UNCONSCIONABLE CONDUCT: THE LATEST IN AN EVER-DEVELOPING LANDSCAPE

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The concept of unconscionability is of such broad compass, and involved in so varied an area of law, that it can be at times a difficult thing to grasp. Whether one seeks to bring or to defend against a claim for unconscionable conduct, it remains important to understand the elements of the cause of action and the different ways in which it might apply to the type of case at hand. In exploring some key cases in the development of the doctrine in Australia, this paper discusses the various elements of the cause of action, at general law and pursuant to statute. The paper then discusses how the concept has been treated more recently in the decisions of the Victorian Court of Appeal, the Federal Court and the High Court.

History of the doctrine

The concept of unconscionable conduct has been described as having 'a very long pedigree'.[1] This paper seeks to identify some recent developments in the doctrine and some possible developments to come, as well as some practical suggestions for bringing or defending claims for unconscionable conduct.

It is beyond the focus of this paper to delve in any great detail into the early history of the doctrine or into the varied discussion on the subject, both in case law and in academia. There are a number of textbooks which can provide a useful overview of the doctrine and its key principles. That being said, in order to place our discussion of some of the more recent developments in context it is useful to review some of the key milestones in the evolution of the doctrine to date.

Beginning in the 17th century, and in the context of the exercise by the Court of Chancery of jurisdiction to set aside inadequate transactions affecting 'expectants and heirs' — that is, persons 'who raised money by selling a reversionary interest (usually in land) before [they] became entitled to

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[1] Justice Chris Maxwell, 'Equity and Good Conscience: The Judge as Moral Arbiter and the Regulation of Modern Commerce' (Victoria Law Foundation Oration, Supreme Court of Victoria, 14 August 2019) 1.

possession of the interest'[2] — the doctrine of unconscionability eventually came to extend to 'all cases in which the parties to a contract have not met upon equal terms'.[3] An early example of the application of the doctrine in Australia was in *Blomley v Ryan*.[4] There, the respondent, of advanced age and 'sodden with rum and sick',[5] had entered into a contract for sale of grazing land to the appellant for well below its market value. The majority of the High Court held that the parties had met on unequal terms and that the appellant, who had sought to uphold the transaction, had together with his agent '[taken] advantage of their relatively superior strength and made undue use of it, and by such unconscientious behaviour procured the purchase of the property at a great undervalue'.[6]

So far as the ability to challenge a transaction was concerned, Fullagar J, for the majority, characterised the difference in approach between the common law (contract) and equity as follows:

> To the common law the transaction in question might be void or voidable, but the primary question was as to the reality of the assent of the person resisting enforcement of the contract. Equity traditionally looked at the matter rather from the point of view of the party seeking to enforce the contract and was minded to inquire whether, having regard to all the circumstances, it was consistent with equity and good conscience that he should be allowed to enforce it.[7]

So far as the notion of parties meeting on unequal terms was concerned, his Honour provided examples of situations where one party might suffer a serious disadvantage in relation to another. These included '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'.[8] His Honour did not seek to list exhaustively the categories of special disadvantage, and it is crucial when identifying a special disadvantage to bear in mind that there must on the facts be something 'seriously affecting the ability of the innocent party to make a judgment as to that party's own best interests'.[9]

Several years after *Blomley v Ryan*, a majority of the High Court in *Commercial Bank of Australia v Amadio* ('*Amadio*') held that a mortgage and guarantee entered between the Amadios — a relatively

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[2] *Guild & Stasiuk* [2020] FamCA 348, [273].

[3] Thomas Snow, *White and Tudor's Equity Cases* (Sweet & Maxwell, 7th ed, 1897) vol 1, 313, quoted in *Blomley v Ryan* (1956) 99 CLR 362, 386.

[4] (1956) 99 CLR 362.

[5] Ibid 382.

[6] Ibid 392.

[7] Ibid 401–2.

[8] Ibid 405.

[9] *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 77 [55]–[56].

uneducated couple for whom English was a second language — and their bank was the product of an unconscionable bargain.[10] In that case, Deane J enunciated what have become the guiding principles for the doctrine so far as generally are applied by Australian courts. His Honour said:

> The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable …[11]

Later, the decision in *Louth v Diprose*[12] — the first of what might be termed the "'clouded judgment" cases'[13] — involved a finding of unconscionable conduct in the context of a personal relationship featuring romantic overtones. In *Louth v Diprose*, the High Court upheld the decision of the Supreme Court of South Australia on a finding of unconscionability. It was a particular passage in the judgment of King CJ, to which Toohey J referred, which perhaps best summarised the situation:

> This litigation results from a deep and persistent, albeit unrequited, emotional attachment of the [respondent] to the [appellant], the [respondent's] bizarre behaviour in pursuance of that attachment and the [appellant's] response to that behaviour.[14]

There was, in that case, more than the mere 'ordinary relationship of a man courting a woman';[15] there was, in the extraordinary facts of the case, an 'atmosphere of crisis' — albeit a false one deliberately created by the appellant, the Court considered — which compelled the respondent to buy gifts, and eventually real estate, for the appellant.[16] It might be that such an extreme is necessary; in *Mackintosh v Johnson*,[17] on the other hand, the Victorian Court of Appeal rejected a claim of unconscionability in circumstances where an elderly man had lavished money on a woman almost 30 years his junior; the Court held that '[s]omething more than mere infatuation and consequent foolish

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[10] (1983) 151 CLR 447 ('*Amadio*').

[11] Ibid 474.

[12] (1992) 175 CLR 621.

[13] Dilan Thampapillai, 'What Becomes of the Broken-Hearted? Unconscionable Conduct, Emotional Dependence, and the "Clouded Judgment" Cases' (2016) 34(1) *Law in Context* 76, 76.

[14] *Diprose v Louth [No 1]* (1990) 54 SASR 438, 439.

[15] *Louth v Diprose* (1992) 175 CLR 621, 629–30.

[16] Ibid 638.

[17] (2013) 37 VR 301.

action based on clouded judgment' was needed to establish an impaired judgment which might constitute a special disadvantage.[18] Findings of unconscionability are based on a full appraisal of the facts,[19] and it is risky to attempt to draw a merely superficial comparison between the facts of one's own case with the facts in cases where a finding of unconscionability has been made.

Further muddying the ability to grasp at the essential concepts for the cause of action is the earlier decision in *Bridgewater v Leahy* ('*Bridgewater*').[20] That case involved the provision in the will of Bill York, a grazier, in favour of his nephew and which the High Court described as 'an option to purchase the whole of the testator's rural interests at a substantial undervalue'.[21] At trial, the judge found that the nephew, in taking up the option, had not acted unconscionably.

The majority of the High Court disagreed. The Court noted that it was both the 'goal [of the testator] to preserve his rural interests intact and his perception that [his nephew] was the candidate to provide reliable and experienced management thereof' which together formed 'significant elements in his emotional attachment to and dependency upon [his nephew]'.[22] This was despite Mr York having been medically assessed as being 'of sound mind and capable of making decisions about his personal affairs'.[23]

Bridgewater is noteworthy (and, potentially, problematic)[24] because it is an example of a finding of unconscionability as between persons who were not the same as the parties in the proceeding; the claim was brought by persons interested in Mr York's will who, although capable of being impacted if the impugned transaction under the will were allowed to stand, had themselves not dealt with the testator in respect of the transaction.

