IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

S CI 2016 00402

JOYCE STOYANOVA AND ANOR — Plaintiffs

v

EQUITY-ONE MORTGAGE FUND LTD
(ACN 106 720 941) — Defendant

JUDGE:	RIORDAN J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	18 JULY 2016
DATE OF JUDGMENT:	2 AUGUST 2016
CASE MAY BE CITED AS:	STOYANOVA v EQUITY-ONE MORTGAGE FUND LTD
MEDIUM NEUTRAL CITATION:	[2016] VSC 414

PRACTICE AND PROCEDURE – Application by defendant/creditor for Summary Dismissal – Whether the following issues should be determined summarily – Whether the creditor is estopped from exercising rights under a first mortgage because of judgment for possession under a second mortgage – Whether clause providing for higher rate of interest, but reduced to lower rate if borrower not in default, is a penalty – Whether consent order in another proceedings in respect of a similar loan contract estopped the plaintiffs disputing enforceability of the loan contract the subject of this proceeding – Whether guarantor estopped from denying enforceability of clause as a person connected with the judgment debtor.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr I Upjohn QC Mr A Sandbach	Novatsis & Alexander
For the Defendant	Mr J P Moore QC Mr G W Moffatt	Mills Oakley

TABLE OF CONTENTS

Summary of the facts **1**

Principles on application of summary judgment **5**

The plaintiffs' claim of *Anshun* estoppel **7**

The Authorities 8

Conclusion on Anshun Estoppel 10

Is the plaintiffs' claim that the higher interest rate clause is a penalty hopeless? **11**

Consideration 13

Issue estoppel with respect to the second facility agreement **18**

Issue estoppel with respect to the first facility agreement and the third facility agreement **19**

Issue estoppel against Mrs Stoyanova with respect to the third facility agreement **19**

Conclusion **21**

Security for costs **21**

Orders **24**

HIS HONOUR:

1 This proceeding is brought by the first plaintiff, Mrs Joyce Stoyanova, and the second plaintiff, M & J Stoyanov Transport Co Pty Ltd ('M & J Stoyanov Transport Co'), as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* on their own behalf and on behalf of group members, being persons who are borrowers or guarantors under three refinancing agreements (the first, second and third facility agreements) with the defendant, Equity-One Mortgage Fund Ltd ('Equity-One').

2 This proceeding is one of three related proceedings in respect of the agreements between M & J Stoyanov Transport Co and Equity-One and the guarantees given by Mrs Stoyanova and her husband (Mr Miljace Stoyanov)[1]. The other proceedings (in which Equity-One is the plaintiff) are S CI 2012 02338 in respect of the second facility agreement and S CI 2012 02440 in respect of the third facility agreement.

3 By summons dated 29 April 2016, Equity-One applied for the following orders in the present proceeding:

(a) Summary judgment for the defendant pursuant to r 26.16 of the *Supreme Court (General Civil Procedure) Rules 2015* and s 62 of the *Civil Procedure Act 2010*.

(b) Alternatively, an order that the plaintiffs give security for the costs of the defendant.

Summary of the facts

4 In mid-2007, Mrs Stoyanova purchased a holiday home at 36 Semaphore Street, Coronet Bay, being the land described in Certificate of Title volume 8576 folio 172 ('the Coronet Bay Property') for $247,500.

5 In March 2011, as a result of a decline in the business operated through M & J Stoyanov Transport Co, Mrs Stoyanova and Mr Stoyanov consulted a financial adviser for the purpose of refinancing their borrowings over the Coronet Bay Property and their family home at 25 Midholm Court, Thomastown, being the land described

[1] Mr Stoyanov died in 2015.

in Certificate of Title volume 9131 folio 309 ('the Thomastown Property'), over which the Commonwealth Bank of Australia held a first mortgage.

6 On 12 May 2011, Equity-One provided refinance of $345,500 pursuant to the following three facility agreements and guarantees in respect of which, in each case M & J Stoyanov Transport Co was borrower and Mrs Stoyanova and Mr Stoyanov were guarantors. The relevant terms of the agreements respectively included the following terms:

(a) The first facility agreement:

(i) an advance of $187,000;

(ii) a higher rate of 14.95% and a lower rate of 10.95%;

(iii) a monthly default charge of $990;

(iv) a first mortgage security over the Coronet Bay Property.

(b) The second facility agreement:

(i) an advance of $51,000;

(ii) a higher rate of 27.45% and a lower rate of 19.45%;

(iii) a monthly default charge of $770;

(iv) a second mortgage security over the Coronet Bay Property.

(c) The third facility agreement:

(i) an advance of $107,500;

(ii) a higher rate of 27.45% and a lower rate of 19.45%;

(iii) a monthly default charge of $990;

(iv) second mortgage security over the Thomastown Property (second in priority to the Commonwealth Bank of Australia which held the first mortgage).

7 Each of the facility agreements included the following relevant terms:

(a) Clause 4.1 ('the higher interest rate clause'):

> Payment of interest
>
> Subject to clause 4.4, the Borrower must pay interest to the Lender monthly in advance on each Advance at the rate specified in Schedule 1, Item 5 (Higher Rate) on each Interest Payment Date. If no Event of Default subsists and if the Borrower pays interest to the Lender on each Advance at the rate specified in Schedule 1, Item 6 (Lower Rate) within two Business Days of an Interest Payment Date, then the Lender will accept interest at the Lower Rate for that Interest Payment Date.

