SUPREME COURT OF QUEENSLAND

CITATION:	*Cusack v De Angelis* [2007] QCA 313
PARTIES:	**MARJORIE JOYCE CUSACK** (plaintiff/respondent) **v** **AGOSTINO DE ANGELIS** (defendant/appellant)
FILE NO/S:	Appeal No 3270 of 2007 SC No 9479 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 September 2007
DELIVERED AT:	Brisbane
HEARING DATE:	13 September 2007
JUDGES:	McMurdo P, Muir JA and Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE – ACTIONS TO REVIEW OR SET ASIDE JUDGMENT – IN GENERAL – where appellant made application before a trial division judge to set aside a default judgment – where the trial judge dismissed the application and varied the default judgment by changing the amounts of principal and interest – whether judgment was irregularly entered – discussion of circumstances in which rule 290 of the *Uniform Civil Procedure Rules* permits a default judgment to be amended *Uniform Civil Procedure Rules 1999* (Qld), r 5, r 290 *Anlaby v Praetorius* (1888) 20 QBD 764 (CA), distinguished *Anson v Trump* (1998) 1 WLR 1404, compared *Armitage v Parsons* [1907] 2 KB 410, cited *Beil v Pacific View (Qld) Pty Ltd; sub nom Beil v Mansell (No 2)* [2006] QSC 199; [2006] 2 Qd R 499, cited *Bolt & Nut Co (Tipton) Ltd v Rowlands, Nicholls & Co Ltd* [1964] 2 QB 10, cited *Building Guarantee & Discount Co Ltd v Dolejsi* [1967] VR

764, cited
Deputy Commissioner of Taxation v Abberwood Pty Ltd (1990) 19 NSWLR 530, distinguished
Faircharm Investments Ltd v Citibank International PLC [1998] EWCA Civ 171, cited
Frisch v Bowman [1928] St R Qd 242, cited
Hodges v Callaghan (2 CB) (NS) 306, cited
Hughes v Justin [1894] 1 QB 667, distinguished
Kwong, Loong & Co v Kwong Yue Loong [1907] QWN 65, distinguished
Luka Brewery v Grundmann [1985] 2 Qd R 204, cited
Muir v Jenks [1913] 2 KB 412 (CA), applied
Re Gasbourne Pty Ltd [1984] VR 801, cited
Ringrow v BP (Aust) (2005) 224 CLR 656, cited
The City Mutual Life Assurance Society Ltd v Giannarelli [1977] VR 463, cited
Thomas v Deputy Commissioner of Taxation [2005] QCA 85, cited
Vosmaer v Spinks [1964] QWN 36, cited

COUNSEL: DJ Campbell SC, with A Christie, for the appellant
J W Peden for the respondent

SOLICITORS: Aitken Craig Lawyers for the appellant
Flower & Hart for the respondent

[1] **McMURDO P:** The appellant, Mr De Angelis, guaranteed a $300,000 loan made to a company owned and controlled by him, Rateki Pty Ltd. The company defaulted in October 2006. Under the loan agreement the interest rate was 30 per cent and the default rate 40 per cent. Ms Cusack required Mr De Angelis to make immediate payment of the $300,000 loan sum together with interest. Mr De Angelis did not meet Ms Cusack's demand.

[2] On 6 November 2006 she filed a claim and statement of claim in the Supreme Court of Queensland seeking damages from him based on his liability under the guarantee. On 12 December 2006 she obtained judgment in default of appearance for $640,442.15, an amount which included interest at 30 per cent until 9 September 2005 and from 10 September 2005 at the compounding default rate of 40 per cent.

[3] On 8 March 2007 Mr De Angelis brought an application to set aside the judgment under *Uniform Civil Procedure Rules 1999 (Qld)* ("UCPR") r 290. In an affidavit in support of his application he contended that he had a good defence to the claim in that he was entitled to rescind the guarantee because it was induced by Ms Cusack's misrepresentations. He also contended that the 40 per cent default rate of interest was, unlike the 30 per cent rate of interest on the loan itself, so unconscionable and disproportionate that it amounted to a penalty: *Ringrow Pty Ltd v BP Australia Pty Ltd.*[1] Ms Cusack filed an affidavit in which she denied the allegations of misrepresentation. The matter was heard by the applications judge on 20 March 2007. Both Mr De Angelis and Ms Cusack were cross-examined.

