SUPREME COURT OF QUEENSLAND

CITATION:	*Parker Wells Pty Ltd v Lenn Financial Services Pty Ltd* [2026] QSC 207
PARTIES:	**PARKER WELLS PTY LTD ACN 639 252 547** (first plaintiff) **SHAUN CHRISTOPHER WELLS** (second plaintiff / first defendant by counterclaim) **JIE DYLAN PARKER** (third plaintiff) **DAVID PAUL WELLS** (fourth plaintiff / second defendant by counterclaim) **LOUISA KATE WELLS** (fifth plaintiff / third defendant by counterclaim) **v** **LENN FINANCIAL SERVICES PTY LTD ACN 621 715 759** (first defendant / first plaintiff by counterclaim) **ALEN MIROSLAV GAJIC AS TRUSTEE FOR SRSG TRUST ABN 80 872 124 738** (second defendant / second plaintiff by counterclaim) **STEVEN KENNETH RENTOUL** (third defendant / third plaintiff by counterclaim)
FILE NO/S:	BS13128 of 2022
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 September 2026
DELIVERED AT:	Brisbane
HEARING DATES:	9-13 February 2026
JUDGE:	Hindman J
ORDERS:	**1. I will hear from the parties as to the appropriate form of orders, including as to the terms of orders for possession of the mortgaged properties and costs.** **2. The hearing is listed at not before 2.30pm before Hindman J on 14 September 2026.** **3. The parties are to file and serve (and provide to the associate to Hindman J via email) any written submissions by 4pm on 11 September 2026.** **4. If all parties file written submissions in accordance with order 3 and the parties agree no oral hearing is required,**

the parties are to inform the associate to Hindman J by 4pm on 11 September 2026, and the hearing listed at not before 2.30pm on 14 September 2026 will be vacated.

CATCHWORDS: EQUITY – GENERAL PRINCIPLES – UNCONSCIONABILITY, UNCONSCIONABLE DEALINGS AND OTHER FORMS OF EQUITABLE FRAUD – GENERALLY – where the first plaintiff applied for a short-term bridging loan from defendant lenders with the assistance of a broker through an intermediary to purchase a bulldozer for a new business operated by it – where the second to fifth plaintiffs were either directors of the first plaintiff or their family members – where the parties had no direct dealings with each other and most dealings were with the intermediary – where the plaintiffs defaulted on the loan – where the plaintiffs claimed the defendants engaged in unconscionable conduct but, by the end of the trial, only the fourth plaintiff's (a director's father) claim was pressed – where the only pleaded basis of the claim was that the intermediary knew the plaintiffs could not repay the loan, the first plaintiff had no established trading history, and the plaintiffs did not receive independent legal and financial advice, which amounted to the fourth plaintiff's special disadvantage, and that knowledge was imputed via agency to the defendants – whether the defendants engaged in unconscionable conduct by enforcing the guarantee and mortgage against the fourth plaintiff

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – PENALTIES AND LIQUIDATED DAMAGES – GENERAL PRINCIPLES – where the first plaintiff obtained a short-term bridging business loan from the defendants to buy a dozer for a new earthmoving business – where the standard interest rate was 2.15% per month – where the higher interest rate applicable upon default was either 3.5% per month or the aggregate of 2.15% and 3.5% per month – where during a default interest could be capitalised – where the loan provided that the plaintiffs indemnified the defendants for all losses and liabilities connected with a default – whether the default interest rate was 3.5% or the aggregate of 2.15% and 3.5% – whether the default interest rate in combination with the capitalisation clause and indemnity is void as a penalty

Australian Securities and Investments Commission Act 2001 (Cth), s. 12CB
Uniform Civil Procedure Rules 1999 (Qld), r. 150(1)(k)

ADKA Investments Pty Ltd v Gleeson [2026] QSC 152, applied
Andrews v Australia and New Zealand Banking Group Ltd (2012) 247 CLR 205; [2012] HCA 30, applied
Australian Securities and Investments Commission v Kobelt (2019) 267 CLR 1; [2019] HCA 18, cited
Commercial Bank of Australia v Amadio (1983) 151 CLR 447;

[1983] HCA 14, applied
Elkofairi v Permanent Trustee Co Ltd [2002] NSWCA 413, distinguished
Kakavas v Crown Melbourne Ltd (2013) 250 CLR 392; [2013] HCA 25, applied
Kowalczuk v Accom Finance Pty Ltd (2008) 77 NSWLR 205; [2008] NSWCA 343, considered
Lordsvale Finance Plc v Bank of Zambia [1996] QB 752, considered
Mitchell v Pacific Dawn Pty Ltd [2007] QCA 74, followed
Oak Capital Mortgage Fund Limited v Dlakic [2019] NSWSC 1538, cited
Paciocco v Australia & New Zealand Banking Group Ltd (2016) 258 CLR 525; [2016] HCA 28, applied
QNI Resources Pty Ltd v North Queensland Pipeline No 1 Pty Ltd (2022) 11 QR 648; [2022] QCA 169, applied
Quantum Asset Management Pty Ltd v Love Properties (WA) Pty Ltd [2017] WASC 167, applied
Ringrow Pty Ltd v BP Australia Pty Ltd (2005) 224 CLR 656; [2005] HCA 71, cited
Rodgers v Australia and New Zealand Banking Group Limited [2009] QSC 86, cited
Stubbings v Jams 2 Pty Ltd (2022) 276 CLR 1; [2022] HCA 6, applied

COUNSEL: RW Tooth for the plaintiffs and defendants by counterclaim
P Travis for the defendants and plaintiffs by counterclaim

SOLICITORS: Lillas & Loel Lawyers for the plaintiffs and defendants by counterclaim
RBG Lawyers for the defendants and plaintiffs by counterclaim

Synopsis

[1] In 2020, the first plaintiff (**Borrower**) obtained a loan (**Loan**) from the defendants (**Lenders**), through a finance broker and an intermediary, for the primary purpose of the purchase of a bulldozer. That involved the father of one of the Borrower's directors – the fourth plaintiff, David Wells (**Mr Wells**), a financially unsophisticated and nearly illiterate man – providing a guarantee and security by way of a mortgage over his home. The Borrower later defaulted, and the Loan remains partially unpaid and continues to accrue interest at a default rate.

