IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2027
[2020] NZHC 402

BETWEEN	QIUFEN LU First Plaintiff
	LIANSEN MAO Second Plaintiff
AND	INDUSTRIAL AND COMMERCIAL BANK OF CHINA (NEW ZEALAND) LIMITED First Defendant
	QIAN HOU Second Defendant

Hearing:	12 February 2020
Counsel:	J Strauss and A Yang for plaintiffs DT Broadmore and LM Edginton for defendants
Judgment:	5 March 2020

JUDGMENT OF FITZGERALD J
[As to application for strike out/anti-suit injunction]

This judgment was delivered by me on 5 March 2020, at 2:30 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Heritage Law, Auckland
Buddle Findlay, Auckland

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Introduction and summary

[1] In August 2015, the first plaintiff (Ms Lu) purchased a property in Albany for the sum of $6 million (the Property). She saw its value in its subdivision potential. In order to support this purchase, Ms Lu borrowed approximately $2.9 million from the first defendant (the Bank).

[2] The Bank says Ms Lu fairly quickly fell into default under her loan agreement. First, in November 2015, a caveat was registered over the Property. Then in September 2017, Auckland Council obtained an enforcement order in relation to the Property, for breaches of the Resource Management Act 1991 and Building Code. Further, by December 2018, Ms Lu had defaulted three times on her repayment obligations, though each of those breaches was ultimately remedied. From January 2018, however, Ms Lu stopped making any repayments to the Bank, based on what she perceived to be the poor service provided by it.

[3] Given Ms Lu's defaults, the Bank issued a notice under s 119 of the Property Law Act 2007 (PLA). This was served on Ms Lu in June 2018 (pursuant to orders for substituted service made by this Court). The PLA notice expired unremedied. The Bank thereafter commenced steps to sell the Property through a mortgagee sale. At this point, Ms Lu requested some time to try and sell the Property herself to avoid a mortgagee sale. Her efforts were ultimately unsuccessful, and the Bank sold the Property in October 2019 for a price of $2.2 million.

[4] Prior to the sale, the Bank also took steps to recover the shortfall due from Ms Lu under her loan agreement. Ms Lu is a Chinese citizen and resides in China. Despite the loan agreement being governed by New Zealand law (though not containing any submission to jurisdiction clause), the Bank commenced proceedings against Ms Lu in China. It did so as that is where Ms Lu's assets are located. As part of its claim, it also brought proceedings against Ms Lu's husband, Mr Mao (the second plaintiff). This is because under Chinese law, certain debts of one spouse are deemed to be owed jointly by the other spouse. I will refer to the Bank's proceedings in China

as the "China proceedings". As part of those proceedings, the Bank also obtained freezing orders against Ms Lu and Mr Mao's assets in China.

[5] Ms Lu and Mr Mao responded to the China proceedings in two ways:

(a) First, they applied to have the proceedings stayed, on the basis that New Zealand is the proper forum for resolution of the Bank's claim. The Chinese Jiangsu Province Suzhou Municipal Intermediate People's Court dismissed that application, though Ms Lu and Mr Mao have since appealed. I was informed by counsel that it may be several months before that appeal is determined.

(b) Second, Ms Lu and Mr Mao commenced these proceedings against the Bank in New Zealand, alleging a number of breaches and defaults on the Bank's part. I will refer to these proceedings as "the New Zealand proceedings".

[6] The statement of claim in the New Zealand proceedings is somewhat inelegant, given Ms Lu and Mr Mao were not represented at the time they prepared and filed it.[1] But the key aspects of their claims are reasonably clear. Mr Broadmore, senior counsel for the Bank, distilled the following claims against the Bank:

(a) Mr Jiang, an employee of the Bank in 2015, is said to have represented or promised Ms Lu that after two years, the Bank *would* lend her more money for the purpose of subdividing the Property, if she showed a good record of repayment history in the interim. In breach of that promise or representation, the Bank did not lend Ms Lu any more money, when she requested a top up to her loan in December 2017.

(b) Between November 2017 and March 2018, Jiawen Mao (Ms Lu's step-daughter and who holds power of attorney for Ms Lu) attempted to contact the Bank to obtain further financing for Ms Lu but was unable to contact any staff member of the Bank. It is alleged this was duress,

[1] Mr Strauss has now been engaged as counsel.

or poor service, or a breach of the Consumer Guarantees Act 1993 (CGA).

(c) It was unfair and in-humanitarian for the Bank to have obtained freezing orders in China.

(d) The Bank breached s 176 of the PLA by failing to exercise reasonable care to obtain the best price reasonably obtainable as at the time of the sale of the Property.

[7] Mr Strauss, counsel for Ms Lu and Mr Mao, helpfully confirmed that this is an accurate distillation of the essence of Ms Lu and Mr Mao's claims. Mr Strauss quite responsibly accepted that the claims based on alleged duress (that is, forming part of (b) above) and that concerning alleged unfair and in-humanitarian conduct (at (c) above) could be struck out, as could the claims against the second defendant (a Bank employee). Mr Strauss also indicated that the claim under the CGA (part of (b) above) was unlikely to be a primary claim going forward. He flagged that on the basis his clients were given the opportunity to replead their claim in a more orthodox fashion, a claim of promissory estoppel would also be included.

[8] In the above context, there are two interlocutory applications before the Court:

(a) First, the Bank has applied to strike out Ms Lu and Mr Mao's claims and/or seeks defendant's summary judgment on them.

(b) Second, Ms Lu and Mr Mao seek an order enjoining the Bank from progressing the China proceedings, on the basis New Zealand is the appropriate forum for resolution of that claim, and the Bank's pursuit of the China proceedings is vexatious and oppressive. Such an order is commonly known as an "anti-suit injunction".

[9] The balance of this judgment is structured as followed:

(a) I first set out the factual background in more detail. The underlying facts are largely agreed, and there is a fulsome contemporaneous documentary record.

(b) I then address the Bank's application to strike out and/or for defendant's summary judgment.

(c) I then address the application for an anti-suit injunction. The merits of that application will of course be influenced by the extent to which the Bank is successful in striking out or securing a defendant's summary judgment on Ms Lu and Mr Mao's claims.

Factual background

Purchase of the Property

[10] Ms Lu purchased the Property pursuant to a sale and purchase agreement dated 1 August 2015 (Agreement). The purchase price was $6 million. A special condition of the Agreement was that Ms Lu, as purchaser, was aware the vendor had a building contract to build a new dwelling on the Property, in accordance with an attached plan and building contract. The Agreement recorded that the purchase price included that dwelling.

[11] On 14 August 2015, Ms Lu applied to the Bank for lending to support the purchase, and completed a personal loan application form. That form recorded that Ms Lu was seeking lending of $2.94 million with a repayment term of 18 years. The application form did not itself refer to any proposed further lending, and recorded the purpose of the loan as being "purchase owner occupied property for daughter". The application form recorded the capital value of the Property as $3.2 million. It also recorded that Ms Lu is not a New Zealand citizen or a permanent New Zealand resident.

[12] The Bank approved the loan application on 24 August 2015. The internal loan approval form recorded that:

> Resource consent for the subdivision of 13 sections on the property has been granted to the vendor, and the property could be subdivided into 27 sections in [sic] pursuant to provided RV report.
>
> According to front line, the borrower intends to demolish the existing dwelling and build a new one to live in; the borrower does not have any subdivision plans in the near future.
>
> The borrower's relative will take care of the property while she was not in New Zealand [sic].

[13] It accordingly is clear that the Bank was aware at that time of the potential to subdivide the Property, though noted that no such plans were imminent.

[14] The same day, the Bank (as lender) and Ms Lu (as borrower) entered into a loan agreement (the Loan Agreement). Pursuant to the Loan Agreement, the Bank agreed to advance Ms Lu the sum of $2.94 million on the terms and conditions set out in the agreement. The loan term was 18 years. The Loan Agreement incorporated by reference the Bank's home loan and personal loan general terms and conditions.

[15] The following from the Loan Agreement and/or the general terms are relevant for present purposes:

(a) That the Property was "to have clear title and to be free from mortgages, charges and all other encumbrances other than the security provided to us", save for where the Bank had given prior written consent to such charges or other matters, or as might be required by law. (Loan Agreement, p 4.)

(b) That the Bank was a member of the Banking Ombudsman Dispute Resolution Scheme pursuant to the Financial Service Providers (Registration and Dispute Resolution) Act 2008, and that any complaints could be made to that Dispute Resolution Scheme at any time. (Loan Agreement, p 7.)

(c) That the term "Loan Documents" comprised the general terms and conditions, the Loan Agreement and also any document "evidencing a

security" (including a mortgage). (General terms and conditions, cl 2.2.)

