SUPREME COURT OF QUEENSLAND

CITATION:	*De Castro v Burtenshaw Super Pty Ltd* [2023] QCA 218
PARTIES:	**GUI JORGE DA COSTA NAPOLEAO DE CASTRO** (appellant) **v** **BURTENSHAW SUPER PTY LTD ACN 635 959 572 AS TRUSTEE FOR THE BURTENSHAW SUPERANNUATION FUND** (respondent)
FILE NO/S:	Appeal No 4776 of 2023 SC No 348 of 2022
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns – [2023] QSC 60 (Henry J)
DELIVERED ON:	10 November 2023
DELIVERED AT:	Brisbane
HEARING DATE:	23 August 2023
JUDGES:	Bond and Dalton JJA and Cooper J
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – ACTIONS TO REVIEW OR SET ASIDE JUDGMENT OR ORDER – where the appellant failed to defend within time and the respondent obtained default judgment against the appellant – where the appellant applied to set aside the default judgment – where the appellant contended that he had a defence on the merits based on the proposition that the lender had been guilty of unconscionable conduct – where the primary judge dismissed that application – where the appellant appealed on a single ground – whether the primary judge miscarried in finding that the appellant had not demonstrated a prima facie defence on the merits *Uniform Civil Procedure Rules 1999* (Qld), r 290 *Day v RAC Motoring Services Ltd* [1999] 1 WLR 2150, considered *Deputy Commissioner of Taxation v Johnston* (2006) 230 ALR 575; [2006] QSC 61, considered *Embrey v Smart* [2014] QCA 75, considered

Evans v Bartlam [1937] AC 473, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, considered
Kumar v Ernst [2021] QCA 260, considered

COUNSEL: M T Tolcon for the appellant (*sol*)
J C Treviño KC for the respondent

SOLICITORS: Forbes Kirby Lawyers for the appellant
MacDonnells Law for the respondent

[1] **BOND JA:** The appellant guaranteed the debt of a corporation which borrowed money from the respondent. It is convenient to refer to these three persons as, respectively, the guarantor, the borrower, and the lender.

[2] The borrower defaulted in repayment of the loan and was later wound up. The lender sued the guarantor under his guarantee for the amount outstanding under the loan. The guarantor failed to defend within time and the lender obtained default judgment against the guarantor.

[3] The guarantor applied to set aside the default judgment which had been entered against him. He contended that he had a defence on the merits, based on the proposition that the lender had been guilty of unconscionable conduct.

[4] The primary judge dismissed that application. His Honour found that the guarantor had not demonstrated a prima facie defence on the merits, essentially because the evidence showed no basis for attribution to the lender of knowledge of the alleged unconscionable conduct.

[5] The guarantor's sole ground of appeal was that the primary judge erred in law by finding that the guarantor could not demonstrate a prima facie defence on the merits. The guarantor's written submissions elaborated that the case on appeal was that the primary judge's discretion miscarried because his Honour –

(a) impermissibly conducted a weighing exercise of the strength and credibility of the guarantor's defence, rather than determining whether there was a prima facie defence on the merits; and

(b) failed to consider the effect of other objective evidence that, regardless of the guarantor's subjective evidence, provided an arguable defence of statutory or common law unconscionability.

[6] For reasons which follow, in my view the guarantor has failed to demonstrate that the primary judge's discretion miscarried in either of these ways. The appeal should be dismissed, with costs.

Relevant legal principle

[7] Rule 290 of the *Uniform Civil Procedure Rules 1999* conferred on the primary judge a discretion "… to set aside or amend a judgment by default …, on terms, including terms about costs and the giving of security, the court considers appropriate."

[8] The discretion is untrammelled although it must be exercised judicially. Its evident purpose is to permit the Court in an appropriate case to avoid the injustice which might be caused if judgment followed automatically on default.[1] Relevant considerations include:[2]

(a) first, whether the defendant has given a satisfactory explanation of the failure to defend within time;

(b) second, whether any delay by the defendant in making the application to set aside precludes it from obtaining relief; and

(c) third, whether the defendant has a prima facie defence on the merits.

