Supreme Court

New South Wales

Case Name:	Oxygen Funding Solutions Pty Ltd v Dick-Telfar
Medium Neutral Citation:	[2020] NSWSC 582
Hearing Date(s):	12 – 13 May 2020
Decision Date:	18 May 2020
Jurisdiction:	Common Law
Before:	Adamson J
Decision:	(1) Judgment for the plaintiffs in the sum of $2,351,780. (2) Judgment for the cross-defendants/plaintiffs on the cross-claim. (3) Order the defendants to pay the plaintiffs'/cross-defendants' costs of the proceedings on an indemnity basis.
Catchwords:	CONTRACTS — Remedies — money claim made under loan agreement — whether attempts to discharge debt by refinancing were frustrated by conduct of the lenders CONTRACTS — Unconscionable conduct — Australian Securities and Investments Commission Act 2001 (Cth) s 12CA — whether interest rates in the loan agreement unconscionable
Legislation Cited:	Australian Securities and Investments Commission Act 2001 (Cth), ss 12CA, 12DA
Cases Cited:	Catalyst Provisional Lending Pty Ltd v Dick-Telfar [2020] NSWSC 79 Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8 Kellas-Sharpe v PSAL Ltd [2013] 2 Qd R 233; [2012]

	QCA 371 Kyabram Property Investments Pty Ltd v Murray [2005] NSWCA 87 Saeed v Capital Securities Australia Pty Ltd [2020] NSWSC 223 Watson v Foxman (1995) 49 NSWLR 315
Category:	Principal judgment
Parties:	Oxygen Funding Solutions Pty Ltd ACN 107 769 415 (First Plaintiff / First Cross-defendant) Catalyst Provisional Lending Pty Ltd ACN 139 887 264 (Second Plaintiff / Second Cross-defendant) John Ramsay (Third Plaintiff / Third Cross-defendant) Robert William James Dick-Telfar (First Defendant / First Cross-claimant) Kristin Lorna Cashman Venae-Telfar (Second Defendant / Second Cross-claimant)
Representation:	Counsel: D Edney (Plaintiffs / Cross-defendants) B Levet (Defendants / Cross-claimants) Solicitors: Summer Lawyers (Plaintiffs / Cross-defendants) Carroll & O'Dea Lawyers (Defendants / Cross-claimants)
File Number(s):	2018/315828

JUDGMENT

Introduction

1 Oxygen Funding Solutions Pty Ltd (Oxygen), Catalyst Provisional Lending Pty Ltd (Catalyst) and John Ramsay (together, the plaintiffs) claim judgment for the amount owing by Robert Dick-Telfar and Kristin Venae-Telfar (the defendants) pursuant to a loan agreement entered into on 4 January 2018. In their amended statement of claim filed on 17 April 2019, the plaintiffs claimed an order for possession of a residential property at Malabar (the property) of which they were a mortgagee, a writ of possession and judgment for the amount owing.

2 On 14 February 2020, Johnson J made orders for summary judgment for possession and granted leave to the plaintiffs to issue a writ of possession forthwith with respect to the property: *Catalyst Provisional Lending Pty Ltd v Dick-Telfar* [2020] NSWSC 79. On 31 March 2020, Harrison J refused the defendants' application for a stay of the writ of possession. The reasons set out below address the balance of the proceedings: the plaintiffs' money claim and the defendants' cross claim for damages.

The facts

3 Before turning to the pleaded claims and the issues between the parties, I propose to set out the facts.

The search for short-term finance

4 The plaintiffs engage in short-term money lending. HomeSec Business Finance Pty Ltd (HomeSec) arranges and manages loans, including loans from the plaintiffs. Paul Stone and Jason Brockmuller were both directors of HomeSec. Mr Stone was also a director of Oxygen. Catriona Anderson was HomeSec's credit manager.

5 In December 2017 the defendants required short-term finance. They used the services of Victoria Sobczyk of EV Financial (the broker) who was, at all material times, their agent. The broker sought funds on their behalf from First Mortgage Capital Pty Ltd (FMC) as well as through HomeSec.

6 On 21 December 2017, the broker approached HomeSec to obtain a loan for East Sydney Hospitality Management Pty Ltd (ESHM), a company associated with the defendants. The broker submitted an application through HomeSec's online portal. On 22 December 2017 HomeSec issued a letter of conditional approval. Later that day, the broker asked for the borrowing entity to be changed to KRV Enterprises Pty Ltd (KRV). In response, HomeSec sent a letter of offer which contained an amended conditional approval, naming KRV as the borrower. The letter of offer was executed by KRV as borrower and the defendants as guarantors of the loan and mortgagors of the property to secure the loan. The plaintiffs instructed Summer Lawyers to act on their behalf, prepare loan documentation and advance the funds that would be provided to them by the plaintiffs when the documents had been executed. Elizabeth

Mead, a solicitor employed by Summer Lawyers, had day-to-day carriage of the matter on behalf of the plaintiffs, under the supervision of Paul Reese.

7 On 4 January 2018 the loan agreement was entered into and the sum of $691,700 was advanced for a period of three months from the "Commencement date". The Commencement Date, which was relevantly defined to be the date of the first advance, was agreed to be 3 January 2018. The terms of the loan agreement included that interest was payable each month at a lower rate of 4% and a higher rate of 10%. The higher rate applied if KRV failed to pay interest on the Due Date, which was defined in Schedule A to the loan agreement as being "on the same day of each month as the Commencement Date". A mortgage over the property was executed to secure the loan.

8 Clause 24 of the loan agreement provided:

> "**24. Lender's Certificate (prima facie evidence)**
>
> 24.1 The Lender may rely on a Lender's Certificate as conclusive evidence and as binding on the Debtor in any proceeding by the Lender against the Debtor whether in a Court or a Tribunal or before any Government Authority.
>
> 24.2 A Lender's Certificate is conclusive of any matter stated in it unless the Debtor establishes in a Court or a Tribunal or before any Government Authority (as the case may be) that any information in the Lender's certificate is incorrect."

9 On 4 January 2018, the defendants paid to the plaintiffs the establishment fee of $58,696 and pre-paid three months' interest of $83,004.