More recently, in *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* ('*Lux Distributors*'),[25] the Full Court of the Federal Court overturned a determination of the primary judge that there had been no unconscionability in the context of 'sale of vacuum cleaners by direct salesmen

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[18] Ibid 316.

[19] 'A court of equity … looks to every connected circumstance that ought to influence its determination upon the real justice of the case': *The Juliana* (1822) 2 Dods 504; 165 ER 1560, 1567 (Lord Stowell).

[20] (1998) 194 CLR 457 ('*Bridgewater*').

[21] Ibid 463.

[22] Ibid 493.

[23] Ibid 465.

[24] See CEF Rickett, '*Bridgewater v Leahy* — A Bridge Too Far?' (2012) 31(2) *University of Queensland Law Journal* 233.

[25] [2013] FCAFC 90 ('*Lux Distributors*').

to three elderly women in their own homes'.[26] Unlike in the cases discussed above, *Lux Distributors* involved a claim of unconscionable conduct under consumer legislation — specifically, s 21 of the Australian Consumer Law ('ACL') as contained in sch 2 of the *Competition and Consumer Act 2010* (Cth) as well as its predecessor provision in s 51AB of the *Trade Practices Act 1974* (Cth).

A key feature of the decision in *Lux Distributors* was the Full Court's reference to both state and federal legislation governing the type of transaction which had occurred, that is, direct selling of goods at a consumer's premises. For the Court, such legislation formed part of the overall matrix of factors to be borne in mind in determining whether the conduct in question was unconscionable in the sense of it contravening community standards of good conscience. In identifying a number of errors in the primary judge's approach, the Full Court in *Lux Distributors* noted that the judge had failed to accord weight to the fact of the dealers' contravention of legislation governing in-home sales;[27] the Court noted that '[i]n assessing the conscionability or not of a particular instance of such selling, the compliance with public regulations will be centrally important'.[28] The Court said:

> The task of the Court is the evaluation of the facts by reference to a normative standard of conscience. That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with consumers. The content of those values is not solely governed by the legislature, but the *legislature may illuminate, elaborate and develop those norms and values by the act of legislating, and thus standard setting*. The existence of State legislation directed to elements of fairness is a fact to be taken into account.[29]

The decision in *Lux Distributors* therefore represents an instance of a court's willingness to measure standards of good conscience by reference to legislation which governs the conduct in question, but which does not itself give rise to the cause of action for unconscionability. It serves as a reminder of the need to make a broad enquiry, covering all the circumstances of the case, when determining whether there has been unconscionable conduct.

Remedies for unconscionable conduct

It being an equitable doctrine, the remedies for unconscionable conduct are the subject of broad discretion and are informed by equitable concepts. Among other things, a court will not tend to grant a

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[26] Ibid [1].

[27] Ibid [68].

[28] Ibid [71].

[29] Ibid [23] (emphasis added).

remedy beyond what is required to do justice in the case,[30] and a court has discretion to order any form of relief provided that it is open to the court on the parties' pleadings.[31] Remedies at general law include equitable compensation or damages, injunctions, declarations, specific performance, and trusts and the formalising of interests in property.

Where an action is brought on a statutory basis — a discussion of which follows in the next part of this paper — remedies are governed by that statute. In the case of a claim under the ACL, for example, the statute sets out remedies which the court may grant including damages (s 236) or 'such order or orders as the court thinks appropriate', provided such order or orders are compensatory in whole or in part as to the loss suffered or otherwise are preventative of or reduce loss suffered or likely to be suffered (s 237). Section 243 sets out some of the kinds of orders a court may make, including setting aside or varying contracts or ordering a refund of money.[32]

The upshot of s 237 is that, subject to the rather broad constraints in s 237(2), the power of the court to grant a remedy is almost as unfettered as it is at general law. Practically speaking, statutory and general law remedies might be seen as substantially the same; it would be unusual for a court ruling on a general law claim for unconscionability to order relief dissimilar to the statutory remedies under the ACL, that is, something which seeks to address the loss which has been suffered or is likely to be suffered.

Bases for making a claim

As discussed above, the doctrine of unconscionability takes its root in equity. A claim of unconscionable conduct brought on this basis broadly involves proof by the claimant of:

(1) a special disadvantage or special disability on the part of the claimant; and

(2) knowing exploitation by the defendant of that circumstance, with such knowledge being either actual or constructive.[33]

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[30] *Bathurst City Council v PWC Properties Pty Limited* (1998) 195 CLR 566, 585.

[31] *Banque Commerciale SA v Akhil Holdings Ltd* (1990) 169 CLR 279.

[32] So far as financial services are concerned, equivalent provisions to ss 236, 237 and 243 appear in the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') ss 12GF, 12GM(1)–(5) and 12GM(7), respectively.

[33] See *Amadio* (n 10) 474 (Deane J).

If the claimant can prove such matters, the onus shifts to the defendant to show that in all the circumstances the conduct complained of was 'fair, just and reasonable'.[34]

At statute, both the ACL and the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') contain provisions prohibiting unconscionable conduct in various transactions. Elsewhere, although beyond the focus of this paper, other statutory regimes contain prohibitions on unconscionable conduct — see, for example, pt 9 of the *Retail Leases Act 2003* (Vic).

Unconscionable conduct under the ACL

Part 2-2 of the ACL relates to unconscionable conduct and includes four provisions.[35] They, and the general effect of their terms, are as follows:

(1) section 20, which prohibits a person in trade or commerce engaging in conduct which is 'unconscionable … within the meaning of the unwritten law from time to time';

(2) section 21, which prohibits a person in trade or commerce and in connection with the supply or possible supply of goods or services or the acquisition or possible acquisition of goods or services engaging in 'conduct that is, in all the circumstances, unconscionable';

(3) section 22, which lists matters to which a court may have regard when ascertaining whether there has been contravention of s 21; and

(4) section 22A, which states that the operation of s 4 — which deals with representations as to future matters — applies to ss 21 and 22 in the same way as it applies to other provisions about the making of representations under the ACL.

Sections 20 and 21 may seem similar in some respects, and the temptation may be to bring a claim under both provisions for the sake of comprehensiveness. There are, however, differences between the provisions which suggest a more economical approach to bringing a claim.

The clearest difference is that whereas s 20 refers to conduct which is unconscionable 'within the meaning of the unwritten law from time to time', s 21 is not so limited. Section 21 imports an arguably broader enquiry for three reasons. First, s 21(4)(a) states that the provision 'is not limited by

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[34] Ibid.

[35] Unconscionable conduct is also dealt with elsewhere in two other provisions of the ACL: one in the context of the imposition of pecuniary penalties if the court is satisfied that a person has engaged in unconscionable conduct (s 224) and the other a provision which empowers a court to order that a person be disqualified from managing a corporation if the person has engaged in unconscionable conduct (s 248).

the unwritten law relating to unconscionable conduct'. Secondly, the provision refers to 'all the circumstances' of a case. Thirdly, while a court's determination of whether or not there has been contravention of s 21 can be governed by the factors listed in s 22, those factors are neither exclusive nor mandatory for a court's consideration.

