Supreme Court

New South Wales

Case Name:	Priority Lending Australia Pty Ltd v Martinsville Pty Ltd (No 2)
Medium Neutral Citation:	[2021] NSWSC 850
Hearing Date(s):	9 July 2021
Decision Date:	14 July 2021
Jurisdiction:	Common Law
Before:	Adamson J
Decision:	(1) Set aside default judgment entered on 7 September 2020 in the sum of $1,011,200.42. (2) Set aside default judgment for possession entered on 1 October 2020 in respect of the property known as [REDACTED], Martinsville NSW 2265. (3) Direct the parties to provide to my Associate, within seven days, a minute of order in respect of other judgments affected by these reasons. (4) Grant leave to the first, second and third defendants to file a defence in the form of annexure “A” to the affidavit of the second defendant sworn 28 June 2021, such defence to be filed within seven days. (5) Order the first, second and third defendants to pay the plaintiffs’ costs of the notice of motion. (6) Stand the matter over for further directions before me on 27 July 2021.
Catchwords:	CIVIL PROCEDURE — Notice of motion — Default judgment for plaintiffs on liquidated claim and on the claim for possession — Plaintiffs granted leave to issue a writ of possession — Borrower and guarantors seeking that the judgments be set aside and a stay of the writ — Application to set aside turn on whether there exists a defence on the merits or a triable issue — Whether interest clause is void for uncertainty and its

	construction are triable issues — Whether interest rate provision qualifies as a penalty is a triable issue — Whether second loan was unconscionable and unjust are defences that raise triable issues — Explanation for delay given — Default judgments ought be set aside CONTRACTS — Construction of loan agreements — Whether terms of the first loan are unconscionable and the second loan is unjust by reason of its terms and surrounding circumstances — Considered in the context of whether there exist triable issues
Legislation Cited:	Australian Consumer Law, ss 237, 243 Australian Securities and Investments Commission Act 2001 (Cth), ss 12CA, 12CB Civil Procedure Act 2005 (NSW) Contracts Review Act 1980 (NSW) Real Property Act 1900 (NSW), s 57 Uniform Civil Procedure Rules 2005 (NSW), rr 14.3, 34.16
Cases Cited:	Commercial Banking Co of Sydney Ltd v Pollard [1983] 1 NSWLR 74 Dai v Zhu [2013] NSWCA 412 Kellas-Sharpe v PSAL Ltd [2013] 2 Qd R 233; [2012] QCA 371 Magnate Projects Pty Ltd v Youma Constructions (No 2) Pty Ltd [2005] NSWCA 331 Re Funds in Court; Application of Mango Credit Pty Ltd [2016] NSWSC 199
Category:	Procedural rulings
Parties:	Priority Lending Australia Pty Ltd (First Plaintiff) Alan Lee Walker t/as Alan Lee Walker and Andre Leon Lakomy (as receivers of Martinsville Pty Ltd) (Second Plaintiff) Martinsville Pty Ltd (First Defendant) Anthony James Murray (Second Defendant) Jamey Melissa Murray (Third Defendant) National Australia Bank Limited (Fourth Defendant)
Representation:	Counsel: J Pokoney (Plaintiffs) P Afshar (First, Second and Third Defendants)

D Hennessey (Fourth Defendant)

Solicitors:
Deutsch Partners (Plaintiffs)
Circle Bridge Legal (First, Second and Third Defendants)
Dentons (Fourth Defendant)

File Number(s): 2020/218726

JUDGMENT

Introduction

1 On 27 July 2020, Priority Lending Australia Pty Ltd (the lender) and Allan Walker, as receiver of Martinsville Pty Ltd (the receiver) (collectively, the plaintiffs) commenced proceedings against Martinsville Pty Ltd (the borrower), Anthony Murray and his wife, Jamey Murray (together, the guarantors), and National Australia Bank Limited (the first mortgagee) for recovery of monies said to be owed to it by the borrower and the guarantors, and possession of a property in Martinsville (the secured property). An amended statement of claim was filed on 30 July 2020, which amended the amount claimed.