10 After the loan agreement had been signed, Mr Dick-Telfar received a phone call from Anthony Marquez of FMC who accused him of "shopping around" with his loan and demanded payment of a brokerage fee of $12,780. He threatened to lodge a caveat on the property if the money was not paid. The defendants paid the sum requested.

11 Ms Mead lodged a caveat on the title of the property to protect the plaintiffs' interest as equitable mortgagees pursuant to the loan agreement. Ms Mead contacted the first registered mortgagee, Perpetual Corporate Trust Ltd (La Trobe), and requested that it make available the certificate of title to the property so that the plaintiffs' interest in the property (as mortgagees) could be registered. The certificate of title was in the possession of, and controlled by,

LexTech, a service provider associated with Purcell Partners, La Trobe's solicitors. LexTech sent an invoice dated 16 January 2018 under cover of a letter of the same date which set out the charges for the production of the certificate of title for this purpose.

The extension to the loan agreement

12 On 21 March 2018 the parties agreed to extend the loan period until 3 June 2018 on condition that the defendants would continue to pay interest at the rate of 4% per month for the extended period. In April 2018 the defendants paid interest in the amount of $27,500 to the plaintiffs.

Attempts by the plaintiffs to register their interest as mortgagees

13 The invoice rendered by LexTech to Summer Lawyers for production of the certificate of title on 16 January 2018 was not paid until 18 April 2018. When Ms Mead tried to register the plaintiffs' interest on the title, she discovered that in the meantime, caveats had been lodged on the title and that the defendants were endeavouring to refinance the loan. As Ms Mead appreciated that the plaintiffs' mortgage would need to be discharged in that event, she took no further steps at that time to register the plaintiffs' interest in the property. However, the certificate of title to the property remained "in production" from La Trobe (through LexTech) because of the plaintiffs' earlier request that it be produced to enable their mortgage to be registered.

The FMC caveat

14 On 24 April 2018, Mr Dick-Telfar discovered that FMC had lodged a caveat on the title to the property which was said to be based on a charge arising from an agreement entered into on 19 December 2017. Mr Dick-Telfar noticed when he reviewed the caveat that it had been lodged by Summer Lawyers on behalf of FMC. He contacted Melissa Le Cornu of FMC to seek a pay-out figure. She informed him that it was $14,000.

The ANZ refinance

15 On 27 April 2018 the Australia and New Zealand Banking Corporation (ANZ) offered to refinance the loans secured by the property by advancing the sum of $2.08 million with an interest rate of 4.7% per annum (the ANZ refinance). It

was a condition of the ANZ refinance that the certificate of title to the property be made available to be produced by La Trobe.

16 On 27 April 2018, following receipt of the letter of offer from the ANZ, the defendants sent a discharge request to La Trobe.

17 The defendants also sought “shortfall funding” from FMC to bridge the gap between what ANZ was prepared to advance and what they required to clear the title of all encumbrances and caveats.

18 On 1 May 2018 Mr Dick-Telfar sent an email to HomeSec attaching the letter of offer from ANZ. Ms Anderson, of HomeSec, responded by saying that a settlement date could not be booked until the defendants were actually in a position to settle. She confirmed that, as interest was payable monthly in advance, the interest payment of $27,668 was due on 2 May 2018.

19 The defendants paid interest to the plaintiffs for May 2018. Neither KRV nor the defendants have made any payments pursuant to the loan agreement since 8 May 2018.

20 In May 2018, Ms Mead became aware that the defendants were seeking to refinance. When she undertook a title search of the property, she learned that two further caveats had been lodged on the title, one by FMC and the other by Prospa Advance Pty Ltd (Prospa). The caveat lodged by Prospa was said to be based on a charge granted by the defendants to Prospa pursuant to an agreement made on 18 September 2017 between Prospa, the defendants and ESHM. The caveat lodged by FMC was said to be based on a charge granted by the defendants pursuant to an agreement with FMC dated 19 December 2017.

21 As it happened, Summer Lawyers acted not only for the plaintiffs, but also for Prospa and FMC. Ms Mead’s evidence was that all practitioners at Summer Lawyers work in a single room. She deposed that Summer Lawyers acts for a number of different lenders and that the solicitors in the firm who act for clients on different sides of a transaction are directed to treat each other as though they are part of different law firms. She explained that she would not have access to the files of clients for whom she did not act on a particular

transaction and that this was the practice in the firm generally. She deposed that, as the solicitor with day-to-day carriage of the matter on behalf of the plaintiffs, she had no knowledge of instructions given by Prospa or FMC, except to the extent that she became aware of such matters through correspondence addressed to her. Nonetheless she was able to ascertain the identity of the solicitors at Summer Lawyers who had day-to-day conduct of the matters concerning Prospa and FMC and to inform the defendants' solicitor, Kate Riley of Patrick Hargraves & Co, of their contact details by email sent on 31 May 2018 so that Ms Riley could obtain a pay-out figure from them. Ms Mead told Ms Riley that Kate Brann acted for FMC and Jennifer Balech acted for Prospa.

22 On 31 May 2018, Samantha Mackinnon, "Securities Officer – Discharges" of LexTech, who acted on behalf of La Trobe, sent an email to Ms Riley informing her that they had contacted their "agent" to "follow up the whereabouts of the title for this matter". She also set out the booking requirements for settlement as follows:

> "We require 10 business days' notice (once we get the title returned to our office we should be able to settle sooner than this)."

23 On 31 May 2018 Ms Venae-Telfar phoned Ms Anderson and told her that they had just been told that there was an issue about the certificate of title to the property and that if it was not resolved they would not be able to settle on 4 June 2018. Ms Anderson told her that it was nothing to do with HomeSec and that any issues with title were the fault of La Trobe. She also told Ms Venae-Telfar that if settlement did not take place before 4 June 2018, they would have to pay another month's interest of $27,668 before that date.

24 On 1 June 2018, FMC executed a power of attorney in favour of Summer Lawyers. This document would appear to have no relevance to the affidavit sworn by Ms Mead in these proceedings. It was, however, included in the version of her affidavit included in the Court Book and bears a page number which follows sequentially from the pages of the affidavit itself. Ms Mead's evidence was that she did not know how that page came to be part of her affidavit. She confirmed that she had not acted on behalf of FMC for the transaction the subject of these proceedings. Stephanie Jin was the solicitor at

Summer Lawyers who had day-to-day conduct of this litigation on behalf of the plaintiffs, subject to the supervision of Mr Reese. The presence of this document as part of Ms Mead's affidavit of 17 September 2019 was relied on by Mr Levet, who appeared for the defendants, as showing that the so-called Chinese walls said to have been notionally erected in the room from which all lawyers at Summer Lawyers practised were ineffective to create a sufficient barrier. This submission will be addressed below in the context of the cross-claim.

