HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M13/2021
File Title:	Stubbings v. Jams 2 Pty Ltd & Ors
Registry:	Melbourne
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondents
Date filed:	28 May 2021

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No M13 of 2021

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' SUBMISSIONS

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Issues

2 The issues are those which are identified in Part II of the appellant's submissions (**AS**).

Part III: Section 78B of the *Judiciary Act 1903*

3 This matter does not give rise to any issues that would require notice under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

4 The respondents generally accept the appellant's recitation of the facts. However there are some matters that require correction or further context.

5 The appellant overstates Mr Stubbings' (**Stubbings**) level of special disadvantage: AS [8]. It is true that Stubbings was unemployed at the time that he obtained the asset based loans. However he had previously been employed repairing boats until a falling out with his employer precipitated the events in issue in this proceeding: *JAMS 2 Pty Ltd v Stubbings* [2020] VSCA 200 (**CAJ**) at [7]. Likewise, although Stubbings may have had a limited formal education and may have been unable to perform simple calculations in front of the trial judge, the Court of Appeal found that Stubbings "was in control of his own affairs and could well speak and read English. He owned other assets, including the two Narre Warren properties": CAJ [123]. Further, Stubbings had managed mortgage repayments for the Narre Warren properties while also managing to rent a property in the Mornington Peninsula, where Stubbings preferred to live: CAJ [7]. Accordingly, Stubbings was able to manage his own financial affairs in a responsible manner. Further, the Court of Appeal also held that Stubbings did not suffer any profound disabilities of the kind founding the special disadvantage in *Elkofairi v Permanent Trustee Co Ltd*[1] (***Elkofairi***): CAJ [123].

6 The appellant identifies that a second loan was offered to Stubbings at the rate of 18 per cent per annum and 25 per cent per annum on default, but does not identify why that second mortgage was necessary and why those rates were justified: AS [9]. The second mortgage was necessary because the first mortgage amount was limited to two-thirds of the combined valuation of the two Narre Warren properties and the Fingal property, and that amount was not sufficient to cover the costs of the relevant transactions: CAJ [18]. The higher interest rates reflected the fact that the any loan to security ratio was riskier for the second loan: CAJ [18].

7 The appellant states that Mr Jeruzalski (**Jeruzalski**) "gave evidence that he knew or believed that Stubbings had no income or means of servicing the loans": AS [9]. However the Court of Appeal held that, at its highest, the evidence only supported a conclusion that Jeruzalski assumed that Stubbings did not have an income on which he could draw to service the loan: CAJ [131(1)] (see also CAJ [97]). There was no evidence that Jeruzalski knew or believed that Stubbings had no income or that he suspected that Stubbings had no other means of servicing the loans.

8 In discussing the loans obtained and the interest due under the loans, the appellant also fails to refer to the fact that Stubbings had no apparent intention of maintaining and servicing three loans for any period of time: AS [9]. Mr Zourkas (**Zourkas**) advised Stubbings that he

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[1] (2002) 11 BPR 20, 841.

could "borrow enough to pay out the two CBA loans over the Narre Warren properties, purchase the [Mornington Peninsula] property, and have about $53,000 surplus loan funds to enable him to pay three months' interest on the loan while he sold the Narre Warren properties, reduce the [asset-based] loan to about $400,000, and then refinance the loans with a bank at lower interest rates": CAJ [11]. That proposal did not involve Stubbings servicing the interest on the loan from his income or other means.

9 The appellant then refers to the trial judge's finding that Stubbings was bound to lose all his assets including his home from the moment the loans were made: AS [10]. It is important, however, to add that the Court of Appeal did not include that fact in the facts known to Jeruzalski: CAJ [131]-[132].

10 The appellant makes a number of factual assertions that are not supported by the paragraphs of the trial judge's reasons that are cited for those facts: AS [10]. The appellant states that Mr Stubbings "could not" understand the loan agreement or its financial consequences, but the finding of the trial judge was that Stubbings misunderstood, not that he could not understand, those matters: *JAMS 2 Pty Ltd v Stubbings* (No 3) [2019] VSC 150 (**TJ**) [266]. The appellant states that Stubbings did not have the income or savings to pay a single month's interest, and that Stubbings defaulted immediately, but the cited paragraph – TJ [43] – does not support those facts. In any event, Stubbings managed the first two months payments and did not default until he failed to make the third payment: CAJ [4]-[5].

