**[2020] WASCA 198**

| | | |
|---|---|---|
| **JURISDICTION** | **:** | SUPREME COURT OF WESTERN AUSTRALIA |
| **TITLE OF COURT** | **:** | THE COURT OF APPEAL (WA) |
| **CITATION** | **:** | SHANNON -v- PERMANENT CUSTODIANS LIMITED [2020] WASCA 198 |
| **CORAM** | **:** | QUINLAN CJ<br>VAUGHAN JA<br>TOTTLE J |
| **HEARD** | **:** | 3 & 4 FEBRUARY 2020<br>FURTHER SUBMISSIONS ON 16 OCTOBER 2020 |
| **DELIVERED** | **:** | 24 NOVEMBER 2020 |
| **FILE NO/S** | **:** | CACV 98 of 2018 |
| **BETWEEN** | **:** | ANITA LOUISE SHANNON<br>CHRISTOPHER CHARLES SHANNON<br>Appellants<br><br>AND<br><br>PERMANENT CUSTODIANS LIMITED<br>First Respondent<br><br>GEL CUSTODIANS PTY LTD<br>Second Respondent<br><br>AUSTRALIAN MORTGAGE SECURITIES PTY LTD<br>Third Respondent<br><br>AFIG WHOLESALE PTY LTD<br>Fourth Respondent<br><br>REGISTRAR OF TITLES<br>Fifth Respondent |

PEPPER GROUP LIMITED
Sixth Respondent

---

**ON APPEAL FROM:**

| | | |
|---|---|---|
| **Jurisdiction** | **:** | SUPREME COURT OF WESTERN AUSTRALIA |
| **Coram** | **:** | LE MIERE J |
| **Citation** | **:** | PERMANENT CUSTODIANS LTD -v- SHANNON [No 2] [2018] WASC 295 |
| **File Number** | **:** | CIV 1174 of 2013 |

---

*Catchwords:*

Appeal - Loan agreement and mortgage - Whether the loan agreement and mortgage were unjust under s 76 of the *National Credit Code* - Securitisation program where third party correspondent assess creditworthiness of borrowers - Third party correspondent fabricated financial details in the loan application - Lender has constructive knowledge of fraud - Lender failed to inquire as to borrowers' capacity to repay loan - Lender did not observe operations manual under securitisation program

*Legislation:*

*Australian Securities and Investments Commission Act 2001* (Cth)
*Consumer Credit (Western Australia) Act 1996* (WA)
*Consumer Credit (Western Australia) Code*
*Contracts Review Act 1980* (NSW)
*First Home Owner Grant Act 2000* (WA)
*Limitation Act 2005* (WA)
*National Consumer Credit Protection Act 2009* (Cth)
*National Credit Code*
*Transfer of Land Act 1893* (WA)

*Result:*

Appeal allowed

*Category:* B

**Representation:**

*Counsel:*

| | | |
|---|---|---|
| Appellants | : | In person |
| First Respondent | : | G D Cobby SC |
| Second Respondent | : | G D Cobby SC |
| Third Respondent | : | G D Cobby SC |
| Fourth Respondent | : | G D Cobby SC |
| Fifth Respondent | : | No appearance |
| Sixth Respondent | : | G D Cobby SC |

*Solicitors:*

| | | |
|---|---|---|
| Appellants | : | In person |
| First Respondent | : | Norton Rose Fulbright Australia |
| Second Respondent | : | Norton Rose Fulbright Australia |
| Third Respondent | : | Norton Rose Fulbright Australia |
| Fourth Respondent | : | Norton Rose Fulbright Australia |
| Fifth Respondent | : | No appearance |
| Sixth Respondent | : | Norton Rose Fulbright Australia |

**Case(s) referred to in decision(s):**

Australian Securities and Investments Commission v Kobelt [2019] HCA 18; (2019) 93 ALJR 743
Baltic Shipping Company v Dillon [1991] NSWCA 19; (1991) 22 NSWLR 1
Barker v GE Mortgage Solutions Ltd [2013] QCA 137
Beneficial Finance Corporation Ltd v Karavas (1991) 23 NSWLR 256
Buccoliero v Commonwealth Bank of Australia [2011] NSWCA 371; (2011) 16 BPR 30,333
Collier v Moreland Finance Corp (Vic) Pty Ltd (1989) 6 BPR [97462]
Custom Credit Corporation Ltd v Lupi [1992] 1 VR 99
Fast Fix Loans Pty Ltd v Samardzic [2011] NSWCA 260; (2011) 15 BPR 29,445
Forrest v Australian Securities and Investments Commission [2012] HCA 39; (2012) 247 CLR 486
Fox v Percy [2003] HCA 22; (2003) 214 CLR 118

GEL Custodians Pty Ltd v Gibson [2016] WASC 318
Joyce v Anderson [2020] WASCA 48; (2020) 91 MVR 334
Kowalczuk v Accom Finance Pty Ltd [2008] NSWCA 343; (2008) 77 NSWLR 205
Lee v Lee [2019] HCA 28; (2019) 266 CLR 129
Lightfoot v Rockingham Wild Encounters Pty Ltd [2018] WASCA 205
Micarone v Perpetual Trustees Australia Ltd (1999) 75 SASR 1
Minister for Immigration and Border Protection v SZVFW [2018] HCA 30; (2018) 264 CLR 541
Minister for Immigration v SZVFW [2018] HCA 30; (2018) 264 CLR 541
Paciocco v Australia and New Zealand Banking Group Ltd [2014] FCA 35; (2014) 309 ALR 249
Paciocco v Australia and New Zealand Banking Group Ltd [2015] FCAFC 50; (2015) 236 FCR 199
Paciocco v Australia and New Zealand Banking Group Ltd [2016] HCA 28; (2015) 258 CLR 525
Permanent Custodians Ltd v Shannon [No 2] [2018] WASC 295
Permanent Mortgages Pty Ltd v Vandenbergh [2010] WASC 10; (2010) 41 WAR 353
Perpetual Trustee Company Ltd v Burniston [No 2] [2012] WASC 383; (2012) 271 FLR 122
Perpetual Trustee Company Ltd v Khoshaba [2006] NSWCA 41; (2005) 14 BPR 26,639
Riz v Perpetual Trustee Australia Ltd [2007] NSWSC 1153; (2008) NSW Conv R 56–198
Robinson Helicopter Co Inc v McDermott [2016] HCA 22; (2016) 90 ALJR 679
Serventy v Commonwealth Bank of Australia [No 2] [2016] WASCA 223
St George Bank Ltd v Trimarchi [2004] NSWCA 120
Thompson v Byrne [1999] HCA 16; (1999) 196 CLR 141
Tonto Home Loans Australia Pty Ltd v Tavares [2011] NSWCA 389; (2011) 15 BPR 29,699
Warren v Coombes [1979] HCA 9; (1979) 142 CLR 531
West v AGC (Advances) Ltd (1986) 5 NSWLR 610

Contents

**Quinlan CJ & Tottle J**

**Vaughan JA**

**QUINLAN CJ & TOTTLE J**:

## Introduction

1 This appeal concerns a long-running dispute between Anita and Christopher Shannon (**the appellants**) and the mortgagee of their home in Baker's Hill, Western Australia (the **property**). The current registered proprietor of the mortgage is Permanent Custodians Ltd (**the first respondent**). The original mortgagee was the second respondent, GEL Custodians Pty Ltd (**GEL Custodians**).

2 Mr and Mrs Shannon purchased the property in 2006 for the sum of $565,000. Approximately $132,000 of the purchase price was provided by a loan from Mr Shannon's mother. The balance of the purchase price was paid from a loan of $452,000 (the **Loan**) pursuant to a loan agreement with GEL Custodians (the **Loan Agreement**). The appellants granted GEL Custodians a mortgage over the property as security for the repayment of the Loan (the **Mortgage**).

3 GEL Custodians acted as the trustee and lender of record and mortgagee in respect of loans made under the ARMS III securitisation program. The third respondent, Australian Mortgage Securities Ltd (**AMS**), had overall responsibility for the originating and servicing of loans under the program. AMS appointed the fourth respondent, AFIG Wholesale Pty Ltd (**AFIG**), as its agent to exercise all of its powers, rights and functions.

4 Another company, since deregistered, Yes Home Loans Pty Ltd (**Yes Home Loans**), was a 'Correspondent' under the ARMS III Program pursuant to a Correspondent Deed and carried out functions which included originating and managing mortgages under the program. As will be seen, the role of Yes Home Loans and Mr David Lock, its South Australian manager, loom large in this litigation.

5 Mr and Mrs Shannon ultimately defaulted under the Loan Agreement and, in 2013, GEL Custodians commenced the primary proceedings, *inter alia*, to recover the sum then owing under the Loan Agreement, being $581,042.18 (with interest from 4 February 2013 at the rate of 8.27% per annum) and possession of the property.

6 Mr and Mrs Shannon denied GEL Custodians' claim and brought a counterclaim against a number of parties, including the respondents to

this appeal.[1] In October 2016 the first respondent was substituted for GEL Custodians as plaintiff in the action, it having acquired the rights, and assumed the obligations, under the Loan Agreement.[2]

7 Following a trial in late 2017, Le Miere J rejected the appellants' defence and counterclaim.[3] On 21 September 2018 his Honour ordered that Mr and Mrs Shannon pay the outstanding debt under the Loan Agreement, then being $1,386,920.87 and deliver up vacant possession of the property within 42 days. The judgment sum has continued to accrue interest at the rate of 8.27% per annum since 22 September 2018.

8 The appellants appeal from the learned trial judge's decision.

9 Mr and Mrs Shannon were unrepresented in the appeal. They were also unrepresented for the lion's share of the proceedings at first instance, up until June 2017, when they engaged solicitors. They were represented at the trial.

10 The litigation, and the dispute with the respondents generally, have taken their toll on the appellants, particularly Mr Shannon who could at times be belligerent and intemperate in his interactions with the Court. This is not intended as a criticism of Mr Shannon, who clearly feels a genuine sense of grievance at the predicament in which he and Mrs Shannon have found themselves. That sense of grievance, and the generally acrimonious relationship between the appellants and the respondents, nevertheless may serve to explain some of the complexities of these proceedings and the sometimes distracting issues that have arisen throughout its long history.

11 The submissions on behalf of the appellants at the hearing of the appeal were largely presented by Mrs Shannon. Mrs Shannon presented the appellants' case in a thoughtful and considered way. Indeed, the resolution of the appeal was greatly assisted by the focus that Mrs Shannon brought to bear on the real issues in the appeal. The Court is also indebted to senior counsel for the respondents,

---

[1] The fifth respondent (the Registrar of Titles) did not participate in the appeal. The remaining respondents were jointly represented in the appeal and, unless otherwise stated, are referred to in these reasons as 'the respondents'.

[2] The first respondent undertook that it would not rely upon any indefeasibility of title to defeat any interest of Mr and Mrs Shannon (see ***GEL Custodians Pty Ltd v Gibson*** [2016] WASC 318 [9] (Allanson J)). Counsel for the respondents confirmed the currency of that undertaking in the appeal, submitting that the relief sought in the appeal, if allowed, 'would take effect no matter who currently holds the rights' (Appeal ts 162).

[3] ***Permanent Custodians Ltd v Shannon [No 2]*** [2018] WASC 295 (**Primary reasons**).

Mr Cobby SC, who provided considerable assistance in navigating the issues that arose in the proceedings.

12 In that regard, as we shall return to later, the issues in the appeal were largely confined to the question as to whether the learned trial judge ought to have reopened the Loan Agreement and the Mortgage pursuant to s 76 of the *National Credit Code* (or the *Code*), on the ground that the Loan Agreement and the Mortgage were 'unjust' within the meaning of that section.

## Section 76 of the *National Credit Code*

13 The *National Credit Code* has effect as a law of the Commonwealth.

14 Section 76 provides:

> **76 Court may reopen unjust transactions**
>
> *Power to reopen unjust transactions*
>
> (1) The court may, if satisfied on the application of a debtor, mortgagor or guarantor that, in the circumstances relating to the relevant credit contract, mortgage or guarantee at the time it was entered into or changed (whether or not by agreement), the contract, mortgage or guarantee or change was unjust, reopen the transaction that gave rise to the contract, mortgage or guarantee or change.
>
> *Matters to be considered by court*
>
> (2) In determining whether a term of a particular credit contract, mortgage or guarantee is unjust in the circumstances relating to it at the time it was entered into or changed, the court is to have regard to the public interest and to all the circumstances of the case and may have regard to the following:
>
> (a) the consequences of compliance, or noncompliance, with all or any of the provisions of the contract, mortgage or guarantee;
>
> (b) the relative bargaining power of the parties;
>
> (c) whether or not, at the time the contract, mortgage or guarantee was entered into or changed, its provisions were the subject of negotiation;
>
> (d) whether or not it was reasonably practicable for the applicant to negotiate for the alteration of, or to reject,

any of the provisions of the contract, mortgage or guarantee or the change;

(e) whether or not any of the provisions of the contract, mortgage or guarantee impose conditions that are unreasonably difficult to comply with, or not reasonably necessary for the protection of the legitimate interests of a party to the contract, mortgage or guarantee;

(f) whether or not the debtor, mortgagor or guarantor, or a person who represented the debtor, mortgagor or guarantor, was reasonably able to protect the interests of the debtor, mortgagor or guarantor because of his or her age or physical or mental condition;

(g) the form of the contract, mortgage or guarantee and the intelligibility of the language in which it is expressed;

(h) whether or not, and if so when, independent legal or other expert advice was obtained by the debtor, mortgagor or guarantor;

(i) the extent to which the provisions of the contract, mortgage or guarantee or change and their legal and practical effect were accurately explained to the debtor, mortgagor or guarantor and whether or not the debtor, mortgagor or guarantor understood those provisions and their effect;

(j) whether the credit provider or any other person exerted or used unfair pressure, undue influence or unfair tactics on the debtor, mortgagor or guarantor and, if so, the nature and extent of that unfair pressure, undue influence or unfair tactics;

(k) whether the credit provider took measures to ensure that the debtor, mortgagor or guarantor understood the nature and implications of the transaction and, if so, the adequacy of those measures;

(l) whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship;

(m) whether the terms of the transaction or the conduct of the credit provider is justified in the light of the risks undertaken by the credit provider;

(n) for a mortgage—any relevant purported provision of the mortgage that is void under section 50;

(o) the terms of other comparable transactions involving other credit providers and, if the injustice is alleged to result from excessive interest charges, the annual percentage rate or rates payable in comparable cases;

(p) any other relevant factor.

*Representing debtor, mortgagor or guarantor*

(3) For the purposes of paragraph (2)(f), a person is taken to have represented a debtor, mortgagor or guarantor if the person represented the debtor, mortgagor or guarantor, or assisted the debtor, mortgagor or guarantor to a significant degree, in the negotiations process prior to, or at, the time the credit contract, mortgage or guarantee was entered into or changed.

*Unforeseen circumstances*

(4) In determining whether a credit contract, mortgage or guarantee is unjust, the court is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the contract, mortgage or guarantee was entered into or changed.

*Conduct*

(5) In determining whether to grant relief in respect of a credit contract, mortgage or guarantee that it finds to be unjust, the court may have regard to the conduct of the parties to the proceedings in relation to the contract, mortgage or guarantee since it was entered into or changed.

*Application*

(6) This section does not apply:

(a) to a matter or thing in relation to which an application may be made under subsection 78(1); or

(b) to a change to a contract under this Division.

(7) This section does apply in relation to a mortgage, and a mortgagor may make an application under this section, even though all or part of the mortgage is void under subsection 50(3).

15 The *National Credit Code* was enacted by the *National Consumer Credit Protection Act 2009* (Cth).[4] The *National Credit Code* largely replicates the Uniform Consumer Credit Code that had been applied in States and Territories since 1996, including, in this State, the *Consumer Credit (Western Australia) Code*, which was enacted pursuant to the *Consumer Credit (Western Australia) Act 1996* (WA).

16 The Explanatory Memorandum for the *National Consumer Credit Protection Bill 2009* (Cth) makes clear that:[5]

> As the Code largely replicates the UCCC, the objectives of the regime remain the same as those when the UCCC was first enacted. Namely, to ensure strong consumer protection through 'truth in lending', while recognising that competition and product innovation must be enhanced and encouraged by the development of non prescriptive flexible laws.

17 Consistent with the *National Credit Code*'s replication of the Uniform Consumer Credit Code, ss 76(1) to 76(5) of the *Code* are in relevantly identical terms to s 70 of the former *Consumer Credit (Western Australia) Code*.

18 We will return to s 76 of the *National Credit Code* later.

19 First, it is necessary to set out the facts relevant to the appeal and to identify some of the other issues at trial.

## Background Facts

20 The following facts are taken from the factual findings made by the learned trial judge, supplemented where necessary from the evidence at trial. We have not included any factual matter alleged, or evidence given, by the appellants at trial that was rejected by his Honour.[6] Accordingly, the facts that follow may be regarded as primary facts for the purposes of the appeal.

### The ARMS III Securitisation Program

21 As noted above, GEL Custodians acted as the trustee and lender of record and mortgagee in respect of loans made under the ARMS III securitisation program. The ARMS III program succeeded the ARMS

[4] *National Consumer Credit Protection Act 2009* (Cth), s 3.
[5] National Consumer Credit Protection Bill 2009, Explanatory Memorandum [8.3].
[6] In that regard we have not included reference to the appellants' claim, which was rejected by the learned trial judge that Mr Lock had represented to them (and that they believed) that Yes Home Loans was the actual lender (see [116] and [122] below).

II program in May 2006,[7] at around the time that the appellants entered into the Loan Agreement and the Mortgage.

22 Being securitisation programs, ARMS II and ARMS III operated through trusts, which were held for the benefit of unit holders. The money invested by the unit holders (by purchasing units in the trust) was available for investment under the program on registered first home mortgages.[8] The trust in each case was governed by a Master Trust and Security Trust Deed. The original trustee was Permanent Custodians Ltd, although the original Master Trust and Security Trust Deed was not in evidence.

23 The ARMS III Program was based on the Master Trust and Security Trust Deed dated 5 May 2006 (the **2006 Trust Deed**).[9] The 2006 Deed was between GEL Custodians, as trustee, and AMS, the initial trust manager. Under the terms of the 2006 Trust Deed, it was AMS who could create the trust.[10]

24 Under both the ARMS II program and the ARMS III program, the trustee and AMS also entered into a Master Originating and Servicing Agreement (**MOSA**). The MOSA for the ARMS II program was dated 7 March 1995 (the **1995 MOSA**)[11] and the MOSA for the ARMS III program dated 6 May 2006 (the **2006 MOSA**).[12]

25 The 'Master Servicer' under the MOSA, in each case, was AMS. The Master Servicer was responsible for the origination and management of loans and mortgages as investments of the trust.

26 As part of its obligations to the trustee under the MOSA, the Master Servicer (i.e. AMS) made certain representations and gave certain warranties to the trustee. For example, clause 12.1 of the 2006 MOSA provided:[13]

> **12. Representations and warranties**
>
> **12.1 Regarding Mortgages**
>
> The Master Servicer represents and warrants to the Trustee that except as disclosed to the Trustee in writing, and approved or

[7] Primary reasons [21].
[8] Primary reasons [23].
[9] Exhibit 10.
[10] Exhibit 10, cl 2.1 (Trial Bundle page 175).
[11] Primary reasons [22], Exhibit 1.
[12] Exhibit 11 (GAB 163).
[13] Exhibit 11 (GAB 178-179). The 1995 MOSA was to the same effect (Exhibit 1).

waived by the Trustee on or prior to the settlement or acquisition of a Mortgage, the following matters will be true and correct in all material respects in relation to that Mortgage:

…

(c) **(Mortgage Documents)**: each Mortgage Document relating to that Mortgage is and will at all times be, in all material respects, in the form required by the Agreed Procedures, and the Master Servicer will not agree to any amendment, variation or waiver of any Mortgage Document except as specifically permitted by and in accordance with this Agreement or the Agreed Procedures;

(d) **(Property Insurance)**: the Property is insured in accordance with the requirements of the Mortgage;

(e) **(Mortgage Insurance)**: the Mortgage is covered by a Mortgage Insurance Policy;

(f) **(Loan Application)**: the Mortgagor's Loan Application is substantially in the form required by the Agreed Procedures and has been investigated by the Master Servicer in accordance with the Agreed Procedures;

(g) **(Consumer Credit Code)**: in the case of a Mortgage entered into before the Consumer Credit Code, none of the Mortgage Documents relating to that Mortgage is a Regulated Mortgage (as defined in Section 5 of the Credit Act 1984 (NSW) or the corresponding legislation of any other Australian Jurisdiction);

(h) **(Adverse Circumstances)**: the Master Servicer is not aware of any circumstances relating to the Mortgage, the Property or any Obligor which could reasonably be expected to cause a prudent investor to:

(i) regard the Mortgage as an unacceptable investment;

(ii) expect the Mortgagor to default under the Mortgage; or

(iii) diminish the value or marketability of the Property from that stated in the Valuation;

(i) **(Agreed Procedures)**: the Agreed Procedures have been fully complied with in relation to that Mortgage; and

…

27 The MOSA also provided that the Master Servicer could delegate its powers under the MOSA to a delegate. AMS, as Master Servicer, appointed AFIG as its agent to exercise all of its powers, rights and functions under the MOSA.[14]

28 AMS and AFIG in turn appointed 'correspondents' to carry out functions in relation to the origination and management of loans under the ARMS II and ARMS III programs. Yes Home Loans was one such correspondent, it having entered into a Correspondent Deed dated 1 September 1999 (the **Correspondent Deed**). It was common ground at trial that Yes Home Loans continued as a Correspondent under the 1999 Correspondent Deed.[15]

29 The Correspondent Deed provided that the status of the Correspondent (Yes Home Loans) was that of independent contractor. Clause 3.1 provided:[16]

> **3. STATUS OF CORRESPONDENT**
>
> 3.1 **Independent Contractor**
>
> Except for the express delegation to the Correspondent of the exercise of the Powers contained in this Deed, the Correspondent agrees that in performing its obligations under this Deed:
>
> (a) it is an independent contractor and is not the agent, partner or employee of AMS or the Mortgagee;
>
> (b) it must not hold itself out as, or engage in conduct which would lead others to believe that it is the Mortgagee under any Mortgage or the agent, partner or employee of AMS or any Mortgagee;
>
> (c) it will be solely responsible for the acts or omissions of its employees or agents, or of independent contractors, advisers or Representatives engaged by it in the performance of its obligations under this Deed; and
>
> (d) it must not (except as permitted by clause 3.2) issue any promotional or advertising material which includes the

[14] Primary reasons [24]. The respondents, at trial, were unable to locate any document directly evidencing the relationship between AMS and AFIG, although it appears uncontroversial that the relationship of agency did exist (ts 260).
[15] Primary reasons [26].
[16] Exhibit 8 (GAB 139).

> name of AMS, any Mortgagee or the provider of any Enhancement without the prior written consent of AMS, that Mortgagee or that Enhancement provider (as the case may be).

30 The Correspondent Deed goes onto provide that the Correspondent may from time to time give to AMS mortgage proposals. Each mortgage proposal was required to be in the form and in accordance with the Operations Manual (as defined in the Correspondent Deed) and any relevant mortgage insurance policy.[17] The Correspondent Deed included the following provisions in relation to the provision of information to AMS and AMS' discretion whether to accept a mortgage proposal:[18]

> **4.2 Correspondent to Provide Information**
>
> The Correspondent must give AMS all information requested by AMS in relation to a particular Mortgage Proposal which is reasonably required by AMS to give consideration to and process in accordance with its usual practices and procedures the Mortgage Proposal.
>
> **4.3 Acceptance of Mortgage Proposal**
>
> AMS may accept (but has no obligation to accept) a Mortgage Proposal. Any such acceptance must be in the form, contain the information, be accompanied by the documents specified in, and otherwise be made in accordance with the *Operations Manual*.

31 The Correspondent Deed also provided for certain representations and warranties by the Correspondent to AMS, including in relation to the Operations Manual. Clause 12.1 provided:[19]

> 12.1 **Regarding Mortgages**
>
> The Correspondent represents and warrants to AMS that except as disclosed to AMS in writing, and approved or waived by AMS on or prior to the settlement or acquisition of a Mortgage, the following matters will be true and correct in all material respects in relation to that Mortgage:
>
> …
>
> (d) **(Mortgage Documents)**:

[17] Primary reasons [27].
[18] Exhibit 8 (GAB 140).
[19] Exhibit 8 (GAB 149-150).

(i) each Mortgage Document relating to that Mortgage is and will at all times be in the form required by the *Operations Manual*;

(ii) the Correspondent will not agree to any amendment, variation or waiver of any Mortgage Document except as specifically permitted by and in accordance with:

A. this Deed or the *Operations Manual*; or

B. the written approval of AMS; and

(iii) all blanks and variables in the form of each relevant Mortgage Document have been completed in accordance with the *Operations Manual* and the manner of such completion is consistent with relevant Loan Application, Mortgage Proposal and AMS' Solicitors' instructions pack and each relevant Mortgage Document appears to have been duly executed;

(e) **(Property Insurance)**: the Property is insured in accordance with the requirements of the Mortgage;

(f) **(Mortgage Insurance)**:

(i) the Mortgage is covered by a Mortgage Insurance Policy with a mortgage insurer approved by AMS and all of the requirements of the relevant mortgage insurer; the *Operations Manual* and the relevant Mortgage Insurance Policy with respect to the application for and taking out of that Mortgage Insurance Policy have been complied with; and

(ii) all information provided to the insurer under the relevant Mortgage Insurance Policy was, to the best of the knowledge of the Correspondent true and correct in all material respects, when provided, was not misleading (including by omission) and was verified by the Correspondent in accordance with the procedures set out in the *Operations Manual*;

(g) **(Loan Application)**: the Mortgagor's Loan Application has been fully investigated by the Correspondent in accordance with the *Operations Manual*, and the Correspondent is satisfied that all

statements and information contained in it are correct in all respects;

(h) **(Origination)**: the Mortgage (and each Loan secured by that Mortgage) has been assessed and originated in accordance with the *Operations Manual*;

(i) **(Credit Act)**: in the case of a Mortgage entered into in any State or Territory of the Commonwealth of Australia before the coming into force in that State or Territory of the Consumer Credit Code, none of the Mortgage Documents relating to that Mortgage is a Regulated Mortgage, as defined in Section 5 of the Credit Act 1984 (NSW) or the corresponding legislation of any other Australian Jurisdiction;

(j) **(Consumer Credit Code)**: in the case of any Mortgage which is regulated by the Consumer Credit Code, all of the requirements of the Consumer Credit Code with respect to the entering into of the relevant Mortgage Documents were complied with, except to the extent that such non-compliance was caused by the act or omission of AMS, any adviser or consultant to AMS, or any person referred to in clause 6.4;

(k) **(Adverse Circumstances)**: the Correspondent is not aware of any circumstances relating to the Mortgage, the Property, the Mortgagor or any Guarantor which could reasonably be expected to cause a prudent investor to:

(i) regard the Mortgage as an unacceptable investment;

(ii) expect the Mortgagor to default under the Mortgage; or

(iii) diminish the value or marketability of the Property from that stated in the Valuation;

…

32 It will be apparent from these provisions that the Operations Manual was a key document in the relationship between AMS, AFIG and the correspondents. A number of documents, each headed 'AFIG Wholesale Operations Manual', dealing with specific issues were tendered by consent at trial.[20] It was agreed at trial that the 'AFIG

[20] Exhibits 2, 3, 4, 5, 6, and 7; Ts 544.

Wholesale Operations Manual' was the relevant manual applicable at the time of the Loan and the Mortgage.[21]

33 The Operations Manual described the role of the Correspondent (in Section 2) as follows:[22]

> **2.1 The Role of the Correspondent**
>
> AFIG Wholesale is committed to quality in all aspects of its business operations and looks to its relationship with its Correspondent to reflect this philosophy.
>
> The relationship between AFIG Wholesale and a Correspondent is governed by the Correspondent Deed executed between the Correspondent, AFIG Wholesale and AMS, and this Operations Manual.
>
> Correspondents have two distinct roles in the ARMS II Program:
>
> - They originate mortgage loans in accordance with the approved guidelines, as outlined in this Operations Manual and the Correspondent Deed; and
>
> - They manage those mortgages through to maturity or discharge.
>
> It is the Correspondent's role to manage its relationship with the approved solicitors.

34 As part of its function of originating loans, a Correspondent was required to evaluate the credit worthiness of borrowers, including inquiries in relation to a borrower's income. Sections 4.5 and 4.6 provided:[23]

> **4.5 Credit Analysis**
>
> The Correspondent is to evaluate the credit worthiness of the borrower in conjunction with the guidelines outlined in this manual and any criteria of the Mortgage Insurer.
>
> A borrower should have a clear credit history and a stable employment record.
>
> Verification of the loan application must include, but not limited to:

[21] Ts 260-261.
[22] Exhibit 2 (GAB 86).
[23] Exhibit 2 (GAB 93).

- Signed and dated asset and liability statements of all individual borrowers and guarantors plus balance sheet and profit and loss accounts for all company borrowers;

- If a Fastdoc product is being applied for, self-employed applicants may choose to provide an income/affordability declaration in lieu of income verification;

- For refinance loans, evidence of satisfactory repayment history by way of loan, bank account or internet statements (or payslips, if the existing loan is paid by salary deduction) for at least the last 6 months, confirming the balance, punctual payments and satisfactory conduct;

- Credit checks must be undertaken on all potential borrower and guarantors. Correspondents must include an inquiry to a recognised credit bureau or reference association;

- Evidence of borrower's equity; and

- Execution of the Privacy Act Form.

**4.6 Borrower's Income**

Correspondents must not submit loan applications to AFIG Wholesale for approval unless the Correspondent is completely satisfied, having made all reasonable enquiries of the borrower, that the borrower will be able to meet its obligations under the loan contract in accordance with its terms without substantial hardship.

The Code empowers the Courts to reopen transactions giving rise to a contract, mortgage or guarantee if it is satisfied that, in the circumstances when it was entered into or changed, it was unjust. Whether or not the loan is governed by the Code, Correspondents are required to satisfy themselves of the borrower's ability to afford the loan.

See 4.6.2 for verification of a borrower's income. The most recent financial data obtained must not be more than six months old.

Capacity of borrower to fund loan payments from rental income should be verified by reference to a current tenancy agreement and schedule of property expenses and Rental set out in the Valuations.

Correspondents must, in the course of verifying a borrower's income, comply with the collection, use and disclosure requirements of the Privacy Act (see generally 5.6).

35 Section 6 of the Operations Manual made particular provision for the Loan Submission Process to be followed by a Correspondent. It

prescribed a seven-step process. Relevantly, that process included, as Step 2, the requirement to evaluate the credit worthiness of the borrower in accordance with Section 4.

36 Step 4 of the Loan Submission Process required the Correspondent to obtain lenders mortgage insurance:[24]

> **Step 4 Submit to Mortgage Insurer**
>
> Subject to the Correspondent being satisfied that the loan conforms to the qualifying mortgage criteria outlined in part 4, the Correspondent should complete an application for lender's mortgage insurance.
>
> The application, supporting documentation and valuation should be forwarded to the approved mortgage insurer.
>
> The mortgage insurance approval should clearly detail the relevant master policy number, loan details, (including loan term and product type) and should not contain any special conditions (except reference to cross collateralisation (where applicable).

37 Step 5 required the Correspondent to forward to the borrower a loan proposal. Step 5 provides:[25]

> **Step 5 Forward Loan Proposal to Borrower**
>
> After obtaining mortgage insurance approval, the Correspondent is to forward to the borrower a loan proposal for the appropriate product type. …
>
> Please note that the loan proposal is indicative only and does not oblige the trustee to make the loan available. It is a non-binding statement of intention.

38 As this final paragraph makes clear, up until Step 6 in the process no information has yet been provided to the trustee, AMS or AFIG and, at that point, a final lending decision is yet to be made.

39 Step 6 is the critical point at which the application is submitted to AMS or AFIG. The application is described as the mortgage purchase application (or **MPA**). Step 6 provides:[26]

> **Step 6 Mortgage Purchase Application**

[24] Exhibit 2 (GAB 102).
[25] Exhibit 2 (GAB 102).
[26] Exhibit 2 (GAB 102).

When the loan proposal has been issued, the Correspondent is to forward an MPA to AFIG Wholesale. The following documents are to be attached to the MPA:

- Signed MPA Declaration;
- Schedules 1 and 2 (fully completed);
- NSR worksheet and/or declaration of income/affordability;
- Loan proposal letter;
- LMI proposal forms and approval;
- Valuation;
- The service nomination form and/or the loan purpose declaration (as applicable) (Appendix 9);
- Linkpoint Card Applications;
- MasterCard/Cheque book application(s) where the customer has applied for a MasterCard and/or Cheque book); and
- FTRA document with supporting identification documents (Line of Credit applications where the applicant has applied for a MasterCard and/or Cheque book).

If the total AFIG Wholesale loans to this borrower exceed or will exceed $500,000 attach also:

- Copy of application (including assets & liabilities statement);
- Evidence of income (including financial statements (if a company);
- Correspondent loan summary;
- Satisfactory evidence (refer Section 4.5) of loan conduct for last 6 months (for all loans being refinanced); and
- Other relevant background and supporting documentation (see section 4.2).

The MPA will be the source document for input to the AFIG Wholesale computer system and preparation of the solicitor's instructions, therefore the information content is important and needs to be full, complete and accurate.

