less. The law, recognising these realities, will ordinarily allow for proof to be given by secondary means of the contents of documents and records alleged to have been lost.

66 At the trial of the present case, it was open to Westpac to call evidence as to what its standard forms of personal guarantee were in November 1985 and what those forms contained. However, in the trial, no such evidence was led by Westpac. In these circumstances, as between the parties, the proper inference would be that relevant witnesses could not have proved the facts asserted by Westpac by direct evidence. Otherwise, surely, the witnesses would have been asked the relevant questions[9]. Especially is this so because the manager of the Goulburn Street branch and the assistant manager of the Westpac Plaza branch were called in Westpac's case to give oral evidence. Neither was asked the relevant questions concerning Westpac's practice at the time. Nor was either asked to give evidence about the existence of standard guarantee forms or to produce such forms from the bank's records.

67 It is not possible for a party, who denies the execution of such documents, to prove the negative except by assertion. Nor is it reasonable to expect a party, denying such execution, to prove the existence and contents of documents which it contests. Still less, would it be reasonable to expect a customer to know bank practice or to have a collection of bank forms and documents. On the face of

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9 cf *Commercial Union Assurance Company of Australia Pty Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418-419.

things, therefore, in the light of the factual disagreement that arose at the trial, it was for Westpac, forensically, to prove from its records or practice, the existence and contents of the instrument of guarantee which it claimed was executed by Mr Gattellaro in November 1985 and upon which it relied to resist the *Contracts Review Act* defence. This was so although the issue to which that evidence related, being a matter of defence by the Gattellaros, was otherwise one upon which the Gattellaros bore the burden of proof. In the event, Westpac set about trying to prove the existence and content of the guarantee of November 1985 from contemporary records. However, it did so imperfectly. It also relied upon various legal arguments.

The reliance on judicial notice was erroneous

68 One legal argument, accepted by the majority of the Court of Appeal, depended upon the doctrine of judicial notice. According to this argument, judicial notice could be taken by the court of the fact that institutions, such as Westpac, "used a standard form guarantee"[10]. This was the approach that the majority in the Court of Appeal embraced to derive the conclusion that the guarantee executed by Mr Gattellaro contained a clause rendering him liable in the absence of a signature of Mrs Gattellaro as co-surety.

69 I agree with the joint reasons that this conclusion was erroneous[11]. Whether approached by reference to the applicable language of the *Evidence Act* 1995 (NSW), s 144[12] or by reference to the former principles of the common law, the dissenting view of Priestley JA in the Court of Appeal is to be preferred[13].

70 On the face of things, this conclusion vindicates the Gattellaros' appeal to this Court. It would normally require that the appeal be allowed. That order would usually be accompanied by orders that the matter be remitted to the Court of Appeal to hear and determine any remaining issues in the appeal to it consistently with the reasons of this Court. Similarly, it would involve an order that Westpac pay the Gattellaros' costs of the appeal. These were the orders that the Gattellaros sought in their notice of appeal and in their submissions to this Court.

71 In favour of making such orders are two significant considerations. First, this Court is the final appellate and constitutional court of the nation. It does not

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10 *Gattellaro* [2001] NSWCA 76 at [35] per Giles JA, with whom Handley JA agreed.

11 Joint reasons at [15]-[28].

12 Joint reasons at [17].

13 *Gattellaro* [2001] NSWCA 76 at [10]-[12].

ordinarily involve itself in performing, effectively for the first time, the trial of contested new issues. This is especially so where those issues have not previously been advanced on the pleadings; where they raise questions addressed to the detailed evidence and record of the case (comprising in this appeal three appeal books); and where, ultimately, their resolution is said to depend upon the manner in which the case was fought below; the way it was pleaded; and the location of the legal and forensic burden of proof of establishing disputed facts.

72 The second consideration favouring making the usual orders is that, where this Court, effectively for the first time, decides a contested issue, it deprives a party discontented with its resolution of that issue of the opportunity of further appellate consideration of its determination. Sometimes, even a Court such as this, can err in deciding a matter on a new ground[14]. Where that happens elsewhere in the Australian judicature, the decision, if wrong, is susceptible to correction, ultimately by this Court. Where it happens in this Court, it is not capable of being corrected, unless it falls within the truly exceptional class of case where this Court will reopen its consideration of a matter that it has decided[15].

