Supreme Court

New South Wales

Case Name:	Bhundia v Sommers (No 4)
Medium Neutral Citation:	[2021] NSWSC 455
Hearing Date(s):	27 April 2021
Decision Date:	30 April 2021
Jurisdiction:	Common Law
Before:	Adamson J
Decision:	(1) Judgment for the plaintiff against the first defendant. (2) Direct the parties to calculate the judgment sum in accordance with my reasons and provide an agreed figure to my Associate within seven days to permit the judgment sum to be entered. (3) Subject to order (4), order the first defendant to pay the plaintiff's costs of the proceedings. (4) If either party seeks an order other than the order in (3) above, the party is to make a written application to my Associate, together with any evidence relied upon and written submissions in support of the application within seven days and the other party is to provide evidence and written submissions by a further seven days with the intention that any such application or applications will be determined on the papers.
Catchwords:	CONTRACTS — Whether amount not payable on breach is a penalty — Whether interest rate claimed is a penalty – short-term unsecured bridging loan advanced by foreign investor PRACTICE AND PROCEDURE — Amount claimed in

	allegations made in statement of claim inconsistent with "relief claimed" section of the statement of claim COSTS — Party/Party — General rule that costs follow the event — Application of the rule
Legislation Cited:	Australian Securities and Investments Commission Act 2001 (Cth) Civil Procedure Act 2005 (NSW), s 100 Competition and Consumer Act 2010 (Cth), Sch 2 (Australian Consumer Law) Reserve Bank Act 1959 (Cth), s 85A Uniform Civil Procedure Rules 2005 (NSW), r 42.1
Cases Cited:	Andrews v Australia and New Zealand Banking Group Limited (2012) 247 CLR 205; [2012] HCA 30 Bay Bon Investments Pty Ltd v Selvarajah [2008] NSWSC 1251 Paciocco v Australia & New Zealand Banking Group Ltd (2016) 258 CLR 525; [2016] HCA 28 Ringrow Pty Ltd v BP Australia Pty Ltd (2005) 224 CLR 656; [2005] HCA 71 Robophone Facilities Ltd v Blank [1966] 1 WLR 1428
Category:	Principal judgment
Parties:	Sundip Bhundia (Plaintiff) Timothy John Sommers (First Defendant) Sean Patrick Neylon (Second Defendant)
Representation:	Counsel: D W Robertson (Plaintiff) J Rose (First Defendant) Solicitors: Colin Biggers & Paisley (Plaintiff) Sydney City Lawyers (First Defendant)
File Number(s):	2019/227905

JUDGMENT

Introduction

1 By statement of claim filed on 23 July 2019, Sundip Bhundia (the plaintiff) claims the sum of US$925,076.38 (the Debt), together with interest under

s 100 of the *Civil Procedure Act 2005* (NSW) from Timothy Sommers (the first defendant) and Sean Neylon (the second defendant) (together, the defendants). The defendants guaranteed a loan from the plaintiff to Propertybay Holdings Pty Ltd (the company), a company of which each was a director who owned 50% of the issued shares in the company.

2 On 11 October 2019, default judgment was entered against the second defendant in the sum of US$935,071.19, inclusive of costs. On 30 January 2020, the first defendant filed an amended defence in which he admitted the loan and the guarantee, did not admit that he received the notices of demand, admitted that he had not repaid the amount claimed, and alleged that the operative provisions of the transactional documents (addressed below) are void and unenforceable as penalties.

The facts

The need for finance

3 Between October and December 2018, the defendants were seeking funding for their company to purchase and redevelop the Dunk Island Resort in Queensland (the Dunk Island project). In mid-December 2018, the company sought a short-term bridging loan for the Dunk Island project. Tim Ward, a broker, indicated that the plaintiff (who lived in Switzerland) might be willing to provide such a loan. Negotiations for the loan continued from about 20 December 2018 until 30 December 2018.

