Supreme Court

New South Wales

Case Name:	Jin Lian Group Pty Ltd (in liq) v ACapital Finance Pty Ltd
Medium Neutral Citation:	[2021] NSWSC 931
Hearing Date(s):	22 - 23 April, 9 June 2021; further written submissions 10 and 16 June 2021
Decision Date:	29 July 2021
Jurisdiction:	Equity - Commercial List
Before:	Stevenson J
Decision:	Proceedings dismissed
Catchwords:	CONTRACTS – Construction – Interpretation – where mortgagee exercised power of sale and recovered entire amount claimed – whether mortgagee retained from proceeds more than its entitlement – proper construction of facility deed and mortgages entered into as part of one transaction RESTRICTIVE TRADE PRACTICES – exclusive dealing – third line forcing – whether lender imposed condition that borrower enter deed of guarantee with named company – special federal matter – whether s 47(6) of Competition and Consumer Act 2010 (Cth) engaged – whether lender required use of discrete services – whether effect of any contravention of s 47 is that guarantee fee agreement void
Legislation Cited:	Civil Procedure Act 2005 (NSW) Competition and Consumer Act 2010 (Cth) Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW) Real Property Act 1900 (NSW)
Cases Cited:	Acron Pacific Ltd v Offshore Oil NL (1985) 157 CLR 514; [1985] HCA 63

Andrews v Australia and New Zealand Banking Group Ltd (2012) 247 CLR 205; [2012] HCA 30
Arab Bank Australia Ltd v Sayde Developments Pty Ltd (2016) 93 NSWLR 231; [2016] NSWCA 328
Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd; Guan v Linfield Developments Pty Ltd [2017] NSWCA 99
Australian Competition and Consumer Commission v Bill Express Ltd (in liq) (2009) 180 FCR 105; [2009] FCA 1022
Australian Competition and Consumer Commission v IMB Group Pty Ltd [2002] FCA 402
Boyded Industries Pty Ltd v Gateway Parramatta Two Pty Ltd [2020] NSWSC 1368
Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd (1986) 162 CLR 395; [1986] HCA 72
David Securities Pty Ltd v Commonwealth Bank of Australia (1990) 23 FCR 1
Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79
Golden J Wealth Pty Ltd v AC Holdings Co Pty Ltd [2019] NSWSC 1342
James v James (No 2) [2019] NSWSC 116
Jin Niu Investments Pty Ltd v Wang [2019] NSWSC 1697
Kellas-Sharpe v PSAL Ltd [2013] 2 Qd R 233; [2012] QCA 371
King Investment Solutions Pty Ltd v Hussain (2005) 64 NSWLR 441; [2005] NSWSC 1076
Kowalczuk v Accom Finance Pty Ltd (2008) 77 NSWLR 205; [2008] NSWCA 343
Mascarello v Registrar-General of NSW [2018] NSWSC 284
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37
O'Dea v Allstates Leasing System (WA) Pty Ltd (1983) 152 CLR 359; [1983] HCA 3
Oak Capital Mortgage Fund Ltd v Dlakic [2019] NSWSC 1538
Paciocco v Australia and New Zealand Banking Group Ltd (2015) 236 FCR 199; [2015] FCAFC 50
Paciocco v Australia and New Zealand Banking Group Ltd (2016) 258 CLR 525; [2016] HCA 28

	Paul Dainty Corp Pty Ltd v National Tennis Centre Trust (1990) 22 FCR 495 PT Thiess Contractors Indonesia v PT Arutmin Indonesia [2015] QSC 123 Rieson v SST Consulting Services Pty Ltd (2005) 142 FCR 482; [2005] FCAFC 6 SST Consulting Services Pty Ltd v Rieson (2006) 225 CLR 516; [2006] HCA 31
Texts Cited:	K Lewison & D Hughes, The Interpretation of Contracts in Australia (2012, Law Book Company) P Herzfeld and T Prince, Interpretation (2nd ed, 2020, Law Book Company)
Category:	Principal judgment
Parties:	Jin Lian Group Pty Ltd (in liq) (Plaintiff) ACapital Finance Pty Ltd (First Defendant) Australia Capital Investment Management Pty Ltd (Second Defendant)
Representation:	Counsel: C J Birch SC (Plaintiff) J Hutton (First Defendant) N Furlan (Second Defendant) (on 9 June 2021) Solicitors: Holman Webb (Plaintiff) Arnold Bloch Leibler (First Defendant) Henry William Lawyers (Second Defendant)
File Number(s):	2019/204875

JUDGMENT

1 The plaintiff, Jin Lian Group Pty Ltd (in liquidation), was in 2016 a property development company based in Sydney.

2 The First Defendant, ACapital Finance Pty Ltd, is a wholly owned subsidiary of Australia Capital Holding Limited.

3 Australia Capital Holding is a finance company that lends money to property developers and construction companies to fund commercial property projects, often (as in the present case) in circumstances where the developer or construction company is unable to access bank finance.

4 As a wholly owned subsidiary of Australia Capital Holding, ACapital is not a bank or an authorised deposit taking institution. Rather, it is a subsidiary of a finance company supported by funds raised from its shareholders or contributed to by its major shareholder, Mr Owen Chen.

5 The Second Defendant, Australia Capital Investment Management Pty Ltd ("ACIM") is a company wholly owned by entities associated with Mr Chen and his family. In circumstances not necessary to recite, ACIM has only been a party to the proceedings since 17 May 2021. It thus did not participate in the hearing on 22 and 23 April 2021. It did so on 9 June 2021.

6 In September 2016, Jin Lian approached Australian Capital Holding concerning the possibility of providing finance for the development of a 120 unit residential apartment complex on a property at Carlingford ("the Development Site"). The project was to involve the demolition of 11 existing dwelling houses and the construction on the Development Site of 3 residential apartment buildings comprising 120 apartments and car parking. In the end, the project did not proceed.

7 Jin Lian's directors aimed ultimately to obtain finance at lower interest rates from a major bank. However, Jin Lian did not have enough presales at the time to meet the requirements of major banks and was in default under a number of the loans it had taken out in order to acquire the Development Site.

8 ACapital agreed to make an interest only loan to Jin Lian of $15 million originally for 12 months ("the Facility").

9 On 11 January 2017, Jin Lian and ACapital entered into a number of agreements including:

(a) a loan agreement entitled "Carlingford Facility Agreement" ("the Facility Agreement");

(b) a deed entitled "Specific Security Deed" ("the Security Deed"); and

(c) mortgages in favour of ACapital over the properties comprising the Development Site ("the Mortgages").

10 On the same date, Jin Lian entered into a "Deed of Financial Guarantee" ("the Guarantee") and a "Financial Guarantor Fee Deed" ("the Fee Deed") with

ACIM. Under those agreements ACIM agreed to guarantee Jin Lian's obligations under the Facility Agreement and Jin Lian agreed in return to pay a fee ("the Guarantee Fee") to ACIM. Jin Lian also granted mortgages in favour of ACIM over the Development Site. Those mortgages ranked behind the Mortgages.

