IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-085
[2018] NZHC 3386

BETWEEN	TREVOR JAMES MURRAY Appellant
AND	UDC FINANCE LIMITED Respondent

Hearing: 5 July 2018

Appearances: Appellant in person
J M Embling for Respondent

Judgment: 18 December 2018

JUDGMENT OF PAUL DAVISON J

This judgment was delivered by me on 18 December 2018 at 1:00 pm
Pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Minter Ellison Rudd Watts, Auckland

Introduction

[1] On 28 November 2017, Judge Harrison entered summary judgment in favour of UDC Finance Ltd against Mr Trevor Murray in the sum of $55,657.46.[1] The Judge found that Mr Murray had not raised a credible defence or counterclaim to the application for summary judgment.

[2] Mr Murray, who is self-represented, now appeals against Judge Harrison's decision.

Background

[3] Mr Murray was the sole director and shareholder of Enlightenz NZ Limited (Enlightenz), a company now in receivership and liquidation. The plaintiff, UDC Finance Limited (UDC), brought proceedings against Mr Murray on 10 March 2017. It applied for summary judgment on the same date.

[4] In its statement of claim UDC says that it advanced funds to Enlightenz in 2012 and 2013 under six written credit sale agreements.[2] Those agreements funded the purchase by Enlightenz of six vehicles: a 2009 BMW 730D Sedan, a 2012 Volkswagen Passat Alltrack, a 2012 Volkswagen Passat Variant, a 2013 Volkswagen Passat Variant, a 2013 Volkswagen Passat TDI, and a 2013 forklift. Among other terms, UDC says that the agreements required Enlightenz to make monthly repayments, and entitled UDC to repossess and sell the goods on the provision of 10 working days' notice if Enlightenz did not perform its contractual obligations; became insolvent; entered receivership; or went into liquidation. UDC says that Mr Murray provided a guarantee of all amounts payable by the company under the agreements.

[5] UDC further says that in early 2016, Enlightenz defaulted under the agreements by failing to make the monthly payments then due. Enlightenz was placed in liquidation in April 2016. UDC says that it sent Mr Murray notices of its intention to sell the six vehicles, and it then sold the vehicles through Turners Auctions between

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1 *UDC Finance Ltd v Murray* [2017] NZDC 26323.

2 Three of the agreements were dated 21 December 2012, while the remaining three were dated 12 March 2013, 9 April 2013, and 3 September 2013.

June and November 2016. It says it retained Turners to provide professional advice as to the best marketing and method of sale in respect of each vehicle. Turners provided estimated auction values for each vehicle, and valuations were also provided by Mike Goeffic, an asset sales specialist contracted to UDC. UDC says all the vehicles were sold at or above the valuations provided by Turners and Mr Goeffic.

[6] The net proceeds of sale were applied to the amounts outstanding by Enlightenz under the agreements, leaving a shortfall of $54,284.41. UDC says it provided accounts of sale to Mr Murray, and made demand on him as guarantor for payment of the outstanding amounts due under the agreements with interest. It says Mr Murray did not pay the amounts outstanding, and accordingly UDC sought summary judgment.

District Court decision

[7] Judge Harrison granted UDC's application for summary judgment on 28 November 2017. After setting out the factual background, the Judge noted that Mr Murray did not challenge the validity of his guarantees. Rather, he raised various defences to the claim which the Judge addressed in turn.

[8] First, Mr Murray said he had a contract with UDC's repossession agent allowing Mr Murray to deliver the 2009 BMW to Turners himself. He says that, in breach of that agreement, the agent arrived at his address and demanded the vehicle, causing Mr Murray hurt and humiliation. Judge Harrison held that no defence to the claim was established on this ground.

[9] Mr Murray then said that an adjoining commercial tenant, Mr Malinowski, entered into an agreement with UDC to purchase the forklift. The Judge held that there was no arguable defence on this ground either, as Mr Malinowski was advised of the upcoming Turners auction and the opportunity to purchase the forklift at the auction but no sale eventuated.

[10] Next Mr Murray said that UDC sent the notices of intention to sell the vehicles to the incorrect address, and they were not forwarded to him until later. However, the Judge held that UDC acted quite properly in this regard, as this was the address

provided by Mr Murray at the time the credit sale agreements and guarantees were entered into and he did not notify UDC of any change in address.

