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**FROM THE BENCH – CASE LAW UPDATE:  
NEW ZEALAND**

**Hon Justice Venning**  
Chief High Court Judge, New Zealand

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[1] I propose to discuss four recent New Zealand decisions of interest to those involved in banking and financial services. They cover registration of security interests; the latest appellate authority involving penalty clauses; peer-to-peer lending; and a claim involving refinancing swaps. My written paper also refers to two other cases involving the consequences for a receiver where their appointee does not act in good faith, and the extent of the obligation of disclosure to the markets during an administration.

[2] First, I set out a short background to the establishment and operation of the Commercial Panel in the High Court of New Zealand.

**Commercial Panel**

[3] The Commercial Panel of the High Court of New Zealand was established pursuant to s 19 of the Senior Courts Act 2016.

[4] The Panel was created primarily in response to requests from the profession for a degree of commercial specialisation in the High Court.

[5] Of the 40 High Court Judges, 13 have been allocated to the Commercial Panel. Judges on the Commercial Panel also deal with other business of the Court, such as general civil, judicial review and criminal cases.

[6] The procedure for allocation of a panel Judge is relatively informal. A plaintiff or defendant can, by memorandum, nominate the proceeding be dealt with by a Panel Judge. The nomination must be served on the other party who may either consent or

oppose. The memoranda are referred to the Chief High Court Judge. The Chief High Court Judge may either convene a hearing or make a decision on the papers.<sup>1</sup>

[7] The Senior Courts (High Court Commercial Panel) Order 2017 provides for the types of commercial proceedings which may be assigned to a panel Judge. The proceedings must involve:<sup>2</sup>

- (a) a commercial dispute between parties engaged in trade or commerce where the value of the claim, counterclaim, or transaction in dispute or at issue is not less than \$2 million;
- (b) an application under the Arbitration Act 1996 where the sum at issue is not less than \$2 million;
- (c) appeals from or applications for judicial review of regulatory decisions affecting domestic or international commerce;
- (d) proceedings brought by public authorities to enforce regulatory standards of commercial behaviour;
- (e) proceedings involving the amalgamation of companies, mergers, takeovers, or corporate insolvency where the public interest or complexity warrants determination by a panel Judge;
- (f) claims or disputes arising out of or relating to intellectual property rights; and
- (g) other proceedings of a commercial character that are of sufficient private or public importance to justify consideration by a panel Judge.

[8] Even if a proceeding falls within one or more of the categories it will not necessarily be assigned to a panel Judge if it does not exhibit a significant commercial element or if there is no real dispute about the commercial issue.<sup>3</sup>

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<sup>1</sup> High Court Rules 2016 (Commercial Panel) Amendment Rules 2017, rule 29.2.

<sup>2</sup> Senior Courts (High Court Commercial Panel) Order 2017, cl 5(1).

<sup>3</sup> Senior Courts (High Court Commercial Panel) Order 2017, cl 5(2).

[9] The allocated Judge will deal with the proceedings throughout the interlocutory stages. The allocated Judge is also expected to hear the substantive fixture.

[10] Since the panel became operative in September 2017, 26 applications for panel judges for the case to be heard have been made. Only two have been declined. Of the 24 cases assigned to Commercial Panel Judges, 10 have been resolved. There are 14 active cases.

[11] The cases before the panel include claims by regulators for breaches of Commerce Act and the Financial Markets Conduct Act; takeovers requiring approval under the Companies Act; major commercial claims; interpretation of commercial contracts; breaches of directors' duties; trademark disputes, Fair Trading Act claims; and significant share purchase disputes.

### ***Partners Finance and Lease Ltd v Richmond***

[12] The first case, *Partners Finance and Lease Ltd v Richmond* is a High Court decision.<sup>4</sup> Osborne J declared a security interest, registered by way of a financing statement on the Personal Property Securities Register (PPSR), imperfect on the ground the financing statement was seriously misleading.

[13] Partners Finance and Lease Ltd (Partners) is a finance company. In 2015, Partners financed the purchase of a bulldozer and leased it to Westland Hire Ltd (Westland). Partners title to the bulldozer became a security interest pursuant to s 17 of the Personal Property Securities Act 1999 (the Act). Westland secured rights in the bulldozer under s 40(3) of the Act. Partners registered the financing statement on the PPSR on 17 November 2015.

[14] Westland purported to sell the bulldozer to Richmond, the first defendant, in December 2017. Richmond borrowed funds from ASB Bank Ltd (ASB), the second defendant, to finance the purchase and granted security to ASB. ASB registered its financing statement on the PPSR on 6 December 2017. ASB had undertaken a search of the PPSR on 24 November 2017 and had not discovered Partner's security interest.

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<sup>4</sup> *Partners Finance and Lease Ltd v Richmond* [2019] NZHC 34, [2019] NZAR 168.

[15] Partners applied for summary judgment, seeking a declaration as to its ownership and an order that ASB remove its security from the PPSR.

[16] ASB applied for summary judgment as a defendant on the basis that Partners' security interest was unperfected. Section 66(a) of the Act confirms that a perfected security has priority over an unperfected security.

[17] The Judge determined that ASB's security interest was perfected. ASB had given value to Richmond for the security interest. Richmond had rights in the bulldozer. ASB's security interest was enforceable against third parties as Richmond had signed the security agreement and the financing statement had been registered on the PPSR.<sup>5</sup>

[18] The Judge then considered whether Partners had perfected its prior security interest. The Judge noted the requirement to describe the collateral to which the security interest attaches when registering it. He then referred to ss 149-152 of the Act, which provide for validity of registrations of financing statements. A seriously misleading defect in a financing statement will invalidate its registration, rendering it imperfect.

[19] The Judge adopted previous authority to the effect a seriously misleading error is one that "would prevent a registration being disclosed by a properly formatted search in the relevant searchable field."<sup>6</sup> The Judge noted that such a test eliminates any subjective assessment of what a searcher of the register might or should have been taken to have known.

[20] The Act requires a description of the collateral to be contained in a financing statement to register it, including its serial number and any other data required by the Act or by the regulations.<sup>7</sup> The Personal Property Security Regulations 2001 require that all collateral must be assigned to at least one of several collateral types. Those types include both "goods: motor vehicles" and "goods: other".<sup>8</sup>

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<sup>5</sup> Personal Property Securities Act 1999, ss 36, 40(1) and 41.

<sup>6</sup> *Polymers International Ltd v Toon* [2013] NZHC 1897, (2013) 10 NZBLC 99-712 at [23].

<sup>7</sup> Personal Property Securities Act 1999, ss 142(1)(e) and (g).

<sup>8</sup> Personal Property Security Regulations 2001, schedule 1 clause 8(a) and (e).

[21] Motor vehicle is defined in s 57 of the Act to mean a vehicle that is equipped with wheels, tracks or revolving runners; is propelled by mechanical power; and has a registration or chassis number. A chassis number is defined as numbers or letters or a combination thereof stamped directly onto a plate, that are part of the permanent structure of the vehicle and are intended to identify the vehicle.<sup>9</sup>

[22] Partners had registered their security interest by way of a financing statement, on the PPSR labelling the bulldozer as “goods: other” and included the identifying number J8B00623, as found on the bulldozer. ASB, when searching the PPSR on 24 November 2017, had undertaken a motor vehicles search. As a result, its search did not identify Partners’ security interest. ASB had registered its security interest by way of financing statement, on the PPSR by labelling the bulldozer as “goods: motor vehicles”.