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[1] (2005) 224 CLR 656, 669.

[4] In his reasons for judgment, the judge noted that, as Mr De Angelis's barrister correctly conceded, Mr De Angelis's cross-examination revealed that the alleged representations were not made out. In the light of that concession, the judge unsurprisingly concluded that Mr De Angelis had failed to demonstrate an arguable defence on the merits warranting the setting aside of the default judgment. The only other issue between the parties concerned the 10 per cent uplift on the default interest rate which Mr De Angelis contended was a penalty. The judge noted that it was unnecessary to deal with this contention because Ms Cusack, through her barrister, Mr Peden, agreed to amend the judgment sum to reflect the contractual rate of 30 per cent, rather than relying on the 40 per cent default interest rate.

[5] That concession was made in the following terms by Mr Peden:

> "Your Honour, I might be able to short-circuit matters. I've been able to take instructions that my client is prepared to accept an amendment of the judgment such that interest be calculated at 30 per cent per annum up to today instead of the 40 per cent uplift from the date of default. Your Honour has power to do that under rule 290.
> HIS HONOUR: There's nothing more either of you wishes to say, I take it?
> [COUNSEL FOR MR DE ANGELIS]: No, thank you, your Honour."

[6] There was no suggestion from either party that the amendment of the judgment sum, which favoured Mr De Angelis and was made with his consent, could not be made under UCPR r 290. The judge dismissed Mr De Angelis's application subject to amending the judgment of 12 December 2006 by reducing it from $640,442.15 to $504,234.91. Mr De Angelis was ordered to pay Ms Cusack's costs of and incidental to his application.

[7] Mr De Angelis appeals from those orders contending through his counsel, Mr Campbell SC and Mr Christie, that the primary judge erred in varying the quantum of the judgment entered on 12 December 2006; that judgment was irregularly entered and so had to be entirely set aside *ex debito justitiae* (as of right). In support of that contention he relies on a number of authorities,[2] none of which concerned the interpretation of the UCPR which came into operation on 1 July 1999.

[8] Significantly, it was not seriously submitted that Mr De Angelis now has any meritorious defence to Ms Cusack's claim. Nor was it suggested that Mr De Angelis's barrister at first instance (who is no longer his barrister) did not effectively consent to the orders made by the primary judge.

[9] UCPR r 5 sets out the philosophy and overriding obligations of parties and the court under the rules:

> "**5 Philosophy—overriding obligations of parties and court**
> (1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
> (2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.

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[2] *Anlaby v Praetorius* (1888) 20 QBD 764; *Thomas v Deputy Commissioner of Taxation* [2005] QCA 85; Appeal No 7536 of 2004, 1 April 2005; *Luka Brewery v Grundmann* [1985] 2 QdR 204.

> (3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.
> …"

[10] UCPR r 290 is contained in Ch 9 – ENDING PROCEEDINGS EARLY, DIV 2 – PROCEEDINGS STARTED BY CLAIM. It provides:

> "**Setting aside judgment by default and enforcement**
> **290** The court may set aside or amend a judgment by default under this division, and any enforcement of it, on terms, including terms about costs and the giving of security, the court considers appropriate."

[11] In requesting on behalf of Ms Cusack that the judgment sum entered on 12 December 2006 be amended, I am not persuaded Mr Peden was necessarily conceding the 40 per cent interest rate was a penalty. His request was consistent with a pragmatic decision to obtain a timely final judgment for a lesser sum by foregoing an entitlement to interest at the default rate. I am unpersuaded that the judgment sum obtained in default of appearance on 12 December 2006 was irregularly entered. In any case, well before the UCPR came into operation courts have recognised a power to vary the amount of a judgment by default by reducing it to the proper amount: *Muir v Jenks*,[3] *Frisch v Bowman*[4] and *Building Guarantee & Discount Co Ltd v Dolejsi*.[5] Here, the amendment of the default judgment against Mr De Angelis was made with his lawyer's consent. The amendment was a sensible, just and expeditious resolution of the issues between the parties in the circumstances. The judge rightly considered the amendment of the judgment sum was appropriate. The clear and ordinary meaning of the express terms of r 290 allowed the amendment, which was entirely consistent with the philosophy of the UCPR set out in r 5. The appeal should be dismissed with costs.

