Supreme Court

New South Wales

Case Name:	Aquamore Credit Equity Pty Ltd v Hung; First on First Development Pty Ltd v Aquamore Credit Equity Pty Ltd
Medium Neutral Citation:	[2021] NSWSC 1681
Hearing Date(s):	4, 5 and 6 May 2021
Date of Orders:	21 December 2021
Decision Date:	21 December 2021
Jurisdiction:	Common Law
Before:	Meagher JA
Decision:	See [150]
Catchwords:	CONTRACTS — loan agreement — where deed of amendment varied date for repayment — whether condition precedent to that deed satisfied CONTRACTS — loan agreement — where Lower Rate of interest of 2.5% per month — where Higher Rate of 5% whilst event of default subsists — whether event of default occurred — whether clause imposing Higher Rate unenforceable as penalty MORTGAGES AND SECURITIES — mortgages — where mortgagee purportedly exercised power of sale — whether mortgagee authorised to exercise power of sale — whether mortgagee breached equitable and statutory obligations in that exercising power
Legislation Cited:	Corporations Act 2001 (Cth), ss 9, 420A Real Property Act 1900 (NSW), ss 57, 58 58A
Cases Cited:	2-6 First Ave Pty Ltd v Aquamore Credit Equity Pty Ltd [2018] NSWSC 980 Andrews v Australia & New Zealand Banking Group Ltd (2012) 247 CLR 205; [2012] HCA 30

Arab Bank Australia Ltd v Sayde Developments Pty Ltd (2016) 93 NSWLR 231; [2016] NSWCA 328
Artistic Builders Pty Ltd v Elliot & Tuthill (Mortgages) Pty Ltd [2002] NSWSC 16; (2002) 10 BPR 19,565
Artistic Builders Pty Ltd v Elliot & Tuthill (Mortgages) Pty Ltd [2002] NSWSC 16; (2002) 10 BPR 19,565
Bevham Investments Pty Ltd v Bellgot Pty Ltd (1982) 149 CLR 494; [1982] HCA 45
Boz One Pty Ltd v McLellan [2015] VSCA 68; (2015) 105 ACSR 325
Cavendish Square Holding BV v Makdessi [2016] AC 1172
CME Properties (Australia) Pty Ltd v Prime Capital Securities Pty Ltd [2016] WASC 231
Commonwealth Bank of Australia v Hadfield (2001) 53 NSWLR 614; [2001] NSWCA 440
Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79
GE Capital Australia v Davis (2002) 180 FLR 250; [2002] NSWSC 1146
Hoole v Smith (1881) 17 Ch D 434
In the matter of Australasian Barrister Chambers Pty Ltd (in liq) [2017] NSWSC 597
Integral Home Loans Pty Ltd v Interstar Wholesale Finance Pty Ltd (2007) 2 BFRA 23; [2007] NSWSC 592
Investec Bank (Australia) Ltd v Glodale Pty Ltd (2009) 24 VR 617; [2009] VSCA 97
James v Australia & New Zealand Banking Group Ltd (2018) 97 NSWLR 663
Kellas-Sharpe v PSAL Ltd (2013) 2 Qd R 233; [2012] QCA 371
Lordsvale Finance Plc v Bank of Zambia [1996] QB 752
Notaras v Sly & Weigall; Notaras v Newman Psaltis [2005] NSWCA 275
O’Dea v Allstates Leasing System (WA) Pty Ltd (1983) 152 CLR 359; [1983] HCA 3
Paciocco v Australia & New Zealand Banking Group Limited (2016) 258 CLR 525; [2016] HCA 28
Ringrow Pty Ltd v BP Australia (2005) 224 CLR 656; [2005] HCA 71
Robophone Facilities Ltd v Blank [1966] 1 WLR 1428
Stockl v Rigura Pty Ltd [2004] NSWCA 73; (2004) 12 BPR 23,151

	Wilkie v Gordian Runoff Ltd (2005) 221 CLR 522; [2005] HCA 17
Category:	Principal judgment
Parties:	Aquamore Credit Equity Pty Ltd (Plaintiff, 2019/371915; First defendant, 2020/341930) Edgar Hung (First defendant, 2019/371915) Trevor Chappell (Second defendant, 2019/371915) First on First Development Pty Ltd (Plaintiff, 2020/341930) Allen Hsu (Second defendant, 2020/341930) Zachary Chang (Third defendant, 2020/341930)
Representation:	Counsel: B Le Plastrier and R Sud (Plaintiff, 2019/371915; Defendants, 2020/341930) F Corsaro SC (Defendants, 2019/371915; Plaintiff, 2020/341930) Solicitors: Independent Legal (Plaintiff, 2019/371915; Defendants, 2020/341930) Tzovaras Legal (Defendants, 2019/371915; Plaintiff, 2020/341930)
File Number(s):	2019/371915; 2020/341930
Publication Restriction:	Nil

JUDGMENT

Introduction

1 There are two proceedings before the Court for determination. In the first in time (2019/371915) the plaintiff (Aquamore), which advanced moneys to First on First Development Pty Ltd (First on First) pursuant to a Facility Agreement dated 7 December 2016, seeks a money judgment against two director guarantors of that advance. Those directors are Mr Edgar Hung and Mr Trevor Chappell.

2 In the second (2020/341930) First on First seeks equitable compensation or damages from Aquamore and its directors, Mr Zachary Chang and Mr Allen Hsu, the former for breach of its equitable and statutory duties in exercising a

power of sale, and the latter for breaches of statutory and common law duties when acting as directors of Aquamore. The latter claim against the directors was abandoned during the final hearing.

3 In their defence to Aquamore's claim, the guarantors maintain that there was no money default under the Facility Agreement, and Mortgage securing it, before the due date for repayment (being 6 or 7 September 2017) agreed by the Deed of Amendment and Restatement which became binding on 28 June 2017. Aquamore contends that Deed never became binding because a condition precedent to its doing so was not satisfied. Relying on that being the position, Aquamore maintains that the moneys advanced under the Facility Agreement became due for repayment on either 7 May or 7 June 2017. Following demands for payment on 12 July 2017, Aquamore served a notice under s 57(2)(b) of the *Real Property Act 1900* (NSW) in respect of those alleged payment defaults.

4 On 5 March 2018 Aquamore contracted to sell the security property "as mortgagee exercising power of sale pursuant to registered mortgage AM9356". Later it terminated that contract with effect on 31 May 2018. There followed brief litigation concerning the removal of a caveat, after which a second contract for sale was exchanged with the same purchasers on 9 July 2018. That second contract was completed on 15 January 2019.

5 The guarantors further maintain in their defence that Aquamore was not entitled to sell the property and that in doing so it breached its equitable and statutory obligations (the latter as a "controller" under *Corporations Act 2001* (Cth), s 420A). No particular damages are identified as claimed for that "wrongful sale", as distinct from the alleged breach of those obligations. In the latter case it is accepted that should Aquamore be found to be in breach, the guarantors are entitled to a pro tanto reduction in the amount due under the guarantee reflecting the difference between the price eventually received on the sale and the price which would have been obtained had the mortgagee taken "all reasonable care" to sell the property for not less than its market value. (In this last respect it is common ground that at the time it was sold the property had a "market value", thereby engaging s 420A(1)(a)).

6 Aquamore's money claim against the guarantors is for the amount owing by First on First under the Facility Agreement. The determination of that amount, whether or not the Facility Agreement was varied, requires attention to the applicable interest rate. The agreement provides for the payment of interest at two rates – a Higher Rate of 5% per month and a Lower Rate of 2.5% per month. There are issues as to which of those rates apply and over what period or periods of time. Those issues raise questions as to the construction of the relevant default provisions; and as to whether there were, and if so, when, subsisting non-monetary or monetary Events of Default in the period before Aquamore sold the property. There is also a question as to whether the provision requiring payment of interest at the Higher Rate is unenforceable as a penalty.

The principal issues

7 After recording my findings as to the general circumstances in which they fall for determination, I propose to deal with the following issues:

(1) Whether the Deed of Amendment and Restatement executed by First on First and its two directors on 28 June 2017 became binding;

(2) Whether there were Events of Default entitling Aquamore to interest calculated at the Higher Rate, either before or after 6 September 2017;

(3) Whether Aquamore was authorised to exercise any power of sale under s 58 of the *Real Property Act* (NSW) or cl 9.4 of the Mortgage;

(4) Whether Aquamore breached its equitable and statutory obligations in exercising any power of sale;

(5) Whether the provisions for payment of interest at the Higher Rate are unenforceable as a penalty; and

(6) What remedies follow from the determination of these issues.

Background facts

8 There follow my findings as to the circumstances in which these questions arise.

9 By the Facility Agreement dated 7 December 2016, Aquamore advanced $8,925,000 to First on First. That loan was secured by a registered first mortgage over a development property owned by First on First at 2-6 First Avenue, Blacktown. The loan was initially for a term of four months, expiring on 7 April 2017. It was then extended for one month to 7 May 2017, and then for a

further month to 7 June 2017. During and after this second one month extension the parties negotiated an additional three month extension to 6 or 7 September 2017. Those negotiations were conducted by Mr Hsu on behalf of Aquamore, and Mr Hung on behalf of First on First.

10 As at 7 April 2017, the amount due to be repaid was $8,925,000. That was the amount advanced on 7 December 2016 and included prepaid interest for the four months to 7 April 2017 of $926,530, calculated at the Lower Rate of 2.5% per month compounding monthly.

11 In the period from 7 April to 7 June 2017, a further $446,250, being two months' interest at 2.5% per month, accrued due with the result that as at 7 June 2017 the amount required to be repaid (before consideration of the effect of any non-monetary Events of Default which may have occurred but were not then known to Aquamore) was $9,371,250.

12 By 28 June 2017 the parties had reached at least "in principle" agreement that Aquamore would extend the existing facility for three months from 7 June 2017 in return for an establishment fee of 3% (calculated on the amount of $9,371,250) and prepaid interest calculated on that same amount for those three months and at the Lower Rate. Accordingly the amount advanced, and to be repaid by 6 or 7 September 2017, was $10,470,670 being the amount due as at 7 June 2017 ($9,371,250) plus the establishment fee of 3% and three months' interest at 2.5% per month compounded monthly

13 The Deed of Amendment and Restatement was signed and returned to Aquamore's solicitor, Mr Phil Hustler, on 28 June 2017, a Wednesday, as requested. In its terms it provided that it would become effective on the date that "all Conditions to Variation" had been satisfied.

