HIGH COURT OF AUSTRALIA

KIEFEL CJ,
KEANE, GORDON, STEWARD AND GLEESON JJ

JEFFREY WILLIAM STUBBINGS APPELLANT

AND

JAMS 2 PTY LTD & ORS RESPONDENTS

Stubbings v Jams 2 Pty Ltd
[2022] HCA 6
Date of Hearing: 14 October 2021
Date of Judgment: 16 March 2022
M13/2021

ORDER

1. *Appeal allowed.*

2. *Set aside orders 2 and 3 made on 5 August 2020 and orders 2 and 3 made on 24 August 2020 by the Court of Appeal of the Supreme Court of Victoria and, in their place, order that:*

   (a) *orders 1 and 3 made on 22 July 2019 by the primary judge be varied so that the date of those orders be taken instead to be the date of final orders in Proceeding No M13 of 2021 in the High Court of Australia;*

   (b) *the appeal be otherwise dismissed;*

   (c) *the appellants pay the respondent's costs of the application for leave to appeal and of the appeal on the standard basis; and*

   (d) *pursuant to r 63.34.2 of the* Supreme Court (General Civil Procedure) Rules 2015 *(Vic):*

(i) the appellants pay the costs of the legal assistance provided to the respondent by the legal practitioners on a pro bono basis, as if the legal assistance had been provided by the legal practitioners not on a pro bono basis but on the basis that the respondent was under an obligation to pay for the legal assistance in the ordinary way; and

(ii) costs payable in respect of legal assistance given on a pro bono basis are payable directly to the legal practitioners.

3. The respondents pay the appellant's costs.

On appeal from the Supreme Court of Victoria

Representation

N C Hutley SC with A M Dinelli and A Christophersen for the appellant (instructed by Garland Hawthorn Brahe Lawyers)

B W Walker SC with J D Watson for the respondents (instructed by Christopher William Legal)

CATCHWORDS

Stubbings v Jams 2 Pty Ltd

Equity – Unconscionable conduct – Where respondents engaged in business of asset-based lending – Where system of lending involved law firm, acting through intermediary, facilitating secured loans by respondents – Where law firm acted as agent of respondents – Where respondents' agent never dealt directly with appellant – Where appellant unemployed with no regular income and poor financial literacy – Where appellant guaranteed loan made by respondents to company owned and controlled by appellant – Where company had no assets and never traded – Where loan and guarantee secured by mortgages over appellant's three properties – Where appellant provided signed certificates of independent financial advice and independent legal advice drafted by law firm – Where company defaulted on loan and respondents sought to enforce rights against appellant – Whether respondents acted unconscionably in seeking to enforce rights – Whether respondents' agent had knowledge of appellant's circumstances – Whether respondents entitled to rely on certificates of independent advice – Whether unconscientious exploitation of appellant's special disadvantage.

Words and phrases – "agent", "asset-based lending", "certificates of independent advice", "knowledge of that special disadvantage", "special disadvantage", "system of conduct", "unconscientious", "unconscientious exploitation", "unconscionable conduct", "vulnerability", "wilfully blind".

1 KIEFEL CJ, KEANE AND GLEESON JJ. The respondents in this matter are in the business known as asset-based lending, or "pure asset lending". This type of lending has the distinguishing feature, which often makes it easier for a borrower to obtain finance, that loans are made exclusively on the basis of the value of the assets securing the loan "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"[1].

2 The appellant was the guarantor of loans made by the respondents to a company owned and controlled by him, Victorian Boat Clinic Pty Ltd ("the company")[2]. The appellant's obligations as guarantor were secured by mortgages given over parcels of land owned by him. The company had no assets and had never traded. The appellant had no income or other means to meet his obligations to the respondents.

3 The primary judge (Robson J) found that the appellant's indebtedness to the respondents had been procured by unconscionable conduct on the part of their agent which was attributable to them. This conduct was found to be contrary to equitable principle and to s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) ("the ASIC Act")[3]. The Court of Appeal of the Supreme Court of Victoria (Beach, Kyrou and Hargrave JJA) overruled the primary judge's decision, concluding that the evidence could not support a finding of unconscionable conduct attributable to the respondents[4].

4 In this Court, the respondents argued that there is nothing inherently unconscionable about asset-based lending insofar as it involves lending on the value of the assets that secure the loan without any reliance upon the borrower's ability to repay the loan from his or her income or other assets. The appellant conceded this general proposition, but contended that in this case, on the unchallenged findings of fact made by the primary judge, the loans to the company and the appellant's guarantee were effected in circumstances which made the enforcement of the respondents' rights against the appellant unconscionable. The appellant's contentions should be accepted.

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1 *Perpetual Trustee Co Ltd v Khoshaba* (2006) 14 BPR 26,639 at 26,660 [128].

2 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [3].

3 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [317].

4 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [126]-[135].

5 The appellant's lack of commercial understanding coupled with his inability to repay the loans from his own income or other assets meant that default in repayment, and the consequent loss by the appellant of his equity in his properties by way of interest payments to the respondents, were inevitable as a matter of objective fact. The respondents, through their agent, sufficiently appreciated that reality that the exercise of their rights under the mortgages to turn the appellant's disadvantages to their own profit was unconscionable. Equitable intervention was justified in this case "not merely to relieve the [appellant] from the consequences of his own foolishness ... [but] to prevent his victimisation"[5].

6 The appeal to this Court should be allowed.

The facts

7 The appellant owned two houses in Narre Warren, both of which were mortgaged to Commonwealth Bank. The mortgage repayments were between $260 and $280 per week. The appellant did not live in either house; instead he lived at rental premises at Boneo, where he worked repairing boats for the owner of the property. Due to a falling out with the owner, the appellant ceased work and needed to move house. Rather than live at one of the Narre Warren properties, he sought to purchase another property on the Mornington Peninsula[6].

8 The appellant was unemployed and had no regular income. He had not filed tax returns in several years and was in arrears on rates payments in respect of the two Narre Warren properties[7]. After a home loan application to ANZ was rejected for lack of financial records, the appellant was introduced to Mr Zourkas[8].

9 Mr Zourkas described himself as a "consultant", in the business of introducing potential borrowers to Ajzensztat Jeruzalski & Co ("AJ Lawyers"). AJ Lawyers in turn provided a service to clients, such as the respondents, to facilitate the making of secured loans by those clients. The primary judge found

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5 *Louth v Diprose* (1992) 175 CLR 621 at 638; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 401 [18].

6 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [8], [105]-[106]; *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [7].

7 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [8].

8 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [108]-[109]; *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [9].

that Mr Zourkas played an "important and essential" role in these transactions, in that his involvement ensured that AJ Lawyers never dealt directly with the borrower or guarantor, such as the appellant[9].

10 The appellant and Mr Zourkas met on a number of occasions in 2015. At their first meeting, the appellant said that he "wanted to buy a little house" to live in, to which Mr Zourkas responded that "there would not be a problem going bigger and getting something with land"[10]. On the strength of that suggestion, the appellant found a five-acre property with two houses on it in Fingal, available for $900,000. At another meeting, Mr Zourkas told the appellant that he could borrow a sum sufficient to pay out the existing mortgages over the Narre Warren properties, purchase the Fingal property, and have approximately $53,000 remaining to go towards the first three months' interest on the loan. Mr Zourkas advised the appellant that he could then sell the Narre Warren properties, reducing the loan to approximately $400,000, which the appellant could then refinance with a bank at a lower interest rate[11].

11 The two Narre Warren properties and the Fingal property would secure the appellant's obligations as guarantor[12]. The existing debt to Commonwealth Bank secured on the Narre Warren properties totalled approximately $240,000[13]. On the basis that the two properties had a market value of $770,000, the appellant's equity was thus worth about $530,000[14].

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9 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [10]-[11].

10 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [114]; *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [10].

11 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [116], [120]-[124], [137]-[138]; *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [11].

12 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [15].

13 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [105].

14 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [304].

12 On 30 June 2015, the appellant signed a contract to purchase the Fingal property for $900,000. A deposit of $90,000 became payable on 7 July 2015. The appellant only ever paid $100 towards it[15].

13 In late July or early August 2015, Mr Zourkas introduced the appellant to Mr Jeruzalski, a partner at AJ Lawyers. On 10 August 2015, AJ Lawyers arranged to have the two Narre Warren properties and the Fingal property valued as security for the loan. Together, the properties were valued at $1,570,000[16]. Satisfied that this would support a loan, AJ Lawyers provided two letters of offer, on behalf of their clients, including the respondents, to provide first and second mortgage finance to the company. Each offer was conditional on the appellant acting as guarantor and with the three properties as security for his guarantee[17].

14 It is necessary to note here that AJ Lawyers, and Mr Jeruzalski in particular, acted for the respondents in these transactions[18]. On that basis, Mr Jeruzalski's state of mind and his conduct can be sheeted home to the respondents.

15 The first mortgage loan was for a sum of $1,059,000 at an interest rate of 10 per cent per annum and a default rate of 17 per cent per annum. The second mortgage loan was for a sum of $133,500 at an interest rate of 18 per cent per annum and a default rate of 25 per cent per annum. Two loans were necessary because, in line with AJ Lawyers' standard practice, the first was capped at two-thirds of the combined property valuations to avoid a higher loan-to-security ratio that might be considered too risky for the lender. The second loan was required to pay Mr Zourkas' consultancy fees, loan procuration fees, the respondents' legal costs as mortgagees, and the costs and expenses of purchasing the Fingal property. It was also necessary to enable the appellant to pay the first month's interest, which was payable in advance[19].

16 After another meeting with Mr Zourkas, the appellant accepted the offers on 21 or 22 August 2015, signing on his own behalf and on behalf of the company. At the meeting, the appellant also signed a "mandate" at Mr Zourkas' request,

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15 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [12].

16 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [13].

17 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [15].

18 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [111], [126], [131].

19 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [17]-[18].

which contained an agreement to pay Mr Zourkas' consultancy fee, even if the loans did not proceed, which was secured by a charge over the Narre Warren properties. The primary judge found, and the Court of Appeal accepted, that the amount of the fee ($27,000) was not written on the document at the time the appellant signed it[20].

17 Around this time, the price for the Fingal property was renegotiated to $815,100. The appellant signed a contract of sale for that price on 27 August 2015. Although the appellant had no income, Mr Zourkas assured him that he would "not have a problem in obtaining finance"[21]. The deposit on the Fingal property was $81,510, of which $5,100 was described as having already been paid. However, the appellant gave evidence at trial that he had "no idea" where the reference to a payment of $5,100 came from[22].

18 On 19 September 2015, Mr Zourkas presented the appellant with two letters, dated 16 and 17 September 2015, which indicated that AJ Lawyers had been "instructed to approve" the two loans. The letters enclosed documents for execution by the appellant and the company. This documentation included a certificate of "Independent Financial Advice", to be signed by an accountant, and a certificate of "Independent Legal Advice", to be signed by a lawyer[23].

19 The certificates were of critical importance to the decision of the Court of Appeal and were a significant focus of argument in this Court. In the certificate of independent legal advice, under the heading "Acknowledgement by Guarantor", was the following list of questions, which the appellant was to answer by writing in the right-hand column[24]:

> "1. Have you received copies of the documents described under the heading 'Security Documents' below?
>
> 2. Have you been given an opportunity to read those Security Documents?

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20 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [131]-[132], [290]; *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [19].

21 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [130].

22 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [21].

23 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [22]-[23], [25].

24 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [77]-[81].

3. Have the Security Documents been fully explained to you by your solicitor?

4. Do you understand the effects of the Security Documents and the consequences to you if the Borrower defaults on its obligations to the Lender?

5. In particular, do you understand 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 you as Guarantor to recover the moneys due to it?

6. Was this Acknowledgement read and signed by you BEFORE you signed the Security Documents?

...

I confirm the accuracy of the answers to the above questions and acknowledge that the Lender will be relying on these answers in respect of giving the loan to THE VICTORIAN BOAT CLINIC PTY LTD."

20 The certificate of independent financial advice, meanwhile, required an independent accountant to sign and attest to the following[25]:

"1 I have been instructed by THE VICTORIAN BOAT CLINIC PTY LTD ACN 601 712 172 to explain the financial risks being assumed:-

(a) by executing the security documents in respect of the financial accommodation to be provided by the Lender which security documents are referred to in Item 1 of the Schedule below ('the Security');

(b) by the application of the said financial accommodation for the purposes referred to in Item 2 of the Schedule below.

2 Before the Security was executed by the Borrower, I explained the financial risk being assumed by executing the Security and by the application of the aforesaid financial accommodation in the manner stated in Item 2 of the Schedule.

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25 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [85].

> 3 To the best of my knowledge and belief and in my opinion the Borrower appears to understand the nature and extent of the financial risk which the Security places and the nature and extent of the financial risk which will be assumed by the application of the aforesaid financial accommodation in the manner stated in Item [2] of the Schedule.
>
> 4 I have been engaged by the Borrower in advising and have given this Certificate entirely independently of any other Borrower or Guarantor.
>
> 5 The Loan herein is required for business purposes."

21 The primary judge found that Mr Zourkas had presented the certificates to the appellant by handing over two sealed envelopes (one labelled "Accountant", the other labelled "Solicitor"), a business card for a solicitor, Mr Kiatos, and a phone number for an accountant, Mr Topalides. Mr Zourkas told the appellant to "take these documents, get them signed and bring them back"[26]. The Court of Appeal observed that it was clear from context that approval of the loans was conditional on the two certificates being duly signed and returned[27].