(b) Schedule Item 7 ('the monthly default fee clause'):

> If there is an Event of Default under clause 8, the Borrower will be, in addition to payment of interest at the Higher Rate and any other remedies available to the Lender under this document, liable for a monthly charge of $990.00 [or $770 in the case of the second facility agreement] per calendar month or any part thereof until the Event of Default ceases.

8 In 2012, by proceeding S CI 2012 02338, Equity-One brought an action against the plaintiffs and Mr Stoyanov to recover possession of the Coronet Bay Property and to recover the moneys due under the second facility agreement and guarantee.

9 On 20 September 2012, orders were entered by consent in proceeding S CI 2012 02338 that:

(a) Equity-One recover from Mrs Stoyanova possession of the Coronet Bay Property; and

(b) Mrs Stoyanova, M & J Stoyanov Transport Co and Mr Stoyanov pay Equity-One the sum of $79,975.96 (being the debt due under the second facility agreement as at 5 April 2012) together with interest of $10,104.58 (calculated at a daily rate of $27.68 from 5 April 2012 to 19 September 2012).

10 By a contract of sale dated 4 March 2013, Equity-One, as mortgagee in possession, sold the Coronet Bay Property for $260,000.

11 On 19 April 2013, the sale of the Coronet Bay Property settled and, after expenses etc, Equity-One received proceeds in the sum of $245,058.07, which it applied in reduction of the debt due to Equity-One under the first facility agreement, which Equity-One alleged was, at that time, $278,198.67.

12 By writ filed on 27 April 2012, in proceeding S CI 2012 02440, Equity-One claimed possession of the Thomastown Property against Mr Stoyanov as registered proprietor and mortgagor, and recovery of $138,110.88 together with interest pursuant to the third facility agreement and guarantee.

13 On 30 September 2013, Mukhtar AsJ gave summary judgment in proceeding S CI 2012 02440 against Mr Stoyanov for possession of the Thomastown Property and ordered that Mr Stoyanov and M & J Stoyanov Transport Co pay Equity-One the sum of $198,468.71. The summary judgment application did not proceed against Mrs Stoyanova.

14 On 17 March 2014, an appeal from the orders of Mukhtar AsJ was heard by Judd J who:

(a) ordered Mr Stoyanov and M & J Stoyanov Transport Co to pay to Equity-One the balance of principal and interest outstanding under the third facility agreement, less the amount of $990 per month payable under the monthly default fee clause;

(b) gave leave to defend the claim to the extent of the amount claimed under the monthly default fee clause; and

(c) otherwise dismissed the appeal.

There was no challenge to the Equity-One's claim with respect to the higher interest rate clause.

15 By a contract of sale dated 28 March 2015, the Thomastown Property was sold for $405,000 by Equity-One as mortgagee in possession.

16 On 1 May 2015, the sale of the Thomastown Property settled. After expenses of sale, adjustments and repayment of the Commonwealth Bank of Australia as first mortgagee, the sum of $149,501.45 was retained by Equity-One.

17 On 5 February 2016, the plaintiffs filed this group proceeding (proceeding S CI 2016 00402) in which they claim declarations and associated relief to the effect that:

(a) The monthly default fee clauses in the first, second and third facility agreements constitute penalties and are thus void.

(b) The higher interest rate clauses in the first, second and third facility agreements constitute penalties and are thus void.

(c) Equity-One is estopped, pursuant to the principles established in *Port of Melbourne Authority v Anshun Pty Ltd*[2] from claiming the amount due under the first facility agreement or asserting rights under the first mortgage over the Coronet Bay Property, which also served as security in respect of the second facility agreement.

Principles on application of summary judgment

18 The principles to be applied on applications of this type are well established. In *Ottedin Investments Pty Ltd v Portbury Developments Co Pty Ltd*,[3] Dixon J summarised the relevant principles to be applied on an application for summary judgment as follows:

> (a) If a proceeding or defence, or any particular claim, cause of action or ground of defence ('claim') is hopeless, untenable, bound to fail, or could not possibly succeed, then it ought be summarily dismissed. In other words, a claim which ought be dismissed under the old test will be dismissed under s 63 [of the *Civil Procedure Act 2010*].

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2 (1981) 147 CLR 589.
3 (2011) 35 VR 1.

(b) Section 63, however, is less stringent [than the pre-existing law in Victoria and under similar statutory provisions in other jurisdictions]. It does not direct an inquiry into whether a certain and concluded determination could be made that the proceeding, or a claim, would necessarily fail. What is required is a practical judgment by the court as to whether a claim has more than a 'fanciful' prospect of success.

(c) The court's discretion whether to exercise the power of summary dismissal is very wide. Section 64 of the [*Civil Procedure Act 2010*] expresses that the power is based in a consideration of the interests of justice. The Act provides direction in Pt 2.1. The discretion is to be exercised to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute between the parties. The court's powers in furthering the overarching purpose are facilitated by having regard to the objects and matters set out in s 9 of the Act.

(d) The court may be satisfied, on an interlocutory application, that there is no real prospect of success in a civil proceeding but nevertheless consider the dispute to be of such a nature that only a full hearing on the merits is appropriate. Whether a full hearing on the merits is appropriate is a relevant discretionary consideration in the circumstances of each proceeding.

(e) The power to order summary dismissal is to be exercised with great care, as a trial upon evidence of issues raised is the well-settled approach to the determination of litigation. When proceeding on a summary application to assess the prospect of success, a judge ought to feel confident that an assessment can properly be made of whether the overarching purpose is facilitated on dismissal of the impugned claims.