Besides the factors listed in s 22 — which constitute matters to which a court may have regard when determining a claim under s 21 — s 21 itself contains a number of matters informing the court's assessment. These are:

(1) section 21 does not apply to conduct that is engaged in *only* because the defendant to a claim instituted legal proceedings or referred matters to arbitration in relation to the supply/possible supply/acquisition/possible acquisition of goods or services (s 21(2));

(2) a court *must not* have regard to matters which were not reasonably foreseeable at the time of the alleged contravention (s 21(3)(a));

(3) a court may have regard to conduct or circumstances which existed before commencement of the provision (s 21(3)(b));

(4) a court may have regard 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' (s 21(4)(b)); and

(5) a court may, in considering whether conduct to which a contract relates is unconscionable, consider matters beyond (merely) the formation of the contract, including the terms of the contract and the manner in which, and extent to which, the contract is carried out (s 21(4)(c)).

When bringing a claim under s 21, it is important to consider the above factors; they will inform the kinds of evidence you may need to muster in support of your case.

One other thing to bear in mind is that, as stated above, s 22A imports the operation of s 4 for actions for unconscionable conduct under the ACL. Section 4 provides that where a person makes a representation as to a future matter and does not have reasonable grounds for doing so, the representation is deemed to have been misleading. The person making the representation is taken not to have had reasonable grounds for making it 'unless evidence is adduced to the contrary'. The upshot of this is that s 22A can support an allegation of unconscionable conduct on the basis the conduct has involved, solely or in part, one or more representations as to future matters which are deemed to have been misleading until proven otherwise.

Actions for unconscionable conduct under the ACL must be brought within six years after the day on which the cause of action accrues. Here, a cause of action accrues when the loss arising from the relevant conduct is incurred. This is because, as a starting point, 'at common law, a cause of action accrues once the plaintiff is able to issue a statement of claim capable of stating every existing fact which is necessary for the plaintiff to prove to support his or her right to judgment.'[36] So far as unconscionable conduct is concerned, 'a cause of action in respect of which causation of loss is an essential element requires the pleading of the material facts which are said to give rise to the causal connection'.[37] Both ss 236 and 237 are driven by the incurring (or apprehended incurring) of loss and damage, so the element of loss and damage is the final thing to fall into place before the cause of action can be said to have accrued.

Case illustration

In *Good Living Company Pty Ltd as trustee for the Warren Duncan Trust No 3 v Kingsmede Pty Ltd* ('*Good Living Company*'),[38] an appeal relating to a claim of unconscionable conduct, the Full Court of the Federal Court described not only the principles relating to unconscionable conduct generally but also the different approaches to determining contraventions of ss 20 and 21 of the ACL.

The respondents in that case owned premises in Blight Street, Sydney. The respondents leased the premises to Chop 1 Pty Ltd ('Chop 1'), which ran a restaurant. The lease included terms that:

(1) Chop 1 was to provide an unconditional bank guarantee to secure performance of its obligations under the lease;

(2) Chop 1 would be in default if a receiver or manager were appointed to any of its assets; and

(3) if Chop 1 defaulted, the respondents were entitled to call upon the bank guarantee in whole or in part and without notice to Chop 1.

In December 2012 and pursuant to the terms of the lease, the Commonwealth Bank issued a bank guarantee in favour of the respondents in the sum of $100,000.

In August 2014, the appellants — a corporate group — acquired Chop 1. The respondents did not know of this acquisition until some time later. As part of the acquisition, the appellants guaranteed Chop 1's performance under the bank guarantee.

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[36] *McQueen v Mount Isa Mines Ltd* [2018] 3 Qd R 1, 21, citing *Central Electricity Board v Halifax Corporation* [1963] AC 785, 806.

[37] *McQueen v Mount Isa Mines Ltd* [2018] 3 Qd R 1, 25.

[38] [2021] FCAFC 33 ('*Good Living Company*').

In June 2016, receivers and managers were appointed over each of the companies in the appellants' corporate group, including Chop 1. In time, the receivers and managers sought to sell Chop 1's restaurant business and, in doing so, to create a new lease or assign the existing lease of the premises. There were protracted, and ultimately fruitless, negotiations between the respondents and the receivers and managers to this end.

In October 2016, the respondents notified both Chop 1 and its receivers and managers that, because Chop 1 had become subject to receivership, it had defaulted under the terms of the lease. The respondents signalled an intention to terminate the lease.

Between October and December 2016, the respondents negotiated with a new tenant for the premises. During the course of those negotiations, the receivers and managers agreed to pay the respondents $500,000 upon sale of Chop 1's business to the new tenant. According to the respondents, this payment was intended to compensate the respondents for various expenses and losses the respondents claimed they had suffered as a result of Chop 1's default. The money was to be paid pursuant to the terms of a deed of settlement and release which was scheduled for completion on 19 December 2016.

On 16 December 2016 — a few days before the deed of settlement and release was due for completion — the respondents signalled their intention to call upon the bank guarantee. In their evidence at trial, the respondents maintained that both the $500,000 settlement sum and the ability to call upon the $100,000 bank guarantee were part of a 'package deal'.

In dealing with Chop 1's receivers and managers, the respondents did not know of Chop 1's acquisition by the appellants until after negotiating the above arrangements, nor of the appellants' guarantee of Chop 1's performance under the bank guarantee.

In January 2017 and following disagreement with the receivers and managers about the respondents' entitlement to do so, the respondents formally called upon the bank guarantee by hand-delivering it to the Commonwealth Bank and obtaining a cheque for $100,000. Soon after, the Bank demanded payment of that amount from Chop 1 pursuant to the terms of the guarantee.

Ultimately, in January 2018, the appellants paid the guaranteed moneys to the Bank plus interest which had accrued over the year since the guarantee was called upon.

The appellants' claim

The appellants commenced proceedings in the Federal Court. They claimed the respondents had engaged in unconscionable conduct in contravention of ss 20 and 21 of the ACL by:

(1) continuing to demand, and not withdrawing their call upon, the guarantee in circumstances where they had received $500,000 pursuant to the deed of settlement and release; and

(2) collecting and retaining the $100,000 from the bank guarantee.

The appellants also alleged, in related fashion, that the respondents had been unjustly enriched in their receipt and retention of the guaranteed moneys.

The primary judge rejected the claim of unconscionable conduct on both bases. The judge held that there was no inequality in bargaining power and nor was there any special disadvantage which had been exploited. The judge held that the claim under s 20 of the ACL could not succeed for the same reasons it could not succeed under s 21. The appellants appealed to the Full Court.

The matter was heard by Allsop CJ, Besanko and Jagot JJ. In giving separate reasons, their Honours were unanimous in their dismissal of the appeal. A number of key matters are apparent from the reasons.

Subjectively and objectively reasonable actions

Jagot J gave a substantive judgment which included a detailed outline of the facts to which the other judges referred. In dismissing the appeal, her Honour held that there were two 'essential problems' in the appellants' case.