40 The 'service nomination form and/or the loan purpose declaration' referred to in Step 6 is a reference to the service nomination form for

notices and the declaration as to the intended purpose of the loan (which was, in turn, relevant to the applicability of the *Consumer Credit Code* (see clause 5.2)).

41 It will be apparent from this summary of the relevant documentation that, in the case of a loan that does not exceed $500,000, the Correspondent is *not* required to provide AMS or AFIG with either the loan application, the borrower's assets and liabilities statement or any evidence of the borrower's income.

42 Turning then to the particular Loan to the appellants.

**The appellants' financial circumstances prior to the Loan**

43 Prior to 2005 the appellants were living in Sydney. While they were in Sydney Mr Shannon started an online marketing business called E-News Direct.[27] The appellants operated the business as a partnership.

44 The appellants moved to Western Australia in early 2005. They registered the business name E-News Direct in Western Australia in April 2005.

45 At that time the appellants' only income was the profit earned from their partnership in operating the E-News Direct business. It was not, with respect to the appellants, a particularly profitable enterprise.

46 For the year ended 30 June 2003, according to the partnership tax return for the following year, the profit of E-News Direct available for distribution was $12,609, which was distributed to Mr and Mrs Shannon in the sum of $6,304 and $6,305 respectively.[28]

47 For the year ended 30 June 2004, the partnership tax return for the year shows that the profit available for distribution was $62,446, which was divided equally between the appellants (i.e. $31,223 each).[29]

48 For the year ended 30 June 2005, the partnership tax return for the year shows that the the profit available for distribution was $24,213, which was distributed to Mr and Mrs Shannon in the sum of $12,107 and $12,106 respectively.[30]

[27] Primary reasons [28].
[28] Exhibit 353 (Trial Bundle page 2329).
[29] Exhibit 353 (Trial Bundle page 2329; Primary reasons [29].
[30] Exhibit 356 (Trial Bundle page 2361).

49 For the year ended 30 June 2006 (the year in which the appellants entered into the Loan Agreement), the partnership tax return for the year shows that the profit available for distribution was $88,155, which was divided equally (i.e. approximately $44,078 each).[31]

50 The following year, the year ended 30 June 2007, the partnership tax return for the year shows that the profit available for distribution had fallen to $7,292.[32]

51 On the basis of the evidence as to their income the learned trial judge found, as a matter of fact, that the appellants could not afford the Loan and could not make the loan repayments without substantial hardship.[33] There is no challenge to that finding of fact in the appeal. It is clearly correct. The monthly repayments under the loan were $2,595.23 ($31,143 per year).[34] The appellants' average combined pre-tax income for the three years prior to the date of the loan ($33,089) was barely higher than the yearly repayments. Even including the year ended 30 June 2006, which returned a reasonable profit, the average yearly income from the partnership would have left little for living expenses after the mortgage repayments.

52 The appellants nevertheless thought that they could afford mortgage repayments between $2,000 and $2,500 per month, apparently based upon the amount of rent that they had been paying in Sydney. The appellants were clearly wrong about this and the learned trial judge found that they did not have reasonable grounds for their belief that they could afford the Loan. It is apparent, however, that his Honour accepted that the appellants genuinely held the belief that they professed.[35]

## The appellants approach Mr Lock and Yes Home Loans

53 Following their move to Western Australia, the appellants began to look for a house to buy.

54 In March 2006, the appellants identified the property as a potential purchase. The property was on the market for $579,000.[36]

[31] Exhibit 359 (Trial Bundle page 2388); see also Exhibit 357 (Trial Bundle page 2366) and Exhibit 358 (Trial Bundle page 2373).
[32] Exhibit 362 (Trial Bundle page 2417).
[33] Primary reasons, [30], [239].
[34] Primary reasons, [30].
[35] Primary reasons, [32].
[36] Exhibit 501, [7] (GAB 3).

55 On 23 March 2006 the appellants took Mr Shannon's mother, Bernice Shannon (Mrs Shannon Snr), to look at the property. Mrs Shannon Snr initially suggested that she purchase the property. Between 23 March 2006 and 19 April 2006 the appellants and Mrs Shannon Snr discussed the option of Mrs Shannon Snr buying the property. Ultimately the appellants decided to see if they could get finance to purchase the property themselves.[37]

56 The appellants decided to approach Mr Lock at Yes Home Loans.

57 It may, at this point, be observed that Mr Lock had been a friend of Mr Shannon. They met in Sydney in 1999. Mr Lock had moved to Adelaide in 2004 to work with Yes Home Loans, but he and Mr Shannon had remained friends.[38] It was because of their past friendship that the appellants approached Mr Lock and Yes Home Loans for the Loan.

58 The friendship between Mr Lock and Mr Shannon became a matter of contention at trial, principally because the appellants (at times when they had been representing themselves) did not disclose the nature of their relationship with Mr Lock in many affidavits that had been sworn prior to trial. The learned trial judge concluded their failure to do so adversely affected their credibility in relation to significant issues at the trial. That conclusion in turn led his Honour to reject certain parts of their evidence (a matter to which we shall return later).

59 One thing, however, should be made clear in relation to the relationship between Mr Shannon and Mr Lock. It is this: as will become apparent, the learned trial judge found that, in multiple respects, Mr Lock engaged in dishonest and fraudulent conduct in arranging the Loan Agreement and the Mortgage. It was not suggested at trial, and there is no finding of the learned trial judge to the effect, that either Mr or Mrs Shannon were in any way involved in, or aware of, Mr Lock's dishonest and fraudulent conduct.

60 Accordingly, while there are certain findings of fact adverse to the appellants that, on appeal, they are unable to disturb, there is no finding that the appellants were involved in, or aware of, Mr Lock's dishonest and fraudulent conduct. The appellants are innocent of that conduct.

---

[37] Primary reasons [33].
[38] Exhibit 503, [13] (GAB 48).

61 While it was not clear precisely when the appellants approached Yes Home Loans in relation to the Loan, it was prior to 23 March 2006, as on that day Mr Shannon sent an email to Mr Lock requesting a loan application form.[39]

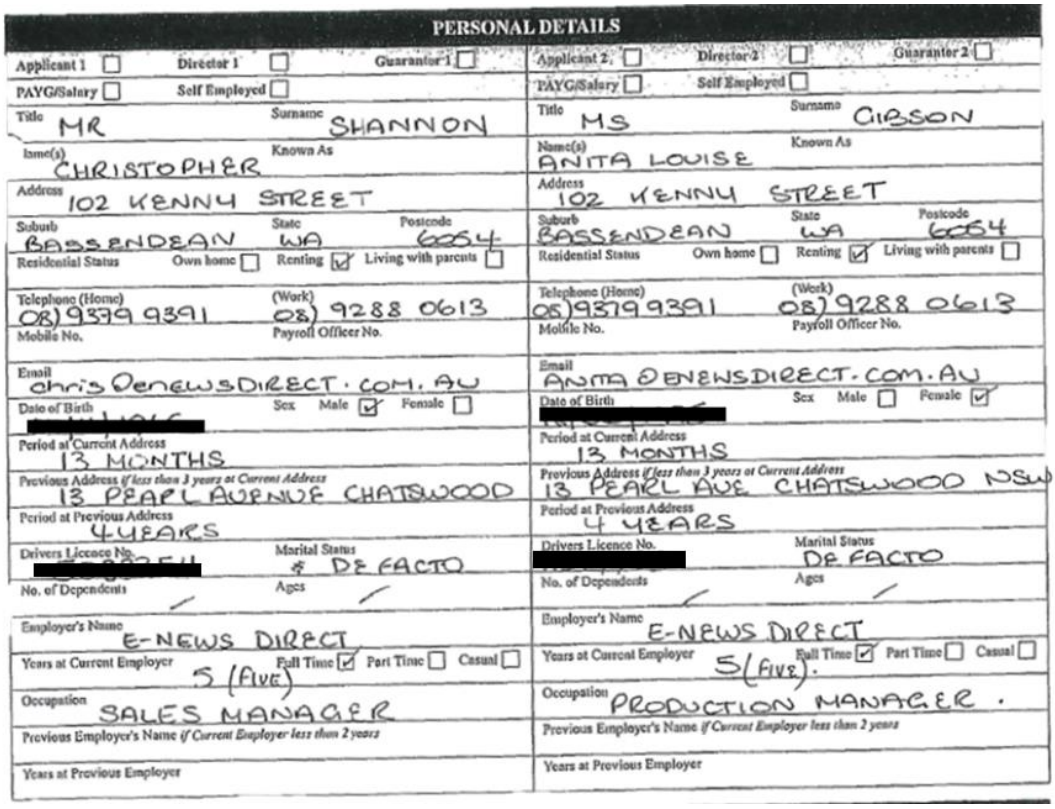
62 Mr Lock provided a blank loan application document that same day.[40]

63 The appellants partially completed the loan application form and returned it to Mr Lock by facsimile.[41] The form stated that Mr Shannon and Mrs Shannon (by her previous surname, Gibson) were employed by E-News Direct as sales manager and production manager respectively. The appellants did not fill in any financial details, namely, their income, assets and liabilities. They signed and dated the form at various points with the date 19 April 2006.

64 A couple of additional points should be made in relation to the application form prepared by the appellants.

65 First, the personal details included in the form were accurate. That part of the form appears as follows:[42]

[39] Primary reasons [34]; Exhibit 32.
[40] Primary reasons [34]; Exhibit 33 (GAB 233) and Exhibit 34.
[41] Primary reasons [35]. The learned trial judge refers to the appellants having emailed the form; it is apparent from the exhibit (Exhibit 37 (GAB 241)) that it was in fact sent by facsimile. The error is of no consequence.
[42] Exhibit 37 (GAB 243). This image has been redacted to remove the appellants' unique personal identifiers (i.e. their dates of birth and driver's licence numbers).



PERSONAL DETAILS

| | |
|---|---|
| Applicant 1 ☐ Director 1 ☐ Guarantor 1 ☐ | Applicant 2 ☐ Director 2 ☐ Guarantor 2 ☐ |
| PAYG/Salary ☐ Self Employed ☐ | PAYG/Salary ☐ Self Employed ☐ |
| Title MR Surname SHANNON | Title MS Surname GIBSON |
| Name(s) CHRISTOPHER Known As | Name(s) ANITA LOUISE Known As |
| Address 102 KENNY STREET | Address 102 KENNY STREET |
| Suburb BASSENDEAN State WA Postcode 6054 | Suburb BASSENDEAN State WA Postcode 6054 |
| Residential Status Own home ☐ Renting ☑ Living with parents ☐ | Residential Status Own home ☐ Renting ☑ Living with parents ☐ |
| Telephone (Home) 08) 9379 9391 (Work) 08) 9288 0613 | Telephone (Home) 08)93799391 (Work) 08) 9288 0613 |
| Mobile No. Payroll Officer No. | Mobile No. Payroll Officer No. |
| Email chris@enewsDIRECT.COM.AU | Email ANITA@ENEWSDIRECT.COM.AU |
| Date of Birth [redacted] Sex Male ☑ Female ☐ | Date of Birth [redacted] Sex Male ☐ Female ☑ |
| Period at Current Address 13 MONTHS | Period at Current Address 13 MONTHS |
| Previous Address *if less than 3 years at Current Address* 13 PEARL AVENUE CHATSWOOD | Previous Address *if less than 3 years at Current Address* 13 PEARL AVE CHATSWOOD NSW |
| Period at Previous Address 4 YEARS | Period at Previous Address 4 YEARS |
| Drivers Licence No. [redacted] Marital Status DE FACTO | Drivers Licence No. [redacted] Marital Status DE FACTO |
| No. of Dependents Ages | No. of Dependents Ages |
| Employer's Name E-NEWS DIRECT | Employer's Name E-NEWS DIRECT |
| Years at Current Employer 5 (FIVE) Full Time ☑ Part Time ☐ Casual ☐ | Years at Current Employer 5 (FIVE). Full Time ☑ Part Time ☐ Casual ☐ |
| Occupation SALES MANAGER | Occupation PRODUCTION MANAGER. |
| Previous Employer's Name *if Current Employer less than 2 years* | Previous Employer's Name *if Current Employer less than 2 years* |
| Years at Previous Employer | Years at Previous Employer |

66 Secondly, while the page of the loan application that made provision for financial details (assets, liabilities and income) had been left blank, that page was not signed by the appellants.[43]

67 Thirdly, the pages of the application that do contain the appellants' signatures (pages 6, 7, 8 and 9) are pro forma pages and otherwise contain no relevant information in relation to the loan application. Page 8 included a pro forma declaration as to the purpose of the loan (which was not completed) and a joint nomination form (which was completed).

68 On 24 April 2006, the appellants signed a contract to purchase the property by a contract for sale of land by offer and acceptance. It was signed by the vendor on the same day. The purchase price was $565,000. The contract was conditional upon finance approval being obtained before 22 May 2006 in an amount of 80% of the purchase price (that is, $452,000). The specified lender is Yes Home Loans. The appellants sent a copy of the contract for sale of land to Yes Home Loans.[44]

[43] While the copy of the document which was tendered at trial (Exhibit 37 (GAB 241-250)) has initials at the bottom of each page, it is apparent that those initials were added later, when the document was annexed to an affidavit sworn by the appellants in March 2014.

[44] Primary reasons [36].

69 From late April 2006 into early May 2006 there were various communications between the appellants and Mr Lock concerning a valuation report in respect of the property. Ultimately, on 11 May 2006, Yes Home Loans received a valuation report from Hegney Property Valuations, providing a valuation of $565,000. A copy of the valuation was provided to the appellants. Mr Shannon responded to Mr Lock, thanking Mr Lock for all his assistance in 'getting this deal financed' and expressing the appellants' appreciation.[45]

70 On 18 May 2006, Mr Shannon sent an email to Mr Lock attaching a copy of a building report and stated that it should give Mr Lock 'some confidence that you have backed a good each way bet'. The email also stated:[46]

> Also, our deadline for finance approval is Monday, (22/05/06). Could you, please, make sure the approval paperwork gets to the REA before close of business Monday, please?
>
> …
>
> Thanks for all your help. We're excited!~!~!

71 On 22 May 2006 at 10.44 am Mr Shannon telephoned Mr Lock to make sure that Mr Lock sent the finance approval letter that day.[47]

## Mr Lock advises Elders Real Estate that the Loan had been approved

72 At this point in the narrative, Mr Lock engaged in a range of conduct that was fraudulent and dishonest.

73 First, on 22 May 2006 at 11.35 am (1.05 pm Australian Central Standard Time), Mr Lock sent a facsimile to Elders Real Estate, the vendor's agent under the contract for the sale of the property, advising it that the finance had been approved. The facsimile said:[48]

> Please accept this memo as advice of the formal approval with regards to the aforementioned purchase.
>
> We have approved $452,000 in the names of Christopher Shannon and Anita Gibson.

74 This was false. Not only were Yes Home Loans not the relevant lender under the ARMS III program (and so unable to approve the

[45] Primary reasons [37]; Exhibit 58 (GAB 280-282).
[46] Primary reasons [38]; Exhibit 60 (GAB 286).
[47] Primary reasons [39].
[48] Primary reasons [39]; Exhibit 63 (GAB 291).

Loan), at the time this advice was given to Elders Real Estate, Yes Home Loans had not arranged for lenders mortgage insurance (see Step 4 at [36] above), issued a loan proposal (see Step 5 at [37] above), or forwarded a mortgage purchase application to AFIG (see Step 6 at [39] above).

75 Shortly thereafter, at 12.30pm, Mr Lock advised Mr Shannon by email that an approval letter had been sent to Elders Real Estate.[49]

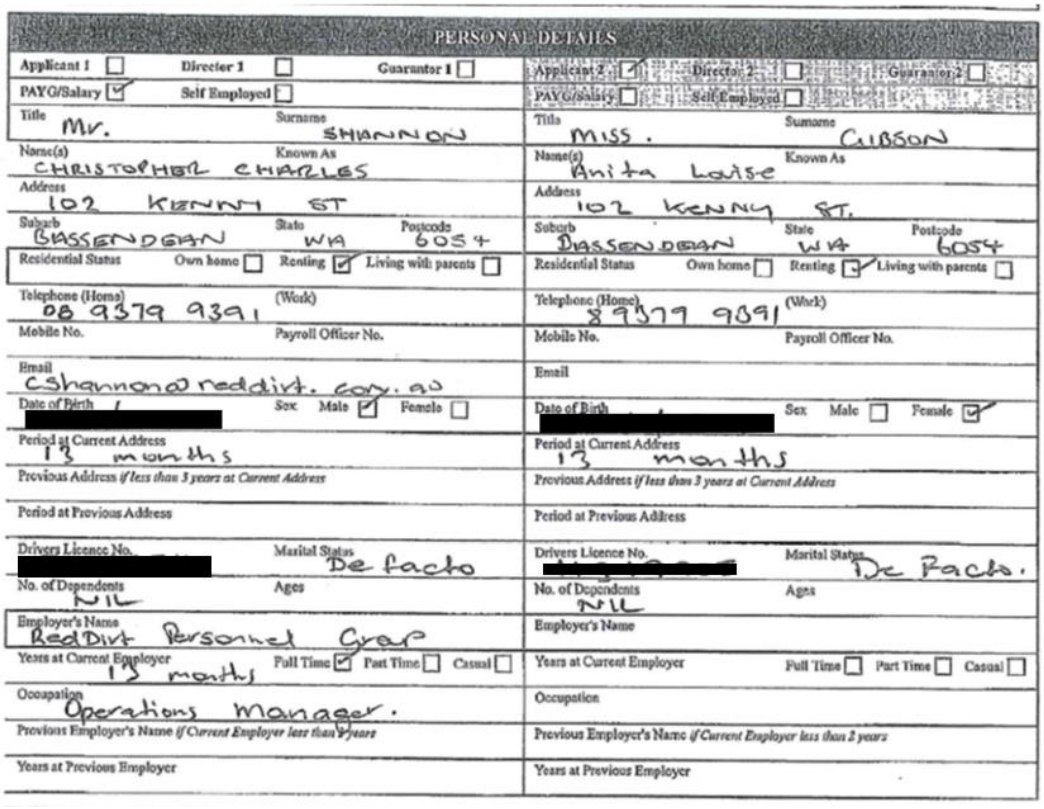
76 Mrs Shannon also gave evidence at trial that she recalled Yes Home Loans contacting the appellants by telephone advising them that the loan had been approved.[50] While the learned trial judge did not refer to this evidence in the Primary reasons, it is consistent with the email to Mr Shannon.

## Mr Lock obtains lenders mortgage insurance approval

77 Three days later, on 25 May 2006, Mr Lock sent a facsimile to Genworth Financial Mortgage Insurance Pty Ltd (**Genworth Financial**) attaching an application for lenders mortgage insurance in respect of a loan of $452,000 to the appellants. The application included a copy of what was said to be a loan application from the appellants.

78 The personal details part of the form appears as follows:[51]

[49] Primary reasons [39]; Exhibit 62 (GAB 289).
[50] Exhibit 501, [45] (GAB 10); ts 432.
[51] Exhibit 68 (GAB 300). Again, redacted to remove the appellants' dates of birth and driver's licence numbers.



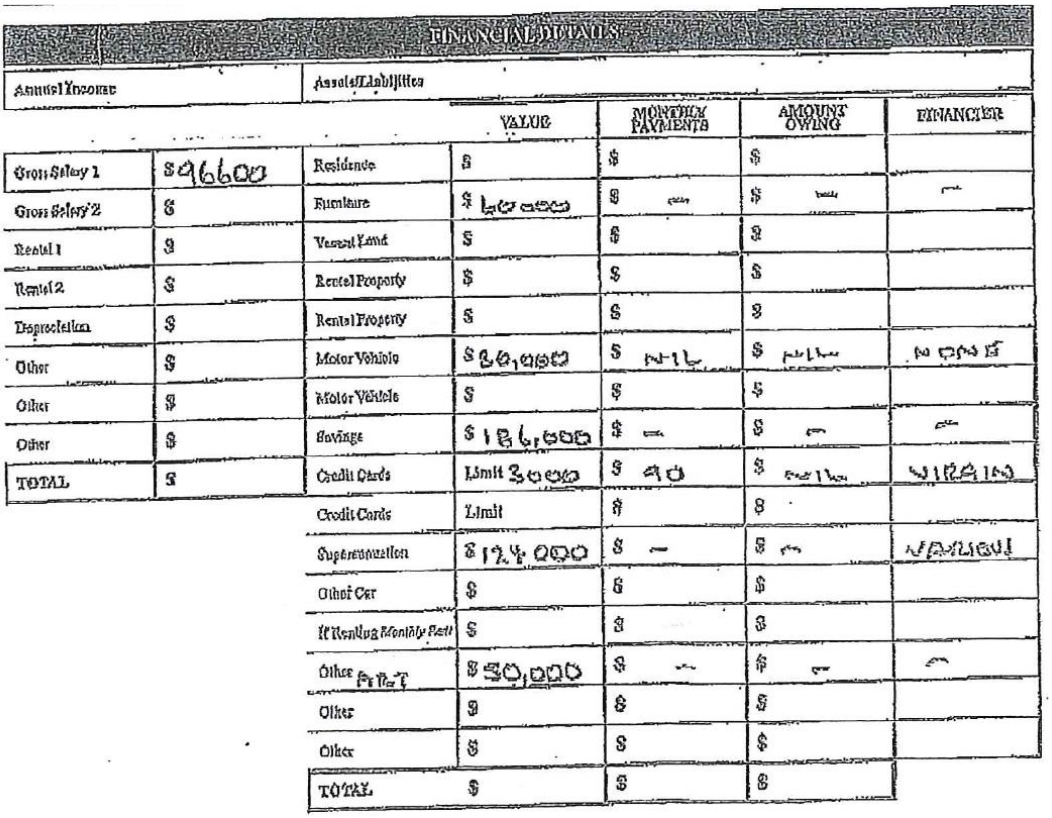
PERSONAL DETAILS

| | | | |
|---|---|---|---|
| Applicant 1 ☐ Director 1 ☐ Guarantor 1 ☐ | | Applicant 2 ☑ Director 2 ☐ Guarantor 2 ☐ | |
| PAYG/Salary ☑ Self Employed ☐ | | PAYG/Salary ☐ Self Employed ☐ | |
| Title: Mr. | Surname: SHANNON | Title: Miss. | Surname: GIBSON |
| Name(s): CHRISTOPHER CHARLES | Known As: | Name(s): Anita Louise | Known As: |
| Address: 102 KENNY ST | | Address: 102 KENNY ST. | |
| Suburb: BASSENDEAN | State: WA Postcode: 6054 | Suburb: BASSENDEAN | State: WA Postcode: 6054 |
| Residential Status: Own home ☐ Renting ☑ Living with parents ☐ | | Residential Status: Own home ☐ Renting ☑ Living with parents ☐ | |
| Telephone (Home): 08 9379 9391 | (Work): | Telephone (Home): 89379 9391 | (Work): |
| Mobile No.: | Payroll Officer No.: | Mobile No.: | Payroll Officer No.: |
| Email: cshannon@reddirt.com.au | | Email: | |
| Date of Birth: [redacted] | Sex: Male ☑ Female ☐ | Date of Birth: [redacted] | Sex: Male ☐ Female ☑ |
| Period at Current Address: 13 months | | Period at Current Address: 13 months | |
| Previous Address *if less than 3 years at Current Address* | | Previous Address *if less than 3 years at Current Address* | |
| Period at Previous Address | | Period at Previous Address | |
| Drivers Licence No.: [redacted] | Marital Status: De facto | Drivers Licence No.: [redacted] | Marital Status: De Facto. |
| No. of Dependents: NIL | Ages: | No. of Dependents: NIL | Ages: |
| Employer's Name: Red Dirt Personnel Grp | | Employer's Name: | |
| Years at Current Employer: 13 months | Full Time ☑ Part Time ☐ Casual ☐ | Years at Current Employer: | Full Time ☐ Part Time ☐ Casual ☐ |
| Occupation: Operations Manager. | | Occupation: | |
| Previous Employer's Name *if Current Employer less than 2 years* | | Previous Employer's Name *if Current Employer less than 2 years* | |
| Years at Previous Employer | | Years at Previous Employer | |

79 As will be readily apparent, this is not the page that was completed by the appellants (see [65] above). The information included in the form in relation to Mr Shannon's email address (cshannon@reddirt.com.au) and employer (Red Dirt Personnel Group) is false. The learned trial judge inferred that the page was completed by Mr Lock or someone at his direction.[52]

80 The application form provided to Genworth Financial also included purported financial details of the appellants. It contained the following:[53]

[52] Primary reasons [42].
[53] Exhibit 68 (GAB 301).



FINANCIAL DETAILS

| Annual Income | | Assets/Liabilities | | | | |
|---|---|---|---|---|---|---|
| | | | VALUE | MONTHLY PAYMENTS | AMOUNT OWING | FINANCIER |
| Gross Salary 1 | $96600 | Residence | $ | $ | $ | |
| Gross Salary 2 | $ | Furniture | $ [illegible] | $ — | $ — | — |
| Rental 1 | $ | Vacant Land | $ | $ | $ | |
| Rental 2 | $ | Rental Property | $ | $ | $ | |
| Depreciation | $ | Rental Property | $ | $ | $ | |
| Other | $ | Motor Vehicle | $ [illegible] | $ [illegible] | $ [illegible] | [illegible] |
| Other | $ | Motor Vehicle | $ | $ | $ | |
| Other | $ | Savings | $ 186,000 | $ — | $ — | — |
| TOTAL | $ | Credit Cards | Limit 3000 | $ 90 | $ [illegible] | [illegible] |
| | | Credit Cards | Limit | $ | $ | |
| | | Superannuation | $ 124,000 | $ — | $ — | [illegible] |
| | | Other Car | $ | $ | $ | |
| | | If Renting Monthly Rent | $ | $ | $ | |
| | | Other [illegible] | $ 50,000 | $ — | $ — | — |
| | | Other | $ | $ | $ | |
| | | Other | $ | $ | $ | |
| | | TOTAL | $ | $ | $ | |

81 This was not completed by the appellants either and, as the learned trial judge found, was completed by Mr Lock or someone at his direction.

82 All of the information set out above in relation to Mr Shannon's employment (including the salary of $96,600) and all of the other financial information was, as his Honour also found, a complete fabrication.[54]

83 The only parts of the loan application form which accurately reflected the form that the appellants had earlier provided to Yes Home Loans were the pages of the application containing the appellants' signatures (pages 6, 7, 8 and 9). As noted at [67] above, they were pro forma pages and otherwise contained no information in relation to the loan application. Indeed the copy of those pages were themselves altered in the copy provided to Genworth Financial.[55]

84 While not referred to in the Primary reasons, it is also apparent from the evidence at trial that the fabrication of the loan application

[54] Primary reasons [42].

[55] The copy of the page 7 provided to Genworth Financial includes 'tick' marks in the Loan Purpose declaration that did not appear in the loan application form completed by the appellants.

provided to Genworth Financial was compounded by the covering facsimile to Genworth Financial which stated (falsely):[56]

> Chris is employed as the Operations Manager for Red Dirt Personnel; he has held this position for 13 months and has an annual salary of $96,600.00
>
> Anita is responsible for home duties.
>
> The clients have one credit card with Virgin with a limit of $3,000, they have no other liabilities.
>
> The clients have saved $76,000 of their own funds, and they have recently inherited $110,000.00.

85 That facsimile was personally signed by Mr Lock. At the end of the facsimile, in a handwritten addendum, it states:[57]

> Please note*
>
> Clients are Directors of E-News P/L, this company is not trading and has no liabilities.

86 On 29 May 2006, Genworth Financial issued an acceptance advice to Yes Home Loans for lenders mortgage insurance in respect of the Loan for an amount of $452,000.[58]

87 There is no evidence that the appellants had any knowledge of the fraudulent circumstances in which the lenders mortgage insurance was obtained. Indeed, it appears that the appellants only became aware of the fabricated loan application when the respondents' solicitors provided them with a copy of it by letter dated 21 September 2012.[59]

## Mr Lock forwards a mortgage purchase application to AFIG

88 On 31 May 2006, by facsimile, Yes Home Loans forwarded a mortgage purchase application to AFIG requesting that it accept purchase of a mortgage loan to the appellants of $452,000.[60]

89 The mortgage purchase application itself was dated 30 May 2006 and signed by an authorised signatory at Yes Home Loans. The

[56] Exhibit 68 (GAB 292).
[57] Exhibit 68 (GAB 293).
[58] Exhibit 74 (GAB 318).
[59] Exhibit 154 (Trial Bundle page 1233); Exhibit 501, [147] (GAB 24); Exhibit 503, [106] (GAB 64).
[60] Primary reasons [44].

mortgage purchase application certified the following matters in relation to the mortgage:[61]

> 1. The information contained in this Mortgage Purchase Application and all attachments is correct.
>
> 2. Each Mortgage to be purchased complies with the criteria set out in the Operations Manual (as amended from time to time) except for registration, and upon registration, the mortgage loan will meet all criteria in the Operations Manual.
>
> 3. We are not aware, nor been able to ascertain by reasonable enquiry, of any reason or circumstance under which the Borrower might be unable to pay in accordance with the terms set out in the loan contract or not without substantial hardship.
>
> 4. We are not in default under the Approved Correspondent Deed and each mortgage loan is to be required by the Trustee pursuant to and in accordance with the Correspondent Deed.

90 As the learned trial judge found, each of the matters certified by Yes Home Loans was false. The information contained in the application and in the attachments was not correct. Nor did the mortgage comply with the Operations Manual.[62]

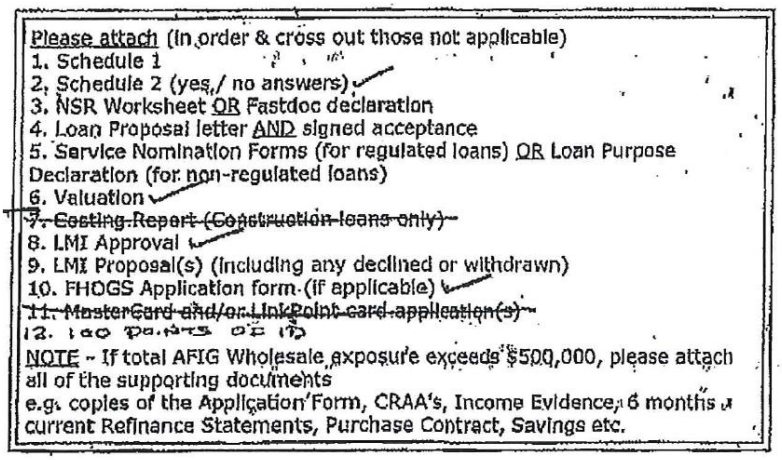
91 In particular, the attachments to the mortgage purchase application included a schedule signed by Mr Lock stating that a signed and completed application form and evidence of income were held on file and the employer had been telephoned by Yes Home Loans to verify income.[63] Another schedule stated that the appellants were not self-employed.[64] All of those statements were plainly false.

92 The attachments to the mortgage purchase application also included the acceptance advice issued by Genworth Financial referred to at [86] above.

93 Also included, on the front of the mortgage purchase application, was a checklist of matters to be attached to the MPA. While not referred to by the learned trial judge, this check list was, we infer, a standard part of the processes between Yes Home Loans and AFIG.

[61] Primary reasons [44]; Exhibit 74 (GAB 308).
[62] Primary reasons [46].
[63] Exhibit 74 (GAB 311).
[64] Exhibit 74 (GAB 309).

94 The checklist appears as follows:[65]



Please attach (in order & cross out those not applicable)
1. Schedule 1
2. Schedule 2 (yes,/ no answers)
3. NSR Worksheet OR Fastdoc declaration
4. Loan Proposal letter AND signed acceptance
5. Service Nomination Forms (for regulated loans) OR Loan Purpose Declaration (for non-regulated loans)
6. Valuation
~~7. Costing Report (Construction loans only)~~
8. LMI Approval
9. LMI Proposal(s) (including any declined or withdrawn)
10. FHOGS Application form (if applicable)
~~11. MasterCard and/or LinkPoint card application(s)~~
12. [illegible]

NOTE - If total AFIG Wholesale exposure exceeds $500,000, please attach all of the supporting documents
e.g. copies of the Application Form, CRAA's, Income Evidence, 6 months current Refinance Statements, Purchase Contract, Savings etc.

95 As is apparent, this checklist closely mirrors the requirements set out in Step 6 of the Loan Submission Process in the Operations Manual (see [39] above). That is, it lists the documents that are required by the mortgage purchase application to be attached to the mortgage purchase application, including those additional documents that are to be attached if the loan exceeds $500,000.

96 The proposed loan in the present case did not exceed $500,000. Accordingly, in accordance with both the Operations Manual and the checklist, Yes Home Loans was not required to attach the application form and income evidence to the mortgage purchase application.

97 Even still, the attachments to the mortgage purchase application in the present case were incomplete and did not include each of the matters required by the Operations Manual. Both the Operations Manual and the checklist, for example, require the inclusion of the Loan Proposal letter and signed acceptance (item 4 on the checklist) and the service nomination form or loan purpose declaration (item 5).[66] Neither a Loan Proposal letter and signed acceptance nor a service nomination form was attached to the mortgage purchase application.[67] Indeed, there is no evidence that a Loan Proposal letter and signed acceptance ever came into existence.