[23] It was common ground the bulldozer satisfied the requirements of being a vehicle as it was equipped with wheels, tracks or revolving runners, and was propelled by mechanical power. However, it was contended by Partners that the bulldozer was not a motor vehicle because it lacked a registration or chassis number.

[24] Evidence was adduced in the form of a picture of the bulldozer showing the metal plate stamped on it reading “Sequence Number J8B00623”. The Judge concluded this was a chassis number, as those combination of letters was intended to identify the bulldozer.

[25] The Judge considered the use of the collateral type “goods: other” to be misleading. The use of that descriptor conveyed the inference that the goods in question were goods other than motor vehicles. The Judge considered that satisfied the seriously misleading test. A searcher adopting an appropriate collateral type of “goods: motor vehicles” would be unable to identify the registered financial statement.

[26] There was a further aspect to the case. ASB had conducted an earlier search in September 2017, which had revealed that the bulldozer was charged. Partners argued that ASB had not been misled as it had knowledge the bulldozer was charged. But the Judge considered that ASB’s knowledge did not relieve Partners of the effect

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<sup>9</sup> Personal Property Security Regulations 2001, r 3.

of its seriously misleading registration. The Judge considered that it was the capacity or potential to mislead, and not the actual misrepresentation, that was crucial. In coming to that conclusion, he relied on the previous authorities of *Polymers International Ltd v Troon* and *Re OneSteel Manufacturing Pty Ltd*.<sup>10</sup>

### *Themes*

[27] One of the Act's objectives is to enable searchers of the PPSR to determine quickly and easily whether collateral is subject to a prior security interest. To this end, it is incumbent upon those asserting a security interest to properly record that interest in their registered financial statement. If Partners had been allowed to maintain that the bulldozer was other than "goods: motor vehicles" the above objective would be undermined. Searching parties would be obliged to conduct multiple searches, with no guarantee that their security interest would take priority over another interest they had not uncovered.

[28] While ASB may have had actual knowledge three months prior to the registration of its own financial statement, I suggest the Judge was correct to focus on whether Partners' financial statement was misleading rather than on ASB's previous knowledge. The register exists to inform financiers and buyers contemplating the purchase of items of property. Those using the system should be protected from errors made by other users of the register. Applying a strict standard as to whether a financial statement is seriously misleading will ultimately avoid unnecessary litigation and satellite arguments. The focus will properly be on the integrity of the register.

[29] The case rejects what has been dubbed the "dual search approach".<sup>11</sup> Under the dual search approach, the reasonable searcher would use both the serial number of the goods and the name of the debtor and conduct two searches, so that an error in one (name or serial number) would be cured by the other. The argument for the dual search approach proceeds on the basis that a "reasonable searcher", having access to both the debtor's name and the serial number of the goods, would undertake a search for both,

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<sup>10</sup> *Polymers International Ltd v Troon* [2013] NZHC 1897; and *Re OneSteel Manufacturing Pty Ltd* [2017] NSWSC 21.

<sup>11</sup> Barry Allan *Personal Property Securities Act 1999: Act & Analysis* (Thomson Reuters, Wellington, 2010) at 251.

given the relative ease with which such a search may be conducted and the fact that a search for only one of the criteria might not show up all encumbrances.<sup>12</sup>

[30] The argument against the dual search approach is that the errors under s 150 are not alternate criterion, of which only one must be correct.<sup>13</sup> Section 150 provides a registration is invalid if there is a seriously misleading defect, irregularity or error in either the name of the debtor or the serial number. The section uses the disjunctive “or”, instead of the conjunctive “and”, indicating that Parliament did not support the dual support approach.

[31] The final point of interest is that the case is a good example of the exception to the principle *nemo dat quod non habet* under the Act. Partners was the purchaser of the bulldozer and had leased it to Westland. Westland’s interest in the bulldozer was limited, but, when it on sold the bulldozer, Richmond acquired full ownership. In turn, the rights that Richmond acquired enabled ASB to register a security interest, by way of financing statement, over the bulldozer on the PPSR.

[32] Under s 17 of the Act a lease of over one year is a security interest. Section 52 provides that a buyer of collateral for value takes that collateral free of an unperfected security interest in the collateral. The Act allows a debtor to convey a greater interest in collateral to a buyer for value than the debtor itself possessed, provided the security interest of the secured creditor is unperfected.<sup>14</sup>

[33] In this case, Partners’ failure to register its security interest as a motor vehicle allowed Richmond to acquire better title to the bulldozer than that held by Westland. That in turn enabled ASB to attach a security interest to the bulldozer.

[34] The case is a reminder of the importance for financiers to register their security interests in a timely manner, by way of a financing statement on the PPSR, and to ensure that the details of that financing statement are correct. As the case illustrates, a defect in categorisation can deny a financier’s security interest, even where that security interest is founded in ownership of the goods in question.

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<sup>12</sup> *Re Lambert* (1994) 7 PPSAC (2d) 240 at [41].

<sup>13</sup> *Kelln v Strasbourg Credit Union Ltd* [1992] 2 WWR 310.

<sup>14</sup> *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528.

***127 Hobson Street Ltd v Honey Bees Preschool Ltd***

[35] The next case is the Court of Appeal decision of *127 Hobson Street Ltd v Honey Bees Preschool Ltd*.<sup>15</sup> The Court again considered its approach to the interpretation and application of penalty clauses.

[36] Honey Bees ran a preschool. In 2013 it leased premises on the fifth floor of 127 Hobson Street. Access was important. At the time of the lease negotiations the premises only had a single lift. The landlord agreed to install another.

[37] The lease was in two parts. The standard deed of lease was for an initial period of six years (to 2019) with three rights of renewal. In addition, the parties entered a collateral deed which provided for the installation of a second lift. The collateral deed stipulated that if the second lift was not installed within a period of two years and seven months, 127 Hobson and its director, jointly and severally, would indemnify Honey Bees “for all obligations they may incur ...under the lease including...payment of rent, [opex] ...to the expiry of the lease.”

[38] The lift was to be installed by 31 July 2016. It was not installed and compliant until 9 April 2018. Honey Bees issued proceedings seeking recovery of amounts already paid under the lease and an order for specific performance directing 127 Hobson to indemnify it for all amounts due at the time of the proceedings, and in the future, pursuant to the collateral deed. The landlord argued the clause was an unenforceable penalty. The High Court had held the clause lawful and enforceable.<sup>16</sup>

[39] The Court of Appeal confirmed that whether a clause is an unenforceable penalty is a primarily a question of construction. The ultimate question is whether the secondary obligation in the clause imposes a detriment on the promisor “out of all proportion” to any legitimate interest of the promisee in the enforcement of the primary obligation. Importantly, it recognises that contracting parties, particularly commercial entities, are likely to be the best judges of their own interests. The threshold for meeting the disproportionality test, “out of all proportion” is a particularly high one.

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<sup>15</sup> *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2019] NZCA 122.

<sup>16</sup> *Honey Bees Preschool Ltd v 127 Hobson Street Ltd* [2018] NZHC 32.



