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Supreme Court of Victoria - Court of Appeal

Violet Homes Loans Pty Ltd v Schmidt & Anor [2013] VSCA 56 (25 March 2013)

Last Updated: 26 March 2013

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2010 0093

VIOLET HOME LOANS PTY LTD
(ACN 120 045 025) — Appellant

v

MANFRED PETER SCHMIDT — First Respondent

and

PERPETUAL TRUSTEES AUSTRALIA LIMITED (ACN
000 431 827) — Second Respondent

JUDGES	WARREN CJ, CAVANOUGH and FERGUSON AJA
WHERE HELD	MELBOURNE
DATE OF HEARING	15 October 2012
DATE OF JUDGMENT	25 March 2013
MEDIUM NEUTRAL CITATION	[2013] VSCA 56
JUDGMENT APPEALED FROM	*Perpetual Trustees Aust Ltd v Schmidt & Anor* [2010] VSC 67 (J Forrest J)

UNCONSCIONABLE CONDUCT – Mortgage originator acting as agent for lender – Fraudster supplying false application and income declaration for borrower to finance broker who submitted documents to mortgage originator and fund manager – Borrower not consciously responsible for inclusion of false information – Application and declaration contained different income figures for borrower and did not include ABN – Mortgage originator asked for ABN and stated that income figures in forms needed to be the same – Application and declaration re-submitted with reduced income figure below threshold requiring ABN – No direct contact between borrower and finance broker, mortgage originator, fund manager or lender – Employee of mortgage originator who processed application available but not called – Conduct of mortgage originator unconscionable – Orders against lender and mortgage originator accordingly – *Australian Securities and Investments Commission Act 2001* (Cth) s 12CB(1); *Tonto Home Loans Australia Pty Ltd v Tavares* (2011) 15 BPR 29 considered.

FINANCIAL SERVICES – Supply of financial services to a consumer – Loan of type used for personal investment - Services of a kind ordinarily acquired for personal, domestic or household use – *Australian Securities and Investments Commission Act 2001* (Cth) s 12CB(5).

Appearances:	Counsel	Solicitors
For the Appellant	Mr N Lucarelli QC with Mr P Bravender-Coyle	Mingos Kay Lawyers
For the First Respondent	Dr K P Hanscombe SC with Mr S E Marantelli	Wisewould Mahony
For the Second Respondent	Mr R Moore	HWL Ebsworth Lawyers

WARREN CJ

CAVANOUGH AJA

FERGUSON AJA:

1 In 2004 Manfred Schmidt obtained a line of credit facility with a limit of $190,000 from Perpetual Trustees Australia Limited and gave a mortgage over his home as security for the facility. Violet Home Loans Australia Pty Ltd ('Violet') was the mortgage originator and manager and processed the loan application on behalf of Perpetual. Mr Schmidt borrowed the money to invest in what he thought were property developments in Carrum. He was duped into doing so by Mr Ian Maddocks, who has since been convicted of fraud. Most of the money advanced by Perpetual to Mr Schmidt was paid directly or indirectly to Mr Maddocks and was lost. The amount owing on the loan is now in excess of $450,000. In essence, the question is who should bear the loss — Mr Schmidt or the appellant, Violet Home Loans Pty Ltd ('VHL'), that company effectively having indemnified Perpetual for any loss sustained by reason of Violet's conduct.

2 The trial judge decided this question in favour of Mr Schmidt. He held that Violet acted unconscionably and in breach of the general law, s 51AC of the Trade Practices Act 1974 (Cth) ('TPA') and s 12CB of the Australian Securities and Investments Commission Act 2001 (Cth) ('ASIC Act').[1] The judge determined that the loan contract and the mortgage should be set aside on condition that Mr Schmidt was required to repay to Perpetual $85,269 plus interest. That represented the amount that Mr Schmidt owed on an existing Bank of Melbourne mortgage[2] that was discharged at the time that the Perpetual loan was advanced. An order that VHL indemnify Perpetual was also made.[3]

3 VHL has appealed from the orders that the trial judge made. Perpetual has not appealed, but it supports Violet's appeal.

4 The principal issue in the appeal is whether Violet's conduct in dealing with Mr Schmidt and his application for finance was unconscionable within the meaning of the relevant statutory provisions or at general law.

5 If Violet's conduct was unconscionable in any of those senses, there is a subsidiary issue as to whether Mr Schmidt should nevertheless be required, as a condition of relief, to repay (with interest) two additional components of the monies advanced by Perpetual, being a sum of $17,000 paid in the first instance to Mr Schmidt himself and a sum of $6,500 paid to a company called Able Financial Solutions Pty Ltd.

6 We have reached the conclusion that the judge did not err insofar as he found that Violet's conduct was unconscionable within the meaning of s 12CB of the ASIC Act. That is sufficient to uphold the substance of the judge's order. We need not and do not decide whether his Honour was also correct in relation to the applicability of s 51AC of the TPA or in relation to unconscionability at general law. Further, in our opinion, there is insufficient reason to disturb the trial judge's orders in relation to the amounts paid to Mr Schmidt and to Able Financial Solutions Pty Ltd. The appeal should be dismissed. Our reasons are set out below.

The facts

7 Although the notice of appeal includes several grounds complaining that there was 'no evidence' for a particular finding by the trial judge, or that a particular finding was against the evidence or the weight of the evidence, we understand that the judge's findings of primary fact are not seriously in dispute and that, in the end, the appellant's real complaint is about the trial judge's characterisation of the facts as a whole. Hence we have based the following account of the relevant facts mainly on the trial judge's findings of primary fact. At the same time we acknowledge that many of the facts relating to Mr Schmidt personally were not actually known to Violet at the relevant time.

8 Mr Schmidt was born in Austria in December 1939. He did not have much of a formal education. He attended primary school followed by trade school. After completing an apprenticeship as a printer, he undertook national service. When he was 20, he came to Australia under the assisted migration programme. He had various jobs but spent most of his working life as a printer. He retired in 1999 and at all relevant times thereafter he was a pensioner receiving Commonwealth benefits.

9 Mr Schmidt can read and write English although it is not his first language. Indeed the trial judge, having heard Mr Schmidt give evidence, said that Mr Schmidt had 'only a rudimentary knowledge of the English language'. On the other hand, Mr Schmidt was able to complete applications for loans which he had obtained to assist him with the purchase of four homes. At the time of trial, he lived in a house in Carrum that he had purchased in late 2000.

10 Mr Schmidt had had an interest in a fund managed by Perpetual. He had also acquired some Telstra shares in the initial public offering when that company was floated and he continued to own at least some of those shares at the relevant time. Before he moved to Carrum in 2000, he sought financial advice from a Mr Huxtable from time to time. After moving, he did not consult Mr Huxtable professionally, although he did continue to have some intermittent informal contact with Mr Huxtable, including during 2003 and 2004. Mr Schmidt did not obtain advice on the matter of the investment with Mr Maddocks, or on the matter of the loan from Perpetual, from Mr Huxtable or from any lawyer or any accountant.

11 Mr Schmidt's Commonwealth benefits were deposited into an account with the Bank of Melbourne. He also had a line of credit from the bank with a limit of $85,000 in an Assetbuilder Loan account. The bank held a mortgage over his home as security for the line of credit.

12 In early May 2003, Mr Schmidt saw an advertisement in his local paper offering an opportunity to participate in Asset Equity Group's Property Syndicate No. 4. The advertisement stated that an investment of $40,000 would lead to a net return of $80,000 within 12 months. Mr Schmidt rang the telephone number that was included in the advertisement and spoke to Mr Maddocks. Over the month that followed, Mr Schmidt invested $80,000 in syndicates 4 and 5. Mr Schmidt used the funds from his Assetbuilder Loan account with the Bank of Melbourne.

