IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA350/2020
[2022] NZCA 397

BETWEEN	GREGORY JOHN JONES Appellant
AND	NEW ZEALAND BLOODSTOCK FINANCE & LEASING LIMITED Respondent

Hearing:	4 and 5 May 2022
Court:	Dobson, Thomas and Duffy JJ
Counsel:	Appellant in person F A King and A Osama for Respondent
Judgment:	25 August 2022 at 11.00 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is granted in part.

B The appeal is dismissed.

C The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Dobson J)

Table of contents

[1] This is an appeal from a judgment granting the respondent (NZB Finance) summary judgment for amounts claimed from the appellant (Mr Jones) pursuant to contracts by which NZBS advanced monies to fund Mr Jones' acquisitions of interests in thoroughbred horses.[1] Demands for repayment of the advances had been made in March 2019. Proceedings to recover the amounts outstanding were commenced in early September 2019 including an application for summary judgment. The hearing on the summary judgment application was conducted on 26 May 2020 and on 5 June 2020 Jagose J delivered his decision, granting NZBS summary judgment for the amount of $431,632.22 plus interest and costs.

[2] The proceedings have a somewhat protracted history with steps both before and after the summary judgment hearing. The procedural history will be addressed to the extent it is relevant, as it arises on issues argued in the appeal.

[3] Mr Jones challenges the Judge's decision to grant summary judgment on three broad sets of grounds. The more confined of these is that the contracts were unenforceable either because NZB Finance breached obligations to disclose the terms of the contracts, or because NZB Finance's conduct was oppressive. It is convenient to deal with the contractual terms and challenges to their enforceability first before

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1 *New Zealand Bloodstock Finance & Leasing Ltd v Jones* [2020] NZHC 1233 [Judgment granting summary judgment].

assessing the larger set of challenges raised by Mr Jones' second set of grounds. Those are wide ranging allegations that NZB Finance committed fraud and was a party to conspiracies. Mr Jones contends that these constitute tenable claims qualifying for an equitable set-off in circumstances that require NZB Finance's claims to go to trial. Finally, Mr Jones criticises Jagose J's determination of applications by Mr Jones for a stay or dismissal of NZB Finance's summary judgment application, and for adjournment of the summary judgment hearing.[2]

The parties

[4] Mr Jones is a senior Auckland lawyer. He has practised in partnership specialising in insurance law for some 40 years and, since 2018, he has practised at the independent Bar. Mr Jones describes himself as having expertise in the thoroughbred breeding industry that represents a longstanding interest and business for him.

[5] NZB Finance is in the business of providing finance for the purchase and breeding of horses. It and the group of companies of which it is a member is a dominant player in the New Zealand thoroughbred industry. Although there was no specific evidence on it, there was also no dispute that the ultimate ownership and control of the New Zealand Bloodstock group of companies is held by the Vela family who are active in the thoroughbred racing industry.

The contracts

[6] On 23 May 2016 Mr Jones and NZB Finance entered into a contract for current advances (CCA) pursuant to which NZB Finance would advance monies to Mr Jones by way of provision of credit with an initial limit of $200,000. Advances under the CCA were repayable in full on 30 June 2017 or upon demand being made. Mr Jones

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2 Mr Jones takes issue with two decisions of Jagose J: *New Zealand Bloodstock Finance & Leasing Ltd v Jones* HC Auckland CIV-2019-404-1822, 20 May 2020 (Minute of Jagose J) [20 May Minute], in which Jagose J declined an application to stay or dismiss NZB Finance's summary judgment application, leaving such issues to be determined "at or after the substantive hearing"; and Jagose J's decision on an application by Mr Jones on 25 May 2020 to stay the summary judgment application and adjourn the hearing [25 May 2020 decision]. In respect of the 25 May 2020 decision, there is no minute before us, but it is clear that Jagose J decided he would deal with the arguments at the hearing. Both the 20 and 25 May 2020 applications were declined by Jagose J in the Judgment granting summary judgment, above n 1, at [42].

was to provide security for the advances over the interests in horses acquired by him. The terms of the CCA contemplated that a schedule identifying the interests in horses to which the security would relate would be updated from time to time but that was not done, at least not exhaustively.

[7] Advances were made under the CCA from time to time. In January 2018 Mr Jones sought to borrow further monies under it but NZB Finance was not prepared to allow that and advised that he should sell a share he then held in a stallion (Reliable Man) to reduce the extent of his debt. Mr Jones did not follow that advice.

[8] Meanwhile, in October 2017 Mr Jones and NZB Finance entered a lease to purchase agreement (LTP) in relation to a mare called Woodpecker Hill. The terms of the agreement involved NZB Finance funding the purchase of Woodpecker Hill for $44,000 plus GST and retaining title to the mare until completion of payments. Mr Jones was to make rental payments of $14,056.96 each in July 2018, July 2019 and July 2020 with payment of a residual $11,000 in October 2020, after which title to the mare would pass to Mr Jones. The payments included interest calculated at 10 per cent per annum. Mr Jones assumed control of Woodpecker Hill but did not make any of the payments under the LTP.

[9] In mid-September 2018 Mr Jones acknowledged in an email to NZB Finance that he was "stitched for cash" and requested an extension of the CCA facility for a further year. NZB Finance outlined the terms on which it would be prepared to extend the facility but none of those were acceptable to Mr Jones. He was urged to sell interests he had in horses to reduce the amount owing under the facility, but declined to do so.

[10] On 28 November 2018 there were exchanges of emails between Mr Jones and Mr Fraser with whom he was dealing at NZB Finance. Mr Jones questioned the entitlement of NZB Finance to retain the proceeds of sale of an interest in a horse, Athenri, that he owned where the proceeds were in the hands of an affiliate of NZB Finance. Mr Fraser set out in one of his emails the amount owing under various accounts maintained under both the CCA and the LTP.

[11] The same day Mr Jones responded to Mr Fraser including the following:

> I accept that those are the figures on the face of the contracts we entered into but I have been taken to the position where I am unable to accept they are due and owing. I do not believe [NZB Finance] have dealt with me in a fair and conscionable manner as they are bound to as amateur [sic] of contract. This in my opinion places those figures into the position of being genuinely disputed debts.
>
> The retaining of funds from the sale of athenri is just another knowing act in respect of our relationship I am afraid.
>
> …

[12] In March 2019 Mr Jones retained an insurance payment of $50,000 plus GST on a mare that had died and refused to account to NZB Finance for it in reduction of the amounts outstanding. At the end of March 2019 NZB Finance issued a notice of demand which overstated the amounts then outstanding. The error in the amounts was addressed in a revised notice of demand served on Mr Jones on 26 April 2019, reciting the outstanding debt at that time of $369,800.22 under the CCA.

[13] On 26 April 2019 NZB Finance served Mr Jones with a notice of default under the LTP seeking payment of the amounts by then outstanding of $22,718.08. No payments were made by Mr Jones and thereafter all amounts owing under the LTP fell due, constituting a debt of $61,832.

High Court contractual analysis

[14] Jagose J dealt quite shortly with the prospect of any grounds that might be available to Mr Jones to resist enforcement of the contracts on their terms. He dismissed the prospect of any failure by NZB Finance to comply with initial disclosure requirements. This was addressed as follows:[3]

> [25] Although the advances contract included a section titled "Initial disclosure" made with reference to s 17 of the Credit Contracts and Consumer Finance Act 2003, that section only applies to "consumer credit contracts", for "the credit … to be used, or … intended to be used, wholly or predominantly for personal, domestic, or household purposes". Mr Jones' own evidence is the advances were sought to be used for his thoroughbred breeding business. Section 17 has no application.

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3 Judgment granting summary judgment, above n 1.

[15] The Judge also dismissed the prospect of any representation by NZB Finance that it would not require compliance with the contractual payment obligations for a period of years which would prevent NZB Finance from enforcing the terms of the contracts in issue. The Judge noted that there was almost no evidence from either Mr Jones or NZB Finance of his dealings with Mr Gwyn who was the finance manager at NZB Finance with whom Mr Jones dealt when both contracts were entered into.[4]

[16] The Judge found it inherently improbable that a commercial trading operation such as NZB Finance would waive its contractual entitlements to recover amounts from Mr Jones for five to seven years. The Judge considered it was equally improbable that a person of Mr Jones' legal and business experience would have entered into written contracts intended to sustain his business for five to seven years, when those contracts contained express requirements for earlier periodic and unilateral on-demand repayment.[5]

[17] The Judge also dismissed the prospect that Mr Jones could raise a defence under ss 118 and 120(b) of the Credit Contracts and Consumer Finance Act 2003 (CCCFA), on grounds that NZB Finance's conduct was oppressive, harsh, unjustly burdensome, unconscionable or in breach of reasonable standards of commercial practice.[6]

Challenge to contractual analysis

[18] Mr Jones' notice of appeal included as one of 14 grounds of challenge to the judgment that Jagose J had not addressed NZB Finance's failure to disclose as required "in terms of the [CCCFA]". This criticism was not addressed in Mr Jones' written submissions, or orally. In any event, the Judge's characterisation of the contract as falling outside the definition of a "consumer credit contract",[7] and therefore not being subject to the requirements for initial disclosure in s 17 of the CCCFA inarguably disposes of the point.[8]

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4 At [28].
5 At [36].
6 At [35].
7 Credit Contracts and Consumer Finance Act 2003, s 11.
8 Judgment granting summary judgment, above n 1, at [25].

