Court of Appeal
Supreme Court
New South Wales

Medium Neutral Citation:	**Tonto Home Loans Australia Pty Ltd v Tavares; FirstMac Ltd v Di Benedetto; FirstMac Ltd v O'Donnell [2011] NSWCA 389**
Hearing dates:	1- 4 August 2011
Decision date:	21 December 2011
Before:	Bathurst CJ at 1 Allsop P at 2 Campbell JA at 303
Decision:	(1) As to appeal number 2009/00298570 (formerly 40454 of 2009) being the Tavares and Rowe appeal: (a) Allow the appeal in part. (b) Set aside order 2(b) made by the Supreme Court on 26 February 2010 (as set out in [448] of the primary judge's reasons) and in lieu thereof order that the mortgagee Tonto Home Loans Australia Pty Ltd deliver up to Jose De Carvalho E Rego Tavares and Kim Lee-Anne Rowe a registrable discharge of mortgage, but only on condition that Mr Tavares and Ms Rowe pay or have paid to the mortgagee or at its direction the sums referred to in order 4 made by the Supreme Court on 26 February 2010. (c) The appellant pay the respondents' costs of the appeal. (2) As to appeal number 2009/00298571 (previously 40455 of 2009) being the Di Benedetto appeal: (a) Allow the appeal in part. (b) Set aside order 2(b) made by the Supreme Court on 26 February 2010 (as set out in [447] of the primary judge's reasons) and in lieu thereof order that the mortgagee, Permanent Trustee Company Limited ("Permanent"), or to the extent that it has acceded to that company's rights, FirstMac Limited, deliver up to Lawrence Di Benedetto and Maria Di Benedetto a registrable discharge of mortgage.

(c) The appellant pay the respondents' costs of the appeal.

(3) As to appeal number 2009/00298572 (previously 40456 of 2009) being the O'Donnell appeal:

(a) Allow the appeal in part.

(b) Set aside orders 2 and 5 made by the Supreme Court on 26 February 2010 (as set out in [446] of the primary judge's reasons) and in lieu thereof order:

(i) The loan agreement dated 10 January 2003 and made between Permanent as lender, or to the extent that it has acceded to that company's rights, FirstMac Limited, and Gillian O'Donnell and John Robert O'Donnell as borrowers be varied to reduce the principal loan from $500,000 to $125,000 such variation to take effect from 1 August 2005, with the effect that thereafter the responsibility for payment of interest and principal be referable to a principal sum of $125,000.

(ii) The security provided by registered mortgage numbered 9386484P between Mr and Mrs O'Donnell and Permanent, or to the extent that it has acceded to Permanent's rights, FirstMac Limited, be limited in effect accordingly such that upon payment of the sum or sums sufficient to repay said loan as varied the O'Donnells be entitled to receipt of a registrable discharge of mortgage.

(iii) The plaintiff pay 75 per cent of the defendants'/cross-claimants' costs of the proceedings.

(c) The appellant pay 75 per cent of the respondents' costs of the appeal.

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Catchwords:

CONTRACT - unjust - Contracts Review Act 1980 (NSW) - operation of Act where lender uses mortgage originators which in turn use sub-introducers to bring forward potential borrowers - sub-introducers engaged in fraud by falsifying

relevant information concerning assets and earnings of borrowers in relation to low documentation lending secured by mortgage over borrowers' homes - lenders had no knowledge of fraud - relevant enquiry for the purposes of the Act, ss 7 and 9 is whether contract is unjust in all the circumstances of the case and whether it is just to grant relief - low documentation lending not unjust of itself but carries inherent systemic risk - principal safeguard against risk in present cases was vigorous application by lender of lending guidelines - lending guidelines not followed - just in all circumstances to grant relief notwithstanding carelessness of borrowers.

AGENCY - nature of relationship - agency is a consensual arrangement whereby one party undertakes to act for or on behalf of another - centrality of conception of identity or representation of the principal - entrusting of organisational or enterprise tasks to another party not of itself sufficient to constitute relationship of agency - no relationship of agency between mortgage originator and sub-introducer.

UNCONSCIONABLE CONDUCT - requirement of moral obloquy or that conduct is irreconcilable with what is just and reasonable - necessary to characterise relevant contracting party's conduct as unconscionable and not that of a third party - unconscionability not made out in absence of knowledge of contracting party of fraud of third party - Australian Securities and Investments Commission Act 2001 (Cth), ss 12CB and 12CC considered.

Legislation Cited:

Australian Securities and Investments Commission Act 2001 (Cth), ss 1, 5, 12A, 12BAA, 12BAB, 12CA, 12CB, 12CB, 12CC, 12CC, 12GD, 12GH and 12GM
Australian Securities and Investments Commission Regulations 2001 (Cth), Reg 2B
Consumer Protection Act 1967 (British Columbia), s 18
Contracts Review Act 1980 (NSW), ss 6, 7, and 9
Corporations Act 2001 (Cth), s 1330
Fair Trading Act 1987 (NSW), s 43
German Civil Code (BGB)
Industrial Arbitration Act 1940 (NSW), s 88F

Trade Practices Act 1974 (Cth), ss 51AB and 51AC
Unconscionable Transactions Relief Act 1990 (Ontario), s 2

Cases Cited:

Attorney General of New South Wales v World Best Holdings Ltd [2005] NSWCA 261; 63 NSWLR 557
Australian Competition and Consumer Commission v Samton Holdings Pty Ltd [2002] FCA 62; 117 FCR 301
Australian Securities and Investments Commission v National Exchange Pty Ltd [2005] FCAFC 226; 148 FCR 132
Baltic Shipping Co v Dillon (1991) 22 NSWLR 1
Beach Petroleum NL v Johnson (1993) 43 FCR 1; 115 ALR 411
Beach Petroleum NL v Kennedy [1999] NSWCA 408; 48 NSWLR 1
Belmont Finance Corporation Ltd v Williams Furniture Ltd [1979] 1 Ch 250
Birtchnell v The Equity Trustees, Executors and Agency Co Ltd [1929] HCA 24; 42 CLR 384
Boardman v Phipps [1967] 2 AC 46
Branwhite v Worcester Works Finance Ltd [1969] 1 AC 552
Bunnings Group Limited v Laminex Group Limited [2006] FCA 682; 153 FCR 479
Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd [1931] HCA 53; 46 CLR 41
Cook v Permanent Mortgages Pty Ltd [2007] NSWCA 219
Espin v Pemberton (1859) 3 De G & J 547; 44 ER 1380
Hewitt v Loosemore (1851) 9 Hare 449; 68 ER 586
Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; 156 CLR 41
Hygienic Lily Ltd v Deputy Federal Commissioner of Taxation (1987) 13 FCR 396
In re Goldcorp Exchange Ltd [1995] 1 AC 74
International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co [1958] HCA 16; 100 CLR 644
Kennedy v De Trafford [1897] AC 180
Kennedy v Green (1834) 3 My & K 699; 40 ER 266
Kirkpatrick v Kotis [2004] NSWSC 1265; 62 NSWLR 567
Kowalczuk v Accom Finance Pty Ltd [2008] NSWCA 343; 77 NSWLR 205

Leveraged Equities Ltd v Goodridge [2011] FCAFC 3; 191 FCR 71
Lloyd v Grace, Smith & Co [1912] AC 716.
McKenzie v McDonald [1927] VLR 134
Morlea Professional Services Pty Ltd v Richard Walter Pty Ltd (In liq) [1999] FCA 1820; 96 FCR 217
Nathan v Dollars & Sense Finance Ltd [2007] NZCA 177; [2007] 2 NZLR 747
NMFM Property Pty Ltd v Citibank Ltd (No 10) [2000] FCA 1558; 107 FCR 270
Perpetual Trustee Company v Khoshaba [2006] NSWCA 41
Perpetual Trustees Victoria Ltd v Longobardi [2009] NSWSC 654
Qantas Airways Ltd v Cameron (1996) 66 FCR 246
Riz v Perpetual Trustee Australia Ltd [2007] NSWSC 1153
Scott v Davis [2000] HCA 52; 204 CLR 333 South Sydney District Rugby League Football Club Ltd v News Ltd [2000] FCA 1541; 177 ALR 611
Spina v Permanent Custodians Ltd [2009] NSWCA 206
Transfield Pty Ltd v Arlo International Ltd [1980] HCA 15; 144 CLR 83

Texts Cited:

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J R Peden Harsh and Unconscionable Contracts: Report to the Minister for Consumer Affairs and Co-operative Societies and the Attorney-General for New South Wales, 1976
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F M B Reynolds, W Bowstead and M Graziadei Bowstead and Reynolds on Agency (17th Ed, Sweet & Maxwell, 2001)
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P Watts, "Imputed Knowledge in Agency Law - Excising the Fraud Exception" (2001) 117 Law Quarterly Review 300

Category: Principal judgment

Parties: 2009/298570
Tonto Home Loans Australia Pty Ltd (Appellant)
Jose De Carvalho E Rego Tavares (First Respondent)
Kim Lee-Anne Rowe (Second Respondent)
Australian Securities and Investments Commission (Third Respondent)

2009/298571
FirstMac Limited (Appellant)
Lawrence Di Benedetto (First Respondent)
Maria Di Benedetto (Second Respondent)
Australian Securities and Investments Commission (Third Respondent)

2009/298572
FirstMac Limited (Appellant)
Gillian O'Donnell (First Respondent)
John Robert O'Donnell (Second Respondent)
Australian Securities and Investments Commission (Third Respondent)

Representation: A Leopold SC, D F C Thomas (FirstMac Limited and Tonto Home Loans Australia Pty Ltd)
P Menzies QC, A Fernon (Jose De Carvalho E Rego Tavares, Kim Lee-Anne Rowe, Lawrence Di Benedetto, Maria Di Benedetto, Gillian O'Donnell and John Robert O'Donnell)
R J Wright SC, J A Arnott (Australian Securities and Investments Commission)
Gadens Lawyers (FirstMac Limited and Tonto Home Loans Australia Pty Ltd)
Champion Legal (Jose De Carvalho E Rego Tavares , Kim Lee-Anne Rowe, Lawrence Di Benedetto, Maria Di Benedetto, Gillian O'Donnell and John Robert O'Donnell)
Australian Securities and Investments Commission Litigation Counsel (Australian Securities and Investments Commission)

File Number(s):	2009/298570, 2009/298572, 2009/298571
Decision under appeal	9111
Jurisdiction:	
Citation:	Permanent Trustee Company Limited v Gillian O'Donnell; Permanent Trustee Company Limited v Di Benedetto; Tonto Home Loans Australia Pty Ltd v Tavares [2009] NSWSC 902
Date of Decision:	04 September 2009
Before:	Price J
File Number(s):	2006/12148; 2006/12147; 2005/15644

JUDGMENT

1 **BATHURST CJ:** I agree with Allsop P.

2 **ALLSOP P:** These three appeals principally concern the operation of the *Contracts Review Act 1980* (NSW) (the " *CRA* ") in circumstances where a lender uses contracted so-called "mortgage originators" which in turn use their own networks of so-called "sub-introducers" to find and bring forward potential borrowers and one of those sub-introducers engages in deceptive, indeed dishonest, conduct that leads to the borrowers borrowing funds from the lender and providing mortgage securities in return. In each case, the borrowers, after a body of conduct directed towards them involving a mixture of falsehoods and pressure and their own imprudence, entered the borrowing arrangements and provided the funds obtained to a company associated with the sub-introducer, which funds were ultimately lost. The primary judge set aside the loans of all borrowers thereby relieving them of any obligations to the lenders in question: *Permanent Trustee Company Limited v Gillian O'Donnell; Permanent Trustee Company Limited v Di Benedetto; Tonto Home Loans Australia Pty Ltd v Tavares* [2009] NSWSC 902 . The appeals also concern the operation of the *Australian Securities and Investments Commission Act 2001* (Cth) (the " *ASIC Act* "), ss 12CB and 12CC.

3 The judgment of the primary judge and the submissions discuss phrases or concepts of "asset lending" and "Lo Doc Lending". At the outset, it is important to stress that such labels should be eschewed as determinative of legal reasoning. That said, the widespread use of the commercial structure of the lending in this case has led the Australian Securities and Investments Commission ("ASIC") to intervene in these appeals under the *Corporations Act 2001* (Cth), s 1330.

STRUCTURE OF THESE REASONS

4 These reasons have been organised as follows:

Factual background to the borrowings [5]-[90]

The O'Donnells [5]

The Di Benedettos [54]

Mr Tavares and Ms Rowe [71]

The structure and operation of the lending arrangements: the Origin Program and the FirstMac Program [91]-[151]

General outline of structure [91]

The Origin Program [92]

The FirstMac Program [99]

Some commercial incidents of the lending structure [101]

The place of the loan introducer [103]

The lending guidelines [106]

Origin Program guidelines [107]

FirstMac Program guidelines [113]

Failure to follow the guidelines by Tonto HL [122]

The relationship between Tonto and Streetwise [129]

The terms of the arrangement [130]

The role played by Streetwise and the risks of the arrangements [133]

The question of Streetwise (S Loans) as agent for Tonto HL [141]

The imputation of Streetwise's knowledge to the lenders [147]

Asset lending [152] - [155]

The application of the CRA [156]-[167]

The O'Donnell Loan **[157]**

The Di Benedetto Loan **[163]**

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Relief **[165]**

The appeal [168]-[298]

Agency [170]-[213]

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The Introduction Deed [181]

Conclusion on agency [195]

Aspects of the primary judge's reasoning as to agency [198]-[213]

Streetwise's part in the administrative process [198]

The joint venture agreements [199]

Tonto HL's knowledge of Streetwise [201]

Imputation of knowledge [206]

The other grounds of the appeal [214]-[250]

Giving manifestly insufficient weight to the misleading conduct of the borrowers **[215]**

Other relevant factual errors asserted [229]

Erroneous finding of borrowers not exposing lenders to risk of fraud [236]

Erroneous finding that the borrowers obtained no benefit

[238]

The question of legal advice [246]

Asset lending [248]

Reconsideration of the *CRA* **and the notice of contention** [251]-[281]

Reapplication of the CRA [251]

Whether the contracts were unjust [252]

Public interest [269]

Relief [273]

Notice of contention - other statutory relief [282]-[298]

Orders [299]

Factual background to the borrowings

The O'Donnells

5 The first two borrowers, John O'Donnell and Gillian O'Donnell, were registered proprietors as joint tenants of their home at Harbord in Sydney. The home had been purchased in 1984 with the assistance of a bank loan. On about 10 January 2003, the O'Donnells entered into a loan agreement for an advance of $500,000 with Permanent Trustee Company Limited ("Permanent"). The security was a first registered mortgage over their home. The loan was settled on 7 February 2003.

6 The primary judge described the facts concerning and leading up to the borrowing by the O'Donnells at [29]-[95] of his reasons. I will seek to distil what occurred.

7 In September 2002, Mr O'Donnell was 54 years of age. He had been unemployed for 18 months after selling a small business which he had run from 1993 to 2001 with the assistance of his wife. The O'Donnells had borrowed $100,000 on the security of their home to buy that business. Mrs O'Donnell was employed as a customer service officer at a bank, earning about $23,000. The primary judge described them as follows at [32]:

> "Mr and Mrs O'Donnell were neither sophisticated nor na i ve in financial matters. Before they commenced their dealings with Streetwise they understood what it meant to provide a mortgage and that a possible consequence of default in the loan repayments was the sale of the secured property."

8 In 2002, there was very little owing on their home, which was worth about $750,000. They had savings, superannuation and shares of under $300,000. Mr O'Donnell had some experience in share market trading and had managed the family superannuation fund for a few years.

9 In September 2002, Mr O'Donnell was approached in a shopping mall by a young woman employed by one of the companies in what can be called for present purposes the "Streetwise Group". At this stage, I will not seek to differentiate the various Streetwise companies. It suffices at this point to say that one of the Streetwise companies (to which I will refer as "S Loans" when needing to be precise) carried on business as a finance broker and was a sub-introducer of loans to the mortgage schemes to which I will come. Another Streetwise

company (to which I will refer as "S Property" when needing to be precise) carried on the business of land development.

10 The young woman asked Mr O'Donnell if he was interested in using the equity in his home to fund a property investment. She took Mr O'Donnell's contact details. A few days later, Mr Downs from Streetwise rang and arranged a meeting at the O'Donnells' home.

11 Before the meeting took place, Mr O'Donnell made a telephone call to ASIC about Streetwise. He was told there was nothing negative known. He considered bringing his accountant to the meeting, but decided against that because of the cost.

12 The first meeting took place on 11 October 2002 at the home of the O'Donnells. Mr Downs attended. He asked the O'Donnells about assets, liabilities and income and was told the matters that I have described. He sought to explain a scheme whereby, using 75 - 80 per cent of the equity in their home, they could partner Streetwise in a joint venture building project, splitting the profits on sale, and buy (or build) a second property as an investment property. It would all cost $500,000. To Mrs O'Donnell's statement that they could not afford to borrow $500,000 and she did not want to lose their house, Mr Downs said:

> "'It's okay. Streetwise will pay the majority of the loan. You can borrow about $500,000. We'll use about $52,000 of this as a deposit for the house and land package. The rest will be used to enter the joint venture with Streetwise. We will get a good house and land package for you.
>
> ...
>
> Your portion of the payments should be about $300 to $400 per month.'"

13 During the meeting, Mrs O'Donnell said:

> "I don't know how you'll get a loan on my income."

14 Mr Downs responded by saying:

> "That's not a problem. We'll get the loan."

15 At the meeting, Mrs O'Donnell took detailed notes. Mr Downs made notes which he left with them. The O'Donnells gave Mr Downs a cheque for $495 for a so-called financial strategy. Another meeting was arranged at premises of Streetwise. Mr Downs told them that they would have to then pay $2,500 to ensure that they would be given a project.

16 After the meeting, Mrs O'Donnell spent some time explaining to her husband how she understood that the investment would work.

17 Also after the meeting, a letter from Streetwise Financial Strategies Pty Ltd bearing the Streetwise logo dated 11 October 2002 and signed by Mr Luke Hajje was sent to the O'Donnells. It appointed 2 pm on 17 October for the next meeting. The letter stated:

> "Thank you for choosing Streetwise as your value-adding partner to work a proven financial strategy for wealth creation and tax reduction.
>
> As one of Streetwise's valued clients, the rewards that you will realise through methodical application of the strategy combined with reasonable cash flow discipline, will put you and your family in a stronger financial position.
>
> We are preparing your financial strategy based on the information you furnished your streetwise client advisor.
>
> ...
>
> Our aim is for you both to have a thorough understanding of our proposal and the mechanics involved in the structure. We, at Streetwise, feel this is essential before we can progress any further."

The letter requested the O'Donnells to bring to the meeting various documents that gave information about income, including recent pay slips, mortgage or other loan statements, rental statements from any rental property, council rates, PAYE group certificates or full tax returns for the last two years or self-employed or corporate tax returns or partnership accounts for the last two years.

18 The second meeting took place on 17 October 2002, at Streetwise offices in Milsons Point, Sydney. Mr and Mrs O'Donnell met Mr Downs and Mr Hajje. Mrs O'Donnell took a number of the documents requested in the letter of 11 October: her pay records and council rate notices. The primary judge at [40] of his reasons described how the scheme was explained using a white board:

> "At the meeting Mr Hajje gave a presentation as to how the O'Donnells could invest $500,000 of which $50,000 was to be used as a deposit on a house and land package in either Narre Warren or Shell Cove. The rest of the money would be used to enter a joint venture agreement to develop a block of land in Botany with six townhouses on it."

19 Mrs O'Donnell once again said that they could not afford the loan, as Mr O'Donnell was not working and that she did not want to lose their house. This time Mr Hajje said:

> "It's okay because Streetwise pays the majority of the loan."

20 At the meeting, the O'Donnells were given a document entitled "Irrevocable authority to act as co-ordinator and Project Manager". This was the joint venture agreement that they later signed. It was a document that was said to represent a "formal agreement" with Streetwise Property & Projects Pty Ltd (S Property). The O'Donnells took it away with them. Mrs O'Donnell recalled that

either Mr Downs or Mr Hajje asked whether their accountant could come to the next meeting.

21 The primary judge succinctly described the joint venture agreement at [42] of his reasons:

> "The O'Donnells were given a document called an ' *Irrevocable authority to act as co-ordinator and Project Manager* '. The document provided inter alia that the agreement was expressed to be 'binding and irrevocable' and that Streetwise Property was irrevocably appointed as co-ordinator and project manager on the O'Donnells' behalf to locate and develop a ' *suitable* ' site. The document further stated that:
>
> > *'Streetwise will, whether through Streetwise Home & Investment Loans Pty Ltd or through an external financier, obtain necessary finance for the original purchase and construction of the proposed development.*
> >
> > *All external costs, including government statutory charges, legal, finance, construction costs as well as the financing of the borrowed funds, will be the responsibility of John and Gillian O'Donnell'."*

The company mentioned, Streetwise Home & Investment Loans Pty Ltd, was S Loans.

22 The extent of the advice sought by the O'Donnells was described by the primary judge at [43]-[45] of his reasons, as follows:

> "[43] Sometime after the meeting, Mrs O'Donnell showed the document to Ms Liddle, a solicitor, who was a friend. Ms Liddle told her there was no escape clause once she had signed on the dotted line, but 'otherwise it seems okay'. Mrs O'Donnell did not otherwise seek advice from Mrs Liddle in relation to Streetwise or the investment generally.
>
> [44] On around 18 October 2002, the O'Donnells attended the office of their accountant Mr Burchall principally for the completion of their taxation returns. The accountant was handed a booklet entitled 'Streetwise Financial Strategy' which had been given to them by Mr Hajje. Mr Burchall did a company search of Streetwise and circled the directors' names and said:
>
> > 'There's been a few. Just be careful.'
>
> [45] When asked by the O'Donnells if he would come to their next meeting with Streetwise, the accountant advised it would cost them about $300 per hour and that he did not think it was worthwhile for him to come."

23 Thus, at this point, it is to be noted that the O'Donnells were in effect told they could bring their accountant to a meeting, were given the joint venture agreement to take away, had and took the opportunity to consult an accountant and solicitor, but declined to retain them, it can be inferred because of considerations of cost.

24 The third meeting took place at Streetwise's offices in Clarence Street, Sydney on 23 October 2002. The O'Donnells met with Mr Downs, Mr Hajje, Mr Bassili and Mr Bangaru. The primary judge made the following findings about this

meeting at [47]-[54] of his reasons:

"[47] Mr Hajje explained to them that Streetwise was having difficulties with the Botany project and the Narre Warren house and land package was discussed. Mr O'Donnell recalled that Mr Hajje told them they had to sign some papers. When they hesitated signing, Mr Downs left the room and returned with Kovelan Bangaru. Mr Bangaru said:

> *'I will personally guarantee your money'*
>
> and
>
> *'We provide the loan and do everything in-house. You can use our solicitors.'*

[48] It seems that the joint venture agreement was signed at this meeting.

[49] Mr O'Donnell in his affidavit gives an account of being provided with a loan application form by Mr Bassili.

[50] Paras 70-73 are as follows:

> *'Jill and I were handed documents by Mr Bassili which appeared to be a loan application form. I did not read the document, however, I did observe that some information had already been handwritten on this form, including my name and address. The section concerning my income was left blank, as I had already informed them that I was unemployed. I also noticed that there were figures concerning our assets, however, I did not get the chance to look at the document in detail as everyone in the room kept talking about the projects.'*

There were various conversations going on at the same time. They seemed keen to progress quickly and were rushing us.

I recall Jill saying words to the effect of:

> *"It's a bit high"*

I was talking to someone else at the time however, and did not hear the rest of the conversation.

I signed the document while everyone was still talking. A copy of the loan application is at pages 117-120 of exhibit JR01. It is not in my handwriting.'

[51] Mrs O'Donnell recounts in para 66 of her affidavit that she looked down at the paperwork and saw the heading ' *Streetwise Home and Investment Loans'* . She asked Mr Bangaru:

> *'...are we getting the loan from you?'*

To which he replied:

> *'Yes. We like to keep everything in house.'*

[52] Mr Bassili told Mrs O'Donnell that [Streetwise] preferred to use its own solicitors and there was no need for other solicitors. Mrs O'Donnell understood that they would be using Streetwise solicitors as it all needed to be done quickly and that there was no time for other lawyers.