25 FMC agreed to accept a reduced figure of $7,000 to remove the caveat which it had lodged on the property. This sum was paid on 6 June 2018. FMC removed the caveat on 7 June 2018.

26 On 12 June 2018, FMC told the defendants that it was not prepared to advance any shortfall funding.

27 On 18 June 2018 Ms Riley wrote to HomeSec to inform it that she was awaiting current documentation from the incoming mortgagee and would keep HomeSec advised as to progress. On 19 June 2018, Ms Mead wrote to Ms Riley and asked for the expected settlement date so that she could inform her clients. On 20 June 2018, Ms Riley confirmed in an email to Ms Mead that she was not in a position to nominate a settlement date as she was awaiting "paperwork".

First settlement date proposed: 29 June 2018

28 On 27 June 2018, Ms Riley wrote to Ms Mead and informed her that she wanted to book settlement on Friday, 29 June 2018 and asked for "payout figures and relevant documentation at your earliest convenience".

29 On 29 June 2018 at 10.04am Ms Mead informed Ms Riley by email that the pay-out figure was $721,449.198. A further email was sent at 10.27am, confirming the amount. Mr Dick-Telfar's evidence was that the defendants were in a position to pay that amount on 29 June 2018. However, at about lunchtime on 29 June 2018, Ms Riley told Mr Dick-Telfar that settlement could not go ahead that day as the certificate of title was not available. It was common ground that the certificate of title had not been requested from La Trobe for a settlement on that date.

Second settlement date proposed: 6 July 2018

30 The following Monday, 2 July 2018, Ms Mead wrote to Ms Riley, referring to a discussion the previous Friday in which Ms Mead had confirmed that the pay-out figure which had been given on 29 June 2018 was the figure to pay out the loan to the plaintiffs. Ms Mead encouraged Ms Riley to contact the solicitors at Summer Lawyers (whose names and contact details had been provided by her on 31 May 2018) to ascertain the pay-out figures for the withdrawal of the caveats lodged by FMC and Prospa.

31 On about 2 July 2018, Ms Mead became aware that the certificate of title of the property was still "in production", having been requested by the plaintiffs in April 2018 for the purposes of registration of their mortgage. At 9.34am on 2 July 2018, she wrote to LexTech and said:

> "We refer to the above matter and understand the Certificate of Title is in production for lodgement of our client's mortgage.
>
> We have been advised the matter is now ready to discharge and your office will not take a settlement booking until the title is removed from production.
>
> Please urgently uplift the Certificate of Title from production and advise once done to enable the proprietor's solicitor to book in settlement."

32 In response, LexTech emailed Ms Mead and confirmed that she had contacted their agent "today to pull the Title out of Production".

33 At 1.54pm on 2 July 2018 Ash Mola, a solicitor who was also employed by Summer Lawyers, sent an email to Ms Mead, informing her that he acted for Ankat Investments Pty Ltd (Ankat). At that stage, the defendants were hoping to obtain finance from Ankat. Mr Mola asked for a pay-out figure for the loan from the plaintiffs as at 6 July 2018. Ms Mead did not respond directly to Mr Mola. Instead, she sent an email to Ms Riley on 4 July 2018 informing her that the current pay-out figure was $750,000 but that an exact pay-out figure could not be provided without a settlement date. Later that afternoon, at 4.36pm, Mr Mola sent an email to Ms Riley, which was copied to Karen Siu, another solicitor at Summer Lawyers, seeking that further details be entered into the security documentation. The email concluded:

> "Finally, the writer has spoken to his colleagues who act for Catalyst and Prospa. Contrary to your letter, these loans remain outstanding and no withdrawal of caveats have been lodged. Please seek your client's instructions."

34 At 6.01pm on 2 July 2018, Angelo Hatsatouris of Patrick Hargraves & Co (whom Ms Riley was assisting) emailed Mr Dick-Telfar and said:

> "Further to our recent discussion and the forwarding scans of the documents for review to the lenders solicitor I have received the response below to my letter attached with the attachments.
>
> On further review of the file I had some concerns around your belief that the other caveats were or would be withdrawn. It has been confirmed that you will need to be independently advised of Kristen and the company by another solicitor in the firm. I will speak to John Kenny to ascertain his availability. I also need to sight approval of the first mortgagee and be satisfied that they are aware of this loan and there is no Deed of Priority reqiured [sic].
>
> One of the caveats has been withdrawn but it appears that there are other matters that need to be addressed concerning the withdrawal of the 3 that remain and I need to know what they are and satisfy myself that there can and will be compliance with all outstanding requirements and you have sufficient funds to achieve the outcome you are seeking within the time frame before the matter falls apart.
>
> See the essential matters referred to below:-
>
> - In accordance with our email dated 29 June 2018, Robert (who is not a director or secretary of the borrowing company) must receive independent legal advice from a separate solicitor in your firm (or another solicitor if one is not available)
> - In accordance with our email dated 29 June 2018 and covering letter, we require a certified photograph of each debtor holding identification documents taken by the solicitor providing the advice and witnessing execution of the security documents.
> - Please provide an updated council rates notice (if available).
> - Please advise us of ANZ's priority amount.
> - Finally, the writer has spoken to his colleagues who act for Catalyst and Prospa. Contrary to your letter, these loans remain outstanding and no withdrawal of caveats have been lodged. Please seek your client's instructions.
>
> ..."

35 On 5 July 2018, Mr Hatsatouris sent an email to Ms Mead and advised that Ankat was providing funds to refinance the loan and that it was proposed that settlement occur the following day. Ms Mead responded by providing a pay-out figure of $749,606.58 in the form of a lender's certificate pursuant to cl 24 of the loan agreement. The expiry date of the pay-out figure was said to be 6 July 2018. Later on 5 July 2018 Mr Hatsatouris informed Ms Mead by email that the settlement was unlikely to proceed on 6 July 2018 and that he would seek a further pay-out figure when a further settlement date was arranged. Mr Dick-

Telfar's evidence was that the defendants were unable to settle on the amount in the lender's certificate without obtaining additional funds.

