Federal Court of Australia

Good Living Company Pty Ltd as trustee for the Warren Duncan Trust No 3 v Kingsmede Pty Ltd [2021] FCAFC 33

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| Appeal from: | *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 120 of 2020 |
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| Judgment of: | **ALLSOP CJ, BESANKO AND JAGOT JJ** |
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| Date of judgment: | 16 March 2021 |
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| Catchwords: | **CONSUMER LAW** – appeal – where appellants provided security for bank guarantee required by lease between a related company and the respondents – where respondents called on bank guarantee prior to entry into deed of settlement and release – where respondents were unaware that appellants had provided security – where respondents received and retained moneys provided after bank guarantee was called – whether the calling on and collecting of money the subject of the bank guarantee constituted unconscionable conduct in contravention of s 20 and s 21 of Sch 2 to the *Competition and Consumer Act 2010* (Cth) – whether primary judge erred in not finding unconscionable conduct – whether primary judge erred in analysis of s 20 and s 21 – whether primary judge failed to consider pleaded case – whether the primary judge erred in not finding special disadvantage – whether the primary judge erred by not finding entitlement to relief – appeal dismissed  |
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| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth) s 12CB*Competition and Consumer Act* *2010* (Cth) Sch 2, ss 20, 21, 22, 236, 237*Trade Practices Act 1974* (Cth) s 51ACExplanatory Memorandum, Competition and Consumer Legislation Amendment Bill 2010 (Cth) Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth)  |
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| Cases cited: | *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd* [1978] HCA 45; 141 CLR 335*Australian Competition and Consumer Commission v Allphones Retail Pty Ltd (No 2)* [2009] FCA 17; 253 ALR 324 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* [2003] HCA 18; 214 CLR 51 *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90; ATPR ¶42-447*Australian Competition and Consumer Commission v Medibank Private Ltd* [2018] FCAFC 235; 267 FCR 544*Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* [2002] FCA 62; 117 FCR 301*Australian Competition and Consumer Commission v South East Melbourne Cleaning Pty Ltd (In Liq)* [2015] FCA 25*Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; 267 CLR 1*Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226; 148 FCR 132*Bluescope Steel (AIS) Pty Ltd v Australian Workers’ Union* [2019] FCAFC 84; 270 FCR 359*Boral Formwork v Action Makers* [2003] NSWSC 713*Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1996] 4 All ER 563*Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1998] 1 WLR 461*Chidiac v Maatouk* [2010] NSWSC 386*CIT Credit Pty Ltd v Keable* [2006] NSWCA 130*Clough Engineering Limited v Oil and Natural Gas Corporation Limited* [2008] FCAFC 136; 249 ALR 458*Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* [2017] FCAFC 75; 251 FCR 404*Commercial Bank of Australia Limited v Amadio* [1983] HCA 14; 151 CLR 447*Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; 249 FCR 421*Jenyns v Public Curator (Qld)* [1953] HCA 2; 90 CLR 113*Kakavas v Crown Melbourne Limited* [2013] HCA 25; 250 CLR 392*Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2002] FCAFC 197; 122 FCR 110*O’Sullivan v National Australia Bank Ltd* [1998] NSWSC 303 *Ottoway Engineering Pty Ltd v Westpac Banking Corporation (No 3)* [2017] FCA 1500; 123 ACSR 549*Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50; 236 FCR 199*QNI Resources Pty Ltd v Sino Iron Pty Ltd* [2016] QSC 62; [2017] 1 Qd R 167*Secure Funding Pty Ltd v Stark* [2015] NSWSC 223; 106 ACSR 173*Silvestro v S R Factors Pty Ltd* [2010] NSWCA 74*Stern v McArthur* [1988] HCA 51; 165 CLR 489*Simic v New South Wales Land and Housing Corporation* [2016] HCA 47; 91 ALJR 108*SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2; 150 FCR 214*Tameeka Group Pty Ltd v Landan Pty Ltd (No 3)* [2016] FCA 733*The Juliana* (1822) 2 Dods 504 at 522; 165 ER 1560*Thorne v Kennedy* [2017] HCA 49; 263 CLR 85*Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389*Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155; 266 FCR 631*Wong v Huisman* [2010] QSC 192*Wood Hall Ltd v Pipeline Authority* [1979] HCA 21; 141 CLR 443 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Sub-area: | Regulator and Consumer Protection |
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| Number of paragraphs: | 125 |
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| Date of hearing: | 5 November 2020  |
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| Counsel for the Appellants: | Mr V Bedrossian SC |
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| Solicitor for the Appellants: | Keypoint Law |
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| Counsel for the Respondents: | Mr N J Beaumont SC with Mr T Maltz |
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| Solicitor for the Respondents: | Herman Legal |

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| **Table of Corrections** |  |
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| 23 September 2021 | In paragraph 62, the word “Keystone” has been substituted for the word “Kingsmede” so that the last sentence in paragraph 62 reads: “When he delivered the letter Mr Mattiussi said to Mr Somerton that the directors of the Keystone companies wanted the Chophouse guarantee back and Mr Somerton said it had already been claimed and the respondents would not be returning it: PJ [107].” |

ORDERS

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|  | NSD 120 of 2020 |
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| BETWEEN: | THE GOOD LIVING COMPANY PTY LTD ACN 001 974 705 ATF THE WARREN DUNCAN TRUST NO 3First AppellantKIMANA PTY LTD ACN 002 731 599Second Appellant |
| AND: | KINGSMEDE PTY LTD ACN 054 526 635First RespondentPAMIERS PTY LTD ACN 010 650 236Second Respondent |

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| order made by: | ALLSOP CJ, BESANKO AND JAGOT JJ |
| DATE OF ORDER: | 16 MARCH 2021 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellants pay the respondents’ costs of the appeal, as agreed or taxed.

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

REASONS FOR JUDGMENT

ALLSOP CJ:

1. I have read the reasons to be published of Jagot J. I agree with the orders proposed by her Honour. Subject to that which follows, I agree with her Honour’s reasons. Subject to that which appears at [13], I also agree with the reasons of Besanko J.

## Some introductory considerations

1. It is appropriate to express a number of matters by way of introduction. First, whether a claim is brought under s 20 or s 21 of the *Australian Consumer Law* (**the ACL**) being Schedule 2 to the *Competition and Consumer Act* *2010* (Cth), the proper judicial technique involved is the technique of equity described in *Jenyns v Public Curator (Qld)* [1953] HCA 2; 90 CLR 113 at 118–119, and see *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50; 236 FCR 199 at 268–269 [271]–[274], 270–271 [281], 275 [300] and 276 [304]–[306]. As Jagot J says at [26]: “Close attention to the facts is required.” This requirement is an incident of the technique of equity described by Dixon CJ, McTiernan and Kitto JJ in *Jenyns* in their citation of the words of Lord Stowell in *The Juliana* (1822) 2 Dods 504 at 522; 165 ER 1560 at 1567:

A court of equity … looks to every connected circumstance that ought to influence its determination upon the real justice of the case.

1. Secondly, the primary judge expressed the principles governing unconscionability by reference to a number of first instance decisions. The principles of the application of s 21 and statutory unconscionability have been expressed in a consistent way in at least seven Full Court judgments of this Court: *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226; 148 FCR 132; *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90; ATPR ¶42-447; *Paciocco* 236 FCR 199; *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; 249 FCR 421; *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* [2017] FCAFC 75; 251 FCR 404; *Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155; 266 FCR 631 and *Australian Competition and Consumer Commission v Medibank Private Ltd* [2018] FCAFC 235; 267 FCR 544*.*
2. Thirdly, until the High Court says otherwise the principles informing s 20 and the unwritten law, and those informing s 21 and the concept of statutory unconscionability are related but distinct and different. The relationship is that the principles of equity governing the setting aside of transactions by reason of unconscionable conduct (see *Commercial Bank of Australia Limited v Amadio* [1983] HCA 14; 151 CLR 447; *Kakavas v Crown Melbourne Limited* [2013] HCA 25; 250 CLR 392; and *Thorne v Kennedy* [2017] HCA 49; 263 CLR 85) inform but do not control s 21: s 21(4)(a) of the ACL and *Paciocco* 236 FCR at 271 [282]–[283]. The difference is that the “fact-pattern which fits within the equitable paradigm” (see Gageler J in *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; 267 CLR 1 at 39 [89]) requires for s 20 a special disability of which the stronger party takes unconscientious advantage, whereas s 21 involves an evaluative inquiry which is not so limited: see *Paciocco* 236 FCR at 271 [283], which dealt with the equivalent provisions to s 20 and s 21 in the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), s 12CA and s 12CB:

By the incorporation of the unwritten law into the ASIC Act, Parliament can be taken to have adopted, for the operation of the Act and arising out of its text, the values and norms that inform the living Equity in that doctrine. Section 12CB(4)(a) makes it plain that the operation of s 12CB is not limited by the unwritten law referred to in s 12CA. That is not to say, however, that the values and norms that underpin the equitable principle recognised within s 12CA do not have a part to play in the ascription of meaning to, and operation of, s 12CB, notwithstanding s 12CA(2).

