Supreme Court

New South Wales

Case Name:	Commercial N Pty Limited v Huang & Ors
Medium Neutral Citation:	[2024] NSWSC 23
Hearing Date(s):	14, 15, 16 and 17 March, 24 August, 7 September, 27 October and 7 December 2022
Date of Orders:	31 January 2024
Decision Date:	31 January 2024
Jurisdiction:	Equity
Before:	Henry J
Decision:	See [364]–[377]
Catchwords:	CONTRACTS – penalty – relief against penalties – whether penalties doctrine engaged – differential interest rates – where loan agreement provided for "Lower Interest Rate" and "Higher Interest Rate" – where "Lower Interest Rate" operated as a concessional rate payable whilst there was no default – principle in Kellas-Sharpe v PSAL Ltd [2013] 2 Qd R 233 – penalties doctrine not engaged CONTRACTS – unconscionable conduct – Australian Securities and Investments Commission Act 2001 (Cth), s 12CB – whether interest rates in loan agreement unconscionable – where Higher Interest Rate stated to be 70.02% per annum – where interest provisions in contract exceedingly complex – where outstanding interest capitalised – effective annual interest rate by date of hearing of 417% per annum – where borrowers had benefit of legal advice – interest "utterly crushing" – capitalisation provisions unconscionable – loan agreement void in part CONTRACTS – unjust contracts – Contracts Review

Act 1980 (NSW) – whether business contract – whether contract unjust

CONTRACT – construction – where literal application of formula for calculation of interest would result in very low rate of interest – whether literal construction absurd – provision construed in accordance with commercial common sense

NEGLIGENCE – legal practitioners – professional negligence – scope of oral retainer – whether solicitor adequately explained complex terms in loan agreement – whether breach causative of loss

Legislation Cited:

Australian Securities and Investments Commission Act 2001 (Cth), ss 12BB, 12CA, 12CB, 12CC, 12DA, 12GM
Civil Procedure Act 2005 (NSW), s 98
Contracts Review Act 1980 (NSW), ss 6, 7, 9
Competition and Consumer Act 2010 (Cth), s 139B, Sch 2 – Australian Consumer Law, ss 18, 20, 21, 22, 243
National Consumer Credit Protection Act 2009 (Cth), Sch 1 – National Credit Code, s 13
Civil Liability Act 2002 (NSW), Pt 4

Uniform Civil Procedure Rules 2005 (NSW), r 42.1

Cases Cited:

Abigroup Ltd v Sandtara Pty Ltd [2002] NSWCA 45
Andrews v Australia and 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
Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd [2017] NSWCA 99; 18 BPR 36,683
Australian Competition and Consumer Commission v Geowash Pty Ltd (subject to a deed of company arrangement) (No 3) [2019] FCA 72; (2019) 360 ALR 441
Awad v Twin Creeks Properties Pty Limited [2012] NSWCA 200
Balagiannis v Balagiannis [2022] NSWCA 18
Bank of Western Australia Ltd v Luo [2010] NSWSC 733

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337; [1982] HCA 24
Commercial Bank of Australia v Amadio (1983) 151 CLR 447; [1983] HCA 14
Commercial N Pty Ltd v Huang (Supreme Court (NSW), Henry J, 7 December 2022, unrep)
Custom Credit Corporation Ltd v Lynch [1993] 2 VR 469
David Securities Pty Ltd v Commonwealth Bank of Australia (1990) 23 FCR 1; [1990] FCA 186
Dodds v Kennedy (No 2) (2011) 42 WAR 16; [2011] WASCA 131
Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79
First Mortgage Capital Pty Ltd v Westpac Banking Corp Ltd [2021] NSWSC 1143
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22
Guardian Mortgages Pty Ltd v Miller [2004] NSWSC 1236
HomeSec Finance Express Pty Ltd v Richardson [2012] NSWSC 1375
Jin Lian Group Pty Ltd (In Liq) v ACapital Finance Pty Ltd [2021] NSWSC 931
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8
Kakavas v Crown Melbourne Ltd (2013) 250 CLR 392; [2013] HCA 25
Kellas-Sharpe v PSAL Ltd [2013] 2 Qd R 233; [2012] QCA 371
Kowalczuk v Accom Finance Pty Ltd (2008) 77 NSWLR 205; [2008] NSWCA 343
Lauvan Pty Ltd v Bega [2018] NSWSC 154; 330 FLR 1
Miwa Pty Ltd v Siantan Properties Pte Ltd [2011] NSWCA 297
Morlend Finance Corporation (Vic) Pty Ltd v Westendorp [1993] 2 VR 284
N & M Investments/Properties Pty Ltd v Australian Property Enterprise Pty Ltd [2022] NSWSC 1370
Nitopi v Nitopi (2022) 109 NSWLR 390; [2022] NSWCA 162
O'Dea v Allstates Leasing System (WA) Pty Ltd (1983) 152 CLR 359; [1983] HCA 3
Oak Capital Mortgage Fund Ltd v Dlakic [2019] NSWSC 1538

	Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11 Oxygen Funding Solutions Pty Ltd v Dick-Telfar [2020] NSWSC 582 Paciocco v Australia and New Zealand Banking Group Ltd (2016) 258 CLR 525; [2016] HCA 28 Perpetual Trustee Co Ltd v Burniston (No 2) [2012] WASC 383; 271 FLR 122 Perpetual Trustee Co Ltd v Khoshaba (2005) 14 BPR 26,639; [2006] NSWCA 41 Provident Capital Ltd v Papa (2013) 84 NSWLR 231; [2013] NSWCA 36 Quikfund (Australia) Pty Ltd v Airmark Consolidators Pty Ltd (2014) 222 FCR 13; [2014] FCAFC 70 Ringrow Pty Ltd v BP Australia Pty Ltd (2005) 224 CLR 656; [2005] HCA 71 Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq) (2019) 99 NSWLR 317; [2019] NSWCA 11 Steele-Smith v Liberty Financial Pty Ltd [2005] NSWSC 398 Stubbings v Jams 2 Pty Ltd [2022] HCA 6; 96 ALJR 271 Studer v Boettcher [2000] NSWCA 263 Superannuation & Corporate Services Pty Ltd v Turner [2020] NSWCA 246 Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315; [2003] HCA 57 Taylor v Stav Investments Pty Ltd as trustee for the Stav Investments Family Trust (No 2) [2023] NSWCA 322 Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52 Tonto Home Loans Australia Pty Ltd v Tavares [2011] NSWCA 389; 15 BPR 29,699 Watson v Foxman (1995) 49 NSWLR 315
Texts Cited:	NC Seddon & RA Bigwood, Cheshire & Fifoot Law of Contract (LexisNexis Butterworths, 11th ed, 2017)
Category:	Principal judgment
Parties:	Commercial N Pty Limited (Plaintiff/First Cross-Defendant) Connie Hsing-Yi Huang (First Defendant/First Cross-Claimant)

	Stephanie Wen-Jen Chien (Second Defendant/Second Cross-Claimant) National Australia Bank Limited (Third Defendant) Equity Lenders Pty Limited (Fourth Defendant) Peter Ronis trading as Shanahans Butlers Solicitors (Second Cross-Defendant)
Representation:	Counsel: HW Somerville (Plaintiff) JR Young (First and Second Defendants/Cross-Claimants) D Talintyre (Second Cross-Defendant) Solicitors: Summer Lawyers (Plaintiff) Badarne Lawyer (First and Second Defendants/Cross-Claimants) Yeldham Price O'Brien Lusk (Second/Cross-Defendant) Bangroves Lawyers (Fourth Defendant)
File Number(s):	2020/00240815
Publication Restriction:	Nil

JUDGMENT

1 In these proceedings, the plaintiff, Commercial N Pty Ltd (**Commercial N**), seeks a monetary judgment against the first and second defendants, Connie Hsing-Yi Huang and her adult daughter, Stephanie Wei-Jen Chien, and orders for possession and the sale of a property that Ms Huang and Ms Chien own in Burwood Road, Burwood (**Burwood Property**).

2 Commercial N's claim relies on an agreement made on 2 October 2019 as varied by Deed of Variation signed on 14 October 2019 that provided for Commercial N to advance the principal sum of $430,000 to T&C Excellent Pty Ltd (of which Ms Chien was the sole director), Ms Chien and Ms Huang (as the three borrowers) for a term of 26 weeks and to take a mortgage over the Burwood Property as security. The borrowers were required to make monthly interest payments over the term, with a lower interest rate of 0.35% per week (**Lower Interest Rate**) and a higher interest rate of 1.36% per week (**Higher Interest Rate**) specified in the mortgage schedule.

3 The money was advanced by Commercial N and used to discharge a short term loan from Detex Pty Ltd (**Detex**) that was secured by a caveat on the Burwood Property, and to pay mortgage arrears and outstanding water rates and fees to Commercial N. There were no surplus funds for the borrowers, who defaulted on their interest payments and have failed to repay the principal sum.

4 Ms Chien and Ms Huang accept that the principal sum of $430,000 needs to be repaid. However, they resist the relief sought by Commercial N.

5 In their defence and cross-claim, Ms Huang and Ms Chien allege that the interest claimed by Commercial N of 70.72% per annum compounding monthly is excessive and amounts to a penalty. They also allege that the agreement and Deed of Variation, which reduced the sum to be advanced from $588,000 to $430,000, are unenforceable and/or liable to be set aside by reason of Commercial N's misleading or deceptive and/or unconscionable conduct, in contravention of ss 12DA, 12CA or 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) or ss 18, 20 or 21 of Sch 2 of the *Competition and Consumer Act 2010* (Cth) (the Australian Consumer Law) (**ACL**), and/or as an unjust contract under the *Contracts Review Act 1980* (NSW).

6 Ms Huang and Ms Chien have also brought a cross-claim against Peter Ronis (the second cross-defendant), the solicitor who advised them about the agreement. They allege breaches of Mr Ronis' retainer and his duty of care by failing to protect their interests and adequately advise them about the agreement and Deed of Variation.

7 T&C Excellent is not a party to the proceedings; it was deregistered in January 2020. National Australia Bank Limited (**NAB**) and Equity Lenders Pty Ltd are the third and fourth defendants. They are the first mortgagee and a caveator of the Burwood Property respectively and have filed submitting appearances. In these reasons, I refer to Ms Huang and Ms Chien together as the Defendants.

8 The cases advanced by the parties changed somewhat over the course of the hearing and led to further hearing days and refinements of how the cases were put. Commercial N's interest claim was the subject of various iterations and a number of the parties' pleaded claims were not pressed.

Evidence and witnesses

9 Commercial N read affidavits from Hugo Ng and Morgan Ng, each of whom were cross-examined.

10 Hugo Ng is the director of Commercial N. Morgan Ng (Hugo Ng's brother) is a director of Mutual Mortgage Services Pty Ltd (**Mutual Mortgages**) and works as a loan manager for that entity. Mutual Mortgages trades as Mutual Support and operates as Commercial N's loan manager (T49, T63).

11 The Defendants read affidavits from Ms Huang and Ms Chien, who were cross-examined at some length. Ms Huang's affidavit was translated to her by an accredited interpreter and she gave oral evidence through a Mandarin translator.

12 Mr Ronis read an affidavit which he swore and an affidavit from Jenny Oliveric. Mr Ronis and Ms Oliveric were also cross-examined.

13 Mr Ronis was the principal of Shanahans Butlers Solicitors (**Shanahans**) in 2019. He was admitted as a solicitor on 31 August 2001 and was a consultant in property law at Shanahans when he gave evidence, having sold the business in November 2020. Ms Oliveric is a conveyancer employed by Shanahans. She assisted Mr Ronis and dealt with Ms Chien in relation to the transaction.

14 As will appear, there are factual disputes about the Defendants' knowledge and understanding of the Deed of Variation and mortgage and the events when they executed the documents at Shanahans' offices on 2 and 14 October 2019. Submissions were made about the reliability and credibility of some of the witnesses. In assessing the evidence and making my findings, I have had regard to my notes taken during the hearing, the transcript and the submissions of the parties. In view of the frailty of human memory and the parties' self-interest, I have also placed more weight on the contemporaneous documents to the extent they are available, the objective surrounding facts and the inherent probabilities and improbabilities of events: *Watson v Foxman* (1995) 49 NSWLR 315 at 319; *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at [28]–[31].

15 I generally accept the evidence of Hugo Ng and Morgan Ng. They were straightforward witnesses who made appropriate concessions. Hugo Ng acknowledged that he did not have any direct involvement or knowledge of the Defendants' loan application, the agreement or the Deed of Variation. Morgan Ng had more involvement, including instructing Commercial N's lawyers, Summer Lawyers, in relation to the transaction but had little recall of some of the events.

16 While accepting that memories fade and Ms Chien was understandably concerned about her and her mother's financial predicament, overall, I formed the impression that Ms Chien was an unreliable and unsatisfactory witness.

17 Ms Chien failed to refer in her affidavit evidence to any of the emails and text messages she received and sent to Mutual Support and in cross-examination said she could not recall them. Her lack of recall about those communications and about other matters, such as what Mr Ronis said to her at the 2 October meeting about the items recorded in his file note (including Ms Chien's request for a change to the payment arrangements) and not knowing that T&C Excellent had been deregistered, was at odds with her ability to recall new matters in cross-examination that assisted her case, such as her having told Mr Ronis that her mother did not speak, write or read English (T194), having discussed the reduction of the loan with "Fay" and having told Mutual Support that the loan amount had been reduced without her understanding (T125). Her evidence that she had a "few, not a lot" of communications with Mutual Support but lots of discussions with Fay (T125) was not supported by the contemporaneous documents and her suggestion during cross-examination that her ex-husband had "hack[ed] into my phone" was not believable (T112, T119).

18 Ms Chien's evidence (and that of Ms Huang) about the meeting with Mr Ronis on 2 October 2019 lacked credibility for the reasons explained at [91]–[94] below, as did her evidence that she had no idea what she was signing when she executed the Deed of Variation on 14 October, she did not know that the amount under the loan had been reduced to $430,000 and that was the only sum to be advanced (as described at [121]–[130]).

19 Ms Chien also hesitated on occasion and came across as evasive and trying to answer in terms that were favourable to her case, rather than being frank and candid. For example, in her evidence about Ms Huang's involvement in T&C Excellent, Ms Chien denied that she knew Ms Huang had been a director, suggested that her ex-husband may have lodged false documents in respect of the appointment, and explained that Ms Huang simply followed her to meetings with the company accountant and only fulfilled the role by looking after Ms Chien's children. This evidence was unconvincing given Ms Huang had been a director for 2 years and signed minutes of a meeting of directors at which Ms Chien and her husband were also present.

20 As to Ms Huang, during cross-examination, she seemed genuinely distressed about the financial implications of the proceedings. However, Ms Huang's evidence was also unsatisfactory in some material respects.

21 Ms Huang's initial affidavit had been translated to her by Ms Chien and according to Ms Chien's evidence, Ms Chien wrote it with Ms Huang and their solicitor (T167.32–48), giving rise to the suggestion that they had conferred about the details of Ms Huang's evidence. This, together with Ms Huang's evidence that she could not communicate with her solicitor and the fact that she signed documents written in English in Ms Chien's presence, highlighted that Ms Huang relied on and was content to sign documents and attend to legal matters with Ms Chien as her translator.

22 I consider that Ms Huang was not entirely frank in giving evidence, including about what she understood when she signed the documents in this case. Her evidence that she did not know what a mortgage was before the commencement of these proceedings and did not believe the documents she signed would have consequences beyond a mere application for a loan to repay the loan to Detex was implausible having regard to her experience with loans and mortgages over properties, the fact that she signed the indicative letter of offer (which set out the main terms of the loan) and her evidence in cross-examination that she knew that the Burwood property would be security for the loan and if it was not paid back, the lender would have recourse to it to satisfy the debt and that interest would have to be paid (T254.30–36).

23 Ms Huang's evidence that she had no business knowledge whatsoever also lacked credibility given that she was the sole director and company secretary of T&C Excellent for a period and helped her daughter financially (T222.27–45).

24 Like Ms Chien, Ms Huang answered questions in a non-responsive and seemingly self-serving manner on occasion, such as referring to her age, her lack of understanding and English-speaking ability and lack of business acumen when asked about the transaction (T223.5, T247.7–8, T228.46–47).

25 As to Mr Ronis, I generally accept his evidence. He came across as seeking to provide the best and most accurate recollection of what took place at the relevant meetings. He candidly acknowledged that he did not have an independent recollection of everything that was said when he met the Defendants, such as whether he explained the operation of particular clauses of the mortgage memorandum, such as cl 5.12.

26 There were aspects of Mr Ronis' evidence that were inconsistent and not entirely satisfactory. Mr Ronis' evidence that Ms Huang did not talk at the meeting (other than to exchange pleasantries) makes it hard to see the basis on which he could certify that Ms Huang told him she had read and understood the effect of the mortgage and its terms, a matter which was not to his credit. Mr Ronis' evidence in cross-examination that he drew the Defendants' attention to the lower amount that would be provided under the Deed of Variation (T315.22–42) was also inconsistent with his affidavit evidence that he did not specifically draw their attention to that matter (at [34]). He could not satisfactorily explain this and then said he could not recall what he said about the Deed of Variation.

27 However, where there is a conflict, I have preferred the evidence given by Mr Ronis and Ms Oliveric to that of Ms Chien and Ms Huang. Ms Oliveric came across as a truthful witness who endeavoured to give evidence to the best of her recollection. She made concessions where appropriate about her lack of recall and notes and I accept her evidence. In my view, Mr Ronis and Ms Oliveric's evidence was more consistent and inherently more plausible having regard to the contemporaneous documents, the logic of events and the issues with the Defendants' evidence outlined above.

28 Two other matters are notable about the evidence.

29 The first is that “Fay” (no last name), an account manager at MaxFunding, and the person with whom Ms Chien says she spoke on various occasions and who the Defendants claim played an integral role in their loan application process did not give evidence. There were also very few documents in evidence from Fay or relating to MaxFunding, a business which describes itself as a “business fund facilitator and business finance fund provider”, and there were no call records to corroborate Ms Chien’s evidence of her many calls with Fay.

30 I do not draw an inference pursuant to *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8 from the Defendants’ failure to call Fay in the context where they claim she behaved inappropriately by misleading Ms Chien, and by extension, Ms Huang. Commercial N could have called her, but I do not consider it was necessary for it to do so having regard to Commercial N’s case that MaxFunding operated as a mortgage broker for the Defendants and was not acting on behalf of Commercial N. However, Fay’s absence and the unreliability of Ms Chien’s evidence has led me to not accept Ms Chien’s testimony about what she and Fay discussed unless it is supported by the objective evidence or against the Defendants’ interest. The absence of Fay and documents relating to MaxFunding also raises issues for the Defendants, who have the onus of establishing, on the balance of probabilities, that Fay was Commercial N’s employee, agent or representative when she dealt with Ms Chien.

31 The second matter is that it was apparent that Ms Huang had little involvement in the transaction other than signing documents. All of the communications in relation to the loan, including emails and phone calls with Fay, Shanahans and Mutual Support, were with Ms Chien and not Ms Huang. It was also apparent that Ms Huang relied on what Ms Chien told her about the loan. Those matters, her appearance in the witness box and the evidence that another loan facility had been translated to Ms Huang in Mandarin, supports the Defendants’ contention that Ms Huang had a limited command of English. While there was some merit to the submission advanced by Commercial N and Mr Ronis that Ms Huang likely understood more English that her and Ms Chien’s evidence

suggested, which was it did not exceed her “name, address etc” and if Ms Huang was asked a question in English she would not understand (T221.49), based on Ms Huang answering a question in cross-examination before the question was translated into Mandarin (T246.37–T247.17), overall, I am satisfied that Ms Huang lacked the ability to understand an explanation about or read legal documents without the assistance of an interpreter.

Facts

32 The following sets out a narrative of the facts, based on the affidavit, oral and documentary evidence and includes findings on factual disputes. Unless otherwise indicated, I am satisfied of the following matters.

The Defendants' background

33 Ms Huang and Ms Chien were born in Taiwan in 1954 and 1979 respectively. In 1994, they migrated to Australia. Ms Huang's husband followed in 1997. He died in 2010.

34 Ms Huang deposes that she has very elementary education and her English language skills are limited. She gives evidence that she has always been a housewife, has never worked and has no business experience whatsoever.

35 Ms Chien's evidence did not detail her educational or work background. In cross-examination, she gave evidence that she had experience in running a café business before T&C Excellent was established in August 2015.

36 Ms Chien described T&C Excellent as a company that provided information technology consultancy services, including to government entities such as to Transport NSW, that had been established by her and run with her former husband, Yensheng Lin.

37 What became clear from the evidence is that Ms Huang was not inexperienced in business or with loans and mortgages prior to executing the agreement with Commercial N.

38 Ms Huang had been appointed a director of T&C Excellent on 20 September 2016 and became the sole director and company secretary on 15 December 2016, upon Mr Lin ceasing as a director and the secretary. Ms Huang

remained the sole director and company secretary until 17 December 2018, when Ms Chien was appointed to them.

39 Ms Huang's evidence also referred to having purchased properties in Australia for 20 to 30 years and obtaining loans from the Commonwealth Bank, Westpac and ANZ. One of those properties was in Roseville and, according to Ms Chien, was subject to the mortgage to the Commonwealth Bank (T123.10–17). Ms Huang accepted that the bank loans had been secured by mortgages and she understood that a mortgage secured the obligation to repay the money loaned against a property, although she said that the loan and mortgage documents that she signed on those occasions had been explained to her in Mandarin (T230.25-T231.32).

40 On a date unknown, but I infer was on or around 8 March 2019, Ms Huang and Ms Chien, in their capacities as directors of T&C Excellent, signed minutes of a meeting of directors which record that: T&C Excellent requested a commercial loan from Detex for the purposes of working capital; the company accepted the terms of the finance documents tabled for the board's discussion; and Ms Huang and Ms Chien were authorised to accept, sign and deliver the documents.

41 The Defendants each provided guarantees in respect of a Secured Loan Agreement between T&C Excellent and Detex dated 12 March 2019 (**Detex Loan**).