[19] Mr Jones did advance arguments on appeal that the nature of his dealings with NZB Finance personnel led to a mutual recognition that establishment of his bloodstock business would take a period of years substantially longer than the contractual terms for the advances, arguably leading to an acceptance by NZB Finance that it either could not or should not seek to enforce the repayment obligations stipulated in the contracts.

[20] In the course of his oral submissions, Mr Jones accepted that there was no evidence of any written or oral representation by those with whom he dealt at NZB Finance, to the effect they would not enforce the repayment obligations in accordance with the contracts. Nonetheless he contended that his evidence demonstrated an ongoing business relationship, and that it would be inconsistent with the basis of this relationship to insist on repayment when industry standards recognised that establishment of a thoroughbred breeding business took a period of five to seven years.

[21] We are satisfied that there is no prospect of Mr Jones mounting a defence in the nature of estoppel or variation of contract that would constrain NZB Finance's entitlement to enforce the contracts on their terms. Mr Jones' notice of appeal cited a criticism that the Judge had failed to consider his claims that NZB Finance was guilty of oppressive conduct. This point was not addressed in his submissions and from a review of the extensive dealings between Mr Jones and NZB Finance, we are satisfied that no tenable basis for a claim of oppressive conduct could be made out.

[22] On that basis, Mr Jones would only be able to resist enforcement of the contracts if he demonstrated there was a tenable prospect of the entry into one or both of the contracts being induced by fraud. That prospect is the subject of the larger aspect of Mr Jones' challenges to the judgment, namely that he had a tenable claim against NZB Finance for fraud or participation in unlawful conspiracies against him constituting grounds for an equitable set-off.

[23] We accordingly proceed to deal with the broader grounds for resisting summary judgment, from the premise that we can find no error in the Judge's decision that the contracts are otherwise enforceable on their terms.

Legal test for summary judgment

[24] Mr Jones submitted as a matter of law that all he needed to do to resist summary judgment was to persuade the Court that it could not be certain there was no prospect of his making out claims of fraud and/or conspiracy. Mr Jones submitted that this proposition was consistent with the approach adopted by this Court, as exemplified in the following statement of principle in *Krukziener v Hanover Finance Ltd*:[9]

> [26] The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried. 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. 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. 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.

[25] This is a case in which the creditor can make out its entitlement to enforce the contracts, leaving the Court without any real doubt or uncertainty about their enforceability. Where summary judgment is resisted, as here, on the basis of a qualifying form of counterclaim, then the evidential onus shifts to the opponent of summary judgment to make out a credible basis for a qualifying counterclaim or set-off.[10] The essential issue in the appeal is whether the accumulation of incidents and suspicions deposed to by Mr Jones demonstrates the existence of a potentially tenable cross-claim.

The evidence in the High Court

[26] Mr Jones has filed a number of affidavits in these proceedings. The following summary describes the substantive affidavits filed in the High Court, omitting reference to formal affidavits filed by Mr Jones confirming procedural steps taken with no narrative content. Mr Jones filed an initial affidavit in support of his opposition to

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9 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, (2008) 19 PRNZ 162 (citations omitted).
10 *McGrouther v Paulden* HC Christchurch CIV-2010-409-1124, 7 December 2010 at [15].

the summary judgment application on 13 November 2019. It deposed to his having accepted instructions to act for a Mrs Twyname in 2004 in advancing her claim against Mr David Ellis for failure to account to her as owner of an interest in a racehorse that had been sold. Mr Jones characterises Mr Ellis as a leading figure in the New Zealand thoroughbred industry. He deposed to a belief that his preparedness to act against senior figures in the New Zealand thoroughbred racing industry, alleging improper behaviour against them, caused animosity towards him as someone who was prepared to stand up to those who controlled the industry. Mr Jones cited that perceived animosity towards him as persisting throughout the period of the contracts in issue, resulting in a number of instances of his interests in the bloodstock industry being sabotaged by others.

[27] Mr Jones' original affidavit also alleged that Mr Rolston, the sales manager at NZB Finance had threatened Mr Jones and was involved in a scheme to repeatedly unsettle Mr Jones including by injuring a colt belonging to him. A further component of the complaints was that he was induced to purchase the mare Woodpecker Hill (the subject of the LTP) in reliance on a fraudulently inflated valuation provided by Mr Rolston.

[28] On 14 February 2020 Mr Jones filed a second narrative affidavit described as being in support of an application for orders that evidence be taken orally at the hearing of the summary judgment application. It was also endorsed as being in opposition to summary judgment. That affidavit began with a further explanation of the circumstances in which he had acted for Mrs Twyname against Mr David Ellis. Mr Jones described the thoroughbred industry as attributing considerable significance to the controversy that Mrs Twyname's claim would cause. He perceived there being concerns for the New Zealand racing industry and particularly Mr Ellis, which caused antipathy towards him. Mr Jones believes that "[f]rom that point in time [his] life changed".

[29] The 14 February 2020 affidavit included allegations by Mr Jones of collusion and deliberate injuring of his horses. He alleged a specific threat from Mr Rolston of NZB Finance, followed immediately by a severe gash to the leg of one of Mr Jones' horses. Further, Mr Jones alleges that a foal born to one of his mares, which he owned

in a partnership, "was left dead at birth in retribution" for his partner's attempt to continue racing the mare the previous season. Mr Jones states his belief that Mr Rolston "completely disagreed" with the decision to continue racing the mare, and that Mr Jones "thought something might happen and it did".

[30] The 14 February 2020 affidavit also included a comparison of Mr Rolston's valuation for Woodpecker Hill with one obtained by Mr Jones from a Mr Adrian Clark, a registered bloodstock valuer. Mr Jones annexed copies of those valuations to his affidavit. In contrast to the $45,000 valuation of the mare by Mr Rolston as at September 2017, Mr Clark had valued the mare in February 2020, as at August 2018, at $1,500. Mr Jones stated in a later affidavit that after providing that valuation Mr Clark had declined to assist further, so Mr Jones sought an order that he be subpoenaed to address his valuation in oral evidence.

[31] Mr Jones' allegations of deliberate harm to his horses included allegations that a colt by the stallion Reliable Man was deliberately mistreated between November 2017 and January 2018. Mr Jones believes that those involved deliberately avoided undertaking an ultrasound which would have identified the form of injury to the colt and enabled a prompt remedy. Instead, the colt was left without such treatment for a period. Mr Jones took advice from Professor Ben Ahern, a professor of veterinary science at the University of Queensland. Although not waiving privilege in the content of that advice, Mr Jones' affidavit implied that Mr Jones' analysis of the circumstances of harm to the Reliable Man colt was confirmed by Professor Ahern.

[32] Mr Jones deposed that having had useful indications from the Professor his more recent request for an affidavit had drawn no response. Mr Jones inferred the withdrawal of cooperation by the Professor was caused by industry pressure not to take Mr Jones' side against industry interests. Accordingly, Mr Jones also sought an order requiring the Professor to be required for oral evidence to address the issue about which he had given Mr Jones initial views.

[33] Mr Jones' application for leave to adduce further evidence, including the issue of subpoenas, was dealt with by Peters J in a judgment of 6 March 2020.[11] The Judge

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[11] *New Zealand Bloodstock Finance & Leasing Ltd v Jones* [2020] NZHC 431 [Evidence judgment].

granted leave to rely on the 14 February 2020 affidavit at the summary judgment hearing, subject to reserving to NZB Finance the entitlement to challenge admissibility of various parts of its content.[12] The Judge also granted leave for Mr Jones to file and serve an affidavit from Mr Clark on his valuation of Woodpecker Hill, which was to be completed by 17 March 2020.[13]

[34] As to Mr Jones' application under r 9.75 of the High Court Rules 2016 for an order that Professor Ahern attend the hearing for the purpose of giving evidence, the Judge held that there was insufficient evidence of a request for the Professor (or any other veterinarian) to provide an affidavit, and the requisite refusal by the Professor (or any other veterinarian) to do so. Her Honour adjourned that "aspect of Mr Jones' application to enable him to adduce evidence of request and refusal and ideally of more than one veterinarian".[14] The Judge also cautioned that Mr Jones would need more to establish the relevance of the proposed evidence given NZB Finance's denial of any sufficient connection with or control over the Waikato stud, Wentwood Grange, at which the colt had allegedly been deliberately mistreated.[15]

[35] On 8 May 2020 Mr Jones filed a further affidavit that was described as being in support of his interlocutory application to have evidence taken orally and for its content to be considered in support of his opposition to summary judgment. In addition the affidavit advanced his claimed entitlement to an award of costs as a self-represented barrister should he be successful in defending the application for summary judgment. Mr Jones described the affidavit as reflecting his consideration of comments and directions made in the judgment of Peters J. It also included responses to the submissions by then served by NZB Finance in support of its application for summary judgment.