13 From that time on, Mr Maddocks visited Mr Schmidt regularly. In early 2004, he persuaded Mr Schmidt to make further investments in the property syndicate and suggested that Mr Schmidt approach his manager at the Bank of Melbourne for a loan. The bank told Mr Schmidt that he could not borrow the money for this further investment

because he was a pensioner and did not have the capacity to repay. In those circumstances, Mr Maddocks promised to arrange a loan for Mr Schmidt. That is what happened.

14 The loan was to come from Perpetual, which was the trustee of an investment fund called the Puma Fund. In March 2004 Mr Maddocks prepared a form of loan application and an income declaration for Mr Schmidt to sign. Both documents contained false information. In the loan application, Mr Schmidt was described as a self-employed domestic painter. In truth, he was receiving Commonwealth benefits. His employer was described as 'Schmidt Painting Service' when no such organisation ever existed. He was said to have been employed in the fictitious business for 25 years in full time employment. His annual income was stated as $75,000 in the loan application and as $65,000 in the income declaration. The person named as the witness to Mr Schmidt's signature, Mr Andrew Paranavitana, did not witness the document. While Mr Schmidt had provided some personal information to Mr Maddocks in connection with the proposal to borrow from Perpetual, the trial judge found, and it is no longer in dispute, that Mr Schmidt was not knowingly responsible for the inclusion of the false information in the documents. On the other hand, Mr Schmidt signed the documents without reading them.

15 For the purposes of the loan application, Mr Maddocks also obtained from Mr Schmidt and provided to a finance broker, Medallion Finance Concepts Pty Ltd ('Medallion'), nine statements for Mr Schmidt's Bank of Melbourne Assetbuilder Loan account. The bank statements disclosed that there were no deposits to the account and that the interest on the outstanding balance from time to time was simply added to the total outstanding. This was possible because the total debt never went above the loan limit of $85,000.

16 The completed forms and the bank statements were provided by Mr Maddocks to Medallion, for onforwarding to Violet. Mr Maddocks had a contact at Medallion, being Mr Andrew Paranavitana, whose name had been falsely attached to the loan application as a witness.

17 On 27 March 2004 Medallion sent the completed forms and the bank statements to Violet under cover of a 'lodgement advice' which recorded that the loan amount was $190,000 and which stated:

> This loan was sent to us through a business partner at another company who deals with business finance. A disbursement authority for their company (Asset Equity Group) has been included instead of ours. Let me know if you can pay into their account or if our one is needed.

The 'business partner' was likely a reference to the fraudster, Mr Maddocks.

18 At Violet, the documents were received by Ms Tammi Bonnici, who was one of Violet's credit officers. She undertook the processing of the application. In early April 2004 she sent an email to Mr Paranavitana, of Medallion, as follows:

> To: Andrew Paranavitana
> Subject: Schmidt
>
> Good Morning Andrew
>
> Loan look okay, just need a couple of bits of information

1. Craa showing that clients has no history and we have just created a new file, please confirm that client has had no name change
2. Term that client has been self employed (This has not been filled in on application)

3. Client earning more than $50k p/a please supply a ABN

4. LoDoc Dec saying client earns $65k application saying $75k these need to be the same, please have this amended so both read the same income
5. Need copy of back of client D/License as the front is showing the incorrect address. D/L must have the correct address on it

Once the above are completed I can send to LMI for cond approval
Many Thanks.

19 Mr Paranavitana responded:

Hi Tammy,
Hope you had a good weekend.

Regarding Schmidt:

- Client has had no name change

- Has been self employed for 25 years

- Lodoc Declaration and income amount on application are both being changed to $49K as client does not have an ABN

- All other docs and additional info will be sent by tomorrow at the latest.

Apologies for the delay with this file, we have no direct contact with the client as the file is filtered through a third party.

Kind Regards,

Andrew.

20 Mr Maddocks then set about preparing an amended loan application and an amended income declaration for Mr Schmidt to sign. Both showed his income as $49,000. At the time, a taxpayer was required to be registered under the A New Tax System (Goods and Services Tax) Act 1999 (Cth) if they had a business with an annual turnover of $50,000 or more. Again, Mr Schmidt did not read either document. He did not know how the documents differed from their predecessors. He simply accepted Mr Maddocks' statement that the previous documents had been wrongly prepared and that he needed to sign the new documents. Shortly after that, the reexecuted documents were sent by Medallion to Violet.

21 Ms Bonnici completed the paperwork for processing the loan. She included in a document headed 'Loan Comments' the following:

Client has refinancing from BOM, current loan has been paid in a good manner — Client is self-employed as a painter for the last five years — Craa showing no credit history — Client would like extra funds for future investments.

Ms Bonnici also signed a completed 'Puma Fastrack Approval Checklist'. The checklist included a number of questions. Amongst other things, the completed checklist indicated that:

the purpose of the loan was not for construction, business or investment but rather was for the purpose of refinance;
there was sufficient evidence to show that Mr Schmidt had funds to complete the transaction;
Mr Schmidt was self-employed and had been so for at least two years.
22 The completed paperwork, including the checklist, the loan application, the income declaration and other documents, were then sent to Macquarie Securitisation Limited ('MSL'). MSL had been appointed by Perpetual to manage the Puma Fund. The loan was approved by MSL. The loan contract with Perpetual was signed by Mr Schmidt and settlement took place on 19 May 2004. In round terms, the money was disbursed as follows:

Repayment of the Assetbuilder Loan $85,000

Asset Equity Group[4] $29,000

Members Benefit[5] $50,000

Mr Schmidt $17,000

Able Financial Services Pty Ltd approximately $ 6,500

The balance went to legal fees, stamp duty and disbursements.

23 At no time throughout the process did anyone from Perpetual, MSL, Violet or Medallion deal directly with Mr Schmidt.

24 In July 2003, MSL had issued a document in relation to the Puma Programme entitled 'Retail Programme Parameters'. It included a number of guidelines that Violet was obliged to follow in assessing a borrower's application.[6] The guidelines stated that MSL and Perpetual would be relying on Violet and that Violet would be required to indemnify them against any loss or damage they might suffer 'as a result of an Application or the documentation accompanying an Application being untrue or misleading'. The guidelines further stated that, as a result, Violet 'must ensure that all information disclosed on an Application and on all accompanying documentation is genuine and correct'.[7] The guidelines then imposed a requirement that Violet:

> Personally interview and identify each Borrower ... in respect of an Application in accordance with the Identification Method as per **Attachment 5**.

25 Attachment 5 was headed 'AUSTRAC Section 21 Account Holder Identification Form'. It required completion of the name of the person to be identified, details of and a statement by an acceptable referee (who must have known the person for at least 12 months) and a list of the documents examined by the referee for identification (including birth certificate and passport).

Unconscionability

26 Mr Schmidt relied on s 12CB of the ASIC Act and s 51AC of the TPA as well as unconscionability at general law.[8]

27 At the relevant time, s 12CB of the ASIC Act provided (so far as pertinent):

> (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.

...

(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.

28 Section 51AC of the TPA prohibited unconscionable conduct in business transactions. So far as relevant, s 51AC(1) provided:

A corporation must not, in trade or commerce, in connection with:
(a) the supply or possible supply of goods or services to a person (other than a listed public company) ...

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

29 Section 51AC(3) set out, non-exhaustively, matters that a court may have regard to when determining whether the conduct was unconscionable. The first five matters replicated the matters referred to in s12CB(2) of the ASIC Act. The following additional matters were included in s 51AC(3):

(f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers; and
(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the business consumer 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 business consumer:

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

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

(j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; and

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

30 Section 51AC(7) provided:

> A reference in this section to the supply or possible supply of goods or services is a reference to the supply or possible supply of goods or services to a person whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce.