[40] The Court noted that its previous decision in *Wilaci Pty Ltd v Torchlight Fund No 1 LP (In Rec)*<sup>17</sup> was a decision applying New South Wales law, but confirmed its reasoning was applicable in New Zealand for several reasons. First, New Zealand has largely followed English law prohibiting penalties. Next, the English law had recently been restated by the UK Supreme Court in *Cavendish Square Holding BV v Makdessi*.<sup>18</sup> Third, one issue apart, there was no material difference between Australian and English law in relation to penalties.

[41] Finally, the Court considered that a commensurate redirection of the penalties prohibition in New Zealand was necessary. The common law now tends towards greater contractual freedom and the enforcement of consensually selected remedies than it did a century ago. Modern consideration of contractual overreach calls for an assessment, primarily through the lens of impaired consent, unconscionability or consumer law infringement, meaning there is less work for the prohibition against penalties to do. Save for cases of gross overreach, commercial parties should be left to the bargain they have agreed and the remedies they have consensually elected.

[42] The disproportionality test is a more sophisticated and demanding one than the comparative damages test, which prevailed under *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*.<sup>19</sup>

[43] The genuine pre-estimate test asked whether the sum stipulated in the contract as the consequence of a breach was a reasonable estimate of the loss likely to result from breach, as judged at the time of contract formation. There will be cases where the innocent promisee's protected interest will be equal to the compensation available upon breach, such as when the breach is simply the payment of a sum of money. In such a case the legitimate interest of the promisee will likely be entirely satisfied by the payment of that sum together with interest and costs. However, as the Court of Appeal noted, compensation may not be the only legitimate interest that a party has in the performance of the promisor's obligations. Some interests, both commercial and non-commercial, for instance those affecting reputation, will justify the imposition of a super-compensatory burden.

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<sup>17</sup> *Wilaci Pty Ltd v Torchlight Fund No 1 LP (In Rec)* [2017] NZCA 152.

<sup>18</sup> *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67.

<sup>19</sup> *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1914] UKHL 1, [1915] AC 79.

[44] The Court of Appeal considered that the punitive purpose test provided a valuable cross check to the disproportionality test. It tests whether the predominant purpose of the secondary obligation is to punish the promisor rather than to protect the promisee's legitimate interests in the performance of the primary obligation. The punitive purpose test is concerned with predominant rather than sole purpose. The Court confirmed that in adopting the predominant purpose test in *Wilaci*, it had rejected the sole purpose test postulated by Gaegeler J in *Paciocco v Australia and New Zealand Banking Group Ltd*.<sup>20</sup> The Court considered its approach to be consistent with the UK's Supreme Court approach in *Cavendish*, and with that of Keane J in *Paciocco*.

[45] The Court rejected the proposition that the prohibition against penalties was essentially one of equity rather than of common law. That was also the view of the UK Supreme Court in *Cavendish*, where it was noted that since the fusion of law and equity in 1873 the equitable jurisdiction appears to have left no trace in the development of the doctrine.

[46] The Court confirmed its view that the jurisdictional premise for the prohibition against penalties is breach of contract. However, as the Court noted, the High Court in Australia has taken a broader view of the operation of the penalty doctrine. In *Andrews v Australia and New Zealand Banking Group Ltd*<sup>21</sup> the applicant challenged the bank fees applied where a borrower exceeded their approved limits. The fees were not a secondary obligation imposed in the event of a breach, as no breach had been occasioned by exceeding the approved limits. The High Court of Australia held that the penalty doctrine might apply to any secondary or collateral obligation arising in the event of a failure to observe another contractual provision, whether or not that amounted to a breach.

[47] The Court of Appeal, though not deciding the point as it was not before it, rejected the approach in *Andrews* and preferred the approach of the Law Lords in *Cavendish*, noting that the Court does not possess a general review function to revise ill-advised bargains, instead the Court's role is to resolve the consequences of breach.

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<sup>20</sup> *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28.

<sup>21</sup> *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30, (2012) 247 CLR 205.

[48] On the facts, the Court determined that the clause in question was not a penalty clause. The Court noted that Honey Bees had already expended significant expense on fitting out the premises and had a legitimate commercial interest in seeing a second lift installed. Such a lift was crucial for licensing purposes allowing it to expand its operation to 50 children (when at the time it was obliged to pay rent based on having 48 children in its care, while only being licensed for 24).

[49] The Court considered the strongest point against the clause was that if 127 Hobson was only a day late, the indemnity would relieve Honey Bees of its further rental and outgoings obligations. However, as the Court considered that would only be the case for the period of a further three years and five months, after Honey Bees had already paid those amounts for two years and seven months, the strength of that argument was abated. The duration of the indemnity only ran until the end of the initial term of the lease and was limited to economic obligations.

#### *Themes*

[50] The Court confirmed that the approach to determining whether a liquidated damages clause is an unenforceable penalty is the same as that in England and Australia. It involves application of the disproportionality test. The test respects the parties right to contractual freedom and reflects the fact that a promisee might have a legitimate interest in the performance of the promisor's primary obligations beyond the payment of compensation.

[51] The test requires an examination of the background to the inclusion of the clause. The admissible matrix evidence will be that which sheds light on the parties' legitimate commercial interests and relevant transactional risks – including risks to capital, collateral and reputation.

[52] There may be a differing approach between the UK and New Zealand on the one hand and Australia on the other, relating to the ambit of the doctrine. In Kós P's view the Australian approach grants the Court something analogous to that which it does not possess: a general review function of ill-advised bargains.

[53] The Court's view was that its role is limited to resolving the consequences of breach of primary obligations. Individuals generally are, and should be, free to enter

whatever primary obligations they chose. The law of contract renders those obligations legally enforceable, but the Court does not actually enforce primary obligations directly (except in its equitable jurisdiction of specific performance). Instead, it enforces secondary obligations consequent on breach by requiring the defaulting promisor to make good any loss resulting from the breach of their primary obligation. The Court's refusal to enforce penalty clauses is consistent with both the freedom of parties to choose their primary obligations and the Court's role in enforcing those primary obligations indirectly by imposing secondary obligations on the parties that are compensation (but nothing more) for the harm occasioned upon breach.

[54] The fact that courts recognise liquidated damage clauses is not inconsistent with the second of these principles. Instead, such clauses are in effect just an efficient substitute for the Court's own jurisdiction to require a defaulting party to pay compensation. It is only when such clauses lose their quality of efficiency and overreach the Court's jurisdiction to order compensation (and nothing more), by purporting to oblige a party to pay a greater sum than the promisee could legitimately expect to recover, do the Courts intervene. The Court cannot, and will not, require a party to grossly overcompensate an innocent promisee, and by the same token, cannot be expected to enforce a contractual provision seeking such gross overcompensation.

[55] Contract law in New Zealand and the UK, and for the most part in Australia, exhibits a healthy respect for the contractual autonomy of parties to make bargains, regardless as to whether they be ill-advised or otherwise. An expansion of the role of the penalty doctrine, into primary and collateral obligations, would involve the Courts in the review of bargains struck between the contracting parties. Arguably that would be both undesirable and contrary to established principles of contractual autonomy and certainty.

[56] The Supreme Court has recently granted leave to appeal on the question of whether the indemnity clause offends against the prohibition against penalties.<sup>22</sup>

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<sup>22</sup> *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2019] NZSC 62.

