



## REASONS OF THE COURT

(Given by O'Regan P)

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### Introduction

[1] The appellant, Ms Mitchell, guaranteed a loan made by the respondent, Trustees Executors Ltd (TEL), to a company called River Cottage Ltd, secured over two units in an apartment complex, Quattro Apartments, in Auckland. River Cottage defaulted and TEL sought summary judgment in the High Court against Ms Mitchell and her partner, Mr Richards. Mr Richards is now bankrupt. The application for summary judgment was opposed and after a hearing before Associate Judge Doogue, summary judgment was entered against Ms Mitchell for \$562,059.85 plus interest at

14.7 per cent per annum from 18 March 2009 up to the date of the judgment (28 January 2010).<sup>1</sup> The interest amounted to \$71,756.12.

[2] Ms Mitchell appeals to this Court against the High Court decision. She argues that the Associate Judge ought not to have entered summary judgment against her, and that the matter should have proceeded to a trial.

### **Issues**

[3] The issues raised by the appeal are:

- (a) Did the Associate Judge adopt the wrong test for the entry of summary judgment?
- (b) Did TEL's pleadings cause unfair prejudice to the conduct of Ms Mitchell's opposition to summary judgment?
- (c) Did the Associate Judge wrongly rule that there was no loss or detriment arising from statements allegedly made by an employee of TEL, Mr Dellabarca, which Ms Mitchell argued, raised an estoppel?
- (d) Was it arguable that TEL had breached its mortgagee's duty in exercising its power of sale of one of the units, unit 3D?
- (e) Was it arguable that TEL was a mortgagee in possession of unit 3H and if so what is the impact of that on the present appeal?
- (f) Was it arguable that TEL breached its duty of good faith?
- (g) Was it arguable that TEL breached the oppression provisions of the Credit Contracts and Consumer Finance Act 2003 (CCCFA)?
- (h) Was there sufficient evidence or agreement on the quantum claimed by TEL?

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<sup>1</sup> *Trustees Executors Ltd v Richards* HC Auckland CIV-2009-404-4693, 28 January 2010.

[4] Ms Mitchell sought to adduce further evidence in support of the appeal and to amend the grounds of appeal to include grounds (a), (b) and (h) above. Whether that should be permitted is another issue to be resolved.

[5] Before turning to these issues, we set out the factual background.

## **Facts**

[6] Ms Mitchell and Mr Richards were involved in the development of the Quattro Apartments complex through their shareholdings in the development company, B R Properties No 8 Ltd (BRP).

[7] When the development ran into financial difficulties, it was decided that some of the units would be sold down. Mr Richards and Ms Mitchell arranged for the formation of three separate companies, River Cottage, Arnold Group (2006) Ltd and Chaparel Investments Ltd, and each of these companies purchased two apartments in the complex, funded by TEL. In each case a first mortgage was granted in favour of TEL and the obligations of the relevant company were guaranteed by Mr Richards and Ms Mitchell. In addition, Ms Mitchell through another company, Mitchell Trustee Ltd, purchased two further units, with funding by the Bank of New Zealand. Ms Mitchell was the sole director and sole shareholder of River Cottage.

[8] The transaction between TEL and River Cottage involved a loan of \$808,000 for a five year term at an interest rate of 8.4 per cent per annum, fixed for one year. The units purchased by River Cottage were units 3D and 3H. The loan agreement was dated 20 July 2006.

[9] By early 2008, the property developments of Mr Richards and Ms Mitchell had encountered further financial difficulties. They approached TEL to advise that their companies would not be able to meet interest payments due under the various loan agreements and that they were making efforts to sell the six apartments over which TEL had security. TEL allowed this attempted sale process to proceed, but an

auction of the six apartments which took place on 31 March 2008 was unsuccessful and all of them were passed in. The best offer received was \$320,000 for unit 3D.

[10] On 15 April 2008, Ms Mitchell wrote to TEL in these terms:

We have been unable to secure a buyer for any of the six apartments unless they are in the very very low 3's. Offers have come in and I have countered them to quit debt only but we are unable to get anyone to commit. We ran an extensive marketing campaign but unfortunately due to the current climate, the blue-chip fallout (on-going) no-one is ready to purchase unless they pick them up for nothing. We are still trying to on-sell.

[11] TEL then served notices under ss 119 and 122 of the Property Law Act 2007. The notices were not complied with.

[12] Mr Richards and Ms Mitchell continued to try to sell the apartments. On 27 May 2008 River Cottage entered into an agreement with a purchaser named "Alpha B Trust or Nominee" to sell unit 3D for \$586,000. This was subject to due diligence and no deposit was payable until the agreement became unconditional, and then only \$5,000 was payable. The agreement was subject to a due diligence provision allowing Alpha B Trust to withdraw if it was not satisfied that the property was suitable in all respects for it after taking such advice as it deemed necessary or relevant. It was signed on behalf of Alpha B Trust by a Mr Betros. Associated with this was an underwriting agreement under which River Cottage agreed to pay an entity associated with Mr Betros, Betros Consultancy Ltd, an underwriting fee of 30 per cent of the purchase price.

[13] The arrangement required TEL's consent but TEL rejected the arrangement and advised that it would proceed with obtaining its own valuations. The dealings between TEL and Ms Mitchell in relation to the Betros arrangement are the foundation of the estoppel claim, and we will come back to this aspect of the case later.

[14] Subsequently Mr Richards and Ms Mitchell notified TEL that they could refinance, but nothing came of this.

[15] TEL then began to look at selling the units by way of mortgagee sale.

[16] On 12 June 2008, Seagar and Partners valued the units at the instruction of Otto Properties Ltd, a company associated with Mr Richards. The units were inspected on 6 June 2008. The valuer, Mr Buckley, concluded that the likely value of unit 3D was \$490,000 and for unit 3H \$500,000.

[17] Ms Kim Stone, of Edwards Valuation Ltd, swore an affidavit that she had been instructed by TEL to value the properties on 5 June 2008. She arranged a viewing time with Mr Richards, but he did not appear at the agreed time and then advised that he had obtained another valuation and felt it was unnecessary to get a second one. She was advised by TEL to leave the matter with them and did not have another opportunity to value the properties.