22 The appellant visited both Mr Kiatos and Mr Topalides that same day. Mr Kiatos (and not the appellant) completed and signed the certificate of independent legal advice, writing in answers to the list of questions directed to the appellant as guarantor. The appellant signed an acknowledgment on behalf of the company confirming the accuracy of those answers and that he had received independent legal advice. Mr Kiatos also signed the certificate, both as witness to the appellant's signature and to confirm that he had explained the content, nature and effect of the loans to the appellant, including the consequences of default[28]. Mr Topalides signed the certificate of independent financial advice. In completing the certificate, Mr Topalides stated that the purpose of the borrowings was to "Set up & Expand the business"[29]. The primary judge noted Mr Jeruzalski's evidence that he understood the purpose of the loan to be a "business loan ... mainly

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26 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [134], [170]; *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [25].

27 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [23].

28 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [26]-[30].

29 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [31]-[32].

concerned with boat repairs"[30]. But this evidence sat awkwardly with Mr Jeruzalski's evidence in cross-examination that, around the time of issuing the letters of offer dated 16 and 17 September 2015, he telephoned the council and made inquiries which informed him that the Fingal property was zoned "green wedge", meaning that it could not be used for commercial purposes[31]. It is evident that, as Mr Jeruzalski must have known, the statement of the purpose of the loan in the certificate did not reflect reality.

23 It is necessary to note, in this regard, Mr Jeruzalski's evidence that, on instructions from the respondents, all loans in the course of his practice were made subject to the condition that they were not for personal, domestic or household purposes. Mr Jeruzalski insisted on this condition to avoid loans being governed by the *National Credit Code* ("the Code")[32]. This practice was reflected in a deed signed by the appellant, on his own behalf and on behalf of the company, whereby he variously agreed that the first mortgage loan was "for business purposes", "not for personal, domestic or household purposes", "not to purchase, renovate or improve the residential property for investment purposes" and not to "refinance credit that [had] been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes"[33]. The true purpose of the loan was identified by the Court of Appeal as being "to enable [the appellant] to purchase, in his own name, a property as a home"[34].

24 With the documentation complete, the loans were settled, the mortgages were registered, and the Fingal property was purchased on 30 September 2015. Once the various fees and payments had been made, the appellant was left with a sum of $6,959. The appellant subsequently moved into the Fingal property with his son. He never carried on any boat repair business[35].

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30 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [88].

31 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [22].

32 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [10], [70]-[72]. See *National Consumer Credit Protection Act 2009* (Cth), Sch 1.

33 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [242]-[243]; *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [33].

34 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [3].

35 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [40]-[42].

25 The first month's interest having been paid in advance by the funds received from the second loan, the appellant managed to sell some assets to pay off the second month's interest. However, on 30 December 2015, the company defaulted on the third month's interest payments[36]. The respondents commenced proceedings against the appellant, seeking to enforce the guarantee and their rights as mortgagees of the two Narre Warren properties and the Fingal property.

The primary judge

26 The primary judge found that the appellant laboured under circumstances of "special disadvantage". His Honour described the appellant's financial position as "bleak". Notably, in this regard, the Narre Warren properties were the appellant's only assets of any value[37]. The primary judge also found that the appellant was "unsophisticated, naïve and had little financial nous"[38]. The primary judge observed that the appellant's demeanour at trial – at which he represented himself – indicated that he was "completely lost, totally unsophisticated, incompetent and vulnerable"[39].

27 The primary judge found that Mr Jeruzalski "[did] not seek or want any further information about the guarantor or his or her personal or financial circumstances"[40]. Mr Jeruzalski's attitude in this regard conformed to the standard practice of AJ Lawyers of making no inquiries as to a borrower's capacity to repay the loan, and having no contact with borrowers save for written correspondence and documentation[41].

28 The primary judge found that Mr Jeruzalski knew that the loans were "a risky and dangerous undertaking for [the appellant]"[42] because of the high interest

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36 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [17], [23]; *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [43].

37 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [97]-[105].

38 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [264]. See also [266], [269].

39 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [265].

40 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [57].

41 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [61]-[62], [65].

42 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [308].

rates, the risk to the appellant of the cost of forced sales, and the consequential impact of a default upon the appellant[43].

29 The primary judge concluded that Mr Jeruzalski "knowingly and deliberately failed to make any inquiries about [the appellant] and whether Mr Zourkas had misled him about [the appellant's] ability to service the loans, about [the appellant's] understanding of the loans, or about [the appellant's] financial nous and vulnerability"[44]. The primary judge inferred that Mr Jeruzalski's ostensible indifference to the appellant's financial circumstances reflected a concern on his part that proof of his knowledge of such matters "would in some way undermine his clients' ability to recover their loans"[45]. The primary judge did not accept that Mr Kiatos and Mr Topalides were truly independent sources of advice for the appellant[46].

30 The primary judge concluded that these findings demonstrated a "high level of moral obloquy"[47] and "wilful blindness" as to the appellant's financial and personal circumstances[48]. His Honour found that the loans were procured by unconscionable conduct, and ordered that the mortgages be discharged, and the loan agreement be declared unenforceable[49].

The Court of Appeal

31 The Court of Appeal concluded that the primary judge's reasons reflected an adverse view of asset-based lending "as a concept" and concluded that this adverse view "overwhelmed ... his determination of the unconscionability issue"[50]. The Court of Appeal was not satisfied that Mr Jeruzalski had either actual or

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43 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [300]-[307].

44 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [312].

45 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [58]. See also [312].

46 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [314].

47 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [313].

48 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [315].

49 *Jams 2 Pty Ltd v Stubbings [No 4]* (2019) 59 VR 1 at 14-15 [46].

50 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [126].

constructive knowledge of the appellant's desperate personal and financial circumstances[51].

32 Importantly in this regard, the Court of Appeal considered that Mr Jeruzalski was entitled to rely on the certificates of independent advice as showing that the appellant had consulted a solicitor and an accountant, and as to the truth of the matters stated therein[52]. In their Honours' view, the certificates made it reasonable for Mr Jeruzalski to refrain from any further inquiry as to the appellant's circumstances; indeed, their Honours noted that, absent the certificates, there may have been sufficient knowledge on Mr Jeruzalski's part to "justify the serious finding that it was unconscionable for him to abstain from inquiry in all the circumstances"[53]. As to the primary judge's finding that the certificates did not reflect truly independent advice[54], the Court of Appeal held that there was no sufficient basis in the evidence for that inference[55].

33 Nevertheless, the Court of Appeal accepted that at the time Mr Jeruzalski approved the loans on behalf of the respondents, he knew that the appellant and the company had paid only a nominal amount as a deposit on the Fingal property; that the proceeds of the loans would be applied by the appellant as explained to him by Mr Zourkas; and that any remaining sum available to the appellant after such application of funds would be "very small"[56]. Importantly, the Court of Appeal accepted that Mr Jeruzalski proceeded on the assumption "that [the appellant] 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"[57].

The parties' contentions in this Court

34 In this Court, the appellant conceded that asset-based lending is not necessarily unconscionable in itself, and focussed upon the circumstances of the

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51 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [130].

52 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [132].

53 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [132]-[133].

54 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [314].

55 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [134].

56 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [131(2)-(4)].

57 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [131(1)].

system of asset-based lending employed by the respondents and AJ Lawyers in this case.

35 The appellant submitted that the Court of Appeal attributed unwarranted significance to the certificates of independent advice. The appellant argued that the primary judge was entitled to infer that Mr Jeruzalski knew it was unlikely that the appellant had received truly independent advice. More broadly, the appellant argued that the Court of Appeal failed to have due regard to the findings made and inferences drawn by the primary judge as to Mr Jeruzalski's appreciation of the dangers confronting the appellant in taking the loans, particularly since the primary judge had relied on his impressions of the witnesses in making these findings.

36 The respondents, on the other hand, emphasised the appellant's concession that asset-based lending, in and of itself, is not unconscionable, and submitted that the facts attending the making of the loans exclusively by reference to the security value of the appellant's assets were not significant as to a finding of unconscionability. In this regard, it was said that the Court of Appeal was right to hold that Mr Jeruzalski was entitled to rely on the certificates as conveying that the nature and consequences of the loans had been sufficiently explained to the appellant[58]. The respondents supported the conclusion of the Court of Appeal that it was permissible for Mr Jeruzalski deliberately to abstain from further inquiries precisely because he had the "comfort" of the certificates.

37 The respondents argued that the only significant finding of the primary judge that was disregarded by the Court of Appeal was the finding to the effect that the certificates were not truly independent[59]. It was said that the Court of Appeal was justified in taking this course on the basis that there was no evidence to support the primary judge's inference.

Unconscionable conduct

38 In *Kakavas v Crown Melbourne Ltd*[60], this Court said:

> "[E]quitable intervention does not relieve a plaintiff from the consequences of improvident transactions conducted in the ordinary and undistinguished course of a lawful business. A plaintiff who voluntarily engages in risky

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58 See *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [77]-[85].

59 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [133]-[134].

60 (2013) 250 CLR 392 at 401-402 [20].

> business has never been able to call upon equitable principles to be redeemed from the coming home of risks inherent in the business. The plaintiff must be able to point to conduct on the part of the defendant, beyond the ordinary conduct of the business, which makes it just to require the defendant to restore the plaintiff to his or her previous position."

39 In *Commercial Bank of Australia Ltd v Amadio*[61], this Court held that unconscionability involves: a relationship that places one party at a "special disadvantage" vis-à-vis the other; knowledge of that special disadvantage by the stronger party; and unconscientious exploitation by the stronger party of the weaker party's disadvantage[62]. But these considerations should not be understood as if they were to be addressed separately as if they were separate elements of a cause of action in tort. As Dixon CJ, McTiernan and Kitto JJ said in *Jenyns v Public Curator (Qld)*[63], in a passage approved by this Court in *Kakavas*[64] and *Thorne v Kennedy*[65], the application of the equitable principles relating to unconscionable conduct:

> "calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of the [vulnerable party]. Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition. Indeed no better illustration could be found of Lord Stowell's generalisation concerning the administration of equity: 'A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case'." (citation omitted)

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61 (1983) 151 CLR 447 at 459-460, 461, 474.

62 See also *Louth v Diprose* (1992) 175 CLR 621 at 626; *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1 at 109 [589]; *Turner v Windever* [2003] NSWSC 1147 at [105]; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392.

63 (1953) 90 CLR 113 at 118-119.

64 (2013) 250 CLR 392 at 426 [122]. See also 401 [18].

65 (2017) 263 CLR 85 at 105 [43].

Special disadvantage

40 In this field of discourse, "special disadvantage" means something that "seriously affects the ability of the innocent party to make a judgment as to his [or her] own best interests"[66]. While the factors relevant to an assessment of special disadvantage have not been exhaustively listed, Fullagar J in *Blomley v Ryan*[67] considered that special disadvantage may be inferred from "poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary". No particular factor is decisive, and it is usually a combination of circumstances that establishes an entitlement to equitable relief[68].

41 At all times, the appellant was incapable of understanding the risks involved in the transaction[69]. He was unable to perform simple calculations, such as 10 per cent of $130,000[70]. The primary judge observed that the very circumstance that the appellant was disposed to enter into such a transaction was evidence of his vulnerability[71]. To say the least, the appellant's financial circumstances were "bleak"[72].

42 It could not be, and was not, disputed by the respondents that the primary judge's findings as to the appellant's circumstances established that he was at a special disadvantage vis-à-vis the respondents. The outcome of the appeal to this Court turns on the extent of Mr Jeruzalski's knowledge of the appellant's circumstances and whether Mr Jeruzalski exploited that disadvantage so that the

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66 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462.

67 (1956) 99 CLR 362 at 405; see also *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462, 474-475; *Louth v Diprose* (1992) 175 CLR 621 at 628-629, 637-638, 650.

68 Dal Pont, *Equity and Trusts in Australia*, 7th ed (2019) at 298 [9.30].

69 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [264]-[272].

70 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [103], [269].

71 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [266].

72 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [101].

respondents' attempt to enforce their rights under the loans and mortgages was unconscionable.

Knowledge and exploitation

43 The inevitable outcome of the transaction was, objectively speaking, that the appellant's equity in his properties would be taken by the respondents by way of interest payments, including at default interest rates. The dangerous nature of the loans, obvious to Mr Jeruzalski but not to the appellant, was central to the question whether the appellant's special disadvantage had been exploited by the respondents.

44 The primary judge found that Mr Jeruzalski "should have known" that the appellant was bound to lose his equity in the Narre Warren properties[73]. It may be accepted that his Honour's findings as to Mr Jeruzalski's state of mind did not rise to an unequivocal finding of actual knowledge on the part of Mr Jeruzalski that the appellant would inevitably lose his equity in his properties by taking these loans; but a finding in such terms was not essential to the appellant's case for relief. For a court of equity, the question is whether Mr Jeruzalski's appreciation of the appellant's special disadvantage was such as to amount to an exploitation of that disadvantage.

45 In *Kakavas*[74], this Court approved of the emphasis laid by Mason J in *Amadio*[75] on the point that:

> "the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his [or her] own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party."

46 A case for relief against an unconscionable attempt to enforce legal rights is established in this case because Mr Jeruzalski had sufficient appreciation of the appellant's vulnerability, and the disaster awaiting him under the mortgages, that

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73 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [17].

