NEW SOUTH WALES SUPREME COURT

CITATION: Accom Finance Pty Limited v Mars Pty Limited, Accom Finance Pty Limited v Kowalczuk [2007] NSWSC 726
This decision has been amended. Please see the end of the judgment for a list of the amendments.

JURISDICTION: Equity Division

FILE NUMBER(S): 5906 of 2006 and 1887 of 2006

HEARING DATE{S): 13, 14, 15, 16 and 19 March and 16 April 2007

JUDGMENT DATE: 6 July 2007

PARTIES:
Accom Finance Pty Limited (Plaintiff/First Cross-Defendant in both matters)
Mars Pty Limited (Defendant/Cross-Claimant)
Samir Dalla (Second Cross-Defendant in both matters)
Edward John Kowalczuk (First Defendant in 1887/06)
National Australia Bank Limited (Fourth Defendant in 1887/06)
Actions discontinued against Second and Third Defendants in 1887/06

JUDGMENT OF: Windeyer J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
Mr M W Young (Plaintiff/Cross-defendant in both matters)
Mr M Gracie (Defendant/Cross-Claimant in both matters)
Mr G Craddock (Second Cross-Defendant in both matters)
Submitting Appearance (Fourth Defendant 1887/06)

SOLICITORS:
Brangroves (Plaintiff/First Cross-Defendant in both matters)
Greg Mackey Associates (First Defendant in both matters)
Ebsworth and Ebsworth (Second Cross-Defendant

CATCHWORDS:
Estoppel – Res Judicata – Issue estoppel – Anshun estoppel – Default judgment in action by mortgagee for possession and for money sum due under mortgages in first proceedings – Defendant sought to bring cross claim for damages under Trade Practices Act – Whether defendant estopped from bringing cross claim – Issue

raised in new proceedings must be on precise issue determined in original proceedings – No estoppel
Equity – Trade Practices Act – Unconscionable conduct – Where cross-claimant gave mortgage due to fraudulent conduct of third party – Cross-claimants not in a position of special disadvantage – Lender did not have knowledge of third party's fraud – No unconscionable conduct
Contracts – Unjust contracts – Contracts Review Act – When contract "unjust" – Where borrower did not have means to repay loan – Where lender given fraudulent information about borrower's ability to repay loan – Where rates of interest unrelated to lender's risk – Where contract was a bad bargain – Contract not unjust – Whether strong possibility of default under mortgage triggering very high default rate could amount to predatory conduct – Contracts Review Act 1980 ss 7, 8, 9
Legal Practitioners – negligence and retainer - Duties and liabilities – To client – Solicitor advising on security documents – Scope of duty – No obligation to advise client on financial sense of mortgage – No obligation to recommend client obtain financial advice – Scope of Rule 45 of the Solicitor's Practice Rules
Mortgages – Gap between higher rate and lower rate – In reality lower rate not concessional rate but expected rate

LEGISLATION CITED:
Australian Securities and Investments Commission Act 2001, s12CC
Contracts Review Act 1980 s7, s8, s9(2), Sch 1 Cl 1(c)
Fair Trading Act 1987 s4(4); s42
Solicitors' Revised Professional Conduct and Practice Rules 1995, Sch 1, 4 & 5 of rule 45
Trade Practices Act 1973 s51AA, s51AC, s52 s75B, s82, s87

CASES CITED:
ASIC v National Exchange Pty Limited (2005) 148 FCR 132
Beneficial Finance Corporation Limited v Karavas (1991) 23 NSWLR 256
Citicorp Australian Limited v O'Brien (1996) 40 NSWLR 398
Elkofairi v Permanent Trustee Company Limited [2002] NSWCA 413
Guardian Mortgages v Miller [2004] NSWSC 1236
Henderson v Henderson [1843] 3 Hare 100
Hoong v Leong Cheong Kweng Mines Limited [1964] AC 993
King Investment Solutions v Hussain [2005] NSWSC 1076
Linprint Pty Limited v Hexham Textiles Pty Limited (1991) 23 NSWLR 508
Metcash Trading Ltd v Hourigan's IGA Umina Pty Ltd [2003] NSWSC 683
New Brunswick Railway Company v British and French Trust Corporation Limited [1939] AC 1
Perpetual Trustee Company Limited v Khoshaba [2006] NSWCA 41
Takemura v National Australia Bank Ltd [2003] NSWSC 339

DECISION:
Cross-claims dismissed in both proceedings. Orders for Judicial Sale to be made when pleading amended

JUDGMENT:

IN THE SUPREME COURT

OF NEW SOUTH WALES

EQUITY DIVISION

WINDEYER J

FRIDAY 6 JULY 2007

5906/06 ACCOM FINANCE PTY LIMITED V MARS PTY LTD

1887/06 ACCOM FINANCE PTY LIMITED V EDWARD JOHN KOWALCZUK

JUDGMENT

1 This judgment covers two actions. The first action was originally 10743/06 in the Possession List of the Common Law Division and is now matter number 5906/06 in the Equity Division. It will be called the "Haberfield proceedings". In the Common Law Division, the plaintiff, Accom Finance Pty Limited (Accom), as mortgagee under two mortgages, sought an order for possession of 37 O'Connor Street, Haberfield, (the Haberfield property) against Mars Pty Limited (Mars), the registered proprietor of the property and the mortgagor to Accom under the first and second mortgages. On 28 October 2006 judgment for possession was obtained by default, together with judgment for $1,000,444.48, being the amount outstanding under the first mortgage, and for $13,387.31, being the amount outstanding under the second mortgage.

2 The common law action was formally transferred to the Equity Division on 27 October 2006. However, before that Brereton J on 1 September 2006 apparently acting on the basis that the Common Law action had been transferred to Equity by Kirby J on 17 July 2006, made an order giving leave to Mars to file a cross-claim seeking relief and orders pursuant to ss82 and 87 of the Trade Practices Act 1973 against Accom, grounded upon breaches of ss51AA, 51AC(1)(a) and 52 of that Act.

3 Mr Samir Dalla (Dalla) was joined as second cross-defendant to the cross-claim. He is a solicitor, who was engaged to provide independent advice on the security documents to Mars and perhaps also to Mr Kowalczuk (Kowalczuk), the director of Mars and the guarantor under the mortgages. A claim is made against Dalla for breaches of s75B of the Trade Practices Act, specifically for aiding or abetting Accom in its contravention. Claims are also made against him in negligence, for breach of contract of retainer and for breach of s42 of the Fair Trading Act 1987, without any allegation of damage resulting from the breaches, although the relief sought includes a claim in damages. The pleading by way of cross-claim seems to allege breaches of duty owed by Dalla to Kowalczuk as guarantor, however, as Kowalczuk is not a cross-claimant, it seems that can be disregarded.

4 The second action, which was commenced in the Equity Division, is 1887/06, under which Accom is plaintiff and Kowalczuk is the first defendant. It will be referred to as the "Berowra proceedings". Accom seeks orders for specific performance by Kowalczuk of certain obligations it claims are owed by Kowalczuk as guarantor of the Haberfield mortgages, under which he mortgaged to Accom any real estate he then owned. As I will explain Kowalczuk is and was then the owner of a property at 979 Pacific Highway, Berowra (Berowra property) and it is against that property that Accom seeks orders for possession, for leave to issue a writ of possession and orders for judicial sale. The second defendant to this action is the National Australia Bank which holds a first mortgage over the Berowra property and which has filed a submitting appearance. The action against Kowalczuk in respect of the Berowra property was brought because after the sale of the Haberfield property by Accom there was insufficient money to pay off the first and second mortgages, and Accom seeks to recover this shortfall from Kowalczuk under his secured guarantee. Apart from a defence of

non est factum, which had no basis, the real defence to this action is by way of cross-claim against Accom and Dalla, based upon much the same facts as are alleged in the cross-claim in the Haberfield proceedings.

5 This judgment will consider first, Mars' cross-claim under the Trade Practices Act in the Haberfield proceedings, secondly, Accom's claim in the Berowra proceedings, thirdly Kowalczuk's cross-claim under the Trade Practices Act and Contracts Review Act 1980 in the Berowra proceedings, and finally, Mars' and Kowalczuk's cross-claim against Dalla in both proceedings. First it is necessary to set out the background to this sad matter.

Overall position

6 Before the events giving rise to the actions took place, Mars was the owner of an unencumbered property at Haberfield worth about $1 million and Kowalczuk was the owner of an unencumbered property at Berowra, worth about $500,000. As a result of what appears to have been clearly fraudulent conduct on the part of Kowalczuk's wife's cousin, a Mr Anastasi (Anastasi), who has left the jurisdiction, Mars has no property, and Kowalczuk's Berowra property is subject to a first mortgage to the National Australia Bank of $350,000, as well as the claim against it by Accom made in these proceedings, which, if it succeeds, would take up most of the rest of the equity. Neither Kowalczuk, nor his company, Mars, received any benefit whatsoever from these transactions. The loan funds have been dissipated through the actions of Anastasi, who apparently convinced Kowalczuk that he could make substantial profits by using his properties to borrow money for on-lending, and then misappropriated funds thus obtained for his own purposes.

Facts: The Three Mortgages

7 In brief the history and the facts relate to three mortgages each securing loans from Accom to either Kowalczuk or his company, Mars, and all of which were arranged by Anastasi. The first mortgage under consideration here was dated 9 August 2005. Under it Accom lent to Kowalczuk the sum of $320,000, and Kowalczuk gave Accom security over the Berowra property. Dalla says it was executed in his office at Lakemba. Kowalczuk says that he has never been to Lakemba and that it was executed on the bonnet of the motor car in the service station where he worked at Alexandria. This mortgage was discharged in December 2005 through refinancing through the National Australia Bank.

8 The second mortgage was from Mars to Accom over the Haberfield property to secure a loan of $807,000. This mortgage was dated 12 December 2005. It is agreed it was executed by Mars as mortgagor and Kowalczuk as guarantor in the presence of Dalla in a park at Monterey on 10 December 2005. Mars defaulted and the judgment to which I have referred was obtained as a result of this default.

