FEDERAL COURT OF AUSTRALIA

The Good Living Company Pty Limited ATF the Warren Duncan Trust No 3 v Kingsmede Pty Ltd [2019] FCA 2170

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| File number: | NSD 2304 of 2017 |
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| Judge: | **MARKOVIC J** |
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| Date of judgment: | 20 December 2019 |
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| Catchwords: | **CONSUMER LAW** – application pursuant to s 21 of Sch 2 of the *Competition and Consumer Act 2010* (Cth)(**ACL**) – where applicants provided security for bank guarantee provided under lease between a related company and the respondents – where respondents called on the bank guarantee prior to entry into deed of settlement and release – whether applicants can rely on s 21 in the circumstances – whether respondents engaged in unconscionable conduct in calling on the bank guarantee – application dismissed**CONSUMER LAW** – application pursuant to s 20 of the ACL – where respondents received and retained moneys provided after bank guarantee called – whether respondents acted unconscionably – whether respondents unjustly enriched at the expense of the applicants – application dismissed  |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) Sch 2, ss 20, 21  |
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| Cases cited: | *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51*Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in* *liquidation)* (1978) 141 CLR 335*Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1996] 4 All ER 563; 2 Lloyd’s Rep 524*Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd* (2008) 249 ALR 458; [2008] FCAFC 136*Ideas Plus Investments Ltd v National Australia Bank Ltd* (2006) 32 WAR 467*Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110*O’Sullivan v National Australia Bank Ltd* [1998] NSWSC 303*Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199*Tameeka Group Pty Ltd v Landan Pty Ltd (No 3)* [2016] FCA 733*Wong v Huisman* [2010] QSC 192*Wood Hall Ltd v Pipeline Authority* (1979) 141 CLR 443  |
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| Date of hearing: | 11-12 April 2019 |
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| Date of last submissions: | 26 April 2019 (Applicants)30 April 2019 (Respondents) |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Regulator and Consumer Protection |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 219 |
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| Counsel for the Applicants: | Mr B DeBuse |
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| Solicitor for the Applicants: | Keypoint Law |
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| Counsel for the Respondents: | Mr T Maltz |
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| Solicitor for the Respondents: | Herman Legal |

ORDERS

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|  | NSD 2304 of 2017 |
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| BETWEEN: | THE GOOD LIVING COMPANY PTY LIMITED ACN 001 974 705 ATF THE WARREN DUNCAN TRUST NO 3First ApplicantKIMANA PTY LTD ACN 002 731 599Second Applicant |
| AND: | KINGSMEDE PTY LTD ACN 054 526 635First RespondentPAMIERS PTY LTD ACN 010 650 236Second Respondent |

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| JUDGE: | MARKOVIC J |
| DATE OF ORDER: | 20 December 2019 |

THE COURT ORDERS THAT:

1. Paragraph 1 of the originating application filed on 29 December 2017 is dismissed.
2. Grant leave to the parties to file and serve submissions, not exceeding two pages in length, on the question of costs of the proceeding by 31 January 2020.
3. If submissions are filed in accordance with Order 2 and neither of the parties requests that there be an oral hearing, the issue of costs of the proceeding will be determined on the papers.
4. If no submissions are filed in accordance with Order 2 the following order be made with effect from 31 January 2020:
	1. the applicants pay the respondents’ costs of the proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MARKOVIC J:

1. This proceeding arises out of the lease (**Lease**) of premises located at ground floor and mezzanine level, 25 Bligh St, Sydney (**Premises**) to Chop 1 Pty Ltd (in liquidation) (receivers and managers appointed) (**Chop 1**). A restaurant known as the “Chophouse” was operated from the Premises by Chop 1. The respondents, Kingsmede Pty Ltd (**Kingsmede**) and Pamiers Pty Ltd (**Pamiers**), are the landlords of the Premises.
2. The applicants, The Good Living Company Pty Limited as trustee for the Warren Duncan Trust No 3 (**TGLC**) and Kimana Pty Ltd (**Kimana**), provided security for, among other things, a bank guarantee issued by the Commonwealth Bank of Australia (**CBA**) in support of the Lease. On 16 December 2016, in circumstances more fully described below, the respondents called on the bank guarantee.
3. The applicants allege that in calling on the bank guarantee the respondents engaged in unconscionable conduct within the meaning of ss 20 and 21 of the Australian Consumer Law, being Sch 2 to the *Competition and Consumer Act 2010* (Cth) (**ACL**) as a result of which they have suffered loss and damage and the respondents have been unjustly enriched. The applicants claim damages pursuant to ss 236 and 237 of the ACL.

# material before the court

1. Before turning to consider the facts I note that the parties provided the Court with a court book comprising some 3,000 pages. However, they ultimately tendered or sought to tender only some of that material. That was done in two stages: a number of documents were tendered during the course of the hearing; and following the conclusion of the hearing, together with post-hearing submissions going to particular issues, the parties provided lists of additional documents they sought to tender. Save for three documents, the admissibility of which was the subject of oral argument which I address below at [130]-[140], the documents included on those lists were admitted as exhibits.

# facts

## The Keystone Group of Companies

1. Warren Duncan is a director of each of TGLC and Kimana. He is also a chartered accountant and partner in the international accounting firm known as Mazars.
2. Mr Duncan and his family have been involved in the hospitality and hotel business for many years and were involved with each of the venues that became assets of Keystone Australia Holdings Pty Ltd (referred to as the **Keystone Group**) on 13 August 2014. Prior to that date the Keystone Group was an amalgamation of various entities and venues, all of which were controlled by Mr Duncan and his son, John Duncan.
3. On 13 August 2014 the Keystone Group acquired the Pacific Restaurant Group Limited (**PRG**) and, as a result, the control of Chop Brands Pty Limited and Chop 1, which became part of the Keystone Group. The funds used to acquire PRG and the assets of the Keystone Group were provided by PT Limited as security trustee for Corporate Capital Trustee Inc, KKR Mezzanine Partners ILP, KKR Mezzanine Partners Side by Side and Koi Structured Credit Pte Ltd (**Senior Lenders**).
4. By June 2016 the Keystone Group consisted of 42 companies, of which 17 companies (**Operating Companies**) each owned and operated a single venue being either a hotel, wine bar or restaurant.
5. Keystone Group Holdings Pty Limited (**KGH**) acted as the treasury company for the Keystone Group. John Duncan has been a director of KGH since 15 April 2011 and on 1 February 2012 Warren Duncan became a non-executive director of KGH.
6. TGLC was a secured creditor of Keystone (Australia) Pty Ltd (administrators appointed) (receivers and managers appointed) and other entities within the Keystone Group including Chop 1. TGLC had, for its benefit and the benefit of other parties (**Noteholders**), a general security agreement over the assets of each of the companies in the Keystone Group including Chop 1.
7. On 18 December 2015 TGLC entered into an inter-creditor deed with other secured creditors of the Keystone Group, one effect of which was to rank the security interest of the Senior Lenders ahead of that of TGLC and the Noteholders.

## Kingsmede and Pamiers

1. Andrew Potter is the sole director and secretary of each of Kingsmede, Pamiers and Kingsmede Property Management Services Pty Ltd (**KPMS**), a wholly owned subsidiary of Kingsmede. Scott Somerton is the director of finance and operations at KPMS. Brent Mulligan is an employee of KPMS but holds the title “General Manager, Kingsmede”.
2. KPMS provides property management services to companies in the Kingsmede group of companies, including Kingsmede and Pamiers. Those services include organising leases and memoranda, dilapidation reports and make-good reports; collecting rent; corresponding with tenants and building managers; handling lease disputes; and the other day-to-day activities that a landlord needs to perform to manage a commercial property. There is no written management services agreement between KPMS and the respondents.
3. Mr Potter is away from Sydney for about six months every year. He is most involved in the respondents’ operations when he is in Sydney. Mr Potter guides the respondents’ business plans and growth strategies and provides Mr Somerton with instructions about the outcomes he would like the respondents to achieve.
4. As director finance and operations, Mr Somerton is responsible for the day-to-day operation of KPMS in the provision by it of property management services to the respondents and, in effect, responsible for the respondents’ day-to-day operations. According to Mr Potter, Mr Somerton is responsible for creating and implementing plans, policies and tactics to manage and resolve accounting, legal, insolvency and back-office issues, and if necessary, contesting any legal issues. This includes liaising with external accountants, lawyers and insolvency practitioners on behalf of the respondents as required. While not documented, Mr Potter has delegated the role of managing and resolving the respondents’ legal, accounting, insolvency and back-office issues to Mr Somerton.
5. Mr Somerton said that, in addition to his duties at KPMS, he contributes to growing the respondents’ business which includes formulating and implementing business plans and growth strategies.
6. Mr Mulligan is responsible for developing and implementing policies and plans to grow and manage the respondents’ investments. Mr Potter gives Mr Mulligan wide discretion to implement the policies and plans that he believes will achieve the best investment results for the respondents.
7. Mr Somerton, with other employees of KPMS, in particular Mr Mulligan, develops and implements methods to achieve Mr Potter’s business plans and growth strategies and to meet his desired outcomes. Mr Somerton said that he has wide discretion about how to do those things. While he defers questions of large capital expenditure to Mr Potter, he is otherwise authorised by Mr Potter to run and operate the respondents’ business and to manage its properties.

## The Lease and the provision of the bank guarantee

1. On 1 March 2008 Kingsmede and Pamiers as landlord and Chop 1 as tenant entered into the Lease. Chop 1 owned and operated a restaurant called the Chophouse from the Premises (**Chophouse Sydney**). The Lease was for a term of 10 years commencing on 1 March 2008, with an option for a further 10 year term. The Lease relevantly provided:
2. in cl 12.1 “Right of re-entry” that the following were events of default:

…

(e) the Tenant (being a company):

…

(iv) is placed under official management; or

(v) has a receiver or manager of any of its assets appointed; or

…

1. in cl 12.4 “Landlord’s rights of damages” that:

In addition to the right of the Landlord to·re-enter the Premises after breach by the Tenant of this Lease, and any other rights and remedies of the Landlord, the Landlord may sue the Tenant for damages for loss of the benefits which performance of this Lease by the Tenant would have conferred on the Landlord.

1. in cl 19 “Bank guarantee” that:

19.1 **Issue of Bank Guarantee**

On or before the signing of this Lease the Tenant must cause an unconditional bank guarantee in a form acceptable to the Landlord issued by an Australian bank (**the bank guarantee**) for the sum set out in **Item 18** in favour of the Landlord to be provided to the Landlord to secure the performance by the Tenant of its obligations under this Lease. The bank guarantee must not specify any expiry date.

19.2 **Entitlement on default**

If an event of default occurs, the Landlord may, without Notice to the Tenant, call up the bank guarantee in whole or part. The amount claimable by the Landlord will include, without limitation the amount of any consequential loss, damage or expense incurred by the Landlord in respect to the event of default.

…

1. in Item 18 of annexure A to the Lease, which set out a summary of particulars, for a bank guarantee in the sum of $75,000 to be provided.
2. On 22 October 2012 the Lease was amended by a variation of lease as a consequence of which item 18 of annexure A to the Lease was varied so that, relevantly, on and from 1 September 2012 a bank guarantee in the sum of $100,000 was to be provided.
3. On 24 December 2012 the CBA issued a bank guarantee in the sum of $100,000 in favour of the respondents (**Chophouse Guarantee**). This was prior to acquisition of Chop 1 by the Keystone Group. The Chophouse Guarantee was addressed to the respondents and was expressed to be security for the obligations of Chop 1, defined as the **Customer**. It was to continue until one of the following events occurred: the CBA received written notification from the respondents that it was no longer required, it was returned to the CBA; or upon payment by the CBA to the respondents of the whole of the guaranteed amount or such lesser amount as required by the respondents. Relevantly, it provided that:

Should the [respondents] notify the [CBA] in writing that it requires payment to be made to it of the whole or any part or parts of the Guaranteed Amount, it is unconditionally agreed that such payment will be made to the [respondents] forthwith without further reference to the Customer and notwithstanding any notice given by the Customer to the [CBA] not to pay same. The [CBA] reserves the right to require proof of identity of any person acting on behalf of the [respondents] and to confirm the authenticity of the written notification of the [respondents] before making payment to the [respondents].

## Facility agreement with the CBA

1. On or about 8 August 2014 the Keystone Group entered into a facility agreement with the CBA for a sum of $8,050,000 (**CBA Facility**) which was subsequently amended by deed dated 3 October 2014.
2. On 3 October 2014, pursuant to the CBA Facility as amended, TGLC and Kimana executed guarantees of the obligations of each of the companies in the Keystone Group to the CBA. Kimana’s obligations to the CBA under the guarantee were secured by a real property mortgage dated 3 October 2014 granted by it over a rural property located in Murringo, NSW. The CBA provided bank guarantees in support of the leases executed by each of the Operating Companies, including, as set out at [21] above, Chop 1.

## External administration of companies in the Keystone Group

1. From March 2016 the Keystone Group was involved in discussions with the Senior Lenders about the restructuring of its debt. On 28 June 2016 the Senior Lenders appointed Ryan Eagle and Morgan Kelly of Ferrier Hodgson as the joint and several receivers and managers of each of the companies in the Keystone Group, including Chop 1 (**Receivers**). On 14 May 2018 the Receivers retired as receivers and managers of Chop 1.
2. As the Senior Lenders did not have security over the leasehold interests of the Operating Companies, in the case of Chop 1 the Receivers were appointed over all of its assets other than its leasehold interest in the Premises.
3. Also on 28 June 2016:
4. the directors of each of the companies in the Keystone Group appointed Kate Barnet, Hugh Armenis and Henry McKenna of Bentleys as joint and several voluntary administrators (**Administrators**) of each of the companies in the Keystone Group, including Chop 1; and
5. the Receivers and Administrators entered into an agreement which provided, amongst other things, that the Receivers were responsible for the day-to-day operation of each “Keystone Company” which included Chop 1 and the process of selling or disposing of the property of, relevantly, Chop 1.
6. The convening period for Chop 1 was extended on at least two occasions and the voluntary administration of Chop 1 came to an end on 11 April 2017 when its creditors voted to appoint Ms Barnet and Mr Armenis as liquidators (**Liquidators**).
7. From the date of their appointment the Receivers traded the businesses owned by each of the Operating Companies, including Chop 1, and each Operating Company (except the owner of the Chophouse Perth) continued to occupy its respective premises until business sale agreements for its assets were exchanged. To assist them in running the businesses owned and operated by the Operating Companies, the Receivers engaged the executive directors and most of the managers of the various Keystone Group companies and retained most of the staff.
8. In about August 2016 the Receivers commenced a sale process for the businesses of the Keystone Group. Details of that process were not provided to or discussed with Mr Duncan. Mr Kelly, one of the Receivers, gave evidence about the sale process. He said that the Receivers’ capacity to recover the value in the businesses depended on the landlords of each property agreeing to assign the existing lease to a purchaser or agreeing to enter into a new lease with a purchaser.
9. During the sale process the directors of the companies in the Keystone Group submitted three proposals for a pooled deed of company arrangement and incorporated a company, K2 MBO Pty Ltd (**K2MBO**), which submitted a number of offers to acquire various combinations of venues.

