Supreme Court

New South Wales

Case Name:	JCP Holdings Pty Ltd v Ulrich Pty Ltd
Medium Neutral Citation:	[2025] NSWSC 911
Hearing Date(s):	15 and 16 July 2025
Date of Orders:	15 August 2025
Decision Date:	15 August 2025
Jurisdiction:	Equity - Real Property List
Before:	Pike J
Decision:	Loan contract not void for uncertainty, default interest unenforceable as a penalty.
Catchwords:	CONTRACTS – Construction – Interpretation – where multiple interest rate clauses in Loan Agreement – whether contract void for uncertainty – no question of principle CONTRACTS – Construction – Penalties – whether compounding interest clause constituted penalty – no question of principle
Legislation Cited:	Civil Procedure Act 2005 (NSW), s 100
Cases Cited:	Aquamore Credit Equity Pty Ltd v Hung [2021] NSWSC 1681 Arab Bank Australia Ltd v Sayde Developments Pty Ltd (2016) 93 NSWLR 231; [2016] NSWCA 328 Bay Bon Investments Pty Ltd v Selvarajah [2008] NSWSC 1251 Bellas v Powers [2023] NSWSC 1198 Belrose RB1 Pty Ltd v Oldfield [2025] NSWSC 603 Commercial N Pty Ltd v Huang [2024] NSWSC 23 Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79

	First Cash Flow Solutions Pty Ltd v Saad [2023] NSWSC 686 Guardian Mortgages Pty Ltd v Miller (2004) 12 BPR 22,833; [2004] NSWSC 1236 HomeSec Finance Express Pty Ltd v Richardson (2012) 8 BFRA 347; [2012] NSWSC 1375 Hung v Aquamore Credit Equity Pty Ltd [2022] NSWCA 272 Kellas-Sharpe v PSAL Ltd [2013] 2 Qd R 233; [2013] QCA 371 Taylor v Dexta Corporation Ltd (2006) 14 ANZ Insurance Cases 61-712; [2006] NSWCA 310 Toohey v Gunther (1928) 41 CLR 181; [1928] HCA 19 Zhong v Guan [2024] NSWCA 300
Texts Cited:	Herzfeld and Prince, Interpretation (3rd ed, 2024, Thomson Reuters) JD Heydon, Heydon on Contract: The General Part (2019, Thomson Reuters)
Category:	Principal judgment
Parties:	JCP Holdings Pty Ltd (Plaintiff/Cross-Defendant) Ulrich Pty Ltd (First Defendant) Jovan Sarai (Second Defendant/Cross-Claimant)
Representation:	Counsel: C Bolger (Plaintiff/Cross-Defendant) M Fernandes (Defendants/Cross-Claimant) Solicitors: MD Law Group (Plaintiff/Cross-Defendant) Safe Harbour Lawyers (Defendants/Cross-Claimant)
File Number(s):	2025/00095645
Publication Restriction:	Nil

JUDGMENT

1 The present proceedings concern a loan from the plaintiff to the first defendant.

2 The defendants do not dispute that on or about 30 September 2024, the plaintiff paid to the first defendant an amount of money just shy of $350,000 and that those monies have not been repaid. It is also not in dispute that a

loan contract constituted by several documents - was entered into by the parties on or about 27 September 2024.

3 The plaintiff sues to recover those monies from the first defendant as borrower and the second defendant as guarantor, together with default interest which the plaintiff contends is owing pursuant to the loan contract.

4 Notwithstanding that the monies have not been repaid, the defendants' primary case is that the proceedings should be dismissed.

5 The proceedings were heard on 15 and 16 July 2025. Mr C Bolger of counsel appeared for the plaintiff and Mr M Fernandes of counsel for the defendants.

6 Each party read a number of affidavits, and a number of documents were tendered. The paragraphs read, and the number of documents tendered, was substantially less than what had previously been included in the court book by reason of the narrowing of issues at the commencement of the hearing. No witness was required for cross examination. In the end, there was very little factual dispute between the parties.

7 For the reasons set out below, I have determined that the loan contract is not void for uncertainty but the default interest is unenforceable as a penalty. The parties should seek to agree orders to give effect to these reasons with any remaining issues to be determined on the papers.

The issues

8 Whilst a plethora of issues were raised by the defendants in their defence, and the second defendant's cross claim, the issues substantially narrowed at the commencement of the hearing. A number of the pleaded issues were abandoned by counsel for the defendants. The defendants also added at the commencement of the hearing what became the primary basis for contending that the proceedings should be dismissed - namely that the entire loan contract was void for uncertainty.

9 The plaintiff also sought at the commencement of the hearing to expand its case so as to claim for administrative costs purportedly incurred by reason of the defendants' default under the loan contract. This was based on an affidavit filed by the plaintiff dated 7 July 2025, setting out the alleged administrative

work carried out. I refused leave to the plaintiff to amend the relief in the manner sought. I set out later in these reasons, my reasons for so refusing.

10 In the end, the parties agreed that five issues arose:

(a) whether the loan contract on its proper construction is void for uncertainty by reason of the alleged incurable inconsistencies of the interest clauses;

(b) if not, whether the interest clauses on their proper construction are a penalty;

(c) if not, what amount is owing on the proper construction of the loan contract;

(d) whether any property other than the Darling Point property is security for the loan;

(e) section 74MA of the *Conveyancing Act 1919* (NSW) and judicial sale.

11 By the conclusion of the closing addresses, the issues had narrowed further. The last set of issues set out above in (e), fell away. The defendants accepted that the appropriate time for considering whether the second caveat should be ordered to be removed was when there was an actual refinancing proposal capable of acceptance. That position had not yet been reached. Further, the plaintiff accepted that in circumstances where it had not joined to the proceedings the admitted first mortgagee, the claim for judicial sale of the Darling Point property was no longer pressed.

Factual overview

12 The following factual summary suffices for determining the issues in dispute.

13 The second defendant is a solicitor and the principal of the first defendant. He acted as solicitor for himself and the first defendant in the proceedings.

14 As at late September 2024, the second defendant was in the process of purchasing a property located at X Eastbourne Road, Darling Point (**Darling Point property**). He had entered into a contract to purchase that property in February 2022 for $14 million and paid a $2.1 million deposit in three instalments of $700,000 each, in 2022, 2023 and 2024. He occupied the property from June 2022 onwards, and paid the seller rent during the period of occupancy.

15 The original completion date for the purchase of the Darling Point property was 1 August 2024. On 15 August 2024, the vendor issued a notice to complete. By deed, the vendor and the second defendant resolved the issues in dispute and subsequently agreed to extend the completion date to 27 September 2024, with time to be of the essence.

16 The second defendant arranged for finance to enable him to complete the purchase of the Darling Point property. This was by way of two loans which were for a term of three months, scheduled to mature on 31 December 2024. The second defendant contends that in preparation for settlement of the purchase of the Darling Point property, he was advised by the primary lender that the estimated funds available at settlement would be approximately $1 million less than the amount required to complete the purchase and payable to the vendor. The second defendant sought assistance from his finance broker, Mr Anthony Del Baglivo (**Mr Del Baglivo**), to obtain funds to meet the settlement shortfall. With Mr Del Baglivo's assistance and through his own resources, the second defendant was able to obtain approximately $650,000, leaving a shortfall of approximately $350,000.

17 It was in these circumstances that the loan between the first defendant as borrower, and the plaintiff as lender was entered into. It is perhaps of some relevance to observe that the funding was obtained on short notice, and in circumstances where it would appear that no other sources of funding were available to the defendants.

18 I set out below the relevant documents constituting the loan contract, between the plaintiff and defendants including the relevant terms relied upon. It is not in dispute that the loan documents were executed by the parties on 27 September 2024.

