NEW SOUTH WALES COURT OF APPEAL

CITATION:
Kowalczuk v Accom Finance [2008] NSWCA 343
This decision has been amended. Please see the end of the judgment for a list of the amendments.

FILE NUMBER(S):
40514/07

HEARING DATE(S):
8/5/08-9/5/08

JUDGMENT DATE:
10 December 2008

PARTIES:
Edward John Kowalczuk (First Appellant)
Mars Pty Limited (Second Appellant)
Accom Finance Pty Ltd (First Respondent)
Samir Dalla (Second Respondent)

JUDGMENT OF:
Hodgson JA McColl JA Campbell JA

LOWER COURT JURISDICTION:
Supreme Court - Equity Division

LOWER COURT FILE NUMBER(S):
1887/06

LOWER COURT JUDICIAL OFFICER:
Windeyer J

LOWER COURT DATE OF DECISION:
6 July 2007

LOWER COURT MEDIUM NEUTRAL CITATION:
Accom Finance Pty Limited v Mars Pty Limited, Accom Finance Pty Limited v Kowalczuk [2007] NSWSC 726

COUNSEL:
DR Conti SC; MR Gracie (Appellants)
MW Young; AM Chee (First Respondent)
G Craddock SC; M Avenell (Second Respondent)

SOLICITORS:
Greg Mackey & Associates, Five Dock (Appellants)
Bransgroves Solicitors, Sydney (First Respondent)
Ebsworth and Ebsworth, Sydney (Second Respondent)

CATCHWORDS:
CONTRACTS – Harsh and Unconscionable Contracts and Statutory Remedies – where Appellants entered into short-term loans with Respondent at extremely high rates of interest – where higher rate of interest payable upon default and interest compounded monthly – where default interest provision drafted so as to avoid the application of law of penalties as conventionally understood – where provision made all extra expense incurred in consequence of a default recoverable – where loans fell into default – whether loan contract unjust within meaning of Contracts Review Act 1980 – where Appellant supplied false information about his income – whether error concerning factors relevant to vulnerability – whether pure asset lending is in the circumstances unconscionable or unjust – relevance of lender's failure to observe its own lending guidelines – whether provisions concerning default rate of interest unjust – whether Respondent's conduct contravened s 51AA and s 51AC Trade Practices Act 1974 (Cth) – whether loan contract unconscionable within meaning of s 43 Fair Trading Act – availability of remedy if s 43 contravened
TRADE AND COMMERCE – Definitions and general – whether loans were "for the purpose of trade and commerce" within s 51AC Trade Practices Act – where Appellants acquired loans for investment purposes
LEGAL PRACTITIONERS – Contractual obligations – Duty of care – where solicitor engaged to provide independent advice on security documents to Appellants – whether breach of contractual obligations – whether duty of care more extensive than contractual duty – whether any loss had been shown to arise from any breach of duty – whether activities were "in trade or commerce" within s 42 Fair Trading Act – whether any contravention of s 42 Fair Trading Act – what constitutes misleading or deceptive conduct by a solicitor – whether inadvertent conduct can be misleading and deceptive – whether concept of causation operates differently to a cause of action under s 42 to the way it operates concerning tort of negligence

LEGISLATION CITED:
Australian Securities and Investments Commission Act 2001 (Cth)
Bankruptcy Act 1966 (Cth)
Consumer Credit Code
Contracts Review Act 1980
Corporations Law
Fair Trading Act 1987
Legal Profession Act 1987
Legal Profession Act 2004
Real Property Act 1900
Trade Practices Act 1974 (Cth)

CATEGORY:
Principal judgment

CASES CITED:
Accom Finance Pty Ltd v Mars Pty Ltd, Accom Finance Pty Ltd v Kowalczuk [2007] NSWSC 726
Australian Securities and Investments Commission v National Exchange Pty Ltd [2005] FCAFC 226; (2005) 148 FCR 132

Australian Securities Commission v Marlborough Gold Mines Ltd [1993] HCA 15; (1993) 177 CLR 485
Beneficial Finance Corporation Ltd v Karavas (1991) 23 NSWLR 256
Boland v Yates Property Corp Pty Ltd (1999) 167 ALR 575
Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd (1987) 14 FCR 215
Bridge Wholesale Acceptance Corporation (Australia) Ltd v Burnard (1992) 27 NSWLR 415
Canon Australia Pty Ltd v Patton [2007] NSWCA 246; (2007) ATPR 42-183
Chappel v Hart [1998] HCA 55; (1998) 195 CLR 232
Citicorp Australia Ltd v O'Brien (1996) 40 NSWLR 398
Concrete Constructions (NSW) Pty Ltd v Nelson [1990] HCA 17; (1990) 169 CLR 594
Curnuck v Nitschke [2001] NSWCA 176
Elkofairi v Perpetual Trustee Co Ltd [2002] NSWCA 413; (2003) 11 BPR 20,841
Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22; (2007) 230 CLR 89
Guardian Mortgages v Miller [2004] NSWSC 1236; (2004) 12 BPR 22,833
Heydon v NRMA Ltd [2000] NSWCA 374; (2000) 51 NSWLR 1
Houghton v Arms [2006] HCA 59; (2006) 225 CLR 553
Linprint Pty Ltd v Hexham Textiles Pty Limited (1991) 23 NSWLR 508
Louth v Diprose [1992] HCA 61; (1992) 175 CLR 621
March v E & M H Stramare Pty Ltd [1991] HCA 12; (1991) 171 CLR 506
Miller v Cooney [2004] NSWCA 380
Nguyen v Taylor (1992) 27 NSWLR 48
Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd [2002] NSWCA 211; (2002) 18 BCL 322
Perpetual Trustee Company Limited v Khoshaba [2006] NSWCA 41
Plimer v Roberts (1997) 80 FCR 303
Prestia v Aknar (1996) 40 NSWLR 165
Riz v Perpetual Trustee Australia Limited [2007] NSWSC 1153; (2008) NSW Conv R 56-198
Rosenberg v Percival [2001] HCA 18; (2001) 205 CLR 434
Semrani v Manoun [2001] NSWCA 337
Shahid v Australasian College of Dermatologists [2008] FCAFC 72; (2008) 168 FCR 46
Sims v Deputy Commissioner of Taxation [2006] NSWSC 305; (2006) 57 ACSR 249; (2006) 24 ACLC 465
Suttor v Gundowda [1950] HCA 35; (1950) 81 CLR 418
Townsend v Roussety & Co (WA) Pty Ltd [2007] WASCA 40; (2007) 33 WAR 321
Vairy v Wyong Shire Council [2005] HCA 62; (2005) 223 CLR 422
Waimond Pty Ltd v Byrne (1989) 18 NSWLR 642
Walmsley v Cosentino [2001] NSWCA 403
Wardley Australia Ltd v Western Australia [1992] HCA 55; (1992) 175 CLR 514
Watkins v De Varda [2003] NSWCA 242
West v AGC (Advances) Ltd (1986) 5 NSWLR 610

TEXTS CITED:

DECISION:
(1) So far as the appeal is brought against Dalla, the appeal is dismissed with costs.

(2) So far as the appeal is brought against Accom, in substance,

(a) Accom to pay:

(i) to Kowalczuk the sum of $18,143.17 plus interest at the prescribed court rates from 14 December 2005 to the date when that judgment is entered, and

(ii) to Mars the sum of $20,761.84 plus interest at the prescribed court rates from 13 October 2006 to the date when that judgment is entered.

(b) Accom to pay to Kowalczuk and Mars two-thirds of their costs of the appeal, insofar as those costs relate to the appeal they brought against Accom.

(c) Otherwise, appeal dismissed.

(d) Accom, Mars and Kowalczuk to each bear their own costs in the court below.

JUDGMENT:

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IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40514/07
SC 1887/06

HODGSON JA
McCOLL JA
CAMPBELL JA

10 DECEMBER 2008

EDWARD JOHN KOWALCZUK & ANOR v ACCOM FINANCE PTY LTD

Judgment

1 **HODGSON JA**: I agree with Campbell JA.

2 **McCOLL JA**: I have had the privilege of reading Campbell JA's reasons. I agree with his Honour's reasons and the orders he proposes.

3 **CAMPBELL JA**:

PART A – NATURE OF THE CASE

Core Facts

4 In 2005 Mars Pty Ltd ("**Mars**") was the registered proprietor of a house located in O'Connor Street, Haberfield. Mars was effectively under the control of Mr Edward Kowalczuk ("**Kowalczuk**"). Mars held the Haberfield property as trustee of a family trust for the benefit of Kowalczuk's family. The house was worth about $1m, and was unencumbered. Kowalczuk, his wife, and their two children, occupied it as their home.

5 Kowalczuk, in his own name, was the registered proprietor of another house property, located at Pacific Highway, Berowra. That property was worth about $500,000, and was unencumbered. It was leased to a childcare centre.

6 Kowalczuk was a service station driveway attendant, whose salary in the 2005 tax year was $14,400. His total taxable income in the 2005 tax year was a little over $45,000. The income above his salary was the net rental from the Berowra property, plus some interest from financial institutions.

7 Mr Tony Anastasi ("**Anastasi**") is a cousin of Kowalczuk's wife. He has practiced a serious fraud upon Kowalczuk and Mars. Broadly, he induced Kowalczuk to mortgage the properties and give the mortgage money to Anastasi. Anastasi represented that he would be able to invest the money, and obtain a greater return than the interest that Kowalczuk and Mars were paying on the mortgages. That representation was untrue, and Anastasi has now disappeared.

8 The mortgage loans over the properties were obtained from Accom Finance Pty Ltd ("**Accom**"). They were short-term loans, at very high rates of interest. When Anastasi's *"investors"* did not make the payments Anastasi had said they would make, the loans quickly fell into default, and interest accrued on them at the higher rate provided by the mortgages.

9 Kowalczuk left school at the age of 16 and trained as a motor mechanic. The trial judge, Windeyer J, found (at [11]):

> "Kowalczuk had owned other properties before the Berowra property. He and his sister had been given a property at Campbelltown by their mother. They had been involved together in the development of that property. This had involved entering into mortgages, the construction of buildings on it and their sale. There was some litigation between brother and sister about this venture, which was settled. With the moneys that he received from that settlement and other moneys Kowalczuk, on the advice of Anastasi, purchased the Berowra property which was then leased and is still leased to a child care business. At the same time, on the advice of his accountant and solicitor, Mr Alex Lee, he arranged for Mars to be incorporated for the purpose of acting as trustee of his family trust with Mr Lee appointed the sole director and sole shareholder in that company. The trust was set up because apparently at that stage there were marriage difficulties between Kowalczuk and his wife and it had been suggested to him that it was preferable not to have assets in his own name. A mortgage was entered into when the Haberfield property was purchased and Kowalczuk was a guarantor under the mortgage. Kowalczuk has held other real estate assets over the years and borrowed money on mortgages over those properties. One property at Hoxton Park was what is generally called a negative gearing investment, which was not a success."

Relief Claimed

10 Kowalczuk and Mars seek relief against Accom enforcing the mortgages in accordance with their terms. That relief was sought at first instance under the general law concerning unconscionable transactions, section 51AA and 51AC ***Trade Practices Act*** **1974** (Cth), and the ***Contracts Review Act*** **1980**. On the appeal the basis on which relief is sought has been expanded to include section 43 ***Fair Trading Act*** **1987**.

11 Mr Samir Dalla ("**Dalla**") is a solicitor who, as the trial judge found (at [3]),

> "… was engaged to provide independent advice on the security documents to Mars and perhaps also to Mr Kowalczuk".

12 Kowalczuk and Mars made claims for damages against Dalla under section 82 as expanded by section 75B ***Trade Practices Act***, arising from aiding or abetting Accom in its contravention of that Act. Claims were also made against him in negligence, for breach of his contract of retainer, and for breach of section 42 ***Fair Trading Act*** **1987**.

13 The trial judge rejected all those claims: ***Accom Finance Pty Ltd v Mars Pty Ltd, Accom Finance Pty Ltd v Kowalczuk*** [2007] NSWSC 726. In this appeal Mars and Kowalczuk seek to have this Court make the orders that Windeyer J declined to make. Further, the trial judge made orders that Accom be granted possession of the Berowra property, subject to the lease to the childcare centre, and that the Berowra property be sold by Accom, on terms approved by the court. Those orders for possession and sale have been stayed pending this appeal. Kowalczuk and Mars seek to have those orders overturned.

Issues Arising

14 The principal issues that arise on the appeal are:

1. Whether the terms on which the loans were made were unjust within the meaning of the ***Contracts Review Act***. By reason of the way in which the trial judge's reasoning proceeded, this also involves consideration of whether the loans are unconscionable within the meaning of the general law and for that reason contrary to section 51AA ***Trade Practices Act***.

Particular attention is given to provisions of the loans whereby a higher rate of interest is payable upon default, and interest is compounded monthly.

2. If the terms of the loans are unjust, is a remedy appropriate and if so what remedy.

3. Whether the loans were *"for the purpose of trade or commerce"*, and therefore capable of being unconscionable within the meaning of section 51AC ***Trade Practices Act***.

4. Whether a remedy would be available if the loans were to contravene section 43 ***Fair Trading Act***.

5. Whether the loans are unconscionable and thereby contravene section 43 ***Fair Trading Act***.

6. Whether Dalla breached his contractual obligations to his clients.

7. Whether Dalla owed a duty of care to his clients that was more extensive than his contractual duty.

8. Whether any loss had been shown to arise from any breach of duty by Dalla

9. Whether the activities of Dalla were *"in trade or commerce"* within the meaning of section 42 ***Fair Trading Act***.

10. If yes, whether the conduct of Dalla contravenes section 42 ***Fair Trading Act***.

PART B – FURTHER FACTUAL BACKGROUND

The Security Documents

The Berowra Mortgage

15 The first of the mortgages that Anastasi induced Kowalczuk to give to Accom was over the Berowra property. It was entered on 9 August 2005. The principal was $320,000. The term was one month. The lower rate of interest was 48% pa, while the higher rate of interest was 96% pa. Each of those rates of interest was compound.

16 It included a provision headed *"Damages for Late Repayment"*, that stated:

> "If the loan is repaid late an additional fee equal to one month's interest at the lower rate will be payable in addition to the daily interest at the higher rate until the loan is repaid."

17 The mortgage incorporated by reference the provisions of a registered Memorandum. Clause 37 of that Memorandum provided that, for compound interest, *"interest will be capitalised with monthly rests"*.

18 Pursuant to clauses 132 and 133 of the Memorandum the rate of interest payable was the lower rate, provided that payment was made within seven days of the due date, and all other covenants had been observed. Otherwise, the higher rate was payable. Clause 105 of the Memorandum made express provision for judgment debts to bear interest at the higher rate.

19 The Memorandum contained a provision requiring the debtor to pay legal costs and disbursements of the lender. It included, in clause 66, provision whereby at the option of the lender's solicitors certain *"standard items"* could be charged on a *"liquidated basis"*. The amounts included $480 for drafting and issuing default notices, $2,000 for drafting a statement of claim and affidavit verifying, $2,800 for drafting and filing orders for substituted service, $2,300 for drafting notice of motion and affidavit in support for default judgment, $1,000 for *"drafting contracts for the sale of land"*, $1,200 for *"supervising marketing campaign"*, $950 for *"appointing real estate agent"*, and $1,500 for *"acting on conveyance pursuant to power of sale"*. As Windeyer J correctly observed, a statement of claim and affidavit verifying is a document *"which is more or less standard in possession matters"*, and neither appointing a real estate agent nor supervising a marketing campaign could possibly be said to be legal work.

20 There was a provision that the legal costs and disbursements of the lender form part of the debt, and would carry interest at the higher rate from the date the liability arises until the date of payment by the debtors.

21 The Berowra mortgage debt was not repaid on time. After Accom had begun enforcement action concerning it, the debt was repaid and the mortgage was discharged in December 2005, when Kowalczuk was able to obtain a loan from the National Australia Bank of $350,000. The Berowra property remains subject to a mortgage to the NAB to secure the debt arising from that borrowing.

The First Haberfield Mortgage

22 The next mortgage that Anastasi induced Kowalczuk to give to Accom was a mortgage by Mars of the Haberfield property. It was signed on 12 December 2005, but money was not advanced under it until 15 December 2005. The principal was $807,000. The term was two months. The lower rate of interest was 60% pa, while the higher rate of interest was 120% pa. Again, each of those rates was compound.

23 The first Haberfield mortgage included the same *"Damages for Late Repayment"* provision as the Berowra mortgage, and incorporated by reference the provisions of the same registered Memorandum as the Berowra mortgage.

24 Kowalczuk was also a party to this mortgage, as a guarantor of the obligations of Mars under it.

25 The Memorandum of mortgage that is incorporated by reference in the first Haberfield mortgage contains the following clause No. 68:

> "The DEBTORS do hereby mortgage to the LENDER all their estate title & interest in any real property they currently own or partly own as surety for the DEBT ("OTHER SECURITY"). The terms of the mortgage over the OTHER SECURITY will be the same as those laid out in the MORTGAGE. The LENDER undertakes not to protect its priority in relation to the OTHER SECURITY by registering a caveat or mortgage over the title of the OTHER SECURITY unless any of the DEBTORS default under any of the AGREEMENTS. Regardless of whether a default is rectified the LENDER will not be obliged to remove any caveats placed on the title of the OTHER SECURITY until the MORTGAGE is discharged. The DEBTORS are free to deal with the OTHER SECURITY without regard to the LENDER so long as they do not default under any of the AGREEMENTS. In the event of a default under any of the AGREEMENTS the LENDER will have the right to take possession of the OTHER SECURITY and exercise power of sale and/or foreclosure to recover the DEBT and the DEBTORS will yield and surrender possession of the OTHER SECURITY to the LENDER."

26 The definition of *"DEBTORS"* in the memorandum includes both the mortgagor and the guarantor. Accom is the "*LENDER*". Accom seeks to enforce this clause in the first Haberfield mortgage, on the basis that it is an agreement by Kowalczuk to confer on Accom all the rights of a mortgagee over the Berowra property, to secure the debt that is also secured by the Haberfield property.

The Second Haberfield Mortgage

27 The $350,000 that Kowalczuk was able to borrow from the National Australia Bank in December 2005 was not quite enough to pay out all the money that Accom claimed it was owed on the Berowra mortgage. To cover the amount of that claimed shortfall, Kowalczuk caused Mars to give a second mortgage to Accom over the Haberfield property. It is dated 20 December 2005. Its term is one month. The amount of the principal is $10,300. The lower rate of interest is 60% pa, while the higher rate of interest is 120% pa. Again, each of those rates is compound.

28 The mortgage incorporates the same *"Damages for Late Repayment"* clause and the terms of the same registered Memorandum, as did the first Haberfield mortgage.

29 The only reason why there was a claimed shortfall concerning the Berowra mortgage was because Accom's calculations of the payout figure had included an amount of $13,383.77 for *"Damages for Late Repayment"*. A clause in the same terms as the *"Damages for Late Repayment"* clause in the Berowra mortgage had already been held, in ***Guardian Mortgages v Miller*** [2004] NSWSC 1236; (2004) 12 BPR 22,833 to be void as a penalty. The Berowra mortgage in the present case was produced by Bransgroves, Solicitors, the same solicitors who had produced the mortgage involved in the litigation concerning ***Guardian Mortgages***. Windeyer J noted (at [55]) that, notwithstanding the decision in ***Guardian Mortgages***

> "… the same clause is still included. I do not know whether the solicitors advise this. If they do it is close to professional misconduct."

30 Windeyer J held that the clause in question was void as a penalty, in consequence of which no debt was secured by the second Haberfield mortgage. In those circumstances, Accom consented to the second Haberfield mortgage being set aside. Windeyer J made an order setting it aside, the correctness of which is not disputed on this appeal. It is therefore not necessary to consider in any detail in this judgment the circumstances of entering of the second Haberfield mortgage.

The Court Proceedings

31 On 15 February 2006 Accom began proceedings against Mars in the Possession List of the Common Law Division of the Supreme Court of New South Wales (the "**Common Law Proceedings**").

32 Accom obtained a default judgment for possession of the Haberfield property on 28 March 2006, together with default judgments for $1,000,444.48, being the amount outstanding under the first Haberfield mortgage, and $13,387.31, said to be the amount outstanding under the second Haberfield mortgage. Those monetary judgments were against Mars alone, not Kowalczuk.

33 On 13 October 2006 Accom applied to the Haberfield loan an amount of $1,123,309.41, being the net proceeds of sale of the Haberfield property. However, by that time interest had, it claimed, continued to accrue at the higher rate on the unpaid balance, so that the proceeds of sale of the Haberfield property were not sufficient to discharge the Haberfield loan.

34 When it became apparent that a shortfall would be likely on the Haberfield loan, Accom began proceedings in Equity, naming as defendants Kowalczuk and National Australia Bank (the "**Equity Proceedings**"). In those proceedings, it sought an order in the nature of specific performance for the

enforcement of the agreement to give a mortgage over the Berowra property, that was contained in clause 68 of the Memorandum relating to the Haberfield mortgage, and an order for possession of the Berowra property (though subject to the rights of the childcare centre that continued to occupy the property as lessee.) Though the Equity Proceedings at one time had included a claim for a monetary judgment against Kowalczuk, that claim was abandoned at the hearing.

35 The Common Law Proceedings were transferred to the Equity Division, and Mars filed a cross-claim in those proceedings, against both Accom and Dalla. Kowalczuk has also filed a cross-claim in the Equity Proceedings, seeking relief against both Accom and Dalla. Windeyer J heard both proceedings together.

36 Though the proceedings before Windeyer J included claims to set aside the Haberfield mortgages and seek orders to the effect that no money was owing under those mortgages, or alternatively less money was owing than that for which Accom had obtained default judgment, those claims were ultimately not pressed. It was accepted that the default judgments gave rise to a *res judicata*, such that any matters that had merged in the judgment could not be re-litigated: ***Linprint Pty Ltd v Hexham Textiles Pty Limited*** (1991) 23 NSWLR 508. That conclusion is not challenged on this appeal.

37 However, Windeyer J held that the default judgments did not prevent Mars from bringing a claim for monetary compensation against Accom, and did not inhibit Kowalczuk's claims in any way.

Entry Into the Berowra Mortgage

38 Mr Daniel Dunsford ("**Dunsford**") was the director of Accom involved in the granting and administration of the loans relevant to these proceedings. The judge said that he was *"not a particularly satisfactory witness"* (at [63]). There were some matters concerning which the judge *"found his evidence to be quite inaccurate"*. However the judge found that *"Kowalczuk was even less reliable*. *The impression I had from his oral evidence in cross-examination, which went to show conflict in his written material, was that what he said was directed towards his obvious wish to retrieve something from the wreckage heaped on him by the actions of Anastasi."* As well, the trial judge found that *"Dalla was a most unimpressive witness"* (at [78]). Notwithstanding this unpromising evidentiary base, the judge could ascertain some of the relevant events from documents, and accepted some of the oral evidence given.

39 Dunsford was contacted by Anastasi around 27 July 2005. Anastasi told Dunsford that Kowalczuk was a developer who needed $500,000 urgently to *"push through a DA"*, and was seeking *"bridging finance"* on a childcare centre. Dunsford then faxed a loan application form to Anastasi.

40 On 28 July 2005 Kowalczuk signed a loan application, on Accom's letterhead, seeking a loan of $500,000. It identified Anastasi as the *"broker"*. It gave the name and telephone number of Dalla alongside the space for *"solicitor's name"*. It asserted a combined gross income of $100,000, said that the loan term was one month, and the purpose of the loan *"business re investment"*. It identified the *"plan for repayment"* as being *"bank refinance"*. It identified his assets as being the Berowra and Haberfield properties, with a combined value of $2.1m and no mortgage. It stated he owned two vehicles, a four-wheel drive worth $30,000, and a BMW worth $30,000. In fact he owned a four-wheel drive that was worth less than $5,000 by March 2007, and no BMW at all. Kowalczuk signed the form immediately underneath some bold printing that stated *"I/we declare that this Asset and Liability Statement is a true and correct description of our position."*

41 Dunsford carried out some enquiries about the value of the Berowra property, and told Anastasi that the most that could be offered was $320,000. Dunsford searched the Property Information Database under Kowalczuk's name, and found that there were properties at Hornsby and at Hassall Grove of which the registered proprietor was a person with Kowalczuk's name. As it turned out from evidence at the hearing, but unknown to Dunsford at the time, the only one of those properties that this Edward John Kowalczuk owned was the Hornsby property (which was in fact the Berowra property). The search also showed that he was a previous owner of five different properties. (The search listed six properties as the ones of which he was a previous owner, but two of them have the same title reference). The judge found that Dunsford then telephoned Kowalczuk, and the following conversation took place:

"DUNSFORD: I could not find your house at Haberfield when we did the ownership search on you through the LPI.

KOWALCZUK: That's because it's not in my name. It is held in trust.

DUNSFORD: Okay, well you certainly have had a lot of property in your name.

KOWALCZUK: They are developments that I have done.

DUNSFORD: Mr Kowalczuk I say this to everyone I loan to, I don't want you calling me from your solicitors office and complaining, our rates are very high. We are charging 48% on this loan.

KOWALCZUK: I know that it is Ok, Tony is organising a refinance."

42 On 8 August 2005 Dunsford emailed to Dalla the various mortgage documents. He did this after first searching for Dalla's name on the Law Society website.

43 On 9 August 2005 Kowalczuk signed, and Dalla witnessed, the various documents that Dunsford had sent to Dalla. Amongst them was a typed document addressed to Accom, headed *"Loan Repayment Ability Declaration"*. It said:

"I certify, warrant and represent to you that:

1. I have applied for a [sic] interest only loan of $320,000 (Three Hundred Twenty Thousand Dollars) through Accom Finance Pty Ltd (ACN 097 598 886) payable by monthly instalments of $12,800 over 1 months [sic] at 48% per cent per annum fixed.

2. My current gross income per annum is $100,000

   a) I am aware of my financial obligations under my proposed loan with you; and

   b) I have fully disclosed to you all details of my income and expenditure in the application form.

3. I know my income and expenditure and based on that knowledge and my understanding of my current financial position, I declare to you that I am able to make all the required monthly repayments and repay the loan in accordance with its term and can do so without substantial hardship.

4. I am not aware of any factors, for example, a possible claim made against us involving payment of an amount of money, ill health or disability, or other factor which may result in a decrease in income or increase in expenditure, which may affect my ability to make the repayments or which may cause substantial hardship to us to make repayments.

5. I acknowledge that you insist that we take independent legal and financial advice in relation to this loan. I acknowledge that you are relying on this letter in agreeing to make a loan."