## The Receivers’ early dealings with the respondents and attempts to sell Chophouse Sydney

1. Initially, Mr Kelly and Ryan Spooner, a director at Ferrier Hodgson, dealt with Stephen Harrison and Mr Mulligan of Kingsmede, who Mr Kelly understood represented Kingsmede as landlord. They first met with Messrs Harrison and Mulligan in early July 2016, and during July and August 2016 negotiated variations to the Lease which the respondents required.
2. According to Mr Somerton, between around 29 June 2016 and 17 October 2016 Messrs Mulligan and Harrison worked with the Receivers to identify a replacement or new tenant for the Premises and during that time kept Mr Somerton informed about developments in the receivership.
3. On 29 August 2016 Mr Spooner attended a meeting with Messrs Mulligan and Harrison. Mr Kelly said that later that day he was notified by the CBA that it had received correspondence putting it on notice that the respondents intended to terminate the Lease.
4. On 30 August 2016 Henry Davis York (**HDY**), the solicitors for the respondents, wrote to the CBA informing it that Chop 1 was in breach of cl 12.1(e)(v) of the Lease because of the appointment of the Receivers and, relevantly, notifying the CBA of their clients’ intention to terminate the Lease effective from 7 September 2016.
5. On 31 August 2016 Mr Spooner sent an email to Mr Mulligan, copied to Messrs Kelly and Harrison, in which he thanked Mr Mulligan for his time earlier in the week and noted that “[o]n the basis that Kingsmede will remove the demolition clause in the [Lease] and offer an extended 5 year option” the Receivers were prepared to accept the terms offered. Mr Spooner then set out a summary of “the commercial terms for a variation of the [Lease]”. Mr Mulligan responded by email dated 2 September 2016 thanking Mr Spooner for the information and noting that they would “be taking it up with the owners Monday”.
6. On 6 September 2016:
7. Mr Mulligan sent a further email to Messrs Spooner and Harrison, copied to Mr Kelly, in which he noted that he had left the matter with Mr Harrison to finalise;
8. Tim Grosmann of CBRE Group, the Receivers’ appointed sales agents and advisers, informed Mr Kelly by email that he had spoken with Mr Harrison who had confirmed that they were “happy with the proposal and happy for CBRE to try to secure them a tenant through [its] sales process”. Mr Kelly understood the reference by Mr Grosmann to “our proposal” was a reference to the agreed terms set out in Mr Spooner’s email of 31 August 2016 and that the reference to “they” was a reference to the owners of Kingsmede; and
9. Mr Spooner responded to Mr Grosmann’s email noting that he had had a similar discussion with Mr Harrison that evening.
10. Mr Kelly instructed the Receivers’ solicitors, Herbert Smith Freehills (**HSF**), to prepare documentation allowing for the variation and assignment of the Lease. HSF provided the documentation on 8 September 2016. The Receivers’ online data-room for the sales process, which had information for potential purchasers of the businesses of the Keystone Group, including the indicative terms on which landlords were willing to transfer their leases as part of the sale of the businesses conducted at each venue, was updated to reflect the terms agreed with the respondents.
11. On 27 September 2016 Mr Spooner provided Messrs Harrison, Mulligan and Kelly with a confidential update on the sales campaign for the Keystone Group portfolio.
12. By mid-October 2016 Mr Kelly had identified Dixon Hospitality Pty Limited (**Dixon**) as the preferred purchaser of seven of the 17 venues operated by the Keystone Group, including Chophouse Sydney.
13. On 17 October 2016:
14. Messrs Somerton, Mulligan and Harrison met with Dixon and, among others, representatives of the Receivers; and
15. Mr Spooner sent an email to Mr Harrison in which he thanked him for meeting with Dixon, noted that the Receivers were working on “transitioning the business under a licence to [Dixon]” and asked that Mr Harrison provide his “‘in principle’ consent by 19 October 2016 that [Dixon] is a suitable tenant and that Kingsmede would be prepared to assign the [Lease] including the variations as previously discussed”. A copy of the email was forwarded to Mr Somerton by Mr Mulligan.
16. As a result of the meeting referred to in the preceding paragraph, Mr Somerton understood that Dixon proposed to replace Chophouse Sydney with a “gastro pub”. Mr Somerton did not consider that Dixon’s proposal reflected the standing of the building or that it was in keeping with the quality and location of the Premises and believed that the proposed use of the Premises was inconsistent with the terms of the Lease. Mr Potter had informed Mr Somerton that he was not happy with Dixon as a tenant, that he wished to explore options for the respondents without the Receivers and that he would not agree to allow the Premises to be transformed from a high-end fine-dining restaurant into a “gastro pub”. For those reasons, Mr Somerton considered that Dixon was not a suitable tenant for the Premises
17. Mr Potter’s evidence was to the same effect. He said that in about mid-October he learnt from Mr Mulligan or Mr Somerton that the Receivers’ preferred new tenant was Dixon and that it proposed to set up a gastro pub in the Premises. Mr Potter described the building at 25 Bligh Street, Sydney, in which the Premises are located, as the respondents’ most important and valuable property and a significant high-rise tower in which over 95% of the rental income is generated from leasing the office space. Mr Potter said that the Premises, where Chophouse Sydney is located, is a very desirable site with outside seating which people entering the building must walk past. Mr Potter believed setting up a “gastro pub” in the Premises would make the office space less desirable, undermine the respondents’ ability to let the office space and put at risk 95% of the rental income generated by the building. He strongly opposed the idea and informed Mr Somerton accordingly.
18. At that point Mr Potter came to believe that the failure of Chop 1, the receivership and the future tenancy of the Premises would be contentious and could have legal implications. Mr Potter thus decided that Mr Somerton should manage all of the day-to-day issues connected with the receivership of Chop 1.
19. Upon becoming involved in the issues surrounding the receivership of Chop 1 and taking over the management of the relationship with the Receivers and the Administrators, Mr Somerton reviewed the records to acquaint himself with the dealings between the respondents and the Receivers. He became aware that the Receivers had continued to pay the rent, albeit not always on the first day of each month as required by the terms of the Lease.

## Termination of the Lease

1. On 18 October 2016:
2. HDY notified Chop 1, the Receivers and the Administrators that Chop 1 was in breach of the Lease by reason of the appointment of the Receivers and that the Lease was terminated effective 5 pm on 1 November 2016; and
3. Mr Somerton notified the Receivers that all future correspondence should be directed to him and in a letter of the same date informed the Receivers that the terms of the proposed assignment to Dixon were “wholly unacceptable to the [respondents]” and set out the reasons why that was so, principally because of the nature of Dixon’s intended business at the Premises and the resulting change in use. The letter concluded:

The Receivers made it clear to us in the meeting yesterday that Dixon’s offer to take over seven of the operations of the Keystone Group, including Chop House, is by far the best offer received. Further, the Receivers advised that they do not expect a better offer to eventuate. As Dixon’s plan for the space is an unacceptable change of use, the Landlord has lost faith in the Receivers ability to finalise a sale acceptable to the Landlord. Accordingly, the Landlord has no option but to terminate the Lease (in accordance with its rights under clause 12.1 of the Lease) so that it may prospect for a suitable operator for the space.

Subsequent to the appointment of the Receivers, officers of the Landlord have impressed upon officers of the Receivers the importance of locating an operator compatible with the use of the premises. The importance of the operator’s offering cannot be overstated.

 Mr Kelly cannot recall any conversations of the nature referred to by Mr Somerton in the final paragraph of his letter and does not recall such statements having been made by Mr Somerton or any other representatives of Kingsmede.

1. On 19 October 2016 Kingsmede informed the CBA, as a matter of courtesy, that on the preceding day it had notified Chop 1, its Receivers and Administrators of termination of the Lease effective at 5 pm on 1 November 2016.
2. Notwithstanding the termination of the Lease, the respondents continued to accept rent for the Premises from the Receivers and to demand and to be paid outgoings.
3. On 15 December 2016 the Lease was removed from the title of the Premises.

## Subsequent steps to sell the Chophouse Sydney business

1. According to Mr Kelly, after 18 October 2016 Mr Somerton indicated that it was possible Kingsmede would accept Dixon as a tenant and that the respondents would prefer a 12-month bank guarantee. According to Mr Somerton, on or about 19 October 2016 he had a conversation with Mr Kelly to the following effect:

Mr Somerton: Dixon Hospitality wasn’t right for the Property. We’ve lost faith in the Receivers, Morgan. I don’t think you can find us the right tenant for the Property.

Mr Kelly: Stick with us, Scott. We want you to attend a second meeting. KKR really want you to reconsider accepting Dixon. If you don’t, we can cure the technical breach under the lease. We are paying rent, so there is no financial default. We require you to attend a second meeting.

Mr Somerton: Alright, we’ll attend.

1. On 20 October 2016 Mr Somerton and Mr Mulligan attended a meeting with, among others, representatives of Dixon and Mr Kelly. On 21 October 2016 Mr Kelly received a detailed list of queries about Dixon from Mr Somerton.
2. On 26 October 2016 Mr Somerton sent a letter to the Receivers in which he, in effect, rejected Dixon as a tenant for premises. In that letter, among other things, Mr Somerton said that “Dixon’s proposed operation of the Premises would be an unacceptable change in use that is inconsistent with the Lease” and that “Dixon’s proposed use would (amongst other things) significantly prejudice the [respondents’] ability to attract high-quality tenants to the Premises”.
3. On 26 October 2016, Mr Somerton received an email from Mr Kelly indicating that Bruce Solomon and Matt Moran may be interested in Chophouse Sydney and in entering into a lease for the Premises. Mr Somerton was aware of Messrs Solomon and Moran and their business, Solotel.
4. On 28 October 2016 Messrs Somerton and Mulligan met with, among others, Messrs Solomon, Spooner and Kelly. According to Mr Somerton, the purpose of the meeting was to discuss the possibility that a company within the Solotel group of companies would enter into a lease for the Premises and maintain Chophouse Sydney if the respondents agreed to a new lease. After that meeting, Mr Somerton was satisfied that Solotel would be a good tenant for the Premises as it would maintain Chophouse Sydney if the respondents agreed to a new lease.
5. On or about 31 October 2016 the Administrators and Receivers executed a sale agreement for the sale of six venues, not including Chophouse Sydney, to Dixon (**Dixon Sale Agreement**). Mr Duncan understood from the Administrators that the respondents had refused to assign the Lease to Dixon or to enter into a new lease with it. After the execution of the Dixon Sale Agreement, Mr Duncan was in regular contact with the Administrators and Receivers in relation to the sale of venues. That was for two reasons: first, he was concerned that all of the bank guarantees be returned; and secondly, because K2MBO had submitted an offer for some venues, including Chophouse Sydney.
6. By 30 November 2016 Mr Kelly understood that Kingsmede had agreed that Solotel would be an acceptable tenant for the Premises and that the terms of a proposed lease to companies within the Solotel group were more or less settled. According to Mr Somerton, between 28 October 2016 and 16 December 2016 JDK Legal, on behalf of the respondents, and Phoenix Legal, on behalf of Solotel, negotiated the terms of a lease pursuant to which two companies within the Solotel group of companies, Sol Bligh Pty Ltd and Mash Bligh Pty Ltd (**Solotel Companies**), would lease the Premises. By 1 December 2016 it seemed to Mr Somerton that it was likely, although not yet guaranteed, that the Solotel Companies would take a lease of the Premises.
7. On 1 December 2016 Mr Somerton sought a meeting with Mr Kelly. On 2 December 2016 Mr Somerton telephoned Mr Kelly and they had a conversation during which Mr Kelly recalls that Mr Somerton said words to the following effect:

Kingsmede would prefer to have Bruce Solomon as the tenant to move in now however Leon Fink has offered a $1 million cash incentive. This is not our preferred option because Leon Fink is not willing to take possession until after Christmas. If you were willing to pay $500,000 then you can have the premises. I understand that Bruce Solomon is paying $1.5 million so you walk away with $1 million and we keep $500,000 and Bruce Solomon can move in now. In my view the easiest way forward is for the Solotel sale to occur immediately however the $500,000 needs to be paid to Kingsmede immediately otherwise there will be no deal.

Mr Kelly took a note of his conversation with Mr Somerton which he immediately dictated after the discussion and had typed by a staff member, which includes a record of Mr Somerton’s comments set out above. In cross-examination Mr Kelly agreed that his conversation with Mr Somerton was so heated that he thought it was possible that one day it would result in litigation.

1. Although Mr Somerton did not give any evidence in his affidavit about his conversation with Mr Kelly on 2 December 2016, in cross-examination he:
2. accepted that he said to Mr Kelly words to the effect that “Kingsmede would prefer to have Bruce Solomon as the tenant to move in now”, that “however, Leon Fink has offered a $1 million cash incentive” and “this is not our preferred option because Leon Fink is not willing to take possession until after Christmas”;
3. accepted that he knew that as at 2 December 2016 the Receivers wanted the Solotel Companies to take possession before Christmas and assumed that they would be capable of doing so;
4. said that he understood that Kingsmede had a critical role in the process because there was no possibility of Chophouse Sydney business being sold without a lease;
5. accepted that he said words to the effect that “if you’re willing to pay $500,000 then Bruce Solomon can have the Premises” and “I understand that Bruce Solomon is paying $1.5 million”. By that latter statement Mr Somerton understood that the amount of $1.5 m was the purchase price for the Chophouse Sydney business from the Receivers and that he was asking that, of that amount, the Receivers take $1 m and Kingsmede be paid $500,000;
6. said that the idea of the negotiation was that the respondents, specifically Mr Somerton, “had been highly inconvenienced by the receivership, and it was an arrangement whereby [the Receivers] could walk away, Solotel could be in place, and we could receive some level of compensation for what I felt was significant amount of time spent on this issue”;
7. understood that the $500,000 to be paid to the respondents would have to be paid simultaneously with the business sale agreement for the Chophouse Sydney business and out of the purchase price;
8. denied saying words to the effect that “unless Kingsmede is going to be paid there will be no deal” and giving an ultimatum. He said that he and Mr Kelly spoke about what would be most beneficial for both parties;
9. accepted that Mr Kelly said words to the effect “you want us to pay $500,000 key money to you”, that he responded “yes, we are asking for a payment of $500,000” and that Mr Kelly had said that “key money” would be illegal. However, Mr Somerton said that he never responded to the term “key money” and that he did not know what key money was at the time but has subsequently come to understand the concept; and
10. said that Mr Kelly became quite irate at that point, screamed that he had lost lots of money through Mr Somerton’s actions already and hung up the phone.
11. Mr Kelly recalls that on 2 December 2016 he had a further conversation with Mr Somerton in which Mr Somerton suggested that the $500,000 Kingsmede required could be considered compensation for its losses as a result of the receivership and the time and effort expended by the owners/respondents. Mr Somerton also recalls a subsequent conversation with Mr Kelly in which Mr Kelly indicated that the Receivers would be prepared to pay $500,000 as compensation.
12. In cross-examination Mr Somerton was asked to explain what he intended the $500,000 payment would cover. The following exchanges occurred with Mr Somerton:

Mr DeBuse: And was that in the context of you saying the $500,000 can be considered compensation for losses as a result of the receivership and the time and effort expended by the owners?

Mr Somerton: It was – I described it as widely as I could. It was compensation for expenses, losses, the time spent …

Mr DeBuse: And what that $500,000 was to cover everything that you could possibly think of that you had incurred under the lease by way of a loss, a damage or an expense?

Mr Somerton: No, that’s not the case. The 500,000 together with the settlement agreement together with any amounts that have been paid for rent and so forth. So it was – it was a package deal that included everything, including what was to come.

…

Her Honour: What do you mean by “that included everything”?

Mr Somerton: So releases under the agreement between the receivers and I were hard fought and very strongly negotiated and they were crucial to us agreeing.

Her Honour: But you say the $500,000 was partly in payment for the release?

Mr Somerton: Partly in payment for – it just encompassed everything. The time spent on the receivership, the agreements we had to put forward, a release form Chop 1 and the receivers, and the expenses and the loss.

1. Mr Somerton accepted that as at 2 December 2016 there had been no discussion about the Chophouse Guarantee and what was to occur in relation to it, and that there had been no threat to call on it as at that date.
2. In relation to the new lease being negotiated with the Solotel Companies, Mr Somerton gave the following evidence in cross-examination:

Mr DeBuse: Okay. You had, in negotiating the lease with Mr Soloman and Solotel, insisted on terms which resulted in a significantly increased rent from the rent that Chop 1 had been paying?

Mr Somerton: Yes.

Mr DeBuse: And the term, the initial term under the lease, was longer than the remaining – than the balance of the term under the Chop 1 lease?

Mr Somerton: Yes.

Mr DeBuse: And the amount of the bank guarantee that you were obtaining from Solotel in the event of the lease was $175,000, as opposed to the bank guarantee you held of $100,000?

Mr Somerton: I can’t recall the exact amount, but I think the bank guarantee was higher than that.

Mr DeBuse: You think it was higher than 175,000?

Mr Somerton: Yes.

Mr DeBuse: So there was an – at least in those ways, there was significant benefits in the proposed lease with Solotel to Kingsmede?

Mr Somerton: With the exception of time, yes. Those were more financially beneficial terms than the previous lease.

1. On 9 December 2016 Mr Duncan became aware that on 8 December 2016 Chop 1 as vendor had exchanged a contract for sale of Chophouse Sydney (**Chophouse Sale** **Agreement**). An email dated 9 December 2016 from John Duncan to, among others, Mr Duncan was in evidence before me. In that email, John Duncan informed the recipients that “Chophouse Sydney has exchanged last night to Solotel”. John Duncan’s email dated 9 December 2016 was a part of an email chain which included an earlier email dated 7 December 2016 from Mr Spooner in which he wrote:

Hi Ant

Further to Phil’s note below regarding the Chophouse Sydney venue, we confirm:

* Contracts are being exchanged on the venue today / tomorrow
* The landlord and purchaser have agreed the new lease agreement
* Completion is scheduled for **19 December 2016**
* I am expecting a call from Solotel’s HR manager to discuss the employment of Keystone staff following exchange
* I was proposing to introduce you to Solotel’s HR lead for you to liaise with throughout the process.

