IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA353/2017
[2018] NZCA 122

	BETWEEN	JOHN STEPHEN PATRICK Appellant
	AND	BANK OF NEW ZEALAND Respondent

Hearing:	9 April 2018
Court:	Gilbert, Dobson and Toogood JJ
Counsel:	A J Woodhouse for Appellant R J Gordon and N J Smith for Respondent
Judgment:	26 April 2018 at 11 am
Recalled and Reissued:	4 May 2018
Effective date of Judgment:	26 April 2018

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is declined.

B The appeal is dismissed.

C If the appellant had not been legally aided, we certify that we would have ordered him to pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Dobson J)

Background

[1] In June 2017, the respondent (the Bank) obtained summary judgment against the appellant (Mr Patrick) for the sum of approximately $1.1 million.[1] Liability arose from Mr Patrick's guarantee of obligations owed to the Bank by family-owned companies that he had operated in Hawke's Bay in the businesses of grape-growing, contract harvesting and machinery engineering (the Moteo Group).

[2] Mr Patrick and his wife have had a relationship with the Bank as customers since shortly after their arrival in Hawke's Bay from the United Kingdom in 2006. The Bank partially financed the acquisition and development of grape-growing land and relatively extensive machinery, and funded other working capital requirements for what became the Moteo Group. The first contentious refinancing of advances to the Moteo Group occurred in June 2010. The extent and terms of financial accommodation were thereafter revisited in 2011, 2012 and 2014.

[3] Mr Patrick complained about the Bank's conduct to the Banking Ombudsman in 2014. There were delays in that complaint being addressed. Matters came to a head in November 2015 when formal demands for repayment were made. At a meeting facilitated by the Banking Ombudsman and which Mr Patrick thought was solely intended to advance a mediated solution, Bank representatives served notices under the Property Law Act 2007 and thereafter appointed receivers.

[4] The claim against Mr Patrick in the High Court was based on his December 2013 guarantee of the last refinancing arrangements concluded between the parties at that time. That guarantee was on terms that required Mr Patrick to guarantee obligations assumed thereafter by the Moteo Group as principal debtors. It was therefore effective as a guarantee of obligations assumed by the principal debtors in 2014. A list of criticisms of the Bank said to found arguable set-offs of Mr Patrick's

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1 *Bank of New Zealand v Patrick* [2017] NZHC 1184. That amount includes interest up to 1 June 2017.

admitted liability under the guarantee were all argued without success in the hearing of a summary judgment application before Associate Judge Smith.

[5] Mr Patrick wishes to advance an expanded list of criticisms as grounds for a counterclaim or set-off on appeal. He does not take serious issue with much of the reasoning of Associate Judge Smith, although he seeks to re-argue some of the findings made against him. Instead, he argues that the fault of counsel retained in the High Court led to numerous viable arguments for a set-off or counterclaim not being advanced.

Further evidence

[6] Mr Patrick commenced the appeal on his own behalf. More recently, new counsel on his behalf (Mr Woodhouse) applied for leave to file an amended notice of fappeal and for leave to adduce five new affidavits that traverse additional background to the relationship between the Moteo Group, Mr Patrick and the Bank. The new evidence is intended to provide a factual basis for a number of fresh arguments. Essentially Mr Patrick seeks to argue that the Bank acted unreasonably and in breach of obligations it ought to recognise that it owed to him and the Moteo Group in the course of earlier funding transactions in and since 2010.

[7] The evidence filed in the High Court opposing the Bank's application for summary judgment comprised two affidavits. The first from Mr Patrick contained 46 paragraphs and a small number of exhibits. That affidavit traversed the history of his and the Moteo Group's dealings with the Bank and outlined grounds for the complaints he made about the manner in which they had been treated by the Bank.

[8] The second affidavit was from Mr Erik Behringer, a business consultant in Hastings. Mr Behringer has experience in rural banking. His affidavit deposed both to factual matters from his involvement as a consultant to Mr Patrick in his dealings with the Bank, and also expressions of opinion about breaches of reasonable standards by the Bank as he perceived them to be. That affidavit extended to 32 paragraphs.

