IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2016-441-106
[2017] NZHC 1184

BETWEEN	BANK OF NEW ZEALAND Plaintiff
AND	JOHN STEPHEN PATRICK Defendant

Hearing: 3 February 2017

Appearances: R J Gordon and M W P Mazenier for the plaintiff
P Ross for the defendant

Judgment: 1 June 2017

JUDGMENT OF ASSOCIATE JUDGE SMITH

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[1] The plaintiff (the Bank) sues Mr Patrick for certain monies said to be owing by him on a guarantee signed by him on 8 December 2013 (the guarantee). The Bank contends that Mr Patrick has no defence to its claims, and it now applies for summary judgment.

Background

[2] Mr Patrick was originally from the United Kingdom. He immigrated to New Zealand with his wife in 2006. Prior to coming to New Zealand, he worked as an engineer, and more recently in the finance and banking sectors.

[3] When Mr Patrick came to New Zealand he and his wife purchased a small lifestyle block of approximately ten hectares in the Hawke's Bay (the property). There was a vineyard on the property, with mature grapes under contract to Villa Maria.

[4] The purchase of the property was financed with a loan of $1.14 million from the Bank, and the Bank subsequently provided finance for further business activities carried on by Mr Patrick or entities with which he has been associated.

[5] Mr Patrick and his wife established a company called Moteo Ridge Ltd (Moteo). With assistance from the Bank, Moteo acquired various items of plant and equipment over the years, including a harvester, a tractor, and other items of equipment required for the vineyard.

[6] In 2012, Mr Patrick decided to diversify the business operations by adding a small engineering workshop. He says that that was a natural extension, as he had always conducted engineering work within the business and had already carried out engineering work for outside customers. A separate company was formed (Moteo Agri Engineering Ltd – "Moteo Agri") to carry out the engineering work. The engineering business was moderately successful in its first year, generating a net profit of $121,000.

[7] By the end of July 2014, Mr Patrick considered that the businesses were going well. He had leased extra land from surrounding vineyards, and had good

relationships with a number of major wineries. He says that the businesses' total assets amounted to about $1.5 million for the property, with an additional $900,000 in machinery and other assets.

[8] Mr Patrick says that the businesses' first financial problem occurred in August 2014, when the Bank dishonoured a GST cheque for approximately $32,000. He asserts that the Bank advised him at the time that it was withdrawing the companies' overdraft facilities, and that he should cancel the companies' contracts and leases. Mr Patrick says that he was particularly concerned at that suggestion, which would seriously damage the companies' trading reputations and impair their ability to generate further income. He contends that he had "never missed a payment due to [the Bank]. Each interest and capital payment was made on the required date. We had never suffered any defaults or had arrears".

[9] Mr Patrick says that he responded to the Bank's advice to cancel the companies' contracts and leases by closing down the engineering workshop. Four of the seven staff were laid off, and various business contacts were advised. He says that he was no longer then in a position to guarantee the continuity of Moteo's services and/or payments.

[10] Mr Patrick says that at that stage there were three loans from the Bank: the main loan supported by a mortgage over the property, an equipment finance loan, and a loan for a second harvester which Moteo had acquired.

[11] By November 2015, the relationship between Mr Patrick and his companies and the Bank was under significant strain. Mr Patrick had complained to the Banking Ombudsman (the Ombudsman), and various meetings were held to discuss the position. No resolution was reached, however, and on 13 November 2015 the Bank made formal demand on Moteo under the two facilities which were then outstanding.

[12] The first such facility was a "Business First Term Loan" facility entered into by the Bank and Moteo on 2 December 2014 (the term loan). Its expiry date was 30 November 2015.

[13] The second facility was a "Business and Farming Overdraft" facility entered into between the Bank and Moteo on 18 August 2015 (the overdraft). The overdraft facility was repayable upon demand, but it also had a fixed end date of 30 November 2015.

[14] These two loan facilities had been applied to the repayment of earlier loan facilities the Bank had made available from time to time.

[15] At the time of the Bank's demand the term loan was in arrears. The monthly payments due on 15 September 2015 and 15 October 2015 had not been paid. The overdraft also exceeded its maximum limit, which was then $150,000.

[16] The Bank's demands were not met and, from 30 November 2015, the full amount of the term loan became due. Relying on the defaults, the Bank appointed Mr Tony Pattison and Mr John Fisk, Chartered Accountants, as receivers and managers of Moteo and Mr Patrick's family trust (the Dansam Family Trust). The appointment of the receivers was made on 1 December 2015.

The issues raised by Mr Patrick

[17] Mr Patrick does not contest the facts that he signed the guarantee, that the term loan and the overdraft agreements were entered into between Moteo and the Bank, or that his personal guarantee applied to Moteo's liability under those facilities. His notice of opposition was based on the following grounds:

(a) the relief sought against him arises through a personal guarantee. As a result, he "subrogates the rights of the principal borrower".

(b) the Bank acted improperly in appointing a receiver when it did, as there were attempts being made to mediate a resolution, in which the Ombudsman was involved with officers of the Bank.

(c) the Bank acted improperly by dishonouring payments and freezing the principal borrower's accounts at a time when its facilities were

operating within agreed terms and when all payments due had been made.

(d) in appointing the receivers, the Bank breached s 25 of the Personal Property Securities Act 1999 (the PPSA) by acting in bad faith and contrary to reasonable commercial practice.

(e) the appointment of the receivers brought about significant losses because of the manner in which the receivership was conducted.

(f) the receivers acted in breach of their duties under s 19 of the Receiverships Act 1993, in failing to obtain the best price reasonably obtainable when selling assets of the principal borrower.

[18] At the hearing, Mr Ross advised that only two issues would be pursued by Mr Patrick:

(a) whether or not there was a breach by the Bank of its obligations under s 25 of the PPSA, and if so, what were the consequences of that breach; and

(b) whether the Bank was in fact acting as a director of Moteo or Moteo Agri (under the extended definition of "director" in s 126 of the Companies Act 1993 (the Act)), and if so whether it breached any duties as a director which caused loss to Mr Patrick (which he is entitled to set off against the amount claimed under the guarantee).

[19] The result of that advice from Mr Ross is that the court will not need to consider the grounds of opposition (e) and (f) at para [17] of this judgment.

[20] The argument that the Bank was acting as a de facto director under s 126 of the Act was first raised in Mr Ross' written submissions. However Mr Gordon addressed the argument in his oral submissions, so I will deal with it in this judgment.

The evidence

Mr Patrick's evidence

[21] Mr Patrick stated that during 2013 the growth of income from grape harvesting and contracting slowed. There was also an accident with a harvester which was written off when it rolled over. The insurance payout was less than the residual amount owing to the bank, and it cost Moteo $113,000 to rebuild the harvester.

[22] Mr Patrick referred to a letter from the Bank dated 24 October 2013, in which the Bank expressed some concern that the earnings of the Moteo group were lower that year than expected. The Bank noted that earnings to 30 June 2013 were lower than the original budget figure for that period, and that trading deficits had been recorded by Moteo in two of the preceding three financial years. Moteo had required additional working capital facilities to assist with the low season over and above those approved within the restructure of facilities and an increase provided in November 2012. Trading results over the preceding three years had not been sufficient to fully met the level of principal debt repayment required on an annual basis, leading to recurring requests for additional working capital facilities in low seasons.

[23] Mr Patrick disputed those assertions. He stated in his evidence that no payments had been missed. Although the 2013 year was a poor harvest year, and Moteo's earnings were lower than expected, all payments of principal and interest due to the Bank had been made during the year. Supplier accounts were current.

[24] Notwithstanding its concerns, the Bank was nevertheless prepared to continue its funding commitment to the group, including the availability of a seasonal (overdraft) facility to Moteo. It indicated that it would closely monitor the group's financial performance, on a monthly basis.