98 As it was, the only documents signed by the appellants that *were* attached to the mortgage purchase application were the original contract

[65] Exhibit 74 (GAB 308).
[66] See also dot-points 4 and 7 in Step 6 set out at [39] above.
[67] Given that the Loan was a regulated Loan a loan purpose declaration was not required. A service nomination form (which the appellants had signed - see [67] above), however was required.

of sale for the property[68] and a copy of their application under the *First Home Owner Grant Act 2000* (WA).[69] The attachments did not include a copy of a loan application form. It included neither the accurate but incomplete application form prepared by the appellants[70] nor the fabricated one prepared by Mr Lock or someone at his direction.[71]

## AFIG approves the Loan and the Mortgage

99 On 6 June 2006 AFIG completed a document headed 'Instruction to Solicitor' (the **Instruction**). The Instruction was addressed to Wignall Solicitors (an approved solicitor) via Yes Home Loans and it stated that AFIG confirmed acceptance of the mortgage and loan detailed in the schedule. The schedule stated that the borrowers were to be the appellants, the mortgagee to be GEL Custodians, the loan to be for $452,000 over 30 years with a five-year interest only period. The monthly repayments were to be $2,595.23 during the interest only period and $3,162.99 for the remainder of the term. The Instruction instructed Wignall Solicitors to prepare and serve the loan contract, mortgage and other ancillary documents and to settle the Loan.[72]

100 Also on 6 June 2006 Yes Home Loans forwarded the Instruction to Wignall Solicitors.[73]

## The appellants sign the Loan Agreement and the Mortgage

101 On 12 June 2006 the appellants received from Wignalls Lenders Mortgage Services (**Wignalls**) a loan pack. The loan pack included a letter dated 8 June 2006 from Wignalls to Mr Shannon. The letter listed documents that needed to be signed and returned (including the Loan Agreement and the Mortgage). The letter contained the following note:[74]

> We recommend you obtain independent advice. Please note we act for the mortgagee and cannot provide advice to you.

102 The appellants signed the Loan Agreement and Mortgage documents and returned them to Wignalls on 13 June 2006. The

[68] Exhibit 74 (GAB 326-327).
[69] Exhibit 74 (GAB 320-325).
[70] See [65] to [67] above.
[71] See [77] to [83] above
[72] Primary reasons [48].
[73] Primary reasons [48].
[74] Primary reasons [49].

following day, Wignalls sent a facsimile to Yes Home Loans advising that that settlement had been arranged for 19 June 2006.[75]

**Settlement and the advance of funds pursuant to the Loan Agreement**

103 Settlement took place on 19 June 2006.[76] On that day, GEL Custodians advanced $452,000 to the appellants pursuant to the Loan Agreement.[77] On 22 June 2006, the appellants were registered as proprietors of the property and GEL Custodians was registered as mortgagee under the Mortgage.[78]

**The appellants default under the Loan Agreement and the Mortgage**

104 In July 2006 the appellants commenced making interest only loan repayments under the Loan.[79]

105 On 19 October 2006 the defendants failed to make the loan repayment then due and payable.[80] The defendants failed to make the payments when due and payable each month up to and including May 2007 and again on numerous occasions up until July 2011, when they ceased making payments altogether. Between 2009 and 2011, the appellants also made a number of hardship requests in relation to the Loan.[81]

106 On 22 March 2011, GEL Custodians' solicitors served a default notice on the appellants, and on 20 February 2012, GEL Custodians commenced enforcement proceedings in this Court (CIV 1276 of 2012). Those proceedings were discontinued on 23 November 2012.[82]

107 On 5 February 2013, GEL Custodians commenced the primary proceedings tried before the learned trial judge. The sum then owing under the Loan Agreement was $581,042.18 (with interest from 4 February 2013 at the rate of 8.27% per annum).[83]

[75] Primary reasons [68].
[76] Primary reasons [73].
[77] Primary reasons [77].
[78] Primary reasons [75].
[79] Primary reasons [80].
[80] Primary reasons [81].
[81] Primary reasons [82]-[84].
[82] Primary reasons [87] and [89].
[83] BAB 89.

108 As at the commencement of the trial, 4 December 2017, the sum outstanding under the Loan Agreement was $1,301,131.80.[84] Interest has been accruing at the rate of 8.27% per annum ever since.

109 We turn now to briefly summarise the Primary reasons.

## The Primary Reasons

110 For reasons that will become apparent, in summarising the Primary reasons it is convenient to consider separately the claims *other* than the claim made pursuant to s 76 of the *National Credit Code* and then to consider the claim made under the *Code*.

### The claims other than the claim under s 76 of the *National Credit Code*

111 As we noted at the commencement of these reasons, the issues in this appeal were largely confined to the question as to whether the transaction giving rise to the Loan Agreement and the Mortgage should be reopened pursuant to s 76 of the *National Credit Code*, on the ground that the Loan Agreement and the Mortgage are 'unjust' within the meaning of that section.

112 The issues raised by the appellants at trial (ironically, given that they were then represented) were not nearly as focussed. Together with the ubiquitous 'and/or' form of pleading, the Amended Defence and Counterclaim[85] may properly be described as a 'forest of forensic contingencies',[86] much of which failed to bear fruit in the outcome of the trial.

113 The Amended Defence and Counterclaim, for example, in addition to the claim under s 76 of the *National Credit Code*, pleaded:

(a) four separate misrepresentations by Yes Home Loans and Mr Lock (the **Misrepresentations**);[87]

(b) that the Misrepresentations were made on behalf of AMS, AFIG and GEL Custodians;[88]

---

[84] Primary reasons [101].
[85] Amended Substituted Defence and Counterclaim to Plaintiff's Amended Statement of Claim dated 17 November 2017 (**Amended Defence and Counterclaim**) (BAB 102).
[86] ***Forrest v Australian Securities and Investments Commission*** [2012] HCA 39; (2012) 247 CLR 486 [27] (French CJ, Gummow, Hayne & Kiefel JJ).
[87] Amended Defence and Counterclaim [3], [22] and [34].
[88] Amended Defence and Counterclaim [25].

(c) that Yes Home Loans, AMS, AFIG and GEL Custodians engaged in misleading and deceptive conduct contrary to s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (the ***ASIC Act***);[89]

(d) that Yes Home Loans, AMS, AFIG and GEL Custodians engaged in unconscionable conduct contrary to s 12CB(1) of the *ASIC Act*[90] and under the general law;[91]

(e) that Yes Home Loans, AMS, AFIG and GEL Custodians committed fraud;[92]

(f) the Loan Agreement and the Mortgage were entered into on the basis of a common mistake and were void;[93]

(g) Yes Home Loans, AMS, AFIG and GEL Custodians made false and misleading representations contrary to s 154 of the *National Credit Code* and s 144 of the *Consumer Credit (Western Australia) Code*; [94] and

(h) The Mortgage was void pursuant to s 214A of the *Transfer of Land Act 1893* (WA).[95]

114 The Misrepresentations referred to in [113(a)] above played a central role in many of the causes of action pleaded by the appellants. They formed the basis, for example, for the fraud claims, the statutory unconscionability claims and the misleading and deceptive conduct claims.[96]

115 The Misrepresentations fell into two categories.

116 The First and Second Misrepresentations were said to have been made, by Yes Home Loans to the appellants. In particular:

(a) that in 2006, during its negotiations with the appellants, Yes Home Loans held itself out and represented itself to the

[89] Amended Defence and Counterclaim [25].
[90] Amended Defence and Counterclaim [25].
[91] Amended Defence and Counterclaim [48].
[92] Amended Defence and Counterclaim [38].
[93] Amended Defence and Counterclaim [46].
[94] Amended Defence and Counterclaim [45(c)].
[95] Amended Defence and Counterclaim [45(d)].
[96] Amended Defence and Counterclaim [25], [38].

appellants to be a lender of home loans and the lender of the then proposed Loan (the **First Misrepresentation**); and[97]

(b) that, in June 2006, Mr Lock, on behalf of Yes Home Loans, represented to Mr Shannon in a telephone conversation that GEL Custodians was a subsidiary of Yes Home Loans and the trustee of Yes Home Loans (the **Second Misrepresentation**).[98]

117 The Third and Fourth Misrepresentations concern the conduct of Yes Home Loans in relation to persons other than the appellants. While the distinction between the Third and Fourth Misrepresentations is not entirely clear from the pleading,[99] they were identified by the learned trial judge as follows:

(a) that Yes Home Loans altered and/or forged and fabricated the first two pages of the loan application made by the appellants to convey, contrary to the facts, the income, assets and liabilities of the appellants there stated (the **forged loan application**) (the **Third Misrepresentation**);[100] and

(b) Yes Home Loans certified to AMS and AFIG, *inter alia*, that Yes Home Loans was not aware of (or had been able upon reasonable enquiry to ascertain) any reason or circumstance under which the appellants might be unable to pay in accordance with the Loan Agreement or not without substantial hardship and further that, in arranging the policy of mortgage insurance, Yes Home Loans provided to Genworth Financial a copy of the forged loan application (**Fourth Misrepresentation**).[101]

118 The learned trial judge comprehensively dealt with all of the claims set out in [113(a) to (h)] above.

119 In that regard, his Honour found that all of the appellants' claims (other than the claim to reopen the Loan Agreement and the Mortgage under s 76 of the *National Credit Code*) were time-barred under each of the applicable limitation periods.[102] His Honour also declined to extend time within which to commence those claims pursuant to s 38 of the *Limitation Act 2005* (WA) (the ***Limitation Act***). In that context,

[97] Amended Defence and Counterclaim [3].
[98] Amended Defence and Counterclaim [3].
[99] Amended Defence and Counterclaim [34]-[37].
[100] Primary reasons [205].
[101] Primary reasons [207].
[102] Primary reasons [147], [199].

his Honour held (correctly in our view) that the power to extend time under the *Limitation Act* did not apply to the time limits imposed by laws of the Commonwealth (including the *ASIC Act* and the *National Credit Code*).[103]

120 More importantly, the claims other than the claim under s 76 of the *National Credit Code* were also rejected by the learned trial judge on their merits.

121 In that regard, his Honour made a number of critical findings of fact in relation to the four Misrepresentations.

122 In relation to the First and Second Misrepresentations, his Honour rejected the appellants' case that those representations were in fact made, or that the appellants relied upon them. His Honour said:[104]

> I am not satisfied that [Yes Home Loans] represented to the defendants that it was the lender of the then proposed loan. The application form states that [Yes Home Loans] is the mortgage manager and the credit provider is each of the organisations named in sch A, which includes Permanent Custodians but not [Yes Home Loans]. In any event, before they signed the Loan Agreement and the Mortgage the defendants read the Loan Agreement and the Mortgage carefully. Those documents clearly identify GEL Custodians as the lender or credit provider and mortgagee.
>
> …
>
> I reject the evidence of the defendants that Mr Lock represented to them that GEL Custodians was a subsidiary of [Yes Home Loans] and the trustee of [Yes Home Loans] for the reasons I have stated. The defendants have not proved the First and Second Misrepresentations. Furthermore, the defendants entered into the Loan Agreement and the Mortgage knowing that they were entering into agreements with GEL Custodians and did not rely upon any representation that the lender was [Yes Home Loans] or that GEL Custodians was a subsidiary of [Yes Home Loans] and the trustee of [Yes Home Loans].

123 The learned trial judge did find that the Third and Fourth Misrepresentations were made by Yes Home Loans and that they were false. That is, his Honour found that Yes Home Loans had engaged in the fraudulent conduct set out in [77] to [82] and [89] to [91] above.[105]

---

[103] Primary reasons [150].
[104] Primary reasons [202]-[204].
[105] Primary reasons [205], [207].

124 The learned trial judge nevertheless concluded that the Third and Fourth Misrepresentations were not made to the appellants and, indeed, as was the case, that the appellants did not find out about them until 2012.[106] Not being aware of those Misrepresentations, his Honour (unsurprisingly) found that the appellants had not relied upon them in entering into the Loan Agreement and the Mortgage. Accordingly, his Honour found that the Third and Fourth Misrepresentations were not actionable *per se*.

125 The rejection of the claims based on the Misrepresentations, and in particular the learned trial judge's finding that the appellants had not proved that the First and Second Misrepresentations were in fact made, was fatal to many of the claims made by the appellants at trial, including those that were otherwise time-barred in any event.

## The claim under s 76 of the *National Credit Code*

126 The appellants' claim under s 76 of the *National Credit Code* was, in a number of respect, very different to the other claims.

127 First, that claim was not time barred in any way. At trial the respondents accepted that the *National Credit Code* applied to the Loan Agreement and the Mortgage and that an application made pursuant to s 76 of the *Code* was not time barred.

128 Secondly, as will be seen, while the claim under s 76 of the *National Credit Code*, relied, in part, upon the (failed) Misrepresentation claims, whether the Loan Agreement and the Mortgage were, relevantly, unjust, raised broader issues, and was a matter to be determined in light of all the circumstances. The evaluative exercise required by s 76 did not depend upon the existence of any one particular circumstance. That is how the learned trial judge approached the issue and how it was approached in the appeal.

129 After referring to a number of authorities in relation to the jurisdiction to reopen 'unjust transactions', the learned trial judge observed:[107]

> The defendants say that in deciding whether a transaction is unjust a court is to have regard to the public interest and may look to all of the circumstances. As I have said, the public interest considerations are consumer protection and upholding bargains. Both must be given weight appropriate in the circumstances.

[106] Primary reasons [206], [208].
[107] Primary reasons [259]-[260].

> The defendants have set out a number of matters which they say relate to the matters which, pursuant to s 76(2) of the *National Credit Code*, the court is to have regard to in determining whether a term of a credit contract or mortgage are just in the circumstances.

130 His Honour then proceeded to individually address a number of the circumstances listed in s 76(2)(a) to (p) of the *National Credit Code*. His Honour dealt with eleven matters in total.

131 First, in relation to s 76(2)(a) - the consequences of compliance or non-compliance with the transaction - the learned trial judge said:[108]

> The defendants say that if the contracts are not set aside they will lose their home and face bankruptcy due to the Loan, which they did not and do not have the capacity to service, or at least not without more than substantial hardship. If the Loan Agreement and Mortgage are not reopened and set aside or discharged the plaintiff will be given judgment for a sum exceeding $1 million and possession of the Land. The defendants will lose their home. That consideration is relevant but is lessened somewhat by the facts that the defendants acquired that home by entering into the Loan Agreement and the Mortgage and have lived in it for 12 years notwithstanding that they made only three monthly loan repayments before defaulting in October 2006, failed to make the monthly payments from then until May 2007 and failed to make the monthly repayments on numerous occasions from May 2007 until July 2011 when they ceased making any payments.
>
> More importantly, a contract will not be unjust merely because it was not in the claimant's interest to enter into it, or because the claimant cannot perform when called upon to do so, or because enforcement of the contract will lead to the loss of the claimant's home: ***Esanda Finance Corp Ltd v Viet Nho Tong & Thi Kim Lien Tong*** (1997) 41 NSWLR 482 per Handley JA at 491.

132 Secondly, in relation to s 76(2)(b) - the relative bargaining power of the parties - his Honour said:[109]

> If a contract or its relevant provisions is neither unfair nor unreasonable it is difficult to see how the existence of any inequality of bargaining power or lack of independent advice, for example, can render a contract or a provision of the contract unjust: ***West*** [621].

133 Thirdly, in relation to s 76(2)(d) - the practicability of the appellants being able to negotiate the provision of the contracts - the learned trial judge said:[110]

---

[108] Primary reasons [261]-[262].
[109] Primary reasons [263], referring to ***West v AGC (Advances) Ltd*** (1986) 5 NSWLR 610 (***West v AGC***).

> The defendants say that having committed the defendants (without their knowledge) to a settlement on 19 June 2006, YHL exploited that fact to allow the defendants no time to consider the terms of or seek advice upon the contracts. The defendants say they had no realistic opportunity to negotiate, alter or reject any terms. I have found that YHL did not commit the defendants 'without their knowledge' to a settlement on 19 June 2006. YHL, by Mr Lock, informed Elders Real Estate that the defendants' finance had been approved at the urging of the defendants. Mr Shannon pressed Mr Lock to inform Elders of finance approval by his email of 18 May 2006 and his telephone call to Mr Lock on 22 May 2006. Mr Shannon says that he knew the proposed term of the loan and the interest rate. Indeed, he claims the interest rate was one of the matters that made him approach YHL. The defendants did not simply sign the Loan Agreement and Mortgage because they had no other option. They spent hours reading through the terms. They did not at the time identify any terms they considered to be harsh or unjust. They claim to have spoken to Mr Lock by telephone on 13 June 2006 but did not seek to negotiate or change any of the terms or raise any question about any of the terms.

134 Fourthly, in relation to s 76(2)(e) - the difficulty of compliance with the provisions of the contracts - the learned trial judge said:[111]

> The defendants say that the Loan Agreement imposed conditions (that is repayment) on the defendants' actual financial position that were not only unreasonably difficult to comply with, they could not be complied with. The defendants knew the amount of the contractual repayments. They turned their minds to whether they could make the repayments without substantial hardship. They considered they could do so because they had been able to make similar payments for rent previously. They knew how their circumstances had changed since that time, albeit they did not have any financial statements for their business available at that time. Neither GEL Custodians nor YHL made any representations to the defendants concerning their capacity to make the repayments. YHL did not make any representations to induce the defendants to enter into the agreements. To the contrary, the defendants approached YHL. The defendants did not provide YHL with any information concerning their financial situation notwithstanding that they knew the loan application form required such information.

135 Fifthly, in relation to s 76(2)(g) - the form and intelligibility of the contracts - the learned trial judge said:[112]

> The defendants say that the Terms and Conditions were missing from the loan package as was advice about the need for financial advice. I have found that either the Terms and Conditions document was

[110] Primary reasons [264].
[111] Primary reasons [265].
[112] Primary reasons [266].

> enclosed in the loan pack or the defendants knew that the terms and conditions of the Loan Agreement included terms and conditions in a separate document and were content to enter into a contract which included those terms and conditions without receiving a copy of it. There are no terms in the Terms and Conditions document which are unusual in a Loan Agreement or which are themselves harsh or unjust.

136 Sixthly, his Honour said, in relation to s 76(2)(h) - independent legal or expert advice:[113]

> The defendants did not obtain independent legal or other expert advice. The letter which accompanied the loan pack recommended the defendants obtain independent advice. I am satisfied that the defendants read and understood that recommendation. They elected not to obtain legal or other expert advice. Any time constraints upon the defendants was a matter of their own doing - YHL informed Elders of the defendants' finance approval at the urging of the defendants.

137 Seventhly, in relation to s 76(2)(i) - any explanation of, and the appellant's understanding of the provisions and their effect - the learned trial judge said:[114]

> GEL Custodians did not explain to the defendants the legal and practical effect of the Loan Agreement and the Mortgage. I am not satisfied that the defendants did not understand the provisions and their effect. The defendants understood the amount of the Loan, the term of the Loan, the rate of interest and the repayments. The defendants signed an acknowledgement that they had read and understood the nature and effect of the Loan Agreement and the security referred to in the Loan Agreement, that is the Mortgage.

138 Eighthly, in relation to s 76(2)(j) - the use of any unfair pressure - his Honour said:[115]

> The defendants say that YHL exerted unfair pressure on the defendants to sign and return the documents without a proper understanding, without any opportunity to obtain it and their lack of understanding was underlined by the fact that the material terms and conditions to the Loan Agreement were not included. I am not satisfied that YHL exerted unfair pressure on the defendants to sign and return the documents. As I have said, Mr Shannon pressed Mr Lock to inform Elders Real Estate that finance had been approved. The defendants did not simply sign the documents and return them without reading them because of any pressure exerted. To the contrary, they spent hours reading them before signing them and returning them.

---

[113] Primary reasons [267].
[114] Primary reasons [268].
[115] Primary reasons [269].

139 Ninthly, his Honour said, in relation to s 76(2)(k) - the measures taken to explain the transaction to the appellants:[116]

> The defendants say GEL Custodians took no measures to ensure that the defendants understood the nature and implications of the contracts because the defendants were never given the opportunity to do so. I do not accept that. The Loan Agreement and Mortgage were sent to the defendants at their home so that they might read and consider them in their own time. The defendants spent hours doing so. The defendants did not identify any provision in the documents which they did not understand or in relation to which they wanted advice but had no time to obtain it. I have found that either the Terms and Conditions document was enclosed with the other documents sent to the defendants or the defendants knew that the terms and conditions of the Loan included the terms and conditions in a separate Terms and Conditions document and the defendants were content to enter into a contract which included those terms and conditions without receiving a copy of it.

140 The tenth and eleventh matters dealt with by the learned trial judge are critical to the resolution of the appeal and, accordingly, we set them out in full:[117]

> 271 The tenth s 76(2) matter relied upon by the defendants is:
>
> > (l) whether at the time the contract, mortgage … was entered into …, the credit provider knew, or could have ascertained by reasonable enquiry at the time, that the debtor could not pay in accordance with its terms or without substantial hardship.
>
> The defendants say that YHL (and thus GEL Custodians) and from 2012 GEL Custodians or the plaintiff itself knew that the defendants did not and could not meet the ARMS programme parameters - that is why YHL fabricated the loan application and application for mortgage insurance in the first place. The defendants further say that any reasonable enquiry or checking in 2006 and again from 2012 onwards would have determined that the defendants could not pay in accordance with the terms of the Loan Agreement at all, let alone without substantial hardship.
>
> 272 The knowledge of YHL that may be attributed to GEL Custodians is that the defendants had not provided any details of their income, assets or liabilities. There is no evidence that the defendants gave to YHL any information that, or from which it

[116] Primary reasons [270].
[117] Primary reasons [271]-[287].

could be inferred, that they could not meet the mortgage repayments or not without substantial hardship. Mrs Shannon's evidence is that at the time the defendants had no financial statements available for their business. Reasonable enquiry would not have disclosed that the defendants were not able to make the repayments without substantial hardship but it would have disclosed that the defendants did not have financial statements available to substantiate their belief that they could make the repayments without substantial hardship.

273 The eleventh s 76(2) matter is:

(p) any other relevant factor

The defendants say that rendering the offer and acceptance unconditional bound the defendants in circumstances where they had not agreed or seen the transaction documents. They further say that the misrepresentations induced them into the transactions when they would otherwise have not entered into them. They further say that the manager's failure to make any enquiries about YHL's fraudulent conduct allowed it to remain uncovered.

274 I have found that the rendering of the offer and acceptance unconditional by YHL informing Elders Real Estate that the defendants' finance had been approved was done by Mr Lock at the urging of Mr Shannon. Mr Shannon did that knowing that the defendants had not received the loan and mortgage documents. I have found that the defendants were not induced into the transactions by misrepresentations. I find that the procedures set out in the Correspondent Deed and Operations Manual were not complied with.

275 The defendants referred to the responsible lender provisions of the *National Consumer Credit Protection Act 2009* (Cth). The Act does not act retrospectively. Part 3-1 of the Act which imposes 'responsible lending' obligations upon credit licensees that provide assistance in relation to credit contracts has no application in these proceedings.

276 A lender does not owe a general common law duty of care to a borrower, or prospective borrower, to warn or to guard against risk of loss. In ***Perpetual Trustee*** Edelman J said at [331] there is no general common law duty upon a lender to advise or to protect a borrower against fraud. At [335] his Honour said that there is no general common law duty upon a lender to advise or protect a borrower against fraud, or to check the accuracy of information or warn of the risk of loss, but a specific duty can arise at common law in some circumstances. His Honour said

that one of those circumstances was an assumption of responsibility.

277 In ***Micarone v Perpetual Trustees Australia Ltd*** (1999) 75 SASR 1 Debelle and Wicks JJ rejected the contention that a lender owed a duty to its borrower to take care to verify the borrower's application. Their Honours explained:

> What inquiries a lender makes to verify information given in support of a loan application is entirely its concern. It may choose to make no independent inquiries … there is no duty on a financier to provide either a borrower or a third party with commercial advice, although if such advice is tendered, the financier may assume the duty of care …[A] lender is not to be treated as a branch of a social services agency [624] - [625].

278 In ***Kowalczuk v Accom Finance Pty Ltd*** (2008) 77 NSWLR 205 Campbell JA (with whom Hodgson & McColl JJA agreed) said:

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

279 Furthermore, a lender does not owe any duty under the general law to be alert for fraud by or on behalf of a borrower. A lender does not owe any duty under the general law to assess the capacity of a borrower to repay a loan, to ascertain the viability of the loan or to verify the details provided in a loan

application. The provision of false information by or on behalf of a borrower to a lender does not make a loan unjust: ***Riz v Perpetual Trustee Australia Ltd*** [2007] NSWSC 1153 [78]. Nor does the fact, without more, that a party cannot afford a loan make a credit contract unjust: ***Barker v GE Mortgage Solutions Ltd*** [72] citing ***Australian Societies Group Financial Services (NSW) Ltd v Bogan*** [1989] ASC 55-938.

280 The Loan Agreement and the Mortgage are unexceptional. They contain no harsh or unjust terms of themselves. The unjustness of the contracts arises, if at all, from the fraud upon GEL Custodians and AFIG practised by YHL in the arrangement of the Loan Agreement and the Mortgage, or the defendants' inability to meet the mortgage repayments without substantial hardship or at all. I find that in all the circumstances the agreements were not unjust. I will not reiterate all the facts. The following matters are important.

281 There was, at the time the Loan Agreement and Mortgage were entered into the real possibility of detriment to the defendants in incurring the debts and interest liability without the means to meet them. However that on its own is insufficient to render the Loan Agreement and the Mortgage unjust.

282 Whilst unconscionability looks to the conduct of the person said to have acted unconscionably, the assessment of unjustness requires consideration of the extent to which both the lender and borrowers bear responsibility for what happened in applying the broad considerations contained in the *National Credit Code*, founded as they are in justice and fairness. It is only fair and just to recognise the significant responsibility of the defendants in the circumstances of this case.

283 The defendants signed the loan application form with the information concerning their income, assets and liabilities blank. They have offered no explanation as to how they thought the loan application might be completed and processed without them providing any such information. By leaving those sections blank the defendants were careless and facilitated the fraud by YHL.

284 The defendants made the loan application and entered into the Loan Agreement without making any proper enquiry or assessment whether they could afford the repayments without substantial hardship or at all. Their only source of income was the E-News Direct business. The defendants did not have any financial statements showing the income and expenses of the business nor make any attempt to obtain such financial statements. The defendants made no attempt to ascertain the income and expenses of the business in the preceding 12 months

> or to assess its present profitability and the likely income it would deliver to them in the short and medium term.
>
> 285 The principal wrongdoing was the fraud of YHL in filling in and submitting the various forms and information to AFIG. This brought about the agreements which would not have been entered into without the false information. There was no misleading conduct, trickery or predatory conduct by GEL Custodians. The defendants' entry into the Loan Agreement and the Mortgage was not facilitated by GEL Custodians or AFIG failing to require appropriate information, it came about because of the fraudulent conduct of YHL. YHL was not the agent of GEL Custodians or AFIG in making the loan application, it was operating its own business.
>
> 286 This is not a case, like in ***Tonto Homes***, where the fraud was effected by a mortgage introducer who was an intimate commercial counterparty to the lender but a stranger to the borrower and effected the fraud for the financial advantage of the mortgage introducer. Here, the defendants were 'fairly close friends' of the principal person acting on behalf of YHL. YHL did not make representations or induce the defendants to enter into the Loan Agreement. The defendants urged and pressed YHL to obtain finance approval for a loan. They knew the amount of the loan, its term and interest rate and the required repayments. The defendants did not provide any financial information to YHL which would enable YHL to assess whether the defendants could make the repayments without substantial financial hardship or at all. The defendants alone made that assessment. The defendants knew that they had not provided any financial information to YHL and that they had not completed the information required on the loan application form concerning their income, assets and liabilities.
>
> 287 In all the circumstances I am not persuaded that in the circumstances relating to the Loan Agreement and the Mortgage at the time they were entered into those agreements were unjust.

141 As a consequence of this finding, of course, the learned trial judge was not required to consider the discretion whether to reopen the Loan Agreement and the Mortgage or what, if any, relief should be granted in that regard.

142 Turning then to the grounds of appeal.

## Grounds of Appeal

143 The appellants bring the appeal on 18 grounds. Those grounds are:

**Ground 1**

**No Loan Application Form - signed by the Appellants was ever received by GEL in 2006**

The learned trial judge erred in fact in finding that a loan application form had been provided by Yes Home Loans (YHL) to AFIG (and through it GEL) at **paragraphs [3] [238] and [241]** and based upon the evidence should have found that no loan application form was ever provided to AFIG/ GEL in 2006.

**Ground 2**

**GEL Custodians or AFIG failed to require appropriate information**

Further to Ground 1, the learned trail [sic] judge erred in fact and law in finding that the Appellants entry into the Loan Agreement and Mortgage was not facilitated by GEL Custodians or AFIG failing to require appropriate information at paragraphs [285] and should have found that YHL provided no information to GEL and AFIG in the loan application form process which included any information regarding the employment, income, assets of expenses of the Appellants.

**Ground 3**

**Unconscionable Conduct and Unjustness**

While finding that GEL had knowledge that the loan application form submitted to Genworth was false **[195 - 198 of Judgment]**, before making an offer of credit (secured by a mortgage) to the Appellants the honourable trial judge erred in law by not finding that such knowledge constituted unconscionable conduct and or unjustness under the provisions of S.76 and erred in his discretion in failing to set aside the loan agreement and mortgage under S.77 of the National Credit Code.

**Ground 4**

**Reasonable Inquiries - S.76 (2) (L) - National Credit Code**

The trial judge erred in law by his interpretation of 'Reasonable Inquires' under the provisions of S.76 (2) (L) of the National Credit Code, and further erred in law in applying the obligation onto the Appellants **[270 - 271 of Judgment]**

**Ground 5**

**Contracting-Out**

The trial judge erred in law by allowing the Respondents to 'contract-out' of the effects of the National Credit Code in order to escape any responsibility and or liability for the misconduct of YHL and/or alternatively the effects of YHL's conduct on the unjustness and unconscionability of the transaction **[280 of Judgment]**.

**Ground 6**

**Indemnifying the Respondents for its breaches of the Consumer Credit (Western Australia) Code**

The trial judge erred in law by ordering the Appellants to indemnify the First Named Respondent for all its costs associated with the litigation (since 2012) under the provisions of the loan agreement and mortgage (enforcement expenses for breach of contract) in circumstances where the Respondents knew that it had not made reasonable inquires of the Appellants ability to repay the loan under the terms of the contract, knew it had not received nor relied upon any loan application form signed by the Appellants, knew that it had instructed YHL not to send it a copy, and should have obtained the required indemnity from YHL not the Appellants **[288 of the judgment]**

**Ground 7**
The trial judge erred in law and fact in finding that the Correspondent Deed did not preclude YHL from acting in the interests (as an agent) of the Appellants **[190 of the judgment]**

**Ground 8**
The trial judge erred in law by his use of case precedents which suggested YHL was the Appellants 'broker' and therefore an agent of the Appellants. **[[156] [197] [279] of the judgment]**

**Ground 9**
The learned trial judge erred in law in his failure to afford the Appellants the opportunity to make submissions regarding YHL being an agent of the Appellants in circumstances where the Respondents had not pleaded that YHL was an agent of the Appellants.

**Ground 10**
The trial judge erred in fact and law in finding that the Appellants had facilitated the fraud of YHL by providing YHL with an incomplete loan application form, in circumstances where GEL did not receive a loan application form signed by the Appellants, nor did GEL rely upon one. **[238 of the judgment]**

**Ground 11**
The learned trial judge erred in law by his failure to assess the conduct of GEL as recklessness and wilful blindness of the fraud of YHL by not receiving a loan application form signed by the Appellants and the effect this had on the unjustness of the transaction. (As the Court failed to assess the conduct no paragraph from the judgment can be referred to)

**Ground 12**
The trial judge erred in law in failing to find that the Respondents had intentionally mislead [sic] the Court regarding receiving a copy of a loan application form signed by the Appellants. (As the Court failed to assess the conduct no paragraph from the judgment can be referred to)

**Ground 13**

By his erroneous findings of facts that the Correspondent Deed did not preclude YHL from acting as an agent of the Appellants **[190 of the judgment]** and finding that YHL had provided a loan application form to the Respondents [[3] [238] and [241] of the judgment], the trial judge erred in law by failing to take all of the circumstances of the case into consideration and failed to apply the public interest (being the Consumer Protection provisions) under S.76 and S.77 of the National Credit Code.

**Ground 14**

**Irrational - Misconduct complained of was not discoverable within the limitations period as it was deliberately withheld.**

The trial judge was irrational and erred in finding that the misconduct complained of was discoverable within the statute of limitations (an error of mixed fact and law, at paragraphs [139]).

**Ground 15**

***Limitation Act* s 38(1)**

Based upon the factual statements contained in Ground 14, the Court erred in law in not extending the Statute of Limitations under the *Limitation Act* s 38(1) for breaches of the UCCC and to sue in tort and equity at common law from 6 years to 9 years. **([148] - [154] of the judgment)**

**Ground 16**

**Public Interest**

The trial judge erred in law by failing to apply the Public Interest under the provisions of the National Credit Code (Cwth), or alternatively failed to apply it appropriately. His honour also erred by failing to articulate how he was applying the Public Interest under the provisions of the NCC and placed weight only on the Appellants signing of the loan agreement and mortgage as relevant **(an error in law, at paragraphs [257] - [259])**.

