Supreme Court
New South Wales

Medium Neutral Citation:	**Blackbird First Mortgage Corporation Pty Ltd v Cam Engineering & Construction Pty Ltd [2026] NSWSC 876**
Hearing dates:	30 June 2026
Date of orders:	23 July 2026
Decision date:	23 July 2026
Jurisdiction:	Common Law
Before:	Muston J
Decision:	Decision at [76]-[79]

(1) The parties are to confer and forward to my Associate by 5.00pm on 30 July 2026 short minutes of order giving effect to my reasons for judgment.

(2) If the parties are unable to agree on the form of orders to be made, including in respect of costs, the parties are to notify my Associate of that fact by 4pm on 30 July 2026 and provide a single set of orders which identifies the areas of agreement and disagreement, accompanied by their respective submissions addressing those areas of disagreement by no later than 4pm on 6 August 2026.

(3) The matter is listed for the making of orders on 13 August 2026 at 9:30am.

(4) In the event that an agreement is reached between the parties as to the making of orders in the sense contemplated by order 1, I will vacate the listing contemplated by order 3 and make the orders in Chambers.

Catchwords:	REAL PROPERTY — possession — proceedings by secured creditor for possession of land under registered mortgage — entitlement to possession not in dispute

	CONTRACTS — secured loan — where defendants have defaulted in their obligations under the loan — where plaintiff seeks judgment for the sum of the outstanding debt — dispute as to the quantum of the defendants' indebtedness — whether Dobb's certificate provision satisfied — whether default interest rate provisions are void as a penalty
Legislation Cited:	*Civil Procedure Act 2005* (NSW) s 100 *Real Property Act 1900* (NSW) s 57
Cases Cited:	*Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30 *Aquamore Credit Equity Pty Ltd v Hung; First on First Development Pty Ltd v Aquamore Credit Equity Pty Ltd* [2021] NSWSC 1681 *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* (2016) 93 NSWLR 231; [2016] NSWCA 328 *B&G Properties v Fayad* [2021] NSWSC 1382 *Bay Bon Investments Pty Ltd v Selvarajah* [2008] NSWSC 1251 *Crescent Capital Ltd as trustee for the Rockdale Central Security Trust v Chanine* [2026] NSWSC 371 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 *Fayad v B&G Properties Pty Ltd* [2022] NSWCA 129 *Hoho Property Pty Ltd v Bass Finance No 37 Pty Ltd* [2023] NSWSC 411 *JCP Holdings Pty Ltd v Ulrich Pty Ltd* [2025] NSWSC 911 *Lordsvale Finance Plc v Bank of Zambia* [1996] QB 752 *Paciocco v Australia and 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
Category:	Principal judgment
Parties:	Blackbird First Mortgage Corporation Pty Ltd (Plaintiff) Cam Engineering and Construction Pty Ltd (First Defendant) Craig Michael Bateman (Second Defendant) Sarah Samantha Bateman (Third Defendant) CMB and SSB Investments Pty Ltd (Fourth Defendant)
Representation:	Counsel: A Berriman (Plaintiff) N Simpson / M Short (Defendants)

	Solicitors: Gadens Lawyers (Plaintiff) Alvaro Edwards Solicitors (Defendants)
File Number(s):	2024/00442645

JUDGMENT

1 In November 2023, the plaintiff, **Blackbird** First Mortgage Corporation Pty Ltd, made an offer of finance to the defendants. The purpose of that offer was to refinance an earlier loan advanced by Blackbird Private Equity Pty Ltd to the first defendant, **Cam Engineering** and Construction Pty Ltd. By November 2023, Cam Engineering had fallen into default of its obligations under that earlier loan. Blackbird's offer was accepted by the defendants.

2 On 24 November 2023, Blackbird and each of the defendants executed a Deed of Secured **Loan** and a **General Security Agreement**. In addition to these documents, the second, third and fourth defendants executed a **Guarantee & Indemnity** in favour of Blackbird. The second defendant, Craig Bateman, also executed a **mortgage** over a residential **property** he owns in the Central Coast suburb of Brightwaters. It was not in dispute in these proceedings that the defendants' obligations under the Loan are secured by the mortgage.

3 The defendants have defaulted in their obligations under the Loan. In these proceedings, Blackbird seeks judgment against the defendants for the sum said to be outstanding under the Loan, and an order for possession of the property.

Blackbird's claim for judgment and possession

4 Pursuant to cl 3 of the Loan, Blackbird was to provide to Cam Engineering a cash advance on the "Drawdown Date"; defined in cl 1.1 as being "on or about 27 November 2023 or such other date as the Lender and the Borrower Agree in writing". It was not in dispute that Blackbird advanced the relevant sum on 14 December 2023.

5 Clause 6 of the Loan outlined Cam Engineering's repayment obligations as follows:

> "The Borrower must repay and finally discharge the Loan on the Repayment Date. The Borrower must also pay any interest accrued on the Loan and not then paid, and all other amounts payable under this deed and unpaid, to the Lender on or before the Repayment Date."

6 The "Repayment Date" was defined in cl 1.1 of the Loan as being "six (6) months from the date of the first Drawdown" (i.e., six months from 14 December 2023 — being 14 June 2024). The "Interest Rate" was defined as being "2.0% per calendar month".

7 Relevantly for present purposes, cl 10.2 of the Loan listed the following as an "Event of Default":

> "(a) **payment default:** if the Borrower fails to repay the Loan on the Repayment Date or fails to pay any instalment of interest on the relevant Interest Payment Date or fails to pay any other money payable under [the Loan] on the due date for payment of that money and such failure continues for more than five (5) Business Days".