*Commerce Commission v Harmoney Ltd*

[57] The next case is the High Court decision of *Commerce Commission v Harmoney Ltd*.<sup>23</sup> Harmoney operates a web-based platform that matches borrowers with lenders. The practice is commonly referred to as peer-to-peer lending.

[58] Peer-to-peer lending has become more common in New Zealand over the past few years. Harmoney has been at the forefront and has recently made inroads into the Australian market as well. Peer-to-peer lending involves individual investors putting up money, which is aggregated on their behalf by the lending service, before being loaned to the borrowers, with each individual lender/investor having a beneficial share in the total loan.

[59] The issue was whether the Platform Fee that Harmoney charged borrowers was a “credit fee” as defined in s 5 of the Credit Contracts and Consumer Finance Act 2003 (the CCCFA) or a brokerage fee. A credit fee is subject to the statutory regime, in particular that it not be unreasonable,<sup>24</sup> whereas a brokerage fee is not.

[60] A prospective borrower would register with Harmoney. Harmoney would receive that application and consider whether to approve it. Once approved for registration, a borrower completed a loan application. The application was designed to assess borrowing capacity, including the maximum borrowing amount and the appropriate interest rate. The borrower would then select an approved loan amount and choose the amount of time over which it would repay the loan. Investors could then decide whether to fund the loan and in what amounts. They paid their contribution into an account with Harmoney. The amounts were held on trust. Once sufficient funds had accumulated to fund the requested loan, Harmoney would transfer those funds into another account operated by its related company, Harmoney Investor Trustee Ltd (HITL), which also held those funds on trust for the investors. HITL then transferred the loan principal to the borrower. From that point on, HITL held the loan on trust for the benefit of the investors. At that time, Harmoney would deduct the Platform Fee from the loan amount and transfer that amount to its own account.

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<sup>23</sup> *Commerce Commission v Harmoney* [2018] NZHC 1107

<sup>24</sup> Credit Contracts and Consumer Finance Act 2003, s 41.

[61] Five different documents were involved:

- (a) The “Administration Deed” which recorded the relationship between Harmony and HITL. The parties were Harmony and HITL.
- (b) The “Investor Agreement” which set out the terms on which the investor could access the Harmony website. The parties were Harmony, HITL and the investor.
- (c) The “Borrower Agreement” which set out the terms on which the borrower could access the Harmony website. The obligation to pay the Platform Fee arose under the Borrower Agreement. The parties were Harmony, HITL and the borrower.
- (d) The “Loan Disclosure” which provided disclosure about the loan before the loan contract came into existence, as per the CCCFA. This document set out the specifics of the loan, including the principal amount, the duration of the loan and the interest charged thereon. The Platform Fee was included in the principal amount.
- (e) The “Loan Contract” which came into existence following the Loan Disclosure being sent to the borrower. The parties were HITL and the borrower (with HITL said to be acting as Harmony’s agent).

[62] A credit fee is defined in s 5 of the CCCFA to mean:

**credit fees** means fees or charges payable by the debtor under a credit contract, or payable by the debtor to, or for the benefit of, the creditor in connection with a credit contract, ...

[63] To resolve the issue of whether the Platform fee was a credit fee for the purposes of the CCCFA, the Judge was required to determine three issues. Those issues, and the parties’ respective responses were:

- (a) Which of the above documents formed a “credit contract” for the purposes of the CCCFA?

- (i) Harmony argued that the Loan Contract was the only relevant document.
  - (ii) The Commerce Commission argued that several of the documents needed to be read together to form the credit contract. It argued that the Borrower Agreement, the Loan Disclosure and the Loan Contract in particular all formed a single contract.
- (b) Based on those documents and the facts, which entity or entities were the “creditors” for the purposes of the CCCFA?
- (i) Harmony argued that only HITL and the investors were creditors.
  - (ii) The Commission argued that Harmony was also a creditor.
- (c) Based on the foregoing, was the Platform Fee a “credit fee” for the purposes of the CCCFA?
- (i) Harmony accepted that if it was held to be a creditor, then the Platform Fee would be a credit fee, but argued that otherwise it was not.
  - (ii) The Commission argued that the Platform Fee would be a credit fee whether or not Harmony was held to be a creditor.

[64] The Judge noted that the CCCFA was enacted to protect consumers, including borrowers under credit contracts. The CCCFA predated the rise of peer-to-peer lending and did not directly address it. Instead, peer-to-peer lending was regulated under the Financial Markets Conduct Act 2013.

[65] On the first issue, the Judge noted that the parties agreed a loan facilitated through the Harmony website was a credit contract for the purposes of s 7 of the CCCFA, though they disagreed on which documents constituted that contract. The

Judge accepted that a contract may be comprised of multiple documents. After reviewing relevant case law, she said:<sup>25</sup>

The mere fact that several documents relevant to the same transaction are executed in proximity to one another does not necessarily mean that they should be treated as a single contract. The issue is whether that is the proper conclusion to draw given the nature of the transaction and the context in which it is entered into.

[66] The Judge held that both the Loan Contract and the Loan Disclosure together formed the credit contract for the purposes of the CCCFA.

[67] The Judge rejected Harmony's argument that only the Loan Contract allowed a borrower to incur a debt and defer payment in accordance with the definitions of "credit" and "credit contract".<sup>26</sup> The Loan Contract was a standard form agreement under which the borrower agreed to borrow an amount, for a term, and at a rate, none of which were specified. Those terms were key information and had to be specified to satisfy the requirement for certainty of contract. They were only to be found in the Loan Disclosure, which defined the total amount to be borrowed as including the amount to be paid to Harmony to cover the Platform Fee.

[68] The Judge however, did not consider the Borrower Agreement formed part of the credit contract. She considered that the Borrower Agreement covered matters beyond the scope of specific credit contracts and existed independently of the Loan Contract, as the borrower could register but never take out a loan. Nor did the Borrower Agreement provide credit to the borrower. While the Borrower Agreement created an obligation to pay the Platform Fee, it did not provide credit in the sense of deferring payment of debt. There was no basis to construe it as part of the credit contract.

[69] While HITL was the only named creditor in the Loan Contract, the Judge accepted that did not preclude another party also being creditor under the arrangements. The investors were also clearly creditors as the loan was held for them beneficially. The issue was whether Harmony was also a creditor.

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<sup>25</sup> At [26].

<sup>26</sup> Credit Contracts and Consumer Finance Act 2003, ss 6 and 7.



[70] The Judge considered it was. Harmony was an undisclosed principal to the credit contract. Taking the documents as a whole, the Judge considered that Harmony's role extended beyond mere matchmaking. Harmony undertook all the administration of the loans. It engaged HITL to contract with the investors on the basis that HITL would appoint Harmony as its agent to undertake that work. Harmony had full discretion to dismiss HITL and appoint a new trustee in its place, while HITL had no discretion or ability to dismiss Harmony from its role in administering the loan.

[71] Harmony conceded that, should the Court find, as it did, that it was a creditor, then the Platform Fee was a credit fee. As a result, there was strictly no need to go on and consider the Commission's alternative arguments that the Platform Fee would be a credit fee even if Harmony was not a creditor. Nevertheless, the Judge went on to consider the status of the Platform Fee even if Harmony was not a creditor.