73 Further considerations that are relevant to the course to be adopted include the rather narrow points of pleading and proof that were argued for Westpac and the consequence that the course urged by Westpac has for depriving the Gattellaros of the costs order that their initiative of appeal would normally merit. This consideration has persuaded the majority of this Court to withhold a costs order in this Court in favour of Westpac although they eventually dismiss the appeal and such a costs order would usually follow such dismissal[16]. This is small consolation for the Gattellaros who were otherwise justified, by the Court of Appeal's error about judicial notice, in bringing their appeal to this Court. It suggests a departure from normal practice both in the disposal of the appeal and in the provision for its costs. It indicates a measure of ambivalence about the outcome - a feeling that I share but, respectfully, follow to its logical, and usual, conclusion.

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14 eg *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1980) 144 CLR 300 at 304 (PC).

15 *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 684; *State Rail Authority of New South Wales v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38, 45-46; *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300 at 302-303; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 168; *De L v Director-General, New South Wales Department of Community Services [No 2]* (1997) 190 CLR 207 at 215-217.

16 Joint reasons at [58]-[59].

An extremely belated reliance on a new contention

74 The majority decided to permit new arguments to be advanced by Westpac, based on its notice of contention. Indeed, the majority has gone further. It has permitted Westpac, in this Court and for the first time, to add a second contention although it was not pleaded in the Court of Appeal in resistance to the Gattellaros' unsuccessful appeal to that Court[17].

75 By its notice of motion the respondent sought this Court's leave to rely on an amended ground in its notice of contention. But it was not filed until 18 June 2003. That was one day before the hearing of this appeal. To say the least, this was a last minute attempt by Westpac to rescue the appeal from the looming jaws of defeat. Prior to the amendment, the notice of contention raised only one relevant issue. This was the issue of evidentiary inference. The joint reasons explain why the argument concerning that inference must be rejected[18]. The motion to amend was opposed by the Gattellaros. For reasons that I will explain, the motion should be dismissed. In this Court, Westpac should be confined to the substantive issues fought and argued at trial and in the Court of Appeal.

76 As the joint reasons correctly state[19], it is doubtful that, on remitter to the Court of Appeal, that Court would permit Westpac to raise the new ground upon which it now succeeds in this Court. If this is so, then, by taking the course that the majority favour, this Court effectively alters the character and course of the case. It does so at the last conceivable moment. It does so in a way that would probably not have occurred below. In doing so it adds a third novelty to the two other departures from the usual practice of this Court. With all respect, I disagree with such a turn of events.

The proper course is remitter

77 Given the antiquity of the circumstances out of which this litigation arose, the delay in Westpac's prosecution of its claim in the Supreme Court and the consequence of such tardiness for the availability of evidence, written and oral, and the memory of counsel concerning what exactly transpired in earlier proceedings, there are strong reasons for adhering to the usual rules. In the present case, this would require remitter. I do not need to elaborate the consideration of the seemliness of this Court's busying itself, at the death-knock,

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17 Joint reasons at [52]-[53].

18 Joint reasons at [15]-[28]; cf *Holloway v McFeeters* (1956) 94 CLR 470 at 477.

19 Joint reasons at [58].

by trying to identify from the pleadings the location of the relevant burden of proof and to resolve subjects never tried below, so as to determine on the record the residual question presented by Westpac's new contention.

78 Issues may be raised in an ultimate court for the first time[20]. Under the rules of court, this may be done by a respondent to an appeal relying on a notice of contention[21]. However, normally, at least in civil appeals[22], contentions will be confined to questions where the law is clear and is applied to facts that are found, admitted or proved and addressed to an issue raised in the court below[23]. Rare indeed is the case, at least in a civil appeal, where this Court will embark upon examination of the detailed evidence, and the course of the trial, effectively for the first time[24]. I remain of the view that I expressed in *Dovuro Pty Ltd v Wilkins*[25], also a case involving civil liability:

> "As a court of law, this Court should adhere to common law principle. Above all, we should be cautious in assuming the function of a jury, redetermining factual conclusions in a complex case with a lot of evidence, where it is difficult, or impossible, to recapture all of the advantages of the trial."

