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 SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. *First,* did the Court below fail to properly take into account primary findings regarding the lenders' knowledge of, and wilful blindness to, the guarantor's vulnerability? And were the pro forma certificates of legal and accounting advice addressed to the lenders capable of negating the lenders' knowledge of facts that would otherwise have made the loan transaction unconscionable? (Grounds 2 and 3)

3. *Second,* did the Court below fail to have proper regard to the primary judge's advantage when substituting its own findings as to Jeruzalski's knowledge, where the primary judge's findings were informed by his impressions as to the character and demeanour of the witnesses? (Ground 3)

4. *Third*, was the lenders' system of lending money secured against a person's home, suspecting that he or she has no income or capacity to service the loan, yet deliberately avoiding information as to his or her financial or personal circumstances in order to "immunise" themselves from knowledge of vulnerability, unconscionable in all of the circumstances? (Ground 1)

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

5. The appellant considers that notice is not required under s 78B of the *Judiciary Act*.

Part IV: Judgments of the Court below

6. The first reasons of the primary judge are unreported: *Jams 2 Pty Ltd v Stubbings (No 3)* [2019] VSC 150 (**TJ**).[1] The second reasons of the primary judge are reported: *Jams 2 Pty Ltd v Stubbings (No 4)* (2019) 59 VR 1 (**TJ II**).[2] The reasons of the Court of Appeal are unreported: *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 (**CA**).[3]

Part V: Facts

7. The respondents (**lenders**) acted through their agent, Myer Jeruzalski of Ajzenstat Jeruzalski & Co Lawyers (**AJ Lawyers**).[4] Jeruzalski had practised as a solicitor arranging

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1 [**CAB / Tab 1 / 4–94**].
2 [**CAB / Tab 2 / 95–113**].
3 [**CAB / Tab 5 / 132–200**].
4 TJ, [52]–[54]: [**CAB / Tab 1 / 19–20**].

loans on behalf of lenders for about 30 years.[5]

8. Stubbings was under a special disadvantage.[6] He was unemployed,[7] uneducated,[8] and earned money by mowing lawns and changing tap washers.[9] He was incapable of performing simple calculations and his speech and demeanour were child-like.[10] The primary judge observed that "[i]t was readily apparent from the way Stubbings spoke in the witness box and conducted himself in court that he was precisely the sort of person who needed protection and was vulnerable to being exploited".[11] Stubbings' only asset was his equity in two nearby homes occupied by his family.[12] He had no other assets and some debts.[13] The homes were mortgaged to the Commonwealth Bank at bank rates, with repayments totalling about $1000 per month.[14] He wanted to buy a modest home for himself to live in, and he was introduced to an intermediary, Trayan Tzountzourkas (**Zourkas**).[15] Zourkas approached Jeruzalski.

9. The lenders offered to lend $1,059,000 to Victorian Boat Club Pty Ltd (**VBC**), a shell company that had no assets and had never traded, to be secured by first registered mortgages against the three properties.[16] Jeruzalski gave evidence that he knew or believed that Stubbings and his family were living at the properties to be mortgaged. Each of the lenders' directors gave evidence that they made their decision to lend to Stubbings based solely on the valuations of the security properties.[17] An additional amount was needed to settle the purchase of the Fingal property and discharge the existing mortgages on the two existing properties.[18] Jeruzalski arranged a second loan of $133,500 to be offered against the same security by another client of AJ Lawyers as part of the package of loans, at 18 per cent per annum and 25 per cent per annum on default.[19] The effect of the refinance and discharge of the mortgages on the existing properties was that Stubbings' loans at bank rates were refinanced at rates of 10 and 18 per cent per annum

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[5] TJ, [54]: [**CAB / Tab 1 / 19–20**].
[6] TJ, [266]: [**CAB / Tab 1 / 74**].
[7] CA, [8]: [**CAB / Tab 5 / 136**].
[8] TJ, [97]: [**CAB / Tab 1 / 30–31**].
[9] TJ, [270]: [**CAB / Tab 1 / 75**].
[10] TJ, [266], [269]: [**CAB / Tab 1 / 74–75**].
[11] TJ, [270]: [**CAB / Tab 1 / 75**].
[12] CA, [7]: [**CAB / Tab 5 / 135**].
[13] TJ, [101]–[102], [105]: [**CAB / Tab 1 / 31–32**].
[14] TJ, [105]: [**CAB / Tab 1 / 32**]; CA, [7]: [**CAB / Tab 5 / 135**].
[15] TJ, [106], [109]: [**CAB / Tab 1 / 32–33**]; CA, [7]–[9]: [**CAB / Tab 5 / 135–7**].
[16] CA, [15]–[16]: [**CAB / Tab 5 / 139**].
[17] TJ, [69]: [**CAB / Tab 1 / 22**].
[18] CA, [18]: [**CAB / Tab 5 / 140**].
[19] TJ, [301]: [**CAB / Tab 1 / 82**].

under the loans.[20] Together, interest under the loans was $10,377.50 per month (at rates of 10 and 18 per cent per annum respectively) on principal of $1,192,500.[21] Jeruzalski gave evidence that he knew or believed that Stubbings had no income or means of servicing the loans.[22]

10. Stubbings was bound to lose all his assets including his home from the moment the loans were made.[23] Stubbings had no capacity to service or repay interest at $10,377 per month[24] Stubbings could not understand the loan agreement or its financial consequences.[25] The first month's interest was set aside from the advance, and Stubbings paid the second month's interest in part from the advance and in part by selling personal possessions.[26] He did not have the income or savings to pay a single month's interest on the loans.[27] He defaulted immediately.[28] Interest began to accrue in default on the loans at the higher rates of 17 and 25 per cent per annum respectively, or $17,783.25 per month.

