

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2021-404-1695
[2022] NZHC 411**

BETWEEN

COLIN DAVID OWENS and
DAVID SEAN WEBB
as Receivers of NZDMG LIMITED
(RECEIVERS OF SPECIFIC ASSETS
APPOINTED)
First Plaintiffs

BANK OF NEW ZEALAND
Second Plaintiff

AND

LILI DONG
First Defendant

DMG KITCHEN LIMITED
Second Defendant

NZDMG LIMITED (RECEIVERS OF
SPECIFIC ASSETS APPOINTED)
Third Defendant

Hearing: 25 February 2022 at 10:00am

Appearances: D T Broadmore/H C M S Snell for the Plaintiffs
Defendants are self-represented

Judgment: 11 March 2022

JUDGMENT OF ASSOCIATE JUDGE C B TAYLOR

*This judgment was delivered by me on 11 March 2022 at 3:00pm
pursuant to Rule 11.5 of the High Court Rules*

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Registrar/Deputy Registrar

Solicitors:

Buddle Findlay (David Broadmore/Hugo Snell), Auckland, for the Plaintiffs

Introduction

[1] Mr Colin Owens and Mr David Webb (together, the **Receivers**) are the first plaintiffs in this proceeding. They are the receivers of specific assets of NZDMG Ltd (**NZDMG**), the third defendant in this proceeding. The Bank of New Zealand (**BNZ**) is the second plaintiff in this proceeding.

[2] The first defendant in this proceeding is Ms Lili Dong. The second defendant is DMG Kitchen Ltd (**DMG Kitchen**).

[3] The plaintiffs apply for various orders against the defendants, principally including an order for summary judgment.

Background

[4] On 18 July 2018, BNZ and NZDMG entered into an asset finance agreement (**AFA**), under which BNZ advanced \$490,000 to NZDMG. NZDMG granted BNZ a security interest in some of its property as part of that agreement (the **NZDMG Secured Property**). Ms Dong guaranteed NZDMG's obligations to BNZ under the AFA.

[5] On 10 December 2018, BNZ and a related entity of NZDMG, NZDMG Appliance Ltd (**NZDMG Appliance**), entered into a loan facility agreement, pursuant to which BNZ advanced \$714,341 to NZDMG Appliance (**Appliance Loan**). NZDMG Appliance granted BNZ a security interest in all of its present and after-acquired property (**Appliance Secured Property**). Ms Dong, NZDMG and NZDMG Appliance provided an interlocking guarantee in respect of each of their obligations in favour of BNZ (**Interlocking Guarantee**).

[6] On 24 March 2020, BNZ granted both NZDMG and NZDMG Appliance temporary overdrafts. Those overdrafts were in the amounts of \$94,000 and \$115,000 respectively.

[7] Ms Dong was a director of both companies at the time the AFA, the Appliance Loan, the Interlocking Guarantee and the temporary overdrafts were entered into.

[8] The two temporary overdrafts had an original expiration date of 25 May 2020. That date was later extended to 19 June 2020. Neither overdraft was repaid on that date. On 28 July 2020, BNZ met with Ms Dong and explained that if repayment had not occurred by 31 August 2020, formal demands would likely issue.

[9] The overdrafts were not repaid by 31 August 2020. On 30 September 2020, BNZ requested repayment of outstanding amounts. Formal demands for repayment were issued on 15 October 2020.

[10] On 16 October 2020, Ms Dong proposed that the two companies would repay \$10,000 each month until they had cleared their overdrafts. The companies made those payments in October and November 2020 and January 2021. They made no further payments.

[11] By 11 May 2021, the outstanding NZDMG overdraft was \$40,436.467, the outstanding NZDMG Appliance overdraft was \$87,359.04 and \$12,063.52 remained owing under the Appliance Loan. That day, BNZ requested Ms Dong repay those outstanding amounts by 19 May 2021.

[12] Ms Dong did not repay the amounts owing, with further formal demands issuing on 25 May 2021 and 27 May 2021. On the latter date, BNZ also issued formal demands against NZDMG, NZDMG Appliance and Ms Dong under the Interlocking Guarantee.

[13] No payments were made following the demands of 25 and 27 May 2021. On 2 June 2021, BNZ appointed the Receivers as joint and several receivers of the NZDMG Secured Property and all present and after-acquired property of NZDMG Appliance (being the Appliance Secured Property).

[14] The following day, BNZ and the Receivers issued a notice to NZDMG under s 128 of the Property Law Act 2007, requiring payment of \$154,611.37 (plus interest)

by 19 July 2021 (the **NZDMG PLA Notice**). The Receivers and their agents attended the premises at 68 Ascot Road, Mangere (the **Premises**), the registered offices of NZDMG and NZDMG Appliance, there identifying the secured property of both companies. They uplifted the Appliance Secured Property.

[15] BNZ then accelerated the Appliance Loan, demanding immediate repayment of \$385,135.65 that was by that time owing.

[16] On 4 June 2021, Ms Dong complained to the Banking Ombudsman Scheme (**BOS**) about the conduct of BNZ and the Receivers. On 2 July 2021, the BOS advised Ms Dong it had no jurisdiction in relation to the complaint.

[17] DMG Kitchen, a related entity, claims to be the occupier of the Premises. Its director, Mr Carl Duan, issued trespass notices to the Receivers. The registered owner of the premises is Pengelly's Properties Ltd. It is unclear what lease arrangements exist between the owner of the Premises, NZDMG, NZDMG Appliance and related entities.

[18] On 19 July 2021, the NZDMG PLA Notice expired. All amounts secured by the AFA between BNZ and NZDMG then became payable, while the power of BNZ and the Receivers to sell all or any part of the NZDMG Secured Property became exercisable.

[19] By 16 August 2021, a total of \$788,641.87 was outstanding under the AFA, NZDMG overdraft, NZDMG current account, the Appliance Loan, NZDMG Appliance overdraft and NZDMG Appliance current account. BNZ issued further formal demands for that sum.

[20] The plaintiffs therefore seek summary judgment against all the defendants for delivery up of the NZDMG Secured Property, and against Ms Dong and NZDMG for amounts owing to BNZ.

[21] Ms Dong has filed a notice of opposition to the plaintiffs' interlocutory application for summary judgment. She alleges the receivers failed in their duties to

act in good faith and for a proper purpose, and that they have taken personal belongings over which BNZ did not have security.

[22] Ms Dong says further that BNZ exercised its rights oppressively, without considering the borrowers' capability to repay the loans. And she says the BOS has intervened and was investigating before this proceeding was begun, meaning BNZ has no right to recover the loans.

[23] The plaintiffs say Ms Dong's notice of opposition and accompanying affidavits disclose no reasonably arguable defence to their claims.

Notice of interlocutory application for summary judgment

Application

[24] The plaintiffs apply for orders:¹

- (a) requiring the immediate delivery of the NZDMG Secured Property to the Receivers;
- (b) granting permission to the Receivers to access the premises at 68 Ascot Road, Mangere, Auckland 2022 to search for, remove and take possession of all NZDMG Secured Property at 68 Ascot Road, Mangere, Auckland 2022;
- (c) granting permission to the Receivers to access any other premises in the control of the defendants to search for, remove and take possession of all NZDMG Secured Property at those premises;
- (d) for summary judgment against the first and third defendants in the sum of \$788,641.87;
- (e) for interest from the first and third defendants from 17 August 2021 up to the date of payment in full on the amount of:
 - (i) \$264,096.31 at the rate of 7.4% per annum;
 - (ii) \$41,440.78 at the rate of 20.20% per annum;
 - (iii) \$95,220.75 at the rate of 20.20% per annum;
 - (iv) \$387,884.03 at the rate of 7.62% per annum;
 - (v) In the alternative, under s 10 of the Interest on Money Claims Act 2016;

¹ Notice of interlocutory application for summary judgment dated 19 August 2021 at [1].

