HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M13 / 2021

ON APPEAL FROM THE COURT OF APPEAL
OF THE SUPREME COURT OF VICTORIA

BETWEEN:

JEFFREY WILLIAM STUBBINGS
Appellant

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and

JAMS 2 PTY LTD (ACN 600 173 117)
First Respondent

CONTERRA PTY LTD (ACN 078 900 017)
Second Respondent

JANACO PTY LTD (ACN 006 209 105)
20 Third Respondent

APPELLANT'S REPLY

Part I: Certification

1. This reply is in a form suitable for publication on the internet.

Part II: Argument

Certificates of advice

2. The respondents, like the Court below, depend on the certificates to overcome Jeruzalski's knowledge of facts that made the transaction unconscionable: Respondents' Submissions (**RS**), [19]; CA, [132]–[133]. But the certificates do not—because they cannot—operate to negate the matters otherwise known to the lenders. A lender who knows, for example, that a surety is under duress or has been misled cannot rely upon the presentation of a certificate to ignore what he or she already knows.[1] For that reason, the true issue is not the certificates, inadequate though they were (see AS, [25]), but the lenders' actual knowledge and wilful blindness.

3. Further, the respondents mistakenly assert, at various junctures, that Stubbings himself personally received accounting advice or that the lending was to Stubbings: RS, [12], [19], [26]. But the respondents' case showed only a certificate in respect of the borrower: Appellant's Submissions (**AS**), [26]. The respondents' mistake highlights the corresponding error in the reasons of the Court below, where it was said that Jeruzalski "should not be fixed with knowledge [because] the loan approvals were conditional on Stubbings obtaining independent legal and accounting advice" and that "Jeruzalski was entitled to rely on the certificates… as evidence that Stubbings had consulted a solicitor and an accountant for advice": CA, [132] (emphasis added). The error conflates the position of Stubbings and the borrower to the lenders' advantage, despite the fact that the lenders consciously relied upon the corporate veil to avoid well-known personal lending protections: TJ, [57], CA, [100]. The respondents' contention that the solicitor's certificate alone was sufficient (RS, [28]–[29]) is a departure from the weight placed on the accountant's certificate in the reasons below: CA, [133]. But the solicitor's certificate could not satisfy the lenders that the guarantor had been advised of the probability (in reality, certainty) of default or the extent of his personal financial exposure. The accountant's certificate, drafted by Jeruzalski, was "independent of any guarantor" and confined to the risks to the company: CA, [31].

4. The respondents' submission that "the factual findings of the trial judge preclude a

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[1] cf. *Thorne v Kennedy* (2017) 263 CLR 85, 112 [65] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), 128–129 [123] (Gordon J).

conclusion that the certificates were somehow deficient" (RS, [19]) is illogical. The primary judge's finding that the lenders were apparently satisfied by the certificates says nothing about whether they were entitled to be satisfied by them. The respondents' submission that the certificate of accounting advice "was appropriately drafted [by Jeruzalski] to achieve its purpose" (RS, [26]) highlights the vice in the reasoning of the Court below. The certificate formed part of the very system designed to immunise the lenders from liability. The certificate was an attempt to clothe the transaction with propriety, where the lenders were wilfully blind to the inevitability of default. The respondents criticise the appellant for submitting that "the certificates were manifestly inadequate" (RS, [61]). If it matters, the appellant's submission was, in fact, that Stubbings had "received manifestly inadequate advice"—and that fact must have been known to Jeruzalski when he gave his evidence in the manner that the primary judge described as "smug": AS, [39].

5. The respondents purport to distinguish *Elkofairi* by reason of the existence of the certificates (RS, [31]) but ignore that, in *Elkofairi*, the lenders had received letters from an accountant positively attesting to the ability to service the loan without hardship.

The lenders' knowledge

6. The lenders knew that Stubbings "most probably" had no income (CA, [56]), had made no business case for the loans (CA, [31]–[32]), and that the loans were secured against Stubbings' home.[2] They also knew that there was a real possibility that a guarantor such as Stubbings was at a special disadvantage or otherwise vulnerable: so much flows directly from the fact that the lenders' system was designed to deprive guarantors of access to relief for unconscionable conduct: TJ, [58], [310]–[316], CA [126], see also, AS [38]. If, as the respondents submit at RS, [7], the Court below derogated from Jeruzalski's evidence in chief that "[m]ost probably I was aware … Yeah" that Stubbings had no income, the Court below thereby erred. But Jeruzalski was an experienced solicitor giving evidence in chief on behalf of the lenders as to his own knowledge. The findings made by the primary judge were not only open to him but followed the evidence. The Court of Appeal erred in overturning such findings: see AS, [34]–[36].

7. To that end, the respondents' submission that the numerous relevant findings raised at AS, [21] were either "insignificant, irrelevant or taken into account" (RS, [18]) sits

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[2] At a minimum: see other matters at AS, [21]–[23], [36].

uncomfortably with the requirement that the Court consider all the circumstances,[3] and the omission by the Court below of those matters from its purportedly exhaustive statement of Jeruzalski's knowledge "at its highest" (CA, [131]). The respondents' proffered explanations are unsatisfactory. For instance, the respondents submit that "there was no evidence that [Stubbings] would not be employed in the future" (RS, [18]), but until now it has not been suggested that Jeruzalski believed or had a basis to believe there was a real prospect that Stubbings—to Jeruzalski's knowledge, a 60-year old man with no income—would during the loan term obtain fresh employment sufficient to service the loans.