[9] The new evidence sought to be adduced on the appeal comprises substantially longer affidavits from Messrs Patrick and Behringer. Mr Patrick's affidavit extends

to 39 pages of text and 165 pages of exhibits. Mr Behringer's affidavit contains substantially more by way of criticism of the Bank's conduct. Both deponents corrected errors or omissions in the exhibits they appended to those affidavits in brief supplementary affidavits sworn shortly after their larger ones.

[10] A new affidavit has also been filed from Ms Pidd, formerly a solicitor in practice in Napier who acted for the Moteo Group and Mr Patrick on the June 2010 refinancing with the Bank. That affidavit deposes that the refinancing appears to have been done in relatively short order and that Mr Patrick was seriously unhappy about its terms.

[11] Mr Woodhouse applied for leave to adduce the new evidence and to file the amended notice of appeal.[2] On the basis that the opposed applications would be heard at the same time as the substantive appeal, both parties filed relatively extensive written submissions in support of and in opposition to the application to adduce further evidence. Thorough submissions were also filed on the issues raised by the amended notice of appeal. Mr Woodhouse's substantive submissions optimistically addressed factual matters raised in the new evidence. For the Bank, Mr Gordon's submissions resisted the need to address matters raised by the further evidence, but could nonetheless be read as applying to any broader arguments that arose from the new evidence, should it be admitted.

[12] Oral submissions at the hearing focused on the criteria for admission of new evidence. However, because consideration as to whether the proposed evidence was cogent involved questions of the tenability of various claims Mr Patrick would seek to advance against the Bank, the scope of argument inevitably expanded to deal with the issues as if the proposed evidence was admissible.

The test for adducing further evidence on appeal

[13] The well-settled test for admitting further evidence requires it to be fresh, credible and cogent. The approach is as follows:[3]

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2 The amended grounds of appeal are outlined at [17] below.

3 Court of Appeal (Civil) Rules 2005, r 45; and *Erceg v Balenia Ltd* [2008] NZCA 535.

> [15] … Those requirements are that the evidence be fresh, credible and cogent. It will not be regarded as fresh if it could, with reasonable diligence, have been produced at the trial: *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 at 192. Particular weight will be accorded in summary judgment proceedings to the need for finality: it is only in exceptional circumstances that the Court will permit further evidence to be filed on appeal: *Lawrence v Bank of New Zealand* (2001) 16 PRNZ 207 (CA).

Cogency

[14] The main plank of Mr Gordon's opposition was that none of the proposed new evidence was cogent because it did not address factual matters bearing on any tenable defence. If the proposed evidence only addressed topics that could not give rise to a tenable defence, then such evidence arguably lacked cogency. This required an assessment of whether any of the grounds for opposing summary judgment foreshadowed in the amended grounds of appeal were sufficiently tenable to raise the prospect of an arguable defence.

[15] A matter dealt with towards the end of Associate Judge Smith's judgment was a provision in Mr Patrick's guarantee provided to the Bank that prevented him from raising any counterclaim or set-off as a ground for resisting a demand under the guarantee. That provision adopted a routinely used formula, in the following terms:

> **15 No deductions from payments**
>
> 15.1 You must pay us without any set-off or counterclaim and without any deduction or withholding.

[16] The Associate Judge had already rejected all arguments for the existence of a tenable defence. However, in the event that he was wrong in doing so, he accepted the Bank's submission that any arguable defence signalled by way of a set-off or counterclaim was precluded by this term in Mr Patrick's guarantee.[4]

[17] The somewhat discursive amended notice of appeal foreshadowed claims allegedly available to Mr Patrick against the Bank as follows:

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4 *Bank of New Zealand v Patrick*, above n 1, at [153]–[155].