Please let me know if this creates any issues.

I will give you a call once exchange occurs.

Mr Duncan could not recall seeing the earlier email dated 7 December 2016 which notified the scheduled completion date for the sale of Chophouse Sydney as 19 December 2016.

1. The Chophouse Sale Agreement provided for the sale of the business carried on at the Premises, ie Chophouse Sydney, to the Solotel Companies as **Buyer**. The other parties to the Chophouse Sale Agreement were Chop 1 and Chop Brands Pty Ltd (receivers and managers appointed) (administrators appointed) as **Sellers**, Keystone Group Holdings Pty Ltd (receivers and managers appointed) (administrators appointed), the Receivers and the Administrators. The Chophouse Sale Agreement included the following terms:
2. in cl 1.1 “Definitions” the term “Bank Guarantee” is defined to mean:

the Bank Guarantee issued by [the CBA] in favour of [Kingsmede] and [Pamiers] for an amount of $100,000.00

1. clause 2.1 “Conditions precedent” includes:

(a) Clauses 4.1 and 6 do not become binding on the parties and are of no force or effect unless and until:

…

(2) (**grant of new lease**) the ‘Lease Condition Precedent’;

…

(5) (**Bank Guarantee**) the ‘Bank Guarantees Condition Precedent’

have been satisfied or waived in accordance with clause 2.4.

…

(c) In this clause 2.1:

…

(2) ‘**Lease Condition Precedent**’ means the owner of the Property grants a new lease in respect of the Property to the Buyer on terms satisfactory to the Buyer (acting reasonably);

…

(5) ‘**Bank Guarantee Condition Precedent**’ means the lessor under the Property Lease has confirmed in writing to the relevant Seller (a copy of which confirmation has been provided to the Buyer) it will return the original of the Bank Guarantee held by (or on behalf of) the lessor under the Property Lease at Completion.

1. clause 2.4(b) provided relevantly that the condition in cl 2.1(a)(5), which I will refer to as the **Chophouse Guarantee Condition Precedent**, is for the benefit of the Sellers and may only be waived by the Sellers in writing;
2. clause 4.1 provided for the sale of the “Business Assets” on the “Completion Date” in consideration of the Buyer assuming the “Assumed Liabilities” and agreeing to pay the “Purchase Price”; and
3. clause 6 concerned “Completion”.
4. There was no evidence that the Chophouse Sale Agreement was provided to Mr Somerton or any other employee of KPMS or the respondents. Mr Somerton’s evidence, which I accept, is that he had nothing to do with the Chophouse Sale Agreement and did not know about it at the time, by which I infer he was unaware of its terms.

## The Chophouse Guarantee

1. Mr Somerton’s evidence was that he was still concerned that the lease between the respondents and the Solotel Companies would not proceed. While he did not identify when in time he held that belief, he said that it was “a real risk in [his] mind”. Mr Somerton said that from about 31 October 2016 the respondents and the Solotel Companies had had disagreements about the terms of the proposed new lease, particularly in relation to turnover rent.
2. In late November or early December 2016 Mr Somerton had conversations with Mr Potter about calling on the Chophouse Guarantee due to Chop 1’s default. Mr Somerton considered that Chop 1 had breached the Lease and that the respondents had incurred and were continuing to incur costs and expenses in connection with that breach and the receivership. Mr Somerton said that he discussed this with Mr Kelly when he learnt that the Receivers intended to have the Chophouse Guarantee returned as a condition of settlement on 19 December 2016.
3. Mr Potter recalled that at some point he had a conversation with Mr Somerton about the Chophouse Guarantee but does not recall the specific details of that conversation.
4. Mr Somerton believed that if the negotiations for the proposed new lease with the Solotel Companies failed the respondents would have large claims for costs and expenses against Chop 1 which could not be met by Chop 1, including:
5. the loss of rental income as there would be no tenant for the Premises;
6. the fit out of the Premises would be rendered useless without an operator for the restaurant;
7. make-good costs for the Premises which the respondents may have to incur and the cost of fitting out the space for a new tenant;
8. marketing and agent fees to obtain a new tenant;
9. actual expenses comprising legal fees in connection with the breach of the Lease and the receivership and the time spent and invested over the preceding six months by officers and employees acting for the respondents; and
10. potential liability and expense in the event that the Receivers might sue the respondents because they had somehow acted in a way that caused them loss or damage.
11. Mr Somerton was also concerned that the settlement between the respondents and the Receivers would not occur. On 13 December 2016 Mr Somerton received a draft of the proposed deed between the respondents and the Receivers which incorporated changes proposed by the Receivers, a number of which he did not agree with. Mr Somerton said that on 13 December 2016 he spoke with, among others, Messrs Solomon, Kelly and Spooner and informed them of his concerns and that on 13 and 15 December 2016 he exchanged emails with Messrs Kelly and Spooner.
12. Mr Somerton said that, having regard to the matters set out at [65]-[66] and [67]-[69] above, his reasons for calling on the Chophouse Guarantee on 16 December 2016 were:
13. the respondents already had claims on Chop 1 for external costs and “internal notional costs”. He did not know what the total value of those claims might be, but thought that the legal costs were already about $40,000 to $50,000 and that there would be more to come;
14. he had a feel for how much time he and others at KPMS and Kingsmede had spent and were still spending on the receivership and it seemed that they were investing enormous time and energy to resolve a problem caused by Chop 1;
15. there were growing costs that were unknown, since he could not predict with any accuracy the future costs or how much more time and energy KPMS and the respondents would have to continue to invest in the receivership to achieve a final outcome; and
16. there was a real possibility that the respondents would lose around $40,000 per month if the proposed new lease fell away and Chop 1 left the premises, which could amount to hundreds of thousands of dollars in lost revenue.
17. Accordingly on 16 December 2016 Mr Somerton decided to cause the respondents to call on the Chophouse Guarantee by sending a letter to the CBA.
18. On 16 December 2016 Mr Potter signed a letter addressed to the CBA which had been prepared by Rachel Fisher, a former employee of Kingsmede who held the position of property manager. At the time Mr Potter understood that Mr Somerton had decided to have the respondents claim the Chophouse Guarantee in connection with the receivership of Chop 1, and that this letter was that call on the guarantee. The letter included:

With reference to the above bank undertaking dated the 24th of December 2012 in the sum of $100,000.00, copy of which I have enclosed, we would like to make a full claim for the total amount of the bank guarantee being $100,000.00 due to the tenant’s default.

As a result, kindly have the proceeds paid by cheque. Please be informed that I hereby authorise our Property Manager, Rachel Fisher, to pick up the cheque in exchange of the original bank guarantee at the CBA branch at 48 Martin Place, Sydney NSW 2000.

1. Between 16 December 2016 and 17 January 2017, when the CBA paid out the amount due under the Chophouse Guarantee (see [112] below), Mr Somerton had no contact with the CBA.
2. In cross-examination Mr Somerton:
3. accepted that:
	1. as at 16 December 2016 the Receivers had paid rent, as he recalled, up to 19 December 2016;
	2. there was significant financial benefit to the respondents in completing and entering into the new lease with the Solotel Companies;
	3. on the sale of Chophouse Sydney the respondents would receive $500,000; and
	4. none of the matters set out at [70] above could have operated on his mind either as at 20 December 2016, the day after the deed of settlement and release had been signed by the Receivers and delivered with a cheque for $500,000 to HDY, or as at 17 January 2017, when the CBA paid out the Chophouse Guarantee;
4. agreed that he knew that as at 12 December 2016 HDY had received a signed copy of the new lease from the Solotel Companies and that all he had to do was to have it signed by the respondents and there would be a binding agreement;
5. said that at the time there was “risk floating around between all the parties” and that they “required all pieces of the puzzle to land” by which he meant the respondents’ deed of settlement with the Receivers, the new lease, which he accepted they had, and the Chophouse Sale Agreement;
6. said that he was not aware of the arrangements sitting behind the Chophouse Guarantee but accepted that there was likely to be an arrangement for indemnification of the CBA;
7. said it was not the case that he used the Chophouse Guarantee to obtain money to which he knew he, in a very short period of time, would not be entitled;
8. was emphatic that he had serious concerns that the settlement between the respondents and the Receivers might not occur (see [69] above); and
9. disagreed both that the only thing that could have possibly caused the transaction between the respondents and the Solotel Companies to not go ahead was the actions of Kingsmede and that there was no serious concern in his mind that the respondents and the Solotel Companies would not enter into the transaction documents.
10. Mr Somerton said that he called on the Chophouse Guarantee on 16 December 2016 because of the difficult relationship he had with the Receivers. He said that after the respondents terminated the Lease, the Receivers maintained that the Lease was still on foot and they could cure the technical default, so it was only after Mr Somerton went through the process of terminating the Lease and having it removed from the title of the Premises, which occurred on 15 December 2016, that he felt sufficiently comfortable that the Receivers could not rectify the breach and so he called on the Chophouse Guarantee. He denied that:
11. he called on the Chophouse Guarantee on 16 December 2016 because there was nothing anybody could do about it at that point;
12. his explanation for calling on the Chophouse Guarantee was one he had come to with the benefit of hindsight; and
13. at the time he called on it he knew that the respondents were not going to suffer any expense, loss or damage.
14. According to Mr Somerton on or about 16 December 2016 he was told by HDY that the Receivers wanted to finalise the receivership and one of the things they wanted was the Chophouse Guarantee.
15. According to Mr Kelly on 16 December 2016 he had a telephone conversation with Mr Somerton during the course of which they had an exchange to the following effect:

Mr Kelly: Can we discuss the bank guarantee? It is an outstanding item.

Mr Somerton: We won’t return the bank guarantee. We will call on it when the sale settles. What made you think we would return the bank guarantee? It has always been our intention to draw down on it, and we have the right to.

A letter from the Receivers to the respondents dated 19 December 2016 (see [87] below) refers to a conversation between Messrs Somerton and Kelly on 16 December 2016 and an email from Mr Kelly to the Administrators dated 19 December 2016 (see [92] below) refers to a conversation which took place “late on Friday”. I am satisfied that late on 16 December 2016 Messrs Somerton and Kelly had a conversation in which Mr Kelly sought return of the Chophouse Guarantee and Mr Somerton informed Mr Kelly that it would not be returned.

1. Mr Somerton said that he informed the Receivers in a conversation with Mr Kelly on the morning of 19 December 2016 that the respondents had called on the Chophouse Guarantee. Given the matters set out in the preceding paragraph it is likely that this conversation took place late on 16 December 2016. Mr Somerton’s version of the conversation is to the following effect:

Mr Kelly: The directors want the Bank Guarantee back.

Mr Somerton: The Bank Guarantee has been claimed already. It’s ours. I can’t do anything about it now, it’s too late. If you want us to give $100k to the Directors, you need to make good the difference and tip on another $100k to our agreement. We need to get to that figure.

Mr Kelly: That’s nuts. I’m not doing that. You’ve already cost us millions of dollars.

Mr Somerton: Where do you want to go from here?

Mr Kelly does not recall having a conversation in the terms recorded above and does not recall Mr Somerton informing him that the Chophouse Guarantee had already been called on.

1. In cross-examination Mr Somerton gave evidence that the Chophouse Guarantee was never discussed with Mr Kelly and when the issue of its return came to light he told Mr Kelly that it had been called. He said that he had always assumed the Chophouse Guarantee was part of what he described as “the package deal” while Mr Kelly had assumed that it was not.
2. The arrangements that had been struck between the respondents and the Solotel Companies, the Receivers and the Solotel Companies and the respondents and the Receivers were interdependent. However, as at 16 December 2016 there was, on the evidence, no certainty one way or the other that all parts of the transaction would complete. Mr Somerton aptly described them as pieces of a puzzle. As at 16 December 2016 the puzzle was not complete. While the new lease had been signed by the Solotel Companies, the Chophouse Sale Agreement had been exchanged but not completed and the deed of settlement and release had not been finalised.
3. As at 16 December 2016 Mr Somerton had the concerns set out at [65]-[66] and [67]-[70] above. There was nothing in any of the evidence before me that displaced Mr Somerton’s evidence in that regard or that would cause me to conclude that Mr Somerton did not have those concerns at the time.
4. As set out at [79] above, Mr Somerton and the Receivers never discussed the Chophouse Guarantee prior to it being called on 16 December 2016. The evidence bears that out. It is also apparent that on 16 December 2016 Mr Somerton became aware that the Receivers sought the return of the Chophouse Guarantee. That was the first time Mr Somerton became aware that was so. That occurred in the conversation which took place on the evening of 16 December 2016 and thus, I infer, after Mr Potter had signed the letter addressed to the CBA and the call on the Chophouse Guarantee had been made. Mr Kelly cannot recall whether Mr Somerton informed him that the respondents had called on the Chophouse Guarantee at that time but does not deny that he did. That being so, I would accept that Mr Somerton did inform Mr Kelly of that fact. In any event, even on Mr Kelly’s version of his conversation with Mr Somerton on 16 December 2016, it is clear that the respondents’ and the Receivers’ respective positions on, and assumptions in relation to, the Chophouse Guarantee and what would happen to it were at odds, it being a matter which had simply not been a part of any discussion or negotiation between those parties.

## The Deed of Release

1. The deed to be entered into reflecting the arrangement referred to at [58] above, called a deed of settlement and release (**Deed of Release**), was the subject of negotiation between the solicitors for the respondents, HDY, and the solicitors for the Receivers, HSF, over the period from about 8 to 19 December 2016.
2. On 16 December 2016 HDY provided an amended version of the Deed of Release to HSF and asked for confirmation that the Deed of Release was “now agreed”. By email sent at 8.35 pm that evening HSF confirmed that the Deed of Release was “now in agreed form” and that it could “be put into execution form of signing, with exchange at completion”.
3. Mr Kelly said that he agreed to enter into the Deed of Release with the respondents as he believed that it would result in the sale of Chophouse Sydney finally settling and, in accordance with the Chophouse Sale Agreement, assumed that the Chophouse Guarantee would be returned. Of course Mr Kelly could have only assumed that to be so until the evening of 16 December 2016. Mr Kelly also believed that once the Deed of Release had been signed the respondents would have experienced no losses and were receiving a replacement guarantee from the incoming party.

## The events of 19 December 2016

1. A number of events took place on 19 December 2016, although the order in which they occurred is not clear.
2. Mr Kelly sent a letter to Kingsmede and Pamiers in which he referred to the Lease, the Chophouse Guarantee, the proposed sale of the business of Chop 1 to the Solotel Companies and his conversation with Mr Somerton on 16 December 2016 in which Mr Somerton had informed him that they intended “to make a call on the [Chophouse Guarantee] at or after completion of the Sale in the amount of $100,000”. Mr Kelly’s letter continued as follows:

As I have previously communicated to Mr Somerton, [Chop 1] disputes the [respondent’s] entitlement to call on the [Chophouse Guarantee]. I note that there are no rental arrears under the Lease and that the Lessor has to date failed to articulate any basis upon which it would be entitled to call on the [Chophouse Guarantee]. [Chop 1] will hold the [respondents] responsible for any loss suffered by [Chop 1] in connection with any improper call on the [Chophouse Guarantee].

We reserve all rights of [Chop 1], the Receivers and the Administrators in respect of the Lease, the [Chophouse Guarantee] and the Premises.

In cross-examination Mr Kelly accepted that at this time he was in a predicament: the Receivers had signed the Chophouse Sale Agreement which included as a condition precedent the return of the Chophouse Guarantee; and the respondents had informed him that they were not going to return the Chophouse Guarantee.

1. By email sent at 9.38 am HSF requested an execution copy of the Deed of Release and by email sent at 10.16 am that was provided by HDY together with a request that HSF confirm that completion would take place at 4.00 pm on that day.
2. By email sent at 10.33 am to Ron Zucker, the solicitor for the Solotel Companies, Mr Somerton confirmed that the lease was in a form acceptable to the respondents subject to:

1. settlement of the Business Sales Agreement between your clients and the Receivers; and

2. execution of the [Deed of Release] between the [respondents], the Receivers and Chop 1 Pty Ltd (administrators appointed) (receivers and managers appointed).

