SUPREME COURT OF QUEENSLAND

CITATION:	*Harburg Nominees Pty Ltd & Anor v Deen* [2019] QSC 291
PARTIES:	**HARBURG NOMINEES PTY LTD ACN 103 245 923 IN ITS CAPACITY AS TRUSTEE OF THE TW SUPERANNUATION FUND** (first plaintiff) **HARBURG INVESTMENTS PTY LTD ACN 010 279 884 IN ITS CAPACITY AS TRUSTEE OF THE PETER HARBURG FAMILY TRUST** (second plaintiff) **v** **ABDUL RAHMAN DEEN** (defendant)
FILE NO:	2972 of 2017
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	27 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	21 and 22 November 2019
JUDGE:	Applegarth J
ORDER:	**1. Judgment be entered against the defendant in the sum of $40,057,964.18.** **2. The defendant pay the plaintiffs' costs of and incidental to the proceeding to be assessed on the indemnity basis.**
CATCHWORDS:	GUARANTEE AND INDEMNITY – CONTRACT OF GUARANTEE – MISREPRESENTATION OR NON-DISCLOSURE – ENFORCEABILITY – where the plaintiffs loaned monies to a company of which the defendant was sole director for the purpose of a real estate development – where the defendant executed personal guarantees in relation to the loans – where the defendant's case is that he is not liable under the guarantees because of alleged oral representations made by the plaintiffs' director that the plaintiffs would not enforce the guarantees and would fund sufficient moneys to complete the development – where the defendant contends that, but for the representations, he would not have entered into a guarantee in June 2016 and would have obtained alternative finance or found another developer to complete the

development – where the plaintiffs' director denies the representations – where, in the alternative, the defendant submits that any judgment against him should not be given or should be stayed until the development has been sold – whether the defendant has proven that the representations were made – whether the defendant is liable under the guarantees – whether judgment should be deferred or stayed

Watson v Foxman (1995) 49 NSWLR 315, cited

COUNSEL: R A Kipps for the plaintiffs
P G Jeffery for the defendant

SOLICITORS: Enyo Lawyers for the plaintiffs
Hall & Co Solicitors for the defendant

[1] The plaintiffs loaned moneys to Warapar Resources Pty Ltd for the purpose of a real estate development. There were a number of loan agreements, including one dated 3 June 2016 by which the plaintiffs agreed to advance Warapar a further amount of $4,450,000.

[2] The defendant was the sole director of Warapar. The plaintiffs seek judgment against him for moneys owing under a guarantee dated 3 June 2016 by which he guaranteed the due and proper performance by Warapar of the terms and conditions of the loan agreement made the same day.

[3] The defendant's case is that he is not liable under the guarantee because of alleged representations made on behalf of the plaintiffs. These representations are denied.

[4] The threshold issue is whether the plaintiffs' director and representative, Mr Peter Harburg, made the alleged representations. The alleged representations are that the plaintiffs:

(a) would not enforce the guarantee dated 3 June 2016 or any earlier guarantee given by the defendant; and/or

(b) would fund sufficient moneys and provide sufficient support to Warapar to enable it to complete the real estate development project.

[5] If the defendant proves the alleged representations were made then there are a number of consequential issues. The defendant contends that if the representations had not been made, he would not have executed the loan agreement and the guarantee on 3 June 2016 and would have by December 2016:

(a) obtained finance from an alternative lender for an amount sufficient to discharge Warapar's obligations and complete the development; or

(b) found another developer to take over the development and associated obligations to the plaintiffs.

Were the alleged representations made?

[6] Warapar owned a large area of land at Archerfield. It set about obtaining council approvals and taking other steps to develop it. The defendant, Mr Deen, was introduced by a finance broker

to Mr Harburg. There was an initial loan of $5,990,000 to complete Stage 1. There were additional loans to fund further stages of the development. The fourth loan, executed on 18 February 2015, brought the amount advanced to approximately $18.5 million. The loan agreement dated 18 February 2015 was supported by a guarantee given by Mr Deen.