44 He signed another document, headed *"Acknowledgment of legal advice by borrower"* that referred to having instructed Dalla to give him legal advice concerning eleven listed documents. The document continued:

> "3. The advice given to me by my solicitor included that:
>
> a) by signing the Mortgage I will be liable for regular payments of Interest and repayment of the amount of the loan at the due date;
>
> b) if I fail to make any payment on time, the lender can charge a higher rate of interest, and the lender's costs of rectifying that failure;
>
> c) if I fail to comply with any of the terms and conditions of the loan including the obligations to pay principal and interest;
>
> i) the Mortgagee can sue me personally; and
>
> ii) the Mortgagee may take possession of the security property; and
>
> iii) after notice, sell the security property to recover the amount owing with interest together and other costs including solicitor's costs, the costs of selling the property and the costs of maintaining the property; and
>
> iv) if the proceeds of the sale of the security property are insufficient to satisfy the debt to the Mortgagee, the Mortgagee can sue me for the deficit.
>
> d) …
>
> e) by making a Statutory Declaration verifying the giving of the advice I am making a statement having the force of an Oath which can be relied upon by the lender.
>
> 4. Generally, in relation to the proposed transaction my solicitor advised me that:
>
> a) he does not profess any qualification to give financial (as distinct from legal) advice; and
>
> b) if I have any questions about any financial aspect of the transaction or the documents, I should consult an accountant or other financial counsellor of my choice before singing the documents.
>
> 5. After receiving the above advice I freely and voluntarily signed the above documents."

45 He also signed, on 9 August 2005, other documents including a direction as to the manner in which the advance was to be paid, a *"Consent of Borrower to Legal Advice"*, and a declaration that the credit was to be applied wholly or predominantly for business or investment purposes (or for both purposes).

46 While the registered Memorandum was a very long and complicated document, the mortgage document itself was comparatively simple. It was only three pages long, of which the first page was a ***Real Property Act* 1900** standard form of mortgage, the second page was a table that set out in summary form the

most important provisions of the mortgage, and the third page was for execution. The table on the second page clearly identified the amount of the principal, the term of the loan, the higher and lower rates, and that the interest was compound. Kowalczuk signed on that page, twice.

47 On 11 August 2005 Accom sent the net proceeds of the loan, $301,852, by telegraphic transfer to the bank account of an entity called Venture Connect. Kowalczuk had signed a written direction on 9 August 2005, directing the proceeds to be sent to a bank account of Venture Connect, that was identified by quoting the bank, branch, BSB and account number, as well as the account name.

48 Various of the forms stated that they were signed at Lakemba, which is the suburb where Dalla has his office. Dalla gave the documents to Anastasi once they were executed, and Anastasi delivered them to Accom.

49 The judge found that there was no evidence that either Dunsford or Accom knew or should have known that Kowalczuk was being influenced, let alone defrauded by Anastasi. Dunsford had dealt with Anastasi as a finance broker concerning two previous transactions, and had observed nothing untoward concerning those transactions. The trial judge's finding was (at [50]):

> "Mars was a company formed by Kowalczuk, albeit with the guidance of his accountant, to protect his assets. Kowalczuk was not completely uneducated, illiterate or inexperienced. He had owned other properties. Before he came into contact with Accom he had borrowed moneys under mortgage. He knew what a guarantee was. He was not old or young or infirm or mentally deficient. He had decided, unfortunately for him and his company, to act on the advice of Anastasi, and to use his real estate to gain income. Even after his experience with the Berowra loan, knowing it was in default and that the required payments were not being made by "the investors", he agreed to the proposal of Anastasi that he should borrow against Haberfield in spite of the refusal of Anastasi to identify the investors. I therefore find that neither Mars nor Kowalczuk was in a position of special disability in dealing with Accom. Kowalczuk relied on Anastasi and so far as Accom was concerned he got competent advice from Dalla."

50 Though the statement that Kowalczuk made in both the loan application dated 28 July 2005, and the *"Loan Repayment Ability Declaration"* dated 9 August 2005 that he had an income of $100,000 was false, Accom and Dunsford had no reason to doubt the truth of Kowalczuk's statement.

Circumstances of Entering First Haberfield Loan

51 Kowalczuk did not fill out an application form relating to the first Haberfield loan. Anastasi telephoned Dunsford on 5 December 2005. By that time the Berowra loan was in default, and Accom had commenced enforcement proceedings concerning it. Anastasi told Dunsford that the Berowra loan had been successfully refinanced with NAB, and would settle in a day or two. In fact NAB had made a Letter of Offer to Kowalczuk on 8 December 2005, offering a loan of $350,000 for 15 years, with the interest fixed for two years at an indicative rate of 7.6% pa. That indicative rate could change in accordance with market movements between the date of the Letter of Offer and the date of drawdown. The evidence does not establish that Dunsford actually saw that Letter of Offer.

52 Anastasi raised the topic of *"another deal"* concerning the property in Haberfield. Once Dunsford had obtained confirmation from Anastasi that Kowalczuk lived in the Haberfield property, Dunsford said that, *"we don't do owner occupied"*. However, Anastasi told Dunsford that it was tenanted, there were two residences on the property, and the main residence was tenanted. Anastasi told Dunsford that Kowalczuk *"is working on a loan at the moment from First Loan. [W]e are almost there."* When Anastasi suggested that the loan might be needed for *"a couple of weeks, maybe longer"*, Dunsford suggested to make it a longer term, so that *"you don't run into trouble again"*. Anastasi said: *"He is really in a hurry. He has got this big deal going and if he misses out he stands to lose big bucks"*.

53 There was some truth in Anastasi's story about seeking a loan from FirstLoan. On 8 December 2005 Kowalczuk signed a loan application on behalf of Mars for a loan of $750,000 from FirstLoan Australia Pty Ltd.

54 A company search on Mars quickly informed Dunsford that Kowalczuk held no corporate office in Mars, and was not even a shareholder. Instead, a Mr Alex Lee was the sole officer and shareholder. Dunsford then telephoned Kowalczuk for an explanation, and was informed that Mr Lee was Kowalczuk's solicitor, who was holding the property on trust for him, *"it's for asset protection in case someone tries to make me bankrupt"*. Dunsford spoke to Mr Lee, and obtained confirmation that this statement was correct. Dunsford told Anastasi that he would be prepared to go ahead if Kowalczuk became sole director and shareholder of Mars. Anastasi, Kowalczuk and Lee then set about arranging for that to happen.

55 There was a grain of truth in the story that Anastasi told Dunsford about there being a tenant in the house. It was that at that time Kowalczuk and his wife were having some marital difficulties, and were living in separate parts of the same house. Mrs Kowalczuk was being paid child maintenance by her husband, and was using this to pay rent to Mars, thereby enabling her to claim rental assistance. However, there was no indication, in the external appearance of the house, that it was divided into separate residences. Dunsford gave evidence that he went to inspect the Haberfield property and his inspection showed that there was a separately occupied flat at the back, and it looked like a rental property. He did not claim to have seen the interior of the house. The trial judge accepted that Dunsford went to inspect the property, but rejected the balance of his evidence on that topic. The trial judge also rejected evidence that Dunsford gave of seeing that improvements had been made to the property between the date of the mortgage and the time of the trial. Dunsford did not claim to have made any enquiries about the nature of the tenancy or the rental received.

56 Kowalczuk signed various loan papers connected with the first Haberfield loan on 10 December 2005, in Dalla's presence at Monterey. The documents that Kowalczuk signed on that occasion were of the same type as those that he had signed concerning the Berowra loan.

57 The Loan Repayment Ability Declaration was on this occasion signed by Kowalczuk *"for Mars Pty Ltd"*. Its first paragraph read:

> "I certify, warrant and represent to you that:
>
> 1. I have applied for a [sic] interest only loan of $807,000 (Eight Hundred Seven Thousand Dollars) through Accom Finance Pty Ltd (ACN 097 598 886) payable by monthly instalments of $40,350 over 2 months at 60% per cent per annum fixed."

58 It was otherwise identical in text to the Loan Repayment Ability Declaration set out at para [43] above.

59 The terms of the *"Acknowledgment of Legal Advice"* document that Kowalczuk signed concerning the Haberfield loan differed slightly from that executed concerning the Berowra loan, in that its clause 3 stated:

> "3. The advice given to me by my solicitor included that:
>
> (a) by signing the loan documents I will be liable for regular repayment of the amount of the loan at the due date;
>
> (b) if I fail to make any payment on time, the lender can charge a higher rate of interest, and the lender's costs of rectifying that failure;
>
> (c) if I fail to comply with any of the terms and conditions of the loan documents including the obligations to pay principal or interest,
>
> – the lender can sue me personally; and

– the lender may take possession of my property; and

– after notice, sell my property to recover the amount owing together with interest and other costs including solicitor's costs, the costs of selling the property and the costs of maintaining the property; and

– if the proceeds of the sale of my property are insufficient to satisfy the debt to the lender, the lender can sue me for the deficit; and …"

60 That wording is apt to cover a situation where the property of Kowalczuk, as guarantor, is at risk if the loan conditions are not performed.

61 Kowalczuk signed a document, of a kind purporting to direct where the settlement proceeds were to be paid. However that document left blank the destination of the $755,888 that was to be available to Kowalczuk after various fees and expenses were paid from the advance, and a month's interest was withheld.

62 It was only on 14 December 2005 that documents confirming the resignation of Mr Lee as a Mars company officer, the appointment of Kowalczuk, and the transfer of Mr Lee's shareholding in Mars to Kowalczuk, were lodged with ASIC, and proof of that lodgement given to Accom.

63 Kowalczuk signed another Authority to Pay letter, addressed to Accom and bearing a typed date of 14 December 2005. Though the letter speaks as though the advance had already been made, the advance was in fact not made on 14 December 2005, but on 15 December 2005. The letter stated:

> "I confirm to you that I will be repaying the loans secured by the property at 37 O'Connor Street Haberfield NSW 2045 with your company by way of refinance with First Home Loans Australia.
>
> I also confirm that the following payments have been made according to my directions:
>
> [list of payments]"

64 Mr D Conti SC, counsel for Kowalczuk and Mars, submits that Dalla gave evidence that this document was signed on 17 December 2005. Dalla gave affidavit evidence to that effect, on which he was not cross-examined. Even accepting that this letter was not signed until after the loan advance had been made by Accom, it is still confirmatory of Accom having been told, before the advance was made, that it was intended that there be a re-finance with FirstLoan Australia, and that Kowalczuk was willing to sign and provide documents to Accom that confirmed that such a re-finance was intended. This is particularly so when the date of 14 December 2005 appearing on the letter is typed in the same font as the body of the letter, from which I would infer that it was a document that Accom had prepared on 14 December 2005, even though it was not actually signed until 17 December 2005.

65 Accom did not advance the money until 15 December 2005. On 15 December 2005 a handwritten note, dated 14 December 2005, was faxed to Accom, signed by Kowalczuk, giving details of his own bank account. Accom made the advance by electronic deposit of the funds into that bank account.

66 On the same afternoon that the loan proceeds were deposited electronically in Kowalczuk's bank account, Anastasi took Kowalczuk to the bank. There, Kowalczuk obtained a bank cheque for $750,000 made payable to St George Bank, which Kowalczuk then handed to Anastasi.

PART C – THE CASE AGAINST ACCOM

The Legal Norms

67 Kowalczuk and Mars submit that Accom's conduct in making the loans on the terms and in the circumstances it did contravenes section 51AA and section 51AC ***Trade Practices Act* 1974** (Cth), and is also an *"unjust contract"* within the meaning of the ***Contracts Review Act* 1980**.

Contracts Review Act

68 It is only Kowalczuk who could ever be granted relief under the ***Contracts Review Act***. That is because section 6(1) precludes the granting of relief under the Act to a corporation.

69 Section 7 ***Contracts Review Act*** provides:

> "(1) Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, do any one or more of the following:
>
> (a) it may decide to refuse to enforce any or all of the provisions of the contract,
>
> (b) it may make an order declaring the contract void, in whole or in part,
>
> (c) it may make an order varying, in whole or in part, any provision of the contract,
>
> (d) it may, in relation to a land instrument, make an order for or with respect to requiring the execution of an instrument that:
>
> (i) varies, or has the effect of varying, the provisions of the land instrument, or
>
> (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the land instrument."

70 Section 4(1) provides a non-exhaustive definition of *"unjust"*.

> "***unjust*** includes unconscionable, harsh or oppressive, and ***injustice*** shall be construed in a corresponding manner."

71 Other assistance in ascertaining the intended content of *"unjust"* is derived from section 9:

> "(1) In determining whether a contract or a provision of a contract is unjust in the circumstances relating to the contract at the time it was made, the Court shall have regard to the public interest and to all the circumstances of the case, including such consequences or results as those arising in the event of:
>
> (a) compliance with any or all of the provisions of the contract, or
>
> (b) non-compliance with, or contravention of, any or all of the provisions of the contract.

(2) Without in any way affecting the generality of subsection (1), the matters to which the Court shall have regard shall, to the extent that they are relevant to the circumstances, include the following:

(a) whether or not there was any material inequality in bargaining power between the parties to the contract,

(b) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation,

(c) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract,

(d) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the contract,

(e) whether or not:

(i) any party to the contract (other than a corporation) was not reasonably able to protect his or her interests, or

(ii) any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he or she represented,

because of his or her age or the state of his or her physical or mental capacity,

(f) the relative economic circumstances, educational background and literacy of:

(i) the parties to the contract (other than a corporation), and

(ii) any person who represented any of the parties to the contract,

(g) where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed,

(h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act,

(i) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect,

(j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act:

(i) by any other party to the contract,

(ii) by any person acting or appearing or purporting to act for or on behalf of any other party to the contract, or

(iii) by any person to the knowledge (at the time the contract was made) of any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract,

(k) the conduct of the parties to the proceedings in relation to similar contracts or courses of dealing to which any of them has been a party, and

(l) the commercial or other setting, purpose and effect of the contract.

(3) For the purposes of subsection (2), a person shall be deemed to have represented a party to a contract if the person represented the party, or assisted the party to a significant degree, in negotiations prior to or at the time the contract was made.

(4) In determining whether a contract or a provision of a contract is unjust, the Court shall not have regard to any injustice arising from circumstances that were not reasonably foreseeable at the time the contract was made.

(5) In determining whether it is just to grant relief in respect of a contract or a provision of a contract that is found to be unjust, the Court may have regard to the conduct of the parties to the proceedings in relation to the performance of the contract since it was made."

72 Section 7(3) makes section 7 subject to the operation of section 19. Section 19 provides:

"(1) An order made under section 7(1)(b) or (c) has no effect in relation to a contract so far as the contract is constituted by a land instrument that is registered under the ***Real Property Act*** **1900**.

(2) Where an order is made under section 7(1)(b) or (c) in relation to a contract constituted (in whole or in part) by a land instrument, not being a land instrument registered under the ***Real Property Act*** **1900**, the regulations made under this Act may make provision for or with respect to prescribing the things that must be done before the order, so far as it relates to the land instrument, takes effect.

(3) The Registrar-General and any other person are hereby authorised to do any things respectively required of them pursuant to subsection (2)."

73 In the present case, the only contracts between Accom on the one hand, and Mars and Kowalczuk on the other hand, are contained in registered mortgages. There was no argument on the appeal about whether section 19(1) insulates all provisions in a registered land instrument, from an order under section 7(1)(b) or (c) (including provisions that would not themselves be afforded indefeasibility by virtue of being registered). In light of the conclusion I have reached for other reasons, it is not necessary to form a view on whether section 19(1) would prevent Kowalczuk from obtaining an order under section 7(1)(b) or (c) curtailing or preventing the enforcement of clause 68 of the Memorandum against him.

74 Schedule 1 has effect, pursuant to section 8. Schedule 1 provides:

"**Schedule 1 Ancillary relief**

1 Where the Court makes a decision or order under section 7, it may also make such orders as may be just in the circumstances for or with respect to any consequential or related matter, including orders for or with respect to:

…

(b) the payment of money (whether or not by way of compensation) to a party to the contract …"

75 Mr Conti SC argues that, even if the Court is precluded from making any of the types of orders identified in section 7(1)(a)-(d), if the Court makes a decision under section 7, that a contract or a provision of a contract has been unjust in the circumstances relating to the contract at the time it was made, that suffices to attract the jurisdiction to make ancillary orders under Schedule 1. That argument is not contested.

Trade Practices Act

76 Section 51AA provides:

"(1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

(2) This section does not apply to conduct that is prohibited by section 51AB or 51AC."

77 At the trial Mars and Kowalczuk had alleged that the conduct of Accom in granting both the Berowra loan and the Haberfield loan, contravened section 51AA ***Trade Practices Act***. The trial judge did not accept that contention. The Further Amended Notice of Appeal withdraws the attack that the Appellants had originally made in their Notice of Appeal on this finding of the trial judge. However, the way in which the argument on the appeal progressed left me in some doubt about whether Mr Conti had made a final election to abandon reliance on section 51AA. As well, because some of the trial judge's findings relating to both injustice under the ***Contracts Review Act*** and unconscionability were cast in terms relevant to section 51AA, and there continues to be a submission made in the appeal that there has been unconscionability contrary to section 43 ***Fair Trading Act***, it is desirable to deal with the applicability of section 51AA.

78 In ***Louth v Diprose*** [1992] HCA 61; (1992) 175 CLR 621 Brennan J said, at 626:

"The jurisdiction of equity to set aside gifts procured by unconscionable conduct ordinarily arises from the concatenation of three factors: a relationship between the parties which, to the knowledge of the donee, places the donor into special disadvantage vis-à-vis the donee; the donee's unconscientious exploitation of the donor's disadvantage; and the consequent overbearing of the will of the donor whereby the donor is unable to make a worthwhile judgment as to what is in his or her best interests."

79 Similarly, Deane J said, at 637:

"It has long been established that the jurisdiction of courts of equity to relieve against unconscionable dealing extends generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party to the transaction with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that special disability was sufficiently evident to the other party to make it prima facie unfair or 'unconscionable' that that other party procure, accept or retain the benefit of, the

disadvantaged party's assent to the impugned transaction in the circumstances in which he or she procured or accepted it."

80 The reasoning of Deane J on this topic was also accepted by Dawson, Gaudron and McHugh JJ (at 643).

81 It is that concept that section 51AA picks up, when it refers to *"conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories"*.

82 Section 51AC provides:

> "(1) A corporation must not, in trade or commerce, in connection with:
>
> (a) the supply or possible supply of goods or services to a person (other than a listed public company); …
>
> engage in conduct that is, in all the circumstances, unconscionable.
>
> …
>
> (7) A reference in this section to the supply or possible supply of goods or services is a reference to the supply or possible supply of goods or services to a person whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce."

Applicability of *Contracts Review Act*

83 While Mr Conti relied upon both the ***Contracts Review Act***, and a variety of statutory provisions dealing with unconscionable contracts, he did not submit that the criteria by reference to which conduct was unconscionable within any of those statutory provisions were any wider than the criteria by reference to which conduct was unjust within the meaning of the ***Contracts Review Act***. Rather, Mr Conti's invocation of the various statutory prohibitions on unconscionable conduct sprang from a recognition that relief could not be granted under the ***Contracts Review Act*** to a corporation. The forensic point of reliance on the various statutory prohibitions of unconscionable conduct was to try to obtain an order that benefited Mars directly.

84 When Kowalczuk was the borrower and mortgagor in relation to the Berowra loan, a guarantor and the giver of the covenant contained in clause 68 of the Memorandum in relation to the Haberfield loan, and the directing mind and will of Mars, all the factual circumstances relevant to both the alleged injustice under the ***Contracts Review Act***, and the alleged unconscionability, can emerge from a discussion of whether Kowalczuk is entitled to relief under the ***Contracts Review Act***. I therefore deal with that topic first.

Principles Concerning Relief Under Contracts Review Act

85 Comparatively early in the life of the ***Contracts Review Act***, McHugh JA in ***West v AGC (Advances) Ltd*** (1986) 5 NSWLR 610 recognised, at 621, that the Act

> "… is revolutionary legislation whose evident purpose is to overcome the common law's failure to provide a comprehensive doctrinal framework to deal with *"unjust"* contracts."

86 McHugh JA recognised, at 620, that a contract can be unjust *"because of the way it operates in relation to the claimant or because of the way in which it was made or both."* He recognised that a contract could be

unjust because it contained *"substantive injustice"* – which arises *"because its terms, consequences or effects are unjust"*, or because of *"procedural injustice"* – which arises *"because of the unfairness of the methods used to make it"* – or both. He recognised, at 621, that a contract can be *"unjust"* even if it is not unconscionable, harsh or oppressive. Notwithstanding the traditional view that equity took about circumstances in which it would hold that enforcement of a contract was unconscionable, a contract may be unjust even though the circumstances that give rise to that injustice are not known to the other party: ***Beneficial Finance Corporation Ltd v Karavas*** (1991) 23 NSWLR 256 at 277; ***Nguyen v Taylor*** (1992) 27 NSWLR 48 at 71 per Sheller JA; ***Perpetual Trustee Company Limited v Khoshaba*** [2006] NSWCA 41 at [94]-[96].

87 In applying the ***Contracts Review Act***, two distinct steps are involved. As stated by Brereton J in ***Riz v Perpetual Trustee Australia Limited*** [2007] NSWSC 1153; (2008) NSW Conv R 56-198 at [51]:

> "… The first is whether the contract was unjust in the circumstances in which it was made, having regard to the factors referred to in s 9. This is a conclusion of fact, albeit one of ultimate fact involving a broadly based value judgment [***Antonovic v Volker*** (1986) 7 NSWLR 151, 154-155 (Samuels JA, Kirby P agreeing); ***Beneficial Finance Corporation Ltd v Karavas*** (1991) 23 NSWLR 256, 270E (Samuels JA); ***Perpetual Trustee Company Ltd v Khoshaba*** [2006] NSWCA 41, [34]-[40] (Spigelman CJ), [106]-[111] (Basten JA)]. The second, which arises only if the first is resolved in the affirmative, is whether any and if so what relief should be granted; this involves the exercise of a judicial discretion [***Khoshaba***, [34]-[36] (Spigelman CJ), [109] (Basten JA)]."

88 Thus, if the contract is found unjust by reason of circumstances not known to one of the contracting parties, it does not automatically follow that relief will be given to remedy that injustice.

Was the Berowra Loan Unjust?

89 In the present case, there was no evidence that Dunsford or Accom knew about Kowalczuk's occupation. The information they had about Kowalczuk's income was the false information that his income was $100,000 a year. They had no reason to disbelieve the false information that Anastasi gave them, about Kowalczuk being a developer. They had no reason to disbelieve the information that they were given, that the loan they were asked to make was for a very short period, and that Kowalczuk's intention was to re-finance it.

Error Concerning Factors Relevant to Kowalczuk's Vulnerability?

90 Kowalczuk's affidavit evidence gave an account of himself as a man of limited capacity. According to his account, his parents were Eastern European migrants, and English was not the language spoken at home. He said:

> "I am not very good at remembering dates, or the order in which things happened. The other problem I have is that, five minutes after I have remembered when something happens, I have usually forgotten it again.
>
> I takes me a long time to read papers and I sometimes forget what I have read and have to start reading again. Many times, I pretend that I have understood things that I have read because I am embarrassed and try to cover up my embarrassment. Other times, I pretend I have understood someone who has read a paper out to me but it has gone out of my head as soon as I heard it and I don't really remember what they said.
>
> …
>
> [M]ost times, people talk to me too fast or don't give me a chance to think about what they are saying, and I just give up, sign whatever they ask me, and do or say whatever they want.

> This is especially the case when I trust the person who is helping me. This was what happened in my dealings with Tony Anastasi and with Samir Dalla …"

91 The judge made no specific findings about whether this evidence was correct. Mr Conti submits it should have been taken into account when the judge was considering whether the making of the loans involved unconscionability or conduct contrary to the ***Contracts Review Act***.

92 I am not persuaded that the judge made an error in this respect. I do not see that the language Kowalczuk spoke at home as a child is relevant, when he went to school in Australia and does not now claim any particular difficulties with English, as opposed to comprehension.

93 The judge was unimpressed with Kowalczuk as a witness. This arose not just from demeanour, but from contradictions in his evidence as basic as at one stage saying he did not know the name of the lender, but eventually admitting that he did, or saying that a meeting with Dalla at which documents relating to the Berowra loan were signed took only about 15 minutes, when that was impossible. The general tenor of Kowalczuk's evidence was to paint himself as an extremely simple man of limited education, intellectual capacity and business experience. The trial judge did not accept that general picture, but rather concluded as I have set out at para [49] above. The matters that Mr Conti says should have been taken into account are details of the general picture that the judge has rejected. In those circumstances I am not prepared to conclude that the judge was in error in failing to make specific mention of the matters concerning which complaint is made under this head.

94 Mr Conti also contends that the judge failed to take into account that Kowalczuk had no prior experience with bridging loans or short term finance. There was no explicit evidence that he lacked such experience, or that he had such experience. The variety of property dealings he had engaged in in the past were ones that might, or might not, have involved bridging loans or short term finance, so it could not be said that the judge should have inferred, from the overall nature of Kowalczuk's life experience, that he had no experience with bridging loans or short term finance. I am not satisfied that the trial judge made an error in this respect.

Failure to Follow Lending Criteria and Inevitability of Default?

95 Mr Conti also submits that Accom failed to follow its own lending criteria, concerning the Berowra loan, that there was an inevitability that Kowalczuk would default under the Berowra loan, and that those circumstances together with the extremely high interest rates suffice to make the transaction unjust.

96 It can be accepted that pure asset lending – described by Basten JA in ***Khoshaba*** at [128] as being *"to lend money without regard to the ability of the borrower to repay by instalments under the contract, in the knowledge that adequate security is available in the event of default"* – is in at least some circumstances unjust within the meaning of the ***Contracts Review Act***, or unconscionable: ***Elkofairi v Perpetual Trustee Co Ltd*** [2002] NSWCA 413; (2003) 11 BPR 20,841 at [57]-[59], [79] per Beazley JA (with whom Santow JA and MW Campbell AJA agreed); ***Khoshaba*** at [92] per Spigelman CJ (with whom Handley JA agreed on this point), [128] per Basten JA. However whether lending on the basis that the loan can adequately be repaid from the security, is in the circumstances of any particular case unconscionable or unjust, depends on other matters as well. Thus, in ***Elkofairi*** the facts that neither the applicant nor her husband had any income, the loan in question was for five years, and the security was over the applicant's only asset (involving the proposition that the applicant had no other resources from which to service the loan) and that the secured property was the applicant's home, were all relevant matters in reaching the conclusion that the transaction was both unconscionable and unjust. In ***Khoshaba***, other factors relevant to the conclusion of injustice were that the applicants were a husband and wife, one of whom earned $43,000 pa and the other of whom was a pensioner, the lender had no information at all about the purpose for which the loan was being sought, and the security was over their home.

