IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2014-470-000065
[2014] NZHC 2247

BETWEEN	UDC FINANCE LIMITED Plaintiff
AND	RAY LEWIS BRUNTON First Defendant
	RAY LEWIS BRUNTON and MARIAN PATRICIA BRUNTON as Trustees of the R L and M P Brunton Family Trust Second Defendant

Hearing: 25 August 2014

Counsel: M Pascariu for the Plaintiff
M J Fisher and P Hardie for the Defendants

Judgment: 17 September 2014

JUDGMENT OF ASSOCIATE JUDGE BELL

This judgment was delivered by me on 17 September 2014 at 11.30 a.m.
Pursuant to Rule 11.5 of the High Court Rules

.....
Registrar/Deputy Registrar

Solicitors:
MinterEllisonRuddWatts, Auckland
Jones Howden Lawyers, Matamata

[1] UDC Finance Limited sues Mr and Mrs Brunton for $373,034.26 under a guarantee they gave on 13 September 2004 for the indebtedness of RMD Logging Limited. It has applied for summary judgment. There was no dispute as to the principles applied on a summary judgment application.[1]

[2] In opposition, Mr and Mrs Brunton raise three matters:

1. Any judgment against Mrs Brunton should not be enforceable against her personally, but should be limited to the assets of the R L and M P Brunton Family Trust.

2. By reason of a representation made in September 2004, UDC is estopped from suing them in respect of RMD Logging Limited's indebtedness under a guarantee it gave for advances UDC made to Stroke Logging Limited.

3. In selling machinery of RMD Logging Limited over which it held security, UDC did not comply with its duty of reasonable care to obtain the best price reasonably obtainable.

[3] The first matter is not contentious. On 11 October 2004 UDC wrote to Mr and Mrs Brunton confirming that the guarantee signed by Mrs Brunton was limited to the assets of the trust. UDC accepts that for summary judgment purposes, Mrs Brunton has an arguable defence that any judgment should not be enforced against her personally, but that UDC may be subrogated to her position as trustee to seek indemnity out of the trust assets.

Facts

[4] For the other issues, I set out some of the factual background.

[5] As its name suggests, RMD Logging Limited carried on business as a logging contractor. Mr Brunton was its director. The shareholders were the trustees of the

---

[1] See the summary in *Krukziener v Hanover Finance Limited Ltd* [2008] NZCA 187, (2008) 19 PRNZ 162 at [26].

R L and M P Brunton Family Trust, and Mr and Mrs Brunton. The trustees were Mr and Mrs Brunton and their lawyer, Mr Clancy.

[6] Between 2004 and 2011 UDC made loans to RMD Logging Limited. The last, made on 15 August 2011, was for $1,874,251.34. UDC had security over machinery owned by RMD Logging Limited. On 13 September 2004 UDC obtained a guarantee. The guarantors were Mr Brunton personally, and the trustees of the R L and M P Brunton Family Trust. The guarantee recorded that Mr Clancy would not have an unlimited personal liability under the guarantee but his liability would be limited to the assets of the trust (but that limitation was subject to a dishonesty exception). Mr Clancy has not been sued on the guarantee. The guarantee is for all amounts payable by RMD Logging Limited to UDC. As is typical of guarantees used by banks and finance companies, it contains extensive terms drawn so as to protect UDC's position fully.

[7] Mr and Mrs Brunton's son, Darren, had his own logging company, Stroke Logging Limited. Stroke also obtained finance from UDC. In late 2004 Stroke refinanced its existing loans with UDC with a fresh loan for $817,461.83. UDC took security over Stroke's machinery. Darren and Brunton Management Limited, a company associated with Darren, guaranteed Stroke's debt. In addition, on 29 November 2004 RMD Logging Limited gave UDC a written guarantee for Stroke's indebtedness. In anticipation of RMD Logging Limited giving that guarantee, Mr Clancy wrote to UDC on 15 September 2004 recording an understanding as to that guarantee. That letter is the basis for the Bruntons' estoppel defence.

[8] Stroke Logging Limited failed. It went into voluntary liquidation on 18 April 2006. Its equipment included a hydraulic excavator and a processing head secured in favour of UDC. RMD Logging Limited bought the excavator and processing head for $506,250.00. A sale and purchase agreement shows that RMD Logging Limited bought the equipment from Brunton Business Trust, rather than from Stroke. It is not clear from the evidence exactly how the transaction was structured, but for this application it is accepted that RMD Logging Limited did acquire the equipment. UDC financed the purchase with a loan of $655,731.77, more than the purchase

price of the equipment. The loan proceeds were applied to pay off Stroke's entire indebtedness to UDC. By this transaction RMD Logging discharged its liability under its guarantee of Stroke's indebtedness. With RMD Logging Limited having paid $506,250.00 for the equipment but having borrowed $655,731.77 from UDC, RMD Logging Limited had assumed additional indebtedness of $149,481.77 not represented by assets acquired from Stroke Logging Limited. This additional indebtedness is the "shortfall amount". Under their estoppel defence, the Bruntons say that they cannot be sued for any liability of RMD Logging Ltd related to this shortfall amount.

[9] Mr Brunton now says that the shortfall amount should be set higher because the value of the excavator and processing head was much less than $506,250.00. Even if that is the case, the parties adopted the sum of $506,250.00 as the agreed purchase price. Mr Brunton was RMD Logging Limited's director and signed the agreement on its behalf. It is not now open to Mr Brunton to contend that the agreement should be rewritten to show a different purchase price.[2]

[10] In August 2009 RMD Logging Limited refinanced its loans from UDC. It took out a fresh loan for $1,038,814.33. $450,305.46 was applied to repay the loan taken out in May 2006 to repay Stroke's indebtedness.