11 The appellant then emphasises that the certificate of independent financial advice which Stubbings was required to complete was confined to advice to the borrower and did not require any advice to be given to Stubbings as personal guarantor: AS [11]. However, the appellant omits any reference to the fact that Stubbings was also separately required to and did in fact obtain a certificate of independent legal advice, which contained an "Acknowledgement by Guarantor' that he understood the loan and mortgage documents and the consequences if there was a default, and required a solicitor to certify the same: TJ [77]-[83].

12 The appellant emphasises what is absent from the certificates of independent advice that Stubbings was required to obtain. The appellant states that the certificate of independent financial advice "did not require the accountant to sight any financial documents and contained no information about the business, Stubbing's financial position, the substance of the advice given, or the purpose of the borrowing": AS [11]. The appellant further states that neither the certificate of independent financial advice nor the certificate of independent legal advice

contained any substantive information about the borrower or guarantor: AS [15]. However the appellant omits to state what those certificates *did* contain. The terms of the certificates are set out at TJ [77]-[85]. The certificates required a solicitor and an accountant to separately certify that the guarantor and borrower respectively had been provided with independent advice about the nature and consequences of the transactions being entered into and to certify that the guarantor and borrower respectively appeared to understand that advice. That is, the certificates left it to the accountant and solicitor to identify what information they required in order to certify, in their professional opinion, the matters required by the certificates. In this respect, it is important to add the fact, which is omitted by the appellant, that the trial judge found that, but for the accountant's negligence in certifying to the lender that Stubbings had been properly advised and understood that advice, the lender would not have provided the loan to Stubbings: TJ [333]-[338].

Part V: Argument

13 There are some substantial discrepancies between the grounds of appeal, the issues identified at AS [2]-[4], and the submissions that the appellant makes in support of those issues. In order to most closely address the appellant's arguments, these submissions take the approach of responding to the issues as they are presented under the Argument section of the appellant's submissions.

Grounds 2 and 3 – Issue 1: Lender's knowledge of guarantor's vulnerability/certificates

AS [21]: Court of Appeal's identification of the "real question"

14 Ground 2/Issue 1 turns upon the Court of Appeal's identification of the "real question" in the case. The Court of Appeal identified the real question as being "whether the trial judge correctly held that Jeruzalski had knowledge of facts which ought to have put him on inquiry as to Stubbing's personal and financial circumstances, including details of the company's assets and business": CAJ [127]. The Court then weighed Jeruzalski's knowledge of those matters as against Jeruzalski's reliance on the certificates of independent legal and financial advice, and held that, in light of the content of those certificates, "Jeruzalski should not be fixed with knowledge of Stubbings' personal and financial circumstances such that default under the loans was inevitable, as the trial judge found": CAJ [132], see generally [130]-[134].

15 The appellant contends in Ground 2/Issue 1 that "[i]n describing the case in these terms, the Court below omitted reference to a range of relevant primary findings and inferences going to Jeruzalski's knowledge", and identifies that purported range of evidence.

16 That submission is misconceived. Plainly enough, the identification of the real question in the proceeding determines what evidence is relevant. The fact that certain evidence was not relevant to the question that was identified does not establish error. The appellant does nothing to seek to undermine the reasoning in support of the identification of the real question, which determined what evidence would be relevant.