Reasoning of the trial judge

31 The judge found that Violet was acting as Perpetual's agent in respect of the loan. That issue was hotly contested at trial but the judge's finding is not challenged on this appeal.[9]

32 The trial judge was not satisfied that Mr Schmidt suffered from any linguistic, educational or intellectual disability in respect of which Violet took advantage.[10] His Honour found that, to a certain extent, Mr Schmidt was capable of protecting his own interests.[11] However, the judge observed that Mr Schmidt was unsophisticated, naïve and gullible.[12] He also found that Violet participated in the 'fudging' of the figures as to income such that it could have no confidence in the assertion that he was a self-employed painter, particularly one who was in a position to service the loan from his income.[13] The judge therefore treated the loan to Mr Schmidt as asset based lending;[14] that is, that the loan was not based on Mr Schmidt's ability to repay but on the security of his home which was his only substantial asset. The judge noted that asset based lending of itself was not sufficient to make the conduct of the lender unconscionable.[15] Rather, his Honour observed that there must be some other factor that makes the conduct of the lender morally repugnant.[16] The judge took into account the following matters in determining that the conduct of Violet was unconscionable:

(a) the irregularities in the income declaration and the loan application;

(b) the lack of an ABN;

(c) that Violet knew that Mr Schmidt was in his mid sixties, close to the community retirement age and that his home was his only substantial asset;

(d) that there must have been significant doubt as to whether Mr Schmidt had any capacity to repay the loan particularly when Violet knew from the Assetbuilder Loan bank statements that his repayments of that loan came out of the capital remaining in that account rather than from other sources (such as income from self-employment or investments);

(e) that Ms Bonnici knew that the figures were fudged and chose to make no further inquiry – she submitted the documents to MSL with no qualifying statement or observation concerning the internal discrepancies in the first

set of figures included in the loan application and income declaration and Ms Bonnici was not called to give evidence to explain why she did not do this;

(f) that Violet knew that as part of the arrangements with MSL and Perpetual, it was, at the least, contemplated that a personal interview of the borrower was to be undertaken to determine not only the existence of the borrower and their identity, but also in the broadest sense to confirm some of the details in the loan application. Not only was this not done, it was known to Violet that it had not performed the check, and on the basis of the evidence available, it could reasonably have concluded that Medallion had not carried out any such interview. Only a few questions — indeed, perhaps only one — directed to Mr Schmidt's occupation and source of income would inevitably have led to the conclusion that his loan application details were false.[17]

33 The judge accepted that Mr Schmidt:

(a) knew that he was signing a mortgage;

(b) understood that his house was security for the loan;

(c) knew that loan funds were to be paid out as he intended;

(d) was not in a situation in which he was in desperate financial need; and

(e) made his decision without seeking any independent financial advice, although he had sought advice in the past.

34 However, the judge formed the view that Mr Schmidt was vulnerable in the sense that he was an unsophisticated and naïve man who had little financial nous.

35 The judge's conclusion was that notwithstanding the matters set out in [33], Violet's conduct was unconscionable in breach of the general law, s 51AC of the TPA and s 12CB of th[18]ASIC Act.18 The judge said:

> Violet's actions in processing the loan in the knowledge of the various factors I have referred to were deliberate and attended by moral fault and lack of moral responsibility. By, at the least, turning a blind eye to the irregularities in the loan application and the income declaration and ensuring that the supplementary information was massaged, Violet did not act in good faith. Rather than just accept the massaged supplementary documentation, it could have, conscious of the inconsistency between the amounts in the three forms ($69,000, $75,000 and then $49,000), asked for further proof of the income of Mr Schmidt. This would undoubtedly have led to the rejection of the loan, as would a personal interview, which would have ascertained that all the figures provided and relevant to income were patent nonsense.[19]

36 The judge held that Mr Schmidt should be relieved of the requirement to repay any money to Perpetual other than the amount that was advanced to repay the debt owing on the Assetbuilder Loan account.

Grounds of appeal

37 There are 26 extant grounds of appeal.[20] They may be dealt with under six headings. First, whether Violet's conduct could be unconscionable within the meaning of s 12CB(1) of the ASIC Act or s 51AC(1) of the TPA when Mr Schmidt's position and his own conduct are considered. Secondly, whether Violet's conduct was unconscionable for the purposes of either of the relevant statutory provisions having regard to all relevant circumstances, including the matters dealt with under the first heading. Thirdly, whether the financial services

acquired by Mr Schmidt were of a kind ordinarily acquired for personal, domestic or household use within the meaning of s 12CB(5) of the ASIC Act. Fourthly, whether the services were acquired for the purpose of trade and commerce within the meaning of s 51AC(7) of the TPA. Fifthly, whether the conduct of Violet was unconscionable in breach of the general law. Lastly, whether in any event Mr Schmidt ought to be required to repay to Perpetual amounts paid to him and Able Financial Solutions Pty Ltd.

Whether Violet's conduct was unconscionable when the position and conduct of Mr Schmidt is considered: grounds 1, 2, 3, 11, 12, 19–22

38 The nub of these grounds of appeal was that, rather than being unsophisticated and naïve, Mr Schmidt had investment experience and knew what he was doing when he entered into the loan; that he provided much of the information that went into the application; that he signed it and the loan documents without reading them; and that he could have obtained financial advice but he chose not to do so. Counsel for VHL submitted that, if not reckless, Mr Schmidt's conduct was careless and unreasonable. VHL relied on the following facts about Mr Schmidt:

(a) he had purchased four residential properties and sold three of them (and borrowed money for that purpose);

(b) he held, purchased and sold Telstra shares;

(c) he held units in a Perpetual managed investment;

(d) he had a share portfolio and bought and sold shares;

(e) he had previously used Mr Huxtable as his financial advisor and had maintained contact with Mr Huxtable in 2003 and 2004;

(f) he had decided not to seek Mr Huxtable's advice as to the investments for which he was seeking to borrow money;

(g) he had invested in property developments (promoted to him by Mr Maddocks) and had borrowed money for that purpose;

(h) he had been told by the bank that he could not borrow the money because he did not have the capacity to repay such a loan;

(i) he signed the loan application and income declaration without reading them and placed them into the hands of Mr Maddocks who he knew was raising money on the basis of them.

39 VHL submitted that Mr Schmidt was anxious to sign the loan application to enable him to invest with Mr Maddocks and make a good return; that he signed the loan application which verified the accuracy of the information provided; and that he was not a surety but rather was to be the beneficiary of the advances.

40 We do not accept that the trial judge overlooked or failed to take into account any of these matters. Indeed his Honour said:

> I accept that Mr Schmidt knew that he was signing a mortgage. He understood that his house was security for the loan. He also knew that loan funds were to be paid out as he intended. As counsel for VHL and Perpetual emphasised it was Maddocks who was directly responsible for Mr Schmidt's loss. I also accept that this was not a situation in which Mr Schmidt was in desperate financial need, but rather, it was his decision without seeking any independent advice (i.e. from a financial advisor as he had in the past) to invest in the ill-fated investment scheme, although given his age and position,

> one should not be too critical of him endeavouring to provide for himself in his old age. [21]

41 Later in his reasons, his Honour drew the following inferences:

> I formed the view that Mr Schmidt was vulnerable in the sense that he was an unsophisticated and naïve man who had little financial nous. His financial dealings throughout his time in this country were minimal. He was putty in the hands of Maddocks. His demeanour and answers to questions when giving evidence were consistent with a man with limited education and only a rudimentary knowledge of the English language.[22]

42 It is true that, this being an appeal by way of re-hearing:

> ... the established principles are ... that in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it.[23]

43 Nevertheless, this being an unconscionable conduct case, the observations of this Court in Macintosh v Johnson[24] are particularly pertinent:

> Before going further, it is necessary to address the issue of the trial judge's advantage in making factual findings, drawing inferences, and assessing the character and credibility of the parties in cases of this kind; especially where there are few contemporaneous documents to assist in the task. In *Louth v Diprose* Deane J said that a trial judge in an unconscionable conduct or undue influence case 'ordinarily enjoys an immeasurable advantage in estimating the characters and capacities of those involved in the impugned transaction', and that advantage extends to findings of fact and inferences drawn in that context. Mason CJ agreed with this approach, as did Dawson, Gaudron and McHugh JJ in their joint judgment.
> This does not mean that the factual findings and inferences of the trial judge in such cases cannot be questioned on appeal and, if found to be clearly wrong, set aside by an appeal court. This is especially so where there are undisputed facts or facts found by the trial judge which are inconsistent with the finding or inference. In such cases, an appeal court can interfere, and would be failing in its duty if it did not.[25]