2 On 4 September 2020, the plaintiffs filed a notice of motion for default judgment on the liquidated claim, which was entered in the registry by the Chief Clerk of the Court on 7 September 2020. On 30 September 2020, the plaintiffs filed a motion for default judgment on the claim for possession, which was ordered on 1 October 2020. On 7 October 2020, the plaintiffs sought leave to issue a writ of possession which was granted on 8 October 2020, at which time a writ was issued.

3 On 18 December 2020, the borrower and the guarantors filed an amended notice of motion seeking that the judgment for possession of the secured property and the judgment for the liquidated claim be set aside. By notice of motion filed on 19 April 2021, Mr Murray sought a stay of the writ and that judgment for possession of another property (also secured by the loan) be set aside. Orders were also sought in relation to associated proceedings (2020/320982) on the basis that the same issues arise.

The relevant principles

4 This Court has jurisdiction inherently and pursuant to r 34.16 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) to set aside default judgment. The relevant considerations are in the discretion of the court. They include the matters referred to in Part 6 of the *Civil Procedure Act 2005* (NSW), such as the just determination of the proceedings and their timely disposal. In the context of an application to set aside default judgment, the existence of a defence on the merits, or a "triable issue", is an important consideration: see the summary of principles in *Dai v Zhu* [2013] NSWCA 412 at [83]-[92] (Sackville AJA, Barrett and Leeming JJA agreeing). Other relevant considerations include whether there is an explanation for not filing a defence within the time specified by the rules, as indicated in the prescribed form of the statement of claim; and whether the plaintiff will suffer prejudice if the judgment is set aside. It is thus necessary to address the facts in more detail than is set out in the introduction to these reasons before turning to the question whether the default judgments for possession and the liquidated sum ought be set aside.

5 It was also common ground that, in addition to the secured property (as defined) there was a further property in respect of which default judgment for possession had been granted. Mr Pokoney, who appeared for the plaintiffs, and Mr Afshar, who appeared for the borrower and the guarantors, agreed that the orders in respect of the secured property ought also be made in respect of the other property.

6 I confirm that the facts as set out below derive from the pleadings and the uncontested affidavit evidence adduced in relation to the application to set aside default judgment. They do not represent findings of fact for any purpose other than the determination of the notice of motion.

The Facts

The need for refinance

7 The borrower mortgaged the secured property to the first mortgagee in order to obtain a loan. As the borrower did not have the income to repay the loan, the

guarantors made the repayments. Between July 2018 and September 2018, the first mortgagee issued default notices to the borrower.

8 On 20 January 2019, Steven Murray, the guarantors' son and a finance broker at Lumley Finance & Loans Pty Ltd, sent an email to Justin Hatfield, also of Lumley Finance & Loans Pty Ltd, proposing that the borrower refinance its loan from the first mortgagee, under which $500,000 was said to be owing. A loan term of 12 months with an option to extend for a further six months was proposed with interest to be capitalised. The proposed "exit strategy" bore the annotation, "Please call me to discuss." Further emails were exchanged between Steven and Mr Hatfield in which Steven identified as an "exit strategy" the sale of a completed development of residential units in Bonnyrigg (the Bonnyrigg development). Steven described the Bonnyrigg development in his email of 9 April 2019 as follows:

> "- Residential development
> - 177 apartments
> - Development complete
> - Awaiting Occupation Certificates
> - Borrower has equity in this project, and this equity will be available within 4-6 months.
> - Funds will be paid out in total from this".

9 Mr Hatfield contacted the lender to discuss the proposal with a view to the lender providing the finance requested.

10 The first mortgagee's payout figure was $1.13m, rather than the $500,000 envisaged. The refinance proposal set out above was not proceeded with.

The First Loan

11 Ultimately, the lender agreed to lend the borrower a net amount of $160,000 (the First Loan). This amount was to be used by the borrower to repay outstanding amounts to the first mortgagee and to pay other debts of the borrower or guarantors. On or about 16 April 2019, the lender advanced this sum to the borrower pursuant to a Loan Facility Agreement (to which the lender and the borrower were parties), a General Security Agreement (to which the lender and the borrower, both in its own capacity and as trustee of the Murray

Family Trust, were parties) and a Deed of Guarantee and Indemnity (to which the lender and the guarantors were parties).