[72] The Judge addressed the alternatives for establishing a credit fee under s 5. The first requires only that the fee be payable under a credit contract. The Judge found that the Platform Fee was payable under the credit contract, comprising the Loan Contract and the Loan Disclosure. Although the Borrower Agreement imposed the obligation to pay the Platform Fee, payment was not due until settlement of the loan and was paid by way of deduction from the loan. The Platform Fee formed part of loan amount and was subject to interest. Had the amount been payable directly to Harmony by the borrower then it would legitimately have been a brokerage fee. As it was, however, even if Harmony was not a creditor to the credit contract, the Platform fee would still constitute a credit fee for the purposes of the CCCFA.

[73] The alternative requires the fee to be payable by the debtor to, or for the benefit of, the creditor in connection with a credit contract. The Judge accepted that as the Platform Fee was payable "for arranging each loan" and out of the monies advanced under the loan contract, there was a sufficient relationship or connection between the fee and the credit contract to say that it was payable in connection with the credit contract.

[74] However, the Judge rejected the Commission's argument based on the Platform Fee providing a direct or indirect benefit to the creditor. It could not be a

direct benefit (as the Commission argued because the creditor charges interest on the increased loan amount) because interest was specifically excluded from the definition of credit fee.

[75] The Judge also rejected the Commission's further argument the Platform Fee provided an indirect benefit to HITL because without its payment, HITL would not be able to make the loan and receive its fee. The definition of credit fees does not capture every payment that has a positive effect on a creditor. It was directed at payments made to a creditor or for the creditor's benefit.

### *Themes*

[76] The important points confirmed by the judgment were that Harmony was a creditor to the credit contract, but that even if it were not, the Platform Fee would nevertheless be a credit fee under the first limb of s 5 of the CCCFA. It is also of interest that the Judge relied on trustee and agency law to conclude Harmony was a creditor.

[77] Importantly, the credit contract purported to appoint HITL as bare trustee. A bare trustee has no duties to a beneficiary other than to hold property in trust and to convey it to the beneficiary at its request. Under the credit contract, HITL appointed Harmony as its agent to undertake tasks, which HITL as bare trustee was not itself, empowered to perform. A fundamental principle of agency law is that a principal cannot appoint an agent to do anything that the principal cannot do itself. Therefore, Harmony had to be a principal to the credit contract.

[78] Harmony has filed an appeal against the High Court decision. That appeal is yet to be determined. A preliminary matter, dealing with the right of a party to appeal against a decision of the High Court on an application for case stated under the CCCFA and Commerce Acts, has been decided in Harmony's favour.<sup>27</sup>

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<sup>27</sup> *Harmony Ltd v Commerce Commission* [2019] NZCA 355.

***Bushline Trustees Ltd v ANZ Bank New Zealand Ltd***

[79] Next is the recent Court of Appeal decision of *Bushline Trustees Ltd v ANZ Bank New Zealand Ltd*.<sup>28</sup> That case concerned the effect of certain undertakings and representations ANZ was said to have made to the appellants, prior to a refinance loan made between the parties in April 2008.

[80] The Coomeys were dairy farmers. Together with Bushline Trustees Ltd, the Coomeys were trustees of two mirror family trusts which own the family's dairy farms. I will call them Bushline.

[81] Bushline had been a customer of ANZ for many years. In 2008, when Bushline's debt to ANZ already totalled \$11.97 million, the Coomeys decided to purchase another farm using Bushline. That farm was to cost \$7.25 million.

[82] ANZ agreed to refinance Bushline's various facilities. The Bank agreed to consolidate Bushline's debt into a single loan of \$19.47 million (the Refinancing Loan) at a floating interest rate plus a margin of 0.7 percent. That loan was for a period of one year but, as the parties clarified in Court, it would be, and was, rolled over every year for a period of five years.

[83] As a means of hedging the risk of the floating rate, Bushline also entered fixed rate swaps with ANZ (the Refinancing Swaps). The effect of these swaps was that, in return for Bushline paying a fixed rate of interest on the total amount of \$19.47 million, ANZ agreed to meet Bushline's obligation to pay the floating rate.

[84] The arrangement was structured so that every month Bushline would pay the floating interest rate plus the margin to ANZ. Then, depending on whether the floating interest rate was either greater or lesser than the fixed interest rate, ANZ would pay the difference to Bushline, or deduct the balance from their account to make up the shortfall. Bushline was, at all times, responsible for the payment of the margin.

[85] Before this arrangement was concluded a series of discussions took place between Bushline and ANZ. One of the central points for negotiation concerned the margin rate. In 2006, Bushline had refinanced with ANZ and a margin rate of 1.1 per

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<sup>28</sup> *Bushline Trustees Ltd v ANZ Bank New Zealand Ltd* [2019] NZCA 245.

cent had been introduced. At the time of negotiating the Refinancing Loan in 2008, Bushline was also in negotiations with BNZ and ASB, and was seeking to use those negotiations as leverage over ANZ to achieve a reduction in the margin rate. While the parties disagreed on the effect of the outcome of those negotiations, both agreed that a margin rate of 0.7 per cent “ongoing” was represented to Bushline by ANZ.

[86] During the discussion the following representations were made to Bushline:

- (a) The Refinancing Swaps operated like a fixed term loan rate, but with greater flexibility. For instance, the Refinancing Swap would manage the interest rate risk so that the overall cost of the finance would be no worse than the original rate, (the Fixed Cost representation) but would likely be better and margins would not change (the Margin representation).
- (b) ANZ could and would monitor the Refinancing Swaps on an ongoing basis to ensure that Bushline was able to take the best advantage of that flexibility (the Monitoring representation).

[87] The Global Financial Crisis of 2008 hit. Interest rates plummeted shortly after the Refinancing took place. The Refinancing Swaps were no longer advantageous to Bushline. Moreover, ANZ increased the margin rate on the Refinancing Loans. Bushline moved its banking facilities to a competitor in 2013 and brought proceedings against ANZ under several heads of claim, including misrepresentation, breach of contract, breaches of the Credits Contract and Consumer Finance Act 2003, negligence and breaches of the Fair Trading Act 1986.

[88] The High Court rejected Bushline’s claim. It found that although ANZ had misrepresented the effect of combining floating rate loans with fixed rate swaps, no legal liability followed; there had been no promise by ANZ not to vary the 0.7 per cent margin.

[89] The Court of Appeal allowed the appeal. It considered the case before the High Court had been complicated by the various causes of action pleaded. It focussed primarily on the misrepresentation and breach causes of action.

[90] First, the Court considered the correct characterisation of the representations. Were they statements of past or present fact, or were they contractual promises? Next, were the representations made? Then, what was the effect of the disclaimer clauses? Having done that, the Court did not feel the need to revisit the High Court's findings on negligence, or on Bushline's arguments under the Fair Trading Act and Credit Contracts and Consumer Finance Act.

[91] Bushline's arguments on the representations were effectively threefold:<sup>29</sup>

- (a) ANZ had misrepresented to Bushline that interest rate swaps were like fixed interest loans, by representing to Bushline that the costs of finance would be no worse than the fixed rate of the Swap Refinancing but would likely be better.
- (b) ANZ had breached an undertaking to provide ongoing advice and management to Bushline in relation to its Refinancing Swap.
- (c) ANZ had breached an undertaking that the margin rate would not increase above 0.7 percent for a period of five years.

