

AUSTRALIA / JUDGMENT

SPV Capital Pty Ltd v Bhatt & Anor

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District Court

New South Wales

Medium Neutral Citation:

SPV Capital Pty Ltd v Bhatt & Anor [2026] NSWDC 346

Hearing dates:

16, 17, 18 June, 24, 25 and 26 August, 18 September 2026

Date of orders:

23 September 2026

Decision date:

23 September 2026

Jurisdiction:

Civil

Before:

Acting Judge Levy SC

Decision:

- (1) Default judgment against both defendants is confirmed;
- (2) Dismissal of the cross claim brought by the defendants;
- (3) The plaintiff's damages are assessed at \$1,539,315;
- (4) The sum of \$340,649.32 is to be credited to the defendants as a set-off against the plaintiff's assessed damages on account of payments already received;
- (5) After set-off, judgment for the plaintiff against both defendants in the adjusted sum of \$1,197,665.68;
- (6) The defendants are to pay the costs incurred by the plaintiff in these proceedings as agreed or assessed;

- (7) The exhibits may be returned;
- (8) Liberty to apply for further or other orders if required.

Catchwords:

MERCANTILE LAW – commercial loan agreements – O’Dea clause – default in repayment – default judgment entered against defendants at interlocutory stage – dismissal of cross claim by defendants alleging penalty term, unconscionability, and misleading and deceptive conduct within the meaning of s 21 of the Australian Consumer Law

Legislation Cited:

Australian Consumer Law, s 21 and s 236

Civil Procedure Act 2005 (NSW), s 63(2)

Uniform Civil Procedure Rules 2005 (NSW), r 42.1

Cases Cited:

Andrews v Australia and New Zealand Banking Group Ltd (2012) 247 CLR 205; [2012] HCA 30

Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd (2021) 285 FCR 133; [2021] FCAFC 40

Australian Competition and Consumer Commission v Samton Holdings Pty Ltd (2002) 117 FCR 301; [2002] FCA 62

Australian Securities and Investment Commission v Kobelt (2019) 267 CLR 1; [2019] HCA 18

Ledinh Sovereign Super LTD v CT Stone Pty Ltd [2023] NSWSC 1079

O’Dea v Allstate Leasing (WA) Pty Ltd (1983) 152 CLR 359; [1983] HCA 3

Paciocco v Australia and New Zealand Banking Group Ltd (2016) 258 CLR 525; [2016] HCA 28

Petelin v Cullen (1975) 132 CLR 355; [1975] HCA 24

Ringrow Pty Ltd v BP Australia Pty Ltd (2005) 224 CLR 656; [2005] HCA 71

Saunders v Anglia Building Society (Gallie v Lee) [1970] UKHL 5; (1971) AC 1004

SPV Capital Pty Ltd v Bhatt & Anor, 12 August 2024, Judge Andronos SC, unreported

SPV Capital Pty Ltd v Bhatt & Anor, 22 July 2025, Judge Andronos SC, unreported Stubbings v Jams 2 Pty Ltd (2022) 276 CLR 1; [2022] HCA 6

Category:

Principal judgment

Parties:

SPV Capital Pty Ltd (Plaintiff / Cross-Defendant)

Ashish Hiteshkumar Bhatt (First Defendant / First Cross-Claimant)

Shruti Gunavantray Vyas (Second Defendant / Second Cross-Claimant)

Representation:

Counsel:

Mr E Ball (Plaintiff / Cross-Defendant)

Mr S Gupta (Solicitor for Defendants / Cross-Claimants – to 18 June 2026 – defendants were self-represented thereafter)

Solicitors:

Vincent Young (Plaintiff / Cross-Defendant)

Gupta & Co (Defendants / Cross-Claimants – to 18 June 2026 – defendants were self-represented thereafter)

File Number(s):

2024/00145519

Publication restriction:

None

Judgment

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Preamble

Transactions involving the borrowing of money for commercial purposes can pose financial risks for all parties to the transaction.

To protect the lender against the risk of default in repayment by borrowers, prudence suggests that the terms and conditions of loan agreements be drafted to anticipate the possibility of a default in loan repayment.

The borrowers in this case needed the services of a private commercial money lender of last resort to obtain a short term business loan because of post-COVID-19 business liquidity issues. In their negotiations with the money lender, it appears that they were inexperienced in recognising and managing legal pitfalls in the course they had embarked upon.

Those unfortunate circumstances were compounded by the fact that throughout the process, the borrowers did not have the guidance and benefit of legal or accounting advice.

Nature of the case

These reasons concern the unfortunate legal consequence of an unpaid commercial debt incurred pursuant to the terms of a commercial loan agreement whereby the plaintiff, SPV Capital Pty Ltd, a short term money lender, provided the defendant borrowers, Mr Ashish Hiteshkumar Bhatt and his wife Mrs Shruti Gunavantray Vyas, with a 3 month loan of \$450,000 which attracted additional interest, fees and charges.

In sequence, the defendants entered into two separate loan facility agreements with SPV Capital Pty Ltd, the first being on 27 January 2022 (Exhibit “A”, pp 538 – 566), and the second being on 26 April 2022 (Exhibit “A”, pp 600 – 630). Each loan agreement contained 214 paragraphs expressed in the same terms except as to dates of commencement and completion. In each instance, the interest rate was 1 per cent per week (52 per cent per annum) and 2 per cent per week (104 per cent per annum): Exhibit “A”, p 565; p 629.

The defendants defaulted in repaying the first loan. They subsequently defaulted in repaying the agreed refinancing of that loan in the form of a second loan involving the same lender. Those circumstances resulted in a default judgment being entered against both defendants.

At an earlier contested interlocutory hearing, the defendants succeeded in having the default judgment set aside, but only in limited part. They also succeeded in obtaining leave to pursue a cross claim against the money lender to seek damages. The basis of the cross claim was the inclusion of an alleged penalty clause in the loan contract, alleged unconscionability, and alleged misleading and deceptive conduct within the meaning of s 21 of the Australian Consumer Law.

In those circumstances, in this final phase of the proceedings, subject to the determination of the merits of the cross claim brought by the defendants, the plaintiff claims damages comprising the principal sum borrowed, with accrued interest, fees, and charges, in the adjusted total sum of \$1,539,315.

Parties, persons, entities

The relevant parties, persons, and entities, are identified as follows:

The plaintiff, SPV Capital Pty Ltd (SPV Capital), described in the evidence as a lender of last resort, is the plaintiff and the cross defendant in the proceedings;

Mr Erik Unger is an officer of SPV Capital. In that role, he oversaw and administered the relevant loan agreements and the quantification of the monetary claim against the defendants;

Innovative Constructions (NSW) Pty Ltd (Innovative Constructions) was a successful construction company. Following the difficult time of the COVID-19 pandemic, it found itself in pressing need of working capital in circumstances where borrowed funds were required in order to enable it to continue to conduct its business;

The defendants, Mr Bhatt, and his wife Ms Vyas, were directors and shareholders of Innovative Constructions;

Mr Bhatt was the guiding mind of Innovative Constructions. He was the person who conducted negotiations leading to the execution of the relevant loan agreements with the SPV Capital;

Mr James Okkerse, a finance broker whose firm Money Doesn't Sleep Pty Ltd, acted as an agent in transacting the subject loans with SPV Capital. Although he and his company are referred to in the evidence and in the correspondence within the evidence, neither he nor his company are parties to the proceedings. He was not called to give evidence in the proceedings;

Koa Capital Pty Ltd (Koa Capital) was a company related to SPV Capital. In contrast to SPV Capital, which offered relatively short term "low doc" loans at higher interest rates commensurate to the assessed commercial risk in circumstances of limited security, Koa Capital offered longer term loans at lesser rates of interest but secured by mortgage.

Procedural background

The proceedings have taken a chequered procedural course, as appears in the detailed summary within the Appendix to these reasons. That summary shows there were over 30 procedural steps and interlocutory listings in this case which resulted in several tranches of procedural and case management orders.

On 22 July 2025, following a contested interlocutory hearing which proceeded before Judge Andronos SC, where the defendants were represented by counsel (25 October, 22 November, and 7 December 2024, where the extensive written submissions concluded on 20 January 2025), in an unreported decision, orders were made enabling the defendants to file and serve defences in terms limited to and consistent with what his Honour identified as raising arguable legal matters.

In the detailed reasons of Judge Andronos SC, three distinct unconscionability claims were identified as being arguably raised by the defendants as against SPV Capital, as follows:

The second loan facility entered into by the parties was arguably oppressive and unjust in that its imposition was arguably unconscionable within the meaning of s 21 of the Australian Consumer Law;

Clause 92 of the second loan facility was arguably so oppressive and unjust in that its imposition was unconscionable within the meaning of s 21 of the Australian Consumer Law;

All of the conduct alleged in paragraphs 18 to 87 of the proposed defence, if proven, was arguably unconscionable.

In the decision of Judge Andronos SC, (which reviewed the factual background, the nature of the loans, the factual allegations raised by the defendants, and the circumstances of the entry of default judgment), the default judgment entered against Mr Bhatt and his wife was to a very limited extent set aside in the following context:

[100] For the reasons set out above, the defendants have raised arguable defences with respect to the issues of penalty and unconscionability. Those defences only go to the plaintiff's entitlement to interest or set up allegations in the nature of a cross claim or set off. I do not consider that the proposed defences of uncertainty, unfair terms, misleading or deceptive conduct or public policy, generally, are arguable on the face of the proposed defence or on the basis of the evidence before me.

The foreshadowed cross claim by the defendants, for which leave was granted, was handed up in court irregularly, in an unsigned form. As no point was taken with regard to that irregularity, in the circumstances of this case, the unsigned cross claim was treated as having been validly raised: Civil Procedure Act 2005 (NSW), s 63(2).

The cross claim was originally fixed for hearing on 14 April 2026 with the allocation of a one day hearing estimate, but in the lead up to that date, it became apparent the defendants were not ready to proceed.

On 13 March 2026, the matter came before Judge Dicker SC as the List Judge for consideration of an application by the defendants to vacate the hearing date. At that hearing the defendants were represented by their solicitor, Mr Gupta. At that time, orders were made vacating the 14 April 2026 hearing date and a new hearing date then allocated to commence on 16 June 2026.