19 It should be observed at this juncture that the original draft terms of the loan documents were drafted by the second defendant and provided to the plaintiff. At this time the plaintiff does not appear to have had separate legal representation but separate representation was arranged shortly thereafter. The plaintiff's solicitor made handwritten amendments to the documentation that had been provided by the second defendant and the relevant loan

documents were executed by the plaintiff and the plaintiff's solicitor and retransmitted to the second defendant. The loan documents, with the handwritten amendments made by the plaintiff through its solicitor, were then executed on behalf of the defendants.

20 On 30 September 2024, the plaintiff transmitted to the first defendant an amount of $347,300, made up of the sum of $350,000 less certain fees set out in the loan contract.

21 On 4 October 2024, the plaintiff lodged a caveat on the Darling Point property.

22 The defendants did not repay the monies as advanced within the intended repayment period of two months, that is by 30 November 2024. Apart from the sum of $15,000, which I refer to below, no repayments have been made by the defendants.

23 On 4 December 2024, the plaintiff served a notice of default on the defendants.

24 On 4 December 2024, after the service of the default notice, the plaintiff received a payment of $15,000 from the defendants as a part payment of the monies due.

25 The defendants then sought further time to pay.

26 It is not in dispute that on or about 23 December 2024, a further agreement was entered into whereby the defendants agreed to pay a further $120,000 to the plaintiff to remove the caveat on the Darling Point property on refinance of the defendants' loan and in consideration of the plaintiff not taking any further action or steps before 20 January 2025 to enforce its rights or recover the monies due and payable under the loan agreement.

27 No further monies were repaid by the defendants.

28 On 21 February 2025, the plaintiff received a lapsing notice in respect of the caveat.

29 On 11 March 2025, the proceedings were commenced by way of summons, seeking relief that included the extension of the caveat on the Darling Point property.

30 On 13 March 2025, orders were made by Richmond J that included granting leave to the plaintiff to lodge a further caveat on the Darling Point property and for the proceedings to continue by way of pleadings.

The Loan Contract

31 The loan contract (**Loan Contract**) is constituted by the following documents:

(a) a 10 page document entitled Loan Offer, which includes at pages three to 10 a separate document entitled "Loan terms". Although the Loan terms contain a separate page for acceptance of the loan, this page was not completed by the parties. The borrower and guarantor did, however, initial the first 2 pages of the Loan Offer;

(b) a document entitled "Loan Agreement" dated 27th September 2024, which also attaches a document entitled "Commercial Details". The Loan Agreement has been executed by all parties.

32 The operative provisions of each of the documents may be summarised as follows.

33 Dealing first with the Loan Offer:

(a) loan amount is $450,000;

(b) the Borrower is the first defendant;

(c) the Mortgagors are the first defendant and the second defendant;

(d) the Guarantor is the second defendant;

(e) the term of the loan is two months;

(f) the early repayment term of the loan is also described as two months;

(g) the security is Loan Offer and Loan Agreement, Second mortgage over Security Properties and Caveat over Security Property. The last entry, referring to the caveat, is in handwriting, and was added by the solicitor for the plaintiff to the typed script prepared by the second defendant;

(h) the "Security Properties" is the Darling Point property;

(i) against the item "Fixed interest rates", the typed text of "$50,000 at the maturity of loan **Discount Rate** for timely payment and when not in default" has been crossed through and next to it, in handwriting has been inserted "$50,000 interest Monthly at the Beginning of each Month in Advance";

(j) against the item "Total amount of interest charges per annum" is "$50,000 (Note. this is calculated for 3 months, however your loan term may be longer or shorter)";

(k) against the item “Method of calculation of interest payments” is a formula for the calculation of the monthly interest payment, and then the following text “Calculated and payable in advance each month for the term of the loan with the exception of interest for the two (2) months of the loan in the sum of $50,000 being deducted and paid in advance on draw – down”;

(l) against “Repayments” are two bullet points. The first states: “This is an interest only loan, calculated and payable as set out above, based on a 2 month term, with the loan amount/ principal sum payable on expiration of the loan term” and, the second bullet point states: “The due date for interest payments (unless stated above as prepaid, compounded or an allowance made) is the date each month coinciding with the date of the advance or settlement”.

34 Turning now to the Loan terms, the following clauses assumed significance in the arguments advanced by the parties:

(a) by clause 5, headed “Security”, the Borrower (being the first defendant), Mortgagor (being both defendants) and any Guarantor (being the second defendant) agreed to provide the security outlined, in favour of the lender;

(b) by clause 10(c), headed “Costs”, it was agreed that if any enforcement or recovery action is required or a default occurs or the Lender is required to enforce their rights, the Borrower will be liable to pay “the Lender’s costs and outlays and the Lender’s Lawyer’s professional costs on a Lawyer and own client/ indemnity basis being $550 per hour (excluding GST), together with any outlays, court filing fees or Barristers fees”;

(c) clause 13 headed “Charge”, relevantly provides that “in consideration of this agreement and any subsequent agreement, the Borrower, the Mortgagor and any Guarantor (in any capacity) named herein, hereby charges all its assets including but not limited to any real estate including the security named herein with the repayment of any money owing under this agreement and consent to the lodging of a Caveat over such property to better secure the repayment of all such sums”;

(d) clause 20 contained a standard form clause that any part of the agreement that is illegal, void or unenforceable must be severed.

35 The document entitled “Loan Agreement” relevantly provided as follows:

(a) the parties to the agreement are the plaintiff as lender, the first defendant as borrower and the second defendant as guarantor;

(b) pursuant to clause 2.1, the plaintiff as lender agreed to make available to the first defendant as borrower the “Facility” which is defined in schedule 1 to relevantly mean “the financial

accommodation provided or to be provided by the Lender to the Borrower under this agreement or any Loan Offer by the Lender";

(c) pursuant to clause 2.4, the Borrower must draw down the Facility on the "Interest Commencement Day or as soon as reasonably practicable thereafter". The "Interest Commencement Date" is defined in schedule 1 as "the date specified as such in the Reference Section or such other date as agreed between the parties from time to time". The Reference Section is in turn defined to mean "the commercial details and descriptions contained in the section of this Agreement which appears immediately before the execution of this Agreement";

(d) by clause 3.1, the Borrower agreed to repay the outstanding balance of the debt to the Lender on the Repayment Date, which again is defined by reference to the date for repayment set out in the Reference Section;

(e) under clause 3.6, early repayment is permitted, but any interest prepaid for a period after the actual repayment date will not be refunded to the Borrower;

