

# SUPREME COURT OF QUEENSLAND

CITATION: *Stacks Managed Investments Limited v Tolteca Pty Ltd*  
[2015] QSC 276

PARTIES: **STACKS MANAGED INVESTMENTS LIMITED**  
ACN 085 843 125  
(plaintiff)  
v  
**TOLTECA PTY LTD**  
ACN 096 926 519  
(defendant)

FILE NO/S: SC No 1001 of 2014

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 28 September 2015

DELIVERED AT: Brisbane

HEARING DATE: 20-23 July 2015

JUDGE: Ann Lyons J

ORDERS: **1. Judgment for the plaintiff.**  
**2. The defendant's counterclaim filed on 23 July 2015 is dismissed.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – HARSH AND UNCONSCIONABLE CONTRACTS AND STATUTORY REMEDIES – where the defendant borrowed \$1,000,000 from the plaintiff for the purpose of a subdivision of a block of land – where the residential property of the defendant's sole director was provided as security for the loan – where the defendant defaulted in loan repayments – where the plaintiff is seeking an order for the recovery of possession of the land – where the defendant counterclaims that the plaintiff engaged in unconscionable conduct pursuant to s 12CC

of the *Australian Securities and Investments Commission Act 2001* (Cth) – whether the plaintiff’s conduct was unconscionable

*Australian Securities and Investments Commission Act 2001* (Cth), s 12CC

*Land Title Act 1994* (Qld), s 78

*Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90, followed  
*Duhs v Pettett* [2009] QCA 347, cited

*Duhs v Pettett & Ors* [2009] QSC 100, cited

*Duhs v Pettett & Ors* [2010] QSC 55, cited

*Director of Consumer Affairs Victoria v Scully (No 3)* [2012] VSC 444, followed

*Elkofairi v Permanent Trustee Company Limited* [2002] NSWCA 413, considered

*National Australia Bank Ltd v Smith* [2014] NSWSC 1605, considered

*Paciocco v Australia and New Zealand Banking Group Limited* (2015) 321 ALR 584; [2015] FCAFC 50, followed  
*Perpetual Trustee Company Ltd v Khoshaba* [2006] NSWCA 41, considered

*Tonto Home Loans Australia Pty Ltd v Tavares; FirstMac Ltd v Di Benedetto; FirstMac Ltd v O'Donnell* [2011] NSWCA 389, followed

*Violet Home Loans Pty Ltd v Schmidt* (2013) 300 ALR 770; [2013] VSCA 56, followed

COUNSEL: D B O’Sullivan QC, with D Ananian-Cooper, for the plaintiff  
 N H Ferrett, with B Le Plastrier, for the defendant

SOLICITORS: McCullough Robertson Lawyers for the plaintiff  
 Turner Freeman Lawyers for the defendant

## Overview

- [1] In early 2010, Tolteca Pty Ltd (Tolteca) borrowed \$1,000,000 from Stacks Managed Investments Limited (Stacks) for a 12 month period for the purpose of a subdivision of land at Richards Street, Loganlea. As part of the security for the loan, Tolteca granted Stacks a mortgage over a farming property at Innisplain near Rathdowney where the sole director of Tolteca, Maria Pettett, resided with her husband, Trevor Pettett, and their twin sons who were then aged nine.

- [2] Stacks now sues Tolteca for an order for the recovery of possession of the land at Innisplain. Counsel for Tolteca indicates that whilst loan repayments in the order of \$982,000 have been made over the last five years, an amount in excess of \$1,200,000 remains outstanding.
- [3] Tolteca admits to the loan, mortgage and default, but counterclaims for relief on the basis of ‘unconscionable conduct’ by Stacks in breach of s 12CC of the *Australian Securities and Investments Commission Act 2001* (Cth) (the ASIC Act) which regulated Stacks’ conduct at the relevant time. Section 12CC is in similar terms to the current s 12CB of the ASIC Act.
- [4] It is necessary therefore to consider the extent of Tolteca’s allegations in some detail.

#### **The substance of Tolteca’s allegations**

- [5] Tolteca’s Amended Counterclaim alleges that Stacks’ conduct in giving the loan and taking the mortgage was unconscionable within the meaning of s 12CC of the ASIC Act. In essence, it is argued that it was unconscionable of Stacks not to investigate certain facts which ought to have put a prudent lender on inquiry. It is alleged that if the inquiries had been undertaken, it would have disclosed a significant degree of vulnerability such that it would have been unconscionable for Stacks to lend money knowing those factors.
- [6] The basis of the unconscionable conduct claim is that:
- (i) The loan amount of \$1,000,000 was far greater than the amount which Tolteca had unsuccessfully sought from Stacks in a prior loan application in October 2009 in circumstances where there had been no material change in Tolteca’s situation.
  - (ii) Stacks knew that Maria Pettett, the sole director of Tolteca, was not commercially sophisticated and lacked an understanding of the details of the proposed subdivision.
  - (iii) Stacks knew that the solicitor, James Loel, was involved in the joint venture and acted for John Anderson who was a party to the development. James Loel was not a disinterested party and Maria Pettett, who was dependent on him, required independent advice to enable her to make a decision about the subject loan.
  - (iv) Stacks failed to inquire into various discrepancies in the documentation concerning the loan transaction, particularly in relation to Tolteca’s income and Maria Pettett’s financial position.
  - (v) Stacks gave no proper consideration to Tolteca’s capacity to service the loan, as it did not consider the income of the defendant for the previous three

financial years and whether that income was sufficient to meet the interest payments and other fees payable under the mortgage as well as the other expenses paid by Tolteca in relation to the land.

- (vi) Stacks had no real concern as to whether Tolteca could service the loan and was happy to resort to the mortgage. It is alleged that it was not Stacks' policy to seriously investigate an applicant's capacity to service a loan so long as it could recover the amounts advanced by enforcing the security. Tolteca pleaded that a prudent lender would be interested to ensure repayment rather than resting on the protection afforded by the security
  - (vii) Tolteca has suffered loss and damage in the form of interest, default interest and fees as a consequence of the obligations and liabilities imposed by the mortgage and the loan which constitutes unconscionable conduct in contravention of s 12CC of the ASIC Act.
- [7] Tolteca alleges therefore that Stacks' conduct was reckless as to whether Maria Pettett had the acumen to speak with accuracy about the features of the project she described, whether she had the expertise to undertake the property development, whether she had independent legal advice and whether she could service the loan.
- [8] Accordingly, Tolteca claims the following relief:
- (a) An order pursuant to s 12GM of the ASIC Act setting aside the mortgage.
  - (b) In the alternative, pursuant to s 12GD of the ASIC Act, an injunction permanently restraining the plaintiff from enforcing the mortgage.
  - (c) An order pursuant to s 12GM of the ASIC Act setting aside the loan agreement.
  - (d) Further and alternatively, damages pursuant to s 12GF of the ASIC Act in such amount as would otherwise be necessary to pay out the loan.
- [9] Stacks denies that its conduct was unconscionable and argues that it engaged in entirely appropriate and responsible lending procedures. Stacks also submits that it is entitled to rely on a borrower's representations about the project to be funded and their capacity to repay the loan.
- [10] Given the allegations in relation to Stacks conduct in granting the loan, it is necessary to examine the circumstances behind those allegations in some detail. Most of the facts are uncontroversial, except in relation to a telephone interview on 9 February 2010. I shall therefore set out the relevant background facts and highlight any areas of contention.

### **Background to the loan applications**

- [11] At the time of the two loan applications, Maria Pettett was the sole director of Tolteca. She was born in Romania and worked in an orphanage there until she came to Australia at the age of 23 in 1994. She subsequently married Trevor Pettett and their twin sons were born in 2000. Whilst she has worked as a relief teacher's aide, she was not in full time employment at the time of the loan applications. She is currently employed as a cook at a local boarding school.
- [12] Trevor Pettett is a 72 year old builder who has previously been involved in a number of building projects. At the time of the loan applications, the family resided on the security property at Innisplain where a farming enterprise was conducted. The land was registered in the name of Tolteca as Trustee. There is a smaller adjacent block of land at the same address on a separate title which is referred to as Lot 5. It is approximately 19 hectares in area.

### **Litigation involving Trevor Pettett**

- [13] During 2009, Trevor Pettett was one of the defendants in a Supreme Court litigation matter brought by an investor in relation to a loan of \$2,700,000.<sup>1</sup> On 6 May 2009, judgment was entered in accordance with the plaintiff's claim.
- [14] The evidence indicates that Trevor Pettett changed solicitors during the course of the litigation and engaged the firm of Lillas & Loel in June 2009. Trevor Pettett's appeal to the Court of Appeal was dismissed on 30 October 2009.<sup>2</sup>
- [15] On 11 December 2009, Philip McMurdo J held that Trevor Pettett was in contempt of orders dated 16 July 2009 which had been made in the proceedings.<sup>3</sup> The matter was adjourned for further submissions and any further evidence relevant to the punishment for that contempt. Whilst Philip McMurdo J imposed "no penalty" at the resumed contempt hearing on 1 March 2010, he ordered that Trevor Pettett pay the plaintiff's costs on an indemnity basis.<sup>4</sup> His solicitors in the contempt proceedings were Lillas & Loel.
- [16] Trevor Pettett had been declared bankrupt on 19 December 2009.<sup>5</sup>

### **The first loan application**

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<sup>1</sup> *Duhs v Pettett & Ors* [2009] QSC 100.

<sup>2</sup> *Duhs v Pettett* [2009] QCA 347.

<sup>3</sup> *Duhs v Pettett & Ors (No 2)* [2009] QSC 400.

<sup>4</sup> *Duhs v Pettett & Ors (No 3)* [2010] QSC 55.

<sup>5</sup> *Duhs v Pettett & Ors (No 3)* [2010] QSC 55, [10].