36 Mr Dick-Telfar's evidence was that, up until 5 July 2019, he believed that La Trobe was responsible for the delay in settlement because it had withheld production of the certificate of title. On the basis of this belief, the defendants made a complaint to the Australian Financial Complaints Authority about La Trobe. The response from La Trobe included a statement that it had been unable to locate any requests from the defendants or their solicitors for a settlement date in June 2018. The statement from La Trobe also included the following:

> "The title was made available at the request of the borrowers' other financiers (the second mortgagee) [the plaintiffs] and should there be a change in the circumstances, the onus to instruct or request the withdrawal of title from production lies with borrowers or the second mortgagee's Solicitors. It was open to the borrowers to request that the second mortgagee either register their mortgage and return the title, or return the title without registering the mortgage. As far as LTF [La Trobe] is concerned we were required to produce the title and in this case, acted reasonably upon the request of the second mortgagee."

Third settlement date proposed: 11 July 2018

37 Mr Dick-Telfar's evidence was that on 9 July 2018 he arranged shortfall finance from Ankat (for whom Mr Mola acted) and that the settlement was rescheduled for 11 July 2018.

38 On 10 July 2018 Ms Riley phoned Ms Mead and told her that the defendants expected that there would be a shortfall of funds and asked her to obtain instructions from the plaintiffs as to whether they were prepared to accept a reduced sum. Following that call, Ms Mead emailed Ms Riley and sought details of the expected shortfall. No response was received to that email.

39 On 11 July 2018 Ms Riley emailed the defendants and Ms Mead and told them that settlement could not occur on that day but proposed a further settlement at 2.30pm on 13 July 2018. Ms Riley said, of present relevance:

> "We have been advised by Ash Mola of Summer Layers that settlement of this matter cannot take place today and will have to be rescheduled for Friday, 13 July 2018."

40 The evidence did not reveal any further detail about the reason why settlement could not proceed on that day. However, as Mr Mola acted for Ankat, it can be

inferred that the delay related to an issue with respect to the loan from Ankat to the defendants.

Fourth settlement date proposed: 13 July 2018

41 Under cover of an email sent at 11.12am on 11 July 2018, Ms Mead sent an updated pay-out figure for a settlement date of 13 July 2018. The pay-out figure was $749,606.58 and was communicated in the form of a lender's certificate pursuant to cl 24 of the loan agreement. The expiry date was said to be 13 July 2018. I note that this was the same pay-out figure that had been given when the proposed settlement date was 6 July 2018.

42 At 4.06pm on 11 July 2018 Ms Riley sent a letter dated 10 July 2018 to Ms Mead which said, of present relevance:

> "We confirm that your client, Catalyst Provisional Lending Pty Ltd/Oxygen Funding Solutions Pty Ltd/John Ramsay, hold Caveat AN21238 for which you advised the payout figure to be $749,606.58 should settlement take place tomorrow.
>
> Our clients have instructed that their calculation of the payout should be $720,900.00. Your payout figure of $749,606.58 therefore leaves our client with a shortfall of $28,706.58 short in their calculations to payout all mortgages and caveats on title, and puts the settlement arrangements planned in jeopardy.
>
> As requested, we set what our client needs to payout and source of funds:-

Mortgage advance from ANZ		$2,079,138.80
Advance from Ankat Investments Pty Ltd		$140,800.00
		$2,219,938.80
La Trobe Financial	$1,431,457.93	
Purcell Partners Pty Ltd	$331.10	
GlobalX	$137.50	

Patrick Hargraves & Co No. 2 Account	$6,219.80	
Summer Lawyers Trust Account	$70,895.69	
Summer Lawyers Trust Account	$790,900.00	
	$2,229,942.02	

> On these figures this leaves a balance of $10,003.22 for our clients to make up to achieve settlement.
>
> We ask that you seek your client's urgent instructions as our client will be unable to settle this matter due to lack of sufficient funds."

43 After receiving this email, Ms Mead telephoned Ms Riley and told her that the figures in the letter of 10 July 2018 (sent on 11 July 2018) appeared to be incorrect. Ms Mead asked Ms Riley to provide each caveator's pay-out figure so that she could obtain instructions from the plaintiffs.

44 On 13 July 2018 at 11.18am, Ms Mead, who had not yet received a response to her request of 11 July 2018, emailed Ms Riley again asking about the pay-out figures. She confirmed that the plaintiffs' pay-out figure in the lender's certificate dated 11 July 2018 would be valid only if settlement occurred on 13 July 2018. Ms Mead did not receive a response to her email of 13 July 2018. Settlement of the refinancing did not occur on that day.

45 According to Mr Dick-Telfar, before 2.30pm on 13 July 2018 (the appointed time for settlement), Ms Riley phoned him and said, "They want $832,000 to settle today". As funds in that amount were not available, Mr Dick-Telfar told Ms Riley that they could not settle that day. A statement in such terms at that time is objectively improbable: see the analysis in *Watson v Foxman* (1995) 49 NSWLR 315, at 319 (McLelland CJ in Eq). First, it was inconsistent with the lender's certificate which had been provided on 11 July 2018 and confirmed earlier on 13 July 2018 which specified a pay-out figure of $749,606.58. Secondly, the figure of $832,000 was first communicated by Ms Mead by letter sent by post on 13 July 2018 (see below). Therefore, Ms Riley cannot have known about the figure at the time she is alleged to have made the statement

to Mr Dick-Telfar. Thirdly, Ms Riley did not have access to her emails on 13 July 2018 because of difficulties with her computer (see below). Ms Mead had not communicated with her by phone on 13 July 2018.

46 I infer that the figure of $832,000 was mentioned by Ms Riley to Mr Dick-Telfar the following week after the notice of default had been received. I do not accept Mr Dick-Telfar's recollection that Ms Riley made the statement attributed to her on 13 July 2018. I infer that Mr Dick-Telfar has misremembered the date on which he learned of the new figure and has mistakenly attributed the date of 13 July 2018 to a conversation which he had the following week with Ms Riley. The unreliability of his evidence on this chronology also appears from his evidence that he received the default notice (referred to below) on 13 July 2018, when it had only been posted on that day and therefore could not have come to his attention until the following week. While these matters affect his reliability as a witness to some degree, I do not consider there to be any lack of honesty in his answers. Rather, I formed the impression that he was trying to piece together the narrative from contemporaneous documents in a period which must have been extremely stressful for him because of the financial pressure he was under at the time.