42 The Detex Loan provided for Detex to loan T&C Excellent the principal sum of $350,000 for a term of six months (extendable for a further six months if agreed in writing) at an interest rate of 15% per annum. The Detex Loan was secured against the Burwood Property and Detex lodged a caveat on title in respect of its interest.

43 On 8 March 2019, the Defendants were provided independent legal advice in relation to the Detex Loan and their role as guarantors by a solicitor, Sarah Gao of Summit Legal. The Independent Legal Advice Certificates signed by Ms Gao and both Defendants record that Ms Gao explained the loan documentation to the "Guarantors" in Mandarin, which included an explanation

of the Secured Loan Agreement, a General Security Agreement, a Guarantee and Indemnity, and an Authority.

44 Ms Huang accepted that she understood the nature and terms of the Detex Loan, including that the Burwood Property was security for the loan, when she signed the documents (T251.32–T252.14).

45 Having regard to the above matters, I am satisfied and find that Ms Huang understood both what a mortgage was and the concept of real property security for a loan before entering the agreement with Commercial N, in the sense that she understood that a mortgage involved a loan (for the purchase of a property or to raise funds for other purposes, such as for a business) where the lender has the right to take and sell property owned by Ms Huang if the money borrowed plus interest was not repaid in accordance with the agreed terms.

September 2019: application for loan

46 In September 2019, Ms Chien made an online application for a business loan of $560,000 through a website run by MaxFunding (T146).

47 The loan application she made records the “Purpose of Loan” as “Business cash flow.” In the section headed “Business Details”, T&C Excellent is identified as the business entity, “Trading Over 6 Months” with “Average Total Sales” of “$20,000 Monthly” in “Consulting”, and the “Repayment Ability” as “$2000.00 Monthly” from “Business Income”. The Burwood Property is identified in the “Assets” section, as “residential” with a current value of $3,000,000 and $1,480,000 owing to NAB.

48 The Annexure to the loan application submitted by Ms Chien on 20 September 2019 identifies each of the Defendants and T&C Excellent as the three borrowers. It also records: that “Connie can communicate in basic English”; the “Loan Purpose” as being “To pay off the caveat due end of Sept 2019” (which I infer is a reference to the Detex Loan),“Pay of (sic) business ATO debt” and “Purchase equipment for company”; the “Exit Strategy” as “Refinance property after credit record restored”; and in relation to “Assets”, “Roseville property sold 3 years ago with no mortgage arrear at $3.6 m, and used the sale to purchase current Burwood Property”.

49 MaxFunding referred the loan application to Commercial N by sending it to Mutual Mortgages (T73.39–40).

50 Ms Chien told Ms Huang that the loan application was made as she needed to borrow money to pay back the Detex Loan (T149.9–15).

51 On 20 September 2019, Commercial N issued an Indicative Letter of Offer (**ILO**) to T&C Excellent and the Defendants in relation to a loan of $588,000 for a term of 26 weeks (approximately six months) from drawdown. Mutual Mortgages issued the ILO on behalf of Commercial N. The ILO stated that the application for finance had been approved subject to final verification and was indicative only, based on the documents and information that "you (or your Agent)" have provided. The Terms and Conditions included the following: a "Facility Table" that identified a range of payments, including to Detex of $350,000 and "Net to You" of $210,000 (cl 1); "Exit Strategy" as "Payout of the loan will be from Business Income and Property Refinance" (cl 4); "Purpose of Loan … must be predominantly for business and/or investment purposes" (cl 5); "Repayments" as a "weekly loan repayment" of interest of $2,052.37 and a balloon payment of $588,000 after 26 weeks (cl 6); "Interest Rate" as a "Lower Rate per week" of 0.35% and a "Higher Rate per week" of "1.36% (Upon event of default or missed payment)" (cl 7); and "Proposed Security" as a Registered second mortgage over the Burwood Property with a Maximum Loan Value Ratio (LVR) not to exceed 71% (cll 8 and 9).

52 Ms Chien accepted the ILO by signing on behalf of T&C Excellent and in her personal capacity. Ms Huang also accepted by signing her name as borrower in Chinese characters.

53 In cross-examination, Ms Huang did not deny it was her signature but said she did not know what the document is (T252.20–35). I find that Ms Huang signed the ILO having been told by Ms Chien that the document had to be signed by her as part of the application process for the loan to pay out the Detex Loan.

54 On around 23 September, a Declaration of Commercial Interest form dated 20 September 2019, which was addressed to Commercial N as lender, from Ms Huang as co-borrower, was signed by Ms Huang and witnessed by a Postal

Manager of the Burwood Post Office. The Declaration of Commercial Interest form signed by Ms Huang states:

> "I/We acknowledge that:
>
> -- I/We acknowledge incurring obligations and giving rights under this Agreement for valuable consideration received from the Lender.
>
> -- I/We have received independent legal advice regarding the loan offer.
>
> -- I/We have received accountant's advice regarding the loan offer.
>
> -- I/We understand that I may lose security if the loan is in default.
>
> -- I/We will receive part of the money from the loan and from the business.
>
> -- My/Our role in the business is a (unregistered) silent working partner.
>
> I/We acknowledge that Commercial N is relying on the correctness of the above representations and statements and that it is on the basis of those representations and statements that Commercial N has agreed to provide the credit to the Borrower.
>
> I/We have signed this Declaration first before signing any other loan documents.
>
> I/We hereby declare that the information given above is correct."

55 Defendants' Counsel submits that the Court should find that Ms Huang did not sign the Declaration based on her evidence in re-examination that she had never seen the Declaration of Commercial Interest form and it was not her signature (T260). I am not persuaded to make that finding having regard to: Ms Huang's affidavit evidence that she signed documents that Ms Chien asked her to sign; her evidence in cross-examination that she signed the Declaration of Interest document, that she thought that her accountant asked her to and that she attended the Burwood Post Office to sign an "application, letter or form" (T235.13–T236.23); and the fact that Ms Huang's driver's licence number (which the Postal Manager witness examined) appears on the Declaration of Commercial Interest form. Ms Chien also gave evidence that she was present when her mother signed the document at Burwood Post Office and recognised the signature as her mother's (T151.50–T152.6). That said, I cannot exclude the possibility that it was Ms Chien, and not Ms Huang, who signed the Declaration of Commercial Interest form (in Ms Huang's name) given that Ms Chien was present when it was signed, as evidenced by Ms Chien's driver's licence number also appearing on the form.

56 Irrespective of whether Ms Huang or Ms Chien signed, the Declaration was false as Ms Huang had not received independent legal advice or accountant's advice in relation to the ILO and, according to the Defendants' own evidence, Ms Huang was not at that time, a silent partner in T&C Excellent's business.

57 According to Ms Chien, she told Ms Huang that she needed to sign the Declaration as part of the process the application she had made online and she did not translate everything on the Declaration to Ms Huang (T151.16–48).

58 On 26 September 2019, Ms Chien received an email from Fay at MaxFunding which states that they were ready to proceed with the application, asks Ms Chien to advise whether she preferred a process that involved a valuation only (option 1) or a valuation and contract together (option 2) (which involved a faster process but if the valuation returned was short and they were no longer able to provide any funding, the borrowers would be liable for the "valuation, legal and any other associated cost") and contact details for Ms Huang. Ms Chien responded to Fay by email advising that she preferred option 2 and providing a mobile contact number for Ms Huang.

59 Ms Chien had deposed that, shortly after, Fay called Ms Huang who passed the phone to Ms Chien, who told Fay that her mother did not speak English and they needed to communicate with Ms Chien about the loan. Ms Chien also said she had a further telephone conversation with Fay on 30 September 2019 in which Fay said that the loan documents were ready to be sent, Ms Chien asked them to be sent to her as she wanted them to be explained to her mother because she did not speak English and Fay said the documents could only be sent to the Defendants' solicitor and Ms Chien needed to nominate a solicitor from a list that Fay would send her. I accept it is likely that Ms Chien and Fay had a discussion about the need for Ms Chien to execute the loan documents before a solicitor and that Fay said she would assist Ms Chien in identifying a solicitor in the area. However, I find Ms Chien's evidence that she told Fay that her mother did not speak English and that Fay told her she had to choose a solicitor from the list that Fay provided to be unconvincing, particularly having regard to the terms of Fay's email below, and I reject her evidence about those matters.

60 On 30 September 2019, at 10.46 am, Ms Chien received an email from Fay at MaxFunding stating they had completed research on available solicitors nearby and providing names and quotes for three solicitors, one of which was Shanahans, at $400 per hour plus GST, who were said to be located at a Strathfield address. The email asked Ms Chien to contact a solicitor "individually", to complete their own due diligence and advise their choice to MaxFunding for contract execution.

61 Ms Chien deposes that, on 30 September, she nominated Shanahans as they had the cheapest rates and she telephoned Fay and told Fay of her nomination and Fay said the loan documents would be sent to Shanahans and Ms Chien and her mother needed to go to their office to sign them.

62 At 4.57pm that day, Mutual Support sent an email to Ms Chien advising that "our credit agreement papers are now ready", their solicitor would email the paperwork to her nominated solicitor within 1–2 hours and stating that "To ensure you can receive the funds as soon as possible, please find attached the 'Settlement Guide' (which is not in evidence). This email and all other emails sent to Ms Chien by Mutual Support were sent from the "Settlement Team" (with no other name) to the same email address Ms Chien had used in the emails between her and Fay.

63 At 5.20pm, Mr Balaban, a solicitor from Summer Lawyers, acting on behalf of Commercial N, sent an email to Mr Ronis advising that they acted for the lender, Commercial N. The email stated that he understood that Mr Ronis was acting for the "borrower/guarantor" (referred to as the debtors), who were identified as T&C Excellent and the Defendants.

64 Summer Lawyers' email to Mr Ronis attached security documents for execution and asked Mr Ronis to note that Commercial N had strict requirements that: each of the debtors receive legal advice on the security documents separate from any other debtors; satisfactory evidence must be provided that the legal advice had been given, in either the form included with the security documents schedules or an approved form from the relevant state law society; and a photograph must be provided of the debtors taken at the time of signing the security documents certified by the same solicitor providing the independent

legal advice. The documents attached to the Summer Lawyers' email were described as: a Mortgage Summer Lawyers Memorandum 2017; Schedule A; Schedule B; Cheque Directions; Authority and Direction; and Borrower's and Guarantor's ancillary documents.

65 At 5.47pm, Mutual Support sent a further email to Ms Chien that was addressed to "Stephanie and Connie", which referred to the credit agreement being sent to their nominated solicitor, a range of things that "can be done", which included asking them to complete forms in relation to the NAB Mortgage and noting that they would pay out the Detex caveat for "your security property" at Burwood, and asked them to prepare and take with them to their solicitor various documents (including original bank statements, 100 points of ID and Council rates) and to ask their solicitor to scan through copies of the executed mortgage and security documents to their lawyers, Summer Lawyers, for review.

66 Ms Chien deposes that she and her mother went to the Strathfield address of Shanahans on 1 October 2019 but there was no solicitor there. She says she telephoned Shanahans and had a conversation with the receptionist who informed her that their office was in Bankstown, and that Ms Chien could not come to the office at that time as Mr Ronis was away but that they could come the next morning. I consider that evidence likely based on the appointment in Mr Ronis' calendar for him to meet with the Defendants at 8.30am the next day.

67 Ms Chien also says she asked whether the solicitor in the office spoke Mandarin and she was told "no, they did not". Ms Chien says she then spoke to Fay and told her she had contacted Shanahans and Fay said that she did not need a solicitor that spoke Mandarin as they only needed to sign the documents before a solicitor, which had already been sent to Shanahans. For the reasons set out at [30] and in the absence of any corroborating evidence, I do not accept Ms Chien's evidence about her inquiry with Shanahans and what Fay said in relation to a Mandarin speaker.

2 October 2019: Defendants meet Mr Ronis and execute loan and mortgage documents

68 On the morning of 2 October 2019, Ms Huang and Ms Chien attended the Bankstown office of Shanahans and met with Mr Ronis. The meeting was scheduled for 8.30am in Mr Ronis' calendar.

69 At the meeting, the Defendants signed the documents that required execution by them personally as borrowers, Ms Chien signed on behalf of T&C Excellent, in her capacity as its director, and Mr Ronis signed them as the witness. Mr Ronis also signed Australian Legal Practitioner's Certificates in respect of advice given to each of Ms Chien and Ms Huang and Identification Verifications Forms, and obtained copies of the Defendants' passports and driver's licences and certified them.

70 At 9.27am, Mr Ronis took a photograph on his iPad of Ms Chien and Ms Huang holding their passports. The meeting ended shortly after; Mr Ronis had another meeting at 9.30am.

71 At 10.43am that day, Mr Ronis prepared a file note of his attendance on the Defendants, which records that: Mr Ronis went through the documents emailed to him from Summer Lawyers; Ms Chien said it was urgent and wanted to settle as soon as possible; Ms Chien was the sole director of T&C Excellent; Mr Ronis explained to both of them the reason why Ms Huang was there; the lender was securing the debt by way of a caveat over the Burwood Property; there was discussion about the fees to ensure that there were enough funds required after fees were deducted and the caveat paid out; after finishing going through the documents, Mr Ronis told Ms Chien that he would give her a list of further documents required; and Mr Ronis took a photograph of the Defendants on his iPad.

Documents executed on 2 October

72 The documents that each of Ms Chien and Ms Huang executed and Mr Ronis witnessed on 2 October are, as follows:

(1) Mortgage which identifies Ms Huang and Ms Chien as Mortgagor and Commercial N as Mortgagee, contains title reference 3/XXXX82 and states:

"The mortgagor mortgages the estate and/or interest in land specified in this mortgage to the mortgagee as security for the debt or liability described in the terms and conditions set out or referred to in this mortgage, and covenants with the mortgagee to comply with those terms and conditions.

Terms and Conditions of this Mortgage

(a) Document Reference AM544278P

(b) Additional terms and conditions

Schedule A

Commencement Date

Final Repayment Date On the same day which is 26 weeks after the Commencement Date.

Parties

Lender 1 Name: Commercial N Pty Ltd ACN 627 478 997

Address: C/- Mutual Support ('Manager')

…

Borrower 1 Name: T & C Excellent Pty Ltd ACN 607 430 562

…

Borrower 2 Name: Stephanie Wei-Jen Chien

…

Borrower 3 Name: Connie Hsing-Yi Huang

…

Mortgage Details

Principal Amount $588,000.00

Line of Credit Amount $560,000.00 (at the Lender's discretion)

Lower Rate of Interest 0.35 % per week ($2,052.37)

Higher Rate of Interest 1.36 % per week

Date for the Payment of Interest On the same day of each month as the Commencement Date.

Specified Interest Regime

Interest Regime B (clause 5.12)"

(2) Schedules A and B, both of which contain a footnote that they were a schedule to "Summer Lawyers 2017 Memorandum" and were to be interpreted as though all of the provisions set out in that memorandum are set out in the Schedule. Schedule A repeated much of what was set out in the Mortgage including the Lower Rate of Interest of 0.35% per week ($2,052.37), the Higher Rate of Interest of 1.36% per week, and the Specified Interest Regime as Interest Regime B (clause 5.12). Schedule B set out a list of various fees.

(3) Declarations (identified as "Schedule C") under s 13 of Sch 1 to the National Consumer Credit Protection Act 2009 (Cth) (**National Credit Code**) by which each of the Defendants declared that the credit to be provided to them is to be applied wholly or predominantly for business purposes or investment purposes other than investment in residential property, and states:

> "The Principal Amount will be used for business operating cash flow purposes for a consulting business."

(4) Debtor's Advice Declarations (identified as "Schedule D") in which each of the Defendants declared and acknowledged that: they understood the terms of the Mortgage and their liability both financial and legal; the Mortgage had been freely and voluntarily executed by them; they had had the opportunity of obtaining and did obtain legal advice prior to executing the Mortgage as to its legal effect and their obligations under it; they were aware that the lender relies on the statements in the declaration; and they had considered and understood that the provisions of the Mortgage will have a financial impact upon them if enforced by the lender.

(5) Cheque Directions that state that the Borrowers authorised Summer Lawyers to pay the Principal Amount to: Commercial N in relation to fees of $28,000; Detex for a caveat payout of $350,000; T&C Excellent of $126,000 and Ms Huang of $84,000.

(6) Powers of Attorney appointing Paul Reese, Solicitor Director of Summer Lawyers, as attorney for the purpose of carrying out and giving force and effect to the "Summer Lawyers 2017 Memorandum".

(7) Direct Debit Request signed by Ms Chien in relation to T&C Excellent's account that provided for weekly payments by way of a first debit of $2,057.87 and then regular debits of $2,053.33.

(8) Authority and Direction forms, Client Authorisation forms and Politically Exposed Person Statements that declare they are not considered a politically exposed person and the source of their wealth/assets is business activities.

73 The Australian Legal Practitioner's Certificates (identified as Schedule E) that Mr Ronis signed in respect of each of Ms Chien and Ms Huang, relevantly provide:

> "I, the Australian Legal Practitioner named above do hereby certify:
>
> 1. I am satisfied that the person named above and the person who has executed the Mortgage is the same person and my means of so identifying the signatory is contained within the attached Combined Appointment as Identified Certificate and Identification Certificate.
>
> 2. I have explained to the signatory the nature and the effect of the Mortgage to be executed by him/her and each of its terms and the legal effect of the Mortgage and its terms.
>
> 3. That the signatory told me he/she had:

(a) read and understood the effect of the Mortgage and its terms; and

(b) understood the financial risks to him/her of signing the Mortgage.

4. That the signatory told me that he/she signed the Mortgage of his/her own free will.

5. That following the steps in paragraphs 1 to 4 above, the Mortgage was then signed by the signatory in my presence and witnessed by me."

Mortgage Memorandum

74 The "Summer Lawyers 2017 Memorandum" (**Memorandum**) contains the mortgage common provisions for NSW, Registration Number AM544278P. It relevantly provides that:

(a) Schedules A, B, C, D and E constitute Schedules to the Memorandum and form part of the Mortgage: cl 1.1;

(b) the Mortgagor grants to the Lender (Commercial N) a Mortgage of the Mortgaged Property to secure payment of the Secured Money, which is defined to include the Principal Amount and any interest and fees: cll 1.1 and 2.1; and

(c) the Debtor (defined as Borrower or Mortgagor) covenants to pay the Secured Money to the Lender in accordance with the terms of this Mortgage and by the end of the Term or if no date is specified, immediately on demand: cl 3.1.

75 Term is defined to mean the period from the Commencement Date (which is defined to mean the earlier of the date specified in Schedule A or when the Principal Amount is advanced to the Lender) to the Final Repayment Date, which is 26 weeks from the Commencement Date: cl 1.1.

76 As no date was specified in Schedule A, the Commencement Date is the day that the Principal Sum is advanced which, as set out at [145_Ref157607066], was on 18 October 2019.

77 Clause 5 deals with the payment of interest and fees and relevantly includes cl 5.12, which provides as follows:

"5.12 If the Specified Interest Regime applicable to this Mortgage is Interest Regime B:

(a) the Debtor shall pay Interest to the Lender monthly in arrears on the Date for the Payment of Interest until the Outstanding Interest is paid in full;

(b) and, the Debtor fails to pay Interest on the Date for the Payment of Interest, then:

(i) the Debtor shall be liable to pay Interest on the Outstanding Interest at the Higher Interest Rate compounding monthly on the Date for the Payment of Interest until the Outstanding Interest is paid in full; and

(ii) the Interest on the Outstanding Interest compounded on the basis specified in paragraph (i) above, shall become part of the Secured Money as soon as it compounds."

78 Clause 5 also provides that:

(a) Interest to be paid by the Debtor shall at all times be the Higher Interest Amount unless the Lender notifies that the Debtor that the Lower Interest Amount is payable by the Debtor for any Interest Period: cl 5.3;

(b) the Higher Interest Amount and Lower Interest Amount are calculated by reference to formulae that both provide for outstanding interest to form part of the Secured Money on which interest is to be paid and by reference to the Higher Interest Rate and Lower Interest Rate respectively: cll 5.5 and 5.6;

(c) the Higher Interest Amount is payable in circumstances where the Debtor has failed to pay any amount due under the Mortgage, failed to comply with any Obligations or an Event of Default has occurred: cll 5.7 and 5.9; and

(d) the Specified Interest Regime governs the calculation and payment of any Interest: cl 5.10

79 Higher Interest Rate and Lower Interest Rate mean the higher rate of interest and lower rate of interest specified in Schedule A (cl 1.1) which, in this case, are 1.36% per week and 0.35% per week respectively.

80 Under cl 18.1 of the Memorandum, an Event of Default is deemed to have occurred on the occurrence of one or more of the events in cl 18.2, which include, the Debtor failing to pay any Secured Money in accordance with the Mortgage.

81 Where an Event of Default occurs, the Lender may: demand the immediate payment to it of the Secured Money which the Debtor is obliged to repay in full in accordance with that demand; exercise any right, power or privilege conferred as a Mortgagee by this Mortgage (whether under any legislation or at common law, or in equity); take possession of and eject any occupants from the Mortgaged Property; and sell, assign, transfer, dispose of, or exchange the Mortgaged Property: cl 18.3.

Further findings about the 2 October meeting

82 According to Ms Chien and Ms Huang, the meeting only lasted 15 minutes. They say that Mr Ronis told them he was busy and they needed to sign the documents very quickly, then he produced a large number of documents and asked them to sign them and only indicated where to sign. According to their evidence, Mr Ronis did not explain anything about the documents when they were signing and just said, “sign here[,] sign here”, and he did not ask them (and they did not tell him) whether they had read and understood the mortgage and its terms or the financial risk in signing it.

83 Ms Chien gave evidence in cross-examination that she told Mr Ronis that Ms Huang did not speak English and asked him to explain the contract but he said he was in a hurry and “you know that you’re borrowing money” (T174.31–32). She also said that he didn’t give them copies of the documents. Ms Huang says she did not ask any questions because she felt pressured about the documents they were signing and she did not know what she was signing although she understood that the documents were in relation to a loan application for the repayment of the Detex Loan.

84 According to Mr Ronis, the meeting started at 8.30am. He recalled that the Defendants arrived on time, noting that he does not usually take appointments that early in the morning. He says he went through his usual process that he had developed when delivering advice to borrowers or guarantors.