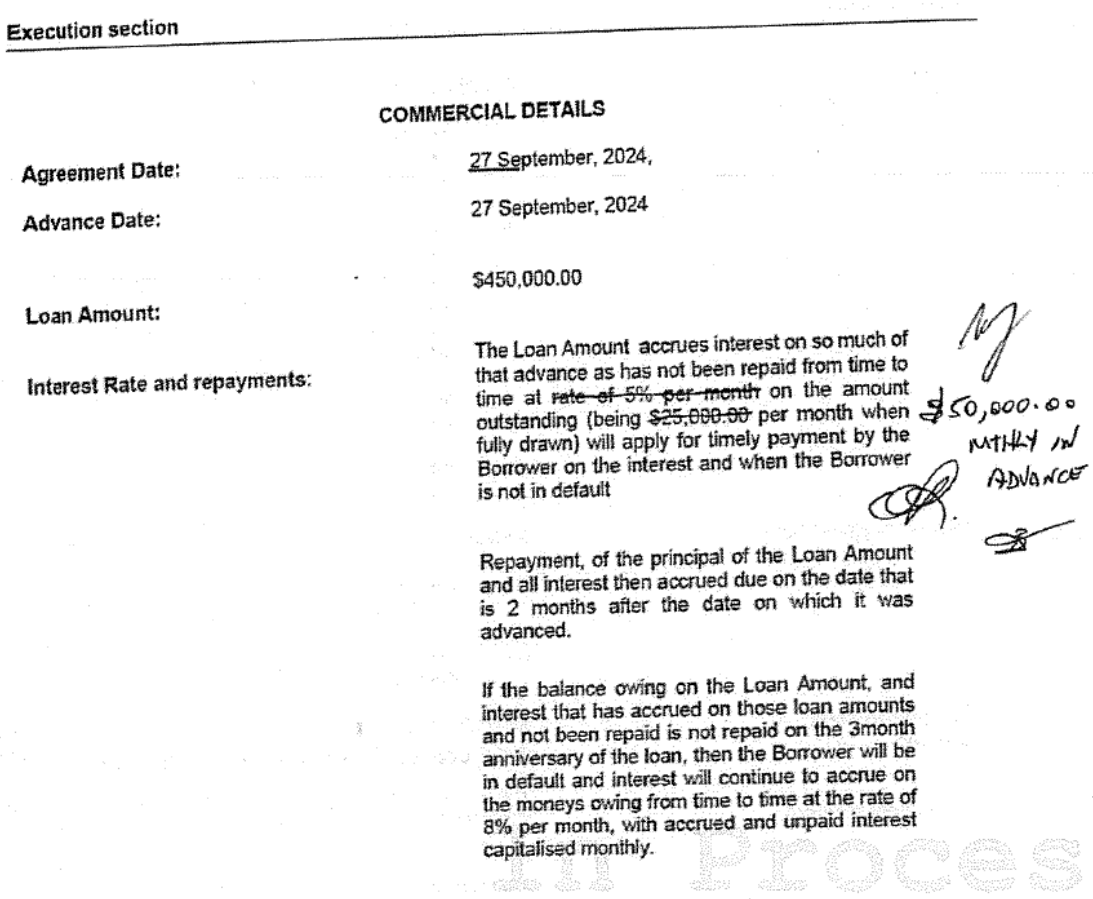
(f) clause 4.1 provides that "The Borrower must pay interest to the Lender on or before each Interest Payment Date as specified as the Repayment Method in the Commercial Details in the reference section, at the Interest Rate on the outstanding balance of the Debt during the period from the Interest Commencement Day to the date when the Debt is repaid in full";

(g) clause 4.2 relevantly deals with calculation of interest and pursuant to subclause (a), relevantly provides that it is payable at the Interest Rate. The definition of Interest Rate in schedule 1 again directs attention to the Reference Section – which I extract below;

(h) clause 11.2 is headed "Charge over assets" and relevantly provides "In addition to the Borrower's other Obligations, as at the Agreement Date, the Borrower and Guarantor's charge in favour of the Lender, all of its Rights, title an interest in all of its real property and PPS Property (including, without limitation, choses in action) and whether existing or acquired after the Agreement Date, with the repayment of the Debt. As and after the time when a default has occurred under the Loan Agreement, the Borrower consents to the Lender lodging a caveat over any of the Borrower's real property and authorises and consents to the Lender physically accessing any land where any of the Borrower's assets are located for the purposes of taking possession of any PPS Property". "PPS Property" is defined in schedule 1 to mean "all property over which a Borrower or Guarantor is legally capable under the PPS Act of granting a Security Interest";

(i) clause 16.8 contains a relatively standard form "Severability" clause to the effect that so far as possible the agreement is to be construed so as not to be invalid, illegal or unenforceable in any respect but if a provision is held to be illegal, invalid or unenforceable that provision shall, so far as possible, be read down or severed.

36 The Commercial Details assumed considerable importance in the arguments advanced by the parties. I extract immediately below the entirety of the "Commercial Details":



Execution section

COMMERCIAL DETAILS

Agreement Date:	27 September, 2024,
Advance Date:	27 September, 2024
Loan Amount:	$450,000.00
Interest Rate and repayments:	The Loan Amount accrues interest on so much of that advance as has not been repaid from time to time at ~~rate of 5% per month~~ on the amount outstanding (being ~~$25,000.00~~ per month when fully drawn) will apply for timely payment by the Borrower on the interest and when the Borrower is not in default Repayment, of the principal of the Loan Amount and all interest then accrued due on the date that is 2 months after the date on which it was advanced. If the balance owing on the Loan Amount, and interest that has accrued on those loan amounts and not been repaid is not repaid on the 3month anniversary of the loan, then the Borrower will be in default and interest will continue to accrue on the moneys owing from time to time at the rate of 8% per month, with accrued and unpaid interest capitalised monthly.

$50,000.00 MTHLY IN ADVANCE

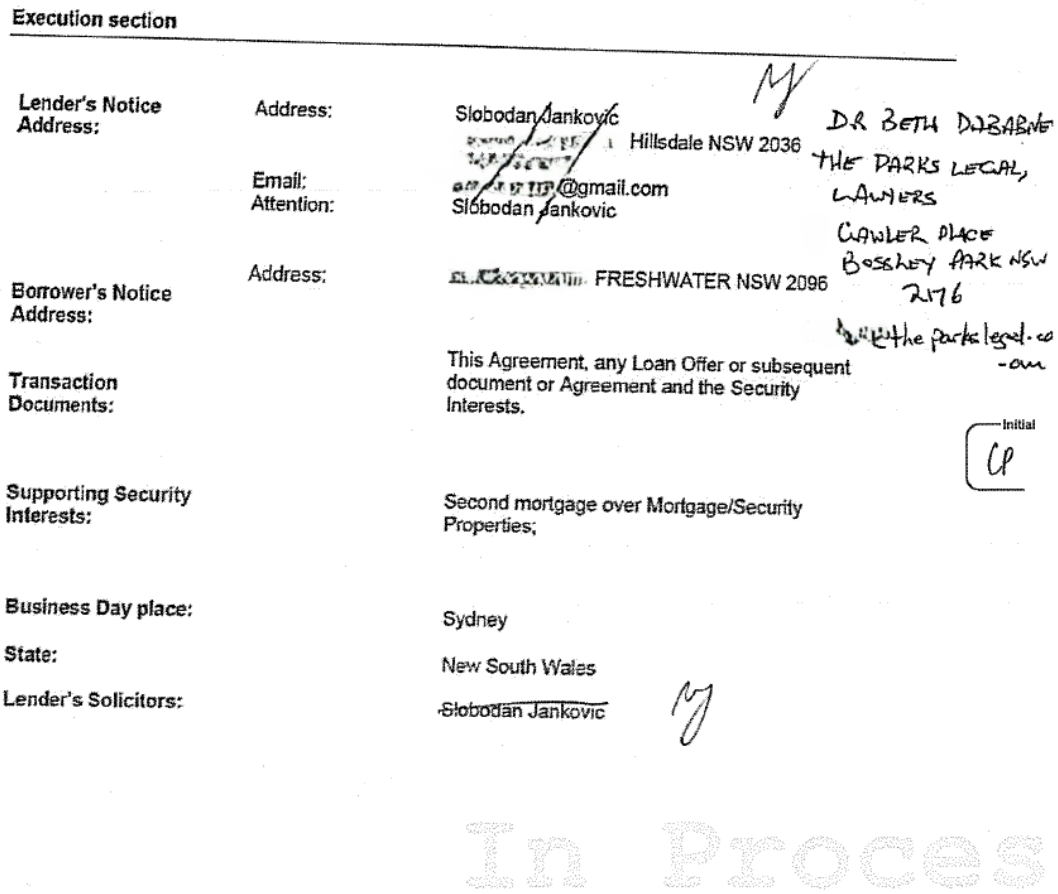
Process

Execution section

Interest Commencement Day	The day which is the earlier of: (a) the day that the Borrower has requested the Lender to make available the Loan Amount; (b) the day that the Lender confirms to the Borrower, or the Borrower's solicitors, that the money for the Loan Amount of the Facility is available to be drawn down, even if the Borrower has not as at that day, satisfied all conditions precedent (for example, the Borrower has not returned all signed loan and security documents to the satisfaction of the Lender); and (c) the first date on which the Loan Amount has been advanced.
Interest Payment Date	Means: (a) the Advance Date - in relation to the first month's interest; and (b) thereafter, the last day of each month for the term of the Loan.
Minimum Interest Amount:	$50,000.00 (being 1 months interest) $100,000.00 (Being 2 mths interest)
Repayment method:	The Borrower must on the Advance Date, pay interest for the first month of the term The Borrower must then pay interest monthly in advance on each Interest Payment Date. The Borrower must repay the outstanding Debt on the Repayment Date.
Repayment Date:	The Debt must be repaid in full by the date which is 2 months after the Interest Commencement Date.
Authorised Purpose:	$450,000.00 for business cashflow
Discharge fee:	$350
Guarantors:	JOVAN SARAI of [redacted], FRESHWATER NSW 2096
Mortgage/Security Properties:	[redacted] Eastbourne Road, Darling Point NSW 2027

