Supreme Court

New South Wales

Case Name:	First Cash Flow Solutions Pty Ltd v Saad
Medium Neutral Citation:	[2023] NSWSC 686
Hearing Date(s):	2 May 2023
Date of Orders:	22 June 2023
Decision Date:	22 June 2023
Jurisdiction:	Equity
Before:	Robb J
Decision:	The orders of the Court are: (1) Judgment in favour of the plaintiff against the defendant for the amount of $132,304.08. (2) The defendant pay the plaintiff's costs of and incidental to the proceedings on an indemnity basis.
Catchwords:	CIVIL PROCEDURE — commencement of proceedings — where proceedings wrongly commenced by summons — where plaintiff unable to apply for default judgment — court's role in proceedings in absence of defendant CONTRACTS — remedies — liquidated damages — penalty — deed of loan — onus of proving contractual provision penalty — where provisions allowing indefinite application of certain fees unconscionable and out of all proportion to the loss that the failure to pay the interest under the deed could realistically cause the plaintiff to suffer
Legislation Cited:	Civil Procedure Act 2005 (NSW), s 101(1) Uniform Civil Procedure Rules 2005 (NSW), rr 6.3(a), 6.3(f), 14.3(1), 16.2(1), 16.6(1)

Cases Cited:	Arab Bank Australia Ltd v Sayde Developments Pty Ltd (2016) 93 NSWLR 231; [2016] NSWCA 328 Bay Bon Investments Pty Ltd v Selvarajah [2008] NSWSC 1251 Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79 Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7 Paciocco v Australia & New Zealand Banking Group Ltd (2016) 258 CLR 525; [2016] HCA 28 United Group Resources Pty Ltd v Calabro (No 5) (2011) 198 FCR 514; [2011] FCA 1408
Category:	Principal judgment
Parties:	First Cash Flow Solutions Pty Ltd (Plaintiff) Steve Saad (Defendant)
Representation:	Counsel: N Simone (Plaintiff) Solicitors: Stratos Legal (Plaintiff)
File Number(s):	2022/00329218
Publication Restriction:	Nil

JUDGMENT

1 The plaintiff, First Cash Flow Solutions Pty Ltd, makes this claim against the defendant, Mr Steve Saad, by summons filed on 3 November 2022.

2 By affidavit of service, the plaintiff proved that it served the defendant with the summons and the supporting affidavit of the plaintiff's solicitor on 21 December 2022.

3 The defendant did not file a notice of appearance or a defence or evidence, and he did not appear at any directions hearing or at the final hearing.

Relief claimed by plaintiff

4 The plaintiff claimed the following relief in its summons:

> 1. Judgment in favour of the plaintiff against the first and second defendants for the amount of $142,395.18.

> 2. An order granting the plaintiff possession and right to sell [the security property] pursuant to the Mortgage dated 28 June 2022 and section 11 of the *Conveyancing Act 1919* (NSW) and/or section 57 of the *Real Property Act 1900* (NSW).
>
> 3. The defendant's [sic] pay interest on the amount of $142,395.18 at the base rate of 4.00% per month pursuant to the Deed of Loan Facility until payment of the monies owing under the Facility/Guarantee are paid in full or on such other terms as this Honourable Court shall deem just or appropriate.
>
> 4. The first and second defendants pay the plaintiff's costs of and incidental to this Summons on an indemnity basis.
>
> 5. Any such other orders this Honourable Court shall deem just or appropriate.

5 The explanation for my reference to Mr Saad as the only defendant, while prayer 1 of the summons refers to the first and second defendants, is that the Deed of Loan Facility (the Deed) upon which the plaintiff sues treated Mr Saad as if he were two separate parties to the one deed, in his capacity as the borrower and in the capacity of a guarantor of his own liability. The summons made Mr Saad a defendant twice. I will treat him as a single defendant, which is what he is.

6 By the time of the hearing on 2 May 2023, the $142,395.18 claimed by the plaintiff in prayer 1 of the summons had increased by $79,805.33 to $222,200.51. I will explain the make up of the amount finally claimed by the plaintiff below.

7 At the hearing, counsel for the plaintiff advised the Court that the plaintiff no longer sought the order for possession in prayer 2. That was because, as the evidence given by the plaintiff's solicitor in her 28 April 2023 affidavit showed, on or about 25 February 2023 the first mortgagee, National Australia Bank Ltd, entered into a contract to sell the security property for a price of $870,000. The contract for sale was completed on 3 April 2023. The first mortgagee collected the amount of $841,417.39 in sale proceeds on completion. The first mortgagee advised that its payout figure as at 3 April 2023 was $827,470.72, excluding the costs of sale. Consequently, the time for the Court to be able to order the defendant to give possession of the security property to the plaintiff had passed. Furthermore, the amount that remained available from the sale of the security property to satisfy the plaintiff's second mortgagee may be no

more than about $14,000, subject to any additional amounts to which the first mortgagee may be entitled.

8 By prayer 3, the plaintiff sought an order that the defendant pay post-judgment interest at the default rate under the Deed, or at such other rate as the Court shall deem just or appropriate. When asked by the Court during the hearing as to what rate the plaintiff sought for post-judgment interest, counsel for the plaintiff said that "an order is not sought in relation to interest after a judgment" and that the plaintiff "would be entitled to post-judgment interest in the usual way": T 2.43. I take that to mean that the plaintiff only seeks post-judgment interest at the prescribed rate under s 101(1) of the *Civil Procedure Act 2005* (NSW).

9 Although the plaintiff's proceedings are a claim for relief in relation to a debt, the plaintiff did not commence the proceedings by statement of claim as required by Uniform Civil Procedure Rules 2005 (NSW) (UCPR) r 6.3(a), nor did the plaintiff comply with UCPR r 6.3(f), given that prayer 2 of the summons is a claim for possession of land.