(f) That argument directed to the issues relevant on the application, perhaps even extensive submissions, may be necessary to demonstrate that the case of the plaintiff had no real prospect of success is not ordinarily a relevant consideration.[4]

19 In *Equity-One Mortgage Fund Ltd v Stoyanov*[5] (the appeal of the summary judgment in related proceeding S CI 2014 02440 referred to at paragraphs [14]-[15] above), Judd J stated that he considered that the intended liberalisation under the *Civil Procedure Act 2010* was best expressed in the following recommendations of the Victorian Law Reform Commission recited in the Explanatory Memorandum to the Civil Procedure Bill 2010:

> The Commission stated that claims or defences that are without merit create problems for the parties and the administration of justice, subjecting plaintiffs and defendants to the inconvenience and expense of litigation. The pursuit of unmeritorious claims or defences also has adverse consequences for the

4 Ibid 8-9 [18].
5 [2014] VSC 70.

> administration of justice. Judicial and other publicly funded resources are expended and diverted from dealing with other cases.
>
> The Commission stated that the summary judgment procedure is too restrictive, that the applicable test should be liberalised and that the procedure should be used more frequently and flexibly to dispose of claims or defences that are unmeritorious. It recommended that summary disposition should be available where a claim or defence has 'no real prospect of success'.
>
> The Bill reforms the procedure for the earlier determination of disputes, including liberalising the test for the summary disposal of unmeritorious claims and defences. This will help the courts to remove at an early stage cases where a party has no real prospect of success.[6]

The plaintiffs' claim of *Anshun* estoppel

20 It was submitted by Mr Moore QC, who appeared with Mr Moffatt for Equity-One, that the plaintiffs' contention that Equity-One was estopped from exercising its rights under the first mortgage over the Coronet Bay Property was hopeless for the following reasons:

(a) Equity-One's claims under the first facility agreement and the first mortgage over the Coronet Bay Property were separate and distinct from its rights under the second facility agreement and the second mortgage over the Coronet Bay Property, which were the subject of the consent orders entered on 20 September 2012.

(b) Equity-One submitted that various authorities had found in similar (but not identical circumstances) that later claims in related matters were not sufficient to give rise to an *Anshun* estoppel.

(c) There were efficiencies in Equity-One instituting only one proceeding for the recovery of the Coronet Bay Property and applying the sale proceeds in accordance with s 77(3) of the *Transfer of Land Act 1958*.

(d) There was no prejudice established by the plaintiffs by Equity-One restricting its claim in proceeding S CI 2012 02338 to its rights under the second facility agreement and the second mortgage over the Coronet Bay Property.

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6 Ibid [48].

21 Mr Upjohn QC, who appeared with Mr Sandbach for the plaintiffs, submitted as follows:

(a) The conduct of Equity-One, in not including its claims under the first facility agreement in proceeding S CI 2012 02338, was unreasonable because the two claims were so closely related, in particular:

(i) the first and second facility agreements were on substantially the same terms and were entered into on the same date; and

(ii) the first mortgage securing the first facility agreement and the second mortgage securing the second facility agreement were both over the Coronet Bay Property.

(b) The failure to include the claim could result in prejudice to the plaintiffs because a separate action under the first facility agreement would involve additional costs.

The Authorities

22 In *Port of Melbourne Authority v Anshun Pty Ltd*,[7] Gibbs CJ, Mason, Murphy, Aickin and Brennan JJ dismissed an action under an indemnity agreement, which had not been relied upon in contribution proceedings between the parties in an earlier personal injuries claim. Gibbs CJ, Mason and Aickin JJ adopted the relevant principles of estoppel in these circumstances as those expressed by Sir James Wigram VC in *Henderson v Henderson*[8] as follows:

> Where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of

7 (1981) 147 CLR 589.
8 (1843) 3 Hare 115; 67 ER 319.

> litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.[9]

23 The plurality specifically rejected the proposition that it was an abuse of process to raise in subsequent proceedings matters which could, and therefore should, have been litigated in earlier proceedings.[10] The plurality said that there would be:

> no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding.[11]

24 The defendant relied upon the following authorities:

(a) In *Boles v Esanda Finance Corporation Ltd*,[12] a lessor brought a second proceeding to recover the entire rent payable under three chattel lease agreements, in circumstances where a prior claim for one instalment of rent under each of the leases had already been brought and dismissed. Samuels JA, with whom Priestley and Meagher JJA agreed, said:

> In my opinion, upon the facts here, it was not unreasonable for the respondent [lessor] to have advanced the claim it did in the first proceeding. … There were tactical considerations favouring a claim for an instalment of which the appellants' lawyers must have been aware and which therefore disposed of any contrary expectation.
>
> I am doubtful whether it is helpful to try and apply the notion of 'relevance', which is mentioned in *Port of Melbourne Authority v Anshun* (at 602) in the context of a defence which might have been raised in an earlier proceeding … to the failure to advance a claim. … In this case the claim first made and the current claim are connected in the sense that each has its genesis in the same contract. But it is meaningless to say that one is relevant to the other.[13]

(b) In *Securum Finance Ltd v Ashton*,[14] the English Court of Appeal considered whether a bank was estopped from bringing a claim in 1998 against guarantors

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9 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 598.
10 Ibid 602.
11 Ibid.
12 (1989) 18 NSWLR 666.
13 Ibid 674.
14 [2001] Ch 291.