Initial CP

In Process



Execution section

Lender's Notice Address:	Address:	Slobodan Jankovic [redacted] Hillsdale NSW 2036
	Email: Attention:	[redacted]@gmail.com Slobodan Jankovic
Borrower's Notice Address:	Address:	[redacted] FRESHWATER NSW 2096
Transaction Documents:		This Agreement, any Loan Offer or subsequent document or Agreement and the Security Interests.
Supporting Security Interests:		Second mortgage over Mortgage/Security Properties;
Business Day place:		Sydney
State:		New South Wales
Lender's Solicitors:		~~Slobodan Jankovic~~

DR BETH DABARE
THE PARKS LEGAL, LAWYERS
CAWLER PLACE
BOSSLEY PARK NSW 2176
[redacted]@theparklegal.com.au

Initial
CP

In Process

37 A number of documents were also annexed to the Loan Agreement and completed by the parties at the time of execution. Relevantly, a "General Authority" was completed by the defendants to the following effect:

General Authority

TO: The lender and ~~Slobodan Jankovic~~ DR BETH DABABNEH

I/We, the borrower(s) and/or the director(s) of the borrowing company and/or the guarantors and/or mortgagors in their personal capacity, as mentioned, authorise and direct you:

1. To deduct from settlement and pay your solicitor and own client costs and all outlays and expenses in relation to this matter.
2. To deduct your solicitor and own client costs and all outlays and expenses incurred in this matter as and when they accrue from time to time from any moneys paid to your Trust Account in this matter.
3. To date and fill in any blanks in the mortgage and any other documents executed and execute any documents on behalf of all parties, so that they will, when completed, provide a good and effective security for any advances and accommodation granted or to be granted by the lender.
4. To pay/disburse the proposed loan to be made by the lender to me as follows:-

Initial CP

~~Slobodan Jankovic~~ DR BETH DABABNEH	Costs & outlays (inc GST and Land titles registration fees)	$2,000.00
LPI NSW	Registration fees Discharge and Mortgages	Included above
Lender	Interest ~~two~~ ONE months	$50,000.00
~~As Lender directs~~	~~Establishment/Uplift fee~~	~~$50,000.00~~
As Lender directs	Application fee	$NIL
As borrower directs (business cashflow)	Balance initial draw down	$350,000

The surplus loan funds are to go to the following account (Must Complete):

ACCOUNT NAME: SAFE HARBOUR LAWYERS TRUST ACCOUNT
BANK: CBA
BSB: 062-105
A/C NO: 1076 1307

Signed – Borrower — Name: JOHN SAAD — Date: 27/09/24

Signed – Guarantor — Name: JOHN SAAD — Date: 27/09/24

38 Independent Solicitor's certificates were also prepared to the effect that the transaction documents were relevantly explained to the second defendant both in his personal capacity as a guarantor and in his capacity as director of the first defendant.

The Void for Uncertainty Argument

39 As set out above, the contention that the entire Loan Contract was void for uncertainty was added by way of an amendment made on the first day of the hearing. The amendment had first been foreshadowed in the written submissions of the defendants filed the Friday before the hearing.

40 The substantive amendment was the insertion of a new paragraph 12A in the cross claim. The Particulars to paragraph 12A neatly encapsulate the argument advanced. The new paragraph and the Particulars are in the following terms:

> 12A. The interest clauses of the contract of loan are void for uncertainty and, as a result, the contract of loan as a whole is void for uncertainty.
>
> Particulars
>
> i. *The following items or terms in the Loan Offer are interest clauses relevant to the uncertainty argument:* "Fixed interest rates", *"*Total amount of interest charges per annum"*,* "Method of calculation of interest payments" *and* "Repayments"
>
> ii. *The following items or terms in the Commercial Details section of the Loan Agreement are interest clauses relevant to the uncertainty argument*: "Interest Rate and repayments", "Interest Payment Date", "Minimum Interest Amount", "Repayment method", "Repayment Date"
>
> iii. **The first uncertainty: as to whether repayment/default date is 3 months or 2 months after advance**:
>
> 1. *The term "*Interest Rate and repayments*" "provides that if the balance owing and interest has not been repaid on the 3-month anniversary of the loan, then the Borrower will be in default and interest will continue to accrue … at the rate of 8% per month*"
>
> 2. *Other terms provide for a repayment obligation upon 2 months*
>
> 3. *In circumstances where the term* "Interest Rate and repayments" *is the only term of the entire contract of loan that sets a default interest rate, the term "*Interest Rate and repayments" *should not be construed other than its ordinary meaning, which is inconsistent with all other references to the repayment date*
>
> 4. *In the premises, the contract is inconsistent and uncertain as to when the repayment/default date was*
>
> 5. *By reason of this uncertainty alone, the interest clauses in this respect are void and the contract as a whole is void as the clauses cannot be severed*
>
> iv. **The second uncertainty: as to whether 2nd month of term interest due at advance or due on a monthly basis (so due at end of 1st month after advance)**:
>
> 1. *The following clauses all refer to monthly interest repayments each month:*
>
> "Fixed interest rate", "Method of calculation of interest payments", "Repayments" "Interest Rate and repayments", "Interest Payment Date", "Repayment method"
>
> 2. *The term* "Method of calculation of interest payments" *provides for the interest to be paid for the whole 2-month term in advance*
>
> 3. *In the premises, the contract is inconsistent and uncertain as whether the 2nd month of Interest was due upon advance or whether it was only due at the end of the first month or beginning of the second month of the term*
>
> 4. *By reason of this uncertainty alone, the interest clauses in this respect are void and the contract as a whole is void as the clauses cannot be severed*

v. ***The third uncertainty: as to whether the interest for the 2-month term was $100,000 or $50,000****:*

1. *The only clause referring to the payment of interest in advance at drawdown other than for the first month is "*Method of calculation of interest repayments"*, which refers to "interest for the two (2) months of the loan in the sum of $50,000.00 being deducted and paid in advance on drawdown*".

2. Other clauses refer to $50,000 being the monthly interest

3. *In the premises, the contract is inconsistent and uncertain as whether the monthly interest was $50,000 or $25,000, and so whether the whole term interest was $100,000 or $50,000*

4. *By reason of this uncertainty alone, the interest clauses in this respect are void and the contract as a whole is void as the clauses cannot be severed*

The Relevant Principles

41 The relevant principles were not in dispute between the parties.

42 A provision of a document is uncertain when, having regard to the applicable principles of construction, the language is incapable of any precise and definite meaning. There are two main reasons a provision will be uncertain. The first (not relevant here) is where the language used is devoid of any meaning. The second, relevant in the present case, is where a provision is open to multiple meanings and it is impossible for the court, applying the relevant principles of construction, to select which meaning is the applicable one: see Herzfeld and Prince, *Interpretation* (3rd ed, 2024, Thomson Reuters) (***Interpretation***) at [19.130].