- [17] On 30 September 2009, James Loel had sent a letter by facsimile<sup>6</sup> to mortgage broker Paul Guthrie indicating that Maria Pettett was the sole director and shareholder of Tolteca which owned a block of land, namely Lot 5 at Innisplain, and that she was looking to borrow 35 percent of the value of that property. A loan application form was requested and a valuation of \$350,000 was attached.
- [18] On 6 October 2009, a letter<sup>7</sup> was sent by facsimile from James Loel to Paul Guthrie enclosing a completed loan application form. That letter stated that the form was “completed and executed by Mrs [Maria] Pettett personally and as the sole director of Tolteca Pty Ltd”.<sup>8</sup> At the back of the loan application form, the assets were listed as follows:

<b>Address and Description</b>	<b>Owner</b>	<b>Value</b>	<b>Amount Owed</b>
Home: Tolteca P/L as Trustee 9847 Mt Lindesay Hwy	Tolteca	\$1.5M	NIL
Other property – Lot 5	Tolteca	\$350K	NIL
Furniture –	Maria	\$20K	
Car – Ford Focus	Maria	\$15K	
Bank accounts – CTB	Maria	\$5K	
Business Value – Colonial Mutual	Maria	\$15K	

- [19] In terms of the description of security, there was a reference to “see valuation”.<sup>9</sup>
- [20] Maria Pettett’s evidence was that she did not complete that loan application form and believed it was completed by James Loel. That application requested an amount of \$140,000 for the purpose of “working capital” and offered Lot 5 of Tolteca’s property at Innisplain as security. The form indicated that Tolteca was applicant one and Maria Pettett was applicant two. Maria Pettett was also listed as the guarantor. Her occupation was listed as mother/director and the form indicated that there was a net income of \$30,000 from the trust, farm income of \$170,000 plus cattle and lucerne. The form also indicated

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<sup>6</sup> Ex 1 doc 3.

<sup>7</sup> Ex 1 doc 5.

<sup>8</sup> Ex 1 doc 5.

<sup>9</sup> Ex 1 doc 5.

that the name of a relative if the applicant was unavailable was Trevor Pettett and gave a phone number, which was the home phone number of the family.

- [21] Maria Pettett's evidence was that she was unaware of that form being completed until 23 October 2009. On that date, she came home and was told by her husband that there had been a phone call from Stacks and that they required access to Lot 5 for valuation purposes. Maria Pettett said that at that point:

“I rang Mr [James] Loel and asked him what it was all about, and he said, ‘Well, as you’re aware, we require legal fees, and I have done a valuation on your property on the 30<sup>th</sup> of September,’ which I have never knew that he has done this, ‘and I want you to borrow – I want Tolteca to borrow \$140,000 to pay my legal fees’.”<sup>10</sup>

- [22] A further loan application form dated 7 October 2009<sup>11</sup> was completed and signed by Paul Guthrie. It was in similar terms to the earlier loan application form, except that in the net income section an amount of \$200,000 was inserted. That document also indicated that the loan was introduced by P J Guthrie rather than Lillas & Loel who were listed on the 6 October document. The 7 October 2009 loan application form indicated that the purpose of the loan was for “farm improvements” and the eventual repayment strategy for the loan was stated to be “sale of property”. The assets remained the same as in the 6 October document. In the comments section, the loan introducer, Paul Guthrie, had written “business introduced to me by [Lillas &] Loel solicitors”. Maria Pettett's evidence was that she did not provide any of that information.

- [23] That document was faxed through to Stacks by Paul Guthrie on 8 October 2009. Stacks assessed the application at a meeting of the Credit Committee in accordance with their usual processes and sent a conditional letter of offer to Tolteca via Paul Guthrie on 9 October 2009.<sup>12</sup> That offer on page one referred to a loan of \$140,000 for a period of 12 months to Tolteca as borrower and mortgagor and referred to both Maria and Trevor Pettett as guarantors. The final page of the conditional letter of offer indicated that Maria Pettett signed as borrower/mortgagor in her capacity as director of Tolteca and that she and Trevor Pettett signed as guarantors. The date alongside the signatures was 12 October 2009.<sup>13</sup> Given that signed acceptance by them on that date, it is difficult to reconcile Maria Pettett's evidence that she was unaware until 23 October 2009 that the loan application form had been sent to Stacks.

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<sup>10</sup> T 1-28 ll 36-39.

<sup>11</sup> Ex 1 doc 6.

<sup>12</sup> Ex 1 doc 8.

<sup>13</sup> Ex 1 doc 12

- [24] On 13 October 2009, Paul Guthrie forwarded the signed acceptance of the conditional offer to Stacks.<sup>14</sup> Stacks proceeded to further assess the application. On 23 October 2009, Maria Pettett signed an authority to act form for and on behalf of Tolteca authorising Outsource Secretarial and Financial (Paul Guthrie's firm) to act on her behalf in arranging mortgage finance for \$140,000 and agreed to pay a broking fee of four percent plus GST. She states that the form was not addressed to any particular financial body. A letter of retainer appointing James Loel to act was also signed.

### **The subsequent assessment of the first loan application by Stacks**

- [25] Evidence of the usual procedures adopted by Stacks in relation to loan applications was given at trial by Ray Stack and Paul Stack, who are the directors of Stacks, and by three employees, namely Mark Newnham, Leanne Elford and Yvonne May. That procedure was that once an applicant accepted a conditional offer and paid the commitment fee, a file would be opened and Leanne Elford would conduct a telephone interview. After that, it would go to Ray Stack for further assessment and he would conduct a further telephone interview based on the information gathered by Leanne Elford. If he is satisfied, then the application would then proceed to the Board of Stacks for approval.<sup>15</sup>
- [26] In relation to this first loan application, Leanne Elford's evidence was that she conducted a telephone interview with Trevor Pettett on 23 October 2009 and she made notes of that interview at the end of the call. Those notes indicate the following:

“TCT Trevor (Maria in background). Trevor was very vague on the purpose of the loan, but will use some funds to pay Sols costs on his current court case (bankruptcy pending?) + complete some renovations to another dwelling on his property to enable it to be tenanted + complete farm improvements or purchase a tractor. Income is derived from the farm (cattle) and hay sales + another house on the property is tenanted at \$135- pw. (3 dwellings all together). Trevor said ‘legally we earn \$36k pa, all together’. Our security property is approx. 80 acres of adjoining vacant rural land, with some shedding. Trevor also mentioned that he travels overseas frequently, however would not confirm what he does overseas! Trevor said ‘no-one knows what I do and no-one needs to know what I do’. I asked Trevor if they would have any problems meeting interest payments following the first 12 months and he laughed and said they ‘have enough money in the shed to pay our loan back in 48 hours’- regarding the stored hay bales. Trevor said ‘anyway this loan is nothing. I usually borrow \$10million at a time for my developments and I always get it from the Jews on the Coast – Jerry Steindles (?)’. Trevor said he knows the Taree area well as his late-wife's family owned CMAC Timber in

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<sup>14</sup> Ex 1 doc 12.

<sup>15</sup> T 3-19 ll 29-44.

Wauchope and Port Macquarie and he built a lot of houses in Taree area. Trevor said that due to their current Court Case, they are under a Mareva Injunction and have to watch everything they do.”<sup>16</sup>

[27] At the conclusion of the interview, Leanne Elford stated that she gave the file and her notes to either Paul or Ray Stack but cannot recall precisely who it was. The evidence indicates that Stacks subsequently withdrew its conditional offer of finance because the loan was for a consumer/personal purpose and because Trevor Pettett, who was one of the guarantors, failed the loan interview due to his attitude to Leanne Elford. He was also considered to have been “vague” as to the purpose of the loan. At trial, Leanne Elford gave evidence about the loan interview with Trevor Pettett and she stated that “He was very arrogant and almost to the point of being intimidating.”<sup>17</sup>

[28] On 23 October 2009, Mark Newnham from Stacks advised the following to Paul Guthrie via email:

“This offer has been withdrawn. The guarantor was evasive and unco-operative. We would have been unable to complete the val as the guarantor said he threw the proposed valuer off a building site 12 months ago and he would not be welcome nor want to set foot on his property.”<sup>18</sup>

[29] James Loel was then advised and he notified Trevor Pettett.<sup>19</sup> A formal Loan Not Proceeding Form was then signed<sup>20</sup> and a formal Notice of Withdrawal was issued.<sup>21</sup> Maria Pettett’s evidence was that James Loel then organised a loan for \$140,000 from Tradbray Pty Ltd (Tradbray) and that those monies were paid into his trust account.

### **Findings in relation to the first loan application**

[30] As a result of the information obtained by Stacks during the first loan application, it would seem to me that it would have been clear to Stacks that Trevor Pettett was involved in an ongoing court case and needed a loan to pay his solicitors’ fees.

[31] It was also clear from the documentation submitted and the telephone interview that Tolteca owned vacant rural land, there was farm income of \$170,000 plus cattle and lucerne worth at least \$140,000 given Trevor Pettett’s statement to Leanne Elford that

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<sup>16</sup> Ex 1 doc 15.

<sup>17</sup> T 2-71 ll 2-3.

<sup>18</sup> Ex 1 doc 19.

<sup>19</sup> Ex 1 doc 20.

<sup>20</sup> Ex 1 doc 23.

<sup>21</sup> Ex 1 doc 24.

they had have enough money in the shed to pay the loan back in 48 hours. However, a Mareva injunction was currently in place which meant they had a problem with cash flow.

- [32] The evidence indicates that the reason the loan was declined was because the money was not required for a commercial purpose and because Trevor Pettett failed the interview given he was rude and overbearing to Leanne Elford. It was also clear that he had development experience but there was some concern about possible bankruptcy.
- [33] There is no objective evidence that at that point in time Stacks was concerned about Tolteca or Trevor Pettett being unable to repay the loan.
- [34] Objectively, however, Stacks knew that Tolteca and Maria and Trevor Pettett had cash flow problems at the time of the loan application.
- [35] A loan was ultimately obtained from Tradbray to pay Lillas & Loel's legal fees.

### **The second loan application**

#### *Maria Pettett's evidence*

- [36] Maria Pettett's evidence was that in late December 2009, there was further discussion with James Loel in relation to monies that were owing to him for his ongoing legal work. In January 2010, the amount still outstanding to James Loel was around \$47,000 to \$50,000. She states that he referred them to a property development at Richards Street, Loganlea and proposed that they discuss the development with John Anderson. Maria Pettett stated that the concept was that the property development would allow them to repay the loan from Tradbray and have a profit so they could pay James Loel's legal fees.
- [37] An email dated 22 December 2009 from James Loel to Maria Pettett attached plans and figures in relation to the project.<sup>22</sup> Those figures related to the cost of purchasing the land, the cost of development, sewerage works as well as costs in relation to water, head works and professional fees. Those figures showed a total project cost of \$925,000 which included the cost of purchasing the property at \$725,000. It then showed that with the realisation of the sale of the lots of the subdivision, there would ideally be total sales of \$1,334,000 and an expected net profit of \$336,000.
- [38] On 23 December 2009, Maria Pettett stated that she went to John Anderson's home at Jimboomba with her husband and discussed the proposal with him. They subsequently discussed the development after they came home and it is clear that Maria Pettett had some concerns in relation to the development. An email from her to James Loel on 6 January 2010 sets out the following concerns:

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<sup>22</sup> Ex 1 doc 27.

“Hi James,

It’s Maria.