- (f) alternatively, for judgment on the plaintiffs' claim against the defendants on the issues of liability and on such part of the quantum that is indisputably due and owing, with directions as to the trial of the remaining issues of quantum, including the time and place of any such trial, and any such further directions as may be required; and
- (g) for costs against the defendants on a solicitor-client basis.

[25] The grounds on which the orders are sought are:²

- (a) appearing in the statement of claim filed with this application;
- (b) appearing in the affidavits of David Sean Webb and Sarah Louise Bartosiak filed in support of this application; and
- (c) that the defendants have no defence to the plaintiffs' claim.

Statement of claim dated 18 August 2021

[26] In the plaintiffs' statement of claim dated 18 August 2021, they allege:

- (a) BNZ (as lender), NZDMG (as borrower) and Ms Dong entered into a finance agreement on 18 July 2018. The agreement involved a loan of \$490,000 for a term of five years, with NZDMG granting BNZ a first-ranking security interest in a number of its assets. On 20 July 2018, NZDMG drew down the loan under the agreement.³
- (b) NZDMG and NZDMG Appliance operated current accounts with BNZ, on terms including that overdraft amounts were subject to compounding interest and repayable to BNZ on demand.⁴
- (c) On 10 December 2018, Ms Dong, NZDMG and NZDMG Appliance executed a deed of guarantee and indemnity in respect of each of their obligations in favour of BNZ.⁵
- (d) On that same date, BNZ (as lender), NZDMG Appliance (as borrower) and NZDMG and Ms Dong (as guarantors) entered into a loan facility

² At [2].

³ At [6]–[10].

⁴ At [11]–[13].

⁵ At [14]–[15].

agreement. The loan had a limit of \$740,475 and was subject to default interest. After entering this agreement, NZDMG Appliance drew down \$714,341.⁶

- (e) In return for the NZMG Appliance loan, NZDMG Appliance granted BNZ a security interest in all of its present and after-acquired property (the Appliance Secured Property) pursuant to a general security agreement (**GSA**). The GSA gave BNZ rights to enter upon any land and buildings in which the secured property was located, to repossess it, and to appoint any person as receiver of all or any part of it.⁷
- (f) Since 31 August 2020, NZDMG and NZDMG Appliance have been in default of their obligations to BNZ under their respective current accounts. Since 15 April 2021, NZDMG Appliance has been in default of its obligations to BNZ under the NZDMG Appliance loan. BNZ has made various formal demands for outstanding amounts, but neither Ms Dong, NZDMG or NZDMG Appliance have paid. Accordingly, BNZ appointed the Receivers to attempt to realise the companies' secured property.⁸
- (g) On 2 June 2021, the Receivers attended the premises of the companies' registered offices in Mangere, there locating the majority of NZDMG's secured property. The following day, BNZ and the Receivers issued a notice to NZDMG under s 128 of the Property Law Act in relation to its and NZDMG Appliance's defaults. BNZ then accelerated the debt owed under the NZDMG Appliance loan and demanded immediate payment of \$385,135.65. In response, DMG Kitchen, claiming to be the occupier of the Premises, issued trespass notices to the Receivers. Ms Dong, on behalf of NZDMG, then also issued a trespass notice against the Receivers in respect of the Premises. The plaintiffs dispute the validity of the trespass notices but have been unable to enter the

⁶ At [16]–[18].

⁷ At [19]–[20].

⁸ At [21]–[35].

Premises to remove and take possession of the NZDMG Secured Property.⁹

- (h) As at 16 August 2021, Ms Dong, NZDMG and NZDMG Appliance owed BNZ \$788,641.87 under the various agreements, accounts and facilities. Despite demand, they have failed or refused to pay.¹⁰
- (i) For conversion and detinue of the NZDMG Secured Property, the plaintiffs seek orders requiring the property's immediate delivery; permission to access the Mangere premises to search for, remove and take possession of the secured property; permission to access any other premises in the control of the defendants to search for, remove and take possession of the secured property; and costs.¹¹
- (j) For failure to pay the various debts, BNZ seeks judgment in the sum of \$788,641.87 plus interest up to the date of payment in full, and costs.¹²

Mr Webb's affidavit of 18 August 2021

[27] In an affidavit affirmed 18 August 2021, Mr Webb deposes that he is a licensed insolvency practitioner and Deloitte partner. Along with Mr Owens, he is a joint and several receiver of specified assets charged of NZDMG and of all present and after-acquired property of NZDMG Appliance.¹³

[28] Mr Webb says he and Mr Owens believe the defendants have no defence to the claim. On 2 June 2021, he and three members of his staff attended the companies' registered offices at 68 Ascot Road, Mangere, Auckland 2022. There, they located the majority of the NZDMG Secured Property. Three items of secured property, being a wood polishing machine, a stone polishing machine and a spray machine, were not located.¹⁴

⁹ At [36]–[45].

¹⁰ At [46]–[53].

¹¹ At [54]–[57].

¹² At [58]–[59].

¹³ Affidavit of David Sean Webb in support of plaintiffs' interlocutory application for summary judgment affirmed 18 August 2021 at [1].

¹⁴ At [4]–[12].

[29] Mr Webb deposes that on 3 June 2021, BNZ and the Receivers issued a notice under s 128 of the PLA in relation to NZDMG and NZDMG Appliance's defaults. He says the Receivers then successfully uplifted the secured assets of NZDMG Appliance, but not those of NZDMG.¹⁵

[30] Next, Mr Webb says Ms Dong has emailed the Receivers and their solicitors multiple times, stating reasons she considered their appointment as receivers to be illegal. But, despite the Receivers' requests that Ms Dong meet with them to resolve issues, she has refused to do so.¹⁶

[31] Mr Webb deposes that on 9 July 2021, Mr Duan of DMG Kitchen issued trespass notices to the Receivers. He says the Receivers have been unable to determine the Premises' leasing arrangement. The Receivers subsequently sent a letter of demand to the defendants disputing the trespass notices' validity and demanding they deliver up the NZDMG Secured Property. The defendants failed to comply.¹⁷

[32] Mr Webb says that on 16 July 2021, Ms Dong also issued trespass notices against the Receivers. Shortly thereafter, she sent a letter to the receivers and their solicitors disputing the validity of BNZ's demands for payment and disclaiming the PLA Notice. Mr Webb says the Receivers do not consider Ms Dong's opposition to the notice has any basis.¹⁸

[33] The Receivers believe NZDMG Secured Property (other than the spray machine) is still located at the Premises. Once they obtain possession of that property, the Receivers intend immediately to commence a sale process to realise its value for BNZ. But, Mr Webb says, despite the PLA Notice and the demand dated 14 July 2021, the defendants have refused to allow the Receivers to take possession of the property. He says BNZ has the first-ranking security interest and the Receivers are entitled to the property by virtue of cl 12.1 of the AFA's general terms.¹⁹

¹⁵ At [13]–[16].

¹⁶ At [17]–[18].

¹⁷ At [19]–[22].

¹⁸ At [24]–[25].

¹⁹ At [29]–[31].

[34] Finally, Mr Webb reiterates that the plaintiffs consider that the defendants have no defence to the claims, because:²⁰

- (a) the defendants have failed to pay the amounts owed under the AFA, NZDMG Current Accounts, Appliance Loan and Appliance Current Accounts;
- (b) the defendants have failed to deliver up the NZDMG Secured Property to the plaintiffs;
- (c) the defendants have not denied their liability in any way that would prevent this court granting judgment as sought; and
- (d) quantum is sought in accordance with the documentation agreed between BNZ and the defendants.

