Court of Appeal
Supreme Court
New South Wales

Medium Neutral Citation:	**Fast Fix Loans Pty Ltd v Samardzic [2011] NSWCA 260**
Hearing dates:	29 July 2011
Decision date:	02 September 2011
Before:	Bathurst CJ at 1 Allsop P at 2 Campbell JA at 55
Decision:	Appeal dismissed with costs. *[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*
Catchwords:	CONTRACT - Contracts Review Act 1980 (NSW) - "asset lending" - deed of guarantee and mortgage by parents of borrower - parents obtained no benefit from transaction - failure of lender to make enquiries concerning ability of parents to repay in event of default - fact that parents guarantors and not borrowers no bar to relief - asset lending not a term of art but an expression applied in cases where contract may be found to be unjust. CONTRACT - unjust - Contracts Review Act 1980 (NSW) - relevant enquiry for the purposes of the Contracts Review Act, ss 7 and 9 is whether contract is unjust in all the circumstances of the case and whether it is just to grant relief - no requirement of moral obloquy on the part of the party against whom relief is sought.
Legislation Cited:	Contracts Review Act 1980 (NSW) ss 7, 9, (2)(a), (b), (c), (d), (e), (f), (h), (i), (j)
Cases Cited:	Beneficial Finance Corporation Ltd v Karavas (1991)

	23 NSWLR 256 Kowalczuk v Accom Finance Pty Ltd [2008] NSWCA 343; 77 NSWLR 205 Perpetual Trustee Co Ltd v Khoshaba [2006] NSWCA 41; 14 BPR 26,639 Spina v Permanent Custodians Ltd [2009] NSWCA 206; 14 BPR 26,923 St George Bank Ltd v Trimarchi [2004] NSWCA 120
Category:	Principal judgment
Parties:	Fast Fix Loans Pty Ltd (Appellant) Mladenko Samardzic (First Respondent) Dragica Samardzic (Second Respondent)
Representation:	M W Young (Appellant) M B J Lee, C Cassimatis (Respondents) Greenstein & Associates Solicitors (Appellant) Mitry Lawyers (Respondents)
File Number(s):	2010/34211
Decision under appeal	9111
Jurisdiction:	
Citation:	Fast Fix Loans Pty Limited v Mladenko Samardzic and Anor [2011] NSWSC 19
Date of Decision:	2011-02-04 00:00:00
Before:	Hoeben J
File Number(s):	2010/34211

JUDGMENT

1 **BATHURST CJ:** For the reasons given by Allsop P, in my opinion the appeal should be dismissed with costs.

2 **ALLSOP P:** The appellant seeks to have orders made by a judge in the Possession List of the Common Law Division (Hoeben J) set aside and in their place to have an order for possession of land at Bowral owned by the respondents. The primary judge made the orders in question under the *Contracts Review Act 1980* (NSW) (the "Act") in respect of a deed of loan, a deed of variation of loan and a mortgage that the respondents entered in 2008 at the behest of their son.

3 The primary facts were not in dispute and are taken principally from the careful reasons of the primary judge.

4 The respondents' son, Milan Samardzic, was a builder and property developer, and had been for about 13 years. He was the sole director and shareholder of TT Management Group Pty Limited (the "company").

5 Milan's father, Mladenko Samardzic, was born in 1934 in the former Yugoslavia. He was educated in the Serbian language, leaving school at 12, after which he worked on a farm. At 16, he began an apprenticeship as a fitter and turner and, apart from two years in the army as a young man, he worked as a fitter and turner until he came to live in Australia in 1970. In Australia, he worked in manual jobs, mainly welding work and was continually in work as an employee until his retirement in 1999. The primary judge said that he had a basic knowledge of ordinary English sufficient to enable him to buy things in shops and communicate at a simple level. His English was not such as would enable him to talk about or understand commercial and financial matters. He could read English to a simple degree, but the primary judge found that though he knew what a mortgage was, his capacity was insufficient to enable him to understand the deed of loan and mortgage upon which the appellant relied.