First, the respondents had 'good reasons' to call upon the guarantee in December 2016. Her Honour considered that such reasons were both subjective — that is, based on the belief of the particular individual charged with making the decision on behalf of the respondents to call upon the guarantee — and objective — namely, that 'the respondents as parties to a commercial deal … remained at real commercial risk until all "pieces of the puzzle" [as the respondents had described it] had been finalised'.[39]

Second, the appellants had executed the deed of settlement and release (which provided for payment of the $500,000) while knowing about the respondents' position with respect to the guarantee; the terms of the lease permitted the respondents to call upon the guarantee. The appellants submitted that because the respondents could call on the guarantee without notice to Chop 1, the appellants were at a significant disadvantage and the respondents exploited this. In rejecting this submission, Jagot J cited

[39] Ibid [98].

Gleeson CJ in *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd*,[40] where the Chief Justice said:

> A person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, simply because of inequality of bargaining power. Many, perhaps even most, contracts are made between parties of unequal bargaining power, and *good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests*.[41]

Jagot J noted that the appellants 'knew that they were providing security for an unconditional bank guarantee which could be exercised without notice to Chop 1 in the event of default';[42] the respondents, it seems, had not acted unconscionably simply because they insisted on their rights under the terms of the lease with Chop 1 in a way which ultimately affected the appellants due to the appellants having guaranteed Chop 1's performance.

The relevance of the source of power said to have been exercised unconscionably

Besanko J noted that 'the nature of the commercial instrument containing the power, the exercise of which is said to involve unconscionable conduct, is clearly relevant.'[43] Based on the evidence of the nature of the guarantee itself, his Honour could identify no bad faith nor any improper purpose in the respondents' decision to call upon the guarantee. His Honour quoted the earlier decision of the Full Court in *Clough Engineering Limited v Oil and Natural Gas Corporation Limited*,[44] where it was said:

> The wide purpose of the performance bank guarantees and their character as reflecting an allocation of risk and a provision of security to their holder militate against any argument as to disproportion in their exercise.[45]

His Honour conceded that that the respondents had enjoyed 'a good, if not very good, commercial bargain' in being able to claim the $500,000 under the deed of settlement and release in addition to the $100,000 the subject of the bank guarantee.[46] However, without any other element which might trigger the Court's equitable jurisdiction — unfair dealing, trickery, bad faith or misleading conduct

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[40] (2003) 214 CLR 51.

[41] Ibid 157 (emphasis added).

[42] *Good Living Company* (n 38) [114].

[43] Ibid [20].

[44] [2008] FCAFC 136.

[45] Ibid [138].

[46] *Good Living Company* (n 38) [23].

— the respondents' ability to craft and benefit from a good commercial bargain did not render their actions unconscionable.

Other key principles

In the Chief Justice's separate reasons, Allsop CJ set out several factors informing the decision to dismiss the appeal. A number of those factors reflect principles relating to claims of unconscionable conduct generally, and of the differences between ss 20 and 21 specifically. Those principles, as drawn from his Honour's judgment, are as follows.

First, whether a claim is brought under s 20 or s 21, 'the proper judicial technique involved is the technique of equity described in [authorities including the decision in *Paciocco v Australia and New Zealand Banking Group Limited* ('*Paciocco*')[47]]' — namely, that a court must pay close attention to the facts.[48]

Second, the Full Court has 'expressed in a consistent way in at least seven … judgments' the principles of the application of s 21 and statutory unconscionability including, again, in *Paciocco*.[49]

Third, 'until the High Court says otherwise the principles informing s 20 and the unwritten law, and those informing s 21 and the concept of statutory unconscionability are related but distinct and different.'[50] In particular, 'the principles of equity governing the setting aside of transactions by reason of unconscionable conduct [in cases such as *Amadio*] inform but do not control s 21'.[51] His Honour noted that the specific difference is that whereas s 20 requires the presence of a special disability which the stronger party unconscientiously exploits, s 21 'involves an evaluative inquiry which is not so limited'.[52]

Fourth, in rejecting the appellants' claim under s 21, his Honour quoted a passage from an earlier Full Court decision in *Unique International College Pty Ltd v Australian Competition and Consumer Commission*[53] where the Full Court described what was meant by the notion of behaving 'unconscionably'. Allsop CJ observed that the Full Court in that case 'did not introduce a notion of

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[47] (2015) 236 FCR 199.

[48] *Good Living Company* (n 38) [2].

[49] Ibid [3].

[50] Ibid [4].

[51] Ibid.

[52] Ibid.

[53] (2018) 266 FCR 631.

moral obloquy or a requirement for any pre-existing disability or vulnerability. Rather, it recognised the seriousness of an evaluative judgment that conduct was against or offended good conscience'.[54] Fifth, in determining whether there has been unconscionable conduct for the purposes of s 21, a court is to consider 'the totality of the circumstances' which include the matters set out in s 22 of the ACL and 'the values of the common law and equity in which context the statute sits'.[55]

Finally, the legislative regime contemplates that the threshold for unconscionable conduct is high:

> [T]he conduct must depart sufficiently from societal norms of acceptable commercial behaviour as to be characterised as against or as offending conscience, recognising that such is a matter which Parliament has considered sufficient to warrant censure by the imposition of a civil penalty to deter such conduct. There may be more or less serious manifestations of unconscionable conduct.[56]

Turning to the facts of the case, Allsop CJ held that there had been no unconscionable conduct under either provision of the ACL. His Honour noted that '[t]he appellants were not the respondents' commercial counterparties, and were not known to the respondents … until after the negotiation of the relevant arrangements'.[57] Allsop CJ considered that the respondents 'acted in their own interests, without sharp practice, honestly and openly, even if in an uncompromising way'.[58]

Unjust enrichment, as distinct from unconscionability

Finally, with respect to the appellants' claim that the respondents in cashing in the bank cheque and retaining the money had been unjustly enriched, Allsop CJ was keen to draw a distinction between the concepts of unjust enrichment and unconscionable conduct. His Honour stated:

> That unjust enrichment, if present, may play a part in the evaluation of all the circumstances as to whether conduct is or is not unconscionable is a far cry from equating the presence of unjust enrichment with the consequence of unconscionable conduct.[59]

While the success of a claim of unconscionable conduct under the ACL will depend on all the facts of a case, and while a court in determining such a claim will have broad equitable discretion, *Good Living Company* sets out a number of principles worth bearing in mind when making, or defending,

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[54] *Good Living Company* (n 38) [7].

[55] Ibid [8].

[56] Ibid [10].

[57] Ibid [11].

[58] Ibid.

[59] Ibid [12].

such a claim. Besides the several factors apparent from the judgment of Allsop CJ — including the distinction between ss 20 and 21 of the ACL and the fact that the latter provision calls for a broader enquiry — the other judges' reasons suggest:

(1) the importance of looking to the reasonableness of the actions of the defending party, both subjectively and objectively; and

(2) the relevance of the particular source of power said to have been exercised unconscionably.

Unconscionable conduct under the ASIC Act

Almost identical statutory prohibitions against unconscionable conduct to those which appear in ss 20 and 21 of the ACL appear in ss 12CA and 12CB of the ASIC Act, in the context of 'financial services.'

