SUPREME COURT OF QUEENSLAND

CITATION:	*KF Garty Pty Ltd as Trustee for the Tiger Trust v Prasad & Ors* [2025] QSC 91
PARTIES:	**KF GARTY PTY LTD AS TRUSTEE FOR THE TIGER TRUST ACN 167 919 137** (plaintiff) **v** **SIMON SAUL PRASAD** (1st defendant) **and** **SKI PROJECTS PTY LTD ACN 623 251 696** (2nd defendant) **and** **CHADOORA PTY LTD ACN 010 056 363** (3rd defendant)
FILE NO/S:	4506/24
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 May 2025
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2025
JUDGE:	Smith J

ORDERS:

1. **I declare that those parts of the loan agreement and guarantee dated 12 October 2023 which purport to impose an interest rate of 8% per month are a penalty and are void and unenforceable.**
2. **I order that part of the judgment of Muir J dated 11 July 2024 that the first defendant and the second defendant pay to the plaintiff the amount of $1,058,950.43 plus interest be set aside. In lieu thereof I propose to order judgment against the First and Second Defendants in an amount calculated in accordance with these reasons.**
3. **I will hear the parties as to the form of any other consequential orders.**
4. **The application for an injunction and the removal of caveats is dismissed.**
5. **I will hear the parties on the question of costs.**

CATCHWORDS: CIVIL PROCEDURE – DEFAULT JUDGMENT – Setting aside default judgment – where the defendants allege unconscionable conduct by the plaintiff – whether defence on the merits – where the defendants also allege that the default interest rate was excessive and amounted to a penalty

CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – Harsh and unconscionable contracts and statutory remedies – where the interest rate of the loan was 4% per month but increased to 8% per month - whether default interest rate of 96% per annum amounts to a penalty

EQUITY – Unconscionable conduct – whether evidence of exploitation of special disadvantage

TORT – interference with contract – whether sufficient evidence of such an allegation – whether refusal to allow refinancing is actionable in this matter

Australian Consumer Law 2010 (Cth) ss 20, 21, 22
Uniform Civil Procedure Rules 1999 (Qld) r 290
Andrews v ANZ Banking Group Ltd [2012] HCA 30; (2012) 247 CLR 205, cited
Aquamore Credit Equity Pty Ltd v Hung [2021] NSWSC 1681, considered
Bellas v Powers [2023] NSWSC 1198, considered
Commercial Bank of Australia Ltd v Amadio [1983] HCA 14; (1983) 151 CLR 447, applied
De Castro v Burtenshaw Super Pty Ltd [2023] QCA 218, applied
Donaldson v Natural Springs Australia Ltd [2015] FCA 498, cited
Dunlop Pneumatic Tyre Company v New Garage & Motor Co [1915] AC 79, applied
Kakavas v Crown Melbourne Ltd [2013] HCA 25; (2013) 250 CLR 392, considered
McKernan v Fraser [1931] HCA 54; (1931) 46 CLR 343, cited
Northern Territory v Mengel [1995] HCA 65; (1995) 185 CLR 307, cited
Pacciocco v ANZ Banking Group Ltd [2016] HCA 28; (2016) 258 CLR 525, applied
Stubbings v Jams 2 Pty Ltd [2022] HCA 6; (2022) 276 CLR 1, considered
Zhu v Treasurer [2004] HCA 56; (2004) 218 CLR 530, cited

COUNSEL: Solicitors for the plaintiff
Self-Represented defendants

SOLICITORS: Bennett and Philp Lawyers for the plaintiff
Self-Represented defendants

Introduction

[1] This is an application by self-represented defendants to set aside a default judgment pursuant to Rule 290 of the *Uniform Civil Procedure Rules*.

[2] On 11 July 2024, Muir J ordered judgment against the first, second and third defendants in default of their failing to file a notice of intention to defend. Her Honour ordered that the first and second defendants pay to the plaintiff the amount of $1,058,950.43 plus interest of $205,591.40 and further judgment against the third defendant for recovery of possession of land situated at 5 Campbells Pocket Road Wamuran in the State of Queensland.