9 The third mortgage, dated 20 December 2005, was a second mortgage from Mars to Accom over the Haberfield property this time to secure $10,300. Kowalczuk was again a guarantor. This figure represented the difference between the amount paid by the National Australia Bank to Accom on discharge of its mortgage over Berowra and the amount which was actually due to Accom under the mortgage together with large amounts for fees. Dalla says that this mortgage was executed by Mars and Kowalczuk at Kowalczuk's place of employment at the service station at Alexandria and signed on the bonnet of a motor vehicle. Kowalczuk denies this and says that he did not sign any document at Alexandria in December 2005 in the presence of Dalla. He admitted that the signatures on the document and other documents signed in connection with this mortgage were his.

Facts: Kowalczuk

10 Kowalczuk left school at the age of 16 and trained as a motor mechanic. He was in 2005 and is now employed as a driveway attendant at a service station workshop in Euston Road, Alexandria. The business of that service station in large part is the servicing of taxis particularly at their change over time.

11 Kowalczuk had owned other properties before the Berowra property. He and his sister had been given a property at Campbelltown by their mother. They had been involved together in the development of that property. This had involved entering into mortgages, the construction of buildings on it and their sale. There was some litigation between brother and sister about this venture, which was settled. With the moneys that he received from that settlement and other moneys Kowalczuk, on the advice of Anastasi, purchased the Berowra property which was then leased and is still leased to a child care business. At the same time, on the advice of his accountant and solicitor, Mr Alex Lee, he arranged for Mars to be incorporated for the purpose of acting as trustee of his family trust with Mr Lee appointed the sole director and sole shareholder in that company. The trust was set up because apparently at that stage there were marriage difficulties between Kowalczuk and his wife and it had been suggested to him that it was preferable not to have assets in his own name. A mortgage was entered into when the Haberfield property was purchased and Kowalczuk was a guarantor under the mortgage. Kowalczuk has held other real estate assets over the years and borrowed money on mortgages over those properties. One property at Hoxton Park was what is generally called a negative gearing investment, which was not a success.

12 Prior to the events that matter here, which occurred in 2005, there had been financial dealings between Kowalczuk and Anastasi. In 2001 Kowalczuk lent to Anastasi and his wife the sum of $150,000 which should have been repaid within 30 days but has not been repaid. In addition to that in February 2005 Kowalczuk, on the advice of Anastasi, lent to Alpha Second Pty Limited the sum of $200,000 for a term of two years with the interest for the first 12 months paid in advance. This has now been repaid.

Facts: Accom Finance Pty Limited

13 Accom is a small short-term high interest rate lender in the short-term mortgage market. Mr Dunsford (Dunsford) is its managing director. Accom invests money, mainly on behalf of Dunsford's family, in the market to which I have referred. Dunsford gave some rather strange evidence about his company and its activities and of his efforts to keep up with the law. So far as the latter evidence was concerned I have no doubt that the efforts to keep up with the law and with recent decisions on mortgage law were for the purpose of making sure that Accom's risks were minimised as far as possible. In other words, those efforts had nothing to do with any concern for the interests of investors. One reason for saying that is that on the evidence about 75% of the mortgages with which Accom is currently involved and the same percentage for last year are or were in default and court proceedings are being taken or were taken to enforce the securities.

14 According to Dunsford persons seeking short term finance from Accom are often people waiting for refinance through a bank or other lending institution more conservative than his own, or persons waiting for development approval to enable them to obtain such new finance, or purchasers of properties again seeking finance until more long term finance becomes available, or vendors of properties where contracts have been exchanged but settlement is some months away and in the meantime short term finance is required.

15 Dunsford gave detailed evidence of the steps taken by Accom to ensure that there would be no problems with repayment. These included (a) ensuring that the borrower had an exit strategy, meaning as I understood it, a prospect of refinance or sale of the mortgaged property; (b) ensuring the borrower had the ability to pay the short term interest which, in any event, was ordinarily deducted; and (c) insisting that the borrower had a proper explanation by an independent solicitor of the security documents. He said that he took particular precautions to make sure there was no fraud on the part of brokers introducing the loan, and in order to ensure that there was no opportunity to forge or alter valuations or to alter mortgage documents after signature, he insisted that he send these documents by email direct to the borrower's solicitor and that they were delivered back to him direct by such solicitor. He gave other instances of checks made such as bankruptcy searches, searches to ascertain what property an applicant for finance had and investigations to verify valuations which Accom received. To a large extent I accept what he said about this, although it seems to be perfectly clear that any inquiries about what he described as "exit strategies" were of little value if 75% of all loans went into default, meaning that they were not repaid on the due date. He said, however, that bringing court enforcement proceedings normally brought about discharge without too much delay whereas if such action was delayed his experience was that borrowers always expected further extensions. He said that because many loans did not proceed he had taken over the preparation of the mortgage documents himself after instruction from his

solicitors. Quite how that justified what was described as a documentation fee, particularly when this seems to have some relationship to the amount of the loan, was not explained. However, in spite of all this it is fair to say that the evidence of Dunsford was that this was the first occasion where one of these loans had ended up in contested proceedings in the court which went to trial. This was not challenged and I accept it as true. His evidence about checking on "exit strategy" was quite unsatisfactory. At one stage he said Accom made enquiries with the ultimate lenders and that offers of refinance were inspected. When it became apparent this did not happen he said he relied on the borrowers' statements as the nominated subsequent lenders would not give the information needed.

First mortgage loan on Berowra

16 Some time in July 2005, Anastasi approached Kowalczuk with a proposal under which he said he could make money for him out of the Berowra property. The suggestion was that Kowalczuk borrow funds on this property and that Anastasi would arrange to invest the funds in a scheme with investors which would bring Kowalczuk clear returns of seven percent per annum after all outgoings in connection with the funds which he borrowed. In spite of his previous somewhat unsatisfactory financial ventures with Anastasi, Kowalczuk was prepared to accept his word and in effect go along with whatever Anastasi arranged for this purpose.

17 Dunsford said that he was contacted by Anastasi around 27 July 2005 seeking bridging finance on a child care centre for Kowalczuk, whom Anastasi said was a developer who needed $500,000 urgently to "push through a DA". Dunsford faxed a loan application form to Anastasi which was completed or at least signed by Kowalczuk, perhaps in blank. The figures may have been inserted by Anastasi. It stated that Kowalczuk had an income of $100,000 (this was untrue), that his solicitor was Dalla and that the purpose of the loan was business or investment, which description Dunsford stated in another affidavit was inadequate. It also said that repayment would be by "bank re-finance". Dunsford said that he organised a valuation which was never put into evidence but which estimated the property to be worth $400,000 as a house rather than a child care centre. He said that he went to Berowra to inspect the property and that he made inquiries through other real estate agents. He told Anastasi that the property could not be borrowed against as a child care centre but only as a house and that the most which could be offered was $320,000. He then searched the Property Information Database under the name of Edward John Kowalczuk, finding a number of properties under that name, including the Berowra property and one at Hassell Grove, against which he later entered a caveat but which Kowalczuk had never owned. He did find the property at Cabramatta and other properties some of which had never been owned by Kowalczuk. He said that on the (unjustified) basis of the property searches he thought he was dealing with someone of sophistication as a property developer. There was little basis for that. After making these inquiries he said he telephoned Kowalczuk and that during the conversation the following exchange took place:

> [Dunsford]: I could not find your house at Haberfield when we did the ownership search on you through the LPI.
>
> Kowalczuk: That's because it's not in my name. It is held in trust.
>
> [Dunsford]: Okay, well you certainly have had a lot of property in your name.
>
> Kowalczuk: They are developments that I have done.
>
> [Dunsford]: Mr Kowalczuk I say this to everyone I loan to, I don't want you calling me from your solicitors office and complaining, our rates are very high. We are charging 48% on this loan.
>
> Kowalczuk: I know that it is Ok, Tony is organising a refinance.

Kowalczuk denied that the conversation ever took place. While I was not impressed by either of them as a witness I find that the conversation did take place. The words claimed to be said about the trust tend to support this, and the telephone numbers on the loan application form are Kowalczuk's.

18 After this conversation Dunsford said that he searched for the name of Samir Dalla on the Law Society website and then emailed the mortgage documents to him, and that he received the documents back after signing by registered post or by courier. I am not prepared to find that the documents were, as a matter of certainty, returned in that way. Dalla's subsequent evidence was that Anastasi said that he would return them and it is as likely as not that he did so in this case. Dunsford said that after he got the documents back he spoke to Dalla to confirm he had witnessed the signing of the cheque directions which included a direction for the surplus funds to be paid into the account of Venture Connect. Although in his affidavit evidence he said he was always concerned if payments went to a third party rather than the borrower, he subsequently said that the practice of Accom was to just pay on directions.

19 While Kowalczuk and Dalla have conflicting accounts about how they came to be signed, it is indisputable that Kowalczuk's signature appears on the following documents:

1. Acknowledgement, authority, direction and undertaking. This acknowledged receipt of copies of the various documents signed on 9 August and was a direction to pay the loan advance as directed by the solicitors.

2. Acknowledgement of legal advice by the borrower. This included an acknowledgement that the advice included the liability to make regular payments of interest and to repay the loan on the due date.

3. Declaration regarding security property.

4. Cheque directions and surplus proceeds account details. This contained an authority to pay the surplus, after deductions for various fees, to the account of Venture Connect at the ANZ Bank at Chinatown. Venture Connect had nothing whatsoever to do with Kowalczuk.

5. Consent of borrower to legal advice.

6. Loan repayment ability declaration.

7. Declaration of purposes for which credit is provided.

8. Declaration by borrower.

9. Mortgage.

10. Copy of mortgage memorandum AB283719M.

20 Some of these documents are in the form specified by Schedules 1, 4 and 5 to rule 45 of the New South Wales Law Society's Solicitors' Revised Professional Conduct and Practice Rules 1995 (Solicitors' Practice Rules). The loan repayment ability declarations signed by Kowalczuk stated that his current gross income was $100,000 and declared that he had fully disclosed all details of his income and expenditure on the application form for the loan and that he was able to meet the monthly payments under the loan and repay the loan. It ended with the following statement:

> 5. I acknowledge that you insist that we take independent legal and financial advice in relation to this loan. I acknowledge that you are relying on this letter in agreeing to make a loan.