1. Fourthly, the facts in this case demonstrated no special disability of the appellants or those for whose economic interests they stood. The appellants gave security for a commercial guarantee which it was in their interests to give. There was no position of vulnerability or disability under which they laboured and of which the respondents may be said to have taken advantage. The case under s 20 was misconceived.
2. Fifthly, as to the case under s 21, the facts, at whatever level or perspective of focus one attends them, do not disclose conduct of the respondents or of Mr Somerton that can be characterised as unconscionable. In *Unique* 266 FCR at 667 [155], the Full Court said:

[155] … To behave unconscionably should be seen, as part of its essential conception, as serious, often involving dishonesty, predation, exploitation, sharp practice, unfairness of a significant order, a lack of good faith, or the exercise of economic power in a way worthy of criticism. None of these terms is definitional. The *Shorter Oxford Dictionary on Historical Principles* (1973) gives various definitions including “having no conscience, irreconcilable with what is right or reasonable”. The *Macquarie Dictionary* (1985) gives the definition “unreasonably excessive; not in accordance with what is just or reasonable”. (The search for an easy aphorism to substitute for the words chosen by Parliament (unconscionable conduct) should not, however, be encouraged: see *Paciocco* at [262]). These are descriptions and expressions of the kinds of behaviour that, viewed in all the circumstances, may lead to an articulated evaluation (and criticism) of unconscionability. It is a serious conclusion to be drawn about the conduct of a businessperson or enterprise. It is a conclusion that does the subject of the evaluation no credit. This is because he, she or it has, in a human sense, acted against conscience. The level of seriousness and the gravity of the matters alleged will depend on the circumstances. Courts are generally aware of the character of a finding of unconscionable conduct and take that into account in determining whether an applicant has discharged its civil burden of proof. We see no reason to doubt the primary judge was conscious of this: so much is apparent from some of the passages in his Honour’s reasons to which we have earlier referred. We reject Unique’s invitation to make some broader statement of principle about *Briginshaw* in the context of alleged contraventions of s 21. …

1. This expression of the matter did not introduce a notion of moral obloquy or a requirement for any pre-existing disability or vulnerability. Rather, it recognised the seriousness of an evaluative judgment that conduct was against or offended good conscience. The words “conscionable” and “unconscionable” may not be words of daily parlance of many, but they have an ordinary meaning derived from an inner human sense of doing right. The human values that can be seen in s 22 and in the common law and equity as set out in *Lux* [2013] ATPR ¶42-447 at [23] and *Paciocco* 236 FCR at 274–275 [296] inform the concept. These are basal values familiar to business people and ordinary people and, along with the circumstances in s 22, find their place in the text, structure and context of the legislation.
2. Sixthly, s 21 (like s 12CB of the ASIC Act) prescribes a statutory normative standard of conduct by proscribing conduct which is “unconscionable”. As the Full Court said in *National Exchange* 148 FCR at 140 [33], “unconscionable conduct, on its ordinary and natural interpretation, means doing what should not be done in good conscience”. The function of the Court is to recognise and administer that normative standard in the totality of the circumstances. Those circumstances include the considerations identified in s 22 and in the values of the common law and equity in which context the statute sits. The nature of the task was set out in *Paciocco* 236 FCR at 274–275 [296]–[298], 275 [300], 276 [304] and 276 [306]:

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

[297] The variety of considerations that may affect the assessment of unconscionability only reflects the variety and richness of commercial life. It should be emphasised, however, that faithfulness or fidelity to a bargain freely and fairly made should be seen as a central aspect of legal policy and commercial law. It binds commerce; it engenders trust; it is a core element of decency in commerce; and it gives life and content to the other considerations that attend the qualifications to it that focus on whether the bargain was free or fair in its making or enforcement.

[298] The normative standard of a business conscience referred to in the statute is permeated with accepted and acceptable community values: *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR 42-447 at [23]; *Perpetual Trustee Company Limited v Khoshaba* (2006) 14 BPR 26,639 at [64] and *Australian Securities and Investment Commission v National Exchange Pty Ltd* (2005) 148 FCR 132 at 139-140, esp [30].

…

[300] It should also be borne in mind that the conduct in s 12CB is of sufficient seriousness as to warrant the punishment involved in a civil penalty: s 12GBA. The penal character of the provision is relevant to its construction: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [57]; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at [45].

…

[304] In any given case, the conclusion as to what is, or is not, against conscience may be contestable. That is inevitable given that the standard is based on a broad expression of values and norms. Thus, any agonised search for definition, for distilled epitomes or for shorthands of broad social norms and general principles will lead to disappointment, to a sense of futility, and to the likelihood of error. The evaluation is not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules. It is an evaluation of business behaviour (conduct in trade or commerce) as to whether it warrants the characterisation of unconscionable, in the light of the values and norms recognised by the statute.

…

[306] As Deane J said in *Muschinski v Dodds* at 616, property rights (and the same can be said of jural relations in trade or commerce) should be governed by law, and not some mix of judicial discretion or the subjective views as to who should win based on the formless void of individual moral opinion. Nothing in Subdiv C and ss 12CB and 12CC or the other statutes with which this case is concerned should be seen as requiring this. The notions of conscience, justice and fairness are based on enunciated and organised norms and values, including the organised principles of law and Equity, taken from the legal context of the statutes in question and the words of the statutes themselves. Employing judicial technique involving a close examination of the complete attendant facts and rational justification, the Court must assess and characterise the conduct of an impugned party in trade or commerce against the standard of business conscience, reflecting the values and norms recognised by Parliament to which I have referred.

1. This expression of the matter was the view of the Court in *Paciocco*: 236 FCR at 289 [371] and 295 [398], in *Kojic* 249 FCR at 434–437 [54]–[59], 438–439 [69]–[72] and 442 [85], in *Colin R Price* 251 FCR at 416–418 [50]–[56], and in *Unique* 266 FCR at 667–668 [156]–[157]. In *Medibank* 267 FCR at 569 [102] and [103] and 602–609 [232]–[255], the expression of principle was similar and was recognised expressly to be consistent with the above: see 267 FCR at 609 [255].
2. Seventhly, the conduct must depart sufficiently from societal norms of acceptable commercial behaviour as to be characterised as against or as offending conscience, recognising that such is a serious matter which Parliament has considered sufficient to warrant censure by the imposition of a civil penalty to deter such conduct. There may be more or less serious manifestations of unconscionable conduct.

## There was no unconscionable conduct here

1. The reasons of Jagot J demonstrate with clarity why there was no unconscionable conduct here. The respondent parties, through Mr Somerton, negotiated openly and without subterfuge or deceit with parties representing the defaulting lessee and with the prospective lessee. Mr Somerton formed views as to the legitimate protection of his employer’s interests. The appellants were not the respondents’ commercial counterparties, and were not known to the respondents and Mr Somerton until after the negotiation of the relevant arrangements. To the extent that the respondents might be said to have been unjustly enriched by retaining both the $500,000 payment and the $100,000 bank guarantee that was the result of a negotiated bargain between relevant counterparties. Equity might give relief to the provider of a bank guarantee, such as Chop 1 Pty Ltd (**Chop 1**), to recover monies above or beyond losses suffered by the beneficiary of the guarantee, such as the respondents, who had called the guarantee and received its benefit. That claim was open to be made by Chop 1 if it so desired. Those who controlled Chop 1 at the time were responsible for any prosecution of the claim. The circumstances of the negotiation that led to the absence of its prosecution and possible release reveal no feature that would lead to the respondents’ conduct being criticised. The respondents acted in their own interests, without sharp practice, honestly and openly, even if in an uncompromising way. If it was anyone’s responsibility to look after the interests of those providing the security for Chop 1’s bank guarantee it was those controlling Chop 1’s affairs during the negotiation.
2. There was some concentration before the primary judge upon an entitlement to restitution or the presence of unjust enrichment as a foundation for unconscionability. That is taking too far and out of context the reference in *Paciocco* 236 FCR at 274 [296] to “the reversibility of enrichments unjustly received” as one factor that may be relevant to the evaluation of unconscionability. That unjust enrichment, if present, may play a part in the evaluation of all the circumstances as to whether conduct is or is not unconscionable is a far cry from equating the presence of unjust enrichment with the consequence of unconscionable conduct.
3. In the circumstances of this case it is unnecessary to consider the correctness or the proper scope of the Full Court’s decision in *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2002] FCAFC 197; 122 FCR 110.