[2] The plaintiffs' case raises two key issues:[1]

(a) whether, in making the Loan, the Lenders engaged in unconscionable conduct against Mr Wells such that he should be released from his obligations under the guarantee and security;

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[1] Initially, the plaintiffs other than Mr Wells also sought to set aside their various guarantees, mortgage and loan documents on the grounds of unconscionable conduct (in equity and on statute). However, that was abandoned at trial, and that claim was restricted to one by Mr Wells only. There were also initially concurrent claims under s. 21 of the *Australian Consumer Law* and s. 7 of the *Contracts Review Act 1980* (NSW) but they were also abandoned by all the plaintiffs including Mr Wells.

(b) whether the default interest rate under the Loan should be declared void as a penalty (affecting all plaintiffs).

[3] For the reasons that follow:

(a) Mr Wells has not established his unconscionable conduct claim and therefore he remains bound by his guarantee and the giving of the security provided;

(b) the default interest rate is a penalty and is declared void; the standard interest rate is to be applied in substitution – that will affect the quantum of the outstanding debt owed by the plaintiffs to the defendants;

(c) I will hear from the parties regarding the form of orders to be made, including in respect of orders for possession of the mortgaged properties and costs.

The witnesses in the proceeding

[4] The plaintiffs called as witnesses the second plaintiff (**Shaun**), the third plaintiff (**Jie**), Mr Wells, the fifth plaintiff (**Louisa** – wife of Shaun) and Mr Geoff Green (an expert in debt and credit advisory). The Lenders called the following lay witnesses: Mr Michael Lenn (the sole director of the first defendant, one of the Lenders), Mr Alen Gajic (the second defendant, one of the Lenders) and Mr Bradley Hall (the former sole director of the Intermediary, before it was deregistered on 30 November 2025). The Lenders also read an affidavit of Mr Steven Rentoul (the third defendant, one of the Lenders) without him being required for cross-examination. The Lenders' expert was Mr Darren Stacey (an expert in debt advisory). No adverse credit findings are required to be made to resolve this proceeding. I generally accept the factual evidence that the witnesses gave; it was broadly consistent with the written record and none of them were seriously shaken in cross-examination.

Background

[5] On 30 January 2020, Shaun and Jie engaged a finance broker, Entire Finance (**Broker**), to source financing for the purchase of a bulldozer. At the time, a hired bulldozer was being used by them to complete jobs and generate some income, with Jie being the bulldozer operator. On 20 February 2020, they constituted the Borrower with themselves as its directors.

[6] The financing sought was a short-term bridging loan. Short-term bridging loans generally have relatively high interest rates. That was the only financing readily available because the Borrower had no trading history and Shaun had an outstanding debt that impacted his credit file.[2] The Borrower's intention was to refinance the short-term bridging loan at its expiry with a longer-term loan at a lower interest rate, by which time Shaun would have cleared his credit file and the Borrower would have built up some trading history to support the refinance.

[7] On about 23 March 2020, the Broker (on behalf of the Borrower) engaged Balance Lending (**Intermediary**), an entity that matches persons in need of finance with its network of lenders, to source a short-term bridging loan for the Borrower by submitting a loan application.

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2 It was a small debt from a default judgment entered against him on 16 May 2019.

[8] The Broker and the Intermediary are not parties to the proceeding.

[9] The Intermediary did not merely match borrowers and lenders. It also vetted borrowers, set certain conditions which (in its opinion) would likely be necessary for a lender to provide the relevant loan, and managed loans on behalf of lenders once advanced. Conditions set by the Intermediary could include being provided with the Borrower's business plan and exit strategy for the loan, and the provision of security for the loan (for example, guarantees by directors and other persons, mortgages over real property, security interests over chattels).

[10] Initially, the Intermediary rejected the Broker's loan request made on behalf of the Borrower because it fell outside its preferred range of acceptable loan-to-value ratios (that is, there was insufficient security being offered[3]). In response, the Borrower additionally offered a mortgage over the home owned and lived in by Mr Wells (**Property**).

[11] The Property was valued at about $250,000 and encumbered by a pre-existing mortgage for about $30,000. The Borrower's requested loan amount was increased so that with part of the loan funds to be advanced the mortgage over the Property could be discharged, which meant that the lenders could take a first registered mortgage over the Property. That was satisfactory to the Intermediary.

[12] Once the Intermediary's due diligence and vetting process of the Borrower's request for a loan was complete, it sought to source a lender or several lenders from its network who might be willing to provide a loan on terms. It would then provide the possible lender with the proposed terms of the loan and a due diligence report. In this case, the Intermediary sourced the Lenders, to whom it provided a due diligence report on 8 June 2020 (**Due Diligence Report**).

[13] The Intermediary and the Lenders had ongoing arrangements. Each of the Lenders had entered into funder agreements with the Intermediary whereby the Intermediary would refer loans to the Lenders and then manage any accepted loans (**Funder Agreements**). The Funder Agreements expressly state that neither party is the other's agent, and neither party should represent itself as such to third parties.

[14] The important details of the Loan follow. The principal was $395,000 to be repaid after six months with an option to extend the term by up to another six months. The Loan was to be applied to buying a bulldozer, discharging the existing mortgage over the Property, prepaying six months' interest and covering other fees and charges. The lower interest rate was 2.15% per month and the higher interest rate was 3.5% per month. The rate applicable upon a default was the aggregate of those two rates. Other fees and charges associated with the Loan included an originating fee to the Intermediary and a brokerage fee to the Broker. Guarantees and general security deeds were required from each of Shaun, Jie, Louisa and Mr Wells. Mortgages over Shaun and Louisa's property and the Property were also required.

[15] On 9 June 2020, Shaun engaged the law firm Parker Kissane Solicitors (**Law Firm**) to advise Shaun, Jie, Louisa and Mr Wells regarding the legal implications and risks

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[3] At the time, what was contemplated was a security interest over the bulldozer and a second mortgage over Shaun and Louisa's property.

arising from their personal guarantees. The Law Firm had previously been engaged by Shaun before January 2020 for other purposes.

[16] On 10 June 2020, Mr Wells and the other individual plaintiffs met with the Law Firm in person. At that meeting, Mr Wells agreed to waive his right to obtain *independent* legal advice – the Law Firm was not independent given it was representing Shaun (a director of the Borrower). Nevertheless, Mr Wells signed a certificate to the effect that he had in fact obtained independent legal advice. All parties, or their representatives, were aware of this discrepancy though, and nothing much turns on it.

[17] That same day, the plaintiffs executed:

(a) a "Standard Terms" document;

(b) a "Facility Terms" document;

(c) a "Loan Disbursement Schedule";

(d) a "General Security Deed"

(**Loan and Security Documents**).