[9] In *Kumar v Ernst*, Fraser JA (with whom Sofronoff P and Mullins JA agreed) explained that the third consideration is usually the most important. His Honour observed:[3]

> "In *Embrey v Smart*, to which Applegarth J referred, his Honour (Muir and Morrison JJA agreeing) referred to McPherson J's summary of considerations relevant in an application to set aside a regularly entered default judgment in *National Mutual Life Association of Australasia Ltd v Oasis Developments Pty Ltd*; the Court must consider whether the defendant had given a satisfactory explanation for failing to appear, any delay in making the application to set aside the judgment, and whether the defendant had a prima facie defence on the merits. McPherson J observed, with reference to authority, that the last of those considerations was the most cogent; a defendant who had an apparently good ground of defence would not often be refused the opportunity of defending, even though a lengthy interval of time had elapsed, provided that no irreparable prejudice was thereby done to the plaintiff; and, conversely, to obtain an order setting aside a regularly entered default judgment, the defendant was "required to show by affidavit a defence on the merits; that is, what is described in *Evans v Bartlam* [1937] A.C. 473, 480, as a "prima facie defence", and in *Saunders v Hammond* [1965] Q.W.N. 39 as "a substantial ground of defence"".

[10] In *Embrey v Smart*, Applegarth J (with whom Muir and Morrison JJA agreed) observed (emphasis added):[4]

> "The third matter has been described in different ways. Lord Atkin in *Evans v Bartlam* referred to rules that guide the discretion and one of them was "an affidavit of merits, meaning that **the applicant must produce to the Court evidence that he has a prima facie defence**". It has been said that the affidavit "must set out all the defences on which the defendant intends to rely and briefly set out the facts by which the defendant seeks to establish such defences". **The defendant must make more than a bare allegation: the allegation must be supported by "some reference to evidence to suggest that**

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1 Cf *Alpine Bulk Transport Co In v Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd's Rep 221 at 223.

2 *Deputy Commissioner of Taxation v Johnston* [2006] QSC 61 per Atkinson J at [3] and the cases there cited.

3 *Kumar v Ernst* [2021] QCA 260 at [13], footnotes omitted.

4 *Embrey v Smart* [2014] QCA 75 at [68], footnotes omitted.

> **the defence is plausible and not just raised for the purpose of having default judgment set aside**". It is insufficient for an applicant:
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> > "to allege that he has a defence upon the merits and swear to such a defence generally. **He must go further and disclose what such merits are, and show to the court that his application is bona fide**."

[11] Nothing turns on the differences in language between "prima facie defence on the merits" and "substantial ground of defence". Such differences should be viewed as the emphasis in a particular case to the particular facts of that particular case.[5] Neither formulation should be treated as though it was some statutory statement of a condition precedent to the exercise of the discretion. In any particular case, the extent of evidence necessary to persuade a judge to exercise the discretion in favour of a defendant cannot be specified by any *a priori* "rule" or "rules". As Lord Wright explained in *Evans v Bartlam* (emphasis added):[6]

> "**It is, however, often convenient in practice to lay down, not rules of law, but some general indications, to help the Court in exercising the discretion, though in matters of discretion no one case can be an authority for another**. As Kay L.J. said in *Jenkins v. Bushby* ..., "the Court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion." **A discretion necessarily involves a latitude of individual choice according to the particular circumstances**, and differs from a case where the decision follows *ex debito justitiae* once the facts are ascertained. **In a case like the present there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication**."

[12] The judge's duty is to consider whether the defendant has a prima facie defence on the merits by reference to the evidence put before the judge on the defendant's application, and with a view to exercising the discretion in a principled way, for the purposes for which the discretion has been conferred. However, in approaching the issue of the merits of the suggested defence on an application to set aside a default judgment, the judge must appreciate that the judge is not conducting a trial. As Ward LJ warned in *Day v RAC Motoring Services Ltd* (emphasis added):[7]

> "… judges should be very wary of trying issues of fact on evidence where the facts are apparently credible and are to be set aside against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on the interlocutory

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5 Cf the suggestion made by Ward LJ in *Day v RAC Motoring Services Ltd* [1999] 1 WLR 2150 at 2157 in analogous circumstances.

