



When Loans Go Bad: Supreme Court sides with ANZ on Unconscionable Conduct Claim

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Currently, due to the pandemic, there are a number of restrictions in place that make it impractical or undesirable for lenders to recover outstanding debts. These protections will expire in September 2020, which will place additional pressure on borrowers to meet their repayment obligations. Despite the reprieve, many borrowers simply will not be able to financially recover. It is in this context we discuss a defence utilised by borrowers seeking to set aside their obligations, being a claim of unconscionable conduct.

This was argued by a director in *Australia and New Zealand Banking Group Ltd v Giannaklis (No 2)* [2020] NSWSC 148, who was the guarantor for his company, which had borrowed from ANZ Bank. The director alleged that the ANZ bank improperly granted loans to him while he was suffering from the strain of his wife's death.

Key Background Facts

- Mr Giannaklis purchased the franchise business 'Tyrepower' through his company Trojan King Pty Ltd in 2015.
- ANZ believed that Mr Giannaklis' older brother could assist him with the business, and did not view his lack of business experience as an issue.
- The resulting credit agreement contained a personal guarantee which Mr Giannaklis signed in favour of ANZ.
- Mr Giannaklis had difficulty in running the business, and had sought further loans and overdrafts from ANZ in the time the business operated, being from October 2015 to January 2017.
- By January 2017 the business had collapsed and liquidators had been appointed to Trojan King Pty Ltd. ANZ then enforced the personal guarantee, the amount claimed was \$796,256.68.

Legal Claim and Decision

Mr Giannaklis claimed that it was unconscionable to allow ANZ to enforce the personal guarantee. He argued that ANZ acted in a predatory manner by allowing him to borrow so much money when his business was failing. He further argued that ANZ knew of his wife's passing in February 2013 and took advantage of his distress and anxiety to further advance loans.

The Court rejected this argument. For ANZ to have acted improperly, Mr Giannaklis had to show that ANZ knew that he wasn't capable of managing his financial affairs and business, and actively took advantage of this to advance further loans.

ANZ did know that Mr Giannaklis was recently widowed, but they were not aware of the distress and anxiety Mr Giannaklis was suffering. The Court said that just because Mr Giannaklis' wife had passed away, it didn't mean Mr Giannaklis was now incapable of looking after himself or his business. ANZ was not aware of how Mr Giannaklis' mental state had been impacted by his wife's death, so the subsequent lending couldn't have been to take advantage of him.

Furthermore, the information available to ANZ at the time of the initial loan did indicate Mr Giannaklis could repay the borrowed amounts. ANZ did conduct a thorough assessment of Mr Giannaklis' ability to repay the loan to support this view.

What does this mean for the enforcement of loan transactions?

This decision was handed down before the COVID-19 pandemic period, but the legal principles are applicable to any future recovery action. In the current economic climate, a lender may have to confront the possibility that they will need to commence recovery proceedings against a greater number of borrowers.

It is common for defaulting borrowers to be enduring difficult personal or financial circumstances, but a claim of unconscionability has precise legal requirements. If a borrower or guarantor cannot show that a lender knowingly took advantage of a vulnerability, a claim of unconscionability will fail.

The period following the lifting of restrictions may be an uncertain time for lenders.

If you require further information on this decision, or would like assistance in your insurance dispute, please contact [Chris Kintis](mailto:Chris.Kintis@clarkekann.com.au) on 02 8235 1251.