(a) the Bank was bound to comply with the New Zealand Bankers' Association Code of Banking Practice (the NZBA Code) to act fairly, reasonably, consistently and in a timely manner in relation to its dealings with Mr Patrick and the Moteo Group, and had arguably breached those obligations in a number of respects;

(b) the terms of communications from the Bank in 2010 committed the Bank to providing the best loan structures for the Moteo Group and had failed to do so, instead providing loan structures that were disadvantageous to the Moteo Group;

(c) the Bank breached s 118 of the Credit Contracts and Consumer Finance Act 2003 (the CCCFA) because it breached reasonable standards of commercial practice in its dealings with him;

(d) in enforcing securities over Moteo Group assets, the Bank had acted in breach of s 25 of the Personal Property Securities Act 1999 (the PPSA);

(e) the extent of the Bank's involvement in the operation of the Moteo Group constituted it a shadow director, for which it should be held liable; and

(f) the receivership of the Moteo Group had been conducted negligently or improperly, and the Bank was liable for not taking action to control the receivers it had appointed.

[18] The amended notice of appeal contended that these claims were sufficiently tenable to constitute a set-off that justified reversing the summary judgment or were sufficient for the Court to exercise its discretion to either not enter summary judgment or to enter a stay in respect of any judgment in favour of the Bank.

[19] Unless Mr Patrick could raise an argument that the no set-off clause should not apply, claims against the Bank stemming from a set-off or counterclaim could not avail him and evidence intended to support those claims would lack cogency.

The enforceability of no set-off clauses in guarantee documents is well-settled.[5] Mr Woodhouse was not persuasive in suggesting that we should reverse the line of authority, including decisions of this Court, that have upheld the enforceability of such clauses.

[20] If the no set-off clause was enforceable against Mr Patrick in this case, Mr Woodhouse suggested that the potential availability of counterclaims or set-off against the Bank could nonetheless be relevant given the need for the Court to consider whether to exercise its residual discretion to award summary judgment once the Court was satisfied that no arguable defence existed. Certainly in the present circumstances, we do not see the prospect of counterclaims such as those foreshadowed in the amended grounds for appeal as affecting an evaluation of that relatively narrow residual discretion.

[21] Accordingly, the proposed arguments for claims by way of set-off or counterclaim cannot avail Mr Patrick because he has committed to a guarantee with a no set-off provision.

[22] To avoid this outcome, Mr Woodhouse argued that forms of statutory relief that might be available to Mr Patrick under the CCCFA or PPSA fell outside the notions of set-off or counterclaim as contemplated in cl 15 of the guarantee, so he was not precluded from raising claims for those forms of statutory relief. It would follow that evidence to support them would be cogent in terms of the test for adducing further evidence.

[23] For the Bank, Mr Gordon argued that both types of possible claim were caught within the scope of "set-off or counterclaim" as that expression was used in cl 15 of the guarantee. He submitted that any attempt under the CCCFA to re-open the credit contract obligations which triggered the call on Mr Patrick's guarantee would now be substantially out of time. So far as the prospect of claims under the PPSA were concerned, although provided for by the terms of a statute, they were rights of action

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5 *Bromley Industries Ltd v Martin and Judith Fitzsimons Ltd* [2009] NZCA 382, (2009) 19 PRNZ 850.

that, if at all, gave rise to a right for damages which constituted a form of set-off or counterclaim in any event.

Re-opening an allegedly oppressive credit contract

[24] A first point taken by Mr Gordon against the prospect of any re-opening that might be initiated now is that Mr Patrick's complaint about oppression related to the June 2010 refinancing. He submitted that the CCCFA could not apply belatedly to credit arrangements between the Moteo Group and the Bank, where those arrangements had been revisited at least three times between the June 2010 refinancing and the advances which were called up in 2015, on which the Bank has now claimed against Mr Patrick's guarantee.

