IN THE COURT OF APPEAL OF NEW ZEALAND

CA263/2013
[2014] NZCA 537

BETWEEN	ZANE JOSEPH GARDINER Appellant
AND	WESTPAC NEW ZEALAND LIMITED Respondent

CA264/2013

AND BETWEEN	DENNIS JOSEPH GARDINER First Appellant
	HUTIA MONICA GARDINER Second Appellant
AND	WESTPAC NEW ZEALAND LIMITED Respondent

Hearing:	30 July 2014
Court:	Miller, Lang and Clifford JJ
Counsel:	G A Paine for Appellant in CA263/2013 G N Cruden and L W Goodman for Appellants in CA264/2013 B J Upton and P V Shackleton for Respondent
Judgment:	7 November 2014 at 3.00 pm

JUDGMENT OF THE COURT

A The appeals are dismissed.

B Zane Gardiner must pay the respondent indemnity costs in respect of his appeal.

C We make no order as to costs against the appellants in CA264/2013.

REASONS OF THE COURT

(Given by Lang J)

[1] Mr and Mrs Gardiner and their son Zane Gardiner signed guarantees in respect of advances made by Westpac New Zealand Ltd (Westpac) to their company, Gardost Properties Ltd (Gardost). Westpac subsequently required them to honour their guarantees after Gardost defaulted on its obligations to the Bank. When they failed to do so, Westpac realised the securities that it held and then applied for summary judgment against the guarantors in respect of the resulting shortfall.

[2] Westpac initially obtained summary judgment against Mr and Mrs Gardiner by default, because they took no steps to defend Westpac's application for summary judgment. Westpac then issued bankruptcy proceedings against them, and these proceeded to the stage where the High Court was required to determine whether Mr and Mrs Gardiner should be adjudicated bankrupt. Mr and Mrs Gardiner opposed the bankruptcy proceedings, and also applied for orders setting aside both the default judgments and the bankruptcy notices that Westpac had obtained based on the judgments.

[3] Zane Gardiner defended Westpac's application for summary judgment, and the Court was therefore required to determine whether he had an arguable defence to Westpac's claim. All of these issues were the subject of a single hearing before Associate Judge Abbott.

[4] All three appellants argued that they were not liable to Westpac under their guarantees. They contended that Westpac failed to meet obligations it owed to them at the time they gave the guarantees, and that the guarantees are unenforceable as a result. In addition, they argued that Westpac had exercised its powers of sale as mortgagee in a manner that breached obligations Westpac owed to them as guarantors.

[5] In a judgment delivered on 8 April 2013, Associate Judge Abbott found in Westpac's favour in respect of all of these issues.[1] As a consequence, he dismissed

---

1 *Westpac New Zealand Ltd v Gardiner* [2013] NZHC 683, (2013) NZCPR 456.

the applications by Mr and Mrs Gardiner for orders setting aside the default judgments and the bankruptcy notices based on those judgments. The Associate Judge then made orders adjudicating Mr and Mrs Gardiner bankrupt. He also entered summary judgment in favour of Westpac against Zane Gardiner in the sum of $238,397.34.[2]

[6] The appellants appeal against all of the orders that the Associate Judge made.[3]

Background

[7] The appellants' predicament has arisen because, together with Zane Gardiner's then partner Ms Shelly Osten, they decided to acquire a 16.6 hectare rural property situated at 41 County Heights Drive, Palmerston North (the Property). The Property comprised three to four hectares of paddocks. The balance of the land was planted in pine forest. There were no buildings of any consequence on the Property.

[8] Gardost was incorporated on 19 July 2007 for the express purpose of acquiring the Property. Zane Gardiner was Gardost's sole director. He and Shelly each owned 25 per cent of the shares in the company, as did Mr and Mrs Gardiner.

[9] Gardost purchased the Property for $490,000 plus GST. Westpac agreed to advance Gardost the sum of $404,000 to enable it to complete the purchase. It also agreed to provide further loans to Gardost that effectively refinanced loans the bank had earlier made to Zane and Shelly. They in turn transferred one of their existing properties into Gardost's name. Mrs Gardiner also had an existing loan with Westpac secured over her residential property.

[10] Westpac and Gardost entered into four loan agreements on 31 October 2007. These recorded the terms of four separate loans, all of which were repayable by Gardost. Gardost provided the bank with security in the form of a mortgage over the

---

2 By the time the proceeding came before the Associate Judge, Westpac had settled a claim that it had also made against Zane Gardiner's former partner, Ms Shelly Osten.

3 Two appeals were filed, one by Mr and Mrs Gardiner and another by Zane, and the two sets of appellants were represented before us separately. However, it is convenient to deal with the two appeals together as they raise broadly similar issues.

Property, and the four shareholders provided the bank with guarantees in respect of Gardost's indebtedness.

[11] By that stage Zane had gone overseas indefinitely to pursue a career as a professional rugby player. He has not yet returned to New Zealand. Before his departure on 28 July 2007, Zane had been employed as a lawyer by Tararua Law. All parties instructed that law firm to act on their behalf in relation to the acquisition and financing of the Property. Zane and Shelly appointed a lawyer at Tararua Law to act as their attorney in relation to all aspects of the transaction, and that person exercised the power of attorney to sign the loan agreements and security documentation on their behalf.

[12] By June 2008, three of the loans had been repaid. Gardost's only remaining liabilities to the bank at that stage were the loan that Westpac had made to enable Gardost to acquire the Property, together with a current account through which Gardost made interest payments.

[13] Gardost defaulted on its obligations to Westpac in April 2010, when its current account went into unauthorised overdraft. Westpac made demand of Gardost on 20 April 2010 requiring it to bring its overdraft back within agreed limits. It then made demand on the guarantors when Gardost failed to do so. After the guarantors failed to comply with the notices of demand, Westpac served notices on them and Gardost under ss 119 and 122 of the Property Law Act 2007. When these expired unremedied, Westpac exercised its power of sale as mortgagee to sell the Property.

[14] In or about April 2010, Mrs Gardiner also defaulted on her separate obligations to Westpac. When she failed to remedy that default, Westpac proceeded to sell her residential property, over which it also held a mortgage. The net proceeds of sale of that property allowed Mrs Gardiner's personal borrowings from Westpac to be repaid, and it also cleared Gardost's current account indebtedness. Westpac credited the balance thereafter remaining to Gardost's loan account.

[15] The Property was marketed for auction by Professionals, a firm of real estate agents. There were no bids at the auction, and the Property was passed in. Westpac

subsequently sold the Property for $181,000 to Mr Peter Read, the real estate agent who had earlier been responsible for marketing the Property for sale by auction. Westpac applied the net proceeds of sale to the sum then owing under Gardost's remaining loan, leaving a shortfall of $238,397.34. This is the amount for which Westpac obtained judgment against all three appellants in the High Court.

Grounds of appeal

[16] Mr and Mrs Gardiner advance several grounds of appeal. They can be summarised as follows:

(a) The guarantees are invalid because they gave them whilst they were subject to undue influence by their son Zane, and the Associate Judge found that Westpac was arguably on notice as to that fact.

(b) Westpac breached a duty of care it owed to the appellants not to loan monies to Gardost in circumstances where Westpac knew that the lending was imprudent.

(c) Westpac breached obligations that it owed to the appellants under the New Zealand Bankers Association Code of Banking Practice 2007.

(d) Westpac breached its statutory obligations to the guarantors because it sold the Property for less than its market value;

(e) Westpac breached its statutory and common law obligations to the guarantors by selling that property to the real estate agent who had earlier marketed the Property for sale.

(f) Westpac acted oppressively and unconscionably in requiring Mrs Gardiner to give a guarantee that placed her home at risk in the event that she could not repay Gardost's indebtedness.