[25] The "close monitoring" required Moteo to submit monthly management accounts for itself and Moteo Agri, together with a written commentary on any negative variance to budget of greater than ten per cent. In addition to the monthly

reporting requirement, the following new covenants were applied from 24 October 2013 until further notice:

(a) a forecast profit and loss, balance sheet and cash flow for the year ending 30 June 2015 was to be provided to the Bank sixty days prior to the end of the current financial year;

(b) no further external indebtedness was to be incurred by any of the group entities without the Bank's prior approval;

(c) no new capital expenditure in excess of $500 was to be incurred by any of the group entities without the Bank's prior approval.

[26] The Bank noted in the 24 October 2013 letter its expectation that sufficient cash flows would be generated from the group's operating activities to clear the additional seasonal facility in full by June 2014, and to recommence principal debt repayments on standard lending terms.

[27] Mr Patrick stated in his evidence that the Bank's letter simply set out its expectations as to the group's performance in the 2014 season. It set out targets, not formally contracted obligations, and it explained that if the targets were not met the Bank would be unlikely to support additional borrowing.

[28] By July 2014, the total debt to the Bank stood at about $1.2 million. Mr Patrick viewed the group's debt-to-asset ratios as within acceptable levels. However he acknowledged in his evidence that, despite the group's compliance with the various covenants in the Bank's letter of 24 October 2013, it did not manage to clear the additional seasonal overdraft the Bank had made available. The Bank's response was to cancel the additional overdraft facility, and Mr Patrick stated that that was done with no prior warning: the Bank simply dishonoured the GST payment in August 2014 and removed the facility. According to Mr Patrick, that had the effect of preventing Moteo from accessing any funds.

[29] Mr Patrick's evidence was that, although Moteo and Moteo Agri were allowed to keep trading during the 2015 financial year, in fact their accounts had been "strait-jacketed" by the Bank for a significant period, and "we were in no way able to trade properly". He said that: "the Bank had withdrawn the means by which [the group] could trade. [The Bank] controlled every payment that we needed to make. In effect [the Bank] was operating the business. This was a de facto administration". In Mr Patrick's view, the Bank effectively caused the acts of default which led to the appointment of the receivers.

[30] Mr Patrick said that at the time the Bank appointed the receivers, the Ombudsman had arranged a mediation in Auckland which was to be attended by representatives of the Bank, Mr Patrick, and Mr Patrick's financial adviser, Mr Behringer.

Mr Behringer's evidence

[31] Mr Behringer is a former banker who had worked in rural lending for Westpac Banking Corporation, Rabobank New Zealand and Wrightson Ltd, rural stock and station agents. Since his retirement, he has been assisting distressed farmers through the East Coast Rural Support Trust. He is an admitted barrister and solicitor, although he does not hold a current practising certificate. His evidence was that he was involved with Mr Patrick and his companies from August 2014.

[32] Mr Behringer said that at the time he became involved, the Bank was putting pressure on Mr Patrick to refinance his group's lending through another lending institution, or to sell assets to repay the total amount owing to the Bank.

[33] He stated that he attended a meeting with Bank representatives and Mr Patrick on 12 November 2014. At the meeting, the Bank was seeking an update on a number of matters, including the refinancing of the Moteo group debt through Heartland Bank and/or UDC, and the sale of plant and equipment. At the time the vineyard was listed for sale with Bayleys, and there was a general discussion about the sale process. The Bank requested a further registered valuation. There was also general discussion about the group's forecast cash flow. Mr Williams of the Bank asked for details of what the peak debt would be before Moteo received income from

the next grape harvest (in the expectation that a sale of the property would not be achieved before the harvest).

[34] According to Mr Behringer, the Bank was unwilling to make any commitment for further support to the group, beyond stating that it would meet the following week's wages.

[35] Mr Behringer stated that it was shortly after this meeting that Mr Patrick advised him that he had closed down the engineering business. Mr Behringer was unsure how the Bank would react to the news. Without the engineering business debt servicing was going to become more difficult.

[36] The remaining businesses continued to trade, and the 2015 grapes were harvested between March and May of that year. However, the harvest was adversely affected by heavy rainfall.

[37] A further meeting was held at the Hastings branch of the Bank on 15 July 2015. One of the agenda items was whether the Bank would consider granting further time for a voluntary sale of the vineyard and business assets, and consider funding in the meantime for the 2016 season. The Bank was reluctant to take over the sale process, although in Mr Behringer's view it had become apparent by then that the business was not viable.

[38] Mr Behringer arranged to meet again with the Bank officers at the Hastings Branch on 19 August 2015. The Bank says that a proposal discussed at this meeting (and described by Mr Behringer in his affidavit) was made on a without prejudice basis, and should not have been put in evidence. In the event it is not necessary to refer to the proposal, or Mr Behringer's opinion of it, as it is common ground that the proposal would have had to be approved by the Bank's credit committee, and that approval was never given. It is enough to record that it was agreed at the meeting that Mr Behringer would be given some further time to see if the group's debts could be refinanced elsewhere (the Bank was not itself prepared to further restructure the lending).

[39] In the event, the group's negative trading performance over the previous two years was such that no other lender was prepared to entertain a loan application.

[40] The Bank continued to extend the time frame for Mr Behringer to refinance the outstanding indebtedness, and it continued to meet essential outgoings by extending credit. Mr Behringer stated that lending on an "invoice by invoice" basis is not uncommon in situations such as that in which the Moteo group found itself. He expressed the view that the Bank's intention at that time was to preserve the value of the vineyard, which was its main security. The vineyard was then being actively marketed for sale, and it was important to ensure that the group was still being managed, general maintenance was carried out, and the property was presented in a manner that would make it attractive to potential purchasers.

[41] While the Bank did continue to fund the group's day-to-day trading activities to some extent, Mr Behringer was critical of at least one of the Bank's decisions. He referred to the Bank's agreement to approve payment of wages, but not fuel costs. Given that the group's operations were very machinery-intensive, Mr Behringer considered it illogical to have staff on site who were unable to work because there was no fuel for the machines.

[42] The window of opportunity to refinance was closing in October 2015, and it became apparent to Mr Behringer that the Bank would take over the sale process. That was an outcome he had spent the last 12 months trying to avoid, because forced sales would be likely to result in lower prices being achieved.

[43] In November 2015, the Ombudsman had agreed to contact the Bank to see if the group's facilities could be extended until at least February 2016. On 13 November 2015 the Ombudsman sent an email to Mr Patrick advising that Mr Cuthbert of the Bank had confirmed that the Bank would cover the cost of Mr Patrick attending a meeting arranged by the Ombudsman. The Ombudsman advised the Bank that there should be just one meeting, at which all matters could be fully discussed. The Ombudsman proposed to contact the Bank to make arrangements for representatives of the Ombudsman to be involved in the meeting.

Neither Mr Cuthbert nor anyone else from the Bank's complaints department would be attending the meeting.

[44] Mr Behringer expressed the opinion that the Bank gave the appearance of allowing the business to continue trading in 2015, but in reality the business could not trade properly or profitably given the strictness of the control imposed by the Bank.

Mr Williams' evidence

[45] The evidence for the Bank was given by Mr Williams, a manager of Strategic Business Services employed by the Bank.

[46] Mr Williams confirmed that the term loan was drawn down in full ($860,000) by Moteo on 15 December 2014. The term was six months from the date of the advance, and Moteo was required to make monthly payments (interest only) pending repayment.

[47] The Bank agreed to extend the terms on two separate occasions. The last of the extensions required repayment on 30 November 2015.

[48] The overdraft was made available to Moteo on 18 August 2015, with a limit of $150,000. It was repayable on demand, or (in the absence of any demand) on 30 November 2015.

[49] The Bank sent an updated letter of demand to Mr Patrick on 22 July 2016, claiming the sum of $1,013,652.88 which was then said to be owing by Mr Patrick on his guarantee. By 24 August 2016 that amount had risen to $1,020,183.91.

[50] Mr Williams stated in his first affidavit (affirmed on 29 August 2016) that the receivership of Moteo was nearing completion. Some plant and equipment remained to be sold, but he did not expect the proceeds of sale would be sufficient to allow for any further payment to the Bank.