[36] The 8 May 2020 affidavit made further references to Mr Jones' involvement in acting for Mrs Twyname, this being the third affidavit in which those factual matters were addressed. He also traversed allegations previously raised that NZB Finance were influential in ensuing that his colt by the stallion Deep Field did not receive a bid

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12 At [7].
13 At [11].
14 At [18].
15 At [19].

when included in a sale. He disputed evidence in reply on behalf of NZB Finance which had denied a connection between NZB Finance and Wentwood Grange. He alleged Wentwood Grange and NZB Finance were jointly involved in injuring one of his colts in 2016. He deposed to his belief that his conduct in the Twyname litigation resulted in the dissolution of his then legal partnership. He also traversed unsettling reversals in numerous personal relationships which Mr Jones claims had resulted from pressure on family, friends and legal colleagues from NZB Finance or other interests aligned with it.

[37] As to the need for a subpoena of Mr Clark, Mr Jones' 8 May 2020 affidavit cited correspondence with Mr Clark from 12 March 2020, in which Mr Clark explained why he would not be further involved in the proceedings. Mr Jones attributed to Mr Clark a statement that he stood by the valuation he had provided for Woodpecker Hill but that Mr Clark had no desire to get into the middle of the dispute where one party was a company that he needed to have "a happy relationship with". Mr Jones cited that as justification for requiring a subpoena on the issue of the contrasting valuations of Woodpecker Hill. Mr Jones also deposed to further dealings with Professor Ahern, which had concluded with Professor Ahern advising Mr Jones that he was unable to assist Mr Jones any further. Mr Jones deposed to other unsuccessful attempts to obtain expert evidence from veterinarians to support his claims, leading to his belief that no veterinarian would assist him other than pursuant to a subpoena.

[38] On 25 May 2020 (the day before the summary judgment application was to be heard) Mr Jones filed a fourth substantive affidavit. This affidavit was also described as being in opposition to the summary judgment application, and in support of Mr Jones' application for a stay of proceedings and an adjournment of the summary judgment hearing. Notwithstanding an acknowledgement of the constraints on evidence in opposition to summary judgment applications, Mr Jones detailed further examples of his experiences with veterinarians and others caring for his horses, described as "inappropriate behaviour".

[39] Mr Jones also described a specific discussion with Mr Ellis that he had recently recalled, and which he treated as indicative of an intention by Mr Ellis to harm

Mr Jones' thoroughbred business. The affidavit made one further reference to the Twyname proceedings, and attached a copy of the home page from the NZB Finance website to illustrate the interconnected nature of the various companies in its group.

[40] He also reported on investigative steps being undertaken (apparently for the purposes of other proceedings against the veterinary service involved) to establish that a diagnosis of one of his horses was aberrant. Mr Jones deposed that this had got to the stage of a draft affidavit from another Queensland expert, Dr François-René Bertin. Other than deposing to the imminent availability of an affidavit from Dr Bertin, the 25 May affidavit did not specifically address reasons why the summary judgment application ought to be stayed or an adjournment of the hearing be granted.

[41] NZB Finance objected to substantial portions of the evidence Mr Jones sought to rely on in opposing summary judgment. NZB Finance submitted that the evidence did not meet the requirement for relevance to the issues raised by its summary judgment application, and that substantial components of the evidence were inadmissible hearsay and opinion.

[42] Jagose J dealt with the objections to the challenged evidence after concluding that the summary judgment application succeeded and that there were no grounds for adjournment, stay or dismissal of it.[16]

[43] The Judge recognised that a party challenging evidence on the grounds that it lacked relevance faced a more difficult task in summary judgment applications than at trial.[17] He saw greater latitude as being appropriate where a defendant must demonstrate that there is an issue of fact or law that ought to be determined at a subsequent trial. The Judge concluded on the evidentiary challenges in the following terms:[18]

> [41] On that basis, I am not minded to determine the objections to admissibility. I accept, even with the latitude I have expressed, Mr Jones' affidavits extend well beyond the factual expression of what he saw, heard, or

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16 Judgment granting summary judgment, above n 1, at [38].
17 At [40].
18 At [41].

> knew. But no purpose now is served in excluding any aspect of his evidence. I have given it the weight it deserves.

[44] There was no clarification from the Judge on the weight he had given to Mr Jones' evidence. The terms in which the Judge assessed all the evidence are consistent with his accepting Mr Jones' recollection of matters of which he had first-hand knowledge by direct observation, but a high level of scepticism about the very extensive inferences that Mr Jones sought to draw from matters within his personal knowledge. The Judge's findings suggest that he would not have accepted that a factual basis had been made out to raise a tenable claim for fraud or conspiracy against NZB Finance.

[45] However, the extent of analysis of the evidence was confined because of the Judge's finding that any cross-claim Mr Jones could establish against NZB Finance for harm to his economic interests was not interdependent with NZB Finance's claims for repayment of its advances to Mr Jones. The Judge found that there would be nothing unfair or unjust about determining NZB Finance's claim without taking Mr Jones' intended cross-claim into account.[19] We return to that finding, with which we respectfully disagree, below.[20] At this point we recognise that it rendered any closer analysis of the admissibility, or credibility of Mr Jones' extensive evidence unnecessary.

Further evidence on appeal

[46] Mr Jones sought leave to adduce further evidence and filed a new affidavit in this appeal dated 17 December 2021. Mr Jones described the evidence as covering a wide range of issues relating to the background to the dispute between him and NZB Finance. The principal annexure to the affidavit was an unsworn affidavit completed by Mr Jones in proceedings he had commenced in the Auckland High Court, seeking an interim injunction against 16 named defendants and further unnamed defendants.[21] In that proceeding Mr Jones sought relief in respect of acts of

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19 At [37].

20 See [64] below.

21 Venning J struck out some of the claims, and stayed the others pending Mr Jones filing an amended pleading in proper form: *Jones v New Zealand Bloodstock Finance and Leasing Ltd* [2021] NZHC 3220 at [34]–[36].

conspiracy, breaches of privacy and harassment allegedly committed by the defendants. The annexures to that affidavit include his affidavits completed in the present proceeding on 13 November 2019, and 8 and 25 May 2020. Also annexed are affidavits completed in October 2019 in support of an application for discovery in other proceedings, affidavits completed in September 2020 seeking to set aside a bankruptcy notice that had issued and to pursue a challenge to a Registrar's decision sealing judgment in respect of the judgment presently under appeal.

[47] The unsworn affidavit intended for Mr Jones' interim injunction proceedings includes narrative running to more than 32 pages. It describes incidents involving interactions with Mr Jones by each of the named defendants. Mr Jones attributes an intention by those persons to either take steps adverse to his personal or financial security, or to warn him off pursuing initiatives against imprecisely identified personnel in the thoroughbred industry. In each case Mr Jones deposes to a conviction that conduct he perceives as otherwise inexplicable was undertaken deliberately to harm his interests.

[48] An example of the matters narrated in the unsworn affidavit is Mr Jones' reconstruction of events surrounding his despatch of a Tivaci–Adalia[22] filly to Queensland for sale in the Magic Millions sale there. Mr Jones asserts that the filly was in good condition when she left New Zealand, and presumably continued to be in such condition when sold for $30,000 after passing through the sale ring. Shortly afterwards the auctioneer's agent advised Mr Jones that the sale could not go ahead at other than a very reduced price because of an injury that had occurred to the filly. Mr Jones assumes that the injury was inflicted deliberately. He does not identify those responsible or how the injury was inflicted and his description does nothing to dispel the alternative prospect that the injury was caused accidentally. He treats it as an example of "people" in the racing industry considering they can freely carry out such acts with impunity. He states "[t]hat was a clear and intended outcome from Justice Jagose['s] decision [in the judgment under appeal]".

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[22] The filly was sired by the stallion Tivaci, out of the mare Adalia. We use the format [sire]–[dam] when referring to the pedigree of horses throughout this judgment.

[49] All these allegations are extremely speculative, and except by drawing the most tenuous of connections between incidents that otherwise appear unrelated, the individual observations would appear to be capable of innocent explanations. A small number of the individuals criticised are either directly or indirectly related to NZB Finance. For the most part however, criticisms relate to Mr Jones' former wife and her sister, former staff in his law firm and former friends in the law.