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| I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop. |

Associate:

Dated: 16 March 2021

REASONS FOR JUDGMENT

BESANKO J:

1. I have had the advantage of reading the reasons for judgment of Jagot J. I agree that the appeal should be dismissed with costs and I agree with her Honour’s reasons. Subject to the qualification that I agree with what Jagot J says about this Court’s decision in *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2002] FCAFC 197; (2002) 122 FCR 110, I also agree with the additional reasons of the Chief Justice. I add the following observations.
2. It is clear from the reasons of both the primary judge and those of Jagot J, that 16 December 2016 is a critical date in terms of the appellants’ unconscionable conduct case under s 21 of the *Australian Consumer Law* (the ACL) in Sch 2 to the *Competition and Consumer Act* *2010* (Cth). It was on that day that the respondents called on the Chophouse Guarantee. That was the appellants’ pleaded case and the allegation was admitted by the respondents.
3. The appellants’ case under s 21 of the ACL at trial related to both the period up to and including 16 December 2016, and the period after that with primary emphasis, it seems, on the former period which included the conduct of calling on the Chophouse Guarantee.
4. On the appeal, the case was the same, but with more emphasis by the appellants on the respondents’ conduct following 16 December 2016 and up to and including 17 January 2017 when the amount of the Chophouse Guarantee was paid by the Commonwealth Bank of Australia to the respondents. It was asserted that it was unconscionable for the respondents to collect on the Chophouse Guarantee.
5. The difficulty for the appellants on the appeal in pursuing their unconscionable conduct case for the conduct before and on 16 December 2016 is that the primary judge accepted the evidence of one of the respondents’ principal witnesses, Mr Scott Somerton. Her Honour accepted that, as at that date, Mr Somerton’s concerns were that (putting the matter broadly) there were costs, both external costs and “internal notional costs” which were unknown and which were likely to grow, for which the respondents would have claims against Chop 1 and there was a real possibility that the respondents would lose around $40,000 per month if the proposed new lease to the Solotel companies fell away and Chop 1 left the premises, which could amount to hundreds of thousands of dollars in lost revenue (Primary Judge at [65]–[70]). The primary judge accepted that Mr Somerton had those concerns. Her Honour said (at [81]):

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.

1. It seems to me quite impossible, in light of the primary judge’s acceptance of Mr Somerton’s evidence and two other matters I will mention, to conclude that the respondents’ conduct in calling on the Chophouse Guarantee on 16 December 2016 was unconscionable.
2. First, the nature of the commercial instrument containing the power, the exercise of which is said to involve unconscionable conduct, is clearly relevant. Adapting the words of Stephen J in *Wood Hall Ltd v Pipeline Authority* [1979] HCA 21; (1979) 141 CLR 443 (*Wood Hall v Pipeline Authorit*y) at 457, being “as good as cash” in the eyes of the respondents, is essential to the function of the Chophouse Guarantee (see also at 445 per Barwick CJ). Furthermore, as the Full Court of this Court said in *Clough Engineering Limited v Oil and Natural Gas Corporation Limited* [2008] FCAFC 136; (2008) 249 ALR 458 at [138]:

… 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 also *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47; (2016) 91 ALJR 108 at [6], [8] per French CJ; at [85] per Gageler, Nettle and Gordon JJ).

1. Mr Somerton’s evidence and the nature of the Chophouse Guarantee mean, as the primary judge found, that there was no bad faith or improper purpose in calling on the Chophouse Guarantee.
2. Secondly, there was never any secrecy or trickery on the part of the respondents and there is no suggestion of unfair dealing, lack of good faith or misleading conduct as at the time the respondents called on the Chophouse Guarantee. These were the findings of the primary judge and nothing was said that persuades me that they are incorrect.
3. That leaves for consideration an unconscionable conduct case to the effect that after the recovery of $500,000 under the Deed of Settlement and Release became a certainty somewhere in the period 20 December 2016 to 23 December 2016, the pursuit of recovery under the Chophouse Guarantee by the respondents was unconscionable. Such a case as developed on the appeal relies heavily on the primary judge’s finding of fact that Mr Somerton accepted that, as at 20 December 2016 and 17 January 2017, the concerns he held as at 16 December 2016 could no longer have operated on his mind (Primary Judge at [179] (21)). However, that acceptance by Mr Somerton as recorded by the primary judge, does not have the consequence for which the appellants contend. Mr Somerton viewed recovery under the Chophouse Guarantee and the Deed of Settlement and Release as, in effect, part of a package deal. It seems to me that this is what the primary judge was referring to when she said that, independent of the Deed of Settlement and Release, Mr Somerton assumed that the respondents would call on the Chophouse Guarantee and retain those monies (Primary Judge at [184]). As it turned out, the package deal appears to have been a good, if not very good, commercial bargain from the respondents’ point of view, but, even so, it was the result of a dealing between experienced business people without any inequality of bargaining power and, as I have said, no secrecy or trickery or unfair dealing, lack of good faith or misleading conduct. Assuming, without expressing any view, that any rights Chop 1 had were not extinguished by the Deed of Settlement and Release, then, as the primary judge said, if Chop 1 wishes to contest the retention of the monies under the Chophouse Guarantee on the basis that the monies exceed the loss which falls within clause 19.2 of the lease, then it can do so (*Wood Hall v Pipeline Authority; Australasian Conference Association Ltd v Mainline Constructions Pty Ltd* [1978] HCA 45; (1978) 141 CLR 335; *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1996] 4 All ER 563; on appeal [1998] 1 WLR 461).

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| I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Besanko. |

Associate:

Dated: 16 March 2021

REASONS FOR JUDGMENT

JAGOT J:

## The appeal

1. I consider that this appeal should be dismissed.
2. The appellants claim that the respondents engaged in unconscionable conduct in contravention of ss 20 and 21 of the Australian Consumer Law (the **ACL**) in Sch 2 to the *Competition and Consumer Act 2010* (Cth) by calling on and collecting the money the subject of an unconditional bank guarantee. The bank guarantee related to a tenant’s obligations under a lease granted by the respondents to the tenant. The tenant breached the lease because it was the subject of the appointment of a receiver. The appellants had guaranteed the tenant’s obligations under the bank guarantee. The primary judge dismissed the appellants’ claims: *The Good Living Company Pty Limited ATF the Warren Duncan Trust No 3 v Kingsmede Pty Ltd* [2019] FCA 2170; (2019) 142 ACSR 221. The appellants contend that the primary judge erred on 10 grounds. For the reasons which follow I do not accept that any of the grounds are sustainable.

## The facts

1. Close attention to the facts is required. The relevant facts are explained below. References to the primary judge’s judgment are identified as **PJ**.
2. The respondents, Kingsmede Pty Ltd (**Kingsmede**) and Pamiers Pty Ltd (**Pamiers**), are the owners of premises known as 25 Bligh Street, Sydney (the **premises**). The owners leased the premises to Chop 1 Pty Ltd (in liquidation) (receivers and managers appointed) (**Chop 1**). The lease was for 10 years commencing 1 March 2008 with an option for a further term of 10 years. Chop 1 operated a restaurant on the premises known as the “Chophouse” (**Chophouse**): PJ [1] and [19].
3. Under the lease it was an event of default if the tenant had a receiver or manager appointed to any of its assets: cl 12.1. Clause 19.1 required the tenant to cause an unconditional bank guarantee in a form acceptable to the landlord to be issued in favour of the landlord to secure the performance by the tenant of its obligations under the lease. By cl 19.2 if an event of default occurred, the landlord was entitled without notice to the tenant to call up the bank guarantee in whole or part. Clause 19.2 continued in these terms:

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.

See PJ [19].

1. The required amount of the bank guarantee was initially $75,000, subsequently amended to $100,000: PJ [20].
2. The Commonwealth Bank of Australia (the **CBA**) issued a bank guarantee in the sum of $100,000 in favour of the respondents on 24 December 2012 (the **Chophouse guarantee**). As explained by the primary judge at [21]:

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].