The mortgage did set out quite clearly the basic terms of the loan, namely its term of one month, expiry date, principal sum of $320,000, the lower rate of interest of 48% per annum, the higher rate of interest of 96% per annum, and the fact that the interest was compound and paid in advance in a sum of $12,800. I will deal with the terms of the memorandum later. The forms all said they were signed at Lakemba. Dalla's office is at Lakemba.

21 Kowalczuk's evidence about the signing of the documents is that they were signed at his place of work and that Dalla and Anastasi arrived after a telephone call from Anastasi saying he was coming with Accom's solicitor. Kowalczuk said that the documents were signed on the bonnet of a car, and in his first affidavit said that Dalla asked him nothing about his financial circumstances, did not explain the mortgage documents to him in any real way and did not explain the rate of interest. He persisted with some evidence that he did not know the name of the lender but eventually admitted that he did. He said in a later affidavit that he told Dalla that he could not read very well and that Dalla read the papers out to him; that he did not remember what was said and could not understand it or understand the import of the documents he signed at the time. He was concerned that his employer would notice he was not working which made it difficult to concentrate. He was not given copies of the papers which he signed. Kowalczuk said this all took about ten to fifteen minutes, which on any basis would have been impossible.

22 Dalla's evidence was quite contrary to this. He said he was first approached by Anastasi who said Kowalczuk needed his help as he had approval for a loan which he wanted to settle the next Monday. He said Anastasi took Kowalczuk to meet him at his Lakemba office on 29 July 2005, and that he took out a blank costs agreement and obtained from Kowalczuk information required to fill it in, such as his address. He said that Kowalczuk on being asked what his address was said, "Mars Pty Limited of 37 O'Connor Street, Haberfield" and that when he asked who was the client, Kowalczuk or the company, Kowalczuk said "I am your client the company is mine, it is a one person company, I am the sole director". None of that was really true. He said he regarded Kowalczuk as the client and his invoices were addressed to him. Dalla said Kowalczuk signed the costs agreement and that he then asked where the documents were and was told that they would be probably sent to him on Monday by email. His evidence was that he then said, "I am not Mr Kowalczuk's solicitor for the loan. I am not involved in the loan itself. As per the costs agreement I will give Mr Kowalczuk independent legal advice. I have to see the documents to give that advice", to which Anastasi responded, "Don't worry I have completed the application already. You will receive the documents on Monday." It is obvious this conversation was directed to Anastasi and casts some doubt on the presence of Kowalczuk. In fact he did not receive the documents that Monday but on the following Monday 8 August 2005 by email.

23 Dalla said he arranged for Anastasi and Kowalczuk to attend his office on 8 August but it seems that appointment was cancelled and another was arranged for the next day at 10.50 am when the listed documents were signed.

24 Dalla says that he gave Kowalczuk a full explanation in accordance with the requirements of rule 45 of the Solicitors' Practice Rules. Dalla said his advice concentrated on the form "Acknowledgement of Legal

Advice by Borrower" and said that he asked Kowalczuk if he knew the loan was only for a month and Kowalczuk said that it was just bridging finance. He said that his impression of Kowalczuk was that he was a very confident businessman who knew what he was doing. Before the mortgage was signed he asked Kowalczuk if he had read the mortgage documents and that Kowalczuk said, "Yes". It is quite clear I think that he knew that Kowalczuk had not seen the documents. He said that Anastasi took the documents and said that he would deliver them back to Accom. Contrary to what Dunsford said was the practice it is likely that did happen. On settlement the mortgage moneys were paid to the account of Venture Connect as directed. It is not known what happened to them. It is accepted that Kowalczuk got no benefit from them and I think it clear Anastasi's proposed investors never existed.

25 Some interest was paid on this loan. It is not quite clear by whom although it was not paid by Kowalczuk. The mortgage was, at some stage, extended by two months with interest on the extension also payable in advance presumably somehow arranged by Anastasi. Mr Dunsford could not explain how the mortgage came to be extended. In any event it is not disputed that by November 2005 Kowalczuk was in default. Accom began enforcement proceedings by commencing an action for possession and by service of a notice to occupier on the tenant. Although he originally denied it, I find that the statement of claim was served on Kowalczuk. He said that he had little knowledge of problems with the loan and that Anastasi told him after Kowalczuk was informed that the notice to occupier had been served, that everything was all right and that there had just been some delay in organizing refinance through the bank.

26 This mortgage over Berowra was in fact discharged with funds lent by the National Australia Bank of $350,000, the loan moneys going to pay out (although not entirely) the amount due under the mortgage to Accom. The date of the discharge was 15 December 2005. So far as the National Australia Bank loan is concerned it is also quite clear that Kowalczuk believed Anastasi and expected the investors to pay the interest on that loan, although he was advised from time to time that they were not doing so.

27 Even after discharge, which had the effect of relieving Kowalczuk from the burden of the very high default rate of interest payable under the Accom mortgage, Kowalczuk remained liable to National Australia Bank for the mortgage loan of $350,000 having, as I have explained, obtained no benefit from this whatever. It would, of course, have been impossible to earn on the borrowed moneys seven percent more than the 48% interest due on them to Accom, but it might not have been impossible after refinancing was put in place through the bank. Insofar as this transaction is concerned, Kowalczuk claims from Accom $350,000 plus interest.

First Haberfield loan

28 In spite of the difficulties with the Berowra mortgage, which were known to Kowalczuk, although he had accepted the statements by Anastasi that there was some delay with the investors and he would fix it all up, and in spite of the loan of $150,000 which he had made to Anastasi still being outstanding, when Anastasi suggested to Kowalczuk a new scheme, under which money would be borrowed against the Haberfield property, Kowalczuk was prepared to consider the proposal and go along with it. Under this new proposal made in December 2005, Anastasi said that money could be borrowed against Haberfield and invested in a blue chip company or with blue chip investors and he could make "7% on top. We have to do this deal quickly or you are going to have a problem".

29 There was no application form filled in for this Haberfield mortgage. Dunsford says Anastasi, as agent for Mars, called him on 5 December and told him that the Berowra loan would be refinanced through the National Australia Bank, and that Mars needed a short term loan until a loan Anastasi was working on from "First Loan" came through. He told Dunsford there was in a hurry because Kowalczuk had a "big deal going and if he misses out he stands to lose big bucks". I accept that evidence.

30 Dunsford said he told Anastasi that Accom's practice was not to lend on owner occupied properties, but he understood that although the Haberfield property was in the name of Mars that Kowalczuk was living in it. Anastasi told him that the house was divided into two and there was a tenant in the major part of it. This was not really true, because at this stage although Kowalczuk and his wife's relationship was in difficulties they

were living in separate parts of the same house. Mrs Kowalczuk was being paid child maintenance by her husband and was using this to pay rent to Mars, thereby enabling her to claim rent assistance. Dunsford also said that a valuation would be required, but in view of the hurry he thought he might look at the property himself and proceed without a valuation, as the loan to value ratio was quite low. Dunsford said that he went to inspect the Haberfield property and his inspection showed that there was a separately occupied flat at the back and it looked like a rental property. I accept that he went there, but I find the balance of this evidence untrue. There was a back door. There was nothing to show any separate residence whatsoever. In addition evidence of Dunsford as to the improvements being made to the property between the date of the mortgage and the present time was, I find, incorrect.

31 Dunsford made a search of Mars and ascertained that Mr Alex Lee was the sole director and shareholder. He was prepared to lend to trusts but not in such circumstances. He said he then telephoned Kowalczuk asking about Mr Lee and said that Kowalczuk said to him, "that's my solicitor, he holds the trust for me" and that it was for asset protection in case he became bankrupt. Dunsford says he then spoke to Anastasi about this and said that he would be prepared to go ahead if Kowalczuk became sole director and shareholder. Anastasi, Kowalczuk and Mr Lee then arranged for the shares to be transferred to Kowalczuk and for Kowalczuk to become sole director of the company. Dunsford said he spoke to Mr Lee to confirm the position with him. After the inspection to which I have referred he said that he thought the property was worth $1.1 million and issued security documents to Dalla.

32 Kowalczuk said that a short time after Anastasi approached him about the new venture, Anastasi said to meet him at Brighton-le-Sands on a Saturday as it was necessary to sign loan papers with Dalla. They went to a beach area at Monterey and Dalla arrived with the loan papers and again said that he would read them to Kowalczuk. At first Dalla said Kowalczuk and Anastasi arrived with the loan papers, but later accepted he got them from his office. Security documents and other documents to support the loan were signed on 10 December 2005 at Monterey and I will explain the documents in greater detail shortly. Apart from the mortgage, which is dated 12 December, the other documents were dated 10 December the typed placed of signature of Lakemba was crossed out by Dalla and Monterey written in. This time the mortgage was for a period of two months with an interest rate of 60% per annum and a default rate of 120%. The principal was $807,000 and the due date 12 February 2006. Once again the interest for the two months was paid in advance and deducted from the principal sum. Dunsford justified the higher rate of interest on the ground the matter was very urgent and there was no time to obtain a valuation. Kowalczuk said that at Monterey it was windy and although Dalla started to read the papers, he told Kowalczuk, "It's more or less the same shit as last time". He said Dalla read out some parts of documents and flicked over other parts. In the end Dalla said, "Just sign here". He said that he never read the papers, that he was never given a copy and he was given no advice about his liability as guarantor. He said that Dalla said that it took only 15 minutes but he would put it down as 40 minutes. He said that after this happened Dalla came up to him and said, "You're on your own now", which Dalla denied. Dalla said that Anastasi took the security documents and said he would take them back to Accom.