[11] Mr Murray then referred to s 110 of the Personal Property Security Act 1999 (PPSA), which provides that a secured party exercising a power of sale owes a duty to obtain the best price reasonably obtainable as at the time of sale. The Judge noted that this obligation is owed to guarantors, as well as to the debtor. He referred to the principles set out in *Public Trust v Ottow*[3] and *Harts Contributory Mortgage Co Ltd v Bryers*,[4] and UDC's evidence as to the steps it took to discharge its duty to obtain the best price reasonably obtainable.

[12] The Judge concluded that it was appropriate for the vehicles to be sold through Turners, and referred to the evidence that the vehicles had been groomed for sale. There was no evidence to support Mr Murray's allegation that Turners was known to be an auction house where vehicles could be purchased cheaply. The Judge also considered there were deficiencies in the valuation evidence provided by Mr Murray, which was purportedly prepared by professional valuers, Grays. There was no affidavit evidence from that organisation, and the spreadsheet of values for each of the vehicles did not establish on what basis the vehicles were valued or on what dates the valuations were conducted. Nor was there any comparative evaluation by Grays of the valuations carried out by Turners and Mr Goeffic. The Judge accordingly did not accept that Mr Murray's claim the vehicles were sold at an undervalue was established to the point where an arguable defence had been raised. He commented:[5]

> The procedure adopted by UDC for the sale of the vehicles in question follows a well trodden path of obtaining valuations from an independent valuer, and value assessments and the setting of reserve prices by the auctioneer. Not only was that done but the vehicles were listed for sale on Turners' website, the auction website, TradeMe, and displayed on Turners' premises for between 7 and 49 days.

[13] The Judge then considered Mr Murray's counterclaims for:

(a) the alleged shortfall in the sale price of the assets;

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3 *Public Trust v Ottow* (2009) 10 NZCPR 879 (HC).

4 *Harts Contributory Mortgages Nominee Co Ltd v Bryers* HC Auckland CP403-IM00, 19 December 2001.

5 At [32].

(b) $10,000 for alleged hurt and humiliation; and

(c) misrepresentation in relation to the emissions statistics of Volkswagen vehicles.

[14] The Judge concluded that none of Mr Murray's counterclaims were credible. Having concluded that Mr Murray had not raised any credible defence or counterclaim to UDC's application for summary judgment, the Judge entered summary judgment for UDC in the sum of $55,657.46.

Mr Murray's submissions on appeal

[15] The point on which Mr Murray focuses his appeal is his claim that UDC did not properly discharge its legal responsibilities when selling the vehicles, namely the duty under s 110 of the PPSA to obtain the best price reasonably obtainable as at the time of sale. He does not pursue the other grounds listed in his notice of appeal.

[16] Mr Murray makes the following points regarding the alleged breach of UDC's duty under s 110 of the PPSA:

(a) There was an extremely large discrepancy (of around 37 per cent) between the market value of the vehicles and the prices obtained by UDC, which points towards a failure by UDC in exercising its duty.

(b) Mr Malinowski had an agreement to purchase the forklift directly from UDC for around $28,000, and the Judge erred in finding there was no such agreement. UDC's failure to complete the sale with Mr Malinowski or to ensure they achieved a sale at an equivalent price was a breach of their duty to obtain the best price reasonably obtainable, considering the forklift was later sold for $20,700.

(c) Turners exhibited a lack of care and professionalism in presenting the cars for sale, particularly the BMW.

(d) Sale via Turners did not maximise the exposure of the cars to the market, as Turners have traditionally been a place where buyers go to buy a low-priced vehicle; it is not an appropriate outlet for sale of recent model luxury brand vehicles. Further, in recent years most buyers have gravitated towards online private or dealer sales through websites such as TradeMe. In contrast to auctions of real property, car auctions are very poorly attended and do not achieve a good price for the seller.

(e) In any event, all the car sales were conducted by Turners through the "Buy Now" process, rather than by public auction as UDC claims. Mr Murray exhibits email evidence to this effect from Ben Nicholson, Sales Manager at Turners North Shore.