43 Courts do not lightly find uncertainty and strive to avoid the conclusion that a provision is uncertain. Ambiguity is not uncertainty, and apparent uncertainty will commonly be resolved by the process of construction, including the reconciliation of inconsistencies and the application of the principles concerning the correction of mistakes: *Interpretation* at [19.140].

44 In this latter respect, reliance was placed by the defendants on what was recently said by Kirk JA (with whom Payne JA and Price AJA relevantly agreed) in *Zhong v Guan* [2024] NSWCA 300 at [23] to [38] as follows:

> [23] In *Seymour Whyte* Leeming JA used a sub-heading "rectification by construction" which his Honour distinguished from "rectification in equity" (see at [6] and [12]). The term has also been used elsewhere: see the authorities gathered in *James Adam Pty Ltd v Fobeza Pty Ltd* [2020] NSWCA 311; (2020) 103 NSWLR 850 at [29] (Leeming JA). However, Leeming JA was not suggesting in *Seymour Whyte* that there was some doctrine of "rectification by

construction" distinct from general principles of construction. So much was illustrated, for example, by his Honour's quotation at [8] of his own earlier judgment in *National Australia Bank Ltd v Clowes* [2013] NSWCA 179; (2013) 8 BFRA 600 at [34]. He there said that "where the literal meaning of the contractual words is an absurdity, *and* it is self-evident what the objective intention is to be taken to have been" (emphasis in the original), then "*ordinary processes of contractual construction* displace an absurd literal meaning by a meaningful legal meaning" (emphasis added).

[24] The "'correction of mistakes by construction' is not a separate branch of the law, a summary version of an action for rectification": *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101 at [23]; see also *Marley v Rawlings* [2014] UKSC 2; [2015] AC 129 at [40]. A similar point was emphasised in the Australian context by Bell P, with the agreement of Macfarlan JA, in *James Adam*:

> [2] I would personally eschew the terminology of "rectification by construction". Whilst Leeming JA makes very plain the distinction between this concept and the equitable doctrine of rectification, the use of "rectification" in both contexts is, in my opinion, apt to confuse. Rectification in equity is a mainstream doctrine and the principles associated with it are well understood in Australia and are set forth in leading texts. So also, decisions such as *Fitzgerald v Masters* (1956) 95 CLR 420 are well understood as permitting a contract to be construed in very limited circumstances in a way that involves a recognition that the drafting of the contract has miscarried. The principles of contractual construction most closely associated in Australia with *Fitzgerald v Masters* do not, in my opinion, need to be elevated to the status of a "doctrine" or fixed with a label which might be thought to undermine the importance of courts adhering to the language parties have chosen to employ in setting out the nature and scope of their contractual relations.

[25] Leeming JA himself has since commented extra-curially that "it would be clearer to avoid the label 'rectification'. What is happening in these cases is merely an aspect of construing (which is to say, giving legal meaning to) a legal text": "The Limits of Rectification" (2023) 17 J Eq 122 at 127.

[26] The process is not novel, nor does it inhabit a distinct enclave within the law of contract. The use of the label "rectification by construction" has the potential to mislead by suggesting to the contrary or distracting from the fact that what is involved is simply an exercise in construction. Statutory construction, too, may involve effectively reading in or ignoring words: see eg *Taylor v Owners - Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531 at [35]-[40] and [65]-[66]. Yet there could be no suggestion of a court rectifying a statute. In my view – alike with that of the now Chief Justice and Macfarlan JA in *James Adam* and the later-expressed view of Leeming JA – the label should be avoided. The issue is always and only one of construction according to established common law principles.

[27] Justice Leeming's statement in *Seymour Whyte* at [8] quoted by the primary judge (see above at [20]), too, must be understood in context. To begin with, the issue does not only arise in cases of absurdity. His Honour acknowledged as much by quoting, at [10], Dixon CJ and Fullagar J in *Fitzgerald v Masters* [1956] HCA 53; (1956) 95 CLR 420 at 426-427 referring to cases of absurdity or inconsistency. Meagher JA and Ball J noted

in *HDI Global Specialty SE v Wonkana No 3 Pty Ltd* [2020] NSWCA 296; (2020) 104 NSWLR 634 at [51] that ”earlier authorities referred only to the presence of a ’palpable’ or ’obvious’ mistake”; see also *James Adam* at [55]-[56].

[28] Further, what may be ”corrected” is not only language but punctuation: note JD Heydon, *Heydon on Contract* (Thomson Reuters, 2019) at [8.660], and generally at [8.640]-[8.680].

[29] There may also be issues of degree involved in terms of the extent to which words are read in, ignored, or otherwise ”corrected”: see analogously *Taylor* at [38]. The greater the departure from the language employed, the greater the degree of persuasion needed to establish that such a departure is warranted.

[30] More generally, the notion of ”correcting” contractual language involves the application of basic principles of contractual construction. The court does not make an order altering or correcting the language of the contract; it is simply construing what has been agreed. It is a purposive and contextual exercise. It reflects ”trite law that an instrument must be construed as a whole”: *Fitzgerald v Masters* at 437.

[31] The central principles with respect to commercial contracts were summarised recently in *J & P Marlow (No 2) Pty Ltd v Hayes & McCabe* [2023] NSWCA 117; (2023) 112 NSWLR 29:

> [89] Four members of the High Court summarised the core principles of construction of commercial contracts as follows in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 at [35]:
>
> (1) 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.
>
> (2) That requires 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. That, in turn, is facilitated by an understanding of the genesis of the transaction, the background, the context and the market in which the parties are operating.
>
> (3) 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. The contract is to be construed so as to avoid it making commercial nonsense or working commercial inconvenience.
>
> [90] Put simply, as Gageler, Nettle and Gordon JJ stated in *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85; [2016] HCA 47 at [78], the “proper construction of [a contract] is to be determined objectively by reference to its text, context and purpose” (footnote omitted). Inherent in recognition of the importance of context and purpose is that the construction adopted may depart from the literal or ordinary meaning of the words employed. Gibbs J, for example, indicated as much

in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109; [1973] HCA 36 (*ABC v APRA*):

> "if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate' … Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument." (Citation omitted)

[32] Implicit in these principles is the notion that the court is seeking to identify the joint intentions of the parties, doing so by the objective standard of what a reasonable person in the position of the parties would understand that to be. The notion of intention here is used to describe "what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened": *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; (2002) 209 CLR 95 at [25]; see also *Realestate.com.au Pty Ltd v Hardingham* [2022] HCA 39; (2022) 277 CLR 115 at [17], [43], [82]-[83].

[33] The presumptive best guide to the intention of the parties who have adopted a written contract is the words that they have employed in that document. The "primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied": *ABC v APRA* at 109 (Gibbs J). However, if the terms of a contract lead to absurd results or are inconsistent or otherwise seem clearly contrary to the parties' mutual purposes such as to be an obvious mistake, as established objectively by permissible evidence, that fact suggests the objective common intention of the parties was not in fact as manifested by some particular words or punctuation employed: note Perry Herzfeld and Thomas Prince, *Interpretation* (3rd edition, Thomson Reuters, 2024), [22.130]-[22.160]. Thus "[w]ords may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency": *Fitzgerald v Masters* at 426-427 (Dixon CJ and Fullagar J).

[34] The principle is of longstanding. Knight Bruce LJ, for example, said in *Key v Key* (1853) 4 De GM & G 73 at 84-85; 43 ER 435 at 439:

> there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly.