The loan agreement, the variation and the guarantees

4 By loan agreement dated 30 December 2018, between the plaintiff (as lender), the company (as borrower) and the first and second defendants (as guarantors), the plaintiff, by clause 1, agreed to lend to the company US$500,000 and the company promised to repay this principal amount with a fixed amount of interest of US$150,000 “in one bullet repayment” on or before 31 January 2019. Clause 2 provided that the loan would be repaid in full with interest “on or before 31 January 2019”.

5 Clause 3 provided that, if the company defaulted, the plaintiff may immediately declare the principal amount and any interest due to be immediately due and payable. Clause 4 provided:

> "Further, if the Lender declares the principal amount and/or interest or any part thereof owing under this Agreement to be immediately due and payable, and the Borrower fails to provide full payment, interest at the rate of 30.00% (thirty percent) per annum, compounded monthly, will be charged on the outstanding amount, commencing on the day the [scil, that] any amount is declared due and payable, until full payment is received by the Lender."

6 Clause 6(b) provided that the "collateral for the loan" was the personal guarantee from each of the directors. By clause 10, the law of the contract was agreed to be the law of New South Wales. Clause 13 provided that the agreement could only be amended by written instrument executed by the lender and the borrower.

7 Clause 16 provided:

> "This Agreement has been drafted by the Borrower who has offered the terms thereof to the Lender and the Borrower has also sought legal advice and has agreed to the Terms of this Agreement as being fully legal, binding and enforceable against it. The Personal Individuals that have given Personal Guarantees for the Loan have been given Personal legal advice and have decided to proceed with giving Personal Guarantees for this Loan."

8 By agreement dated 30 December 2018, entitled "Loan Personal Guarantee", the first defendant guaranteed that the company would promptly pay the full amount of the principal and interest of the Debt. The second defendant executed a similar guarantee.

9 On 31 December 2018, Mr Ward confirmed that his commission fee was 5% of the total funds advanced (GBP500,000), being GBP25,000, which was accepted to be equivalent to US$31,500.

10 On 31 December 2018 US$400,000 was transferred to the company.

11 On 3 January 2019, a document entitled "Variation Agreement" was entered into between the borrower, the company and the two defendants. The parties acknowledged that the plaintiff had already paid US$400,000 to the company. The parties agreed that loan amount would increase from US$500,000 to US$630,000, less a fee of US$31,500 due by the company to Mr Ward, and that the company would repay the total principal amount to the plaintiff with a fixed amount of interest of US$189,000 "in one bullet repayment on or before 31 January 2019." The parties agreed that, otherwise, the terms of the loan would remain the same. The defendants, as guarantors, acknowledged the

variation and that they had sought legal advice. The defendants also signed separate guarantee documents, which reflected the variation.

12 On 14 January 2019, the balance of US$198,500 was transferred to the company. The evidence established that the total of US$630,000 was advanced as follows:

Date of payment	Amount in US$
31 December 2018	$400,000
January 2019	$31,500
14 January 2019	$198,500

The default and subsequent demands

13 It was common ground that the company failed to repay any part of the amount of US$819,000 (being the sum of US$630,000 and US189,000) on 31 January 2019 or at any time thereafter. The company was wound up on 22 July 2019.

14 The plaintiff demanded repayment of the money from the company and each of the defendants by notice of default dated 1 February 2019. The plaintiff, by his solicitors, served a further letter of demand on the first defendant on 26 February 2019 and also on 18 March 2019. As referred to above, the statement of claim was filed on 23 July 2019.

The statement of claim

15 The "relief claimed" portion of the statement of claim said as follows:

> "The Plaintiff seeks the following orders:
>
> 1. The First and Second Defendants to pay to the Plaintiff the sum of $925,076.38 United States Dollars (Debt).
>
> 2. The First and Second Defendants to pay to the Plaintiff interest on the Debt from 30 June 2019 at the rate applying pursuant to section 100 of the *Civil Procedure Act 2005* (NSW) and continuing at that rate.