(f) The vehicles, particularly the BMW, should have been sold through a car dealership. Mr Murray refers to evidence he submitted in the District Court from Clive Matthew-Wilson, editor of the Dog and Lemon Guide (an annual car buyer's guide sold in Commonwealth countries).

(g) UDC could and should have sold the vehicles through Tristram European, a branded dealership that is also UDC's finance agent.

Respondent's submissions

[17] Mr Embling submits that UDC discharged its duty to obtain the best price reasonably obtainable for the vehicles because it followed the process recommended by Asher J in *Public Trust v Ottow*. He addresses the various points made by Mr Murray:

(a) Regarding the alleged agreement for sale of the forklift between UDC and Mr Malinowski, Mr Embling says that Mr Malinowski was given an opportunity to purchase the forklift but no sale was completed. He refers to the evidence of Ms Mascarenhas of UDC.

(b) UDC had no obligation to repair or improve the conditions of the vehicles for sale.

(c) Use of the "Buy Now" feature, rather than sale by public auction, was not a breach of UDC's duty. Section 113 of the PPSA provides that a secured party may effect a sale of collateral under s 109 by auction, public tender, private sale, or another method.

(d) There can be no certainty in the accuracy of the Grays valuations, and they should be disregarded.

Fresh evidence

[18] Mr Murray seeks to adduce new evidence on appeal which was not before the District Court Judge:

(a) an affidavit of Jakub Malinowski sworn on 27 June 2018;

(b) an affidavit of Michael Hatch sworn on 28 June 2018;

(c) an affidavit of Jennifer Murray sworn on 27 June 2018; and

(d) an affidavit of Lachlan Murray sworn on 27 June 2018.

[19] Mr Embling for UDC opposes the introduction of the further evidence on appeal on the grounds that no application for leave has been filed, and the affidavits do not meet the criteria for the admission of further evidence on appeal.

[20] A party to an appeal may adduce further evidence only with the leave of the Court.[6] As Mr Embling points out, Mr Murray has not made a formal application for leave to adduce further evidence. However, he has filed a memorandum in which he submits that the evidence should be admitted because it is essential to ensure the facts of the case are correctly established on appeal. Because Mr Murray is a lay litigant

6 High Court Rules 2016, r 20.16(2).

and has in substance applied for leave in his memorandum, I am prepared to consider whether the further evidence meets the criteria for admissibility.

[21] The Court of Appeal described the principles applicable to admissibility of further evidence on appeal in *Erceg v Balenia Ltd*:[7]

> Those requirements are that the evidence be fresh, credible and cogent. It will not be regarded as fresh if it could, with reasonable diligence, have been produced at the trial … Particular weight will be accorded in summary judgment proceedings to the need for finality: it is only in exceptional circumstances that the Court will permit further evidence to be filed on appeal …

[22] As Duffy J observed in *Complaints Committee No 1 of the Auckland District Law Society v P*, however, in special cases further evidence may be admitted even though it was reasonably available for the hearing at first instance:[8]

> The discretionary power in [r 20.16] is broad enough to permit a Court to allow such evidence to be adduced. Furthermore, discretionary authority should never be fettered by fixed guidelines. But such exceptions would be rare and to occur, the fresh evidence would need to be cogent and material to the appeal's resolution …

Jakub Malinowski

[23] Mr Malinowski states in his affidavit that he agreed to purchase the forklift from UDC for a sum of approximately $28,000 including interest charges, administration fees and other costs. He says that Natasha Mascarenhas of UDC confirmed this sum with him on the telephone, and an invoice for the full amount was to be sent to him to pay. He says that the forklift was then repossessed without warning, and he was unable to complete the purchase. He was later invited to participate in an auction of the forklift, but did not receive any "sensible communication" from Turners advising him of the auction details. He says the forklift was eventually sold for considerably less than he was prepared to pay.

[24] Mr Malinowski's evidence is not fresh, as it could with reasonable diligence have been produced in the District Court. It also lacks specificity: he says he reached

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7 *Erceg v Balenia Ltd* [2008] NZCA 535 at [15].