85 According to Mr Ronis’ process and his evidence, Mr Ronis printed out two copies of the documents he was emailed by Summer Lawyers and separated them into piles; he took one pile of the documents (the client copy) and went through them with the Defendants; he marked the documents by highlighting or making notes next to the important matters to which he had drawn their attention, such as the principal amount, interest rates and upfront fees, and marking an “x” next to items of concern, such as penalty clauses and parts which he thought they should remember, such as default procedures. He also says he sought to ensure the clients understood the advice they have been given by asking if they had any further questions; he took the Defendants through each place they had to sign and went through the documents and

signed as a witness to each signature; and gave the copy on which he made various marks and notes to the Defendants to take away with them.

86 Mr Ronis says that: he pointed out the lower and higher interest rates in Schedule A, the term of 26 weeks and the advance of $588,000; he told them the lower rate of interest was payable and there was a discussion about repayments, noting that the documents provided for payments of around $2000 per week and he discussed a weekly and monthly scenario with Ms Chien; he explained what the security meant and they would have to make repayments even if the company was unable to; they discussed the fees and Cheque Direction to ensure there were enough funds for payment of fees and the caveat had been paid, and highlighted there would be funds over; he explained that both of them were also named as borrower and guarantor in the documents because they both owned the Burwood property which was security for the loan and he talked about Ms Huang's name on the title and explained that if there was a problem with the loan, her share would be affected as the lender had security over the property.

87 Mr Ronis said he went through the mortgage Memorandum by going through the headings and identifying matters of importance and highlighted the default provisions. Mr Ronis could not recall discussing the Specified Interest Regime in cl 5.12, the formula in cl 5 or what made the interest rate go beyond the Higher Interest Rate of 70.72% per annum, but recalled explaining that the higher rate of interest would apply if they were in default and showed them the higher rate of 1.35% per week.

88 Mr Ronis said that Ms Chien asked questions and responded to English and although Ms Huang did not speak during the conference, she said hello and introduced and he believed that she understood because when he spoke to her, such as when he explained the interest rates, she nodded and smiled, and had no difficulty following instructions. He described Ms Huang as "a submissive participant… wasn't mute… but she - she did not – like, she was a submissive person in - in - in the conference" and rejected that she did not understand.

89 I prefer Mr Ronis' evidence to that of the Defendants and find that their meeting started at 8.30am, lasted until just after 9.27am and during the meeting, Mr Ronis explained the nature and effect of the documents and the transaction in the manner outlined at [84_Ref157607112]–[88_Ref157607128] above.

90 The Defendants' evidence about the length of the meeting was not convincing in light of the scheduled 8.30am appointment with Mr Ronis and the photograph taken of them at 9.37am. Ms Chien's attempted explanation in cross-examination that she could not attend a meeting at 8.30am because she had to take her children to school was also shown to be incorrect given it was accepted by her counsel to be a school holiday that day (T157.8–19, T159.26–47).

91 In my view, Mr Ronis' evidence about what he discussed at the meeting by reference to his standard process was more plausible than the Defendants' evidence and more consistent with the contemporaneous documents, particularly Mr Ronis file note and the circumstances at that time. The file note may not be very detailed, but it supports his evidence that he provided the Defendants with an explanation of the key terms of the loan and mortgage documents, including the periods for repayment (weekly and monthly) and the Burwood property being used as security for the loan, he explained there was financial exposure and risk to both Ms Chien and Ms Huang and told them that they would need to provide further documents for settlement, which Ms Chien had indicated was urgent.

92 The impression sought to be created by the Defendants' evidence that they did not receive any explanation or have an understanding of what they signed is also at odds with the certifications they and Mr Ronis signed, with Mr Ronis' obvious function being to provide advice and satisfy himself that the Defendants' understood and agreed to what they were signing. Even accepting that Ms Huang did not expressly tell Mr Ronis in English that she had read the documents and understood them, I am persuaded that Mr Ronis explained the Mortgage and other documents to the Defendants. In particular, I am satisfied that Mr Ronis explained the requirement to pay interest during the 26 week term based on the Lower Interest Rate, that the Higher Interest Rate of 1.36%

per week would be payable in the event of any default in payment and that Commercial N was taking a mortgage over the Burwood Property as security for repayment which could be enforced in the event of default. As it was identified as the Specified Interest Regime in the Mortgage and Schedule A and based on Mr Ronis' evidence of his usual practice and his approach that day, I also find it likely that Mr Ronis referred the Defendants to cl 5.12 of the Memorandum and explained it to them, in the sense that he told them that it provided for the Higher Interest Rate to apply to outstanding interest compounding monthly if they defaulted on their interest payments, although I consider it unlikely that that he explained the capitalisation of outstanding interest in the formulae in cl 5.5 and 5.6 or the financial impact those matters would have on the amount of Interest payable under the agreement.

93 I accept Mr Ronis' evidence that he genuinely believed that Ms Huang understood by nodding and communicating non-verbally as he was going through the documents, including by reference to the dollar amounts and the weekly interest rates, and he would not have proceeded if he believed she did not understand and needed a translator. I do not accept Ms Chien's evidence that she told Mr Ronis that her mother could not speak or understand English and she expected to see a Mandarin translator (T256).

94 I also accept Mr Ronis' evidence and find that Mr Ronis gave a copy of the documents he had taken them through, including the Memorandum, to the Defendants to take with them at the end of the meeting.

2 October: Shanahans confirm execution and request change to monthly repayments

95 At 11.27 am on 2 October, Mr Ronis sent an email to Summer Lawyers advising that he had seen the Defendants that morning, all loan documents were executed and he was waiting for further documents, including council rates for the secured property and a bank statement from the borrower. He also requested an amendment to the direct debit arrangements, to read as monthly repayments in lieu of weekly.

96 Summer Lawyers responded by email that day, advising that Commercial N was agreeable to amending the frequency of the interest payments from weekly to monthly.

4 October – 13 October: events leading to the execution of Deed of Variation

97 On the morning of 4 October, Mutual Support sent an email to Ms Chien asking that she and Ms Huang return documents to their solicitor (a mortgage balance confirmation form and a NAB authority) and to her solicitor (original bank statements, council rates and cheque direction) as soon as possible so that settlement could proceed. Ms Chien responded saying that the documents would be sent soon but she had to go to Melbourne for a short notice business trip.

98 An attendance note from Shanahans' file records that Ms Chien called Shanahans that day and said that she was putting the outstanding paperwork together and was told that Shanahans would send off the loan documents once they were received.

99 Later that day, Summer Lawyers emailed Mr Ronis about the further documentation required and attached a copy of the payout figure for the Detex Loan (of $362,475.17), which Detex's solicitors had sent to Summer Lawyers.

100 On 8 October, Mutual Support and Ms Chien exchanged emails; Mutual Support asked for documents to be returned to them and to her solicitor (in the same terms of their 4 October email); Ms Chien requested advice on the progress of paying out the Detex caveat, stating "really hope and need the fund today if possible"; and Mutual Support referred to a discussion earlier that day and stated that they understood Ms Chien was having difficulties completing the mortgage balance confirmation form with NAB Bank.

101 On 9 October, Mutual Support sent an email to Ms Chien in response to her request for a progress update, advising that they were waiting for their credit department to do a final review of the property valuation report and the completed mortgage balance confirmation forms.

102 The reference to a property valuation report was to a residential valuation report of the Burwood Property that had been prepared by Sydney Sothern

Property Valuations, on instruction from Mutual Mortgages, which valued the property (as at 30 September 2019) at $2,600,000 (market value) and at $2,250,000 (a forced sale value).

103 Ms Chien was aware that a valuation had been obtained and it was less than the $3 million valuation she had provided as part of her loan application. The Additional loan application information submitted by Ms Chien on 30 September refers to a "valuer under value her property, her personally arranged valuation returned at 2.8m 2 month ago". The Additional Information also records the exit strategy as, "plan to sell property eventually in the future" and the company bank account statement not yet available as "sorting out past issue with ex-partner". In cross-examination, Ms Chien also gave evidence that she spoke to Fay and asked what the house value was and was told it was confidential (T165.26–29).

104 Hugo Ng deposes that, based on the valuation, Commercial N revised the principal amount to be advanced, which was calculated adopting the market value of $2,600,000 and a 75% LVR, which resulted in an approval amount of $415,440, after taking account of the existing first mortgage to NAB and 10% for costs and other. Mutual Mortgages instructed Summer Lawyers to prepare a Deed of Variation which provided for the principal amount to be reduced to $430,000 (T57.13).

105 On 9 October 2019, Shanahans sent to Summer Lawyers by express post the documents executed by the Defendants and Mr Ronis, as well as Bank Statements (in the name of T&C Excellent), a Burwood Council rates notice (which was overdue) and a photograph of the Defendants with identification. That afternoon, Shanahans sent an email to Ms Chien advising her they had sent the documents to the Lender's solicitor and attaching their tax invoice for payment.

106 On 10 October 2019, at 12.46pm, Mutual Support sent an email to Ms Chien advising that the following item was still outstanding:

> "1. **Water Rate notice**. As per our previous phone conversation, please kindly forward us the current SYDNEY WATER CORPORATION rate notice as we will pay off the Outstanding Rates… via email."

107 On 10 October 2019, Summer Lawyers sent an email to Mr Ronis advising that the offered loan amount had been changed due to the valuation of the Burwood Property coming back lower than expected and that Commercial N was only willing to proceed on the condition that the Detex caveat would be paid off and withdrawn and the mortgage arrears to NAB and outstanding water rates were paid. The email enclosed a Deed of Variation for execution by the Borrower and to be returned in order to progress further with the facilities and also noted that proof of payment of outstanding council rates and certified photographs of each debtor were still outstanding. As set out below, the Deed of Variation provided that the principal amount of the loan was reduced to $430,000. Mr Ronis' reply stated that he would obtain further instructions and respond in relation to the outstanding items.

108 On 11 October 2019, at 1.30pm, Mutual Support sent an email to Ms Chien headed "Progress Update: Await Docs/Others", which states:

> "Please be advised that these items are still out standing:
>
> **1. Water Rate notice:** As per our previous phone conversation, please kindly forward us the current SYDNEY WATER CORPORATION rate notice via email as we will pay off the Outstanding Rates ….
>
> **2. Deed of Variation**: At this stage, we only pay out the DETEX PTY LTD to Discharge Caveat Number AP165117, pay off AN43349 mortgage arrears NATIONAL AUSTRALIA BANK LIMITED and pay off the outstanding Rates Over 3/563482 for SYDNEY WATER CORPORATION. No surplus fund are avaiable (sic).
>
> We understand that the deed of variation has been sent to your solicitor. Please kindly contact your solicitor as soon as possible to get this documents (sic) signed by you and Connie.
>
> Thank you for your patience."

109 Ms Chien deposes that sometime after signing the loan documents, she received a telephone call from Fay who told her she needed to take the water bill to Shanahans and go back there with Ms Huang because there were some documents that they had not signed. She also says that sometime in mid-October 2019, she received a telephone call from Shanahans from a person she referred to as "Jenny", who told her that she and Ms Huang had to come back to the office and bring the water bill with her, and that Jenny made an appointment for them to attend the office, which Ms Chien believes was on 10 October 2019. I do not accept Ms Chien's evidence about these matters.

110 As set out below, the meeting was on 14 October 2020. I consider it likely and find that someone from Mutual Support (not Fay) spoke with Ms Chien about sending the Sydney Water rate notice to Mutual Support (not to Shanahans) and that Ms Chien was aware that the purpose of the meeting at Shanahans was to sign a "Deed of Variation". I also consider it likely and find that Ms Chien and Ms Oliveric spoke on the morning of 14 October and arranged for Ms Chien and Ms Huang to come to Shanahans to sign the Deed of Variation and that Ms Oliveric did not tell Ms Chien to bring the Sydney Water rates notice with her or that the document to be signed related to the water bill. This is based on the emails which refer to Ms Chien sending the water bill to Mutual Support, the references to a Deed of Variation that needed to be signed and Ms Oliveric's evidence that her first day back from a period of leave was 14 October.

14 October: Defendants sign Deed of Variation at Shanahans

111 On the morning of 14 October there were various communications between Ms Chien, Mutual Support, Mr Ronis and Summer Lawyers, as follows:

(a) at 8.40am on 14 October, Ms Chien sent an email to Mutual Support which attached a document for "the water fee".

(b) at 9.02am, Mutual Support sent an email to Ms Chien which asked her to send them the current Sydney Water Rate Corporation rate notice with the direction to pay in order for them to pay off the outstanding rates and to "Also, please kindly contact your solicitor as soon as possible to get the deed of variation signed by you and Connie";

(c) at 9.24am, Mr Ronis sent an email to Summer Lawyers advising that arrangements were being made for the Defendants to attend his office to execute the variation document;

(d) at 10.07am, Ms Chien emailed Shanahans requesting they contact Detex's lawyer so as to remove the caveat that day as a matter of urgency;

(e) at 10.22am, Mr Ronis sent an email to Summer Lawyers in response to an email from Summer Lawyers (sent at 10.13am) asking for an update about meeting the clients, advising that an appointment had been made at 11.30am that morning. As events transpired, this was changed to 4.00pm that afternoon; and

(f) at 11.44am, Ms Oliveric sent an email to Detex's solicitor asking for an anticipated payout figure for the withdrawal of the caveat, noting that settlement was anticipated to take place later that

week, to which Goodwin & Co replied and attached payout figures as at 14 October 2020.

112 At around 4.00pm, Ms Huang and Ms Chien attended the offices of Shanahans and executed the Deed of Variation and Cheque Directions. As before, the Defendants signed in their personal capacity as borrowers, Ms Chien signed on behalf of T&C Excellent in her capacity as its director, and Mr Ronis signed as the witness.

113 At 5.18pm, Shanahans sent an email to Summer Lawyers attaching the executed Deed of Variation. They also sent the originals by express post that day.

114 At 6.03pm on 14 October, Summer Lawyers sent an email to Shanahans noting that there were documents that remained outstanding, including the recent water rates notice for payment from settlement funds, and indicated that settlement was intended to occur on 16 October.

Deed of Variation and Cheque Directions

115 The Deed of Variation is dated 10 October 2019 and states, in the background section, that the Debtor and the Lender are parties to the Security Documents (defined as Schedules A and B dated 2 October 2019 and the Mortgage of the same date) and the Debtors and the Lender wish to vary the Security Documents so as to replace Schedules A and B and the Mortgage Schedule with the Substitute Schedules A and B and the Substitute Mortgage Schedules. The operative terms provide that the Security Documents are varied by substituting Schedules A and B and the Mortgage Schedules with the Substitute Schedules A and B and the Substitute Mortgage Schedule annexed to the Deed: cll 2 (a) and (b).

116 Annexed to the Deed are two schedules entitled “Substitute Schedule Schedule A” and “Substitute Schedule Schedule B” (**Substitute Schedules A and B**). There is no Substitute Mortgage Schedule annexed to the Deed.

117 Substitute Schedules A and B are in the same terms as Schedules A and B, other than the references to “Substitute Schedule” in the title and Substitute Schedule A, which provides for a reduction in the principal and line of credit

amounts and the amount payable per week based on the Lower Rate of Interest, as follows:

> "**Mortgage Details**
>
> Principal Amount $430,000.00
>
> Line of Credit Amount $402,000.00 (at the Lender's discretion)
>
> Lower Rate of Interest 0.35% per week ($1,643.82)
>
> Higher Rate of Interest 1.36% per week
>
> Date for Payment of Interest On the same day of each month as the Commencement Date."

118 The Cheque Directions signed by the Defendants:

(a) state that the Borrowers (T&C Excellent and the Defendants) authorise Summer Lawyers to pay the Principal Amount to: Commercial N in relation to fees of $28,000; Detex for the withdrawal of the caveat of $364,700; NAB for mortgage arrears of $35,300; Sydney Water Corporation for outstanding rates of $2,000; and to Borrower "AMOUNT TO YOU…NIL"; and

(b) in a section headed "Key Terms", identify the Principal Amount as $430,000 and the Higher Rate and Lower Rate as 1.36% and 0.35% per month respectively. (The reference to "per month" interest rates was incorrect; it should have referred to 1.36% "per week").

Further findings about 14 October

119 According to Ms Chien and Ms Huang, Mr Ronis was not present when they executed the Deed of Variation and Cheque Directions. They say the only person they met with was Ms Oliveric, who indicated to them where to sign, which they did as directed. They also say that Ms Oliveric did not explain the meaning or effect of the document other than it was in relation to the water bill which Ms Chien says Ms Oliveric collected from her.

120 According to Ms Chien, Ms Oliveric led them to her office and said, "these are some documents in relation to the water rates that you need to sign". Ms Chien also deposes that she had no idea what the Deed of Variation was before it was explained to her by her solicitor after the commencement of these proceedings.

121 I do not accept the Defendants' evidence about the events on 14 October and find that Mr Ronis was present and witnessed Ms Chien and Ms Huang signing the Deed of Variation and the Cheque Directions and he signed them as the

witness in their presence. In my view, Mr Ronis' evidence was more plausible than the Defendants given his signature appears as a witness. It was also corroborated by Ms Oliveric's evidence that Mr Ronis was present when they signed and she had never known Mr Ronis to sign as a witness unless he saw the signatory place their signature.

122 Mr Ronis gave evidence that he had a meeting with another client at 4.00pm from which he excused himself when he saw the Defendants arrive. He says that he met them at the front reception desk and witnessed their execution of the Deed of Variation there, after which he went back to his other meeting. Ms Oliveric gave evidence that she met the Defendants at the front office and Mr Ronis came out of the other meeting and witnessed their signature on the Deed of Variation.

123 As to what he said to the Defendants, in his affidavit, Mr Ronis deposes that he understood that the Defendants had already been provided with a copy of the Deed of Variation (which was intended to reduce the amount that the Lender would advance to them) and he did not have an independent recollection of what he said to the Defendants. He said that he did not take them through the Deed of Variation in detail as he formed the view it was not necessary in the absence of specific questions because it did not increase their liability or obligations, and he did not specifically draw their attention to the lower amount because he thought that the change would already have been conveyed to them by Commercial N and any broker they used to secure the loan.

124 In cross-examination, Mr Ronis rejected that he did not provide any advice about the Deed of Variation. He said he explained what the variation was, namely a reduced amount because of the low valuation which he knew from Summer Lawyers, he showed them that the amount they were borrowing had been reduced and his advice concerned whether or not they had enough funds to settle the previous caveat. When challenged about his affidavit evidence, he gave evidence that he could not recall what he said about the Deed of Variation to the Defendants but he remembered focusing on the lower principal amount and referred to going through the Cheque Directions to ensure there

was enough to settle but could not say specifically whether he went through it with the clients (T315–318).

125 I accept that there is an inconsistency in Mr Ronis' evidence, but I consider it likely and find that Mr Ronis brought the reduced amount of the loan, namely the sum of $430,000, to the attention of the Defendants when they signed the Deed of Variation and the Cheque Directions and explained to them the general nature and effect of the documents they signed. This is for three reasons.

126 First, the very purpose of the Deed of Variation was to reduce the amount of the advance to $430,000. In my view, irrespective of whether Mr Ronis was of the view that the Defendants knew about the valuation, the reduced principal amount and the Deed of Variation, it is not unreasonable to conclude that a solicitor would ordinarily bring to the attention of their client the general nature and purpose of the documents they were signing and that the solicitor was witnessing, including the reason why it came about (in this case, the lower valuation).

127 Second, even if Mr Ronis did not take the Defendants to the Substituted Schedule A, the reduced principal amount of the loan, of $430,000, the payout to Detex of $364,700 and "Nil" to the borrower was apparent to a reader of the Cheque Directions which the Defendants signed and Mr Ronis witnessed. In that context, I consider it likely that Mr Ronis referred to the reduced amount of the loan and also likely explained that there would be sufficient funds available to settle the withdrawal of the Detex Loan caveat, a matter which was clearly the main focus of Ms Chien at that time.

128 Third, according to Ms Oliveric's evidence, Mr Ronis spent about 10 minutes discussing the documents with the Defendants, a sufficient amount of time to discuss those matters.

129 Fourth, Ms Chien's evidence that she had no idea what she was signing when she executed the Deed of Variation on 14 October and thought it related to the water rates notice that she delivered to Shanahans that day, which was maintained in cross-examination when she gave evidence that she was only told by Fay to attend Mr Ronis' office to provide water bills, was implausible

having regard to the emails Ms Chien received from and sent to Mutual Support and Ms Oliveric prior to the Deed of Variation which referred to needing to sign a Deed of Variation, and which stated that no surplus funds would be available and Ms Chien needed to send the water rates notice to Mutual Support and not Shanahans. Similarly, her evidence that she did not become aware that the amount available under the Loan offer had been reduced lacked credibility having regard to the Cheque Directions she signed and the subsequent emails with Ms Oliveric regarding the shortfall in funds and from Mutual Support that identified the amount of the advance as $430,000, about which there was no recorded complaint.

130 I accept that the Cheque Directions refer to Water rates and that that was the topic of emails at the time. However, for the reasons set out at [110], I do not accept Ms Chien's evidence that she was told that the documents she had to sign on 14 October, or specifically the Deed of Variation, related to the water rates or water bill. Based on the emails below, I also do not accept Ms Chien's evidence that she left the water bill or water rates with Ms Oliveric that day. Overall, the evidence satisfies me that Ms Chien was aware that the principal sum of the loan was to be reduced due to the lower valuation of the Burwood Property and, at the time she signed the Deed of Variation, it was for an amount of $430,000.

15–17 October: Events leading to settlement

131 On 15 October 2019, there were communications between the parties in relation to documents required for settlement, as follows:

(a) at 8.30am, Ms Chien emailed Shanahans a copy of the Sydney Water rate bill and payment receipt for council rates and also requested that the caveat be removed that day;

(b) at 10.55am, Shanahans emailed the documents received from Ms Chien to Summer Lawyers;

(c) at 10.58am, Shanahans emailed Ms Chien regarding further outstanding documents required by Commercial N;

(d) at 1.46pm, Ms Chien emailed Shanahans a certificate of Currency of Insurance in relation to the Burwood Property which Shanahans forwarded to Summer Lawyers at 1.52pm; and

(e) at 4.34pm, Shanahans emailed Summer Lawyers copies of bank statements for Ms Huang, Ms Chien and T&C Excellent.