[11] In August 2011 RMD Logging Limited refinanced again, this time borrowing $1,874,251.34 from UDC. Of that, $1,303,715.98 was applied to repay the loan of August 2009.

[12] On 25 November 2013, RMD Logging Limited went into voluntary liquidation. At that time, it was in arrears of $583,675.12 in paying instalments

---

[2] In saying that, I am taking a different course from my decision in *Renner v Renner* [2014] NZHC 1743. In that case, interests associated with a guarantor purchased a property over which the creditor held a mortgage. In a summary judgment application by the guarantor for contribution from a co-guarantor, I held that the purchase price for the property arguably did not bind the co-guarantor. There was evidence suggesting that the price had been fixed artificially so as to enhance a contribution claim. The circumstances of that case, which arguably allowed the purchase price to be manipulated, do not apply here.

under its loans from UDC. At liquidation date the total balance under the loans (including amounts that had not yet fallen due) was $1,399,958.22.

[13] As UDC had security over the company's machinery, in early December 2013 it gave notices under ss 128 and 130 of the Property Law Act 2007 to RMD Logging Limited as mortgagor and to Mr and Mrs Brunton as covenantors. The defaults were not remedied. On 15 April 2014, UDC's lawyers gave notice that it had accelerated the amount owing under the loan agreement. The lawyers demanded payment of $751,034.26, the balance then outstanding after sales of some of the machinery.

[14] In December 2013, before the time for complying with the Property Law Act notices had expired, UDC instructed Contractors Plant NZ Limited to arrange the sale of the machinery. That company carries on business in Taupo selling industrial vehicles and equipment. So far it has sold the following machinery on behalf of UDC:

Volvo EC360CL excavator	$520,000
Volvo EC290CL excavator	$140,000
Volvo UC240BL excavator	$45,000
Timberpro TF840 forwarder	$350,000

One item remains unsold, a Timbco T44SE Fella Buncher.

[15] UDC's case is that after those sales have been taken into account, the balance owing by RMD Logging Limited is $373,034.26 plus interest. It looks to the Bruntons for payment under their guarantee of the indebtedness of RMD Logging Limited.

The Bruntons' estoppel defence

[16] The principles as to equitable estoppel were not in dispute. After the hearing, counsel for UDC helpfully filed a memorandum referring me to the Court of Appeal's recent decision, *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*.[3]

---

3 *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407.

The estoppel principles recorded in that decision were common ground in this case.[4] I am not required to consider the Court's valuable discussion of remedies, as that is a matter for final judgment if the estoppel is established. Here the question is whether the Bruntons have an arguable case for estoppel. That turns largely on the effect of the representation.

[17] For their estoppel defence, the Bruntons rely on the letter Mr Clancy wrote to UDC on 15 September 2004. That was just after Mr Brunton and the trustees of the Brunton Family Trust had signed the guarantee of the indebtedness of RMD Logging Limited to UDC, but before RMD Logging Limited gave its guarantee of the indebtedness of Stroke Logging Limited. UDC says that it cannot find a copy of Mr Clancy's letter on its file but for summary judgment purposes, it accepts that it is arguable that the letter was sent and that it does record discussions between UDC on the one hand and RMD Logging Limited and the Bruntons on the other.

[18] Mr Clancy's letter said:

> We refer to our discussion on 13 September after which a deed of guarantee from the trust in favour of RMD Logging Limited was signed.
>
> The purpose of this letter is to record the understanding in respect of the guarantee to be given by RMD Logging Limited in favour of Stroke Logging Limited – namely that the guarantee is to be limited to the assets of RMD Logging Limited and any obligations under that guarantee are not to be linked to a shareholder (or otherwise) by way of a further guarantee. This is as explained to us and to our client. Please ensure that the guarantee is termed accordingly and we will assume this arrangement to be in place unless you contact us to advise otherwise.

[19] The guarantee that RMD Logging Ltd gave for Stroke's indebtedness was in the standard UDC form and was not tailored to reflect the understanding in Mr Clancy's letter.

[20] The Bruntons' case is that the understanding recorded in that letter is a representation by UDC to both RMD Logging Ltd and themselves; by reason of that representation any sum for which RMD Logging Ltd might be liable to pay to UDC for the indebtedness of Stroke Logging Limited should be payable only out of the assets of RMD Logging Limited; but UDC cannot recover from them for any Stroke

---

4 At [44].

debt. They want to deduct from UDC's claim the shortfall part of the Stroke debt. They assert equitable estoppel.

[21] They say that they relied on UDC's representation:

(a) By signing the guarantee of RMD Logging's existing and future indebtedness to UDC on 13 September 2004.

(b) By Mr Brunton as director of RMD Logging Limited signing that company's guarantee of the indebtedness of Stroke Logging Limited to UDC on 29 November 2004.

(c) By Mr Brunton as director of RMD causing that company to assume liability as principal debtor for Stroke Logging's debt to UDC of $651,000 on the assumption that the Bruntons would not be personally liable for the difference between that debt and the value of the assets transferred (the shortfall amount).

(d) By Mr Brunton as director of RMD Logging Limited causing that company to enter into fresh facility agreements for UDC on the assumption that the defendants would not be liable under the guarantee for the shortfall amount.