74 (2013) 250 CLR 392 at 398 [6]. See also *Thorne v Kennedy* (2017) 263 CLR 85 at 103 [38].

75 (1983) 151 CLR 447 at 462. See also 467.

his conduct in procuring the execution of the mortgages is justly described as unconscientious.

47 There can be no doubt that Mr Jeruzalski, on behalf of the respondents, had a lively appreciation of the likelihood that the loss of the appellant's equity in his properties would be suffered by reason of his financial naïveté and his lack of means. The findings of the primary judge pertaining to Mr Jeruzalski's state of knowledge were made after having had the benefit of hearing Mr Jeruzalski in person over several days[76]. The primary judge's findings were "inevitably affected" by his collective impressions of Mr Jeruzalski as a witness and were not "glaringly improbable" or "contrary to compelling inferences"[77]. The Court of Appeal had no basis for disregarding those findings. Certainly the certificates were not a basis for doing so.

48 The certificates contained nothing to suggest that the appellant had actually turned his attention to the difference between the cost of his existing borrowings with Commonwealth Bank and the proposed loans, or to how he would service the proposed loans. The absence of even the most general reference in the certificates as to the existence and terms of the company's business plan or as to how the Fingal property zoning problem (of which Mr Jeruzalski was aware) might be resolved is eloquent of their artificiality.

49 In addition, given the bland boilerplate language of the certificates and the statement therein of the purpose of the loan (which Mr Jeruzalski must have known to be inaccurate), it is open to draw the inference that the certificates were mere "window dressing". A similar inference may be drawn in relation to the commercially unnecessary interposition of the company as borrower, a step calculated to prevent or impede scrutiny of the fairness of the transaction under the Code. The certificates might also be seen to have been a precautionary artifice designed to prevent an inference that the respondents were wilfully blind to the obvious danger to the appellant. But however one views the certificates, they could not negate Mr Jeruzalski's actual appreciation of the dangerous nature of the loans and the appellant's vulnerability to exploitation by the respondents[78]. Indeed, one might regard the deployment of such artifices in a context where the lender or its agent deliberately distances itself from evidence that must confirm the dangerous

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76 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [88]-[90], [92]-[96], [313].

77 See, eg, *Castle v The Queen* (2016) 259 CLR 449 esp at 472 [66].

78 See *Bridgewater v Leahy* (1998) 194 CLR 457 at 470-471 [41]; *Thorne v Kennedy* (2017) 263 CLR 85 at 112 [64]-[65], 128-129 [123].

nature of the transaction for the borrower or its guarantor as evidence pointing to an exploitative state of mind on the part of the lender.

50 The primary judge found that Mr Jeruzalski suspected that the appellant did not receive truly independent advice from either Mr Kiatos or Mr Topalides[79]. Mr Jeruzalski's evidence was that, "if [the appellant] or [the company] had no income, then, from his experience, a first-tier bank would not have lent money to him", and further, that "his firm would not assist somebody like [the appellant] to obtain a bank loan"[80]. There was nothing in the evidence to suggest to Mr Jeruzalski that the appellant had an income that would enable him to refinance with a bank. The circumstances of Mr Jeruzalski's involvement with the appellant meant that what Mr Jeruzalski did know of the appellant's affairs made the prospect of the appellant's refinancing with a bank a forlorn hope.

51 Mr Jeruzalski, on behalf of the respondents, appreciated that the loans were a dangerous transaction from the appellant's point of view; but the prospect of obtaining the profit to be made by the taking of the appellant's equity by way of interest payments made the exploitation of the appellant's disadvantages good business for the respondents. The transaction in this case cannot be regarded as if it were, for example, a loan to an asset-rich but income-poor individual sought for the purposes of meeting a temporary liquidity problem. The transaction could not even be seen as a high-risk loan to a person willing to gamble on the prospect of a rise in property values. Having regard to the unchallenged findings of fact by the primary judge, it is evident that Mr Jeruzalski, on behalf of the respondents, took the opportunity to exploit the appellant's lack of business acumen and meagre financial resources to deprive him of his equity in the Narre Warren properties.

Conclusion

52 Mr Jeruzalski's conduct on behalf of the respondents amounted to the unconscientious exploitation of the appellant's special disadvantage. The primary judge was right to hold that it was unconscionable for the respondents to insist upon their rights under the mortgages. That being so, it is unnecessary to consider whether the appellant was entitled to succeed pursuant to s 12CB of the ASIC Act.

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79 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [315], cf *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [133]-[134].

80 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [93].

Orders

53 We would make the following orders:

1. Appeal allowed.

2. Set aside orders 2 and 3 made on 5 August 2020 and orders 2 and 3 made on 24 August 2020 by the Court of Appeal of the Supreme Court of Victoria and, in their place, order that:

   (a) orders 1 and 3 made on 22 July 2019 by the primary judge be varied so that the date of those orders be taken instead to be the date of final orders in Proceeding No M13 of 2021 in the High Court of Australia;

   (b) the appeal be otherwise dismissed;

   (c) the appellants pay the respondent's costs of the application for leave to appeal and of the appeal on the standard basis; and

   (d) pursuant to r 63.34.2 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic):

      (i) the appellants pay the costs of the legal assistance provided to the respondent by the legal practitioners on a pro bono basis, as if the legal assistance had been provided by the legal practitioners not on a pro bono basis but on the basis that the respondent was under an obligation to pay for the legal assistance in the ordinary way; and

      (ii) costs payable in respect of legal assistance given on a pro bono basis are payable directly to the legal practitioners.

3. The respondents pay the appellant's costs.

54 GORDON J. The detail of the relevant background is set out in the reasons of other members of the Court. I agree that the appeal must be allowed. I write separately because I consider that the respondent lenders' system of conduct was contrary to s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) ("the *ASIC Act*").

Section 12CB of the *ASIC Act* – system of conduct

55 Section 12CB(1)(a) of the *ASIC Act* prohibits persons from engaging "in conduct that is, in all the circumstances, unconscionable", in connection with, relevantly, the supply of financial services in trade or commerce. Section 12CB(4)(b) makes clear that the prohibition in s 12CB(1) can apply "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" (emphasis added). "A 'system' connotes an internal method of working; a 'pattern' connotes the external observation of events"[81]. Because a specific person need not be identified, "special disadvantage of an individual is not a necessary component of the prohibition"[82].

56 "Unconscionable" is not defined in the *ASIC Act*. Unconscionable conduct under s 12CB "is not limited by the unwritten law of the States and Territories relating to unconscionable conduct"[83], a clear reference to the equitable doctrine of unconscionable conduct[84]. The statutory conception of unconscionability is more broad-ranging than the equitable principles; it does something more[85].

57 Section 12CB of the *ASIC Act*, like equity, requires a focus on all the circumstances[86]. The court must take into account each of the considerations

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81 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 56 [143], citing *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 266 FCR 631 at 654 [104].

82 *Kobelt* (2019) 267 CLR 1 at 78 [232]; see also 101 [293].

83 *ASIC Act*, s 12CB(4)(a).

84 See *Kobelt* (2019) 267 CLR 1 at 37 [83], 39 [89], 56 [144], 97 [284].

85 *Kobelt* (2019) 267 CLR 1 at 37 [83], 38-39 [87]-[89], 56 [144], 102 [295].

86 *Kobelt* (2019) 267 CLR 1 at 15 [8], 37 [83], 60-61 [154]-[155]. See also *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 118-119, quoted in *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 426 [122] and *Thorne v Kennedy* (2017) 263 CLR 85 at 105 [43]; *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 587 [188], 620 [294]. "[T]he court must not have regard to

identified in s 12CC if and to the extent that they apply in the circumstances[87]. The considerations listed in s 12CC are non-exhaustive, but they provide "express guidance as to the norms and values that are relevant to inform the meaning of unconscionability and its practical application"[88]. They assist in "setting a framework for the values that lie behind the notion of conscience identified in s 12CB"[89]. "The assessment of whether conduct is unconscionable within the meaning of s 12CB involves the evaluation of facts by reference to the values and norms recognised by the statute, and thus, as it has been said, a normative standard of conscience which is permeated with accepted and acceptable community standards. It is by reference to those generally accepted standards and community values that each matter must be judged"[90].

58 Put in different terms, the s 12CC considerations assist in evaluating whether the conduct in question is "outside societal norms of acceptable commercial behaviour [so] as to warrant condemnation as conduct that is offensive to conscience"[91]. A court should take the serious step of denouncing conduct as unconscionable only when it is satisfied that the conduct is "offensive to a conscience informed by a sense of what is right and proper according to values which can be recognised by the court to prevail within contemporary Australian society"[92].

59 It was common ground that the lenders' conduct in issue in these proceedings was subject to the prohibition in s 12CB(1) of the *ASIC Act*. The appellant, Mr Stubbings, contended that the lenders' system of lending money secured against a guarantor's property, suspecting that the guarantor had no income or capacity to service the loan, yet deliberately avoiding information as to the

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any circumstances that were not reasonably foreseeable at the time of the alleged contravention": *ASIC Act*, s 12CB(3)(a).

87 *Kobelt* (2019) 267 CLR 1 at 38 [87]; see also 49 [120], 60-61 [154]-[155], 105 [302].

88 *Kobelt* (2019) 267 CLR 1 at 60 [154], quoting *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 270 [279].

89 *Kobelt* (2019) 267 CLR 1 at 60 [154]; see also 37-38 [84]-[87], 105 [302].

90 *Kobelt* (2019) 267 CLR 1 at 78 [234] (footnote omitted).

91 *Kobelt* (2019) 267 CLR 1 at 40 [92]; see also 59 [153], 78 [234]. See also *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* (2013) ATPR ¶42-447 at 43,463 [23]; *Paciocco* (2015) 236 FCR 199 at 275 [298], 276 [304].

92 *Kobelt* (2019) 267 CLR 1 at 40 [93].

guarantor's financial or personal circumstances in order to "immunise" themselves from knowledge of vulnerability, was, in all the circumstances, unconscionable conduct in connection with the supply of financial services in trade or commerce contrary to s 12CB of the *ASIC Act*. I agree.

Lenders and Mr Jeruzalski

60 Mr Jeruzalski is a solicitor and partner of Ajzensztat Jeruzalski & Co ("AJ Lawyers"). AJ Lawyers "acts for clients who wish to lend money". At the time of trial, Mr Jeruzalski had 10 to 15 clients who wished to lend money and used the services of AJ Lawyers to do so. The lenders conceded in this Court that "[Mr] Jeruzalski's conduct [was] attributable to the lenders as their agent". In other words, Mr Jeruzalski's system was the lenders' system.

Typical loan terms

61 Mr Jeruzalski prepared and advanced all loans in the same manner using the same pro forma documents. Mr Jeruzalski would only make loans to companies, ostensibly for business purposes, to avoid the operation of the *National Credit Code* (Cth)[93]. He required the loans to be guaranteed by an individual, with the guarantee secured by a mortgage over real property held by the guarantor. He would not make loans that were covered by the *National Credit Code*.

62 The loans were short-term, interest-only loans; around 90 per cent of the loans arranged by AJ Lawyers were for a maximum of 12 months and a minimum of between four and six months; and most of the loans were "around the million-dollar mark". The interest rates on a loan secured by a first mortgage were high.

63 Before suggesting to his clients that they lend money, Mr Jeruzalski obtained a valuation of the proposed security, which was normally provided by the intermediary seeking the loan on behalf of the borrower. The maximum loan-to-value ratio for a loan secured by a first mortgage was typically two-thirds.

Assumptions made about borrowers and guarantors

64 Mr Jeruzalski assumed that anyone seeking a loan from one of his clients had no income, because if they did they would not need to come to him. In effect, he assumed that the loans were "unbankable", in the sense that the personal and financial circumstances of anyone seeking a loan from one of his clients were such that they would not be able to access funds from a traditional financial lender.

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93 See *National Consumer Credit Protection Act 2009* (Cth), Sch 1, s 5(1)(a) and (b).

Acknowledged risks

65 An interest-only, asset-based, 12-month loan of around $1 million at a high rate of interest will always be, at the very least, an extremely risky product for a person who has no income and is unbankable. Mr Jeruzalski was aware that a loan of this kind could be "a dangerous product in the hands of the wrong person".

Lack of information about borrowers and guarantors

66 Mr Jeruzalski did not require application forms from borrowers. He did not "seek income particulars" or "look at the income of the [borrower]". Mr Jeruzalski had no interest in the ability of the borrower (the company) or the guarantor (the individual) to service the loan and was only concerned with the sufficiency of the security to meet repayment of capital and accrued interest. Mr Jeruzalski checked that proposed guarantors and directors of proposed borrowers were not bankrupt, but he otherwise "[gave] no weight to the ability of the borrower or guarantor to repay the loan, other than from the mortgaged security".

67 He did not run credit checks: if the borrower was a registered corporation, that satisfied AJ Lawyers' requirements. Mr Jeruzalski did not make any inquiries into whether borrowers (or guarantors) had any assets other than the proffered security. And despite the requirement that loans be "for business purposes", Mr Jeruzalski's evidence was that his practice was *not* to ask what the actual purpose of the loan was.