**Ground 17**

**Failing to consider the Respondents Conduct when considering the National Credit Code**

The trial judge erred in law by failing to consider the Respondents conduct as particularised in the proceeding grounds of this appeal, when he considered the National Credit Code 'founded as they are in justice and fairness' **(paragraph 282 of the judgment)** and proceeds to particularise the responsibility of the Appellants in the circumstance of the case.

**Ground 18**

***Conduct of the Parties after the loan was entered into***

The trial judge erred by failing to apply proper weight to GEL/AMS/AFIC/Pepper/ PCL and YHL's conduct after the contract

had been entered into under the provisions of S.76 (5) of the National Credit Code and S.47 (1) and (2) of the National Consumer Credit Protection Act (Cwth) and the equivalent provisions under the Corporations Act (Cwth) (S.912A) **(an error of mixed fact and law, at paragraphs [88] - [89], [92]).**

## General observations on the grounds of appeal

144 As is apparent from the terms of the grounds of appeal, almost all of the grounds are, in their express terms, concerned with the learned trial judge's findings in relation to the claim under s 76 of the *National Credit Code*.

145 While two of the grounds (grounds 14 and 15) seek to challenge the learned trial judge's conclusions that the claims other than the claim under s 76 of the *National Credit Code* were time-barred under their applicable limitation periods (and that those limitation periods should not be extended), the grounds do not challenge his Honour's findings that the time-barred claims should also be rejected on their merits. In particular the grounds of appeal did not challenge the learned trial judge's findings of fact to the effect that the appellants had not proved the First and Second Misrepresentations and that they had not relied upon the Third and Fourth Misrepresentations.

146 In that context, while we recognise that ground 3 does refer to 'unconscionable conduct', in our view the reference to unconscionable conduct in that ground should be understood as being directed towards the application of s 76 of the *National Credit Code* and what is 'unjust' in all the circumstances.[118] The reference to 'unconscionable conduct' in ground 3, therefore, should not be taken to be a reference to the independent claims of unconscionable conduct, based on the Misrepresentations[119] or a special disability,[120] that were rejected by learned trial judge.

147 Significantly, in this context, the findings of fact rejecting those claims are not challenged by the grounds of appeal. Those findings included the findings that the appellants had not proved the First and Second Misrepresentations and that the appellants had not established

[118] A matter that was raised with Mrs Shannon at the commencement of the hearing of the appeal (see Appeal ts 29 - 30).
[119] Amended Defence and Counterclaim [25] (BAB 120).
[120] Amended Defence and Counterclaim [47] (BAB 127).

that GEL Custodians had knowledge of any special disability of the appellants in entering into the Loan Agreement and the Mortgage.[121]

148 We acknowledge that the appellants did make reference to a number of those findings in further written submissions that they filed shortly prior to the hearing of the appeal.[122] Those submissions, in particular, purported to challenge two findings of fact:

(a) a finding that it was 'disingenuous and misleading' of the appellants not to refer, in their pleadings or their witness statements, to the email referred to in [70] above or the telephone call referred to in [71] above (the **disingenuous finding**);[123]

(b) the finding that the appellant's had not proved the Second Misrepresentation (see [122] above).

149 While these challenges appeared, belatedly, in written submissions, it remained the position that there was no ground of appeal challenging either of the factual findings referred to in [148] above. The absence of any such ground was raised with Mrs Shannon on the first day of the hearing of the appeal.

150 In that context, it was put to Mrs Shannon that the challenge to the disingenuous finding did appear to be relevant to the existing grounds of appeal, and that it should be reflected in a ground of appeal if it was to be pursued. On the other hand, Mrs Shannon was advised that a challenge to the finding as to the Second Misrepresentation did not appear to be relevant to any existing ground.[124] At the conclusion of the first day of the hearing of the appeal, the parties were left to consider whether any amendment to the grounds of appeal was necessary.

151 On the second day of the appeal, Mr Cobby SC advised the Court that the respondents did not oppose the appellants being permitted to challenge to the disingenuous finding and that the respondents did not require a formal ground of appeal for them to be able to do so.[125] That was, with respect, a helpful and cooperative approach for the respondents (and their representatives) to take. We have therefore dealt

[121] Primary reasons [223].
[122] See Appellant's Further Written Submissions dated 28 January 2020; Appeal ts 28-29.
[123] Primary reasons [19].
[124] Appeal ts 148.
[125] Appeal ts 160.

with the disingenuous finding later in these reasons in the context of the issues under the *National Credit Code*.[126]

152 It remains the case, however, that the learned trial judge's finding that the appellants had not proved the First and Second Misrepresentations were not challenged in any ground of appeal. While an appropriate degree of latitude has been allowed to the appellants as to the formalities in the appeal, in our view, it is not in the interests of justice that the appellants be permitted to challenge that finding as part of the appeal.

153 We have reached that conclusion for the following reasons.

154 First, none of the grounds of appeal squarely challenge the learned trial judge's conclusions that the claims other than the claim under s 76 of the *National Credit Code* should be rejected on their merits. Each of those claims raised matters of some legal and factual complexity which the parties have not addressed in their submissions and, in particular, have not been the subject of proper notice to the respondents.

155 Secondly, and in any event, we are satisfied that the appellants would have faced significant obstacles in any challenge to the learned trial judge's findings of fact that the appellants had not proved the First and Second Misrepresentations.[127] Those findings were findings of fact likely to have been affected by impressions about the credibility and reliability of witnesses formed by the learned trial judge as a result of having seen and heard them give their evidence. An appeal court should not interfere with findings of this kind unless they are demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or they are 'glaringly improbable' or 'contrary to compelling inferences'.[128]

156 We are not satisfied that it is reasonably arguable that the learned trial judge's findings in relation to the First and Second Misrepresentations meet that description. His Honour's findings in this regard were consistent with contemporaneous documentation[129] and the evidence in support of the making of the First and Second

[126] See [249]-[264] below.
[127] See in particular Primary reasons [59]-[67], [200]-[204].
[128] ***Robinson Helicopter Co Inc v McDermott*** [2016] HCA 22; (2016) 90 ALJR 679, 687 [43] (French CJ, Bell, Keane, Nettle & Gordon JJ); ***Lee v Lee*** [2019] HCA 28; (2019) 266 CLR 129, 148 [55] (Bell, Gageler, Nettle & Edelman JJ); ***Joyce v Anderson*** [2020] WASCA 48; (2020) 91 MVR 334 [105]-[108], [132] (Mitchell JA), [205]-[213], [244], [262]–[263] (Beech & Vaughan JJA).
[129] See in particular the evidence in relation to the home insurance obtained on 1 June 2006 (Primary reasons [47], [65]).

Misrepresentations was inconsistent with earlier sworn accounts by the appellants.[130] Indeed, in our view, it is not surprising, given the long, and at times acrimonious, dispute between the parties, that 11 years after the events in question, the appellants' evidence would be affected by their conscious or unconscious reconstruction of the events.[131]

157 There being no grounds of appeal challenging the learned trial judge's rejection, on the merits, of the claims other than the claim under s 76 of the *National Credit Code*, grounds 14 and 15 (in relation to the limitation periods) should be dismissed.

158 As the respondents submitted, there is no utility in these grounds of appeal, as there was no appeal against the learned trial judge's finding to the effect that the allegations of misrepresentation, fraud, common mistake and unconscionable conduct were not made out.[132]

159 This leaves the remaining grounds of appeal, which concern the claim under s 76 of the *National Credit Code*. We do not propose to address each of those grounds of appeal separately and individually. That is principally because each of those grounds is, in one way or another, directed to aspects of a single evaluative exercise, namely whether the learned trial judge erred in concluding that the Loan Agreement and the Mortgage were 'unjust' in all of the circumstances.

160 In this regard, the respondents quite properly accepted that the correctness standard of appellate review applied to that evaluative exercise.[133] As Kiefel CJ and Bell J said, in relation to the statutory concept of 'unconscionability', in ***ASIC v Kobelt***:[134]

> The conclusion that a supplier of a financial service has engaged in conduct that contravenes the statutory norm of conscience fixed by s 12CB(1) of the *ASIC Act* is an evaluative judgment. Nonetheless, it is a judgment that is either right or wrong. It was the duty of the Full Court to conduct a 'real review' of the evidence and the primary judge's reasons for judgment.

161 This approach applies equally to the evaluative judgment as to whether the Loan Agreement and the Mortgage were 'unjust' in all of

[130] See Primary reasons [62]-[63].
[131] See Primary reasons [14]-[15].
[132] Respondent's' Outline of Submissions [76].
[133] Appeal ts 186. ***Minister for Immigration v SZVFW*** [2018] HCA 30; (2018) 264 CLR 541, 562 [46] (Gageler J), [151] (Edelman J); ***Australian Securities and Investments Commission v Kobelt*** [2019] HCA 18; (2019) 93 ALJR 743 (***ASIC v Kobelt***), 756 [47] (Kiefel CJ & Bell J).
[134] ***ASIC v Kobelt*** [47] (Kiefel CJ & Bell J).

the circumstances within the meaning of s 76 of the *National Credit Code*.

162 Accordingly, it is more appropriate to address the issues that arise from the grounds of appeal, as they relate to that evaluative judgment, as a whole and not in a piecemeal way.

163 Before turning to the particular circumstances of this case, it is appropriate to deal with a number of the legal issues that arose in the appeal concerning the application of s 76 of the *National Credit Code*.

## Applicable Principles under s 76 of the *National Credit Code*

164 As we have observed above at [15] above, s 76 of the *National Credit Code* is in a form that has existed in Western Australia, in relation to consumer credit, since the passage of the *Consumer Credit (Western Australia) Act 1996* (WA). It is also very similar in form to earlier consumer protection legislation granting courts jurisdiction to grant relief to in relation to 'unjust' contracts and, in particular, the jurisdiction granted by the *Contracts Review Act 1980* (NSW) (***Contracts Review Act***). For this reason, the principles that have developed in decisions relating to the *Contracts Review Act* have proven instructive in the application of s 76 of the *National Credit Code* and its predecessors.

165 In a similar way, it may also be noted that decisions considering the *Contracts Review Act* and the *National Credit Code* have, on occasion, made reference to general legal or equitable principles. The learned trial judge, for example, did so in the present case, in referring to principles under the general law in relation to the 'duties' of lenders.[135] There is, of course, nothing necessarily wrong with drawing upon the principles developed under the general law in this way - so long as it is recognised that the *National Credit Code* (as with its predecessors) are, by definition, intended to alter the law of contract, as they apply to consumers (including borrowers).

166 As McHugh JA said in ***West v AGC***:[136]

> The *Contracts Review Act* 1980 is revolutionary legislation whose evident purpose is to overcome the common law's failure to provide a comprehensive doctrinal framework to deal with "unjust" contracts. Very likely its provisions signal the end of much of classical contract theory in New South Wales. Any contract or contractual provision, not

[135] See Primary reasons [277]-[279].
[136] ***West v AGC***, 621 (McHugh JA; Hope JA agreeing); see also 611-612 (Kirby P).

> excluded from the operation of the Act and which the court considers is unjust in the circumstances existing at the time when it was made, may be the subject of relief under the Act. Moreover, the provisions of s 9(2) do not exhaustively indicate the criteria as to what can be taken into account in determining whether a contract or any of its provisions is unjust. The provisions of s 9(2) of the Act are concerned for the most part with matters of procedural injustice. But the court is entitled to have regard to all the circumstances of the case, subject to s 9(4), and the public interest.

167 Following ***West v AGC***, and other decisions in relation to the *Contracts Review Act*, Gordon J in ***Paciocco v Australia and New Zealand Banking Group Ltd*** summarised a number of general principles applicable under s 76 of the *National Credit Code* as follows:[137]

> 317 'Unjust' includes unconscionable, harsh or oppressive: s 76(8) of the New Code. 'Unjust' is not however confined to that 'tautological trinity': *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 621. The definition is not exclusive. As is self-evident, s 76(2) of the New Code is mostly concerned with matters of procedural injustice: *West* at 620-621 (dealing with identical wording under the *Contracts Review Act 1980* (NSW) (the **CRA**). However, it is not limited to questions of procedural injustice. As McHugh J explained in *West* at [620]:
>
> > a contractual provision may be unjust simply because it imposes an unreasonable burden on the claimant when it was not reasonably necessary for the protection of the legitimate interests of the party seeking to enforce the provision. ...
> >
> > Thus a contract may be unjust under the [CRA] because its terms, consequences or effects are unjust. This is substantive injustice. Or a contract may be unjust because of the unfairness of the methods used to make it. This is procedural injustice.
>
> 318 As the statutory language of s 76 of the New Code makes clear, it is the contract or the provisions, not the transaction, that must be unjust: *West* at 621E. As Kirby P stated in *Baltic Shipping Company v Dillon ("Mikhail Lermontov")* (1991) 22 NSWLR 1 at 20 (considering the CRA):

[137] ***Paciocco v Australia and New Zealand Banking Group Ltd*** [2014] FCA 35; (2014) 309 ALR 249 (***Paciocco***) [317]-[321] (Gordon J). This passage was accepted as correctly stating the various principles by the Full Court in ***Paciocco v Australia and New Zealand Banking Group Ltd*** [2015] FCAFC 50; (2015) 236 FCR 199, 284 [348] (Allsop CJ; Besanko & Middleton JJ agreeing). A further appeal to the High Court was dismissed, without questioning the statement of principles (***Paciocco v Australia and New Zealand Banking Group Ltd*** [2016] HCA 28; (2015) 258 CLR 525).

> I consider that it is a mistake to read into the language of s 9 an obligation to show that the contract was unjust because it was produced by unfair conduct or unjust conduct on the part of one of the parties to it. This is not what the section says. It addresses attention to the resulting contract itself ... A contract may be 'unjust' because of peculiarities inherent in the circumstances of one of the parties of which the other party was quite ignorant. It may be 'unjust' although the other party has acted quite honourably and lawfully.

319 In determining whether a credit contract is unjust, a Court is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the contract was entered into or changed: s 76(4) of the New Code. However, the Court must take into account the public interest and all the circumstances of the case: s 76(1) of the New Code.

320 Different views have been expressed about the 'public interest' element. In *Custom Credit Corporation Ltd v Lupi* [1992] 1 VR 99 at 105 Murphy J noted that 'public interest' was a difficult concept but suggested that it directed attention to whether the credit provider's conduct offended against community standards of business morality. As Mr Paciocco submitted, the community standards of business morality 'may vary over time': *Perpetual Trustee Company Limited v Khoshaba* [2006] NSWCA 41 at [64]. In *Knowles v Victorian Mortgage Investments Ltd* [2011] VSC 611 at [64] and [68], the Court considered that the public interest criteria involved a weighing and balancing of competing considerations including the consumer protection purpose of the Code with the need to hold parties to their bargain.

321 Determination of unjustness involves a normative evaluation of the totality of relevant circumstances. As Allsop P (as he then was) said in *Provident Capital Ltd v Papa* [2013] NSWCA 36 at [7]:

> The characterisation of a contract as unjust and the sheeting home to the other contracting party of the consequences of its unjustness may be a difficult evaluative exercise. At its heart, however, is the recognition of the inadequacy of one party to protect his or her interests in the circumstances.

168 We adopt these principles as correctly stating the law. We would also add that we agree with the additional observations made as to the applicable principles by Vaughan JA at [371] to [382].

169 An important matter arising from these principles is the recognition that, whether a particular contract is 'unjust' will depend upon both the terms of the contract itself and the circumstances in which the relevant contract was made. The passage from McHugh JA's judgment in ***West v AGC*** (referred to by Gordon J in ***Paciocco*** at [317]) includes the following broader context:[138]

> Under s 7(1) a contract may be unjust in the circumstances existing when it was made because of the way it operates in relation to the claimant or because of the way in which it was made or both. Thus a contractual provision may be unjust simply because it imposes an unreasonable burden on the claimant when it was not reasonably necessary for the protection of the legitimate interests of the party seeking to enforce the provision. … In other cases the contract may not be unjust per se but may be unjust because in the circumstances the claimant did not have the capacity or opportunity to make an informed or real choice as to whether he should enter into the contract. … More often, it will be a combination of the operation of the contract and the manner in which it was made that renders the contract or one of its provisions unjust in the circumstances. Thus a contract may be unjust under the Act because its terms, consequences or effects are unjust. This is substantive injustice. Or a contract may be unjust because of the unfairness of the methods used to make it. This is procedural injustice. Most unjust contracts will be the product of both procedural and substantive injustice.

170 In the present case, of course, the appellants relied upon both the consequences of the Loan Agreement and Mortgage (in terms of the burden it placed upon them) and the circumstances in which it was entered into (including the fraudulent conduct of Yes Home Loans, the lending structures established by GEL Custodians and the consequences of those structures in this particular case).

171 In addition to these general principles there were a number of particular legal issues raised in the course of this appeal that it is appropriate that we address at this point.

## Is there an obligation to assess the viability of a loan?

172 There was much attention, in the parties' submissions, and at the hearing of the appeal, given to whether there was 'a legal obligation on a lender to assess a borrower's capacity to repay a loan'.[139] The respondents had clearly relied upon the absence of such an obligation at

[138] ***West v AGC***, 620 (McHugh JA; Hope JA agreeing).
[139] Appellants' Submissions [21]. See also Appeal ts 47-48, 170-171.

trial,[140] and it certainly finds expression in a number of the authorities referred to in the Primary reasons. The issue is relevant, *inter alia*, to grounds of appeal 2, 4, 6, 11, 13, 16, and 17.

173 In that regard, the learned trial judge referred to the fact that 'responsible lender provisions' in Part 3-1 of the *National Consumer Credit Protection Act 2009* (Cth) were not in operation at the time that the appellants entered into the Loan Agreement and the Mortgage and that those provisions did not operate retrospectively.[141] There is no doubt that those provisions do impose 'obligations' (enforceable by civil penalties) on licensees to make reasonable inquiries as to the capacity of a borrower to repay a loan.[142]

174 Similarly the learned trial judge referred to a number of authorities to the effect that there is no general law obligation or duty on a lender to advise or protect a borrower, or to check the accuracy of information provided to it by a borrower. His Honour referred, in that regard to the decisions in ***Micarone v Perpetual Trustees Australia Ltd***[143] and, ***Perpetual Trustee Company Ltd v Burniston [No 2]***[144] in support of those propositions.[145]

175 Statements of principle to this effect must, however, be understood in their proper context. The statements in ***Micarone v Perpetual Trustees*** were made in the context of a discussion as to whether a lender had constructive knowledge of a special disability on the part of the borrower for the purposes of an unconscionability claim. The statements in ***Perpetual Trustee v Burniston*** were made in the context of a claim that the lender owed the borrower a common law duty of care. Neither case concerned whether a contract was 'unjust' in accordance with the evaluative judgment required by the *National Credit Code* (or a like provision).

176 It may, of course, be perfectly correct to say that there is no such 'duty' or 'obligation' on a lender at general law to assess the capacity of a borrower to repay a loan. That does not, however, mean that the failure of a lender to do so (i.e. assess the capacity of the borrower) cannot, in some circumstances, lead to a contract that is 'unjust' within

[140] Ts 660.
[141] Primary reasons [275].
[142] See e.g. *National Consumer Credit Protection Act 2009* (Cth) s 117.
[143] ***Micarone v Perpetual Trustees Australia Ltd*** (1999) 75 SASR 1 (***Micarone v Perpetual Trustees***) 121 [624]-[625] (Debelle & Wicks JJ).
[144] ***Perpetual Trustee Company Ltd v Burniston [No 2]*** [2012] WASC 383; (2012) 271 FLR 122 (***Perpetual Trustee v Burniston***) [331]-[335] (Edelman J).
[145] Primary reasons [276]-[277].

the meaning of the *National Credit Code*. Put another way, if, in all of the circumstances (including the failure of the lender to take any steps to satisfy itself that the borrower would be likely to be able to repay the loan without substantial hardship) a credit contract should be characterised as 'unjust', it is no answer to say that, under the general law, the lender had no positive obligation to take such steps.

177 In this context, the appellants referred to the Second Reading Speech of the Minister who introduced the *Consumer Credit (Western Australia) Bill 1995* (WA), and in particular to that part relating to s 70 of the *Consumer Credit (Western Australia) Code*. The Minister said:[146]

> The code also empowers the Commercial Tribunal to reopen unjust transactions. It may reopen a transaction if it is satisfied, on the application of the debtor, mortgagor or guarantor, that in the circumstances relating to the contract, mortgage or guarantee at the time it was entered into or changed, the transaction was unjust. The code sets out certain circumstances that the tribunal can take into account in determining whether in fact a transaction should be reopened. Those are set out in clause 70(2). They are not intended to be exhaustive.
>
> One area of concern that the code seeks to address is overcommitment. It does not deal with lenders giving credit to borrowers who make it clear from the outset that they will have difficulties repaying their loan but whom, nevertheless, want to take on the obligation because of the lifestyle they wish to pursue. However, overcommitment has, over the past few years particularly, been a problem related to sudden changes in the economic circumstances of the borrower. *The code does not require credit providers to make inquiries beyond those ordinarily made by prudent lenders.* Nor is it intended to place obstacles in the way of those lenders. *It is intended to deal with credit providers who lend without making proper inquiries into the debtor's ability to pay.* (Emphasis added)

178 These remarks were, of course, made in relation to former (State) legislation rather than the *National Consumer Credit Protection Act 2009* (Cth). Nevertheless, given that the *National Credit Code* was passed with the same objectives as the former Uniform Codes, this identification of the legislative purpose of the original Codes provides a useful reminder of the legislative purposes that have underlain the Codes since their inception.[147] Those legislative purposes have always included attention being given to the consequences that may be

[146] Western Australia, *Parliamentary Debates*, Legislative Council, 28 June 1995 (Mr G Cash).

[147] See ***Thompson v Byrne*** [1999] HCA 16; (1999) 196 CLR 141, 155 [35] (Gleeson CJ, Gummow, Kirby & Callinan JJ); Pearce, *Statutory Interpretation in Australia*, (9th ed, 2019) 102 - 103 [3.20].

appropriate where a lender fails to make proper inquiries as to a borrower's capacity to pay.

179 In that regard it is clear from s 76(2)(l) of the *National Credit Code* that it has always been a relevant consideration to consider whether the credit provider knew, or could have ascertained by reasonable inquiry at the time, that the debtor could not pay in accordance with its terms (or not without substantial hardship). While not expressed in terms of duty or obligation to make inquiries, the actual or constructive knowledge of an inability to pay is therefore an express consideration to which the Court may have regard.

180 Nor, depending upon the circumstances, is the relevance a credit provider's failure to make inquiries limited to cases of actual or constructive knowledge. The failure to inquire itself may be a relevant factor to take into account in the assessment of all of the circumstances, including the public interest.

181 ***Perpetual Trustee Co Ltd v Khoshaba***,[148] for example, concerned a loan entered into by the appellant as trustee for a securitised mortgage program in circumstances in which program manager did not assess the loan in accordance with the relevant guidelines. In that case the loan application form included fabricated information in relation to the respondent's occupation and income. The fabrication was made by a third party and neither the appellant (lender) nor the respondent (borrower) were aware of the fabrication. The application also failed to identify the purpose for the loan. While no two cases are the same, it will be apparent that ***Perpetual Trustee v Khoshaba*** had a number of features in common with the present case.

182 In relation to the evaluative judgment required under the *Contracts Review Act*, Spigelman CJ said:[149]

> Plainly, the conduct, whether by act or omission, of the party resisting a finding of unjustness under the Act is highly relevant, and will often be determinative. However, the scope of relevant circumstances is not confined to what the person resisting an order under s7(1) did or did not do and knew or ought to have known. The critical phrase in s7(1)- 'the circumstances relating to the contract at the time it was made' - cannot be so limited. Section 9(1) provides that when determining unjustness 'the court shall have regard to the public interest and to all the circumstances of the case'.

[148] ***Perpetual Trustee Company Ltd v Khoshaba*** [2006] NSWCA 41; (2005) 14 BPR 26,639 (***Perpetual Trustee v Khoshaba***).
[149] ***Perpetual Trustee v Khoshaba*** [76] (Spigelman CJ; Handley & Basten JJA agreeing).

183 One of the relevant circumstances in ***Perpetual Trustee v Khoshaba*** was the appellant's failure to 'verify or follow up' details in the loan application. In that regard, Spigelman CJ said:[150]

> I do not suggest that the matter can be approached … on the basis that the Appellant should be fixed with the knowledge it would or may have acquired if the Guidelines had been observed. However, the other failures, such as not verifying employment and income and not ensuring documents were properly executed, reinforce the conclusion that the Appellant was prepared to act on the basis of adequate security alone.
>
> Where the security is the family home of a low income earner and a pensioner, this posture on the part of a lender is entitled to significant weight against the lender in the determination of unjustness.

184 To similar effect, Basten JA said (albeit in the context of the failure to inquire as to the purpose of the loan):[151]

> The reason that the agent of the lender had no such knowledge was because he made no inquiries as to the purpose of the loan. The trial judge found that, had inquiries been made of the borrowers, they would have answered them honestly. These circumstances do not mean that constructive knowledge should be imputed to the lender, but the circumstances are relevant to a consideration of whether the loan contract and security may be unjust, in part, because no such inquiry was made.

185 Later in his reasons, Basten JA said of asset lending generally:[152]

> To engage in pure asset lending, namely to lend money without regard to the ability of the borrower to repay by instalments under the contract, in the knowledge that adequate security is available in the event of default, is to engage in a potentially fruitless enterprise, simply because there is no risk of loss. At least where the security is the sole residence of the borrower, there is a public interest in treating such contracts as unjust, at least in circumstances where the borrowers can be said to have demonstrated an inability reasonably to protect their own interests, for the purposes of, for example, s 9(2)(e) or (f). That does not mean that the Act will permit intervention merely where the borrower has been foolish, gullible or greedy. Something more is required.

186 This passage, in particular, was cited with apparent approval by Murphy JA in ***Permanent Mortgages Pty Ltd v Vandenbergh***,[153]

---

[150] ***Perpetual Trustee v Khoshaba*** [84] - [85] (Spigelman CJ; Handley & Basten JJA agreeing).
[151] ***Perpetual Trustee v Khoshaba*** [126] (Basten JA).
[152] ***Perpetual Trustee v Khoshaba*** [128] (Basten JA). See also ***Kowalczuk v Accom Finance Pty Ltd*** [2008] NSWCA 343; (2008) 77 NSWLR 205 (***Kowalczuk v Accom Finance***), 227 [97] (Campbell JA; Hodgson & McColl JJA agreeing).

although his Honour was careful to observe that it is 'important not to allow an analysis of the overall nature and effect of the "connected circumstances" … to be reduced to a search for, and rigid application of, formulaic expressions such as "pure asset lending"'.[154] While that note of caution was made in the context of a 'pure' unconscionability claim, in our view it applies equally to the application of s 76 of the *National Credit Code*.

187 It will be apparent from the above discussion that, in relation to this issue, in a sense both parties are correct. The respondents are correct to submit (and the learned trial judge was correct to hold) that there is no general law obligation or duty on a lender to advise or protect a borrower, or to check the accuracy of information provided to it by a borrower. However, the appellants are correct that whether proper inquiries are made by a lender as to the capacity of a borrower to repay a loan, including as to the accuracy of information provided to it, is a relevant consideration in the overall evaluation as to whether a particular contract is 'unjust' within the meaning of s 76 of the *National Credit Code*.[155]

188 Whether the learned trial judge gave appropriate weight to this distinction in undertaking the evaluative judgment in the present case, we will address later.

## The relevance of a lender's business structure

189 Another matter of focus in the appeal concerned the structure established by the respondents under the ARMS III program. It is for this reason that we have set out the structure in some detail at [21] to [41] above.

190 Those aspects of the structure of the program that were identified by the appellants as relevant to the assessment of whether the Loan Agreement and Mortgage were 'unjust' include (by way of summary only):

---

[153] ***Permanent Mortgages Pty Ltd v Vandenbergh*** [2010] WASC 10; (2010) 41 WAR 353 (***Permanent Mortgages v Vandenbergh***).

[154] ***Permanent Mortgages Pty Ltd v Vandenbergh*** 396 [214] (Murphy JA).

[155] Indeed, while it is not relevant to the objective construction of s 76 of the *National Credit Code*, it is clear from the provisions of the Operations Manual for the ARMS III securitisation program that the respondents regarded 'the borrower's ability to satisfy the loan' as a matter relevant to which the contract or mortgage was unjust under the Code (see Section 4.6 [34] above).

(a) the separation of the functions for assessing and approving loans between the correspondents and AMS/AFIG under the Correspondent Deed and the Operations Manual;

(b) relatedly, the identification of the Correspondent as having responsibility for determining whether a borrower is able to afford a loan,[156] particularly in circumstances where the Correspondent Deed expressly provides that the Correspondent is not the agent of AMS or the mortgagee;[157] and

(c) the prescription of the information required to be provided by the Correspondent to AMS/AFIG for the purposes of a lending decision by the latter, including (in the case of a loan that did not exceed $500,000) the information that was *not* required to be provided.[158]

191 These matters were relied upon by the appellants, *inter alia*, in the context of grounds 2, 3, 5 and 16.

192 The respondents rejected the proposition that the arrangements between the various actors in the ARMS III securitisation program were improper or contrary to law.[159] At the hearing of the appeal the respondents emphasised that the structures in place were 'permitted by law' and that in previous cases had been accepted as within the law.[160] The respondents referred in this context to the decision of the Court of Appeal in New South Wales in ***Tonto Home Loans Australia Pty Ltd v Tavares***[161] and, in this State, in ***Serventy v Commonwealth Bank of Australia [No 2]***.[162]

193 Again, in a sense, both parties are correct in their submissions. There is, indeed, as the respondents submitted, nothing unlawful in the manner in which the respondents structured their business affairs. Nevertheless, in our view, the nature of those structures and any inherent risks to which they gave rise, remain relevant considerations in the overall assessment of whether, in this particular case, the Loan agreement and Mortgage is 'unjust' for the purposes of s 76 of the *National Credit Code*.

---

[156] See Operations Manual, Section 4.6 ([34] above).
[157] See Correspondent Deed, clause 3.1 ([29] above).
[158] See Operations Manual, Section 6, Step 6 ([39] above).
[159] Respondents' Outline of Submissions [37] (WAB 55).
[160] Appeal ts 176-177.
[161] ***Tonto Home Loans Australia Pty Ltd v Tavares*** [2011] NSWCA 389; (2011) 15 BPR 29,699 (***Tonto Home Loans***).
[162] ***Serventy v Commonwealth Bank of Australia [No 2]*** [2016] WASCA 223 (***Serventy***).

194 In this context, in our view, the decision in ***Tonto Home Loans*** is instructive in relation to this issue.

195 Before turning to ***Tonto Home Loans*** as it relates to the issue as to whether a contract is 'unjust', we should note that the decisions in ***Tonto Home Loans*** and ***Serventy*** were the subject of detailed consideration in the proceedings at first instance and in the Primary reasons. Nevertheless it is apparent that the principal focus on those decisions in the Primary reasons related to the question whether the structure established under the ARMS III securitisation program created a relationship of agency between Yes Home Loans and GEL Custodians such that the conduct of Yes Home Loans could be attributed to GEL Custodians.[163] That issue was in turn essential to the fraud, misrepresentation and unconscionability claims.

196 As explained below (at [265] to [273]), the issue of agency assumed far less significance on the appeal than it did in the primary proceedings. As we have noted above, the independent claims of unconscionable conduct (either in equity or pursuant to statute), which were not successful at trial, are quite separate to the issues arising under s 76 of the *National Credit Code*. As the principles discussed above make clear, whether a contract is 'unjust' is not confined to whether the lender has been unconscionable, harsh or oppressive.[164] Indeed, this is evident from the result in ***Tonto Home Loans*** itself, in which the claim of unconscionability failed but the claims under the *Contracts Review Act* were, to varying degrees, successful.

197 ***Tonto Home Loans*** received considerably less attention, in the primary proceedings, in relation to the claim under s 76 of the *National Credit Code*. The only reference to that decision in the context of the claim under s 76 is that which appears in the Primary reasons at [286].[165]

198 We now turn to that aspect of ***Tonto Home Loans***.

### *Tonto Home Loans*

199 The decision in ***Tonto Home Loans*** concerned a number of appeals involving separate borrowers in relation to two lending programs: the Origin Program and the FirstMac Program. The lenders under those programs were Permanent Trustee Co Ltd (**Permanent**)

[163] See in particular Primary reasons [156]-[172].
[164] See ***Paciocco*** [317] (Gordon J) and ***West v AGC*** 620 - 621 (McHugh JA).
[165] See [140] above.

and Tonto Home Loans Australia Pty Ltd respectively. As will be apparent there are certain similarities with the structures considered in ***Tonto Home Loans*** and those in the present case (although, as with any analogy, the analogies are not perfect).

200 Under the Origin Program the ANZ bank provided the wholesale funds for lending under an arrangement in which Permanent was the lender of record, fulfilling a custodial function.[166] ANZ, through one of its businesses, provided delegated authority to another company (**Tonto HL**)[167] to assess each loan application and to make a credit decision on lending.[168] Tonto HL was described as the mortgage originator or mortgage manager under a number of deeds.[169]

201 The FirstMac Program was similar but was funded by the Tonto Group. Tonto HL had the same role as mortgage originator or mortgage manager.[170]

202 In both schemes, Tonto HL did not seek to attract borrowers directly itself. Rather Tonto HL recruited and retained 'introducers' who referred loan applications to it for assessment.[171] One of those introducers was Streetwise Home & Investment Loans Pty Ltd (**S Loans**).[172] S Loans was part of a group known as the Streetwise group, and the loans in question were used for investments with other companies in the Streetwise group. In procuring the relevant loans S Loans engaged in fraudulent behaviour. The Streetwise investments ultimately failed and the Streetwise group went into liquidation.