I am wondering how this business transaction is going to work? The way I am seeing it is:

Tolteca borrows the 1.2M, John Anderson (not Tolteca) increases his assets on our security and if everything works OK and we have a smooth ride we stand to get 50% of whatever profit the land makes. The question is what guarantees do we have that the land will sell in time so Tolteca can pay its loan back in 6 months time and if not do we lose the farm and Anderson walks away with no risk on his part (other than the property at Loganlea). Since the ratio of the guarantee is 1/4 (Loganlea 600G and Tolteca 2M) the profits should be split accordingly, 1/4 to Anderson and 3/4 Tolteca. Also I want to become one of the buyers since I am putting my farm as security.”<sup>23</sup>

[39] Later on the same day, Trevor Pettett also sent James Loel an email in the following terms:

“James,

On my rough calculations (and please feel free to correct me if I am wrong) there is no (sic) much profit in this deal. Lets (sic) forget estimates and what marketing agents tell us because until we sell the properties we cannot be 100% we will get the prices they tell us we could get. After talking to a builder mate of mine this is my estimate of the whole deal.

(i) Selling the land and the existing house;

Loan	1,200,000.00
Less the house	400,000.00
Less the duplex site	360,000.00 (if we are lucky and after seeing what others in the area sell similar blocks for)
Less the block with the pool	200,000.00
Less the 2 vacant blocks	378,000.00 (189,000.00 each)
Leaves a profit of	138,000.00

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<sup>23</sup> Ex 1 doc 31.

(ii) Selling land plus building the duplex:

Loan	1,600,000.00
Less the house	400,000.00
Less the block with the pool	200,000.00
Less the 2 vacant blocks	378,000.00
Less the duplexes	760,000.00

Leaves a profit of 138,000.00

In both these scenarios I did not take the agents fees out of the selling price. I cannot see how this can be a good deal. If I am putting the farm at risk I would like to get at least enough money to repay my debts to Steindles and you and this deal is not showing me that I can do that.

In my opinion the price of the land is much too high. We need to get this in the 6 hundreds in order for us (John and us) to make some money.

Please let me know what you think about the above before we engage people to do more work in this matter.

Thanks,

Trevor”<sup>24</sup>

[40] Following those emails, there was an exchange of correspondence between James Loel and Trevor Pettett in relation to those figures.<sup>25</sup> Maria Pettett gave evidence that she was aware of those emails and she stated that there were a number of discussions with James Loel about the project and during those discussions he tried to persuade them “that it was a good thing to invest in”.<sup>26</sup> Maria Pettett stated:

“... he introduced the deal as: if we do this, he will guarantee that he will – we will have no more legal fees to him, we will pay Tradbray’s loan and he will see us out of our debt.”<sup>27</sup>

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<sup>24</sup> Ex 1 doc 32.

<sup>25</sup> Ex 1 docs 32 and 33.

<sup>26</sup> T 1-31 ll 41-42.

<sup>27</sup> T 1-32 ll 1-3.

- [41] Maria Pettett also gave evidence that she and her husband discussed the project with a few local real estate agents at Loganlea. Her evidence during cross-examination by counsel for Stacks was that by 12 January 2010 she had become “convinced by [James] Loel that this will happen” in six months and that the subdivision was feasible.<sup>28</sup>

*The documentation in support of the loan*

- [42] On 25 January 2010, a Company Borrower Loan Application Form was completed.<sup>29</sup> Maria Pettett’s evidence was that the document was not completed by her. Paul Guthrie gave evidence that it was completed by him.<sup>30</sup> That form indicates that the loan amount was for \$1,000,000 and that the referring broker was P J Guthrie. The purpose of the loan was indicated to be the “purchase of residential block and dwelling” and the security offered was both the property at Innisplain which was valued at \$2,000,000 and the property which was proposed to be subdivided at Richards Street, Loganlea with a value of \$665,000.
- [43] The borrower/applicant listed on the application form was “TOLTECA Pty Ltd ATF UNDER INST 712635114”. The director’s name was Maria Pettett and her residential address was the same address as the security property at Innisplain and her occupation was listed as “investor”. The name of her employer was “self” and the number of years employed was listed as “10”. The form indicated that Maria Pettett has two children aged 10. A note next to her mobile phone number indicated that James Loel was to be contacted so he could organise a phone interview. Attached to that form was the following document:

“GENERAL

Maria wishes to purchase dwelling at Loganlea for further improvement and development.

Estimated profit from this venture is \$289,000. It is to be completed within six months under the guidance of Solicitor, Mr James Loel, and Votiva – Marketing/Sales.

Maria is married with two children. She does not have any other relatives in Australia.

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<sup>28</sup> T 1-74 ll 33-35.

<sup>29</sup> Ex 1 doc 45.

<sup>30</sup> T 2-20 ll 35-45.

Would you kindly arrange Maria's interview through Mr James Loel on 07 3844 6344 as this applicant does not act unless she has Mr Loel present to give her any guidance or advice that may be required.”<sup>31</sup>

- [44] Maria Pettett’s evidence was that she had no idea how the figure of \$289,000 was given as her gross income per annum. There were a number of other documents attached to the application form. There was a document which had details of the “Security (1)” property at Innisplain with an estimated value of \$2,000,000 and the “Purchase (2)” property at Loganlea which had a purchase price of \$665,000. In relation to the property at Loganlea, there was a note which stated “To be split into 5 Blocks, average 920 square metres each. Original house to stay – development approval already. On purchase it will be split up immediately.” In terms of improvements, the document indicated that they were a brick low set residence with 4 bedrooms, a pool and a large separate garage. The following figures were also attached to the loan application form:

“Purchase Price		665,000
Interest in advance		51,250
Consultants		10,000
Set up costs		25,000
Stamp Duty and Solicitors costs		45,000
Other:-		
Local Authority – Headworks	80,000	
Construction costs	40,000	
Preliminary excavations – Roads		
Sewerage	20,000	
Water	20,000	
Power	15,000	
Renovations	20,000	
Contingencies	8,750	<u>203,750</u>
		<u>\$1,000,000</u>

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<sup>31</sup> Ex 1 doc 45.

Small development expected to be completed and sold within six months. Lots of local interest, location and size average 920 square metres well sought for.

INCOME

Sales – Projected 1,334,000

COSTS

Sales costs 45,000

Pay out loan 1,000,000

NET PROFIT \$289,000<sup>32</sup>

*Paul Guthrie's evidence*

- [45] Paul Guthrie's evidence was that he had completed the loan application forms on behalf of Tolteca and sent them by facsimile to Stacks on 27 January 2010.

*Mark Newnham's evidence*

- [46] Mark Newnham, the Credit Application Manager at Stacks, gave evidence that he received the forms and reviewed the application. He made some notes and recorded that the residential property had already been approved for a subdivision and that the house on the residential land could be cut off and sold separately to the subdivision. He considered that it was a simple transaction, particularly as it was a small subdivision with approval and that the stated profits "seemed okay".<sup>33</sup> He stated that the application was then put to an internal meeting of the Credit Committee on 29 January 2010.
- [47] The meeting on 29 January 2010 was attended by Ray Stack, Paul Stack, Leanne Elford and Mark Newnham. Their conclusion was that based on the information in the application, the proposal was acceptable, particularly as there was an exit strategy as well as a strategy for the repayment of the loan. The committee considered it should be conditionally approved subject to specific conditions<sup>34</sup> and the provision of further information about the proposed development. Those conditions were:

- (i) the retention of six months' interest by Stacks;

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<sup>32</sup> Ex 1 doc 45.

<sup>33</sup> T 3-14 17.

<sup>34</sup> Ex 1 doc 48.

- (ii) the Loganlea security was to be valued as is having no regard to material change of use;
- (iii) a letter was required from the engineer or surveyor confirming the cost of the proposed subdivision. This was necessary because Stacks required independent verification of the costs involved, which would confirm whether the borrower had the support of an engineer or surveyor in carrying out the subdivision; and
- (iv) a copy of the receipt of Council planning consent for subdivision.

*The conditional letter of offer dated 29 January 2010*

[48] A conditional letter of offer dated 29 January 2010 was sent to Paul Guthrie who forwarded it to James Loel.<sup>35</sup> On 1 February 2010, James Loel forwarded an email to Trevor and Maria Pettett attaching the conditional approval for the loan from Stacks. That email stated: “Please do not discuss with ANYONE other than me before it is fully approved.”<sup>36</sup>

[49] That letter of offer was signed by Maria Pettett and returned to Stacks on 4 February 2010.

[50] On 5 February 2010, Mark Newnham sent an email to Paul Guthrie in the following terms:

“Mate, it will be very important that when Leanne [Elford] speaks with Mrs [Maria] Pettett that she knows all the ins and outs of the business. It’s (sic) debts and assets, its plans, its income. If the powers that be (sic) get one sniff that she is just a figurehead and hubby runs the business then the deal will go. If she says anything like you’ll have to ask hubby or sol, or defers to them, the deal will go.”<sup>37</sup>

*Maria Pettett’s evidence of the interviews*

[51] Maria Pettett’s evidence was that she rang James Loel and he advised her that she would have to have an interview with Stacks and that she had to have those three pieces of paper in front of her and “had to repeat everything that was on the pieces of paper parrot-

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<sup>35</sup> Ex 1 doc 49.

<sup>36</sup> Ex 1 doc 53.

<sup>37</sup> Ex 1 doc 60.

fashion.”<sup>38</sup> Maria Pettett gave evidence that on 9 February 2010 she spoke to Leanne Elford:

“Can you tell me about the conversation with Ms Elford, what was said to her?---Well, I – I recall that I told her – she asked me about my income. I said I was receiving Centrelink payments, \$400 a fortnight. Then she asked me about Tolteca’s income. I said Tolteca was earning between 40 to 100,000 per year, depending on the year.

Depending on?---The year. Each year it’s different income. It’s not the same.

And why is that? Why does it vary from year to year?---Because Tolteca was earning – was – the farm business that we have was paying lease to the – to Tolteca. I think it’s – that’s what it’s called, and also if we were making a profit on the farm business, Tolteca was getting a share.

Now, just coming back to the conversation. So you talked about the income that Tolteca was earning. Anything else that you told Ms Elford in the course of that conversation?---I – I recall she asked me about the project, but because I did not know much about the project – I had very basic information about the Loganlea project – I asked Ms Elford to ring Mr James Loel, because he had all – I had no plans, other than whatever he send (sic) me on emails, and because he was aware of more about the project than I was. He was managing the project.

Now, apart from talking about your income with her – well, what did you tell her about your income?---About my income?

Yes?---Nothing much, because I was – personally, I had no income. I had only the \$400 family tax benefit that I was receiving from Centrelink.

