



## HIGH COURT OF AUSTRALIA

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### YOLANDA AND ROCCO GATTELLARO v WESTPAC BANKING CORPORATION

A guarantee given by Mr Gattellaro for his company's debts was held to be valid by the High Court of Australia today. The Court also held that security given by his wife also covered the liability.

Mr and Mrs Gattellaro owned Falgat Constructions which built and renovated houses. In 1977 they executed a mortgage over their home at Chiswick in Sydney to secure their personal indebtedness to the Commercial Bank of Australia (now part of Westpac). The Gattellaros in 1986 entered into another mortgage over their home to secure an advance of \$450,000. Westpac took action over that mortgage and in 2000 the New South Wales Supreme Court ordered the Gattellaros to pay Westpac \$983,000 and to give up possession of their home. The Court of Appeal dismissed their appeal.

Westpac said Falgat's indebtedness was secured by an unlimited guarantee given by Mr Gattellaro in 1985, that obligations under that guarantee were secured by the 1977 mortgage, and that this mortgage also made Mrs Gattellaro liable. Westpac's difficulty was that it could not produce the 1985 unlimited guarantee on which its contention depended, forcing it to rely on other documents, including an internal memo that Mrs Gattellaro was to sign the guarantee later the same week. Whether she ever signed remained uncertain. Mr Gattellaro said, because she had not signed, his guarantee was inoperative.

The Court of Appeal by majority held it was unnecessary to decide whether Mrs Gattellaro had given a guarantee as the 1977 mortgage made her liable and rendered their home security for company debts. The majority took judicial notice that Westpac had a standard form guarantee which contained a clause that the guarantee was binding on each person who signed it, even though someone named as a guarantor had not. The Gattellaros said the guarantee did not contain the clause, but a guarantee with a print date of 1984 signed in 1986 by their relatives, the Falcomatas, did contain such a clause.

In the High Court, Westpac accepted that the doctrine of judicial notice did not permit the Court of Appeal to find as common knowledge that the bank used a standard form of guarantee.

The High Court held that, as the case was pleaded and conducted, the Gattellaros bore the onus of proving both that the 1986 mortgage was unjust and of nullifying the 1985 guarantee by proving Mrs Gattellaro had to be a co-surety for the guarantee. This the Gattellaros were unable to do. The Court, by a 4-1 majority, dismissed the Gattellaros' appeal. The 1977 mortgage continued to apply and it made Mrs Gattellaro liable for all money for which Mr Gattellaro might be liable to Westpac. The second mortgage did not increase their overall liability.

However the High Court unanimously criticised Westpac's slowness in conceding that the Court of Appeal had erred. If it had conceded this when the High Court was hearing the Gattellaros' special leave application the Court could have allowed the appeal immediately and remitted the matter to the Court of Appeal. Instead, the Gattellaros had to incur the expense of an appeal, so the Court denied Westpac its costs.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*