203 In ***Tonto Home Loans*** the borrowers argued that S Loans was an agent for Tonto HL and that Tonto HL had engaged in unconscionable conduct. Those claims were unsuccessful.

204 The Court in ***Tonto Home Loans*** nevertheless concluded, notwithstanding the absence of an agency relationship between S Loans and Tonto HL, that the contracts were 'unjust' within the meaning of the *Contracts Review Act*. In so holding Allsop P (with whom Bathurst CJ & Campbell JA agreed) took into account a number of features of the

---

[166] By analogy, Permanent was in a similar position as GEL Custodians in the present case.
[167] A different entity to the lender Tonto Home Loans Australia Pty Ltd.
[168] By analogy, Tonto HL was in a similar position as AMS/AFIG in the present case.
[169] ***Tonto Home Loans*** [93] (Allsop P, Bathurst CJ & Campbell JA agreeing).
[170] ***Tonto Home Loans*** [99] (Allsop P, Bathurst CJ & Campbell JA agreeing).
[171] ***Tonto Home Loans*** [97] (Allsop P, Bathurst CJ & Campbell JA agreeing).
[172] By analogy, the introducers in ***Tonto Home Loans*** were in a similar position as the correspondents in the present case, and S Loans in a similar position as Yes Home Loans.

structural arrangements between the parties to the Origin Program and the FirstMac Program.

205 Allsop P said:[173]

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

206 His Honour continued:[174]

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

207 His Honour's conclusions in this regard were as follows:[175]

> The position of the lenders should not be judged as detached third parties, distinct and separate from what happened. Nor should they be seen as complicit with, or actually knowing of, Streetwise's deception,

[173] ***Tonto Home Loans*** [255] (Allsop P, Bathurst CJ & Campbell JA agreeing).
[174] ***Tonto Home Loans*** [256] (Allsop P, Bathurst CJ & Campbell JA agreeing).
[175] ***Tonto Home Loans*** [264]-[266] (Allsop P, Bathurst CJ & Campbell JA agreeing).

> fraud and predatory conduct towards the borrowers. Whilst not having actual knowledge or actual notice of Streetwise's behaviour, the lenders' position should be assessed by reference to the reality of the significant responsibility of those structuring the elements of the lending programmes or, in the case of Permanent, those providing the wholesale funds. The mortgage manager (Tonto HL) with delegated lending authority operated the guidelines loosely and in a way which reflected a lack of concern with the suitability of the borrowers and serviceability. The mortgage manager brought into the roles of interviewing and selecting prospective borrowers an intermediary whose commercial attractiveness bespoke the inhering risks to which I have referred, heightened by Tonto HL's agreement not to contact prospective borrowers before settlement. These considerations materially facilitated the ability of Streetwise to effect these frauds.
>
> In all the circumstances, these considerations are relevant to conclude that the unjustness of the contracts can be seen as unjustness affecting Tonto HL and the lenders. This conclusion is relevant to the assessment of unjustness and the extent to which the lenders should be viewed as bearing responsibility for what happened and in applying the broad considerations contained in the [*Contracts Review Act*], founded as they are in justice and fairness. Looking at these events as brought about primarily by the fraud of Streetwise, a fair assessment is that the business structure put in place by the lenders in how it operated was significantly responsible for the preying upon these people by Streetwise. That is not to ignore the basis upon which the trial and appeal proceeded, that "Lo Doc Lending" per se was not unjust. Nor is it to introduce an enterprise concept of agency; rather it is to recognise that a sub-contracted lending structure of the kind here, in which persons such as Streetwise are "chased" to become the introductory agents, should have guidelines enforced with real vigour to deal with the obvious objective risks of fraud and deception. No one criticised these guidelines. Their operation was loose, and affected by the attitude found by his Honour. It is only fair and just to recognise the significant responsibility of the lenders in these circumstances.
>
> Unjustness is a not concept or word with immutable or unvarying content. The degree of unjustness here stems primarily from the fraud and procedural injustice of Streetwise. Though not the agent in law of Tonto HL or Permanent, it was, as I have explained, the link in the business enterprise for which, in the sense I have discussed, the lenders, through Tonto HL, should take significant responsibility.

208 As we noted above, there are a number of analogies that can be drawn between the structural matters identified in ***Tonto Home Loans*** and the present case. They include:

(a) Yes Home Loans (the perpetrator of the fraud in this case) was not a stranger to AMS/AFIG. It was, to use Allsop P's

expression 'a sought-after commercial counterparty put in place by [AMS/AFIG] for the purpose of hoped for introduction of business';

(b) the mortgage manager (AMS/AFIG) brought into the roles of interviewing and selecting prospective borrowers an intermediary, which (while not having the same or as substantial a commercial interest as S Loans) did have a commercial interest in applications being approved; and

(c) as will be discussed later, the apparent 'looseness' of the adherence to the lending process in the Operations Manual.

209 At the same time there are also real differences between the structural arrangements in ***Tonto Home Loans*** and the present case.

210 On one hand, for example, in ***Tonto Home Loans*** the 'introducer' had a close commercial relationship with the entity with whom the loan funds were to be invested. The risk of fraud in such a case was no doubt a factor in favour of a finding of 'unjustness'. That feature is absent from the present case.

211 On the other hand, there were structural features of the present case that gave rise to additional risks that were not present in ***Tonto Home Loans***. In particular, the lending guidelines in ***Tonto Home Loans*** required an assessment of the information in relation to the proposed borrowers (including financial information) by Tonto HL itself. That is, documentation supporting the loan application were required to be (and were in fact) sent to the credit manager at Tonto HL, who was to approve them under the lender guidelines.[176] By contrast, in the present case in the case of a loan that does not exceed $500,000, the correspondent is not required to provide AMS or AFIG with either the loan application, the borrower's assets and liabilities statement or any evidence of the borrower's income. In that sense, the credit approval in the present case is structurally distanced from relevant information.

212 These similarities and differences must, of course, all be taken into account in the final assessment of all of the circumstances. That exercise is undertaken later in these reasons. It is sufficient to observe that ***Tonto Home Loans*** provides clear support for the principle that,

[176] ***Tonto Home Loans*** [106]-[121] (Allsop P, Bathurst CJ & Campbell JA agreeing).

notwithstanding that the respondents were lawfully entitled to structure their business affairs in the way that they did, the nature of those structures and any inherent risks to which they gave rise, are relevant matters in the overall assessment of whether, in a particular case, a credit contract is 'unjust'. We so find.

213 Before leaving this issue it is appropriate to address a specific argument made by the appellants in this context.

***Contracting out – s 169 of the Consumer Credit (Western Australia) Code***

214 In the context of the structure established under the ARMS III program the appellants made a specific submission (reflected in ground 5) that the learned trial judge erred by allowing the respondents to 'contract out' of the effect of the *National Credit Code* (and presumably its predecessor, s 70 of the *Consumer Credit (Western Australia) Code*).

215 The appellants relied upon s 169 of the *Consumer Credit (Western Australia) Code*) which provided:

> **169. Contracting out**
>
> (1) A provision of a contract or other instrument by which a person seeks to avoid or modify the effect of this Code is void.
>
> (2) A provision of a contract or other instrument by which a person seeks to have the debtor or guarantor indemnify the credit provider for any loss or liability arising under this Code is void.

216 Section 191 of the *National Credit Code* is to the same effect.

217 The appellants' contention, in this regard, is essentially that the contractual arrangements between Yes Home Loans and the other respondents sought to cast upon Yes Home Loans the obligation to make 'reasonable inquiries' into the appellants' ability to pay, in circumstances in which that obligation was one owed by GEL Custodians as the credit provider. Thus, so the argument runs, GEL Custodians (and AMS/AFIG) unlawfully sought to modify the effect of s 76 of the *National Credit Code*.

218 As the appellants put it:[177]

> [I]n a broad sense GEL was entitled to appoint YHL to originate loans and mortgage for it and make the necessary inquiries into the

[177] Appellants' Submissions [80] (WAB 27).

> Appellants ability to repay the loan, however, it cannot escape the liability when YHL fails to fulfil the task adequately.

219 We trust that we have, by this summary, done justice to this aspect of the appellants' case, which was developed in more detail in their submissions.

220 The learned trial judge did not address this issue in the Primary reasons. That is not surprising; it was not raised in the trial before his Honour.

221 In any event, as a submission as to the operation of s 169, it is, with respect, misconceived.

222 The respondents did not, by their contractual arrangements *inter se*, attempt to modify the effect of the *Code*. Those contractual arrangements left unaffected the operation of s 70 of the *Consumer Credit (Western Australia) Code* and, when it came into operation, s 76 of the *National Credit Code*. The jurisdiction of the Court to reopen a transaction on the basis that the contract or mortgage resulting from it was 'unjust' is in no way modified, or purported to be modified, by the contractual arrangements between the participants in the ARMS III program.

223 In our view s 169 of the *Consumer Credit (Western Australia) Code* is principally (if not exclusively) concerned with provisions in contracts or instruments between the credit provider and its customer (e.g. borrower or guarantor) which seek to relieve the credit provider of the effect of some provision of the *Code*. A provision in a contract that purported to relieve a credit provider from its obligation to give periodic statements of account,[178] for example, would be rendered void by s 169.

224 Indeed, by way of example closer to the present case, a provision in a contract in which a debtor agreed not to bring an application pursuant to s 70 of the *Consumer Credit (Western Australia) Code* or s 76 of the *National Credit Code* would similarly be void. There is no such provision in the present case.

225 As discussed at [172] to [187] above, however, while failure of a lender to make reasonable inquiries into a borrower's capacity to repay a loan is a relevant circumstance in the evaluative judgment required by s 76 of the *National Credit Code*, there was nevertheless, at the time of

[178] See *Consumer Credit (Western Australia) Code* s 31.

the Loan Agreement and Mortgage, no positive 'obligation' to that effect upon which s 169 of the *Consumer Credit (Western Australia) Code* might operate.

226 The appellants' contention that s 169 has some role to play in this appeal must therefore be rejected.

227 In saying this, however, it should be recognised that the general theme underlying the appellants' submission in this regard does have some real merit. That is, as we have concluded above, the structures devised by the respondents and any inherent risks to which they gave rise, are relevant considerations in the overall assessment of whether the Loan Agreement and the Mortgage are 'unjust'. Those structures include the fact that Yes Home Loans was charged with assessing the ability of the appellants to repay the Loan and the fact that, under the Operations Manual, AMS/AFIG did not require Yes Home Loan to provide them with information relevant to that issue.

228 In the end, in our view, the appellants' reliance on s 169 of the *Consumer Credit (Western Australia) Code* did not add to what we have already concluded as to the relevance of those structures.

229 We turn now to the application of the principles in the present case.

## Application of s 76 of the *National Credit Code* in the present case

230 In carrying out a real review of the evidence, this Court must proceed upon the primary facts found by the learned trial judge, unless those primary facts are found to be in error. In relation to inferences to be drawn from those primary facts, in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from the primary facts. While an appellate court will give respect and weight to the conclusion of the trial judge, it should not shrink from giving effect to its own conclusion as to the inference that should be drawn.[179]

231 In the present case, insofar as the issues on appeal are concerned, there are few primary facts that are in contention. In that regard, the evaluative judgment required by s 76 must be carried without regard to those parts of the appellants' evidence that were rejected and which are not challenged in the appeal (see [155] to [156] above). Indeed most of

[179] ***Fox v Percy*** [2003] HCA 22; (2003) 214 CLR 118, 126 - 127 [25] (Gleeson CJ, Gummow & Kirby JJ).

the contentious issues on appeal concerned the conclusions or inferences that the learned trial judge drew from the primary facts.

232 There are, however, three matters relating to the primary facts that are challenged on appeal. We will deal with those now.

**The information provided by Yes Home Loans to AFIG**

233 As is apparent from the summary of the primary facts set out above, when Yes Home Loans forwarded the mortgage purchase application to AFIG, it was not required to, and did not, provide AFIG with a copy of a loan application form from the appellants or any evidence of their income or their assets and liabilities.[180]

234 In that context, the appellants contend (principally in ground 1) that the learned trial judge erred, in fact, in finding contrary to the evidence that a loan application form had been provided to AFIG. In ground 12 the appellants contend that the respondents at trial 'misled' his Honour into making that error.

235 The appellants rely upon three paragraphs in the Primary reasons. The first is in the summary at the commencement of the Primary reasons:[181]

> The Loan and mortgage loan insurance in respect of the Loan were procured by misrepresentations made by David Lock to AFIG and Genworth Financial Mortgage Insurance Pty Ltd (Genworth Financial) respectively concerning the employment, income, assets and liabilities of the defendants.

236 The other two references are in Primary reasons [238] and [241] respectively, which read:

> [T]he defendants rely upon the Third Misrepresentation, that is, that YHL altered, forged or fabricated the first two pages of the loan application. YHL did so but it was not acting as the agent of GEL Custodians when it did so for the purpose of submitting to AFIG or GEL Custodians a loan application by the defendants.
>
> …
>
> Having outlined the defendants' contentions I consider that there are three matters relied upon by the defendants which have substance. The first is the fraudulent conduct of YHL in fabricating the loan application form, falsely informing AFIG that the loan application and verification

[180] See [88] to [98] above.
[181] Primary reasons [3].

> processes required by the Operations Manual had been complied with and submitting the false loan application form to Genworth Financial as part of a mortgage loan insurance application. The second is that YHL did not comply with, and the Loan was not in accordance with, the loan submission process in the Operations Manual and the representations and warranties in the Correspondent Deed. The third is that at the time it submitted the loan application to AFIG, YHL could not be satisfied that the defendants would be able to meet their obligations under the loan contract in accordance with its terms without substantial hardship and as a matter of fact it is likely the defendants would not be able to do so.

237 We note, in passing, that these findings appeared in the context of the 'agency' argument and whether the conduct of Yes Home Loans was, relevantly, to be treated as the conduct of GEL Custodians. That may be put to one side for present purposes.

238 For present purposes, the appellants submit that these paragraphs reveal the factual error, namely that his Honour found that the 'loan application by the [appellants]' was provided to AFIG. If his Honour did so find, in our view, such a finding would clearly have been an error.

239 The respondents submit that, based on a fair reading of the Primary reasons as a whole, the learned trial judge did not make the error alleged. The respondents submitted, rather, that while his Honour, in some instances conflated the terms 'loan application' and 'mortgage purchase application', the first of which was provided to Genworth Financial and the second of which was provided to AFIG, the Primary reasons as a whole properly distinguish between the two documents.[182]

240 While we accept that it may have been an inadvertent conflation of the two documents on the part of the learned trial judge, read literally Primary reasons [238], at least, in referring to Yes Home Loans 'submitting to AFIG or GEL Custodians a loan application by [the appellants]', does reveal an error. It is not, however, clear that that error affected the particular paragraphs identified by the appellants.

241 For example, while Primary reasons [3] does 'slightly conflate the 2 documents'[183] it remains, in terms, correct as it relates to AFIG. That is, the Loan *was* 'procured by misrepresentations made by David Lock to AFIG … concerning the employment, income, assets and liabilities

[182] Respondents' Outline of Submissions [19]-[20] (WAB 52 - 53).
[183] Respondents' Outline of Submissions [19] (WAB 52).

of the [appellants]'. That statement should necessarily be taken to suggest that the particular misrepresentation to AFIG was in the form of the fabricated loan application. Mr Lock quite separately misrepresented to AFIG that the appellants were not self-employed, that evidence of income was held on file and the employer had been telephoned by Yes Home Loans to verify income.[184]

242 Similarly, insofar as findings in Primary reasons [238] and [241] conflate the loan application form and the mortgage purchase application, it is apparent that that conflation did not affect the reasoning that immediately followed in the Primary reasons, which related to the question of agency and unconscionable conduct.

243 Nevertheless, in our view, when it comes to the assessment of the circumstances relevant to whether the Loan Agreement and the Mortgage are 'unjust' within the meaning of s 76 of the *National Credit Code*, it is important to recognise that one of the primary facts is the fact that no loan application form was provided to, or required by, AFIG. That fact was not specifically identified by his Honour in the context of the consideration of s 76. In our respectful view it ought to have been. To that extent, insofar as his Honour conflated the loan application form and the MPA, ground 1 should be upheld so as to recognise that fact.

244 We would add, in this context, that we do not accept that any error in that regard was a result of the respondents having misled his Honour at trial, as alleged in ground 12. That contention should be specifically rejected.

245 The absence of any loan application, or supporting documentation, being provided to AFIG leads to another fact, not addressed by his Honour, that should be taken into account in the evaluative judgment required by s 76 of the *National Credit Code*.

246 As noted above, both the Operations Manual and the checklist on the front of the mortgage purchase application required the inclusion of the Loan Proposal letter and signed acceptance (item 4 on the checklist) and the service nomination form (item 5). Neither of those documents was attached to the mortgage purchase application and there is no

[184] See [91] above.

evidence that the Loan Proposal letter and signed acceptance ever came into existence.[185]

247 These facts were not referred to in the Primary reasons or, indeed, at the hearing of the appeal. In that regard, following the hearing of the appeal, the parties were invited to make further submissions as whether the facts referred to in [246] above were correct and what, if any, relevance those facts had to the application of s 76 of the *National Credit Code*. Both parties accepted that the facts were correct and formed part of the 'circumstances of the case' for the purposes of s 76. The parties each made contrary submissions as to the significance of the absence of those documents.[186]

248 It is therefore appropriate to record, for the purposes of the appeal, that the primary facts include the following:

(a) Yes Home Loans was not required to provide to AFIG a copy of a loan application form or any evidence of the appellant's income or assets and liabilities;

(b) Yes Home Loans did not provide AFIG a copy of a loan application form or any evidence of the appellant's income or assets and liabilities;

(c) Yes Home Loans was required to provide to AFIG a copy of a signed Loan proposal letter and a service nomination form;

(d) Yes Home Loans did not provide AFIG a copy of a signed Loan proposal letter and a service nomination form; and

(e) The mortgage purchase application did not comply with the requirements of the Operations Manual as to the documents that Yes Home Loans was required to provide to AFIG.

[185] See [97] above.

[186] The parties were requested to file submissions limited to 3 pages in relation to these issues. The respondents complied with that request. The appellants provided 13 pages of submissions (including separate submissions prepared by Mrs Shannon and Mr Shannon respectively). We have only had regard to the first three pages of those submissions which sufficiently addressed the questions raised by the Court. Regrettably the second half of the submissions (evidently written by Mr Shannon) concluded with personal and offensive remarks directed to the members of the coram. Those remarks have, of course, been ignored.

## The disingenuous finding

249 As noted at [148] to [151] above, the appellants sought to challenge the disingenuous finding as part of the appeal. The full context of the finding in the Primary reasons is as follows:[187]

> In their defence, the defendants plead that on or about 22 May 2006, without further reference to the defendants and without obtaining any agreement or acceptance to any proposed loan or the conditions thereof from the defendants, YHL advised Elders Real Estate that YHL had approved a $452,000 loan to the defendants thereby making the contract for sale unconditional and committing the defendants to the purchase of the Land. In their witness statements, each of Mr Shannon and Mrs Shannon state that on 22 May 2006 YHL informed them that it had sent an approval letter to the real estate agent that YHL had unconditionally approved their loan. Neither of them referred to Mr Shannon's email of 18 May 2006 to Mr Lock in which he referred to the defendants' deadline for finance approval being 22 May 2006 and asked Mr Lock to make sure that the approval got to the real estate agent before then. Neither of them referred to the telephone call Mr Shannon made to Mr Lock on the morning of 22 May 2006 to make sure that Mr Lock sent the finance approval later that day. Mr and Mrs Shannon's evidence was disingenuous and misleading.

250 The significance of the finding, for the issues at trial, lay principally with an argument, advanced by the appellants at the trial, that by making the contract for the sale of the property 'unconditional', Yes Home Loans, as agent for GEL Custodians, had left the appellants in a position where they were committed to proceed with sale.[188] That argument, which was relevant to the statutory unconscionability claim, was rejected for various reasons not the subject of the appeal.

251 Nevertheless, the disingenuous finding did find expression in the context of the claim under s 76 of the *National Credit Code*, insofar as his Honour had regard to Mr Shannon having 'pressed' Mr Lock to inform Elders Real Estate of finance approval.[189] It is therefore relevant to address that issue as part of the appeal.

252 It must be acknowledged that the disingenuous finding was one of a number of credit findings made in relation to the evidence given by Mr and Mrs Shannon. As we have stated at [155] above a number of those findings are likely to have been affected by impressions about the

[187] Primary reasons [19].
[188] See e.g. Primary reasons [234], [240].
[189] Primary reasons [264], [286].

credibility and reliability of witnesses formed by the learned trial judge as a result of having seen and heard them give their evidence.

253 In our view, however, the disingenuous finding was different. At best, it related to the pleading drawn by their counsel and an omission of part of the narrative from their witness statements. The omission, in particular, concerned the email from Mr Shannon of 18 May 2006 seeking to ensure that finance approval occurred prior to the deadline under the contract of sale.[190]

254 The appellants were asked about the email of 18 May 2006 in cross-examination. In neither case did the cross-examination reveal that the appellants were seeking to conceal the fact that they wished (or indeed were eager) to have finance approved.

255 Mr Shannon, for example, said:[191]

> And it was on that basis you asked Mr Lock to make sure he had sent the finance approval letter?---You're referring to the second paragraph of the email of 18 May. Right?
>
> Yes?---Also, the deadline for financial approval was Monday, the 22nd. I – I was thinking about that and I actually think, considering that this was the first home that Anita and I – or I will just say I had ever been involved in the purchase of and I was very green and very wet behind the ears, in terms of proper process and procedure of what goes on, that wouldn't have been something that I would have thought up on my own. I believe what has most-likely happened is that the real estate agent has probably chased me up for it and said, 'Could you contact your financier about these things and make sure they're here by the 22nd of the 5th.' I think that's the most-probably scenario because I don't think I was that knowledgeable on how things should be done.

256 The apparent reconstruction of the reasons for the email may be put to one side. There is nothing in Mr Shannon's answer to suggest that he had any diffidence about accepting that he wanted the finance to be approved.

257 Similarly, Mrs Shannon was asked about the email of 18 May 2006. She gave evidence that she did not know about it at the time but, nevertheless, volunteered that she and her husband were desirous of the finance being approved by 22 May 2006:[192]

---

[190] See [70] above.
[191] Ts 509-510.
[192] Ts 432.

> Did you have any knowledge of this email being sent in May of 2006?---I don't think I knew the email was – this email was going but I know we were talking about that we knew that the approval was needing to be done by 22 May.
>
> When you say 'we were talking,' do you mean you were talking to Mr Lock?---Well, Chris and I and Mr Lock, but Chris and I were probably talking at this time.
>
> Did you speak to Mr Lock about the finance approval letter?---Did I speak to Mr Lock – no, I didn't speak to Mr Lock. I know that he had – sorry, the finance approval letter – are you talking about the one after this email now?
>
> No, I'm talking about finance approval. Were you talking about finance approval with Mr Lock in May of 2006?---When he – yes, I know that he called us to say that he had formally approved us for finance and we were really excited about it.
>
> And you say that happened on 22 May?---On or around.

258 It was not put to Mr or Mrs Shannon that their pleadings or witness statements with respect to the finance approval were disingenuous or misleading.[193]

259 The pleadings, and indeed the witness statements, are likely to have been drawn (or at least settled) by the appellants' then legal representatives, who were no doubt in possession of the relevant documents. In those circumstances, in our view, it cannot be assumed that an omission from the narrative such as that in the present case is, without more, attributable to disingenuity on the part of the witness.

260 In addition, in our view, there was nothing particularly surprising about the fact that the appellants were eager to ensure that finance was approved within the time required by the contract of sale. It would be a natural position for a purchaser, keen to acquire a property, to adopt. In that regard there is nothing sinister about the fact that the appellants would have been eager to see that the contract became 'unconditional' and no reason to suppose that their eagerness would be hidden from the Court.

261 In this context it must be remembered that the appellants, in a general sense, 'wanted' the deal to go through and that they had,

[193] Appeal ts 167.

erroneously, convinced themselves that they could afford the repayments under the proposed Loan.[194]

262 That reality, unfortunately, appears to have been clouded and overshadowed by the unmeritorious case advanced by the appellants that, had they known that the true lender was GEL Custodians and not Yes Home Loans they would not have entered into the Loan Agreement or the Mortgage.[195] Regardless of the findings as to the First and Second Misrepresentations, in our view, it would have been very difficult for the appellants to establish that counterfactual.

263 Leaving aside the issue of the identity of the lender, however, there is nothing, in our view, to suggest that the appellants' eagerness to have finance approved should be regarded as a matter that would be concealed in the present case, or that their failure to expressly refer to it should be regarded as disingenuous or misleading.

264 For these reasons, in our respectful view, the learned trial judge was in error in making the disingenuous finding.

**The issue of agency**

265 The issue of agency between Yes Home Loans and GEL Custodians was, again, one that loomed large in the trial before the learned trial judge.

266 Whether Yes Home Loans was the agent of GEL Custodians in its dealings with the appellants was essential to many of the claims made by the appellants because it was by the mechanism of agency that the appellants sought to attribute to GEL Custodians the fraudulent and dishonest *conduct* of Yes Home Loans. Attributing that conduct to GEL Custodians was then sought to be relied upon in relation to the fraud, misrepresentation and unconscionability claims.

267 Some of that conduct was, of course, accepted by the learned trial judge as having occurred, such as the preparation of the forged loan application to obtain the lenders mortgage insurance and the misrepresentations in the mortgage purchase application itself. However, in the absence of a finding that that conduct was the conduct of GEL Custodians, the learned trial judge concluded those claims of

[194] See [52] above.
[195] Amended Defence and Counterclaim [24] (BAB 119).

fraud, misrepresentation and unconscionability could not be made out.[196]

268 There was, however, one aspect of the relationship between the parties in relation to which the learned trial judge found that Yes Home Loans *was* the agent of GEL Custodians. That was in relation to Yes Home Loans' actions in obtaining the lenders mortgage insurance from Genworth Financial. In that context his Honour found:[197]

> YHL is the agent of AFIG, AMS and GEL Custodians for the purpose of providing information and statements in and accompanying the mortgage loan insurance. The law presumes that the knowledge of an agent acquired in the course of acting within the scope of its authority is imputed or attributed to the principal. In this case the knowledge of YHL that the defendants had provided no information about their income, assets and liabilities and that the information about the defendants financial circumstances stated in the application to Genworth Financial for lenders mortgage insurance was false was attributable to AFIG, AMS and GEL Custodians.

269 His Honour, accordingly, found that while the *conduct* of Yes Home Loans could not be attributed to GEL Custodians (for the purposes of the fraud, misrepresentation and unconscionability claims) the *knowledge* of Yes Homes Loans could be (constructively) attributed to GEL Custodians.

270 The distinction was important for the resolution of those other claims because, as his Honour found:[198]

> The knowledge attributed to GEL Custodians for the purpose of the mortgage loan insurance is not sufficient to meet the real degree of moral obloquy required for a finding of unconscionable conduct.

271 Nevertheless, when it came to the claim under s 76 of the *National Credit Code*, the constructive knowledge of AFIG, AMS and GEL Custodians as to *all* of the knowledge attributable to them was clearly relevant to the determination as to whether the Loan Agreement and the Mortgage were 'unjust'.

272 In that regard, the respondents (again quite properly) accepted that the knowledge imputed to AFIG, AMS and GEL Custodians for the purposes of obtaining the lenders mortgage insurance was also to be

[196] See Primary reasons [243], [244], [247].
[197] Primary reasons [198].
[198] Primary reasons [243].

attributed to them for the purposes of the receipt of the mortgage purchase application.[199]

273 For this reason, insofar as the issues on the appeal are concerned, the fact that the learned trial judge confined the finding of agency to Yes Home Loans' conduct in obtaining lenders mortgage insurance is of much less significance in the appeal, where the focus is on s 76 of the *National Credit Code*. That is because, insofar as constructive knowledge is concerned, the entirety of Yes Home Loans' knowledge is attributable to AFIG, AMS and GEL Custodians, regardless of the scope of the agency.

274 The significance of this for the purposes of the appeal is that, in the context of the claim under s 76 of the *National Credit Code*, in our respectful view, the learned trial judge does not appear to have given full weight to that constructive knowledge.

275 In that context, at Primary reasons [272], the knowledge that his Honour said could be attributed to GEL Custodians was that the appellants 'had not provided any details of their income, assets or liabilities'. From this, in the context of s 76(2)(l) of the *National Credit Code* his Honour concluded that reasonable enquiry would not have disclosed that the appellants were not able to make the repayments without substantial hardship (albeit that it would have disclosed that the appellants did not have financial statements available to substantiate their belief that they could make the repayments).[200]

276 These conclusions, with respect, do not adequately recognise the extent of the knowledge that the learned trial judge had concluded was attributable to GEL Custodians. It was not simply that the appellants had 'not provided details of their income, assets or liabilities'. It also included the knowledge 'that the information about the [appellants'] financial circumstances stated in the application to Genworth Financial for lenders mortgage insurance was false'.[201] That is, they were taken to have knowledge of that fraud.

277 The attribution of such knowledge was of significantly greater weight in the evaluation as to whether the Loan Agreement and Mortgage were 'unjust' than simply knowledge of the absence of details. The learned trial judge, with respect, erred in not giving

[199] Appeal ts 177, 179-180.
[200] Primary reasons [272] (see [140] above).
[201] Primary reasons [198] (see [268] above).

consideration to the full extent of the knowledge attributed to GEL Custodians in the context of s 76 of the *National Credit Code*.

278 To that extent, grounds 4, 11 and 17, which relate to the knowledge of the respondents have been made out.

**The normative evaluation in of all the circumstances in the present case**

279 In light of the primary facts found by the learned trial judge, together with those additional findings reflected in [248], [263] and [276] above, we turn to the normative evaluation in all of the circumstances of the present case as to whether the Loan Agreement and the Mortgage were 'unjust'.

280 The first point to make about that evaluation is to distinguish between two (potentially conflicting) notions that have run in parallel throughout these proceedings. We have alluded to them at [262] above.

281 On one hand, the appellants sought to establish their case at trial on the basis of a counterfactual to the effect that without the conduct of the respondents they (the appellants) would not have entered into the Loan Agreement and the Mortgage. That counterfactual therefore drew much attention to what the appellants would have done if the events had been different. It is not surprising, then, that many of the learned trial judge's findings focussed on the appellants' conduct and their decision-making: for example that they wanted the loan to proceed,[202] what they knew about the loan and their own circumstances[203] and that they failed to make proper enquiry or assessment as to their capacity to afford the Loan.[204]

282 It did not help, in that context, that the learned trial judge also concluded that the appellants had not proven a number of the factual matters that they alleged that they had relied upon in their decision making, such as the First and Second Misrepresentation.

283 There was, however, a quite different counterfactual upon which the appellants' case could be viewed, particularly in relation to the claim under s 76 of the *National Credit Code*. That is the counterfactual to the effect that, had the respondents conducted themselves differently, GEL Custodians would not have entered into the Loan Agreement and the Mortgage because GEL Custodians should

[202] Primary reasons [264].
[203] Primary reasons [265], [270].
[204] Primary reasons [284].

and would have concluded that the appellants could not afford to repay the Loan (regardless of what the appellants thought or wanted). It poses the ultimate counterfactual question not as 'what would the appellants have done' but as 'what would (and should) the respondents have done'?

284 That counterfactual brings with it a greater focus on the conduct of the respondents and a recognition that a substantial purpose of the legislative scheme underlying the *National Credit Code* is to protect people who cannot reasonably protect themselves.[205]

285 Of course, both of these counterfactual notions were relevant throughout the proceedings and both were available reasoning upon which the learned trial judge could have proceeded. In addition, they are both matters to which regard should be had in the overall assessment of whether the contract is 'unjust'. Nevertheless, when the Primary reasons are read as a whole it is apparent, in our view, that the importance of the alternative counterfactual was, to some extent, lost in the 'forest of forensic contingencies' planted by the Amended Defence and Counterclaim.

286 Two further examples will perhaps illustrate this point.

287 First, in relation to the business structures put in place by the respondents, and the risk to which they might give rise, the learned trial judge said:[206]

> Leaving aside YHL's dishonest conduct what remains is breaches of the lending guidelines by YHL and the objective risk that existed by the use of a mortgage introducer together with AFIG or GEL Custodians not approaching the borrowers or verifying their loan application directly. In ***Perpetual Trustee***, Edelman J found that such facts involving 'structural creation of risk and heightening of risk' by the arrangements, were not sufficient for the high or possibly significant or real degree of moral obloquy required for finding of unconscionable conduct [185] - [186]. In my view the same assessment applies in this case.

288 His Honour made this observation in the context of the statutory unconscionability claim. In that context, it may be correct to say that 'structural creation of risk and heightening of risk … [are] not sufficient for the high or possibly significant or real degree of moral obloquy required for finding of unconscionable conduct'. However, as the authorities demonstrate (see [189] to [212] above), such structures may

[205] ***Perpetual Trustee Co Ltd v Khoshaba*** [80] (Spigelman CJ; Handley & Basten JJA agreeing).
[206] Primary reasons [244].

nevertheless contribute to a contract that is 'unjust' within the meaning of s 76 of the *National Credit Code*, where no element of 'moral obloquy' is required.