[17] Zane Gardiner appeals against the Associate Judge's decision on the same grounds as his parents, although he does not rely upon undue influence. Nor does he deny bringing undue influence to bear on his parents.

Undue influence

The Associate Judge's decision

[18] As the Associate Judge observed, a guarantee executed under the influence of a borrower may not be enforceable by the lender.[4] The principles underpinning the doctrine of undue influence apply to conduct within a relationship that justifies the conclusion that the party seeking to establish undue influence did not enter into a contract of his or her own free will.[5]

[19] The Associate Judge noted that in some relationships undue influence may be presumed. These include contracts between solicitor and client. In other cases, including those involving contractual arrangements between parents and their children, it will be a question of fact as to whether one party entered into a contract under the undue influence of another. The party who claims to have been subject of the undue influence bears the burden of proving it. The nature of the evidence required to prove the allegation will depend on the circumstances of the case, but may include the nature of the relationship between the parties, their respective personalities, and the extent to which the transaction cannot be readily explained by the motives of ordinary persons in such a relationship.[6]

[20] The Associate Judge held that the Gardiners had established, albeit "by the narrowest of margins", that their relationship with Zane was arguably of a type that may have left them vulnerable to undue influence by him.[7] He also found that the Gardiners may not have known that they were providing guarantees in respect of all of Gardost's loans from the bank, including those that had formerly been owed by Zane and Shelly. These factors persuaded the Associate Judge that there was a "weak but arguable" basis to hold that the Gardiners were in fact subject to undue

---

4 *Gardiner*, above n 1, at [53].
5 *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157 (CA) at 165.
6 *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 at [13].
7 *Gardiner*, above n 1, at [63].

influence by Zane when they signed their guarantees.[8] Although we consider both conclusions were generous to Mr and Mrs Gardiner, Westpac has not contested this aspect of the Associate Judge's decision. We therefore proceed on the same basis as the Associate Judge in relation to these issues.

[21] Notwithstanding these conclusions, the Associate Judge was not persuaded that the circumstances of the case were sufficient to put Westpac on inquiry.[9] He considered there was an obvious commercial explanation for the Gardiners' decision to provide guarantees in respect of Gardost's indebtedness to the bank. This was that the acquisition of the Property was "a joint commercial venture in respect of which all defendants were to benefit equally, and to which each was applying personal assets".[10]

[22] The Associate Judge also found that Westpac was entitled to rely upon certificates given by the solicitors who had acted for Mr and Mrs Gardiner when they signed their guarantees.

The argument on appeal

[23] Counsel for Mr and Mrs Gardiner focussed on the nature of the overall arrangement. He contended that the Associate Judge was wrong to conclude that the loans Gardost obtained from Westpac formed part of a joint commercial transaction in which all parties were to benefit equally.[11] Rather, he argued that the principal beneficiaries of the proposal were Zane and Shelly, who were thereby able to restructure their indebtedness and obtain a site upon which to build a family home. Mr and Mrs Gardiner, on the other hand, increased their indebtedness to the bank in circumstances where there was no certainty that they would be able to subsequently live on the Property themselves. He also submitted that this was clearly a family transaction, and that it had no commercial element.

[24] Counsel for Mr and Mrs Gardiner contended that the circumstances were such as to place Westpac on inquiry. He invited the Court to apply the principles

---

8 At [65].
9 At [67].
10 At [68].
11 *Gardiner*, above n 1, at [68].

enunciated by the House of Lords in *Barclays Bank Plc v O'Brien*[12] and *Royal Bank of Scotland Plc v Etridge (No 2)*.[13] Those cases involved claims against wives who had signed guarantees in respect of loans obtained by their husbands for business purposes. In that context the House of Lords drew a distinction between loans made to parties jointly, and those that are made for the purposes of one of the borrowers or guarantors rather than for their joint benefit.[14]

[25] Given the fact that Westpac was making a non-commercial loan that was effectively for the sole benefit of Zane and Shelly, counsel for Mr and Mrs Gardiner submitted that in dealing with his clients Westpac was subject to the obligations identified by Lord Nicholls in the following passage in *Etridge*:[15]

> Since the bank is looking for its protection to legal advice given to the wife by a solicitor who, in this respect, is acting solely for her, I consider the bank should take steps to check *directly with the wife* the name of the solicitor she wishes to act for her. To this end, in future the bank should communicate directly with the wife, informing her that for its own protection it will require written confirmation from a solicitor, acting for her, to the effect that the solicitor has fully explained to her the nature of the documents and the practical implications they will have for her. She should be told that the purpose of this requirement is that thereafter she should not be able to dispute she is legally bound by the documents once she has signed them. She should be asked to nominate a solicitor whom she is willing to instruct to advise her, separately from her husband, and act for her in giving the necessary confirmation to the bank. She should be told that, if she wishes, the solicitor may be the same solicitor as is acting for her husband in the transaction. If a solicitor is already acting for the husband and the wife, she should be asked whether she would prefer that a different solicitor should act for her regarding the bank's requirement for confirmation from a solicitor.
>
> The bank should not proceed with the transaction until it has received an appropriate response directly from the wife.

[26] Counsel for Mr and Mrs Gardiner pointed out that Westpac did not follow this procedure in dealing with Mr and Mrs Gardiner. Instead, it instructed Zane's solicitors to act on its behalf and also on behalf of Gardost and all four guarantors in relation to the transaction. As a consequence, the process was flawed from the outset, and Mr and Mrs Gardiner did not receive adequate legal advice in relation to the nature and effect of the guarantees they were being asked to provide. They say,

---

12 *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 (HL).
13 *Etridge*, above n 6.
14 *Etridge*, above n 6, at [49].
15 At [79](1) (emphasis in original).

for example, that they did not appreciate that they were providing their home as security for all of the advances that Westpac made. Westpac had therefore failed to properly insulate itself from the undue influence that Zane Gardiner had brought to bear on his parents to provide their guarantees. For that reason counsel for Mr and Mrs Gardiner submitted that the Court should declare the guarantees to be unenforceable.

Analysis

[27] As we have observed, Westpac has not appealed against the Associate Judge's finding that that Mr and Mrs Gardiner were arguably subject to undue influence by Zane. This means that our decision turns on whether Westpac was placed on inquiry, and if so whether it took sufficient steps to insulate itself from the consequences of Zane's undue influence.[16]

When is a creditor put on inquiry?

[28] The test as to when a bank will be put on inquiry in this context has been described in a number of ways.

[29] In *O'Brien,* Lord Browne-Wilkinson considered that a creditor would be put on inquiry when a wife offered to stand surety for her husband's debts.[17] In relation to other relationships his Lordship held that "where the creditor is aware that the surety reposes trust and confidence in the principal debtor in relation to his financial affairs, the creditor is put on inquiry".[18]

[30] A Full Court of this Court considered this approach in *Wilkinson v ASB Bank Ltd.*[19] That case involved a guarantee given by an elderly woman in support of a loan advanced to her husband in respect of his business. Blanchard J observed that a creditor will be put on inquiry when the creditor is aware of facts giving rise to a presumption of undue influence.[20] Undue influence is likely to be presumed if the guarantor has limited commercial ability, has a minimal financial stake in the

---

16 *Hogan v Commercial Factors Ltd* [2006] 3 NZLR 618 (CA) at [13].
17 *O'Brien,* above n 12, at 196.
18 At 198.
19 *Wilkinson v ASB Bank Ltd* [1998] 1 NZLR 674 (CA).
20 At 690.

enterprise guaranteed and is in a relationship involving an emotional tie or dependency on the part of the guarantor towards the principal debtor.[21] The Court also observed that the jurisprudential basis of *O'Brien* remained uncertain.[22]