[3] Her Honour further declared that by clause 2.2 of the written guarantee made between the plaintiff and the first defendant on 12 October 2023, the first defendant granted an equitable charge to the plaintiff in respect of 392 Mullum Road Mount Mellum Queensland. Further, by clause 2.2 of the written guarantee between the plaintiff and second defendant on 12 October 2023, the second defendant granted an equitable charge to the plaintiff in respect of the second defendant's interest in the following properties:

(a) 339 Sandy Creek Road Sandy Creek.

(b) 341 Sandy Creek Road Sandy Creek.

(c) 126 King Street Caboolture.

[4] Her Honour further declared by clause 3.1 of a loan agreement between the plaintiff and the third defendant, the third defendant granted an equitable charge to the plaintiff in respect of its interest in the Mount Mellum property.

[5] With respect to each of the equitable charges, her Honour declared that the charge charged the relevant interest in payment of all monies due and owing by the respective defendant to the plaintiff including for claims for interest and legal costs on a solicitor own client basis.

[6] Her Honour further ordered that the equitable charges referred to above be enforced by sale and pursuant to s 99(2) of the *Property Law Act* 1974, the Mount Mellum property and the second defendant's lands be sold; the first second and third defendants were to deliver up vacant possession to the plaintiff within 14 days and the sales were to be conducted by public auctions.

[7] The first, second and third defendants are applying to the court for an order setting aside the default judgment; an order setting aside the foreclosure order; an order removing caveats over the properties and an injunction restraining the plaintiff from taking any further enforcement action.

[8] In essence, the defendants submit that the default interest rate of 96% per annum is an unenforceable penalty. It is also claimed that the plaintiff has refused to release caveats obstructing the defendants from refinancing. It is submitted the plaintiff has

engaged in unconscionable conduct and an order for damages is claimed against the plaintiff for unconscionable conduct and alleged improper use of caveats.

Background

[9] In the claim and statement of claim filed 11 April 2024, the plaintiff alleges that on or about 12 October 2023 the plaintiff and the third defendant signed a loan agreement for the plaintiff to provide financial accommodation to the third defendant. The material terms of the loan agreement were:

(a) The principal amount involved was $600,000.

(b) Loan establishment fees were $22,500.

(c) Broker management fees $22,500.

(d) Legal fees $1,500.

(e) Interest for minimum interest period $88,159.

(f) Interest rate – 8% per calendar month fixed.

(g) Concessional rate – 4% per calendar month fixed.

(h) The interest commencement date was 25 September 2023.

(i) The repayment date was six calendar months from the interest commencement date.

(j) The borrower charged all of its right, title and interest in all real estate and leasehold or personal property.

(k) Subject to clauses 4.2 and 4.3 for the period between the interest commencement date and the repayment date, the borrower must pay interest on the outstanding balance of the loan amount monthly in advance and interest is calculated at the interest rate and interest not paid when due would compound and itself bear interest.

(l) Clause 4.2(a) provided "Notwithstanding anything to the contrary in this agreement if in the lender's reasonable opinion, no event of default occurs either on or before the repayment date, then the lender will accept interest at the concessional rate in lieu of interest under clause 4.1."

(m) In the event of default prior to the repayment date then the concession on interest does not apply.

(n) If the borrower fails to repay the loan on the repayment date, then the borrower must pay interest on the outstanding balance at the interest rate which shall compound.

(o) In the event of default, the total amount owing will at the option of the lender become due and payable as determined by the lender.

(p) If the borrower fails to pay the total owing on the repayment date or fails to pay any other money payable and this continues for more than five business days this amounts to payment default.

[10] Also, on or about 12 October 2023 the first defendant and the second defendant entered into written guarantees to guarantee the payment of the monies owed by the third defendant to the plaintiff and, to secure their obligations under the deed, the guarantors charged any of its right title and interest in any land, realty or other assets owned by the guarantors.