[35] Arguments of absurdity or such like might readily be made but are not easily established. Courts "have no mandate to rewrite agreements, so as to depart from the language used by the parties, merely to give a provision an

> operation which, as it appears to the court, might make more commercial sense": *Miwa Pty Ltd v Siantan Properties Pte Ltd* [2011] NSWCA 297; (2011) 15 BPR 29,545 at [18]; *Willis Australia Ltd v AMP Capital Investors Ltd* [2023] NSWCA 158; (2023) 113 NSWLR 1 at [53].
>
> [36] Moreover, the step of effectively supplying, ignoring or otherwise departing from the words or punctuation employed may only be taken if what the parties *did* intend – as ascertained according to established principles – is otherwise clear. The court is identifying the parties' common objective intentions; it is not making its own choices as to what their contractual relations should be. That does not mean that any departures from the text must only be capable of being expressed by one possible formulation of words or punctuation. That will often not be the case. For example, in *Fitzgerald v Masters* the High Court concluded that the word "inconsistent" in a contract should be read as either "consistent" or "not inconsistent" (at 427 and 438). What is required is that the agreed position is clear (see eg *James Adam* at [57]-[61]).
>
> [37] The argumentative steps of establishing an absurdity, inconsistency or other obvious mistake and of identifying the intended meaning are not entirely distinct. Whether or not there is such an obvious mistake (etc) may depend upon there being some other clear intention apparent which indicates that the literal meaning was not intended. As Meagher JA and Ball J said in *HDI Global*, the two criteria "are merely steps involved in reasoning to a conclusion" in the process of construction (at [53]).
>
> [38] In sum, it is possible to construe a written contract in a manner which departs from some particular words or punctuation employed. This is an exercise in objective, purposive, contextual construction, giving effect to the court's assessment of what the parties have actually agreed consistently with basic principles of construction. It is not a matter of rectifying – rewriting – the contract to prevent one party's unconscientious behaviour by correcting a mutual mistake in the parties' expression of their actual agreement. This constructional step will only be taken if it is clear, first, that the terms lead to absurd results or are inconsistent or manifest some obvious mistake as established by permissible evidence and, second, if the position intended to be agreed is clear. These matters may overlap. The greater the departure from the language employed then in general the more difficult it will be for the argument to be made out.

45 As Kirk JA makes clear, the issue is one of construction.

46 It is also clear where, as here, the agreement is constituted by several documents, each of the provisions of the relevant documents must be read together and construed with the others, so as to render, as far as is possible, the provisions harmonious with each other: *Toohey v Gunther* (1928) 41 CLR 181; [1928] HCA 19 at 196 per Isaacs J; *Belrose RB1 Pty Ltd v Oldfield* [2025] NSWSC 603 at [137]-[138] per McGrath J.

47 Where, however, a harmonious construction cannot be rendered because different parts are truly inconsistent, effect must be given to that part which is

calculated to carry into effect the real intention of the parties as gathered from the instrument as a whole, and that part which would defeat it must be rejected: see, for example, *Taylor v Dexta Corporation Ltd* (2006) 14 ANZ Insurance Cases 61-712; [2006] NSWCA 310 (***Taylor v Dexta***) at [1] per Beazley JA, at [66] per Santow JA, and at [89] per Ipp JA.

48 There are various presumptions that are often employed to resolve inconsistencies – see *Interpretation* at [22.110]ff. At the end of the day the quest is to ascertain the true intention of the parties.

49 If uncertainty exists, the issue is whether the uncertain provision can be severed. If it can, it is simply struck out and ignored. If it cannot be severed, the entire agreement will be void for uncertainty.

50 Various tests have been formulated for when a provision may be severed. The present case is not the occasion for a detailed discussion of the tests. They are helpfully summarised in *Interpretation* at [19.160].

51 The defendants emphasised the test is whether the invalid promise is so material and important for a provision in the whole bargain that there should be inferred an intention not to make a contract without it.

Determination of the Uncertainty Argument

52 For the reasons set out below, I do not accept that the Loan Contract is uncertain in any of the respects contended by the defendants.

53 The alleged uncertainties are extracted above in 12A of the amended pleading.

54 The first alleged uncertainty concerns whether the repayment date is two months or three months after the advance. In my view, the repayment date is two months and there is no relevant uncertainty.

55 The Loan Offer clearly states that the term of the loan is two months. The “Repayments” section of the Loan Offer also refers to the loan being a two month loan. Clause 6 of the Loan terms refers back to the term of the loan being as specified in the table – which is a reference to the Loan Offer – being two months.

56 Clause 3.1 of the Loan Agreement requires the Borrower to repay the balance outstanding of the debt to the Lender on the Repayment Date, which is defined in schedule 1 by reference to the Reference Section (being the Commercial Details section). The Commercial Details section defines Repayment Date as, in effect, two months after the Interest Commencement Date which is relevantly the date of the advance of monies. A statement to similar effect is set out on page 1 of the Commercial Details next to "Interest Rate and repayments" which clearly states that repayment is due on the date that is two months after the date on which the monies were advanced. The "Repayment method" in the Commercial Details also clearly states that the "Borrower must repay the outstanding Debt on the Repayment Date".

57 The defendants' uncertainty argument in this regard is premised on a section of the Commercial Details dealing with "Interest Rate and repayments". The section relied on states:

> If the balance owing on the Loan Amount, and interest that has accrued on those loan amounts and has not been repaid is not repaid on the 3month anniversary of the loan, then the Borrower will be in default and interest will continue to accrue on the moneys owing from time to time at the rate of 8% per month, with accrued and unpaid interest capitalised monthly.

58 This section deals in my view, quite clearly, with when it is that default interest will be charged, rather than arguably creating a different date for repayment of the loan. This emerges most clearly, in my view, from the words used in the section. The conclusion is reinforced when the words used are construed in context, most importantly, appearing as they do immediately after a statement that deals with the repayment date of two months, which is the same as the definition of Repayment Date on the next page of the Commercial Details. The effect of this section is that if the loan is not paid by the two month repayment date, then there is a grace period of one month, with default interest only commencing if repayment in full has not been made by three months from the advance date. During the one month period of grace, no additional interest is payable.

59 The second alleged uncertainty concerns whether the second month of term interest (of $50,000) is due on advance, or due on a monthly basis - that is at the end of the first month after advance?

60 In my view the Loan Contract, properly construed in this regard, requires only the first month of interest to be payable on advance, with the second month being due at the end of the first month after advance.

61 The starting point in this regard is the handwritten amendments to both the Loan Offer and the Commercial Details section. The handwritten amendments to both clearly state that interest is $50,000 monthly in advance.

62 The Interest Payment Date in the Commercial Details section refers to the first month's interest being payable on the Advance Date and thereafter interest is payable on the last day of each month for the term of the loan. The Repayment Method is to a similar effect, with interest for the first month of the term being payable on the Advance Date, with interest monthly thereafter paid in advance on the Interest Payment Date.

63 There is nothing in these provisions that require the second month's interest to be paid on advance.

64 The defendants' uncertainty argument in this respect relies on what is said in the Loan Offer next to the heading "Method of calculation of interest payments" – being "Calculated and payable in advance each month for the term of the loan with the exception of interest for the two (2) months of the loan in the sum of $50,000 being deducted and paid in advance on draw down". It is of some significance, in my view, that in this section the amount of interest for the two months of the loan is said to be $50,000. This reflected what was set out in the Loan Offer prior to it being amended in handwriting by the plaintiff's solicitor, signed by the plaintiff and the plaintiff's solicitor, and then executed by the defendants. The effect of the amendments in handwriting was to replace what was previously said in the Loan Offer, of $50,000 in interest for the entire two months of the loan, with a provision requiring $50,000 per month to be paid in interest in advance. The inconsistency between the section relied upon by the defendants, and the handwritten amendments, is in my view clearly resolved in favour of the handwritten amendments.