11. In arranging the loans, Jeruzalski passed the loan documents to Zourkas to be completed. Zourkas arranged for Stubbings to meet with a solicitor, Kiatos, and an accountant, Topalides. Kiatos and Topalides completed the certificates and Zourkas returned the certificates to Jeruzalski.[29] The pro forma certificate of accounting advice is confined to advice to VBC in relation to the loan debenture to be executed by it.[30] The certificate does not refer to any advice having been given to Stubbings as personal guarantor, nor does it refer to the mortgage security. The certificate is expressed to be given "entirely independently of any other Borrower or Guarantor".[31] The certificate did not require the accountant to sight, and Topalides did not ask to see, any financial documents.[32] The completed certificates contained no information regarding the business, VBC or Stubbings' financial position, the substance of the advice given, or the purpose of the borrowing, except for the handwritten words, "Set up & Expand the business".[33]

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[20] CA, [17]: [**CAB / Tab 5 / 140**].
[21] TJ, [300]–[302]: [**CAB / Tab 1 / 82**]; CA, [17]: [**CAB / Tab 5 / 140**].
[22] TJ, [92]: [**CAB / Tab 1 / 28–29**].
[23] TJ, [17]: [**CAB / Tab 1 / 12**].
[24] TJ, [302]: [**CAB / Tab 1 / 82**].
[25] TJ, [266]: [**CAB / Tab 1 / 74**].
[26] TJ, [145]: [**CAB / Tab 1 / 41**].
[27] TJ, [43]: [**CAB / Tab 1 / 148–149**].
[28] TJ, [43]: [**CAB / Tab 1 / 149**].
[29] TJ, [84]: [**CAB / Tab 1 / 27**]; CA, [23]–[26]: [**CAB / Tab 5 / 142–143**].
[30] The terms of the certificate are reproduced at CA, [31]: [**CAB / Tab 5 / 144–145**].
[31] TJ, [85]: [**CAB / Tab 1 / 27**]; CA, [31]: [**CAB / Tab 5 / 145**].
[32] TJ, [195], [197]–[198], [214]: [**CAB / Tab 1 / 54–55, 57–58**].
[33] CA, [31]–[32]: [**CAB / Tab 5 / 144–145**].

Jeruzalski gave evidence that he knew the property was zoned "green wedge" and could not be used for commercial purposes.[34] Kiatos and Topalides were paid directly by AJ Lawyers from the loan proceeds for their advice.[35] Topalides gave evidence that he forwarded his invoice for the accounting advice directly to AJ Lawyers because "otherwise I would not have been paid".[36] The primary judge found that Topalides was negligent in his advice[37] and refrained from making findings in relation to Kiatos' advice, as Kiatos had settled the claim against him prior to trial.[38]

12. Jeruzalski disbursed the loan advance to the vendor's conveyancer to settle the purchase of the Fingal property and to the Commonwealth Bank to discharge the existing mortgages. Zourkas charged $27,000 for his part in arranging the loans to Stubbings, and AJ Lawyers charged $31,000 for procuration and legal fees, paid from the advance.[39]

13. These facts were consistent with the system that Jeruzalski generally follows when arranging loans.[40] He avoids the application of the National Credit Code by only lending to companies, but requires that every loan be secured by a guarantee in the form of a mortgage over land.[41] He will never meet a borrower or guarantor, nor will he lend to a person who approaches him directly.[42] Jeruzalski relies on intermediaries such as Zourkas to bring in business and to do all things necessary to enable loans to be made.[43] Jeruzalski and Zourkas knew each other for 25 years, and had arranged 30 to 40 loans together over the preceding three or four years.[44] After hearing Zourkas' evidence, the primary judge described Zourkas as a dishonest and predatory man.[45]

14. Jeruzalski does not inquire as to the borrower or guarantor's financial circumstances beyond performing a title and bankruptcy search.[46] He does not want or receive any information about the guarantor's personal or financial circumstances or capacity to service the loan.[47] The primary judge observed that he understood "from Jeruzalski's

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[34] CA, [22]: [**CAB / Tab 5 / 141**].
[35] TJ, [183], [210]–[211]: [**CAB / Tab 1 / 51, 57**].
[36] TJ, [211]: [**CAB 57**].
[37] TJ, [337]: [**CAB 93**].
[38] TJ, [185]: [**CAB / Tab 1 / 52**]; CA, [34]: [**CAB / Tab 5 / 146**].
[39] TJ, [73], [141]: [**CAB / Tab 1 / 23, 40**]; CA, [16(4)]: [**CAB / Tab 5 / 139**].
[40] TJ, [55]–[67]: [**CAB / Tab 1 / 20–30**].
[41] TJ, [57]: [**CAB / Tab 1 / 20**].
[42] TJ, [61]–[62]: [**CAB / Tab 1 / 21**].
[43] TJ, [61], [68], [221]–[224]: [**CAB / Tab 1 / 21, 22, 60**].
[44] TJ, [155]: [**CAB / Tab 1 / 43**].
[45] TJ, [271]: [**CAB / Tab 1 / 75–76**].
[46] TJ, [57]: [**CAB / Tab 1 / 20**].
[47] TJ, [57]–[58]: [**CAB / Tab 1 / 20–21**].

evidence that he would prefer not to know these things in case his knowledge would in some way undermine his clients' ability to recover their loans".[48] In deciding whether to lend, Jeruzalski gives no weight to the borrower or guarantor's ability to service or repay the loan.[49] Rather, he relies solely on valuations of the mortgage security property.[50] In his words, he is "lending on the assets".[51] Jeruzalski assumes that borrowers approaching him for loans do not have an income to service the loan: "If he had an income sufficient to service a loan of that amount, he would've gone to a bank".[52]

15. As part of the system of lending, Jeruzalski had designed pro forma certificates of advice addressed to his client lenders, which he used in arranging all AJ Lawyers' loans.[53] Jeruzalski would give the loan documents, including the pro forma certificates, to Zourkas (or an intermediary like him), who would then arrange for the documents to be completed and returned. The loan documents did not contain any substantive information about the borrower or guarantor. The lenders did not provide or receive any application form that would have contained details or particulars of the borrower or guarantor's income, assets, other finances or proposed means of repayment.

16. The lenders commenced proceedings in May 2016 and obtained orders from an Associate Justice for possession of the two existing properties and sold them, retaining the proceeds.[54] The second mortgagee has not taken part in the proceedings.[55] The orders for possession were overturned on appeal to a single judge.[56] Stubbings counterclaimed, relying relevantly on equitable unconscionability and s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), and joined Zourkas, Kiatos and Topalides as third parties.[57] Stubbings appeared in person at trial, as did Zourkas and Topalides.[58] Stubbings succeeded against the lenders and obtained relief.[59] The Court below allowed the lenders' appeal and granted possession of the Fingal property.[60]

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[48] TJ, [58]: [**CAB / Tab 1 / 20–21**].
[49] TJ, [57]: [**CAB / Tab 1 / 20**].
[50] TJ, [57], [59], [61]: [**CAB / Tab 1 / 20–21**].
[51] TJ, [92]: [**CAB / Tab 1 / 29**].
[52] TJ, [92]: [**CAB / Tab 1 / 29**].
[53] TJ, [72]: [**CAB / Tab 1 / 24**].
[54] TJ, [2], [18]: [**CAB / Tab 1 / 8, 12**].
[55] TJ II, [8]: [**CAB / Tab 2 / 99**].
[56] *Stubbings v Jams 2 Pty Ltd* (2017) 53 VR 420. See TJ, [5]: [**CAB / Tab 1 / 9**].
[57] TJ, [33]–[51]: [**CAB / Tab 1 / 14–19**].
[58] TJ, [6]: [**CAB / Tab 1 / 9**].
[59] *Jams 2 Pty Ltd v Stubbings (No 4)* (2019) 59 VR 1 [**CAB / Tab 2 / 95-113**].
[60] *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 [**CAB / Tab 5 / 132–200**].