8 *Complaints Committee No 1 of the Auckland District Law Society v P* (2007) 18 PRNZ 760 (HC) at [21].

an agreement to buy the forklift for a sum "over $28,000" and does not give the dates or times of the events to which he refers. However, his evidence is relevant to the issue on appeal, namely whether UDC complied with its duty to obtain the best prices reasonably obtainable. Mr Malinowski says that he was prepared to purchase the forklift for a sum of around $28,000, and it is undisputed that the forklift was subsequently sold for the significantly lesser sum of $20,700. His affidavit contains material of which he has first-hand knowledge. I consider it is in the interests of justice to admit Mr Malinowski's affidavit, despite it not being fresh evidence. In reaching this conclusion I am influenced by the fact that UDC has provided a reply affidavit, meaning the Court has the benefit of both party's versions of events. Accordingly I also admit the affidavit of Natasha Mascarenhas.

Michael Hatch

[25] Mr Hatch states that he is a vehicle valuer with 40 years' experience, having incorporated the company Car Valuation New Zealand Ltd some 20 years ago and having started the company Car Valuers (BOP) Ltd in 2017. Mr Hatch reaches the following conclusions:

> My analysis shows compared with statistical based market values (backed by sales data from experienced industry retail senior managers) and with due consideration to my experience and qualifications:
>
> a. The average sale price of all vehicles and assets is about 37% below the market price.
>
> b. Turners valuation was about 48% below the market price.
>
> c. Mr Goeffic's valuation was about 38% below the market price.

[26] Mr Hatch confirms the valuations made by Grays by reference to his own analysis and market data. He attaches a table setting out the Grays' valuations and his own comments, as well as data from vehicle dealers around New Zealand.

[27] Mr Hatch's evidence is not fresh in that it could, with reasonable diligence, have been provided to the District Court. As Mr Embling points out, Mr Hatch is an experienced car valuer from whom Mr Murray has sought an expert opinion, but Mr Hatch does not state that he has agreed to comply with the Code of Conduct for Expert

Witnesses.[9] That code of conduct is important because it sets out the expert's duty of independence and impartiality. However, I note that UDC has relied on the valuations provided by Mr Goeffic without any evidence of his qualifications as an expert valuer or any evidence that he has agreed to comply with the Code of Conduct for Expert Witnesses. It is apparent that Mr Hatch is a person with a considerable amount of vehicle valuation experience which qualifies him as an expert witness able to comment on the approximate values of the vehicles in question. The basis on which Mr Hatch has made the valuations is not entirely clear: he does not state that he has viewed the vehicles; nor does he attach notes referencing their condition. However, he lists the make, model and year of each vehicle and refers to their mileage.

[28] Mr Hatch's evidence, while it suffers from some lack of specificity and clarity, is clearly material to the resolution of the issue on appeal. It is cogent in that it supports the Grays' valuations with reference to industry data and Mr Hatch's own experience. Elements of Mr Hatch's affidavit stray into legal submission, for example where he expresses the view that UDC has breached s 110 of the PPSA. With the exception of those portions that express a view on points of law, I admit the evidence of Mr Hatch.

Jennifer Murray

[29] Again, the affidavit provided by Mr Murray's wife, Jennifer Murray, is not fresh evidence as it could have been provided to the District Court. In her affidavit Mrs Murray expresses views about Turners and the sales conducted by them, including the way in which cars are prepared and presented for sale. Her affidavit contains hearsay statements by staff members at Turners, and also assertions of fact about Turners on which Mrs Murray is not qualified to comment. Her affidavit also inappropriately strays into legal submissions regarding UDC's obligations under the PPSA. With regard to the requirements for adducing further evidence on appeal, I decline to admit Mrs Murray's affidavit.

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9 High Court Rules 2016, sch 4.

Lachlan Murray

[30] The affidavit of Mr Murray's son, Lachlan Murray, refers to the sale of a 2013 Volkswagen Passat vehicle belonging to his mother. He says it was similar to the vehicles purchased by Enlightenz on credit, but an inferior model. He says he listed it on TradeMe for sale in March 2018, and sold it several days later for $21,100. Before selling it, he says he took it to Turners Auctions in Albany for an appraisal. He attaches emails from Turners valuing the car at around $10,000 - $12,000, based on Turners' record of sales for similar cars.