Mr Bangaru said, Mrs O'Donnell recounts:

'I will personally guarantee your mortgage. Streetwise will pay the bulk of the repayments.'

[53] Mrs O'Donnell told him that she did not want to lose their house and was assured by Mr Bangaru that they would not.

[54] Mrs O'Donnell recalls at para 70 of her affidavit of 5 October 2007:

'After Mr Bangaru left the room, I briefly looked down at the paper work regarding the application again. Mr Downs and Mr Bassilli kept talking to Johnno and I while I looked at the application. It was already filled out with my name, income and my assets. I noticed that Johnno's income was blank however this made sense as he was unemployed. I also noticed that some of the figures regarding our assets were larger than John and I had estimated at our earlier meeting, particularly our furniture and superannuation. I said words to the effect of

"It's a bit too much"

Either Mr Downs or Mr Hajje said words to the effect of:

"Most people underestimate their assets"

Johnno and I had never independently checked the estimates that we had earlier given them regarding our assets or referred to any paper work, so we accepted what they said. We thought they knew what they were doing. I did not have time to read the document in detail as Mr Downs and Mr Bassili continued to talk to Johnno and I while we signed."

25 The two page loan application form, with a Streetwise logo, had, as Mrs O'Donnell apparently noticed, "Streetwise Home & Investment Loans Pty Ltd" printed at the bottom of both pages. The document consisted of one and a half pages of boxes for relevant information, a credit card authorisation and a detailed declaration by the O'Donnells.

26 The loan application form was largely blank when the O'Donnells signed it. It had only their names, address and basic details including driver's licence numbers. Many of the boxes could legitimately have been left blank as not applicable. Both Mr and Mrs O'Donnell were cross-examined by Mr Adam Bell SC, counsel for the lenders below. The questions were pointed (but fair) and were answered frankly. They were set out by the primary judge at [63] and [64] of his reasons. Importantly, they reveal that the O'Donnells knew that this was a document that the lender would look at in assessing the loan (for $500,000), that it was (with hindsight) careless and that they were leaving it to Streetwise to fill in. It was not put to them that they intended to mislead the lender or that they should have appreciated that the lender would or might be misled. It is also important to understand that, at this point, the O'Donnells had been told, falsely, that S Loans was the lender.

27 The primary judge recorded at [59] the false information put in the form by someone at Streetwise:

> "It is evident that the loan application form after it had been signed by the O'Donnells was altered by an undisclosed person or persons at Streetwise inserting in the box headed 'Current Occupation & Employer' that John O'Donnell was a ' *Self-Employed - Sole Trader Coffee Shop* ' for ' *5 years* ' and in the box provided for 'Salary' a fortnightly income of $3,500. The form also disclosed superannuation to the value of $241,000, cash to the value of $60,000 and furniture to the value of $60,000. All of this material was untrue and was inserted without the knowledge of Mr and Mrs O'Donnell."

28 The above finding that the disclosed values of superannuation ($241,000), cash ($60,000) and furniture ($60,000) were placed on the form after the event was not correct. These figures were placed on the form at the meeting. They were incorrect. The O'Donnells had previously told Mr Downs the figures of $165,000 - $179,000 (superannuation), $40,000 (cash) and $40,000 (furniture). Mrs O'Donnell gave evidence about these figures in para 70 of her affidavit (see [24] above).

29 The information concerning Mr O'Donnell referred to in the first half of [59] of his Honour's reasons, set out above, was apparently placed there later by someone at Streetwise. It was false and contrary to what Streetwise was told by the O'Donnells.

30 Mrs O'Donnell was cross-examined to the effect that she was careless signing a form with incorrect information. She was not cross-examined to the effect that she intended to mislead the lender.

31 The loan product written on the first page was "1 st Run Lo Doc" loan; and the loan purpose was recorded as being "Purchase Investment Property".

32 The declaration was one by "Applicant and Guarantor". It was thirty lines of close type that commenced:

> "I/We have made an application for credit from Nationale Limited ABN ... trading as Tonto Home Loans (Tonto)"

Tonto was then mentioned a number of times in the text. At the bottom of the declaration above the signature panels, there appeared the following:

> "I/We declare that to the best of my/our knowledge and belief, the facts, information and statements set out in this application are true and correct, and that no information, which might affect the decision of the credit provider, has been withheld. Unless indicated below I/We consent to Tonto using and disclosing information about me/us for the purposes of direct marketing and agree to being contacted by Tonto and its business partners to be informed about products and services that I/We may be interested in."

33 Below the signature panels for Mr and Mrs O'Donnell was a declaration by the "Introducer or Introducer's Agent", as follows:

"I declare that I have sighted and validated and/or will sight and validate all the original documents of all copies of documents associated with this loan application forwarded or to be forwarded to Tonto Home Loans and I declare that I have given to the Applicant/s/Guarantor/s a copy of the Tonto Home Loans Personal Information Collection Statement."

34 The O'Donnells also signed a one page document also under Streetwise logo entitled "Declaration as to Purpose of Credit". This contained a declaration and warning as follows:

"I/We declare that the credit to be provided to me/us by the credit provider is to be applied wholly or predominantly for business or investment purpose (or for both purposes).

Important

You should not sign this declaration unless this loan is wholly or predominantly for business or investment purposes. By signing this declaration you may lose your protection under the Consumer Credit Code."

The O'Donnells signed immediately below this. The document also had an authority to Tonto Home Loans to discharge the pre-existing mortgage. The O'Donnells also signed immediately below this.

35 The O'Donnells also each signed a document, again under the Streetwise logo, with "Streetwise Home & Investment Loans Pty Ltd" printed at the bottom of the page and entitled "Borrower Income Declaration for the First Run & Flexi Range of Lo Doc Loans". That signed by Mrs O'Donnell stated in handwriting $25,000 (which was substantially accurate); that signed by Mr O'Donnell contained a declaration of $91,000. The primary judge made the following findings about Mr O'Donnell's declaration at [67] of his reasons:

"It is plainly the case that when Mr O'Donnell signed the document the space provided for the insertion of income had been left blank. The false income figure of $91,000 was subsequently inserted by an undisclosed person at Streetwise without Mr O'Donnell's knowledge."

36 Each of these forms had the following acknowledgments printed on it:

"I acknowledge that Permanent and FirstMac have relied upon the information contained in the application for credit including the following information provided by me in or with the application in assessing whether to approve the application.

...

I acknowledge that neither Permanent nor FirstMac have independently verified the information relating to my personal income provided by me in or with the application. I declare that the information provided in or with the loan application is true and correct and that I can afford to make the loan repayments without any undue financial hardship."

37 The O'Donnells were not given copies of the documents they signed. The primary judge made the following findings about this meeting at [68] of his reasons:

> "Mr and Mrs O'Donnell were not told by Streetwise that the loan application was for a Lo Doc loan or what a Lo Doc Loan was. They were not informed of the particular significance that the information provided as to their income had in Lo Doc Lending. They were rushed by Streetwise into signing the incomplete loan application and income declaration and at the time believed that Streetwise knew what it was doing. Mr and Mrs O'Donnell acknowledged what they did was careless. Regrettably, it exposed themselves, Tonto and Permanent to the risk of fraud by Streetwise."

38 A document under Streetwise logo headed "Irrevocable Authority to act as Co-ordinator & Project Manager" in the form of the document taken away by them from the second meeting that was signed by the O'Donnells also bears the date 23 October 2002. It records that upon signing they will pay an "Establishment Fee" of $2,000.

39 A week later, on 30 October, after the O'Donnells returned from Melbourne, having been flown there, with Mr Bassili, by Streetwise to inspect the land at Narre Warren, they signed another document, again under Streetwise logo, entitled "Irrevocable letter of intent and authority to act". In this document, the O'Donnells acknowledged that S Property had proposed the Narre Warren property and that they were proceeding with the purchase of that property at a price of $261,000. The document authorised Streetwise Financial Strategies Pty Ltd to appoint a solicitor to act on their behalf to effect a transfer and settlement and further authorised the financial institution providing the mortgage finance to forward the mortgage documents direct to Streetwise. They paid a "deposit" of $2,000.

40 On or shortly after 7 November 2002, the O'Donnells received a preliminary approval letter bearing that date under Streetwise logo from S Loans. It commenced, "Dear Customer" and stated:

> "We are pleased to indicate the basis on which a loan will be made to you ..."

Whilst the borrowers were identified, no lender was, though there was reference to the "Lenders". The product was called a "FirstRun LoDoc Variable". Indicative payments were $2,895.83 per month (over 30 years). Interest only was payable for the first five years. There was a special condition about cashing out stated to be as follows:

> "Any cash out component in excess of $100K is to be fully documented and the purpose considered acceptable by the Funder and Mortgage Insurer."

Insurance of various kinds was mentioned:

> "We recommend that all borrowers carry risk cover and life insurance to at least the value of their loan commitments. A representative from our insurance department will call you to offer an extremely attractive package.
>
> Lenders mortgage insurance may be required. Lenders mortgage insurance protects the lender against loss in certain circumstances. Lenders mortgage insurance does not protect the Borrower."

The following was stated as to solicitors:

> "If the proposed loan is approved, we will instruct our solicitors who will prepare and forward documents to you or your solicitors."

41 To all intents and purposes, the letter appeared to reflect what had been said at the meetings - that Streetwise was lending the funds. S Loans was certainly acting to arrange the funds and it was not holding itself out as representing the interests of anyone but Streetwise.

42 After preliminary approval of the loan, Mr O'Donnell received enquiry from someone at Streetwise about whether he had an ABN. The evidence was unclear. He told the person or persons who enquired that he and Mrs O'Donnell had deregistered their ABN after sale of their business. An ABN in the name of Mrs O'Donnell appears to have been re-registered. Mrs O'Donnell, who had provided Streetwise with the expired number, denied having sought to re-activate it. The primary judge concluded (at [74] of his reasons) that she did not do so, finding that the re-activation of the ABN and its provision to the lender (as **Mr** O'Donnell's ABN) was a deception by Streetwise on the lender.

43 On or shortly after 7 January 2003, the O'Donnells received a final approval letter bearing that date, again under Streetwise logo, and again from S Loans. The letter commenced, "Dear Customer" and stated:

> "We are pleased to inform you that the following loan has been approved."

Again no lender was mentioned, but a "Mortgage Manager" was identified: "Tonto Home Loans Limited". (This company, which will be referred to as Tonto HL, was the mortgage manager for the two lending programmes to which I will come.) It will be recalled that the close print of the declaration in the loan application form commenced "I/we have made an application for credit from Nationale Limited ABN ... trading as Tonto Home Loans ('Tonto')." The information was otherwise, broadly, as contained in the preliminary approval letter, including the same cash out condition.

44 As to the identity of the lender, Mrs O'Donnell gave evidence that she thought Streetwise was the lender (at least up to and at the point of receiving the final approval letter).

45 On or shortly after 7 January 2003, Hunt and Hunt, who acted for Permanent and Tonto, prepared a letter bearing that date addressed to Mr and Mrs O'Donnell. Before turning to its terms, it is to be noted that the primary judge found (after a contest in the evidence) that the letter, which enclosed the loan agreement, mortgage and memorandum of mortgage, was sent direct to the O'Donnells, and not to Streetwise. This letter was clearly inconsistent with Streetwise being the lender. The subject matter of the letter was described as follows:

> "LENDER: PERMANENT TRUSTEE COMPANY LIMITED
> MANAGER: TONTO HOME LOANS LIMITED
> PROPERTY: ....."

The letter commenced:

> "We act for the Lender and the Manager."

Under the heading "How to sign the documents", the following appeared:

> "Please read the documents carefully to ensure they agree with your understanding of the transaction. If you have any queries, please ask before you sign. The lender is keen to ensure that you understand the transaction.
>
> You may decide whether or not to obtain independent legal advice. You must sign the box on the last page of the Loan Agreement to confirm which option you chose."

Under the heading "Independent legal advice", the following appeared:

> "Remember, you are free to contact your own solicitor for explanation of the documents at any stage. If you have any doubts or want more information, contact your government consumer agency or get legal advice."

46 The O'Donnells signed all relevant transaction documents. In the loan agreement, they signed the box on the last page of the loan agreement which specifically stated that they had chosen not to obtain legal advice. The primary judge made the following findings about Mrs O'Donnell at [84]:

> "Mrs O'Donnell agreed in cross-examination that she had the opportunity in her home to read the documents before she signed them but said she had not read them in their entirety. She agreed that she observed the lender was Permanent, the originator was Tonto, that she and her husband were the borrowers, that they were contracting to make payments monthly during the facility term and that a mortgage was being given over their property as security for the loan. Mrs O'Donnell further agreed that she understood what the interest rate was and knew that she was liable to the lender irrespective of what their arrangements with Streetwise were. She agreed that she understood that by giving a mortgage over their property it was at risk if the loan was not repaid. Mrs O'Donnell agreed that they had the right to obtain independent legal advice if they required it."

This involved a rejection of the legitimate continuation of any belief in Mrs O'Donnell, which might hitherto have been engendered by Streetwise and the

correspondence that Streetwise was the lender. Mr O'Donnell was cross-examined to the same effect. An answer in cross-examination of Mr O'Donnell recorded by the primary judge at [87] of his reasons reflected the position they both were in with some clarity:

> "Q. You took the risk of giving a mortgage to the lender because you believed Streetwise would make those repayments; is that fair?
>
> A. Yes, of course."

47 The actual signing of the documentation took place at a meeting on 10 January 2003 in Streetwise's boardroom with Mr Bangaru and Mr Downs. At the meeting there was discussion about a change of site from Botany to Seaforth for the property joint venture. The O'Donnells gave evidence, which the primary judge accepted, that they were rushed in signing the documents at the meeting. The primary judge summarised the circumstances of signing as follows at [92] of his reasons:

> "Although the signing of this documentation was deliberately rushed by Mr Bangaru and the other Streetwise employees at the meeting, Mr and Mrs O'Donnell had had the opportunity of considering the loan agreement and mortgage prior to the meeting and understood, I am satisfied, the gist of what they were signing. They both appreciated that they could obtain independent legal advice but were persuaded not to do so. The impressive Streetwise offices, high pressured and convincing presentations undoubtedly impacted upon the prudence of their considerations and their common belief was that there was little risk that Streetwise would not meet its promise to pay most of the mortgage instalments ."

48 The primary judge found the following at [91] of his reasons:

> "Mr Bangaru assured them during the meeting that their profit from the Battle Boulevard property joint venture should be about $60,000 and it would take 12 to 18 months to complete."

49 The primary judge crisply summarised the overall circumstances of the taking out of the loan as follows, at [93] of his reasons:

> "Mr and Mrs O'Donnell, however, had been dishonestly misled by Streetwise about their investment. Furthermore, Streetwise had fraudulently completed the loan application form and Income declaration as Streetwise knew that truthful disclosure of the O'Donnells' assets and income would not meet the lending guidelines either under the Origin Program or the FirstMac securitised lending program. But for the fraud of Streetwise, the loan would not have been approved. Mr and Mrs O'Donnell were unaware that the loan had been approved upon the fraudulent material inserted by Streetwise. If they had known that the lender did not take into account the promise by Streetwise to contribute to the loan repayments when considering the application and that their financial position truthfully stated did not meet the lending guidelines, I am satisfied on the balance of probabilities that the O'Donnells would not have proceeded with the loan application."

(I will explain the "Origin Program" and "FirstMac securitised lending program" in due course.)

50 One of the documents signed by the O'Donnells on 10 January was a direction to Hunt and Hunt authorising them to disburse all the funds on settlement to "Streetwise Property and Projects Pty Ltd". This occurred at settlement on 7 February 2003.

51 On or shortly after 11 February 2003, the O'Donnells received a letter of that date on Streetwise letterhead thanking them for "choosing Streetwise Home & Investment Loans Pty Ltd to provide your recent funding". It was signed (or purported to be signed) by Mr Kim Cannon on behalf of that company. In fact Mr Cannon was an officer of Tonto. This was found by the primary judge to be a mistake.

52 The primary judge described the fate of the O'Donnells' loan and interest thereafter and their lack of any financial benefit at [95]-[96] of his reasons, as follows:

> "[95] Following the settlement of the loan, Streetwise paid $2,345.86 into Mrs O'Donnell's St George account whilst the O'Donnells paid $319.89. The total amount was withdrawn by Tonto. It appears that Streetwise with interest variations made deposits into the St George account until June 2005. During that time Mr and Mrs O'Donnell had received various assurances from Streetwise about the progress of the Battle Boulevard joint venture and the completion of the Narre Warren property all of which proved to be untrue. They were also assured at a meeting in April 2004 that Mr Bangaru would write a cheque for $6,000 to cover the repayments for the Narre Warren property until the joint venture was completed. The cheque was never received.
>
> [96] Property searches undertaken after Streetwise went into liquidation revealed that Mr and Mrs O'Donnell had neither received security over the Narre Warren property nor the property at Battle Boulevard. Mr and Mrs O'Donnell obtained no financial benefit whatsoever from their investment with Streetwise."

53 There was no evidence dealing in any detail with the affairs of Streetwise, and in particular the specific use of the O'Donnells' funds.

The Di Benedettos

54 The history of the Di Benedettos' involvement with Streetwise and the borrowing from Permanent was similar to the O'Donnells' and was set out at [97]-[136] of the primary judge's reasons. Mrs Di Benedetto met a Streetwise representative in Warringah Mall in late October 2002 and gave the person her contact details. A Mr Steve Fassos came to their home and informed them that Streetwise did property joint ventures and suggested a consultation. The Di Benedettos, who operated a smallgoods business, and whose tax returns disclosed modest taxable income, gave Mr Fassos information at this meeting which reflected their modest financial worth and which the primary judge set out at [101] of his reasons:

"Income: $45,000 (combined average for the past two years)
House: $600,000
Business: $25,000 (purchase price)
Cash $25,000 (in name of business)
Furniture $25,000 to $30,000
Grace Bros Card: $750 (limit)
No Superannuation"

They provided Mr Fassos with the name of their accountant.

55 The primary judge described the Di Benedettos at [100] of his reasons, as follows:

> "Mr and Mrs Di Benedetto were neither sophisticated nor na i ve in financial matters before they commenced their dealings with Streetwise. They understood what it meant to provide a mortgage and that a possible consequence of default in the loan repayments was the sale of the secured property."

56 Meetings then occurred in January 2003, described by the primary judge at [103]-[104] as follows:

> "[103] In early January 2003, Mr and Mrs Di Benedetto met Luke Hajje at the Streetwise office in Clarence Street. Mr Hajje explained how they could use the equity in their home as a deposit in a Streetwise development at Shell Cove. When asked questions by Mr Fassos about their business and income, Mrs Di Benedetto provided him with the same figures with which he had been previously provided. At the end of the meeting, the Di Benedettos met Kovelan Bangaru who told them:
>
> > *'Streetwise are a one-stop shop. We do everything. We get the loan and you can use our legals.'*
>
> [104] On the following Saturday, Mr and Mrs Di Benedettos met Mr Bangaru and Trevor Downs at the Streetwise Clarence Street office where they discussed a joint venture arrangement in connection with a property at Battle Boulevard Seaforth. This was the same Battle Boulevard property which was the subject of Mr and Mrs O'Donnell's joint venture with Streetwise. Mr Bangaru informed them that Streetwise paid the loan payments each month and that Streetwise was in the process of buying the property. After inspecting the property and returning to the Streetwise office, the Di Benedettos were informed that it would cost them $500,000 to participate in the joint venture."

57 At this second meeting, the Di Benedettos said they could not afford a loan of $500,000. They were assured by Mr Bangaru that Streetwise would pay all the interest (on the interest only loan). After saying that "Tonto" would be used, Mr Bangaru said:

> "... Tonto knows all about this. The director of Tonto, Kim Cannon knows what we do. He knows we pay the loan. We do this all the time."

58 After some hesitation, the Di Benedettos then signed a loan application (in the same form as the O'Donnells') in blank, not knowing, the primary judge found, what it was. It was said to be a form to "get the loan underway" which "we'll

fill out later". The Di Benedettos did not read the forms.

59 The fate of the blank application form was described by the primary judge at [109] of his reasons, as follows:

> "It is evident that the application was subsequently falsely completed by an undisclosed person or persons at Streetwise. Mr and Mrs Di Benedetto's income was inserted as each having income of $55,000 per annum. The business was valued at $125,000 when the estimation provided was $25,000. Although the Di Benedettos had no superannuation an amount for superannuation was inserted as being $30,000. Furniture was valued at $75,000 notwithstanding Mrs Di Benedetto's estimation of $25,000-$30,000. The value of shares was inserted as being $10,000 when no value for shares was provided by Mrs Di Benedetto. All of this false information was inserted without the knowledge of Mr and Mrs Di Benedetto."

60 Once again the loan product applied for was a "First Run Lo Doc" loan of $500,000. The purpose of the loan was stated to be "free up equity for investment purchase". The Di Benedettos were not told or given a copy of the form of the application as it was submitted by Streetwise.

61 In cross-examination, the Di Benedettos conceded that they appreciated that the document related to the loan application and that, looking back, it was careless to sign in blank.

62 They each also signed income declaration forms in blank in the same form as those signed by the O'Donnells. Each form falsely stated an annual income of $55,000. The primary judge found the following at [114]-[115] about the circumstances of these signings:

> "[114] It is plain that Mr and Mrs Di Benedetto were pressured by the salesmanship of Streetwise into signing the loan application and income declaration forms which were in blank and about which their understanding was limited. They did not know that the application was for a Lo Doc loan nor had they been informed of the particular significance that the information provided as to their income had in Lo Doc lending. Nevertheless with their experience in financial matters which included operating a small business and the borrowing and granting of mortgages on earlier occasions, the signing of these documents in blank, even without the benefit of hindsight, was careless. They exposed themselves, Tonto and Permanent to the risk of fraud by Streetwise.
>
> [115] Mr Bangaru told Mr and Mrs Di Benedetto that they would make between $50,000 to $70,000 on the Seaforth property and Streetwise would make the repayments which would be deducted from their share of the profit."

63 The Di Benedettos received letters from Streetwise dated respectively 31 January and 13 February 2003 informing them of preliminary and final approval for the loans, in the same terms, *mutatis mutandis* , as received by the O'Donnells.

64 Shortly thereafter, Mr Fassos and Mr Bangaru came to their home with the loan agreement, mortgage and direct debit authority. These had been sent by Hunt and Hunt to the Di Benedettos care of Streetwise, in the circumstances which are discussed below. Mrs Di Benedetto did, however, also receive in the mail directly a letter from Hunt and Hunt enclosing, at least a copy of, the loan agreement. Mrs Di Benedetto said she kept the loan agreement and may have read it. The primary judge made the following comments at [123] of his reasons about the failure of Hunt and Hunt to send the transaction documents directly to the Di Benedettos:

> "Hunt and Hunt had been appointed to the Origin program panel for documenting mortgage loan transactions in June 1997. The firm's failure to comply with Origin's service requirements placed the loan documentation in the hands of Streetwise thereby assisting Mr Bangaru and Mr Fassos to rush Mr and Mrs Di Benedetto into signing the loan agreement and mortgage without the Di Benedettos having the opportunity to consider the documents."

65 The Di Benedettos signed the transaction documents at their home during the visit of Mr Fassos and Mr Bangaru. The Di Benedettos did not read them; the documents were not explained to them; Mr Bangaru told them that they did not need legal advice. In cross-examination, Mrs Di Benedetto accepted that she looked at the first page, saw they were described as borrowers of $500,000, noticed who the other parties were and what the interest rate was. It was her understanding that Streetwise was going to pay the interest to them and they would pay Tonto. She understood that she was giving a mortgage over her home as security for the loan.

66 In his cross-examination, Mr Di Benedetto made similar concessions, though he said that he thought that the lender was Tonto. He accepted that he left it to his wife to make the decision, and that he did not read the documentation because he was relying on Streetwise to fund the interest payments from their account.