(Emphasis in original.)

1. The appellants, The Good Living Company Pty Ltd as trustee for the Warren Duncan Trust No 3 (**TGLC**) and Kimana Pty Ltd (**Kimana**), are a part of a company group known as the Keystone Group. The Keystone Group acquired, amongst other entities, Chop 1 on 13 August 2014: PJ [7]. The Keystone Group entered into a facility agreement with the CBA in August 2014. Pursuant to that facility TGLC and Kimana executed guarantees of the obligations of each of the companies in the Keystone Group to the CBA in October 2014: PJ [22]-[23].
2. On 28 June 2016 Ryan Eagle and Morgan Kelly of Ferrier Hodgson were appointed as the joint and several receivers and managers of each of the companies in the Keystone Group, including Chop 1: PJ [24]. The receivers were appointed over all of the assets of Chop 1 other than the lease of the premises (as the relevant security under which the receivers were appointed did not extend to the lease): PJ [25]. Also on 28 June 2016:
3. the directors of each of the companies in the Keystone Group appointed joint and several voluntary administrators to each of the companies in the Keystone Group, including Chop 1; and
4. the receivers 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: PJ [26].
5. The voluntary administration of Chop 1 came to an end on 11 April 2017 when its creditors voted to appoint liquidators: PJ [27].
6. In the meantime, the receivers wished to sell the businesses of the companies within the Keystone Group. Mr Kelly, one of the receivers, explained that the 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 to enter into a new lease with a purchaser: PJ [29]. The receivers continued the business of each company in the Keystone Group pending the sale of the businesses: PJ [28]. They continued to pay rent for the premises, albeit not always on the day required: PJ [44].
7. To achieve a new lease or an assignment of the existing lease over the premises, the receivers had to negotiate with Kingsmede and Pamiers. 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 of KPMS: PJ [12]. KPMS provides property management services to companies in the Kingsmede group of companies, including Kingsmede and Pamiers: PJ [13]. Mr Somerton is responsible for the day-to-day operation of KPMS: PJ [15].
8. In July and August 2016 the receivers negotiated variations to the lease of the premises which Kingsmede and Pamiers required: PJ [31]. At the same time and until October 2016 they negotiated about a replacement tenant: PJ [32].
9. 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 notified the CBA of their clients’ intention to terminate the lease effective from 7 September 2016: PJ [34].
10. By mid-October 2016 Mr Kelly, receiver, had identified Dixon Hospitality Pty Limited (**Dixon**) as the preferred purchaser of seven of the 17 venues operated by the Keystone Group, including Chophouse: PJ [39].
11. Kingsmede and Pamiers did not consider Dixon a suitable tenant for the premises: PJ [41] and [42]. Mr Potter directed Mr Somerton to manage all issues concerning the receivership of Chop 1: PJ [43].
12. On 18 October 2016 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: PJ [45]. On the same day Mr Somerton notified the receivers that Dixon was not an acceptable tenant for the premises and that the landlord had lost faith in the receivers’ ability to finalise a sale acceptable to the landlord so that the landlord had no option other than to terminate the lease so that the landlord could find a suitable occupant of the premises: PJ [45]. Despite the termination of the lease, rent continued to be paid: PJ [47]. The lease was not removed from the title of the premises until 15 December 2016: PJ [48].
13. Negotiations about Dixon occupying the premises continued but to no avail as Kingsmede and Pamiers would not accept Dixon as the tenant due to the nature of its proposed occupancy as a gastro-pub: PJ [42] and [51]. A potential new tenant emerged, being the Solotel group of companies run by Bruce Solomon and Matt Moran. Mr Somerton was aware of Solotel and, after a meeting with Solotel representatives, considered a Solotel company would be a good tenant for the premises as Solotel proposed to continue Chophouse if a new lease was granted: PJ [53].
14. 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, although not yet guaranteed, it was likely that the Solotel companies would take a lease of the premises: PJ [55].
15. On 2 December 2016 Mr Somerton called Mr Kelly. It is not in dispute that this conversation was heated. During this conversation Mr Somerton said 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”; and
* “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”,

and Mr Kelly said “you want us to pay $500,000 key money to you”, to which Mr Somerton responded “yes, we are asking for a payment of $500,000” and Mr Kelly said that “key money” would be illegal (other than that Mr Somerton said 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): PJ [57].

1. In any event, the receivers agreed to pay Kingsmede and Pamiers the $500,000 once the Chop 1 business was sold. Mr Somerton said the $500,000 payment was intended to encompass everything – the “time spent on the receivership, the agreements we had to put forward, a release from Chop 1 and the receivers, and the expenses and the loss”. There had been no discussion between Kingsmede and Pamiers and the receivers about the Chophouse guarantee at this point: PJ [60].
2. Kingsmede and Pamiers also managed to negotiate with the Solotel companies a lease on more favourable terms than the terminated lease. There was a significantly increased rent, a larger bank guarantee, and a longer term than the terminated lease: PJ [61]. However, the lease negotiations had not been finalised and disagreements about the terms had not been fully resolved. Mr Somerton was concerned that the lease might not proceed: PJ [65]. Mr Somerton raised calling on the Chophouse guarantee in late November or early December 2016 with Mr Potter, his principal: PJ [65]. Mr Somerton believed that if the lease negotiations with the Solotel companies broke down then Kingsmede and Pamiers would have large claims for costs against Chop 1 which Chop 1 would not be able to meet including loss of rent, new fit-out costs for any new tenant, marketing and agent fees, legal fees, and potential liability if the receivers decided to sue Kingsmede and Pamiers on the basis that they had somehow acted in a way that caused Chop 1 loss or damage: PJ [68]. Mr Somerton was also concerned that Kingsmede and Pamiers would not be able to agree the terms of a settlement deed with the receivers as there were disagreements about the terms of a draft deed which had been prepared and circulated by 13 December 2016: PJ [69].
3. The sale of the business of Chop 1 to the Solotel companies was subject to an exchange of contracts on 8 December 2016 with completion scheduled for 19 December 2016: PJ [62]. The business sale agreement had two relevant conditions precedent: the grant of a lease of the premises to the Solotel companies and the return of the Chophouse guarantee by Kingsmede and Pamiers to Chop 1 and Chop Brands Pty Ltd (receivers and managers appointed) (administrators appointed) as sellers of the business: PJ [63]. Kingsmede and Pamiers were not aware of the terms of the business sale agreement: PJ [64].
4. The Solotel companies forwarded a signed lease to Kingsmede and Pamiers on 12 December 2016. Mr Somerton accepted that if Kingsmede and Pamiers also signed the lease at this time then the lease would be binding: PJ [74(2)]. The respondents did not sign the lease at this time and did not confirm acceptance of the terms of the lease until 19 December 2016 (see below).
5. On 16 December 2016 Mr Somerton caused Kingsmede and Pamiers to call on the Chophouse guarantee by forwarding a letter to the CBA saying:

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.

See PJ [72].

1. Mr Somerton said that his reasons for so doing were (PJ [70]):

(1) 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;

(2) 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;

(3) 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

(4) 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.

1. Mr Somerton otherwise gave evidence recorded at PJ [74] that he:

(1) accepted that:

(a) as at 16 December 2016 the Receivers had paid rent, as he recalled, up to 19 December 2016;

(b) there was significant financial benefit to the respondents in completing and entering into the new lease with the Solotel Companies;

(c) on the sale of Chophouse Sydney the respondents would receive $500,000; and

(d) none of the matters set out at [PJ] [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;

(2) 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;

(3) 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;

(4) 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;

(5) 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;

(6) was emphatic that he had serious concerns that the settlement between the respondents and the Receivers might not occur (see [PJ] [69] above); and

(7) 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.

1. The primary judge also recorded at PJ [75] that:

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:

(1) he called on the Chophouse Guarantee on 16 December 2016 because there was nothing anybody could do about it at that point;

(2) his explanation for calling on the Chophouse Guarantee was one he had come to with the benefit of hindsight; and

(3) at the time he called on it he knew that the respondents were not going to suffer any expense, loss or damage.