(d) That the following would be "events of default":

(i) "you do not pay, when due, any Amounts Owing, or any other amount owing under any agreement with us";

(ii) "if you or any other Collateral Provider fails to comply with any of the terms of your Loan Documents or our General Terms";

(iii) "we think that there has been an event which impacts adversely on our ability to enforce any document evidencing any Security";

(iv) "something happens (whether by your actions or not) that we think impacts adversely on your ability, or on any Collateral Provider's or any ability, to continue meeting your or their obligations under the Loan Documents";

(v) "circumstances exist which, in our opinion, impact adversely on our ability to continue making the Loan available to you".

(General terms and conditions, cl 14.)

[16] Of particular relevant to the present case, cl 17 of the Loan Agreement provides as follows:

> **If** you are complying with all of the terms of the Loan Documents, you may ask us (amongst other things) to:
>
> - increase any Portion which is subject to our Variable Interest Rate;
> - lend you a new fixed Portion; or
> - extend the term of a Portion which is subject to our Variable Interest Rate.

> We will give you notice confirming any increase, new fixed Portion or extension **that we agree to**.
>
> [Emphasis added]

[17] The Loan Documents were to be governed by and interpreted in accordance with New Zealand law. The general conditions do not, however, include a submission to jurisdiction clause (either exclusive or non-exclusive).

[18] Finally, the mortgage itself provided that "the party giving this mortgage must not create or allow the creation of or allow to remain any mortgage, charge or other security interest in the land without the prior written consent of the mortgagee".

The caveat and enforcement order

[19] On 23 November 2015 (thus fairly shortly after Ms Lu purchased the Property), a caveat was lodged over it by a Chengjiang Wu. The interest upon which the caveat was said to be based was an interest pursuant to a sale and purchase agreement of 30 September 2015 between Ms Lu and the caveator (as purchaser).[2]

[20] The Bank says the lodging of the caveat against the Property amounted to an event of default under the Loan Agreement.[3] It does not appear, however, that the Bank took any steps at that time as a result of this breach.[4]

[21] Subsequently, on 27 September 2017, Auckland Council obtained an enforcement order against the Property in respect of works carried out on it that were without the requisite building or resource consents. The enforcement order recorded that a building which had been relocated onto the Property in December 2014 and converted into a dwelling exceeded the permitted activity standards for a minor dwelling. It also recorded that in about January 2015, a second larger home had been relocated onto the Property and was at that point (namely September 2017) in the process of being converted into two dwellings. The Environment Court judgment on the application for the enforcement order noted that the dwellings on the Property were not lawfully established, and that in order for it to comply with the Resource

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2 I note in passing that the caveat was lodged by a Mr Kashyap, who was later *Ms Lu's* solicitor, when it became apparent the Bank was taking enforcement action under the mortgage.

3 In particular, [15](a), (d) and [18] above.

4 It is not clear on the materials before me whether the Bank was aware of the caveat at the time.

Management Act, the number of dwellings would need to be reduced to one (or a resource consent obtained).[5]

[22] The Environment Court judgment went on to note that a Mr Augustine Lau managed the Property and the development work on it.[6] The enforcement order was accordingly directed at Ms Lu and Mr Lau. The Council had sought and the Court granted a dwelling disestablishment order, which required Ms Lu and Mr Lau to lawfully disestablish all but one dwelling.[7] A dwelling prohibition order was also made, prohibiting Ms Lu and Mr Lau from establishing any more than a total of one dwelling and one fully compliant minor dwelling on the site.[8]

[23] In light of these developments, in October 2017 the Bank's solicitors, Buddle Findlay, sent a letter of demand to Ms Lu, to an email address at which the Bank had earlier corresponded with her.[9] The letter of demand referred to the caveat lodged by Chengjiang Wu and the enforcement order. The letter noted that the mortgage granted by Ms Lu required her to undertake works at the Property in accordance with a building consent and with the Bank's prior written approval. The Bank required the breaches to be remedied within seven days of the date of the letter of demand, by way of Ms Lu providing a "full explanation" of the circumstances in which the caveat came to be registered, arranging for its immediate discharge, and details of the steps being undertaken to comply with the Council's enforcement order.

[24] A separate letter was also sent to Mr Mao concerning breaches of a loan agreement he had with the Bank in relation to a separate property. Mr Wong, a retail credit manager at the Bank who has sworn a number of affidavits on its behalf in these proceedings, notes that neither Ms Lu nor Mr Mao responded to the correspondence (although Mr Mao subsequently remedied his defaults by selling his property and repaying the Bank).

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5 *Auckland Council v Lau* [2017] NZEnvC 160.
6 At [57].
7 At [56]–[57].
8 At [58]–[59].
9 The letter was also sent to the Property's address.

[25] A further letter was sent by the Bank's solicitors to Ms Lu and Mr Mao on 24 November 2017, following up on the early October letter and noting there had been no response and that the caveat remained registered on the Property's title. The 24 November 2017 letter again required the breaches to be remedied within seven days of the date of the letter.

Payment defaults

[26] Also during this period, on three occasions between 20 September 2016 and 20 December 2017, Ms Lu fell into payment default under the Loan Agreement (although these defaults were remedied on each occasion). On 27 December 2017, the Bank wrote to Ms Lu (at the email address mentioned earlier), requesting that she clear the most recent payment default (that had occurred on 20 December 2017). The email stated:

> Your loan at our Bank has been overdue for over one week since the 20th of this month. If you have received this email, please clear the total amount due this month … by making payment to your [account] as soon as possible for the system to deduct automatically.
>
> If you can't repay the amount due this month as soon as possible, this overdue record may be recorded in your credit records in New Zealand.

[27] Ms Lu responded to this with an email the following day, stating:

> I myself have reached my foreign currency transfer limit for 2017. Currently I am waiting for my friends and family's assistance. The earliest I can pay is at the end of January. The ongoing subdivision work has experienced overruns. **It'd be better if your Bank can lend another $1 million**. Current RV is 5.75 million.
>
> [Emphasis added]

[28] It was not in dispute that this was the first time Ms Lu had requested additional funds from the Bank.

[29] The Bank responded to Ms Lu's email as follows:

> We fully understand your circumstances. However, could you please discuss the issue with your family and friends and repay the overdue principal and interest of the loan by this Friday if possible? Because the Bank is at its year-end closure period, if your overdue records at our Bank carries over to 2018, it might have a negative effect on your credit records in New Zealand in the future, hence can be detrimental to your future application of loans locally.

> Regarding your request to apply for top up at our Bank, we'll also analyse in detail according to your personal circumstances when the time comes. We hope you can understand! If it is convenient for you, could you please give us a call back on [telephone numbers].

[30] Mr Wong says (and Ms Lu does not say otherwise) that Ms Lu did not respond to this email. As noted at [26] above however, it appears that Ms Lu did remedy this default shortly thereafter, though the evidence before the Court does not disclose precisely when that occurred.

[31] On 19 January 2018, the Bank's solicitors sent a further letter concerning the defaults addressed in the October and November 2017 correspondence. The letter noted that the caveat remained registered, and no written explanation or correspondence had been received in relation to it, or the steps being taken to comply with the Council's enforcement order. I note that this correspondence (as with the earlier October and November letters) was sent to a different email address from that with which the Bank had corresponded with Ms Lu on 27 and 28 December 2017 (referred to at [26]–[29] above).

[32] Ms Lu fell into repayment default again on 20 January 2018 and has not paid the Bank any further amounts since that date. She does not dispute this. She says she stopped making any payments to the Bank given her dissatisfaction with the Bank's service.

[33] On 22 January 2018, the Bank's solicitors sent two further emails to Ms Lu (to the email address from which she had corresponded in late December 2017), further demanding she remedy her defaults. No response was received.

The PLA notice

[34] As a result, in March 2018, the Bank instructed its solicitors to issue a notice pursuant to s 119 of the PLA. The Bank could not locate Ms Lu and therefore could not effect personal service on her. The affidavits in support of a subsequent application for substituted service noted the various efforts to locate Ms Lu, and that the Bank believed the PLA notice would be brought to Ms Lu's attention if it were posted to a Flat Bush address recorded on her loan application as her New Zealand residence, sent

to Ms Lu at her last known email address, as well as being sent to that email address from which Ms Lu had corresponded on 27 and 28 December 2017.

[35] The Court subsequently made an order (on 7 June 2018) for substituted service of the PLA notice in accordance with the above. Service in accordance with those methods was effected on 14 June 2018.