Facilitative case management directions were also made at that time.

On 13 March 2026, in those circumstances, Judge Dicker SC made an interlocutory guillotine order by which it was made clear to Mr Bhatt that he should get his house in order to prepare for the hearing, including by serving evidence in accordance with a directed timetable: Exhibit “A”, p 1127.

On 18 May 2026, following the hearing of an interlocutory notice of motion before Judge Cole (whereby the defendants were seeking to prevent the solicitor for SPV Capital from continuing to act for that company in these proceedings), the defendants indicated that they had evidence ready to serve but service of that material was being withheld pending the determination of that motion. After that motion was dismissed the solicitor for SPV Capital wrote to remind the solicitor then acting for the defendants that such evidence had to be served in accordance with orders made on 13 March 2026: Exhibit “A”, p 1104.

Despite indications by the defendants that such a course was in progress at that time, and that such evidence would be served, the defendants have not filed or served the evidence contemplated by those orders.

At the hearing of the present cross claim, as events unfolded, the estimate of a one day hearing proved to be overly optimistic. The case proceeded over the course of 7 hearing days, on June 16, 17, 18, August 24, 25, 26, and September 18, 2026. SPV Capital was represented by its solicitor and counsel on each of those dates.

The defendants were legally represented by their solicitor until 18 June 2026. Thereafter they were self-represented. Those circumstances unfortunately contributed to the extended length and complexity of the hearing.

Issues

In light of the prior entry of default judgment and the orders made at prior interlocutory hearings, the remaining issues calling for determination in this final stage of the proceedings have narrowed. It is common ground between the parties that the pivotal issues calling for decision in this case are as follows:

Was Mr Okkerse, of Money Doesn't Sleep Pty Ltd, the agent of the plaintiff or the defendants at the time the loans from SPV Capital were negotiated and transacted?

Are any of the provisions in the relevant loan agreement unconscionable in the sense of involving a penalty, and if so, do such circumstances disentitle SPV Capital to claim interest in these proceedings?

What is the quantum of SPV Capital's claim for damages comprising the principal amount of the loan, related fees, charges, enforcement costs, and interest?

Have the defendants established their cross claim based on alleged penalty and unconscionable conduct for a set-off to be applied against SPV Capital's quantum claim?

It is common ground that the defendants carry the onus of proof in respect of their cross claim allegations of penalty, unconscionability, and also with respect to their claims of alleged misleading and deceptive conduct.

Evidence overview

Mr Bhatt and Mr Unger were the only witnesses who gave oral evidence. The array of documentary evidence relevant to the limited issues that remain to be decided in the proceedings is summarised below. At the hearing it was noted that no adverse comment arises from the fact that the second defendant, Ms Vyas, was not called to give evidence as it was Mr Bhatt who undertook all relevant negotiations in respect of the subject loans.

Documentary evidence

SPV Capital's documentary exhibits were marked in the series Exhibit "A" to Exhibit "F". Within that array of evidence SPV Capital relied upon the content of a five-volume court book which included assembled copies of contractual documents, emails, and related correspondence: Exhibit "A", Volumes A, B, C, D and E, pp 1 – 1104. The documentary evidence relied upon by the defendants comprised Exhibits "1" to "9".

At this point it is relevant to refer to the provision in the respective loan agreements for interest to accrue, where in each loan document, it was agreed that two different rates of interest would apply depending on the timing for repayment.

The loan agreements stipulated that in the event that payments due under the loan agreements were made on time, a "low" interest rate of 1 per cent per week (52 per cent per annum) would apply, and if such payments were not made on time, a "high" interest rate of 2 per cent per week (104 per cent per annum) would apply: Exhibit "A", p 585; p 629.

In evidence and argument in these proceedings, those alternative rates were referred to as an O'Dea clause, as explained in *O'Dea v Allstate Leasing (WA) Pty Ltd* (1983) 152 CLR 359; [1983] HCA 3. However, in the cross claim part of the proceedings, SPV Capital only relies on the lesser of those two interest rates.

Notwithstanding that SPV Capital seeks interest at the lesser rate specified in the loan agreement, the defendants claim each of those rates comprised an unconscionable penalty, a claim disputed by SPV Capital.

Evidence of Mr Bhatt

In the paragraphs that follow, 6 of Mr Bhatt's affidavits, respectively affirmed or filed on 21 August 2024, 30 August 2024, 20 November 2024, 5 September 2025, 27 November 2025 and 27 April 2026 are reviewed. Those affidavits were primarily directed to matters that have already been considered and determined in the earlier interlocutory decisions.

Consequently, with the exception of the third affidavit, those other affidavits do not need to be revisited in detail in this phase of the proceedings.

Mr Bhatt's affidavits

A summary of those affidavits now follows.

Mr Bhatt's first affidavit – 21 August 2024

Mr Bhatt's first affidavit, with annexures, was affirmed on 21 August 2024: Exhibit "A", pp 389 – 407. It dealt with the circumstances of Mr Bhatt's unsuccessful attempts to file a defence following the entry of default judgment and his related desire to have that judgment set aside and to pursue a cross claim against SPV Capital. This affidavit has been overtaken by events.

Mr Bhatt's second affidavit – 30 August 2024

Mr Bhatt's second affidavit, with annexures, was affirmed on 30 August 2024: Exhibit "A", pp 408 – 428. It sets out some details of Mr Bhatt's attempts to obtain legal assistance once he became aware of the proceedings and it repeated his desire to have the default judgment set aside and to pursue a cross claim against SPV Capital. This affidavit has also been overtaken by events.

Mr Bhatt's third affidavit – 20 November 2024

Mr Bhatt's third affidavit was affirmed on 20 November 2024: Exhibit "A", pp 429 – 440. It describes the background circumstances which led Mr Bhatt to approach Mr Okkerse of Money Doesn't Sleep Pty Ltd to seek a loan. Mr Bhatt said that he had sought a 6 month term. He said he had selected that term to enable him to sell one of his properties. He said he did not want to undertake a 3 month loan at a very high interest rate. He said that instead, he was prepared to pay interest at 17 per cent per annum for a 6 month loan.

Notwithstanding that objective, on 27 January 2022, Mr Bhatt signed a 3 month loan agreement that Mr Okkerse had arranged for him with SPV Capital. That agreement contained an O'Dea clause which provided for a high interest rate of 104 per cent per annum which would be reduced to 52 per cent per annum if the loan was repaid on time. After executing that agreement, Mr Bhatt then pursued attempts to obtain alternative finance from other financiers.

By 16 June 2022 Mr Bhatt was advised by Mr Unger of SPV Capital that the outstanding amount of his loan with SPV Capital, which by that time was in serious default, was \$586,000. At that time Mr Bhatt was unsuccessful in seeking to negotiate more favourable terms for himself from other lenders.

Those events placed Mr Bhatt under increasing financial pressure, including in the form of emergent requests from other creditors to repay his outstanding loans. In those circumstances he fell further behind in his obligation to repay his loan from SPV Capital.

As a result, SPV Capital appointed the insolvency firm Hall Chadwick as an external administrator for Innovative Constructions to seek recovery of the monies lent. This resulted in all of Mr Bhatt's bank accounts, both personal and business, being frozen. As Mr Bhatt could not operate his business in those circumstances, he pursued odd jobs including mowing lawns for friends and neighbours.

In those events, on 8 May 2023, Mr Bhatt eventually succeeded in selling one of his properties and he then paid SPV Capital the sum of \$109,350.86 from the proceeds of sale. In response, his bank accounts were then unfrozen at the direction of SPV Capital.

On 31 July 2024, Mr Bhatt attended to his letterbox and discovered a copy of the statement of claim issued by SPV Capital in these proceedings. He managed to secure an extension of time until to 6 August 2024 in order to file a defence to the statement of claim. He said that on 7 August 2024 he experienced difficulties in filing his defence online. However, he managed to file it in person over the counter in the registry on 12 August 2024, and he then served a copy on the solicitor for SPV Capital.

At that time, he was unaware that the solicitor for SPV Capital had in the meantime filed a notice of motion seeking a default judgment in the proceedings. In the circumstances that followed, an order had been made for the entry of default judgment against the defendants and Mr Bhatt received a rejection notice from the registry advising that his defence could not be filed because a default judgment had already been entered.

Mr Bhatt then sought the assistance of solicitors for the purpose of seeking to set aside the default judgment. Ultimately, on 12 November 2024, the firm David Kam & Co agreed to take instructions to represent him in his procedural endeavours. This led to the orders and observations made by Judge Andronos SC as set out at paragraphs [12] to [14] above.

Mr Bhatt's fourth affidavit – 5 September 2025

Mr Bhatt's fourth affidavit was affirmed on 21 August 2024. It is marked as having been filed in September 2025: Exhibit "A", pp 441 – 444. It was filed in support of Mr Bhatt's application to vary the terms of the default judgment and it foreshadowed the cross claim against SPV Capital. This affidavit has also been overtaken by events.

Mr Bhatt's fifth affidavit – 27 November 2025

Mr Bhatt's fifth affidavit was affirmed on 27 November 2025: Exhibit "A", pp 445 – 461. It summarised historical attempts and difficulties, including financial difficulties, that the defendants encountered in seeking to defend the proceedings and pursue a cross claim against SPV Capital. This affidavit also dealt with the defence attempts at compliance with case management orders. This affidavit has also been overtaken by events.

Mr Bhatt's sixth affidavit – 27 April 2026

Mr Bhatt's sixth affidavit was affirmed on 27 April 2026. It dealt with the factual circumstances which based his unsuccessful interlocutory attempt to prevent his former solicitors (who also act for SPV Capital in these proceedings) from continuing to act for that company. This affidavit has also been overtaken by events.

Mr Bhatt's oral evidence

Mr Bhatt's oral evidence in chief, which included some background evidence given on the voir dire, was led by his solicitor, Mr Gupta: T51 - T57. He was then cross-examined at length: TT58 – T191. Re-examination then followed: T191 – T214. The evidence on the voir dire was subsequently read in the proceedings.