6 Milan's mother, Dragica Samardzic, was born in 1941 in the former Yugoslavia. She too was educated in the Serbian language and left school at 12, also commencing work on a farm. She continued farm work until she married Mladenko in 1963. Like Mladenko, prior to coming to Australia, she had never spoken English. Between 1970 and 1995 Dragica worked in many different jobs in various factories. Like her husband, she was not formally taught English, but like Mladenko she had a sufficient knowledge of English to enable her to attend shops and converse with English speakers on a basic level. Like her husband, she understood what a mortgage was but was unable to converse in English concerning financial matters of any complexity.

7 In November 2006, Milan, through the company, entered into a call option for nine months to purchase a property at Head Street in Forster for $1,330,000 plus GST. With stamp duty, this price exceeded $1,400,000. The company paid an option fee of $22,000. The intention of Milan and the company was to obtain development approval from the relevant council for the construction of 22 apartments on the property. On or about 30 March 2007, the company submitted a development application to the council for that project.

8 In July 2007, Milan approached a finance broker to arrange finance for the purchase of the Forster property and the construction of the development. The company needed to borrow approximately $1,100,000. Milan believed that he could obtain that finance using only the Forster property as security.

9 On 8 October 2007, Milan was advised by his solicitors that his option to purchase the Forster property would expire on 16 November 2007. He was advised that unless he exercised the option, the option fee of $22,000 would

be lost. After some negotiation, the vendor of the Forster property agreed to extend the date for the exercise of the option.

10 In December 2007, Milan was advised by the council that a decision on the development application had been adjourned to a date in late February 2008. Also in that month, Milan was advised by the finance broker that unless further security could be obtained, all that he could expect from a primary lender on the security of the Forster property was $640,000. The finance broker, however, advised Milan that it could arrange a second loan with a short-term lender, the appellant, but that this lender would require, in addition to a second mortgage over the Forster property, further security. The term of the loan would be for three months and the interest rate would be two per cent per month.

11 I digress at this point to note that the interest rate on the loan taken out was two per cent per month, with a default rate of four per cent per month. The true interest rate, however, must be understood by reference to the fact that the interest was calculable on daily rests. It is unnecessary in this case to make precise calculations, given the way the matter was presented, but it suffices to say that the true annual interest rate for the loan was significantly in excess of 24 per cent on the standard rate or 48 per cent pursuant to the default rate. It can be assumed that a commercial man such as Milan would have understood this.

12 Milan believed that he would be unable to obtain funds from other sources within the time available. His evidence was that if the purchase of the Forster property did not proceed he stood to lose approximately $250,000 (presumably including the option fee). His expectation was that settlement of the purchase of the Forster property would occur in February 2008 and the development application would be approved later that month. After the approval of the application, he expected to be able to refinance the Forster property and pay off the loan to the appellant.

13 In December 2007, Milan met with the principal of the appellant, a Mr Calleja, and the appellant's solicitor, Mr Greenstein. Milan told Mr Calleja that he had no other property to offer as security which was unencumbered, except for his parents' house in Bowral. He gave Mr Calleja the address of the property and told him that it was worth approximately $550,000. In fact there was no building on the land at that time, and the value of the land was probably significantly less than $550,000. The primary judge found that the statements by Milan that the Bowral property was worth $550,000 and that his parents were residing on it were both untrue and made for the motivation of persuading Mr Calleja to agree to the loan. The inference plainly available is that Milan did not expect Mr Calleja to undertake either an inspection or a valuation.

14 Some days later, Mr Calleja telephoned Milan to advise that the appellant would accept the Bowral property as security for a short-term loan in addition to a second mortgage over the Forster property.

15 Mladenko and Dragica Samardzic purchased the Bowral land in 2007, after they sold their house in Berala. They then entered into a contract with a project builder to build a house on the Bowral land, in the meantime renting premises at Burradoo in which to live. Neither was working at the time and they were to finance the building of the house by the proceeds of the sale of their previous home. The Bowral home was completed and they moved into it in mid-2009. It is a four-bedroom house and, under the original contract with the project builder (which company went into liquidation), the contract price for construction was $250,000.