14 On 3 July 2017, the following Monday, Aquamore's solicitors caused "updated" Personal Property Securities Register (PPSR), land title and ASIC searches to be undertaken. The results of those searches revealed that a security interest statement had been registered under the *Personal Property Securities Act 2009* (Cth) (the PPS Act) on the application of NWC Finance Pty Ltd (NSW) (NWC) and remained in place; that a caveat against dealing had also been

lodged in relation to the mortgaged property on 25 January 2017 by NWC; and that Mr Chappell had resigned as a director of First on First on 5 April 2017.

15 In July 2016, First on First had accepted an offer from NWC to make or arrange a loan of $8.4 million to enable it to purchase the Blacktown property. A term sheet was signed and dated 22 July 2016 (NWC Term Sheet). It included an agreement by First on First "to charge all present and after acquired property" to NWC as security for any costs owing. That loan did not proceed and the fact of the registration of NWC's security interest was notified to Aquamore on 7 December 2016 and before the Facility Agreement was entered into. The caveat lodged by NWC lapsed in late August 2017, after the service of a lapsing notice on about 20 July 2017, and the security interest registration was withdrawn shortly after the execution on 25 October 2017 of a Deed of Settlement between NWC and First on First. Finally, Mr Chappell had resigned as a director of First on First on 5 April 2017, because of ill-health. He was reappointed as a director on 26 June 2017 and signed the amending deed, as a director and guarantor.

16 On becoming aware of these matters on about 4 July 2017, Aquamore determined not to proceed with the Deed of Amendment and Restatement. That position was not conveyed to First on First and its directors until 12 July. Mr Hustler's letter of that date stated that the extension of the Facility Agreement was subject to "specific conditions" that included that there "be no subsisting defaults". It maintained there were three "subsisting events of default" which were not "capable of remedy" and that accordingly the Facility Agreement had not been varied. The letter claimed an amount due of $10,417,901, which included interest at the Higher Rate apparently calculated from 7 April 2017. There followed correspondence in which the Borrower disputed that the variation had not become effective.

17 On 20 July 2017, Aquamore served a s 57(2)(b) notice alleging a default in the payment of the Secured Money. The amount said to be due at that date was $10,555,658. Clause 9.1(a) of the Mortgage entitled Aquamore "at any time while an Event of Default subsists" to exercise the power of sale conferred under cl 9.4 which in turn was subject to "compliance with any requirements

under the Applicable Legislation", relevantly including s 57 of the *Real Property Act*.

18 A valid s 57(2)(b) notice authorises the registered mortgagee to exercise the power of sale conferred by s 58(1). The efficacy of the notice dated 20 July 2017 depends on there having been a money default by that date. As counsel for Aquamore rightly conceded, that was not the case if the Deed of Amendment and Restatement was effective before that date.

19 In mid-August 2017 there were further negotiations between the parties directed to the possible suspension of any enforcement action taken by Aquamore so as to enable First on First to pursue opportunities to sell the property, or to refinance it and pay out Aquamore. At no time did First on First seek to restrain Aquamore from exercising a power of sale relying on the s 57(2)(b) notice served in July. If the Deed of Amendment and Restatement was effective, the amount of $10,470,670 fell due for repayment on or prior to the Termination Date, being the date three months after the Interest Commencement Date and accordingly 6 September 2017. That money was not repaid on that date with the result that, as is conceded by First on First, if the Facility Agreement was varied there was a non-payment Event of Default on 6 September 2017 which continued to subsist after the sale of the property was completed in January 2019.

20 In September and October 2017, First on First sought proposals for the sale or refinancing of the development project. On 15 November 2017, Aquamore appointed Ozem Kassem and Alan Walker of Cor Cordis as receivers and managers to First on First. In late November or early December an offer to purchase the property for $10 million (plus GST) was communicated to Mr Hsu via LJ Hooker, Blacktown. In mid-December, Mr Hung maintained that he had three "prospects" that were "still alive" for sale or refinancing, none of which exceeded a price of $10 million. The earlier offer was the subject of negotiation through December 2017 and into January 2018. Two agents who had previously been engaged in selling the property were requested to provide details of all "offers and expressions of interest previously made". In responding, the leading agent CBRE Pty Ltd (CBRE) provided an "indicative

sale price" of the property at that time of between $8 and $9 million (plus GST). In late January Aquamore decided to sell the property for $10 million plus GST.

21 Having terminated the appointment of the receivers and managers, on 31 January 2018 Aquamore took possession of the property as mortgagee and signed an agency agreement with LJ Hooker, Blacktown. Negotiations continued and the contract for sale to 2-6 First Ave Pty Ltd was signed and exchanged on 5 March 2018. Aquamore purported to do so "as mortgagee exercising power of sale pursuant to registered mortgage AM9356".

22 The contract provided for completion to take place four months after the provision of First on First's architect's drawings, and other documents relating to the proposed development. Following exchange there was a dispute as to whether all of those documents had been provided, and, as a result, the completion date. On 31 May 2018 Aquamore terminated the contract. It then served a lapsing notice in respect of a caveat lodged by the purchaser. Court proceedings followed concerning the removal of that caveat (*2-6 First Ave Pty Ltd v Aquamore Credit Equity Pty Ltd* [2018] NSWSC 980). Their outcome left unresolved the purchaser's claims as to repudiation and wrongful termination. Those issues were resolved by the exchange of the further and substitute contract for sale between the same parties dated 9 July 2018. Aquamore again contracted as mortgagee exercising its power of sale. Notwithstanding further disputation that contract was completed on 15 January 2019. The delay in completion was due partly to difficulties in the purchaser obtaining finance. In that context, two extensions to the completion date were agreed, and in return for that agreement, additional payments were made, as interest on the balance of the purchase price payable. Ultimately, Aquamore received $11,624,044.

Whether Deed of Amendment and Restatement became binding

The sequence of events

23 I make the following findings as to the specific events leading to this variation. In the evening of 6 June 2017, Mr Hsu emailed Mr Hung advising "we are happy to offer you a further three-month term". That term was to commence on 6 June and to be for the total amount, including prepaid interest and an establishment fee, of $10,470,670. Mr Hsu concluded "we will need a new

contract in place. Please let me know if I should instruct Phil [Hustler] to commence drafting the new agreement". On 19 June, Mr Hustler sent an email to Mr Tzovaras, solicitor for First on First, advising that he had been instructed that Aquamore and First on First:

> "have agreed that the finance is to be rolled into a new facility. To minimise additional costs and paperwork we have amended and restated the previous facility (re-working where necessary to include the new terms). Please see the documentation attached. Our client will continue to rely on its existing security".

24 In the morning of 28 June, Mr Hung emailed Mr Hsu querying the calculation of the interest for the three months to 6 September 2017. In his later response to Mr Hsu's explanation as to the make up of the amounts proposed to be borrowed, Mr Hung said "happy with your explanations. No more issue with me". Following receipt of that email, Mr Hsu replied requesting that Mr Hung "execute the documents and email Phil scanned copies today as agreed. Another month has almost passed and I wish to finalise this contract". He added "Phil will send you his invoice for work done".

25 The Deed of Amendment and Restatement, which annexed a marked up copy of the Facility Agreement, was executed by First on First, signed by Messrs Hung and Chappell and returned to Mr Hustler at 5:20pm on 28 June 2017. Further documents were provided to the Borrower and guarantors for signature and return at the same time. They were a statutory declaration by Messrs Chappell and Hung as directors of First on First as to the condition of the mortgaged property and separate acknowledgements (also in the form of statutory declarations) by each as guarantor, confirming that he had received independent legal and financial advice.

26 On or about 3 July, someone at Mr Hustler's firm caused the updated ASIC, land title and security interest searches to be undertaken. Mr Hsu's evidence was that he became aware of Mr Chappell's resignation as a director and the existence of the caveat on 4 July 2017. He did not suggest that he had required or requested any information from First on First, or the guarantors, in connection with the execution of the variation to the Facility Agreement.

27 There were no communications between Aquamore and First on First about the variation of the Facility Agreement until 12 July 2017. In the meantime,

according to Mr Hsu's evidence, which I accept, the costs of Aquamore's legal advisors estimated at $3,500 had been paid out of the establishment fee which formed part of the amount advanced of $10,470,670. At the same time Aquamore's internal accounting records treated the "new loan facility" as made on the day that Mr Hung "delivered" the documents. Although in his oral evidence Mr Hsu agreed that date was 27 June, it is plain, and I find, that he was referring to the return of the signed documents which occurred on 28 June 2017.

28 Aquamore's solicitor's letter to First on First of 12 July 2017 stated:

> "…
>
> 4. The Lender has verbally agreed to allow one additional month after the expiry of the Term, for the Borrower to repay the "Money Owing" as set out in the Facility Agreement (**Extended Period**). During the Extended Period the Borrower approached the Lender seeking a formal extension and this was agreed to by the Lender subject to specific conditions that included:
>
> a. Formal restatement documentation to be prepared and signed by the parties; and
>
> b. There be no subsisting defaults
>
> (**Restatement Conditions**).
>
> 5. The Borrower has not fulfilled the Restatement Conditions due to there being subsisting events of default, namely:

	Default Event	**Clause in Facility Agreement**
1	A caveat was registered against the Property on 25 January 2017	10.3(b)
2	There was a change in the officeholder of the Borrower company without the consent of the Lender	10.2(b)(ii)
3	The PPSR registration made by NWC Finance Pty Ltd remains	10.3(b) and a representation and agreement by the

	registered	Borrower to have this removed

6. The above mentioned defaults have either not been remedied within the time period allowed in the Facility Agreement or are not capable of remedy.

7. Accordingly, the Facility Agreement has not been varied, the Term has expired and interest may be charged at the higher rate."

29 That letter (especially pars 4 and 5 as extracted above) does not correctly record the conditions which had to be satisfied before the Deed of Amendment and Restatement became effective.

30 Clause 1.2 of that Deed defines "Effective Date" to mean "the date that all Conditions to Variation have been satisfied". Those conditions are set out in cl 3.1 as follows:

"**3. Conditions**

3.1 Conditions to Variation

It is a condition precedent to the variations in clause 2.2 becoming effective, that the Financier receives the following in form and substance satisfactory to it:

(a) Signing

A duly executed original counterpart of this Deed of Variation signed by all parties (other than the Financier).

(b) Legal Certification

An opinion from the Financier's legal advisors confirming, amongst other things, that the Agreement has been property executed; and

(c) Approvals

Such other approvals, certificates, opinions, statutory declarations and other documentation or information as the Financier may reasonably require.

(d) Variation costs

The Obligors must ensure that the following costs are paid on or prior to the Effective Date:

(i) Legal Fees:

The Borrower must pay the costs of the Financiers legal advisors in attending preparation of this Deed and the related documents, estimated to be $3,500.00 plus GST and disbursements. The total amount will be confirmed upon satisfaction of items 3.1(a), (b) and (c). This must be paid by direct deposit to Independent Legal's nominated account, or by Bank Cheque.