12 At the time of the First Loan, the secured property was the borrower's only asset. Its value was said to be in the order of $1.85m. The borrower had no income with which to repay the loan. The guarantors' income was insufficient to repay the loan. The guarantors allege in the defence to the amended statement of claim that the lender made no assessment of their capacity, or that of the borrower, to repay the loan.

The further proposal

13 Subsequently, on 12 June 2019, the lender set out the terms of a further proposed transaction whereby it would advance $440,307 to the borrower for a period of six months at an interest rate of 3% per month and a default interest rate of 6% per month. In large measure, the $440,307 represented the original principal amount of $160,000, interest on that sum, fees and expenses and pre-paid capitalised interest for the term of the proposed further loan. The lender proposed that the security for the loan would be provided by guarantees from the guarantors and Murray Super Holdings Pty Ltd together with a second mortgage over the secured property and three other properties located at Mount Victoria, Muswellbrook and Merriwa. The offer was said to be open for a period of three business days from 12 June 2019.

The Second Loan

14 Before executing the Second Loan, Mr Murray obtained advice "because [he] was required to do so by the terms of the Second Loan." He consulted a solicitor, Derek Ziman, who told him that the interest rates on default were "quite high". Mr Murray did not read the documents "in detail" and "was not aware that the default interest rate was 9% per annum, a total of 109% [sic, 108%] per annum, within a 6 month interval." He said that he "understood that the interest rate was high, however [did not appreciate that it was] at that exorbitant level." Mrs Murray received advice from Fowler Predny of Morriset Lawyers to similar effect. Mr Murray was not asked to leave the room while his wife was receiving advice.

15 On 8 July 2019, the lender and the borrower entered into a further Loan Facility Agreement whereby the lender advanced $404,485 to the borrower (the Second Loan) which was to be repaid in full in January 2020. As referred to above, the sum of $404,485 represented the original $160,000 which had been advanced under the First Loan together with interest and fees. The Second Loan required the borrower to repay, in addition to the principal, interest and receiver's fees. The Second Loan was secured by an unregistered mortgage over three properties, including the secured property. The guarantors were required to obtain independent advice in relation to the Second Loan.

16 The borrower and the guarantors make similar allegations as are made in respect of the First Loan as to the lender's failure to enquire as to their capacity to repay the Second Loan. They also argue that its terms are unconscionable at general law, under the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*) and under the *Australian Consumer Law* and that the Second Loan is, as far as the guarantors are concerned, unjust within the meaning of the *Contracts Review Act 1980* (NSW), both by reason of its terms and the surrounding circumstances. The borrower and guarantor also allege that the interest provisions of the Second Loan are void for uncertainty.

17 It is, accordingly, necessary to set out the terms alleged to be either unconscionable or void for uncertainty.

18 Clause 1.1 defines "Advance" as meaning "the Principal Advance and/or the Deemed Advance." Clause 1.1 defines "Interest Rate" as meaning "the rate specified in Item 4 of Schedule 1." Clause 1.1 defines "Repayment Date" as "the date specified in Item 5 of Schedule 1." Clause 5.1(a) provides that the borrower must pay interest on the "Advance" and the "Overdue Money". Clause 5.1(b) and (c) provide:

> "(b) The interest rate on the Advance until it becomes due and payable will be at the Specified Rate but if:
>
> (i) an interest payment calculated at the Interest Rate is received by the Financier on the Repayment Date; and
>
> (ii) no Event of Default has occurred at or before the date of receipt of such interest payment by the Financier, the Financier will accept that payment for the period to which it relates instead of an interest payment calculated at the Specified Rate.

(c) The interest rate on the Advance or the Outstanding Principal, after any such money becomes due and payable and remains unpaid, and the Overdue Money, will be the Specified Rate."