16 The circumstances of Milan bringing his parents to the transaction with the appellant were as follows. On the primary judge's findings, Milan rang his father in February 2008 and said that he had a "big problem" and needed money for a property in Forster and asked for their help. He said he would come to see them and that they needed to sign some documents. Some days later, Milan visited his parents and said that he needed to borrow money from the bank and required them to give the land in Bowral as security. He said that he had an appointment to see a solicitor in Bowral that day and that they needed to go there with him to sign some documents. In the conversation between Milan and his parents, his mother Dragica said that they could not afford to borrow any money and repay it, but, she said: "we can help you by putting our name on the bank document if it helps you get the loan, but only if our obligation ends in three months". To this Milan agreed, saying that they would need to sign some documents and see a solicitor.

17 The events concerning the signing of the relevant documents in February 2008 were that an English speaking solicitor in Bowral attempted to explain matters to the parents. It was evident to him that the parents did not understand what he was saying and appeared confused. The solicitor decided to refer them to a lawyer who spoke Serbian. They were taken to Fairfield to attend upon a solicitor there who was a sole practitioner and who spoke Serbian. That solicitor's recollection of the advice she gave was based on her usual practice. She summarised the documents, explaining who the lender was, who was borrowing the money, the principal amount, the interest rate and the securities. Milan was present during the explanation.

18 The primary judge found that Milan pressured his parents to obtain the legal advice and to sign the documents. The primary judge was satisfied that the parents were aware that by signing the documents they were placing the Bowral property at risk if Milan did not repay the loan. However, his Honour

also found that the parents thought that their liability would cease at the end of three months. His Honour accepted that the solicitor in Fairfield would have told the parents about the interest rate; but he was not persuaded that they understood the significance of how high the interest rate was or that there was any evidence that they understood the part played by the Forster property in the transaction. Nor was there any evidence that they had any knowledge about the financial position of Milan or the company.

19 In the deed of loan and mortgage that the parents signed, their address was specified as the Bowral property. This was done on the basis of information provided to the appellant by Milan. The primary judge was satisfied that the parents did not in any way seek to mislead the appellant as to the existence of a house on the Bowral property.

20 The primary judge found that the motivation of the parents in entering into the agreement was to help Milan. They were prepared to risk the property because they trusted him and believed that he would be able to repay the loan at the end of three months. They had on one prior occasion guaranteed a loan for Milan and mortgaged a property to assist him.

21 Neither parent had the capacity to understand the deed of loan and mortgage. The documents were only generally explained to them. They had no understanding of the transaction and the significant risk that they were undertaking because of the financial position of the company. The parents obtained no benefit from the transaction and, as the judge found, it was an improvident arrangement from their point of view.

22 The appellant made no enquiries as to the financial wherewithal of the parents. As the primary judge found, the appellant was indifferent to their ability to make payments under the loan because of the security they were providing. The primary judge found that the appellant was only concerned about whether there was adequate security available in case of default and that it must have been aware that there was a real likelihood of the company and Milan defaulting.

23 The reality of the position, as was accepted in argument by Mr Young, who appeared for the appellant, was that the financial wherewithal of Milan, the company and the parents was, in a sense, irrelevant. The transaction was bridging finance in anticipation of development finance being obtained after a satisfactory approval of the development application. It was clear to the appellant that there were only going to be two possible sources of repayment: a successful refinancing of the Forster property after approval of the development application or action against the security. Mr Young emphasised the appellant's lack of apparent concern about the property itself and the failure to obtain a valuation. He said this reflected the strength of the belief of

the appellant in the likelihood of the refinancing being successful. It may be that Mr Calleja was prepared to accept Milan's optimism about the future in this respect; however, the business arrangement entered is the best objective guide to the realities and risks of the transaction. The appellant and Mr Calleja were only prepared to lend the funds they were with the clean security of the parents' property. A significant interest rate was extracted from Milan as the price of short-term funding from a lender of last resort. The interest rate reflected the real and significant risk that the facts bespoke. No one could be sure of what the council would do. No one could be sure what conditions would be imposed. No one could be sure that there would not be a court case. No one could think that there was other than a significant risk to the parents' property by the transaction.