6 *Evans v Bartlam* [1937] AC 473 at 488 to 489.

7 *Day v RAC Motoring Services Ltd* [1999] 1 WLR 2150 at 2157.

> application, **unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it**."

[13] Finally, it must be observed that any challenge on appeal to the exercise of discretion pursuant to r 290 must demonstrate that the discretion miscarried on one or other of the familiar bases referred to in *House v The King*.[8]

Undisputed background facts

[14] At all material times the guarantor was a financial adviser who provided advice to clients through a company, of which he was a director, called PMM Group Pty Ltd (**PMM Group**). He was also the sole director of the borrower, which was a company called My Two Boys (Aust) Pty Ltd. The borrower was the trustee of a family trust connected with the guarantor.

[15] On about 1 June 2021, the lender entered into a loan agreement (**the Advance Agreement**) with the borrower pursuant to which it lent the borrower $450,000.00. The Advance Agreement was for a very short term. It obliged the borrower to repay the full amount borrowed plus interest prior to 26 August 2021. There was a commensurately high interest rate, namely 4% per month and 6% per month following an event of default.

[16] Under a written deed of guarantee and indemnity with the lender, the guarantor assumed joint and several liability with the borrower to the lender for the monies to be paid by the borrower to the lender under the Advance Agreement. The guarantor was liable to pay the lender all monies owing immediately upon there being any default in payment by the borrower, and without the need for any demand to be made.

[17] The borrower defaulted in making payment to the lender under the Advance Agreement. On 27 September 2021, the lender both issued a notice of default to the borrower and notified the guarantor of the default and of the then total outstanding amount owing of $482,826.18, inclusive of principal, interest and costs.

[18] On 23 May 2022, the borrower was wound up by Order of Master Sanderson of the Western Australian Supreme Court.

[19] On 14 June 2022, the lender commenced proceedings in the Supreme Court of Queensland against the guarantor which sought recovery of the outstanding amount due under the deed of guarantee and indemnity, including interest and costs. After allowing for $240,000 in payments which had been made in January and February 2022, the amount which the lender sought to recover (inclusive of interest) was $479,483.85, together with costs on a solicitor and own client basis.

[20] As mentioned, the guarantor did not defend within time; the lender regularly obtained default judgment for the amount claimed; and the guarantor applied to the primary judge for an order setting set aside the default judgment so that he could then defend the proceeding.

The defence which the guarantor sought to set up

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8 *House v The King* (1936) 55 CLR 499.

[21] The guarantor sought to set up a defence which avoided the operation of the deed of guarantee and indemnity. He contended that the lender had acted unconscionably by taking advantage of the guarantor's known vulnerability and disadvantage when offering the loan and having the guarantor provide the personal guarantee.

[22] The critical relevant factual propositions were advanced in paragraphs 15 to 42 of a proposed defence which the guarantor placed before the primary judge. They may be summarised in this way:

(a) When negotiating the terms of the Advance Agreement and the deed of guarantee and indemnity, the lender acted through its agents Mr Martino and Mr Williams.[9]

(b) In around August 2016 Mr Martino and Mr Williams were directors of Rocky Organics Pty Ltd (**Rocky Organics**),[10] a company which sought to raise capital in anticipation of being listed on the Australian Securities Exchange through an initial public offering.[11]

(c) At that time Rocky Organics sought to raise capital by an offer of preference shares which could be converted to equity upon the IPO occurring, and, if the IPO did not occur within 12 months, Rocky Organics would repay the initial investment plus a 20% premium.[12] The repayment would be the subject of a guarantee by Mr Martino and a company of which he was a director.[13] Mr Martino and Mr Williams (together defined as "**the Promoters**") issued a term sheet on behalf of Rocky Organics which contained those terms.[14]