97 Mr Conti submitted that the trial judge had adopted too high a standard for the degree of certainty that a lender must have that a loan will fall into default before the making of the loan counts as being pure asset lending. He pointed to a passage in the judgment (at [52]) where the judge stated that ***Elkofairi*** and ***Khoshaba***:

> "… are not authority for some general proposition that a lender of money on security of real estate to a borrower who has no ability through his own income or assets to repay the loan, is guilty of taking part in some unconscionable and predatory conduct. That may be the position if there is no means disclosed for payment of interest, but a good proportion of borrowers for fixed terms in any mortgage situation would be proceeding on the basis that the principal debt would be repaid by new borrowings or by sale of the mortgaged land. The position is of course different if the lender knows that there will be default in payment of the interest or principal so that mortgagee sale will be the inevitable result. This latter conduct is the type of pure asset lending that has been found unconscionable; the former is not. In the instant case so far as payment of interest was concerned, it was paid in advance and deducted from the loan funds "

98 Mr Conti submitted that there could be unconscionable lending in circumstances where it could not be said that the lender actually knew that there would be a default in payment of interest or principal so that a mortgagee sale will be the inevitable result, but the lender knew there was a high risk that the intended means for payment of the loan might fail. As well, he submitted that a lender who was not acting unjustly should look into the prospect of refinancing, and if that prospect is too risky, the lender should refuse to make the loan.

99 I would accept that in some circumstances knowledge of a high degree of risk that there might be a default in payment of interest or principal so that a mortgagee sale would result, could be unjust lending, even though it could not be said that the lender knows that there *will* be default. However I do not accept that a lender is always bound to carry out a detailed investigation of the practicality of an intending borrower actually being able to carry through the plan the borrower says he or she has for repayment of the loan. In the present case, Kowalczuk stated to Accom that he proposed to pay the Berowra loan out through bank refinance, and the Haberfield loan through refinancing with FirstLoan (the same brokers through whom Kowalczuk was able successfully to refinance the Berowra loan) and there was no occasion for Accom to doubt that he would be able to do so. Thus, even if Mr Conti is right in saying that there can be pure asset lending if the lender knew that there was a high risk that the intended means of repayment might fail, in the present case Accom did not have knowledge of that type.

100 I should also say, in fairness to the trial judge, that I doubt that in the passage that Mr Conti criticises the judge was intending the focus of his remarks to be on the degree of certainty that a lender must have that a loan will fall into default.

101 Mr Conti also relies upon Accom having failed to follow its own due diligence procedures in relation to the making of the Berowra loan. The failure to follow due diligence procedures is relied on in relation to allegations of both injustice and unconscionability.

102 In ***Khoshaba*** Spigelman CJ at [80]-[82] regarded a lender's failure to observe its own lending guidelines as entitled, in the circumstances of that particular case, to significant weight. The way in which it was relevant was twofold. First, while the guidelines were designed to enable the lender to assess and minimise its own risk, and thus were for the purpose of protecting the lender rather than the borrower, following the guidelines conferred an indirect benefit on the borrower through risky loans not being made, and one of the legislative purposes of the ***Contracts Review Act*** was to protect people not able to look after themselves. The second way in which it was relevant was, in the circumstances where the lender had no idea for what purpose the loan was being borrowed, the failure to observe the lending guidelines assisted the inference that the lender was lending on the value of the security.

103 Dunsford gave evidence that Accom followed the following *"rules"*:

> "a) We do not [make] third party loans (unless the mortgagor is the sole owner of the company borrower or vice-versa).
>
> b) We do not lend to pensioners, elderly or vulnerable people. We stick with *wheeler-dealer* property developer types, we prefer to loan on multiple securities.

c) We do not lend to anyone who is borrowing to give to their relatives, or to lend to their relatives or to invest with their relatives. Anything to do with relatives we will have nothing to do with. The reason is they may be vulnerable to emotional blackmail.

d) We do not lend to people who are not sophisticated. Mums and Dads on incomes with jobs as their only cashflow cannot support hight interest rates and have no business dealing with these sorts of loans. The classic borrower for us is a developer who needs bridging finance between a purchase and sale. Essentially we need to see they are business people of some sophistication. We will not lend to mum & dad types who own a franchise – because as we see it that is just a common road to ruin that mums and dads who are wet behind the ears seem to take.

e) We generally do not lend money on people's own homes unless they can demonstrate a clear business use of the money. I estimate that only 1 in 20 of our loans to owner occupiers.

f) Improvident loans – See (a), (c), (d), (e) above, (g) below.

g) We always insist on an exit strategy for each loan. We do not want a loan which is going to go into default. This requirement is usually satisfied by the provision of a letter of offer from a reputable lender. The letter of offer must be subject to a valuation figure which our investigations regard as realistic (otherwise the letter of offer is worthless). Another common acceptable exit strategy is the sale of the property where an agent has been appointed (or contracts already exchanged)."

104 Dunsford also said that if the borrower's cheque directions show that there is a significant transfer of money to a third party:

> "… we ask more questions. Many loans have faltered at this point. Usually it will be because our requisitions reveal the money is to be advanced into some investment scheme of a dubious nature."

105 So far as the Berowra loan was concerned, it was not a third party loan, so criterion (a) was met.

106 Dunsford had no reason to believe that Kowalczuk was a pensioner, elderly or vulnerable. He was misinformed (but had no reason to doubt) that Kowalczuk was a developer. The loan was not on multiple securities. Thus, so far as his belief went, criterion (b) was satisfied, save that the preference to lend on multiple securities was not met.

107 Dunsford did not know that the purpose of the borrowing was to give the proceeds to Anastasi. Thus, so far as his knowledge or belief went, there was no breach of criterion (c).

108 As to criterion (d), Dunsford had Anastasi's say-so that Kowalczuk was a *"business person of some sophistication"*. As well, he obtained Kowalczuk's apparent confirmation that properties apparently registered in his name were *"developments that I have done"*. He was aware that Kowalczuk already had Dalla available to act as his solicitor concerning this transaction. He had reason to believe that Kowalczuk had enough business sophistication to have put the family home into a trust, as protection against possible bankruptcy. No franchise was involved. So far as Dunsford's belief went, there was no reason to believe that criterion (d) was not satisfied.

109 The loan was not on Kowalczuk's own home, so criterion (e) was satisfied.

110 There was no Letter of Offer made available to Accom, from any kind of lender (whether reputable or not). Though Dunsford said he organised a valuation that estimated the Berowra property to be worth $400,000 as a house rather than a childcare centre, that valuation was never put into evidence. However the trial judge did not reject Dunsford's evidence about obtaining such a valuation. Given that NAB was later prepared to lend $350,000 on the property there is nothing inherently implausible about the evidence. As well, a professional valuation report that Kowalczuk obtained of the Berowra property, dated 13 October 2005, valued it at $670,000. That report stated that the property was approved for its existing use as a childcare centre. In these circumstances, though Dunsford was informed about an exit strategy on two occasions, when the application form identified the *"Plan for Repayment"* as being *"bank re-finance"*, and when Kowalczuk told him on the telephone that *"Tony is organising a re-finance"*, there was no specificity about the *"exit plan"*, and the lack of a letter of offer meant that criterion (g) was not satisfied in the way it was *"usually satisfied*".

111 There was a further departure from Accom's own standards when the proceeds of the Berowra loan were transferred to a third party, without Accom or Dunsford asking questions about why this was being done. So far as the evidence discloses, Dunsford knew nothing about who or what Venture Connect was, but neither did he know that it was not a business operated by Kowalczuk.

112 The trial judge found that, notwithstanding that Accom's *"Loan Repayment Ability Declaration"* form included a statement that *"I acknowledge that you insist that we take independent legal and financial advice in relation to this loan"*, Dunsford never expected that financial advice would be obtained by Mars or Kowalczuk.

113 As well as these lending criteria, Dunsford said that Accom carried out various steps of what he described as *"positive due diligence"*.

> "a) Requiring an exit strategy for the loan.
>
> b) Investigating the exit strategy for the loan.
>
> c) Requiring a letter or deed of [release] from priority from prior mortgagees.
>
> d) Requiring a letter of conduct from prior mortgagees.
>
> e) Performing a bankruptcy search.
>
> f) Performing real property ownership and company director searches.
>
> g) Searching the Austlii for references to them.
>
> h) Searching the name of the borrower on Google.
>
> i) Searching RP Data to see comparable properties in the area
>
> j) Viewing the property.
>
> k) Talking with the local real estate agents.
>
> l) Require independent legal advice by the borrower.
>
> m) Requiring the independent solicitor to verify the identity of the borrower.
>
> n) Searching the independent solicitor on the Law Society database and ensuring the contact details match those on his or her letterhead.

o) Require the Solicitor to have known the borrower for a minimum of 12 months (this requirement was implemented in 2006).

p) We do not lend above 80% of the market value as assessed by us."

114 In the present case, while there was an exit strategy, of a sketchy kind it could hardly be said it was investigated, so due diligence step (b) was not carried out.

115 Due diligence steps (c) and (d) were not applicable, as there was no prior mortgagee.

116 Steps (e), (f), (g) and (h) were carried out. The bankruptcy search, the search of Austlii, and the search of Google turned up no reference to Edward Kowalczuk. Steps (j), (k), (l), (m), and (n) were all carried out. It is not clear from the evidence that step (i) was carried out. Step (o) is inapplicable, as the requirement was implemented only in 2006. It appears that step (p) was also implemented, as the initial request for $500,000 was turned down, by reason of the value of the security.

117 Even accepting that there were some departures from Accom's own lending guidelines and due diligence procedures, the trial judge was well aware of those departures, and did not regard them as enough, even when combined with other factors, to show the loan was either unconscionable or unjust. It needs to be recalled that departure from a lender's own lending guidelines does not in itself establish the injustice of a loan. Rather, those departures need to be part of a process of reasoning, such as that engaged in by Spigelman CJ in ***Khoshaba***, the ultimate outcome of which is that the loans in question are unjust. I turn to consider for myself whether there are any other factors that, when combined with departures from the lending criteria and due diligence procedures, lead to the conclusion that the loans are unjust.

118 It can readily be accepted that the interest rates charged on the Berowra loan were extremely high. However, Dunsford had no reason to believe that Kowalczuk had not received adequate advice from Dalla concerning the loan and its terms. The *"Acknowledgement of Legal Advice"* document that Kowalczuk signed and returned to Accom included express acknowledgement of being aware that there was a higher rate of interest under the mortgage, and the liability to pay the lender's costs of remedying any default. The mortgage document that Kowalczuk signed stated what the higher rate and lower rate were, in a format that made them hard to miss. In the telephone conversation that Dunsford had with Kowalczuk (para [41] above) Kowalczuk acknowledged awareness of the 48% interest rate, and expressed no concern about it.

119 That Dunsford carried out the checks and enquiries that he carried out, even though they did not amount to absolutely full satisfaction of his lending criteria or due diligence procedures, is not suggestive of a man whose only concern was to obtain a mortgage over a property that had enough equity in it to be able to repay the loan.

120 Dunsford gave evidence, accepted by the judge, that about 75% of the mortgages with which Accom was involved at the time of the trial, and the same percentage for the previous year, are or were in default and court proceedings are being taken or were being taken to enforce the securities. Accom's policy is to commence enforcement proceedings immediately a loan becomes overdue. Dunsford's usual experience is that once proceedings are commenced the borrower re-finances the loan or (less frequently) sells the property. There have been approximately five occasions when Accom has exercised a power of sale, usually in circumstances where the borrowers have taken out further borrowings that rank behind Accom's mortgage, and so cannot give a clear title if they try to sell themselves. The present action is the only action where enforcement action by Accom has resulted in a trial.

121 Thus, even though the experience of Dunsford was that about 75% of Accom's loans went into default at one stage or another, his experience was also that that default was usually remedied, and the need to sell the security property was rare.

122 Given that it was always, apparently, Anastasi's intention to defraud Kowalczuk, and that his *"investors"* did not exist, it can now be seen that there was an inevitability about the Berowra loan falling into default. However, there was no reason for Dunsford or Accom to know or suspect Anastasi's dishonest intentions. Accom deducted interest relating to the whole one-month term of the loan from the funds made available to Kowalczuk when the loan was made. When the loan was for such a short term, and was entered on the express basis that it would be refinanced, this is not the sort of situation where Accom knew or ought to have known that sale of the security to realise the loan was either likely or inevitable. Particularly is that so when, even though Kowalczuk's stated income was such that he could not finance default rate interest from it, he had other resources in the form of the unencumbered house held by Mars. Indeed, as events turned out Kowalczuk was able to refinance the Berowra loan, reasonably promptly after it fell into default, and without using Mars' house as security. The only reason why there is, now, the possibility of the Berowra property is being sold is because of the additional transaction that Kowalczuk entered concerning the Haberfield loan, an additional transaction that was not foreshadowed or reasonably predictable at the time the Berowra loan was entered.

123 In these circumstances in my view the Berowra loan was not one in relation to which Accom realised, or should have realised, that default, with consequent resort to the security property, was inevitable or even highly likely.

124 To the extent to which the factors on which Mr Conti relies are made out, they do not detract, in my view, from the trial judge's conclusion that neither Mars nor Kowalczuk was in a position of special disability in dealing with Accom. Further, if one considers what was known to Dunsford concerning the proposed transaction, it was not *"sufficiently evident"* to him that Kowalczuk or Mars was under any special disability.

125 In these circumstances, I am not persuaded that his Honour's conclusion that the Berowra loan was not unconscionable within the meaning of the unwritten law (and hence within the meaning of section 51AA ***Trade Practices Act***) is incorrect. Nor am I persuaded that the type of injustice under the ***Contracts Review Act*** that overlaps with unconscionable conduct under the unwritten law has been made out concerning the Berowra loan. I will return later to whether any other type of injustice has been made out concerning the Berowra loan.

Kowalczuk's Guarantee of Haberfield Loan – Injustice?

126 There were also departures from Accom's stated lending guidelines concerning this loan. While the loan monies were advanced by being paid into Kowalczuk's own bank account rather than to a third party, the loan involved, in substance, lending on the security of owner-occupied property, and Dunsford's inspection ought not have been enough to persuade him otherwise. Cases under the ***Contracts Review Act*** have regarded the fact that a security is being proposed over the borrower's home, rather than over some investment asset, as a relevant factor to whether a loan is unjust. The reason is that, at least in the usual case, loss of a home imposes particular hardships on a borrower and any of his or her dependents who live there, and the notions of justice that underpin the ***Contracts Review Act*** call for a lender to exercise greater care in circumstances where a borrower's home might be lost if there is a default than if the security is of some other type. Even if it was true that part of the Haberfield home was let, Dunsford's knowledge of the situation was still that Kowalczuk would lose his home if security was taken over the Haberfield property and it was necessary to exercise of power of sale over that security.

127 Lending criterion (e) did not involve an absolute ban on lending on owner occupied property, even in circumstances where the borrower did not *"demonstrate a clear business use of the money"*. However Dunsford did not explain by reference to what circumstances he decided whether it was appropriate to lend on owner-occupied property. In the present case, while an intention to use the borrowings for a business purpose was asserted, and there was talk from Anastasi of a most general kind about how Kowalczuk *"has got this big deal going"*, it could hardly be said that a clear business use of the money had been *"demonstrated"*. If lending criteria (e) was satisfied at all (which I doubt), it was only by the barest of margins.

128 While Dunsford was informed of the *"exit strategy"* involving a re-financing with FirstLoan, no letter of offer from that organisation was provided, and no valuation was obtained concerning the Haberfield property. Lending criterion (g) was not met.

129 On the other hand, that Dunsford insisted that Kowalczuk become sole director and shareholder of Mars before the loan proceeded shows that Dunsford was taking lending criterion (a) seriously.

130 Mr Conti relies on the fact that this loan was made at a time when Kowalczuk had already fallen into default with the Berowra loan. In evaluating the significance of that fact, one needs to consider the circumstances of the default, and what knowledge Accom had about steps being taken by Kowalczuk to remedy the default.

131 Though the Berowra loan was originally for a term of one month, by agreement its term was extended until 10 November 2005. The evidence did not explore the circumstances in which that extension took place, save that interest for the two months' extension agreed was paid in advance. That interest was not paid by Kowalczuk, so presumably it was paid by Anastasi. Thus, the Berowra loan fell into default only when it was not repaid on 10 November 2005. On 18 November 2005 Dunsford instructed his solicitors to commence enforcement action concerning it. By 22 November 2005 Kowalczuk had a loan application on foot with NAB. On 22 November 2005 Dunsford faxed Joshua Partynski, of FirstLoan Australia Pty Ltd, saying that Accom held a first mortgage over the Berowra property and (not altogether truthfully) *"We can confirm that this loan has been conducted in a satisfactory manner. All interest on this loan is prepaid."*

132 I would infer that FirstLoan was, at that stage, acting as a broker in connection with the proposed re-finance from NAB. Thus, by 22 November 2005, Dunsford was aware that Kowalczuk had a re-financing application on foot.

133 On 24 November 2005 Dunsford gave a notice to the tenant of the Berowra property, directing payment of rents thenceforth to be made to Accom. On 25 November 2005 Accom issued a Statement of Claim in the Common Law Possession List against Kowalczuk, seeking an order for possession, the mortgage debt plus interest, and costs. On 5 December 2005 Anastasi told Dunsford the loan had been refinanced with NAB, and would settle in a day or two.

134 As well, in assessing the significance of the default in relation to the Berowra loan to whether the conduct of Accom in making the Haberfield loan (and, of particular relevance for the ***Contracts Review Act*** claim, accepting Kowalczuk's guarantee concerning it), it is important that the Haberfield loan was not actually advanced until the default concerning the Berowra loan had been remedied. Further, the default concerning the Berowra loan was remedied by obtaining a borrowing from NAB, a respectable lender in no way in the fringe or extreme part of the lending market. In all these circumstances I do not regard the Berowra loan having been in default as a particularly strong indicator of the making of the Haberfield loan being unjust, though it is a relevant factor.

135 There are some relevant differences between the situation in which the Berowra loan was entered, and that in which the Haberfield loan was entered. First the Haberfield loan was for a much larger sum of money. Second, the interest rates (both lower and higher) were higher than those for the Berowra loan. Third, as Dunsford knew or ought to have known, the security was in substance over Kowalczuk's home. Fourth, the loan was for a term of two months, and only one month's interest was retained from the initial advance. Dunsford had suggested to Anastasi that there be a longer term than the *"couple of weeks, maybe longer"* that Anastasi had originally proposed, so that *"you don't run into trouble again"*, so the prospect of refinancing not occurring inside a few weeks was one that was not only foreseeable, but foreseen, before the loan was made. It was inevitable that Kowalczuk would have to pay interest of $40,350 on 14 January 2006, unless the loan was paid out early. But, if Anastasi had been right in the representations that he made to Dunsford about the progress on the refinancing from FirstLoan, there was a prospect of there being such an early repayment. Kowalczuk's income, even as falsely stated to Dunsford, was likely not to be able to finance payment of the interest instalment that would fall due on 14 January (particularly when one bears in mind the need to pay tax, and ordinary living expenses, from it before there was income left over from which to pay interest). So far as the asset statement that was provided to Accom in July 2005 showed, Kowalczuk had no cash or readily realisable resources from which that interest payment could be raised. He had stated he owned motor vehicles supposedly worth $60,000. His only other asset of any significance shown on that asset statement, the Berowra property, was (as Accom knew) now mortgaged to NAB. On Accom's own assessment of its value, there would be room for doubt about whether there was any significant borrowing capacity left in the Berowra property, even if a second mortgage could be organised in such short time as would be needed to be able to pay the

interest that fell due on 14 January. There was no statement by Kowalczuk or Anastasi, or enquiry by Dunsford, about whether the statement of assets and liabilities that Kowalczuk had given in July was still current, or whether his position had improved or worsened from it.

136 But Kowalczuk had signed, before a solicitor, the Loan Repayment Ability Declaration, that specifically stated the amounts of the interest instalment at the lower rate, and stated that Kowalczuk could afford to pay them. From the outset, the loan was represented to Dunsford by Anastasi as one concerning which refinancing by FirstLoan was imminent. Even though the letter that Kowalczuk signed confirming that he would be repaying the loans by refinance with *"First Home Loans Australia"* was not signed until after the advance had been made, it is evident that at the time of preparation of that letter on 14 December 2005 Accom's understanding was that Kowalczuk's plan and intention was to refinance the loan in that way. Kowalczuk had already demonstrated his ability to obtain refinancing of an Accom loan, from a reputable lender. Kowalczuk had been presented by Anastasi to Dunsford as a developer, and Dunsford did not know or have reason to believe any differently. By the time the Haberfield loan was made Dunsford was also aware that Kowalczuk had obtained legal advice from Mr Lee in the past, and before the settlement Kowalczuk demonstrated his ability to obtain a prompt change of shareholder and officebearers for Mars, in itself indicative of some financial sophistication.

137 The provision contained in clause 68 of the Memorandum of mortgage, whereby Kowalczuk agreed to make all his real estate available as security for his guarantee is a type of provision the validity of which under the general law has been upheld in this Court: ***Bridge Wholesale Acceptance Corporation (Australia) Ltd v Burnard*** (1992) 27 NSWLR 415. When considering whether it is a provision that is unjust, although permitted by the general law, it is important that clause 68 does not make a radical change to the practical effect of giving a guarantee, because even if a guarantee is given unsecured, a default in payment of the debt which is guaranteed can ultimately result in the guarantor losing any real estate he owns, if a personal judgment is obtained against him or her. The mechanism through which the property is lost in such a case might be bankruptcy, or a sale through a sheriff's enforcement procedure, or a voluntary sale by the guarantor to discharge the debt, but the property is just as effectively lost, though perhaps at a later time than it might be through the operation of clause 68. It could not even be said that clause 68 is likely to offer a considerably faster path to asset realisation, so far as the lender is concerned, than the enforcement provisions for a personal debt on a guarantee, because if a borrower proves uncooperative when a lender wants to enforce its rights under clause 68 it is still necessary for the lender to take court action, and obtain a court order for sale, before the clause will actually result in the property being sold. The most significant practical effect of clause 68 is that it entitles the lender to lodge a caveat on all the real estate of the debtor as soon as there is a default. In particular, so far as the question of whether there is any unconscionability associated with clause 68 under section 51AA is concerned, Dunsford and Accom had no reason to believe it had not been adequately explained to Kowalczuk by Dalla.

138 Though the matter is close to the line, I do not conclude that the making of the Haberfield loan was unconscionable under the general law. It follows that I do not conclude that it was contrary to section 51AA ***Trade Practices Act***. Nor was there the type of injustice under the ***Contracts Review Act*** that overlaps with unconscionability under the general law, so far as Kowalczuk's giving a guarantee concerning the Haberfield loan is concerned.

Injustice of the Interest Rates?

139 Even though Kowalczuk was aware of the interest rates, both the higher and the lower rates, concerning both the Berowra and Haberfield mortgages, that is not the end of the enquiry about whether the Berowra loan, or Kowalczuk's guarantee concerning the Haberfield loan, were unjust because of the interest rates in the context of the other facts concerning each loan. It is in principle possible for a contractual provision to be unjust, even though the contracting parties are aware of what the provision is and assent to it. Even some equitable principles relating to unconscionability, such as those that undo transactions in which one contracting party has taken advantage of the ignorance, weakness or necessity of another contracting party, operate regardless of the agreement of the contracting party to the arrangement. In the present case, Mr Conti has submitted that both the higher and the lower interest rates are unjust even though Kowalczuk agreed to them. I start by considering the higher rate and the circumstances in which it was payable.

Injustice of the Higher Rate?

140 Even though Dunsford had no specific reason to believe that the loan would fall into default, in my view what would happen if it were to fall into default is a relevant matter to take into account in deciding whether the contract is unjust in any respect. Further, even though Dunsford had no specific information about the likelihood of this loan falling into default, his general experience with borrowers in the segment of the market in which Accom dealt was a relevant matter to take into account in deciding whether the loan was unjust in any respect.

141 Section 9(4) ***Contracts Review Act*** forbids the Court, when determining whether a contract or a provision of a contract is unjust, from having regard to any injustice arising from circumstances that were not reasonably foreseeable at the time the contract was made. In my view, given that 75% of Accom's loans went into default, in the present case it was reasonably foreseeable that each of the Berowra loan and the Haberfield loan could go into default, even though there was no specific reason to believe that either of them would actually do so.

142 Interest at the lower rate on the Berowra loan would require payment of $12,800 per month, which was payment at a greater rate than would be available solely from even the income of $100,000 per annum that Kowalczuk falsely stated he had. I recognise that the Loan Repayment Ability Declaration form specifically referred to these figures, and Kowalczuk said in that form that he could afford it. When he had an unencumbered house in his family trust, that statement was far from inherently incredible. Similarly, the Loan Repayment Ability Declaration concerning the Haberfield loan specifically identified the amount of the lower rate of interest concerning that loan, and Kowalczuk stated that he could afford it. While careful examination of the circumstances that were known to Dunsford might have shown that there was some room for doubt about the correctness of that statement, the statement would still not be said to have been, from the point of view of a person with the information that Dunsford had, one that should have been regarded as inherently incredible. However, if either loan were to fall into default, it is not interest at the lower rate that would be the relevant rate.