24 The appellant was not prepared to take the commercial risk of the loan without the clean security. The parents did not have the appreciation of the underlying commercial and legal facts to grasp the fact that they were taking the risk, which was not insignificant, that the lender was not prepared to take. The primary judge was correct to characterise this as an improvident arrangement.

25 The loan went through on 22 February 2008, the parents having, on 19 February, signed the deed of loan, the mortgage over the Bowral property and a declaration to the effect that they had received independent legal advice regarding the loan and security documents. The parties to the deed of loan were the appellant, the company, Milan and the parents. The borrower was the company. Pursuant to the guarantee, the parents, together with Milan, jointly and severally guaranteed payment of the loan by the company. The deed of loan contained a usual clause by which the guarantees and indemnities contained in the document were said to be principal obligations and were not to be treated as ancillary or collateral. The loan funds were deployed by extracting prepaid interest and legal costs and disbursements and putting $419,500 towards the purchase of the Forster property.

26 In May 2008, the company sought from the appellant an extension of the loan period for one month, with an option for a second month if required. The appellant agreed to this proposal, sending the company a deed of variation to give effect to it. Milan sent the deed of variation to his parents. He asked them to sign the document and said that they only needed someone to witness their signatures and did not need to see a solicitor. The parents signed the deed of variation and mailed it back to Milan. They did not seek any legal or other advice.

27 The company made interest payments in June and July 2008. The company was unable to make interest payments in August and has not paid any further amounts. The default rate of four per cent commenced to apply on 23 August

2008. The company and Milan attempted to obtain alternative finance but were unsuccessful.

The primary judge's consideration of the *Contracts Review Act* claim

28 After considering the statutory provisions and some of the main authorities the primary judge commenced by characterising what occurred as between the appellant and the parents as "asset lending". His Honour said the following at [78]-[79]:

> "[78] When considering the question of unjustness, the CRA requires the court to have regard to the public interest (s 9(1)). In the present case it seems clear that as between the plaintiff and the defendants, what occurred amounted to asset lending. What the plaintiff was told about the defendants was that they were the parents of Milan and that they owned and lived in the Bowral property which was unencumbered. By reference to Milan's age, Mr Calleja should have inferred that his parents were in their mid to late sixties. While I have found that he did not have any detailed knowledge of their financial circumstances, it is significant that neither he nor Fast Fix made any inquiries as to that issue.
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> [79] Accordingly, I infer that Mr Calleja and Fast Fix were not concerned with the ability of the defendants to fulfil their obligations under the deed of loan should Milan and the company default. All that Fast Fix and Mr Calleja were concerned about was whether there was adequate security available in the case of such default. Asset lending in those circumstances raises public interest considerations."

29 The primary judge then referred to what Campbell JA said in *Kowalczuk v Accom Finance Pty Ltd* [2008] NSWCA 343; 77 NSWLR 205 at 227 [96] and 228 [99] (with whom Hodgson JA and McColl JA agreed) and to the observations of Young JA in *Spina v Permanent Custodians Ltd* [2009] NSWCA 206; 14 BPR 26,923 (with whom Tobias JA and Campbell JA agreed). The primary judge then, applying these statements of principle, concluded that it must have been clear to the appellant that, insofar as the parents were concerned, the transaction was an improvident one, that they gained no benefit from it, and if Milan and the company failed to meet their obligations under the deed of loan then the parents were liable to lose the Bowral land (though the parents were not at that time living there, only having a dwelling constructed thereon).

30 The primary judge then found that the appellant was well aware of the company's plans for the Forster property, that it must have been aware of the "precarious" position in which the company found itself as a result of the delay in the development application being approved, which fact was demonstrated by the onerous interest provisions of the commercially negotiated loan. The primary judge also found that the appellant would have also been aware of the limited capacity of the company to meet its obligations under the deed of loan if there were any further delay in the council approving the development

application. As his Honour then found, this was one of the reasons why the appellant wanted unencumbered or clean security before it would advance the moneys sought by the company.