(d) In around August 2016, the guarantor introduced some of PMM Group's clients to "the Promoters" as potential investors in Rocky Organics.[15] In August 2016 five of PMM Group's clients (**the PMM Client Investors**) invested a total of $1,500,000 in the preference share offering.[16]

(e) Rocky Organic did not reach an initial public offering within the contemplated time frame or at all.[17] Rocky Organics did not make the promised repayment of monies to the PMM Client Investors.[18]

(f) Between 7 September 2017 and early 2020, the PMM Client Investors "were placing increasing pressure on the Promoters and [the guarantor] to have their investments returned and had begun threatening legal action against Rocky Organic and the Promoters."[19]

(g) By early 2020, the PMM Client Investors had commenced issuing redemption notices to Rocky Organics and "the Promoters" pursuant to the terms of the offer.[20]

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9 [15] of the proposed defence, at ARB 150 to 151.
10 [15] and [16] of the proposed defence, at ARB 151.
11 [17] of the proposed defence, at ARB 151.
12 [16] of the proposed defence, at ARB 151 to 152.
13 [18(d)] of the proposed defence, at ARB 152.
14 [18] of the proposed defence, at ARB 152.
15 [20] of the proposed defence, at ARB 152.
16 [21] of the proposed defence, at ARB 152.
17 [23] of the proposed defence, at ARB 153.
18 [23(a)] of the proposed defence, at ARB 153.
19 [23(b)] of the proposed defence, at ARB 153.
20 [24] of the proposed defence, at ARB 153.

(h) Rocky Organics failed to meet the redemption notices and subsequently Rocky Organics, Mr Martino and Mr Martino's company became liable to the PMM Client Investors for the repayment of the $1,500,000 investment and the applicable premium.[21]

(i) On 2 February 2020, Mr Williams ceased being a director of Rocky Organics;[22]

(j) In around March 2021 the guarantor entered into an agreement (**the PYX Agreement**) with Rocky Organic and Mr Martino and Mr Williams whereby:[23]

(i) Martino would cause 3,750,000 shares in PYX Resources Limited to be transferred to the borrower by 30 June 2021 to constitute security for the amounts which Rocky Organics, Mr Martino and Mr Martino's company owed to the PMM Client Investors in exchange for the guarantor and the borrower assuming liability for those amounts in the place of Rocky Organics and Mr Martino and Mr Williams; and

(ii) the guarantor and the borrower would enter into agreements with the PMM Client Investors for payment of the amounts owed to them, on terms to be agreed with them.

(k) In or around March 2021 and pursuant to the PYX Agreement the guarantor and the borrower commenced entering into settlement deeds with individual PMM Client Investors (defined as "**the Remaining PMM Clients**") with the result that the guarantor caused the borrower to enter into "Share Sale Agreements" to purchase from those investors their preference shares in Rocky Organics.[24]

(l) On 24 March 2021 Mr Martino transferred 500,000 PYX shares to the borrower's account in part payment to the borrower pursuant to the PYX Agreement.[25]

(m) During March 2021, the guarantor informed "the Promoters" in telephone conversations that the borrower required a short-term loan because it:[26]

(i) had exhausted its funds after it had started fulfilling its obligations. under the settlement deeds and begun purchasing the Remaining PMM Clients' Preference Shares pursuant the Share Sale Agreements.

(ii) needed cash flow so that it could continue meeting its obligations under the settlement deeds by purchasing the Remaining PMM Clients' Preference Shares until it was able to liquidate the PYX shares it was due to receive from Martino by 30 June 2021.

(iii) needed funds to meet its upcoming obligations under an unrelated property transaction.

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21 [25] of the proposed defence, at ARB 153.
22 [26] of the proposed defence, at ARB 153.
23 [29] of the proposed defence, at ARB 153 to 154.
24 [30] to [31] of the proposed defence, at ARB 154 to 155.
25 [32] of the proposed defence, at ARB 155.
26 [33] of the proposed defence, at ARB 156.

