Supreme Court
New South Wales

Medium Neutral Citation:	**Haiyong Su v 5 Blackman Cres Macquarie Pty Ltd [2026] NSWSC 875**
Hearing dates:	30 March 2026, 1 April 2026
Date of orders:	23 July 2026
Decision date:	23 July 2026
Jurisdiction:	Equity
Before:	McGrath J
Decision:	See [283]–[285]
Catchwords:	PRACTICE AND PROCEDURE – pleadings – matters raised in oral and written submissions that were not pleaded in the defence by the defendant – the plaintiff took issue with unpleaded matters being raised – HELD – the defendant is not permitted to raise unpleaded matters that are likely to surprise and cause prejudice to the plaintiff CORPORATIONS – entitlement to make certain assumptions in relation to dealings with company – whether the defendant was bound by the agreement entered into by its sole director and secretary – HELD – defendant company bound by the agreement entered into by its sole director and secretary MORTGAGES AND SECURITIES – mortgagee's duties, rights and remedies – mortgagee's entitlement to recover the costs of enforcing its rights at common law and under contract – whether mortgagee disentitled to amount for enforcement costs – HELD – mortgagee cannot recover costs which were not proved to have been incurred – mortgagee otherwise disentitled to amount for enforcement costs incurred unnecessarily and unreasonably

ESTOPPEL – *Anshun* estoppel – basis on which the plaintiff sought to recover enforcement costs in these proceedings so connected to the subject matter of earlier proceedings in the Supreme Court of the Australian Capital Territory to make it unreasonable for the plaintiff not to have been made or raised it in those proceedings – high risk of conflicting judgments – HELD – elements of *Anshun* estoppel satisfied

CONTRACTS – construction – penalties doctrine – whether interest rate increase triggered upon default constituted a penalty – HELD – default interest rate out of proportion to the lender's interest sought to be protected – interest at default interest rate an unenforceable penalty

EQUITY – fiduciary duties – breach – whether second cross-defendant obtained funds in breach of either limb of *Barnes v Addy* – HELD – funds cannot constitute trust property where the recipient is independently entitled to them

Legislation Cited: *Corporations Act 2001* (Cth), ss 126, 127, 128, 129, 198E

Cases Cited: *AIG Australia Ltd v Hanna* [2024] NSWCA 91
Allplastics Engineering Pty Ltd v Dornoch Ltd [2006] NSWCA 33
Armagas Ltd v Mondogas SA [1986] AC 717; 2 All ER 385
Atlanta Building Pty Ltd v Abela [2026] NSWCA 126
B&G Properties Pty Limited v Fayad [2021] NSWSC 1382
Bay Bon Investments Pty Ltd v Selvarajah [2008] NSWSC 1251
Bell v Hartnett Lawyers (No 2) [2021] NSWSC 1270
Bellas v Powers [2023] NSWSC 1198
Biggin & Co Ltd v Permanite Ltd [1950] 2 All ER 859; [1951] 1 KB 422
Bryant v Quinn [2022] NSWCA 163
Cherry v Steele-Park (2017) 96 NSWLR 548; [2017] NSWCA 295
Commissioner of Taxation v Normandy Finance and Investments Asia Pty Ltd [2016] FCAFC 180
Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd [2012] NSWCA 184
Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising Co (1975) 133 CLR 72; 7 ALR 527; 50 ALJR 203
Crescent Capital Ltd as trustee for the Rockdale Central Security Trust v Chanine [2026] NSWSC 371

Creswick v Coast RV Pty Ltd [2013] NSWSC 1078
CSR Ltd v Adecco (Australia) Pty Ltd [2017] NSWCA 121
Damm v Coastwide Site Services Pty Ltd [2017] NSWSC 1361
Dare v Pulham (1982) 148 CLR 658; [1982] HCA 70
Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79
Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd (2017) 261 CLR 544; [2017] HCA 12
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7
FAL Healthy Beverages Pty Ltd v Manly Warringah Sea Eagles Ltd [2016] NSWSC 1058
Fayad v B&G Properties Pty Ltd [2022] NSWCA 129
Financialstrategy.com.au Pty Ltd (in liq) v Bailey Roberts Group Pty Limited (in liq) [2026] NSWCA 74
First Cash Flow Solutions Pty Ltd v Saad [2023] NSWSC 686
Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480; 1 All ER 630
Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2) [1993] Ch 171
Hely-Hutchinson v Brayhead Ltd (1986) 1 QB 529; [1967] 2 All ER 14
Henderson-Smart v Quality Blow Moulders Pty Ltd (2010) 25 VR 724
JCP Holdings Pty Ltd v Ulrich Pty Ltd [2025] NSWSC 911
Kyabram Property Investments Pty Ltd v Murray [2005] NSWCA 87
Laszczuk v Bendigo & Adelaide Bank Ltd (2020) 61 VR 1; [2020] VSCA 17
Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd (2023) 276 CLR 500; [2023] HCA 6
Left Bank Investments Pty Ltd v Ngunya Jarjum Aboriginal Corp [2020] NSWCA 144
Leonard v Booth (1954) 91 CLR 454; [1954] HCA 64
Morley v Boothby (1825) 3 Bing 107; 130 ER 455
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37
Nashco Pty Ltd v Yang [2022] NSWCA 137
Northern Territory v Sangare (2019) 265 CLR 164; [2019] HCA 25
Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146; 94 ALR 385; [1900] HCA 32
Ohn v Walton (1995) 36 NSWLR 77

	Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451; [2004] HCA 35 *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711; [1971] 3 All ER 16 *Perpetual Trustees Australia Ltd & Ors v Barker* [2004] SASC 58 *Pinnel's Case* (1602) 5 Co Rep 117; (1602) 77 ER 237 *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 77 ALJR 768; [2003] HCA 10 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 *Rava v Logan Wines Pty Ltd* [2007] NSWCA 62 *Reid Murray Holdings Ltd* (in liq) *v David Murray Holdings Pty Ltd* (1972) 5 SASR 386 *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514; [2019] HCA 13 *Southwick v Moore Stephens Melbourne Pty Ltd* [2008] VSCA 164 *Spicer v Hayward* (1700) Prec Ch 114; 24 ER 55 *State of New South Wales v Moss* (2000) 54 NSWLR 536; [2000] NSWCA 133 *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212; [2016] HCA 44 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; [2015] HCA 28
Texts Cited:	Austin & Black's Annotations to the Corporations Act (LexisNexis, looseleaf) *Company Directors: Principles of Law & Corporate Governance* (Lexis Nexis, 2nd ed, 2023) *Fisher & Lightwood's Law of Mortgage* (LexisNexis Butterworths, 3rd Australian Edition) GE Dal Pont, *Law of Costs* (LexisNexis, 5th ed, 2021) P Herzfeld and T Prince, *Interpretation* (Thomas Reuters, 3rd ed, 2024)
Category:	Principal judgment
Parties:	Haiyong Su (Plaintiff/First Cross-Defendant) 5 Blackman Cres Macquarie Pty Ltd (Defendant/Cross-Claimant) Danny Noumeir (Second Cross-Defendant) Fadi Nihad Kamal (Third Cross-Defendant)
Representation:	Counsel: A Hopkins (Plaintiff/First Cross-Defendant)

	J Polese (Defendant/Cross-Claimant) Fadi Nihad Kamal (Self Represented) (Third Cross-Defendant) Solicitors: Yingke Australia (Plaintiff/First Cross-Defendant) Ad Valorem Law (Defendant/Cross-Claimant)
File Number(s):	2022/00346517
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INTRODUCTION

1 These debt recovery proceedings are brought by the plaintiff/first cross-defendant, Haiyong Su (also known as Henry Su), as lender against the defendant/cross-claimant, **5 Blackman** Cres Macquarie Pty Ltd, as borrower in respect of a secured short-term loan of $100,000 contained in a deed made on 6 May 2019 (**Deed of Loan**) between Mr Su, 5 Blackman and the third cross-defendant, Fadi Nihad Kamal, also as borrower.

2 The second cross-defendant, Danny Noumeir, was the sole director and secretary of 5 Blackman when it was registered and at the time of the entry into the Deed of Loan. The security provided in respect of the loan from Mr Su to 5 Blackman and Mr Kamal took the form of a personal guarantee from Mr Noumeir, as well as mortgages over real property owned by 5 Blackman.

3 The loan term of three months was originally set to expire on 8 August 2019. 5 Blackman sought various extensions, but ultimately defaulted on repayment, leaving the parties in dispute, now some seven years later. The amount that Mr Su seeks to recover from 5 Blackman in these proceedings has now swollen from $100,000 to as much as $1,394,093.13 (on one permutation) as a result of 5 Blackman failing to repay

the loan. This is because Mr Su claims to be entitled to recover the principal amount of the loan as well interest accruing at 3% per month (i.e. 36% per annum, compounding) and the legal costs arising out of the various enforcement measures taken by him.

4 5 Blackman brought a cross-claim against Mr Su, Mr Noumeir and Mr Kamal seeking to set aside the Deed of Loan and the mortgages granted by 5 Blackman as unenforceable by Mr Su and also recover equitable compensation from:

(1) Mr Noumeir on the alleged basis that he breached fiduciary duties owed as a director to 5 Blackman by causing 5 Blackman to enter into the Deed of Loan and the mortgages; and

(2) Mr Kamal on the alleged basis that he knowingly received trust property.

5 At the commencement of the trial, Mr Noumeir submitted to judgment on the cross-claim against him. Accordingly, on 30 March 2026, I made orders by consent in the following terms:

> (1) Judgment be entered in favour of the cross-claimant as against the second cross-defendant.
>
> (2) The second cross-defendant must compensate the cross-claimant for any and all costs, damages and Judgment that the cross-claimant is found to be liable as against the plaintiff.
>
> (3) The second cross-defendant pay the cross-claimant's costs on an indemnity basis.

6 Mr Kamal appeared in these proceedings and was self-represented.

7 The following four issues arise for determination:

(1) Whether Mr Noumeir was able to bind 5 Blackman by executing the Deed of Loan on 6 May 2019, so that the Deed of Loan is enforceable against 5 Blackman.

(2) Whether Mr Su is entitled to recover the cost of the enforcement measures taken by him under the terms of the Deed of Loan.

(3) Whether Mr Su is entitled to charge the default rates of interest compounding monthly as specified in the Deed of Loan or whether they are unenforceable as a penalty.

(4) Whether 5 Blackman is entitled to equitable compensation from Mr Kamal as a result of his alleged knowing receipt of trust property.

8 For the reasons set out below, in respect of each of these four issues I have made the following determinations:

(1) The Deed of Loan is binding and enforceable against 5 Blackman.

(2) Mr Su has failed to substantiate many of the costs he asserts that he incurred in seeking to enforce the Deed of Loan and the mortgages against 5 Blackman. For those enforcement costs which Mr Su is able to substantiate, he cannot recover them from 5 Blackman because they were unnecessarily and unreasonably incurred in earlier proceedings in the Supreme Court of the Australian Capital Territory (**ACT Supreme Court**) which were dismissed.

Further, Mr Su is subject to an *Anshun* estoppel that prevents him from seeking to recover costs he was ordered to pay 5 Blackman by the ACT Supreme Court in those proceedings.

(3) The default rates of interest which compound monthly under the Deed of Loan are unenforceable against 5 Blackman as a penalty.

(4) 5 Blackman has failed to prove that Mr Kamal knowingly received trust property and therefore the cross-claim against him should be dismissed.

9 The consequence of these determinations is that Mr Su's claim that the amount of the debt owing to him by 5 Blackman as at 9 March 2026 was as high as $1,394,093.13 is considerably overstated. The actual amount of the debt owing as at that date was the vastly lesser amount of $53,775.15.

CLAIMS, CROSS-CLAIM & DEFENCES

10 The claims brought by Mr Su are contained in the amended statement of claim filed 7 June 2023 (**ASOC**). In essence, the debt owing to Mr Su alleged to be outstanding as at 17 May 2023 was $475,349.13, calculated as the total of the principal amount of $100,000, interest at 3% per month and legal costs, less a repayment made by Mr Kamal of $100,000. By the time of the trial, the total amounts of the interest and the legal costs were considerably higher. The parties agreed on a set of calculations of the amount owing to Mr Su as at 9 March 2026 based on different scenarios which depended on the determinations I made on the issues in dispute (T47).

11 The responses of 5 Blackman to the claims made in the ASOC are contained in the defence to the ASOC filed 23 June 2023 (**Defence to ASOC**). Unusually, at the trial many of the factual allegations contained in the Defence to ASOC were accepted by Mr Su as facts relied upon by him in support of the allegations in the ASOC, even though evidence was not provided by either party to support them. Mr Su recited many of those facts in the Plaintiff's Chronology dated 17 March 2026, which I have taken to be facts admitted by him.

12 In summary, the following matters are pleaded in the Defence to ASOC:

(1) Mr Noumeir breached the fiduciary duties he owed to 5 Blackman as part of a dishonest and fraudulent design by entering into the Deed of Loan and the mortgages and permitting the drawdown of the $100,000 loan so that the Deed of Loan and mortgages cannot be enforced against 5 Blackman ([37]–[40]; [52]–[59]; [61]–[68]).

(2) The terms of the Deed of Loan providing for the default interest rate of 3% are void and unenforceable as a penalty ([60]).

(3) 5 Blackman is not liable to pay or reimburse Mr Su for legal costs incurred in the attempted enforcement of the Deed of Loan ([72]–[74]).

13 The Defence to ASOC also contains allegations which ultimately became part of the

cross-claim made by 5 Blackman, which I have dealt with in more detail below.

14 The cross-claim of 5 Blackman was filed on 31 January 2024 (**Cross-Claim**). The Cross-Claim contains allegations that Mr Noumeir breached the fiduciary duties he owed to 5 Blackman as part of a dishonest and fraudulent design by entering into the Deed of Loan and the mortgages, and by permitting the drawdown of the $100,000 loan such that the Deed of Loan and the mortgages cannot be enforced against 5 Blackman ([5]–[38]). The Cross-Claim also contains allegations that Mr Kamal knowingly received trust property in the form of the loan funds ([39]–[40]). Consequently, 5 Blackman seeks a declaration that the Deed of Loan and the mortgages are unenforceable against it ([54]) and orders for equitable compensation or an account against each of Mr Noumeir and Mr Kamal ([55]).

15 On 24 July 2024, Mr Kamal filed his defence to the Cross-Claim (**Kamal Defence to Cross-Claim**).

16 On 26 March 2025, Mr Su filed his defence to the Cross-Claim (**Su Defence to Cross-Claim**).

17 The Kamal Defence to Cross-Claim and the Su Defence to Cross-Claim each contain a mixture of denials, “does not know and cannot admit” and “does not plead” responses and minor admissions to the allegations made against them. The central allegations made in the Cross-Claim are contested in each of the Kamal Defence to Cross-Claim and the Su Defence to Cross-Claim.

18 As I have mentioned above, Mr Noumeir submitted to judgment against him on the Cross-Claim.

RELEVANT FACTS

5 Blackman, the 3 Blackman Property and the 5 Blackman Property

19 On 9 November 2015, 5 Blackman was registered as a company. On registration, Mr Noumeir was appointed the sole director and secretary of 5 Blackman. Mr Noumeir continued to be the sole director and secretary of 5 Blackman until 21 July 2020 when he ceased to hold those positions and was replaced in both capacities by Elias Dimassy.

20 On 10 November 2015, 5 Blackman agreed to purchase 3 Blackman Crescent, Macquarie, Australian Capital Territory (**ACT**) (**3 Blackman Property**) and 5 Blackman Cres Macquarie, Australian Capital Territory (**5 Blackman Property**).

21 In or around July 2016, 5 Blackman settled the purchase of the 3 Blackman Property.

Dealings between Mr Su, Mr Noumeir and Mr Kamal before the Deed of Loan

22 In October 2018, Mr Su met Mr Noumeir through their church (T28).

23 In 2019, Mr Kamal was the sole director and shareholder of **Avava** Tiling Pty Ltd, which provides building, tiling and renovation services. At that time, Mr Noumeir operated a company called **Quantum Tiles** Pty Ltd which owed money to Avava for outstanding

invoices.

24 In or around April 2019, Mr Kamal and Mr Noumeir had a conversation about the amounts owed for outstanding invoices by Quantum Tiles to Avava totalling more than $340,000. During the conversation:

(1) Mr Kamal asked Mr Noumeir to pay the outstanding invoices because Mr Kamal had done the work, was in a difficult financial situation and needed to pay his workers;

(2) Mr Noumeir said he was struggling financially, the only way he could pay Mr Kamal was if he borrowed money and, with Mr Kamal's assistance as another borrower and security provider, he could borrow $100,000 from Mr Su and give it all to Mr Kamal;

(3) Mr Kamal said that he wanted to get paid by Mr Noumeir and he did not want to borrow any money or mortgage his house;

(4) Mr Noumeir assured Mr Kamal that he did not have to worry as Mr Noumeir could "service a loan of $100,000 without any problem", would repay the loan and that Mr Kamal would incur "no risk"; and

(5) Mr Kamal agreed that he would be a borrower but Mr Noumeir needed to make sure that he repaid the loan.

25 In around the middle of April 2019, Mr Noumeir approached Mr Su and said that he would introduce a client who intends to obtain a loan.

26 Later that day, Mr Su, Mr Noumeir and Mr Kamal met at Rashays restaurant in Liverpool for lunch and discussed the loan, including the principal and interest rate. During their conversation, Mr Noumeir said that Mr Kamal wanted to borrow some money for his business. Mr Su asked how much Mr Kamal wanted to borrow and what was the purpose of it. In response Mr Kamal said he wanted to borrow $100,000 for the development of a property in Lurnea. Mr Su said he needed a property to secure the loan and Mr Kamal replied that he had a property located in Casula, New South Wales (**Casula Property**) worth around $500,000, on which there was a mortgage to Westpac of around $300,000. Mr Kamal then provided his driver's license for Mr Su to photograph to formally identify him.

27 Mr Kamal gave a different version of this meeting and suggested that it happened on about 2 or 3 May 2019. Mr Su denied Mr Kamal's recollection of the meeting. I accept Mr Su's version of the meeting, including the timing of it, as it is more plausible than the evidence provided by Mr Kamal, which suggested that Mr Noumeir said he was to be the borrower of the loan and would pay the proceeds to Mr Kamal.

28 A few days later, at Mr Su's request, Mr Kamal showed him his Westpac mortgage accounts on his mobile banking application. Mr Su noticed that there was not only the Westpac mortgage of $300,000 on the Casula Property but also another mortgage

secured over the Casula Property for about $80,000. Mr Su told Mr Kamal that with two mortgages the net proceeds of the Casula Property would not be enough to secure the loan. Mr Su told Mr Kamal that he could not proceed with the loan.

29 In mid-April 2019, Mr Su telephoned Mr Noumeir to inform him that Mr Kamal did not have sufficient security for the loan and he could not proceed with it. Mr Noumeir said that he had a property in the ACT which could provide additional security for the loan. Mr Su asked Mr Noumeir why he would do that and Mr Noumeir responded that he and Mr Kamal "are brothers" and that they do "business together". Mr Noumeir told Mr Su that his property was the 3 Blackman Property. Mr Su said the loan should be acceptable if there were two properties securing it.

30 On 22 April 2019, Mr Su issued a letter of offer in which Mr Su offered to lend $100,000 to Mr Noumeir and Mr Kamal for the purpose of settling a development site in Lurnea (**Letter of Offer**).

31 In about the end of April 2019, Mr Mingbo Wang (Mr Su's then solicitor) telephoned Mr Su and told him that he had conducted a title search for the 3 Blackman Property, found that it was registered in the name of 5 Blackman, and then conducted a company search of 5 Blackman, which confirmed that Mr Noumeir was the sole director of it. Mr Wang also said that the only shareholder of 5 Blackman was **D.A.D Noumeir** Pty Ltd and a company search of it had confirmed that Mr Noumeir was the sole director, secretary and shareholder of D.A.D Noumeir. Mr Wang told Mr Su that as the 3 Blackman Property to be used for security for the loan was registered in the name of 5 Blackman, the borrower of the loan should be 5 Blackman and not Mr Noumeir personally. Mr Su responded that he would check whether that change was suitable to Mr Noumeir.

32 Mr Su then telephoned Mr Noumeir to inform him that he had been told by Mr Wang that the 3 Blackman Property (which was to be used as security for the loan) was registered in the name of 5 Blackman. Mr Noumeir responded that this was correct, 5 Blackman was his company and he was its director. Mr Su also said to Mr Noumeir that Mr Wang told him that the sole shareholder of 5 Blackman was D.A.D Noumeir, which Mr Noumeir confirmed as his company. Mr Su asked Mr Noumeir whether he would agree to change the borrower of the loan from his personal name to the company's name given that the 3 Blackman Property was registered in the name of 5 Blackman. Mr Noumeir agreed to this change.

33 In cross-examination, Mr Su adhered to the essence of his evidence about these respective conversations with Mr Wang and Mr Noumeir (T22–23).