65 These handwritten amendments, together with the other provisions that I have extracted above, clearly evince, in my view, an objective intention that interest for the first month is payable on advance, with interest for the second month

due at the end of the first month after advance. That is the real intention of the parties gathered from the instruments as a whole: *Taylor v Dexta*.

66 The third uncertainty is related to the second alleged uncertainty - namely whether the interest for the two month term was $100,000 or $50,000? This uncertainty allegedly arises by the reference to $50,000 in the "Method of calculation of interest payments". This is inconsistent with the handwritten amendments. The inconsistency is, in my view, clearly resolved in favour of the handwritten amendments. Most importantly, the Commercial Details states in handwriting against "Minimum Interest Amount", "$100,000 (Being 2 mths interest)". The real objective intention, in my view, could not be clearer.

67 Insofar as reliance is placed by the defendants concerning the second and third alleged uncertainties on the fact that only $350,000 was apparently paid on drawdown with the Loan Amount being $450,000, this does not assist the defendants. The "General Authority" dated 27 September 2024, executed by the second defendant on behalf of the first defendant and on his own behalf, clearly directs that surplus (which would likely be the $50,000 interest for month two), to be paid into the trust account of the defendants' lawyers. In any event, care must be taken not to conflate what in fact occurred in giving effect to the Loan Contract, with the terms of the Loan Contract. The terms are clear

68 I accordingly reject the defendants' contention that the terms of the Loan Contract are uncertain in the respects alleged.

Is the default interest clause a penalty?

69 I have set out the default interest clause above. As I have construed the Loan Contract, it applies on and from the third month and requires default interest to be paid at the rate of 8% per month on the balance of the loan outstanding, capitalised monthly.

70 The defendants contend that the clause is void as a penalty. The particular focus of the defendants' contention was on the fact that the default interest was capitalised. The plaintiff contended that the default interest clause is not a penalty and should be given effect to. The default interest claimed from 30 December 2024 to 30 July 2025 was $389,938.48.

Relevant Principles

71 It is convenient to begin by setting out the relevant principles. Not unsurprisingly, there was little dispute between the parties as to the relevant principles. Rather, the area debate was as to the application of those principles to the facts in the present case, with each of the parties relying upon different decisions to support their position.

72 The relevant principles were usefully summarised by McDougall J (with whom Gleeson JA relevantly agreed) in *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* (2016) 93 NSWLR 231; [2016] NSWCA 328 (***Arab Bank***) at [69]-[76] in the following terms:

> [69] The law relating to contractual penalties has been considered by the High Court of Australia in three recent cases:
>
> (1) *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656; [2005] HCA 71;
>
> (2) *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30; and
>
> (3) *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28; (2016) 90 ALJR 835.
>
> [70] Counsel's submissions ranged far beyond those cases. However, in my view, the disposition of this appeal need not go so far.
>
> [71] In *Ringrow*, the Court (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ) accepted at [12] that Lord Dunedin's speech in *Dunlop* set out "the principles governing the identification, proof and consequences of penalties in contractual stipulations", and that the decision in *Dunlop* "continues to express the law applicable in this country".
>
> [72] The relevant aspect of Lord Dunedin's speech ([1915] AC 79 at 86 - 87) reads as follows (omitting citations):
>
> 2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage …
>
> 3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach …
>
> 4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
>
> (a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with

> the greatest loss that could conceivably be proved to have followed from the breach …
>
> (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid …
>
> (c) There is a presumption (but no more) that it is penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage'.

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

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

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

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

> [75] There are two remaining relevant points to be derived from the decision in *Paciocco*. The first is that the onus of proving that a contractual stipulation amounts to a penalty rests with the person asserting it. As Gageler J said in *Paciocco* at [167]:
>
> > "The customers bore the evidentiary and persuasive onus throughout that inquiry."
>
> [76] The second point relates to the "presumption" identified by Lord Dunedin in *Dunlop* at his point 4(c). That presumption is the subject of the first ground stated in the notice of contention. As Keane J said in *Paciocco* at [265], that presumption is "a weak one". Further, as Gageler J said at [168], the invariable nature of the penalty compared to the amount overdue or the length of delay, although it cannot be ignored, is "only weakly indicative of the character of the late payment fee as a punishment".

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.

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.

76 Having set out the relevant principles from McDougall J's judgment in *Arab Bank*, Robb J stated at [64] to [67]:

> [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.

78 Bearing in mind the argument advanced by the plaintiff, it is useful to set out what Robb J said at [94] as follows:

> [94] 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.

79 The plaintiff placed considerable reliance on the decision of Henry J in *Commercial N Pty Ltd v Huang* [2024] NSWSC 23 (***Commercial N***). That case concerned a Lower Rate of Interest of 0.35% per week and a Higher Rate of Interest of 1.36% per week: see *Commercial N* at [2]. Interest was payable at the Lower Rate but if not paid on the date for payment interest was payable at the Higher Rate, compounded monthly (clause 5.12). The defendant borrower held that clause 5.12 operated as a penalty and was thus void. Separately, the defendant borrower contended that the plaintiff lender engaged in unconscionable conduct in relation to the Higher Interest Rate being compounded or capitalised monthly.

80 At [225], Henry J concluded that the defendants had failed to make good their claim that the plaintiff's claim for interest based on the Higher Interest Rate is a penalty and unenforceable. At [221], her Honour determined that the contractual clauses in the case before her were not unenforceable as contractual penalties as the provisions clearly provided for the lower rate to be payable as a discount. Reliance in this regard was placed on *Kellas-Sharpe v PSAL Ltd* [2013] 2 Qd R 233; [2013] QCA 371 (***Kellas-Sharpe***) and like authorities. Her Honour then went on to state at [222] to [225]:

> [222] Objectively, the rate of interest of 70.72% per annum is also high even without the capitalisation factor, particularly when compared to the Lower Interest Rate of 0.35% per week or 18.2% per annum. That said, there is some force to Commercial N's submission that the Defendants have not discharged their onus of establishing that the Higher Interest Rate is penal in character.
>
> [223] No evidence was led to address whether the Higher Interest Rate was commensurate with the interest protected by the bargain or was extravagant and unconscionable by itself. Hugo Ng's evidence may have showed him to have little to no knowledge about the loan application process and the particular transaction in this case, but no attempt was made to ask him or Morgan Ng about matters that would be relevant to assessment to be undertaken by the Court, such as about interest rates in other contracts, the rates of default in the loans Commercial N provides or the likely costs incurred.
>
> [224] The test of whether a particular provision is punitive or penal in character is not whether the sum stipulated would be considered to be merely disproportionate compared to the likely damage, but whether it has been demonstrated to be extravagant or unconscionably disproportionate: Arab Bank at [105]. While finely balanced, I do not consider it open to infer from the Higher Interest Rate itself that it is out of all proportion, extravagant or unconscionably disproportionate or was purely punitive in character, noting the short-term nature of the loan, that Commercial N was likely a lender of last resort for the Defendants and the interest rates that applied in the authorities to which I refer below.
>
> [225] Accordingly, the Defendants have failed to make good their claim that Commercial N's claim for interest based on the Higher Interest Rate in accordance with the formula in cl 5.5 and on the basis of cl 5.12(b)(i) of the Memorandum is a penalty and unenforceable.

81 At [283] to [307], her Honour considered the unconscionable conduct claim in relation to the Higher Interest Rate, concluding that the plaintiff lender had engaged in unconscionable conduct insofar as the Higher Interest Rate was capitalised or compounded monthly. At [302], her Honour stated:

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

82 Her Honour stated at [305] that the Higher Interest Rate with capitalisation was "utterly crushing". In the year to October 2022 the default annual rate of interest was effectively 417% per annum against simple interest of 70.72% per annum.