[22] In their submission it would now be unconscionable for UDC to resile from the representation. Alternatively they say that UDC had a duty to inform them in 2006, before RMD Logging Limited assumed liability for the shortfall amount, that UDC would thereafter no longer consider itself bound by its representation made in September 2004.

[23] UDC denies that the letter has any effect in the circumstances of this case, but says that even if it has, any Stroke debt has now been paid off and is not the subject of the present claim.

What is the effect of the Clancy letter of 15 September 2004?

[24] The letter records a discussion on 13 September 2004 with UDC. It is arguable that a UDC manager made the statements attributed to him in the letter. For the Bruntons, it is arguable that the statements influenced them in their decision to sign the guarantee of the indebtedness of RMD Logging Limited.

[25] At the time it was contemplated that RMD Logging Limited would sign a guarantee of the indebtedness of Stroke Logging Limited and that did happen. What if UDC had not made the statements recorded in the Clancy letter? After RMD Logging Limited had guaranteed Stroke Logging Limited's indebtedness, UDC could look to RMD Logging Limited for payment of any Stroke debt, and it could in turn look to the Bruntons under their guarantee of 13 September 2004, because its terms were wide enough to cover any liability of RMD Logging Limited under a guarantee. The Clancy letter of 15 September 2004 was intended to alter those legal consequences. It is necessary to see how.

[26] The words "not to be linked to a shareholder (or otherwise) by way of a further guarantee" go to the scope of the Bruntons' obligations under their guarantee. They are directed against the Bruntons becoming sub-guarantors for any Stroke debt. UDC would still be able to look to RMD Logging Limited under any guarantee it gave for the indebtedness of Stroke Logging Limited. The obligations of RMD Logging Limited under any guarantee of Stroke's debt were to be met out of the assets of RMD Logging Limited alone and were not to be met by recourse to any further guarantee of the indebtedness of RMD Logging Limited.

[27] At the same time, UDC's rights in respect of other indebtedness of RMD Logging Limited were not affected. An effect of this is that while UDC can have recourse to the assets of RMD Logging Limited to pay Stroke's debts, UDC's rights to recover other indebtedness of RMD Logging Limited may be satisfied both out of the assets of RMD Logging Limited and by recourse to the guarantee given by the Bruntons. One potential outcome is that the Bruntons may still face carrying the consequences of RMD Logging Limited having guaranteed the debt of Stroke Logging Limited because RMD assets applied to meet Stroke's indebtedness will

reduce the ability of RMD Logging Ltd to satisfy other indebtedness, for which the Bruntons are liable under their guarantee. The Clancy letter does not shield the Bruntons from those indirect effects of RMD Logging Ltd having guaranteed Stroke's debt.

[28] I have not yet said how the arrangements in the Clancy letter are to apply in the circumstances where RMD Logging Ltd borrowed afresh from UDC but used the loan proceeds to pay off Stroke debt. That comes in the next part at [31] – [36].

[29] In finding the effects of the Clancy letter I have gone by the text of the letter read in its context. The Bruntons submitted against that approach: I should instead go by their subjective understanding (as they recalled it 10 years later) of what was discussed. Mrs Brunton contended that her understanding was that the amount covered by their guarantee would exclude any indebtedness in connection with any obligations which Stroke might have to UDC. The Bruntons' case is that in calculating their liability under their guarantee there should be a deduction on account of any Stroke debt paid by RMD. In so far as the Bruntons' subjective views may diverge from the objective meaning of the Clancy letter, the latter is to be preferred. The real question is to work out how the understanding in the letter was to apply in the particular circumstances of this case.

[30] For this case the Clancy letter is determinative of what was discussed. Mr Clancy recorded the matter in writing at the time. It is not open to Mrs Brunton to say that her recollection of what was discussed 10 years ago is different from what Mr Clancy wrote.

What was the effect of RMD paying off the Stroke debt?

[31] In 2006 RMD paid off the debt Stroke owed UDC by borrowing afresh from UDC. In borrowing more than it paid for Stroke's plant and equipment, it increased its net indebtedness by $149,481.77. The Bruntons say that they should have a credit for this shortfall amount. They also contend that the credit should be higher because of the overstatement of the value of the Stroke machinery bought by RMD Logging Ltd, but for the reasons given in [9] above, I apply the values given in the sale and purchase agreement.

[32] There is no evidence that UDC made any demand on RMD Logging Limited under its guarantee of November 2004. All the same, the payment of the Stroke debt can be considered in the circumstance that UDC was likely do so. Accordingly, RMD Logging Limited's liability under its guarantee provides a plausible explanation for the transaction of August 2006. UDC provided the finance to RMD Logging Limited to enable it to discharge its liability under the guarantee. This was a fresh borrowing by RMD Logging Limited.

[33] The question is how the understanding in the Clancy letter applies to this transaction. I consider the matter at the time RMD Logging Ltd took the loan to repay the Stroke debt. Later transactions are assessed separately.

[34] The Bruntons' position is that because the indebtedness of RMD Logging Ltd to UDC has been increased by the shortfall amount, the understanding in the Clancy letter applies so as to reduce the amount of UDC's claim against them under their guarantee. On the other hand, UDC says that the Clancy letter only limits its rights as a creditor of Stroke. In this matter it became a creditor of RMD Logging Ltd directly for a fresh loan taken out and the Clancy letter does not stand in its way in enforcing those rights. It is not looking to the Bruntons as sub-guarantors of the Stroke debt, but only as guarantors of RMD Logging Ltd's own borrowing.