The cross-examination of Mr Bhatt took some considerable time because, as counsel for SPV Capital rightly observed, Mr Bhatt was not giving simple answers to relatively straight forward questions: T146.45. In that regard, I considered his reactions were due to the upsetting circumstances in which he found himself. I did not consider him to attempt to obfuscate in his answers to questions.

Much of Mr Bhatt's oral evidence was directed to contextual background matters that are no longer in issue because of the terms of the prior interlocutory decisions and the default judgment entered against the defendants regarding the underlying debt.

Mr Bhatt's professional background is in civil engineering. He achieved his tertiary qualifications in Gujarat, in India. He arrived in Australia in 2009. Since 2016, his company, Innovative Constructions, of which he was a director, had been successfully carrying out piling and ground engineering work in the construction industry. Before the events in question, he also had interests in other companies which undertook similar work, including on interstate sites within Australia and in New Zealand. Prior to the restrictions imposed by the COVID-19 pandemic, the annual turnover of his business enterprises was of the order of more than \$30M.

Through Mr Bhatt's successful business endeavours, he had managed to acquire several properties in NSW and in Queensland. Some of those properties were the subject of mortgages. He had previous commercial experience in pursuing business debts and he had previously engaged the solicitors presently acting for SPV Capital in this case to act for him to collect such debts. In an earlier interlocutory hearing Mr Bhatt unsuccessfully sought to prevent that firm of solicitors from acting against his interests in this case.

During the COVID-19 pandemic it was difficult for Innovative Constructions to conduct business. In the post-COVID-19 period Mr Bhatt found that he needed a loan of \$450,000 because there had been a slowdown in his cash flow which was impeding the completion of some of his work in progress.

That cash flow problem was in part due to one of his clients going into liquidation owing his company \$1.3M. He agreed that the purpose of the loan of \$450,000 obtained from SPV Capital was to pay off another loan in relation to one of his properties and to apply \$150,000 towards the cashflow of his business: T136.25.

Mr Bhatt also explained that his purpose in borrowing money from SPV Capital was because he needed funds for an ongoing construction project and he also needed a cash flow to enable him to purchase materials because his government contract jobs involved delayed payment time frames of between 60 to 90 days: T200.10.

In order to meet those challenging business circumstances, and in order to seek to avoid his own company going into liquidation, he decided to sell one of his properties to pay for building materials and sub-contractors (T200.20) and he took out the first loan from SPV Capital. At the time he candidly conceded that, when he took out that loan, he knew he would not be able to repay it by the agreed due date of three months: T200.28.

Those events occurred against the background where Mr Bhatt sought out the assistance of a finance broker, Mr James Okkerse of Money Doesn't Sleep Pty Ltd to obtain access to a willing lender. He was seeking to obtain a 6 month loan but he was only able to secure a loan for 3 months. This was in circumstances where, in order to avoid taking out another mortgage, he wanted to obtain a short term loan to tide him over for 6 months whilst he sold one of his properties to obtain greater financial liquidity for his business undertakings.

In late 2021 / early 2022, whilst Mr Bhatt was negotiating the \$450,000 loan through Mr Okkerse, he was also shopping around (T88.10) seeking to borrow money from at least 3 or 4 other money lending organisations (T73.41) in circumstances where it was difficult for him to find a lender (T88.37) particularly at that time of the year: T89.2.

In those circumstances, Mr Bhatt opted to borrow from SPV Capital by taking out a 3 month loan through Mr Okkerse (T91.43) although he had never had an in person meeting with Mr Okkerse: T96.15. Whilst he denied that at that time, he was desperate for obtain the loan in question (T93.4 – T93.12), given the evidence of his prevailing financial circumstances, I discount the veracity of that denial, especially given his ambiguously vacillating answer that his need for the loan was “urgent but not urgent”: T100.38.

When Mr Bhatt was challenged about the delay he experienced in completing the initial loan transaction with SPV Capital I gained the impression he was being guarded in his answers to questions along those lines, where he claimed a lack of recollection: T94.14 – T94.48.

The impression that emerges from Mr Bhatt’s evidence is that in the circumstances where he was unable to secure the loan he wanted for a 6 months term, he took a 3 month loan from SPV Capital in the hope or expectation that his circumstances would change for the better and that he could then refinance that loan on more favourable terms to himself with regard to the interest due under the loan.

As events transpired, Mr Bhatt was unable to repay his \$450,000 loan to SPV Capital when that amount fell due for repayment. In those events, because of other mortgages and caveats on his properties, he found that he was unable to secure further loans from other lenders to refinance his endeavours as he had planned.

In those events, Mr Bhatt claimed that when he obtained the partial benefit from the judgment of Judge Andronos SC as summarised at paragraphs [12] and [14] above, he had only a limited understanding of the effect of that judgment. It seems from his explanation that around that time his wife was pregnant and in those circumstances it is possible that his attention may have been diverted from the pressing nature of his business, legal, and his financial problems.

When Mr Bhatt was asked to concede that Mr Okkerse was his agent for the purpose of seeking out and securing the first loan, he adamantly and forthrightly rejected that proposition: T95.39.

In my view, his rejection of that proposition is inconsistent with his oral evidence which explored his affidavit evidence: T97.29. When his evidence on this point was tested, I gained the impression he was vacillating and avoidant in his answers: T98.

Mr Bhatt’s rejection of the proposition that Mr Okkerse was his agent is difficult to accept given that he had sought out the assistance of Mr Okkerse to obtain the funds borrowed. When Mr Bhatt was questioned about the details of his negotiations with Mr Okkerse over variations in interest rates in respect of loans for 3 and 6 months, he initially stated that he could not recall the conversation (T99.18 – T99.22), but he subsequently acknowledged he had such conversations: T100.5 – T100.19.

Mr Bhatt gave evasive answers to questions about his ability to repay the first loan from SPV Capital on time by the due date of 21 April 2022. In that regard, he only acknowledged that fact reluctantly, after he was pressed to do so: T102.1 – T102.22; T103.34.

Mr Bhatt claimed he signed the documents for the second loan transaction with SPV Capital under duress from Mr Okkerse: T103.45 – T104.17; T115.17; T201.26. The documentary evidence does not provide evidence of that claimed duress. Instead, that correspondence makes it plain that that Mr Okkerse was seeking to assist Mr Bhatt, as is evident from Mr Okkerse’s annotated email to Mr Bhatt dated 15 June 2022, where Mr Bhatt stated, in appreciative terms, that he understood that Mr Okkerse was trying his best to assist him: Exhibit “A”, pp 648 – 649.

In his evidence, Mr Bhatt acknowledged two significant propositions that were put to him for comment.

First, Mr Bhatt acknowledged that Mr Okkerse had told him he would consider an interest rate drop to 17 per cent per annum. Here it must be observed that conversation was contentiously interpreted by Mr Bhatt as constituting a promise for a lower interest rate of 17 per cent per annum to be applied.

Secondly, Mr Bhatt acknowledged that he did not know what was actually said in that conversation. However, he claimed that the effect of the conversations was that a promise had been made to him that the interest rate would be dropped to a lower rate: T106.2 – T107.4.

In my view, the inherent imprecision and lack of supporting documentation for that proposition, where Mr Okkerse was not the actual lender, does not constitute a promise by SPV Capital to apply a lower interest rate.

Mr Bhatt was questioned about the email correspondence concerning the second loan he obtained from SPV Capital in order to refinance his position. He was asked why he had not replied to that correspondence. In reply he stated that he had not realised Mr Okkerse’s email had gone to his junk email box until he checked it a week or two after it had been sent: T107.25; T111.42 - T111.48.

Mr Bhatt repeatedly referred to SPV Capital as a

“loan shark” entity: T117.3; T151.41; T157.9. At times he also made it clear that he had antipathy towards Mr Unger, saying he had lost trust in him, proffering that proposition as a further explanation for not answering Mr Unger’s correspondence seeking information in October 2022, where he also alleged Mr Unger had broken unspecified promises “a couple of times”: T173.48 – T174.12.

Mr Bhatt described the attitude of SPV Capital to the refinancing process as one of “stubbornness”. That evidence was disputed by Mr Unger. Mr Bhatt claimed that attitude on the part of SPV Capital had disadvantaged him with regard to him dealing with his properties: T202.11.

At times during Mr Bhatt’s oral evidence, he displayed understandable upset and he railed at the destructive effect of this litigation on his life and his family, where he found himself in a position of debt that he was unable to repay: T152.45. He also railed emotionally at the fact that his family had been disadvantaged by the events: T208.34. He said that he felt he had lost everything: T211.5. He also railed at the way in which his debt had increased due to accrued interest and

other charges, describing the underlying circumstances as a “fake offer” designed to keep him “in the trap” of indebtedness: T211.41.

Mr Bhatt acknowledged that when he entered into the first loan agreement, he understood that if the loan was paid on time, he would only be charged the lower of the two interest rates referred to in the document, namely 52 per cent per annum rather than the higher rate of 104 per cent per annum: T120.50.

Mr Bhatt also acknowledged that when he signed the first loan agreement with SPV Capital for a 3 month loan, he considered the interest rates referred to in that agreement were too high, and that he would not be able to pay the loan by the due date (T200.28), but he was convinced and believed from his discussions with Mr Okkerse, that the rates on the loan were to drop down to 17 per cent per annum: T124.32 – T125.34.

At a later point Mr Bhatt contradicted his evidence that he knew he would not be able to repay the first loan by the agreed date of maturity by denying that proposition when it was put to him again for comment: T127.50.

In that context, Mr Bhatt denied that he had not acted in good faith when he entered into the first loan agreement (T128), and he again referred to his belief or hope that a lesser interest rate of 17 per cent per annum would materialise, saying that he would then be able to pay the full amount of the loan within six months T128.1 – T128.41.

In later evidence, Mr Bhatt added a speculative qualifying comment to that evidence, stating that by the time the due date for repayment of the first loan had arrived, he would have sold one of his properties to repay the whole amount of the loan: T126.45. Unfortunately, that expectation did not materialise into a reality.

When Mr Bhatt was challenged as to why he had not answered Mr Okkerse’s telephone calls concerning the need to refinance the first loan because of non- repayment, he said he could not remember what had happened at that time: T129.45 – T130.10. Those unanswered calls must be viewed in the context where at that time, Mr Bhatt was negotiating with other lenders: T130.21. Those circumstances lead me to doubt the correctness of Mr Bhatt’s cited explanation of a lack of recall.