8 As previously stated, it was not in dispute that the Loan was secured by the mortgage. The terms of the mortgage included a definition of "Mortgaged Property" that covered the property, and a definition of "Secured Money" which included any money owing to Blackbird by Mr Bateman under the Loan.

9 Clause 2 of the mortgage expressly included covenants in the following terms:

> "**2.1 MORTGAGE**
>
> 2.1.1 The Mortgagor charges the Mortgaged Property to the Mortgagee to secure payment of the Secured Money.
>
> **2.2 PAYMENT OF SECURED MONEY**
>
> 2.2.1 The Mortgagor must pay the Secured Money to the Mortgagee on the date agreed between the parties, or if there is no agreement, on demand."

10 Clause 3.1 of the mortgage relevantly listed the following as being "Events of Default":

> "3.1.1.1 if the Mortgagor does not pay any of the Secured Money on time;
>
> 3.1.1.2 the Secured Money becomes prematurely payable or can be rendered prematurely payable by the giving of notice, lapse of time or fulfilment of any condition;
>
> 3.1.1.3 if there is default in the performance of any term, covenant, agreement or condition contained in or implied by the Mortgage or a Collateral Document."

11 Clause 3.2 gave Blackbird the power to do one or any of a list of actions after an Event of Default, including:

> "3.2.1.2 exercise any right, power or privilege conferred by law, equity, the Mortgage or any of the Collateral Documents;
>
> …
>
> 3.2.1.4 take possession of the Mortgaged Property and have access to and make use of plant, equipment and accounting and other records (including computer hardware and software) used in connection with the Mortgaged Property;
>
> …
>
> 3.2.1.6 sell, assign, transfer, dispose, exchange, barter and grant options in respect of the mortgage property…"

12 There was no dispute between the parties that interest payments were made by the defendants during the six-month term of the Loan and for a short period thereafter. Interest continued to be paid at the standard rate up until 13 August 2024, but no payments have been made since that time.

13 Likewise, it was not in dispute that the advance was not repaid by the Repayment Date. This constituted an Event of Default under both the Loan and the mortgage.

14 On 7 November 2024, receivers acting for Blackbird issued a letter of demand to the defendants by way of email. The letter was addressed to Mr Bateman and sent to an email address identified in cl 16.13 of the Loan and cl 17.4.2 of the mortgage as belonging to Mr Bateman. Both agreements allowed notices to be served by email.

15 That letter outlined an indicative payout figure — at that time outstanding and payable — of $432,537.50. It further stated that that payout figure was valid until close of

business on 11 November 2024.

16 That letter went on to note:

> "Should payment not be received within the stipulated timeframe, the Lender reserves their rights and costs with respect to enforcement which will continue to accrue until such time that the outstanding balance is paid, including the costs incurred by myself and my staff.
>
> The Receivers and Managers have instruction to proceed with further enforcement action until such time that the matter settles to the satisfaction of the Lender."

17 On 12 November 2024, a letter enclosing a notice under s 57(2)(b) of the *Real Property Act 1900* (NSW) dated the same date was sent by solicitors acting for the receivers of Blackbird; it was addressed to Mr Bateman, the third defendant and the fourth defendant. That notice was served by way of express post and email, to the aforementioned email address of Mr Bateman.

18 This notice referred to the Loan, the General Security Agreement, the mortgage and the Guarantee and Indemnity. The notice relevantly provided:

> "**Notice of Default**
>
> 4. Pursuant to clause 10.1 of the [Loan], the Lender declares than an Event of Default occurred under the [Loan] and the Security in that the Borrower has failed to repay the Loan on the Repayment Date (being 27 May 2024) as required pursuant to clause 6 of the Loan, comprising an Event of Default pursuant to clause 10.2(a) of the Loan.
>
> 5. As a consequence of the occurrence of the Event of Default detailed above, among other things:
>
> a. the Lender declares that an Event of Default has occurred under clause 8.1(a) of the General Security Agreement and clause 3.1.1.1 of the Mortgage;
>
> b. pursuant to clause 9.1(a) of the General Security Agreement, the Lender declares that the whole of the Secured Money is immediately due for payment;
>
> c. pursuant to clause 10.1 of the [Loan] the Security became immediately enforceable as at the date of the Event of Default referred to above;
>
> d. pursuant to clause 4.3 of the [Loan], interest is payable and will be calculated at the Default Interest Rate, commencing from 27 May 2024;
>
> e. pursuant to clause 5.2(b) of the [Loan], the Borrower must, on demand by the Lender, pay to the Lender and indemnify the Lender against all costs, losses, charges, expenses, liabilities, damages, fees and disbursements paid or incurred by the Lender of or incidental to any breach of, or default under the [Loan] or the Security; and
>
> f. the Lender is entitled, at any time and without notice, to enforce the Security."

19 The notice included a demand for immediate payment of "the whole of the Secured Money (being $464,437.50 as at the date of this notice)", and noted that "interest, fees, costs and charges continue to accrue on the Secured Money until payment in full is received." It then advised:

> "7. Unless the whole of the Secured Money is repaid within one month after the date of this notice the Lender proposes to exercise a power of sale in respect of the property."

20 Other enforcement action was taken by Blackbird under the General Security Agreement. For immediate purposes, it is relevant only to note that this action resulted in the recovery by Blackbird of the following sums, which have been applied toward the sum outstanding under the Loan:

(1) $132,170.64 on 11 March 2025; and

(2) $139,892.76 on 7 May 2025.

21 Otherwise, Blackbird have not received any repayments from the defendants or on their behalf in response to either of the notices.

