EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT AUCKLAND

CIV 2017-004-1403
[2018] NZDC 14062

BETWEEN	HEARTLAND BANK LIMITED Plaintiff
AND	CHARLES SCOTT CARE First Respondent
AND	TERRY RAYMOND ROBINSON Second Respondent

Hearing: 27 June 2018

Appearances: R Schultz for Plaintiff
M McKechnie for First and Second Respondents

Judgment: 12 July 2018

RESERVED JUDGMENT OF JUDGE M-E SHARP

Introduction

[1] The Plaintiff ("Heartland") seeks summary judgment against Mr Care/Mr Robinson for payment of a debt arising under a 2015 loan agreement where Mr Care/Mr Robinson as borrowers made none of the payments due under it. Mr Care/Mr Robinson seek leave to issue a third party notice against CrediFlex NZ Limited ("CrediFlex") which they say was the finance broker that arranged the loan with Heartland. Mr Care/Mr Robinson also raise a counterclaim against Heartland on the basis that they say Heartland owed them a duty of care to search the Personal Property Securities Register ("PPSR") to establish if any security was registered over the boat the Ocean Fox, and breached it by failing to make that search.

[2] I heard both the summary judgment claim and the application for leave to issue a third party notice simultaneously given that without some discussion as to the merits of the former, I would not have been able to determine the latter.

The facts

[3] On 20 January 2015 Heartland agreed to advance $100,000 to Mr Care/Mr Robinson in order that they purchase a boat called the Ocean Fox. The principal loan was advanced on 29 January 2015 when that sum was paid into the bank account nominated by Mr Care/Mr Robinson (it was referred to in a sale invoice for Ocean Fox from a Mr Shane Boese to Mr Care/Mr Robinson). In reliance on the New Zealand Safe Ships Certificate they provided to Heartland, Mr Care/Mr Robinson believed that Mr Boese was the legal owner of the Ocean Fox. Neither Mr Care/Mr Robinson, CrediFlex nor Heartland searched the PPSR to establish if any security was registered over the boat. In fact (and contrary to representations made by Mr Care/Robinson in the loan documentation), there were financing statements registered on the PPSR naming Mr Boese, Picton Launch Charters and a Jennifer Bradley, including the Ocean Fox as collateral.

[4] There is a dispute over who had title to the Ocean Fox. Having taken possession of her, Mr Care/Mr Robinson were unable to retain possession. Mr Boese fled to Australia immediately that Heartland paid the purchase price for the boat into the account that he nominated. Boese was adjudicated bankrupt on 4 February 2015. Mr Care/Mr Robinson paid nothing in respect of the loan thus fell into default, of which they were given notice on 26 May 2016. Demand notices were not complied with; all sums owing under the loan agreement became due and payable. Heartland seeks to recover from Mr Care/Mr Robinson the loan principal and accrued interest as at the date of its demand ($125,164.19) plus contractual default interest from that time totalling $179,241.98 as at 28 June 2018 plus costs.

Summary judgment application

[5] Mr Care/Mr Robinson do not deny the following:

(a) they entered into a loan agreement with Heartland;

(b) they provided Heartland with the details of the account into which the loan principal was paid;

(c) the loan agreement provided for the principal and interest to be repaid in 48 monthly instalments commencing February 2015;

(d) they defaulted on their obligations under the loan agreement;

(e) the agreement provides for the recovery of default interest.

Heads of opposition to summary judgment application

[6] Mr Care/Mr Robinson have a counterclaim which should be heard at the same time as Heartland's claim: they allege Heartland owed a duty of care to Mr Care/Mr Robinson, in the discharge of which it should have checked the PPSR to establish if any securities were registered over Ocean Fox. Had the Plaintiff acted prudently and in accordance with industry practice, Heartland would have done so and ascertained the existing securities over Ocean Fox.

[7] Any representations as to existing security interests over Ocean Fox were made by the Mr Care and Mr Robinson's financial broker CrediFlex through its employee [name deleted]. Application has been made for leave to issue a third party notice against CrediFlex for breach of the duty of care that it owed Mr Care/Mr Robinson, as it failed to check the PPSR to establish if any securities were registered over Ocean Fox. Mr Care/Mr Robinson say it would be unjust if this was not heard and determined with Heartland's claim as the subject matter is inextricably linked.