[50] On 27 April 2022 Mr Jones sought leave to adduce yet further evidence for the hearing of the present appeal. The items included a video showing a horse being led from its stall in a larger stable, walked briefly around the entrance to the stable and returned to its stall. The horse is walking with obvious difficulty in its rear left leg. Mr Jones' commentary on that video is that it shows a horse of his having been injured whilst being prepared for sale.

[51] Mr Jones sought leave to adduce as evidence on the appeal the statement of claim in the High Court proceedings described in paragraphs [46] and [47] above, the judgment of Venning J in that proceeding that was critical of the terms of his statement of claim,[23] and further documents filed in that proceeding in response to Venning J's judgment.[24] He also sought leave to adduce as evidence a judgment of van Bohemen J in other proceedings in the High Court at Auckland to which he is a party,[25] plus additional documents filed in that proceeding. Finally, he sought leave to adduce correspondence from the New Zealand Law Society Lawyers Complaints Service raising concerns about Mr Jones' conduct as a practitioner.

[52] Mr Jones wished to cite some or all of these documents as examples of conspiracies against his interests having spread to the High Court judiciary. Consistency in the reasoning of findings adverse to his interests by a number of judges is treated by Mr Jones as evidence of a conspiracy existing among those members of the judiciary, to be biased in rulings adverse to his interests.

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23 *Jones v New Zealand Bloodstock Finance and Leasing Ltd*, above n 21.

24 Mr Jones made applications for recall and recusal which were unsuccessful: see *Jones v New Zealand Bloodstock Finance and Leasing Ltd* [2021] NZHC 3371.

25 *Jones v Stace Hammond Lawyers* [2022] NZHC 47.

[53] There can be no possible relevance in these documents produced in other proceedings in which Mr Jones is a party, in determining any relevant issues arising on the present appeal. There is no possible foundation for a claim that Jagose J was influenced in any way by bias against Mr Jones so the first link in a chain of possible allegations of a judicial conspiracy to harm his interests could not be made out, with the consequence that the conduct of other Judges is entirely irrelevant.

[54] In opposing all of the evidence sought to be adduced by Mr Jones apart from the initial affidavit in support of his opposition, Mr Osama (who presented the oral submissions on this aspect) acknowledged that admission of "wide-sweeping allegations" advanced by Mr Jones would not benefit Mr Jones' case. The successive layers of Mr Jones' narrative of his suspicions that steps have been taken intentionally and maliciously to harm him instead serve, on Mr Osama's submission, to strongly enhance the grounds for finding that Mr Jones' allegations are entirely incredible and unable to be taken seriously.

[55] Nonetheless, Mr Osama maintained that none of the proposed evidence came near to qualifying for admission, given that it failed the requirements to be fresh, cogent and relevant.

[56] Mr Jones submitted repeatedly that all of the evidence was entirely cogent, and relevant to make out the prospect of a wide-ranging conspiracy or conspiracies — all of which had, on his analysis, some measure of connection to NZB Finance. Mr Jones argued that the Court had to have regard to the evidence to afford him a proper hearing on the issue of whether Mr Jones had an available set-off.

[57] In a minute issued the week before hearing, this Court indicated that it would consider the application to adduce additional evidence as part of the hearing of the substantive appeal. That minute stated that, in the event the Court did admit additional evidence on matters where there was a prospect NZB Finance would be prejudiced by the absence of an opportunity to respond to it, then that opportunity would be afforded.[26]

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[26] *Jones v New Zealand Bloodstock Finance & Leasing Ltd* CA350/2020, 26 April 2022 (Minute of Dobson J).

[58] We did not stop Mr Jones ranging widely in his references to all of the evidence, given that the Court would be in a better position to assess the grounds for admissibility of the additional evidence once it could be measured in light of all the arguments on appeal.

[59] Mr Jones could have included in the authorities he relied upon judgments in other proceedings in which he is a litigant. Other documents generated in those proceedings and his observations about the conduct of the Judges presiding in them are entirely irrelevant and accordingly inadmissible.

[60] Recollections of dealings with his family members and friends could only be claimed as having peripheral relevance if Mr Jones laid some foundation for the proposition that they were parties to conspiracies against him that include NZB Finance. We are satisfied that no such connection could possibly be established and accordingly rule inadmissible on grounds of irrelevance the references to the conduct of and attitudes attributed to Mr Jones' family and friends.

[61] Adopting the most liberal approach to the possible relevance of the evidence to Mr Jones' claims of a conspiracy or fraudulent conduct harmful to him, we are not prepared to rule inadmissible the various narratives about the statements and conduct of other persons involved in the thoroughbred industry. In doing so, we treat the circumstances of this case as unusual and adopt what would in many cases be an unduly lenient approach to admissibility, essentially because the overall breadth of Mr Jones' suspicions is potentially relevant to an assessment of the credibility of his claims, as Mr Osama recognised. We do not intend to alter in any way the rigour of the test for relevance of evidence under ss 7 and 8 of the Evidence Act 2006, in any other context.

[62] In light of Mr Osama's submissions opposing the admission of this evidence and our views on the quality of it, we are satisfied that we can complete our analysis of the prospects of causes of action sought to be advanced by Mr Jones, without affording NZB Finance an opportunity to respond to the matters raised in Mr Jones' various affidavits.

[63] During oral argument Mr Jones agreed that analysis of the prospects for claims such as he seeks to raise can be substantially helped by a party in his position indicating the basis for such claims by filing a draft counterclaim. That was not done in this case. Assessing the prospects for any such claim is not helped by the extent of discursive narrative from Mr Jones in his numerous affidavits, drawing on suspicions that steps were taken intentionally to harm him in disparate instances. That difficulty is greater when assessing the prospects of unlawful conspiracies, than it is when assessing the grounds cited by Mr Jones for a claim of fraud. In all such claims, there would be a need for particularity in pleading as to knowing and intentional involvement by individuals in unlawful conduct.

[64] As noted at [45] above, the prospects of such claims were dismissed by the Judge on the basis that such claims could not in any event qualify for equitable set-off. The Judge found that Mr Jones' contention of liabilities owed to him by NZB Finance were "not interdependent".[27] We respectfully disagree with the Judge on this point. When determining whether a claim qualifies for set-off, the test is whether the claim "so affects the plaintiffs' claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim into account".[28] The claims must be "interdependent".[29] We accept Mr Jones' submission that, at least in respect of a claim for fraud inducing the LTP, where any such cause of action arose out of the dealings between the parties in relation to a contract sought to be enforced by NZB Finance, then a connection would arguably be sufficiently close and relevant for the proposed claim to qualify for an equitable set-off.

[65] In summary, we grant Mr Jones' application to adduce further evidence in part, taking the liberal approach to the relevance of Mr Jones' proffered evidence which we have described at [61] above. We have ruled inadmissible Mr Jones' observations about the conduct of Judges in other proceedings in which he is a litigant and other documents generated in those proceedings, along with Mr Jones' recollections of

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27 Judgment granting summary judgment, above n 1, at [37].

28 *Grant v NZMC Ltd* [1989] 1 NZLR 8 (CA) at 12–13.

29 *Grant v NZMC Ltd*, above n 28; *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2010] NZSC 47, [2010] 3 NZLR 231 at [68]–[69]; and *Gilbert v QSM Trustees Ltd and Body Corporate 162791* [2016] NZSC 61, [2018] 1 NZLR 1 at [48]–[54] per William Young and Glazebrook JJ, citing *Body Corporate 162791 v Gilbert* [2015] NZCA 185, [2015] 3 NZLR 601 at [67]–[72].

dealings with his family members and friends. We have ruled admissible the various narratives deposed to by Mr Jones about the statements and conduct of other persons involved in the thoroughbred industry. We approach the assessment of Mr Jones' claims of fraud and conspiracy on that basis, and in light of our conclusion at [64] above.

Fraud by NZB Finance?

[66] Mr Jones seeks to argue that he was induced to enter the LTP by a fraudulent valuation provided by Mr Rolston for Woodpecker Hill at $45,000. Mr Jones argues that he entered into the LTP in reliance on that representation. The law on such a claim is straightforward and was not addressed by either party. If a fraudulent misrepresentation induced Mr Jones to enter the contract, he should have rights to damages or to cancel the contract.[30] A fraudulent misrepresentation is a knowingly false statement made intending that it be relied upon.

[67] Mr Jones did not advance arguments on the prospect of liability in tort for deceit as an alternative. If that were to be pleaded, then the requirements to make out a false representation of past or existing fact, and that the maker of the representation knew it to be untrue or had no belief in its truth, or was reckless to its truth, would arise.[31] The valuation of a horse is quintessentially a matter of opinion.