[35] At first, UDC's position seems to be based on bare formalism – that the bar on its rights as creditor of Stroke under the Clancy letter does not come into play. But there is more to it than that. RMD Logging Ltd had to meet its liability to UDC under the Stroke guarantee. There are various ways it could do so:

(a) pay from its own resources;

(b) shareholders could advance funds by way of capital or loan;

(c) borrow funds from UDC (as it did in fact);

(d) borrow funds from a third party; or

(e) persuade a third party to invest capital in the company.

[36] Under the last, there was unlikely to be any recourse against the Bruntons (unless they incurred personal liability to the investor by, say, some misrepresentation). But that can be put to one side. If RMD Logging Ltd was doing so well that an outsider could be persuaded to invest capital in the company to allow it to pay off the Stroke guarantee, there would be little chance of UDC needing to pursue the Bruntons under their guarantee. All the other options would impact on the Bruntons. If RMD Logging Ltd paid UDC from its own resources, that would leave less to pay other debts, so exposing the Bruntons to greater risk under their guarantee to UDC. If they injected funds themselves, they would be indirectly paying the Stroke debt, notwithstanding the Clancy letter. Any third party financier would require the Bruntons to guarantee RMD Logging Ltd's borrowing. Using UDC as the financier to pay off the Stroke debt is no different. If other options for getting rid of the Stroke debt would cost the Bruntons personally, there seems to be no good reason for allowing the Clancy letter to apply so widely as to bar UDC from having recourse against the Bruntons because RMD Logging Ltd used it as its financier for the Stroke debt. Accordingly, I interpret the understanding recorded in the Clancy letter as applying only so long as UDC could have recourse against RMD Logging Ltd under its guarantee of Stroke's debt. Once Stroke ceased to be a debtor of UDC, even though UDC financed RMD Logging Ltd to pay off Stroke's debt, UDC could have recourse against the Bruntons for their guarantee of RMD Logging Ltd's own borrowing unfettered by the Clancy letter.

Should UDC have told the Bruntons that the Clancy letter would no longer apply?

[37] The Bruntons say that in May 2006, when RMD Logging Ltd bought Stroke's machinery and repaid Stroke's debt, UDC ought to have warned them that the understanding in the Clancy letter would no longer apply. For them this is a case of estoppel by silence. They relied especially on *Morton-Jones v R B and J R Knight Ltd*[5] and *Purewal BS & JK Ltd v Connell Street Ltd*.[6] In the latter, the Court of Appeal cited[7] these passages from *Equity and Trusts in New Zealand*:[8]

---

5 *Morton-Jones v R B and J R Knight Ltd* [1992] 3 NZLR 582 (HC).

6 *Purewal BS & JK Ltd v Connell Street Ltd* [2012] NZCA 42, (2012) 13 NZCPR 108.

7 At [60], [65] and [66].

8 James Every-Palmer "Equitable Estoppel" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [19.5.1], [19.5.4(1)] and [19.5.4(4)].

> The equitable doctrine of estoppel by acquiescence (which was a strand of proprietary estoppel), traditionally protected a party who relied on a belief or expectation fostered by the silence of another party in circumstances rendering it unconscionable for the silent party to resile from the belief or expectation. This principle now identifies one of the kinds of conduct which may give rise to a cause of action based on the doctrine of modern equitable estoppel...
>
> Duties to speak will be rare between commercial parties dealing at arm's length…
>
> However, a number of relationship-based factors may support the existence of a duty to speak… Secondly, communications between the parties may give rise to a duty to speak and correct a misunderstanding, for example as to the necessity of exercising a formal option to renew a lease, the effect of a contract about to be entered into or the identity of a party in a legal action. Thirdly, the silent party may have been aware that the other party was acting in reliance on a mistaken assumption as to his or her rights over property owned by the silent party…
>
> … [A] duty to speak is strongly indicated where the means of discovering the true situation is solely in the domain of the silent party, where the silent party is aware that the mistaken party's primary avenue of inquiry will be futile, or where the silent party is deliberating concealing the true situation.

Equally relevant is the text's reference to the dictum of Bingham J in *The Lutetian*:[9]

> …the duty necessary to found an estoppel by silence or acquiescence arises where a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations.

[38] While UDC has the overall onus to prove its case on a summary judgment application, the Bruntons have not raised anything in their evidence to suggest a factual basis for an arguable defence of estoppel by silence. Mr Brunton as director of RMD Logging Ltd must have been involved in the purchase of the Stroke machinery and the new loan from UDC, but (apart from stating that his wife's recollection and accounts generally corresponds with his own) he does not say anything about any belief or assumption on his part as to the effect of the Clancy letter in May 2006. He does not say that he or anyone acting on his behalf made known to UDC that he and his wife assumed that the understanding in the Clancy letter would apply so as to bar UDC's recourse against them for the fresh loan RMD Logging Ltd had taken out. Mrs Brunton's second affidavit refers to the failure of

---

9 *Tradax Export SA v Dorada Compania Naviera SA* [1982] 2 Lloyd's Rep 140 (QB) at 157 [*The Lutetian*].

Stroke, the purchase of the machinery and RMD Logging Ltd's new loan from UDC to finance the purchase and to repay the Stroke debt, but again does not say anything about any belief or assumption on her part as to the effect of the Clancy letter in May 2006 or about making that known to UDC.