8. It may be that the respondents' submission is explained by a misunderstanding of the nature of the primary findings of knowledge set aside by the Court below: RS, [40]–[42]. The crux of the primary judge's findings that were set aside at CA, [134] was the words, "Mr Jeruzalski must have suspected …" and "[a]s far as Mr Jeruzalski was concerned …". As such, these were findings as to Jeruzalski's knowledge or state of mind, not as to the independence of the certifiers as a free-standing fact. Similarly, the Court below set aside the primary judge's finding that Jeruzalski was wilfully blind, a finding that was (plainly) as to his knowledge and state of mind: CA, [128]–[130].

The system of lending

9. The conduct in issue in this appeal is the respondent lenders' system of lending as it was applied in making the loan, not whether "asset-based lending" ought be a standalone category. That latter case has always been eschewed by the appellant: see AS, [47]. The respondents' reliance on the phrase "asset-based lending" masks the (true) relevance of circumstances bearing on the proper inquiry whether the transaction—and system—was unconscionable. An asset-based loan within the *Khoshaba* description[4] might be given to a person who is financially savvy or to a desperate and vulnerable person; it might be secured against capital equipment, an investment property, or the guarantor's home and only significant asset. And a lender might disregard "the ability of the borrower to repay by instalments under the contract" because it is satisfied the borrower has articulated a business case for repayment of the principal and any arrears. It would be wrong to accept that "asset-based lending" is a homogenous category and that, because it is not necessarily unconscionable of itself, the nature of the lending and the security are not relevant circumstances informing whether the transaction is unconscionable.

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3 *Australian Securities and Investments Commission Act 2001* (Cth) s 12CB(1); *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113, 118–119 (Dixon CJ, McTiernan and Kitto JJ).

4 *Perpetual Trustees Company v Khoshaba* (2005) 14 BPR 26,639, [128] (Basten JA).

10. The respondents' submission at RS, [21] highlights precisely the error the appellant identifies in the judgment below: the Court's reasoning first accepted the lenders' system of lending on the basis that it fell within the label "asset-based lending" (CA, [126]) before considering whether there were circumstances *additional* to the nature of the lending that would render the transaction unconscionable. By approving of the system in isolation by reference to the label "asset-based lending", the Court below appears to have corralled features of the system from the inquiry as to unconscionability when it should have treated those features of the system of lending as part of the circumstances relevant to unconscionability. In particular, those features included the fact that the lenders' system was deliberately designed to immunise the lenders from liability for unconscionable conduct (CA, [126]), or, put differently, to deprive vulnerable guarantors of recourse to equitable and statutory protections: see AS, [38]–[40]. The respondents' contention that the Court below did not circumscribe its analysis of the system of lending (RS, [49]) is inconsistent with the omission from the reasons below of analysis of those extraordinary features of the lenders' system. Rather, the Court's remarks at CA, [126] make plain that it regarded those features as unremarkable and inherent in "asset-based lending". Neither the Court below nor the respondents point to an example of corresponding conduct in the authorities.

11. The respondents also elide the difference between "disregard" and the lenders' "deliberate avoidance of knowledge": RS, [54], [62]. That difference is made plain in the earlier intermediate authorities: see eg *Tonto Home Loans*, where the impugned loans were found on appeal to be unjust but not unconscionable because, despite lack of attention or care, the loans were not intended by the lender to be secured against assets without regard to the capacity of the borrower to repay.[5] It is trite that intentional conduct differs in law from negligence, particularly when having regard to the operation of conscience and expressions like "honest and fair".[6] Deliberate avoidance of knowledge for fear of what it will reveal is nothing other than wilful blindness, as found by the primary judge: TJ, [315]–[316].

12. The criticisms of *Elkofairi* made by the Court below and pursued by the respondents—namely that the appellant's proposition would amount to a conclusion that "every asset-based loan in these circumstances must be unconscionable" (RS, [31], CA, [121]–[122])—misread both the appellant's case and the reasons in *Elkofairi*. The plain proposition is that

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5 (2011) 15 BPR 29,699, [154], [292] (Allsop P) (emphasis added). See further AS, [46].

6 *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR 42-447, [23], [41] (Allsop CJ, Jacobson and Gordon JJ).

circumstances whereby a lender secures a significant loan with no articulated business purpose against a person's home and only asset, while knowing the person has no income to service the loan, would tend to show that lending was unconscionable, unless otherwise explained by relevant circumstances. There is no suggestion in *Elkofairi* or the appellant's case that the *Jenyns* inquiry ceases at that point: rather, one continues to consider all other relevant circumstances—aggravating or ameliorating—to assess whether the conduct is unconscionable.

Other matters

13. Contrary to the respondents' criticism as overstatement that Stubbings "could not understand" the loans and their financial consequences (cf. RS, [10]), it is the case that Stubbings did not understand the transactions at the time (TJ, [266], [269], [271]), and he still did not understand them at the time of trial: TJ, [145]. The primary judge referred to Stubbings' "obvious lack of understanding" (TJ, [141]), "non-comprehension" (TJ, [146]) and "complete lack of business understanding" (TJ, [264]), and said Stubbings was "completely out of his depth" (TJ, [266]). In those circumstances, the submission at AS, [10] is correct.

14. Contrary to the submission that the Court below took into account the inconsistency identified at AS, [21(i)], the Court overlooked that the valuation relied upon by Jeruzalski (CA, [56]) described the property as zoned "Green Wedge Schedule 4", said that "[a] current planning certificate has not been applied for", and, consistently with those features, disclosed no potential commercial use for the property.

15. The respondents' submission that Stubbings was "able to manage his financial affairs in a responsible manner" appears to be founded solely on the assertion that Stubbings had at one time "managed mortgage repayments … while managing to rent a property": RS, [5]. In reality, that "property" was on-site accommodation at a wrecking yard where the "rent" was deducted from Stubbings' wages: TJ, [98]. Stubbings was precisely the sort of person who needed protection and was vulnerable to being exploited: TJ, [101]–[105], [264], [266], [270].

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