22 Although no formal admissions were made by the defendants, they did not seriously contest Blackbird's entitlement to recover so much of the sum advanced under the Loan as remains outstanding nor did they dispute Blackbird's entitlement to an order for possession of the property. In relation to the latter, the defendants merely requested that any order granting leave to Blackbird to issue a writ of possession in respect of the property be stayed for a short period to provide the defendants with an opportunity to explore further the option of refinancing their debt to Blackbird once the dispute as to the quantum of that debt has been determined.

23 The dispute between the parties regarding the quantum of the defendants' indebtedness to Blackbird boiled down to two essential issues:

(1) whether an affidavit sworn by Stewart Wilkinson on 30 June 2026 satisfies the requirements of the "Dobbs Certificate" provision in cl 16.1 of the mortgage; and

(2) whether the provisions of the Loan relating to the payment of an increased rate of interest in the event of any default by the defendants are void as a penalty.

The Dobbs Certificate

24 Clause 16.1 of the mortgage provides that:

> "**16.1 DOBB'S CERTIFICATE**
>
> 16.1.1 A notice or certificate purporting to be signed by an Officer of the Mortgagee in relation to:
>
> 16.1.1.2 any money, costs, expenses or other liabilities the Mortgagee pays or incurs and which then becomes part of the Secured Money;
>
> 16.1.1.3 the amount owing or contingently owing by the Mortgagor and/or the Borrower under this Mortgage;
>
> 16.1.1.3 the occurrent of an Event of Default;
>
> 16.1.1.4 the occurrence or existence of anything else relevant to this Mortgage;
>
> is, for all purposes, conclusive and binding on the Mortgagor as to the amount stated in it or any other matter of a factual nature.
>
> 16.1.2 A certificate signed by the Mortgagee, an Officer, a Receiver or an attorney appointed under this Mortgage stating the date on which a notice was delivered or sent under clause 16.1.1 is, in the absence of manifest error, sufficient evidence of the date on which that notice was delivered or sent.

> 16.1.3 The Mortgagee's receipt for money payable to it by virtue of this Mortgage is an effective discharge to the payee, who is not obliged to see the application of that money.
>
> 16.1.4 Any right, power and remedy conferred on the Mortgagee under this Mortgage or implied by law may be exercised on behalf of the Mortgagee by an Officer."

25 At the hearing of the proceedings, Blackbird sought, and was granted, leave to file in Court and rely upon Mr Wilkinson's 30 June 2026 affidavit.

26 In his 30 June 2026 affidavit, Mr Wilkinson described himself as "the Director of Blackbird". He went on to say that he had access to the books and records of Blackbird insofar as they relate to the defendants and had "extracted from" those books and records two separate "loan account statements". The first was said to show the total amount owing by the defendants under the Loan "applying the Default Interest Rate". The second provided the same information "applying the standard Interest Rate".

27 Mr Wilkinson went on to note that Blackbird had not charged compounding interest and that each "loan account statement" reflects the application of simple interest to the portion of the advance made under the Loan which remains outstanding.

28 Blackbird contended that, when read in combination with Mr Wilkinson's affidavit, the two loan account statements satisfy the requirements of cl 16.1 of the mortgage and, on that basis, are conclusive proof of the amount owing by the defendants under the Loan. This was disputed by the defendants.

29 This aspect of the defendants' argument was not said by them to be determinative of Blackbird's entitlement to a judgment or an order for possession. Rather, it was said by the defendants to impact on the quantum of that judgment.

30 The defendants accepted that Blackbird is entitled to recover so much of the advance made under the Loan and — subject to the issue I address below — any interest accrued thereon which remains outstanding. The defendants did not accept that Blackbird is entitled to recover the amounts included in each of the loan account statements which are said to be attributable to "Solicitor Fees" and "IA Fees".

31 The loan account statements include debits of $33,000 and $68,892.76, each of which are described as "IA Fees".

32 All parties appeared to accept that I should interpret "IA Fees" as a reference to fees said by Blackbird to have been incurred in connection with work carried out by an investigating accountant.

33 Clause 3.13 of the mortgage provides that:

> "**3.13 INVESTIGATING ACCOUNTANT**
>
> 3.13.1 The Mortgagee may appoint investigating accountants to investigate the affairs and financial position of the Mortgagor.
>
> 3.13.2 The investigating accountants are authorised by the Mortgagor to take all actions that may be reasonably necessary for the purpose of their investigation and the Mortgagor must give them all reasonable assistance for that purpose.

3.13.3 The Mortgagor is liable for the costs of any investigation under this clause and must pay those costs on demand by the Mortgagee. If the Mortgagor does not pay them, the costs form part of the Secured Money and bear interest at the higher rate."

34 The evidence includes a letter from Hall Chadwick to Blackbird Private Equity Pty Ltd dated 27 August 2024 which, on its face, purports to relate to the appointment of Richard Albarron of Hall Chadwick to act as an investigating accountant in respect of Cam Engineering. The defendants placed some reliance on the fact that Hall Chadwick's letter was addressed to a different lender; little turns on this fact. However, beyond proffering an estimate of fees "in the vicinity of $40,000-$50,000", the Hall Chadwick letter does little to substantiate the claim made by Blackbird for "IA Fees". The evidence was otherwise silent as to the work done by Hall Chadwick or the fees charged in connection with any such work.