[31] The House of Lords decided *Etridge* after this Court delivered its decision in *Wilkinson*. In *Etridge,* their Lordships considered eight consolidated appeals, all involving situations where a wife had provided security for her husband's indebtedness or the indebtedness of a company through which the husband carried on business. The decision extended the circumstances in which a financier will be put on inquiry to situations where the relationship between the debtor and the guarantor is "non-commercial".[23] This test also extended to situations where a wife provided a guarantee in respect of the debts of a company in which both the husband and the wife held shares.[24] However, it did not extend to the situation where the creditor was making a joint advance to both husband and wife.[25]

[32] In *Hogan*, this Court addressed the observations made in *Etridge* as to when a creditor will be put on inquiry.[26] The Court observed that the approach taken in *Etridge* was "by no means the same" as that taken in *O'Brien*, which had "largely" been applied by this Court in *Wilkinson.*[27] The Court went on to note that the primary focus in both *O'Brien* and *Etridge* had been on situations in which married women had acted as sureties for their husbands. As a matter of logic, however, the benefit of the regime could not be confined to those persons who were in sexual relationships with principal debtors. For that reason *Etridge* had extended the regime to all "non-commercial" cases.[28]

[33] The Court in *Hogan* was not ultimately required to consider this issue in any greater detail, because it considered the transaction in question to be commercial in every sense. As a consequence, even adopting the *Etridge* approach, the financier

---

21 At 690–691.
22 At 689.
23 *Etridge*, above n 6, at [87]–[89].
24 At [49].
25 At [48].
26 *Hogan*, above n 16.
27 At [42].
28 At [43].

had not been put on inquiry.[29] The Court observed, however, that "those seeking guarantees would be well advised to allow for the possibility that the approach taken by Lord Nicholls will be applied in New Zealand and to act accordingly".[30]

[34] The current position is therefore that, as this Court recognised in *Hogan*,[31] there may be a difference between the approaches taken in *Wilkinson* and *Etridge* as to when a creditor will be put on inquiry. Under *Wilkinson*, a financier will be put on inquiry when it has knowledge of facts leading to a presumption of undue influence. Under the approach taken in *Etridge*, that will occur when the relationship between the principal debtor and the guarantor is non-commercial. To the limited extent that this Court considered the issue in *Hogan*, it appears to have favoured the *Etridge* approach.

What steps should a creditor take after being put on inquiry?

[35] In *O'Brien*, Lord Browne-Wilkinson indicated that a creditor could insulate itself:[32]

> if it insists that the wife attend a private meeting (in the absence of the husband) with a representative of the creditor at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice.

[36] His Lordship went on to say that if the creditor has knowledge of further facts giving rise to a stronger probability of undue influence, then the creditor may need to insist that the wife is separately advised.[33]

[37] In *Wilkinson*, this Court attempted to provide guidance to financiers in New Zealand as to how they could best protect themselves when seeking to obtain a guarantee from a party in circumstances where a claim based on undue influence might subsequently arise.[34] The Court emphasised, however, that each case would turn on its own facts, and that the Court's observations were not to be read as rules to be followed in every case.

---

29 *Hogan*, above n 16, at [57].
30 At [45].
31 At [42].
32 *O'Brien,* above n 12, at 196.
33 At 197.
34 *Wilkinson,* above n 19, at 690.

[38] The Court observed that it will be prudent for a financier to insist that the guarantor be given advice by an independent solicitor, and to obtain from that solicitor a certificate that the effect and implications of the documents have been explained to the guarantor and that the guarantor appears to have understood the explanation.[35]

[39] The Court also observed that it cannot be assumed that a solicitor loses the ability to function independently in advising a guarantor where the solicitor also has some involvement with the principal debtor. Depending on the circumstances, a solicitor in that position may be in a better position than a stranger to give balanced advice and to assess whether its significance has been appreciated by the guarantor.[36] Where the guarantor declines to obtain independent advice, a prudent financier will endeavour to ensure that somebody (and preferably a solicitor) explains the documents and their consequences. Furthermore, while it is prudent for a financier to insist that the guarantor is advised by a solicitor who is not acting for another party to the transaction, it is not for the financier to tell a solicitor how to perform his or her duties or to inquire about the solicitor's independence or the adequacy of the advice.[37]

[40] In *Etridge*, Lord Nicholls noted that current banking practice in the United Kingdom did not reflect the procedure suggested in *O'Brien* under which a financier would provide the wife with advice in the absence of the husband.[38] Instead, banks had continued to rely upon advising the wife to seek independent legal advice. Lord Nicholls did not consider this to be unreasonable, and accepted there may be valid reasons why a financier might be reluctant to hold a personal meeting with a guarantor.[39] His Lordship then set out, in the passage cited above at [25], the steps that a creditor should take to insulate itself from any undue influence when it chose to rely on a solicitor to advise the wife.

---

35 At 691.
36 At 694.
37 At 692.
38 *Etridge,* above n 6, at [51].
39 At [55].

[41] In summary, his Lordship observed that the bank should obtain directly from the wife the name of the solicitor whom she wishes to act for her. This could be the solicitor who is also acting for the bank or the husband. Once this confirmation was obtained, the bank should send the nominated solicitor all of the financial information he or she would need to advise the wife. If the bank had reason to believe that the wife was subject to undue influence by her husband, or was not entering into the transaction of her own free will, the bank should inform the solicitor of the reasons for this belief. Finally, the bank should obtain written confirmation from the solicitor to the effect that this advice had been provided.[40]

[42] Lord Nicholls also provided detailed guidance as to the nature of the advice that the solicitor should provide. He suggested that solicitors should:[41]

(a) explain the nature of the documents and the practical consequences of them;

(b) point out the seriousness of the risks involved;

(c) state clearly that the wife has a choice and that the decision is hers alone; and

(d) check whether the wife wishes to proceed.

[43] The procedure suggested by Lord Nicholls in *Etridge* has not yet been expressly adopted in New Zealand. In *Hogan*, this Court expressed the view that it was "likely" that the principles enunciated in *Etridge* would be applied in New Zealand, at least in banking cases.[42] The Court considered, however, that a final decision should be left for a case in which the issue arose more clearly, and where the Court had the benefit of full information as to industry practice.[43]

---

40 *Etridge*, above n 6, at [79].
41 At [65].
42 *Hogan*, above n 16, at [50].
43 At [50].

The present case

[44] We do not consider it necessary in the present case to finally determine whether the principles enunciated in *Etridge* should be applied in New Zealand. Even proceeding on the basis that this was a family transaction with no commercial element, we consider that Westpac took sufficient steps to insulate itself from the possibility that Mr and Mrs Gardiner may have acted under the undue influence of their son when they agreed to provide guarantees in respect of Gardost's indebtedness. We also record that this is not a situation where one or more members of a family agreed to guarantee the indebtedness of other members of the family when they were not deriving any benefit themselves from the transaction. The appellants all participated fully in the acquisition of the Property, and agreed to provide guarantees in respect of Gardost's indebtedness in the expectation that they would derive benefits from it.

[45] As sometimes happens in New Zealand, Westpac did not at any stage deal with the guarantors directly. Rather, it received the loan application from a mortgage broker engaged by all four guarantors. This contained detailed commentary about the proposal and the means by which the parties proposed to fund it. Once it approved the loans, Westpac dealt solely with Tararua Law, the solicitors who acted for all parties in relation to the transaction.

[46] Westpac instructed Tararua Law to act for it in arranging execution of all documents, including the loan agreements and securities. In doing so, Westpac instructed Tararua Law to explain to each guarantor the meaning and effect of all documents that they were to sign.

