

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**CIV-2017-009-3118
[2018] NZDC 15123**

BETWEEN

UDC FINANCE LIMITED
Plaintiff/Applicant

AND

CORNELIS GIJSBERTUS ZEESTRATEN
Defendant/Respondent

Hearing: 13 June 2018

Appearances: J Embling for the Plaintiff/Applicant
T J Brown for the Defendant/Respondent

Judgment: 24 July 2018

**RESERVED JUDGMENT OF JUDGE P R KELLAR
[Re APPLICATION FOR SUMMARY JUDGMENT]**

[1] This is an application for summary judgment against Mr Zeestraten as the guarantor of money, which his company Southern Sights Limited (“the company”) borrowed from UDC Finance Limited (“UDC”) to buy a loader in 2013.

[2] The issue is whether Mr Zeestraten has a defence. He maintains that UDC failed to obtain the best price reasonably obtainable for the loader at the time of sale. He asserts that UDC should have taken the time and spent money repairing the loader and improving its overall condition. He also contends that UDC should have marketed the loader more widely and taken other steps to achieve the best price for it.

Legal Principles relating to applications for Summary Judgment

[3] Rule 12.2(1) of the District Courts Rules 2014 provides:

The Court may give judgment against a defendant if the plaintiff satisfies the Court that the defendant has no defence to any cause of action in the Statement of Claim or to a particular cause of action.

[4] The principles relating to applications for summary judgment are well settled. The Court of Appeal in *Krukziener v Hanover Finance Ltd*¹ summarised the principles as follows:

- (a) The question on a summary judgment application is whether the defendant has no defence to the claim;
- (b) The onus is on the plaintiff but where the plaintiff's evidence is sufficient to show that there is no defence, the defendant will have to respond if the application is to be defeated;
- (c) The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. However, the Court need not accept evidence that is inherently lacking in credibility;
- (d) 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 Facts

[5] In April 2013 the company, as purchaser, entered into a "credit sale agreement" with Webbline Agriculture Limited trading as Webbline Agriculture ("Webbline"), as vendor to purchase a loader for \$314,456.00. Mr Zeestraten signed the credit sale agreement as guarantor. Part of the purchase price was paid by a trade-in allowance of \$31,346.64.

[6] UDC lent the company \$283,522.36 (including a loan establishment fee and PPSR fees) to complete the purchase. Webbline assigned its rights to UDC.

¹ [2008] NZCA 187

[7] The company began making default under the loan agreement as from the end of June 2015. The defaults continued and eventually (on 14 September 2016) UDC sent the company and Mr Zeestraten a pre-possession notice in respect of the loader.

[8] The company surrendered the loader to UDC on 2 November 2016. On 4 November 2016 UDC gave Mr Zeestraten notice of its intention to sell it.

[9] UDC owed Mr Zeestraten a duty to obtain the best price reasonably obtainable as at the time of sale.² As the key issue relates to whether UDC discharged that duty the focus is on two things. The one is whether UDC should have taken the time and spent money repairing the loader and improving its overall condition. The other is whether the means by which UDC sold the loader fulfilled its obligations.

[10] The steps which UDC took to sell the loader are set out in paragraph [9] of the affidavit of Mr Brian Strickland sworn on 28 March 2018. Mr Strickland deposes as follows:

- (a) UDC retained Webbline to provide professional advice as to the valuation of the loader and best way to market and sell the loader. Webbline is a reputable sales agent, which specialises in the sale of farming equipment such as the loader.
- (b) On or about 17 November 2016, Webbline provided an estimated sales value of \$50,000 plus GST for the loader “as is” and in doing so noted that if the loader was “sale ready, in working condition and well maintained and cared for” then its estimated value would be \$120,000 to \$140,000 plus GST.
- (c) Mr Strickland annexed to his affidavit an email from Webbline that materially notes:

“Attached is the parts cost for Terminal Monitor, Cable and Drive shaft assembly all missing form (sic) machine.