(ii) Variation Fee

> The Borrower must pay to the Financier a non-refundable Establishment Fee of $314,120.11 being 3% of the New Facility. The parties agree this will be withheld from the advance, along with the Prepaid Interest."

31 It is necessary also to note the terms of cll 3.2, 3.3, 4.1 and 4.2:

> "**3.2 Conditions precedent for benefit of Financier only**
>
> Each condition is for the sole benefit of the Financier and compliance with any of the above conditions precedent may only be waived or deferred by the Financer in its absolute discretion.
>
> **3.3 Amendment and restatement**
>
> (a) The parties agree to the variations set out in clause 2.2 and otherwise restate the Facility Agreement as a new facility with effect on the Effective Date.
>
> (b) Clause 3.3(a) does not affect any right or obligation of any party that arises or has arisen before the Effective Date.
>
> …
>
> **4.1 Representations and warranties by Obligors**
>
> Each Obligor makes each representation and warranty set out in clause 9 of the Facility Agreement on the Effective Date.
>
> **4.2 Reliance by the Financier**
>
> Each Obligor acknowledges that the Financer has executed this Deed and agreed to take part in the transactions that it contemplates in reliance on the representations and warranties that are made under clause 4.1."

Was condition 3.1(c) satisfied?

32 Aquamore relies only on the condition in cl 3.1(c) as not having been satisfied. It contends that the information obtained by the solicitor from the searches undertaken on 3 July (see [14] above) was information which Aquamore "reasonably" required within the meaning of that clause and which, when received, was not in "substance satisfactory to it".

33 The language of cl 3.1(c) does not identify in its terms the subject matter of the documentation or information to which it refers. However the words "such other" give some indication as to that subject matter by reference to what precedes that subclause, namely the Deed signed by the Borrower and Guarantors and an opinion from the Financier's lawyers as to the legal efficacy of that signed Deed. In addition the introductory words to cl 3.1 and the closing language of cl 3.1(c) contemplate that the documentation or information to which it refers is something that the Financier may "require", in the sense of

request or call for, from the Borrower or guarantors, and subsequently "receive". The Financier's entitlement to call for such documents from the other parties is limited to what may "reasonably" be required.

34 In addition cl 3.1(d)(i) provides that the final amount of the legal advisor's costs to be paid by the Borrower is to be "confirmed" upon the "satisfaction" of items 3.1(a), (b) and (c). In other words after *whatever* the Financier has "required" under cl 3.1(c) has been received "in form and substance satisfactory" to it, the amount of those legal costs will be finalised.

35 Turning to the evidence, it establishes the following matters relevant to whether the information obtained by the solicitors on 3 July 2017 was ever "required" of the Borrower or guarantors by Aquamore and accordingly within cl 3.1(c). First, there are documents which were apparently required by the Financier to be completed at the time the signed Deed of Amendment and Restatement was returned. They are the three statutory declarations, also returned on 28 June 2017 (see [25] above). Secondly, the evidence does not identify any other approvals, certificates, statutory declarations or information which was requested or required by Aquamore of the other parties with respect to the finalisation of the Deed of Amendment and Restatement. Nor, if it mattered, is there any evidence that it requested any such information from any non-party. Thirdly, the following evidence establishes more probably than not that there were no other such requests or requirements of the Financier. The terms of Mr Hsu's email of 28 June, stating that he wished to "finalise this contract" and that on receipt of the signed documents Mr Hustler would send his invoice "for work done", are consistent with there being no other requirements within cl 3.1(c) having been communicated by that time. That is confirmed by Aquamore's internal records which indicated that the further advance was treated as made on 28 June on the receipt of the signed documentation, at which time the estimated costs of $3,500 were also deducted from the establishment fee, that occurring in accordance with cl 3.1(d)(i). Finally, all of that is consistent with Mr Hustler's letter of 12 July which did not assert that the agreement did not become effective because any documents or information "required" by his client had not been provided, or if provided, had not been satisfactory "in form and substance".

36 For these reasons I am satisfied that by 6pm on 28 June 2017, there were no "approvals, certificates, opinions, statutory declarations [or] other documentation or information" which had been requested and not provided to Aquamore. Accordingly the condition precedent in cl 3.1(c) was by that time satisfied, with the result that the Deed of Amendment and Restatement then became binding.

37 That being the position, there was no monetary default on the part of First on First either as at 12 July 2017 or 20 July 2017 when the s 57(2)(b) notice was issued and served. It follows that the service of that notice and First on First's failure to comply with the demand made in it was not effective to authorise the exercise by Aquamore of the power to sell conferred by *Real Property Act*, s 58.

38 Although there was a monetary default on and after 6 September 2017, no s 57(2)(b) notice was served relying on that default or on any of the non-monetary defaults. Furthermore none of the non-monetary Events of Default subsisted after 1 November 2017. Having regard to the terms of cl 9.1, which conferred the right to exercise the power of sale in cl 9.4 only "while an Event of Default subsists", none of these Events of Default could have justified the exercise of a power of sale in March or July 2019, even if it was not also necessary to serve a s 57(2)(b) notice in relation to those non-monetary defaults. This last subject is dealt with in more detail at [63]ff below.

Whether there were non-monetary Events of Default

39 For the reasons appearing above, the existence of the three Events of Default is only relevant to the calculation of interest during periods in which those defaults subsisted.

Relevant provisions of the Facility Agreement

40 Clause 7.1 of the Facility Agreement as varied provides:

> "**7.1 Default Interest**
>
> The Borrower must pay interest on the Money Owing at the Higher Rate for the period from (and including) the date on which an Event of Default occurs until (and including) the date on which the Event of Default is remedied to the satisfaction of the Financier (acting reasonably), at which point it will revert to the Lower Rate from the following day."

41 The Money Owing is defined (cl 1.1) as the Principal Outstanding and "all other monetary liabilities of the Obligors" under the Finance Documents.

42 Clause 11.1 relevantly provides in relation to Events of Default:

> "**11. Default**
>
> **11.1 Events of Default**
>
> Each of the events set out in this clause 11.1 constitute an Event of Default, whether or not it is within the control of the Obligors:
>
> …
>
> (b) (**non-payment**) an Obligor fails to pay an amount that is due and owing under the Finance Documents when due (or, if such failure is solely due to an administrative or systems error arising in the transmission of funds, within two Business Days after the due date);
>
> (c) (**other obligation not complied with**) an Obligor fails to comply with any obligation under a Finance Document … and, if capable of being remedied, it continues unremedied for 5 Business Days (**Cure Period**) after the earlier of:
>
> (i) receipt by the Borrower of a notice from the Financier identifying the failure to comply; or
>
> (ii) an Obligor becomes aware of the failure to comply;
>
> (d) (**misrepresentation**) a statement, representation or warranty made by or on behalf of an Obligor in a Finance document, or in a document provided in connection with a Finance Document, or in a document provided in connection with a Finance Document, is incorrect or misleading when made or repeated unless the underlying circumstances (where capable of remedy), are unremedied within 10 Business Days of the earlier of:
>
> (i) receipt by the Borrower of a notice from the Financier identifying the incorrect or misleading statement, representation or warranty; or
>
> (ii) an Obligor becoming aware of the incorrect or misleading statement, representation or warranty;"

43 Prior to the amendment of the Facility Agreement, the Cure Period in cl 11.1(c) was a period of 10 Business Days, rather than 5 Business Days as provided by the varied agreement.

The three alleged non-monetary Events of Default

44 In its closing submissions, Aquamore only relied on three non-monetary Events of Default. They were (1) the replacement of Mr Chappell as director of First on First during the period from 5 April 2017 to 26 June 2017; (2) the failure to disclose the NWC Term Sheet dated 22 July 2016 and its charging clause, and (3) incorrectly representing that its property was not the subject of any Security Interest . Each is considered below.

45 Before doing so I should record that the effect of the variation of the Facility Agreement was that the date for repayment of the facility was extended to 6 September 2017. Although there is some confusion about the date on which the new term expired by reason of the definitions of Effective Date and New Term in the Deed of Amendment and Restatement, the position as intended by the parties is made clear in the marked up Facility Agreement attached to that Deed. As there stated the effect of the Deed was to extend the Termination Date under the Facility Agreement to "3 months after the Interest Commencement Date or such later date as agreed to by the Financier" (cl 2.2(h)). The Interest Commencement Date was 6 June 2017 (cl 2.2(e)). It follows, applying the definition of a "month" as meaning a period starting on one day of a calendar month and ending on the numerically corresponding day of the next calendar month (cl 1.2(j)), that the Termination Date was extended until 6 September 2017 by the Deed of Amendment and Restatement. Finally, the Borrower was required to repay all Money Owing on or prior to the Termination Date (cl 6.1). As First on First did not repay the facility on 6 September 2017, there was an Event of Default under cl 11.1(b) from 7 September 2017. The amount owing depended on the calculation of interest to that time which in turn depends on whether any earlier Event of Default had occurred and the period during which it subsisted, and whether the Higher Rate of interest was unenforceable as a penalty.

The replacement of Mr Chappell as a director

46 Under cl 10.2(b)(ii), First on First agreed not to "vary the shareholders or officeholders without the prior approval of the Financier". It was not contested that the officeholders of First on First included its directors, and in particular Mr Chappell. As has already been noted, between 5 April 2017 and 26 June 2017, Mr Chappell retired as a director because of ill-health. It was accepted that Mr Hung became aware of Mr Chappell's resignation "on or shortly after" it occurred.

47 That breach was one which could be remedied, either by reappointing Mr Chappell or by seeking Aquamore's consent. That did not occur during the Cure Period, at that time a period of 10 Business Days from the Borrower becoming aware of the breach. Accepting that First on First became aware of

the breach on 5 April 2017, the 10 Business Days expired on 21 April 2017. There was accordingly an Event of Default from 22 April 2017 until Mr Chappell's reappointment on 26 June 2017. That default did not subsist at the time the Deed of Amendment and Restatement became effective.

