The Federal Court Declared That NAB Had Acted Unconscionably

Summary:
Be very cautious when dealing with a bank like NAB. Particularly if you are asked to guarantee a loan.

Article Information**Category:** Banking News
Banking Company: NAB
Bank Malpractice Type: Unconscionable Conduct
Author: Allan Fels
Source: Sydney Morning Herald
Date First Published: 31 Oct 2001

Posted ByPeter Brandson
24 Mar 2014 - 7:30pm





Article: "Say No To Bullying"

"*Don't allow yourself to be victim of unconscionable conduct*", *writes Professor Allan Fels, chairman of the Australian Competition and Consumer Commission.*

We have all heard about someone losing their home after putting it up as collateral for a loan that failed to save the business. Even worse are cases where someone's relative or friend has put up their home to secure a loan and ended up homeless.

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Often the cash resources of small businesses are stretched to the limit. It could be the result of unexpected expenses, a slump in sales or because customers are slow to pay. The small-business owner not only wants cash but wants it quickly to ward off creditors and survive.Often the only way to get a loan or an overdraft is to put up domestic assets, such as homes, as security. Sometimes a relative or friend succumbs to emotional pressure and puts their home at risk.

If in urgent need of cash you may be vulnerable to high-pressure tactics. Loan application forms, guarantees and mortgages may be difficult to understand because of the legal language. This is the time to get independent professional advice whether you are seeking the loan or going guarantor.

The Trade Practices Act provides protection if you are the victim of unconscionable conduct by a stronger party, such as a bank. Victims can get redress. Here is an example:

The ACCC alleged that when the National Australia Bank sought Kathryn Ashton's Hobart home as a guarantee for her ill husband's business loan it did not explain the nature or effect of the guarantee or advise her to obtain independent legal advice. NAB, the ACCC further alleged, knew the business was in serious financial difficulty but did not inform Mrs Ashton. When NAB sold the home it kept all the money including that in excess of the $200,000 outstanding loan.

The Federal Court declared that NAB had acted unconscionably in its dealings with Mrs Ashton, and the bank, after mediation with the ACCC, agreed to annul the guarantee signed by Mrs Ashton, refund the excess amount with interest and pay $28,500 in damages.

The NAB outcome should be a warning to all financial institutions not to take unfair advantage of a person in a vulnerable position by obtaining a guarantee without ensuring the person has full knowledge of its terms and effect. The court ordered NAB to distribute a bulletin to its entire lending staff requiring them to explain the nature of a guarantee and advise people to seek independent legal advice before signing guarantees.

Small business can be victims of unconscionable conduct in other areas than borrowing when a stronger party uses its dominant position to the detriment of the smaller party.

Examples are when a shopping centre landlord withholds a new lease unless the tenant agrees to harsh conditions or when a franchisor will provide essential computer software only to franchisees that agree to sign a new contract.

Unconscionable conduct can involve acting unreasonably, acting harshly, being oppressive, lacking good faith, bullying or, worse, being thuggish. Section 51AC of the Trade Practices Act is there to protect your interests.

The franchising industry is regulated by a mandatory code of conduct that is part of the Trade Practices Act. This means the Federal Court can take a breach of the code into account when considering whether unconscionable conduct has occurred.
If you believe you have been the victim of unconscionable conduct you can contact the ACCC by phone on 6243 1111 or fax, 6243 1199.

Source URL (modified on 9 Jun 2014 - 5:22pm): https://bankreformnow.com/node/98

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