11 On about 20 January 2017, Jin Lian drew down $15 million under the Facility Agreement. Over $14 million of that $15 million was remitted to 35 different entities to repay debts Jin Lian owed in relation to its acquisition of the Development Site.

12 A year later, on 25 January 2018, Jin Lian and ACapital entered a document which had the effect of amending the Facility Agreement by extending the "Repayment Date" from 12 to 18 months from the "Drawdown Date".

13 It is common ground for the purpose of these proceedings that this is the relevant version of the Facility Agreement.

14 On 10 May 2018, ACapital gave Jin Lian notice of an Event of Default which stated that the "Secured Money", then $17,233,598.41, was "immediately due and payable" and that the Facility was cancelled. It is common ground that by 10 May 2018 Jin Lian had committed Events of Default and that the effect of the default was to cause the Secured Money to be due and payable and to cancel the Facility.

15 The following day, 11 May 2018, the directors of Jin Lian resolved to appoint administrators.

16 By Deed of Appointment dated 17 May 2018 ("the Deed of Appointment"), ACapital appointed receivers ("the Receivers") for the purpose of selling the Development Site.

17 ACapital then exercised its power of sale and sold the Development Site, in one line, for $21,599,000.

18 The sale settled on 12 December 2018.

19 ACapital used the proceeds of sale to pay:

(a) the Receivers' fees and other costs of marketing the property for sale;

(b) the debts and associated costs owing to it; and

(c) the debt owing to ACIM as second mortgagee on account of the Guarantee Fee.

20 ACapital paid the surplus of $293,200.54 into Court. On 15 August 2019, Kunc J ordered that the surplus (less $19,310.21 on account of legal costs) be paid to Jin Lian's liquidators ("the Liquidators").

21 The Liquidators now bring these proceedings contending that ACapital has improperly retained part of the proceeds from the realisation of the Development Site.

22 The Liquidators' contentions give rise to questions as to the proper construction of the various loan documents and as to whether particular provisions in those documents are void as a penalty. A question also arises as to whether ACapital engaged in conduct contravening s 47(6) of the *Competition and Consumer Act 2010* (Cth) ("the Act").

23 The parties agreed a Statement of Issues as follows:[1]

> "Issue A. Was the proviso in cl 13 of the Registered Mortgages engaged from 11 May 2018 to 12 December 2018 such that ACapital was not entitled to charge additional interest at a rate of 5% per annum on the whole of the Loan debt during that period?
>
> Issue B. Were the provisions in the Amended Facility Agreement for charging interest at the Standard Rate (cl 5.1) void as a penalty?
>
> Issue C. Were the provisions in the Registered Mortgages for charging interest on overdue amounts (cl 13.1) void as a penalty?
>
> Issue D. Was ACapital, from 11 May 2018, entitled to add unpaid interest to the Principal Outstanding and calculate interest on the aggregate at a rate of 27% per annum?
>
> Issue E. Did ACapital breach s 47(6) of the *Competition and Consumer Act 2010* (Cth) by supplying financial services to Jin Lian on condition that Jin Lian acquire services from ACIM?
>
> Issue F. Are the Deed of Financial Guarantee and Financial Guarantor Fee Deed void by reason of being entered into in breach of s 47(6) of the *Competition and Consumer Act 2010* (Cth)?

[1] Omitting former "Issue J" which I understood ceased to be relevant once ACIM was joined as a party and "Issue M" which was not pressed in closing submissions.

> Issue G. On the proper construction of the Financial Guarantor Fee Deed, was the $660,000 deferred component of the Guarantee Fee refundable if no call was made by ACapital on the Financial Guarantee?
>
> Issue H. Were the provisions of the Financial Guarantor Fee Deed imposing an obligation on Jin Lian to pay ACIM the $660,000 fee (cl 4.1(b)) void as a penalty?
>
> Issue I. Was ACapital entitled to retain, and to pay to ACIM, a sum from the surplus proceeds of sale representing 5% interest payable on the $660,000 fee payable by Jin Lian to ACIM? …
>
> Issue K. Was ACapital entitled to charge interest at 27% on advances made by it to the Receivers and to lawyers on account of their costs?
>
> Issue L. Was ACapital entitled to retain an amount of money on account of the Receivers' fees for work done in arranging to sell the properties comprising the Development Site in circumstances where the Receivers were appointed under the Specific Security Deed?"

24 I have been greatly assisted by the written and oral submissions I have received from Dr Birch SC, who appeared for Jin Lian, Mr Hutton, who appeared for ACapital, and Mr Furlan who appeared on the final day of hearing for ACIM. Much of what appears in these reasons, especially as to uncontroversial background matters, is drawn with gratitude from those submissions.

25 ACapital accepts that if any of the Liquidators' contentions are made out, ACapital must make restitution to the Liquidators of any amount improperly retained by it.

Principles concerning construction

26 There was no dispute before me as to the principles governing the construction of the documents with which these proceedings are concerned.

27 The meaning of the terms of a commercial contract involves consideration of what a reasonable businessperson in the position of the parties would have understood the terms to mean. This enquiry requires consideration of the language used by the parties, the circumstances addressed by the contract and the contract's commercial purpose. Unless the contract indicates a contrary intention, the approach to be adopted is one that gives an

interpretation that would produce a commercial result and avoid it making commercial nonsense or working commercial inconvenience.[2]

28 It is also common ground that, as the Facility Agreement and the Mortgages were executed as a suite of documents, they should be read together. Indeed, as Dr Birch pointed out, the instruments are to a degree intermeshed by their own definitions and terminology.[3]

29 In fact, the parties' submissions focused on the language used by the parties and it is by reference to that language that the competing contentions must be resolved.

30 In that context, it has been correctly observed that:

> "…the only relevant meaning is that which the text conveys. This follows from the need to ascertain the intention *expressed* in the document. Although, …context and purpose are relevant, ultimately the court must attribute meaning to the words actually used."[4] (Emphasis in original.)

Principles relevant to penalty

31 As the Liquidators contend that provisions of the Finance Agreement and the Mortgages are "void" as penalties, I will set out the relevant principles here.

32 It has long been recognised that a clause in a loan agreement establishing a lower interest rate for timely payment, with a higher rate otherwise applicable, does not attract the rule against penalties.

33 The parties refer to this as an "O'Dea Clause" in recognition of the fact that, in *O'Dea v Allstates Leasing System (WA) Pty Ltd*,[5] Gibbs CJ said:

> "…there is no penalty where it is agreed to charge a certain rate of interest on condition that if payment is made punctually the rate will be reduced… In [a case] of this kind, there is a present debt, which, by reason of an indulgence given by the creditor, is payable…in a lesser amount, provided that certain conditions are met. The failure of the conditions does not mean that the creditor becomes entitled to damages; the consequence is that the sum which

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[2] For example, Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] 256 CLR 104 at 116; [2015] HCA 37 [46] to [49] (French CJ, Nettle and Gordon JJ, with Kiefel, Bell, Gageler and Keane JJ agreeing).