67 Settlement took place. The funds were directed to S Property in accordance with an authorisation signed by the Di Benedettos. The Di Benedettos were notified as described by the primary judge at [125] of his reasons:

> "The first letter Mr and Mrs Di Benedetto received from Tonto was dated 21 February 2003 and advised of a variation in some of the loan terms and conditions. By a letter dated 27 February 2003, Streetwise informed the Di Benedettos that the loan settled on 26 February 2003. Ms Lau from Streetwise in a telephone conversation confirmed the settlement of the loan and that they were *now part owners of the Seaforth property* . On or after 7 March 2003, the Di Benedettos received a letter from Tonto advising of the settlement of the loan."

68 A little later, the Di Benedettos realised that they had no proof of any investment with Streetwise. They then signed a document in circumstances described by the primary judge in [126] of his reasons, as follows:

> "... Mr Bangaru came to their home after Streetwise had been contacted bringing a document entitled *"Deed of Investment* " ... The Deed recorded that Mr and Mrs Di Benedetto had entered into a joint venture with Streetwise Property to acquire and develop the Battle Boulevard property for the purpose of resale and purported to set out the *Framework* of the joint venture. The *Framework* includes the incorporation of a "property investment vehicle" and that Mr and Mrs Di Benedetto "are to raise capital via a mortgage (refinance/redraw) from the equity of their property(ies)" namely $487,660.41 as capital. The Deed, inter alia, authorised the "Trustee and/or the Directors" to borrow monies "for and on behalf of the Investment vehicle." Mr and Mrs Di Benedetto signed the agreement which is dated 5 March 2003. This was the joint venture agreement which Mr and Mrs Di Benedetto entered into with Streetwise."

69 Streetwise made the interest payments into the Di Benedettos' account until mid-2005. At [127] of his reasons, the primary judge found:

> "... A title search made by Mrs Di Benedetto after the collapse of Streetwise disclosed that Streetwise was not the registered proprietor of the Battle Boulevard property. Mr and Mrs Di Benedetto obtained no financial benefit whatsoever from their investment with Streetwise. They had been dishonestly misled by Streetwise about their investment."

70 Mrs Di Benedetto rang Tonto in July 2005, at which time she learnt that Tonto did not know of the arrangement that Streetwise would pay the interest and that she and her husband were liable for the loan payments. The primary judge did, however, find Mrs Di Benedetto's evidence of her understanding of the effect of the loan agreement and mortgage to be less than satisfactory: see [132] of the reasons. It was clear from later ASIC interviews that she always understood that their home was at risk under the mortgage, but they relied on Streetwise to pay it for them: see [131] of the reasons. The primary judge's essential conclusions about the Di Benedettos' entry into the arrangements were set out at [134]-[136] of his reasons, as follows:

> [134] Although at the time of signing Mr and Mrs Di Benedetto did not have the opportunity to closely consider the loan agreement and mortgage, I am satisfied on the balance of probabilities they knew at that time that they were responsible for the loan repayments and their property was at risk if the payments were not made. They understood the gist of what they were signing. They considered, however, that there was little risk of default as Streetwise had agreed to make the payments. For this reason, neither of them took the time to read the documentation after it had been left at their home. Unfortunately they, like Mr and Mrs O'Donnell, had been seduced by Kovelan Bangaru and by high pressured and clever salesmanship into believing that they could place their trust in Streetwise.

> [135] Mr and Mrs Di Benedetto had been dishonestly misled by Streetwise and persuaded not to seek independent legal advice. Streetwise had fraudulently altered the loan application form and income declaration as Streetwise knew that truthful disclosure of the assets and income of Mr and Mrs Di Benedetto would not meet the lending guidelines either under the Origin Program or the FirstMac securitised lending program. The loan would not have been approved without the fraud of Streetwise.
>
> [136] The Di Benedettos were unaware that the loan had been approved upon the fraudulent material inserted by Streetwise. If they had known that the lender did not take into account the promise by Streetwise to contribute to the loan repayments when considering the application and that their financial position truthfully stated did not meet the lending guidelines, I am satisfied on the balance of probabilities that Mr and Mrs Di Benedetto would not have proceeded with the loan application."

Mr Tavares and Ms Rowe

71 The history of Mr Tavares' and Ms Rowe's borrowing was set out at [137]-[185] of the reasons of the primary judge. In December 2002, Mr Tavares and Ms Rowe were also approached by a Streetwise representative at a shopping centre at Castle Hill. They were persuaded to provide their contact details.

72 Mr Tavares was 53 years old, a self-employed musician, creator and publisher of music, with an income of $33,000 - $46,000 per annum. Ms Rowe was employed as a toll booth operator and casual swimming instructor whose income in 2002 was about $28,000. They had a home at Castle Hill, with $40,000 owing; Mr Tavares had superannuation of $35,000. Their financial experience was limited to buying land or a home. The primary judge described them at [140] of his reasons, as follows:

> "Of all the cross-claimants in the three proceedings, Ms Rowe had the least financial experience. She had not been self-employed in a small business. Nevertheless, Ms Rowe had been party to the borrowing and the granting of a mortgage when the home unit at Lane Cove and the Castle Hill home were purchased. Mr Tavares and Ms Rowe were neither sophisticated nor na i ve in financial matters. Before they commenced their dealings with Streetwise they understood what it meant to provide a mortgage and that a possible consequence of default in the loan repayments was the sale of the secured property."

73 Sometime in January 2003, Mr Bevan Lydement from Streetwise came to their home. He suggested a joint venture with Streetwise and in answer to the statement that they could not afford that he said:

> "You can use the equity in your home. You can go into joint venture with Streetwise to build a house. The property will be finished in about 18 to 24 months. We get you the loan and Streetwise will make most of the payments for you. When it is sold we will split the profits. I myself, have property with Streetwise."

74 Mr Tavares rang ASIC and the Australian Competition and Consumer Commission (the "ACCC") and received no negative responses to his enquiries about Streetwise.

75 Another meeting occurred shortly thereafter at their home at which, the primary judge found, Mr Lydement:

> "... was informed by Mr Tavares that his salary was about $36,000, that Ms Rowe's salary was about $28,000, their cars were worth $20,000 and their furniture was insured for $30,000."

Mr Lydement assured them that Streetwise would pay the "majority of the monthly payments", leaving them to fund the same amount they were presently paying in respect of the loan on the house.

76 In early February 2003, they went to Streetwise's Clarence Street office, seeing Mr Lydement and meeting Mr Bangaru and Mr Hajje. After various blandishments by Mr Bangaru, they were handed a document describing a project and were told that Streetwise would get the loan for them from "Tonto" with whom they dealt all the time.

77 At a further meeting they discussed properties.

78 Mr Tavares and Ms Rowe were persuaded to sign loan applications in blank and were told that they would be filled in later and that they (Mr Tavares and Ms Rowe) could use Streetwise's lawyers. Mr Tavares said he was not concerned because he did not think they would get any loan.

79 The primary judge's findings about the filling in of the loan application at [152] were as follows:

> "Mr Tavares's annual salary was subsequently inserted in the loan application form as being $120,000 and Ms Rowe's as $38,000. The value of other assets was overstated. Motor vehicles were valued at $50,000. At the time the combined value of their two vehicles was $20,000. Furniture was valued at $120,000 when its insured value was $30,000. Mr Tavares's annual income at the time was approximately $36,000 and Mrs Rowe's was approximately $28,000. As with the applications the subject of the other proceedings, it is evident that the false information was inserted in the loan application form by an undisclosed person or persons at Streetwise after it had been signed. This was done without the knowledge of Mr Tavares and Ms Rowe."

80 Again, the loan was a "Lo Doc" loan for $500,000, the purpose of the loan being stated as "property investment".

81 The primary judge found at [153]:

> "... Mr Tavares and Ms Rowe were not provided with a copy of the loan application or the Tonto Home Loans Personal Collection Statement. They were not told that the application was for a Lo Doc loan nor had they been told what a Lo Doc loan was."

82 Both Mr Tavares and Ms Rowe were frank in their cross-examination on these documents. They recognised at the time a lender would look at the loan application and income forms and they were (looking back) careless.

83 The primary judge found the following at [158] about the signing of these documents:

> "Mr Tavares and Ms Rowe, it is evident, were persuaded by Streetwise that it was in order for them to sign the loan application and income declaration forms although these forms were partially completed. They did not know that the application was for a Lo Doc loan nor had they been informed of the particular significance that the information provided as to their income had in Lo Doc lending. Nevertheless, they were not totally inexperienced in financial matters and the signing of these partially completed documents, even without the benefit of hindsight, was careless."

84 Mr Tavares and Ms Rowe attended a third meeting at Streetwise's offices at which they were pressured into signing documents concerned with the loan. Later, Mr Lydement, "in a rush" (see [166] of the reasons) came to their home with more documents to be signed. Mr Tavares signed and Mr Lydement drove to the toll booth for Ms Rowe to sign which she did (while cars waited behind Mr Lydement's car).

85 The primary judge made the following findings about these signings at [170] of his reasons:

> "The loan agreement is dated 22 May 2003 and the signatures of Mr Tavares and Ms Rowe on the document are stated as being witnessed by Ms Lau. The mortgage is dated 30 May 2003 and the signatures of the cross-claimants are again stated as being witnessed by Ms Lau. The different dates which the documents bear may be explained by the settlement of the loan on 30 May 2003. I am satisfied of the probabilities that the loan agreement and mortgage were signed at the third meeting at the office of Streetwise which took place on 22 May 2003. The terms of the loan agreement and mortgage had been identified at paras [21-22] above. Other documents signed on that day included an authorisation to Hunt and Hunt to disburse the balance of the loan funds to *Streetwise Administration* ."

86 Mr Tavares and Ms Rowe were sent letters dated 10 and 29 April and 13 May 2003 being preliminary and final approval letters (for some reason there were two preliminary approval letters). These were in the same form (*mutatis mutandis*) that had been sent to the O'Donnells and the Di Benedettos. The final approval identified "Tonto Home Loans" as mortgage manager. The loan was for $416,000.

87 There was a dispute as to whether the loan agreement and mortgage were sent by Hunt and Hunt to Streetwise or directly to Mr Tavares and Ms Rowe. The primary judge was not prepared to conclude that they had been sent to Streetwise (see [180]). Precisely what happened is not clear, but the following findings were made by the primary judge at [178]-[181]:

> "[178] It follows that at the least Mr Tavares had the opportunity of considering the loan agreement and the mortgage shortly after [sic: before] the meeting on 22 May 2003.

> [179] ... My overall impression of the evidence given by Ms Rowe was that she was endeavouring to distance herself as much as possible from an understanding of the loan agreement and mortgage and her denial that the letter was received must be considered with a deal of circumspection.
>
> [180] A significant consideration is Mr Thorne's evidence that the system provided for the re-addressing of a letter to be recorded on that letter. As I have observed, the Di Benedetto letter was addressed *care of Streetwise* whereas the letter dated 15 May 2003 was not. It seems to me unlikely that an instruction which was received by email on 9 May 2003 would be attended to by the re-addressing of an envelope and not the letter itself some six days later. Whilst the documents produced do not by themselves establish that the letter was received by the cross-claimants they provide some support for this contention. I am not satisfied on the balance of probabilities that the letter was sent by Hunt and Hunt to Streetwise.
>
> [181] Although Mr Tavares and Ms Rowe had an opportunity to consider the loan agreement and the mortgage they were persuaded by Streetwise not to obtain independent legal advice. Streetwise had fraudulently altered the loan application form as Streetwise knew that truthful disclosure of the assets and income of Mr Tavares and Ms Rowe would not meet the lending guidelines either under the Origin Program or the FirstMac securitised lending program. The loan would not have been approved without the fraud of Streetwise. Mr Tavares and Ms Rowe were unaware that the loan had been approved upon the fraudulent material inserted by Streetwise. If they had known that the lender did not take into account the promise by Streetwise to contribute to the loan repayments when considering the loan application and that their financial position truthfully stated did not meet the lending guidelines, I am satisfied on the balance of probabilities that Mr Tavares and Ms Rowe would not have proceeded with the loan application."

88 The loan was settled on 30 May 2003, distribution of funds being $50,872.76 to Australian and New Zealand Banking Group Ltd ("ANZ") and $352,824.53 to S Property.

89 One of the documents that Mr Tavares and Ms Rowe signed was a "Deed of Investment" in a form similar to that signed by the Di Benedettos. As the primary judge found at [184]:

> "The document recorded that Mr Tavares and Ms Rowe wished to enter into a joint venture with Streetwise Property to acquire and develop residential property for the purpose of resale and purported to set out the *Framework* of the joint venture. The *Framework* included the incorporation of a "Property Investment vehicle" and that Mr Tavares and Ms Rowe "are to raise capital via a mortgage (refinance/redraw) from the equity of their property(ies)" namely $355,000 as capital and $2,500 for costs associated with the setting up of the company. The Deed, inter alia, authorised the "Trustee and/or the Directors" to borrow monies "for and on behalf of the Investment vehicle". There is no dispute that Mr Tavares and Ms Rowe signed the agreement which on the first page is dated 14 May 2003. Curiously the cover page bears the date of 22 May 2003. This was the joint venture agreement which Mr Tavares and Ms Rowe entered into with Streetwise."

90 The later events and the predicament of Mr Tavares and Ms Rowe were described by the primary judge at [185] of his reasons as follows:

"Following settlement of the loan, Streetwise paid approximately $2,200 each month into the ANZ joint account until July 2005. During that month Streetwise went into liquidation. From the time of the second meeting at the office of Streetwise in 2003, Mr Tavares and Ms Rowe on occasions visited the property at Kellyville Ridge to monitor the progress of the building work. They had, however, been dishonestly misled by Streetwise about their investment. After the collapse of Streetwise, property searches revealed that they had not received security over the Kellyville Ridge property. Mr Tavares and Ms Rowe obtained no financial benefit whatsoever from their investment with Streetwise."

The structure and operation of the lending arrangements: the Origin Program and the FirstMac Program

General outline of structure

91 The two lenders were Permanent (to the O'Donnells and the Di Benedettos) and Tonto Home Loans Australia Pty Ltd ("Tonto HLA"). (FirstMac Ltd has taken over the litigation from Permanent in circumstances that were not explored, but may, perhaps, be presumed.) The existence of two lenders reflects the fact that two wholesale lending programmes were in existence. These two programmes were called the "Origin Program" (in respect of which Permanent was the lender to the borrowers) and the "FirstMac Program" (in respect of which Tonto HLA was the lender to the borrowers). (Confusion may arise if I refer to the now appellant in the O'Donnell and Di Benedetto proceedings as FirstMac Ltd because those loans were under the Origin, and not the FirstMac, programme.)

The Origin Program

92 Under the Origin Program the ANZ provided the wholesale funds for lending under an arrangement in which Permanent was the lender of record, fulfilling a custodial function. ANZ, through one of its businesses, Origin Mortgage Management Services ("Origin"), provided delegated authority to Tonto HL to assess each loan application and to make a credit decision on lending. Relevantly, that delegated authority was $500,000.

93 Tonto HL was a mortgage originator or mortgage manager. The documentation that governed the relationship between Origin and Tonto HL comprised a "Mortgage Origination and Management Deed" (the "MOMD") and a document entitled "Third Party Management Deed", (the "TPMD") referred to by the primary judge as a "Sub-Introducer Deed". This nomenclature has a degree of confusion, deriving as it does from the presence of another party, Queensland State Home Loans Pty Ltd ("QSHL") which managed the programme when it was funded by ANZ's predecessor, Primary Industry Bank of Australia Ltd

("PIBA"). The relevant portions of these documents are as follows (I have used the original form of the document inserting in brackets the relevant parties where appropriate):

MOMD

"3. INTRODUCTION OF LOANS

3.1 Introduction

The Manager [QSHL and then Tonto HL] will endeavour to introduce Loans to PIBA [Origin] which comply with the Terms in accordance with the provisions of this Deed and the procedures specified from time to time by PIBA [Origin]. The Manager [QSHL/Tonto HL] must provide in writing to PIBA [Origin] all information reasonably relevant to considering an Approval. The Manager [QSHL/Tonto HL] must use its best endeavours to ensure that information is accurate.

3.2 No obligation to Lend

PIBA [Origin] is under no obligation to give any Approvals or to give an Approval to any particular Loan or to make any Loan.

...

4. SETTLED LOANS

4.1 Introduction and Management

(a) The Manager [QSHL/Tonto HL] must at its own cost introduce Loans and manage Settled Loans in an efficient and business like manner and in accordance with sound business practices, irrespective of any alleged or actual default of PIBA [Origin] or the Trustee. The Manager [QSHL/Tonto HL] must take such steps and maintain such procedures as would be taken and maintained by a reasonably prudent mortgagee in connection with each Loan including action consequent upon any default of any Settled Loan. The Manager [QSHL/Tonto HL] must comply with all laws relating to the conduct of its business including the Privacy Act.

(b) The Manager [QSHL/Tonto HL] is responsible for the conduct of all its employees, agents, and contractors and any other person connected with introduction and management of Loans by The Manager [QSHL/Tonto HL] to PIBA [Origin]. The Manager [QSHL/Tonto HL] must ensure that all those persons comply with the obligations of The Manager [QSHL/Tonto HL] under this Deed.

TPMD

2.3 Sub-Manager's obligations

The Manager [QSHL] must ensure that the Sub-Manager [Tonto HL] complies with all obligations imposed by the MOMD on The Manager [QSHL]. [Tonto HL] undertakes to perform all obligations delegated to it in an efficient, honest and diligent manner.

...

3.1 General Indemnity

> The Manager, the Sub-Manager and the Guarantor [Mr Cannon and Nationale Equity Corporation Pty Ltd] indemnify the Funder [ANZ] against all actions, claims, demands, losses, damages, liabilities, costs and expenses of any nature, including (without limitation) civil and criminal penalties, (the Loss) sustained or incurred at any time actually or contingently by the Funder arising directly or indirectly from any failure by the Sub-Manager or any Sub-Manager's Agent to comply with any provision of this deed or of any law of any state or territory of Australia or any similar or replacement legislation in respect of or in connection with the MOMD.
>
> ...
>
> 6.1 Definitions
>
> In this deed unless the context otherwise requires:
>
> **Sub-Manager's Agents** means each agent and employee of the Sub-Manager and any other person who is any way directly or indirectly concerned with the introduction or management of loans introduced or by the Sub-Manager under the Program."

(QSHL was "The Manager" for the MOMD and the introduction of Tonto HL in its place was effected by the TPMD.)

94 Clause 9.11 of the MOMD provided the following about the relationship:

> "9.11 Relationship
>
> The Manager is not the agent of the Trustee or PIBA but is an independent contractor."

95 For relevant purposes in this litigation, PIBA and QSHL can be ignored. Under the Origin Program, Origin retained Tonto HL as its Mortgage Manager or Originator, though because of the place of QSHL it was from time to time referred to as a Sub-Introducer. Despite cl 9.11, there was no argument that Tonto HL was not relevantly the agent of Permanent as lender. This was so because Tonto HL under the operation of the relevant delegated authority made the lending decisions in question here.

96 As a mortgage manager, Tonto HL had employees who had delegated lending authorities and who worked under credit guidelines that were also provided by Origin. It will be necessary to refer in some detail to these authorities and guidelines in relation to the approval of the three loans.

97 Tonto HL did not, however, seek to attract borrowers directly. Rather, it recruited and retained introducers who in turn referred loan applications to it for assessment. S Loans was one of Tonto HL's introducers.

98 A major issue in the appeal is the correctness of the primary judge's conclusion that S Loans, as an introducer, was the agent of Tonto HL.

The FirstMac Program

99 The FirstMac Program developed from 2000. This was a lending programme funded by the Tonto Group. It operated similarly to the Origin Program. Tonto HL would use its introducer or broker base (of which S Loans was one) to source loan applications from prospective retail borrowers. Operating guidelines were developed for decision-making in the loan process that were similar to the Origin guidelines.

100 The Tavares and Rowe loan was placed under the FirstMac Program with Tonto HLA as lender. The O'Donnell loan was initially placed under the FirstMac Program, but transferred to the Origin Program, after funding reached a relevant limit on the FirstMac Program. The Di Benedetto loan was placed under the Origin Program.

SOME COMMERCIAL INCIDENTS OF THE LENDING STRUCTURE

101 As Mr Paul O'Donnell (formerly the general manager of Tonto and no relation to Mr O'Donnell, the borrower) said, some features of this lending model were that they permitted the funder to stay in the background (and, presumably, to lower its business costs) and gave a funder greater flexibility as to sourcing loan funds - whether through deposits taken from the public or through securitisation.

102 Through the use of such loan programmes, a lender was able to reach a significant number of potential borrowers without the need to employ staff directly, or to build or maintain physical infrastructure. By this means, a lender was able to build a substantial loan book quickly, using intermediaries (mortgage managers and introducers) to bring forward, approve and manage loan applications and loans.

The place of the loan introducer

103 The importance of the introducers in the position of Streetwise is obvious. They were the vehicle to bring forward the retail customers who desired to borrow money. Much of the evidence before the primary judge was couched in terms of conclusory expressions thought to be in the interests of the party leading the evidence. Thus, in the appellants' evidence and in their submissions, the parties occupying the position of Streetwise were referred to as brokers - whether finance or mortgage brokers. It will be necessary to examine the position of S Loans by reference to the evidence of its particular contractual and business arrangement. Nevertheless, some matters of general comment

can be made arising out of the evidence that are uncontentious.

104 First, for the prudent operation of the programmes, introducers of loan applications, such as S Loans should be reputable. Fraud can be seen as an obvious systemic risk. Depending on the precise function undertaken by such introducers, the lending process was necessarily, to a degree, reliant on the introducer being honest and businesslike in the choice of customer, the extraction of relevant information from the customer and the choice of loan product suitable to the customer.

105 Secondly, whilst enquiries as to probity and competence could be carried out about introducers, the drawing up and the administration of proper lending guidelines was the essential systemic check to avoid lending to unsuitable borrowers. Such guidelines can be seen as part of the business structure of the programme manager (Origin and FirstMac) and mortgage manager (Tonto HL) in the interests of the funds provider and the programme manager. They can be seen also, indirectly, as some protection of putative borrowers who might apply for loans in amounts or under terms unsuitable to them. Such is not to say, however, that the funders owed any legal duty to act in the interests of prospective borrowers. No such submission was put.

The lending guidelines

106 Before turning to the position of S Loans, and its relationship with Tonto, it is appropriate to say something of the guidelines and how they were applied here. The primary judge dealt with the issue at [186]-[261] of his reasons.

Origin Program guidelines

107 The primary judge set out and described a number of the provisions of the guidelines. The Origin Program guidelines were relevant to the approval of the Di Benedettos' loan.

108 The Origin Program guidelines placed responsibilities upon Tonto HL, cl 1.5 providing:

> "Lending guidelines set out 'how' Mortgage Managers and Origin staff are to prepare loan applications and manage loans funded under the residential mortgage origination program.
>
> All loans submitted through ORIGIN under the residential mortgage origination program must comply with the specific requirements of ORIGIN lending guidelines for Mortgage Managers."

109 Clause 1.6 set out the responsibilities of the "Mortgage Manager/Sub-Introducer/Broker", in this context Tonto HL. They included a "Sales & Loan Interview". This was to be undertaken as follows:

"

Conducts a loan interview, discusses loan options and determines the most suitable loan product for the customer.

Advises the customer about the approval process and provides them with appropriate information.

Assists customer with the preparation of the loan application.

Obtains all original documents supporting the loan application and checks their authenticity then signs and notes copies as to having "sighted the originals.

Sends all copies of documents to the authorised officer with loan application."

(This clause assumes some importance, because these tasks were not undertaken by Tonto HL employees, but in effect by the introducers, such as S Loans.)

110 Clause 1.8 dealt with the precedence of lending guidelines, product guidelines and the mortgage insurance policy.

111 The guidelines for and features of the types of loans made here being "Lo Doc" loans called "Flexi Express Home Loans" were set out at [194]-[195] of the reasons:

"

Fully featured variable or fixed rate home loan to assist with the purchase of owner-occupied or investment residential property.

Available for self-employed applicants only, who are not in a position to provide full financial documentation at time of application.