[68] In September 2017 Mr Jones had available to him a service by the stallion Zacinto. The service fee for Zacinto was $12,000 but unless Mr Jones used the stallion's service, that value would be lost to him. He did not then have an appropriate mare to put the stallion to. In liaison with NZB Finance, Woodpecker Hill was identified as an appropriate mare. Mr Jones has deposed that he was somewhat wary of the price that was being discussed for the purchase of Woodpecker Hill and accordingly requested a valuation from NZB Finance. The valuation was provided by Mr Rolston, dated 21 September 2017. It was addressed to Mr Jones and indicated the valuation was done after review of the pedigree, performance and recent sales results, with the caveat that Mr Rolston had not inspected the horse so assumed "he"

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30 Contract and Commercial Law Act 2017, ss 35 and 37.
31 *Amaltal Corporation Ltd v Maruha Corporation* [2007] 1 NZLR 608 (CA) at [46]–[50].

was in "good health and free from any injury or illness". On those criteria Mr Rolston valued the mare at $45,000 exclusive of GST, on the following stipulations:

> Many factors including market fluctuations can cause discrepancies between appraised values and actual sale prices, and the value can vary over time. Therefore the above valuation is accurate as far as my knowledge as at the date of this letter.
>
> Please note that this valuation is provided to the best of my knowledge and belief with the information currently available to me and I am unable to warrant or guarantee its accuracy or completeness, nor can I or New Zealand Bloodstock Ltd accept any liability whatsoever for any loss or damage which may arise directly or indirectly from use of or reliance on this valuation.

[69] Despite Mr Jones' reservations as to the value of the mare and the qualified terms of Mr Rolston's valuation, Mr Jones proceeded to commit to the lease to purchase Woodpecker Hill at the price stipulated in Mr Rolston's valuation.

[70] The LTP was concluded shortly thereafter on terms which appear to have been standard for such funding transactions entered into by NZB Finance. Under the LTP, NZB Finance procured the purchase of the animal and retained title to it until the payments required by the terms of the LTP, including the residual payment at the end of the lease term, were paid by Mr Jones. He had rights to possession of the mare and would have sole property in her progeny. Title was to pass to Mr Jones on his making the final payment under the LTP.

[71] Material to any claim Mr Jones might bring for disentitling conduct by NZB Finance is cl 4 of the LTP, which sets out the warranties, acknowledgements and agreements accepted by Mr Jones as lessee. Clause 4 of the LTP provides in relevant part:

> **4 Lessee's Warranties Acknowledgements and Agreements**
>
> The Lessee warrants acknowledges and agrees that
>
> …
>
> (o) The Lessor makes no representation or warranty of any kind in respect of this Lease other than as expressly referred to herein and, in particular, makes no representation or warranty in respect of any law in relation to the incidence of taxation as effected by this Lease.
>
> (p) Any implied warranty or condition whether statutory or otherwise and whether as to quality state condition or fitness for any particular

> purpose of the Animal or as to any other matter or thing whatsoever by the Lessor is hereby excluded from this Lease to the extent permissible by law.
>
> …

[72] The mare was duly serviced by Zacinto and produced a foal by him. It appears that foal was of no significant value. Although NZB Finance as lessor had the right under terms of the LTP to require Mr Jones to redeliver the mare to it if he defaulted on payments, that has not occurred. Counsel appeared to accept that, whatever her value at earlier points in time, Woodpecker Hill does not now have any substantial value.

[73] After the present proceedings were commenced, Mr Jones claimed that the valuation was relied on by him, was grossly inflated, and disentitled NZB Finance from enforcing, at least the terms of the LTP.[32] In February 2020 Mr Jones procured a valuation of Woodpecker Hill from Mr Clark. Mr Clark cast his valuation as at 1 August 2018, treating Woodpecker Hill as having been a five-year-old maiden mare at that time. He assumed that she would have been in excellent health and condition at the time. He acknowledged as relevant to his valuation that the mare had been passed in when offered at the New Zealand Bloodstock 2015 Karaka premier sale, that she had run 13 times without a win and that she had been retired with a rating of 45.

[74] Mr Clark's valuation on those terms was $1,500, exclusive of GST. The valuation was subject to these comments:

> At the end of the day, a thoroughbred is worth what someone is prepared to pay for it. My own valuation of her, dated 01.08.18, with all factors considered, is NZ$1,500 …
>
> …
>
> While bloodstock valuations vary widely amongst those qualified to judge, I have 35 years of direct industry experience and am comfortable with the figure noted above.

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[32] Mr Jones' submissions on appeal were to the effect that a fraudulent valuation of Woodpecker Hill vitiated all of his contractual commitments to NZBS. See [87]–[88] below.

[75] After Mr Jones had put the quality of Mr Rolston's valuation in issue, Mr Rolston deposed in an affidavit in reply, as follows:

> 13. … When valuing Woodpecker Hill, there were three commercially relevant factors, in addition to the mare being sired by a very potent sire of broodmares, to show why the mare was valued at $45,000.00 plus GST:
>
> 13.1 The mare traces to one of Australasia's most commercial families;
>
> 13.2 The service fee for Zacinto (Woodpecker Hill's sire) at the time of mating was $12,000.00; and
>
> 13.3 New Zealand's leading three-year-old of that season Ugo Foscolo was by the same sire and carried the exact same genetic cross, being out of a Stravinsky mare.

[76] We take the reference to Zacinto as being Woodpecker Hill's sire as an error in that Zacinto was the stallion intended to be put to Woodpecker Hill to get her with foal, rather than the stallion that sired Woodpecker Hill. Both valuations recognised that Woodpecker Hill was sired by Stravinsky. On that basis, it was wrong for Mr Rolston to attribute value to Woodpecker Hill reflecting the $12,000 cost for the mare being serviced when that was only going to occur after Mr Jones' acquisition of a lessee's interest in her.

[77] We do not attribute materiality to the reference in Mr Rolston's valuation to Woodpecker Hill as "he"; rather that must be a careless typographical error given that Mr Rolston's valuation was on the basis that Woodpecker Hill was a chestnut mare.

[78] Mr Jones makes much of the mistake in Mr Rolston's subsequent attempt to justify reaching $45,000 as the value of the mare, by including a notional $12,000 for the mare having been serviced by Zacinto when that had not happened. He likened it to selling a motor vehicle for $45,000 on the basis that there was $12,000 in cash in the boot when the $12,000 was either not there or belonged to the prospective purchaser.

[79] Given the 3000 per cent difference between Mr Clark's subsequent valuation at $1,500 and Mr Rolston's at $45,000, Mr Jones submitted that a compelling and

inevitable inference arose that Mr Rolston deliberately overvalued the mare to induce Mr Jones to commit to the LTP and thereby to cause harm to his financial interests.

[80] Mr Jones' attitude to the Rolston valuation was materially more measured shortly after receiving Mr Clark's valuation of the mare. In his 14 February 2020 affidavit, Mr Jones deposed:

> Mares by the stallion Stravinsky are highly [sought] after and sometimes the possibility of high performing family members being likely to surface in the near future can impact on values and so I considered that in retrospect it was perhaps possible for the mare to be of a value of something like the figure for which I finally purchased her. I recall at the time as well that there was some mention of another purchaser having offered a sum similar to that.

[81] Mr Clark's valuation is documentary hearsay and NZB Finance submitted it ought to be disregarded on that account. Short of evidence pursuant to a subpoena, the prospects of Mr Jones procuring better evidence from Mr Clark appear to have been exhausted, given Mr Jones' claim in an affidavit that Mr Clark will not help further given his concern to maintain a happy relationship with NZB Finance.

[82] Mr Clark's valuation is a reconstruction in February 2020 when Mr Jones requested it purporting to value the mare as a five-year-old maiden in August 2018, that is a year later than Mr Rolston's valuation. By that time, the mare was in foal to Zacinto which would, apart from Mr Jones' interest in Zacinto, have incurred a cost of $12,000. The valuation does not acknowledge any value attributable to the mare by virtue of its sire being Stravinsky, whom Mr Jones describes as producing highly sought-after mares.

[83] If Mr Clark was subject to cross-examination on his valuation, he could expect to be tested on whether it was affected by hindsight. It is also speculative as to what different value Mr Clark would attribute to the mare if asked to reconstruct a valuation as at the 2017 date of Mr Rolston's valuation, and on the basis of an available service by Zacinto. The most that can be taken from Mr Clark's hearsay valuation is that there is a prospect that Mr Jones could procure evidence of a dramatically lower valuation for Woodpecker Hill at the time of Mr Rolston's valuation of her.