33 This is all quite contrary to the evidence of Dalla. Dalla said that he had insisted to Kowalczuk that he explain the documents as he had the earlier ones. He said he explained the company was the borrower but that Kowalczuk was a guarantor and that he went through the documents one by one as before and said, "Don't think that you are covering yourself signing for the company because you are the guarantor. You have to realize that the lender can start by suing you rather than suing the company. Your can make no objections. You cannot say 'No, this is going to the company', because you are the guarantor. It is in brief exactly like the last one. It doesn't matter if you say the loan is from your wife, Mars or your uncle. If you don't pay the lender can take the property", to which Kowalczuk said, "OK, I will sign it. It's OK I understand it, I've been through it." The documents as printed stated they were signed at Lakemba. This was deleted and Monterey handwritten in by Dalla.

34 Although the mortgage is dated 12 December 2005 it appears that the principal was not advanced until 15 December 2005, Dunsford apparently registering the mortgage before advancing the principal sum. Kowalczuk had sent a fax to Accom dated 14 December 2005 giving details of his bank account into which the moneys were to be paid. He also signed a document dated 14 December 2005 confirming the loan payments made by Accom and stating the loan would be repaid "by way of refinance with First Home Loans Australia". Anastasi told Kowalczuk that the moneys would be in Kowalczuk's bank, namely the ANZ Bank, on 15

December 2005. They went together to the bank and Anastasi stayed outside while Kowalczuk obtained a bank cheque for $750,000 made payable, at the request of Anastasi, to St George Bank Limited. Kowalczuk then gave the cheque to Anastasi. It was these moneys which Kowalczuk thought were somehow or other to be lent to the blue chip investment company or blue chip investors, combined in some way with the moneys borrowed on Berowra. However, these moneys in fact were used, at least in part, to pay off a mortgage loan of a Susan Houghton to Accom which had been arranged previously by Anastasi.

Second Haberfield Loan

35 The documents for the second Haberfield loan were signed on 17 December 2005. According to Dalla, Anastasi told him that there was a shortfall on the first loan over Berowra and another $10,000 loan was needed on a second mortgage. As this loan was to cover a shortfall, no money changed hands. Why it could not have been done by variation, I do not understand. In any event according to Dalla, Anastasi picked him up and drove him to Kowalczuk's workplace in Alexandria where he said that he went through his routine advice again and the document was signed on the bonnet of a car. Kowalczuk accepts now that he did sign these documents, but says that he did not sign them in the presence of Dalla. The loan is for $10,300 for a period of one month at a lower rate of interest of 60% and a higher rate of 120%. The one month's interest was payable in advance and formed part of the principal sum as did a documentation fee of the amount of $1,100. That amount might seem astonishing but the documentation fee for the first Haberfield loan was $6,456.00. These documents all have typed on them that they were to be signed at Lakemba, but this has been crossed out and the word "Alexandria" inserted. This is in the handwriting of Dalla. Dalla's evidence on what he did at Alexandria amounted to going through the same procedure as before with the first Haberfield loan, which was to follow slavishly what he thought to be the requirements of r45.

36 The moneys due under the Haberfield mortgages were not repaid on the due dates so those mortgages went into default, immediately attracting a rate of interest of 120%. Accom took proceedings for possession and for judgment for the amounts due under the mortgages. It obtained a judgment by default. An application to set aside that default judgment was refused by Assistant Registrar Howe. It seems from the judgment of Brereton J, giving leave to file the cross-claim, that an application was made for a review of that decision which has never proceeded. In any event possession was obtained of Haberfield and the property has been sold. The sale price was not sufficient to pay out the principal sums of $807,000 and $10,300 together with interest due up to the date of sale. As I have said it was for that reason that the present proceedings are taken against Kowalczuk to attempt to satisfy the shortfall out of the Berowra property.

Mortgage and Memorandum

37 It is now necessary to deal with the form of the mortgage document. The mortgage itself in each case consists of only three pages. Apart from the mortgage clause on page one, the terms are contained in the annexure, which is on page 2, and the memorandum, to which I will come. The annexure in respect of the first Haberfield loan states it is for a term of two months with a principal sum of $807,000, the lower rate of interest is 60%, the higher rate of interest is 120%, the interest type is compound, the instalments are prepaid monthly in advance, the borrower is Mars Pty Limited, the guarantor is Edward John Kowalczuk, and the damages for late repayment are as follows: "if the loan is repaid late an additional fee equal to one month's interest at the lower rate will be payable in addition to daily interest at the higher rate until the loan is repaid". The same memorandum was used for all three mortgages. This memorandum AB283719N, extends over 28 pages. It is a difficult document which incorporates a number of agreements being the mortgage, the loan, the guarantee and the charge with some common provisions applying to all four agreements. The document is long, repetitive and confusing and I would have thought it would take a solicitor at least an hour to comprehend it, unless he or she had seen it before. It is fair to say that the memorandum and the mortgage itself include many onerous provisions, including (a) the extraordinarily high rates of interest, both lower and default; (b) the fact the rates are compound; (c) the provision that if the loan is not repaid on the due date then not only will interest at the higher rate be payable, but there will be an additional fee for late payment equal to one month's interest at the lower rate; and, (d) what on their face appear to be very high legal fees agreed in advance between Accom and its lawyers. For instance those fees can, at the option of the lender's solicitor, include a fee of $2,000 for drafting a statement of claim and affidavit verifying it, this for a document which is more or less standard in

possession matters, a fee of $2,300 for drafting a notice of motion and affidavit in support of default judgment, a fee of $950 for appointing a real estate agent and a fee of $1,200 for supervising a marketing campaign. Neither of the last two could possibly be said to be legal work. There is also a clause providing that if there is a default then the mortgagor prior to discharge can be required either to provide the lender with a release from any claim or dispute as to the amount due and in default of release then the mortgagee can retain $24,000 or two percent of the principal as security for the costs of any later dispute.

38 The clause under which Accom seeks relief against Kowalczuk is Clause 68 of the memorandum, which is part of the common provisions under the heading of "Additional security". In other words it is not in the guarantee section. The clause is as follows:

> 68. The DEBTORS do hereby mortgage to the LENDER all their estate title & interest in any real property they currently own or partly own as surety for the DEBT ("OTHER SECURITY"). The terms of the mortgage over the OTHER SECURITY will be the same as those laid out in the MORTGAGE. The LENDER undertakes not to protect its priority in relation to the OTHER SECURITY by registering a caveat or mortgage over the title of the OTHER SECURITY unless any of the DEBTORS default under any of the AGREEMENTS. Regardless of whether a default is rectified the LENDER will not be obliged to remove any caveats placed on the title of the OTHER SECURITY until the MORTGAGE is discharged. The DEBTORS are free to deal with the OTHER SECURITY without regard to the LENDER so long as they do not default under any of the AGREEMENTS. In the event of a default under any of the AGREEMENTS the LENDER will have the right to take possession of the OTHER SECURITY and exercise power of sale and/or foreclosure to recover the DEBT and the DEBTORS will yield and surrender possession of the OTHER SECURITY to the LENDER.

"Debtor" is defined to include guarantor, but this would not be apparent on a cursory reading.

39 Dalla did not suggest that he read the memorandum to Kowalczuk on the occasion of the Berowra mortgage or the first Haberfield mortgage. He gave some general explanation of it, but whatever else he did, he certainly did not explain the clause which I have set out. Whatever advice was given it is not at all clear whether he was giving it to Kowalczuk on behalf of Mars or Kowalczuk as guarantor or both, although probably he intended to give it to both. His somewhat extraordinary evidence was that even for the Berowra mortgage he explained the guarantee provisions in the memorandum to Kowalczuk, although there was no guarantor in that transaction. He just said that he explained everything. He did not discuss with Kowalczuk the reason for the loan as he said Anastasi had told him of this. He accepted the statement about Kowalczuk's ability to repay the loan, although quite clearly there was no chance of repayment unless there was some re-financing obtained.

40 In an affidavit sworn 21 February 2007, Kowalczuk said that he would never have signed a document where the interest rate was 5% per month increasing to 10% per month if not paid on the due date. It is not quite clear whether that evidence was given in relation to the Berowra loan or the Haberfield loan or both. There is no such evidence in relation to clause 68.

The Haberfield Proceedings: Res Judicata and Estoppel defences to Mars' cross-claim against Accom

41 Judgment for possession and the monetary judgment, both obtained by default, were obtained on pleaded claims. The judgment for possession depended upon the plaintiff proving the Haberfield first mortgage and default under it. To obtain the money judgments the plaintiff had to prove both Haberfield mortgages, and default in payment of principal, interest and other amounts due under the mortgages. As this was a default judgment any estoppel by judgment must be based strictly upon the precise claim on which the judgment was obtained, recognizing that the mortgagee has entered into possession and sold the Haberfield property pursuant to its power of sale and has applied the proceeds of sale in part satisfaction of the judgment debt. In such circumstances a defence of res judicata is good to prevent the matters which have merged in the judgment from being relitigated: ***Linprint Pty Limited v Hexham Textiles Pty Limited*** (1991) 23 NSWLR 508. The mortgagor

under the mortgage covenanted to repay the principal and interest due and mortgaged the Haberfield property as security. The mortgage security cannot be attacked in light of the judgment and execution of the writ of possession and sale. The judgment debt cannot be attacked by cross-claim. Claims for declarations that the mortgages should be declared void ab initio and unenforceable must be dismissed and the claim to set aside the judgment must be dismissed. This is now accepted by counsel for Mars.

42 Those orders will not necessarily dispose of the whole of the cross-claim of Mars against Accom, which is based upon claims for relief under s51AA, s51AC and s52 of the Trade Practices Act. The claim under s52 is not pressed. What remains pressed are the claims (a) for payment of compensation by Accom for any loss or damage suffered by Mars and (b) damages including exemplary damages. Nothing was said about exemplary damages and the claim is not maintainable.