35 The loan account statements include debits of $33,000 and $11,000, each of which are described as "Solicitor Fees".

36 Clause 15.1 of the mortgage relevantly provides that:

"**15.1 SECURED MONEY INCLUDES LEGAL COSTS & EXPENSES**

15.1.1 The Secured Money includes all legal costs & disbursements which the Mortgagee incurs through its own legal representatives, on an indemnity basis, including in relation to:

15.1.1.1 the documentation of a Collateral Document and related due diligence by the Mortgagee prior to and subsequent to the execution of a Collateral Document by the Borrower;

…

15.1.1.7 proceedings to enforce a Collateral Document;

15.1.1.8 proceedings for specific performance or damages in relation to contracts for the sale of any of the Mortgaged Property (whether in the name of the Borrower or the Mortgagee);

15.1.1.9 proceedings to execute judgment debts obtained against the Borrower or third parties arising out of a Collateral Document including bankruptcy proceedings;"

37 To similar effect, cl 5.2 of the Loan relevantly provides that:

5.2 Costs and Expenses

Whether or not the Borrower satisfied any or all of the conditions precedent set out in clause 2.1, the Borrower must, on demand by the Lender, pay to, or as directed by, the Lender, and indemnify the Lender against, all costs, losses, charges, expenses, liabilities, damages, fees and disbursements (including all reasonable legal costs on a solicitor and own client basis) paid or incurred by the Lender of or incidental to:

…

> (b) any breach of, or default under, this Deed or the Security by the Borrower or any Guarantor (including the fees of all professional consultants property incurred by the Lender in consequence of or in connection with, any such breach or default);"

38 Nothing in the evidence addressed the work done by solicitors on Blackbird's behalf or otherwise shed any light on what the "Solicitor's Fees" might have related to.

39 The defendants did not accept that by merely including the debits to which I have referred above in the loan account statements exhibited to Mr Wilkinson's 30 June 2026 affidavit, Blackbird had established its entitlement to be paid those sums.

40 As noted by Rees J in *Hoho Property Pty Ltd v Bass Finance No 37 Pty Ltd* [2023] NSWSC 411 at [289]-[290]:

> "This type of clause is referred to as a 'Dobbs' clause, after *Dobbs v National Bank of Australasia Ltd* [1935] HCA 49; (1935) 53 CLR 643. The purpose of such a clause is to 'provide a ready means of establishing the existence and amount of the … debt and avoiding an inquiry upon legal evidence going to make up the indebtedness': *Dobbs* at 651 (per Rich, Dixon, Evatt and McTiernan JJ).
>
> Whether a certificate issued under a *Dobbs* clause is valid depends on the proper construction of the contract: *Beefeater Sales International Pty Ltd v MIS Funding No 1 Pty Ltd* [2016] NSWCA 217 at [98] (per Bathurst CJ, Gleeson and Payne JJA agreeing); followed in *Vannin Capital Operations Ltd v QNI Resources Pty Ltd* [2023] QSC 001 at [55] (per Burns J). That is, does the certificate conform to what the parties have stipulated in the contract as to the manner and form of the document?: *Australia and New Zealand Banking Group v Smith* [2009] VSC 556 at [41] (per Mukhtar AsJ)."

41 I do not accept that Mr Wilkinson's 30 June 2026 affidavit, or the loan account statements it exhibited, satisfy the requirements of cl 16.1 of the mortgage. While Mr Wilkinson — through a combination of his affidavit and the loan account statements exhibited to it — is implicitly asserting that the "IA Fees" and "Solicitor Fees" alluded to in those statements were paid by Blackbird and are owned by the defendants, this is not sufficient for the purposes of cl 16.1.

42 Even if I were to accept that, in combination, the executed affidavit and its exhibits are capable of amounting to "a note or certificate purporting to be signed by an Officer of the mortgagee", the mere reference in the loan account statements to "IA Fees" and "Solicitor Fees" is, without more, insufficient to bring those items within any of the clauses to which I have referred above.

43 In so far as it might be said that the loan account statements identify — in a way which is conclusive and binding — the total amount owed by the defendants, I am again not satisfied that this is the case. Far from purporting to state the amount owing by the defendants, Mr Wilkinson's affidavit and its exhibits purport to quantify the amount that might be owing on the basis of two different assumptions regarding the applicable rate of interest. As useful as that exercise may be, it is not a statement of the type contemplated by cl 16.1 of the mortgage.

44 Although they contested their obligation to pay the "IA Fees" or "Solicitor Fees", the defendants accepted that some or all of the latter could potentially be revisited in the context of any application Blackbird might wish to make in relation to the costs of these proceedings. That is a matter which can be addressed in due course. At this stage in

the proceedings, I am not satisfied that Blackbird has established its entitlement to recover as part of any judgment the sums attributed to these items in the loan account statements exhibited to Mr Wilkinson's 30 June 2026 affidavit.

45 In a late attempt to overcome the difficulty it had encountered in relation to this issue, Blackbird sought to reopen its case and tender a more formal certificate which was purported to have been prepared under cl 16.1 of the mortgage. This application was made shortly after the defendants' submissions had concluded and before Blackbird made any submissions in reply. This course was opposed by the defendants. I did not permit Blackbird to rely on this document on the basis that it would have substantially altered the forensic landscape of the proceedings at a point in time too late for the defendants to have been able to fairly meet that change.

Is the Default Interest regime in cl 4.3 of the Loan (or any part of the regime) a penalty?