[3] See the authorities referred to in K Lewison and D Hughes, The Interpretation of Contracts in Australia (2012, Law Book Company) at [3.03] and P Herzfeld & T Prince, Interpretation (2nd ed, 2020, Law Book Company) at [22.160].

[4] See P Herzfeld and T Prince, Interpretation at [19.60].

[5] (1983) 152 CLR 359; [1983] HCA 3.

> was always owed, but which the debtor was allowed to pay…in a smaller amount, becomes recoverable…in full".[6]

34 The distinction between a clause so drawn, and one which provides for payment of interest at a lower rate, but at a higher rate in the event of default, has been described as "a well-known, if not much praised", distinction.[7]

35 The distinction has been recognised in many cases.[8]

36 The distinction has survived, and is unaffected by, the recent considerations by the High Court of Australia in *Andrews v Australia and New Zealand Banking Group Ltd*[9] and *Paciocco v Australia and New Zealand Banking Group Ltd.*[10]

37 There was no dispute before me about these matters.

38 The relevant principles were summarised by McDougall J, with whom Gleeson JA and Sackville AJA agreed in *Arab Bank Australia Ltd v Sayde Developments Pty Ltd*[11] as follows:[12]

> "(1) Lord Dunedin's propositions[13] were not 'rules of law', but 'distillations of principle'...
>
> (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...
>
> (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…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...
>
> (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

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[6] At pp 366 and 367.

[7] David Securities Pty Ltd v Commonwealth Bank of Australia (1990) 23 FCR 1 at [29] (Lockhart, Beaumont and Gummow JJ).

[8] For example, Acron Pacific Ltd v Offshore Oil NL (1985) 157 CLR 514 at 518; [1985] HCA 63 (Mason ACJ, Wilson, Brennan and Dawson JJ)); Kowalczuk v Accom Finance Pty Ltd (2008) 77 NSWLR 205; [2008] NSWCA 343 at [162]-[163] (Campbell JA); see also King Investment Solutions Pty Ltd v Hussain (2005) 64 NSWLR 441; [2005] NSWSC 1076 at [136]-[138].

[9] (2012) 247 CLR 205; [2012] HCA 30.

[10] (2016) 258 CLR 525; [2016] HCA 28. See generally: Kellas-Sharpe v PSAL Ltd [2013] 2 Qd R 233 at [41]-[43]; [2012] QCA 371 (Gotterson JA, with whom McMurdo P and Fryberg J agreed); Mascarello v Registrar-General of NSW [2018] NSWSC 284 at [393]-[395] and see also [84]-[89] (Sackar J); Golden J Wealth Pty Ltd v AC Holdings Co Pty Ltd [2019] NSWSC 1342 at [52] (Hammerschlag J); Oak Capital Mortgage Fund Ltd v Dlakic [2019] NSWSC 1538 at [103]-[107] (Fullerton J).

[11] (2016) 93 NSWLR 231; [2016] NSWCA 328.

[12] At [74] omitting citations.

[13] In Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] AC 79.

other legitimate commercial interests that were intended to be protected by the stipulation...

(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...

(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...".

39 Further, although the Liquidators' case is that provisions in the Facility Agreement and in the Mortgages are "void" as a penalty, the consequence of a provision being a penalty is not that it is void.

40 A penal clause is not void *ab initio*; rather it is unenforceable.[14]

41 It follows that if the party in whose favour the penal collateral stipulation does not seek to enforce it, no relief is required.

Interest rates – relevant provisions in the Facility Agreement and the Mortgages

42 Clause 5 of the Facility Agreement provided, relevantly:

"**5.1 Interest**

The Borrower agrees to pay interest on the Principal Outstanding from time to time at the Interest Rate. Interest is:

(a) calculated on a straight-line simple interest method on the basis of a 365-day year and the actual number of days elapsed;

(b) payable in advance to the Financier in respect of each forthcoming Interest Period, on each Interest Payment Date …

5.2 Interest Periods

(a) Subject to clause 5.2(b), the first Interest Period for a Drawing begins on the Drawdown Date and ends on its Monthly Anniversary (Interest Period). Subject to clause 5.2(b), each subsequent Interest Period begins on the last day of the preceding Interest Period and is for the same period as the previous Interest Period.

(b) An Interest Period which would otherwise end:

(i) on a day which is not a Business Day ends on the next Business Day; or

(ii) after the Repayment Date, ends on the Repayment Date."

43 "Principal Outstanding" was defined to mean:

[14] For example, Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd; Guan v Linfield Developments Pty Ltd [2017] NSWCA 99 at [372] (Ward JA, McColl and Gleeson JJA agreeing).

> "…the aggregate principal amount of the outstanding Drawings under the Facility including any capitalised interest".[15]

44 "Interest Rate" was defined to mean:

> "…the Standard Rate [22%]…provided that if as at an Interest Payment Date no Event of Default is subsisting, the Financier will accept the VIP Rate [14%] in lieu of the Standard Rate".

45 The Facility Agreement thus provided for differential interest rates. A higher rate was specified as the operative rate, and a lower concessional rate accepted if no Event of Default was "subsisting" at the relevant time. The clause was, on the face of it, an O'Dea Clause and thus not penal.

46 "Repayment Date" was defined to mean:

> "… the date which is the earlier of:
>
> (a) 18 months after the Drawdown Date; and
>
> (b) the date on which the Facility is terminated or cancelled in accordance with this document or all the Secured Money becomes due and payable under this document".

47 Clause 13.1 of the Mortgages provided, relevantly:

> "Unless another Finance Document already obliges [Jin Lian] to pay interest on an unpaid amount that is due and payable by it under a Finance Document, interest on that overdue amount (including on unpaid interest under this clause) will accrue daily:
>
> …
>
> (b) …at the rate which is the higher of:
>
> > (i) the highest rate interest payable in connection with the Finance Documents as specified in the Agreement; and
> >
> > (ii) the rate determined by the Mortgagee as the sum of 5% per year plus the rate applicable to the overdue amount immediately before the due date (or if no such rate applied, plus the Mortgagee's cost of funding the overdue amount)."

48 It is common ground that the Facility Agreement was a "Finance Document" for the purposes of the opening words of cl 13.2.

Interest rates – the Liquidators' contentions

49 Between 11 May 2018 (when ACapital served the Notice of Default) and 12 December 2018 (when sale of the Development Site settled), ACapital charged interest on the whole of the monies outstanding at the rate of 27% per annum.

[15] Although the Facility Agreement provided for the possibility of interest being capitalised, it was not.

ACapital relied on the "Standard Rate" of 22% specified in the Facility Agreement and a further rate of 5% specified in the Mortgages.

50 The Liquidators contend that:

(a) the provisions in cl 5.1 of the Facility Agreement purporting to enable ACapital to charge interest at the Standard Rate of 22% on the Principal Outstanding rather than the VIP Rate of 14% had, on the proper construction of the Facility Agreement, retrospective effect and were therefore void as a penalty (Issue B);

(b) the provisions in the Mortgages purporting to enable ACapital to charge 5% over and above 22%:

(i) were not, on the proper construction of the facility Agreement and the Mortgages, engaged (Issue A); and

(ii) alternatively, if engaged, were void as a penalty (Issue C).