289 Yet, in relation to the learned trial judge's assessment of the circumstances relevant to s 76 of the *National Credit Code*, the learned trial judge did not return to those structures and the role they may have played in the circumstances of this case.

290 A second example is the finding made by his Honour (at Primary reasons [284]) that the appellants 'made the loan application and entered into the Loan Agreement without making any proper enquiry or assessment whether they could afford the repayments without substantial hardship or at all'. Mrs Shannon made the point, in submissions, that precisely the same proposition holds true if the reference to the appellants in the finding was substituted with a reference to AFIG, AMS and GEL Custodians; namely, that GEL Custodians also entered into the Loan Agreement without making any proper enquiry or assessment as to the appellants' capacity to pay.

291 In the circumstances, particularly given its constructive knowledge, GEL Custodians' failure to make *any* enquiry or assessment as to the appellants' capacity to pay is, in our view, at least as significant a consideration as the appellants' own failure to adequately assess their capacity to repay the Loan. In that regard, it is clear that GEL Custodians had *no* information as to the appellants' income and, while the appellants were clearly wrong in relation to their capacity to afford the Loan, it is of some significance that they were essentially self-employed. They would not be the first persons to embark on a business venture with unrealistic expectations as to its profitability.

292 For these reasons, in our view, it is appropriate to consider whether the Loan Agreement and the Mortgage were procedurally unjust including by reference to the alternative counterfactual (namely that GEL Custodians should never have made the Loan) and the opportunities available to GEL Custodians (and AMS and AFIG) to avoid that having occurred.

293 As we have noted there are a number of circumstances that, in the present case count against the conclusion that the Loan Agreement and the Mortgage were unjust. Many of these have already been referred to above.

294 First, the appellants were certainly imprudent in their own assessment of their capacity to repay the Loan without substantial hardship. Whatever steps they took to satisfy themselves that they could afford the Loan, those steps were plainly inadequate. Nor was the appellants' belief in their capacity to pay due to any conduct on the part of GEL Custodians, AMS or AFIG (or indeed Yes Home Loans). The fact that the appellants completed the initial application form without including any information as to their assets and liabilities demonstrates that they ought reasonably to have taken more care in their assessment of their capacity to pay.

295 Secondly, the appellants did sign the original loan application form without it having been properly completed and provided it to Yes Home Loans. We agree with the learned trial judge that the appellants' conduct in doing so may properly be described as careless, reflecting as it did their inadequate assessment of their capacity to pay. It also meant, as Vaughan JA has said at [419.1] that the appellants could not reasonably have expected GEL Custodians or Yes Home Loans to form any view as to their capacity to repay the Loan. In the circumstances of the present case, however, we do not conclude, as his Honour did, that by doing so the appellants 'facilitated the fraud' by Yes Home Loans.[207]

296 In that regard, the reality is that the only respect in which the actions of the appellants could be said to have 'facilitated' the fraud by Yes Home Loans was by them having signed the pro forma pages of the loan application form. That does not, in our view, amount to facilitation of the fraud by Yes Home Loans. Apart from the fact that a borrower is entitled to assume that a person appointed to facilitate loans for a lender will not engage in fraud, the pages with the signatures contained no information in relation to the loan application.[208] There was, in the circumstances nothing to prevent Yes Home Loans, or Mr Lock, from attaching those pro forma pages to any fabricated document, even if the appellants had completed the entire loan application form.

297 This may be illustrated by the fact that Yes Home Loans did not even include the personal details page of the loan application form completed by the appellants but, rather, substituted its own fabricated personal details page.[209] The page actually completed by the appellants, for example, correctly identified their employer as 'E-News

[207] Primary reasons [283].
[208] See [67] above.
[209] See [65] and [78] above.

Direct' a business name registered by the appellants. The form completed by the appellants could therefore not have facilitated the fraud to the effect that Mr Shannon worked for Red Dirt Personnel Group.

298 We infer from the primary facts that Mr Lock was aware that this aspect of his fraud could not be facilitated by the form as completed by the appellants. His covering facsimile to Genworth Financial made a point both of referring to the employment with Red Dirt Personnel *and* stating that E-News P/L was a company that was not trading.[210] This latter aspect is, we infer, Mr Lock's attempt to pre-empt and neutralise any enquiry that revealed the existence of E-News Direct. From this we conclude that the revelation of the appellants' income being derived from E-News Direct was information that Mr Lock considered might frustrate his fraudulent purpose.

299 The third matter militating against the conclusion that the Loan Agreement and the Mortgage were unjust is the fact that the documents themselves were clear and intelligible. The appellants were not misled as to the actual terms of the Loan and there was nothing in the terms and conditions that were unusual in a Loan Agreement.[211]

300 Fourthly, the appellants did not obtain independent legal or other expert advice, notwithstanding that the loan pack from Wignalls, on behalf of GEL Custodians, recommended that the appellants obtain independent advice.

301 Finally, there was no unfair pressure applied to the appellants to sign and return the Loan Agreement and the Mortgage.[212]

302 We turn, now, to the circumstances that, in the present case, count in favour of the conclusion that the Loan Agreement and the Mortgage were unjust.

303 First, there can be no doubt that that the appellants could not afford the Loan and could not make the loan repayments without substantial hardship.[213] If the Loan Agreement and the Mortgage are not reopened, the appellants will certainly suffer hardship, and will lose their home.

---

[210] See [84] to [85] above.
[211] Primary reasons [266], [270].
[212] Primary reasons [269].
[213] Primary reasons [30], [239].

304 Secondly, the appellants entered into the Loan Agreement and the Mortgage genuinely believing that they could afford the Loan. In that context there are a number of matters that support the inference that, while they were not under any special disability or disadvantage, the appellants lacked experience in financial matters, particularly when it came to the purchase of land and entry into a mortgage. They were, as GEL Custodians knew, first home buyers. They could not be described, to use Basten JA's expression in ***Perpetual Trustee v Khoshaba***, 'foolish, gullible or greedy'.[214]

305 Thirdly, the Loan Agreement and Mortgage were clearly procured by the fraud committed by Yes Home Loans both in obtaining lenders mortgage insurance and in having the mortgage purchase application approved. Yes Home Loans' fraudulent conduct occurred in various ways and over a period of time. It included the false advice to Elders Real Estate that the Loan had been approved,[215] the false and fabricated information used to obtain the lenders mortgage insurance[216] and the falsehoods in the mortgage purchase application.[217] In the absence of that fraudulent conduct, we readily infer, GEL Custodians would not have entered into the Loan Agreement or the Mortgage.

306 Fourthly, GEL Custodians (and AFIG and AMS) had constructive knowledge that the appellants had 'provided no information about their income, assets or liabilities' and 'that the information about the [appellants'] financial circumstances stated in the application to Genworth Financial for lenders mortgage insurance was false'.[218] In those circumstance no prudent lender with that knowledge would have entered into the Loan Agreement or the Mortgage.

307 Fifthly, Yes Home Loans (the perpetrator of the fraud in this case) was not a stranger to GEL Custodians, AMS and AFIG. It was engaged by AMS and AFIG expressly for the purpose of hoped for introduction of business and had a financial interest, in the form of remuneration, for generating work. Yes Homes Loans had a direct commercial relationship with AMS and AFIG. *That* relationship is a relevant consideration. Given that the appellants were innocent of the fraudulent conduct of Yes Home Loans, the fact that they were 'fairly close friends' with Mr Lock was not a relevant consideration. In all of

[214] See [185] above.
[215] See [74] above.
[216] See [82] to [86] above.
[217] See [89] to [91] above.
[218] Primary reasons [198] (see [268] above).

the circumstances, contrary to the conclusion of the learned trial judge,[219] *that* relationship was an entirely neutral matter.

308 Sixthly, by their contractual arrangements, AFIG cast onto Yes Home Loans the sole responsibility for carrying out the credit analysis of borrowers and for being satisfied that a borrower would be able to meet its obligations under any loan contract without substantial hardship.[220] In the particular circumstances of this case, AFIG (and in turn GEL Custodians) entirely abdicated that responsibility by requiring no information in that regard at all.

309 Seventhly, in light of the contractual relationship between them, it was wholly within the power of GEL Custodians, AMS and AFIG to determine what controls, supervision and precautions were in place in relation to the activities of Yes Home Loans (whether or not Yes Home Loans was their agent). AFIG could, and did, prescribe the information required to be submitted by Yes Home Loans for the purposes of mortgage purchase applications. GEL Custodians, AMS and AFIG bore the significant responsibility for structuring the elements of the lending program.[221]

310 Eighthly, in exercising that power, AFIG did not require Yes Home Loans to provide it with either the loan application, the appellants' assets and liabilities statement or any evidence of the appellants' income. AFIG (and in turn GEL Custodians) by reason of the information they had requested, had no way of determining whether the appellants had any capacity to afford the Loan. Significantly, AFIG *did* require Yes Home Loans to provide a copy of the lenders mortgage insurance approval, which provides some indication of its priorities in terms of the information upon which it was prepared to lend.

311 The fact that AFIG (and thereby GEL Custodians) did not require the provision of information as to the assets, liability or income of borrowers of less than $500,000 supports the inference that, in relation to such loans, they were prepared to take the risk that the Loans could not be serviced on the basis of the security available (and the lenders mortgage insurance).

312 Ninthly, the structural arrangements for which GEL Custodians, AMS and AFIG were responsible involved the structural creation of

[219] Primary reasons [286].
[220] See [34] above.
[221] See ***Tonto Home Loans*** [264]-[266] (Allsop P; Bathurst CJ & Campbell JA agreeing).

risk and the heightening of risk that the Yes Home Loans, as Correspondent, could engage in imprudent and even fraudulent conduct without detection. GEL Custodians, AMS and AFIG took no steps to address that heightened risk – for example by requiring information as to the appellants' capacity to service the Loan.

313 Indeed, and tenthly, in the circumstances of this case GEL Custodians and AFIG did not even observe the requirements of the Operations Manual that did exist. The Operations Manual required Yes Home Loans to provide AFIG with a copy of a signed Loan proposal letter and a service nomination form. No such Loan proposal letter, however, ever came into existence or was provided to AFIG. The failure to attach those documents was clear on the face of the mortgage purchase application itself.[222]

314 The respondents submitted, in this context, that the absence of the Loan proposal letter (or service nomination form) does not support a finding that the Loan Agreement or the Mortgage were unjust. They submit that the documents are not intended to convey information as to the appellants' financial position and that the appellants were fully apprised of the terms of the Loan agreement before they signed it.[223]

315 While that may well be the case (there was, in fact, no evidence as to the contents of a Loan proposal letter), the failure to observe the provisions of the Operations Manual are nevertheless relevant to whether the Loan Agreement and Mortgage were unjust.

316 The failure to follow the Operations Manual supports the conclusion that the GEL Custodians and AFIG were prepared to lend in circumstances where their own guidelines were not applied with 'appropriate commercial vigour'[224] and that their operation could be described, at least in the appellants' case, as 'loose'.[225]

317 In ***Kowalczuk v Accom Finance*** Campbell JA (with whom Hodgson and McColl JJA agreed) observed:[226]

> In ***Perpetual Trustee Company v Khoshaba*** Spigelman CJ regarded (at [80]-[82]) a lender's failure to observe its own lending guidelines as entitled, in the circumstances of that particular case, to significant weight. The way in which it was relevant was twofold. First, while the

[222] See [94] above.
[223] Respondents' Supplemental Outline of Submissions [14] to [15].
[224] ***Tonto Home Loans*** [256] (Allsop P, Bathurst CJ & Campbell JA agreeing).
[225] ***Tonto Home Loans*** [265] (Allsop P, Bathurst CJ & Campbell JA agreeing).
[226] ***Kowalczuk v Accom Finance***, 228 [102] (Campbell JA; Hodgson and McColl JJA agreeing).

> guidelines were designed to enable the lender to assess and minimise its own risk, and thus were for the purpose of protecting the lender rather than the borrower, following the guidelines conferred an indirect benefit on the borrower through risky loans not being made, and one of the legislative purposes of the *Contracts Review Act* was to protect people not able to look after themselves. The second way in which it was relevant was, in the circumstances where the lender had no idea for what purpose the loan was being borrowed, the failure to observe the lending guidelines assisted the inference that the lender was lending on the value of the security.

318 While eschewing labels such as 'asset lending', in our view the failure of GEL Custodians and AFIG to observe even the minimum requirements of the Operations Manual, together with the matter referred to at [311] above strengthen the inference, in the present case, that AFIG (and thereby GEL Custodians) displayed a lack of concern with the suitability of the appellants as borrowers and with serviceability. We would draw that inference.

319 The final consideration of significant importance is, of course, the public interest. The public interest in this regard is multi-faceted and involves matters both militating for, and against, a finding that the Loan Agreement and the Mortgage were 'unjust'. One aspect of the public interest, which is of fundamental importance, is that persons should be kept to their freely entered bargains.[227] It is not in the public interest that borrowers should be relieved of their obligations in a manner giving rise to a windfall gain. Mrs Shannon, in essence, recognised this aspect of the public interest at the hearing of the appeal when she submitted that 'one thing consumers don't want - and we never ask for it - is that we want a free house out of this'.[228]

320 At the same time, it is also an aspect of the public interest to promote suitable lending and borrowing and to promote safeguards against conduct that can produce injustice to individual members of the public and thus undermine confidence in the free and fair operation of financial markets.[229] In this regard, confidence in the free and fair operation of financial markets is undermined, not only by conduct or practices that affect persons under special disadvantage or disability, but also practices that lead to disadvantage to ordinary consumers.

321 Both aspects of the public interest must be taken into account in evaluating the circumstances in the present case.

---

[227] ***Tonto Home Loans*** [269] (Allsop P; Bathurst CJ & Campbell JA agreeing).
[228] Appeal ts 59.
[229] ***Tonto Home Loans*** [271] (Allsop P; Bathurst CJ & Campbell JA agreeing).

**Conclusion – the Loan Agreement and the Mortgage were 'unjust'**

322 Having regard to all of the circumstances, in our view, the Loan Agreement and the Mortgage were 'unjust' within the meaning of s 76 of the *National Credit Code*.

323 The Loan Agreement and the Mortgage would never have eventuated without the fraudulent conduct of Yes Home Loans. Neither the appellants nor the respondents were responsible for that fraud. Nevertheless, as between the parties, the respondents were far better placed to address the risks that such conduct might occur and to prevent loans being made to people who were unable to afford them.

324 As it was, the steps put in place by GEL Custodians, AMS and AFIG did not properly address those risks and, indeed, heightened them. The procedures prescribed by the Operations Manual, in relation to loans such as that made to the appellants, effectively insulated it from any actual knowledge as to the financial circumstances of the person to whom it was lending. Those procedures relied solely upon the correspondents, who, by their contractual arrangements, were determined not to be agents. The close business relationship between the lender and the correspondents however was clear.

325 Indeed in the present case, as the learned trial judge found, Yes Home Loans did act as agent for the purposes of obtaining lenders mortgage insurance, a step designed to protect the interests of the lender, and not the borrower. That relationship of agency fixed GEL Custodians, in the present case, with constructive knowledge that the information used to facilitate the loan (by way of the lenders mortgage insurance) was false and that there was no evidence supporting the appellants' capacity to pay.

326 In those circumstances, GEL Custodians, AMS and AFIG must take significant responsibility for the actions of Yes Home Loans and for the result that ensued in the present case.

327 That conclusion is fortified by the inference we have drawn above that in the present case the failure of GEL Custodians and AFIG to observe even the minimum requirements of the Operations Manual that AFIG (and thereby GEL Custodians) displayed a lack of concern with the suitability of the appellants as borrowers and with serviceability.

328 The appellants, as we have noted above, did bear some responsibility for the transaction and for the Loan Agreement and the

Mortgage. That responsibility, however, does not detract from the conclusion that procedural injustice resulted from the circumstances in which the Loan Agreement and the Mortgage were created. The appellants' share of the responsibility may well be relevant to the exercise of the Court's discretion in relation to any relief that might be granted. It does not affect the conclusion that the Loan Agreement and the Mortgage were 'unjust'.

329 For these reasons the appeal should be allowed and there should be an order to the effect that the Loan Agreement and the Mortgage were 'unjust' within the meaning of s 76 of the *National Credit Code*.

## Relief

330 The conclusion that the Loan Agreement and the Mortgage were 'unjust' within the meaning of s 76 of the *National Credit Code*, of course, is not the end of the exercise. It does not automatically have the effect that the contracts should be set aside.

331 The Court retains a wide discretion as to the reopening of the transaction giving rise to the Loan Agreement and the Mortgage and what relief, if any, should be granted. As has been said in relation to s 7(1) of the *Contracts Review Act*:[230]

> The structure of s7(1) involves a two-stage inquiry: first, was the contract unjust; secondly what, if any, orders should be made. The second stage is clearly discretionary. The first stage may more accurately be described as a judgment.

332 The same structure is evident in the *National Credit Code*. The essentially discretionary character of the second stage is reflected in both the word 'may' in the open words of s 76(1) (the 'court may … reopen the transaction') and by the broad discretionary powers reflected in s 77 of the *National Credit Code*. Section 77 provides:

> **77 Orders on reopening of transactions**
>
> The court may, if it reopens a transaction under this Division, do any one or more of the following, despite any settlement of accounts or any agreement purporting to close previous dealings and create a new obligation:
>
> (a) reopen an account already taken between the parties to the transaction;

[230] ***Perpetual Trustee Co Ltd v Khoshaba*** [34] (Spigelman CJ; Handley & Basten JJA agreeing).

> (b) relieve the debtor and any guarantor from payment of any amount in excess of such amount as the court, having regard to the risk involved and all other circumstances, considers to be reasonably payable;
>
> (c) set aside either wholly or in part or revise or alter an agreement made or mortgage given in connection with the transaction;
>
> (d) order that the mortgagee takes such steps as are necessary to discharge the mortgage;
>
> (e) give judgment for or make an order in favour of a party to the transaction of such amount as, having regard to the relief (if any) which the court thinks fit to grant, is justly due to that party under the contract, mortgage or guarantee;
>
> (f) give judgment or make an order against a person for delivery of goods to which the contract, mortgage or guarantee relates and which are in the possession of that person;
>
> (g) make ancillary or consequential orders.

333 In a general sense it may be said that the ultimate purpose of any relief granted under s 77 is to avoid the relevant injustice that has resulted in the conclusion that the contract in question is 'unjust'. In that regard, the orders, if any, that ought to be made will in part depend upon 'the competing matters bearing upon the conclusion of injustice and the content of that injustice'.[231]

334 As Allsop P said in ***Tonto Home Loans***:[232]

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

[231] ***Tonto Home Loans*** [267] (Allsop P, Bathurst CJ & Campbell JA agreeing).
[232] ***Tonto Home Loans*** [276] (Allsop P, Bathurst CJ & Campbell JA agreeing).

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

335 Accordingly, in the present case, the appropriate relief must take into account the various considerations that have led to the conclusion that the Loan Agreement and the Mortgage were 'unjust'. In determining whether to grant relief the court may have regard to the conduct of the parties to the proceedings in relation to the contract or mortgage or guarantee since it was entered into.[233]

336 The parties' post-contract conduct was a matter raised by ground of appeal 18 but, as was observed at the hearing of the appeal, it was not relevant to the first, evaluative, question.

337 Both the appellants and the respondents agreed at the hearing of the appeal that further submissions would be required as to the appropriate orders in the event that the Court concluded that the Loan Agreement and the Mortgage were 'unjust'.[234] Given that the circumstances giving rise to that conclusion are relevant to any relief that might be granted, the parties' positions in that regard were clearly correct.

338 An issue arose at the hearing of the appeal as to whether, in the event that this Court concluded that the Loan Agreement and the Mortgage were unjust, the relief to be granted should be remitted for rehearing, or whether this Court should make appropriate orders, having received further submissions from the parties.

339 The respondents submitted that the matter should not be remitted and that, particularly in light of the fact that the claims other than the claims under s 76 of the *National Credit Code* have fallen away, this Court is in as good a position to determine the appropriate relief based on the record. In this context, the respondents observed that its position, at trial, that the appropriate orders would be the return of the principal sum of $452,000 together with simple interest.[235]

340 The appellants, in submissions in reply, accepted that, from their perspective, it would be 'fine' for this Court to determine the

[233] *National Credit Code* s 76(5).
[234] Appeal ts 59, 191.
[235] Appeal ts 186-187.

appropriate relief if the parties had an opportunity to make further submissions in relation to the question of relief.[236] In that regard, both parties acknowledged that the learned trial judge did not make findings in relation to evidence led at the trial in relation to the post-contract conduct.

341 We are of the preliminary view that, as this Court is seized of the matter, it is appropriate that any consequential orders should be made by this Court rather than on a remitter. The proceedings have been lengthy and drawn out. It is in the interests of justice that they be resolved as soon as is practicable. In that event, the parties should have the opportunity to make further submissions as to the precise form of orders that they seek on the basis of the record of the trial and the findings reflected in these reasons, supplemented, if necessary, by any truly fresh evidence to bring the facts up to date from the date of trial.

342 Notwithstanding the sometimes acrimonious relationship between the parties, we have yet to give up hope, however, that in light of this Court's conclusions, the parties might be able to reach a resolution of their dispute in a manner that best reflects the interests of all parties. While the Court's discretionary powers are very wide, it is nevertheless the case that the parties would have greater freedom in crafting their own resolution of the dispute than the Court. For these reasons, the parties should be referred to mediation before a Registrar of the Court prior to any resumed hearing of the appeal.

343 While we have expressed the preliminary view that, in the absence of a mediated outcome, it is appropriate that any consequential orders should be made by this Court, we accept the note of caution reflected in Vaughan JA's concluding remarks at [471]. It may be that following the mediation the circumstances may have changed to justify a remitter of the question of relief. For those reasons, we would not make any final orders as to the ultimate determination of the matter until after the mediation.

## Orders

344 In light of the foregoing, there should be orders that the appeal be allowed and that the orders made by the learned trial judge on 21 September 2018 be set aside.

[236] Appeal ts 187-188.

345 There should be an order declaring that the Loan Agreement and the Mortgage were 'unjust' within the meaning of s 76 of the *National Credit Code* and the appeal be adjourned for further submissions as to any further orders, including orders as to costs.

346 As noted above, there should also be an order referring the parties to mediation before a Registrar of the Court prior to any resumed hearing of the appeal.

347 We would hear the parties as to the form of orders.

**VAUGHAN JA**:

## Introduction

348 I have the considerable advantage of having read a draft of the reasons of Quinlan CJ & Tottle J (joint reasons). I agree with the ultimate conclusion reached in the joint reasons. The appeal should be allowed and there should be a declaration that the Loan Agreement and the Mortgage are 'unjust' within the meaning and for the purpose of s 76 of the *National Credit Code*. Although, in many respects, my reasons for so concluding overlap with the joint reasons, I wish to state my own reasons for concluding that in the particular and distinctive circumstances of this matter the court's power to reopen the transaction that gave rise to the Loan Agreement and the Mortgage is enlivened.

349 It is, however, not necessary for me to restate the background facts and findings of the primary judge. Nor is it necessary for me to restate the grounds of appeal and the parties' arguments. Instead I adopt what is stated in the joint reasons as to those matters. I will also adopt the abbreviations employed in the joint reasons.[237]

350 I also agree with the joint reasons insofar as Quinlan CJ & Tottle J would dismiss grounds 14 and 15 (see [157] - [158] above) and ground 5 (see [214] - [224] above). Ground 6 is misconceived for similar reasons as ground 5: the contention that the primary judge was in error in providing for recovery of enforcement expenses (as to do so would uphold an indemnity as to the respondents' breaches of the *Consumer Credit (Western Australia) Code*) was based on a misreading

[237] However, as will be seen, I refer to Yes Home Loans as 'YHL'.

of s 169(2) of the *Code*.[238] Otherwise, I, like Quinlan CJ & Tottle J, do not consider it necessary to come to a conclusion on the grounds challenging the primary judge's agency findings (ie grounds 7, 8, 9 and part of ground 13). Ground 18 falls away given what is proposed by way of disposition of the appeal. This leaves the various grounds which individually and collectively sought to challenge the primary judge's fact finding and reasoning in concluding that, in the circumstances relating to the Loan Agreement and the Mortgage at the time they were entered into, the Loan Agreement and the Mortgage were not unjust.

**The challenges to the primary judge's factual findings**

351 Before turning to the principles that inform the application of s 76 of the *National Credit Code*, it is first convenient to consider the relevant challenges to the primary judge's fact finding. Principally these were bound up in grounds 1, 2 and 12, the remainder of ground 13 and the challenge to the 'disingenuous finding' (which arose in the circumstances described at [148] - [151] of the joint reasons). I appreciate that ground 10 also alleges a relevant factual error. I consider it preferable to address that specific complaint when coming to the evaluative conclusion required by s 76.

352 By ground 1 the Shannons claimed that the primary judge erred in finding that a loan application form was provided by YHL to AFIG (and through it to GEL Custodians). The Shannons claimed that the primary judge should have found that no signed loan application form was ever provided to AFIG or GEL Custodians in 2006. I accept that, factually, the Shannons are correct. No signed loan application form was provided to AFIG as part of the loan approval process (recalling that AFIG was AMS's agent and that, while AMS had overall responsibility for the originating and servicing of loans, GEL Custodians was trustee and lender of record in respect of the loans made under the securitisation program). As the joint reasons recount, YHL (by Mr Lock) simply forwarded a mortgage purchase application to AFIG (see [88] - [98] above). Neither version of the loan application was provided to AFIG. However, I do not accept that the primary judge was in error in finding to the contrary. His Honour did not so find.

353 It is true that, at [238] and [241] of the primary reasons, the primary judge referred to YHL submitting the 'loan application' to

[238] Appeal ts 78, 82 - 84, 89, 104.

AFIG. In my view that was no more than a momentary slip in language. The primary judge referred to the 'loan application' when his Honour plainly had in mind the 'mortgage purchase application'. Read as a whole the primary reasons reveal that the primary judge was aware of and under no misapprehension as to what was sent to the relevant parties. At [35] of the primary reasons his Honour refers to Mr Lock's receipt of a partially completed loan application form from the Shannons. At [42] of the primary reasons there is reference to a copy of 'what was said to be the loan application' being sent to Genworth Financial. The primary judge found that the information provided in that loan application was a 'complete fabrication'.[239] At [44] of the primary reasons his Honour referred to YHL sending a mortgage purchase application to AFIG.

354 While, for these reasons, I would dismiss ground 1, I accept the premise of the factual contention pressed by the ground. When evaluating whether the Loan Agreement or the Mortgage was 'unjust' for the purpose of s 76 it is necessary to do so on the basis that:

1. No loan application form was provided to (or required by) AFIG or GEL Custodians as part of the loan approval process.

2. YHL did not provide AFIG or GEL Custodians with any information as to the Shannons' income and expenditure or their assets and liabilities.

355 As I would not uphold ground 1, it necessarily follows that I, like Quinlan CJ & Tottle J, would dismiss ground 12 (see [244] above). Ground 2 is prefaced as being 'further to ground 1'. Accordingly, it fails with ground 1. Nevertheless, I accept that YHL provided no information by way of loan application form to AFIG or GEL Custodians providing the Shannons' financial details, ie their annual income and expenditure or their assets and liabilities. Ground 13 also fails to the extent that it is not informed by the agency findings and is instead premised on the primary judge having incorrectly found that YHL provided a loan application form to the respondents.

356 I would, however, uphold the Shannons' challenge to the 'disingenuous finding' - in that respect again adopting the joint reasons (see [249] - [264] above).

[239] Primary reasons [42].

357 While the primary judge was in error in making the disingenuous finding, I consider it to be an error with no or little consequence for his Honour's s 76 finding. The disingenuous finding appears in a section of the primary reasons dealing with the credibility and reliability of the Shannons' evidence. Other adverse findings were not challenged.[240] The disingenuous finding was limited to evidence concerning YHL having informed Elders Real Estate that it had approved a $452,000 loan to the Shannons with the result that the contract to purchase the property became unconditional. The primary judge characterised the evidence as being disingenuous and misleading by reason of the Shannons having failed to refer to other evidence which suggested that the Shannons were concerned to ensure that the approval was forthcoming and notified. The relevance for the eventual s 76 finding was that, in considering the s 76(2) matters relied on by the Shannons, the primary judge had regard to the circumstances that: (1) Mr Shannon had 'pressed' Mr Lock to inform Elders Real Estate of finance approval; and (2) YHL, by Mr Lock, informed Elders Real Estate of the approval 'at the urging' of the Shannons.[241] Those findings are not gainsaid by upholding the challenge to the disingenuous finding.

358 The significance of those additional findings for the s 76 evaluation is another matter, one that I address at [426] - [427] below.

359 The joint reasons refer to additional circumstances, not found or referred to by the primary judge, to be taken into account in the s 76 evaluation (see [245] - [248] above). In post-appeal hearing submissions the Shannons sought to rely on those circumstances. Essentially, the additional circumstances were that the mortgage purchase application submitted by YHL to AFIG failed to attach:

1. A loan proposal letter as provided to the borrower (see 'Step 5' as detailed in [37] above).

2. A service nomination form - the relevant loan being a 'regulated loan' insofar as it was subject to the then *Consumer Credit Code* (WA) (see 'Step 6' as detailed in [39] (dotpoint 7) above).

[240] See eg Primary reasons [12] - [16], [18].
[241] Primary reasons [264]. See also [286].

360 In addition, the absence of this documentation necessarily demonstrated that the mortgage purchase application did not comply with the procedures established in the Operations Manual.[242]

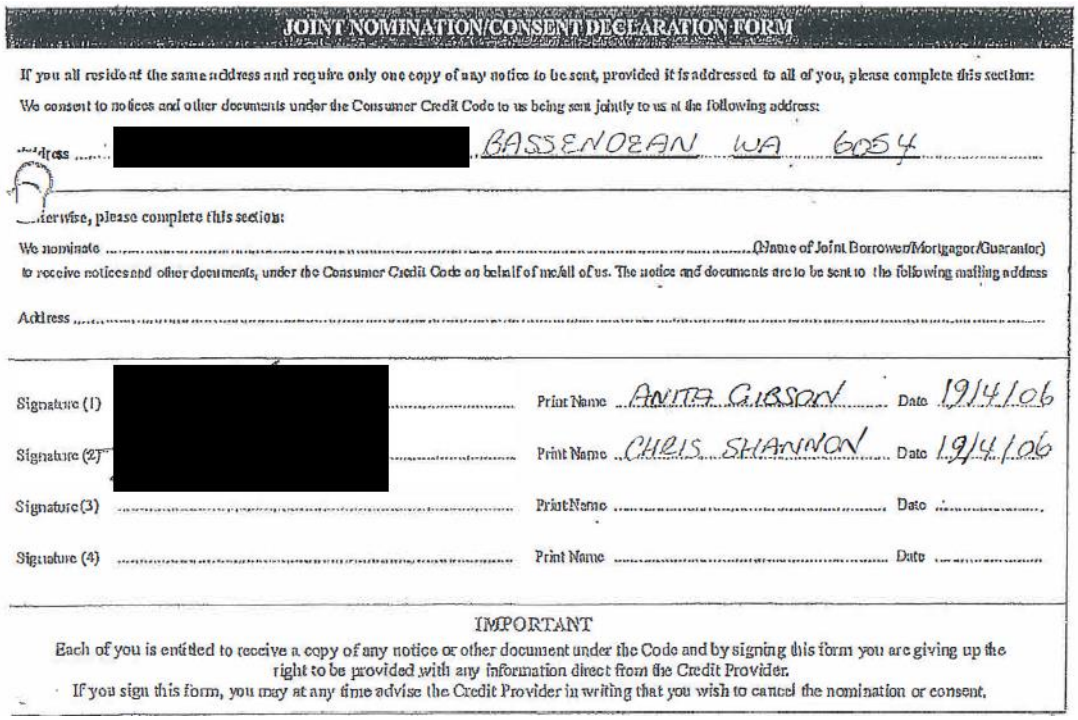
361 In post-appeal hearing submissions the respondents accepted that neither a loan proposal nor a service nomination form was attached to the mortgage purchase application submitted to AFIG.[243] As to the loan proposal, that was contrary to Step 6 of the Loan Submission Process in the Operations Manual[244] and the checklist on the mortgage purchase application itself.[245] There should have been a signed acceptance of the loan proposal letter. The service nomination form was also provided for in Step 6[246] and the checklist.[247] The respondents accepted that there had been a failure to observe these requirements.[248] The respondents further accepted that the absence of the loan proposal and service nomination form, as attachments to the mortgage purchase application as required by the Loan Submission Process in the Operations Manual, might be relevant to the determination under s 76 and form part of the circumstances of the case to be considered in accordance with s 76(2).[249]

362 The loan proposal letter was to take a form depending on the particular product type. What that meant in this particular case was not established on the evidence. However, the Loan Submission Process within the Operations Manual stated that:

> [T]he loan proposal is indicative only and does not oblige the trustee to make the loan available. It is a non-binding statement of intention.[250]

[242] A matter accepted by the respondents. See Respondents' supplementary submissions dated 16 October 2020 par 13.
[243] Respondents' supplementary submissions dated 16 October 2020 par 2.
[244] See [39] above (dotpoint 4).
[245] See [94] above (dotpoint 4).
[246] See [39] above (dotpoint 7).
[247] See [94] above (dotpoint 5).
[248] Respondents' supplementary submissions dated 16 October 2020 pars 2, 3, 9, 11.
[249] Respondents' supplementary submissions dated 16 October 2020 par 11.
[250] GAB 102 (Step 5).