[7] Mr Deen and Warapar experienced problems with progressing the development. They were unhappy with the work of a project manager who had undertaken the majority of negotiations with the contractors and consultants. A new consultant, Mr Prudden, was appointed in late 2015 to co-ordinate the construction and this included producing a series of documents about the estimated costs to bring the site to completion. One such estimate dated 21 April 2016 estimated the cost of completion as $6,780,690. However, this amount included interest of approximately $900,000 and financing charges of $95,000 that were not actual disbursements. It also included a contingency of $250,000. In any event, Mr Harburg recalls a face to face meeting on site with Mr Prudden on 13 May 2016, being told that further funds would be required to complete and being told words to the effect that, in Mr Prudden's view, he would "definitely be out by Christmas". Mr Harburg took this to mean the project would be completed by Christmas 2016. Mr Prudden's interest calculation estimated that the project would be complete in three to four months' time. It seems that Mr Deen and Warapar were able to draw on some funds from other sources. For example, they were able to make payments of about $126,000 in early 2016. However, they were largely dependent on obtaining further funds from Mr Harburg's companies.

[8] Mr Harburg's recollection is that by 3 June 2016, Mr Deen had represented to him that the cost to complete the development was only about $4.45 million. Mr Harburg says that this was why the loan agreement dated 3 June 2016 proposed this as the further sum to be advanced.

[9] Mr Deen says that in about March 2016, Mr Harburg had indicated to him that the limit of his funding was $20 million. In any case, Mr Deen provided Mr Harburg with some documents in relation to the project, including Mr Prudden's estimated costs to complete. He says he did this in about late May 2016. Mr Deen's affidavit sworn on 31 October 2019 gives the following account of a meeting with Mr Harburg in or about late May 2016:

> "25. I subsequently met with Peter Harburg in or about late May 2016 at his North Quay office, after the provision of the above document, wherein he indicated that he had been through the document and that he wished to continue the funding and that he was able to source the necessary funds by alternate means. I told Peter Harburg that I was concerned about my personal liability under the Guarantee that I had previously signed on 18 February 2015 and any earlier Guarantees that I had signed. I had told him that I would be obtaining finance from an alternate lender if some assurance could not be given about the Guarantees.
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> 26. He said to me words to the effect that the First and Second Plaintiffs would provide sufficient finance and support to Warapar Resources Pty Ltd to enable it to complete the development and therefore repay the principal and interest. I distinctly recall that Peter Harburg said to me 'I have never had to rely on a guarantee' and 'I am with you until the end'. He then said that neither the Guarantee that I had previously signed on 18 February 2015 nor any earlier Guarantees that I had signed nor any further Guarantee would ever be enforced. I distinctly recall shaking hands with

> Peter Harburg both in his office and out at the lifts as I was leaving. He said to me that the relevant documents would be prepared shortly."

[10] This alleged agreement was not reduced to writing. Mr Deen says that he did not ask for anything in writing from Mr Harburg as it was a "gentlemen's agreement" and, in his experience, it is commonplace in his industry (demolition and construction) that oral assurances are given before and after documents are signed.

[11] Mr Harburg denies making the representations. He says that it is possible that he told Mr Deen that the plaintiffs had never had to call on a personal guarantee before. This was true. He recalled saying, possibly in response to Mr Deen mentioning his personal exposure, that they ought to focus on getting the project finished and then there would be no need to call on Mr Deen's personal guarantees. Mr Harburg says that he may have said words to the effect of "let's get the project done, and get our money out of it, and then your guarantee won't come into it".

[12] Mr Harburg is "absolutely certain" that he did not suggest or agree to not enforce the personal guarantees given by Mr Deen. The plaintiffs' practice for all loans is to take a personal guarantee from all directors of a corporate borrower. Also, such guarantees were an absolute requirement of the superannuation fund which was the source of some of the loan funding. Mr Harburg says there is no way that the plaintiffs would ever make a loan, of any amount, without insisting on personal guarantees. He says that he is absolutely certain that the alleged promise was not made to Mr Deen, because it would have been very memorable indeed, being the first time that he had ever made such a promise. Also, if he had said that he would not call upon Mr Deen's guarantee, and agreed to fund the project to completion, he would have faced a risk that, if the development was not profitable, Mr Deen would simply walk away from it and Mr Harburg would be left without recourse. This was not a risk that he would have assumed. If the guarantee could not be called on then Mr Deen would not face the personal risk associated with the development's failure and could only stand to gain in the event that it was successful.
Mr Harburg says that at the time of the meeting, he had significant concerns about the project.

