IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-1822
[2020] NZHC 1233

BETWEEN	NEW ZEALAND BLOODSTOCK FINANCE & LEASING LIMITED Plaintiff
AND	GREGORY JOHN JONES Defendant

Hearing: 26 May 2020

Appearances: F A King and M A Dempster for the plaintiff
G J Jones in person

Judgment: 5 June 2020

JUDGMENT OF JAGOSE J

This judgment was delivered by me on 5 June 2020 at 11.00am.
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors/Party:
McKenna King Limited, Hamilton
G J Jones, Auckland

[1] The plaintiff ("NZ Bloodstock") seeks summary judgment on its claims against Mr Jones in the amount of $431,632.22 (plus interest and solicitor-client costs), in repayment of credit provided to him in connection with his bloodstock business. Mr Jones opposes on grounds, predominantly, he has claims to equitable set-off exceeding the repayment sought. This was the entire focus of his substantive submissions at hearing of NZ Bloodstock's application (although he reserved his opposition's other grounds for argument at a sought adjourned hearing).

Background

[2] Mr Jones is a barrister, having practiced in civil litigation for some 40 years and specialising in insurance-related litigation. He also is involved in thoroughbred breeding businesses of his own and with others. In his own business, he had acquired brood mares on lease to purchase agreements with NZ Bloodstock, for repayment over periods of time. Those transactions completed, he then sought credit advances from NZ Bloodstock.

[3] NZ Bloodstock entered into a standard form contract for current advances with Mr Jones on 23 May 2016 (the "advances contract"). Its initial disclosure section identified advances available to a limit of $200,000, at 10 per cent interest on the unpaid daily balance, for payment "[i]n full on the 30th June 2017 or upon demand". That date was the contract's "Review Date", NZ Bloodstock being entitled then "at its sole discretion [to] terminate the Facility extend it or vary it as it thinks fit", subject to NZ Bloodstock's rights to terminate the contract "upon demand" and to receive repayment in full, irrespective of the review date or extension or variation. NZ Bloodstock's provision of further or other advances, whether or not exceeding the limit, would be made on the same terms.

[4] The advances were secured over Mr Jones' rights in relation to identified bloodstock, and others acquired with the advances, and their progeny and proceeds. In consideration for NZ Bloodstock's provision of the credit, while not repaid, Mr Jones only would offer bloodstock for sale through a company related to NZ Bloodstock, which had no obligation to include the bloodstock in any particular sale. NZ Bloodstock also was entitled to deduct any money Mr Jones owed from proceeds

of sale of his bloodstock. Mr Jones was to pay "[a]ll legal fees (on a solicitor-client basis) and other fees and expenses" incurred by NZ Bloodstock in enforcing the contract.

[5] By the end of 2016, Mr Jones had obtained well over $400,000 in advances from NZ Bloodstock to acquire interests in some ten horses. After application of proceeds from sales in the first six months of 2017, he owed NZ Bloodstock just less than $290,000. He acquired interests in another three horses by the end of 2017, bringing his liability to NZ Bloodstock under the advances contract to slightly less than $340,000.

[6] On 10 October 2017, Mr Jones also entered into a lease to purchase agreement with NZ Bloodstock in relation to his acquisition of an interest in another horse for $44,000, for partial annual repayments each July, and the residue on 10 October 2020 or on earlier termination, secured again over the horse and its progeny and proceeds (the "lease"). Under the lease, Mr Jones was to "indemnify" NZ Bloodstock for its costs and expenses incurred under the lease, including "in recovering any monies secured hereunder".

[7] Mr Jones' dealings with NZ Bloodstock had been with its finance manager, Ross Gwyn. In January 2018 – on the eve of NZ Bloodstock's national yearling sales series – Mr Jones met with NZ Bloodstock's managing director, Andrew Seabrook. Mr Seabrook said NZ Bloodstock would not "lend [Mr Jones] more money", and recommended Mr Jones sell his share in an identified horse "to pay [his] debts". No further reductions then were made to Mr Jones' liability.