[18] On 13 June 2020, the Law Firm met Mr Wells and the other guarantors for a verification of identity check.

[19] On 16 and 17 June 2020, the Law Firm advised the lawyers for the Lenders that all plaintiffs, including Mr Wells, had waived their right to obtain independent legal advice.

[20] On 19 June 2020, the Lenders advanced $395,000 to the Borrower, and the Borrower bought the bulldozer the same day. The Lenders registered a first mortgage over the Property on 28 August 2020.

[21] Before expiry of the initial six-month term of the Loan, the parties agreed to an extension of the Loan to 19 March 2021. However, the Borrower defaulted on the Loan by not making the monthly interest payments required. The Borrower was unable to refinance the Loan. The Loan default continued.

[22] By early 2022, the Borrower had sold the dozer and paid about $231,000 to the Intermediary in partial discharge of the Loan debt. However, that did not discharge the entirety of the debt.

[23] The plaintiffs commenced this proceeding on 26 October 2022. Other payments have been made towards the Loan, but it remains partially outstanding and continues to accrue interest.

Did the Lenders engage in unconscionable conduct concerning Mr Wells?

[24] The first issue is whether the Lenders engaged in unconscionable conduct by entering into the transaction with Mr Wells.

The law

[25] Unconscionable conduct in equity "involves: a relationship that places one party at a 'special disadvantage' vis-à-vis the other; knowledge of that special disadvantage by the stronger party; and unconscientious exploitation by the stronger party of the weaker party's disadvantage".[4] It is acknowledged, though, that these are not "separate elements"[5] and the whole of the circumstances are relevant.

[26] In *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, Mason J said at 462 (emphasis added):[6]

> [T]he disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his [or her] own best interests, **when the other party knows or ought to know of the existence of that condition or circumstance** and of its effect on the innocent party.

[27] Actual knowledge or wilful blindness is required.[7] Constructive knowledge (*ought* to know) does not suffice for the purpose of establishing unconscionable conduct.

[28] In *Mitchell v Pacific Dawn Pty Ltd* [2007] QCA 74, Keane JA (de Jersey CJ and Mullins J agreeing) said that it is necessary to plead knowledge of the special disadvantage.[8] In *Rodgers v Australia and New Zealand Banking Group Limited* [2009] QSC 86, McMeekin J considered himself bound by that decision and therefore rejected the plaintiffs' claim because it failed to plead that the plaintiffs suffered from any special disadvantage vis-à-vis the defendant.[9]

Application of the law to the case

Mr Wells' personal special disadvantage and knowledge

[29] There is at least one major flaw to Mr Wells' case against the Lenders for unconscionable conduct: even if Mr Wells had a special disadvantage arising from his illiteracy and general lack of financial nous,[10] there is no pleading that the Lenders had knowledge of that special disadvantage. Knowledge of the special disadvantage is necessary for any unconscionable conduct claim to succeed,[11] such that failure to plead it is fatal to Mr Wells' claim in this respect.

[30] The only pleading made by the plaintiffs relevant to knowledge concerns knowledge of the Borrower's (and perhaps Shaun, Jie and Louisa's) circumstances, but the unconscionable conduct claim made by those particular parties was

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4 *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1 at [39] citing *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 at 459-460, 461, 474.

5 *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1 at [39].

6 Approved in *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at [6] and *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1 at [45].

7 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at [146], [152], [155]-[157].

8 At [9].

9 At [120].

10 Without me determining that to be established. Mr Wells' personal special disadvantage is pleaded at paragraphs 6, 7, 29 and 28A(c) of the third further amended statement of claim (**3FASOC**).

11 *Mitchell v Pacific Dawn Pty Ltd* [2007] QCA 74 at [9]: "[t]o raise such a claim it would be necessary to plead, in addition … that the defendant knew of this disadvantage".

abandoned.[12] The plaintiffs' case in that respect had been that the Borrower had no reasonable prospect of repaying the Loan, each of Shaun and Jie were suffering from a special disadvantage due to their lack of financial nous (which could be attributed to the Borrower), Shaun and Louisa did not have the financial means to meet their liabilities under the Loan without selling their property, and that the Lenders therefore engaged in unconscionable conduct by entering into the Loan and Security Documents with those parties at that time.[13]

[31] Mr Wells' claim of unconscionable conduct focussed on his special disadvantage arising from his near-illiteracy and general lack of financial nous. The plaintiffs' pleading fails to plead knowledge of that disadvantage at all, nor who is said to have held that knowledge (the Intermediary or the Lenders), nor what the particulars of that knowledge were (for example, which individual of the Intermediary or the Lenders held what specific knowledge and how could that be attributed to each of the Lenders). Rule 150(1)(k) of the *Uniform Civil Procedure Rules 1999* (Qld) requires knowledge to be specifically pleaded.

[32] It was submitted for Mr Wells that "[a]ll that is required is that there exist facts which would raise the 'possibility' in the mind of a reasonable person that David [(Mr Wells)] was suffering from a special disadvantage".[14] That was not pleaded. Further, as canvassed above, that type of knowledge (even if made out) is insufficient for an unconscionable conduct claim to succeed.

[33] For Mr Wells reliance was also placed on *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413 (***Elkofairi)***, in which Beazley JA (Santow JA and Campbell AJA agreeing) said (emphasis added):[15]

> …notwithstanding that the respondent did not have knowledge of the appellant's lack of education and her language and domestic difficulties, her lack of income, in the circumstances of this transaction - that is a large borrowing secured over her only asset, in circumstances where the application form failed to disclose any income for either husband or wife - placed her in a special position of disadvantage. Though the full extent of that special position of disadvantage was not known to the respondent, nonetheless **the absence of any relevant financial information was sufficient to put the respondent on notice of the appellant's lack of capacity to meet the repayment obligations under the mortgage. That left as the only source of repayment the selling of her only asset, as again the respondent must be taken to have known.**
>
> Counsel for the respondent submitted that the respondent did not need to be concerned with the fact that the borrowers, or the appellant at least, had no income. It was sufficient for its purposes that the loan was amply secured. That was a position, according to

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12 Paragraph 29(a) of the 3FASOC.

13 Counsel for the plaintiffs clarified during the trial that sub-paragraphs (i)-(iv) of paragraph 29(a) of the 3FASOC were the relevant facts and sub-paragraphs (v)-(viii), as well as 29(b)-(d), were merely conclusions drawn from (i)-(iv). I also note that paragraph 29(a)(ii) was no longer pressed by the plaintiffs in closing submissions.