[18] On 10 July 2008, TEL instructed Barfoot & Thompson as agents to prepare an appraisal and marketing proposal for the apartments. Mr Brain was the real estate agent. He wrote on 11 July 2008 recommending a marketing programme for the apartments:

It is our recommendation that the properties at 444 Great North Road should be put into an Auction marketing programme over a three week period. We would suggest seven (7) separate Auctions, firstly one for the package of all six (6) apartments, then if that did not achieve the required figure, we would immediately Auction all six (6) apartments individually.

[19] The proposal recommended three different marketing options for selling the apartments. These all involved advertisements in the New Zealand Herald, Property Extra and Ponsonby News, colour brochures for the apartments and online listings. TEL adopted an amended version of one of these marketing strategies but accepted the recommendation to advertise all six apartments as being available as a lot or separately. The apartments were eventually marketed:

- (a) in online format on the Barfoot & Thompson, realestate.co.nz and Trademe websites;
- (b) by A4 colour brochures advertising all the apartments and signage outside the properties themselves;

- (c) through an A3 colour window card in Barfoot & Thompson's office window;
- (d) through a quarter page colour display advertisements in the NZ Herald (26 July 2008, 2 August 2008, 9 August 2008);
- (e) through a half page colour display advertisement in the Property Extra (29 July 2008);
- (f) via open homes (26 and 27 July 2008, 2 and 3 August, 9 and 10 August);
- (g) by the agents and client database at Barfoot & Thompson.

[20] On 31 July 2008, Mr Brain wrote with an update on the marketing of the apartments and listing the steps that had been taken. He indicated that there had been a number of interested buyers but that price indications were low, at \$350,000 or less for each apartment.

[21] On 7 August 2008,<sup>2</sup> Mr Brain wrote to TEL updating them on the marketing steps taken and interest, and advising that TEL might not realise what it expected out of the sales.

[22] On about 12 August 2008 Mr Brain wrote with a third and final report. This recorded unconditional pre-auction offers on all 6 apartments at between \$1,500,000 and \$1,800,000 and on individual apartments at \$281,250 at the highest.

[23] The auction was held on 13 August 2008. Unit 3D was sold for \$330,000. The other properties were passed in as not meeting TEL's reserve.

[24] After the auction, Mr Brain wrote to TEL again summarising the campaign. He reported that he had managed to get an unconditional offer on unit 3H for

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<sup>2</sup> All reports subsequent to 31 July 2008 are dated 13 October 2009. This date must be wrong. In Mr Brain's affidavit, he referred to three, weekly reports. The auction was on the 13 August 2008. This would put the other reports at 7 August 2008 and around 11 or 12 August 2008.

\$320,000. Ms Mitchell suggested TEL counter-offer with \$400,000, which Mr Brain considered to be unrealistic given the market and the indicated values of interested buyers. In any event, the property did not sell.

[25] On about 21 August 2008, Mr Richards called Ms McGoverin at TEL and advised that UP, another real estate agency, could get a much better price. He says in his affidavit that “UP had come up with a signed offer on apartment 3H for \$380,000”. He emailed this to Ms McGoverin but said that TEL went “septic” and had also insisted that the UP contract go through Barfoot & Thompson’s agency. This is explained in Mr Brain’s affidavit. The contract was conditional on finance. In fact, Mr Brain said he spoke with the purported buyer by chance soon after being advised of the contract and was told frankly the buyer did not have the finance. Mr Brain said that Barfoot & Thompson had an exclusive agency to market the properties and therefore any offers needed to go through it. In any case, UP did not communicate with Barfoot & Thompson and no unconditional offer emerged.

[26] On 16 March 2009, TEL appointed Mr Brain of Barfoot & Thompson as a receiver of rents for unit 3H.

### **Amendment to notice of appeal**

[27] Shortly before the hearing of the appeal, counsel filed an application to amend the notice of appeal. This added to the grounds of appeal already raised the appeal grounds that the Associate Judge had adopted the wrong test for summary judgment, that the Associate Judge had not taken into account the prejudice caused by the way TEL pleaded its case and that quantum had not been properly proven.<sup>3</sup> A number of changes were made to the other grounds of appeal but we are satisfied that those changes were not of such significance that it could be said that the respondent was facing different grounds of appeal than those set out in the original notice of appeal. While the amendment to the notice of appeal was opposed, we indicated at the hearing that we would hear submissions on all matters, including the new matters raised in the amended notice, and rule on the application to amend the grounds of appeal in this judgment.

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<sup>3</sup> See above at [3](a), (b) and (h).

[28] TEL opposed the amendment on the basis that there was an unexplained and unjustifiable delay between the date of the notice of appeal, 16 April 2010, and the date of the amended notice, which was 14 July 2011, that is only two weeks prior to the hearing of the appeal. However, we are satisfied that the addition of the first two additional grounds of appeal referred to above (wrong test for summary judgment and criticism of pleadings) are matters that can fairly be dealt with on appeal, based on the record before the Court. We need to consider the pleading matter anyway, because it is raised as a ground in support of the admission of new evidence. We also consider that the relatively insignificant amendments to the other grounds of appeal should be permitted. We do not see these changes as causing any substantial prejudice to TEL. In the circumstances we think it is preferable for the Court to address the two new grounds of appeal and the minor changes to the other grounds of appeal, though we record that we would not have allowed this if we had considered that TEL was prejudiced.

[29] We see the additional ground of appeal relating to quantum in a different light however. If quantum was disputed, the time to dispute it was before the sealing of the High Court judgment, not many months later when the appeal was about to be heard. There was no issue raised with the quantum in the notice of opposition in the High Court, and the only reason the Associate Judge did not rule on quantum in his judgment was because details about interest and similar minor matters needed to be resolved. Those issues were resolved in correspondence between counsel before the form of judgment for sealing was settled. No issue was raised about quantum in the original notice of appeal either. We consider it would be unfair to TEL to allow this issue now to be the subject of the appeal. We therefore decline leave to add this ground of appeal. The application to amend the grounds of appeal is otherwise allowed.