363 The service nomination form was, in the present case, to be in the form provided in page 8 of the loan application form. As completed by the Shannons, this provided:[251]



JOINT NOMINATION/CONSENT DECLARATION FORM

If you all reside at the same address and require only one copy of any notice to be sent, provided it is addressed to all of you, please complete this section:

We consent to notices and other documents under the Consumer Credit Code to us being sent jointly to us at the following address:

Address [redacted] BASSENDEAN WA 6054

Otherwise, please complete this section:

We nominate .....(Name of Joint Borrower/Mortgagor/Guarantor)

to receive notices and other documents, under the Consumer Credit Code on behalf of me/all of us. The notice and documents are to be sent to the following mailing address

Address .....

Signature (1) [redacted] Print Name ANITA GIBSON Date 19/4/06

Signature (2) [redacted] Print Name CHRIS SHANNON Date 19/4/06

Signature (3) ..... Print Name ..... Date .....

Signature (4) ..... Print Name ..... Date .....

IMPORTANT

Each of you is entitled to receive a copy of any notice or other document under the Code and by signing this form you are giving up the right to be provided with any information direct from the Credit Provider.

If you sign this form, you may at any time advise the Credit Provider in writing that you wish to cancel the nomination or consent.

364 Given the respondents' concession, I accept that these additional circumstances may be taken into account although not found or referred to by the primary judge. That said, their significance for the purpose of s 76 is very much in dispute. The respondents submitted that the absence of the documents from the mortgage purchase application as submitted did not suggest a finding that either the Loan Agreement or the Mortgage was unjust.[252] I consider the significance of these additional circumstances at [432] and [437] - [441] below.

365 To my mind, by far the most critical circumstance for the evaluative judgement required by s 76 is the constructive knowledge that is imputed to the relevant respondents (referring to those respondents with roles in the ARMS III securitisation program - in particular AFIG and GEL Custodians).

366 At first instance, the primary judge accepted that YHL was the agent of AFIG, AMS and GEL Custodians for the purpose of providing information and statements in and accompanying the lenders mortgage

[251] GAB 249 (address details and signatures have been redacted).

[252] Respondents' supplementary submissions dated 16 October 2020 par 12. See also pars 13 - 17.

loan insurance.[253] That finding is not challenged by notice of contention. Nor was there any challenge to his Honour's consequential finding that, as it is presumed that the knowledge of an agent in the scope of the agent's authority is imputed or attributed to the principal, AFIG, AMS and GEL Custodians were taken to know certain matters. In particular, the primary judge held that AFIG, AMS and GEL Custodians were to be attributed with YHL's knowledge that: (1) the Shannons had provided no information about their income and their assets and liabilities; and (2) the information about the Shannons' financial circumstances as stated in the lenders mortgage insurance application was false.[254]

367 The respondents accepted that this knowledge was to be attributed to the relevant respondents not only in connection with the dealings to obtain the lenders mortgage insurance but also so far as receipt of the mortgage purchase application was concerned.[255]

368 In connection with his s 76 evaluation the primary judge made reference to the knowledge of YHL that was to be attributed to the relevant respondents (simply mentioning GEL Custodians rather than all the relevant respondents). However, his Honour described this in terms only of knowledge that the Shannons 'had not provided details of their income, assets or liabilities'.[256] In my respectful view, that did not go far enough. It was equally important that the relevant respondents were attributed with YHL's knowledge of the falsity of the information about the Shannons' financial circumstances as stated in the lenders mortgage insurance application - and thus the falsity of the lenders mortgage insurance application itself.

369 In that regard, the respondents accepted at the appeal hearing that the consequence of the primary judge's finding as to attributed knowledge was that GEL Custodians was taken to know of the falsity of the lenders mortgage insurance application. Indeed, the respondents went further, accepting that GEL Custodians was to be taken to know that the mortgage purchase application provided to AFIG (for AMS and GEL Custodians) was also false.[257]

370 As will be seen, the respondents nevertheless argued that, in terms of s 76(2)(l) of the *National Credit Code*, the court should evaluate the

[253] Primary reasons [198].
[254] Primary reasons [198].
[255] Appeal ts 179 - 180. See also appeal ts 177.
[256] Primary reasons [272].
[257] Appeal ts 171 - 172, 179.

transaction on the basis that the lender knew nothing about the Shannons' ability to make repayments without substantial hardship. That contention will be addressed when evaluating whether the Loan Agreement and the Mortgage were unjust. For now, however, the relevance of the matters discussed at [366] - [369] above is the identification of additional circumstances that ought to be taken into account - in the form of knowledge to be attributed to the relevant respondents - although not referred to by the primary judge.

## Section 76 of the *National Credit Code*: the applicable principles

### An 'unjust' credit contract for the purposes of s 76

#### *General considerations*

371 The joint reasons examine the historical predecessors and analogues to s 76. It is, in my view, not necessary to have resort to that fuller historical context for the proper disposition of this appeal. The appeal does not turn on any question of statutory construction. It is enough to refer to some of the authorities that have considered the metes and bounds of s 76 and its statutory predecessors and analogues - the most important of those being s 7(1) of the *Contracts Review Act 1980* (NSW) (as read with s 9 of that Act).

372 Section 76(1) of the *National Credit Code* relevantly provides:

> The court may, if satisfied on the application of a debtor ... that, in the circumstances relating to the relevant credit contract … at the time it was entered into … the contract … was unjust, reopen the transaction that gave rise to the contract …[258]

373 The question is whether the *contract* was unjust not whether the *transaction* was unjust.[259] Importantly, whether or not a contract is unjust is not to be determined solely from the viewpoint of the debtor; it requires an examination of the position of both parties.[260]

374 The term 'unjust' is defined inclusively in s 204. It includes that which is 'unconscionable, harsh or oppressive'. Accordingly, the term 'unjust' extends beyond that which is unconscionable, harsh or oppressive. Nevertheless, due recognition must be accorded to the

[258] For ease of exposition the reproduction of the statutory provision (and the discussion that follows) omits the provision's reference to a mortgage or guarantee and changes to credit contracts, mortgages or guarantees.
[259] ***West v AGC (Advances) Ltd*** (1986) 5 NSWLR 610, 621; ***Baltic Shipping Company v Dillon*** [1991] NSWCA 19; (1991) 22 NSWLR 1, 20; ***Paciocco v Australia and New Zealand Banking Group Ltd*** [2014] FCA 35; (2014) 309 ALR 249 [318].
[260] ***West v AGC (Advances) Ltd*** (626).

circumstance that the touchstone is that the contract be 'unjust' rather than merely 'unfair'[261] or 'unreasonable'.[262] Section 76 is concerned with a credit contract that is not *just*, ie not conforming to or consonant with what is honest, proper and right. The content of the concept is given practical operation by the permissible considerations as listed in s 76(2), although those factors are to be viewed as a guide rather than an exhaustive definition.[263] 'Unjust' is not a word or a concept with immutable or unvarying content.[264] In every respect the assessment of 'unjustness' is fact sensitive. Also, as has been recognised by Spigelman CJ, in adopting so general and variable a standard as 'unjust' the legislature intends the court to apply contemporary community standards of what is just or unjust - standards that may vary over time.[265]

375 The enquiry has been described, aptly, as a conclusion of ultimate fact involving a 'broadly based value judgement'[266] or an 'evaluative judgement'.[267]

376 In determining whether a term of a credit contract is unjust in the circumstances relating to it at the time it was entered into, the court 'is to have regard to the public interest' (s 76(2)). Thus the public interest is a mandatory consideration. The relevant public interest is not defined. It requires weighing and balancing the evident purpose of s 76 - one of consumer protection in redressing the effect of unjust credit contracts - and the need to maintain the integrity of contracts.[268] For while the court is required to consider the relevance of the public interest that parties should generally be kept to their agreements:

> [o]bviously, the Act contemplates that they should not be kept to agreements which are 'unjust' by reference to the criteria referred to in [s 76(2)] or any other matter properly emerging from a reflection on 'all the circumstances of the case'.[269]

---

[261] ***West v AGC (Advances) Ltd*** (621 - 622).
[262] ***Baltic Shipping Company v Dillon*** (19).
[263] ***West v AGC (Advances) Ltd*** (621); ***Baltic Shipping Company v Dillon*** (20).
[264] ***Tonto Home Loans Australia Pty Ltd v Tavares*** [2011] NSWCA 389; (2011) 15 BPR 29,699 [266].
[265] ***Perpetual Trustee Company Ltd v Khoshaba*** [2006] NSWCA 41; (2005) 14 BPR 26,639 [64].
[266] ***Perpetual Trustee Company Ltd v Khoshaba*** [40]; ***Riz v Perpetual Trustee Australia Ltd*** [2007] NSWSC 1153; (2008) NSW Conv R 56–198 [51].
[267] ***Perpetual Trustee Company Ltd v Khoshaba*** [99], [107].
[268] ***Baltic Shipping Company v Dillon*** (20); ***Tonto Home Loans Australia Pty Ltd v Tavares*** [269] - [270].
[269] ***Baltic Shipping Company v Dillon*** (20). See also (9) (referring to the 'general policy of the law … that people should honour their contracts').

377 It has also been suggested that the reference to the public interest directs attention to whether the lender's conduct in relation to the credit contract offends against community standards of business morality.[270]

378 The question of whether a credit contract is unjust may include consideration of notions of injustice. That is inherent in the use of the term 'unjust'. The relevance of injustice is made express by s 76(4). In determining whether a credit contract is unjust the court 'is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the contract … was entered into or changed'. Plainly, however, by excluding such considerations, the legislation permits the court to have regard to injustice arising from circumstances that were reasonably foreseeable when the credit contract was entered into or changed.

379 The authorities have identified that the relevant injustice may involve one or both of procedural or substantive injustice. 'Procedural injustice' is where a contract is unjust because of the unfairness of the methods used to make it. 'Substantive injustice' is where a contract is unjust because of its terms, consequences or effects.[271] In short, a credit contract may be unjust because of the circumstances in which it came into being as well as: (1) because its terms are unjust; or (2) its effect on the debtor is unjust. Thus a contract may be unjust because of peculiarities inherent in the circumstances of one of the parties of which the other party is ignorant.[272] There is no requirement of 'moral obloquy' on the part of the person against whom relief is sought.[273]

380 So understood, s 76 does not require the debtor's counterparty to know of or be on notice of the circumstances rendering the credit contract unjust.

---

[270] ***Custom Credit Corporation Ltd v Lupi*** [1992] 1 VR 99, 105.

[271] ***West v AGC (Advances) Ltd*** (620).

[272] ***Baltic Shipping Company v Dillon*** (20). See also: ***West v AGC (Advances) Ltd*** (620); ***Beneficial Finance Corporation Ltd v Karavas*** (1991) 23 NSWLR 256, 277; ***St George Bank Ltd v Trimarchi*** [2004] NSWCA 120 [36], [45]; ***Perpetual Trustee Company Ltd v Khoshaba*** [117] - [119]; ***Kowalczuk v Accom Finance Pty Ltd*** [2008] NSWCA 343; (2008) 77 NSWLR 205 [86]. However, knowledge or lack of knowledge will be relevant to the exercise of the court's discretion under s 76(1): ***Collier v Moreland Finance Corp (Vic) Pty Ltd*** (1989) 6 BPR [97462], 13337 - 13338.

[273] ***Fast Fix Loans Pty Ltd v Samardzic*** [2011] NSWCA 260; (2011) 15 BPR 29,445 [50]. This difference with the requirements for unconscionability under s 12CA or s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) explaining the result in ***Tonto Home Loans Australia Pty Ltd v Tavares*** (there being a finding that various contracts were unjust notwithstanding the failure of unconscionability claims in relation to the same contracts). See ***Tonto Home Loans Australia Pty Ltd v Tavares*** [290] - [295].

381 The counterparty's ignorance of the circumstances said to render the credit contract unjust may not preclude a finding that the contract is unjust. It will, however, be a circumstance of the case to which the court is to have regard in evaluating whether the contract is unjust. It will not always be that such lack of knowledge is a circumstance militating against a finding of unjustness. For example, the lack of knowledge of a lender as to the financial circumstances of a debtor may be a product of the lender's failure to inquire as to those circumstances.[274]

382 In considering whether a credit contract is unjust in the circumstances relating to it at the time it was entered into, the court may consider the matters listed in s 76(2)(a) - (p) and is to have regard to the public interest and all the circumstances of the case (s 76(2)). A credit contract will not be unjust merely because one of the permissive criteria in s 76(2) applies; the criteria are to be considered in all the circumstances of the case. However, a contract may be unjust even though none of the s 76(2) criteria are present.[275]

***Section 76(2)(l): reasonable inquiry as to the debtor's capacity to pay***

383 At the appeal hearing, the parties referred to s 76(2)(l) of the *National Credit Code*. One of the circumstances to which the court may have regard is:

> whether at the time the contract … was entered into … the credit provider knew, or could have ascertained by reasonable inquiry at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship;

384 At the relevant time there was no statutory obligation imposed on a lender to make reasonable inquiries to be satisfied that an intended borrower was able to service a prospective loan.[276] As the joint reasons observe (see [140] above), the primary judge also identified a line of cases which rejected, under the general law, the imposition of various duties of care claimed to be owed by a lender to a prospective borrower.[277] These included putative general law duties: (1) to advise or protect the borrower against fraud; (2) to assess the capacity of the

[274] See eg ***Fast Fix Loans Pty Ltd v Samardzic*** [51].
[275] ***Barker v GE Mortgage Solutions Ltd*** [2013] QCA 137 [64]. See also ***West v AGC (Advances) Ltd*** (621).
[276] The primary judge held, correctly, that the responsible lender provisions in pt 3-1 of the *National Consumer Credit Protection Act 2009* (Cth) were not in operation at the time that the Shannons entered into the Loan Agreement and the Mortgage and that those provisions did not operate retrospectively: Primary reasons [275]. The Shannons accepted that this finding was correct: Appellants' submissions par 69 WAB 16.
[277] Primary reasons [276] - [277], [279].

borrower to repay a loan or to ascertain the viability of a loan; (3) to verify or check the accuracy of the information provided in a borrower's loan application; or (4) to warn or to guard against risk of loss. Those conclusions were not challenged on appeal.

385 These conclusions as to the confined general law duties of a lender are of some, albeit limited, usefulness in evaluating unjustness in the present case. The primary judge made no findings as to specific duties of the respondents in the circumstances of this case; the findings were expressed in terms of the general common law duties and simply noted that a specific duty may arise at common law in some circumstances. Moreover, none of the authorities relied on were concerned with whether a credit contract was unjust for the purpose and within the meaning of s 76 of the *National Credit Code*.

386 It should not be assumed that the beneficial operation of s 76 is to be frustrated by the confined obligations imposed on lenders under the general law. The power provided by s 76 ought not be read down by reference to general law precepts which pre-date the enactment of the legislation. A credit contract may be unjust in circumstances where there was no pre-existing duty owed by a lender to a borrower to act in a particular way[278] and without there being any breach of a general law duty.[279] At most, the confined general law duties are of some guide to contemporary community standards. By far the more significant consideration, in my view, is that which is provided for in s 76(2)(l). Insofar as the court may have regard to whether the credit provider could have ascertained 'by reasonable inquiry' that the debtor could not pay in accordance with the terms of the credit contract (or not do so without substantial hardship) it is implicit that the court may have regard to whether reasonable inquiries were made.

387 In that respect it is established that a lender's failure to make an inquiry as referred to in s 76(2)(l) is a circumstance that may be taken into account in making a determination as to whether a credit contract was unjust.[280]

[278] ***Perpetual Trustee Company Ltd v Khoshaba*** [115]. To similar effect see the joint reasons at [176] above.
[279] ***Perpetual Trustee Company Ltd v Khoshaba*** [127].
[280] ***Barker v GE Mortgage Solutions Ltd*** [70]. See also ***Buccoliero v Commonwealth Bank of Australia*** [2011] NSWCA 371; (2011) 16 BPR 30,333 [71].

388 The primary judge also referred to ***Kowalczuk v Accom Finance Pty Ltd***.[281] There, the Court of Appeal in New South Wales refused to accept that:

> [A] lender is *always* bound to carry out a detailed investigation of the practicality of an intending borrower actually being able to carry through the plan the borrower says he or she has for repayment of the loan.[282] (emphasis added)

389 Four things should be said about that passage. First, it follows an acknowledgement that in some circumstances knowledge of a high degree of risk that there might be a default and consequential mortgagee sale may constitute unjust lending. Second, it responded to a submission that a lender who was not acting unjustly should look into the prospect of refinancing (that being the proposed method of repayment in the case), and, if that prospect was too risky, the lender should refuse the loan. In that context the passage at [388] above is uncontroversial. It simply rejects that - whatever the circumstances - a lender is *always* duty bound to investigate the prospective borrower's ability to repay a loan as intended. On the facts in ***Kowalczuk*** there was said to be no occasion for the lender to doubt the prospective borrower's statement that he would be able to refinance the loan. Third, the statement admits of the possibility that there will be circumstances in which a credit contract is unjust because, among other things, the lender did not make reasonable inquiries as to the prospective borrower's ability to carry out its proposed method of repayment. Fourth, nothing in the passage gainsays the proposition that that a lender's failure to make an inquiry as referred to in s 76(2)(l) is a circumstance that may be taken into account in evaluating whether a credit contract is unjust.

390 The primary judge relied on ***Riz v Perpetual Trustee Australia Ltd*** as establishing that 'the provision of false information by or on behalf of a borrower to a lender does not make a loan unjust'.[283] The relevant passage in ***Riz*** provides:

> The submission that Perpetual [the lender] ought to have discovered the true position of Mr and Mrs Riz [the debtors] bespeaks an assumption that a lender ought to have a high index of suspicion that its borrower (or agent) is endeavouring to defraud it, and is bound in the borrower's interest to be very alert for such fraud. A prospective borrower is not

[281] Primary reasons [278].
[282] ***Kowalczuk v Accom Finance Pty Ltd*** [99] (approved in ***Buccoliero v Commonwealth Bank of Australia*** [70]).
[283] Primary reasons [279]. See [140] above.

> entitled to expect the lender to be alert for fraud by or on behalf of the borrower; and a lender is not required, in the interests of the borrower, to have a high index of suspicion for fraud by the borrower or the borrower's agent. *A lender's failure to detect fraud by or on behalf of a borrower does not weigh significantly in favour of a finding that the consequent loan contract is unjust. To hold that the undetected provision of false information by or on behalf of a borrower to a lender in an attempt to obtain a loan resulted in the loan contract being unjust against the lender would be to invert commonsense, logic and justice, by protecting the wrongdoer against the victim.* To grant remedies under the *Contracts Review Act* on such grounds would be to convert an Act, intended to achieve just results, into an instrument of injustice.[284] (emphasis added)

391 Read in context the passage does not establish any general principle to the effect of that relied on in the primary reasons. The passage as quoted is preceded by Brereton J stating that the evidence did not demonstrate any indifference or recklessness on the part of the lender. His Honour did not accept that, although the lender did not know the debtors' true circumstances, it should have ascertained them. It was said that, in the circumstances of the case, a reasonable lender assessing the loan for serviceability would not have seen anything remarkable or sinister about the false information provided on behalf of the debtors. Unlike the present case, ***Riz v Perpetual Trustee Australia Ltd*** was not a case where the lender is attributed with knowledge that the debtors had not provided any financial information and the relevant applications made on their behalf were false.

392 The quoted passage from ***Riz v Perpetual Trustee Australia Ltd*** does no more than explain Brereton J's reasons for concluding that, in the circumstances of the case before his Honour, the provision of false information by or on behalf of a debtor to a lender did not make the resultant credit contract unjust. Relevantly, the lender did not know that the information was or might be false and was not put on notice that the information was or might be false.

393 In ***Riz v Perpetual Trustee Australia Ltd*** Brereton J also distinguished the case before him from the circumstances in ***Perpetual Trustee Company Ltd v Khoshaba***.[285]

394 The joint reasons have already summarised the circumstances and conclusion of the Court of Appeal in New South Wales in ***Khoshaba*** (see [181] - [185]). I will not repeat what is stated in the joint reasons.

---

[284] ***Riz v Perpetual Trustee Australia Ltd*** [78].
[285] ***Riz v Perpetual Trustee Australia Ltd*** [79].

However, it is worth noting that it does not appear that the primary judge was referred to ***Khoshaba***.[286] As Brereton J observed in ***Riz***, in ***Khoshaba*** the circumstance that the statement of the purpose of the loan was left blank and that the lender made no inquiry about the purpose were decisive[287] - although, as I note below, it was the lender's indifference as to the borrower's ability to repay which was determinative, not any suggestion that the lender had to determine that the proposed investment was reasonable and capable of servicing the loan.[288] In all the circumstances it was not possible to regard the lender as an 'innocent party'.[289]

395 ***Perpetual Trustee Company Ltd v Khoshaba*** establishes that an absence of inquiry on the part of the lender may be a relevant circumstance in evaluating whether a loan and security is unjust.[290] Relevantly:

1. In circumstances where the loan application was incomplete (the purpose of the loan being blank) the lender failed to observe its own guidelines - while the purpose of such guidelines may be to enable the lender to assess and minimise its own risk there is an indirect benefit to the intended debtor in there being a proper risk assessment which may, in appropriate circumstances, be entitled to 'significant weight' in determining unjustness.[291]

2. The failure to make the inquiry reinforced the conclusion that the lender was prepared to act on the basis of adequate security alone.[292] The lender's 'indifference' as to the purpose of the loan indicated that the lender was content to proceed on the basis of simply enforcing the security (as opposed to repayment by other means).[293] In the circumstances of the case (including that the borrowers were low income earning pensioners and the security

[286] It is not mentioned in the Primary reasons and was not referred to in the trial transcript.
[287] ***Riz v Perpetual Trustee Australia Ltd*** [79].
[288] ***Perpetual Trustee Company Ltd v Khoshaba*** [92], [96] (see also [81] - [85]).
[289] ***Perpetual Trustee Company Ltd v Khoshaba*** [96].
[290] ***Perpetual Trustee Company Ltd v Khoshaba*** [80] - [85] (esp [84]), [92], [126].
[291] ***Perpetual Trustee Company Ltd v Khoshaba*** [80]. The acceptance that the following of lending guidelines confers a benefit on the borrower as well as the lender has been endorsed in subsequent decisions in New South Wales. See: ***Kowalczuk v Accom Finance Pty Ltd*** [102]; and ***Tonto Home Loans Australia Pty Ltd v Tavares*** [259] (it 'confers a *direct* benefit on a prospective borrower by identifying risky loans and preventing fraud' (emphasis added)).
[292] ***Perpetual Trustee Company Ltd v Khoshaba*** [84].
[293] ***Perpetual Trustee Company Ltd v Khoshaba*** [92], [96].

comprised their family home) that attitude weighed significantly in the public interest and the determination of unjustness.[294]

396 ***Perpetual Trustee Company Ltd v Khoshaba*** is sometimes referred to as an 'asset lending' case. Presumably that is because Basten JA referred to the concept (the relevant passage is reproduced in the joint reasons at [185] above).[295] That characterisation is irrelevant for present purposes. In considering whether a credit contract is unjust the court must examine the whole of the circumstances and not just rely on labels.[296] To the extent that it matters - and I consider it does not - I do not regard this appeal as raising the paradigm 'pure asset lending' scenario as was criticised by Basten JA in ***Khoshaba***. There is more to the present case than a simple absence of knowledge - and mere indifference - as to the Shannons' financial position and capacity to pay.

***The relevance of the credit provider's business structure***

397 The joint reasons record the parties' respective contentions as to the structure established by the relevant respondents under the ARMS III program (see [189] - [192]). I agree with Quinlan CJ & Tottle J that there was nothing unlawful in the way that the relevant respondents structured their mortgage loans originating and management program (see [193] above). More importantly, however, I agree that this does not mean that the nature of the structure employed by the relevant respondents is irrelevant for the evaluative judgement as to whether the Loan Agreement and the Mortgage were unjust (see [193] and [212] above).

398 The joint reasons contain a substantial discussion as to the facts and outcome in ***Tonto Home Loans Australia Pty Ltd v Tavares*** (see [199] - [207] above).

399 It is plain that, in ***Tonto Home Loans Australia Pty Ltd v Tavares***, the structural arrangements were significant to the eventual finding that the relevant loan agreements were unjust. The business structure put in place by the lenders, and the way in which it was operated, gave rise to an inherent or systemic risk of exaggeration and fraud which came to pass insofar as it resulted in loan contracts which would not have been entered into without false information. That, coupled with a loose

[294] ***Perpetual Trustee Company Ltd v Khoshaba*** [83], [85], [128], [131].
[295] See also ***Perpetual Trustee Company Ltd v Khoshaba*** [131]. Spigelman CJ did not use the term 'asset lending' but had regard to a similar concept: [82], [84].
[296] ***Fast Fix Loans Pty Ltd v Samardzic*** [43]; ***Tonto Home Loans Australia Pty Ltd v Tavares*** [3]; ***Buccoliero v Commonwealth Bank of Australia*** [69].

operation of lending guidelines in a way which reflected a real lack of concern as to the suitability of the borrowers and serviceability, resulted in a finding that it was just to recognise the significant responsibility of the lenders notwithstanding that the entity perpetrating the fraud was not, in law, the agent of the lenders. The unjustness of the contracts was to be seen as unjustness affecting the lenders even though the fraudulent behaviour that was engaged in to procure the loans was conduct on the part of an intermediary 'introducer' rather than the lenders.[297]

400 Apart from the recognition that business structure may be a material consideration in assessing unjustness, ***Tonto Home Loans Australia Pty Ltd v Tavares*** contains an insightful discussion of the relevance of the public interest in this context. Allsop P (Bathurst CJ & Campbell JA agreeing) stated:

> Procedures that promote suitable borrowings and operate as checks against fraud should be seen not only as matters for the lenders to comply with or not as they choose, but as indirect guards against conduct that can produce injustice to members of the public and thus undermine confidence in the free and fair operation of financial markets.[298]

401 Allsop P rejected any suggestion that it was part of the purpose of the relevant Act - there the *Contracts Review Act* - to lay down rules for good banking practice.[299] However, his Honour went on to say:

> [T]o the extent that the organisation of lending programmes, through sub-contracted intermediaries, has the capacity to generate risk of lending to duped, misled or inappropriate borrowers and such structures are administered without clear operational regard for the lending guidelines, it is in the public interest to administer the *CRA* to protect such people. *Such protection will, in the public interest, encourage the recognition by lenders that the safeguards in such structures to avoid or minimise fraud or misleading conduct should be rigorously applied*. … [I]t conforms to the public interest to take into account … systemic and operational failure in order to assist to promote conditions that will make it more difficult for such conduct to exist, and thus encourage circumstances more conducive to free and just contracts.[300] (emphasis added)

402 The public interest consideration so expressed is, I consider, a more specific aspect of the advancement of consumer protection and the promotion of just credit contracts as has been referred to at [376] above.

---

[297] ***Tonto Home Loans Australia Pty Ltd v Tavares*** [254] - [256], [258] - [259], [264] - [266], [272].
[298] ***Tonto Home Loans Australia Pty Ltd v Tavares*** [271].
[299] ***Tonto Home Loans Australia Pty Ltd v Tavares*** [271].
[300] ***Tonto Home Loans Australia Pty Ltd v Tavares*** [271].

***The difficulty in extracting general principles of law from the previous authorities***

403 A finding that a credit contract was unjust, in the circumstances relating to the contract at the time it was entered into, is - as I have sought to emphasise - evaluative and fact sensitive.

404 In setting out my understanding of the principles that arise in the application of s 76 of the *National Credit Code* I have avoided detailed reference to the facts and outcomes in the various lending cases to which the parties referred the court. I have done so advisedly. In this area of jurisprudence there is a real danger (as there is in many other areas) of elevating a determination on the specific facts of a particular case to a supposed general rule of universal application to other cases. There is value in reading the authorities to see how the 'unjust' criteria has been applied in different circumstances. But having done so, it should be appreciated that each case depends on its particular facts and the circumstances in the present appeal are distinctive.

405 The true position is that, consistent with what was explained by Spigelman CJ in ***Perpetual Trustee Company Ltd v Khoshaba***, where the standard is as general as the criterion of 'unjust' as it appears in s 76(1), the court is not confined by reasoning directed to the discrete issues in the particular facts of an individual case as if they established a general principle for universal application in all cases in which s 76 is invoked.[301]

**The three-step approach to the application of s 76**

406 An application invoking s 76 of the *National Credit Code* involves a three-tiered exercise:[302]

1. First, the court must ascertain the primary facts relevant to the question of whether the credit contract is unjust.

2. Second, the court must determine whether the credit contract is unjust.

3. Third, the court must decide as a matter of discretion what, if any, relief should be ordered.

[301] ***Perpetual Trustee Company Ltd v Khoshaba*** [73].
[302] ***Perpetual Trustee Company Ltd v Khoshaba*** [99], [106] - [107], [109].

407 In the present case, the primary facts are those found at first instance as reviewed and augmented in these reasons. I am about to turn to the second step. There is, however, no need, in these reasons, to consider the third step. Whether relief is to be granted, and the form of any such relief, was left to await the outcome of the appeal hearing. For now it is enough to observe that relief is discretionary: the court 'may' reopen the transaction (s 76(1)). Where the discretion is enlivened the court may have regard to the conduct of the parties in the proceedings (s 76(5)). The various orders that the court may make if it reopens a transaction are specified in s 77.

408 It is, however, worth recording that where a contract is found unjust by reason of circumstances not known to one of the contracting parties, it does not automatically follow that relief will be given to remedy that injustice.[303]

## Appellate review of a finding pursuant to s 76

409 The joint reasons observe that the 'correctness standard' of appellate review applies to a finding under s 76(1) of the *National Credit Code* (see [159] - [161] above). I agree. Although evaluative, the legal criterion to be applied - whether the court is satisfied in terms of s 76(1) - admits only of a unique outcome:[304] the Loan Agreement and the Mortgage either were or were not 'unjust' for the purpose and within the meaning of s 76(1). The finding involves a judgement (albeit evaluative) as to whether the facts as found satisfy a statutory description rather than the exercise of a discretion.[305]

410 Accordingly, whether, on the given set of facts, the Loan Agreement and the Mortgage were unjust, must be determined by this court without the deference that applies to discretionary decisions and some evaluative decisions. In deciding upon the correct conclusion, while giving appropriate weight to the primary judge's view, the court must reach and give effect to its own conclusion.[306]

## Evaluation: were the Loan Agreement and the Mortgage unjust?

411 It will be appreciated that, to this point, I have dealt with all grounds of appeal other than grounds 3, 4, 10, 11, 16 and 17.

---

[303] ***Kowalczuk v Accom Finance Pty Ltd*** [88].

[304] ***Minister for Immigration and Border Protection v SZVFW*** [2018] HCA 30; (2018) 264 CLR 541 [46], [48] - [49].

[305] ***Perpetual Trustee Company Ltd v Khoshaba*** [34], [107].

[306] ***Warren v Coombes*** [1979] HCA 9; (1979) 142 CLR 531, 551 - 553. See also, by analogy, ***Lightfoot v Rockingham Wild Encounters Pty Ltd*** [2018] WASCA 205 [57].

> Ground 10 raises a discrete factual issue and is conveniently dealt with when considering the way in which the primary judge came to his Honour's s 76 finding. Otherwise, as I read the remaining grounds in light of the manner in which they were presented and responded to by the parties, in substance they raise a single question: did the primary judge err in fact or law in not concluding that, in the circumstances relating to the Loan Agreement and the Mortgage at the time they were entered into, the Loan Agreement and the Mortgage were unjust within the meaning and for the purpose of s 76(1) of the *National Credit Code*?[307]

412 In any event, even if one of the remaining grounds was upheld - thus impugning some aspect of the primary judge's reasoning and eventual finding - it would be necessary to come back to that question and resolve it in favour of the Shannons if the appeal is to be allowed. Accordingly, I will consider the remaining grounds as a whole in the prism of the question I have identified in [411] above. All the more so it is appropriate to do so insofar as the standard of appellate review is one of correctness.

**Circumstances against the Loan Agreement and the Mortgage being 'unjust'**

413 A number of circumstances militate against a finding that the Loan Agreement and the Mortgage were unjust:

1. The terms and conditions of the Loan Agreement and the Mortgage are, as the primary judge correctly found,[308] unexceptional. In particular:

    (a) there was nothing unusual in the terms[309] - nothing could even arguably be contended to be unreasonable or unfair let alone unjust (see s 76(2)(e) and (m));[310]

    (b) the form and language of the Loan Agreement and the Mortgage was clear and intelligible (see s 76(2)(g)).

[307] Primary reasons [280], [287].
[308] Primary reasons [266], [280].
[309] Primary reasons [41].
[310] So far as the appellants relied on s 76(2)(e) before the primary judge the argument raised was, in my view, one which ought to be assessed within the rubric of s 76(2)(a). See Primary reasons [265]. The argument was that Loan Agreement imposed a condition - repayment - which could not be complied with given the Shannons' financial position.