Mr Bhatt stated that his aim in seeking the loan of \$450,000 was to initially consolidate his debt and to then “get out of the “52 per cent”” interest rate and secure a lower interest rate. In giving that evidence, he acknowledged that he had not put a specific proposal in those terms to Mr Okkerse; T140.45.

Although Mr Bhatt’s first language was Hindi, it was plain that as a successful businessman he was sufficiently fluent in and had an adequate command of the English language. In my assessment, having observed Mr Bhatt’s concentrated engagement with and responses to questions, he did not appear to be labouring under any claim of a special language disadvantage in that regard, as was rightly observed by counsel for SPV Capital: T149.35.

When Mr Bhatt was asked why he had not responded to Mr Unger's email dated 20 September 2022 (Exhibit "A", p 674), in my assessment, his reply was dismissively off-hand and avoidant, where, referring to Mr Unger, he stated: "Because all his writing is crap. It's not worth it to talk about it": T155.20.

Mr Bhatt referred to some mathematical errors he had identified within the documentation of interest charges claimed by SPV Capital referring to this as a "classic example of extortion of money", which was then followed by an understandably emotional outburst, as follows: T177.32 – T177.45

"HIS HONOUR:

Q. Well, there are eight interest charges for that month, this is supposed to be weekly charges, aren't they?

A. That's right. That's the classic example of extortion of money, plus the loan hasn't even started 27, I just signed the contract on 28, they transfer the money to the PEXA on 10th, they're already charging high interest rate, high fees, everything is high, from the day one they set me to fail, they're charging me this kind of thing and they are asking me to settle it. Even if they give it to me, the discount is unfair, there is injustice. How can someone charge for double triple month? Because I already sign the contract, they want me to sell everything, I already lost my business, I cut the people's grass. That's – here, I was self-represented into this case, I don't have a time under only very minute, your Honour, they're attacking on me, and now if I ask a question about the integrity, this is classic proof, how can I get out of this loan, your Honour, I will never be able to get out, they never kept the promise."

At this point it is relevant to note that in final submissions, SPV Capital made appropriate corrective adjustments for the cited clerical and mathematical errors to ensure that there was no double counting in its monetary claim against the defendants: Exhibit "F".

When Mr Bhatt was questioned about the caveats which had been placed on his various properties, he explained that he had not realised that would occur when he was applying for loans with different lenders. He said that he had not realised that those prospective lenders were in the described circumstances entitled to lodge caveats on his properties because of the terms of the documents he had signed, and which he conceded he had not read at the time: T186.8.

Significantly, Mr Bhatt said that he had not obtained legal advice at the time he signed the loan documents provided to him by SPV Capital: T191.35 – T191.39.

Mr Bhatt claimed that at the time he entered into the loan facility with SPV Capital he felt he was under heavy pressure to do so and he was not immediately aware of the significance of the terms which made provision for establishment fees and legal fees: T204.10.

Mr Bhatt said that when he was presented with the option of entering into a third loan facility with SPV Capital he was "very down" and he did not sign the further roll over facility documents that had been offered to him: T206.47.

In those circumstances, where the second or refinanced loan had not been repaid to SPV Capital, the present loan recovery proceedings were then initiated by SPV Capital.

Evidence of Mr Unger

Initially, SPV Capital Pty Ltd was not intending to call oral evidence from Mr Unger. However, that position changed in view of the earlier tender of Mr Unger's affidavits, which were respectively sworn on 6 August 2024, 9 August 2024, and 26 September 2024: T232. In light of those circumstances, on the fourth day of the hearing SPV Capital tendered the fourth affidavit from Mr Unger dated 24 August 2026 to update SPV Capital's evidence. Mr Unger was extensively cross-examined by Mr Bhatt, who was given considerable leeway to follow that course in light of his self-representation: T321.35; T233 – T370.

Mr Unger's first affidavit - 6 August 2024

Mr Unger's first affidavit was sworn on 6 August 2024: Exhibit "A", pp 280 – 287. It set out some historical procedural and quantification matters which have been overtaken by events by reason of the entry of default judgment against the defendants.

Mr Unger's second affidavit - 9 August 2024

Mr Unger's second affidavit was sworn on 9 August 2024: Exhibit "A", pp 333 – 380. It set out some further historical and procedural events and quantification which have also been overtaken by events by reason of the entry of default judgment against the defendants. He also annexed a copy of the loan agreement in question in these proceedings: Exhibit "A", pp 342 – 372.

Mr Unger's third affidavit – 26 September 2024

Mr Unger's third affidavit was sworn on 26 September 2024: Exhibit "A", pp 381 – 388. It was directed at interlocutory matters that have been largely overtaken by events by reason of the entry of default judgment against the defendants.

Materially, at paragraphs 5 to 12 of that affidavit, Mr Unger set out the sequence of historical events in which he was approached by Mr Okkerse on behalf of the defendants to seek a loan of \$450,000. At paragraphs 22 to 50 of that affidavit, he set out the history of the enforcement attempts undertaken by or on behalf of SPV Capital seeking to recover the monies owed, ultimately leading to the commencement of these proceedings.

Mr Unger's fourth affidavit - 24 August 2026

Mr Unger's fourth affidavit was sworn on 24 August 2026. It was presented and read in the course of the hearing. In that affidavit he set out some relevant uncontested details of his qualifications, his experience, and his background in the finance industry. He also explained the history of his evolving role at SPV Capital and the related entity Koa Capital.

In that affidavit, Mr Unger also set out some rebuttal evidence relating to allegations made by Mr Bhatt. Those allegations concerned the agency role of Mr Okkerse allegedly on behalf of the defendants, the entry into the second loan agreement, and the subsequent attempts by Mr Bhatt to enter into a third agreement which never eventuated as it was only raised on an indicative basis. In that affidavit, on sound commercial grounds, he firmly rejected the proposition that he would have entered into a further loan facility with the defendants at a lesser interest rate of about 17 per cent per annum.

Materially, at paragraphs 4 to 5, Mr Unger explained the difference between the approach taken by SPV Capital and Koa Capital when transacting loans of the kind sought by Mr Bhatt, where low documentation loans of the kind offered by SPV Capital were treated differently to the more secure loans of the kind offered by Koa Capital which followed a process of due diligence and mortgage security.

At paragraph 5 of that affidavit, Mr Unger explained as follows:

“5. From my experience in the lending industry and my knowledge and education in commerce and finance, I understand that the interest rate on a loan depends upon the risk to the lender: a higher risk means a higher rate. Matters which increase the risk, and therefore the rate, include (a) the length of the loan (longer term means lower rate because there is more time for the borrower to pay it back; shorter loans also attract a higher rate because it is harder – and therefore more expensive – for lenders to source capital from markets for short periods of time); (b) the nature of the security (a real property mortgage is superior to a mere caveat and charge, and so attracts a lower rate); (c) due diligence on the borrower a “low doc” loan typically has a higher rate for this further reason.”

Mr Unger’s oral evidence

The salient features of Mr Unger’s oral evidence were as follows.

Mr Unger had initially worked in the real estate sector before obtaining a finance degree at the end of 2021. He then commenced employment with SPV Capital, as a junior analyst. Over a period of 2 years, he progressed to the position of analyst, and he then progressed to become the director of loan origination and borrower relations.

Mr Unger stated that SPV Capital had been in business as a short term money lender for about 6 months prior to the commencement of the loan negotiations with Mr Bhatt. Those negotiations had been commenced through Mr James Okkerse, who Mr Unger referred to as Mr Bhatt’s broker. All of those initial dealings which led to execution of the first loan agreement took place without there having been an in person meeting between Mr Bhatt and a representative of SPV Capital. At the time of that first loan agreement Mr Unger worked for SPV Capital as a junior analyst.

Mr Unger explained that SPV Capital had developed its business of lending money to high net worth borrowers who were introduced by word of mouth. He explained that Koa Capital and SPV Capital were in the business of providing distinctly different financial services. He explained that Koa Capital typically provided less urgent loans for periods of between six and twelve months,

with greater security in the form of registered mortgages, which took an average of seven to ten days to arrange. In contrast, he explained that SPV Capital provided borrowers with more quickly arranged loans within a few days. In those circumstances, SPV Capital provided loans involving higher lending risks, less security, and higher interest rates.

Mr Unger identified the approach taken by SPV Capital in these proceedings as being simply to collect the money owed under the loan agreement, which involved commercial lending risks with lesser due diligence, and lesser security, namely caveats on property, rather than securing a registered mortgage on the property.

Mr Unger explained that in those transactions, at the time, the borrower paid the brokerage fee, and in the case of loans with SPV Capital, the maximum of the range of interest rates was 1 percent per week for loans under \$500,000 for a maximum period of loan being 2 to 3 months.

Mr Unger identified the fact that Mr Bhatt's first loan for \$450,000, which SPV Capital had committed itself to on 27 January 2022, was initially taken out and drawn down on 28 January 2022 for a period of 12 weeks with an expiry date no later than 5 May 2022: T256. He explained that although the funds for that loan were settled on 10 February 2022 after "a lot of back and forth" (T257.13; T271.15), interest had started to run on those funds from the backdated date of 27 January 2022: T257.

During cross-examination, Mr Unger was taken to many pages of the court book (Exhibit "A") comprising foundational email correspondence, loan agreements and debtor statements, where some calculation errors in the form of interest charges were conceded as having been erroneously duplicated. He rejected the proposition those errors were deliberate: T344.24.

In my view, that foray into the foundational evidence was largely irrelevant to this final stage of the proceedings as there is a default judgment in place in favour of SPV Capital and the identified calculation errors were conceded and adjusted by SPV Capital for the purpose of accurately identifying the correct amount of the ultimate judgment sought in the proceedings: Exhibit "F".

Mr Unger rejected the proposition that, following the default of the first loan agreement, in negotiating the second loan agreement after default occurred on the first loan, he issued the second loan documents though SPV Capital rather than Koa Capital Pty Ltd because the former entity could charge a higher interest rate: T272.14. He explained that such loans were allocated to either SPV Capital or Koa on the basis of assessed commercial risk.