[47] In addition, and as the Associate Judge pointed out, the opening paragraph of Westpac's letter of instructions advised Tararua Law that the letter was to be read in conjunction with Westpac's general instructions for solicitors acting on its behalf in such situations.[44] These required solicitors to ensure that every guarantor had a full understanding of the obligations being undertaken, and to advise guarantors to seek independent advice before signing any guarantee. In the event that a guarantor did

---

[44] *Gardiner*, above n 1, at [73].

not wish to take such advice, the solicitor was to ensure that the guarantor signed a waiver to that effect.

[48] Once the guarantors had signed the documents, Tararua Law returned them to Westpac along with a solicitor's certificate. Clause 8 of this certificate advised Westpac that all guarantees had been signed in accordance with the instructions and notes provided by Westpac in relation to the completion of guarantees. We also consider that Westpac was entitled to rely upon this certificate as providing confirmation that Tararua Law had carried out Westpac's instructions in relation to the execution of the guarantees. We therefore consider that the steps Westpac took in the present case were sufficient to ensure that it met its obligations to ensure the guarantors understood the nature and effect of their guarantees.

[49] For completeness we also record that counsel for Mr and Mrs Gardiner submitted that Westpac could not rely upon the solicitor's certificate so far as Mrs Gardiner was concerned. This submission was based on the fact that the guarantee Mrs Gardiner signed does not have a corresponding solicitor's certificate confirming that the solicitor who witnessed her signature explained the nature and effect of the document to her before she signed it. In order to understand this submission, and our conclusion in relation to it, it is necessary to outline what appears to have happened when Mrs Gardiner signed the guarantee.

[50] The last five pages of the guarantee document ("the signature pages") contained separate sections in which each guarantor was to sign the document. Four of the signature pages contained spaces for the signatures of individual guarantors, whilst the remaining page was to be used in the case of corporate guarantors. The signature of each individual guarantor was to be witnessed by a solicitor, who was then required to complete a section headed "Individual Guarantor's Solicitor's Certificate". This confirmed inter alia that the solicitor had explained the nature and effect of the guarantee to the guarantor before he or she signed the document.

[51] The first of the signature pages in the present case contains the signature of the attorney who signed the guarantee on behalf of Zane and Shelly. In each case the solicitor who witnessed the attorney's signatures has duly completed the solicitor's

certificate. The next four pages, however, have a line through them drawn in blue ink. The person who put the line through these pages evidently recognised that he or she had done so in error, because the blue line through the second page has largely been erased using white correction fluid. That page contains Mr Gardiner's signature, and also the solicitor's certificate relating to the advice given to him before he signed the document. The third page contains provision for the signatures of corporate guarantors, and remains appropriately crossed out. Mrs Gardiner should therefore have signed the guarantee on the fourth page, which contains further sections for individual guarantors to sign. Unfortunately, however, she did not. The last two pages of the guarantee document remain crossed out.

[52] Mrs Gardiner ultimately signed the guarantee immediately below the section on the second page that contained her husband's signature. Her signature was witnessed by the solicitor who had witnessed the other three signatures and completed the solicitor's certificates in respect of those guarantors. Because that page of the guarantee did not have provision for a second solicitor's certificate, no such certificate was ever completed by the solicitor who witnessed Mrs Gardiner's signature.

[53] We consider it highly probable that the failure to complete a solicitor's certificate in respect of Mrs Gardiner in the guarantee document has been caused by simple human error, and we took Mrs Gardiner's counsel to accept that this was so during the hearing in this Court. The fact remains that the same solicitor witnessed all four signatures and provided solicitor's certificates in respect of the other three guarantors. This persuades us that the risk of Mrs Gardiner not receiving the same advice as the remaining three guarantors is slim. Nor do we consider that the absence within the guarantee document of any solicitor's certificate in respect of Mrs Gardiner meant that Westpac was placed on notice of possible deficiencies in the legal advice she received before she signed the guarantee. We therefore do not accept that this issue calls into question Westpac's ability to rely upon the solicitor's certificate it received from Tararua Law.

[54] There is an added dimension to the present case that we consider to be important when assessing whether Mr and Mrs Gardiner agreed to provide

guarantees with full knowledge of the potential consequences of doing so. It now transpires that when they signed their guarantees each guarantor also signed a document headed "Certificate and Acknowledgement and Confirmation by Guarantor". The document was evidently prepared by Tararua Law of its own initiative, possibly in order to rebut claims such as those now made in the present case. It appears that Westpac did not receive a copy of this document at the time of the transaction, and only became aware of it after Zane Gardiner annexed a copy of it to an affidavit filed in opposition to Wetspac's application for summary judgment. The appellants have not waived privilege so as to permit the solicitor who dealt with them at Tararua Law to give evidence regarding the nature of the advice the appellants received when they gave their guarantees.

[55] This document is addressed to Tararua Law, and was signed by all four guarantors. In the document the appellants confirm the following matters:[45]

> **11. Instructions**
>
> 3.1 We asked you to act as our solicitor to attend to the conveyancing of Gardost Properties Limited for the purchase of 16.6425 ha being Lot 2 at County Heights Drive, Akouterere, Palmerston North.
>
> 3.2 We have relied on our own judgment in deciding to give this Guarantee, and we do not require your advice as to the wisdom of us giving the Guarantee.
>
> **12. Conflicts of interest**
>
> 4.1 You advised us that you are not acting for anyone else in respect of this matter other than the company Gardost Properties Limited and Westpac New Zealand Limited.
>
> 4.2 You advised us that you were acting for the entities stated in clause 4.1 before signing the Guarantee. We acknowledge that you have been advised us to obtain independent legal advice but we waive this right to do so.
>
> **13. Why the Guarantee is being sought**
>
> 5.1 We have advised you why the Guarantee is being sought by the Lender, and what we know about the Borrower and the transaction/business being undertaken by the Borrower.

[45] Numbering as in original.

14. Financial advice

6.1 You advised us that you are not providing us with financial advice, in particular that you are not advising us on:

6.1.1 the ability of the Borrower to meet the Borrower's monetary and other obligations to the Lender;

6.1.2 the viability of the transaction/business which the Borrower is undertaking;

6.1.3 our ability to satisfy the monetary and other obligations required under the Guarantee.

6.2 You advised us of the desirability of obtaining independent financial advice about the matters set out in clause 6.1 before signing the Guarantee. We do not wish to obtain such advice.

15. General explanation

15.1 You explained to us that:

7.1.1 The Guarantee is an important and binding legal document which imposes a serious liability on us.

7.1.2 There is no legal requirement for us to sign the Guarantee and that we should think carefully before doing so.

16. Nature and effect of the Guarantee

8.1 You explained to us:

8.1.1 Under the Guarantee we are liable for all the obligations of the Borrower to the Lender; this includes any liability the Borrower may have as a guarantor for others.

8.1.2 The Guarantee secures:

The lending by Westpac New Zealand Limited to Gardost Properties Limited identified in paragraph 2.1 and any other lending the company Gardost Properties Limited is able to take out now or in the future.

8.1.3 We are personally responsible to the Lender for making sure the Borrower complies with the Borrower's monetary and other obligations to the Lender; we must make good any failure by the Borrower, which can involve the full amount of those obligations as well as interest and costs.

8.1.4 The Guarantee is a continuing security. This means that it secures the on-going indebtedness of the Borrower to the Lender on a continuous basis; it secures all money owing now or in the future to the Lender for any reason and continues to apply to the full amount secured by the Guarantee even if, from time to time, the Borrower repays money to the Lender.

8.2 You also explained to us:

8.2.1 That by giving the guarantee, we may become liable instead of, or as well as, the Borrower.

8.2.2 If the Borrower defaults, the Lender does not have to take action against the Borrower or anyone else before taking action against us, nor does the Lender have to enforce any securities it has before taking action against us.