pursuant to a legal charge granted over their property to secure the repayment of a loan to a debtor. The bank had brought a prior claim in 1989 for repayment of the loan against the debtor and the guarantors, but it had been dismissed for delay in 1997. The guarantors contended that the second action involved re-litigation of the earlier proceeding and should be dismissed on the grounds of delay and abuse of process. Chadwick LJ, with whom Rattee J agreed, dismissed the application stating:

> Nor, as it seems to me, can it be argued that a secured creditor who chooses, in the first place, to sue for payment alone, is thereafter precluded from seeking to enforce his security in a separate action on the grounds that that was a claim that could have been advanced in the first action. As the judge put it, in his written judgment:
>
> > Indeed, it does not seem to me that it is in the interests either of the bank or of the bank's customers that the bank should be obliged to rely on all of its rights under the mortgage when proceedings are first issued if it would prefer to limit itself to a claim under the guarantee. Having decided to confine itself in the first action to a claim under the guarantee, that seems to me to be a perfectly proper course of action for the bank to take and I do not regard it as an abuse of the process of the court for the bank to rely subsequently on its rights under the mortgage. No one could sensibly suppose that by suing on the guarantee the bank is to be taken to be waiving its right to rely, if need be, on the security which it enjoys.
>
> I agree.[15]

Conclusion on Anshun Estoppel

25 In my opinion, the plaintiffs' claim that Equity-One is estopped from making a claim under the first facility agreement or otherwise relying upon its rights as mortgagee under the first mortgage over the Coronet Bay Property is hopeless principally for the reasons submitted by counsel for Equity-One.

26 In particular, Equity-One's claim under the second facility agreement and the second mortgage over the Coronet Bay Property was separate and distinct from any claim it had with respect to the first facility agreement.

27 In the course of submissions, the plaintiffs' counsel accepted that, on his contention:

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15 Ibid 302 [17].

(a) a bank, which obtained judgment on a credit card debt secured over a property, would be estopped from later bringing a claim for default under a home loan, which was secured over the same property and in default at the time of the earlier judgment; and

(b) a secured creditor, which obtained a monetary judgment, would be estopped from subsequently seeking to rely on its mortgage.

In my opinion,

(i) the former proposition is extreme; and plaintiffs' counsel was unable to identify any authority which supported such a proposition; and

(ii) the latter proposition is inconsistent with *Securum Finance Ltd v Ashton*.[16]

28 Accordingly, I propose to dismiss the plaintiffs' claim articulated in paragraphs 27-29 of the statement of claim.

Is the plaintiffs' claim that the higher interest rate clause is a penalty hopeless?

29 It was contended on behalf of Equity-One that the plaintiffs' argument – that the higher interest rate clause was a penalty – had no prospect of success for the following reasons:

(a) The proposition that there was 'no penalty where it is agreed to charge a certain rate of interest on condition that if payment is made punctually the rate will be reduced'[17] ('the No Penalty Rule') has been established by authority dating back over 300 years.[18]

16 [2001] Ch 291.

17 *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359, 366-367 (Gibbs CJ).

18 *Strode v Parker* (1694) 2 Vern 316; 23 ER 804; *Astley v Weldon* (1801) 2 Bos & P 346; 126 ER 1318, 1322 (Heath J).

(b) The No Penalty Rule was recently affirmed by the Queensland Court of Appeal in *Kellas-Sharpe v PSAL Ltd*[19] which was decided after and considered the High Court's judgment in *Andrews v Australia and New Zealand Banking Group Ltd*.[20]

(c) The High Court in *Andrews v Australia and New Zealand Banking Group Ltd* found that a fee could be a penalty even if it was not levied in response to a breach of contract. This could not assist the plaintiffs in this case because the plaintiffs were in breach of contract in failing to make a payment which was due.

(d) This Court was not at liberty to depart from the decision in *Kellas-Sharpe v PSAL Ltd*[21] unless satisfied that the decision was plainly wrong.[22]

30 It was submitted on behalf of the plaintiffs that, despite the line of authority supporting the No Penalty Rule, the plaintiffs had a real prospect of success and, alternatively, there were other reasons[23] why these claims should not be summarily dismissed. The plaintiffs contended as follows:

(a) The High Court in *Andrews v Australia and New Zealand Banking Group Ltd* concluded that there was, independently of the common law, an equitable jurisdiction to relieve against a penalty that was incurred on the other party's failure to observe some provision.[24]

(b) The basis of the decision of the High Court in *Andrews v Australia and New Zealand Banking Group Ltd* was that the court should have reference, for the purposes of determining whether a provision is a penalty, to the substance rather than the form of the transaction. This approach was not consistent with the line of authorities supporting the No Penalty Rule. Further, the High Court

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19 [2013] 2 Qd R 233 (Margaret McMurdo P, Gotterson JA, Fryberg J).

20 (2012) 247 CLR 205 (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

21 [2013] 2 Qd R 233.

22 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151-152 [135] citing *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

23 See the dicta of Dixon J in *Ottedin Investments Pty Ltd v Portbury Developments Co Pty Ltd* (2011) 35 VR 1, 8-9 [18] quoted in paragraph [18d] above.