[11] On or about 12 October 2023, the third defendant granted a mortgage over its interest in the third defendant's property in favour of the plaintiff to secure the debts.

[12] It is alleged that pursuant to the loan agreement the plaintiff advanced the gross sum of $734,659 calculated as follows:

(a) Advance $600,000

(b) Establishment fee $22,500

(c) Balance legal fees $1,500

(d) Minimum interest (3 months) $88,159

(e) Broker management fee $22,500

[13] The third defendant defaulted under the loan agreement and mortgage as it failed to pay interest monthly in advance pursuant to clause 4.1 of the loan agreement.

[14] A letter of demand was sent by Bennett and Philp to the third defendant on 23 February 2024 but despite demand the third defendant neglected to pay this sum.

[15] On 6 March 2024, the plaintiff caused a notice of exercise of power of sale to be served on the third defendant, but the third defendant failed to comply with this notice. Therefore the plaintiff is entitled to possession of the third defendant's properties.

[16] As regards the first and second defendants, it is alleged they failed to pay monies due under the guarantee. Demands were made in letters from Bennett and Philp to Davis Lawyers and the second defendant dated 13 March 2024.

[17] In the premises, the defendants were liable for $1,058,950.43 together with interest at the rate of 8% per month from 8 April 2024 until the date of judgment or earlier payment therein.

Plaintiff's evidence

[18] Mr Kevin Francis Garty swore an affidavit filed 3 July 2024. He produces the material including the loan agreement and a copy of the mortgage document. He also noted that to protect the plaintiff's security interests, caveats had been registered with respect to each property.

[19] He says that $734,659 was advanced to the third defendant on or about 12 October 2023. He says that the third defendant failed to repay the loan within the time prescribed in the loan agreement.

[20] He said at that stage the plaintiff had only received the sum of $107,036.38 on or around 17 May 2024.

[21] He claimed that as at the 2 July 2024 the amount owed was:

(a) Principal $646,500

(b) Interest at 8% per month $403,550.60

(c) Legal costs $8,899.83

(d) Total $1,058,950.43

(e) Further interest $183,950.20

(f) Less amount paid $107,036.38

(g) Total outstanding $1,135,864.25

[22] In an affidavit of Mr Rouyanian sworn 7 April 2025, he attaches a letter which sets out the plaintiff's contentions as follows:

(a) Even if the applicable rate for the loan was 4% there would still be default under the loan.

(b) It is admitted the following amounts were received:

(i) $107,036.38

(ii) $500,118.97 from the sale of the Wamuran property.

(iii) $9,583 from the sale of another Wamuran property.

(c) The interest rate was set in the context this was a short term 6 month loan.

(d) The interest rate is not a penalty.

(e) Mr Prasad was not at a disadvantage before entering into the agreements and had independent legal advice.

[23] In a second affidavit Mr Rouyanian encloses the advice from Mr Davis showing that Mr Prasad received independent legal advice prior to executing the guarantee.

Defendant's evidence

[24] Mr Prasad has filed an affidavit dated 26 March 2025. He agrees that on 12 October 2023 he entered into the loan agreement with the plaintiff. The original loan principal of $646,500 was repaid along with some interest ($664,496.75) but despite this he says the plaintiff has refused to release the caveats placed on his properties which had prevented him from refinancing to pay off any remaining balance.

[25] He believes the interest rate of 96% per annum is an unenforceable penalty under Australian Law. He attaches correspondence with the plaintiff which shows his attempts to refinance and settle the debt. He says he was hospitalised for seven weeks due to severe financial and emotional distress caused by the plaintiff's enforcement actions and medical records are attached to the affidavit. He says that he was unable to properly defend the foreclosure proceedings when judgment was entered. He says the plaintiff's conduct by the use of caveats to block refinancing

and enforce a penalty is unconscionable and has caused severe and personal hardship.

[26] There is email correspondence dated 23 February 2024 from Mr Prasad to the finance company as to his difficulties in repaying the loan. He indicated he wanted to obtain refinancing. By reply dated 23 February 2024, Mr Cooper from Speedy Finance required the load to be refinanced sooner rather than later. There were further discussions about refinancing with Angus Securities.