8.2.3 Our obligations under the Guarantee will not be affected if, for any reason, the Lender has no right to recover the money from the Borrower, or if any securities held by the Lender are unenforceable or are released by the Lender.

8.2.4 All mortgages and securities given by us to the Lender (whether before or after we have signed the Guarantee), including any mortgage held by the Lender over our home, will constitute security for the Guarantee.

8.2.5 If, either before or after signing the Guarantee, we require information about the Guarantee, the Borrower or the transaction/business which the Borrower is undertaking, we should seek it from the Lender. We confirm that we do not require such information before entering into the Guarantee.

8.2.6 The Lender does not have to tell us if the Borrower defaults under its arrangements with the Lender. If we want to know this, we have to ask the Lender.

8.3 You explained to us:

8.3.1 Giving a Guarantee involves risk, and can mean that, if we do not meet all our obligations under the Guarantee, we can be sued by the Lender, lose our property and other assets, and be made bankrupt.

8.3.2 The Guarantee has no monetary limited. [sic]

8.3.3 If we sell our shares in the Company we must initiate the release of our guarantee ourselves or we could end up guaranteeing the Company when it is

owned by third parties or strangers. Also, if the Company acquires a new shareholder when we are the incumbent shareholders we should consider insisting that the new shareholder becomes a Guarantor also.

13. Other guarantors

9.1 You explained to us:

9.1.1 Even if there are other guarantors, we will still be personally liable for the full amount secured by the Guarantee.

9.1.2 Where it is intended that there is another guarantor and that person does not enter into the Guarantee, we will still be personally liable for the full amount secured under the Guarantee.

9.1.3 Our obligations under the Guarantee to the Lender will not be affected if the Lender releases any co-guarantors.

…

15. Understanding

11.1 We have been given the opportunity to read the Guarantee but we do not wish to do so.

11.2 You have advised us that it is a term of the Guarantee that, in agreeing to give the Guarantee, we have not relied on any statement, representation, warranty or information from the Lender. We confirm this is correct.

11.3 We are signing the Guarantee freely, voluntarily and without pressure from anyone.

16. Certificate

12.1 We have instructed you to sign a certificate to the Lender certifying that we fully understand the terms of the Guarantee and our liability under the guarantee. We understand that the certificate may be used by the Lender to counter any challenge by us about the validity of, or our liability under, the Guarantee.

[56] We have set this document out in some detail because, although cl 15 states at [11.1] that Mr and Mrs Gardiner did not read the guarantee before they signed it, the acknowledgments set out under the heading "Nature and effect of the Guarantee" suggest that Tararua Law fully explained the nature and potential effect of the guarantees to all four guarantors. In addition, we did not take counsel for Mr and Mrs Gardiner to contend that the document misstates the nature of the advice his

clients received from Tararua Law before they signed the guarantees. In those circumstances, and notwithstanding the fact that Westpac has only recently become aware that the document existed, we consider it supports our earlier conclusion that Westpac has sufficiently insulated itself from any influence Zane may have exerted on his parents when they provided their guarantees.

[57] This aspect of the appeal fails as a result.

Imprudent lending

[58] All three appellants contend that Westpac arguably breached a duty of care that it owed to them not to lend monies to Gardost imprudently. They say that Westpac agreed to advance monies to enable Gardost to purchase the Property notwithstanding the fact that in doing so it loaned more than 80 per cent of the purchase price. They also contend that Westpac ought to have realised that the combined income of the four guarantors would not be sufficient to service the outgoings on the loans. That was particularly so given the fact that by the time Westpac made the advances Zane Gardiner had left New Zealand, and was living overseas.

[59] The appellants rely for this submission on *Valcorp Australia Pty Ltd v Angas Securities Ltd*, a decision of the appellate division of the Federal Court of Australia.[46] As the Associate Judge pointed out, however, the facts in that case are clearly distinguishable.[47] It involved three lenders who had relied upon a valuation prepared by a valuer in deciding to advance monies against the security of a property that was the subject of the valuation. The borrower defaulted, and the lenders sold the property for a sum considerably less than that ascribed to it by the valuation. They sought to recover the resulting loss from the valuer, alleging the valuer had been negligent and had engaged in misleading and/or deceptive conduct in preparing the valuation. The valuer sought to extinguish or reduce any liability it might have to the lenders by pleading that their negligence contributed to the loss they had suffered. The Judge at first instance reduced the compensation awarded to the

---

46 *Valcorp Australia Pty Ltd v Angas Securities Ltd* [2012] FCAFC 22.
47 *Gardiner*, above n 1, at [80].

lenders by 25 per cent to reflect this factor. That figure was increased on appeal to 50 per cent.

[60] We do not consider the principles applied in *Valcorp* to be of any material assistance in the circumstances of the present case. The short answer to the appellants' argument is that as the law currently stands in New Zealand, a bank or financier owes no duty of care at common law to act prudently when lending monies to a borrower.

[61] In *Forivermor Ltd v ANZ Bank New Zealand Ltd* this Court rejected a submission by the appellants, who had borrowed monies from a bank, that the bank owed duties of care to them.[48] The Court said:[49]

> [56] It is well-established that, as a general principle, a bank does not ordinarily owe its customers any general duty to furnish careful advice on business or banking transactions, whether in contract or tort, unless it specifically undertakes to do so. There is no authority to support Mr Thwaite's submission that the closeness of the relationship between the bank and its customers gives rise to a general duty of care. The focus should be on the question of whether a bank can be taken to have "crossed the line" and impliedly assumed the duties of an adviser in addition to those of a mere banker.

[62] In the present case there is no evidence, and the appellants do not contend, that the guarantors sought advice from Westpac regarding any aspect of their proposed venture. For that reason this ground of appeal must fail.

Failure to comply with the obligations imposed by the Code of Banking Practice

[63] The appellants maintain that Westpac breached obligations it owed to them under the New Zealand Bankers Association Code of Banking Practice.[50] There is no dispute that Westpac is a member of the New Zealand Bankers Association, and that it has voluntarily agreed to be bound by the Code.

---

48 *Forivermor Ltd v ANZ Bank New Zealand Ltd* [2014] NZCA 129, leave refused by the Supreme Court: *Forivermor Ltd v ANZ Bank New Zealand Ltd (formerly ANZ National Bank Ltd)* [2014] NZSC 89. See also *Bartle v GE Custodians* HC Auckland CIV-2008-404-3460, 30 September 2009 at [351]. Part of that judgment, not including the passage cited, has been reported: *Bartle v GE Custodians* [2010] 1 NZLR 802 (HC).

49 Footnotes omitted.

50 New Zealand Bankers Association "Code of Banking Practice" (4th ed, July 2007).

[64] The appellants maintain that Westpac breached its obligations under cls 1.1(c) and (f), 1.2(a) and (c), 5.1(c) and 5.2 of the Code. These relevantly provide:

> 1.1 (c) This Code records good banking practices. We agree to observe these practices as a minimum standard …
>
> …
>
> (f) This Code applies to our relationship with all Customers.
>
> …
>
> 1.2 (a) The purpose of the Code is to–
>
> (i) record and communicate to you the minimum standards and good banking practice that we will observe …
>
> …
>
> (b) In order to achieve these objectives we will–
>
> (i) comply with the provisions of this Code;
>
> …
>
> 5.1 …
>
> (c) We will only provide Credit to you or increase your Credit limit when the information available to us leads us to believe you will be able to meet the terms of the Credit Facility. We have the right to decide not to provide Credit to you.
>
> …
>
> 5.2. guarantors and providers of other security
>
> (a) We will make sure that people who have offered to give us a Guarantee or other Security are made aware of their obligations and informed that–
>
> (i) by giving a Guarantee or providing Security for your debt, they may become liable instead of, or as well as, you;
>
> (ii) they should seek independent legal or, if required, other professional advice before giving any Guarantee;
>
> …

[65] The appellants argue that these clauses were either implied into the loan agreements that they entered into with Westpac, or that they formed part of those agreements upon their proper construction. They say that Westpac breached the obligations imposed by the clauses by imprudently providing credit to them when the information available to Westpac ought to have alerted it to the fact that the appellants would not be able to comply with the terms upon which Westpac made the credit available.