[13] Neither Mr Deen nor Mr Harburg impressed me as having a good recollection of what was actually said at the meeting. Their respective accounts understandably involved an element of reconstruction about what they think must have been said and, in Mr Harburg's case, why certain things definitely were not said.

[14] In my view, it is inherently improbable that Mr Harburg said that he would not enforce the guarantee which was to be given by Mr Deen under the new loan agreement or any earlier guarantee. Mr Harburg did not have a good reason to advance further funds without a guarantee. This was his practice in lending money to a development company like Warapar. A guarantee had been given in respect of the previous loan. The existence of security was not a reason to depart from his practice of insisting upon a guarantee. There was not abundant security. A further advance of up to $4.45 million was unlikely to be recoverable unless there was a commensurate increase in the value of the land. By May 2016, Warapar's debt to the plaintiffs was $18.7 million. The valuation which
Mr Deen presented to Mr Harburg suggested the value of the property was $19.2 million. The possibility of the development not being completed on time or on budget was a real one. The plaintiffs were exposed to a risk of not being able to recover the debts which would be owed to them. They had no reason to relieve Mr Deen of his personal liability under the existing

guarantee, let alone not require him to give a guarantee in respect of the further advance of $4.45 million.

[15] Mr Deen's evidence about the alleged representation to the effect that the guarantee Mr Deen had signed on 18 February 2015 and any new guarantee would not be enforced is improbable for another reason. According to Mr Deen, after expressing concern about his personal liability, he told Mr Harburg that he would be obtaining finance from an alternative lender if some assurance could not be given about the guarantees. This is simply improbable. There is no evidence that Mr Deen had another lender who could provide the required funds to complete, let alone refinance the existing debt. He wanted to stay on good terms with Mr Harburg. Further, if he had told Mr Harburg that Warapar would be obtaining finance from an alternative lender if some assurance could not be given about the guarantees, it is probable that Mr Harburg would have welcomed the opportunity for Warapar to obtain alternative finance and pay out the plaintiffs' loans. Requiring a guarantee would achieve this.

[16] Mr Deen's allegation that Mr Harburg represented that the guarantees would not be enforced is not only improbable, it is not supported by Mr Deen's subsequent conduct. First, the alleged conversation is said to have occurred before the guarantee was signed on 3 June 2016. This is not a case in which the defendant says that a guarantee having been given, the lender subsequently promised not to enforce it. If the guarantee was not going to be enforced then there was no point in signing it. However, Mr Deen did so.

[17] Before doing so, Mr Deen sought and obtained advice from his solicitor about the matter. His solicitor, Mr Frank Carroll, gave him advice and witnessed his signature on the guarantee. Mr Deen acknowledges that Mr Carroll advised him in relation to those documents before he signed them and "cautioned" him in regard to the guarantees. In his re-examination, Mr Deen clarified that Mr Carroll had warned him against the guarantee:

> "Mr Carroll had said that the guarantees could be [onerous].[1] I said there's no worry about that because myself and Peter have a good understanding and we have sort of mutual agreement between each other and that there [has] never been a situation where Peter has ever called on a guarantee or enforced one."

[18] Mr Deen's account of this conversation does not involve him telling his solicitor that the guarantees would not be enforced, even though Mr Deen insists this is what his and Mr Harburg's agreement was. Moreover, if he had told his solicitor that there was an agreement that the new guarantee would not be enforced, and that the existing guarantee would not be enforced either, then one would have expected the solicitor to record and recall this fact. At the very least, the solicitor would have written to the plaintiffs or their solicitors noting such an agreement, or even made the obvious point that the guarantee would not be signed because an agreement had been reached not to enforce it. There would be no point in signing the guarantee if it was not going to be enforced.

[19] The things that Mr Deen says he told Mr Carroll about the understanding which Mr Deen had with Mr Harburg are more consistent with Mr Harburg's evidence of having said something like "let's get the project done, and get our money out of it, and then your guarantee won't come into it". They are not consistent with a representation that the new and the existing guarantee would not be enforced.