68 As Mr Jeruzalski would only make loans that were guaranteed and secured by a mortgage over real property held by a guarantor, he treated the asset position of the borrower (the company) as irrelevant. If the borrower (the company) defaulted, Mr Jeruzalski's practice was to seek judgment against the guarantor and execute on the mortgage given over the guarantor's real property.

Refusal to communicate, meet or negotiate with proposed borrowers

69 Mr Jeruzalski would be approached by intermediaries, such as solicitors, accountants and brokers, who were seeking a loan for a client. He would not make loans to people who approached him directly. Mr Jeruzalski communicated with borrowers and guarantors exclusively through intermediaries, who assisted him in arranging for loan documentation to be executed.

70 Any details that Mr Jeruzalski needed to know about the borrower (the company) and the guarantor (the individual) were obtained from the intermediary. Mr Jeruzalski's evidence was that "most of the work [he did was] verbal, oral" and he did not keep file notes of his conversations with intermediaries, except in relation to title particulars. Mr Jeruzalski did not seek information about what representations, if any, the intermediary had made to the borrower or guarantor. Mr Jeruzalski did not interview prospective borrowers or guarantors. He did not meet with them. He did not negotiate with them. Mr Jeruzalski

deliberately avoided knowledge of borrowers' and guarantors' personal and financial circumstances "in case his knowledge would in some way undermine his clients' ability to recover their loans".

Mr Jeruzalski's clients and pro forma loan documents

71 If Mr Jeruzalski considered that the security was satisfactory, he would approach one or more of his clients to ascertain whether they were interested in making a loan. If one or more of his clients wished to make a loan, Mr Jeruzalski prepared pro forma documents, which were given to the borrower and guarantor by an intermediary. The relevant documents included a deed certifying that the loan was "for business purposes", a "certificate of independent legal advice" in respect of the guarantor and a "certificate of independent financial advice" in respect of the borrower.

Deed

72 The pro forma deed was entered into by the borrower, the guarantor and the lenders. In the deed, the borrower[94] and the "guarantor/mortgagor"[95] separately covenanted that the purpose of the loan was: "for business purposes"; not "for personal, domestic or household purposes"[96]; not "to purchase, renovate or improve the residential property for investment purposes"[97]; and not "to refinance credit that [had] been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes"[98]. As is apparent, each clause of the deed was drafted to address and avoid the application of the *National Credit Code*.

Pro forma certificates of independent legal and financial advice

73 As noted above, Mr Jeruzalski prepared pro forma certificates of independent legal and financial advice. The pro forma certificate of independent legal advice, to be signed by a solicitor, was addressed to the lenders. Under the heading "Acknowledgement by Guarantor", the certificate contained a list of questions, which were to be answered by the guarantor writing their reply in the right-hand column. The questions were directed, among other things, to whether the guarantor had received, read and had their solicitor explain the

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94 Deed, cll 1-4.

95 Deed, cll 5-8.

96 cf *National Credit Code*, s 5(1)(b)(i).

97 cf *National Credit Code*, s 5(1)(b)(ii).

98 cf *National Credit Code*, s 5(1)(b)(iii).

"Security Documents" (the Loan Agreement and Debenture Charge) and whether they understood the effects of the Security Documents and the consequences to the guarantor if the borrower defaulted on its obligations to the lender.

74 The certificate of independent financial advice, to be signed by an accountant, stated that advice had been given *to the borrower entirely independently of the guarantor*. The certificate was addressed to the lenders in respect of the debenture charge granted by the borrower (the company). It contained no substantive information about the borrower, the guarantor or the transaction. The certificate did not require the accountant to sight any financial documents. Neither certificate suggested that the guarantor had turned their attention to or had had their attention drawn to the financial consequences for them.

75 As stated above, on default, Mr Jeruzalski's practice was to enforce against the guarantor and the guarantor's mortgaged property. He treated the asset position of the borrower (the company) as irrelevant.

System of conduct unconscionable

76 Two separate but related points should be made at the outset. First, "[c]onduct can be unconscionable even where the innocent party is a willing participant; the question is *how that willingness or intention was produced*" (emphasis in original)[99]. Second, "a system of conduct or pattern of behaviour may be unconscionable, even though not every individual affected by the conduct or behaviour is or has been disadvantaged by the conduct or behaviour"[100]. There does not need to be loss or disadvantage for a system to be unconscionable.

77 What can be significant is that the conduct targeted a group to take advantage of their likely, although not certain, vulnerability or, as in this case, that the lenders recognised a likely, although not certain, vulnerability and yet designed a system of lending against a guarantor's property, suspecting that they had no income or capacity to service the loan, and deliberately avoiding information as to the guarantor's financial or personal circumstances in order to "immunise" themselves from knowledge of the vulnerability.

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99 *Kobelt* (2019) 267 CLR 1 at 62 [157], citing *Bridgewater v Leahy* (1998) 194 CLR 457 at 491 [118], quoting *Huguenin v Baseley* (1807) 14 Ves Jun 273 at 299-300 [33 ER 526 at 536].

100 *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (In liq) [No 4]* [2018] FCA 1408 at [729].

78 Those related points reflect, and are consistent with, Parliament's intention that[101]:

> "[T]he focus of the [unconscionable conduct] provisions is on *conduct* that may be said to offend against good conscience; it is not specifically on the characteristics of any possible 'victim' of the conduct (though these may be relevant to the assessment of the conduct)." (emphasis in original)

79 The assessment of whether conduct is unconscionable within the meaning of s 12CB involves the evaluation of the conduct – here a system of conduct – by reference to the values and norms recognised by the statute, a normative standard of conscience which is permeated with accepted and acceptable community standards[102].

80 Here, the lenders' system – their "internal method of working"[103] – did not, and was not designed to, prevent the lenders acting unconscionably contrary to s 12CB of the *ASIC Act*. The lenders' system was designed to do the opposite – to hide from the lenders any information which might later be said to make the loan, the guarantee or the taking of security unconscionable. The system sought to "immunise" the lenders from claims by borrowers or guarantors to set aside loans as unconscionable by studiously avoiding any inquiry about why or in what circumstances the individual guarantor provided their property as security despite the lenders recognising that a loan of the kind they were offering "*could be* a dangerous product in the wrong hands and wreak significant damage on the guarantor" (emphasis added). And the lenders' system was not reasonably necessary to protect the lenders' legitimate interests[104].

Vulnerability

81 With knowledge of the significant risks associated with the financial product he was providing, Mr Jeruzalski's system facilitated the making of

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101 Australia, House of Representatives, *Competition and Consumer Legislation Amendment Bill 2011*, Explanatory Memorandum at 21 [2.21], quoted in *Kobelt* (2019) 267 CLR 1 at 78 [232].

102 *Kobelt* (2019) 267 CLR 1 at 78 [234], citing *Lux Distributors* (2013) ATPR ¶42-447 at 43,463 [23], cited in *Paciocco* (2015) 236 FCR 199 at 275 [298]; see also 31 [59], 40 [92], 45 [107], 46 [111], 85 [259], 88 [268].

103 *Kobelt* (2019) 267 CLR 1 at 56 [143], citing *Unique International College* (2018) 266 FCR 631 at 654 [104].

104 *ASIC Act*, s 12CC(1)(b).

interest-only loans to companies (avoiding the operation of the *National Credit Code*), where the loans were guaranteed by persons who he assumed had no income and were otherwise unbankable[105], whilst deliberately avoiding any knowledge that might enliven the court's equitable or statutory jurisdiction to set aside unconscionable transactions. It may be inferred that the system *assumed* that some borrowers and guarantors would be vulnerable in a sense capable of enlivening that jurisdiction[106]. But the lenders' system sought to "immunise" the lenders against that assumption being known to be true because knowledge of its truth would inevitably attract the court's equitable or statutory jurisdiction to set aside the transactions. That was unconscionable.

Unconscientious taking advantage

82 Mr Jeruzalski's system used "unfair tactics"[107] and lacked good faith[108]. Developing and applying a system that seeks to avoid the application of statutory and general law protections is contrary to s 12CB of the *ASIC Act*. Taking advantage of vulnerable borrowers and guarantors reveals a clear power imbalance built into the system[109], reflected in Mr Jeruzalski's refusal even to meet or communicate (let alone negotiate) with prospective borrowers and guarantors. As explained, he acted only through intermediaries.

83 The system was also characterised by a lack of transparency[110], which was exacerbated, not ameliorated, by the certificates of independent advice. The certificates were crafted by Mr Jeruzalski to avoid any meaningful disclosure not only to the lenders but also to the borrowers and guarantors. The certificates of advice were "part of the system of conduct adopted by AJ Lawyers to immunise the [lenders] from knowledge that might threaten the enforceability of the loan".

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105 *ASIC Act*, s 12CC(1)(e).

106 cf *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132 at 142-143 [43].

107 *ASIC Act*, s 12CC(1)(d).

108 *ASIC Act*, s 12CC(1)(l).

109 *ASIC Act*, ss 12CC(1)(a), 12CC(1)(c), 12CC(1)(e), 12CC(1)(i), 12CC(1)(j)(i).

110 *ASIC Act*, ss 12CC(1)(c), 12CC(1)(i), 12CC(1)(j)(i).

84 The lenders' system of conduct is outside the societal norms of acceptable behaviour so as to warrant condemnation as offensive to conscience[111]. It does not reflect values that can be recognised by a court to prevail within contemporary Australian society. It is a system of conduct that is unconscionable contrary to s 12CB(1) of the *ASIC Act*.

Lenders' conduct unconscionable on other bases

85 The lenders' dealings with Mr Stubbings were consistent with the system that Mr Jeruzalski had established.

86 The lenders lent $1,059,000 to Victorian Boat Clinic Pty Ltd ("VBC"), a shell company with no assets of which Mr Stubbings was the sole shareholder and director. They thereby avoided the operation of the *National Credit Code*. The loan was an interest-only loan for a minimum of six months and a maximum of 12 months with high monthly interest payments of $8,825 or $15,002.50 at default rates. Mr Stubbings guaranteed the loan and gave mortgages over two existing properties he owned and a third property ("the Fingal property") which he bought with the loan proceeds. The decision to lend to VBC was based solely on the valuations of the properties Mr Stubbings offered as security for him acting as guarantor of the loan. The lenders "had no evidence and did not request any evidence regarding Mr Stubbings' ability to repay or the capacity of VBC to repay the loan".

87 At the time the loan was made, Mr Jeruzalski assumed Mr Stubbings had no income and that, if Mr Stubbings had no or limited income, a bank would not have lent money to him[112]. Indeed, Mr Jeruzalski's evidence was that if Mr Stubbings "had an income sufficient to service a loan of [the amount he wished to borrow], he would've gone to a bank".

88 Mr Jeruzalski knew Mr Stubbings had paid only a $100 deposit on the Fingal property. Despite the loan being "for business purposes" (to remove any risk that it might be caught by the *National Credit Code*), Mr Jeruzalski knew that the Fingal property was zoned "green wedge", which meant that a business could not be operated from the property without getting an exemption, and that there would be almost no funds left over from the transaction (once the Fingal property had been purchased) to establish or conduct a business. Mr Jeruzalski also knew

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111 *Kobelt* (2019) 267 CLR 1 at 40 [92]; see also 59 [153], 78 [234]. See also *Lux Distributors* (2013) ATPR ¶42-447 at 43,463 [23]; *Paciocco* (2015) 236 FCR 199 at 275 [298], 276 [304].

112 *ASIC Act*, s 12CC(1)(e).

that Mr Stubbings' two existing properties (also taken as security) were lived in by Mr Stubbings' family.

89 Moreover, Mr Jeruzalski was aware that the loan "could cause severe damage" to Mr Stubbings if VBC defaulted[113]. Mr Jeruzalski was a solicitor with considerable experience "in the area of making loans on behalf of clients". Mr Jeruzalski knew that, if VBC defaulted, interest would start accruing at $15,002.50 per month[114], Mr Stubbings' secured properties would be sold, and "the damage to Mr Stubbings' accumulated savings would be severe". In other words, Mr Jeruzalski knew the loan was "a risky and dangerous undertaking for Mr Stubbings". Indeed, based on what Mr Jeruzalski knew at the time that the loan was made, Mr Jeruzalski must have known that no bank would have refinanced the lenders' loan[115].

90 The entry into the improvident transaction by Mr Stubbings – a man with no income who was required to make monthly interest payments of at least $8,825 in respect of a loan which was to buy the Fingal property, but which was described as a loan "for business purposes" when a business could not be conducted from the Fingal property without an exemption, secured against the Fingal property and his only other assets – demonstrated his inability to make any realistic assessment of the worth and consequences of the transaction[116]. The conclusion that, in those circumstances, Mr Stubbings was vulnerable and under a special disadvantage vis-à-vis the lenders was inevitable[117].

91 Mr Jeruzalski knew of Mr Stubbings' vulnerability and that the transaction would inevitably be disastrous for him[118]. Yet, despite Mr Jeruzalski knowing that

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113 *ASIC Act*, s 12CC(1)(d) and (l).

114 *ASIC Act*, s 12CC(1)(j)(ii).

115 *ASIC Act*, s 12CC(1)(e).

116 *ASIC Act*, s 12CC(1)(c). See *Thorne* (2017) 263 CLR 85 at 128 [121], quoting *Bridgewater* (1998) 194 CLR 457 at 493 [123]. See also *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 466.