#### **Application to adduce further evidence on appeal**

[30] Ms Mitchell also sought leave to adduce new evidence in support of the appeal. This evidence comprised:

- (a) An affidavit from a real estate agent, Ms Jagger, relating to attempts to sell unit 3H in October–November 2009 (on instructions from Ms Mitchell), and a further attempt to do so in March 2010. The October–November events as described by Ms Jagger occurred partly before and partly after the High Court hearing, while the attempt at sale in March 2010 post-dates the High Court judgment. In addition Ms Jagger gives evidence on the paucity of advertising of unit 3H for sale from 2009 up until the date of the affidavit (7 July 2011), and an opinion that the rent being charged for unit 3H is low. In addition it replies to an affidavit from Mr Brain about the sale process undertaken by Barfoot & Thompson on instruction from TEL, and makes some criticisms of this.
  
- (b) An affidavit from Ms Mitchell herself, about unit 3H, which expands on Ms Jagger’s account of the attempts to sell this in October–November 2009 and March–April 2010, which Ms Mitchell says were frustrated by TEL and its agent, Barfoot & Thompson. It includes an allegation that the Barfoot & Thompson agent might be living in unit 3H and paying a concessionary rent, though the basis for that assertion is minimal. It also deals with events in June 2011, in particular extensive correspondence between the lawyers for Ms Mitchell and the lawyers for TEL and comments on the quantum issue.
  
- (c) An affidavit from Mr Buckley, a registered valuer which gives evidence of disputed technical aspects of Mr Brain’s evidence in the High Court.

[31] In broad terms, the proposed evidence is in two categories. The first is evidence of events that have occurred since the High Court hearing. The second is evidence disputing matters that were in issue in the High Court, and which should have been therefore adduced in the High Court. We are satisfied that this Court would not be assisted by either category of evidence, and we have reached the conclusion that neither category is admissible on the appeal.

[32] It was accepted that the cornerstone for admission of new evidence is that it is fresh and cogent. The updating evidence is fresh but not cogent, because what has happened after the High Court hearing does not bear on the correctness or otherwise of the High Court decision which is the key issue before us. The evidence of events prior to the High Court hearing may have been cogent but is clearly not fresh, in that it could have been adduced in the High Court.

[33] Mr Woodhouse, for Ms Mitchell, suggested that the way the High Court hearing was conducted militated against this, and we will deal with his concerns in that regard when we come to that ground of appeal. But for present purposes we are satisfied that the way the hearing was conducted in the High Court did not prevent Ms Mitchell from adducing sufficient evidence to support her opposition to summary judgment and, if there had been a need for further time to adduce this evidence that could have been sought by way of adjournment. None was sought. In the circumstances we decline leave to admit the proposed new evidence. We will consider the grounds of appeal on the basis of the evidence that was before the High Court.

#### **Did the Associate Judge apply the wrong test for summary judgment?**

[34] Mr Woodhouse argued that the Associate Judge applied an incorrect test in determining whether summary judgment should be granted. He based this submission on the following statement that appears under the heading “Result” in the Associate Judge’s decision:<sup>4</sup>

I am satisfied that the second defendant [Ms Mitchell] does not have a substantial defence to the plaintiff’s [TEL’s] claim.

He said that this terminology was indicative that the Court had applied an incorrect test and raised the threshold for what Ms Mitchell had to prove, or lower the threshold for TEL.

[35] We do not see this statement of the result of the Associate Judge’s deliberation as indicating the basis of his reasoning. It is clear that he understood

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<sup>4</sup> At [91].

correctly the test to be applied for the grant of summary judgment, because he stated it correctly earlier in his decision,<sup>5</sup> referring to the decision of this Court in *Krukziener v Hanover Finance Ltd.*<sup>6</sup> We now turn to the other issues, which we will evaluate in the light of the test set out in *Krukziener v Hanover Finance Ltd.*

### **Did TEL's pleadings cause prejudice?**

[36] The essence of this ground of appeal was that the way TEL pleaded its case for summary judgment unfairly prejudiced the conduct of Ms Mitchell's opposition.

[37] Mr Woodhouse criticised the way TEL presented its summary judgment claim in the High Court. He said that some issues which had been raised by Mr Richards relating to the sale process of unit 3D were not addressed in the primary affidavits filed in support of the summary judgment application. Similarly, the questions relating to the renting out of unit 3H and the appointment of a receiver of rents were also not addressed. He said this created prejudice to Ms Mitchell and should have led to the summary judgment application being declined. He also argued that this was relevant to the application to adduce further evidence because it explained why evidence which is not fresh was not adduced in the High Court.

[38] Mr Woodhouse said this case had some similarities to *Westpac New Zealand Ltd v Cooper*.<sup>7</sup> In that case Duffy J said that the failure by an applicant for summary judgment to adduce evidence relevant to proving material allegations can result in the application being dismissed where that failure creates real prejudice to a defendant. Mr Woodhouse said that the problem identified by Duffy J in *Westpac New Zealand Ltd v Cooper* also arose in the present case.

[39] Mr Woodhouse accepted that there were far greater deficiencies in the pleadings in *Westpac New Zealand Limited v Cooper* than in the present case. We agree. The problem identified by Duffy J in *Westpac New Zealand Ltd v Cooper* was that Westpac had failed to plead and provide evidence of matters which were

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<sup>5</sup> At [16].

<sup>6</sup> *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307, (2008) 19 PRNZ 162 at [26].

<sup>7</sup> *Westpac New Zealand Ltd v Cooper* HC Auckland CIV-2009-404-900, 29 January 2010.

required to prove its claim. The complaint against TEL in this case is that it did not anticipate matters that would be raised by way of positive defence when the possibility of such defences being raised had been signalled in advance.

[40] We think it is clear from the judgment of Duffy J that if that had been the problem in *Westpac New Zealand Ltd v Cooper*, the solution would have been to grant an adjournment to allow time for Mr Cooper to adduce rejoinder evidence, dealing with the matters that had been raised for the first time in Westpac's reply evidence. It seems to us that that is the answer in the present case as well. However, no adjournment was sought in the High Court, presumably because Ms Mitchell considered that the evidence before the Court already placed matters in issue to the extent required to resist a summary judgment application.