Alleged arguable defence of breach of duty of care

[8] Whilst concomitant duties in contract and tort can and do exist in many situations, this is not one of them. The relationship between Heartland and Mr Care/Mr Robinson was contractual. To accept that Heartland also owed duty of care to Mr Care/Mr Robinson of the kind argued , the Court would have to ignore the plethora of judgments which find that banks have no duty to investigate what a customer proposes to do with the loan that it has sought, or to advise them on any inherent risks (*Bank of New Zealand v Geddes* HC Auckland CIV-2008-404-8082, 28

May 2009 at 23; *Bartle v GE Custodians* HC Auckland CIV-2008-404-3460, 30 September 2009 at 348-349; *Commonwealth Bank of Australia v Gatto* 4252/94 9 August 1996 (BSC)).

[9] Counsel for Heartland suggests at para [22] (b) of his submissions that:

> lenders in New Zealand will examine a transaction from a point of view of their own purposes. The imposition of the duty to advise and warn would disrupt current banking practice, and add to the cost of loans. There is no policy reason why it should be imposed, particularly in a situation where the lender and customers have no ongoing relationship, and the customers have the opportunity of getting their own advice.
>
> *(Bank of New Zealand v Geddes* (supra))

[10] I concur with that statement of position. Furthermore, the following authorities highlight that a lender is under no obligation to give advice unless it is specifically requested to do so and agrees (*Forivermor Limited v ANZ New Zealand (formerly National Bank Limited)* [2014] NZCA 129 at 56; *ANZ Bank NZ Limited v Erasmus* (2013) 14 NZCPR 373 (HC) citing *Wilkins v Bank of New Zealand* [1998] DCR 520; *Lloyds Bank Plc v Cobb* (1991) 12 LDAB210).

[11] Neither counsel was able to identify any authority suggesting that any narrower duty, for example to search the PPSR, exists. The closest is *New Zealand Blood Stock Leasing Limited v Jenkins* 3 NZCCLR 811 (HC) where Mr Care/Mr Robinson alleged a duty of care was owed by the Plaintiff to preserve, perfect and maintain securities in a stallion which was subject to a lease-to-own arrangement. There, the Court declined to recognise such a duty and dismissed the arguments as being without merit.

[12] Even were it arguable that Heartland owed a duty of care (which it breached) to Mr Care/Mr Robinson to check the PPSR and (impliedly) decline to advance the loan to them in order to save them from their own 'folly', such a breach could only be a defence to the Plaintiff's claim if it amounted to set off. Given that set off has been contractually excluded by the parties (clause 3.2(a) loan agreement) and this position seemingly accepted by Mr Care/Mr Robinson because they have not pleaded a set off in either their notice of opposition or their statement of defence and counterclaim, the allegation of a breach of duty of care simply cannot operate as a defence.

[13] In addition, clause 6 of the commercial loan agreement general terms (commercial terms) contained a representation relating to the goods. In particular 6.1(a) represented that from the date of the agreement the borrowers would be the "sole legal and beneficial owner of the boat and no security interest existed over or affected the boat, as created or permitted by the loan agreement or a collateral security." Additionally, clauses 9.1(c) and 11.2(a) of Heartland's commercial terms impose liability on Mr Care/Mr Robinson, as borrowers, to indemnify Heartland for any cost and liability sustained as a result of the untruth of the representations made in the agreement. Thus the loan agreement contains express terms which are inconsistent with Heartland owing a duty of care to Mr Care/Mr Robinson.

[14] Lastly, I agree with the submissions at para [35] and [36] of Mr Schultz's Memorandum of Submissions to the effect that the alleged loss suffered by Mr Care/ Mr Robinson is not supported by evidence, for the reasons that he asserts there. In addition, there is evidence that Mr Care/Mr Robinson received the sum of $19,571.90 from the Official Assignee in Bankruptcy, which has not been offset against their alleged losses:

> "There is no possible causation of loss for the $10,000 deposit paid by Mr Care and Mr Robinson to Mr Boese before Heartland advanced finance;
>
> The claim for the loan principal of $100,000 is unsustainable as that is money which Heartland, not Mr Robinson and Mr Care, has lost, and which Mr Robinson and Mr Care would have to be liable to pay to purchase the Ocean Fox for chartering;
>
> There is no evidence to support the asserted profits totalling $82,870 which Mr Robinson and Mr Care simply assert they have lost;
>
> There is no evidence to support the $4,200 costs of travel, fuel and repair which Mr Robinson and Mr Care also assert that they incurred."