17 Further and in any event, the submission must fail to establish error for at least two reasons.

18 First, for the reasons that follow, the findings referred to by the appellant are variously insignificant, irrelevant or alternatively, were taken into account by the Court of Appeal. The observation that Jeruzalski was "smug" does not go very far, particularly in circumstances where that smugness was attributed to a belief that the lending scheme was lawful: cf AS [21(a)]. The knowledge of what Zourkas would be paid, or that Zourkas had worked previously with and was known to Jeruzalski, or of how Mr Topalides would be paid, is, without more, insignificant to whether the system was unconscionable: cf AS [21(b), (c), (e), (f)]. The finding that Zourkas was dishonest and predatory was not a finding about the lenders or their knowledge: AS [21(d)]. The Court of Appeal did take into account Jeruzalski's knowledge that the asset based loans would replace Commonwealth bank loans: CAJ [131(3)]; cf AS [21(g)]. There is no true inconsistency between the observation that Jeruzalski had been informed that Stubbings intended to refinance with a bank and Stubbings did not have an income – while Stubbings did not have an income at the time that he sought the asset based loans, the evidence was that he had been previously employed, and there was no evidence that he would not be employed in the future: CAJ [7]; cf AS [21(h)]. The Court of Appeal expressly took into account the matters identified at AS [21(i)] (see CAJ fn 198) and AS [(k)] (see CAJ fn 197). Finally, it cannot be said that the Court of Appeal failed to consider the possibility that Jeruzalski knew that the loans could cause significant loss to the guarantor. Having identified the matters known to Jeruzalski at CAJ [131], the Court said at CAJ [132] that if these were the only matters known to Jeruzalski, they might have justified a finding of unconscionability. It is implicit in that finding that the Court of Appeal considered the possibility that Jeruzalski knew that the loans could cause significant loss to Stubbings as guarantor. However the Court went on to hold that in light of the certificates, no such finding could be made. Thus in assessing all of the evidence, the Court did take into account that it must have been known to Jeruzalski that an asset based loan could cause loss to a guarantor.

19 Second, even if those findings were significant or relevant or not taken into account, which is denied, the fact is that the Court of Appeal concluded that, but for the certificates, a finding of unconscionability could have been justified: CAJ [132]. Thus, the Court's conclusion insofar as it was based on the more limited knowledge identified at CAJ [131] was not unfavourable to the appellant. Adding further facts about knowledge to bolster that preliminary conclusion does nothing where the Court went on to find that, having regard to the certificates, Jeruzalski could not be fixed with the relevant knowledge. The true target for the appellant on appeal must be the certificates, not the Court's finding that the knowledge that Jeruzalski did have, may have, absent other facts, justified a conclusion that the lenders' system of lending was unconscionable. However, in that respect it is imperative to recall the trial judge's finding, not challenged on either appeal, that but for the negligence of the accountant in providing the certificate of independent financial advice, the lenders would not have offered the loans to Stubbings: TJ [332]-[338]. Thus the factual findings of the trial judge preclude a conclusion that the certificates were somehow deficient.

AS [22]-[23] – matters going to whether asset based lending is inherently unconscionable

20 The appellant submits that the Court of Appeal erred at [126] in disregarding as innocuous the deliberate and intentional nature of Jeruzalski's system of lending: AS [22].

21 That submission mischaracterises the nature of the Court of Appeal's reasons at [126]. The Court held that the lenders' system of lending based purely on assets and not based on any ability to repay through income or other means, was, under the state of the prevailing law, not unconscionable per se, and that something more was required to render asset based lending unconscionable. The Court then turned to the question of Jeruzalski's knowledge of Stubbing's personal and financial circumstances to determine whether this particular system of lending was unconscionable, ultimately finding that it was not unconscionable for Jeruzalski to deliberately "abstain from inquiry" in circumstances where he had the two certificates of independent advice: CAJ [132], see also CAJ [133]. In so holding, the Court did not "disregard as innocuous the deliberate and intentional nature of Jeruzalski's system of lending", but rather, directly considered it: cf AS [22]. The Court held that it was permissible for Jeruzalski to deliberately abstain (CAJ 132])/refrain (CAJ [133]) from making further inquiries where he had the comfort of the independent certificates.

22 Although the appellant attempts to impugn the lenders' system of lending by describing it in pejorative terms, in truth they repeat the same error as the trial judge – they take issue with

the concept of pure asset based lending – a system in which a lender deliberately and intentionally lends money on the basis that it is secured against an asset and the asset is available in the event that the borrower defaults on the loan: CAJ [126]. Having regard to their concession that asset based lending is not unconscionable per se (AS [44]), what the appellant must do to establish unconscionability is to look at the circumstances of the particular system of lending, not the concept of asset based lending itself.

23 The appellant also makes a submission to the effect that it was inevitable that Stubbings would default under the loans and that all three properties that he owned would have to be sold: AS [23]. He does not identify how that establishes error in the reasoning of the Court of Appeal; it is not a submission about Jeruzalski's (or the lenders') knowledge, but rather that, it was simply the case that default and sale was inevitable. That does not establish the error alleged in Ground 2.