[41] There is an element of the pot calling the kettle black in Mr Woodhouse's argument on this point. At least some of the grounds of opposition pursued by Ms Mitchell in the High Court had not been heralded in the notice of opposition and further grounds are now raised on appeal. The criticisms of TEL's pleadings have to be seen in that context.

### **Estoppel?**

[42] Mr Richards said in his affidavit in opposition to summary judgment that after TEL refused consent to unit 3D being sold under the Betros transaction described above,<sup>8</sup> the employee at TEL with whom he was dealing, Mr Dellabarca, told him that TEL would bear the loss of any shortfall if it failed to achieve at auction an amount equivalent to that available from the Betros contracts. Mr Richards' evidence was as follows:

In the course of the discussions with Mr Dellabarca I asked him what would happen if TEL subsequently took the apartments to auction and if TEL realised less than what the companies would receive under the "Betros" contracts and, if so, who would be responsible for the shortfall. Mr Dellabarca's reply to me was that this would be to "Trustees Executor's [sic] cost if that were the outcome. I reported these comments to [Ms Mitchell].

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<sup>8</sup> At [13].

[43] He said that this prompted him and Ms Mitchell to stop actively marketing the apartments for sale.

[44] In the High Court, it was argued on behalf of Ms Mitchell that TEL ought not to have declined the Betros proposal. The Associate Judge found against Ms Mitchell. He referred to the reasons given by TEL for doing so, and concluded that TEL was not obliged to accept arrangements that could drift on indefinitely. The Associate Judge said TEL was entitled to expect prompt action. It was entitled to reject an arrangement which was so open ended as to time. Its rejection of the Betros proposal could not be seen as a breach of the duty to take reasonable care to obtain the best price reasonably obtainable as at the time of sale.<sup>9</sup> Mr Woodhouse accepted that the refusal to consent to the Betros transaction may not, of itself, amount to a failure to obtain the best price reasonably obtainable, as its refusal was not an element of TEL's exercise of its power of sale. However, he said it was key to the estoppel argument.

[45] The Associate Judge noted that although TEL attacked Mr Richards' assertion as to what Mr Dellabarca was said to have told Mr Richards, it did not directly contradict Mr Richards' evidence by filing an affidavit from Mr Dellabarca as it could have. The Associate Judge noted TEL's response, that if an arrangement of this significance had really been agreed to one would have expected to see it reflected in communications exchanged between the party, and this was not the case. Similarly, TEL argued that it was surprising that a gratuitous assumption of risk would have been entered into by Mr Dellabarca, particularly as TEL did not have valuations of the properties at the time the representation was alleged to have been made. The Associate Judge also noted TEL's argument that Mr Dellabarca would not have had authority to negotiate such an arrangement.

[46] In the end the Associate Judge said that notwithstanding his considerable reservations, and given particularly the absence of an affidavit from Mr Dellabarca, he had to conclude that Ms Mitchell may be able to establish that the representation was in fact made.<sup>10</sup>

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<sup>9</sup> At [48]–[49].  
<sup>10</sup> At [59].

[47] The Associate Judge noted the requirements for an estoppel, being:

- (a) a belief or expectation encouraged through some action, representation or omission to act;
- (b) the belief or expectation being reasonably relied on by the party alleging the estoppels;
- (c) detriment being suffered if the belief or expectation is departed from; and
- (d) it being unconscionable for the party against whom the estoppel is alleged to depart from the belief or expectation.

[48] The Associate Judge found that, even if the representation had been made by Mr Dellabarca, no detriment had been suffered by Ms Mitchell. The Associate Judge said that Ms Mitchell had not spelt out what course she would have taken if the alleged representation had not been made, and this made it difficult to understand what prejudice she said had resulted. He noted that Ms Mitchell had said that, but for the representation, she would have continued her efforts (alongside Mr Richards) to sell to sell the property. He said it was implicit in this that they would have found buyers at higher values than were achieved at auction, but as they had had plenty of opportunity to sell the properties before and had failed to obtain a higher price, there was no basis to make the implication their position required.

[49] That meant that the argument on detriment stood or fell on the likelihood that the Betros proposal might have saved the day. The Associate Judge did not consider that it would have, because it was unrealistic, given that it anticipated a price of \$586,000 for unit 3D, which was well in excess even of the valuation set by the valuer engaged by Mr Richards and Ms Mitchell, Mr Buckley. The Associate Judge had already found this was not a reliable valuation, but, even if it had been, the Betros offer was still unrealistic.

[50] The argument on the estoppel issue in this Court turned on two contrasting positions. For TEL, Mr Gordon argued that the Associate Judge ought to have found that the representation was never made by Mr Dellabarca. For Ms Mitchell, Mr Woodhouse said that the Associate Judge had misunderstood the overall nature of the Betros transaction in holding there was no detriment.

[51] We turn first to Mr Gordon's argument. He argued that the Associate Judge ought to have rejected the allegation that Mr Dellabarca had made the representation, even though it was not challenged. He said if the Associate Judge had correctly applied the approach outlined in *Eng Mee Yong v Letchumanan*,<sup>11</sup> he would have rejected the evidence of Mr Richards outright.

[52] In *Eng Mee Yong v Letchumanan*, the Court was dealing with an appeal from a case in which the registered proprietor of land had applied for the removal of a caveat. One aspect of the applicable test was whether there was a serious question to be tried. There was conflicting affidavit evidence and, it was argued, this meant there was a dispute that could be resolved only at trial. However, Lord Diplock for the Board made it clear that even though it would normally be inappropriate to attempt to resolve conflicts of evidence on affidavit, a court was not bound to accept uncritically a statement in an affidavit "however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent or inherently improbable in itself it may be".<sup>12</sup>

[53] In this case, Mr Gordon highlighted the following factors:

- (a) The Associate Judge himself hesitated in accepting Mr Richard's evidence.<sup>13</sup>
- (b) Mr Richards had already engaged in a subterfuge under which he tried to persuade TEL to release Ms Mitchell from her guarantee so that he remained solely liable, at a time when he knew that he was about to go bankrupt.

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<sup>11</sup> *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341 per Lord Diplock.

<sup>12</sup> At 341.

<sup>13</sup> At [55].