1. The primary judge accepted Mr Somerton’s evidence: PJ [81].
2. As bank guarantees were always hand delivered to the bank, Kingsmede and Pamiers retained the Chophouse guarantee until 17 January 2017 when it was hand delivered to the CBA.
3. On or about 16 December 2016 HDY (the respondents’ lawyers) told Mr Somerton that the receivers wanted to finalise the receivership and one thing that they wanted was the return of the Chophouse guarantee. The primary judge found that late on 16 December 2016 Mr Somerton and Mr Kelly, receiver, had a conversation in which Mr Kelly sought the return of the Chophouse guarantee and Mr Somerton told Mr Kelly that it would not be returned: PJ [78]. As the primary judge put it, Mr Somerton 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”: PJ [79]. This was the first occasion on which the Chophouse guarantee was raised as between Kingsmede and Pamiers and the receivers: PJ [82].
4. The primary judge found at PJ [80] that 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.

1. Further, by the evening of 16 December 2016 the lawyers for the respondents and for the receivers agreed the terms of the settlement deed: PJ [84]. At the time of this agreement or, at the least until his conversation with Mr Somerton also late on 16 December 2016, Mr Kelly, receiver, assumed that the Chophouse guarantee would be returned. He considered that the respondents had suffered no loss and would be receiving a replacement guarantee from the Solotel companies: PJ [85].
2. By a letter on 19 December 2016 Mr Kelly, on behalf of Chop 1, disputed the respondents’ entitlement to call on the Chophouse guarantee. Mr Kelly acknowledged that at this time the problem was that the Chophouse business sale agreement had as a condition precedent the return of the Chophouse guarantee but the respondents had made clear that the guarantee would not be returned: PJ [87].
3. Also on 19 December 2016 Mr Somerton confirmed to the Solotel companies that the lease was acceptable to the respondents subject to completion of the Chophouse business sale agreement and execution of the settlement deed between the respondents, the receivers and the administrators of Chop 1: PJ [89]. The lawyer for the Solotel companies sought confirmation that the respondents would accept the lease commenced on 19 December 2016 subject to completion of the Chophouse business sale agreement and execution of the settlement deed between the respondents, the receivers and the administrators of Chop 1: PJ [90]. Mr Somerton confirmed this to be the case: PJ [91]. He subsequently withdrew this confirmation due to an issue with execution of the settlement deed with the receivers (Mr Potter was required to sign the deed), but an arrangement was reached late on 19 December 2016 to enable the settlement to be finalised and Mr Somerton subsequently re-confirmed to the Solotel companies that the respondents accepted the lease which would be signed and registered: PJ [95]-[100].
4. At the same time Mr Kelly, receiver, informed the administrators that the respondents would not return the Chophouse guarantee but had not yet drawn down the guarantee, the receivers had advised the respondents they were not entitled to call on the guarantee, but that in any event to avoid derailing the settlement they could waive the condition precedent in the Chophouse business sale agreement requiring return of the guarantee. The primary judge accepted that Mr Kelly referred to the fact that the respondents had not yet drawn down the guarantee because he was hoping to negotiate a position where they did not do so. Despite this, the primary judge found that the receivers knew at this stage that the respondents intended to call on the Chophouse guarantee: PJ [92].
5. The lawyers for the administrators then sent an email to the lawyers for TGLC (Stephen Mattiussi) which said that the respondents were proposing not to return the bank guarantee but the administrators and receivers did not consider that the respondents were entitled to do so: PJ [93].
6. The respondents and the receivers executed the agreed settlement deed. However, the receivers included a hand written amendment in their version which purported to exclude from the mutual releases any dispute relating to the Chophouse guarantee: PJ [100]. The respondents refused to accept that amendment: PJ [103]. TGLC and Kimana conceded, for the purpose of this proceeding, that the settlement deed in the form in which the respondents had executed it was binding on the parties to that deed: PJ [104]. Accordingly, by 23 December 2016, Mr Somerton acknowledged that the respondents had received the payment of $500,000, had entered into a new lease with the Solotel companies on more advantageous terms than the previous lease, had a new bank guarantee from the Solotel companies, and no longer had to deal with the receivers: PJ [105].
7. Also on 23 December 2016 Mr Mattiussi delivered a letter to Mr Somerton on behalf of TGLC and “other related entities” of Chop 1. The letter asked for the Chophouse guarantee to be returned and said that if it was not, in addition to any exposure to Chop 1, their clients would look to the respondents for damages and loss their clients would suffer in connection with any improper call on the Chophouse guarantee. This was the first time Mr Somerton had heard of TGLC: PJ [106]. When he delivered the letter Mr Mattiussi said to Mr Somerton that the directors of the Keystone companies wanted the Chophouse guarantee back and Mr Somerton said it had already been claimed and the respondents would not be returning it: PJ [107].
8. After this but also on 23 December 2016 Mr Mattiussi sent an email to the administrators and to the lawyers for the receivers attaching a copy of the letter he had delivered to Mr Somerton and recording that Mr Somerton said the Chophouse guarantee would not be returned and 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”. Mr Mattiussi requested a copy of this agreement: PJ [108].
9. The lawyers for the administrators responded to Mr Mattiussi for TGLC on 6 January 2017 saying that the receivers for Chop 1 had waived the condition precedent of the business sale agreement that the Chophouse guarantee be returned because of “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”: PJ [109].
10. The lawyers for the respondents answered Mr Mattiussi’s letter of 23 December 2016 on 12 January 2017 saying (PJ [110]):

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 TGLC and related entities, through their lawyers, sought from the lawyers for the respondents full particulars of any loss or damage suffered and information as to how the respondents were going to apply or account for the proceeds of the Chophouse guarantee: PJ [111].
2. On the same day, 17 January 2017, the CBA issued a bank cheque to the respondents for $100,000 which was deposited into the respondents’ bank account: PJ [112].
3. The CBA wrote to Chop 1 on 20 January 2017 demanding payment of the amount paid out by the CBA under the Chophouse guarantee: PJ [114].
4. On 23 January 2017 the respondents’ lawyers wrote to TGLC’s lawyers saying (PJ [115]):

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.

1. TGLC’s lawyers responded on 8 February 2017 saying:

…

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.

…

See PJ [116].

1. On 29 March 2017 the CBA informed the principal of the Keystone Group that the CBA would commence recovery action for the $100,000 paid out under the Chophouse guarantee if payment was not made: PJ [118].
2. TGLC’s lawyers sent a further letter to the respondents’ lawyers on 4 April 2017 to the effect that they could not understand how any purported loss or damage could be in the amount of $100,000 given the information from the receivers 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)”. Court action was foreshadowed: PJ [119].
3. On 12 January 2018 TGLC paid $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: PJ [121].
4. Mr Somerton gave evidence of the internal and external costs incurred by the respondents as a result of the receivership of Chop 1. Internal costs were estimated between $27,500 and $55,586.28 and external costs were $74,722.49: PJ [123]-[128].

## The primary judge’s reasons

1. The primary judge identified that the claim was that “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”: PJ [141(8)]. The primary judge said the claim was put in two ways:
2. the s 21 case, that as at 16, 20 or, at the latest, 23 December 2016 the respondents, in making the call, continuing to demand and not withdrawing the call on the Chophouse guarantee, acted unconscionably; and,
3. the s 20 case that the respondents were not entitled to the moneys received by the respondents on 17 January 2017 and thus were liable to repay those moneys to their true owner, TGLC and Kimana: PJ [142].
4. The primary judge, by reference to *Wood Hall Ltd v Pipeline Authority* [1979] HCA 21; (1979) 141 CLR 443 at 445 and 457, identified that there was no basis by which to qualify an unconditional bank guarantee by reference to the terms of the contract between the party providing and the party receiving the guarantee: PJ [145]-[146].
5. The primary judge referred to ***Clough*** *Engineering Limited v Oil and Natural Gas Corporation Limited* [2008] FCAFC 136; (2008) 249 ALR 458 at [83] 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: PJ [147].
6. The primary judge identified that a party who provided a bank guarantee may recover any amount exceeding the true loss sustained, referring to *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1996] 4 All ER 563, *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1998] 1 WLR 461, *O’Sullivan v National Australia Bank Ltd* [1998] NSWSC 303 and *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd* [1978] HCA 45; (1978) 141 CLR 335 at 349: PJ [148]-[151].
7. The primary judge found that, as a matter of construction of the lease, the respondents were entitled to call on the Chophouse guarantee given Chop 1’s event of default under the lease: PJ [152]-[153].
8. The primary judge identified the relevant statutory provisions at PJ [155]-[157]. Relevantly:
9. by s 20(1) of the ACL, 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;
10. by s 21(1) of the ACL, a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person engage in conduct that is, in all the circumstances, unconscionable (s 21(4)(a) expressly providing that it is the intention of the Parliament that s 21(1) “is not limited by the unwritten law relating to unconscionable conduct”); and
11. s 22(1) identifies, without limitation, considerations the court may have regard to in determining whether a supplier has contravened s 21 in connection with the supply or possible supply of goods or services to a person.
12. The primary judge concluded that s 21 of the ACL did not apply to TGLC and Kimana as there was no supply of services by the respondents to TGLC and Kimana under the lease, citing in support ***Monroe Topple*** *& Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2002] FCAFC 197; (2002) 122 FCR 110, ***QNI Resources*** *Pty Ltd v Sino Iron Pty Ltd* [2016] QSC 62; [2017] 1 Qd R 167 at [85]-[103] and ***Tameeka Group*** *Pty Ltd v Landan Pty Ltd (No 3)* [2016] FCA 733 at [166]-[169]: PJ [158]-[165]. At PJ [166] the primary judge said:

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.