51 The Liquidators contend that the amounts that ACapital wrongly retained from the proceeds of sale of the Development Site on account of these matters were:

(a) by reason of charging the Standard Rate rather than the VIP Rate, $1,701,577.04; and

(b) by reason of charging the further 5%, $452,964.69.

52 For the reasons that follow, I do not accept any of these contentions.

Issue B – were the provisions in cl 5.1 of the Facility Agreement retrospective in effect and thus a penalty?

53 I find it convenient to start by dealing with Issue B. It is common ground that when ACapital served the 10 May 2018 Notice, it thereby "cancelled" the Facility and that the Secured Money became "immediately due and payable". The Repayment Date was thus 10 May 2018.

54 As I have said, the Liquidators' contention that the provisions in cl 5.1 of the Facility Agreement are a penalty, despite being in the O'Dea form, depends on the Liquidators' further contention that, on the proper construction of the Facility Agreement, upon an Event of Default, ACapital was able to charge the Standard Rate of interest (22%) retrospectively to "the beginning of the Facility" and "to the interest that accrued prior to the event of default".

55 ACapital first charged the Standard Rate on the Principal Outstanding in September 2017 following a prior Event of Default.[16] ACapital did not, as a matter of fact, retrospectively charge the Standard Rate on the Principal Outstanding. The Liquidators accept this but contend that the relevant provisions of the Facility Agreement are nonetheless penal, and void, because on their proper construction, ACapital could have done so.

56 Clause 5 of the Facility Agreement dealt with payment of interest on principal: the Principal Outstanding.

57 Although this is a point more relevant to the question of whether cl 13.1 of the Mortgage is engaged, cl 5 did not deal with payment of interest on interest; that is, the compounding of interest. Indeed, it provided for "straight line simple interest".

58 The opening sentence of cl 5.1 was the source of Jin Lian's obligation to pay interest on the Principal Outstanding.

59 As this was an interest-only loan, the principal of $15 million was able to remain "outstanding", in the sense of not yet repayable, until repayment was required; that is, until the Repayment Date.

60 Interest was payable on the Principal Amount at the Interest Rate, being the Standard Rate of 22%.

61 The effect of the clause was that the Standard Rate applied only when an Event of Default was "subsisting". The Standard Rate ceased to apply if and when that Event of Default ceased to be "subsisting". If the Event of Default ceased to be "subsisting", the Interest Rate would revert to the concessional VIP Rate of 14%.

62 I see no room here for an argument that ACapital could have continued to charge the Standard Rate of 22% otherwise than during a period in which an Event of Default was subsisting.

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[16] It had hitherto charged interest at the Standard Rate on unpaid interest (that is, it compounded interest at that rate) but did this exercising a power under cl 13.1 of the Mortgages and not under cl 5 of the Facility Agreement. I return to this below.

63 During any such period, Jin Lian's obligation under cl 5.1(b) of the Facility Agreement was to pay interest in advance in respect of each forthcoming Interest Period, on each Interest Payment Date. While an Event of Default was subsisting, such interest would be at the Standard Rate. Once the Event of Default ceased to be subsisting, interest would revert to the VIP Rate of 14%.

64 The effect of these provisions was not that, once an Event of Default occurred, interest already paid in respect of Earlier Interest Periods at the VIP Rate of 14% would, retrospectively, become liable to be increased to the Standard Rate of 22%.

65 The Interest Rate provisions were not retrospective and were not penal.

66 Even if they were, ACapital did not seek to extract the penalty and thus did not seek to enforce the provisions, assuming they were penal. In those circumstances, Jin Lian would not be entitled to relief because ACapital had not sought to enforce the putatively penal provision.[17]

Issue A – the 5% interest uplift – was cl 13.1 of the Mortgages engaged?

67 The question of whether, on the proper construction of the Finance Agreement and the Mortgages, ACapital was entitled to the 5% interest uplift turns on whether the opening proviso of cl 13.1 of the Mortgages was satisfied and cl 13.1 thereby engaged.

68 Clause 13.1 applied "unless" another Finance Document "already" obliged Jin Lian to pay interest on an unpaid amount that was due and payable. That is, cl 13.1 did not apply if another Finance Document did "already" so provide.

69 The question is whether the Facility Agreement "already obliged" Jin Lian to pay interest "on an unpaid amount that [was] due and payable by it" under the Facility Agreement; being "interest on that overdue amount".

70 As I have said, cl 5 does not purport to deal with interest on "due and payable" interest; compounding of interest. That is dealt with in the parenthetical expression, "(including on unpaid interest under this clause)" in cl 13.1 of the Mortgages.

[17] See [39] to [41] above.

71 The question is whether cl 5 of the Facility Agreement provided for interest on "due and payable" principal, that is on the Principal Outstanding, once that Principal Outstanding was itself "due and payable".

72 In my opinion, it did not.

73 The words in cl 5 set out the manner in which Jin Lian was obliged to pay interest on the Principal Outstanding.

74 Interest was calculated as simple interest and was "payable in advance" and "in respect of each forthcoming Interest Period, on each Interest Payment Date".

75 The effect of cl 5.2(b)(ii) of the Facility Period was that an Interest Period that would otherwise end after the Repayment Date would end on the Repayment Date.

76 The Repayment Date was 10 May 2018.[18]

77 Therefore, there could be no further Interest Periods for the purposes of the Facility Agreement after the Repayment Date. What might otherwise have been an Interest Period ending after the Repayment Date was deemed by cl 5.2(b)(ii) to have ended on the Repayment Date.

78 The effect of this was that, once the Repayment Date had occurred, whether by effluxion of time or, as here, because ACapital cancelled the Facility and the Principal Amount became due and payable, cl 5 of the Facility Agreement ceased to operate.

79 Thereafter, the only provision that provided for both the interest on "due and payable" interest and on "due and payable" principal was cl 13 of the Mortgage.

80 That interest rate was specified in cl 13.1(b) of the Mortgages as the higher of the rates specified in cl 13.1(b)(i) and (ii).

81 So far as concerns interest on "due and payable" principal, the higher of the rates specified in cl 13.1(b)(i) and (ii) was that specified in cl 13.1(b)(ii) being 5% plus 22%, the latter being "the rate applicable to the overdue amount immediately before the due date".

[18] See [14] above.

82 Dr Birch submitted that this construction of cl 5 would render the definition of "interest rate" in the Facility Agreement misleading. However, that submission assumes the correctness of Dr Birch's submission that cl 5 of the Facility Agreement had work to do after the Repayment Date. In my opinion, it did not. It must follow that there is nothing misleading about the definition of "interest rate" merely by reason of the fact that the operation of cl 13 of the Mortgage is to entitle ACapital to add the interest rate uplift of 5% after the Repayment Date.

Issue C – the 5% uplift – were the provisions in the Mortgage providing for the 5% uplift a penalty?

83 Dr Birch submitted that cl 13.1(b) was "in effect a surcharge on top of a rate already intended to compensate for untimely payment". The "rate" that Dr Birch was referring to was evidently the Standard Rate. But as the Standard Rate was included in an otherwise unimpeachable O'Dea Clause, I cannot see how this takes the question of whether cl 13 itself is a penalty any further.