- (c) The timing of the alleged statement made it inherently improbable. The statement was alleged to have been made on or about 3 June 2008, at which time TEL's Property Law Act notices had not expired, so it had no power of sale, and it did not have any valuation advice or advice about the appropriate method to conduct a mortgagee sale.
- (d) The statement effectively forgave the outstanding liability of the guarantors for no consideration, in circumstances where TEL was already on notice, as a result of the advice given to it by Mr Richards and Ms Mitchell, that the auction undertaken on behalf of Mr Richards and Ms Mitchell had attracted only offers in the "very very low 3's".
- (e) Such a forgiveness would have been beyond Mr Dellabarca's delegated authority and did not measure up with the actions taken by Mr Dellabarca later, which assumed ongoing liability on the part of the guarantors.

[54] Mr Gordon went further. He said that the alleged representation was also inconsistent with documents generated by Mr Richards and Ms Mitchell after the auction in August 2008 at which unit 3D sold but unit 3H did not. He pointed to:

- (a) An email of 15 August 2008 which responded to an email from TEL informing Mr Richards and Ms Mitchell that if offers of \$330,000 were accepted at auction, this would leave a shortfall of \$636,613 "for which you will be required to pay". The reply simply asked when settlement date would be, and did not contest the statement that Mr Richards and Ms Mitchell were liable for any shortfall.
- (b) Mr Richards' letter of 17 August 2008 in which he asked TEL to countersign offers that had been received for units, including unit 3H, for much higher amounts than the offers themselves. In that letter, Mr Richards complained about TEL's sale strategy, noting that this had "prejudicially affected our position, given the fact that there were

offers prior to going to the market of \$2.1 m - \$2.4m”. If the agreement of TEL to waive the guarantors’ liability had been entered into, there would have been no prejudice to Mr Richards’ position, nor to Ms Mitchell’s.

- (c) Mr Richards’ email of 30 June 2009 to Mr Gordon after service of the formal demands, in which he raised issues about the mortgagee sale process, promising to give detail about that in due course, and asked for a breakdown of the \$586,464.09, being the amount demanded from Mr Richards and Ms Mitchell. Mr Gordon said one would have expected that he would at this stage have pointed out that there was in fact no liability on his part or that of Ms Mitchell because of Mr Dellabarca’s representation. This was followed up with a later email on 5 August 2009, which again did not mention Mr Dellabarca’s representation.
- (d) The letters sent by Carter and Partners on behalf of Ms Mitchell after service of the formal demands (on 28 August and 11 September 2009), which again do not mention Mr Dellabarca’s representation.

[55] We accept Mr Gordon’s submission that, when the *Eng Mee Yong v Letchumanan* approach is applied to Mr Richards’ assertion about Mr Dellabarca’s representation, it becomes clear that Mr Richards’ evidence can be discounted. There is not a single contemporaneous document or exchange which is consistent with Mr Richards’ story and it is simply unbelievable that such a key representation affecting a very significant personal liability on the part of Mr Richards and Ms Mitchell would have escaped mention in every document. Much of Mr Richards’ interaction with TEL would have been unnecessary and meaningless if neither he nor Ms Mitchell had any real economic interest in the outcome of the mortgagee sales process. We accept they may have had a remaining interest if there had remained a possibility of an excess in the sale price over the amount owed to TEL, but it is clear that by the time the sale process took place the prospect of sufficient funds being raised to pay TEL and leave some equity for River Cottage was illusory. In our view, therefore, the Associate Judge ought not to have accepted the possibility that

Mr Richards' assertion about Mr Dellabarca's representation could have been proved at trial.

[56] For completeness, however, we go on to consider whether the Associate Judge was right to find that there had been no detriment. In our view, the only possible detriment would have been if the Betros proposal had had real substance. In that event the purchase price of \$586,000 would have had to be paid by the Alpha B Trust and from this the underwriting fee would have to have been paid to another entity associated with Mr Betros. The net receipt would have been \$410,000.

[57] In that respect we accept Mr Woodhouse's submission that the Associate Judge's assessment that the purchase price of \$586,000 was unrealistic failed to take into account the fact that the \$586,000 purchase price would be balanced by the underwriting fee and thus amount to a net cost to the Betros interests of \$410,000. However, Mr Betros made it a condition of the underwriting agreement that TEL would have to provide a discharge of mortgage on receipt of 70 per cent of the stated purchase price for each company, and there was no reason why TEL should have been bound to do that. That would have been particularly so if, as Mr Richards suggested, TEL had no recourse to guarantors.

[58] At a more general level, we agree with the Associate Judge that the market had been well and truly tested by the marketing efforts made by Mr Richards and Ms Mitchell, and their own verdict was that offers much above \$300,000 were not forthcoming. There was a degree of unreality about the Betros transaction: it looked too good to be true and, in fact, probably was too good to be true.

[59] Nor do we think that any marketing efforts by Ms Mitchell would have achieved a better outcome than those undertaken by TEL. Ms Mitchell had had her chance to sell the apartments and had failed to do so. There is nothing in the evidence that suggests that her complete lack of success would suddenly be replaced by a successful sale at an amount greater than achieved by TEL. Ms Mitchell referred to an offer said to have been submitted by another real estate agency but that was conditional on finance. There was nothing to show that this had any prospect of going unconditional and the buyer did not later materialise.

## **Breach of s 176 of the Property Law Act?**

[60] Under s 176 of the Property Law Act, a mortgagee who exercises the power to sell mortgaged property owes a duty of reasonable care to mortgagors and guarantors (among others) “to obtain the best price reasonably obtainable at the time of sale”.

[61] Mr Carter, who had the carriage of this aspect of the case for Ms Mitchell, argued that there was evidence to support an allegation of such a breach in this case. He said the matter should have been required to go to trial because of this. There were four elements to his argument:

- (a) TEL’s failure to allow the Bertros transaction to proceed;
- (b) TEL’s failure to pursue an offer of \$2.4 million for all of the six units over which it had security;
- (c) TEL’s decision to auction all six apartments together, before individual auctions of each apartment (if the global auction did not succeed) prevented the best price being obtained;
- (d) The lack of any explanation for TEL’s decision to accept \$330,000 for unit 3D.