2. While the Shannons did not obtain any independent legal or other expert advice, the letter accompanying the Loan Agreement and the Mortgage recommended that they obtain independent advice (see s 76(2)(h)). The Shannons read and understood that recommendation but elected not to obtain legal or other expert advice.[311]

3. The Shannons were not subjected to any relevant unfair pressure, undue influence or unfair tactics (see s 76(2)(j)).[312] To the contrary, on the facts, the Shannons were given time to review the Loan Agreement and the Mortgage. The Shannons did not simply sign and return the documents without reading them because pressure was exerted on them. The primary judge found that the Shannons spent hours reading the Loan Agreement and the Mortgage before signing and return them.[313]

4. The primary judge made findings to the effect that the Shannons understood the legal and practical effect of entering into the Loan Agreement and the Mortgage (see s 76(2)(i)).[314] In that respect there was no reason to believe that the Shannons were not reasonably able to protect their interests because of their age or physical condition, the Shannons never relying on s 76(2)(f).

5. There was a finding that measures were taken to ensure that the Shannons understood the nature and implications of the Loan Agreement and the Mortgage (see s 76(2)(k)).[315] The documents were sent to the Shannons' home so that they could review them and the Shannons spent hours doing so. The Shannons also signed an acknowledgement that they had read and understood the documents.[316]

414 The circumstances previously referred to are factors which, in the circumstances of the case, the court should have regard to in assessing whether the Loan Agreement and the Mortgage were unjust. There are two other circumstances which are of significant weight against a finding that the Loan Agreement and the Mortgage were unjust.

---

[311] Primary reasons [267].
[312] Primary reasons [269].
[313] Primary reasons [264], [269] - [270].
[314] Primary reasons [41], [268] (the Shannons 'understood the amount of the Loan, the term of the Loan, the rate of interest and the repayments'), [270] (the Shannons 'did not identify any provision in the documents which they did not understand …'). See also [286].
[315] Primary reasons [270].
[316] Primary reasons [264], [268] - [270].

415 First, the Shannons thought that they could afford the loan repayments.[317] It was found, however, that the Shannons could not afford the loan and would not be able to meet the repayments without substantial hardship unless there was some change in their financial circumstances for the better.[318] In a finding that was not challenged on appeal, the primary judge found that the Shannons did not have reasonable grounds for believing that they could make the monthly mortgage payments. For example, the Shannons did not have available to them any profit and loss statements of cash flow statements, budgets or projections for their business.[319]

416 In the latter respect, the Shannons entered into the Loan Agreement without making any proper inquiry or assessment as to whether they could afford the repayments without substantial hardship or at all.[320]

417 Accordingly, this is not a case where the borrowers' belief that they could meet the repayments under a proposed loan was due to any conduct attributable to the lender. The Shannons formed that belief as a result of their own assessment.[321] Neither YHL nor GEL Custodians made any representations to the Shannons concerning their capacity to meet the repayments. Rather, as the primary judge found, the Shannons knew of the monthly payment amounts and turned their mind to whether they could make the repayments without substantial hardship.[322] The Shannons were wrong in their assessment as to their capacity to pay - and, in so concluding, did not make proper inquiry and came to a conclusion without reasonable grounds. In this respect the Shannons were the authors of their own misfortune.

418 Second, the Shannons did not provide any financial information in making the loan application. It was self-evident that the loan application anticipated that such information would be provided. The Shannons must be taken to have submitted the loan application knowing that they had not completed it by providing any financial information.[323] In that respect the primary judge observed that the Shannons offered no explanation as to how they thought the loan

[317] Primary reasons [29], [31] - [32]. See also [265].
[318] Primary reasons [29] - [30]. See also [239], [241].
[319] Primary reasons [31].
[320] Primary reasons [284].
[321] Primary reasons [32].
[322] Primary reasons [32], [265]. See also [285] - [286].
[323] See Primary reasons [265], [286].

application might be processed and approved without their provision of the financial information required in the loan application form.[324]

419 Two things follow from the Shannons' non-provision of any financial information when submitting the loan application form to YHL:

1. The Shannons, acting reasonably, could not have thought at the relevant time that YHL or GEL Custodians would form or did in fact form any view as to whether the Shannons, as intended borrowers, could pay the monthly loan payments either at all or not without substantial hardship - neither YHL nor GEL Custodians had a reasonable basis on which to come to such an assessment.

2. In that respect the absence of financial information confirms that the Shannons formed their own assessment as to the Shannons' ability, as intended borrowers, to afford the monthly loan payments either at all or not without substantial hardship.

420 So understood, it is somewhat incongruous that the Shannons now complain that any reasonable inquiry or checking by the relevant respondents in 2006 would have determined that the Shannons could not pay at all in accordance with the terms of the Loan Agreement and the Mortgage, let alone without substantial hardship.[325] The Shannons, by their actions in not completing the financial information section of the loan application form, seemingly eschewed any reliance on such reasonable inquiry and assessment of the loan application by the relevant respondents. The Shannons knew that they had not provided any financial information to YHL and that they had not completed the required information on the loan application form concerning income and financial position.

## Neutral circumstances

421 The primary judge relied on various other circumstances in concluding that the Loan Agreement and the Mortgage were not unjust. One of them was that the Shannons signed the loan application form in blank with no information concerning their income and assets and liabilities. The primary judge characterised this as 'careless' and as having 'facilitated the fraud by YHL'.[326] This was challenged by

[324] Primary reasons [283].
[325] See the contention recorded at Primary reasons [271].
[326] Primary reasons [283].

ground 10. I do not accept that this aspect of the Shannons' conduct was careless. All the more so I do not accept that it facilitated YHL's fraud in a way which adversely affects the Shannons' claim pursuant to s 76.

422 I appreciate that in ***Tonto Home Loans Australia Pty Ltd v Tavares*** Allsop P considered that the borrowers' conduct in signing incomplete or blank documents was careless and gave the opportunity for fraud.[327] The facts in ***Tonto Home Loans Australia Pty Ltd*** were different to the present case. In the present case Mr Lock was well known to the Shannons. There is nothing in the facts to suggest that the Shannons knew or ought to have known or were otherwise on notice that Mr Lock or YHL might engage in fraudulent activities of the type that occurred. To all outward appearances, YHL was a reputable mortgage lending originator and manager and Mr Lock was acting properly as an officer of YHL. Members of the public who have engaged a professional service provider are entitled to expect that the provider (and its officers) will act honestly unless and until put on notice of circumstances that might suggest the contrary - all the more so where the relevant person is known personally and there is no reason to believe that he or she will engage in fraudulent and dishonest activities.

423 In the circumstances I do not accept that the Shannons were careless in submitting the loan application form with blank pages. For the reasons already stated I accept that the failure to provide any financial information is a circumstance militating against a finding that the Loan Agreement and the Mortgage were unjust. But this is not because the Shannnons were careless by making themselves vulnerable to YHL's fraud. I am unable to accept that a reasonable person in the Shannons' position would have struck through all parts of the loan application which were not completed - which, in substance, is what is suggested in finding that the Shannons were careless and facilitated the fraud committed by YHL.

424 Ground 10 should be upheld insofar as it challenges this aspect of the primary judge's reasoning.

[327] ***Tonto Home Loans Australia Pty Ltd v Tavares*** [261].

425 There are other circumstances which I also consider to be essentially neutral in terms of whether the Loan Agreement and the Mortgage were unjust:

1. This is not a case where inequality in bargaining power could render the Loan Agreement and the Mortgage unjust (see s 76(2)(b)). The contractual provisions were neither unfair nor unreasonable.[328]

2. Nor, for the same reason, was the lack of negotiation of the contractual provisions - and the fact that it was not reasonably practicable for the Shannons to seek the modification or rejection of the contractual provisions - of any significance to the evaluative judgement required by s 76(1) (see s 76(2)(c) - (d)).

3. GEL Custodians did not explain the legal and practical effect of the Loan Agreement and the Mortgage to the Shannons (see s 76(2)(i)).[329] This omission is of no practical significance given the finding that the Shannons understood the legal and practical effect of entering into the Loan Agreement and the Mortgage as referred to at [413.4] above.

426 In concluding that the Loan Agreement and the Mortgage were not unjust the primary judge also relied on the relationship between the Shannons and Mr Lock - they being said to be 'fairly close friends' - and that the Shannons urged and pressed YHL to obtain finance approval for the loan.[330]

427 I regard both matters as being essentially neutral for the purpose of the s 76 evaluation. The friendship between the Shannons and Mr Lock had no bearing on YHL's fraudulent conduct. There is no suggestion that the Shannons were involved in or aware of YHL's fraudulent conduct. The fact that there was a friendship between the Shannons and Mr Lock provides no fiat to attribute any wrongdoing to the Shannons. In any event, the friendship between the Shannons and Mr Lock is balanced out by the commercial relationship between YHL and AFIG. Even less significance may be attached to the Shannons having urged and pressed YHL to obtain finance approval. YHL, by Mr Lock, was approached to obtain finance prior to entry into the

[328] ***West v AGC (Advances) Ltd*** (621).
[329] Primary reasons [268].
[330] Primary reasons [286].

contract to purchase the property. The contract was conditional on finance approval being obtained by 22 May 2006. It is entirely unsurprising that the Shannons would have been urging and pressing YHL to obtain the finance approval within the time provided for under the contract to purchase the property. The Shannons' actions in doing so are of no consequence for finding the Loan Agreement and the Mortgage to be 'unjust' or 'not unjust' for the purposes of s 76 of the *National Credit Code*.

**Circumstances in favour of the Loan Agreement and the Mortgage being 'unjust'**

428 The primary judge considered that any unjustness arose, if at all, by reason of YHL's fraud practised on AFIG and GEL Custodians and the Shannons' inability to meet the mortgage repayments without substantial hardship or at all.[331]

429 While those circumstances are certainly to be taken into account, they are not, in my view, the only circumstances that militated in favour of a finding that the Loan Agreement and the Mortgage were unjust. Nor, in my view, was this characterisation of the two circumstances a sufficient description which explained why those circumstances tended to show that the Loan Agreement and the Mortgage were unjust. Having made those general observations I turn to the circumstances that militate in favour of a finding that the Loan Agreement and the Mortgage were unjust.

430 I have regard to the following:

1. One consequence of non-compliance with the Loan Agreement and the Mortgage is that - given that the Shannons could not afford the loan - the Shannons will lose their home if the transaction is not re-opened (see s 76(2)(a)). The primary judge took this into account.[332] The weight to be attributed to this circumstance is, in my view, lessened by the circumstance that the property could not have been purchased without entry into the Loan Agreement and the Mortgage. This is not a case where a borrower or guarantor risked his or her pre-existing property by entry into an improvident loan. There is, however, some suggestion that the Shannons have made payments in repairs and improvements to the property. There were also

[331] Primary reasons [280].
[332] Primary reasons [261].

funds applied by the Shannons to the purchase as borrowed from Mr Shannon's mother.

2. A further consequence of non-compliance with the Loan Agreement and the Mortgage is that the Shannons have incurred a substantial interest obligation without the means to meet that obligation.

3. The Shannons were not involved in, or aware of, YHL's dishonest and fraudulent conduct. In this regard it should be recalled that the primary judge observed that the principal wrongdoing was the fraud of YHL and found, in substance, that this was not attributable to the relevant respondents as YHL was not the agent of AFIG or GEL Custodians in making the loan application.[333] It is, in my view, equally important to observe that the Shannons did not in fact participate in and were not aware of the fraudulent conduct on the part of YHL.

431 In that last respect, the Shannons as prospective debtors and GEL Custodians as prospective lender are both 'innocent' parties - neither knew of the fraud practised by YHL in the arrangement of the Loan Agreement and the Mortgage (although, as accepted by the respondents, AFIG and thus GEL Custodians are taken to be aware of the falsity of the mortgage purchase application).

432 YHL was not a stranger to either the Shannons (through the personal connection with Mr Lock) or the relevant respondents (given YHL's role under the Correspondent Deed). It is, however, of significance and I have regard to the circumstances that:

1. The structure adopted by the relevant respondents pursuant to the ARMS III mortgage loans originating and management program outsourced to YHL in its entirety the task of obtaining satisfaction as to an intended borrower's ability to afford a loan. Accordingly, the business structure put in place by the relevant respondents put both them and the Shannons at risk in the event that YHL did not perform its obligations, for reasons of fraud or otherwise.

2. The mortgage purchase application submitted by YHL to AFIG was not compliant with the guidelines as formulated for the ARMS III mortgage loans originating and management

[333] Primary reasons [285].

> program: the application was not supported by either (1) a loan proposal letter; or (2) a service nomination form. Separately, the primary judge found that the procedures in the Correspondent Deed and the Operations Manual were not complied with.[334]

433 In terms of the first matter - the business structure - as the loan was in an amount under $500,000, YHL was not required to provide AFIG with the Shannons' loan application form (meaning AFIG was not required to be supplied with an asset and liability statement), evidence of income or other relevant background and supporting documentation. Nor, as it happened, was information of that kind in fact provided by YHL to AFIG or GEL Custodians. AFIG only received a mortgage purchase application, the schedules thereto (which had the false statements as to the Shannons' employment status and whether YHL held evidence of their income and equity), a valuation of the property, the lenders mortgage insurance acceptance advice, a 100 point check identification record, a copy of the Shannons' first home owner grant application form and a copy of the contract to purchase the property.

434 Accordingly, in terms of the permissive consideration prescribed by s 76(2)(l) of the *National Credit Code*, the relevant respondents received no first-hand information and could conduct no verification as to the credit worthiness of the Shannons and no assessment of the Shannons' ability to meet the obligations under the Loan Agreement and the Mortgage - either at all or without substantial hardship. The relevant respondents did not place themselves in a position, personally, to satisfy themselves of the Shannons' ability to afford the proposed loan. Instead, AFIG (and thereby GEL Custodians) relied solely on YHL and made no inquiries of its own.

435 In particular, in assessing whether the Shannons could pay the proposed loan in accordance with the Loan Agreement and the Mortgage without substantial hardship or at all, AFIG (and thereby GEL Custodians) could do no more than rely - and rely exclusively - on:

1. YHL's representation and warranty under cl 12.1(g) of the Correspondent Deed - a representation and warranty to the effect that the loan application had been fully investigated in

[334] Primary reasons [274].

accordance with the Operations Manual and YHL (see [31] above).

2. The credit analysis and borrower's income verification and evaluation obligations on the part of YHL as provided for in pt 4.5 and pt 4.6 of the Operations Manual - including that YHL was completely satisfied, having made all reasonable inquiries, that the borrower would be able to meet the obligations under the loan contract without substantial hardship (see [34] above).

3. YHL's certification under and the other information in the mortgage purchase application - the certification being to the effect that the loan met the criteria in the Operations Manual and, among other things, that YHL had not been able to ascertain by reasonable inquiry any reason why the Shannons might be unable to pay in accordance with the loan contract or not do so without substantial hardship (see [89] above).

436 The primary judge made a finding that the Shannons made the loan application and entered into the Loan Agreement without making any proper inquiry or assessment whether they could make the repayments without substantial hardship or at all.[335] On appeal the Shannons submitted that was equally the position with the relevant respondents.[336] Senior counsel for the respondents accepted the essential premise of the Shannons' submission stating that, in substance, the same position held true for AFIG and GEL Custodians.[337] They too had no relevant financial statements and had made no attempt to determine the Shannons' income and expenses over the preceding 12 months or the present profitability and projected income the Shannons would derive in the short to medium term. The relevant respondents contended, however, that in terms of who should bear responsibility as between the Shannons and the relevant respondents, it was material that AFIG and GEL Custodians played no part in the Shannons' decision to take the loan: it was entirely their decision.[338]

437 I will return to this argument and, separately, to the significance of the business structure employed in the ARMS III mortgage loans originating and management program. It is necessary, first, to say something about the second matter, ie the fact that the mortgage

[335] Primary reasons [284].
[336] Appeal ts 134.
[337] Appeal ts 172.
[338] Appeal ts 172 - 174.

purchase application as submitted by YHL to AFIG was not compliant with the relevant respondents' own guidelines.

438 I accept that departure from a lender's own lending guidelines does not in itself establish the injustice of a loan.[339] There is also much force in the respondents' post-hearing submissions - and I accept - that the absence of these particular documents caused no appreciable disadvantage to the Shannons.[340] The documents would not, of themselves, have conveyed any information about the Shannons' financial position and their ability to service the proposed loan. Nevertheless, in my view, the matter is a circumstance to which regard ought to be had in evaluating whether the Loan Agreement and the mortgage were unjust: the absence of these documents from the mortgage purchase application indicated that the mortgage purchase application, as submitted, did not comply with the procedures established in the Operations Manual.

439 The relevance is not just that AFIG and GEL Custodians were prepared to lend when their own guidelines were not applied with appropriate commercial vigour and that the operation of the guidelines could be characterised as loose. The more significant ramification is that AFIG (and thereby GEL Custodians) knew of or at the least ought to have known of YHL's failure to follow these procedures as established in the Operations Manual. That should have been a matter of concern to any reasonable lender where, as in the present case, the lender had by the business structure it employed deliberately divested itself of and relinquished to an independent mortgage lending originator and manager the tasks of investigating whether - and obtaining satisfaction that - the intended borrower was able to afford the loan without substantial hardship.

440 The inherent risk presented by the business structure adopted by the ARMS III securitisation program, and its reliance on YHL's proper and diligent performance of its duties as independent mortgage lending originator and manager, ought, in my view, to have increased the relevant respondents' sensitivity to and awareness of any failures on the part of YHL.

441 In this case the significance of YHL's non-compliance with the procedures under the Operations Manual was made more acute by the knowledge of YHL that was to be attributed to GEL Custodians. That

[339] ***Kowalczuk v Accom Finance Pty Ltd*** [117] (see also [102]).
[340] Respondents' supplementary submissions dated 16 October 2020 pars 13 - 16.

knowledge was not merely that the Shannons had not provided details of their income and their assets and liabilities.[341] It included that:

1. The information about the Shannons' financial circumstances as stated in the lenders mortgage insurance application was false.

2. The mortgage purchase application provided to AFIG by YHL was false.

442 The last aspect of the constructive knowledge to be attributed to GEL Custodians was not mentioned by the primary judge. It was, however, accepted on behalf of the respondents at the appeal hearing (see [369] above). The respondents' concession was properly made. Once there was constructive knowledge that no financial information was provided to YHL it necessarily followed that the mortgage purchase application was false. Schedule 2 to the mortgage purchase application stated, positively, that YHL held evidence of the Shannons' income and equity on file.[342] That could not be the case if no financial information was provided to YHL. Nor, in the absence of such financial information, could it be accepted that YHL had made reasonable inquiry as to whether the Shannons might be unable to pay in accordance with the terms set out in the loan contract or not do so without substantial hardship - that being the implied representation conveyed by the certification that formed part of the mortgage purchase application (see [89] above).

443 The primary judge held that, given the Shannons' lack of financial statements, reasonable inquiry would not have disclosed that the Shannons were unable to make repayments without substantial hardship: it would only have disclosed that the Shannons did not have available financial statements to substantiate their belief that they could make the repayments without substantial hardship.[343]

444 To similar effect, senior counsel for the respondents argued that, even accepting that the relevant respondents knew of the fraudulent information given to Genworth Financial (as lenders mortgage insurer) by YHL and the absence of any information as to the Shannons' true financial position, it was not possible to conclude that the relevant respondents ought to have gone further and drawn the inference that the

[341] Compare Primary reasons [272] (the primary judge noting only that '[t]he knowledge of YHL that may be attributed to GEL Custodians is that [the Shannons] had not provided any details of their income, assets or liabilities').
[342] GAB 311.
[343] Primary reasons [272].

Shannons could not pay in accordance with the terms of the Loan Agreement or not do so without substantial hardship. Senior counsel contended that the transaction should be assessed on the basis that the lender knew *nothing* about the financial position of the Shannons or their ability to make repayments without substantial hardship.[344]

445 Let that be accepted. The absence of such knowledge does not mean that the Loan Agreement and the Mortgage are not unjust. There is no need to establish moral obloquy or knowledge of the reasonably foreseeable consequences of the Loan Agreement for the Shannons. Moreover, the absence of such knowledge in no way establishes that the relevant respondents made reasonable inquiry as to whether the Shannons could pay the monthly payments under the proposed loan without substantial hardship. Nor does it establish that the relevant respondents reasonably believed, albeit mistakenly, that the Shannons could pay the monthly payments under the proposed loan without substantial hardship.

446 In both respects the opposite is true. The relevant respondents are taken to know that the Shannons had not provided details of their income and their assets and liabilities and that the mortgage purchase application as submitted by YHL was false in material respects. That circumstance is incompatible with the making of reasonable inquiries - or even a belief that there had been reasonable inquiries - and having reason to believe that the Shannons could pay the monthly payments under the proposed loan without substantial hardship. A prospective lender could not reasonably hold such a belief where it was aware that *no* financial information had been provided by the intended borrower. On appeal the respondents did not go so far as to contend that there was such a belief. There was simply a disclaimer of any knowledge whatsoever as to the Shannons' ability to make repayment. Nevertheless, having regard to their knowledge, the relevant respondents had no reason to believe, positively, that the Shannons could pay the monthly payments under the proposed loan without substantial hardship.

447 Accordingly, even accepting the position advanced by the respondents on appeal, the absence of a positive finding that the relevant respondents knew that the Shannons could not pay in accordance with the terms of the Loan Agreement and the Mortgage (or

[344] Appeal ts 172, 178 - 179. See also Appeal ts 182.

not do so without substantial hardship) does not overcome adverse findings in these other, different, respects.

448 It will be apparent from what I have said that, in all the circumstances of the present case, I am unable to accept that it was proper and right for AFIG and GEL Custodians to rely on the matters referred to in [435] above. Their knowledge that the Shannons had not provided any financial information, and of the falsity of the mortgage purchase application in material particulars, precluded such reliance.

449 The ARMS III securitisation program contemplated lending in which reasonable inquiry was made of the prospective borrower as to whether he or she would be able to meet the loan obligations without substantial hardship. The Operations Manual provided that a loan application should not be submitted for purchase unless YHL, as the mortgage lending originator and manager, was 'completely satisfied, having made all relevant enquiries … that the borrower will be able to meet its obligations … without substantial hardship'.[345] That safeguard was primarily for the protection of the GEL Custodians. It, nevertheless, provided an indirect benefit for a prospective borrower. A prospective borrower - generally less commercially sophisticated and more financially naïve than the relevant respondents and in any event less able to objectively consider his or her ability to meet loan repayments without substantial hardship - would not be saddled with an unaffordable loan.

450 The absence of reasonable inquiry as to whether a prospective borrower will be able to meet its obligations under a proposed loan without substantial hardship is accepted to be a circumstance that may be taken into account in evaluating whether a credit contract was unjust. Having regard to their actual and attributed knowledge, the relevant respondents were on notice that the structure they had employed to assess a prospective borrower's ability to meet its obligations under a proposed loan without substantial hardship had failed in relation to the Shannons. The relevant respondents were on notice that reasonable inquiry had not been carried out and had no reason to believe that the Shannons could afford the proposed loan without substantial hardship.

[345] See [34] above.

451 I do not suggest that the relevant failure is one of failure to detect and appreciate that YHL's conduct was fraudulent and dishonest. Rather, it is the twofold failure of:

1. First, the structure employed by the ARMS III securitisation program - which depended on independent mortgage lending originators and managers executing their duties properly and diligently.

2. Second, the relevant respondents continuing to rely on the failed structural safeguards - and not themselves making reasonable inquiry as to whether the Shannons would be able to meet their obligations under the proposed loan without substantial hardship - in circumstances where:

    (a) the relevant respondents had the actual and attributed knowledge as previously referred to - including that the mortgage purchase application was non-compliant and false in material particulars and that the Shannons had not provided any financial information to YHL; and

    (b) the relevant respondents were thus on notice that the structure they had employed had failed and, consequently, that there had been no reasonable inquiry as required by the various constituent instruments comprising the ARMS III securitisation program, and that there was no reason to believe that the Shannons could afford the proposed loan without substantial hardship.

452 GEL Custodians proceeded with the Loan Agreement and the Mortgage despite that failure. The relevant respondents' attitude was one of indifference and lack of concern as to whether or not the proposed loan was suitable for the Shannons as prospective borrowers. The relevant respondents were prepared to assume the risk presented by the loan pursuant to the Loan Agreement and the Mortgage despite their knowledge as referred to and having no reason to believe that there had been a reasonable inquiry as to whether the Shannons would be able to meet their obligations under the proposed loan without substantial hardship. There was no or no adequate consideration of the position of the Shannons. From the relevant respondents' perspective, it was enough that there would be adequate security (given the valuation) and that lenders mortgage insurance was in place.

453 These matters are not swept away and rendered inconsequential by the respondents' submission that AFIG and GEL Custodians played no part in the Shannons' decision to take the loan (see [436] - [437] above).

454 I accept that the Shannons' decision to enter into the Loan Agreement and the Mortgage was entirely their own decision; it was not contributed to by any suggestion on the part of the relevant respondents. Moreover, as the primary judge found, the Shannons acted without making any proper inquiry or assessment. But the question whether a credit contract is unjust requires an examination of the position of both parties. The Shannons' failures do not automatically, without more, render the Loan Agreement and the Mortgage not unjust. It is necessary to have regard to all the circumstances of the case and the public interest. Those circumstances include the failures on the part of the relevant respondents, as identified above, which must be weighed in the balance with all the circumstances including the failures on the part of the Shannons.

**Conclusion: the Loan Agreement and the Mortgage were 'unjust'**

455 I have identified the circumstances to which it is necessary to have regard in evaluating whether the Loan Agreement and the Mortgage were unjust at the time they were entered into. It is now necessary to come to a conclusion on the question of unjustness having regard to the public interest and those circumstances.

456 This case is very finely balanced. The Shannons bear considerable responsibility for the predicament in which they found themselves. It was the Shannons alone who decided - without proper inquiry or reasonable grounds - that they could afford the monthly loan payments when they could not. It was the Shannons who failed to provide any financial information in the loan application form. The Shannons understood the material terms and effect of the Loan Agreement and the Mortgage. Putting aside the fraudulent and dishonest conduct of YHL, the terms of the Loan Agreement and the Mortgage - and the circumstances of the Shannons' entry into those instruments - are unexceptional. The case undoubtedly engages the well-established public interest in a competent person being bound by and having to honour an agreement where the agreement was entered into freely without conduct by the counterparty that vitiates the competent person's assent.

457 The countervailing circumstances - those which support a finding that the Loan Agreement and the Mortgage were unjust - engage the protective aspects of the public interest served by s 76.

458 One purpose of the legislation is to protect persons who are not able to look after themselves. I do not suggest that the Shannons were at some constitutional disadvantage which affected their ability to make a judgment as to their best interests. However, on the matter of whether reasonable inquiry was made as the Shannons' ability to meet their obligations without substantial hardship - and whether there had been adherence to the relevant respondents' own lending guidelines - the relevant respondents were far better situated than the Shannons. The relevant respondents were aware of or on notice of the various failures I have referred to. Unlike the Shannons, the relevant respondents were in a position to appreciate the potential consequences of and to rectify the risk arising from the failure of the structure employed in the ARMS III securitisation program. Moreover, as is apparent from the passages I have reproduced from ***Tonto Home Loans Australia Pty Ltd v Tavares*** at [400] - [401] above, the public interest is served by encouraging lenders to 'rigorously apply' such safeguards as will protect against the risk of lending to duped, misled or *inappropriate* borrowers (the Shannons falling within the last category).

459 True it is that, in this case, the Shannons' failure to provide any financial information is one of the relevant factual circumstances. I have already noted the incongruity that thereby arises so far as the Shannons now rely on the relevant respondents' failure to make reasonable inquiry. Nevertheless, the protective component of the public interest engaged by s 76 is not only for those potential debtors who can and do look after themselves; it applies, with greater reason, to those who lack commercial sophistication or financial experience. The latter will often lack the knowledge and skills to make an informed and prudent decision in keeping with their individual needs and circumstances.

460 The Shannons lacked financial experience of the kind presented by entry into the Loan Agreement and the Mortgage. They were, as the relevant respondents knew - first home buyers. The comparative positions of the relevant respondents and the Shannons is one of the circumstances of the case to which I have regard - it, to a degree, lessens the significance of the Shannons' failure to provide any financial information in support of the loan application.

461 I will not repeat all the circumstances I have referred to at [428] - [454] above. The critical matter, in my view, is that before providing the Shannons with the loan pursuant to the Loan Agreement and the Mortgage the relevant respondents were on notice of the failure of procedures under the ARMS III securitisation program - in particular that there had been no reasonable inquiry as to whether the Shannons would be able to meet their obligations without substantial hardship. The relevant respondents had no reason to believe that the Shannons could meet their obligations under the proposed loan without substantial hardship. However, the relevant respondents are taken to know that the Shannons did not provide any financial information to YHL and thus of the material falsity in the mortgage purchase application.

462 The relevant respondents proceeded with the Loan Agreement and the Mortgage notwithstanding these matters. They did so without making their own inquiry as to the Shannons' financial position and ability to meet the monthly loan payments either at all or not without substantial hardship. The relevant respondents were indifferent to whether the Shannons could afford the proposed loan and - despite the matters referred to in [461] above - were prepared to assume the risk that the Shannons could not afford the proposed loan.

463 The relevant respondents' own procedures contemplated that reasonable inquiry would be made of any prospective borrower. YHL, as independent mortgage lending originator and manager, was to be satisfied - having made all reasonable inquiries - that the prospective borrower would be able to meet the loan obligations without substantial hardship. That was a safeguard which indirectly guarded against conduct that which might otherwise be productive of injustice to members of the public. It was a procedure which promoted suitable borrowings and minimised the risk of lending to an inappropriate borrower who could not afford a proposed loan.

464 The absence of any reasonable inquiry, despite the critical nature of the various matters known or taken to be known and of which the relevant respondents were on notice, is highly material in evaluating whether the Loan Agreement and the Mortgage were unjust in the circumstances relating to them at the time they were entered into. As between the parties, AFIG (and thereby GEL Custodians) was better placed to identify the failures that had occurred and the risk they presented. So too AFIG (and thereby GEL Custodians) was better placed to rectify the failures and thereby eliminate or minimise the risk

that had ensued. AFIG could have done so by requiring information about the Shannons' capacity to service the proposed loan.

465 It cannot be determined whether, had inquiry been made, the relevant respondents would have uncovered YHL's fraudulent and dishonest conduct. What can be said is that, had inquiry been made of the Shannons, the relevant respondents would have become aware that: (1) the Shannons only source of income was the E-News Direct business; and (2) the Shannons did not have any available financial statements to substantiate their belief that they could make mortgage repayments without substantial hardship.[346] That would not have been sufficient to satisfy the criteria provided for in pt 4.5 and pt 4.6 of the Operations Manual (see [34] above). Either the loan would have been refused or - if it had not - the relevant respondents' indifference to their own lending guidelines and the Shannons' ability to afford the proposed loan would have been patent.

466 Having regard to and weighing all the circumstances of the case, and the competing aspects of the public interest, I am satisfied that, in the circumstances relating to the Loan Agreement and the Mortgage at the time they were entered into, the Loan Agreement and the Mortgage were unjust. The tipping point, in my view, is the relevant respondents' willingness to assume the risk created by the failure of procedures under the ARMS III securitisation program, and indifference to whether the Shannons could afford the proposed loan, in proceeding with the proposed loan without making reasonable inquiry in terms of s 76(2)(l) despite: (1) knowing that financial information had not been provided and of the falsity of the mortgage purchase application; and (2) being on notice of the failure of the procedures under the ARMS III securitisation program - thus having no reason to believe that the Shannons could afford the loan without substantial hardship.

467 It should not be thought that my conclusion that the Loan Agreement and the Mortgage were unjust means that, in every case, a credit provider who fails to make reasonable inquiry in terms of s 76(2)(l) will be susceptible to an adverse finding in terms of s 76(1) of the *National Credit Code*. My conclusion is a matter of evaluative judgement based on all the particular and distinctive circumstances of this case after having had regard to and evaluating the public interest in the particular and distinctive circumstances of this case.

[346] See Primary reasons [272], [284].

**Conclusion and orders**

468 I would, for the reasons I have set out above, uphold the essential complaint made by the Shannons as is the subject of grounds 3, 4, 11, 16 and 17 as well as upholding ground 10. I consider, respectfully, that the primary judge erred in not being satisfied that, in the circumstances relating to the Loan Agreement and the Mortgage at the time they were entered into, the Loan Agreement and the Mortgage were unjust within the meaning and for the purpose of s 76(1) of the *National Credit Code*. Accordingly, I would allow the appeal.

469 In allowing the appeal, I, like Quinlan CJ & Tottle J, would declare that the Loan Agreement and the Mortgage were unjust within the meaning and for the purpose of s 76(1) of the *National Credit Code* (see [329], [345] above).

470 This court is not at present in a position to mould any consequential relief. Indeed, in my view, it is premature to conclude that consequential relief ought to be ordered. Whether there should be consequential relief, and if so the nature and extent of that consequential relief, ought to await a further hearing. It is, however, appropriate that I express my general agreement with what is stated in the joint reasons at [328] and [330] - [335] above. I also agree that the parties should be referred to mediation before any further steps are taken in the litigation.

471 I am, however, not persuaded that this court should necessarily undertake the task of determining what orders, if any, should be made by way of consequential relief. Depending on the parties' respective positions - and the extent to which additional evidence may be sought to be adduced and allowed - remittal to the General Division might be a more practicable alternative. Subject to the parties having first attended the mediation contemplated in the joint reasons, I would grant the parties liberty to apply to make further submissions as to whether any application for consequential relief should be heard by this court or determined in the General Division.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

AK
Research Associate to the Honourable Chief Justice Quinlan

24 NOVEMBER 2020