[66] Westpac maintains that the obligations imposed by the Code did not form part of the contractual arrangement between itself and the appellants and that, even if it did, Westpac complied with those obligations.

[67] The appellants in *Forivermor* advanced a similar submission to that advanced by the appellants in the present case. This Court dealt with the argument in the following way:[51]

> [42] The circumstances in which a court may imply a term in a commercial context are governed by the question of what a reasonable person would consider both parties must have meant to happen in circumstances not expressly addressed by the contract. The importation of terms by usage or custom rests on the assumption that it represents the intention of the parties, unless they expressly depart from it. A term will be implied by custom if the alleged custom:
>
> (a) has acquired such notoriety that the parties must be taken to have known of it and intended that it form part of the contract;
>
> (b) is certain and reasonable;
>
> (c) is proved by clear and convincing evidence; and
>
> (d) is not inconsistent with any other terms of the contract.
>
> [43] As Mr Walker submitted, Forivermor adduced no evidence of the alleged custom. The Code of Banking Practice is a self-regulatory standard developed by members of the New Zealand Banking Association and enforced by reference to the Banking Ombudsman. It is not designed as a contractual code enforceable by private action. The fact that an obligation is in the Code is not evidence that it is a customary obligation in banking contracts.
>
> [44] It is not sufficient for Forivermor to say that the Code itself is well-known. What must be notorious is the fact that the relevant term is

---

[51] *Forivermor Ltd*, above n 48. Footnotes omitted.

> customary in contracts of this kind. We agree with the reasons of Associate Judge Doogue in *Westpac NZ Ltd v Patel* where he rejected, in the context of a summary judgment, an identical submission by Mr Thwaite, made in mistaken reliance on Goddard J's decision in this case, that there was any evidence that the terms of the Code are customarily imported into contracts between customers and banks.

The same observations can be made in the present case.

[68] In *Forivermor* the Court also rejected a submission that it was necessary to imply clauses from the Code into a loan contract in order to give the contract business efficacy and because the information contained in the clauses was so obvious that it went without saying.[52] The Court observed that this test may be no more than "a useful indicator relevant to the ultimate question of what a reasonable person would have understood the contract to mean".[53] The Court also held that to the extent that this approach may remain an independent test, the provisions of the Code failed to meet the test given the clear and unambiguous terms of the finance contract into which the parties had entered. We take the same view in the present case.

[69] It is possible to envisage a situation in which a borrower enters into a loan agreement with a bank on the basis of assurances he or she has taken from reading the Code and perhaps discussing those assurances with the bank's representatives. In such a case it may be possible for the borrower to mount an argument that the terms of the Code formed part of the contractual arrangement with the bank. In the present case, however, there is no evidence that any of the appellants were ever aware of the Code, let alone that they borrowed monies from Westpac based on assurances contained within it.

[70] This ground of appeal fails as a result.

---

[52] At [45]. See *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC) at 283.

[53] At [45] citing *Hickman v Turn and Wave Ltd* [2011] NZCA 100, [2011] 3 NZLR 318 at [248]; and *Dysart Timbers Ltd v Nielsen* [2009] NZSC 43, [2009] 3 NZLR 160 at [25].

Issues arising out of the sale of the Property

[71] These issues arise because Westpac ultimately sold the Property to Mr Read, the real estate agent who had unsuccessfully marketed it for sale by auction, for the sum of $181,000. In order to properly explain these issues and the conclusions we have reached, it is necessary to describe the sale process in somewhat greater detail.

The sale process

[72] Westpac initiated the sale process by obtaining two valuations of the Property from registered valuers. One of these valued the Property at $280,000 if sold on the open market in the usual way, but at $168,000 if sold at a forced sale by a mortgagee. The other valuation ascribed a value of $15,131 to the tree crop on the Property.

[73] Westpac then obtained appraisals from two firms of real estate agents. It selected one of these, Unique Realty Ltd trading as Professionals, to market the Property for sale by auction. Mr Read, who evidently specialised in sales of forestry land, was the agent given responsibility for organising the sale of the Property.

[74] Mr Read then developed a marketing programme that included advertising the forthcoming auction in two newspapers circulating in the Manawatu region during the five week period leading up to the auction. He also advertised the auction on at least five real estate websites, and approached parties whom he considered may have an interest in purchasing the Property. These included the owners of neighbouring properties, contacts in the forestry industry and persons who had earlier expressed an interest in other listings of similar properties.

[75] The marketing campaign evoked interest from two different market segments, namely those looking for a rural bare land lifestyle property and those seeking a forestry investment. Mr Read deposed, however, that interest in the Property was muted, and that few prospective purchasers went to the effort of inspecting the Property or arranging for it to be assessed. He said that he kept in regular contact with those who showed interest in the Property, and responded without delay to any queries they had. He also said that the level of new enquiries dropped off significantly towards the end of the campaign, and that parties who had earlier

expressed interest appeared to lose interest in the Property. He said this reflected the state of the market at the time. The market was slow for both bare land and forest blocks.

[76] Mr Read said he began to consider the possibility of purchasing the Property himself just before the auction took place, and he immediately advised the firm's Manager, Mr John Campbell, of this fact. Mr Campbell instructed Mr Read to continue to attempt to sell the Property at auction, and not to take any steps to purchase the Property himself until after the auction. Mr Campbell said that he would assume responsibility for selling the Property if it did not attract a purchaser at the auction. This would permit Mr Read to make an offer to purchase the Property in competition with any other potential purchasers.

[77] The auction was held on 17 February 2011. The only attendee was a person who owned a neighbouring property. That person had earlier told Mr Read that he would not be bidding at the auction. As we have already recorded, there were no bidders and the Property was passed in.

[78] Mr Campbell then took over as the salesperson tasked with selling the Property. Mr Campbell advised Westpac's solicitors of the fact that Mr Read was interested in purchasing the Property on 21 February 2011. He also asked Westpac's solicitors to forward an agreement for sale and purchase of the Property that contained conditions appropriate to recognise the fact that the purchaser had formerly been the real estate agent selling the Property on Westpac's behalf. In addition, Mr Campbell advised Westpac's solicitors that he would contact all persons who had earlier expressed an interest in the Property to see whether they still had any interest in purchasing it. Mr Campbell then contacted all those persons, but found that none had any interest in buying the Property.

[79] On the following day, Mr Campbell submitted Mr Read's offer to purchase the Property for the sum of $181,000 inclusive of GST if any. The email that accompanied the offer contained the following advice:

> Peter Read one of our agents has been the specific salesperson handling this sale. Last week we auctioned the property and had no interest. Peter Read

who represented the property has now made an offer on the property which I enclose for your consideration. I personally have taken over handling this sale in light of one of staff wanting to purchase it [sic]. Prior to considering the offer I need to make you aware of the following.

- That although I have personally visited the property I have no real idea of its value as it has considerable planting on it and very few agents in our area would have experience in knowing its value (re the trees).

- Peter Read (the prospective purchaser) is unique in that he has considerable forestry experience.

- The offer contains the mandatory section 34 [sic] of the Real estate Agents act inserted which notifies the vendor of our position in connect [sic] to the purchaser and also includes the mandatory valuation clause to protect the vendor.