[8] At the end of August 2018, Mr Gwyn retired from NZ Bloodstock. On 11 September 2018, NZ Bloodstock's new finance manager, Eion Fraser, contacted Mr Jones "regarding [his] accounts with NZB and [his] plan going forward". On 13 September 2018, Mr Jones responded:

> Well is it possible for NZB to consider an overall extension on the facility for a [y]ear to allow current debt s to be paid provided cash flow is ok for the next 12 months as well.i touched on this with ross but it didn't get much traction by the sound of it yet it's the only way to keep the business going forward. For you the issue is cashflow to cover the interest and security.i am a good and

> active client and the business needs another 2 -3 years to find it's feet.i am only in year 3-4.
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> I never got the chance to present the proposition to nzb and so delaying th e progress of that has left me stuffed with bookings to stallions so the whole thing is precarious at the moment. [I'd] like to think about sending a mare to aus and perhaps bringing one back-all more business. Currently I am stitched for cash but a bit of room would solve that -you have all the figures.Can we talk urgently about this. I am holding back on services as I said.

[9] On 17 September 2018, Mr Jones again indicated he was "considering flying one mare to aus-would nzb have in mind covering this sort of thing in a general facility for the next year[?]". Mr Fraser responded the same day NZ Bloodstock could "extend [his] current advance facility for another 12 months, with settlement of the account due on 20th September 2019, however there will be no further advance of funds". With reference to sending mares to Australia for the breeding season, expenses would have to be paid by Mr Jones in advance: "unfortunately NZB will not be extending any further credit. This is a firm directive from the NZB board".

[10] Mr Fraser also specified conditions for the extension of time, aimed at reducing Mr Jones' debt to NZB. Mr Jones rejected those conditions, saying "[i]t is the least profitable way to deal with the situation and will eliminate the business completely. Any business relationship such as ours exists on discussion not ultimatums". His correspondence continued over the next week, seeking other ways to address his concerns. Mr Fraser indicated NZ Bloodstock had its own concerns about its security over the horses, and ultimately reinforced its 17 September 2018 offer (with a minor variation), for acceptance by 28 September 2018.

[11] Mr Jones again rejected the offer, reinforcing his preference to "work together as business partners with a five year plan", and subsequently for NZ Bloodstock "to offer funding for around $150k … with the provision of adequate security and cash flows". Mr Fraser explained those presently were not feasible, and repeated NZ Bloodstock's security concerns, which Mr Jones refused to answer. Mr Jones then objected to NZ Bloodstock applying proceeds from sales and insurance of his horses to reduction of his debt, indicating he would issue proceedings.

[12] NZ Bloodstock referred Mr Jones to its solicitors, who accepted by letter of 25 March 2019 there was a question to be determined in relation to involuntary

application of insurance proceeds in reduction of Mr Jones' debt, invited him voluntarily to do so as a mark of his intention "to genuinely attempt to repay all debts to NZB", and otherwise indicated demand would issue for repayment, for subsequent enforcement if necessary. Mr Jones responded on 27 March 2019, saying:

> [T]the only common-sense interpretation of the arrangement [Mr Gwyn and he] made was that the facility would continue (but I agree not necessarily increase) over a period of three to four years while my business developed.
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> I'm sure Mr Gwyn would also acknowledge that this was the driving force behind the arrangement we had as he stated, for example, that I was going to be involved in the breeding industry "for a long time" which was of course my intention as well.

[13] By letter of 28 March 2019, NZ Bloodstock's solicitors demanded repayment of $422,004.70, comprising $364,648.18 under the advances contract and $57,356.52 under the lease as at 10 October 2018. By letter of 12 April 2019, the solicitors formally revised the advances contract demand to $369,800.22 as at 31 March 2019, taking into account subsequent proceeds from sale and interest. By separate letter of the same date, the solicitors gave Mr Jones notice of default in due payments of $22,718.08 under the lease, unless remedied giving rise to all payments under the agreement (amounting to $61,832.00) falling due, as well as on 12 April 2019 giving him statutory notice of default in the same amount.