[36] The PLA notice was clearly brought to Ms Lu's attention, because shortly before its expiry, on 13 July 2018, Ms Lu's then solicitor, Mr Kashyap, made contact with the Bank. He noted that he had been instructed in relation to the PLA notice and that Ms Lu was going to try to sell the Property to repay the Bank as soon as possible. He stated:

> I am instructed that all efforts are being made to minimise the losses and a sale in this market is hard to come by. My client seeks your client's leniency to let my client sell the property as the best result could be achieved without the property be advertised as a forced sale.

[37] The Bank's solicitors responded stating that they would seek instructions from the Bank but in the interim, sought details of what steps were then being taken by Ms Lu to sell the Property, and that their understanding was it was listed with Ray White (and sought copies of the Ray White marketing updates). No response was received to that email. However on 23 July 2018, the Bank's solicitors emailed Mr Kashyap confirming that the Bank was prepared to allow some time for Ms Lu to sell the Property. Mr Kashyap responded noting that negotiations were then on foot for the sale of the Property and that he would forward a copy of the contract once signed by Ms Lu for the Bank's consent.

[38] I interpolate to note that at no point during these communications did either Ms Lu or Mr Kashyap say anything about Ms Lu's complaints or concerns which are now the subject of the New Zealand proceedings.

Steps to sell the Property

[39] On 3 August 2018, Mr Kashyap presented the Bank an offer from Navcon Developments Ltd (Navcon) to purchase the Property for $3.35 million. That offer was, however, conditional on Navcon obtaining subdivision consent by 6 December

2018. On 7 August 2018, the Bank responded noting that it did not want to consent to an agreement that was conditional on subdivision consent being obtained, given the significant uncertainty around whether it would be possible to obtain such consent, that the processes and timeframes around obtaining any subdivision consent were unknown, and there was no ability for the vendor to cancel the proposed agreement prior to December 2018 if substantive progress was not made over that time. Indeed, in his covering email forwarding the agreement, Mr Kashyap himself had said to the Bank:

> See this offer my client has signed. We cannot see how the Bank would approve this agreement in light of clause 27 [the condition re subdivision consent]. Do let me know your thoughts and I could introduce directly to you the developer clients we have who had shown interest in this property.

[40] The Bank's solicitors followed up with Mr Kashyap about the Navcon agreement on 13 and 16 August 2018, noting that unless the arrears under the Loan Agreement could be cleared imminently, they had instructions to commence a mortgagee sale process. On 16 August 2018, Mr Kashyap noted he was then working with two parties, so requested some further time (of about a week) to continue those negotiations.

[41] On 23 August 2018, Mr Kashyap presented to the Bank an offer by Aayaan Developments Ltd (Aayaan) to purchase the Property for $3.3 million. That offer was conditional on a 20-day due diligence period, Ms Lu giving clear title on settlement and settlement occurring in January 2019. The Bank agreed to wait for the 20-day due diligence period to expire before commencing the mortgagee sale process.

[42] On 13 September 2018, Mr Kashyap advised that Aayaan had sought an extension to the due diligence period. Mr Kashyap noted:

> Further, if all else fails clients, my clients wish to advance matters through another agent in the middle part of October for an urgent auction. This will be substantially beneficial for all parties concerned as without a sale being through your client the return to your client would be higher as my clients are not GST registered so do not have to account the same to IRD. I have been advised however that if the property is sold via your client then your client is obligated to without [sic] sums for GST purposes.

[43] Mr Kashyap subsequently requested that the Bank allow Ms Lu until 31 October 2018 to sell the Property, to which the Bank agreed, provided the relevant agreements were entered into by 1 October 2018.

[44] Towards late September 2018, Ms Lu changed her real estate agent. On 27 September 2018, Mr Kashyap advised Buddle Findlay that he had not heard from Aayaan, so he did not have much hope that it would proceed with the purchase.

[45] Marketing reports provided to the Bank and communications from Mr Kashyap at this time indicated there was little interest in the Property. On 25 October 2018, Mr Kashyap stated "further to the last report, apart from scant interest, it does not seem that anyone is prepared to make a 100 per cent commitment at this time. There is no confirmation of anyone attending the auction despite advice from potential buyers that they are interested". On 26 October 2018, the proposed auction was cancelled. Mr Kashyap advised the Bank's solicitors on 31 October 2018 that Ms Lu had, despite "best efforts", been unable to secure any contracts. He noted that negotiations were continuing with two interested parties (but that an imminent contract looked unlikely).

[46] By this point, the Bank was not prepared to let the matter drift any further, and instructed Bayleys Real Estate Ltd (Bayleys) on a mortgagee sale.

[47] On 1 November 2018, Mr Kashyap presented the Bank with an offer by Hamann Investments Ltd (Hamann) to purchase the Property for $2.3 million. The agreement was conditional on a 10-day due diligence period. The Bank paused the mortgagee sale process until it received confirmation on whether the Hamann agreement became unconditional. On 14 November 2018, Hamann sought an extension of the due diligence period to 30 November 2018. Mr Kashyap advised the Bank's solicitors that Ms Lu was "not happy" to grant the extension of time, and nor was the Bank. The Hamann agreement was accordingly cancelled by Ms Lu on 15 November 2018.

[48] On 16 November 2018, Bayleys were instructed to proceed with marketing and selling the Property by way of mortgagee sale. In parallel, however, the Bank

continued to receive information from Ms Lu, Mr Kashyap and the real estate agent employed by Ms Lu (Mr Papunui) about offers or potential offers they were receiving. This comprised the following:

(a) On 25 January 2019, Mr Papunui advised Bayleys (who subsequently advised the Bank) that he had been communicating with a potential buyer that was interested in purchasing the Property for $1.1 million to $1.2 million.

(b) On 12 February 2019, Mr Kashyap advised Buddle Findlay that Aayaan was interested in purchasing the Property for $2.3 million.

(c) On 9 August 2019, Mr Kashyap presented to the Bank three offers to purchase the Property from Farihah Properties Limited (Farihah) and Xing Enterprises Limited (Xing):

    (i) Farihah - first option:

        A. $2.1 million purchase price;

        B. 3 days due diligence;

        C. the Bank to give clear title on settlement.

    (ii) Farihah - second option:

        A. $1 million purchase price to purchase half of the site;

        B. settlement would occur on 31 January 2020 or the date of subdivision, whatever was to occur later;

        C. the Bank to give clear title on settlement.

    (iii) Xing:

        A. $1.6 million purchase price.

[49] The Bank had a number of concerns with these offers. In particular:

(a) It was not clear how the Bank could ensure clear title upon settlement, because the Property's title was by that time also encumbered by a charging order to Westpac New Zealand Limited (for $2,297,802.14), and three charging orders to Auckland Council (totalling $110,276.48). By email on 9 August 2019, Buddle Findlay raised this issue with Mr Kashyap, but did not receive any substantive response.

(b) The Bank was also unwilling to agree to any offer that was conditional on subdivision consent being obtained.

[50] On 23 August 2019, Ms Lu presented the Bank with two offers to purchase the Property, from Farihah and Skylin Home Number 2 Limited (Skylin). Those offers were as follows:

(a) Farihah:

(i) $1.35 million purchase price to purchase half of the site;

(ii) conditional on Westpac and Auckland Council giving their consent to the sale and subdivision on the Property;

(iii) the Bank to give clear title on settlement;

(iv) the Property would be subdivided by 28 February 2020, and if subdivision did not occur before this date, the purchaser could cancel the agreement.

(b) Skylin:

(i) $1.55 million purchase price to purchase half of the site;

(ii) conditional on Westpac and Auckland Council giving their consent to the sale and subdivision on the Property;

(iii) the Property would be subdivided by 30 March 2020, and if subdivision did not occur before this date, the purchaser could cancel the agreement.

[51] The Bank says it did not accept these offers because:

(a) It understood the subdivision proposals required funding to be provided by the Bank.

(b) After subdivision, the Bank would be left with a back block, which would be difficult to sell.

(c) It was unwilling to agree to any offer that was conditional on subdivision occurring.

(d) It was not clear whether the charge holders would consent, and what steps had been taken to get their consent, or how clear title could be obtained.

(e) Skylin was at that time in the process of being removed from the Companies Office register.

[52] In the interim, in March 2019, the Bank had obtained a valuation report from CBRE Valuation and Advisory Services (CBRE). CBRE advised that as at 21 March 2019, the Property's market value was approximately $2.9 million, and the estimated likely mortgagee sale price was between $2.2 million to $2.5 million.

[53] On 18 September 2019, Farihah offered to purchase the Property for $2.2 million. That offer was conditional upon the Bank settling all litigation and claims against Ms Lu.[10] That offer was not accepted by the Bank, as it was not willing to settle its claims against Ms Lu.