[39] UDC's reply evidence alleges that its only involvement in May 2006 was to consent as secured creditor to the sale of the Stroke machinery and to enter into the fresh loan with RMD Logging Ltd.

[40] There is nothing in the evidence to suggest that UDC was put on notice that the Bruntons were under some mistake as to their rights. There is no evidence that anyone turned their minds to the matter. The Bruntons were in as a good a position as UDC to work out whether the May 2006 transactions were outside the scope of the understanding in the Clancy letter. Of course it was difficult to work out the effect of the transactions. Legal advice would be required. But that goes for both sides. The Bruntons cannot say that because they did not raise the matter, UDC was required to do so. There was nothing unconscionable or inequitable in UDC leaving RMD Logging Ltd and the Bruntons to assess for themselves how the Stroke liability was to be met and what impact that would have on the Bruntons.

Has the Stroke debt been paid off in any event?

[41] UDC has a further argument, even if the Bruntons are able to rely on equitable estoppel after the May 2006 transactions and to say that even after that date there was some Stroke part of the RMD Logging Ltd debt which could not be the subject of a claim against them as guarantors. UDC says that any Stroke part of the debt has already been paid. It relies on matters both before and after liquidation.

[42] It refers to rights to appropriate payments under the common law rule in *Clayton's case*[10] and under powers in its contracts. Clause 2.8 of the guarantee says:

> UDC may at its discretion either pay to suspense account, or appropriate amongst the Guaranteed amounts as it thinks fit, any amount that UDC receives either from the Customer, from enforcement of UDC's securities or

[10] *Devaynes v Noble* (1816) 1 Mer 572, 35 ER 781 (Ch) [*Clayton's case*].

> from any of the Guarantors, until the Guaranteed Amounts have been paid in full.

[43] Clause 7.9 of its security agreement says:

> Any amounts paid to UDC by the Customer which are not expressly allocated by the Customer to a particular credit contract may be applied by UDC in satisfaction of the Customer's obligations to UDC, as UDC thinks fit.

[44] For the events before liquidation, it points out that the shortfall amount in May 2006 was $149,481.77 out of the total loan of $655,731.77. When RMD Logging Ltd refinanced in 2009, the amount required to repay the loan taken out to pay the Stroke debt in May 2006 had reduced to $450,305.46.46, which was then entirely repaid. The initial loan had been reduced by $205,381.31, more than enough to cover the shortfall amount. By this argument UDC is trying to say that the loan of May 2006 can be divided into two parts, one part for the purchase of the Stroke machinery and the other for the shortfall amount; that payments in reduction of the loan of May 2006 were applied firstly towards the shortfall component until it was repaid and only then towards the machinery component. There is however no evidence that when payments under the loan were made, either RMD Logging Ltd or UDC drew that distinction and applied payments towards one component rather than another. Appropriation is made at the time of payment.[11] In the absence of evidence as to appropriation at the time, it is not possible to say that the shortfall amount was entirely repaid by the time of the refinancing in 2009. Similarly, the fact of refinancing does not remove the shortfall amount; it only turns it into a fresh loan. It is therefore arguable for the Bruntons that before liquidation any shortfall amount (if it could be claimed after May 2006) had not been repaid before liquidation.

[45] The matter is otherwise after liquidation. UDC sold the secured machinery of RMD Logging Ltd. It could apply the proceeds of sale as it saw fit. It was entitled under the guarantee and under the security agreement to apply the proceeds towards any surviving shortfall component. In the absence of any express appropriation by UDC, under the rule in *Clayton's case* any reductions in debt would be applied against the oldest debt. By the time of the sales of machinery, that was the

---

[11] See *Clayton's case*, above n 10.

refinanced portion of the May 2006 loan. All of that loan has now been repaid out of the sales of the machinery. Even if the Bruntons could claim some shortfall amount after the May 2006 loan, it has now gone.

[46] I conclude that UDC has shown that the Bruntons do not have a defence based on equitable estoppel.

Did UDC take reasonable care to get the best prices reasonably obtainable in selling RMD Logging Limited's machinery?

Did UDC owe the Bruntons such a duty?

[47] UDC denies that it owed the Bruntons a duty to obtain the best price reasonably obtainable when it sold RMD Logging Limited's machinery. It says that while it may owe such a duty to RMD Logging Limited as the borrower, it does not owe the same duty to the Bruntons as guarantors. It relies on s 110 of the Personal Property Securities Act 1999 as the only provision imposing a duty of care in selling collateral and contends that the Bruntons cannot invoke it. Section 110 says:

> **Duty of secured party selling collateral to obtain best price reasonably obtainable**
>
> A secured party who exercises a power of sale of collateral under section 109 owes a duty to obtain the best price reasonably obtainable as at the time of sale to the following persons:
>
> (a) The debtor:
>
> (b) Any person who has registered a financing statement in the collateral that is effective at the time the secured party took possession of the collateral:
>
> (c) Any person who has given the secured party notice that that person claims an interest in the collateral.