Even if any of those losses were provable against Heartland, by its loan agreement it is entitled to full indemnity from Mr Care/Mr Robinson in that amount.

Counterclaim

[15] A counterclaim is not of itself a defence. If it amounts to a legal or equitable set off, that can be a basis to decline summary judgment. As was said by the Court of Appeal in *Grant v NZMC Limited* [1989] 1 NZLR 8 (CA) at 12-13:

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

[16] As discussed above, the counterclaim would be deficient in law, a duty of care (even in the narrowest sense contended for) not being arguable against Heartland. Furthermore, in *Grant v NZMC Limited* [1989] 1 NZLR 8 the Court of Appeal confirmed at p 11:

> the effect of the distinction between set-off and counterclaim is well understood. A counterclaim is a cross-action which may have no connection at all with the subject-matter of the claim. See *EG Stumore v Campbell & Co* [1892] 1 QB314, and is not confined to money claims. It is not of itself a defence to the claim although under RR534 and 535 of the High Court Rules, where claim and counterclaim arise out of the same matter (*McPhee v Wright, Stephenson & Co* 19 NZLR 321), one judgment only is given in favour of the party who on the balance is entitled to recover. Set-off affords a defence to an action wholly or in part depending upon the amount and is by its very nature limited to money claims. When a set-off is established by judgment it will pro tanto extinguish the plaintiff's claim. *Briscoe v Hill (*1842) 10 M & W 735, 738 *re Hiram Maxim Lamp Company* [1903] 1Ch 70,74.

Conclusion on summary judgment

[17] There appears to be no arguable defence open to Mr Care/Mr Robinson on the claim against them by Heartland. In accordance with DCR 12.2, therefore the Court may give judgment against them. The core principles relating to the summary judgment threshold are summarised by the Court of Appeal in *Krukziener v Hanover Finance Limited* [2008] NZCA 187, (2008) 19 PRNZ 162 at [26]. Applying them here:-

(a) I am satisfied that there is no real question to be tried (*Pemberton v Chappell*) [1987] 1 NZLR 1 at 3 (CA).;

(b) I am not left with any real doubt or uncertainty, the onus having been on the Plaintiff;

(c) there has not been a need to resolve conflicts of evidence or assess the credibility of deponents as there are no material conflicts. I

believe that a robust and realistic approach is warranted by the facts.

[18] Nevertheless, because Mr Care/Mr Robinson have sought leave to join a third party, which application if granted would delay the Court from entering summary judgment against them, I now move to consider that application.

Application for leave to issue Third Party

[19] By DCR 4.4(3) a third party notice may be issued only with the leave of the Court if an application for judgment is pending under r 12.2 or 12.3. DCR 4.8(1) and (2) summarise the Court's discretion to grant leave. It specifically directs the Court to consider delay to the plaintiff. In *Druids Friendly Soc v Westpac Merchant Finance Ltd* (1996) 9 PRNZ 644 (HC), where Master Thompson granted an application by the defendant for joinder of the third party, an apposite passage from *Nissan Datsun Holdings Ltd v R Savory Ltd* HC Auckland, 6 October 1989, Smellie J No5 was quoted:

> It is a question of weighing the respective interests of the parties and in this case comparing the prejudice of delay and possible escalation of issues to be argued so far as the plaintiff is concerned against the danger faced by the defendant of having to conduct two trials with possible inconsistent results.

[20] In *Druids*, Master Thompson set out examples where in summary judgment applications there was joinder of a third party but the tenor of the judgment is that leave to issue a third party notice in the summary judgment context will only rarely be granted. In the *Druids* case these factors were identified:

(a) delay involved if leave were granted to the defendant to issue third party claims;

(b) the strength of the plaintiff's case/ the fact that the plaintiff should otherwise be entitled to the fruits of its judgment;

(c) the fact that entry of judgment would not prevent the defendant from commencing separate proceedings;

(d) whether the third party if joined could meet any judgment against that party. In addition the Court should consider the risk that conflicting findings on the same issues might be made by different courts (*Brummer v Murreli* [2015] NZHC 1036 at 37). In S(

[21] In *Dairy Containers Ltd v NZI Bank Ltd* [1993] 1 NZLR 160 (HC) at 167, summarised in *Pre-Cast NZ Limited v Any Step Limited* [2015] NZHC 2375, [2015] NZAR 1574 at 11 (J) the Court found that it was open to it to have regard to an assessment of the relative strengths and weaknesses of the parties' cases including the case against the proposed third party and the likelihood of recovery.