Mr Unger explained that although the loan agreements in default provided for a high and a low rate of interest, namely 104 per cent per annum and 52 per cent per annum, in these proceedings, SPV Capital only claimed interest at the lower of those rates (T294.45) although he explained that there was a combination of factors that warranted charging at the higher rate for loans by SPV Capital: T326.43.

Mr Unger rejected the proposition that Mr Bhatt was pressured into signing the second loan agreement: T319.36. He explained that when Mr Bhatt defaulted on the first loan agreement, SPV Capital was contractually entitled to charge default interest: T319.9.

Mr Unger rejected at length the proposition that when a part payment of \$200,000 had been made by Mr Bhatt after the sale of one of his properties, this warranted that a lesser rate of interest be imposed on the remaining balance. He said that because the lending risk had by then become elevated, as a matter of commerciality, SPV Capital would never have agreed to release some of its securities on the basis that was put to him: T330 – T333. He explained that by that stage SPV Capital was losing its confidence in Mr Bhatt's ability to refinance the loan in default, and it therefore needed to strengthen its security position by registering a caveat on one of Mr Bhatt's properties: T347.32 – T347.41; T350.30.

Mr Unger explained that at the time, as SPV Capital did not have the resources to manage the loan in default, it engaged the insolvency firm Hall Chadwick to take on the role of receiver for enforcement purposes: T354.44.

Mr Unger explained that the enforcement course undertaken by SPV Capital was to simply seek to recover the monies owed to it where the loan was in default: T363.3. He did not accept the proposition that his company was not keen on having the debt discharged because it held the advantage of charging a greater rate of interest in the circumstances of default where the loan was meant to be for only a short term: T363.44 – T364.6. He added that it made no commercial sense to reduce the interest rate on the loan after circumstances of elevated loan risk had emerged due to the borrower's default in making repayments: T364.20 – T365.3.

I found Mr Unger to be a witness who gave his evidence honestly. Although he fairly conceded an understandable lack of recollection on some aspects of the historical dealings between Mr Bhatt and SPV Capital in view of the passage of time, and although at times he expressed understandable frustration at the course of, the complexity of, the confusion within, and the repetitively meandering content of, questions asked on him in cross-examination, I found him to be a witness whose evidence could be relied upon and accepted.

I find no reasonable ground upon which to reject any aspect of Mr Unger's evidence on the basis of credibility. In my assessment, his evidence is capable of acceptance on its face.

Witnesses not called to give evidence

Mr Bhatt decided not to call Ms Vyas to give oral evidence on the ground that her evidence would not be of relevance or assistance to determining the issues calling for decision. As already observed, it is common ground that no adverse inferences arise from those circumstances as it was Mr Bhatt who undertook all relevant negotiations in respect of the subject loans.

Neither party called Mr Okkerse to give oral evidence. No valid criticism arises from that decision where, on the cross claim, the onus is on the defendants to prove their claims of alleged penalty, unconscionability, and alleged misleading and deceptive conduct. If required, either party could have called Mr Okkerse as a witness.

Submissions

The parties presented an extensive array of submissions in the following sequence.

SPV Capital submissions at the opening of the case

At the commencement of the hearing on 16 June 2026, counsel for SPV Capital provided a detailed opening of his client's position: T2 -T25. The solicitor who was then acting for the defendants also provided a short oral opening address on the cross claim issues: T25 – T30. Counsel for SPV Capital then made further submissions to clarify the issues for trial: T30 – T35. In those circumstances, the issues, including as to the onus of proof of matters raised in the cross claim, were made clear to Mr Bhatt.

Issues identified during the opening submissions

At the commencement of the hearing on 16 June 2026, in addition to quantum assessment the issues were relevantly identified as being: whether the interest provision relied upon by the plaintiff was a penalty; whether unconscionable conduct has been shown on the plaintiff's part (with regard to maintaining a high interest provision); enforcing the loan and the underlying security for the loan; constraining the defendants from refinancing the loan with another lender; and allegedly extracting a disproportionate benefit from the defendants in the transaction under review.

Mr Bhatt's request for an adjournment to prepare his submissions

At the conclusion of the evidence, in light of Mr Bhatt's self-representation, and for Mr Bhatt's benefit, counsel for SPV Capital delivered his closing address both orally (T379 – T404) and in writing: Exhibit "E".

Mr Bhatt's request for an adjournment to prepare his submissions

Following the completion of the closing submissions made on behalf of SPV Capital, Mr Bhatt requested a 6 week adjournment to review the transcript and prepare his closing written submissions. At that time he was informed that request could not be accommodated for administrative and practical reasons which were explained to the parties at the time. In those circumstances orders were made for Mr Bhatt to file and serve his written submissions by 12 September 2026. The date for the presentation of his oral submissions was then fixed for 18 September 2026.

Subsequently, those orders were varied in chambers because Mr Bhatt had emailed the court seeking an extension of time for the preparation of his submissions, stating that he could not provide his written submissions according to the above timetable.

In those circumstances, an order was made in chambers relieving Mr Bhatt of the burden of preparing written submissions. Instead, he was informed that he could make his closing submissions orally on 18 September 2026. Those orders were communicated to the parties by an administrative email from the Associate. On that basis, the case then proceeded to finality on 18 September 2026, and judgment was then reserved.

SPV Capital's initial written closing submissions - 26 August 2026

At the outset of the closing written submissions presented by SPV Capital it was made clear that as a consequence of the previous and unchallenged interlocutory orders, there was no issue over the amount of the principal debt claimed and there was no issue over the validity of the loan the subject of the proceedings.

On that basis SPV Capital submitted that in this case, the quantification of damages is a mathematical exercise where arithmetical or clerical errors that appeared in loan statements, do not form part of the claim for damages as those errors were revised and corrected during the hearing: Exhibit "F".

The closing written submissions by SPV Capital stated, not for the first or the last time, that one could not avoid feeling sympathy for the difficult position the defendants have encountered in this case. Those submissions went on to state that such feelings do not justify a grave and serious finding that SPV Capital had relevantly engaged in unconscionable conduct, citing *Australian Securities and Investment Commission v Kobelt* (2019) 267 CLR 1; [2019] HCA 18, at [30] – [32].

Those closing written submissions by SPV Capital went on to state that the present position the defendants find themselves, with a default judgment against them, do not justify revisiting the history of how they came to be in such a position. It was further submitted that there was no justification for placing blame on SPV Capital for those circumstances which Mr Bhatt subsequently encountered.

Those closing written submissions by SPV Capital proceeded to review and justify in detail the historical circumstances of the defendants before they entered into the subject loans.

Those submissions canvassed the nature of the brokerage relationship with Mr Okkerse, the advancement of the loan monies by SPV Capital, the terms of the loan, rebuttal of allegations unconscionability, the actions of other financiers, and the actions of SPV Capital, and the evidence of Mr Bhatt.

Those closing written submissions argued that, sympathy aside, Mr Bhatt's evidence should be seen as having been impacted by emotion, including confusion, and expressed anger at several persons and entities, including towards his own broker Mr Okkerse, and to other financiers.

Those submissions drew attention to evidence of antipathy which Mr Bhatt had displayed towards Mr Unger. That submission concluded with the proposition that aspects of Mr Bhatt's evidence were self-serving and non-responsive.

Those submissions went on to argue that Mr Bhatt's evidence should be given little weight beyond what could be corroborated by objective documentary records.

SPV Capital's oral closing submissions

After the conclusion of the evidence, counsel for SPV Capital spoke to his written submissions so that Mr Bhatt would have the benefit of considering the totality of the submissions made on behalf of SPV Capital against his interests (T380 – 404) on the understanding that Mr Bhatt would be provided with a copy of the transcript in order to consider and structure his own submissions to be delivered at the resumed hearing scheduled for 18 September 2026.

In essential summary, in those oral submissions, counsel for SPV Capital argued the following points:

The defendants bear the onus of proving there was relevant unconscionable conduct on the part of SPV Capital, and by reference to well accepted previously decided cases, SPV Capital argued that the defendants have not discharged their onus of proof on the allegation of unconscionability;

The defendants have not called relevant evidence to seek to prove unconscionability on the part of SPV Capital;

Mr Okkerse, a financial broker and agent, was not called to give evidence. It was noted that it was not incumbent on SPV Capital to call Mr Okkerse as a witness where he was not a party to the loan;

The mathematical errors identified in some of the loan statements in the evidence as issued by SPV Capital have been corrected and those errors do not form part of the quantum claim made against the defendants by SPV Capital;

The defendants have not identified any criticisable conduct on the part of SPV Capital, or any criticisable content of the loan documents, that suggest unconscionable conduct on the part of SPV Capital;

Mr Bhatt's claim of alleged unconscionable conduct on the part of SPV Capital is based on an attitude which was aggrieved, affronted, emotional, confused, distorted, and which misperceived the true perspective of documented events concerning the now questioned financial dealings between the parties;

The loan terms offered by SPV Capital were commercially consistent with the attendant risk, and they were not unconscionable, and they did not comprise a penalty;

When the likelihood of non-repayment of the first loan became apparent, Mr Unger had taken reasonable steps to try to assist the defendants to re-negotiate their liability under the loan;

Without explanatory evidence, consistent with High Court authority, the variable range of interest rates, namely 104 per cent per annum and 52 per cent per annum on a loan of \$450,000, do not amount to a penalty or unconscionability in circumstances where a lender of last resort is agreeing to provide a relatively unsecured loan for a relatively short period of time;

Whilst after the event the interest rates on the loan of \$450,000 may have been subjectively perceived by Mr Bhatt to have been arbitrary, that is not a sufficient basis for a finding of unconscionability on the part of the lender;

Mr Bhatt's grievances about the way in which his financial transactions had ended up and how they had affected him and his family, without more, do not translate into a finding of unconscionable conduct on the part of SPV Capital;

Accepting for the purpose of hypothetical argument that Mr Okkerse may have misled Mr Bhatt concerning an indication of a possible future reduction in interest rates on a roll over of the loan (a matter not convincingly proven on the evidence), that does not of itself justify a finding of unconscionability on the part of SPV Capital, especially where the terms of the relationship of borrower and lender are fully set out in the loan facility agreement, where Mr Okkerse was the agent of the defendants;

Where a commercially sophisticated party has not engaged in wrongdoing in the course of commercial activity, courts should be reluctant to undo an agreement which was fairly negotiated, where each party was taking a considered risk.