10 As the plaintiff did not commence the proceedings by filing a statement of claim, the defendant is not in default of filing a defence within the time required by UCPR r 14.3(1). Therefore, the defendant is not a defendant in default within the meaning of UCPR r 16.2(1). Consequently, the plaintiff was not entitled to obtain a default judgment against the defendant under UCPR r 16.6(1). The plaintiff was therefore required to prove its case at the hearing in the same manner as if the proceedings were defended.

11 In the events that have happened, the failure of the plaintiff to comply with the rules that required it to commence the proceedings by statement of claim may have little moment, as the defendant has not appeared to resist the plaintiff's claim. It is nonetheless the case that the plaintiff has not formally informed the defendant of the facts upon which it relies to obtain the relief ultimately sought against him.

Deed of Loan Facility and Deed of Variation

12 The plaintiff and the defendant entered into a Deed of Loan Facility on 24 June 2022. As noted above, the defendant was made party to the Deed separately

as borrower and guarantor. The principal of the loan was $54,000 plus the costs listed in the Loan Particulars Schedule as being payable in connection with the making of the loan. The total of those costs was $5,663.40, making the initial principal of the loan $59,663.40.

13 The plaintiff and the defendant entered into a Deed of Variation on 12 July, 2022, under which the plaintiff agreed to advance an additional amount of $25,000 to the defendant plus the costs of the variation. The total amount of the costs was $1,650, so that the additional amount of the advance was $26,650.

14 The total amount of the advance made by the plaintiff to the defendant, which was drawn down by 13 July 2022, was therefore $86,313.40.

15 Between the date of the Deed and the Deed of Variation, the defendant made two weekly interest payments. The defendant did not make any repayments or payments of interest after the 13 July 2022 drawdown under the Deed of Variation.

Termination of Facility and addition of new Fees

16 On 3 August 2022, the plaintiff's solicitors delivered a letter to the defendant, which included the following:

> …
>
> Default and Termination of the Facility.
>
> The Borrower has committed an Event of Default of the terms of the Facility as follows:
>
> 1. Non-Payment. The Borrower has failed to pay to the Lender monies when due under the Facility. Specifically, there has been a failure to pay multiple interest payments when due, noting that the direct debit payments have been rejected.
>
> 2. Obligations not complied with. Special condition (c) of the Facility (Item 14 of Schedule 1 of the Facility), provided that you are to complete nominated bank account verification through bankstatements.com.au and the Lender is to be satisfied with the bank account verification. The bank account verification has not been completed.
>
> In addition, we are instructed that our client strongly rejects your assertion that our client has engaged in "threatening" or "aggressive" behaviour. Our client has engaged in no such conduct. By recent email correspondence, our client has simply requested that the Borrower and the Guarantor to remedy the default under the Facility. This has not occurred, and you remain in breach of the terms of the Facility.

> Our client hereby terminates the Facility effective immediately.
>
> Introduction of Fees.
>
> With respect to the Event of Default under the Facility, we are instructed that pursuant to clause 6.2 of the Facility, our client provides notice of the introduction of the following fees effective from Wednesday, 10 August 2022. These fees may be applied in the Lender's sole and absolute discretion.
>
> 1. Risk Fee. A risk fee of 2.0% per month or part thereof of the Facility Limit, will be charged until repayment of the Monies Owing under the Facility in full.
>
> 2. Default Management Fee. A fee of $440.00 per week or part thereof, will be charged until repayment of the Monies Owing under the Facility in full.
>
> We note that the above-mentioned fees are in addition to the Fees contained in Item 9 of the Loan Particulars Schedule to the Facility.
>
> Demand for Payment
>
> Our client demands that by 4:00pm on Monday, 15 August 2022 you are to repay the monies owing under the Facility, being the amount of $98,343.22 (Monies Owing).
>
> We enclose Loan Account Statement for your reference.
>
> Please note: The above payout figure is the payout figure for loan until 15 August 2022 only, and will change after that date.
>
> We advise you that interest at the base rate of interest at the rate of 4.00% per month accrues as from the date of the Event of Default on the principal outstanding, pursuant to the Facility, while the Monies Owing (plus accrued interest and costs) under the Facility remain outstanding.

17 The letter then explained the steps that the plaintiff would take to recover the amount owed to it if the defendant did not comply with the demand made in the letter.

18 One effect of the letter of demand was to terminate the Facility effective immediately, and another effect was to unilaterally impose two new fees pursuant to clause 6.2 of the Deed, which were to be payable by the defendant after the date of termination of the Facility.

19 The only evidence of any communication from the defendant is an email dated 12 September 2022 from the defendant to the plaintiff's solicitor, which was written in response to the plaintiff's letter of demand and a notice of intention to exercise its power of sale. The email stated:

> Stop sending threatening emails, I’m in enough depression in my life. You put me in This situation. You lied to me to get my interest knowing I can't afford it. I have spoken to Afca already to help me. LEAVE ME ALONE.

Relevant terms of Deed of Loan Facility

20 The Loan Particulars Schedule in the Deed provided that the purpose of the loan was "business funds", and the Lower Rate of interest was 2.15% per month and the Base Rate was 4.00% per month.

21 Item 9 of the Loan Particulars Schedule listed the Fees payable by the defendant. There were fees payable in connection with the making of the loan and fees payable in connection with its repayment in the ordinary course. It is not necessary to refer to those fees in detail. The plaintiff has claimed repayment of those fees and there is nothing exceptional about that claim.

22 Item 9(e) is called "Monthly Administration Fee" in the sum of $33.00, payable monthly on the “monthly anniversary” of the Drawdown Date, and is to be paid by way of direct debit. The plaintiff claims this Monthly Administration Fee.