6 May 2019: Deed of Loan

34 On 6 May 2019, Mr Su, Mr Kamal and 5 Blackman entered into the Deed of Loan.

35 Mr Noumeir signed the Deed of Loan stating it to be pursuant to s 127 of the ***Corporations Act*** *2001* (Cth) and in his capacity as the sole director and secretary of 5 Blackman. Mr Su believed that in signing the Deed of Loan, Mr Noumeir was acting on behalf of 5 Blackman (T21).

36 In cross-examination, it was accepted by Mr Su that the reason 5 Blackman was the borrower under the Deed of Loan (and not Mr Noumeir himself) was because the 3 Blackman Property was owned by 5 Blackman and not by Mr Noumeir in his personal capacity (T23).

37 Mr Kamal also signed the Deed of Loan. Mr Kamal gave evidence that on about 7 May 2019, Mr Noumeir took him to his solicitor, George Anagnostellis of Citywide Legal in Mortlake, to sign documents in relation to the loan from Mr Su, stating that he remembers that date because it was written on the documents that he signed and he did not have a specific recollection of the date. Mr Kamal said that he did not read the documents because of his basic English language skills and that they were not explained to him before he signed them but he knew that the documents were about a loan from Mr Su in the amount of $100,000 and that Mr Kamal was a borrower. Mr Kamal also said that as far as he knew, Mr Noumeir was borrowing the money with him and he did not know that any company was a borrower.

38 The Letter of Offer indicates that it was signed by Mr Noumeir and Mr Kamal on 7 May 2019.

39 The Deed of Loan contains the date 6 May 2019 and not 7 May 2019 and the name of 5 Blackman clearly appears as a borrower together with Mr Kamal in the Deed of Loan. I find that Mr Kamal must have known that 5 Blackman was a borrower, not Mr Noumeir. In any event, nothing turns on the difference between those dates or Mr Kamal's knowledge of 5 Blackman as a borrower because Mr Kamal has made no claim to have the Deed of Loan set aside on any basis.

40 In summary, pursuant to the terms of the Deed of Loan, which are set out in detail below, Mr Kamal and 5 Blackman were obliged to repay the loan of $100,000, together with interest and costs, to Mr Su by no later than 7 August 2019.

41 The recital in the Deed of Loan states:

> The Lender has agreed at the request of the Borrower to advance the Principal Sum to the Borrower on the terms and conditions set out in this Deed.

42 The Deed of Loan does not contain any definition of "Lender" or "Borrower", but the listing of the parties at the commencement of the Deed of Loan states that Mr Su is the Lender and Mr Kamal and 5 Blackman are each a Borrower.

43 Clause 1.1 of the Deed of Loan is titled "Definitions" and relevantly provides (emphasis in bold in original):

> …

Deed means this deed and any schedules and annexures attached to this deed, as amended by the parties in writing.

Discount Interest Rate means 2% per month.

Drawdown Date means subject [to] **clause 2** of this Deed, if no date is specified the date of contract or if agreed any date as otherwise agreed in writing by the parties.

Encumbrance means a mortgage, charge, pledge, lien, encumbrance, title retention, preferential right, trust arrangement, contractual right of set-off or any other security agreement or arrangement in favour of any person.

Event of Default means any of the events or circumstances described in **clause 9**.

Guarantors means Danny Noumeir.

…

Initial Interest Payment means Three (3) months interest calculated on the Principal Sum at the Discount Interest Rate.

Interest Rate means 3% per month.

Interest Commencement Date means the earlier of the date on which Principle [sic] Sum is advanced and the Drawdown Date.

Money Owing means all money which the Borrower is or at any time may become actually or contingently liable to pay to or for the account of the Lender for any reason whatever under or in connection with this Deed. It includes money by way of principal, interest, fees (including legal fees to enforce this Deed), costs, indemnity, charges, duties or expenses or payment of liquidated or unliquidated damages under or in connection with this Deed, or as a result of a breach of or default under or in connection with this Deed.

Principal Outstanding means, without double counting, the Principal Sum or any part of the Principal Sum then outstanding and any Money Owing.

Principal Sum means $100.000.00 Australia dollars only.

Repayment Date means Three (3) months from the Interest Commencement Date or the Drawdown Date, whichever is earlier.

Secured Property means:

(a) the property suited [sic] at 3 Blackman Cres Macquarie ACT 2614, being Macquarie Section 7 Block 2 on Deposited Plan 1884; and

(b) the property suited [sic] at 4/2 Kurrajong Rd Casula NSW 2170, being Lot 4 in Strata Plan 90259.

…

Transaction Document means:

(a) This Deed;

(b) An equitable mortgage over the property suited [sic] at 3 Blackman Cres Macquarie ACT 2614, being Macquarie Section 7 Block 2 on Deposited Plan 1884;

(c) An equitable mortgage over the property suited [sic] at 4/2 Kurrajong Rd Casula NSW 2170, being Lot 4 in Strata Plan 90259;

(d) Deed of Guarantee between Haiyong Su and Danny Noumeir dated on or about the date of this deed;

(e) Any other instrument executed or granted pursuant to, or contemplated by, any of the parties to the Loan Deed.

44 Clause 3 of the Deed of Loan is titled “Loan”, cl 3.1 of which states (emphasis in bold in original):

> Subject to the terms and conditions of this Deed, the conditions precedent in **clause 2** and in reliance on representations and warranties set out in **clause 8**, the Lender has agreed to lend to the Borrower the Principal Sum on the Drawdown Date.

45 Clause 4 of the Deed of Loan is titled “Interest” and provides (emphasis in bold in original):

> 4.1 If there is no Event of Default, the amount of Interest payable will be calculated on the Principal Outstanding at the Discount Interest Rate.
>
> 4.2 If there is or has been an Event of Default, the amount of Interest payable will be calculated on the Principal Outstanding at the Interest Rate.
>
> 4.3 Interest for the whole loan term shall be paid as follows:
>
> > 4.3.1 Initial Interest Payment shall be deducted from the Principle [sic] Sum before the Lender advance the Principle [sic] Sum to the Borrower; and
> >
> > 4.3.2 Difference between the Initial Interest Payment and the amount of Interest payable in accordance with clause 4.1 or 4.2 shall be paid on the Repayment Date.
>
> 4.4 Subject to clause 2.1.1 and clause 4.3.1, the amount that will be advanced to the Borrower shall be calculated as
>
> > $100,000.00-($100,000.00*2%*3mth)-$2200=$91,800.00 (**Available Funds**).

46 Pursuant to cll 4.1 and 4.2 of the Deed of Loan, interest is "calculated on the Principal Outstanding" at either the Interest Rate (being 3% per month, which applies if there has been an Event of Default) or the Discount Interest Rate (being 2% per month, which applies if there has been no Event of Default). The "Principal Outstanding" is defined as including "any Money Owing". "Money Owing" is defined broadly to capture "all money which the Borrower is or at any time may become actually or contingently liable to pay to or for the account of the Lender for any reason whatever under or in connection with this Deed" and includes "money by way of principal, interest, fees (including legal fees to enforce this Deed), costs, indemnity, charges …". Accordingly, it is clear that under the terms of the Deed of Loan, interest is calculated on the principal and any and all moneys owing (including interest already accrued) as at the date of calculation.

47 By this means, interest accruing under the Deed of Loan compounds monthly because interest is not only calculated on the Principal Sum (i.e., simple interest) but on the Principal Sum and all the interest accrued to date (i.e., compound interest).

48 The Initial Interest Payment (defined as "Three (3) months interest calculated on the Principal Sum at the Discount Interest Rate") is in simple interest (i.e., 2% x $100,000 = $2,000 for each month of the first three months = $6,000). However, pursuant to cll 4.3.1 and 4.3.2 of the Deed of Loan, the interest owed for those three months is nonetheless compounding:

(1) "Initial Interest Payment shall be deducted from the Principle [sic] Sum before the Lender advance the Principle [sic] Sum to the Borrower" (cl 4.3.1); and

(2) the "Difference between the Initial Interest Payment and the amount of Interest payable in accordance with clause 4.1 or 4.2 shall be paid on the Repayment Date" (cl 4.3.2).

49 Clause 5.1 of the Deed of Loan is titled "Repayment and Prepayments" and provides:

> 5.1 Subject to clause 5.2 and 5.3, the Borrower shall repay the Principal Outstanding on before the Repayment Date by way of bank cheque that in [sic] favour of the Lender.
>
> 5.2 Early repayments are permitted subject to payment of a Break Cost and any such early repayments made may not be redrawn by the Borrower.

5.3 Upon payment by the Borrower to the Lender of the Principal Outstanding and if repaid early of the Break Cost this Loan will be discharged.

50 Clause 6 of the Deed of Loan is titled “Extension” and provides:

6.1 The Borrower may be granted a one (1) months extension for Repayment Date if

6.1.1 a written notice was given to the Lender, no less than 10 days prior to the Repayment Date; and

6.1.2 there is no Event of Default prior to the giving of such notice.

6.2 Notwithstanding clause 4.1, interest for the extension period will be $2,000.00 per month if there is no Event of Default in that period and will be paid in advance for every month in the extension period with no adjustment on the Actual Repayment Date.

51 Pursuant to cl 8 of the Deed of Loan, which is titled “Representations and Warranties”, the Borrowers made several representations and warranties, relevantly including:

…

8.1.5 (**Purpose**) The Principle Sum will be used for the purpose of settling the development site suited at 7 Webster Road Lurnea NSW 2170 and shall be used for that purpose only.

8.1.6 (**Status**) It is a corporation validly existing under the laws of the place of its incorporation.

8.1.7 (**Power**) It has the power to enter into and perform its obligations under this Deed and to carry out the transactions contemplated by this Deed.

8.1.8 (**Corporate authorisations**) It has taken all necessary corporate action to authorise the entry into and performance of this Deed.

…

8.1.10 (**Transactions permitted**) The execution and performance by it of this Deed did not and will not violate in any respect a provision of:

…

8.1.10.2 its constitution or other constituent documents; or

8.1.10.3 any other document or agreement which is binding on it or its assets

…

8.1.11 (**Authorisations**) Each Authorisation which is required in relation to:

8.1.11.1 the execution, delivery and performance by it of this Deed; and

8.1.11.2 the validity and enforceability of this Deed,

has been obtained or effected.

8.2 The Borrower acknowledges that the Lender has entered into this Deed in reliance on the representations and warranties in this clause.

52 Clause 9 of the Deed of Loan subsequently outlines the circumstances that constitute an Event of Default, relevantly including:

9.1 For the purposes of this Deed, each of the following events will be an Event of Default (whether or not it is in the control of the Borrower):

…

9.1.2 (**Obligations under this Deed**) The Borrower fails:

9.1.2.1 to pay an amount payable by it under this Deed when due; or

9.1.2.2 to comply with any of its obligations under this Deed.

…

9.2 In addition to any other rights provided by law, at any time after an Event of Default (whether or not it is continuing) the Lender may by notice to the Borrower declare all sums actually or contingently owing under this Deed immediately due and

payable, and the Borrower shall immediately pay the Principal Outstanding together with accrued interest and fees and all other sums.

53 Clause 10 of the Deed of Loan is titled “Rights upon Default” and provides:

> 10.1 At any time after default the Lender may in the manner and at the times the Lender in its sole and absolute discretion deems appropriate but without any obligation to do so and notwithstanding any omission, neglect, delay or waiver of the right to exercise such option and without liability for loss:
>
> 10.1.1 terminate this Deed;
>
> 10.1.2 require the immediate payment by the Borrower (and the Borrower covenants to comply with any such requirement) to the Lender of the Principal Outstanding
>
> 10.1.3 exercise any right under any Transaction Document or do anything else the Lender considers appropriate in its absolute discretion, to recover the Principal Outstanding.
>
> 10.2 Any restriction, requirements for notice or effluxion of time stipulated or required by any statute is hereby negatived insofar as is lawful.

54 Clause 12 of the Deed of Loan is titled “Costs” and provides:

> The Borrower must pay or reimburse the lender on demand for all costs, charges and expenses of the Lender in connection with the negotiation, preparation, execution, delivery, stamping, registration, completion, variation, discharge or enforcement of any rights under or in relation to any Transaction Document. The Borrower must pay all stamp, mortgage and other duties, imposts, taxes and levies arising directly or indirectly in relation to this Deed or any transaction contemplated or evidenced by or variation of this Deed.

55 Clause 19 of the Deed of Loan states that it is governed by the laws of New South Wales, and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of courts exercising jurisdiction in New South Wales.

6 May 2019: Deed of Guarantee

56 Also on 6 May 2019, Mr Noumeir (as guarantor) and Mr Su (as Lender) entered into a Deed of Guarantee under which Mr Noumeir agreed to guarantee and indemnify Mr Su for the due and punctual payment of any money due from Mr Kamal and 5 Blackman under the Deed of Loan. As this dispute does not concern any aspect of the Deed of Guarantee, it is not necessary for me to set out the terms of it.

7 May 2019: 3 Blackman Mortgage

57 On 7 May 2019, Mr Noumeir executed a Mortgage over the 3 Blackman Property on behalf of 5 Blackman as its sole director and secretary (**3 Blackman Mortgage**).

58 At that time, Pepper Finance Corporation Ltd held a first registered mortgage over the 3 Blackman Property which was registered on 19 July 2016. As a result, the 3 Blackman Mortgage was not registered but was held as an equitable mortgage over the 3 Blackman Property by Mr Su.

59 The terms of the 3 Blackman Mortgage are contained in the Mortgage Memorandum of Standard Conditions in Annexure A to the 3 Blackman Mortgage, which was signed by Mr Su as mortgagee and executed by Mr Noumeir on behalf of 5 Blackman as mortgagor in his capacity as its sole director and secretary.

60 Clause 1.1 of the 3 Blackman Mortgage defines "Primary Document" as the document identified in item 2 of the Schedule to the 3 Blackman Mortgage, which is the Deed of Loan.

61 Clause 1.1 of the 3 Blackman Mortgage defines "Event of Default" to mean "any event described in clause 10 and any default by the Grantor and/or Co-Debtor of their respective obligations to the Secured Party under the Primary Document".

62 Clause 18 of the 3 Blackman Mortgage is titled "Costs and Expenses" and includes the following provisions:

> 18.1 **General**
>
> The Mortgagor shall pay and if paid by the Mortgagee reimburse to the Mortgagee:
>
> (a) the Mortgagee's reasonable costs and expenses relating to this Mortgage, including, without limitation, those which the Mortgagor is liable to pay under any applicable law and those in relation to:
>
> …
>
> (iii) the exercise or attempted exercise or the preservation of any rights of the Mortgagee under this Mortgage;
>
> (iv) any Event of Default or Potential Event of Default; and
>
> …
>
> 18.2 **Legal Costs**
>
> A reference to costs and expenses in this Mortgage includes, without limitation, legal costs and expenses on a full indemnity basis.
>
> …

63 Clause 19 of the 3 Blackman Mortgage is titled "Indemnities" and provides that:

> 19.1 **General**
>
> (a) The Mortgagor indemnifies the Mortgagee against any liability, loss, cost or expense caused or contributed to by any Event of Default or the exercise or attempted exercise of any right by the Mortgagee, any Receive or any Attorney under this Mortgage.
>
> (b) The Mortgagor shall indemnify each Receiver and Attorney and their respective Representatives and the Representatives of the Mortgagee against any liability, loss, cost and expense caused or contributed to by anything the Mortgagee is indemnified under clause 19.1(a) and the Mortgagee holds the benefit of this clause 19.1(b) on trust for those persons.

…

8 – 9 May 2019: Drawdown of the loan under the Deed of Loan and payment to Mr Kamal

64 On 8 May 2019, Mr Kamal and Mr Noumeir signed a drawdown notice dated 8 May 2019 addressed to Mr Su requesting the drawdown of the loan amount under the Deed of Loan of $91,047.23 by cheque in favour of Mr Kamal.

65 On about 9 May 2019, Mr Su paid the loan amount to Mr Kamal in accordance with the drawdown notice.

66 Mr Kamal used the loan funds he received to pay his employees.

30 May 2019: Caveat lodged over 3 Blackman Property

67 On 29 May 2019, Juris Cor on behalf of Mr Su lodged caveat 2218565 over the 3 Blackman Property on his behalf, claiming the nature of the estate or interest in the land to be as follows:

> An equitable mortgage over the property by reason of a written mortgage securing the caveator's entitlements under a deed of loan between the caveator and registered proprietor dated 6 May 2019

68 Accordingly, the Deed of Loan was secured by an equitable mortgage (being the unregistered Mortgage) over the 3 Blackman Property with caveat 2218565 registered on its title.

August 2019 – February 2020: Extensions of repayment and payments of interest under the Deed of Loan

69 On 8 August 2019, after the original Repayment Date of 7 August 2019, Mr Su agreed with Mr Noumeir and Mr Kamal to extend the Repayment Date under the Deed of Loan by one month. This had the effect that the interest payable remained at the Discount Interest Rate of 2% per month until 8 September 2019.

70 On 22 August 2019, Mr Su sent an email to Mr Kamal and Mr Noumeir confirming that he had received an interest payment on 9 August 2019 of $1,000 in cash and an interest payment of $1,000 by electronic funds transfer on 14 August 2019 for the period from 8 August 2019 to 7 September 2019. Mr Su also stated that the Deed of Loan, including the extension period, would expire on 8 September 2019 and that full repayment of the Principal Sum of $100,000 would need to be made by 8 September 2019.

71 On 4 September 2019, Mr Su sent an email to Mr Kamal and Mr Noumeir again stating that the Deed of Loan, including the extension period, would expire on 8 September 2019 and that full repayment of the Principal Sum of $100,000 would need to be made

by 8 September 2019. On the same day, Mr Noumeir replied by email to Mr Su requesting a further extension of three months (until 8 December 2019) with interest payable “at [the] normal rate”.

72 On 15 October 2019, Mr Su sent an email to Mr Kamal and Mr Noumeir confirming that he had received an interest payment of $2,000 in cash on 11 October 2019 for the period from 8 October 2019 to 7 November 2019. Mr Su also stated that the Deed of Loan, including the extension period, had expired on 8 September 2019 and interest in the default period would be charged at the Interest Rate of 3% per month, which was $3,000 per month.

73 On 17 November 2019, Mr Su sent an email to Mr Kamal and Mr Noumeir confirming that he had received an interest payment of $1,000 in cash on 8 November 2019 and an interest payment of $1,000 in cash on 16 November 2019 for the period from 8 November 2019 to 7 December 2019. Mr Su also stated that the Deed of Loan, including the extension period, had expired on 8 September 2019 and interest in the default period would be charged at the Interest Rate of 3% per month, which was $3,000 per month.

74 On 20 December 2019, Mr Su sent an email to Mr Kamal and Mr Noumeir confirming that he had received an interest payment of $1,000 in cash on 19 November 2019 and an interest payment of $1,000 by authorised cash withdrawal on 19 November 2019 for the period from 8 December 2019 to 7 January 2020. Mr Su also stated that the Deed of Loan, including the extension period, had expired on 8 September 2019 and interest in the default period would be charged at the Interest Rate of 3% per month, which was $3,000 per month.

75 In mid and late 2019, Mr Kamal recalls being sent by Mr Noumeir to meet Mr Su on at least two occasions to give him $2,000 in cash. Mr Kamal recalled doing this once in Leichardt and on another occasion in Liverpool.

76 On 11 January 2020, Mr Su sent an email to Mr Kamal and Mr Noumeir confirming that he had received an interest payment of $2,000 by authorised cash withdrawal on 10 January 2020 for the period from 8 January 2020 to 7 February 2020. Mr Su also stated that the Deed of Loan, including the extension period, had expired on 8 September 2019 and interest in the default period would be charged at the Interest Rate of 3% per month, which was $3,000 per month.

77 On 12 February 2020, Mr Su sent an email to Mr Kamal and Mr Noumeir confirming that he had received an interest payment of $1,000 in cash on 10 February 2020 and an interest payment of $1,000 in cash on 12 February 2020 for the period from 8 February 2020 to 7 March 2020. Mr Su stated that the “grace period for 2% Discount Interest Rate” finished on 8 February 2020 and a “3% Interest Rate per month is to be charged since 08/03/2020 for the rest of money owing period”. Mr Su also said that the Deed of Loan, had expired on 8 September 2019, including the extension period, and “[y]ou need to make a full repay the Principal amount of $100k immediately”.

20 February 2020: Default notice sent to 5 Blackman and Mr Kamal and caveat lodged over Hoxton Park Property

78 On 20 February 2020, Summer Lawyers (on behalf of Mr Su) sent a letter to each of 5 Blackman and Mr Kamal by post stating that they were in default under the Deed of Loan by failing to pay the agreed payment in respect of the loan provided under the Deed of Loan and that Mr Su terminates the Deed of Loan pursuant to clause 10.1.1. The letter also attached a default notice addressed to 5 Blackman and Mr Kamal demanding payment of the amount of $100,000 within seven days, which noted that "[i]nterest, fees and charges continue to accrue on this amount until paid". The default notice also stated that if they failed to remedy the default within seven days, Mr Su proposed to commence recovery action against them.

79 On 20 February 2020, Summer Lawyers (on behalf of Mr Su) sent a letter to Mr Noumeir by post making demand for payment of $100,000 within 14 days under the Deed of Guarantee, failing which Mr Su may take recovery action against him.

