IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-1114
[2023] NZHC 200

UNDER	the Bills of Exchange Act 1908, Bank of New Zealand Act 1971, Bills of Rights Act 1908, and Fair Trading Act 1986
BETWEEN	TANYA FELICITY DUNSTAN Plaintiff
AND	BANK OF NEW ZEALAND First Defendant
AND	EDDIE (WHETŪ) RANGI Second Defendant

Hearing: 7 February 2022

Appearances: T F Dunstan – Plaintiff in person
L M Edginton for Defendants

Judgment: 16 February 2023

JUDGMENT OF ASSOCIATE JUDGE LESTER

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[1] The plaintiff, Ms Dunstan, is not a customer of the Bank of New Zealand (**BNZ**). Without prior notice, Ms Dunstan, posted to the BNZ a document called a "Promissory Note" in which Ms Dunstan promised to pay the home loan of customers of the BNZ, who I should refer to as "the trustees". The trustees are not a party to this proceeding.[1]

[2] Ms Dunstan does not claim to be acting with the authority of the trustees. The BNZ is not aware whether Ms Dunstan has any connection with the trustees and Ms Dunstan has not sought to provide any information in that regard.

[3] Ms Dunstan is a stranger to the debtor/creditor relationship between the BNZ and the trustees, in particular, she is not a guarantor of the trustees' debt.

[4] Ms Dunstan maintains that the Promissory Note she posted to the BNZ promising to pay the trustees' debt, was effective to meet the trustees' indebtedness to the BNZ. Ms Dunstan seeks by way of summary judgment the following orders:

> RELIEF SOUGHT:
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> 7. Confirmation from the BNZ bank the mortgage **[REDACTED]** is paid in total and no further costs will be incurred for this settlement.
>
> 8. Repayment of any interest of payments received regarding this mortgage since 24 April 2022 which have been fraudulently acquired from BNZ.
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> 9. Assurance the bank will not inflate costs or harass, intimidate or in any other way disadvantage myself, or the [Trust] for this resolution of matters, should they not be agreeable to the cessation of these matters I seek.

[5] The starting position in this case is that Ms Dunstan is not one of the debtors whose debt she says has been paid. I shall refer to Ms Dunstan as a voluntary intervenor when discussing the legal principles applying where a third party seeks to discharge a debt to which they are not a party.[2]

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1 The BNZ and Ms Dunstan sought that the customers' details be confidential given they have no involvement in this proceeding. On 27 September 2022 Justice Gault made a direction that the Court file not be searched without an order of a Judge.

2 The term "voluntary intervenor" comes from the article Peter Birks and Jack Beatson "Unrequested Payment of Another's Debt" (1976) 92 LQR 188, referred to in. RM Goode and Victoria Dixon *Goode on Payment Obligations in Commercial and Financial Transactions (*4th ed, Sweet & Maxwell, London, 2021) at 45.

[6] The basis of Ms Dunstan's claim against the BNZ is captured by the following proposition from her written submissions:

> The case before the court is that an instrument of payment was delivered and therefor[e] accepted by the bank – in accordance with the interpretation of the terms of the Bills of Exchange Act 1908 and reiterated in s 17 and s 21 of the Act. . … the promissory note served as a repayment of the mortgage.

[7] Along with opposing Ms Dunstan's application for summary judgment, the BNZ applies to strike out Ms Dunstan's claim and/or seeks summary judgment as a defendant against Ms Dunstan.

The nature of payment generally

[8] The following passage is from *Goode on Payment Obligations in Commercial and Financial Transactions (***Payment Obligations***)*:[3]

> Payment is a consensual act and thus requires the accord of both creditor and debtor. A tender which is not made in conformity with the contract between the parties is of no effect if rejected by the creditor but produces payment if accepted by him as a valid payment.

[9] As to what amounts to acceptance, the authors of *Payment Obligations* note:[4] "Mere receipt of a tender does not necessarily take effect immediately as an acceptance."