1. By email sent at 11.18 am, Mr Zucker sought “confirmation in more specific terms” from Mr Somerton. His email included:

Could you please confirm the following on behalf of the [respondents]:

1. You have received the attached executed lease, the Lessee’s disclosure statement, the original bank guarantee and evidence of current insurances.

2. These documents are satisfactory and meet the Lessor’s requirements in relation to the granting of the lease.

3. Provided:

a) settlement of the Business Sale Agreement between the Lessee and the Receivers occurs; and

b) the [Deed of Release] between the Landlord, the Receivers and Chop 1 Pty Ltd (administrators appointed) (receivers and managers appointed) is exchanged and you receive $550,000 pursuant to that deed,

the Lessor will accept the lease with a commencement date of 19 December 2016 and as soon as practicable, have it executed and registered.

1. By email sent at 11.25 am Mr Somerton provided the confirmation sought by the Solotel Companies.
2. At 11.51 am Mr Kelly sent an email to Mr McKenna, one of the Administrators, which included:

Just by way of update, in a discussion with the landlord of Chophouse Sydney late on Friday the landlord advised that they would not return the bank guarantee for Chophouse.

The bank guarantee for Chophouse is a property backed guarantee provided by CBA, with a limit of $100k. We have advised the landlord that they have no right to draw down on the guarantee because:

* There are no rental arrears, and no economic loss to the landlord
* There is a new tenant
* There is a replacement guarantee in place

The landlord has not advised us whether they are planning to draw down on the guarantee nor provided any reason or basis for doing so. HSF have written to the landlords solicitors confirming this position, and we will keep you informed as to how these discussions progress.

This development will not prevent settlement, as we have the ability to waive the CP in the sale agreement that provides for the return of the bank guarantee, and we have significant concerns that settlement is in fact not going to happen if there are further delays from today. It may be worth notifying Wendy Jacobs of this development and she may wish to correspond with the landlord directly.

In cross-examination Mr Kelly was asked why he included the statement in his email that “[t]he landlord has not advised us whether they are planning to draw down on the guarantee”. It was put to Mr Kelly that he did so because he did not want Mr Duncan to know that the landlords had stated unequivocally that they were going to call on the Chophouse Guarantee but Mr Kelly could not recall if that was so. He said that he did not recall his motivation for using those words, noted that he expressly said that the respondents were refusing to return the Chophouse Guarantee and surmised that he was hoping to negotiate with the respondents to encourage them not to drawdown on the Chophouse Guarantee. He said that he was not trying to conceal from anyone the fact that the Chophouse Guarantee was at risk. It is clear, even on Mr Kelly’s version of his conversation with Mr Somerton on the evening of 16 December 2016, that the Receivers knew at the very least that the respondents intended to call on the Chophouse Guarantee. However, I accept Mr Kelly’s evidence that his email to Mr McKenna was framed as it was because, at that stage he hoped, though his solicitors, to achieve a different outcome.

1. At 12.33 pm Leonard McCarthy, special counsel at K&L Gates, lawyers for the Administrators, sent an email to, among others, Stephen Mattiussi at Russells, at the time the lawyers for TGLC, (**Administrators’ Email**), which included:

In relation to Chophouse Sydney, completion of that sale is expected to occur today. The administrators have been informed by the receivers and managers this morning that the landlord it is not proposing to return the bank guarantee. The administrators together with the receivers and managers do not consider the landlord is able to do this because:

• There are no rental arrears, and no economic loss to the landlord.

• There is a new tenant.

• There is a replacement guarantee which will be provided by the new tenant.

The landlord has not advised whether it is planning to draw down on the guarantee nor provided any reason or basis for doing so. HSF, the solicitors for the receivers and managers, have written to the landlords solicitors confirming this position.

We are instructed to inform you of this development as we understand the bank guarantees generally have been issued at the request of one or more of the directors or entities associated with them and are secured by property in which the directors have, directly or indirectly, an interest. You therefore may wish to agitate the issue with the landlord directly at the same time as it is being agitated through the external administrations.

1. By email sent at 4.05 pm Mr Somerton informed Mr Zucker that they were “presently trying to resolve an issue with respect to execution of the [Deed of Release]” and that until it was resolved, the respondents were “unable to accept the lease with a commencement date of 19 December 2016”.
2. It seems that Mr Somerton had assumed that the execution of the Deed of Release and the proposed new lease could occur without Mr Potter. At some point on 19 December 2016 Mr Somerton was informed by the respondents’ lawyers that that was not possible. As Mr Potter was not available on 19 December 2016, an issue arose as to how to manage and co-ordinate the settlement going forward.
3. The proposed resolution of that issue which was discussed between the parties’ lawyers was for an escrow arrangement to be put in place. In that regard, by email sent at 4.12 pm HDY proposed that they would hold and not release the original signed counterparts of the Deed of Release signed by Chop 1 and the Receivers and the bank cheque for $550,000 (collectively, **Receiver Documents**) until they received the original signed counterparts of the Deed of Release and the proposed new lease from the respondents (**Respondents’ Undertaking**).
4. By email sent at 4.26 pm HDY informed HSF that the respondents would “confirm entry into the new lease upon provision of the Receiver Documents to HDY in accordance with the terms set forth in the undertaking below”. They requested that the Receivers’ lawyers confirm that they “agree to the below terms”.
5. By email sent at 4.58 pm HSF confirmed that the Receivers were “willing to proceed on the basis of the HDY undertaking set out below” and that in order to settle the transaction the Solotel Companies required confirmation from the respondents “that the new lease has been accepted by the [respondents] and will be signed and registered by the [respondents]”.
6. By email sent at 5.01 pm Mr Somerton confirmed to Mr Zucker “the position as set out in [Mr Zucker’s] email at 11:18AM today”.
7. By email sent at 5.35 pm HSF sought confirmation from the Solotel Companies that they were happy to proceed to completion on the basis of the Respondents’ Undertaking. Mr Zucker responded noting that the form of undertaking was of no consequence to the Solotel Companies. Rather, they required confirmation from the respondents that the lease had been accepted and would be registered.
8. The copy of the Deed of Release in evidence before me, signed by Chop 1 and Mr Kelly, was not dated. It includes the following terms:
9. clause 2 titled “Payment” provided that:

(a) The Receivers will pay the Payment Amount to Kingsmede by bank cheque simultaneously on exchange of original executed counterparts.

(b) The parties acknowledge and agree that the Payment Amount represents a payment to compensate Kingsmede for the internal and external fees and expenses incurred by Kingsmede as a result of the Receivership.

(c) Payment of the Payment Amount is in full and final settlement of any Dispute.

1. in cl 3 the provision of mutual releases by the Receivers on the one hand and Kingsmede on the other. The release provided by the Receivers, referred to as the “Releasor”, was in the following terms:

(a) The Releasor, to the extent it is able:

(i) jointly and severally releases Kingsmede and its Related Persons from any Claim which it has or may have in the future against Kingsmede or its Related Persons; and

(ii) irrevocably covenants with Kingsmede and its Related Persons jointly and severally not to make or bring any Claim against Kingsmede or its Related Persons in any jurisdiction,

in respect of or arising in whole or in part, either directly or indirectly, out of any Dispute, wherever and whenever arising, whether known or unknown at the time of execution of this deed, whether presently in contemplation of the parties or not and whether arising at common law, in equity, under statute or otherwise (collectively the **Releasor or** **Released Matters**).

In the Receivers’ counterpart the following was included in handwriting in cl 3(a) after the word “otherwise” and before the words in round brackets:

but not including any Dispute relating to the bank guarantee issued to Kingsmede in connection with the lease

1. in cl 5 that the parties to the Deed of Release treat the existence and provisions of the deed and all information provided by any other party under the deed on a without prejudice basis in an attempt to settle or resolve any dispute as confidential information not to be disclosed except in the specified circumstances set out in cl 5(b).
2. Mr Duncan first became aware that the respondents would not return the Chophouse Guarantee on 19 December 2016. Mr Duncan cannot recall whether he became aware of this from Mr Kelly or via the Administrators’ Email (see [93] above).

## Subsequent events

1. By letter dated 23 December 2016 HDY provided HSF with the original signed counterparts of the Deed of Release and a copy of the new lease for the Premises. Their letter included:

In accordance with the undertaking given on 19 December 2016, we are now irrevocably authorised to release the Receiver Documents held in escrow by Henry Davis York to Kingsmede Pty. Limited and Pamiers Pty. Ltd.

We note that our client does not accept the last minute (and without notice) hand written amendment to clause 3(a) of the Deed. The enclosed Deed and Lease are provided to you upon that basis.

1. For the purposes of the proceeding TGLC and Kimana provided a concession in the following terms:

That the [Deed of Release] in the form executed by the respondents was binding from at the latest 23 December 2016 on all of the parties to it (including [Chop 1]).

The effect of the concession is that for the purpose of resolving the issues in dispute between the parties, the Deed of Release signed by the respondents, without the handwritten amendment inserted by the Receivers, is the version of that document which TGLC and Kimana accept is binding on the parties to it.

1. Mr Somerton accepted that as at 23 December 2016 the respondents had received a cheque for $500,000, entered into a new lease on more advantageous terms with the Solotel Companies, received a new guarantee on behalf of the Solotel Companies for the new lease and no longer had to deal with the Receivers.
2. On 23 December 2016 Steven Mattiussi of Russells delivered a letter addressed to the respondents to Mr Somerton. In that letter Russells indicated that it acted for TGLC and “other related entities” of Chop 1. The letter included:

Our instructions are that:

l. the Former Lease has been terminated, and there are no rental arrears or other financial obligations owing to you by the Former Lessee;

2. a bank guarantee was issued in your favour by the Commonwealth Bank of Australia in connection with the Former Lease (the **Bank Guarantee**);

3. the Former Lessee (by way of its external controllers) has requested the return of the Bank Guarantee;

4. despite the request, you have not returned the Bank Guarantee;

5. to the contrary, on or about 16 December 2016, Mr Scott Somerton (on your behalf) informed Mr Morgan Kelly (one of the Former Lessee’s joint and several Receivers and Managers) that you intend to call on the Bank Guarantee;

6. Mr Kelly, on behalf of the Former Lessee, has (by way of letter to you dated 19 December 2016):

(a) disputed your entitlement to call on the Bank Guarantee;

(b) noted your ongoing failure to articulate any basis upon which you would be entitled to call on the Bank Guarantee;

(c) confirmed that the Former Lessee will hold you responsible for any loss suffered by the Former Lessee in connection with any improper call on the Bank Guarantee; and

(d) otherwise reserved all of the Former Lessor’s rights in respect of the Bank Guarantee and the Premises;

7. a new lease of the Premises has been executed in favour of Sol Bligh Limited and Mash Bligh Pty Ltd (the **Current Lessee**); and

8. the Current Lessee has provided a bank guarantee in your favour in connection with the new lease.

Please confirm, by COB today (23 December 2016), that the Bank Guarantee has been returned. Otherwise, we too are instructed to demand the immediate return of the Bank Guarantee.

If the Bank Guarantee has not or will not be returned, and in addition to the exposure you will have to the Former Lessee, our clients will also look to you for damages and loss that they too will suffer in connection with any improper call on the Bank Guarantee.

Mr Somerton said that it was only by reason of this letter that he first heard of TGLC.

1. At the time of delivery of the letter referred to in the preceding paragraph Mr Somerton had a conversation with Mr Mattiussi to the following effect:

Mr Mattiussi: I act for the directors of companies in the Keystone Group of Companies. I understand Kingsmede has claimed a bank guarantee in the Chop 1 receivership. The directors want it back.

Mr Somerton: The bank guarantee has already been claimed. We won’t be returning it.

Mr Mattiussi: I understand. The directors are very upset. Here’s a letter. Have a good Christmas.

1. Later on 23 December 2016 Mr Mattiussi sent an email to the solicitors for the Administrators and the solicitors for the Receivers which included:

Earlier today, we wrote to Kingsmede/Pamiers regarding the bank guarantee. A copy of our letter is also attached. On delivering the letter, I met briefly with Mr Somerton who indicated, amongst other things, that:

1. the bank guarantee was called upon 3 or 4 days ago; and

2. there is an agreement of some kind regarding the lease (to which the Receivers are a party) and, consistent with its terms, the landlord felt perfectly entitled to call on the bank guarantee.

Our clients are both surprised and disconcerted by these developments, particularly in light of the previous correspondence referred to above.

Please immediately provide a copy of the agreement referred to at 1 above so that we may take a coordinated approach to what, on its face, appears to be conduct by the landlord that is entirely inconsistent with the stance that both the Receivers and the Administrators have taken with respect to the bank guarantee.

1. By email dated 6 January 2017 K&L Gates informed Russells, among other things that:

As has been conveyed to you previously by both the administrators and the receivers and managers, it is a condition precedent to completion in the relevant BSA’s that the relevant landlord(s) agree to the return of the existing bank guarantee(s). That condition precedent is able to be waived by the Seller and was waived by he [sic] Seller, through the receivers and managers, in the case of Chophouse Sydney. This was because of a real apprehension the sale would be lost if the waiver was not given and completion did not occur on the day that it in fact did. We refer to our emails to Steven Mattiussi in that regard.

…

1. By letter dated 12 January 2017 HDY responded to Russells’ letter dated 23 December 2016. That response relevantly included:

Clause 12.1(e) of the Lease provides that it is an event of default if, amongst other things, the Tenant is placed under official management or has a receiver or manager of any of its assets appointed. In accordance with clause 12, if an event of default occurs, the Landlord has a contractual right to re-enter the Premises and determine the Lease. Clause 19.2 of the Lease provides that the Landlord may, without notice to the Tenant, call upon the bank guarantee in whole or in part if an event of default occurs.

The Lease was terminated by the Landlord effective 1 November 2016 pursuant to the Termination Letter, a copy of which is attached.

The Landlord called upon the bank guarantee in accordance with the terms of the Lease. The bank guarantee was claimed by the Landlord in advance of it entering into the deed of settlement and release between the Landlord, the Tenant and Morgan John Kelly and Ryan Reginald Eagle in their capacity as joint and several receivers and managers of the Tenant.

The Lease was terminated and the security was called upon as a result of the event of default. Accordingly, the Landlord will not return the bank guarantee nor will it account to the Tenant for any moneys received in accordance with its claim on the bank guarantee.

1. On 17 January 2017 Russells wrote to HDY seeking “full particulars of any alleged loss or damage suffered by [the respondents] in respect of the [Lease]” and requesting those solicitors to indicate how the respondents “intend to apply or account for any proceeds of the [Chophouse Guarantee]”.
2. Also on 17 January 2017 a bank cheque for $100,000 was drawn by the CBA in the names of Kingsmede and Pamiers and on 18 January 2017 a deposit of $100,000 was made into an account in the names of Kingsmede and Pamiers held with the National Australia Bank.
3. On or about 18 January 2017 Mr Duncan was informed by John Duncan that the CBA had paid out the Chophouse Guarantee. Mr Duncan understood that the CBA had paid $100,000 to the respondents.
4. By letter dated 20 January 2017 the CBA demanded payment of the amount paid out by it under the Chophouse Guarantee from Chop 1. Mr Duncan did not become aware of this demand until after commencement of this proceeding.
5. On 23 January 2017 HDY responded to Russells’ letter dated 17 January 2017 including that:

The Landlord has incurred significant costs as a direct result of the Tenant’s default under the Lease. The costs include but are not limited to, legal costs and management costs.

In no event will the Landlord account to your client for the moneys received in accordance with its claim on the bank guarantee as the Lease was terminated and the security was called upon in its entirety to compensate the Landlord for its loss due to the event of default.

What’s more, your client is The Good Living Company Pty Ltd and other (non-specified) related entities of the Tenant. As such, your client has absolutely no authority to demand the return of the bank guarantee on behalf of the Tenant nor does your client have any right to claim against the Landlord for any alleged damages or loss as your client has no connection with, or entitlement to, the bank guarantee.

Those solicitors refused to provide the Deed of Release and correspondence with the Receivers and their solicitors as requested by Russells on the basis that that document and the correspondence were governed by a confidentiality agreement.

1. By email dated 8 February 2017 Mr Mattiussi informed Mr Steele of HDY that:

We are instructed as follows in response to your letter dated 23 January 2017:

1. the administrators and receivers have previously advised that they do not consider that the landlord was able to validly call on the bank guarantee because:

(a) there were no rental arrears, and no economic loss to the landlord;

(b) there was a new tenant; and

(c) there was a replacement guarantee provided by the new tenant;

2. the solicitors for the receivers have previously written to you confirming the position referred to at 1 above;

3. notwithstanding 1 and 2 above, your recent oblique reference to “*significant costs*” remains entirely unsubstantiated; and

4. as each of the receivers and administrators will no doubt confirm for you, the bank guarantee was issued at the request of certain of our clients’ directors, and is secured by property in which our clients have an interest - accordingly, our clients have suffered loss as a direct consequence of the landlord’s conduct.