19 Item 2 of Schedule 1 provides:

"**Item 2 - Principal Advance**

$404,485 less:

1. $65,753 (Interest for the term of the loan deducted at settlement)

2. $188,000 (to extinguish the current loan)

3. Legal fees and disbursements $4,840 (inclusive of GST)

4. Establishment fee $25,000 (inclusive of GST)

5. Brokerage fee $21,000 (inclusive of GST)

6. Net advance= $99,910"

20 Item 4 of Schedule 1 provides:

"**Item 4 - Interest Rate**

a) 3% per month - **discounted rate**

b) 9% per month - **interest at normal rate**"

21 Item 5 of Schedule 1 provides:

"**Item 5 - Repayment Date**

Six (6) month after execution of the Loan Facility Agreement. The Financier agrees to charge interest at the discounted rate provided no breach of the loan occurs with $404,485 being payable 6 months from execution of this Agreement."

The default and enforcement

22 The Second Loan provided for repayment in January 2020. The borrower defaulted on the repayment. No amount was repaid. The guarantors were unable to repay the loan.

23 On 28 January 2020, the lender served on the borrower a notice pursuant to s 57(2)(b) of the *Real Property Act 1900* (NSW) notifying it of its intention to take possession of the property in the event of continuing default.

24 On 7 February 2020, the lender served a notice of demand on the borrower.

25 As referred to above, a statement of claim was filed on 27 July 2020 and an amended statement of claim was filed on 30 July 2020. Mr Murray acknowledged that he was served with the original pleading in "late July" and with the amended pleading on 30 July 2020. As soon as he was served, he

engaged Mr Ziman (the solicitor who had purported to advise him on the Second Loan) to give him advice. According to Mr Murray (whose evidence was not challenged for the purposes of this application), Mr Ziman told him that he would not do anything on the matter, including file a defence, until the amount claimed by the lender was transferred to his trust account. As Mr Murray did not have the money to meet this requirement, he could not proceed to give Mr Ziman the instructions to draft a defence. Further, Mr Murray assumed that any solicitor he instructed would impose the same requirement. On this basis, he did not instruct another solicitor to act on behalf of the borrower and the guarantors and did not arrange for a defence to be filed.

26 On 7 September 2020, default judgment was entered against the borrower and the guarantors in the amount of $1,011,200.42. The amount of this judgment, which derived from the initial advance of $160,000 (in April 2019) demonstrates the effect of the interest provisions contained in the First and Second Loan agreements.

27 There is no evidence about whether the lender gave notice to the borrower and the guarantors of its intention to enter default judgment. Mr Pokoney was not instructed to concede that no notice had been given. It is possible that notice was given in the course of without prejudice negotiations but I cannot find that to be the case. It follows that I cannot be satisfied either that notice was given or that it was not given. This matter cannot readily be resolved by reference to onus since, in an application such as the present, it would be in the interests of the lender to prove that notice *was* given (beyond the pro forma notice in the statement of claim) and in the interests of the borrower and guarantors to prove that it was *not* given.

28 Judgment for possession was entered on 1 October 2020. On 15 October 2020, Mr Ziman filed a notice of appointment which indicated that he had been appointed by the borrower and the guarantors to act on their behalf in the proceedings. The evidence does not reveal the basis on which he did so, given his clients' inability to meet his requirement for retainer.

29 A notice to vacate dated 16 October 2020 was served on the "occupier" of the secured property, indicating that the occupier was required to vacate the

property by 10am on 2 December 2020. Mr Murray's unchallenged evidence is that he was surprised to receive this notice. When he received the notice, he contacted Mr Ziman and was told that judgment for the liquidated sum had been entered against the borrower and the guarantors on 7 September 2020; judgment for possession of the secured property was entered on 1 October 2020 and a writ for possession of the secured property issued on 8 October 2020. Mr Murray immediately terminated Mr Ziman's instructions and appointed Circle Bridge Legal (Circle Bridge), his current solicitors, to act on his behalf in these proceedings.