[10] Here, there is of course no contract between Ms Dunstan and the BNZ creating the debt she says she has paid, so no question of her payment being in conformity with a contract arises. Accordingly, it will be necessary for Ms Dunstan to establish the BNZ accepted payment by way of her Promissory Note. The BNZ, in support of its application, says it can show it never accepted payment from Ms Dunstan as a non-customer, nor by way of Promissory Note and therefore Ms Dunstan's case is fatally flawed.

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3 Goode and Dixon, above n 2, at 35.
4 At 41.

Payment by a voluntary intervenor

[11] Ms Dunstan, to obtain summary judgment on her application, has to demonstrate the BNZ has no defence to her claim. That means not only must she establish all the elements of her claim, but she must then fully rebut any defences raised by the BNZ. What then must Ms Dunstan prove to establish her claim?

[12] The following quote is from *Payment Obligations* concerning payments by a third party to a debt:[5]

> An *accepted tender* made not by the debtor personally but by a third party is effective as payment only if the person making the tender was under a duty to pay (e.g. as co-guarantor or surety) or had actual or ostensible authority from the debtor to do so or if the debtor later ratifies the payment, expressly or by implication. (Emphasis added)

[13] Only the third possibility from the above passage could apply in this situation. I have already noted that Ms Dunstan is not a guarantor, nor did she claim to be acting with the authority of the trustees. Ms Dunstan in fact asserted the BNZ, producing documents relating to the trustees, was a breach of the trustees' privacy which could not be the case if Ms Dunstan was the trustees' agent. The authors of *Payment Obligations* note that a voluntary intervenor who pays for a debt owed by another cannot change the relations of debtor and creditor against the wishes of the debtor.[6] A debtor is entitled to retain control over the discharge of his or her own indebtedness without such being satisfied by the intervention of a stranger.

[14] The law is that the trustees' debt to the BNZ will only be discharged in the case of payment by a voluntary intervenor where the BNZ has accepted the tender of payment *and* the trustees have adopted the payment.[7]

[15] Ms Dunstan must show:

(a) the BNZ agreed to accept payment of the debt from her and by way of a Promissory Note; *and*

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5 Goode and Dixon, above n 2, at 45; Birks and Beatson, above n 2.
6 Goode and Dixon, above n 2, at 46.
7 Birks and Beatson "Unrequested Payment of Another's Debt", above n 2, at 193.

(b) that the trustees adopted the payment.

[16] If Ms Dunstan cannot satisfy the elements listed at [15] above, then her claim must fail as those elements are essential to the relief she seeks.

[17] With regard to Ms Dunstan's application, there is no evidence that both trustees have adopted the purported payment. The absence of this critical element is fatal to Ms Dunstan's application.

[18] The high point in terms of the involvement of the trustees, is that one of the trustees witnessed Ms Dunstan's signature on the Promissory Note. Witnessing a document cannot be equated with acceptance of the contents of the document being witnessed. Trustees must act unanimously. There is no evidence that all trustees have adopted Ms Dunstan's purport of payment.

[19] No consensus was reached between the BNZ and Ms Dunstan that the BNZ would accept payment from her as a voluntary intervenor or by way of her Promissory Note. It will be recalled, as set out at [6] above, that Ms Dunstan's claim is based on the fact of delivery of her Promissory Note, not that the BNZ actually agreed to accept payment from her or by way of Promissory Note.

[20] Ms Dunstan must show there is no arguable defence to her claim.[8] For Ms Dunstan to succeed (leaving to one side all other issues), she would have to show that both trustees adopted her payment. In the absence of such evidence, I therefore *dismiss* Ms Dunstan's application for summary judgment. Further, Ms Dunstan is also unable to show that the BNZ accepted payment by way of Promissory Note. As discussed below, this would have been a further ground for dismissing her application.

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[8] Rule 12.2 of the High Court Rules 2016 provides that the Court may give summary judgment against the defendant if the plaintiff satisfied the Court that the defendant has no defence. The onus is on the plaintiff to satisfy the Court that the defendant has no defence. See *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).