14 Plaintiffs' Closing Submissions at [31].

15 At [56]-[57].

> the respondent, which the respondent was entitled to take. I do not agree. In fact, it demonstrates the unconscientious nature of the transaction and the advantage the respondent took of the appellant's disadvantageous position. On its own submission, the respondent was only concerned with its ability to recoup any amount outstanding on the loan in circumstances where it must be taken to have known, because on the only information the respondent had, the appellant had no income, that the appellant, who was exposed to liability for the whole of the loan, had no ability to make even the first payment. The unconscientious nature of the transaction was that she was thereby at risk of losing her only asset. That risk was both immediate and real.

[34] Based on that passage, for Mr Wells it was then submitted that the *Intermediary* knew a series of facts[16] which are said to be "sufficient to establish the 'possibility' in the mind of any reasonable person that David [(Mr Wells)] could not make a judgment in his own interests. This is the special disadvantage". The submission was that knowledge should be imputed to the Lenders because the Intermediary was their agent.

[35] There are three issues fatal to that submission.

[36] First, as stated above, a "possibility" is not sufficient for knowledge.

[37] Second, there is again no pleading that the *Intermediary* had any relevant knowledge about Mr Wells' circumstances. The only pleading is that the Lenders knew a series of facts (paragraph 29(a)(i), (iii)-(iv) of the 3FASOC), none of which include Mr Wells' circumstances. I will return to that series of facts shortly.

[38] Third, this case is far-removed from *Elkofairi*. Shaun and Jie made it clear to the public at large and the Intermediary that the Borrower was doing significant amounts of work and had substantial contracts for future work. That can be seen in Facebook posts showing their work and several emails to the Intermediary (sometimes passing through the Broker) in support of the Borrower's contention in the Loan application that it had "contracts for 38k per month". Ongoing serviceability was also important in *Elkofairi* because that case involved monthly instalments of about $4,500 over five years. That contrasts with this case where future interest payments (for the six-month term) formed part of the principal of the Loan – meaning serviceability during the original term was not a relevant issue – and the ultimate goal was to simply refinance, not to keep servicing the Loan for a long period of time. That makes serviceability much less of an issue in this case; what was more important was the prospect of refinancing.

[39] Furthermore, the evidence does not show that the Lenders *in fact* had any knowledge about Mr Wells' circumstances. The Lenders relied on the Due Diligence Report, one or more telephone conversations with the Intermediary about the Loan, and the certificates of legal advice in making their decisions to provide the Loan. Those documents comprise the extent of the Lenders' knowledge. The Lenders never personally interacted with any of the plaintiffs, nor with each other. They only ever interacted with the Intermediary. At best, the evidence indicates the

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16 See Plaintiffs' Closing Submissions at [34].

Broker may have known (or at least possibly should have suspected) something about Mr Wells' circumstances, but that is insufficient to fix the Lenders (or even the Intermediary had that been pleaded) with knowledge. I will come back to the Intermediary's knowledge below.

[40] The reason that a plaintiff is generally not entitled to run a case that it has not pleaded is that it may put the defendant at an unfair disadvantage in not knowing the case it must meet and therefore not mounting a fulsome defence. Whilst there may be exceptions in situations such as where both parties are lax about adhering to their pleadings,[17] this is not such a case. Throughout the trial, including in closing submissions, the Lenders took express issue with the plaintiffs' departures from their pleadings.

[41] It is also worth mentioning that the plaintiffs' final pleading was the 3FASOC, meaning it was the fifth iteration of the document.[18] That supports that the Lenders were holding the plaintiffs to their case. Indeed, a former version of the plaintiffs' pleading as to knowledge was the subject of a strike out application by the Lenders where the Lenders made extensive complaints about the inadequacy of the pleading in that respect.

[42] Earlier versions of the plaintiffs' pleading[19] did in fact make specific allegations that the Lenders wilfully shut their eyes to the obvious in relation to Mr Wells' circumstances and wilfully and recklessly failed to make enquiries that an honest and reasonable person would have made. Earlier pleadings also articulated a case in the further or alternative about the Lenders' actual knowledge. That was nevertheless an inadequate pleading, and all of those allegations were struck out on application with leave given to replead generally. That resulted in the version of the plaintiffs' pleading on which the case was tried – the 3FASOC. The plaintiffs should not be permitted to revert to their struck-out case (which was insufficiently pleaded in any event) that is not reflected in the repleading that replaced those struck out parts.

The Intermediary's knowledge and any special disadvantage arising from paragraph 29 of the 3FASOC

[43] I now return to the series of facts the Lenders are pleaded to have known. The series of facts are contained in paragraph 29(a)(i) and (iii)-(iv) of the 3FASOC:

> (a) the [Lenders] knew, apprehended or ought to have known that (as was the fact):
>
> (i) [the Borrower] had no established trading history and no demonstrated means to derive an income sufficient to:
>
> (A) meet its liabilities under the Loan and Security Documents; or
>
> (B) to satisfy another lender to refinance the loan the subject of the Loan and Security Documents;

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17 See, eg, *ADKA Investments Pty Ltd v Gleeson* [2026] QSC 152 at [16]-[31] and the cases cited there.

18 Having been filed on 26 October 2022 and amended on 22 July 2024, 30 October 2024, 22 November 2024 and 5 February 2025.

19 At paragraph 29 of the FASOC and 2FASOC.

> … [sub-paragraph (ii) was abandoned by the plaintiffs]
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> (iii) the [Lenders] had not required [sic] satisfaction of conditions precedent to the loan the subject of the Loan and Security Documents, namely:
>
> (A) demonstration of a satisfactory exit strategy;
>
> (B) evidence that security interests over [Shaun and Louisa's property] had been discharged; and
>
> (C) evidence that the Plaintiffs had each obtained independent legal and financial advice regarding their entry into the Loan and Security Documents;
>
> (iv) Shaun Wells and Louisa Wells did not have the financial means to meet their liabilities under the Loan and Security Documents without selling [their property.]

[44] Mr Wells accepts that the Lenders did not actually personally know those things. Whether the Lenders knew those things instead relies (by reason of the paragraphs in the pleading on which paragraph 29 is premised) on an agency relationship with the Intermediary that is sufficient to fix the Lenders with the Intermediary's knowledge. Whether such an agency relationship exists is doubtful. But even if it did and the Lenders were fixed with the Intermediary's knowledge, the series of facts in paragraph 29(a)(i) and (iii)-(iv) of the 3FASOC were not all proven to be true and therefore could not be "known" by the Intermediary.