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[1] The transcript reads "ominous". This may be what was said, however, the word may be "onerous".

[20] Next, after these proceedings were commenced on 23 March 2017, the defence which was filed on 21 April 2017 made no mention of the alleged representations. The defence was filed by Mr Carroll's firm and this suggests that neither at the time Mr Carroll advised Mr Deen about the guarantee in early June 2016 nor at the time the defence came to be filed did Mr Deen report the alleged representations to Mr Carroll. Also, when there was an application for summary judgment, Mr Deen's affidavit in response to it sworn on 23 May 2018 made no reference to the representations. His complaints were directed towards the conduct of the receivership which was alleged to have resulted in delays and additional expense. Receivers had been appointed in December 2016. Mr Deen has not explained why there was no reference to the alleged representations in his original defence or in his affidavit resisting summary judgment. This undermines the reliability of his recollection that such representations were made.

[21] In discussing proof that a representation was made (in the context of a representation which was alleged to be likely to mislead or deceive), McLelland CJ in Equity made the following wise and oft-cited observations:

> "Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances. In many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition. Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience."[2]

[22] In my view, Mr Deen has reconstructed a conversation and, in doing so, reconstructed it as one in which Mr Harburg said that the neither the guarantees which Mr Deen had signed nor any further guarantee would ever be enforced. This reconstruction is unreliable. It is not a sufficient answer that Mr Harburg's evidence also involves some degree of reconstruction. It is for the defendant in this instance to prove the words which were actually spoken with a degree of precision to enable the Court to be reasonably satisfied that Mr Harburg actually said that the guarantees would not ever be enforced. For the reasons which I have given, it is inherently improbable that he promised not to enforce the guarantees which had been given or the further guarantee which he required. Mr Deen's subsequent conduct is not consistent with such a promise or representation having been made.

[23] Mr Carroll was called as a witness, seemingly on short notice, and seemingly without reference to his file or any file notes which he made. I would not regard his recollection of what was said

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[2] *Watson v Foxman* (1995) 49 NSWLR 315 at 318-9.

to him by Mr Deen in early June 2016 or the advice given by him to Mr Deen to be particularly reliable in its detail. However, I accept his evidence that he gave advice to Mr Deen about the two documents that were to be signed and explained them to Mr Deen. Mr Carroll's recollection is that Mr Deen thought that he had a good business relationship with Mr Harburg and trusted him. According to Mr Carroll:

> "Mr Deen made it clear to me on that occasion and others that be believed the ultimate total worth of the developed land would well cover the debt and that he wouldn't get into any financial difficulty because Mr Harburg had always been a gentleman to him and given his assurances that it would not end in tears for them."

[24] Mr Deen may have hoped, or even expected, that the guarantees would not need to be enforced, but this does not mean that Mr Harburg represented that they would not ever be enforced.

[25] I conclude that Mr Deen has not proven his assertion in paragraph 26 of his affidavit that Mr Harburg said at their meeting that neither the previous guarantees nor any further guarantee would ever be enforced.

[26] I turn to the second alleged representation, namely that the plaintiffs would fund sufficient moneys and provide sufficient support to Warapar to enable it to complete the development.

[27] The context in which this alleged representation occurred should be noted. Mr Deen was seeking additional finance from Mr Harburg. Mr Deen and his consultant, Mr Prudden, were seeking to assure Mr Harburg that the project was close to completion. Mr Deen's company had already borrowed a large amount of money from the plaintiffs and he did not wish to agitate Mr Harburg. Including financing charges and interest and contingencies, Mr Prudden estimated in April 2016 that the cost to complete would be $6.8 million. According to Mr Deen, as at 3 June 2016 the cost to complete the development was about $6 million. Mr Harburg's recollection is that Mr Deen had represented to him that the cost to complete was only about $4.45 million and this was why the loan agreement proposed this as the further sum. It may be that this was all that Mr Harburg was prepared to loan. In any case, it seems improbable that Mr Deen would ask to borrow more than he needed to complete the project (and pay substantial interest on money which he did not need to borrow) or borrow less than he needed.