3. The First and Second Defendants to pay the plaintiffs' service fees and filing fees totalling $1,251.00.

4. The First and Second Defendants to pay the Plaintiffs costs as agreed or assessed.

5. Such further or other orders as this Court deems fit.

Amount of claim	USD$925,076.38
Interest	USD$1,393.95
Filing fees	$1,123.00
Service fees	$128.00 (based on $64 per additional defendant)
Solicitors fees	$1,099.00
TOTAL USD CLAIMED	**$926,470.33**
TOTAL AUD CLAIMED	**$2,350.00**"

16 Paragraphs 13 and 14 of the statement of claim alleged as follows:

> "13. The Plaintiff is entitled to and claims payment of the sum of $819,000 United States Dollars, being the sum of the Amended Loan Amount owed to the Plaintiff from the First and Second Defendants under the Loan Personal Guarantees and Further Loan Personal Guarantees.
>
> 14. Further, the Plaintiff is entitled to and claims contractual interest under clause 4 of the Loan Agreement and as guaranteed in the Loan Personal Guarantees and Further Loan Personal Guarantees at the rate of 30 percent per annum from 31 January 2019 amounting to $106,076.38 United States Dollars as at 30 June 2019 **and continuing to accrue at that rate**."
>
> [Emphasis added.]

The amended defence

17 It was ultimately accepted by Mr Rose, who appeared for the first defendant, that the only positive defence raised was contained in paragraph 14 of the amended defence, as follows:

> "14 In response to paragraph 14 of the Statement of Claim, the First Defendant:

14.1 Says that clause 1 of the Loan Agreement and clause 1 of the Variation Agreement are each a penalty provision and is void and unenforceable.

14.2 Says that the lump sum interest payment of USD$150,000.00 reflects an annual interest rate of 360%.

14.3 Says that the amount of USD$150,000.00 was not a genuine pre-estimate of the costs the Plaintiff would suffer by reason of any delay in repayment at the time the Loan Agreement and/or Variation Agreement was entered into by the parties.

14.4 Says that the amount of USD$150,000.00 does not protect the legitimate financial interests of the Plaintiff.

14.5 Says that clause 1 of the Loan Agreement and clause 1 of the Variation Agreement are each intended to operate *in terrorem*.

Particulars

(a) The Plaintiff was aware, or ought to have been aware, that any loss it may suffer by reason of non-repayment was significantly less than USD$150,000.00.

(b) The annual interest rate of 360% is exorbitant and out of all proportion to commercial interest rates charged by financial institutions and other private lenders.

14.6 Otherwise does not admit the allegations."

18 While Mr Rose sought to argue that the defence, as pleaded, alleged facts which could give rise to relief under the *Australian Securities and Investments Commission Act 2001* (Cth) or under the *Australian Consumer Law* in respect of alleged unconscionability, I ultimately understood him to accept that such a claim had not been pleaded. This concession was appropriate. Paragraph 14 is manifestly insufficient to put the plaintiff on notice that such a claim was made. Mr Rose properly did not seek leave to amend the defence since such an application made at the hearing would have been doomed to failure. An amendment application had been foreshadowed at a directions hearing before Bellew J on 7 December 2020 and revisited on 11 December 2020, which led his Honour to direct that any such application was to be filed by 29 January 2021 and made returnable on 2 February 2021. No such application was made.

Consideration

The issues between the parties

19 Although Mr Rose did not concede that the whole amount was outstanding, he did not wish to speak against such a finding, except on the bases set out below. His objections to the plaintiff's claim were as follows.

20 First, he contended, in reliance on *Andrews v Australia and New Zealand Banking Group Limited* (2012) 247 CLR 205; [2012] HCA 30 (*Andrews*), that, for an amount claimed to be a penalty, it was not necessary that it be payable only on breach of contract. On this basis, he argued that the US$189,000, which was the consideration for the loan of US$630,000 was itself a penalty and amounted to an interest rate of approximately 360% per annum (calculated on the basis of one month's interest being US$189,000 for a principal sum of US$630,000 which amounts to annualised interest of US$2,268,000 for a principal of $630,000).