[14] NZ Bloodstock's claim for judgment on Mr Jones' debts, together with its application for summary judgment of that claim, was filed in early September 2019 and later served on Mr Jones. Mr Jones opposed the summary judgment application on the particularised grounds:

(a) NZ Bloodstock was not entitled to recover the full amount owing under the lease;

(b) NZ Bloodstock failed to make all necessary initial disclosure to Mr Jones;[1]

(c) NZ Bloodstock acted oppressively in exercising its rights under both the advances contract and the lease;[2]

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1 Credit Contracts and Consumer Finance Act 2003, s 17.
2 Section 120(b).

(d) Mr Jones had a claim to equitable set-off equalling or exceeding the amounts claimed by NZ Bloodstock; and

(e) the Court otherwise should exercise its discretion not to enter judgment.

The foundation for Mr Jones' opposition is an alleged wide-ranging conspiracy in at least the thoroughbred industry to harm his bloodstock business (but extending to allegations against his former wife, the firm in which he formerly was partner, and an insurance company), of which NZ Bloodstock's actions in enforcement of his liabilities to it are said to be a part.

Relevant law

—*summary judgment*

[15] On a plaintiff's application for summary judgment, "[t]he court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim".[3] Judgment may summarily be granted if there is no good reason for trial of the plaintiff's claim:[4]

> If the defendant … does not particularise his defence so as to show an issue of fact which ought to be tried, or if the plaintiff's pleading, whether or not supplemented by an affidavit by the defendant, does not show an arguable question of law worthy of trial, the plaintiff's statement of claim verified by or for him and the sworn belief that there is no defence will be sufficient to discharge the onus on him. If a defence is not evident on the plaintiff's pleading I am of opinion that if the defendant wishes to resist summary judgment he must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. In this way a fair and just balance will be struck between a plaintiff's right to have his case proceed to judgment without tendentious delay and a defendant's right to put forward a real defence.
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> … In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence, no fairly arguable defence. … On this the plaintiff is to satisfy the Court; he has the persuasive burden. Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.
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> Where the only arguable defence is a question of law which is clearcut and does not require findings on disputed facts or the ascertainment of further facts

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3 High Court Rules 2016, r 12.2.

4 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 3–4 (citations omitted).

> the Court should normally decide it on the application to strike out a claim or defence before trial on the ground that it raises no cause of action or no defence…[;] where the defence raises questions of fact upon which the outcome of the case may turn it will not often be right to enter summary judgment. There may however be cases in which the Court can be confident – that is to say, satisfied – that the defendant's statements as to matters of fact are baseless. [There is a] need to scrutinise affidavits, to see that they pass the threshold of credibility … .

Nonetheless, the onus is on the plaintiff throughout.[5]

—equitable set-off

[16] A cross-claim to a related equitable set-off will afford a defence, if it is "unjust that a claimant should seek to enforce a claim without giving credit for a related cross-claim which the defendant had against him".[6] The presently-accepted principle is:[7]

> The defendant may set-off a cross-claim which so affects the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account. The link must be such that the two are in effect interdependent: judgment on one cannot fairly be given without regard to the other; the defendant's claim calls into question or impeaches the plaintiff's demand. It is neither necessary, nor decisive, that claim and cross-claim arise out of the same contract.

Similarly:[8]

> The cross-claim must so affect the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account. The link must be such that the two are in effect interdependent.

Procedural matters

[17] Mr Jones' opposition is supported by his affidavit of 13 November 2019. He filed a further affidavit of 14 February 2020, in support of his 14 February 2020 application to file further affidavit evidence and to require the attendance of people for examination. NZ Bloodstock's counsel, Fraser King, objected to admission of

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5 *Pemberton v Chappell*, above n 4, at 3; *MacLean v Stewart* (1997) 11 PRNZ 66 (CA) at 69.

6 *BICC Plc v Burndy Corp* [1985] Ch 232 (CA) at 250–251, cited with approval in *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2010] NZSC 47, [2010] 3 NZLR 231 at [64].

7 *Grant v NZMC Ltd* [1989] 1 NZLR 8 (CA) at 12–13, approved in *Property Ventures Investments Ltd v Regalwood Holdings Ltd*, above n 6, at [69].