[92] The Court considered the Fixed Cost representation was a statement of fact capable of being a misrepresentation under the Contractual Remedies Act 1979. Equally, the Margin and Monitoring representations were not statements of fact, but, if made, were contractual undertakings.

[93] ANZ agreed that it had represented to Bushline that interest rate swaps were like fixed interest loans. It also accepted this was a misrepresentation, because it had not disclosed that the margin rate could increase under the floating rate loan, unlike a fixed rate loan; it had not disclosed that break costs for a fixed rate loan under a finance

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<sup>29</sup> There were other causes of action that were not pursued on appeal, or which the Court of Appeal did not consider necessary to determine.

swap were calculated differently to break costs for a fixed rate loan;<sup>30</sup> and there was no disclosure that a more restrictive credit limit applied than would have been the case if Bushline borrowed at a fixed rate or unhedged floating rate.

[94] Bushline argued ANZ had breached its undertaking to provide ongoing advice and management in relation to its Refinancing Swap by failing to respond to its requests for advice in 2008 on the possibility of breaking the Refinancing Swap.<sup>31</sup> ANZ accepted that it had given the undertaking. The Court of Appeal held this undertaking was breached by ANZ's failure to respond to the request for advice on the breaking of the Refinancing Swap, and, by failing to communicate to Bushline its developing view as to the likelihood of significant reductions in official cash rates by the Reserve Bank, and the significance of those reductions.

[95] Witnesses for ANZ accepted that an undertaking had been given to Bushline that its margin rate would be fixed at 0.7 per cent, just not for five years as Bushline had argued. The Court of Appeal disagreed and found for Bushline. The Court noted that a manager at the local ANZ branch had recorded in his diary, following negotiations with Bushline "Agreed – 70 pts ongoing". The Court considered the matrix of fact surrounding the parties' negotiations in determining what both parties would have understood "ongoing" to mean. In particular, the Court noted that ANZ was aware of an offer made to Bushline from a competitor for funding for five years at a fixed interest rate including margin, and that if Bushline wasn't satisfied with what ANZ had to offer, it would go elsewhere.

[96] The Court found that in making the Fixed Cost representation, ANZ misrepresented the nature and effect of the swaps. It also found that ANZ had failed to comply with the Margin and Monitoring undertakings.

[97] ANZ's central defence was that the loan agreement contained numerous disclaimer clauses. The disclaimers included no reliance clauses, limitation of liability clauses and entire agreement clauses. Those clauses precluded Bushline from relying on statements, advice or information made by ANZ about the Refinancing Loan and Swap; confirmed that Bushline understood the Loan and Swap, having assessed those

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<sup>30</sup> Break costs being the charge upon a party for ending the Swap Refinancing early, thus being able to take advantage of lower floating interest rates.

<sup>31</sup> As noted above, in 2008, interest rates took a quick and unexpected dive.

transactions on their merits and risks; and confirmed Bushline's acknowledgment that the terms represented the entire agreement between the parties.

[98] Bushline's response was that s 4 of the Contractual Remedies Act applied.<sup>32</sup> The section provides that, where a contract contains a provision the effect of which is to preclude a Court from inquiring into or determining the question of whether a misrepresentation or undertaking was made, the Court is not prevented from so inquiring unless it is fair and reasonable that the clause should be conclusive between the parties. Bushline argued it was not fair and reasonable for ANZ to rely on those disclaimers in the circumstances.

[99] The Court confirmed that the party seeking to rely on the disclaimer clause will bear the onus of persuading the Court that it should be upheld. When the Court considers the reasonableness of that clause it will have regard to a number of factors, including the subject matter and value of the contract, the parties' respective bargaining strengths, and whether they received legal representation. Other matters might include the circumstances in which the representation was made and whether the disclaimer was in a standard form or drafted especially.

[100] The Court found, having regard to the circumstances, that it was not fair and reasonable for ANZ to rely on those disclaimer clauses. First the Court noted that ANZ had undertaken to provide ongoing advice because of the complexities of the Refinancing Swap. Such financial arrangements involve expertise which most people don't have.

[101] Second, within ANZ itself, there was a lack of understanding regarding the differences between fixed loan rates and the loans associated with fixed rate swaps. In particular, ANZ staff members did not themselves fully comprehend that the margin rate under the floating portion of the Refinancing Swap could increase.

[102] Third, ANZ accepted that it had said that it had promised Bushline would have a fixed 70 basis points margin. The only dispute had been as to what "ongoing" meant.

[103] The Court also considered it of relevance that while one of the disclaimer clauses was contained in a separate document (the Confirmation), which formed part

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<sup>32</sup> Now s 50 of the Contract and Commercial Law Act 2017.

of the contract, another part of the contract made clear that Bushline's rights and liabilities were not affected if ANZ did not send the Confirmation to Bushline or if Bushline did not sign the Confirmation. At the same time, ANZ was entitled to cancel the contract if Bushline did not sign the Confirmation. The Court considered it could not be said to be fair and reasonable to enforce a disclaimer in that Confirmation in circumstances where ANZ did not even need to send it to Bushline.

[104] While Bushline had received legal advice, the Court considered that advice to be mechanical and formal in nature. It was only given once, in 2005, at a time when the Coomeys and Bushline had only a limited understanding of the mechanics and risks of the Refinancing Swap.

### *Themes*

[105] The main point from the case was the Court's consideration of "fair and reasonable" under s4 of the Contractual Remedies Act and its rejection of ANZ's reliance on its disclaimer clauses.

[106] As the Court of Appeal noted, disclaimer clauses are not automatically effective. The provisions of the Contractual Remedies Act (now the Contract and Commercial Law Act 2017) provide that such clauses are of no effect unless the Court is satisfied that it is fair and reasonable that they should be conclusive. It is for the party relying on the clause to satisfy the Court that it should apply the clause.

[107] There are several considerations the Court may take into account when considering whether to give effect to a disclaimer clause. Of interest is the Court of Appeal's apparent acceptance of the proposition from the Dawson and McLauchlan text that in the case of clauses intended to limit liability by stating that the document contains the whole of the contract between the parties, but where an oral undertaking was given which was intended to be legally binding, the disclaimer clauses will simply be untrue.<sup>33</sup> In effect, the writing was not in fact assented to as the complete record of the parties' contract.

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<sup>33</sup> Francis Dawson and David W McLauchlan *The Contractual Remedies Act 1979* (Sweet & Maxwell, Auckland 1981) at 36-37.



[108] The Court considered the circumstances of the breach of the Monitoring undertaking and the Fixed Cost representation to be determinative, particularly as ANZ had accepted the findings that the independent advice and assessment clauses were simply untrue.<sup>34</sup> In accepting that, ANZ was in effect accepting that the relevant disclaimers requiring Bushline to acquire independent advice and to assess the merits and risks of the Refinancing Swap, were not part of the parties' contract.