24 (2012) 247 CLR 205, 216-217 [10] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

impliedly approved the statement of Deane J in *Acron Pacific Ltd v Offshore Oil NL* as follows:

> The question whether the provisions of an agreement impose a penalty must, however, be determined as a matter of substance rather than of mere form. If, as a matter of substance, the provisions of an agreement operate, in the case of breach or non-performance, to impose some additional or different financial obligation in the nature of a punishment (as distinct from a genuine pre-estimate of damage or withdrawal of a mere incentive), they will prima facie impose a penalty.[25]

(c) Summary dismissal of this aspect of the plaintiffs' claim would result in little saving of costs because the remaining issue, being whether the monthly default fee clause is a penalty, would involve consideration of substantially the same legal and factual matters.

(d) The decision in *Kellas-Sharpe v PSAL Ltd* was decided without the benefit of argument based on *Andrews v Australia and New Zealand Banking Group Ltd*,[26] because the judgment of the High Court in the latter case was delivered after the hearing before the Queensland Court of Appeal.[27]

Consideration

31 In *Kellas-Sharpe v PSAL Ltd*,[28] the Queensland Court of Appeal considered a loan agreement which provided that the interest rate on an advance of $1,129,368 was 'the standard rate of 7.50% per month, but while the Borrower is not in default under the Facility, the Lender will accept interest at the concessional rate of 4.00% per month'. The appellants contended that this provision was void as a penalty and was unconscionable.

32 Gotterson JA (with whom Margaret McMurdo P and Fryberg J agreed) dismissed the appeal citing extensive authority in support of the rule.[29] Gotterson JA concluded:

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25 (1985) 157 CLR 514, 520 (citations omitted).
26 (2012) 247 CLR 205.
27 *Kellas-Sharpe v PSAL Ltd* (2013) 2 Qd R 233, 244 [21] n 10.
28 Ibid.
29 See headnote on page 233 in which the following cases are cited: *Astley v Weldon* (1801) 2 Bos & P 346; 126 ER 1318; *Wallingford v Mutual Society* (1880) 5 App Cas 685; *Brett v Barr Smith* (1919) 26 CLR 87;

> I am of the view that it is not open to this Court to accept the invitation made on behalf of the appellants. Although the correctness of the rule appears never to have been affirmed after a deliberate examination of it by the High Court, it has been acknowledged more than once by members of that Court.
>
> …
>
> Despite the criticism that has been made of the rule, I am not convinced that it is plainly wrong. That criticism has tended to focus upon the distinction that the rule makes. The objection to the distinction underlying the criticism is centred upon its dependence upon form rather than upon substance. The provisions are differently expressed in form, yet in substance the same interest rate outcome results from them where payment is not punctual – the higher interest rate is charged.
>
> It is true that, from this perspective, the distinction made by the rule does contradict equity's preference for substance over form in a way that is anomalous. However, it is not as clear to me that the distinction ought to be abolished.[30]

33 The President, in agreeing with Gotterson JA, said as follows:

> The appellant's contentions which criticise this long-established semantic distinction are, therefore, not new. But those in the commercial world have acted upon it for centuries. It is not for this Court to gainsay the long line of authority which supports the distinction. In any case, I am unpersuaded that the distinction has caused injustice in this case.[31]

34 Fryberg J also agreed that it was not appropriate for the court to overturn the authorities but commented as follows:

> It is an unfortunate feature of the common law that from time to time judicial findings of fact, sometimes expressed with incautious generality, become elevated into rules of law. Something of the sort seems to have happened in the evolution of the so-called rule which is the subject of the present appeal. I agree with those who think the rule anomalous. It may express a practice which had some economic utility in the 19th century (although even that is far from clear), but it does not do so in the 21st.[32]

35 In *Astley v Weldon*,[33] the English Court of Common Pleas found that an agreement to pay £200 for any breach of a contract between a performer and a theatre owner was in

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O'Dea v Allstates Leasing System (WA) Pty Ltd (1983) 152 CLR 359; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1990) 23 FCR 1; *Beil v Mansell (No 2)* [2006] 2 Qd R 499; *Accom Finance Pty Ltd v Mars Pty Ltd* (2007) 13 BPR 98272; *Kowalczuk v Accom Finance Pty Ltd* (2008) 77 NSWLR 205; *Summer Hill Business Estate Pty Ltd v Equititrust Ltd* [2011] NSWCA 149; *Seton v Slade* (1802) 7 Ves Jun 265; 32 ER 108; *Acron Pacific Ltd v Offshore Oil NL* (1985) 157 CLR 514.

30 *Kellas-Sharpe v PSAL Ltd* (2013) 2 Qd R 233, 249 [41], [43]–[44].

31 Ibid 241 [3].

32 Ibid 251 [57].

33 (1801) 2 Bos & P 346; 126 ER 1318 (Lord Eldon CJ, Heath, Rooke and Chambre JJ).

the nature of a penalty and not of liquidated damages. Heath J noted in obiter as follows:

> It is a well-known rule in equity, that if a mortgage covenant be to pay 5l. per cent. and if the interest be paid on certain days then to be reduced to 4l. per cent. the Court of Chancery will not relieve if the early day be suffered to pass without payment; but if the covenant be to pay 4l. per cent. and if the party do not pay at a certain time it shall be raised to 5l. there the Court of Chancery will relieve.[34]

In my opinion, this is a clear statement that equity, uncharacteristically, in this instance should prefer form over substance.