The BNZ's applications to strike out or for summary judgment

[21] The BNZ's applications in part build on the deficiencies in Ms Dunstan's claim, which I have already outlined. The BNZ says that at no point did it agree to accept payment from Ms Dunstan at all or by Promissory Note.

The BNZ's application for summary judgment

[22] A defendant is entitled to summary judgment if it can demonstrate on the balance of probabilities the claim cannot succeed.[9] The Court may take a robust and realistic approach to the evidence, but it must also be fair. As in a plaintiff's application for summary judgment, the summary procedure is not appropriate to determine genuine factual disputes. The BNZ says here there is no factual dispute as Ms Dunstan does not assert the BNZ accepted her Promissory Note.

[23] The BNZ's strike out application relies on r 15.1 of the High Court Rules 2016 (**the Rules**), on the basis that the allegations Ms Dunstan makes in her statement of claim do not disclose a reasonable cause of action.[10]

[24] The threshold for a strike out is high. The Court is entitled to receive affidavit evidence on a strike out application and will do so on a proper case. Just as in a summary judgment application, in a strike out application the Court will not attempt to resolve genuinely disputed issues and will therefore limit evidence to that which is undisputed.

[25] The strike out application is made on similar grounds to the summary judgment application, that is, the absence of agreement by the BNZ to accept payment by way of Ms Dunstan's Promissory Note.

[26] Given that overlap, I will discuss both applications together. I do not see there being a material difference in the two applications in this case.

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9 High Court Rules 2016, r 12.2(2), *Westpac Banking Corporation v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [61].

10 High Court Rules, r 15.1.1.

Payment by Promissory Note requires acceptance by creditor

[27] A creditor is not required to accept a Promissory Note as payment of a debt unless it is akin to cash or the parties have agreed that payment can be made in that way.[11] The New Zealand Courts have consistently held that absent the recipient's agreement, Promissory Notes are generally not an accepted method of payment.[12] The exception are bank cheques which are Promissory Notes because a bank's promise to pay is treated as reliable.[13] I note here Ms Dunstan submitted the BNZ was being inconsistent in declining her Promissory Note when it issued its own bank cheques/Promissory Notes which are treated as legal tender. I see no inconsistency. Bank cheques, while technically Promissory Notes, are seen as so reliable that they are treated as akin to legal tender.[14]

[28] Ms Dunstan sought to distinguish some of the cases relied on by BNZ on the basis that in those cases the Promissory Note was tendered after a default by the debtor. Ms Dunstan submitted that here the trustees were not in default of their payment obligations to the BNZ. I do not accept this is a valid ground for distinguishing the above principles as the cases confirm a creditor has the right to choose whether to accept payment by Promissory Note (unless they have bound themselves to do so by their agreement with their debtor). A creditor does not lose that right because their debtor is not in breach of their agreement

Did the BNZ agree to accept payment from Ms Dunstan?

[29] As I have already noted, Ms Dunstan posted her Promissory Note to the BNZ without prior communication. The envelope with the Promissory Note was received by the BNZ on or about 2 May 2022. In the Promissory Note, Ms Dunstan promises to pay the BNZ as specified with the Promissory Note saying: "This is to be allocated to the existing account" for the trustees. The promise was to pay the specified amount

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11 *Bank of New Zealand v Donaldson* [2016] NZHC 1225 at [46].

12 *Dunstan v Riddell* [2021] NZCA 378 at [5] referring to *Commissioner of Inland Revenue v Meredith* [2015] NZHC 3030 at [16] *Bank of New Zealand v Donaldson*, above n 11; and *Marunui v Co-operative Bank Ltd* [2019] NZHC 765 at [11]-[12].

13 *Tyrees Banking Law in New Zealand* (3rd ed, 2013 Lexis Nexis at 7.8) and *Dunstan* [2021] NZCA 378 footnote 4.

14 *Otago Station Estates Ltd v Parker* [2005] NZSC 16, [2005] 2 NZLR 734 (SC).

by relatively small annual instalments over a period that would extend for hundreds of years.

[30] As already noted, payment is a consensual act, that is, it requires agreement. Assuming Ms Dunstan's communication with the BNZ was an offer to pay by her as a voluntary intervenor, the question becomes whether that offer was accepted (leaving to one side the form of the proposed payment by way of Promissory Note rather than by cash).