[27] In response to a letter of demand, Mr Paul Davis from Davis Lawyers for Mr Prasad wrote to the plaintiff confirming that Speedy Finance had been assisting the defendant with refinancing options and it would take a few weeks to finalise. There is a further letter from Mr Davis dated 13 March 2024 which referred to the plaintiff's refusal to allow refinancing and there were no other refinance options available.

[28] There were discussions in May 2024 about the plaintiff receiving $90,000 net sale proceeds of a property at 97 Wayland Street Stafford and a caveat would be withdrawn.

[29] There is other evidence relating to the sale of some properties. He attaches a letter from a psychiatrist from the Belmont private hospital which indicates that Mr Prasad was admitted to the hospital for treatment.

Defendants' submissions

[30] The defendants submit that injunctions should be ordered by the court to restrain the plaintiff from enforcing any interest over the defendants' properties and to remove caveats lodged by it. The plaintiff's conduct constitutes unconscionable conduct both in equity and statute and has resulted in significant economic and personal loss. It is submitted that the losses are somewhere between six to ten million dollars. It is submitted that the plaintiff acted unconscionably contrary to section 21 of the Australian Consumer Law and under the principles of equity.[1]

[31] It is alleged that there has been a tortious interference and refusal to cooperate with refinancing.[2] The submissions attach an email from Mr Davis dated 6 March 2024 alleging that the plaintiff was frustrating attempts at refinancing.

[32] In the notice of intention to defend it is alleged that the 96% interest rate is unconscionable and unenforceable as it amounts to a penalty and that the plaintiff engaged in unconscionable conduct.

Plaintiff's Submissions

[33] The plaintiff on the other hand submits that the third defendant defaulted on the mortgage after having made only one payment of $107,036.48. On or about 11 July 2024 default judgment was obtained. About one month after this the plaintiff received payments totalling $509,701.97 from a mortgagee sale. The plaintiff has not taken steps to enforce this judgement.

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1 *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447.
2 *Zhu v Treasurer* [2004] HCA 56; (2004) 218 CLR 530.

[34] Without making any admissions, the plaintiff would consent to the judgment debt being set aside but does not consent to the balance of the judgment being set aside as:

(a) Even if the court was to deem the lower rate of 4% per month applicable the default would never have been remedied.

(b) The judgment was not entered irregularly.

(c) The defendants have no prima facie defence to the action.

Discussion

[35] Rule 290 of the *UCPR* confers on the court a discretion to set aside or amend a judgment by default on terms including terms about costs and the giving of security as the court considers appropriate.

[36] Relevant considerations include;

(a) Whether the defendant has given a satisfactory explanation of the failure to defend within time.

(b) Whether any delay by the defendant in making the application to set aside the judgment precludes it from obtaining relief.

(c) Whether the defendant has a prima facie defence on the merits.

[37] I consider the defendants have explained their delay with reference to the medical material and the ongoing negotiations between the parties. The real question here is whether there is a prima facie defence on the merits.

[38] In *De Castro v Burtenshaw Super Pty Ltd*[3] the Court of Appeal noted that the defendant must make more than a bare allegation, the allegation must be supported by some reference to evidence to suggest the defence is plausible and not just raised for the purpose of having the default judgement set aside. It is the judge's duty to consider whether the defendant has a prima facie defence on the merits by reference to the evidence put forward on the application.

[39] I first turn to the allegation of unconscionable conduct. Unconscionable conduct both in equity and under the statute[4] can occur when a party makes unconscientious use of his or her superior positional bargaining power to the detriment of a party who suffers from a special disability or is placed in some special situational disadvantage.[5] A mere difference in bargaining power is not a special disadvantage or liability. The circumstance must be one which seriously affects the ability of the innocent party to make a judgment in their best interests.[6]

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3 [2023] QCA 218 at [8].