80 Also on 20 February 2020, Mr Su lodged a caveat over the property situated at 89 Nineteenth Avenue, Hoxton Park, New South Wales (**Hoxton Park Property**). The Hoxton Park Property was held by Branislava Nenic and Mr Kamal in equal shares as tenants in common.

March 2020: Refinancing effort

81 Between 9 and 19 March 2020, George Koovousis of South Western Financial Services, on behalf of Mr Kamal and Mr Noumeir, contacted Summer Lawyers in an effort to arrange the refinancing of the debt owing to Mr Su. By 26 March 2020, it became apparent that the proposed refinancing arrangement was not going to proceed.

28 March 2020: Deregistration of 5 Blackman

82 On 28 March 2020, 5 Blackman was deregistered by the Australian Securities and Investments Commission (**ASIC**).

31 March 2020: Caveat lodged over 5 Blackman Property

83 On 31 March 2020, Mr Su lodged caveat 2270922 over the 5 Blackman Property claiming the nature of the estate or interest in the land to be as follows:

> A charge within an agreement relating to the subject land with the Caveator and the Registered Proprietor executed on 7 May 2019

April 2020: Mr Su instructs Summer Lawyers to commence proceedings

84 On 1 April 2020, Mr Su instructed Summer Lawyers to commence proceedings on his behalf against 5 Blackman and Mr Kamal in the ACT Supreme Court.

May 2020: Further refinancing effort

85 On 13 May 2020, Rory McDonnell telephoned Mr Su to inform him that he was a broker assisting Mr Kamal and Mr Noumeir to refinance. Mr Su agreed that any recovery action would be deferred until 7 June 2020 on the condition that Mr Kamal and Mr Noumeir pay $9,000 to Mr Su by 19 May 2020 (referrable to the interest payable for the period from 8 March 2020 to 7 June 2020 calculated at 3% per month) and that the total amount owing be paid to Mr Su by 7 June 2020. This agreement was formalised in an email on 13 May 2020 from Summer Lawyers to Rory McDonnell.

86 On 19 May 2020, $8,992 was transferred into Summer Lawyers' trust account and the remaining $8 was transferred on 20 May 2020. The total amount owing to Mr Su was not paid by 7 June 2020.

20 June 2020: Commencement of the ACT Proceedings

87 On 16 June 2020, Mr Su filed the originating claim and the statement of claim commencing proceedings in the ACT Supreme Court (**ACT Proceedings**) against Mr Kamal, Mr Noumeir, Pepper Finance Corporation Ltd (the first registered mortgagee of the 3 Blackman Property), Secure Funding Pty Ltd (the first registered mortgagee of the 5 Blackman Property) and ASIC, which included seeking orders for:

(1) the reinstatement of 5 Blackman;

(2) the sale of the Hoxton Park Property and the 5 Blackman Property; and

(3) judgment against Mr Kamal, Mr Noumeir and 5 Blackman for the monies due and owing under the Deed of Loan, the Deed of Guarantee and the 3 Blackman Mortgage (alleged to be $135,384.38) and costs.

88 At that time, Summer Lawyers were acting for Mr Su in the ACT Proceedings.

21 July 2020: Mr Noumeir replaced by Mr Dimassy as director and secretary of 5 Blackman

89 As stated above, on 21 July 2020, Mr Noumeir was replaced as the sole director and secretary of 5 Blackman by Mr Dimassy.

17 September 2020: Amended claim in the ACT Proceedings

90 On 17 September 2020, Mr Su filed the amended application, amended originating claim and amended statement of claim removing ASIC and adding 5 Blackman as a party to the ACT Proceedings and increasing the amount sought to $164,235.36, with the inclusion of interest claimed at 3% per month.

November 2020: Sale of Hoxton Park Property, removal of caveat and $100,000 payment by Mr Kamal

91 Between October and mid-November 2020, Tony Nenic, the husband of Branislava Nenic (one of the owners of the Hoxton Park Property) telephoned Mr Su a couple of times and then met with Mr Su to request that Mr Su remove the caveat on the Hoxton

Park Property. Mr Nenic said that Ms Nenic had nothing to do with the debt owed by Mr Kamal but had suffered as a consequence of Mr Kamal offering the Hoxton Park Property as security for the loan made under the Deed of Loan.

92 In late October 2020, Mr Noumeir spoke to Mr Su and said that he was selling another property located in the ACT and that he would repay all of the monies owing under the Deed of Loan as soon as the contract for sale had been signed and settled.

93 In late 2020, the Hoxton Park Property was sold, with settlement due to take place on 27 November 2020.

94 On 27 November 2020, Mr Kamal and Mr Su had a telephone conversation in words to the following effect (T25):

> Mr Kamal: The Hoxton Park Property has been sold and is settling today at 2 PM, can you remove the caveat and let the sale go through to let Ms Menic [sic] out of the hook from your legal proceedings. I will put $100,000 into a solicitor's trust account as security for my ability under the Loan.
>
> Mr Su: Ok, I will as long as you deposit the money into my solicitor's trust account.

95 Mr Su's recollection of this conversation was also challenged in cross-examination by the suggestion that his evidence of it was false (T27). Mr Su adhered to his evidence of the conversation, which I accept.

96 On 27 November 2020, the caveat over the Hoxton Park Property was removed by Mr Su in exchange for the deposit of $100,000 made by Mr Kamal into the trust account of Yingke Law Firm acting for Mr Su. In cross-examination, Mr Su repeatedly denied the proposition that the $100,000 deposit from Mr Kamal paid off the entirety of the amount owing under the Deed of Loan (T26–27).

December 2020 – February 2021: Further progress of the ACT Proceedings

97 On 14 December 2020, Mr Su filed and served the further amended statement of claim (**FASOC**) in the ACT Proceedings, increasing the amount sought to $214,443.

98 On 22 December 2020, Mr Su applied for default judgment in the sum of $239,255.30 against Mr Kamal and Mr Noumeir in the ACT Proceedings.

99 On 23 December 2020, 5 Blackman filed and served a counterclaim in the ACT Proceedings against Mr Kamal, Mr Noumeir and **B & F Oz Investments** Pty Ltd alleging that Mr Noumeir breached the fiduciary duties he owed to 5 Blackman by causing it to enter into the Deed of Loan and that each of Mr Kamal, Mr Noumeir and B & F Oz Investments conspired to defraud 5 Blackman by entering into the Deed of Loan and using the 3 Blackman Property and the 5 Blackman Property as collateral.

100 On 11 January 2021, the ACT Supreme Court entered default judgment in favour of Mr Su against Mr Kamal and Mr Noumeir in the ACT Proceedings in the amount of $239,255.30 (**ACT Default Judgment**).

101 On 11 February 2021, 5 Blackman filed a defence to the FASOC in the ACT Proceedings.

February – March 2021 – Dealings with $100,000 received by Yingke Law Firm

102 On 24 February 2021, Yingke Law Firm transferred $100,000 to the trust account of Summer Lawyers.

103 On 1 March 2021, Summers Lawyers confirmed by email to Mr Su that they had transferred $39,757.71 to his nominated account (comprising $27,000 as nine months of interest from 9 June 2020 to 8 March 2021 and $12,757.71 for the reimbursement of counsel fees paid to Robert Clyne in May and June 2020) and would apply the funds in trust of $60,242.29 towards their costs as agreed.

April 2021: Yingke Law Firm replace Summer Lawyers

104 On or around 22 April 2021, Mr Su appointed Yingke Law Firm in place of Summer Lawyers to act for him in the ACT Proceedings.

Mid-2021: Discussion about failure to repay the loan

105 In or around mid-2021, Mr Su, Mr Kamal and Mr Noumeir met at the Paper Mill restaurant in Liverpool, New South Wales, to discuss the failure to repay the loan, during which Mr Kamal said that he would not sign any new documents in respect of the loan.

November 2021: Order to sell 3 Blackman Property and 5 Blackman Property

106 On 21 November 2021, by consent the ACT Supreme Court ordered that the 3 Blackman Property and the 5 Blackman Property be sold and that 5 Blackman pay into the court the sum of $480,000 to be held on trust to account for any amount found to be due to Mr Su from 5 Blackman (**Trust Order**).

2022: Developments in the ACT Proceedings

107 On 24 March 2022, Mr Su consented to an order of the ACT Supreme Court that he produce documents in response to a notice to disclose discoverable documents within 28 days.

108 On 9 May 2022, there was no appearance on behalf of Mr Su before the Registrar of the ACT Supreme Court and the ACT Proceedings were stood over to 23 May 2022, with the Registrar indicating that on that date Mr Su was required to show cause why the ACT Proceedings should not be dismissed due to his failure to appear.

109 On 23 May 2022, there was again no appearance on behalf of Mr Su before the Registrar of the ACT Supreme Court and the ACT Proceedings were stood over before McCallum CJ on 27 May 2022.

110 On 27 May 2022, the ACT Proceedings came before McCallum CJ and directions were made for affidavits to be filed and the show cause hearing stood over to 16 June 2022 (which was later moved to 23 June 2022 on the ACT Supreme Court's own motion).

111 On 23 June 2022, the solicitor for Mr Su indicated that he was not ready to argue a show cause hearing as he was not aware of the basis on which the proceedings were stood over to that date.

112 On 1 July 2022, McCallum CJ heard the discovery application by 5 Blackman against Mr Su arising from Mr Su's failure to provide discovery in accordance with the consent order made on 24 March 2022.

113 On 5 July 2022, McCallum CJ delivered judgment in *Su v Kamal* [2022] ACTSC 161 and made orders requiring Mr Su to provide further discovery within 14 days, stood the ACT Proceedings over before her Honour on 26 July 2022 and that Mr Su pay 5 Blackman's costs of the matters determined in the application, including costs of the appearances on 9, 23 and 27 May 2022, 23 June 2022 and 1 and 5 July 2022.

September 2022: ACT Dismissal Judgment

114 On 1 September 2022, McCallum CJ heard the resumed show cause hearing in the ACT Proceedings.

115 On 2 September 2022, McCallum CJ delivered judgment in *Su v Kamal (No 2)* [2022] ACTSC 239 (**ACT Dismissal Judgment**) in the ACT Proceedings and made orders dismissing the ACT Proceedings pursuant to r 1404 of the *Court Procedure Rules 2006* (ACT) by reason of Mr Su's repeated failure to comply with orders for proper disclosure, requiring Mr Su to pay 5 Blackman's costs for the ACT Proceedings and requiring the $480,000 to be paid into court by 5 Blackman pursuant to the Trust Order to be paid out to 5 Blackman (**5 Blackman Proceeds Order**), the operation of which order was stayed for 30 days (**Stay Order**).

116 In essence, rule 1404 of the *Court Procedures Rules 2006* (ACT) provides that if a party, after receiving notice of a directions or listing hearing, does not attend the hearing or fails to comply with a direction about the conduct of a proceeding, the ACT

Supreme Court may make various orders, including giving further directions it considers appropriate, dismissing the application or proceeding and making an order for costs for or against a party. Rule 1404 also provides that in deciding whether to dismiss the application or proceeding, the court must have regard to the principle that the interests of justice are paramount.

117 In the ACT Dismissal Judgment, McCallum CJ set out the following essential factual matters regarding the conduct of the ACT Proceedings:

> [5] On 5 February 2022, the solicitor for the sixth defendant [5 Blackman] served on the plaintiff a notice to disclose discoverable documents. In the face of an indication that the plaintiff would not comply with the notice, on 21 February 2022 the sixth defendant was granted leave by the Deputy Registrar to file an application in proceedings concerning the adequacy of the plaintiff's discovery.
>
> [6] The issues raised by those steps essentially concerned the plaintiff's unwillingness or inability to produce any documents created by him during his consideration of the loan application other than the final loan document or other iterations of the transaction as he contends it to be. That of course omits a body of material one would expect a lender ordinarily to hold and it happens to be the material essential to the sixth defendant's contention that the plaintiff, had he made the necessary inquiries, would have discovered the second defendant's lack of authority to bind the sixth defendant as a borrower.
>
> [7] The sixth defendant in due course filed an application in proceedings in accordance with the leave granted by the Deputy Registrar and that was returnable on 25 March 2022. The day before that hearing, on 24 March 2022, however, the plaintiff consented to comply with the notice to disclose discoverable documents. The proceedings were then stood over to 9 May 2022.
>
> [8] The plaintiff initially sought to comply with the disclosure notice by providing a letter to the solicitor for the sixth defendant. The period within which the plaintiff was permitted to comply with that notice expired on 21 April 2022. As has commonly occurred in these proceedings, it was only on that last date for compliance that Mr Barry received the letter to which I have referred. In that letter, the plaintiff's solicitor stated:
>
> > "We advise that our client seeks to rely on the solicitor's files kept for this matter by Juris Cor Legal and our client did not keep and does not have access to those documents sought in the discoverable documents."
>
> [9] It may be noted that the letter appears to contemplate the existence of a solicitor's file containing documents answering the description in the discovery notice. It may further be noted that the letter includes an express assertion that the plaintiff himself did not hold copies of those documents.
>
> [10] By letter dated 27 April 2022, the sixth defendant's solicitor, Mr Barry, provided a careful explanation of the inadequacies of that letter as a response to the discovery notice, not least among which was that the letter did not comply with express requirements of the rules. He noted that the plaintiff ought to have served a list of documents verified by him and attaching a solicitor's certificate of the advice as to the plaintiff's list of documents given by the solicitor; see r 607(3) of the *Court Procedures Rules* 2006 (ACT).
>
> [11] The letter also identified reasons why the solicitor's file ought to have been included in the list in one way or another, that is, either as a document within the plaintiff's custody or power or a document no longer in his custody or power and, if the latter, an explanation as to why.
>
> [12] On two occasions after that when the proceedings came before the Court, the plaintiff failed to appear. That triggered an obligation on his part to show cause why the proceedings should not be dismissed, the Registrar having made a referral on that basis. The failure to appear was explained in an affidavit sworn by the solicitor and that explanation has previously been accepted by me as adequate. However, what happened in that intervening period, so it would seem, is that the solicitor lost sight of the need to respond to the substance of Mr Barry's letter of 27 April 2022.
>
> [13] When the proceedings ultimately came before me for the show cause hearing, the plaintiff's solicitor appeared to be under the misapprehension that the only issue for which he had to answer was his failure to appear, whereas Mr Barry was pressing for

dismissal of the proceedings on the basis of what he contended to be inadequate compliance with the discovery notice.

[14] That issue ultimately having been made clear to the plaintiff's solicitor, I heard an argument on 1 July 2022 as to the adequacy of the discovery. On 5 July 2022, I made the following orders, for the reasons published that day: see *Su v Kamal* [2022] ACTSC 161 at [28]:

> (1) That the plaintiff give further discovery in accordance with the previous order to comply with the notice to produce discoverable documents within 14 days;
>
> (2) Stand the proceedings over before McCallum CJ on 26 July 2022 at 9am.
>
> (3) Order the plaintiff to pay the sixth defendant's costs of the matters determined today which include the costs of Mr Barry's appearances on 9, 23 and 27 May, 23 June and 1 and 5 July 2022.

[15] In those reasons, I said at [27]:

> "It is appropriate to emphasise the following matters. First, that the order today should be understood by the plaintiff to be very much a "last chance" kind of order. Secondly, that what is established on the evidence, at the very least, is that the discovery should have included reference to the solicitor's file and also to the earlier loans to Mr Noumeir referred to in Mr Barry's submissions in Court last week."

[16] My order permitting a further 14 days within which the plaintiff should give further discovery in accordance with the previous order to comply with the discovery notice expired on 19 July 2022. As noted by Mr Barry, subsequent evidence revealed that it was only on that day that the plaintiff sent authorities to his previous solicitors to release their files.

[17] Most recently, the proceedings came before me yesterday for further argument as to whether the plaintiff had yet complied with the discovery notice. Mr Barry submitted that he has not and that the time has come, in accordance with the warning of my judgment of 5 July, for the proceedings to be dismissed for want of prosecution or failure to comply with directions of the Court.

[18] Mr Li, who appears for the plaintiff, submitted conversely that there is no basis for the Court to conclude that the plaintiff has not done all he can to obtain the documents it was previously apprehended he might be able to obtain based on his dealings with the previous solicitors.

118 In reaching the conclusion to dismiss the ACT Proceedings, in the ACT Dismissal Judgment her Honour reasoned as follows:

> [34] The difficulty in the present case, as I have said, is that the documents which the sixth defendant has taken every step to obtain are central to the question of the ostensible authority of the second defendant to bind it. Without even knowing what documents exist falling into that category, the sixth defendant is left to fight the case in effect with one arm tied behind its back.
>
> [35] A further consideration is, as submitted by Mr Barry, that the sixth defendant has had to take repeated efforts to bring the plaintiff even to compliance with the rules let alone taking the steps required to put the sixth defendant in a position to defend the proceedings.
>
> [36] I am of the view that the plaintiff has demonstrated himself to be a "reluctant gladiator", to adopt the language of Young JA, and that the time has come to dismiss these proceedings for failure to comply with directions of the Court on repeated occasions, a failure which is now causing real prejudice to the sixth defendant.

September – November 2022: ACT Appeal Proceedings

119 On 13 September 2022, Mr Su filed an application for leave to appeal the ACT Dismissal Judgment in the ACT Court of Appeal (**ACT Appeal Proceedings**). The application in the ACT Appeal Proceedings was listed for hearing on 19 October 2022.

120 On 5 October 2022, Mossop J made an order in the ACT Proceedings extending the

Stay Order until 20 October 2022.

121 On 19 October 2022, Loukas-Karlsson J heard the application in the ACT Appeal Proceedings for leave to appeal the ACT Dismissal Judgment. At the conclusion of the hearing, Loukas-Karlsson J reserved judgment and also extended the Stay Order.

122 On 11 November 2022, Loukas-Karlsson J delivered judgment in *Su v 5 Blackman Cres Macquarie Pty Ltd* [2022] ACTCA 62 (**ACT Appeal Judgment**) and made orders dismissing Mr Su's application for leave to appeal, requiring Mr Su to pay 5 Blackman's costs, vacating the Stay Order and staying the operation of the vacation of the Stay Order for seven days.

123 In the ACT Appeal Judgment, Loukas-Karlsson J stated as follows (emphasis added in bold):

> [56] In my view, it could not be said that substantial injustice will flow if (even assuming the decision is not correct) leave is not granted. This is the case for the following reasons.
>
> [57] First, the cost consequences that flow from the primary judge's decision are an ordinary result that occurs following non-compliance with court orders. While I accept that with the matter being dismissed, those costs will become due and payable earlier than may otherwise be the case, that is, in my view, hardly a matter of substantial injustice. The costs would have had to be paid at some stage in any event, even if these were to be set off against a future costs order in his favour if he were successful.
>
> [58] In relation to the question of security, I accept the respondent's submission that the order for security was an indulgence of the Court. In particular, **it is apparent that the remaining claim is only for interest and costs (there being no dispute that the principal sum has been repaid to the applicant by a different defendant in the primary proceeding)**. In the result, I accept that the order for $480,000 in security significantly exceeds the remaining claim.
>
> [59] Second, there does not seem to me to be any bar in the applicant seeking a new order for security in the event he re-commences proceedings. The applicant conceded there was no bar on him re-instituting proceedings, the same concession must extend to any application for security.
>
> [60] While the applicant from the bar table submitted that if the security lapses, the respondent will have "free use of the money that's in Court. It can distribute that to its shareholders, and it can then properly put itself in liquidation" there is no evidence before me explaining why either course would be taken or was likely. In particular, there is no evidence before me that suggests that the respondent is likely to enter liquidation once the money currently held in court is returned to the respondent. In any event, if the applicant seeks to re-institute proceedings, he could seek an urgent hearing in relation to that matter.
>
> [61] In relation to the submissions concerning the Corporations Act while I accept that these submissions are matters that I can take into account in terms of assessing the injustice that flows from the primary judge's decision, I do not accept the submission that the Juris Cor documents are not relevant and as such the applicant has suffered significant injustice as the proceeding has been dismissed for a failure to provide irrelevant documents.
>
> [62] While it is possible that the documents will ultimately not be relevant if the applicant can establish his argument that he can rely on ss 128 and 129 of the Corporations Act, there is not sufficient material before me to determine that matter. Ultimately, as the respondent has pleaded that the applicant has actual knowledge that the respondent could not be bound by the agreement, it seems that there is at the least a live issue in the matter that would need to be proven at trial.
>
> [63] In my view, there is at least a possibility that the documents may contain information as to what knowledge the applicant possessed at the time the loan agreement was entered into. The documents may therefore contain information that could establish the applicant had actual knowledge, enabling the respondent to rely on s 128(4). Alternatively, the documents may tend to reveal that the applicant had no

> knowledge but was aware of the status of the director which may tend to support the applicant's argument. For those reasons it could not be said that the documents are irrelevant.
>
> [64] In any event, even if I am wrong in relation to that matter, in circumstances where the argument was not advanced before the primary judge it seems to me that the argument cannot now be deployed to claim the documents are irrelevant. Indeed, this conflicts directly with the applicant having consented to the discovery order being made. Having consented to that order and having accepted before the primary judge that the documents were relevant (as contrasted to the Summer Legal documents) the applicant should not now be permitted to argue that the documents are irrelevant in order to seek leave to appeal from the primary judgment. Simply put, the time to argue as to relevance of the discovery documents has well and truly passed.