Unless the alleged “*significant costs*” can be substantiated (with supporting evidence) to our clients’ satisfaction, they will be left with no alternative but to commence proceedings against the landlord (and others) for the loss suffered as a direct consequence of your clients calling on the bank guarantee. Accordingly, whilst reserving all of our clients’ rights and without making any admissions, we are instructed to reiterate our previous request for full particulars of the alleged “*significant costs*” with all supporting material. Should you fail to answer this request, we will rely on this and previous correspondence on the question of the costs of court proceedings.

Finally, we are not aware that the receivers have any objection to the said deed of settlement and release being disclosed to us, subject to any reciprocal confidentiality regime that might be necessary; please let us know what obligations of confidentiality you require before that document can be provided.

1. On 15 February 2017 Mr Mattiussi sent a follow-up email to Mr Steele of HDY seeking a response to his email of 8 February 2017.
2. On 29 March 2017 Mr Duncan received an email from Ricardo Woelms, relationship executive CBA, in which Mr Woelms confirmed that there had been a claim on the Chophouse Guarantee. In his email Mr Woelms also informed Mr Duncan that:

As you know the Bank is obligated to make an immediate payment upon demand and has duly done so. In the absence of direct cash support the Bank has had to establish a loan account to make the necessary payment of $100,000.00.

If the loan account is not repaid in full the Bank will need to commence recovery action. Security consists of:

…

1. On 4 April 2017 Mr Mattiussi sent a further email to Mr Steele which included:

Our clients need to properly understand, with precision, the loss or damage your clients say they have suffered as a consequence of the event of default under the lease with Chop 1. However, despite all previous requests for information and documentation, our clients have not received any substantive information or documentation to support your clients’ position in calling on the relevant bank guarantee. Given the information and documentation vacuum - and whilst reserving all rights - our clients cannot begin to understand how any purported loss or damage might total $100,000.

Importantly, your clients’ conduct (in denying previous requests for information and documentation) must be considered in the context of the Receivers having repeatedly indicated and confirmed to us that all necessary payments under the lease with Chop 1 were made, that the new tenant took the premises on an ‘as is’ basis, and that the new lease was on better terms and included a guarantee (to replace the guarantee called upon by your clients to the detriment of our clients).

Our clients are loathe to incur further legal costs on this matter, particularly given the quantum involved and the losses incurred by our clients to date. However, this is an issue of principle as much as anything else, and we are instructed that our clients will not tolerate any unconscionable or wrongful conduct by your clients.

Given your clients’ ongoing refusal to act reasonably in providing the information and documentation previously requested, our clients will proceed to make an appropriate court application.

1. TGLC and Kimana subsequently commenced proceedings in the Supreme Court of New South Wales seeking orders for preliminary discovery from the respondents. On 18 May 2017 an order was made in that proceeding requiring the respondents to give discovery “of all documents that are or have been in their possession and relate to whether or not [TGLC and Kimana] are entitled to make a calm for relief”.

## Payment of amount owing to the CBA

1. According to Mr Duncan, on 12 January 2018 he arranged for TGLC to pay $114,154.44 to the CBA made up of $100,000, being the amount of the Chophouse Guarantee, and $14,154.44, being interest on that amount. That amount was paid by two direct debit transactions of $112,000 and $2,145.55.
2. There were a number of statements of account in evidence which, when considered together, establish that the CBA was repaid the amount it paid out on the Chophouse Guarantee plus interest thereon by TGLC. Those statements of account were:
3. a CBA “Cash Deposit Account Statement” addressed to TGLC for an account in the name of TGLC for the period 1 January 2018 to 31 January 2018 which showed the following transactions:



1. a CBA statement addressed to the secretary, TGLC for the period 1 January 2018 to 31 March 2018 for a “Cheque Acct Bearing Interest” in the name of TGLC which showed the following transactions:



1. a CBA “list of transactions” for account “Chop 1 Pty Ltd contingent liability payment account”, account type “overdraft cheque account” which showed the following transactions:



## The respondents’ costs and expenses

1. Mr Somerton gives extensive evidence of the expenses and costs associated with the administration and receivership of Chop 1. It is not necessary to set that evidence out in any detail. In summary Mr Somerton says that the respondents incurred both internal and external costs.
2. The internal costs comprise the time Mr Somerton spent working on the issues arising out of Chop 1’s receivership and administration. Mr Somerton has undertaken the exercise of estimating the hours spent and allocated a cost by pro-rating his estimated time to his annual salary. In doing so he has calculated both a low estimate and a high estimate.
3. The other internal cost is KPMS’ cost for management of the Chop 1 receivership based on 5% of the income for the Premises for each month. The management fee is for collecting rent, paying bills and addressing maintenance issues on the respondents’ properties. Mr Somerton says that:
* from July to October 2016 the management fees were $7,914.32;
* in November 2016 the management fee was $1,978.58;
* in December 2016, when the sum of $500,000 was paid by the Receivers, the management fee was $26,117.64; and
* on 31 December 2016 KPMS issued an invoice in the sum of $27,500, inclusive of GST, for work done in addition to collecting rent, paying bills and dealing with maintenance issues and which was an estimate of the time, work and effort expended by KPMS employees in dealing with the breach of the Lease by Chop 1 and the receivership. Mr Somerton said that this amount was an estimate. That invoice has not been paid because the issue has not been finalised. When it is finalised Mr Somerton says that KPMS will issue further invoices to the respondents and they will pay the invoices together.
1. Mr Somerton also says that as a result of spending time on issues associated with Chop 1’s receivership he was unable to undertake some of his ordinary duties during the period. However, he does not attribute any amount to this.
2. The external costs comprise legal fees for work undertaken by HDY and JDK Legal and work done by KPMG SGA for completing interim and final building inspection reports.
3. Mr Somerton’s summary of the internal and external costs which have been incurred is as follows:



1. Mr Somerton also estimates that he spent a further 10 to 20 hours on receivership issues between 23 December 2016 and 7 April 2017.

## The Assignment Documents

1. TGLC and Kimana sought to tender three documents over the opposition of the respondents. They were:
* deed of assignment apparently dated 8 March 2019 between Chop 1 as assignor and TGLC as assignee signed for and on behalf of Chop 1 (**Deed of Assignment**);
* execution page for the Deed of Assignment signed for and on behalf of TGLC; and
* assignment notice signed for and on behalf of Chop 1 by one of the Liquidators,

(together, **Assignment Documents**).

1. I reserved on the question of whether the Assignment Documents should be admitted into evidence.
2. TGLC and Kimana did not seek to tender the Assignment Documents as evidence that there had been an effective assignment but as evidence of the state of mind of the Liquidators of Chop 1 and their intentions insofar as the risk of double recovery is concerned. In other words, if the Court was to find that the money paid under the Chophouse Guarantee was TGLC’s and Kimana’s money then, based on the Assignment Documents, the Court would be satisfied that it is appropriate to make an order in favour of TGLC and Kimana.
3. In opposing the tender, the respondents made the following submissions.
4. First they said that there was nothing in the pleadings which would make the Assignment Documents relevant to an issue in dispute, noting that TGLC and Kimana had failed in their application just prior to the hearing to amend their statement of claim to include the purported assignment of the “Chose in Action” as defined in the Deed of Assignment. That included that there was no pleading about the Liquidators’ state of mind, an issue which could be defended if raised.
5. Secondly, an issue which arises on the respondents’ defence is that TGLC and Kimana are not the proper applicants for a cause of action based on unjust enrichment and that the only party who could rely on such a cause of action is the lessee, Chop 1, nor are they able to make a claim based on an alleged breach of s 21 of the ACL.
6. Thirdly, insofar as TGLC and Kimana seek to rely on the Assignment Documents to meet any argument, assuming they were otherwise successful, that there would not be double recovery because Chop 1 would not bring a claim, they did not seek to amend to raise that issue in their pleadings, for example by amending their reply to plead the assignment as an answer to [33A] of the respondents’ defence.
7. Fourthly, had the assignment been pleaded then the respondents may have challenged its effectiveness.
8. Having considered the parties’ submissions, I would uphold the respondents’ objection to the tender of the Assignment Documents and reject their tender. That is so because they are not relevant. Based on the pleadings on which the hearing proceeded, the assignment of the “Chose in Action”, being Chop 1’s right to receive or recover a debt, demand or damages on a cause of action arising out of or in relation to the Lease, was not raised or in issue.
9. If TGLC and Kimana wished to rely on the Assignment Documents to establish any part of their claim against the respondents, it was incumbent on them to set out clearly in their statement of claim or reply how that was so. It is the case that their attempt to amend the statement of claim prior to the hearing to rely on the Deed of Assignment failed, but no further application was made to amend either the statement of claim or the reply in relation to that matter.
10. That TGLC and Kimana sought to tender the Assignment Documents on a limited basis, namely as evidence of the Liquidators’ state of mind about the “Chose in Action”, does not assist. The respondents are entitled to know the case they have to meet. TGLC and Kimana cannot overcome an issue clearly raised by the respondents in their defence by the late tender of documents.

# the pleaded case

1. In their statement of claim TGLC and Kimana, among other things, allege that:
2. on or about 16 December 2016, during and notwithstanding the moratorium imposed by s 440F of the *Corporations Act 2001* (Cth), the respondents formally called on the Chophouse Guarantee;
3. by letter dated 19 December 2016 the Receivers wrote to the respondents noting that there were no arrears or other amounts outstanding to the respondents under the Lease and disputing their entitlement to call on the Chophouse Guarantee;
4. as at 16 December 2016 the respondents had not suffered loss or damage arising from, or in relation to, the termination of the Lease up to, equal to or exceeding $100,000;
5. on or about 23 December 2016 the respondents and the Receivers entered into the Deed of Release pursuant to which the respondents received payment of $500,000 plus GST as “compensation for the internal and external fees and expenses incurred by [them] as a result of the receivership”;
6. as at 23 December 2016 the respondents had not suffered loss or damage arising from or in relation to the termination of the Lease;
7. on or about 17 January 2017 in response to the call on the Chophouse Guarantee, the CBA paid $100,000 to the respondents;
8. as at 17 January 2017 and at all times thereafter, the respondents had not suffered loss or damage arising from, or in relation to, the termination of the Lease;
9. in circumstances where:
	1. the respondents did not suffer loss or damage arising from, or in relation to, the termination of the Lease, to the value of $100,000 or at all but instead unjustly enriched themselves;
	2. all amounts due and payable to the respondents under the Lease were paid as and when they fell due by the Receivers;
	3. the respondents obtained better security and overall lease terms by entering into the new lease with the Solotel Companies; and
	4. the respondents received $500,000 under the terms of the Deed of Release,

the respondents by calling on the Chophouse Guarantee, failing to withdraw that call after receipt of the moneys under the Deed of Release and before receipt of the proceeds of the Chophouse Guarantee on 17 January 2017 and retaining the amount paid by the CBA under the Chophouse Guarantee, engaged in unconscionable conduct within the meaning of ss 20 and 21 of the ACL; and

1. as a result of the respondents’ unconscionable conduct TGLC and Kimana have suffered loss and damage and the respondents have been enriched to the detriment of TGLC and Kimana.
2. In effect, TGLC and Kimana put their case in two ways:
3. in the alternative they say that either as at 16, 20 or, at the latest, 23 December 2016 Mr Somerton knew that there was a real likelihood that the respondents would receive the sum of $500,000 and that in making the call on, continuing to demand and not withdrawing the call on the Chophouse Guarantee, the respondents acted unconscionably (**s 21 Case**); and
4. they say that the moneys received by the respondents from the CBA on 17 January 2017 was not the respondents’ money and there was no obligation owing in respect of that money as at 17 January 2017 pursuant to which the respondents were entitled to appropriate and retain those moneys. If there was no entitlement as alleged, the respondents are liable to repay the moneys to their true owner, TGLC and Kimana (**s 20 case**).
5. In summary, the respondents:
6. deny that they engaged in unconscionable conduct within the meaning of ss 20 or 21 of the ACL;
7. say that if they did engage in such conduct by calling on the Chophouse Guarantee, that conduct was not in connection with the supply or possible supply of goods or services to TGLC and Kimana within the meaning of that phrase in s 21(1) of the ACL; and
8. say that further and in the alternative, in the circumstances, the claim is not one which can be made by TGLC and Kimana but can only be made by Chop 1.

# the lease and the chophouse guarantee

1. As a preliminary matter it is convenient to consider the contractual relationship between the respondents as lessors and Chop 1 as lessee insofar as the Chophouse Guarantee was concerned. The requirement to provide a guarantee and the circumstances in which the respondents were permitted to call on the guarantee so provided are set out in cl 19 of the Lease (see [19] above).
2. The nature of a bank guarantee was discussed in *Wood Hall Ltd v Pipeline Authority* (1979) 141 CLR 443 (***Wood Hall***)*.* At 445 Barwick CJ described the bank guarantees in that case as unconditional bonds to pay money on demand up to a stated maximum amount and as a “cash deposit or its documentary substitute”, the purpose of which was to act as security for the due performance of the contract. His Honour said that there was no basis on which the unqualified nature of the promise to pay on demand could be qualified by reference to the terms of the contract between, relevantly, the contractor and the owner.
3. At 457 Stephen J in agreeing with the conclusion of the court below about the unqualified nature of the bank guarantees said:

… Not only does the clear, indeed empathic [sic], language of these guarantees preclude the introduction of any such qualification: to introduce such a qualification would be to deprive them of the quality which gives them commercial currency. Once a document of this character ceases to be the equivalent of a cash payment, being instantly and unconditionally convertible to cash, it necessarily loses acceptability. Only so long as it is “as good as cash” can it fulfil its useful purpose of affording to those to whom it is issued the advantages of cash while involving for those who procure its issue neither the loss of use of an equivalent money sum nor the interest charges which would be incurred if such a sum were to be borrowed for the purpose. Being “as good as cash” in the eyes of those to whom it is issued is essential to its function. …

1. In *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd* (2008) 249 ALR 458; [2008] FCAFC 136 (***Clough***) at [83] a Full Court of this Court (French, Jacobson and Graham JJ) observed that clear words are required to support a construction of a performance guarantee which would inhibit a beneficiary from calling upon it where a breach is alleged in good faith, that is, not fraudulently.
2. In *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1996] 4 All ER 563; 2 Lloyd’s Rep 524 (***Cargill***) one of the issues before the court was whether, in the event of obtaining payment under a performance bond as a result of a call it was entitled to make, a party was entitled to retain all of the moneys obtained or only those moneys equal to the amount of its loss or some other amount.
3. In addressing the issues before him, Morison J commenced with a consideration of the commercial purpose of a performance bond. At 568 his Honour observed that it is implicit in the nature of a bond, in the absence of clear words to the contrary, that when the bond is called at some stage in the future there will be an accounting between the parties “in the sense that their rights and obligations will be finally determined”. His Honour said that the bond was not intended as an estimate of the amount of damages to which the beneficiary may be entitled for the breach said to give rise to the right to make a call but that it was “a ‘guarantee’ of due performance” and that if the amount of the bond is not sufficient to meet the beneficiary’s claim for damages he or she can sue for the loss.
4. Justice Morison then considered the question of whether the party providing the bond could recover any overpayment, concluding that it could. At 570, after referring to two Australian cases, *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in* *liquidation)* (1978) 141 CLR 335 (***Mainline Constructions***) and *Wood Hall*,his Honour said that those cases “lend (limited) support for the proposition that moneys paid under a performance bond are designed to be used in accordance with the provisions of the contract and that any surplus is for the account of the party which provided the bond”. At 571, having regard to the commercial purpose of bonds, the authorities and commentary in texts, his Honour said that he took the view that:

if there has been a call on a bond which turns out to exceed the true loss sustained, then the party who provided the bond is entitled to recover the overpayment. It seems to me that the account party may hold the amount recovered in trust for the bank, (where, for example, the bank had not been paid by him) but that does not affect his right to bring the claim in his own name. In the normal course of events, the bank will have required its customer to provide it with appropriate security for the giving of the bond, which would be called upon as soon as the bank was required to pay. ... In principle, I take the view that the account party is always entitled to receive the overpayment, since his entitlement is founded upon the contract between himself and the beneficiary.