46 The defendants' obligation to pay interest on the sum advanced under the Loan is addressed in cl 4 of that document, which provides:

> "**4 Payment of interest**
>
> **4.1 Rate of interest**
>
> Interest is payable by the Borrower on the Loan at the Interest Rate and will be calculated on the Advance (that is $290,148.47) until all money owing be it principal, interests, costs or expenses of the Lender is repaid in full.
>
> **4.2 Payment of interest in Advance**
>
> The Borrower must pay interest in advance on the first one (1) month. If the Loan remains unpaid after the first one (1) month the Borrower must pay interest to be calculated in advance and paid on the first Business Day of every calendar month. No pro rata adjustment of the amount of the first and last interest instalments will be made by the Lender.
>
> **4.3 Default interest**
>
> Where any sum, or any part of any sum, payable by the Borrower under this Deed is not paid to, or as directed by, the Lender on or before its due date for payment, default interest will accrue on the outstanding amount. Accrued default interest must be paid by the Borrower to the Lender upon demand by the Lender. Default interest will be calculated at the Default Interest Rate for the calendar month for which the outstanding amount is overdue. Accordingly, default interest will accrue on and from the due date for payment of the outstanding amount up to but excluding its date of payment. It will be computed on a calendar monthly basis and will be compounded on the first day of each calendar month the Borrower is in default.
>
> For example: if the Loan is to be repaid on 6 May of a year and the Loan is not repaid until the 10th of May of that year, the Borrower must pay a full calendar months interest at the Default Interest Rate."

47 The above clause included a diagrammatic representation of the mechanism by which the Default Interest Rate was to be calculated in the event of any delayed payment.

48 The term "Default Interest Rate" was defined in cl 1.1 of the Loan as 4% per calendar month.

49 There was no dispute that the defendants' failure to have repaid the advance and all other amounts payable before the Repayment Date was a default of the type required to trigger the default interest obligations provided for in cl 4.3 of the Loan. However, that

clause was said by the defendants to be unenforceable as a penalty.

50 The principles to be applied when assessing whether a contractual provision amounts to a penalty were not in dispute. Those principles were stated in ***Dunlop*** *Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 and more recently examined by the High Court in *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656; [2005] HCA 71, *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30 and *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; [2016] HCA 28.

51 The principles which may be drawn from these authorities were summarised by Rees J in ***Crescent Capital*** *Ltd as trustee for the Rockdale Central Security Trust v Chanine* [2026] NSWSC 371 at [4]-[11]. In doing so, her Honour identified the following five points which have direct bearing on the dispute between the parties in this matter:

> "First, 'The law of contract normally upholds the freedom of parties, with no relevant disability, to agree upon the terms of their future relationships': *Ringrow* at [31]. The Court elaborated at [32]:
>
> > 'Exceptions from that freedom of contract require good reason to attract judicial intervention to set aside the bargains upon which parties of 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"...'
>
> As Keane J put it more recently in *Paciocco*, 'the penalty rule does not operate to displace the parties' freedom to settle for themselves the contractual allocation of benefits and burdens and the rights and liabilities following a breach of contract': at [221].
>
> Second, the evidentiary and persuasive onus of proving that a contractual provision is a penalty rests on the person asserting it: *Paciocco* at [167] (Gageler J). Of course, the contract may be sufficiently heinous on its face that it is sufficient for the defendant to simply tender the contract, with the effect that the evidentiary burden moves to the plaintiff to call evidence to explain why it is not a penalty. That was the case in *First Cash Flow Solutions Pty Ltd v Saad* [2023] NSWSC 686 at [56] (Robb J). As White J (as his Honour then was) noted in *Bay Bon Investments Pty Ltd v Selvarajah* [2008] NSWSC 1251, evidence is to be weighed according to the power of a party to produce it. Once some evidence is adduced by a defendant which may be sufficient to satisfy the onus, it may fall to the plaintiff to explain the nature of its business, the rates at which it is able to lend, and how it was anticipated (when the contracts were entered into) that the moneys would be re-deployed on repayment of the loan: at [51].
>
> Third, not much has changed since Lord Dunedin's classic summary of the principles in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 86-87:
>
> > '(ii) 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 ...
> >
> > (iii) 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 ...
> >
> > (iv) 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 a 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".

(v) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties…' (Citations omitted.)

In *Paciocco*, Gageler J explained that Lord Dunedin used the word "construction" in *Dunlop Pneumatic Tyre Co* to refer to something beyond the attribution of legal meaning and extended to all of the circumstances which bore on the legal characterisation of the provision: at [146]. As Keane J put it, 'construction' calls for identification of 'the legal character of the provision from the effect of its terms in the commercial context in which it is to operate … which does not depend upon the parties' … subjective intention, purpose or calculations': *Paciocco* at [243].

Fourth, the fact that a higher rate of interest is charged in the event of default does not render it a penalty per se, as long as the increased rate is not immodest and is payable prospectively from the event of default. The commercial reality reflected in higher rates of interest on default was explained by Colman J in *Lordsvale Finance Plc v Bank of Zambia* [1996] QB 752 at 763:

'… 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. That is not because there is in any real sense a genuine pre-estimate of loss, but because there is a good commercial reason for deducing that deterrence of breach is not the dominant contractual purpose of the term.'

Colman J's observations were cited in *Paciocco* at [263] (Keane J) and followed in *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* (2016) 93 NSWLR 231; [2016] NSWCA 328 at [106] (McDougall J, Gleeson and Sackville JJA agreeing). An increased interest rate on default may also be explained by the expectation of the plaintiff of the internal rate of return to be made on its funds: *PT Thiess Contractors Indonesia v PT Arutmin Indonesia* [2015] QSC 123 at [158] (Jackson J).