[84] Both valuations are caveated in respects suggesting elements of subjectivity, and the legitimate prospect for substantial differences of view among valuers. Having received Mr Rolston's valuation, Mr Jones entered the LTP without inspecting Woodpecker Hill. He professes to have expertise in breeding matters. NZB Finance contended that Mr Jones retained his own bloodstock adviser, a Mr Dean Hawthorne. That claim was not responded to in Mr Jones' affidavits and he was equivocal on the point during oral submissions.

[85] In his own reaction to Mr Clark's valuation, as quoted at [80] above, Mr Jones was accepting of the prospect that Mr Rolston's valuation could have been justified. Without more, we are not prepared to attribute to Mr Rolston the prospect of an intentionally fraudulent overvaluation of the mare in reliance only on the dramatic difference between his contemporaneous valuation and hearsay of Mr Clark's subsequent reconstruction of value a year later.

[86] After hearing all of Mr Jones' arguments about Mr Rolston's valuation we consider that, if any tenable cause of action could be advanced, it could not be for more than negligence in its preparation. It appears to have been somewhat cursorily prepared and Mr Rolston's subsequent affidavit is disappointingly casual in providing an explanation for it. However, nothing less than intentional overvaluation could avail Mr Jones in the present context. If the prospect is only of negligent valuation, then the waiver of any claim for negligence that is included in the terms of the warranties accepted by Mr Jones in the conditions of the LTP would prevent him having a tenable cause of action for negligent overvaluation.

[87] For completeness, we acknowledge Mr Jones' submission that once he raised a tenable basis for a claim of fraud affecting the LTP, then he could also rely on that to deny liability for the earlier CCA. He put it that the evidence showed "an unseverable intertwining of the relationship between myself and [NZB Finance] in respect of both contracts". Mr Jones relied upon observations of Denning LJ in the English Court of Appeal in *Lazarus Estates Ltd v Beasley*.[33] That appeal arose in litigation in which the tenant of a residential flat subject to statutory rent restrictions

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[33] *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA).

challenged the extent of increased rent claimed by the landlord on the basis of improvements allegedly undertaken to maintain or improve the state of the tenanted flat. The tenant claimed that moneys purportedly spent by the landlord were fraudulently claimed to relate to the state of her flat. The landlord opposed the tenant's challenge to the increased rent on grounds including her failure to make timely challenge to notice of the money spent on the property, in reliance on which the landlord had purported to increase the rent. In that context, Denning LJ observed:[34]

> No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever …

[88] We would not accept that the context in which Denning LJ observed that "[f]raud unravels everything" could apply in the present litigation to disqualify NZB Finance from enforcing the earlier contract on its terms where it was quite unaffected by any fraud influencing the subsequent entry into the LTP. Relief for both innocent and fraudulent misrepresentation is governed by ss 35 and 37 of the Contract and Commercial Law Act 2017, which do not provide any basis for disentitling NZB Finance from enforcing an earlier contract not induced by the fraud.

[89] Mr Jones bolsters his allegations that Mr Rolston's valuation of Woodpecker Hill was fraudulent by linking the valuation with what Mr Jones alleges are concerted actions by NZB Finance, and others in the thoroughbred industry allied with it, to harm Mr Jones' interests. We turn next to the prospects for any claim against NZB Finance that it, or any individuals for whom it might be vicariously liable, participated in unlawful conspiracies against Mr Jones. In the end we are satisfied that these wide-ranging allegations cannot add anything to what is otherwise clearly an inadequate basis for alleging that the Woodpecker Hill valuation was fraudulent.

Conspiracies against Mr Jones?

[90] Mr Jones' lengthy affidavits detail a diverse range of suspicions about conspiracies allegedly intended to harm his horse breeding interests, plus conduct and

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[34] At 712–713.

signals which Mr Jones perceives as being intended to harm him or threaten him in his legal career or his personal life. Mr Jones has not related his wide-ranging suspicions to a draft pleading setting out the alleged scope of the conspiracies, along with the identity of the alleged conspirators and some indication of the timing and nature of steps allegedly taken against his interests.

[91] Mr Jones contended that he had been subjected to both lawful means and unlawful means conspiracies. He set out the elements required to establish each form of conspiracy, with common elements including the need for those participating to know, and to agree to at least the context or outline of the conspiracy, and to be motivated by intentions to injure him.[35] A plaintiff must prove damage suffered as a result of the conspiracy for it to be actionable in tort.[36]

[92] Mr Jones' submissions did not include an outline of those proposed defendants who had been responsible for the requisite elements of either form of conspiracy with anywhere near the specificity that would be required in a draft pleading.

[93] Mr Jones implicates his former wife and her sister in steps he perceived generally as adverse to his interests, extending to warnings that he should not rock the boat with NZB Finance or other establishment interests in the thoroughbred industry. Those suspicions are fanciful. We have ruled the evidence of conduct by family members as inadmissible and there is no suggestion in Mr Jones' affidavits that could credibly connect any steps taken by his former wife or her sister with NZB Finance or other interests in the thoroughbred industry.

[94] Mr Jones also cites an instance of allegedly deliberate physical impact with a member of his family in the course of a non-contact sporting event. Mr Jones perceives that as part of a campaign to warn him off taking steps contrary to the interests of either NZB Finance or others in the thoroughbred establishment. Mr Jones

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[35] Mr Jones distilled the elements of an unlawful means conspiracy from *Swann v Secureland Mortgage Investment Nominees Ltd* [1992] 2 NZLR 144 (CA) at 147 per Cooke P, citing *Wai Yu-tsang v R* [1991] 4 All ER 664 (PC) at 671–672, and the elements of a lawful means conspiracy from *JSC BTA Bank v Khrapunov* [2017] EWCA Civ 40, [2017] QB 853.

[36] Stephen Todd (ed) *The Law of Torts in New Zealand* (8th ed, Thomson Reuters, Wellington, 2019) at [13.4.01]. The elements of a lawful means conspiracy were set out by Ellis J in *Wagner v Gill* [2013] NZHC 1304 at [88]. The elements of an unlawful means conspiracy were set out by French J on appeal in *Wagner v Gill* [2014] NZCA 336, [2015] 3 NZLR 157 at [50].

does not cite any grounds for any possible connection between the unnamed persons involved in that incident and any conspiracy undertaken by NZB Finance to improperly influence Mr Jones' conduct.

[95] Mr Jones also cites a range of random instances involving friends and colleagues in the law in Auckland that he has interpreted as intended to convey signals to him that he ought not to take any steps contrary to the interests of those dominant in the thoroughbred industry. We have ruled the diverse recollections of these alleged incidents to be inadmissible. In any event, none of the instances described could provide any credible foundation for an allegation that former friends and colleagues have contributed to conspiracies intended to influence Mr Jones in his dealings with NZB Finance, by taking intentional steps adverse to his interests.

[96] Mr Jones went so far as to attribute two instances of food poisoning he had suffered to unnamed participants in conspiracies against him. The first occasion was in or around 2011 when Mr Jones considers he was poisoned in a food hall in Newmarket, Auckland. At an unspecified later point in time whilst on a golf trip on the Mornington Peninsula out of Melbourne, Mr Jones suffered similar symptoms which led him to conclude that on both occasions he had been poisoned intentionally. Mr Jones offers no evidence that anyone remotely connected to NZB Finance, or someone prepared to do their bidding in deliberately poisoning a customer at an eating establishment, could have had any part in the causes of those two instances of food poisoning. This claim was one of those singled out by Mr King in his submission that the fanciful nature and wide-ranging extent of Mr Jones' unsubstantiated suspicions required the whole of his contentions about conspiracies to be rejected.

[97] The alleged conspiracies most closely related to Mr Jones' contractual obligations to NZB Finance allege physical or financial harm to his interests in thoroughbred horses, committed by NZB Finance personnel or others motivated to help it.

[98] The allegation of an intentionally inflated valuation for Woodpecker Hill is treated by Mr Jones as part of a continuing course of conduct by NZB Finance, and others aligned with them to intentionally harm Mr Jones' thoroughbred breeding

business. Mr Jones details various instances which he alleges form part of that continuing course of conduct. He alleges that in June 2015 a telephone discussion with Mr Rolston ended with their taking different views about a matter and Mr Rolston saying words to the effect "we'll see about that in the morning". Mr Rolston denies making a statement to that effect.

[99] The next morning Mr Jones learnt that one of his colts which was being cared for at Wentwood Grange had a large gash in its leg. Mr Jones now cites the timing of the injury to that colt as part of a "continued series of events aimed at repeatedly unsettling me". Mr Jones does not attribute personal responsibility to Mr Rolston for the damage, and nor does he describe the circumstances in which Mr Rolston allegedly directed those caring for the colt to deliberately cause it damage, or how Mr Rolston became aware that such an injury was to be deliberately inflicted. Mr Jones' description of his discussion with Mr Rolston gives no reason why Mr Rolston's statement might have reflected any more than an observation that Mr Jones (or both of them) might see the matter they had different views about from another perspective after further consideration.