Okay. And did you tell Ms Elford anything about what you did day-to-day?--I – I said that I was helping my husband on the farm.

Now, you told us a moment ago that you referred Ms Elford to Mr Loel with respect to details of the project. Did you give her any more detail than that during the conversation about the project?---No.

Can you recall any questions that Ms Elford asked you during that conversation?---No. There was – that – I was asked about assets, and I had no assets in my name. I have no assets in my name. No. Nothing – income.

Now, I think a little while ago you said first you spoke to Ms Elford?---Yes.

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<sup>38</sup> T 1-35 ll 1-4.

Did you speak to anyone else during that conversation?---After we finished talking – I finished talking to Ms Elford, she asked me to be put on hold and wait for the director to come and talk to me.

The director? And do you know who – did you talk to someone else after you'd been put on hold?---Mr Ray Stack came.

All right. How did you know it was Mr Ray Stack?---Because he introduced himself.

All right. And can you tell us about the conversation you had with Mr Stack?--Mr Ray Stack asked me about – one of the questions Mr Ray Stack asked me was why do I think my property where I was living increased from 620 to 1.6 million valuation. We bought it in 2002 for 620 and he was wondering why it valued at 1.6. I explained to him that we've done improvements on the properties; dams were built, sheds were built. Then he asked me why was important<sup>39</sup> previous years. I recall I was important<sup>40</sup> because I was a director of a company and my husband built two houses for someone and, at the last final payment, he wasn't – he didn't get paid so we couldn't pay the contractors – the company couldn't pay the contractors, so we – I don't know. I can't recall what it was but I remember being important<sup>41</sup> because I wasn't part of any dealings with, you know - - -

Now – sorry, your Honour. Now, during your discussion with Mr Stack, did you have any – or Ms Elford – did you have any further discussion about the purpose of the loan?---The purpose of the loan was to purchase the property at Loganlea.

All right. Did you tell them that the loan was for anything other than that?--No.

All right. Now, during that conversation with Ms Elford or Mr Stack, did you go into any further detail about how the property development might be conducted?---No. I was asked what the purchase price was going to be and I said 665, because that's what I was told. I did not talk about any other figures. I asked – even Mr Ray Stack, I asked to talk to Mr Loel was the one that was going to even administer the money and manage the project.”<sup>42</sup>

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<sup>39</sup> This would seem to be a transcription error and the reference should be to “in Part 10”.

<sup>40</sup> This would seem to be a transcription error and the reference should be to “in Part 10”.

<sup>41</sup> This would seem to be a transcription error and the reference should be to “in Part 10”.

<sup>42</sup> T 1-35 l 11 – T 1-36 l 36.

[52] Maria Pettett stated that she made a note of the phone call in her diary as follows:

“Rang Stacks finance on 02 65913444 at 13:33pm. Asked to speak to Leanne Elford as instructed by James.

Leanne asked me about my personal income, Tolteca’s income, why was Tolteca buying 33 Richards St. Asked her to talk to my lawyer James Loel.

I was put on hold and a guy called Stack came on the line to ask me (sic) few questions:

- (i) When did you purchase 9847 Mt Lindesay Highway?
- (ii) Why are the valuations so much higher than in 2002?
- (iii) What happen (sic) in 1997, 1999, why was I in part 10 then?
- (iv) Are we going to use any of these funds for legal fees for Trevor?

Told him to talk to James as he knows more about the development. He was going to manage and administer this venture.”<sup>43</sup>

[53] Maria Pettett’s evidence of the circumstances surrounding that phone call are disputed by Leanne Elford and Ray Stack to the extent that Maria Pettett stated that she was put on hold after her interview with Leanne Elford and then spoke to Ray Stack. That sequence is denied by both Leanne Elford and Ray Stack, as they maintain that Maria Pettett spoke to Ray Stack in a separate phone call later in the day. I consider that Maria Pettett was an honest witness but that she was probably mistaken about whether it was a separate phone call or not. I am not satisfied that her notes were not made contemporaneously. Ultimately, I do not consider that there is any real significance in that difference of opinion about the timing of the call given the evidence as to the content of the conversation is essentially the same.

*Leanne Elford’s evidence*

[54] Leanne Elford gave evidence that the purpose of the interview was to go through the loan agreement with the prospective borrower and confirm information in the application form. Her notes, which were made shortly after the phone call, were as follows:

**“9/2/2010 2:57:58 PM Leanne Elford**

TCT Maria - Loan is to purchase investment property at Loganlea QLD. The property already has a DA for 5 lots, so balance loan funds are to complete

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<sup>43</sup> Ex 2.

earthworks, fences, stormwater pipes etc to enable the blocks to be sold. Maria thought the blocks could be sold for \$210- plus and believes they will all be sold within 6 months, hence their need for us to retain 6 months interest. Maria describes herself as a mother and a farmer and explained her income is derived from her Centrelink Family Allowance of \$400- pf plus income from the farm. This usually comes from the sale of cattle or hay, however Maria said they are not selling anything at present as prices are too low. Maria estimated this income could be anywhere between \$50-\$100k pa. Maria said that this loan has nothing to do with her husband (currently Bankrupt) or her personal life and if we have any further questions we have permission to discuss same with her Solicitor - James Loel.”<sup>44</sup>

[55] Leanne Elford gave evidence that when she spoke to Maria Pettett about the information on the loan application form, she updated the form and made it clear that the income figure of \$289,000 was the projected income from the subdivision. She also noted on the back of the form some issues she wished to discuss with Ray Stack when she handed over the file to him, which were the following:

- “1. previously Bankrupt
2. Husband currently Bankrupt
3. earns insufficient income to repay debt”<sup>45</sup>

[56] She stated that the last dot point related to Maria Pettett’s capacity to repay the loan as a guarantor.

[57] Leanne Elford’s evidence was that she gave the file to Ray Stack and discussed it with him and then he spoke to Maria Pettett later in the day. Leanne Elford’s evidence was that there were two separate phone calls and she denied that Maria Pettett was placed on hold and that Ray Stack then came on the phone.

*Ray Stack’s evidence*

[58] Ray Stack’s evidence was that he rang Maria Pettett on 9 February 2010 and discussed the proposed development with her.

[59] Ray Stack gave evidence that he made handwritten notes of his conversation with Maria Pettett in the following terms:

“TCT Maria – sell 3 lots @ 210, house & lot 380, large lot 320 > 1330. Land 665 dev costs about 250-300 total cost <1M. Profit expected 300 K-400 K.

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<sup>44</sup> Ex 1 doc 64.

<sup>45</sup> Ex 1 doc 64.

Housing market v.g. Rental market huge – developers will buy off us & then build & sell. Pay us upfront subdivision contractors will only take 2 months. If subdivn not completed 6 mths could sell hay & cattle to pay Interest.

Her Solicitor James Loell (sic) has copy plans & full details of their affairs.”<sup>46</sup>

- [60] Ray Stack gave evidence that he then spoke to James Loel about the application and his notes record the following;

“TCT James Loell (sic) (I met him with the Taree Service Centre - seemed a really nice cove) He knew Maria well & vouched for her honesty & the ability to make money out of this project – Happy for us to pay money as development proceeds. Husband was badly advised in his case – he was the Pettett in Pettit & Sevitt Builders. Maria prepared to risk her & her children (sic) financial future by putting up farm.”<sup>47</sup>

- [61] Ray Stack’s evidence was that he ultimately formed the impression that “she [Maria Pettett] knew exactly what she was doing. She was very keen to complete the purchase and enter into the development, and she was certain she was going to make a profit from it.”<sup>48</sup> The information provided by James Loel was also very positive for the application. Having been involved in subdivisions previously, he was satisfied that it was a straightforward subdivision and that Maria Pettett’s husband, Trevor Pettett, would be able to advise her if necessary, given his background in building.

- [62] In evidence, he stated that he had made notes of his conversation with Maria Pettett as follows:

“Well, basically, my first note is that she said, from the development, they expected to sell three lots at approximately 210,000 per lot, the house and the lot for 380,000 and the large lot for 320,000, which made a total of 1,330,000.

Yes?---The land was costing 665,000, development costs about 250 to 300, total cost less than 1 million. Profit expected, 3 to 400,000. The housing market was very good. The rental market was huge and developers, she felt, would buy off them and then build and sell or rent. She would – but they would be paid up front. The subdivision construction would take only two months to complete and if the subdivision was not completed within six months and we were holding the interest back for six months, they could sell

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<sup>46</sup> Ex 1 doc 64.

<sup>47</sup> Ex 1 doc 64.

<sup>48</sup> T 2-48 ll 23-25.

hay or cattle to pay the future interest. Her solicitor, James Loel, has copy plans and full details of their affairs.

How do you know this isn't just your interpretation of the document you'd seen rather than what you tell the court, a record of what was said to you?---No, no. It's the result of my telephone conversation."

Now, do you recall forming an impression about Maria Pettett, one way or another, after this call?---Yes. I formed the impression that she knew exactly what she was doing. She was very keen to complete the purchase and enter into the development, and she was certain she was going to make a profit from it.

Do you recall Ms Pettett saying to you that she had only a very basic knowledge of the project?---No. I don't recall that.

Do you recall her saying to you words to the effect that Mr Loel was managing the project?---No. I don't - - -"<sup>49</sup>

*The approval of the loan*

- [63] On 10 February 2010, James Loel wrote to Ray Stack confirming their telephone call on the previous day and attaching a number of documents including the development plan permit, a development overview and the infrastructure charges. He also indicated that the purchase price of the property was \$709,000 and that "The small scale development is fully approved and is to commence immediately."<sup>50</sup>
- [64] On 11 February 2010, Stacks forwarded the mortgage and supporting documentation together with the executed letter of offer to Lillas & Loel. On 16 February 2010, two documents called "Loan Repayment Ability Declaration" executed by Maria Pettett were sent to Stacks. The first document stated that her current gross income was \$35,000 and that she had been in employment for 10 years.<sup>51</sup> The second document stated that Tolteca's gross income per annum was \$250,000.<sup>52</sup> On 9 March 2010, a document in the same terms was also forwarded to Stacks.<sup>53</sup> Maria Pettett's evidence was that those figures had not been inserted by her.

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<sup>49</sup> T 2-48 ll 5-31.

<sup>50</sup> Ex 1 doc 68.

<sup>51</sup> Ex 1 doc 78.

<sup>52</sup> Ex 1 doc 79.

<sup>53</sup> Ex 1 doc 89.