132 At 8.31am on 16 October 2019, Summer Lawyers sent an email to Shanahans seeking agreement from the borrowers to manually amend the original Deed of Variation on page 3 (Schedule A) to change the heading to “Substitute Schedule and Substitute Mortgage Schedule” in lieu of “Substitute Schedule” (as it had been erroneously titled) and asking for documents to be provided that evidenced the NAB mortgage arrears.

133 At 9.24am, Ms Oliveric forwarded Summer Lawyers’ email to Ms Chien, who responded at 10.51am, noting that the NAB documents had been provided and also stating:

> “What is the contract part needing to change?
> Can you do help to do that accordingly, please?
> I really need the caveat to be removed today
> Please help!!”

134 At 11.27am, Ms Oliveric sent an email to Summer Lawyers advising that they were authorised to make the amendments to the Deed, as noted in “your email below”. She then sent an email to Ms Chien (at 11.29am) advising that she had spoken to the Lender’s solicitor who had told her they were awaiting an updated payout figure from Detex’s solicitor. Ms Oliveric asked Ms Chien to provide the documentation evidencing the NAB Mortgage arrears and the original Sydney Water rate notice and original evidence of payment of council rate as a matter of urgency.

135 At 11.41am, Ms Chien replied by email advising that she had already provided the NAB information to the Lender, she would email the council rate payment and could deliver the original water rate if needed. Ms Chien sent a further email to Ms Oliveric that day indicating that she did not think she could deliver the original Sydney Water rate notice that afternoon but could do so first thing in the morning but she really needed help with the caveat and the arrears of NAB, that she needed them to be settled that day.

136 Ms Chien deposes that she was never consulted in relation to the amendment to the Deed of Variation and the handwritten amendment made was not authorised by her. Ms Huang also gives evidence to the same effect.

137 I find it likely that Ms Chien spoke to Ms Oliveric between 9.24 and 11.27am and gave her authority to agree to the amendment. This is based on Ms Oliveric's evidence that she likely obtained the instructions via a telephone call to Ms Chien but was unable to locate a copy of any notes of such a call.

138 At 3.17pm on 16 October 2019, Ms Oliveric emailed Shanahans' amended tax invoice to Ms Chien in the amount of $1,1000 (incl GST). The tax invoice is addressed to T&C Excellent and refers to "Attending to Review and Advice on Loan Advance from Commercial N" (with an incorrect date of 9 October) and to the perusal and arranging the execution of the Deed of Variation, dealings with the solicitors for the caveator and lender and arranging settlement and cheque directions to finalise the loan advance.

139 At 3.42pm on 16 October 2019, Ms Oliveric sent an email to Ms Chien advising that: settlement would not be taking place that day but had been scheduled for 17 October 2019; the Lender's solicitor had advised that after receiving the payout figures, there would be a shortfall of funds of "approximately $19" (this was an error and should have read "approximately $190"); to finalise settlement Ms Chien would need to provide the extra funds; their fees would need to be paid as there was not sufficient funds from the loan advance to pay them.

140 Ms Chien responded, by email sent at 3.56pm, regarding the shortfall stating that she had "another loan settlement that needs your help" and as far as she was aware, "they may be willing to provide extra funding. I will follow up (sic)". In an email sent to Ms Chien at 4.09pm, Ms Oliveric indicated, amongst other things, that if the Lender would not advance additional funds to cover the shortfall, Ms Chien would "then need to provide extra funds tomorrow morning in our trust account".

141 On the morning of 17 October, Ms Oliveric sent an email to Ms Chien noting that Ms Chien was yet to attend their office to provide the original Sydney Water rate notice and asked whether she had spoken to the Lender about providing the extra funds to cover the shortfall. Ms Chien responded that her parents would deliver the rate notice that morning and referred to another new loan coming.

142 At around 3.00pm that afternoon, Ms Oliveric spoke to Ms Chien about the shortfall amount. Ms Oliveric's attendance note records that Ms Chien had spoken to the Lender and was aware the shortfall amount was approximately $190, Ms Oliveric told Ms Chien she needed to put the shortfall funds into the trust account for the settlement to go ahead and that Ms Chien said that the Lender had agreed to let the caveat payment and NAB arrears go through and she would fix up the shortfall separately.

143 Later on 17 October, Ms Chien arranged to deposit the settlement shortfall amount of $194.99 into Shanahans' trust account. The original Sydney Water rate notice and other documents were also left at Shanahans reception, which Summer Lawyers collected (via courier later that day).

144 Having regard to emails exchanged between Ms Oliveric and Ms Chien about the shortfall in funds, I find that Ms Chien was aware that the sum to be advanced from Commercial N was not enough to pay Detex, NAB, Sydney Water and Commercial N's fees prior to 18 October and do not accept her evidence that she "did not understand the whole thing" and thought the shortfall of funds would come out of the $588,000". In my view, the fact that Ms Chien paid the shortfall amount also supports my finding that Ms Chien was aware that the principal amount of the loan had been reduced to $430,000 and also knew that there was no funds to be paid to the borrowers, and I so find.

145 Ms Oliveric deposes that settlement occurred via PEXA in the afternoon of 17 October 2019. Based on the documents in evidence, I am satisfied that settlement in fact occurred on 18 October 2019 and the principal amount of $430,000 was advanced in accordance with the credit facility that day.

146 The PEXA settlement completion record identifies that the funds settled via PEXA were $399,665.06, of which $35,288.61 were paid to Summer Lawyers, representing the NAB mortgage arrears on the Burwood Property, and the balance of $364,376.45 to the solicitors for Detex in relation to the Detex Loan and other fees. The balance of the Principal Amount of $430,000 was retained by Commercial N for fees and charges relating to the loan ($28,000) and payment of the outstanding Sydney Water rates ($2,529.93).

Events post-settlement of advance

147 On 18 October 2019 at 2.29pm, Mutual Support sent an email to Ms Chien, with the subject, "IMPORTANT Repayment Schedule" that states as follows:

> "Dear Stephanie and Connie,
>
> Please be kindly reminded, your repayment is due on 11/11/2019 for $6,325.13 and every month thereafter.
>
> **Note**: the balloon payment of **$430,000** will be due on your credit agreement maturity date on 11/04/2020."

148 The references to the first repayment of interest being due on 11 November and the credit agreement "maturity date" of 11 April 2020 were incorrect as they should have been based on the date of the advance, namely, 18 October. However, the email is significant as it identified that the loan amount was $430,000. Further, the repayment amount of $6,325.13, which Mutual Support advised Ms Chien and Ms Huang was due on 11/11/2019 and "every month thereafter", must have been based on the Lower Interest Rate of 0.35% per week (1.52% per month) as a monthly repayment based on the Higher Interest Rate of 1.36% per week (5.89% per month) would have been higher, around $25,327 for one full month (see, for example, Exhibit C).

149 Later that day, Mutual Support sent an email to Ms Chien congratulating her on her recent finance approval and settlement. The email identified that repayment was due on "11/11/2019 and every month thereafter", payments should be made manually by way of bank deposit and provided details for that to occur.

150 On 21 October 2019, Ms Oliveric sent an email to Ms Chien confirming that the caveat lodged by Detex had been removed from title. Her email also noted that Commercial N had registered a caveat over title to protect their interest. Commercial N's caveat (AP607782) had been lodged over the Burwood Property on 15 October 2019.

151 On 22 October 2019, Mutual Support sent an email to Ms Chien about the agreement to put a second mortgage in favour of the Lender on title. The documents from Mutual Support's file record that Ms Chien called and asked why a caveat (by the Lender) was placed on the property when there was

going to be a second mortgage and was told that the caveat would be removed at the time of lodging the second mortgage.

152 During the period November 2019 to March 2020, Mutual Support and Ms Chien exchanged email communications in relation to defaults in making payments under the agreement.

153 On 13 November 2019, Mutual Support sent an email and a text message to Ms Chien and Ms Huang advising that they were in arrears in the amount of $6,375.13, asking whether they would pay today (option 1), pay in a week (option 2), or request a call (option 3). Ms Chien replied by text message identifying option 2. Ms Chien subsequently requested postponement of the payment due on 20 November and asked to have it debited on 4 December.

154 On 3 December 2019, Mutual Support sent an email headed “URGENT, PAYMENT DEFAULT NOTICE”, that referred to an overdue amount of $6,375.13, stated that higher interest rates would apply when the credit agreement remains in default and that repossession and legal action could be taken.

155 On 6 December 2019, the Defendants paid the amount of $6,375.13, which was then allocated to their account. It is common ground that this was the only payment made and that no further payments were made by the Defendants or T&C Excellent.

156 On 20 January 2020, Ms Chien sent an email to Mutual Support advising that she was selling her property and she could pay “Max Funding $430,000 on the 24th of January 2020”, requesting a payout figure of $430,000 and noting that interest on top of that “maybe another $60,000 or something”. Mutual Support sent an email to Ms Chien advising that the indicative outstanding balance for the account as at 20 January was $495,649.55. A further email sent by Mutual Support that day stated that the mortgage could not be released until the account was paid off in full and she could pay off the lender/mortgagee on title, Commercial N, at settlement.

157 On 25 February 2020, Ms Chien sent an email to Mutual Support from herself and Ms Huang advising that they were arranging another higher amount loan

from another second mortgage provider, they had a certified valuation of the Burwood Property that it was worth more than $3.1 million and requested help in arranging a loan increase to get some funds for repair works to be done and to sell the house to pay off the arrears that they currently have. Ms Chien's email also stated they were aware the account was overdue for around three months. Mutual Support responded that no further drawdown was available and provided information about how to apply for financial assistance.

158 On 3 and 4 March 2020, emails were exchanged in which: Mutual Support advised that the borrowers were in arrears of 83 days and $19,125.39; Ms Chien advised that she was in the "final process" of selling her business privately, asked for a payout figure and stated that the best figure she could offer to pay off in full was $360,000; and Mutual Support advised a payout figure of $533,605.28.

159 On 11 March 2020, Mutual Support sent an email to Ms Chien advising that the account had been in default for 91 days and recovery action had been commenced by the Lender.

160 On 24 March 2020, Summer Lawyers sent a default notice to T&C Excellent and the Defendants by mail which identified defaults under the agreement each week between 24 October 2019 to 19 March 2020 and arrears amounting to $141,694.37. At the hearing, Commercial N accepted that the default notice did not accurately record the dates of default (T98.49–50).

161 Despite corresponding with NAB, during this period, Commercial N did not achieve registration of its second mortgage on the Burwood Property and its caveat remained on title.

162 On 12 January 2020, T&C Excellent was deregistered.

163 On 18 August 2020, Commercial N commenced these proceedings by statement of claim filed that day.

Overview of claims and issues for determination

164 Commercial N claimed that the Defendants were indebted to it in the sum of $3,611,074.84 (as at 7 November 2022), comprising the principal sum of $430,000 together with interest of $3,187,486.90 (less $6,412.06 already paid

by the Defendant, and inclusive of a "Rollover Fee" of $11,975.47 charged by Commercial N to the Defendants (**Rollover Fee**)) calculated at the rate of 70.72% per annum from 17 October 2019 to 17 November 2022 in accordance with clauses 5.5 and 5.12(b)(i) of the Memorandum. It also claimed that this indebtedness was secured against the Burwood Property by way of an unregistered equitable mortgage on the terms of the Memorandum although it appears that a Mortgage was registered by Commercial N on or about 28 September 2022.

165 The Defendants do not dispute that they signed the documents that comprise the credit agreement and mortgage, namely: the Mortgage dated 2 October 2019; the Deed of Variation; the two schedules to the Deed of Variation (Substitute Schedules A and B); Schedule C, being the Declarations under the National Credit Code (**NCCP Act Declarations**), or that the Memorandum sets out the detailed terms and conditions of the Mortgage (**Agreement**).

166 The Defendants also accept that the sum of $430,000 was advanced by Commercial N and used to pay off the Detex Loan, NAB arrears, Sydney Water Rates and fees to Commercial N, they have defaulted under the Agreement and the sum of $430,000 must be paid back to Commercial N (T23.42–T24.6).

167 Their main concerns relate to Commercial N's claim for interest at 70.72% compounded monthly and the Deed of Variation. The defences and cross-claims pressed by the Defendants at the hearing allege that:

(a) Commercial N's claim for interest at the higher rate compounding monthly is a penalty;

(b) Commercial N, including by its agent, representative or employee, Fay from MaxFunding, made representations about the Agreement and the Deed of Variation that were misleading or deceptive contrary to s 18 of the ACL and/or s 12DA of the ASIC Act, and which the Defendants relied on when entering into the Agreement;

(c) that Commercial N's conduct was unconscionable within the meaning of ss 20 and 21 of the ACL and/or ss 12CA or 12CB of the ASIC Act as the Defendants were under a special disadvantage, Commercial N was on notice or ought to have known they were at a special disadvantage due to a range of matters, including Ms Huang's lack of English, and Commercial N unconscientiously took advantage of the Defendants. A wide

range of matters are relied on by the Defendants, the main ones being the reduction in the principal sum advanced under the Deed of Variation, the interest being claimed at the higher rate compounding monthly and Commercial N's business model which, it was asserted, did not allow for the Defendants to deal with anyone in relation to the loan other than MaxFunding, to be provided with the documents prior to meeting Mr Ronis or to choose their own solicitor; and

(d) relying on the same matters as those relied on in support of their unconscionable conduct , that the Agreement, including the Deed of Variation, is an unjust contract and ought to be set aside pursuant to s 7 of the *Contracts Review Act*. Commercial N contends that relief under the *Contracts Review Act* is precluded because the Agreement was entered into in the course of or for the purposes of a trade, business or profession carried on by the Defendants.

168 By way of relief, the Defendants seek an order that the Agreement be set aside, including as an unjust contract and declarations that Commercial N has engaged in misleading or deceptive and unconscionable conduct. They did not press their pleaded claims that the Agreement was uncertain and that there had been no default because the commencement date could not be ascertained, only $399,665.06 of the loan amount had been advanced, the amount advanced had not been disbursed in accordance with their directions, and Commercial N had exerted undue influence, unfair pressure and unfair tactics on them when entering into the Agreement. Nor did they press for relief by way of damages, for relief in relation to Commercial N's caveat or for a declaration that no moneys are due and payable to Commercial N.

169 The Defendants' cross-claim against Mr Ronis asserts that Mr Ronis' retainer included implied terms that he would provide to the Defendants all necessary legal advice to ensure that they understood their rights and obligations and the risks associated with the transaction and to ensure that the respective interests of each of the Defendants were protected. They claim that Mr Ronis breached his retainer and failed to act with reasonable care in breach of duty when he met with the Defendants on 2 and 14 October 2019 in various respects, including because he failed to explain adequately or at all the terms, the meaning and/or the legal effect of the Agreement, the Deed of Variation and related documents such as the NCCP Act Declarations (Schedule C) and failed to adequately explain the risks and consequences if they defaulted.

170 Mr Ronis disputes the scope of the alleged retainer, denies that any breaches occurred or were causative of loss and also raises a defence of proportionate liability pursuant to Pt 4 of the *Civil Liability Act 2002* (NSW) (**Civil Liability Act**). Mr Ronis did not press his pleaded defences of contributory negligence or competent professional practice under s 50 of the *Civil Liability Act.*

Commercial N's interest claim

171 Two issues arose in relation to Commercial N's interest claim. The first is a question of construction in relation to the formula for the calculation of the Higher Interest Amount in cl 5.5. The second is whether the Higher Interest Rate charged under the Agreement is a penalty and unenforceable.

172 Before dealing with those issues, it is appropriate to record that on the last hearing day, Commercial N's counsel candidly acknowledged (appropriately in my view) that the various attempts to articulate its interest claim, "have been hopeless" and that there would be costs consequences (7 Dec 2022, T7.9–13).

173 As Defendants' counsel noted in opening submissions, Commercial N's statement of claim did not plead all the material facts or identify the provisions of the Agreement relied on for its claim for interest, which was identified as the sum of $324,452.99 (as at 4 August 2020) plus interest at the rate of 70.72% per annum (for pre- and post-judgment).

174 In Commercial N's written closing submissions, interest was claimed in the amount of $2,121,003.76 (that had accrued according to cll 5.2–5.5 of the Memorandum) or, alternatively, $263,129.41 at the Lower Interest Rate. Commercial N submissions did not refer to cl 5.12, other than to identify it, elsewhere in the submissions, as the Specified Interest Regime B that was "additionally expressed to govern the calculation and payment of Interest". The Defendants' written closing submissions described Commercial N's interest claim as a "movable feast" and asserted that Commercial N could not even, at that stage, positively formulate its own interest case.

175 On 24 August 2022, the day allocated for oral closing submissions, Commercial N tendered a loan statement that showed a balance outstanding of $2,523,408.23 (as at 12 April 2022), with interest calculated at 1.36% per week and capitalised (Exhibit E). In the context where issues were again raised

about the articulation of their interest claim and the Defendants having been granted leave to amend their unconscionable conduct claim, the Court proceeded on the basis that Commercial N's interest claim was for the Higher Interest Rate, the Borrowers had defaulted and the interest was to be calculated in accordance with cl 5.12, subject to receipt of a document that Commercial N indicated was "coming" that would address the issues raised in a more simplistic and non-adversarial way, but which needed some further refinement. It was agreed that Commercial N would circulate the document to the other parties and then to the Court, with the Court noting that it was expected that the document would specify the terms of the Agreement on which Commercial N relied to claim interest, the circumstances that gave rise to the entitlement to interest and the final calculation of the claim, in a manner akin to points of claim.

176 Commercial N provided the document to the Court on 1 September (after inquiries had been made as to its whereabouts). In the document, Commercial N contended that the Higher Interest Rate prevailed at all times under cl 5.3 of the Memorandum, Commercial N was entitled to claim the Higher Interest Amount by reference to the formula in cl 5.5 and referred to the Higher Rate of interest of 1.36% per week. It was submitted that the effect of the formula in cl 5.5 was that interest was capitalised, but Commercial N would not press for any capitalisation and only claimed simple interest at the Higher Rate, which it calculated to be $5,848 per week. Adopting the simple Higher Rate of Interest approach, Commercial N calculated the balance owing on the loan (as at 30 August 2022) to be $1,324,113.62, of which $894,677.68 was Interest and the Rollover Fee. The document (which I refer to as the **September Submissions**) did not refer to the Specified Interest Regime B in cl 5.12 of the Memorandum, other than to note that "no claim is made for compound interest in accordance with cl 5.12".

177 At a hearing on 7 September, questions arose about the basis on which Commercial N's calculations in the September Submissions had been made and its impact on the Defendants' case, on which the parties needed to obtain instructions. This led to an adjournment and a period during which the Court was informed the parties were in settlement negotiations. It also led to

Commercial N setting out its Interest Claim in Points of Claim served on 11 November 2022 (**POC**), the Defendants responding by way of Points of Defence dated 24 November 2022 (**POD**) and Commercial N filing a notice of motion for leave to re-open to adduce further evidence, which was refused with reasons given ex tempore: *Commercial N Pty Ltd v Huang* (Supreme Court (NSW), Henry J, 7 December 2022, unrep).

178 In its POC, Commercial N claims that the Defendants are liable to pay interest:

(a) at the rate of 70.72% per annum from 17 October 2019, such interest being payable in arrears monthly;

(b) on the Secured Money comprising the Principal and Outstanding Interest at the rate of 70.72% per annum in accordance with the formula in cl 5.5 and on the basis of cl 5.12(b)(i) of the Memorandum; and

(c) in the amount set out in the attached Schedule, which identifies the balance owing on the loan (as at 17 October 2022) as $3,611,074.84, with the total interest calculated as $3,187,486.90 (including the $6,412.06 already paid and the Rollover Fee).

179 In the POC, Commercial N asserts that: cl 5.3 of the Memorandum provides that the prevailing interest rate is the Higher Interest Rate unless it (as Lender) elects in writing to only require payment of the Lower Interest Rate, which it says it has never done; in applying the formula for the calculation of the Higher Interest Amount in cl 5.5, as a matter of commercial efficacy and proper construction, it is necessary to convert the weekly Higher Interest Rate of 1.36% per week specified in Schedule A into an annual rate of 70.72% to obtain the 'HIR'; and pursuant to cl 5.12(b), interest runs on any overdue and Outstanding Interest compounding monthly until all Outstanding Interest is paid in full.

180 In its written submissions served with the POC, Commercial N withdrew the September Submissions to the extent that they were contrary to the submissions made. Having regard to this and the interest claim advanced in the POC and at the hearing on 7 December, I have proceeded on the basis that Commercial N withdraws its claim for simple interest only at 70.72% and is pursuing the interest claim, which includes capitalisation and compound interest under cl 5.12(b), as set out at [178 Ref157510559] above.

181 The Defendants do not admit most of the matters in the POC, including that the Higher Interest Rate prevailed at all times and a notice under cl 5.3 was never given. They also say that the only figure in Schedule A for the Higher Interest Rate is 1.36% per week and deny Commercial N's claim for interest on the basis set out at [178_Ref157510559] above.

182 As already noted, in their defence to Commercial N's statement of claim, the Defendants denied Commercial N's claim for interest of $324,452.99 as excessive and amounting to a penalty and asserted that the amount was disproportionate to any real loss or damage that might have been incurred by Commercial N.

Construction issue

183 The interest rates identified in Substitute Schedule A to the Memorandum of Mortgage are expressed to be:

> "Lower Rate of Interest 0.35% per week ($1,643.82)
>
> Higher Rate of Interest 1.36% per week."

184 Clauses 5.3 and 5.4 of the Memorandum provide:

> "5.3 The Interest to be paid by the Debtor shall at all times be the Higher Interest Amount unless the Lender notifies the Debtor that the Lower Interest Amount is payable by the Debtor for any Interest Period.
>
> 5.4 The Lender may notify the Debtor that a Lower Interest Amount is to be paid for any Interest Period and upon the Lender giving that notice the interest to be paid for that Interest Period shall be that Lower Interest Amount."