[51] In his reply affidavit, Mr Williams provided a fuller narrative of the events, in which he responded to Mr Patrick's evidence about the Bank's relationship with the Moteo group prior to the agreements to provide the term loan and the overdraft.

[52] In response to Mr Patrick's statement that "no payments had been missed", Mr Williams stated that, while instalment payments were mostly met, they were being funded out of, and at the expense of, Moteo's overdraft facility. The overdraft base limit in the first half of 2010 stood at $183,400, but when the debts were restructured in June 2010 the limit was raised to $200,000. By September 2012, the overdraft base limit had been increased to $220,000. In addition, the Bank approved temporary additional facilities from time to time which exceeded those base limits. The temporary additional facilities were never repaid in full.

[53] Mr Williams' concern was that the overdraft limits were repeatedly exceeded, and, with the repeated failures to repay the additional (seasonal) lending, the total overdraft debt was steadily increasing.

[54] On 10 December 2013 and again on 10 February 2014 the Bank wrote to Mr Patrick requiring the overdraft be brought back within its then base limit of $220,000. The letter stated that the Bank saw Moteo's upcoming harvest as a critical period to repay the seasonal facility in full, plus provide sufficient working capital to fund the next low season, "thereby completely removing the future requirement to raise additional seasonal facilities beyond the base limit of $220,000 ... . The Bank's ongoing funding commitment is conditional on the above point." Mr Williams emphasised in his evidence that reducing the overdraft was not merely a "target", but a condition of the Bank's willingness to continue financial support through to the end of the 2014 harvest.

[55] Mr Williams stated that by May 2014, despite the completion of the 2014 harvest, the overdraft was still operating well in excess of its $220,000 base limit. The Bank again agreed to increase the overdraft, as a short term measure. As at the end of July 2014, the total approved overdraft was $270,000, consisting of the base figure of $220,000 plus an additional $50,000 repayable by 31 July 2014.

[56] It was at this time that Moteo sought to make the GST payment referred to in para [8] of this judgment. It did so by cheque drawn on its account with the Bank. When the cheque was presented, the total amount outstanding on the overdraft was $341,177.78, being more than $70,000 in excess of the group's temporary limit and more than $120,000 in excess of the base limit of $220,000. Further, the additional $50,000 temporary facility had expired on 31 July 2014.

[57] In response to Mr Patrick's contention in his affidavit that, at or about the time of the dishonouring of the GST payment the Bank advised that the group should simply cancel its contracts and leases, Mr Williams stated that no such advice was given by the Bank. He produced a copy of a letter dated 4 August 2014 from the Bank to the directors of Moteo, in which the Bank said:

> The provision of seasonal overdraft funding last October and subsequent increases was on the basis this would be fully repaid and surpluses available to cover the off season from revenues generated from the 2014 harvesting season based upon the cash flow forecasts provided by you to the Bank. This has not occurred with the Company operating in excess of the base overdraft limit of $220,000. Further significant funding is required to get you through to the 2015 harvest.
>
> The Bank outlined that in the event of non-clearance of the overdraft from the 2014 harvest it [sic] was unlikely to make further seasonal advances to the Company. The Bank further advised that you consider alternatives to raising additional debt if the cash flow performance fell short of expectations over this period.
>
> ...
>
> The Bank is not prepared to provide additional seasonal funding to the Company beyond the current level of borrowing.
>
> The current position with the Company and Trust's bank accounts is capped and no further drawings are to be issued without the Bank's prior consent.

[58] The Bank requested an urgent meeting with Mr Patrick and his accountant to address its concerns. It reserved its rights and remedies, and recommended that Mr Patrick seek independent accounting and legal advice.

[59] There was a meeting between Mr Patrick and officers of the Bank on 6 August 2014, at which the Bank agreed to consider funding a temporary increase to the group's facilities to allow it time to investigate refinancing and a sale of the

contracting business. The bank approved the temporary additional funding on 11 August 2014.

[60] On 11 August 2014 Mr Patrick complained to the Ombudsman.

[61] The substance of Mr Patrick's complaint was that he considered that he and his group were being forced into selling their farming-related business, even though they had made significant repayments of capital in the preceding tax year. He complained that the Bank did not want to recognise that selling a seasonal business had to be done at the right time of year, and didn't care about preserving the group's equity in its property. He asked that time be given to either trade out of the situation or liquidate group assets, so that the group would at least come out with something.

[62] The Bank provided a detailed response to the complaint on 26 November 2014. It did not accept Mr Patrick's complaints.

[63] In his evidence, Mr Williams denied that the Bank was forcing Mr Patrick to sell his house. He also noted that the Ombudsman ultimately found (in letters written in February and March of 2016) that there was no evidence of any misconduct by the Bank.

[64] Formal demands for repayment were served on Mr Patrick at a meeting on 19 September 2014, and he was advised on that date that the Bank was no longer prepared to provide additional funding (other than for essential drawings to enable the group to trade). Unless Mr Patrick was able to refinance, the Bank would look to enforce its security.

[65] Notwithstanding that advice, in December 2014 the Bank agreed to restructure the debt. The existing facilities were merged into a new term loan of $860,000. This is the term loan on which the Bank now sues Mr Patrick.

[66] A new temporary overdraft facility (the overdraft) was also approved, to be repaid on 31 May 2015. As part of the restructure, the Bank obtained interlocking

guarantees in respect of all members of the Moteo group, including the guarantee from Mr Patrick on which the Bank now sues.

[67] Mr Williams' evidence was that Moteo's 2015 grape harvest was poor, and income did not meet cash flow forecasts. Moteo could not repay the seasonal facility due for repayment on 31 May 2015. Nor was it able to arrange any refinancing, or find a buyer for the contracting business or the property.

[68] A meeting was convened on 15 July 2015. Messrs Patrick and Behringer attended, along with Mr Kingston, a Rural Support representative, and a number of representatives of the Bank, including Mr Williams. Mr Patrick advised the meeting that $14,000 of the GST payment which had been dishonoured the previous August was still owing to the Inland Revenue Department, and that a PAYE payment of $2,477 was outstanding from January 2015. These sums were being paid off at $900 per month under a repayment plan Mr Patrick had arranged with the Department.

[69] Mr Williams advised the meeting that, as debt servicing commitments could not be met, a sale of the group's assets would be required to repay the Bank lending. The Bank's file note of the meeting records that Mr Patrick's response was that he had cancelled all of the group's long term harvesting contracts and additional vineyard leases the previous year on the basis that the loans would be called up and he would not be able to guarantee the group's contractual obligations if that occurred. As a result, the group's income for 2014–2015 was down on the previous year's income.

[70] Mr Patrick advised the meeting that the property was still on the market with Bayleys, but with no further interest inquiry. Bayleys had advised that the property should be taken off the market, and listed again in the spring.

[71] Mr Williams' evidence was that the Bank accepted that the property should be taken off the market. He stated that it was agreed that a voluntary sale process would recommence in early September 2015. The Bank agreed to provide interim funding (in line with interim cash flow forecasts provided by the group) through to

the end of November 2015, so that the property could be maintained ahead of the sale.

[72] Mr Williams described a final meeting with Mr Patrick and Mr Behringer before the receivers were appointed. It took place on 26 November 2015. Mr Kingston was again present, and the Ombudsman and two of her investigation staff attended the meeting by telephone conference link. According to Mr Williams, this was the only meeting between the Bank and representatives of the Moteo group in which representatives of the Ombudsman participated.

[73] Mr Williams denied that any agreement to go to mediation was reached between the group and the Bank.

[74] The Bank's note of the 26 November 2015 meeting records that one of the Ombudsman's investigators, Ms Kenworthy, expressed surprise at the Bank's letter of demand dated 13 November 2015, given discussions which had previously taken place between the Ombudsman's office and Mr Cuthbert of the Bank, which had appeared to indicate that a conciliation process was under way.