[35] On that basis, Mr Webb says the plaintiffs seek summary judgment against the defendants.²¹

Ms Sarah Louise Bartosiak's affidavit of 19 August 2021

[36] Ms Sarah Bartosiak, a BNZ manager, has filed an affidavit in support of the interlocutory application. She deposes that BNZ has registered financing statements in respect of the NZDMG Secured Property, being:²²

Make	Year	Unique ID	Description
JINAN JIAXIN	2018	DL 1704030	2018 JINAN JIAXIN Wood Polishing Machine
SENLIAN	2018		2018 SENLIAN TSP-W2S UV Spray Machine
JINAN JIAXIN	2018		2018 JINAN JIAXIN JX-3015S Stone Polishing Machine
MICRONAIR	2017	M1730-0730E	2017 MICRONAIR VC8 DB Dust Collector

²⁰ At [32].

²¹ At [33].

²² Affidavit of Sarah Louise Bartosiak in support of plaintiffs' interlocutory application for summary judgment affirmed 19 August 2021 at [6].

Make	Year	Unique ID	Description
HUALONG	2018		2018 HUALONG HKSQ 500 Stone Brage Saw
BRANDT AMBITION	2018	0-261-09-3504	2018 BRANDT AMBITION 1230AT Edgebander Machine
SENLIAN	2018		TS-1300B SENLIAN Belt Conveyor
FELDER	2018	424.06.173.17	2018 FELDER K700s Panel Saw
SENLIAN	2018		2018 SENLIAN TC-1300 Dust Cleaner Machine
SENLIAN	2018		2018 SENLIAN TH-1300S 24IR Levelling Tunnel
SENLIAN	2018		2018 SENLIAN TGW-1300D UV Curing Machine
SYNTEC	2018	S5100198	2018 SYNTEC 60A.6 Axes AM335x-H CNC Router

[37] Ms Bartosiak deposes that she understands from the Receivers that the NZDMG Secured Property is located at the Mangere Premises. She says further that she understands that the Receivers do not wish to enter the Premises without the Court's direction because of the trespass notices that have been issued.²³

[38] Ms Bartosiak says she understands that the Receivers, upon obtaining possession of the NZDMG Secured Property, intend immediately to commence a sale process to realise its value. And, despite the Property Law Act notice, the defendants have refused to allow the Receivers to take possession of the NZDMG Secured Property, in which BNZ has the first-ranking security interest.²⁴

²³ At [26].

²⁴ At [27]–[29].

[39] Next, Ms Bartosiak deposes to her understanding that the amount the Receivers will be able to realise from selling the NZDMG Secured Property and Appliance Secured Property will likely be significantly less than the debts owed by Ms Dong, NZDMG and NZDMG Appliance. She says that as at 16 August 2021, the total amount outstanding was \$788,641.87.²⁵

[40] Ms Bartosiak deposes that the defendants have no defence to the plaintiffs' claims because:²⁶

- (a) the defendants have failed to pay the amounts owed under the AFA, NZDMG Current Accounts, Appliance Loan and Appliance Current Accounts;
- (b) the defendants have failed to deliver up the NZDMG Secured Property to the plaintiffs;
- (c) the defendants have not denied their liability in any way that would prevent this court granting judgment as sought; and
- (d) quantum is sought in accordance with the documentation agreed between BNZ and the defendants.

[41] Ms Bartosiak finally reiterates that the plaintiffs seek summary judgment against the defendants as set out in the statement of claim.²⁷

Notice of opposition

[42] Ms Dong opposes the plaintiffs' application on the following grounds:²⁸

- A. The Receivers failed to meet their duties to act in good faith and for a proper purpose, and the agents instructed by the Receivers are very likely to have committed robbery of personal belongings neither the agents nor the companies in receivership had right to, on 4 June 2021, during the repossession of assets of NZDMG Appliance in the premises of 68 Ascot Road;
- B. I request the court to consider replacing the appointed Receivers or cancel the appointment of the Receivers, or give direction to trial regarding the misconducts of the Receivers, before the judgment of the misconduct of the Receivers is made, the order requested in 1.(a) 1.(b) and 1.(c) in the summary judgment application shall not be granted;

²⁵ At [30]–[31].

²⁶ At [36].

²⁷ At [37].

²⁸ Notice of opposition dated 2 November 2021 at [2]–[3].

- C. BNZ exercised the right to AFA and GSA in an oppressive way, without carefully considering the actual capability of the borrowers to repay the loan in arrest, and without communication in good faith;
- D. There has been a dispute between NZDMG and BNZ regarding the loans, and the Bank Ombudsman Scheme has intervened and is investigating the matter of the loans before the plaintiffs started this proceeding to the High Court, as the Bank Ombudsman Scheme can award compensation of up to \$350,000 for direct financial loss and has jurisdiction to the loans matter, and the decisions of the Bank Ombudsman Scheme will be binding to the bank, BNZ has no right to sue the loan related matters to the High Court to take advantage of the process, therefore the order requested in 1.(d) 1.(e) and 1.(f) and 1.(g) shall not be granted;
- E. appearing in the affidavit of Lili Dong filed in support of this notice of opposition.

Ms Dong's affidavit of 2 November 2021

[43] In an affidavit filed in support of the notice of opposition, Ms Dong deposes that on or about 19 July 2018, BNZ (as lender), NZDMG (as borrower) and she (as guarantor) entered into an asset finance agreement. She says the BNZ representative represented that the loan was a mortgage only and would not personally affect her in any way.²⁹

[44] Ms Dong deposes that because NZDMG Appliance had entered into another loan, a machinery lease agreement was set up between NZDMG Appliance (as lessor) and NZDMG (as lessee) and DMG Panel Ltd (as lessee). Under that agreement, NZDMG Appliance would lease equipment to NZDMG and DMG Panel Ltd for \$5,000 rent per month.³⁰

[45] Ms Dong says COVID-19 has put significant strain on the various group businesses. She says that in March 2020, BNZ customer manager Ms Joyee Pincott offered a total of \$210,000 in overdraft facilities to NZDMG and NZDMG Appliance. Ms Dong says, however, that she is not aware what the security liabilities are under the two overdraft accounts.³¹

²⁹ Affidavit of Lili Dong in support of the notice of opposition affirmed 2 November 2021 at [5].

³⁰ At [6].

³¹ At [8].

[46] Next, Ms Dong says that when Ms Pincott explained the loan to her at the time, she said that it would be only temporary and that it would not cause the companies' cash flow problems. She says that she agreed to the two overdraft loans over the phone and that she did not understand their terms. Ms Dong says Ms Pincott failed in a promise to obtain a long-term loan guaranteed by the government to replace the overdraft loans, and because of this the companies experienced serious cash flow problems.³²

[47] Ms Dong says that because she has borrowed all the money she can borrow to help alleviate the cash flow problems and is still unable to meet the bank loan, she has become very depressed and was at one time suicidal. Because of that depression she rarely checked her emails, and therefore missed BNZ's demands. She was shocked and surprised when the Receivers entered the Premises. She says BNZ never communicated with her about the Receivers.³³

[48] Ms Dong says that on 3 June 2021, she realised the NZDMG Appliance Loan under the general security agreement was in arrears of only \$23,981.21, which the company could easily repay. She says, however, that when she tried to make the payment to the NZDMG Appliance Loan account, it was locked. She was unable to make the deposit. While the account remained locked, BNZ accelerated the debt owed under the Appliance Loan, making it too difficult to repay in a short time.³⁴

[49] Of the Receivers' uplift of the NZDMG Secured Property, Ms Dong says the Receivers had not obtained a landlord waiver to enter the Premises. She says that in the process of removing machinery, the Receivers crushed the road in the factory and destroyed the shutter doors. She says more than \$50,000 damage was caused. Ms Dong then called the BOS to submit a complaint about BNZ. The Receivers paused their repossession operation about an hour afterwards.³⁵

[50] Ms Dong deposes that Ms Bartosiak of BNZ rejected a plan for repayment of outstanding amounts, and at the same time sped up the debt recovery process. She

³² At [9]–[10].