MUIR JA: Introduction

[12] The appellant appeals from an order of a judge of the trial division of this Court dismissing an application to set aside a default judgment. The order amended the default judgment by changing the amounts of principal and interest stated therein respectively from $640,442.15 and $30,965.22 to $504,234.91 and $202,931.51.

[13] The appellant argues that the judgment was irregularly entered and should have been set aside *ex debito justitiae*. The irregularity alleged was the inclusion in it of default interest payable under a contractual provision claimed to give rise to a penalty. The other point argued is that, if the default judgment was regularly entered, there was no power under r 290 of the *Uniform Civil Procedure Rules* to amend it by substantially reducing the judgment sum.

The allegations in the claim and statement of claim

[14] By a claim filed on 6 November 2006 the respondent/plaintiff claimed from the appellant/defendant moneys allegedly owing pursuant to a guarantee and indemnity. The accompanying statement of claim contained the following allegations. Rateki Pty Ltd borrowed $300,000 from the respondent pursuant to a loan facility to assist it in the acquisition and development of land at Goodna. It was a term of the loan

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[3] [1913] 2 KB 412, Buckley LJ at 417; Kennedy LJ at 418.
[4] [1928] St R Qd 242, 245.
[5] [1967] VR 764, 766.

facility that interest be paid on the loan at the rate of 30 per cent per annum save that, in the event of default, Rateki was obliged to pay interest at the rate of 40 per cent per annum. On 8 September 2004 the respondent and the appellant entered into a deed of guarantee and indemnity under which the appellant agreed to pay on demand moneys due and owing under the facility. In breach of its obligations Rateki failed to repay the principal and the interest which had accrued under the facility. The appellant failed to pay after a demand duly made on 27 October 2006.

Default judgment and the proceedings at first instance

[15] Judgment by default was entered on 12 December 2006 and an application to set it aside was heard on 20 March 2007. Before the learned primary judge it was argued initially that the judgment should be set aside because of an alleged defence on the merits. The defence advanced was that the appellant developer had been induced to give the guarantee and to cause Rateki, which was controlled by him, to enter into the loan facility in reliance on misrepresentations by the respondent which she had no basis for making. The misrepresentations were to the effect that:

(a) The project would take only six months;
(b) People in the respondent's office would "keep an eye on the project" and assist with Council approval;
(c) the project would return $1.4 million to $1.6 million.

[16] As was remarked by the primary judge in the course of the hearing, the allegations of misrepresentations and reliance had an air of improbability about them. The appellant was cross-examined, briefly, in relation to the representations. The respondent was also cross-examined. After the conclusion of the evidence, the primary judge asked the appellant's counsel if he was pursuing the application. He responded that he was, stating that he did not have instructions to do anything else but that he did not have any further submissions he wished to make. He accepted that, in the light of his client's evidence in cross-examination, there was no substance in the case based on the alleged misrepresentations.

[17] The appellant's counsel also sought to rely on an argument that the provision under which default interest was charged constituted a penalty. When the matter first arose, after satisfying himself that the point had been pleaded, the primary judge queried:

> "So to the extent to which the judgment is calculated by reference to the 40 per cent, you want to contend that the difference between the 30 and the 40 is a penalty"?

[18] The appellant's counsel responded: "I accept that it goes to quantum." He accepted also that the penalty argument was based solely on the wording of the clause in the finance facility imposing the default interest rate and that, if his argument succeeded, the consequence would be that the judgment would stand but for a reduced amount.

[19] Counsel for the respondent, after the making of these concessions, informed the primary judge that the respondent would accept an amendment of the default judgment to give effect to the calculation of interest at the non penalty rate. He submitted that there was power under rule 290 for the amendment to be made. There was no dissent from that proposition.

Does rule 290 of the *UCPR* permit a default judgment to be amended except to correct "an error arising from a slip or omission"?