47 On 13 July 2018 Ms Mead arranged for formal default notices to be sent by post to the defendants. The amount claimed to be payable as at 13 July 2018 was $832,510.58, which comprised the principal of $691,700; outstanding interest of $138,340 and outstanding costs of $2,470. The notice of default gave the defendants 31 days from service of the notice to rectify the default, failing which the property would be sold by the plaintiffs as mortgagee.

48 On Monday 16 July 2018, Ms Riley responded to Ms Mead's email of 13 July 2018 as follows:

> "… Sorry for the delay. Computer went MIA [missing in action] and I have just been able to check emails.
>
> I am waiting on further instructions from our clients and will keep you advised."

49 On 23 July 2018 Ms Riley sent an email to Ms Mead attaching a letter dated 20 July 2018 in which she sought the plaintiffs' consent to accepting a lesser sum in the following terms:

> "It is with great concern our client received this Notice particularly as your firm was also acting on the advance from Ankat Investments Pty Limited approved to pay out this and other loans relying upon the indicative payout figure of $690,000.00 and part of the reason the delay in achieving settlement of the discharge with the funds approved on the refinance relates to the subsequent increases to the payout figure your client has requested, which increased significantly, has created an impasse. This has resulted in our client having to raise additional funds at short notice. Had the payout figure remained as it was initially advised, settlement would have taken place last week.
>
> In these circumstances, we would respectfully request that consideration be given to the payout figure now requested of $832,510.58 remain at $749,606.58.
>
> We look forward to hearing from you."

50 Ms Mead did not respond to that letter.

51 On 25 July 2018, Mr Mola wrote to Ms Riley, seeking "withdrawal costs of $10,200 (less the application fee of $900 already paid) being the money owed to our client pursuant to the attached letter of offer". The payment was to be made to "Summer Lawyers Statutory Trust Account". The attached letter referred to in the email was not included in Mr Dick-Telfar's evidence.

Fifth settlement date proposed: 3 August 2018

52 On 26 July 2018 the defendants obtained a shortfall loan from Joseph Essey, a private funder, with a view to the loan from the plaintiffs being paid out on 3 August 2018. The letter of offer provided for a loan of $230,000 for a period of three months at an interest rate of 4% per month, if paid on time, and an interest rate of 8% per month, if not paid on time. At that stage Hassat Lee and Co Solicitors were instructed by Mr Essey, who later transferred his instructions to Summer Lawyers.

53 On 1 August 2018, according to Mr Dick-Telfar's evidence, the broker rang Ms Venae-Telfar and said to her on speaker phone in the presence of Mr Dick-Telfar:

> "I've got good news for you. HomeSec has agreed [to] accept the $749,000 so long as it settles on the 3rd and you can cover the $28,000 shortfall owed to the caveators."

54 This evidence was admitted on the basis that it was limited to the terms of the communication and not as evidence of the truth of its contents. It follows that the fact that the broker told the defendants that HomeSec had agreed to accept $749,000 at a settlement on 3 August 2018 is insufficient to prove that

HomeSec (as agent for the plaintiffs) was actually prepared to accept that amount. It is, accordingly, necessary to review any other evidence to determine whether the defendants have proved that such an agreement was reached. The broker was not called by the defendants. Ms Anderson was not called by the plaintiffs. Accordingly, there is no evidence from the persons who can be inferred were the agents of the principals in reaching any such agreement.

55 At 5.17pm on 1 August 2018, Ms Anderson sent an email to Mr Stone and Mr Brockmuller which said, of present relevance:

> "I just got off the phone to Victoria, the approx breakdown of the payout are:
>
> Available funds
>
> ANZ $2,080,000
>
> Incoming 2nd $176,900
>
> Total $2,256,900.00
>
> Latrobe $1,435,000
>
> Us $750,000.00 (lower rate payout $747,036.00 plus costs)
>
> Prospa $71,000 (Victoria's BDM gave a wrong payout earlier)
>
> Caveator $10K (this is apparently the lender that didn't settle the first time)
>
> Based on these figures there is still a short fall to payout the $10K.
>
> Victoria is going to email me, this was her figures off the top of her head whilst driving.
>
> This deal only works as a refi [refinance] if we accept a lower rate and let them payout the ones behind us."

56 At 5.19pm (a mere two minutes later), Mr Stone responded:

> "Thanks for that. So effectively EVERYONE is getting full tote, except us."

57 At the end of the sentence, Mr Stone inserted an emoji of a face with a downturned mouth.

58 The plaintiffs called Mr Stone as a witness. He purported to be authorised on behalf of all three plaintiffs. In an affidavit in reply sworn on 17 September 2019, Mr Stone deposed:

> "I have reviewed the Lenders' [plaintiffs'] files regarding the Loan and can find no record of the Lenders agreeing to accept $749,000 (or any similar amount) in discharge of the Loan on 1 August 2018, and I am not otherwise aware of such an offer ever being made on behalf of the Lenders."

59 I do not accept Mr Stone's evidence that he would have reviewed the emails extracted above for the purposes of preparing his affidavit. While the statement in the affidavit is not inconsistent with the terms of the email, I would have expected Mr Stone to refer to the email exchange between him and Ms Anderson on 1 August 2018, had he been reminded of it before swearing his affidavit, if only to say that the offer was not acceptable. However, I accept his evidence that his consent was required for any agreement which bound HomeSec to accept a reduced amount to pay out a loan and that neither Mr Brockmuller nor Ms Anderson had authority to make such a decision on behalf of HomeSec without Mr Stone's approval.

60 It was plain from Mr Stone's evidence that he had no particular recall of the transaction. He surmised that he did not accept the offer made by the broker on behalf of the defendants from his response to the email and from the absence of any record that it had been accepted. His evidence was that the plaintiffs had documentary records of acceptances of offers but might not have a documentary record where an offer made by a borrower had been rejected. I did not find his evidence to be particularly reliable. However, the defendants bore the onus of proving the agreement. The plaintiffs had no onus of disproving it.