- [65] All documents which were required to be provided as a condition of the loan were provided by James Loel by 17 February 2010. Those documents included a declaration signed by Maria Pettett on 16 February 2010 whereby she acknowledged that she was the guarantor named in loan documents between Tolteca and Stacks, had received legal advice relating to the loan and security documents and had freely and voluntarily signed the documents.
- [66] Paul Stack stated that he conducted a complete review of the loan file before settlement of the loan and that he formed the view that if the development took longer than six months then Tolteca would be able to sell hay or cattle to make the interest repayments. He also considered that in the worst case scenario “It would have been easy to sell the security that they just purchased for around the purchase price. That would leave with \$150,000, approximately a hundred thousand, available to the client to draw to significantly repay the loan, [at] which stage they’d have 200,000 owing that they would be able to service.”<sup>54</sup>
- [67] The loan was granted by Stacks. The mortgage documents were signed on behalf of Tolteca by Maria Pettett as mortgagor on 9 March 2010 and by Ray Stack on behalf of Stacks on 22 March 2010.<sup>55</sup>
- [68] On 6 April 2010, James Loel wrote to Maria Pettett enclosing a “Settlement Statement” which confirmed that the settlement of the purchase of 33 Richards Street, Loganlea had occurred on 18 March 2010.<sup>56</sup> That letter stated that the development opportunity had been introduced by John Anderson through James Loel, Maria Pettett was to receive the first \$200,000 net of all costs and then set out a profit sharing arrangement above that figure. It also stated that John Anderson was to receive \$2,000 per month by way of management fees.

### **Findings in relation to the circumstances of the second loan application**

- [69] The second loan application forms were completed by Paul Guthrie and sent to Stacks on 27 January 2010.
- [70] Mark Newnham reviewed the second loan application and it was considered by the Credit Committee comprising of Ray Stack, Paul Stack, Mark Newnham and Leanne Elford on 29 January 2010. The committee approved the loan on the basis of the information provided, subject to a number of conditions, including retention of six months interest, a

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<sup>54</sup> T 3-33 ll 46-47 – T 3-34 ll 1-3.

<sup>55</sup> Ex 1 doc 95.

<sup>56</sup> Ex 1 doc 96.

letter from the engineer confirming costs of the proposed subdivision and a copy of the receipt of Council consent for the subdivision.

- [71] A conditional letter of offer dated 29 January 2010 was prepared and sent to Paul Guthrie who forwarded it to James Loel. It was then signed by Maria Pettett and returned to Stacks on 4 February 2010.
- [72] On 9 February 2010, Leanne Elford conducted a telephone interview with Maria Pettett to clarify the income and asset figures on the forms and to discuss the purpose of the loan with her. As a result of that interview, Leanne Elford ascertained that the income figure of \$289,000 was the projected income from the subdivision. She advised Ray Stack of this and that Maria Pettett had previously been bankrupt, that her husband was currently bankrupt and that Maria Pettett did not earn sufficient income to repay debt.

### **Default**

- [73] Whilst the five lots the subject of the subdivision eventually sold for more than \$1,000,000, those sales took many years to eventuate and certainly not within the initially anticipated timeframe of 12 months. There were a number of delays, which included increased costs and delays with the council, particularly in relation to lodging the plan for subdivision. This ultimately occurred after 12 months which was six months after the planned completion date for the entire project. There were also difficulties in the relationship between Maria Pettett and the project manager John Anderson.
- [74] Interest was paid on the loan until May 2012, which included an amount of \$51,250 prepaid interest, \$8,072.99 from Tolteca via direct debit and \$8,551.67 by bank cheque as well as amounts from the sale of lots 5 and 6 of the Richards Street property.
- [75] An amount in the vicinity of \$980,000 has been paid by Tolteca, however, there are outstanding payments pursuant to the loan in the order of \$1,200,000.
- [76] Accordingly, the plaintiff seeks an order for the recovery of possession of property as mortgagee pursuant to s 78 of the *Land Title Act 1994* (Qld) in respect of all of the land at Innisplain.

### **The ASIC Act**

- [77] The relevant provisions of s 12CC of the ASIC Act are as follows:

#### **“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
  - (ja) whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the service recipient for the supply of the financial services; and
  - (k) the extent to which the supplier and the service recipient acted in good faith.
- .....
- (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.”

### **What constitutes ‘unconscionable conduct’?**

[78] A convenient summary of the law was set out by Allsop P (as he then was) in *Tonto Home Loans Australia Pty Ltd v Tavares; FirstMac Ltd v Di Benedetto; FirstMac Ltd v O'Donnell*.<sup>57</sup> In that decision, the court found that the loan and mortgage documents were unjust within the meaning of the *Contracts Review Act 1980* (NSW), but that Tonto had not acted unconscionably in contravention of s 12CB or s 12CC of the ASIC Act or s 51AB or s 51AC of the *Trade Practices Act 1974* (Cth). His Honour noted the following:

“[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*

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<sup>57</sup> [2011] NSWCA 389.

*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 [Contracts Review Act 1980 (NSW)] 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].”<sup>58</sup>

[79] His Honour considered that it was neither possible nor desirable to provide a comprehensive definition of what constitutes unconscionable conduct, given the wide range of conduct which he considered could constitute unconscionable conduct including bullying and thuggish behaviour, undue pressure and unfair tactics, taking advantage of vulnerability or lack of understanding, trickery or misleading conduct.<sup>59</sup> He considered that such a finding could only be made after an examination of all the circumstances.<sup>60</sup> This analysis was further expanded by his Honour in *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd*.<sup>61</sup> That decision related to the sale of vacuum cleaners to elderly women by a salesman who had gained entry into their homes under the pretext of giving them a free maintenance check. Allsop CJ stated:

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

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<sup>58</sup> [2011] NSWCA 389, [291].

<sup>59</sup> [2011] NSWCA 389, [291].

<sup>60</sup> [2011] NSWCA 389, [291].

<sup>61</sup> [2013] FCAFC 90.

publicly recognised content of fairness, without in any way constricting it. Values, norms and community expectations can develop and change over time. Customary morality develops ‘silently and unconsciously from one age to another’, shaping law and legal values: Cardozo, *The Nature of the Judicial Process* (Newhaven, Yale University Press, 1921) pp 104-105. These laws of the States and the operative provisions of the ACL [*Australian Consumer Law* in Sch 2 to the *Competition and Consumer Act 2010* (Cth)] reinforce the recognised societal values and expectations that consumers will be dealt with honestly, fairly and without deception or unfair pressure. These considerations are central to the evaluation of the facts by reference to the operative norm of required conscionable conduct.”<sup>62</sup>

- [80] A review of the cases indicates that a high level of moral obloquy on the part of the person said to have acted unconscionably is still required and the Victorian Court of Appeal specifically endorsed that requirement in *Violet Home Loans Pty Ltd v Schmidt*<sup>63</sup> where Warren CJ, Cavanough and Ferguson AJJA considered a case which involved a borrower and a fraudulent intermediary. The court endorsed the decision of Hargrave J in *Director of Consumer Affairs Victoria v Scully (No 3)*<sup>64</sup> who had held:

“[31] 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’.”<sup>65</sup> (citations omitted)

- [81] I accept that the task requires a synthesised approach which takes into account all of the factors relevant to the conduct and then a determination on whether that particular conduct is unconscionable. As the court held in *Violet Home Loans Pty Ltd v Schmidt*:

“[59] ...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

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<sup>62</sup> [2013] FCAFC 90, [23].

<sup>63</sup> [2013] VSCA 56.

<sup>64</sup> [2012] VSC 444.

<sup>65</sup> [2012] VSC 444, [31].

to consider whether conduct is unconscionable simply because of the type of lending that is involved, for example, asset based lending.”<sup>66</sup>

[82] In *Paciocco v Australia and New Zealand Banking Group Limited*,<sup>67</sup> Allsop CJ also referred to these factors and indicated that they assisted in setting a framework for the values that lie behind the notion of the relevant conscience of parties who are engaged in trade or commerce and he considered that those values were fairness and equality, a lack of understanding or ignorance of a party, the risk and worth of the bargain, good faith and fair dealing. His Honour continued:

“[296] The working through of what a modern Australian commercial, business or trade conscience contains and requires, in both consumer and business contexts, will take its inspiration and formative direction from the nation’s legal heritage in Equity and the common law, and from modern social and commercial legal values identified by Australian Parliaments and courts. The evaluation of conduct will be made by the judicial technique referred to in *Jenyns*. It does not involve personal intuitive assertion. It is an evaluation which must be reasoned and enunciated by reference to the values and norms recognised by the text, structure and context of the legislation, and made against an assessment of all connected circumstances. **The evaluation includes a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal**

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<sup>66</sup> [2013] VSCA 56, [59].

<sup>67</sup> [2015] FCAFC 50.

**moral judgment and exercise of power and discretion based thereon.**<sup>68</sup> (my emphasis)

- [83] Counsel for Tolteca placed considerable importance not only on the decision of *Elkofairi v Permanent Trustee Co Ltd*,<sup>69</sup> but also on the discussion of the court in *Violet Home Loans Pty Ltd v Schmidt*<sup>70</sup> to wilful blindness and the court's endorsement of the decision of Hargrave J in *Director of Consumer Affairs Victoria v Scully (No 3)*.<sup>71</sup> In *Director of Consumer Affairs Victoria v Scully (No 3)*, Hargrave J had indicated that the conduct had to be more than negligent and usually would involve some deliberate wrongdoing.<sup>72</sup> He recognised, however, that there were cases where recklessness would suffice and, in particular, cases involving wilful blindness.<sup>73</sup> His Honour indicated that ultimately each case depends on its own circumstances and that the court must make a value judgment as to "whether to characterise the conduct with 'the opprobrium of unconscionability'".<sup>74</sup>
- [84] The court in *Violet Home Loans Pty Ltd v Schmidt* specifically affirmed the proposition "that recklessness, in the form of wilful blindness, may in some cases supply the necessary element of moral obloquy"<sup>75</sup> and was satisfied that there was the requisite degree of conduct to constitute recklessness and wilful blindness. In that case, the broker had sent documents to the lender on a number of occasions, each of which disclosed different income levels. Whilst the discrepancy between each of the three stated income levels was not great and varied between \$49,000 and \$75,000, the Court of Appeal held that those discrepancies ought to have raised the lender's suspicion that something may be amiss with the application.<sup>76</sup> It was held that the lender had turned a blind eye to the irregularities in the loan application and the income declaration.<sup>77</sup> Their Honours held that wilful blindness could constitute recklessness and would therefore supply the necessary element of moral fault.<sup>78</sup> The borrower in *Violet Home Loans Pty Ltd v Schmidt* was an unsophisticated and naive man in his mid-sixties who was held to have little

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<sup>68</sup> *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50, [296].