[31] Ms Dunstan's evidence is that she telephoned the BNZ to confirm receipt of the Promissory Note on 12 May 2022. Ms Dunstan reports that the operator she spoke to, told her that the letter could be sitting in a drawer somewhere ignored by the BNZ. Ms Dunstan does not claim she was told by the operator that her Promissory Note had been accepted. Even if the operator has said the Promissory Note was accepted, it is highly unlikely the operator would have had the authority to give that advice.[15]

[32] As a result of her telephone call, Ms Dunstan sent an email on 12 May 2022 to the BNZ's email address used to report scam email. Ms Dunstan's email prompted contact from Mr Rangi, the second defendant. Mr Rangi, in his email of 12 May 2022, asked Ms Dunstan to provide a telephone number. Ms Dunstan declined to provide a number in a further email on 12 May 2022 saying that given the telephone call she had had, she preferred communication to be by way of email.

[33] On 13 May 2022, Mr Rangi replied: "In regard to your Promissory note attached, this is not something that BNZ cannot accept." Despite the double negative, it is clear from the email as a whole that the Promissory Note was not being accepted. The email advised Ms Dunstan that if she wished to contribute to the home loan payments for the trustees, that was something for her to organise with them. This advice as to what Ms Dunstan would have to do if she wished to contribute to the trustees' mortgage payments would not have been necessary if the Promissory Note had been accepted. I find Mr Rangi's email was a rejection of payment by Ms Dunstan and of payment by Promissory Note.

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15 *Guy v BNZ* [2013] NZHC 836 at [6].

[34] Ms Dunstan then wrote to Mr Rangi in a letter of 16 May 2022 and said:

> Please be advised in accordance with the bills of exchange act 1908 I have made a payment via legal tender for the amount of $399,740.98 to your bank dated 21 April 2022.
>
> In accordance with legislation, delivery is acceptance and I can not see any section of the Bills of exchange act 1908 that allows any bank to refuse the acceptance and allocation of legal tender to any debt held by the bank.
>
> If your bank is formally refusing to accept and allocate this payment in accordance with legislation, please immediately return this payment to:

[35] The last paragraph of Ms Dunstan's email shows she understood Mr Rangi's 13 May 2022 email was a refusal to accept payment. Further, it is clear from Ms Dunstan's own pleading that she understood Mr Rangi did not accept her Promissory Note as she pleads: "Whetu stated the bank would not accept the promissory note and mailed the original back to me."

[36] On 19 May 2022, Mr Rangi wrote to Ms Dunstan advising that as requested, the original Promissory Note had been posted back to the address provided by Ms Dunstan.

[37] The evidence is clear that at no point did the BNZ agree to accept payment from Ms Dunstan for the debt owed by the trustees.

[38] Ms Dunstan may have argued that between 2 May 2022 when the letter was received and her telephone call of 12 May 2022, the BNZ did nothing to communicate with her. However, the Promissory Note was not accompanied by a covering letter providing contact details for Ms Dunstan. No contact details for Ms Dunstan are provided on the Promissory Note. The BNZ had no way of responding to the Promissory Note until Ms Dunstan made her follow-up contact. As soon as contact occurred, the BNZ promptly advised Ms Dunstan it was not accepting payment by her in respect of the trustees' debt.

[39] The flaw in Ms Dunstan's case is that she equates the posting of her Promissory Note to the BNZ and its delivery to the BNZ, with the acceptance by the BNZ of the Promissory Note. Ms Dunstan relies on the idea of "delivery" under s 21 of the Bills of Exchange Act 1908. However the act of delivery, that is, of posting the Promissory

Note to the BNZ, cannot without more, bind the BNZ to accept the terms of the Promissory Note, yet Ms Dunstan's claim is founded on that proposition.