[45] In this analysis, it must also be borne in mind that the series of facts must not just be shown to be known by the Intermediary (which would then be attributed to the Lenders if it is their agent). The series of facts together (but independently from Mr Wells' personal disabilities discussed above) must be shown to demonstrate a special disadvantage of Mr Wells. I note that type of special disadvantage on the part of Mr Wells is not expressly pleaded, and Mr Wells' unconscionable conduct case fails on that basis alone. But in case I am wrong about that, I consider the point below.

[46] As stated, I find that not all of the series of facts in paragraph 29(a)(i) and (iii)-(iv) of the 3FASOC are proven to be true.

[47] First, regarding subparagraph (i), it is true that the Borrower had no established trading history. However, I am not persuaded that the Borrower had no demonstrated means to derive an income sufficient to meet its liabilities or refinance the Loan. That is touched on at [38] above. Further:

(a) the Borrower sent several emails to the Broker regarding what seemed to be confirmed future jobs.[20] Also included was a calendar purporting to show the Borrower had several nearly fully booked weeks of work between February and April 2020. They were sent to support the assertion in the Loan application that the Borrower would earn $38,000 per month. (If that were true, I consider $38,000 per month to be more than sufficient income for the

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20 For example, exhibits 5, 13, 16, 17, 18. See also Shaun's affidavit and Jie's affidavit.

Borrower to meet its liabilities and to refinance the Loan.) The Broker then seemingly passed that information to the Intermediary;

(b) the Borrower made several Facebook posts regarding advertisements and finished jobs (using a hired bulldozer it would appear).[21] One of these states that the Borrower had been "absolutely flatout". The intention could only have been to portray the Borrower as being very busy with lots of jobs completed and lined up for the future.

[48] Despite the lack of trading history and financial statements of the Borrower, the above matters mean that I am not persuaded the second part of subparagraph (i) has been made out.

[49] Second, regarding subparagraph (iii)(A), the evidence of Mr Hall of the Intermediary and the Lenders shows that the condition precedent of a satisfactory exit strategy had indeed largely been met. The exit strategy the Borrower proposed in the Loan application was to refinance the Loan once the Borrower had established some trading history and Shaun had cleared his credit file (which had a small debt for lawyers' fees). The evidence given by Mr Hall and the Lenders shows that that was a common exit strategy for this type of bridging loan, and they considered it reasonable, especially in light of the prospective trading activity and the seeming simplicity of clearing Shaun's credit file of that debt.

[50] Third, regarding sub-paragraph (iii)(B), it can be accepted that security interests over Shaun and Louisa's property were not discharged and thus that condition precedent was not satisfied.

[51] Fourth, regarding subparagraph (iii)(C), I accept that the plaintiffs had not all obtained *independent* legal advice and seemingly had not obtained any financial advice. However, the plaintiffs did receive some explanation of the Loan and Security Documents from the Law Firm. In addition, the relevant plaintiffs waived their rights to independent legal advice and the Intermediary knew this. I reiterate the fact that the advice they did receive was not independent was known to all parties. Despite that, however, almost any lawyer, even one who may be less than competent (not suggested to be the case here) would advise a guarantor, especially one who gave a mortgage, that doing so would mean their house could be sold to recover the debt. Noting the plaintiffs did not call the lawyer from the Law Firm as a witness, I infer that that lawyer must have discussed that prospect at the meeting with the natural plaintiffs, including Mr Wells, on 10 June 2020. I accept that Mr Wells may indeed not have understood the legal advice he received, but there is no evidence that was obvious to anyone, not even the person giving the advice.

[52] Fifth, I accept that Shaun and Louisa, independently of the Borrower, likely did not have the financial means to meet liability under the Loan without selling their property. They had minimal income: Shaun's was derived from the success of the Borrower's business and Louisa was a school teacher. Their only major asset was their property (other than a car, which was not valuable enough to satisfy the Loan), which they bought in 2016 for $650,000 and was in June 2020 valued at approximately $830,000 and encumbered by a first-registered mortgage in the

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21 Exhibit 8.

amount of around $480,000 (the Lenders' mortgage then becoming a second-registered mortgage after the Loan).

[53] What remains then is:

(a) the Borrower had no established trading history;

(b) security interests over Shaun and Louisa's property were not discharged;

(c) the plaintiffs had not all received *independent* legal advice or any financial advice;

(d) Shaun and Louisa did not independently have the financial means to repay the Loan without selling their property.

[54] That is not sufficient to put Mr Wells at a special disadvantage vis-à-vis the Lenders. The Borrower seemingly had good prospects of obtaining future work and therefore would be likely to be able to refinance the Loan. The fact that Shaun and Louisa could not repay the Loan if the Borrower defaulted without selling their property is not particularly relevant because the Lenders could enforce against any or all of the guarantors, so could have had resort to Mr Wells and the Property in the first instance if they so chose. That point about Shaun and Louisa therefore does not significantly contribute to any special disadvantage on the part of Mr Wells. The fact that Mr Wells did not receive independent legal advice or any financial advice does put him at some disadvantage. However, the Lenders did not prevent him from doing so or exert any pressure in that respect. Mr Wells could have sought such advice but did not. It can be inferred he did receive some legal advice although not independent.

[55] Therefore, even if the Intermediary was the Lenders' agent and its knowledge could be attributed to them, the matters pleaded in paragraph 29 of the 3FASOC are not sufficient to conclude that the Intermediary knew or ought to have known that Mr Wells was suffering from a special disadvantage.

[56] But even if that were sufficient, none of that is to say that the Intermediary was actually the Lenders' agent. The above also does not deal with the substantial difficulty of showing that the Lenders (through the Intermediary) unconscientiously exploited or took advantage of any special disadvantage of Mr Wells. I do not consider those points necessary to decide.

[57] Mr Wells' unconscionable conduct claim fails.

ASIC Act

[58] Mr Wells' case based on s. 12CB of the ASIC Act is restricted by paragraph 41 of the 3FASOC to one solely on the same basis as his claim in equity, as set out above.[22] The parties agree that this part of the plaintiffs' claim rises and falls on the same facts and issues as the equitable unconscionable conduct claim. Likewise, therefore, it fails. I give some brief additional reasons below.