...

A maximum loan amount of $500,000 between 60 per cent and 80 per cent of formal valuations with Lenders Mortgage Insurance (LMI).

Security of 1 st registered mortgage over standard residential property being purchased or refinanced.

The purpose of the loan being for the purchase or refinance of owner occupied property or investment residential purposes.

Special Conditions which provide, inter alia, 'Must have a signed 'Borrower Income Declaration' and 'Express' does not waive the requirement to confirm employment as per Origin lending guidelines.

112 There were also "Delegated Lending Authority Guidelines" that applied to a credit manager of Tonto HL who had such an authority. These included in cl 7 a requirement relating to employment as follows (set out at [196] of the reasons):

"

Certificate of Business registration or incorporation or financial statements for self-employed.

For self-employed persons, self-employment for 2 years and satisfaction that the business will continue for the term of the loan, otherwise the loan term must be reduced to fit expectations or the application be rejected altogether.

For a new self-employed customer, a certification of business registration for sole proprietor or partnership and certificate of incorporation for a company."

FirstMac Program guidelines

113 These guidelines were relevant to the Tavares and Rowe loan, as well as the O'Donnell loan (although the O'Donnells were thereafter transferred to the Origin Program).

114 Clause 2.0 described the role of the guidelines:

"The manual should not be interpreted as inflexible rules, but as a set of guidelines, to go hand in hand with prudent lending and common sense. Every application should be assessed individually on its own merit.

Loans that do not comply with the guidelines may be considered if there are other inherent strengths to the transaction and Lender's Mortgage Insurance is available. Such loans must be referred to FirstMac Underwriting Managers for approval."

115 The responsibilities on the mortgage manager, Tonto HL, were similar to those in the Origin guidelines.

116 Clause 7 dealt with the purpose of a loan:

"To assist in the determination of a loan's Code status (refer Consumer Credit Code section of the Program Overview), applicants must provide full details of the loan purpose."

117 The acceptable purposes for loans of the kind made here (being described as "Tonto FirstRun LoDoc" loans) were as follows in the relevant product guidelines:

"You can use your FirstRun LoDoc variable loan to purchase or refinance your home or an investment property, or to access the equity in your property for any worthwhile personal or investment purpose. Maximum cash out restrictions may apply."

118 Clause 18.0 dealing with employment was dealt with by the primary judge at [202] of the reasons:

"Clause 18.0 provided for employment confirmation. In the Table (at p 284) which described " *the types of employment and minimum term that is acceptable"* appears the following:

'Self employed / minimum 2 years trading in the current business.'"

119 The guidelines also set out how such employment confirmation was to occur:

> "Where the loan is Lo Doc the Originator/Manager must either contact the borrower's accountant to confirm the borrower is self-employed (income confirmation is not required) or alternatively conduct an ABN search to confirm the existence of the business operation. The ABN search can be additionally utilised to confirm the authenticity of the PAYG borrower's employer where there is doubt in this regard, eg no telephone listing of the employer."

120 The Di Benedetto and O'Donnell loans were insured by an insurer whose guidelines provided the following in relation to "Lo Doc" loans:

> "
>
> Eligible borrowers are self-employed and/or are unable to provide up to date financial information.
>
> PAYG borrowers are only allowed as co-borrowers (secondary borrowers).
>
> The maximum loan to value ratio (LVR) is 80 per cent.
>
> The loans can be used for an investment purpose.
>
> Verification of self-employment was required.
>
> For self-employed borrowers, verification of ABN, BAS and/or Business registration/status details was required together with evidence of self-employment for a minimum of two years in the same business or industry."

121 The Tavares/Rowe loan was insured by another insurer whose guidelines included the following:

> "
>
> For self-employed persons, at least two years trading in the current business.
>
> Confirmation of current employment must be obtained by the lender.
>
> For Lo Doc loans above 65 per cent of LVR, cash out is restricted to the borrower to $100,000. For loans to 65 per cent LVR, there is no restriction on funds released to the borrower.
>
> For self-employed applicants for all proposals the last two years business and personal tax returns and latest available tax assessment notice was required."

Failure to follow the guidelines by Tonto HL

122 All of the loans were in fact approved by the one person, Mr Geoffrey Lougoon, under the FirstMac lending manual and guidelines.

123 The primary judge made the following findings (see generally [215]-[218]):

(a) No check was made as to whether the borrowers qualified for Lo Doc loans "as being owner-occupiers or investors who had limited income verification and had been self-employed for two years" ([217] of the reasons).

(b) No searches or enquiries were made in relation to any ABN numbers.

(c) No enquiries were made to confirm that the borrowers were self-employed trading in the same business for a minimum of two years.

124 There was a contest in the evidence about the reasonableness or not of the conduct of Tonto HL in this and other respects in the loan approval process and of its causative effect. The primary judge made a number of findings:

(a) As to the investigation of employment status, at [226] he said:

> " ... The failure to comply with cl 18.0 of the *FirstMac Manual* indicates that Mr Lougoon was not much concerned about the cross-claimants' employment status and was content to lend on the security provided and the mortgage insurance."

(b) As to the O'Donnells' position and the reactivated ABN, his Honour said at [227]:

> " ... If an ABN search in the name of Mr O'Donnell had been made by Tonto the deregistration of the ABN in July 2001 would have been revealed. An ABN search in Mrs O'Donnell's name, if it had been made by Tonto, would have disclosed its recent reactivation. To a reasonably prudent lender, these disclosures would have plainly indicated that the description of Mr O'Donnell's occupation as self-employed coffee shop sole trader for 5 years was at the very least unreliable and required further investigation. It is of concern that in such circumstances PMI provided mortgage insurance."

(c) As to the ABN searches, at [228] his Honour said:

> "Whilst I accept that non-compliance with lending guidelines does not necessarily mean a departure from prudent lending practices, I accept Mr Robertson's opinion that a prudent lender would have made in the circumstances of each of the loan applications an ABN search. "

(d) As to reasonableness and a GST search, at [229] his Honour said:

> "In his affidavits in reply, Mr Robertson was of the opinion that a reasonableness test to loan approval could not be completed without having first obtained an ABN and GST registration search. Whilst I accept his opinion as to the ABN search, there was no requirement in the lending guidelines in 2003 about checking for GST registration which Mr Robertson conceded in cross-examination. I do not accept that a reasonableness test could not be completed without a GST registration search."

(e) Mr Wright, the Origin credit manager, reviewed the O'Donnell and Di Benedetto loans. He did not check that the borrowers qualified for Lo Doc loans. He did not make any enquiries to verify any ABNs; he assumed that the insurer had done this. His approach was summarised by the primary judge at [236]:

> "I am satisfied from the absence of indication in the lending files of enquiries being made that no steps were taken to obtain a certificate of business registration or financial statements for Mr O'Donnell and Mr and Mrs Di Benedetto. I am also satisfied Mr Wright was content to rely on the prior loan approvals by Mr Lougoon and PMI and that he did not take any action to confirm the self-employment of the loan applicants. In these respects when the loans to the O'Donnells and Di Benedettos were approved, the Origin lending guidelines and the Origin DLA were not followed."

(f) The primary judge found the following about Mr Wright's failure to follow the relevant guideline at [239]:

> "The Origin DLA required Mr Wright to obtain certificates of business registration or financial statements for self-employed persons, to confirm self-employment for 2 years and satisfaction that the business would continue for the term of the loan. He took no steps to confirm any of those matters. As Mr Robertson emphasised, the fact that a loan became insured '[did] not abrogate the prudent processing responsibilities of a lender'. A reasonably prudent lender, in my opinion, would not rely on enquiries that might have been made by PMI or Mr Lougoon but would have undertaken those tasks in accordance with the DLA. The failure to comply with cl 7 of the Origin DLA indicates that Mr Wright was not much concerned about the cross-claimants' employment status and was content to lend on the security provided and the mortgage insurance."

(g) Mr Wright also overlooked the fact that the purposes of the loans to the O'Donnells and Di Benedettos were described in a manner contrary to that permitted in the guidelines: see [240] of the reasons.

(h) The primary judge found that the O'Donnell loan document contained a special condition as to cashing out:

> "Any cash out component in excess of $100K is to be fully documented and the purpose considered acceptable by the Funder and Mortgage Insurer."

Streetwise provided documentation described at [243] of the reasons in support of the cashing out that was inadequate: [247] of the reasons.

125 With the exception of [125(a) and (h)], none of these findings in [124] and [125] was challenged.

126 As I have already said, Hunt and Hunt held settlement authorities to pay the balance of all loan proceeds to S Property. The primary judge made no criticism of Hunt and Hunt in this respect, saying at [258]-[260]:

> "[258] ... There was no evidence adduced by the cross-claimants of an expert nature which suggested that the practices adopted by Hunt and Hunt did not accord with practices of reasonably competent solicitors in 2003. Mr Robertson was not qualified to express an opinion of that nature.

> [259] It should not be overlooked that Hunt and Hunt were acting in accordance with the cross-claimants' directions. The cross-claimants were content at the time of the loan settlement in each case to have the money paid to Streetwise to enable the joint venture to proceed. It is apparent that if the settlement monies had been paid directly to them, they would have paid the money to Streetwise. Furthermore, if the solicitors had gone behind the written authority and sought confirmation from the cross-claimants of their directions, I have no doubt that at the time of settlement Hunt and Hunt would have been directed by the cross-claimants to pay the money to Streetwise.
>
> [260] I am not persuaded that Hunt and Hunt should have disobeyed the mandate provided by the borrowers. I am not satisfied that the solicitors breached the guidelines to solicitors by acting in accordance with the written instructions."

127 There was no evidence of any pressure on Mr Lougoon or Mr Wright by Streetwise.

128 The primary judge found that the failure to follow the lending guidelines made it easier for the fraud of Streetwise to remain undetected. Indeed, had the guidelines been followed with some rigour, it is difficult to see how the loans would have been made.

The relationship between Tonto and Streetwise

129 The primary judge dealt with this matter at [262]-[375] of his reasons.

The terms of the arrangement

130 There was a body of contested evidence about the retention of S Loans by Tonto HL. The primary judge found (at [307]) that the arrangements were contained in an Introduction Deed dated 10 April 2002 (the terms of which are discussed below) and in various conversations, principally between Mr Narramore (of Tonto) and Mr Bangaru. These additional aspects of the relation were set out by the primary judge at [307] of his reasons:

> "(b) In addition to the terms of the Introduction Deed, Tonto agreed:
>
> (i) not to contact borrowers introduced by Streetwise until after the loan had settled.
>
> (ii) to brand loan application forms and letters confirming preliminary and final approval of loans as Streetwise. For this purpose, a jpeg file containing the Streetwise Group's logo was placed on the loan application form by Tonto and loaded onto Tonto's web-based system.
>
> (iii) that Streetwise would have absolute administrative control of the loan applications. For this purpose, Streetwise was provided with a 'live' window into Tonto's processing system which enabled Streetwise staff to make enquiries about the progress of the loan applications made by Streetwise clients and to communicate those enquiries into the Tonto system.

(iv) to pay commission to Streetwise on each approved loan introduced by Streetwise. For this purpose, Streetwise signed a "Recipient Created Tax Invoice" which enabled Tonto to pay tax invoices on behalf of Streetwise in relation to commissions payable to Streetwise.

(v) that Streetwise could recommend valuers for the Tonto panel.

(c) Tonto offered to answer telephone calls from Streetwise's clients in the name of Streetwise. Tonto also required Streetwise to have professional indemnity insurance.

(d) I am satisfied that Tonto knew that Streetwise was a property developer whose main business was to build and develop properties for sale to its clients."

131 Apart from these findings, there was evidence, in particular from Mr Narramore, that he had chased Streetwise as a target for some time (approximately 18 months) as a potentially lucrative source of business bringing persons who were doing business with Streetwise in relation to property development to Tonto for finance.

132 The Introduction Deed between Tonto HL and S Loans included the following provisions (S Loans was referred to as "the Introducer"):

" **BACKGROUND**

A. TONTO is a manager for a number of mortgage origination programs (the **Programs**).

B. The Introducer has expertise in identifying prospective borrowers and wishes to introduce borrowers to TONTO for participation in the Programs.

OPERATIVE PROVISIONS

1. **Definitions and Interpretation**

...

Funders means the company providing loans and includes the scheme manager or any other company which pays TONTO for the introduction of Loans;

Introducer's Agents means any employee or contractor of the Introducer, or any other person who is in any way directly or indirectly concerned with the introduction of Loans by the Introducer to TONTO;

Loans means a transaction which has a mortgage as its primary security;

Terms means the terms and conditions for Loans as specified by TONTO from time to time;

...

2. **INTRODUCTION OF LOANS**

2.1 **Introduction of loans**

The Introducer will endeavour to introduce Loans to TONTO which comply with the Terms. The Introducer must provide in writing to TONTO all information required by TONTO from time to time to consider an application for a Loan. The Introducer must use its best endeavours to ensure that information is accurate.

2.2 **Approval of loans**

TONTO will endeavour to obtain approval for Loans through one of the Programs. No obligation to make a Loan must be created until a formal loan approval is obtained.

...

2.4 **Conduct business properly**

(a) The Introducer must introduce all Loans in an efficient and businesslike manner and in accordance with sound business practices. The Introducer must take such steps and maintain such procedures as would be taken and maintained by a reasonably prudent mortgagee in connection with the introduction of each Loan. In particular, the Introducer must ensure that prospective borrowers and guarantors are not misled or misrepresented to in any way.

(b) The Introducer must comply with all the laws relating to the conduct of its business including the Privacy Act. The Introducer must obtain any licences necessary for the conduct of its business.

2.5 **Comply with the directions**

The Introducer must comply with all reasonable directions of TONTO in performing its duty as an introducer of loans. The Introducer must promptly provide TONTO with any information regarding a Loan required by TONTO from time to time.

2.6 **Not create obligations on TONTO**

The Introducer must not without the prior written consent of TONTO create any legally binding obligation on TONTO in relation to an actual or proposed loan or otherwise. Without limitation, the Introducer will not issue any binding loan approvals. All loan approvals will be issued by TONTO.

2.7 **No churning**

The Introducer must not encourage borrowers to repay a Loan early or to refinance a Loan.

2.8 **Introducer's Agents**

The Introducer's must ensure that all the Introducer's Agents comply with the terms of this Deed imposed on the Introducer.

2.9 **No fees from applicants**

The Introducer undertakes that the Introducer and the Introducer's Agents will not receive any commissions, charges or fees from an applicant in respect of the Loan other than those approved in writing by TONTO.

3. **RELATIONSHIP OF PARTIES**

3.1 **No partnership**

Nothing in this deed creates the relationship of partnership or servant or agent.

3.2 **Confidentiality**

The parties must maintain confidential the terms of this deed and the arrangement between TONTO and the Introducer. The parties may disclose details of this deed to any mortgage insurer, any Funder, as required by a Program, to any professional advisers as required by law or to anyone approved in writing by the other party.

4. **REMUNERATION**

4.1 **Fees payable by Funders**

TONTO will be solely entitled to all fees payable by the Funders.

4.2 **Fees payable to Introducer**

(a) TONTO must pay introduction fees and management fees to the Introducer as agreed in writing from time to time.

...

5. **INDEMNITY**

5.1 **General indemnity**

The Introducer indemnifies TONTO against any loss, damage, cost and expenses suffered or incurred by TONTO as a result of any action of the Introducer or the Introducer's Agents in respect of the introduction of Loans under this Agreement."

The role played by Streetwise and the risks of the arrangements

133 The primary judge made certain findings at [308]-[310] concerning the role played by S Loans in these loans:

"[308] In each of the proceedings Tonto did not deal with the cross-claimants until the loan had settled. By agreeing not to contact borrowers until after the loan had settled, Tonto had entrusted in Streetwise the responsibility under the Origin lending guidelines and FirstMac Lending Manual of:

(a) conducting the loan interview, discussing the loan options and determining the suitable loan product for the customer;

(b) advising the customer about the loan approval process and providing the customer with the appropriate information;

(c) assisting the customer with the preparation of the loan application; and

(d) obtaining the supporting documentation.

[309] Nobody at Streetwise explained to the cross-claimants that they were applying for a Lo Doc loan or what was meant by a Lo Doc loan. There was no discussion about other loan options or loan products. Streetwise did not make enquires of or make loan applications on behalf of the cross-claimants to lenders other than Tonto. No attempt was made by Streetwise as a finance broker to find the best deal for its clients.

[310] It is apparent from the evidence of Mr Lougoon and Mr Wright that no effort was made by Tonto to determine if the cross-claimants were eligible for the Origin or FirstMac Lo Doc loans as being self-employed applicants who were not in a position to provide 'full financial documentation' at the time of the loan application. I am satisfied that Tonto relied upon Streetwise to determine whether the cross-claimants were eligible for Lo Doc loans and assumed because the loan applications were made through Streetwise that the cross-claimants fell within the product guidelines of eligibility for Lo Doc loans. The true position was that the cross-claimants were able to provide copies of income tax returns and other financial documentation. A Lo Doc loan was not a suitable loan product for them. The applications for Lo Doc loans should not have been made on behalf of the cross-claimants to Tonto."

134 Mr Paul O'Donnell was cross-examined about the aspects of the arrangements that Streetwise had insisted on, in particular that Tonto would **not** contact prospective borrowers before settlement. The risk created by that arrangement was discussed by the primary judge at [311] as follows:

"As is evident from the passage of cross-examination of Paul O'Donnell by Mr Menzies quoted at [305] above, Tonto was aware that its agreement with Streetwise created a risk in respect of compliance with the lending guidelines and the reliability of the information provided in Lo Doc loan applications. Tonto knew that Streetwise was a property developer whose main business was to build and develop properties for sale to its clients. Furthermore Tonto was aware that loan applicants might be misled but nevertheless proceeded with the arrangement."

135 As to the arrangement as to "branding" the correspondence with Streetwise logo, the primary judge said at [314]:

"It is more likely than not that the branding of the documentation as Streetwise supported the impression that all the cross-claimants had that Streetwise was a business of substance with whom they could enter into a joint venture and borrow on the security of their family homes for that purpose."

(It should also be added at this point that it reinforced the fact that Streetwise was promoting its own business interests and not acting as an outward representative of Tonto or any external lender.)

136 As to the question of restricting Tonto's contact with Streetwise customers, the primary judge said the following at [349]:

> "It is unclear whether such an agreement was a common industry practice at the time. I do accept, however, that there was general industry support for allowing brokers better "ownership" of their customers. What is clear is that Mr Bangaru imposed as a condition of the agreement with Tonto that Tonto was not to contact borrowers introduced by Streetwise. Tonto agreed to this condition to obtain the loans which would be introduced by Streetwise."

137 Importantly, the primary judge was not satisfied that Tonto had told Streetwise that it would approve all its applications or that Tonto knew that Streetwise was contributing to the loan payments. Further, there was no suggestion that anyone at Tonto was aware that Streetwise was falsifying loan applications.

138 Considerable debate took place before the primary judge as to the significance of the relationship between Tonto and Streetwise and whether it exposed the borrowers to the risk of fraud: At [320]-[321] the primary judge found:

> "[320] ... At the time each of the loan applications in these proceedings was made, Tonto knew that Streetwise was not only a broker, but was a property developer whose main business was to build and develop properties for sale to its clients. Tonto knew that the business of Streetwise was not confined to being a loan introducer. It seems to me that it would have been obvious to a reasonably prudent lender possessed of that knowledge that Streetwise as a broker had a clear conflict of interest. The agreement between Tonto and Streetwise, moreover, extended beyond the Introduction Deed. By not agreeing to contact Streetwise's clients until after settlement, Tonto removed itself from the face-to-face interview process and confined its ability to seek verification or clarification from prospective borrowers of the material in the loan applications. Mr O'Donnell as I have found at [311] above was aware of the risk that the agreement created with compliance with the lending guidelines and the reliability of the information provided.
>
> [321] ... In the circumstances where Streetwise had a clear conflict of interest, it would have been evident, in my opinion, to a reasonably prudent lender in Tonto's position that in applications for Lo Doc loans the risk of fraud was significantly enhanced by the agreement not to contact Streetwise's clients. I accept the cross-claimants' submission that Tonto used a broker with a clear conflict of interest which thereby exposed the cross-claimants to a serious risk of fraud."

139 These conclusions did not, in the primary judge's view, give rise to either a fiduciary relationship or a duty of care between Tonto and the borrowers, but it had an effect on the significance of the loan guidelines. The primary judge said at [322]:

> "Whilst it might be for the lender to determine what enquiries it should make to verify information given in support of a loan application ... , it seems to me that adherence by a lender to its own guidelines has added importance where prospective borrowers are exposed to a serious risk of fraud."

140 In this context, however, the primary judge recognised at [323] that the borrowers, by signing blank or partially completed documents, exposed both themselves and the lender to the risk of fraud by Streetwise.

The question of Streetwise (S Loans) as agent for Tonto HL

141 After a review of the evidence, in particular the terms of the arrangement between them, the primary judge concluded at [359] that:

> "Streetwise was Tonto's agent for those duties which Tonto had entrusted in Streetwise."

These duties were set out by the primary judge at [308] of his reasons (see [133] above) and elaborated by his Honour at [350], as follows:

> "The responsibilities which Tonto entrusted in Streetwise included the conducting of the loan interview, the determination of the eligibility of the prospective borrowers for Lo Doc loans and the assistance of the customer with the preparation of the loan application. Although Tonto may have considered that it was in the commercial interests of itself and Streetwise (Mr O'Donnell's *value proposition*) to agree not to contact a Streetwise client prior to settlement, the consequence was that Streetwise represented and acted for Tonto in the performance of these duties. These were duties of particular significance in Lo Doc lending as full financial documentation supporting the loan application was not required and reliance was placed by Tonto upon the information in the loan applications and upon the declarations in the borrower income declaration forms. Both Mr Lougoon and Mr Wright relied on what was stated in the loan applications and income declarations as being true statements of the loan applicants' financial positions."

142 There was no issue that Tonto HL was the agent of Tonto HLA.

143 Nor was there any issue on appeal that Tonto HL was Permanent's agent in accepting a loan application under delegated lending authority. The primary judge concluded that if S Loans was the agent of Tonto HL its appointment was within the authority of Tonto HL and thus S Loans in such circumstances was the agent of Permanent: see [362] of the reasons.

144 The reasons of the primary judge for his conclusion that S Loans was Tonto HL's agent were in substance as follows. The primary judge construed the Introduction Deed and collateral arrangements and concluded (at [350]) that Tonto HL entrusted responsibilities to S Loans. His Honour found S Loans to have a duty to ensure borrowers it introduced were eligible and that information was correct ([353]). His Honour found the agreement to badge the loan application forms and letters as supporting "the inference that Tonto intended that Streetwise represent and act for it" ([355]). His Honour found that the conduct of S Loans was not that of an independent finance broker, saying at [356]:

> "The conduct of Streetwise was not that of an independent finance broker. The cross-claimants were not advised of any potential lender other than Tonto nor were any steps taken to ascertain alternative loan sources. Streetwise was more than a loan introducer. Streetwise played, as ASIC submitted, ' *an integral part on behalf of Tonto and Origin in their loan approval and credit assessment process* '. In my opinion the facts of all three proceedings go beyond the cases cited by the plaintiffs and they may be distinguished."

145 The primary judge rejected the involvement of S Property tending to the conclusion that S Loans was the borrowers' agent, saying at [357]:

> " ... A particular focus of this argument was the agreement in the joint ventures that Streetwise would obtain the necessary finance for the developments. The joint venture agreements with the cross-claimants were entered into after the agreement between Streetwise and Tonto had been reached and any arrangement to obtain finance for the cross-claimants was in reality subject to that agreement. At no stage did Streetwise disclose to the cross-claimants the terms of its agreement with Tonto."

146 The primary judge concluded at [358] as follows:

> " ... The facts and circumstances of these proceedings displace, in my view, the *prima facie* characterisation of a finance broker as the agent for the borrower. I have considered the possibility that Streetwise was the agent for both the lender and the borrower but do not make such a finding. Because of its confidentiality agreement with Tonto, Streetwise could not make it clear to a prospective borrower that it had been engaged as agent for the lender and obtain the borrowers' consent to its acting on both sides of the loan transaction. Streetwise could not serve two principals."