AS [24]-[31] – whether the Court of Appeal erred in placing decisive weight on the certificates

24 The appellant then submits that the Court of Appeal erred in placing decisive weight on the independent certificates. Error is said to be established for four reasons.

25 The first is that it is said the Court of Appeal omitted "reference to the limited nature of the information disclosed by the certificates": AS [24]-[25]. The appellant objects that the certificates did not contain details about the business proposed to be set up pursuant to the loan, did not require the certifiers to consider any documents beyond those provided by the lender, did not require that the accountant who certified the certificate of independent financial advice be a certified tax accountant, did not require the substance of the advice given to be set out, and were wholly drafted by the lenders: AS [25].

26 That submission fails however, to have regard to what the certificates did in fact require. They required an independent lawyer and an independent accountant each to certify that the guarantor and borrower respectively understood the nature and risks of the financial transactions constituted by the asset based loans: TJ [77]-[85]. The certificates thus imposed upon those professionals a responsibility to do whatever those professionals considered necessary in order to be able to give those certifications. The fact that the certificates preserved that flexibility to those professionals does not indicate that the certificates were deficient. Indeed, the trial judge found that, if the accountant had exercised reasonable care, he would not have provided the certificate, and if he had not provided the certificate, the lenders would not have proceeded with the loan to Stubbings: TJ [332]-[338]. Thus, contrary to the

submission now made by the appellant, the factual findings made by the trial judge support a conclusion that the certificate of independent financial advice was appropriately drafted to achieve its purpose. No findings were made in respect of the lawyer who certified that Mr Stubbings had received independent advice because Mr Stubbings' negligence case against him settled: CAJ [34].

27 The second reason that the appellant submits the Court of Appeal erred in placing decisive weight on the certificates is that the certificate of financial advice only required the company to get independent advice, and did not require the guarantor to be given any advice.

28 This submission should fail in light of the fact that the certificate of independent legal advice required Stubbings as the guarantor to acknowledge that he understood the security documents, including "the effects of the Security Documents and the consequences to [the Guarantor] if the Borrower defaults on its obligations to the Lender", and that "if the Borrower fails to pay all of the moneys due to the Borrower to the Lender then the Lender will be entitled to call on… the Guarantor to recover the moneys due to it": TJ [78]. The certificate of independent legal advice also required the solicitor to certify that:

> Before the Security Documents were executed by the Guarantor/s I explained the contents, nature and effect of them to the Guarantor/s. In particular, I explained and advised on the consequences of default under the relevant Security Documents, including the Lender/Mortgagee's right to sell the property constituting the security. The Guarantors appeared to be aware of and to understand the terms, nature and effect of the Security Documents and their obligations under them. I have made a diary note of the advice and explanation give to the Guarantor/s (TJ [83]).

29 In light of these requirements of the certificate of independent legal advice, it is simply immaterial that the certificate of independent financial advice did not involve the accountant giving that advice the guarantor.

30 The third reason that the appellant submits the Court of Appeal erred in placing decisive weight on the certificates is that the appellant submits the Court was wrong to find that the certificates excused or negated the lender's actual knowledge of matters indicating Stubbings vulnerability: AS [27]. In this respect the appellant relies on *Elkofairi*, and submits that the Court of Appeal was wrong to distinguish *Elkofairi* from the present case.

31 It is difficult to see how *Elkofairi* could support the submission upon which it is called to aid. As the Court of Appeal recognised, in *Elkofairi,* Mr and Mrs Elkofairi elected to sign a document which stated that they had been told by the mortgagee to take independent legal advice and they chose not to so do: CAJ [117]. Nothing in *Elkofairi* can establish that the Court

of Appeal erred in placing decisive weight on the independent certificates (because there was no such certificate in *Elkofairi*), unless the submission is that every asset based loan in those circumstances must be unconscionable. But as the Court of Appeal recognised, such a submission is contrary to the weight of intermediate appellate authority and inconsistent with the requirement "that the serious finding that someone has acted unconscionably depends upon a close examination of all the facts of the particular case": CAJ [122].