23 By item 9(f) of the Loan Particulars Schedule, the defendant was required to pay the plaintiff a “Rejected Direct Debit Fee” of $55.00 per rejected direct debit. That fee was payable "at the time of a direct debit which is processed by the Lender being rejected."

24 Item 9(g) of the Loan Particulars Schedule provided for a "Payment Default Fee" of $1,100.00 per default payable "at the time a payment which is owing under this Deed is not received by the Lender within 48 hours of the due date for payment."

25 It is not now necessary to refer to the terms of the Loan Particulars Schedule or the Deed that provided for the defendant to give the plaintiff a registered second mortgage over the security property.

26 By item 12 of the Loan Particulars Schedule, the “Repayment Date” was 24 August 2022, two months after the date of the Deed.

27 The Special Conditions in item 14 of the Loan Particulars Schedule noted at par (f) that the plaintiff had approved the Facility on the basis of information provided by the defendant that the amount secured by the first mortgage was $788,957, and the Special Conditions at par (h) required that the security property be listed for sale and sold within the loan term.

28 Clause 2.1 of the Deed included the following provisions:

2.1 Availability of Facility

…

(e) This Facility shall commence on the Drawdown Date and expire on the earlier to occur of termination of this Deed due to default under or breach of the terms of this Deed or the Repayment Date.

(f) In consideration of the Lender, at the request of the Borrower, making available the Facility, the Borrower agrees to repay the Advance by the Repayment Date…

29 Clause 4.1 of the Deed provided for payment of interest, relevantly in the following terms:

4.1 Payment of Interest.

(a) Interest accrues at the Base Rate but while there exists no Event of Default or Potential Event of Default under the Facility, the Lender agrees to accept interest at the concessional rate, being the Lower Rate. The applicable rate under this clause is referred to in this Deed as the Interest Rate.

…

(c) The Borrower must pay interest to the Lender on or before each Interest Payment Date at the Interest Rate on the outstanding balance of the Advance from the Drawdown Date to the date when the Advance is repaid in full.

(d) Interest shall be paid in accordance with the Direct Debit Request Form executed by the Borrower on or about the date of this Deed. The failure to make payment of the interest shall constitute an Event of Default.

(e) The parties agree that if the Borrower does not make payment of interest when due on the interest Payment Date and immediate payment is not made within 48 hours thereafter, then interest at the Base Rate applies in accordance with clause 4.2 and the Borrower is liable to pay to the Lender an administration fee of $1,100.00, as described in Item 9(g) of Schedule 1, being a genuine pre-estimate of the Lender's costs associated with the failure to pay the interest instalment plus all legal costs incurred by the Lender with respect of the default on an indemnity basis, in accordance with clause 12 of this Deed. The Lender's costs are not limited to this amount.

30 Clause 6 of the Deed provided for Fees in the following terms:

6. Fees

6.1 The Borrower must pay the Lender, the Fees specified in Item 9 of the Schedule to this Deed, as specified in Item 9 of the Schedule, or otherwise as directed by electronic funds transfer to the account nominated by the Lender.

6.2 The Lender may vary the fees payable by the Borrower or introduce new fees to be paid by the Borrower under this Deed. If the Lender introduces any new fees it will provide written notice of the new fees at least seven days before the fee or charge takes effect and the new fee shall take effect unless the Borrower provides a notice of objection in which case the Lender may terminate this Deed, and clause 9 shall apply.

31 Clause 9 of the Deed provided for the plaintiff's rights in the case of an Event of Default committed by the defendant, in the following relevant terms:

> 9. Lender's Rights on Event of Default
>
> 9.1 If any Event of Default occurs, the Lender may, by written notice to the borrower:
>
> (a) declare the Facility to be immediately terminated in which case the Facility will be terminated immediately; and/or
>
> (b) declare the Money Owing to be immediately due and payable, and the same are immediately due and payable, regardless of whether the Facility has been terminated, and any certificate issued by the Lender shall be prima facie evidence of the Money Owing; and/or
>
> (c) enforce any of its rights under any Transaction Document, which may include the right to appoint a Receiver in accordance with clause 9.3 of this Deed.
>
> 9.2. Upon termination of this Facility, the Borrower must make payment to the Lender of the Money Owing within seven (7) days) [sic], make payment to the Lender of any other costs demanded by the Lender pursuant to clause 12 within seven (7) days notice of the amount payable. If payment is not made, the Borrower must deliver up the Secured Property to the Lender in accordance with any directions given by the Lender at the cost of the Borrower with the risk in the Secured Property to remain with the Borrower until the Lender has acknowledged receipt of the Secured Property in writing.
>
> …
>
> 9.4 The Borrower and Guarantor agree that the Borrower is liable to pay the Lender a Default Fee of $1,100.00 upon occurrence of an Event of Default as described in Item 9(g) or (h) of Schedule 1 plus all legal costs incurred by the Lender with respect of the default on an indemnity basis in accordance with clause 12 of this Deed. The Borrower acknowledges this is a genuine pre-estimate of the Lender's loss upon the occurrence of an Event of Default. The Lender's costs are not limited to this amount.

32 Clause 15 of the Deed provided for payment by the defendant by direct debit.

33 At the time the Deed was made, the defendant signed a document called "Customer Direct Debit Request (DDR) Service Agreement" and a "Direct Debit Request (DDR)". Those documents appear to have authorised the plaintiff to arrange for payments due to it to be paid by direct debit from a nominated account in the name of the defendant with the Commonwealth Bank of Australia.

34 The defendant also executed at the time of the Deed two documents in which he waived the right to legal advice and waived the right to financial advice.