[62] We will deal with each of these in turn.

### *Bertos transaction*

[63] We have already dealt with this aspect of the case. We are satisfied that TEL’s refusal to pursue the Bertros arrangement does not, of itself, indicate a breach of s 176. We are satisfied that TEL acted reasonably in relation to the Bertros transaction.

*The offer for \$2.4 million*

[64] We do not see any merit in this argument. While there was an indication of interest at that price level, the offer was conditional and, according to Mr Brain's evidence, involved a property "trade" and was still subject to due diligence. There were also a number of unconditional offers but these were at very low price levels. There is no evidence to support Mr Richard's contention that Ms McGoverin had told him TEL had decided not to accept on the basis that it could "do better" at auction. In any case, had the interest been genuine, the offeror could have participated in the auction. Apparently it did not. In those circumstances we do not think there was anything unreasonable about TEL's decision to proceed with the auction, which did not preclude the \$2.4 million offeror participating if it wished to do so.

*Auctioning all six apartments*

[65] Mr Carter argued that the offer of all six apartments together at the outset of the auction discounted the value and led to the obtaining of a lower price than otherwise would have been the case. He relied on evidence from a valuer, Mr Buckley, who expressed that view, though without elaborating or particularising his reasons. This view was rejected by the Associate Judge. He said the fact that all were to be offered together at the outset of the auction would not have deterred buyers for individual apartments who knew that the individual auctions would proceed immediately after the global auction if the global auction was not successful. We note that TEL acted in accordance with advice from Barfoot & Thompson in this regard and we do not see any reason to gainsay that advice.

[66] Mr Carter suggested that Barfoot & Thompson's advice was not independent because they stood to earn commission from the sales. But Barfoot & Thompson stood to earn commissions from the sales however the properties were sold. Barfoot & Thompson had a clear interest, in common with TEL, River Cottage, Mr Richards and Ms Mitchell, to achieve as many sales as possible at the best possible price.

*No explanation for sale at \$330,000*

[67] Mr Carter said there was no evidence given why TEL accepted \$330,000 for unit 3D at the mortgagee's auction nor any explanation as to what reserve was set for unit 3D or who set it. He said this meant it was at least arguable that TEL did not exercise reasonable care in exercising the power of sale when it had no independent valuation advice as to what price would be reasonable to accept for the units.

[68] Mr Carter pointed to the valuation evidence of Mr Buckley, who had assessed the value of unit D at \$490,000 two months prior to the auction. The Associate Judge rejected that for these reasons:

- (a) A discrepancy between the sale price and the valuer's opinion may, not must, establish that a breach of duty of care has occurred. We agree. As Asher J stated in *Public Trust v Ottow*,<sup>14</sup> a sale for a price less than the current market value assessed by valuers does not of itself establish a breach of duty.
- (b) Whether there has been a breach of a duty of care must be assessed by considering factors that provide an indication of the reliability and accuracy of the valuer's report. Associate Judge Doogue made a number of criticisms of Mr Buckley's report and noted that it was dated two months before the date of the mortgagee auction. It also noted that there had been some low sales in 2008, yet used sales evidence that dated back to 2007. Mr Buckley himself accepted that mortgagee sales will lead to a depression of the value by 15 to 20 per cent, which even on his assessed value of \$490,000 left a mortgagee sale price of \$392,000. We agree with Associate Judge Doogue that there were reasons to be cautious in accepting Mr Buckley's view.
- (c) If the mechanism adopted for the mortgagee sale properly tested the market, then the results obtained at auction, rather than the opinion of the valuer, must be taken as demonstrating what the market value of

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<sup>14</sup> *Public Trust v Ottow* (2009) 10 NZCPR 879 (HC).

the property was. Further, if the report of the expert on its face indicates that conclusions reached are questionable, then the Court will have less concern about the divergence between what the valuer said the property was worth and what was actually obtained. We have already mentioned our reservations about Mr Buckley's report. We are satisfied that the mortgagee sale process was adopted according to appropriately qualified expert advice from Barfoot & Thompson and that the sales method<sup>15</sup> met the requirements for a sale process adequately testing the market at the time of sale.

[69] Mr Gordon pointed out that TEL engaged a valuer to undertake a valuation but Ms Mitchell's co-guarantor, Mr Richards, frustrated this.<sup>16</sup>

[70] Mr Carter said the sales process was flawed because the marketing period of three weeks was too short and the open homes were for 30 minutes each. He said the marketing was "economical" (we assume this is a claim that it was inadequate) and the units were sold too hastily (in fact, only unit 3D was sold: the complaint in relation to unit 3H is that it has not been sold). The Associate Judge rejected these criticisms and found the marketing campaign had been effective in generating interest in the apartments. We agree.

*Conclusion: s 176*

[71] We agree with the Associate Judge that the fact that Mr Buckley had valued unit 3D at a higher value than the price obtained on its sale does not provide a basis for arguing that the sale was at an undervalue. The evidence of the failed sales efforts of Mr Richards and Ms Mitchell and the evidence as to the sale process followed by TEL indicates the price obtained was a proper determination of the unit's value at the time of sale by the market. In any event, given that the effort to obtain a valuation was frustrated by Mr Richards, it is hard to sympathise with Ms Mitchell about the lack of a contemporaneous valuation of unit 3D.

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<sup>15</sup> Outlined above at [18]–[23].

<sup>16</sup> See [17] above.

[72] We agree therefore with the Associate Judge’s conclusion that it was not arguable that there was a breach of s 176 in this case, and that he was right to reject this basis for declining summary judgment.

### **Mortgagee in possession of unit 3H?**

[73] Mr Woodhouse submitted that it was arguable that TEL became a mortgagee in possession of unit 3H through its appointment of Mr Brain of Barfoot & Thompson as a receiver of rents, and that it failed to comply with the duties imposed by the Property Law Act on mortgagees in possession. As an additional point of appeal, he argued that if TEL was not a mortgagee in possession, it was arguable that Mr Brain was a receiver in terms of the Receiverships Act 1993, and the obligations arising from the appointment of a receiver had not been complied with either.