Part VI: Argument

17. The Court below found that the lenders' conduct, including a deliberate intention to avoid information as to their borrowers' personal and financial circumstances so as to "immunise" the lenders from unconscionability claims, was not unconscionable.[61] The Court reasoned that the lenders were entitled to rely on certificates of legal and accounting advice and refrain from inquiry as to the guarantor's circumstances.[62]

18. In so doing, the Court wrongly reasoned from the label "'mere' asset-based lending",[63] wrongly placed unwarranted weight on the lenders' use of certificates of legal and accounting advice,[64] and failed to have regard to relevant primary findings and inferences drawn by the primary judge from his impressions of the witnesses as to Jeruzalski's knowledge.[65] The Court below thereby failed to apply the technique of equity in assessing the lenders' conduct, as it ought to have done for a case concerning unconscionability, and failed to properly discharge its appellate function.

19. Indeed, the effect of the decision below is to authorise a system of lending to shell companies secured against unemployed guarantors' property, thereby circumventing personal lending protections and creating a risk of predation on the vulnerable by unethical finance intermediaries, for the financial advantage of lenders and their agents.

20. The lenders' approach ensures that true commercial advice is not given to, or received by, any guarantor: the pro forma certificate of accounting advice is of narrow scope and confines the accountant's considerations to the borrower company's position, to the exclusion of the guarantor's position; and, further, and in any case, the certificate did not contemplate or permit any advice to the guarantor about the financial viability of the loan to the borrower, let alone the consequences to the guarantor.[66]

Issue 1: The lenders' knowledge of facts making the transaction unconscionable

21. The first issue is the misuse by the Court below of the evidence regarding the lenders' actual knowledge of facts relevant to the transaction, and in particular the certificates of legal and accounting advice. In rejecting the primary judge's finding of unconscionability, the Court below referred to Jeruzalski's knowledge as the "real

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[61] CA, [126]: [**CAB / Tab 5 / 193–194**].
[62] CA, [132]: [**CAB / Tab 5 / 197–198**].
[63] CA, [126]: [**CAB / Tab 5 / 193–194**].
[64] CA, [126], [132]: [**CAB / Tab 5 / 194, 197–198**].
[65] CA, [128]–[134]: [**CAB / Tab 5 / 195–198**].
[66] CA, [31]: [**CAB / Tab 5 / 144–145**]. See further, Issue 1 below.

question"[67] and purported to weigh the facts of Jeruzalski's knowledge "at its highest" against Jeruzalski's reliance on the pro forma certificates.[68] In 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 including:

(a) the primary judge's recorded observation of Jeruzalski's "apparent smugness when he gave evidence" and the primary judge's inference that Jeruzalski's smugness was due to his belief that AJ Lawyers' system of lending "immunised them and their clients from the breach of equity to protect the likes of Stubbings";[69]

(b) Jeruzalski's knowledge that Zourkas stood to receive $27,000 if the certificates were granted and the loans were approved;[70]

(c) Zourkas' evidence that he and Jeruzalski had arranged "30 to 40 loans" together over the preceding three or four years[71] and the finding that Zourkas was a significant source of income for Jeruzalski;[72]

(d) the primary judge's findings as to Zourkas' character, including that Zourkas was dishonest and prepared to prey on the weak and vulnerable;[73]

(e) Zourkas' evidence that he and Jeruzalski had known one another for 25 years and the primary judge's observation from viewing the courtroom that Zourkas and Ms Robinson, Jeruzalski's assistant, acted in a way that showed that they were friendly and well known to one another;[74]

(f) Topalides' evidence that he would not have been paid fees for his advice except from settlement of the loans once approved, and that he sent his invoice for the certificate of accounting advice to AJ Lawyers directly,[75] and Jeruzalski's knowledge that Stubbings did not have a solicitor of his own;[76]

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[67] CA, [127]: [**CAB / Tab 5 / 194**].
[68] CA, [131]: [**CAB / Tab 5 / 196–197**].
[69] TJ, [313]: [**CAB / Tab 1 / 85**]. The primary judge's inference is relevant to both Jeruzalski's actual knowledge and to the question whether the lenders' system of reliance on the certificates of advice was genuinely intended to ensure that guarantors had received independent advice, or was in fact, as the primary judge found, a device for the lenders to avoid knowledge of guarantors' vulnerability, as to which see also Grounds 1 and 3.
[70] TJ, [75]: [**CAB / Tab 1 / 25**]; CA, [24]: [**CAB / Tab 5 / 142**].
[71] TJ, [155]: [**CAB / Tab 1 / 43**].
[72] TJ, [294]: [**CAB / Tab 1 / 81**].
[73] TJ, [271]: [**CAB / Tab 1 / 75–76**].
[74] TJ, [156]: [**CAB / Tab 1 / 43–44**].
[75] TJ, [211]: [**CAB / Tab 1 / 57**].
[76] TJ, [311]: [**CAB / Tab 1 / 84**].