- I imagine that prior to entering the market your client had a valuation but of course our staff member would still need to supply one should his offer be successful.

- I personally have contacted every person who had previously shown any interest in the property and advised them that we have an offer should they wish to visit to compete with an offer (I have not exposed the details of that offer) To date I do not have another interested party.

- I do not have any advice [on] whether your client should consider this offer or not, as a company we want to err on the side of caution and protect our client and ourselves. I would suggest that registered valuations would be a better guide than me offering advice. I have obviously looked at the original appraisal and it fits in with that.

- I am confident that the property has received adequate exposure and that it has been made available for prospective purchasers to view and that [their] questions and or interest has been dealt with well.

[80] Westpac accepted Mr Read's offer on or about 25 February 2011.

[81] Mr Read subsequently complied with his obligation under s 134(3)(b) of the Real Estate Agents Act 2008 (REAA) to provide Westpac with a further valuation of the Property that he obtained at his own expense from a registered valuer. This ascribed a value of $185,000 to the Property. Westpac agreed to proceed with the sale notwithstanding the fact that Mr Read's offer was for a lesser amount. The sale was completed on 18 March 2011.

The issues

[82] The appellants do not take issue with the manner in which Mr Read marketed the Property for sale up to the point where he became interested in purchasing the Property. They contend, however, that Westpac ultimately sold the Property to Mr Read for a price that was well below its true value, and that it thereby breached its statutory obligations to the appellants as guarantors. They also contend that the circumstances in which Westpac sold the Property to Mr Read were such that Mr Read as Westpac's agent was arguably in breach of his obligations under the REAA and at common law. Finally, they argue that the Associate Judge was wrong to give no weight to the fact that the agreement for sale and purchase apportioned $120,000 of the purchase price to the land and $61,000 to the forest.

Breach of statutory duty under s 176 of the Property Law Act 2007

[83] There is no dispute that when it sold the Property, Westpac was subject to the duty of care imposed by s 176(1) of the Property Law Act 2007. Section 176(1) provides:

> **176 Duty of mortgagee exercising power of sale**
>
> (1) A mortgagee who exercises a power to sell mortgaged property, including exercise of the power through the Registrar under section 187, or through a court under section 200, owes a duty of reasonable care to the following persons to obtain the best price reasonably obtainable as at the time of sale:
>
> (a) the current mortgagor:
>
> (b) any former mortgagor:
>
> (c) any covenantor:
>
> (d) any mortgagee under a subsequent mortgage:
>
> (e) any holder of any other subsequent encumbrance.

[84] The appellants contend that it is arguable that the sale of the Property to Mr Read for $181,000 was not a sale for the "best price, true market value or full value". The submission relies almost exclusively on the fact that Westpac sold the Property to Mr Read for a price that was considerably less than the market value ascribed to the Property by earlier valuations. They also challenge the level of

discount that earlier valuations applied in the event that the Property was to be sold at a forced sale by the mortgagee.

[85] The scope of the duty under s 176 is now well-established through the decisions of this Court and the Privy Council in *Apple Fields Ltd v Damesh Holdings Ltd* and the cases that have followed them.[54] In *Long v ANZ National Bank Ltd*, this Court summarised the principles to be taken from the cases as follows: [55]

> (a) The statutory obligation is not to obtain the best price reasonably obtainable, but to take reasonable care to obtain the best price reasonably obtainable. That price might not necessarily be obtained.
>
> (b) When the property is sold in a forced sale, such as at a mortgagee sale, it is likely to sell at a substantial discount from the market value that the property would achieve in a sale undertaken by an owner not under financial pressure to sell.
>
> (c) Valuations lose much of their significance if reasonable care is taken, there has been a properly advertised and conducted auction, and the property has been sold at auction or by negotiation after the auction.
>
> (d) What constitutes reasonable care will always turn on the facts of the case. The steps taken by the mortgagee in fulfilling the statutory duty have to be looked at in the round.
>
> (e) In considering the reasonableness of the care taken, the courts should be slow to second guess the actions of a mortgagee acting on apparently sound professional advice.

[86] It follows that this Court has already accepted that in the present context valuation evidence will generally be of significantly less weight than evidence regarding the price that purchasers in a properly tested market are actually prepared to pay for a property sold by a mortgagee. This Court has also recognised the fact that the sale price achieved when a property is sold by a mortgagee is likely to be at a substantial discount to that which is obtained in the case of a willing buyer and a willing seller. The Court in *Long* also noted[56] that the Privy Council had emphasised in *Apple Fields* that the issue is a "commercial one, to be viewed in practical commercial terms".[57]

---

54 *Apple Fields Ltd v Damesh Holdings Ltd* [2001] 2 NZLR 586 (CA); aff'd *Apple Fields Ltd v Damesh Holdings Ltd* [2003] UKPC 54, [2004] 1 NZLR 721 [*Apple Fields* (PC)].

55 *Long v ANZ National Bank Ltd* [2012] NZCA 132 at [21] (footnotes omitted).

56 At [19].

57 *Apple Fields* (PC), above n 54, at [24].

[87] As we have already observed, the appellants do not challenge the steps that Mr Read took to market the Property for sale by auction up to the point just prior to the auction when he became interested in purchasing the Property himself. That concession is significant, because it effectively means the appellants accept that Westpac took appropriate steps to bring the sale of the Property to the attention of potential buyers. This maximised the opportunity to attract buyers prepared to pay market value for the Property.

[88] The fact that the auction attracted no bidders left Westpac with limited options. One option was to contact persons who had earlier expressed an interest in the Property to see whether they might still have an interest in purchasing it. When Mr Campbell's enquiries of other potential purchasers proved fruitless, however, Mr Read was left as the only person expressing any interest in buying the Property. Once matters reached that point, we consider that Westpac was entitled to take the commercial decision to sell the Property to him.

[89] Whilst the valuation of the Property that Mr Read obtained after he had submitted his offer was higher than the purchase price he was offering, it was not markedly so. It was also higher than the forced sale value ascribed to the Property in the valuation Westpac had obtained before it appointed Mr Read's firm to sell the Property. Westpac was therefore entitled to conclude that Mr Read's offer was close to the market value of the Property in a forced sale situation. Even if that had not been the case, the lack of other potential buyers meant that Westpac had no ability to obtain a better price in the prevailing circumstances. This fact means that it becomes an academic exercise to compare the purchase price that Westpac ultimately obtained with valuations prepared on any basis other than that of a forced sale by a mortgagee. This deals with a large part of the appellants' argument under this head.

[90] Given the position in which Westpac found itself after the auction, it is also difficult to see what further steps it could reasonably have taken to find another purchaser. Counsel for Zane Gardiner submitted that Mr Campbell ought to have disclosed the price that Mr Read was prepared to pay for the Property to those whom he contacted after the Property failed to attract a bid at the auction. He suggested that this may have prompted another person to make a higher bid for the Property.

This submission faces two obstacles. First, it ignores the fact that Mr Campbell does not say that any of the persons to whom he spoke after the auction told him that they might be interested in buying the Property, but at a lower price than they believed Westpac was likely to sell it for. Rather, he says that no other persons expressed any interest in purchasing the Property. Secondly, even if this method had produced another purchaser, it is highly unlikely that such a person would have offered to pay significantly more than the sum offered by Mr Read. The end result for the appellants is therefore unlikely to have been greatly different.

[91] It follows that we consider the Associate Judge was correct to hold that Westpac satisfied the duty of care imposed upon it by s 176 of the Property Law Act. This ground of appeal fails as a result.