43 Accom has pleaded defences of res judicata, issue estoppel and Anshun estoppel in response to these claims. While, contrary to the submissions of counsel for Mars, the default judgment is a final judgment, it is not a judgment which would determine the compensation claim of Mars under the cross-claim. Res judicata does not apply and neither does issue estoppel. So far as Anshun estoppel is concerned, had there been a consent judgment or judgment after trial I consider an Anshun defence could well have succeeded, as a finding for Mars on the cross-claim could have neutralised the money judgment obtained by Accom and could probably have been set off against it. However, there are cases of long standing which have held that particular care must be taken in applying estoppel to default judgments: see ***Kok Hoong v Leong Cheong Kweng Mines Limited*** [1964] AC 993 at 1012; ***New Brunswick Railway Company v British and French Trust Corporation Limited*** [1939] AC 1 at 21. The thrust of those decisions, which I should follow, is that an estoppel in such circumstances only applies to a question determined with precision in a previous judgment. It follows that there is no room for the extended doctrine identified originally in ***Henderson v Henderson*** [1843] 3 Hare 100 to apply. The claim of Mars under its cross-claim against Accom is by way of compensatory relief or damages for the sum of $1.18 million being the amount for which Accom sold Haberfield, plus interest on that sum. It is that claim that will have to be addressed. No estoppel applies to it.

Haberfield proceedings: Cross-claim of Mars against Accom under s51AA and s51AC of the Trade Practices Act

44 The first thing to be said is that it is not possible to claim under both sections. Section 51AA does not apply to s51AC conduct: s51AA(2). No attention was given to this and perhaps it does not matter as in this case I do not think a different conclusion would be reached under one section than under the other. I am inclined to the view that s51AC does not apply because while the lending of money by Accom to Mars was a supply of goods and services, its acquisition by Mars was not I consider for the purpose of trade or commerce under s51AC(7). Nor was Mars a business consumer. This view is, I think, supported by ***ASIC v National Exchange Pty Limited*** (2005) 148 FCR 132, a decision under s12CC of the Australian Securities and Investments Commission Act 2001 which mirrors s51AC. So far as Mars was concerned this was a one off borrowing for the purpose of on-lending and not a small business borrowing for the purpose of its business. This issue was raised on the pleadings. However, if I am wrong in this I consider the result reached under s51AA would apply to the conduct if it were within s51AC.

45 I turn to s51AA. Paragraph 22 of the cross-claim is somewhat confusing as it directs attention to conduct not only as against Mars but also against Kowalczuk as guarantor although Kowalczuk is not a cross-claimant. It has to be read, I think, on the basis that Kowalczuk was the sole director of Mars and that in its dealings with Mars Accom was in effect dealing with Kowalczuk on behalf of Mars so that any disability or position of disadvantage of Kowalczuk in the dealings should be considered as applying to Mars.

46 On that basis it is claimed that (a) Mars was in a position of special disadvantage or disability because Kowalczuk could not understand the documents due to lack of education, lack of comprehension, difficulty in reading and lack of business experience; (b) this was or should have been obvious to Accom because Accom failed to follow its usual practice and did not require both borrower and guarantor to sign a loan repayment ability declaration, Kowalczuk had recently defaulted on a smaller loan to Accom, and the nature of the transaction was obviously improvident so that only a person suffering from disability would enter into it; (c) that

Accom took unfair advantage of its superior position in fixing an excessive interest rate not necessary to protect its interests without Mars having capacity to negotiate the rate; and (d) that as the transaction was improvident, Accom should have insisted on Kowalczuk or Mars obtaining proper advice, including advice of a financial planner, and that instead the loan was rushed through.

47 In addition to this, in a somewhat inarticulate way, Mars relies on paragraph 25 of the cross-claim which, under the heading of "Particulars", pleads facts relating to both s55AA and s55AC setting out a list of claimed failures of Accom to do what is claimed it should have done prior to advancing the loan funds under the Haberfield mortgages. Because paragraph 25 is difficult to summarise I set it out in full:

25. Particulars

(a) Mars refers to and repeats the particulars in paragraph 22.

(b) Accom was aware that the Guarantor in his personal capacity had previously defaulted in relation to the August 2005 Loan. Accom also required the Guarantor to discharge the balance of the August 2005 Loan out of funds advanced by it to Mars under the December 2005 loans.

(c) In such circumstances, it was incumbent upon Accom:

(i) To make such inquiries as were necessary to determine Mars' capacity to repay the proposed loan.
(ii) To require Mars to provide substantiation of its income and its capacity to repay the loan and any interest.
(iii) To require the Guarantor to provide substantiation of his income and its capacity to repay the loan and any interest.
(iv) To carry out checks on the creditworthiness of Mars and of the Guarantor and of their financial circumstances and capacity before advancing funds to Mars and/or the Guarantor pursuant to the December 2005 loans.

(d) Accom failed to carry out any such checks.

(e) Had Accom done so it would have established:

(i) That Mars had no income and no capacity to pay any interest on or after the date when the December 2005 loans were due for repayment and that it lacked the capacity to refinance the December 2005 loans at that date.

(ii) That the Guarantor was a driveway attendant earning approximately $568 per fortnight, and that, likewise, he had no capacity to pay any interest on or after the date when the December 2005 loans were due for repayment and that he lacked the capacity to refinance the December 2005 loans at that date.

(iii) That neither Mars nor the Guarantor had any commercial strategy in place at the time the December 2005 loans were taken out to ensure the December 2005 loans were refinanced through other sources on their due date and to ensure that the debts the subject of the December 2005 loans were repaid to Accom.

(iv) That it was inevitable that Mars and the Guarantor would default when the time came for repayment of the December 2005 loans, that neither Mars nor the Guarantor had anything remotely like a sufficient income to meet the default monthly repayments of 10%, and that the Haberfield property and the Berowra property would have to be sold to repay the December 2005 loans.

(f) In such circumstances, it was incumbent upon Accom to warn both Mars and the Guarantor of the inevitability of default and of the consequences of default.

(g) Accom failed to advise either Mars or the Guarantor that the interest rate to be charged for the loan agreements was 50% higher than its then interest rate charge of 4% per month for loans of this nature, and why it was that this higher interest rate was being charged.

(h) Accom failed to advise either Mars or the Guarantor that they could have sought to obtain finance from an alternate source at a lower and more serviceable interest rate than that being offered by Accom.

(i) Accom failed to make any inquiry as to the needs of Mars and/or the guarantor as borrowers.

(j) Accom failed to ensure that it only entered into a transaction with Mars and/or the Guarantor which it genuinely and reasonably believed was appropriate to the purported needs of Mars.

(k) Either, Accom:

(i) failed to have in place any practices and procedures to ensure that it only advanced funds to the parties who had the capacity to repay the loan funds advanced under the December 2005 loans or, alternatively,

(ii) had such practices and procedures in place, but failed to follow them when it advanced funds to Mars under the December 2005 loans.

(l) Accom:

(i) failed to make any enquiries or, alternatively, any reasonable or adequate inquiries, as to the commercial purpose or purposes for the loans sought by Mars,

(ii) did not ask anything of Mars nor of the Guarantor as to the nature of the business transaction and/or commercial proposal for which the funds the subject of the December 2005 loans were to be used, and, had it done so, would have readily established:

(1) that neither Mars nor the Guarantor had any real or actual business or commercial purpose in mind,

(2) and that, both Mars and the Guarantor lacked the capacity to form any concept of what a business or commercial purpose of this nature was.

(m) Accom failed to inquire as to the legal status of Mars as trustee of the Mars Trust and as to its position with respect to the beneficiaries of the Mars Trust in the event that it entered into this transaction as trustee, and thereby failed to establish that:

(i) the Guarantor was the true borrower under the December 2005 loans;

(ii) as a mere trustee, Mars had no income or other assets whatsoever and that the transaction was patently improvident to Mars and that there was no prospect that Mars could repay the December 2005 loans as and when they fell due;

(iii) the proposed mortgage to be given by Mars was in the nature of a third party loan; and

(iv) the Guarantor as principal debtor had no capacity to repay the loan.

(n) Accom insisted upon an early settlement of the December 2005 loans so as to ensure the repayment of the balance of funds outstanding to it with respect to the August 2005 Loan to the Guarantor, and did not allow either Mars or the Guarantor sufficient time to obtain proper and independent legal advice and sufficient financial advice concerning their legal and financial positions respectively.

(o) Accom failed to advise the Guarantor sufficiently, properly, or at all or failed to ensure that he obtained appropriate advice:

(i) As to his obligations as a Guarantor as distinct from his obligations as the director of Mars, and/or

(ii) the difference between his execution of the documents in his capacity as a director of Mars and in his capacity as a Guarantor.

(p) Accom failed to advise Mars sufficiently, properly, or at all that it proposed unilaterally to withhold some of the funds otherwise to be advanced to Mars under the December 2005 loans, in order to discharge the balance due and payable by the Guarantor to Accom pursuant to the August 2005 loan and to afford Mars the opportunity to decline to enter into the December 2005 loan transactions in such circumstances.

(q) Either Accom

(i) caused Mars and the Guarantor to enter into the December 2005 loans without informing either Mars or the Guarantor that Accom had the right to take possession of the Guarantor's property at Berowra in the event that either Mars or the Guarantor failed to repay the December 2005 loans as agreed, or

(ii) by its subsequent conduct and actions, led Mars and the Guarantor falsely to believe that, by entering enter into the December 2005 loans, Accom had the right to take possession of the Guarantor's property at Berowra in the event that either Mars or the Guarantor failed to repay the December 2005 loans as agreed, when it had no such right.

(r) Accom's real or ulterior purpose in advancing the December 2005 loans to Mars was not to assist Mars in any commercial venture, but to engage in predatory commercial activity, so as to secure for itself all of the rights Mars had in Haberfield property and all of the Guarantor's rights in the Berowra property.

(s) At all times, Accom did not deal directly with Mars and/or the Guarantor, but dealt solely with Tony Anastasi, with whom it had previously dealt in the same manner in relation to the August 2005 Loan, which it knew of itself was of an improvident nature, and Accom was aware or ought to have known that Tony Anastasi was acting with reckless indifference to the interests of Mars and/or the Guarantor, and/or was acting negligently and incompetently and in such a manner as to render the December 2005 loan transactions improvident.