[25] The ability for a debtor to raise a claim of oppression to a credit contract that has subsequently been superseded is provided for in s 125(2) of the CCCFA:

> **125 When reopening proceedings may be commenced**
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> …
>
> (2) …, subsection (3) applies if,—
>
> (a) with the knowledge of the creditor under a credit contract,—
>
> (i) the credit provided under the contract is used (in whole or in part) to pay amounts owing under another credit contract or other credit contracts; or
>
> (ii) amounts owing under the contract were paid from credit provided under another credit contract or other credit contracts; and
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> (b) the creditors under the credit contracts are either the same person or related companies.

[26] Accordingly, where the proceeds of successive advances from the Bank were applied to discharge the Moteo Group's obligations under the preceding credit contracts, then oppression might still be raised in relation to a credit contract that had been superseded.

[27] However, a specific time limitation for any re-opening of a credit contract on the ground that it was oppressive is provided for in s 125(3):

> (3) Proceedings seeking the reopening of all or any of the credit contracts referred to in subsection (2) may be commenced at any time earlier than 1 year after the due date for the performance of the last obligation required to be performed under any of those contracts.

[28] The last obligations under the final set of credit contracts with the Bank were required of the debtors on 30 November 2015 – the due date for repayment of the loan. Accordingly, the time limit in s 125(3) would have required any application for re-opening on the ground of oppression to have been commenced before 30 November 2016. No such step was taken.

[29] Mr Woodhouse sought to avoid the s 125(3) time limit applying in this way by arguing that the Bank still contends that obligations continue to be owed because it continued to charge interest for non-payment of the amounts originally demanded. It would follow that the "due date for performance" of obligations under those contracts continued to run. With respect, that argument is untenable. Unless extended, the last obligation in terms of the contracts on which the material default occurred was the date for performance of the debtors' obligation to make repayment.

[30] It follows that Mr Patrick could not now initiate any proceedings for a re-opening of the relevant contracts on the ground of oppression under the provisions of the CCCFA.

[31] We accept the position of the Bank on all other potential claims raised by the amended grounds of appeal, namely that they would constitute a set-off or counterclaim and are therefore precluded as matters of arguable defence for the purposes of opposing summary judgment.

Lack of tenable grounds for claims

[32] Out of a deference to the wide-ranging arguments we heard from counsel, and in particular Mr Woodhouse's concern to give a full airing to all of the grounds for complaint which Mr Patrick considered had been inadequately raised on his behalf in the High Court, we summarise briefly why we are not satisfied they would raise a tenable basis for a defence, even if not precluded by the no set-off clause.

Breach of the NZBA Code

[33] Mr Patrick wished to claim that the Bank was obliged to deal with the Moteo Group and with him in accordance with the standards agreed between members of the NZBA in its Code. Arguably, in a number of respects, the Bank had dealt with the Moteo Group or Mr Patrick on terms or in circumstances that did not meet the aspirational terms of various provisions of the NZBA Code. Mr Behringer's existing and proposed evidence included opinions applying his experience that such breaches had occurred.

[34] Mr Woodhouse would not commit to whether this duty arose in tort, in contract, or possibly as an incident of a fiduciary relationship between bank and customer. We are satisfied that there is no basis for altering the terms of contractual dealings between a bank and a customer, so as to require a bank to adhere to the standards stipulated in the NZBA Code. This Court rejected that prospect in *Forivermor Ltd v ANZ Bank New Zealand Ltd*, holding that the NZBA Code is not designed as a contractual code enforceable by private action.[6] That decision is consistent with a number of High Court decisions rejecting this notion.[7]

[35] Mr Gordon argued that even if there was a legal basis for such a claim, then there was no sufficient evidentiary basis to make out an actionable breach of the standards required by the NZBA Code. He emphasised the Bank had no opportunity to respond to the fuller version of Mr Behringer's criticisms, but submitted any weight given to Mr Behringer's opinions ought to be reduced because of his obvious identity with Mr Patrick's interests, having acted as consultant to him in dealings with the Bank throughout much of the relevant period. The Bank would also rely on the evidence that complaints made by Mr Patrick to the Banking Ombudsman were (after delays caused or contributed to by the Bank for which they compensated Mr Patrick) resolved by the Ombudsman finding the Bank had dealt with the Moteo Group and Mr Patrick on reasonable terms.