The imputation of Streetwise's knowledge to the lenders

147 The primary judge rejected the appellants' arguments that even if Streetwise were to be considered Tonto HL's agent, the relevant knowledge of Streetwise about the borrowers should not be imputed to Tonto HL. This involved a rejection of the proposition that the fraud of Streetwise should prevent such attribution of knowledge. The knowledge said to be attributed to the lenders was as described in [364] of the reasons, where the primary judge recounted the relevant part of the borrowers' submissions:

> " ... Tonto thereby clearly knew the actual financial position of each of the cross-claimants and that they could not afford or satisfy the repayment obligations of the respective loan agreements and mortgages. Tonto, it was submitted, thereby knew that the only manner in which the loan could be repaid was by the sale of the cross-claimants' family homes that had been provided as security. Tonto therefore knew that the loans were asset loans secured by family homes, being the only substantial asset of the respective cross-claimants."

148 The reasoning of the primary judge is contained at [366]-[375]. His Honour accepted that Streetwise fraudulently inserted false financial information in the loan applications and income declarations of which Tonto HL had no knowledge ([367]). Tonto HL had, however, authorised Streetwise to conduct the loan interviews and assist with the preparation of the loan applications and thus Streetwise committed the fraud within the scope of its authority ([368]). Tonto was aware of the risk of entrusting these duties in Streetwise and was answerable for the manner in which Streetwise conducted itself ([368]). Referring to von Doussa J in *Beach Petroleum NL v Johnson* (1993) 43

FCR 1 at 31-32; 115 ALR 411 at 574, the primary judge said that to the extent to which the fraud exception exists to the imputation of knowledge of an agent, the acts must be in total fraud of the principal (here Tonto HL).

149 The primary judge rejected the appellants' reliance upon the statement of principle in *Bowstead and Reynolds on Agency* (16 th Ed, Sweet & Maxwell, 1996) at 533 cited by this Court in *Beach Petroleum NL v Kennedy* [1999] NSWCA 408; 48 NSWLR 1 at 99 [475] referring to the moral certainty of the information not being passed on to the principal as the basis of the so-called fraud exception to the rule that an agent's knowledge would be imputed to its principal. The cited passage in *Bowstead and Reynolds* (16 th Ed) is as follows:

> "In knowledge cases, however, the presumption that information will be passed on may also be nullified by proof that the agent was defrauding the principal in that transaction, whether or not the third party knew this: it can, in such a case, be said that there was a moral certainty that the information would not be communicated, or that communication would require disclosure of the very fraud being practised upon the agent by the principal, or that the agent was not acting for the principal when he received the information."

150 The primary judge's essential reasoning is contained at [373]:

> "I do not accept that Tonto did not benefit from the fraud of Streetwise. Loan moneys were advanced to the cross-claimants upon which interest was payable and the advances were secured by mortgages over their family homes. The reality is that the cross-claimants did not benefit from the fraudulent conduct of Streetwise. It is not irrational to impute the knowledge of Streetwise to Tonto. By the agreement which Tonto had reached with Streetwise in its own commercial interests, Tonto had placed Streetwise in the position where the fraud could readily be committed. The correct information from the cross-claimants of their financial circumstances was received by Streetwise when acting as agent for Tonto and there was no moral certainty that this information would not be communicated. It is the knowledge of Streetwise of the true financial position of the cross-claimants which is to be imputed to the plaintiffs. In the circumstances of the present proceedings, reasons of justice and commonsense, to my mind, require that the knowledge of Streetwise of the true financial position of the cross-claimants be imputed to the plaintiffs."

151 The primary judge highlighted the importance of this finding at [374]-[375] of his reasons:

> "[374] Without derogating from the significance of the information that Streetwise possessed of the assets of the cross-claimants, it is helpful at this point to summarise the cross-claimants' income:
>
> *Mr and Mrs O'Donnell* :
>
> Mr O'Donnell had not been working for 18 months since the business had been sold and had no income.
>
> Mrs O'Donnell was employed by St George Bank with an annual income of about $23,000.
>
> - The application was for a Lo Doc loan of $500,000 with an interest rate of 6.95 per cent per annum and a loan term of 30 years.

Mr and Mrs Di Benedetto:

Their combined average annual income for the past two years was $45,000 from the smallgoods business known as 'LB Foodservices'.

The application was for a Lo Doc loan of $500,000 with an interest rate of 6.95 per cent per annum and a loan term of 30 years.

Mr Tavares and Ms Rowe :

Mr Tavares's annual income from JT Business was about $36,000.

Ms Rowe's salary was about $28,000

The application was for a Lo Doc loan of $500,000 with an interest rate of 6.9 per cent per annum and a loan term of 30 years. The amount of the loan that Mr Tavares and Ms Rowe entered into with Tonto was $416,000 with an interest rate of 6.95 per cent per annum.

[375] Mr Robertson stated that he did not know of a lender who would have approved any of the loans under the lender's normal affordability assessment criteria on the basis of the cross-claimants' income. As I have found, Streetwise knew that truthful disclosure of the cross-claimants' assets and income would not meet the lending guidelines. Streetwise, in particular, knew that the income of the cross-claimants, would not meet the loan serviceability requirements of the Origin and FirstMac lending programs. Tonto (in all three proceedings) and Permanent (in the O'Donnell and Di Benedetto proceedings) possessed this knowledge."

Asset lending

152 The primary judge then, at [376]-[382] dealt with a question that he phrased at [376]:

" ... whether the loans to the cross-claimants amounted to asset lending."

153 His Honour took from one of the expert's reports the following characterisation as relevant:

"Asset-based loans in general are those where the loan has been extended primarily or solely on the basis of the valuation of the asset over which the loan is secured, irrespective of the borrowers' capacity to meet the loan commitments."

154 The primary judge accepted that the two types of loans ("Flexi Express Home Loan" from the Origin Program and the "FirstMac Lo Doc Loan" under the FirstMac Program) were not intended to be lendings against assets without regard to the capacity of the borrower to repay. At [378], however, he said:

> " ... The failures by Mr Lougoon and Mr Wright to follow the lending guidelines indicated that they were not much concerned about the cross-claimants' employment status and were content to lend on the security provided and mortgage insurance. Moreover, the plaintiffs possessed the knowledge of Streetwise as to the true financial position of the cross-claimants. The cross-claimants did not have the capacity to meet the loans commitments, however, their equity in their family homes met the LVR requirements of the loans. I conclude that the loans to the cross-claimants were asset-based loans and amounted to asset lending."

155 Referring to *Kowalczuk v Accom Finance Pty Ltd* [2008] NSWCA 343; 77 NSWLR 205 at 227 [96] and *Riz v Perpetual Trustee Australia Ltd* [2007] NSWSC 1153 at [70], the primary judge said that consequences, if any, of the lending being so characterised depended on all the circumstances.

The application of the *CRA*

156 The primary judge granted relief under the *CRA* . He did not need to consider any other ground of relief. The primary judge's reasoning in granting relief was as follows.

The O'Donnell Loan

157 At [405] the primary judge dealt with the application of the CRA, s 9(4) to the O'Donnells, as follows:

> "Although they were rushed and not provided with the opportunity to consider the loan applications in any detail by Streetwise, Mr and Mrs O'Donnell were careless when they signed the partially completed loan application. Mr O'Donnell was also careless in signing the income declaration form in blank. By doing so, the O'Donnells exposed themselves, Tonto and Permanent to the risk of fraud by Streetwise. Section 9(4) of the CRA requires the court not to have regard to any injustice arising from circumstances that were not reasonably foreseeable at the time the contract was made. Whilst the O'Donnells were careless, they could not have reasonably foreseen that Streetwise would insert in the loan application and income declaration false details of their assets and income. It was not suggested by the plaintiffs nor does the evidence establish that the risk of fraud by Streetwise could reasonably have been foreseen by Mr and Mrs O'Donnell."

158 The primary judge then considered the following circumstances:

(a) the matters upon which the O'Donnells were misled by Streetwise ([406]);

(b) the lack of income to service the loans ([407]);

(c) the fraud of Streetwise (not making any distinctions as to corporate form) without which the loan would not have been made ([407]);

(d) the lack of legal advice and the persuasion by Streetwise that the O'Donnells did not need their own lawyers, balanced against the opportunity (not taken up) to see a lawyer and an accountant ([407]);

(e) the lack of full explanation of the contract and mortgage documents balanced against the opportunity the O'Donnells had to read them ([408]);

(f) the O'Donnells' understanding of the gist of what they were doing ([408]);

(g) Tonto HL and Permanent not being parties to the joint venture ([409]);

(h) the general policy to hold people to their bargains and to provide certainty in commercial relations ([410]-[411]);

(i) the fact that the contracts arose from unfair pressure, deception and fraudulent conduct of Tonto HL's agent Streetwise ([413(i)]);

(j) the fact that by the way Tonto HL conducted its business with Streetwise, Tonto HL exposed the O'Donnells to a serious risk of fraud which was reasonably foreseeable at the time the contracts were made ([413(ii)]);

(k) that the branding of the loan application and letters assisted Mr Bangaru to mislead the O'Donnells, supporting the impression that Streetwise was a business of substance ([413(ii)];

(l) that the O'Donnells were in a position of disadvantage compared to Tonto and Permanent when they came to negotiate the terms of the contracts. Tonto was in a much better position both to appreciate and to manage the risk of fraud by Streetwise than Mr and Mrs O'Donnell ([413(ii)]);

(m) the failure to follow the Origin lending guidelines, in particular the failure to make an ABN search or obtain a certificate of business registration or financial statements ([413(iii)]);

(n) with Streetwise's knowledge imputed to Tonto HL, the characterisation of the lending as asset lending ([413(iii)]); and

(o) that failure to follow the cash out condition made it easier for the fraud to remain undetected ([415]).

159 The primary judge emphasised at [414] the consequences of the loose attitude to lending guidelines:

> " ... The loose attitude that was adopted to the lending guidelines indicates that the lender was not much concerned about the purpose of the loan and the self-employment of the borrowers and was content to lend on the security of the Harbord property and mortgage insurance."

160 The importance of the finding of agency can perhaps best be seen in how the primary judge dealt at [416] and [418] with the submission that the O'Donnells were not people unable to look after themselves in entering a transaction such as that offered by Streetwise:

> "[416] ... Where the asset lending has arisen because of the fraud and deception of the lender's agent and the borrowers are unaware that the reality of the lending is on the value of their home, in my opinion, it makes little difference to considerations of injustice under the CRA that the borrowers are persons who normally are able to look after themselves. After all, a purpose of the CRA is to protect persons from unfair pressure or unfair tactics when they enter into contracts.
>
> ...
>
> [418] ... The fraudulent conduct of Streetwise commenced at the time the borrowers were persuaded to sign the loan applications and income declarations. ... [I]t was not the borrowers who supplied false information to Tonto but its agent, Streetwise. ... Tonto possessed the knowledge of Streetwise and by the way it conducted its business with Streetwise exposed itself and the borrowers to a serious risk of fraud."

161 Finally, at [419], the primary judge considered the public interest:

> "There is, as the cross-claimants submit, a public interest in ensuring that prudent lending practices are followed. Prudent lending practice, to my mind, includes the conduct of the relationship between loan provider/mortgage manager and finance broker. This must be the case in Lo Doc lending where reliance is placed by the lender on the accuracy of the information provided in the loan application documentation. Prudent lending practice requires adherence by the lender to Lo Doc lending guidelines when the finance broker has been entrusted with the first stage of the loan application process. An agreement for commercial self-interest not to contact a broker's client until after the settlement of the loan does nothing to ensure the integrity of the material supplied. The public interest against unjust asset lending was referred to in *Khoshaba* and *Kowalczuk.* I consider that it is unnecessary to consider ASIC's submissions on public interest."

162 He concluded at [420]:

> "I have concluded that the loan agreement and mortgage were unjust in the circumstances relating to the contracts at the time that they were made."

The Di Benedetto Loan

163 The reasons of the primary judge for concluding at [429] that the loan agreement and mortgage were unjust in all the circumstances were set out at [421]-[428] and were similar to the reasons dealing with the O'Donnells, which I have outlined.

The Tavares and Rowe Loan

164 Once again the reasons at [430]-[438] were similar.

Relief

165 In dealing with relief, the primary judge set the whole loan agreements aside.

166 Once again, the importance of the agency finding was referred to by the primary judge: [440]-[441] of his reasons.

167 In rejecting an argument that the loan agreements should be set aside in part, his Honour said at [445]:

> " ... It seems to me that if I was to accede to this submission an unjust consequence or result would not be avoided as the contracts arose from the fraudulent conduct of Streetwise and the cross-claimants received no benefit from the loan monies save for the sum of $50,872.76 which was used by Mr Tavares and Ms Rowe to discharge their mortgage with the ANZ bank."

The appeal

168 Central to the appeal are the primary judge's conclusions on agency and imputation of knowledge.

169 Depending upon the outcome of those grounds of appeal, three broad areas of debate were raised by numerous other complaints:

(a) the insufficiency of weight said to have been given to the conduct of the borrowers and its capacity to mislead the lenders;

(b) the characterisation of this as asset lending; and

(c) numerous asserted factual errors.

Agency

Introductory remarks on agency

170 Before turning to the evidence it is appropriate to say something of the ultimate issue that is being addressed. The word agency is one apt to cause difficulty, in significant part, because of its broad usage in business: *Kennedy v De Trafford* [1897] AC 180 at 188; *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* [1931] HCA 53; 46 CLR 41 at 50; *Scott v Davis* [2000] HCA 52; 204 CLR 333 at 338 [4], 408 [227] and 435 [299]. It is a common business expression with a potentially wide and varying meaning.

171 The core conception of agency as a legal concept was expressed by the High Court in *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* [1958] HCA 16; 100 CLR 644 at 652:

> "Agency is a word used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties. But in the business world its significance is by no means thus restricted."

The relevant question in that case was whether the manufacturer of goods (or its Australian subsidiary) was a party to a contract for sale of equipment sold

through one of its distributing "agents", so-called. The question was whether the so-called agent had capacity to make the manufacturer (or its local subsidiary) a party to the contract for sale of goods, and so bind its interests. The answer was, no. The distribution agent was a business in its own right, not in any way acting on behalf of the manufacturer in the sale transaction in question.

172 As will be seen from the provisions of the Introduction Deed, S Loans had no authority to bind Tonto HL, and, through it, the lender, to acceptance of any loan.

173 One needs to consider the purpose for which one is asking the question whether A is P's agent: *Kirkpatrick v Kotis* [2004] NSWSC 1265; 62 NSWLR 567 at 581 [86], per Campbell J (as his Honour then was). The question that must be addressed here by the factual and legal analysis is whether Tonto HL appointed S Loans to undertake tasks for it, short of creating a binding loan agreement, such that knowledge gained, or conduct engaged in, by S Loans in the performance of such tasks was knowledge to be imputed to Tonto HL, or conduct for which Tonto HL was to be held legally responsible by some form of vicarious attribution.

174 The appellants' first submission was that this could not be so because the expression of the matter in *International Harvester* was the limit of any relevant concept of agency known to the common law. If S Loans had no capacity to create legal relations between the third party and the principal by binding the lender to a loan, it could not, in law, be an agent. This is too narrow a conception of agency. The High Court in *International Harvester* was concerned with the question of the creation of legal rights. Other cases contemplate a possibly broader role for agents. See for example the place of an insurance canvasser in *Colonial Mutual* at 48-51.

175 The conception and central elements of agency were discussed helpfully by Finn J in *South Sydney District Rugby League Football Club Ltd v News Ltd* [2000] FCA 1541; 177 ALR 611 at 645-647 [131]-[137], in P Watts and F M B Reynolds *Bowstead and Reynolds on Agency* (19 th Ed, Sweet & Maxwell, 2010) at 1-10, in G E Dal Pont *Law of Agency* (2 nd Ed, LexisNexis, 2008) at 4-8 and 26-28 and see also W A Seavey "The Rationale of Agency" (1919-1920) 29 *Yale Law Journal* 859. Recognising, at once, the wisdom of what the authors of *Bowstead and Reynolds on Agency* (19 th Ed) say at 2 [1-003] as to the limited utility of reasoning from conceptual or presupposed definitions, it is to be borne in mind that the concept of agency is not merely functional, whereby something that is necessary to be done for P and that could be done by P itself is done by A under some arrangement; rather it is a consensual arrangement, a relationship, whereby A is to be taken as, or as representing, P. In *South Sydney v News* at 646 [136], Finn J referred to the authoritative

character of the expressions of the relationship in Art 1 of *Bowstead and Reynolds on Agency* (an earlier edition) and Art 1 of the *Restatement, Second, on Agency* , these expressions being as cited by Finn J:

> "'[1] Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.'

I would note in passing that the definition proposed in the *Restatement, Third, Agency* , Tentative Draft No 1, [1.01] proposes no material departure from the above. Bowstead and Reynolds' definition is that:

> 'Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.'

176 It is appropriate to set out the whole of Art 1 from *Bowstead and Reynolds on Agency* (19 th Ed) at 1 [1-001] since Art 1(4), in particular, posits a form of agency of some relevance here - one in which the agent has no power to create or affect legal relations:

> "(1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.
>
> (2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.
>
> (3) Where the agent's authority results from a manifestation of assent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party ; such authority is called apparent authority.
>
> (4) A person may have the same fiduciary relationship with a principal where he acts on behalf of that principal but has no authority, and hence no power, to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent."
>
> (Footnotes omitted.)

177 These expressions of the central characteristics of the relationship reveal the closeness of identity that is required for the relationship to exist. Not every independent contractor performing a task for, or for the benefit of, a party will be an agent, and so identified as it, or as representing it, and its interests. Agency is a consensual relationship, generally (if not always) bearing a fiduciary character, in which by its terms A acts on behalf of (and in the interests of) P and with a necessary degree of control requisite for the purpose

of the role. Central is the conception of identity or representation of the principal: *Colonial Mutual* at 48-49; Seavey *op cit* at 859. Examples and contexts may be infinite, and any arrangement must be understood and characterised by reference to its legal terms in context. In *McKenzie v McDonald* [1927] VLR 134 at 144 Dixon AJ, in saying that not every agent stands as a fiduciary, was recognising that the word "agent" is used in many senses and is apt to mislead, citing *Kennedy v De Trafford* at 188. That is, however, no more than to say that the word "agent" has a potentially wide and varying meaning in life and business and that, on some occasions, the business description will be given to someone who is not a fiduciary. See also *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; 156 CLR 41 at 71-72 (per Gibbs CJ), cf at 96-97 (per Mason J), *Boardman v Phipps* [1967] 2 AC 46 at 127, F E Dowrick "The Relationship of Principal and Agent" (1954) 17 *Modern Law Review* 24 and R P Meagher, J D Heydon and M J Leeming (eds) *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4 th Ed, LexisNexis, 2002) at 191-192 [5-195]. It is sufficient to recognise that the essential characteristic is that one party (A) acts on the other's (P's) behalf, and that this will generally be in circumstances of a requirement or duty not to act otherwise than in the interests of P in the performance of the consensual arrangement. *Bowstead and Reynolds on Agency* , the *Restatement* and Seavey *op cit* at 863 include in the conception of agency the characteristic of fiduciary duty. The duty will, of course, conform with the extent and scope of the agency and thus be of potentially varied content, recognising that context (in particular, perhaps, a market or commercial context) may attenuate the rigour or content of the fiduciary duty: *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* [1929] HCA 24; 42 CLR 384 at 408; *In re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 98; *Meagher, Gummow and Lehane* (4 th Ed) at 161-162 [5-010]); Finn J in *South Sydney v News* at [136], and in his text *Fiduciary Obligations* (LawBook Co, 1977) at 201. The necessary good faith implicit in a fiduciary character in the relationship reflects the character of identity or representation that the relationship essentially carries.

178 That the concept of agency may properly extend to canvassers and those seeking to bring business to another party should not be controversial. In a helpful discussion at 9-10 [1-019], the authors of *Bowstead and Reynolds on Agency* (19 th Ed) refer to Art 1(4) as "incomplete agency" directed in particular to the "canvassing" or "introducing agent". The following is useful and relevant:

> "Article 1(4) seeks to achieve completeness by taking in a well-established type of intermediary who makes no contracts and disposes of no property, but is simply hired, whether as an employee or independent contractor, to introduce parties desirous of contracting and leaves them to contract between themselves. In effecting such introductions he is remunerated by commission, which he may sometimes take from both parties. Such a person is a common figure in most western legal systems and may well be referred to as an agent. The most obvious example of such an intermediary in the English cases is the estate agent, who introduces purchasers to vendors and tenants to lessors of houses and vice versa ... Canvassing agents are on the fringe of the central agency principles used by the common law, since their powers to alter their principals' legal relations are at best extremely limited. They often, however, have authority to receive and communicate information on their principals' behalf, and in so doing have the capacity to alter their principals' legal position. They also usually act in a capacity which may involve the repose of trust and confidence, and hence may be subject in some respects to the fiduciary duties of agents towards their principals."
>
> (Footnotes omitted.)

179 It is appropriate to turn to the particular facts of this case to ascertain whether S Loans agreed to act in the manner described by the authors of *Bowstead and Reynolds on Agency* to receive and communicate information and otherwise act on Tonto HL's behalf in a capacity which has the necessary character to permit the characterisation of agency.

180 There was no challenge to the findings at [362] that Tonto HL was the agent of the lender in each case and that any appointment by Tonto HL of S Loans as its agent was within the scope of Tonto HL's authority, and, thus, if S Loans were Tonto HL's agent, it was also the agent of Permanent and Tonto HLA.

The Introduction Deed

181 I turn to the Introduction Deed. Two clauses should be dealt with at the outset: cl 3.1 (no agency) and cl 2.6 (no power to bind).

182 Clause 3.1 (see [132] above) is not determinative. The true character of the parties' relationship is to be gathered from an examination of all the surrounding circumstances, including, in particular, the provisions of the deed. Though agency is consensual, it is sufficient that the parties have agreed to what amounts in law to such a relationship. The labelling of the relationship as not agency does not determine the question, though, unless a sham, the relevant provision is to be given proper weight. There was no dispute about the relevant governing principles in this regard: see *South Sydney v News* at 645-646 [133]-[134] per Finn J; *NMFM Property Pty Ltd v Citibank Ltd (No 10)* [2000] FCA 1558; 107 FCR 270 at 408-409 [629] per Lindgren J.

183 Clause 2.6 (see [132] above) was said to strike at the core of agency. Reliance was placed on *International Harvester* . Whilst the clause is sufficient to deny to S Loans the authority to bind Tonto HL, for the reasons already adverted to, that is not the end of the agency enquiry.

184 The relationship between Tonto HL and Streetwise was contained in the Introduction Deed and the collateral arrangements as to non-contact by Tonto HL of loan applicants, rebadging and access to Tonto HL's computer system.

185 The relationship must be set in its commercial context. Tonto HL appreciated that Streetwise, and thus S Loan, had its own customers. Indeed, the expectation that there would be many customers of Streetwise was the reason why Streetwise was targeted as an introducer. Thus, the Introduction Deed must be construed against the background of the recognition of the parties that S Loans would have customers on whose behalf and in whose interests it was obliged to act carefully and in good faith.

186 Turning to the clauses in that light, the principal obligation in cl 2.1 was to "endeavour" to introduce loans which complied with the terms and conditions as specified by Tonto HL from time to time. The word "endeavour" means to try, no doubt imparting an element of reasonable conduct. That is not, as the appellants submitted, an empty or illusory promise. S Loans was obliged to endeavour to introduce such loans. In the recognition that S Loans had a client base, such an obligation would not require S Loans to sacrifice the interests of its customers if another funder or programme were more attractive. No reasonable reading of "endeavour" would require that; and the Court would hesitate before giving such a meaning. Further, a reasonable endeavour would not necessarily require S Loans to sacrifice its own interests to Tonto HL by introducing loans in circumstances where they could obtain higher commission elsewhere. Reasonable endeavour is not sacrifice of one's own interests: cf *Transfield Pty Ltd v Arlo International Ltd* [1980] HCA 15; 144 CLR 83, where "best endeavours" to sell the Arlo pole did not impliedly restrict the promisor from selling competing poles.