61 There is insufficient evidence to amount to a *prima facie* case that any such agreement was reached. Mr Levet placed significant emphasis on the fact that the plaintiffs had not called any witnesses other than Mr Stone and Ms Mead. However, a *Jones v Dunkel* inference (after *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8) can rise no higher than an inference that the evidence of a witness who could be expected to have been called by a party would not have assisted the defendants' case.

62 On 2 August 2018, according to Mr Dick-Telfar's evidence, Ms Venae-Telfar rang someone from La Trobe. Because she put the phone on speaker, he was able to hear that the representative from La Trobe said:

> "We want this settlement to go ahead. We will attend the settlement. We are prepared [to] reduce the amount we require on settlement by $28,000. You will still owe us that money, but we will get it from you later so that it doesn't hold up the settlement."

63 Straight after that conversation, the defendants rang Ms Riley and told her that La Trobe would accept $28,000 less at settlement. They instructed her to proceed to settle the matter on 3 August 2018 as they considered themselves to be in a position to do so.

64 On 2 August 2018 Ms Riley rang Ms Mead asking for settlement to be booked for 3 August 2018 and seeking a pay-out figure for that date. By email sent later that day Ms Mead provided a pay-out figure of $903,880.58 in the form of a lender's certificate pursuant to cl 24 of the loan agreement. Mr Edney, who appeared for the plaintiffs, explained that the substantial increase in the pay-out figure was because the plaintiffs had been prepared to accept interest at the lower rate (4% per month) for the outstanding balance up until 13 July 2018 when the notice of default was issued but that after default, the plaintiffs were not prepared to accept interest at the lower rate and calculated interest for outstanding monies (including those which remained outstanding prior to 13 July 2018) at the higher rate of 10%.

65 Following receipt of this email from Ms Mead on 2 August 2018, Ms Riley wrote to the defendants in the following terms:

> "This morning we received a telephone call from Victoria of EV Financial, the Broker for HomeSec, who has advised that HomeSec will no longer settle for the agreed $750,000.00. If this matter was to settle today the payout figure to HomeSec would be $830,000.00 and should the matter settle tomorrow the payout figure would be $900,000.00.
>
> The reasoning behind their decision was that the loan was in default with no attempt at payment. Victoria advised that HomeSec was of the view "*that the Telfar's had $3,000.00 to throw at another lender and did not do anything to make payment on the default of this loan*."
>
> Victoria suggested that you commence to put the property on the market to get the best possible sale price.
>
> It is with regret that our news is not happy news as we have all worked very hard to achieve a mutually positive outcome for you both.
>
> …"

66 When Mr Dick-Telfar received this email, he realised that the defendants were not in a position to settle in the sum of $830,000. Later that morning each of the defendants spoke to Mr Brockmuller. Mr Dick-Telfar asked him to let the settlement proceed at $749,000, to which he responded, "Mate, it's not enough money", and then hung up.

67 On 3 August 2018, Ms Riley informed Ms Mead by email that settlement would not be taking place that day.

Further negotiations between the parties

68 On 9 August 2018 Ms Riley wrote to Ms Mead asking the plaintiffs to accept a reduced repayment figure of $721,000. Ms Mead responded by rejecting the offer and confirming the then current pay-out figure of $903,880.58. Ms Riley responded by offering a reduced repayment figure of $774,200. Further negotiations of a without prejudice nature took place.

69 In September 2018 Ms Mead registered the mortgage which the defendants had granted to the plaintiffs over the property.

70 On 20 September 2018, the defendants' new solicitor, Martin Rosenblatt of Somerset Ryckmans, emailed Ms Mead and alleged that the plaintiffs had bound themselves in July 2018 to accept a pay-out figure of $749,606.58. By letter dated 27 September 2018 Ms Mead rejected the allegation and enclosed a further lender's certificate pursuant to cl 24 of the loan agreement which specified a pay-out of $1,088,380 with an expiry date of 3 October 2018.

71 On 16 October 2018 the plaintiffs commenced these proceedings by filing a statement of claim.

72 In 2019, the defendants arranged to sell the property to prospective purchasers for the sum of $1.8 million. Ultimately, the plaintiffs, as mortgagees, managed to persuade the prospective purchasers to increase their offer to $2.325 million. The defendants approached this Court for orders to restrain the sale. The delay occasioned by their application for an injunction caused the sale not to proceed. The parties waived privilege on an offer made by the plaintiffs to the defendants at that time that the plaintiffs would take the property (which was to be sold for $2.325 million) in full and final settlement of the proceedings, including the cross-claim. The defendants rejected the offer because they were not prepared to give up their right to prosecute the cross-claim.

73 As at 3 June 2019, the outstanding balance owing under the loan agreement was $1,590,910, excluding the costs of these proceedings.

The relevant legislation

74 Section 12CA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (the *ASIC Act*) provides:

> "**Unconscionable conduct within the meaning of the unwritten law of the States and Territories**
>
> (1) A person must not, in trade or commerce, engage in conduct in relation to financial services if the conduct is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories."

75 Section 12DA(1) of the *ASIC Act* provides:

> "**Misleading or deceptive conduct**
>
> (1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive."

76 The defendants allege in their cross-claim that the plaintiffs acted in contravention of these two provisions. They also rely on the principles of equitable fraud.

Consideration

77 The defendants did not dispute the amount of the claim and accepted that the figure claimed by the plaintiffs be payable unless they made out their cross-claim. The parties identified the following issues arising from the cross-claim and confirmed that these were the issues on the pleadings and remained in issue. The answers to the questions (the reasons for which are given below) follow in italics:

> **1. Allegedly unconscionable interest rate (Amended Defence paragraph 9)**
>
> a. Is the rate of interest provided for in the agreement sued upon (the Loan), being a "higher rate" of 10% per month and "lower rate" of 4% per month, unconscionable?
>
> *No*.
>
> b. If so, to what relief (if any) are the defendants entitled?
>
> *Not applicable.*
>
> **2. Alleged withholding of certificate of title (Amended Defence paragraphs 12.3 and 21-30)**
>
> a. Did the plaintiffs prevent the defendants from being able to refinance the Loan before 5 July 2018 by improperly withholding the certificate of title to the Loan's security property until then?
>
> *No.*

b. If so, to what relief (if any) are the defendants entitled?