1. As a result the primary judge held that TGLC and Kimana could not rely on s 21 of the ACL: PJ [168].
2. In case she was wrong in this regard, the primary judge considered whether the respondents had engaged in unconscionable conduct as provided for in s 21 of the ACL assuming s 21 did apply: PJ [169]. Having identified the submissions for TGLC and Kimana at PJ [170]-[174], the primary judge referred to the principles about s 21 of the ACL and the meaning of unconscionable conduct discussed in *Tameeka* at [170]-[172] in which her Honour referred to *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd (No 2)* [2009] FCA 17; (2009) 253 ALR 324 at [113], *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 at [291], and *Australian Competition and Consumer Commission v South East Melbourne Cleaning Pty Ltd (In Liq)* [2015] FCA 25 at [116]: PJ [175]. In the latter case Murphy J summarised the relevant principles in these terms:

(a) The Court must first and foremost have regard to the language of the statute rather than judicial explanations of unconscionability: *PT Ltd* [*PT Ltd v Spuds Surf Chatswood Pty Ltd* [2013] NSWCA 446] 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. The primary judge referred to the narrow scope for the application of s 20 of the ACL to a bank guarantee given the nature of that instrument, citing *Clough* at [138] and ***Ottoway*** *Engineering Pty Ltd v Westpac Banking Corporation (No 3)* [2017] FCA 1500; (2017) 123 ACSR 549 at [198]. The primary judge said the same considerations must apply to a claim for unconscionable conduct in respect of a bank guarantee under s 21 of the ACL, despite s 21 being broader in its application than s 20: PJ [177].
2. The primary judge rejected the claim of unconscionable conduct for five reasons:
3. the respondents were entitled to call on the Chophouse guarantee given that the appointment of receivers to Chop 1’s assets was an event of default under the lease: PJ [181]. Mr Somerton’s evidence about why he called on the Chophouse guarantee on 16 December 2016 should be accepted: PJ [182];
4. the receivers knew that the respondents had called on the Chophouse guarantee and proceeded to complete the business sale agreement and execute the settlement deed with the respondents. The respondents were open about their intentions and no secrecy or trickery is associated with their actions: PJ [183];
5. at the time they called on the Chophouse guarantee the respondents were unaware of TGLC and Kimana or that they had provided security to the CBA for the guarantee. It cannot be suggested that there was any unfair dealing, lack of good faith or misleading conduct in the respondents calling on the Chophouse guarantee: PJ [184];
6. there was no inequality of bargaining power between the respondents and the receivers. They were all experienced business people. The principal of TGLC and Kimana was also an experienced business person. The agreement between TGLC and Kimana and the CBA was not known by the respondents and was struck for the benefit of the Keystone Group: PJ [185]; and
7. if there was an overpayment to the respondents, Chop 1 would have a right of recovery, subject to the settlement deed between the receivers and administrators of Chop 1 and the respondents: PJ [186].
8. Further, the primary judge held that it was not unconscionable for the respondents to not withdraw the call on the Chophouse guarantee given Mr Somerton’s assumption that the respondents would call on the guarantee and retain the money paid under it irrespective of the settlement deed: PJ [187].
9. The primary judge also rejected the claim under s 20 of the ACL. Having identified the submissions for TGLC and Kimana at PJ [188]-[194], the primary judge summarised their position in these terms at PJ [195]:

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.

1. The primary judge considered that the claim could not succeed on either basis: PJ [196]. She noted that s 20 of the ACL concerns unconscionable conduct in equity only, citing in support *Australian Competition and Consumer Commission v C G* ***Berbatis*** *Holdings Pty Ltd* [2003] HCA 18; (2003) 214 CLR 51 at [42], *Clough* at [130]-[131], and ***Paciocco*** *v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50; (2015) 236 FCR 199 at [279]-[282]: PJ [197]-[200]. On this basis, the primary judge concluded that the claim under s 20 could not succeed for the same reasons the claim could not succeed under s 21 of the ACL: PJ [201]. The primary judge also said at [201]:

As is apparent from the authorities referred to …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].

1. In considering the unjust enrichment aspect of the claim, the primary judge referred to *Paciocco* at [296] and at PJ [205] observed that the analysis of Allsop CJ therein concerning s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth), which is the equivalent of s 21 of the ACL “should not be taken to apply to s 20 of the Act or be seen to be extending the reach of unconscionable conduct in equity beyond established fact patterns”. As a result, the primary judge was not satisfied that, without more, unjust enrichment could sustain a claim under s 20 of the ACL.
2. In any event, the primary judge considered that if unjust enrichment could found a claim of unconscionable conduct as provided for in s 20 of the ACL, TGLC and Kimana were not the proper applicants: PJ [207]. At PJ [208]-[210] the primary judge noted the similarity between the present case and ***Wong*** *v Huisman* [2010] QSC 192 stating at PJ [211]:

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.

1. The primary judge was not persuaded that the fact that Chop 1 was not a party to the proceeding, made no claim to the money, and had released the respondents from any claim made any relevant difference to the circumstances considered in *Wong*: PJ [214]-[215].
2. The primary judge was also not persuaded that TGLC and Kimana had identified any basis for the claimed unjust enrichment. They had not pointed to any mistake, duress, illegality or total failure of consideration or other recognised vitiating factor, citing *Chidiac v Maatouk* [2010] NSWSC 386 at [224]-[226]: PJ [216].