[28] Similarly, Mr Harburg would not be interested in advancing more than was needed to complete the project, with the risk that he would be unable to recover the full amount advanced, together with interest. He was interested in ensuring that any further moneys advanced were tied to the costs which had been estimated. This is reflected in the terms of the Loan Agreement. Clause 2.3(c) provides that:

> "The Lender shall not be bound or obliged to make any progress advance which may cause the amount shown in the Prudden Report in relation to the relevant item to be exceeded".

[29] Clause 6(l) provides that the Borrower shall be in default under the Loan Agreement:

> "if in the reasonable opinion of the Lender the Development Undrawn Amount shall be insufficient to complete the Development".

[30] Having regard to the commercial context in which Mr Deen and Mr Harburg found themselves in late May and early June 2016, with the current indebtedness to the plaintiffs about the same as the valuation figure, it seems improbable that Mr Harburg would make any kind of open-ended promise to continue to provide whatever finance was required to enable Warapar to complete the development. Mr Harburg would not have been prepared to advance sufficient finance, whatever it cost, particularly if that cost made the development unprofitable. Any reference to providing "sufficient finance" would have been related to realistic costs which had been estimated and made subject to the kind of conditions contained in the loan agreement. Mr Deen and Mr Harburg had a mutual interest in seeing the project completed. This was the best way for the plaintiffs to recover their existing loans. It is entirely probable that Mr Harburg said something like "Let's get the project done and get our money out of it". This was not an unqualified representation or promise to continue to advance sufficient funds to enable the project to be completed, particularly if there was mismanagement of the project, with costs vastly exceeding the estimates which had been provided and which were factored into the Loan Agreement.

[31] In his re-examination, and after stating that, based on the Prudden report, as at 3 June, he thought the cost to complete the development was approximately $6 million, Mr Deen was asked the following question:

> "Mr Deen, you've just indicated to me it would be $6 million to complete the development. The loan amount was 4.45 million. What was your belief at that time as to where the rest of the money was going to come from?--- Because Ian had – Peter had been through from the start and he said he would be through to the end, if there was any need for further, we'd look at it as the time arises, but at that time we didn't know what the final figure would – because we didn't have the final approval from the council."

This evidence does not support the conclusion that Mr Harburg represented that the plaintiffs would provide, at some future stage, sufficient money to complete the project, let alone whatever it cost to complete. I doubt if Mr Deen at that stage was encouraging Mr Harburg to think that he would need more than the further amount of $4.45 million. In any case, according to Mr Deen, Mr Harburg said that if there was any need for further funds, the plaintiffs would "look at it as the time arises". Even accepting this evidence, which involves a degree of reconstruction, it falls short of proving the alleged representation.

[32] I am not satisfied that Mr Harburg made the representation alleged. Mr Harburg had no interest in making a promise to make further advances if, in doing so, his prospects of recovering the amount he already had lent were reduced.

[33] I conclude that the defendant has not proven with a sufficient degree of precision that the alleged representations were made. I find that Mr Deen has reconstructed the terms of conversations which did not occur in those terms. It is improbable that the alleged representations were made. Mr Deen did not appear to have a clear recollection of the actual words which were said. If the alleged representations had been made then I would have expected them to be referred to in Mr Deen's original defence and in his affidavit opposing summary judgment. Their omission from those documents inclines me to think that the alleged representations are a reconstruction of what Mr Deen thinks must have been said. I am not satisfied that these things were in fact said.

Other issues

[34] Because I am not satisfied that the representations were made, the issues which have been identified as issues 2(a) to (e) fall away. It is not necessary to determine them. I will, however, briefly address one aspect. Mr Deen deposes that, had the representations not been made:

(a) He would have not signed the loan agreement and guarantee;

(b) He would have "cut his losses" by:

(i) having another developer take over the project in consideration for an amount at the very least sufficient to cover principal and interest; or

(ii) engaging a broker to source alternative funding to both complete the project and pay out the plaintiffs;

(c) Sufficient funds could have been pulled together to ensure that the plaintiffs' loan was repaid both in terms of principal and interest at that time.