Not applicable.

3. Alleged frustration of further refinancing attempts (Amended Defence paragraphs 31-40)

a. Were the defendants' further attempts to refinance the Loan over the course of July 2018 improperly frustrated by third parties also represented by the same firm of solicitors as the plaintiffs?

No.

b. If so, is relief available against the plaintiffs in respect of that conduct?

Not applicable.

c. If so, to what relief (if any) are the defendants entitled?

Not applicable.

4. Alleged failure to accept agreed payout figure (Amended Defence paragraphs 41-46)

a. Did the plaintiffs agree to accept a payout figure of $749,606.58 in respect of a refinancing of the Loan to occur on 3 August 2018?

No, no such agreement has been established on the evidence.

b. If so, were the plaintiffs bound by that agreement, or is relief otherwise available against the plaintiffs for refusing to accept the said sum in satisfaction of the Loan?

Not applicable.

c. If so, to what relief (if any) are the defendants entitled?

Not applicable.

Alleged unconscionable interest rate (issue 1)

78 Mr Levet contended that both the "lower" interest rate of 4% and the "higher" interest rate of 10% were unconscionable. Mr Edney submitted that, although the interest rates were high, it was not open to me to accept Mr Levet's submission. He relied on *Kellas-Sharpe v PSAL Ltd* [2013] 2 Qd R 233; [2012] QCA 371 (*Kellas-Sharpe*) as summarising the authorities for this proposition.

79 It is plain that interest rates of 4% per month and, *a fortiori* 10% per month will result in outstanding interest exceeding the principal within a relatively short period. Such rates will be attractive only to the naïve, the ill-advised or the desperate. It was not suggested that the defendants fell into either of the first two categories. The rates are such that any prospect of refinancing the debt with a reputable lender, such as a bank, is likely to quickly disappear. One only has to compare the "lower" rate of 4% per *month* (48% per annum) which

applied for the loan from the plaintiffs with the rate of 4.7% per *annum* offered by the ANZ to appreciate the uplift applied by lenders such as the plaintiffs on monies advanced by them. Loans on the terms advanced by the plaintiffs have such a high risk of default that it is almost inevitable that any property secured will have to be sold and that any equity held by the borrowers will be extinguished by the passage of time, consumed at a voracious pace by the interest.

80 However, courts have consistently held that, as long as the provisions for the lower and higher rates of interest are drafted in such a way as to make clear that the lower rate is payable by way of a discount, or reward, for timely payment and the higher rate is the rate otherwise applicable, the rate does not amount to a penalty and the lender's conduct is not unconscionable. Thus, it is irrelevant that 10% cannot possibly be a genuine pre-estimate of the plaintiffs' loss if the payment at 4% is not made on time since this is not the test. While trial judges and intermediate courts have railed against the consequences of this distinction, which is to immunise the result of a drafting device from scrutiny on the basis of equitable principles relating to penalties and unconscionability, it has been said, time and again, that the principle is too well established to be disturbed other than at the highest level, by the High Court or by Parliament: *Kellas-Sharpe* at [2]-[4] (Margaret McMurdo P), [32]-[49] (Gotterson JA) and [57]-[60] (Fryberg J).

81 Accordingly, the question is not whether the interest rates are unconscionable in any moral sense, but whether the law regards them as being unconscionable. In these circumstances, I accept Mr Edney's submission that it is not open to me to find that the interest rates charged by the plaintiffs were unconscionable within the meaning of s 12CA of the *ASIC Act*.

Alleged withholding of certificate of title (issue 2)

82 The defendants alleged that the plaintiffs prevented the refinancing before 5 July 2018 by improperly withholding the certificate of title to the property until that date. One of the difficulties with this allegation is that, as referred to above, the defendants were unable to settle on 6 July 2018 in any event as they did not have sufficient funds to pay-out the plaintiffs at the figure specified in the

lender's certificate which had been provided to them by Ms Mead on 5 July 2018. In these circumstances, it was immaterial whether the certificate of title was available or not.

83 Further, the evidence established that, on 2 July 2018, Ms Mead had requested LexTech to remove the certificate of title from production to enable the defendants' solicitors to book a settlement date and was thereby facilitating the production of the certificate of title for a settlement on 6 July 2018, had settlement proceeded on that day. Thus, while the plaintiffs appear to have been responsible for the certificate of title having been in production for a considerable period (from the request in April 2018 until 2 July 2018), no settlement date was booked during this period.

84 Further, even had the defendants been ready to settle on, say, 28 June 2018, and had the certificate of title not been available because it had been requested by Ms Mead earlier and not returned to La Trobe by LexTech, this would not amount to any impropriety by, or attributable to, the plaintiffs. I accept Mr Stone's evidence that the plaintiffs wanted the refinance to settle and did not do anything untoward to obstruct it.

Alleged frustration of further refinancing attempts

85 As the narrative above sets out, there were several settlement dates booked in July 2018, which will be addressed in turn.

Proposed settlement date of 6 July 2018

86 As referred to above, the settlement on 6 July 2018 did not proceed because the defendants did not have sufficient funds to pay the amount specified in the lender's certificate. However, notwithstanding this matter, the defendants alleged that the settlement had to be deferred because of the conduct of the caveators, Prospa and FMC (although the latter's caveat appears to have been removed on 7 June 2018, as referred to above), for whom Summer Lawyers also acted.

87 It is apparent from the email from Mr Mola (who acted for Ankat) to Ms Riley that Prospa's caveat remained on title as at 6 July 2018. There is no allegation that the debt which the defendants owed to Prospa had been repaid or that it did not create a charge over the property. The only basis advanced to support

the allegation that Prospa "improperly frustrated" the settlement on 6 July 2018 was that Ms Balech (who acted for Prospa) was a solicitor at Summer Lawyers, as was Ms Mead, who acted for the plaintiffs. In substance, the defendants allege that there was collusion between solicitors at Summer Lawyers who acted for different lenders to frustrate the settlement on 6 July 2018. This is a very serious allegation for which there is insufficient basis. It appears from the evidence that, at times, the solicitors at Summer Lawyers who acted for different lenders spoke to each other directly rather than writing to each other as if they were in different firms. However, there is no indication that there was anything improper about the discussions. For example, Ms Mead appears to have been told by the solicitor at Summer Lawyers who acted for Prospa that Prospa's debt had not been repaid and that, accordingly, the caveat would remain on title until it was.