35 A number of other terms of the Deed are relevant to the determination of the plaintiff's claim, even though the plaintiff does not rely upon those terms to support its claim.

36 First, clause 4.4 gave the plaintiff a right to elect to capitalise unpaid interest payments that would then accrue interest at the rate provided by the Deed. Consequently, to that extent the plaintiff was protected from loss by reason of breaches by the defendant of his obligation to make timely interest payments, because the plaintiff would then become entitled to charge interest on the unpaid amounts as if they were part of the principal advance.

37 Secondly, the definition in clause 1.1 of the term "Event of Default" included any failure by the defendant to comply with any of his obligations under the Deed. Clause 8.1 listed 16 separate positive undertakings, including in clause 8.1(p) an obligation to comply with any Security Interest, which had the effect that it would be a breach of the Deed for the plaintiff to have committed any breach of the mortgage that he granted to the plaintiff. Clause 8.2 also listed nine negative undertakings, and clause 8.3 prohibited the defendant from borrowing any further funds without the written consent of the plaintiff. It is not necessary to list all of the ways that the defendant could have committed breaches of the Deed. It is sufficient to note that there was a substantial number of ways that breaches could have been committed by the defendant, and the consequences of those breaches and the potential loss that could have been caused to the plaintiff differed in each case depending upon the circumstances, some of which may have been relatively trivial and others of which may have caused significant loss to the plaintiff.

38 Thirdly, clause 12.2 created a comprehensive entitlement in the plaintiff to be indemnified for all costs and expenses including legal costs on a full indemnity basis as a result of any default by the defendant. Clause 12.4 created a further comprehensive right of indemnity in respect of all loss, which was widely defined, suffered by the plaintiff arising directly or indirectly from a failure by the defendant to pay any money owing when payable or to comply with any other obligation owed to the plaintiff. It is difficult to conceive of any consequence of

any breach of the Deed that would not give rise to a full right of indemnity on the part of the plaintiff.

Composition of debt claimed

39 It will now be convenient to explain the composition of the amount of $222,200.51 claimed by the plaintiff at the time of the hearing. That composition is as set out in a document called Facility Statement issued by the plaintiff on 1 May 2023 and annexed to an affidavit dated 27 April 2023 made by a director of the plaintiff.

40 The composition of the debt claimed by the plaintiff from the defendant is approximately as follows. (It may be that I have not fully understood some of the detail of the composition of the plaintiff's claim – that will not be significant to the formulation of the orders that the Court will make):

(1) Total of amounts drawn down by the defendant of $79,000 plus the initial and variation costs of $7,313.40, giving a total principal amount of $86,313.40.

(2) Weekly interest payments at the Lower Rate for 41 weeks at $428.25, giving a total of $17,558.25, a pro rata Lower Rate charge to 2 May 2023 of $428.25, plus a Base Rate adjustment to 2 May 2023 of $14,961.74 to increase the interest payable to the default rate. The total amount of interest claimed is $32,948.24.

(3) Monthly Loan Administration Fee of $33 for 9 months, giving a total of $297.

(4) Fees payable on discharge of the mortgage and legal fees of $9,644.40.

(5) Weekly Payment Default Fee of $1,100 per default for four weeks up to the date of the termination of the Facility in the sum of $4,400.

(6) Rejected Direct Debit Fee for four weeks up to the date of the termination of the Facility of $55 in the total sum of $220.

(7) Payment Default Fee of $1,100 per week after the date of termination of the Facility for 47 weeks, including one week (4 March 2023) where the Payment Default Fee appears to have been charged twice, giving a total of $52,800.

(8) Rejected Direct Debit Fee of $55 per week after the date of termination of the Facility for 47 weeks, giving a total of $2,585.

(9) Risk Fee applied in the letter of termination of the Facility of $1,726.27 per month for nine months, giving a total of $15,536.43.

(10) Default Management fee applied in the letter of termination of the Facility of $440 per week for 39 weeks, giving a total of $17,160.

41 Although the plaintiff terminated the Facility on 3 August 2022, with the result that the total Monies Owing then became payable to the plaintiff, the plaintiff has relied upon the fact that clause 4.1(c) of the Deed required the defendant to pay interest on the outstanding balance to the date when the Advance was repaid in full, and that item 8 of the Loan Particulars Schedule made interest payable weekly in arrears, to impose a weekly Payment Default Fee of $1,100 up to the hearing of the plaintiff's claim. As the defendant was required to sign a direct debit authority, the plaintiff has also imposed a weekly Rejected Direct Debit Fee from the date the Facility was terminated to the date of the hearing. Furthermore, the plaintiff has purported to impose an additional monthly Risk Fee and an additional weekly Default Management Fee on the defendant from the date of termination of the Facility. The logic of the plaintiff's claim is that it would be entitled to recover these four fees indefinitely until it chose to obtain an order from the Court that the defendant pay the total amount due to the plaintiff under the Deed, as varied. In the present case, as I have explained above, it appears that little money will remain after the first mortgagee has sold the security property and recovered the debt owed to it for payment of the amount that the defendant owes to the plaintiff. However, the logic of the plaintiff's claim is that, whatever the value of the equity in the security property after the payment of the debt to the first mortgagee may have been, the plaintiff would be entitled to continue to impose weekly and monthly fees on the defendant for whatever time might be necessary to exhaust the equity in the security property after payment of the debt owed to the first mortgagee.