[22] In *Sudfeldt v UDC Finance Ltd* (1987) 1 PRNZ 205 (CA), Casey J observed at [209] that it would be difficult to see how an application could be refused once the plaintiff satisfies the Court that there is no defence and that there are no circumstances suggesting that summary judgment might cause injustice.

[23] In *Druids*, Master Thompson said at [647] the Court will not allow a defendant to delay the plaintiff the fruits of a judgment when liability is clear: to in effect grant the defendant a stay, while issues of liability, indemnity or contribution are determined by the Court as between the defendant and a third party.

[24] Thus there must be a compelling reason for denying a summary judgment.

[25] In the present case Heartland says that the merit of the summary judgment application must be a signal factor.

[26] Mr Care/Mr Robinson submit that "Heartland and CrediFlex (the intended third party) have obligations towards them both under the Law of Contract and in Tort" (para 3.1 submissions for Defendants dated 21 June 2018). As Counsel reminds the Court, it is trite that there can be concurrent obligations in contract and tort. The Court is advised that there is no written contract of any kind between Mr Care/Mr Robinson and the intended third party. Mr Care/Mr Robinson allege that no matter the type of relationship between CrediFlex and them, there should be implied a term or obligation to exercise appropriate care and diligence to ensure that the security granted in favour of Heartland was adequate, since that issue was not directly addressed between the

parties. Alternatively, Mr Care/Mr Robinson allege that in the particular relationship between them and Crediflex, Crediflex owed them a duty of care of the same nature and breached it by failing to search the PPSR.

[27] In its intended statement of claim against Crediflex, Mr Care/Mr Robinson assert that Crediflex is a commercial finance broker which they engaged "to obtain funds to assist in the purchase of a vessel named Ocean Fox" (Para [2] statement of claim by Defendants against Third Party). They assert that [the employee] of Crediflex approached Heartland (then trading as Marac) in order to obtain the necessary funds. He completed the loan application documentation (para 3 statement of claim by Defendants against Third Party). Mr Care/Robinson then assert that the loan application to Marac, prepared by [the Credflex employee], stated there were no securities registered over Ocean Fox when "there were three security interests registered over Ocean Fox under the Personal Properties and Securities Act 1999 and the PPSR, one of which was in the name of Picton Launch Charters in the possession of which Ocean Fox is presently after Mr Care/Mr Robinson were forced to relinquish her" (paras [16]-[18] Defendants' Statement of Claim against Third Party).

[28] The exact failing of Crediflex is alleged at para [20] of the Statement of Claim: "failed to ensure that the loan application to Marac was accurate and/or failed to adequately or at all carry out a check of the PPSR which was a breach of the duty of care that it owed to them." The particulars are pleaded at para [19] statement of claim:

> "(a) to ensure that the loan application submitted to Marac was accurate;
>
> (a) to check the Personal Property Security Registrar (PPSR) to establish if any securities were registered over Ocean Fox;
>
> (b) the PPSR is a matter of public record and can be readily accessed."

[29] Mr Care/Mr Robinson seek an indemnity from Crediflex in respect of any judgment that the Plaintiff may obtain against them. Additionally, they claim lost income of $197,070 as detailed at para [23] (a)-(f) Defendants' Statement of Claim against Third Party.

[30] Whilst Mr Care/Mr Robinson's submissions in respect of their application for Leave to issue a Third Party Notice assert both a contractual and a tortious obligation, the Statement of Claim only alleges breach of a duty of care.

[31] Heartland opposes the grant of leave on the basis that it is not in the interests of justice and comes nowhere near the threshold required in the context of a summary judgment application "in respect of an essentially uncontested debt arising from a commercial loan." Heartland also says leave ought to be refused as the proposed third-party claim is fundamentally not the proper subject matter for a third party notice in any event." (Para [5], Plaintiff's synopsis of submissions in opposition to Mr Care/Robinson's application for Leave to issue a Third Party Notice dated 25 June 2018).