November 2022 – February 2023: District Court Proceedings

124 On 17 November 2022, Mr Su filed a summons commencing proceedings against 5 Blackman in the **District Court** of New South Wales (**District Court Proceedings**), applying to restrain 5 Blackman from seeking the release of or transferring the $480,000 held by the ACT Supreme Court and judgment on the $100,000 debt against 5 Blackman.

125 Also on 17 November 2022, at the conclusion of an ex parte hearing, upon Mr Su giving the usual undertaking as to damages, Andronos SC DCJ made an order in the District Court Proceedings restraining 5 Blackman from seeking the release of or transferring the $480,000 held by the ACT Supreme Court until 5pm on 21 November 2022.

126 On 21 November 2022, Dicker SC DCJ made an order in the District Court Proceedings vacating the restraining order made on 17 November 2022 and in its place, upon Mr Su giving the usual undertaking as to damages, made an order requiring 5 Blackman to pay the $480,000 to the District Court in the event that it obtained that amount from the ACT Supreme Court. Dicker SC DCJ also made orders in the District Court Proceedings for the matter to proceed on pleadings, the statement of claim to be filed and served by 25 November 2022 and the defence and any cross-claim to be filed and served by 16 December 2022.

127 On 25 November 2022, Mr Su filed the statement of claim in the District Court Proceedings, seeking judgment in the amount of $536,633.69, or alternatively damages, interest and costs against 5 Blackman.

128 On 25 January 2023, 5 Blackman filed its defence in the District Court Proceedings.

129 On 8 February 2023, on the oral application of 5 Blackman, Dicker SC DCJ made an order transferring the District Court Proceedings to this court.

November 2024 – February 2025: Sale of the Casula Property

130 On 23 November 2024, Mr Kamal exchanged contracts for the sale of the Casula Property.

131 On 26 February 2025, it was agreed between Mr Su and Mr Kamal that Mr Su would discharge the second mortgage that encumbered the Casula Property so long as the net proceeds from the sale of the Casula Property were to be held in the trust account

of Yingke Law Firm on behalf of Mr Su pending the outcome of these proceedings.

Procedural history in this court

132 On 27 February 2023, Registrar Jones in the Common Law Division of this court transferred these proceedings to the Equity Division of this court.

133 On 2 March 2023, Registrar Walton made orders in these proceedings, including for Mr Su to serve draft amended pleadings by 16 March 2023 and to stand these proceedings over to 3 April 2023.

134 On 8 June 2023, Mr Su filed the ASOC.

135 On 23 June 2023, 5 Blackman filed the Defence to ASOC.

136 On 31 October 2023, Mr Su filed a notice of motion in these proceedings seeking to strike out paragraphs 41 to 51 of the Defence to ASOC, alleging to the effect that Mr Su had knowledge and was involved in a purported "dishonest and fraudulent" design with Mr Noumeir to prejudice the interests of 5 Blackman by entering into the Deed of Loan.

137 On 1 December 2023, Kunc J made orders in these proceedings striking out paragraphs 41 to 51 of the Defence to ASOC and granting leave to 5 Blackman to file and serve any amended defence and cross-claim by 22 December 2023.

138 On 31 January 2024, 5 Blackman filed the Cross-Claim.

139 On 8 March 2024, Mr Su filed a notice of motion in these proceedings seeking the summary dismissal of the Cross-Claim, the striking out of the whole of the Cross-Claim or the striking out of paragraphs 42 to 54 of the Cross-Claim, which contained allegations largely identical to the portion of the Defence to ASOC which had been previously struck out by Kunc J on 1 December 2023.

140 On 28 June 2024, Hammerschlag CJ in Eq made orders in these proceedings, including striking out paragraphs 42 to 49 of the Cross-Claim.

141 On 24 July 2024, Mr Kamal filed the Kamal Defence to Cross-Claim.

142 On 26 March 2025, Mr Su filed the Su Defence to Cross-Claim.

143 On 15 September 2025, Registrar Walton fixed the trial of the proceedings for 30 March to 2 April 2026 before me.

144 On 30 March and 1 April 2026, I heard the proceedings, at the conclusion of which I reserved judgment.

Costs incurred by Mr Su in the ACT Proceedings and the ACT Appeal Proceedings

145 On 1 May 2021, Mr Su said he received tax invoices from Summer Lawyers totalling $308,443.90 (including GST) for the legal costs incurred in the ACT Proceedings. No copies of those invoices are in evidence.

146 On 4 May 2022, Mr Su applied for a costs assessment against Summer Lawyers in respect of those costs.

147 On 20 December 2022, the costs assessor (John Bartos) issued a certificate of determination of costs stating the costs payable by Mr Su to Summer Lawyers to be the amount of $205,820.66 (including GST).

148 Mr Su asserted that the costs incurred by him for the work done by Yingke Law Firm in acting in the ACT Proceedings were a total of $58,213.10. No invoices for that amount are in evidence.

149 Mr Su also asserted that the costs incurred by him for the work done by Yingke Law Firm in acting in the ACT Appeal Proceedings were a total of $67,771.87. Again, no invoices for that amount are in evidence.

Costs orders made in the ACT Proceedings

150 There were three costs orders made in the ACT Proceedings which required Mr Su to pay the costs of 5 Blackman, being on 5 July 2022 by McCallum CJ, on 2 September 2022 by McCallum CJ and on 11 November 2022 by Loukas-Karlsson J.

151 On 16 May 2024, the solicitor for 5 Blackman issued a bill of costs to Mr Su seeking assessment of the costs incurred in the ACT Appeal Proceedings.

152 On 21 August 2024, the Deputy Registrar of the ACT Supreme Court issued a certificate of costs assessment determining the costs payable by Mr Su to 5 Blackman under the order made on 11 November 2022 by Loukas-Karlsson J in the ACT Appeal Proceedings to be $43,757.50.

Further judgment in ACT Proceedings

153 On 2 July 2026, the Registrar of the ACT Supreme Court forwarded me the judgment of McCallum CJ delivered on 22 June 2026 in the ACT Proceedings in relation to the application made by Mr Su to vary the Trust Order and the 5 Blackman Proceeds Order so that the monies held by the ACT Supreme Court be paid to this court until further order in these proceedings: *Su v Kamal (No 3)* [2026] ACTSC 208 (**ACT Proceeds Judgment**).

154 In the ACT Proceeds Judgment, McCallum CJ recounted the procedural history of the ACT Proceedings and the District Court Proceedings. At the conclusion of the ACT Proceeds Judgment, McCallum CJ said at [11]:

> In any event, after some discussion, the parties reached agreement that the issue can be dealt with satisfactorily to each of them if I simply vary the order I made on 2 September 2022 so as to provide that the funds that have been paid into court by consent on 21 November 2021, and which were ordered to be paid to the sixth defendant by my order made 2 September 2022, instead be held by this Court until

> further order. I will make that order. I will make a further direction that, if practicable, any application for an order for release of the funds be listed before me as I have the history of the matter. I will further direct that a copy of these reasons, when available, be provided to Justice McGrath of the New South Wales Supreme Court, who has reserved his decision in the proceedings in that jurisdiction.

155 Her Honour then made the following orders in the ACT Proceeds Judgment:

> (1) I vary the consent orders made on 21 November 2021 and order 3 of the orders made by me on 2 September 2022, so that the monies paid into this Court pursuant to the consent orders, or otherwise payable to the sixth defendant pursuant to order 3, be retained by the Court until further order of this Court.
>
> (2) If any application for release of the funds is made to this Court, the matter is to be listed before me if practicable.
>
> (3) I direct that a copy of these reasons, when available, be provided to Justice McGrath of the New South Wales Supreme Court.
>
> (4) I reserve costs of this application.
>
> (5) I ask the Registrar to write to the parties and inform them of the terms on which the funds are held by the Court.

156 Accordingly, whatever the outcome of these proceedings, it will be necessary for the parties in the ACT Proceedings to make a further application to the ACT Supreme Court regarding the amount held by the ACT Supreme Court pursuant to the 5 Blackman Proceeds Order.

UNPLEADED MATTERS

157 Mr Su made it unambiguously clear that he was holding 5 Blackman to its pleaded case by identifying each of the matters which had not been pleaded in the Defence to ASOC and submitting that each matter was not open to consideration (T5, T50, T51, T52, T53, T58, T60, T74 and T76).

158 Mr Su's primary contention in respect of each of these submissions was that it is not open for me to consider them because they were not expressly pleaded in the Defence to ASOC.

Legal principles

159 Pleadings play an essential role in defining the issues at trial: *Dare v Pulham* (1982) 148 CLR 658; [1982] HCA 70. However, where a case is run in a particular manner that departs from the pleadings and is decided in accordance with the manner in which it was run, the result should be upheld unless some injustice is done: *Southwick v Moore Stephens Melbourne Pty Ltd* [2008] VSCA 164 at [30]; *Commissioner of Taxation v Normandy Finance and Investments Asia Pty Ltd* [2016] FCAFC 180 at [143].

160 The relevant principles regarding what must be pleaded were summarised in ***Crescent Capital*** *Ltd as trustee for the Rockdale Central Security Trust v Chanine* [2026] NSWSC 371 by Rees J at [51]:

> A general rule of pleading is that a party must plead specifically any matter that, if not pleaded specifically, may take their opponent by surprise: r 14.14, UCPR. This rule "secures a party's right to th[e] basic requirement of procedural fairness": *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286 (Mason CJ and Gaudron J); [1990] HCA 11. The rule minimises the risk of injustice arising from surprise: *Arthur Young v Tieco International (Aust) Pty Ltd* [1995] SASC

5173; (1995) 182 LSJS 367 at 370 [14] (Lander J), followed in *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets (No 6)* [2007] NSWSC 124 at [279] (McDougall J). …

161 In ***Bryant*** *v Quinn* [2022] NSWCA 163, Ward P (with whom White and Brereton JJA agreed) observed at [74]–[79]:

> [74] It is well recognised that there is a distinction between pleadings and particulars (see Scott LJ in *Bruce v Odhams Press Limited* [1936] 1 KB 697 at 712–713 per Scott LJ; *Pinson v Lloyds and National Provincial Foreign Bank Limited* [1941] 2 KB 72 at 75–76 per Scott LJ); and that the requirement for pleading is that the statement of claim state the material facts (and need not plead the conclusions of law to be drawn from those facts, if established). However, it is also well known that the issues to be determined at hearing are those as framed by the pleadings and that departure from the case as pleaded is not permitted unless the parties have consented or acquiesced in such a departure (see *Ingot Capital Investments Pty Limited v Macquarie Equity Capital Markets Limited* (2008) 73 NSWLR 653; [2008] NSWCA 206 (*Ingot NSWCA*) at [424] per Ipp JA; see also the decision at first instance: *Ingot Capital Investments Pty Limited v Macquarie Equity Capital Markets (No 6)* (2007) 63 ACSR 1; [2007] NSWSC 124 (*Ingot*) per McDougall J).
>
> [75] In *Ingot*, McDougall J implicitly recognised that in some circumstances the parties might, by their conduct of the case, acquiesce in the widening of the pleaded case. There, however, various of the counsel for the various defendants had repeatedly stated that they were responding to the plaintiff's pleaded case from which the plaintiff ought not be allowed to depart. The same can be said of the present case. Counsel for the appellant made plain on a number of occasions that the appellant objected to a departure from the pleaded case (and that the pleaded case did not raise a claim for equitable relief or relief on the basis of unjust enrichment or the like). That included complaint in the course of final closing submissions on 8 April 2021 to the claim in effect being recast as a claim for a conditional gift.
>
> [76] On appeal, in *Ingot NSWCA*, Ipp JA considered the authorities and principles relevant to whether a party would be allowed at trial to depart from its pleaded case, noting that there may be a departure from the pleadings where adherence to them would be unjust or unfair (citing *Banque Commerciale* at 286–287 per Mason CJ and Gaudron J). Here, however, it is the departure from the pleadings that is said to be unjust or unfair to the appellant.
>
> [77] In *Banque Commerciale*, it was said that, ordinarily, the question of whether the parties have chosen some issue different from that disclosed in the pleadings as the basis for the determination of their respective rights and liabilities is to be answered by inference from the way in which the trial was conducted. It was there accepted that, in a clear case, mere acquiescence by one party in a course adopted by the other will be sufficient to ground such an inference. There was certainly no such acquiescence in the present case.
>
> [78] Ipp JA noted in *Ingot NSWCA* (at [424]) that the rule that, in general, relief is confined to that available on the pleadings secures a party's right to a basic requirement of procedural fairness; and that, apart from cases where the parties choose to disregard the pleadings and to fight the case on additional issues chosen at the trial, the relief that may be granted to a party must be founded on the pleadings.
>
> [79] In *Vines v Australian Securities and Investments Commission* (2007) 62 ACSR 1; [2007] NSWCA 75 at [57], Spigelman CJ stated the test as being whether the parties "have chosen to fight the case on a different basis".

Consideration

162 5 Blackman made additional allegations in both oral and written submissions which are not contained in the Defence to ASOC. Applying the principles in *Crescent Capital* and *Bryant*, I do not permit any of these additional allegations to be raised now in light of the fact that none of them were pleaded, they come as a surprise to Mr Su and cause prejudice to Mr Su in having to meet them.

163 The unpleaded allegations which I do not permit 5 Blackman to raise are the following arguments:

(1) Mr Su has already received the full benefit of payments, funds and orders of the ACT Supreme Court, including money sitting in trust for him and default judgment (as well as payments under guarantees and mortgages against Mr Noumeir and Mr Kamal) and, therefore, Mr Su's claim is fully extinguished and that to find otherwise would enable Mr Su to "double dip". In any event, I agree with Mr Su's submission that none of these amounts received are referable to the moneys owed under the Deed of Loan, and to the extent they are referable, they do not extinguish the debt owed under the Deed of Loan until those funds are received (T6; T60). To date, Mr Su has not received any of the funds in respect of the ACT Default Judgment such that the obligations to repay the Deed of Loan have not yet been extinguished (T6; T60).

(2) The Discount Interest Rate of 2% per month was a penalty and unenforceable as against 5 Blackman such that any interest ought to be calculated at court rates. 5 Blackman conceded that this point was not pleaded (T65).

(3) The Deed of Loan and mortgages were unenforceable as against 5 Blackman for want of consideration because the entirety of the $100,000 loan was advanced to Mr Kamal and none of it was advanced to 5 Blackman. In any event, I agree with Mr Su's submission that the Deed of Loan was a deed and accordingly no consideration beyond the execution of the deed was required (T6): *Laszczuk v Bendigo & Adelaide Bank Ltd* (2020) 61 VR 1; [2020] VSCA 17, Whelan, Hargrave and Emerton JJ at [38]–[42] citing *Morley v Boothby* (1825) 3 Bing 107; 130 ER 455, Best CJ at 456. See also *Spicer v Hayward* (1700) Prec Ch 114; 24 ER 55; *Pinnel's Case* (1602) 5 Co Rep 117; (1602) 77 ER 237; *Leonard v Booth* (1954) 91 CLR 454; [1954] HCA 64 at 474; *Reid Murray Holdings Ltd* (in liq) *v David Murray Holdings Pty Ltd* (1972) 5 SASR 386.

(4) Mr Su had an obligation to mitigate his loss and he failed to do so and is in breach of his obligation of good faith in attempting to enforce the Deed of Loan. In any event, I agree with Mr Su's submission that it is not bad faith for Mr Su to insist on payment of amounts owing in accordance with the terms of the Deed of Loan (T60).

(5) Mr Su conceded, or otherwise agreed, that Mr Kamal had repaid him the entirety of the principal owing under the Deed of Loan upon Mr Kamal transferring $100,000 into the trust account of Yingke Law Firm (T31). The contention that

Mr Su conceded that the entirety of the amount owing under the Deed of Loan was repaid is based on a finding made in the ACT Dismissal Judgment at [58] ("it is apparent that the remaining claim is only for interest and costs (there being no dispute that the principal sum has been repaid to the applicant by a different defendant in the primary proceeding)"). I do not regard this "finding" in an interlocutory judgment of Loukas-Karlsson J as recording a concession by Mr Su that nothing was owing under the Deed of Loan and it certainly would be improper for me to regard it as a finding of fact based on different evidence to that which has been presented to me. In any event, I agree with Mr Su that it is clear that as at the date of the payment of $100,000 on 27 November 2020 by Mr Kamal, there was "Money Owing" to Mr Su under the Deed of Loan no matter which permutation of the calculations is taken to be correct (T59–60). In other words, even with the payment by Mr Kamal, at that time there was still money which was owed to Mr Su under the Deed of Loan. In addition, as there is no agreement between Mr Su and Mr Kamal forgiving the entirety of the debt owed under the Deed of Loan, 5 Blackman conceded (correctly, in my view) that there remained an amount owing under the Deed of Loan after payment of the $100,000 (T70).

(6) 5 Blackman's positive defence advanced at the trial that the Deed of Loan was not in the best interests of 5 Blackman and Mr Noumeir was unable to bind 5 Blackman. It is unsurprising that this defence was not expressly pleaded considering its similarities to the defence in the ACT Proceedings and that the respective portions of the Defence to ASOC and the Cross-Claim which raised it were struck out. I do not allow this defence to be raised again when it has already been removed from the pleadings.

ISSUE ONE: MR NOUMEIR'S ABILITY TO BIND 5 BLACKMAN

164 The primary submission advanced by 5 Blackman is that the Deed of Loan and the 3 Blackman Mortgage are not enforceable against it because Mr Noumeir executed each of those documents in his personal capacity and not in his capacity as the sole director and sole company secretary of 5 Blackman. Further, it is contended that Mr Su could not rely on the assumptions in s 129 of the *Corporations Act* insofar as Mr Su "knew or suspected that the assumption" in s 129 was incorrect: citing s 128(4) of the *Corporations Act*; *FAL Healthy Beverages Pty Ltd v Manly Warringah Sea Eagles Ltd* [2016] NSWSC 1058.

165 At the time of execution of the transaction documents, Mr Noumeir was the sole director, sole company secretary and the sole shareholder of 5 Blackman.

Legal principles

166 As a matter of common law, it is assumed that the director or secretary of a company has the authority to exercise the powers customarily exercised by that office: *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480; 1 All ER

630; *Hely-Hutchinson v Brayhead Ltd* (1986) 1 QB 529; [1967] 2 All ER 14; *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711; [1971] 3 All ER 16; *Armagas Ltd v Mondogas SA* [1986] AC 717; 2 All ER 385; *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising Co* (1975) 133 CLR 72; 7 ALR 527; 50 ALJR 203; *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146; 94 ALR 385; [1900] HCA 32; *Left Bank Investments Pty Ltd v Ngunya Jarjum Aboriginal Corp* [2020] NSWCA 144.

167 Section 198E(1) of the *Corporations Act* provides:

> **Single director/shareholder proprietary companies – Powers of director**
>
> (1) The director of a proprietary company who is its only director and only shareholder may exercise all the powers of the company except any powers that this Act or the company's constitution (if any) requires the company to exercise in general meeting. The business of the company is to be managed by or under the direction of the director.
>
> Note: For example, the director may issue shares, borrow money and issue debentures.
>
> (2) The director of a proprietary company who is its only director and only shareholder may sign, draw, accept, endorse or otherwise execute a negotiable instrument. The director may determine that a negotiable instrument may be signed, drawn, accepted, endorsed or otherwise executed in a different way.

168 In respect of the powers that sole directors of proprietary companies hold to bind their company, the authors of *Company Directors: Principles of Law & Corporate Governance* (2nd ed, 2023, Lexis Nexis) observe at [3.60]:

> In a proprietary company with only one director who is its only shareholder, the director has a wide actual authority given by s 198E(1). Section 198E(1) provides that the director can exercise all the powers of the company unless they are powers which the Corporations Act or the company's constitution (if any) requires the company to exercise in general meeting. By a provision which cannot be displaced by the company's constitution, s 198E(1) requires the business of the company to be managed by or under the direction of the director.
>
> One effect of s 198E is that the director's act in transacting business on behalf of the company, or making representations, in the course of managing the business, or his or her act in the exercise of other corporate powers, can be considered an act of the company itself rather than the act of an agent acting for a principal. The Corporations Act makes the sole director/shareholder the organ of the company.
>
> …

169 Section 126 of the *Corporations Act* provides:

> (1) A company's power to make, vary, ratify or discharge a contract, or execute a document (including a deed), may be exercised by an individual acting with the company's express or implied authority and on behalf of the company.
>
> (2) The power may be exercised without using a common seal.
>
> (3) This section does not affect the operation of a law that requires a particular procedure to be complied with in relation to the contract or document (including a deed), other than to the extent that the law is inconsistent with this section.
>
> (4) The individual mentioned in subsection (1) need not be appointed by a deed.
>
> (5) In exercising the company's powers in accordance with subsection (1), the individual may execute a document as a deed if the document is expressed to be executed as a deed.
>
> (6) In exercising the company's powers in accordance with subsection (1), the individual may execute a document as a deed:
>
> (a) without that execution being witnessed; and
>
> (b) regardless of whether the document signed by the individual is in physical form or electronic form.