[31] Lachlan Murray's evidence is fresh in the sense that the events to which he refers took place after the District Court hearing. He compares Turners' recent sales history of 2013 Volkswagen Passat vehicles with the results achieved at his private sale via TradeMe, with a view to establishing that Turners sells vehicles more cheaply than the price which can be achieved through private sales. I do not consider that the single example given by Lachlan Murray of a higher price achieved by private sale cogently establishes that point. With regard to the principles that govern the admission of further evidence on appeal, I decline to admit Lachlan Murray's affidavit.

Mr Murray

[32] Finally, UDC also objects to the admission of Mr Murray's affidavit on appeal. I acknowledge that much of it strays into legal submission rather than fact, and indeed reiterates many of the points made by Mr Murray in his synopsis of argument. Because Mr Murray is self-represented, I do not take a strict approach and I am prepared to admit and consider those portions of his affidavit that contain legal submissions. I also admit those portions of his affidavit that contain assertions of fact of which he has first-hand knowledge. However, I disregard the hearsay statements that Mr Murray records in his affidavit, as well as assertions of fact that are essentially repetitions of the affidavit evidence of Mrs Murray and Lachlan Murray, which I have held to be inadmissible on appeal.

Discussion

Legal principles

[33] The principles applicable to a summary judgment application were summarised by the Court of Appeal in *Krukziener v Hanover Finance Ltd*:[10]

> (a) 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. The Court must be left without any real doubt or uncertainty.
>
> (b) 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.
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> (c) 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.
>
> (d) 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.

[34] An appeal against the entry of summary judgment proceeds by way of rehearing.[11] The appellant is entitled to judgment in accordance with the opinion of the appellate Court, which must consider the merits of the case afresh.[12] In doing so the appellate court must form its own opinion of the acceptability and weight to be accorded to the evidence, rather than deferring to the lower court's assessment.[13]

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10 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26]; High Court Rules 2016, r 12.2(1).

11 *Meroiti v Southern Receivables Ltd* [2017] NZHC 2637 at [18].

12 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

13 *McKay v Sandman* [2018] NZCA 103, [2018] NZAR 707 at [31].

[35] Mr Murray's argument on appeal is that the Judge was wrong to reject his defence that UDC had breached its duty under s 110 of the PPSA. Section 110 of the PPSA provides that a secured party who exercises a power of sale of collateral under s 109 owes a duty to obtain the best price reasonably obtainable as at the time of sale. Although the duty is not expressed in the statute as being owed to guarantors, I agree with Associate Judge Bell in *UDC Finance Ltd v Brunton* that it would be anomalous if the duty was owed to borrowers but not to guarantors.[14]

[36] Judge Harrison held, and I agree, that the principles applicable to a mortgagee's duty when exercising a power of sale under s 176 of the Property Law Act 2007 are relevant by analogy to the duty under s 110 of the PPSA. As Judge Harrison recognised, those principles were collected and summarised in *Public Trust v Ottow*:

(a) a mortgagee has no duty to exercise the powers of sale or possession at any particular time. In default of any provision to the contrary in the mortgage, the power of sale is for the benefit of the mortgagee, who can sell at any time in accordance with the mortgagee's convenience;

(b) the mortgagee's duty of care is to take reasonable care to obtain the best price reasonably obtainable at the time of sale;

(c) it does not matter that the time may be unpropitious and that by waiting a higher price could be obtained;

(d) a mortgagee is under no obligation to improve the property or increase its value;

(e) a mortgagee sale for a price less than the current market value assessed by valuers does not, of itself, establish a breach of duty, although a large discrepancy may indicate a failure to take reasonable care;

(f) a mortgagee does not have any general duty to maintain properties prior to sale;

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[14] *UDC Finance Ltd v Brunton* [2014] NZHC 2247 at [59].

(g) following the service of a Property Law Act notice there is no duty on a mortgagee to keep a guarantor informed of sales activities;

(h) the mortgagee is not entitled to sell in a hasty way at a knock-down price sufficient to pay the debt, which because of the speed of sale leads to a lower price than could otherwise be obtained; and

(i) proper care must be taken to expose the property to the market and to obtain the best price reasonably obtainable.