Jurisdiction for the issue of third party notices

[32] 4(1)(a)-(d) provides:

> 4.4 Third parties
>
> (1) A defendant may issue a third party notice if the defendant claims any or all of the following:
>
> (a) that the defendant is entitled to a contribution or an indemnity from a person who is not a party to the proceeding (a *third party*):
>
> (b) that the defendant is entitled to relief or a remedy relating to, or connected with, the subject matter of the proceeding from a third party and the relief or remedy is substantially the same as that claimed by the plaintiff against the defendant:
>
> (c) that a question or issue in the proceeding ought to be determined not only between the plaintiff and the defendant but also between—
>
> (i) the plaintiff, the defendant, and the third party; or
>
> (ii) the defendant and the third party; or
>
> (iii) the plaintiff and the third party:
>
> (d) that there is a question or an issue between the defendant and the third party relating to, or connected with, the subject matter of the proceeding that is substantially

[33] Indemnity means a legal right of indemnity, usually a contractual one arising from an express or implied term. It has no wider meaning (*Atkins Fibreglass Ltd v Atkins* HC Wellington, A312/76, 5 March 1986):

> Contribution is a doctrine of common law and equity existing independently of contract where parties are liable for the same damage and it is just and reasonable that the burden is shared. (*Hotchin v New Zealand Guardian Trust* Company Ltd [2016] NZSC 24, [2016] 1 NZLR 906).

[34] S 17 Law Reform Act 1937 reflects this concept in the provision about shared liability of joint tortfeasors. Grounds in sub rules (b) to (d) are less restrictive:- a joinder may be appropriate where a question or issue relating to or connected with the subject matter of the proceeding is substantially the same, such that the delay and prejudice to the plaintiff and joinder is outweighed (*Irvine v Shaw* (1989) 2 PRNZ 118 (HC)).

[35] In *re Securitybank Limited* [1986] 2 NZLR 280 (HC) at 288 the Court said that where the mooted proceeding against a third party is really just an independent claim for damages for breach of contract or tort, and not a claim for contribution or indemnity, it is not normally considered the proper subject of a third party notice.

Application of principles to this case

Delay

[36] Heartland will suffer additional costs and delay if summary judgment is not entered but this is not a compelling point in this case.

The strength of the Plaintiff's case/the fact the Plaintiff would otherwise be entitled to the fruits of this judgment

[37] There is no arguable defence available to Mr Care/Mr Robinson. The debt is due and owing.

The fact that entry of judgment would not prevent the defendant from commencing separate proceedings

[38] That is so in this case.

Could the third party, if joined, meet any judgment against that party?

[39] There is no evidence before the Court about CrediFlex's ability in this regard.

The risk that conflicting findings on the same issues might be made by different courts

[40] As there appear to be no significant disputed facts in the claim by Heartland against Mr Care/Mr Robinson and Mr Care/Robinson's proposed claim against the Third Party relates only to what CrediFlex did or failed to do when preparing the loan application to Heartland, for Mr Care/Mr Robinsons, there appears to be no risk of this.

Strength of proposed Third Party claim is not grounded in r 4.41(a) or (b)

[41] Given my findings on the Plaintiff's Summary Judgment application, I cannot see that there is a question or issue in the proceeding which ought to be determined between the Plaintiff and Mr Care/Mr Robinson as well as the Defendant and the Third Party.

[42] Nor for the following reasons do I consider that there is a question or an issue between the Defendant and the Third Party relating to, or connected with, the subject matter of the proceeding that is substantially the same as a question or issue arising between the Plaintiff and Mr Care/Mr Robinson. Whilst Mr Care/Mr Robinson assert essentially the same duty by CrediFlex to Mr Care/Mr Robinson as by Heartland to Mr Care/Mr Robinson (a duty to search the PPSR to establish if any securities were registered over Ocean Fox, and if there were existing securities in place how they might be discharged "so as to ensure that bona fide ownership of Ocean Fox would pass to the Defendants" (para [2.4] submissions for Defendants), both the evidence and the allegations are of a course of dealing between CrediFlex and Mr Care/Mr Robinson up until and including lodgement of the loan application by CrediFlex for Mr Care/Mr Robinson with Heartland. If Heartland owed any duty of the same type, to Mr Care/Mr Robinson (which I have expressly found it did not), it occurred after that time and there was little or no overlapping period.