[75] The note of the meeting of 26 November 2015 records that Mr Williams provided the meeting with a summary of various steps taken by the Bank from 2013 up to the point in mid-2015 when the Bank agreed to provide conditional assistance to the group until 30 November 2015, to enable a spring sale of the group's assets. Mr Kingston then queried where the Bank's position left Mr Patrick's complaint to the Ombudsman. Ms Kenworthy is reported to have replied that the Ombudsman had no power to prevent the Bank from continuing with its current process (referring to the Bank's demand for repayment and the issue of notices under the Property Law Act).

[76] Mr Williams advised Mr and Mrs Patrick, Mr Behringer and Mr Kingston that the Bank would move to appoint receivers the following week.

[77] Mr Williams stated that the Bank's decision to appoint receivers was made for purely commercial reasons, and not in an attempt to subvert Mr Patrick's renewed complaint to the Ombudsman.

[78] Mr Williams also responded to Mr Patrick's evidence relating to the closure of the engineering workshop. He said that the Bank was aware that Moteo Agri was the better performing of Mr Patrick's ventures, and it would have appreciated the implications of closing the workshop. But the Bank only became aware in December 2014 that Moteo Agri had ceased trading, when the loan restructure documents were being prepared and Mr Patrick's solicitor advised the Bank that Moteo Agri had ceased trading on 1 August 2014. Mr Williams stated that there was little the Bank could do retrospectively in relation to Mr Patrick's decision to close down the most successful aspect of the group's business.

[79] In response to Mr Behringer's evidence that the dishonoured GST payment of approximately $33,000 suggested that Moteo had made a trading profit of around $230,000 in the preceding two months, Mr Williams pointed to the seasonal nature of the group's businesses, where larger proportions of annual income would be expected to be (and in fact were) received over shorter periods of time — eg around harvest time.

Mr Pattison's evidence

[80] The last of the affidavits was provided by one of the receivers, Mr Tony Pattison. Mr Pattison's affidavit was primarily directed to Mr Patrick's criticisms of actions taken by the receivers following their appointment. As those arguments were not pursued at the hearing, it is not necessary to refer to Mr Pattision's evidence on them. For the purposes of this judgment I need only note Mr Pattision's evidence that the property was not sold by the receivers, but by its owners, the trustees of the Dansam Family Trust. According to the Bank's statement of claim, the sale was settled on 10 February 2016.

Legal principles applicable to summary judgment applications

[81] Rule 12.2(1) of the High Court Rules 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 action in the statement of claim or to a particular part of any such cause of action.
>
> ...

[82] The principles applied by the courts in dealing with plaintiffs' applications for summary judgment are well settled. They are conveniently summarised in the Court of Appeal decision of *Krukziener v Hanover Finance Ltd* as follows:[1]

> 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; (1986) 1 PRNZ 183 (CA), at p 3; p 185. 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; [1979] 3 WLR 373 (PC), at p 341; p 381. 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).

The issues to be determined

[83] The following are the issues to be determined:

(a) is it reasonably arguable for Mr Patrick that, in appointing the receivers, the Bank acted prematurely and in breach of its obligations under s 25 of the PPSA to act in good faith and in accordance with reasonable standards of commercial practice?

(b) is it reasonably arguable for Mr Patrick that, by not honouring an undertaking to negotiate or attend mediation, the Bank acted in breach of its obligations under s 25 of the PPSA to act in good faith and in accordance with reasonable standards of commercial practice?

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

(c) is it reasonably arguable for Mr Patrick that the Bank was at any relevant time a director of Moteo or Moteo Agri, within the extended meaning of "director" set out in s 126 of the Act?

(d) if the answer to any of issues (1)–(3) is "yes", does that answer provide Mr Patrick with an arguable set-off defence?

(e) if and to the extent the Bank has shown that Mr Patrick has no arguable defence, are there any reasons for the court to exercise its discretion against the entry of summary judgment?

[84] I will address each of these issues in turn.

Issue 1: is it reasonably arguable for Mr Patrick that, in appointing the receivers, the Bank acted prematurely and in breach of its obligations under s 25 of the PPSA to act in good faith and in accordance with reasonable standards of commercial practice?

[85] Section 25 of the PPSA provides:

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

[86] Mr Ross submitted that Mr Patrick already had the companies' assets on the market for sale when the Bank moved to appoint the receivers, and the appointment of the receivers immediately reduced the likely recovery. Any sales by the receivers would be seen by the market as forced sales by distressed commercial entities. Also, there would be the unnecessary addition of receivers' costs.

[87] In response, Mr Gordon referred to the following clause in the General Security Agreement (the GSA):

> **14 RIGHTS ON ENFORCEMENT**
>
> 14.1 At any time after an Event of Default occurs you [ie the Bank] may at your option, exercisable by notice in writing to us … treat the Secured Amounts as payable immediately and may immediately or at any later time (in addition to the exercise and enforcement of all or any of your other Rights) do all or any of the following things without giving us any or further notice or demand:
>
> …
>
> 14.1.7 whether in or out of possession appoint any person or persons to be a Receiver of all or any part of the Secured Property; …

[88] At the time the receivers were appointed, there were a number of events of default which justified the appointment of receivers (including Moteo's failure to make the monthly term loan payments due on 15 September 2015 and 15 October 2015, and its failure to remedy that default following the Bank's demand of 13 November 2015, the failure to repay the overdraft in full following the 13 November 2015 demand, and the failure to repay the term loan in full when it expired on 30 November 2015). Mr Gordon submitted that it could not have been a breach of reasonable standards of commercial practice for it, as a secured creditor, to enforce its legal rights arising from a borrower's default.

Discussion and conclusions on Issue (1)

[89] I accept Mr Gordon's submissions on this issue.

[90] As to the first limb of s 25 — good faith — the common law has determined that a decision by a secured party to exercise in a valid manner a power of appointment of a receiver cannot be challenged, unless it is exercised in bad faith.[2] Generally, this just means that the secured party must be acting to protect its own position and need not have regard to the consequences for the debtor.[3] A secured

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2 *Shamji v Johnson Matthey Bankers Ltd* [1986] BCLC 278 cited in Peter Blanchard and Michael Gedye, *Private Receivers of Companies in New Zealand*, (Lexis Nexis, Wellington, 2008).

3 Blanchard and Gedye, above n 2, at 57.

party is unlikely to be found to have acted in bad faith where the secured party was motivated by a desire to recover the amount due to it or otherwise protect its collateral.[4]

[91] As to the second limb of s 25, if the debtor resists the appointment of a receiver on the grounds of alleged failure to observe reasonable standards of commercial practice, the debtor must provide evidence as to what reasonable standards are in the circumstances, and it must prove that the secured party is acting in contravention of them.[5] As Vautier J has said: "[it] … requires something more than a simply uninformed conclusion as to what is fair or unfair from the standpoint of commercial dealings."[6]

[92] In *Compass Capital Ltd v New Zealand Guardian Trust Company Ltd*, the Court considered a challenge to the appointment of receivers under s 25.[7] The company had been unable to pay its debts for many months, its indebtedness was significant, and its hopes of refinancing had been extant for many months.[8] Cooper J accepted that the secured creditor was justified in taking the view that the prospective refinancing might not eventuate and in any event should not be a reason to delay the appointment of receivers. On the facts, his Honour found that there was no arguable basis for concluding that the decision to appoint receivers was not made in accordance with reasonable standards of commercial practice.[9]

[93] In *Taylor v Bank of New Zealand*, receivers had been appointed following a letter of demand being served on the debtor.[10] The making of the demand and subsequent appointment of receivers were challenged under s 25 of the PPSA. The Judge noted that no evidence had been produced to show what would have

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4 *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295, [1993] 1 NZLR 513 (PC), cited in Blanchard and Gedye, above n 2, at 57.

5 *Greenbank New Zealand Ltd v Haas* [2000] 3 NZLR 341 (CA).