42 An obvious feature of the plaintiff’s claim is that the defendant’s debt of $86,313.40, including transaction costs, had ballooned to $222,200.51 in a period of about 10 months. That is an increase of almost 160%. To the extent that the increase is attributable to the interest which the defendant agreed to pay on default, or to costs actually incurred by the plaintiff as a result of the defendant’s breaches, that is a result of the bargain made by the defendant. There is no scope for the Court to criticise the interest rates to which the defendant agreed, given that it is apparent that the advance that the plaintiff agreed to make to the defendant carried considerable risks. However, given the comprehensive protection that the Deed provided the plaintiff in respect of

all breaches committed by the defendant, I became concerned at the hearing about the effect of the plaintiff's entitlement to charge weekly Payment Default Fees of $1,100, given that the plaintiff had terminated the Facility on 3 August 2022, and there was no appearance from the evidence, or likelihood, that the plaintiff itself was required to incur any significant administrative costs after it placed the recovery of the advance in the hands of its solicitors. Furthermore, the plaintiff had unilaterally imposed the monthly Risk Fee on the defendant after he had breached the Deed, when the plaintiff was already entitled to recalculate the interest payable by the defendant at the Base Rate, and it had also imposed the weekly Default Management Fee, when the matter was in the hands of its solicitors, and the plaintiff had become entitled to recover its legal costs on the indemnity basis. The nature of these additional fees was such that the plaintiff could have continued to impose them at its pleasure for the full amount of time that it allowed to elapse before it obtained a judgment against the defendant for the amount owed to it. I considered that to be a problematic outcome, as although it was not possible in the present case because of the limited value of the security property, in different circumstances a lender in the plaintiff's position could simply choose to soak up the borrower's equity in the security property by allowing the fees to which I have referred to run.

43 Pressed about the enforceability of the Payment Default Fee, the Risk Fee and the Default Management Fee, counsel for the plaintiff responded by submitting that the Court was required to give judgment in favour of the plaintiff that included recovery of all of these fees, because the defendant had not appeared to challenge the enforceability of the fees, he had provided no evidence that the fees were unjustified, and the defendant had the burden of challenging the fees if he wished to establish that the plaintiff's entitlement to the fees was unenforceable, particularly if he wished to assert that the contractual entitlement to the fees imposed unenforceable penalties: T 4.6 and T 6.43.

Court's role at the hearing of undefended proceedings

44 As I have explained above, the plaintiff was not entitled in this case to apply for a default judgment, but was required to prove its case to the Court's satisfaction in the same way as if the case had been defended – though, of

course, the absence of an active defence might provide many forensic advantages to the plaintiff.

45 I consider that the role of the Court in determining an undefended claim in this context is as succinctly stated by McKerracher J in *United Group Resources Pty Ltd v Calabro (No 5)* (2011) 198 FCR 514; [2011] FCA 1408, as follows:

> [42] As the unrepresented respondents were absent, the applicants applied to the Court for an order pursuant to O 32, r 2(1)(d) of the former Rules that the hearing proceed generally.
>
> [43] In my view, an order for the hearing to proceed generally was appropriate in circumstances where the unrepresented respondents had been on notice since October or November 2010 of the proceedings against them, and the consequence of failing to take any step in the proceedings had been explained to them. The unrepresented respondents, in effect, should be regarded as having waived their rights (*Hadgkiss v Aldin (No 2)* (2007) 169 IR 76 at [13]).
>
> [44] In circumstances where the Court determines to proceed with the trial generally pursuant to O 32, r 2(1)(d) of the former Rules, the authorities suggest that:
>
> (a) the Court must investigate the merits of the matter (*A184 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 210 ALR 543 at [89]);
>
> (b) the applicants must prove their case on the balance of probabilities in the usual way (*TVBO Production Ltd v Australia Sky Net Pty Ltd* (2009) 82 IPR 502 at [15]);
>
> (c) the Court should generally restrict the relief to that claimed (*AA Shi Pty Ltd v Avbar Pty Ltd (No 5)* [2010] FCA 971 at [12]);
>
> (d) the Court may allow evidence to be tendered and affidavits to be read on behalf of the party which is present (*Scoway Pty Ltd v Faxon Pty Ltd* [2004] FCA 249 at [7]-[9]; and *AA Shi Pty Ltd* at [12]); and
>
> (e) the Court is entitled to assume the correctness of the facts claimed by the applicants in their submissions, where there is uncontroverted evidence tendered by the applicants in support of those submissions (*AA Shi Pty Ltd* at [13]).

Onus of proof that a contractual provision is a penalty

46 In *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* (2016) 93 NSWLR 231; [2016] NSWCA 328 (*Arab Bank*), McDougall J said (Gleeson JA and Sackville AJA agreeing):

> [75] There are two remaining relevant points to be derived from the decision in *Paciocco*. The first is that the onus of proving that a contractual stipulation amounts to a penalty rests with the person asserting it. As Gageler J said in *Paciocco* at [167]:
>
> > "[167] … The customers bore the evidentiary and persuasive onus throughout that inquiry."

47 I will return to the judgment of McDougall J shortly, as it contains a concise but comprehensive statement of the principles that the Court is required to apply in determining whether a contractual provision is an unenforceable penalty. However, for present purposes the relevance of the extract from his Honour's judgment that is set out above is that it establishes that a party who asserts that a provision is a penalty generally has the evidentiary and persuasive onus of establishing that consequence.

48 However, there is a qualification to this rule that may apply in the present case. In the leading case of *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 87, Lord Dunedin said (citations omitted):

> 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:
>
> …
>
> (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" (Lord Watson in *Lord Elphinstone v. Monkland Iron and Coal Co*.).

49 In *Arab Bank*, McDougall J said of this presumption:

> [76] The second point relates to the "presumption" identified by Lord Dunedin in *Dunlop* at his point 4(c)… As Keane J said in *Paciocco* at [265], that presumption is "a weak one". Further, as Gageler J said at [168], the invariable nature of the penalty compared to the amount overdue or the length of delay, although it cannot be ignored, is "only weakly indicative of the character of the late payment fee as a punishment".