On those bases, counsel for SPV Capital argued that the orders sought by his client should be made, thus bringing the proceedings to an end in favour of SPV Capital.

Mr Bhatt's closing written submissions

Although Mr Bhatt had been excused from providing written submissions in view of his stated time constraints, on 18 September 2026, when his oral submissions were due, he provided a concisely drafted and argued set of written submissions with identified headings.

Those headings (lettered A to R), included an overview, the financial literacy of the defendants, details of prior loan facilities for a lesser interest rate, the role of Mr Okkerse as broker, Mr Unger's role, the broad factual background of the case, the applicable legal principles for claims of penalty and unconscionability, evidentiary matters, the topic of loan interest, the amended loan facility the statements issued by SPV Capital, erroneous payout figures, quantum negotiations, securities and receivership, penalty and unconscionability, causation and the relief sought, and tabulated calculations setting out an argued conclusion for liability to SPV Capital for a lesser amount than that claimed in the proceedings: MFI "1", pp 1 – 20, paragraphs 1 – 173.

Having regard to the narrow range of residual issues requiring determination in the case, following the entry of default judgment, not all of the matters submitted by Mr Bhatt were relevant, although it is entirely understandable that he felt it necessary to provide a broad outline of the circumstances which have led to the proceedings and to the cross claim.

In essence, the matters raised by Mr Bhatt were as follows:

The defendants accept the principal liability that was determined by the earlier default judgment: Paragraph 157;

The interest charges imposed by SPV Capital predated the drawdown or settlement of the loan and involved some duplications which could not be reconciled, resulting in an inaccurate claim against the defendants: Paragraph 158(a), (c), (d), (e), (f) and (g);

The content and veracity of Mr Unger's evidence was criticised: Paragraph 158(b) and (h);

After applying scrutiny in the manner suggested by the submissions of counsel for SPV Capital, the defendants' liability to SPV Capital should be limited to \$197,249.39: Paragraphs 159 – 173;

The combined impact of the charging of interest on the first loan agreement before drawdown or settlement without a justified reconciliation, along with a claimed uncertainty and alteration of contractual dates, duplications of interest, a failure to reduce interest down to 17 per cent per annum after 3 months, the provision of inaccurate payout figures and subsequent enforcement steps taken, were submitted to amount to alleged penalty and unconscionability: Paragraphs 4 – 8;

The defendants claimed limited commercial literacy: Paragraphs 9 – 13;

Comparators were invoked from a loan transacted in relation to another commercial property: Paragraphs 14 – 26;

The role of Mr Okkerse as agent and broker was explored: Paragraphs 27 – 33;

The role of the defendants' indebtedness to an entity identified as Prime Capital was raised as a comparator concerning the mortgage on their home: Paragraphs 34 – 47;

Mr Unger's commercial background was explored: Paragraphs 48 – 60;

The factual background to the case was explored: Paragraphs 61 – 78;

Applicable legal principles concerning penalties and statutory unconscionability were identified: Paragraphs 79 – 88;

The utility of evidence comprising SPV Capital correspondence: Paragraphs 89 – 91;

The interest charged before drawdown of the first loan facility was explored: Paragraphs 92 – 100;

Alterations to the amended loan facility were explored: Paragraphs 101 – 105;

SPV Capital loan statements were explored: Paragraphs 92 – 100, Paragraphs 106 – 115;

The claim of an erroneous payout figure was explored: Paragraphs 107 – 122;

SPV Capital responses and quantum calculations were set out: Paragraphs 123 – 129;

Negotiations, security and receivership issues were explored: Paragraphs 130 – 141;

Penalty and unconscionability issues were explored: Paragraphs 142 – 150;

Causation and the nature of the relief sought were explored: Paragraphs 151 – 155;

Conclusions to be drawn from the evidence were argued: Paragraphs 156 – 173.

The wide ranging scope and detail of matters of residual relevance within those submissions will be addressed in the course of the required consideration after reviewing Mr Bhatt's oral submissions.

Mr Bhatt's closing oral submissions

Mr Bhatt made closing oral submissions at supplementing and explaining his written submissions: T 406 – T429. Those oral submissions were based on his argued proposition that if his first loan agreement with SPV Capital was determined to be invalid, then the second loan agreement should also be seen be invalid or wrong: T409.30 – T410.45; T417.45 – T419.5.

Mr Bhatt emphasised his submitted point that in the respective transactions, Mr Okkerse should be seen as having been the agent of SPV Capital and not his agent: T411.5. He submitted that his financial problems resulting from the first loan that required the negotiation of the second loan occurred because Mr Okkerse had not been passing on to SPV Capital relevant communications concerning his financial intentions regarding the funds he had borrowed, including his intentions regarding renewal of the first loan: T413.45.

Mr Bhatt submitted that he had not been in default of the first loan at the time when Mr Okkerse had pressed him to sign the documents for the renewal or second loan: T412.35. He also submitted that Mr Okkerse had been remiss in his duty to seek out a cheaper borrowing option: T415.39.

Mr Bhatt submitted that his need to accept and sign the terms of the second loan arose because of timing issues, and because of an alleged failure on the part of Mr Okkerse and SPV Capital to reduce the interest rate to a promised 17 per cent per annum for a 6 month period in order to fit in with his plans: T412.45 – T413.38. He claimed that in those events, the actions of SPV Capital in placing caveats on his properties as a form of security cruelled his chances of negotiating with other lenders to refinance his position: T 414.45.

Mr Bhatt expressed his dislike for making personal attacks on the evidence of Mr Unger and Mr Okkerse, but he went on to criticise their conduct and the “spin” that he argued they had placed on the true facts: T416.5 – T416.45.

Mr Bhatt went on to submit that because of the terms of the first loan which he characterises as being flawed, he never had the opportunity of complying with the repayment terms of that loan: T419.9 – T419.17; T419.25 – T420.11. In effect, he submitted that the flawed circumstances of the first loan compounded his position of disadvantage which then required him to enter into the second loan facility (T420.11), which was obviously an unenviable situation: T420.43.

Mr Bhatt went on to explain that his unconscionability argument as based on the proposition that the 3 month short term interest rate he had agreed to was too high at 52 per cent per annum, which no-one could afford to pay. He stated that he had not intended that loan to be a lifelong obligation. He submitted that rate was “never acceptable”.

In his elaboration of that point, Mr Bhatt drew attention to the cheaper mortgage at an interest rate of 40 per cent per annum which he had on his Nelson Bay property, arguing that rate, if implemented in his dealings with SPV Capital, would have saved him a lot of money: T421.5 – T421.24. He rounded off the point by submitting that the interest rate of 52 percent per annum was simply unconscionable: T421.45 – T421.48.

When Mr Bhatt’s above cited argument was tested with the proposition that he had entered into the first agreement knowing that the interest rate of 52 per cent per annum was onerous, and that he had hoped that in the ensuing 12 weeks he could sell a property and enter into a different arrangement at a different and lesser interest rate, he only agreed with that position in part because he was of the view at the time that the market for selling property would change to his advantage: T422.10 – T422.48. It later became apparent that argument was based on the proposition he believed he had been promised that a lesser interest rate would materialise for his benefit: T423.7; T424.9.

Mr Bhatt characterised the transactions with SPV Capital as involving inflated charges and high interest rates designed to keep in a state of indebtedness to SPV Capital: T424.20.

Mr Bhatt fairly conceded that as a person who had not previously experienced financial difficulties, and had been paying his other creditors, he felt he had been “tricked by Mr Okkerse” to take the loan from SPV Capital, and because of what I take to be his inexperience in such matters, he “wasn’t even aware of the documentation, and needing a lawyer”, whereas now he knows differently from reflecting on his reading of his present situation: T424.40 – T424.50.

I now turn to the consideration of the relevant residual issues and matters raised in these proceedings.

Consideration

In considering the issues calling for decision it is important to observe, as was acknowledged by Mr Bhatt, that many of the issues raised in submissions by the defendants have been determined by the earlier decision of Judge Andronos SC, and the defendants do not contend that a high commercial interest rate or an isolated clerical error is necessarily unconscionable: Defendants' written submissions, paragraphs 1 and 4. It is convenient to commence the consideration of the remaining issues calling for decision by identifying the applicable legal principles.

Applicable legal principles

It is well settled that unless there is reliable evidence of remediable mistake or transactional wrongdoing, a party with full legal capacity who signs a financial agreement, whether due to carelessness or otherwise, should be bound by the terms of their bargain: *Petelin v Cullen* (1975) 132 CLR 355; [1975] HCA 24, following *Saunders v Anglia Building Society (Gallie v Lee)* [1970] UKHL 5; (1971) AC 1004, at p 1019.

The application of the penalty doctrine to relieve a borrower of harsh terms of a loan agreement regarding liability for interest on a loan where alternative "high" and "low" rates of interest are specified and agreed to in what has become known as "O'Dea" clauses, has been considered and applied according to longstanding well settled authority. The presence of an O'Dea clause in a loan agreement does not necessarily indicate penalty or unconscionability: *O'Dea v Allstate Leasing (WA) Pty Ltd* (1983) 152 CLR 359; [1983] HCA 3.

On questions of alleged unconscionability involving arguments over higher rates of interest charged by lenders of last resort compared to lesser rates charged by banks, where the last resort lender rates at first blush might seem harsh or unfair, without more, courts do not necessarily interfere with or adjust agreed interest rates in cases where the commercial bargains in issue were freely entered into by the parties in recognition of the risks involved: *Ledinh Sovereign Super LTD v CT Stone Pty Ltd* [2023] NSWSC 1079, at [64] – [69].

Section 21(1) of the Australian Consumer Law provides that in trade or commerce concerning the supply or potential supply of goods or services, persons must not engage in conduct that is in all the circumstances, unconscionable.

Section 236 of the Australian Consumer Law enables a person who has suffered loss or damage by the actions of another person to recover damages for the amount of the loss or damage caused by the conduct which contravenes Chapter 2 or Chapter 3 of that legislation.