117 See *Blomley v Ryan* (1956) 99 CLR 362 at 405; *Amadio* (1983) 151 CLR 447 at 459, 461-462, 474-475; *Louth v Diprose* (1992) 175 CLR 621 at 628-629, 637-638, 650; *Kakavas* (2013) 250 CLR 392 at 398 [6], 424-425 [117]-[118]; *Thorne* (2017) 263 CLR 85 at 103 [38], 115-116 [74], 122 [94], 125-126 [109]-[113].

118 *ASIC Act*, s 12CC(1)(a).

Mr Stubbings was under that disadvantage, he exploited that disadvantage[119]. There was an immediate need for the lenders, through Mr Jeruzalski, to provide Mr Stubbings with an explanation and assistance in the form of a warning that the loan was "a risky and dangerous undertaking for Mr Stubbings" and that the damage to Mr Stubbings from entry into the transaction would be severe. Not only did Mr Jeruzalski have no reason to think that Mr Stubbings had received that assistance or explanation[120], but his behaviour was worse than that. Mr Jeruzalski deliberately did not make any inquiries or provide Mr Stubbings with the advice and explanations that were necessary. He deliberately avoided making inquiries about Mr Stubbings' personal and financial circumstances in order to avoid acquiring any knowledge that might enliven the court's equitable or statutory jurisdiction to set aside the loan on the grounds of unconscionability[121].

92 Mr Jeruzalski refused to meet Mr Stubbings, relying instead on an intermediary[122]. He avoided finding out anything about the dealings between Mr Stubbings and the intermediary. The only evidence Mr Jeruzalski had about the assistance or explanation provided to Mr Stubbings was the two certificates he had drafted. The certificates were deficient. As stated above, it may be inferred that the certificates were crafted that way to *avoid* any meaningful disclosure[123].

93 The certificate of independent legal advice did not state that Mr Stubbings had received financial advice. The certificate of independent financial advice stated that advice had been given to VBC, independently of any guarantor, in relation to the debenture charge to be executed by it. It did not require the accountant to sight any financial documents. It did not refer to the mortgage security. Neither certificate stated that Mr Stubbings had been given any financial advice as guarantor. Neither certificate stated that Mr Stubbings had turned his attention to or had had his attention drawn to the improvidence of the transaction and the inevitable and disastrous consequences for him. The completed certificates contained no information regarding the "business", VBC's or Mr 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".

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119 *ASIC Act*, s 12CC(1)(d) and (l). See *Blomley* (1956) 99 CLR 362 at 405.

120 cf *Amadio* (1983) 151 CLR 447 at 466, 468.

121 *ASIC Act*, s 12CC(1)(d) and (l).

122 *ASIC Act*, ss 12CC(1)(a), 12CC(1)(i), 12CC(1)(j)(i).

123 *ASIC Act*, s 12CC(1)(d), (i) and (l).

94 In the circumstances, the lenders' conduct (through Mr Jeruzalski) amounted to unconscientious taking advantage of Mr Stubbings' special disadvantage[124] – there was a "lack of assistance or explanation where assistance or explanation [was] necessary"[125]. The lenders are fixed with the knowledge that they deliberately avoided, including that Mr Stubbings was effectively unemployed, had no regular income and fundamentally misunderstood the transaction[126]. In all the circumstances, the lenders' conduct in respect of Mr Stubbings was unconscionable contrary to the prohibition in s 12CB of the *ASIC Act* and unconscionable in equity.

Orders

95 I agree with the orders proposed by Kiefel CJ, Keane and Gleeson JJ.

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124 See *Thorne* (2017) 263 CLR 85 at 125-126 [109]-[112].

125 *Blomley* (1956) 99 CLR 362 at 405.

126 *ASIC Act*, s 12CC(1)(c).

96 STEWARD J. The respondents lent money, secured by mortgages over three properties and by a debenture charge, to Victorian Boat Clinic Pty Ltd ("VBC"). The appellant was the sole director and shareholder of VBC, which was at all times no more than a shell company with no assets. The loan was guaranteed by the appellant. The purpose of this loan was to refinance existing indebtedness and to fund the purchase of a property in Fingal which would become the appellant's home. Subsequently, VBC defaulted on the payment of interest to the respondents. The respondents brought proceedings in the Supreme Court of Victoria against the appellant to enforce the guarantee and to seek possession, as mortgagees, over the appellant's home[127]. VBC also entered into a smaller second loan with a different lender who was not a party to the proceedings below.

97 The appellant's financial position was bleak. He was effectively unemployed, was not receiving any government benefits and had no savings. He also owed two years of council rates in arrears. The primary judge made findings, undisturbed on appeal, that in reality there were "no circumstances" in which the appellant's plan for repayment could "work", and that any person with a "modicum of intelligence" who had been apprised of the actual nature of the transaction and the appellant's circumstances would not have proceeded with the loans[128]. However, the agent of the respondents – a solicitor – made no attempt to enquire into the appellant's fitness to be a guarantor and made no enquiries about his personal or financial circumstances. Nor was the appellant ever warned about the dangers of entering into what was, for him, so glaringly improvident an arrangement.

98 The primary judge found that the solicitor had developed a "system of conduct" whereby such enquiries would not need to be made. It was found at first instance, however, that this system rendered the solicitor wilfully blind and that the failure to make enquiries constituted unconscionable conduct[129]. The Court of Appeal agreed that there may have been a sufficient basis to conclude that it was unconscionable for the solicitor to have made no enquiries "in all the circumstances"[130]. But the Court of Appeal decided, nonetheless, that the receipt

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127 The respondents, as mortgagees, had already sold the other two properties previously owned by the appellant.

128 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [16]-[17] per Robson J.

129 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [315]-[316] per Robson J.

130 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [132] per Beach, Kyrou and Hargrave JJA.

of two certificates, from an independent solicitor and an independent accountant, ensured that the solicitor was not wilfully blind[131].

99 For the reasons set out below, and with respect, that conclusion was mistaken. It follows that equity must deny the respondents the remedy of possession over the appellant's home.

The "system of conduct" and the appellant

100 Save for one finding, the Court of Appeal did not disturb the facts found by the primary judge. It is necessary to address those facts with a degree of detail.

The appellant's plan

101 The appellant owned two properties in Narre Warren. He leased one to his son. He wanted to buy a new property to live in after falling out with the owner of a property where he had lived. He found a property for sale in Fingal on the Mornington Peninsula. The sale price was $900,000. However, with no savings and being unemployed, no regular bank would lend to him. The appellant was nonetheless able to obtain the necessary funds from the respondents in the circumstances described below by procuring VBC to enter into two loans, secured by mortgages over the three parcels of land and by a debenture charge. For each loan, the appellant guaranteed VBC's loan obligations. The appellant's plan was to use these funds to purchase the land in Fingal, renovate the two properties in Narre Warren, sell them, and then refinance the two loans at a lower interest rate through a bank after two or three months, leaving him with the Fingal property and a manageable amount of debt. As already mentioned, and for the reasons which follow, this plan was never going to work.

The "system of conduct"

102 In order to borrow money from the respondents, the appellant needed to participate in what the primary judge described as a "system of conduct"[132]. That system is described below. For the moment it is necessary to describe its principal parties. The system employed a solicitor, an intermediary, a borrower, a guarantor and a lender or lenders. It also employed an independent solicitor and an independent accountant to provide advice to the borrower and the guarantor.

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131 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [132]-[133] per Beach, Kyrou and Hargrave JJA.

132 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [293] per Robson J.

103 The first-mentioned solicitor was Mr Jeruzalski, a partner of the law firm Ajzensztat Jeruzalski & Co ("AJ Lawyers"). Amongst other things, that firm arranged loans between its clients and third-party borrowers. The type of loan used was called "asset-based lending". Nothing turns upon whether that label has any necessary meaning. Here, it simply refers to the type of loans organised by Mr Jeruzalski. The primary judge found that Mr Jeruzalski gave his evidence at trial with "apparent smugness"[133].

104 The intermediary was Mr Zourkas. His role was to assist a potential borrower to apply to AJ Lawyers for a loan and to assist Mr Jeruzalski in having the borrower complete the necessary paperwork. In the past three or four years, Mr Zourkas had referred to Mr Jeruzalski about 60 to 80 potential borrowers, which resulted in 30 to 40 loans being made. The primary judge found that Mr Zourkas believed that the appellant had no money when he arranged the loan with him[134]. His Honour characterised Mr Zourkas' evidence at trial as "dismissive, flippant, arrogant, patronising, and rude"[135]. The primary judge was not prepared to accept his evidence on any relevant issues unless it was corroborated[136]. His Honour found that Mr Zourkas was "not an honest man, but a man prepared to prey upon the weak and vulnerable like [the appellant]"[137].

105 The borrower was VBC. For reasons explained below, the loans organised by AJ Lawyers were only ever made to companies.

106 The guarantor was the appellant. At the time the loans were made, he was earning some money as a handyman, doing things such as replacing tap washers and mowing lawns, but was otherwise unemployed. Both of the Narre Warren properties were mortgaged. These secured outstanding indebtedness of, in aggregate, the sum of $240,000. The appellant was obliged to pay, in total, about $260 per week by way of interest. He also owed two years of council rates in arrears.

107 The appellant left school after fourth form. In that year, he failed English and third-form mathematics (after repeating that latter subject). By his own admission, he could not budget, could not understand a balance sheet, and could

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133 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [313] per Robson J.

134 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [163] per Robson J.

135 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [178] per Robson J.

136 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [180] per Robson J.

137 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [271] per Robson J.

not calculate interest. He was self-represented at trial. The primary judge described the appellant's demeanour at trial as "completely lost, totally unsophisticated, incompetent and vulnerable"[138]. It was said that he behaved "much as you would expect a child to behave"[139]. The appellant was also found to have had an "obvious lack of understanding"[140] of the details of the loans and his ability to finance them. For example, he did not understand that the loans could not be repaid for six months, and he failed to understand how much surplus loan funds he would receive. He was easily manipulated, naïve, vulnerable and "lacking in financial nous"[141]. From the way the appellant spoke in the witness box, it was clear to the primary judge that "he was precisely the sort of person who needed protection and was vulnerable to being exploited"[142].

108 The foregoing findings about the appellant's history, education and experience, as well as the observations made by the primary judge about his demeanour, were not matters known to Mr Jeruzalski when organising the loans to VBC.

109 The lenders of the first loan were the respondents. They did not know the appellant and never met him. Again, they also had no knowledge concerning the appellant's history, education and experience. They lent on the basis of valuations of the three properties obtained by AJ Lawyers and no more. They had never met Mr Zourkas.

110 The second solicitor, Mr Kiatos, and the accountant, Mr Topalides, played the role of respectively providing independent legal advice to the appellant and independent financial advice to VBC, and of issuing certificates which confirmed that this advice had been provided. Mr Kiatos, a sole practitioner, had previously dealt with Mr Jeruzalski on a "handful"[143] of occasions, and Mr Zourkas had previously referred clients to him for loan purposes. Mr Topalides was Mr Kiatos' accountant. Mr Zourkas and Mr Topalides had met three or four times previously.

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138 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [265] per Robson J.

139 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [265] per Robson J.

140 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [141] per Robson J.

141 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [289] per Robson J.

142 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [270] per Robson J.

143 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [182] per Robson J.

111 The "system of conduct" devised by AJ Lawyers had a number of features. First, it used asset-based loans secured by mortgages. Under these loans, the lender is concerned with the quality of the assets that can be pledged, or mortgaged, to secure repayment[144]. The loans are always secured in this way. There is, however, no one "type" of asset-based lending[145]. Parties are always free to negotiate their own particular terms for lending money. The type of asset-based lending used by AJ Lawyers, if it may be so termed, contained the following further feature. The lender, once satisfied with the borrower's security, otherwise has no interest in, and makes no enquiries about, the borrower's capacity to service the loan[146]. In this case, the "system of conduct" permitted Mr Jeruzalski, as agent for the respondents, to proceed with the first loan even though he was most probably aware that the appellant had no income. Indeed, Mr Jeruzalski said in evidence[147]:

> "If [the appellant] had an income sufficient to service a loan of that amount, he would've gone to a bank."

112 It was on this basis that the primary judge found that Mr Jeruzalski suspected that the appellant had no income to service the loans and also knew that the guarantee was a risky and dangerous undertaking for him[148].

113 Inferentially, the system of asset-based lending used by AJ Lawyers could have been attractive to financially distressed individuals or entities who are not eligible to obtain a loan in the ordinary way. That was the case here with the appellant. In that respect, the respondents emphasised that, but for the availability

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144 Paterson, "Knowledge and neglect in asset-based lending: When is it unconscionable or unjust to lend to a borrower who cannot repay?" (2009) 20 *Journal of Banking and Finance Law and Practice* 18 at 18; MacLeod, Patterson and Aiken, "Asset-Based Lending Credit Facilities: The Borrower's Perspective" [2017] (February) *Business Law Today* 1 at 1; Rajapakse, "Unconscionable or unfair dealing in asset-based lending in Australia" (2014) 22 *Competition & Consumer Law Journal* 151 at 151-152.

145 For example, while asset-based lending traditionally relied on "tangible" security such as inventory or real estate, the security relied on can also include intangible assets such as patents and contracts: Gertzof, "The Changing Face of Asset-based Lending" (2000) 15(4) *Commercial Lending Review* 52 at 53.

146 Whether this feature is commonly found in asset-based lending need not be considered.

147 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [92] per Robson J; see also at [93]-[94].