50 In *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525; [2016] HCA 28 (*Paciocco*), Kiefel J said the following concerning Lord Dunedin's presumption (footnotes omitted):

> [36] The third "test" is stated as a presumption ("(but no more)") that a sum will be a penalty where it is a single sum made payable on the occurrence of one or more of several events, some of which may occasion serious, and others only inconsequential, damage. The presumption derives from what was said by Lord Watson in *Lord Elphinstone v Monkland Iron and Coal Co*:
>
> > "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, the presumption is that the parties intended the sum to be penal, and subject to modification."
>
> …

> [38] Further, because a provision of the kind mentioned is merely a presumption, it may be rebutted. In *Dunlop*, Lord Atkinson observed that it was there rebutted by the fact that the damage caused by default may be of such an uncertain nature that it cannot be accurately ascertained.

51 Nettle J, in dissent, said of Lord Dunedin's presumption (footnotes omitted):

> [339] Additionally, as the primary judge also held, this case engaged test 4(c) of the Dunlop tests. The late payment fee was of the same amount regardless of the magnitude of the Monthly Payments required to be made and of the extent of lateness in payment, and thus, according to test 4(c), there arose an evidentiary presumption that the payment was penal. It then fell to the Bank to show why the late payment fee was not penal.

52 Although the presumption referred to by Lord Dunedin may be weak in the particular case, its existence is established by these authorities. This is at least relevant in the present case to the plaintiff's claim for the weekly Payment Default Fees that it imposed upon the defendant. Those fees became payable in the circumstances of this case every week when the defendant failed to pay that week's interest payment. As explained above, the plaintiff was entitled to capitalise each unpaid interest payment and to claim interest on the unpaid amounts. The plaintiff was separately entitled to impose the Rejected Direct Debit Fee in respect of each unpaid amount of interest as the Deed required interest payments to be paid by direct debit. There was no reason at all to expect that the plaintiff would actually incur weekly administration costs of $1,100 each time an interest payment was not made. As I have explained above, clause 9.4 and the Loan Particulars Schedule Item 9(g) and (h) imposed upon the defendant an obligation to pay the same Fee of $1,100 per default in respect of the breach of every term of the Deed. Some of those breaches could have caused the plaintiff to suffer serious loss but others would have been inconsequential.

53 I consider that Lord Dunedin's presumption applies in the present case. It is immaterial in my view that the Payment Default Fee is imposed separately in clause 4.1(e) of the Deed of Loan Facility as well as clause 9.4, as the relevant provisions taken as a whole satisfy the precondition for the application of the presumption. Whether or not the nature of the presumption as being weak will have any significance will depend upon the particular circumstances of the case.

54 The existence of the presumption is significant in this case because of the absence of the defendant to defend the claim. The plaintiff submitted that no term of the Deed could be found to be a penalty because of the absence of any defence, but that is not so where there is a presumption that a provision is a penalty because it imposes the same cost on the defendant for all breaches ranging from the serious to the trivial. The existence of the burden on the plaintiff to overcome the presumption opens the door to a court that is required to satisfy itself of the plaintiff's entitlement to the relief that it claims to make a ruling on the available evidence as to whether the particular contractual term is a penalty.

55 Furthermore, as White J (as his Honour then was) said in *Bay Bon Investments Pty Ltd v Selvarajah* [2008] NSWSC 1251, which was a case that was defended but the defendant called no evidence:

> [51] Whilst I accept that the onus is on the defendant to show that the provision is a penalty, it appears to me that once some evidence is adduced which may be sufficient to satisfy that onus, there is an evidentiary onus on the plaintiff to explain the nature of its business, the rates at which it is able to lend, and how, when the contracts were entered into, it would have been anticipated that the moneys would be re-deployed on repayment of the loans. This information was entirely in the plaintiff's camp. Evidence is to be weighed according to the power of a party to produce it. Where facts are peculiar within the knowledge of one party, comparatively slight evidence may be sufficient to discharge the onus of proof lying on the opposite party (*Parker v Paton* (1941) 41 SR (NSW) 237 at 243; *Hampton Court Ltd v Crooks* (1957) 97 CLR 367 at 371–2; *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation* (1985) 1 NSWLR 561 at 564–5; *Krstic v Brindley* [2006] NSWSC 1414 at [26]).

56 There may be cases, of which I think the present is one, where the plaintiff must tender the contract upon which it sues in order to make out its case, and the contract itself is then evidence that is capable of establishing a sufficient basis for the Court to find that a particular term is a penalty so as to cast an evidentiary burden on the plaintiff to call evidence to explain why it is not.

Principles for determining the existence of a penalty

57 The principles that this Court is required to apply in determining whether a contractual provision is a penalty have been sufficiently stated in a binding manner in *Arab Bank* by McDougall J as follows:

> [69] The law relating to contractual penalties has been considered by the High Court of Australia in three recent cases:

(1) *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656; [2005] HCA 71;

(2) *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30; and

(3) *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 90 ALJR 835; [2016] HCA 28.

…

[71] In *Ringrow*, the court (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ) accepted at [12] that Lord Dunedin's speech in *Dunlop* set out "the principles governing the identification, proof and consequences of penalties in contractual stipulations", and that the decision in *Dunlop* "continues to express the law applicable in this country".

[72] The relevant aspect of Lord Dunedin's speech (*Dunlop* at 86–87) reads 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 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 …
>
> …

[73] In *Andrews*, the court (French CJ, Gummow, Crennan, Kiefel and Bell JJ) referred to *Dunlop* at [69] and following. Nothing that their Honours there said cast any doubt on the position stated in *Ringrow*, to the effect that the principles identified by Lord Dunedin expressed the legal position in this country. That is perhaps not surprising, because the real point of the decision in *Andrews* was to identify that the equitable jurisdiction to relieve against penalties remained alive and well. It followed, in the court's view, that the penalty doctrine was not only applicable in the case of breach of contract. Since the present case involves a stipulation operative on breach of contract, that aspect of the decision in *Andrews* is of no significance.