The failure to disclose the NWC term sheet and the charging clause

48 By clause 9.1 of the Facility Agreement, First on First represented and warranted "to and for the benefit of the Financier" that:

> "(l) (**No failure to disclose**) it has fully disclosed in writing to the Financier all material information of which it is aware relating to itself, the Finance Documents, each acquisition and each Obligor and which, in the opinion of the Obligor (acting reasonably), if not disclosed may have adversely affected the decision of a prudent financial institution to participate in the Facility on the terms set out in this document;"

49 An Event of Default under cl 11.1 includes:

> "… (d) (**misrepresentation**) a statement, representation or warranty made by or on behalf of an Obligor in a Finance document, or in a document provided in connection with a Finance Document, or in a document provided in connection with a Finance Document, is incorrect or misleading when made or repeated unless the underlying circumstances (where capable of remedy), are unremedied within 10 Business Days of the earlier of:
>
> (i) receipt by the Borrower of a notice from the Financier identifying the incorrect or misleading statement, representation or warranty; or
>
> (ii) an Obligor becoming aware of the incorrect or misleading statement, representation or warranty;"

50 Aquamore submitted that the representation and warranty made by cl 9.1(l) was incorrect or misleading because at the time the Facility Agreement was made on 7 December 2016, First on First had not disclosed the fact of the NWC Term Sheet by which it had agreed to "charge all present and after acquired property" in favour of NWC as security for any costs owing to it under that agreement. First on First's response was that there had been no failure to disclose material information in relation to the term sheet because of disclosures which it made to Aquamore prior to the signing of the Facility Agreement.

51 On 7 December 2016 and before that agreement was executed, Mr Tzovaras sent the following email to Mr Hustler:

> "Hi Phil

> I refer to our discussion at your office earlier this morning in relation to NWC Finance Pty Ltd's [PPS Act] security interest registration [PPSR number omitted] and Remagen Capital Pty Ltd. … In respect of each of these parties, I confirm as follows:
>
> 1. First on First Developments Pty Ltd had applied for finance, but no acceptable offer was provided, and therefore no loan or security documentation was proceeded with.
>
> 2. First on First Development Pty Ltd paid all application, legal and valuation fees payable in respect of each finance application, and there are no outstanding fees due to either of the above parties. The directors of First on First Development Pty Ltd have also confirmed to me that there [are] no outstanding fees due by First on First Development Pty Ltd to either of the above parties.
>
> 3. Consequently, neither of the above parties has any security interest the subject [of] the above PPSA security interest registration, and each of these ought to be discharged.
>
> 4. I acted for First on First Development Pty Ltd in respect of each finance application; and have therefore direct knowledge of the matters stated in 1, 2 and 3 above."

52 This letter does not in terms disclose the existence of the charging clause. Having regard to its terms the question is whether the representation and warranty made by cl 9.1(l) was incorrect or misleading because First on First had not disclosed something which in its opinion (acting reasonably) "may have adversely affected the decision of a prudent financial institution to participate in the Facility".

53 In my view the terms of the charging clause did not constitute information which, if not disclosed, it should reasonably have considered may adversely affect such a decision. Paragraphs 2 and 3 of Mr Tzovaras' letter imply that the arrangement with NWC included some form of security for the payment of fees due with respect to the finance application. That is made tolerably clear by par 3 which emphasises that it is the fact that there are no "outstanding fees due" (and not the non-existence of any form of security) which has the consequence that NWC does not have "any security interest the subject [of] the above PPSA security interest registration".

54 That this was a reasonable position to take, having already made the disclosures in the letter, was confirmed by Mr Hsu's evidence in cross-examination. He accepted that the letter conveyed that there was at least a possibility that NWC had some form of security for the payment of any

outstanding fees and that what First on First was saying was that there was no security interest because it had no liability to NWC for fees or charges. His evidence included the following exchange:

> "Q. You would have expected that if someone was proceeding with an application such as this, there would be some arrangement with the broker or other party and the potential borrower, which would deal with the basis on which the application was made, and include the possibility of a security for outstanding fees.
>
> A. Yes.
>
> Q. And in paragraph 3, therefore, when you saw the word "consequently", you understood they were really saying, there's no security interest because there's no money outstanding.
>
> A. Correct."

55 In this state of affairs, it is not established that there was any misstatement or misrepresentation by reason of cl 9.1(l) and the non-disclosure of the charging clause. The directors of First on First were justified in concluding that the terms of the charging clause would not have adversely affected Aquamore's decision whether to advance the moneys in circumstances where it had been told that there were no moneys outstanding and was prepared to proceed knowing that there was a possibility of such security.

Incorrect statement that First on First's "property" not subject to any Security Interest

56 By cl 9.1(o), First on First represented and warranted that:

> "(o) (**no Security Interests**)
>
> (i) its property is not, nor is the property of any Obligor, subject to any Security Interest, other than a Permitted Security Interest;
>
> (ii) no person holds an interest in its property other than under a Permitted Security Interest; and
>
> (iii) each Security has the priority which it is expressed to have."

57 The representation and warranty made by cl 9.1(o) in relation to the Blacktown property was said to be misleading at the time of the Facility Agreement and accordingly a separate Event of Default under cl 11.1(d).

58 The terms "Security Interest", "Permitted Security Interests" and "Security" are defined in cl 1.1 as follows:

> (a) **"Security Interest** means:

(b) A mortgage, pledge, lien, charge, caveat, assignment by way of security, hypothecation, title retention arrangement, preferential right, trust arrangement or other arrangement (including any set-off, sale and repurchase agreement or flawed-asset arrangement) having the same or equivalent commercial effect as a grant of security (including under PPS Law), but excludes a PPS lease, commercial consignment, a transfer of account or chattel paper (each as defined in the PPS Act); or

(c) An agreement to create or give any arrangement referred to in paragraph (a) of this definition.

(d) …

Permitted Security Interests means

(e) Each Security or Security Interest in favour of the Financier;

(f) Any lien or Security Interest arising under any retention of title, hire purchase or conditional sale arrangement or arrangements having similar effect in respect of goods supplied to the Borrower in the ordinary course of trading and on the supplier's standard or usual terms and not arising as a result of any default or omission by the Borrower;

(g) Any lien or other Security Interest arising by operation of Law in the ordinary course of ordinary business activity and securing an obligation that is not yet due; and

(h) Any other Security Interest consented to by the Financier, provided that any condition of the Financier's consent has been complied with."

(i) …

(j) **Security** means:

(k) The General Security Agreement;

(l) The Mortgage;

(m) Each other Security Interest granted by an obligor to the Financier to secure the Money Owing."

59 First on First submits that the representation or warranty made by cl 9.1(o) with respect to no security interests was not incorrect within cl 11.1(d) because whilst there was an agreement for charge, there was no money owing to NWC which was or could be secured by that charge. That argument does not take account of the breadth of the definition of "Security Interest" as including "an agreement to create or give" a charge which may be made or exist before any moneys or liabilities to be secured have been advanced or incurred.

60 Separately, it is submitted that if there was an incorrect representation made when the Facility Agreement was entered into, the existence of the Security Interest granted to NWC was consented by Aquamore by 12 December 2016 and accordingly within 10 Business Days of the making of any misleading or incorrect representation. That consent was given by Mr Hsu's email to Mr Hung on that day following a conversation between them about the attempts made by First on First to have NWC release the security interest registration it had lodged. Mr Hsu wrote on 12 December 2016:

> "Further to our conversation I understand you are having difficulties in getting NWC to release the registration.
>
> We will not treat [that] as default as we understand you are doing everything you can to have them release the entry.
>
> Please keep us updated on the progress. Also provide me with your undertaking that the only potential liability is limited to NWCs claim of $96,800."

61 Mr Hung gave that undertaking in his reply later that day. In cross-examination Mr Hsu accepted that by the last paragraph of this email he acknowledged and was aware of the possibility that NWC had a claim of up to $96,800 secured by the interest which was the subject of the PPSA registration.

62 If there was an incorrect or misleading representation made when the Facility Agreement was signed, that default was remedied within 10 Business Days by the receipt of Aquamore's consent to the security interest claimed by NWC. Accordingly there was no Event of Default within cl 11.1(d).

Was Aquamore authorised to exercise any power of sale under s 58 of the Real Property Act or cl 9.4 of the Mortgage

63 The answer to this question is no. As at 7 September 2017 the only subsisting Event of Default was First on First's failure to pay the amount due under cl 6.1 of the varied Facility Agreement. However no s 57(2)(b) notice was served in respect of that continuing monetary default and before the property was sold. The only non-monetary Event of Default had subsisted between 22 April and 26 June 2017.

64 It is not necessary to consider whether cl 11.4(a) of the Mortgage was effective to dispense with the requirement for service of a s 57(2)(b) notice in relation to any non-monetary default because none of those defaults subsisted at the time

the power of sale was exercised in 2019 (see *Real Property Act*, s 58A(1); *Bevham Investments Pty Ltd v Bellgot Pty Ltd* (1982) 149 CLR 494 at 498; [1982] HCA 45 and *Notaras v Sly & Weigall; Notaras v Newman Psaltis* [2005] NSWCA 275 at [84]).

65 Nevertheless the property was sold and First on First claims damages from Aquamore for its "wrongful" sale; meaning that the property was sold in circumstances which did not enliven either the power under s 58 of the *Real Property Act* or the authority conferred under cll 9.1 and 9.4 of the Mortgage. However First on First had notice of the proposed sale and did not move to restrain it. The question remains what damages did it suffer as a result of the unauthorised sale of which it had advance notice, but did not seek to restrain.

66 It is pleaded that as a result of Aquamore's wrongful conduct in taking and retaining possession, and in selling the property, First on First suffered loss and damage. The damage particularised is: "loss of opportunity to use of the Property"; for "legal costs, valuation fee and receivers' fees" incurred in relation to the exercise of the power of sale; and "aggravated and exemplary damages". However no evidence was led or submissions made in support of the claims to any of these heads of loss. In the circumstances First on First has not proved that it suffered any damage as a result of Aquamore's unauthorised exercise of its power of sale as distinct from its alleged breaches of duty in doing so.

67 The present is not a case where the mortgagee failed to give notice to the borrower of its proposed exercise of its power of sale resulting in loss due to the borrower's inability in the absence of knowledge to redeem the mortgage and prevent the sale: cf *Hoole v Smith* (1881) 17 Ch D 434. First on First had knowledge of the proposed sale. However it was not in a position to redeem the mortgage so as to prevent it from proceeding. Nor could it have prevented Aquamore from serving a valid s 57(2)(b) notice, and thereafter proceeding with the sale.

68 First on First was entitled to an account from Aquamore in respect of the application of the proceeds of sale. See *Commonwealth Bank of Australia v Hadfield* (2001) 53 NSWLR 614 at [35]-[48]; [2001] NSWCA 440. That relief is

not formally sought, in part because the calculation of the amount owing depends upon the resolution of the issues in these proceedings.

Whether Aquamore breached its equitable and statutory obligations in exercising the power of sale

Equitable and statutory obligations

69 Under the general law a mortgagee exercising a power of sale must act in good faith. The test of good faith "focuses primarily upon whether the mortgagee has seriously failed to take reasonable steps in all of the circumstances to obtain a proper price, and not upon what valuers may say the property should have sold for" (per Palmer J (Mason P and Ipp JA agreeing) in *Stockl v Rigura Pty Ltd* [2004] NSWCA 73 at [37]; (2004) 12 BPR 23,151).