² Section 110 Personal Property Securities Act 1999

2013 980k Bergman Loader Wagon

- As is inspected
 - Missing monitor, cable and drive shaft assembly
 - Extremely rough condition
 - Our valuation as is condition \$50,000 plus GST
 - If this machine was in sale ready and working condition and well maintained and cared for our valuation is \$120,000 - \$140,000 plus GST.”
- (c) A number of “key considerations” affected Webblines valuation of the loader including that the loader was ‘surrendered’ (as distinct from being repossessed) to UDC by the company. Further the loader was missing a number of parts including its Terminal Monitor, drive shaft and cable.
- (d) Webblines provided a quotation on \$19,191.46 plus GST to replace those parts. Furthermore, Webblines stated that the loader was in “extremely rough” condition. It was last serviced in October 2014 and the knife bank and floor chain bars were in a poor condition and required repair.
- (e) Webblines Agriculture sent an email to UDC on 4 November 2016 with this advice:
- Last serviced October 2014
 - Clean and assessment estimate only as below
 - Missing monitor and drive shaft
 - Storage costs \$99 plus GST per week
 - Arrived in our yard 31 October 2016

With considerable cost to get ready for sale, my view would be tender asap.

- (f) Replacing the missing parts and refurbishing the loader would have taken significant time and this would risk the “current” seasonal market opportunity of selling the loader that typically runs from November to January during which UDC would incur the costs of storing the loader until the next season.

[11] Accordingly, UDC instructed Webblines to tender the loader “as is”. From about 18 November 2016 Webblines advertised the loader for sale in Webblines’s premises, TradeMe and on Webblines’s Facebook page.

[12] Leave was granted at the hearing of the application for summary judgment for Mr Strickland to file a further affidavit sworn 12 June 2018. He deposed that the typical season for the sale of grass harvesting equipment such as the loader runs between September to December each year in order that such equipment may be purchased and readied for the harvesting season which typically runs from December through late January in the Canterbury region.

[13] Mr Strickland annexed a printout from TradeMe showing the auction page for the loader. The page noted that the loader was “repossessed and selling OBH [on behalf of] finance company”. The advertisement provided the loader’s particulars and stated that it would be “sold in as is and where is condition on behalf of the finance company”. The page also noted that “new replacement over \$200,000 plus GST”. It also recorded that the particular model of loader is a “flagship model for the Bergmann fleet for serious contractor or large-scale farmer wanting to maximise field harvest performance and volume”.

[14] The TradeMe page showed that it had been viewed 3,647 times. There is no evidence as to how many people viewed the page. Webblines Agriculture reported to UDC that there were 126 bids placed on the loader during the course of the auction.

[15] Mr Strickland also annexed a quotation from Webblines for the cost of the labour to repair the knife bank and floor chain bars of \$14579.13 including GST.

[16] Mr Zeestraten filed an affidavit in which he deposed that he had no involvement in the sale of the loader. He considered that the loader was worth a lot more than the price UDC sold it for. He had obtained a valuation from JJ Limited for Heartland Bank in respect of the loader dated 20 January 2016 that valued the loader at \$120,000 plus GST.

[17] Counsel for Mr Zeestraten accepted that the JJ Limited valuation did not appear to have been based on an inspection of the loader. Nor did the valuation make mention of the condition of the loader, the cost of any repairs or its value if work was required to be done to put the loader in good condition. The JJ Limited valuation is broadly in line with Webblines assessment of the value of the loader if it was in working condition, well maintained and cared for.

[18] Mr Zeestraten also takes issue with what he deposes is a lack of independence on the part of Webblines in that it was Webblines who sold the loader to him in the first place. He also asserts that he knew nothing about missing parts. He deposed that UDC did not say anything to him about them and in particular that nothing was said about the significance of those parts on the value of the loader.

[19] Mr Zeestraten's principal contention is that the value of the loader would have "substantially increased" if UDC had replaced the missing parts, which he says it could easily have done.

[20] Mr Zeestraten also takes issue with an apparent lack of information about how the loader was advertised, what process was followed to obtain the best price for it, and to whom the loader was sold.