Finally, contractual payments prescribed in the event of default may legitimately protect more than, say, the lender's exposure to a higher credit risk or a higher cost of funds. As Kiefel J explained in *Paciocco*, 'a sum stipulated for payment on default may be intended to protect an interest that is different from, and great than, an interest in compensation for loss caused directly by the breach of contract': at [26]. The question is whether the contractual provision for the payment of a sum of money on default was out of all proportion to that interest, whether it be of a business or financial nature: at [29] (Kiefel J). As Gageler J put it, the interest sought to be protected may extend to 'interests that the innocent party has in contractual performance which are intangible and unquantifiable'; the entitlement of a party to protect its interests cannot 'be limited

> by considerations of common law causation of damage to protecting only against incremental loss that the party would sustain as a direct result of that breach': *Paciocco* at [161]."

52 Of particular relevance in the present case is the second of the points identified in the above extract.

53 The defendants said that the rate of interest payable on default under the Loan is "sufficiently heinous on its face" for the burden of proving that it was not a penalty to have shifted to Blackbird.

54 In support of this contention, the defendants relied on the fact that the standard interest payable on the advance under cl 4.1 of the Loan was 2% per month (or 24% per annum). On default, this increased to 4% per month (or 48% per annum) by operation of cl 4.3 of the Loan. When the monthly compounding of interest contemplated by that clause is taken into account, it was said by the defendants that the loan balance increases by around 60% over 12 months when it is engaged.

55 The defendants referred, by way of analogy, to the decision of Meagher JA in *Aquamore Credit Equity Pty Ltd v Hung; First on First Development Pty Ltd v Aquamore Credit Equity Pty Ltd* [2021] NSWSC 1681, in which his Honour held (at [145]) that in the context of a relevantly similar loan arrangement there was good reason to deduce that the only purpose served by increasing the interest charged in the event of a default from 2.5% per month to 5% per month was:

> "by the imposition of a substantial detriment on the Borrower, to secure as far as possible the outcome that there would be Events of Default, and the further outcome if there were, that they would be remedied so far as possible."

56 Reliance was also placed on the following observations of White J in *Bay Bon Investments Pty Ltd v Selvarajah* [2008] NSWSC 1251 at [51]:

> "Whilst I accept that the onus is on the defendant to show that the provision is a penalty, it appears to me that once some evidence is adduced which may be sufficient to satisfy that onus, there is an evidentiary onus on the plaintiff to explain the nature of its business, the rates at which it is able to lend, and how, when the contracts were entered into, it would have been anticipated that the moneys would be re-deployed on repayment of the loans. This information was entirely in the plaintiff's camp. Evidence is to be weighed according to the power of a party to produce it. Where facts are peculiar within the knowledge of one party, comparatively slight evidence may be sufficient to discharge the onus of proof lying on the opposite party." (Citations omitted).

57 The defendants pointed to eight matters, all but the first of which were said to be peculiarly within the knowledge of Blackbird and could have been addressed in its evidence but were not, namely:

(1) the market for comparable secured lending. No data was produced identifying prevailing interest rates for short-term mortgage-secured commercial facilities of this kind, whether at origination or in default scenarios. No evidence was adduced showing that defaulting borrowers in this category are charged, in any relevant market, rates approaching 4% per calendar month, let alone a compounding annualised return in the order of 60%.

(2) any risk-based pricing methodology. Blackbird did not identify any internal or external credit model used to determine the uplift from 2% to 4% per calendar month. There was no analysis showing how the probability of default, loss given

default or exposure at default changes in a manner that would justify a doubling of the monthly rate. There was no evidence that the occurrence of an "Event of Default" placed the borrower into a materially different risk category such that a discrete pricing step was commercially rational.

(3) any evidence that Blackbird's cost of funds increased upon default. Blackbird did not adduce any funding agreements, warehouse facility terms or capital cost modelling. There was no explanation of whether Blackbird was funded through equity, wholesale debt, investor capital or securitised structures, nor any evidence that any of those funding sources impose higher costs when a single loan within the portfolio enters default. There was also no evidence of any marginal cost increase attributable to this particular facility.

(4) any opportunity cost or foregone lending capacity. Blackbird did not identify any pipeline of alternative lending opportunities allegedly displaced by the continued existence of the loan in default. There was no evidence of declined applications, delayed settlements or constrained lending capacity attributable to capital being tied up in non-performing facilities.

(5) any enforcement or administrative cost escalation that might rationally justify the uplift. While lenders plainly incur enforcement costs in recovering defaulted facilities, there was no attempt made by Blackbird to quantify those costs, to link them to the magnitude of the uplift or to show that such costs increase in a manner proportionate to a doubling of the monthly rate. Nor was there any suggestion that such costs are not already recoverable under separate contractual or statutory provisions.

(6) any evidence that the Default Interest Rate reflects a pre-estimate of loss. The clause was not structured by reference to anticipated loss categories, duration of default or stages of enforcement. It applied uniformly upon default, irrespective of whether the default was technical, temporary, or substantive and irrespective of whether any actual loss is suffered.

(7) any evidence explaining the introduction of compounding upon default. The ordinary interest rate is not compounded. Blackbird did not identify any rationale for why compounding becomes appropriate only upon default. There was no evidence that compounding reflected any cost increase, risk transition or funding structure change. The effect was simply to accelerate accrual once default occurs, without any articulated commercial explanation.

(8) any evidence that Blackbird applied similar default pricing across its lending book in a consistent or risk-based manner.