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6 *Forivermor Ltd v ANZ Bank New Zealand Ltd* [2014] NZCA 129 at [43].

7 For example *Clarke v Westpac Banking Corporation* (1996) 7 TCLR 436 (HC); *Dungey v ANZ Banking Group Ltd* [1997] NZFLR 404 (HC); and *TSB Bank Ltd v Burgess* [2013] NZHC 3291.

[36] The issues were focused on the cogency of the proposed evidence for potential grounds of counterclaim. It is therefore neither necessary nor appropriate to make a factual finding on the standard of the Bank's conduct against a hypothetical that is not relevant to any potential cause of action against it.

Lender liability to customers

[37] Mr Woodhouse acknowledged that New Zealand courts have rejected any general notion that lenders ought to be liable to their customers for loss caused by providing advances on terms that subsequently appear to be disadvantageous or impossible for the borrowers to repay. Mr Woodhouse submitted that the prospect of such liability has been acknowledged in other jurisdictions, citing the decision of the New South Wales Court of Appeal in *Commonwealth Bank of Australia v Mehta*.[8] However, we agree with Mr Gordon that the reasoning in that case does not recognise any general duty owed by lenders. Rather, it was confined to circumstances where, in a particular bank/customer relationship, the bank had assumed an obligation to provide advice to an intending borrower. In those circumstances the bank must do so competently.

[38] Mr Woodhouse urged that Mr Patrick's was an appropriate case in which to acknowledge the prospect of a trading bank owing duties to prevent borrowers taking advances on terms that are disadvantageous. Again, Mr Woodhouse was not specific as to whether such obligations ought to arise as implied terms of the contractual dealings, in tort or arguably by virtue of some fiduciary obligation.

[39] We agree with earlier decisions of this Court, and with decisions of the High Court in which the prospects of such a duty have been argued more thoroughly than they were in the present case, all of which have rejected the notion.[9]

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8 *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84 (CA).

9 For example *Bank of New Zealand v Ginivan* [1991] 1 NZLR 178 (CA) at 181; *Forivermor*, above n 6, at [56]; and *Bank of New Zealand v Geddes* HC Auckland CIV-2008-404-8082, 28 May 2009.

Oppressive conduct or breach of reasonable standards under the CCCFA

[40] The focus of this ground appeared to be that the Bank worked against the best interests of the Moteo Group and Mr Patrick in 2010, contrary to representations that they were working on a refinancing package that would be to the borrowers' best advantage. Mr Patrick complained that substantial and unexpected delays in the Bank presenting him with a refinancing offer left him with no alternative but to accept what it then proposed, despite very shortly thereafter complaining about the adverse consequences of having done so. He would characterise that as a breach of reasonable standards of commercial practice, resulting in oppressive terms.

[41] The prospects for any relief under the CCCFA would depend on an application to re-open the financing contracts between Moteo Group and the Bank as a means of reference back to the 2010 refinancing. We are satisfied that the time limit in s 125(3) of the CCCFA discussed above is a complete answer to the prospect of any such claim now being pursued.

Lack of good faith and breach of reasonable standards, contrary to the PPSA

[42] The Bank took a general security agreement (GSA) over the assets of the Moteo Group to secure the advances made to those companies. In exercising rights under the GSA, the Bank is subject to the obligations created by s 25 of the PPSA:

> **25 Rights or duties that apply to be exercised in good faith and in accordance with reasonable standards of commercial practice**
>
> (1) All rights, duties, or obligations that arise under a security agreement or this Act must be exercised or discharged in good faith and in accordance with reasonable standards of commercial practice.
>
> (2) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.