Determination

83 The defendants placed principal reliance on Robb J's analysis in *Bellas* and the similarities to the present case.

84 The plaintiff placed reliance on the fact that the defendants have the onus of establishing a penalty and had not satisfied their onus.

85 In particular, it was contended that:

(a) no evidence was led by the defendants to show the interest was extravagant or unconscionable or that the interest was not commensurate;

(b) the rate was not excessive or even unusual in the context of a short term financing and is within the bounds of rates considered by the Court and found not to be unconscionable or unfair;

(c) the facts and circumstances of the loan must be considered and include:

(i) the finance was required urgently, obtained through a broker as a last resort and was for a short term;

(ii) the second defendant is a solicitor who prepared the loan documents;

(iii) the defendants obtained legal advice before they entered into the loan;

(iv) default interest was only payable after three months, with a one month grace period;

(v) the loan was to be secured by a second mortgage.

86 For the reasons set out below, the default interest is a penalty and unenforceable.

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.

92 Some evidence was also led on behalf of the plaintiff to the effect that if the first defendant had repaid on time, the monies would have been used by those standing behind the plaintiff to pay the ongoing interest payable by another company in relation to monies it had borrowed. Counsel for the plaintiff accepted that this evidence was not relevant to the question of penalty.

93 *Commercial N* does not provide support for the plaintiff. Nor do the decisions referred to by Henry J at [302] of her Honour's judgment. It appears that the primary basis on which her Honour held that the relevant clause was not a penalty was based on the drafting of the clauses in question and the decision in *Kellas-Sharpe* and like decisions.

94 Henry J's reliance on other decisions such as *Guardian Mortgages Pty Ltd v Miller* (2004) 12 BPR 22,833; [2004] NSWSC 1236, *HomeSec Finance Express Pty Ltd v Richardson* (2012) 8 BFRA 347; [2012] NSWSC 1375 and *First Mortgage Capital Pty Ltd v Westpac Banking Corp Ltd* [2021] NSWSC 1143 was principally on the separate issue of whether the capitalisation component of the default interest clause was unconscionable. As Robb J observed in *Bellas* at [94] (extracted above) those cases are not penalty but rather unconscionable conduct cases.

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.

96 For completeness, I also reject the plaintiff's submission that the clause is not a penalty because the defendants proposed the interest rates, including the default rate. In the absence of ambiguity, the rule against receiving extrinsic evidence in relation to the party who proposed the clause applies: see JD Heydon, *Heydon on Contract: The General Part* (2019, Thomson Reuters) at [26.1190]. Accordingly, reliance cannot be placed on the context of which party proposed the clause when considering objectively whether the clause is unenforceable as a penalty. In any event, regard to such a matter would not alter any conclusion set out above that the default interest rate clause is a penalty.

What amount is owing?

97 The next issue is what amount is owing by the defendants to the plaintiff.

98 Having determined that default interest is not payable because it is unenforceable as a penalty, I did not understand there to be a dispute between the parties. The amount owing is:

Principal sum	$450,000
Default interest	NIL
Further sum agreed 23 December 2024	$120,000
Monthly administration fee to 30 July 2025	$8,250
Default notice fee	$200
Total	**$578,450**

99 There was no dispute that costs under the Loan Contract should be added. The proposed costs order sought was in the following terms:

> 1. The First defendant and second defendant pay the plaintiff's costs of and incidental to the proceedings, including the default in the Loan Agreement and the steps taken to enforce the Loan Agreement, as agreed or assessed.
>
> a. on an indemnity basis and with the rate of charge for professional costs capped at $550 per hour (ex GST), or
>
> b. in the alternative to (a) on an ordinary basis.

100 I did not understand the defendants to dispute costs being paid on an indemnity basis in accordance with sub paragraph (a) above. The defendants otherwise indicated that they wished to exercise their statutory right to have the costs assessed.

101 An order should be made to the effect sought with sub paragraph (b) deleted.

102 In circumstances where I have found that no default interest is payable it sems to me that the plaintiff is entitled to simple interest at Court rates under s 100 of the *Civil Procedure Act 2005* (NSW). If there is any dispute about this, it can addressed as part of the regime I propose to order for the parties to agree orders to give effect to these reasons. Otherwise, simple interest at Court rates should be included in the judgment sum.

Is the Darling Point property the only security for the Loan?

103 The defendants contend that the Darling Point property is the only security for the loan whereas the plaintiff contends that the security extends to any other property owned by either the Borrower (first defendant) or Guarantor (second defendant).

104 It was not in dispute that the first defendant owned two units in Glebe Point Road, Glebe – which were sold in April 2025 – and still owns the land comprised in folio identifier X/X, being the property known as unit X/X Macquarie Street, Sydney (**the Macquarie Street Unit**). The second defendant owns the Darling Point property.

105 The dispute between the parties concerns, again, the proper construction of the Loan Contract.

106 In my view, the Loan Contract is quite clear – all real property is charged.

107 Clause 13(a) of the Loan Terms (extracted above) clearly states (emphasis added) that each of "the Borrower, the Mortgagor and any Guarantor (in any capacity) … hereby charges all its assets including but not limited to any real estate including the security named herein with the repayment of any money owing, under this agreement." The "security named herein" is obviously the Darling Point property.

108 Clause 11.2 of the Loan Agreement is to similar effect – charging all real property, not just the Darling Point property.

109 The plaintiff is thus entitled to the declaratory relief sought in paragraph 6 of the statement of claim in relation to the Macquarie Street Unit.

Plaintiff's application to amend

110 As set out above, at the commencement of the hearing, the plaintiff sought to claim for administrative costs of $90,550 said to be payable under the Loan Contract. The defendants objected to the plaintiff being entitled to make this claim. After hearing argument, I refused leave to the plaintiff to make this claim.

111 I did so because I was not satisfied that it was in the interests of justice to permit this to occur. The claim had not been pleaded as it should have been.

Whilst the statement of claim made a reference to all monies due under the agreement and all other monies, costs, charges, damages and expenses are due and payable, there was nothing to suggest that a claim for administrative work was being made. Further, the evidence quantifying the claim was not served until 7 July 2025, well after it should have been and only shortly prior to the commencement of the hearing.

112 There was no real suggestion that the defendants should have been in a position to deal with the claim at the hearing. They would be entitled to an adequate opportunity to investigate the claim including disclosure from the plaintiff.

113 The plaintiff suggested that the issue should be dealt with by the Court referring out the quantum of the claim. The suggestion was that the claim was similar to an assessment of legal costs. I do not agree. One of the issues on the claim would have been whether the alleged work was in fact done. Another issue would likely have been a legal one as to what costs are in fact recoverable. These are issues ordinarily dealt with by the Court.

114 Given the quantum of the additional claim – less than $100,000 – I was not satisfied that the hearing should be adjourned to be concluded at a later date. No reason was put forward as to why the claim and the evidence in support could not have been put on well before the hearing to enable it to be dealt with at the hearing.

115 For these reasons, I refused leave for the plaintiff to claim administrative costs.

Conclusion and orders

116 The parties should seek to agree orders to give effect to these reasons. Any remaining issues should be determined on the papers.

117 The orders of the Court are:

(1) Direct the parties to confer and seek to agree final orders to give effect to these reasons, including as to costs.

(2) Direct the parties to provide any agreed orders, or competing orders, to my Associate by no later than 5pm on 22 August 2025.

(3) In the event there is no agreement, including as to costs, direct the parties to provide to my Associate by no later than 5pm on 22 August

2025 any submissions and supporting material, such submissions not to exceed 3 pages.

(4) Direct the parties to provide to my Associate by no later than 5pm on 29 August 2025 any submissions and supporting material in reply, such submissions not to exceed 3 pages, whereupon the remaining issues will be determined on the papers.

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