32 The appellant then submits that the Court of Appeal was wrong to hold that *Elkofairi* was authority for the proposition that "there may be irregularities with the loan application which put the lender on notice that further inquiries should be made" (CAJ [2]): AS [28] The basis on which this is said to be wrong is that the appellant states that *Elkofairi* is authority for the proposition that the absence of relevant financial information may put a lender on notice of an inability to repay (see AS [28]). That is a distinction without a difference. What is said by the Court of Appeal at CAJ [2] is the same as what is said by the appellant, but simply stated at a higher level of generality. In any event, even if it were in error, which is denied, it would be immaterial, given that the statement at CAJ [2] is a simple introductory example of a circumstance in which an asset based loan may be unconscionable.

33 The appellant's submission to the effect that the Court below erred in construing the necessary knowledge as constructive knowledge rather than actual knowledge (AS [28]) is directly contrary to the express words of the Court's reasons. The Court of Appeal said that "Jeruzalski should not be treated as having actual or constructive knowledge of Stubbings' personal and financial circumstances and the fact that the company had no assets, had never conducted business and did not immediately intend to do so": CAJ [130]. The submission must fail.

34 While the general legal propositions at AS [29] may be accepted, the final phrase, being that the certificates of independent advice did not expressly or impliedly negate the matters actually known to the lenders that indicated Stubbings' vulnerability in the transaction, is no more than disagreement with the conclusions of the Court of Appeal. This does not establish error in the Court of Appeal's reasons.

35 The fourth reason that the appellant submits the Court of Appeal erred in placing decisive weight on the certificates is that the appellant contends that the Court of Appeal erred in concluding that the accountant and solicitor were independent. Consistently with the appellant's submissions (AS [30]), this is addressed under Issue 2 below.

36 The conclusions that the appellant seeks to draw at AS [31] by reference to the preceding paragraphs should each be rejected on the basis that nothing that is said in the preceding paragraphs establishes any form of error by the Court of Appeal.

37 For the above reasons, Ground 2 should be dismissed.

Ground 3 – Issue 2: Court of Appeal substituting own findings for those of trial judge

38 The appellant submits that the Court of Appeal erred in substituting its findings for those of the trial judge.

39 The appellant's submission overstates what factual findings the Court of Appeal set aside and mischaracterises the nature of those findings.

40 The only relevant findings that the Court of Appeal set aside were findings in relation to the accountant and the solicitor who provided the certificates of independent advice, to the effect that they were not independent. The Court of Appeal said:

> [133] We conclude that the certificates, especially the accountant's certificate, made it reasonable for Jeruzalski to refrain from inquiry as to how the company and Stubbings intended to, or whether they could in fact, service the loans pending refinance following sale of the two Narre Warren properties. In reaching that conclusion, we have been mindful that the judge inferred that:
>
> > Mr Jeruzalski must have suspected that Mr Stubbings would be guided by Mr Zourkas as to which solicitor and accountant to approach. I see this conduct as part of the system of conduct adopted by AJ Lawyers to immunise the firm from knowledge that might threaten the enforceability of the loan. As far as Mr Jeruzalski was concerned, the accountant and the solicitor would only be paid if the loans went ahead. There was no incentive for them to withhold the certificates. If they withheld the certificates, then they would receive nothing for their services. To characterise them as independent is perhaps a bridge too far.
>
> [134] In our view, those inferential findings, and the 'bridge too far' comment are not supported by the evidence. No basis for the inferred suspicion is given. No basis is given for the inference that the suspected conduct was 'part of the system'. The disbursement authorities enclosed with the two approval letters made no mention of the fees due to Kiatos and Topalides coming from the loan proceeds, and their fees were not deducted at settlement. It was only after settlement that their fees were paid from the $16,360 remaining in the AJ Lawyers trust account – after authorisation from Stubbings.