[20] Rule 290 is contained in Div 2 of Pt 1 of ch 9 dealing with judgments by default and provides:

> "**Setting aside judgment by default and enforcement**
> The court may set aside or amend a judgment by default under this division, and any enforcement of it, on terms, including terms about costs and the giving of security, the court considers appropriate."

[21] It is contended by counsel for the appellant that when regard is had to the evolution of the rule it should be construed as sanctioning only amendments which correct "errors arising from a slip or omission". On the hearing of the appeal the Court was not referred to authority which directly supported such an unlikely proposition and there is good reason why the provision should be regarded as one which empowers a court to do whatever is necessary to achieve justice between the parties and to avoid unnecessary delay and expense. Rule 5(1) of the *Uniform Civil Procedure Rules* explains that the purpose of the Rules is to "facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense". Rule 5(2) requires the Rules to be applied "with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules". To construe r 290 as the appellant urges would be to limit the scope of the rule in a manner not required or supported by its words or by any other rule. Furthermore the construction would be contrary to the purpose and objectives stated in r 5, and more importantly, contrary to the plain meaning of the words in the rule.

Does rule 290 of the *UCPR* permit the amendment of irregularly entered judgments?

[22] In support of his argument counsel for the appellant relied on three cases. The first of these is *Thomas v Deputy Commissioner of Taxation*[6] in which it was submitted that r 283, r 290 and r 371 of the *Uniform Civil Procedure Rules* did not interfere with the right of a defendant to have an irregularly entered default judgment set aside as of right. The court found it unnecessary to deal with the point.

[23] The next decision is *Anlaby v Praetorius*[7] in which Fry LJ, referring to a default judgment entered prematurely and irregularly, observed:[8]

> "In such a case the right of the defendant to have the judgment set aside is plain and clear. The Court acts upon an obligation; the order to set aside the judgment is made *ex debito justitiae*, and there are good grounds why that should be so, because the entry of judgment is a serious matter, leading to the issue of execution, and possibly to an action of trespass."

[24] The appellant in *Anlaby* argued that O 70 r 1 of the *Supreme Court Rules* (UK) gave the court a discretion which it ought exercise in favour of the appellant. That rule provided:[9]

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6 [2005] QCA 85.
7 (1888) 20 QBD 764.
8 At 768.
9 At 768-769.

> "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or a judge shall think fit."

[25] Fry LJ concluded that the rule did not apply as the irregular entry of judgment was made independently of any of the rules and did not constitute non compliance. He then observed:

> "There is a strong distinction between setting aside a judgment for irregularity, in which case the Court has no discretion to refuse to set it aside, and setting it aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the Court has a discretion to impose terms as a condition of granting the defendant relief."

[26] The other member of the court, Lopes LJ, reached the same conclusions for generally similar reasons. There was no occasion for the court to consider the power to amend an irregularly entered judgment and it did not do so. The case says little, if anything, about the power of a court under a rule such as r 290 to amend a default judgment.

[27] The remaining case is *Luka Brewery v Grundmann*,[10] a decision of Master Lee QC. In *Luka Brewery*, the defendant applied to set aside a default judgment on grounds of irregularity. It was contended, and the Master held, that the action was irregularly commenced as the plaintiff, a corporation, impermissibly brought an action in a firm name "*Luka Brewery*" used by it. The plaintiff's response to the application was to seek leave to amend the writ, all other proceedings and the judgment to substitute for "*Luka Brewery*" the name of the plaintiff. Reliance was placed on O 93 rr 17 and 18 of the *Rules of the Supreme Court* (Qld).

[28] Order 93 r 17(1) provided that any failure to comply with the requirements of the rules was an irregularity which did not nullify the proceedings or anything done thereunder or therein. Order 93 r 17(2) conferred power on the court in respect of matters coming under r 17(1) to "allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as the Court thinks fit".