48 Much of this is directed towards Kowalczuk as guarantor which is really irrelevant except insofar as it is directed towards Kowalczuk as the alter ego of Mars or is directed to the claim of predatory conduct in 25(r), and when considering 25(r) it is necessary to bear in mind that this is not a suit for foreclosure.

49 In considering this part of the claim it is necessary to bear in mind at all times that Anastasi was not the agent of Accom but of Kowalczuk, and it is Anastasi's conduct which has directly brought about the present circumstances of Mars and of Kowalczuk. It is clear that Anastasi engaged in fraudulent conduct towards Kowalczuk. But unless Accom had reason to know of this or to suspect it or actually knew of it, then neither Mars nor Kowalczuk can rely on such conduct to establish unconscionable conduct by Accom.

50 I now return to the arguments put forward by Mars/Kowalczuk to support their claim for relief under s51AA. The first is the question of whether Mars or Kowalczuk were in a position of special disadvantage or disability. Mars was a company formed by Kowalczuk, albeit with the guidance of his accountant, to protect his assets. Kowalczuk was not completely uneducated, illiterate or inexperienced. He had owned other properties. Before he came into contact with Accom he had borrowed moneys under mortgage. He knew what a guarantee was. He was not old or young or infirm or mentally deficient. He had decided, unfortunately for him and his company, to act on the advice of Anastasi, and to use his real estate to gain income. Even after his experience with the Berowra loan, knowing it was in default and that the required payments were not being made by "the investors", he agreed to the proposal of Anastasi that he should borrow against Haberfield in spite of the refusal of Anastasi to identify the investors. I therefore find that neither Mars nor Kowalczuk was in a position of special disability in dealing with Accom. Kowalczuk relied on Anastasi and so far as Accom was concerned he got competent advice from Dalla.

51 Furthermore, in relation to Accom's knowledge of Kowalczuk's position, I find that there is no evidence that Accom or Dunsford knew or should have known that Kowalczuk was being influenced, let alone being defrauded, by Anastasi. Neither was there any reason for Accom to think or know that Dalla was not giving or had not given Kowalczuk or Mars competent independent advice. In this case independent means independent of Accom not independent of Anastasi. On the basis of these findings I have come to the conclusion that the claim under s51AA fails.

52 There are other matters which support that conclusion. Accom did not know that Mars would have difficulties with repayment and it did not know of Kowalczuk's educational background. It had statements signed by him that he earned $100,000 a year, which were untrue, but not to Accom's knowledge. Anastasi had told Dunsford, so Dunsford said, that it was a short term loan until other funds became available from First Loans Limited. The loan ability repayment form confirmed this. I accept that evidence. While the Berowra loan did go into default Dunsford said that this was not unusual and that nearly all loans in default were paid out usually by a new lender. That is what happened in this case and this matched the information given to Dunsford regarding refinancing through the National Australia Bank before negotiating the Haberfield loan. As to the argument that Dunsford should have realised Kowalczuk's position because of the "obvious improvidence of the loan", the loan would only be improvident if there was no plan to repay with other borrowed funds. Cases such as ***Elkofairi v Permanent Trustee Company Limited*** [2002] NSWCA 413 and ***Perpetual Trustee Company Limited v Khoshaba*** [2006] NSWCA 41 are not authority for some general proposition that a lender of money on security of real estate to a borrower who has no ability through his own income or assets to repay the loan, is guilty of taking part in some unconscionable and predatory conduct. That may be the position if there is no means disclosed for payment of interest, but a good proportion of borrowers for fixed terms in any mortgage situation would be proceeding on the basis that the principal debt would be repaid by new borrowings or by sale of the mortgaged land. The position is of course different if the lender knows that there will be default in payment of the interest or principal so that mortgagee sale will be the inevitable result. This latter conduct is the type of pure asset lending that has been found unconscionable; the former is not. In the instant case so far as payment of interest was concerned, it was paid in advance and deducted from the loan funds.

53 The same considerations are applicable to the arguments about Accom's failure to ensure that Mars obtained independent financial advice. It is true, I find, that Dunsford never expected such advice would be obtained by Mars or Kowalczuk in spite of the wording of the Accom form. That does not mean it was unconscionable not to insist on such advice. Even assuming that time had been given to obtain such advice I think it is clear from the conduct of Kowalczuk and his acting constantly in accordance with the wishes of Anastasi, that the advice would not have been obtained. There are a lot of things Accom could have done in the

terms set out in the paragraph 25 particulars. The fact many were not done does not make out the unconscionability claim.

54 The final issue to address is whether Accom's interest rates somehow made the transaction unconscionable. Many people would think that the rates of interest charged were exorbitant for first mortgage loans of say 75% of value. I agree. But bad bargains are not necessarily unconscionable bargains or illustrative of unconscionable conduct. The fact is that there have been quite a number of decisions in this Court of trial judges where interest rates similar to the ones here have been upheld or at least not resulted in any relief being given on that ground: e.g. ***Takemura v National Australia Bank Ltd*** [2003] NSWSC 339; ***Guardian Mortgages v Miller*** [2004] NSWSC 1236; ***King Investment Solutions v Hussain*** [2005] NSWSC 1076. Accom's rates, or at least the higher rates, have nothing whatsoever to do with risk, although it is possible the lower rates might have some connection in view of the speed with which the loans are made available. The higher rates really have everything to do with what the lender thinks can be got away with, which at least here seems to be a doubling of the lower rate. However, unless there is pure asset lending, the fact that the rates appear exorbitant does not in itself make them unconscionable. I am aware through experience in other cases that such rates are not unusual. It is not claimed by paragraph 22(c)(i) of the cross-claim that the rate is unconscionable; what is claimed is that Accom arbitrarily fixed a grossly excessive rate and that Mars had no capacity to negotiate the rate. The point here however is that Mars might have been pressured by Anastasi to enter into the loan but so far as Accom was concerned Mars could take it or leave it. There was no need whatsoever for Mars to enter into the mortgage. It did not need any money at all. It was not in any position of desperation and as discussed above, was also not in a position of disadvantage since, despite the somewhat rudimentary level of Kowalczuk's education, he was far from ignorant and inexperienced.

55 There was no argument that the higher rate and the provision for a special payment on default was a penalty, probably because in the long run there was no claim for a money judgment as against Kowalczuk. In any event, at least so far as the higher rate is concerned, I agree with what Campbell J said in ***King Investment Solutions Pty Limited v Hussain*** at paragraphs 136 and 137, that while it may be time for substance to prevail over form a trial judge can do nothing but follow the established law. That does not apply to the special payment of one quarter's interest at the lower rate: It was a penalty; ***Guardian Mortgages v Miller*** established this. In mortgages which, according to Dunsford, are produced on advice from the same solicitors as acted for Guardian Mortgages, the same clause is still included. I do not know whether the solicitors advise this. If they do it is close to professional misconduct. Although I consider I am bound to follow the long established law on higher and lower interest rates, my reason for thinking it is time for a change is because the principle is based upon the understanding that the higher rate is a proper rate and the lower rate a concessional rate. Such reasoning envisages a relatively small variation between the rates. No one could consider 120% a proper rate even if 48% or even 60% could be justified as a proper rate. Thus when attention is given to the lower rate alone the principle really becomes absurd.

Berowra Proceedings: Claim of Accom against Kowalczuk

56 Accom by its statement of claim seeks an order for specific performance of the Haberfield mortgages, (1) by Kowalczuk giving possession of the Berowra property to Accom, and by way of enforcement of (1), (2) by judgment for Accom against Mars for possession of the Berowra property and leave to issue a writ of possession forthwith, and (3) orders for judicial sale. The claim for judgment for $817,300 plus interest was not pursued.

57 The statement of claim does not refer to or plead clause 68 of the memorandum relied upon in written submissions. No order for possession by way of specific performance would be made unless there were a mortgage or charge in favour of Accom over Berowra and no order by way of specific performance would be made pursuant to "the right to exercise power of sale" referred to in clause 68. The plaintiff itself cannot exercise power of sale. However, as the case proceeded without objection on the basis that there was a claim for possession and a claim for judicial sale I will proceed on that basis as it can cause no prejudice to the defendant. On the other hand, and assuming the cross-claim fails, I would not make any final order until the pleading is brought into line with the argued claim. It is not in any event appropriate to speak of an order for specific

performance of some part of an unpleaded mortgage agreement. The plaintiff is not seeking an order that Kowalczuk execute a mortgage in terms of some agreement pursuant to clause 68 of the memorandum.

58 In his defence Kowalczuk denies that there was a term of the mortgages that in the event of default Accom could take possession and sell Berowra. As I have said no argument was addressed to this. It was a term under clause 68. There is also a defence of non est factum. No submissions were addressed to this. The set off is claimed by reason of the cross-claim. That set off would only arise if there were a money judgment on the statement of claim which is not sought.

Berowra Proceeding: Cross-claim by Kowalczuk against Accom

59 Kowalczuk's first claim for relief is for damages or compensation in the sum of $350,000, being the amount borrowed from the National Australia Bank to pay out the Berowra mortgage to Accom, plus interest on that amount from 15 June 2005. The second claim is for orders setting aside the loan transaction and mortgages as against Kowalczuk as guarantor under the Haberfield mortgages. The other claims were not pursued.

60 Kowalczuk makes these claims in respect of the Berowra mortgage and as guarantor of the Haberfield mortgages pursuant to s51AA, s51AC and s52 of the Trade Practices Act and under the Contracts Review Act 1980. For the reasons given when determining the cross-claim of Mars against Accom I do not consider s51AC applies.