[48] Section 16(1) of that Act defines "debtor":

> **Interpretation**
>
> (1) In this Act, unless the context otherwise requires,—
>
> **Debtor—**
>
> (a) Means—

(i) A person who owes payment or performance of an obligation secured, whether or not that person owns or has other rights in the collateral; or

(ii) A person who receives goods from another person under a commercial consignment; or

(iii) A lessee under a lease for a term of more than 1 year; or

(iv) A transferor of an account receivable or chattel paper; or

(v) A transferee of or successor to the interest of a person referred to in subparagraphs (i) to (iv); or

(vi) If the person referred to in subparagraph (i) and the person who owns or has other rights in the collateral are not the same person, includes—

(A) The person who owns or has other rights in the collateral, where the term "debtor" is used in a provision of this Act dealing with the collateral; or

(B) The obligor, where the term "debtor" is used in a provision of this Act dealing with the obligation; or

(C) Both the person who owns or has other rights in the collateral and the obligor (if the context so requires); and

(b) Includes a trustee for any of the persons referred to in paragraph (a)…

[49] UDC denies that the Bruntons are debtors under that definition. It argues that the Bruntons do not owe payment or performance of an obligation secured, even though the Bruntons do not own or have any rights in the collateral (the equipment over which UDC had security). It relies on an Ontario decision, *Moskun v Toronto-Dominion Bank*.[12]

[50] The Bruntons instead rely on s 176 of the Property Law Act 2007:

176 Duty of mortgagee exercising power of sale

(1) A mortgagee who exercises a power to sell mortgaged property, including exercise of the power through the Registrar under section 187, or through a court under section 200, owes a duty of reasonable care to the following persons to obtain the best price reasonably obtainable as at the time of sale:

(a) the current mortgagor:

---

12 *Moskun v Toronto-Dominion Bank* (1985) 5 PPSAC 221 (ONSC).

(b) any former mortgagor:

(c) any covenantor:

(d) any mortgagee under a subsequent mortgage:

(e) any holder of any other subsequent encumbrance.

(2) A mortgagee who exercises a power to sell mortgaged property may not become the purchaser of the mortgaged property except in accordance with section 196 or an order of a court made under section 200.

[51] The Bruntons say that mortgaged property includes real and personal property and that they are covenantors under s 176.[13]

[52] In response, UDC says that s 176 of the Property Law Act does not apply in this case because s 78 of the Property Law Act requires that the Personal Property Securities Act must prevail. That section says:

Provisions of Part are supplementary, but subject, to Personal Property Securities Act 1999 in relation to mortgages over personal property

(1) If a provision of this Part applies to a mortgage that creates or provides for a security interest to which the Personal Property Securities Act 1999 applies, the provision is supplementary to the Personal Property Securities Act 1999.

(2) However, if the provision is inconsistent with a provision in the Personal Property Securities Act 1999, the provision in the Personal Property Securities Act 1999 prevails.

…

[53] There are difficulties with UDC's argument.

[54] The Bruntons are debtors as defined in s 16 of the Personal Property Securities Act because they have payment obligations under the deed of guarantee. The definition extends to persons who do not have rights in collateral. Guarantors, who have secondary liability, have payment obligations, even though they may have no interest in collateral. The Bruntons are in that position. They were answerable to

[13] See definitions of "covenantor" and "property" in s 4of the Property Law Act 2007.

UDC, although they had no interest in RMD Logging Ltd's plant and machinery. Further, they are "obligors" within the sixth limb of the definition.

[55] The view that under personal property securities legislation, a guarantor is not a debtor seems to be confined to Ontario. Other Canadian provinces have not followed Ontario on the ground that their legislation is different. Commentators have not approved the Ontario approach. The authors of the Canadian text, *Personal Property Security Law*, point out:[14]

> The same policies that demand protection of the primary obligor extend to the secondary obligor, with the exception of rights that are clearly limited to the primary obligor, for example, rights of reinstatement.

The majority of New Zealand text writers agree that a guarantor is a debtor under the Personal Property Securities Act.[15]

[56] The Bruntons' status as debtors is reinforced by the guarantee, which contains a "principal debtor clause":

> 2.4 The guarantors' obligations under this guarantee are not subject to any condition precedent, and are intended to be absolute and *enforceable against the guarantors as principal debtors in all circumstances.*
>
> (Emphasis added.)

Having agreed that the Bruntons are to be principal debtors in all circumstances under the guarantee, UDC cannot say that they are not debtors under the Personal Property Securities Act.

[57] Even if the duty under s 110 of the Personal Property Securities Act did not extend to the Bruntons as guarantors, the duty under s 176 of the Property Law Act does. There is no inconsistency under s 78(2) of the Property Law Act that prevents s 176 applying. If the duty under s 176 of the Property Law Act extends more

---

[14] Ronald CC Cuming, Catherine Walsh and Roderick J Wood *Personal Property Security Law* (2nd ed, Irwin Law, Toronto, 2012) at 15.

[15] See Michael Gedye, Ronald CC Cuming and Roderick J Wood *Personal Property Securities in New Zealand* (Brookers Ltd, Wellington, 2002) at [16.1.14]; Linda Widdup *Personal Property Securities Act: A Conceptual Approach* (3rd ed, LexisNexis NZ Ltd, Wellington, 2013) at [29.7]-[29.12]; and Roger Tennant Fenton *Garrow and Fenton's Law of Personal Property in New Zealand* (7th ed, LexisNexis NZ Ltd, Wellington, 2010) vol 2 at [3.6.1(c)]. Barry Allan's *Personal Property Securities Act 1999 – Act & Analysis* (Brookers Ltd, Wellington, 2010) does not address the matter.

widely than the duty under s 110 of the Personal Property Securities Act, that is simply supplementary, not an inconsistency. On this I follow the approach of Richardson J in *Stewart v Grey County Council*:[16]

> It is inevitable that in the complex legislative processes of a modern society there will be occasional conflicts and inconsistencies between the provisions of different statutes. There are well established rules for determining which provisions are to prevail. The starting point, of course, is that there be an inconsistency. If it is reasonably possible to construe the provisions so as to give effect to both, that must be done. It is only if one is so inconsistent with, or repugnant to the other, that the two are incapable of standing together, that it is necessary to determine which is to prevail.