The Operation of Default Rate Compound Interest

143 It will be recalled that the Berowra loan made provision for a default rate of 96% pa, compounded monthly. The way the interest calculation of such a rate is carried out is to convert the annual rate to a monthly rate, and to apply that monthly rate to the amount owing at the end of each month. For 96% pa, the monthly rate is 8%. As a matter of arithmetic, an amount of $100 that has been lent at interest of 8% per month, compounded monthly, grows in the following fashion:

End Month	Amount Owed $		End Month	Amount Owed $		End Month	Amount Owed $
1	108.00		13	271.96		25	684.84
2	116.64		14	293.71		26	739.63
3	125.97		15	317.21		27	798.80
4	136.04		16	342.59		28	862.71
5	146.93		17	370.00		29	931.72
6	158.68		18	399.60		30	1006.26
7	171.38		19	431.56		31	1086.76
8	185.09		20	466.09		32	1173.70
9	199.90		21	503.38		33	1267.60
10	215.89		22	543.65		34	1369.01
11	233.16		23	587.14		35	1478.53

12	251.81		24	634.11		36	1596.81

144 If one uses this table to derive the rate of simple interest per annum that would yield that same amounts owing (and doing the calculation only at three-monthly intervals for the purpose of simplicity) the result is as follows:

End Month	Simple Interest Equivalent % pa
3	103.80
6	117.30
9	133.20
12	141.80
15	173.70
18	199.70
21	230.50
24	267.00
27	310.50
30	362.50
33	424.50
36	498.90

145 The higher rate of 120% that was chargeable, according to the documents, on the Haberfield mortgage equates to 10% per month. $100 lent at 10% per month, with the interest compounding monthly, results in the debt growing in the following fashion:

End Month	Amount Owed $		End Month	Amount Owed $		End Month	Amount Owed $
1	110.00		13	345.22		25	1083.47
2	121.00		14	379.74		26	1191.81
3	133.10		15	417.72		27	1310.99
4	146.41		16	459.49		28	1442.09
5	161.05		17	505.44		29	1586.30
6	177.15		18	555.99		30	1744.93
7	194.87		19	611.59		31	1919.43
8	214.35		20	672.74		32	2111.37
9	235.79		21	740.02		33	2322.51
10	259.37		22	814.02		34	2554.76
11	285.31		23	895.43		35	2810.24
12	313.84		24	984.97		36	3091.26

146 Those amounts equate with simple interest being charged at the following rates:

End Month	Simple Interest

	Equivalent % pa
3	132.30
6	154.20
9	181.00
12	213.80
15	254.10
18	303.90
21	365.70
24	442.40
27	538.20
30	657.90
33	808.10
36	997.00

Payout Figures Concerning Berowra Mortgage

147 An affidavit that Dunsford swore on 11 July 2007 sets out how the payout figure for the Berowra mortgage was arrived at. It shows that the principal amount of $320,000 was owing on the final date of the extended term of the loan, namely 10 November 2005. On 10 November 2005, an amount of $25,600 was debited, for default interest for the month from 10 November 2005 to 10 December 2005. An amount of interest, $11,005.77, was received on 11 November 2005. The evidence does not disclose the source of that amount, or how the amount was arrived at. It is slightly less than the amount of $12,800 that is the monthly interest instalment at the lower rate. It is at least possible that by that time amounts had fallen due for legal or other expenses, that were deducted from a payment of some amount larger than $11,005.77, but it cannot be said that the evidence establishes that this is so. What matters for present purposes is that interest at the default rate is charged, for a month, on the very day that the loan first falls into default. In accordance with the terms of the loan, it would have been charged even if a month's interest at the lower rate had been proffered on that day.

148 The payout amount included, as well, legal fees that had been invoiced on 24 November 2005 in the amount of $4,027.23, and interest on those legal fees for 18 days, in the amount of $190.66. The reader will recall that the Memorandum made provision for a *"liquidated"* tariff of legal fees and other fees that were said to be legal fees – see para [19] above. In accordance with the agreement, the interest on those legal fees was charged from the date the liability to pay them was incurred, at the higher rate, regardless of whether Accom had a liability to pay interest to its own solicitors on those legal fees at the higher rate (or at all), and regardless of the debtor not having been informed of the amount of the fees or given an opportunity to pay them. The aspects of the mortgage concerning legal fees, and interest on legal fees, are not challenged on this appeal.

149 The payout figure also included the *"late discharge fee"* that was later conceded to be a void penalty, in the sum of $13,383.77, and daily interest from 10 December 2005 at the higher rate.

Payout Figures Concerning the Haberfield Mortgage

150 It will be recalled that the amount of principal notionally advanced on the Haberfield mortgage was $807,000, (though the amount Kowalczuk actually received in his bank account was $750,000). One month's interest at the lower rate (*viz* $40,350) was retained, when the loan was advanced on 15 December 2005. A month's interest at the default rate, in the sum of $80,700, was debited on 14 January 2006. Though an amount of $41,000 was paid in interest on 23 January 2006, this was applied to the outstanding debt, and it was of no moment that the amount that had been paid was more than a month's interest would have been at the lower rate. Thereafter, no further payments of interest were made, and on Accom's calculations the debt continued to

compound, at 10% per month, until by the time that payment was received of the proceeds of sale of the Haberfield property on 13 October 2006 the debt had climbed to $1,988,020.99. In other words, by that date the debt was 2.46 times the amount of the principal that had originally been notionally advanced approximately 10 months earlier, notwithstanding that $81,350 in interest had actually been paid in that 10 month period.

151 On 13 October 2006 the debt was reduced by the amount of $1,123,309.41 (being part of the net proceeds of sale of the Haberfield property). In a recalculation of the debt that was performed for the purpose of these proceedings, an additional amount of $26,602.43 was taken off the debt as at 13 October 2006. That amount represents the remainder of the net proceeds of sale of Haberfield, that had originally been applied by Accom in payment of the second Haberfield loan, that it now concedes was unenforceable.

152 After making those two deductions from the account balance as at 13 October 2006, an amount of $838,109.15 remained owing.

153 That amount continued to accrue interest, on a monthly compound basis, until, when the interest charged on 14 May 2008 was added, the debt stood at $5,142,651.30 at the time of the hearing of the appeal.

154 In other words, if the Haberfield loan were to be enforced in accordance with its terms, an original debt of $807,000, incurred on 15 December 2005, has grown in the space of 2½ years to over $5.1m, notwithstanding that the lender has also received over $81,000 in interest, within the first six weeks of the loan being advanced, and a further nearly $1.15m ten months after the loan was advanced.

155 In the course of the first day's hearing of the appeal, the Court made available to counsel the calculations that I have set out at paras [143] and [145] above, concerning the manner in which the compounding default interest rates operated. At the start of the second day's hearing of the appeal Mr MW Young, counsel for Accom, proffered to the Court an undertaking, that was offered regardless of the outcome of the proceedings, that Accom would not enforce the Haberfield mortgage or the guarantee of Kowalczuk relating to the debt owed by Mars under the Haberfield mortgage for more than the lower rate fixed by that mortgage at simple interest, plus any costs it is entitled to, pursuant to that mortgage.

156 The effect of that proffered undertaking on the figures relating to the Haberfield mortgage is very large indeed. Calculations that Accom provided to the Court on the second day of hearing the appeal show that after the net proceeds of sale of the Haberfield property are credited to the loan account (meaning thereby both the amount of $1,123,309.41, and the amount of $26,602.43), Accom would have owed Mars $20,761.84, as at 31 October 2006. There would then be no occasion for any interest to accrue on the Haberfield loan after 13 October 2006. Furthermore, Accom would not have suffered a shortfall on the Haberfield loan, and so there would be no occasion to seek to enforce clause 68 of the Memorandum by obtaining an order for sale of the Berowra property, save to the extent that Accom may have an entitlement to be paid legal costs. Mr Young accepts that any interest on costs that is provided for under the mortgage will only be claimed at the lower rate pursuant to the undertaking.

157 No argument was put concerning whether Accom was entitled to charge interest even at the lower rate in the period between when it obtained default judgment on 28 March 2006, and when it obtained the proceeds of sale of the Haberfield property. If the covenant to pay interest on any judgment debt at the higher rate had merged in the judgment, it may be that interest would have accrued only at the rate applicable to judgment debts.

158 I raised with Mr Young a question about what the Court should do if the undertaking that he proffered were to be accepted, and in particular whether the Court should provide any reasons as to whether it was appropriate to set aside the default interest provision. I mentioned to him a previous case where a frequent litigant, who had the benefit of a reported judicial decision in an earlier case concerning its entitlement to receive a particular type of payment, came before me at first instance seeking orders that included an order for a payment of the same type. The case that came before me was ***Sims v Deputy Commissioner of Taxation*** [2006] NSWSC 305; (2006) 57 ACSR 249; (2006) 24 ACLC 465. In the course of argument in ***Sims*** it became apparent that there was reason to doubt that the earlier decision was correct concerning entitlement to that type of payment. Thereupon the litigant indicated it would not seek that particular component of the payment. That

would have left the earlier decision still on foot and not the subject of any adverse judicial decision or comment. After I had outlined these things to Mr Young, the transcript continues:

> "CAMPBELL JA: … I took the view at that stage that as the matter had been committed to the court for decision it was nonetheless appropriate to give reasons as to why that was an appropriate course. Now would you wish to say anything about whether a similar course should be followed in the present case?
>
> YOUNG: I'm supportive of that course, your Honour. I will be making submissions that there isn't any unconscionability and even absent the undertaking and I have no objection to the court ruling as to whether there was any unconscionability or not. But I submit as far as a remedy is concerned, whatever remedy the court might otherwise make, obviously the undertaking would be of relevance to that; that's a matter separate from any finding as to whether any aspect of the contract was unjust in the circumstances."

159 In light of that discussion, I turn to consider whether there is a basis for setting aside the default interest provisions in the mortgages.

160 In the court below the substance of the claim brought by Kowalczuk and Mars was that the Berowra loan and the Haberfield loan were unjust or unconscionable, and that Kowalczuk and Mars should be relieved of all consequences of entering them. While there was, in the cross-claim in the Equity Proceedings, a contention in paras 15 and 44 that each of the agreements relating to the Berowra loan and the Haberfield loan *"should be set aside* ***or varied****"* under the ***Contracts Review Act***, no case was run as to the precise form that any such variation should take. Notwithstanding that, consistently with Mr Young submitting it was appropriate for this court to consider whether the default interest provisions were ones that should be set aside, he said that:

> "If the only point that is being made is that one should order the lower rate rather than the higher rate or cut out the compounding, there wouldn't need to be any evidence about that…"

161 In my view the provisions of the mortgages concerning the default rate are ones that should be set aside under the ***Contracts Review Act***.

162 There is a conventional view that a properly drafted mortgage containing higher and lower rates does not attract the law of penalties at all. That is because the law of penalties strikes down those provisions of a contract that state the consequences that will flow when there is a breach of contract, if those consequences are not a genuine pre-estimate of the damage likely to be suffered in consequence of that breach. If the mortgage is drafted so that the borrower agrees to pay a particular rate of interest, but the lender agrees to accept a lower rate of interest in full satisfaction of the borrower's obligation to pay interest at that particular rate provided that the lower rate of interest is paid timeously (and, sometimes, provided that there is no breach of any other provision of the mortgage) that provision is not one that states the consequences of a breach of contract, and hence the law of penalties does not apply to it.

163 In the present case, the mortgage document itself identifies a higher rate and a lower rate, for each of the Berowra mortgage and the Haberfield mortgage. However it is necessary to turn to the Memorandum for the specific contractual provisions that create the obligations to pay interest. Though there may be some room for argument about it, I shall proceed on the basis that the provisions requiring payment of interest are of a type whereby the law of penalties is not applicable to them.

164 It is not my concern in the present case to consider whether that conventional view of the application of the law of penalties to mortgages containing a higher rate and a lower rate of interest is correct. That is because a contract can be unjust under the ***Contracts Review Act*** even if no equitable principle is contravened. The applicability of the ***Contracts Review Act*** depends upon the court considering the various factors listed in section 9(1) and (2), subject to the expansion of application contained in section 9(3), and the limitation on relevant factors contained in section 9(4).

165 It is relevant that the Memorandum contains various provisions aiming to protect the lender against loss suffered in any way in consequence of the entry of the loan agreement, its administration, or its breach. It contains the following provisions:

> "59. If any of the SECURITIES are sold and valuation fees, survey fees, legal fees, real estate fees etc are paid or incurred by the LENDER then those monies will form part of the DEBT.
>
> 60. The LENDER may obtain a valuation for the property at any time, and the DEBTORS will pay all expenses associated with any such valuation.
>
> 61. In addition to all costs and expenses which the DEBTORS may be liable at law or in equity to pay in respect of the AGREEMENTS the DEBTORS are additionally jointly & severally liable for all costs and expenses incurred by the LENDER in consequence of or occasioned by any one or more of the following:
>
> (a) any default on the part of any of the DEBTORS;
>
> (b) any act taken by the LENDER for the preservation of the SECURITIES or otherwise in relation to, the AGREEMENTS;
>
> (c) the preparation, execution and registration of the AGREEMENTS to register or protect the priority of the AGREEMENTS. The preparation of any discharge of mortgage, withdrawal of caveat, deed of release, withdrawal of charge etc upon repayment of the DEBT and attendance at settlement of the same. These will be recoverable by the LENDER whether or not the[y] advance proceeds. In this regard this MORTGAGE will be valid and give rise to a registrable and caveatable interest whether or not the PRINCIPAL is advanced in full or in part.
>
> 62. The costs and expenses payable by the DEBTORS include (but are not limited to) the internal administrative costs of the LENDER, the liability of the LENDER to pay legal costs and the liability of the LENDER to pay disbursements (whether or not the LENDER has paid the said legal costs or disbursements). These costs and expenses are to be paid on an indemnity basis. The liability of the DEBTORS for the costs and expenses will arise immediately upon the LENDER becoming liable to pay the same. The costs and expenses form part of the DEBT, and will carry interest at the HIGHER RATE from the date the liability arises until the date of payment by the DEBTORS.
>
> 63. The DEBT includes (but is not limited to)
>
> (a) any expenses and losses which the LENDER incurs if a DEBTOR does anything which it has agreed not to do or does not do anything it has agreed to do,
>
> (b) any expenses and losses which the LENDER incurs if the LENDER exercises any of its rights or powers under the AGREEMENTS,
>
> (c) any expenses and losses which the LENDER incurs concerning the making or perfecting the AGREEMENTS (eg stamp duty, registration fees, legal fees),

(d) any establishment fees the DEBTOR agreed to pay the lender or introducer where the LENDER has agreed to ensure the introducer's fee is paid,

(e) any expenses and losses which the LENDER incurs protecting or preserving any ASSETS or SECURITIES (eg insurance premiums, repairs, consideration for exercise of a right).

(f) Any legal or other fees (including internal administration costs) the lender incurs in enforcing the AGREEMENTS."

166 No question has arisen on the argument of the appeal about whether all of these provisions are in themselves enforceable, and I shall proceed on the assumption that they are enforceable. If those provisions are enforceable, it is hard to see how the lender would suffer any detriment at all in consequence of, in particular, either interest or principal not being paid on the due dates. I say that bearing in mind that the other provision of the Memorandum, relating to Damages for Late Repayment (para [16] above) has already been held to be void as a penalty. Where a lender has specific contractual entitlements to recover all loss and expenses it suffers in consequence of a default, a provision for a higher rate of interest to become payable in circumstances where there has been a default (even if such a provision is cast in a form that takes it outside the law concerning penalties) is not in my view reasonably necessary for protection of any legitimate interest of any party to the contract.

167 The lower rate of interest under a mortgage is the only rate of interest that the lender will receive if the transaction is completed without default. In the course of argument, Mr Young's response was sought to a suggestion that the lower rate of interest on the mortgage was presumably the commercial assessment by the lender of what return it needs on its money to make an acceptable profit and adequately recognise the degree of risk that might be involved in a particular loan, so what other interest did the lender need to protect by having a higher rate payable on default. His response was:

> "The way that men of business I would submit, would normally go about these sorts of assessments, would be to look each year on the amount of money that they are getting in, both through lower rate interest and higher rate interests, and then looking at the amount of money that they had to pay out or money that they lose through not being able to recover money due to defaults and their legal costs and working out whether they were making a reasonable profit doing that or not. If they weren't, then presumably they would bump-up their interest rates but part of the money they were getting in each year, particularly someone in the position of Mr Dunsford or Accom, it's a combination of some money at the lower rate and some money at the higher rate. All we know is that Mr Dunsford considered these higher and lower rates sufficient to give him enough money to carry on Accom's business as a lender. It may or may not be the case that if there was just lending at the lower rate, Mr Dunsford would have thought that commercially worthwhile. He knows from past experience that there are payments that are going to be made at the higher rate. That happens in 75% of cases. Presumably it must be something he takes into account when formulating his business plan for any given year. He would also know that in relation to those matters, he's got to do extra work. His lawyers have got to do extra work. He's got to pay his lawyers no doubt upfront for doing that work. That whatever the theoretical liability to pay costs, he's not actually going to get back all of his actual legal costs and all of the expense and trouble--
>
> CAMPBELL JA: Usually a mortgage does contain a provision saying that the mortgagor has to pay every last cent of the costs.
>
> YOUNG: Yes, but it having a provision and actually getting back all one's expenditure can be a different matter because first of all, there is internal costs incurred by the lender itself and they are not covered normally by such a clause. As a matter of practice, one must bear in mind most of these loans are settled. As a matter of practice, it may be necessary to take some sort of discount in order to get one's money paid back quickly. One mightn't want to go to the expense of having a proper bill of costs drawn up from one's solicitors to get every last cent back. One could well imagine some figure being a discounted figure on what was

> actually expended being put forward in each case for a quick settlement but certainly Mr Dunsford and Accom is distracted by the need to litigate against people and will incur costs and loss of time as a result of dealing with litigation. Plus the uncertainty factor of not knowing where their money is coming back in. If the money hasn't come back in and they can't be sure when Accom's money will be coming back in, then that interferes with the ability to lend money out again. There is just no evidence as to how the higher rate and the lower rate are fixed in relation to the commercial expectations of Mr Dunsford and I would submit that unless one could start off with the proposition that lending at the higher rate is unconscionable, then the addition of a concessional lower rate, I mean that can only make it less unconscionable because it gives the borrower an opportunity to reduce the amount of interest paid by adhering promptly to the repayment schedule."

168 I do not accept that these arguments show that the provision for payment of interest at the higher rate in the present case is not unjust. Even if it were the case that in fixing rates Accom took into account that part of its returns in any year were likely to include a significant proportion of interest paid at default rates, in my view it is not in the public interest that a moneylending business should be structured in a way that it is only by its contracts going into default that it can make a satisfactory profit that recognises the risk of its business. In any event, I would not be prepared to conclude without evidence that if Accom lent only at the lower rate Dunsford would not have thought that commercially worthwhile.

169 While there are very commonly extra costs and some overhead expenses associated with administering a loan in default, by comparison with a loan that is proceeding in accordance with its terms, this Memorandum contains provisions that entitle the lender to recover those extra costs and expenses.

170 I cannot, in the context of the present lender that has 75% of its loans in default, place weight on *"the uncertainty factor of not knowing where their money is coming back in"*.

171 Nor do I accept that it is only if the higher rate is itself unconscionable that the provision can be unjust within the meaning of the ***Contracts Review Act***. The way in which the interest rate for the Berowra loan was presented to Kowalczuk by Dunsford in his telephone call (para [41] above) and in the first paragraph of the Loan Repayment Ability Declaration (para [43] above) was as the lower rate. While the mortgage document stated a higher and a lower rate, for each of the Berowra mortgage and the Haberfield mortgage, and Kowalczuk knew those rates, the difference between the lower rate than the higher rate was extremely great, both in that the lower rate was double the higher rate, and in that the difference was huge in absolute terms, at 48% per annum for the Berowra loan, and 60% per annum for the Haberfield loan. Regardless of how the traditional law concerning penalties might have regarded it, the difference between the higher and the lower rates is as a matter of substance that the higher rate is payable as a consequence of there being a default.

172 The traditional law of penalties had a sound basis of justice in taking the view that a contractual provision that imposed an extra obligation when there was a default was inherently unjust if the extra obligation imposed was not a genuine attempt to estimate the loss that flowed as a consequence of the default. In my view, even if as a matter of drafting a mortgage that imposes higher and lower rates of interest is able to avoid the application of the law concerning penalties, by making the lower rate a bonus for compliance rather than a penalty for breach, a mortgage so drafted can still be looked at for its substantial commercial effect when one is considering whether it is unjust within the meaning of the ***Contracts Review Act***.

173 It is beyond belief that the difference between the lower and the higher rates, for these mortgages, was anything like a genuine attempt to estimate the loss that would flow from the occurrence of a default. That is particularly so when the mortgage included provisions whose obvious objective was to provide a separate basis upon which every cent of extra expense incurred as a consequence of a default could be recovered.

174 It does not follow from the view I am expressing that in no circumstance is any difference between a higher and lower rate in a mortgage justified, when the higher rate becomes payable upon a default. I have some doubt about whether such a provision could coexist with provisions like those in the present Memorandum, that made every cent of the extra expense incurred as a consequence of a default specifically recoverable. If there were no provisions that made extra expense incurred in consequence of a default recoverable, or provisions that made only certain specific expenses incurred as a consequence of a default

recoverable without covering the entire field of loss suffered in consequence of a default, there would often, it seems to me, be room consistently with the ***Contracts Review Act*** for a provision that allowed a higher rate of interest to be paid upon default, to the extent that it protected a legitimate interest of the lender.

175 The provision for compounding of interest at monthly rests in the present case is one that, particularly when applied at the higher rate, has the potential to be utterly crushing to a borrower. That a borrowing of $100 can be turned into a debt after 36 months of nearly $1,600 by compounding at 8% monthly, or into a debt of over $3,000 by compounding at 10% monthly makes this clear. It is also amply demonstrated in the present case by the way in which (even treating all expenses deducted at the outset as part of the advance) the amount of money actually advanced concerning the Haberfield loan was $766,650 (the principal of $807,000 minus the retained interest of $40,350), Accom has received in return a total of $1,231,261.80 in the form of principal and interest within 10 months (in itself a full return of its capital and of the order of 60% profit over the 10 months) yet Kowalczuk still owed $5.1 million at the time of the hearing of this case in May 2008. There are some injustices too plain to need elaboration.

176 In the present Memorandum, there was a single contractual provision that made interest compound at monthly rests. That provision was in general terms, so that it applied to both the higher and the lower rate. As applied to the higher rate, it is clearly in my view unjust. If the court decides that a contract or a provision in a contract is unjust, its power to grant relief, under section 7, arises *"if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result"*. The decision about whether the contract or a provision in the contract is unjust is made by reference to the contract as it is written. It is sufficient, in my view, in the present case to conclude that the provision for compounding of interest is unjust because it applies equally to the higher rate and the lower rate.

177 No doubt in light of the undertaking that he offered, Mr Young did not submit that it was appropriate to vary the provision for compounding so that it applied to interest at the lower rate. It is unnecessary to decide anything about whether in other cases it might be appropriate to vary a provision for compounding in a mortgage like the present so that it applied only to the lower rate. I recognise that provisions for capitalisation of interest at monthly rests are not uncommon in lending documentation. (But then, lending documentation does not usually include rates like those in the present case.) There is also a significant question about the extent to which courts, in granting relief under the ***Contracts Review Act***, in circumstances where a lender has lent on terms that are, as written, unjust, should rewrite the contract into a form that the court decides would not have been unjust had the lender adopted that form in the first instance. If courts were to act in that way, it is hard to see that there would be any downside, apart possibly from costs, in a lender including unjust provisions in its documentation, as it could be confident that, if those provisions were challenged the courts would refashion them to allow the lender the maximum the court decides the lender could get away with without contravening the Act, and the lender might be lucky enough to deal with a borrower who did not challenge the enforceability of the contract as written. There is a very real question about whether a court should take part in that sort of enterprise. There is also a very real question about the extent to which the court should, in exercise of its power under section 7, take into account whether it would be just for it to adopt a certain *practice* concerning the granting of relief, or whether its consideration of justice in granting remedies should be confined to the circumstances of the instant case. When those questions do not arise in the present case, I express no view concerning them.

178 Various of the specific factors listed in section 9(2) also support the conclusion that the higher interest rate and compounding provision were unjust. There was significant inequality in bargaining power between the parties to the contract, there was no negotiation about the terms, and it was not reasonably practicable for Kowalczuk to negotiate for the alteration of or to reject the higher interest rate and the compounding provision. The provisions of the Memorandum were verbose, in some instances contradictory, and hard even for a lawyer to follow. However I do not base my conclusion that the higher interest rate provision and the compounding provision were unjust on the presence of those specific factors.

Reduction of Interest Rate to 8%

179 One of the orders that Mars and Kowalczuk sought in a Further Amended Notice of Appeal, a draft of which was made available to the other parties only shortly before the appeal hearing commenced, was an order varying the lower interest rates in both the Berowra mortgage and the Haberfield mortgage to a simple rate of

8% pa. No such order had been sought at the hearing. While a claim had been made, in general terms, for Mars and Kowalczuk to be compensated for any loss they had suffered by reason of contravention of the ***Trade Practices Act***, or (so far as Kowalczuk was concerned) for compensation under the ***Contracts Review Act***, no claim was put forward that the standard by reference to which such compensation should be measured was the situation that Mars and Kowalczuk would have been in had they borrowed at 8% simple interest.

180 Mr Young opposes the Court entertaining an application for such an order on the appeal. He submits that the appropriate rate of interest at which a borrower in Kowalczuk's position could have obtained a loan, in the circumstances of urgency in which the present loans were sought, and when the loan was being obtained only for a very short period, were matters upon which it would have been relevant to call evidence at the hearing. Thus, he opposes the matter now being agitated, on ***Suttor v Gundowda*** [1950] HCA 35; (1950) 81 CLR 418 grounds.

181 In my view, Mr Young's submission is correct. This Court should not entertain the argument that the lower rate of interest should be reduced to 8% simple, when there was no issue of that kind litigated in the court below.

Applicability of Section 51AC

182 The trial judge held that section 51AC did not apply to the entering of either the Berowra mortgage or the first Haberfield mortgage. That was because, while both Kowalczuk and Mars acquired *"services"* within the meaning of the ***Trade Practices Act*** by entering the contracts for the lending of money, they did not acquire those services *"for the purpose of trade or commerce"*, and hence section 51AC(7) excluded the operation of section 51AC. In each case, the borrowing was, in the judge's view, a one-off borrowing for the purpose of on-lending, and not a small business borrowing for the purpose of its business.

183 The judge placed reliance upon the decision of the Full Federal Court in ***Australian Securities and Investments Commission v National Exchange Pty Ltd*** [2005] FCAFC 226; (2005) 148 FCR 132. That decision was on section 12CC ***Australian Securities and Investments Commission Act*** **2001** (Cth), a provision that mirrors section 51AC so far as the acquisition of financial services is concerned. National Exchange Pty Ltd had made offers to various shareholders in a listed company, offering to acquire their shares for a price that was in fact significantly below the price at which those shares could have been sold on the Stock Market. One of the grounds on which ASIC's allegation that National Exchange had contravened section 12CC failed was that while a shareholder's acceptance of National Exchange's offer might have been *"in the course of"* trade and commerce, it was not *"for the purpose of"* trade or commerce.

184 In my view, the present case is distinguishable in one respect from ***ASIC v National Exchange***, but even so the judge's conclusion about the inapplicability of section 51AC was correct.

185 In ***ASIC v National Exchange***, all that the shareholders would have done, by accepting the offer that National Exchange made, was to realise an asset. Obtaining the sale price of that asset was not of itself for the purpose of trade or commerce – the shareholders could have used the proceeds in any way whatever that they might choose.