[29] Master Lee considered at length English authorities in which the English analogues of O 93 r 17 had been discussed. In so doing he observed:[11] "Obviously O 93 r 17 cannot apply to *any* type of non-compliance with the rules" and that the provisions of O 93 r 17(1) did not "apply to make regular an irregular judgment entered in default of appearance or defence by a defendant".[12] He held that there was no scope for the application of the "slip rule", O 32 r 12, as the judgment had been deliberately entered in its existing form. He observed that,[13] "The power to amend a judgment under the rules is restricted" and remarked that no other rule had been brought to his attention which allowed the judgment to be corrected. The reasons do

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10 [1985] 2 Qd R 204.
11 At 214.
12 At 217.
13 At 219.

not mention and, seemingly, the Master was not referred to O 15 r 10, which was in terms similar to r 290.

[30] Contrary to the appellant's counsel's submissions, the view that r 290 permits a default judgment to be varied, whether irregularly entered or not, and whether the error resulted from accidental slip or omission is in fact supported by authority.

[31] Woolcock J in *Frisch v Bowman*[14] acknowledged the power to vary a judgment entered for an excessive amount. He did not exercise the power as no application in that regard had been made by the plaintiff.

[32] In *Muir v Jenks*[15] Buckley LJ, referring to the entering of a judgment in default in a sum exceeding that due to the plaintiff, said:

> "… the defendant is entitled to have that judgment set aside, unless the party who holds the judgment applies as he may to reduce it to the proper amount. If application to amend be duly made it may be right not to set the judgment aside but to reduce it to the proper sum; but unless the party who holds the judgment elects to have it put right, then upon the authority of *Hughes v Justin* it seems to me the defendant is entitled to say 'this is a wrong judgment, set it aside.'"

[33] In *Building Guarantee & Discount Co Ltd v Dolejsi*[16] McInerney J, after reviewing the authorities, accepted the existence of a discretion to amend an irregularly entered judgment. His Honour referred to *Dolejsi* in a later decision of his[17] when giving reasons for his conclusion that an irregularly entered default judgment should be varied. More recently, the English Court of Appeal has held that it may be inappropriate to set aside an irregularly entered judgment if a subsequent application for summary judgment is bound to succeed.[18] That decision is consistent with the contemporary approach of applying rules of practice and procedure, whether statutory or developed under the common law, not rigidly and with undue technicality, but with regard to considerations of cost, expedition, utility and justice.

[34] But no exhaustive review of authority is necessary in order to demonstrate the unsustainability of the appellant's argument. The meaning of r 290 is best ascertained by a consideration of its words in the context in which they occur. Neither the words nor anything in the context, for reasons already given, support the qualification urged on behalf of the appellant.

[35] The primary judge correctly exercised his discretion to vary the default judgment rather than set it aside. He did what the parties invited him to do. Once the respondent abandoned any claim to the interest affected by the penalty argument, to set aside the judgment would have been to restore proceedings in which the appellant had no defence to the respondent's claim. Such a course would have been perverse.

Was the judgment irregularly entered?

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14 (1928) St R Qd 242.

15 [1913] 2 KB 412 (CA) at 417.

16 [1967] VR 764.

17 *The City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VR 463 at 471.

18 *Faircharm Investments Ltd v Citibank International Plc* [1998] EWCA Civ 171.

[36] It has been long accepted that a defendant is entitled to have an irregularly entered judgment set aside as of right,[19] subject to the exercise of a power of amendment and the futility of interfering with the judgment. Such judgments are the product of the exercise of administrative acts performed without legal authority.[20] Irregularity, as that term is used in relation to default judgments, normally results from a failure to comply with the rules of court relating to the entering of default judgments.

[37] But the concept of irregularity has been given a more extended meaning. A number of cases support the proposition that where judgment is entered for too large an amount, the defendant is entitled to have them set aside *ex debito justitiae*.[21] In some of these cases such default judgments have been treated as having been irregularly entered.

[38] In *Hughes v Justin*[22] judgment in default of appearance was entered for the amount of a liquidated demand endorsed on the writ of summons. After the writ was served, the dispute between the parties was compromised and the defendant paid the agreed sum leaving only the costs outstanding. Not surprisingly the judgment was set aside. Lord Esher MR observed:[23]

> "The judgment for the debt and costs was wrong, and *Anlaby v Praetorius* shews that the defendant has a right *ex debito justitiae* to have it set aside."