Section 12CA of the ASIC Act is effectively a mirror provision to s 20 of the ACL (that is, the prohibition of unconscionable conduct within the meaning of the unwritten law, in trade or commerce) save that the latter applies in the context of 'conduct in relation to financial services'.

Similarly, s 12CB of the ASIC Act is effectively a mirror provision to s 21 of the ACL (that is, the statutory prohibition against unconscionable conduct in trade or commerce). The key difference in this case is that the ACL provision applies in relation to the actual or possible supply or acquisition of *goods* and services, whereas the ASIC Act provision applies in relation to the actual or possible supply or acquisition of *financial* services.

Likewise, the 'matters the court may have regard to' for the purpose of the statutory prohibition are the same in both s 22 of the ACL and s 12CC, save that where the former refers to 'goods and services', the latter refers to 'financial services'.

The distinction between the ACL and ASIC Act provisions is therefore, at first blush, simple enough — but that is before one grapples with the question: What are 'financial services' (and what are they not)?

It is important to answer this question correctly because the ACL and ASIC Act provisions are mutually exclusive; if the ASIC Act applies, the ACL provisions are ousted. This is because, with certain exceptions (which are not relevant to this analysis), s 131A of the *Competition and Consumer Act 2010* (Cth) provides that the ACL does not apply to the actual or possible supply of services that are financial services.

The expression ‘financial service’ is ultimately defined, albeit in a somewhat convoluted fashion, in s 12BAB of the ASIC Act as including, among other things, the provision of financial product advice, the dealing in a financial product and the provision of a service that is otherwise supplied in relation to a financial product. ‘Financial product’, in turn, is defined in s 12BAA of the ASIC Act as meaning ‘a facility through which, or through the acquisition of which, a person … makes a financial investment …; manages financial risk [or] makes non-cash payments.’

The question of what is meant by ‘financial services’ is one which arose in the recent Federal Court case of *Wade v J Daniels and Associates Pty Ltd* (‘*Wade*’),[60] in which O’Bryan J noted that ‘[t]he application of the definition of “financial services” in the ASIC Act is often difficult, as the definition is framed in imprecise terms’.[61]

Neither party in *Wade*, it seems, was overly anxious to answer the question, with O’Bryan J noting that ‘[w]hile both parties submitted that nothing turns on which provisions applied, it is desirable to be clear about the application of the legislative provisions.’[62]

The Court in *Wade* then set out to answer the question, before landing on another vexed question, namely, what does the phrase ‘in relation to’ mean for the purpose of s 12BAB of the ASIC Act? O’Bryan J stated as follows:

> The phrase 'in relation to’ has an imprecise meaning. At its most broad, it can refer to any relationship between two things, whether direct or indirect. When used in a statute, the meaning of the phrase is determined by the nature and purpose of the provision in question and the context in which the phrase appears.[63]

Ultimately, the Court in *Wade* gave a narrow reading to the phrase ‘in relation to’ and, in so doing, found that, while the relevant home loan itself was a ‘financial product’, a ‘service involving negotiations with a bank to defer recovery action and to agree temporary reductions in repayments’ was *not* a ‘financial service’ for the purpose of s 12BAB of the ASIC Act, and the ACL provisions therefore applied. His Honour nevertheless concluded that ‘as noted earlier, it is not apparent that anything turns on which legislative provisions apply.’[64]

Practical observations

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[60] [2020] FCA 1708 (‘*Wade’*).

[61] Ibid [301].

[62] Ibid [297].

[63] Ibid [305] (citations omitted).

[64] Ibid [312].

In relation to the distinction between the ACL and the ASIC Act provisions, the following principles should be borne in mind:

(1) the ASIC Act picks up the ACL prohibitions against unconscionable conduct in trade or commerce, and applies them (to the exclusion of the ACL) in the context of 'financial services';

(2) it is not always straightforward to ascertain which Act applies due to the inherent vagaries in the definition of 'financial services';

(3) while it is important to ascertain which regime applies, it is ultimately an academic matter as the practical consequence is the same under both regimes; and

(4) while not using the above as an excuse for 'lazy pleading', practitioners may well plead the ASIC Act provisions with the ACL provisions as an alternative when there is legitimate doubt as to whether the relevant facts of a given case involve 'financial services.'

Recent developments in the law

Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd

One of the most significant recent developments in the law of unconscionability (in the statutory context in particular) was the decision of the Full Court of the Federal Court of Australia on 19 March 2021 — three days after handing down its decision in *Good Living Company* — in the case of *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* ('*Quantum*').[65]

Background

Quantum Housing Group Pty Ltd ('QHG') was (prior to its liquidation) in the business of facilitating investments by external investors in properties which qualified for government incentives by virtue of the Commonwealth Government's National Rental Affordability Scheme, which commenced in 2008. QHG was deemed to be an 'Approved Participant' for the purpose of building new rental accommodation premises and offering them at subsidised rental rates to low- and middle-income earners.[66]

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[65] [2021] FCAFC 40 ('*Quantum*').

[66] Ibid [12].

Between February 2017 and July 2018, QHG devised and implemented a 'roll up plan', the aim of which was 'to pressure all of the investors who had agreements with QHG to arrange to obtain property management services from property managers identified as approved by QHG' without disclosing to investors QHG's own commercial links with those property managers.[67] As part of the 'roll up plan', at least 450 investors received correspondence from QHG designed to pressure them into terminating their contractual relationships with their existing property managers, and which contained statements that were ultimately found to be misleading and deceptive. Any investors who refused were then issued with notices informing them that they were in default in their respective agreements with QHG.[68]

In 2019, the Australian Competition and Consumer Commission ('ACCC') commenced proceedings against QHG and its sole director, Ms Howe, alleging misleading representations in contravention of ss 18(1), 29(1)(l) and 29(1)(m) of the ACL and statutory unconscionable conduct in contravention of s 21 of the ACL.[69]

The decision at the first instance

On 9 June 2020, the primary judge found that QHG and Ms Howe had engaged in misleading and deceptive conduct in contravention of ss 18(1) and 29(1) of the ACL and imposed penalties of $700,000 on QHG and $50,000 on Ms Howe, who was banned from managing a corporation for three years.[70]

On the question of statutory unconscionability, however, and after having regard to the five separate judgments of the High Court in *Australian Securities and Investments Commission v Kobelt* ('*Kobelt*'),[71] the primary judge ultimately found that QHG's and Ms Howe's conduct did not contravene s 21 of the ACL because it lacked the requisite element of 'exploitation, victimisation, unconscientious conduct or a predatory state of mind'.[72]

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[67] Ibid [14].

[68] Ibid [14].

[69] Ibid [6].

[70] Ibid [8].

[71] [2019] HCA 18 ('*Kobelt*').

[72] *Quantum* (n 65) [21], citing *Kobelt* (n 71) [115], [116], [118] and [119] (Keane J), as cited at the first instance in *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd [No 2]* [2020] FCA 802, [23] (Colvin J).