84 Assuming that the provision should be seen as a collateral stipulation, I cannot see how it could be said that the 5% interest uplift provided for by cl 13.1 upon default could be said to be "extravagant" or "out of all proportion" to the detriment ACapital suffered by reason of Jin Lian's default. Indeed, Dr Birch did not seek to develop any submission to this effect.

85 I do not accept that the provisions in cl 13.1 of the Mortgages were a penalty.

Issue D – was ACapital entitled to compound interest?

86 There is no dispute that ACapital charged compound interest from 10 May 2018 onwards.

87 The Liquidators' challenge to ACapital's entitlement to charge compound interest depended on the correctness of their contentions as to Issue A, because ACapital's entitlement to charge compound interest could only arise under cl 13.1 of the Mortgages.

88 As I have rejected the Liquidators' contentions concerning Issue A, it follows that their challenge to ACapital charging compound interest also fails.

The Guarantee Fee paid to ACIM

89 In its letter of offer of 30 November 2016, ACapital stated that it would consider providing finance in the "Finance Amount" of $15 million on terms that included the provision of a guarantee by three named individuals associated with Jin Lian and one named company (evidently associated with one or more of those individuals) and that:

> "A separate agreement must be entered into between [Jin Lian] and [ACIM] in which [ACIM] will provide additional guarantee to [ACapital].
>
> A guarantee service fee will apply."

90 Further, cl 12.3 of the Facility Agreement provided:

> "In consideration for [ACIM] entering into the Financial Guarantee to enable this Facility to be provided to [Jin Lian], [Jin Lian] must pay to [ACIM] on or prior to the Drawdown Date the [Guarantee Fee]…in accordance with the terms of the [Fee Deed]...".

91 On 11 January 2017, ACapital, Jin Lian and ACIM entered into the Guarantee pursuant to which ACIM agreed to guarantee Jin Lian's obligations under the Facility Agreement.

92 On the same day, Jin Lian and ACIM entered the Fee Deed.

93 Clause 4 of that document provided:

> "**4.1 Financial Guarantor Fee**
>
> [Jin Lian] must pay to [ACIM] a fee as follows:
>
> (a) on or prior to the Drawdown Date, an upfront fee in an amount equal to $165,000 (being 1% of the Principal Amount plus GST); and
>
> (b) upon the occurrence of an Event of Default, a conditional fee in an amount equal to $660,000 (being 4% of the Principal Amount plus GST).
>
> (**Financial Guarantor Fee**)".

94 Jin Lian paid ACIM the "upfront fee" of $165,000 referred to at cl 4.1(a) of that document at the time of the drawdown of the loan.

95 ACapital retained the "conditional fee" of $660,000 referred to at cl 4.1(b) (the "Conditional Fee") from the proceeds of sale of the Development Site and paid it to ACIM.

Issues E and F – third line forcing?

96 At the relevant time, January 2017, ss 47(1) and (6) of the Act provided:

> "(1) Subject to this section, a corporation shall not, in trade or commerce, engage in the practice of exclusive dealing.
>
> …
>
> (6) A corporation also engages in the practice of exclusive dealing if the corporation:
>
> (a) supplies, or offers to supply, goods or services;
>
> (b) supplies, or offers to supply, goods or services at a particular price; or
>
> (c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the corporation;
>
> on the condition that the person to whom the corporation supplies or offers or proposes to supply the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation."

97 The Liquidators allege that ACapital contravened s 47(6) of the Act by offering to provide, and providing, the Facility to Jin Lian on the condition that Jin Lian acquire services from ACIM, namely the Guarantee.

98 The Liquidators contend that the effect of s 4L of the Act is that cl 12.3 should be severed from the Facility Agreement as being void and that cl 4.1(b) should likewise be severed from the Fee Deed.

99 For the reasons that follow, I do not agree.

100 It is common ground that ACIM is not a "related" body corporate to ACapital for this purpose.

Special federal matter

101 Jin Lian's third line forcing claim is a "special federal matter" for the purposes of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) ("the Cross-vesting Act").

102 Section 6(1) of the Cross-vesting Act provides that if a matter is a special federal matter, the Court must transfer the proceedings to the Federal Court of Australia unless the Court makes an order under s 6(3).

103 Section 6(3) of the Cross-vesting Act provides that:

> "The Supreme Court may order that the proceeding be determined by that court if it is satisfied that there are special reasons for doing so in the particular

circumstances of the proceeding other than reasons relevant to the convenience of the parties."

104 Section 6(4) provides that, before making an order under s 6(3) the Court must be satisfied that notices have been sent to the Attorney-General of the Commonwealth and the Attorney-General of the State where the proceeding is pending and that reasonable time be allowed since the giving of such notices for the Attorneys-General to consider whether they wish to make submissions to the Court.

105 Notices have been sent to the Attorneys-General who have indicated that they do not wish to participate in the proceedings.

106 When considering whether there are "special reasons" for the purposes of s 6(3) of the Cross-vesting Act, the following principles emerge from the cases:[19]

> "a. the circumstances do not have to be extraordinary or unique…;[20]
>
> b. circumstances are special if they are unusual, uncommon or exceptional in character, quality or degree; if they differ from the ordinary or the usual; or if they are particular or individual; but they need not be unique…;[21]
>
> c. 'likely costs and delays occasioned by the transfer' can be a special reason…;[22]
>
> d. where the issue requiring cross-vesting arises once the proceeding is 'well under way' can constitute a special reason…[23] (in a context where the relevant event was the appointment of a bankruptcy trustee to one of the parties);
>
> e. the proceedings being advanced can be a special factor…;[24]
>
> f. that the matter does not require any specialist knowledge of the relevant area can be a relevant factor…;[25]
>
> g. the parties' convenience is not wholly irrelevant, but there must be some other factor which is the decisive factor – it cannot be the sole basis…;[26]
>
> h. the better administration of justice can be a decisive factor…;[27]
>
> i. the efficient and cost-effective conduct of litigation and use of the Court's resources is not merely a matter of convenience to parties to proceedings, but are matters going to the proper administration of justice...".[28]

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[19] Taken, with gratitude, from a summary prepared by Mr Hutton.
[20] James v James (No 2) [2019] NSWSC 116 at [98] (Slattery J); Jin Niu Investments Pty Ltd v Wang [2019] NSWSC 1697 at [26] (Henry J).
[21] At [98].
[22] James v James (No 2); Jin Niu Investments Pty Ltd v Wang at [28].
[23] James v James (No 2).
[24] Jin Niu Investments Pty Ltd v Wang at [29].
[25] James v James (No 2).
[26] James v James (No 2) at [97] and Jin Niu Investments Pty Ltd v Wang at [27].
[27] James v James (No 2) at [101]-[102].

107 Regard must also be had to the "general rule that special federal matters should be heard by the Federal Court".[29]

108 It is common ground that I should find that there are "special reasons" why I should determine this issue rather than refer it to the Federal Court.