21 Secondly, he contended that, even if the US$189,000 was not a penalty, the interest rate of 30% per annum, compounded monthly, was a penalty. He argued that, if the Court accepted that this rate was a penalty, it should allow no more than the pre-judgment interest rate under s 100 of the *Civil Procedure Act*, since there was no evidence of other prevailing rates. He also relied on s 85A of the *Reserve Bank Act 1959* (Cth) which authorises the Court to take judicial notice of the Reserve Bank cash rate, which, in any event, was agreed to be 1.5% as at the date of the loan.

22 Further, Mr Rose contended that the contractual interest rate of 30% was inapplicable after 30 June 2019 in any event, since the plaintiff had claimed only interest under s 100 of the *Civil Procedure Act* after that date in the "relief claimed" section of its statement of claim. Further, he contended that any discrepancy between what was claimed in paragraph 14 and what was set out in the "relief claimed" section ought be resolved in favour of the "relief claimed" since this was the operative part of the pleading.

23 Mr Robertson argued that the amount of US$189,000 could not amount to a penalty because it was not payable on breach but was the price of the bargain. Secondly, he contended that an interest rate of 30% per annum, while high, did not amount to a penalty and had not been shown to be other than appropriately reflective of the risk associated with such a loan which was unsecured and made to foreign (as far as the plaintiff, who lived in Switzerland, was concerned) borrowers and guarantors. Thirdly, he argued that the first defendant was on notice from the contents of paragraph 14 of the statement of

claim that the plaintiff claimed interest at the contractual rate of 30% per annum, compounded monthly, and that there was no injustice in awarding interest on that basis.

What interest has been claimed by the plaintiff

24 As referred to above, there is a discrepancy between what has been claimed in the "relief claimed" portion of the statement of claim (contract interest up to 30 June 2019 and interest pursuant to s 100 of the *Civil Procedure Act* thereafter) and what is alleged in paragraph 14 of the statement of claim (contract interest up until the date of judgment).

25 In my view, the plaintiff's claim is to be taken to be what is claimed in the "relief claimed" part of the statement in claim. This portion has an important function and operative effect, as appears from the notice to the defendant contained in the statement of claim, which is part of the prescribed form, Form 3A, and reads as follows:

> "NOTICE TO THE DEFENDANT
>
> **If you do not file a defence within 28 days of being served with this statement of claim:**
>
> **- You will be in default in these proceedings.**
>
> **- The court may enter judgment against you without any further notice to you.**
>
> The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you."

26 When default judgment is entered, it is entered on the basis of what is set out in the "relief claimed" part of the statement of claim. There was no application made by the plaintiff to amend the relief claimed. Accordingly, it prevails to the extent of any inconsistency with the allegations in the statement of claim.

General principles on what will amount to a penalty

27 The onus of showing that a stipulation in a contract is a penalty rests on the party who is sued upon it: *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1447 (Diplock LJ).

Ringrow Pty Ltd v BP Australia Pty Ltd

28 What was required for a contractual stipulation to amount to a penalty was considered by the High Court in *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656; [2005] HCA 71 (*Ringrow*). The Court (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ) said at [32]:

> "Exceptions from that freedom of contract require good reason to attract judicial intervention to set aside the bargains upon which parties at full capacity have agreed. That is why the law on penalties is, and is expressed to be, an exception from the general rule. It is why it is expressed in exceptional language. It explains why the propounded penalty must be judged 'extravagant and unconscionable in amount'. It is not enough that it should be lacking in proportion. It must be 'out of all proportion'."