[100] This incident occurred before the CCA had been entered into. In addition, some other matters now cited by Mr Jones occurred before the LTP was entered into. It would be irrational to undertake such borrowings if Mr Jones sensed at the time that animus towards him persisted. That tends to suggest there has been a re-definition of such incidents by Mr Jones once he disputed his liability to repay the advances.

[101] In his 25 May 2020 affidavit, filed on the eve of the summary judgment hearing, Mr Jones raised his recent recollection of a telephone discussion with Mr Ellis that he believes occurred in the middle of 2017. In the context of an outstanding bill owed by Mr Jones to a stud operated by Mr Ellis, Mr Jones contends that Mr Ellis made a statement to the effect that Mr Jones' legal business "had better become profitable by September". Mr Jones now treats that comment as a threat that Mr Jones' legal practice would need to be profitable to subsidise losses Mr Ellis predicted for Mr Jones' thoroughbred interests.

[102] Mr Jones submitted that NZB Finance had elected not to respond to this fresh allegation, despite opportunities to do so. That point is not sustainable, given the fact that Mr Jones raised the allegation at the very last minute before the summary judgment hearing. When viewed as a component of the whole narrative of events cited by Mr Jones in support of his suspicions of a conspiracy against him, we do not accept that his allegations about Mr Ellis in this respect deserved a response. Nor do we see them adding anything to his allegations of conspiracies involving NZB Finance.

[103] In about October 2017 Mr Jones was anticipating offering a Reliable Man–Adalia colt for sale in the January 2018 Karaka sales. His own view, which he claims was supported by others expert in assessing thoroughbred horses was that he could anticipate a sale price of somewhere between $200,000 and $250,000. Mr Jones intended to apply the proceeds of sale to pay off the debt he owed to Wentwood Grange and, with other proposed sales, make significant inroads in the amounts owed to NZB Finance.

[104] However, in early November 2017 the Reliable Man–Adalia colt became injured with a swollen hock. The injury did not heal and it was necessary for the horse to be operated on early in January 2018, preventing a sale at Karaka that year. Mr Jones contends that Wentwood Grange and the veterinary service involved in caring for the colt conspired to harm him financially by deliberately failing to attend properly to the colt.

[105] Mr Jones alleges that the treatment of the Reliable Man–Adalia colt was part of a campaign to place him under pressure and prevent his business from succeeding. Mr Jones perceived NZB Finance as pressuring him to sell his interest in the stallion Reliable Man which Mr Jones assessed to be valued at approximately $150,000. Implicitly it appears that Mr Jones perceived NZB Finance as wanting to exclude him from ownership interests in the stallion either because they saw its value increasing because of the performance of its progeny, and did not want Mr Jones to enjoy that greater value; or possibly because he was difficult to deal with and NZB Finance wanted to avoid that. Mr Jones perceives NZB Finance as placing pressure on him to reduce his debt to them as a means of forcing him to sell his interest in Reliable Man. He points to valuations of his bloodstock which NZB Finance provided Mr Jones in

the course of discussions about the state of his business and his interest in Reliable Man. Mr Jones takes issue with the accuracy of those valuations, and submits that the valuations are an example of attempts to apply pressure to him.

[106] In January 2019 Mr Jones entered a Contributor–Adalia filly in the Karaka sales that were conducted by an affiliate of NZB Finance. Mr Jones learnt that the filly had been entered in the second sale when he considered she should have been placed in the first sale based on her "pedigree and conformation". On Mr Jones' analysis four other fillies of equivalent pedigree were chosen ahead of his to be placed in the main sale, giving them a significant marketing advantage over his. He contends that this action caused him a loss of up to $130,000.

[107] Mr Jones also alleges that sale of a foal in Australia was sabotaged by persons aligned with NZB Finance conveying to those present at the auction negative terms about the attributes of the foal. Those comments allegedly caused it to be passed in at the auction without any bids.

[108] In addition, Mr Jones complains of mistreatment of another foal born at Wentwood Grange that was not given prompt attention when required at the time of its birth. Veterinary services allegedly in league with NZB Finance attributed a defect to the foal that would reflect adversely on its mother rendering her worthless for further breeding purposes. Mr Jones alleges that veterinary analysis was deliberately wrong.

[109] In respect of the same foal, Mr Jones cites a telephone discussion with Mr Andrew Seabrook, the managing director of NZB Finance, sometime before its birth. In discussing the value of his interests, Mr Seabrook allegedly dismissed the value that Mr Jones attributed to the foal that was then still to be born, by discounting any valuation on the basis that the foal might be born with health problems. From that comment, Mr Jones contends that NZB Finance intervened in the care of the mare at the time of birth of the foal, to deliberately harm it.

[110] Both NZB Finance and Wentwood Grange were, at the time of these various actions allegedly taken by them to harm Mr Jones' interests, owed substantial amounts

of money by him. NZB Finance was pressing for reduction or repayment of the advances that are the subject of the judgment under appeal. Wentwood Grange had agreed to provide credit for Mr Jones in respect of agistment and other costs of caring for his horses, through until the following yearling sales. Optimising the proceeds of such sales and the value of his horses in their care would be material to Wentwood Grange, as these were the assets from which Mr Jones would repay his obligations to them.

[111] When it was pointed out to Mr Jones that his allegations suggested irrational conduct by NZB Finance and Wentwood Grange as creditors of his harming their own financial interests by impairing his ability to repay amounts owed to them, Mr Jones readily accepted that the conduct he alleged was economically irrational. He submitted that NZB Finance and industry interests aligned with them would be happy for their conduct harming his interests to cost them millions of dollars in order, in Mr Jones' words, to "keep them out of jail".

[112] The only evidence that Mr Jones has adduced to support his claim that NZB Finance enjoys a position of dominance in the New Zealand thoroughbred industry sufficient for other participants in the industry to do its bidding in order to stay onside or curry favour with it is the hearsay statement he attributes to the valuer, Mr Clark. Mr Clark supposedly declined to assist Mr Jones further because of the importance of his maintaining a happy relationship with NZB Finance. Although it may be credible that other participants in the industry would wish to stay on side with NZB Finance, there is nothing in the extensive narratives deposed to by Mr Jones that could lay any foundation for a claim that the individuals and organisations referred to by Mr Jones would be prepared to expose themselves to civil or even criminal liability for conduct intended to harm his interests.

[113] As already mentioned, Mr Jones perceives the animosity towards him on the part of NZB Finance and interests aligned with it to derive from his acting for Mrs Twyname in 2004. Mr Jones ceased acting for Mrs Twyname before the substantive claims went to court and after he ceased acting, the claim was apparently settled. The CCA and the LTP were concluded some 12 and 13 years after Mr Jones supposedly caused offence over the nature of allegations he made against Mr Ellis.

On any view, his participation in Mrs Twyname's claim must by then have been old history.

[114] Mr Jones does not claim that he was pressured to seek finance from NZB Finance when he entered the CCA in 2016, or in 2017, when he entered the LTP. Nor is there any suggestion that NZB Finance would only deal with Mr Jones on terms less advantageous to him than those it offered in the ordinary course of financing thoroughbred horses. If any animosity towards Mr Jones still persisted in 2016, a rational reaction from NZB Finance would be to decline to deal with him. It is far-fetched and without any credible factual foundation to suggest that NZB Finance undertook money lending transactions with Mr Jones intending to cause harm to his interests, given a natural consequence of pursuing such a strategy would create the risk of their losing money.

[115] In any event, we are satisfied that the allegations made in Mr Jones' original affidavit and the additional points made in his subsequent affidavits regarding the conduct of NZB Finance, or those allied to it, inarguably fall short of the foundation that would be required to recognise the prospect of such a claim.

Other procedural issues

[116] On 19 May 2020 Mr Jones had made a separate application to either dismiss or stay the summary judgment application on the grounds that the summary judgment procedure was inappropriate because Mr Jones had alleged fraud against the plaintiff; there were genuine conflicts of evidence, some of which arose from the opinions of experts; and the application was oppressive and had been brought in bad faith.

[117] On 20 May Jagose J issued a minute declining to dismiss or stay the summary judgment application at that stage, and deferring determination of the application until "at or after the substantive hearing".[37] In that minute, the Judge also noted Mr Jones' contention that there was "a 'gap' caused by his inability to call his intended witnesses", being the witnesses Mr Jones had earlier applied to subpoena.[38] As noted

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37 20 May Minute, above n 2.
38 At [4], citing Evidence judgment, above n 11, at [11] and [19].

above, Peters J had adjourned Mr Jones' application for orders under r 9.75 of the High Court Rules to enable him to adduce evidence that he had requested the proposed witnesses to provide an affidavit, and that they had refused to do so.[39] By the time Jagose J issued his minute on 20 May 2020, Mr Jones contemplated subpoenas for Mr Clark in relation to the valuation of Woodpecker Hill, and Professor Ahern in relation to the treatment of the Reliable Man–Adalia colt. After Jagose J issued his minute, Mr Jones filed a further memorandum requesting clarification on the status of his applications to adduce viva voce evidence.