The Full Court's decision

The ACCC appealed the primary judge's finding that there was no unconscionability. By its notice of appeal, the ACCC invited the Full Court to consider whether the primary judge had erred in:

(1) finding that statutory unconscionable conduct always requires exploitation by the stronger party of a special disadvantage or vulnerability of the weaker party;

(2) finding that financial disadvantage must be suffered by the person to whom the service was supplied (and not third parties, such as, in this case, the investors' existing property managers);

(3) failing to find that QHG's conduct was unconscionable and that Ms Howe was knowingly concerned in the s 21 contravention; and

(4) holding that statutory unconscionable conduct always requires exploitation of a vulnerability or disadvantage.[73]

The Full Court (constituted by Allsop CJ, Besanko and McKerracher JJ) ultimately upheld the appeal and overturned the primary judge's finding that QHG's conduct was not unconscionable within the meaning of s 21 of ACL.[74]

In doing so, the Full Court dismissed the suggestion that the High Court's judgments in *Kobelt* had mandated a requisite element of exploitation of vulnerability before a statutory unconscionability finding could be made. Rather, the Full Court concluded that the judgments in *Kobelt* were to be read in the context of the manner in which the Australian Securities and Investments Commission ('ASIC') had framed its case in that particular matter, 'as a natural consequence of the facts and circumstances as they presented themselves'.[75] After surveying the *Kobelt* judgments in some detail, the Full Court relevantly held:

> From the above we reject the proposition that *ratio* or seriously considered *obiter dicta* of a majority of the High Court, indeed, of any justice of the Court in *Kobelt* (other than Keane J) requires *in any case* that for conduct to be unconscionable by reference to ss 12CB and 12CC of the ASIC Act (or ss 21 and 22 of the ACL) there must be found some form of pre-existing disability, vulnerability or disadvantage of which advantage was taken.

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[73] *Quantum* (n 65) [28]–[29].

[74] Ibid [4], [97].

[75] Ibid [39].

> The notion of what is a 'pre-existing' vulnerability or disadvantage as we described it at [36] above introduces a requirement that the so-called victim of the conduct brings to the relationship an attribute of vulnerability in some factor and to some degree. Such vulnerability or disadvantage will often exist: as it did in the Anangu people in *Kobelt.* But their Honours' reasons in *Kobelt* (other than Keane J) do not express that requirement as a matter of principle as to the meaning of s 12CB (s 21).[76]

The Full Court's decision in *Quantum* was not appealed to the High Court, and now stands as authority for the proposition that the existence and exploitation of special disadvantage or vulnerability is *not* a prerequisite to a finding of statutory unconscionability, whether under the ACL or the ASIC Act.

The subsequent South Australian Court of Appeal decision in *Pitt v Commissioner for Consumer Affairs* ('*Pitt*')[77] lends further weight to the position that exploitation of a special disadvantage is not a prerequisite to a finding of statutory unconscionability. In *Pitt*, the Court heard an appeal regarding a claim of unconscionable conduct under the ACL. Although the necessity of special disadvantage was not raised in the grounds of appeal, the Court nonetheless analysed a number of authorities concerning the scope of the statutory test, including the various judgments in *Kobelt*, and stated:

> In summary, the High Court's reasons in *Kobelt* provide majority support for a potentially broader or more flexible approach to statutory unconscionability that does not require satisfaction of the two limbs of the equitable doctrine. However, in applying that approach, the court may in appropriate cases … nevertheless group and assess the relevant considerations by reference to the central concerns of those two limbs, namely the nature and extent of any vulnerability or disadvantage on the part of the weaker party, and the extent to which the stronger party's conduct involved exploiting or taking advantage of the weaker party's position.[78]

While the question of special disadvantage was raised on the special leave application in *Pitt*, in rejecting the application, Gageler, Gordon and Steward JJ expressed no view about the potential resolution of the question, finding that the case was not an appropriate vehicle for the grant of special leave.[79] However, and particularly given the varying approaches found in the five separate sets of reasons in *Kobelt*, the resolution of the *Pitt* special leave application in that manner suggests that the High Court might later revisit the question should an appropriate vehicle emerge.

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[76] Ibid [78]–[79] (emphasis in original).

[77] [2021] SASCA 24 ('*Pitt*').

[78] Ibid [166]. Earlier in its reasons in *Pitt*, the Court of Appeal characterised a majority of the High Court in *Kobelt* (Gageler J, Nettle and Gordon JJ, and Edelman J) as having 'favoured a broader or more flexible approach': [155].

[79] *Commissioner for Consumer Affairs v Pitt* [2021] HCATrans 209.

Stubbings v Jams 2 Pty Ltd

Background

The relevant facts of the case were as follows. The applicants were three lender companies which, in 2015, lent $1,059,000 to Victorian Boat Clinic Pty Ltd. Victorian Boat Clinic Pty Ltd was a shell company with no assets which was owned and controlled by the respondent, Jeffrey Stubbings.[80] The purpose of the loan was to enable Mr Stubbings to fund the purchase of a $900,000 residential property in Fingal.

The loan had an interest rate of 10 percent per annum and a default rate of 17 percent per annum. It was secured by a guarantee given by Mr Stubbings and supported by mortgages over the Fingal property and two existing properties which he owned in Narre Warren, Victoria.[81]

Ajzensztat Jeruzalski & Co ('AJ Lawyers') were lawyers who acted on behalf of various lender-clients and employed a system of structuring loans in such a way as to avoid the application of the National Credit Code (the 'Code'). They did so by advancing funds to companies.[82] They also sought to minimise the risk of loans being set aside as unconscionable by using an individual, Mr Zourkas, as an intermediary and avoiding direct contact between the borrowers and AJ Lawyers or their lender-clients.[83]

The director of the borrower company, Mr Stubbings, was unemployed and had nominal income, no assets (other than the Narre Warren security properties) and insufficient funds to pay the 10 percent deposit on the Fingal property or service the loan. This led Robson J to note:

> Any person with a modicum of intelligence, who was apprised of the actual nature of the loan and Mr Stubbings' circumstances, would not have proceeded with the loan. It was bound to end with serious losses and damage to Mr Stubbings.[84]

While AJ Lawyers did ensure that Mr Stubbings received legal and accounting advice by requiring a signed certificate, the reality was that the solicitor and accountant to whom Mr Stubbings was

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[80] *Jams 2 Pty Ltd v Stubbings [No 3]* [2019] VSC 150, [1] ('*Jams 2 (Trial)*').

[81] Ibid [21].

[82] Ibid.

[83] Ibid [11].

[84] Ibid [17].

'guided' by Mr Zourkas would only be paid if the loans proceeded, which Robson J found, incentivised them to provide certificates and undermined their independence.[85]

In September 2015, the loan was advanced, the mortgages to Commonwealth Bank on the Narre Warren properties were paid out, the Fingal property purchase was settled, and Mr Stubbings moved in. He paid the first two monthly interest instalments by selling valuables that he owned, before defaulting on the instalments.[86]

The lenders issued demands for payment before commencing proceedings against Mr Stubbings for recovery of the guaranteed debt (which now totalled $1,149,944.56) and possession of the three security properties.[87] After obtaining summary judgment, the lenders took possession of and sold Mr Stubbings' two Narre Warren properties.[88] The lenders' claim for recovery of the debt and possession of the Fingal property proceeded to trial.