## Appeal grounds

### Unconscionable conduct – grounds 3, 4 and 8

1. TGLC and Kimana contended that the primary judge made an error of fact by assuming that the respondents’ call on the Chophouse guarantee on 16 December 2016 was somehow irrevocable in circumstances where it is apparent that the CBA did not pay out under the guarantee until the original was hand delivered to it on 17 January 2017.
2. The problem for TGLC and Kimana is that they expressly pleaded that the respondents called on the Chophouse guarantee on 16 December 2016. Further, nothing in the primary judge’s reasons suggest that she considered the call to be irrevocable from that time. To the contrary, her Honour’s reasons reflect her clear understanding that it was part of the case for TGLC and Kimana that it was unconscionable of the respondents to not withdraw the call and to collect and retain the money paid to them on 17 January 2017: see PJ [141], [142], [187], [188], [195], and [201].
3. To the extent that TGLC and Kimana otherwise summarise the facts as found by the primary judge to support their contentions in the appeal, the summary is inaccurate. In particular:
4. the primary judge did not find that the lease from the respondents to the Solotel companies was agreed by 8 December 2016. She found that the terms of the lease were not agreed until 19 December 2016 and even then agreement was conditional on the completion of both the business sale agreement from Chop 1 to the Solotel companies and the settlement deed between the respondents and receivers: PJ [89]. It is not to the point that the lease was not amended after 12 December 2016 or that the Solotel companies had executed the lease by that date. The respondents had not accepted that the terms of the lease were agreed until 19 December 2016 as the primary judge found;
5. the primary judge did not find that the respondents had used a superior bargaining position to obtain a windfall gain of $500,000. There was no suggestion in the case that the requirement for the payment of $500,000 was tainted by any illegality. The primary judge expressly found equal bargaining power between the receivers and the respondents: PJ [185];
6. the primary judge accepted Mr Somerton’s evidence as to why the respondents called on the bank guarantee on 16 December 2016. Accordingly, these cannot be described as the respondents “purported reasons” for so doing: PJ [81] and [182];
7. Mr Somerton never said there was no reason to call on the Chophouse guarantee. To the contrary, his evidence as to why he caused the respondents to do so on 16 December 2016 was accepted by the primary judge: PJ [81]. He did accept, however, that his reasons for calling on the bank guarantee no longer applied as at 20 December 2016: PJ [74(1)(d)]. This was because the settlement deed had been executed by that time and, on Mr Somerton’s view, that deed resolved all issues between the respondents and the receivers including the fact of the call on the Chophouse guarantee which was known to the receivers before they executed the settlement deed: PJ [179(19)], [79], [82], and [85];
8. the primary judge found that as at the time of the call on the Chophouse guarantee on 16 December 2016 Mr Somerton believed that the respondents faced significant uncertainty and actual and potential costs, so it cannot be said that at that time the respondents had no losses to recoup: PJ [68], [70], [179(16)], and [182]; and
9. the respondents admitted that if $500,000 was taken into account then they had suffered no loss as provided for in cl 19.2 of the lease but said further that cl 19.2 was not limited to loss as it included expenses, and that the $500,000 could not be so taken into account.
10. Otherwise, the characterisation of the respondents’ conduct by collecting the money under the Chophouse guarantee as unconscionable overlooks the effect of the primary judge’s acceptance of Mr Somerton’s evidence that he always considered the circumstances the subject of the settlement deed, including the call on the Chophouse guarantee, to be a package deal: PJ [79] and [82].
11. As to the primary judge’s five reasons for rejecting the contention of unconscionable conduct (PJ [181]-[186]), the contentions of TGLC and Kimana are untenable. Contrary to those contentions:
12. the primary judge found that the respondents acted in good faith and those findings are not challenged or, if challenged, no sound reason for the challenge has been identified: PJ [182] and [184];
13. the lack of any secrecy or trickery on the part of the respondents is not an irrelevant consideration;
14. the submission that the primary judge was incorrect to say there can be no suggestion of unfair dealing, lack of good faith or misleading conduct does not rise above mere assertion;
15. the primary judge’s finding of no inequality of bargaining power was correct. The fact that one party has given an unconditional bank guarantee which may be called upon unilaterally and without notice does not, of itself, create any such inequality. All relevant persons must have understood the nature of a bank guarantee at the time the Chophouse guarantee was given; and
16. it is relevant that Chop 1 would have had a right to claim against the respondents if there had been an overpayment under the Chophouse guarantee. If (as may or may not be the case – an issue which need not be determined here) Chop 1 gave up its rights by the receivers entering into the settlement deed then all that can be said is that Chop 1 did so knowing of the respondents’ position and in circumstances where its receivers made a commercial judgment that they did not want to lose the deal by insisting on the return of the Chophouse guarantee: PJ [79]-[82], [85], [87], [92], and [183].
17. The essential problems with the case for TGLC and Kimana are twofold. Their case fails to recognise that, on the primary judge’s unchallenged acceptance of Mr Somerton’s evidence, there were good reasons for the respondents to call on the Chophouse guarantee on 16 December 2016. Those good reasons were not just mere subjective beliefs of Mr Somerton. They were evidence of the not unreasonable position of the respondents as parties to a commercial deal that they remained at real commercial risk until all the “pieces of the puzzle” had been finalised: PJ [74] and [80]. The primary judge, accordingly, did not fail to adopt an objective analysis of the question of unconscionable conduct. She found that the respondents acted in good faith both subjectively and objectively. Their case also fails to recognise that the receivers executed the settlement deed knowing the respondents’ position in respect of the Chophouse guarantee. It is not to the point that the deed refers to the $500,000 as being in full and final payment of any Dispute: cl 2(b). The receivers, before execution, were informed of the respondents having called on the Chophouse guarantee and of the respondents’ position that they intended to retain the money payable under that guarantee. It is not the case that the settlement deed meant that there was no reason for the respondents to take the money under the Chophouse guarantee by 17 December 2017. As far as the respondents were concerned, they were dealing with the receivers of Chop 1, had never heard of TGLC and Kimana, had no reason to consider the commercial interests of TGLC and Kimana, and had done a “package deal” with the receivers. Further, it was not the effect of Mr Somerton’s evidence that his concerns were all ameliorated by the payment of the $500,000 and the beneficial terms of the new lease. As at 16 December 2016, as he put it in oral evidence, “there was nothing set in stone”. As at 20 December 2016, he had struck what he believed to be a package deal with the receivers which included the call on the Chophouse guarantee. TGLC and Kimana have not confronted the reality of those circumstances in their contentions of unconscionable conduct by the respondents in either calling on or collecting and retaining the money under the Chophouse guarantee. They have never identified why the respondents should have had TGLC and Kimana in mind at all as at 16 December 2016 or should have been subject to any obligation to put the commercial position of TGLC and Kimana ahead of their own commercial position up to and as at 17 January 2017.
18. For these reasons appeal grounds 3, 4 and 8 must fail.

### Section 21 of the ACL – ground 2

1. For the reasons given below, the primary judge’s analysis of *Monroe Topple* was correct and the primary judge was right to apply *Monroe Topple* to the circumstances of the present case.
2. Contrary to the submissions for TGLC and Kimana, the point being made in ***Secure Funding*** *Pty Ltd v Stark* [2015] NSWSC 223; (2015) 106 ACSR 173 at [44]-[53] was that provided there is the fact of supply between the stipulated categories of person, the claimant for damages is not necessarily confined to the acquirer of the supplied services. That analysis, found only to be “reasonably arguable” in *Secure Funding* at [53], was not the basis for the case of TGLC and Kimana before the primary judge. Their case was that they were a person to whom supply was made in connection with the lease by reason of their provision of security to enable Chop 1 to provide the Chophouse guarantee under the lease. The primary judge was right to reject that argument on the basis that TGLC and Kimana were strangers to the lease and the supply of services under it: PJ [165]. TGLC and Kimana now say, however, that services in connection with the lease were provided to Chop 1 by the respondents and that the respondents have acted unconscionably towards Chop 1 (satisfying s 21 of the ACL) as a result of which TGLC and Kimana (as third parties or strangers to the relevant services) may claim damages under ss 236 and 237 of the ACL. Sections 236 and 237 refer to a person who has suffered loss or damage because of the contravening conduct of another person. This argument was not put to the primary judge. The primary judge dealt with the argument as it had been put.
3. Leaving aside the fact that the respondents contend that TGLC and Kimana should not be permitted to put the case in this new way in the appeal, the insuperable difficulty for TGLC and Kimana is that, as discussed above, nothing in the facts indicates any unconscionable conduct of the respondents in their dealings with Chop 1. Chop 1 was in default under the lease. At 16 December 2016 the respondents considered that there was substantial commercial risk to them, a position which was objectively reasonable in the circumstances. By that time the lease had been removed from the title and Chop 1 could not rectify the breach which explains why the call was made on 16 December 2016 and not earlier. The receivers knew about the call and the respondents’ position that they were going to retain the money paid under the Chophouse guarantee before the receivers executed the settlement deed. The receivers nevertheless proceeded with all elements of the deal including execution of the settlement deed which TGLC and Kimana conceded was binding on the parties to that deed in accordance with its terms without the receivers’ handwritten amendment. As noted, there is no suggestion that the settlement deed itself involved any unconscionable conduct by the respondents towards Chop 1. In circumstances where the respondents considered that they had done a “package deal” including the payment under the Chophouse guarantee and the receivers were aware of the respondents’ position before completing the deal it cannot be said that the respondents’ conduct was unconscionable in respect of Chop 1. The primary judge was thus correct to reject the claim of unconscionable conduct assuming her approach to s 21 was incorrect, for the reasons she gave at PJ [169]-[187].
4. Given the facts of the present case as recorded above, it is not necessary to decide whether it is possible to satisfy the causation requirement in ss 236 and 237 of the ACL if the contravention is of s 21 and the person claiming loss or damage is not a person to whom a supply was made by the other person. Jackson J considered this issue in *QNI Resources* at [85]-[103] and held that the causation requirement was not satisfied. Causation is fact dependent. No general principle should be expressed where, on the present case, there has been no contravening conduct. As the respondents also submitted, TGLC and Kimana appear to have assumed the issue of causation in their favour. They have not identified how the exercise of the power given to the respondents under the lease to call on the Chophouse guarantee, being a power that was legally available and properly exercised, constituted a contravention of s 21 of the ACL because of which TGLC and Kimana have suffered loss.
5. In any event, I am not persuaded that *Monroe Topple* is wrong and that I should depart from the reasoning adopted in that case: *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2; (2006) 150 FCR 214 at [187]-[190]. Leaving aside the argument about the operation of ss 236 and 237 of the ACL, the only submission put in support of the proposition that *Monroe Topple* is wrong is an alleged gap in the statutory scheme. It is said that as s 20 does not apply to conduct prohibited by s 21 (s 20(2) of the ACL) no relief would be available to anyone other than the parties contracting for or directly involved in the supply or acquisition of goods or services. This does not follow. If the proper approach is that s 21 does not apply to unconscionable conduct by a supplier/acquirer to a third party then s 20 may be engaged by that conduct. It is also relevant that s 21 of the ACL was enacted after the decision in *Monroe Topple*, which supports the proposition that Parliament did not intend to alter the substance of the provision: *Bluescope Steel (AIS) Pty Ltd v Australian Workers’ Union* [2019] FCAFC 84; (2019) 270 FCR 359 at [54]-[55].
6. For these reasons the primary judge was right to apply *Monroe Topple* for the reasons she gave at PJ [158]-[168]. There is no material difference between s 21(1) of the ACL and the predecessor provision considered in *Monroe Topple*, s 51AC of the *Trade Practices Act 1974* (Cth). As the respondents submitted, the explanatory memoranda in respect of the ACL disclose the intention of Parliament to continue the effect of the preceding provisions relating to unconscionable conduct: Explanatory Memorandum, Competition and Consumer Legislation Amendment Bill 2010 (Cth) at [2.4]-[2.10] and Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) at [4.9]-[4.14].
7. For these reasons appeal ground 2 must fail.