³³ At [13]–[14].

³⁴ At [16]–[17].

³⁵ At [18]–[19].

says Ms Bartosiak almost never communicated with her and set out “deliberately trying to destroy the company”. As well, she says that the Receivers intentionally breached the machinery lease agreement, as BNZ knew that the machinery was subject to a lease agreement.³⁶

[51] Next, Ms Dong says that the Receivers contacted the landlord of the premises many times, which caused the landlord to apply pressure to Ms Dong and the group companies. This has caused her great panic and deepened her depression. She says she could only take more medicine to maintain her life. Ms Dong deposes that on 9 July 2021, she authorised DMG Kitchen to issue trespass notices to the Receivers and their staff. On 16 July 2021, she did the same on behalf of NZDMG.³⁷

[52] Finally, Ms Dong says the defendants oppose the summary judgment application because there are major disputes between the defendants and the plaintiffs in each of the orders sought in the application. She says the defendants seek directions of counterclaim or crossclaim as to the trial.³⁸

Ms Dong's affidavit of 17 January 2022

[53] In a further affidavit of 17 January 2022, Ms Dong introduces additional evidence from Ms Kathy Liang and Mr Haoran Mao.³⁹

[54] Ms Liang is the DMG companies' tax agent and accountant. Her evidence confirms that she prepared all the required financial reports for funding requirements and loan applications from BNZ and under the Business Finance Guarantee Scheme. She says she liaised with Ms Pincott for reports and supporting documents. She says her clients later advised her that the \$500,000 government support loan was not approved. And she says until NZDMG and NZDMG Appliance were put into receivership, both companies had been operating as usual. Both had experienced a significant growth in business, although they had also encountered short term cash flow issues.

³⁶ At [21].

³⁷ At [23]–[25].

³⁸ At [28].

³⁹ Affidavit of Lili Dong witness evidence affirmed 17 January 2022 at [5]–[6].

[55] Mr Mao was the sole director of NZDMG until 17 June 2021, when he was replaced by Ms Dong. His evidence is that he witnessed Ms Dong sign the AFA with Ms Jenny Liu from BNZ. He witnessed Ms Dong get confirmation from Ms Liu before she signed that the loan would only recover from the collateral and would not personally affect Ms Dong. He says Ms Pincott pushed him and Ms Liang very hard with multiple phone calls every day to prepare the financial reports for an application for a loan under the Business Finance Guarantee Scheme.

[56] Ms Mao's memorandum further discloses that on 2 June 2021, he advised the Receivers that the business was running very well but that it had encountered short term cash flow issues. He says he showed the Receivers over \$600,000 in upcoming receivables.

[57] Mr Mao also says that he told the Receivers they could not remove anything from the Premises, as NZDMG was using the assets and rented them from NZDMG Appliance. He says he explained to them that the Premises are not occupied by NZDMG Appliance and there was no landlord waiver or any kind of permission to allow them to break into a third party's premises. He says the Receivers and their agents, in purporting to uplift the Appliance Secured Property, took a lot of personal belongings that never belonged to NZDMG Appliance.

[58] Mr Mao says NZDMG staff videoed some of the interactions with the Receivers. Links to the relevant videos are appended to the affidavit.

Ms Bartosiak's reply affidavit of 10 February 2022

[59] Ms Bartosiak has filed an affidavit in reply to Ms Dong's two affidavits. In it, she deposes that because neither Ms Dong nor the DMG companies had made payments in response to the formal demands of 25 May 2021 and 27 May 2021, she considered the appointment of the Receivers was commercially appropriate. She says it was clear the companies had cashflow issues and were unable to meet repayment commitments as they were falling due.⁴⁰

⁴⁰ Affidavit in reply of Sarah Louise Bartosiak in support of plaintiffs' interlocutory application for summary judgment affirmed 10 February 2022 at [20].

[60] Ms Bartosiak says, contrary to Ms Dong's assertions, that she did not deliberately avoid Ms Dong's calls. She says it appears she missed one or two calls on 2 June 2021 but was not sure who had phoned her because the caller did not leave a voicemail. She says further that she called Ms Dong later that day and spoke to her for almost 45 minutes, explaining BNZ's enforcement steps. She says she considers that BNZ's approach has been reasonable throughout this process. Both NZDMG and NZDMG Appliance's overdraft facilities expired in June 2020, but BNZ took no enforcement steps until a year later.⁴¹

[61] As to Ms Dong's offers to repay in June 2021, Ms Bartosiak says that BNZ had been prepared to accept immediate repayment of amounts in arrears. It was not, however, prepared to accept Ms Dong's part-repayment proposal, because the two companies had been in default since at least July 2020. Ms Bartosiak says further that while BNZ had locked the companies' various accounts upon the appointment of the Receivers, that stop did not prevent Ms Dong from depositing funds into them. In any event, the stop was removed from the NZDMG accounts on the morning of 4 June 2021.⁴²

[62] Ms Bartosiak then says that even if Ms Dong had repaid arrears under the Appliance Loan, there were significant amounts outstanding under the temporary overdraft facilities that would have independently given BNZ the right to appoint the Receivers in relation to the NZDMG Secured Property and the Appliance Secured Property.⁴³

[63] Of Ms Dong's complaint to the BOS, Ms Bartosiak highlights that the BOS replied to Ms Dong and advised her that it did not have jurisdiction to consider the appointment of the Receivers or their conduct of the receivership. On 9 November 2021, the BOS issued a preliminary view that BNZ had acted reasonably and did not breach any duty or obligation. Later that month, the BOS closed its file on Ms Dong's complaint, recording it as "not upheld".⁴⁴

⁴¹ At [21]–[22].

⁴² At [23]–[26].

⁴³ At [27]–[28].

⁴⁴ At [29]–[34].

[64] Finally, Ms Bartosiak says BNZ has not instructed the Receivers, and certainly has not instructed them recklessly to harass and arbitrarily take items the Receivers had no right to take. BNZ expects the Receivers to, and has the utmost faith that they have and will continue to, discharge their duties in accordance with their statutory obligations.⁴⁵

Ms Pincott's reply affidavit of 11 February 2022

[65] Ms Pincott has also filed an affidavit in reply to Ms Dong's affidavits. She deposes that Ms Dong's claim that the machinery lease was set up on BNZ's instructions is incorrect. She says she was advised by Ms Dong that NZDMG Appliance would be the asset-holding entity for the machines, with NZDMG paying a monthly rental for their use. She says that in granting the NZDMG Appliance loan, BNZ adopted a consolidated income assessment, meaning its assessment of the group's debt-servicing capability would not have been affected by the presence of any lease agreement between the two companies.⁴⁶

[66] Ms Pincott says she was not aware of the alleged machinery lease and has seen nothing to suggest BNZ knew of it at the time of the NZDMG Appliance Loan. She says that if she had known of the machinery lease with DMG Panel Ltd, she would not have consented to it. That would not be standard practice for BNZ.⁴⁷

[67] Ms Pincott says she did not represent to Ms Dong that the Interlocking Guarantee was limited to the Appliance Loan. The Interlocking Guarantee secured multiple facilities, as set out in the written warning accompanying it. She says she explained this to Ms Dong, and that she is confident that Martelli McKegg (as solicitors BNZ appointed for the borrowers) would have explained to Ms Dong her obligations as guarantor. BNZ received a solicitor's certificate to that effect.⁴⁸

⁴⁵ At [35].

⁴⁶ Affidavit in reply of Joyee Pincott in support of plaintiffs' interlocutory application for summary judgment affirmed 11 February 2022 at [6]–[8].

⁴⁷ At [9]–[10].

⁴⁸ At [11].