[74] Mr Woodhouse said that because TEL failed to comply with the relevant statutory obligations as mortgagee in possession, there was an arguable defence or counterclaim for the difference between the market rent for unit 3H and the rent actually received for that unit. He also argued that the failure to comply with the relevant obligations, particularly the failure to publish notices and send reports supported Ms Mitchell’s claims that TEL breached its equitable duty of good faith as mortgagee and/or acted oppressively in terms of the CCCFA. Mr Woodhouse accepted that it was “problematic” as to whether a breach of the relevant duties in this context would give rise to a right to damages, and did not ask us to rule that damages could be payable solely because of breaches of statutory notification and reporting duties.

[75] In his written submissions, Mr Woodhouse suggested that Associate Judge Doogue had accepted that TEL was a mortgagee in possession of unit 3H, but what the Associate Judge actually said was:<sup>17</sup>

It would appear, and I accept for the purposes of the present decision, that [TEL] by arranging tenants and accepting rent probably became a mortgagee in possession.

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<sup>17</sup> At [80].

[76] Mr Woodhouse said it was undisputed that TEL's agent, Barfoot & Thompson, had full access to unit 3H and conducted pre-auction open homes in relation to both units. He said this means it may have been a mortgagee in possession by July or August 2008. He also said it was clear from TEL's evidence that it received rent from unit 3H from March 2009. In oral argument he said that TEL's agent had keys and selected the tenant for unit 3H and required the payment of rent to TEL's agent, rather than to River Cottage (or presumably, Ms Mitchell, once River Cottage was struck off the Register of Companies). He said the facts fell within the description of a mortgagee in possession in terms of s 137 of the Property Law Act. Of course, the striking off of River Cottage meant something had to be done to ensure that the rent was collected and applied in reduction of the mortgage debt.

[77] Mr Gordon resisted this argument. He pointed to the terms of the mortgage between River Cottage and TEL which gave an express contractual power to TEL, after the occurrence of an Event of Default, to appoint a "receiver of income". The relevant provision provided that any such receiver of income "shall be deemed to be the agent of the mortgagor who shall be solely responsible for the [receiver of income's] acts or defaults" and that the exercise of this power "shall not be construed as an entry into possession by the Mortgagee". He said that, given this provision, and given that TEL had done no more than appoint Mr Brain to receive rents, it was not arguable that TEL was a mortgagee in possession. He said that a person undertaking the role of a receiver of rents did not fit within the definition of "receiver" in the Receiverships Act.

[78] Determining whether TEL was mortgagee in possession or Mr Brain was a receiver in terms of the Receiverships Act requires the resolution of disputed facts which is difficult in the summary judgment context. In particular, it is unclear whether Mr Brain's task was limited to receiving rent and it is also unclear whether his role was such that Ms Mitchell was deprived of access to, or control over, the unit. Mr Woodhouse sought to rely on the new evidence in relation to those issues, but we have ruled that evidence out. Without the resolution of those factual disputes it is difficult to apply the relevant legal tests. In those circumstances we consider

that the Associate Judge was right to proceed on the basis that TEL may have been a mortgagee in possession. We will do the same.

[79] The impact of this approach is that it brings into play three grounds for resisting summary judgment. The first is a counterclaim or defence based on an allegation that unit 3H was rented for a below market rent. The second is breach of the duty of good faith. The third is oppression in terms of the CCCFA. We can deal with the first of these briefly. Having done so, we will consider the second and third in some detail.

[80] The counterclaim for insufficient rent was pursued in the High Court but rejected by the Associate Judge on the basis that it had not been properly raised in the notice of opposition, and that TEL had therefore been deprived of the ability to give any explanation. The proposed counterclaim for deficiency of rent in this Court relied on fresh evidence which we have not allowed to be admitted. In those circumstances we take the same approach as that taken in the High Court to this aspect of the case. That does not prevent Ms Mitchell from pursuing the counterclaim in separate proceedings, however.

### **Breach of duty of good faith?**

[81] The case for Ms Mitchell was that while TEL's breach of duty in relation to unit 3D arose from the fact that it decided to sell, its breach in relation to unit 3H was that it decided not to sell. Mr Woodhouse said that it was arguable that TEL's failure to sell unit 3H had breached TEL's duty to Ms Mitchell and led her to suffer loss. There were a number of heads to this, but the principal one was that TEL's failure to comply with the statutory notice requirements for mortgagees in possession meant that Ms Mitchell was deprived of the opportunity to undertake a sale of unit 3H herself. Such a sale could have reduced her debt and the accrual of interest on the debt. It seems to us that the fatal flaw in this argument is that Mr Woodhouse accepted in argument that Ms Mitchell knew that unit 3H had not sold at the mortgagee auction. He was right to do so: it was clear on the evidence. As this claim depended on lack of knowledge on her part, this fact was significant. Notwithstanding this, he argued that because no notices were given to Ms Mitchell

by TEL as mortgagee in possession, Ms Mitchell assumed that unit 3H must have sold and therefore was deprived of the ability to sell it herself.

[82] Given the ongoing correspondence between Ms Mitchell and/or Mr Richards and TEL during this period, there is nothing to support the legitimacy of such an assumption. There was also the practical difficulty that the mortgagor, River Cottage, had by this stage been struck off the Register of Companies so was, itself, incapable of undertaking a sale.

[83] Mr Woodhouse said that TEL's actions breached the "duty to be fair" described in *Palk v Mortgage Services Funding plc*.<sup>18</sup> He said that TEL had effectively gambled with the unit at the expense of Ms Mitchell by not selling it and instead renting it on terms that yielded net rent receipts that were substantially less than the interest accruing on the debt. Mr Woodhouse did not allege an absence of good faith on TEL's part, but said that this was not a requirement for a successful claim, contrary to the view expressed by Associate Judge Abbott in *Contributory Mortgage Nominees Ltd v Harrison*.<sup>19</sup>

[84] Mr Woodhouse accepted that delay in selling the property did not on its own amount to a breach of the equitable obligation of good faith, as Associate Judge Doogue had found. But he sought to rely on additional evidence as to what he described as being the "obstruction" of Ms Mitchell's attempt to sell unit 3H to support the case that a breach of good faith occurred in this case. We have not allowed the admission of that evidence for the reasons we have already given.