36 It cannot be doubted that since the time of that decision at the turn of the nineteenth century, the rule has been referred to as firmly established in a number of authorities. However, the following has also been said about the rule:

(a) In *Brett v Barr Smith*, Isaacs J referred to the rule as an 'anomaly'.[35]

(b) In *O'Dea v Allstates Leasing System (WA) Pty Ltd*,[36] Gibbs CJ's often quoted statement that 'there is no penalty where it was agreed to charge a certain rate of interest on condition that if payment is made punctually the rate will be reduced'[37] is a reference to the proposition espoused in 'cases to which counsel for the first respondent referred in support of his argument'.[38] However, the High Court in that case found that the clause of a three year lease for a vehicle which, on its face, expressly provided for the entire rental to be due on the signing of the agreement, but provided that the lessor would accept monthly instalments providing they were paid on time, to be a penalty. The High Court looked to the substance of the agreement rather than its form and Gibbs CJ said that the proper approach was as follows:

> The question whether a contractual provision amounts to a penalty depends on all the surrounding circumstances existing at the time of the making of the contract as well as on the terms of the contract itself,

34 Ibid 353; 1322-1323.
35 (1919) 26 CLR 87, 94.
36 (1983) 152 CLR 359.
37 Ibid 366–367.
38 Ibid 366.

> and it is therefore not always possible to apply a decision given upon one contract to another case even though that case concerns a contract in identical terms.[39]

(c) In *David Securities Pty Ltd v Commonwealth Bank of Australia*, the Full Court of the Federal Court described the rule as 'well-known, if not much praised'.[40]

(d) In *Fisher & Lightwood's Law of Mortgage*, the learned authors said of the rule that:

> It is a well settled, if not an intelligible, rule that if the mortgagee wishes to stipulate for a higher rate of interest in default of punctual payment he must reserve the higher rate as the interest payable under the mortgage and provide for its reduction in case of punctual payment: *Strode v Parker* (1694) 2 Vern 316; 23 ER 804. …
>
> Lord Eldon criticised this distinction as preferring form over substance as early as 1802: *Seton v Slade* (1802) … 32 ER 108, 111. The distinction is now too well entrenched to be altered: *Meredith* (1916) 32 LQR 420; *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359, 366–7; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1990) 23 FCR 1, 29 …[41]

(e) In an article entitled 'A Nicety in the Law of Mortgage',[42] Mr Arthur C Meredith submitted that the rule seemingly had its origin by way of mistake in the very late 17th century, though the distinction made by it had been ignored, even disparaged, by some eminent jurists during the following century or so; but that in the 19th century, it was apparently accepted by the Chancery Judges and adopted by the text writers as settled law.[43]

(f) In *Andrews v Australia and New Zealand Banking Group Ltd*,[44] the High Court found that, in equity, the fact that the fees were charged for exceeding an overdraft limit, which was not a breach of contract, did not mean that fees

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39 Ibid 373 (citation omitted).

40 (1990) 23 FCR 1, 29 (Lockhart, Beaumont and Gummow JJ). This decision was reversed on other grounds in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

41 Edward Tyler, Peter Young and Clyde Croft, *Fisher & Lightwood's Law of Mortgage* (Lexis Nexis Butterworths, 2nd Aust ed, 2005) [3.18] cited by Young JA in *Summer Hill Business Estate Pty Ltd v Equititrust Ltd* [2011] NSWCA 149 [47] and quoted by Chesterman J in *Beil v Mansell (No 2)* [2006] 2 Qd R 499 [24].

42 (1916) 32 LQR 420.

43 Cited by Gotterson JA in *Kellas-Sharpe v PSAL Ltd* [2013] 2 Qd R 233, 248 [39].

44 (2012) 247 CLR 205.

charged as a consequence could not be characterised as penalties. The Court stated that:

> 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.[45]

The High Court specifically approved of the refusal in *Jobson v Johnson*[46] to draw a distinction between a stipulation on default for transfer of property and payment of money because 'such a distinction would elevate form over substance'.[47]

37 From the above discussion, the following short propositions can be concluded:

(a) The No Penalty Rule is anomalous and can only be attributed to the elevation of form over substance.

(b) In *Andrews v Australia and New Zealand Banking Group Ltd*,[48] the High Court, generally with respect to the application of the rule of penalties, has adopted the approach that a court should look to substance rather than form.

(c) The No Penalty Rule is well established; and a judge at first instance would not be not at liberty to reconsider the application of the rule.

38 Although I consider that, on the current state of authorities, the plaintiffs' claim – that the higher interest rate clauses in the facility agreements with Equity-One are penalties – must fail at trial, I do not propose to dismiss the claim for the following reasons:

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45 Ibid 216 [10] (citation omitted).
46 [1989] 1 WLR 1026.
47 *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205, 217 [13].
48 Ibid.

(a) The High Court has not 'affirmed [the No Penalty Rule] after a deliberate examination'[49] and there must be some prospect that the High Court will reconsider the rule.

(b) If the plaintiffs were to attempt to take the issue to the High Court for determination in this case, appellate courts may benefit from evidence, full argument and reasons in the trial division.

(c) The plaintiffs' claims with respect to the monthly default fee clause constituting a penalty will proceed and, in my opinion, determination of the issue of the application of the rule with respect to higher interest rate clauses will not require the expenditure of substantial further costs.

(d) Consideration of whether the monthly default fee clauses constitute a penalty may require consideration of the effect of the additional interest payable under the higher interest rate clause, consequent on the same default.

(e) The summary dismissal of the claim with respect to the higher interest rate clauses will require any appeal to be filed prior to the determination of the balance of the action. This is likely to lead to fragmentation of the claims and delays in the finalisation of the proceeding.