58 In response, Blackbird embraced the observation of Colman J in ***Lordsvale*** *Finance Plc v Bank of Zambia* [1996] QB 752 which is set out in the above extract from *Crescent Capital* and was endorsed by the Court of Appeal in *Arab Bank Australia Ltd v*

Sayde Developments Pty Ltd (2016) 93 NSWLR 231; [2016] NSWCA 328 at [106]. It further drew to my attention to the observation of Ball J in *B&G Properties v Fayad* [2021] NSWSC 1382 at [31] that:

> "… There is nothing penal in nature in compound interest. The requirement to pay interest on interest compensator creditor for the fact that the creditor is out of pocket for the interest and consequentially is unable to invest that interest in other profit-making investments."

59 Finally, Blackbird noted that the defendants' evidence included a refinancing offer received from an organisation which described itself as Merlot Finance on 28 August 2024, which contemplated a "standard interest rate" of 48% per annum that was to be "discounted" to 21% per annum in the absence of any breach of the payment and other terms contemplated by the offer. It was said by Blackbird that the Merlot Finance offer was good evidence of the market for comparable secured lending and revealed that the default interest rate contemplated by the Loan reflected the rates available in that market for a risky loan secured by a second ranking mortgage.

60 Blackbird otherwise accepted that it had not adduced evidence in relation to any of the other matters highlighted by the defendants, and said that it was not necessary for it to have done so, as the interest payable through cl 4.3 of the Loan in the event of a default was not "so heinous" as to have shifted the evidentiary burden from the defendants to Blackbird.

61 As Leeming JA emphasised in *Fayad v B&G Properties Pty Ltd* [2022] NSWCA 129 at [36], what matters, as a matter of substance and not form, is the extent of an increase in interest rate in the event of default. The shift from 24% per annum to 48% per annum (or 60% per annum when the compounding of unpaid interest is brought to account), is not a "small rateable increase" of the type contemplated by Colman J in *Lordsvale* at 763. Views may differ on whether it can properly be described as "heinous" or "extravagant and unconscionable". However, without needing to deploy any particular adjective to describe it, I am satisfied that the increase in the interest rate on default brought about by the operation of cl 4.3 of the Loan is sufficiently disproportionate to the loss that might ordinarily be expected to be suffered by a lender in the event of a default by a borrower of their obligations under a loan agreement for the evidentiary burden of explaining the basis for that increase to have shifted to Blackbird.

62 As will be apparent from the reasons I have given above when dealing with the Dobbs certificate issue, the defendants were always obliged to indemnify Blackbird for a wide range of expenses which it might incur in the event of any default; see, for example, cl 5.2 of the Loan and cll 13.3 and 15.1 of the mortgage. Blackbird's potential exposure to such expenses in the event of a default thus provides no real explanation for any increase in the interest payable by the defendants in such circumstances, and particularly not an increase of the magnitude contemplated by cl 4.3 of the Loan.

63 I accept that the defendants' default, at least potentially, meant that they represented a worse credit risk than was the case when the advance was made and that — as a general proposition — money becomes more expensive as the quality of the risk

declines. However, this can only be taken so far in the present case. It is to be recalled that the Loan was a refinance of a loan advanced by an entity bearing a very similar name to Blackbird, and that the defendants had failed to repay that earlier loan in accordance with its terms. In these circumstances, the quality of the risk they presented when the Loan was entered into already fell at the lower end of the spectrum.

64 In the absence of any other explanation, I am satisfied that the only real purpose for the doubling of what was already a very substantial interest rate on default was to deter non-compliance with the terms of the Loan. Adopting the language of Lord Dunedin in *Dunlop*, the imposition of the Default Interest Rate was stipulated *in terrorem* of compliance by the defendants with their obligations under the Loan.

65 The fact that Merlot Finance was proposing to charge an equivalent rate of interest in the event of a default under its loan proposal does not cause me to alter my view on this issue. That company may be able to establish through evidence that the increase in interest contemplated by its offer of finance reflected a genuine pre-estimate of the loss it would suffer in such circumstances or, alternatively, it too might have been void as a penalty. That is not a matter that needs to be determined in these proceedings.

66 While I consider the introduction of the Default Interest Rate to be a penalty, I do not consider there to be anything inherently penal about that portion of cl 4.3 of the Loan which provides for the compounding of interest on a monthly basis.

67 Clause 4.2 of the Loan requires that interest be paid monthly and in advance. At the time of entry into the Loan, it would have been clear to the parties that if the defendants defaulted in their obligations under cl 4.2, Blackbird would be deprived of the opportunity to loan to other borrowers, or otherwise invest, any unpaid interest. On its face, the compounding of interest in the event of such a default by the defendants reflects a reasonable pre-estimate of this loss.

68 How, then, are the above conclusions to be addressed in the context of cl 4.3 of the Loan?

69 It was faintly suggested by the defendants that, if cl 4.3 of the Loan was unenforceable as a penalty, no interest was payable under the Loan from the point at which the relevant Event of Default occurred. In support of this proposition, the defendants referred to the decision of this Court in *JCP Holdings Pty Ltd v Ulrich Pty Ltd* [2025] NSWSC 911; it is not clear how this authority supports the proposition advanced by them. At [98], Pike J refers to what his Honour understood to be an agreement between the parties to the effect that, if the default interest provisions being considered in that case were unenforceable as a penalty, no interest was payable and that, instead, the

plaintiff was entitled to simple interest at Court rates under s 100 of the *Civil Procedure Act 2005* (NSW). There was no equivalent agreement between Blackbird and the defendants in this case.

70 To the contrary, Blackbird contended that, if the obligation to pay interest at the Default Interest Rate was unenforceable as a penalty, the defendants' obligation to pay interest at the Interest Rate continued. In my view, this is plainly correct.