4 Sections 20, 21 and 22 of the *Australian Consumer Law 2010 (Cth). Kakavas v Crown Melbourne Ltd* [2013] HCA 25; (2013) 250 CLR 392 at [2].

5 *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447.

6 *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447.

[40] As was noted in *Stubbings v Jams 2 Pty Ltd*[7] equitable intervention does not relieve a plaintiff of the consequences of improvident transactions conducted in the ordinary and undistinguished course of a lawful business.

[41] In *Stubbings* the plaintiff at all times was incapable of understanding the risks involved in the transaction. That is not the case here. In this particular case I consider there is insufficient evidence to justify a prima facie allegation of unconscionability. Whilst there is no doubt the defendants were in a difficult financial situation; they did not appear to be under any position of disadvantage. They voluntarily entered into this short term loan contract. Additionally the fact is, advice was received from an independent solicitor as to the advisability of entering into the guarantee. On the evidence they willingly entered into this short term loan agreement aware of its terms and potential consequences.

[42] I do not consider the defendant has satisfied the court of a prima facie defence on the merits on this ground. Also, as the plaintiff points out, the medical certificate relates to a period after the entry into the loan agreement and the issuing of proceedings.

[43] I next turn to the question of whether an action is available to the defendants for the tort of interference with a contract. In order to establish such an action a plaintiff must prove that the defendant intentionally induced a party to break a contract or that the defendant brought about a state of affairs as a result of which a party to the contract is incapable of performing it.[8] The tort has been described by the High Court as one which depends on an intention to harm on the part of the defendant.[9] It must be proved there is a pre-existing contract.[10]

[44] In this case I do not consider there is sufficient evidence of this tort. When I read the correspondence attached to the defendant's affidavit at most it shows that there was a refusal to allow a refinance I do not see how this amounts to inducing another party to break any contract. There is no evidence in the material of any pre-existing contract alleged to have been broken or how it is alleged the plaintiff induced this. There is also no evidence of any intention to harm. I therefore do not find a prima facie cause of action on this ground.

[45] I next turn to the issue of the alleged penalty.

[46] A penalty has been defined as being "in the nature of a punishment for the non-observance of a contractual obligation and consists upon breach of the imposition of an additional or different contractual liability."[11]

[47] In *Dunlop Pneumatic Tyre Company v New Garage & Motor Co*[12] the test was said to be "if 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 that flows from the breach" that it could be said that the stipulation is a

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7 [2022] HCA 6; (2022) 276 CLR 1 at [38].
8 *Donaldson v Natural Springs Australia Ltd* [2015] FCA 498.
9 *Northern Territory v Mengel* [1995] HCA 65; (1995) 185 CLR 307 at p 342.
10 *McKernan v Fraser* [1931] HCA 54; (1931) 46 CLR 343.
11 *Andrews v ANZ Banking Group Ltd* [2012] HCA 30; (2012) 247 CLR 205 at [9].
12 [1915] AC 79 at [69].

penalty and intended to punish. This test has been adopted in Australia.[13] The critical question is whether the sum agreed was commensurate with the interest protected by the bargain.[14]

[48] Whether a term is a penalty or liquidated damages is a question of construction to be decided upon the terms and circumstances of each contract, judged at the time of the making of the agreement not at the time of the breach.[15] If a term is found to be a penalty, then it is unenforceable.

[49] Ordinarily a court will consider whether sum agreed upon is comparable to the loss the innocent party will suffer if the contract is breached.[16] Where this sum is not easily ascertainable then a decision is made based on all of the circumstances of the case.[17]

[50] There are two relatively recent New South Wales Supreme Court decisions which have examined loan agreements like the present.