<sup>69</sup> [2002] NSWCA 413.

<sup>70</sup> [2013] VSCA 56.

<sup>71</sup> [2012] VSC 444.

<sup>72</sup> [2012] VSC 444, [31].

<sup>73</sup> [2012] VSC 444, [31].

<sup>74</sup> [2012] VSC 444, [31].

<sup>75</sup> [2013] VSCA 56, [58].

<sup>76</sup> [2013] VSCA 56, [59].

<sup>77</sup> [2013] VSCA 56, [62].

<sup>78</sup> [2013] VSCA 56, [62].

financial nous. The financial circumstances there raised a significant doubt as to whether he could repay the loan. In the circumstances, the lender was held to have acted unconscionably because it did not apply an inquisitive mind when there were “significant discrepancies in the information supplied.”<sup>79</sup>

- [85] Counsel for Tolteca argued that *Violet Home Loans Pty Ltd v Schmidt* provides a basis for accepting that conscientious conduct in modern Australian commerce involves responding to circumstances which would lead a reasonable person to suspect that a party is ill-equipped to protect their interests in the transaction by making further inquiries.
- [86] Counsel for Tolteca also argued that a similar conclusion is available in the decision of *Elkofairi v Permanent Trustee Co Ltd*.<sup>80</sup> In that case, the lender knew that Mrs Elkofairi had no income and that the loan amount was a large borrowing secured over her only asset. That was apparently clear from the application form but the lender made no inquiries about the purpose of the loan other than to note that a proportion of the advance was to be used for business or investment purposes. It would seem that the lender made no inquiries about Mrs Elkofairi’s income or what income the business or investment was likely to generate. The lender also knew that Mrs Elkofairi did not receive legal advice. In those circumstances, the Court of Appeal said that those facts should have “sounded a warning bell”<sup>81</sup> to the lender and further observed:

“[56] In my opinion, notwithstanding that the respondent did not have knowledge of the appellant’s lack of education and her language and domestic difficulties, her lack of income, in the circumstances of this transaction – that is a large borrowing secured over her only asset, in circumstances where the application form failed to disclose any income for either husband or wife – placed her in a special position of disadvantage. Though the full extent of that special position of disadvantage was not known to the respondent, nonetheless the absence of any relevant financial information was sufficient to put the respondent on notice of the appellant’s lack of capacity to meet the repayment obligations under the mortgage. That left as the only source of repayment the selling of her only asset, as again the respondent must be taken to have known.

[57] Counsel for the respondent submitted that the respondent did not need to be concerned with the fact that the borrowers, or the appellant at least, had no income. It was sufficient for its purposes that the loan was amply secured. That was a position, according to the respondent, which the

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<sup>79</sup> [2013] VSCA 56, [68].

<sup>80</sup> [2002] NSWCA 413.

<sup>81</sup> [2002] NSWCA 413, [55].

respondent was entitled to take. I do not agree. In fact, it demonstrates the unconscientious nature of the transaction and the advantage the respondent took of the appellant's disadvantageous position. On its own submission, the respondent was only concerned with its ability to recoup any amount outstanding on the loan in circumstances where it must be taken to have known, because on the only information the respondent had, the appellant had no income, that the appellant, who was exposed to liability for the whole of the loan, had no ability to make even the first payment. The unconscientious nature of the transaction was that she was thereby at risk of losing her only asset. That risk was both immediate and real."<sup>82</sup>

- [87] The court ultimately determined that it was unconscientious for the lender to lend such "a large sum of money to a person with no income with full knowledge that if the repayments under the loan were not met, it could sell that person's only asset."<sup>83</sup>
- [88] Counsel for Tolteca also relied on the decisions of *National Australia Bank Ltd v Smith*<sup>84</sup> and *Perpetual Trustee Company Ltd v Khoshaba*<sup>85</sup> in support of the submission that Stacks' conduct amounted to unconscionable conduct. In *National Australia Bank Ltd v Smith*, which is a decision with respect to the *Contracts Review Act 1980* (NSW), guarantees and mortgages over a property were declared void where the bank had failed to ensure that the guarantors had received financial advice in circumstances where the financial advisors' certificates were suspicious and strongly suggested they had been prepared by someone other than a financial advisor. In *Perpetual Trustee Company Ltd v Khoshaba*, Spigelman CJ considered that the fact that a lender was content to lend on the value of the security would add weight to a "determination of unjustness"<sup>86</sup> and Basten JA considered that the fact that the security was the sole residence of the borrower was also significant.<sup>87</sup>
- [89] As previously noted, each case depends on a consideration of all of the unique circumstances and all of the interconnected facts and issues. The court is essentially required to stand back and look at the whole episode.

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<sup>82</sup> *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413, [56]-[57].

<sup>83</sup> *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413, [59].

<sup>84</sup> [2014] NSWSC 1605.

<sup>85</sup> [2006] NSWCA 41.

<sup>86</sup> *Perpetual Trustee Company Ltd v Khoshaba* [2006] NSWCA 41, [82].

<sup>87</sup> *Perpetual Trustee Company Ltd v Khoshaba* [2006] NSWCA 41, [128].

### **Does Stacks' conduct constitute 'unconscionable conduct'?**

- [90] Some of the allegations raised by Maria Pettett, particularly in relation to the initiation of the project and the apparent involvement of James Loel who acted for a number of parties, do raise concerns as does the allegation that she was told by him not to get independent financial advice. However, James Loel is not a party to these proceedings and he has not given evidence or has been given a chance to present his version of events. The focus is not on James Loel, Paul Guthrie, John Anderson or on any other person not associated with Stacks. The focus of the inquiry, in this case, is on Stacks' conduct and whether it can be characterised as unconscionable. In this regard, I turn in particular to Tolteca's pleaded case.

#### *Had the circumstances changed?*

- [91] Tolteca argued that there are a number of aspects of Stacks' conduct which amount to unconscionable conduct. Tolteca argued that, on the basis of the loan application form, Maria Pettett was known to be a housewife with two young children who was trying to borrow \$1,000,000 against her major asset, the family home, to conduct a property development in circumstances where an earlier loan for a lesser amount had been rejected and her circumstances had not changed.
- [92] It would seem to me that many factors indeed remained the same in relation to Maria Pettett's financial circumstances at the time of the second loan application. Trevor Pettett was still bankrupt and Maria Pettett did not earn sufficient income to repay the debt. There was, however, a significant factor that did change and that was the purpose of the loan. On the face of the documents, it was very clear that the loan was now required for a commercial purpose, namely for the development of a subdivision. It was not being used to pay legal fees or to make improvements on the farm and Trevor Pettett was not a guarantor of the loan.
- [93] The application was from Maria Pettett who was the sole director of Tolteca. The money was clearly being advanced for the purpose of a subdivision of a block of land and not for a domestic or consumer purpose. The evidence from Stacks was that it did not lend money for non-commercial purposes such as those specified in the first loan application.
- [94] I consider that there was a material change in the circumstances, as the purpose of the loan had changed.

#### *Was Maria Pettett commercially unsophisticated? Did she lack an understanding of the details of the proposed subdivision?*

- [95] Tolteca argued that Maria Pettett was not a well-known property developer and had no relevant business experience. Tolteca argued that this ought to have led to further inquiries, as Stacks knew that Maria Pettett was the controlling mind of Tolteca and she

was the only person who ought to have had the relevant knowledge of the subdivision project. It was argued that if she did not have the knowledge, then Tolteca did not have the knowledge.

- [96] Tolteca argued that a successful development project requires a project manager who is capable of assessing the work of the engineers and ensuring that the development proceeds in an efficient way. Ray Stack agreed that a successful project requires management by a capable person who would take charge of the project. He admitted that he assumed that there was someone who could perform that role in the subdivision and accepted that he did not actually ensure that there was such a person. Ray Stack also accepted that his assessment did not take into account all of the relevant factors and that none of the documents he saw told him anything about Maria Pettett's ability to undertake the subdivision or her commercial experience.
- [97] Ray Stack also agreed that there was a difference between having a repayment strategy and being able to carry out the repayment strategy. He accepted that he had no documents which allowed him to make an assessment of Maria Pettett's capacity to bring the project to fruition. Tolteca argued that Ray Stack's failure to ask James Loel whether Maria Pettett had ever managed a subdivision was an example of his wilful blindness towards Maria Pettett's ability to complete the project.
- [98] Tolteca also argued that Mark Newnham clearly doubted Maria Pettett's involvement in the project and queried her knowledge of the details of the project. Tolteca argued that at the Credit Committee meeting on 29 January 2010, Mark Newnham introduced the second loan application and explained to the committee that it was different to the first loan application because Trevor Pettett was not involved and the loan had a "different and well explained purpose". However, in his email to Paul Guthrie on 5 February 2010, he stated that when Maria Pettett is interviewed, she must know the ins and outs of the business. Tolteca argued that it was "baffling" that Mark Newnham had stated that the loan was for a different and well explained purpose whilst he was simultaneously unsure whether Maria Pettett understood the details of the project. Tolteca argued that this was indicative of the high level of indifference on the part of Stacks and that Stacks, as a prudent lender, should not be indifferent to whether Maria Pettett understood the details of the project.
- [99] Having considered the evidence given by Maria Pettett, Leanne Elford and Ray Stack and the relevant notes taken by all three parties, it would seem to me that Maria Pettett did in fact have a good technical understanding of the development and what was required to make it a profitable venture. In particular, Maria Pettett's actual level of knowledge prior to the interview on 9 February 2010 is borne out by her analysis of the reality of the situation in her email to James Loel on 6 January 2010 where she essentially queried the figures. She also acknowledged that she was aware of her husband's email on the same day, which set out his concerns about the feasibility of the project. Furthermore, her evidence was that she and her husband subsequently discussed the project with a few

local real estate agents at Loganlea and by 12 January 2010 she stated that she had become convinced by James Loel that the subdivision was feasible and would happen in six months.

- [100] Accordingly, on the basis of that evidence, I consider that Maria Pettett had a good understanding of the loan, as she knew what it was required for and what was required in order to make a profit. Maria Pettett was an intelligent, articulate and thoughtful witness at trial and I have no doubt she was able to have an intelligent conversation on a theoretical level about the project. I do not consider that she was commercially unsophisticated but I accept that she was not commercially experienced at the time of the loan in February 2010.