Issue estoppel with respect to the second facility agreement

39 Equity-One contended that all the relevant issues with respect to the second facility agreement were finally resolved by the consent order on 20 September 2012 in proceeding S CI 2012 02338.

40 The plaintiffs do not contest this proposition and assert that, although the pleadings do refer to matters with respect to the second facility agreement, the plaintiffs claim no relief with respect to the second facility agreement, which is consistent with their plea in paragraph 30 of the statement of claim that:

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49 *Kellas-Sharpe v PSAL Ltd* (2013) 2 Qd R 233, 249 [41], [43].

> The Plaintiffs do not seek any relief or remedy to the extent that any judgment of this Honourable Court or any other Court of competent jurisdiction has determined any relevant issue between the Defendant and any group member.

41 The plaintiffs did not contest the proposition that references in the pleadings to the second facility agreement should be deleted and I propose to order accordingly.

Issue estoppel with respect to the first facility agreement and the third facility agreement

42 Equity-One contended that the consent order made in proceeding S CI 2012 02338 with respect to the second facility agreement prevented the plaintiffs in this proceeding from contesting the enforceability of the higher interest rate clauses and the monthly default fee clauses under the first facility agreement and the third facility agreement. Equity-One submitted that this was a consequence of the fact that the enforceability of those clauses under the first and third facility agreements was a necessary condition to the amount ordered to be paid by the plaintiffs, with respect to the second facility agreement pursuant to the consent order.

43 In the course of argument, it was conceded by Equity-One that it was arguable that the different amounts of the loans, the different securities, the different interest rates and the different monthly default fees with respect to the various facility agreements could lead to a different result in determining whether the relevant clauses were penalties under the first and third facility agreements. Accordingly, Equity-One, in my opinion correctly, did not press for summary judgment on this basis.

Issue estoppel against Mrs Stoyanova with respect to the third facility agreement

44 As noted above, on 17 March 2014 summary judgment was entered by Judd J in proceeding S CI 2012 02440 against Mr Stoyanov and M & J Stoyanov Transport Co with leave for them to defend the claim only with respect to the monthly default fee of $990. Accordingly, although it had not been argued, it was not contested that, in that proceeding, M & J Stoyanov Transport Co was estopped from raising any issue about the invalidity of the higher interest rate clause in the third facility agreement.

45 Mrs Stoyanova's leave to defend proceeding S CI 2012 02440 was not in issue before Judd J because she denied that she had signed the guarantee to the third facility agreement on which the claim against her was based. Equity-One contended that although Mrs Stoyanova was not a party to the summary judgment application, she was bound by the issue estoppel binding M & J Stoyanov Transport Co because she was:

(a) a defendant to the proceeding;

(b) a director and shareholder of M & J Stoyanov Transport Co;

(c) a guarantor of M & J Stoyanov Transport Co's debts to Equity-One.

(d) by reason of (b) and (c), someone who had a real financial interest in the outcome of the summary judgment application; and

(e) a participant in the summary judgment application, by the swearing of an affidavit on behalf of M & J Stoyanov Transport Co.

It was contended that, in these circumstances, it could be inferred that Mrs Stoyanova gave instructions to the solicitors for M & J Stoyanov Transport Co on the summary judgment application.

46 Accordingly, Equity-One submitted that it would be an abuse of process to allow Mrs Stoyanova, as a person 'otherwise connected',[50] to dispute the validity of the higher interest rate clause in the third facility agreement, when that had been resolved against M & J Stoyanov Transport Co in proceeding S CI 2012 02440.[51]

47 I reject the contention that, on a summary judgment application, Mrs Stoyanova has no real prospect of contending that she is not so bound to the issue estoppel binding M & J Stoyanov Transport Co for the following reasons:

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50 *Kermani v Westpac Banking Corporation* (2012) 36 VR 130, 157 [112] (Robson AJA with whom Neave and Harper JJA agreed).

51 *Thomas v Balanced Securities Ltd* [2012] 2 Qd R 482 [40], [49] (White JA with whom Margaret Wilson AJA and Martin J agreed).

(a) The question of whether she was a guarantor to the third facility agreement is in dispute.

(b) She was not the sole director or shareholder of M & J Stoyanov Transport Co and there was no evidence that she was in effective control of the company.

(c) The fact that she swore an affidavit in the summary judgment application in proceeding S CI 2012 02440 does not necessitate the inference being drawn that she was giving instructions on the application.

Conclusion

48 In summary:

(a) Mrs Stoyanova and M & J Stoyanov Transport Co are entitled to contend that the monthly default fee clause and the higher interest rate clause in the first facility agreement each constitutes a penalty.

(b) M & J Stoyanov Transport Co is entitled to contend that the monthly default fee clause under the third facility agreement constitutes a penalty.

(c) Mrs Stoyanova is entitled to contend that the monthly default fee clause and higher interest rate clause under the third facility agreement each constitutes a penalty.

Security for costs

49 The jurisdiction of this Court to order security for costs in a group proceeding is established.[52] In *De Jong v Carnival PLC,*[53] Beech-Jones J identified the following five propositions from cited authorities which should be considered:

(1) An order for security against the representative party does not affect the immunity conferred by s 43(1A) of the *Federal Court of Australia Act 1976* (Cth)

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52 *Hall v Australian Finance Direct Ltd* [2005] VSC 306 [106] (Hollingworth J); *Matthews v SPI Electricity Pty Ltd (No 9)* [2013] VSC 671 [84] (Derham AsJ).