6 *Italia Holdings (Properties) Ltd v Lonsdale Holdings (Auckland) Ltd* [1984] 2 NZLR 1 (HC) at 16.

7 *Compass Capital Ltd v New Zealand Guardian Trust Company Ltd* HC Auckland CIV-2009-404-1500, 19 March 2009.

8 At [37].

9 At [43].

10 *Taylor v Bank of New Zealand* [2011] 2 NZLR 628 (HC).

constituted reasonable standards of commercial practice in the circumstances of the case.[11]

[94] Applying the approach adopted in those cases to this case, I note first that defaults in the payment of money on due date were deemed by cl 13 of the GSA to be "Events of Default" for the purposes of cl 14. There is no question that "Events of Default" had occurred at the time the receivers were appointed.

[95] Leaving on one side for the moment Mr Patrick's argument that the Bank was obliged to go to mediation with him at the time the receivers were appointed (I will address that argument under issue (2)), the evidence does not support Mr Patrick's argument that the Bank moved prematurely in appointing the receivers.

[96] As early as 11 November 2014 Mr Behringer attended a meeting with representatives of the Bank, at which the Bank sought an update on the group's attempts to refinance, the sale of the vineyard, and the process to be adopted for selling plant and equipment. At that time, the discussion about the sales process was primarily concerned with the timing of the marketing of the property (prospective purchasers of a vineyard would look to purchase immediately post-harvest, because they would then only be buying the land, buildings, infrastructure and vines). But it is noteworthy that over a year before the appointment of the receivers Mr Patrick was already discussing with Bank representatives a sell-down of the group's assets.

[97] The topic of selling the assets was discussed again at the meeting on 15 July 2015. By then the property had already been on the market with Bayleys for some time, but had apparently attracted little interest. The Bank accepted the agent's advice that the property would be best marketed in the spring, and it was removed from the market on the basis that a voluntary sale process would recommence in early September 2015. The Bank agreed to provide interim funding through to the end of November 2015, so that the property could be maintained ahead of that sale.

[98] The Bank's staff made it clear at the meeting on 26 November 2015 that they considered the Bank had allowed a sufficient time for a voluntary sale to be

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[11] At [48].

achieved. And they believed the market might have already become aware that there were issues about the group's financial position; if that is right, nothing was likely to be achieved by further delay.

[99] In the circumstances just described, I do not consider it arguable that the Bank exercised its power to appoint receivers prematurely, and in bad faith. There is no evidence that the Bank was acting otherwise than to protect its interests as it perceived them to be.

[100] Nor is it reasonably arguable for Mr Patrick that the bank was acting contrary to reasonable standards of commercial practice. In *Coffey v DFC Financial Services Ltd*, it was stated:[12]

> The mere exercise by the respondent of the rights or powers specifically conferred by the contract cannot of itself be sufficient to satisfy the test of 'oppressive' under s 9 [of the Credit Contracts Act 1981] unless the contract itself is oppressive, or unless there are circumstances which make it so.

[101] Mr Patrick and his group were given ample time to refinance or sell down the assets, and on the evidence produced I am satisfied that there is no reasonable argument that the Bank acted oppressively when it appointed the receivers.

[102] Mr Patrick's real concern appears to have been that a sale by the receivers would result in prospective buyers of group assets having an expectation of purchasing at a discounted price. No evidence of that has been produced, but even if it were so it would appear to be no more than a normal incident of any sale by a mortgagee or receiver. The ordinary exercise by a lender of its rights cannot, without more, constitute a failure to observe reasonable standards of commercial practice.

[103] A further point is that the sale of the property was not in the event undertaken by the receivers at all — it was sold by the trustees of the Dansam Family Trust.

[104] Considering all the circumstances, there is nothing which supports the view that the Bank acted prematurely because the group's assets were already on the market. They had been on the market for a long time, and once Moteo was in default

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[12] *Coffey v DFC Financial Services Ltd* (1991) 5 NZCLC 67,403 at 67,417.

the Bank owed no obligation to it or Mr Patrick to stay its hand. It was entitled to appoint the receivers, and there is nothing to support the view that, in doing so, it acted in bad faith or otherwise failed to act in accordance with reasonable standards of commercial practice. I find for the Bank on Issue (1).

Issue (2) is it reasonably arguable for Mr Patrick that, by not honouring an undertaking to negotiate or attend mediation, the Bank acted in breach of its obligations under s 25 of the PPSA to act in good faith and in accordance with reasonable standards of commercial practice?

[105] Mr Ross submitted that the Bank had agreed to mediate (or at least negotiate) further with Mr Patrick, and that ordinary standards of good faith and reasonable commercial practice dictated that the Bank should follow through on its undertaking to negotiate or attend mediation. Instead, it proceeded to appoint receivers without negotiating further.

[106] Mr Gordon submitted that the Bank was not bound by any mediation agreement. Mr Behringer confirmed to the Bank that all of the group's attempts to refinance had been unsuccessful, and the Ombudsman's representative advised at the meeting of 26 November 2015 that the Ombudsman had no power to prevent the Bank from issuing notices under the Property Law Act. Mr Gordon submitted that in those circumstances there could have been no "agreement to mediate" which restricted the Bank's entitlement to enforce the debts.

Discussion and conclusions on Issue (2)

[107] Mr Patrick stated that at the time the Bank appointed the receivers the Ombudsman was arranging a mediation in Auckland, which would be attended by representatives of the Bank, Mr Behringer and himself. He contends that it was during the period when arrangements were still being made to mediate, that the Bank appointed the receivers, and that it acted in bad faith in so doing (or at least its conduct fell below reasonable commercial standards of behaviour).

[108] Mr Behringer referred to an email dated 13 November 2015 from Ms Kenworthy of the Ombudsman's office to Mr Patrick, in which Ms Kenworthy advised that Mr Shane Cuthbert of the Bank had confirmed that he would cover the

cost of Mr Patrick attending a meeting arranged by the Ombudsman's office — and possibly the costs of one or both of Mr Patrick's advisers (depending on where they were coming from).

[109] Ms Kenworthy's 13 November 2015 email to Mr Patrick went on to say:

> In the letter you attached from [the Bank's] Mr Josh Rumble he refers to a meeting to take place on Thursday 26 November. I understand the Bank's intention may have been for that meeting to be a separate meeting to the meeting we would like to arrange. However, I indicated to [the Bank's] Mr Cuthbert this morning that I had concerns about this and that it was my preference that there be one meeting so that all matters can be fully discussed with the relevant parties – particularly in light of the fact that you have a complaint with our office. I would therefore like to contact the Bank to make arrangements for our office to be involved in the meeting that has been proposed for 26 November — if you are happy for me to do this. Please note that neither Mr Cuthbert nor anyone else from BNZ's complaints department would be attending the meeting.

[110] In accordance with Ms Kenworthy's preference, the meeting on 26 November 2015 duly took place. Mr and Mrs Patrick were there, as were Messrs Behringer and Kingston, and a number of Bank officers. The Ombudsman and two of her staff (including Ms Kenworthy) attended by telephone link.

[111] Pausing there, Mr Patrick has produced no evidence of any agreement to mediate: there appears to have been no more than an agreement by the Bank to attend a *meeting* with Mr and Mrs Patrick and their advisers, which would be attended by the Ombudsman. That meeting was duly convened.

[112] An agreement to "meet" was far short of an agreement to mediate, but even if there had been an agreement to mediate there is nothing before me on which I could conclude that such an agreement would have prevented the Bank from demanding what was due to it (as it did on 13 November 2015) before the mediation took place. Certainly Ms Kenworthy expressed surprise at the Bank's action in issuing the demand, saying at the meeting of 26 November 2015 that she believed "a conciliation process was under way". But Ms Kenworthy also expressed surprise at the meeting that a written offer regarding a refinance (and debt write-down) had not been provided to the Patricks, and it was fairly quickly made clear to her and others at the meeting that any such prospect was completely unrealistic. The Bank's note

records that Mr Behringer reported that "all finance offers to date had been turned down, starting from Tier 1 Banks and working back down to fringe lenders". Mr Behringer told the meeting that that was the position even after the amount requested was reduced from $1.1 million down to $950,000.