31 The primary judge said that it followed from the circumstances that the appellant must have been aware that there was a real likelihood that the company and Milan would default in meeting their obligations under the deed of loan. His Honour said that in such circumstances the authorities said that the lender should have made enquiries as to the capacity of the parents to meet the obligations, if the company and Milan were unable to do so. The fact that no such enquiry was made reinforced the inference that the appellant was not concerned about the eventuality of default provided that it had adequate security. His Honour found that it should have been well within contemplation of the appellant that the parents of Milan might have no assets other than the Bowral property and might no longer be working. His Honour then held that the failure of the appellant to make any enquiry as to the parents' financial position should not place it in any better position than a lender who, on the same facts, did make enquiries but proceeded to make the loan.

32 The primary judge then addressed the relevant factors within the considerations listed under the Act, s 9(2).

33 As to s 9(2)(a) - any material inequality in bargaining power between the parties to the contract, the primary judge said at [91]:

> "The defendants had limited schooling to age 12. Their knowledge of English was limited. They had only modest experience with financial transactions such as loans, guarantees and mortgages. They were being pressured by Milan and were required to sign the loan documents as a matter of urgency. Except for the explanation of the loan documents provided by Ms V -, they were not represented by a solicitor. Fast Fix was an experienced lender which at all times was represented by Mr Greenstein as its solicitor. I am satisfied that there was material inequality between the defendants and Fast Fix."

34 As to s 9(2)(b) and (c) - the question of negotiation of the terms, the primary judge said at [92]:

> "There was no opportunity afforded to the defendants to negotiate the terms of the deed of loan. They were not advised of such an option. They were being pressured by Milan to sign the loan documents as a matter of urgency because if they did not do so he was likely to suffer a significant financial loss. With that degree of urgency having been communicated to them, it was simply not practicable for the defendants to either negotiate the alteration of or to reject any of the provisions of the loan documents."

35 As to s 9(2)(d) - unreasonably difficult terms or terms not reasonably necessary for the protection of the legitimate interests of the relevant party, the primary judge said at [93]:

> "The company was obliged to repay the principal loan of $450,000 with interest calculated at 2% per month (24% p.a.) and in the event of default, at 4% per month (48% p.a.) compounded daily. Given the nature of the security provided by the Bowral property, these were very onerous interest rates, particularly that applying in the case of default."

36 As to s 9(2)(e) and (f) - whether the relevant party was reasonably able to protect its interests and the economic circumstances, educational breakdown and literacy of the parties, the primary judge said the following at [94]:

> "The defendants were disadvantaged by their limited education, experience and ability to speak and read English. They were not represented by a lawyer. The loan documents were explained to them and signed by them in circumstances of urgency and pressure being exerted by Milan. By contrast, the plaintiff was an experienced lender who was represented by a solicitor, Mr Greenstein."

37 As to s 9(2)(h) and (i) - the provision of independent legal advice and the nature of that advice, the primary judge said the following at [95]-[97]:

> "[95] While it is clear that Ms V- explained what she described as the "basic concept" of the loan documents, it is not clear how far that explanation went. Milan was present during that explanation and spoke to Ms V- from time to time using English which the defendants could not understand. It is not clear to what extent, if at all, the defendants understood the effect of the high rates of interest which applied. While the defendants were aware that they could lose the Bowral property if the company and Milan did not repay the loan, they appear to have been confused as to the significance of the three month duration of the loan.
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> [96] Their evidence indicates a belief that at the expiration of three months their liability under the loan documents would cease. They do not appear to have been aware that their obligations under the deed of loan were continuing obligations extending beyond the three month period if the loan were not repaid. It is clear that they had no information concerning the development of the Forster property and the part played by this loan in that development. They were not given any information about how the loan was to be repaid, nor the capacity of the company and Milan to make such repayments. In signing the documents they seem to have relied entirely upon their trust in and affection for Milan as their son.
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> [97] While I have no doubt that Ms V- provided an explanation of the loan documents to the defendants, I do not accept that the defendants fully understood the explanation. In particular, I do not accept that the defendants understood the continuing nature of the liability beyond three months, nor that they understood the significance of the high rate of interest and the effect that might have on Milan's and the company's ability to comply with their obligations under the deed of loan. I find that the defendants' knowledge of the transaction was limited to an understanding that they might lose the Bowral property if Milan did not pay off the loan but that they thought that their exposure would only last for three months. They clearly had no understanding of the commercial background to the loan in that Milan and the company's capacity to pay off the loan was contingent upon the Council approving the DA in respect of the Forster property within a short time."