148 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [308]-[310] per Robson J; see also at [94]-[96].

of the asset-based loans offered by AJ Lawyers' clients, the appellant would never have been able to raise the funds he needed. The respondents also submitted that he borrowed here understanding the obligations and risks involved.

114 Another feature of the loan system used by AJ Lawyers, at least in the case of the appellant, is that it imposed an obligation to pay interest at rates that appeared to be greater than that which might be obtained in a subsequent refinancing with a bank. Certainly, the appellant expected this. Here, absent an act of default, the rate in relation to the first loan was 10% per annum and in relation to the second loan the rate was 18%. Upon an act of default taking place, the interest rate on the first loan increased to 17% per annum and on the second to 25%.

115 Secondly, to buttress the "system of conduct" and to reduce the possibility that loans made to potentially impecunious land owners might be set aside, AJ Lawyers only ever organised loans to companies. This was said to avoid the *National Credit Code* contained in Sch 1 to the *National Consumer Credit Protection Act 2009* (Cth). This step in the "system of conduct" explains the presence of VBC as the borrower. In addition, to remove any further risk that the *National Credit Code* might apply, AJ Lawyers always stipulated in the documentation that the loans were not to be used for personal, domestic or household purposes.

116 Thirdly, lending to potentially impecunious individuals raised the risk that equity might intervene to inhibit the enforcement of the loans Mr Jeruzalski organised on behalf of AJ Lawyers' clients. That is because AJ Lawyers knew that the loans could cause severe damage to a guarantor, such as the appellant, if the loans could not be serviced. These loans were, as the primary judge found, a "dangerous product in the wrong hands"[149].

117 Fourthly, in response to this potential issue, AJ Lawyers took deliberate steps, in the case of the appellant, to ensure that it did not ascertain any information about VBC's actual financial capacity to service the loans made to it or about the appellant's economic capacity to guarantee the performance of the loans. To assist in achieving this end, AJ Lawyers used Mr Zourkas, as the intermediary, to deal exclusively with the appellant. Deliberate steps were taken to ensure that AJ Lawyers did not obtain any information about the appellant's financial circumstances and, further, to ensure that the firm was not informed of the representations and inducements made by Mr Zourkas to the appellant.

118 Fifthly, in an attempt to enhance the enforceability of each loan, the system required the procurement of two certificates – one from a solicitor and one from an accountant. Without both certificates there would be no loans. Each pro forma

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149 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [283] per Robson J.

certificate used here had been drafted by Mr Jeruzalski. Mr Kiatos and Mr Topalides were chosen by Mr Zourkas to be the independent solicitor and accountant.

119 In the case of Mr Kiatos, what was here headed "Certificate of Independent Legal Advice" ("the Legal Certificate") was addressed to the respondents. It identified both VBC and the appellant, and under the heading "Acknowledgement by Guarantor" asked the appellant the following questions:

> "1. Have you received copies of the documents described under the heading 'Security Documents' below?
>
> 2. Have you been given an opportunity to read those Security Documents?
>
> 3. Have the Security Documents been fully explained to you by your solicitor?
>
> 4. Do you understand the effects of the Security Documents and the consequences to you if the Borrower defaults on its obligations to the Lender?
>
> 5. In particular, do you understand 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 you as Guarantor to recover the moneys due to it?
>
> 6. Was this Acknowledgement read and signed by you BEFORE you signed the Security Documents?"

120 The Legal Certificate in this case continued with the following:

> "I confirm the accuracy of the answers to the above questions and acknowledge that the Lender will be relying on these answers in respect of giving the loan to [VBC].
>
> I request the Lender to give this loan to the Borrower."

121 The Legal Certificate needed to be signed by the proposed guarantor, with that signature witnessed by the solicitor. Below these signatures, the form contained a "Certificate by Independent Solicitor" in the following terms:

> "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."

122 The document headed "Certificate of Independent Financial Advice" ("the Financial Certificate") contained, in this case, the following certification by Mr Topalides concerning the risks to be undertaken by VBC:

> "1 I have been instructed by [VBC] to explain the financial risks being assumed:-
>
> (a) by executing the security documents in respect of the financial accommodation to be provided by the Lender which security documents are referred to in Item 1 of the Schedule below ('the Security');
>
> (b) by the application of the said financial accommodation for the purposes referred to in Item 2 of the Schedule below.
>
> 2 Before the Security was executed by the Borrower, I explained the financial risk being assumed by executing the Security and by the application of the aforesaid financial accommodation in the manner stated in Item 2 of the Schedule.
>
> 3 To the best of my knowledge and belief and in my opinion the Borrower appears to understand the nature and extent of the financial risk which the Security places and the nature and extent of the financial risk which will be assumed by the application of the aforesaid financial accommodation in the manner stated in Item [2] of the Schedule.
>
> 4 I have been engaged by the Borrower in advising and have given this Certificate entirely independently of any other Borrower or Guarantor.
>
> 5 The Loan herein is required for business purposes."

123 By these means, AJ Lawyers sought to immunise the loans it had organised from the reach of equitable remedies. That this was the very object of the "system of conduct" was conceded by Mr Jeruzalski, who gave evidence, as already mentioned, with "apparent smugness" when he explained that this was so[150].

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150 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [313] per Robson J.

Obtaining the Certificates from a solicitor and an accountant was an essential part of this system.

124 A final critical feature of the "system of conduct" was the enrichment of AJ Lawyers, Mr Zourkas, Mr Kiatos and Mr Topalides. This was achieved by obliging the appellant to pay AJ Lawyers and the individuals consultancy, procuration and other fees. For the most part, these fees were funded out of the loan proceeds. Indeed, as the Court of Appeal observed, the smaller second loan was needed precisely to enable these fees to be paid, together with "mortgagees' legal costs totalling $31,500 to AJ Lawyers; the costs and expenses of the purchase of the Fingal property, including stamp duty; and, importantly, the first month's interest under the two mortgages (about $10,000), which was payable in advance"[151].

Application of the "system of conduct" to the appellant

Meetings with Mr Zourkas, Mr Kiatos and Mr Topalides

125 Initially the appellant attempted to borrow from the ANZ Bank. However, his application was refused because he had no financial records, such as tax returns. He was then put on to Mr Zourkas. There was an initial telephone conversation between the appellant and Mr Zourkas and then six further meetings. Mr Zourkas suggested that the appellant borrow enough to pay out the loans relating to the Narre Warren properties ($240,000), to pay $900,000 for the Fingal property, and to pay for three months of interest, which Mr Zourkas said would be $8,000 per month. He told the appellant that the loan should be around $1,059,000. Mr Zourkas never asked the appellant whether he had the means to make any further interest payments. As already mentioned, he believed (and not merely suspected) that the appellant had no money. Mr Zourkas told the appellant that all applicable fees would "be covered". He also told the appellant that he would have surplus loan funds of $53,000, which would be used to pay the first three months of interest and to renovate the Narre Warren houses. Remarkably, Mr Zourkas also told the appellant that based upon a record of having made three monthly interest payments, and no more, the appellant would then be able to refinance his loans with a bank with lower interest rates. The appellant thought that once he had sold the Narre Warren properties, his outstanding overall loan balance to be refinanced would be only $300,000.

126 At the fourth meeting, reassured by Mr Zourkas that there would be no problem in obtaining finance, the appellant signed a contract of sale for the Fingal property (for which he had previously placed only a $100 deposit). At the fifth meeting, the appellant, as requested, gave $1,000 in cash to Mr Zourkas and he

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151 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [18] per Beach, Kyrou and Hargrave JJA.

signed offers for the first and second mortgages as well as a "mandate". The latter document obliged the appellant to pay Mr Zourkas his fee even if the loans were not ultimately made. At the sixth meeting, Mr Zourkas gave the appellant two envelopes, one labelled "accountant" and the other labelled "solicitor". The appellant was told to take the documents contained in the envelopes to Mr Kiatos and Mr Topalides, and to have them signed and then returned to Mr Zourkas. The envelope labelled "solicitor" contained the Legal Certificate described above as well as the applicable loan documents (as prepared by AJ Lawyers) to be executed. The envelope labelled "accountant" enclosed the Financial Certificate and documents pertaining to the first and second mortgages.

127 Mr Zourkas then met with Mr Kiatos. Mr Kiatos wrote next to each of the questions set out above in the Legal Certificate the word "yes". He also witnessed the appellant's signature on the Legal Certificate.

128 What took place when the appellant met Mr Topalides was the subject of conflicting evidence before the primary judge. In general, it would appear that the primary judge had difficulty in accepting Mr Topalides' account. In essence, the appellant gave evidence that he handed Mr Topalides the envelope and $1,000 in cash. Mr Topalides looked through the contents of the envelope and then the appellant signed the documents as directed by Mr Topalides. Mr Topalides asked no questions of the appellant, such as what his earnings were. According to the appellant, the meeting took about 15 minutes. The appellant did not bring to this meeting any financial documents, such as tax returns or documents setting out his assets, liabilities, income and expenses.

129 The Financial Certificate contained a Schedule that needed completion with respect to "Item 2". Item 2 stated: "(purpose of borrowings) (please complete)". At this part of the Financial Certificate, Mr Topalides then handwrote the phrase "Set up & Expand the business". The primary judge made an unchallenged finding that Mr Topalides otherwise did not understand the very transaction about which he purported to give advice[152].

130 Critically, as set out above, the Financial Certificate was addressed to VBC and not to the appellant as guarantor. Nowhere did the certification completed by Mr Topalides identify or refer to the appellant as guarantor. There is no suggestion that he ever received independent personal financial advice before entering into the two loans in his capacity as guarantor.

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152 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [217] per Robson J.

Knowledge of Mr Jeruzalski and AJ Lawyers

131 Mr Zourkas' knowledge cannot be attributed to Mr Jeruzalski. Mr Zourkas was not an agent of either Mr Jeruzalski or the respondents[153]. In contrast, Mr Jeruzalski was the agent of the respondents. As an example of this distinction, the primary judge found that from the moment the loans were entered into, the appellant, as guarantor, was "bound to lose his existing properties"[154]. His Honour found that this was a fact that "would" have been well known to Mr Zourkas, but which only "should" have been known by AJ Lawyers[155]. Nor is there any reason to conclude that Mr Jeruzalski had knowledge of the circumstances in which each Certificate was obtained, especially the one signed by Mr Topalides. Moreover, the observations made by the primary judge about the appellant's demeanour when presenting his case at trial, and the findings made about his history, education and experience, were matters unknown at the time to Mr Jeruzalski and AJ Lawyers.

132 It was Mr Zourkas who had approached Mr Jeruzalski about a possible loan to VBC. To proceed, Mr Jeruzalski obtained valuations for each of the three properties. He confirmed that it was his practice not to seek "income particulars". As already mentioned, Mr Jeruzalski suspected that the appellant had no income. It would appear that he knew from Mr Zourkas of the appellant's plan to sell the Narre Warren properties and to seek to refinance the loans. He also said that he had been told by Mr Zourkas that the loan would be used to fund a business concerned with boat repairs. Even though he knew the Fingal property was located in a "green wedge" planning zone, precluding the conduct of a business without planning permission, he assumed that council consent would be obtained.

133 Other than the foregoing knowledge, AJ Lawyers was not apprised of the appellant's financial or personal circumstances. Mr Jeruzalski did not ask Mr Zourkas any questions that might have elicited such information. That is because he relied on the three valuations and ostensibly upon both of the Certificates. It is also because, consistently with the "system of conduct", he deliberately wished to avoid knowledge of the truth. Mr Jeruzalski did not wish to see the appellant. Mr Zourkas told the appellant that he could not go to AJ Lawyers' offices. Indeed, when Mr Zourkas went with the appellant to attend the offices of AJ Lawyers to obtain the pro forma loan documents, he instructed the appellant to "wait in the car"[156]. Nonetheless, even with such confined

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153 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [223] per Robson J.

154 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [17] per Robson J.

155 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [17] per Robson J.

156 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [310] per Robson J.

knowledge of the appellant, the primary judge found that Mr Jeruzalski knew the loan transactions were a risky and dangerous undertaking[157]. Critically, the appellant was never warned that this was so. Mr Jeruzalski knew that the appellant had no other lawyer acting for him, and that Mr Zourkas had a significant incentive for closing the deal between the respondents, the appellant and VBC. Of course, given the fees to be earned by AJ Lawyers, Mr Jeruzalski had the very same incentive.

The consequences for the appellant

134 In September 2015, VBC entered into two loans. The first loan was entered into with the respondents and was for a term of one year. The smaller second loan was also for a term of one year. Neither loan could be repaid for a period of six months. The appellant was the guarantor of both loans. The guarantee was secured by mortgages over the three properties. In addition, VBC granted a debenture charge over its assets, although it in fact had no assets and had never traded. Prior to default, the first loan obliged VBC to make monthly interest payments of $8,825 to the respondents; the second loan obliged VBC to make monthly interest payments of $1,552.50. The appellant moved into the Fingal property on 28 or 29 September 2015.

135 Before VBC entered into the two loans, the appellant had significant equity in the Narre Warren properties. The primary judge considered that this was likely to be the only equity he would take into retirement[158]. The aggregate value of both properties was $770,000. As already mentioned, the aggregate loan balance was $240,000, leaving the appellant with equity of about $530,000. The loans threatened that equity with high interest repayments; with the fees payable to AJ Lawyers, Mr Zourkas, Mr Kiatos and Mr Topalides; and with the cost of the forced sales that would inevitably occur, estimated by the primary judge to be in excess of $100,000[159].