70 More relevantly, as a "controller" within *Corporations Act*, s 9, Aquamore in exercising a power of sale in respect of the property was required to take "all reasonable care to sell the property for" not less than its market value (s 420A(1)(a)). That provision modifies the obligation otherwise existing under the general law and in doing so "enhances the duty of the controller and the protection afforded to the corporation" (per Bryson J in *GE Capital Australia v Davis* (2002) 180 FLR 250; [2002] NSWSC 1146 at [53]). Accordingly the guarantors are entitled to insist on a pro tanto reduction in the amount due under the guarantee should Aquamore have breached its duties owed to First on First when exercising its power of sale, including the requirement that it act in accordance with s 420A(1) (*James v Australia & New Zealand Banking Group Ltd* (2018) 97 NSWLR 663 at [67]-[68] (Leeming JA and Sackville AJA)).

71 In *Investec Bank (Australia) Ltd v Glodale Pty Ltd* (2009) 24 VR 617; [2009] VSCA 97 at [47] (Neave and Redlich JJA and Forrest AJA) cited with approval the following statement of Campbell J in *Artistic Builders Pty Ltd v Elliot & Tuthill (Mortgages) Pty Ltd* [2002] NSWSC 16; (2002) 10 BPR 19,565 at [126]:

> "In deciding whether there has been a breach of s 420A, a court looks at the process that a controller of property of a corporation has gone through in selling that property. The enquiry is whether, in the course of that process, the controller has taken all reasonable care to sell the property for not less than its market value. It is not necessary to prove that the property was in fact sold for less than its market value — a controller could breach s 420A, but, through luck, still manage to sell the property for its market value or more. Further, it is not necessary for me to find what actually was the market value of the

> property, to be able to find that s 420A(1)(a) was breached — all that I need find is that the process gone through was not one where all reasonable care was taken to sell the property for its market value, whatever that market value might be."

See also Black J in *In the matter of Australasian Barrister Chambers Pty Ltd (in liq)* [2017] NSWSC 597 at [38], citing Le Miere J in *CME Properties (Australia) Pty Ltd v Prime Capital Securities Pty Ltd* [2016] WASC 231 at [18].

72 Thus the principal question to be addressed is whether the mortgagee has taken all reasonable care in advertising and selling the property. What must be done to comply with that general obligation will ultimately depend on the circumstances of the particular case (*Boz One Pty Ltd v McLellan* [2015] VSCA 68 at [371]; (2015) 105 ACSR 325). A breach of the requirement to take all reasonable care is not established merely because a mortgagee fails to realise the property for its market value (*Boz* at [168]). The focus remains upon whether the process utilised to effect the sale was undertaken with reasonable care (*Investec Bank* at [46]).

Allegations of breach of duty and failure to act in good faith

73 In oral argument, senior counsel for First on First and the guarantors summarised their case on this issue shortly. It is not contended that the property had to be sold by auction rather than by private contract. Rather it is said that Aquamore proceeded to sell the property in March 2018 without having embarked on a marketing campaign and did so in circumstances where it did not have any "reliable market valuation" or any "credible realistic appraisal" of the property's market value. It is said that in those circumstances the exercise of reasonable care required that it be sold following a marketing campaign. In its outline of written submissions, First on First contends that the market value of the property at the time it was sold was $15 million whereas the sale price was $10 million. The valuation of Mr Kent Wood dated 18 August 2020 is relied on in support of the former contention. No expert evidence was called which addressed what steps might reasonably have been taken by Aquamore in the circumstances as they existed in December 2017 and early 2018, when the decision to sell was made.

74 In response Aquamore submits that it exercised all reasonable care. The property had not sold in the hands of two experienced professional agents

between February and December 2017. At that same time the “offers” that were made gave some indication as to its value. In January 2018 one of those agents, CBRE, estimated the “indicative” value of the property, following a further marketing campaign, and sale on an expression of interest basis, as between $8 and $9 million (plus GST). The price for which the property was sold exceeded that range by $1 million.

75 Aquamore also relies on a valuation of Mr Mark Ellis dated 28 April 2021 which assesses the value of the property as at 5 March 2018, based on the current development application approval and potential changes in planning controls, as being $9,825,000.

76 For the reasons which follow I am not satisfied that there was any breach by Aquamore of its obligation to take all reasonable care in selling the property for not less than its market value.

77 In estimating the “sale price” of the property as at January 2018, CBRE described the market for development sites in the Blacktown area as follows:

> “There [are] far less buyers in the market for development sites in Blacktown due to the funding constraints and slow resale demand. The high volume of supply in the apartment market is diluting demand and profit for developers.”

The circumstances leading to the sale of the property

78 It is necessary to make findings as to the position, as it was known to Aquamore, by the end of January 2018 when it took possession of the property and engaged LJ Hooker, Blacktown (Mr Roumeliotis, a principal of that agency) to sell the property.

79 First on First purchased the vacant property following its exercise of a call option, for a price of $6,790,000. The main purpose of the Aquamore loan was to enable it to complete that purchase in December 2017, and to cover initial property development costs. At some stage before that option was entered into, Mr Hung obtained a valuation of three proposed developments from Mr Wood. The report, described as being “for First Mortgage security purposes”, valued the property as at 5 October 2016 at $12,750,000. It will be necessary to return to that valuation.

80 On 6 December 2016, First on First retained CBRE and Matrix Property Group Australasia Pty Ltd (Matrix) as exclusive selling agents of the property. Matrix specialised in identifying and marketing property development sites and commercial property as well as acting as a selling and purchase agent of property development sites. The person involved for CBRE was Mr Alex Mirzaian, described as “CBRE’s Western Sydney specialist”.

81 The agency agreement contained an estimate of the selling price range at $14-$15 million and recorded the agents’ recommendation as to the most suitable method of sale being “Private Treaty – EOI”. At that time it had the benefit of a development consent for the construction of an 18 storey “shop top housing development” consisting of a two-storey podium with business/retail floor space and 16 floors of residential development. That development assumed a floor space ratio (FSR) of 6.5:1 and a building height limit of 56m, in accordance with the relevant planning instrument, the Blacktown Local Environmental Plan (LEP) 2015.

82 In February 2017, CBRE published a media release in the property sections of the Sydney Morning Herald and The Australian which invited expressions of interest, describing the land area as “of 2,111 sqm” with a development approval. The property was advertised in print media and online listings. By the end of June 2017, Matrix had received two purchase proposals, one in May 2017 of $10.8 million (plus GST) and the other made orally in June 2017 of $11.2 million (plus GST). Each was rejected by Mr Hung as “too low”. Mr Hsu of Aquamore gave evidence, which I accept, that by the end of 2017 he was aware from meetings and telephone calls with CBRE personnel that the purchasers who had earlier expressed interest in the property were no longer interested.

83 By early November 2017 whilst CBRE and Matrix continued to represent First on First on a non-exclusive basis, Mr Hung was seeking to sell the property through other agents. It is to be noted that Mr Hung was the chief executive officer and a director of Austcorp Property Group. As such he had since 1992 been actively involved in property developments (in New South Wales, Victoria, Queensland and the Northern Territory) from their acquisition to their

realisation. As at 2020 he estimated the combined value of those developments as being “over $1 billion”.

84 At the same time Mr Hsu had retained a Mr Williams of LEVR Pty Ltd to engage with LJ Hooker, Blacktown to identify potential buyers of the property. On 29 November 2017, Mr Hsu advised Mr Hung that “we have an offer on the site, our price was $12M, they have come back at $10M, we think it will settle anywhere between $10M and $11M”. The proposed buyer was a client of Mr Roumeliotis, who advised on 30 November that he had two parties “potentially” interested at prices between $9.8 million and $10.5 million with settlement from three to six months to allow for due diligence. On 4 December 2017, one of those clients made an offer of $10 million with a six-month settlement. Aquamore rejected that offer, requesting a settlement within 42 days.

85 On 7 December, that proposed purchaser communicated two alternative offers, one of $10.25 million with settlement in six months, and the other of $10.5 million with settlement in nine months. On 11 December a revised offer of $10 million with settlement within four months was made and communicated to Mr Hung by Mr Hsu who commented “looks like the best deal we are able to get”.

86 Mr Hung responded on 11 December 2017, indicating that he had three “prospects” which were “still alive” and that based on one offer Aquamore would get “say $9.5m (after commission, land tax, council rate, etc) in five months. May be better for you to wait for a little longer”. Mr Hsu responded that the second of Mr Hung’s prospects was the “same as [the] current offer, circa $10m”. Mr Hung replied that his second option would “recognise the land value at more than $10m”.

87 On 18 December Mr Hsu wrote to Mr Hung, requesting his “consent on the $10M sale”. In his email response on the same day, Mr Hung said he could not provide that consent, not because he did not want to but because of a difficulty with a personal guarantee given by Mr Chappell of another loan which was “tied to the property”. That email also proposed an arrangement under which the directors of First on First would have an opportunity to match the existing offer (net of the commission payable by Aquamore) and accordingly pay it about $9.7m on or before 17 April 2018. Mr Hung indicated that he could

achieve this outcome “by bringing in a JV partner who believes in this project”. Mr Hung continued that if he was unable to complete that arrangement “Your sale transaction would proceed to settlement as normal. No one is being disadvantaged. If I can deliver, we should be both happy”. Finally Mr Hung said that he had spoken with Mr Chappell and that “we will give you a consent on the above proposal if you are agreeable”. At no stage during this period did Mr Hung suggest that a sale at $10m (plus GST) was not within his assessment of the market value of the property. Indeed the above exchanges suggest that he regarded it as within that range.

88 In mid-November Aquamore had also appointed receivers and managers of the property. On 16 January 2018, Mr Hsu wrote to the receivers and managers requesting that they supply “all EOIs and offers for the property so we can evaluate the best steps moving forward”. The receiver responded on 19 January 2018 as follows:

> “We contacted CBRE who provided the attached documentation for our consideration, which is summarised below:
>
> CBRE has provided a marketing quote of $14,881.50 (incl. GST) for an accelerated sale campaign (inclusive of CBRE listings, online listings newspaper advertisements);
>
> The sale campaign will commence on 5 February 2018, with expressions of interest closing on 15 March 2018;
>
> CBRE has provided an indicative sale price of between $8M - $9M (excl. GST);
>
> …
>
> We are awaiting details of all offers and expressions of interest previously made. From our discussions with CBRE, we have been advised that an offer was put forward during March/April 2017 which was rejected by the directors. Furthermore, CBRE has confirmed that their recent discussions with this party (Quest Apartments) indicate it is no longer interested.
>
> We are waiting a sale proposal from LJ Hooker Blacktown (the agent who sourced the $10M offer in December) and will update you [once] it has been received.”