[37] Section 109 of the PPSA provides that a secured party may effect a sale of collateral by auction, public tender, private sale, or another method. In *Public Trust v Ottow*, Asher J set out the following steps which would indicate that a mortgagee had made reasonable efforts to obtain the best reasonably obtainable price:[15]

(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 the circumstances, can be reconciled with expert opinion as to value.

[38] Judge Harrison set out those steps at [22] of his judgment. I note, however, that Asher J was dealing with the appropriate steps for sale of real property. Those steps may require some modification where personal property is concerned: sale by public auction, for example, may not always be the most effective method of sale for

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15 At [31].

items of personal property. I consider that the duty to take reasonable care to obtain the best price reasonably obtainable requires the secured party to select an appropriate method of marketing and sale that is likely to achieve market value or close to market value for that particular form of personal property.

The present case

[39] UDC set out the valuations and sale price for each of the vehicles in a schedule to its submissions. I add a further column containing the valuations provided by Grays, as confirmed by Michael Hatch:

Vehicle	**Turners' suggested reserve price**	**Mr Goeffic's valuation**	**Sale price**	**Grays valuation**
2009 BMW	$26,000	$24,000	$26,000	$40,000
2012 Volkswagen Passat Alltrack	$21,500	$24,000	$25,500	$30,000
2012 Volkswagen Passat Variant	$12,000	$13,000	$14,500	$28,000
2013 Volkswagen Passat Variant	$16,000	$18,000	$20,000	$30,000
2013 Volkswagen Passat TDI	$15,000	$18,000	$20,000	$29,000
Forklift	$17,000	N/A	$20,700	N/A

[40] It is evident from the table that there is a significant dispute between the parties as to the market value of the vehicles. The Goeffic valuations are found in vehicle appraisal forms where details about the individual vehicle are noted, including the WOF expiry, details of any extras present on the vehicle, and the condition of the bodywork, paint, interior, tyres and glazing. In some cases the condition is noted as being average or fair, by reference to dirt or stains in the interior, small dents or visible

scratches, chips or other marks on the vehicles. In the section for general comments, Mr Goeffic has noted matters such as no service history or service overdue, or the battery needing replacing. Although no affidavit was provided by Mr Goeffic, it is plain that he has conducted a detailed personal inspection of the vehicles.

[41] Mr Hatch's valuations, by contrast, do not refer to the condition of the vehicles or other matters that may well affect their market value, such as their service history. However, it is apparent that he has conducted a careful comparison of market prices for each vehicle by reference to their make, model, year and mileage. Mr Hatch's experience as a valuer is evident, while I am unaware of Mr Goeffic's experience and qualifications, or the way in which he reached his valuations. The evidence of both experts is unsatisfactory in that neither has assured the Court of their independence and impartiality by agreeing to the Code of Conduct for Expert Witnesses.

[42] A summary judgment hearing is not the appropriate forum for the resolution of the dispute as to market value. However, with the benefit of Mr Hatch's affidavit on appeal, I consider that it is arguable that the vehicles were sold for prices considerably below their true market value. Although the factors referred to on Mr Goeffic's vehicle appraisal forms may have lowered the value of the vehicles, they are not sufficient to explain the significant difference between Mr Goeffic's valuations and Mr Hatch's estimation of the vehicles' market value.

[43] While sale below market value is not determinative of breach of s 110 of the PPSA, Asher J recognised in *Public Trust v Ottow* that a large discrepancy between the sale price and the current market value may indicate a failure to take reasonable care.

[44] Turning to the sales process, Mr Embling submits that UDC took the following steps:

(a) UDC retained Turners, a reputable sales agent for used vehicles, to provide professional advice as to the most appropriate marketing and method of sale in respect of each vehicle.

(b) Turners evaluated and provided an estimated auction value and suggested reserve price for each of the vehicles. Mike Goeffic, an asset sales specialist, also appraised each vehicle (with the exception of the forklift) and provided an estimated market value for each vehicle.

(c) Turners recommended that each of the vehicles be sold by public auction, with the exception of the 2009 BMW which Turners recommended be sold using the "Buy Now" process.

(d) The vehicles were listed for sale on Turners' website, the auction website, TradeMe, and displayed on Turners' premises for between 7 and 49 days.