44 The trial judge heard Mr Schmidt give evidence over a considerable period. Mr Schmidt was called twice. On the first occasion, on 29 and 30 September 2009, Mr Schmidt was examined in chief, cross-examined by counsel for Perpetual and further cross-examined by (junior) counsel for Violet. The cross-examination was punctuated by an overnight adjournment. This evidence occupied 54 pages of transcript. Mr Schmidt was recalled on 25 November 2009 following certain amendments to the pleadings. Mr Schmidt gave further evidence in chief and was further cross-examined by counsel for Perpetual. He was also further crossexamined on behalf of Violet, this time by senior counsel (Mr Wilson). Mr Schmidt's evidence on this occasion occupied another 21 pages of transcript. The trial judge, of course, had the great advantage of hearing all of this evidence delivered orally. As

we have noted in [41], having done so, his Honour formed the view that Mr Schmidt was unsophisticated and naïve and had little financial nous. Having reviewed Mr Schmidt's evidence and all of the other evidence in this case for ourselves, we can see no sufficient reason to depart from the trial judge's conclusion about Mr Schmidt.

45 We repeat that the trial judge found, and that it is no longer in dispute, that Mr Schmidt was not knowingly responsible for the inclusion of the false information in the documents. That distinguishes the present case from cases like Permanent Mortgages Pty Ltd v McFadyen.[26] Indeed, in that case the judgment of J Forrest J in the present case was distinguished on this very basis and was otherwise referred to with apparent approval.[27]

46 The appellant made a further, specific complaint which falls under both the present heading and the next one. The appellant submitted that the judge had erred insofar as he found lack of good faith on the part of Violet, in circumstances where lack of good faith had not been pleaded or relied upon by Mr Schmidt and where, in any event, if good faith was to be considered, it was necessary to consider the good faith not only of Violet but also of Mr Schmidt.[28] In this regard the appellant referred to s 51AC(3)(k) of the TPA which specified as a matter to which the court 'may' have regard:

> (k) The extent to which the supplier and the business consumer acted in good faith.

At the relevant time, s 12CB of the *ASIC Act* did not contain any directly equivalent provision.

47 It is true that his Honour set out the terms of s 51AC(3) of the TPA, including para (k), at one point of his judgment[29] and it is true also that, at a later point, his Honour said that, by turning a blind eye to the irregularities in the loan application and the income declaration and by ensuring that the supplementary information was massaged, Violet 'did not act in good faith'.[30]

48 Further, it was accepted by counsel for Mr Schmidt at the hearing before this Court that lack of good faith had neither been pleaded nor relied upon in submissions by Mr Schmidt at the trial. And, as we will explain below (without deciding the point), it may be that s 51AC of the TPA was not applicable in this case at all, in that it may be that there was no sufficient basis for a finding that the loan was obtained by Mr Schmidt 'for the purpose of trade or commerce' within the meaning of s 51AC(7) of the TPA.

49 However, if and insofar as his Honour was in error, we do not regard the error as being of any real significance in the context of this case as a whole. Although the expression 'good faith' may not have been used in Mr Schmidt's pleadings or submissions, nonetheless it was of the essence of his case on unconscionability that Violet's conduct was marked by moral fault. Accordingly, in the sentence immediately preceding his Honour's reference to a lack of good faith on the part of Violet, his Honour determined that Violet's actions in processing the loan in the knowledge of the various factors to which his Honour had referred were 'deliberate and attended by moral fault and lack of moral responsibility'. In saying that Violet's conduct exhibited a lack of good faith, his Honour was not meaning to add anything significantly different, in our opinion.

50 Further, it matters not that s 51AC of the TPA may have been inapplicable and that s 12CB of the ASIC Act had no direct equivalent to s 51AC(3)(k) of the TPA. The matters to which the Court may have regard for the purpose of determining whether a person has contravened s 12CB(1) of the ASIC Act are not limited by the list of matters contained in s 12CB(2) (as those provisions stood at the relevant time). There is no doubt that matters going to moral fault may be relevant, and, at least for the purposes of the present case, the labels of 'moral fault' and 'lack of good faith' might be used interchangeably.[31]

51 Finally, on this aspect, there is no substance in the complaint that his Honour failed to consider and weigh up any lack of good faith on the part of Mr Schmidt. His Honour plainly did take into account all of the matters which

were in the nature of failures on the part of Mr Schmidt, including in particular his omission to read the documents which he signed. However, his Honour was plainly not satisfied that these matters pointed to moral fault or a lack of good faith on the part of Mr Schmidt in circumstances where Mr Schmidt 'was vulnerable in the sense that he was an unsophisticated and naïve man who had little financial nous'. Once again, we are not persuaded that his Honour was wrong in this regard.

52 In our view, the matters relating to the position and conduct of Mr Schmidt do not preclude a conclusion of unconscionability on the part of Violet. Nonetheless, we do continue to bear closely in mind all of the matters relied upon by the appellant in the present context as we turn now to the ultimate question whether in all the circumstances the impugned conduct of Violet was 'unconscionable'.

Whether Violet's conduct involved statutory unconsionability: grounds 6–10, 13–19, 23–25

53 The nub of these grounds of appeal was that the inconsistencies as to Mr Schmidt's income as stated in the loan documentation did not demand further inquiry since there was no reason for Violet to doubt Mr Schmidt's capacity to service the loan from his income, nor anything to put Violet on notice that the loan to be made to Mr Schmidt involved asset based lending.[32] VHL submitted that, to succeed, Mr Schmidt needed to establish that Violet's conduct involved some moral fault or responsibility or was highly unethical.[33] It submitted that the failure of Violet to interview Mr Schmidt about his income, having regard to the discrepancy in figures in the original loan application and income declaration and the final application and declaration, was not unconscionable conduct. At most, it submitted, the conduct of Violet was careless or negligent and more than that was required. VHL also contended that, so far as Violet could tell from the information that was supplied, if the loan was approved Mr Schmidt would have an interest in an investment, and there was nothing to put Violet on notice that his only asset was his home, nor that he was receiving Commonwealth benefits. According to VHL, the fact that Mr Schmidt was aged 64 was neither here nor there when the information that Violet had was that he was self-employed and there was no evidence to support the proposition that either self-employed people or most people retire at 65. Nor, VHL argued, was Violet to make anything of the fact that Mr Schmidt was meeting the interest payments on the line of credit out of the remaining credit available on the facility. VHL submitted that when all of these matters are taken into account, together with the matters that the judge found in relation to Mr Schmidt discussed in the previous section, it was not correct to characterise Violet's conduct as unconscionable.