187 The obligation of "endeavour", thus understood, may lead to elements of assessment and choice as to whether S Loans should, conformably with its obligations to its customers, to Tonto HL and taking into account its own interests, refer any particular loan application to Tonto HL. These are not obligations to act in the interests of Tonto HL, and not ones of a fiduciary character.

188 If the circumstances are such that its obligation to endeavour to introduce loans to Tonto HL leads to an application being submitted, the balance of cl 2.1 requires all information required by Tonto HL to be provided. Clause 2.4 is also directed to the introduction of loans. Clause 2.5 places S Loans under the reasonable directions of Tonto HL, not as to the conduct of its business in general, but in performing its "duty as an introducer of loans", that is once the performance of an introduction has commenced. Clause 2.7 attaches only once an introduction has been accepted by Tonto HL and a loan has been

made. Clause 2.9 restricts Streetwise in how it is to be remunerated should it introduce a loan to Tonto HL.

189 No provision requires that S Loans will represent Tonto HL. Not only is that not contemplated, but S Loans was contractually forbidden from disclosing the terms of the deed or the arrangement: cl 3.2. This position was reinforced by the collateral arrangement that Tonto HL not contact applicants until after settlement. The fact that S Loans did not hold itself out as working for, or being in some way connected with, Tonto or Permanent or the relevant loan programme makes it plain that the facts could not give rise to ostensible or apparent authority in S Loans. That is not, however, the limit of the relevance of that fact. It also assists in the conclusion that S Loans was not representing Tonto HL in any real business sense in what it (S Loans) was doing. It was, as between it and prospective borrowers, canvassing for itself, apparently. This could not deny any conclusion of agency as between S Loans and Tonto HL if the agreement between them otherwise dictated that conclusion. It removed, however, any suggestion that S Loans did in fact act as a representative of Tonto HL in dealing with third parties.

190 No provision purported to regulate how S Loans conducted its business prior to the point of introduction of loans, except cl 2.4, which only required the maintenance of sound business practices according to law.

191 Taken as a whole, the Introduction Deed and the other agreed arrangements did not provide for an arrangement under which S Loans would act on behalf, and in the interests, of Tonto HL in the respects found by the primary judge. The reasoning of the primary judge commenced with the recognition that Tonto HL did not undertake interviews with the prospective borrowers and played no part in collecting and submitting relevant information. All those tasks, in respect of these borrowers, and any others introduced to Tonto HL by S Loans were done by S Loans. Thus, there was an entrusting of the organisational or enterprise tasks in that respect to S Loans. In these circumstances, and given the obligations of the deed, the primary judge saw no room for S Loans to act for its own customers.

192 That approach has two principal flaws. First, it elevates the organisational or enterprise structure of the relevant business and activity as a key factor in determining agency. Tonto HL, as the instigator of the business structure, is seen to have placed Streetwise in the position of collecting all relevant information for the conduct of the lending enterprise. Therefore the tasks that are part of the operation of the organisation or enterprise are to be viewed as entrusted with S Loans as agent: see generally Seavey *op cit* at 883-885; the discussion in F M B Reynolds, W Bowstead and M Graziadei *Bowstead and Reynolds on Agency* (17 th Ed, Sweet & Maxwell, 2001) at 21-22, and Lord Wilberforce in dissent in *Branwhite v Worcester Works Finance Ltd* [1969] 1

AC 552 at 585-586. This approach deflects attention from the correct task - ascertainment of the legal content of the consensual agreement between the parties.

193 Secondly, the approach fails to place the Introduction Deed in its commercial context. It was an agreement between two entities each of which had its own business. One was to endeavour to introduce business from its own customer base for the mutual commercial advantage of both.

194 Agency is to be determined by an analysis of the consensual legal relations between the parties, it is not merely a conclusion drawn from the performance by A of a function important, even necessary, to the operation or functioning of the business enterprise of P in question.

Conclusion on agency

195 The primary judge was wrong to characterise the relationship between Tonto HL and S Loans as agency.

196 This conclusion does not, however, mean that when one turns to the application of the *CRA* , one ignores the history and detail of the relationship between Tonto HL and S Loans. They were not commercial strangers; they were intimate commercial counterparties, the latter performing functions that were integral to the operation of the former's business and the lending enterprises.

197 This conclusion makes it unnecessary to deal at any length with some of the particular complaints made about the primary judge's reasoning as to agency. It is appropriate to deal with some, however, in order that this Court's evaluation of the circumstances for the operation of the *CRA* can take place on the correct factual foundation.

Aspects of the primary judge's reasoning as to agency

Streetwise's part in the administrative process

198 Particular challenge was made to the primary judge's finding (at [307 (b)(iii)]) that Streetwise would have "absolute administrative control of the loan applications". That challenge was to any proposition beyond the matters explained by Mr Narramore: that the live window was provided to Streetwise to upload required documents and to monitor the status of the application. The primary judge's finding went no further than this. Taken together with the agreement by Tonto HL not to contact prospective borrowers, and the ability of Streetwise to have read only access to the progress of any application,

Streetwise had a degree of control over the administrative process once an application was lodged. I do not take his Honour's finding of Streetwise playing an "integral part on behalf of Tonto and Origin in their loan approval and credit assessment process" ([356]) as going further than that. This can be seen from the primary judge's findings at [261] that neither Mr Lougoon nor Mr Wright was contacted by Mr Bangaru or anyone at Streetwise when approving the loan applications in question. If the primary judge is to be understood as going further, any such finding was not supported by the evidence.

The joint venture agreements

199 A central submission of the appellants as to the error in the conclusion of agency concerned the relevant joint venture agreements. The appellants submitted that the primary judge fundamentally misconceived the place of the joint venture agreements. The joint venture agreements were formal and binding, appointing S Property as "co-ordinator and project manager on our behalf to locate and develop a suitable site" in a "profit share arrangement". As the primary judge found at [330], S Property promised in the agreement that either through Streetwise Home & Investment Loans Pty Ltd (that is, S Loans) or through an external financier, it would obtain necessary finance on the basis that the "financing of the borrowed funds" would be the responsibility of the O'Donnells, Di Benedettos or Mr Tavares and Ms Rowe. S Property undertook to advise the respondents. Thus, it was submitted that before Tonto HL or the lender was approached, the respondents had assumed contractual obligations to develop land. Thus, it was submitted, there could be no conflict between the interests and duties of S Loans (the party to the Tonto HL Introduction Deed). In the joint venture agreement, the respondents agreed that S Property would act on their behalf to obtain finance. This was done, it was submitted, by S Property delegating this task to S Loans to obtain funds from external financiers. Thus, S Loans, acting on behalf of S Property to effect the latter's obligation to the respondents to obtain finance to fulfil their obligations under the joint venture agreements, can be seen as acting for the respondents.

200 This is a legitimate legal and factual analysis of what occurred, though it is unnecessary to be this precise. These borrowers were enticed to Streetwise. They entered agreements with S Property and, through their involvement with Streetwise, became persons for whom S Loans undertook tasks. I have already concluded that S Loans was not Tonto HL's agent. The fact of agency or not is not conclusive or determinative as to the attribution of responsibility here within an analysis under the *CRA* , a subject to which I will return.

Tonto HL's knowledge of Streetwise

201 It is convenient at this point to the deal with the challenge to the primary judge's findings at [320] (see [138] above) that Tonto HL knew that Streetwise was "not only a broker, but was a property developer" and that "the business of Streetwise was not confined to being a loan introducer" and that "it would have been obvious to a reasonably prudent lender possessed of that knowledge that Streetwise as a broker had a clear conflict of interest". It was submitted that it was wrong to conflate the companies in the Streetwise group. One undertook property development; the other was a finance broker. It was wrong in law, it was submitted, to analyse the position otherwise than by reference to the interests of S Property and the duties of S Loans. Further, it was submitted that the timing of the joint venture agreements meant that there was no conflict because the respondents knew from the joint venture agreements that S Property would seek finance for them, either from an internal company or externally. Indeed, they had bound themselves to this process.

202 With respect, these submissions of the appellants have an air of unreality and formalism. What Tonto HL could see (as Mr Paul O'Donnell accepted in cross-examination, reflecting on it) was that an apparently closely held group ran a land developing business, had a finance broking operation and had a significant interest in having loans approved to gain access to loan funds, through the borrowings of individuals dealing with the so-called broking arm of the group, which had in fact bound itself to Tonto HL in the form of the Introduction Deed. This was more than the usual interest of a broker in a commission. There was a powerful incentive for Streetwise to see loans given to borrowers. The description of this as "conflict" is reasonable. There was a plain and obvious incentive for Streetwise to put forward loans to obtain money for its customers and through them its property business, which interest might conflict with duties to Tonto HL or to its customers if the commercial interest overwhelmed care or honesty. The relevant point was what could reasonably be perceived by Tonto HL. The companies in the group were seen by Mr Paul O'Donnell as "effectively the same".

203 The property development business of S Property and the prospective borrowers generated by Streetwise were the attractions for Tonto HL. Mr Narramore said at para 19 of his affidavit of 15 April 2008:

> "Streetwise ... was the typical type of target client that I was employed to chase. They were multi-tiered and vertically integrated in selling property: they would have a division that would generate a lead with a particular investor market, a separate division would then make a sale and a further division again would organise the finance on behalf of those investors to fund that purchase."

Mr Paul O'Donnell gave similar evidence. Tonto HL viewed Streetwise as a group and as a potentially lucrative "target client to chase". This was because

of the volume of anticipated lending to people introduced by S Loans to fund their arrangements with S Property.

204 The primary judge's findings of a "conflict of interest" able to be perceived by Tonto HL rested on an assumption that any Streetwise entity acting as a broker had a potentially powerful conflicting interest if its duty to a prospective borrower required caution or advice as to the suitability of borrowing. To that extent and so understood the finding was open. Tonto HL knew that S Loans would bring people to the lending programme in order to provide funds to invest in business offered by Streetwise. That was the commercial attraction of Streetwise. It bespoke the real risk that any duty that S Loans may have to a borrower would or might give way to the interest in Streetwise as a property developer for funds.

205 The timing of the joint venture agreements and of the approach to Tonto HL did not affect this commercial position and the reality of the potential for conflict that was apparent to Tonto HL.

Imputation of knowledge

206 The conclusion that S Loans was not the agent of Tonto HL makes it unnecessary to consider whether, on the assumption that there were an agency relationship, the so-called fraud exception would prevent the imputation of knowledge held by Streetwise employees to Tonto HL and through to the lenders.

207 Knowledge acquired through an agent is dealt with in *Bowstead and Reynolds on Agency* (19 th Ed) in Art 95 at 514 [8-207]:

> "(1) The law may impute to a principal knowledge relating to the subject-matter of the agency which the agent acquires while acting within the scope of his authority.
>
> (2) Where an agent is authorised to enter into a transaction in which his own knowledge is material, knowledge which he acquired outside the scope of his authority may also be imputed to the principal.
>
> (3) Where the principal has a duty to investigate and make disclosure, he may have imputed to him not only facts which he knows but also material facts of which he might expect to have been told by his agents.
>
> (4) Knowledge is not attributed to the principal where it is acquired by an agent who is defrauding the principal in the same transaction."
>
> (Footnotes omitted.)

The authors express the exception in Art 95(4) with the same clarity of expression as did Buckley LJ in *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] 1 Ch 250 at 261-262:

> "But in my view such knowledge should not be imputed to the company, for the essence of the arrangement was to deprive the company improperly of a large part of its assets. As I have said, the company was a victim of the conspiracy. I think it would be irrational to treat the directors, who were allegedly parties to the conspiracy, notionally as having transmitted this knowledge to the company; and indeed it is a well-recognised exception from the general rule that a principal is affected by notice received by his agent that, if the agent is acting in fraud of his principal and the matter of which he has notice is relevant to the fraud, that knowledge is not to be imputed to the principal."

208 Notwithstanding this apparent clarity, the rule is not without controversy. The authors of *Bowstead and Reynolds on Agency* (19 th Ed) express the view that the existence of and justification for the rule is open to question: at 523 [8-213], citing the illuminating article of one of the authors (Prof Watts) in (2001) 117 *Law Quarterly Review* 300. That said, as Prof Watts makes clear in the article, the rule appears to have been applied for over 150 years, having its roots in the decision of Lord Brougham in *Kennedy v Green* (1834) 3 My & K 699; 40 ER 266. Glazebrook J and Robertson J in the New Zealand Court of Appeal have expressed the view that the exception is not soundly grounded in authority: *Nathan v Dollars & Sense Finance Ltd* [2007] NZCA 177; [2007] 2 NZLR 747 at 770 [99].

209 The rule is not limited to circumstances where the principal is suing the agent. There imputation of knowledge is irrelevant. It extends to circumstances where it becomes relevant to know the state of knowledge of the principal by reference to what the agent knew in relation to the claims or rights of third parties.

210 The rationale of the exception is said to be twofold: the existence of the fraud rebutting a presumption of communication of information: Turner VC in *Hewitt v Loosemore* (1851) 9 Hare 449; 68 ER 586; or as taking place outside or as severing the agency relationship: *Espin v Pemberton* (1859) 3 De G & J 547 at 554-555; 44 ER 1380 at 1383. Certainly, the latter foundation is difficult to sustain after *Lloyd v Grace, Smith & Co* [1912] AC 716.

211 No party put submissions that the exception did not exist. It was said not to apply for the reasons given by the primary judge: that S Loans' actions were not "acting totally in fraud" of Tonto HL (see *Beach Petroleum v Johnson* 43 FCR 1 at 31; 115 ALR 411 at 574 and *Morlea Professional Services Pty Ltd v Richard Walter Pty Ltd (In liq)* [1999] FCA 1820; 96 FCR 217 at 229 [46]) and there was no "moral certainty" of lack of disclosure (see *Bowstead and Reynolds on Agency* (16 th Ed) cited in *Beach Petroleum v Kennedy*).

212 I would agree with the primary judge that the transaction was not totally in fraud of Tonto HL. The lenders are, after all, seeking to enforce the very transaction and security that have given them monetary return even though the engagement was brought about by the fraud in question. The lenders and

Tonto HL obtained a benefit - the deployment of the funds at interest upon a valuable security. Lies brought it about, but they were not the victims of a theft or depredation. They maintain the validity of that very transaction.

213 There is much to be said for not applying the exception to a case such as the present where Tonto HL and the lenders have chosen (on this hypothesis) the agent who was undertaking the very tasks required of it, albeit exhibiting dishonesty, to the immediate benefit of both it and the principal and, further, where the ultimate principal seeks to enforce the very transaction. That said, it is unnecessary to express a final view on the rule.

The other grounds of the appeal

214 Given my view that the primary judge erred in his conclusion about agency, it must be concluded that his Honour's conclusions as to relief under the *CRA* were flawed, requiring the powers under the *CRA* , ss 7 and 9 to be examined and, if necessary, re-exercised by this Court in the light of the notices of contention that have been filed. The other complaints made by the appellants are relevant to examine, because the resolution of them will inform this Court's approach to the re-application of the *CRA.*

Giving manifestly insufficient weight to the misleading conduct of the borrowers

215 The appellants drew particular attention to the misleading character of the borrowers' conduct in the way they applied for the loans. Emphasis was placed on the incompleteness of the documents that were signed and the fact that some of the information in the O'Donnells' forms was false, to their knowledge. Thus, by leaving blank sections (and the O'Donnells by allowing wrong information to remain in the document) the borrowers misled the lenders. Further, the declarations that they could afford to make the loan repayments without undue financial hardship were false: they could not, without the Streetwise contribution.

216 The conduct was objectively misleading and it was a cause of inducing the loan facility. The conduct was, it was submitted, careless, misleading and reckless and directly facilitated the fraud.

217 The primary judge recognised that the borrowers' conduct exposed the lenders and themselves to the risk of fraud: [68], [323] and [405] of the reasons. The submission that the primary judge gave manifestly insufficient weight to the circumstances need not be dealt with insofar as a consideration of the primary judge's reasoning does not assist in any re-exercise of the powers under the *CRA* . It is helpful, however, to analyse the complaints so as to throw up the

correct approach for this Court in the re-exercise of power.

218 First, the appellants complained that the primary judge understated the conduct by his Honour by merely calling it "careless". It was said to be reckless, intentional and grossly misleading conduct, which had a direct consequence on the conduct of Tonto and the lenders. To the extent that reckless and grossly misleading seek to import a notion of intention or perception of the risk to others, the primary difficulty standing in the way of the submission is that senior counsel appearing for the appellants at first instance did not put this matter to the borrowers in cross-examination. That is not a criticism of his cross-examination. The conduct of the borrowers, in its carelessness, speaks for itself. As to whom they actually perceived might be misled by this depended, in significant part, upon who they thought the lenders were at the time they were doing things. The failure to press the borrowers with notions of intentionally misleading conduct and actual perception of risk of others puts it out of the hands of the appellants now to rely on such submissions.

219 There can be no doubt that the borrowers were careless and careless in a significant degree. But they were misled with blandishments and worse. They thought they were dealing with a substantial organisation, perhaps they should not have done so. They expected Streetwise to deal honestly with their applications and there is no evidence that they actually anticipated any fraud. It can be accepted that, as a matter of objective fact, they left the forms concerned in a misleading state. That they were aware that they were misleading people or may mislead lenders was not put to them. In any re-exercise of power, the cause or place of the plain carelessness of the borrowers is to be given significance, which conclusion will involve the capacity of the forms to mislead the lender should they be filled in incorrectly or falsely by Streetwise. However, given the way the matter was conducted, it is not to be found that the borrowers intentionally misled anyone or were conscious of the risk of doing so.

220 The truly misleading conduct was that of Streetwise inserting false information without the borrowers' knowledge; though their careless conduct objectively permitted the conduct of Streetwise to mislead the lenders.

221 The second complaint as to the manifestly inadequate weight given to the borrowers' conduct was that the primary judge discounted the significance of the carelessness on the basis of his finding ([68] and [405]) that the respondents were rushed by Streetwise into signing the incomplete documents. It was submitted that the primary judge should not have found that the fact that Streetwise rushed the borrowers into signing was an excuse for making false and misleading declarations to the appellants. However, the findings as to being rushed were plainly open to the primary judge. If there

were a misleading of the lenders by the borrowers, it may not excuse it. However, as discussed earlier, the misleading of the lenders was by the fraudulent conduct of Streetwise. His Honour was entitled to take into account the objective facts he found about the pressure placed upon the borrowers as to time. How it falls out in an ultimate re-exercise of power will be dealt with later.

222 The third complaint was that his Honour mitigated the findings as to carelessness by what was said to be an erroneous conclusion that the fraud of Streetwise was not reasonably foreseeable by the respondents. This conclusion led his Honour, it was submitted, to treat as irrelevant the circumstance that the conduct by the borrowers exposed the appellants to the risk of fraud. This finding was said to have been bound up with a misapplication of the *CRA* , s 9(4) in that the primary judge failed to take into account at all the injustice to the appellants which the carelessness caused.

223 For present purposes the important question is whether or not the primary judge was correct (and this Court can apply a similar finding) that the fraud of Streetwise was not reasonably foreseeable by the respondents. This is not a tort case. It can be readily accepted, for the purpose of argument, that if one gives a signed document to a stranger (or someone of whom one has little knowledge) with blank sections to be filled in, which document is to be given to a third party for a business purpose, it is reasonably foreseeable that if the person is dishonest or careless the wrong information may be placed on the documents. That objective analysis is readily acceptable. The primary judge was engaged, however, in a more subtle exercise. He was assessing the people before him and characterising their conduct. All these borrowers trusted Streetwise. In particular with the benefit of hindsight, they should not have done so. Other people in the community may have been more cautious. His Honour found them to be careless. They were careless because they were giving open documents signed by them to commercial persons they had just met. The finding as to lack of reasonable foreseeability was based on the trust of ordinary people who had accepted the blandishments of rogues. That is how his Honour's findings should be understood; they were open and should not be disturbed.

224 In due course, I will say something as to the systemic risk inhering in a business organisation and structure whereby Tonto HL placed the gaining of all relevant information in the hands of Streetwise. The reasonable foreseeability of Tonto HL is that of business people assessing the risk in the structure and running of their enterprise. This is a quite different matter from the reasonable foreseeability of honest, trusting, but careless people such as these borrowers acting under the blandishments and lies of Streetwise. Seen in the above light, I do not think that his Honour's findings as to lack of reasonable foresight in the respondents of the risk that Streetwise would

engage in fraud are open to criticism.

225 The fourth complaint was that in evaluation of the injustice the primary judge found that Tonto HL "was in a much better position both to appreciate and to manage the risk of fraud by Streetwise" than were the respondents: [413(ii)]. It was submitted in this regard that the various declarations and acknowledgements contained in the application forms and declaration were prudent measures for Tonto to take in order to avoid the risk of fraud. It was submitted that it was the borrowers who facilitated the fraud in the face of those measures and absent their conduct the fraud would not have occurred. At this point the appellants emphasised that the fraudulent party (Streetwise) was the agent of the borrowers, not the lenders.

226 I will deal with these submissions more fully in due course. However the fundamental point made by his Honour was a good one. Tonto HL had chased and finally won a property development group to act through its finance broking arm as a loan introducer. The commercial risks (and rewards) involved in that choice have been adverted to and will be the subject of further consideration in the re-exercise of power. The fact that S Loans was not the agent of Tonto HL does not mean that all the surrounding facts as to how S Loans came to be an introducer and the terms of the arrangement, including, in particular, the agreement by Tonto HL not to approach customers before settlement, should not be taken into account. The clear inhering business risk of sub-contracting the important process of information collection and choice of appropriate loan product to a land developer to assist in obtaining funds for people doing business with it and so effectively providing a source of funding for its projects should be taken into account in understanding how the fraud occurred. In any such business enterprise, appropriate safeguards were necessary to minimise the risk of fraud. They were administered loosely, to the direct risk of the lenders and the indirect risk of the prospective borrowers. Agreeing not to contact prospective borrowers before settlement and agreeing to mislead them if they rang by answering the telephone as Streetwise were hardly risk minimisation strategies. The guidelines for loan approval were fundamental to avoiding the risk of fraud. None of this is to say that anyone at Tonto HL actually knew or suspected that Streetwise was fraudulent. The point his Honour was making was that in undertaking a business enterprise of this character, Tonto HL, as a professional mortgage manager, was in a much better position to appreciate the risk of fraud or mismanagement, than were the borrowers. Putting declarations in the fine print of application forms is not an entirely adequate response in the other circumstances to which I have made reference. I will deal with this more fully in due course.

227 Fifthly, the appellants submitted that the primary judge should have followed the approach of McDougall J in *Perpetual Trustees Victoria Ltd v Longobardi* [2009] NSWSC 654 in relation to borrowers who sign documents in blank. His Honour said that such borrowers should bear the responsibility for fraud because they permitted it to happen. Judges are not obliged to follow other judge's findings of fact. One needs to understand all the facts in any case to form relevant views as to their importance. In *Longobardi* the factual circumstances were different. The Longobardis signed application forms in blank and saw documents before the loan was completed which, had they read them, would have told them that the lender was proceeding upon an incorrect understanding of their income.

228 None of the above is to deny that the objective fact that the documents were signed in blank is an important matter to take into account in circumstances where it has facilitated fraud.