(7) Delivery is not necessary if the individual executes a document as a deed in the exercise of the company's powers in accordance with subsection (1).

(8) This section does not limit the ways in which the individual may execute a document (including a deed).

170 Section 127 of the *Corporations Act* provides:

Executing a document without a common seal

(1) A company may execute a document without using a common seal if the document is signed by:

(a) 2 directors of the company; or

(b) a director and a company secretary of the company; or

(c) for a proprietary company that has a sole director--that director, if:

(i) the director is also the sole company secretary; or

(ii) the company does not have a company secretary.

Executing a document with a common seal

(2) A company with a common seal may execute a document if the seal is fixed to the document and the fixing of the seal is witnessed by:

(a) 2 directors of the company; or

(b) a director and a company secretary of the company; or

(c) for a proprietary company that has a sole director--that director, if:

(i) the director is also the sole company secretary; or

(ii) the company does not have a company secretary.

(2A) For the purposes of subsection (2), the fixing of a common seal to a document is taken to have been witnessed by a person mentioned in paragraph (a), (b) or (c) of that subsection if:

(a) the person observes, by electronic means or by being physically present, the fixing of the seal; and

(b) the person signs the document; and

(c) a method is used to indicate that the person observed the fixing of the seal to the document.

Executing a document as a deed

(3) A company may execute a document as a deed if the document is expressed to be executed as a deed and is executed in accordance with subsection (1) or (2).

(3A) A company may execute a document as a deed in accordance with subsection (1):

(a) without that execution being witnessed; and

(b) regardless of whether the document signed by the director or company secretary of the company, as applicable, is in physical form or electronic form.

(3B) Delivery is not necessary if a company executes a document as a deed in accordance with subsection (1) or (2).

Other ways of executing documents not limited

(4) This section does not limit the ways in which a company may execute a document (including a deed).

171 Section 128 of the *Corporations Act* provides:

(1) A person is entitled to make the assumptions in section 129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.

…

(3) The assumptions may be made even if an officer or agent of the company acts fraudulently, or forges a document, in connection with the dealings.

(4) A person is not entitled to make an assumption in section 129 if at the time of the dealings they knew or suspected that the assumption was incorrect.

172 Section 129 of the *Corporations Act* provides that:

> (1) A person may assume that the company's constitution (if any), and any provisions of this Act that apply to the company as replaceable rules, have been complied with.
>
> Director or company secretary
>
> (2) A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company:
>
> (a) has been duly appointed; and
>
> (b) has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.
>
> …
>
> (5) A person may assume that a document has been duly executed by the company if the document appears to have been signed in accordance with subsection 127(1). For the purposes of making the assumption, a person may also assume that, if any person who signs the document states next to their signature that:
>
> …
>
> (d) they are the sole director and sole company secretary of the company – that is the case.

173 The authors of Austin & Black's Annotations to the Corporations Act (LexisNexis, looseleaf) observe at [2B.129]:

> Where the company is a proprietary company that has a single director secretary, requirements (i)-(iv) apply, except that only one signature appears on the face of the document and it must appear from a statement next to the signature that the signatory is the sole director and sole company secretary: see s 127(1)(c) and 127(2)(c), and *Slattery v Fordyce; Fordyce v Slattery* [2019] NSWSC 173l BC201901291.

Consideration

174 The Deed of Loan was signed by Mr Noumeir on 7 May 2019. No common seal appears on the Deed of Loan. Below Mr Noumeir's signature, the words "Signature of Sole director and secretary" appear. Above his signature, the following words appear: (emphasis in the original)

> **Executed by** 5 BLACKMAN CRES
>
> MACQUARIE PTY LTD ACN 609 195
>
> 422 pursuant to s 127 of the
>
> Corporations Act 2001 (Cth):

175 Similarly, the 3 Blackman Mortgage appears to be signed by Mr Noumeir in his capacity as the sole director and secretary of 5 Blackman as made clear by the signature block, which appears as follows:

> Executed on behalf of 5 BLACKMAN CRES
>
> MACQUARIE PTY LIMITED
>
> Signer Name NOUMEIR, DANNY
>
> Signer Organisation 5 BLACKMAN CRES
>
> MACQUARIE PTY LIMITED
>
> Signer Role SOLE DIRECTOR / SECRETARY

Signature [Mr Noumeir's signature]

Execution Date 7 May 2019

176 No common seal of 5 Blackman appears on the 3 Blackman Mortgage.

177 Without needing to consider the assumptions enumerated in s 129 of the *Corporations Act*, Mr Noumeir was plainly able to enter into the transaction documents with Mr Su on behalf of 5 Blackman. The authority to do so was provided by ss 198E(1) and 127(1)(c) of *Corporations Act* which give Mr Noumeir, as the sole director and sole company secretary of 5 Blackman at the relevant time, authority to execute the various transaction documents without the need for use of a common seal.

178 Relevantly, this is not a case where there is a dispute as to whether Mr Noumeir was the sole director, shareholder and company secretary of 5 Blackman at the relevant time, nor is it in dispute that the relevant transaction documents were executed by him. Accordingly, I agree with Mr Su that he does not rely, nor does he need to rely, on the statutory assumptions enumerated in s 129 of the *Corporations Act* (T7 and T48). By the operation of s 127(1)(c) of the *Corporations Act*, Mr Noumeir had the legal capacity to, and did, execute each of the Deed of Loan and the 3 Blackman Mortgage on behalf of 5 Blackman. This alone is sufficient to bind 5 Blackman to each of those documents as a matter of law: *Creswick v Coast RV Pty Ltd* [2013] NSWSC 1078, Beech-Jones J at [33].

179 If I am wrong about this conclusion and the s 129 assumptions are relevant, I reject 5 Blackman's submission that, by operation of s 128(4) of the *Corporations Act*, Mr Su was disentitled because Mr Su was allegedly aware that Mr Noumeir was entering into the loan for personal reasons and in his personal capacity (T28–29). Contrary to how 5 Blackman put its submissions, the relevant inquiry under s 128(4) is whether Mr Su knew or suspected that the assumption sought to be relied upon – namely, the assumption that Mr Noumeir was the sole director and company secretary of 5 Blackman at the relevant time – was incorrect. 5 Blackman has not made any suggestion that there was any material that might put Mr Su on inquiry as to whether Mr Noumeir was the sole director and company secretary at the relevant time. Rather, that fact was not in dispute whatsoever.

180 The line of inquiry pursued in the cross-examination of Mr Su, including his awareness that the loan was being used for the settling of the development site of the Lurnea Property (which was not owned by 5 Blackman) and that the funds were going to Mr Kamal exclusively is irrelevant to the determination of whether s 128(4) disentitles Mr Su from relying on the assumptions in ss 129(2) and 129(5) of the *Corporations Act.* Those facts, if true, do not bear on whether Mr Su was put on inquiry as to the status of Mr Noumeir's position within 5 Blackman nor whether the transaction documents were duly executed by 5 Blackman.

181 Accordingly, if I am wrong on the applicability of s 127 of the *Corporations Act*, then Mr Su was entitled to rely on the assumptions in ss 129(2) and 129(5) of the *Corporations Act* regarding Mr Noumeir's status as the duly appointed sole director and sole

secretary of 5 Blackman and that each of the Deed of Loan and the 3 Blackman Mortgage had been duly executed. Neither of those assumptions were displaced by the operation of s 128(4) of the *Corporations Act*.

182 As a result, both the Deed of Loan and the 3 Blackman Mortgage are enforceable against 5 Blackman.

ISSUE TWO: RECOVERY OF ENFORCEMENT COSTS

183 Mr Su seeks to recover the costs he claims to have incurred in enforcing, or attempting to enforce, the Deed of Loan and the 3 Blackman Mortgage, either at common law or pursuant to the indemnity provisions in the Deed of Loan and the 3 Blackman Mortgage. The costs sought to be recovered are (T53):

(1) Mr Su's costs of the ACT Proceedings and the ACT Appeal Proceedings;

(2) Mr Su's liability for the costs orders made in 5 Blackman's favour against him in the ACT Proceedings and the ACT Appeal Proceedings; and

(3) Mr Su's costs of these proceedings on an indemnity basis.

184 Mr Su argues that these enforcement costs form part of the "costs, charges and expenses" of Mr Su incurred "in connection with the … enforcement of any rights under or in relation to" the Deed of Loan or the 3 Blackman Mortgage that 5 Blackman is required to pay or reimburse under cl 12 of the Deed of Loan. Mr Su further argues that the enforcement costs are part of "any liability, loss, costs or expense caused or contributed to by …. the exercise or attempted exercise of any right by" Mr Su under the 3 Blackman Mortgage that 5 Blackman is required to indemnify under cl 19.1 of the 3 Blackman Mortgage. Mr Su also argues that these enforcement costs are payable on

a "full solicitor and own client basis" by reason of cl 18.2 of the 3 Blackman Mortgage, which states that a reference to "costs and expenses" in the 3 Blackman Mortgage "includes, without limitation, legal costs and expenses on a full indemnity basis".

185 Mr Su also submits that these categories of enforcement costs form part of the "Money Owing" as defined in cl 1.1 of the Deed of Loan. Mr Su also claims to be entitled to the interest that would accrue on those enforcement costs in accordance with cl 4 of the Deed of Loan.

186 In reply, 5 Blackman contends that:

(1) Mr Su has failed to substantiate the costs that he said that he incurred in the ACT Proceedings and the ACT Appeal Proceedings;

(2) Mr Su cannot claim costs in relation to the ACT Proceedings and the ACT Appeal Proceedings against 5 Blackman because 5 Blackman received costs orders in its favour against Mr Su;

(3) any contractual clauses do not override the court's discretion as to costs and the determinations made by the ACT Supreme Court; and

(4) Mr Su is estopped from raising any dispute in respect of costs that have been the subject of any costs order made in the ACT Proceedings and the ACT Appeal Proceedings.

Legal principles

General right of mortgagee to enforcement costs

187 It is important to note from the outset that a mortgagee generally has an entitlement to recover any costs incurred in enforcing the mortgage both as a principle at common law and as a contractual entitlement under the mortgage. This was recognised in ***Kyabram Property*** *Investments Pty Ltd v Murray* [2005] NSWCA 87 by Beazley JA (with whom Hodgson and Ipp JJA agreed) at [12]–[13] as follows:

> [12] It is well established that a mortgagee may rely upon its contractual entitlement to costs so as to claim an order other than on a party/party basis. In *Re Adelphi Hotel (Brighton) Limited* [1953] 2 All ER 498, Vaisey J at 502 observed that the prima facie rule was that costs were awarded on a party/party basis unless some alternative basis was shown "either on some well-recognised principle, or under some contract plainly and unambiguously expressed". The New Zealand Court of Appeal applied the rule to the payment of a mortgagee's legal costs in a recovery action: *ANZ Banking Group (NZ) Ltd v Gibson (Court of Appeal)* [1986] 1 NZL 446 at 566, 569.
>
> [13] The application of the principle is well recognised in Australia: see *Inglis v Commonwealth Trading Bank of Australia* (1973) 47 ALJR 234 at 235. In *AGC (Advances) Limited v West* [1984] 5 NSWLR 301, Hodgson J stated (at 304-305) that at general law a mortgagee was entitled to party/party costs only but that the general law was subject to the precise terms of any provision of the mortgage. Cole J accepted this to be correct in *Sandtara Pty Limited & Others v Australian European Finance Corporation Ltd* (1990) 20 NSWLR 82, at 97.

188 The general right of a mortgagee to recover enforcement costs at common law was described in *Overton Investments Pty Ltd v Cuzeno RVM Pty Ltd* [2003] NSWCA 27 by Hodgson JA (with whom Handley and Stein JJA agreed) at [61] in the following terms:

> Even where there is no express provision in the mortgage, a mortgagee is generally entitled to all costs it incurs in ascertaining or defending its rights, in preserving the security or in recovering the mortgage debt: see Fisher & Lightwood's Law of Mortgage (Aust.Ed.) [40.3], *National Provincial Bank of England v. Games* (1886) 31 Ch.D. 582 at 592. A mortgagee does not lose the right to costs merely by making a bona fide claim beyond its entitlement, at least so long as that claim has some merit: Fisher & Lightwood [40.11], *Cotterell v. Stratton* (1872) 8 Ch.App. 295, *Credland v. Potter* (1874) 10 Ch.App. 8, *Bird v. Wenn* (1886) 33 Ch.D. 215, *Kinnaird v. Trollope* (1889) 42 Ch.D. 610.

189 The authors of **Fisher & Lightwood's Law of Mortgage** (LexisNexis Butterworths, 3rd Australian Edition) at [40.1] observe that a mortgagee at common law and in equity has a general right to the costs of enforcement:

> At common law the mortgagee is entitled as of right to the costs properly incurred by him in an action for foreclosure or other action to enforce the mortgage… As Lord Eldon LC said in *Detillin v Gale* (1802) 7 Ves 583 at 584–5; 32 ER 234 at 235, so long as the mortgagee acts reasonably, he ought to be indemnified. This has been quoted on many occasions since: see, for example, *Perry v Rolfe* [1948] VLR 297 at 301 per Fullagar J.
>
> This right extends to an equitable mortgagee, including a mortgagee by deposit, whether with or without a memorandum of deposit: *Cotterell v Stratton* (1874) LR 17 Eq 543; *Elders Trustee and Executor Co Ltd v Eagle Star Nominees Ltd* (1986) 4 BPR 9205; and see *Central Mortgage and Housing Corp v Johnson* (1971) 20 DLR (3d) 622.
>
> But the mortgagee may forfeit these costs by misconduct and may even have to pay the costs of such an action where he has acted vexatiously or unreasonably. The court departs from the general rule with reluctance. Formerly, it was the proper practice that a claim by the mortgagor that the mortgagee should pay the costs should be specifically pleaded. However, nowadays an omission to do so would not be fatal to an order depriving the mortgagee of costs or making him pay costs.
>
> …
>
> Nowadays, rules of court general confirm the above rule: see New South Wales Uniform Civil Procedure Rules Pt 42.

190 The general right does not permit a mortgagee to recover costs which were unnecessarily or improperly incurred. The authors of Fisher & Lightwood's Law of Mortgages continue at [40.12]–[40.13]:

> … The mortgagee may be deprived of costs where his claim is unfounded, though bona fide: a claim is not classed as 'unfounded' if fairly arguable: *Credland v Potter* (1874) 10 Ch App 8; *Bird v Wenn* (1886) 33 Ch D 215; *Kinnaird v Trollope* (1889) 32 Ch D 610.
>
> …
>
> It is the duty of the mortgagee so to pursue his remedies as not to incur unnecessary costs. Hence he must bear the cost of proceedings so far as they are mistaken or useless. Where, for instance, an action was not originally commenced as, but was turned into, a foreclosure action, the costs incurred before it assumed that form were thrown on the mortgagee: *Smith v Smith* (1815) Coop G 141; 35 ER 508; *Briant v Lightfoot* (1837) 1 Jur 20; *Philips v Davies* (1843) 7 Jur 52; *Hogan v Baird* (1843) 4 Dr & War 296. As to costs incurred unnecessarily, see *Ex parte Fletcher* (1832) Mont 454; *Cocks v Stanley* (1857) 4 Jur NS 942.

191 This limitation of the recovery of costs by a mortgagee is reflected in r 42.25 of the Uniform Civil Procedure Rules (**UCPR**), which provides that:

> (1) Subject to subrule (2), a person who is or has been a party to any proceedings in the capacity of trustee or mortgagee is entitled to be paid his or her costs in the proceedings, in so far as they are not paid by any other person, out of the fund held by the trustee or out of the mortgaged property, as the case may be.
>
> (2) The court may order that the person's costs not be so paid if –
>
> (a) the trustee or mortgagee has acted unreasonably, or

> (b) in the case of a trustee, the trustee has in substance acted for his or her own benefit rather than for the benefit of the fund.

192 Therefore, there appears to be a qualification to the general rule that a mortgagee is entitled to recover the costs of enforcing a mortgage that the costs must be incurred properly and not unnecessarily, and the mortgagee must bear the cost of proceedings insofar as they are mistaken or useless.

Recovery of enforcement costs under an agreement

193 The principles regarding the construction of written contracts generally, as well as those principles particularly applicable to the construction of written commercial contracts, are well established. There was no dispute about them in these proceedings.

194 As to the construction of written contracts generally, the meaning of the words used in the contract are to be determined objectively, applying the standard of what a reasonable person in the position of the parties would have understood them to mean. That, normally, requires consideration not only of the text, but also of the context in which they appear, as well as the purpose and object of the transaction: *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451; [2004] HCA 35, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at [40].

195 The relevant principles of construction were also summarised by Bathurst CJ (with whom Macfarlan and Meagher JJA agreed) in *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184 at [52]:

> … A contract is to be construed by reference to what a reasonable person would understand by the language in which the parties have expressed their agreement having regard to the context in which the words appear and the purpose and object of the transaction: *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]; *Toll (FGCT) Pty Limited v Alphafarm* [sic] *Pty Limited* [2004] HCA 52; (2004) 219 CLR 165 at [40]; *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3; (2008) 234 CLR 151 at [53]. At least in the case of ambiguity, resort can be had to the surrounding circumstances known to the parties in interpreting the particular provision: *Codelfa Construction Pty Limited v State Rail Authority of NSW* [1982] HCA 24; (1982) 149 CLR 337 at 352; *Western Export Services Inc v Jireh International Pty Limited* [2011] HCA 45; (2011) 282 ALR 604.

196 In *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7*,* French CJ, Hayne, Crennan and Kiefel JJ stated at [35] (citations omitted):

> … 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".

197 The task of construction to be undertaken in cases such as this was elucidated in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37, with French CJ, Nettle and Gordon JJ stating at [47]–[50] (citations omitted):

> [47] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.
>
> [48] Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.
>
> [49] However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.
>
> [50] Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.

198 This approach was more recently restated in one of the many litigious exploits involving members of the Rinehart family in *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514; [2019] HCA 13, with Kiefel CJ, Gageler, Nettle and Gordon JJ at [44] confirming that a commercial contract "should be construed by reference to the language used by the parties, the surrounding circumstances, and the purposes and objects to be secured by the contract", citing *Electricity Generation Corporation* at [35].

199 In *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd* (2023) 276 CLR 500; [2023] HCA 6, Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ at [27], quoted with approval in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544; [2017] HCA 12, Kiefel, Bell and Gordon JJ at [16], stating:

> It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it.

200 In the present context, a contractual indemnity should be construed according to the ordinary principles of construction and where the application of those principles leaves the court with a doubt as to its proper construction, the doubt should be resolved in favour of the surety or indemnifier: see P Herzfeld and T Prince, *Interpretation* (Thomas Reuters, 3rd ed, 2024) at [29.290] citing *Rava v Logan Wines Pty Ltd* [2007] NSWCA 62, Campbell JA at [53]–[56]; *Henderson-Smart v Quality Blow Moulders Pty Ltd* (2010)

25 VR 724, Bongiorno JA (with whom Mandie JA and Williams AJA agreed) at [17]–[18]; *CSR Ltd v Adecco (Australia) Pty Ltd* [2017] NSWCA 121, McColl JA (with whom Macfarlan and Simpson JJA agreed) at [163]; *Cherry v Steele-Park* (2017) 96 NSWLR 548; [2017] NSWCA 295, Leeming JA (with whom Gleeson JA agreed) at [112]; *Nashco Pty Ltd v Yang* [2022] NSWCA 137, Mitchelmore JA (with whom Leeming and Brereton JJA agreed) at [29]–[32].

201 The question of the proper construction of a term in a mortgage requiring the mortgage to pay or indemnify for enforcement costs is dealt with by GE Dal Pont in *Law of Costs* (LexisNexis, 5th ed, 2021), where it is observed at [15.52] (emphasis added in bold):

> Whatever the basis of taxation, both at general law and pursuant to the court rules, the court or taxing officer will not allow costs that are unreasonable in nature or amount unless, in the case of solicitor and own client taxation, the client has agreed to the incurrence of these costs after being fully advised in this respect. **The issue thus arises as to whether, by the terms of a mortgage instrument, the mortgagee is able to throw upon the mortgagor costs that are unreasonable in nature or amount. The answer to this question has uniformly been in the negative, whether by a process of construction or on grounds of public policy**.

202 The issue of whether a mortgage can provide that the mortgagee is required to pay for unreasonable enforcement costs was answered in the negative in ***Gomba Holdings*** *(UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171, by Scott LJ at 187–188:

> It is difficult to contemplate that a mortgage deed would ever be construed as entitled a mortgagee to charge against the mortgaged property, or to require the mortgagor to pay, all costs charges and expenses even if improperly or unreasonably incurred or improper or unreasonable in amount unless the mortgage deed has expressly in terms so provided. But if a mortgage deed did expressly so provide, the enforceability of such a provision would… be open to serious question on public policy grounds.

203 *Gomba Holdings* was referred to with approval in *Kyabram Property*, Beazley JA (with whom Hodgson and Ipp JJA agreed) at [14].