109 Those reasons are:[30]

> "a. the case is well-advanced and is part heard;
>
> b. there would be significant costs and delay involved in transferring to the Federal Court now, including (perhaps most importantly) wastage of the resources of this Court;
>
> c. as for convenience of the parties, the primary consideration is the convenience of ACapital; Jin Lian having failed to consider and address jurisdiction as it should have. Further delay in ACapital having the case against it determined is the most important consideration. There have already been extensive delays in the case by reason of the conduct of Jin Lian, including the proceedings being delayed for about six months (and conditionally dismissed) by reason of Jin Lian's default in respect of an order to pay security for costs;
>
> d. the third line forcing claim does not require specialist expertise to determine – it is a technical claim and does not really raise any competition law issue;
>
> e. the third line forcing claim is a relatively minor part of Jin Lian's overall case;
>
> f. the third line forcing claim was only made when Points of Claim were filed after the proceedings had been on foot in this Court for about four months; and
>
> g. the interests of justice and the *Civil Procedure Act 2005* (NSW) imperatives of achieving 'just, [quick] and [cheap]' determination of the real issues in dispute, favour the matter being determined in this Court."

110 I find, for the purpose of s 6(3) of the Cross-vesting Act, that there are special reasons why I should determine this issue and order, pursuant to s 6(3), that the issue be determined by this Court.

Is s 47(6) engaged?

111 The first question is whether ACapital provided the facility to Jin Lian "on the condition" that ACIM guarantee Jin Lian's obligations under the Facility.

112 As I have set out, one of the "terms" on which ACapital offered the Facility to Jin Lian was that ACIM "will provide an additional guarantee" to ACapital.

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[28] Jin Niu Investments Pty Ltd v Wang at [32].

[29] Section 6(6)(a).

[30] And again, this summary is taken with gratitude from Mr Hutton's submissions.

113 It was also a term of the Finance Agreement that ACIM do so.

114 ACapital's initial offer of finance was contained in its letter of 21 October 2016 to Jin Lian.

115 In that letter ACapital offered to lend Jin Lian $10,938,000 on various terms including that three named individuals, Linfa Jin, Huiju Jin and Qindi Shen guaranteed the loan.

116 The offer was also on the basis of a loan to valuation ratio of "60% of the value of the Carlingford Property".

117 Special Condition 7 provided:

> "The Standard LVR at any given time is 60% unless there is a financial guarantee company or any other guarantor willing to provide additional guarantee to our satisfaction".

118 On 28 October 2016, a meeting took place between Mr Chen, Mr Kun Fang, the Deputy General Manager of ACapital, Mr Li, Mr Zhu and Mr Jin from Jin Lian.

119 The following conversation took place:

> "[Mr Jin]: We need the loan amount to be increased to $16 million.
>
> [Mr Chen]: A loan for that amount would have an LVR of more than 60% and you will need to provide a third-party guarantee if you want to borrow more than $10,938,000. Do you know any other company that may be able to provide a financial guarantee? It could be your own company or another project you are involved in? If you are not able to provide a financial guarantee, then we will not be able to lend to you.
>
> [Mr Jin]: No I don't know any other company who is willing to provide a financial guarantee for me. Can you find one or would you or one of your companies be able to help?
>
> [Mr Chen]: I cannot provide a personal guarantee, but maybe one of my companies can … There are a few risks here. The purchase price for the pre-sales are low. There are also a lot of rumours that the government is going to change its policies about lending and the amount for the first home buyers grant. This means that there is a substantial risk that a lot of the purchasers will rescind their contracts".

120 On 15 November 2016, ACapital wrote to Jin Lian saying that there were "two options for you to consider" one of which was a loan of $16 million and:

> "Engagement of a financial guarantee company to provide additional guarantee to [ACapital]".

121 This led to Jin Lian agreeing to engage ACIM to provide the Financial Guarantee.

122 In these circumstances, Mr Hutton submitted:

> "Further, the [third line forcing] would appear to fail because, as a matter of fact, there is no evidence that ACapital made it a 'condition' of the supply of its lending services that ACIM give the guarantee. For one thing, ACapital was prepared to provide a lending service to Jin Lian without any guarantee – it is only that in such circumstance it would not lend at an LVR higher than 60%. For another thing, ACapital did not restrict Jin Lian to procuring ACIM to give a guarantee. It appears that Jin Lian was unable to find another appropriate guarantor and that is why ACIM was used."

123 I do not agree. It is true that ACapital was prepared to lend at a loan to valuation ratio of 60% or less without a "financial guarantee". But its agreement to lend at a loan to valuation ratio higher than 60% was on the condition that such a guarantee be obtained.

124 But this is not unusual conduct. Every day of the week, banks and finance companies agree to lend funds to corporations on the condition that the loan is guaranteed by "another person not being a body corporate related to the [borrower] corporation".[31]

125 Here, if ACapital was engaging in third line forcing by making it a condition of the loan that Jin Lian procure ACIM to guarantee the loan, the same would apply to its requirement that Linfa Jin, Huiju Jin and Qindi Shen guarantee the loan, as set out in ACapital's letter of offer of 21 October 2016 and repeated in its letter of offer of 30 November 2016.

126 This cannot be right.

127 And the reason it is not right is that s 47(6) is, as Mr Hutton submitted, directed to circumstances where a corporation requires another corporation to use the discrete services of a third party in the future, a matter emphasised by the use of the words "will acquire" in s 47(6).

128 The section is not directed to circumstances where there is a single supply of services.

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[31] To adopt the words in s 47(6).

129 Thus, in *Australian Competition and Consumer Commission v Bill Express Ltd (in liq)* [32] Gordon J said[33]:

> "In order to establish third line forcing, there must be two discrete products or services, with the supply of the first being *conditional* on the purchaser acquiring another product or service directly or indirectly from a third person".[34] (Emphasis added.)

130 As Mr Hutton submitted, that is not what has occurred here. The making of a loan and the guarantee of that loan were not discrete goods or services. The only service that was provided by ACapital to Jin Lian was the giving of a guaranteed loan.

131 The authorities to which Gordon J referred in *Australian Competition and Consumer Commission v Bill Express* provide support for Mr Hutton's submission.[35]

132 For those reasons, my conclusion is that the Liquidators have not established that ACapital acted in breach of s 47(6).

133 The facts of these cases may be contrasted with those in *SST Consulting Services Pty Ltd v Rieson,*[36] a case on which Dr Birch placed particular emphasis. In that case, the third line forcing arose because it was a condition of the loan by SST that the borrower "direct all work of [a particular nature] to the corporations that the lender shall direct".[37]

134 But the lender in *SST* lent money expressly on condition that the directors of the borrowers be named as guarantors.[38] There was no suggestion that this conduct amounted to third line forcing.