38 As to s 9(2)(j) - undue influence, unfair pressure or unfair tactics, the primary judge said the following at [98]:

> "Although I am not prepared to find that the defendants were subject to undue influence as that term is understood under the general law, they were certainly exposed to considerable pressure. They clearly had great affection for Milan, were proud of him and trusted him. As a result, when advised by him that he would lose a large amount of money unless the Bowral property was put forward as security for the loan, as his parents they felt a moral obligation to assist him. That pressure was increased when they were required to sign the loan documents as a matter of urgency in circumstances where they did not fully understand them."

39 The primary judge then addressed the arguments of the appellant, some of which were similar to matters put to this Court: the importance of the public interest in keeping parties to their bargains, the provision of legal advice and a certificate to that effect, the commercial context, the lack of pressure or undue influence on the part of the appellant and the essential competence of the parents to know what they were doing. Primarily for the reasons already addressed by his Honour under the particular provisions of s 9, the primary judge was not persuaded of these points. The primary judge concluded that the deed of loan was unjust and that relief should be given relieving the parents of liability.

40 As to relief, the appellant argued that it was an "innocent" party against whom relief should not run: *Beneficial Finance Corporation Ltd v Karavas*(1991) 23 NSWLR 256 at 277 per Meagher JA. The primary judge dealt with this argument at [114]-[118], as follows:

> "[114] While it is true that Fast Fix did not know the financial circumstances of the defendants, that was not because it was misled in some way (as happened in *Kowalczuk* and *Ford*) but because it made no inquiry. It made no inquiry because it was not concerned about the defendants' ability to meet their obligations under the deed of loan should there be default by the company and Milan because it had the Bowral property as security.
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> [115] In the circumstances of this case, I am not persuaded that Fast Fix should be regarded as "an innocent party". It knew that the deed of loan provided no benefit for the defendants. It was an improvident arrangement from their point of view. It was indifferent to their ability to make payments under the deed of loan because of the security which they were providing. Its ignorance of their financial affairs was of its own making, i.e. it made no inquiry. In *Khoshaba* it was this indifference on the part of the lender which Spigelman CJ regarded as determinative ([92] and [96]).
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> [116] Basten JA put the matter somewhat more strongly:

> '128 To engage in pure asset lending, namely to lend money without regard to the ability of the borrower to repay by instalments under the contract, in the knowledge that adequate security is available in the event of default, is to engage in a potentially fruitless enterprise, simply because there is no risk of loss. At least where the security is the sole residence of the borrower, there is a public interest in treating such contracts as unjust, at least in circumstances where the borrowers can be said to have demonstrated an inability reasonably to protect their own interests, for the purposes of, for example, s 9(2)(e) or (f). That does not mean that the Act will permit intervention merely where the borrower has been foolish, gullible or greedy. Something more is required: see *Esanda Finance Corp Ltd v Tong* (1997) 41 NSWLR 482 at 491 (Handley JA) cited with approval in *Elkofairi* (above) at [77] by Beazley JA.'

> [117] I have concluded that the defendants are entitled to relief under the CRA. The balancing of their position against that of Fast Fix by reference to the criteria set out in the CRA decisively favours them. When Fast Fix entered into the deed of loan there was already a body of law in cases such as *Pasternacki* , *Elkofairi* and *Khoshaba* which pointed out the dangers for lenders where monies were advanced without regard to the ability of those persons who put forward the security, to meet repayment obligations.

> [118] In the circumstances of this case as between Fast Fix and the defendants, it is appropriate that the loss of the monies advanced pursuant to the deed of loan should be borne by Fast Fix and not the defendants."

41 The primary judge dealt with the deed of variation at [119], as follows:

> "In setting out these reasons, I have said little about the deed of variation of loan. It added nothing to the obligations already contained in the deed of loan. Nevertheless, as part of the relief to which the defendants are entitled, it will also need to be altered. The simplest way of effecting that relief is to remove the defendants as parties to the deed of loan and to the deed of variation of loan."