[51] In *Aquamore Credit Equity Pty Ltd v Hung*[18] Meagher JA was concerned with a loan agreement where the higher rate of interest was 5% per month and the lower rate 2.5% per month. His Honour at [117] noted that lower rate of interest was equivalent to slightly more than 30% per annum whereas the higher rate was slightly more than 60% per annum. The difference arose as interest was compounded monthly in arrears (like in the present case.) His Honour examined the relevant principles and in particular noted the judgment of Keane J in *Pacciocco* i.e. whether the impugned provision requires payment on breach which is out of all proportion to the legitimate commercial interest of the party relying on it such that its punitive character is revealed. His Honour ultimately held at [142] that an increase of 30% to 60% per annum was on the face of it out of proportion to any increased credit risk that the borrower was likely to represent on the happening of any event of default. The doubling of the rate of interest was a substantial detriment on the borrower and was a penalty.

[52] In *Bellas v Powers*[19] Robb J examined a similar situation. In Bellas, the court considered a dispute over the enforceability of a clause which imposed the higher interest rate on a loan facility in the event of a default. In that facility the "standard" interest rate was 9.75% per month and the "discounted" interest rate was 1.75% per month. His Honour noted that the standard rate was significantly more than the discounted rate. His Honour noted at [67] that the onus is on the person claiming that the provision is a penalty.

[53] Robb J relying on *Dunlop Pneumatic Tyre Company v New Garage & Motor Co*[20] held the clause was a penalty as it was extravagant and unconscionable as compared to a loss which could be proved to have followed from the breach. It was therefore determined that the clause was void and unenforceable.

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13 *Pacciocco v ANZ Banking Group Ltd* [2016] HCA 28; (2016) 258 CLR 525 at [29].
14 *Pacciocco v ANZ Banking Group Ltd* [2016] HCA 28; (2016) 258 CLR 525 at [28].
15 *Ringrow Pty Ltd v BP Australia Pty Ltd* [2005] HCA 71; (2005) 224 CLR 656 at [11].
16 *Pacciocco v ANZ Banking Group Ltd* [2016] HCA 28; (2016) 258 CLR 525 at [136]-[137].
17 *Pacciocco v ANZ Banking Group Ltd* [2016] HCA 28; (2016) 258 CLR 525 at [53].
18 [2021] NSWSC 1681.
19 [2023] NSWSC 1198.
20 [1915] AC 79.

[54] The approach in the above cases has been persuasive. In this case, I form the clear view that an interest rate of 96% per annum is excessive and constitutes a penalty. The effect of the clause is to require a person to repay double the borrowed amount over a year. The doubling of the interest rate in the event of breach is not a realistic estimate of the damages in this case. I find that the higher rate is extravagant and out of proportion to any damages which could be awarded because of the breach.

[55] Let me do this analysis. Under the 8% rate the total judgment as at 20 May 2024 was:

(a) Principal $646,500

(b) Legal Costs $8,899.83

(c) Interest $403,550.60

(d) Total $1,058,950.43

[56] Under the 4% rate the total amount as at 20 May 2024 would have been[21]:

(a) Principal $600,000

(b) Legal Costs $8,899.83

(c) Interest $190,000

(d) Total $798,899.83

[57] Then one must factor in that the following amounts have been paid by the defendants:

(a) $107,036.38

(b) $500,118.97

(c) $9,583

(d) Total $616,738.35

[58] One can see that the plaintiff stood to gain a very large sum under the higher interest rate. Far higher in my view than was warranted in all of the circumstances particularly when one considers the defendants have in fact paid the same amount as the principal.

[59] In the circumstances I find the clause imposing the default interest rate of 8% per month to be void and unenforceable.

Orders

[60] In those circumstances, for the reasons given I make the following orders:

1. I declare that those parts of the loan agreement and guarantee dated 12 October 2023 which purport to impose an interest rate of 8% per month are a penalty and are void and unenforceable.

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[21] Exhibit 1.

2. I order that part of the judgment of Muir J dated 11 July 2024 that the first defendant and the second defendant paid to the plaintiff of the amount of $1,058,950.43 plus interest be set aside. In lieu thereof I propose to order judgment against the First and Second Defendants in an amount calculated in accordance with these reasons.

3. I will hear the parties as to the form of any other consequential orders.

4. The application for an injunction and the removal of caveats is dismissed.

5. I will hear the parties on the question of costs.