54 VHL relied on the decision of the New South Wales Court of Appeal in Tonto Home Loans Australia Pty Ltd v Tavares[34] which was decided after judgment was delivered in the proceeding which is the subject of this appeal. Tonto concerned three pairs of borrowers who had been duped by the dishonest conduct of a finance broker (Streetwise) to borrow funds which could not be repaid. As in the current case, a mortgage originator and manager (Tonto) was involved. Tonto was not aware of the dishonesty of Streetwise. The first couple of borrowers (the O'Donnells) borrowed $500,000 on security of a first registered mortgage over their home. Mr O'Donnell was aged 54. He had been unemployed for 18 months after selling a small business which he had previously operated. The O'Donnells had borrowed $100,000 to purchase that business on the security of their home. Ms O'Donnell was a customer service officer at a bank and earned about $23,000. The O'Donnells had savings, superannuation and shares (less than $300,000). Mr O'Donnell was approached in a shopping mall by a representative of Streetwise and asked if he was interested in using the equity in his home to fund a property investment. There was then a meeting between the representative of Streetwise and the O'Donnells at their home. The proposed investment was to cost $500,000. Ms O'Donnell said that they could not afford to borrow that amount. However, the Streetwise representative persuaded the O'Donnells that he could arrange a loan. Ms O'Donnell said that she was not sure how this could be done on her income. There was then a second meeting to which the O'Donnells took Ms O'Donnell's pay slips and their council rate notices. The proposed investment scheme was explained to

them. Again Ms O'Donnell said that they could not afford the loan. They were told that Streetwise would pay the majority of the loan. They were given the joint venture agreement to take away. Ms O'Donnell showed it to a friend who was a solicitor who gave some limited advice and they also showed it to their accountant who said that they should be careful. A third meeting with Streetwise then took place at which the O'Donnells signed the loan application. It was largely blank when they signed it. False information was added to the form later. It included the false statement that Mr O'Donnell was a self employed coffee shop trader for five years with a fortnightly income of $3,500. Streetwise purported to give preliminary approval for the loan. It subsequently asked Mr O'Donnell whether he had an ABN. He told Streetwise that they had deregistered the ABN that they had when they sold the business that he had run. The O'Donnells signed a loan agreement and mortgage. ANZ provided the wholesale funds for lending under an arrangement in which Permanent Trustee Company Limited acted as custodian and appeared as the lender on the record. Tonto had delegated authority to assess each loan application and to make a credit decision on lending. It acted as a mortgage originator or mortgage manager. Guidelines for the relevant loan fund provided, among other things, that Tonto was to conduct a loan interview with the customer and, where the customer was self-employed, Tonto was to contact the customer's accountant for verification. The guidelines specified the types of loans that would qualify for 'Lo Doc' loans. Tonto failed to follow the guidelines — no check was made as to whether the O'Donnells qualified for a Lo Doc loan; no searches or enquiries were made in relation to an ABN; and no enquiries were made to confirm that Mr O'Donnell was self employed trading in the same business for a minimum of two years.

55 Allsop P (with whom Bathurst CJ and Campbell JA agreed) held that the mortgage and loan contract were unjust within the meaning of the Contracts Review Act 1980 (NSW). His Honour also considered whether the conduct of Tonto, and through it the lender, was unconscionable under the ASIC Act or the TPA. Commencing with a series of propositions extracted from a number of cited appellate decisions, Allsop P said:

> 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...; the conduct must be irreconcilable with what is right or reasonable...; factors similar to those that are relevant to the [*Contracts Review Act*] are relevant...; 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...; the statutory provisions focus on the conduct of the person said to have acted unconscionably.... 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.[35]

56 Allsop P was not satisfied that there was unconscionability on the part of Tonto. He observed:

> 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 *[Contracts Review Act]*, 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.[36]

57 His Honour described his conclusion as to unconscionability as an evaluative one, and continued:

> 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.[37]

58 In Director of Consumer Affairs Victoria v Scully & Ors (No. 3),[38] Hargrave J discussed the principles relevant to the establishment of statutory unconscionability. His Honour rejected a contention by the Director that 'moral obloquy' was not required. Having reviewed many of the cases which were in turn cited to us, including Tonto, Hargrave J said:

> It follows that the conduct in question must be more than negligent. It will usually involve some deliberate wrongdoing, although there may be cases where recklessness will suffice. For example, cases involving wilful blindness. Ultimately, as the cases demonstrate, each case must depend upon its own circumstances and the Court must make a value judgment as to whether to characterise the conduct with 'the opprobrium of unconscionability'.
> The concept of statutory unconscionability is embodied in legislation across the states, territories and the Commonwealth. Uniformity of decision-making must be preferred unless I am convinced that the interpretation placed on the legislation in the authorities is plainly wrong. I am not.[39]

We agree with the analysis of Hargrave J.[40] We note that recklessness, in the form of wilful blindness, may in some cases supply the necessary element of moral obloquy.

59 In our view, little is to be gained by a close factual analysis of the myriad of cases that have considered whether particular conduct was unconscionable. Whilst there are sometimes factual similarities between the cases, inevitably there are differences. Similarly, we do not find it of assistance to consider whether conduct is unconscionable simply because of the type of lending that is involved, for example, asset based lending. Rather, the task requires a more synthesised approach which takes into account all of the facts relevant to the impugned conduct and determines whether, in all the circumstances, that particular conduct is unconscionable. However, in effect, VHL contended that the facts in the present case are on all fours with Tonto. We do not accept that

submission. Mr O'Donnell had run a small business and the O'Donnells had borrowed money on security of their home to purchase that business. Whilst Mr Schmidt had previously borrowed money, that had nothing to do with a business — he had never operated his own business. Mr O'Donnell had managed the family superannuation fund for a few years. Mr Schmidt had held some shares including those from the float of Telstra and had had a small investment in a Perpetual managed fund, but that is not as sophisticated as running a self managed superannuation fund. There is no suggestion that the O'Donnells' first language was not English. We accept that, in some senses, these distinctions are of little moment, because Violet had no information about Mr Schmidt other than what appeared in the false loan application and income declaration. However, and more importantly, there were significant differences between the conduct of Tonto and that of Violet. There is nothing to suggest that at any stage Tonto was put on notice that there may be irregularities with the loan application. That is in stark contrast to Violet. Here, the discrepancy in the figures in the loan application and income declaration, not just once, but twice and the absence of an ABN, which was requested but never provided, ought to have raised the suspicion of Violet that something may be amiss with the application. The judge said:

> [Violet] knew that there were irregularities in the income declaration and the loan application. ... Mr Schmidt's loan application figures had been 'massaged'. Moreover, it was known to [Violet] that Mr Schmidt was in his mid sixties (as evidenced by the copy of his passport details) and had no ABN, notwithstanding the original application nominating income from self-employment of either $69,000 or $75,000, depending upon which document one looked at. There must have been significant doubt as to whether Mr Schmidt had any capacity to repay the loan. This is particularly so when [Violet] knew from the details in the asset builder loan statements that his repayments of that loan were not being made out of other sources (such as income from self-employment or investments) but came out of the capital remaining in that account.[41]

60 We agree with these observations.

61 Further, the failure of VHL to call Ms Bonnici as a witness to give evidence exacerbated the problems it faced in the litigation. Mr John Mingos, a solicitor who was a director of Violet and VHL, gave evidence about the absence of Ms Bonnici as a witness. He testified that he had not been able to contact Ms Bonnici because she was on leave and he understood that she was overseas. However, Mr Matthew Rae, who was an arrears manager at Violet, gave evidence that he believed that Ms Bonnici was working for a broker in Melbourne. Counsel for VHL informed the judge that no subpoena had been issued in respect of Ms Bonnici. The judge described the explanation for Ms Bonnici's absence as a witness as unsatisfactory. We agree. She was a central figure in the events that took place. At the highest, the evidence goes no further than suggesting that Ms Bonnici was temporarily overseas and was to return during the course of the trial.[42] Her absence laid the foundation for the judge to find as he did.[43] His Honour said:

> There can be no doubt that Ms Bonnici knew the figures were fudged and chose to make no further inquiry. Indeed, to the contrary, once the $49,000 declaration was obtained and inserted within the application, it was submitted to MSL with no qualifying statement or observation concerning the previous figures and their internal discrepancies. Ms Bonnici was not called to explain what thought processes, if any, induced her to submit the loan to MSL.[44]

62 As indicated above, the judge concluded that Violet's actions in processing the loan in the knowledge of the various factors to which his Honour had referred were deliberate and were attended by moral fault and lack of moral responsibility. Violet had turned a 'blind eye' to the irregularities in the loan application and the income declaration and had ensured that the supplementary information was massaged.[45] Given that wilful blindness may constitute recklessness and may thus supply the necessary element of moral fault in cases of this kind, we see no error in his Honour's approach. VHL contended that the calculation which it carried out as to loan serviceability satisfied the lender's requirements. It argued that this calculation was unaffected by the level of Mr Schmidt's income such that it was not a matter to which Violet ought be expected to give attention. It submitted that what has to be guarded against is inflated income figures, not a reduction in income. However, that is not an answer in this case where the information ought to have suggested that further investigation was required even though any of the three figures given for income would have satisfied the PUMA guidelines.