[68] Turning to the NZDMG and NZDMG Appliance overdraft facilities, Ms Pincott says that on 20 March 2020, she discussed with Ms Dong and Mr Mao the impact COVID-19 was having on their business. They explained to her that their cashflow position was increasingly tight and requested temporary relief in the form of two temporary overdrafts. During the discussion, she suggested other options such as exploring the government wage subsidy. But she says that at no point did she represent that a term loan would replace the overdrafts to alleviate the companies' cash flow problems. She says that is particularly so in circumstances where BNZ had neither asked for nor received all the required financial information and completed all the necessary due diligence for such a loan.⁴⁹

[69] Ms Pincott disputes that she simply read the terms of the loans to Ms Dong over the phone and said it did not matter if she did not understand. She says the companies had previously applied for temporary overdrafts on the same terms and conditions and Ms Dong would have been aware of the process involved in granting temporary overdrafts. She says that despite her invitation, neither Ms Dong nor Mr Mao asked her any questions once the temporary overdrafts had been put in place. Both overdraft facilities were fully utilised within weeks of their approval.⁵⁰

[70] Ms Pincott deposes that on 25 March 2020, Mr Mao approached her about the government's Business Finance Guarantee Scheme. In early April 2020, Ms Pincott emailed Ms Dong about the scheme and included information about how to apply. She requested that Ms Dong complete the enquiry application to enable BNZ to assess whether Ms Dong's business might be eligible and asked her to provide related documentation. She says she made no representation that their application would be approved, or that the amount of any loan would be \$500,000.⁵¹

[71] Ms Pincott says NZDMG group's application failed for three main reasons. First, the companies' pre-COVID-19 financial situation was not strong enough to service any additional debt under their existing finance facilities. Second, they provided an unclear business plan for COVID-19 recovery. Finally, the group's

⁴⁹ At [13]–[14].

⁵⁰ At [15]–[19].

⁵¹ At [20]–[23].

financials did not meet the government's funding criteria. NZDMG was indebted to several other financial companies and banks, which further impacted on their debt-servicing capability.⁵²

[72] Next, Ms Pincott deposes that she and Andy Hewitt of BNZ met with Ms Dong and Mr Mao. They recommended Ms Dong and Mr Mao engage a collection agency and that they seek professional advice on the viability of their business. They also explained that BNZ was unable to provide any further lending and that they required the overdrafts to be cleared by the end of August 2020 or formal demands would issue. Later that day, Ms Pincott had a follow-up conversation on the phone with Ms Dong. Ms Dong advised that the business would not consider the recommendation to engage a collection agency.⁵³

[73] Ms Pincott then details her further unsuccessful attempts to chase up Ms Dong and Mr Mao for payments to clear the temporary overdrafts. By 30 September 2020, no further payments having been made to the overdraft accounts and with the companies not having made efforts to collect their accounts receivable, BNZ's Strategic Business Services team took carriage of the matter. Ms Pincott's involvement ceased at this time.⁵⁴

[74] Concluding, Ms Pincott says she always tried her best to support NZDMG and NZDMG Appliance through the difficulties of 2020. She says she always treated Ms Dong and Mr Mao in what she considers a transparent and professional manner.⁵⁵

Ms Liu's reply affidavit of 10 February 2022

[75] Ms Liu has filed an affidavit in reply to Ms Dong's two affidavits. She deposes that she was the BNZ staff member involved in arranging the AFA and discussing it with Ms Dong.⁵⁶

⁵² At [24].

⁵³ At [26]–[27].

⁵⁴ At [28]–[32].

⁵⁵ At [33].

⁵⁶ Affidavit in reply of Jenny Liu in support of plaintiff's interlocutory application for summary judgment at [4]

[76] Ms Liu deposes that BNZ had been content to accept Ms Dong's representation that, at the time of the AFA application, NZDMG owned all of the NZDMG Secured Property.⁵⁷

[77] She disputes Ms Dong's contention that the AFA was not explained to her and that BNZ told her the guarantee would not affect her in any way. She says she explained to Ms Dong and Mr Mao that because NZDMG was a limited liability company, BNZ would require security in the form of a personal guarantee in the case of default. She says she also asked Ms Dong to think about the obligations she was personally incurring and to seek independent legal advice. She did not pressure Ms Dong to sign the guarantee.⁵⁸

[78] Finally, Ms Liu notes that Ms Dong signed an acknowledgment confirming that her obligations had been explained to her and that she understood them. Ms Liu deposes she never would have said to Ms Dong that the AFA was "mortgage only", given that she was giving a guarantee.⁵⁹

Ms Louise Craig's reply affidavit of 9 February 2022

[79] Ms Louise Craig has filed an affidavit in reply to Ms Dong's two affidavits. She deposes that she is an Associate Director at Deloitte and works closely with the Receivers. She disputes that the Receivers broke into the Premises and threatened Ms Dong. Instead, she says that she and the Receivers attended the Premises on 2 June 2021 to meet with Mr Mao and Ms Dong. She says the conversation was amicable and non-threatening, with the Receivers offering to facilitate discussions to settle with BNZ.⁶⁰

[80] Ms Craig says that when she and another Deloitte employee returned to the premises on 3 June 2021, Mr Mao advised that BNZ had agreed to his repayment plan. That proved to be incorrect. As well, she says that the Receivers checked all uplifted assets against the Personal Property Securities Register and security documents and

⁵⁷ At [5].

⁵⁸ At [6]–[7].

⁵⁹ At [8].

⁶⁰ Affidavit in reply of Louise Adrienne Craig in support of plaintiffs' interlocutory application for summary judgment at [1]–[7].

confirmed with Mr Mao that they belonged to NZDMG Appliance. She says the contractors who uplifted the secured property took care to ensure nothing was damaged.⁶¹

[81] Ms Craig says she does not believe there was any damage to the driveway or to the shutter doors at the premises. The equipment was uplifted by a specialist industrial equipment moving company.⁶²

[82] Next, Ms Craig deposes that the Receivers had no knowledge of, or ever sighted, the machinery lease. While the Receivers were at the premises on 4 June 2021, Mr Mao did not dispute the uplifted assets were owned by NZDMG Appliance.⁶³

[83] Ms Craig says she and the Receivers have at all times acted professionally, reasonably and in compliance with their statutory obligations. In fact, she says that it is because the Receivers are so conscious of their professional responsibilities that they brought this proceeding to be guided by the Court, rather than simply rely on their powers under the AFA and GSA.⁶⁴

Submissions

Plaintiffs' submissions

[84] Mr David Broadmore and Mr Hugo Snell, for the plaintiffs, submit that there will have been a conversion of goods where.⁶⁵

- (a) the defendant's conduct is inconsistent with the rights of the owner or other person entitled to possession;⁶⁶
- (b) the conduct is deliberate;⁶⁷

⁶¹ At [9]–[11].

⁶² At [13].

⁶³ At [14].

⁶⁴ At [20].

⁶⁵ Synopsis of submissions of the plaintiffs in support of application for summary judgment dated 11 February 2022 at [5.1], citing *Glenmorgan Farm Ltd (in rec and liq) v New Zealand Bloodstock Leasing Ltd* [2011] NZCA 672, [2012] 1 NZLR 555 at [25]–[27] (citing *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 & 5)* [2002] UKHL 19, [2002] 2 AC 883; and Stephen Todd (ed) *The Law of Torts in New Zealand* (online ed, Thomson Reuters) at [59.12.3]–[59.12.4].

⁶⁶ Todd, above n 65, at [59.12.3.01].

⁶⁷ At [59.12.3.01].