(g) Jeruzalski's knowledge that the lenders were advancing loans at rates of 10 and 18 per cent per annum to VBC partly in discharge of home loans from the Commonwealth Bank to Stubbings at ordinary bank rates,[77] making the transaction prima facie disadvantageous;

(h) the inconsistency between the observation at CA, [131(3)] that "Jeruzalski had been informed... that Stubbings' plan was to sell the two Narre Warren properties and then refinance the loans with a bank", and Jeruzalski's evidence that, without an income, a bank would not lend money to Stubbings or VBC;[78]

(i) the inconsistency between Jeruzalski's evidence that he understood from Zourkas that the purpose of the borrowing was to operate a boat repair business at the Fingal property,[79] and Jeruzalski's evidence that he knew that the Fingal property was zoned "green wedge" and could not be used for commercial purposes;[80]

(j) the inconsistency between Jeruzalski's evidence that Kiatos and Topalides had given him advice that Stubbings was "conducting a business there" at the Fingal property and had "applications in council",[81] and the facts that at that time the property had not yet settled, that Kiatos and Topalides were nominally advising Stubbings and not the lenders, and the absence of any other evidence of communication between Jeruzalski and Kiatos or Topalides; and

(k) Jeruzalski's knowledge that VBC would receive at most $16,360 following settlement,[82] which, in the absence of an income or other known external source of funds, would be likely to result in VBC defaulting after two months;

(l) Jeruzalski's knowledge that the loans could cause significant loss to the guarantor.[83]

22. The Court below also erred by disregarding as innocuous the deliberate and intentional nature of Jeruzalski's system of lending.[84] That element establishes the lenders' awareness of a significant risk of loss to borrowers or sureties who require the assistance of equity or statute for their protection, and the lenders' intentional exposure of those

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77 CA, [7]: [**CAB / Tab 5 / 135**].
78 TJ, [93]–[94]: [**CAB / Tab 1 / 29–30**].
79 TJ, [88], [92]: [**CAB / Tab 1 / 27, 29**]; CA, [55]–[56], [131(5)]: [**CAB / Tab 5 / 154–155, 197**].
80 CA, [22]: [**CAB / Tab 5 / 141**].
81 CA, [22]: [**CAB / Tab 5 / 141**].
82 CA, [40]: [**CAB / Tab 5 / 147–148**].
83 TJ, [283]: [**CAB / Tab 1 / 79**].
84 CA, [126]: [**CAB / Tab 5 / 193–194**].

persons to that risk, while denying them that protection, for their own financial gain: see further Issue 3 below.

23. Further, Jeruzalski knew that he was advancing loans of $1,192,500 for a period of 12 months against security valued at $1,590,000, comprising $375,000 and $395,000 in respect of each of the existing properties and $820,000 in respect of Fingal.[85] The economics of those figures were such that, absent some external source of funds, repaying the principal and interest would require all three properties, including Stubbings' home, to be sold. There was no external source of funds. Jeruzalski gave evidence that, without an income, there was no way Stubbings could refinance the loans with a bank.[86]

10 24. Against the findings as to the lenders' knowledge, the Court below attributed decisive weight to the certificates of legal and accounting advice that formed part of the system of lending.[87] The weight placed on the certificates by the Court below is unjustified having regard to: (a) the limited substantive information conveyed by the certificates; (b) the absence of independent financial advice to the guarantor; (c) the lenders' actual knowledge of matters demonstrating Stubbings' vulnerability in the transaction; and (d) the primary judge's finding that Jeruzalski suspected that Stubbings did not receive truly independent advice from the certifiers.[88]

25. ***First***, the analysis of the certificates in the reasons below omit reference to the limited nature of the information disclosed by the certificates. The pro forma certificates:

20 (a) lacked any particulars as to the business purpose of the loans except for the words, "Set up & Expand the business", on the completed accountant's certificate;[89]

(b) did not request, and the completed certificates did not contain, any financial information about either VBC or Stubbings such as current or projected income, assets, liabilities or expenses;

(c) did not require, and the completed certificates did not indicate, that the certifier receive or consider any financial or other documents or information except for the documents provided by AJ Lawyers;

(d) did not require, and were not completed to suggest, that the accountant was a

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[85] CA, [13]: [**CAB / Tab 5 / 138**], although the Court below appears to have calculated the sum of $1,570,000.
[86] TJ, [93]: [**CAB / Tab 1 / 29**].
[87] CA, [126]: [**CAB / Tab 5 / 194, 197–198**].
[88] TJ, [315]: [**CAB / Tab 1 / 85**]; see Ground 3 below.
[89] CA, [31]–[32]: [**CAB / Tab 5 / 144–145**].

certified tax accountant, as would be needed in order for VBC to receive meaningful accounting advice in respect of business loans of $1,192,500;

(e) did not request, and did not contain, any information about the substance of the advice given or whether the certifier had advised against the transaction; and

(f) were wholly drafted by AJ Lawyers.[90]

26. ***Second***, the Court of Appeal's determinative finding that "Jeruzalski was entitled to rely on the certificates… as evidence that Stubbings had consulted a solicitor and an accountant for advice"[91] is undermined by the correct finding elsewhere in the Court's reasons below that the accountant's certificate was in fact "addressed to the lenders concerning the loan to the company on the security of a debenture charge over its assets".[92] The accountant's certificate indicated that the company had received advice as to its risk, but indicated that Stubbings had not received advice as to the financial risk: (a) the pro forma accountant's certificate was confined to advice on the financial risks assumed by VBC;[93] (b) the pro forma accountant's certificate expressly confined those risks to the debenture charge to be executed by VBC, a company with no assets; (c) the pro forma accountant's certificate does not refer to the existence of the guarantee, nor the mortgage security to be granted by Stubbings as guarantor, nor the risks associated with the grant of mortgage security; and (d) the pro forma accountant's certificate expressly stated that the certificate (and by extension, the advice) was to be given "entirely independently of any other Borrower or Guarantor".

27. ***Third***, the Court below was wrong to find that the certificates excused or negated the lenders' actual knowledge of matters indicating Stubbings' vulnerability. Those known matters correspond closely to the matters that led the New South Wales Court of Appeal in ***Elkofairi*** *v Permanent Trustee Co Ltd*[94] to set aside a loan transaction as unconscionable: Beazley JA found that the lender took advantage of Mrs Elkofairi's vulnerability by lending on the security of her home in the knowledge that she had no income or ability to service the loan. It was relevant that the loan was secured against her only asset being her home, and that the disclosed business purpose of the loan was vague

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[90] TJ, [72]: [**CAB / Tab 1 / 24**]; CA, [24], [26]: [**CAB / Tab 5 / 142–143**].
[91] CA, [132]: [**CAB / Tab 5 / 198**] (emphasis added).
[92] CA, [31]: [**CAB / Tab 5 / 144**] (emphasis added).
[93] CA, [31]: [**CAB / Tab 5 / 144–145**].
[94] (2002) 11 BPR 20,841 (Beazley JA, Santow JA and Campbell AJA agreeing).

and unparticularised.[95] Although Mrs Elkofairi had not received independent advice, the lenders had letters from Elkofairi's accountant representing that the borrowers could service the loan.[96] The Court below purported to distinguish this case from *Elkofairi* by comparing the degree of special disadvantage suffered by Mrs Elkofairi to that of Stubbings, facts that did not form part of the reasoning in *Elkofairi*.[97] Beazley JA had expressly accepted that Mrs Elkofairi's lender did not know the extent of her disadvantage.[98] Rather, the relevant knowledge was the matters actually known to the lender. Jeruzalski's knowledge that Stubbings had no income to service the loan, that the loan was secured against all Stubbings' assets including his home, and that the business purpose of the borrowing was vague and unparticularised, were precisely the features that the NSWCA identified in *Elkofairi* as constituting an unconscionable taking advantage of the borrower's vulnerability.[99] If the circumstances are to be distinguished, it is on the basis that AJ Lawyers' system of lending was deliberate, systematic, and repeated.