136 As already mentioned, the appellant understood that following the application of the loan funds to pay for the Fingal property and to pay out the amounts owed on the Narre Warren properties, there would be a surplus of $53,000. This is what the appellant said Mr Zourkas had told him. Mr Zourkas

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157 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [299], [308] per Robson J.

158 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [303] per Robson J.

159 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [305] per Robson J.

denied this, but the primary judge observed that it was corroborated by Mr Topalides[160].

137 In fact, the fees swallowed up almost all of the expected surplus. AJ Lawyers was paid "procuration" fees in the sum of about $19,000 and $12,000 for each loan. Mr Zourkas was paid a consultancy fee of $27,000, a sum described by the primary judge as "obscene"[161]. Mr Kiatos was paid $1,650 and Mr Topalides was paid $300, although the appellant's evidence was that he also gave him $1,000 in cash. Save for that cash payment, each of the foregoing fees were paid out of the loan proceeds.

138 Emblematic of the appellant's lack of understanding of the arrangement was that he did not appreciate the size of Mr Zourkas' fee, and did not know about the procuration fees charged by AJ Lawyers until after each loan had been entered into.

139 The appellant was left with only $6,900 to fund the second and third monthly interest payments and the cost of renovations. In the end, VBC was only able to pay the first two monthly interest payments before it defaulted. In order to fund the second monthly payment of interest, the appellant had to sell certain assets he owned. He then tried to sell each of his Narre Warren properties, but on each occasion the sale was blocked by AJ Lawyers, presumably acting on behalf of the respondents as mortgagees. The appellant unsuccessfully tried to contact AJ Lawyers in an attempt to negotiate a resolution. But neither AJ Lawyers nor the respondents replied to that attempt. Instead, the appellant was just sent a notice to pay. Eventually the respondents obtained summary judgment against the appellant and the Narre Warren properties were sold. At trial, the appellant said he was unsure about how much was still owing to the respondents.

140 The economic result for the appellant is that, in substance, his equity in the Narre Warren properties has ultimately been used to fund the fees paid to AJ Lawyers, Mr Zourkas, Mr Kiatos and Mr Topalides and to pay some interest to the respondents. He is no longer the owner of the Narre Warren properties and, by reason of the orders of the Court of Appeal, stands to lose his home.

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160 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [165], [199] per Robson J.

161 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [290] per Robson J.

Disputed finding

141 The primary judge made the following additional finding[162]:

> "Mr Jeruzalski must have suspected that [the appellant] 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."

142 The Court of Appeal found that these inferential findings were not supported by the evidence before the primary judge[163]. The appellant, however, submitted that the inferences were wrapped up in the primary judge's overall impression of the credibility of Mr Jeruzalski and Mr Zourkas as witnesses. As such, the Court of Appeal should not have overturned the factual inferences drawn by the primary judge unless the findings were "demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or [were] 'glaringly improbable' or 'contrary to compelling inferences'"[164]. The Court of Appeal's reasoning never went this far. It merely expressed disagreement with the primary judge. In a case where the credibility of Mr Jeruzalski and Mr Zourkas loomed large, where much of Mr Zourkas' evidence was rejected, and where the primary judge recorded in his reasons that Mr Jeruzalski gave evidence with "apparent smugness", it was not open to the Court of Appeal to overturn the inferences drawn by the primary judge concerning the independence of Mr Kiatos and Mr Topalides. Those inferences are entirely consistent with the other findings made by the primary judge about the "system of conduct" used, which findings the Court of Appeal did not disturb.

The conclusions of the primary judge

143 The primary judge decided that the appellant was in a position of special disadvantage. Much of that finding turned upon the appellant's greatly diminished economic circumstances, the evidence he gave and his conduct in representing

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162 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [314] per Robson J.

163 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [134] per Beach, Kyrou and Hargrave JJA.

164 *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679 at 687 [43] per French CJ, Bell, Keane, Nettle and Gordon JJ; 331 ALR 550 at 558-559.

himself before his Honour. For example, in relation to the last matter, the primary judge observed[165]:

> "[The appellant] did not grasp the gravity of the occasion. He did not bring any relevant documents to court. It didn't occur to him that they might be needed. He behaved as if he could have been at a social gathering. He could not differentiate between serious matters and incidental matters. In fact, in many ways, he behaved, much as you would expect a child to behave. As mentioned, he was not able to put his case to any of the witnesses. He didn't appear to understand the concept or the consequences of not putting his case to the witnesses."

144 The primary judge went on to find that the appellant misunderstood his rights and obligations under the loan agreements and was "completely out of his depth"[166]. The fact that he even entered into them, given his circumstances, was said to evidence his vulnerability[167].

145 The primary judge decided that the actions of AJ Lawyers constituted wilful blindness as to the appellant's financial and personal circumstances[168]. His Honour concluded that Mr Jeruzalski had "knowingly and deliberately shut his eyes" to those circumstances[169]. It followed that AJ Lawyers was fixed with actual knowledge of the appellant's inability to service both loans as guarantor. Accordingly, lending in such circumstances was found to be unconscionable[170].

146 In support of the foregoing conclusion, the primary judge reasoned as follows:

(a) First, his Honour found that Mr Jeruzalski knew the loans were a "risky and dangerous" undertaking for the appellant[171].

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165 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [265] per Robson J.

166 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [266] per Robson J.

167 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [266] per Robson J.

168 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [315] per Robson J.

169 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [316] per Robson J.

170 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [316] per Robson J.

171 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [308] per Robson J.

(b) Secondly, in those circumstances, standards of ethical conduct imposed upon Mr Jeruzalski a moral duty to satisfy himself that the appellant was not unreasonably exposing himself to significant financial risk. And because Mr Jeruzalski was a solicitor and an officer of the Supreme Court of Victoria, that duty was all the more compelling[172].

(c) Thirdly, Mr Jeruzalski's duty was "enlivened" because he suspected or believed that the appellant had no income to service the loans. He then purported to apply AJ Lawyers' "system of conduct" to prevent him from ever confirming that this was actually so[173].

(d) Fourthly, Mr Jeruzalski was aware of Mr Zourkas' considerable incentive to complete the loan transactions and to receive his fee. But again, he made no attempt to determine the basis upon which Mr Zourkas dealt with the appellant. In particular, he made no attempt to determine whether Mr Zourkas may have misled the appellant[174].

(e) Fifthly, it was the "system of conduct" used by AJ Lawyers that prevented these enquiries from taking place. They did not take place precisely because Mr Jeruzalski was concerned, or suspected, that the answers he may have obtained would have suggested a basis for setting the loans aside on the grounds of unconscionability[175].

(f) Sixthly, the "system of conduct" deployed by AJ Lawyers demonstrated a high level of "moral obloquy"[176].

(g) Seventhly, the procurement of the two Certificates was part of the "system of conduct" utilised to immunise AJ Lawyers from knowledge that might imperil the enforceability of each loan. The independence of each of Mr Kiatos and Mr Topalides was undermined because if they withheld their respective Certificates, they would not be paid their fees[177].

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172 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [309] per Robson J.

173 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [310] per Robson J.

174 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [311] per Robson J.

175 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [312] per Robson J.

176 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [313] per Robson J.

177 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [314] per Robson J.

The conclusions of the Court of Appeal

147 The Court of Appeal did not express disagreement with the finding of the primary judge that the appellant was at a special disadvantage[178]. The Court said that the "real question" was whether Mr Jeruzalski had knowledge of facts which ought to have put him on enquiry as to the appellant's personal and financial circumstances, including details of the assets and business of VBC[179].

148 The Court distilled the case "at its highest" for the appellant as follows[180]:

> "(1) Jeruzalski assumed that [the appellant] and [VBC] 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.
>
> (2) Jeruzalski knew that [the appellant] and [VBC] had paid only a token deposit under the two contracts to purchase the Fingal property – $100 under the first contract (in force when the loan offers were made) and $5,100 under the second contract (in force when the loans were approved). This supported Jeruzalski's assumption that [the appellant] and [VBC] had insufficient income to service the loans.
>
> (3) Jeruzalski had been informed by Zourkas that the proceeds of the two loans would be used to both settle the purchase of the Fingal property and to pay out the existing CBA mortgage loans over the two Narre Warren properties; and that [the appellant's] plan was to then sell the two Narre Warren properties and then refinance the loans with a bank. Jeruzalski gave evidence that he treated [the appellant's] equity in these properties as his deposit on the Fingal property.
>
> (4) From the disbursement authorities prepared by his office at the time the loans were approved, Jeruzalski knew that – after settlement of the Fingal property purchase, repayment of the mortgages over the Narre Warren properties, and the payment of all costs and expenses including loan procuration fees and commissions – the net proceeds of the loans available to [the appellant] and [VBC] for any business

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178 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [65] per Beach, Kyrou and Hargrave JJA.

179 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [127] per Beach, Kyrou and Hargrave JJA.

180 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [131] per Beach, Kyrou and Hargrave JJA.

purposes would be very small in comparison to the amount borrowed.

(5) Jeruzalski had been told by Zourkas that [the appellant] and [VBC] intended to conduct a 'business concerned with boat repairs' at the Fingal property.

(6) Jeruzalski knew that he, as agent of the mortgagees, had the right under conditions (y) and (z) of the letters of offer to demand that [the appellant] and [VBC] provide 'evidence of serviceability' or evidence of 'proposed means of repayment of the loans' but chose not to exercise that right before approving the loans." (footnotes omitted)

149 There is, with respect, some force in the criticism articulated by senior counsel for the appellant that some of the foregoing findings diluted the facts set out in the reasons of the primary judge. For example, in the finding concerning Mr Jeruzalski's suspicion that the appellant had no income, the Court of Appeal added a qualification, not made by the primary judge, that this referred to having insufficient income to service the interest payable for between six and 12 months. In addition, the Court of Appeal made no reference to the primary judge's finding that Mr Jeruzalski knew that the loans were risky and dangerous.

150 In any event, based on the appellant's case perceived at its highest, the Court of Appeal considered that the circumstances "may have been sufficient to justify the serious finding that it was unconscionable for [Mr Jeruzalski] to abstain from inquiry"[181]. However, the Court of Appeal also considered that the obtaining of independent legal and financial advice foreclosed any such conclusion[182]. The Court reasoned that Mr Jeruzalski was entitled to rely on each Certificate as evidence both that the appellant had consulted a solicitor and accountant for advice and of the truth of the matters contained in each Certificate[183]. It followed, it was said, that Mr Jeruzalski should not be fixed with knowledge of the appellant's

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181 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [132] per Beach, Kyrou and Hargrave JJA.

182 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [132] per Beach, Kyrou and Hargrave JJA.

183 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [132] per Beach, Kyrou and Hargrave JJA.

"personal and financial circumstances such that default under the loans was inevitable"[184].

151 In reaching this conclusion, the Court of Appeal may have been distracted by the "concept" of asset-based lending[185]. "[P]ure" or "mere" asset-based lending was said to comprise a situation where lenders deliberately intend neither to seek nor to receive information about the personal and financial circumstances of the borrowers[186]. The Court of Appeal was of the view, based upon its understanding of the prevailing authorities, that this type of asset-based lending "is not, by itself, unconscionable conduct"[187], especially when combined with a system of lending that includes a requirement for certificates of independent legal and financial advice. The Court of Appeal then characterised the reasoning of the primary judge as constituting "in substance an adverse view of asset-based lending as a concept"[188]. That view, it was said, "infected" the reasoning of the primary judge[189].

152 With respect, those observations are not sustainable. In the first place, as already mentioned, there is not one "type" of asset-based lending. In that regard, determining whether identified conduct is unconscionable cannot turn upon some *a priori* categorisation of a product – here a type of lending – as being either immune from, or subject to, equitable remedies. Observing that asset-based

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184 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [132] per Beach, Kyrou and Hargrave JJA.

185 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [126] per Beach, Kyrou and Hargrave JJA.

186 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [126] per Beach, Kyrou and Hargrave JJA.

187 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [126] per Beach, Kyrou and Hargrave JJA, citing *Kowalczuk v Accom Finance Pty Ltd* (2008) 77 NSWLR 205 at 227-228 [96]-[99] per Campbell JA (Hodgson and McColl JJA agreeing); *Tonto Home Loans Australia Pty Ltd v Tavares* (2011) 15 BPR 29,699 at 29,706 [3], 29,765-29,766 [291]-[293] per Allsop P (Bathurst CJ and Campbell JA agreeing); *Violet Home Loans Pty Ltd v Schmidt* (2013) 44 VR 202 at 219-220 [59] per Warren CJ, Cavanough and Ferguson A-JJA; *Perpetual Trustees Australia Ltd v Schmidt* [2010] VSC 67 at [200], [207] per J Forrest J.

188 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [126] per Beach, Kyrou and Hargrave JJA.

189 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [126] per Beach, Kyrou and Hargrave JJA.

lending "by itself" is not unconscionable conduct is not, with respect, a useful proposition. Rather, in every matter there must be "close consideration of the facts of each case"[190]. Secondly, that is exactly what the primary judge did here. His Honour's reasoning was not concerned with asset-based lending generally but with the particular circumstances of the entry into the two loans here, and upon the application of AJ Lawyers' "system of conduct" to those facts. So much is clear from his Honour's careful examination of the actions of Mr Jeruzalski, Mr Zourkas and others in connection with the application of that system to the appellant.