- (c) the conduct is so extensive an encroachment on the rights of the owner or other person as to exclude him or her from use and possession of the goods.⁶⁸

[85] Mr Broadmore submits that, similar to conversion, detinue is the detention of property with the intention of keeping it in defiance of the rights of the person entitled to possession of it. A remedy is delivery up of the goods, if the defendant's ability to pay damages is in doubt and the goods are sufficiently identified or identifiable.⁶⁹

[86] Mr Broadmore submits that the plaintiffs have a better right to possess the NZDMG Secured Property than the defendants or any third party. BNZ has a perfected security interest in the NZDMG Secured Property, and in the event of a default under the AFA, BNZ could take possession of the property or appoint a receiver over it. The security interest is enforceable against third parties.⁷⁰

[87] The defendants' actions are inconsistent with BNZ and the Receivers' rights in the NZDMG Secured Property. Mr Broadmore submits the defendants are deliberately preventing the plaintiffs from repossessing the property despite demand, including by their issue of trespass notices. Further, NZDMG must have owned the secured property at the time of the AFA. Even if some of that secured property was later sold to NZDMG Appliance, it would remain subject to BNZ's security interest. Finally, even if NZDMG Appliance owned the secured property at the time of the AFA, the property would be subject to BNZ's security under the GSA NZDMG Appliance granted.⁷¹

[88] Next, Mr Broadmore submits that BNZ has reasonably exercised its rights under the AFA and the GSA. It has not been "oppressive" in terms of s 118 of the Credit Contracts and Consumer Finance Act 2003. To the contrary, it has consistently observed high standards of commercial practice, including by engaging constructively

⁶⁸ At [59.12.3.02(2)].

⁶⁹ Plaintiffs' submissions, above n 65, at [5.2]–[5.3], citing Todd, above n 65, at [59.12.4.01] and [59.12.3.04].

⁷⁰ At [5.4]–[5.5], citing *New Zealand Bloodstock Ltd v Waller* [2006] 3 NZLR 629 (CA) and Personal Property Securities Act 1999, ss 36 and 109.

⁷¹ At [5.6]–[5.8].

with Mr Mao and Ms Dong to facilitate repayment, and by holding off for nearly a year before making formal demands.⁷²

[89] Mr Broadmore submits the stop on the NZDMG and NZDMG Appliance accounts did not prevent payments being received into those accounts, and that the stop was in any event removed on 4 June 2021. Further, after the stop had been removed, Ms Dong did not make a payment towards the Appliance Loan that she said she would. For all those reasons, BNZ was entitled to appoint the Receivers.⁷³

[90] Ms Dong and NZDMG have failed or refused to pay the outstanding amount of \$788,641.87. Mr Broadmore submits that BNZ is entitled to judgment for that debt, saying contemporaneous documentary evidence shows that BNZ did not mislead Ms Dong in relation to the two overdraft facilities; the overdrafts provided by BNZ were valid and enforceable against Ms Dong under the Interlocking Guarantee; the security for the overdrafts included the group companies' secured property; Ms Dong has provided a valid and enforceable guarantee of NZDMG under the AFA; and the BOS has closed its investigation into Ms Dong's complaint.⁷⁴

[91] For completeness, Mr Broadmore addresses the position in relation to NZDMG Appliance. NZDMG Appliance is not a party to the proceeding. But, in any event, counsel say the plaintiffs deny any allegations that the Receivers caused damage to NZDMG or NZDMG Appliance. Even if they had caused such damage, it was not caused by a breach of any duty by the Receivers. And they submit the Receivers took no personal belongings when they uplifted the Appliance Secured Property.⁷⁵

[92] Finally, on the Receivers' alleged breach of the machinery lease, Mr Broadmore submits that the Receivers were entitled to repossess the machinery the subject of that lease in accordance with BNZ's security. The Receivers did not breach any duty. Further, the Receivers were acting as NZDMG and the NZDMG Appliance's agents, with those two companies being solely responsible for the Receivers' acts.⁷⁶

⁷² At [5.9]–[5.11].

⁷³ At [5.12]–[5.16].

⁷⁴ At [6.1]–[6.20].

⁷⁵ At [7.1]–[7.5].

⁷⁶ At [7.8]–[7.9].

[93] Concluding, Mr Broadmore submits the defendants have no defence to the plaintiffs' claims. The defendants should be ordered to deliver up the NZDMG Secured Property to the plaintiffs, with the judgment sum of \$788,641.87 to be awarded to BNZ together with interest from 17 August 2021 and costs on a solicitor-client basis.⁷⁷

Defendants' submissions

[94] Ms Dong has filed submissions on behalf of the defendants. She submits the defendants have arguable defences to the claims and that the defendants are entitled to submit a counterclaim against the plaintiffs. A full trial is needed.⁷⁸

[95] Ms Dong submits there is video evidence to prove that the plaintiffs caused damage at the Premises. She submits the Receivers had not obtained the landlord waiver nor the consent of the occupier of the Premises before they uplifted the Appliance Secured Property. She says a large number of witnesses saw the Receivers take personal belongings from the site.⁷⁹

[96] Ms Dong submits further that Mr Mao witnessed the Receivers' agents damage machinery in the uplift, and that the Receivers have failed to supply evidence that the machinery was not damaged. She says the Receivers have failed to meet their duty to identify the inventory of the goods before repossession and that they have caused huge losses to NZDMG, DMG Panel Ltd and DMG Kitchen.⁸⁰

[97] Next, Ms Dong submits that BNZ misled her in relation to the two overdraft facilities. She says Ms Pincott's affidavit is not valid because Ms Dong never anticipated applying for the temporary cash flow overdrafts, and that it was only Mr Mao who was authorised by Ms Dong to communicate with BNZ about the overdrafts. Further, she submits that BNZ requested a lot of reports and documents to apply for the loan under the Business Finance Guarantee Scheme.⁸¹

⁷⁷ At [8.1].

⁷⁸ Synopsis of submissions of the defendants in opposition of application for summary judgment dated 18 February 2022 at [1.2].

⁷⁹ At [2.1(a)]–[2.1(c)].

⁸⁰ At [2.1(d)]–[2.1(g)].

⁸¹ At [3.1].

[98] Ms Dong submits there was never any explanation of the terms and conditions of the two overdrafts and that NZDMG and NZDMG Appliance's liability under the AFA and GSA should not apply to the overdraft loans. BNZ's appointment of the Receivers was oppressive. And BNZ only notified Ms Dong of the Receivers' appointment by email, during a time in which she was seriously depressed and not checking her emails regularly.⁸²

[99] Ms Dong submits BNZ failed to explain its reasons for declining the proposed repayment plan and never gave Ms Dong the chance to explain. She says NZDMG Appliance's assets are far in excess of its liabilities, and that BNZ does not have the right to put NZDMG Appliance into receivership. She says BNZ has failed to disclose the communications between BNZ and the Receivers, "where the truth may be hidden".⁸³

[100] As to the machinery lease, Ms Dong says BNZ instructed NZDMG to enter such a lease agreement to support its proof of income to meet loan requirements. She submits that BNZ and the Receivers have breached the machinery lease and were not entitled to repossess machinery. The plaintiffs should be liable for losses in terms of the production line interruption.⁸⁴

[101] Concluding, Ms Dong submits that there are arguable defences to the plaintiffs' claims. The Court should not grant summary judgment to the plaintiffs. As well, the losses the plaintiffs have caused the defendants far exceed the plaintiffs' claim. A new timetable considering the defendants' counterclaim should be ordered.⁸⁵

Legal principles

[102] Rule 12.2(1) of the High Court Rules 2016 provides:

12.2 Judgment when there is no defence or when no cause of action can succeed

- (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of

⁸² At [4.1]–[4.2].

⁸³ At [4.3]–[4.6].

⁸⁴ At [5.1]–[5.3].

⁸⁵ At [6.1]–[6.2].

action in the statement of claim or to a particular part of any such cause of action.