The decision at the first instance

Robson J ultimately dismissed Mr Stubbings' claims under the:

(1) Code, holding that the Code did not apply to the loan pursuant to s 5(1) as the borrower was not a natural person or strata corporation, and s 7 of the Code meant it did not apply to the mortgage;[89] and

(2) ACL, holding that Mr Zourkas was Mr Stubbings' own agent and not the agent of the lenders or AJ Lawyers.[90]

On the question of unconscionability, however, Robson J upheld Mr Stubbings' claim that the loan, mortgage and guarantee were procured by unconscionable conduct, and ordered that they be set aside on the condition that Mr Stubbings not be unjustly enriched.[91]

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[85] Ibid [312].

[86] Ibid [23], [45].

[87] Ibid [26].

[88] Ibid [49].

[89] Ibid [245]–[246].

[90] Ibid [223].

[91] Ibid [317].

His Honour found that AJ Lawyers were deemed to have known Mr Stubbings' personal and financial circumstances by virtue of their 'wilful blindness' in adopting a system to avoid them becoming apprised of Mr Stubbings' personal and financial circumstances.[92] His Honour concluded that this system involved 'a high level of moral obloquy',[93] to adopt a phrase used by Spigelman CJ in *Attorney-General (New South Wales) v World Best Holdings Ltd*[94] and which had come to be considered in various subsequent decisions as a touchstone of unconscionability.[95] His Honour found that Mr Stubbings was in a position of special disadvantage in that he was 'unsophisticated, naïve and had little financial nous' and was 'unrealistic in the management of his financial affairs and demonstrated a complete lack of business understanding'.[96]

Mr Stubbings had also brought third-party claims against Mr Zourkas, Mr Topalides (an accountant), and Mr Kiatos (a solicitor). As to these claims, the trial judge:

(1) dismissed the claim against Mr Zourkas (for misleading and deceptive conduct pursuant to s 18 of the ACL);[97]

(2) upheld the claim against Mr Topalides for negligence[98]; and

(3) did not deal with Mr Kiatos as this claim was settled before the trial started.

No damages were ordered against Mr Topalides because Mr Stubbings 'was fully compensated by the orders made on his successful counterclaim'.[99]

In the Court of Appeal

In overturning the primary judge's finding that the loan transaction was unconscionable, the Court of Appeal (constituted by Beach, Kyrou and Hargrave JJA) had regard to the decision in *Kobelt* in which

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[92] Ibid [316].

[93] Ibid [313].

[94] (2005) 63 NSWLR 557.

[95] Albeit with some criticism: see, eg, *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15, [278].

[96] *Jams 2 (Trial)* (n 80) [264].

[97] Ibid [328].

[98] Ibid [339].

[99] *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200, [49] ('*Jams 2 (Court of Appeal)*').

the High Court had dismissed ASIC's appeal 4:3[100] and held that a book-up system was not unconscionable for the purpose of s 12CB of the ASIC Act.[101]

The Court of Appeal observed that in *Kobelt*:

> Kiefel CJ and Bell J did not make any pronouncement as to the content of the statutory prohibition against unconscionable conduct in s 12CB(1) of the ASIC Act. They decided the case on the obviously correct basis that, if conduct is unconscionable in equity, it will be unconscionable under s 12CB(1). … [T]he remaining four judges did not take such a narrow view of ASIC's case.[102]

The Court of Appeal also noted that, in his Honour's separate judgment in *Kobelt*, Gageler J (who formed part of the majority) indicated that he regretted his earlier adoption of the 'moral obloquy' requirement in *Paciocco*, now considering that such 'arcane terminology does nothing to elucidate the normative standard embedded in the section.'[103]

The Court of Appeal adopted the approach taken by Gageler J, Nettle and Gordon JJ and Edelman J in *Kobelt* (noting that only Gageler J was in the majority) as to the content of the statutory standard to be applied in assessing statutory unconscionability:

> The applicable standard is a normative one involving the evaluation of whether the conduct in question is 'so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience'; in the sense that a court should only take the serious step of denouncing conduct as unconscionable 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'.[104]

The Court of Appeal rejected the 'moral obloquy' requirement in favour of an evaluative judgment as to morality by reference to societal norms, stating:

> [W]e accept that the effect of *Kobelt* is that the previously accepted arcane terminology of 'moral obloquy' should no longer be used. But the requirement that the conduct in question be 'so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is

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[100] With Nettle and Gordon JJ and Edelman J dissenting.

[101] ASIC did not, in that case, allege that the conduct was unconscionable within the meaning of the unwritten law for the purpose of s 12CA of the ASIC Act.

[102] *Jams 2 (Court of Appeal)* (n 99) [83].

[103] *Kobelt* (n 71) [91] (Gageler J), cited in *Jams 2 (Court of Appeal)* (n 99) [85].

[104] *Jams 2 (Court of Appeal)* (n 99) [90] (citations omitted).

> offensive to conscience' should still be understood as requiring an evaluative judgment as to the morality of the allegedly unconscionable behaviour.[105]

Ultimately, the Court of Appeal upheld the lenders' contention that making asset-based loans available on a 'take it or leave it' basis was not unconscionable in this case, just as the High Court had found that bank fees charged to customers on a 'take it or leave it' basis were not unconscionable in *Paciocco*.[106]

The Court of Appeal confirmed that asset-based lending will not automatically be deemed to be unconscionable, but will simply be a 'relevant factor in deciding whether a particular loan resulted from unconscionable conduct' in all the circumstances of the case.[107] The Court of Appeal noted as follows, in finding that the trial judge had erred in characterising asset-based lending as generally involving moral obloquy:

> The judge's adverse view of the system of lending — in substance an adverse view of asset-based lending as a concept — overwhelmed (or as the first mortgagees contend 'infected') his determination of the unconscionability issue.[108]

The Court of Appeal also found that AJ Lawyers were entitled to rely on the signed solicitor and accounting certificates 'both as evidence that Stubbings had consulted a solicitor and an accountant for advice and as to the truth of the matters stated in the certificate' and determined that they therefore 'should not be fixed with knowledge of Stubbings' personal and financial circumstances such that default under the loans was inevitable, as the trial judge appears to have found'.[109]

Before the High Court

On 26 February 2021, Mr Stubbings filed a notice of appeal, in which he invited the High Court to determine whether the Court of Appeal had erred in:

(1) failing to properly take into account the primary judge's findings regarding the lenders' knowledge of, and wilful blindness to, his vulnerability;

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[105] Ibid [91] (citation omitted).

[106] Ibid [99].

[107] Ibid [2].

[108] Ibid [126].

[109] Ibid [132].

(2) failing to properly take into account the trial judge's advantage in assessing the character and demeanour of the witnesses in substituting its own finding as to Mr Jeruzalski's (of AJ Lawyers) knowledge; and

(3) finding that the lenders' asset-based lending system (including its wilful blindness element) was not unconscionable.[110]

The High Court, constituted by Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ, allowed the appeal and upheld the trial judge's finding that the respondents had engaged in unconscionable conduct.[111] Gordon J and Steward J, concurring in the result, gave separate reasons.

There was no dispute that Stubbings had been at a special disadvantage vis-à-vis the respondents. The issue was whether the respondents had exploited that disadvantage. It was of importance to that question that, by virtue of the respondents' way of doing business, the 'dangerous nature of the loans' was evident to the intermediary but not to Stubbings himself.[112] Given his position as agent, whatever knowledge the intermediary possessed could be attributed to the respondents.