1. The decision in *Cargill* was affirmed on appeal: see *Cargill International S.A. v Bangladesh Sugar and Food Industries Corporation* [1998] 1 WLR 461. It was also referred to in *O’Sullivan v National Australia Bank Ltd* [1998] NSWSC 303. In that case Young J said that what Morison J was saying in *Cargill* in the passage quoted in the preceding paragraph is that “it is a matter of contract between the person who provides the security and the person who gets paid under the security, and that one does not muddy the waters by looking to see how the promised bond was furnished because it can be assumed that there will be collateral contracts between other parties which will deal with that situation commercially”. In that case his Honour said that the fact that the company, Frogs for Fitness Pty Ltd, had agreed to provide the bond and there was an “overplus” provided a cause of action to it. However, his Honour said that Mr O’Sullivan, who had arranged for the bank guarantee to be provided and against whom the bank proceeded for reimbursement of the amount paid under the guarantee in answer to a call, would have his claim against the company “in contract, trust or otherwise, so that any moneys recovered by Frogs for Fitness will in fact flow through it like a conduit to the ‘real owner’. That, however, does not prevent Frogs for Fitness maintaining an action”.
2. Having regard to those principles I return to cl 19.2 of the Lease and its proper construction:
3. clause 19.2 gives a clear and unconditional right to the respondents to call up the Chophouse Guarantee in whole or part if there is an event of default and without notice to Chop 1;
4. clause 12.1 relevantly provides that an event of default occurs where, in the case of a tenant which is a company, it is placed under official management or has a receiver or manager of any of its assets appointed. There was no dispute between the parties that an event of default had occurred upon the appointment of the Receivers and the Administrators to Chop 1;
5. the right to make a call on the Chophouse Guarantee arises upon the occurrence of the event of default. There is no requirement that the respondents first incur or establish that they have incurred “any consequential loss, damage or expense” as a pre-condition to making the call. To construe the clause otherwise would undermine the purpose of the guarantee;
6. this construction is reinforced when one has regard to the terms of the Lease as a whole: see *Clough* at [85]. In that regard cl 19.1 of the Lease provides that on or before signing the Lease, the tenant must provide “an *unconditional* bank guarantee in a form acceptable to the [respondents] issued by an Australian bank” to secure the tenant’s performance of its obligations under the Lease (emphasis added); and
7. in the event that the respondents make a call on the Chophouse Guarantee and it is later established that it was overpaid and received an amount in excess of its “consequential loss, damage or expense” arising from the default, Chop 1 could sue for repayment of the amount that was overpaid.
8. That is, as submitted by the respondents, cl 19.2 of the Lease is permissive such that if a default occurs, as it had here, then, in the absence of fraud, the Chophouse Guarantee could be called.
9. The contractual position is of course not decisive of the question of whether, as alleged by TGLC and Kimana, in the circumstances of this case the respondents acted unconscionably and contrary to ss 20 or 21 of the ACL in making the call on the Chophouse Guarantee as alleged by TGLC. I turn now to consider the issues arising out of those claims.

# Legislative framework

1. Sections 20 and 21 of the ACL relevantly provide as follows:

20 Unconscionable conduct within the meaning of the unwritten law

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

(2) This section does not apply to conduct that is prohibited by section 21.

21 Unconscionable conduct in connection with goods or services

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

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

…

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

…

(3) For the purpose of determining whether a person has contravened subsection (1):

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

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

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court’s consideration of the contract may include consideration of:

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

1. The terms “goods” and “services” are defined in s 2 of the ACL. Those definitions are inclusive. Insofar as services are concerned, s 2 provides:

***services*** includes:

(a) any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce; and

(b) without limiting paragraph (a), the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:

(i) a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods; or

(ii) a contract for or in relation to the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or

(iii) a contract for or in relation to the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction; or

(iv) a contract of insurance; or

(v) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or

(vi) any contract for or in relation to the lending of money;

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

1. Section 22 of the ACL sets out a series of considerations to which the Court may have regard in determining whether a corporation has engaged in unconscionable conduct. It relevantly provides:

(1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the ***supplier***) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the ***customer***), the court may have regard to:

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

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

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

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

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

(f) the extent to which the supplier’s conduct towards the customer was consistent with the supplier’s conduct in similar transactions between the supplier and other like customers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and

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

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

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

(j) if there is a contract between the supplier and the customer for the supply of the goods or services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and

(l) the extent to which the supplier and the customer acted in good faith.

# the s 21 case

## Can TGLC and Kimana rely on s 21?

1. The respondents contend that because TGLC and Kimana are third parties and strangers to the lessor/lessee relationship and the Lease they cannot rely on s 21 of the ACL. That is, the respondents say that there is no supply relationship between TGLC and Kimana on the one hand and the respondents on the other such as would come within s 21. If the respondents are correct in their assertion it is a complete answer to TGLC’s and Kimana’s claim insofar as they rely on s 21.
2. In support of that contention the respondents rely on *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110 (***Monroe Topple***). In that case, among other things, Monroe Topple & Associates Pty Ltd (**MTA**) alleged that the Institute of Chartered Accountants in Australia (**Institute**) had engaged in unconscionable conduct within the meaning of s 51AC of the *Trade Practices Act 1974* (Cth) (**TPA**), the predecessor to s 21 of the ACL.
3. In order to obtain membership to the Institute, it was necessary to pass exams and assessments conducted by the Institute for which it provided training and materials on a per module basis. Until 2000 the Institute charged an enrolment fee for some of the services and materials it provided and offered for sale and charged separately for “instructional and support material” which was principally three guides: a Technical Guide, an Examination Guide and a User Guide. MTA and others also provided “instructional and support material” in competition with the Institute. From 2000 the Institute supplied all material required for each module, including the “instructional and support material”, for no charge beyond the enrolment fee. MTA alleged that the Institute acted unconscionably in the way in which it bundled together the material and services for training, previously the subject of separate charges, and in fixing its single charge at less than cost.
4. Justice Heerey summarised the decision of the primary judge, noting at [74] that in connection with unconscionable dealing the primary judge had held that s 51AC only applied in transactions between a “supplier” and “business consumer” and that the expression “in connection with” required that the conduct impugned “accompany, go with or be involved in” the supply of goods or services. The primary judge found that it was not sufficient that “such supply be the occasion of unconscionable conduct of the supplier to an unrelated third party with whom the supplier has no dealings at all”. At [114]-[116] Heerey J considered whether s 51AC applies where there was no supply or acquisition of services as between the Institute and MTA. His Honour said (Black CJ agreeing at [1]-[2] and Tamberlin J agreeing at [162]):

114 As a matter of language s 51AC(1) is directed not to conduct in trade or commerce generally, but rather to conduct in trade or commerce in connection with a particular kind of transaction, namely the supply or acquisition of goods or services to or from a person (other than a listed public company). This may be contrasted with s 52(1) which simply provides that a corporation shall not in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

115 That s 51AC(1) is concerned only with conduct in relation to dealings between the corporation in question and a particular kind of person (a person other than a listed public company) is confirmed by s 51AC(3) and 51AC(4). In each case some 12 factors which may be taken into account are stipulated. It is true that they are non-exclusive but they are all concerned with dealings between “supplier” and “business consumer” (sub-s (3)) or between “acquirer” and “small business supplier” (sub-s (4)). They contemplate that the Court is engaged in the task of determining whether there has been a contravention of s 51AC(1), and thus are confined to a particular kind of transaction, namely the supply or acquisition of goods or services as between stipulated categories of person.

116 The conclusion that s 51AC is not concerned with the impact of conduct on third parties is confirmed by the legislative history: see *Australian Competition and Consumer Competition v CG Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491 at 494-496. In the present case his Honour (at 52,362-52,363 [255]-[259]) recounts in detail the legislative history. It is not necessary to repeat that history in these reasons. In my view it shows convincingly that the present s 51AC can be traced back to the original recommendation of the Swanson Committee in 1976 that unconscionable conduct be prohibited “to give the Act a greater ability to deal with the general disparity between buyers and sellers.”

1. While *Monroe Topple* was concerned with s 51AC of the TPA, the principle enunciated therein continues to apply to s 21 of the ACL: see *QNI Resources Pty ltd v Sino Iron Pty Ltd* [2016] QSC 62 at [85]-[103]; *Tameeka Group Pty Ltd v Landan Pty Ltd (No 3)* [2016] FCA 733 (***Tameeka***) at [166]-[169].
2. TGLC and Kimana submitted that s 21 of the ACL does not expressly require privity of contract but that it is concerned with the supply or possible supply of goods and services, the conduct does not have to be conduct to which a contract relates and s 21 is not confined to contracts. They said that it is a “connection test” and what needs to be considered is whether the conduct complained of was unconscionable conduct in connection with services. TGLC and Kimana submitted that in this case the conduct was calling on a guarantee which was in respect of a lease that had effectively come to an end in circumstances where it meant that somebody, namely TGLC and Kimana, was going to have to meet the liability to the CBA.
3. TGLC and Kimana also submitted that this case could be distinguished from *Monroe Topple* because the applicant in that case, MTA, was a stranger to the transaction and only commercially affected by the relevant supply,relying on *Monroe Topple* at [118].
4. It was not in dispute that the conduct in s 21 is directed to conduct in trade or commerce in connection with, relevantly, the supply of services *to a person* as opposed to conduct in trade or commerce generally: cf s 18 of the ACL and *Monroe Topple* at [114]. Section 21 is concerned with dealings between a supplier and consumer: see *Tameeka* at [166]. Here, TGLC and Kimana contend that there was a supply of services by the respondents under the Lease. Accepting for present purposes that is so, those services were prima facie supplied to Chop 1, who was the lessee and occupied the Premises pursuant to the terms of the Lease. The question is whether, in providing the security for the Chophouse Guarantee, which Chop 1 was required to provide under the Lease, TGLC and Kimana were brought into a relationship with the respondents which would be captured by s 21 of the ACL. In my opinion they were not. TGLC and Kimana were not only strangers to the Lease, in that they were not party to it, but they were strangers to the supply of the relevant services. TGLC and Kimana’s relationship was with the CBA which could demand repayment of any amount paid under the Chophouse Guarantee. It could not be said that there was any supply of services to them under the Lease.
5. That the respondents may have understood that in calling on the Chophouse Guarantee the CBA would not pay the moneys due out of its own pocket but that it would be indemnified or hold security in some form is not to the point. The relationship between the CBA and its surety is a separate matter. In any event the provision of such security, albeit in connection with the guarantee which was a requirement of the Lease, does not mean that the services provided by the respondents were extended such as to also be provided to TGLC and Kimana.
6. TGLC and Kimana sought to rely on *Monroe Topple* at [118] to distinguish the circumstances of this case from those before the Court in *Monroe Topple*. At [118] Heerey J considered if, contrary to his earlier finding, s 51AC of the TPA applied, whether the Institute engaged in unconscionable conduct. In doing so his Honour observed that MTA was “far removed” from those persons whom equity, by the doctrine of unconscionability, sought to protect, referring to persons disadvantaged by age, infirmity, illiteracy and so on. His Honour observed that there was an unchallengeable finding that the Institute acted in good faith “for the improvement of the practical education of persons seeking to obtain the valuable right to practice as Chartered Accountants”. The facts of that case are different to those that are present here. But there is nothing in the findings at [118], which concerned whether the Institute had engaged in unconscionable conduct as opposed to whether MTA was involved in the sort of transaction contemplated by s 21, that would cause me to reach a different conclusion.
7. That being so, in my opinion TGLC and Kimana cannot rely on s 21 of the ACL.

## Did the respondents engage in unconscionable conduct?

1. Against the possibility that I am wrong in the conclusion I have reached in the preceding paragraph, I turn to consider whether the respondents engaged in conduct which was unconscionable contrary to s 21 as alleged by TGLC and Kimana.

### TGLC’s and Kimana’s submissions

1. TGLC and Kimana submitted that the issues of unconscionability which arise from the call on the Chophouse Guarantee are that the right to make a call was not used for the purpose for which it was given. They said that the Chophouse Guarantee reversed an insolvency risk, namely that the right given by the Chophouse Guarantee was to bring about a situation where, rather than the lessor having a risk that it could not recover moneys or would be required to expend moneys in recovery of moneys owed to it, it received a payment from a third party, the CBA, from which it could deduct any damage suffered without requiring the assistance of the courts or risking its recovery by a liquidator as a preference.
2. TGLC and Kimana submitted that if that purpose is accepted then, at the time the call on the Chophouse Guarantee was made, the purpose for which the right had been given had become otiose. They said that was because there was no need or requirement to make the call. TGLC and Kimana contended that s 21 of the ACL draws attention to the nature of the act relied upon and is not limited to the circumstances existing at the formation of the contract. They said that it is unconscionable to use a power provided by a contract for a purpose for which the power was not provided, there was no mitigation and no attempt by the respondents to preserve the benefit for each part of the contract so far as it remained to be performed and the conduct was unconscionable because the respondents attempted to obtain compensation in excess of the amount which they were entitled to receive as damages for breach of the Lease.
3. TGLC and Kimana submitted that there was no loss of the benefits conferred by the Lease and, based on the known circumstances, none was reasonably foreseeable. They contended that, in the circumstances, the obligation to mitigate is inconsistent with a right to take the Chophouse Guarantee. They also contended that the parties had agreed to a strategy in substitution for the breach which returned a substantial commercial benefit above that which was conferred pursuant to the terminated Lease and that a reasonable businessperson acting in his or her legitimate business interests would not have required, or made, the call on the Chophouse Guarantee. TGLC and Kimana submitted that the right of the court to intervene where a power is exercised in fraud of the power extends across a wide range of powers and forms of unconscionability and that, if the court would have intervened, it is no less unconscionable for the respondents to retain the money that was the result of the unconscionable exercise of the power.
4. TGLC and Kimana contended that on its proper construction the Deed of Release says nothing about the receipt of moneys from third parties, in particular moneys to which the respondents were not entitled, and it is not the subject of any carve out or identified as a matter the subject of the release.
5. They also contended that the continuing demand for payment or failure to withdraw the call is unconscionable if they are successful in either of the first two submissions and that this provides a further basis for damages in the amount paid to the CBA in excess of the $100,000, being the interest on that amount.

### Relevant principles

1. In *Tameeka* at [170]-[172] I set out the principles relevant to the application of s 21 of the ACL as follows:

170 In *Australian Competition and Consumer Commission v Allphones Retail Pty* *Ltd (No 2)* (2009) 253 ALR 324 Foster J considered s 51AC of the *Trade Practices Act 1974* (Cth) (the **Trade Practices Act**), the predecessor to s 21 of the ACL. At [113] his Honour said:

 113. There is a body of authority in this Court which establishes the following propositions:

(a) The scope of s 51AC is wider than that of s 51AA. The meaning of unconscionable for the purposes of s 51AC is not limited to the meaning of the word according to established principles of common law and equity;

(b) The ordinary or dictionary meaning of unconscionable, which involves notions of serious misconduct or something which is clearly unfair or unreasonable, is picked up by the use of the word in s 51AC. When used in that section, the expression requires that the actions of the alleged contravenor show no regard for conscience, and be irreconcilable with what is right or reasonable. Inevitably the expression imports a pejorative moral judgment; and

(c) Normally, some moral fault or moral responsibility would be involved. This would not ordinarily be present if the critical actions are merely negligent. There would ordinarily need to be a deliberate (in the sense of intentional) act or at least a reckless act.

(citations omitted)

171 In *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 the New South Wales Court of Appeal considered the operation of the *Contracts Review Act 1980* (NSW). In that context Allsop P (as his Honour then was) (with whom Bathurst CJ and Campbell JA agreed) said the following at [291] in relation to the term unconscionable:

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

172 In *Australian Competition and Consumer Commission v South East Melbourne Cleaning Pty Limited (In Liq)* [2015] FCA 25 at [116] Murphy J provided the following guide to considering a claim under s 21 of the ACL:

Dealing first with the principles of law, amongst other things, the following matters underpin a proper approach to unconscionability under the ACL:

(a) The Court must first and foremost have regard to the language of the statute rather than judicial explanations of unconscionability: *PT Ltd* at [101]; *Director of Consumer Affairs Victoria v Scully and Another* (2013) 303 ALR 168 (“*Scully*”) at [45] per Santamaria JA (Neave and Osborn JJA agreeing).