79 In countless proceedings, this Court has declined the invitations of the parties, in effect, to try residual factual and evidentiary questions although to do so would bring to an end a protracted saga of litigation[26]. Why should this Court accept such an invitation in this case, where, with all of the resources available to

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20 *Water Board v Moustakas* (1988) 180 CLR 491 at 497; *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533 at 562 [82].

21 High Court Rules O 70 r 6(5).

22 Different considerations arise in criminal appeals: *Gipp v The Queen* (1998) 194 CLR 106 at 116 [23], 154-155 [136]-[138].

23 *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319; *Coulton v Holcombe* (1986) 162 CLR 1 at 8. In cases where a successful party does not seek a retrial, the issue raised is a simple one of fact and the relevant facts are found or admitted, the Court will sometimes determine the outstanding issue: eg *Nicol v Allyacht Spars Pty Ltd* (1987) 163 CLR 611 at 619, 622.

24 See eg *Water Board v Moustakas* (1988) 180 CLR 491 at 497.

25 (2003) 77 ALJR 1706 at 1729 [122]; 201 ALR 139 at 170 (footnote omitted).

26 For example *Walsh v Law Society of New South Wales* (1999) 198 CLR 73 at 99-100 [72]-[73], 109 [110]-[111].

Westpac, a substantial banking corporation with access to the best legal advice, it only discovered the key to its success on the very eve of the hearing in this Court[27]?

80 The cobwebs that have grown over the facts and memories relevant to the just disposition of the residual question propel judges, concerned with substance, to attempt to bring a case such as the present to a speedy and lawful conclusion. These considerations have persuaded the majority to permit the new contention to be added and to decide the appeal upon that basis. Whilst I understand that decision, and the motivation that has led to it, I disagree. Where a case has gone so far, it is desirable, in my view, that it should proceed to judicial orders in the orthodox way. This means remitter to the Court of Appeal[28].

81 Remitter should especially be ordered where, as here, serious legal issues arise concerning a very late amendment to the notice of contention upon which Westpac now succeeds. The assessment of the trial on a completely new footing is a course that should be performed, if at all, by the intermediate court. New issues of law are raised, that have not previously been passed upon either by the trial judge or by the Court of Appeal. In my view, they should not be decided by this Court without the benefit of the opinion and analysis of the appellate court of the State in which the trial took place.

Liabilities of co-sureties who do not execute a guarantee

82 Much weight is given in the joint reasons to the question of whether the Gattellaros satisfied an evidentiary burden borne by them, in the circumstances of the original pleadings, by making good a contention that they were entitled to the benefit of the law of guarantees expressed in the decision of a single judge of the Supreme Court of New South Wales (Powell J) in *Marston v Charles H Griffith & Co Pty Ltd*[29].

83 The joint reasons adopt a view of the principles of law stated in that decision that leads to the search for the location of the relevant onus of proof, and hence to the record at trial. However, with respect, these are not matters that have ever been explored by the court below. Nor does this Court have the benefit of the opinion of the Court of Appeal on the correctness, scope and application of

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27 cf *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483; 60 ALR 68 at 70-71; cf *Multicon Engineering Pty Ltd v Federal Airports Corp* (1997) 47 NSWLR 631 at 645-646.

28 *Murphy v Overton Investments Pty Ltd* [2004] HCA 3 at [70].

29 (1982) 3 NSWLR 294 at 300-301.

the *Marston* principle to guide it to the proper resolution of the dispute between Westpac and the Gattellaros. The reasons in *Marston* conclude with a series of propositions, two of which have been extracted in the joint reasons[30]. However, in his consideration of the state of legal authority leading to those propositions, Powell J expressed himself as differing from the views stated in the respected text, *Rowlatt on Principal and Surety*[31]. Powell J said that "[d]espite the respect which is customarily accorded to Rowlatt", he adhered to an opinion that "the statement of principle contained in the passages [from *Rowlatt* … was] rather less than clear"[32].

84 The issue in *Marston* is therefore one of legal principle upon which the opinions of a judge and respected text-writers have diverged. Nor is the point of divergence an insignificant one for this case. Neither is it unimportant for the law of guarantees, with respect to the obligations owed to a principal where a co-surety "does not join or after joining is released" from the guarantee obligations in question[33].

85 Basic legal principle would therefore appear to support the proposition that where an instrument of guarantee intended to be signed by two sureties, is signed only by one and not by the other, the signatory is entitled to have the instrument "given up to be cancelled, and not merely to have relief to the extent of the contribution which the other surety might have been compelled to pay in his relief"[34].

