HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M13/2021
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Important Information

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

BETWEEN: JEFFREY WILLIAM STUBBINGS

Appellant

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)

Third Respondent

RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline

(a) Reasoning of the Court of Appeal

2 Asset-based lending involves lending on the value of the assets securing the loan, without any consideration of the borrower's ability to repay the loan from their own income or other assets. No credit-risk analysis other than the calculation of the loan amount to security value ratio is undertaken by the lender: CA [1]; CAB 135. Asset-based lending is relevant to, but not determinative of, unconscionability. All the circumstances of the particular case must be considered: CA [2]; CAB 135.

3 Although Mr Jeruzalski was aware of six matters which, absent further information, may have been sufficient to put him on inquiry in relation to Mr Stubbings' personal and financial circumstances, Jeruzalski was entitled to rely upon the independent legal and accounting certificates as evidence that Stubbings had consulted a solicitor and an accountant for advice in relation to proposed asset based loans and understood the nature and risks of the asset-based loans. The certificates made it reasonable to refrain from further inquiry about repayments. The trial judge therefore erred in fixing Jeruzalski with knowledge that default was inevitable given Stubbings' personal and financial circumstances: CA [127]-[133]; CAB 195-199.

4 There was no basis in the evidence for the trial judge's finding that the solicitor and accountant were not independent: CA [134]; CAB 199.

(b) Did the Court fail to take into account primary findings regarding the lenders' knowledge of, and "wilful blindness to", the guarantor's vulnerability?

5 The matters identified at Appellant's Submissions (**AS**) [21](a)-(g) were not relevant to Jeruzalski's knowledge of Stubbings' personal and financial circumstances: Respondents' Submissions (**RS**) [16]-[19].

6 There was no inconsistency between Jeruzalski being informed that Stubbings intended to refinance with a bank and Jeruzalski's evidence that a bank would not lend money to Stubbings without an income: cf AS [21(h)], [23]. Jeruzalski's evidence was that he was told that the proposed loan was a business loan, that the

business was concerned with boat repairs, and that Stubbings was conducting that business from the Fingal property: CA [22], [36]; CAB 142, 147.

7 The Court of Appeal referred to the green wedge zoning of the land at FN 198 and to the net proceeds that would be available to Stubbings following settlement at FN 197: RS [18]; cf AS [21(i) and (k)]; Appellant's Reply (**AR**) [14].

8 The Court of Appeal did not omit reference to any "inconsistency" between Jeruzalski giving evidence that he was advised of certain matters by Mr Kiatos and Mr Topalidies and the absence of any evidence of communications between them. The Court of Appeal pointedly refers to the fact that Jeruzalski was not pressed on this issue in cross-examination: CA [22]; CAB 142-143. The Court could not take that matter any further because of the manner in which the trial had been run.

9 The Court of Appeal did not fail to have regard to the potential loss to the guarantor: cf AS [21(l)]. That was the very premise of the proceeding.

10 The Court did not disregard "as innocuous the deliberate and intentional nature of Jeruzalski's system of lending": AS [22], [47]; RS [21]. The court recognised the inherent risk and found that the lenders' scheme might have been unconscionable but for the certificates: CA [94], [129]-[133]; CAB 180, 196-199.

(c) Were the certificates capable of "negating the lender's knowledge of the facts that would otherwise have made the loan transaction unconscionable"?

11 The certificates of independent advice required a solicitor and accountant to certify that they had advised the guarantor and borrower respectively in relation to the nature and risks of the transactions and that the guarantor and borrower respectively understood or appeared to understand the nature and risks of the transactions: TJ [77]-[85] (CAB 26-28); CA [23]-[31] (CAB 143-146); RS [25]-[26].

12 The fact that the certificates were not prescriptive is no basis to conclude that they could not be relied upon as evidence that Stubbings had consulted a solicitor and an account for advice and as to the truth of the broader matters stated in the certificate: cf AS [25]; RS [25]-[26]. It is not significant that the trial judge and Court of Appeal referred to Stubbings, as opposed to the corporate entity, as having received advice (TJ [77]-[85] (CAB 26-28); CA [132] (CAB 198-199)), where Stubbings and the corporate entity were indivisible: RS [27]-[28]; cf AS [26]; AR [3]

13 *Elkofairi* is distinguishable from this case and the Court of Appeal did not err in its description of it: CA [123] (CAB 193); AS [27]-[28]; RS [30]-[32]; AR [5].

14 The certificates were relevant to Jeruzalski's knowledge of Stubbings' personal and financial circumstances: CA [130]-[132] (CAB 196-199); RS [34]; cf AS [29].

(d) Did Court below fail to have proper regard to any advantage of the primary judge when substituting findings as to Jeruzalski's knowledge?

15 The Court of Appeal recognised the principles relating to appellate review and did not err in finding that Jeruzalski could not be attributed with wilful blindness as to Stubbings' personal and financial circumstances in light of the content of the independent certificates (CA [127], [130]-[133] (CAB 195-199)) or that there was no evidence to sustain a finding that the accountant and solicitor were not independent: CA [134] (CAB 199); RS [38]-[43]. The trial judge did not enjoy any advantage in respect of, and the evidence identified at AS [32]-[36] does not go to, those matters.

(e) Was the lender's system of lending unconscionable?

16 The absence of inquiry into any ability to repay the loan did not render the loan unconscionable: cf AS [37]-[43]. That is a characteristic of asset based lending: CA [2] (CAB 135); RS [54]. Despite express disavowal (AS [44]; RS [22]), the appellant contends that asset based lending is presumptively unconscionable: AR [14].

17 There is no evidence that the lenders' system was designed to take advantage of vulnerable persons: cf AS [37]-[40]. Nor can unconscionability be established by pointing to steps taken to comply with the law: AS [38]; RS [55]. The amplitude of the appellant's reliance on Jeruzalski's "smugness" is unjustified: AS [39].

18 The Court of Appeal correctly had regard to all the circumstances of the case, including the certificates: RS [57]-[58]; cf AR [10]. The fact that Stubbings did not take steps to sell his existing properties as planned to reduce the loan repayments does not render the lenders' system of lending unconscionable: CA [11], [43] (CAB 138, 149-150): cf AS [37], AR [12].

Dated: 14 October 2021

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