[113] Against that background, I think the Bank was perfectly entitled to conclude that enough was enough, and to decline to refinance. And while Mr Patrick and members of the Ombudsman's staff may have been disappointed to learn at the 26 November 2015 meeting that the Bank would not be offering any refinancing (or debt write-down), Mr Behringer (and presumably Mr Patrick) must have expected that that would be the case. They had known since late August 2015 that they had six weeks to obtain an alternative lender, and that period had elapsed without any third party lender having been identified.

[114] Mr Behringer says that Mr Patrick told him on 6 November 2015 that the Ombudsman was going to contact the Bank to seek an extension of the Bank's facilities through to February 2016, but there is no evidence that the Bank agreed to any such extension. Indeed, the demand it made on 13 November 2013 made it clear that the Bank had rejected any further extensions.

[115] Mr Patrick has failed to produce any evidence that there was an agreement to mediate. There was an agreement to meet, and the meeting took place, but in my view it is not reasonably arguable that he was entitled to any particular outcome from the meeting. He has not shown that he held any commitment from the Bank to continue to fund the group beyond 30 November 2015, or that the Bank had committed to any ongoing process of discussion from which it was not free to withdraw at any time. In those circumstances I do not think there can be any arguable case of bad faith on the Bank's part, nor any argument that it failed to act in accordance with reasonable standards of commercial practice, when it declined to extend the discussions beyond the meeting of 26 November 2015. I find for the Bank on Issue (2).

Issue (3): is it reasonably arguable for Mr Patrick that the Bank was at any relevant time a director of Moteo or Moteo Agri, within the extended meaning of "director" set out in s 126 of the Act?

[116] Section 126 of the Act materially provides:

> **126 Meaning of director**
>
> (1) In this Act, director, in relation to a company, includes—
>
> (a) a person occupying the position of director of the company by whatever name called; and
>
> (b) for the purposes of sections 131 to 141 ... , —
>
> (i) a person in accordance with whose directions or instructions a person referred to in paragraph (a) may be required or is accustomed to act; and
>
> (ii) a person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act; and
>
> (iii) a person who exercises or who is entitled to exercise or who controls or who is entitled to control the exercise of powers which, apart from the constitution of the company, would fall to be exercised by the board; and
>
> ...
>
> (4) Paragraphs (b) to (d) of subsection (1) do not include a person to the extent that the person acts only in a professional capacity.

[117] Mr Ross submitted that the Bank was controlling the business decisions of Moteo and Moteo Agri from (at least) late 2014 so closely that the companies were effectively under "de facto administration". He submitted that the Bank's oversight and direction was so close that the business could not trade properly or profitably.

[118] As an example of the level of control exercised by the Bank, Mr Ross referred to the letter the Bank sent to Moteo on 24 October 2013.[13]

[119] Mr Ross submitted that, in becoming a "director" under s 126, the Bank assumed the ordinary duties of directors under the Act, including duties to act in good faith and in the best interests of the company (s 131), to exercise the powers of

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[13] Referred to at paras [22]–[26] of this judgment.

management of the companies for a proper purpose (s 133), to avoid reckless trading (s 135), not to incur obligations unless it believed on reasonable grounds that the companies could meet their obligations (s 136), and to manage the companies with reasonable care, diligence, and skill (s 137).

[120] Mr Gordon submitted that cl 15.1 of the guarantee, which precludes any set-off of claims against the amount guaranteed, precludes Mr Patrick's claims based on the Bank having allegedly acted as a director of Moteo and/or Moteo Agri. Mr Gordon also referred to the judgment of Stevens J in *Krtolica v Westpac Banking Corporation*,[14] in which the judge declined to find that a bank, concerned to protect its own position as a creditor, was caught by the shadow director provisions in s 126 of the Act. Mr Gordon submitted that Mr Patrick was not accustomed to act on the Bank's instruction — for example, it was Mr Patrick who elected to close Moteo Agri's engineering plant, without telling the Bank, and it was Mr Patrick who was responsible for all policy and strategic aspects of the business.

[121] Mr Gordon submitted that the conditions in the Bank's letter of 24 October 2013 did not amount to the Bank telling Mr Patrick how the businesses were to be run: it was a situation where the Bank was simply telling Mr Patrick and his group that it would not continue to fund the businesses come what may. The letter was all about "clearance of the additional seasonal facility by June 2014, and [recommencing] principal debt repayment …". It does not show that the Bank was controlling the businesses.

[122] Mr Gordon pointed to a timing issue over the alleged "freezing" of Moteo's loan facilities. While Mr Patrick says that this occurred a week after the dishonouring of the $32,000 GST payment, he submitted that it is beyond dispute that the Bank continued to advance further funds to Moteo after that time (including by way of the two facilities on which the Bank now sues).

[123] Mr Williams' figures relating to Moteo's overdraft levels thus provide the answer to the so called "freezing", or "straight-jacketing" of the companies, of which Mr Patrick now complains. It was not a case of the Bank unilaterally freezing

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[14] *Krtolica v Westpac Banking Corporation* [2008] NZCCLR 24 (HC).

Moteo's bank accounts from August 2014, but the Bank refusing to permit Moteo to continue to draw down debt funding when the agreed lending limits (including those on the temporary facilities) had been reached or exceeded. The Bank was not obliged to continue funding Moteo's expenditure simply because it was operating a seasonal business.

[124] Faced with ever-increasing indebtedness, and especially when the term loan instalments were being met from the overdraft, the Bank required Moteo to keep to the terms and agreed facility limits (particularly in respect of the overdraft), and sought to bring about a reduction in the overall group indebtedness.

Discussion and conclusions on Issue (3)

[125] A director, for the purposes of the provisions specified in s 126(1)(b), includes a person in accordance with whose directions or instructions:

(a) a person occupying the position of director may be required, or is accustomed, to act; and

(b) the board of the company may be required, or is accustomed, to act.

[126] Mr Patrick says that:

(a) the Bank was controlling the business decisions of Moteo from (at least) late 2014 so closely that the company was effectively under "de facto administration"; and

(b) the Bank's oversight and direction was so close that the business could not trade profitably or properly, and the Bank accordingly contributed to Moteo's deteriorating financial position.

[127] In *Re Hydrodam (Corby) Ltd*, a wrongful trading case decided under s 214 of the Insolvency Act 1986 (UK), Millett J stated:[15]

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[15] *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 at 183.

> A shadow director ... does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. To establish that a defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether de facto or de jure; (2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act. What is needed is, first, a board of directors claiming and purporting to act as such; and, secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others.

[128] In *Australian Securities Commission v AS Nominees Ltd*, Finn J, sitting in the Federal Court of Australia considered that the reference in the definition to directors being "accustomed to act" did not require that there be instructions issued on all board decisions but merely that when the directors were instructed, they followed those instructions without independent reflection or discussion.[16]

[129] In their text *Companies and Securities Law in New Zealand*, Farrar and Watson suggest that the conventional wisdom is that a bank acting in defence of its own interests is unlikely to be found to be either a shadow director or a de facto director.[17] The creditor cases suggest that a creditor is not a shadow director because the board makes independent decisions to comply with the various demands of the creditor to stave off bankruptcy or the like.[18]

[130] In *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd*, the New South Wales Court of Appeal dismissed an appeal by the liquidators, who contended that the primary judge erred in not finding that the second creditor (Apple) and its finance director had been acting as shadow directors. The leading judgment was given by Young J A, with whom Wheally J agreed. Young J A expressed general agreement with the following statement of White J, who gave the first instance decision in the Equity Division of the Supreme Court:

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16 *Australia Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504; (1995) 133 ALR 1 at 52–53.