(n) In around March 2021, Mr Martino informed the guarantor in a telephone conversation that Mr Williams would be able to provide a short-term loan to help with cash flow issues and on 9 April 2021 "the Promoters" provided the guarantor with an indicative term sheet identifying the terms on which the loan would be provided.[27]

(o) Relying on the PYX Agreement, and on Mr Martino performing his promise to cause the shares to be transferred to the borrower, the guarantor and the borrower accepted the terms of the indicative term sheet and later entered into the Advance Agreement and the deed of guarantee and indemnity believing:[28]

(i) that the borrower would be borrowing the funds from Williams;

(ii) that Martino would deliver the remaining PYX shares to the borrower by 30 June 2021;

(iii) that the borrower would be able to repay the amount borrowed within 90-days by liquidating the PYX shares after 30 June 2021.

(p) Martino breached his obligations under the PYX agreement when he failed to transfer the remaining shares by 30 June 2021 or at all.[29]

(q) The guarantor gave the guarantee in circumstance where:[30]

(i) he did not know of the relationship with the actual lender prior to receiving a copy of the guarantee;

(ii) the lender was lending at an LVR above the calculation identified in the indicative term sheet;

(iii) at drawdown of the funds lent, the lender retained more money in prepaid interest than it was authorised to do;

(iv) in order to repay the loan, the guarantor relied on the assurances by Martino that he (Martino) would transfer the remaining PYX shares to the borrower by 30 June 2021 and he so informed "the Promoters"; and

(v) had the guarantor known that Martino would not deliver the PYX shares by 30 June 2021 or at all, the borrower would not have borrowed from the lender and he would not have guaranteed the loan.

(r) "The [lender] was aware or ought to have been aware of [all of the relevant pleaded matters] through its agents namely, the Promoters. Further or alternatively, by reason of [all of the relevant pleaded matters] the [lender] had sufficient knowledge of facts and circumstances giving rise to a duty to make further inquiries but was wilfully ignorant to such matters."[31]

(s) "At all material times relating to the [guarantor] giving the Guarantee in favour of the [lender], the [lender]:

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27 [34] and [36] of the proposed defence, at ARB 156.
28 [37] of the proposed defence, at ARB 156 to 157.
29 [39] of the proposed defence, at ARB 157.
30 [40] of the proposed defence, at ARB 157.
31 [41] of the proposed defence, at ARB 158.

(i) Made no enquiries as to whether the [guarantor] would be able to repay the loan under the Advance Agreement if its agent namely, Martino, breached his obligations under the PYX Agreement.

(ii) Further and alternative …, knew or ought to have known that the [guarantor] would not be able to repay the loan under the Advance Agreement if its agent namely, Martino, breached his obligations under the PYX Agreement.

(iii) Was aware that the [guarantor] had inadequate financial means to meet a demand by the [lender] under the Advance Agreement and Guarantee.

(iv) Procured the Guarantee for the sole benefit of itself and the Promoters.

(v) As a consequence …, the giving of the Advance Agreement and Guarantee by the [lender] was improvident and likely to result in legal action by [lender].

(vi) Exploited its superior bargaining position against the comparative lack of knowledge and financial resources of the [guarantor] to the extent that it would be against conscience for him to be held to the terms of the Guarantee."[32]

[23] The draft proposed defence summarised the case in this way:[33]

> "By reasons of the matters pleaded in paragraphs 15 to 42 herein:
>
> (a) The [guarantor] was placed in a position of vulnerability and disadvantage (Special Disadvantage).
>
> (b) The [lender] procured the Guarantee with wilful blindness and contumelious disregard for the Special Disadvantage of the [guarantor].
>
> (c) The [lender's] procurement of the Guarantee from the [guarantor] constitutes unconscionable conduct in contravention of ss 20 and 21 of the *Australian Consumer Law*, alternatively in breach of section 12CA of the *Australian Securities and Investment Commission Act 2001*.
>
> Further and in the alternative, the [lender's] procurement of the Guarantee offends equity and should be void.
>
> By reasons of the matters pleaded in this Defence, it is unconscionable for the [lender] to procure the Guarantee and it would be unconscionable for the [lender] to rely upon the alleged Guarantee given by the [guarantor]."