71 Clause 4.1 of the Loan makes clear that interest is payable at the Interest Rate "until all money owing be it principal, interests, costs or expenses of the Lender is repaid in full." Nothing in the text of that clause suggests that the parties intended that the clear obligation it creates would fall away if the defendants were to default in their repayment obligations. Accordingly, whatever view might be reached in relation to cl 4.3 of the Loan, the obligation arising under cl 4.1 to pay simple interest at the Interest Rate will continue.

72 The defendants next said that I must find that cl 4.3 of the Loan is void in its entirety. In support of this submission, they relied on cl 16.6 of the Loan which provides that:

> "**16.6 Severability and survival of covenants**
>
> If any provision of this Deed is, or at any time becomes, prohibited by, or unlawful under, any applicable law, regulation or other condition actually applied or otherwise becomes void or unenforceable, it will be severed from this Deed and rendered ineffective so far as is possible without modifying the remaining provisions of this Deed. The remaining provisions will, to the extent permitted by the relevant law, regulation or other condition, continue in full force and effect. Where, however, the provisions of any such applicable law, regulation or other condition may be waived, they are waived by the Borrower and the Lender to, but not beyond, the full extent permitted by the law, regulation or other condition to enable this Deed to constitute a valid and binding obligation enforceable in accordance with its terms.
>
> Any prohibited, unlawful, void or unenforceable provision will be replaced forthwith by an allowable, lawful, effective and enforceable provision which so far as possible achieves the same economic benefit or burden for the Lender and the Borrower as the prohibited, unlawful, void or unenforceable provision was intended to achieve. All obligations of the Borrower under this Deed will survive the expiration or termination of this Deed to the extent required for their full observance and performance."

73 The defendants submitted that the word "provision", where used in cl 16.6 of the Loan, should be equated with "clause" and that this precluded me from "taking the blue pen" to cl 4.3. They said that cl 16.6 required me to approach cl 4.3 on the basis that the entire clause is either a penalty or it is not, and, that if it is, the entire clause must be severed from the Loan. The practical effect of this approach would be to remove both the obligation to pay interest at the Default Interest Rate and the compounding of any unpaid interest upon a default by the defendants of their repayment obligations.

74 It is clear that I cannot rewrite the parties' agreement for them. Neither party suggested that I should do so. However, in my view, the provision of the Loan which amounts to a penalty is that portion of cl 4.3 which imposes the Default Interest Rate. That provision can readily be severed from the Loan by excising the third sentence of cl 4.3 so that it reads:

> "Where any sum, or any part of any sum, payable by the Borrower under this Deed is not paid to, or as directed by, the Lender on or before its due date for payment, default interest will accrue on the outstanding amount. Accrued default interest must be paid by the Borrower to the Lender upon demand by the Lender. ~~Default interest will be~~

~~calculated at the Default Interest Rate for the calendar month for which the outstanding amount is overdue.~~ Accordingly, default interest will accrue on and from the due date for payment of the outstanding amount up to but excluding its date of payment. It will be computed on a calendar monthly basis and will be compounded on the first day of each calendar month the Borrower is in default."

75 In my view the excision of only that portion of cl 4.3 of the Loan which I have found amounts to a penalty is precisely what the parties intended when they included cl 16.6 in their agreement.

Conclusion

76 For the above reasons, I have concluded that:

(1) Blackbird is not entitled to recover, as part of any judgment, the sums described in the loan account statements exhibited to Mr Wilkinson's 30 June 2026 affidavit as "IA Fees" or "Solicitor Fees".

(2) The provision of cl 4.3 of the Loan which has been struck through in the extract at paragraph [74] above is unenforceable as a penalty. Accordingly, Blackbird is not entitled to recover interest from the defendants at the Default Interest Rate.

(3) Interest has continued to accrue at the Interest Rate and — from the point at which the defendants defaulted in their repayment obligations under the Loan and ceased making interest payments — has compounded on the first day of each calendar month during which the default has subsisted.

77 As I have noted above, the defendants do not dispute that the advance was made to the defendants under the Loan. They accept that they have not repaid this advance nor, since August 2024, have they made any interest payments to Blackbird. Blackbird accepts that interest payments calculated at the Interest Rate were made by the defendants until August 2024. Blackbird also accepts that it has made the recoveries referred to at [20] above.

78 I propose to direct that the parties confer and agree upon short minutes of order which quantify the judgment to be entered in favour of Blackbird having regard to the conclusions I have reached above. Those orders should include an order for possession of the property, leave to issue a writ of possession, and should address any agreement which might be reached by the parties in relation to any stay of those orders to enable the defendants to explore refinancing options. If agreement is able to be reached in relation to the appropriate orders to be made in relation to the costs of these

proceedings, they too should be included in the short minutes of order. If necessary, I will hear the parties further on the question of costs and any other issue relating to the orders to be made consequent on the conclusions I have reached above.

79 Accordingly, I make the following directions:

(1) The parties are to confer and forward to my Associate by 5.00pm on 30 July 2026 short minutes of order giving effect to my reasons for judgment.

(2) If the parties are unable to agree on the form of orders to be made, including in respect of costs, the parties are to notify my Associate of that fact by 4pm on 30 July 2026 and provide a single set of orders which identifies the areas of agreement and disagreement, accompanied by their respective submissions addressing those areas of disagreement by no later than 4pm on 6 August 2026.

(3) The matter is listed for the making of orders on 13 August 2026 at 9:30am.

(4) In the event that an agreement is reached between the parties as to the making of orders in the sense contemplated by order 1, I will vacate the listing contemplated by order 3 and make the orders in Chambers.

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Decision last updated: 23 July 2026