8 *Body Corporate 162791 v Gilbert* [2015] NZCA 185, [2015] 3 NZLR 601 at [69], citing *Grant v NZMC Ltd*, above n 7, at 12–13 and *Hamilton Ice Arena Ltd v Perry Developments Ltd* [2002] 1 NZLR 309 (CA) at [3]–[12], approved in *Gilbert v Body Corporate 162791* [2016] NZSC 61, [2018] 1 NZLR 1 at [54].

significant portions of the affidavits, as well as of the further affidavit and oral evidence sought.

[18] By judgment dated 6 March 2020, Peters J considered (as earlier had Gault J in case management)[9] any objections to the affidavits' content should have to be determined at the application's hearing, for which she granted Mr Jones leave to rely on his February 2020 affidavit.[10] She granted him leave also to file an affidavit of Adrian Clark.[11] (In the event, the further affidavit appeared not to be forthcoming, meaning Mr Jones sought Mr Clark also be required to attend for examination.) She noted people could be required to attend before the court for examination, if requested but refusing to make affidavits as to information relevant to the proceeding.[12] But without evidence of either request or refusal, or identification of relevant information, that aspect of the application could not then be granted.[13] She granted Mr Jones leave to "pursue this point" with the necessary evidence of request and refusal, by communication with the case officer.[14] Mr Jones' affidavit sworn 7 May 2020 provided such evidence; his memorandum of the next day sought a brief hearing. It is unclear if the matter was raised with the case officer.

[19] Mr Jones instead applied on 19 May 2020 to dismiss or stay NZ Bloodstock's summary judgment application, on grounds:

(a) the summary judgment procedure was inappropriate because he alleged NZ Bloodstock's fraud;

(b) there was a genuine conflict of evidence between the parties, of which expert evidence was likely to form a significant part of the dispute; and

(c) NZ Bloodstock's application was oppressive and brought in bad faith.

In a supporting memorandum, Mr Jones contended there was sufficient evidence on which to argue NZ Bloodstock fraudulently represented the value of a mare,

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9 *New Zealand Bloodstock Finance & Leasing v Jones* HC Auckland CIV-2019-404-1822, 17 December 2019 (Minute).
10 *New Zealand Bloodstock Finance & Leasing Limited v Jones* [2020] NZHC 431 at [7].
11 At [11].
12 High Court Rules 2016, r 9.75.
13 *New Zealand Bloodstock Finance & Leasing Limited v Jones*, above n 10, at [19].
14 At [20].

Woodpecker Hill, for his acquisition at a vastly inflated price. Woodpecker Hill was acquired under the lease. This, he alleged, was one of a large number of actions taken against him by parties involved in the thoroughbred industry, including by NZ Bloodstock in refusing entry of his bloodstock to particular sales under its control and denigrating the worth of his bloodstock business and the value of the progeny he sought to sell.

[20] I did not see any of that provided grounds then to dismiss or stay NZ Bloodstock's summary judgment application, all of which was capable of being raised by him in opposition to NZ Bloodstock's necessary contention he 'had no defence' to its claims. Mr Jones also raised the rump of his 14 February 2020 application as remaining to be determined; I did not think it significant as "what the witnesses may have to say is less material in opposition than the availability of a defence":[15] i.e., "reasonable particulars of the matters which he claims ought to be put in issue".[16] Mr Jones remained on notice he needed to be able to establish the prospective relevance of such evidence before it would be admitted. I deferred consideration of Mr Jones' 19 May 2020 application as "better to be determined at or after the substantive hearing".[17]

[21] On 25 May 2020, the day before the substantive hearing, Mr Jones applied for stay of NZ Bloodstock's application and adjournment of the proceeding, pending hearing of his appeal to the Court of Appeal against my refusal earlier to stay or dismiss NZ Bloodstock's summary judgment application. His supporting affidavit of 25 May 2020 exhibits examples of the New Zealand Bloodstock corporate group's representation of itself as a unitary whole, and generally explains his "great difficulties with the behaviour of numerous people within the bloodstock industry", including disputes with entities without apparent connection to NZ Bloodstock.

