HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M13 / 2021

ON APPEAL FROM THE COURT OF APPEAL
OF THE SUPREME COURT OF VICTORIA

BETWEEN:

JEFFREY WILLIAM STUBBINGS

Appellant

10

and

JAMS 2 PTY LTD (ACN 600 173 117)

First Respondent

CONTERRA PTY LTD (ACN 078 900 017)

Second Respondent

JANACO PTY LTD (ACN 006 209 105)

20 Third Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of the propositions to be advanced in oral argument

Facts and findings at first instance

2. The primary factual findings are uncontroverted: AS, [7]–[15], including that:

(a) Stubbings did not have the income or savings to service the loans and defaulted almost immediately: AS, [10]; TJ [17], [145], [270]; CA, [43];

(b) Stubbings was bound to lose his home from the moment the loans were made: AS, [10]; TJ, [16]–[17];

(c) Stubbings was at a special disadvantage that was readily apparent from his speech and demeanour: AS, [8], TJ, [97], [264]–[272]; and

(d) Jeruzalski took deliberate steps to avoid being fixed with knowledge of Stubbings' circumstances for fear that knowledge might risk the enforceability of the loans: AS, [14]; TJ, [55]–[66], [282]–[285], [287], [310]–[314]; CA, [126]; ABFM, pp 61, 71, 88.

3. The primary judge made findings as to Jeruzalski's knowledge:

(a) in light of hearing the way that Jeruzalski gave evidence, in combination with other primary findings and uncontroverted facts: AS, [21], [32]–[36]; TJ, [58], [313]; ABFM, pp 4–5, 25–30, 61, 64–65, 68–75, 79, 88, 103, 119, 122–123; and

(b) including finding that Jeruzalski knew that the loans were risky and dangerous for Stubbings, that Jeruzalski suspected that Stubbings did not have the income to service the loans, that Jeruzalski suspected that Stubbings had not received truly independent advice and that Jeruzalski deliberately shut his eyes to affect wilful blindness to Stubbings's personal and financial circumstances: TJ, [308], [310]–[316].

Issue 1: The lenders' knowledge of facts making the transaction unconscionable (Grounds 2 and 3)

4. In characterising Jeruzalski's knowledge "at its highest", the Court of Appeal omitted reference to primary findings of fact relating to Jeruzalski's knowledge: AS, [21]–[23]; Reply [14]; TJ [88], [90], [308], [310]–[312]; CA [131]; ABFM pp 27, 73–74, 129, 133.

5. The *pro forma* certificates were incapable of satisfying the lenders that Stubbings had received independent advice: AS, [24]; CA, [132]–[133].

6. The certificates did not disclose any financial advice to Stubbings regarding the risk to him as guarantor by granting the mortgages as security, which was the crux of the transaction: AS, [24]–[26]; Reply, [3]; TJ, [308], [314]; CA, [31], [132]–[133], ABFM, pp 28, 76.

7. Jeruzalski's receipt of signed *pro forma* certificates could not negate or overcome his actual knowledge of relevant facts. The Court of Appeal's reasons confuse the nature and quality of knowledge in issue ("on inquiry"), wrongly disregarding Jeruzalski's actual knowledge of relevant facts: AS, [24]–[29]; CA, [129]–[130], [132]–[133]; ABFM, pp 5, 73–75, 79, 119.

10 **8.** Independent advice cannot be relied upon by a stronger party to ignore a vulnerability or special disadvantage where facts giving rise to the vulnerability or special disadvantage are already known: AS, [29]; Reply, [2].

- *Thorne v Kennedy* (2017) 263 CLR 85 at 112 [65], 127–128 [123].

Issue 2: The Court below wrongly substituted findings for those of the primary judge (Ground 3)

9. The Court of Appeal rejected the findings that:

(a) Jeruzalski suspected that Stubbings had not received proper independent advice: TJ, [314]; CA, [133]–[134]; and

(b) Jeruzalski knowingly shut his eyes to Stubbings' circumstances: TJ, [308], [312],
20 [315]–[316]; CA, [130].

10. Those findings were informed by the primary judge's advantage in observing Jeruzalski's oral evidence and by the primary judge's recorded and unrecorded impressions. They were findings that required appellate restraint: AS, [21], [33]–[35]; Reply, [8]; TJ, [58], [88]–[90], [92]–[96], [308], [313]; CA, [130], [134].

- *Lee v Lee* (2019) 266 CLR 129 at 148–149 [55].
- *Thorne v Kennedy* (2017) 263 CLR 85 at 104–105 [42]–[43], 111 [62].

11. The primary judge's findings were <u>not</u> glaringly improbable or contrary to compelling inferences but rather were wholly consistent with the evidence: AS, [32]–[36]; TJ [182]–[183], [210]–[211], [314]; ABFM, p 83.

30 ***Issue 3: The lenders' system of conduct was unconscionable in all the circumstances (Ground 1)***

12. The system of lending was deliberately designed to "immunise" the lenders from claims by borrowers or guarantors to set aside the loans as unconscionable, in circumstances where the lenders knew the loans were risky and dangerous and assumed that borrowers or guarantors did not have incomes to service the loans: AS, [38]; TJ, [58], [282]–[285],

[292], [298], [310]–[314]; CA, [126].

13. The lenders' system was designed with the potential for loss to vulnerable guarantors in mind but, rather than create protections to avoid causing or taking advantage of that loss, the lenders' system was designed to permit the lenders to deprive guarantors of the protection of s 12CB of the *ASIC Act* and equity so that the lenders could resort to the guarantor's property if or when the borrower defaulted regardless of any vulnerability or special disadvantage: AS, [38]–[43], [48]; TJ [308], [316]; CA [126].

- *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 436–438 [151]–[156].
- *Australian Securities and Investment Commission Act 2001* (Cth), s 12CB(1).

14. Jeruzalski's "apparent smugness when giving evidence" is evidence consistent with the primary judge's finding that the system was intended to enable the lenders to avert their eyes from guarantors' vulnerability: AS, [39]; TJ, [313], [316].

15. Reliance on labels such as "asset based lending" distracts from the proper inquiry into all the relevant circumstances: AS, [44]–[47]; Reply, [9]–[12]; CA, [121]–[126]; ABFM, p 75.

- *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 118–119.
- *Australian Securities and Investment Commission Act 2001* (Cth), s 12CB(1).

16. The Court of Appeal was wrong to accept that the lenders' system was consistent with conduct approved in preceding authorities. The lenders' deliberate intention to avoid knowledge in order to immunise themselves was a novel element that does not appear in the preceding authorities: AS, [46]–[47]; Reply, [9]–[12]; CA, [121]–[126].

17. The system was unconscionable regardless of the circumstances of any individual guarantor because the system was deliberately designed to enable the lenders to be wilfully blind to the vulnerability of individual guarantors: AS, [41]–[43].

- *Australian Securities and Investment Commission Act 2001* (Cth), s 12CB(4)(b).

18. The facts known to Jeruzalski at the time of making the loans were sufficient to make the lenders' conduct unconscionable in operating the system and making the loans to Stubbings: AS, [21]–[23], [41]–[43]; Reply, [6]; TJ, [308], [310], [315]–[316], CA, [121]–[122], [131].

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