[85] Mr Gordon argued that *Palk* did not provide support for an equitable duty broader than the duty not to act in bad faith. He said that *Palk* itself related to a particular statutory context and did not cast doubt on the decision of the Privy Council in *China and South Seas Bank Ltd v Tan*.<sup>20</sup>

[86] We accept Mr Gordon's submission in that regard. We do not see any reason to go behind well established authorities such as *Apple Fields Ltd v Damesh*

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<sup>18</sup> *Palk v Mortgage Services Funding plc* [1993] 2 WLR 415 (CA) at 420.

<sup>19</sup> *Contributory Mortgage Nominees Ltd v Harrison* (2005) 6 NZCPR 824 (HC).

<sup>20</sup> *China and South Seas Bank Ltd v Tan* [1990] 1 AC 536 at 545.

*Holdings Ltd*<sup>21</sup> to the effect that the mortgagee has the right to decide when it is appropriate to sell the property, and to make that decision in its own interest.<sup>22</sup> Further, *Palk* has not been cited in the Court of Appeal in analogous circumstances. The case relied on by Mr Woodhouse, *Harris v ANZ Banking Group (NZ) Ltd*,<sup>23</sup> involved a quite different issue as to the extent to which it is permissible for the mortgagee to incur expenses when selling the property. The Court merely noted *Palk* as authority for the long settled common law (and now statutory) rule that the mortgagee has a duty to obtain the best price reasonably available.<sup>24</sup>

[87] We do not consider there is an arguable defence of a breach of equitable duty in relation to unit 3H.

### **CCCFA oppression?**

[88] Mr Woodhouse submitted that it was arguable that Ms Mitchell would be entitled to have the credit contract between River Cottage and TEL reopened under s 120 of the CCCFA because TEL had exercised its powers under the mortgage in an oppressive manner. He emphasised that the definition of oppressive in s 118 includes “in breach of reasonable standards of commercial practice” and that case law on the section emphasises that aspect of the definition.<sup>25</sup>

[89] Mr Gordon argued that the oppression provision did not apply in this case because there was no consumer credit contract as defined in s 11 of the CCCFA. However, we agree with Mr Woodhouse that s 117 makes it clear that any credit contract can be the subject of reopening under s 120, not just consumer credit contracts.

[90] The basis of the argument made in this Court differed somewhat from that made in the High Court. In that Court the Associate Judge commented that the ground had not been adequately particularised.

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<sup>21</sup> *Apple Fields Ltd v Damesh Holdings Ltd* [2001] 2 NZLR 586 (CA) at [53].

<sup>22</sup> See also *Public Trust v Ottow* (2009) 10 NZCPR 879 (HC) at [17](a).

<sup>23</sup> *Harris v ANZ Banking Group (NZ) Ltd* CA165/01, 10 June 2002.

<sup>24</sup> At [16].

<sup>25</sup> *GE Custodians v Bartle* [2010] NZSC 146, [2011] 2 NZLR 31 at [46], citing *Greenbank New Zealand Ltd v Haas* [2000] 3 NZLR 341 (CA) at [24].

[91] As we understand it, the ground now pressed by Mr Woodhouse is that TEL's conduct fell below reasonable commercial standards because it did not comply with the requirements imposed on a mortgagee in possession by the Property Law Act. He said TEL had also fallen below those standards because it had entered into possession of unit 3H and had effectively prevented Ms Mitchell from taking steps to sell that unit because it had failed to advise her that it had not sold unit 3H, had "gambled" with the equity in the property, had not provided information on the loan when requested and had not met its obligations to furnish reports required by the Property Law Act.

[92] There is a degree of overlap in all of these allegations and they also duplicate the allegation of breach of equitable duty. But, the root of the argument is that TEL should not have delayed in selling unit 3H. As we have already noted, there is a "damned if you do and damned if you don't" element to this argument, given the complaints about the sale of unit 3D. We are satisfied for the reasons we have already given that TEL was entitled to choose the most propitious moment to sell the unit and there is nothing in this case to show that its choice was not in accordance with reasonable commercial practice.

[93] TEL considered (and still maintains) that its actions in appointing Mr Brain to receive the rent from unit 3H did not make it a mortgagee in possession. The essence of the argument is, therefore, that if TEL's view is wrong on that score, and it did become a mortgagee in possession, its conduct becomes oppressive. We do not consider this is arguable. TEL was entitled to choose when to sell and Ms Mitchell knew that 3H had not sold. There was regular contact between Ms Mitchell or Mr Richards and TEL and nothing to indicate that unit 3H had been sold. When pared back to its core, the argument is that a failure by a lender to comply with the regulatory requirements of the Property Law Act renders its conduct as mortgagee oppressive in terms of the CCCFA. No authority was cited in support of that proposition, and we are satisfied that it is not reasonably arguable.

## **Quantum**

[94] For the reasons given earlier,<sup>26</sup> we did not permit the appellant to raise this ground.

## **Result**

[95] The appeal is dismissed.

## **Costs**

[96] TEL seeks costs. Ms Mitchell is legally aided. In the High Court, the Associate Judge made an order under s 40(5) of the Legal Services Act 2000 specifying that, but for the fact that Ms Mitchell was in receipt of legal aid, he would have awarded costs against her on a scale 2B basis plus disbursements. There has been no appeal against that order and Mr Gordon sought a similar order in this Court under s 45 of the Legal Services Act 2011, which is now the applicable legislation.<sup>27</sup>

[97] An award of costs for a standard appeal on a band A basis and usual disbursements would have been appropriate in the present case. There was no claim for any higher award of costs under any provision of the mortgage or the guarantee. We are satisfied that it is appropriate to make an order under s 45(5).

[98] We therefore order that an order for costs for a standard appeal on a band A basis plus usual disbursements would have been made against Ms Mitchell in relation to the present appeal if s 45 of the Legal Services Act 2011 had not affected Ms Mitchell's liability to costs.

Solicitors:  
Carter & Partners, Auckland for Appellant  
Buddle Findlay, Wellington for Respondent

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<sup>26</sup> At [29] above.

<sup>27</sup> Legal Services Act 2011, s 132.