[22] At the hearing, I explained I remained unwilling to stay the application or adjourn the proceeding, determination of which should continue to depend on NZ Bloodstock's ability to discharge its onus to satisfy me Mr Jones 'had no defence'

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15 *New Zealand Bloodstock Finance & Leasing v Jones* HC Auckland CIV-2019-404-1822, 20 May 2020 (Minute) at [4].

16 At [15] above.

17 *New Zealand Bloodstock Finance & Leasing v Jones*, above n 15, at [5].

to its claims, in opposition to which Mr Jones remained able to argue for its unfair or unjust determination in light of his intended cross-claims and proposed evidence.

[23] Mr King then renewed his objection to much of the content of Mr Jones' November 2019 and February 2020 affidavits, largely as inadmissible irrelevant, opinion and hearsay evidence. Additionally, he objected to admission of Mr Jones' two May 2020 affidavits. I address those matters at [39] below.

Discussion

[24] The advances contract provides at cl 2(d):

> Notwithstanding the Review date its extension or variation and notwithstanding the due date for payment in full described herein, the advances and all other monies outstanding under this Facility or any part thereof are repayable by the Borrower to the Creditor 'upon demand' as defined herein.

'Upon demand' self-referentially is defined as meaning "upon demand being made by notice in writing", signed by or on behalf of NZ Bloodstock and served on its recipient personally or by post. NZ Bloodstock's solicitors' letter of 12 April 2019 in respect of the advances contract establishes service of that demand on Mr Jones. It was not met.

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

[26] The lease provides at cl 7(d):

> Upon the termination of this Lease for any reason other than effluxion of time the Lessee shall pay to the Lessor by way of liquidated and ascertained damages an amount equal to the sum ….

The "sum" is everything "payable by the Lessee to the Lessor under the provisions of this Lease". The scheme of the lease specifies as a default any failure to pay money

due under the lease. Default entitles NZ Bloodstock to call up the balance of monies payable under the lease, and/or to obtain judgment against Mr Jones for those monies.

[27] In effect, on Mr Jones' initial default in paying periodic rental (and GST and interest) under the lease, by its solicitors' 12 April 2019 letter in respect of the lease, NZ Bloodstock called up the balance of monies payable and, on Mr Jones' continued default, now seeks judgment accordingly. If Mr Jones' defence would be he only was liable for the initial payments,[18] the 12 April 2019 letter is effective to extend his liability to the balance.

[28] Strikingly, given Mr Jones' contention he had a business relationship with NZ Bloodstock in which NZ Bloodstock would not avail itself of its powers to demand repayment for a period of some years, there is almost no evidence tendered by Mr Jones or NZ Bloodstock of Mr Gwyn's representations to him. Mr Gwyn's retirement from NZ Bloodstock does not put him out of bounds as a witness for either party. No explanation otherwise is given for the absence of evidence from him. I infer his evidence would not have assisted either of them.[19] Given that mutuality, I do not go further to conclude either party's case is strengthened by his absence.

[29] Mr Jones' evidence is more equivocal on the metes and bounds of his relationship with NZ Bloodstock. He acknowledges, while NZ Bloodstock is said to have encouraged investment in his business through its credit facility, "doing so and expanding the business was clearly part of my plan". That is supported by Mr Fraser who says NZ Bloodstock "desired a successful bloodstock business for [Mr Jones], and loaned [him] funds to achieve his business goals". But Mr Jones comprehends:

> [I]t would have been plain to both Mr Gwyn and [NZ Bloodstock] that a repayment of the loan on demand would have had the effect of stultifying the business completely at any time that was chosen to be done.

Mr Jones asserts a widely-held understanding bloodstock businesses "will take 5 to 7 years to move into profit", by reason of "the nature of breeding and the required waiting time for progeny to reach to point of sale". The inference is NZ Bloodstock is to be taken to have agreed to provide him with that support for that period of time.

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18 See [14](a) above.

19 *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA) at [153].