29 In *Ringrow*, Ringrow Pty Ltd (the operator) purchased a site from BP Australia Pty Ltd (the fuel distributor) to operate a service station. It was a condition of the agreement that the operator sell only fuel under the fuel distributor's brand. In a separate agreement, the operator granted the fuel distributor an option to re-purchase the site on termination of the agreement for a price which excluded goodwill. The operator purchased fuel from a third party. The fuel distributor terminated the agreement and gave notice of its intention to exercise the option. The operator claimed that various provisions of the agreements amounted to penalties, including the term of option agreement which denied it the value of the goodwill of the business. The Federal Court held that none of the terms amounted to a penalty. The operator's appeal to the Full Federal Court was dismissed, as was its appeal to the High Court.

30 The High Court held, at [22], that, in order to assess whether the term of the option agreement amounted to a penalty, it was necessary to make a comparison between the position of the defaulting party (which alleged that the term was void as a penalty) with or without the alleged penalty. This required a comparison to be made between the price to be paid and the value of what was to be transferred as a result of the option's having been exercised. As the onus was on the person claiming that the clause amounted to a penalty, the operator was obliged to establish that its goodwill was valuable. It was unable to do so. Similar considerations arose in respect of the other bases on which the operator alleged that the option agreement amounted to a penalty, which led to the dismissal of the appeal.

Andrews

31 In *Andrews*, the High Court (French CJ, Gummow, Crennan, Kiefel and Bell JJ) held that the penalty doctrine was not limited to situations where there had been a breach of contract. The fees which were in issue at first instance comprised honour and dishonour fees and non-payment fees in respect of various retail and business deposit accounts and late payment and over-limit fees in respect of credit card accounts. Thus, the separate question which had been answered by the trial judge (that the penalty doctrine applied only to late payment fees since these fees were the only fees charged by the respondent which depended on there being a breach of contract) was remitted for determination. The High Court, in substance, determined that the equitable jurisdiction to relieve against penalties was not dependent on there being a breach of contract (which derived from the common law).

Paciocco v Australia & New Zealand Banking Group Ltd

32 In *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; [2016] HCA 28, Kiefel J (French CJ agreeing) held, at [34], that the question whether a contractual term was penal was to be determined by reference to whether the payment of the sum was extravagant, unconscionable or out of all proportion to the legitimate commercial interests of the party which the provision is intended to protect. The Court reiterated the authorities and test applied in *Ringrow* and *Andrews*.

Whether the amount of US$189,000 amounts to a penalty

33 In the present case, the sum of US$189,000 was the consideration payable for the advance of US$630,000. While the price was very high, I am not persuaded that the first defendant has proved that it amounted to a penalty. First, it was payable for the *performance* by the plaintiff of his promise to pay the US$630,000, which was in fact paid. It was not payable on breach. Secondly, even if *Andrews* makes the doctrine of penalties applicable to such a clause (which I doubt), the first defendant has adduced no evidence to demonstrate what his position would have been but for the term. For example, had the company not obtained the loan and the variation (which was accepted to be a bridging loan), the company may have forfeited its interest in valuable property or foregone the opportunity to make an acquisition. Further, there

was no evidence of prevailing rates at which short-term finance of that order would have been available in December 2018 on an unsecured basis. I do not consider *Andrews*, which concerned fees which were charged routinely for particular aspects of the banker-customer relationship, to gainsay the conclusion that the first defendant has not established that the term requiring payment of US$189,000 was a penalty.

Whether the interest rate of 30% per annum compounded monthly is a penalty

34 The interest rate of 30% per annum compounded monthly was chargeable on breach. The first defendant was obliged to repay the money on or before 31 January 2019 (if the company failed to repay it). If he did not, he was in breach and obliged to pay interest at that rate. As referred to above, the parties agreed that the Reserve Bank cash rate at the time of the agreements was 1.5%. Neither party has adduced evidence to establish comparable rates available in the market at the time for such funds at short notice without security. The first defendant has not adduced any evidence of the cost of refinance with another lender or whether any such finance would have been forthcoming. The plaintiff (who does not bear the onus) has not adduced evidence as to what its loss was as a consequence of the money not being repaid on the due date of 31 January 2019. Nor has the first defendant sought to adduce such evidence.