Other relevant factual errors asserted

229 Amended appeal ground 16 concerns the asserted error of the primary judge in finding that the preliminary and final approval letters and the application, having been "branded" as "Streetwise" assisted Streetwise dishonestly to mislead the respondents: [312]-[314] and [413(ii)]. It was submitted that these documents do not support such a conclusion. In support of this, detailed textual expressions are focused upon in the preliminary and final approval letters and in the application forms. With great respect, these submissions are somewhat unrealistic. What the learned primary judge found was plainly open. Indeed, it was the very commercial advantage and circumstance that Tonto and Streetwise understood at the time. The branding (and the agreement not to speak to prospective borrowers by Tonto HL) was to assist the introducer in fostering a belief that it had a connection with the lender or the making of the loan. It was to facilitate the development of a business connection of the making of the loan with the introducer's name and operation. It enabled Streetwise to represent that it was closer to the loan than it really was. This enabled Streetwise, as happened here, to persuade people that the filling in of forms was a matter of formality, it (Streetwise) having been given all relevant information. Of course the forms, if read carefully, make clear the importance of their being filled in fully and accurately and carefully, but this aspect of the conduct of the two businesses (of Tonto HL and Streetwise) did justify the primary judge's conclusion that it facilitated Streetwise misleading the respondents into a view that Streetwise was either the lender or closely related to the lender. It may be a common practice. Nevertheless, to the extent that such impression can lead to difficulty, it is designed to permit the introducer to represent its connection with the loan. It is to be recalled that Tonto HL in its standard form Introduction Deed had a provision forbidding S

Loans disclosing the terms of the deed or the arrangement with Tonto HL. Tonto HL and the lenders wanted to "stay in the background". That is, if they desire it, a legitimate commercial position. What the primary judge was saying, and it was entirely justified, was that the branding and the "ownership" given to the introducer enabled the introducer to have the borrower believe that it was closely connected with the loan to the extent that such might be relevant to a deception.

230 Appeal grounds 9 and 11 complain about erroneous findings as to Tonto HL exposing the respondents to a serious risk of fraud. At [311] and [320]-[321] the primary judge found that Tonto's agreement with Streetwise not to speak to borrowers and to answer telephone calls from Streetwise clients in the name of Streetwise created a risk in respect of compliance with lending guidelines and the reliability of information provided in applications and that Tonto was aware that loan applicants might be misled. This was relevant to his Honour's findings that the way Tonto conducted its business with Streetwise exposed the respondents to a serious risk of fraud which was reasonably foreseeable.

231 First it was said that the conclusion was tainted by a misconceived finding as to "conflict of interest". I have already dealt with this question of conflict of interest. In my view, Tonto HL was plainly aware of the character of Streetwise's business and the inhering risk that someone in the business of Streetwise might misuse its position in order to obtain funding for its own projects through selling products or involving itself with members of the public. Further, the primary judge was entitled to give weight to answers in cross-examination by Mr Paul O'Donnell about the relationship with Streetwise and risk.

232 Secondly, it was submitted that the answer of Mr O'Donnell as to risk referred only to the ordinary risk of brokers fulfilling the function of interviews and information collection. That is not the case. Mr O'Donnell was being cross-examined by Mr Menzies SC about the heightened risk brought about by Tonto HL disentitling itself from communicating with prospective borrowers. That undoubtedly, as the primary judge correctly found, undermined the capacity of Tonto HL to carry out its tasks by diligently applying the guidelines insofar as that might require, in any given case, contact with the prospective borrower.

233 Thirdly, complaint was made about the finding in the last sentence of [311] that Tonto HL was aware that loan applicants might be misled by the badging of Streetwise, but nevertheless proceeded with the arrangement. It was submitted that the cross-examination did not squarely put this matter to Mr Paul O'Donnell. Looking at the cross-examination of Mr Menzies, I do not accept that criticism. Mr Menzies was cross-examining Mr O'Donnell about

badging of the documentation and the agreement not to speak to prospective borrowers. The relevant cross-examination is set out in [306] of the reasons. The answer by Mr O'Donnell was to a direct question to the effect that there was some consideration to the possibility that persons would be misled or confused about the process. Evidently Tonto did go ahead nevertheless. The finding of his Honour was open.

234 Fourthly, it was submitted that the primary judge did not properly take clause 2.1 of the Introduction Deed into account in his finding that Tonto exposed the borrowers to a serious risk of fraud. The Introduction Deed of course required all information to be accurate. I do not think that this is a fair criticism of his Honour. He was well aware of the deed. What his Honour found created a risk was the taking on of an introducer such as Streetwise with the risks inhering in that in circumstances where, in particular, Tonto HL put it out of its hands to rigorously pursue its guidelines to the extent that such required contact with the prospective borrower before settlement of the loan.

235 These considerations should not be taken as part of any conclusion that Tonto HL could not retain S Loans as an introducer. They do however mean that a commercial party in Tonto HL's position should appreciate the inhering risks involved, as his Honour correctly found. The consequence of this should be to apply guideline checks with rigour.

Erroneous finding of borrowers not exposing lenders to risk of fraud

236 The appellants complained that the primary judge did not at [415] take into account the findings, otherwise properly made, that the borrowers by signing blank or partially completed documents exposed themselves and the lenders to the risk of fraud.

237 Given the necessity to re-examine and re-exercise the power under the *CRA* it is strictly unnecessary to deal with the point. The borrowers were careless. Their actions created, to a degree, the risk of fraud. The primary judge's conclusion as to the lack of reasonable foreseeability of fraud (at [405]) should be understood in the way that I have described earlier.

Erroneous finding that the borrowers obtained no benefit

238 At one level of analysis there is force in the appellants' contention that the borrowers received a benefit from the loans. Their obligations under the joint venture agreements were satisfied. Thus, a financial benefit was obtained from the agreement said to be unjust. That, however, was not the point being

made by the primary judge. The investment was worthless.

239 It was submitted that this finding about the worthlessness of the investment was irrelevant. It was not. It was relevant to all the circumstances that might go to relief, should the contracts be held to be unjust.

Erroneous finding as to non-compliance with special condition

240 At [247], [413(iv)] and [415] of his reasons, the primary judge found that the "cash out" special condition in the O'Donnells' application was not complied with, and that the approach of Tonto HL made it easier for the fraud to go undetected.

241 The complaint is that the special condition was not a condition at all of the loan agreement. The primary judge should have worked on the basis that there was no special condition.

242 There is some confusion with this special condition. It appeared in the preliminary approval letter of 7 November 2002, the approval letter of 6 January 2003 issued under the FirstMac Program, and the approval by Origin on 30 January 2003 of the application submitted by Tonto HL on 29 January 2003. Thereafter, the special condition was removed. It is unclear why this occurred. The closeness in time of the (second) final approval letter (31 January 2003) may bespeak a decision around this time to remove the condition.

243 The primary judge did not refer to this complexity. In the circumstances, it is difficult to draw any conclusion relevant to the causal consequences of what might, nevertheless, be seen to be a failure to follow guidelines.

244 One possible reason for the removal of the condition in the agreement was that it had been satisfied (by the inadequate information).

245 To the extent that the special condition was in the documentation put forward by Tonto HL for approval, the guidelines were breached. It was a matter for the appellants to explain in evidence the irrelevance of the information to satisfy it. At the very least, the inadequate information reflects a lack of attention to the guidelines when the condition was stated to be relevant. That said it is, perhaps, problematic what causal effect it had.

The question of legal advice

246 Whilst the appellants do not challenge the finding at [407] that the O'Donnells were "persuaded" or "convinced" by Streetwise not to obtain legal advice, it was submitted that the primary judge erred in failing to take into account the O'Donnells' signing of a legal advice acknowledgement certificate. It was submitted that the certificate was misleading if they had been "convinced" not to do so because the certificate use the word "chosen". With respect the submission thus put is semantic and pedantic.

247 More to the point is the fact that it told the lenders that the borrowers had had the opportunity to seek legal assistance. The facts otherwise found by his Honour make clear the choice they made - both as to legal and accounting advice. These are matters of some significance.

Asset lending

248 The primary judge found at [378] that the loans to the borrowers were "asset-based ... and amounted to asset lending." A critical aspect of that conclusion was his findings of agency and imputation of knowledge. Such findings were wrong.

249 Also relevant to the conclusions were the breaches of the guidelines set out at [413(iii)], which findings were not challenged. Complaint was made, however, about the findings in respect of the assessment of each of the loans that the loose attitude adopted to the lending guidelines indicated that those examining the application were not much concerned about the purpose of the loans and whether the borrowers were self-employed and were content to lend on the security of the properties and mortgage insurance: [414], [428] and [437] of the reasons.

250 The appellants referred to all the steps taken by Mr Wright and Mr Lougoon in their approval processes and submitted that it is unfair to them, in the absence of the finding having been put to them in terms, to conclude as his Honour did. I disagree. There can be little doubt that their attention to the guidelines was inadequate. There was a clear preparedness to rely upon what had been assumed to be done by others. The overall impression of Mr Lougoon and Mr Wright in the light of their work of applying the guidelines makes it difficult for this Court to interfere with the primary judge's conclusion. To adopt the language of the submissions of ASIC as another way of putting what his Honour did: the lack of regard for the borrowers' capacity to pay can be inferred from the failure to follow the relevant guidelines, the agreement not to contact the borrowers before settlement, the preparedness to rely upon the mortgage insurers' assumed assessment, the paltry information accepted and perfunctory enquiries as to loan purpose and the lack of verification of information, all set against the otherwise scrupulous

care and perspicacity with which independent valuations and valid first mortgages were taken. Failure to verify information relevant to capacity to service the loans, in particular ABNs and certificates of business registration and, in relation to Mr Tavares, confirmation that he had been self employed in the same business for two years, lead inexorably to the conclusion his Honour made.

Reconsideration of the *CRA* and the notice of contention

Reapplication of the CRA

251 The principles concerning relief under the *CRA* were recently restated by Campbell JA in *Kowalczuk* . There was no substantive debate as to the relevant principles. It was their application that was in contest.

Whether the contracts were unjust

252 The first stage of analysis is whether the contracts were unjust as between the parties in the circumstances in which they were made. Of particular relevance here is the element of procedural injustice. The agreements for loan and mortgage were unexceptional. They contained no harsh or unjust terms of themselves. The unjustness of the contracts arises from the deception and fraud practised by Streetwise in the arrangement of the agreements.

253 For the reasons that follow, the circumstances in each case lead to the conclusion that the contracts were unjust. I will not re-iterate all the facts. The following features are to be emphasised.

254 The central feature that brought about the loan agreements and mortgages was the dishonest conduct of Streetwise in the filling in, and submission of, the various forms and information to Tonto HL. This brought about the contracts which would not have been entered without false information. This was done for the financial advantage of S Property and the principals of Streetwise, to the distinctly possible (at the time) detriment of the lenders and the borrowers.

255 That S Loans was not in law the agent of Tonto HL does not mean that for the purpose of evaluating the operation of the *CRA* , the position of Streetwise, how it came to take its place in the overall enterprises of the lending programmes and the objective perceptible risk of fraud arising from its position should not be considered.

256 The perpetrator of the fraud was not a stranger to Tonto HL. It was a retained introducer. It was a sought-after commercial counterparty put in place by

Tonto HL for the purpose of hoped for introduction of business. It was part of the "shopfront" of the retail business of the enterprise, albeit sub-contracted, and branded as Streetwise. Its role was to introduce business, obtain information in respect of suitable products and bring forward applications. The characteristics of the group of companies to which it belonged gave it its commercial attractiveness to Tonto HL. As a broking arm of a group engaging in property development it had the attraction to Tonto HL of members of the public as customers engaging in property development or buying property from the group and seeking money so to do. It was obvious commercially that Streetwise was obtaining sources of funding for members of the public going into or doing business with it (all funds at settlement being directed to S Property) and thus providing funding directly or indirectly for its projects. One need not be too specific about this. It is sufficient to recognise that S Loans had a significant incentive (beyond the obtaining of commission) for successful applications, and that this was objectively evident to a commercial party in the position of Tonto HL. In a structure based on independent contract without the control over employees, there was an inherent or systemic risk of exaggeration and fraud which came to pass. This was only heightened by the agreement not to contact prospective borrowers until after settlement, which necessarily weakened Tonto HL's ability to apply its own credit guidelines under both programmes with appropriate commercial vigour.

257 One legitimate way of analysing the facts is that through S Property, S Loans was the agent of the borrowers. If S Loans had been worth powder and shot any suggestion that it was not acting for the borrowers would have been shortly dealt with. Nevertheless, this legal position should not be over emphasised in the whole commercial context in which the lending took place, in particular the place and function of S Loans in the commercial enterprise of the lending programmes.

258 Whilst the effect of the "badging" of the approvals with the Streetwise logo and name should also not be overstated, its capacity (correctly recognised by the primary judge) to mislead or confuse should not be ignored. As was apparently common in the industry, Streetwise was assisted through the badging (reinforced by the agreement of Tonto HL not to contact prospective borrowers before settlement) to represent itself as closely connected with the lending and as a company of substance. This permitted some of the borrowers to think, at least up until the final loan and mortgage documentation was sent to them, that Streetwise was the lender. Thus, a sense of completeness of disclosure in the customers was brought about, irrespective of the formalities in the various documents that were shown. Once again, this capacity to mislead was created by the structure and operation of the commercial arrangement put in place by Tonto HL.

259 The only clear organisational checks and precautions were the guidelines. Not only were they not followed, but they were disregarded in a way found by the primary judge to reflect a lack of real concern for aspects that underpinned serviceability and the suitability of the borrowers. Of course, lending guidelines such as these are principally the relevant tool to protect the lender's interests. However, as recognised by Spigelman CJ in *Perpetual Trustee Company v Khoshaba* [2006] NSWCA 41 at [80]-[82] and Campbell JA in *Kowalczuk* at 228 [102], following the guidelines confers a direct benefit on a prospective borrower by identifying risky loans and preventing fraud. The failures can be seen to be material in permitting the fraud to occur.

260 There can be no doubt that, to varying degrees, these borrowers were preyed upon by Streetwise, through the blandishments and lies of apparently sophisticated and skilful people. The written page can never fully reflect, in recalled snippets of conversations, the effects of personality, charm, pressure and deception in a carefully orchestrated body of persuasion of ordinary people. That is not to say that the borrowers were not careless, to a degree, foolish and gullible. They all succumbed to the lure placed before them of monetary gain, the lure being made more respectable by its characterisation as the provision for their future and "wealth-building" for their later years. Greed would be too strong a word, and unfair perhaps. But such caution as was initially revealed by them dissolved under the persuasion of, and trust in, Streetwise. These matters went, in particular, to the collateral joint venture transaction. To complete the exercise of deception, a group of lies directed to obtaining the contracts in question was necessary.

261 The above said, the behaviour of the borrowers to a degree militates against any conclusion of injustice. The signing of incomplete or blank documents was careless, giving the opportunity for the fraud. The carelessness also extended to the degree to which the documents were misleading; though, to a significant, indeed overwhelming, degree the causative deception occurred through the dishonesty of Streetwise.

262 I will not repeat the detail of the coming of each couple to the borrowing set out above and more fully by the primary judge. Read with that detail the following is necessary to say. The O'Donnells were the most deeply involved in the analysis of the property venture put to them by Streetwise. Mrs O'Donnell spent time analysing what was said to her, making notes and explaining matters to her husband. They visited Melbourne to view the property. They considered the retention of a lawyer and accountant, but chose not to do so because of cost and the persuasion of Streetwise. They were prepared to, and did, bind themselves to S Property under the joint venture agreement. Yet, as those at Streetwise must have known, the undertaking was fraught with risk and imprudence. The O'Donnells' judgment was influenced and impressed by

Streetwise's apparent substance and its lies and persuasions. The loan, although one which they clearly had applied for, was, however, effected by the fraudulent conduct of Streetwise.

263 The same conclusions follow in relation to the loan and mortgage contracts of the Di Benedettos and Mr Tavares and Ms Rowe. The Di Benedettos were subject to greater pressure than the O'Donnells. They did not have the advantage of having the loan and mortgage documentation sent to them directly to enable them to consider it. Tonto HL sent it to them via Streetwise. They were somewhat less deliberate in their assessment of what they were being persuaded of than were the O'Donnells. Mr Tavares and Ms Rowe were the least sophisticated of the three couples. They paid the least attention to what was happening. They were persuaded, pressured and lied to and their loan, like the others, was effected through fraud.

264 The position of the lenders should not be judged as detached third parties, distinct and separate from what happened. Nor should they be seen as complicit with, or actually knowing of, Streetwise's deception, fraud and predatory conduct towards the borrowers. Whilst not having actual knowledge or actual notice of Streetwise's behaviour, the lenders' position should be assessed by reference to the reality of the significant responsibility of those structuring the elements of the lending programmes or, in the case of Permanent, those providing the wholesale funds. The mortgage manager (Tonto HL) with delegated lending authority operated the guidelines loosely and in a way which reflected a lack of concern with the suitability of the borrowers and serviceability. The mortgage manager brought into the roles of interviewing and selecting prospective borrowers an intermediary whose commercial attractiveness bespoke the inhering risks to which I have referred, heightened by Tonto HL's agreement not to contact prospective borrowers before settlement. These considerations materially facilitated the ability of Streetwise to effect these frauds.

265 In all the circumstances, these considerations are relevant to conclude that the unjustness of the contracts can be seen as unjustness affecting Tonto HL and the lenders. This conclusion is relevant to the assessment of unjustness and the extent to which the lenders should be viewed as bearing responsibility for what happened and in applying the broad considerations contained in the *CRA* , founded as they are in justice and fairness. Looking at these events as brought about primarily by the fraud of Streetwise, a fair assessment is that the business structure put in place by the lenders in how it operated was significantly responsible for the preying upon these people by Streetwise. That is not to ignore the basis upon which the trial and appeal proceeded, that "Lo Doc Lending" per se was not unjust. Nor is it to introduce an enterprise concept of agency; rather it is to recognise that a sub-contracted lending structure of the kind here, in which persons such as Streetwise are "chased"

to become the introductory agents, should have guidelines enforced with real vigour to deal with the obvious objective risks of fraud and deception. No one criticised these guidelines. Their operation was loose, and affected by the attitude found by his Honour. It is only fair and just to recognise the significant responsibility of the lenders in these circumstances.

266 Unjustness is a not concept or word with immutable or unvarying content. The degree of unjustness here stems primarily from the fraud and procedural injustice of Streetwise. Though not the agent in law of Tonto HL or Permanent, it was, as I have explained, the link in the business enterprise for which, in the sense I have discussed, the lenders, through Tonto HL, should take significant responsibility.

267 What order ought be made for the purpose of "avoiding an unjust consequence or result" for the *CRA* , s 7(1) will depend in part on the competing matters bearing on the conclusion of injustice and the content of that injustice.

268 Before turning to relief it is necessary to say something about the public interest.

Public interest

269 The public interest is the subject of particular reference in the *CRA* , s 9(1). One aspect of the public interest recognised early is keeping people to their freely entered bargains: *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1 at 9. By stating the importance of this aspect of the public interest shortly, I should not be thought to be consigning it as a matter of mere note only. It is fundamental, indeed it inheres in the *CRA* itself. It is an aspect of society that is of vital importance. As Story J said, writing extra-judicially ("Contract" (1832) 9 *Encyclopaedia Americana* 156), "confidence in promises is ... essential to the existence of social intercourse among men ...". Its strength as an operative legal norm that can be seen as fundamental is directly related to circumstances which give it strength - the just and free circumstances that give rise to the bargain. As Finn J said, writing extra-judicially in "Unconscionable Conduct" (1994) 8(1) *Journal of Contract Law* 37 at 49, if parties are to be held to their bargains once made, the law should act with vigour to promote the conditions necessary to make the freedom of contract effective, free and just.

270 Another aspect of the public interest is the advancement of the protection, which the *CRA* manifestly intends to give, to those not able fully to protect themselves and to those preyed upon by dishonesty, trickery and other forms of predation. The Peden Report (J R Peden *Harsh and Unconscionable Contracts: Report to the Minister for Consumer Affairs and Co-operative Societies and the Attorney-General for New South Wales* , 1976) said that the

reference to public interest "would direct the courts' attention to the underlying purpose of the Bill, namely to prevent unjust dealings which offend against community standards of business morality": J R Peden *The Law of Unjust Contracts* (Butterworths, 1982) at 122.

271 ASIC sought to draw into the public interest contemplated by s 9(1) aspects of the aims, functions and powers of ASIC in performing its duties under the *ASIC Act* . By the *ASIC Act* , s 1(2)(a) in performing its functions and exercising its powers ASIC must strive, amongst other things, to promote and facilitate commercial certainty and efficiency of the economy; and by s 12A it has the function of promoting market integrity and consumer protection in relation to the Australian financial system. These concepts can be seen as relevant to the public interest, not because of the direct operation of the Commonwealth statue, but by their inherent appropriateness to the concept of public interest in respect of financial contracts and the operation of the financial market insofar as an individual contract is concerned. Procedures that promote suitable borrowings and operate as checks against fraud should be seen not only as matters for the lenders to comply with or not as they choose, but as indirect guards against conduct that can produce injustice to members of the public and thus undermine confidence in the free and fair operation of financial markets. That said, it is not part of the purpose of the *CRA* to promote an efficient banking system or to lay down rules for good banking practice: cf *Cook v Permanent Mortgages Pty Ltd* [2007] NSWCA 219 at [14]. Nevertheless, to the extent that the organisation of lending programmes, through sub-contracted intermediaries, has the capacity to generate risk of lending to duped, misled or inappropriate borrowers and such structures are administered without clear operational regard for the lending guidelines, it is in the public interest to administer the *CRA* to protect such people. Such protection will, in the public interest, encourage the recognition by lenders that the safeguards in such structures to avoid or minimise fraud or misleading conduct should be rigorously applied. For example, here, it was not good enough to be precise and perspicacious only about the taking of security and its value. Care must be taken not to misuse a statute, designed for the protection of individuals, by employing it to regulate the financial system. But when people are duped, misled, defrauded or taken advantage of by participants in the financial system by means that have been, in significant part, facilitated by inhering obvious risk and lax operation of appropriate safeguards, it conforms to the public interest to take into account such systemic and operational failure in order to assist to promote conditions that will make it more difficult for such conduct to exist, and thus encourage circumstances more conducive to free and just contracts.

272 Such considerations here militate in favour of a finding of unjustness and in favour of granting relief to the borrowers. This is so because the structure of the enterprise, the retention of Streetwise with its evident interests, the lack of attention to safeguards and the act of the retained intermediary (albeit not an agent) played a significant and material part in creating the conditions for Streetwise's fraud to flourish and for these loans to be effected.

Relief

273 Section 7(1) authorises the Court, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, to declare the contract void (s 7(1)(b)), refuse to enforce the contract (s 7(1)(a)), vary the contract (s 7(1)(c)) and, in respect of a land instrument, make orders requiring execution of an instrument that varies, terminates or affects the land instrument or its operation (s 7(1)(d)). Section 7 is subject to s 19, sub-section (1) of which says:

> "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* ."

274 It is necessary to amend the orders of the primary judge. Section 19(1) meant that he could not declare the registered mortgages void. If, as his Honour found, the loan agreements were to be declared void, that meant that there was no indebtedness over which the mortgages could operate. Thus, the appropriate order to make was that the mortgagees deliver up a discharge of mortgage in registrable form to the borrowers.

275 Of course, as the primary judge provided for, Mr Tavares and Ms Rowe were required to give credit for the indisputable benefit of the receipt of $50,872.76 together with interest.

276 The relief to be given in accordance with the direction of s 7(1) permits the Court a wide choice based on its evaluation of the circumstances and of the injustice, to avoid the relevant unjustness. In circumstances such as the present, where the primary source of the unjustness is the fraud of a third party, avoidance of the unjustness calls for an evaluation of the respective positions of the parties. Relevant to that is the degree and extent to which the parties can be seen to have responsibility for what happened and the extent to which it is just that such responsibility should be reflected in the extent of remedial relief. Also of particular relevance is the capacity and context of the respective participation of the parties. The borrowers were all the subject of the kind of predation that the *CRA* was designed to relieve, in appropriate circumstances. The predation occurred in circumstances that were objectively facilitated by the structure and operation of the lending enterprises. I do not wish to repeat what I have already said about this, except to emphasise that it

was the chosen commercial counterparty of Tonto HL which committed the fraud, and in circumstances where the objective risk of placing the functions of interview and information collection in that party's hands were evident and exacerbated by the arrangements not to speak to borrowers and by the loose attention to operational checks by the guidelines.

277 In respect of the Di Benedettos, Mr Tavares and Ms Rowe, the order that is appropriate, in all the circumstances of the unjustness, including the public interest to which I have referred, is to relieve them of liability as the primary judge did (recognising the repayment by Mr Tavares and Ms Rowe and amending the orders about the mortgages).