[30] The inference is at odds with Mr Jones' representations to NZ Bloodstock in January 2018, after meeting with its managing director, Andrew Seabrook. He had spoken to Mr Seabrook in terms of them being "business partners", of which Mr Seabrook had asked what Mr Jones meant. Mr Jones later responded he "regarded nzb and myself as having a *potentially* long term relationship" (emphasis added). As I have explained,[20] in correspondence with Mr Fraser in September 2018, seeking "an overall extension on the facility for a [y]ear", Mr Jones said "I am a good and active client and the business needs another 2-3 years to find [its] feet. [I] am only in year 3-4". In both of those exchanges, as well as in myriad others during this period, Mr Jones' pre-existing "business relationship" contention would have been a complete answer to NZ Bloodstock's alternative course. Mr Jones did not then raise it.

[31] Mr Jones also is express the conspiracy he complains to have been subjected is his reconstruction in hindsight of a variety of untoward circumstances exceeding coincidence. An example of that is the alleged fraud by which NZ Bloodstock is said to have induced Mr Jones' entry into the lease by misrepresenting the subject mare's value, to which I now turn.

[32] In opposition to the summary judgment application, Mr Jones exhibits the only correspondence in evidence from Mr Gwyn, an email dated 24 January 2018, at Mr Seabrook's request attaching NZ Bloodstock's valuation of Mr Jones' bloodstock as at 31 December 2017. The valued horses include Woodpecker Hill at $50,000. Mr Jones says at the time of its acquisition in September 2017, he was concerned by "the asking price which seemed significant relative to the pedigree of the mare". He sought a pre-purchase valuation from NZ Bloodstock. He doubted its $45,000 valuation (such doubt said to have been affirmed by a subsequent informal valuation of the mare at $15,000), but was unlikely to be able to secure a competing valuation given NZ Bloodstock's dominant market presence.

[33] Specific fraud was not then alleged. Rather, Mr Jones accepted "the thoroughbred industry is a relatively volatile one and … prices can fluctuate over a period of time for young horses", but considered he:

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[20] At [8] above.

> … was regarded as a 'free hit' by those whose advice I was taking in relation to the purchase and sale of animals and the marketing and other behaviour of people towards me, my animals, and my business was highly questionable.

In reply, NZ Bloodstock's bloodstock sales manager, Daniel Rolston, affirmed and substantiated Woodpecker Hill's initial valuation at September 2017. Notwithstanding his initial doubt he could obtain an alternative valuation, Mr Jones then did so, from Mr Clark of $1500 at August 2018.

[34] Even so, at the time of seeking leave to adduce affidavit evidence of the new valuation, Mr Jones acknowledged:

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

That seems a more accurate assessment in the context of the lease's clause 4, by which Mr Jones "warrants acknowledges and agrees", among other things, NZ Bloodstock "makes no representation or warranty of any kind in respect of this Lease". Thus Mr Jones cannot point to substantiated allegations of fraud by NZ Bloodstock, such as may make its claim against him unsuitable for resolution by summary judgment.

[35] Without fraud, Mr Jones needs to point to something in NZ Bloodstock's conduct in the advances contract or lease, or their enforcement, that is "oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice".[21] But Mr Jones was express he sought the advances contract's extension of further credit at a time he was "stitched for cash" and sought "a bit of room".[22] (Inconveniently, this was around the time the first annual payment of the lease fell due on 10 June 2018.) He rejected the conditions proposed for the proffered extension of time. The consequences were unavoidable.

[36] I see nothing in the evidence to suggest the availability to Mr Jones of any defence to NZ Bloodstock's claims. It inherently is improbable a commercial trading operation such as NZ Bloodstock would have waived contractual entitlements to

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21 Credit Contracts and Consumer Finance Act 2003, s 118.

22 At [8] above.

recover its credit to Mr Jones for five to seven years, irrespective of his business' financial position; it is as improbable a legally-experienced business person such as Mr Jones would have entered arrangements, intended to sustain his business for those five to seven years, containing express requirements for their earlier periodic and unilateral on-demand repayment. Even Mr Jones acknowledged NZ Bloodstock's current requirements were at least for "cashflow to cover the interest and security".[23] But, except for the proceeds of sale in the first half of 2017, he provided no cashflow. And NZ Bloodstock's queries about the whereabouts of its security went unanswered. Mr Jones disputed NZ Bloodstock's entitlement to proceeds of sale in late 2018.