41 The Court of Appeal set aside those findings on the basis that there was no foundation in the evidence for those inferential findings, rather than on the basis that a witness was or was

not credible or on some other basis in respect of which the trial judge would have enjoyed an advantage. An appeal court is in as good a position to determine that there is no evidence to support a finding as is a trial court. The requirement that an appellate court not depart from a trial judge's conclusions where a trial judge had an advantage, unless they are shown to be wrong by reference to incontrovertible facts or were otherwise contrary to compelling inferences, was not engaged.[2]

42 Contrary to the appellant's submissions, the Court of Appeal did not set aside the trial judge's findings "as to the knowledge and state of mind of a witness, Jeruzalski": AS [32]-[36]. Tellingly, the appellant does not identify any place in the Court of Appeal's reasons where that occurred. Rather, the Court of Appeal reframed the relevant legal question, and only considered the evidence relevant to the question that it determined was the "real question" in the proceeding: CAJ [127]. Thus the Court narrowed the range of relevant evidence, rather than setting aside factual findings (other than those at CAJ [133]-[134], dealt with above).

43 Ground 3 should be dismissed.

Ground 1 – Issue 3: whether the lender's system of lending was unconscionable in all the circumstances

44 Ground 1 alleges that the Court of Appeal erred "by evaluating the respondent's system of lending by reference to the short-hand label "asset-based lending", rather than the normative standard of conduct underlying s 12CB of the [ASIC Act]".

45 That issue appears to be dealt with at AS [44]-[47]. The nature of the submission is as follows.

46 The appellant accepts that the description of asset-based lending adopted by the Court of Appeal at CAJ [1] (i.e. the lending of money "without regard to the ability of the borrower to repay by instalments under the contract, in the knowledge that adequate security is available in the event of default") is consistent with the description of asset-based lending in other intermediate appellate authorities (AS [44]).

47 The appellant also accepts the orthodox proposition that whether "asset-based lending" is unconscionable in a particular case depends on all the circumstances, as held by the Court of Appeal at CAJ [2]. That concession is important. The appellant does not invite this Court to

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[2] *Fox v Percy* (2003) 214 CLR 118 at [28]-[29]; *Robinson Helicopter Company Inc v McDermott* (2016) 90 ALJR 679 at [43].

rule that asset based lending is, as a concept, necessarily, or even presumptively, unconscionable. Rather the appellant only invites the Court to find that the Court of Appeal erred in its assessment of the facts in this case.

48 The appellant submits that the Court of Appeal erred at CAJ [126] by describing asset based lending as a system of asset-based loans "involving a deliberate intention to neither seek or nor receive information as to the personal and financial circumstances of the borrowers or guarantors" where "the purpose of the system was to protect (or 'immunise') the lenders from claims that the loans should be set aside as unconscionable". The appellants submit that both the deliberate intention and the purpose identified by the Court of Appeal fall outside the
10 accepted definition of asset based lending in the existing authorities: AS [45]-[45].

49 That contention should be rejected because the appellant misunderstands what is said at CAJ [126], seeks to place more significance on what is there said than can be supported by the text, and because what was said at CAJ [126] did not circumscribe the Court of Appeal's substantive analysis of the lenders' system of lending.

50 At CAJ [126], the Court of Appeal referred to the trial judge's description of the lenders' system of lending and said that it was "a description or 'pure' or 'mere' asset-based lending". "Pure asset lending", as referred to in *Perpetual Trustee Company Ltd v Khoshaba*[3] (***Khoshaba***) and *Kowalczuk v Accom Finance Pty Ltd*[4] (***Kowalczuk***), both of which are cited by the Court of Appeal in CAJ [1], is a simple paradigmatic concept, being a type of lending
20 on an asset which involves a deliberate choice not to inquire into the ability of the borrower to repay the loan from their own income or other assets. In *Khoshaba*, Basten JA said:[5]

> To engage in pure asset lending, namely to lend money without regard to the ability of the borrower to repay by instalments under the contract, in the knowledge that adequate security is available in the event of default, is to engage in a potentially fruitless enterprise, simply because there is no risk of loss. At least where the security is the sole residence of the borrower, there is a public interest in treating such contracts as unjust, at least in circumstances where the borrowers can be said to have demonstrated an inability reasonably to protect their own interests … . That does not mean that the Act will permit intervention merely where the borrower has been foolish, gullible or greedy. Something more is required.

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3 [2006] NSWCA 41 at [128] (Basten JA).
4 (2008) 77 NSWLR 205 at 227 [96] (Campbell AJA).
5 [2006] NSWCA 41 at [128].