89 The documentation received from CBRE included a draft schedule to an agency agreement which proposed sale by expressions of interest, and a current estimated price range of between $8 and $9 million.

90 On 23 January 2018, the receiver put a number of specific questions to CBRE, being questions raised by Aquamore. Those questions and CBRE's answers, received on 25 January 2018, are set out below (the answers are in italics):

> "**1. Marketing**
>
> a. What marketing did CBRE conduct during the 2017 calendar year? (online advertisements, paper advertisements, e-brochures etc) *Marketing list attached*
>
> b. What was CBRE's marketing budget/spend? *$9,097.94 – Marketing quote attached we feel to effectively sell this property a new budget should be set to revitalise some of the material. There will be some photos, images, tables and CGI's we can use from the old campaign that will save costs.*
>
> c. Are CBRE currently running any marketing for this property? *Yes, still currently listed online and we are still receiving enquiries*
>
> d. Are CBRE still engaged as agent? If so, can we have a copy of the signed agency agreement. *Yes. We are in a continuing agency and have issued 36 IM's to prospective purchasers. No we are unable to provide agency.*
>
> **2. Offers**
>
> a. What offers and EOI responses did CBRE receive during the 2017 calendar year? *3 offers received*
>
> b. Specifically, when was the offer received, what was the amount and any pertinent conditions relating to the price? *3 offers ranging from $9,000,000 to $11,000,000 all with 5% deposits.*
>
> c. What happened with the offer? Was it rejected? *Yes, rejected at that time*
>
> **3. Suggested sale price**
>
> a. How did CBRE form the view that the proposed marketing campaign should yield an estimated sale price of $8 to $9M plus GST? *We feel this is an acceptable range, the highest offer we achieved during the campaign was $11,200,000 and was rejected because it was conditioned on a sec96 conversion to make part of the site suitable for serviced apartments. This was an off shore Chinese group that ended up withdrawing from negotiations*
>
> b. How has this estimated sale price changed from the time CBRE were initially engaged to act as agent? *There is far less buyers in the market for development sites in Blacktown due to the funding constraints and slow resale demand. The high volume of supply in the apartment market is diluting demand and profit for developers.*"

91 Those answers were provided by Mr Mirzaian. The attached marketing list (see answer 1a in [90] above) described print media, online listings and signage over a period of six weeks.

92 On 31 January 2018, Aquamore received advice from Mr Hustler that the information provided by CBRE enabled it to form a view that the current offer of $10m is "likely the best offer that will be made in the foreseeable future, noting particularly that in CBRE's opinion, after their campaign, they hope to find a purchaser at a price of between $8-9M". On the basis of that advice, Aquamore decided to proceed with the sale of the property as mortgagee in possession. An agency agreement was signed with LJ Hooker, Blacktown and contracts for sale exchanged on 5 March 2018. Legal proceedings were then commenced and settled on the basis that a new contract was exchanged. That exchange occurred on 9 July 2018. Completion of that contract was delayed in the circumstances summarised at [22] above, and took place on about 14 January 2019. Aquamore received $11,624,044 from the purchasers taking into account additional payments made in consideration for delayed completion.

The valuation evidence

93 Before addressing the relevance of the two valuations of Mr Wood and that of Mr Ellis, it is necessary to make findings as to "potential changes in planning controls" to which each of the valuers refers.

94 On 23 December 2016, the Blacktown City Council wrote to the Department of Planning and Environment requesting a Gateway Determination under *Environmental Planning and Assessment Act 1979* (NSW), s 56 in relation to a proposal to amend Blacktown LEP 2015 to remove FSR controls for the Blacktown central business district and nominate key sites where additional heights of up to 20m (six levels) might be achieved. A delegate of the Department of Planning and Environment responded to that request on 12 April 2017, determining that the proposed amendments to that LEP should proceed subject to certain conditions. The request for that Gateway Determination and the delegate's response became known to Mr Hung at the times each was made. It may be inferred that he took them into account in his subsequent actions in relation to the property.

95 It is convenient to deal first with Mr Wood's second valuation and Mr Ellis' valuation, each of which considered the market value of the property as at 5 March 2018. Those valuations adopted the same methodology. Two

comparable sales were considered to be particularly relevant. The first was of a property at 5-19 George Street, Blacktown and the second of a property at 26 Second Avenue, Blacktown. The gross floor area (GFA) of each property was derived by multiplying its site area by the applicable FSR, which under the existing LEP was 6.5:1. The comparable sale price was then divided by the GFA (expressed in m2) to arrive at a rate of dollars per m2 of GFA. Having considered the market value of the subject property by reference to those comparable sales, it was then necessary to consider the value of the potential changes in the planning controls which were the subject of the Gateway Determination. Their effect was to increase the potential FSR above 6.5:1, and to increase the maximum building height to 76m or thereabouts.

96 Mr Wood and Mr Ellis disagreed as to the applicable GFA dollar rate per m2 for the Second Avenue property. Mr Wood calculated it at $697/m2 and Mr Ellis at $567/m2. That difference is due to Mr Wood not using the site area figure derived from the relevant development approval. For that reason Mr Ellis' rate is the correct one for deriving a GFA dollar rate.

97 The valuers also disagreed as to the applicable GFA dollar rates for the George Street property. There are two reasons which explain that difference.

98 First, there were two transactions concerning that property, one on 3 August 2017 and the other on 21 December 2018. Mr Ellis used the former, and rejected the latter as not involving an arm's length transaction. I agree with Mr Ellis' reasons for taking that position in light of the apparent association between the transferor and transferee companies.

99 Secondly, the valuers adopted different site areas, 4,652m2 in the case of Mr Wood and 4,630m2 in the case of Mr Ellis. Again, for the reasons given by Mr Ellis, his site area is to be preferred. It accords with that area as shown in the relevant deposited plan. It follows that the rate of dollars per m2 of GFA for the George Street property was $731, and not $851 as derived by Mr Wood.

100 Having regard to the derived GFA dollar rates per m2 of the two properties, namely $567/m2 and $731/m2, Mr Ellis assessed the GFA rate for the subject property at $700/m2. Using his GFA dollar rates per m2 of $697/m2 for Second

Avenue and $851/m2 for George Street, Mr Wood assessed the GFA dollar rate for the subject property as being $800/m2.

101 The valuers also used a different site area for the subject property in determining the gross floor area to which their respective assessments of the GFA dollar rate were to be applied. It was not controversial that the gross floor area was derived by multiplying the site area by the FSR of 6.5:1. In doing so Mr Ellis used a "developable" site area of 2,111m2 producing a value of $9,605,000. Mr Wood undertook the same exercise, but used a site area of 2,214m2 because that was the original site area *before* dedication of an area of 103m2 for road widening. He did so adopting an assumption that the relevant consent authority would allow the permissible GFA to be calculated by reference to the original site area.

102 Mr Ellis took issue with the correctness of that assumption. It was not the site area used by Mr Wood in his October 2016 valuation which took account of the July 2016 DA. Nor was it the site area described in the marketing material issued by CBRE and Matrix which referred to the property as being a "site of 2,111sqm" with a DA. Ultimately Mr Wood's evidence was that the assumption he adopted accorded with a practice of which he became aware at some time after October 2016. It is not necessary to make any further findings as to Mr Wood's understanding because the evidence does not establish that the practice was widely known or adopted as between potential buyers and sellers in the relevant market. The evidence as to how CBRE and Matrix described the property makes it most likely that participants in the relevant market treated the developable site area as 2,111m2. For that reason Mr Ellis' calculation of the GFA is to be preferred.

103 Mr Wood and Mr Ellis arrived at different conclusions as to the value of the potential changes to the relevant planning controls arising from the Gateway Determination. Mr Ellis allowed a small additional value of $221,550 for the opportunity of taking advantage of those changes; whereas Mr Wood attributed a value of $3,481,800 to that opportunity.

104 Again I prefer the evidence of Mr Ellis concerning the allowance that should be made for this opportunity. It is far more conservative than that made by Mr

Wood, and the latter produces an overall value of the property which is not at all reflected in the offers and indications which were being made in the market place during 2017 and in early 2018.

105 For these reasons, I would adopt the valuation of Mr Ellis as more likely to reflect the market value of the property in March 2018 than that of Mr Wood, which overstates that value by at least $5 million.

106 It is not necessary to deal with Mr Wood's first valuation in any detail. Although it undertakes a comparable sales analysis, it derives the value of $12,750,000 by applying a net yield per unit from the approved development of $75,000 as "fair and reasonable". To the extent that the valuation addresses GFA dollar rates per m2 for the Second Avenue and George Street properties, it applies a rate of $891 for the Second Avenue property (whereas Mr Wood's later valuation derives a rate of $697) and a rate of $696 in respect of the George Street property (whereas the later report derives a rate of $851 based on the 3 August 2017 sale).

Did Aquamore breach its obligation to take all reasonable care in selling the property for not less than its market value

107 Before selling the property, Aquamore sought and obtained advice from CBRE as to the manner in which the property might be sold and the price likely to be achieved assuming the marketing campaign CBRE proposed. That advice was sought in the context of CBRE (and Matrix) having undertaken an earlier sales campaign. In the light of CBRE's somewhat pessimistic description of the state of the market, Aquamore is certainly not shown to have acted unreasonably in deciding to sell the property to Mr Roumeliotis' proposed buyer for $10 million.

108 The exchanges between Mr Hsu and Mr Hung in mid-December 2017 concerning the latter's consent to a sale at that value do not suggest that sale was regarded by Mr Hung as outside the market range at that time. Nor do the results of CBRE's and Matrix's earlier marketing endeavours suggest otherwise. In the face of CBRE's advice as to the state of the market, Aquamore's decision to sell for $10m, rather than proceed with a marketing campaign which the agent did not think likely to produce a higher price, was justifiable and reasonable.

109 The valuation evidence confirms the reasonableness of that decision, in the sense that Mr Ellis' opinion, which I accept, assessed a market value which was less than the amount for which the property was sold.

110 In the result, there was no breach of Aquamore's equitable or statutory obligations in exercising the power of sale. In reaching this conclusion I have not addressed any suggestion that Aquamore acted unreasonably in terminating the first contract for sale and then entering into the second with the same purchaser. First on First's written and oral submissions did not make such a case.