63 In the alternative, VHL contended that an enquiry was made and a plausible explanation was given for the change in income figures — that is, that Mr Schmidt did not have an ABN. Counsel for VHL contended that a person reviewing the information may think that the proposed borrower was earning more than $49,000 but was not prepared to declare it. Counsel submitted that this did not lead to the conclusion that the reviewer ought to have a 'high index of suspicion'.[46] However, in our opinion, the explanation given for the reduction in income in this case is not properly characterised as one which did not demand further inquiry. It is not a case where one higher figure had been given and reduced to an amount below the relevant threshold. Rather, there were two previous inconsistent figures, submitted at the same time to Violet, which were then reduced to a figure just below the level in respect of which the borrower must be registered for GST and have an ABN.

64 VHL further submitted that there is nothing to suggest that an interview would have disclosed the falsity of the information in the loan application, unless it be accepted that an interview would necessarily have led to the interviewer asking questions about virtually every item in the loan application. Counsel contended that the purpose of the interview required by the PUMA parameters was simply to satisfy the Austrac 100 points requirements that called for identification by reference to passports, driver's licence et cetera. However, we agree with the trial judge that the purpose of the required interview went beyond the confirmation of identity and extended to confirmation of at least 'some of the details of the loan application'.[47] The requirement in the parameters was that Violet 'Personally interview and[48] identify each Borrower in accordance with' the Austrac identification method. Further, as mentioned above, the statement of this requirement in the guidelines followed immediately after the statement that Violet was required to 'ensure' that all information disclosed on an application and all accompanying documentation was genuine and correct. At trial, Violet sought to deflect responsibility in this regard by saying that, contrary to the express terms of the guidelines, a 'broker model' had been agreed between the parties and adopted, whereby brokers, such as Medallion, would carry out the interview instead of Violet. But that response avails Violet nothing in this case, because the email from Mr Paranavitana set out above clearly told Ms Bonnici that Medallion had had 'no direct contact' with Mr Schmidt.

65 In circumstances where three different figures were given for income, Violet, through Ms Bonnici, ought to have delved further. There was only one question that had to be asked — a question about the different levels of income stated in the various forms. This is a case that is unusual in the extreme — three differing versions of income and the failure to call the witness that might have explained why, in those circumstances, no contact was made with Mr Schmidt. Whether one classifies the lending as asset based lending or not, to make no inquiry is, in the absence of an explanation, entirely unacceptable. As his Honour held, had the inquiry been made, the truth as to Mr Schmidt's income and his status as a pensioner would 'inevitably' have emerged.[49]

66 We reject the appellant's contention that Violet was unaware that Mr Schmidt's home was his only substantial asset. Even in the falsified loan application form, that much appears. The only other listed 'assets' were 'Telstra and Unit Trust Shares — $120,000', 'Toyota — $12,000' and 'Westpac — $5,000'. Against these assets, a mortgage liability of $82,000 was listed, leaving an overall balance of only $55,000. In truth, of course, the 'Unit Trust Shares', which comprised the main component of the $120,000 item, were worthless.

67 Undoubtedly, there are many commercial advantages for lenders in simplifying the processes for what might be described as routine small lending (whether for home loans or small investors). Outsourcing functions that traditionally were performed by lenders to mortgage originators and managers also has advantages for lenders. There may also be benefits for borrowers because the simplified processes and outsourcing likely lead to lower costs. Lenders' manuals and guidelines to assist clerks in processing loan applications attempt to address the risks associated with this simplification and outsourcing. However, sometimes a risk eventuates and, depending on all the circumstances, the lender may be held responsible for the consequences, partly because the very system the lender has established facilitates the perpetration of frauds upon borrowers.[50] No doubt lenders take this into account when pricing their products and determining that, overall, it is in their commercial interests to proceed with the simplified and, in some senses, automated, processing and outsourcing of lending functions.

68 In this case, one of the risks of this type of lending came to fruition — the person charged with responsibility for checking the information provided by the proposed borrower (via a broker) did not apply an inquisitive mind to the task when there were significant discrepancies in the information supplied. In the absence of evidence given by Ms Bonnici, the processing of Mr Schmidt's application gives the appearance of her simply making the information, as it were, 'tick all the boxes' so that the loan could be approved. So it was that when the revised forms were submitted with a reduced figure for Mr Schmidt's income and no ABN, Ms Bonnici did not question this nor examine nor question more closely the other matters that suggested all was not right (for example the payment of interest out of capital in the Assetbuilder Loan account and Mr Schmidt's age) that ought to have been apparent from the other information provided. In those circumstances, and without a satisfactory explanation, the failure of Violet to conduct an interview (by telephone or in person) was reprehensible. Whilst a failure to conduct an interview and thus comply with the guidelines may not of itself constitute unconscionable conduct in the generality of cases,[51] in the circumstances of this case, that failure strongly supports the proposition that Violet's conduct was unconscionable.

69 We turn to the ultimate question of the proper overall characterisation of Violet's conduct in all the circumstances. We have already indicated that, this being an unconscionability case, we have given weight to the trial judge's assessment of the character and capacities of Mr Schmidt, in accordance with Louth v Diprose[52] and Macintosh v Johnson.[53] On our own analysis of the evidence (albeit with the benefit of the trial judge's assessment of Mr Schmidt), and of the facts that are undisputed or no longer in dispute, we agree with the conclusion of the trial judge that the conduct of Violet in processing the loan application as it did was unconscionable within the meaning of s 12CB(1) of the ASIC Act. Having formed our own views, it is not necessary for us to resolve a question of principle, which appears to be unresolved, as to whether it would be proper for an appellate court to give separate weight to the trial judge's overall conclusion as to unconscionability.[54]

70 In conclusion, we do not accept that the trial judge's decision should be reversed by reason of any of the matters covered by this heading.

Whether the services acquired were of a kind ordinarily acquired for personal, domestic or household use: ground 27

71 Section 12CB of the ASIC Act prohibits unconscionable conduct in the supply of financial services to a consumer. VHL submitted that the judge erred in finding that this provision had been contravened as the services acquired by Mr Schmidt were not of a kind 'ordinarily acquired for personal, domestic or household use'.[55] VHL relied on the loan application signed by Mr Schmidt which said that the credit to be provided was for business or investment purposes. VHL also relied on the following evidence given by Mr Schmidt:

> His Honour: So what was being built in Myola Street? - - - There was a Syndicate No. 4 where was one house on it, old house, and that was a double block, and later on, we come to Syndicate No. 5, it's a single block, and on each of those, they build three units on it, and Syndicate No. 4, that was available to build six units on it.
> Mr Marantelli: These two properties, as I understand it, there were two properties both in Myola Street?- - - Yes, yes.
>
> And next to each other? - - - It's just a few doors – further down doors.
>
> As I understand it, the next development is then in May the following year.... Did you ever get any money back from Mr Maddocks between September 2003 and May 2004? - - - No.