[21] For the purposes of the application for summary judgment the facts are as follows:

- i. The loader was in poor condition and in need of repair when it was returned at the end of October/beginning of November 2016;

- ii. It would cost \$19,191.46 plus GST in parts and \$14,579.13 including GST in labour to replace the “missing” parts;
- iii. Replacing the “missing” parts and improving the overall condition of the loader would take time. As a result, the loader could not be repaired in time for the optimum window for sale of such equipment; between November and January;
- iv. UDC would incur the cost of storage of the loader if repairs were carried out and the optimum window for selling it was lost;
- v. The market value of the loader “as is” would be \$50,000. It’s value would be between \$120,000 and \$150,000 if repairs were carried out and the overall condition of the loader was improved.

Legal Principles

[22] Section 110 of the Personal Property Securities Act 1999 provides as follows:

110 Duty of secured party selling collateral to obtain best price reasonably obtainable

A secured party who exercises a power of sale of collateral under section 109 owes a duty to obtain the best price reasonably obtainable as at the time of sale to the following persons:

- (a) The debtor;
- (b) Any person who has registered a financing statement in the collateral that is effective at the time the secured party took possession of the collateral;
- (c) Any person who has given the secured party notice that that person claims an interest in the collateral.

[23] The equivalent provision under the Property Law Act 2007 is section 176. Case law in respect of either s 110 of the Personal Property Securities Act 1999 or s 176 of the Property Law Act 2007 will generally be available to guide the application of the other.

[24] The relevant principles may be distilled from the judgments of Asher J in *Public Trust v Otto* (2009) 10 NZCPR 879 at [17] and Fisher J in *Harts Contributory Mortgages Nominee Co Ltd v Bryers* (HC Auckland, CP 403-IM00, 19 December 2001 at [43] as follows:

- (a) The mortgagee has the power to decide, purely in the interests of the mortgagee, if and when to sell. Consequently, it is only the best price reasonably obtainable at the time of sale that matters;
- (b) It does not matter that the time may be unpropitious and that by waiting a higher price could be obtained;
- (c) A mortgagee is under no obligation to improve the property or increase its value. Nor does a mortgagee have any general right to maintain the secured property prior to sale;³
- (d) Where the security is substantial, or specialised property is involved, it will usually be necessary for the mortgagee to obtain and act upon specialist advice as to the method of sale. Appointing a competent agent to sell does not discharge the mortgagee's duties but since its duty is ultimately only one of reasonable care, putting the matter in the hands of a competent agent will usually go a long way towards discharging the mortgagee's duties.
- (e) Obtaining a valuation report from an experienced valuer as a guide to what could reasonably be expected for the property is a step that indicates that a mortgagee has made a reasonable effort to obtain the best reasonably obtainable price;⁴
- (f) In the normal course, the proposed sale will need to be advertised with an adequate description of the property's attributes and, within reason,

³ Citing *Silven Properties Ltd v Royal Bank of Scotland PLC* [2004] 1 WLR 997

⁴ *Public Trust v Otto* (2009) 10 NZCPR 879.

widely enough to attract all possible purchasers. In some cases this will need to extend to both general and specialist publications;

- (g) 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 risk of loss;
- (h) When assets are sold by tender or auction, a reasonable period must usually be allowed for purchasers to inspect the property and arrange finance for submitting bids.

The Defendant's Contentions

[25] Counsel for Mr Zeestraten submitted that UDC had failed to discharge its duty to obtain the best price reasonably obtainable for the loader by reason of the following:

- (i) Webblines were not independent. UDC retained Webblines both to provide a valuation and to sell the loader. Hence, it was in Webblines' interest to achieve a quick sale to collect its commission rather than to obtain the best price reasonably obtainable;
- (ii) The price for which the loader was sold (\$65,304.35 + GST) was significantly below the independent valuation the company obtained from JJ Limited on 20 January 2016 (\$120,000 + GST);
- (iii) There was a significant difference between Webblines' "as is, where is" valuation for the loader of \$50,000 + GST and its "sale ready and working condition and well maintained and cared for" valuation of between \$120,000 and \$140,000 + GST. The difference between those valuations could not possibly be accounted for by reference to carrying out repairs and improving the overall condition of the loader;

- (iv) There is no expert evidence as to the condition of the loader;
- (v) UDC did not afford a reasonable period of time for purchasers to inspect the property or arrange finance so that they could submit a bid or offer. Nor has UDC provided any evidence as to the time it would have taken to replace the missing parts or to refurbish the loader;
- (vi) UDC has failed to provide adequate evidence to show that Webbline advertised and marketed the loader widely enough to attract possible purchasers.