[109] One issue left open by the Court of Appeal's decision concerns the effect of exclusion or limitation clauses. The effect of ANZ's disclaimer clauses was not to say that ANZ would not be liable for any breaches of oral undertakings it gave to Bushline, or misrepresentations it made. Instead the effect of those terms was that Bushline could not rely on those undertakings or representations as the terms of the loan agreements were either inconsistent with those terms, or because Bushline was precluded from relying on those terms. Therefore, the Court did not have to grapple with the effect of s 5 of the Contractual Remedies Act 1979.<sup>35</sup> That section provides:

#### **5 Remedy provided in contract**

If a contract expressly provides for a remedy in respect of misrepresentation or repudiation or breach of contract or makes express provision for any of the other matters to which sections 6 to 10 relate, those sections shall have effect subject to that provision.

[110] As the Court noted, a more controversial question is whether a clause that purports to exclude liability altogether can fit within the ambit of s 5. The Court noted that Dawson and McLauchlan do not support such an interpretation, arguing that such clause does not provide a remedy, but instead provides that there shall be no remedy. However, the Court left the point open.

#### ***Fatupaito v Harris***

[111] In *Fatupaito v Harris*<sup>36</sup> the Court of Appeal discussed the circumstances in which the appointment of a receiver may be held invalid for lack of good faith and the effect of such invalidity.

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<sup>34</sup> At [269].

<sup>35</sup> See s 34 of the Contract and Commercial Law Act 2017.

<sup>36</sup> *Fatupaito v Harris* [2018] NZCA 497, [2019] NZAR 192.

[112] Ms Fatupaito and Mr Hawkes were the liquidators of CIT Holdings Ltd (CIT). CIT and the second respondent, The Bankhouse Trust Ltd (Bankhouse) were parties to a general security deed (GSD). The GSD secured repayment of a debt owed to Bankhouse by CIT. Amongst other things, the GSD charged various properties owned by CIT.

[113] Mr Olliver was the sole director of both Bankhouse and CIT. Following unsuccessful negotiations between entities associated with Mr Olliver to purchase the properties from the liquidators, Bankhouse exercised a right under the GSD to appoint Mr Harris and Mr Nellies (the first respondents) as receivers of CIT. The receivers then had CIT enter an agreement for sale and purchase between CIT and GMO Trust Ltd (GMO), an entity associated with Mr Olliver. The effect of the agreement was that Mr Olliver retained control over the properties while also obtaining claims CIT had against his former wife, Ms Sparks, whom he was in an acrimonious relationship property dispute with.

[114] The receivers applied to the Court for approval of that sale and purchase agreement, which they were obliged to do by a previous Court order and by the terms of the agreement.

[115] The liquidators opposed the receiver's application for Court approval. They were concerned that the agreement was nothing more than an option to purchase, conditional in its terms and favouring GMO's position. The liquidators considered the receiver's appointment had led to a significant increase in cost, without value to creditors, and the agreement was an uncommercial transaction.

[116] The liquidators brought their own application for orders to set aside the GSD. They also sought orders:

- (a) declaring the receivers appointment invalid and a related order that the receivers were not entitled to remuneration;
- (b) setting aside the agreement for sale and purchase to GMO;
- (c) directing the receivers cease to act;

- (d) that Bankhouse be prohibited from appointing any other receiver, and
- (e) that the receivers be prohibited from acting as receivers for a period of five years.

[117] Ultimately the sale and purchase agreement did not proceed. The receivers retired from their appointment and discontinued their application. As a result, the High Court decision only addressed the liquidator's application.<sup>37</sup> Jagose J ordered that:

- (a) the GSD be set aside; and
- (b) no other receiver was to be appointed under that GSD.

[118] The Judge declined to grant orders declaring the receivers' appointment invalid and that they were not entitled to remuneration.<sup>38</sup> That aspect of the decision was appealed by the liquidators.

[119] The liquidators argued that the receivers were not appointed for the legitimate purpose of obtaining repayment of the debt. They argued that the receivers were appointed by Bankhouse to ensure that the charged properties were sold on very specific terms to an entity controlled by Mr Olliver.

[120] The Court confirmed that a security holder/mortgagee has considerable autonomy as to how to exercise its contractual powers under a general security agreement. Those powers include the appointment of receivers and the right to conduct mortgagee sales. The Court noted that a mortgagee could exercise rights to appoint a receiver, even if the effect is to cause loss to the company or its unsecured creditors, though it is still incumbent on the mortgagee to act in good faith.

[121] However, the Court applied the Privy Council decision of *Downsview Nominees Ltd v First City Corp Ltd*<sup>39</sup> to the effect that a mortgagee owes a duty to subsequent encumbrancers and the mortgagor to act in good faith and for purpose of obtaining repayment of the debt. The Court considered that the appointment of a

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<sup>37</sup> *Harris v Bank of New Zealand* [2017] NZHC 2374.

<sup>38</sup> The Judge also declined to order that the receivers be prohibited from acting for five years.

<sup>39</sup> *Downsview Nominees Ltd v First City Corp Ltd* [1993] 1 NZLR 513 (PC).

receiver in bad faith would invalidate that appointment. The Court considered that to exercise a contractual power to appoint a receiver for a purpose other than to obtain repayment is a bad faith exercise of that power and is invalid. The Court noted this equitable principle is also expressed in s 25 of the Personal Properties Securities Act 1999.

[122] The more difficult question was what constitutes bad faith in these circumstances. The Court rejected the argument for the respondents that for bad faith the mortgagee needs to have a sole purpose and that purpose must be other than to obtain repayment. The Court held that a mortgagee acts in bad faith when, judged objectively, it acts for a predominant purpose which is collateral to its interest as a mortgagee in obtaining repayment. However, a mortgagee does not act in bad faith the effect of the exercise of its power, undertaken for the predominant purpose of obtaining repayment, is that it secures to itself some collateral advantage.

[123] The Court considered it will be a rare case where there is evidence to meet this standard. Ordinarily, the inference to be drawn will be that the receiver was appointed to realise the mortgagee's security.

[124] The Court considered this to be a clear case where the predominant purpose of the appointment was to gain control of the proceedings against Mr Olliver's former wife. The Court relied on evidence of the discussions and negotiations between Mr Olliver and the liquidators prior to the appointment of the receivers to find that one of the receivers, Mr Harris, was aware of Mr Olliver's desire to acquire the debts and knew that the deal between the parties had broken down because of the liquidators' refusal to acquiesce to Mr Olliver's demands for sale of those debts. The Court considered it safe to infer that when Mr Olliver, as the sole director, appointed the receiver he was doing so in the belief that they would agree to sell the causes of action to GMO. This intention was borne out in the agreement negotiated between the receivers and GMO, and on uncommercial terms.

[125] As a result, the receivers were not entitled to remuneration. The terms of the GSD confirmed that the receivers' costs formed part of Bankhouse's secured debt. Because the appointment was invalid, and because they were only entitled to be

remunerated from the assets of the company, they had no right to charge the costs of the receivership.

[126] The Court also considered the potential liability of receivers whose appointment might be later set aside as invalid. The Court said that receivers were not expected to interrogate the motives of their appointers, absent something which put them on notice that the appointer was acting in bad faith. Responsible receivers can rely on s 33(1) of the Receiverships Act 1993, which allows a Court to relieve a receiver of personal liability where they have acted honestly and reasonably and, in the circumstances, ought to be excused. Receivers could also negotiate an indemnity with their appointer, to cover the cases where their appointment is later held to be invalid.