Breach of statutory obligations imposed by the REAA and/or common law duty

[92] The argument based on breach of the statutory obligations imposed by the REAA is somewhat difficult to follow. The written submissions filed by counsel for Mr and Mrs Gardiner point out that s 134(1) of the REAA provides that a contract for the sale of land may be cancelled if a licensed real estate agent acquires a client's property without the client's consent. That is clearly so, but there can be no suggestion in the present case that Westpac did not give its informed consent to the sale of the Property to Mr Read.

[93] The written submissions move on to allege that although Mr Campbell became aware that Mr Read was interested in purchasing the Property on or about 15 February 2011, his firm did not advise Westpac of that fact until 21 February 2011. The difficulty with this submission is that Mr Read says he did not become interested in purchasing the Property until immediately before the auction. He says he then immediately advised Mr Campbell of that fact. Mr Campbell confirms that Mr Read told him of his interest in purchasing the Property on the day of the auction. This resulted in Mr Campbell's instruction that Mr Read was to continue with the auction, and was not to take his own interest in purchasing the Property further unless the auction failed to produce a purchaser. In those circumstances Mr Read

was under no obligation prior to the auction to advise Westpac of his interest in purchasing the Property.

[94] Counsel for Mr and Mrs Gardiner also submitted that Mr Read continued to be involved in the sale process when he submitted his offer to purchase the Property on 22 February 2011. He relied for this submission on the fact that Mr Read inserted his name as both the buyer and the listing and selling agent in a Selling Consent Form that Mr Campbell sent to Westpac along with the agreement for sale and purchase of the Property. Counsel submitted that this amounted to a clear breach of s 134(2) of the REAA, which prohibits a licensee from continuing to carry out agency work without the client's consent in respect of any transaction in which the licensee will acquire the land to which the transaction relates.

[95] Two points can be made in response to this submission. First, although Mr Read may have signed the form as listing and selling agent, the evidence establishes that Mr Campbell had assumed responsibility for the sale of the Property from at least the previous day when he wrote to Westpac's solicitors advising them of Mr Read's interest in purchasing the Property. Mr Campbell was also responsible for submitting Mr Read's offer to Westpac on 22 February 2011. Mr Read's involvement in the sale process appears to have come to an end by the time he submitted his offer to Westpac.

[96] Secondly, part of the reason that Mr Campbell wrote to Westpac on 21 February was to obtain its consent to Mr Read making an offer to purchase the Property. Westpac clearly gave its informed consent to the transaction proceeding when it subsequently accepted his offer on 25 February 2011. There is therefore nothing in this point.

[97] Next, counsel for Mr and Mrs Gardiner submitted that Westpac ought to have declared the sale void under s 135(5) of the REAA because the valuation that Mr Read subsequently provided ascribed a greater value to the Property than Mr Read had offered to pay. This submission overlooks the fact that s 135(5) did not require Westpac to declare the sale void once it received the valuation. Rather, the agreement to sell the Property became voidable at Westpac's option. Westpac was

therefore entitled to make a commercial decision to proceed with the sale notwithstanding the fact that it was for a lesser price than the valuation Mr Read had provided to it.

[98] This ground of appeal fails as a result.

Breach of common law duty

[99] This argument is based on the fact that Mr Read continued to be involved in marketing the Property as soon as he became interested in purchasing it. Counsel for Mr and Mrs Gardiner submitted that at this point Mr Read was subject to an obvious conflict of interest, and that he ought to have immediately ceased to have any further involvement in the sale process. Counsel also contended that Mr Read's continued involvement in the sale process arguably contributed to the very low sale price that Westpac ultimately achieved for the Property.

[100] This submission fails to take into account the fact that the evidence is to the effect that Mr Read did not become interested in purchasing the Property himself until immediately prior to the auction. By that stage the marketing of the Property had been completed, and the appellants take no issue with Mr Read's efforts up to this point. Nor do they identify how Mr Read's efforts after he became interested in purchasing the Property fell below the required standard. We therefore see no merit in this aspect of the appeal.

Apportionment of the sale price

[101] Counsel for the appellants contends that the Associate Judge erred in failing to give any weight to the fact that the agreement for sale and purchased ascribed a value of $120,000 for the land and $61,000 for the forest. On this point the Associate Judge said:[58]

> [97] Similarly I find that there is nothing to help the defendants in the fact that in the agreement that Westpac accepted the purchase price was apportioned $120,000 for the land and $61,000 for the trees. Counsel for the defendants sought to argue that this fact lent strength to the defendants' arguments that insufficient value had been given to the trees in Westpac's

[58] *Gardiner*, above n 1.

> valuation and that the land was sold well below its forced sale value. However, the apportionment clause states that the apportionment was "for revenue purposes". Whatever that might mean (and what revenue consequences it might have) it is clear that this (last minute) allocation of the purchase price cannot assist in terms of whether the offer price was the best price reasonably obtainable.

[102] Counsel for Mr and Mrs Gardiner argued that a finding on the apportionment was "a necessary basis for assessing the expert reports and sale price". He also submitted that the Associate Judge erred in finding that the apportionment was done at the last minute. He pointed out that the apportionment formed part of the agreement for sale and purchase from the outset.

[103] The short answer to this submission is that it is immaterial for present purposes how Westpac and Mr Read apportioned the sale price as between themselves. The real issue is whether Westpac breached its statutory or common law duties to the appellants in selling the land and forest to Mr Read for the sum of $181,000. The manner in which the parties to the agreement elected to apportion the sale price for their own purposes does not assist in determining that issue.

[104] This ground of appeal fails as a result.

The sale of Mrs Gardiner's home

[105] This argument relates to the fact that Westpac sold Mrs Gardiner's home after she failed to remedy the default specified in the notice that Westpac served upon her under s 122 of the Property Law Act as a guarantor of Gardost's indebtedness. Mrs Gardiner has not challenged the process by which Westpac sold the home using its powers as mortgagee.

[106] As we have already observed, Westpac applied the proceeds of sale in repayment of Mrs Gardiner's indebtedness to the bank. It then applied the balance towards Gardost's indebtedness. Counsel for Mrs Gardiner submitted that Westpac would need to repay this sum to Mrs Gardiner in the event that it held her guarantee to be unenforceable. Our conclusion that the guarantee is enforceable against Mrs Gardiner means it is not necessary for us to consider this aspect of the appeal.

[107] Counsel for Mrs Gardiner also sought to argue that Westpac had acted in a manner that was oppressive or unconscionable by requiring Mrs Gardiner unwittingly to provide a guarantee that effectively placed her home at risk in the event that she could not repay Gardost's indebtedness.

[108] This submission is effectively answered by our conclusion in relation to the validity of Mrs Gardiner's guarantee. The advice that Mrs Gardiner received when she signed the guarantee must have alerted her to the fact that she was thereby undertaking an obligation that could place her home in jeopardy in the event she and Gardost were unable to repay the loans that Westpac was about to make to Gardost. There is nothing in the evidence to suggest that Westpac acted harshly, oppressively or in an unconscionable manner by requiring Mrs Gardiner to provide a guarantee of the type that she signed.

[109] This final ground of appeal also fails.

Result

[110] The appeals are dismissed.

Costs

[111] Westpac has a contractual right under the guarantees to recover indemnity costs against the appellants in respect of these appeals. We make an order to that effect against Zane Gardiner in respect of his appeal.

[112] Mr and Mrs Gardiner are legally aided, and we make no order for costs in relation to them at this stage. If counsel for Westpac seeks any order against Mr and Mrs Gardiner he should file a memorandum setting out the orders that Westpac seeks.

Solicitors:
Powell Lyall, Palmerston North for Appellant in CA263/2013
Goodmans, Palmerston North for Appellants in CA264/2013
Simpson Grierson, Auckland for Respondent in CA263/2013 and CA263/2013