[74] I turn to the decision in *Paciocco*. In that case, the High Court held by majority (French CJ, Kiefel, Gageler and Keane JJ) that a late payment fee imposed by the respondent bank on its credit card customers was not a penalty. Their Honours gave separate reasons: Kiefel J (with whom French CJ agreed on this point), Gageler J and Keane J. The majority judgments paid

close attention to the reasoning of Lord Dunedin in *Dunlop*. The following propositions emerge from the majority decision:

(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).

Enforceability of Payment Default Fee

58 In my view the Payment Default Fee the subject of clause 4.1(e) of the Deed, when read with the Loan Particulars Schedule Item 9(g), is a penalty and is unenforceable.

59 At the time the parties entered into the Deed, they must be taken to have known that it was a possibility that the terms of the Deed may be extended by a later variation to apply to an increased Facility Limit to that which was permitted by the Loan Particulars Schedule item 4. That is something that in fact happened in this case.

60 The result was, as it has happened, that the total amount of the advance was $86,313.40. The weekly interest at the Lower Rate was $428.25. Upon default, the weekly interest at the Base Rate became $796.74. The imposition each

week of an additional fee of $1,100 made the weekly impost $1,896.74. Under the Deed, the defendant would be required to pay that amount indefinitely until such time as the plaintiff chose to terminate the obligation by obtaining a court judgment in debt against the defendant that would have the result that the defendant's contractual obligation under the Deed would merge in the judgment. Therefore, as at the date of entry into the Deed, the effect of the provisions imposing the Payment Default Fee were to be judged on the basis that the fee was payable on a breach of the obligation to repay the principal plus every single weekly interest payment. The obligation to pay the fee would continue indefinitely irrespective of the true level of administrative burden placed upon the plaintiff to respond to each failure to pay interest.

61 As at the date of entry into the Deed, the likelihood that the plaintiff would suffer an administrative burden as a result of the default by the defendant in making weekly interest payments and the cost of that burden would need to be weighed against the fact, as explained above, that the financial loss that the plaintiff might suffer would be covered by the entitlement to capitalise the unpaid interest, and the administrative cost of dealing with the reversal of direct debits was covered by a separate fee. The plaintiff was also entitled to a complete indemnity for all of the loss that it suffered as a result of each breach and for its costs of recovering the debt owed by the defendant, including its legal costs. It was likely as at the date of entry into the Deed that the plaintiff would incur some administrative costs following the initial breaches by the defendant of his payment obligations, but from the time that the plaintiff decided to terminate the Facility for breach by the defendant, the recovery of the outstanding debt would be placed in the hands of the plaintiff's solicitors in circumstances where the plaintiff would be entitled to an indemnity from the defendant for all costs.

62 The plaintiff did not tender evidence that provided any explanation as to how the Payment Default Fee was justifiable at the date the Deed was entered into because it protected some legitimate interest of the plaintiff that existed in addition to the comprehensive protection of the plaintiff provided by all of the other terms of the Deed that have been considered above: cf the reasoning of the High Court in *Paciocco*.

63 In the present case, the comprehensive protection afforded the plaintiff on a complete indemnity basis for all of the consequences of weekly defaults by the defendant in making interest payments has the effect that the imposition of an additional weekly Payment Default Fee in a sum significantly greater than the weekly interest payments, and to be incurred indefinitely, was unconscionable and out of all proportion to the loss that the failure to pay the interest could realistically cause the plaintiff to suffer.

Enforceability of Risk Fee and Default Management Fee

64 The enforceability of these fees must be considered on the basis that I have already found that the obligation on the defendant to pay the Payment Default Fee is unenforceable. Were the Payment Default Fee enforceable, the enforceability of the Risk Fee and the Default Management Fee would have to be determined on the basis that they were imposed unilaterally by the plaintiff to be paid in addition to the Payment Default Fee.

65 The plaintiff imposed the additional fees at a time when the defendant was in default of payment of interest under the Deed of Loan Facility and in the same 3 August 2022 letter in which the plaintiff terminated the Facility in exercise of its right in clause 9.1(b). As the Facility was terminated, the defendant was required to repay the Money Owing within seven days and in default of repayment, was required to deliver up the secured property to the plaintiff. The defendant ceased to have any rights in relation to the continuation of the Facility under the Deed.

66 The first question is whether on the proper construction of the Deed the plaintiff was entitled to unilaterally impose the Risk Fee and the Default Management Fee in the circumstances in which it purported to do so.

67 In *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 French CJ, Hayne, Crennan and Kiefel JJ laid down the following principles concerning the proper approach to be adopted in the construction of a commercial contract (footnotes omitted):

> [35] Both Verve and the Sellers recognised that this Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood

> those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties … intended to produce a commercial result". A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".

68 Clause 6.2 of the Deed empowered the plaintiff to "vary the fees payable by the Borrower or introduce new fees to be paid by the Borrower under this Deed." The plaintiff was required to provide written notice of the new fees to the defendant at least seven days before the fee or charge took effect. Clause 6.2 then provided: "and the new fee shall take effect unless the Borrower provides a notice of objection in which case the Lender may terminate this Deed and clause 9 shall apply." The question is: how can this provision operate if the plaintiff has purported to impose new fees at the same time or after it has terminated the Deed? That leads to the question: what is meant by "terminate this Deed" in the context of clause 6.2?