#### *Themes*

[127] The case involved a reasonably straightforward application of the principle in *Downsview* that a mortgagee must act in good faith when exercising its contractual powers under its security agreement. That is an equitable obligation which is superimposed over the contractual powers by the PPSA and equity. Appointing receivers for a predominant purpose other than to recoup a debt owed to the mortgagee is an act done in bad faith. Such bad faith vitiates the appointment and can lead to the result that the receivers are not entitled to claim for remuneration, and, in more serious cases, the possible exposure to civil liability.

[128] On the other hand, provided the appointment is primarily for the purpose of recovering the debt, the appointer will not be found to be acting in bad faith, even if the appointment also secures some collateral advantage.

[129] For receivers, the importance of the decision is that they are not required to interrogate the motives of their appointers to avoid civil liability for actions taken pursuant to their appointment, which is later vitiated, unless they are on notice. Should they be put on notice that their appointment is other than in good faith, then they cannot rely on s 33(1) of the Receiverships Act to shield them from liability.

[130] Receivers would be well advised to include indemnification clauses in their appointment agreements. Should their appointment be deemed invalid for breach of

the obligation of good faith, or any other reason, they would then still be able to recover their costs and fees from their appointer. This is of particular importance bearing in mind the remarks made in the High Court and the Court of Appeal, that receivers are not ordinarily in a good position to interrogate the motives of their appointers, but that a bad motive on the part of the appointer will nevertheless vitiate their appointment and disentitle them from recovering their fees from the assets of the company.

***Financial Markets Authority v Jackson***

[131] The final case is the decision of the High Court in *Financial Markets Authority v Jackson*.<sup>40</sup> The FMA stated a case for the opinion of the High Court under s 48 of the Financial Markets Authority Act 2011. The issue arose in the course of the voluntary administration of CBL Corporation Ltd (CBL). CBL had been placed into administration at the end of February 2018. Mr Jackson and Gibson were appointed as administrators.

[132] The FMA argued that the disclosure obligations imposed upon entities listed on the NZX and the NZDX continued during a period of administration. The administrators considered that they did not.

[133] By way of background, s 270 of the Financial Markets Conduct Act 2013 (FMCA) obliges a listed issuer to comply with the disclosure provisions of the listing rules for the licensed market. There was no dispute that CBL was a listed issuer.

[134] The relevant listing rules were the NZX Main Board/Debt Market Listing Rules. Rule 10.11.1(a) requires every issuer, once it became aware of any material information, to immediately release such information to the NZX. Material information is essentially that which relates to financial products, (such as shares), and which a reasonable person would expect would have a material effect on the price of the quoted financial products of the issuer.<sup>41</sup>

[135] The Court noted at the outset that neither Part 15A of the Companies Act 1993, which sets out the regime for companies in administration, nor the listing rules

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<sup>40</sup> *Financial Markets Authority v Jackson* [2018] NZHC 2052.

<sup>41</sup> Financial Markets Conduct Act 2013, s 59.

expressly dealt with the issue. Therefore, determination of the issue largely turned on the interpretation of the purpose for the disclosure obligations, as set out in s 270 of the FMCA and the listing rules, and the purpose of the provisions relating to the administration of companies under Part 15A of the Companies Act 1993.

[136] The Court first considered the purpose of the regime under Part 15A of the Companies Act 1993 dealing with the administration of companies. The Court noted that administration provides for a company to be administered in a way that best maximises the chances of it successfully continuing in existence, or failing that, which results in a better return for its shareholders and creditors than would result from immediate liquidation.

[137] The Court noted that creditors meetings are of fundamental importance in a voluntary administration. Following an investigation, the administrator is to inform the creditors at a watershed meeting of its opinion concerning whether it would be in the creditors interests for the administration to continue, for it to end, or for liquidators to be appointed. The course to be adopted is then decided by vote of those creditors at the watershed meeting. As the Court noted, it is the creditors who determine the company's fate.

[138] Pursuant to their obligations to the creditors of the company, the administrator must provide a report prior to the creditors' watershed meeting.<sup>42</sup> But other than the requirement to file accounts with the Registrar of Companies every six months, an administrator has no other disclosure obligations under the Companies Act.<sup>43</sup>

[139] The Court considered that the purpose of the listing rules was to provide the market with material information relating to the issuer in order to preserve the integrity of that market. Disclosure promotes fair, orderly and transparent markets. It assists with preventing market manipulation and insider trading. It also ensures that company management can be held to account for the company's performance.

[140] However, and of importance to the case, during an administration, shares in the company cannot be transferred and the rights and liabilities of shareholders cannot

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<sup>42</sup> Companies Act 1993, s 239AU(3)(a).

<sup>43</sup> Companies Act 1993, s 239ACZ(1)(a).

be altered without administrator or Court approval.<sup>44</sup> As the Court said, Part 15A of the Companies Act prohibits the very activity that the disclosure rules are meant to facilitate; trading of shares on an open market.

[141] The Court agreed with the administrators' submission that when read together, Part 15A of the Companies Act 1993 and the listing rules make clear that the administrator is only obliged to provide disclosure to the extent set out in the Companies Act. It was Parliament's intention in enacting the administration regime that only such limited disclosure obligations would apply at that time.

[142] The Court considered that, apart from the policy reasons, there were also practical reasons for such a limitation on disclosure. As noted at the outset, the focus of the administration is the operation of the company during times of its financial difficulties, largely for the benefit of creditors. It would derogate from the administrator's task if he or she were required to divert time and resources to satisfy the disclosure obligations. The administrators would be obliged to review pre-administration history which would be of limited relevance to the administration, and which they would not otherwise waste time and resources on. Further, as was the case with the CBL administration, there were a number of subsidiaries under CBL's control, two of which were not in the same administration, and which were under no obligation to provide any information to the administrators to assist them to comply with the listing rules. Any information that might be made available could be incomplete and may in fact misinform the market.

### *Themes*

[143] The continuous disclosure rules are intended to promote the fair and efficient operation of the market. They ensure that information that would have an impact on share prices is released to the market. This has the effect of limiting market manipulation and insider trading. But importantly, as the Court noted, since shares are unable to be traded during a period of administration, the purpose of those rules are rendered moot during the administration.

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<sup>44</sup> Companies Act 1993, s 239AB(1).



[144] The case suggests that the Court will be prepared to look beyond the plain text of a statutory provision or rule to provide a more commercially sensible outcome. The relevant listing rules did not explicitly exclude a company in administration from their operation. But, since the imposition of the rules upon an administrator would be unnecessarily burdensome and would not serve the purpose for which they were enacted, the Court adopted an approach which favoured the interests of the company in administration, and particularly its creditors. Those creditors are entitled to relevant information about the company's prospects during an administration, but that information may be different to the information required by the listing rules.

[145] Another factor the Court considered was the desirability of consistency between Australian and New Zealand law. The administration regime in Part 15A of the Companies Act had been largely modelled on the provision of the Corporations Act 2001 (Commonwealth). The Court noted that the listing rules were also materially identical to the ASX listing rules. But the ASX rules provided that, during an administration, only limited disclosure was required by a company, such disclosure relating to its status and progress with the administration, and particularly its plans for future trading in shares.

[146] There is good reason for comity between the Australian and New Zealand provisions. Cross border insolvency is a common reality. The harmonisation of trans-Tasman commercial law can only lead to greater stability and predictability of the processes to be followed, and the results which follow.