The arguments of the appellant and the disposition of the appeal

42 The complaints of the appellant on appeal can be summarised as follows:

(a) The primary judge incorrectly applied principles applied to borrowers in asset lending cases, impermissibly extending them to guarantors.

(b) The primary judge incorrectly concluded that the company was in a "precarious" position, and that there was a real likelihood of default, such conclusion embodying an over-statement of the risk faced by the parents.

(c) The primary judge erred in his finding of unjustness and in exercising his discretion to grant relief, in particular in concluding that the appellant was not an innocent party.

(a) *Asset lending*

43 The complaint about "asset lending" tended to raise a debate over semantics. "Asset lending" is not a label or a legal frame of reference. It is a convenient expression, used in cases such as *Perpetual Trustee Co Ltd v Khoshaba* [2006] NSWCA 41; 14 BPR 26,639 and *Spina* to describe a form of lending where the lender has little, if any, regard for the capacity of the borrower to repay and rests satisfied with the security to protect itself. As Campbell JA made clear in *Kowalczuk* at [96]-[99], the conclusion of "unjust" for the Act, ss 7 and 9 depends on all the circumstances and not on labels. There is no reason why considerations such as those here cannot lead to the conclusion that a contract of guarantee is unjust if entered into by a lender who is uncaring of a guarantor's capacity to repay where there is a real and significant possibility of default by the borrower and the guarantor takes no benefit under the borrowing. This is particularly so in all the other circumstances of this case - most particularly the recognition by the appellant of the only two likely sources of repayment, one (successful refinancing) having a real risk to it. The appellant lent at a significant interest rate, reflecting the underlying commercial risk, appreciating the position the parents had been placed in, without any basis to consider that the parents appreciated the commercial risk or that they could afford to take that risk.

44 In any event, the transaction documents made the parents' obligations principal in character and not merely collateral.

45 There was ample basis for the primary judge to find assistance in the so-called "asset lending" cases.

46 Some attempt was made to undermine the factual findings about Mr Calleja's lack of enquiry. It was submitted that Mr Calleja's stroke and subsequent inability to give evidence or assist in the litigation should ameliorate the conclusion or inferences that could be drawn from the lack of evidence of enquiries. Those submissions should be rejected. The appellant had a file, which, if any enquires had been made, could be expected to have contained a record of them.

47 It was submitted that there were a "myriad of alternative reasons why the appellant did not make enquiries" as to the parents' ability to repay the loan out of their own resources. As developed in argument, however, Mr Young accepted that the reality was, as I have earlier said, that repayment was to occur only by refinancing of the Forster property or liquidating the security. The appellant knew these were the parents (likely elderly and likely of a non-English speaking background) of a middle-aged businessman in property development in a position of financial stringency. Looked at in this light, the conclusion that the appellant was uncaring as to the financial position of the parents was overwhelming.

(b) *The precarious position of the company*

48 The appellant sought to cover the facts with a veneer of hope and confidence - that there was no reason for the appellant to believe that the company and Milan would not succeed in obtaining the development approval and project finance. One does not need to place any gloss on the uncontested facts to recognise the over-sanguine nature of this submission. The company's (and thus the parents') position was precarious. It depended upon two third parties (the council and any future lender) acting in accordance with the company's interests and in a timely fashion. If this did not occur (as it did not) the parents would certainly lose their property. The measure of the commercial risk that they were taking was reflected in the indicia of the lending - especially the term and interest rate. "Precarious" in terms of the position of the company can be understood as a "real and substantial" risk of default by it. That described the risk the parents faced.