69 The meaning of "terminate this Deed" must be addressed in the context that the Deed does not elsewhere expressly refer to the plaintiff as having a right to terminate the Deed. Clause 9, which deals with the "Lender's Rights on Event of Default", only speaks in clause 9.1(a) in terms of the plaintiff having a right to "declare the Facility to be immediately terminated in which case the Facility will be terminated immediately". As a general matter, termination of the Deed would have a different legal effect to the termination of the Facility by the plaintiff in the exercise of its right under clause 9.1(a). In the former case, the Deed would cease to be enforceable prospectively, but rights accrued to the date of termination would be preserved. In the latter case, the Deed would continue in operation, but the defendant would cease to have the ongoing rights to which he would be entitled if the Facility had continued. However, apart from the fact that the reference to the determination of the Deed seems to be anomalous in the context of the terms of the Deed as a whole, if it did indeed mean termination of the Deed, the exercise of the right would cause the

plaintiff to deprive itself of all of the ongoing benefits of the continued operation of the terms in the Deed that were obviously inserted in its favour. It is improbable that that result was intended. Furthermore, although clause 6.2 gives the plaintiff the right to terminate the Deed, it goes on to say "and clause 9 shall apply". Clause 9 assumes that the Deed will continue in effect for the benefit of the plaintiff and will not literally be terminated. For example, clause 9.2 commences: "Upon termination of this Facility, the Borrower must…" It follows that the defendant was intended to have ongoing obligations that would be enforceable under the Deed. In my opinion, clause 6.2 of the Deed treats the termination of the Deed as having the same meaning and effect as what might otherwise have been called the termination of the Facility.

70 The relevance of these considerations is that, in my view, on its proper construction, the right given to the plaintiff by clause 6.2 is a right to vary fees and introduce new fees during the period before the Facility has been terminated. That is commercially sensible, as during that period the circumstances may change in a way that causes the plaintiff to decide that its existing fee structure is unsuitable. That may cause the plaintiff to vary existing fees or impose new ones. Clause 6.2 gives the defendant the right to decide whether to accept the varied or additional fees, or not. If not, the defendant must notify the plaintiff, in which case the plaintiff will not be entitled to the varied or additional fees, but the plaintiff will have a right to terminate the Facility. In that way, the defendant would have the right to reject the varied or additional fees, but the price for the rejection would be the possible termination of the Facility by the plaintiff and the need for the defendant to refinance the advance within a short period.

71 Clause 6.2 will not work in a commercially sensible manner if it is construed as permitting the plaintiff to vary existing or add new fees after it has terminated the Facility because of the default by the defendant. First, if the defendant rejected the varied or additional fees, there would be no consequences because the plaintiff had already terminated the Facility. As explained above, the Deed already contains a suite of comprehensive protections for the plaintiff upon default by the defendant, and it is improbable that the parties seriously

intended that the plaintiff could vary or add additional fees at will when the defendant no longer had any useful rights under the Deed.

72 In any event, I consider that the defendant's 12 September 2022 response to the plaintiff's solicitors' notification of the termination of the Facility and the imposition of the additional fees should be construed as an objection to the imposition of the new fees for the purposes of clause 6.2. That response is set out above at [19 Ref138172892]. The response does not use the wording in clause 6.2 and does not specifically object to the additional fees. However, it was written by a layperson who clearly appears from the terms of the response to have been acting under considerable emotional pressure. The response should be interpreted as a blanket rejection of all of the steps taken on behalf of the plaintiff of which the defendant had been notified by the solicitors.

73 Whether the defendant's response was effective depends upon the proper construction of the relevant part of clause 6.2. That clause could have two meanings. By the first, the requirement that the plaintiff must give at least seven days notice before the fee or charge takes effect and that the defendant must provide notice of objection for that result to be averted would require that the notice be given in the seven-day period. By the second, the seven-day notice period would only govern the time for commencement of the new fee or charge, and would not put a time limit on the provision of the objection by the defendant. The latter alternative is to be preferred as the proper construction of clause 6.2. It would be commercially unreasonable for the defendant to be absolutely bound by any arbitrary additional fee or charge imposed by the plaintiff, if the defendant's attempt to notify his opposition miscarried and was not delivered within a seven-day period. The seven-day period only determines the commencement of the operation of the additional fee or charge. If notice of objection is given by the defendant within the seven-day period, the fee or charge will not become payable. If the objection is made later, the fee or charge will be payable between the end of the seven-day notice period and the date of the giving of the notice of objection to the plaintiff. In either case, clause 6.2 would then permit the plaintiff to "terminate the Deed" in the special sense that I have explained above, meaning that the plaintiff could trigger the operation of clause 9. It would in the context work substantial commercial

inconvenience if the notice of objection could only effectively be delivered within the seven-day period. There is no apparent reason why that should be essential. On that basis, the plaintiff is not entitled to the Risk Fee and the Default Management Fee.

Orders

74 The plaintiff is entitled to succeed on its claims in prayers 1 and 4 of the summons, save that the judgment for the relief sought in prayer 1 should exclude the claim for $4,400.00 for Payment Default Fees before the termination of the Facility (see [40(5)_Ref138228713] above); the claim for $52,800 for Payment Default Fees after the termination of the Facility (see [40(7)_Ref138228730] above); the $15,536.43 Risk Fee (see [40(9)_Ref138228746] above); and the $17,160 Default Management Fee (see [40(10)_Ref138228758] above). The total amount of the plaintiff's claim that has been rejected is $89,896.43.

75 The orders of the Court are:

(1) Judgment in favour of the plaintiff against the defendant for the amount of $132,304.08.

(2) The defendant pay the plaintiff's costs of and incidental to the proceedings on an indemnity basis.

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