[58] Here the fact that the s 176 of the Property Law Act may extend more widely than s 110 of the Property Securities Act does not mean that both cannot apply. There is not the inconsistency or repugnancy that requires one to prevail in place of the other.

[59] It would in any event be anomalous if, when selling secured property, mortgagees owed duties to borrowers to get the best price obtainable but not to guarantors. It needs to be remembered that these duties may be raised in proceedings as a ground for a cause of action and also by way of defence. When they are a cause of action, a guarantor can sue the mortgagee only after becoming subrogated to the position of the mortgagor: otherwise he will have suffered no loss. But the duty can also be raised in defence of a claim by the mortgagee against the guarantor. Subject to any particular terms of the guarantee, the guarantor can use in defence any ground that the mortgagor could raise to say that the debt is not due or has been overstated. Subrogation is not required. There is no good reason under the general law for the guarantor to be denied defences available to the mortgagor. If the mortgagor can defend by showing that the debt has been overstated because the mortgagee failed in his duty to obtain the best price reasonably obtainable, the guarantor should be able to as well.

Has UDC shown that it complied with the duty?

[60] There is little dispute as to the principles to be applied under s 110 of the Property Securities Act and s 176 of the Property Law Act. Although it was a case

---

[16] *Stewart v Grey County Council* [1978] 2 NZLR 577 (CA) at 583.

about a mortgagee's sale of real property, *Harts Contributory Mortgages Nominee Co Ltd v Bryers*[17] has a helpful summary. Fisher J said:

> (a) The overriding requirement is to take reasonable care to obtain the best price reasonably obtainable…
>
> (b) The mortgagee has the power to decide, purely in the interests of the mortgagee, if and when to sell… Consequently, it is only the best price reasonably obtainable at the time of sale that matters.
>
> (c) Where the security is substantial, or specialised property is involved, it will usually be necessary for the mortgagee to obtain and act upon specialist advice as to the method of sale… Appointing a competent agent to sell does not discharge the mortgagee's duties, but since its duty is ultimately only one of reasonable care, putting the matter in the hands of a competent agent will usually go a long way towards discharging the mortgagee's duties.
>
> (d) In the normal course the proposed sale will need to be advertised with an adequate description of the property's attributes and, within reason, widely enough to attract all possible purchasers. In some cases this will need to extend to both general and specialist publications…
>
> (e) There is no obligation to postpone the sale in the hope of a better price later, or to break up the assets and sell in a piecemeal manner if this can only be carried out over a substantial period or at a risk of loss…
>
> (f) When assets are sold by tender or auction, a reasonable period must usually be allowed for purchasers to inspect the property and arrange finance for submitting bids…
>
> (g) Those are simply detailed examples of the way in which the duty to take reasonable care to obtain the best price reasonably obtainable might be discharged in particular cases. In the end, the mortgagee's performance can only be assessed by reference to each particular case.
>
> (h) The fact that a mortgagee has acted in good faith does not mean that it has necessarily discharged its equitable duty to take reasonable care to obtain the best price reasonably obtainable…
>
> (i) On the other hand, in evaluating judgments made by or on behalf of the mortgagee it should not be forgotten that in the absence of bad faith, the mortgagee shares with the mortgagor and guarantor an incentive to maximise the price obtained. It is not lightly to be assumed that the mortgagee has acted in a way that was contrary to its own interests as well as the interests of others.

---

[17] *Harts Contributory Mortgages Nominee Co Ltd v Bryers* HC Auckland CP403-IM00, 19 December 2001 at [43].

(References to authorities omitted.)

[61] In *Public Trust v Ottow* Asher J said:[18]

> [31] The following steps indicate that a mortgagee has made reasonable efforts to obtain the best reasonably obtainable price:
>
> (a) The appointment of a reputable real estate agent to market the property.
>
> (b) Obtaining a valuation report from an experienced valuer as a guide to what could reasonably be expected for the property.
>
> (c) Marketing over a reasonably long period of time.
>
> (d) An extensive advertising and promotional campaign.
>
> (e) A properly conducted auction.
>
> (f) A sale price that, given all circumstances, can be reconciled with expert opinion as to value.

[62] Caution must be applied in following that. The trap to avoid is assuming that it sets out definitively all that a mortgagee has to do, without tailoring the steps for the circumstances of the case. Here it is necessary to bear in mind that the security was over logging machinery. Clearly there was only a specialised market.

[63] In June 2013 UDC obtained a valuation of RMD Logging Limited's machinery by a registered plant and machinery valuer. All the equipment the subject of this decision was valued at $1,905,000 excluding GST.

[64] In early December 2013 UDC instructed Contractors Plant NZ Limited to sell all the equipment. Mr Wilson, director of Contractors Plant NZ Limited gave evidence as to marketing and sales. He says that around that time he and Mr Brunton inspected the equipment and agreed on estimated lower and upper selling prices for each of the machines as follows:

Volvo EC360CL excavator	$500,000 - $550,000
Volvo EC290CL excavator	$140,000 - $170,000

[18] *Public Trust v Ottow* (2010) 10 NZCPR 879 (HC).