[59] Section 12CB of the ASIC Act provides:

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22 Paragraph 41 of the 3FASOC restricts the premises to paragraph 29 of the 3FASOC.

> **12CB Unconscionable conduct in connection with financial services**
>
> (1) A person must not, in trade or commerce, in connection with:
>
> (a) the supply or possible supply of financial services to a person; or
>
> (b) the acquisition or possible acquisition of financial services from a person;
>
> engage in conduct that is, in all the circumstances, unconscionable.
>
> …
>
> (4) It is the intention of the Parliament that:
>
> (a) this section is not limited by the unwritten law of the States and Territories relating to unconscionable conduct; and
>
> (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and
>
> (c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:
>
> (i) the terms of the contract; and
>
> (ii) the manner in which and the extent to which the contract is carried out;
>
> and is not limited to consideration of the circumstances relating to formation of the contract.

[60] Section 12CC of the ASIC Act then non-exhaustively sets out the factors to which the Court may have regard. Notably, the plaintiffs do not specifically refer to those factors, either in their pleading or submissions. In fact, the plaintiffs' closing submissions make no more than a general passing reference to s. 12CB and do not elaborate on that provision.

[61] The use of the word "unconscionable" in s. 12CB of the ASIC Act connotes an element of exploitation.[23] That is so despite subsection (4)(a) stating that the section is not limited by the unwritten law regarding unconscionable conduct; because knowledge, conscience and exploitation are inherent in the meaning of the word "unconscionable". Further, Parliament could not have intended the provision to operate where a claim is based on a special disadvantage, yet it is not shown that the defendant knew about that special disadvantage. The word "unconscionable" as used in the statute has a technical meaning at general law, which Parliament must

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[23] See *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at [14]-[15], [118]-[119]; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at [18], [117], [161].

have known. Its root – "conscience" – remains the target of the statute, and a person's conscience cannot be affected by something they were unaware of (or at least something they did not wilfully and recklessly shut their eyes to); they cannot have taken advantage of someone unconscientiously if they did not know the other person was disadvantaged.[24]

[62] The deficiencies in Mr Wells' knowledge case and in the paragraph 29 special disadvantage case (and the Intermediary being the Lenders' agent case) that I set out above in relation to equitable unconscionable conduct therefore apply equally here. That is sufficient to dismiss the claim based on s. 12CB of the ASIC Act.

[63] Insofar as the submission is then made for Mr Wells that the Lenders directly engaged in a system of conduct that is unconscionable contrary to s. 12CB of the ASIC Act,[25] which is presumably (but not expressly) an implied reference to subsection (4)(b), that case is not pleaded in the 3FASOC, although it is referred to in the plaintiffs' second amended reply.[26] The system was submitted to be one in which the Lenders:

(a) did not meet the prospective borrower;

(b) organised loans to small businesses or individuals through an intermediary;

(c) required the loan to be secured by personal guarantees and mortgages;

(d) used or authorised the use of pro forma certificates of independent legal and financial advice.

[64] The 3FASOC does not allege a system of conduct that should result in a finding of unconscionable conduct under s. 12CB(4)(b) of the ASIC Act. Therefore, I do not further consider that submission except to state that the there is nothing about the system submitted above which of itself, as a system, could possibly amount to unconscientious exploitation of borrowers.

Is the interest rate applicable during a default void as a penalty?

[65] The second issue is whether the interest rate applicable during a default under the Loan is a penalty and should be declared void. For the below reasons, I find that the default interest rate under the Loan is a penalty. Only the standard interest rate of 2.15% per month will apply during a period of default.

What is the interest rate applicable during a default?

[66] The Facility Terms describe the "Lower Interest Rate" as 2.15% per month (**Standard Rate**) and the "Higher Interest Rate" as 3.5% per month (**Higher Rate**). At first glance, one would assume that means the Higher Rate would be charged when the obligors are in default. Indeed, that is the basis on which the parties proceeded at trial. However, that ignores the definition of "Higher Interest Rate" in clause 1.1 of the Standard Terms. That term is defined there as (emphasis added):

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24 See *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at [14]-[15], [118]-[119].

25 Plaintiffs' Opening Submissions at [37].

26 At [6BB(c)].

> … the **aggregate** of the Higher Interest Rate referred to in the Facility Terms and the rate applicable to the Advance immediately before the occurrence of the relevant Event of Default

[67] Clause 5.1.1, read with its chapeau, provides that "[t]he Borrower must pay interest to the Lender on each Advance … at the applicable Interest Rate". Clause 1.1 defines "Interest Rate" as: "in respect of a Facility, the Interest Rate referred to in the Facility Terms for that Facility". Ignoring the slight circularity in that definition, the Facility Terms do not provide for an "Interest Rate"; they provide only for a Lower Interest Rate and Higher Interest Rate. The Facility Terms do not shed any light on when each of those rates should apply – only the Standard Terms explain that. In light of the rest of the contract and commercial commonsense, I take the "applicable Interest Rate" for the purposes of clause 5.1.1 to be the Standard Rate, or what the Facility Terms call the "Lower Interest Rate" – 2.15% per month.

[68] Therefore, the rate applicable immediately before a default (for the purposes of the definition of "Higher Interest Rate") is 2.15%. The *aggregate* then is 2.15% plus 3.5%, amounting to 5.65% per month. That is what clause 1.1 defines as the "Higher Interest Rate". I will call that the **Default Rate**.

[69] That is important because clause 5.2.1, read with its chapeau, provides that "[w]hilst an Event of Default subsists, the Obligors must pay interest to the Lender on the Money Owing … at the Higher Interest Rate [being what I defined as the Default Rate]".

[70] That means the basis on which the parties proceeded at trial – that the default interest rate to be assessed in the penalty question is 3.5% per month – is wrong. The parties did not apply to rectify the contractual documents and I am not prepared to act on an incorrect interpretation of a clear contractual clause (even if pleaded as such by both parties) that was drawn to the parties' attention during the trial so that they had an opportunity to address the court on same. The appropriate rate to be assessed is the Default Rate - 5.65% per month. Where I refer below to the parties making submissions about the Default Rate, they actually make submissions about the Higher Rate, but I have substituted the terms for clarity.

Should the Default Rate be examined in isolation?