204 On this point, Slattery J observed in *Bell v Hartnett Lawyers (No 2)* [2021] NSWSC 1270 at [35] (emphasis added in bold):

> There are multiple sources of authority identifying the Court's power to adjust the costs as between the mortgagor and the mortgagee, and to have them quantified independently. It is sufficient to refer to UCPR, r 42.25, which expressly authorises the Court not to allow payment to a mortgagee, who has acted unreasonably. **The ordinary equitable principal [sic] is that the mortgagee would be unable to recover costs which are the result of misconduct or where the mortgagee has acted unreasonably: *Road Chalets Pty Ltd v Thornton Motors Pty Ltd* (1986) 47 SASR 532. There is nothing in the indemnity clause in the mortgage in this case that would displace this ordinary rule.**

205 Mr Su relies on the decision of ***Tarkington*** *Pty Ltd & Anor v Kingdrake Pty Ltd* [2000] VSCA 98 as authority for the proposition that the specific wording of a contractual obligation to pay enforcement costs may create an obligation to pay those costs which is triggered by "enforcement or attempted enforcement", suggesting that the payment obligation arises even where claims are unsuccessful (T53–54).

206 In *Tarkington*, the mortgagee successfully recovered the costs of unsuccessful proceedings brought against other guarantors and borrowers from the borrower in the *Tarkington* proceedings. Mr Su places particular weight on *Tarkington* where Chernov JA said at [17]:

> In my view, none of the three grounds of appeal which were pursued has been made out. In my opinion, his Honour was correct in finding on the evidence before him that Kingdrake's proceedings against the third to fifth-named defendants, although ultimately aborted, amounted to an enforcement by Kingdrake, or an attempted enforcement by it, of the security that the legal expenses incurred in relation to it were not unnecessarily or unreasonably incurred. … I have previously referred to the evidence of the conduct of the third to fifth-named defendants which attacked and put in jeopardy the securities held by Kingdrake. … It was open to his Honour to find, as he did that the legal expenses incurred in relation to the proceeding were related to the enforcement by Kingdrake of its securities.

207 As is apparent, this passage concerns the issue of whether Kingdrake's legal expenses had been incurred in connection with the enforcement or attempted enforcement of the mortgage. Plainly, it was not concerned with the issue in these proceedings, as to whether those costs were incurred unnecessarily or unreasonably. On that point, the decision in *Tarkington* can be distinguished, as Chernov JA continued at [19]:

> Mr Bernnett further contended, however, that his Honour was bound to satisfy himself that the legal expenses were properly charged; that, given the lack of particulars about the legal expenses, his Honour could not have been so satisfied; and that, therefore, the judge should have ordered that Kingdrake provide further material before determining the matter. This contention does not fall within the grounds in the notice of appeal and no application to amend was made. Had it been made I would have refused leave. Not only was it entirely novel, the point was unlikely to succeed.

208 Chernov JA continued to reason that the point was unlikely to succeed because there was no evidence to suggest that the costs were incurred unnecessarily or unreasonably and reasoned that the primary judge was not required to, on his own volition, call for further particulars explaining the incurring of the legal costs as set out by the parties.

209 I do not regard the decision in *Tarkington* as supporting any general proposition that enforcement costs of unsuccessful proceedings are properly charged by a lender/mortgagee against borrower/mortgagor.

Anshun **estoppel**

210 5 Blackman raised, as an anterior question to recovery, that there is an *Anshun* estoppel which prevents Mr Su from relitigating the determination of costs by the ACT Supreme Court (T12).

211 An *Anshun* estoppel takes its name from *Port of Melbourne Authority v* ***Anshun*** *Pty Ltd* (1981) 147 CLR 589. The *Anshun* principle has more recently been restated in ***Tomlinson*** *v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; [2015] HCA 28 (and reinforced in ***Timbercorp*** *Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212; [2016] HCA 44).

212 In *Tomlinson*, French CJ, Bell, Gageler, Keane and Nettle JJ explained the operation of an *Anshun* estoppel in the context of the three forms of estoppel arising from a final judgment, saying at [22] (citations omitted):

> Three forms of estoppel have now been recognised by the common law of Australia as having the potential to result from the rendering of a final judgment in an adversarial proceeding. The first is sometimes referred to as "cause of action estoppel". Estoppel in that form operates to preclude assertion in a subsequent proceeding of a claim to a right or obligation which was asserted in the proceeding and which was determined by the judgment. It is largely redundant where the final judgment was rendered in the exercise of judicial power, and where res judicata in the strict sense therefore applies to result in the merger of the right or obligation in the judgment. The second form of estoppel is almost always now referred to as "issue estoppel". Estoppel in that form

> operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment. The classic expression of the primary consequence of its operation is that a "judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies". The third form of estoppel is now most often referred to as "*Anshun* estoppel", although it is still sometimes referred to as the "extended principle" in *Henderson v Henderson*. That third form of estoppel is an extension of the first and of the second. Estoppel in that extended form operates to preclude the assertion of a claim, or the raising of an issue of fact or law, if that claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding. The extended form has been treated in Australia as a "true estoppel" and not as a form of res judicata in the strict sense. Considerations similar to those which underpin this form of estoppel may support a preclusive abuse of process argument.

213 In *Tomlinson*, the majority went on to explain the overlap and distinction between these estoppels and the wider notion of abuse of process, saying at [24]–[26]:

> [24] To explain contemporary adherence to the comparatively narrow principle in *Ramsay v Pigrim*, it is appropriate also to explain the relationship between the doctrine of estoppel and the doctrine of abuse of process as it has since come to be recognised and applied in Australia. The doctrine of abuse of process is informed in part by similar considerations of finality and fairness. Applied to the assertion of rights or obligations, or to the raising of issues in successive proceedings, it overlaps with the doctrine of estoppel. Thus, the assertion of a right or obligation, or the raising of an issue of fact or law, in a subsequent proceeding can be simultaneously: (1) the subject of an estoppel which has resulted from a final judgment in an earlier proceeding; and (2) conduct which constitutes an abuse of process in the subsequent proceeding.
>
> [25] Abuse of process, which may be invoked in areas in which estoppels also apply, is inherently broader and more flexible than estoppel. Although insusceptible of a formulation which comprises closed categories, abuse of process is capable of application in any circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute. It can for that reason be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel.
>
> [26] Accordingly, it has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel. Similarly, it has been recognised that making such a claim or raising such an issue can constitute an abuse of process where the party seeking to make the claim or to raise the issue in the later proceeding was neither a party to that earlier proceeding, nor the privy of a party to that earlier proceeding, and therefore could not be precluded by an estoppel.

214 The above description of an *Anshun* estoppel in *Tomlinson* is reinforced in *Timbercorp* at [27], where French CJ, Kiefel, Keane and Nettle JJ said:

> … An estoppel of this kind, an "*Anshun* estoppel", will preclude the assertion of a claim or of an issue of law or fact if the claim or issue was so connected to the subject matter of the first proceeding as to make it unreasonable, in the context of the first proceeding, for the claim or issue not to have been made or raised in it.

215 In *Anshun*, one of the matters to be taken into account in determining whether an *Anshun* estoppel arose was the likelihood of conflicting judgments. Gibbs CJ, Mason and Aickin JJ stated at 603–604:

> … It has generally been accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment.
> …
>
> …

> The likelihood that the omission to plead a defence will contribute to the existence of conflicting judgments is obviously an important factor to be taken into account in deciding whether the omission to plead can found an estoppel against the assertion of the same matter as a foundation for a cause of action in a second proceeding. By "conflicting" judgments we include judgments which are contradictory, though they may not be pronounced on the same cause of action. It is enough that they appear to declare rights which are inconsistent in respect of the same transaction. …

Consideration

Recovery of substantiated enforcement costs only

216 Mr Su seeks to recover the alleged enforcement costs incurred by him in the ACT Proceedings and the ACT Appeal Proceedings under the general right of a mortgagee to cover such costs at common law and pursuant to the contractual indemnities contained within the Deed of Loan and the 3 Blackman Mortgage.

217 While Mr Su provided evidence by way of a certificate of determination of costs to prove that the amount of the assessed costs arising from Summer Lawyers acting for Mr Su in the ACT Proceedings was $205,820.06, Mr Su merely asserted that the costs incurred by him for the work done by Yingke Law Firm in acting in the ACT Proceedings were a total of $58,213.10 and the costs incurred by him for the work done by Yingke Law Firm in acting in the ACT Appeal Proceedings were a total of $67,771.87. No invoices to substantiate these amounts and the work alleged to have been undertaken by Yingke Law Firm were provided by Mr Su.

218 Where precise evidence is available, the court expects to have it and the degree of precision with which loss and damage is to be proved is proportionate to the proof reasonably available: *Biggin & Co Ltd v Permanite Ltd* [1950] 2 All ER 859; [1951] 1 KB 422, Devlin J at 438, approved in *State of New South Wales v Moss* (2000) 54 NSWLR 536; [2000] NSWCA 133, Heydon JA at [72]. This is a case where Mr Su "has fallen short in adducing evidence of the kind that permits certainty and particularity, where such certainty was possible": *Atlanta Building Pty Ltd v Abela* [2026] NSWCA 126, Ball JA (with whom Leeming and Free JJA agreed), citing *Financialstrategy.com.au Pty Ltd (in liq) v Bailey Roberts Group Pty Limited (in liq)* [2026] NSWCA 74 at [119], in turn citing *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 77 ALJR 768; [2003] HCA 10 at [38].

219 I consider that the only evidence of the costs which have been incurred by Mr Su in the ACT Proceedings is the amount of $205,820.06, as set out in the certificate of determination of costs. The evidence of what Mr Su has asserted as having been paid to Yingke Law Firm for the ACT Proceedings and the ACT Appeal Proceedings does not prove that those amounts have been incurred, does not prove the date on which they were incurred and does not prove to what those amounts relate. It is not sufficient for Mr Su to say that no objection was taken to the evidence of his assertion of those amounts and he was not cross-examined in relation to them. The evidence rises no

higher than Mr Su's assertion in circumstances in which it would be expected that Mr Su would have little difficulty in proving them by producing the relevant invoices. He has not done so, nor has he provided any explanation why he has not done so.

220 The normal manner in which a liability for the payment of legal costs arises for a client is by the receipt by the client of an invoice with a particular date and particular description of the services provided for a particular amount of money. There is no reason advanced as to why Mr Su has failed to provide evidence in the form of invoices from Yingke Law Firm to prove the amount of legal costs which he claims to have incurred in relation to the ACT Proceedings and the ACT Appeal Proceedings. There is no evidence before me to prove the costs incurred by Mr Su of the type I would expect.

221 Accordingly, I deny the recovery of the amounts of $58,213.10 and $67,771.87 in Mr Su's claim for enforcement costs on the basis that they have not been proved by proper evidence. Only the amount of $205,820.06 has been substantiated.

Right to recover enforcement costs

222 As indicated above, Mr Su relies on cl 12 of the Deed of Loan and cl 19.1 of the 3 Blackman Mortgage to seek to recover the enforcement costs incurred.

223 Applying the principles regarding the general right of a mortgagee to recover enforcement costs as outlined above, such costs do not extend to the recovery of unnecessarily, improperly or unreasonably incurred costs or costs which are unnecessary, improper or unreasonable in amount. I can discern no intention in cl 12 of the Deed of Loan and cl 19.1(a) of the 3 Blackman Mortgage to require 5 Blackman to indemnify Mr Su against costs or expenses incurred unnecessarily, improperly or unreasonably.

224 As stated above, the only enforcement costs which have been substantiated by Mr Su are the assessed costs arising from Summer Lawyers acting for Mr Su in the ACT Proceedings for the total amount of $205,820.06. But those costs have been incurred in relation to an action which the ACT Supreme Court has now dismissed in the ACT Dismissal Judgment, which has been confirmed on appeal in the ACT Appeal Judgment. I consider those costs of Mr Su to be unnecessarily and unreasonably incurred because they were incurred in respect of a claim by Mr Su in the ACT Proceedings which the ACT Supreme Court has determined should be dismissed because Mr Su failed to appear in court when he was required, he delayed in sending the appropriate authorisations to obtain documents and he failed to provide reasons for his inability to obtain documents.

225 As a result, I consider that those costs are not recoverable by Mr Su under any general or contractual right he seeks to enforce against 5 Blackman. If it had been necessary for me to decide, for precisely the same reason I would also have found that the costs incurred by Mr Su in retaining Yingke Law Firm to act for him in the ACT Proceedings

and the ACT Appeal Proceedings were also unnecessarily and unreasonably incurred and are not recoverable by Mr Su under any general or contractual right he seeks to enforce against 5 Blackman.

226 Mr Su suggests that it even if his non-compliance with the procedural requirements in the ACT Proceedings which led to the ACT Dismissal Judgment and the ACT Appeal Judgment was unreasonable, the costs incurred up to that point should be recoverable by him from 5 Blackman because it cannot be said that he was unreasonable in bringing the ACT Proceedings (T54). However, whether the attempted enforcement costs were reasonably incurred does not turn only on whether commencing the proceedings was reasonable, but rather whether the costs incurred by Mr Su in those proceedings were unnecessary or unreasonable. Self-evidently, they were.

227 Mr Su contends that his failure to subpoena Summer Lawyers (with whom he was in dispute) to obtain earlier drafts of the transaction documents to produce on discovery cannot be considered gross misconduct to preclude a mortgagee's right to recovery (T54). I reject Mr Su's submission that I am required to be satisfied that Mr Su's efforts in the ACT Proceedings must amount to gross misconduct or gross negligence to preclude recovery (T54–55). The threshold is not so demanding. Rather, the right of recovery will be precluded where it can be demonstrated that the mortgagee acted unnecessarily or unreasonably in incurring the costs.

228 At the hearing before me, Mr Su sought to challenge the merits of the ACT Dismissal Judgment and ACT Appeal Judgment, suggesting that Mr Su's case should not have been dismissed because he had no obligation to compel other persons to provide material to then discover (T54). Mr Su's arguments on these points were completely misconceived. It is not appropriate for me to go behind either of the decisions in the ACT Supreme Court, which tell me all I need to know about Mr Su's conduct so as to categorise his conduct of the ACT Proceedings generally. It is certainly not part of my role to consider or comment on the merits of either decision, despite Mr Su's invitation that I do so.

229 As indicated above, the decision in *Tarkington* is not authority for the proposition that the adverse costs consequences of the dismissal of the ACT Proceedings and the dismissal of the ACT Appeal Proceedings are capable, as between these parties, of answering the description of costs incurred in an attempted enforcement. I also agree with 5 Blackman that *Tarkington* must be distinguished from the present case as Mr Su does not seek to recover the enforcement costs in unsuccessful proceedings against third parties, but rather against 5 Blackman, who has the benefit of numerous costs orders in the ACT Proceedings (T63). This is markedly different from the present case in which Mr Su contends that he has incurred substantial costs in the ACT Proceedings and the ACT Appeal Proceedings, which have led to the dismissal of the ACT Proceedings by reason of his failure to provide proper disclosure in a timely manner.

230 As a result, I consider that Mr Su cannot require 5 Blackman to pay the substantiated costs of $205,820.06 which he incurred in relation to the ACT Proceedings.

The costs orders made in favour of the 5 Blackman

231 As observed by 5 Blackman, it was open to Mr Su to raise any arguments in respect of the making of the costs orders made against him in the ACT Proceedings and the ACT Appeal Proceedings respectively, both of which were proceedings against 5 Blackman (T64). Mr Su failed to do so, and he now wishes to side-step the payment of those costs orders by seeking an indemnity from 5 Blackman as costs incurred in the enforcement of the Deed of Loan and the 3 Blackman Mortgage.

232 Applying *Tomlinson*, I accept the submission of 5 Blackman that there is an *Anshun* estoppel which prevents Mr Su from relitigating against 5 Blackman the determination of costs by the ACT Supreme Court because the issue he now raises in these proceedings is so connected to the subject matter in the ACT Proceedings and the ACT Appeal Proceedings that it was unreasonable in the context of those proceedings for Mr Su not to have raised that issue in those proceedings as a basis for asserting that he was not liable for the costs he was ordered to pay in the ACT Proceedings and the ACT Appeal Proceedings.

233 Essentially, Mr Su has already been found to be liable for the costs of the ACT Proceedings and the ACT Appeal Proceedings and there is a high likelihood it would result in a conflicting judgment in these proceedings if 5 Blackman was found to be liable to pay those costs. To permit Mr Su to recover the costs of 5 Blackman he was ordered to pay in the ACT Proceedings and the ACT Appeal Proceedings would directly contradict with the orders made by McCallum CJ in the ACT Proceedings and by Loukas-Karlsson J in the ACT Appeal Proceedings. As explained above, the likelihood of conflicting judgments — in the sense that they appear to declare rights which are inconsistent in respect of the same issue — supports the existence of an *Anshun* estoppel.

234 I reject Mr Su's submission that it would be unfair or impractical to suggest that the argument he now makes in these proceedings could have, and ought to have, been run before the ACT Supreme Court (T55–56). The mere fact that the validity and enforceability of the Deed of Loan and the 3 Blackman Mortgage were in dispute at that time did not preclude Mr Su from raising the submission that any costs incurred by him pursuant to an adverse costs order is recoverable under the Deed of Loan and the 3 Blackman Mortgage.

235 If I am wrong in my finding concerning the operation of the *Anshun* estoppel point, then the question arises as to whether Mr Su can recover the costs incurred by the orders of McCallum CJ in the ACT Proceedings and Loukas-Karlsson J in the ACT Appeal

Proceedings pursuant to the mortgagee's general right to the costs of attempted enforcement or under the provisions in the Deed of Loan and the 3 Blackman Mortgage.

236 Mr Su observed there are no authorities in which a party who has been unsuccessful in proceedings and has had an adverse costs order made against them but has nonetheless recovered the costs of enforcement and the adverse costs order against the other party to those proceedings (T53). I am not surprised because it involves any entirely novel proposition for which an obvious answer lies. For the same reasons as I have expressed above, I consider that the costs of the adverse costs order made against Mr Su would fall within the category of having been unnecessarily and unreasonably incurred by Mr Su if he sought to recover them from 5 Blackman having already been ordered to pay them to 5 Blackman. Any other result would be absurd.

237 The purpose of a costs order is to compensate the person in whose favour it is made and it is not to punish the person against whom the order is made: *Northern Territory v* ***Sangare*** (2019) 265 CLR 164; [2019] HCA 25, Kiefel CJ, Bell, Gageler, Keane and Nettle JJ at [25]; ***Ohn*** *v Walton* (1995) 36 NSWLR 77, Gleeson CJ at 79; *Allplastics Engineering Pty Ltd v Dornoch Ltd* [2006] NSWCA 33, Tobias J (with whom Santow JA agreed) at [34]. In *Ohn* at 77, Gleeson CJ noted that the test of whether to impose an order for costs against an unsuccessful party is not whether that party had done anything to warrant punishment, but rather, whether, in the circumstances, the other party should be compensated.

238 It is not inconsistent with this principle that costs orders also play an essential role in case management. Although not "punitive", defaults in compliance with procedural directions will often merit a costs order because of the additional cost which the default occasions to the innocent party. This was recognised by the High Court of Australia in *Sangare* at [25]:

> … A guiding principle by reference to which the discretion is to be exercised — indeed, "one of the most, if not the most, important" principle — is that the successful party is generally entitled to his or her costs by way of indemnity against the expense of litigation that should not, in justice, have been visited upon that party. The application of that principle may be modified or displaced where there is conduct on the part of the successful party in relation to the conduct of the litigation that would justify a different outcome. … There was no suggestion of any conduct on the part of the appellant, whether by unreasonable delay or a want of the cooperation required of litigants to ensure the "just resolution of the real issues in civil proceedings with minimum delay and expense", that might have been taken into account to justify refusing the appellant an order for its costs.

239 The costs orders were made against Mr Su because of his own conduct that was non-compliant with procedural requirements in the ACT Proceedings. But that is not to say that they are punitive. Rather, it recognises the increased costs faced by 5 Blackman as

a result of the procedural non-compliance. On this basis, it would be absurd to permit Mr Su to rely on his own procedural shortcoming to recover under the provisions of the Deed of Loan and the 3 Blackman Mortgage.

240 Further, as stated above in respect of Mr Su's own costs in the ACT Proceedings and the ACT Appeal Proceedings, Mr Su unreasonably incurred the costs which are the subject of the costs orders made against him. As the ACT Dismissal Judgment and the ACT Appeal Judgment make clear, Mr Su failed to appear in court when he was required, he delayed in sending the appropriate authorisations to obtain documents and he failed to provide reasons for his inability to obtain documents. Presumably, even if he did not want to ultimately subpoena his law firm, he likely could have avoided these costs orders and continued the ACT Proceedings had he been timely and frank with the court.

The costs of these proceedings

241 Mr Su's evidence did not quantify the costs to date of these proceedings. Rather, he seeks an order that 5 Blackman pay the Plaintiff's costs on an indemnity basis as agreed or assessed.