86 If this proposition could be made good, upon full argument, it is one of law. It is not one, as such, that depends upon the proof by the sole signatory of that person's intention or state of mind. In the present case, the *legal* character of the contest between the Gattellaros and Westpac is accepted in the joint reasons[35]. At one stage, Westpac's case at trial was that the instrument of guarantee of November 1985 had been signed both by Mr Gattellaro and Mrs Gattellaro. Westpac's claim in written submissions to this Court was that it had never been their argument that both of the Gattellaros had signed the

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30 Joint reasons at [31].

31 3rd ed (1936) at 281-284; 4th ed (1982) at 180-182.

32 *Marston* (1982) 3 NSWLR 294 at 300.

33 Rowlatt cited in *Marston* (1982) 3 NSWLR 294 at 299.

34 Rowlatt cited in *Marston* (1982) 3 NSWLR 294 at 299, referring to Wood VC in *Evans v Bremridge* (1855) 2 K & J 174 at 185 [69 ER 741 at 745-746].

35 Joint reasons at [29]-[37].

guarantee. However, Westpac's Notice of Contention in the Court of Appeal, in par 1(b) claimed that "the [a]ppellants, or alternatively … the First Appellant" executed the guarantee. It therefore appears that Westpac was still trying to establish this fact in the appeal, but abandoned its attempt in this Court. Having regard to the fact that the trial judge concluded that Mrs Gattellaro had not signed the guarantee and that the Court of Appeal was satisfied that only Mr Gattellaro had signed the guarantee, this was a prudent if belated course to adopt. Because Mrs Gattellaro, in her oral evidence, had resisted the attempt of Westpac to suggest that she also had signed it, the primary judge's conclusion about her conduct must have depended, to some extent, upon his Honour's assessment of her veracity as a witness. Indeed, that conclusion is the more significant because of reservations which the primary judge expressed about the general acceptability of the Gattellaros' evidence[36]. The finding in relation to Mrs Gattellaro's actions therefore appeared impregnable against appellate disturbance[37]. It provided the factual foundation upon which the application of the law of guarantees has now to be applied to the case.

87 In the Court of Appeal, Giles JA took judicial notice of the terms of cl 20 of a contemporaneous but different contract of guarantee[38]. Such evidentiary matters would have been superfluous if issue had been joined at trial only on whether Mr Gattellaro, alone, had signed the guarantee. It was clear from the diary entries produced by Westpac that the bank always envisaged that both Mr and Mrs Gattellaro were to give the 1985 guarantees[39]. If the *Marston* principle accurately states the common law, it enlivens a question of whether the signature of each of the sureties was required as a condition to the effectiveness of the promise of the other in the joint contract of guarantee that Westpac propounded. That is a question of law upon which views have differed.

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36 *Westpac Banking Corporation v Gattellaro* [2000] NSWSC 775 at [64], [66]-[67], [70] and [73]; see also *Gattellaro* [2001] NSWCA 76 at [4].

37 See *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1608 [52]-[53], 1614-1616 [90]-[100]; 200 ALR 447 at 461, 470-473 where the authorities governing appellate disturbance of credibility-based findings are collected.

38 The guarantee given by Mr and Mrs Falcomata in May 1986 securing the indebtedness of the Gattellaros to Westpac. See joint reasons at [13].

39 The trial judge referred to an internal memo of Westpac which provided that "Mr Gattellaro has signed … Guarantee to support Company advances. *Mrs Gattellaro is to sign this week*." *Westpac Banking Corporation v Gattellaro* [2000] NSWSC 775 at [37] (emphasis added).

The operation of a principle of law

88 If a true understanding of the law considered in *Marston* is that joint signatures to the guarantee, in the case of Mr and Mrs Gattellaro was necessary for the legal validity of the 1985 guarantee, the absence of Mrs Gattellaro's signature was fatal to Westpac's strategy in the trial. Moreover, if, upon a full examination of the applicable law there is an evidentiary presumption that, in the absence of acceptable evidence to the contrary, the execution by both sureties to a joint guarantee constitutes a condition precedent to its validity, Mr Gattellaro was released by the failure of Westpac to establish that it had secured the signature of Mrs Gattellaro. Upon this footing both Mr and Mrs Gattellaro would have had an arguable defence at law to Westpac's action on the 1985 guarantee. It would follow that, by assuming personal liability to Westpac in the 1986 mortgage for Falgat's debts, the Gattellaros had indeed altered their position to their disadvantage. And this was the evidentiary element they needed to establish their defence under the *Contracts Review Act*.