17 John Farrar and Susan Watson (eds) *Company and Securities Law in New Zealand* (2nd ed Brookers Ltd, Wellington, 2013) at 341, referring to *Re PFTZM Ltd* [1995] 2 BCLC 354; *Tridos Bank N V v Dobbs* [2004] EWHC 845 (Ch) at [215]; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1267]–[1269].

18 At 341.

> [243] In my view the reason that third parties having commercial dealings with a company who are able to insist on certain terms if their support for the company is to continue, and are successful in procuring the company's compliance with those terms over an extended period, are not thereby to be treated as shadow directors within the definition, is because to insist on such terms as a commercial dealing between a third party and the company is not ipso facto to give an instruction or express a wish as to how the directors are to exercise their powers. Unless something more intrudes, the directors are free and would be expected to exercise their own judgment as to whether it is in the interests of the company to comply with the terms upon which the third party insists, or to reject those terms. If, in the exercise of their own judgment, they habitually comply with the third party's terms, it does not follow that the third party has given instructions or expressed a wish as to how they should exercise their functions as directors.

[131] Young J A noted that not every person whose advice is in fact heeded as a general rule by the board is to be classed as a de facto or shadow director. If a person such as a mortgagee had a genuine interest in giving advice to the board, the mere fact that the board tended to take advice to preserve it from the mortgagee's wrath would not make the mortgagee a shadow director.[19]

[132] The third judgment in *Buzzle* was that of Hodgson J A. His Honour stated:[20]

> [9] I agree that influence exercised on directors of a company by a mortagee acting in its own interests, particularly if supported by contractual rights in its mortgage documents, would not generally constitute the mortgagee a shadow director. While in such a case the directors may on many occasions act in accordance with the instructions or wishes of the mortgagee, this will generally be so because the directors make their own decision that to do so is in the interests of the company, rather than because they defer to decision-making by the mortgagee on behalf of the company. In my opinion, the statutory formula contemplates the directors being accustomed to act in accordance with the instructions or wishes of a person, in the sense of treating those instructions or wishes as themselves being a sufficient reason so to act, rather than making their own decisions in which those instructions or wishes are merely taken into account as one factor, external to the management of the company, bearing on what is in the best interests of the company.

[133] The question of whether a bank had acted as a shadow director was at issue in *Krtolica v Westpac Banking Corporation*,[21] the case to which Mr Gordon referred. In that case, Westpac was attempting to enforce a guarantee. The guarantor claimed that Westpac had participated in the running of a creditor preference regime by the

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19 *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2011] NSWCA 109, (2011) 277 ALR 189 at [191], [228] and [229], per Young J A.

20 At [9], per Hodgson J A.

21 *Krtolica v Westpac Banking Corporation*, above n 12.

principal debtor, Seamart, while Seamart attempted to trade its way out of insolvency. The guarantor alleged that, in so doing, Westpac had acted as a shadow director of Seamart, and had thereby exposed itself to liability for reckless trading. Stevens J concluded that there was no evidence that Seamart's sole director was required or accustomed to act on the directions or instructions of Westpac, or that he had taken directions or instructions from Westpac. Seamart's director was responsible for all Seamart's strategic and policy decisions, and it was Seamart employees who were responsible for deciding which payments to dishonour in order to remain within the company's overdraft limit with the bank. The Judge accepted that the regularity with which that occurred was due to poor account management by Seamart, and to Seamart's poor systems, and not involvement by Westpac in Seamart's commercial decision-making.[22] Seamart's payment negotiations with its creditors remained at Seamart's complete discretion.

[134] Having regard to the principles discussed in those cases, I am satisfied that Mr Patrick does not have an arguable case that the Bank was acting as a shadow director at any relevant time.

[135] While Mr Patrick's complaint under this head appears to relate primarily to the period from late 2014 on, there was discussion at the hearing about the Bank's letter of 24 October 2013, and in particular the requirements that:

> - No further external indebtedness is to be incurred by any of the group entities without the Bank's prior approval.
>
> - No new capital expenditure in excess of $500 is to be incurred by any of the group entities without the Bank's prior approval.

[136] Those requirements must be understood in the context of the letter, in which the Bank had expressed concern about the trading performance and financial viability of Moteo. Moteo had achieved lower than anticipated earnings in the year to 30 June 2013 (almost $200,000 below the original budget figure for the period), and Moteo had recorded trading deficits in two of the preceding three financial years. It had required additional working capital facilities to assist with the low season over and above those which had been approved in November 2012, when the group's

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22 At [105].

facilities had been restructured. Having set out its concerns (and acknowledged certain positive steps taken by the group to improve financial performance and reduce the effects of seasonality) the Bank confirmed in the letter that it was prepared to continue its existing funding commitment to the group, including the availability of a seasonal facility to Moteo, substantially on the terms and conditions set out in the letter. New facility and security documents were to be sent to Moteo's solicitors, and there would be a further review of the facilities prior to 31 January 2014.

[137] Not surprisingly given its concerns, the Bank required, as part of its commitment to continue the funding, the regular provision of financial information from Moteo and Moteo Agri.

[138] It is abundantly clear from the letter that the Bank's concern was to protect its own financial position as best it could in the face of a group financial performance which was clearly concerning to the Bank. In those circumstances the Bank had a legitimate interest in any decision the group might make to borrow from a third party — servicing any third party lending clearly had the potential to impact on Moteo's ability to service the Bank lending. The position is similar with the covenant requiring that capital expenditure in excess of $500 was not to be incurred without the Bank's prior approval. The Bank's overall concern was clearly to reduce its exposure to the group, by getting the debt levels down to more manageable proportions. Moteo had a substantial overdraft with the Bank, and the effect of any capital expenditure would likely have been to increase the overdraft.

[139] I have no doubt that the Bank was acting in its own commercial interests when it imposed the conditions set out in the 24 October 2013 letter. Furthermore, the continuation of the facilities at that stage was clearly negotiated on an arm's length commercial basis (consistent with that, the new facility documentation was to be sent not to Mr Patrick but to the group's solicitors). It may be that Mr Patrick considered that he had little choice but to accept the Bank's conditions, but that was not sufficient to make the Bank a shadow director. The Bank was entitled to state the conditions on which it was prepared to continue funding the group, and it would have expected Moteo's and Moteo Agri's direction to exercise their own judgment as

to whether it was in the companies' interests to accept the Bank's terms or whether those terms should be rejected.

[140] The events in 2014 confirm that Mr Patrick was directing the group's businesses, not the Bank. For example, the Bank's note of a meeting with Mr and Mrs Patrick on 7 August 2014 records Mr Patrick's advice that he had just employed an additional engineer, and he clearly then had control of the group's attempts to obtain additional funding and/or sell down assets (Mr Patrick advised the meeting that he had been in discussion with a local dealership to possibly broker a sale).

[141] The Bank's dishonour of the GST cheque in August 2014, and Moteo's expenditure exceeding its overdraft limits on a number of occasions, clearly show that it was Moteo, and not the Bank, that was controlling payments to Moteo's creditors. And Mr Ross accepted at the hearing that Mr Patrick acted unilaterally in closing down the engineering business. That was a significant decision affecting the group's structure and its ongoing viability, which would normally have been a board decision, and it was made by Mr Patrick apparently without any prior consultation with the Bank.

[142] At the meeting with the Bank officers on 15 July 2015, Mr Patrick advised that he had cancelled all long term harvesting contracts and additional vineyard leases in 2014, on the basis that the loans would be called up and he could not guarantee contractual obligations if that occurred. Again, the picture is one of Mr Patrick making substantial decisions affecting the group, which one would have expected to be made at board level, without prior reference to the Bank.

[143] Mr Patrick's reports to the Bank at meetings also tend to confirm that it was he that was directing the day-to-day operations of the group. For example, at a meeting on 19 September 2014, Mr Patrick is reported to have advised that the engineering business had moved out of a leased workshop and back to the vineyard premises. He reported details of the group's debtors and creditors positions, and provided an update on the attempts to refinance or effect a sale of the business or property. The Bank's note of the 19 September 2014 meeting records that Mr Patrick asked if the Bank was happy for Moteo to continue using the machinery

to complete ongoing work, while attempts were being made to refinance or sell assets. Mr Teague of the Bank is reported to have replied that it was, but he recommended that Mr Patrick seek independent financial and legal advice regarding the continuation of trading. The decision as to whether the group would continue trading at that stage was clearly considered to be one for Moteo's directors, and not for the Bank.