Whether the provisions for payment of interest at the Higher Rate are unenforceable as a penalty

The relevant interest provisions

111 The provisions as to the calculation and payment of interest and default interest are contained in cll 5.1, 5.2 and 7.1 of the Facility Agreement, which are extracted below, together with the definition of prepaid interest:

> "**Prepaid interest** means the amount of $785,300.29 which represents 3 months interest at the lower rate, which is to be retained by the Financier from the first Advance
>
> **…**
>
> **5. Calculation and payment of interest**
>
> **5.1 Calculation**
>
> Interest is calculated from the Interest Commencement Date to the date of full and final repayment of the Money Owing and:
>
> (a) accrues on a daily basis;
>
> (b) will be compounding monthly in arrears; and
>
> (c) will be paid in advance on the Drawdown Date.
>
> **5.2 Interest period**
>
> The Borrower shall pay to the Financier Interest at the Higher Rate on the Termination Date provided that if no Event of Default has occurred and is subsisting, then the Financier shall accept the payment of interest for the Term calculated at the Lower Rate. Any difference between interest charged at the Higher Rate and the Prepaid Interest will be added to the Money Owing.
>
> …
>
> **7. Default Interest**
>
> **7.1 Default interest**

> The Borrower must pay interest on the Money Owing at the Higher Rate for the period from (and including) the date on which an Event of Default occurs until (and including) the date on which the Event of Default is remedied to the satisfaction of the Financier (acting reasonably), at which point it will revert to the Lower Rate from the following day."

The construction of cll 5.1, 5.2 and 7.1

112 Clause 5.1 specifies the period for which interest is to be calculated and paid, the basis on which it accrues, the fact that it is to be compounded monthly in arrears, and that it is to be the subject of a payment in advance on the Drawdown Date, which under the varied Facility Agreement was 6 June 2017, the same date as the Interest Commencement Date. This clause makes no reference to the rate at which interest is to be calculated. However the statement that it will be "paid in advance" is a reference to the Prepaid Interest, which is to be calculated at the Lower Rate and paid out of the advance of $10,470,670.

113 There is a potential inconsistency between the provisions of cl 5.2 and those of cl 7.1. The latter provides for the payment of interest at the Higher Rate for the period during which there is a subsisting Event of Default, before and following which interest is payable at the Lower Rate. However on one reading of its language, cl 5.2 provides that interest is payable at the Higher Rate unless no Event of Default has occurred and is subsisting on the Termination Date, in which event interest payable will be calculated at the Lower Rate. That clause was no doubt drafted in that way with a view to avoiding an argument that the imposition of the Higher Rate was a penalty, by providing that if there is no default, an indulgence is granted by allowing for payment of interest at the Lower Rate. See, for example, *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 at 366-367; [1983] HCA 3 (Gibbs CJ) and more generally the discussion in *Kellas-Sharpe v PSAL Ltd* (2013) 2 Qd R 233; [2012] QCA 371 at [32]-[38] (per Gotterson JA).

114 In providing that if there is no subsisting Event of Default the Financier "shall accept the payment of interest for the Term calculated at the Lower Rate", cl 5.2 leaves uncertain whether that condition applies throughout the Interest Period so that interest is calculated at the Lower Rate during any period when there is no subsisting Event of Default, or only where there is no default

subsisting at the end of the term. The former construction is consistent with cl 7.1, which provides that the Higher Rate only applies during a period where there is a subsisting Event of Default. Furthermore, if cl 7.1 was construed as only granting the indulgence, being interest at the Lower Rate, if there is no subsisting Event of Default on the Termination Date, it would have the unlikely outcome that the Higher Rate would apply through the whole of the Interest Period in the event there was an Event of Default subsisting on the Termination Date. Such an outcome would be inconsistent with the clear language of cl 7.1.

115 In construing the Facility Agreement, preference is to be given to a construction which gives these clauses a consistent and coherent operation (see *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522; [2005] HCA 17 at [16]). That is the outcome if cl 5.2 is understood as directed to any period during which there is no subsisting Event of Default, in which event the Lower Rate applies instead of the Higher Rate. Aquamore does not contend that so construed, cl 5.2 has the consequence that the agreed rate of interest is the Higher Rate, unless there is no Event of Default.

116 Adoption of that construction of these provisions requires that one of First on First's penalty arguments be rejected. As I understand the argument, it is that, in circumstances where interest has been prepaid at the Lower Rate, to apply the Higher Rate on termination because there is a subsisting Event of Default (as it is suggested is the effect of cl 5.2) is to increase retrospectively the rate of interest for the whole of the advance period. Operating in that way the clause is said to impose a penalty (see *Kellas-Sharpe* at [35]). However, the operation of cll 5.2 and 7.1 as I have construed them does not have the consequence that interest accrues at the Higher Rate in respect of any period before the relevant Event of Default occurs.

The Higher and Lower Rates of interest

117 The Lower Rate is 2.5% per month and equivalent to slightly more than 30% per annum. Similarly the Higher Rate of 5% per month is equivalent to slightly more than 60% per annum. In each case the difference arises because interest is compounded monthly in arrears. In the period of the varied Facility Agreement, the amount owing on which interest was payable for the three

months ending 6 September 2017 was $8,925,000. For the first month of that period, interest at the Lower Rate was $7,437 per day and $223,125 for the first month (deleting cents, and assuming 30 days in a month). At the Higher Rate, interest was $14,875 per day and $446,250 for the first month.

118 The first advance was for an initial period of four months, and subsequently extended. It was secured by a registered first mortgage over the property and guarantees from the directors of First on First. That there was a market for the provision of bridging finance for short periods at rates, at least up to 30% per annum, is to some extent confirmed by the NWC Term Sheet dated 22 July 2016 which records that NWC was prepared to provide or arrange finance which included interest at a "normal" rate of 5% per month (although described as the "normal" rate, it was a default rate) and a "lower" rate of 2.5% (being the rate payable if there was no default). Those rates were quoted for a loan period of six months with "an option to roll over for a further three months subject to good conduct". I do not, however, find that the NWC Term Sheet is any evidence that commercial borrowers seeking short term bridging finance for a development project would pay interest at a starting rate of 60% per annum to secure such finance.

Is cl 7.1 unenforceable as a penalty?

119 In *Andrews v Australia & New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30 at [10], the Court (French CJ, Gummow, Crennan, Kiefel and Bell JJ) described the "settled aspects" of the penalty doctrine as including that:

> "In general terms, a stipulation prima facie imposes a penalty on a party (the first party) if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and in terrorem of the satisfaction of the primary stipulation. If compensation can be made to the second party for the prejudice suffered by failure of the primary stipulation, the collateral stipulation and the penalty are enforced only to the extent of that compensation. The first party is relieved to that degree from liability to satisfy the collateral stipulation."

120 The "collateral" stipulation, or term of the Facility Agreement said to constitute a penalty and accordingly to be unenforceable, is cl 7.1 which imposes an

obligation on the Borrower to pay interest at the Higher Rate for the period during which an Event of Default subsists. If that default is "remedied", interest reverts to the Lower Rate. The interest rate difference is equivalent to 30% per annum and that is so irrespective of the occurrence constituting the Event of Default.

121 The "primary" stipulation upon the "failure" of which cl 7.1 operates is that no Event of Default should occur during the period of the borrowing. That is the condition, the non-performance of which engages the obligation to pay interest at the Higher Rate whilst the default subsists. There are sixteen "events" which separately constitute Events of Default (cl 11.1(a)-(p)). The 'headline' descriptions of the subject matter of those "events" include insolvency, payment obligation not complied with, other obligation not complied with, misrepresentation, litigation, loss of priority, ceasing business, maintenance of capital, cross-default, compulsory acquisition, and qualification of accounts.

122 There is no express contractual promise on the part of the Borrower to perform the condition that there be no Events of Default, however two of those events (cll 11.1(b) and (c)) consist of breaches of monetary and non-monetary obligations arising under one or more of the Finance Documents. With few exceptions, the remaining "events" are not in terms breaches of any of those agreements. Some of the occurrences constituting or giving rise to an Event of Default may have been avoidable by the Borrower. Others will not necessarily involve any acts or omissions over which the Borrower has direct control. Some may be capable of being "remedied". Others may not.

123 In *Andrews* the Court held that the primary stipulation to which the penalty doctrine applies may be the occurrence or non-occurrence of an event which is neither a breach of contract nor an event which it is the responsibility or obligation of the party subjected to the penalty to avoid (at [12], [45], [46], [67]. See also *Paciocco v Australia & New Zealand Banking Group Limited* (2016) 258 CLR 525; [2016] HCA 28 at [118], [119] (per Gageler J), [253] (per Keane J)). Accordingly the penalty doctrine applies to cl 7.1 notwithstanding that there may not be any express contractual promise by the Borrower to perform the condition that there be no Event of Default. That is because "a penalty

conditioned on failure of a condition is [treated as] in substance equivalent to a promise that the condition will be satisfied" (per Brereton J in *Integral Home Loans Pty Ltd v Interstar Wholesale Finance Pty Ltd* (2007) 2 BFRA 23 at 53-54; [2007] NSWSC 592, approved in *Andrews* at [67]).

124 In *Ringrow Pty Ltd v BP Australia* (2005) 224 CLR 656; [2005] HCA 71, the Court (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ) at [12] accepted that Lord Dunedin's speech in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 continued to express the principles "governing the identification, proof and consequences of penalties in contractual stipulations". Those principles (extracted in *Ringrow* at [11]) are:

> "2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage ...
>
> 3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach ...
>
> 4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
>
> > (a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach ...
> >
> > (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid ...
> >
> > (c) There is a presumption (but no more) that it is penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage'."

125 This statement addresses the application of the penalty doctrine to a detriment imposed on or following a breach of contract.

126 In *Paciocco* at [26], Kiefel J (with whom French CJ agreed) observed that a sum stipulated for payment upon the happening of a relevant event may be intended to protect an interest "that is different from, and greater than, an interest in compensation for loss caused directly by the breach of contract".

127 At [29] her Honour formulated the question to be addressed in characterising a payment obligation as a penalty as being:

> "whether a provision for the payment of a sum of money on default is out of all proportion to the interests of the party which it is the purpose of the provision to protect. This interest may be of a business or financial nature."

128 Gageler J at [158], in seeking to frame the inquiry as to whether a stipulation imposing a detriment on a contracting party in the event of non-observance of another stipulation is a penalty, observed:

> "To ask whether a stipulation serves merely to secure the enjoyment of a collateral object is to ask whether the conclusion objectively to be drawn from the totality of the circumstances is that the only purpose of the stipulation was to punish: to impose a detriment on a contracting party in the event that a principal contractual stipulation is not observed, in order to deter non-observance of that principal stipulation. To ask that question in the context of a stipulation for the payment of money on breach of contract accords with the statement of Lord Dunedin in Dunlop that "[t]he essence of a penalty is a payment of money stipulated as in terrorem of the offending party"."