[37] Neither does the thoroughbred industry's, or even NZ Bloodstock's, alleged animus toward Mr Jones offer a basis on which to impeach NZ Bloodstock's claim. Regardless of the parties' relationship, the reality is NZ Bloodstock provided Mr Jones with funds for his business, which he was liable to repay. Mr Jones does not dispute such liability, but only the timing of its recovery. From that perspective, the availability of his claimed equitable set-off is immaterial. It does not impeach Mr Jones' liability to NZ Bloodstock. If the timing of its recovery is proved to contribute to the conspiracy alleged by Mr Jones, it may provide an additional head for damage from NZ Bloodstock, rather than any reduction of his liability to NZ Bloodstock. The two – Mr Jones' liability to NZ Bloodstock, and NZ Bloodstock's contended liability to Mr Jones – are not interdependent. The cross-claim does not impeach NZ Bloodstock's claim, but rather relies on its pursuit as further evidence of the industry-wide conspiracy against Mr Jones. There is nothing unfair or unjust about determining NZ Bloodstock's claim without taking Mr Jones' intended cross-claim into account.

[38] NZ Bloodstock's claim for judgment raises nothing justifying trial; neither does anything in Mr Jones' opposition to its summary determination. I am satisfied Mr Jones has no defence to NZ Bloodstock's claim. I therefore will dismiss his applications for adjournment, stay, or dismissal of the summary judgment application.

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[23] At [8] above.

Objections to evidence

[39] Parties and counsel have significant obligations to ensure evidence complies with the Evidence Act 2006. The Act's purpose is "to help secure just determination of proceeding by … providing for facts to be established by the application of logical rules". No leeway can be permitted an unrepresented litigant. At least in relation to briefs, challenges to admissibility must first be notified to the party concerned, for resolution between counsel. If remaining unresolved, "notice that there is an admissibility issue *must* be given to the court by the challenging party" (emphasis added).[24] Although the time limits applying in relation to challenges to briefs may be less observable in proceedings in which affidavits are adduced, the principle should be no different. The objective is challenges to admissibility are addressed in advance of hearing or trial.[25]

[40] NZ Bloodstock's challenges to admissibility of Mr Jones' November 2019 and February 2020 affidavits are brought on orthodox grounds. However, in opposition to summary judgment applications, irrelevance is a harder contest. That is because defendants are directed to file "an affidavit raising an issue of fact or law and give reasonable particulars of the matters which [they claim] ought to be put in issue".[26] Thus, for example, what may appear to be hearsay evidence if offered to prove the truth of its contents may not be objectionable if offered instead to give such reasonable particulars, or to raise an issue of fact or law. The issue is if what is offered justifies trial; not if it is true in itself. An example is Mr Clark's $1500 valuation. It is offered not necessarily for its truth, but to show the availability of an alternative valuation, contended to justify trial of NZ Bloodstock's claims for repayment. A further example is the breadth of the conspiracy contended for by Mr Jones. But the more speculative and less grounded the offering, the less weight it carries to require trial.

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24 High Court Rules 2016, r 9.11.

25 *Jarden v Earthquake Commission* [2015] NZHC 204 following *MacDonald v Tower Insurance Ltd* [2014] NZHC 2876, (2014) 22 PRNZ 490 at [16] and [20]; and *Parihoa Farms Ltd v Rodney District Council* (2010) 20 PRNZ 8. See also Gillian Combe QC "Witness statements in civil cases – show me the evidence" (paper presented at "Litigation Skills Masterclass" seminar, Stamford Plaza, Auckland, 25 November 2015) <www.gilliancoumbe.co.nz>.

26 *Pemberton v Chappell*, above n 4, at 4.

[41] On that basis, I am not minded to determine the objections to admissibility. I accept, even with the latitude I have expressed, Mr Jones' affidavits extend well beyond the factual expression of what he saw, heard, or knew. But no purpose now is served in excluding any aspect of his evidence. I have given it the weight it deserves.

Result

[42] Mr Jones' applications dated 19 and 25 May 2020 are dismissed. I give judgment against Mr Jones on NZ Bloodstock's claim dated 3 September 2019.

—Jagose J