[43] We understood Mr Woodhouse's argument to be separate from the discrete criticism of the conduct of the receivers during the receivership of the Moteo Group. Instead, Mr Patrick would seek to argue that the Bank had not exercised its security rights over the Moteo Group's assets in good faith, or in accordance with reasonable standards of commercial practice. Again in this regard, Mr Patrick would rely on the analysis of the Bank's conduct by Mr Behringer, which included the opinion that the

Bank may arguably not have met the relevant standards in exercising its security rights.

[44] We are not persuaded that the criticisms of the Bank's conduct in relation to exercising its rights under the GSA could make out a tenable ground for breach of s 25 of the PPSA. Mr Patrick's criticisms, and to a lesser extent Mr Behringer's opinions, relied on the premise that the Bank had to be mindful of the best interests of the debtor in all its dealings, including the timing and circumstances of making demands after breach of terms of the advances had occurred. That is not a tenable premise from which to assess the reasonable commercial standards and we are not satisfied it could found any tenable claim in this case.

The Bank operated as a shadow director

[45] This foreshadowed ground was not pursued.

Misconduct by the receivers

[46] Mr Patrick made a series of specific criticisms of the conduct of the receivership, contending that the receivers had failed to obtain the best price for assets, and had failed to exercise competent judgement in managing the Moteo Group to optimise the return to creditors.

[47] For any complaint of this type to be relevant, Mr Patrick would have to attribute responsibility to the Bank for the conduct of the receivers. However, this was a receivership on conventional terms so that the receivers were acting as agent of the companies. There is no tenable basis for contending that a claim could be made against the Bank for deficiencies in their conduct.

[48] We are accordingly satisfied that the new evidence is not admissible because it is not cogent in respect of any possible basis for a defence to the Bank's claim that might be raised by Mr Patrick. Given the breadth of argument we heard, we are also able to find that, even if it had been admissible, the new evidence would not provide any basis for reversing the High Court finding that there is no arguable defence available to Mr Patrick.

New evidence not "fresh"

[49] That is sufficient to dispose of the appeal. However, we add a comment about the argument advanced by Mr Woodhouse to avoid the requirement that new evidence has to be fresh, in the sense that it could not, with reasonable diligence, have been available for presentation before the High Court. It is clear from the content of the further affidavits that that the evidence could, with a measure of diligence, have all been placed before the High Court.

[50] Mr Woodhouse submitted that the requirement for the evidence to be fresh was satisfied because the failure to adduce it before the High Court was the responsibility of incompetent counsel acting for Mr Patrick at that stage. Mr Woodhouse invited analogy with the test for adducing fresh evidence in criminal appeals where the appellant contends the absence of the evidence in the court below was caused by counsel error. Arguably, a similar concern to avoid a miscarriage of justice ought to persuade the Court on Mr Patrick's assertion that the further evidence should be treated as fresh when its omission from the evidence before the High Court was caused by incompetent counsel.

[51] We do not accept that argument enables Mr Patrick to avoid the usual requirement that the proposed evidence be fresh in the conventional sense. The criminal context is quite distinct and the analogy is not a valid one. The general practice where trial counsel error is contended in a criminal appeal requires the appellant to waive solicitor/client privilege as between the appellant and trial counsel, so that both the appellant's and trial counsel's version of the circumstances in which matters were presented at trial is before the court on appeal.

[52] Although it is somewhat self-serving, Mr Gordon's observation was that counsel in the High Court dealt as well as could be expected with the hand presented to him. Relaxing the requirement for the evidence to be fresh in a case such as the present would be undesirable where the issue is one of summary judgment and the scope of such additional evidence is intended to enable what would effectively be a more thorough re-argument of many of the issues raised unsuccessfully in the High Court.

[53] In any event, there is no room for criticism of counsel who appeared for Mr Patrick in the High Court. We have found that the arguments that Mr Patrick wished to have run, but which were not, were in any event untenable. Counsel cannot be criticised for failing to run arguments that had no prospects of success.

Result

[54] The application for leave to adduce further evidence is declined.

[55] The appeal is dismissed.

[56] If the appellant had not been legally aided, we certify that we would have ordered him to pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Woodhouse Law, Auckland for Appellant
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