30 On 1 December 2020, the Court, *ex parte* on the application of the borrower and guarantors, ordered that the writ of possession for the secured property be stayed until 5pm on 8 December 2020. On 2 December 2020, Circle Bridge filed a notice of change of solicitor to inform the Court and the other parties that they had been appointed to act on behalf of the borrower and the guarantors. They also filed a notice of motion for a stay of execution of the writ of possession and an order setting aside judgment for possession. On 8 December 2020, the application was referred to the Duty Judge (Wright J), who extended the stay until midnight on 18 December 2020.

31 On 18 December 2020, Hamill J extended the stay until midnight on 1 February 2021 and stood over the motion (which had been amended to include an application to set aside default judgment for the liquidated sum) to 1 February 2021 for directions. This amended motion was heard on 9 July 2021, following several directions hearings before the Registrar.

Consideration

32 The principal factor in a determination of whether default judgment ought be set aside is whether there is a triable issue on the merits. Accordingly, I propose to address this matter first. It was common ground that the determination of an application such as the present one did not call for any detailed analysis of the merits of the defences sought to be put in answer to a plaintiff's claim: *Magnate Projects Pty Ltd v Youma Constructions (No 2) Pty Ltd* [2005] NSWCA 331 at [52] (Hodgson JA, Handley JA and M Campbell AJA agreeing). Rather, what was required was to determine whether such

defences were reasonably arguable. Although the process is different from an application for summary disposal, there are some analogies in that a similar question arises as to whether a matter ought be permitted to go to trial.

The construction of the Second Loan agreement

33 Mr Afshar argued that there were four triable issues. He submitted, first, that the interest payable under the Second Loan was so unclear as to be nonsensical. He relied on the circumstance that while clause 5.1 refers to interest being payable at the "Interest Rate" and the "Specified Rate", these terms were not referred to at all in Item 4 of Schedule 1. I understood him to rely on the *contra proferentem* rule, that an agreement (particularly one between a sophisticated party and an unsophisticated one) is to be construed *against* the drafting party. In response, Mr Pokoney argued that, in order to make commercial sense of the Second Loan, it was necessary to construe "Interest Rate" as being equivalent to "discounted rate" and "Specified Rate" as being equivalent to "interest at normal rate" and that, if the agreement was construed in that way, there was no ambiguity. It is not necessary to descend further into the detail of the arguments. I accept that Mr Afshar's submissions are arguable and that the construction of clause 5.1 and whether the interest clause is void for uncertainty constitute triable issues.

Whether the interest provision constitutes a penalty

34 Secondly, Mr Afshar submitted that the interest under the Second Loan constituted a penalty and was therefore unenforceable. He relied on *Re Funds in Court; Application of Mango Credit Pty Ltd* [2016] NSWSC 199 in which Lindsay J said, of present relevance, at [59]:

> "In the present case, there are several features of the applicant's mortgage and the underlying loan contract that require close scrutiny. They are:
>
> (a) the high rates of interest for which the mortgage provided;
>
> (b) the disparity between the lower and higher rates for which the mortgage provided;
>
> (c) the contractual requirement that interest (calculated at the lower rate) for the whole loan term be paid at the outset of the term;
>
> (d) the circumstance that the higher rate became payable upon, and only upon, a default by the mortgagor, including (but not limited to) a default in repayment of the principal sum;

(e) the apparently disproportionate relationship between the amount of the loan and the amount required to discharged the mortgage;

(f) the generally onerous character of the terms required to be fulfilled by the mortgagor to redeem the mortgage, including broad provisions for the mortgagor to pay the mortgagee's enforcement costs; and

(g) the apparent availability of equity (in the sense of realizable value) in the mortgaged property (confirmed by a valuation exercise undertaken by the mortgagee, at the cost of the mortgagor, in anticipation of the mortgage) sufficient to provide security for repayment of moneys lent, and reasonable ancillary charges, without substantial risk of loss to the mortgagee."