185 Clause 5.5 provides that the Higher Interest Amount is to be calculated as follows:

> "B x HIR ÷ 365 x N
>
> Where:
>
> B = the Balance
>
> HIR = the Higher Interest Rate
>
> N = the number of days for the relevant Interest Period"

186 Clause 5.6 provides for the calculation of the Lower Interest Amount in an equivalent manner, but with "LIR", defined as the Lower Interest Rate, in place of "HIR".

187 Under clause 1.1:

"**Balance** means the balance of the Secured Money on any given day as determined by the Lender as owing by the Debtor;

…

Higher Interest Rate means the higher rate of interest specified in Schedule A as the "Higher Rate of Interest";

…

Secured Money means the aggregate of all monies which the Debtor is, or at any time may become, actually or contingently liable to pay to the Lender for any reason or on any account whatsoever and includes, without limitation:

(a) the Principal Amount;

(b) any Interest;

(c) any Outstanding Interest;

(d) any Fees;

(e) any Costs and Expenses;

(f) – (i)

…

Outstanding Interest means any Interest that is due for payment but which has not been paid by the Debtor to the Lender by the Date for the Payment of Interest in accordance with this Mortgage".

188 The construction issue is whether the weekly interest rate of 1.36% should be used as the "HIR" integer in the formula in cl 5.5 or whether that rate of 1.36% should be converted into an annual rate of 70.72% prior to plugging that figure into the cl 5.5 formula as the HIR integer.

189 Commercial N concedes that the contractual regime relating to the formula in cl 5.5 is attended by a degree of ambiguity. However, it contends that the HIR in the formula should be read as 70.72% in order to avoid an absurd outcome contrary to "commercial common sense", referring to the well-known principles of construction in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337; [1982] HCA 24 at 352 and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52 at [40].

190 The Defendants submit that there is no ambiguity in the formula in cl 5.5 (and, by analogy, cl 5.6), which refers to a Higher Interest Rate that is expressly identified in Substitute Schedule A as 1.36%. It submits that it is not open to the Court, in the exercise of its powers of construction, to convert the weekly rate to 70.72% per annum for the purposes of the formula in cl 5.5, that

Commercial N has not sought rectification and that, therefore, cl 5.5 is to be construed according to its plain meaning.

191 Mr Ronis also contends that Commercial N's interest claim falls squarely within the field of rectification rather than construction (7 Dec 2022, T15.35). He also submits that:

> "…if Commercial N, which was in the best position to understand its claimed entitlement to interest, could produce the original loan documentation; demand payment in accordance with it; commence proceedings; and litigate them to trial on the basis of such documentation, all before identifying the absurdity now sought to be cured, Ronis might be excused for not identifying it himself in the short time he had to review the documentation and provide advice upon it."

192 In my view, Commercial N's construction is the correct one.

193 I accept that an absurdity arises if the weekly rates of interest are plugged into the cl 5.5 formula and are divided by 365. This is apparent by comparing the outcomes in the following examples, which calculate the Higher and Lower Interest Amounts for one month adopting the respective Higher and Lower Interest Rate integers for which the parties contend. Assuming B is $430,000 and N is 30 days:

> Higher Interest Amounts:
>
> $430,000 x 1.36% ÷ 365 x 30 = $480.66
>
> $430,000 x 70.72% ÷ 365 x 30 = $24,994.19
>
> Lower Interest Amount:
>
> $430,000 x 0.35% ÷ 365 x 30 = $123.70
>
> $430,000 x 18.2% ÷ 365 x 30 = $6,432.33

194 Substitute Schedule A expressly provides that the weekly repayment at the Lower Interest Rate was $1,643.82 (with the date for payment of Interest on the same day each month). In my view, it would be commercially absurd to construe the formula in the manner contended for by the Defendants, as it results in a Higher Interest Amount lower than that specified based on the Lower Interest Rate. It would also mean that the monthly interest payment at the Lower Interest Rate was only $123.69, rather than that based on the amount specified in the Agreement.

195 I also accept Commercial N's submission that the objective purpose of the division by 365 in the formula is to produce a daily amount of interest and it is

commercially implausible that it was intended that the amount to be divided by 365 would be based on a weekly rate of interest. Considered objectively, it is also implausible that a mercantile lender, such as Commercial N, who was providing a short term loan to a borrower/mortgagor, would have agreed to charge annual rates of interest of 1.36% and 0.35% even allowing for capitalisation and compounding factors. The Defendants understood that payments would be made based on those annual rates, having regard to the specification of the amount payable each week based on the Lower Interest Rate and the Detex Loan, which provided for an interest rate of 15% per annum.

196 I also consider that converting the weekly rate of 1.36% to an annual rate of 70.72% by, for example, reading the reference in cl 5.5 to the "Higher Interest Rate" as meaning "*annualised* Higher Interest Rate" (or the definition of "Higher Interest Rate" as meaning the *annualised* higher rate of interest specified in Schedule A as the Higher Interest Rate) is a permissible exercise of construction to resolve the ambiguity and absurdity and the Agreement does not require rectification. This is because the absurdity from a strict and literal interpretation and calculation on the basis of the weekly rate when plugged into the formula is apparent, even accepting that the test of absurdity is not easily satisfied. In my view, it is also self-evident what the objective intention was and what a reasonable person would have understood the parties to have meant, namely that a per annum rate of interest would be used for the formula: *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq)* (2019) 99 NSWLR 317; [2019] NSWCA 11 at [6]–[15]; *Miwa Pty Ltd v Siantan Properties Pte Ltd* [2011] NSWCA 297 at [13]–[18].

197 It follows that for the purposes of the Agreement and Deed of Variation, I find that the rates of 70.72% and 18.2% apply as the HIR and LIR respectively for the formulae in cll 5.5 and 5.6 of the Memorandum.

Penalty

198 The Defendants submit that the relevant interest clause, cl 5.12 (Specified Interest Regime B), contains a contractual penalty provision, namely cl 5.12(b)(i), because that sub-clause operates on a default (namely, when the

Debtor fails to pay interest) and then provides for interest to be payable at the Higher Interest Rate compounding monthly. It submits that the Higher Interest Rate compounding monthly cannot be justified on any basis as the amount claimed by Commercial N provides for the interest rate to increase by a factor of almost 400% on default (from 0.35% to 1.36%) which, to use the language of the authorities, is extravagant, excessive and out of all proportion.

199 Commercial N's submissions do not address cl 5.12. Its submissions focus on cl 5.3, which provides that interest is payable at all times in the Higher Interest Amount unless Commercial N notified the Debtors that the Lower Interest Amount was payable for any Interest Period, and the calculation of interest on which their claim is based, namely the formula in cl 5.5.

200 It refers to cll 5.7 and 5.9, which also provide for payment of the Higher Interest Amount in circumstances likely to involve a default but maintained that the position under the Agreement was that the Higher Interest Amount would ordinarily apply, such that it cannot be said that the Higher Interest Amount was a collateral stipulation, the purpose of which was to punish the Debtors and so discourage non-compliance. It also submits that the Defendants had not meaningfully engaged with the elements required to establish a penalty at either an evidentiary or conceptual level, noting that nothing was put to Commercial N's witnesses in cross-examination regarding the question of proportionality.

201 In reply, the Defendants submit that nothing was put to Hugo Ng on the issue of proportionality as his evidence was that he knew nothing about the loan.

202 The relevant legal principles on contractual penalties were summarised by McDougall J (with whom Gleeson JA agreed and Sackville AJA agreed with added reasons) in *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* (2016) 93 NSWLR 231; [2016] NSWCA 328 (**Arab Bank**) at [69]–[76]. In that case, McDougall J observed that the High Court in *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656; [2005] HCA 71 (**Ringrow**) accepted aspects of Lord Dunedin's speech in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 (**Dunlop**) as expressing the law applicable in Australia, which the High Court in *Andrews v Australia and New*

Zealand Banking Group Ltd (2012) 247 CLR 205; [2012] HCA 30 (**Andrews**) also followed. The relevant parts of *Dunlop* (at 86–87) are as follows:

> "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 a 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."

203 McDougall J also summarised the propositions emerging from the judgments of those forming the majority in *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; [2016] HCA 28 (**Paciocco**) as follows:

> "(1) Lord Dunedin's propositions were not 'rules of law', but 'distillations of principle': at [143] (Gageler J); compare at [32] (Kiefel J) and at [260] (Keane J).
>
> (2) The essence of a penalty is that it is a collateral stipulation, the (or a predominant) purpose of which is to punish the borrower for breach, and thus to compel performance: at [29] (Kiefel J); at [127], [159], [166] (Gageler J); at [254], [259], [273] (Keane J).
>
> (3) One way of testing whether the impugned stipulation is penal – intended to punish – is to inquire whether the sum that it stipulates to be payable on breach (as I have indicated, the equitable origins and continuing equitable operation of the principle have no present relevance) is to ask whether the stipulated sum is extravagant or out of all proportion to, or unconscionable in comparison with, the maximum amount of damage that might be anticipated to follow from the breach: at [29], [54] (Kiefel J); at [158]–[162] (Gageler J); at [221] (Keane J).
>
> (4) 'Damage' in this sense is not limited to damages recoverable upon breach of contract, but may extend to damage, or losses, caused by the impairment of other legitimate commercial interests that were intended to be protected by the stipulation: at [33], [42]–[47] (Kiefel J); at [145], [160]–[162] (Gageler J); at [216], [283] (Keane J).

> (5) The analysis is to be made at the time, and taking into account the circumstances applicable, when the contract was made; not at the time of breach; the analysis is prospective, not retrospective (or as is said in some judgments, is *ex ante*, not *ex post*): at [62] (Kiefel J); at [169] (Gageler J) .
>
> (6) Mere disproportion between the stipulated sum and the possible damage is not enough to indicate 'penalty'; the disproportion must be such that it is unconscionable for the lender to rely on the stipulation: at [54] (Kiefel J); at [164] (Gageler J); at [221], [240], [279] (Keane J)."

204 The onus of proving that a stipulation amounts to a penalty lies with the party asserting it, in this case the Defendants: *Paciocco* at [167] (Gageler J); *Arab Bank* at [76].

205 In the present case, these principles raise two primary issues for determination.

206 The first is whether the impugned provisions are susceptible to the application of the penalty doctrine at all. That is, whether there exists in the contract a collateral stipulation which, upon the failure or non-occurrence of a primary stipulation, imposes upon the defendants an additional detriment to the benefit of the plaintiff: *Andrews* at [10]. As the Court noted in *Andrews* at [15], this question (of whether the penalty doctrine is "engaged" at all) is "anterior" to the second, substantive inquiry, namely, whether the collateral stipulation is properly characterised as penal and, if it is, what the consequences might be: *Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd* [2017] NSWCA 99; 18 BPR 36,683 at [361]; *N & M Investments/Properties Pty Ltd v Australian Property Enterprise Pty Ltd* [2022] NSWSC 1370 at [23].

207 The Defendants did not address these principles in their written or oral submissions. Nor did they identify the primary stipulation in respect of which the collateral stipulation imposed an additional detriment for breach so as to compel performance, although I have proceeded on the basis that the collateral stipulation upon which they rely is cl 5.12(b) (T61.39–50).

208 The starting point to consideration of the first question is cl 5.12, which is the Specified Interest Regime B under the Agreement that governs the calculation and payment of any Interest in respect of the Mortgage: cl 5.10.

209 The terms of cl 5.12 are set out [77] above.

210 Clause 5.12(a) requires the Debtor to pay Interest to the Lender monthly in arrears but does not specify what amount of Interest is payable under that clause.

211 As already noted, cl 5.3 provides that Interest shall at all times be the Higher Interest Amount (which is calculated by reference to the formula in cl 5.5) unless the Lender notifies that the Lower Interest Amount is payable for any Interest Period, and cl 5.4 provides that a Lower Interest Amount may be notified as the amount to be paid for any Interest Period. Thus, the Mortgage contemplated that different interest rates could apply for different Interest Periods.

212 Commercial N's POC asserts that notice had never been given to the borrowers under cl 5.3. While the Defendants do not admit that matter in their POD, they did not advance any submission that they had been notified in accordance with cl 5.3 or cl 5.4 that the Lower Interest Amount was payable for any particular Interest Period. However, it seems to me that notice may have been given by the email sent from Mutual Support to Ms Chien on 18 October (referred to at [147] above).

213 In any event, irrespective of whether notice had been given, I am not persuaded that interest at the Higher Interest Amount (calculated on the formula in cl 5.5) or at the Higher Interest Rate compounding monthly under cl 5.12(b) is a penalty, based on the recognised distinction between provisions in agreements, such as a mortgage or a guarantee, which incentivise prompt payment and clauses which increase the rate of interest upon failure to make prompt payment, where the latter may be held to be a penalty clause and the former are not: see, for example, *Kellas-Sharpe v PSAL Ltd* [2013] 2 Qd R 233; [2012] QCA 371 (**Kellas-Sharpe**); *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 at 366–7; [1983] HCA 3; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1990) 23 FCR 1 at 29; [1990] FCA 186 (Full Court); *Jin Lian Group Pty Ltd (In Liq) v ACapital Finance Pty Ltd* [2021] NSWSC 931 at [31]–[37].

214 In *Oak Capital Mortgage Fund Ltd v Dlakic* [2019] NSWSC 1538, Fullerton J considered clauses in the same terms as cll 5.3 and 5.4 in this case. A

difference was that Schedule A to the mortgage qualified the operation of cll 5.3 and 5.4 by a "Special Condition", by which the lender notified the debtor that cl 5.4 applied whilst ever an Event of Default had not occurred, whereas cl 5.3 applies at any or all other times. In other words, notice under cl 5.3 was given by the Lender that the Higher Interest Amount was not payable during periods of no default.

215 Fullerton J concluded that the interest rate model in question was outside the purview of the penalty doctrine, saying at [106]–[107]:

> "In any event, it would appear that the interest rate model incorporated in the loan agreement is outside the purview of the penalty doctrine. Under the agreement, the default or Higher Interest Rate was the standard rate applicable under the loan and the Lower Interest Rate only applied if notice was given by the plaintiff, with notice deemed to have been given where there was no default. Accordingly, in a technical sense, the differential interest structure does not operate to penalise the borrower for breach but rather provides for a 'concessional' lower rate whilst ever there has been no default. As noted in *Kowalczuk v Accom Finance* (2008) 77 NSWLR 205; [2008] NSWCA 343 (Campbell JA, Hodgson and McColl JJA agreeing)
>
> > [162] …There is a conventional view that a properly drafted mortgage containing higher and lower rates does not attract the law of penalties at all. That is because the law of penalties strikes down those provisions of a contract that state the consequences that will flow when there is a breach of contract, if those consequences are not a genuine pre-estimate of the damage likely to be suffered in consequence of that breach. If the mortgage is drafted so that the borrower agrees to pay a particular rate of interest, but the lender agrees to accept a lower rate of interest in full satisfaction of the borrower's obligation to pay interest at that particular rate provided that the lower rate of interest is paid timeously (and, sometimes, provided that there is no breach of any other provision of the mortgage) that provision is not one that states the consequences of a breach of contract, and hence the law of penalties does not apply to it.
>
> Further, as noted by counsel for the plaintiff, a clause similar to that contained in the mortgage and memorandum was the subject of consideration by Campbell J (as his Honour then was) in the decision of *King Investment Solutions Pty Limited v Hussain* (2005) 64 NSWLR 441; [2005] NSWSC 1076. His Honour held that such a clause fell outside the ambit of the doctrine:
>
> > [138] One requirement for a provision in a contract being a penalty is that it states a consequence which is agreed to follow from breach of one of the provisions of the contract. The structure of the interest clause in the present case is not like that. Rather, the interest clause in the contract involves a promise by the mortgagors to pay interest at 118.8%, and a promise by the mortgagee that, if the mortgagors pay the interest on time, or no more than 7 days late, the mortgage will accept interest at 60%. *A clause structured in that way is not regarded as a penalty*." (Emphasis added by Fullerton J.)

216 In my view, Fullerton J's reasoning is apt in this case. Here, the primary contractual obligation was to pay the Higher Interest Amount, with the differential interest structure providing for a lower concessional rate of interest whilst there was no default, rather than operating to penalise the Defendants for breach. Applying that to the regime in cl 5.12, a Lower Interest Amount payable under cl 5.12(a) is a lower concessional rate available whilst there was no default. Where the concessional rate is not paid punctually, interest is payable on the Outstanding Interest at the Higher Interest Rate compounding monthly, and that interest becomes part of the Secured Money under cl 5.12(b).

217 In other words, the liability to pay interest at the Higher Interest Rate compounding monthly in cl 5.12(b) does not impose an additional or different contractual liability that arises upon the non-observance of the primary contractual obligation to pay the Higher Interest Amount, but rather is payable because the reduced rate has not been paid punctually. Further, and while noting that the terms on which interest is payable under cl 5.12(b) is worded differently to the formula in cl 5.5, there are no calculations before the Court to suggest that the application of the interest provisions under cl 5.12(b) gives rise to a different outcome or higher amount than would be payable if applying the formula under cl 5.5 to ascertain the Higher Interest Amount. In that regard, I note that the Schedule to the POC is calculated on the Secured Money comprising the Principal and Outstanding Interest at the rate of 70.72% per annum in accordance with the formula in cl 5.5 and on the basis of cl 5.12(b)(i).

218 I accept that this construction may appear to apply a matter of form over substance and relies on a distinction that has been the subject of debate.

219 In *Kellas-Sharpe*, Gotterson JA observed that the rule was "anomalous" and contrary to equity's preference for substance over form and noted the description of the rule as "well-known, if not much praised": at [35], [39]. At [49], His Honour stated:

> "The appellant's submissions do raise matters which give cause to question the appropriateness for contemporary times of the rule and the distinction it makes. However, for reasons which I have mentioned, this Court is constrained by authority to apply it."

At [59], Fryberg J similarly observed that:

> "If the problems are susceptible of judicial resolution, they should be examined nationally at the highest level."

220 In *Oxygen Funding Solutions Pty Ltd v Dick-Telfar* [2020] NSWSC 582, Adamson J (as her Honour then was) said at [80]:

> "However, courts have consistently held that, as long as the provisions for the lower and higher rates of interest are drafted in such a way as to make clear that the lower rate is payable by way of a discount, or reward, for timely payment and the higher rate is the rate otherwise applicable, the rate does not amount to a penalty and the lender's conduct is not unconscionable. Thus, it is irrelevant that 10% cannot possibly be a genuine pre-estimate of the plaintiffs' loss if the payment at 4% is not made on time since this is not the test. While trial judges and intermediate courts have railed against the consequences of this distinction, which is to immunise the result of a drafting device from scrutiny on the basis of equitable principles relating to penalties and unconscionability, it has been said, time and again, that the principle is too well established to be disturbed other than at the highest level, by the High Court or by Parliament: *Kellas-Sharpe* at [2]-[4] (Margaret McMurdo P), [32]-[49] (Gotterson JA) and [57]-[60] (Fryberg J)."

221 Accordingly, and while the operation of the interest regime in cl 5.3, cl 5.12(b) and the formula in cl 5.5 provides for an amount of interest that I would readily accept is seemingly extravagant, out of all proportion or unconscionable due to the operation of the capitalisation/compounding factor applied to the Higher Interest Rate of 70.72% per annum, I am not satisfied that those clauses are unenforceable as contractual penalties in this case.

222 Objectively, the rate of interest of 70.72% per annum is also high even without the capitalisation factor, particularly when compared to the Lower Interest Rate of 0.35% per week or 18.2% per annum. That said, there is some force to Commercial N's submission that the Defendants have not discharged their onus of establishing that the Higher Interest Rate is penal in character.

223 No evidence was led to address whether the Higher Interest Rate was commensurate with the interest protected by the bargain or was extravagant and unconscionable by itself. Hugo Ng's evidence may have showed him to have little to no knowledge about the loan application process and the particular transaction in this case, but no attempt was made to ask him or Morgan Ng about matters that would be relevant to assessment to be undertaken by the Court, such as about interest rates in other contracts, the rates of default in the loans Commercial N provides or the likely costs incurred.

224 The test of whether a particular provision is punitive or penal in character is not whether the sum stipulated would be considered to be merely disproportionate compared to the likely damage, but whether it has been demonstrated to be extravagant or unconscionably disproportionate: *Arab Bank* at [105]. While finely balanced, I do not consider it open to infer from the Higher Interest Rate itself that it is out of all proportion, extravagant or unconscionably disproportionate or was purely punitive in character, noting the short-term nature of the loan, that Commercial N was likely a lender of last resort for the Defendants and the interest rates that applied in the authorities to which I refer below.

225 Accordingly, the Defendants have failed to make good their claim that Commercial N's claim for interest based on the Higher Interest Rate in accordance with the formula in cl 5.5 and on the basis of cl 5.12(b)(i) of the Memorandum is a penalty and unenforceable.

Misleading or deceptive conduct claim

226 The defence and cross-claim refer to two representations made by Commercial N which are claimed to be misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the ACL and/or s 12DA of the ASIC Act. They also allege that they relate to future matters and rely on s 4 of the ACL and/or s 12BB of the ASIC Act.

227 The first representation is the ILO, which is alleged to have represented that the amount advanced would be $588,000 pursuant to which the net amount that was to be made available to the borrowers was $210,000 (**First Representation**).

228 The second representation is that sometime in early October 2019, Commercial N advised Ms Chien and Ms Huang that they needed to provide the water rates bill in respect of the Burwood Property to Mr Ronis and sign another document in relation to the water rates (**Second Representation**). The particulars given refer to a telephone conversation in early October 2019 between Ms Fay and Ms Chien in which Ms Fay said words to the effect "you and your mother need to take the water bill and go and see Peter Ronis solicitor and sign another document in relation to the water rates bill".

229 The Defendants allege that the First and Second Representations relate to future matters and Commercial N did not have a reasonable basis for making them as:

> "(i) The terms of the Agreement are not in accordance with the [ILO] in that only the amount of $430,000 was to be advanced instead of $588,000 as per the [ILO];
>
> (ii) The document which was signed by [Ms Huang and Ms Chien]… was not in relation to the outstanding water bill as stated by [Commercial N] but rather it was the Deed of Variation which substantially varied the terms of the loan from Commercial N, in that it reduced its amount and changed its disbursement;
>
> ….
>
> (iv) In so far as the First and Second Representations were as to existing matters of facts, they were false and untrue."