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[10] The fact this was a condition of the offer would indicate some connection or relationship between Ms Lu and Farihah.

[54] On 1 October 2019, Barfoot & Thompson were engaged by the Bank in relation to the mortgagee sale. On 10 October 2019, Farihah made an unconditional offer to purchase the Property for $1.91 million. After negotiating with Farihah, this was increased to an unconditional offer of $2.2 million. Although the Bank sought to increase the price further, Barfoot & Thompson advised there was no possibility of the offer being increased and that there was real urgency in accepting the offer. The Bank accepted that offer on 14 October 2019. The sale of the Property to Farihah settled on 11 November 2019.

[55] As at 3 December 2019, and taking into account the application of the net proceeds of sale, the amount outstanding to the Bank from Ms Lu under the Loan Agreement was $545,032.82 plus $296,407.77 in interest.

The China proceedings

[56] In May 2019, the Bank commenced the China proceedings against Ms Lu and Mr Mao, seeking payment of the amounts then owed by Ms Lu under the Loan Agreement. Mr Wong notes in his affidavit that the Bank understood Ms Lu had very limited assets in New Zealand, and a property which it thought she might own here was later confirmed by Mr Kashyap not to be hers. Given Ms Lu's citizenship and primary residence in China, and that Ms Lu has assets there, the Bank accordingly decided to commence proceedings in China.

[57] Together with the claim against Ms Lu, the Bank also claimed against Mr Mao for the amounts outstanding under the Loan Agreement. Mr Wong notes that his understanding is that the law in China is that if a spouse incurs a debt in his or her own name during a marriage which is to meet the needs of everyday life of the family, a creditor can recover the debt from both that person *and* their spouse. The relevant provisions of Chinese law, translated into English, were produced in evidence before me. There was no expert evidence in relation to them. But at least on the face of the translation, Mr Wong's summary appears to be correct. There is no information, however, as to what the concept of "meeting the needs of everyday life of the family" means under Chinese law. Plainly there would be no possibility of bringing such a claim against Mr Mao in New Zealand.

[58] As part of the China proceedings, on 8 July 2019, the Bank applied for and was granted freezing orders over Ms Lu and Mr Mao's assets in China. The orders attached to seven bank accounts held by Ms Lu (holding a total of approximately NZD $4,700 and AUD $138.40), shares held by Ms Lu (to the value of approximately NZD $433,000), bank accounts held by Mr Mao (holding amounts totalling approximately NZD $32,500) and shares held by Mr Mao (to the value of approximately NZD $2,500).

[59] There is no information before me as to the basis upon which freezing orders may be granted in China (for example, the need to show a risk of dissipation as is the case here). I can only proceed on the basis, however, that the Chinese Court making the orders was satisfied it was appropriate under Chinese law to do so.

[60] Ms Lu and Mr Mao subsequently filed a protest to jurisdiction in the China proceedings, on the basis New Zealand is the most appropriate forum in which the Bank's claims should be brought. On 21 October 2019, the Court in China dismissed the protest to jurisdiction. There is some dispute as to whether the translation of the Court's judgment shows that it did so on the basis that it simply *had* jurisdiction, rather than it had jurisdiction and also considered itself an appropriate forum for resolution of the dispute. However, I do not need to resolve that interpretation issue for the purposes of the current application. For whatever reason, the application was dismissed and Ms Lu and Mr Mao have now appealed.

[61] As at the date of the hearing before me, and stated to be on "compassionate grounds", the Bank has discharged the freezing orders in China over Mr Mao's bank accounts. The Bank is also taking steps to discharge the freezing orders over Ms Lu's bank accounts in China (though not her securities).

[62] I turn now to consider the parties' applications. I deal first with the application to strike out and/or grant a defendant's summary judgment.

Strike out/summary judgment

[63] High Court Rule 15.1(1) provides that the Court may strike out all or part of a pleading if it discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading.

[64] The relevant principles are well established.[11] A claim will be struck out where the causes of action are clearly untenable, even assuming the pleaded material facts to be true (but this does not extend to pleaded allegations which are entirely speculative and without foundation).[12] The jurisdiction, which should be exercised only in clear cases, is not excluded by the need to decide difficult questions of law requiring extensive argument.[13] Defendants should not be forced through a lengthy trial process to defend untenable claims.[14] The Court can strike out part of a pleading in appropriate cases.[15]

[65] High Court Rule 12.2(2) provides that the Court may give judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed. It is similar in nature to an application for striking out, but the same restrictions on evidence do not apply.[16]

[66] The defendant bears the onus of proving on the balance of probabilities that the plaintiff's claim cannot succeed. The threshold for summary judgment is reasonably high. Summary judgment will generally only be entered against a plaintiff where there is a complete defence to the plaintiff's claim, or a clear answer to the claim which cannot be contradicted.[17]

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11 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

12 *Southland Building Society v Allison* [2012] NZHC 2614 at [18(a)].

13 *Attorney-General v Prince and Gardner*, above n 11, at 267.

14 *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] NZCA 374, [2009] 3 NZLR 786 at [16].

15 For example, one of two causes of action was struck out in *MacKenzie v MacLachlan* [1979] 1 NZLR 670 (SC).

16 *Ferrymead Tavern Ltd v Christchurch Press Ltd* (1999) 13 PRNZ 616 (HC) at 619.

17 *Westpac Banking Corp v MM Kembla NZ Ltd* [2001] 2 NZLR 298 (CA) at [60].

[67] In *Krukziener v Hanover Finance Limited*, the Court of Appeal summarised the legal principles relating to summary judgment and, in particular, confirmed that:[18]

> The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it.

The misrepresentation claim

[68] The alleged promise or representation in this case is that the Bank representative dealing with Ms Lu's loan application in 2015, knowing of the subdivision plans, *promised* that she would be provided loan finance for the purpose of completing the subdivision, with such finance to be provided after two years from purchase. This is pleaded on the basis Ms Lu had shown a "good record of repayment history" in the interim. I clarified with Mr Strauss at the hearing that the alleged representation was not that the promised further lending would be made "come what may", that is, irrespective of Ms Lu's performance under the Loan Agreement in the interim. Mr Strauss acknowledged that he could not suggest a representation of that nature, and that the representation, as currently pleaded, is what is relied on.

[69] A misrepresentation must relate to an existing fact or past event.[19] A statement of intent, future fact, or future performance is not actionable as a misrepresentation.[20] However, if it can be shown that the person making the representation had no intention to carry out the promise or did not genuinely believe that the future event would eventuate, then there can be a misrepresentation.[21]

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

19 *West v Quayside Trustee Ltd (in rec and in liq)* [2012] NZCA 232 at [30]; and *Gavigan v Eichelbaum* [2017] NZCA 412, [2018] 2 NZLR 530 at [38].

20 *Ware v Johnson* [1984] 2 NZLR 518 (HC) at 537; *West v Quayside Trustee Ltd,* above n 19, at [30]; *Superior Minerals Ltd v Watt* (2006) 8 NZBC 101,822 (HC) at [11] and [14], applied in *Lightbourne v New Zealand Racing Board* HC Auckland CIV-2008-404-7273, 10 December 2008 at [36]; and *Gavigan v Eichelbaum,* above n 19, at [38].

21 *Edgington v Fitzmaurice* (1885) 29 Ch 459 (CA) at 481; *Buxton v The Birches Time Share Resort Ltd* [1991] 2 NZLR 641 (CA) at 646; and *Gavigan v Eichelbaum,* above n 19, at [38].

[70] Mr Broadmore submits that the existence of the pleaded representation is inconsistent with the contemporaneous documentary record. He points to Ms Lu's loan application, which makes no reference to future additional funding. He also notes cl 17 of the Loan Agreement, which reflects that further lending might be contemplated, but only if the borrower were complying with the terms of the Loan Documents and would be subject to the Bank's further agreement in any event. He also notes that the loan approval form indicates the Bank was not aware of any subdivision plans at the time the Property was purchased. Mr Broadmore further says that the alleged representation, at least in the form of a *promise* of future lending, is inconsistent with Ms Lu's own conduct, given when she first requested an additional $1 million (on 27 December 2017), and the Bank responded that it would need to consider that request and it would be subject to the Bank's agreement, Ms Lu did not object or otherwise point to the existence of the alleged earlier promise.

[71] Mr Strauss notes that whether or not there was such a promise (which need not need to be reduced to writing) is a question of fact, and is accordingly not suitable to being determined on a strike out application or a defendant's summary judgment. Further, he says the pleaded representation is to be treated, at least for a strike out application, as being true, and at the date Ms Lu's request for a further $1 million, while there had been *some* defaults, there were only three earlier *payment* defaults, two of which had already been remedied by that time.