186 By contrast, here, both Kowalczuk and Mars acquired the loans from Accom for the purpose of on-lending to make a profit. Each loan was made after Kowalczuk or Mars had sent Accom a signed declaration that the loan was to be *"applied wholly or predominantly for business or investment purposes (or for both purposes)"*. In the present case, the purpose of Kowalczuk and Mars was to invest the proceeds. However, not all investment is engaged in *"for the purpose of trade or commerce"*. In ***Concrete Constructions (NSW) Pty Ltd v Nelson*** [1990] HCA 17; (1990) 169 CLR 594 Mason CJ, Deane, Dawson and Gaudron JJ said, at 603, that the expression *"in trade or commerce"* in section 52 ***Trade Practices Act***

> "… can be construed as referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character."

187 Their Honours held that the expression *"in trade or commerce"* refers to:

> "… "the central conception" of trade or commerce and not to the "immense field of activities" in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business."

188 Similarly, a transaction is entered *"for the purpose of trade or commerce"* when it is entered to enable some further activity, that has itself a trading or commercial character, to be engaged in. For a private individual, or a private individual's company, to make an investment is not, in my view, to enter a transaction *"for the purpose of trade or commerce"* when it is not itself a part of a business of investing. It is unnecessary, on the facts of the present case, to decide whether an investment made by such a person or company as part of a business of investing would have the necessary character of being entered *"for the purpose of trade or commerce"*.

189 The appellants submit that it would be anomalous if Accom was able to avoid the protective provisions of the **Consumer Credit Code** because the loan was one for *"business or investment"*, but then not be caught by section 51AC because the loan was not *"for the purpose of trade or commerce"*. I do not agree that this situation is anomalous. The **Consumer Credit Code** is State legislation while the ***Trade Practices Act*** is Federal legislation. When the enacting legislatures are different, and the purposes of the respective pieces of legislation are different, there is no reason to expect that they will dovetail perfectly.

Unconscionability and the *Fair Trading Act*

190 Even though it had not been relied upon in the court below, Mr Conti sought in the Further Amended Notice of Appeal to rely upon an allegation of unconscionability contrary to section 43 ***Fair Trading Act***. He seeks to make such an allegation against Accom concerning both the Berowra loan and the Haberfield loan, and to seek relief concerning it for both Mars and Kowalczuk.

191 The Court made clear in the course of argument of the appeal that it regarded this ground of appeal as having implicit in it an application to make any necessary amendments to the pleadings, to enable the argument to be given effect to if successful.

192 Given the close similarity between factual issues arising concerning the alleged breaches of section 51AC and section 51AA ***Trade Practices Act*** that had been litigated in the court below, and factual issues that would arise concerning the contravention of section 43 ***Fair Trading Act***, Mr Young (correctly, in my view) did not argue that raising the issue under section 43 ***Fair Trading Act*** only on the appeal was impermissible on ***Suttor v Gundowda*** grounds.

193 Section 43 ***Fair Trading Act*** appears to be modelled on section 51AC ***Trade Practices Act***, though with some differences. Section 43(1) ***Fair Trading Act*** provides:

> "A supplier shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a consumer, engage in conduct that is, in all the circumstances, unconscionable."

194 Section 43(2) says:

> "Without limiting the matters to which the Supreme Court may have regard for the purpose of determining whether a supplier has contravened subsection (1) in connection with the supply or possible supply of goods or services, the Court may have regard to:
>
> (a) the relative strengths of the bargaining positions of the supplier and the consumer,

(b) whether, as a result of conduct engaged in by the supplier, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier,

(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services,

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer (or a person acting on behalf of the consumer) by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services, and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the supplier."

195 Thus, it contains a non-exhaustive list of factors that the Court can take into account in deciding whether there has been a contravention of subsection (1), that is closely analogous to section 51AC(3)(a)-(e), save only that it relates to a *"consumer"* rather than a *"business consumer"*. Most importantly for the present purposes, section 43 contains no analogue of section 51AC(7). Thus, Mr Conti submits, the reason why the trial judge found that section 51AC did not apply in the present case does not provide an obstacle to section 43 being contravened.

196 I accept that there is no such obstacle to a finding of contravention of section 43. However, before considering whether analysis of the facts shows that section 43 had been contravened by Accom, it is necessary to consider an argument that was raised about whether a contravention of section 43 could lead to any remedy, in the circumstances of the present case.

Availability of a Remedy if Section 43 Contravened?

197 Section 43 ***Fair Trading Act*** occurs in Part 5 of that Act. The provisions of the ***Fair Trading Act*** relating to enforcement and remedies are contained in Part 6, which runs from section 61 to section 73A inclusive.

198 Of those sections, section 61 is purely definitional. Section 62 creates various offences and imposes penalties for them, but no offence is created concerning any contravention of section 43. Sections 63-64 are procedural sections relating to proceedings for offences. Section 64A enables various statutory licences to be suspended, and deals with the consequences of any such suspension. It does not relate to the circumstances of the present case.

199 Section 65 is a general provision empowering the Minister, the Director-General or *"any other person"* to apply to the Court for an injunction relating to a contravention of (inter alia) Part 5. The proceedings do not seek any injunction under section 65. Sections 66-67, 73 and 73A relate to a variety of other orders that can be sought, but only a limited class of applicants (in some cases the Director-General, and in other cases the Minister or the Director-General) has standing to seek those orders.

200 Section 68(1) relevantly provides:

> "A person who suffers loss or damage by conduct of another person that is in contravention of a provision of Part … 5 (section 43 excepted) … may recover the amount of the loss or damage by action against the other person, or against any person involved in the contravention."

201 Section 68A provides remedies for contraventions of section 27 or section 32, and thus is not able to be invoked in the present case.

202 Sections 69 and 70 are evidentiary provisions, and provisions relating to when conduct or a state of mind of a person is attributed to a body corporate.

203 Section 71 provides a variety of defences.

204 Section 72 provides, so far as is relevant:

> "(1A) A reference in this section to loss or damage does not, if the loss or damage arises from a contravention of Part 5 (section 43 excepted), include a reference to:
>
> (a) the death of a person, or
>
> (b) personal injury to a person (including any pre-natal injury, any impairment of the person's physical or mental condition and any disease).
>
> (1) Without limiting the generality of section 65, if, in a proceeding instituted under this Part, or for an offence against Part … 5, … the Supreme Court finds that a person has sustained, or is likely to sustain, loss or damage by conduct of another person that contravened a provision of Part … 5, … the Court may, whether or not it grants an injunction under section 65 or makes an order under section 67 or 68, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders specified in subsection (5)) if the Court considers that the order or orders concerned will compensate the first-mentioned person wholly or in part for the loss or damage or will prevent or reduce the loss or damage.
>
> (2) Without limiting the generality of section 65, the Supreme Court may, on the application of a person who has sustained, or is likely to sustain, loss or damage by conduct of another person that contravened a provision of Part … 5, … make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders specified in subsection (5)) if the Court considers that the order or orders concerned will compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, wholly or in part for the loss or damage or will prevent or reduce the loss or damage.
>
> (3) An application may be made under subsection (2) in relation to a contravention of Part … 5, … even if a proceeding has not been instituted under another provision of this Part in relation to the contravention.
>
> …
>
> (5) The orders referred to in subsections (1) and (2) are:
>
> (a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Supreme Court thinks fit, to have been void from its beginning or at all times on and after such date before the date on which the order is made as is specified in the order,

(b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified,

(c) an order refusing to enforce any or all of the provisions of such a contract or arrangement,

(d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage,

(e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage,

(f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at the person's own expense, to repair, or provide parts for, goods that had been supplied by the person who engaged in the conduct to the person who suffered, or is likely to suffer, the loss or damage,

(g) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at the person's own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage, and

(h) an order, in relation to an instrument creating or transferring an interest in land, directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to execute an instrument that:

(i) varies, or has the effect of varying, the first-mentioned instrument, or

(ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument.

…

(7) For the purpose of determining whether to make an order under this section in relation to a contravention of section 43, the Court may have regard to the conduct of the parties to the proceedings since the contravention occurred.

(8) The powers conferred on the Supreme Court under this section in relation to a contract or arrangement do not affect any powers that any other court may have in relation to the contract or arrangement in proceedings instituted in that other court in respect of the contract or arrangement."

205 One of the preconditions for the operation of section 72(1) is that the finding of *"loss or damage by conduct of another person that contravened a provision of Part … 5"* must be made *"in a proceeding instituted under this Part, or for an offence …"*. If section 72(2) and (3) had not been enacted, section 72(1) would have

no application, because the cross-claims in the present case were neither a proceeding instituted under Part 6 of the ***Fair Trading Act***, nor proceedings for an offence. In particular, the exclusion, under section 68, of any action for damages for a breach of section 43 would preclude an action seeking such damages from being *"a proceeding instituted under this Part",* and no other portion of Part 6 appears relevant.

206 However, section 72(7) makes clear that in at least some circumstances Parliament intended an order to be available under section 72 concerning a contravention of section 43. It is readily understandable how such relief might be appropriate if, for example, an injunction were sought against the continuance of a business practice that amounted to unconscionable conduct, and ancillary orders were sought under section 72 to make good damage that had already occurred from the carrying on of that business practice. However, the application of section 72 for contraventions of section 43 is not limited to that circumstance. It is the effect of section 72(2) and (3) that proceedings may be brought under section 72(2) concerning any contravention of Part 5 (including a contravention of section 43), and may be brought even if a proceeding has not been instituted under another provision of Part 6 in relation to the contravention.

207 Section 72(1A) has the consequence that, where a contravention of section 43 is alleged the reference in section 72 to *"loss or damage"* has a wider field of operation than it has concerning a contravention of any other provision of Part 5. Concerning a contravention of section 43, *"loss or damage"* in section 72 includes death and personal injury, even though *"loss or damage"* does not include death or personal injury concerning a contravention of Part 5 other than section 43. Thus, section 72(1A) provides a further textual illustration of Parliament's intention that section 72 should be able to operate in relation to contraventions of section 43. However when the loss or damage that Kowalczuk and Mars claim in the present case is financial, section 72(1A) cannot be directly applied to the facts of the present case.

208 In my view, the power to make an order under section 72(2) should not be regarded as impliedly limited by the express exception of section 43 from the right to seek damages under section 68(1). It is the effect of section 68(1) that a person who suffers loss or damage by conduct of another person that is in contravention of section 43 does not have a legal right to recover the amount of the loss or damage by action against the other person. However, orders granted under section 72 are not orders that a person is entitled to as of right. They are orders dependent upon an exercise of discretion or judgment by the Court. That discretion or judgment relates to whether the Court grants an order at all (as is shown by the words occurring early in the section, *"the Supreme Court may …"*), and also as to the form of the order (as is shown by the words *"make such order or orders as the court thinks appropriate"*). The limitation on the Court's power to make an order under section 72(2) is that the order can only be made:

> "… if the Court considers that the order or orders concerned will compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, wholly or in part for the loss or damage or will prevent or reduce the loss or damage."

209 While the orders that can be made under section 72(2) are not limited to those specified in subsection (5) the orders can at least be of the various types listed in subsection (5). Thus, orders for payment of money under section 72(5)(e) are in principle possible.

Has Section 43 Been Contravened?

210 Under the definitions contained in section 4(1) ***Fair Trading Act***, *"services"* includes:

> "… the rights, benefits, privileges and facilities that are, or are to be, provided, granted or conferred under:
>
> …
>
> (d) a contract for or in relation to the lending of money."

Thus, the contracts in the present case count as services.

211 Under the definition in section 4(1):

> "**Supplier** means a person who, in the course of a business, supplies goods or services.
>
> **Supply** includes:
>
> …
>
> (b) in relation to services – provide, grant or render for valuable consideration …"

Thus, Accom is a *"supplier"* within the meaning of that Act.

212 Before section 43 can apply, there must be a supply or possible supply of goods or services *to a consumer*. Section 5 provides:

> "(1) In this Act, a reference to a consumer is a reference to a person who:
>
> (a) acquires goods or services from a supplier, or
>
> (b) acquires an interest in land, other than land used, or intended to be used, or apparently intended for use, for industrial or commercial purposes.
>
> (2) Goods or services referred to in subsection (1) do not (except for the purposes of section 43) include goods or services acquired, or held out as being acquired, for re-supply or, in the case of goods, in the course of a business other than a farming undertaking for the purpose of:
>
> (a) consuming or transforming them by a process of manufacture or production, or
>
> (b) using them for the repair or treatment of other goods or of fixtures on land."

213 Each of Mars and Kowalczuk is a *"consumer"*, within the meaning of section 43.

214 In ***Canon Australia Pty Ltd v Patton*** [2007] NSWCA 246; (2007) ATPR ¶42-183 the meaning of *"unconscionable conduct"* for the purposes of section 51AC ***Trade Practices Act*** was considered. I said, at [39]-[46], with the assent of Harrison J:

> "When s 51AA was first enacted, it did not contain subsection (2) in its present form. Section 51AC was added to the ***Trade Practices Act*** after s 51AA, and by the same legislation as amended s 51AA(2) to its present form. As s 51AC was evidently intended to have practical effect, it must follow that relief will potentially be available under s 51AC in circumstances that do not involve unconscionability within the meaning of the unwritten law of the States and Territories.
>
> In ***Hurley v McDonald's Australia Ltd*** (2000) ATPR ¶41–741 the Full Federal Court (Heerey, Drummond and Emmett JJ) considered whether a statement of claim should be permitted to be amended to include an allegation of unconscionable conduct under s 51AB ***Trade Practices Act***. Because the question of construction of s 51AC arose in that context it

was not necessary for their Honours to express a final view about any precise meaning that "unconscionable conduct" had in s 51AC. They said (at [21]–[22]):

> "… Nevertheless, it must be possible for the Applicant to demonstrate that the particular conduct alleged in the proposed new causes of action is capable of constituting unconscionable conduct, at least on some arguable construction of that expression.
>
> For conduct to be regarded as unconscionable, serious misconduct or something *clearly unfair or unreasonable*, must be demonstrated — ***Cameron v Qantas Airways Ltd*** (1994) 55 FCR 147 at 179. Whatever "unconscionable" means in s 51AB and s 51AC, the term carries the meaning given by the Shorter Oxford English Dictionary, namely, actions *showing no regard for conscience*, or that are *irreconcilable with what is right or reasonable* — ***Qantas Airways Ltd v Cameron*** (1996) 66 FCR 246 at 262. The various synonyms used in relation to the term "unconscionable" import a *pejorative moral judgment* — ***Qantas Airways Ltd v Cameron*** (1996) 66 FCR 246 at 283–284 and 298."

In ***Attorney General (NSW) v World Best Holdings Ltd*** (2005) 63 NSWLR 557, Spigelman CJ (at [119], 583) said, concerning a different statutory provision,

> "Over recent decades legislatures have authorised courts to rearrange the legal rights of persons on the basis of vague general standards which are clearly capable of misuse unless their application is carefully confined. Unconscionability is such a standard."

He continued (at [121], 583):

> "Unconscionability is a concept which requires a high level of moral obloquy. If it were to be applied as if it were equivalent to what is "fair" or "just", it could transform commercial relationships …"

Those remarks can equally, in my view, be applied to the notion of *"unconscionable conduct"* in s 51AC.

In ***Australian Securities and Investments Commission v National Exchange Pty Ltd*** (2005) 148 FCR 132; [2005] FCAFC 226; (2005) 56 ACSR 131 the Full Federal Court (Tamberlin, Finn and Conti JJ) construed s 12CC of the ***Australian Securities and Investments Commission Act*** **2001** (Cth). That section prohibits unconscionable conduct in trade or commerce in connection with the supply of financial services. The prohibition is in terms not materially different to s 51AC ***Trade Practices Act***. Their Honours said (at 140; [30]) that s 12CC "was intended to operate as a 'mirror' provision to s 51AC of the ***Trade Practices Act*** …". Their Honours continued:

> "… Authority on s 51AC supports the proposition that the prohibition in s 12CC is not to be read down by limiting its operation only to circumstances where the common law would grant relief in respect of unconscionable conduct: ***Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd (No 2)*** (2000) 96 FCR 491 at 502 per French J; ***Australian Competition and Consumer Commission v Keshow*** [2005] ATPR (Digest) 46–265 at [97] per Mansfield J and the cases and authorities there cited. It is equally clear both from the actual language of s 51AC and of s 12CC and from the extrinsic materials relating to s 51AC that these provisions were intended to build on and not to be constrained by common law case law: see ***Australian Competition and Consumer Commission v Radio Rentals Ltd*** [2005] FCA 1133 at [24]; and *Debates*. The language must be given its ordinary meaning and must not qualified by pre-existing constraints on liability: see

> ***Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd*** (2000) 104 FCR 253 at [30]–[37]; Pearson G, "The ambit of unconscionable conduct in relation to financial services" (2005) 23 (2) C&SLJ 105 at 123; Bigwood R, "Curbing Unconscionability: Berbatis in the High Court of Australia" (2004) 28(1) MULR 203."

Their Honours also said (at 142; [40]), concerning the list of factors the court was empowered to have regard to in deciding whether a contravention of s 12CC had occurred.

> "… These factors should be considered and weighed as a whole. Some may weigh in favour of a characterisation of the conduct as unconscionable and others may not. It is not appropriate to approach this list as exhaustive. This list is indicative of some of "the relevant circumstances"."

Consistently with ***Australian Securities Commission v Marlborough Gold Mines Ltd*** (1993) 177 CLR 485 (at 492) the principles of construction propounded in the Full Federal Court in ***Hurley*** **and** ***National Exchange*** should also be applied in this court."

215 In light of the close similarity between section 43 ***Fair Trading Act*** and section 51AC ***Trade Practices Act***, in my view those remarks apply equally to the notion of unconscionability contained in section 43.

216 Unconscionability, for the purpose of section 43 is a characteristic that the conduct of Accom must have before there is a breach. At least in the facts of the present case, it seems to me that unconscionability within the meaning of section 43 is somewhat harder to establish than is injustice within the meaning of the ***Contracts Review Act***. However, in my view the reasoning that leads to the conclusion that the provisions of the mortgages concerning default interest and compounding are unjust within the meaning of the ***Contracts Review Act*** also leads to the conclusion that those provisions are unconscionable within the meaning of the ***Fair Trading Act***. In my view it is appropriate to make an order to compensate Mars for the loss it has suffered in consequence of that unconscionable behaviour. The appropriate measure of its compensation is the extent to which Accom retained money from the Haberfield settlement to which it would not have been entitled if the mortgage had not contained the provisions concerning the default rate of interest and compounding. That amount is $20,761.84 (para [156] above). That amount should bear interest at the court rate from 13 October 2006.

Orders and Costs in Appeal Against Accom

217 Apart from the claim to set aside the mortgages totally, that I am not satisfied has been made out, and the claim to reduce the interest to 8% simple, that I would not permit to be raised for the first time on appeal, the only claim to relief that the appellants have made against Accom is for compensation in an amount that would put them into the same position as they would have been in if the mortgages had not contained the provisions for payment of the higher rate of interest, and for compounding of interest. While it would be appropriate for the undertaking to be accepted, in case these proceedings do not completely resolve the rights of the parties, it is also appropriate to make an order for compensation to Mars.

218 There is also occasion to make such an order concerning the Berowra mortgage. Its effect will be to entitle Kowalczuk to a sum of money, representing compensation for the extent to which the payout figure for the Berowra mortgage was calculated on the basis that the debt of $320,000 attracted interest, over the period 10 November 2005 to the payout date in December 2005, at the default rate and with compounding, rather than at the lower rate for that mortgage. That calculation should recognise that the Damages for Late Repayment clause has already been set aside.

219 If Accom had received the amount that, in accordance with those principles, it was entitled to receive upon discharge of the Berowra loan, it would have received at $327,716.58, made up as follows:

Principal	$320,000.00
Interest 10/11/05-10/12/05	12,800.00
Interest 11/12/05 – 14/12/05 inclusive – 4 days @ 420.82 per day	1683.28
Legal fees and interest on legal fees as charged by Accom	4239.07
SUBTOTAL	338,722.35
Less interest received 11/11/05	(11,005.77)
NET PAYOUT	**$327,716.58**

220 In fact NAB paid Accom $345,859.75. Thus Accom has received an overpayment of $18,143.17.

221 That gives rise to a question of what is the appropriate remedy concerning that overpayment.

222 It seems to me that the most likely consequence, if Accom had calculated the payout figure for the Berowra mortgage in accordance with the Berowra mortgage as varied, is that Kowalczuk would have borrowed less from NAB on the security of the Berowra property. After all, the purpose of the borrowing from NAB was to refinance Accom's Berowra loan, and there is no evidentiary basis for concluding that NAB would have been prepared to lend him not only the amount needed to pay out the Berowra loan but also an additional amount that he could use for some other purpose. I doubt that the effect of Accom receiving only the amount to which it was entitled under the Berowra mortgage as varied would be that Kowalczuk would have borrowed less from Accom under the Haberfield mortgage – the likelihood is that Anastasi would have persuaded him to borrow as much as Accom was prepared to lend. In that situation, I do not think it would be appropriate to make an order for compensation under the ***Contracts Review Act***, where the measure of that compensation is the amount of the overpayment on the Berowra loan, plus interest at the lower rate charged under the Haberfield mortgage. Rather, the appropriate measure of compensation is to order Accom to pay Kowalczuk $18,143.17 plus interest at the usual court rates from 14 December 2005 to the date of entry of judgment.

223 The order for judicial sale of the Berowra property that was made in the court below was made on the basis that there had been a shortfall on the sale of the Haberfield property, that triggered the operation of clause 68.

224 The undertaking that Accom proffered in this Court is a sufficient reason why the basis on which the orders for possession and judicial sale were made concerning the Berowra property has now disappeared. However, Mr Young submits that Accom will still have an entitlement to be paid costs, to which clause 68 is capable of attaching.

225 Accom has not established that it had, at the time of the hearing in the court below, any entitlement to be paid costs. The principle upon which this court makes orders is that (subject to the fairly narrow circumstances in which an appellate court can receive additional evidence) it makes the orders that the court below should have made, on the basis of the evidence before the court below. In those circumstances, in my view the correct order for this court to make is to set aside the orders for possession and sale that were made in the court below.

226 Further, whether Accom has any entitlement to be paid costs will depend, at lease in part, on the order for costs made in these proceedings.

227 The trial judge ordered Kowalczuk to pay Accom's costs of the claim and cross-claim in the Equity Proceedings. He ordered that Mars pay Accom's costs of the cross-claim in the Common Law Proceedings.

228 In para [54] of his judgment, the primary judge addressed the issue of whether Accom's interest rates made the transaction unconscionable. He commented on the distinction between the lower rate and the higher rate; and at para [55] he addressed the question whether the higher rate amounted to a penalty.

229 In para [66] the primary judge noted an argument that section 9(2)(d) of the ***Contracts Review Act*** was applicable because the provisions of the contract relating to interest were not reasonably necessary to protect the legitimate interests of Accom. He noted that Kowalczuk was not arguing for partial relief so far as interest rates were concerned; but he went on to say that, if he were to decide such provisions were unjust, it could be within power pursuant to section 8 and Schedule 1 clause 1(c) of the Act to make some order for partial compensation. He then found, subject to a public policy argument, that the Berowra mortgage was not unjust.

230 The primary judge does not appear to have addressed the contention, which was made by Kowalczuk, that the first Haberfield mortgage (in its application to his guarantee) was unjust in terms of the ***Contracts Review Act***, but presumably his conclusions would have been the same.

231 I note that in para 39 of his cross-claim, Kowalczuk claimed (particular (c)(i)) that the interest rate for the first Haberfield mortgage was grossly excessive, and that in para 44 he claimed that the mortgage should be *"set aside or varied"* pursuant to the ***Contracts Review Act*** (relying on para 42 which in turn relied on para 39). The cross-claim sought a declaration that the mortgage was unjust pursuant to section 9 of the ***Contracts Review Act*** and that it be set aside. However, the cross-claim did not seek that the mortgage be varied.

232 Paras 24 and 25 of Kowalczuk's submissions below (Red 121 BF) and para 69 of those submissions (Red 121 BO) addressed the question of interest. This matter was also addressed by Accom in paras 84-92 of its submissions (Red 121 DL to 121 DN) and in para 102 (Red 121 DP).

233 In those circumstances, the question whether the mortgage was unjust by reason of interest provisions was squarely raised below; and although the order that was sought was the setting aside of the mortgage and not variation of it, in my opinion the possibility of variation was sufficiently before the primary judge.

234 For those reasons, I would order that Kowalczuk, Mars and Accom each be liable for its own costs of both sets of proceedings at first instance.

235 Concerning the costs of the appeal, while Kowalczuk and Mars had some measure of success against Accom, their success has been far from total. I recognise that, apart from the orders for payment of $18,143.17 plus interest and $20,761.84 plus interest, all of the extent of his success falls within the ambit of the undertaking that Mr Young offered. However, in light of Mr Young's proper concession that evidence was not needed for this court to consider whether it was appropriate to restrict interest to the lower rate or delete the compounding clause, offering that undertaking was recognizing the inevitable. In my view the appropriate order is for Accom to pay two thirds of Kowalczuk's costs of the appeal, insofar as Kowalczuk's costs relate to his appeal against Accom.

PART D – THE CASE AGAINST DALLA

Aiding and Abetting Trade Practices Act Breach

236 It can be said at the outset that when the claim that Accom has breached the ***Trade Practices Act*** fails, the claim against Dalla for aiding and abetting any such breach also fails.

Legal and Factual Basis for the Case Against Dalla

Rule 45

237 In October 1999 the Council of the Law Society of New South Wales adopted a new Solicitors Rule 45. That Rule was adopted by the Council pursuant to its powers under section 57B ***Legal Profession Act*** **1987**. Section 711(1) ***Legal Profession Act*** **2004** makes Legal Profession Rules binding, and Schedule 9 clause 24 of that Act deems Solicitors Rules made under the ***Legal Profession Act*** **1987** to have been made under the 2004

Act. Thus, rule 45 continued to be binding on the occasions when Dalla gave advice to Kowalczuk about the Accom security documentation.

238 Rule 45.2.1 states that the purpose of the rule

> "… is to state the approved practice to be followed by a solicitor … when engaged to advise a proposed signatory on loan or security documents."