129 He added at [164]:

> "… the fact that the amount of a payment stipulated to be made on breach of contract is set at a level which provides a negative incentive – even a very strong negative incentive – to perform the contract is not enough to justify the conclusion that the stipulation served only to punish. The prospect of paying compensatory damages to be assessed by a court in the event of breach itself provides a negative incentive to perform a contract. The relevant indicator of punishment lies in the negative incentive to perform being so far out of proportion with the positive interest in performance that the negative incentive amounts to deterrence by threat of punishment."

130 Also writing separately in *Paciocco*, Keane J, having observed at [256] that it is only "where the impugned provision requires a payment upon breach which is out of all proportion to the legitimate commercial interests of the party relying upon it that the punitive character of the provision stands revealed", adopted (at [270]) Lord Hodge's formulation in *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 at [255] of the question to be addressed in distinguishing a penalty from a provision protective of a legitimate interest, being:

> "whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract."

131 This inquiry is directed to the legal characterisation of the impugned provision which, as Lord Dunedin's third proposition makes clear, is a question of construction to be decided upon the terms and inherent circumstances of the contract, judged as at the time of the making of the contract and not as at the

time of breach (see also *Paciocco* at [31] (Kiefel J), [146] (Gageler J), [243] (Keane J)).

132 The onus of proving that the impugned clause is a penalty rests with the party asserting it (*Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1447; *Paciocco* at [167]; *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* (2016) 93 NSWLR 231; [2016] NSWCA 328 at [75], [111] (McDougall J, Gleeson JA and Sackville AJA agreeing)).

133 Returning to the terms of the Facility Agreement, the occurrence of an Event of Default has other consequences, or potential consequences, aside from giving rise to a liability to pay interest at the Higher Rate whilst the event subsist, assuming it is capable of remedy.

134 First, on the happening of an Event of Default the Financer may by notice (after any relevant Cure Period has expired) declare that the Money Owing is immediately due and payable, and enforce and exercise any of its rights under any security (cl 11.2(b)). Thus, cl 11.2(b) permits the Financer to treat any Event of Default, however serious or trifling, as equivalent to a breach of an essential term entitling it to terminate the facility and require its immediate repayment.

135 Secondly, by cl 17.4(d) the Borrower is required pay the amount of "all costs and expenses (including legal, professional and consultant fees, out of pocket expenses and administration costs) incurred by the Financier in connection with or as a result of any Event of Default".

136 Thirdly, by cl 16.1(a)(i) and (ii) each Obligor (meaning the Borrower and each of the guarantors) "indemnifies the Financier against any loss the Financier incurs or is liable for in connection with" the occurrence of any Event of Default or potential Event of Default or the Financier exercising its powers consequent upon or arising out of the occurrence of any such default.

137 The effect of these provisions is to place the Borrower and the guarantors in substantially the same position as they would have been had the Borrower given a promise that there would be no Event of Default during the term of the borrowing. The prospect of having to pay those costs and expenses and to

make good the indemnity against loss undoubtedly constituted an incentive for the Borrower and guarantors to avoid, if possible, the happening of any Event of Default.

138 In this context, it is necessary to consider the purpose of cl 7.1. Lords Neuberger and Sumption said in *Cavendish Square* at [28]:

> "[T]he penal character of a clause depends on its purpose, which is ordinarily an inference from its effect. … [T]his is a question of construction, to which evidence of the commercial background is of course relevant in the ordinary way. But, for the same reason, the answer cannot depend on evidence of actual intention."

139 Clause 7.1 does not by its terms or their effect impose a fee or other payment to be made by way of compensation to the Financier, in whole or in part, for reason of any non-observance of a monetary or non-monetary obligation of the Borrower. Nor does it do so for reason of the mere happening of any specific event. To the extent that the Financer might be liable to incur loss or expense as a result of or in connection with the occurrence of an Event of Default, its interests were to be substantially protected by the covenants in cll 16.1(a) and 17.4(d). It remained possible that the Financier would have interests affected by the happening of the Event of Default beyond the protection provided by these covenants. However cl 7.1 does not purport to address those interests.

140 What then is the purpose of a provision which doubles an already substantial interest rate upon the happening of any Event of Default, whether serious or otherwise, and provides that interest at that rate be paid only whilst the relevant event subsists?

141 The different occurrences constituting Events of Default are, in various respects and to different extents, at least potentially capable of influencing the ongoing assessment of the credit risk which the Borrower represents. Whether the happening of a particular Event of Default might do so, and to what extent, was not easily predicted in advance; although there were some events, such as those involving insolvency and failures to comply with payment obligations, which were more likely to have that outcome.

142 It may be taken as not controversial that the lower interest rate charged by the Financier at the commencement of the loan reflected what the parties regarded

as a commercially acceptable interest rate having regard to the Financier's then assessment of the Borrower's credit risk, and the nature of the finance as short term lending for the purpose of property development. The effect of cl 7.1 was to double that rate to one which could not have been proffered at the commencement of the loan as a genuine pre-estimate of the or an interest rate which would have taken account of the increased credit risk that the Borrower in default would have represented on the happening of any of the Events of Default. First, it was not possible, at the time the agreement was made, to make other than a very conservative estimate because of the many different events which could constitute the occurrence of the Event of Default. Secondly, the effect of cl 7.1 is not to increase the underlying interest rate for the balance of the loan period on the basis of an increase in the credit risk represented by the Borrower. If cl 7.1 had been intended to have that outcome it would have provided for the Higher Rate to apply during the remaining term. Thirdly, an increase from 30% to 60% per annum imposed an interest rate which on the face of it was out of proportion to any increased credit risk that the Borrower was likely to represent on the happening of any Event of Default.

143 On the other hand it was plainly in the Financier's interest to discourage any actions or inactions on the part of the Borrower and the guarantors that might result in an increased credit risk. In circumstances where the Financier had not imposed any express obligation on the Borrower to prevent the occurrence of Events of Default, the effect and purpose of cl 7.1 becomes clear. It was to discourage any action or inaction which might result in an Event of Default and did so by the imposition of a sufficiently exorbitant interest rate to have that consequence.

144 The position in the present case is to be contrasted with that addressed by Colman J in *Lordsvale Finance Plc v Bank of Zambia* [1996] QB 752. The defendant bank's funding facility provided that where there was default in payment of any sum due under the facility, interest was payable from the date of default until the facility was repaid in full at a 'default rate' which was to be 1% above the otherwise applicable rate. At 763 (in the passage cited by Keane J in *Paciocco* at [263]) Colman J observed:

> "… the borrower in default is not the same credit risk as the prospective borrower with whom the loan agreement was first negotiated. Merely for the pre-existing rate of interest to continue to accrue on the outstanding amount of the debt would not reflect the fact that the borrower no longer has a clean record. Given that money is more expensive for a less good credit risk than for a good credit risk, there would in principle seem to be no reason to deduce that a small rateable increase in interest charged prospectively upon default would have the dominant purpose of deterring default."

And concluded at 767:

> "If the increased rate of interest applies only from the date of default or thereafter, there is no justification for striking down as a penalty a term providing for a modest increase in the rate. I say nothing about exceptionally large increases. In such cases it may be possible to deduce that the dominant function is in terrorem the borrower. But nobody could seriously suggest that a 1% rate increase could be so. It is ... consistent only with an increase in the consideration for the loan by reason of the increased credit risk represented by a borrower in default."

145 Here, by contrast, there is good reason to deduce that the only purpose of cl 7.1 in doubling the rate of interest charged whilst a default subsisted was, by the imposition of a substantial detriment on the Borrower, to secure as far as possible the outcome that there would be no Events of Default, and the further outcome if there were, that they would be remedied so far as possible.

146 For these reasons cl 7.1 in seeking to impose the Higher Rate of interest during the subsistence of an Event of Default was a penalty.

Summary of conclusions

147 In the result I have concluded:

(1) That the Deed of Amendment and Restatement became binding on 28 June 2017;

(2) That there was a non-monetary Event of Default from 22 April to 26 June 2017 and a continuing monetary default from 7 September 2017;

(3) That cl 7.1 of the Facility Agreement is unenforceable as a penalty. Accordingly no interest was recoverable at the Higher Rate as a result of either of the defaults in (2);

(4) That although Aquamore was not authorised to exercise any power of sale under s 58 of the *Real Property Act* or cl 9.4 of the Mortgage, its want of authority to do so did not give rise to any recoverable loss or damage suffered by First on First;

(5) That Aquamore did not breach its equitable and statutory obligations in exercising its power of sale in respect of the property in March and July 2018.

Directions for finalising of orders

148 The parties provided, in the course of argument, a document titled “Quantum Matrix” which was intended to identify the judgment sum depending upon the resolution of various issues. I remain unable to determine the amount for which judgment should be entered having regard to my conclusions recorded above. Accordingly, I propose to direct that the parties confer and agree short minutes of order providing for the amount of the judgment, including interest to the date of judgment, and the costs of the proceedings.

149 There were five principal issues in the proceedings. First on First and the guarantors have succeeded in relation to at least three of them, including whether the Deed of Amendment and Restatement became binding and whether cl 7.1 is unenforceable as a penalty. Having regard to the time occupied during the hearing with respect to those issues, and assuming that time reflects the division of work undertaken more generally in preparing for the hearing, I would propose that Aquamore pay 25% of First on First’s costs of the proceedings. If the parties cannot agree on the costs order to be made, they should exchange written submissions addressing that question, which will then be dealt with on the papers.

150 Accordingly, I make the following directions:

(1) That the parties confer and agree if possible by 5:00pm on 23 December 2021 short minutes of order giving effect to the reasons for judgment published on 21 December 2021. Such short minutes are to be forwarded to Meagher JA’s associate by that deadline.

(2) That if the parties are unable to agree on the form of orders to be made, other than in respect of costs, the proceedings be stood over for directions before Meagher JA at 4:30pm on 31 January 2022.

(3) That if the parties cannot agree on the costs orders to be made, the Aquamore parties should provide their written submissions on costs (not exceeding 4 pages) by email to Meagher JA’s associate and the First on First parties by 5:00pm on 24 January 2022.

(4) That the First on First parties are to provide their written submissions on costs (not exceeding 4 pages) by email to Meagher JA’s associate and to the Aquamore parties by 9:00am on 31 January 2022.

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Amendments

21 December 2021 - [142] - first sentence, "It may be accepted" changed to "It may be taken as not controversial". Last sentence, "likely" deleted before "increased credit risk"