28. The error in the reasoning below is compounded by the Court's mistaken citation of *Elkofairi* as authority for a proposition that "there may be irregularities with the loan application which put the lender on notice that further inquiries should be made".[100] *Elkofairi* contains no such proposition. Rather, Beazley JA observed that, "the absence of any relevant financial information", such as income figures or an articulated business purpose, "was sufficient to put the respondent on notice of the appellant's lack of capacity to meet the repayment obligations".[101] That is, *Elkofairi* turned on actual knowledge, not imputed or constructive knowledge. The Court below, having misconstrued the relevant knowledge as being, in substance, constructive knowledge of Stubbings' special disadvantage, rather than Jeruzalski's actual knowledge of matters corresponding to those in *Elkofairi*, erred by finding that the certificates and the information they conveyed were capable of negating Jeruzalski's actual knowledge.[102]

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[95] (2002) 11 BPR 20,841, [55]–[58].
[96] (2002) 11 BPR 20,841, [55].
[97] CA, [123]: [**CAB / Tab 5 / 192**]. The better distinction between Stubbings' case and *Elkofairi* is the deliberate and systematic nature of AJ Lawyers system of lending, as to which, see Issue 3 below.
[98] "[N]one of those matters were known to the respondent": (2002) 11 BPR 20,841 [53]. See also, [56].
[99] (2002) 11 BPR 20,841, [55]–[58] (Beazley JA).
[100] CA, [2]: [**CAB / Tab 5 / 134**].
[101] *Elkofairi* (2002) 11 BPR 20,841 [56] (emphasis added).
[102] See also, the Court's mischaracterisation of the primary judge's key findings as having been that the lenders "had been put on inquiry" (CA, [70]: [**CAB / Tab 5 / 163**]) and "had knowledge of facts which ought to have put [them] on inquiry": CA, [127]: [**CAB / Tab 5 / 194**]. The primary judge's key findings were to the effect that the respondents' actions in applying their system of lending in Stubbings' constituted wilful blindness

29. Independent advice may be significant in cases of undue influence, where the relevant inquiry is as to the quality of the consent.[103] Independent advice might also be curative to some forms of special disadvantage, such as language or literacy. But independent advice cannot be relied upon by a stronger party to overcome all special disadvantages.[104] Crucially, independent advice cannot be used to "launder" a weaker party's vulnerability if that vulnerability is known to, or has been influenced by, the stronger party.[105] Here, the certificates did not expressly or impliedly negate the matters actually known to the lenders that indicated Stubbings' vulnerability in the transaction.

30. ***Fourth***, as to Jeruzalski's suspicion that Stubbings had not received truly independent advice, see Issue 2 below.

31. Having regard to the preceding matters, the proper inquiry as to knowledge leads directly to the inferences drawn by the primary judge: the pro forma certificates of independent advice had been designed as part of the system of lending not to ensure that the borrower and guarantor received genuinely independent advice but rather as a means of enabling the lenders to secure their lending while averting their eyes from the obvious. The adoption and application of the system was conduct evidencing wilful blindness, and was unconscionable in all the circumstances.[106] Moreover, the matters actually known to the lenders were sufficient evidence of vulnerability that it was unconscionable for the lenders to disregard the borrower and guarantors' ability to repay the loan and instead rely solely on their ability to take possession and sell Stubbings' only assets.

Issue 2: The Court below wrongly substituted findings for those of the primary judge

32. The Court below substituted its own findings for the primary judge's findings as to the knowledge and state of mind of a witness, Jeruzalski. In so doing, it departed from established principles of appellate restraint. The primary judge's findings that were rejected by the Court below at CA [132]–[134][107] were findings as to Jeruzalski's

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(wilful blindness being a species of actual knowledge: ***Kakavas*** *v Crown Melbourne Ltd* (2013) 250 CLR 392, [156]), and that they knowingly and deliberately shut their eyes to his circumstances such that they must be treated as knowing of them: TJ, [315]–[316]: [**CAB / Tab 1 / 85–86**].

[103] *Commercial Bank of Australia v* ***Amadio*** (1983) 151 CLR 447, 461 (Mason J), 474 (Deane J).

[104] *Thorne v Kennedy* (2017) 263 CLR 85, 112, 128–129; *Bridgewater v Leahy* (1998) 194 CLR 457, [41] (Gleeson CJ and Callinan J, in dissent).

[105] *Thorne v Kennedy* (2017) 263 CLR 85, 112, 128–129; *Bridgewater v Leahy* (1998) 194 CLR 457, [41] (Gleeson CJ and Callinan J, in dissent).

[106] TJ, [312]–[316]: [**CAB / Tab 1 / 85–86**]. The applicant also submits that the lenders' system of conduct as operated by Jeruzalski was unconscionable within the meaning s 12CB of the ASIC Act regardless of the lenders' knowledge of any of Stubbings' particular characteristic: see Issue 3 below.

[107] [**CAB / Tab 5 / 197–198**].

knowledge, both directly by way of actual knowledge[108] and inferentially by way of wilful blindness.[109] They were findings that depended on the primary judge's assessment of Jeruzalski's oral evidence together with inferences from primary facts.

33. The primary judge inferred from Jeruzalski's "apparent smugness" when giving evidence that Jeruzalski believed that his system of lending immunised the lenders from an equitable unconscionability defence.[110] The primary judge also referred to relevant findings, including: (a) that Jeruzalski and Zourkas had known each other for 25 years and had arranged 30 to 40 loans together over the preceding three or four years;[111] (b) that Zourkas was a significant source of income for AJ Lawyers and vice versa;[112] (c) Zourkas' character as an evidently dishonest and predatory man;[113] (d) AJ Lawyers' reliance on Zourkas to do all things necessary to ensure that the loans were arranged;[114] and (e) the familiar relationship between Zourkas and Ms Robinson of AJ Lawyers.[115]

34. The relevant findings as to Jeruzalski's knowledge were findings: (a) as to a witness' state of mind and knowledge; (b) drawn from extensive witness evidence at trial and other uncontroverted evidence;[116] (c) made after the primary judge heard Jeruzalski's evidence in person over three days. The primary judge recorded his impression of the witness in this context.[117] The primary judge's findings as to Jeruzalski's knowledge, including the finding that Jeruzalski was wilfully blind, and that Jeruzalski suspected that Stubbings had not received truly independent advice, were inevitably affected by his recorded and unrecorded impressions of Jeruzalski's evidence. The primary judge's findings that were overturned by the Court of Appeal were not open to be re-visited unless they were glaringly improbable or contrary to compelling inferences.