242 The principles relevant to determination of the appropriate costs order between a mortgagor and mortgagee where the terms of the mortgage indemnity for costs incurred in the proceedings were summarised in *Kyabram Property* by Beazley JA at [11]–[14]:

> [11] The costs of an action in the Court are, pursuant to the provisions of s 76(1)(a) of the *Supreme Court Act* (the Act) "in the discretion of the Court". This provision is subject to the Act and the Rules of Court. Part 52A r 11 of the Supreme Court Rules provides that subject to Pt 52A costs follow the event except where it appears to the Court that some other order ought to be made. Conventionally, costs are awarded on a party/party basis, unless there is some reason for the Court to make a different order.
>
> [12] It is well established that a mortgagee may rely upon its contractual entitlement to costs so as to claim an order other than on a party/party basis. In *Re Adelphi Hotel (Brighton) Limited* [1953] 2 All ER 498, Vaisey J at 502 observed that the prima facie rule was that costs were awarded on a party/party basis unless some alternative basis was shown "*either on some well-recognised principle, or* ***under some contract plainly and unambiguously expressed***". The New Zealand Court of Appeal applied the rule to the payment of a mortgagee's legal costs in a recovery action: *ANZ Banking Group (NZ) Limited v. Gibson* (Court of Appeal) [1986] 1 NZLR 556 at 566, 569.
>
> [13] The application of the principle is well recognised in Australia: see *Inglis and Anor. v. Commonwealth Trading Bank of Australia* (1973) 47 ALJR 234 at 235. In *AGC (Advances) Limited v. West* (1984) 5 NSWLR 301, Hodgson J stated (at 304-305) that at general law a mortgagee was entitled to party/party costs only but that the general law was subject to the precise terms of any provision of the mortgage. Cole J accepted this to be correct in *Sandtara Pty. Limited & Others v. Australian European Finance Corporation Ltd. & Others* (1990) 20 NSWLR 82, at 97.
>
> [14] *AGC v. West* and *Sandtara* were concerned with whether the terms of the mortgage agreement itself provided for costs on a specific basis. The question which arises here is more specific. It is whether the existence of a contractual provision entitling a mortgagee to the costs of litigation in relation to the enforcement of the mortgage governs the parties' entitlements, or whether such a provision is subject to a general discretion in the Court. This question was considered by the Court of Appeal in England in *Gomba Holdings UK Limited & Others v. Minories Finance Limited & Others (No. 2)* [1993] Ch 171. Scott LJ, delivering the Judgment of the Court, after reviewing the cases stated at 194:
>
> > In our opinion, the following principles emerge from the cases and dicta …

(i) An order for the payment of costs of proceedings by one party to another party is always a discretionary order: s.51 of the Act of 1981.

(ii) Where there is a contractual right to the costs, the discretion should ordinarily be exercised so as to reflect that contractual right.

(iii) The power of the Court to disallow a mortgagee's costs sought to be added to the mortgage security is a power that does not derive from s.51 but from the power of courts of equity to fix the terms on which redemption will be allowed.

(iv) A decision by a court to refuse costs, in whole or in part, to a mortgage litigant may be a decision in the exercise of the s.51 discretion or a decision in the exercise of the power to fix the terms on which redemption will be allowed or a decision as to the extent of a mortgagee's contractual right to add his costs to the security or a combination of two or more of these things. The pleadings in the case and the submissions made to the judge may indicate which of the decisions to which we have referred has been made.

(v) a mortgagee is not, in our judgment, to be deprived of a contractual or equitable right to costs to the security merely by reason of an order for payment of costs made without reference to the mortgagee's contractual or equitable rights and without any adjudication as to whether or not the mortgagee should be deprived of those costs."

Section 51(1) of the *Supreme Court Act 1981 (UK)* ,which is in similar terms to s.76 of the *Supreme Court Act 1975 (NSW)* , provides that the costs of proceedings shall be in the discretion of the Court.

243 In respect of whether a mortgagee might be entitled to recover those costs on an indemnity basis, Beazley JA in *Kyabram Property* continued at [15]–[17]:

> [15] In this case senior counsel for Mr. and Mrs. Murray submitted that in the exercise of its discretion, the Court should not accede to the application that costs be on an indemnity basis because, in its claim, repeated through three versions of the Statement of Claim, Kyabram and Banksia sought an order for costs in terms which would conventionally be interpreted as costs on a party/party basis. It was submitted that had Kyabram and Banksia intended to claim costs under their contractual entitlement, they should have specified that in their pleadings. It was submitted that this was a matter of some significance, given that, because of the default under the mortgage, interest on such costs would also be at the default rate. The Murrays submitted that the failure of Kyabram and Banksia to claim costs other than as a conventional incident of the litigation prejudiced the Murrays in any consideration they might give to making an offer of compromise in the proceedings, because the full extent of the claim now made by Kyabram and Banksia had not been pleaded.
>
> [16] There is considerable force in this submission. When Kyabram and Banksia brought this matter to Court, it would be reasonable for the Murrays to assume that they were facing the entirety of their mortgagee's claim against them. On the face of the pleadings there was nothing to indicate that the claim for costs was other than the conventional claim for costs. If any other claim was being made, Kyabram and Banksia should, in my opinion, have specifically pleaded it in accordance with the requirement of Pt 15 r.13(1) of the Supreme Court Rules, which provides that a plaintiff shall plead specifically any matter which, if not pleaded specifically, may take the defendant by surprise.
>
> [17] The requirement is of no small moment. Costs of litigation are a heavy burden in any event. A costs order, if made in the terms of the contractual provision in this case, would be substantially more and would attract interest at the mortgage default rate. The Murrays were entitled to know what claim they were facing so that they could make informed decisions in respect of any step they might take in the litigation, including, but not limited to, making an offer of compromise. Accordingly, I would propose that costs, both at first instance and on the appeal, be on a party/party basis only and be the entirety of the costs to which Kyabram and Banksia are entitled.

244 The Full Court of the Supreme Court of South Australia summarised the relevant principles in *Perpetual Trustees Australia Ltd & Ors v Barker* [2004] SASC 58 at [19]–[22]:

> [19] It is common practice for mortgages and associated agreements to include covenants and terms of this type, thus rendering it necessary for courts to consider the interaction between such agreements and the discretionary power to award costs.
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> [20] In *Gomba Holdings (UK) Ltd v Monories Finance Ltd* [1993] Ch 171 at 194 the Court of Appeal, whilst recognising the discretionary nature of costs orders, held that where there is a contractual right to costs, the discretion should ordinarily be exercised so as to reflect that right.
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> [21] This approach was followed by the Full Court in *Citibank v Pirrotta & Ors* (Full Court of Supreme Court of SA, 1 April 1998, unreported) with the qualification that the mortgagee should be limited to party and party costs unless the mortgage contract plainly and unambiguously provides for taxation on some other basis.
>
> [22] The effect of clauses bestowing such rights on mortgagees will depend upon their interpretation in each case and they will not be given effect so as to place mortgagors in a less favourable position than would otherwise be the case unless they are unambiguously expressed.

245 I consider that the question of what costs order I should make in these proceedings should await argument from the parties based on the reasons which I have expressed in this judgment.

ISSUE THREE: IS THE DEFAULT INTEREST RATE A PENALTY

246 Mr Su seeks repayment of interest on the Principal Outstanding, which accrued under the Deed of Loan at 2% per month until 8 February 2020 (Mr Su having agreed in the email correspondence set out below to extend the Discount Interest Rate to that date) and 3% per month thereafter (compounded monthly). 5 Blackman's primary submission is that the default interest rate, calculated at 3% compounded monthly after the first four months at the Discount Interest Rate of 2% compounded monthly, is unenforceable as a penalty.

247 5 Blackman also attempted to raise in its closing submissions that the 2% Discount Interest Rate was also unenforceable as a penalty (T65). As I have stated above, I agree with Mr Su — and it was conceded by 5 Blackman (T65) — that this defence was not pleaded (T51). I consider it would be unjust to require Mr Su to meet a case which was not pleaded. In any case, it is difficult to see how such a submission could succeed insofar as the 2% Discount Interest Rate was agreed between the parties and does not operate *ad terrorem* upon default under the Deed of Loan to motivate performance under it (the latter being a necessary characteristic of a penalty).

Extension of Discount Interest Rate

248 As outlined above, from 15 October 2019, Mr Su sent several emails to Mr Noumeir and Mr Kamal notifying them that they were in default, having failed to repay the amount owing under the Deed of Loan by 8 September 2019, and that the Interest Rate of 3% applied.

249 On 12 February 2020, Mr Su sent an email to Mr Kamal and Mr Noumeir stating that the "grace period for 2% Discount Interest Rate" finished on 8 February 2020 and a "3% Interest Rate per month is to be charged since 08/03/2020 for the rest of money owing period". This communication was then followed shortly after by the letters sent on

20 February 2020 by Summer Lawyers (on behalf of Mr Su) to each of 5 Blackman and Mr Kamal with default notices attached, which noted that "interest, fees and charges continue to accrue" until the amount owing was paid.

250 The operation of the relevant provisions of the Deed of Loan is not in dispute. The initial Discount Rate of interest was 2% per month (or 24% per annum) for the period of the loan (three months), with the option to extend the Discount Rate for one further month. Upon default, the amount of interest payable was calculated at the Interest Rate of 3% per month (or 36% per annum). As explained above, the interest payable on the loan compounds monthly because the interest is calculated on the Principal Outstanding, which includes Money Owing, which in turn includes interest.

Legal principles

251 The question of whether an interest rate is an unenforceable penalty is a question of construction to be determined upon the terms and the circumstances of the particular agreement, judged as at the time of contracting (and not as at the time of the breach): *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, Lord Dunedin at 86.

252 The principles applicable to determining whether a contractual provision is unenforceable as a penalty were summarised in *B&G Properties Pty Limited v Fayad* [2021] NSWSC 1382 by Ball J at [29]–[30]:

> [29] A contractual stipulation the essence of which is to punish the other party for a breach of contract will be unenforceable as a penalty: see Paciocco v Australia & New Zealand Banking Group Ltd (2016) 258 CLR 525 (**Paciocco**); Arab Bank Australia Ltd v Sayde Developments Pty Ltd (2016) 93 NSWLR 231 (**Arab Bank**). The impugned stipulation must solely (Paciocco at para [166] per Gageler J) or predominantly (ibid at para [221] per Keane J) be punitive in nature. The question whether a contractual stipulation is penal in nature directs attention to whether the sum stipulated is extravagant and unconscionable (see Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd [1915] AC 79 at 87 per Lord Dunedin; Paciocco at para [29] per Kiefel J; Arab Bank at para [74] per McDougall J (citations omitted)). The party who impugns a contractual stipulation as a penalty bears the evidentiary and persuasive onus of proving that that stipulation meets the relevant requirements: see Paciocco at para [167] per Gageler J; Arab Bank at para [75] per McDougall J). Whether a contractual stipulation for the payment of a sum of money on breach of contract is so extravagant and unconscionable as to amount to a penalty is to be judged by reference to the circumstances that existed at the time the contract was made: see Paciocco at para [62] per Kiefel J, para [169] per Gageler J; Arab Bank at para [74] per McDougall J. See also Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd; Guan v Linfield Developments Pty Ltd [2017] NSWCA 99 at [329]–[330] per Ward JA).
>
> [30] The penalty doctrine operates as an exception to freedom of contract: see Arab Bank at [105] per McDougall J). Accordingly, when applying the doctrine, "courts will not lightly invalidate a contractual provision for an agreed payment on the ground that it has the character of a punishment" (Paciocco at para [220] per Keane J).

253 This summary was approved on appeal in *Fayad v B&G Properties Pty Ltd* [2022] NSWCA 129 by Leeming JA (with whom Bell CJ and Basten AJA agreed) at [33].

254 Where the relevant contractual provision is an increase in the rate of interest imposed upon the borrower's default under a loan, the authors of Fisher & Lightwood's Law of Mortgage observe at [3.18]:

> It is a well settled, if not an intelligible, rule that if the mortgagee wishes to stipulate for a higher rate of interest in default of punctual payment he must reserve the higher rate as the interest payable under the mortgage and provide for its reduction in case of punctual payment: *Strode v Parker* (1694) 2 Vern 316; 23 ER 804. An agreement to pay a higher rate for non-payment at the appointed time is considered to be a penalty against which equity may give relief: *Wallingford v Mutual Soc* (1880) 5 App Cas 685.
>
> Lord Eldon criticised this distinction as preferring form over substance as early as early as 1802: *Seton v Slade* (1802) 7 Ves 265 at 273-4; 32 ER 108 at 111. The distinction is now too well entrenched to be altered: *Meredit* (1916) 32 LQR 420; *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 at 366-7; *Davis Securities Pty Ltd v Commonwealth Bank of Australia* (1990) 23 FCR 1 at 29 (reversed on other grounds (1992) 174 CLR 353).

255 The authors of Fisher & Lightwood's Law of Mortgage continue at [39.55]:

> For the rule that if the mortgagee wishes to stipulate for a higher rate of interest in default of punctual payment, he must reserve the higher rate as the interest payable under the mortgage, and provide for its reduction in case of punctual payment, see [3.18]. The mortgagee cannot effect this object by reserving the lower rate, and making the higher the penalty for non-payment at the appointed time, because, it is said, an agreement of the latter kind, being *nomine poenae*, is relievable in equity: *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 702; *Belmore (C J) Pty Ltd v AGC (General Finance) Ltd* [1976] 1 NSWLR 507; *Kelles-Sharpe v PSAL Ltd* [2012] QCA 371.

256 The principle applicable to determining whether an increase in interest rate upon default constitutes an unenforceable penalty were helpfully summarised recently in ***JCP Holdings*** *Pty Ltd v Ulrich Pty Ltd* [2025] NSWSC 911 by Pike J at [73]–[82]:

> [73] The defendants placed principal reliance on the decision of Robb J in *Bellas v Powers* [2023] NSWSC 1198 (***Bellas***), which in turn relied heavily on the decision of Meagher JA (sitting at first instance) in *Aquamore Credit Equity Pty Ltd v Hung* [2021] NSWSC 1681 (upheld on appeal – see *Hung v Aquamore Credit Equity Pty Ltd* [2022] NSWCA 272).
>
> [74] *Bellas* concerned a Facility Agreement which contained a Standard Rate of interest of 9.75% per 30 days, and a Discounted Rate of 1.75% per 30 days: see *Bellas* at [38]. The Agreement provided that interest was payable at the Standard Rate provided that if no Event of Default has occurred or remains subsisting, the Financier shall accept interest at the Discounted Rate. The Agreement also provided for any unpaid interest to be capitalised monthly and for default interest to be paid at the Standard Rate, capitalised monthly.
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> [75] At [56], Robb J observed that the Discounted Rate of 1.75% per 30 days annualised to 21.3% per annum. At [57], Robb J observed that the Standard Rate of 9.75% per 30 days annualised to 118.6% per annum, but when the effect of monthly capitalisation is recognised, the effective rate for the first year would be approximately 200% per annum, greater than 600% during the second year, and so on exponentially.
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> [76] Having set out the relevant principles from McDougall J's judgment in *Arab Bank*, Robb J stated at [64] to [67]:
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> > [64] In *Yarra Capital Group Pty Ltd v Sklash Pty Ltd* [2006] VSCA 109 (*Yarra Capital*), Chernov JA (with the agreement of Warren CJ) noted with apparent approval that in *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1447, Diplock LJ had said that, although the onus of showing that a stipulation is a penalty lies upon the party who is sued upon it, the terms of the clause may be sufficient to give rise to the inference that it is a penalty.
> >
> > [65] *Bay Bon Investments Pty Ltd v Selvarajah* [2008] NSWSC 1251 was a case in which the defendant called no evidence. White J (as his Honour then was) made the following observation concerning the evidentiary onus on the issue of whether a particular provision was a penalty:
> >
> > > [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]).

[66] As I have said previously in *First Cash Flow Solutions Pty Ltd v Saad* [2023] NSWSC 686:

> [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.

[67] Consequently, although the burden of proving that a contractual provision is a penalty always remains on the party who makes that claim, which in the context of a loan agreement will generally be the borrower, the lender will need to tender the contract to prove the debt claimed, and the terms of the contract will constitute evidence that may cause an evidentiary onus to shift to the creditor. As the interests that the challenged provision is intended to protect will be the interests of the creditor, and as the information relevant to the need for the creditor to be able to rely upon the provision to protect those interests may be solely within the creditor's province, the failure of the creditor to lead evidence beyond the contract may have the effect that the presumption operates, notwithstanding its weakness.

[77] At [71] and following, Robb J considered whether the imposition of the Standard Rate is a penalty in that case. Appreciating that the circumstances of each case must be carefully considered (see the remarks of Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 86-87), the following paragraphs from Robb J's judgment are of some relevance in the present case:

> [73] Starting with Ward JA's proposition that the Court should first identify the interests which are sought to be protected by the impugned provision, the only interests suggested by the Powers in the present case is their interests as lenders to earn the greatest amount of interest on their loan funds that was sustainable in the market in which they operated, which was the market for relatively high risk short-term loans on the security of a mortgage over real property. The same was the case in *Aquamore*. This is not a case, such as was considered by Ward JA in *Guan v Lindfield Developments Pty Ltd*, where the party seeking to enforce the collateral stipulation had a commercial interest in the opportunity to develop land and share in the profits of a development, in circumstances where it had already invested considerable funds and effort.
>
> [74] There was no objective evidence in this case of the interest rates obtainable by creditors in the market for short-term loans secured by a mortgage over real property. It is a reasonable inference that the personal covenants of Artos, as the Borrower, and Mr Bellas, as the Guarantor, to repay the Money Owing were risky, but the fact that the Advance was secured by a first registered mortgage over the two properties would have significantly diminished the ultimate risk. I am prepared to infer that the Discounted Rate, being a rate agreed between the parties at arm's length, was consistent with there being a market for the provision of bridging finance for short periods at rates up to that amount. In *Aquamore*, Meagher JA made that finding in respect of the greater amount of 30% per annum.
>
> …
>
> [78] The evidence does not support a finding that the occurrence of any particular Event of Default, or even any Event of Default at all, would sufficiently increase the credit risk profiles of the Obligors to justify an increase in the applicable interest rate from the Discounted Rate to the Standard Rate.
>
> [79] I conclude, as did Meagher JA in *Aquamore* at [143], that the effect and purpose of clause 7.1 "was to discourage any action or inaction on the part of the Borrower that might result in an Event of Default and did so by the imposition of a sufficiently exorbitant interest rate to have that

consequence." While the doubling of the interest rate was considered to be exorbitant in that case, I find that, more so in this case, the increase in the interest rate by a factor of over 4 was exorbitant.

257 In *JCP Holdings*, Pike J concluded that the default interest rate of 8% per month on the balance of the loan outstanding, capitalised monthly, was unenforceable as a penalty. His Honour's reasoning is relevant to the present case:

> [87] As a starting point I am conscious that the default interest provision was freely included in the Loan Contract. As Sackville AJA observed in *Arab Bank* at [7]:
>
> > [7] The present case is a very good example of a contractual arrangement that should not attract the penalty doctrine. A corporation, apparently perfectly capable of acting in its own interests, borrows a large amount of money from a bank to assist with a commercial undertaking. The borrower agrees to pay additional interest in the event of default, for the period the default continues. There is no suggestion that the borrower has been misled or subjected to improper or unfair tactics. When the borrower defaults, it pays the additional interest and then seeks to recover the amount it has paid on the ground that the provision requiring payment of additional interest is a penalty and therefore unenforceable.
>
> [88] I am also conscious of the circumstances in which the Loan Contract was entered into and in particular that it could be said that the plaintiff was providing bridging finance of last resort. Like Robb J in *Bellas*, at [74], I am prepared to infer that there is a market for the provision of bridging finance for short periods at rates up to the monthly rate payable for the two months of the loan.
>
> [89] Although the defendants bear the ultimate onus of demonstrating that the clause is a penalty, this is a case like that considered by Robb J in *Bellas* and Robb J in *First Cash Flow Solutions Pty Ltd v Saad* [2023] NSWSC 686 where the contract itself is 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: see also *Bay Bon Investments Pty Ltd v Selvarajah* [2008] NSWSC 1251 at [51] per White J.
>
> [90] In the present case, the effect of the capitalisation of the rate of 8% per month is an annual rate in year one of something in the order of 151% and in year two of approximately 382%. Interest for year one would be approximately $683,000 and approximately $1.7 million in year two.
>
> [91] No evidence was adduced by or on behalf of the plaintiff as to the interests of the plaintiff that the clause was intended to protect. That evidence was obviously entirely within the knowledge of the plaintiff. The evidence simply established that the plaintiff has had dealings with the broker, Mr Del Baglivo, over the past one and a half years and he has assisted the plaintiff, or those behind it, with several private lending arrangements and opportunities.
>
> …
>
> [95] Having regard to the exorbitant effect of the capitalisation in the present case, and absent the identification by the plaintiff of any legitimate interest of the plaintiff that the clause is designed to protect, I am driven to the conclusion that the predominant purpose of the clause is to punish the defendants for breach, and thus compel performance.