(b) “Unconscionability” is not a term of art but simply means “something not done in good conscience”: *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd [*2013] FCAFC 90 (“*Lux*”) at [41] per Allsop CJ, Jacobson and Gordon JJ; Scully at [36]; *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132 at [33] per Tamberlin, Finn and Conti JJ.

(c) The court should have due regard to the remedial and beneficial objects of the legislation: *Investec Bank v Naude* [2014] NSWSC 165 (“*Investec*”) at [54] per McDougall J.

(d) The court must have regard to the non-exhaustive and non-prescriptive list in s 22(1) although the presence of one or more of these matters will not be determinative to an unconscionability enquiry: *Scully* at [41]. However these matters may nevertheless assist the court in illuminating the scope and meaning of unconscionable conduct*: Scully* at [42]; *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* (2011) 34 VR 536 at [76] per Macaulay AJA (with whom Harper and Hansen JJA agreed).

(e) The court is not constrained by the general equitable concept of unconscionability although equity’s exploration of unconscionable conduct may assist the court: s 21(4)(a) ACL; *Investec* at [55]; *Scully* at [40].

(f) In determining unconscionability, the court is prevented from having regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention: s 21(3)(a) ACL.

(g) Whether or not conduct is unconscionable will depend on careful consideration of all of the conduct and involves standing back and looking at the whole episode: *Lux* at [44].

(h) The Court’s task involves evaluating conduct by reference to a normative standard of conscience which may develop and change over time and which must be understood and applied in the context in which the circumstances arise: *Lux* at [23] and [41]; *Scully* at [56].

(i) Notions of moral obloquy or moral tainting are relevant, but it must be recognised that it is conduct against conscience by reference to the norms of society that is in question: *Lux* at [41]. The task of statutory construction must focus on the text of the statute and a number of the factors in s 22 of the ACL do not necessarily involve dishonesty, sharp practice or conscious wrongdoing (eg s 22(1)(a), (b), (c), (e), (f), (h) and (j)). While conduct involving dishonesty, sharp practice or conscious wrongdoing is no doubt unconscionable, conduct which does not involve those factors may still be regarded as unconscionable. Substituting a test of “a high level of moral obloquy” for the standard of “unconscionability” is of doubtful assistance in determining whether the statutory prohibition has been contravened: *PT Ltd* at [101]-[106].

(j) As “unconscionability” in this context is predicated on “conduct”, a person’s conduct is to be distinguished from the consequences that that conduct may have on the lives of other people: *Scully* at [39]; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at [19] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.

(k) A determination of unconscionability involves a broadly based value judgment, applied to the facts on which reliance is placed, to the extent that they are proved: *Investec* at [59]; *Lux* at [23].

1. Given that the enforcement of a bank guarantee is at the heart of this case, it is relevant to note the comments of the Full Court in *Clough*,which concerned an appeal from a decision refusing to grant an interlocutory injunction restraining the respondent from enforcing its performance guarantees and the banks from making payment under those guarantees. One of the issues before the Full Court was whether the call on the performance guarantees contravened s 51AA of the TPA, the predecessor to s 20 of the ACL, on the ground that it was unconscionable within the meaning of the unwritten law of Australia.In relation to that issue at [138] the Full Court said:

As already pointed out, on their proper construction, the performance bank guarantees were unconditioned on any actual breach and did entitle ONGC to call upon them for their full amount. Given the commercial purpose of such guarantees, recognised in *Wood Hall Ltd* assuming the absence of fraud, there would seem to be very little, if any, scope for the application of equitable doctrines of unconscionable conduct to restrain the exercise by a party of its legal rights under such guarantees. There may be extreme cases which would merge into the area of bad faith exercises of the power. However that may be, the present is not a case which, on the materials before his Honour, justified any finding of a serious question to be tried of a contravention of s 51AA. The wide purpose of the performance bank guarantees and their character as reflecting an allocation of risk and a provision of security to their holder militate against any argument as to disproportion in their exercise.

See too *Ottoway Engineering Pty Ltd v Westpac Banking Corporation (No 3)* (2017) 123 ACSR 549; [2017] FCA 1500 where Besanko J followed *Clough*,noting at [198] that he would proceed in that case “on the basis that there is very limited scope for a holding of unconscionable conduct within s 20(1) of the ACL in a case involving a performance bond or demand guarantee because of the nature of the instrument”.

1. While these cases concerned s 20(1) of the ACL and its predecessor, which is of narrower application than s 21 of the ACL, the observation that there is limited scope for a finding of unconscionable conduct in relation to a bank guarantee or performance bond, given the nature of such an instrument, must apply equally to a claim under s 21 of the ACL, albeit having regard to the principles which are applicable to that section.

### Consideration

1. The conduct on the part of the respondents that TGLC and Kimana say was unconscionable was as follows:
2. as at early December 2016 the parties were moving forward with what Mr Somerton described as a “package deal” which did not involve the Chophouse Guarantee;
3. Chop 1 continued to pay rent under the Lease and to comply with its terms;
4. it was in all parties’ interests that there be a new lease of the Premises to the Solotel Companies – the new lease was on advantageous terms to the respondents and the Receivers would get the benefit of selling the Chophouse Sydney business as a going concern;
5. as part of the arrangements the respondents were to receive $500,000 from Chop 1 and the Receivers, which amount would satisfy every aspect of the respondents’ loss and damage; and
6. as at 16 December 2016 Mr Somerton must have been aware that the amount of $500,000 to be received from Chop 1 and the Receivers was sufficient to satisfy any loss or damage incurred by the respondents and the Court should find that his reasons as to why he called on the Chophouse Guarantee as at that date and was not so satisfied were developed with hindsight in order to justify the call after the fact.
7. In summary, the established facts are:
8. Chop 1 and the respondents entered into the Lease. The Lease was amended and on or about 24 December 2012 the Chophouse Guarantee issued by the CBA was provided to the respondents;
9. in about 2014 TGLC and Kimana provided security to the CBA for, among other things, the Chophouse Guarantee. The respondents were unaware of TGLC and Kimana having done so at the time. They only became aware of those companies at the earliest on 23 December 2016, in the case of TGLC, and on 7 April 2017, in the case of Kimana;
10. on 28 June 2016 the Receivers and Administrators were appointed to Chop 1. This constituted an event of default under the Lease;
11. following their appointment the Receivers traded the businesses owned by each of the Operating Companies, including Chophouse Sydney owned by Chop 1. Chop 1 continued to occupy the Premises and to pay rent until 19 December 2016;
12. between 29 June 2016 and 17 October 2016 on behalf of the respondents, Messrs Harrison and Mulligan, who were employees of KPMS, worked with the Receivers to attempt to identify a new tenant for the Premises;
13. on 30 August 2016 the respondents notified the CBA that they intended to terminate the Lease;
14. the Receivers’ preferred purchaser of Chophouse Sydney was Dixon. The respondents were not happy with Dixon as a preferred purchaser because of its proposed concept of a “gastro pub” for the Premises;
15. from about 17 or 18 October 2016, at Mr Potter’s direction, Mr Somerton assumed responsibility for dealing with the Receivers;
16. on 18 October 2016 the respondents terminated the Lease with effect from 1 November 2016;
17. notwithstanding the concern with Dixon as a prospective tenant of the Premises, at the Receivers’ request on 20 October 2016 Mr Somerton attended a further meeting with representatives of Dixon;
18. on 26 October 2016 the respondents formally rejected Dixon as a prospective tenant for the Premises;
19. commencing on 28 October 2016 the respondents and the Receivers entered into discussions with representatives of the Solotel Companies in relation to the acquisition of Chophouse Sydney and entry into a new lease of the Premises;
20. thereafter negotiations took place between the lawyers for the respondents and lawyers for the Solotel Companies in relation to a new lease of the Premises. By 1 December 2016 Mr Somerton thought that it was likely but not guaranteed that a new lease of the Premises with the Solotel Companies would proceed;
21. on 2 December 2016 Messrs Somerton and Kelly had two telephone conversations the result of which was that Mr Somerton requested and the Receivers subsequently agreed to a payment of $500,000 to the respondents as compensation. The first of those conversations became heated and it is clear that Mr Kelly was annoyed by the request for the payment of $500,000 as part of the transaction to effect the sale of the Chophouse Sydney business to the Solotel Companies and the grant of the new lease. However, the Receivers subsequently agreed to the payment;
22. on 8 December 2016 the Chophouse Sale Agreement was exchanged. That agreement included the Chophouse Guarantee Condition Precedent and a clause permitting the Sellers to waive the Chophouse Guarantee Condition Precedent. The respondents were not a party to the Chophouse Sale Agreement and had no knowledge of its terms;
23. on 16 December 2016 Mr Somerton decided to cause the respondents to call on the Chophouse Guarantee. As at that date Mr Somerton, conscious of their interdependency, held a number of concerns about whether the various parts of the whole transaction would complete and was concerned that the respondents had already incurred expenses and that he would incur additional costs and expenses if all parts of the transaction did not complete. Accordingly, he arranged for Mr Potter to sign a letter addressed to the CBA calling up the Chophouse Guarantee;
24. Mr Somerton became aware of the Receivers’ desire for return of the Chophouse Guarantee on 16 December 2016 after the call on the Chophouse Guarantee had been made. It is evident that the fate of the Chophouse Guarantee had not been a topic of discussion or negotiation between the respondents and the Receivers prior to that date;
25. on 19 December 2016 the Receivers were aware that the respondents would not return the Chophouse Guarantee. Correspondence was exchanged about that. Ultimately the Chophouse Sale Agreement was completed, with the Sellers waiving the Chophouse Guarantee Condition Precedent and the Receivers signed the Deed of Release and provided the cheque in the sum of $550,000 to HDY to be held in escrow until execution of the Deed of Release by the respondents. On their counterpart of the Deed of Release the Receivers attempted to include an amendment purporting to exclude the release from operating in relation to the Chophouse Guarantee;
26. on 23 December 2016 the respondents’ version of the Deed of Release (without the addition of the Receivers’ last minute handwritten amendments) came into operation. As at that date the Receivers were aware that the call had been made on the Chophouse Guarantee and the respondents were unaware of the existence of any third party interest in the Chophouse Guarantee. The first notion of the existence of TGLC came with the delivery of the letter from Russells on 23 December 2016;
27. on 17 January 2017 the CBA paid $100,000 to the respondents due under the Chophouse Guarantee;
28. Mr Somerton accepted that as at 20 December 2016 and 17 January 2017 the matters set out at [70] above could not have operated on his mind; and
29. there is evidence of the respondents’ costs incurred in dealing with the receivership of Chop 1.
30. In my opinion having regard to all of the circumstances there is no basis for a finding that the respondents engaged in conduct which was unconscionable in calling on the Chophouse Guarantee. That is so for the following reasons.
31. First, there was an event of default under the Lease permitting the call. Given the unconditional nature of a bank guarantee, which shifts the risk between parties, and the terms under which the Chophouse Guarantee could be called, it is clear that the respondents were entitled to call on it once there was an event of default.
32. TGLC and Kimana contend that Mr Somerton’s motivation for the call on the Chophouse Guarantee should not be accepted given that there was a concluded agreement which, although not yet signed by Kingsmede, was far advanced. As noted above, I accept Mr Somerton’s evidence of his reasons for calling on the Chophouse Guarantee. Mr Somerton believed that he had a contractual right, because of the event of default under the Lease, to call up the Chophouse Guarantee and was concerned by the current status of the transaction and the respondents’ exposure. In the face of that contractual right it is difficult to see how there could be any bad faith or improper purpose on Mr Somerton’s part, particularly in light of the other surrounding circumstances which existed as at 16 December 2016.
33. Secondly, the Receivers were aware of the respondents’ decision to call on the Chophouse Guarantee and of the fact that the call had been made. The respondents were open about their intentions and their actions, and there was no secrecy or trickery associated with their actions. Armed with that knowledge the Receivers entered into the Deed of Release and made the payment due under that deed to the respondents. They did not attempt to renegotiate the arrangement, rather they proceeded not only with the Deed of Release but with completion of the Chophouse Sale Agreement waiving the Chophouse Guarantee Condition Precedent to enable the whole of the transaction to proceed. The Receivers were concerned that the deal should not fall though.
34. Thirdly, given the circumstances that existed at the time the call was made on the Chophouse Guarantee there can be no suggestion of unfair dealing, lack of good faith or misleading conduct. Further, at that time the respondents were unaware of TGLC or Kimana and their role in providing security to the CBA for the Chophouse Guarantee.
35. Fourthly, this is not a case of inequality of bargaining power at any level. Both the Receivers and Mr Somerton were experienced business people. The Deed of Release was the subject of robust and detailed negotiations between Mr Somerton on behalf of the respondents and Mr Kelly on behalf of the Receivers, with each party represented by lawyers. Mr Duncan, a director of TGLC and Kimana, is a partner of an international accounting firm and an experienced businessman with substantial experience spanning at least 20 years in business transactions. In any event to the extent the call on the Chophouse Guarantee had any effect on TGLC and Kimana, because they had to reimburse the CBA, that was as a result of their contractual arrangements with the CBA, which were not known to the respondents and which were struck for the benefit of the Keystone Group.
36. Fifthly, if there was an overpayment to the respondents by reason of the call on the Chophouse Guarantee, Chop 1 would have a right of recovery for that amount subject to the Deed of Release which, as noted above, was the subject of negotiation between the respondents and the Receivers and which the Receivers entered into with the knowledge that the respondents had called on the Chophouse Guarantee.
37. TGLC and Kimana also contend that the failure to withdraw the call on the Chophouse Guarantee was unconscionable. Independent of the Deed of Release, Mr Somerton assumed that the respondents would call on the Chophouse Guarantee and retain those moneys. If Chop 1 wishes to contest that retention it can do so but, in my opinion, of itself the retention of those funds does not, in the circumstances, constitute unconscionable conduct.

# THE S 20 CASE

## TGLC and Kimana’s submissions

1. TGLC and Kimana described this claim as the simplest part of their case. They submitted, leaving aside the question of whether or not the respondents acted unconscionably as they allege, that in calling for payment under the Chophouse Guarantee, or maintaining that call after 23 December 2016, the moneys received on 17 January 2017 were not the respondents’ moneys at the time of the receipt because:
2. pursuant to the Deed of Release, the respondents had released the obligor, for whose benefit the moneys were paid, from any claim under the Lease which was the only basis for the respondents to retain the moneys. TGLC and Kimana contended that the release is in the widest terms but relates to identified matters and “claims under the [Lease]”, and that the receipt of payment under the Chophouse Guarantee is neither an identified matter in the Deed of Release or, by the time the money was received, a payment under the Lease. By the time of the respondents’ receipt of the moneys from the CBA the contractual relationship, which allocated risk and benefit as between the respondents and Chop 1, had come to an end by virtue of the Deed of Release;
3. the respondents acknowledge in their defence that they had, by 23 December 2016, received an amount that adequately compensated them for any claim under the Lease or the subject of dispute between themselves and the lessee and Receivers; and
4. Chop 1 is aware of this proceeding and makes no claim to the moneys.
5. TGLC and Kimana say that in *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 (***Paciocco***) at [250]-[307] Allsop CJ observed that claims in restitution form part of this Court’s jurisdiction under the rubric of the unwritten law in relation to unconscionable conduct. They said that the claim for the recovery of moneys unconscientiously retained (unjust enrichment) lies in restitution in an action for moneys had and received is made clear by the primary judge’s analysis of the claim for recovery, in that case of an alleged penalty, as one for money had and received as summarised in *Paciocco* at [376].
6. TGLC and Kimana submitted that once the source of the moneys and receipt by the respondents is established, the obligation to establish a right to retain the moneys passes to the respondents. They said that in relation to s 21 of the ACL the common law has always historically treated money as a chattel which can be detained and in that sense it is synonymous with goods. They noted that through preliminary discovery they sought to identify the right to the money maintained by the respondents but none has ever been provided.
7. TGLC and Kimana contended that no legally recognisable defence to repayment is advanced by the respondents and that their claim (pleaded in [31] of their defence) that they might have acted otherwise had TGLC and Kimana known of the potential claim would depend on there being a legal basis upon which they would be entitled to retain both the sum of $500,000 and the moneys received from the Chophouse Guarantee, but none is identified. TGLC and Kimana submitted that there is no detriment that falls within the accepted principles of alteration of position as a basis for retaining the moneys and that the respondents’ “evidence and admissions” do not support the contention that there is a loss or right of compensation, either contractually or as a result of an alteration of position from which they have suffered some detriment. TGLC and Kimana say that there was no compulsion on the respondents to execute the Deed of Release prior to receiving the moneys the subject of the Chophouse Guarantee.
8. TGLC and Kimana contended that the respondents’ defence conflates the rights of the landlord to recover from a named guarantor and the rights to call for and appropriate moneys under the Chophouse Guarantee. They said that the Lease does not appear to make the Chophouse Guarantee security for the obligations of the guarantor but directly for those of the lessor (although I assume that TGLC and Kimana intended to refer to the lessee here). TGLC and Kimana further contended that, notwithstanding the basis of the entitlement relied upon, the respondents do not appear to identify any expense, loss or damage for which the $500,000 received under the Deed of Release was not ample compensation for any expense, loss or damage against which the moneys under the Chophouse Guarantee could be appropriated.
9. TGLC and Kimana submitted that the character of the payment of the moneys is important both under the Chophouse Guarantee and the underlying obligation which it secured pursuant to the Lease. That is, the money was held pursuant to a performance bond and was not an amount for liquidated damages. TGLC and Kimana contended that pursuant to the Lease any money received in advance as surety of performance had to be appropriated against a failure to perform which was identifiable and calculable. They said that this benefit under the Lease is to be contrasted with a provision, which was absent, that the sum represented a genuine pre-estimate of damage that was appropriated to the damage by the parties in advance of the eventuality.
10. TGLC and Kimana further submitted that the fact that the respondents had called for the money the subject of the Chophouse Guarantee did no more than provide a basis for a receipt from a third party, the CBA. They noted that there is a dispute as to whether or not any entitlement might have been maintained when the call on the Chophouse Guarantee was made, but the subject of the call and underlying potential entitlement to appropriate the moneys was released by 23 December 2016 or satisfied by the payment by Chop 1 on the same date. They said that once the money the subject of the call under the Chophouse Guarantee was not received between 16 December 2016, when the call was made, and 23 December 2016 any entitlement was released or satisfied by payment of the $500,000 under the Deed of Release. TGLC and Kimana contended that any moneys received after that date (ie the $100,000 under the Chophouse Guarantee) were not the respondents’ moneys and the respondents were required to pay those moneys back or they were unjustly enriched.