Volvo UC240BL excavator	$50,000 - $70,000
Timberpro TF840 forwarder	$380,000 - $420,000
Timbco T44SE Fella Buncher	$80,000 - $120,000

[65] Mr Wilson advertised all the equipment on his company's worksite, in *NZ Logger* magazine and in *Deals on Wheels* magazine. The equipment was available to be viewed and inspected at the company's yard in Taupo. The advertising ran until the equipment was sold. The current website shows the Timbco T44SE as the only item remaining unsold.

[66] Mr Wilson received enquiries, some of which resulted in firm offers which he passed onto UDC for approval. For the Volvo EC360CL excavator he received an offer around 9 December 2013. At that time the notices under s 128 and 130 of the Property Law Act had been served but the time to remedy the defaults had not expired. UDC's power to sell the equipment had not yet accrued. However the point was not taken. It is not clear from the evidence whether UDC entered into a conditional agreement under s 134 of the Property Law Act. An email of Mr Wilson of 9 December 2013 says, "I consider this a good offer for this machine and Ray Brunton also agrees." That may explain why the Bruntons have not taken the point. The other Volvo excavators were sold in March 2014. The Timberpro TF840 was sold in June 2014. Mr Wilson explains that in the case of the Volvo EC290CL, oil leaks were discovered which appeared costly to fix. He recommended acceptance of the offer of $140,000. Similarly, for the Volvo UC240BL an interested purchaser and his own mechanic uncovered mechanical issues which he was not previously aware of. He considered the price of $45,000 offered as reasonable. He recommended acceptance of an offer of $350,000 for the Timberpro TF840 as reasonable given that only two potential purchasers had expressed any serious interest. A similar unit had recently sold for $325,000. The industry was entering a quiet period and holding off selling was unlikely to yield a better price.

[67] UDC pointed to the sale of the Volvo EC360CL excavator at $520,000, close to the figure agreed with Mr Brunton, as indicating that there had been adequate marketing. Against that, the Bruntons pointed out that the price included a waratah,

(an accessory) which had been separately valued. In fact the machine was sold only just after instructions had been received. The sale price cannot be used to prove adequate marketing.

[68] The Bruntons raised these points:

(a) The sale prices were well below the valuation obtained in June 2013.

(b) Mr Brunton criticised the sale methods. In particular, the equipment was not advertised on TradeMe, which in his experience is the best way for selling second-hand forestry equipment.

[69] Clearly it was appropriate for UDC to appoint an experienced machinery dealer as an agent to carry out marketing and to negotiate sales of RMD Logging Limited's equipment.

[70] The fact that the equipment sold for prices below those shown in the valuation of June 2013 does not by itself mean that UDC breached its duties to obtain the best price reasonably obtainable. There are a large number of cases under s 176 of the Property Law Act where sales by mortgagees have failed to reach prices projected by valuers and sales agents, but mortgagees have not been held to have breached their duty.[19]

[71] Taking matters so far, UDC has gone a long way to showing that it took proper steps to comply with its duty. There is however one aspect on which UDC has not satisfied me that it has fully complied. That is Mr Brunton's challenge that equipment ought to have been marketed on the TradeMe website.

[72] Mr Wilson deposed to limited interest in at least some of the equipment (the Timberpro TF840). At the same time he and UDC have not replied to Mr Brunton's point that the equipment could have been advertised on TradeMe, said to be an established means of buying and selling second-hand forestry equipment. For the

---

[19] Decisions of my own that come to mind are *Bank of New Zealand v Cannell* HC Auckland CIV-2010-404-3877, 2 May 2011; *Southland Building Society v Austin* [2012] NZHC 497; *ANZ Bank Ltd v Thompson* [2013] NZHC 517; *ASB Bank Ltd v Robertson* [2013] NZHC 2125 and *Bank of New Zealand v Taylor* [2013] NZHC 2848.

Bruntons it remains arguable that if Mr Wilson had used TradeMe as well as his other marketing efforts (which in themselves are not criticised), more extensive advertising may have generated more interest among potential purchasers. UDC may have an answer to that criticism, but it has not given it yet. To that extent, and only to that extent, the Bruntons have an arguable defence that UDC did not market the machinery widely enough and thereby breached its duty of reasonable care.

Outcome

[73] Because the Bruntons have an arguable defence that UDC did not take reasonable care to obtain the best price reasonably obtainable for the machinery, I cannot at this stage enter summary judgment against the Bruntons. UDC has not shown that they do not have a defence on that aspect. Mrs Brunton also has an arguable defence that any judgment against her will be limited to the assets of the R L and M P Brunton Family Trust, but will not otherwise be enforceable against her personally. The Bruntons will not be able to rely on their estoppel defence.

[74] I make these orders:

(a) I dismiss the application for summary judgment.

(b) The Bruntons are to file and serve statements of defence by **29 September 2014**. They may not rely on the estoppel defence considered in this decision.

(c) I direct a telephone case management conference for **Monday 13 October 2014 at 4.15 pm**. The parties are to confer as to discovery. If they cannot agree on directions, UDC is to file and serve its memorandum for the conference by **6 October 2014**, the Bruntons by **9 October 2014**. Directions are likely to be given through to hearing.

(d) Costs on the summary judgment application are reserved.

_____

Associate Judge R M Bell