230 Commercial N denies that it engaged in misleading or deceptive conduct as alleged. It admits to making the loan offer for $588,000 in the ILO but denies that the offer constituted a representation, denies that Ms Fay was Commercial N's employee and/or agent and/or representative and that anything she said was said on behalf of Commercial N, and denies that the Second Representation was made.

231 Subsection 18(1) of the ACL provides that a "person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." Subsection 12DA(1) of the ASIC Act contains a prohibition in similar terms, specifically applying to conduct "in relation to financial services."

232 Section 4 of the ACL and s 12BB of the ASIC Act are also in similar terms: both provisions relate to misleading representations concerning future matters and relevantly provide that a representation with respect to a future matter will be taken to be misleading if the person making the representation does not have reasonable grounds for making it.

233 There was no dispute that the First and Second Representations, if made, were made within the course of trade or commerce.

234 As to the First Representation, the issuance of the ILO was conduct engaged in by Commercial N.

235 The ILO contained the Terms and Conditions of an offer of finance for $588,000 with a net amount available to the Defendants from the facility of $210,000. However, it also expressly provided that the offer was indicative only, was based on the documents and information that had been provided by the Defendants which relevantly valued the Burwood Property at $3 million, and the maximum LVR was not to exceed 71%. Further, after the ILO, Ms Chien elected to take the "valuation and contract together", likely because it involved the quicker process but also came with the risk of funding changing due to a lower than expected valuation, as was the case with the Burwood Property.

236 Considered in that context, the ILO was not misleading in any relevant sense, notwithstanding that the Deed of Variation provided for a reduced sum of $430,000.

237 I have also concluded that the Defendants have failed to establish that the Second Representation involved any misleading or deceptive conduct by or on behalf of Commercial N.

238 This is primarily for the reasons and my finding that Ms Chien was told to send the water rates notice to Mutual Support (not Shanahans) on 13 and 14 October and my rejection of her evidence that she was told that the documents she had to sign on 14 October, including the Deed of Variation, related to the water bill or water rates. It follows that I am not satisfied that the Defendants have established that the Second Representation was made or that it was misleading or likely to mislead the Defendants.

239 Even if satisfied of those matters, I am unpersuaded by the Defendants' contention that Commercial N engaged in the alleged conduct because the alleged representation had been made by Ms Fay from MaxFunding, who they asserted was "Commercial N's employee and/or agent and/or representative".

240 At the hearing, the Defendants accepted that Fay was not Commercial N's employee. However, they submitted that the Court should find that she and MaxFunding were acting as Commercial N's agent. It was submitted that Commercial N could not isolate itself from the representations of Fay and MaxFunding as the business model that emerged when Hugo Ng gave

evidence is that he knew nothing about the transaction and had given no instructions. They submitted that Commercial N had deliberately refrained from any involvement in the loan so that the only direct contact was with Fay and MaxFunding, with indirect contact with Summer Lawyers, and the Defendants were entirely dependent on the advice of Fay and MaxFunding, including in respect of the solicitor they chose.

241 The Defendants submitted that Fay and MaxFunding were heavily involved in the loan process after the ILO was sent, such as getting contact details for solicitors and organising the process of the conference between Mr Ronis and the Defendants, beyond what would be expected by a broker, as the brokerage part had been affected. It was submitted that no one contacted the Defendants from Commercial N to say you need to go and see a solicitor, it was only done through Fay and MaxFunding, with no involvement by Mutual Support.

242 Commercial N submitted that there was no basis on which to conclude that Fay was an agent or representative of Commercial N, either on the pleadings or from the evidence as it emerged during the hearing.

243 By s 139B(2)(a) of the *Competition and Consumer Act* (**CC Act**), any conduct engaged in "on behalf of" a body corporate by a "director, employee or agent of the body corporate within the scope of the actual or apparent authority of the director, employee or agent" is taken, for the purposes of the Australian Consumer Law to have been engaged in also by the body corporate.

244 Similarly, any conduct engaged in "on behalf of" a body corporate by a third party will be taken to have been engaged in by the body corporate, if done "at the direction of a director, employee or agent of the body corporate", or with the "consent or agreement (whether express or implied)" of such persons, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent: CC Act, s 139B(2)(b).

245 Similar provisions are contained in s 12GH(2)(a) and (b) of the ASIC Act.

246 The term agent is not defined in the CC Act and the ASIC Act; its scope is determined by reference to the general law: *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389; 15 BPR 29,699 at [287] (**Tonto**); *Perpetual*

Trustee Co Ltd v Burniston (No 2) [2012] WASC 383; 271 FLR 122 at [286] (**Burniston**).

247 Commercial N referred to the discussion of agency and the position of independent contractors in *Tonto* at [177], and cases which established that a mortgage or finance broker is generally the agent of the borrower and not the lender, referring to *Custom Credit Corporation Ltd v Lynch* [1993] 2 VR 469 at 486–487 (VSC – Appeal Division); *Morlend Finance Corporation (Vic) Pty Ltd v Westendorp* [1993] 2 VR 284 at 308 (VSC – Appeal Division); *Steele-Smith v Liberty Financial Pty Ltd* [2005] NSWSC 398 at [104]; *Bank of Western Australia Ltd v Luo* [2010] NSWSC 733 at [54]; *Dodds v Kennedy (No 2)* (2011) 42 WAR 16; [2011] WASCA 131 at [57]; *Burniston* at [245]–[247].

248 In *Tonto* at [176] and [177], Allsop P (with whom Bathurst CJ and Campbell JA agreed) stated:

> "[176] It is appropriate to set out the whole of Art 1 from *Bowstead and Reynolds on Agency* (19th ed) at 1 [1–001] since Art 1(4), in particular, posits a form of agency of some relevance here — one in which the agent has no power to create or affect legal relations:
>
> > '(1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.
> >
> > (2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.
> >
> > (3) Where the agent's authority results from a manifestation of assent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority.
> >
> > (4) A person may have the same fiduciary relationship with a principal where he acts on behalf of that principal but has no authority, and hence no power, to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent.'
> >
> > (Footnotes omitted.)

> [177] These expressions of the central characteristics of the relationship reveal the closeness of identity that is required for the relationship to exist. Not every independent contractor performing a task for, or for the benefit of, a party will be an agent, and so identified as it, or as representing it, and its interests. Agency is a consensual relationship, generally (if not always) bearing a fiduciary character, in which by its terms A acts on behalf of (and in the interests of) P and with a necessary degree of control requisite for the purpose of the role. Central is the conception of identity or representation of the principal… It is sufficient to recognise that the essential characteristic is that one party (A) acts on the other's (P's) behalf, and that this will generally be in circumstances of a requirement or duty not to act otherwise than in the interests of P in the performance of the consensual arrangement… The necessary good faith implicit in a fiduciary character in the relationship reflects the character of identity or representation that the relationship essentially carries."

249 In *Tonto*, the Court concluded that a mortgage sub-originator, which introduced loans to (but did not represent) the originator and its client lender, was not the agent of the originator or the lender, describing the introduction deed as "an agreement between two entities each of which had its own business," whereby "[o]ne was to endeavour to introduce business from its own customer base for the mutual commercial advantage of both": at [191]–[194].

250 In this case, there is no evidence of any documentation between Commercial N and MaxFunding or, in my view, evidence of any express or implied actual agency between Commercial N and MaxFunding.

251 Hugo Ng gave evidence that MaxFunding was a separate entity and the referrer of the loan application to Commercial N (T41.9–27, T54.47). Morgan Ng said that MaxFunding was involved in the process but did not have any association with Commercial N and was not authorised to act as agent for Commercial N, in contrast to Mutual Mortgages, who was Commercial N's authorised agent. He described MaxFunding's role as the originator of the loan and its involvement as being in the initial referral and application process although occasionally assisting Mutual Mortgages with the issuance of loan offers (T83.15–20).

252 Based on that evidence and the description of MaxFunding in the emails sent by Fay, there is force to Commercial N's submission that Max Funding appears to be an online mortgage brokerage service for small business and acted for the Defendants as their broker, and not for or on behalf of Commercial N.

253 It is possible that MaxFunding was, at the time of the ILO and leading to the execution of the documents on 2 October, the agent of Commercial N by way of apparent authority. This assumes that MaxFunding assisted with the issuance of the ILO and finds some support in the three emails sent by Fay, including about solicitors and the need to appoint one for contract execution. I would also accept that Ms Chien may have believed that there was some connection between MaxFunding and Commercial N as lender and relied on what Fay said in those emails at that time.

254 However, Fay's role (and that of MaxFunding), on the facts as I have found them, ended on 30 September and predated the Deed of Variation. It is also not correct, as the Defendants submit, that "no one contacted the Defendants from Commercial N to say you need to go and see a solicitor, it was only done through Fay and MaxFunding and there was no Mutual Support". Mutual Support sent an email on 30 September about those matters and all of the email communications after that time were between Mutual Support and Ms Chien, there were none from Fay or MaxFunding. Thus, even if there was some agency relationship between Commercial N and MaxFunding at the time of the ILO and possibly at 30 September, it does not follow that it was the agent after and in respect of the Deed of Variation.

255 In any event, I am not satisfied that the Defendants relied on what Fay said in her emails to Ms Chien or otherwise in deciding to execute the Deed of Variation. Even if I was, I am not satisfied that that by advancing a lower amount than first indicated, the Defendants established that the alleged misleading conduct was causative of loss or damage on their part or that it would be appropriate for the Court to exercise its discretion and declare the Agreement and Deed of Variation void under s 243 of the ACL and/or 12GM of the ASIC Act in circumstances where I have found that Ms Chien was aware that the principal amount of the loan had been reduced to $430,000 after 14 October 2019 and her subsequent actions, such as paying the shortfall funds for settlement and making the monthly repayment on 6 December, are more indicative of an affirmation of the Agreement, rather than electing or reserving her right to rescind: *Awad v Twin Creeks Properties Pty Limited* [2012] NSWCA 200 at [43].

Unconscionable conduct and Contracts Review Act

256 Although raising issues under the general law and statute, there is little to differentiate the Defendants' articulation or proof of their unconscionable conduct and *Contracts Review Act* claims. The matters relied on in support of the *Contracts Review Act* are no different to those relied on in support of the unconscionable claims, and they seek the same relief.

Pleaded claims

257 The Defendants' pleaded unconscionable conduct defence and cross-claim (as pressed at the hearing) claims that the Defendants were at a 'special disadvantage' as Commercial N knew and/or ought to have known that:

(a) the Defendants were not aware that the amount to be provided by Commercial N had been reduced by the Deed of Variation;

(b) Ms Huang did not speak, read or write English and a translation certificate should have been procured in respect of her signing any document;

(c) the Deed of Variation was not in relation to a water bill but changed the terms of the loan, for which documents had already been signed by the Defendants;

(d) the terms of the Agreement, including the Deed of Variation were different from the terms of the ILO;

(e) the documents in relation to the ILO could and should have been sent directly to the Defendants; and

(f) the Defendants should have been free to seek legal advice in relation to the Agreement and/or the Deed of Variation from any solicitor of their choosing without having to nominate a solicitor from the list provided to them.

258 They also say that when they signed the Agreement and the Deed of Variation:

(a) there was a material inequality between Commercial N and the Defendants by reference to their bargaining power and respective economic circumstances;

(b) the provisions of the Agreement and Deed of Variation were not the subject of any negotiations and it was not reasonably practicable for the Defendants to negotiate, alter or reject their provisions;

(c) the Defendants were not able to understand the documents; and

(d) Commercial N failed to act in good faith towards them. The particulars to this allegation refer to conversations with 'Fay', in which she allegedly said that the Agreement was per the ILO and

> the Deed of Variation was in relation to the water rates, the loan documents would not be sent to the Defendants but only to their solicitor and the Defendants should act very quickly as the ILO would expire soon.

259 The Defendants allege that Commercial N unconscionably took advantage of their special disadvantage as Commercial N induced the Defendants to sign the loan documents; the Defendants signed the relevant documents without the benefit of legal advice; and the Deed of Variation was not merely in relation to a water bill but rather changed the nature of the transaction.

260 The Defendants say that by reason of the above matters, Commercial N engaged in unconscionable conduct and are entitled to a declaration under s 243 of the ACL and/or s 12GM of the ASIC Act that the Agreement and the related documents are void ab initio and of no effect and/or not enforceable against them or either of them.

261 The Defendants also allege that by reason of the matters at [258_Ref157583146] above and their reliance on the First and Second Representations in signing the Agreement, the Agreement and deed of variation are unjust and should be set aside under the *Contracts Review Act*.

Submissions

262 The Defendants submit that there are two major issues in relation to unconscionability and whether the contract was unjust, one being the interest rate, and the other the Deed of Variation.

263 The Defendants emphasise Ms Huang's inability to speak English at more than a basic level and said it was central to the issues. They say that the Lender was on notice that Ms Huang had at least limited English language skills, neither Ms Huang nor Ms Chien were financially experienced and the security documents were long and complicated. They also contend that no proper explanation was given by Commercial N for why the Deed of Variation was required and that they also failed to receive adequate advice about that document.

264 The Defendants further submit that the mortgage interest provisions were hidden away and provided for a compounding monthly interest rate that gave the "astonishing" rates of interest which are claimed, which are closer to a rate

of 353% per annum. They say that they were not provided with adequate advice about the interest regime and it was only if Interest Rate Regime B and cl 5.12 had been properly explained that they would have become aware of their effect.

265 They submit that this case was unlike *Provident Capital Ltd v Papa* (2013) 84 NSWLR 231; [2013] NSWCA 36 (**Provident Capital**), where there was a specific finding that the lender was not in any way at fault for the inadequacy of the legal advice given to the borrowers. They say that, here, Commercial N went out of its way to never interface with the borrowers directly and insisted that the documents were only sent to their solicitor (Mr Ronis), whose attention was not drawn to the particular provisions of the contract that provided for the extraordinarily high interest rates to be charged.

266 They submit that no reasonable lender could have believed that the Defendants were not 100% certain to default on the loan, particularly once the Deed of Variation was executed, as there were no surplus funds to pay interest while the exit strategy was put in place. They also submit that this case is similar to *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6; 96 ALJR 271 (**Stubbings**), stating in submissions that:

> "The brutal truth was that the whole exercise was a charade to provide legal documentation for an advance for money which were (sic) secured and where it was simple inevitably (sic) that the borrowers would default."

267 As to the Defendants' unconscionable conduct claim, Commercial N submits that no distinction had been drawn between the circumstances of Ms Huang on the one hand and Ms Chien on the other hand, save for the allegation relating to Ms Huang's command of English.

268 Commercial N submits that no allegation was advanced to the effect that Commercial N possessed any knowledge which could have reasonably raised concerns regarding the veracity of the certifications made by Mr Ronis and the Defendants with respect to legal advice and the allegations pleaded are devoid of any cogent articulation of the basis for the contention that the reduction in the loan amount pursuant to the Deed of Variation was in anyway detrimental to the Defendants, let alone unjust or unconscionable.

269 Commercial N submits that any perceived shortcomings in respect of Mr Ronis' advice or conduct were unknown to it at the time of entry into the loan and Deed of Variation and it was entirely reasonable and appropriate for Commercial N to rely on the certifications he provided regarding the provision of legal advice, referring to the reasoning and principles to be drawn from *Provident Capital* at [7], [114].

270 Commercial N submits that there was an absence of predatory conduct by it as lender and it would be unjust to visit the blandishments of Ms Chien *vis-à-vis* Ms Huang and the adequacy of any fulfilment of retainer by Mr Ronis on Commercial N. It says that public interest did not necessarily require asset lending to be proscribed or even deterred as it may advance the interests of the parties to many transactions for financiers to be able to lend on a "low doc basis" without requiring the expenditure of time and effort in ascertaining and verifying the ability of borrowers to service loans. If, instead, a financier is satisfied that a borrower is able to make the decision for themselves or has received appropriate advice, the public interest reflected in the *Contracts Review Act* would be satisfied: *Provident Capital* at [113] (Macfarlan JA; cf Allsop P at [8]).

271 Commercial N also places reliance on the Defendants' NCCP Act Declarations (Schedule C) and the Declaration of Commercial Interest that Ms Huang executed. It submits that, at best, the Defendants must have been careless, if not reckless, regarding the veracity and accuracy of the representations they made by certifying those matters and at worst, they contained false declarations under their own hands and they must have outright lied. Either way, it submits that the Defendants are the architects of the circumstances in which they now find themselves.

272 Commercial N submits that the loan provided substantial benefit in favour of the Defendants, which was an important feature against the conclusion that it was attended by unconscionability or was unjust and ought to be set aside. It also says that there is a distinction between circumstances where a parent is "bolted on" as a guarantor of a loan but derives no benefit of the transaction to the position this case, where both Ms Chien and Ms Huang were borrowers

involved in the subject business and who also enjoyed the benefit of the repayment of the Detex Loan and NAB arrears.

273 Commercial N also submits that the features that underpinned the reasoning in *Stubbings* were absent in the present case, emphasising that the loan was not a personal loan dressed up as a business loan, Ms Chien clearly conveyed that the exit strategy in respect of the loan included the refinance of the Burwood Property or its sale in the future. It was submitted that both of the Defendants possessed a reasonable degree of financial acumen and experience and the only possible disadvantage which may have been known to Commercial N was Ms Huang's apparent lack of good command of English but the evidence was clear that Ms Huang utilised her daughter as a translator, such that any lack of English on the part of Ms Huang was inconsequential.

274 Commercial N submits that the *Contracts Review Act* claim should be rejected on the basis of s 6(2) of the Act, and otherwise relied on their submissions made in relation to unconscionable conduct.

Unconscionable conduct: legal principles

275 The Defendants unconscionable conduct claim alleges that Commercial N engaged in unconscionable conduct within the meaning of the unwritten law from time to time (ACL, s 20(1) or ASIC Act, s 12CA) or under statute: ACL, s 21(1) or ASIC Act, 12CB.

276 So far as the general law is concerned, the principles relating to unconscionable conduct were set out in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 at 459–460, 461–462 and 474; [1983] HCA 14 (**Amadio**). The Court held that unconscionability involves: a relationship that places one party at a special disadvantage *vis-à-vis* the other; knowledge of that special disadvantage by the stronger party; and unconscientious exploitation of the stronger party of the weaker party's disadvantage. These "considerations" were approved by the plurality in *Stubbings* at [39] (Kiefel CJ, Keane and Gleeson JJ), subject to the caution that they "should not be understood as if they were to be addressed separately as if they were separate elements of a cause of action in tort".

277 In *Stubbings*, a case concerning unconscionability under the ASIC Act, the joint judgment of Kiefel CJ, Keane and Gleeson JJ said:

> "[40] In this field of discourse, 'special disadvantage' means something that 'seriously affects the ability of the innocent party to make a judgment as to his [or her] own best interests'. While the factors relevant to an assessment of special disadvantage have not been exhaustively listed, Fullagar J in *Blomley v Ryan* [(1954) 99 CLR 362; [1956] HCA 81] considered that special disadvantage may be inferred from 'poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary'. No particular factor is decisive, and it is usually a combination of circumstances that establishes an entitlement to equitable relief."

278 Actual knowledge of the special disadvantage or vulnerability is not essential. Constructive knowledge is sufficient: *Nitopi v Nitopi* (2022) 109 NSWLR 390; [2022] NSWCA 162 at [4]–[9] (Bell CJ), [118] (Ward P) (**Nitopi**).

279 Unconscionability is not the mere breach of accepted standards of commercial behaviour or any conduct that involves an element of hardship or unfairness. It requires conduct that is characterised by a substantial departure from that which is generally acceptable commercial behaviour that is so plainly or obviously contrary to what is expected that it is offensive: *Australian Competition and Consumer Commission v Geowash Pty Ltd (subject to a deed of company arrangement) (No 3)* [2019] FCA 72; (2019) 360 ALR 441 at [662]. An element of hardship or unfairness, without more, is insufficient: *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315; [2003] HCA 57 at [26].

280 Equity will not intervene to relieve a party from the consequences of their own foolishness or an improvident transaction where they voluntarily engage in risky business. The party must point to conduct on the part of the other party which makes it just to require them to restore the first party to their previous position: *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; [2013] HCA 25 at [20].

281 Unconscionability under statute requires the Court to have regard to the matters which are referred to in s 12CC(1) of the ASIC Act and s 22(1) of the ACL, which set out a non-exhaustive list of factors, including matters referred to by the Defendants in their pleading, such as the relative strengths of the parties' bargaining positions and whether the Defendants were able to understand the documents. The Court may also have regard to whether, as a

result of the conduct engaged in by Commercial N, the Defendants were required to comply with conditions that were not reasonably necessary for the protection of Commercial N's legitimate interests: s 22(1)(b) of the ACL; s 12CC(1)(b) of the ASIC Act.

282 The statutory formulation of unconscionable conduct in the ACL and ASIC Act does not refer to knowledge of the attributes or circumstances of the recipient of the services and does not require actual or constructive knowledge of an alleged special disadvantage. However, actual knowledge or constructive knowledge of a special disadvantage may affect whether they have acted in good faith.

Unconscionable conduct: consideration and determination

283 Having considered the parties' submissions and the above principles, I have concluded that subject to one matter, Commercial N has not engaged in conduct that is unconscionable in relation to the Agreement, including the Deed of Variation, within the meaning of ss 20 or 21 of the ACL and/or ss 12CA or 12CB of the ASIC Act. That matter concerns the capitalisation or compounding of interest calculated at the Higher Interest Rate monthly in the formula in cl 5.5 and as applied in cl 5.12(b).

284 Dealing first with special disadvantage, I have found that Ms Huang had a limited command of English and needed a Mandarin interpreter to understand documents written in English or when given an explanation in spoken English. Ms Huang may have had experience in dealing with loans and mortgages and been a director of T&C Excellent but (with no disrespect intended) she was not someone who would be described as a sophisticated or experienced businessperson. I consider that, on her own, Ms Huang's inadequate English seriously affected her ability to make a judgement as to her own best interests and she suffered a special disadvantage in the relevant sense.