## Consideration

1. TGLC and Kimana’s ground relying on s 20 of the ACL did not appear to be as simple as they claimed. As I understood the claim TGLC and Kimana allege that the respondents acted unconscionably by receiving and retaining the moneys paid under the Chophouse Guarantee in circumstances where by the time of receipt they had received sufficient payment under the Deed of Release such that they were unjustly enriched. In the alternative TGLC and Kimana’s claim can be seen as one where they allege that the respondents were unjustly enriched by their receipt and retention of the moneys paid under the Chophouse Guarantee and that this constituted unconscionable conduct under s 20 of the ACL.
2. On either basis the claim cannot succeed.
3. Section 20 of the ACL is narrower in its application than s 21. It focuses on unconscionable conduct in equity. In *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 (***Berbatis***) at [42] Gummow and Hayne JJ in considering s 51AA of the TPA, the predecessor to s 20 of the ACL, said:

The term “unconscionable” is used as a description of various grounds of equitable intervention to refuse enforcement of or to set aside transactions which offend equity and good conscience. The term is used across a broad range of the equity jurisdiction. Thus, a trustee of a settlement who misapplies the trust fund and the fiduciary agent who makes and withholds an unauthorised profit may properly be said to engage in unconscionable conduct. The relief given by equity against the imposition of monetary penalties and the forfeiture of proprietary interests has been said to reflect the attitude of equity to overreaching and unconscionable dealing, as well as to accident, mistake and surprise. The remedy of rescission may reflect the characterisation as unconscionable of the conduct of the party seeking to hold the plaintiff to a contract entered into under the influence of innocent misrepresentation or unilateral mistake. Again, the various doctrines and remedies in the field of estoppel, at a general level, may be said to overcome the unconscionable conduct involved in resiling from the representation or expectation induced by the party estopped.

(footnotes omitted.)

1. In *Clough* at [130]-[131] the Full Court, in considering s 51AA of the TPA, said:

130 The scope of s 51AA was discussed by the Full Court in *Samton* *Holdings*. As was pointed out in that case, a party alleging a contravention of s 51AA must be able to identify conduct which is unconscionable in a sense known to the “unwritten law, from time to time, of the States and Territories”. Under the unwritten law, which is the common law of Australia, unconscionable conduct will be such conduct as would support the grant of relief on principles set out in specific equitable doctrines.

131 Equity does not provide a remedy in respect of conduct in trade or commerce which is, in the opinion of a judge, unfair. It does not apply to unconscionable conduct at large: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 245; 185 ALR 1 at 28-9; 54 IPR 161 at 188-9; [2001] HCA 63 per Gummow and Hayne JJ.

1. It is convenient at this point to also refer to the decision in *Paciocco* on which TGLC and Kimana rely. In that case the appellants sought to set aside various bank fees charged by the respondent, the Australia and New Zealand Banking Group (**ANZ**). One of the claims they made was that the fees were the product of unconscionable conduct on the part of the ANZ within the meaning of ss 12CB and 12CC of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) or ss 8 and 8A of the *Fair Trading Act 1999* (Vic). Sections 12CB and 12CC of the ASIC Act are equivalent to ss 21 and 22 of the ACL. In that context, under the heading “Statutory unconscionability, unjustness and unfairness” commencing at [250] Allsop CJ considers the approach to unconscionable conduct in equity and the unconscionability provisions in issue in that case and, by analogy, the ACL. At [279]-[280] his Honour distinguishes the requirements of s 12CB of the ASIC Act from s 12CA of that Act (the equivalents of ss 21 and 20 of the ACL respectively) saying:

279 … The central provision relied upon, s 12CB, is to be understood in the context of Subdiv C of Div 2 of Pt 2 of the ASIC Act. Section 12CA provides immediate statutory context. The unwritten law referred to in s 12CA is the general law or common law of Australia, including in that phrase, the principles and doctrines of Equity. Unconscionability in Equity can be understood from at least two perspectives: first, the principles of unconscionable conduct as a basis for setting aside or refusing to enforce transactions or contracts entered into in certain circumstances; and, secondly, as a thematic feature of Equity being a central ethical or moral aspect of the character of Equity: see generally *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at [42]-[46]. Both features are relevant to Subdiv C as a whole. Further, s 12CB as a provision of an Australian statute can be taken to have been using the conception of “unconscionable” used in Australian legal discourse. It is Australian legal and public values that inform the meaning of words of an Australian statute. This is not an expression of parochialism, but a reflection of the influence of community values in the development of legal standards and legal development appropriate to a community: *Lange v Atkinson* [2000] 1 NZLR 257 at 263 (PC); *Skelton v Collins* (1966) 115 CLR 94 at 134-137 (Windeyer J); *O’Sullivan v Noarlunga Meat Ltd (No 2)* (1956) 94 CLR 367 at 375-376 (Dixon CJ, William, Webb and Fullagar JJ).

280 Insofar as one is considering the first perspective, it is important to recall that Equity operated to set aside or not enforce a particular transaction between the parties. The conduct and circumstances that gave rise to equitable relief related to the parties themselves, and to the transactional setting in which they found themselves. This is to be contrasted with s 12CB, which, in subs (4)(b), provides that the section is capable of applying whether or not a particular individual is identified as having been disadvantaged by the conduct.

1. At [282] Allsop CJ said of unconscionable conduct in the context of its roots in equity:

Unconscionable conduct, as a coherent basis for relief, had, at its root, the protection of the vulnerable from exploitation by the strong: *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at esp 461-462 and 474-475; *Blomley v Ryan* (1956) 99 CLR 362 at esp 405, 415 and 428-429; *Louth v Diprose* (1992) 175 CLR 621 at esp 626-627, 637 and 650; *Bridgewater v Leahy* (1998) 194 CLR 457 at 485-486; and *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392. Equitable relief for unconscionable conduct is based on a principle, not a rule. The applications or exemplifications of the principle are impossible to describe fully. Care should be exhibited in dwelling over technically or textually on individual expressions of the general principle of normative values, rooted in Equity’s remedying of injustice. That said, the expressions of the underlying general principle by Mason J and Deane J in *Amadio* at 462 and 474 and Lord Selborne LC in *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484 at 490-491 are enduring.

1. Having regard to those principles the conduct complained of, namely the receipt and retention of the moneys under the Chophouse Guarantee, was not unconscionable for the purposes of s 20 of the ACL. That is principally for the reasons set out at [181]-[187] above. As is apparent from the authorities referred to at [176] above, the nature of a bank guarantee means that there is only very limited scope for a finding of unconscionable conduct pursuant to s 20 of the ACL in a case involving such an instrument. In addition and as I have already found, there was no inequality in bargaining power and it could not be said that TGLC and Kimana were in a position of special disadvantage as the cases recognise: see for example *Berbatis* at [8]. The parties involved were all business people “concerned to advance or protect their own financial interests”: *Berbatis* at [15].
2. I turn then to consider the issue of unjust enrichment insofar as it forms a part of the first way in which TGLC and Kimana put their claim and it is said to constitute the conduct for the purpose of the second way in which I understand they put their claim under s 20 of the ACL.
3. TGLC and Kimana’s pleaded case does not include a standalone claim of common law restitutionary relief. Rather TGLC and Kimana rely on s 20 of the ACL to make good this part of their claim.
4. The notion of unjust enrichment is referred to, albeit briefly, by Allsop CJ in considering the approach to unconscionable conduct for the purposes of ss 12CB and 12CC of the ASIC Act at [296] where his Honour says:

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

(emphasis added.)

1. As noted at [199] above, his Honour drew a careful distinction between the scope of the ASIC Act equivalents of ss 20 and 21. The analysis set out in the preceding paragraph elaborates the principles relevant to unconscionable conduct under s 12CB of the ASIC Act (s 21 of the ACL) and should not be taken to apply to s 20 of the Actor be seen to be extending the reach of unconscionable conduct in equity beyond established fact patterns. Accordingly, I am not satisfied that, without more, unjust enrichment would be a sufficient basis for making out a claim of unconscionable conduct for the purposes of s 20 of the ACL. As noted at [201] above, TGLC and Kimana have been unable to point to further circumstances that would make the respondents’ receipt and retention of the Chophouse Guarantee unconscionable.
2. For completeness I note that TGLC and Kimana also refer to *Paciocco* at [376]. There Besanko J considered the limitation defences raised by the ANZ and the way in which the applicant sought to avoid the operation of the relevant legislation. That passage does not appear to assist TGLC and Kimana to take the issue any further.
3. Even if unjust enrichment is available as a basis of relief under s 20, in that it could be recognised as constituting unconscionable conduct, which I doubt, as submitted by the respondents TGLC and Kimana are not the proper applicants in any such claim.
4. In support of their position the respondents relied on *Wong v Huisman* [2010] QSC 192 (***Wong***) which was an application for summary judgment against the first plaintiff and an order dismissing the second plaintiff’s claim.
5. In that case the second plaintiff was the lessee from the defendants of industrial premises. The first plaintiff was the wife of the sole director of the second plaintiff. Pursuant to the lease, the second plaintiff was required to provide a bank guarantee for the due performance of its obligations under the lease, with the maximum liability of the bank being not less than the sum of the annual rent from time to time. The first plaintiff agreed as a condition of the guarantee issued by the bank that she would pay the bank any amount it paid to the defendants pursuant to the guarantee. The second plaintiff went into receivership and the defendants called on the guarantee. The bank paid the defendants $194,000 and in turn the first plaintiff paid that amount to the bank. The plaintiffs contended that the defendants called on the guarantee when they were not entitled to do so. The first plaintiff claimed the sum of $194,000 as damages for breach of contract or alternatively as moneys had and received.
6. At [27] Wilson J set out the first plaintiff’s submission to the effect that the defendants had been enriched by the receipt of a benefit which they had gained at the first plaintiff’s expense, and that it would be unconscionable for them to retain that benefit. At [28] Wilson J said that she did not accept “even in principle” those submissions. Her Honour said that any enrichment of the defendants was at the second plaintiff’s expense and not the first plaintiff’s and that any failure in consideration was a failure of basis or consideration in the relationship between the second plaintiff and the defendants. Wilson J concluded that there was no basis for a finding of any wrong committed by the defendants as against the first plaintiff.
7. The facts in this case are analogous to those before the court in *Wong*. TGLC and Kimana are in the same position as the first plaintiff and the respondents are in the same position as the defendants in *Wong*. Here the CBA paid the respondents prior to making any demand on TGLC and Kimana. The funds paid under the Chophouse Guarantee were not TGLC’s and Kimana’s funds. TGLC and Kimana were required to repay the CBA, which they ultimately did. As was the case in *Wong*, there was no enrichment at TGLC’s and Kimana’s expense.
8. In their submissions in reply TGLC and Kimana sought to distinguish *Wong*. First they say that in *Wong* Wilson J was considering the claim for relief in a subsisting contractual relationship, albeit one that was terminated, between the lessor and lessee and that her Honour treated the circumstances before her as analogous to those considered in *Ideas Plus Investments Ltd v National Australia Bank Ltd* (2006) 32 WAR 467 (***Ideas Plus***). TGLC and Kimana contended that their claim is made in different circumstances to that made by the plaintiff in *Ideas Plus* and by the first plaintiff in *Wong* as here the receipt of the moneys is said to be made unconscientiously because the entitlement to make it had come to an end by reason of the Deed of Release and the payment of the sum of $500,000, which was not the case in *Wong* and *Ideas Plus*. TGLC and Kimana’s alternative claim is that the call was made unconscientiously. They say that if the plaintiff in *Ideas Plus* had established that there was no entitlement to receipt then the outcome of the proceeding may have been different having regard to the principles considered.
9. TGLC and Kimana submitted that *Cargill*, *Mainline Constructions* and *Wong* are each concerned with determining rights to any surplus from the proceeds of a bond by reference to the rights of the parties after receipt but under a continuing contractual relationship and do not deal with the situation where those rights have been released. They said that those authorities do not deal with the situation where the party providing the guarantee to the beneficiary through the surety, I assume Chop 1, had undertaken to arrange its return and made no claim to the money or the benefit of it. TGLC and Kimana also noted that in each of *Cargill*, *Mainline Constructions* and *Wong* the other party to the underlying contract with the beneficiary was also a party to the proceeding and asserted an interest, which was not the case here.
10. TGLC’s and Kimana’s attempts to distinguish *Wong* and *Ideas Plus* based on factual differences do not in my opinion advance their position. TGLC and Kimana have not explained how it is they say that those cases can be distinguished beyond their assertion that the facts are different. Certainly in those cases there was no release between the party obliged to provide the guarantee or performance bond and its beneficiary. However, it is not clear why the application of the principle identified in *Wong* is different because Chop 1 is not a party to this proceeding, because Chop 1 had undertaken to arrange the return of the Chophouse Guarantee and made no claim to the money or, critically, because a release has been provided by Chop 1 to the respondents/beneficiary under the Chophouse Guarantee.
11. In those circumstances, I am satisfied that the principle in *Wong* applies here such that any enrichment of the respondents was at Chop 1’s expense and not at the expense of TGLC and Kimana. Those parties are not the proper applicants for such a claim.
12. In any event TGLC and Kimana have not identified any of the recognised factors to found a claim for unjust enrichment. That is, they have not identified the existence of a qualifying or vitiating factor such as mistake, duress, illegality or total failure of consideration: see *Chidiac v Maatouk* [2010] NSWSC 386 at [224]-[226]. Contrary to TGLC’s and Kimana’s submission, they bear the onus of establishing a recognised vitiating factor for restitutionary relief. That they have not done so is no doubt because no such factor is present. That being so there is no scope for unjust enrichment to operate.

# CONCLUSION

1. TGLC and Kimana have failed to make out their claims pursuant to ss 20 or 21 of the ACL. It follows that the proceeding should be dismissed.
2. No submissions were made about the costs of the proceeding. As TGLC and Kimana have been unsuccessful, subject to any submissions the parties may wish to make, I would propose to make an order that TGLC and Kimana pay the respondents’ costs.
3. Accordingly, I will make orders dismissing the proceeding and granting leave to the parties, if they wish, to file and serve submissions in relation to the issue of costs, not exceeding two pages in length, within 21 days of the date of delivery of these reasons. If submissions are filed then, unless any party requests an oral hearing, the question of costs will be dealt with on the papers. If no submissions are filed and served the order contemplated in [218] above in relation to the costs of the proceeding will be made to take effect on 31 January 2020.

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| I certify that the preceding two hundred and nineteen (219) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Markovic. |

Associate:

Dated: 20 December 2019