72 A useful and comprehensive review of the authorities considering the meaning of the phrase 'ordinarily acquired for personal, domestic or household use or consumption' in the TPA was undertaken by Young J in Bunnings Group Ltd v Laminex Group Ltd.[56] That case concerned the merchantable quality of goods provisions under the TPA.[57] The legislative provisions only applied where the goods were of a kind 'ordinarily acquired for personal, domestic or household use or consumption'. The goods in question were insulation products that had been supplied to various builders and contractors and had been incorporated into the structure of warehouses that Bunnings had either acquired or leased. Young J observed that the phrase appeared in several contexts in the TPA and that, in all likelihood, the legislature intended that it should carry a consistent meaning wherever it was used in that Act. His Honour stated that the phrase 'should be construed broadly, wherever it appears in the TPA, so as to give the fullest relief which the fair meaning of its language will allow'.[58] His Honour drew the following propositions from the authorities:

(a) the word 'ordinarily' means 'commonly' or 'regularly', not 'principally', 'exclusively' or 'predominantly;'[59]

(b) it is preferable to ask whether the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption as a single composite question. His Honour referred to a passage from *Clean Investments Pty Ltd v Commissioner of Taxation:*[60]

> For example, an architect's stool, an office chair and a kitchen stool or chair may be described as 'stools' or 'chairs' and their purpose as being 'to provide seating'. Yet it would be wrong to conclude that the architect's stool or the office chair is of a kind ordinarily used for household purposes for no other reason than that, like the kitchen chair, it is ordinarily used for the purpose of providing seating.[61]

(c) depending on the precise statutory question and the circumstances of the particular case, it will be relevant to inquire as to the essential character of the goods in question;

(d) the question is ultimately a question of fact and degree.[62]

Young J ultimately determined that the insulation products in question were of a kind 'ordinarily' acquired for personal, domestic or household use or consumption, notwithstanding that in the particular case they had been purchased for installation into Bunnings stores.

73 In the later case of Leveraged Equities Ltd v Goodridge,[63] the Full Federal Court considered whether margin calls made under a margin lending agreement were valid. Jacobson J delivered the leading judgment. Having determined in the course of a lengthy judgment that on a proper construction of the relevant margin lending loan and security agreement the margin calls were valid and that those calls could be made by an assignee of the lender, his Honour turned to consider a claim by the borrower that s 12CB of the ASIC Act applied to the financial services provided under the agreement because they were of a kind ordinarily acquired for personal, domestic or household use within the meaning of s 12CB(5). Jacobson J dealt with that contention shortly as follows:

> ...s 12CB applies only to financial services of a kind ordinarily acquired for personal, domestic or household use: see s 12CB(5). Mr Goodridge acknowledged when he entered into the LSA that the funds would be applied wholly or predominantly for business or investment purposes. His evidence that the funds were invested for the purpose of providing for his retirement was not relevant to the question of whether s 12CB was engaged.[64]

74 As noted previously, the court in Tonto held that the conduct there in question was not unconscionable. Therefore, it was not necessary to determine finally whether the financial services were of a kind ordinarily acquired for personal, domestic or household use. Nevertheless, Allsop P did make some observations on this issue and, in doing so, referred to the decision in Leveraged Equities. His Honour said:

> 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* 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.
>
> In any analysis of this question, the careful and helpful judgment of Young J in *Bunnings Group Limited v Laminex Group Limited* 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.
>
> 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*; *Bunnings v Laminex*. 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.[65]

75 In our opinion, the financial services provided here were of a kind ordinarily acquired for personal use. It is true that Mr Schmidt declared that the credit to be provided to him was to be applied wholly or predominantly for business or investment purposes. However, that does not show that the kind of financial services acquired by Mr Schmidt were not of a kind 'ordinarily' acquired for personal use. Indeed, the declaration assists Violet very little. Investments can be personal. As Allsop P noted in Tonto, it is now not uncommon for funds to be borrowed by retirees and used in investment projects, such as the project that Mr Schmidt thought he was investing in. Indeed, the advertisements to which Mr Schmidt responded were headed 'Retirees/Investors/Superannuation'. Moreover, the type of 'low doc loan' obtained by Mr Schmidt was only available if the security property was residential with a loan to value ratio of 80 per cent. The maximum amount that could be borrowed was $600,000. Ordinarily, that type of loan is one that is used for personal investment, rather than for the operation of what might be described as an investment business. In our view, the loan falls within s 12CB(5) and the judge did not err in finding that s 12CB(1) was applicable.

Whether the services were acquired for the purpose of trade and commerce: ground 26

76 Having reached the view that the judge correctly concluded that s 12CB(1) of the ASIC Act was applicable and was contravened, it is not necessary for us to consider whether Violet's conduct was also covered by s 51AC of the TPA. However, without deciding that matter, we will now briefly indicate our views on it.

77 VHL contended, somewhat inconsistently with its submission concerning s 12CB(5) of the ASIC Act, that s 51AC(1) of the TPA could not apply because Mr Schmidt did not acquire the services 'for the purpose of trade or commerce' within the meaning of s 51AC(7) of the TPA.

78 In Kowalczuk v Accom Finance Pty Ltd,[66] the New South Wales Court of Appeal considered, among other issues, whether s 51AC applied in circumstances where a borrower and the company that he controlled entered into short term loans at very high interest rates so that they could invest money with someone who turned out to be a fraudster. As in the present case, the question posed by the statute was whether the borrowers had entered into the loan for the purpose of trade or commerce. Campbell JA (with whom Hodgson and McColl JJA agreed) said:

> not all investment is engaged in 'for the purpose of trade or commerce'. In *Concrete Constructions (NSW) Pty Ltd v Nelson* ... Mason CJ, Deane, Dawson and Gaudron JJ said ... that the expression 'in trade or commerce' in s 52 Trade Practices Act (Cth): 'can be construed as referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character'.
> Their Honours held ... that the expression 'in trade or commerce' refers to: 'the central conception' of trade or commerce and not to the 'immense field of activities' in which

> corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business.
>
> Similarly, a transaction is entered 'for the purpose of trade or commerce' when it is entered to enable some further activity, that has itself a trading or commercial character, to be engaged in. For a private individual, or a private individual's company, to make an investment is not, in my view, to enter a transaction 'for the purpose of trade or commerce' when it is not itself a part of a business of investing. It is unnecessary, on the facts of the present case, to decide whether an investment made by such a person or company as part of a business of investing would have the necessary character of being entered 'for the purpose of trade or commerce'.[67]

79 That reasoning is part of the ratio of the decision. We do not think that the analysis could be described as plainly wrong. Whilst the types of loan in that case and in the present were not identical, it seems to us that Kowalczuk could not be distinguished on that basis. Nor was there any or any sufficient evidence at trial to show that Mr Schmidt was engaged in a business of investing, notwithstanding that he was frequently visited by Mr Maddocks at his home and that Mr Schmidt was interested enough in the progress of the unit developments to visit them on some 20 occasions (they being located in the same suburb in which he lived, namely Carrum). Had it been necessary to decide this point, we consider that we would have been obliged to follow Kowalczuk and to find that s 51AC did not apply in this case.

Whether Violet's conduct was unconscionable at general law: notice of appeal, passim

80 Again, it is not necessary for us to decide whether Violet's conduct was unconscionable at general law and we will not do so. Suffice to say that in our view, Perpetual's submissions (that the facts necessary for a finding of common law unconscionability were not present in this case) are not without force. The equitable concept of unconscionable conduct is no doubt narrower than that of 'statutory unconscionability'.[68] However, difficult and important issues are raised by Perpetual's submissions and it is not desirable for us to comment further upon them in this appeal in which they are not required to be determined.

Whether Mr Schmidt ought be required to repay the money that was paid to Able Financial Solutions Pty Ltd (approximately $6,500) and him ($17,000): ground 4

81 VHL submitted that if Mr Schmidt was not required to repay the amounts that were paid to Able Financial Solutions Pty Ltd and him, then he would be unjustly enriched. Mr Schmidt gave evidence that of the $17,000 paid to him, $10,000 went to Mr Maddocks with the other $7,000 on a Macquarie card for 'something like' prepaid interest on the loan. Mr Schmidt also gave the following evidence:

> This is from the settlement — the settlement day — there's — where the $17,000 and I had to make out a cheque for $10,000 to Maddocks' company and the $7000 I had to keep in there because they — for repayment of that loan so there were $7000 but this was peanuts — was nothing so it run out ...

82 The $10,000 was paid to Mr Maddocks. Even if, as counsel for VHL contended, that amount was not paid immediately to Mr Maddocks, it is apparent that Mr Schmidt has not had the benefit of the funds. It is not clear from the documentary evidence what happened with the $7,000. There is no evidence as to what role Able Financial Solutions Pty Ltd played nor whether it is independent of Mr Maddocks.