### The pleaded case – ground 5

1. According to TGLC and Kimana, the primary judge at PJ [141(8)] acknowledged that their cases pursuant to ss 20 and 21 of the ACL were co-extensive (relating to both the call on the Chophouse guarantee on 16 December 2016 and the maintenance of that call thereafter including taking the money under the guarantee on 17 January 2017 and retaining it), but then decided the case on the basis that the claims under each provision were different including at PJ [142], [158]-[187] and [188]-[216]. In particular, they allege that the primary judge incorrectly treated the s 20 allegation as being confined to the unjust enrichment allegation, and thereby failed to consider the claim that s 20 was breached by collecting the money under the bank guarantee.
2. The propositions put for TGLC and Kimana do not fairly characterise the primary judge’s reasons. The primary judge, having correctly identified the pleaded case at PJ [141(8)], dealt with the case as in fact put by TGLC and Kimana in their supporting submissions at PJ [158]-[216]. In so doing the primary judge recognised that the cases under ss 20 and 21 of the ACL were co-extensive as her reasons at PJ [201] disclose. At PJ [201] the primary judge said:

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 [PJ] [181]-[187] above. As is apparent from the authorities referred to at [PJ] [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].

1. It was only after the primary judge had rejected the s 20 case on this basis that she turned to consider the unjust enrichment aspect of the arguments put for TGLC and Kimana at PJ [202]-[216].
2. Ground 5 of the appeal, accordingly, must be rejected.

### Special disadvantage – grounds 6 and 7

1. TGLC and Kimana contended that the primary judge erred at PJ [185] and [201] in concluding that they were not in a position of special disadvantage in relation to the respondents given the terms of the Chophouse guarantee, the ability of the respondents to unilaterally call on the guarantee without notice to TGLC and Kimana, and the fact that TGLC and Kimana had provided security for the benefit of the CBA for the guarantee. According to TGLC and Kimana the primary judge’s approach to special disadvantage was too narrow, as special disadvantage may be situational: *Berbatis* at [9]-[11]. It may exist in the context of the exercise of contractual rights: *Stern v McArthur* [1988] HCA 51; (1988) 165 CLR 489 at [39], *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* [2002] FCA 62; (2002) 117 FCR 301 at [46], *Silvestro v S R Factors Pty Ltd* [2010] NSWCA 74 at [21]-[23], and *Boral Formwork v Action Makers* [2003] NSWSC 713 at [82]-[90]. Unconscionable conduct is to be assessed at the time of the conduct: *CIT Credit Pty Ltd v Keable* [2006] NSWCA 130 at [66].
2. According to TGLC and Kimana the unconscionable conduct was the purported exercise of power under cl 19.2 of the lease and the associated acts of delivering the original Chophouse guarantee to the CBA and collecting the payment. As the respondents were able to do so without notice to Chop 1, TGLC and Kimana said that they were placed in a position of significant disadvantage and the respondents exploited their position.
3. In *Berbatis* at [11] Gleeson CJ said:

One thing is clear, and is illustrated by the decision in *Samton Holdings* itself. A person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, simply because of inequality of bargaining power. Many, perhaps even most, contracts are made between parties of unequal bargaining power, and good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests.

1. The primary judge recognised that the mere fact that the impugned conduct constituted the exercise of a contractual right was not determinative: PJ [154], [176], [182]-[187] and [201]. For the reasons already given, the primary judge did not err in concluding that in the circumstances as they existed at all material times there was no unconscionable conduct by the respondents towards TGLC and Kimana. TGLC and Kimana knew that they were providing security for an unconditional bank guarantee which could be exercised without notice to Chop 1 in the event of default. As a matter of fact, Chop 1 (through the receivers) knew that the respondents had called on the Chophouse guarantee before the receivers executed the settlement deed and proceeded with the sale of the Chop 1 business. There was no purported exercise of power under cl 19.2 of the lease. Chop 1 was in default and the respondents were entitled to call on the Chophouse guarantee. They did so in good faith according to the primary judge’s unchallenged findings: PJ [182] and [184]. In those circumstances the primary judge was right to reach the conclusion she did that there was no special disadvantage of TGLC and Kimana, applying the reasoning in *Clough* at [138] and *Ottoway* at [198]: PJ [176]. This was not a case of unconscionable exploitation of the disadvantage of TGLC and Kimana to protect their own interests. The observations in *Berbatis* at [14] in this regard are inapplicable.
2. Accordingly, grounds of appeal 6 and 7 must be rejected.

### Entitlement to relief – grounds 1, 9 and 10

1. TGLC and Kimana contended that the primary judge should have held that they were entitled to relief, including on the basis that it was certain or highly probable that the Chophouse guarantee would be paid out by a third party who had provided security and that the primary judge was wrong to dismiss this fact as irrelevant at PJ [166].
2. The reasoning in PJ [166] (set out above) in fact undermines the contention that the primary judge considered these matters to be irrelevant.
3. The primary judge at PJ [166] was dealing with the application of s 21 of the ACL to TGLC and Kimana. When her Honour considered the issue of unconscionable conduct assuming that s 21 did apply to TGLC and Kimana, she took into account the position of TGLC and Kimana noting that the respondents were unaware of them: PJ [184]. The primary judge found that “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”: PJ [185]. Accordingly, ground 10 of the appeal, alleging that the primary judge considered the position of TGLC and Kimana as undisclosed providers of security, must fail.
4. Grounds 1 and 9 must also be rejected for the reasons already given. For those reasons, it was not in bad faith, disingenuous or unconscionable for either the call to have been made on 16 December 2016 or the money to have been collected from the CBA on 17 January 2017.
5. Further, the respondents did not concede before the primary judge that collecting on the Chophouse guarantee after 23 December 2016 would be difficult to justify. At T 163-164, on which TGLC and Kimana rely, the discussion concerned a hypothetical situation in which the settlement deed had been signed before the respondents called on the Chophouse guarantee, which is not the case.
6. The qualifications to the principle that a court will not enjoin the issuer of a performance guarantee from performing its unconditional obligation to make payment discussed at *Clough* at [77]-[78] and [80] (fraud, unconscionable conduct and contractual promise not to enforce) are not applicable on the facts.
7. It is also not for TGLC and Kimana to say, as they do, that they “do not accept the accuracy of” PJ [184] (the primary judge’s finding of good faith on the part of the respondents) in circumstances where they have not directly challenged that finding as in error. In any event, for the reasons given, no such challenge would succeed on the primary judge’s findings accepting Mr Somerton’s evidence.
8. The primary judge did not merely rely on the terms of the lease. She considered the circumstances of the exercise of the power under the lease, as is clear from PJ [178]-[187].
9. In all of the circumstances the fact that the respondents understood that the CBA would not be paying out the Chophouse guarantee from its own funds does not take the case for TGLC and Kimana anywhere.

## Conclusion

1. For the reasons given, the appeal must be dismissed. Costs should follow the event.

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| I certify that the preceding one hundred and two (102) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jagot. |

Associate:

Dated: 16 March 2021