89 If the foregoing analysis accurately describes this case, then the respective positions of the Gattellaros and Westpac are not decided by the state of the pleadings or the burden of proof which the respective parties bore to establish their competing claims. It was determined by the application of the law of guarantees to the evidence as found by the primary judge. Given the way the issue has arisen, this Court does not have the advantage either of an analysis of the applicable principles of law nor an examination of the application of that law to the facts of this case as found at trial. Nor do the parties, Westpac as well as the Gattellaros, have the opportunity to challenge any determination on either of these points by a further appeal. Instead, in the manner of a trial court, this Court proceeds on the assumption of the correctness of the principles stated by Powell J and upon views concerning the respective obligations of the parties based on those principles and on the state of pleadings which may, or may not, accurately reflect the ultimate way in which the trial was conducted.

90 Because I accept the importance of the issues raised in *Marston* for the law to be applied to the rights of Westpac and obligations of the Gattellaros (and because those principles are on any view significant for legal doctrine concerning the rights and obligations of parties to joint guarantees) I am confirmed in my opinion that the correct course is to remit the matter to the Court of Appeal.

91 Adopting this course has three clear advantages. First, by order of this Court it corrects the error of the Court of Appeal on the issue of judicial notice. It also holds that the same outcome cannot be reached, in the evidence, on the basis of an available inference. Secondly, it withholds any alteration to the position of the parties which flows from the belated attempt of Westpac, in this Court, to add a new contention for the first time with significant consequences both for the costs and the outcome. Thirdly, it adheres to the normal rule that this Court does not accept the obligation of conducting a trial upon points such as

now determine this appeal[40]. Moreover, before it accepts and applies important principles of law, giving them the *cachet* of the endorsement of this Court, this Court ordinarily requires the opinion of an intermediate appellate court addressed to the subject. This is a particularly wise course where the point of law is not without commercial importance, is the subject of conflicting legal opinions and has not previously been passed upon either by the primary judge or by the Court of Appeal[41].

92 In correcting the error of the Court of Appeal when it sought to resolve the case by reference to an inapplicable principle of judicial notice, this Court should not itself proceed in an unconventional way. Least of all should it do so when the decision and the principles that it then endorses have significant consequences for the parties and for the exposition of the relevant law, hereafter binding throughout Australia. There must indeed be an end to litigation. But it is important that such end should be attained by procedures that avoid injustice to the parties and do not derogate from the larger obligations of this Court to the orderly development of legal doctrine.

Consideration of the new point in the proper place

93 Generally speaking, I am sympathetic, whilst proceedings remain alive in the judicature, to a relatively flexible approach to the raising of new issues where that is just, particularly when a point of law is discovered at a late stage[42]. By their conduct of proceedings, parties cannot oblige a court to mis-apply the law. However, by the way they have acted, parties can sometimes disentitle themselves from raising a new point, even if it is purely one of law[43]. Considerations of natural justice and procedural fairness govern the response of

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40 *Dainford Ltd v Smith* (1985) 155 CLR 342 at 366; *Walsh v Law Society of New South Wales* (1999) 198 CLR 73 at 100 [75], 109 [110] per McHugh, Kirby and Callinan JJ.

41 *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 77 ALJR 1263 at 1280 [92]; 198 ALR 179 at 201.

42 cf *A Solicitor v The Council of the Law Society of New South Wales* [2004] HCA 1 at [39]-[41] where the facts were uncontested and fully litigated in the Supreme Court, where the applicable law was clear and settled and the parties joined in asking this Court to give effect to its own conclusions.

43 *Roberts v Bass* (2002) 212 CLR 1 at 54-55 [143]-[144]; *British American Tobacco Australia Ltd v Western Australia* (2003) 77 ALJR 1566 at 1586 [106]; 200 ALR 403 at 430.

appellate courts to such issues rather than the rigid rules of pleading and practice applied in earlier times[44].