239 It included the following provisions:

> "45.6.1 The solicitor should advise a proposed signatory of those matters that the solicitor, in exercising the professional skill and judgment called for in the circumstances of the particular case, considers appropriate.
>
> 45.6.2. Without limiting the generality of 45.6.1, when advising a borrower, the solicitor should, where necessary, advise the borrower that:
>
> 45.6.2.1 by signing the documents the borrower will be liable for regular payments of interest and repayment of the amount of the loan at the due date;
>
> 45.6.2.2 if the borrower fails to make any payment on time, the lender can charge a higher rate of interest, and the lender's costs of rectifying that failure;
>
> 45.6.2.3 if the borrower fails to comply with any of the terms and conditions of the loan including the obligations to pay principal or interest,
>
> – the lender can sue the borrower personally; and
>
> – the lender may take possession of the borrower's property; and
>
> – after notice, sell it to recover the amount owing together with interest and other costs including solicitor's costs, the costs of selling the property and the costs of maintaining the property; and
>
> – if the proceeds of sale of the borrower's property are insufficient to satisfy the debt to the lender, the lender can sue the borrower for the deficit; and
>
> 45.6.2.4 if the Consumer Credit Code applies, additional obligations, rights and remedies may apply as set out in the loan documents.
>
> 45.6.3 Without limiting the generality of 45.6.1, when advising a guarantor, the solicitor should, where necessary, advise the guarantor that:
>
> 45.6.3.1 if the borrower fails to make any payment on time, the guarantor will be liable to remedy that failure, and that could involve the guarantor in payment to the lender of all amounts owed by the borrower to the lender including principal, interest, default interest and the lender's costs of rectifying the default;

45.6.3.2 if the guarantor fails to remedy any failure by the borrower to comply with the terms and conditions of the loan in any way, including the obligation to pay principal, interest, default interest, or other charges,

– the lender can sue the guarantor personally; and

– can take possession of the guarantor's property secured to the lender and sell it to recover the amount owing together with interest and other costs, including solicitor's costs, the costs of selling the property and the costs of maintaining the property; and

– if the proceeds of sale of the guarantor's property are insufficient to satisfy the debt to the lender, the lender can sue the guarantor for the deficit;

45.6.3.3 if the guarantor is a proposed signatory to documents under which the guarantor's liability can be increased, that fact, and the extent of the possible increase, and of any restriction or limitation of the guarantor's rights or obligations in relation to the security and any other party to the documents;

45.6.3.4 the lender can exercise its rights against the guarantor even if it has not pursued the borrower;

45.6.3.5 the liability of the guarantor is limited to a specified sum, or is unlimited (whichever is the case) and may be affected by cross guarantees; and

45.6.3.6 if the Consumer Credit Code applies, additional obligations, rights and remedies may apply as set out in the loan documents.

45.6.4 In any case, the solicitor must advise the proposed signatory that:

45.6.4.1 the solicitor does not profess any qualification to give financial (as distinct from legal) advice; and

45.6.4.2 if the proposed signatory has any questions about any financial aspect of the transaction or the documents, the proposed signatory should consult an accountant or other financial counsellor of the proposed signatory's choice before signing the documents."

240 The judge accepted that Dalla had a red folder with a copy of rule 45 in it, and that Dalla followed the rule *"more or less to the letter, at least if r 45.6.1 is not taken into account"*. The judge found (at [79]) concerning each of the Berowra loan and the Haberfield loan:

> "I accept that he gave the advice required by r45.6.2 to 45.6.2.3 and that he gave the advice required by r45.6.4. He had the necessary documents relevant to these matters signed. He did not say that he made special reference to the interest rate or the principal sum because he said, quite correctly, that these were obvious on the second page of the mortgage itself to which he drew attention."

Dalla's Role Concerning Berowra Transaction

241 On 29 July 2005 a costs agreement was entered into between Mars and Kowalczuk on the one part, and Dalla on the other. It identified the work to be done as *"to provide indep legal advice & explain legal effect [two illegible words]"*. There was no other documentation or discussion about terms of his retainer. However, it seems to be accepted that the retainer was one to provide independent legal advice and explain the legal effect of the various documents relating to the Berowra mortgage.

242 There was a significant conflict of evidence between Kowalczuk and Dalla concerning the circumstances in which the various mortgage documents came to be signed, and the explanations that were given concerning them. Even though the documents relating to the Berowra loan purport to have been signed at Lakemba, Kowalczuk's evidence was that he had never been to Dalla's office at Lakemba, that the loan documents were signed on the bonnet of a car at his workplace at Alexandria in the course of an interview that took about 15 minutes, and that he was given only a brief description of the loan documents and their meaning. Kowalczuk's employer also gave evidence of Kowalczuk signing some documents at work in August 2005. While the trial judge thought the employer was an honest witness endeavouring to do his best, the judge did not find his evidence as to date convincing. Further, the judge was unimpressed with Kowalczuk as a witness.

243 The trial judge accepted Dalla's evidence about the location at which documents were signed. There was some documentary support for Dalla's account of when and where his meetings with Kowalczuk took place. There was a costs agreement dated 29 July 2005, an entry in a *"registration book"*, in which Dalla kept brief particulars of new matters opened, that records Kowalczuk's name and address and telephone number against the date 29 July 2005, there was a diary entry relating to Tony Anastasi on 9 August 2005, and Dalla took the trouble to alter the place of execution that Accom had typed on the Haberfield mortgage documents from *"Lakemba"* to *"Monterey"* but made no such alternation for the Berowra mortgage documents.

244 Dalla gave evidence that before the Berowra mortgage was signed he asked Kowalczuk if he had read the mortgage documents and that Kowalczuk had said, *"Yes"*. The mortgage documents had in fact been sent by Accom to Dalla, as email attachments. The judge found (at [24]) it was *"quite clear ... that [Dalla] knew that Kowalczuk had not seen the documents"*. After the various documents were signed, Dalla handed them to Anastasi, for delivery back to Accom. One can be confident that Anastasi would not have made the documents available to Kowalczuk for further perusal before Anastasi delivered them back to Accom. Thus, the only understanding of the documents that Kowalczuk would have would be any explanation Anastasi had given him (and Kowalczuk gave no evidence of Anastasi giving any such explanation), and the oral explanation he received from Dalla.

245 Dalla gave evidence that he told Kowalczuk he could obtain financial advice and should do so. The judge found (at [80]):

> "As [Dalla] accepted that any financial advisor would need to see the documents to give advice and as he knew Kowalczuk did not have a copy of the documents it was perfectly clear that this was untrue or he knew that this advice would not be obtained."

246 Though the documents that Dalla saw included the payment direction for the proceeds to be paid to Venture Connect he made no enquiry about why payment was being made to this particular entity. He took the view that it had nothing to do with him, and that enquiring about that topic might have something to do with giving financial advice, which was not his task.

247 Dalla's evidence was that the totality of the specific conversation he had concerning the Memorandum was:

> DALLA: "This is a standard memorandum. You have to read it carefully before you sign. You don't need me. You can read it carefully on your own, but you should note that there are special fees if you default. Are you going to default?"
>
> KOWALCZUK: "No."

DALLA: "Ok then you should be all right".

248 The Judge found this was a *"quite inadequate explanation"* (at [84]). The reason Dalla gave that explanation was recorded by the judge as being *"because he said in cross-examination that all mortgages included a memorandum which was more or less standard. That was of course incorrect."*

249 Dalla's evidence was to the effect that he went through the Acknowledgment of Legal Advice by Borrower form paragraph by paragraph, and in relation to each individual paragraph asked Kowalczuk whether he understood it, and in each case received an affirmative response. He elaborated on the terms of the form somewhat, by saying:

> "The bottom line of it is if you don't pay they will take the property. It doesn't matter if you sign as Edward, Director, Borrower or Guarantor. Do you understand that?"

Kowalczuk replied "Yes".

250 Notwithstanding that rule 45.6.3 was of no relevance to the Berowra loan (because it related only to loans where there was a guarantor), Dalla said that he gave the advice referred to in rule 45.6.3 concerning the Berowra loan. The judge found that Kowalczuk knew of the interest rates (plural) concerning the Berowra loan, and that he was told of the consequences if he defaulted.

251 Dalla said, in cross-examination:

> "I read the important parts – you are borrowing $320,000, the interest, low rate 48, higher rate if you default 96. I did not go through, for example, to explain to him the interest is compound or not compound. You know, I mentioned to him two areas – the term and the rate of interest. I just wanted him to understand, and, then, to explain to him the legal effect. I do not want to trespass into the area of whether the loan is good or bad, or I do not want to go through the financial aspect."

Dalla's Role Concerning the Haberfield Transaction

252 There was no costs agreement concerning the Haberfield transaction, but it seems to be accepted that, again, the retainer was one to provide independent legal advice and explain the legal effect of the various documents relating to the Haberfield mortgage.

253 Again Accom sent the mortgage documents as email attachments to Dalla. The documents were executed in a park at Monterey on Saturday, 10 December 2005.

254 The judge found, in particular, that Dalla did not explain clause 68 of the Memorandum, on the occasion of either execution of the documents concerning the Berowra loan, or concerning the execution of documents for the Haberfield loan.

255 Dalla's evidence was that he took the same course as he did with the Berowra mortgage. His evidence was that, to the extent that his advice was in words he chose as directed to the circumstances of the particular case, it included:

> DALLA: "Don't think that you are covering yourself by signing for the company because you are the guarantor. You have to realise that the lender can start by suing you rather than suing the company. You can make no objections. You cannot say, 'no this is the company, go to the company' because you are the guarantor. … It doesn't matter if you say the loan is from your

wife, Mars, or your Uncle. If you don't pay the lender can take the property."

KOWALCZUK: "Ok, I'll sign it. It's ok. I understand it. I've been through it".

256 Dalla also gave evidence, when asked about clause 68:

> "… I give him the effect of that, that they are putting their hands on your property, and all of the other properties which you own, if you don't pay. I put it in simple language, that they will take your properties unless you pay."

257 Concerning the Haberfield loan, the judge also found that Kowalczuk knew of the interest rates, and that he was told of the consequences if he defaulted, though not that he was told that those consequences might arise through the specific mechanism contained in clause 68 of the Memorandum.

258 At the time he was advising on the Haberfield mortgage, there is no evidence that Dalla knew that the Berowra mortgage had gone into default.

The Required Standard of Conduct

259 Rule 45 is a regulation, with the force of law. It was not submitted that failure to comply with it gave rise to an action for the tort of breach of statutory duty. Nor was it is submitted that liability in negligence of Dalla in the present case arose through failure to comply with a statutory standard governing some field of conduct being itself evidence of negligence.

260 The obligation of the solicitor under rule 45.6.1 is dependent upon the solicitor forming an opinion about what advice is appropriate for the circumstances of the particular case. If a solicitor were to form an opinion that particular advice was appropriate for the circumstances of the particular case, but the solicitor failed to give that advice, the solicitor would be in breach of rule 45.6.1. It was not submitted that Dalla had formed an opinion about the advice it was appropriate to give to Kowalczuk, and then failed to give him that advice.

261 Rather, the submission was that Dalla did not exercise the appropriate standard of care and skill for a solicitor in considering the question of what advice it was appropriate to give to Kowalczuk in the circumstances of the particular case. In principle, liability of a solicitor to a client can arise through an argument such as this. That such an argument is possible shows that rule 45 does not state exhaustively what a solicitor engaged to advise a proposed signatory of loan or mortgage documents must do to perform his or her duty to the client.

262 There was a conflict of expert evidence concerning what a solicitor exercising reasonable care should do to advise a client concerning interest rates of the type that were involved in the present mortgages. Mr Neville Moses, a solicitor of long experience concerning conveyancing matters, accepted that a solicitor retained to advise on terms of mortgage documents and loan documents is not obliged to go beyond the retainer and, for example, give financial advice. However, in his view it is standard practice (by which he means practice which would be accepted by competent and prudent solicitors acting in relation to the matters in question as appropriate in the circumstances) for a solicitor to give the client the benefit of any advice which, although not directly related to the explanation of the documents, is within the solicitor's competency to give. In Mr Moses' view, if the document contains unusual or onerous conditions, it is standard practice for the solicitor to advise that this is so, and that the client should endeavour to renegotiate these provisions.

263 Concerning a short term loan at a high interest rate, in Mr Moses' view a solicitor should stress to the client the importance of being in a position to repay the loan on the due date, and that it is usual for a solicitor to enquire of the client as to the source of the funds which will be used to repay the loan. In his view, it would have been obvious to Dalla that it was unlikely that Kowalczuk would be in a position to repay the loan on the due date, and that in that circumstance it would be standard practice to advise the client to at least endeavour to negotiate a longer term and, if the funds were not urgently needed, to consider not proceeding with the loan at

all. In Mr Moses' view, the high interest rate and short term should have led the solicitor to have advised Kowalczuk that he should seek independent financial advice both as to the possibility of obtaining funds at a much lower interest rate and also in relation to the proposed investment which he was to make with the advance. Further, when Dalla was asked to witness the *"Loan Repayment Ability Declaration"*, which stated that Kowalczuk's gross income was $100,000, he should have pointed out that he was making a statutory declaration, and that consequences could flow from the making of a false declaration, and that the client should be in a position to justify the statement as to income if need be.

264 There was a considerable difficulty in the way of the trial judge simply accepting and applying Mr Moses' view, because that view had been formed on the basis of Mr Moses having been asked to assume that the facts about the advice given had been accurately stated by Kowalczuk in his affidavit evidence. As things eventuated, the judge did not accept substantial parts of Kowalczuk's account of his dealings with Dalla.

265 Mr Dennis Bluth, another solicitor with considerable conveyancing experience, disagreed with Mr Moses' statement that it was standard practice for a solicitor to give the client the benefit of any advice that, although not directly related to the explanation of the documents, was within the solicitor's competency to give. He does not accept that it is standard practice to recommend that the client obtain independent financial advice in respect of a transaction when the solicitor's retainer related (as here) to signing the mortgage documentation. Similarly, in Mr Bluth's view, the purpose of the loan did not form part of the solicitor's retainer, nor was it within the purview of rule 45.

266 Concerning the differing views of Mr Moses and Mr Bluth, the trial judge said (at [82]):

> "… Probably the correct position lies between the two. For instance, I consider that a solicitor seeing a first mortgage on real estate for a term of a year or more which provided for a higher rate of interest of 120% and a lower rate of 60%, ought to ask the borrower why he is entering into such a transaction when far better rates are available elsewhere. Any solicitor experienced in mortgage work would know that to be the position. That would not be giving financial advice but asking a sensible question based on fact. On the other hand, if the solicitor were advising on a short term mortgage loan to be replaced by finance at reasonable interest rates, then I would consider that obligation would not arise under the terms of the retainer, although I would have thought that the solicitor ought to say to the client, "You realize that if the moneys you expect on refinancing do not come through then you will be in default, the higher interest rate will apply and the lender can exercise all other rights under the mortgage". In other words questions should be asked relating to the particular circumstances rather than just parroting the requirements of r45.6.2."

A Solicitor's Penumbral Duty of Care?

267 Mr Conti submitted that there was a duty of care on Dalla in the present case that went beyond his contractual obligation to exercise the care and skill of a reasonably competent solicitor to explain the documents. He urged the court to follow the decision of Brereton J in ***Riz***, and in particular an aspect of the decision where Brereton J held that the solicitor involved in that case should have given advice about the improvidence of the transaction the client was proposing to enter into. That submission requires me to examine the present state of authority about whether a solicitor can owe to a client what has been called a *"penumbral"* duty, that is a duty of care that extends beyond the scope of the solicitor's contractual obligations to the client.

268 In ***Citicorp Australia Ltd v O'Brien*** (1996) 40 NSWLR 398 Sheller JA (with whom Meagher JA and Abadee AJA agreed) considered a situation where a husband and wife had purchased a home financed by a mortgage repayable by monthly instalments, the amount of which increased at the end of each of the first three years, but thereafter remained constant. Some elementary financial planning would have shown that, even assuming the couple remained in the type of employment that they had, it was unlikely that their income would increase during the first four years of the mortgage, at a rate sufficient to enable them to pay the mortgage instalments and have enough money left to live on. Mr Eliades was a solicitor they engaged to act on the contract for sale and on the mortgage of the property. Sheller JA said, at 413:

> "As a matter of contract, such a retainer would not, by inference or implication, extend to require him to provide financial advice to the O'Briens."

269 The trial judge had held Mr Eliades liable in negligence. The trial judge had said, as recorded by Sheller JA at 407:

> "There was a need for Mr Eliades to consider the O'Briens' financial position, to protect their position and to advise them in relation to it having regard to these contract terms, and this made the terms on which they could obtain finance, the carriage of an application for finance and the feasibility of any proposal for finance matters within his retainer for which Mr Eliades incurred professional responsibility to the O'Briens. It could not be a reasonable view of his professional duty that he should only see that they got finance on some basis which enabled them to complete their purchase; the terms on which they obtained finance had to be related to the overall objective of owning and keeping the house, or the retainer would be futile."

270 Another finding that the trial judge made in ***O'Brien***, recorded by Sheller JA at 408, was:

> "As counsel said, no further duty beyond the precise retainer arises. Yet the retainer must be carried out to a reasonable standard of professional care, skill and responsibility. In the O'Briens' circumstances it ought to have been very obvious to a reasonable solicitor acting for them that, putting together the facts of their income, prospects and the amounts of the obligations incurred, that the chances of their carrying their projects through to a successful outcome in which they owned the house and paid off their debts were very small. The difficulties which the O'Briens faced were so great, and to professional persons, so obvious that a solicitor could not reasonably leave them unstated.
>
> In my finding the terms of the documents were not adequately explained, in that this effect of the workings of the documents was not brought home to the O'Briens. The deficiency in explanation was not a deficiency in explaining the detail in what the documents said, or in explaining the broad nature of the documents. The deficiency was in explaining how the obligations undertaken would operate in the O'Briens' circumstances. It is not a matter of explaining anything obscure or subtle, requiring a deep knowledge of their affairs to understand. A superficial knowledge of their affairs was quite enough to show that there was a need to spell out where they would stand as they attempted to pay the instalments and meet the interest obligations."

271 This Court upheld an appeal by Mr Eliades, Sheller JA saying, at 418:

> "In my opinion the difficulties faced by the O'Briens which his Honour considered were so great and, to professional persons, so obvious that a solicitor could not reasonably leave them unstated, did not impose the duty his Honour held Mr Eliades to be under. Stated bluntly, such a duty would require solicitors, retained to act on a purchase or mortgage for their skill in the law, to inform every client for whom they so acted of their views about the financial prospects of the purchase or mortgage where they felt or ought reasonably to have felt that there was risk of loss. One consequence of this would be to require solicitors to give opinions, which they were not qualified to give, with the obvious consequence that if they were wrong and the client had acted on the basis of those views, they would be liable in negligence. For good reason such a proposition is contrary to authority. The solicitor's duty is found in the terms of the retainer and the ambit of any additional assumed responsibility relied upon.
>
> Moreover, in order to make such a case in negligence, the O'Briens were bound to prove that, if Mr Eliades had advised them for the reasons suggested not to go on with the contract for purchase or finance, they would have acted on that advice. They gave no such evidence and in my opinion it was not open to his Honour to infer in the absence of any such evidence that the O'Briens would have taken some course other than the course they did in fact take."

272 In ***Heydon v NRMA Ltd*** [2000] NSWCA 374; (2000) 51 NSWLR 1 this court accepted that the duty of care of the solicitors involved in that case was coextensive with the solicitors' contractual liability, and there was no *"penumbral"* duty. The course of authority was summarised by MacPherson AJA at [364]:

> "At one time a solicitor's duty was considered to be limited by the terms of the retainer from the client, there being no affirmative legal obligation to give advice going "beyond the specifically agreed task or function". Then, in ***Hawkins v Clayton*** (1988) 164 CLR 539 at 585, it was held that there was no justification for imposing a contractual duty of care that was co-extensive with the parallel duty independently imposed in the law of negligence. It followed that an obligation might arise requiring a solicitor to take positive steps, beyond the specifically agreed professional task or function, to avoid a real and foreseeable risk of economic loss being sustained by the client, or even by others who were not the clients who had retained the solicitor. The result was that in ***Waimond Pty Ltd v Byrne*** (1989) 18 NSWLR 642 at 652, a majority of this Court held that an affirmative duty to advise might exist in relation to matters that were not directly within the ambit of the retainer from the client. The decision on this point in ***Waimond Pty Ltd v Byrne*** has since been followed on several occasions. More recently, however, in ***Henderson v Merrett Syndicates Ltd*** [1995] 2 AC 145 at 193–194, the House of Lords rejected the reasoning of Deane J in ***Hawkins v Clayton***, holding instead that there was "no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy", and that it was the contract that defines the relationship of the parties, so that ordinarily "the parties must be taken to have agreed that the tortious remedy is to be limited or excluded". In ***Astley v Austrust Ltd*** (1999) 197 CLR 1, the High Court decided to follow the reasoning in ***Henderson v Merrett Syndicates Ltd***, in preference to that of Deane J in ***Hawkins v Clayton***. The result, in my respectful opinion, is that what was said by Deane J in ***Hawkins v Clayton*** has ceased to be good law in Australia. Because it formed the or a pivotal point in the reasoning in ***Waimond Pty Ltd v Byrne***, it is no longer possible to say that there is a "penumbral" duty in tort requiring a solicitor to advise on matters going beyond the limits of his or her retainer. On that aspect, the decision in ***Waimond Pty Ltd v Byrne*** is inconsistent with the reasoning in ***Astley v Austrust Ltd***, and should, in my opinion, no longer be followed. It had the effect of enlarging or extending the range of matters on which a solicitor, and possibly also a barrister, might be required by the law of tort to advise a client or other persons."

273 Malcolm AJA and McPherson AJA also referred to ***Astley*** as providing a reason why the ***Waimond Pty Ltd v Byrne*** (1989) 18 NSWLR 642 principle did not apply to advice given by barristers, at [309], [365] and [417].

274 Similarly, concerning the scope of a solicitor's duty of care Malcolm AJA said, at [147]:

> "In this context the content of the duty of care and the liability is the same whether it is founded on contract in the case of a solicitor, or whether it is founded on a duty of care in tort in the case of a barrister. In each case the duty is to apply the relevant degree of skill and exercise reasonable care to carrying out the task. There is no implied undertaking that the advice is correct, but only that the requisite degree of professional skill and care has been exercised in the giving of the advice. Of course, where there is reason for doubt or there are risks which a person possessing the relevant degree of skill and competence should perceive, it follows from the above that there may be a duty to warn of the kind recognised by their Honours in ***Rogers v Whitaker***. Thus, in ***Hawkins v Clayton*** (at 583–585), it was held by Deane J that, in the case of a solicitor, the circumstances may give rise to a duty to do more than simply perform the task defined by his instructions, if circumstances arose giving rise to a real and foreseeable risk of economic loss by the client, or, in particular circumstances, even a person who was not a client but who may be adversely effected. See also ***Waimond Pty Ltd v Byrne*** in which the judgment of Deane J was followed. In ***Henderson v Merrett Syndicates Ltd*** [1995] 2 AC 145, the House of Lords declined to follow ***Hawkins v Clayton*** insofar as it suggested that in the case of a solicitor liability lay only in contract rather than concurrently in contract and tort. In ***Astley v Austrust Ltd***, the High Court decided to follow the decision in ***Henderson v Merrett Syndicates Ltd*** in preference to the judgment of Deane J so that in the case of solicitors, the liability remains a concurrent liability in contract and in tort."

275 This paragraph followed reasoning leading to the conclusion that lawyers who were the leaders of their profession in particular areas of the law were to be judged by the standard of an ordinary skilled person exercising and professing to have that special skill, not by some higher standard. It seems to me that what Malcolm AJA was intending by opening the paragraph I have quoted with the words *"In this context"* was to indicate that the paragraph was dealing with *what is* the content of the standard of an ordinary skilled person exercising and professing that special skill.

276 Ormiston AJA referred briefly, at [678] to *" ... the "**Waimond**" principle described and correctly criticised in the judgment of McPherson A-JA"* and also said, at footnote 478 to para [667]:

> "Insofar as I have failed to deal with certain of the matters raised in argument, I would adopt the reasoning of the other members of the Court, to the extent that is not inconsistent with this judgment."

277 ***Heydon*** was not a case where it was necessary to consider whether, in a situation where a solicitor gives advice, conveys information or expresses an opinion on a topic outside that for which the solicitor has been retained, the solicitor comes under any, and if so what, duty of care. Thus, the remarks of the judges in ***Heydon*** concerning the absence of a penumbral duty of care should not, in my view, be treated as applying to that situation. Nor is the present case one where it is necessary to consider whether there is a duty of care if a solicitor embarks upon acting outside the scope of his or her retainer. There is no complaint in the present case that Dalla went outside the scope of the task he was retained to perform and erred in so doing. Rather, the complaint is that the task for which he was retained was inadequately carried out, and that as well he failed to take positive action to protect Kowalczuk and Mars from the financial danger for which they would be heading if they borrowed the money and granted the mortgages.

278 The question of whether a solicitor owes to a client duties beyond the contractual duties was further considered in ***Curnuck v Nitschke*** [2001] NSWCA 176. There, solicitors were retained to advise, institute and maintain proceedings against the vendor of a defective truck. The client was slow in providing particulars both of the defects and of the damages, but by a date approximately three years after the date of purchase of the truck some further instructions on those topics had been obtained, counsel who had already drafted a statement of claim returned his brief with a draft of some further particulars, and said that the statement of claim and further particulars would enable the solicitors to commence the proceedings. However the following month the client entered into a Deed of Arrangement under Part X of the ***Bankruptcy Act* 1966** (Cth). Counsel advised the trustee of the Deed that the client had reasonable prospects of succeeding, but that the particulars of loss were yet to be completed. Even so, the trustee was not willing to fund the action. On a date less than four years after the purchase of the truck, the trustee assigned the benefit of the cause of action against the vendor of the truck back to the client. The solicitors took no further action concerning the matter before the limitation period expired.

279 Fitzgerald AJA held that the solicitors were in breach of both their contractual and tortious duty by failing to notify the clients of their decision not to act in relation to the cause of action after it was reassigned, or to warn clients of the limitation period (at [59]). He took the view that, even though entering the Deed of Arrangement terminated the solicitors' instructions to commence proceedings, it did not terminate the entire relationship of solicitor and client or bring the entire contract to an end, and after the reassignment the solicitors were in breach of their ongoing contractual duty to (at least) provide *"information and advice which was appropriate for a prudent finalisation of their relationship if that was to occur."* (at [63])

280 Davies AJA at [2]-[5] noted the course of authority that had led McPherson AJA in ***Heydon*** to conclude that the decision in ***Waimond*** was no longer good law. He continued, at [6]-[9]:

> "However, I do not read the decisions in ***Henderson v Merrett Syndicates Ltd*** and ***Astley v Austrust Ltd*** as leading to that conclusion. The fact that the causes of action in tort and contract may be concurrent does not mean that their incidents are necessarily the same. Under contract law, duty turns upon the terms, scope and context of the contract. Under torts law, issues of proximity and foreseeability are crucial to liability. Public policy may play a part.