88 In these circumstances, the question posed in 3a must be answered, in relation to the settlement date of 6 July 2018, in the negative.

Proposed settlement date of 11 July 2018

89 It appears from the narrative set out above that the defendants had insufficient funds to pay out the plaintiffs and that, accordingly, the matter could not have settled on 11 July 2018 in any event, unless the plaintiffs agreed to reduce the pay-out figure and issue a new lender's certificate. However, even had the defendants been able to settle on 11 July 2018, the settlement could not go ahead for a reason associated with Ankat, for whom Mr Mola acted. It is not clear from Ms Riley's email to Ms Mead sent on 11 July 2018 what reason, if any, Mr Mola gave for the deferral of the settlement date of 11 July 2018.

90 In these circumstances, it is not open to me to conclude that Ankat did not proceed with the settlement for an "improper" reason. Further, the only basis advanced by the defendants for the inference that the plaintiffs were implicated in the deferral is that Mr Mola and Ms Mead both worked for Summer Lawyers. However, there is no evidence that there were any improper communications between Mr Mola and Ms Mead or that either was in breach of the fiduciary duties each owed his or her client, as the case may be. Nor is there any tenable connection which would implicate the plaintiffs vis-à-vis the defendants.

91 For these reasons, the question posed in 3a must be answered, in relation to the settlement date of 11 July 2018, in the negative.

Proposed settlement date of 13 July 2018

92 Once again, it is apparent from the narrative set out above that the defendants did not have sufficient funds to pay-out the amount specified in the lender's certificate issued by the plaintiffs for a settlement on 13 July 2018. They could only have settled if their creditors (including the plaintiffs and Prospa) had been prepared to compromise on the amounts owing. Ms Riley did not provide the information as to the caveators' pay-out figures which Ms Mead had requested on 11 July 2018, which appears to have been necessary before the plaintiffs were prepared to consider compromising their pay-out figure.

93 There is no evidence that either the plaintiffs or any third party for whom Summer Lawyers acted caused the deferral of the settlement on 13 July 2018, much less that their conduct was improper in relation to that settlement day. For these reasons, the question posed in 3a must be answered, in relation to the settlement date of 13 July 2018, in the negative.

Alleged failure to accept agreed pay-out figure (issue 4)

94 The allegation which forms the basis for issue 4 is that the plaintiffs agreed to accept $749,000 if the matter settled on 3 August 2018. For the reasons given above, the defendants have not proved that there was any such agreement. For this reason, the question posed in 4a must be answered in the negative.

Further matters

95 A question arose in the course of the cross-examination of Mr Dick-Telfar, whether the defendants had failed to mitigate their loss by not co-operating with the plaintiffs' attempts to sell the property at $2.325 million. This issue does not need to be separately addressed given the answers to the questions posed above.

The conduct of the plaintiffs as a whole

96 Mr Levet urged me to regard the issues raised in the statement of issues as a whole and to have regard to the number of parties for whom Summer Lawyers acted in determining whether the defendants have made out their claim for relief on the cross-claim. For the reasons given above, I am not satisfied that

the business practices of Summer Lawyers afford the defendants relief from the plaintiffs' claims. No connection has been established between these practices (and the attendant conflicts within the firm which were sought to be resolved by the erection of so-called Chinese walls) and the refinancing of the loan advanced by the plaintiffs.

97 The substantial cause of the defendants' difficulties in refinancing the loan was that the interest rates under the loan agreement were so inflated that even the slightest delay significantly diminished the chance that the defendants could locate substitute lenders to pay out an ever-increasing amount. For the reasons given above, it is not open to me to ameliorate the exorbitant interest rates charged by the plaintiffs, having regard to the existing law and the way in which the loan agreement was drafted.

Conclusion

98 For the reasons given above, the defendants have not made out their claims for relief under the cross-claim since they have established neither equitable fraud, nor that the plaintiffs' conduct was unconscionable within the meaning of that term under s 12CA of the *ASIC Act* or any relevantly causative misleading or deceptive conduct by the plaintiffs.

99 In these circumstances, the plaintiffs are entitled to judgment in the sum claimed at the hearing of $2,351,780.

Costs

100 The plaintiffs submitted that they are entitled to indemnity costs on the basis of their contractual right to such costs. Clause 3.1 of the mortgage memorandum requires the "Debtor" which includes guarantors such as the defendants, to pay the "Secured Money". The definition of "Secured Money" includes "any Costs and Expenses". The definition of "Costs and Expenses" includes "all Legal Fees incurred by the Lender arising from or in connection with … the exercise of any rights or powers", including recovery action in the event of default. The term "Legal Fees" is defined as meaning "all solicitor's costs, barristers fees, and any disbursements on a full indemnity or solicitor and own client basis whichever basis yields the higher amount".

101 An identical mortgage memorandum has been found to warrant an order for indemnity costs: *Saeed v Capital Securities Australia Pty Ltd* [2020] NSWSC 223 at [38]-[41] (Davies J).

102 In *Kyabram Property Investments Pty Ltd v Murray* [2005] NSWCA 87, the Court of Appeal refused an application for indemnity costs because a claim for indemnity costs under the relevant agreement had not been pleaded: [15]-[17] (Beazley JA, Hodgson and Ipp JJA agreeing). However, in the present case, the plaintiffs expressly pleaded their claim for costs on an indemnity basis and particularised cl 3.1 of the mortgage memorandum (when read with the definition of Secured Money in cl 1.1 of the memorandum) as being the basis for the claim. In these circumstances, it cannot be said that the defendants were not on notice that the plaintiffs would seek costs on an indemnity basis if they were successful. In these circumstances, I am satisfied that, pursuant to the terms of the mortgage, the plaintiffs are entitled to their costs on an indemnity basis.

Orders

103 For the reasons set out above, I make the following orders:

(1) Judgment for the plaintiffs in the sum of $2,351,780.

(2) Judgment for the cross-defendants/plaintiffs on the cross-claim.

(3) Order the defendants to pay the plaintiffs'/cross-defendants' costs of the proceedings on an indemnity basis.

****

Amendments

19 May 2020 -

[63] - "position" substituted for "positon"