In cases such as this, on the cross claim the defendants bear the onus of proof for establishing a rational basis for their contended findings that, in the loan agreements in question, the interest rates were excessive, they were coerced to enter into loan agreements, and that penal provisions and relevant elements of unconscionability were embedded within the contractual arrangements.

Mr Bhatt's submissions referred to the decision of the High Court in *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656; [2005] HCA 71, where it was held that the law of penalties is attracted when a contract stipulates that on breach the breaching party will pay an agreed sum which exceeds what can be regarded as a genuine pre-estimate of the likely damage caused by the breach: *Ibid*, at p 662.

In that case (at p 668), it was observed that the law does not re-write imprudently made contracts but it may operate to relieve against unconscionable or oppressive elements that are penal in nature, rather than being compensatory. In *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2002) 117 FCR 301, at pp 317 – 319; [2002] FCA 62, unconscionable dealing was described as the exploitation of a party having a special disadvantage which may arise in a variety of ways, including through inexperience or a lack of education.

Mr Bhatt also referred to the decision of the High Court in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30; *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; [2016] HCA 28; *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1; [2019] HCA 18; *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1; [2022] HCA 6, and the decision of the Full Court of the Federal Court in *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* (2021) 285 FCR 133; [2021] FCAFC 40.

Those decisions will be referred to in the appropriate context in the consideration of the issues that now follows.

The relevant circumstances

In order to fairly determine the questions of penalty and unconscionability in this case it is necessary to consider the whole of the surrounding circumstances relating to the transactions in question.

At the time the defendants entered into the first loan agreement, Innovative Constructions was operating in a difficult trading environment where its liquidity problems posed ongoing operational and trading challenges. It needed funds to complete works in progress against the background of a slowdown in business due to the COVID-19 pandemic and in light of a slowing of its income stream.

In addition to those factors, Innovative Constructions was burdened by fact of non-payment of \$1.3M owed to it by a client company that went into liquidation. This was in circumstances where the properties owned by the defendants, which in ordinary circumstances may have provided security for borrowing, were the subject of mortgages which needed to be serviced.

In those circumstances Mr Bhatt acknowledged that there was an “urgent but not urgent” need to borrow funds to pay down debts and provide working capital for his business. In that factual setting, I interpret Mr Bhatt's characterisation of the need to borrow such funds as “urgent but not urgent” to mean that he had a pressing need for such funds in order to carry on business.

Taken together, that sense of urgency, the fact of Mr Bhatt's existing mortgages, and his inexperience in dealing with private lenders of last resort, were the relevant circumstances in which he sought out the assistance of Mr Okkerse, of Money Doesn't Sleep Pty Ltd.

Mr Okkerse's role was that of an intermediate agent to assist Mr Bhatt to obtain loan funds. It is plain on the evidence that Mr Bhatt needed Mr Okkerse to act as his intermediary to select and negotiate with a moneylender to assist him in borrowing the funds he was seeking for the continued operation of Innovative Constructions.

Default risks

The evidence of Mr Unger demonstrated that financiers advancing loan funds in the circumstances that prevailed at the time the first and second loan agreements, applied a default risk assessment process when assessing proposed lending transactions.

In this case, that process of risk assessment was in fact undertaken by SPV Capital. It led to the O'Dea clause appearing in the terms and conditions of each agreement. That clause provided the high (104 per cent per annum) and low (52 per cent per annum) rates of interest. This was in circumstances where registered mortgages already existed on the defendants' properties. This meant that the risk of default in loan repayment was elevated because, amongst other things, the short term loans in question were the subject of low level documentation and due diligence enquiries.

Although Mr Unger's evidence did not spell out the full details of the risk assessment process, it is plain that SPV Capital was mindful of the risk of loan default in those circumstances. The potential for default to occur was demonstrated by Mr Bhatt's evidence that at the time he entered into the first loan agreement, he knew he could not repay the borrowed funds by the due date: T124.32 – T125.34; T200.28.

The level of the risk assessments undertaken by SPV Capital for its "low doc" loans is evidenced by the extensive 214 paragraph terms of the respective loan agreements, and by the fact that the defendants were named as the relevant borrowers, rather than Innovative Constructions.

At this point it is relevant to record that by the time it became necessary for Mr Bhatt to negotiate the second loan agreement, due to a looming non-repayment under the first loan agreement, the level of risk to the lender had become elevated, as was pointed out by Mr Unger when he was explaining why he would not have been prepared to offer a lesser interest rate for the second loan agreement. He said that to accede to such a request was not considered to be a viable commercial proposition.

The defendants' submissions in response to Mr Unger's evidence raised what I consider to be impression-based or contingent-based arguments about high interest rates and speculative arguments. The submission was that if they had been permitted to sell a property in a timely manner (which was not possible because of the non-removal of caveats), they would have qualified for a loan involving a lower interest rate than those specified in the respective loan agreements.

The speculative nature of those contingent submissions, unsupported by cogent evidence, necessarily leads to the conclusion that those arguments must be rejected.

In my assessment, SPV Capital was obviously mindful of the risk of a default in loan repayments in its dealings with the defendants, and those circumstances obviously influenced the interest rate that was offered to and was accepted by the defendants.

Mr Okkerse's intermediary role as agent

The question of the agency role of Mr Okkerse was resolved in an earlier phase of these proceedings by the interlocutory judgment by Judge Andronos SC, where it was recorded that Mr Okkerse was the agent of Mr Bhatt and not the agent of SPV Capital: SPV Capital Pty Ltd v Bhatt & Anor, 12 August 2024, unreported. That decision is not open to be relitigated on the present cross claim.

In my view, on the cross claim, that decision binds the defendants on the question of the agency role of Mr Okkerse. Mr Bhatt obviously sought out the assistance of Mr Okkerse as his finance broker for the subject loans and it is clear on the evidence that Mr Okkerse was the agent of the defendants when those loans were transacted.

In closing submissions, the defendants maintained that Mr Okkerse was not their agent but was instead the intermediary agent of SPV Capital when the respective loans were negotiated.

I do not accept that submission. Mr Bhatt did not have the connections for negotiating the first loan agreement and he needed the funds he was seeking as a pressing matter of urgency. He needed the services of an experienced intermediary such as Mr Okkerse in order to obtain the first loan in circumstances which indicated he needed to borrow from a lender of last resort. It is plain that he asked Mr Okkerse to make the necessary loan arrangements in order to try and achieve his stated objectives. The same observations apply to the second loan.

In my view, the fact that Mr Okkerse had a history of previous commercial dealings with SPV Capital and the fact that SPV Capital paid Mr Okkerse's fees for his services in obtaining approval for the respective loans should be seen as being irrelevant when the whole of the surrounding circumstances are considered because on the evidence, Mr Okkerse was obviously negotiating on behalf of the defendants.

I therefore find that when Mr Okkerse was dealing with SPV Capital to obtain the respective loans he was acting as the agent for the defendants.

In those circumstances, where Mr Okkerse is not a party to these proceedings, it follows that any representations he might have made to the defendants concerning particular variations in future interest rate charges and loan terms did not bind SPV Capital.

Claimed promise of lesser interest rate of 17 per cent per annum for second loan

Mr Bhatt stated that Mr Okkerse had promised him a lesser interest rate of around 17 per cent per annum for the second loan. In my view, based on the evidence cited earlier in these reasons, there was no promise made to Mr Bhatt in those terms.

At best, the evidence shows that there were indicative discussions about future interest rates that did not amount to a positive promise or a representation that there would be a reduction of the interest rates charged in a renegotiated loan.

In my view, although Mr Bhatt may have subjectively perceived that the conversations he had with Mr Okkerse to have amounted to a promise of a reduced interest rate of around 17 per cent per annum, that view is not reflected or confirmed in the correspondence that passed between them.

In my view, if such a significant change of interest rate on the loan had been promised, whereby a lesser interest rate of 17 per cent per annum had been promised, it would be improbable that such a change would not have been documented by Mr Okkerse or by SPV Capital. As Mr Okkerse has not been called to give evidence, that matter cannot be further clarified.

If I am wrong in that view, and if there was a promise in the terms claimed by Mr Bhatt, the argument raised by him goes nowhere because Mr Okkerse was the agent of the defendants. As such, any promise made by him with regard to interest rates would not have been binding on SPV Capital, as was made abundantly clear by Mr Unger in his evidence, for example, at T330 – T333.

Alleged coercion when signing second loan agreement

Mr Bhatt submitted that he was coerced into borrowing from SPV Capital on unfavourable terms. I do not accept that characterisation of the events.

In my assessment, that submission is met and answered by reference to Mr Bhatt's relative urgency for obtaining the funds in question, his limited options for obtaining commercial finance in the situation where he had to obtain refinancing of the first loan, and the fact that Mr Okkerse was the agent of the defendants when the loans were negotiated.

Whilst I accept that Mr Bhatt was under significant financial pressure at the times the respective loans were transacted, and that Mr Okkerse was encouraging him to complete the documentation, on the evidence adduced, I do not accept the submission that unlawful coercion was applied to the defendants, by either by Mr Okkerse, or by SPV Capital, in the process of obtaining finance in this instance. On the evidence, it is plain that Mr Bhatt was exploring other borrowing options, but he ultimately decided to borrow from SPV Capital. I find that he did so without coercion.

Alleged penalty

The defendants have been given leave to argue that the terms of their borrowing included an unlawful penalty, which means a punitive provision that does not involve an actual loss.

Ordinarily, questions concerning whether a provision in a loan agreement comprises a non-compensatory penalty do not arise where the parties have agreed that, if repayment is made punctually, a reduced rate of interest would be charged on the monies loaned: *O'Dea v Allstate Leasing (WA) Pty Ltd* (1983) 152 CLR 359; [1983] HCA 3, at [5]; p 367.

The inclusion of a contractual term in a loan agreement specifying a high rate of interest, without more, does not of itself compel an inference that such a provision constitutes a penalty.

In this case, where SPV Capital relies on the lesser of the two agreed interest rates in the loan agreement, namely 52 per cent per annum, there is a heavy onus is on the defendants to prove that rate constitutes a penalty. That onus is not readily discharged in this case where the complaining parties, here, the defendants, have not called cogent evidence aimed at demonstrating the alleged penal nature of the agreed lesser interest rate.