94 In the present case, I would certainly not exclude Westpac from its attempt to rely upon a completely new contention. However, considerations of procedural fairness suggest to me that that attempt should not enjoy larger prospects because raised for the first time in this Court. It should be left to Westpac to seek leave to rely on the new point in the court where it ought to have been raised in the first place: in the Court of Appeal of New South Wales. Not only is this fairer to the parties, avoiding a change in the character of the appeal at the last moment and alteration of the normal disposition of costs after so many years of litigation. It is also one more respectful of the constitutional role of the Supreme Court of the State and the functions of its appellate court in cases of such a kind.

Application of the strict law of guarantees

95 My strong preference would therefore be for this Court to determine the content of the governing rule for joint sureties after that question had been fully litigated at trial, or at least fully considered in a court of appeal. If forced without these normal advantages to decide the question in the peculiar circumstances of this case, I would express the following conclusion. If a contract of guarantee is to be signed by co-sureties, so that a principal debt will be secured in that way then, unless the intended surety who has executed the guarantee consents to the other co-surety who has not executed the guarantee not thereafter executing it, the intended surety never becomes liable under the guarantee. This is so despite the execution of it by one party alone.

96 If this is a rule of law, as I presently think it is, the failure of Westpac to obtain the signature to the personal guarantee of Mrs Gattellaro (as found by the primary judge) released Mr Gattellaro of any obligation assumed under the guarantee[45]. At least it did so in the absence of a clear term of the contract of guarantee (not proved by Westpac) rendering Mr Gattellaro separately and individually liable. On this footing, Westpac failed to prove that there was a personal guarantee binding Mr and Mrs Gattellaro in respect of Falgat's debts to the bank on the basis of the propounded guarantee of November 1985. It follows that, when in June 1986, Westpac refinanced the debt owed by the Gattellaros

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44 *Coulton v Holcombe* (1986) 162 CLR 1 at 8; *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 155, 169-172; *Jackamarra v Krakouer* (1998) 195 CLR 516 at 541-542 [66.5]-[66.6].

45 cf *Walker v Bowry* (1924) 35 CLR 48 at 54, 58; *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 655, 657-658.

and Falgat and procured from the Gattellaros a mortgage over their home to secure the advance made by the bank for such refinancing, the Gattellaros were not at that time shown to have been personally liable for Falgat's debts. They therefore changed their financial obligations significantly to their disadvantage. They did so in circumstances giving rise to an arguable defence under the *Contracts Review Act*. At the very least, as Priestley JA pointed out in the Court of Appeal[46], Mrs Gattellaro suffered an arguable disadvantage. It would follow that the primary judge erred in rejecting the foundation for the argument based on the *Contracts Review Act*.

97 Upon this view, despite the great delay, it would be necessary, if the subject is to be addressed, for the issue to be retried. This is appropriate because an error of law has occurred based upon mistaken findings as to the relevant facts. That error was occasioned by the failure at trial to apply the strict law governing the liability of sureties under the law of guarantees in determining a question relevant to the defence of the Gattellaros[47]. In Australian law, the surety is a favoured debtor, viewed with solicitude both at law and in equity[48]. Many are the creditors that have failed to recover from a surety because of the doctrine of *strictissimi juris*[49]. The results may not always seem just or sensible. However, they represent settled law in this Court[50]. In this appeal, this Court should apply that law.

Orders

98 The motion of the respondent to amend its notice of contention should be dismissed. The appeal should be allowed. The judgment of the Court of Appeal of the Supreme Court of New South Wales should be set aside. In lieu thereof, the proceedings should be remitted to that Court to be determined conformably with the conclusions of this Court on the issues of judicial notice and inference. It should be for the Court of Appeal to decide whether Westpac should have leave to rely upon the amended ground of its notice of contention. Westpac should pay the appellants' costs in this Court. The costs of the proceedings in the

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46 *Gattellaro* [2001] NSWCA 76 at [16].

47 See eg *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 561; cf *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 256.

48 *Tricontinental Corporation Ltd v HDFI Ltd* (1990) 21 NSWLR 689 at 693-694.

49 *Chan* (1989) 168 CLR 242 at 256; *Tricontinental* (1990) 21 NSWLR 680 at 710, 722; cf 696-697.

50 eg *Ankar* (1987) 162 CLR 549 at 560-562.

Court of Appeal should be decided by that Court in the light of the ultimate outcome of those proceedings.