[71] Insofar as the plaintiffs then submit that the Default Rate – in combination with clause 5.4, which permits the Lenders to capitalise interest (**Capitalisation Clause**), and other charges under the Standard Terms which arise because of a default (**Default Charges**) – is a penalty, the Lenders correctly point out that is not the pleaded case. The plaintiffs' pleaded case essentially treats the Default Rate in isolation from any other terms of the contract and contends that it alone was a penalty. However, despite that, I will nevertheless examine the combination of the Default Rate, Capitalisation Clause and Default Charges.

[72] The Default Charges are contained in clauses 13 and 14.4 of the Facility Terms. In essence, those clauses independently require the obligors to pay to the Lenders all costs and losses, both direct and indirect, associated with a default, including enforcement costs, legal costs, consultant fees, out-of-pocket expenses, administration costs and loss of margin.

[73] It would be artificial to look at the Default Rate in a vacuum, ignoring the rest of the contract. The contract operates as a whole. Examining the contract in the isolated way pleaded by the plaintiffs and contended for by the Lenders would be artificial in a way that could enter the realm of hypotheticality. Furthermore, the Lenders are not materially prejudiced by me proceeding in this way because they were alive to the issue before and at the trial, had the whole contract and knew of the Capitalisation Clause and Default Charges.

[74] In closing submissions, counsel for the Lenders took express issue with the case being recast as one about the combination of the Default Rate and Capitalisation Clause. For clarity, my below findings would not be affected if the Capitalisation Clause was not in the Standard Terms. The Default Rate in combination with the Default Charges is sufficient to make the former a penalty.

[75] I also note that the Capitalisation Clause was not pleaded to be a penalty, and I do not find that it is (at the least because it is not an obligation collateral to a default – it exists even before a default). Consequently, the Capitalisation Clause continues to apply to interest accrued at the Standard Rate.

The law

[76] The starting position is that parties with no relevant disabilities are free to enter into contracts with terms of their choice – in other words, they have the freedom to contract.[27] That generally includes terms setting out the consequences of a default. From that starting position, equity can intervene to render unenforceable a term that is held a penalty.

[77] In *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 (***Paciacco***), the High Court explained that the two essential qualities of a penalty are "threat" and "punishment".[28] The Queensland Court of Appeal summarised the position as follows:[29]

> A contractual provision imposing a penalty is unenforceable at common law. A penalty is essentially a threat to be enforced *in terrorem*. It is a collateral stipulation which acts to secure and, *in terrorem* of, a primary stipulation. The relevant inquiry can be framed in terms of whether the contractual provision requires an amount to be paid that "is out of all proportion" to or in "gross disproportion" with the interests damaged or which are sought to be protected. The gross disproportionality must be such as to point to a predominant punitive purpose.

[78] In *Andrews v Australia and New Zealand Banking Group Ltd*, the High Court defined a penalty as follows:[30]

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27 *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656 at [31]-[32]; *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525 at [221].

28 At [2], [17], [164]-[165]. See also *Oak Capital Mortgage Fund Limited v Dlakic* [2019] NSWSC 1538 at [99].

29 *QNI Resources Pty Ltd v North Queensland Pipeline No 1 Pty Ltd* (2022) 11 QR 648 at [67] (citations omitted).

30 (2012) 247 CLR 205 at [10].

> In general terms, a stipulation *prima facie* imposes a penalty on a party ("the first party") if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and *in terrorem* of the satisfaction of the primary stipulation. If compensation can be made to the second party for the prejudice suffered by failure of the primary stipulation, the collateral stipulation and the penalty are enforced only to the extent of that compensation. The first party is relieved to that degree from liability to satisfy the collateral stipulation.

[79] In *Quantum Asset Management Pty Ltd v Love Properties (WA) Pty Ltd*, Banks-Smith J summarised the principles relating to the penalty doctrine as follows:[31]

> The following can be drawn from the authorities:
>
> (a) the question whether a sum stipulated is a penalty or liquidated damages (that is, a genuine pre-estimate) is to be judged as at the time of the making of the contract;
>
> (b) the party seeking to be absolved of the liability imposed by the stipulation bears the onus of proving that the stipulation constitutes an unenforceable penalty;
>
> (c) the critical issue is whether the sum agreed was commensurate with the interest protected by the bargain;
>
> (d) the nature of the interest sought to be protected is relevant. The sum agreed may be intended to protect an interest that is different from, and greater than, an interest in compensation for loss caused directly by the breach. It may be intangible and unquantifiable. This is consistent with Lord Dunedin's statement in *Dunlop* that, 'the essence of liquidated damages is a genuine pre-estimate of damage'. The reference to 'damage' as distinct from 'damages' is significant;
>
> (e) an interest may be of a business or financial nature;
>
> (f) a sum that is merely disproportionate to the loss suffered does not qualify as a penalty. The penalty must be 'extravagant, exorbitant or unconscionable' and 'out of all proportion' to the interest of the party which it is the purpose of the provision to protect;
>
> (g) the distinction between liquidated damages and a penalty, whilst useful, is not a limiting rule and does not mean that if no pre-estimate is made at the time the contract was entered into, the sum agreed will be a penalty;

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31 [2017] WASC 167 at [64].

(h) nor does it mean that a sum that reflects or attempts to reflect other types of loss or damage beyond those caused directly will be a penalty;

(i) it may be that a reliable pre-estimate is not possible or that damage caused by default is of such an uncertain nature that it cannot accurately be estimated or proved. In such a case a stipulated payment agreed by the parties may well be the true bargain and not a penalty;

(j) where pre-estimation of loss is difficult, precision may not be called for, bearing in mind the question is whether the stipulation is 'out of all proportion' to the interest said to be damaged by default;

(k) the court will not lightly interfere with the bargain struck between the parties. The court requires good reason to attract judicial intervention to set aside the bargains upon which parties of full capacity have agreed. That is why the law on penalties is expressed as an exceptional rule and descriptors such as 'extravagant' and 'out of all proportion' are used in its application;

(l) the ultimate question in determining whether a stipulation is a penalty, is whether it is intended only to punish the defaulting party. Framed another way — does the innocent party's interest in the observance of the principal contractual obligation explain the agreed stipulation as having a purpose other than punishment;

(m) the conventional application of the doctrine of penalties arises when a stipulated sum is made payable by upon breach. However, the rule as to penalties is not limited to cases arising out of breach of contract; and

(n) whether a clause is a penalty invites attention to the proper construction of that clause, and the contract as a whole, but it is not solely a matter of contractual construction. The court is not limited to considering the terms of the contract and any background factual matrix evidence that would be admissible for the purposes of contractual construction.