[24] It is apparent from the foregoing summary that it was critical to the guarantor's case to demonstrate that:

(a) the lender had a sufficient state of knowledge about the circumstances giving rise to the guarantor's position of vulnerability that it could be said that the

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32 [42] of the proposed defence, at ARB 158.

33 [43] to [45] of the proposed defence, at ARB 158.

lender was either wilfully blind concerning those circumstances or proceeded in contumelious disregard of them; and

(b) the guarantor sought to achieve that outcome by asserting that Mr Martino and Mr Williams had the requisite knowledge and that they were the agents of the lender and accordingly their knowledge should be attributed to the lender.

[25] Some preliminary observations should be made as to the deficiencies in the evidence before the primary judge in that regard.

[26] The guarantor's evidence before the primary judge comprised three affidavits by the guarantor personally, the second of which exhibited the draft defence.

[27] In his first affidavit the guarantor deposed to having the belief that "the [lender], through its agents, Mark Williams and Dominic Martino, acted unconscionably and in a misleading and deceptive manner when offering me the loan and having me provide the personal guarantee"; that he had instructed his solicitors to prepare a proposed defence; and that he intended to file that in supplementary affidavit. Notably, the fact that he had that belief did not go any way towards proving he had a prima facie defence on the merits, let alone the truth of the matters pleaded in paragraphs 15 to 42 of the proposed defence.

[28] The guarantor's second affidavit exhibited the proposed defence; deposed to having read it; and deposed to his belief that "he had an arguable defence to the [lender's] claim … based on the facts, matters, and circumstances pleaded in the Proposed Defence." Again, the existence of such a belief did not go any way towards proving he had a prima facie defence on the merits, let alone the truth of the matters pleaded in paragraphs 15 to 42 of the proposed defence.

[29] Nor was the position much improved by the guarantor's third affidavit. It relevantly stated "[t]he facts, matters and circumstances pleaded in paragraphs 15 to 42 of the Proposed Defence are true to the best of my knowledge and I adopt the definitions and headings set out therein." As to that:

(a) First, such a formulation is not an assertion that the deponent knows the pleaded facts, matters and circumstances to be true. To the contrary, it merely conveys that the deponent believes them to be true; is not knowingly making a false statement; but may not have sufficient actual knowledge to support the statement.[34]

(b) Second, such a manner of verification likely conflates matters which might actually be capable of being known by the deponent with matters which are only based on information and belief. The flaw in so doing is that verification based on hearsay can only be rendered admissible on this type of application by a statement of the sources of information and the grounds for the belief, in compliance with r 430 of the *Uniform Civil Procedure Rules 1999*. The guarantor's verification did not comply with r 430.

(c) Third, where the statement so verified is a proposition which is incapable of being "known" by the deponent – for example, that a particular person is an agent of a third party or had a particular state of mind – that manner of verification adds nothing at all. It is either an expression of inadmissible

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34 Cf *Deputy Commissioner of Taxation v Ahern (No 2)* [1988] 2 Qd R 158 at 163.

opinion evidence or a verification based on hearsay which does not comply with r 430.

[30] The affidavit evidence relied on by the guarantor did exhibit some documents. Yet the circumstances evidenced by those documents contained significant deficiencies:

(a) Before this Court the guarantor accepted that there was no evidence to support the proposition that Mr Martino was the agent of the lender. That was inconsistent with a very large part of the pleaded case and contrary to what the guarantor had apparently been prepared to verify, albeit in the deficient way already identified. However, it was consistent with affidavit evidence adduced by the lender.

(b) The documentary evidence supported the conclusion that Mr Martino would have known he had an exposure to claims by the disappointed PMM Client Investors arising out of Rocky Organics' redeemable preference share issue. He and his client had personally guaranteed the return of the amounts invested plus a premium. Mr Williams, however, had not guaranteed those amounts and there was no evidence that he had misconducted himself in relation to the issue such that he personally might have had an exposure to suit in relation to the issue. The evidence did not provide any support for the conclusion that Mr Williams must have perceived he had an exposure in that regard.