35 Mr Afshar submitted that each of subparagraphs (a)-(e) is analogous to the present case and that (f)-(g) were also relevant. He relied on what Lindsay J said at [89]-[91] which implicitly distinguished *Kellas-Sharpe v PSAL Ltd* [2013] 2 Qd R 233; [2012] QCA 371 (*Kellas-Sharpe*), in which the Queensland Court of Appeal held that a contract which provided for an interest rate which would apply except where a discounted interest rate applied as a reward for timely performance did not amount to a penalty. Whether interest rate provisions in a contract fall within the well-established principle in *Kellas-Sharpe* and therefore do not qualify as penalties or whether they fall outside the principles and may be set aside as penalties, is affected by the construction of the applicable clauses. In part, because of the drafting discrepancy referred to above, I do not consider that the present case is such a clear case of a clause which would fall into the same category as the one held to be valid in *Kellas-Sharpe*. The question of what constitutes a penalty depends on the facts of each case. Whether clause 5 amounts to a penalty constitutes, in my view, a triable issue in the present case.

Whether the agreements are unconscionable or unjust

36 Thirdly, Mr Afshar submitted that the Second Loan was unconscionable under the general law, the *Australian Consumer Law* (ss 237 and 243) or under the *ASIC Act* (ss 12CA and 12CB) and therefore was void or could be varied or set aside by the Court. Fourthly, in respect of the guarantors, he submitted that the Second Loan was unjust within the meaning of the *Contracts Review Act*. These arguments can be considered together. Where a defence under the *Contracts Review Act* is pleaded, summary judgment cannot generally be ordered since there will almost inevitably be triable issues of fact: *Commercial Banking Co of Sydney Ltd v Pollard* [1983] 1 NSWLR 74 at 80 (Rogers J). I

consider that the question whether a contract is unconscionable to fall within a similar category. Accordingly, I am persuaded that these defences raise triable issues.

Other factors

37 Mr Pokoney accepted that if I were satisfied that there was an arguable defence that gave rise to a triable issue, the authorities were to the effect that default judgment ought generally be set aside. Accordingly, I can be brief about other discretionary matters.

Delay

38 I am satisfied that Mr Murray has adequately explained the delay. As soon as he was served with the statement of claim, he approached Mr Ziman (who had purported to advise him about the Second Loan) to instruct him to act in the proceedings. The condition required by Mr Ziman (that the whole amount owing to the lender be paid into his trust account) was impossible for the borrower or the guarantors to fulfil. This appears to have led to a paralysis on the part of the borrower and guarantors because Mr Murray assumed that all solicitors would impose the same condition. However, when he received the notice to vacate, Mr Murray appears to have appreciated that he had no choice but to oppose the taking of possession of the secured property. Circle Bridge acted quickly to bring on the application for a stay and to file a notice of motion to set aside the default judgment. In these circumstances, I am not persuaded that it would be fair to penalise the borrower and guarantors since their delay would appear to have been largely due to the conduct of their former solicitor (against whom I make no finding as he has not been heard and Mr Murray's evidence has not been challenged on this application).

39 Had Circle Bridge been instructed instead of Mr Ziman, I infer that a defence to the amended statement of claim in the form of the proposed draft would have been filed within the 28 days prescribed by UCPR, r 14.3(1).

Prejudice to the plaintiffs

40 Further, the borrower's and guarantors' indebtedness to the plaintiffs is secured over a number of properties. The plaintiffs have not established that they would be prejudiced if the default judgments were set aside.

Conclusion

41 For the reasons given above, I am persuaded that the default judgments for possession and for the money sum ought be set aside.

Costs

42 Mr Afshar accepted that, given that his clients were seeking the indulgence of having default judgments set aside, it was appropriate that they pay the plaintiffs' costs of the application.

Orders

43 For the reasons given above, I make the following orders:

(1) Set aside default judgment entered on 7 September 2020 in the sum of $1,011,200.42.

(2) Set aside default judgment for possession entered on 1 October 2020 in respect of the property known as [REDACTED], Martinsville NSW 2265.

(3) Direct the parties to provide to my Associate, within seven days, a minute of order in respect of other judgments affected by these reasons.

(4) Grant leave to the first, second and third defendants to file a defence in the form of annexure "A" to the affidavit of the second defendant sworn 28 June 2021, such defence to be filed within seven days.

(5) Order the first, second and third defendants to pay the plaintiffs' costs of the notice of motion.

(6) Stand the matter over for further directions before me on 27 July 2021.

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