51 In *Kowalczuk*, Campbell AJA said:[6]

> It can be accepted that pure asset lending — described by Basten JA in *Perpetual Trustee Company v Khoshaba* (at [128]) as being "to lend money without regard to the ability of the borrower to repay by instalments under the contract, in the knowledge that adequate security is available in the event of default" — is in at least some circumstances "unjust" within the meaning of the Contracts Review Act, or unconscionable: … However whether lending on the basis that the loan can adequately be repaid from the security, is in the circumstances of any particular case unconscionable or unjust, depends on other matters as well.

52 In those paragraphs, what was being referred to is the simple concept of "pure asset based lending". The Court of Appeal's identification of that concept at CAJ [126] involved no error. Nor did the Court of Appeal err in stating that the purpose of "pure asset lending" may be to avoid the responsibility or liability that would ensue upon the making of those enquiries. It is inherent in the nature of pure asset lending that it is a simple transaction in which a loan is granted on the basis of the security of the asset, and the lender does not assume any greater degree of responsibility in making that loan.

53 The appellant's mistake, in stating that "none of the earlier authorities dealt with the position of a lender who deliberately avoids knowledge of the borrower's circumstances, let alone as part of an intentional and systematic avoidance of potential liability"(AS [46]), is threefold.

54 First, there is no real distinction to be drawn between making a loan without regard to a person's ability to repay on the basis that the loan is adequately secured by an asset, and deliberately avoiding knowledge of a person's ability to repay. The point is that the loan is made on the basis of the security of the asset and no other considerations.

55 Second, and related to the first point, there is nothing unconscionable about a lender seeking to create a system of lending that does not contravene the law. It is entirely appropriate that a lender would take precautions so as to ensure that its system of lending did not result in in loans that may be characterised as unconscionable at law or by statute: TJ [293]. It is notable that the appellant cites no principle or authority in support of its arguments in this respect. To be clear, he cannot call in aid those authorities which state that equity precludes reliance on or enforcement of strict legal rights where to do so would be harsh, oppressive or strict in all the circumstances.[7] That is not what is in issue in this appeal. The appellant seeks to characterise

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6 (2008) 77 NSWLR 205 at 227 [96].

7 *Legione v Hately* (1983) 152 CLR 406 at 444 (Mason and Deane JJ).

as unconscionable the lenders' general system of offering asset based loans without inquiring into the borrower's ability to repay the loan from income, and in particular, seeks to impugn that system on the basis that the lenders were careful to ensure that such a system did not result in loans which could be set aside as unconscionable. That is a far cry from reliance on, or enforcement of, strict legal rights in circumstances that would render a particular transaction unconscionable.

56 Third, the appellant cannot refer to the particular facts of the earlier authorities (*Elkofairi*, *Tonto Home Loans Australia Pty Ltd v Tavares*[8] and *Violet Home Loans v Schmidt*[9]), and the basis upon which particular lending schemes in those cases were found to be unconscionable, to establish that the Court erred in its definition of the paradigm concept "pure asset based lending" that was referred to in those cases, and relied upon by the Court of Appeal at CAJ [1], [2] and [126]. That is simply a category mistake.

57 In any event, as foreshadowed at [49] above, the appellant overstates the significance of the Court's reference to "pure asset based lending" at CAJ [126]. That reference was simply a starting point. The Court went on to consider, at CAJ [127]-[134], whether, in all the circumstances of this case, the lenders' system of lending was unconscionable. In that analysis, set out below, the reference to the concept of pure asset based lending at CAJ [126] did not relevantly circumscribe the Court's analysis of the system of lending at CAJ [127]-[134].

58 The Court of Appeal considered Jeruzalski's knowledge, including Jeruzalski's assumption that Stubbings and the company had no income, in the sense that they did not have sufficient income to service interest under the loans for between six and 12 months: CAJ [131(2)]. The Court said that "if these were the only matters known to Jeruzalski at the time the loans were approved, they may have been sufficient to justify the serious finding that it was unconscionable for him to abstain from inquiry in all the circumstances": CAJ [132], see also "refrain from inquiry" at CAJ [133]. In those phrases, the Court recognised that in some circumstances, deliberately abstaining/refraining from inquiring into personal and financial circumstances could, depending on the circumstances, be unconscionable. There was no failure by the Court in this case to consider the lenders' deliberate intention to neither seek nor receive information as to the personal and financial circumstances of the borrowers or guarantors and whether that constituted unconscionable conduct. To the contrary, in the absence of the

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8 (2011) 15 BPR 29,699.
9 (2013) 44 VR 202.

independent certificates, the Court of Appeal considered that such conduct may have justified a finding of unconscionability.