[118] Mr Jones then filed a further application for stay of the summary judgment application and adjournment of the hearing on 25 May 2020. There is no minute before us but it is clear that Jagose J determined that he would deal with the applications at the hearing. Both the 20 and 25 May 2020 applications were declined in Jagose J's judgment.[40] Mr Jones then separately sought leave to appeal against the 20 and 25 May 2020 decisions. That initiative was subsequently pursued by him in a separate appeal in this Court: CA538/2020.

[119] On 30 October 2020 Brown J issued a minute directing that all the challenges sought to be raised in CA538/2020 ought to be pursued in the current appeal which had been commenced by then.[41] Mr Jones did not comply with that minute, purporting to pursue the issues in CA538/2020 separately. After the Court gave him notice of its intention to consider striking out CA538/2020, and submissions had been received from Mr Jones opposing any striking out, the Court determined that it should indeed be struck out as an abuse of process.[42]

[120] Mr Jones included in his submissions in the present appeal criticisms of the decisions of Jagose J not to grant either a stay or adjournment of the summary judgment application, and for not granting orders for the hearing of viva voce evidence from witnesses Mr Jones sought to subpoena.

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39 Evidence judgment, above n 11, at [18].
40 Judgment granting summary judgment, above n 1, at [42].
41 *Jones v New Zealand Bloodstock Finance & Leasing Ltd* CA538/2020, 30 October 2020 (Minute of Brown J).
42 *Jones v New Zealand Bloodstock Finance & Leasing Ltd* [2021] NZCA 213.

[121] Mr Jones had sought leave to appeal the interlocutory rulings first, leaving for later, separate argument his challenge to the substantive reasoning in Jagose J's judgment granting summary judgment. He had failed to comply with the relevant provisions of the Court of Appeal (Civil) Rules 2005 as to the time for filing his case on appeal in the present appeal and for applying for a hearing date. He was granted an extension until June 2021 to take those steps. However, his attempt to separately appeal the interlocutory rulings was found not to be arguable.[43] In confirming the outcome the Court ruled:[44]

> CA538/2020 is struck out, bringing to an end Mr Jones's applications for leave to appeal the decisions of 20 and 25 May.

[122] Mr King submitted for NZB Finance that the Court should not consider Mr Jones' submissions challenging the separate interlocutory rulings, on the ground that the terms of the striking out of CA538/2020 had determined that they were not tenable. Mr Jones insisted in his oral submissions that he would not be afforded an adequate hearing unless the Court considered his challenges to those rulings because they adversely impacted on the adequacy of his opportunity to oppose summary judgment.

[123] The reasoning in this Court's decision striking out CA538/2020 must be understood in the context that the decision granting summary judgment against Mr Jones was to be the subject of an appeal which remained on foot because of the extension of time granted. It might be argued that the decision to strike out CA538/2020 was influenced to an extent by the adequacy of the opportunity Mr Jones would have to advance all arguments open to him on the present appeal. From an abundance of caution, we accordingly record our views on the arguments Mr Jones advanced against those interlocutory rulings.

[124] Granting leave to issue subpoenas and have viva voce evidence in the course of hearing an application for summary judgment is rare.[45] If the court is persuaded of factual disputes requiring such initiatives, then generally a defendant will have made

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43 At [37].
44 At [45(a)].
45 See generally *Legg v Shelf Number Nine Ltd* (1987) 1 PRNZ 191 (HC) and *Host Catering Ltd v Air New Zealand Ltd* (1989) 2 PRNZ 126 (HC).

out the proposition that the nature of the dispute is inappropriate for resolution at summary judgment.[46]

[125] It was open to Jagose J to defer determination of the application until he had heard argument on summary judgment and would be able to come to a better-informed view as to the justification for adjourning resolution of the application to allow viva voce evidence. It was also open to the Judge to reach the view that adjournment of the hearing to allow the prospect of viva voce evidence from Mr Clark and Professor Ahern was not warranted in the interests of justice. Assuming in Mr Jones' favour that Mr Clark adhered to his original valuation of Woodpecker Hill of $1,500, the vast discrepancy between the two valuations could not materially advance Mr Jones' claims of fraud by NZB Finance, beyond the terms that he had argued.

[126] The subject of Professor Ahern's opinion related to treatment of a horse where Mr Jones attributed conspiracy between those with care of the horse, and NZB Finance. There was no evidence that the care of the horse had been in any way directed by NZB Finance and that critical break in any allegation of responsibility by NZB Finance for its alleged mistreatment casts doubt on the possible relevance of an opinion proffered to the Court by the Professor.

[127] We are not persuaded that there was material error by the Judge in dealing with this aspect of Mr Jones' procedural initiatives as he did.

[128] As to the application for dismissal, stay or adjournment, the summary judgment application had been filed in September 2019 with Mr Jones filing documents in opposition to it sequentially from mid-November 2019 through until the week of the hearing in late May 2020. Irrespective of the complexity claimed by Mr Jones for the issues, and the difficulties he claims to have encountered in producing evidence because of NZB Finance's dominant position in the industry, he had been afforded a reasonable opportunity to prepare evidence in opposition to the application for summary judgment. The argument occurred some 14 months after demand had been made for repayment of commercial money lending advances. We can find no

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[46] See *Host Catering Ltd v Air New Zealand Ltd*, above n 45, at 127; and see *Westpac Banking Corporation v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [62].

error in the Judge's decision to proceed with the hearing, rejecting grounds for adjournment of it or stay or dismissal of the summary judgment application.

[129] We accordingly dismiss Mr Jones' appeal and uphold the judgment allowing summary judgment. We were advised by counsel that there have been issues in quantification of the judgment that NZB Finance has sought to seal. It is beyond the scope of the present appeal to express any view on that matter. Any disputes on matters of quantification are to be resolved in the High Court.

Costs

[130] At the conclusion of the hearing, Mr King did not press for indemnity costs if the appeal was unsuccessful. He acknowledged that the contractual provisions entitling NZB Finance to recover costs of enforcement of the contracts arguably did not extend to costs on any appeal.

[131] The terms of this judgment had been settled when on 25 July 2022 a memorandum addressing costs issues was filed on behalf of the respondent.[47] The memorandum sought indemnity costs on two bases: first pursuant to the contractual provisions of the loan documents, and secondly on account of Mr Jones' frivolous and vexatious conduct of the proceeding.

[132] It appears that this application may have been encouraged by a 23 June 2022 decision of Jagose J granting the respondent indemnity costs in respect of the High Court proceeding.[48]

[133] Consistently with Mr King's original indication, we do not consider the contractual provisions ought to apply to costs incurred in defending the summary judgment that NZB Finance was granted by the High Court. It is unnecessary to analyse in detail the different provisions included in the two contracts for recovery of costs incurred by the creditor/lessor in the event of default by the debtor/lessee. In this Court, NZB Finance was defending its entitlement to have summary judgment for the amounts outstanding under both contracts. It is entitled to the truncated procedure

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47 It had been foreshadowed in an informal email sent to the Registry on 23 June 2022.
48 *New Zealand Bloodstock Finance & Leasing Ltd v Jones* [2022] NZHC 1477.

involved in an application for summary judgment, and whilst Mr Jones has raised wide-ranging arguments all of which have been dismissed as untenable, we treat NZB Finance as a respondent in the usual position, entitled to a contribution only and not complete indemnification for the costs it has incurred in defending the judgment obtained from the High Court.

[134] As to the second ground seeking indemnity or increased costs, the memorandum cites a number of factors, including that the fraud and conspiracy claims were made without any evidential basis other than Mr Jones' own suspicions, that the appeal was filed multiple times, that the casebook took over a year to file and that there were multiple applications to adduce further evidence. In the end, Mr King acknowledges that the issues on the appeal were very simple, but he criticises Mr Jones for requiring a two-day hearing to canvass an array of irrelevant arguments.

[135] Confining our analysis to just these features of the present appeal, we are not persuaded that it was pursued in a frivolous or vexatious manner to an extent that justifies indemnity or increased costs. Another consequence of the point Mr King makes about the issues being simple is that the respondent's task was not unduly complicated. The focus on the obvious weaknesses in the appeal was sufficient to make out that it was untenable. We are not persuaded that an increased award of costs is justified.

[136] The respondent is entitled to costs for a standard appeal on a band A basis. Given the extent of Mr Osama's involvement in the argument, we grant an allowance for second counsel, together with usual disbursements which, if necessary, are to be settled by the Registrar.

Solicitors:
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