[72] I am conscious that the matters arising on this aspect of the claim are factual. Nevertheless, the Court is entitled to take a robust and realistic approach, and does not need to uncritically accept all pleaded allegations which are inherently improbable.

[73] It is inherently improbable that a bank officer would effectively promise to make further loan advances to a customer at some point in the future, subject *only* to the customer having a good payment record in the intervening period. Plainly any commercial bank would want to reserve to itself the right to consider the position fully at the time the request for further lending was made, including the quantum of the amount requested, the nature and value of security proposed to cover any further borrowings, the purpose of the borrowings, the customer's credit history and any other matters considered relevant. The fact any such further borrowings would be subject

to review and agreement is also consistent with the terms of the Loan Agreement (cl 17), as well as the contents of the Bank's email in response to Ms Lu's December 2017 request.

[74] The inherent improbability of the representation is reinforced by the fact that there was no reference by Ms Lu or her lawyer to this alleged promise, and the Bank's alleged breach of it, at the time she requested the top up in December 2017, or at any time when she and the Bank were trying to sell the Property. Indeed, the only documentary reference to the alleged "promise" is in an email to the Bank from Ms Lu's step-daughter dated 18 July 2019, being *after* the Bank had commenced the China proceedings.

[75] But even putting aside the inherent improbability of the alleged representation, it was subject to Ms Lu showing a "good record of repayment history" in the intervening period. As is evident from the factual background set out above, by the time Ms Lu made her request for further funding, she had defaulted three times on her repayment obligations, and the Bank was already aware of two further reasonably serious (alleged) breaches, namely a caveat having been registered against the title and Auckland Council having obtained an enforcement order. While Mr Strauss sought to characterise these, and in particular the payment defaults, as "minor matters", the fact remains that at that time, Ms Lu *had* defaulted in her repayment obligations on three occasions, and there were other issues of concern to the Bank. And as noted, by 20 January 2018, Ms Lu was again in breach of her repayment obligations and has been ever since. In those circumstances, the Bank cannot have been in breach of the pleaded representation, even if it were true.

[76] And even putting aside the above, there is a further flaw in this aspect of the claim. Representations as to future facts or future performance are not themselves actionable as a misrepresentation. This is demonstrated by the Court of Appeal's decision in *Gavigan v Eichelbaum*, in which the alleged representations were that Mr Eichelbaum "would receive 10 per cent of the project management fee when it was received in the future", and "that JAFL would continue to be a low-cost operation".[22]

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22 *Gavigan v Eichelbaum,* above n 19, at [37].

These representations were held to be representations as to future events and thus not actionable at law.[23] And, while a representation as to a future event may be actionable where it can be shown the person making the representation did not at that time intend to carry out the future promise, that is not suggested here.

[77] For these reasons, I am satisfied this aspect of the claim cannot succeed and must be struck out.

Promissory (or equitable) estoppel

[78] The various "strands" of equitable estoppel (being estoppel by representation, promissory estoppel and propriety estoppel) are now considered to be "unified" under the doctrine of equitable estoppel based on unconscionability.[24] While the unified doctrine has been shorn of some of the earlier requirements and elements attaching to the separate forms of estoppel, leading commentary suggests that a party relying on a claim of equitable estoppel must nevertheless show that:[25]

(a) relevantly in this case, a belief or expectation has been created or encouraged through some representation by the party against whom the estoppel is alleged;

(b) the belief or expectation has been reasonably relied on by the party alleging the estoppel;

(c) detriment will be suffered if the belief or expectation is departed from; and

(d) it would be unconscionable for the party against whom the estoppel is alleged to depart from the belief or expectation.

[79] Particularly in the case of equitable estoppel based on alleged representation, the representation need not be based on present or past facts, but can extend to

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23 At [38].
24 Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [19.1.3(1)].
25 At [19.2].

statements of future intention.[26] However, "estoppels have not arisen where the representation relied on was ambiguous, overly general or merely a comforting sound".[27] In other words, the *nature* of the representation did not justify the other party's reliance on it.

[80] Even with the most modern and flexible approaches to equitable estoppel, there are a number of (fatal) issues with this aspect of Ms Lu's foreshadowed claim.

[81] First, the alleged representation does not disclose a clear, unambiguous representation or promise. There is no suggestion of how much further lending would be advanced, when, on what terms, against what security, with what repayment obligations and so on. Reflecting the inherent improbability of a *promise* of further lending (even if subject to a requirement of a good repayment history in the meantime), the pleaded representation reflects what would have been much more likely in the case, namely that, so long as Ms Lu maintained a good repayment record, the Bank may well look favourably on any future requests for lending, taking into account the circumstances existing at that time. In other words, general and "comforting" words. That this was the case is consistent with Ms Lu's own reaction to the Bank's response to her December 2017 request for a "top up".

[82] Second, the same points made at [75] above apply to any claim in equitable estoppel, namely that at the time Ms Lu sought to "enforce" the alleged promise, she did not have a good repayment history with the Bank, and indeed serious issues appeared to have arisen in the context of the caveat and enforcement order. In those circumstances, even if Ms Lu had reasonably relied on the representation and suffered some detriment as a result,[28] there is nothing unconscionable in the Bank departing from the pleaded representation in such circumstances. This is particularly so given the terms of the contract which Ms Lu entered into with the Bank, which expressly provided that any further lending would be subject to the Bank's agreement at the time.[29]

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26 At [19.3.2].
27 At [19.3.4].
28 Said to be entering into the Loan Agreement with the Bank, rather than obtaining lending from other banks with (slightly) lower interest rates.
29 Loan Agreement, cl 17.

[83] I accordingly conclude that a pleaded claim of promissory or equitable estoppel would be untenable.

CGA claim

[84] On the factual background as pleaded, as well as described in the parties' affidavits, Mr Strauss could not, understandably, articulate what the precise claim might be under the CGA. At least as formulated by Ms Lu in the pleadings, it appears to be based on a general level of dissatisfaction with the Bank's service, stemming from it declining to advance her more funds in late 2017 and early 2018 (as well as difficulties she said she had getting in touch with Bank staff around that time).

[85] Should Ms Lu have ongoing concerns in this regard, they are properly complaints to be made to the Bank itself, and then for potential referral or resolution through Bank's dispute resolution scheme. General "service" complaints of the type raised by Ms Lu do not give rise to a justiciable cause of action.

[86] This claim is accordingly also struck out.

Breach of "duty"

[87] For completeness, I note that there are also generalised statements in the statement of claim of alleged breach of a duty owed by the Bank to Ms Lu, and/or a breach of a fiduciary duty. These sorts of claims were not expanded on by Ms Lu at the hearing.

[88] But as Mr Broadmore submits, in general terms, there is no duty of care owed by a bank to a borrower. In *Forivermor v ANZ Bank New Zealand Ltd*, the Court of Appeal stated:[30]

> 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.

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[30] *Forivermor Ltd v ANZ Bank New Zealand Ltd* [2014] NZCA 129 at [56].

[89] Similarly, the relationship of banker and customer does not ordinarily give rise to a presumption of a fiduciary relationship.[31]

[90] But even if such "duties" were arguable, for the reasons already explained, there is no tenable case on breach. As already discussed, even on the basis the pleaded representation or promise was true, there was nothing unconscionable or inconsistent with any duty owed by the Bank to Ms Lu in declining to advance further money to her in early 2018. Any purported claim on the basis of an alleged "duty" is accordingly untenable.

Breach of duty to secure reasonable price for the property

[91] An alleged breach by the Bank of s 176 of the PLA does not presently feature in the statement of claim. But given it was clearly flagged in Ms Lu's affidavit materials, I have dealt with it on the basis it is a pleaded cause of action.

[92] In his oral submissions, Mr Strauss confirmed that the essence of the PLA claim would be that the Bank failed to consider with sufficient care some of the earlier offers made for the Property which, although conditional, were at a higher price than ultimately achieved by the mortgagee sale. Mr Strauss also submits that the price at which the Property ultimately sold did not properly reflect the "great subdivision value" inherent in it.