[144] In December 2014, the Bank recommended that Moteo's directors take independent legal advice before accepting the interim restructure offer made by the Bank at that time.

[145] Looking at the position as it developed in 2015, the picture remains the same — Mr Patrick was making the substantive decisions as director of Moteo. That position is illustrated by an exchange between Mr Patrick and Mr Teague reported in the Bank's note of the 15 July 2015 meeting, where Mr Patrick advised that a tractor had been hired out since April, with the lessee paying the lease costs directly to the owner. It is appears from the notes that the Bank had not been aware of this transaction (Mr Teague enquired if there was a formal contract in place).

[146] Mr Patrick also reported at the 15 July 2015 meeting that he had made an agreement with the Inland Revenue Department, apparently without the Bank's prior knowledge or approval, under which outstanding PAYE going back to January of that year was being paid off at $900 per month.

[147] As at 15 July 2015, Mr Patrick still appears to have been in control of payments made by Moteo.

[148] Thereafter, nothing has been produced by Mr Patrick which would show that the Bank was acting otherwise than in its own interest as a secured creditor of Moteo, in circumstances where Moteo had been unable to repay the seasonal overdraft facility which was due for repayment on 31 May 2015 and had been unable to arrange any refinancing or significant sale of assets.

[149] There are a number of other factors which confirm that Mr Patrick was not required to act in accordance with the Bank's instructions, and was not accustomed to so act (except in respect of lending requirements imposed by the Bank in its own commercial interest and accepted by the group). From as early as August 2014 Mr Behringer was assisting Mr Patrick in meetings with the Bank, and Mr Patrick made his first complaint to the Ombudsman on 11 August 2014. The clear impression is that the parties were already then at arms length, with Mr Patrick supported by advisers at key stages.

[150] By July 2015 at latest, it had become clear that Moteo's business was not viable. Funding was extended to 30 November 2015 only for the purpose of allowing the property to be maintained, with a view to facilitating the best possible sale.

[151] In all of the foregoing circumstances I am satisfied that Mr Patrick has not made out an arguable case that the Bank was acting as a director of Moteo or Moteo Agri. As far as the evidence goes, the Bank was acting in defence of its own interests throughout. No doubt the Bank put forward increasingly stringent terms on which it would be prepared to continue funding the group, reflecting the deteriorating financial position. But I do not think it arguable for Mr Patrick that those terms were accepted by the Moteo board without independent consideration or reflection. On the contrary Mr Patrick, assisted by Mr Behringer, appears to have been more than willing to express his disagreement with the decision of the Bank with which he was not happy. I accordingly find for the Bank on Issue (3).

Issue (4): if the answer to any of issues (1)–(3) is "yes", does that answer provide Mr Patrick with an arguable set-off defence?

[152] Mr Ross submitted that Moteo and/or Moteo Agri would be entitled to set off its s 25 and shadow director claims against the amounts which would otherwise be owed by them to the Bank, and that Mr Patrick cannot be liable under his guarantee for more than the Bank could have recovered from the principal debtors. He emphasised that Mr Patrick is not seeking to be subrogated to the Bank's securities, but "to avail himself of any rights the principal debtor has against [the Bank], not any securities it holds".

Discussion and conclusions on Issue (4)

[153] In the view to which I have come on Issues (1) to (3) it is not strictly necessary to address the question raised by this issue. But in case I am wrong in my conclusions on any of Issues (1) to (3), I record that I accept Mr Gordon's submission that any set-off defence Mr Patrick might otherwise have had is precluded by cl 15.1 of the guarantee. Clause 15.1 provided:

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

[154] The clear intention of cl 15.1 was that Mr Patrick was required to "pay now and argue later" if he had any complaints against the Bank.

[155] That position is reinforced by the indemnity provisions in the guarantee, under which Mr Patrick agreed (i) to indemnify the Bank against any loss it might suffer because, for any reason, it was unable to recover the guaranteed amounts (cl 6 of the main guarantee provisions), and (ii) that his liability under that indemnity was deemed to be an additional obligation which the Bank was entitled to enforce against him as a principal debtor, separate from his guarantee (cl 7.4 of the Schedule to the guarantee).

Issue 5: if and to the extent the Bank has shown that Mr Patrick has no arguable defence, are there any reasons for the court to exercise its discretion against the entry of summary judgment?

[156] Mr Ross submitted that the existence of the potential claims under s 25 of the PPSA, and for breach by the Bank of its duties as a director of Mr Patrick's companies, make the case unsuitable for determination on a summary judgment application.

Discussion and conclusions on Issue (5)

[157] As I have found the claims referred to by Mr Ross are not reasonably arguable for Mr Patrick, there is no question of the Bank's claims being unsuitable for determination on a summary judgment application.

[158] The court does have a residual discretion to decline to enter summary judgment where a plaintiff has made out its case, but (as Casey J put it in *Pemberton v Chappell*) the discretion is of the most residual kind.[23] There will be very little scope for the exercise of the discretion if there is no suggestion of injustice.[24]

[159] In this case there is no arguable injustice, and no reason to decline to enter judgment for the Bank.

Result

[160] The Bank is entitled to summary judgment as claimed. Mr Ross did not challenge the Bank's claims to interest at the rates set out in its statement of claim, and Mr Gordon has produced a memorandum setting out the computation of the Bank's claims to principal and interest. I enter judgment for the Bank, in accordance with its statement of claim and Mr Gordon's memorandum, as follows:

(a) for the principal owing on the term loan as at 24 August 2016, the sum of $927,330.27.

(b) interest on that sum at the rate of 11.34% per annum, calculated from 24 August 2016 to 1 June 2017, in the sum of $80,958.91.

(c) for the amount of $92,853.64 owing on the overdraft as at 24 August 2016.

(d) interest on the sum of $92,853.64 at the rate of 15.35% per annum, calculated from 24 August 2016 to 1 June 2017, in the sum of $10,973.05.

(e) in accordance with the Bank's statement of claim, I declare that interest will continue to accrue on the term loan and the overdraft after judgment (and until actual payment), at the respective rates of 11.34% per annum and 15.35% per annum.

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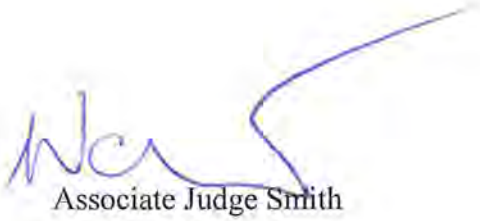
23 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 5.
24 *Sudfeldt v UDC Finance Ltd* (1987) 1 PRNZ 205 (CA) at 209.

[161] In the ordinary course the Bank would be entitled to costs on its claim, but Mr Ross advised in his submissions that Mr Patrick is in receipt of an interim grant of legal aid. Under s 45(2) of the Legal Services Act 2011 (the LSA), no order for costs may be made against an aided person unless the court is satisfied that there are exceptional circumstances.

[162] In the event that the grant of legal aid is established, the Bank seeks an order under s 45(5) of the LSA specifying that, but for s 45(2), an order for indemnity costs would have been made against Mr Patrick.

[163] The extent of Mr Patrick's grant of legal aid is not presently clear to me. I direct that Mr Ross is to file and serve a memorandum explaining Mr Patrick's legal aid position insofar as it may affect his liability for costs, within 10 working days of this judgment. The Bank may file a memorandum setting out any claim for costs (or order under s 45(5)) it may then wish to seek), within 10 working days of its receipt of Mr Ross' memorandum. Mr Patrick may file a reply memorandum within 10 working days of service of the Bank's memorandum.



Associate Judge Smith

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