Kiefel CJ, Keane and Gleeson JJ, in their Honours' joint judgment, articulated the Court's view that the respondents 'sufficiently appreciated [the] reality that the exercise of their rights under the mortgages to turn the appellant's disadvantages to their own profit was unconscionable'.[113] So far as concerned the question of knowledge — and, it followed, any conscious exploitation of Stubbings' situation by the respondents — their Honours held:

> A case for relief against an unconscionable attempt to enforce legal rights is established in this case because [the intermediary] had sufficient appreciation of the appellant's vulnerability, and the disaster awaiting him under the mortgages, that his conduct in procuring the execution of the mortgages is justly described as unconscientious.[114]

Themes in the Court's decision

The following themes emerge from the High Court's decision.

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[110] See Jeffrey William Stubbings, 'Appellant's Submissions', Submission in *Stubbings v Jams 2 Pty Ltd*, M13/2021, 16 April 2021, 1 <https://cdn.hcourt.gov.au/assets/cases/06-Melbourne/m13-2021/Stubbings_App.pdf>.

[111] *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6 ('*Jams 2 (High Court)*').

[112] Ibid [43] (Kiefel CJ, Keane and Gleeson JJ).

[113] Ibid [5].

[114] Ibid [46].

Preferring a trial judge's assessment of (oral) evidence. The High Court was mildly critical of the Court of Appeal's decision, wherein the Court of Appeal held that there had been no unconscionability, to apparently disregard some key pieces of evidence. The High Court also favoured the trial judge's assessment of the evidence relating to the intermediary's (and therefore the respondents') knowledge about Stubbings' special disadvantage. As Kiefel CJ, Keane and Gleeson JJ noted, '[t]he findings of the primary judge pertaining to [the intermediary's] state of knowledge were made after having had the benefit of hearing [him] in person over several days'.[115] The trial judge, it should be noted, had characterised the intermediary's oral evidence as having been given with 'apparent smugness'.[116]

Seeing past a person's efforts to shield themselves from liability. The High Court was unforgiving of the respondents' somewhat artificial (if not cynical) efforts to relieve themselves from having to further enquire about Stubbings' circumstances, including his company's fitness to service the loan. This was with respect not only of the respondents' use of an intermediary — the effect of which was that the respondent wilfully could be oblivious to Stubbings' circumstances — but also of the 'Financial Advice' and 'Legal Advice' certificates. The High Court characterised the certificates as 'mere "window dressing"' and an 'artifice'.[117] Adopting an expression used by the trial judge, Gordon J and Steward J variously described the respondents as having taken steps to 'immunise' themselves against any finding of unconscionability.[118]

Liability-distancing measures can have the opposite effect. Again on the point of the certificates, and whereas they may have been designed to shield the respondents from having to make further enquiries about Stubbings' circumstances (and, in that sense, to avoid any attribution of knowledge which could found a case of unconscientious exploitation), the High Court considered that the certificates in fact had the opposite effect; '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 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'.[119]

Guidance on the application of s 12CB of the ASIC Act. Kiefel CJ, Keane and Gleeson JJ (and, separately, Steward J) ruled that the trial judge had been correct in his finding of unconscionable

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[115] Ibid [47].

[116] *Jams 2 (Trial)* (n 80) [313]. Steward J, in his Honour's separate judgment, noted this impression by the trial judge: see *Jams 2 (High Court)* (n 111) [103], [123], [142].

[117] *Jams 2 (High Court)* (n 111) [49] (Kiefel CJ, Keane and Gleeson JJ).

[118] Ibid [59], [77], [80], [83] (Gordon J), [123], [152], [154] (Steward J). Kiefel CJ, Keane and Gleeson JJ, while not adopting that expression, were similarly critical of the apparent purpose of the certificates: see [49].

[119] Ibid [49] (Kiefel CJ, Keane and Gleeson JJ).

conduct at general law. For that reason, their Honours considered it unnecessary to determine whether the conduct also had contravened s 12CB of the ASIC Act (which prohibits conduct in connection with the provision or possible provision of financial services which is in all the circumstances unconscionable.)

Gordon J, giving separate reasons, applied s 12CB and held that the respondents' conduct breached that section in addition to the general law prohibition on unconscionable conduct. By virtue of s 12CB(4)(b) of the ASIC Act— which is capable of founding unconscionable conduct in the context of 'a system of conduct or pattern of behaviour' — Gordon J noted that there need not be loss or disadvantage in order for a system of conduct to be unconscionable. Her Honour held as follows, in relation to the relevant 'system' employed by the respondents:

> [The respondents] 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 avoid[ed] information as to the guarantor's financial or personal circumstances in order to 'immunise' themselves from knowledge of the vulnerability.[120]

Her Honour also held that the respondents' system 'was not reasonably necessary to protect [their] legitimate interests'.[121]

Not focusing excessively on the type of lending or transaction. Steward J found it necessary only to determine that there had been unconscionable conduct according to equitable principles (in the general law) rather than pursuant to the ACL or the ASIC Act.

In disagreeing with the Court of Appeal's assessment of the case, Steward J was critical of that court's apparent focus on the type of lending which had occurred. In response to the finding that the respondents had no knowledge of Stubbings' personal and financial circumstances — his circumstances being such that default under the loans was inevitable — his Honour stated that 'the Court of Appeal may have been distracted by the "concept" of asset-based lending'.[122] His Honour stated:

> In the first place … 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

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[120] Ibid [77].

[121] Ibid [80].

[122] Ibid [151].

> asset-based 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'.[123]

Practical observations

The recent decision of the Full Court of the Federal Court in *Quantum* now provides clear guidance that the existence and exploitation of special disadvantage or vulnerability is not a prerequisite to a finding of statutory unconscionability, where this question had previously been the subject of debate and uncertainty. It remains to be seen whether this decision will lead to an increase in the pleading of statutory unconscionability by plaintiffs and defendants alike, either as a primary claim/defence or as an alternative to general law unconscionability (where the exploitation of special disadvantage remains a requisite element).

Elsewhere, the recent decision of the High Court in *Stubbings v Jams 2 Pty Ltd* has provided a clear message — if not a stark warning — to lenders, particularly in relation to their ability to provide asset-based lending and to rely on solicitors' and accountants' certificates in order to (intentionally or not) distance themselves from the borrower and from the sorts of circumstances which might otherwise trigger their better conscience.

However, the Court's decision leaves some uncertainty — and some room for further development in the law — in some respects. First, whereas the Court of Appeal in its decision had sought perhaps to modernise the approach to be taken in evaluating statutory unconscionability free from the 'arcane' test of 'moral obloquy', the High Court was silent in that respect.

Second, the High Court did not rule on the role of special disadvantage in the test for statutory unconscionability following the Court's split decision in *Kobelt*, because the element of special disadvantage was not in issue on appeal in *Stubbings v Jams 2 Pty Ltd*. However, and as noted above, the prospect of revisiting special disadvantage remains at large following the denial of special leave in *Pitt*.

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[123] Ibid [152].