[93] The legal principles applying to a mortgagee's duty to take reasonable steps to achieve the best price are well settled. A useful summary of those principles is contained in *Hart v ANZ National Bank Ltd*, which I gratefully adopt:[32]

(a) While a mortgagee is obliged to take reasonable care in the sales process, it does not follow that the best price reasonably obtainable will be achieved.[33]

(b) Where the mortgagee has taken and is acting upon independent professional advice as to the sale processes, the Court will generally

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31 At [61]–[62]. See also Butler, above n 24, at [17.4.1].
32 *Hart v ANZ National Bank Ltd* [2012] NZHC 2839 at [36].
33 *Liddle v Bank of New Zealand* HC Auckland CIV 2009-404-6189, 29 October 2009 at [19].

not intervene.[34]

(c) In the normal course the proposed sale will need to be advertised with an adequate description of the property's attributes and, within reason, widely enough to attract all possible purchasers.[35]

(d) There is no obligation to postpone the sale in the hope of a better price later, or to break up the assets and sell in a piecemeal manner if this can only be carried out over a substantial period or at a rise of loss.[36]

(e) In deciding whether a mortgagee has fallen short of the duty to take reasonable precautions in a sale, the facts must be looked at broadly and in practical commercial terms.[37] It is proper to allow some margin for business and risk assessment by the mortgagee in the realisation of the security.[38]

(f) The fact that a mortgagee has acted in good faith does not mean that it has necessarily discharged its equitable duty to take reasonable care to obtain the best price reasonably obtainable.[39]

(g) Conversely, in evaluating judgments made by or on behalf of the mortgagee it should not be forgotten that in the absence of bad faith, the mortgagee shares with the mortgagor and guarantor an incentive to maximise the price obtained. It is not lightly to be assumed that the mortgagee has acted in a way that was contrary to its own interests as well as the interests of others.[40]

(h) Mere inadequacy of price in relation to the expected value would not

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34 At [20]. See also *Taylor v Westpac Banking Corp Ltd* (1996) 5 NZBLC 104,104 (CA) at 104,108–104,109; and *Long v ANZ National Bank Ltd* [2012] NZCA 132 at [21(e)].

35 *Harts Contributory Mortgages Nominee Co Ltd v Bryers* HC Auckland CP 403-IM00, 19 December 2001 at [43(d)]. This was upheld on appeal: *Bryers v Harts Contributory Mortgages Nominee Co Ltd* [2002] 3 NZLR 343 (CA).

36 *Harts Contributory Mortgages Nominee Co Ltd v Bryers,* above n 35, at [43(e)].

37 *Apple Fields Ltd v Damesh Holdings Ltd* [2004] 1 NZLR 721 (PC) at [24].

38 *Moritzson Properties Ltd v McLachlan* (2001) 9 NZCLC 262,448 at [58]; and *ANZ National Bank Ltd v Claydon* [2012] NZHC 788, (2012) 13 NZCPR 290 at [44].

39 *Harts Contributory Mortgages Nominee Co Ltd v Bryers,* above n 35, at [43(h)].

40 At [43(i)].

> normally suggest a breach of the duty of good faith.[41] Valuations lose much of their significance if reasonable care is taken and there has been a properly advertised and conducted sale process.[42] In the end, market value will be determined by whatever price is realised at auction (or tender).[43]

[94] I am conscious that claims against mortgagees based on an alleged failure to take reasonable steps to obtain the best price can be fact-driven. Expert valuation evidence for example, might be called. So too evidence from real estate agents on the steps taken in the sale process. But in this case, the underlying facts are not in dispute. Further, and as noted in the principles set out above, valuations lose much of their significance if reasonable care has been taken in the sale process and there has been a properly advertised and conducted sale. In those circumstances, market value will be determined by whatever price is realised at auction or tender.

[95] On the basis of the steps taken by the Bank in this case, I am satisfied that Ms Lu's claim under the PLA cannot succeed. It is clear the Bank granted Ms Lu many indulgences to find a buyer herself, before proceeding with the mortgagee sale. And as the evidence demonstrates, both Ms Lu and the Bank found the Property very difficult to sell. Those who initially offered higher prices did so on a conditional basis and were given time to complete the due diligence processes. Ultimately, however, *none* of those purchasers came through to an unconditional offer, and Ms Lu was given ample time to complete those negotiations. If the Property's subdivision potential was as great as Ms Lu suggests, then it is hard to see why this was simply "missed" by all parties who viewed the Property, made conditional offers and engaged in due diligence.

[96] In addition, the Bank sought and followed professional advice at all times. In those circumstances, the Court will not generally intervene. The claim must also be

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41 *Moritzson Properties Ltd v McLachlan*, above n 38, at [61]; *ANZ National Bank Ltd v Claydon*, above n 38, at [32]–[33]; and *Mitchell v Trustees Executors Ltd* [2011] NZCA 519, (2011) 12 NZCPR 659 at [68(a)]. See also *ASB Bank Ltd v Byrne* [2012] NZHC 351 at [27] and [36] where the sale price achieved was 83% of the forced sale valuation.

42 *Long v ANZ National Bank Ltd*, above n 34, at [21(c)].

43 *Public Trust v Lum* HC Auckland CIV-2009-404-2788, 7 September 2009 at [17]; *Mitchell*, above n 41, at [68(c)].

looked at broadly and in practical commercial terms, and allow some margin for business and risk assessment by a mortgagee in the realisation of its security. In the circumstances the Bank faced at the time, where Ms Lu had not made *any* payments on the mortgage since January 2018, and there being issues with the caveat and enforcement order, the evidence demonstrates the Bank took an entirely responsible and reasonable approach to obtaining the best price possible for the Property. In the event, the price ultimately achieved was *higher* than many of the offers Ms Lu herself was able to secure for the Property prior to the mortgagee sale.

[97] In these circumstances, this foreshadowed claim could also not succeed.

Conclusion on strike out

[98] As will be appreciated, the above conclusions mean that all of Ms Lu's (and Mr Mao's) claims (both pleaded and foreshadowed) are struck out. I recognise Ms Lu and Mr Mao will view this as a dramatic step. But I emphasise this does not reflect Mr Strauss' attempts to advance the best possible arguments on their behalf. Their claims simply are, in my view, untenable.

Anti-suit injunction

Introduction

[99] Given the above, the question of the anti-suit injunction is somewhat moot. However, as the issue was fully argued before me, I address the application in the balance of this judgment.

Legal principles

[100] Applications for anti-suit injunctions are not common in New Zealand. But the legal principles, which derive largely from a number of leading United Kingdom decisions, are reasonably well-settled.

[101] The starting point is that the Court has jurisdiction to issue an injunction against a party to restrain that party from commencing or continuing a foreign

proceeding. It is an equitable remedy. As with many equitable remedies, the overriding principle is that the ends of justice require the injunction to be granted.[44]

[102] As will be immediately appreciated, it is a reasonably significant step for a court (referred to in the authorities as the "local court") to restrain a party from pursuing a proceeding before a foreign court. Indirectly at least, it can be seen as the local court "interfering" in the foreign court's process. As such, the leading authorities emphasise that the remedy must be exercised sparingly and with caution.[45] This is particularly so when the claim being pursued in the foreign court could not be brought in the local court.[46]

[103] In basic terms (and when considering claims that could be brought in both the foreign and local courts), a local court considering an anti-suit injunction engages in a three-step inquiry:

(a) First, the local court must determine that it is the natural forum for resolution of the dispute to be commenced or currently in progress before the foreign court.[47] If, as in this case, the foreign court has already determined that it is the natural forum, the local court should only consider the remaining elements if "the foreign court assumed jurisdiction on a basis that is inconsistent with principles relating to forum non conveniens and that the foreign court's conclusion could not reasonably have been reached had it applied those principles".[48]

(b) Second, the local court must be satisfied that the commencement or continuation of the foreign proceedings, or the conduct of the party seeking to be restrained in the context of those proceedings, is vexatious, oppressive, or otherwise unconscionable.[49] Mr Strauss

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44 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 (PC) at 892.

45 *British Airways Board v Laker Airways Ltd* [1985] AC 58 (HL) at 95, *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* at 892.

46 *British Airways Board v Laker Airways Ltd* at 95.

47 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak,* above n 44, at 895.

48 *Amchem Products Inc v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897 at 932.

49 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak,* above n 44, at 896 and 899; and *Turner v Grovit* [2001] UKHL 65, [2002] 1 WLR 107 at [24].

rightly emphasised that the local court should not become distracted by labels such as the pursuit of the foreign proceedings being "vexatious" or "oppressive", but must apply its own notion of the principle of unconscionability. As part of this analysis, the local court must consider whether the applicant has a legitimate interest in seeking to restrain the conduct of the party the subject of the application.[50]

(c) Third, and as flagged above, the ultimate question is whether the ends of justice require the injunction to be granted.

[104] In terms of conduct that would be considered vexatious, oppressive or unconscionable, there are no closed categories. However, the leading authorities demonstrate that the following might meet this threshold:[51]

(a) a party is prevented from properly preparing its case;

(b) where the foreign forum is being misled;

(c) where a party would not have a fair trial abroad;

(d) where a claim is brought before a foreign court in bad faith or is "doomed to fail"; and

(e) where there is no good reason for trying the proceeding abroad, and rather it is done for tactical reasons (for example, to frustrate due process).