(c) Mr Williams had resigned as a director of Rocky Organics more than a year before the loan was made and the guarantee executed. There was no support in the evidence for the notion that Mr Williams was involved in or knew about whatever ongoing financial dealings were then occurring between Mr Martino and the appellant. Before this Court the guarantor accepted that there was no direct evidence to support the pleaded allegation that Mr Williams knew of the PYX Agreement, let alone that he was a party to it. That too was contrary to what the guarantor had apparently been prepared to verify, albeit in the deficient way already identified. However, it was consistent with affidavit evidence adduced by the lender.

Did the primary judge make the first legal error attributed to him?

[31] Obviously enough, the formation of a view on the question whether the guarantor had a prima facie defence on the merits required careful consideration of the evidence in support of paragraphs 15 to 42 of the proposed defence. The primary judge carried out that examination and found that the guarantor had not demonstrated a prima facie case on the merits.

[32] The guarantor does not suggest that the primary judge erred by conducting that examination. Nor could he: it was the duty of the primary judge to do so. Nor does the guarantor assert factual error by the primary judge. Rather, the guarantor asserts that the primary judge's discretion miscarried because he made two types of legal error. The first contention is that he erred in the manner by which he conducted that examination, in that he impermissibly conducted a weighing exercise of the strength and credibility of the guarantor's defence. The effect of this ground is to contend that the primary judge misconceived his role, effectively by ignoring the warning identified at [12] above.

[33] The primary judge made no such legal error.

[34] He correctly identified that the three matters which are usually relevant to the exercise of the discretion to set aside default judgments were the three considerations identified at [8] above. The primary judge found that the material addressing the first two considerations did not sound against the application to set aside default judgment. On the question whether the defendant had a prima facie defence on the merits, the primary judge found that the guarantor's liability to the lender for the borrower's unpaid debt was unambiguous on the face of the terms of the deed of guarantee and indemnity and that the guarantor's only prospect of avoiding that liability was a defence which avoided the operation of the deed of guarantee and indemnity. That was the right conclusion and was not challenged on this appeal.

[35] The primary judge then went on to analyse the way in which the defendant sought to avoid the operation of the deed. The primary judge found that there was a critical logical flaw in the proposed defence on the merits, namely the absence of any evidence supporting any basis to attribute to the lender knowledge of the circumstances said to render the lender's conduct relevantly unconscionable.[35] Although he did identify other problems with the guarantor's case, the primary judge found that the evidentiary "void" in the proposed defence on the merits concerning attribution of knowledge justified the conclusion that the guarantor had not established a prima facie defence on the merits.

[36] That manner of reasoning does not reveal the first type of legal error attributed to the primary judge. It did not involve accepting evidence adduced by the lender over evidence adduced by the guarantor. It did not involve attempting to resolve questions of credibility or reliability. It merely identified what the primary judge concluded was a gap in the guarantor's evidence. That meant that on an aspect of the case which was critical to the existence of a prima facie defence on the merits, the guarantor's case rested on mere assertion. To succeed the guarantor had to demonstrate a case that went beyond mere assertion on that critical issue. The primary judge was not persuaded that it did.

[37] The first way in which the guarantor sought to make good his contention of legal error fails.

Did the primary judge make the second legal error attributed to him?

[38] The second type of legal error which the guarantor attributed to the primary judge involves the contention that the primary judge failed to consider the effect of other objective evidence that, regardless of the guarantor' subjective evidence, provides an arguable defence of statutory or common law unconscionability. This was an attempt to suggest that the discretion miscarried because the primary judge failed to consider relevant considerations.

[39] The guarantor identified four considerations which he submitted that the primary judge had overlooked. He submitted those considerations were relevant because they revealed that the transaction had characteristics which would support a conclusion of unconscionability.

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35 Before this Court the guarantor accepted, as he had to, that his case could not succeed unless such knowledge could be attributed to the lender.