[39] The other members of the Court agreed with Lord Esher's reasons. In the course of his reasons Lopes LJ referred, with approval, to the statement of Willes J in *Hodges v Callaghan*[24] in which reference was made to s 27 of the *Common Law Procedure Act* 1852 (UK) under which judgment in the event of non appearance of the defendant could be entered "for any sum not exceeding the sum endorsed on the writ". In giving judgment, Willes J said:

> "It is absurd to suppose that the statute intended to give an option to be exercised at the mere caprice of the plaintiff. The plaintiff ought to represent the Court as pronouncing judgment in his favour only for the sum which is really due to him."

[40] In *Kwong, Loong & Co v Kwong Yue Loong*[25] after service of a writ claiming a liquidated amount of £32 11s, the defendant paid the plaintiffs' solicitors moneys on account of the debt and costs. Nevertheless the plaintiffs signed judgment for the whole amount. On the application of the defendant to have the judgment set aside, it was submitted on behalf of the plaintiff that the judgment could be amended. Chubb J set aside the judgment with costs. The brief report contains no reference to the judge's reasons.

[41] Waddell CJ in Eq in *Deputy Commissioner of Taxation v Abberwood Pty Ltd*,[26] held that a judgment in default of appearance was irregularly entered where, although

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19 *Vosmaer v Spinks* [1964] QWN 36 and *Anlaby v Praetorius* (1888) 20 QBD 764 (CA).
20 *Vosmaer v Spinks* [1964] QWN 36 and *Anlaby v Praetorius* (1888) 20 QBD 764 (CA).
21 *Muir v Jenks* [1913] 2 KB 412 (CA); *Armitage v Parsons* [1907] 2 KB 410; *Hughes v Justin* [1894] 1 QB 667; *Frisch v Bowman* [1928] St R Qd 242; *Bolt & Nut Co (Tipton) Ltd v Rowlands, Nicholls & Co Ltd* [1964] 2 QB 10 and *Building Guarantee & Discount Co Ltd v Dolejsi* [1967] VR 764.
22 [1894] 1 QB 667.
23 At 669.
24 [1857] 2 CB (NS) 306; 140 ER 434.
25 [1907] QWN 65.
26 (1990) 19 NSWLR 530.

service was effected on the defendant at its registered office, it was known to the plaintiff that the statement of claim had not, and could not have, come to the attention of the defendant. His Honour concluded also that the entering of judgment in these circumstances constituted an abuse of process. In his reasons his Honour referred with obvious approval to *Re Gasbourne Pty Ltd*[27] in which Nicholson J, dealing with a similar factual situation, concluded:[28]

> "In my opinion it is incumbent upon a person who wishes to obtain a judgment against a company in circumstances such as these to disclose the real situation concerning the company to the court and to obtain such directions as the court thinks appropriate as to the proper mode of service."

[42] Nicholson J held that the judgments in question were irregularly obtained.

[43] The cases in which default judgments have been held to be irregular are ones in which there was either some deficiency in the steps prerequisite to the entering of default judgment or an abuse of process or something akin to it resulting from the plaintiff's obtaining a judgment to which the plaintiff knew or ought reasonably have known he or she was not entitled.[29] In this case, before the abandonment of the claim for interest at the default rate, there was a question as to whether the clause relied on by the appellant did give rise to a penalty,[30] which was not necessarily able to be answered merely by reference to the subject clause in the loan facility or the relevant allegations in the statement of claim. Counsel referred to no authority which supported the contention that default judgment entered in such circumstances was irregular. It is doubtful that it was, but it is unnecessary to resolve the point in order to determine this appeal. Nor is it necessary to decide whether the loan facility gave rise to a penalty. That question was only cursorily addressed in argument.

Conclusion

[44] For the above reasons, I would dismiss the appeal with costs.

[45] **LYONS J:** I have had the benefit of reading the reasons of Muir JA. I agree with the reasons set out therein and the order proposed.

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27 [1984] VR 801.
28 At 858.
29 Cf *Anson v Trump* [1998] 1 WLR 1404 at 1409.
30 See *Beil v Mansell (No 2)* [2006] 2 Qd R 499.