83 There is simply insufficient evidence to disturb the trial judge's orders and to require that Mr Schmidt repay the amount of approximately $23,500 to Perpetual.

Conclusion

84 The appeal should be dismissed.

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[1] *Perpetual Trustees Aust Ltd v Schmidt* [2010] VSC 67 [213].

[2] The Bank of Melbourne mortgage had secured monies previously borrowed by Mr Schmidt to invest with Mr Maddocks. Those monies were also lost.

[3] Final orders were made on 17 June 2010 (with a correcting order on 18 June 2010) after a further hearing as to the appropriate form of order and as to costs: *Perpetual Trustees Aust Ltd v Schmidt (No 3)* [2010] VSC 261.

[4] This was an entity associated with Mr Maddocks.

[5] This was also an entity associated with Mr Maddocks.

[6] Clause 13.1 of the Mortgage Origination Agreement between Perpetual, Violet and MSL — see *Perpetual Trustees Aust Ltd v Schmidt* [2010] VSC 67 [52].

[7] Exhibit TP5, page 21. See also *Perpetual Trustees Aust Ltd v Schmidt* [2010] VSC 67 [55(d)].

[8] Although pleaded, ss 51AA and 51AB of the *TPA* were not relied on at trial. The unconscionability provisions in the *TPA* have now been replaced by Part 2-2 of Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

[9] *Perpetual Trustees Aust Ltd v Schmidt & Anor* [2010] VSC 67 [133]–[171].

[10] Ibid [192].

[11] Ibid [185].

[12] Ibid [185], [211].

[13] Ibid [198].

[14] Ibid.

[15] Ibid [200].

[16] Ibid.

[17] Ibid [209].

[18] Ibid [213].

[19] Ibid [212].

[20] Amended notice of appeal dated 13 May 2011, grounds 1–4 and 6–27. Ground 5 was abandoned.

[21] [2010] VSC 67 [210].

[22] Ibid [211].

[23] *Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531, 551. See also *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118, 126–128 [24]–[27]; *Transport Accident Commission v Cuthbertson* [2013] VSCA 29 [34]

[24] [2013] VSCA 10.

[25] Ibid [73]–[74] (authorities and citations omitted).

[26] [2012] NSWSC 130 [16]–[24].

[27] Ibid [111]–[115], [127]. See also *Secure Funding Pty Ltd v Moon* [2012] QSC 244 [44].

[28] See grounds 19–22.

[29] *Perpetual Trustees Aust Ltd v Schmidt & Anor* [2010] VSC 67 [189].

[30] Ibid [212].

[31] See also *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 268; *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 [38], [39], [121].

[32] That asset based lending by mortgagees may, depending upon the circumstances of the particular case, constitute unconscionable conduct even under the general law has been established in a series of decisions both at first instance and on appeal: See, eg, *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413 [57]–[59]; *Kowalczuk v Accom Finance Pty Ltd* [2008] NSWCA 343; (2008) 77 NSWLR 205 [96]–[97]; *Small v Gray* [2004] NSWSC 97 at [105]–[114]. The concept of unconscionable adopted in s 51AC of the *TPA* and s 12CB of the *ASIC Act* is wider than the general law and the provisions are intended to build on and not be constrained by the general law: *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FLR 132. See further below.

[33] *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd (No 2)* [2009] FCA 17; (2009) 253 ALR 324; *Attorney General of New South Wales v World Best Holdings Ltd* [2005] NSWCA 261; (2005) 63 NSWLR 557.

[34] (2011) 15 BPR 29, 699; [2011] NSWCA 389.

[35] Ibid [291] (authorities and citations omitted).

[36] Ibid [292].

[37] Ibid [293].

[38] [2012] VSC 444 [24]–[34].

[39] Ibid [31]–[32] (authorities and citations omitted). See also *Butler v Vavladelis* [2012] VSC 186 [17]–[23] (Hargrave J).

[40] See also *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCA 47 [6]–[10] (Jessup J).

[41] [2010] VSC 67 [209].

[42] The evidence of Mr Mingos was that he understood that Ms Bonnici was on leave until 5 October 2009. Although it appears that VHL closed its case on 1 October 2009, and that other witnesses began their evidence that day, the next sitting day in the trial was 6 October 2009. The trial then stood adjourned from 6 October 2009 and resumed on 10, 25 and 26 November 2009. If, before it had closed its case, VHL had requested that Ms Bonnici be permitted to give evidence after 5 October 2009, it may very well have been possible for the Court and the other parties to have accommodated such a request.

[43] *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298. The judge was entitled to find that the evidence that Ms Bonnici would give would not have assisted VHL's case.

[44] *Perpetual Trustees Aust Ltd v Schmidt & Anor* [2010] VSC 67 [209(b)].

[45] Ibid [212].

[46] VHL relied on *Riz v Perpetual Trustee Australia Ltd* [2007] NSWSC 1153; (2007) ANZ Conv R 615 [78] which was a case, in part, concerned with whether a contract was unjust within the meaning of s 7 of the *Contracts Review Act 1980* (NSW). The judgment was overturned on appeal, although on a different point: *Dominic v Riz* [2009] NSWCA 216.

[47] [2010] VSC 67 [209(c)].

[48] Our emphasis.

[49] [2010] VSC 67 [209(c)]. See also [214].

[50] *Tonto Home Loans Australia Pty Lt v Tavares* (2011) 15 BPR 29, 699; [2011] NSWCA 389 [104]–[105], [128], [140], [250], [255]–[256], [259], [265].

[51] *Riz v Perpetual Trustee Australia Ltd* [2007] NSWSC 1153; (2007) ANZ Conv R 615; *Kowalczuk v Accom Finance Pty Ltd* [2008] NSWCA 343; (2008) 77 NSWLR 205.

[52] [1992] HCA 61; (1992) 175 CLR 621.

[53] [2013] VSCA 10 [73]–[74].

[54] See *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2002) 117 FCR 301 [51]; *Australian Competition and Consumer Commission v C&G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 86, [82]–[83] (Kirby J dissenting), [167] (Callinan J); *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118, 126-127 [25].

[55] *ASIC Act* s 12CB(5).

[56] [2006] FCA 682; (2006) 153 FCR 479.

[57] *TPA*, ss 74A, 74B and 74D.

[58] [2006] FCA 682; (2006) 153 FCR 479 [76].

[59] His Honour noted that this Court in *ICI Australia Operations Pty Ltd v Deputy Commissioner of Taxation* (1987) 19 ATR 647, 650 said, 'The concept of "ordinarily used for" equals "whose primary but not necessarily exclusive purpose and customary use is"' (per Gray J, Kaye J agreeing). That case was concerned with the construction of the phrase 'road vehicles of the kinds ordinarily used for the transport of persons or the transport or delivery of goods' in a schedule to the *Sales Tax (Exemptions and Classifications) Act 1935* (Cth).

[60] [2001] FCA 80; (2001) 105 FCR 248.

[61] Ibid [93]. His Honour also quoted French J in *Diethelm Manufacturing Pty Ltd v Commissioner of Taxation* [1993] FCA 437; (1993) 44 FCR 450, 465.

[62] *Bunnings Group Ltd v Laminex Group Ltd* [2006] FCA 682; (2006) 153 FCR 479 [81]–[92].

[63] [2011] FCAFC 3; (2011) 191 FCR 71.

[64] Ibid [416].

[65] *Tonto Home Loans Australia Pty Lt v Tavares* (2011) 15 BPR 29, 699; [2011] NSWCA 389 [296]–[298].

[66] [2008] NSWCA 343; (2008) 77 NSWLR 205.

[67] Ibid [186]–[188] (citations omitted).

[68] *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226; (2005) 148 FCR 132 [30] (Full Court); *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* [2011] VSCA 196; (2011) 282 ALR 571 [87]; *Tonto* (2011) 15 BPR 29, 699 [291]; *Director of Corporate Affairs v Scully* [2012] VSC 444 [23]; *A v B1 & B2 [No 2]* [2012] WASC 383 [301] (Edelman J).