[40] First, the guarantor suggested that the lender, in breach of the Advance Agreement and without authority, retained $54,000 of the loan amount as prepaid interest, denying the borrower the benefit of this amount for the term of the loan. That suggestion is legally and factually flawed. Clause 6.1(b) of the Advance Agreement expressly authorised retention for prepaid interest of 3 months interest in advance. The calculation appears correct. But even if it was not, both sides of the transaction were represented by lawyers at the time of the drawdown and no complaint was made as to the calculation of the amount to be retained. This point does not support the guarantor's argument.

[41] Second, the guarantor relied on the fact that the default interest rate of the loan was 72% per annum. As has been mentioned, the Advance Agreement provided for the repayment of a $450,000 loan with interest less than 3 months after drawdown. There was a commensurately high interest rate, namely 4% per month and 6% per month following an event of default. The guarantor was the sole director of the borrower and was himself a financial adviser. In that context I would not regard the interest rate as a badge of unconscionability. In any event, the primary judge did not overlook the issue. His reasons expressly acknowledged that the interest rate was a feature of the loan which potentially might inform the assessment of unconscionability. This point does not support the guarantor's argument.

[42] Third, the guarantor relied on the fact that the lender was found by the primary judge to have wrongly calculated the interest under the loan, which in effect meant the demands for payment upon the borrower and the guarantor were for more than was due and payable. The primary judge did not overlook that fact. To the contrary, the incorrect calculation led to the primary judge making an order reducing the amount of the default judgment to reflect the proper calculation. There was no appeal from that order. This point does not support the guarantor's argument.

[43] Fourth, the guarantor suggested that the amount lent to the borrower exceeded the loan to value ratio (**LVR**) constraints identified in the indicative term sheet produced before the loan was made. This point is misconceived because the indicative term sheet was not the lender's document. It was a document which was produced at a time when another corporation was proposed as the lender. This point does not support the guarantor's argument. For completeness, I note that cl 10.2(d) of the Advance Agreement provided that it was an event of default under the Advance Agreement if the LVR exceeded 80%, but there is no suggestion in the evidence that the lender ever sought to rely on that clause. The existence of the clause by itself does not support the guarantor's case and the failure of the primary judge to have regard to the fact is irrelevant.

[44] The second way in which the guarantor sought to make good his contention of legal error fails.

Concluding observations

[45] For completeness, three final points should be made.

[46] First, the guarantor's written submissions did not limit criticism of the primary judge's reasoning to his reasoning in relation to evidence addressing attribution of relevant knowledge to the lender. The primary judge had expressed other criticisms

of the evidence in support of the alleged defence and the guarantor advanced similar arguments in relation to his Honour's reasoning in support of those criticisms. However, it is not necessary to consider those submissions. The primary judge's reasoning in relation to the knowledge issue was not attended by the error of law alleged by the appellant. Accordingly, his reasoning on that issue was sufficient to justify his conclusion.

[47] Second, the sole ground of appeal was that the primary judge's discretion miscarried because of legal error. The notice of appeal did not contend that the primary judge had made any factual error. Accordingly, it is not necessary for this Court to review the evidence with a view to determining whether it would have reached the same conclusion as did the primary judge.

[48] Third, and nevertheless, if this Court had been persuaded that the primary judge's discretion had miscarried because of legal error as alleged, it would have been necessary for the guarantor to persuade this Court to exercise a fresh discretion in his favour. The guarantor would have faced formidable hurdles in so doing. The guarantor's evidence was attended with the deficiencies identified at [25] to [30] above. The guarantor argued that the gaps could be overcome by the drawing of inferences. However, on the guarantor's evidence, it was mere speculation for the guarantor to suggest that at the time of the loan and guarantee Mr Williams must have felt some personal exposure in consequence of the Rocky Organics preference share issue which had occurred years earlier when he was a director of Rocky Organics, or that Mr Williams had been involved with and knew about the PYX Agreement and whatever financial dealings may been occurring as between Mr Marconi and the guarantor.

Proposed orders

[49] The appeal should be dismissed with costs.

[50] **DALTON JA:** I agree with the orders proposed by Bond JA and with his reasons.

[51] **COOPER J:** I agree with Bond JA.