Analysis

[26] The company first made default under the loan agreement on 30 June 2015. It continued to make default over the next fifteen months or so until finally UDC issued a pre-possession notice on 14 September 2016. The evidence is that the harvesting season on Canterbury typically runs from December through late January.⁵ There is no evidence as to whether the company used the loader during the December 2015 – January 2016 harvesting season.

[27] The company surrendered the loader on or about 2 November 2016. The timing and the fact of the surrender of the loader are significant for two reasons. The one is that the surrender occurred just a month or so before the start of the season when the loader would otherwise have been used to generate income. The other is that the typical season for the sale of equipment such as the loader runs between September to December each year in order that the equipment may be purchased and readied for the harvesting season.⁶

[28] The timing of the surrender of the loader informs the decision as to when to sell the loader. There was a relatively small window of opportunity to market and sell the loader before the start of the harvesting season. Counsel for Mr Zeestraten

⁵ Affidavit of Brian Strickland sworn 12 June 2018 at [6]

⁶ Affidavit of Brian Strickland sworn 12 June 2018 at [6]

submitted that UDC could have sold the loader during what would have been the off-season but there is no evidence on which to assess that submission. On the contrary, the uncontradicted evidence of Mr Strickland is that the typical season for selling equipment such as the loader is from September to December. His evidence also makes sense in that a person wishing to acquire a loader would do so in time to start using it to generate income rather than buying after the harvesting season and carrying any debt during the off-season.

[29] The date on which the company surrendered the loader is also significant because it informed the decision as to whether to repair the loader and put it in good condition before sale. The evidence shows that the loader was in need of repair and was in rough condition.⁷ Mr Strickland deposed that Webbline provided a quotation of \$19,191.46 plus GST for parts and \$14,579.13 including GST for labour to replace missing parts and carry out necessary repairs.⁸ Mr Zeestraten did not contradict the evidence that the loader was missing parts, in need of repair and in rough condition. He deposed that he did not personally know about the missing parts and that UDC never communicated to him the importance of those parts or the importance of finding them if they were missing.⁹ Furthermore, on or about 4 November 2016 UDC sent an email to Mr Zeestraten's solicitor noting that the drive shaft and monitor had not been returned with the loader and asked that they be surrendered as well.¹⁰

[30] Part of Mr Zeestraten's case is that UDC should have replaced any missing parts and carried out any necessary repairs to put the loader into good working condition in order to obtain the best price reasonably obtainable. There are three flaws in his argument. First, given that the uncontradicted evidence is that parts were missing and the loader was in rough condition Mr Zeestraten expects UDC to do something the company had a contractual obligation to do but did not, namely spend money to put the loader into good condition.

⁷ Affidavit of Brian Strickland sworn on 28 March 2018 at [9] & [10]

⁸ Affidavits of Brian Strickland sworn 28 March 2018 at [9](c) and 12 June 2018 at [9]

⁹ Affidavit of Cornelis Zeestraten sworn 15 March 2018 at [12.2]

¹⁰ Affidavit of Brian Strickland sworn 28 March 2018 at [10] and exhibit "G"

[31] Secondly, UDC is under no obligation to spend money repairing the loader and putting it into good condition.¹¹ Counsel for Mr Zeestraten sought to distinguish that general proposition by reference to *General Finance Ltd v McNeil*¹² The case concerned section 28(6) of the Hire Purchase Act 1971 which relevantly reads:

“...the sale may be by auction or public tender or a private sale but, in every case, the vendor shall ensure that every aspect of the sale, including the manner, time, place and terms, is commercially reasonable and, in particular, shall use all reasonable efforts to obtain the best price.”