[103] The relevant principles governing a summary judgment application are well established:⁸⁶

The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 (CA). The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341 (PC). In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[104] The wording of r 12.2 (“may give judgment”) indicates a residual discretion. Having regard to the various authorities, the position appears to be as follows:⁸⁷

- (a) The discretion implied by the use of the word “may” is to be restrictively applied. In a great majority of cases, once the court is satisfied the defendant has no defence, there is no room for the exercise of discretion.
- (b) The residual discretion may be invoked to avoid oppression or injustice to the defendant where:
 - (i) The proceeding involves the actions or possible liability of a third party which is not before the court;
 - (ii) The proceedings are such that the opportunity should be given to allow discovery or other interlocutory applications to be concluded;
 - (iii) The circumstances of the case disclose very unusual features, the presence of which leads the court to conclude that the entry of summary judgment would be oppressive or unjust; or
 - (iv) The combination of complex issues of fact and law justify the dismissal of the application for summary judgment, either as a matter of discretion or because the court cannot be satisfied that the defendant has no defence.

⁸⁶ *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26].

⁸⁷ Andrew Beck and others (eds) *McGechan on Procedure* (online ed, Thomson Reuters) at [HR12.2.11].

- (c) Even where the court is not satisfied that a defence has been made out, in exceptional circumstances the application may be adjourned to allow for other processes to be followed.

Analysis

Are the plaintiffs entitled to delivery of the NZDMG secured property?

[105] I consider the plaintiffs are entitled to delivery up of the NZDMG Secured Property. This is for the following reasons:

- (a) The AFA granted BNZ a security interest in the NZDMG Secured Property to secure obligations under the AFA. In addition, NZDMG's temporary overdraft was also secured by the AFA and therefore the security interests created in the NZDMG Secured Property.
- (b) In the event that a default occurred, BNZ could take possession of the NZDMG Secured Property or appoint a receiver over the NZDMG Secured Property who could take possession of the NZDMG Secured Property. An event of default includes a failure to pay any money due under the AFA or NZDMG's temporary overdraft.
- (c) As at 2 June 2021, NZDMG was in default of its obligations under the AFA including because it had failed to pay money due under the NZDMG temporary overdraft and the Interlocking Guarantee. Accordingly, receivers were appointed.

[106] BNZ's security interest in NZDMG Secured Property is enforceable against third parties, including DMG Kitchen Ltd. Under s 36 of the Personal Property Securities Act 1999 (PPSA), a security agreement is enforceable against a third party in respect of particular collateral if (among other grounds) the debtor has signed a security agreement that contains an adequate description of the collateral by item or kind and enables the collateral to be identified. The AFA was executed by NZDMG and by Ms Dong, and contains itemised descriptions of the NZDMG Secured Property which were then used to register financial statements for each item.

Machinery lease

[107] In her opposition, Ms Dong raised the issue of the machinery lease dated 1 July 2018, that existed between NZDMG Appliance and NZDMG and DMG Panel Ltd in relation to the NZDMG Secured Property. NZDMG Appliance is allegedly the lessor under the machinery lease, which would make it the owner of the NZDMG Secured Property. The NZDMG Secured Property is then leased to NZDMG and DMG Panel Ltd. Ms Dong's argument is that as NZDMG Appliance owned the NZDMG Secured Property, the Receivers were not entitled to repossess it.

[108] I am of the view that the plaintiffs are entitled to orders for delivery up of NZDMG Secured Property and the machinery lease, if valid, does not prevent this. This is for the following reasons:

- (a) At the time the AFA was entered into in July 2018, NZDMG represented and warranted that it was, or would be on the date of the loan, the owner of the NZDMG Secured Property. NZDMG agreed that it would not part with possession of the NZDMG Secured Property and therefore any sale of NZDMG property to NZDMG Appliance would be a breach of the AFA.
- (b) Even if some of the NZDMG Secured Property was sold to NZDMG Appliance following the entering into of the AFA, it would remain subject to BNZ's security interest under the AFA because NZDMG Appliance would have taken such property with full knowledge of that security interest (s 36 of the PPSA).
- (c) Finally, even if the NZDMG Secured Property was owned by NZDGM Appliance at the time of the AFA (which would be a serious breach by Ms Dong of representations made to the BNZ at the time the AFA was entered into), the NZDMG Secured Property would be subject to BNZ's security under the GSA granted by NZDMG Appliance. Accordingly, the plaintiffs are still entitled to possession of NZDMG Secured Property and to have it delivered up to them.

Has BNZ exercised its rights in respect of the NZDMG Secured Property in an oppressive way?

[109] Ms Dong asserts that BNZ has exercised its rights under the AFA and the GSA in an oppressive way, without carefully considering the capability of the borrowers to repay the loans, and without communication in good faith.

[110] I accept Mr Broadmore's submissions that BNZ's conduct has not been oppressive. As set out at [5.11] of the plaintiffs' synopsis, the events leading up to the appointment of the Receivers do not reveal any oppressive conduct by BNZ. Tracking through the events from June 2020 until the Receivers were appointed on 2 June 2021, the following occurred:

- (a) In June 2020, NZDMG and NZDMG Appliance went into default under their respective overdraft facilities.
- (b) Between June 2020 and October 2020, BNZ engaged with Ms Dong and Mr Mao to facilitate repayment of the debts including multiple emails and phone calls. In October 2020, BNZ made a formal demand for repayment.
- (c) From October 2020 to January 2021, BNZ received three payments of \$10,000 each from NZDMG and NZDMG Appliance towards their overdraft and was content not to take any enforcement steps during that period.
- (d) From January 2021, NZDMG and NZDMG Appliance ceased to make any further payments towards the overdrafts but gave assurances that the accounts would be cleared by May 2021.
- (e) As at 15 April 2021, NZDMG Appliance was in default under the Appliance Loan and BNZ was seeking an urgent payment of \$11,702.69. BNZ also sent Ms Dong emails on 15 March 2021 and 11 May 2021, to which she did not respond.

- (f) On 25 and 27 May 2021, BNZ made formal demands for repayment of the temporary overdrafts for NZDMG and NZDMG Appliance which were due to have originally been repaid in June 2020. BNZ did not receive any response to those demands and appointed the Receivers on 2 June 2021, almost a year after the original default.

[111] It is clear from this course of conduct that the conduct of the BNZ was not oppressive.

[112] Ms Dong also raised the issue of an inability to make a payment into the NZDMG current account on 3 June 2021. She claims that she wanted to pay towards the Appliance Loan, to remedy defaults, but was prevented from making that payment as there was a stop on the relevant account. The plaintiff's response to this point is that while there was a stop on the account which prevented further drawings from the account, it did not prevent the payment being made. Also, the stop was removed on 4 June 2021. At that time, Ms Dong withdrew \$9,000 of the \$10,000 deposit and spent the rest.

[113] In any event, even if a payment of the \$10,000 had been made to the NZDMG current account, this would not have remedied the defaults. As at 3 June 2021, there was \$40,305.43 owing under the NZDMG overdraft, \$87,105.84 owing under the NZDMG Appliance overdraft, and arrears of \$25,133.37 owing under the Appliance Loan.

[114] The issue of the stop on the account does not indicate any oppressive conduct by BNZ in the exercise of its powers under its securities.

Is BNZ entitled to judgment for the outstanding debt?

[115] Ms Dong, in her notice of opposition and affidavits, has raised a number of issues which she submits should prevent summary judgment being given for the outstanding debt. I deal with each of these in turn.

Business Finance Guarantee Scheme loan

[116] Ms Dong alleges that BNZ persuaded NZDMG and NZDMG Appliance into taking out the temporary overdraft facilities on the basis that BNZ assured her that NZDMG and NZDMG Appliance would be able to obtain a government loan under the Business Finance Guarantee Scheme (**BFGS**) if they first applied for temporary overdraft facilities from BNZ.