278 From the evidence as to their resources, a substantive share of responsibility for the loans could well deprive them of their homes. In the circumstances of their being misled and preyed upon by Streetwise and all the other circumstances, such a result would be unjust.

279 The O'Donnells are in a somewhat different position. The evidence reveals that Mrs O'Donnell, in particular, expended considerable effort in understanding what the property venture was. Their decision to enter all the transactions was significantly more the result of the exercise of free will than the decisions of the Di Benedettos and Mr Tavares and Ms Rowe. The assessment is not an easy one to make; but I am left with the positive persuasion that it would involve a degree of injustice to the lender to remove all consequences of responsibility for what happened from the O'Donnells. It is, of course, to be remembered that it is the loan agreement that was unjust because of the fraud of Streetwise. Further, Mrs O'Donnell was to a degree misled about the identity of the lender. Nevertheless, they wanted this borrowing to effectuate their considered decision to enter into the arrangement with Streetwise, they having chosen not to make use of their available advisers (accounting and legal).

280 In my view, an unjust consequence (both to the O'Donnells and the lender) would be avoided by relieving them of three quarters of the financial consequences of the loan agreement. To do more would be unjust to the lender.

281 It is to be noted that no issue was pleaded or argument run invoking the *CRA* , s 6(2).

Notice of contention - other statutory relief

282 The borrowers and ASIC also maintained that the orders made by the primary judge should be supported by:

(a) the *ASIC Act* , ss 12CB and 12CC;

(b) the *Trade Practices Act 1974* (Cth) (" *TPA* "), ss 51AB and 51AC; and

(c) the *Fair Trading Act 1987* (NSW) (" *FTA* ") , s 43

283 Each of these provisions operates on a prohibition of "conduct that is, in all the circumstances, unconscionable".

284 In argument, it became common ground that the loans in question here involve the provision of a financial service as defined in the *ASIC Act* , s 12BAB. This made the *TPA* and *FTA* provisions irrelevant.

285 The provisions of the *ASIC Act* relied upon by ASIC, ss 12CB and 12CC were, at the relevant time, in the following terms:

" **12CB Unconscionable conduct**

(1) A person must not, in trade or commerce, in connection with the supply or possible supply of financial services to a person, engage in conduct that is, in all the circumstances, unconscionable.

(2) Without limiting the matters to which the Court may have regard for the purpose of determining whether a person (the *supplier*) has contravened subsection (1) in connection with the supply or possible supply of services to a person (the *consumer*), the Court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the consumer; and

(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; and

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

(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 services; and

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

(3) A person is not taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of financial services to another person merely because the person:

(a) institutes legal proceedings in relation to that supply or possible supply; or

(b) refers a dispute or claim in relation to that supply or possible supply to arbitration.

(4) For the purpose of determining whether a person has contravened subsection (1) in connection with the supply or possible supply of financial services to another person:

(a) the Court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the Court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(5) A reference in this section to financial services is a reference to financial services of a kind ordinarily acquired for personal, domestic or household use.

12CC Unconscionable conduct in business transactions

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of financial services (see subsection (6)) to another person (other than a listed public company); or

(b) the acquisition or possible acquisition of financial services (see subsection (7)) from another person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

(2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a person (the *supplier*) has contravened subsection (1) in connection with the supply or possible supply of financial services to another person (the *service recipient*), the Court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the service recipient; and

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

(c) whether the service recipient was able to understand any documents relating to the supply or possible supply of the financial services; and

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

(e) the amount for which, and the circumstances under which, the service recipient could have acquired identical or equivalent financial services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the service recipient was consistent with the supplier's conduct in similar transactions between the supplier and other like service recipients; and

(g) if the person is a corporation-the requirements of any applicable industry code (see subsection (11)); and

(h) the requirements of any other industry code (see subsection (11)), if the service recipient acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the service recipient:

(i) any intended conduct of the supplier that might affect the interests of the service recipient; and

(ii) any risks to the service recipient arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the service recipient); and

(j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the financial services with the service recipient; and

(k) the extent to which the supplier and the service recipient acted in good faith.

(3) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a person (the *acquirer*) has contravened subsection (1) in connection with the acquisition or possible acquisition of financial services from a person (the *business supplier*), the Court may have regard to:

(a) the relative strengths of the bargaining positions of the acquirer and the business supplier; and

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

(c) whether the business supplier was able to understand any documents relating to the acquisition or possible acquisition of the financial services; and

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

(e) the amount for which, and the circumstances in which, the business supplier could have supplied identical or equivalent financial services to a person other than the acquirer; and

(f) the extent to which the acquirer's conduct towards the business supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like business suppliers; and

(g) if the person is a corporation-the requirements of any applicable industry code (see subsection (11)); and

(h) the requirements of any other industry code (see subsection (11)), if the business supplier acted on the reasonable belief that the acquirer would comply with that code; and

(i) the extent to which the acquirer unreasonably failed to disclose to the business supplier:

(i) any intended conduct of the acquirer that might affect the interests of the business supplier; and

(ii) any risks to the business supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the business supplier); and

(j) the extent to which the acquirer was willing to negotiate the terms and conditions of any contract for the acquisition of the financial services with the business supplier; and

(k) the extent to which the acquirer and the business supplier acted in good faith.

(4) A person is not taken for the purposes of this section to engage in unconscionable conduct in connection with:

(a) the supply or possible supply of financial services to another person; or

(b) the acquisition or possible acquisition of financial services from another person; merely because the person institutes legal proceedings in relation to that supply, possible supply, acquisition or possible acquisition or refers a dispute or claim in relation to that supply, possible supply, acquisition or possible acquisition to arbitration.

(5) For the purpose of determining whether a person has contravened subsection (1) in connection with the supply, possible supply, acquisition, or possible acquisition of financial products:

(a) the Court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the Court may have regard to circumstances existing before the commencement of this section but not to conduct engaged in before that commencement.

(6) Subject to subsection (8), a reference in this section to the *supply or possible supply of financial services* is a reference to the supply or possible supply of financial services to a person whose acquisition or possible acquisition of the financial services is or would be for the purpose of trade or commerce.

(7) Subject to subsection (9), a reference in this section to the *acquisition or possible acquisition of financial services* is a reference to the acquisition or possible acquisition of financial services by a person whose acquisition or possible acquisition of the financial services is or would be for the purpose of trade or commerce.

(8) A reference in this section to the supply or possible supply of financial services does not include a reference to the supply or possible supply of financial services at a price in excess of $3,000,000, or such higher amount as is prescribed.

(9) A reference in this section to the acquisition or possible acquisition of financial services does not include a reference to the acquisition or possible acquisition of financial services at a price in excess of $3,000,000, or such higher amount as is prescribed.

(10) For the purposes of subsections (8) and (9):

(a) subject to paragraphs (b), (c), (d) and (e), the price for:

(i) the supply or possible supply of financial services to a person; or

(ii) the acquisition or possible acquisition of financial services by a person;

is taken to be the amount paid or payable by the person for the financial services; and

(b) if a person:

(i) was supplied financial services pursuant to a purchase; or

(ii) acquired financial services by way of purchase;

together with other property or services, or with both other property and services, and a specified price was not allocated to the services in the contract under which they were purchased, the price of the services is taken to have been:

(iii) the price at which, at the time of the supply or acquisition, the person could have purchased the services from the supplier without the other property or services; or

(iv) if, at the time of the purchase, the services were only available for purchase together with the other property or services but, at that time, services of the kind purchased were available for purchase from another supplier without other property or services-the lowest price at which the person could, at that time, reasonably have purchased services of that kind from another supplier; or

(v) if, at the time of the purchase, services of the kind purchased were not available for purchase from any supplier except together with other property or services-the value of the services at that time; and

(c) if a person is supplied with financial services otherwise than pursuant to a purchase, the price of the services is taken to have been:

(i) the price at which, at the time of the supply, the person could have purchased the services from the supplier; or

(ii) if, at the time of the supply, the services were not available for purchase from the supplier, or were available only together with other property or services, but, at that time, services of the kind supplied were available for purchase from another supplier-the lowest price at which the person could, at that time, reasonably have purchased services of that kind from another supplier; or

(iii) if services of the kind supplied were not available, at the time of the supply, for purchase from any supplier, or were not available except together with other property or services-the value of the services at that time; and

(d) without limiting by implication the meaning of the expression *services* in subsection 12BA(1):

(i) the obtaining of credit by a person in connection with the supply of financial services to the person is taken to be the acquisition by the person of a service; and

(ii) any amount by which the amount paid or payable by the person for the services is increased by reason of the person's so obtaining credit is taken to be paid or payable by the person for that service; and

(e) the price for the supply or possible supply, or the acquisition or possible acquisition, of services comprising or including a loan or loan facility is taken to include the capital value of the loan or loan facility.

(11) In this section:

applicable industry code , in relation to a corporation, has the same meaning as it has in subsection 51ACA(1) of the *Trade Practices Act 1974* .

industry code has the same meaning as it has in subsection 51ACA(1) of the *Trade Practices Act 1974* .

listed public company has the same meaning as it has in the Income Tax Assessment Act 1997."

Those provisions were relied upon in the alternative. Section 12CB applied only in circumstances set out in s 12CB(5), being supply of financial services of a kind ordinarily acquired for personal, domestic or household use. If the loans did not fit that description s 12CC applied, but only if the supply of the financial services was to someone whose acquisition or possible acquisition of the financial services is or would be for the purpose of trade or commerce: s 12CC(6). ASIC and the respondents submitted that one or other of s 12CB or 12CC applied. The appellants submitted that neither applied and the only provision that was operative was s 12CA which required unconscionability "within the meaning of the unwritten law". This would have taken the matter back to equitable principle. Only faint reliance was made by ASIC or the respondents upon s 12CA in submissions.

286 It is unnecessary to resolve finally the question as to the operation of either s 12CB or s 12CC because, in my view, the conduct of Tonto HL, and through it the lender, cannot be described as "unconscionable". Section 12CA also therefore should not apply.

287 The conduct of Streetwise was undoubtedly unconscionable. Little time needs to be spent reaching that conclusion. If the correct view were that S Loans was the agent of Tonto HL equally little time would be required to reach the

conclusion that Tonto HL, and through it the lender, would have had its conduct so characterised. No so-called fraud exemption would operate here. This would be the attribution of conduct from an agent to a principal, on this hypothesis, within the scope of the agency. That, however, is not the position. The attribution of corporate state of mind by agency is dealt with in the *ASIC Act* , s 12GH. That provision works on the premise of the existence of a "director, employee or agent" of the body corporate. There was no argument that "agent" here was different to that found at general law.

288 The person whose conduct is to be characterised as unconscionable is Tonto HL and through it the lenders. It is important to bear this in mind. It is not a matter of concluding that a contract induced by fraud of Streetwise is unjust and assessing whether in all the circumstances that unjustness should be seen to taint the agreement such that relief should flow against the lenders. It is the conduct of the lenders, through Tonto HL that is to be attributed with the characterisation as unconscionable. The submissions of ASIC and the respondents recognised this. This unconscionability could, of course, arise from the actions and knowledge of the lenders. Notice of the conduct of Streetwise may well have led to the conclusion that Tonto HL and the lender acted unconscionably. That, however, was not shown.

289 The notion of unconscionable in this context finds its origin in the general law, equity and concepts underpinning provisions such as articles 2-302 and 5-108 of the Uniform Commercial Code and the German Civil Code (BGB) para 138, the *Consumer Protection Act 1967* (British Columbia), s 18, the *Unconscionable Transactions Relief Act 1990* (Ontario), s 2, various money lenders legislation, hire purchase legislation, the *Industrial Arbitration Act 1940* (NSW), s 88F and other particular legislation: see generally Peden *The Law of Unjust Contracts* at 3-81 and the Peden Report.

290 ASIC pressed the argument that the meaning of "unconscionable" in the *ASIC Act* should take its content in part from provisions dealing with ASIC's functions such as ss 1(2) and s 12A. One should be cautious about acceding to a submission that would see subtly different meanings given to cognate provisions in legislation such as the *ASIC Act* and the *TPA* (and *FTA*). It suffices to say that the context of "unconscionable" in the *ASIC Act* does not give it a distinct or different meaning from its equivalent provisions in the *TPA* or *FTA* . All three sets of provisions have similar purposes in the protection of consumers and the promotion of just and fair markets.

291 Aspects of the content of the word "unconscionable" include the following: the conduct must demonstrate a high level of moral obloquy on the part of the person said to have acted unconscionably: *Attorney General of New South Wales v World Best Holdings Ltd* [2005] NSWCA 261; 63 NSWLR 557 at 583 [121]; the conduct must be irreconcilable with what is right or reasonable: *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226; 148 FCR 132 at 140 [30]; *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* [2002] FCA 62; 117 FCR 301 at 316-317 [44]; *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 262; factors similar to those that are relevant to the *CRA* are relevant: *Spina v Permanent Custodians Ltd* [2009] NSWCA 206 at [124]; the concept of unconscionable in this context is wider than the general law and the provisions are intended to build on and not be constrained by cases at general law and equity: *National Exchange* at 140 [30]; the statutory provisions focus on the conduct of the person said to have acted unconscionably: *National Exchange* at 143 [44]. It is neither possible nor desirable to provide a comprehensive definition. The range of conduct is wide and can include bullying and thuggish behaviour, undue pressure and unfair tactics, taking advantage of vulnerability or lack of understanding, trickery or misleading conduct. A finding requires an examination of all the circumstances.

292 I do not propose to rehearse once again the totality of the conduct. Streetwise was not Tonto HL's agent. That is of great importance in this enquiry. Not only does it remove attribution of the conduct of Streetwise and its knowledge, but it also removes the finding of asset lending in the way his Honour found it. There remain the breaches of the guidelines and the lack of attention and care to serviceability and suitability based upon primary reliance upon security. There also remains the objective risk that existed by the employment of a company such as Streetwise together with the additional arrangement of not approaching borrowers. Whilst these are facts which all amount to circumstances and conduct which, for the reasons I have already given, are sufficient to justify relief being given against the lenders under the *CRA* , they do not in my view amount to unconscionability. There is no real suggestion in the argument or the evidence that those at Tonto HL understood the actuality of the trickery and lies that were being undertaken by Streetwise or had any notice of them. I do not think that the structural creation of risk and the heightening of that risk by the arrangements with Streetwise meet the notion of moral obloquy required. The true facts are now known, but in circumstances where those at Tonto HL were innocent of the conduct at the time it is not unconscionable to be seeking to maintain the transaction.

293 This conclusion is an evaluative one. The respondents and ASIC pressed the view strongly that the circumstances that lead (even without a finding of agency) to the conclusion of the responsibility of Tonto HL and the lenders for

what happened so as to invoke the *CRA* equally lead to a conclusion as to unconscionability. I cannot agree. Spigelman CJ in *World Best Holdings* at 583 [121] referred to a "high level" of moral obloquy. Whether that is too stringent and whether "significant" or "real" may be preferable need not be decided. What is required is some degree of moral tainting in the transaction of a kind that permits the opprobrium of unconscionability to characterise the conduct of the party. Here, without a finding of some knowledge or complicity, the circumstances do not reach that level.

294 If I be wrong and if the conduct of Tonto HL and the lenders was unconscionable, the flexible relief provided for by the *ASIC Act* , ss 12GD and 12GM would lead to no different relief than I would give under the *CRA* .

295 In my view relief should not be given on the basis of unconscionability.

296 For the above reasons it is unnecessary to deal with whether s 12CB or s 12CC applied. The question as to how one characterises whether financial services (being here the provision of a "credit facility" within Reg 2B of the *Australian Securities and Investments Commission Regulations 2001* (Cth) (as the provision of credit or a mortgage that secures obligations under a credit contract) and thus a "credit facility" for s 12BAA(7)(k) and through it a "financial product" for ss 5(1) and 12BA(1)) are ordinarily acquired for personal, domestic or household use is not straightforward. It is not necessary to examine whether the Full Court of the Federal Court in *Leveraged Equities Ltd v Goodridge* [2011] FCAFC 3; 191 FCR 71 at 121 [416] was correct in examining the matter from the perspective of the predominant business purpose of the loan. If a person sought to finance a business in trading in derivatives by taking out a 20 year standard home loan it would be difficult to conclude otherwise than that the credit facility or financial product fell within s 12CB(5). Here the "products" were so-called "LoDoc" loans for the purchase or refinance of a home or an investment property or to access equity for personal or investment reasons. Judicial notice can be taken of the wide investment in the community for the provision of retirement saving. Such borrowing for such purposes is not infrequently undertaken for the personal use of saving for one's retirement. To a degree that is a business use; to a degree it is a personal or household use - for personal savings.

297 In any analysis of this question, the careful and helpful judgment of Young J in *Bunnings Group Limited v Laminex Group Limited* [2006] FCA 682; 153 FCR 479 at 496-507 is of great assistance. Given the place of this issue in the resolution of this dispute, it is unnecessary to review in detail his Honour's analysis or reach any final view. It is sufficient to express my general agreement with it.

298 Looking here at the characteristics of this so-called financial product, were it necessary to decide, I would conclude that "ordinarily" such loans are used for the personal use of investment saving: cf *Hygienic Lily Ltd v Deputy Federal Commissioner of Taxation* (1987) 13 FCR 396 at 399; *Bunnings v Laminex* at 502-503. One can see this from the nature and characteristics of the product and the type of small business person that the guidelines reveal might well be applying for the loan.

Orders

299 Thus the orders that I would make are as follows:

(1) As to appeal number 2009/00298570 (formerly 40454 of 2009) being the Tavares and Rowe appeal:

(a) Allow the appeal in part.

(b) Set aside order 2(b) made by the Supreme Court on 26 February 2010 (as set out in [448] of the primary judge's reasons) and in lieu thereof order that the mortgagee Tonto Home Loans Australia Pty Ltd deliver up to Jose De Carvalho E Rego Tavares and Kim Lee-Anne Rowe a registrable discharge of mortgage, but only on condition that Mr Tavares and Ms Rowe pay or have paid to the mortgagee or at its direction the sums referred to in order 4 made by the Supreme Court on 26 February 2010.

(c) The appellant pay the respondents' costs of the appeal.

(2) As to appeal number 2009/00298571 (previously 40455 of 2009) being the Di Benedetto appeal:

(a) Allow the appeal in part.

(b) Set aside order 2(b) made by the Supreme Court on 26 February 2010 (as set out in [447] of the primary judge's reasons) and in lieu thereof order that the mortgagee, Permanent Trustee Company Limited ("Permanent"), or to the extent that it has acceded to that company's rights, FirstMac Limited, deliver up to Lawrence Di Benedetto and Maria Di Benedetto a registrable discharge of mortgage.

(c) The appellant pay the respondents' costs of the appeal.

(3) As to appeal number 2009/00298572 (previously 40456 of 2009) being the O'Donnell appeal:

(a) Allow the appeal in part.

(b) Set aside orders 2 and 5 made by the Supreme Court on 26 February 2010 (as set out in [446] of the primary judge's reasons) and in lieu thereof order:

(i) The loan agreement dated 10 January 2003 and made between Permanent as lender, or to the extent that it has acceded to that company's rights, FirstMac Limited, and Gillian O'Donnell and John Robert O'Donnell as borrowers be varied to reduce the principal loan from $500,000 to $125,000 such variation to take effect from 1 August 2005, with the effect that thereafter the responsibility for payment of interest and principal be referable to a principal sum of $125,000.

(ii) The security provided by registered mortgage numbered 9386484P between Mr and Mrs O'Donnell and Permanent, or to the extent that it has acceded to Permanent's rights, FirstMac Limited, be limited in effect accordingly such that upon payment of the sum or sums sufficient to repay said loan as varied the O'Donnells be entitled to receipt of a registrable discharge of mortgage.

(iii) The plaintiff pay 75 per cent of the defendants'/cross-claimants' costs of the proceedings.

(c) The appellant pay 75 per cent of the respondents' costs of the appeal.

300 I have made the appellant responsible for three quarters of the costs of the proceedings and the appeal because I do not think that the costs order can be separated from relief of the injustice contemplated by s 7(1) of the *CRA.* The variation to the loan agreement leaving the O'Donnells to fund 25 per cent of the loan achieves justice in my view to both the lender and the O'Donnells. The costs order should reflect that proportion. The parties have not, however, been heard on this aspect of costs and I would give the parties an opportunity to seek a different order.

301 There may also be a need for particular variations of the orders to meet exigencies of circumstances or the documentation. Further, the leaving in place of the orders of the primary judge avoiding the loan agreements might be the subject of slight variation to ensure (as no doubt was intended by the primary judge) that Streetwise not benefit in any way from that avoidance.

302 The parties should apply promptly (within 14 days) by notice of motion for any such variations.

303 **CAMPBELL JA:** I agree with the reasons of Allsop P. I add remarks concerning one topic.

304 It is implicit in the President's reasoning at [223] that, insofar as it was relevant to enquire whether the fraud of Streetwise was reasonably foreseeable, the appropriate enquiry was whether that fraud was reasonably foreseeable *by the respondents* . I shall explain why that way of approaching the matter is correct.

305 Presently relevant parts of the *Contracts Review Act* are:

> "7(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,
>
> ...
>
> ...
>
> 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."

306 The wording of s 9(4) does not say by whom circumstances are to be *"not reasonably foreseeable at the time the contract was made"*, if those circumstances are to be ignored by the court.

307 There are textual indications in s 9 that what is meant is *"not reasonably foreseeable by the party to the contract whose conduct and circumstances is being considered"*. Section 9(2)(a) is concerned with the position in which the individual parties to the contract find themselves. The same can be said of each of s 9(2)(b), (c), (d), (e) and (f). Concerning s 9(2)(g), whether the contract is wholly or partly in writing, and the physical form of the contract, are objective matters. However, the intelligibility of the language in which it is expressed can include matters relating to the individual position of a party - a contract written in the plainest of English will not be understood, from the writing alone, by someone who does not read English, or does not read English sufficiently well. Section 9(2)(h), (i) and (j) pay particular attention to the position of the party to the contract who is seeking relief. Section 9(2)(k) requires the court to pay attention to the circumstances of the individual parties to the contract. After all those matters that are dependent upon the particular position of parties to the contract, it would be in keeping that s 9(4) similarly decides what is *"reasonably foreseeable"* by reference to the position of the parties to the contract.

308 Admittedly, there are legal contexts in which *"reasonably foreseeable"* mean reasonably foreseeable by the notional ordinary reasonable person. However, importing that shade of meaning into s 9(4) would not advance the purposes of the *Contracts Review Act*. One of the purposes of the *Contracts Review Act* is to provide some measure of protection to the vulnerable, the naive and the unintelligent. If the term *"reasonably foreseeable"* in s 9(4) was taken to mean reasonably foreseeable by the notional ordinary reasonable person, the Act would be hobbled. This is because injustice arising from circumstances that were reasonably foreseeable by a notional reasonable person but that were not reasonably foreseeable by a person with the limitations that a particular plaintiff has, would be excluded from the balancing exercise that is involved in deciding whether a contract is unjust. Conversely, if either a plaintiff, or a defendant, has particular sophistication or knowledge that makes a consequence reasonably foreseeable to someone in their situation, that consequence can be taken into account in the balancing exercise even if it would not be reasonably foreseeable by the notional ordinary reasonable person. The purpose of s 9(4) is, after all, to identify circumstances that the court is *forbidden* to take into account in deciding whether a contract is unjust. The broader purposes of the Act as a whole are more effectively

advanced by limiting the matters that the Court is obliged to ignore.

309 In the context in which [223] appeared, the topic under discussion was whether the fraud of Streetwise should have been left out of the balancing exercise because it is reasonably foreseeable that handing over signed documents containing blanks might lead to fraud. Thus, in that context, what was relevant was what was reasonably foreseeable to the respondents.

310 Another aspect of this case concerned whether the fraud of Streetwise was reasonably foreseeable by Tonto HL in its position of running a substantial lending business using a structure that involved deliberately keeping itself out of communication with potential borrowers. To such a person the risk was reasonably foreseeable, and thus appropriately entered into the balancing exercise.

311 I agree with the orders proposed by Allsop P.

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Decision last updated: 23 December 2011