[105] Conversely, conduct that will not generally qualify as being vexatious, oppressive or unconscionable includes:

(a) Where there are genuine reasons for commencing proceedings in two jurisdictions. Specifically, commencing proceedings in two

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50 *Turner v Grovit* at [24].

51 See generally, Paul Torremans (ed) *Cheshire, North & Fawcett: Private International Law* (15th ed, Oxford University Press, Oxford, 2017) at 430.

jurisdictions is not vexatious or oppressive if the foreign proceeding "is necessary in the circumstances for the claimant to ensure recovery of damages".[52]

(b) Where the foreign court will apply different law to the local court. In particular, if there is a remedy available in the foreign court that would not be available in the local court, or the cause of action would succeed in the foreign court but not the local court, the local court should be cautious to restrain the foreign proceeding, and should generally only do if it is doomed to fail.[53]

(c) If the claimant receives an advantage in the foreign forum that it would not receive in a local forum (that cannot be appropriately recognised by the giving of undertakings or conditions on any injunction ordered).[54]

[106] Orders such as anti-suit injunctions inevitably give rise to issues of comity. However, as Mr Strauss emphasises, this principle cannot overwhelm the need to grant an injunction if the threshold requirements are made out. As Lord Goff, delivering the judgment of the House of Lords in *Airbus Industrie G.I.E v Patel,* stated in relation to comity:[55]

> As a general rule, before an anti-suit injunction can properly be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction in cases of the kind under consideration in the present case, comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails.

[107] As noted, anti-suit injunctions applications are not common in New Zealand. Indeed, counsel advise that it appears that an application for an anti-suit injunction has been considered fully in only one decision, that of Robertson J in *Jonmer Inc v Maltexo Ltd*.[56] Given the facts of that case (at least in terms of the nature of the parties'

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52 At 428–429, citing *Karafarin Bank v Mansoury-Dara* [2009] EWHC 1217 (Comm), [2009] 2 Lloyd's Rep 289 and *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 1352 (Comm). See also *Société Nationale Industrielle Aerospatiale v Lee Kui Jak,* above n 44, at 894.

53 *Trafigura Beheer BV v Kookmin Bank Company* [2005] EWHC 2350 (Comm) at [46] and [52].

54 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak,* above n 44, at 896–897.

55 *Airbus Industrie G.I.E v Patel* [1999] 1 AC 119 (HL) at 138.

56 *Jonmer Inc v Maltexo Ltd* (1996) 10 PRNZ 119 (HC).

respective claims) are somewhat similar to the present case, it is useful to address them in a little detail.

[108] In *Jonmer Inc v Maltexo*, the plaintiff sought to restrain the defendant, a New Zealand company, from continuing with debt proceedings it had commenced against the plaintiff (based in Texas) in Texas. The plaintiff also sought a direction that all issues between the plaintiff and the defendant be resolved in the New Zealand proceedings.

[109] The New Zealand defendant manufactured and distributed malt products. The Texan-based plaintiff was a distribution company. The parties entered into an agreement which was at least partly evidenced by a written document (although it was never signed). Pursuant to this arrangement, they conducted business together for about a year. Things then started to go wrong. Robertson J records that there were "allegations and counter-allegations" about whether product had been paid for, whether product had arrived in a timely way and when it did, whether it arrived in a reasonable condition. When it became clear the parties could not resolve their differences, Jonmer immediately issued proceedings in New Zealand against Maltexo. Not being aware of this, Maltexo in turn issued debt proceedings against Jonmer in Texas.[57] In the Texas proceedings, Maltexo sought recovery of US$37,000 for unpaid product. The New Zealand proceedings involved a claim by Jonmer for US$210,000 in damages for alleged breach of contract.

[110] Maltexo first filed a protest to the jurisdiction of the New Zealand court. That application was rejected by Thorp J, who held that New Zealand was the forum conveniens for the claims being brought in the New Zealand proceedings.[58] The debt proceedings in Texas continued in the interim, and Maltexo said in response to Jonmer's application for an anti-suit injunction that Jonmer had submitted to the jurisdiction of the Texas Court by taking a step in the proceedings. It submitted that "there was no reason why [it] should be denied the opportunity to pursue a Texan-domiciled corporation in its home state for a simple recovery of debt".[59]

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57 Given that lack of knowledge, Maltexo's proceedings in Texas could not be categorised as a "tactical response" to the New Zealand-based proceedings.

58 *Jonmer Inc v Maltexo Ltd*, HC Auckland, CP521/94, 23 August 1995.

59 At 121.

[111] Robertson J, referring to a number of the decisions referred to above, examined the application in the context of the three-stage inquiry set out at [103] above.[60]

[112] In considering whether New Zealand was the appropriate forum for the Texas debt proceedings, Robertson J accepted that from a "purest legal perspective", the claim in debt, and the rather more complex and broad-ranging claim for breach of contract, were separate legal matters. However, from a practical perspective, he stated both sets of proceedings involved "unresolved problems" arising from the same commercial operations, which were "intertwined, intertangled and dependent one upon the other".[61] Robertson J accordingly said that it was:[62]

> …artificial to suggest that the debt claim is (if not at the centre) at least of critical and continuing importance as far as the breaches are concerned. Whether accounts were being paid or had been paid or might have been paid is what led to the trouble escalating between the parties. I do not accept that there are separate stand-alone matters. I am of the view that there is an unresolved problem between these two parties. What is in the Texas Court and what is in the New Zealand Court are but various aspects of the same problem.

[113] Maltexo raised the issue of trying to enforce a New Zealand judgment in Texas. In response, Jonmer confirmed that if the New Zealand court ruled that the debt was due and owing, and there was not a sufficient sum otherwise to set off against it, it would agree to a consent judgment in the Texas court on the debt claim. Robertson J noted "as against that possibility one must start a careful scrutiny as to why a party wants to keep alive simultaneously the two proceedings".[63]

[114] Having concluded that New Zealand was the natural forum to "sort out the real dispute between these people", Robertson J said the following:[64]

> But having reached that point Mr Dale still faces the real hurdle of establishing vexation or oppression. The onus is on him. But that is not to say that the Court ignores the total reality of the position between the parties.
>
> Dual proceedings per se are not vexation or oppression. But in this case (in contrast to the other reported decisions) what I am unable to find is any advantage or gain to Maltexo in having that debt aspect determined in Texas as opposed to it being determined as part of the parcel of issues left

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60 At 120.
61 At 121.
62 At 121–122.
63 At 122.
64 At 122–123.

> outstanding between the parties in New Zealand. There is no suggestion that there will be either juridical or personal advantage to Maltexo. The matter is fairly near to a hearing as I understand it in Texas, but for the life of me I cannot see why the parties cannot be very near to a hearing in New Zealand as well.
>
> In all of this I do not ignore the affidavit of Mr Greenwood. It is clear from his evidence that if all we were talking about was having a New Zealand judgment which might be enforced in Texas, then there would undoubtedly be serious difficulties and impediments for Maltexo. But if one takes up what was eventually teased out as the proper position in the course of the hearing (that is a Texan consent to the Texas litigation is available to follow immediately upon the New Zealand proceeding so there is the opportunity to get judgment there immediately) all the enforcement issues will be exactly the same as if the matter proceeds to hearing in Texas at that stage.
>
> Inconvenience and expense are but factors which in and of themselves will not determine the issue. What one has is a fractured commercial relationship. A claim which has now been well and truly pumped up (at least from the perspective of Mr Corry and his client) here in New Zealand after forum has been litigated and determined. On the side of it a fundamentally interrelated minor debt claim which is capable of being a counterclaim (and whether it is in the pleadings or not is going to have to be talked about and dissected and analysed ad infinitum in the New Zealand case). In all that it appears to be vexatious and oppressive to try the small issue in another place, where there is no demonstrable benefit or advantage flowing therefrom.
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> If it was because Maltexo wanted punitive or exemplary damages in that jurisdiction which did not exist here a different agenda would apply. If there were issues of limitation or statutory provisions which gave an advantage that would create a different situation.
>
> But when the position is analysed and it appears that there is nothing in this apart from a holding to a legalistic right, that in my judgment in such an exceptional case can create oppression and abuse. I am satisfied that to let the matter run untrammelled at this stage would do just that.