53 [2016] NSWSC 347 [26].

(the equivalent of which in Victoria is s 33ZD(b) of the *Supreme Court Act 1986*).[54]

(2) The fact that an impecunious plaintiff brings proceedings for the benefit of represented persons may be a significant factor in favour of an order for security.[55]

(3) To obtain an order for security it is not necessary to demonstrate that the representative party has been deliberately selected to shield group members with substantial means for whose benefit the proceedings were brought.[56]

(4) The party resisting security on the basis that it will stultify the proceedings bears the onus of proof of that fact.[57]

(5) The financial circumstances of group members are relevant to an application for security especially the contention that an order for security would stultify the proceedings.[58]

50 To these considerations, Finkelstein J added the consideration of the merits of the claim. His Honour considered that this was particularly relevant to avoid class actions as being used as 'an instrument of oppression'.[59]

51 The above factors are by no means exclusive. Further relevant factors were identified by Murphy J in *Kelly v Willmott Forests Ltd (in liq)*[60] which the Full Court of the Federal Court accepted as 'legitimate' in *Madgwick*.[61]

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54 *Bray v F Hoffmann-La Roche Ltd* (2003) 130 FCR 317, 348 [141] (Carr J) ('*Bray*'); *Madgwick v Kelly* (2013) 212 FCR 1, 19-20 [81] and 21 [87] (Allsop CJ and Middleton J) and 37 [141] (Jessup J) ('*Madgwick*').

55 *Madgwick* (2013) 212 FCR 1, 7–8 [21]–[23] (Allsop CJ and Middleton J).

56 *Bray* (2003) 130 FCR 317, 348 [144] (Carr J); *Madgwick* (2013) 212 FCR 1, 7–8 [21]–[23] (Allsop CJ and Middleton J).

57 *Bray* (2003) 130 FCR 317, 348 [142]–[144] (Carr J with whom Branson J agreed at 361–632 [214] and Finkelstein J agreed at 374 [250]); *Madgwick* (2013) 212 FCR 1, 19 [80] and 21 [87] (Allsop CJ and Middleton J), 37 [141] (Jessup J).

58 *Bray* (2003) 130 FCR 317, 348 [142] (Carr J); *Madgwick* (2013) 212 FCR 1, 19–21 [80]–[88] (Allsop CJ and Middleton J), 37 [141] (Jessup J).

59 *Bray* (2003) 130 FCR 317, 375 [252].

60 (2012) 300 ALR 675, 678–679 [13].

61 (2013) 212 FCR 1, 4 [8] (Allsop CJ and Middleton J).

52 On the evidence, the plaintiffs are insolvent and are very unlikely to be able to satisfy any orders for costs if Equity-One is ultimately successful in this proceeding. The plaintiffs do not dispute this proposition, but contend that their financial position was substantially the product of the wrongful conduct of the Equity-One, (which is the subject of the proceeding) and that an order for security will stultify the proceeding. On the basis of the evidence, I am unable to form any view about the first proposition and I have no evidence about the attempts to obtain a litigation funder or the preparedness and the capacity of other group members to provide security.

53 As in *De Jong v Carnival PLC*, I consider that '[t]he potentially critical factors that weigh against an order for security concern the nature and number of the claims sought to be vindicated and the contention that an order for security would stultify the proceedings'.[62]

54 It is too early in the proceeding to make an assessment of either of these factors and Equity-One has indicated a desire to provide further evidence as to the quantum of costs likely to be incurred.

55 Before I can determine whether security for costs should be ordered and the quantum of such security, it is necessary to give the plaintiffs the opportunity to ascertain the nature, the number and the extent of claims and the preparedness and capacity of group members to contribute to a fund to provide security.

56 In similar circumstances in *De Jong v Carnival PLC*, Beech-Jones J ordered that a circular addressing the following issues should accompany the opt out notice:

> First, a statement that the Court is considering an application to order the representative party to provide security for costs in favour of Carnival, and the amount sought by Carnival. Second, a statement that the Court may order all of the security sought be provided, part of the security sought be provided, or dismiss the application. Third, a simple explanation of what security for costs is and the effect of a stay if security is not provided. Fourth, a statement that the forms accompanying the notice seek to ascertain whether the group member is willing to contribute 15% of the cost of the cruise(s) they paid into a pool of funds for security and, if they are not, they should state why. Fifth, a statement confirming that group members will not be ordered to pay costs or

62 [2016] NSWSC 347 [62].

> provide security. Sixth, a statement that, if sufficient group members unreasonably refuse to contribute to a pool to meet the security ordered against the representative party, then the proceedings may be stayed. Seventh, a statement that individual group members who do not respond or unreasonably decline to contribute might be removed from the action even if they do not opt out.[63]

57 I do not propose to make any order for security for costs at this time and will adjourn further consideration until formulation of the opt out notice.

Orders

1. The plaintiffs' claims in paragraphs 27–29 of the statement of claim be summarily dismissed.

2. The plaintiffs' allegations with respect to the second facility agreement be struck out.

3. The second plaintiff's claims with respect to the higher interest rate clause in the third facility agreement be struck out.

4. The defendant's application for security for costs be adjourned to a date to be fixed.

5. The plaintiffs have leave to amend the statement of claim to address the above matters.

58 I will hear the parties for any further and consequential orders.

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[63] Ibid [76].