35. Where a witness' state of mind is in issue, proof will naturally depend largely on the primary judge's assessment of the witness' evidence and character together with inferences drawn from other facts.[118] That observation is not confined to cases involving

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[108] TJ, [308], [310]–[311], [314]: [**CAB / Tab 1 / 83–84, 85**].
[109] TJ, [312], [315]–[316]: [**CAB / Tab 1 / 85–86**].
[110] TJ, [313]: [**CAB / Tab 1 / 85**].
[111] TJ, [155]: [**CAB / Tab 1 / 43**].
[112] TJ, [294]: [**CAB / Tab 1 / 81**].
[113] TJ, [271]: [**CAB / Tab 1 / 75–76**].
[114] TJ, [221]: [**CAB / Tab 1 / 60**].
[115] TJ, [156]: [**CAB / Tab 1 / 43–44**].
[116] TJ, [88]–[90], [92]–[96], [313]: [**CAB / Tab 1 / 27–30, 85**].
[117] TJ, [58], [313]: [**CAB / Tab 1 / 20–21, 85**].
[118] *Thorne v Kennedy* (2017) 263 CLR 85, [41]–[42] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ); *Kakavas* (2013) 250 CLR 392, [144]; *Louth v Diprose* (1992) 175 CLR 621, [4] (Dawson, Gaudron and McHugh JJ).

an intimate personal dynamic between the witnesses.[119] Here, the primary judge formed an impression of Jeruzalski's character and his knowledge of matters, and drew inferences from his impression of Zourkas' character that in turn informed his assessment of Jeruzalski's knowledge and state of mind in operating the system of lending in Stubbings' case. And an assessment of a witness' state of mind is "pre-eminently a matter in which a trial judge has a considerable advantage over an appellate court"[120] and it is only in exceptional circumstances that an appellate court ought reject such an assessment.[121] This is especially so in cases involving unconscionability,[122] in which the "technique of equity" described in ***Jenyns*** *v Public Curator (Qld)*[123] requires a court to look to every connected circumstance to determine the real justice of the case, and which ought not lightly be overturned.

36. Not only do the matters raised against the primary judge's findings not rise to the level of glaring improbability or compelling contrary inference, the impugned finding is in fact correct and supported by the evidence: the primary judge was quite right to suspect that Jeruzalski knew that it was unlikely that Stubbings was receiving independent advice. The primary judge's finding is sustained by Topalides' evidence that he knew he would only have been paid his fee from settlement of the loan,[124] in connection with Zourkas' evidence that he and Jeruzalski had successfully arranged 30 to 40 loans together previously using the same system and pro forma documents.[125] Taken together, the compelling inference is that drawn by the primary judge: that Jeruzalski suspected that Stubbings was not receiving proper, independent advice—whether by reason of Jeruzalski's knowledge of Zourkas' $27,000 incentive to ensure that the certificates were provided, or because the natural inference from Topalides' evidence that he knew he would only be paid from the loan advance is that this was how the certifiers had been paid in respect of each of the 30 to 40 previous loans arranged by Zourkas and Jeruzalski, and that this was a fact that would have equally been known to Jeruzalski. The view of the

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[119] *Kakavas* (2013) 250 CLR 392, [144]; *Wilton v Farnworth* (1948) 76 CLR 646, 654 (Rich J, Dixon J agreeing); cf. *Thorne v Kennedy* (2017) 263 CLR 85 and *Louth v Diprose* (1992) 175 CLR 621.

[120] *Board of Bendigo Regional Institute v Barclay* (2012) 248 CLR 500, 544 [141] (Heydon J).

[121] *Nocton v Lord Ashburton* [1914] AC 932, 957 (Viscount Haldane LC).

[122] *Thorne v Kennedy* (2017) 263 CLR 85, 104–105, [43]–[44]; *Louth v Diprose* (1992) 175 CLR 621, 649-650 (Toohey J); *Wilton v Farnworth* (1948) 76 CLR 646, 654 (Rich J, Dixon J agreeing).

[123] (1953) 90 CLR 113, 118–119 (Dixon CJ, McTiernan and Kitto JJ). Although referring to the unwritten law, that approach maintains in relation to statutory unconscionability by reason of the words, "in all the circumstances": see, eg, *Kobelt* (2019) 267 CLR 1, 49 [120] (Keane J), 60 [154] (Nettle and Gordon JJ).

[124] TJ, [211]: [**CAB / Tab 1 / 57**].

[125] TJ, [72], [155]: [**CAB / Tab 1 / 24, 43**].

evidence adopted by the Court of Appeal—that Jeruzalski did not suspect Zourkas would guide the choice of certifiers so as to ensure the loan was made, and had no reason to believe the certifiers depended for payment on the loan advance—does not meet the level of compelling contrary inference. In overturning those findings, the Court fell into error.

Issue 3: The lenders' system of conduct was unconscionable in all the circumstances

37. The primary judge found that the lenders' system of conduct, in making asset-based loans while deliberately seeking to immunise themselves from knowledge of the guarantor's circumstances by shutting their eyes to the guarantors' personal and financial circumstances, was unconscionable in all the circumstances.[126] That system, as applied in Stubbings' case, resulted in him suffering serious losses. There is no question on this appeal that Stubbings was under special disadvantage.[127] Leaving aside whether s 12CB and its cognates require a plaintiff to establish a taking of advantage,[128] exploitation can be inferred from the effect of the impugned conduct.[129] This rationally follows from the words of s 12CB(4)(b) of the ASIC Act: that is, the legislation is "capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour". Regardless of the vulnerability or disadvantage unique to Stubbings,[130] the lenders' system was unconscionable in all the circumstances, including because it was deliberately designed so as to take advantage of vulnerable persons.