> And there are many other differences. The respective laws on damages are different. The principles of contributory negligence and contribution differ as between the causes of action. The limitation periods may be different. A plaintiff is entitled to sue in both contract and in tort or in either, and may choose the best result.
>
> ***Waimond Pty Ltd v Byrne*** seems to me to be well based upon the principle enunciated in ***Henderson v Merrett Syndicates Ltd*** and ***Astley v Austrust Ltd***. In that case, the duty of a solicitor to speak with his client with respect to a certain transaction did not arise from his contractual retainer. It arose out of the relationship of proximity which existed between the solicitor and his client. The solicitor knew that a transaction, which he had been instructed to carry out for another client, affected the interests of his client. The majority of the Court considered that the circumstances were such that the solicitor had a duty to check with his client or to advise him to seek independent advice.
>
> It is one thing to say, where a solicitor has a contractual relationship with a client and where the matter in issue arises within the scope of the retainer, that there will be no difference between the duty of care imposed by the contract and that imposed by the law of negligence. It is another thing to say that, in respect of a matter which is beyond the scope of the contract, a tortious duty of care may not arise from the relationship between the parties.
>
> In Australia, there have been several cases where a duty of care has been imposed upon solicitors notwithstanding that the solicitor's retainer did not impose that duty. (See ***Hawkins v Clayton***; ***Hill v Van Erp*** (1997) 188 CLR 159; and ***Waimond Pty Ltd v Byrne***.)"

281 Unlike Fitzgerald JA, Davies AJA decided the case on the basis of assuming that there was no ongoing contractual obligation. He noted, at [10]:

> "The solicitors were aware that the cause of action had been reassigned to the appellants. They were the bailees of the appellants' cause of action, insofar as that cause of action consisted of legal papers. They were aware that the documents remained with them because they were the solicitors who had handled the matter. They were aware, moreover, that the cause of action which their file represented would become valueless with the passing of the six year limitation period."

282 Those circumstances, together with the vulnerability of the client arising from the limitation period not being a matter of general knowledge but of legal knowledge, were in his view sufficient to give rise to a tortious duty of care. (How that vulnerability comes into play, in light of the trial judge's finding, recorded by Fitzgerald JA at [50], that the client knew that there was a limitation period, is not altogether clear.)

283 Meagher JA agreed with both Fitzgerald AJA and Davies AJA.

284 Other cases in this court have also accepted that a solicitor can in some circumstances owe a duty of care to a client in circumstances where no contractual duty is owed: ***Walmsley v Cosentino*** [2001] NSWCA 403 at [55] per Powell JA (with whom Priestley and Beazley JJA agreed); ***Miller v Cooney*** [2004] NSWCA 380 at [30] per Sheller JA (with whom Hodgson and Santow JJA agreed).

285 In ***Watkins v De Varda*** [2003] NSWCA 242 at [145] Ipp JA (with whom Sheller JA and Foster AJA agreed) referred to ***Heydon*** at pages 103 and 118 (which is where para [309] occurs) without any express disagreement. However too much should not be read into that. Ipp JA at [146] also referred to [364], 118 of ***Heydon***, where McPherson AJA said the reason why contractual and tortious duties were co-extensive was that:

> "… it was the contract that defines the relationship of the parties, so that ordinarily "the parties must be taken to have agreed that the tortious remedy is to be limited or excluded.""

286 ***Watkins*** was a case where there was no contract of retainer at all, so it was not possible for a contract to limit or exclude the tortious remedy. As I understand it, the purpose of Ipp JA referring to these passages in ***Heydon*** was to distinguish them, and thus he had no occasion to consider their correctness or completeness.

287 Similarly, Buss JA (with whom Wheeler and McLure JJA agreed) in ***Townsend v Roussety & Co (WA) Pty Ltd*** [2007] WASCA 40; (2007) 33 WAR 321 at [116], referred to ***Heydon*** at [364] and [309] without any express disagreement, but again was a case where there was no contract of retainer, so there was no occasion for His Honour to consider the correctness or completeness of those remarks.

288 In ***Riz*** Brereton J considered a claim for negligence, brought by a couple who had borrowed money on mortgage to invest in the ill-fated scheme operated by Karl Suleman Enterprizes, against the solicitors who had acted for them on the mortgage. The breach alleged (para [91]) was of failing to cease to act for the plaintiffs unless and until they had obtained financial advice, or failing to warn the plaintiffs that their proposed investment was imprudent. The plaintiffs in ***Riz*** told their solicitor of the returns that they expected to get from it, namely $12,000 per fortnight on an investment of $150,000, which amounts to a return of in excess of 200%. Brereton J held, at [129] that it should have been plain to the solicitor that the plaintiffs *"were putting their home at risk for the purpose of raising funds for an investment in respect of which they had expectations that objectively were absurd."* Brereton J said, at [109]:

> "I accept that the scope of a retainer is of considerable significance in identifying the extent of a solicitor's duty of care. However, the scope of a solicitor's duty of care to a client is not confined to the contract of retainer but may extend in the circumstances of a particular case to require the taking of positive steps, beyond the specifically agreed task or function, where such steps are necessary to avoid a real and foreseeable risk of economic loss being sustained by the client [*Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642]."

289 After a review of the authorities relating to the scope of a solicitor's duty of care when advising on mortgage and loan documentation, he concluded, at [113]:

> "… the prevailing position is that the scope of a solicitor's duty of care is not limited to the terms of the retainer but, depending upon the circumstances of the particular case, may require the taking of positive steps beyond the specifically agreed professional task or function, where these are necessary to avoid a real and foreseeable risk of economic loss being sustained by the client."

290 Brereton J came to a more specific conclusion about the state of the law at [128]:

> "… although the duty normally owed by a solicitor to a client only extends to legal advice, it is often difficult in a given situation to disentangle legal and business or practical advice, and a solicitor who is carrying out a transaction for a client is not justified in expressing no opinion when it is plain that the client is rushing into an unwise, not to say disastrous, adventure. The cases that state that it is not the function of a lawyer to give financial advice mean that a lawyer is not expected to bring to his or her task the knowledge and expertise of a stockbroker, an accountant or a financial planner. But a lawyer giving independent advice is required to address the fairness or reasonableness of a proposed transaction, so that the client can appreciate its disadvantages; if this involves matters beyond the lawyer's expertise, then the lawyer should seek specialist assistance. That is not to say that the solicitor is to be expected to give financial advice – of the type that a stockbroker might – about the proposed investment. But where it is evident that the borrower is relying on the investment to generate the income to service the loan which is secured over the family home, and where at first sight the expectation appears utterly unrealistic, a solicitor acting reasonably would … take steps for the protection of the client's interest."

291 The Appellants submitted that this Court should follow Brereton J's decision in ***Riz***, and use it as a basis for concluding that Dalla was in breach of his duty in failing to warn against the borrowing.

292 ***Riz*** was decided after the first instance decision in the present case. Mr Craddock SC, counsel for Dalla, submits that it is not open to the Appellants to put an argument based on ***Riz*** in this appeal, when there was no submission put below that there was any difference between the contractual retainer duty and the tort duty. While I accept that it was not put below that there was any difference between the contractual duty and the tortious duty, it was still put below that it was a breach of duty not to warn about the imprudence of the transaction. That is sufficient, in my view, to allow the argument based on ***Riz*** to be considered on the appeal.

293 How the argument based on ***Riz*** is considered in this judgment needs to be approached with some care. There was no application by any party to re-argue the correctness of any of the decisions of this Court concerning the duty of care of a solicitor advising on mortgage or loan documents. That in itself limits the options available in deciding this case. As well, the decision in ***Riz*** is itself the subject of an appeal that has not yet been argued. While this Court should consider the argument based on ***Riz***, in this appeal, if possible that should be done in a way that does not foreclose the outcome of the appeal in ***Riz*** itself.

294 Assuming without deciding that the principles I have quoted from ***Riz*** are correct, the present case is distinguishable from ***Riz***. In the argument of this case there was no attempt made to identify, in the way Davies AJA did in ***Curnuck***, any specific features of the relationship between Dalla and Kowalczuk that might give rise to a tortious duty of care that went beyond the scope of the contractual duty. Dalla was aware that both the Berowra loan and the Haberfield loan were intended to be very short term loans, that were to be refinanced. He did not enter into the question of what Kowalczuk intended to do with the monies that were raised. He was uninformed about Kowalczuk's income (apart from the statement in the documents that emanated from Accom that his income was $100,000), occupation (given that the trial judge rejected Kowalczuk's evidence that the documentation concerning the Berowra loan transaction had been signed at his place of work), and asset and liability position. At the time he was advising concerning the Haberfield loan, he did not know that the Berowra loan had gone into default. The only relationship that existed between Dalla and Kowalczuk was that Dalla was engaged, on two separate occasions, for the isolated task of explaining the mortgage transaction documents. Thus, the factual situations that Brereton J saw as triggering a duty to give more than legal advice within the scope of the retainer, namely *"it is plain that the client is rushing into an unwise, not to say disastrous, adventure",* and that the client has an *"expectation [that] appears utterly unrealistic"* (at [128]) are not present in the present case. Thus, even if the principles on which Brereton J proceeded in ***Riz*** are correct, there is no *"penumbral"* duty in the present case.

Dalla's Breaches of Duty?

295 What Sheller JA was rejecting in ***Citicorp v O'Brien*** was that the solicitor's obligation extended to explaining how the mortgage terms would apply in the particular financial circumstances of the client. That does not, in my view, involve rejecting a proposition that a solicitor who has a retainer to explain a document to a client has an obligation to bring home to the client how the document, according to its own terms, is capable of operating. The Macquarie Dictionary defines *"explain"*, when used as a transitive verb, as

> "1. to make plain or clear; render intelligible: *to explain an obscure point.*
> 2. to make known in detail: *to explain how to do something*; *to explain a process.*
> 3. to assign a meaning to; interpret.
> 4. to make clear the cause or reason of; account for."

296 Necessarily, if an explanation is to make something plain to the client, it must be cast in language that the client can understand. It is appropriate (though not sufficient) for an explanation of a mortgage document to include statements like those Dalla made, set out at paras [249] and [255] above. Explaining the practical effect of the document can sometimes mean it is necessary to hypothesise certain circumstances in which it might operate, and explain how it would operate in those circumstances. Doing that does not involve the giving of financial advice, as its subject matter is the document that is being explained, not the financial wisdom or unwisdom of the client entering the transaction.

297 Mr Conti submitted that the conclusion that the trial judge reached about deficiencies in Dalla's advice should have led him to conclude that he was in breach of his retainer or his tortious duty. Mr Conti also submitted that the advice that Dalla gave fell below standard expected of a solicitor acting as a reasonably

competent solicitor should act, in respects other than those the judge found. In substance, the deficiencies in the advice that the judge found were that he failed to explain clause 68, and failed to remind Kowalczuk that if the money Kowalczuk was expecting to obtain on refinancing did not come through then he would be in default, the higher interest rate would apply, and the lender could exercise all other rights under the mortgage.

298 In my view there is only one respect in which the failure to explain clause 68 leads to the conclusion that there has been a breach of duty. There was a finding that Dalla gave the advice required by (inter alia) rule 45.6.3, and a finding that Kowalczuk *"was told of the consequences if he defaulted"* (at [83]). There was an evidentiary basis for those findings in Dalla's rigid adherence to (*"parroting"* of) rule 45 in giving advice, and in the conversation set out para [255] above. As explained in para [137], clause 68 provides an enforcement mechanism for the obligations of a guarantor, but does not create a risk of (in the present case) Kowalczuk losing the Berowra property if he defaulted, that was not inherent in the giving of an unsecured guarantee, or significantly faster for a lender to enforce. In other words, Kowalczuk was told he might lose the property if he defaulted, even though the precise legal mechanism by which he might lose it was not spelt out, and if that was all that was involved in clause 68 that would have sufficed. However, in my view the aspect of clause 68 that should have been explained, and was not, was that it entitled the lender to lodge a caveat on all Kowalczuk's real estate if there was a default. A caveat can hamper significantly obtaining a quick refinance, which is the very thing a borrower is likely to want if the loan has fallen into default.

299 As well as the findings the judge made concerning deficiencies in the advice, Mr Conti submitted that Dalla did not explain, and should have explained, the provision in the mortgage that if the loan is not repaid on the due date not only will interest at the higher rate be payable, but there will be an additional fee for late payment equal to one month's interest at the lower rate. That submission is correct. Even though the clause has now been held to be void as a penalty, on its face it purports to impose a serious obligation, that makes the consequences of being the slightest bit late in repaying the principal significantly more serious than just triggering the higher rate. If the clause was enforceable in accordance with the terms, and the client was one month late in repaying the Berowra mortgage, interest during that month would effectively run at the higher rate plus the lower rate, ie at 144% pa. Similarly, if the client were one month late in repaying the Haberfield mortgage, interest during that month would effectively run at 180% pa. In my view a proper explanation of the mortgage would involve both pointing out this significant consequence of clause were enforceable in accordance with its terms, and giving advice that an argument was available that the clause might not be effective in accordance with its terms, but that it would be necessary to have a court case to run that argument, with consequent cost and delay and the measure of uncertainty inherent in litigating even a strong case. In practice a borrower would be likely to have no practical alternative but to pay under protest and litigate later. That in itself would trigger clause 50 in the Memorandum (not the subject of attack in this appeal), that says that if any of the agreements are breached the debtors must give a release upon discharge, or else the lender is entitled to retain $25,000 or 2% of the principal (whichever is greater) as security for costs concerning any dispute about the agreement.

300 As well, I accept Mr Conti's submission that the failure to explain the compounding clause was, in the context of the mortgages in this case where the default rates were themselves so high, a breach of the contractual duty to explain. This is because the compounding clauses have the capacity to be utterly crushing if they come into operation and continue in operation for any length of time. Giving an explanation of these mortgage documents required something to be said to bring home to the client the practical reality of the extent of the obligation that the clauses could impose. For a client to be told that there is a higher rate of 96% or 120% if there is default does not bring home to the borrower that the effect of the compounding clause on those rates is to convert them to simple interest rates that are vastly higher than 96% or 120%, if compounding occurs over more than a month or two.

301 In my view, the deficiency that the judge found in the advice, together with these additional two deficiencies that Mr Conti pointed out, show that Dalla was in breach of his contractual duty to explain the documentation.

Causation of Loss

302 Though the judge found there was no breach of duty or breach of contract of retainer by Dalla, he also considered causation of loss. He said that *"there is much that could be said critical of"* Dalla's advice, but (at [85]):

> "… I do not consider it has been established that it was causative of any loss. For some reason and perhaps because he trusted Anastasi in spite of his failure to pay back other moneys, and in spite of his refusal to disclose the identity of the investors, Kowalczuk was prepared to do whatever Anastasi said, hoping to profit from this. Had Dalla properly advised Kowalczuk as to clause 68 I consider it far more likely than not that Kowalczuk would have proceeded with the loan anyway. It was certainly not an obligation of Dalla to prevent him from doing so and to refuse to give the advice or to sign the document. Kowalczuk had been a guarantor before in respect of the original borrowing by Mars when it purchased the Haberfield property. He knew what it was to be a guarantor. Whatever else he was told by Dalla he was told that if the borrower did not pay then as guarantor he would be liable and everything he had could be sold. To some extent therefore, and accepting that was said to Kowalczuk, as I do, it really makes very little difference to Kowalczuk whether the loan was secured or not. I find that if he had been properly advised on the effect of clause 68, he would have signed the document anyway. He has not said that he would not have done so. His evidence as to this is related solely to the interest rate."

303 The evidence of Kowalczuk that the judge here refers to is evidence that had he known in respect of either mortgage that the rates of interest were as they were, he would not have proceeded with the loans. However, the judge found that Kowalczuk knew of those interest rates.

304 To evaluate whether the inadequacy of Dalla's advice was causative of loss it is necessary to explain more about the relationship between Kowalczuk and Anastasi.

305 Kowalczuk's evidence was that Anastasi was a finance broker and investment consultant, whom he had known for a considerable period of time.

306 After Kowalczuk had settled the litigation with his sister, concerning the property they had acquired from their parents, he had a sum of money (that he thinks was about $750,000). It was Anastasi who advised him to purchase the Berowra property. Kowalczuk said:

> "I took Tony's advice and have always regarded it as a good investment. For this reason, I have trusted Tony again when he has given me advice about other investments which I made after that, and, even when I had doubts about such investments, Tony was able to persuade me to make them."

307 In 2001 Kowalczuk lent Anastasi and his wife $150,000 which should have been repaid within 30 days, but was never repaid. This money was lent when Anastasi was in imminent danger of being evicted from his house. Anastasi told Kowalczuk this, but nothing in the evidence gives a hint that Kowalczuk regarded this circumstance as a reason for being cautious about Anastasi. In February 2005 Kowalczuk, on the advice of Anastasi, lent to Alpha Second Pty Ltd the sum of $200,000 for a term of two years, with the interest for the first 12 months paid in advance. The judge found that that amount had now been repaid. There was also an amount of $24,000 that Kowalczuk gave to Anastasi in 2005 to invest in *"an electrical company"*, concerning which Anastasi received interest for *"the first three quarters of the year, though usually late"*. In other words, even though the interest was usually late, there had been no default in relation to that loan by the time the Berowra and Haberfield loans were made.

308 Kowalczuk's account of how he came to enter the Berowra transaction was that Anastasi said to him:

> ""I know I have let you down in the past and that I haven't paid you the money you lent me and my wife, but I want to make it up to you. I have a very good deal going with some people and I think you should borrow money against the Berowra property to invest with them. It's a big corporation, it's a hundred million dollar company, a blue-chip company, and there are

three people involved but I can't tell you very much more about it. They don't want their name disclosed, but I know everything about them, so don't worry. We can generate enough income to pay the loan interest and the outgoings and you'll earn your 7% on top of that."

Although I was angry with Tony because he had not paid me the interest on the other investments, I still trusted him and he was very persuasive when talking about this new deal. Therefore, I decided to go ahead."

309 In a statement that Kowalczuk signed for the purpose of a police investigation into Anastasi's fraud, he said that in August 2005, when Anastasi was putting the proposal to mortgage the Berowra property to him:

""… The people I invest the money with pay all the outgoings. You will make 7% on top. I still owe you the money from before. I've got money overseas." Tony showed me a card which I recall was like a Swiss Bank card with lots of numbers on it. I think the card had Tony's name on it. Tony said, "I'll have a million dollars in this there. I will show you later a sheet of the money that will be coming into the account in commissions, where people owe me money. I have done big loans for people for investments." Tony told me a whole lot of information about making the investment and that it would be secure. ["]I will meet you at work. I'll talk to you some more. It's a big company, it's a hundred million dollar company. A blue chip company. They don't want their name disclosed as yet. Let me put it all together for you." I didn't make any decision with Tony at the time. I trusted that what Tony told me was true and I would wait to hear back from him."

310 Kowalczuk affirmed in cross-examination that Anastasi had said those things to him. Kowalczuk's cross-examination included:

"Q. Mr Kowalczuk, you had absolutely no reason to trust Tony Anastasi about money at this time, did you?
A I trusted him.

Q. You had very good reason, I suggest to you, to distrust him about money?
A. He seemed to be persuasive. He'd say everything was fine, everything was good. He said, "Look at the Alpha Second money, it's coming in. Everything is the same as Alpha Second." He persuaded me."

311 In December 2005, Kowalczuk was served with Accom's claim for possession of the Berowra property (which Kowalczuk inaccurately described as *"some court documents seeking to evict the tenant at Berowra"*). He took them to Anastasi, and was told:

"Don't worry about that, I've arranged a loan through the National Australia Bank. Everything's been fixed up. The people I am investing with will pay all the costs."

312 In his police statement, Kowalczuk said:

"In December 2005, I was telephoned by a solicitor working for the company Woods and Day Solicitors in Sydney. The solicitor informed me that the loan against the Child Care Centre at Berowra was in default. The solicitors were managing a new lease on the property for the Child Care Business. At the time I did not understand what the solicitor meant by a default on the loan. I straight away called Tony Anastasi on his mobile. I said, "Tony, Woods and Day just rang me and said that the Berowra property is in default." Tony said, "Don't worry I will fix it, the solicitors just want to make money, don't worry about them. I know what is going on." I was angry with Tony. I said, "I said what is going on." Tony said, "Don't worry I am going to fix everything, trust me. Once we re-finance everything will be okay"."

313 In cross-examination on this statement, Kowalczuk accepted that, notwithstanding what he had said in the police statement, he knew what a default was. Kowalczuk's cross-examination continued:

> "Q. So the solicitor actually told you that the reason for the default was that the payments were not made on the loan?
> A. Yes.
>
> Q. Did you ask him what do we do about that?
> A. No. I straight away rang Tony and asked him what's going on and he said don't worry about the solicitor, they just want to make money. I will fix it all up.
>
> Q. So you had a choice there whether to make inquiries of that solicitor or whether to make inquiries of Tony Anastasi, that's right, isn't it?
> A. He said there maybe a misunderstanding, don't worry about asking.
>
> Q. Please answer my question. You had a choice there and then, didn't you to make inquiries of that solicitor as to what was going on?
> A. Yes.
>
> Q. Or to make inquiries of Tony Anastasi?
> A. Yes.
>
> Q. And you chose Tony Anastasi, didn't you?
> A. Yes."

314 When Anastasi approached Kowalczuk concerning making a second investment, he described it as *"a very good project for you. An excellent blue chip investment. It is bank guaranteed"*.

315 Kowalczuk's account of how he was persuaded to enter the Haberfield transaction was that Anastasi said:

> ""You're sitting on dead money with Haberfield, I can make it into an investment like the other one, you can make 7% on top. We have to do this deal quickly, or you're going to have problems." I knew Tony meant by this that I would have problems getting back the loan I had already made on the mortgage over the Berowra. Again, Tony was very persuasive and made the deal sound very attractive. Also, although I was still angry with Tony about him not telling me what was happening the other deal, or paying me any of the interest which he owed me, he made me feel that I had no choice but to go ahead and things would be better for me if I did, so I told him I would."

316 Kowalczuk said that he did not discuss with his wife the mortgaging of the Haberfield property:

> "Because Tony told me, "Don't tell her anything. Surprise her with all this money you're going to make. Show her who you are and show her, you know" – Tony told me not to say anything to her."

317 In his police statement Kowalczuk said that when he gave the cheque for $750,000, the net proceeds of the Haberfield loan to Anastasi *"I trusted Tony that he was going to legitimately invest the money on my behalf."*

318 There was no financial pressure on Kowalczuk to take out either the Berowra loan or the Haberfield loan. He took out each of them because he wished to invest the money with Anastasi, to make profits. The history of his relationship with Anastasi shows, as does his own repeated admissions, that he trusted Anastasi.

319 All the deficiencies in Dalla's advice related to what the consequences would be if there was a default. The trial judge was not persuaded that the deficiencies that he found in Dallas advice – failing to advise about clause 68, and failing to specifically point out to Kowalczuk that if the moneys he was expecting on refinancing did not come through then he would be in default, the higher interest rates would apply in the lender could exercise all other rights under the mortgage – led to a conclusion that Dalla's advice was causative of any loss. There was no specific evidence from Kowalczuk about what he would have done if he had been advised of the extremely onerous consequences that would follow from default, in the manner that in my view would have been necessary for Dalla to perform his obligation. Even if such evidence had been given, the High Court's warnings that evidence from the plaintiff about what he or she would have done if the defendant had acted otherwise should be treated with caution in cases where the complaint is failure to warn (***Chappel v Hart*** [1998] HCA 55; (1998) 195 CLR 232 at 246, 272-3; ***Rosenberg v Percival*** [2001] HCA 18; (2001) 205 CLR 434 at [26], [87]-[89], [158] and [221]; ***Vairy v Wyong Shire Council*** [2005] HCA 62; (2005) 223 CLR 422 at [226]) would mean that caution should be applied in accepting that evidence. Kowalczuk's specific evidence that he would not have taken out the loans if he had known about the interest rates has been rejected by the trial judge, and there is no reason to doubt the correctness of that finding. That means that, if Kowalczuk is to discharge his onus of proving that it is more likely than not that he would have acted differently if Dalla had performed his duty, it is necessary that this court infer that he would have done so.

320 I am not prepared to draw the inference. If the refinancing was obtained promptly, there would be no default, and hence none of the onerous consequences that Dalla should have advised about, but failed to, would arise. On the evidence, it is very much an open possibility that Kowalczuk's trust of Anastasi was such that he trusted him to be able to procure the refinancing before there was any default on the Accom loans. The existence of the possibility means that I cannot conclude that it is more likely than not that Kowalczuk would have declined to take out either of the loans if Dalla had advised him properly.

Proposed Additional Grounds of Appeal Concerning Dalla

321 The Appellants seek to add, in their very late Further Amended Notice of Appeal with Appointment, a ground that the trial judge was in error in failing to find that if Dalla had acted in accordance with the requisite standards of a competent solicitor he should have declined to witness the necessary declarations pertaining to the provision of independent legal advice, in which case the Berowra and Haberfield transactions would not have proceeded.

322 The raising of that contention is opposed. It is a contention that was not litigated at the trial. Evidence would clearly have been relevant to it. It is not appropriate to permit it to be raised on appeal.

Breach by Dalla of Section 42 *Fair Trading Act*?

323 The Appellants submitted that the conduct of Dalla breached section 42 ***Fair Trading Act***.

324 Section 42 ***Fair Trading Act*** provides:

> "A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

325 The definition of *"business"* in section 4 ***Fair Trading Act*** includes in that expression *"a trade or profession"*. The definition of *"services"* in section 4 includes in that expression:

> "… the rights, benefits, privileges and facilities that are, or are to be, provided, granted or conferred under:
>
> (a) a contract for or in relation to:

(i) the performance of work (including work of a professional nature), whether with or without the supply of goods …"

326 Section 4(1) also provides:

"***Trade or commerce*** includes any business or professional activity."

and

"***business*** includes:

…

(b) a trade or profession."

327 Section 4(4) provides:

"(a) a reference to conduct is a reference to an act or a refusal to act, including in either case an act that constitutes, or would but for the refusal constitute, making or giving effect to a provision of a contract or arrangement, arriving at or giving effect to a provision of an understanding, or requiring or entering into a covenant,

(b) a reference to refusing to do an act includes:

(i) a reference to refraining (otherwise than inadvertently) from doing the act, and

(ii) a reference to making it known that the act will not be done …"

Is Provision of Legal Advice "In Trade or Commerce"?