59 However the Court of Appeal went on to hold that Jeruzalski was entitled to rely on the certificates of independent legal and financial advice, such that he could not be fixed with knowledge of Stubbings' personal and financial circumstances such that default under the loans was inevitable: CAJ [132]. Thus the Court held, on the facts of this case, that no unconscionability could be established in the lenders' system of lending, *notwithstanding* that it involved deliberately abstaining (CAJ [132]) or refraining (CAJ [133]) from inquiry into a borrower or guarantor's personal and financial circumstances.

60 While that deals with the arguments that relate to the error alleged in Ground 1, the appellant makes a number of additional arguments in this section that it is convenient to now address.

61 The submissions that are made at AS [37]-[43] appear to be the submissions by which the appellant would seek to establish that the lenders' system of lending was unconscionable if error was established by the Court of Appeal. These submissions go nowhere in the absence of error by the Court of Appeal. It should, however, be emphasised that numerous factual assertions are there made which are unsupported by any findings of the Court of Appeal or trial Judge (for example that the lenders' system of lending was "deliberately designed so as to take advantage of vulnerable persons" (AS [37], [39]), that the lenders' system of lending would invariably result in vulnerable persons being exploited to their detriment (AS [38]), that the certificates were "manifestly inadequate" (AS [39]). In truth, despite the concession of the appellant that it does not seek to take issue with asset-based lending as a concept on appeal (AS [44]), the submissions in this section do seek to persuade this Court to take the same general adverse view of asset based lending as the primary judge: see CAJ [126]. That is made clear at AS [42], where the appellant submits that any loan in which a lender does not inquire into capacity to service the loan, and where the lender assumes that the borrower does not have an income, and where there is a *risk* that a borrower *might* be at a special disadvantage, must be unconscionable. That submission encompasses virtually all asset-based lending systems. But that submission is defeated by the appellant's own submission at AS [44] (see also CAJ [122]) that whether asset-based lending is unconscionable depends on all the circumstances of a particular case.

62 The appellant appears to suggest as a general proposition, unsupported by principle or authority, that a lender who refrains from obtaining information from a would be borrower is necessarily more offensive to conscience than a lender who requests but does not receive complete or true information about a borrower: cf AS [47]. That submission is likewise contrary to the established position that whether conduct is unconscionable depends on all the circumstances of the case.

63 The appellant contends that the Court of Appeal failed to consider whether the asset based loan was unconscionable in all the circumstances of the case: AS [47]. That contention cannot withstand proper consideration of the Court's reasons for the reasons set out at [58]-[59] above.

64 Finally, the fact that the lender's system of conduct was designed and operated by an experienced practising solicitor with professional obligations and who owed duties to clients is not something that bolsters the appellant's case against the lenders: cf AS [48]. The case is brought against the lenders as lenders. Jeruzalski's conduct is attributable to the lenders as their agent. Further and in any event, to the extent that Jeruzalski's status as a solicitor could have any relevance to the case against the lenders, it would be that the lenders acted responsibly in engaging in a scheme designed an operated by a person with the professional skills and ethical obligations of a solicitor.

65 For the foregoing reasons, Ground 1 should be dismissed.

Part VI: N/A

Part VII: Time estimate

66 The appellant would seek no more than 2 hours for the presentation of the appellant's oral argument.

28 May 2021

	Bret Walker		Julia Watson
Phone	(02) 8257 2527	Phone	(03) 9225 6642
Email	maggie.dalton@stjames.net.au	Email	juliawatson@vicbar.com.au

Counsel for the respondents

ANNEXURE

The applicable statutory provisions are ss 12CB and 12CC of the *Australian Securities and Investments Commission Act 2001* (Cth) (as in force in September 2015: see compilation No. 58 including amendments up to Act No. 70 of 2015).