38. The fact that the lenders' system was deliberately designed to avoid statutory and equitable protections against unconscionable conduct, as the primary judge found and the Court below accepted,[131] leads directly to the inference that the lenders well knew the risk that a guarantor subject to a special disadvantage might suffer loss as a result of the loan transaction. Moreover, that the lenders' regarded that risk as being sufficiently high to justify the steps taken by AJ Lawyers to immunise themselves from knowledge of their borrower and guarantor. The lenders' system sought to deprive from the guarantor the protection of equity and statute, not by putting in place mechanisms to reduce the risk of loss or harm, but by averting their eyes from the guarantor's circumstances. Thus, the

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126 TJ [293]–[299], [312]–[316]: [**CAB / Tab 1 / 80–81**, **85–86**].
127 TJ, [266]: [**CAB / Tab 1 / 74**]. The primary judge did not state whether his finding that the lenders' conduct was unconscionable was by reference to s 12CB of the ASIC Act or the unwritten law. But it matters not.
128 *Australian Competition and Consumer Commission v* ***Quantum Housing*** *Group Pty Ltd* [2021] FCAFC 40, [4] (Allsop CJ, Besanko and McKerracher JJ).
129 *ASIC v* ***Kobelt*** (2019) 267 CLR 1, 85 [258] (Nettle and Gordon JJ).
130 cf. *Quantum Housing* [2021] FCAFC 40, [91].
131 TJ, [58], [310]–[316]: [**CAB / Tab 1 / 20–21, 84–86**]; CA, [126]: [**CAB 193–194**].

question is whether it was unconscionable for the lenders' agent, a solicitor with 30 years' experience,[132] to deliberately operate a system that would almost inevitably result in vulnerable persons such as Stubbings being exploited to their detriment for the lenders' and AJ Lawyers' benefit.

39. The primary judge inferred that Jeruzalski's "apparent smugness when he gave evidence" was due to his belief that AJ Lawyers' system of lending "immunised them and their clients from the breach of equity to protect the likes of Stubbings".[133] That finding is wholly consistent with the primary judge's related observation (which was rejected by the Court of Appeal at CA, [134]) that the certificates were "part of the system of conduct adopted by AJ Lawyers to immunise the firm from knowledge that might threaten the enforceability of the loan".[134] If AJ Lawyers' and the lenders' system had been intended to ensure that borrowers received genuine independent advice, it would be improbable that the architect of the system would exhibit a smug demeanour in the course of a trial in which a person of readily apparent vulnerability,[135] a person at a special disadvantage, had in fact received manifestly inadequate advice[136] and faced serious financial loss, including the loss of his home. It follows that the system of lending was designed and operated to protect the lenders' financial interests by avoiding legal liability for a known risk of exploitation of vulnerable guarantors—not by ensuring that disadvantageous loans were not made to vulnerable persons, but ensuring that when such loans were made the lenders would nonetheless be able to recover their money from the vulnerable person by resort to the mortgage security.

40. This aspect of the system was addressed by the primary judge in terms of the lenders' wilful blindness as to Stubbings' vulnerability, which approach the appellant adopts (having regard to the matters set out at Issues 1 and 2 above), but it also evidences unconscionability in the nature of the system that was applied in Stubbings' case. This is not a case of constructive knowledge but rather a case that the system as designed was exploitative in that it was liable to cause harm to vulnerable persons—persons without incomes who had secured borrowing against their homes—for the lenders' financial benefit. By deliberately avoiding contact with the borrower or guarantor, the lenders

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132 TJ, [54]: [**CAB / Tab 1 / 19–20**].
133 TJ, [313]: [**CAB / Tab 1 / 85**].
134 TJ, [314]: [**CAB / Tab 1 / 85**].
135 TJ, [270]: [**CAB / Tab 1 / 75**].
136 TJ, [334]–[336]: [**CAB / Tab 1 / 92–93**].

exposed guarantors to greater risk of harm by placing them in the hands of Zourkas and his ilk. It was a system pregnant with risk.

41. AJ Lawyers' system is generally applied in the same way.[137] Jeruzalski never meets a borrower or guarantor.[138] Jeruzalski assumes that any borrower approaching him does not have an income.[139] Every loan is to a company, secured by a guarantee in the form of a mortgage over land.[140] Jeruzalski's evidence was that the loan documents are pro forma and that he prepares and advances all his loans in the same way.[141] Each of the lenders gave evidence that AJ Lawyers had acted for them in arranging multiple loans. While the likelihood of loss to individual guarantors depends on their individual circumstances, the lenders' system of "immunising" conduct—being conduct designed to avoid liability for unconscionable conduct in respect of vulnerable guarantors but which thereby takes advantage of vulnerable guarantors by increasing their risk while also depriving them of the protection of equity and statute—was consistent.[142]

42. Jeruzalski and each of the lenders gave evidence that their sole concern was whether there was sufficient security in Stubbings' property to secure the debt, and that they were "not looking for" any income information or other information as to the borrower or guarantor's personal and financial characteristics.[143] But what lender would not want to know whether its borrower has the capacity to service the loan? The answer must be: a lender who is willing to lend to a borrower regardless of the borrower's inability to repay or service the loan, comfortable in the knowledge that the loan is secured against the guarantor's assets. To operate such a system in circumstances where, as Jeruzalski said in his evidence, he knew or assumed that any borrower approaching him did not have an income to service the loan, and where he knew that there was a risk that a borrower or guarantor might be at a special disadvantage, is unconscionable.

43. The lenders were the stronger party in the transaction: even without Stubbings' particular disadvantages, the lenders set the terms and they were capable of protecting their interests, as demonstrated by their use of experienced solicitors as their agent in the transaction and the securing of their money against the mortgages over Stubbings' property. The lenders

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137 TJ, [55]: [**CAB / Tab 1 / 20**].
138 TJ, [61]–[62]: [**CAB / Tab 1 / 21**].
139 TJ, [92]: [**CAB / Tab 1 / 29**].
140 TJ, [57]: [**CAB / Tab 1 / 20**].
141 TJ, [72]: [**CAB / Tab 1 / 24**].
142 cf. *Unique International College Pty Ltd v ACCC* (2018) 226 FCR 631, [162].
143 TJ, [57]–[58], [69], [92]–[95]: [**CAB / Tab 1 / 20–22, 28–29**].

were well aware of the significant risk of financial loss that would accompany default. They also stipulated a higher default interest rate, despite being well secured in the event of default. The system of lending imposed all costs and all risk on the borrower and guarantor, while conferring considerable financial benefit on the lenders, AJ Lawyers, and Zourkas. The advantage obtained by the lenders as a result of their system is the obtaining of interest at higher rates than is generally available to lenders on the market for secured loans and higher again in the event of default,[144] while performing fewer checks and qualifications of the borrower and without being subjected to the requirements of the National Credit Code. It allowed AJ Lawyers to earn enormous fees and commission paid by the borrower from the advance, and further fees following default, secured against the guarantor's property.