[35] As to these matters, there is no evidence that another developer would have taken over the project in consideration for an amount sufficient to cover principal and interest. As to alternative funding, Mr Deen, on behalf of Warapar, had engaged Mr Rafter, the director of Peli Capital, to refinance the debt. This engagement occurred, it seems, in very early 2016. There is no evidence that by the time the plaintiffs agreed to the further advance in early June 2016 that another investor was available. Mr Rafter says that in or about July 2016 he had sourced a funder, and Mr Deen had organised that funder's initial fee of about $24,000 to be paid to them to commence the application process. The success of that loan application was dependent upon the lender completing due diligence. As matters transpired, there is no evidence from Mr Rafter, let alone from the potential funder, that its due diligence probably would have led it to advance the amount required by Warapar to refinance the plaintiffs' loans, let alone to complete the project. Instead, Mr Rafter says that the lender was unable to complete its due diligence when Warapar was placed into receivership in December 2016 as Mr Deen was prevented access to the site and the company's books and records were provided to the receivers. Before that occurred, on 8 November 2016, Mr Rafter wrote to Mr Deen about numerous discussions they had had over the last nine months regarding Peli Capital testing the market with more than 25 private lending groups in relation to refinancing. There was no evidence of any funder putting an offer in writing.

[36] Had it been necessary to decide the issue, I would have declined to find that if Warapar and Mr Deen had not signed the loan agreement and the guarantee on 3 June 2016, that they would have been able to source alternative funding to both complete the project and pay out the plaintiffs. I think the chance of them doing so was very slight. There is no evidence that any alternative funder would have provided a more attractive funding package than the plaintiffs. If there was such a relatively attractive offer it would have been taken up by Mr Deen in the early months of 2016 and certainly by July 2016. Moreover, any alternative lender would be expected to require a guarantee. Therefore, Mr Deen has not proven the detriment alleged by him.

[37] Also, if Mr Deen had not signed the loan agreement and the guarantee on 3 June 2016, he would nevertheless have been bound by the previous guarantee.

Quantum

[38] The quantum of the outstanding balance of the loan account was satisfactorily proved by the plaintiffs at the hearing. The plaintiffs established that the sum owed under the guarantee as

at 22 November 2019 was $39,319,444.52. The guarantee is an all-moneys guarantee and this is the amount for which Mr Deen is liable. Because of the possibility of further amounts becoming owing after 22 November 2019 while this judgment was written, or proceeds being received from sales, the parties agreed that I should receive an updated report of the amount owing as at the date of my judgment. Subsequent to the hearing, there was a GST refund resulting in a credit of $13,819.00. Interest capitalised as at 25 November 2019 in the amount of $753,338.66. The amount owing at the date of judgment is $40,057,964.18.

Should judgment await the sale of all the mortgaged property?

[39] This matter was debated during oral submissions. The subject property is for sale. There are widely different estimates of the amount which will be realised. They vary from between $32 million to $42 million. To date, three lots have been sold.

[40] The fact that sales may continue is not a reason to defer giving judgment. The guarantee provides for the plaintiffs to exercise their remedies simultaneously or contemporaneously or successively. It would be inconsistent with the terms of the guarantee for the plaintiffs to be forced to delay obtaining judgment until the sale of the secured property. The plaintiffs are not entitled to double recovery. However, they are entitled to look to Mr Deen to honour his guarantee. If and when the subject property is sold then the proceeds will be appropriately accounted for and if Mr Deen has paid all or some of the money owed by him pursuant to the guarantee, he can look to recover that amount from Warapar. Therefore, judgment should be entered for the plaintiffs against the defendant.

Judgment and costs orders

[41] Clause 14 of the guarantee provides for the guarantor "on demand" to pay all reasonable costs, charges and expenses of or incidental to enforcement of the guarantee. This is stated to include legal costs on a solicitor-client basis and all fees charged by counsel. Such a contractual provision is relevant to the exercise of the discretion to award costs on the indemnity basis. Mr Deen does not advance any reason as to why I should not exercise my discretion so as to accord with the parties' agreement by ordering costs on the indemnity basis. I will do so.

[42] The orders will be:

1. Judgment be entered against the defendant in the sum of $40,057,964.18.
2. The defendant pay the plaintiffs' costs of and incidental to the proceeding to be assessed on the indemnity basis.