258 In *Crescent Capital*, Rees J at [66]–[70] provided the following comprehensive review of the relevant authorities (including *JCP Holdings*):

> [66] In *Aquamore Credit Equity Pty Ltd v Hung* [2021] NSWSC 1681 (upheld on appeal in *Hung v Aquamore Credit Equity Pty Ltd* [2022] NSWCA 272), the interest rate was 30% per annum but increased to 60% per annum in the event of default. Meagher JA held that the clause amounted to a penalty. His Honour considered that the lower interest rate charged at the commencement of the loan reflected what the parties regarded as a commercially acceptable interest rate, having regard to the lender's then assessment of the borrower's credit risk and the nature of the finance as short-term lending for the purpose of property development: at [142]. Doubling that interest rate could not have been thought at the time to be a genuine pre-estimate of an interest rate that would take account of the increased credit risk that the borrower represented in the event of default; rather, it was intended to discourage actions that might result in an increased credit risk by imposing a sufficiently exorbitant interest rate to have that effect: at [143], [145].

> [67] In *Bellas v Powers*, an interest rate of 21.3% per annum was increased to 118.6% per annum on default. Robb J referred to "the exorbitance of the difference": at [72]. Unpaid interest was capitalised and, when this was taken into account, resulted in interest of 200% in the first year, 600% in the second year and so on exponentially: at [57]. His Honour accepted that the lenders had an interest to protect, being their ability to enjoy interest on their monies in the market in which they operated, extending bridging finance secured by a mortgage over real property: at [73]. But the evidence did not support a finding that, in the event of any default at all, the credit risk would increase sufficiently to justify the exorbitant increase in interest rate: at [78]-[79].
>
> [68] In *JCP Holdings,* Pike J considered a short-term loan where default interest applied on and from the third month, with default interest to be paid at 8% per month on the balance of the loan outstanding and capitalised monthly. The provision had the result that interest of 151% per annum was payable in the first year, and 382% interest payable in the second year. As to the lender's interest sought to be protected, there was some evidence that the moneys, if repaid on time, would have been used to pay interest on loans. Pike J concluded that the provision was a penalty, "Having regard to the exorbitant effect of the capitalisation … and absent the identification … of any legitimate interest of the plaintiff that the clause is designed to protect, I am driven to the conclusion that the predominant purpose of the clause is to punish the defendants for breach, and thus compel performance": at [95].
>
> [69] Similarly, in *Xu v Cao & Du Management,* a loan of $3.3 million increased to over $71 million in seven years due to "staggering" default interest provisions. Specifically, default compound interest was 3% per month. Beyond the fact that the unsecured loan was risky, there was no evidence that the compounding interest rate was a genuine pre-estimate of loss, where Elkaim AJ noted that a guarantee given in respect of the loan was designed to lessen the risk: at [120]. His Honour concluded that the compounding interest rate was in "extravagant or unconscionable disproportion" and therefore unenforceable as a penalty: at [121].
>
> [70] Closer to the facts at hand is *Fayad v B & G Properties Pty Ltd* [2022] NSWCA 129, where both the lender and borrower were experienced property developers. The lender had recently enjoyed a return on an investment of some 27.5% per annum over four years and was seeking to reinvest those funds. No issue was taken about an interest rate of 25% per annum for a short-term loan of six months for the purposes of property development. On default, the interest rate increased to 30% per annum, which was "a relative increase of one fifth", reflecting "a modest increase": at [36]. The default rate was not penal.

259 In *Crescent Capital*, her Honour held on the evidence that cl 13.3 of the Loan Agreement (which increased the interest rate by 10% per annum on a failure to repay and 5% per annum for all other default events) was not a penalty.

Consideration

260 As a starting point, I must recognise that the penalty doctrine operates as an exception to the freedom of contract and "courts will not lightly invalidate a contractual provision for an agreed payment on the ground that it has the character of a punishment": Paciocco v Australia & New Zealand Banking Group Ltd (2016) 258 CLR 525, Keane J at [220].

261 Neither party in this transaction appears to be a sophisticated commercial party, as Mr Su loaned funds in his personal capacity, he had met Mr Noumeir through his church, and Mr Kamal only came to be party to this transaction through his prior dealings with Mr Noumeir.

262 Mr Su raised an argument in opening submissions that the 3% interest rate cannot be characterised as "default interest" because the Deed of Loan designed the 2% rate as the "Discount Interest Rate" and the 3% rate as the "Interest Rate" (T5).

263 In my opinion, the nomenclature the parties assign to the different rates of interest are not determinative and cannot preclude the proper conclusion that an interest rate which increases from 2% to 3% upon the borrower defaulting under a loan agreement is a "default rate" in the sense necessary to engage the penalty doctrine. Any other conclusion would be contrary to the various decisions in which judicial officers have found that interest rates labelled as the 'Discount Rate' (or similar labels) were penalties: for example, *JCP Holdings* and ***Bellas*** *v Powers* [2023] NSWSC 1198.

264 I accept Mr Su's submission that 5 Blackman bears the onus of demonstrating that the interest provision in the Deed of Loan is a penalty. However, I am of the opinion that this matter is akin to those in *Bellas*, *First Cash Flow Solutions Pty Ltd v Saad* [2023] NSWSC 686 and *JCP Holdings* where the Deed of Loan itself is evidence 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 Mr Su to call evidence to explain why it is not: *JPC Holdings* at [89]; *Bay Bon Investments Pty Ltd v Selvarajah* [2008] NSWSC 1251, White J at [51].

265 In determining whether the default interest rate is an unenforceable penalty, I cannot consider the effect that the addition of various sums (including enforcement costs) which Mr Su claims should be added to Principal Outstanding would have on the increase in the interest owed.

266 The vastly different compounding operation of the interest provision under the terms of the Deed of Loan depending on which interest rate is applicable is best demonstrated in the table below which uses Mr Su's two different calculations of the Principal Outstanding alleged to be payable by 5 Blackman to Mr Su as at 9 March 2026 under the Deed of Loan if the 3% Interest Rate is used or if the 2% Discount Interest Rate is used, excluding the enforcement costs claimed. Scenario A reflects the agreement

under the Deed of Loan with interest accruing at 3% compounding monthly. Scenario B reflects the agreement under the Deed of Loan with interest accruing at 2% compounding monthly.

	Scenario A **3% compounding**	**Scenario B** **2% compounding**
Amount owing as at 9 March 2026	$187,106.26	$53,775.15

267 As is clear from these calculations, the monetary impact on 5 Blackman of compounding interest at 3% compared to compounding interest at 2% is nearly 350% greater.

268 I accept 5 Blackman's submission that Mr Su failed to adduce any evidence that would satisfy me that the increased interest rate upon default is commercially justifiable as opposed to a punitive measure designed to incentivise compliance with the Deed of Loan (T10, T66).

269 It appears to me that cl 4.1 of the Deed of Loan had as its predominant purpose to punish the borrower for breach and, therefore, to compel performance. It was stipulated to operate *in terrorem* upon any default. It is not a genuine pre-calculation of the loss that Mr Su would suffer (or the pitfalls associated with the increased risk under the Deed of Loan) upon default.

270 In the context of this transaction, where Mr Su had security in the form of equitable mortgages over two properties (the 3 Blackman Property and the 5 Blackman Property) and his risk under the Deed of Loan did not materially increase upon Mr Kamal and Mr Noumeir's default, there is no apparent justification for the default interest rate that might otherwise preclude the finding that it is a penalty.

271 In closing submissions, Mr Su directed my attention to two cases where this court has accepted and left undisturbed interest rates similar, or higher, than the interest rate in the instance case. Those two cases are:

(1) In ***HomeSec*** *Finance Express Pty Ltd v Richardson* [2012] NSWSC 1375, in which Button J did not consider that a rate of simple interest of 12% per month (144% per annum) was either unjust or unconscionable.

(2) In ***Guardian*** *Mortgages Pty Ltd v Miller* [2004] NSWSC 1236; (2004) 12 BPR 22,833, Wood CJ at CL did not consider that a rate of simple interest of 14.5% per month (174% per annum) was either unjust or unconscionable.

272 I reject Mr Su's submissions that either of these cases provide any proper basis upon which I can decide the present case. Neither was a case about whether the interest rate was a penalty and instead were determinations about whether the interest rate was unjust or unconscionable. In addition, notably in both cases, the rate of interest was simple interest and the determinations reached turned on a lack of evidence on which

to determine whether the rates were within the range for "very short term, high risk lending" (*HomeSec* at [156]) or "commercial bridging or short term loans" (*Guardian* at [105]). In *HomeSec* , Button J noted the absence of any evidence on which to determine that the default rate went "beyond what was reasonably necessary to protect the interests of the plaintiffs" (at [208]) and expressly held that "[i]f the plaintiffs had sought to enforce the contract on the basis of compound interest, I would have regarded that as not being reasonably necessary for the protection of the legitimate interests of the plaintiffs" (at [209]).

273 Further, the observations of Robb J in Arab Bank Australia Ltd v Sayde Developments Pty Ltd (2016) 93 NSWLR 231 at [94] confirm that these cases did not engage with the issue of whether a provision is a penalty which arises in the present case (emphasis added in bold):

> Finally, the Powers relied upon two further cases in support of the proposition that there have been multiple examples where highly experienced judicial officers have accepted and left undisturbed interest rates in the vicinity of, or even higher than, those applicable under the Facility Agreement. In one case, *HomeSec Finance Express Pty Ltd v Richardson* [2012] NSWSC 1375, Button J did not find that a rate of interest of 12% per month was either unjust or unconscionable. In *Guardian Mortgages Pty Ltd v Miller* [2004] NSWSC 1236; (2004) 12 BPR 22,833, Wood CJ at CL did not find that a rate of interest of 14.5% per month was either unjust or unconscionable. That may be true, but the issue in each case was not whether a contractual provision was a penalty. In each case, the issue was whether the interest term was unjust or unconscionable under the *Contracts Review Act 1980* (NSW), or other statutory grounds for reviewing conduct found to be unconscionable. In the former case, Button J noted that the contract in question permitted the lender to capitalise unpaid interest at the high rate specified in the contract, but that the lender had not sued the borrower on the basis that unpaid interest had been capitalised. Though his Honour accepted that the amount claimed was not unconscionable, he found that a claim on the basis of capitalised interest would have been unconscionable. **The issues the subject of these cases were far removed from the present, and the judgments do not persuade me that clause 7.1 of the Facility Agreement should not be found to be a penalty in this case.**

274 I do not consider either *HomeSec* or *Guardian* as persuasive, let alone determinative, on the issue of whether the default interest rate under the Deed of Loan is unenforceable as a penalty.

275 I am of the opinion that the contractual provision for default interest in the Deed of Loan is a penalty and therefore unenforceable.

ISSUE FOUR: THE CROSS CLAIM

276 5 Blackman filed the Cross-Claim on 31 January 2024. Regrettably, the submissions relating to the Cross-Claim were only brief and cursory in 5 Blackman's oral and written submissions at the hearing.

277 The Cross-Claim was brought against Mr Su, Mr Noumeir and Mr Kamal. The crux of the allegations can be summarised as follows:

(1) Mr Noumeir owed 5 Blackman fiduciary duties as its sole director pursuant to the *Corporations Act* and under the general law. Mr Noumeir breached his fiduciary duties by executing the Letter of Offer, the Deed of Loan, the 3 Blackman Mortgage and ancillary documents insofar as he permitted the

drawdown of the loan as part of a dishonest and fraudulent design to use the properties owned by 5 Blackman as security for a purpose that caused a detriment to 5 Blackman, did not benefit 5 Blackman, exposed 5 Blackman to risk that Mr Su would seek to enforce its security over the properties and involved the use of Mr Noumeir's position that was not within the purpose for which 5 Blackman had been formed and which transgressed ordinary standards of honest behaviour. On this basis, 5 Blackman seeks equitable compensation from Mr Noumeir.

(2) Mr Kamal received trust property (i.e., the money under the Deed of Loan) with the knowledge that it had been obtained by Mr Noumeir in breach of his fiduciary duties owed to 5 Blackman. On this basis, 5 Blackman seeks equitable compensation from Mr Kamal.

(3) The paragraphs of the Cross-Claim which alleged that Mr Su participated in or had knowledge of Mr Noumeir's breach of his fiduciary duties were struck out by Hammerschlag CJ in Eq on 28 June 2025.

(4) The only remaining allegations made against Mr Su was that the Deed of Loan and Mortgage were not enforceable because Mr Su obtained the rights under the Deed of Loan and the Mortgage in circumstances arising out of Mr Noumeir's breach of fiduciary duty as part of the dishonest and fraudulent design which transgressed ordinary standards of honest behaviour. On this, Mr Su submitted that this has no substance and cannot intelligibly give rise to a defence insofar as the material facts (summarised at (3) above) that support the claim were struck out by Hammerschlag CJ in Eq (T5).

278 As explained above, Mr Noumeir has accepted judgment by consent against him. 5 Blackman contends that this means he accept judgment against him in terms of what has been pleaded against him (T71). The terms of orders made by consent state:

> By consent, the Court orders that:
>
> 1. Judgment be entered in favour of the cross-claimant as against the second cross-defendant.
>
> 2. The second cross-defendant must compensate the cross-claimant for any and all costs, damages and Judgment that the cross-claimant is found to be liable as against the plaintiff.
>
> 3. The second cross-defendant pay the cross-claimants costs on an indemnity basis.

279 The legal effect of a consent judgment was discussed in *Damm v Coastwide Site Services* Pty Ltd [2017] NSWSC 1361 by Garling J at [51]–[57]:

> [51] In *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* [1998] HCA 78; (1998) 196 CLR 53, Callinan J at [98] describes the issue which in part falls for consideration on these Motions in this way:
>
> > This appeal is concerned with the liability of concurrent tortfeasors to one another in circumstances in which one tortfeasor has obtained judgment in its favour by consent of the plaintiff. The question is whether a tortfeasor who has sought indemnity or contribution from another tortfeasor who has had a [consent] judgment entered in its favour against the plaintiff, is, as a result of that judgment, precluded from

> obtaining indemnity or contribution. The answer to the question depends upon the proper construction of s 5(1) of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW).

[52] In *Seltsam*, the High Court, by a majority, held that entry of a consent judgment in favour of a defendant established that it was not liable to a plaintiff and, accordingly, it was absolved from all liability to other defendants who were seeking to claim contribution pursuant to s 5(1)(c) of the Law Reform (Miscellaneous Provisions) Act.

[53] Gaudron and Gummow JJ considered the appropriate course open to a cross-claimant in the circumstances. They noted that the appellant, which was the cross-claimant, had not taken all steps that were open to it to protect and advance its position. Their Honours noted at [17]ff:

> The Tribunal, as a court of record, had an overriding power to control its own proceedings and was not obliged to act upon the request by some of the parties before it that consent orders be entered. The appellant had the right to be heard before the Tribunal entered the consent judgment in favour of the respondent against the plaintiff in the plaintiff's action.
>
> …
>
> The appellant might have sought deferral of the entry of judgment in favour of the respondent until determination of the issue of liability of the appellant to the plaintiff for the purposes of the appellant's contribution claim against the respondent. In the process of negotiation between the parties, various options might have been available. A release agreed between the plaintiff and one tortfeasor would not necessarily have released the others. Further, the respondent concedes that, if the plaintiff had released the respondent without a judgment, then the appellant could have maintained its action for contribution.
>
> Against any decision by the Tribunal to enter consent judgment as sought by the respondent and the plaintiff but against the wishes of the appellant, the appellant would have standing to appeal. By that means, the appellant would have kept in play the question whether it was entitled to recover contribution from the respondent. …

[54] In expressing their conclusions, their Honours said at [40]ff:

> However, in the present litigation, the order dismissing the plaintiff's action against the respondent was a final order which brought that action to an end. It would be a distortion of the text and structure of par (c) of s 5(1) to hold in those circumstances that the respondent thereafter answered the description of one yet to be sued. The plaintiff's cause of action against the respondent merged in the judgment, thereby destroying its independent existence.
>
> The status of the Tribunal as a court of record was such that the circumstance that the judgment in favour of the respondent was entered by consent renders it no less effective to absolve the respondent from liability to the plaintiff. It was for the appellant to have taken the necessary steps to oppose that entry of judgment and to have put itself in the procedural position whereby it was competent to appeal against that entry. In the meantime, whilst that judgment remained on the record of the Tribunal, the respondent did not answer either of the statutory descriptions necessary to confer entitlement on the appellant to proceed against it for contribution.
>
> With respect to the first limb, the respondent had not been adjudged liable to the plaintiff. Rather, it had succeeded in establishing the opposite. With respect to the second limb, the presence of the judgment in the respondent's favour denied it the character of a party still awaiting a final determination of a suit in respect of the damage sustained by the plaintiff.

[55] Callinan J agreed with Gaudron and Gummow JJ that the respondent as a consequence of having judgment entered in its favour, did not fall within either of the classes of litigants contemplated by s 5(1)(c) of the Act, that is, it was not liable nor, if sued, would it have been liable. His Honour also was critical of the appellant for failing to make it plain by an application to the Tribunal that judgment should not be entered. He said at [133]:

> It is not as if here the appellant made an application to his Honour Judge Johns to abstain from entering judgment in favour of the respondent. Had the appellant done so, and the judge refused to abstain from entering judgment then the appellant might have been entitled to appeal against that refusal. All that the appellant did was simply to assert that the judgment entered by consent could have no prejudicial effect upon it with respect to the contribution proceedings.

> [56] His Honour went on to point out that his conclusion accorded with authority which could be taken to have been settled for many years.

> [57] The circumstances here are analogous to *Seltsam*. A consent judgment has been entered. It provides a judgment in favour of Leightons with respect to the plaintiff's claim against it. The effect of this is that any of the cross-claims, to the extent that they depend upon the claim for indemnity or contribution under the Law Reform (Miscellaneous Provisions) Act, against Leightons as a tort-feasor must fail.

280 In *AIG Australia Ltd v Hanna* [2024] NSWCA 91, Mitchelmore JA (with whom Payne JA and Griffiths AJA agreed) stated at [66]–[68]:

> [66] I note that AIG advanced ground 6 in the alternative to ground 5. In the written submissions on ground 6, AIG contended that her Honour should not have entered the consent judgment at the behest of the parties as the judgment "unilaterally" affected its rights (AWS [60]). It relied in this regard on *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53; [1998] HCA 78 ("James Hardie").

> [67] The decision in *James Hardie* concerned a statutory right to contribution in s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) for two categories of joint tortfeasor: (a) one who is liable for damage; and (b) one who would, if sued, be liable for that same damage. In *James Hardie*, after a trial involving three defendants had commenced, consent judgments were entered in favour of the plaintiff against two defendants, and in favour of the third defendant against the plaintiff. The Court, by majority, concluded that a claim by the two defendants found liable against the third defendant was no longer available under s 5(1)(c), as that defendant did not satisfy either of the categories of joint tortfeasor.

> [68] By contrast with the legal effect of the consent judgment in *James Hardie*, the consent judgment that the primary judge entered did not determine AIG's liability under the Policy for the sum that Mr Hanna was ordered to pay Mr Hasan. The settlement did not preclude AIG from contending that it was not liable under the Policy on the construction of cl 5.00 on which it relied, or because Mr Hanna had not proved that he was liable to Mr Hasan, or that the settlement was not objectively reasonable. Ground 6 should be dismissed.

281 I am satisfied that the legal effect of the consent judgment did not preclude Mr Kamal from contending that he was not liable for knowing receipt of trust property, and particularly, he was not precluded from contending that Mr Noumeir had not breached his fiduciary duties in obtaining the loan from Mr Su.

282 In any event, I am satisfied that the Cross-Claim can be dismissed against Mr Kamal in the present case simply because he cannot be said to have received any trust property of 5 Blackman. This is because Mr Kamal received loan funds from Mr Su in his own capacity for which he was directly liable to Mr Su under the terms of the Deed of Loan. Mr Kamal also repaid $100,000 of the debt owing by him to Mr Su under the Deed of Loan on 27 November 2020. As no other basis than the receipt of trust property by Mr Kamal was put forward for any liability that he may have to 5 Blackman, it is unnecessary to consider Mr Kamal's liability any further.

ORDERS

283 Based on the determinations I have made above, Mr Su was only entitled to recover $53,775.15 as at 9 March 2026 from 5 Blackman on the agreed calculations provided to me, being interest calculated at the Discount Interest Rate of 2% and no recovery of any enforcement costs. Clearly, those calculations need to be updated to the present date. Further, Mr Kamal is entitled to the dismissal of the Cross-Claim against him and, subject to any contrary submission, an order for costs in his favour against 5 Blackman.

284 The order I make is for the parties to email the Associate to McGrath J a set of agreed short minutes of order to give effect to this judgment by 4pm on 30 July 2026, failing which they are to provide competing submissions of not more than two pages (12 font, 1.5 spacing) with respective proposed short minutes of order and any material on which they rely by 6 August 2026. In either case, I will determine the orders to be made in chambers.

285 Once the final orders have been made in chambers, I will also direct that a copy of these reasons and the final orders be provided to Chief Justice McCallum of the ACT Supreme Court. These reasons and those final orders will be relevant to the further order to be made for the disposition of the funds held by the ACT Supreme Court in the ACT Proceedings.

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Decision last updated: 23 July 2026