49 There was no error in the primary judge's finding in the characterisation of the risk involved.

(c) *The finding of unjustness, the granting of relief and, in particular, the finding that the appellant was not "innocent" in the "Karavas sense"*

50 To a degree, again, the argument of the appellant regarding unjustness was semantic. There is no need, for the purposes of the Act, to find a degree of moral obloquy in the third party. To frame unjustness in terms of the "innocence" (or otherwise) of the third party is to misdirect the enquiry. It is not what is required by the Act, ss 7 and 9. What is to be undertaken is an overall evaluation in determining both unjustness and the justness of granting relief, which involves a consideration of all the relevant circumstances of the case. Here, the relevant circumstances giving rise to the conclusion of unjustness and the granting of relief included the misapprehension by the parents that their obligations would cease after three months, the fact that the parents lacked the capacity to understand the deed of loan and mortgage and did not appreciate the significance of the interest rate even with the benefit of limited legal advice, that Milan (albeit not the appellant) was exerting considerable pressure upon the parents to enter the agreements immediately, that the appellant failed to make enquiries as to the financial circumstances of the parents in circumstances where the appellant appreciated the significant risk of the transaction, being one which it was not prepared to take at the significant rate of interest without the parents' "clean" security.

51 Meagher JA in *Karavas* spoke of the injustice in depriving an innocent person of valuable property, including contractual rights (at 277). His Honour was there referring to the jurisdiction to grant relief under the Act against a party who is unaware of the special disability of the party seeking relief. His Honour did, however, state that undoubtedly the jurisdiction to grant relief existed in those circumstances. It may be unjust in all the circumstances to do so. Meagher JA was not, however, laying down a rule, nor can his Honour's statement be seen to import a requirement of *mala fides* into the Act. As Mason P said in *St George Bank Ltd v Trimarchi* [2004] NSWCA 120 at [45] (with which Sheller JA and Cripps AJA agreed):

> "... s 9 of the Act does not require the party seeking to enforce a contract to be on notice of the circumstances rendering it unfair."

Further, here, as found by the primary judge, the lack of knowledge of the appellant of the financial circumstances of the parents was a product of its failure to enquire as to those circumstances.

52 There was no error in the primary judge's approach. It was open to his Honour to consider that the appellant's failure to make enquiries and the knowledge of the appellant about the transaction, its risks and the position of the parents was such as to enable him to conclude that it was just and appropriate to make orders against the appellant.

53 In the circumstances here, there was ample basis to conclude that the contracts were unjust and that it was just that relief should be granted against the appellant.

54 The appeal should be dismissed with costs.

55 **CAMPBELL JA:** I agree with the orders proposed by Allsop P, and with his Honour's reasons.

56 I agree with the remark of Allsop P at [11] that it is unnecessary in the present case to make precise calculations of the way in which the contractual interest rate translates into a simple interest rate. A result can be arrived at in the present case without performing any such calculation.

57 However, there will be cases under the *Contracts Review Act* in which such a mathematical exercise is of assistance. The facts of the present case illustrate how it could assist. The default interest rate in the present case is 4% per month, compounding on daily rests. 4% per month, compounding daily over the period shown in the left-hand column of the following table, equates to a simple interest rate per annum of the order shown in the right-hand column of the table:

1 year	62%
2 years	81%
3 years	108%
4 years	147%

(In fact some different online calculators on which I had these calculations performed produced slightly different results, but none differed materially from the figures set out in the table.)

58 The relevance of considering a time period as long as three or four years is shown by the facts of the present case, in which the default rate of 4% per month has been applicable from 23 August 2008. It is not unusual for *Contracts Review Act* litigation to take that long, from the time of the first default until the case is finally decided.

59 The relevance of the calculation is that compounding interest on short rests, even if the rate does not seem alarming when stated in a form like *"4% per month"*, can be financial dynamite. Many an unsophisticated borrower would not appreciate, unless it was specifically pointed out to them, that a rate of 4% per month, when compounded, can operate to produce simple interest rates like those shown in the table. It could in some circumstances be a significant contributor to the injustice of a loan made to an unsophisticated borrower that the lender has not received a credible assurance that the borrower has received not only information about what the contract of loan says is the rate of interest, but also an explanation that brings home to the borrower the reality of how the rate of interest, including any compounding, actually operates.

60 Calculators that show the amount that $100 becomes after a particular period of time at compound interest on particular rests, are readily available for purchase, and online calculators that perform that same calculation can be found easily on the Internet. Once that calculation is done, a simple interest rate per annum is readily calculable.

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Decision last updated: 02 September 2011