35 In *Robophone Facilities Ltd v Blank,* Diplock LJ observed, at 1447, that the terms of the clause may, in some cases, be sufficient without further evidence to give rise to the inference that the term is a penalty. Mr Rose argued that the present was such a case and referred to *Bay Bon Investments Pty Ltd v Selvarajah* [2008] NSWSC 1251 (*Bay Bon*), in which White J found that the interest rates of 240% and 360% per annum, which were payable on default, were void because they amounted to penalties.

36 In *Bay Bon*, White J accepted, at [54], that there was "a market for loans of last resort at very high interest rates" but continued:

> "… However, there comes a point … where a rate is so high that it cannot be considered proper. That point is reached where the rate operates *in terrorem* and as a punishment for default rather than as compensation to the lender for being kept out of its money."

37 When addressing the default interest rates (set out above), his Honour considered, at [55], that, in the absence of evidence from the plaintiff, he would not conclude that there was a market at which the plaintiff could lend at such rates, or that, if the money had been repaid, it could have been used to discharge liabilities of the plaintiff that incurred interest at such rates. In these circumstances, his Honour considered that the rates were so high that they, in effect, bespoke exorbitance. His Honour concluded, at [56]:

> "In my view, the disparity between the interest rates charged for the term of the loans and the interest payable as damages for late repayment is so great that the proper conclusion is that the provision for payment of damages is not a genuine pre-estimate of damage, but the imposition of a different financial obligation in the nature of a punishment. The disparity is so great that it is out of all proportion to the damage which it can be inferred the plaintiff could suffer as the result of the borrowers' failure to repay the loan and the guarantor's default. I conclude that those provisions are void as penalties."

38 There was a similar lack of evidence in the present case. There was no evidence from the plaintiff that he could lend to others at such rates or that, if the money had been repaid, it could have been used to discharge his liabilities which incurred interest at such rates. The rate for outstanding monies in the present case is 30% per annum, compounding monthly, which is a significantly lower figure than that claimed in *Bay Bon*. The default rate is also significantly lower than the effective rate for the principal sum had it been repaid in accordance with the agreement (which was particularly high, presumably because of the short term of the loan and the lack of security).

39 The first defendant bore the onus of persuading me that the interest rate of 30% per annum compounding monthly, was "out of all proportion" to a genuine pre-estimate of the plaintiff's damages. In the absence of evidence, I am not persuaded that he has discharged the onus. I do not regard the Reserve Bank cash rate as having a particular bearing on the question since it was not suggested that 1.5% per annum would ever have been available for a unsecured loan from a foreign lender such as the one which is the subject of the plaintiff's claim.

Conclusion

40 It follows that the plaintiff is entitled to succeed on the relief claimed in the statement of claim. He is, accordingly, entitled to judgment in the sum of

US$925,076.38 (principal) plus interest to 30 June 2019 of US$1,393.95 plus interest on US$925,076.38 at pre-judgment interest rates applicable pursuant to s 100 of the *Civil Procedure Act*.

Costs

41 The parties asked me to reserve costs in the event that there was some reason (of which I am presently unaware) to depart from the general rule that costs follow the event: Uniform Civil Procedure Rules 2005 (NSW), r 42.1. Accordingly, to give the parties the opportunity to seek a different order for costs, that will be the default order.

Orders

42 For the reasons set out above, I make the following orders and directions:

(1) Judgment for the plaintiff against the first defendant.

(2) Direct the parties to calculate the judgment sum in accordance with my reasons and provide an agreed figure to my Associate within seven days to permit the judgment sum to be entered.

(3) Subject to order (4), order the first defendant to pay the plaintiff's costs of the proceedings.

(4) If either party seeks an order other than the order in (3) above, the party is to make a written application to my Associate, together with any evidence relied upon and written submissions in support of the application within seven days and the other party is to provide evidence and written submissions by a further seven days with the intention that any such application or applications will be determined on the papers.

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