[117] This allegation is refuted by Ms Pincott in her affidavit. I accept the submissions of Mr Broadmore that this allegation is simply not credible, given the contemporaneous documentary evidence and Ms Pincott's affidavit.

Ms Dong's personal guarantees

[118] Ms Dong also claims her obligations as guarantor did not extend to the NZDMG overdraft and the NZDMG Appliance overdraft. Like the previous allegation, this allegation is not credible given the contemporaneous documentation. On 10 December 2018, Ms Dong entered into the Interlocking Guarantee and signed a waiver of independent legal advice in relation to the Interlocking Guarantee. On 12 December 2018, Steven Lee of Martelli McKegg provided a solicitor's certificate which confirmed that Ms Dong's obligations under the Interlocking Guarantee had been explained to her.

[119] The Interlocking Guarantee extended to all future amounts advanced by BNZ to Ms Dong, NZDMG or NZDMG Appliance. Accordingly, the Interlocking Guarantee extended to the NZDMG overdraft and the NZDMG Appliance overdraft.

Security for the overdrafts

[120] Ms Dong also contends that the NZDMG temporary overdraft was not secured by the NZDMG Secured Property, and the NZDMG Appliance temporary overdraft was not secured by the Appliance Secured Property. This argument is clearly untenable, as set out in [6.10] of the plaintiffs' synopsis.

Guarantee of NZDMG's obligations under the AFA

[121] Ms Dong also claims that she did not provide a valid guarantee of NZDMG's liability under the AFA. She asserts that she was told the guarantee under the AFA did not make her personally liable for NZDMG's obligations under the AFA.

[122] Again, this is clearly not credible for reasons set out in [6.12] of the plaintiffs' synopsis. In particular:

- (a) On 18 July 2018, Ms Dong executed the guarantee under the AFA.
- (b) Ms Dong is named as guarantor on the cover page of the AFA and executed the AFA in two capacities, as director of NZDMG and as guarantor.
- (c) By executing the AFA as guarantor, Ms Dong signed an acknowledgment of her obligations as guarantor under the AFA.
- (d) Ms Dong signed a waiver of independent legal advice in relation to the guarantee under the AFA.

[123] Clearly in the light of this documentation, any argument that the guarantee does not apply to NZDMG's obligations under the AFA is untenable.

[124] Ms Dong has also asserted that she was told by Ms Liu of BNZ that the guarantee did not make her personally liable. Again, this allegation is not credible and is inconsistent with contemporaneous documents and the evidence of Ms Liu.

[125] Also, as pointed out by Mr Broadmore, even if the guarantee under the AFA was unenforceable — which is clearly not the case — Ms Dong subsequently provided the Interlocking Guarantee to the BNZ. There is no dispute that under the Interlocking Guarantee, Ms Dong was liable for NZDMG's and NZDMG Appliance's obligations.

Is the Banking Ombudsman's scheme investigation any defence to summary judgment?

[126] Ms Dong asserts that because the BOS was investigating her complaint before this proceeding was commenced, BNZ is not entitled to pursue this claim.

[127] I agree with Mr Broadmore's submission that this basis of opposition to the summary judgment must fail.

[128] BNZ is a party to the BOS Participation Agreement. Under the BOS Participation Agreement, Terms of Reference and Operational Guidelines:

- (a) A bank must get the scheme to consent before starting legal proceedings against a complainant over a matter the BOS is considering; and
- (b) the BOS cannot consider a complaint that becomes the subject of legal proceedings.

As pointed out by Mr Broadmore, the BOS is no longer considering Ms Dong's complaint and the BNZ retrospectively obtained consent from BOS for these proceedings.

Other matters raised in opposition to the summary judgment

Alleged damage

[129] Ms Dong alleges that the Receivers have caused damage by:

- (a) taking property that does not belong to NZDMG or NZDMG Appliance;
- (b) crushing a road in the factory;
- (c) destroying shutter doors; and
- (d) damaging NZDMG Appliance's UV machine during its uplift on 4 June 2021.

[130] There is insufficient evidence to support these allegations. The video evidence supplied to Ms Dong, which I have viewed, does not support the allegation that damage was caused. I accept Mr Broadmore's submission that even if the damage had been caused to NZDMG or NZDMG Appliance, it had not been caused by a breach of their duty by the Receivers. It does not provide any defence to the summary judgment.

Alleged taking of personal belongings not subject to the BNZ security

[131] Ms Dong alleges that personal belongings were taken. The Receivers deny that any personal belongings were taken, and the evidence of Ms Louise Craig tends to support this view. It is not a ground to deny summary judgment to the plaintiffs.

The plaintiffs' right to repossess a certain UV machine

[132] Ms Dong asserts that because a particular UV machine which was valued higher than the outstanding amount to the BNZ, and the Receivers had not considered the borrower's repayment plan, it could not be repossessed.

[133] This argument is clearly untenable. As has been canvassed earlier in this judgment, the Receivers had a clear right to repossess and sell the Appliance Secured Property.

Trespass notices

[134] NZDMG and DMG Kitchen each issued trespass notices against the Receivers in respect of the Premises. It is clear that these trespass notices are invalid and do not prevent the Receivers accessing the Premises and any other premises where the NZDMG Secured Property is being kept. The reasons for this are as follows:

- (a) Under clause 11.3 of the AFA, NZDMG authorised BNZ and the Receivers to enter into and break into any premises occupied by NZDMG where the NZDMG Secured Property is kept. Clearly, this authorisation negates any right of NZDMG or DMG Kitchen to give a trespass notice against the Receivers.

- (b) Under clause 14.1.1 of the GSA, similar rights are given to the BNZ and the Receivers to those under clause 11 of the AFA to enter into premises where the Appliance Secured Property is being kept.

[135] In any event, the Appliance Secured Property has already been uplifted by the Receivers and no further orders for delivering up of it to the Receivers are sought by the plaintiffs or required.

Result

[136] I am satisfied that the plaintiffs are entitled to an order that the defendants deliver up the NZDMG Secured Property, and that the plaintiffs are entitled to take possession of the NZDMG Secured Property at the Premises or other premises where the NZDMG Secured Property may be stored.

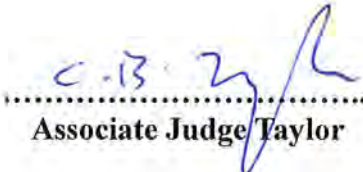
[137] I am also satisfied that there is no credible defence by the defendants to the plaintiffs' application for summary judgment for the debt owing to BNZ and accordingly summary judgment for the outstanding debt should be given.

Orders

[138] I make the following orders that:

- (a) the defendants immediately deliver up the NZDMG Secured Property to the Receivers;
- (b) the Receivers are granted permission to access the premises at 68 Ascot Road, Mangere, Auckland 2022 to search for, remove and take possession of all NZDMG Secured Property at 68 Ascot Road, Mangere Auckland 2022;
- (c) the Receivers are granted permission to access any other premises in the control of the defendants to search for, remove and take possession of all NZDMG Secured Property at those premises;

- (d) summary judgment against the first and third defendants is given in the sum of \$788,641.87;
- (e) summary judgment is given against the first and third defendants from 17 August 2021 up to the date of payment in full on the amount of:
- (i) \$264,096.31 at the rate of 7.4 per cent per annum;
 - (ii) \$41,440.78 at the rate of 20.20 per cent per annum;
 - (iii) \$95,220.75 at the rate of 20.20 per cent per annum;
 - (iv) \$387,884.03 at the rate of 7.62 per cent per annum;
- in accordance with the terms of the contractual documents entered into between BNZ and the first and third defendants; and.
- (f) costs are awarded in favour of the plaintiff on a solicitor-client basis in accordance with r 14.6(4)(e) of the High Court Rules.


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Associate Judge Taylor