The first observation to be made is that interest rates of 52 per cent and 104 per cent seem very high, but a definitive conclusion that either of those rates constitutes a penalty cannot be made without due regard to the surrounding circumstances.

An examination of the surrounding circumstances shows the defendants agreed to a “low doc” loan because their borrowing opportunities were somewhat constrained by their other financial commitments which included mortgages on their properties. Those circumstances motivated them to seek funds from a private lender, in this case, a lender of last resort.

The loan sought was “low doc”, which necessarily meant limited security and higher risk for the lender. The risk assessment of the circumstances was that the defendants had other financial commitments and mortgages, and a sense of urgency for borrowing \$450,000.

SPV Capital obviously made a risk assessment of the financial position of the defendants. In doing so I do not accept the submission that the interest rates which formed the basis of the loan (in particular, the lower rate of 52 per cent per annum relied upon by the plaintiff) constituted a penalty.

The basis for the assessment made by SPV Capital was that it was approached as a lender of last resort, the borrowers' need for the funds sought was pressing, the available security was limited, and the risk for a short term loan was relatively high.

For the above reasons, I conclude that the lower rate of interest of 52 per cent per annum did not constitute a penalty. Instead, it reflected a reasonable approach to the risk of lending such a significant sum in the described circumstances.

Alleged unconscionability

The notion of unconscionability in commercial transactions involves the inclusion of inordinate or extravagant terms that are beyond the expectations of reasonableness.

Unconscionability in commercial dealings is a recognised phenomenon. In general terms, it involves the exploitation of a party having a special disadvantage which may arise in a variety of ways, including through inexperience or a lack of education: *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (supra), at pp 317 – 319.

In this case the defendants were not operating under any special disadvantage that impaired them from understanding the plain language in the loan agreements they were signing. If they had read the detail of the provisions of that agreement it would have been readily apparent that SPV Capital was protecting its interests in a high risk arrangement. There is no proven element of unconscionability in this instance.

In *Ringrow Pty Ltd v BP Australia Pty Ltd* (supra), at p 662, it was held that the law of penalties is attracted when a contract stipulates that on breach the contract breaker will pay an agreed sum which exceeds what can be regarded as a genuine pre-estimate of the likely damage caused by the breach. The law does not re-write imprudently made contracts, but it may operate to relieve against unconscionable or oppressive elements that are penal in nature rather than being compensatory: *Ibid*, at p 668.

The defendants argued that unconscionability has occurred in this case because of the cumulative effect of the 1 per cent per week or 52 per cent per annum interest rate, the imposition of guarantees and caveat security, the unjustified charging of interest before draw down or settlement, uncertainty concerning contractual alterations, duplication of interest charges, an unreconciled statement balance, and an admitted erroneous payout figure: Defendant's written submissions, paragraph 145.

In my assessment, the material parts of that submission has been met and cured by the amended calculations presented by SPV Capital: Exhibit "F". I consider that the arguments based on guarantees and security, and contractual alterations are immaterial in light of the default judgment.

Here SPV Capital only relies on the second loan agreement as the basis for its monetary claim. In my view, there was no coercion or misleading or deceptive conduct on the part of SPV Capital in negotiating the second loan agreement.

The defendants argued that as the first loan was flawed, the second loan was also flawed as it contained unconscionable elements. I do not accept that submission because the clerical and mathematical errors which base that submission have been identified and corrected for the purpose of assessment.

In argument, Mr Bhatt referred to the decision of the High Court in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30, where it was held that the application of the penalty doctrine requires more than a backward glance. In that regard, I consider that the cited case is distinguishable and has no operation to the circumstances under present consideration where the interest rates complained of by Mr Bhatt were assessed according to risk to the lender in the case of a low documentation loan.

Mr Bhatt also referred to the decision of the High Court in *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28 to argue that threats and punishment were to be regarded as essential characteristics of a penalty where the sum in dispute was disproportionate to the actual loss suffered by the lender. That case is distinguishable here and has no application to the circumstances under present consideration where the variations in interest rates were dependent upon timely repayments and risk assessment as explained by Mr Unger.

Mr Bhatt also referred to the decision of the High Court in *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18, at [15], to argue that there had been unconscionability on the part of the lender in this case. In *Kobelt*, in accordance with cited authority, it was held that a conclusion of unconscionability requires not only that the innocent party be subject to special disadvantage, but also, that the other party must have unconscientiously taken advantage of that special disadvantage in the sense of victimisation, unconscientious conduct, or exploitation. In my view, there was no exploitation in the unconscionability sense.

Mr Bhatt also referred to a decision of the Full Court of the Federal Court of Australia to illustrate his point on statutory unconscionability: *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40. In my view, that case is distinguishable from the present case because in the case cited, at [88], following good authority, the species of unconscionability in question was identified as serious conduct involving dishonesty, predation, exploitation, sharp practice, unfairness of a significant order, a lack of good faith, or the exercise of economic power in a way worthy of criticism. Those matters have not been proven against SPV Capital in this case, where there is no reliable evidence to show that Mr Bhatt and his wife were vulnerable to victimisation or predation.

Mr Bhatt also referred to the decision of the High Court in *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6 as an example of a finding of unconscionable conduct. This was in the circumstances of an asset loan arranged through an intermediary where the loan was secured by mortgages over properties owned by the borrower and where the borrower had no assets and had never traded. In my view, that case is distinguishable from the circumstances of the present case where the lender, SPV Capital, held no mortgages over the borrower's properties and where different borrowing risks applied. Furthermore, the interest rates in the case cited were in the lesser range of between 10 per cent per annum and 25 per cent per annum.

In summary, the defendants argued that the claimed flaws in the first loan agreement necessarily meant that the second loan agreement was flawed. I do not accept the validity of that submission. The clerical and mathematical errors identified in the calculations which followed the first loan

agreement have been corrected by the recalculations in Exhibit “F”. The first loan agreement was superseded by the second loan agreement, and that is the agreement upon which SPV Capital has sued and obtained default judgment. These reasons identify the correct monetary assessment due under that judgment, as follows.

It follows that there was no element of unconscionability on the part of SPV Capital in making the loan of \$450,000 to the defendants on the terms offered in the respective loan agreements.

Quantum assessment

The defendants seek a quantum assessment on their cross claim but in view of the above findings in favour of the plaintiff, the need for a quantum assessment does not arise.

However, in accordance with convention, to allow for the possibility that my findings may be overturned on an appeal, I set out my findings on quantum as follows, first observing that the defendants bear the onus of proof as to their claimed losses.

The defendants’ written submissions on quantum, at paragraphs 159 to 173, set out a series of tabulations which seek to recalculate the interest on the first and second loan at \$73,125: Defendants’ written submissions, paragraph 161.

Those submissions then go on to recalculate the principal and interest owing in accordance with the earlier determination by Judge Andronos SC at \$340,649.14: Defendants’ written submissions, paragraph 162.

Those submissions then go on to recalculate the components of interest rates, legal costs, establishment fees and charges at \$20,100: Defendants’ written submissions, paragraph 163.

Those submissions then tabulate an argued total of the interest payable, the remaining principal to be repaid, namely \$433,874.14 which the defendants submit should be paid to the plaintiff: Defendants’ written submissions, paragraph 164.

Those submissions then went through a process of recalculating the defendants’ losses for the cross claim at \$473,249.50 to reach a final submission that, by allowing half of that calculated loss, the ultimate amount due to the plaintiff would be \$197,249.39: Defendants’ written submissions, paragraph 165 – 173.

The difficulty with those calculations is that the defendants rely on questionable and therefore speculative estimates for the value of sold properties. As such, I consider those calculations to be speculative and unreliable as a claimed measure of loss.

The defendants made no submission on the claims made pursuant to s 26 and s 236 of the Australian Consumer Law.

Absent reliable cross claim evidence from the defendants on matters of quantum, where the proffered calculations contain unproven speculative elements, I do not accept the defendant’s quantum submissions.

At the conclusion of the hearing, the plaintiff presented an amended schedule of loss which corrected the clerical and mathematical errors made in earlier financial statements: Exhibit "F". I accept those calculations as reasonable, with the result that, subject to set-off for amounts already received, the plaintiff's damages are assessed at \$1,539,315, as was submitted.

The effect of my findings on the cross claim is that the defendants are not entitled to an assessment of any damages except for an agreed set-off allowance of \$340,649.32 for monies already received by the plaintiff following earlier attempts at enforcement of the subject loan agreements.

Set-off on quantum assessment

The parties have agreed that in the event SPV Capital succeeds in defeating the cross claim brought by the defendants, there should be a set-off of \$340,649.32 applied to the assessed quantum to reflect payments already made to reduce the ultimate indebtedness of the defendants.

Disposition

For the above reasons, the cross claim by the defendants should be dismissed. After allowing for an offset of \$340,649.32 in favour of the defendants, which reduces the plaintiff's assessed quantum from \$1,539,315 down to \$1,197,665.68, the plaintiff should have a judgment against the defendants in the amount of \$1,197,665.68.

Costs

As a consequence of the default judgment in favour of the plaintiff, and as a consequence of the unsuccessful cross claim by the defendants, the plaintiff is entitled to have its costs paid by the defendants on the ordinary basis unless a party can establish an entitlement to some other costs order: Uniform Civil Procedure Rules 2005 (NSW), r 42.1. To allow for that possibility, liberty should be granted for an entitled party to apply for some other cost order if that course is justifiable.

Orders

I make the following orders:

Default judgment against both defendants is confirmed;

Dismissal of the cross claim brought by the defendants;

The plaintiff's damages are assessed at \$1,539,315;

The sum of \$340,649.32 is to be credited to the defendants as a set-off against the plaintiff's assessed damages on account of payments already received;

After set-off, judgment for the plaintiff against both defendants in the adjusted sum of \$1,197,665.68;

The defendants are to pay the costs incurred by the plaintiff in these proceedings as agreed or assessed;

The exhibits may be returned;

Liberty to apply for further or other orders if required.

SPV Capital v Bhatt - Appendix (150 KB, pdf)

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