[32] Hardie Boys J identified the real issue was whether the machine ought to have been kept in secure premises and the learned judge noted that the test was what was commercially reasonable. To that extent, the test was materially different to the obligations under section 110 of the Personal Properties Securities Act 1999 where the mortgagee may sell at any time in accordance with its convenience and its duty is to take reasonable care to obtain the best price reasonably obtainable at the time of sale. The obligations under section 28(6) of the Hire Purchase Act 1971 were more stringent in that the section imposed requirements on the vendor in every aspect of the sale. Furthermore, the decision is distinguishable on the facts because the learned judge found that the necessary repairs were an easy fix. In the current case, Mr Zeestraten expects UDC to spend some \$35,000 in replacing missing parts and improving the overall condition of the loader.

[33] Thirdly, there is some, albeit slight, evidence that taking the time to repair and improve the loader would have risked missing the current seasonal opportunity for selling the loader.¹³ If UDC delayed in selling the loader it would most likely have lost the best time for sale. Furthermore, UDC would have borne the costs, though not substantial, of storing the loader during the off-season and have continued to carry the whole of the debt on which interest would have continued to accrue.

[34] Mr Zeestraten’s case also is that UDC failed to advertise and market the loader so as to obtain the best price reasonably obtainable at the time of sale. This is of course

¹¹ *Silven Properties Ltd & anor v Royal Bank of Scotland plc & anor* [2004] 1 WLR 997 at [16]

¹² A204/83 HC Christchurch 15 July 1985

¹³ Affidavit of Brian Strickland sworn on 12 June 2018 at [5]

a different issue to whether UDC should have spent money repairing and improving the loader.

[35] UDC took advice from Webblin who Mr Strickland considered to be “a reputable sale agent that specialises in the sale of farming equipment such as the Loader”¹⁴ Aside from putting into question Webblin’s independence, Mr Zeestraten has not provided evidence to refute Mr Strickland’s assessment. Webblin provided UDC with an estimated sales value of the loader in an “as is” condition of \$50,000 plus GST and recommended that the loader be tendered for sale as soon as possible having regard to the costs of repair, the costs of holding the loader while repairs were carried out, and the loss of the best time to sell the loader.

[36] Webblin advertised the loader for sale on its premises, on Trademe and on Webblin’s Facebook page. The loader was ultimately sold at auction. Counsel for Mr Zeestraten submitted that by so doing UDC failed to heed Webblin’s advice. However, there is nothing to suggest that selling by auction rather than by tender would not produce the best price reasonably obtainable at the time of sale.

[37] Counsel for Mr Zeestraten was also critical of the fact that the advertising referred to the loader having been repossessed and was being sold on behalf of a finance company. The submission is presumably made on the basis that a prospective purchaser would be alerted to the fact that the sale was not an ordinary sale in the market by a willing but not over-anxious seller. Whilst UDC was not bound to advertise the fact that the loader had been repossessed and was being sold on behalf of a finance company it is not uncommon for property to be sold in those circumstances. Mere knowledge of those factors would not adversely affect the seller achieving the best price obtainable at the time of sale. UDC had a relatively narrow window of time in which to sell the loader in the season and that necessarily curtailed the extent to which it could market the loader.

¹⁴ Affidavit of Brian Strickland sworn on 28 March 2018 at [9](c)

Conclusion

[38] UDC has shown that Mr Zeestraten does not have an arguable defence. UDC's obligation was to obtain the best price reasonably obtainable at the time of sale. The time of sale was of its choosing. UDC was under no obligation to spend money repairing the loader and putting it into good overall condition before selling it. The cost and nature of the work, which was necessary was not an easy fix.

[39] Furthermore, UDC would have lost the best time to sell the loader and would have incurred not insubstantial costs in waiting until the next season to sell the loader. The marketing of the loader was limited but it was curtailed by the narrow window for selling harvesting equipment where there is a short season. Furthermore, the timing of the company's surrender of the loader necessarily limited the time within which UDC had to market and sell the loader.

[40] The application for summary judgment is therefore granted. There is judgment for the plaintiff against the defendant in the sum of \$73,159.85 together with interest on that sum from 16 August 2017 to the date of judgment at the rate of 12.68 per cent per annum plus costs on a 2B basis and such disbursements as the Registrar may allow.

P R Kellar
District Court Judge