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[32] (2009) 180 FCR 105; [2009] FCA 1022 (Gordon J).
[33] At [57].
[34] Citing Australian Competition and Consumer Commission v IMB Group Pty Ltd; [2002] FCA 402 at [72] (Drummond J).
[35] They are Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd (1986) 162 CLR 395; [1986] HCA 72 (supply of beer conditional on use of particular delivery services not third line forcing); Paul Dainty Corp Pty Ltd v National Tennis Centre Trust (1990) 22 FCR 495 (tennis centre requiring customers to use particular booking service operated by third party not third line forcing), Australian Competition and Consumer Commission v IMB Group (fundraising scheme whereby football club required potential members to have invested in sporting and entertainment complex not third line forcing).
[36] (2006) 225 CLR 516; [2006] HCA 31 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan J).
[37] At [10] and [13].
[38] See the judgment of the Full Federal Court in Rieson v SST Consulting Services Pty Ltd (2005) 142 FCR 482; [2005] FCAFC 6 at [43] (Wilcox, Sackville and Finn JJ).

What is the effect of any contravention of s 47(6)?

135 Assuming, contrary to my conclusions, that ACapital's conduct did contravene s 47(6) of that Act, the question arises as to the consequence of such contravention.

136 As developed in final submissions, Dr Birch relied upon s 4L of the Act to argue that cl 12.3 of the Facility Agreement and cl 4.1(b) of the Fee Deed ought to be severed as void.

137 Section 4L of the Act provided:

> "If the making of a contract…contravenes this Act by reason of the inclusion of a particular provision in the contract, then…nothing in this Act affects the validity or enforceability of the contract otherwise than in relation to that provision in so far as that provision is severable".

138 Section 4L is only engaged if:

(a) there is a contract;

(b) the making of that contract contravenes the Act; and

(c) the making of that contract contravenes the Act by reason of the inclusion of a "particular provision" in the contract.[39]

139 Section 4L is not engaged merely because the contract "involves" a contravention of a section of the Act.[40]

140 In its Amended Points of Claim, the Liquidators alleged the following breach of s 47(6):

> "In supplying the services provided by ACapital on condition that financial guarantee services be acquired from ACIM, ACapital and ACIM acted in breach of s 47(6) of the [Act]."

141 The effect of s 4L is to require the severance of the "particular provisions" that offend the Act.[41] Assuming there has been a contravention of s 47(6), the "particular provision" the inclusion of which caused the contravention of the Act, is cl 12.3 of the Facility Agreement.

142 Thus if, contrary to my conclusions, that "particular provision" should be severed, I can see no reason why it follows that cl 4.1(b) of the Fee Deed

[39] SST Consulting v Rieson at [32].
[40] SST Consulting v Rieson at [24].
[41] SST Consulting v Rieson at [52].

should also be severed, as that clause is not the "condition" complained of in the Amended Points of Claim.

143 As Mr Furlan for ACIM submitted, what the Liquidators sought to do was to impugn the provision of a different contract to that in which the "particular provision" is contained. Clause 4.1(b) of the Fee Deed is not that "condition" for the purposes of s 47(6), nor for the purposes of the allegation in the Liquidators' Amended Points of Claim.

144 In any event, as Mr Furlan pointed out, *SST v Rieson* provides no support for the Liquidators' submissions. The High Court did not there conclude that the making of the contracts between the borrower and the persons to whom the lender gave the relevant direction contravened s 47(6) so as to attract the operation of s 4L to those contracts.

145 Were that not correct and cl 4.1(b) was to be severed under s 4L, there is no reason why cl 4.1(a) should not also be severed; a proposition for which the Liquidators did not contend.

146 For all these reasons, my conclusion is that the Liquidator's case under s 47(6) of the Act fails.

Issue G – was the Conditional Fee refundable and not payable in any event

147 Because ACapital recovered its debt from the proceeds of sale of the Development Site, it did not call on ACIM to make any payment under the Guarantee.

148 In those circumstances, the Liquidators suggested, albeit only faintly, that on the proper construction of cl 4.1, the Conditional Fee of $660,000 was not payable to ACIM.

149 I do not accept that submission.

150 Clause 4.1 makes payment of the Conditional Fee contingent on there being an Event of Default. It does not also provide that payment of the Conditional Fee is contingent on a demand being made on ACIM under the Guarantee nor on any payment being made by ACIM under the Guarantee. I can see no basis on which any such contingency could be implied into cl 4.1.

151 The Liquidators submitted that, if that were so, cl 4.1(b) was a penalty, a question to which I now turn.

Issue H – was the provision for the Conditional Fee a penalty?

Collateral stipulation?

152 The Liquidators contend that the provision in cl 4.1(b) of the Fee Deed is void as a penalty.

153 By cl 4.1(a), an "upfront" Guarantee Fee of $165,000, calculated as 1% of the Principal Amount, was payable on the Drawdown Date.

154 By cl 4.1(b), a "conditional" Guarantee Fee of $660,000, calculated as 4% of the Principal Amount, was payable "upon the occurrence of an Event of Default".

155 The question is whether, as a matter of substance, that provision is a collateral stipulation that imposed on Jin Lian a detriment upon failure of a primary stipulation, Jin Lian's obligations to ACapital under the Facility Agreement.

156 In considering this question, it is permissible to take into account extrinsic evidence, including evidence of precontractual negotiations.

157 Further, it is permissible to have regard to extrinsic evidence of a kind that would not be admissible to construe the agreement.[42]

158 In this case, the genesis of the Deed of Financial Guarantee was in the 28 October 2016 meeting to which I have referred.[43]

159 A further meeting took place between Mr Chen, Mr Fang and Mr Jin on 30 November 2016. At that meeting this conversation took place:

> "[Mr Jin]: Cash flow is a problem for me right now. I do not have enough money to pay the 5% financial guarantee upfront to ACIM. I have already paid you a lot of cash. Can't the 5% fee be deducted from the loan amount at settlement instead?
>
> [Mr Chen] No that will not be possible. You may be misunderstanding. We have sent you the financial guarantee documents which say that the total fee

[42] For example, PT Thiess Contractors Indonesia v PT Arutmin Indonesia [2015] QSC 123 at [192] (Jackson J); Paciocco v Australia and New Zealand Banking Group Ltd (2015) 236 FCR 199 at [225]; [2015] FCAFC 50 (Allsop CJ, Besanko and Middleton JJ agreeing); Boyded Industries Pty Ltd v Gateway Parramatta Two Pty Ltd [2020] NSWSC 1368 at [48] (Darke J).

[43] At [118] and [119] above.

> is 5%, but you only have to pay 1% upfront and a further 4% in the event that you stop being a VIP client, which will happen if you default."

160 The "financial guarantee documents" to which Mr Chen referred, included a document called Financial Guarantor Fee Guideline which was in the form attached (Financial Guarantor Fee Guideline (31241, pdf))http://www.caselaw.nsw.gov.au/asset/17aefbebcaf6ac15dfd5eb84.pdf.

161 Mr Jin signed that document on behalf of Jin Lian on 2 December 2016.

162 It is clear that cl 4.1(b) makes payment of the 4% component of the Financial Guarantor Fee conditional on an Event of Default and that the 4% component of that fee would not have been payable if there was no Event of Default.