44. Further, the Court below erred by focusing on the label "asset-based lending".[145] Nowhere in s 12CB of the ASIC Act does that label appear. The Court below purported to adopt Basten JA's description of the term in *Perpetual Trustees Company v* ***Khoshaba*** of "pure asset lending" being 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".[146] That description is largely consistent with the description of asset-based lending in other intermediate appellate authorities.[147] The appellant takes no issue with the orthodox proposition that whether "asset-based lending" is unconscionable in a particular instance depends on all the circumstances: to suggest otherwise would be contrary to the words of s 12CB(1) and the principle enunciated in *Jenyns*.[148] A court's proper task in assessing unconscionability is to undertake a precise examination of all of the relevant circumstances, rather than working from a defined category of circumstance.

45. Elsewhere in its reasons, the Court of Appeal expressly accepted as falling within its definition of asset-based lending the novel element of the lenders' system of conduct that did not form part of Basten JA's description of 'pure asset lending': the lenders' deliberate intention to neither seek nor receive information as to the personal and financial

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144 See paragraph 10 above.
145 CA, [1]–[2], [126]: [**CAB / Tab 1 / 134, 193–194**].
146 CA, [1]: [**CAB / Tab 1 / 134**], citing *Khoshaba* (2005) 14 BPR 26,639, [128].
147 See *Elkofairi* (2002) 11 BPR 20,841; ***Kowalczuk*** *v Accom Finance Pty Ltd* (2008) 77 NSWLR 205; ***Tonto Home Loans*** *Australia Pty Ltd v Tavares* (2011) 15 BPR 29,699; *Violet Home Loans Pty Ltd v* ***Schmidt*** (2013) 44 VR 202.
148 (1953) 90 CLR 113, 118–119 (Dixon CJ, McTiernan and Kitto JJ).

circumstances of the borrowers or guarantors "to protect (or 'immunise') the lenders from claims that the loans should be set aside as unconscionable".[149] And, so, by reasoning from the label, the Court below wrongly disregarded relevant circumstances.

46. None of the earlier appellate decisions cited by the Court below 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. Indeed, in each of those appellate decisions, it was only through inadvertence, error, or misconduct of a third party, that money was lent to a borrower without having received information as to the borrower's capacity to repay the debt other than by resort to the security. For example:

10 (a) in *Kowalczuk*, the lender's efforts were "not suggestive of a man whose only concern was to obtain a mortgage over a property that had enough equity in it to be able to repay the loan";[150] (b) in *Elkofairi*, blank fields in the financial particulars on the loan application put the lender on notice of the fact of the borrowers' lack of income;[151] (c) in *Tonto Home Loans*, the impugned loans "were not intended [by the lender] to be lendings against assets without regard to the capacity of the borrower to repay", but became such due to an intermediary's fraud, which "removes the finding of asset lending" on the part of the lender;[152] and (d) in *Schmidt*, the lender received completed loan applications from the borrower but neglected to inquire into inconsistencies in the income figures stated, and was found to have acted unconscionably for failing to do so.[153]

20 47. It would be contrary to ordinary conceptions of conscience that a lender who requests—but does not receive—complete or true information should be regarded as more offensive to conscience than the conduct of lenders such as the respondents who suspect but deliberately avoid obtaining such information for fear of what it might reveal. By inverting the orthodox reasoning—that whether an asset-based loan is unconscionable depends on a close analysis of all of the circumstances—to in effect say that lending which meets the definition of asset-based lending is presumed not to be unconscionable,[154] the Court below thereby diverged from the approach adopted in earlier authorities. And it was in error to do so. As a result, rather than properly examining the elements of the lenders' system as part of the circumstances bearing on whether their

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149 CA, [126]: [**CAB / Tab 5 / 193–194**].
150 *Kowalczuk* (2008) 77 NSWLR 205, 231 [119] (Campbell JA, Hodgson and McColl JJA agreeing).
151 *Elkofairi* (2002) 11 BPR 20,841, [56].
152 *Tonto Home Loans* (2011) 15 BPR 29,699, [154], [292] (Allsop P).
153 *Schmidt* (2013) 44 VR 202, 223 [68]–[69] (Warren CJ, Cavanaugh and Ferguson AJJA).
154 CA, [126]: [**CAB / Tab 5 / 193–194**].

conduct was unconscionable in all the circumstances, the Court below instead wrongly discounted those relevant circumstances from its consideration.

48. It is not insignificant that the lenders' system of conduct was designed and operated by an experienced practising solicitor. Having regard to the position of a solicitor, an officer of the Court subject to strict ethical obligations, the norms of business conscience are especially enlivened. That is in part because of the expectation of ethical conduct that accompanies the position, but also because of the expectation that a solicitor is aware of the existence and purpose of lending protections, is aware of the risks of harm associated with default under a loan, understands the binding power of the loan instruments, and understands the effect and consequences of his or her inquiry or lack of inquiry on the protections of law that will be available to the borrower. For an experienced solicitor to take advantage of those protections for their clients' (and their own) benefit, while exposing the guarantor to a known risk of victimisation and loss, demonstrates a lack of conscience and, having regard to the full circumstances and Jeruzalski's knowledge of risk to the guarantor, is irreconcilable with just or reasonable conduct.[155]

49. It is conduct that "is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience".[156]

Part VII: Orders sought

50. The appellant seeks the orders set out in the notice of appeal [**CAB / Tab 10 / 218–219**].

Part VIII: Time for oral argument

51. The appellant's time for oral argument, including reply, is estimated to be 2 ½ hours.

Dated: 16 April 2021.

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[155] *Unique International College Pty Ltd v ACCC* (2018) 266 FCR 631, 654 [104].

[156] *ASIC v Kobelt* (2019) 267 CLR 1, [92]. See also, [57] (Kiefel CJ and Bell J), [107] (Keane J), [234] (Nettle and Gordon JJ), [268] (Edelman J); *Quantum Housing* [2021] FCAFC 40, [92].

ANNEXURE

The applicable statutory provisions are:

(a) *Australian Securities and Investments Commission Act 2001* (Cth) sections 12CB and 12CC (as in force in September 2015: see compilation No. 58 including amendments up to Act No. 70 of 2015).