285 There was no direct evidence of Ms Chien's educational achievements, but she spoke and wrote English well, had business experience and prior involvement with and knowledge about loans and mortgages. She also acted as Ms Huang's interpreter including in respect of legal matters, which lessened the impact of Ms Huang's special disadvantage to an extent.

286 As to the Defendants economic circumstances, T&C Excellent had been operating as a technology services consulting business for some years but it is unclear whether it was profitable or not or what income Ms Chien derived from it. The Defendants owned and lived at the Burwood Property as their home, which was subject to the NAB mortgage and the Detex caveat. There is no evidence of other assets they owned. Ms Huang did not work, although she seemed to have access to finances from other members of her family.

287 Commercial N may have been on notice that Ms Huang could only communicate in basic English from the Application Annexure. However, they also received documents written in English that Ms Huang signed, namely the ILO and Declaration of Commercial Interest, neither of which referred to her having had access to an interpreter or suggest a need for one. Further, I am not persuaded that Ms Chien raised the need for an interpreter with MaxFunding, Mutual Support or Shanahans or that she told Mr Ronis that her mother did not speak English.

288 Irrespective of whether Mr Ronis should have identified that Ms Huang had limited English when they met, he did not do so and Mr Ronis' declarations indicated that Ms Huang (and Ms Chien) understood the legal effect of what she was signing. In those circumstances, I am not persuaded that Commercial N had actual or constructive knowledge of Ms Huang's special disadvantage or that it ought to have known that a translation certificate should have been obtained in relation to the Agreement, including the Deed of Variation.

289 I accept that Commercial N was in a relatively stronger bargaining position than the Defendants, particularly as Ms Chien was in urgent need of funds to pay out the Detex Loan and have the caveat removed. However, any pressure from timing was of Ms Chien's own making and mere disparity in bargaining power does not take the matter very far: *Paciocco* at [293] (Keane J). There was also no evidence to suggest that Commercial N applied pressure or sought to take advantage of the Defendants in that regard. Based on my findings in relation to Ms Chien's conversation with Fay, there was also no lack of good faith on the part of Commercial N of the nature alleged.

290 I do not consider that the Defendants were at a special disadvantage or that it was unconscionable for the documents in relation to the loan offer to have been sent to their solicitor rather than to them directly. There were numerous documents to sign. The Mortgage, Schedules A and B and some of the other documents were not difficult to understand but the Memorandum was lengthy, with complex interest provisions. In my view, it was not inappropriate to ensure that the Defendants obtained legal advice by sending the documents to Mr Ronis. Of course, Ms Chien and Ms Huang could have asked Shanahans for a copy of the documents in advance of their meeting or have arranged a second meeting to enable them to review the documents further. However, they chose not to do so, presumably because Ms Chien wanted the transaction to occur quickly.

291 I also do not consider that the Defendants were restricted by Commercial N from obtaining legal advice from a solicitor of their choosing because they were required to nominate a solicitor from the list provided to them by Fay at MaxFunding. Leaving to one side that I have found that Fay was not acting as Commercial N's agent, her email asked Ms Chien to do her own due diligence and seek advice of Ms Chien's choice. An objective reading of Fay's email suggests that the list of solicitors was provided in response to a request for assistance from Ms Chien, rather than operating as a mandate that restricted the Defendants' ability to obtain legal advice from a solicitor of their choosing. In any event, no evidence was led by Ms Chien (or Ms Huang) that the Defendants had made their own inquiries and wanted to use a different solicitor or were concerned about using Mr Ronis, who Ms Chien chose because she thought he was the cheapest.

292 The provisions of the Agreement and Deed of Variation were not the subject of negotiation before they were executed. Presumably, MaxFunding, acting as the Defendants' broker, could have sought to negotiate the commercial terms of the ILO, such as the period of the loan. However, it seems unlikely to have been reasonably practicable for the Defendants to have negotiated for the alteration or rejection of the key provisions relating to the principal sum, interest rates or in respect of security to be provided. That said, other than the fact that

the loan was for a short-term and the interest rates were very high, the terms and conditions were not in themselves unusual or unfair.

293 Independent legal advice was obtained from Mr Ronis on 2 October when the Defendants came to his office and executed the initial documents. There is no evidence that any other expert advice was obtained, such as financial or accounting advice.

294 As I have found, Mr Ronis provided the Defendants with an explanation of the key terms of the loan and mortgage documents on 2 October, including the requirement to pay interest during the 26 week term based on the Lower Interest Rate, that the Higher Rate of Interest of 1.36% per week would, in practice, be payable in the event of default and the Burwood Property was being used as security and could be used in the event of default. I am satisfied that both Ms Chien and Ms Huang understood that they were signing a mortgage with regard to the Burwood Property and that if they defaulted on the loan there was a risk of losing it. If Ms Huang did not understand that from Mr Ronis, she knew from her discussions with Ms Chien.

295 While I am satisfied that Mr Ronis referred the Defendants to cl 5.12 of the Memorandum and told them that it provided for the Higher Interest Rate to apply if they defaulted and also compounded monthly, I do not consider it likely that he explained the impact of the capitalisation on outstanding interest at the higher interest rate such that the Defendants were aware of the significant financial impact of the formulae in cl 5.5 or calculating interest in accordance with cl 5.12(b). For the reasons set out earlier, those provisions are complex and it seems unlikely that Mr Ronis would have had sufficient time in an hour to go through them in sufficient detail to enable the Defendants to understand, explain the other terms and other documents and arrange for all of them to be signed and witnessed. I am satisfied that Ms Chien and Ms Huang did not understand the impact that those clauses would have on the amount they would have to pay under the Mortgage, that was additional to the payment of (simple) interest at the Higher Interest Rate on default.

296 That said, there is nothing to suggest that Commercial N was on notice that Mr Ronis did anything other than fulfil his duty in explaining the provisions of the

Agreement and the Deed of Variation to the Defendants or that it ought to have been aware that he did not. It might have been different if Commercial N had knowledge that the Defendants were labouring under some particular disadvantage, but I am not persuaded of that matter.

297 The Defendants' knowledge and appreciation of the transaction that they were entering into with Commercial N as Lender also needs to be understood by reference to their position as guarantors of another commercial loan, namely the Detex Loan, and mortgagors with a bank, NAB, which entities had both taken security over the Burwood Property. While I accept that they did not know or appreciate the amount of interest that could accrue on the Commercial N loan and Ms Huang's command of English was imperfect, there is no doubt that the Defendants understood the risk of not meeting their obligations to repay loan monies advanced on commercial terms by Commercial N, particularly where that advance was going to be secured by a registered mortgage against their residence.

298 The Deed of Variation may have provided for different terms to the ILO by reducing the loan sum. However, I do not consider that Commercial N acted unconscionably or unfairly in relation to the Deed of Variation in circumstances where: the reduction in the loan amount was based on the 30 September valuation, about which Ms Chien was aware; Ms Chien chose to go with the faster process of the valuation and contract together with the attendant risk that the funds she had sought would not be available; and Ms Chien and Ms Huang accepted the Maximum LVR condition in the ILO. Further, as I have found, Commercial N did not represent to Ms Chien that the Deed of Variation related to a water bill, Ms Chien was on notice about the Deed of Variation and the absence of surplus funds before she met with Mr Ronis and the reduced amount of the principal sum was drawn to the Defendants' attention when they met with Mr Ronis on 14 October 2019.

299 Nor do I consider that Commercial N's system or its processes as a commercial lender involved any unfairness or unconscionability in relation to the circumstances in which the Agreement and the Deed of Variation were signed. Commercial N did not immunise itself or deliberately refrain from

dealing with the Defendants by insisting they go through MaxFunding and make them dependent on advice from Fay. Contrary to the Defendants' submission that all of their dealings had to be and were with MaxFunding, the evidence makes plain that Commercial N's agent, Mutual Mortgage, was dealing with Ms Chien on an ongoing and regular basis from at least 30 September 2019, as evidenced by the emails and messages sent by and received from Mutual Support.

300 I do not consider that this is a case where the certificates of advice from Mr Ronis were "window dressing": cf *Stubbings* at [49]. They may have used boilerplate wording but it could not be said that Commercial N took advantage of Ms Chien or acted unfairly by seeking to have T&C Excellent interposed as a borrower to prevent or impede the transaction coming under the National Credit Code in light of the fact that T&C Excellent was the borrower of the Detex Loan. Ms Chien had also turned her attention to servicing the loan through business income, with an exit strategy of property refinance or sale early on.

301 That leads me to the Higher Interest Rate.

302 I do not consider that the Higher Interest Rate of 1.36% per week or 70.72% per annum itself makes it unconscionable for Commercial N to enter into the Agreement and Deed of Variation. The rate of 70.72% per annum is very high relative to the lower interest rate, but there was no expert evidence provided by either party as to whether such a rate is excessive or even unusual in the context of a short term financing by way of a second mortgage and it is within the bounds of rates considered by the Court and found not to have unconscionable or unfair: See, for example, *Guardian Mortgages Pty Ltd v Miller* [2004] NSWSC 1236 at [104] (interest rates in a loan agreement of 14.5% per month (174% per annum) reducible to 12% per month (144% per annum)) and *HomeSec Finance Express Pty Ltd v Richardson* [2012] NSWSC 1375 (**HomeSec Finance v Richardson**) (default rate of interest of 144% per annum); *First Mortgage Capital Pty Ltd v Westpac Banking Corp Ltd* [2021] NSWSC 1143 at [55] (interest rate of 60% per annum in a loan and mortgage

agreement). Accordingly, I am not satisfied that the Higher Interest Rate is exorbitant for a short term loan of this type by Commercial N.

303 Further, the Defendants were aware of the interest rates, both the higher and lower rates, from the time they signed the ILO and later had them explained by Mr Ronis, including about the application of the higher rate on default. The Higher Interest Rate was not expressed on an annualised basis but it is not a difficult calculation to undertake, at least for Ms Chien.

304 However, I consider that the capitalisation and monthly compounding on the Higher Interest Rate of 70.72% per annum (which the Defendants could expect to pay on default) on a loan of $430,000 for six months is inherently oppressive and unconscionable. This is demonstrated by comparing the effect of the application of the Higher Interest Rate using the formula under the Memorandum at cll 5.5 and 5.12(b) (as Commercial N currently claims: see [180 _Ref157587262] above) with the position applying a simple interest approach, as follows:

	Capitalised approach (HIR) (as at 17 Aug 2022)	Simple interest approach (HIR) (as at 16 Aug 2022)
Principal	$430,000.00	$430,000.00
Interest payable monthly (approx., for month of Aug 2022)	$182,409.04	$25,898.29
Total interest to date (incl. Rollover Fee)	$2,789,342.52	$882,417.62
Balance	$3,219,342.52	$1,312,417.62

305 Considered in that context, it is plain, in my view, that enforcement of the Higher Interest Rate with capitalisation could never be said to be reasonably

necessary for the protection of Commercial N's legitimate interests. Put simply, the Higher Interest Rate with capitalisation, which, in the year to October 2022, was in the order of an effective annual rate of interest (on my rough calculation) of about 417% per annum, is "utterly crushing", and only increasing: *Kowalczuk v Accom Finance Pty Ltd* (2008) 77 NSWLR 205; [2008] NSWCA 343 at [175]. By comparison, the annualised (simple) interest rate apparent on the face of the Agreement is 70.72%.

306 When combined with the following matters: Commercial N took no steps to highlight the effect of capitalisation/compounding on the Higher Interest Rate other than to refer to cl 5.12 on the Mortgage and Schedule A, which was contained within a lengthy set of interest provisions that included a formula which in this case was attended by a degree of ambiguity (as set out above); Commercial N was aware that the Borrowers' ability to make monthly repayments was limited (having been estimated to be $2000 per month) and that they may need to sell their home; the inequality of the parties' bargaining positions, economic and personal circumstances; and the lack of negotiations about the provision and the impracticability of doing so; I am entirely satisfied that Commercial N's conduct in entering into the Agreement and Deed of Variation on those terms is irreconcilable with what is right and reasonable and involves a level of sharp practice and unfairness that is unconscionable within the meaning of s 21 of the ACL and s 12CB of the ASIC Act.

307 It follows, in my view, that the Defendants are entitled to orders that declare void or vary (by removing) those parts of cl 5 of the Mortgage Memorandum that provide for Interest at the Higher Interest Rate to be capitalised and/or compounded, such as cl 5.5 and 5.12(b), with effect from 18 October 2019, pursuant to s 243 of the ACL and/or s 12GM of the ASIC Act but the Defendants are not entitled to relief in respect of the whole of the Agreement.

Contracts Review Act: threshold issue

308 Section 6(2) of the *Contracts Review Act* provides that a person may not be granted relief in relation to a contract so far as the contract was entered into in the course of or for the purpose of a trade, business or profession carried on by the person.

309 The exception under s 6(2) has been interpreted narrowly: NC Seddon & RA Bigwood, *Cheshire & Fifoot Law of Contract* (LexisNexis Butterworths, 11th ed, 2017) at [15.27]. The *Contracts Review Act* has been applied to claimants attempting to escape a guarantee or mortgage given in connection with a business loan. A family element in a transaction, for example, a mortgage given by a wife or parents of a borrower, may be sufficient to bring the contract within the Act. It has also been held that where the business is carried out by the company, it is the company and not the directors who carry out the business, such that the directors and shareholders of a company may not be precluded from being the subject of relief: *Quikfund (Australia) Pty Ltd v Airmark Consolidators Pty Ltd* (2014) 222 FCR 13; [2014] FCAFC 70 at [120]–[137].

310 In this case, the purpose of the loan was identified as predominately for business purposes relating to T&C Excellent, referring specifically to "business cashflow", pay "ATO debt" and the purchase of equipment, the initial exit strategy stating that payout of the loan would be from business income. However, the question is not whether the purpose of the loan was for business, but whether the contract was entered into for the purpose of a business carried on by Ms Chien and Ms Huang.

311 As to Ms Huang, I am not satisfied that she was playing any substantive role in T&C Excellent in October 2019, when the Agreement was entered into. Given Ms Huang's evidence that she did not understand the Declaration (and did not sign it), I place little weight on the assertion that she was an "(unregistered) silent working partner". That Ms Huang was to receive part of the money from the business does not mean she is involved in or carries on the business.

312 The Detex Loan was secured over the Burwood Property and it was intended that some of the funds would be used (and were used) to pay the NAB arrears and water rates for that property. In all the circumstances, it seems to me that the Agreement, including the Deed of Variation, was not entered into as an ordinary incident of the carrying on a particular trade, business or profession by Ms Huang.

313 Similarly, even though Ms Chien was the sole director and company secretary, it was T&C Excellent who carried out the consulting business, and not Ms Chien.

314 In that context, and while finely balanced, I consider that Ms Chien is not precluded from a grant of relief under the *Contracts Review Act*. In my view, Ms Huang is even further removed, given she was neither a director nor an office holder of T&C Excellent at the relevant time.

Contracts Review Act: legal principles

315 Section 7 of the Contracts Review Act provides for the grant of relief, including the making of an order that a contract is void in whole or in part, where the Court finds a contract or provision "to have been unjust in the circumstances relating to the contract at the time it was made". "Unjust" is (non-exhaustively) defined in s 4(1) to include "harsh, unconscionable or oppressive" and "injustice" is to be construed in a corresponding manner.

316 Section 9 lists the matters to which the Court shall have regard, to the extent that they are relevant to the circumstances, and provides as follows:

> 9 Matters to be considered by Court
>
> (1) In determining whether a contract or a provision of a contract is unjust in the circumstances relating to the contract at the time it was made, the Court shall have regard to the public interest and to all the circumstances of the case, including such consequences or results as those arising in the event of
>
> (a) compliance with any or all of the provisions of the contract, or
>
> (b) non-compliance with, or contravention of, any or all of the provisions of the contract
>
> …
>
> (2) Without in any way affecting the generality of subsection (1), the matters to which the Court shall have regard shall, to the extent that they are relevant to the circumstances, include the following:
>
> (a) whether or not there was any material inequality in bargaining power between the parties to the contract,
>
> (b) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation,
>
> (c) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract,
>
> (d) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably

necessary for the protection of the legitimate interests of any party to the contract,

(e) whether or not:

(i) any party to the contract (other than a corporation) was not reasonably able to protect his or her interests, or

(ii) any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he or she represented,

because of his or her age or the state of his or her physical or mental capacity,

(f) the relative economic circumstances, educational background and literacy of:

(i) the parties to the contract (other than a corporation), and

(ii) any person who represented any of the parties to the contract,

…

(h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act,

(i) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect,

(j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act:

(i) by any other party to the contract …"

317 Section 7(1) of the *Contracts Review Act* involves distinct inquiries; first, is the contract unjust, and second, if it is unjust, what if any orders should be made: *Balagiannis v Balagiannis* [2022] NSWCA 18 at [110] (Brereton JA) (**Balagiannis**).

318 The effect of ss 7 and 9 of the *Contracts Review Act* is that a contract may be unjust in the circumstances existing when it was made because of the way it operates in relation to the claimant (substantive unfairness) or because of the way in which it was made (procedural unfairness), or both: *Balagiannis* at [4], [67] and [111]–[112].

319 In *Provident Capital* at [7] (cited with approval in *Superannuation & Corporate Services Pty Ltd v Turner* [2020] NSWCA 246 at [51]), Allsop P (as his Honour then was) said:

"The broad evaluation of unjustness under the *Contracts Review Act 1980* (NSW) ss 4, 7 and 9 involves the normative evaluation of the totality of

> relevant circumstances. Inevitably minds may differ as to conclusions about such questions. Also, it is often not fruitful to compare other cases with the particular circumstances at hand, lest one be deflected from an appropriate overall assessment by focus on particular aspects relevant to any such comparison. Central to the normative evaluation is the recognition that there is a need for the protection of some people in some circumstances, who are not able fully to protect their own interests against factors that may cause injustice. That vulnerability may come from one or more of many circumstances, such as lack of education or of intelligence, from gullibility, from the predation of fraud and greed, and also sometimes from loyalty and love. The characterisation of a contract as unjust and the sheeting home to the other contracting party of the consequences of its unjustness may be a difficult evaluative exercise. At its heart, however, is the recognition of the inadequacy of one party to protect her or his interests in the circumstances. Here, there was no predation. There was no behaviour in which [the lender] sought to take advantage of [the borrower]."

320 The second inquiry involves a discretionary decision: *Balagiannis* at [110]; *Perpetual Trustee Co Ltd v Khoshaba* (2005) 14 BPR 26,639; [2006] NSWCA 41 at [34]–[40] (Spigelman CJ), [106]–[111] (Basten JA) (**Khoshaba**). Before the Court intervenes, it must consider that it is just to do so, and any intervention must be for the purpose of avoiding as far as practicable an unjust consequence or result: s 7(1) *Contracts Review Act*.

Contracts Review Act: consideration and determination

321 As *Contracts Review Act* relief is more broadly available that relief under general law and statutory unconscionability and similar issues arise, I deal with this claim in a more summary fashion.

322 My reasons in relation to unconscionable conduct show that many of the matters set out in s 9(2) to which the Court shall have regard were present at the time the Agreement and Deed of Variation were entered into. Those matters include:

(a) an inequality of bargaining power as between Commercial N and the Defendants;

(b) a lack of negotiations between the parties relating to the terms of the ILO, the 2 October Agreement and the Deed of Variation;

(c) the imposition of capitalised interest conditions which are not reasonably necessary for the protection of Commercial N's legitimate interests and the unreasonable difficulty in complying with those conditions;

(d) it not being reasonably practicable for the Defendants to negotiate for the alternation or rejection of the provision, although

the evidence indicates that Mr Ronis sought an amendment to the repayment period from weekly to monthly;

(e) the relative economic circumstances, education and background of the Defendants and the lack of English speaking and literacy competency of Ms Huang;

(f) the physical form of the contract, and the intelligibility of the language, with the Mortgage memorandum including detailed and somewhat complex and ambiguous capitalised interest regimes;

(g) the obtaining of independent legal advice by the Defendants from Mr Ronis but no other expert;

(h) the explanation given to the Defendants about the terms of the Agreement and Deed of Variation by Mr Ronis and their consequent level of understanding of them;

(i) the absence of any unfair pressure or unfair influence by Commercial N but the inclusion of the capitalised interest provisions involving unconscionable conduct on the part of Commercial N; and

(j) the commercial setting, namely that the Detex Loan was due to be repaid. The loan advance and Mortgage enabled that to happen and to payout other mortgage arrears. However, the effect of the contract was the impact of a very high rate of interest with capitalisation on default and the risk of losing the Burwood Property.

323 In relation to the other matters in s 9(2), I do not consider that the Defendants were unable to protect themselves because of their age of state of physical or mental capacity, nor did this apply to any person representing them. There was no evidence of similar contracts entered into by Commercial N. As for the Defendants, they had entered into other mortgages and well understood them, including the Detex Loan which provided for security over the Burwood Property.

324 Having considered the above matters, I am not satisfied that the operation of the contract or the manner in which it was made renders the Agreement and the Deed of Variation, in their entirety, unjust in all of the circumstances. In particular, I am not satisfied that the Defendants, as co-borrowers of the principal amount of $430,000, did not appreciate or understand that interest was payable at the Higher Interest Rate in the event of default, and that a failure to make interest payments and the principal sum at the end of the term led to a risk they would lose the Burwood Property. Commercial N was also

entitled to rely on the receipt of legal advice by the Defendants and the certificates that were signed by them and Mr Ronis.

325 I am also not satisfied that the Deed of Variation is unjust. I do not consider it to have been unfair or unjust that Commercial N did not proceed on the basis articulated in the ILO and reduced the amount to be advanced having regard to the 30 September valuation and in light of the matters referred to at [298_Ref157607469].

326 I am, however, satisfied that those parts of cl 5 of the Mortgage Memorandum that provide for Interest at the Higher Interest Rate to be capitalised and/or compounded, such as cl 5.5 and 5.12(b), are unconscionable, harsh and oppressive and operate unjustly.

327 In coming to that view, I take into account the public interest in holding parties to their contractual obligations when entered freely, even though the contract might have been an ill-advised transaction. However, there is also a public interest in treating contracts for asset lending, where the security provided is the sole residence of the borrower, as unjust where borrowers have demonstrated an inability to reasonably protect their own interests: *Khoshaba* at [128] (Basten JA).