[80] In *Paciacco*, Keane J at [263] quoted *Lordsvale Finance Plc v Bank of Zambia* [1996] QB 752 at 763, where Colman J said:

> [T]he borrower in default is not the same credit risk as the prospective borrower with whom the loan agreement was first negotiated … [M]oney is more expensive for a less good credit risk than for a good credit risk.

[81] Finally, I note this is not the type of case where the higher interest rate is the standard rate, and the lower interest rate operates only as a discount when the borrower is not in default. Despite that largely being a difference in form, not substance, when compared with the situation in the present case (a lower interest

rate being standard, and the higher interest rate applying upon a default), the High Court has emphasised that the first situation generally does not give rise to considerations of the penalty doctrine for reasons including historical prevalence and freedom of contract. Many cases concern the first of those situations and so are not directly comparable to the present case.

Application

[82] The primary loss during a period of default is not being paid the Standard Rate, which is 2.15% per month and is accounted for by the Default Rate being at least that rate. The question then is whether the uplift to the Standard Rate – being 3.5% per month – is out of all proportion to the Lenders' other anticipated losses. Those losses include:

(a) increased time spent by staff and management on the recovery process, including time spent on negotiations, correspondence and legal processes, and the consequent potential intangible losses arising from (1) staff having less time to assess new applications and (2) general business friction;

(b) recovery costs, including legal, valuation and expert fees;

(c) costs of capital;

(d) loss of new establishment fees (which themselves have an element of profit to them that is foregone during a default – funds not being available to make new loans);

(e) intangible losses in the form of reputational harm with stakeholders (such as other prospective borrowers, referrers and prospective lenders).

[83] The losses associated with foregone establishment fees can be estimated as follows. The establishment fee in this case was $13,035, which can be assumed to be a standard establishment fee for this loan size. That is not entirely profit though as there would be some expenses associated with new loans (for example, staff costs). That establishment fee is earned six-monthly to yearly, assuming a six-month term with up to a six-month extension is standard.

[84] Most of the other costs, however, are very difficult to estimate in advance. The length of the recovery process can vary drastically between borrowers – some may remedy their default quickly whilst other recovery processes can take years, as the present case shows. Legal, valuation and expert fees, as well as the intangible losses, can also consequently vary drastically between cases.

[85] Despite that, though, all of those costs except for the intangible losses can be recovered entirely as part of the Default Charges under the Standard Terms.

[86] What is present in this case then is a Default Rate that results in additional yearly simple interest of $165,900 compared to the Standard Rate which can be capitalised at any point at the discretion of the Lenders (that is calculated on the basis of the entire principal). All of that interest is referrable to only intangible losses and the higher risk associated with a borrower presently in default.

[87] That easily meets and surpasses the bar of out of all proportion with a genuine pre-estimate of losses. The Lenders cannot have suffered (or thought they would suffer)

$165,900 (plus if compounded) per year in reputational harm as a result of a single loan defaulting, even combined with the increased risk of the defaulting borrower. Being in the business of short-term bridging loans for businesses that cannot obtain financing through more traditional financing, it is expected that some loans would default. Operating in such a risky market means defaults are inherent and therefore would not greatly affect the Lenders' reputations. The increased risks associated with borrowers in default also cannot justify a more than doubling of the interest rate from 2.15% to 5.65% per month. Translating those rates to yearly rates might make the point more obvious: the standard rate is 25.8% per annum whilst the default rate is 67.8% per annum – an increase of 42%. And those rates may compound due to the Capitalisation Clause. That gross disproportionality between the Default Rate and the interests sought to be protected is sufficient to infer a predominantly punitive purpose; a threat ensuring the obligors do not default.

[88] Whilst both experts opine that 2% to 3% per month is the most common uplift in the short-term bridging loan market, they do not consider that uplift in conjunction with an all-encompassing indemnity. And "everyone else does a similar thing" is not a sufficient reason to change the character of the clause away from a penalty.

[89] In *Kowalczuk v Accom Finance Pty Ltd* (2008) 77 NSWLR 205, the Court held that where a lender could contractually recover all the losses associated with a default independently from a higher default rate of interest, such a higher default rate of interest would not be reasonably necessary to protect a legitimate interest of the lender.[32] This is a similar case.

[90] I therefore find that clause 5.2, which provides for the imposition of the Default Rate, is a penalty. Declaring clause 5.2 void, however, would have the result that no interest rate at all is applicable during a period of default, which would not be an equitable outcome. Therefore, I will make orders that only the Standard Rate is applicable during a period of default.

The counterclaim

[91] The Lenders' counterclaim for possession of Shaun and Louisa's property and the Property, as well as for indemnity costs.

[92] The only defence the plaintiffs (defendants by counterclaim) plead is that the Loan and Security Documents (and consequently the mortgage in respect of the Property) should be set aside in equity or under the ASIC Act. In light of the issues the plaintiffs abandoned at trial, there is therefore no defence to the counterclaim by the Borrower, Shaun, Louisa and Jie. Because the unconscionable conduct and ASIC Act claims by Mr Wells have failed, Mr Wells' defence here also fails.

[93] However, before I make final orders regarding possession of the two properties, current title searches will need to be provided. If the Lenders' mortgage over Shaun and Louisa's property remains a second-registered mortgage, the first-registered mortgagee may need to be given an opportunity to be heard.

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32 At [161], [166].

[94] Finally, counsel for the plaintiffs also indicated at the trial that he wishes to be heard in respect of the time for the possession orders. Something in the order of 45-60 days is likely to be appropriate.

[95] Regarding the counterclaim for indemnity costs, the parties at the hearing indicated they would want to be heard on that issue before final judgment is issued. As this part of the counterclaim is predicated on clause 16.4 of the respective memorandums of mortgage, those will also need to be provided to the court. I note that a contractual entitlement to indemnity costs is usually enforceable or can justify an order for indemnity costs in the discretion of the court.

Orders

[96] At present, I will make the following orders only:

1. I will hear from the parties as to the appropriate form of orders, including as to the terms of orders for possession of the mortgaged properties and costs.
2. The hearing is listed at not before 2.30pm before Hindman J on 14 September 2026.
3. The parties are to file and serve (and provide to the associate to Hindman J via email) any written submissions by 4pm on 11 September 2026.
4. If all parties file written submissions in accordance with order 3 and the parties agree no oral hearing is required, the parties are to inform the associate to Hindman J by 4pm on 11 September 2026, and the hearing listed at not before 2.30pm on 14 September 2026 will be vacated.