(e) Each of the vehicles were sold at a price equal to or exceeding the reserves suggested by Turners and the valuations provided by Mr Goeffic.

[45] Mr Murray says that the vehicles were not in fact sold by public auction, and attaches email correspondence with a Turners staff member in which he asked for sale details of each of the vehicles. Ben Nicholson, Turners Sales Manager, responded on 25 June 2018 indicating that each of the vehicles were sold through the "Buy Now" process, with the exception of the forklift. On the other hand, Brian Strickland, a manager in UDC's asset management division, states in his affidavit dated 10 March 2017 that each vehicle was sold by public auction at Turners Auctions. There is therefore a conflict in the evidence as to the method of sale, which I am not in a position to resolve. However, I note that Mr Murray is critical of the auction process in any event, saying that vehicle auctions are poorly attended and do not achieve premium prices. The implications of selling vehicles through the "Buy Now" process as opposed to public auction are not clear to me on the evidence provided.

[46] Putting aside the question of whether the vehicles were sold through "Buy Now" or by way of public auction, Mr Murray says that sale through Turners was inappropriate in any event. He relies on Mr Hatch's evidence to the effect that Turners is known in the industry as a place where buyers go to purchase a low-priced vehicle

with an unknown history, unsupported by branded warranties or after sales support. Mr Hatch says that the BMW and Volkswagen vehicles should have been sold through branched franchise dealers to obtain the best price.

[47] I accept that these are matters on which Mr Hatch is qualified to comment, in his experience as a car valuer. In the absence of any explanation from UDC as to why Turners was chosen and why it was an appropriate outlet for sale of these vehicles, I consider that it is arguable UDC has not selected an appropriate method of marketing and sale designed to achieve market value or close to market value.

[48] I note, however, that I do not accept Mr Murray's submissions that Turners exhibited a lack of care and professionalism in presenting the cars for sale. Not only is there no evidence to support that submission, but it is well established that the secured party need not improve the property or increase its value prior to sale.

[49] I turn next to the forklift and the evidence of Mr Malinowski and Ms Mascarenhas. Ms Mascarenhas sets out the following series of events:

(a) On 4 May 2016, she instructed Turners to repossess the forklift, noting that UDC had been instructed by the receiver of Enlightenz, Chapman Atkins, to do so.

(b) Later that same day, she withdrew the instruction to repossess the forklift as her colleague advised her Mr Malinowski had expressed an interest in purchasing it.

(c) Later that same day, her colleague Mr Baynosa discussed the potential sale of the forklift with Mr Malinowski. Ms Mascarenhas called Mr Malinowski and left him a message notifying him that UDC required confirmation from Chapman Atkins that it disclaimed its interest in the assets financed by Enlightenz before it could provide him with a quote.

(d) On 9 May 2016, Ms Mascarenhas called Mr Malinowski to notify him that UDC would proceed with repossessing the forklift, and told him

she would provide his contact details to her colleague at UDC who would be overseeing the sale of the forklift. She then provided Mr Malinowski's details to Jason Gilberd of UDC.

(e) UDC repossessed the forklift on 10 May 2016.

[50] Ms Mascarenhas attaches email correspondence between Mr Gilberd and Mr Malinowski. Mr Gilberd advised Mr Malinowski on 11 May 2016 that because the forklift had now been repossessed, UDC was "bound to follow a prescribed legal process" and after the issuing of statutory notices it would offer the forklift for sale by way of public auction at Turners. Mr Gilberd then offered to pass Mr Malinowski's contact details on to Turners. Mr Malinowski responded on the same day asking for his contact details to be passed on, and providing his cell phone number. He also asked when and where the auction would take place. Mr Gilberd responded on the same day giving the location of the auction and saying he anticipated it would take place on Monday 30 May. He provided the contact details of a Lawrence Chand from Turners.

[51] The next email is dated 9 June 2016: Mr Malinowski asked Mr Gilberd when the auction would take place. Mr Gilberd responded on the same day explaining that the battery charger had not been recovered immediately when the forklift was repossessed, and when the agents returned to the premises they discovered the battery charger had been removed. The matter had been reported to the insurance company and to police, which had delayed the sale of the forklift. Mr Gilberd was unable to confirm the date of auction, as it had to wait until the charger was recovered or an insurance claim was accepted.