Berowra Proceedings: Section 51AA claim

61 The pleading here mirrors the claim in the other action, omitting a few facts which could only be relied upon or be relevant to Mars. I do not consider Kowalczuk was in a position of special disability or disadvantage in relation to Accom which would have made it unconscionable for Accom to enter into the Berowra mortgage with him. It can be accepted that many people who would contemplate entering into a mortgage with a lower rate of interest of 48% and a higher rate of 96% would be desperate or old or sick or otherwise in need of the protection of equity against catching bargains and unconscionable conduct. As I have explained Kowalczuk does not fall into any of those categories.

62 There is no authority of which I am aware which goes so far as to say that a proposed lender has an obligation to obtain proof of the stated income of the borrower or to require a certificate of independent financial advice. As I have explained it was not inevitable that Kowalczuk would default. The interest had been paid in advance and it was intended the borrowing be refinanced, whether or not Dunsford was told of this by Kowalczuk himself.

63 So far as the conversation which Dunsford said he had with Kowalczuk about the loan is concerned, I find it took place. In the circumstances in which Accom was operating it was not a surprising event. It follows that Kowalczuk was aware at least of the lower borrowing rate of 48% and that he said to Dunsford that it was a short term loan being refinanced. Dunsford was not a particularly satisfactory witness. Among other things he said at one stage that he placed emphasis on what was written in a loan application form, and then for the December loans gave some explanation for no application being required. I have referred to other matters where I found his evidence to be quite inaccurate. However, Kowalczuk was even less reliable. The impression I had from his oral evidence in cross-examination, which went to show conflicts in his written material, was that what he said was directed towards his obvious wish to retrieve something from the wreckage heaped on him by the actions of Anastasi. I refer more to this in dealing with his cross-claim against Dalla. The s51AA claim fails.

Berowra Proceedings: Claim by Kowalczuk against Accom under the Contracts Review Act 1980

64 As is usual in these matters the cross-claimant pleaded most of the sub-paragraphs to s9(2) of the Contracts Review Act. To a large extent they cover the same points as those considered under the s51AA claim. There is, however, a difference because in some circumstances a contract may be unjust even though the circumstances which give rise to such injustice are not known to the party against whom relief is sought: ***Beneficial Finance Corporation Limited v Karavas*** (1991) 23 NSWLR 256 at 277. Relief is, of course, a separate matter for consideration.

65 While in accordance with s9(3) it is true that Anastasi represented Kowalczuk in part of the negotiations with Accom, that really has no bearing on the matter, although it is pleaded that both Accom and Anastasi exerted undue influence and pressure on Kowalczuk. In any event while it is correct to say that Kowalczuk was influenced by Anastasi and in fact entered into the mortgages on the encouragement of Anastasi it is not the fact that undue influence or pressure was applied to him.

66 It was argued that s9(2)(d) of the Contracts Review Act was applicable as the provisions of the contract relating to interest were not reasonably necessary to protect the legitimate interests of Accom. That argument was based upon a contention that a return on investment should be related to the risk involved in lending and that in this case there was no real risk because the loan was on first mortgage and the loan value ratio was only about 80%. However the interest of the lender was to lend money on interest. Unless I could find that the intention of the lender was that the borrower would default so as to trigger the higher interest rates I do not think that argument could succeed. I have had concerns about this latter matter because the evidence is that about 75% of the Accom loans over the last two years have gone into default, triggering what on any basis are onerous rates of interest, which it seems from the evidence of Dunsford are generally recovered. However, until substance is held to prevail over form, it is difficult, if not impossible, for the argument to succeed. Decisions of this Court have upheld such high interest rates. It is not, I think, open to me to venture upon some new attack without legislation or without the authority of an appellate court unless the public interest argument were to succeed. The fact is that in this case the cross-claimant is not arguing for some partial relief so far as interest rates are concerned. The relief sought is damages to negate the result of entering into the mortgage at all. That is not an order which could be made under s7 of the Contracts Review Act. However, it seems that if I were to decide that some provisions were unjust then it would be within power pursuant to s8 and Sch 1 Cl 1(c) of that Act to make some order for partial compensation and perhaps for the whole of the amount which the plaintiff claims. In summary and subject to the public policy argument I find that the August mortgage was not unjust. I should state to make it clear that that does not mean that it was reasonable.

67 Mr Paterson and Professor Keen gave expert evidence on the public interest issue. Neither really took the matter far. The general effect of their evidence was that if the loans were not genuine short term loans but were loans entered into by the lender with the intention that they go into default then that was contrary to the public interest. It would be difficult to argue against that, and it is supported by paragraphs 128 and 131 in the judgment of Basten JA in ***Elkofairi***. In the present case the required facts were, in my view, not established, although as I have said this conclusion was not reached without difficulty. The cross-claim against Accom in relation to the Berowra mortgage fails.

Haberfield and Berowra Proceedings: Cross-claims of Kowalczuk and Mars against Dalla

68 Mars and Kowalczuk have claimed against Dalla, in both proceedings, under s75B of the Trade Practices Act, in negligence, in contract and under s42 of the Fair Trading Act. As the cross-claim against Accom fails, the s75B claim must fail as no contravention has been found to which Dalla could be an accessory. However, it is necessary to deal with the other claims in more detail.

Claims against Dalla in negligence, contract and s42 of the Fair Trading Act 1987

69 I will deal first with the claim under the Fair Trading Act. It is pleaded in paragraph 20(a) of the first cross-claim that the provision of legal services by Dalla was made in trade or commerce. This was admitted. For the general reasons given by Young CJ in Eq in ***Metcash Trading Ltd v Hourigan's IGA Umina Pty Ltd***

[2003] NSWSC 683 I think that incorrect. But assuming the admission should be acted upon, the particulars of the conduct set out in paragraph 19 of the cross-claim are directed towards s75B of the Trade Practices Act. Those matters go to failings or omissions, as the claimed breach is of refraining to do something, presumably by silence; such conduct needs to be intentional not inadvertent: section 4(4) of the Fair Trading Act. No intentional conduct was proved. If I were wrong in this I consider that the claim for breach of duty, which is made on the basis of the same facts pleaded in paragraph 19 of the cross-claim ,,would be at least as wide and I think wider than any s42 claim.

70 The claims in negligence and for breach of retainer are not claimed to differ in breadth. The retainer was to provide independent legal advice to Kowalczuk on the loan documents. It is accepted that the limits of the duty are proscribed by r45 of the Solicitors' Practice Rules.

71 Particulars of breaches of duty and of the retainer are given in paragraphs 19 and 48 of the cross-claim, relating to the Berowra mortgage and Haberfield mortgages respectively, but in much the same terms. These are given as particulars rather than being pleaded as facts, but in summary claim that no proper explanation was given of the loan documents, that no advice as to the desirability of obtaining independent financial advice was given and that no advice was given as to capacity to refinance the loans.

72 The cross-claim in relation to the Berowra mortgage and the December loans does not allege that any damage arose out of the complained breach of duty of care or breach of contract or for that matter from misleading and deceptive conduct. It is reasonably clear that the damage claimed for Berowra would be the same amount claimed from Accom, namely $350,000 plus interest. So far as the December loans are concerned it would appear that as the claim against Accom is to set aside the guarantee, then the damages claimed would be, in the event of that claim being unsuccessful, whatever amount was ultimately paid to Accom pursuant to the liability of Kowalczuk under the guarantee.

The Dalla Cross-Claim: Factual issues

73 I have already set out the general matters of contention relating to the Berowra loan. Kowalczuk claims that he has never been to Dalla's Lakemba office, that the loan documents were signed on the bonnet of a car at his place of work at Alexandria and that he was given only a brief description of the loan documents and their meaning, in spite of the fact that he told Dalla that he did not read well. He said that the interview took about 15 minutes.

74 In addition, so far as the second December loan was concerned, Kowalczuk, while he agreed that he signed the documents, said that they were not signed in the presence of Dalla and he was given no advice on them. He said that he was surprised to see them and knew nothing about them until they were shown to him by a barrister. As against this, Dalla says that, when told about the requirements for the final loan, he was picked up by Anastasi in his car and driven to Alexandria to Kowalczuk's place of work. He said that he was surprised by the state of Anastasi's car and by Kowalczuk's place of work. Although no doubt in a briefer way than his advice on the Haberfield loan, he said that he went through what was required under r45 again for the third loan document.

75 It is necessary to make a finding on these conflicting accounts as it is vital to the credit of the parties involved and I think vital to the outcome of this case. The story of Kowalczuk is supported by the evidence of his employer, who said that he remembered an occasion that Kowalczuk was signing documents because this was at change over time in the taxi industry and he did not wish others to be held up by employees not attending to them. He said that this was in August and he was sure that it was not in December. He connected this to a time some documents were received by fax. His evidence was that Kowalczuk did not work on a Saturday so far as he knew and that the date of the signing of the second December mortgage was a Saturday. I thought him an honest witness endeavouring to do his best but I did not find his evidence as to date convincing.

76 As against this, Dalla says that he first interviewed Kowalczuk in his office on 29 July when the costs agreement was signed and then he saw him again in his office on 9 August when the mortgage documents were

signed. His evidence as to the first occasion may be supported by an indecipherable entry in his diary but is certainly supported by what is called the "registration book" which is really an index of clients and the date a file is opened. There is an entry for 29 July with the name and address of Kowalczuk with a telephone number 9519 9475 with additional wording "in care of Tony [Anastasi]". Entries in this registration book are more or less in date order and would support an attendance on Kowalczuk on that day unless it were the fact that only Anastasi was seen on that day. On the other hand, if only Anastasi was seen on that day, at least the date on the costs agreement must have been inserted at a later time because it is signed by Kowalczuk. The telephone number is Kowalczuk's home number. The other piece of evidence which supports the Dalla story is a diary entry of an appointment on 9 August 2005 with Anastasi. While it is of course possible that something could have happened out of the office and that Anastasi had taken him to Alexandria on that day that is, I think, unlikely.