*Did Stacks know that James Loel was in control of the project and that Maria Pettett required independent legal advice?*

- [101] Tolteca argued that James Loel was involved in the project, acted for Tolteca and Maria Pettett and was not a disinterested advisor. Furthermore, it was argued that Stacks knew that James Loel was involved in the project, as his knowledge about it was better than Maria Pettett's and because she deferred to James Loel in her conversations with both Leanne Elford and Ray Stack. Counsel for Tolteca argued that it was clear that Maria Pettett relied on James Loel and that it was unusual for a developer to know less about a project than a solicitor who normally would only be involved in relation to the legal aspects.
- [102] Tolteca argued that Maria Pettett's persistent deference to James Loel ought to have put Stacks on notice of the need to explore the extent of the relationship between James Loel and Maria Pettett. In this respect, reliance is placed on the 5 February 2010 email sent by Mark Newnham to Paul Guthrie in which he indicated that Maria Pettett must know the details of the project and that it was important when she spoke to Leanne Elford that she did not defer to her husband or solicitor. Tolteca argued that Maria Pettett's clear evidence was that in both of her telephone interviews, she stated that they should ring James Loel.
- [103] There is no doubt that Maria Pettett told both Leanne Elford and Ray Stack to ring her solicitor James Loel. There is clear evidence of that. Indeed, both Leanne Elford and Ray Stack confirmed this in their written notes of the telephone interviews with Maria Pettett. Ray Stack also made notes of his subsequent conversation with James Loel.
- [104] The question is, however, whether those references to James Loel by Maria Pettett were such that they displayed to Stacks an undue deference to James Loel and a lack of knowledge on her part of the proposed development? It would seem to me that it is a question as to whether there was deference and whether the level of Maria Pettett's knowledge of the project was such that it would have put both Leanne Elford and Ray Stack on notice.

- [105] Having considered those documents, I am not satisfied that the references by Maria Pettett to James Loel in the conversations were such that they gave rise to an inference that she was unduly deferential to him.
- [106] I accept, however, that no one from Stacks queried Maria Pettett on her technical competence during the telephone interviews. She was not asked who was going to manage the project, whether she was going to superintend the project herself and, if so, how she was going to manage the day-to-day aspects of the development.
- [107] I am satisfied that Stacks was aware that Maria Pettett had no commercial experience and did not possess any particular technical competence.
- [108] The evidence indicates that those issues were in fact a matter of concern for Ray Stack because he raised questions about Maria Pettett and the project in the conversation he had with James Loel. James Loel's response is recorded in Ray Stack's file note of the conversation as follows:
- “...He knew Maria well & vouched for her honesty & the ability to make money out of this project.”<sup>88</sup>
- [109] Furthermore, Ray Stack's evidence at trial was that he was reassured by that information from James Loel and his own view that Maria Pettett would be able to rely on her husband's experience as a developer in carrying out the subdivision. He also stated that he believed, based on the information from James Loel, that Trevor Pettett was the 'Pettit' from the building firm Pettit & Sevitt and therefore had development experience.
- [110] I accept therefore that whilst Stacks did not make any inquiries with Maria Pettett herself about the details of how she would carry out the proposed project, they did make inquiries with James Loel and relied on information provided by him about Maria Pettett's ability and reliability and Trevor Pettett's experience and background.
- [111] However, Stacks did not check the accuracy of that information. The question is therefore whether, in the circumstances, Stacks should have checked the information and whether the failure to do so is blameworthy. In the absence of any authority to the contrary, it would seem to me that it was reasonable for a lending institution to rely on information provided by a person's solicitor without necessarily going behind that information and checking its accuracy.
- [112] Stacks did, however, require that further information be provided with respect to the development itself due to the concerns it had about the project. In particular, Stacks obtained further information that ultimately confirmed that a development approval was

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<sup>88</sup> Ex 1 doc 64.

in place, that it was a simple subdivision and that the costs of the proposed project were accurate. Updated information was obtained from the engineer.

- [113] Tolteca also argued that Stacks and particularly Ray Stack, who was a solicitor with many years of experience, should have been concerned about the importance of avoiding a conflict of interest. It was argued that Ray Stack should have turned his mind to whether James Loel was involved in the project in a manner which placed him in a position of conflict. In particular, it was argued that this conflict arose from James Loel's involvement in the payment of his fees. Tolteca argued that it should have been clear that a conflict existed because the first loan application indicated that James Loel's involvement was precipitated by his desire to have his fees paid. It was argued that this should have put Stacks on notice of the need to explore James Loel's relationship with the project as he was compromised.
- [114] The evidence indicates that by the time of the second loan application, James Loel's fees had been paid by the loan from Tradbray and Stacks was aware of that loan. In the circumstances, I am not satisfied that the fact that James Loel had his fees paid from that loan would have put Stacks on notice that James Loel had some involvement in the project.
- [115] Furthermore, there is no evidence that Stacks was aware of John Anderson and his relationship with James Loel or the subdivision at the time the second loan application was approved. I can see no basis for an inference that Stacks should have been aware that James Loel might have been acting for both John Anderson and Tolteca at the relevant time.
- [116] In terms of the requirement that Maria Pettett obtain independent legal advice, there is clear evidence that she indicated on the application forms that she had obtained independent legal advice.
- [117] In summary, it would seem to me that the information available did not indicate on the face of it that a high level of technical expertise was required. Neither can I see any evidence that would have led Stacks to conclude that James Loel was involved let alone in charge of a joint venture that involved John Anderson. Neither can I see any reason why Stacks was not justified in relying on the information provided by James Loel in circumstances where Maria Pettett had stated that James Loel was acting on her behalf and specifically instructed Stacks to contact him in order to confirm any further information.

*Should the discrepancies in the documentation have raised concerns to Stacks?*

- [118] Tolteca also argued that *Violet Home Loans Pty Ltd v Schmidt* makes it clear that irregularities, even on a small scale, ought to raise the suspicion of a prudent lender and

here there are three different categories of discrepancy: (i) Maria Pettett's personal net worth, (ii) Maria Pettett's personal income and (iii) Tolteca's income.

- [119] In relation to Maria Pettett's net worth, the first loan application recorded a personal net worth of \$55,000 made up of her furniture of \$20,000, her car of \$15,000 and cash at bank of \$20,000. In relation to the second loan application, a personal net worth of \$70,000 was recorded, which was made up of her furniture which was now \$50,000, her car which was now \$10,000 and cash at bank which was now \$10,000. Maria Pettett argued that when she spoke to Ray Stack and Leanne Elford on 9 February 2010, she made it clear that she had no assets in her name.
- [120] In relation to her own personal income, the first loan application was silent on her income. However, the Loan Ability Repayment Declaration dated 16 February 2010 in relation to the second loan application indicated that her income was \$35,000.
- [121] In relation to Tolteca's income, the first loan application indicated that its income was \$200,000. The second loan application indicated that Tolteca's income was its profit from the project, which was \$289,000. The Loan Ability Declaration Form dated 16 February 2010 stated that Tolteca's income was \$250,000.
- [122] Accordingly, Tolteca argued that given the second loan application was made a little over three months after the first loan application and the February interviews occurred a little over four months after the first loan application, the discrepancies ought to have put a prudent lender on notice of the need to make further inquiries.
- [123] There is no doubt that there is no consistency in the information on the forms regarding Maria Pettett's personal income and assets as well as Tolteca's income. There are clearly discrepancies in the forms as argued by Tolteca. However, during the interview with Maria Pettett on 9 February 2010, Leanne Elford queried those figures and Maria Pettett stated that she was in receipt of a family allowance of \$400 per fortnight (\$10,400 per annum) and that the farm income was between \$50,000 and \$100,000. It was also clear that Stacks knew that the sum of \$289,000 was Tolteca's projected income from the project. Tolteca argued that after the telephone interviews, Stacks' internal forms indicated that Maria Pettett's income was between \$60,400 and \$110,400 and that the figure inaccurately merged Maria Pettett's income with that of Tolteca.
- [124] That may well be the case, but it would seem clear that, by the end of the telephone interviews in February 2010, Stacks knew that Maria Pettett had no real source of income other than from Centrelink or Tolteca and that the maximum of that combined amount was no more than \$110,400. It was noted that the amount of \$289,000 related to the anticipated income from the proposed subdivision. Leanne Elford recorded in her notes her conclusion that Maria Pettett had insufficient income to service the loan.

- [125] Despite the discrepancies and contradictions in the financial information on the application forms, Stacks essentially knew Maria Pettett's correct financial position after the telephone interview.

*Should Stacks have been concerned about Trevor Pettett's involvement?*

- [126] Tolteca also argued that Stacks knew that Trevor Pettett was bankrupt and that he had been found guilty of contempt due to his refusal to file an affidavit to explain the location and whereabouts of the investor's money in the sum of \$2,700,000. Stacks had also previously declined a loan to him in circumstances where he had been described by Leanne Elford as evasive, flippant, arrogant and rude. Mark Newnham had described him as evasive and uncooperative. It was also known to Stacks that Trevor Pettett had thrown a valuer off a building site 12 months previously. Trevor Pettett was described subsequently by Mark Newnham in his review of the second loan application as "the smart arse husband". Furthermore, Mark Newnham stated to Paul Guthrie that if he ever heard that Trevor Pettett was involved, he would "pull the pin".
- [127] Tolteca further argued that Stacks was aware that the income from the farm was generated by the labour of both Trevor and Maria Pettett and a prudent lender would have been concerned about Trevor Pettett's involvement. Although James Loel was asked to provide Paul Guthrie with the accountant's details on 25 January 2010, the second loan application included a name but no means of contacting the accountant and Stacks did not pursue that information.
- [128] It would seem clear that, given Ray Stack's evidence, Stacks knew full well that Trevor Pettett would inevitably be involved in the subdivision.

*Should Stacks have been concerned about Tolteca's ability to service the loan?*

- [129] It would seem that counsel for Tolteca accepted that there was some clarity as to Maria Pettett's financial information after the telephone interview on 9 February 2010, as counsel submitted that Stacks knew on the basis of the information supplied that Maria Pettett had insufficient income to repay the loan. Furthermore, whilst interest on the loan was prepaid for six months, the loan was for 12 months with a rollover provision. Accordingly, it is argued that Stacks plainly contemplated that the loan might need to go beyond the six month prepaid interest period and it also knew therefore that the interest payments for one year could not have been met from Maria Pettett's income and Tolteca's income.
- [130] Tolteca also argued that there were three aspects of the mortgage which were not consistent with a short term commercial loan. Firstly, the term was for more than 12 months, expiring on 1 April 2011. Secondly, instalments were to be paid monthly and not on the sale of lots and once the six months were up, there was no prepaid interest to meet further monthly interest. Thirdly, the principal of \$1,000,000 was payable by 1

April 2011, which therefore required the completion of the subdivision and the sale of all the subdivided lots.