328 While I do not consider that the Defendants were unable to protect their interests in entering into the Agreement and the Deed of Variation in all respects, the substantive burden placed on the Defendants from the application of the Higher Interest Rate on a capitalised basis satisfies me that it would be contrary to the public interest for Commercial N to be able to enforce against the Defendants the interest provisions in the Memorandum that provide for the Higher Interest Rate, other than when applied on a simple interest basis.

329 Given my findings on the unconscionable conduct claim, it is unnecessary to grant relief under the *Contracts Review Act*. However, if it were necessary to do, in my view, it would be sufficient to refuse to enforce the provisions in cl 5 of the Memorandum that provide for Interest at the Higher Interest Rate to be capitalised and/or compounded, or to require the execution of an instrument that varies the provisions of the Registered Mortgage to that extent, with the

consequence that the Mortgage does not secure payment of monies due to the operation of those provisions beyond the application of simple interest only.

Defendants' cross-claim against Mr Ronis

330 The Defendants plead that, pursuant to their oral contract with Mr Ronis (**Retainer**), he agreed to provide them with legal advice in relation to the Agreement, and the Retainer contained implied terms that Mr Ronis would:

(a) provide to the Defendants all necessary legal advice to ensure that they understood their rights and obligations and the risks associated with the transaction;

(b) ensure the respective interests of each of the Defendants were protected;

(c) exercise all proper and reasonable care and skill in carrying out his duties pursuant to the retainer; and

(d) he would charge a fee for his service.

331 The Defendants also allege that Mr Ronis knew or ought reasonably to have known that they were reliant on his advice and expertise and that Ms Huang had very limited English skills.

332 The Defendants claim that Mr Ronis breached the Retainer, in that he failed to act with reasonable care and skill to ensure that their interests were protected in the transaction, with a range of matters identified as particulars of breach, and, as a consequence, they have suffered loss and damage.

333 The particulars of loss and damage are alleged to be: exposure to liability to which they would not have otherwise been exposed; the inability to obtain finance from another source or otherwise deal with their property due to caveats that have been lodged by "Prime Capital" against the title of their properties; and legal costs and other expenses. The identity of Prime Capital is obscure; it appears to be an erroneous reference to Commercial N.

334 Mr Ronis admits that the Retainer provided for the matters at [330_Ref157601620(a), (c) and (d)] above, denies that it extended to him ensuring that the respective interests of the Defendants were protected and says that the Retainer was to advise the Defendants as to the legal effect of the mortgage and their obligations under it.

335 Mr Ronis does not admit that the Defendants relied on his advice or that he ought to have been aware that they would do so or that Ms Huang has limited English skills. He also denies he has breached the Retainer and says that any such breach was not causative of any loss to the Defendants in any event.

336 Mr Ronis' defence of proportionate liability under Pt 4 of the *Civil Liability Act* asserts that Commercial N is a concurrent wrongdoer, in respect of which Mr Ronis relies on the matters alleged in the Defendants' cross-claim.

337 The issues raised by the cross-claim against Mr Ronis are:

(a) did the retainer include an implied term that Mr Ronis would "ensure that the respective interests of each of the Defendants were protected";

(b) did Mr Ronis' conduct breach the retainer or his duty of care;

(c) did any breach cause the Defendants to suffer any loss or damage; and

(d) if the answer to (c) if yes, what is the apportionment of that loss, Mr Ronis having raised a proportionate liability defence.

Legal principles

338 The parties' submissions did not address the legal principles in relation to the duties owed by a solicitor to a client when advising on a loan or mortgage transaction.

339 In *Lauvan Pty Ltd v Bega* [2018] NSWSC 154; 330 FLR 1 at [421]–[426], Gleeson JA set out the legal principles in relation to a solicitor's duty to advise, which I gratefully adopt, as follows:

> "A solicitor's duty to his or her client arises in both contract and tort. The terms of the retainer will usually set out the scope of the duty with respect to the latter: *Badenach v Calvert* (2016) 257 CLR 440; [2016] HCA 18 at [16] (French CJ, Kiefel and Keane JJ), citing *Hawkins v Clayton* (1988) 164 CLR 539 at 544-545; [1988] HCA 15.
>
> It is uncontroversial that a solicitor must ensure that the client understands the documents he or she is to execute and the consequences of executing them, especially in relation to unusual provisions: *Fox v Everingham* (1983) 50 ALR 337 at 341-2; *Henderson v Amadio (No 1)* (1995) 140 ALR 391 at 518-9.
>
> That a matter might fall beyond the ambit of the retainer does not necessarily militate against the existence of a duty owed by a solicitor to act in respect of it, though whether any such responsibility is enlivened will always depend upon the circumstances of the case: *Provident Capital Ltd v Papa* at [2] (Allsop P); *Dominic v Riz* [2009] NSWCA 216 at [89] and [91] (Allsop P). It is therefore

> unwise to be in any way dogmatic in general terms about what needs to be done in fulfilment of the retainer: *Provident Capital Ltd v Papa* at [2].
>
> Solicitors are not ordinarily required to advise upon the wisdom of transactions in relation to which they act: *Provident Capital* at [75] (Macfarlan JA), citing *Polkinghorne v Holland* (1934) 51 CLR 143 at 158; [1934] HCA 28, and *Citicorp Australia Ltd v O'Brien* (1996) 40 NSWLR 398 at 418. However, depending on the circumstances known to the solicitor, the performance of the retainer may require more than an explanation of the legal effect of documents, but also the obvious practical implications of the client's entry into the transaction the subject of advice: *Provident Capital Ltd v Papa* at [75], [80] (Macfarlan JA).
>
> Thus, it is necessary to consider what material facts were known to the solicitor when the impugned conduct occurred in order to determine precisely the extent of the obligations attracted by his or her discharge of the retainer: *Provident Capital Ltd v Papa* at [68] and [78] (Macfarlan JA).
>
> With respect to a retainer in relation to a mortgage transaction (whether certified or not), the provision of independent legal advice is not a mere formality and should involve proper and adequate advice about the consequences of entering into the contract. If, during the execution of a retainer, the solicitor is put on notice that the client's interests are endangered unless further steps are carried out, a duty may arise to bring attention to that aspect of concern. The amount of emphasis that ought to be placed on any apparent risk will depend upon the circumstances (e.g. loyalty of blood or love), and may need to be expressed "with clarity and force" or "in strong terms": *Provident Capital Ltd v Papa* at [2] (Allsop P) and [80] (Macfarlan JA); *David v David* [2009] NSWCA 8; (2009) Aust Torts Rep 91-993 at [76] (Allsop P)."

Consideration and determination

340 The first issue concerns the scope of Mr Ronis' Retainer, which is mostly agreed. In my view, it is plain from the objective circumstances that the Retainer was to advise the Defendants in relation to the legal effect of the loan facility and mortgage and their obligations under it.

341 I accept Mr Ronis' submission that the Defendants have not established that the Retainer included an implied term which required Mr Ronis to ensure that each of the Defendants' respective interests were protected.

342 In my view, the evidence does not support the implication of such a term. Leaving to one side the fact that the formulation of the implied term is somewhat vague, it is highly unlikely that it was intended for Mr Ronis to act and provide advice to each the borrowers individually with the requirement that he would do so ensuring that their individual interests were protected, given the potential conflict of interests that could arise between the borrowers.

343 Summer Lawyers' 30 September 2019 email may have noted that it was a strict requirement of Commercial N that each of the Debtors received legal advice on the security document separate from any others but that requirement does not dictate the terms of the Retainer between Mr Ronis and the Defendants. Nor does it suggest that it was intended by the parties to operate as a term of the Retainer.

344 In any event, the implied term is not, in my view, so obvious, necessary or reasonable for the effective operation of the Retainer in the circumstances of this case, which was characterised by the Defendants' need for urgent advice on a suite of documents to enable them to receive funds to pay out the overdue Detex Loan, that its implication goes without saying. This is particularly as a solicitor may have a duty to warn of risks inherent in a transaction but it is not part of their job to protect a client's interests by, for example, advising as to the wisdom of the transaction or whether or not a client should enter it: *Provident Capital* at [75]; *Studer v Boettcher* [2000] NSWCA 263 at [75].

345 In relation to the second issue, the particulars of breach alleged by the Defendants are that Mr Ronis:

(a) failed to explain adequately or at all the terms, the meaning and/or the legal effect of the Agreement and the related documents associated with the Transaction;

(b) allowed each of the Cross-Claimants to provide a declaration under s 13 of the National Credit Code to the effect that the advance by Commercial N was for business or investment purposes knowing that such document/declaration was not explained to them before they signed it;

(c) allowed each of the Cross-Claimants to provide an acknowledgment that they understood the mortgage and that they had had the opportunity of obtaining and did obtain legal advice in relation to it when in fact no such advice was obtained by either of them;

(d) provided a certificate of legal advice falsely or incorrectly stating that he had provided legal advice to the Cross-Claimants knowing that he did not do so and in circumstances where he could not have possibly done so in respect of Huang as she does not speak English and Mr Ronis does not speak Mandarin;

(e) failed to advise the Cross-Claimants about the risks and consequences if they defaulted in any way under the Agreement and the related documents;

(f) failed to inquire as to whether the Company or the Cross-Claimants had the capability to meet the interest payments due and fee obligation under the Agreement;

(g) failed to advise the Cross-Claimants that the Deed of Variation has substantially reduced the amount which would have otherwise been available to them under the Loan Offer; and

(h) failed to advise the Cross-claimants that the documents which they signed in early October (Deed of variation) was not in relation to any water bill.

346 Dealing with each of these in turn, I am not satisfied that particular (a) in the terms alleged has been established. As I have found, Mr Ronis provided an explanation to the Defendants of the meaning and legal effect of the Mortgage and its key terms and the related documents associated with the transaction, which advice was provided during the conference on 2 October 2020. Relevantly, that advice included an explanation of the key terms, including the application of the high interest default rate and the nature and effect of the Mortgage Security over the Burwood Property.

347 As Mr Ronis submits, a lawyer is not required to read every word of every clause of every document to a client in order to provide adequate legal advice. They are entitled to exercise their judgement as to what features of the transaction merit specific reference. In this case, I accept that a prudent and careful solicitor would focus on explaining and ensuring their client understood their legal obligations as to the timing, frequency and monetary amounts of repayments in respect of interest and the principal amount, of the loan, together with an understanding of the manner in which their real property would be encumbered and any default or penalty clauses. I am satisfied that Mr Ronis did so, subject to one matter, namely the operation and effect of the interest provisions that provided for the Higher Interest Rate to be capitalised or compounded which, as the worked examples show, have an increasingly large and disproportionate effect on the amount of interest to be paid under the Mortgage in the event of default. Mr Ronis referred the Defendants to cl 5.12 of the Memorandum and explained it to them, in the sense that he told them that it provided for the Higher Interest Rate to apply to outstanding interest compounding monthly if they defaulted on their interest payments, but I am not satisfied that he explained the capitalisation of outstanding interest in the

formulae in cl 5.5 and 5.6 or the financial impact that those matters would have on the amount of Interest payable under the agreement.

348 To the extent that Mr Ronis' contention (at [191] above) suggests that he should be excused for not identifying the basis on which interest was to be paid in the short time he had to review the documentation and to provide advice upon it, such that it does not involve a breach, I am not persuaded by that submission. It is an ordinary incident of a solicitor's duty to explain the obvious potential pitfalls of legal transactions. While there may have been some ambiguity and complexity attending to the clauses in question, the operation of the capitalised Higher Rate Interest in the event of continuing default was an obvious pitfall that should, in my view, have been explained in more detail than referring to interest compounding monthly. That said, as I have found that those aspects of the Mortgage are not enforceable, to the extent there was any breach of Mr Ronis' duty or the Retainer in that respect, I am satisfied that it could not be causative of any loss to the Defendants. In other words, the Defendants have not suffered any financial detriment due to the inadequacy of Mr Ronis' advice in that respect.

349 As to the Deed of Variation, while Mr Ronis did not give detailed or formal advice to the Defendants, I am not satisfied that he failed to adequately explain its terms in circumstances where Mr Ronis did refer to the reduced amount and went through the Deed of Variation with the Defendants when he saw them on 14 October, and where the effect of the Deed of Variation was not to alter the Defendants' legal obligations to Commercial N in any material sense, but rather to reduce their exposure due to the lower loan amount being offered. Further, and as Mr Ronis' submissions point out, the Deed of Variation and revised Cheque Directions went to commercial matters as between Commercial N and the Borrowers, as distinct from legal obligations. In my view, the suitability of the amount borrowed is a financial matter that is more appropriately dealt with through an accountant or financial advisor, rather than their solicitor. I am also satisfied that Ms Chien, and by extension, Ms Huang, were aware of the reduced loan amount and the need for the Deed of Variation prior to and after execution and about which no complaint was made until these proceedings were commenced.

350 It follows, in my view, that the Defendants have not established the matters alleged in particular (b) and (c) as a matter of fact or as giving rise to a breach of the Retainer. In any event, and in relation to particular (c), it is difficult to accept that Mr Ronis breached the Retainer in that respect or that it could be causative of loss when Ms Huang had already signed the Declaration of Commercial Interest form and Ms Chien had provided information to a similar effect as the NCCP Act Declarations as part of her loan application process.

351 Particular (d) (see [345_Ref157603526] above) assumes that the scope of the retainer extended to Mr Ronis' own certifications and that he had not provided legal advice to the Defendants, contrary to my findings above.

352 As to whether Mr Ronis was aware or ought to have been aware that Ms Huang required a Mandarin translator, as I have found, nothing was said to anyone at Shanahans, including Mr Ronis, by Commercial N, Ms Chien or any other third party to indicate to Mr Ronis that a translator was required. Nor was any such request made by Ms Chien during the meeting. In circumstances where I have preferred Mr Ronis' evidence to that of the Defendants, I have accepted that Mr Ronis genuinely believed that Ms Huang understood what was being discussed, Ms Chien was present and asked and answered questions in English and Ms Huang nodded during the course of the meeting to indicate her understanding and followed instructions in English as to where she should sign, I do not consider that this allegation has been established as to give rise to breach by Mr Ronis. In any event, even if I were satisfied that it did involve a breach, I do not consider that it was causative of loss in the context where Ms Chien acted as her translator in respect of legal documents.

353 Particular (e) is not established. As I have found, other than in respect of the operation and effect of the capitalisation/compounding of interest at the higher interest rate, Mr Ronis explained the risks and consequences to the Defendants if they defaulted and I have found that they understood those matters.

354 In my view, particular (f) assumes that the scope of the Retainer extended to providing advice on the wisdom of the transaction. In any event, I am satisfied on the evidence that Mr Ronis discussed with the Defendants the repayment

obligation under the Agreement, including as to timing and there was no relevant failure or breach in that respect.

355 Particular (g) assumes that the $588,000 would have been otherwise available if the Defendants had not signed the Deed of Variation. I do not agree with that premise having regard to the terms of the ILO and the outcome of the valuation which led to the LVR being over 71%. In any event, Mr Ronis highlighted the reduced amount of the loan when the Deed of Variation was executed and Ms Chien was independently aware of that matter.

356 Particular (h) is not established in light of my finding that there was no representation made to the Defendants to the effect that the Deed of Variation was in relation to a water bill.

357 For these reasons, the Defendants have not established any breach of the Retainer by Mr Ronis that was causative of loss to them and their claim for damages based on a breach of Retainer or breach of duty of care fails.

358 I should record that even if I was persuaded that Mr Ronis had breached the Retainer or failed to exercise reasonable care in providing legal advice in the terms pleaded against him, I am not satisfied that the Defendants have established that they were causative of any loss or damage to them.

359 As Mr Ronis submits, it is plain from the whole of the evidence that the Defendants had a pressing financial imperative to enter into the loan agreement in order to pay the Detex Loan and have the caveat withdrawn from the Burwood Property. That sense of urgency was communicated by Ms Chien to Mr Ronis, Ms Oliveric and to others, including Mutual Support.

360 Ms Chien gave evidence that if had she known that the amount available to her under the loan offer had been varied and reduced she would not have agreed to it. However, neither her evidence, nor that from Ms Huang, identifies why or what she would have done to meet T&C Excellent's financial obligations and her own obligations to NAB in the absence of taking a loan from Commercial N loan for $430,000. Given that time was of the essence and the Defendants needed sufficient funds to pay the Detex Loan which they obtained even with

the reduction in the principal sum, it seems more likely that they would have proceeded with the reduced loan.

361 Further, if the Defendants had, on advice, declined or not signed the Deed of Variation, I do not consider that the amount of $588,000 would have been available from Commercial N based on the ILO terms and the Maximum LVR and there was no evidence before the Court from which to infer that finance from a third party would have been available and secured on more favourable terms, even with the Higher Interest Rate being 70.72% per annum.

362 As Mr Ronis submits, it is the difference between the Defendants' obligations to Commercial N and what their obligations would have been to another financier that would be the measure of any loss they would have sustained if I had been satisfied that Mr Ronis had breached the Retainer in a material respect, which had caused the Defendants to enter into the Deed of Variation and suffer loss by reason of their lost opportunity to obtain finance elsewhere. Their loss would not be the entirety of the interest, fees and charges owed to Commercial N, excluding the Principal Amount. For the Court to award damages and place them in the position they would have been in, the Defendants would need to account for what obligations they would have incurred elsewhere, which they have not done.

363 It follows that the issue of proportionate liability does not arise.

Conclusion, costs and orders

364 It follows from my findings that Commercial N is entitled to judgment comprising the principal sum of $430,000 together with simple interest at the Higher Interest Rate of 1.36% per week (70.72% per annum). The statement of claim also included claims for outstanding fees ($12,402.78) and outstanding costs ($2,200). However, as there was no evidence in support of those claims, I am not satisfied that Commercial N is entitled to recover those sums as part of the judgment.

365 Commercial N would also be entitled to judgment for possession and judicial sale of the Burwood Property based on the unregistered mortgage granted by the Defendants which would have taken effect as an equitable charge. However, as it appears that Commercial N has a registered mortgage over the

Burwood Property and the property may have been sold, I have assumed that orders of that nature are no longer sought by Commercial N.

366 Given their success, the Defendants are entitled to an order that declares void or varies (by removing) those parts of cl 5 of the Memorandum that provide for the payment of interest at the Higher Interest Rate to be capitalised and/or compounded, such as in cll 5.5 and 5.12(b), pursuant to s 243 of the ACL and/or s 12GM of the ASIC Act but are not otherwise entitled to relief setting aside the whole of the Agreement and/or Deed of Variation.

367 As the Defendants have failed in their cross-claim against Mr Ronis, an order should be made for that cross-claim to be dismissed.

368 As to costs, the Court has a broad discretion under the *Civil Procedure Act 2005* (NSW) (**CPA**) and the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) to determine on what basis and to what extent costs should be awarded. This discretion is to be exercised judicially having regard to the circumstances of the case: CPA, s 98(1); *Oshlack v Richmond River Council* (1998) 193 CLR 72; [1998] HCA 11 at [22] (Gaudron and Gummow JJ), [65] (McHugh J) and [134] (Kirby J).

369 The usual rule is that costs follow the event, unless it appears that some other order should be made: UCPR, r 42.1.

370 The event may be characterised in more than one way. Generally, the event refers to the event of the claim or counterclaim and is understood as the practical result of a particular claim. Where there is a mixed outcome in the proceedings, and it is appropriate to entertain the process of apportioning costs as between different issues in the proceedings, in general such an exercise will be carried out on a relatively broad brush basis, and largely as a matter of impression and evaluation by the court: *Taylor v Stav Investments Pty Ltd as trustee for the Stav Investments Family Trust (No 2)* [2023] NSWCA 322 at [7].

371 As between Commercial N and the Defendants, there was mixed success, with the Defendants succeeding in relation to that part of the Mortgage allowing for the capitalisation and compounding of interest at the Higher Interest rate and Commercial N otherwise succeeding with its claims.

372 Commercial N's statement of claim seeks costs on an indemnity basis, in accordance with the terms of the Mortgage, and purports to rely on cll 1.1 and 3.1 of the Memorandum.

373 While the outcome as between Commercial N and the Defendants might suggest an order that costs should follow the event in my view, this is a case where it is appropriate not to apply the usual rule or to grant indemnity costs in favour of Commercial N in accordance with the contractual indemnity. This is primarily because there were delays and inevitably costs incurred by the Defendants (and Mr Ronis) arising from Commercial N's failure to properly articulate its interest claim until well after the date for closing submissions, a matter which Commercial N's counsel accepted would give rise to costs consequences in the proceedings: see [172_Ref157608012] above. Further, a Court is not bound to give effect to the terms of a contract when exercising its discretion to award costs: *Abigroup Ltd v Sandtara Pty Ltd* [2002] NSWCA 45 at [9].

374 As recorded in the judgment, there were two main issues in this case; Commercial N's claim for interest and the Deed of Variation. It is fair to say that there was a mixed outcome in relation to Commercial N's interest claim but, as I have said, the manner in which that claim was framed led to delays and increased costs on the part of the other parties. Overall, the Defendants did not succeed with their claims in relation to the Deed of Variation. I also accept that the contractual indemnity in favour of Commercial N is a relevant matter to be taken into account in the exercise of the Court's costs discretion.

375 Adopting a broad brush and impressionistic approach and bearing in mind the above matters, I consider that the appropriate costs order, as between Commercial N and the Defendants, is that the Defendants should pay 50% of Commercial N's costs of the proceedings on an ordinary basis as agreed or assessed.

376 As between the Defendants and Mr Ronis, given the outcome, I see no reason why costs should not follow the event and will order the Defendants to pay Mr Ronis' costs on an ordinary basis, as agreed or assessed. That is subject to one matter, that being the costs of the proceedings in relation to Commercial

N's interest claim during the period 24 August 2022 to 7 December 2022. In my view, it is more appropriate that Commercial N pays Mr Ronis' costs (on an ordinary basis, as agreed or assessed) for that period rather than the Defendants given it was Commercial N who was the party most responsible for those costs.

377 I direct the parties to bring in agreed short minutes of order to reflect these reasons within 7 days.