[40] A creditor must firstly agree to accept payment from a voluntary intervenor which will no doubt involve assessment of the proposed means of payment: A creditor has the option of whether to accept a Promissory Note.[16]

> … a creditor is not required to accept a promissory note or a bill of exchange as payment of a debt unless the bill of exchange or cheque is akin to cash, or the parties have agreed that payment can be made in that way.

[41] Here, the BNZ did not accept payment from Ms Dunstan as a voluntary intervenor, nor payment by way of a Promissory Note. Ms Dunstan sought to argue that the BNZ had no reason to not accept her Promissory Note given it knew nothing about her financial position and to not accept the Promissory Note involved an element of discrimination. Whatever, Ms Dunstan's means are, the BNZ was not obliged to accept her Promissory Note. In any event, aspects of the Promissory Note, independently of any question of means, would provide a basis for it being rejected. For example, payment was by annual instalments and to obtain payment the BNZ had to attend an address in Australia on the annual payment date.

[42] Ms Dunstan cannot build her case simply on having posted the Promissory Note to the BNZ. She has to point to the BNZ accepting payment from her as a voluntary intervenor *and* by way of Promissory Note. The BNZ's silence between 2 May 2022 and 12 May 2022 does not amount to acceptance and in any event, Ms Dunstan could not rely on the BNZ not contacting her when she, as a non-customer, had not provided any means for the BNZ to contact her.

Conclusion

[43] I am satisfied that Ms Dunstan's cause of action is without merit and should be struck out. On her own case, she does not assert that the BNZ agreed to accept payment from her or by way of Promissory Note. Ms Dunstan's position is, as I have said, based solely on the notion that delivery, that is, the act of posting the

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16 *Bank of New Zealand v Donaldson*, above n 11 at [46].

Promissory Note to the BNZ and the assertion that it was received means the Promissory Note had been "accepted".

[44] The idea that the BNZ became committed to accept Ms Dunstan's promise to pay (whatever its terms) simply through the act of Ms Dunstan posting her Promissory Note to the BNZ without more, is untenable. Ms Dunstan's proceeding cannot be salvaged.

[45] Ms Dunstan's proceeding is struck out as her claim is fatally flawed.

Ms Dunstan's further application

[46] On 11 October 2022, Ms Dunstan filed a without notice application seeking damages in respect of what she considered to be breaches of privacy by the BNZ in respect of its customers. She claimed that the BNZ had breached the customers' privacy by filing documents relating to that customer in this proceeding.

[47] Gault J directed on 1 November 2022 that the amended application be dealt with on notice.

[48] I do not accept there was any such breach. The BNZ has been careful to take steps to protect the privacy of its customers. The material filed by the BNZ had significant redactions. The mortgage registered against the trustees' property is a searchable document.

[49] As Mr Edginton, counsel for the defendants, points out, any allegation of a breach of privacy would have to be raised by the BNZ's customers and is not actionable by Ms Dunstan.

[50] Ms Dunstan's amended application then claims that the BNZ harassed its customers following the issuing of these proceedings. I do not accept that submission. In material informally produced by Ms Dunstan, is a letter from the trustees' solicitor to the trustees, recommending compliance with the BNZ's requests for information. This confirms that the information sought by the BNZ was a standard request for information for anti-money laundering legislation compliance. I am unable to find

any harassment in this material and again, in any event, it would be a matter for the customers to raise with the BNZ.

[51] The BNZ's response to this proceeding cannot be categorised as an abuse of process, harassment of its customers or an attack on Ms Dunstan's character.

[52] For the avoidance of doubt, the further relief sought by Ms Dunstan in her amended application is *declined*.

Costs

[53] The BNZ is entitled to costs being the successful party. Counsel sought to make submissions on costs. Any submissions on costs are to be filed within 10 working days (not more than five pages). If no costs submissions are filed by the BNZ then the order of the Court is that the BNZ is entitled to costs on a 2B basis plus disbursements as fixed by the Registrar. If the BNZ does file costs submissions, Ms Dunstan is to apply within a further 10 working days and I will then deal with costs on the papers.

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Associate Judge Lester

Solicitors:
Ms Dunstan – Plaintiff in person
Buddle Findlay (for First and Second Defendant)