77 There are some matters which bear upon the credit of Kowalczuk. I have already referred to evidence he gave that he did not know that the name of the lender was Accom when he finally admitted that he did. In one affidavit he said that he did not remember Dalla witnessing any of his signatures, whereas in cross-examination he again accepted this was wrong. He denied that the plan in August was to get a short term loan and then a longer term loan but there is no doubt that he applied for a long term loan from the National Australia Bank in November 2005 and, as a matter of interest, the application referred to "Accom Finance" as the existing lender. There were discrepancies between what was stated in his first affidavit and what was stated in subsequent affidavits. He said that he had never heard of First Home Loans and yet he had signed an application for a loan of $750,000 with that company prior to signing the first December loan documents for Accom. He said that all he did was sign the documents and he did not see what was on them. I accept that he might not have seen the details but I do not accept that he did not see the name. In addition he signed a document for Accom on 14 December, stating the repayment of the first December loan was to be through a loan from First Home Loans.

78 Dalla was a most unimpressive witness. He constantly repeated a mantra about his obligation to do what was required by r45 of the Solicitors' Practice Rules and not to trespass into financial advice. It was put that he had no reason to give untrue evidence whereas Kowalczuk had. That is not entirely true. For instance, if he signed documents purporting to witness Kowalczuk's signature when he did not see them signed, his entitlement to continue in practice would have been placed at great risk. On balance, however, and bearing in mind that Kowalczuk bears the onus of proof in this, I accept the evidence of Dalla as to the location at which the various documents were signed. The account given by Dalla is supported by what seems to have been a careful practice of correcting the printed place of signature of documents in handwriting from "Lakemba" to "Monterey" and "Alexandria". In saying this I have not overlooked his costs invoice which refers to a visit to Haberfield which itself was not true. This finding is of importance because it makes it more probable than not that the account Dalla gave as to his explanation of the documents and the time spent more believable than the evidence of Kowalczuk on this question. The finding on the credit of Kowalczuk is also important for my decision to accept the evidence of Dunsford as to his claimed conversation with Kowalczuk.

The Dalla cross-claim: Rule 45 and the scope of Dalla's obligations

79 It is now accepted that the obligations and duties of a solicitor giving advice on loan security documents is to give that advice within the terms of the retainer: ***Citicorp Australian Limited v O'Brien*** (1996) 40 NSWLR 398. It is also accepted that r45 applies when a solicitor is giving that advice. Whatever criticism can be levelled at Dalla, one criticism that cannot be made is that he did not have r45 in mind. He had a red folder with a copy of that rule in it. That red folder he said was always on hand when he was giving the advice. He followed it more or less to the letter, at least if r45.6.1 is not taken into account. I accept that he gave the advice required by r45.6.2 to 45.6.2.3 and that he gave the advice required by r45.6.4. He had the necessary documents relevant to these matters signed. He did not say that he made special reference to the interest rate or the principal sum because he said, quite correctly, that these were obvious on the second page of the mortgage itself to which he drew attention.

80 So far as the Berowra loan was concerned, he said that he complied with r45.6.3 which was quite irrelevant as it only applied where he was advising a guarantor and Kowalczuk was not a guarantor. Nevertheless he said that he gave the advice. All that means, as I have said, is that he slavishly followed the rule without giving any attention to whether its contents bore upon the documents being signed. He said that he told Kowalczuk he could obtain financial advice and should do so. As he accepted that any financial advisor would need to see the documents to give advice and as he knew Kowalczuk did not have a copy of the documents it was perfectly clear that this was untrue or he knew that this advice would not be obtained. He did not inquire in respect of the Berowra loan why the payment was being made to a particular company as he said it had nothing to do with him. He seemed to think that this might have something to do with financial advice. So far as the first Haberfield loan is concerned his evidence was that Kowalczuk was to advise Accom direct as to where the moneys were to be paid. That in fact happened with Kowalczuk giving details of his bank account direct to Accom.

81 Rule 45.6.1 is as follows:

45.6 Advice

45.6.1 The solicitor should advise a proposed signatory of those matters that the solicitor, in exercising the professional skill and judgment called for in the circumstances of the particular case, considers appropriate.

82 There was some variance in the expert evidence about what this requires. Mr Moses, who is well experienced and qualified in these matters, considered that it was important to accept that a solicitor was not acting in a vacuum and was not merely as a matter of form going through the requirements of r45. In other words he said, that where such extraordinary interest rates were required to be paid, then a solicitor should at least ask the client why he was entering into the transaction. On the other hand having been advised of the evidence that the solicitor had been informed by Anastasi (assuming he was the agent of Kowalczuk) that the loans were short term loans to be replaced by long term borrowings, that may have been sufficient. Nevertheless he considered that it would have been proper for the solicitor to have asked Kowalczuk whether or not he was sure the long term moneys would be obtained because otherwise the higher interest rates of 96% or 120% cut in. Mr Bluth on the other hand, who is a solicitor also very well experienced in these matters, considered the obligation was more restricted and that all the solicitor was required to do was to see that the client understood the important provisions such as principal, interest, repayment and the like and was given an overall explanation of the rest of the documents. There was no requirement to go further than that. Probably the correct position lies between the two. For instance, I consider that a solicitor seeing a first mortgage on real estate for a term of a year or more which provided for a higher rate of interest of 120% and a lower rate of 60%, ought to ask the borrower why he is entering into such a transaction when far better rates are available elsewhere. Any solicitor experienced in mortgage work would know that to be the position. That would not be giving financial advice but asking a sensible question based on fact. On the other hand, if the solicitor were advising on a short term mortgage loan to be replaced by finance at reasonable interest rates, then I would consider that obligation would not arise under the terms of the retainer, although I would have thought that the solicitor ought to say to the client, "You realize that if the moneys you expect on refinancing do not come through them you will be in default, the higher interest rate will apply and the lender can exercise all other rights under the mortgage". In other words questions should be asked relating to the particular circumstances rather than just parroting the requirements of r45.6.2.

83 I find Kowalczuk did know of the interest rates and I find he was told of the consequences if he defaulted. On the basis that I find that the Berowra mortgage was signed at Lakemba I do not consider that there was any breach of duty or breach of contract of retainer by Dalla.

84 So far as the first Haberfield loan signed in the park is concerned, leaving aside the provisions of the memorandum, I find that also to be the position. Dalla said that he took precisely the same course as he did with the Berowra mortgage, even though he was being hurried along by Anastasi and even though Kowalczuk seemed to be taking little interest in what he was saying. Insofar as the memorandum was concerned and

insofar as his evidence was directed to that, I find that he gave a quite inadequate explanation of it. That is because he said in cross-examination that all mortgages included a memorandum which was more or less standard. That was of course incorrect. The memorandum in this case is a difficult document to understand. One thing which Dalla said he drew close attention to was the fees which could be charged by the solicitor for the mortgagee if the loan went into default. He did that partly he said to show that his own fees were very reasonable. However, he did not suggest that he gave any real explanation of clause 68 and I find that he did not do so. His evidence relating to what he said about guarantees was given in relation to the Berowra mortgage where such advice was quite irrelevant, but even if he gave evidence about the liability of Kowalczuk as guarantor he certainly did not suggest that Kowalczuk had mortgaged or charged any real estate which he might own to secure the guarantee. In fact I think it would not have occurred to him because the relevant clause does not appear in the guarantee provisions. It relies on understanding that the word "debtor" where it appears in clause 68 includes "guarantor". That requires reference back to the definition of debtor in the mortgage. Dalla denied that he said anything to suggest that the interest was 7% and I accept his evidence on that. It is relevant to state that there is no evidence Dalla knew the Berowra mortgage had gone into default when he was advising on the first Haberfield mortgage.

85 Kowalczuk said that had he known in respect of either mortgage that the rates of interest were as they were, he would not have proceeded with the loans. I have already said that I accept the evidence of Dunsford that he had a conversation with Kowalczuk about the 48% and thus I cannot accept that evidence. Neither do I accept any suggestion that he did not know that they were intended to be short term loans to be replaced by far more advantageous loans so far as interest rates were concerned. So far as the advice of Dalla is concerned, while there is much that could be said critical of it, I do not consider it has been established that it was causative of any loss. For some reason and perhaps because he trusted Anastasi in spite of his failure to pay back other moneys, and in spite of his refusal to disclose the identify of the investors, Kowalczuk was prepared to do whatever Anastasi said, hoping to profit from this. Had Dalla properly advised Kowalczuk as to clause 68 I consider it far more likely than not that Kowalczuk would have proceeded with the loan anyway. It was certainly not an obligation of Dalla to prevent him from doing so and to refuse to give the advice or to sign the document. Kowalczuk had been a guarantor before in respect of the original borrowing by Mars when it purchased the Haberfield property. He knew what it was to be a guarantor. Whatever else he was told by Dalla he was told that if the borrower did not pay then as guarantor he would be liable and everything he had could be sold. To some extent therefore, and accepting that was said to Kowalczuk, as I do, it really makes very little difference to Kowalczuk whether the loan was secured or not. I find that if he had been properly advised on the effect of clause 68, he would have signed the document anyway. He has not said that he would not have done so. His evidence as to this is related solely to the interest rate.

Conclusion

86 It flows from this that the cross-claim has failed and that brings to an end this very sad case. As happens far too often in actions in this Division it is a question of which of two relatively innocent parties should suffer for the fraudulent actions of another party against whom no recovery can be made.

87 In both actions the cross-claims will be dismissed. I will stand the matter over to allow an amended statement of claim to be filed in the Berowra proceedings at which time short minutes are to be brought in to deal with the claim for possession and judicial sale. If the sale is to be in the hands of Accom the orders are to make it clear that costs on the basis provided in the mortgage are not allowed and that there be no payment to Accom without further order.

88 Before determining who should have charge of the sale I require the following evidence:

1. The payout schedule annexed to the letter dated 9 December 2005 from Bransgroves Solicitors to the National Australia Bank. (See page 172 of tender bundle).

2. As to how the shortfall figure of $8,300 relied on to justify the second mortgage over Haberfield was calculated.

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AMENDMENTS:

06/07/2007 - Changed name of Defendant's Solicitors from Greg Mackay and Associates to Greg Mackey and Associates - Paragraph(s) Coversheet

LAST UPDATED: 6 July 2007