Unconscionability and the application of the "system of conduct"

153 The appellant's pleaded case relevantly contended that the respondents had engaged in unconscionable conduct pursuant to s 21 of the *Australian Consumer Law* as set out in Sch 2 to the *Competition and Consumer Act 2010* (Cth), pursuant to s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth), and in accordance with applicable equitable principles. For the reasons set out below, and concordantly with the conclusion of the primary judge, Mr Jeruzalski, as agent for the respondents, acted unconscionably in accordance with equitable principles in failing to make necessary enquiries concerning the personal and financial circumstances of the appellant. Accordingly, it is not necessary to consider the application of s 21 or s 12CB.

154 This appeal ultimately turns upon a narrow issue, namely whether the Court of Appeal was correct in concluding that the Legal Certificate and the Financial Certificate not only precluded a finding of wilful blindness on the part of AJ Lawyers but also, as a result, effectively immunised its failure to make enquiries about the circumstances of the appellant from a conclusion, which might otherwise have been available, that there had been unconscionable conduct.

155 There was no dispute concerning the governing test for when equity will bar a remedy because a party has acted contrary to conscience. The applicable principles were summarised by Kiefel CJ, Bell, Gageler, Keane and Edelman JJ in *Thorne v Kennedy* as follows[191]:

> "A conclusion of unconscionable conduct requires the innocent party to be subject to a special disadvantage 'which seriously affects the ability of

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190 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 400 [14] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ. It is noted that the Court of Appeal appeared to understand the importance of considering the particular facts of a given case in other parts of its reasons: see, eg, *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [2] per Beach, Kyrou and Hargrave JJA.

191 (2017) 263 CLR 85 at 103 [38].

> the innocent party to make a judgment as to [the innocent party's] own best interests'. The other party must also unconscientiously take advantage of that special disadvantage. This has been variously described as requiring 'victimisation', 'unconscientious conduct', or 'exploitation'. Before there can be a finding of unconscientious taking of advantage, it is also generally necessary that the other party knew or ought to have known of the existence and effect of the special disadvantage." (footnotes omitted)

156 The foregoing tests must be applied to the facts and circumstances in existence at the time the two loans were entered into[192].

157 As found by the primary judge, the appellant's disadvantage included his lack of education and business experience, his lack of understanding of the transactions, and his relative impecuniosity. In that respect, relative poverty has long been recognised as a category of special disadvantage. In addition, it has also been recognised that a special disadvantage can exist where there is a need for an explanation and assistance, and none has been forthcoming. As Fullagar J said in *Blomley v Ryan*[193]:

> "The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are *poverty or need of any kind*, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, *lack of assistance or explanation where assistance or explanation is necessary*. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage *vis-à-vis* the other." (emphasis added)

158 The respondents relied upon the observation of the Court of Appeal that the appellant did not suffer from any "profound disabilities" and "was in control of his own affairs and could well speak and read English"[194]. So much may be accepted. But such observations do not address the critical issue here, namely whether, given the suspicion held by Mr Jeruzalski that the appellant had no income, there was a need to give him assistance in the form of a warning about the potential danger to

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192 See *Thorne v Kennedy* (2017) 263 CLR 85 at 125 [110] per Gordon J.

193 (1956) 99 CLR 362 at 405. See also *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 474-475 per Deane J; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 424-425 [117]-[118] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.

194 *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 at [123] per Beach, Kyrou and Hargrave JJA.

him arising from entering into the two loans. The appellant suffered from a disadvantage because he was impecunious and because no such warning or explanation was ever proffered.

159 The disadvantage must be "special". It is well established that this refers not to any mere difference in bargaining power, but to an inability to make a judgment by the innocent party as to her or his best interests, which inability is known, or ought to be known, by the other party[195]. Having regard to Mr Jeruzalski's suspicion, together with his knowledge of the transactions that were to be undertaken, the appellant's disadvantage was special. That was because the appellant's company was about to borrow over $1 million on terms which obliged it to pay at least six months of interest (over $10,000 per month absent default) in circumstances where it was assumed that the appellant, as guarantor, had no income. Lending such a substantial sum of money exposed the appellant to very great danger. It thus gave rise to a need to make enquiries about the actual extent of that danger and to warn the appellant accordingly. For the reasons set out below, had enquiries been made, it would have been realised that the appellant was unable to make a judgment in his best interests. That explains why he entered into what was, for him, such a calamitous transaction.

160 Consistently with the "system of conduct", as already mentioned, Mr Jeruzalski's *actual* knowledge of the appellant was confined. He suspected that the appellant had no income and he also knew that acting as a guarantor of the loans was a risky and dangerous matter for the appellant. Mr Jeruzalski had a general appreciation of the appellant's plan to sell the Narre Warren properties and to refinance the outstanding debt. He also mistakenly believed that the appellant intended to conduct a business at the Fingal property. Finally, he also relied on the contents of the Legal Certificate and the Financial Certificate, both of which he had drafted. Mr Jeruzalski otherwise cannot be fixed with knowledge of the dealings that Mr Zourkas, Mr Kiatos or Mr Topalides had with the appellant. Nor can he be fixed with any knowledge concerning the appellant's history, education and experience. In that regard, unlike the primary judge, Mr Jeruzalski did not, at any stage, have the benefit of observing the appellant's demeanour. In such circumstances it was for the appellant to demonstrate that Mr Jeruzalski, as agent for the respondents, knew or ought to have known about the existence and effect of the appellant's special disadvantage.

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195 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462 per Mason J; *Thorne v Kennedy* (2017) 263 CLR 85 at 112 [64] per Kiefel CJ, Bell, Gageler, Keane and Edelman JJ.

161 In *Commercial Bank of Australia Ltd v Amadio*[196], Mason J said:

> "[I]f A having actual knowledge that B occupies a situation of special disadvantage in relation to an intended transaction, so that B cannot make a judgment as to what is in his own interests, takes unfair advantage of his (A's) superior bargaining power or position by entering into that transaction, his conduct in so doing is unconscionable. *And if, instead of having actual knowledge of that situation, A is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person, the result will be the same.*" (emphasis added)

162 Here, Mr Jeruzalski's suspicion that the appellant had no income and his knowledge that the transaction was for the appellant "risky and dangerous" was sufficient, in and of itself, to establish the "possibility" that he was in a position of special disadvantage. If enquiries had been made, they would have led to Mr Jeruzalski discovering not only that the appellant in fact had no or very little income, and that VBC was no more than a shell company, but also that, by reason of the terms of each loan, VBC was bound to default, with the consequence that all three properties the appellant owned would need to be sold. He would have realised that the transactions from the perspective of the appellant were not merely risky and dangerous but entirely uncommercial and could not in any way have advanced his interests. Mr Jeruzalski would also have learned that the appellant had fundamentally misunderstood the transaction, whether by reason of Mr Zourkas' conduct or for some other reason, and that it was possible that Mr Topalides had given VBC and the appellant no financial advice at all. Mr Jeruzalski would also have realised that the appellant's willingness to enter into what was, for him, such a disastrous arrangement was only explicable because he was in a position of vulnerability, such that he was unable to make a judgment as to what was in his best interests.

163 As the learned primary judge found, AJ Lawyers, but for the "system of conduct", *should* have known that the appellant was bound to lose his properties[197]. That finding was not disturbed on appeal. It supports the conclusion that equity will treat Mr Jeruzalski and AJ Lawyers as having had knowledge of the appellant's special disadvantage. Nothing about the "system of conduct" deployed by AJ Lawyers compels any different conclusion. That system was, at least in this case, no more than a deliberate artifice intended to frustrate the provision of equitable relief.

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196 (1983) 151 CLR 447 at 467, quoted in *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 436-437 [151] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.

197 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [17] per Robson J.

164 It may otherwise be doubted whether Mr Jeruzalski would, by making enquiries, have discovered that the appellant lacked education and experience and that he had the demeanour witnessed by the primary judge. No reliance is placed upon such matters in these reasons.

165 Alternatively, AJ Lawyers was also wilfully blind by reason of the deployment of its "system of conduct". In *R v Crabbe*, this Court defined the doctrine of wilful blindness in the following way[198]:

> "When a person deliberately refrains from making inquiries because he prefers not to have the result, when he wilfully shuts his eyes for fear that he may learn the truth, he may for some purposes be treated as having the knowledge which he deliberately abstained from acquiring."

166 In the same case[199], the Court also referred with approval to the following description of the doctrine of wilful blindness by Professor Glanville Williams[200]:

> "A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice."

167 It cannot be doubted that the very point of AJ Lawyers' "system of conduct", in this case, was the taking of deliberate steps to avoid discovering the truth about the financial state of VBC and the appellant's inability as guarantor to service the payment of interest on each loan. The use of an intermediary to deal with the appellant was directed at that outcome. Mr Jeruzalski, having suspected that the appellant had no income and knowing that the transaction was risky and dangerous for him, then did everything he could to ensure that this would never be confirmed.

168 It follows that Mr Jeruzalski and AJ Lawyers must be fixed, as at the time the loans were made, with that knowledge which they had deliberately abstained

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198 (1985) 156 CLR 464 at 470 per Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ.

199 (1985) 156 CLR 464 at 470-471 per Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ.

200 Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 159.

from acquiring. The findings of the primary judge plainly support the drawing of that inference of fact[201].

169 The arrangement also rewarded the other parties to the "system of conduct". It ensured, in substance, that the appellant's equity in the Narre Warren properties would ultimately be used to pay fees to AJ Lawyers, Mr Zourkas, Mr Kiatos and Mr Topalides, and interest to the respondents. In the particular circumstances that prevailed, not only was the fee paid to Mr Zourkas "obscene"[202], but the same description should apply to the fees charged by AJ Lawyers. As a result, the arrangement secured the only outcome that it objectively could: the enrichment of individuals at the expense of the appellant and his loss of two properties and potentially also his home. The appellant was never warned that this was a likely, or indeed even a possible, outcome. Such a warning or explanation should have been given. In such circumstances, there has been an unconscionable exploitation of the appellant's special disadvantage. The primary judge's finding that Mr Jeruzalski's conduct was unconscionable was correct.

170 The question then is whether, as the Court of Appeal found, the two Certificates can operate to undo this conclusion. The Legal Certificate was directed at two matters. The first was confirmation that the appellant had received the "Security Documents" and had been given an opportunity to read them. The term "Security Documents" was defined to mean the loan agreement and the debenture charge. The second matter was directed at confirmation that the appellant understood the "terms, nature and effect" of the Security Documents and, in particular, that the respondents would be entitled to call on the appellant, as guarantor, to recover monies owed in the event of VBC's default.

171 This Certificate suffered from a critical defect. Whilst on its face it confirmed that the appellant had understood the effect of the Security Documents, it said nothing at all about VBC's or the appellant's capacity to service the loans. It did not address the suspicion held by Mr Jeruzalski and it did nothing to reverse his conclusion that the transaction was risky and dangerous for the appellant. The Certificate avoided these issues.

172 On its face, the Financial Certificate purported to confirm that Mr Topalides had explained the financial risks being assumed by VBC by executing the "security documents". But again, this Certificate suffers from two critical defects. First, it stated that the advice was given to VBC. It made no reference to the appellant

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201 See *English and Scottish Mercantile Investment Company v Brunton* [1892] 2 QB 700 at 707-708 per Lord Esher MR; *Pereira v Director of Public Prosecutions* (1988) 63 ALJR 1 at 3 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; 82 ALR 217 at 219-220.

202 *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150 at [290] per Robson J.

receiving any advice in his capacity as guarantor. According to this Certificate, the appellant never received any independent advice about the financial risks he was assuming. The respondents sought to avoid that conclusion by contending that the appellant was the sole director and shareholder of VBC and that the advice must have been given to him by Mr Topalides. With respect, there is no evidence which suggests that Mr Topalides ever gave such advice. Indeed, on the findings of the primary judge, it is possible that no advice was given at all. Secondly, this Certificate must be judged from the perspective of Mr Jeruzalski. He knew that the appellant was to be the guarantor of the loans and he suspected that the appellant had no income. But like the Legal Certificate, nothing in this Certificate addressed VBC's or the appellant's ability to service the loans. Nor again did it address the dangerous nature of the transaction from the appellant's perspective. The somewhat glib reference in it to the "financial risk" to be "assumed" falls far short of any written record of the warning or explanation that was needed here. As such, the contents could not undo in any way Mr Jeruzalski's suspicion or his belief that the transaction was dangerous.

173 Given these defects or shortcomings, the Court of Appeal, with great respect, erred in deciding that Mr Jeruzalski was entitled to rely on the Certificates and not make enquiries about the appellant's personal and financial circumstances. Neither Certificate provided Mr Jeruzalski with any comfort or assurance that VBC or the appellant would be able to service the loans and not default. By their terms, neither Certificate could have led Mr Jeruzalski to believe that the guarantee, from the perspective of the appellant, had ceased to be risky or dangerous. Neither Certificate had the effect of validating the system used by AJ Lawyers on the facts of this case. Instead, each Certificate was part of the very "system of conduct" designed to inhibit the grant of equitable relief arising from the unconscionable conduct of Mr Jeruzalski and AJ Lawyers in the circumstances of this case.

174 The appeal must be allowed. I agree with the orders proposed by Kiefel CJ, Keane and Gleeson JJ.