328 There was an admission on the pleadings that the provision of legal services by Dalla was in trade or commerce. In his reasons for judgment the judge referred at [69] to that admission, and continued:

"For the general reasons given by Young CJ in Eq in ***Metcash Trading Ltd v Hourigan's IGA Umina Pty Ltd*** [2003] NSWSC 683 [now reported at (2003) 11 BPR 21,129] I think that incorrect."

329 However, as there was an admission on the pleadings, he then went on to deal with the matter on the assumption that the admission should be acted upon.

330 The judge delivered judgment on 6 July 2007. On 17 July 2007 the judge had before him a Notice of Motion whereby Dalla sought to withdraw the admissions. The solicitor for Kowalczuk had notice of the application, and did not appear. The judge granted the leave that was requested. The granting of that leave is not contested, but Mr Conti submits that ***Metcash*** was incorrectly decided, and the giving of advice by Dalla in the present case was *"in trade or commerce"* within the meaning of section 42.

331 ***Metcash*** involved a solicitor who had acted for clients in September 1999 on the purchase of a business, and again in June 2002 on the sale of that business. The agreement by which the clients purchased the business in 1999 gave a right of pre-emption to the vendor. The agreement for sale of the business in 2002 was to sell the business to someone other than the original vendor, and was entered without regard to that right of

pre-emption. The allegation against the solicitor was that he knew or should have known of the right of pre-emption, and by failing to advise the client of it, and failing to warn them about it, the solicitor contravened section 42 ***Fair Trading Act***. Young CJ in Eq rejected that claim for two reasons.

332 The first was that while sometimes a solicitor who was negligent about his or her client's affairs may also have breached a duty not to commit misleading or deceptive conduct, ***Boland v Yates Property Corp Pty Ltd*** (1999) 167 ALR 575 at [239] shows that there is a very real question about whether solicitors are engaged in trade or commerce. Young CJ in Eq said, at [54]-[56]:

> "It must be remembered that merely because a solicitor gives advice to a client which client is involved in trade or commerce, or drafts a document in connection with a lease of premises that are to be used in trade or commerce, the solicitor does not by himself or herself ergo engage in trade or commerce: ***Concrete Constructions (NSW) Pty Ltd v Nelson*** (1990) 169 CLR 594 at 604; 92 ALR 193; 17 IPR 39. Of course, there can be situations where giving advice can be in trade and commerce: ***Bond Corp Pty Ltd v Thiess Contractors Pty Ltd*** (1987) 14 FCR 215; 71 ALR 615, but the giving of advice by a solicitor in respect of a purchase or sale of a business is, ordinarily at least, not one of them.
>
> This is to be contrasted with the situation of an estate agent who is in trade and commerce in selling parcels of realty and cases like ***Argy*** fall into this category.
>
> ***Boland*****'s** case tells us that the oft told myth that one can always sue a solicitor in a count under the ***Trade Practices Act*** or ***Fair Trading Act*** as an alternative to negligence is indeed a myth. If a solicitor is acting in trade or commerce it may be that he or she has committed false and misleading conduct, but one ascertains that not by applying the negligence tests but by looking at the words of the statute and measuring the conduct of the solicitor against those words."

333 ***Boland*** was a claim brought against the solicitors and a barrister who had acted for the plaintiff in previous litigation, alleging that they had conducted the previous litigation in a way that was negligent, or contravened section 52 ***Trade Practices Act***, or contravened section 42 ***Fair Trading Act***. The statutory counts failed at first instance and were not the subject of any appeal. The appeal was confined to the allegation of negligence, on the basis that if the negligence claim failed the statutory claims would fail also. That explains why, in the High Court, it was only Callinan J who made any mention, at [239] of the statutory claims made in the specific case. (Gaudron J at [104]-[107] made some general remarks about the interaction between the law of negligence and section 52 ***Trade Practices Act***, but not their application to the particular case.)

334 Because the claim against the solicitors and barrister was brought in the Federal Court, there had been particular focus on the ***Trade Practices*** claim at first instance, because it was only via the ***Trade Practices*** claim that the jurisdiction of the Federal Court was attracted. The ***Trade Practices*** claim had proceeded on the basis that, though the respondents in the Federal Court proceedings were natural persons, and the prohibition in section 52 was directed to a corporation, section 6(3) extended the operation of the ***Trade Practices Act*** so that (inter alia) section 52 applied to a person who was not a corporation concerning conduct involving the use of postal, telegraphic or telephonic services. It was alleged that the lawyers had sent letters and facsimiles that were part of the misleading and deceptive conduct. It was in this context that Callinan J said at [239]:

> "As to the other matter, whether the appellants were engaged in conduct in trade or commerce, counsel for the respondent quite properly conceded in this court that that question was an even more controversial one. No doubt the respondent was anxious to find and pursue if possible statutory claims to which any immunity of lawyers in negligence suits might not provide an answer. These matters need not, however, be explored now, because no ground of appeal either to the Full Federal Court or to this Court raises any jurisdictional point."

335 Those remarks were confined to the ***Trade Practices*** claim. The ***Trade Practices Act*** does not contain any provision to the effect that trade or commerce includes any business or professional activity. In those circumstances, the remarks of Callinan J at para [239] of ***Boland*** cannot be transposed into a statement that the

question whether solicitors and a barrister were engaged in trade or commerce was a controversial one, for the purpose of the ***Fair Trading Act.***

336 The definition of *"services"* in the ***Trade Practices Act*** includes identical words to those I have quoted above for the corresponding definition in the ***Fair Trading Act***.

337 ***Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd*** (1987) 14 FCR 215, another of the cases relied on by Young CJ in Eq in ***Metcash***, was an application for summary dismissal of a claim, or striking out of parts of a statement of claim. The applicant for those orders was a firm of consulting and supervising engineers, who had advised a developer concerning a subdivision. The allegation against the engineers was, broadly, that they had misrepresented their experience and expertise in the design and supervision of land subdivisions, their ability to provide engineers who had such experience, and their ability to provide accurate estimates of the costs involved in carrying out a subdivision. French J rejected a submission that a professional could not be engaged in trade or commerce, because the professional is engaged in what is *"essentially an intellectual activity and not an activity of a commercial or mercantile kind"* (at 217). He accepted, at 218, that *"trade or commerce" "is intended to cover the whole field in which the nation's trade or commerce is carried on"*. His Honour said, at 218, that although the word *"services"*:

> "… does not appear in s 52, it is found in s 53 in a context which casts further light on the ambit of *"trade or commerce"*.
>
> …
>
> The express inclusion of *"work of a professional nature"* in the definition of services and the use of that term in s 53 to qualify the area of *"trade or commerce"* to which the section applies, suggests very strongly that the words *"trade or commerce"* as used in the Act are intended to apply to the provision of professional services."

338 His Honour also noted the width of the term *"trade"* in its constitutional context.

339 He concluded, at 220:

> "… where the conduct of a profession involves the provision of services for reward, then in my opinion, even allowing for widely differing approaches to definition, there is no conceivable attribute of the aspect of professional activity which will take it outside the class of conduct falling within the description *"trade or commerce"*.
>
> This conclusion flows from both the judicial exposition and the particularly statutory context of that term.
>
> It follows that the provisions of s 52 are applicable to the giving of professional advice by a consulting engineer and nothing flowing from the characterisation of that occupation as a profession prevents their application."

340 The reasoning in that case might need reconsideration in the light of ***Concrete Constructions (NSW) Pty Ltd v Nelson*** [1990] HCA 17; (1990) 169 CLR 594, as one of the themes of ***Nelson*** was that *"in trade or commerce"* in section 52 should not be read as covering the full extent of what counts as *"trade or commerce"* for the purposes of the Constitution. However the important thing for present purposes is that ***Thiess*** was not dealing with the extended definition of *"trade or commerce"* contained in the ***Fair Trading Act***.

341 In my respectful view, the reasoning in the part of ***Metcash*** that I am now considering is flawed because it does not take into account the extended definition of *"trade or commerce"* contained in section 4 ***Fair Trading Act***. If that extended definition is taken into account, it becomes necessary to consider an argument to the effect that, when section 42(1) says *"a person shall not, in trade or commerce, engage in*

conduct that is misleading or deceptive or is likely to mislead or deceive" it is to be interpreted so that the expression *"in trade or commerce"* is given the meaning explained in ***Nelson v Concrete Constructions***, and also as though it said:

> "A person shall not, in any business or professional activity, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

342 In ***Prestia v Aknar*** (1996) 40 NSWLR 165 Santow J (as his Honour then was) gave lengthy consideration, at 178-195 to the meaning of *"in trade or commerce"* in the ***Fair Trading Act***. He identified, at 188, two possible interpretations of the types of professional activity that fell within section 42(1). What he called the *"wider interpretation"* was that any conduct in a profession or by way of professional activity was in itself enough to attract the potential application of section 42(1). The *"narrower interpretation" "requires that the activity inherently bear a trading or commercial character before it is caught"*. Ultimately, his Honour decided that the narrower interpretation was preferable.

343 In ***Plimer v Roberts*** (1997) 80 FCR 303 the Full Federal Court held (as summarised by Jessup J in ***Shahid v Australasian College of Dermatologists*** [2008] FCAFC 72; (2008) 168 FCR 46 at [181]) that in section 42 ***Fair Trading Act***:

> "… the expression *"trade or commerce"* should be so read as to include any professional activity; secondly, that a professional activity will only be such as is unequivocally and distinctively characteristic of the carrying on of a profession; but thirdly, that whether the activity should also be such that, when done in the carrying on of a profession, it bears a trading or commercial character is an open question."

344 In ***Shahid*** Jessup J, at [191] declined to apply the view in ***Prestia*** that, in the ***Fair Trading Act***, the expression *"any professional activity"* is confined to such an activity which bears a trading or commercial character. He concluded at [194]:

> "… I would not construe the expression *"any professional activity"* more narrowly than is implicit in the requirement that the activity in question be unequivocally and distinctly characteristic of the carrying-on of a profession, giving to the latter concept a connotation which is not limited to engagement in professional practice."

345 On the basis of that construction of the ***Fair Trading Act*** (WA) Jessup J held that the Australasian College of Dermatologists had breached the Western Australian equivalent of section 42 ***Fair Trading Act***. Branson and Stone JJ agreed (at [1]) and [30]), but would also have found the College had breached section 52 ***Trade Practices Act***.

346 In ***Houghton v Arms*** [2006] HCA 59; (2006) 225 CLR 553 the High Court considered the Victorian ***Fair Trading Act* 1999**. Section 9 of that Act is the analogue of section 42 of the New South Wales ***Fair Trading Act***. The question at issue in the case was whether a natural person who had engaged in misleading and deceptive conduct while acting solely as an employee of a corporation and not on his own account, could contravene section 9. The Court held he could. At [32] the Court, comparing section 52 ***Trade Practices Act*** and section 9 ***Fair Trading Act*** said:

> "The text and structure of the comparable provisions of the two laws are not identical, but, as submitted by the respondent, it may be accepted that the construction of the phrase "in trade or commerce" as it appears in s 52 of the TP Act which was given by this court in ***Concrete Constructions (NSW) Pty Ltd v Nelson*** applies to s 9 of the FT Act."

There is a footnote reference to the end of the sentence just quoted that reads:

> "See ***Prestia v Aknar*** (1996) 40 NSWLR 165 at 182; ***Fasold v Roberts*** (1997) 70 FCR 489 at 528."

347 Page 182 of ***Prestia***, there referred to, is not in the part of the judgment where Santow J is considering how the extended definition of *"trade or commerce"* applies to section 42. I do not read ***Houghton v Arms*** as having given the High Court's approval to that discussion.

348 In ***Australian Securities Commission v Marlborough Gold Mines Ltd*** [1993] HCA 15; (1993) 177 CLR 485 at 492 Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ held that an intermediate appellate court should not depart from an interpretation placed on uniform national legislation such as the ***Corporations Law*** by another intermediate appellate court, unless convinced that the interpretation is plainly wrong. In ***Farah Constructions Pty Ltd v Say-Dee Pty Ltd*** [2007] HCA 22; (2007) 230 CLR 89 at [135] Gleeson, Gummow, Callinan, Heydon, and Crennan JJ referred to that aspect of ***Marlborough***, and continued:

> "Since there is a common law of Australia rather than of each of Australian jurisdiction, the same principle applies in relation to non statutory law."

349 Neither ***Marlborough Gold*** nor ***Say-Dee*** applies, as a matter of binding precedent, to whether I should follow the decision of the Full Federal Court in ***Shahid***. ***Marlborough*** does not apply because there is not uniform national legislation involved – while each state has a ***Fair Trading Act***, that are markedly similar to each other, the particular extended meaning of *"trade or commerce"* that appears in the New South Wales Act appears in the Western Australian Act, but not in other ***Fair Trading Acts***. Further, ***Say-Dee*** does not apply, because the question is one of statutory interpretation, not application of the common law.

350 Even so, I think it would be out of keeping with the general approach to the law of precedent as between intermediate appellate courts in Australia, that is shown in ***Marlborough Gold*** and ***Say-Dee***, for me to proceed as though I had a completely free hand in deciding whether to follow ***Shahid*** or not. As I perceive it, a consideration that motivates both ***Marlborough Gold*** and ***Say-Dee*** is that Australia is a single country, with a single body of common law and equitable principle applying within it. To the extent to which State Parliaments have passed legislation that is not in substance different, that legislation should be construed in a way that is not in substance different. I consider that, consistently with ***Marlborough Gold*** and ***Say-Dee***, though not dictated by them, I should depart from the Full Federal Court's decision in ***Shahid*** only if convinced it is wrong. I am not so convinced, and therefore shall apply it.

351 I conclude that the fact that Dalla was engaged in professional activities as a solicitor is not in itself sufficient reason why section 42 cannot apply to him. The provision by Dalla of legal advice to Kowalczuk was carried out *"in trade or commerce"*, within the meaning of section 42. That is far from conclusive, however, about whether the prohibition in section 42 actually applies to his dealings with Mars and Kowalczuk.

What Counts as Misleading or Deceptive Conduct by a Solicitor?

General Considerations

352 There are various ways in which a solicitor might engage in misleading or deceptive conduct in the course of his or her professional activities. Sometimes the task of a solicitor is to advise on the prospects of success of proposed litigation, or about how the courts are ultimately likely to decide some presently undecided legal question. Such advice involves the solicitor making a prediction about the future, and can be misleading or deceptive according to the same criteria as any prediction about what will happen in the future can be misleading or deceptive. When the advice in the present case is not of that character, it is not necessary to elaborate on when a prediction about the future can be misleading or deceptive.

353 Sometimes, in the course of seeking or carrying through legal work, a solicitor will make a specific representation of fact, and whether such a representation of fact is misleading and deceptive is judged by the same criteria as any other representation of fact. Sometimes the representation of fact might be an implied one.

One particular circumstance in which an implied representation of fact might be made occurs when the task of the solicitor involves the carrying out of a transaction that requires legal skills, such as carrying through a conveyancing transaction, administering a deceased estate, or drafting a set of documents apt for a commercial transaction the client wants to enter. Though it will depend upon the circumstances of individual transaction, very often the mere entering of the solicitor upon the task involves a representation that he or she has knowledge and skills suited to carrying the task out, and sometimes conveying to the client the message that the task has been completed might involve a representation that is implied or by silence that the task has been completed in accordance with the degree of care and skill of a competent solicitor. In the present case no specific representation of fact is alleged to have been made by Dalla.

354 Sometimes, a solicitor will express an opinion, about the advantages and disadvantages involved in following different proposed courses of action or (more boldly) about which of several different proposed courses of action is more in the client's interests. That sort of opinion is not strictly a prediction about the future, because it involves considering various hypothetical futures only one of which can actually come about, and none of which might actually come about. One aspect of the claims brought against a barrister and solicitors in ***Heydon v NRMA Ltd*** was an allegation that they had each breached section 42 ***Fair Trading Act*** by the advice they gave. In ***Heydon v NRMA*** at [307] Malcolm AJA said:

> "A claim in damages for misleading or deceptive conduct is dependent on the effect or probable effect on the person to whom the conduct is directed, as distinct from any want of care or state of mind of the person engaging in the conduct: ***Yorke v Lucas*** (1985) 158 CLR 661. Where a legal adviser gives an opinion there is not ordinarily any representation or warranty that the opinion is correct, only that a reasonable degree of professional care and skill has been brought to bear on the formation and expression of the opinion: see the formulation of the duty in the joint judgment in ***Rogers v Whitaker***, (at 483) per Mason CJ, Brennan J, Dawson J, Toohey J and McHugh J. Where negligence and misleading or deceptive conduct are both pleaded based upon the same material facts, it is not uncommon for the result to be that they will succeed or fail together: ***Boland v Yates Property Corporation Pty Ltd***, (at 229; 601) per Gaudron J."

(The reference to the judgment of Gaudron J in ***Boland*** should be to [104], 602). See also, to similar effect, at [329]-[331] per Malcolm AJA, [431]-[432] per McPherson AJA [692] 250 per Ormiston AJA. In the present case, I can see no circumstances in which there could be liability under section 42 if there were not also liability for the tort of negligence.

Can Inadvertent Conduct be Misleading or Deceptive?

355 The particulars in the pleading of the allegation of breach by Dalla of section 42 referred the reader back to paragraph 19 of the cross-claim (concerning the Berowra transaction) and to paragraph 48 of the cross-claim (concerning the Haberfield transaction). The trial judge dismissed the claim under section 42 saying:

> "… the particulars of the conduct set out in paragraph 19 of the cross-claim are directed towards section 75B of the ***Trade Practices Act***. Those matters go to failings or omissions, as the claimed breach is of refraining to do something, presumably by silence; such conduct needs to be intentional not inadvertent: section 4(4) of the ***Fair Trading Act***. No intentional conduct was proved. If I were wrong in this I consider that the claim for breach of duty, which is made on the basis of the same facts pleaded in paragraph 19 of the cross-claim, would be at least as wide and I think wider than any s 42 claim."

356 In reasoning in this way the trial judge was acting consistently with the decision in ***Metcash***. The second reason why Young CJ in Eq dismissed the claim against the solicitors in ***Metcash*** was that the complaint against them was one of failure to warn about the pre-emption clause (so far as misleading and deceptive conduct in the course of the first retainer was concerned), and a failure to remember the clause or get out the file and look at it, (so far as misleading and deceptive conduct in the course of the second retainer was concerned).

Young CJ in Eq held, at [59], that by reason of section 4(4) omissions can constitute conduct, but not if the omission is inadvertent.

357 This approach of Young CJ in ***Metcash***, and of the trial judge in the present case, was justified by both the words of section 4(4) and authorities concerning them.

358 Purely as a matter of statutory interpretation, section 4(4)(a) takes the form of an exhaustive definition of *"conduct"*. Section 4(4)(b) is merely an inclusive definition of *"refusing"* to do an act. Thus, the reference to *"a refusal to act"* includes the matters referred to in section 4(4)(b)(i) and (ii), and also includes anything else that would count as a *"refusal to act"* in the ordinary meaning of those words.

359 In ***Semrani v Manoun*** [2001] NSWCA 337 Beazley JA (with whom Mason P and Ipp AJA agreed) considered a situation where Williams, an accountant, did not disclose to a Mr Manoun, information that Williams had that was of great importance to a business venture that Manoun was proposing to enter. Beazley JA at [56] ff considered section 42 and section 4(4) ***Fair Trading Act***, and authorities relating to when there can be misleading and deceptive conduct through silence, and concluded, at [62]:

> "The combined effect of the Act and the authorities therefore, is that for Williams' silence to be actionable, he must have actual knowledge of a matter which he intentionally refrained from telling Manoun in circumstances where there was either a duty to disclose or where Manoun had a reasonable expectation that such information would be disclosed to him."

360 Similarly, in ***Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd*** [2002] NSWCA 211; (2002) 18 BCL 322 there was an allegation of breach of section 52 ***Trade Practices Act***. Section 4(2)(c) ***Trade Practices Act*** is in the same terms as section 4(4)(b) ***Fair Trading Act***. The allegation in question was that failure to disclose a particular project management agreement amounted to misleading and deceptive conduct. Hodgson JA (with whom Mason P and Stein JA agreed) said, at [58]:

> "In my opinion, there is also a difficulty faced by Abigroup arising from the referee's failure to find that the non-disclosure was intentional. I accept Mr Douglas' submission that, in so far as what is alleged to be misleading or deceptive conduct arises from Peninsula's refraining from disclosing the project management agreement, Abigroup needs a finding that this refraining was not inadvertent. Mr Walker submitted that it was sufficient that Peninsula knew of the project management agreement, acted intentionally in negotiating, and did not disclose the agreement in circumstances where this was not due to mistake. However, in my opinion the requirement in s4(2)(c) that a refraining be otherwise than inadvertent requires that there be actual advertence to the question of whether something should be done or not and the formation of an intention that it not be done. I think this is in accordance with the decision in ***Semrani***."

361 The only way in which the failures of Dalla to act, complained of in this case, could even arguably fall within the exhaustive definition of *"conduct"* in section 4(4)(a) is if it were a refusal to act. The various failures that Dalla is alleged to have engaged in do not count as a *"refusal to act"*, within the ordinary meaning of those words. Further, when the various failures that were relied upon have not been proved to be intentional, they do not fall within the extended meaning contained in section 4(4)(b). Thus, any such failures to act do not fall within the prohibition of section 42.

Causation and Section 42

362 Another submission of Mr Conti, not developed at length, was that the concept of causation operated differently in its application to a cause of action arising under section 42 ***Fair Trading Act*** to the way it operated concerning the tort of negligence. The right to damages for breach of section 42 is conferred by section 68(1) ***Fair Trading Act***:

> "A person who suffers loss or damage by conduct of another person that is in contravention of a provision of Part … 5 … may recover the amount of the loss or damage by action against the other person …"

363 This is not materially different to section 82 ***Trade Practices Act***, the section that confers an entitlement to damages for a breach of section 52 ***Trade Practices Act***. Concerning section 82 ***Trade Practices Act***, ***Wardley Australia Ltd v Western Australia*** [1992] HCA 55; (1992) 175 CLR 514 at 525 noted that while the word *"by"* was a somewhat curious expression in the context, it conveyed the concept of causation in the practical or *"common-sense"* approach discussed in ***March v E & M H Stramare Pty Ltd*** [1991] HCA 12; (1991) 171 CLR 506 (itself a negligence case). In ***Heydon v NRMA*** at [346] per Malcolm AJA, [441] per McPherson AJA accepted that the same analysis applied to section 68 ***Fair Trading Act***. The same conclusion was reached in ***Semrani v Manoun*** [2001] NSWCA 337 at [47]. I respectfully agree with those decisions. I am not persuaded that the concept of causation operates differently to a cause of action under section 42 to the way it operates concerning the tort of negligence.

364 In that circumstance, even if a breach of section 42 had been made out, causation of damage would not be established.

Orders re Dalla Appeal

365 In my view, insofar as the appeal challenged the trial judge's dismissal of the action against Dalla, it should be dismissed with costs.

366 By order 2 in the Equity Proceedings, the judge had dismissed the cross-claim against both cross-defendants. By order 16 in the Equity Proceedings, the judge had ordered Kowalczuk to pay the cross-defendants' costs of the cross-claim. In the Common Law Proceedings the judge had ordered the cross-claim be dismissed, and the cross-claimant (ie Mars) pay the cross-defendants' costs of the cross-claim.

367 For the reasons I have given, it is not appropriate to alter the effect of any of those orders in so far as they benefit Dalla. However, because orders made below were made in terms that applied to both cross-defendants in the respective proceedings, it will be necessary to revoke those orders, and replace them with orders that benefit Dalla alone.

PART E – ORDERS

Final Disposition?

368 It is desirable to make orders now to dispose of the appeals as far as possible. The only thing that is preventing the making of orders enabling the appeal to be disposed of completely is the need to calculate the interest that is due to Kowalczuk and Mars that will be part of the final amount of the judgment in their favour. I can see no reason why the solicitors cannot agree on the quantum of that calculation, and submit an agreed minute of a supplementary order, that can be made in chambers by a single judge. However, against the possibility that something unexpected prevents that agreement being arrived at, and for no other purpose, I shall reserve liberty to apply and further consideration.

Orders Proposed

369 The orders I propose are:

1. So far as the appeal is brought against Dalla, the appeal is dismissed with costs.

2. So far as the appeal is brought against Accom:

(a) Note the undertaking of Accom by its counsel to the Court that Accom will not enforce the Haberfield mortgage or the guarantee of Kowalczuk relating to the debt owed by Mars under the Haberfield mortgage for more than the lower rate fixed by that mortgage at simple interest, plus any costs it is entitled to, pursuant to that mortgage.

(b) Upon that undertaking, allow the appeal to the extent that the orders in the court below are varied in the manner set out in order 3 hereof, and Accom will hereafter be ordered to pay

(i) to Kowalczuk the sum of $18,143.17 plus interest at the prescribed court rates from 14 December 2005 to the date when that judgment is entered, and

(ii) to Mars the sum of $20,761.84 plus interest at the prescribed court rates from 13 October 2006 to the date when that judgment is entered.

(c) Direct the solicitors for the parties to confer concerning the amounts that shall be ordered pursuant to 2 (b) above, and to submit to the court within 28 days of the date of delivery of these reasons, agreed short minutes of order for the payment of those sums.

(d) Reserve liberty to apply and further consideration concerning the quantum of those sums.

(e) Order Accom to pay to Kowalczuk and Mars two-thirds of their costs of the appeal, insofar as those costs relate to the appeal they brought against Accom.

(f) Otherwise, appeal dismissed.

3. Orders in the court below in 1887 of 2006 (the Equity Proceedings) are varied as follows:

(a) Orders 2-16 revoked.

(b) In lieu of order 2, order that the cross-claim against Dalla be dismissed.

(c) In lieu of orders 2–16,

(i) note that the Plaintiff will hereafter be ordered to make a payment to Kowalczuk in accordance with 2(b)(i) above, and reserve liberty to apply and further consideration concerning the quantum of that sum.

(ii) order Kowalczuk to pay Dalla's costs of the cross-claim.

(iii) order that Kowalczuk and Accom each bear his or its own costs of the claim and cross-claim.

4. Orders of the Court below in 5906 of 2006 (the Common Law Proceedings) made on 17 July 2007 revoked, and in lieu thereof order:

(a) Note that the plaintiff will hereafter be ordered to make a payment to Mars in accordance with 2(b)(ii) above, and reserve liberty to apply and further consideration concerning the quantum of that sum.

(b) order Mars to pay Dalla's costs of the cross-claim.

(c) order that Mars and Accom each bear its own costs of the claim and cross-claim.

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AMENDMENTS:

21/05/2009 - Correction of typographical error in penultimate sentence of paragraph - "that" changed to "than". - Paragraph(s) 126

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