- [131] It would seem clear that Stacks must have known that there was a very real possibility that the subdivision would not be completed within the anticipated timeframe. Stacks also must have known that Maria Pettett and Tolteca would probably not meet the interest payments if there was a delay, although there was an ability to sell the hay or the land which was to be subdivided.

*The role of Ray Stack*

- [132] Tolteca argued that Ray Stack played a large role in the decision to approve the second loan application and that he was in the best place to ensure that Stacks acted prudently in its assessment of the project and particularly the roles of Maria Pettett, Trevor Pettett and James Loel. Tolteca alleged that Ray Stack did not act prudently.
- [133] Tolteca argued that Ray Stack's assessment in approving the loan does not withstand scrutiny. In particular, it was argued that even a subdivision which is simple can have complexities. Furthermore, even if there is a grant of a development application, there is still a great deal of work to be done to ensure that the council's requirements are satisfied. It was argued that councils operate differently and Ray Stack's experience with the Taree Council would not inform him about the Logan City Council and its practices.
- [134] Tolteca also argued that Ray Stack's claim that he had derived confidence from James Loel who told him that Trevor Pettett was part of Pettit & Sevitt and had extensive development experience is an assessment that is hard to reconcile given the email from Mark Newnham to Paul Guthrie on 5 February 2010. That email essentially stated that if Maria Pettett indicated that Trevor Pettett was really running the business, the deal would go.
- [135] Tolteca also argued that Ray Stack's confidence in Maria Pettett's ability to obtain support from her husband is difficult to reconcile when it was known that Trevor Pettett was bankrupt, had been found guilty of contempt and there was concern about the whereabouts of \$2,700,000 which he had borrowed. Furthermore, Stacks had previously declined a loan to Trevor Pettett for a lesser amount and there was evidence that he had been described as evasive, flippant, arrogant, uncooperative and rude.
- [136] It would seem to me, however, that even if all those allegations are true, that would not necessarily mean that Trevor Pettett was not able to give advice and assistance to his wife to complete what was acknowledged to be a simple subdivision. None of those allegations go to his ability to provide technical advice and assistance to his wife.
- [137] Despite the fact that Tolteca argued that Ray Stack did not act prudently as a lender, no expert evidence was led as to the practice of a prudent lender in relation to granting

commercial loans, let alone in the circumstances that presented themselves here. Tolteca simply argued that a prudent lender would have examined income tax returns and assessments as well as business activity statements and financial statements from Tolteca's accountants.

### **Findings as to Stacks' knowledge and conduct in relation to the loan**

[138] Having considered all of the arguments advanced as to Stacks' conduct in relation to the granting of the loan, I consider that the following findings can be made about Stacks' conduct and knowledge at the time the loan was granted:

- (i) The directors of Stacks knew that Trevor Pettett and Tolteca had requested an earlier loan of \$140,000 in late 2009 which was, in part, required to pay James Loel's fees in relation to Trevor Pettett's litigation in 2009.
- (ii) The directors of Stacks knew that Trevor Pettett was bankrupt at the time the loan was granted in February 2010.
- (iii) The directors of Stacks knew that Tolteca's sole director was Maria Pettett and she had no commercial experience or technical competence.
- (iv) The directors of Stacks knew that Maria Pettett and her family resided at the security property at Innisplain.
- (v) The directors of Stacks knew that Maria Pettett could not make interest payments if she was solely relying on her income.
- (vi) The directors of Stacks did not independently investigate Maria Pettett's capacity to service the loan from other sources.
- (vii) The directors of Stacks knew that the development was considered to be straightforward and the inquiries conducted confirmed the viability of the project.
- (viii) The directors of Stacks knew that the anticipated profit of \$289,000 was dependent on the completion of both the subdivision and the sale of the five lots within 12 months.
- (ix) The directors of Stacks did not make any inquiries from Maria Pettett about the superintendence of the proposed project, but rather relied on information from James Loel about Maria Pettett's ability and reliability and Trevor Pettett's experience and background without checking that information.
- (x) Ray Stack knew that Trevor Pettett had development experience.

**How should Stacks' conduct be characterised as a result of those findings?**

- [139] Tolteca argued that it was unconscionable not to investigate certain facts which ought to have placed a prudent lender on inquiry. Tolteca argued that if Stacks had investigated further, it would have discovered a degree of vulnerability in Maria Pettett such that it would have been unconscionable to lend the money to her. Tolteca argued that Stacks was wilfully blind to Maria Pettett's vulnerability.
- [140] In putting their argument in terms of wilful blindness, it would seem to me that Tolteca accepted that *prima facie* there was nothing to alert Stacks to Maria Pettett's vulnerability, but rather the circumstances were such that if Stacks had looked further it would have found that a vulnerability existed. I note at the outset that Maria Pettett does not present as vulnerable in any way. As I previously indicated, she was an intelligent, articulate and thoughtful witness. She was also robust in her exchanges with counsel and was not suggestible or easily persuaded.
- [141] Furthermore, what was it that should have alerted Stacks to look behind the facts presented? What was it that should have alerted them to investigate further? Was the development project doomed to failure from the outset? Was it a subdivision that could never have been completed in 12 months?
- [142] There is no doubt that the directors of Stacks clearly knew that if the project took longer than the anticipated 12 months, then there would be real issues as to Maria Pettett's ability to make the interest payments. However, it is clear from the evidence of Ray Stack, Paul Stack and also Maria Pettett that the consensus was that this subdivision was viable and could have been completed within the anticipated timeframe. As previously noted, Stacks did make some further inquiries about the costs and the council processes in order to satisfy itself in this regard.
- [143] The evidence before me indicates that there was also a general consensus that the figures for the development, the anticipated sale figures and profit margins seemed realistic. Ultimately, Maria and Trevor Pettett were convinced of the viability of the project as was James Loel who promoted the project to them. I also note that eventually the five blocks were sold for amounts which were close to the projected sale prices. Whilst the project was completed and the sale prices were ultimately realised, it took five years and not the projected one year. It would seem that the project was beset by delays and personality conflicts between Maria Pettett and John Anderson. I am not satisfied that those features would have been known or even objectively anticipated by Stacks. There is nothing to indicate it was a particularly high risk venture. Objectively, there was nothing about the development itself which indicates to me that it was fraught from the outset or was intrinsically alarming in some way such that Stacks can be criticised for lending money for such a project.

- [144] There is no doubt that Stacks did not objectively and independently ascertain Maria Pettett's ability to repay the loan, but rather relied on information provided by Maria Pettett and her solicitor James Loel. I accept the submission that Stacks could have done more to independently ascertain and verify the financial information provided. However, both Leanne Elford and Ray Stack questioned Maria Pettett and indeed ascertained the correct financial figures. Should Stacks have independently verified some of the financial information? What would such an investigation have revealed that was different to what was already known? Stacks knew that Maria Pettett did not have the income to make the interest payments, but objectively it knew, as Ray Stack stated, that the hay or the block with the house on it could have been sold if there were delays. Clearly, as there were five blocks to be sold, the blocks could have been sold gradually and there would have been incremental profits paid. That is what occurred. I am not satisfied that Tolteca has established that Stacks failed to act as a prudent lender in this regard.
- [145] It is also clear that Stacks did not satisfy itself independently that Maria Pettett had the requisite technical skills to complete the project. However, it is not clear to me why Stacks was required to independently verify this. It would seem to me that all she had to do was find someone who did have the skills to supervise the subdivision. She did not necessarily have to be able to complete the subdivision on her own. It was also obvious on the face of the documentation before Stacks that Maria Pettett was in fact assisted by her solicitor, James Loel, and her builder husband, Trevor Pettett, and that engineers had also been engaged. I am not satisfied that there was any further matter Stacks had to be satisfied about before it could lend the money to Tolteca.

### **Was Stacks' behaviour unconscionable?**

- [146] The particular factors which s 12CC of the ASIC Act requires the Court to consider include the relative strengths of the bargaining positions of the parties, whether the borrower is able to understand the documents, whether there has been any undue influence, whether there has been any deception and the extent to which both parties have acted in good faith. Whilst it is clear that the list of factors in s 12CC of the ASIC Act are not meant to be exhaustive, it would seem that the section applies to conduct involving dishonesty, abuse and oppression. As an academic commentator has noted,<sup>89</sup> the first question that is normally asked in determining whether s 12CC of the ASIC Act applies is whether there was dishonesty, that is, conduct which was intended and likely to lead another person into error. The second question is whether there was any abuse, particularly whether there has been a misuse of a legal right, title or position, or of a relationship or situation of trust, confidence or power, or of another's age, infirmity, disability or ignorance. The third question is generally whether an issue of oppression

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<sup>89</sup> Dr Paul Vout, "Unconscionability and Good Faith in Business Transactions", National Commercial Law Seminar Series, 21 October 2013.

exists and whether the enforcement of a strict legal right would cause overwhelming hardship to another party such that it ought not to be enforced.

- [147] Having considered the cases referred to by both counsel and the list of factors set out in s 12CC of the ASIC Act, there is no doubt that there must be some degree of moral obloquy or something not done in good conscience in order to establish a claim for unconscionable conduct. Whilst I can see that some further financial information might have been requested by Stacks from Maria Pettett's accountant and greater detail could have been sought about the management of the project, I do not consider that Stacks was under any obligation to do so. Neither has any evidence been led that a prudent lender would have taken those steps.
- [148] Furthermore, I cannot see anything which could constitute trickery or sharp practice in the present case. Neither am I satisfied that Stacks' conduct and the state of its knowledge were such that it took "advantage" of Maria Pettett on the basis that she was "vulnerable". In particular, I am simply not satisfied that Stacks should have been aware that James Loel was allegedly involved in the project in order to have his fees paid and of the allegations that he was also acting for another party in the project and was not a disinterested advisor. In my view, there was simply nothing that should have put Stacks on notice in this regard. I cannot see that Stacks was under any obligation to investigate Tolteca's solicitor or the advice he had given to Tolteca's sole director Maria Pettett.
- [149] I am not satisfied therefore that any of Stacks' failures to investigate further or verify information were such that they would draw condemnation which would amount to unconscionable conduct. It would seem to me that this was a bargain freely made and, as Maria Pettett's email to James Loel of 6 January 2010 shows, it was a bargain where she fully understood the issues and the risks.
- [150] I am simply not satisfied that Stacks' conduct in relation to the loan was such that it can be characterised as unconscionable. Tolteca otherwise admits the loan, the mortgage and the default. Stacks is therefore entitled to the relief it seeks.

### **Orders**

- [151] I consider that the orders should be in the following terms:
1. Judgment for the plaintiff.
  2. The defendant's counterclaim filed on 23 July 2015 is dismissed.
- [152] I will hear from counsel in relation to the terms of the orders and orders as to costs.