[52] Mr Malinowski next emailed Mr Gilberd on 10 August asking for an update. Mr Gilberd responded the following day saying that the matter was with the police and insurer and "beyond UDC's control". He reiterated that once UDC was in a position to sell, Turners would contact Mr Malinowski.

[53] There followed some discussion via email about whether the forklift could be sold without a battery charger, Mr Gilberd maintaining it could not as UDC had funded the purchase of the forklift with a charger. Mr Malinowski replied on 11 August saying

"OK, up to you, but I cant [sic] wait anymore so I will just go ahead and buy another one". Mr Gilberd replied with an apology and asked whether Turners should remove him from their contact list. There was no further response from Mr Malinowski.

[54] In his affidavit Mr Malinowski claims that he had an agreement with UDC for purchase of the forklift. He says:

> I spoke to a female representative of UDC who I believe was Natasha Mascarendhas [sic] and we agreed on the price and an invoice was to be sent through for me to pay the full amount.

[55] I do not find Mr Malinowski's claim to have concluded an agreement with UDC for the purchase of the forklift to be credible, particularly as he did not assert he had a concluded agreement in subsequent correspondence. It is apparent from the affidavit evidence of both Ms Mascarenhas and an email from Chapman Atkins, which Mr Malinowski attaches to his affidavit, that while Mr Malinowski had made an offer to UDC, no concluded agreement was in place. Ms Atkins of Chapman Atkins wrote to Ms Mascarenhas on 11 May 2016, saying:

> We also understand that the tenant (Jacob) has made an indicative offer to UDC Finance for the purchase of the forklift of approximately $28,000. I further understand that you have advised him that UDC Finance wish to have a "cooling off" period of 30 to 40 days. In all likelihood this purchaser will be lost as I further understand that he is not prepared to wait 30-40 days to purchase.
>
> As Andree Atkinson has previously advised Jason Gilberd, the offer of $28,000 is significantly greater than the valuation we received on appointment.

[56] Although no final agreement had been reached, the email from Ms Atkins indicates that UDC was on notice that Mr Malinowski would likely be lost as a potential purchaser if made to wait for 30-40 days. UDC was also aware that the price being offered by Mr Malinowski was significantly higher than valuations Chapman Atkins had received. As Ms Mascarenhas notes, there was some difficulty locating the battery charger which delayed matters, as sale was not possible without the battery charger. Mr Malinowski blames the failure to collect the charger and its subsequent loss on UDC's negligence. It is not possible to determine matters of fault regarding the battery charger on the evidence presented, so I put that matter to one side.

[57] I consider Mr Gilberd was wrong to suggest that UDC was "bound to follow a prescribed legal process", meaning sale through Turners. UDC was bound to take reasonable care to obtain the best price reasonably obtainable, which does not necessarily mean selling the property at a public auction when an offer exceeding market value was made by a private purchaser. I consider it is arguable that UDC's determination to sell the forklift through Turners rather than agreeing to a private sale to Mr Malinowski (or using an alternative method of sale that would have achieved a comparable price to that offered by Mr Malinowski) constituted a failure to take reasonable care to obtain the best price reasonably obtainable for the forklift.

Conclusions

[58] Having reviewed the evidence and the arguments afresh, I consider Mr Murray has an arguable defence to UDC's claim on the grounds that UDC has failed in its duty as the secured party to take reasonable care to obtain the best price reasonably obtainable when selling the six vehicles. In particular, I consider there is room for argument as to the true market value of the vehicles; whether Turners was the appropriate outlet for sale; and whether UDC should have accepted Mr Malinowski's offer to purchase the forklift or used an alternative method of sale that would have secured a comparable price to Mr Malinowski's offer.

[59] It follows that I find there to be a serious question to be tried, and consequently summary judgment should not have been entered.

Result

[60] The appeal is allowed. The order for summary judgment is set aside, and I remit the matter to the District Court for directions as to the future conduct of the proceeding and mode of trial.[16]

Paul Davison J

[16] See District Court Rules 2014, r 12.12(1).