Discussion

[115] In this case, the Chinese Jiangsu Province Suzhou Municipal Intermediate People's Court has rejected the plaintiffs' application for a stay of the China proceedings on the grounds of forum non conveniens. In the interests of comity, and where a foreign court could reasonably have concluded there was no alternative forum that was clearly more appropriate, the local court should respect that decision and the application for an anti-suit injunction should be dismissed.[65] But as Sopinka J in *Amchem Products Inc* stated:[66]

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65 *Amchem Products Inc v British Columbia (Workers' Compensation Board),* above n 48, at 932.

66 At 932.

> When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions. In most cases it will appear from the decision of the foreign court whether it acted on principles similar to those that obtain here, but, if not, then the domestic court must consider whether the result is consistent with those principles.
>
> In a case in which the domestic court concludes that the foreign court assumed jurisdiction on a basis that is inconsistent with principles relating to forum non conveniens and that the foreign court's conclusion could not reasonably have been reached had it applied those principles, it must go then to the second step of the … test [that is, whether to grant an injunction on the ground that ends of justice require it].

[116] The basis upon which the Chinese Jiangsu Province Suzhou Municipal Intermediate People's Court declined the application for a stay it is not entirely clear on the face of its judgment. There is some merit in Mr Strauss' point that the decision might indicate that the Court has essentially adopted jurisdiction, rather than made a positive finding that it is the most appropriate forum. Nevertheless, the decision does appear to refer to and take into account the Chinese law principles of forum non conveniens.

[117] The difficulty I face is that there is no clear statement before me as to the basis upon which the Chinese Jiangsu Province Suzhou Municipal Intermediate People's Court exercised its jurisdiction, nor the principles applying in that jurisdiction in relation to forum non conveniens. For present purposes, however, I am prepared to proceed on the basis that it does not appear the Court applied the principles applying to forum non conveniens that would be applicable in this jurisdiction. Given my conclusion on the balance of the matters to be considered, I am also prepared to proceed for present purposes on the assumption that in the context of the parties' relationship overall, New Zealand is the natural forum for resolution of the whole of the dispute between them.

[118] But as Robertson J noted, that is not enough to support the granting of an anti-suit injunction. And in this case, I am far from persuaded that it would be unconscionable for the Bank to be permitted to continue its debt proceedings in China.

[119] First, I accept Mr Broadmore's submission that in and of itself, there is nothing unusual or untoward in a creditor pursuing a debtor in the debtor's home jurisdiction

where it is believed to have assets. Ultimately, the creditor's interest is not the esoteric pursuit of legal proceedings around the world, but is the recovery of its money. Victory in court proceedings will be hollow if there are no assets in the relevant jurisdiction against which the judgment debt can be enforced. There was accordingly nothing "sinister" in the Bank proceeding against Ms Lu in China, particularly given that is where she has assets, the Bank's understanding that she does not have assets in this jurisdiction, and it was not aware at that time that Ms Lu would bring proceedings against it in New Zealand.

[120] I accept that the parallel claim in China against Mr Mao, or at least at first blush, appears somewhat opportunistic. However, on the basis that Ms Lu *has* incurred a debt to the Bank, then at least as a matter of Chinese law, there may be a claim available to the Bank against Mr Mao. While that might be seen as somewhat surprising from a New Zealand law perspective, there is nothing inherently wrong with the Bank pursuing a claim available to it under Chinese law in a Chinese court. Whether or not that claim has merit is a not a matter for me to determine, and at least on the materials before me, I cannot say it is "doomed to fail".[67]

[121] Second, and unlike in the *Maltexo* proceedings, there are likely to be advantages to the Bank in pursuing its claim against her in China. First there is the convenience and benefit of obtaining a judgment against Ms Lu in China which will be directly enforceable in that jurisdiction, rather than having a New Zealand judgment which it then seeks to enforce in China. I consider it is appropriate for me to take judicial notice of the fact that, despite improvements in more recent times, it is still relatively difficult to enforce foreign court judgments in China. Mr Broadmore noted that this would be particularly so if the judgment were a default judgment, given there would be no incentive for Ms Lu to participate in the New Zealand proceedings (at least if they were limited to the debt claim).

[122] During the course of the hearing before me, Mr Strauss confirmed that Ms Lu would undertake not to oppose any enforcement of a New Zealand court judgment against her in China. This would no doubt make the process of enforcing a New

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[67] Recognising these points, Mr Strauss, again quite responsibly, confirmed that the anti-suit injunction was not pursued on behalf of Mr Mao.

Zealand judgment in the Bank's favour in China easier, though as Mr Broadmore noted, to what extent that non-opposition would affect the Chinese court's approach to enforcement of a New Zealand judgment is unknown. Accordingly, in my view there remains a residual advantage to the Bank in suing Ms Lu in her home jurisdiction and where she has assets.

[123] The Bank has also secured freezing orders in China. It was not in dispute that such orders, if applied for in New Zealand, may not have been granted, given there is no evidence, at least on the present application, of steps being taken to dissipate assets.[68] Accordingly, the availability of freezing orders in China is another advantage the Bank would likely lose if it were required to bring its debt claim in New Zealand. Mr Strauss raised concerns as to the basis upon which the freezing orders in China were obtained. However, I cannot descend into the merits or otherwise of those orders being granted. There is nothing before me to suggest that they were not properly granted as a matter of Chinese law.

[124] Accordingly, and unlike in *Maltexo,* I do not view the Bank's commencement or continuation of its debt proceedings against Ms Lu in China as "holding to a legalistic right". Rather there are legitimate advantages and benefits to the Bank pursuing its debt claim against Ms Lu in her home jurisdiction, coupled with the fact that its actions in doing so were not a cynical or tactical response to proceedings already commenced against it here.

[125] Perhaps the best point in Ms Lu's favour is that it may well be difficult for her to bring her claims against the Bank in the Chinese proceedings. Ultimately, Mr Strauss characterised the argument as the China proceedings effectively precluding Ms Lu from raising a counterclaim/set-off based on her claims against the Bank, against there being no real disadvantage to the Bank bringing its debt claim in New Zealand. However, as noted above, I have concluded that there are benefits to the Bank in bringing its debt claim before the Chinese courts.

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[68] Noting, of course, that as far as the evidence demonstrates, Ms Lu does not in fact have assets in this jurisdiction.

[126] Finally, given the overall inquiry is whether the interests of justice require the anti-suit injunction to be granted, I also take account of the respective merits of the parties' claims (that is, had I not struck out Ms Lu's proceedings).[69]

[127] The Bank's claim against Ms Lu is very strong. In reality, there is no dispute there is a shortfall owing by her to the Bank under the Loan Agreement. Conversely, even if I had not struck out Ms Lu's claims against the Bank, I would have viewed those claims as weak, for the reasons identified in determining the strike out application. Further, even if some of those legal claims had succeeded, there would be an additional question of whether any significant damages attach to them, at least sufficient to off-set or exceed the Bank's claim against Ms Lu. Ms Lu's suggested losses appear somewhat speculative. For example, if Ms Lu *had* been offered further funds by way of lending, she would have had to fully comply with her repayment obligations in relation to those additional amounts (which does not appear straightforward given her difficulties under her existing loan), dealt with the Council's enforcement order against the Property, incurred the additional interest in facility costs of the additional lending, and seen the subdivision through to a successful completion and, importantly, profit.

[128] Accordingly, for all of the reasons discussed at [118] to [127] above, even if I had declined to strike out Ms Lu and Mr Mao's claims, I would not have been prepared to exercise my jurisdiction to grant an anti-suit injunction against the Bank. Ms Lu's application is accordingly declined.

Result and costs

[129] The Bank's strike out application is granted and Ms Lu and Mr Mao's claims are struck out in their entirety.

[130] Ms Lu's application for an anti-suit injunction is declined.

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[69] Noting that in *Trafigura Beheer BV v Kookmin Bank Co,* above n 53, at [42(iv)], citing *Turner v Grovit*, above n 49, Cooke J noted that "there must be proceedings in this country which require protection".

[131] There appears to be no reason why costs ought not to follow the event in the ordinary way. At least on the basis of the materials currently before me, I can see no basis for increased or indemnity costs. There is nothing about the way in which the matter was conducted by or on behalf of Ms Lu and Mr Mao that would have unnecessarily increased the Bank's costs.

[132] It does not appear the proceeding has been categorised for cost purposes. I consider category 2 is appropriate. The steps taken to date are appropriately classified as category B for costs purposes.

[133] Accordingly, my provisional and non-binding view is that there ought to be a costs award in favour of the Bank against Ms Lu and Mr Mao on a 2B basis. The parties are encouraged to seek to agree costs. If they cannot, the Bank may submit a costs memorandum within **15 working days of the date of this judgment**, and Ms Lu and Mr Mao may submit a memorandum in response within a further **five days**. I will thereafter determine costs on the papers.

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Fitzgerald J