163 Nonetheless, Mr Hutton submitted that:

> "[I]n substance, and particularly when the pre-contractual negotiations and the other matters of background are taken into account…the better characterisation of the parties' agreement is that Jin Lian agreed to pay the whole Guarantee Fee (i.e. 5% of the money lent) to ACIM in exchange for it agreeing to give the Financial Guarantee and enable Jin Lian to obtain a loan at greater than 60% LVR, but that, by way of concession, only the 1% component would be payable if Jin Lian avoided any Event of Default."

164 Similarly, Mr Furlan, for ACIM, submitted:

> "Properly construed, clause 4.1(b) was part of the total price [Jin Lian] agreed to pay in return for ACIM entering into the Deed of Financial Guarantee."

165 If regard were had only to the terms of the Financial Guarantor Fee Guideline document, and the conversation of 30 November 2016, I could see substance in these submissions.

166 But I find them impossible to reconcile with the words that the parties have used in cl 4.1 of the Fee Deed.

167 It is true that cl 4.1 provides that Jin Lian must pay "a" fee. But the clause then goes on to say that 4% of that fee is payable only on an Event of Default.

168 To reflect what Mr Hutton and Mr Furlan submitted should be found as the "better characterisation of the parties' agreement", it would be necessary to read cl 4.1 as if it said something to the effect:

> "[Jin Lian] must pay to [ACIM] a fee of $825,000.00 provided that if no Event of Default occurs [ACIM] will accept a fee of $165,000.00, such fee to be paid prior to the Draw Down Date."

169 I cannot see how cl 4.1 can be read this way.

170 My conclusion is that cl 4.1(b) should be seen as a collateral stipulation that imposes a detriment on Jin Lian upon its failure to comply with the primary stipulations in the Facility Agreement.

Grossly disproportionate?

171 However, the Liquidators must show more than this. They must show that the detriment thereby imposed is grossly disproportionate to ACIM's commercial interest in Jin Lian's performance of its obligations under the Facility Agreement, such as to make it unconscionable for ACIM to rely upon the provision.[44]

172 The Liquidators must also show what the commercial risk was to ACIM attendant on Jin Lian committing an Event of Default because:

> "…the penalty doctrine is not engaged if the prejudice or damage to the interests of the second party by the failure of the primary stipulation is insusceptible of evaluation and assessment in money terms. It is the availability of compensation which generates the 'equity' upon which the court intervenes; without it, the parties are left to their legal rights and obligations."[45]

173 It is true, as Dr Birch submitted, that the Facility Agreement provides for a large number of Events of Default and that the effect of cl 4.1(b) is that the 4% component of the Financial Guarantor Fee is payable irrespective of the duration or seriousness of the Event of Default or whether it led to a call being made on the guarantee.

174 In that regard, Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[46] said:

> "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'."

175 But that presumption has been said to be a "weak" one[47] and that the invariable nature of the penalty compared to the amount overdue or the length

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[44] See the principles summarised in Arab Bank Australia Ltd v Sayde Developments Pty Ltd at [38] above.
[45] Andrews v Australia and New Zealand Banking Group Ltd at [11].
[46] [1915] AC 79 at [87].
[47] Paciocco v Australia and New Zealand Banking Group Ltd (2016) 258 CLR 525; [2016] HCA 28 at [265] (Keane J).

of delay, although it cannot be ignored, is "only weakly indicative of the character of the late payment fee as a punishment".[48]

176 The presumption will be displaced if there is evidence of additional risk.

177 There are many Events of Default prescribed in the Facility Agreement which, if they occurred, would bespeak Jin Lian's inability to repay and a likelihood that ACIM's obligations under the Fee Deed would be enlivened.

178 It may be that it is not possible to quantify the additional risk with any precision but such "insusceptib[ility] of evaluation" tends against the conclusion that the relevant provision was a penalty, in which event "the parties are left to their legal rights and obligations".[49]

179 As it turns out, Jin Lian committed multiple Events of Default, none of which are suggested to have been trifling.

180 In these circumstances, I am not persuaded that the Liquidators have discharged the onus of showing that cl 4.1(b) was imposed predominately to punish Jin Lian, rather than to protect ACapital against the additional risk it faced were Jin Lian to default.

Issues I and K – interest on advances to the Receivers and for legal costs

181 In the exercise of its powers of sale under the Mortgages, ACapital paid advances to the Receivers, to its legal representatives and to other agents engaged in the exercise of those powers.

182 ACapital borrowed money from a related body corporate in order to pay those advances and paid interest on that borrowing at the rate of 5% per annum. The Liquidators do not dispute that the 5% interest paid by ACapital was an expense that ACapital was entitled to recover from the proceeds of sale of the Development Site.

183 ACapital charged interest to Jin Lian on the advances paid to the Receivers and legal representatives and other agents of ACapital at the rate of 27% per annum.

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[48] Paciocco v Australia and New Zealand Banking Group Ltd (2016) 258 CLR 525; [2016] HCA 28 at [168] (Gageler J).

[49] See, [172] above.

184 The Liquidators dispute ACapital's entitlement to charge such interest to the extent it exceeded the 5% paid by ACapital in respect of its borrowings.

185 Clause 12.4 of the Facility Agreement provides:

> "[Jin Lian] must immediately pay on demand all costs and expenses of [ACapital] [and] any Receiver…relating to or in connection with:
>
> …
>
> (c) the exercise, enforcement, protection or waiver, or attempted exercise, enforcement or protection, of any Power."

186 "Power" was defined to mean:

> "…any right, power, discretion or remedy of [ACapital], [and] a Receiver… under any Finance Document or applicable law".

187 Further, cl 13 of the Facility Agreement provides that:

> "[Jin Lian] must immediately indemnify [ACapital] on demand against any Loss by [ACapital] in respect of any of the following:
>
> (a) the occurrence of any Event of Default;
>
> (b) the exercise or attempted exercise by the Financier of any Power…".

188 These provisions provide the basis on which ACapital was entitled to recover the undisputed 5% on its borrowings.

189 The amounts paid by ACapital to the Receivers et al, and the 5% borrowing expenses, were monies that were "due and payable under a Finance Document" for the purposes of cl 13.1 of the Mortgages.

190 Accordingly, interest on those amounts accrued at the rate prescribed in cl 13.1(b)(ii) of the Mortgages: 27 %.

Issue L – Receivers' fees

191 ACapital paid the Receivers $345,213.73 and deducted this sum from the proceeds of sale of the Development Site.

192 The Liquidators do not dispute that the Receivers' fees were incurred, nor that they were reasonable.

193 The Receivers were appointed pursuant to the Security Deed and the Deed of Appointment. The sale of the Development Site was thus within the scope of the Receiver's appointment.

194 In any event, ACapital's obligation in s 58(3) of the *Real Property Act 1900* (NSW) was to apply the proceeds of sale to the "expenses occasioned by such sale".

195 In my view, Mr Hutton was correct to submit that no matter what the basis of their appointment, the Receivers' fees were "expenses occasioned by such sale".

Conclusion

196 The Liquidators' claims fail. The proceedings are dismissed.

197 If there is to be a dispute as to costs, the parties should confer and agree on a timetable for written submissions. I will deal with the question on the papers.

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