[44] As importantly, the loan application asserted in Mr Care/Mr Robinson's evidence to have been completed by [the CredFlex employee] of CrediFlex was signed by each of them and contained the following representation:

> The borrower and each guarantor acknowledges and accepts that this facility and any other facility provided by the lendor or any other related company, subsidiary, society or member (in each case whether present or future) of the Heartland NZ Limited Group (each an entity and together the HMZ Group) to the borrower and/or any of the guarantors is secured by the Securities and all other securities entered into by the Borrower and/or the Guarantors in favour of the Lendor and/or an entity of the HMZ Group, whether before or after the date of this Facility.

[45] It matters little who prepared that document:- it was in the name of Mr Care/Mr Robinson upon whom it was incumbent to read it before signing. By signing, they acknowledged the truth of the contents and in particular the above acknowledgement.

[46] In their proposed statement of claim Mr Care/Mr Robinson allege that the proposed third party was a commercial finance broker. If it fell within the definition of a broker under the Financial Advisors Act 2008, it would be subject to a statutory obligation to exercise care, diligence and skill. But s 77A of the Act (1) defines a broking service as:

> (a) the receipt of client money or client property by a person and the holding, payment, or transfer of that client money or client property; and
>
> (b) includes the holding of client money or client property by a person (A) in trust for, or on behalf of, a client
>
> (c) or another person nominated by C, under an arrangement between A and C or between A and another person with whom C has an arrangement (whether or not there are also other parties to any such arrangement).

[47] The Act contains another definition of "financial advisor" which does not appear to apply to CrediFlex as it has been described in Mr Care/Mr Robinson's evidence. The evidence discloses that in all likelihood, CrediFlex was an intermediary between Mr Care/Mr Robinson and Heartland; a conduit and agent of Mr Care/Mr

Robinson to raise money to enable them to purchase Ocean Fox. In these circumstances, I consider it would be novel to impose a duty of care on CrediFlex. The Court has been unable to find any authority recognising that a duty of care of this kind exists in similar circumstances. Thus I consider the proposed claim against CrediFlex lacks merit.

Conclusion on application for leave to issue Third Party notice

[48] There is no right of indemnity or contribution under DCR 4.4(1)(a); Mr Care/Mr Robinson claim different relief from that claimed by the Plaintiff against Mr Care/Mr Robinson; the issue in the proceeding between Mr Care/Mr Robinson and the Third Party ought not to be determined between the Plaintiff and Mr Care/Mr Robinson; there is no question or issue between Mr Care/Mr Robinson and the Third Party that is substantially the same as a question or an issue arising between the Plaintiff and Mr Care/ Mr Robinson.

[49] The intended third party claim is an independent claim for damages for breach of a tortious duty (not for breach of contract of agency given that it has not been pleaded in the statement of claim), and not a claim for contribution or indemnity. Even were breach of contract pleaded, the question of whether there should be a term implied in the contract between Mr Care/Mr Robinson and the Third Party is a difficult one. In *BP Refinery (Western Port) Pty Ltd v Shire of Hastings*, the Privy Council laid a five point test for the implication of terms:-

> (a) reasonable and equitable;
>
> (b) necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
>
> (c) so obvious that it "goes without saying";
>
> (d) capable of clear expression;
>
> (e) not contradict any express term of the contract.

[50] The position in New Zealand is that the *BP Refinery* criteria are still considered relevant as "various expressions of the central question of what a reasonable person would have understood the contract to mean" but they are not a series of independent tests which must each be surmounted (*AP & AW Hughes Ltd v Lyall* CIV 2015-412-

000030 [2017] NZHC 1109, 26 May 2017 Dunningham J No1 – upheld in the Court of Appeal CA 331/2017 [2018] NZCA 28, 1 March 2018 No2). Mr Care/Mr Robinson assert that CrediFlex was required to act with the reasonable care and skill of a competent financier and financial broke; it failed to do so. Whilst no evidence is yet before the Court, Mr Care/Mr Robinson intend, their counsel advises, to call at trial a senior legal practitioner from the Bay of Plenty to depose that a search of the PPSR ought to have been among the first steps taken by CrediFlex. That of course presupposes that such a duty/contractual term existed or should be implied by the law. Given the oral nature of the contract between the parties, I consider it more likely than not that the Court would not imply such a term into the contract between the parties.

[51] Lastly, the implication by Customs of a term such as that argued for into a contract would require a great amount of evidence which is not before the Court. It is not done lightly.

Overall conclusion

[52] There is no evidence of prejudice to Mr Care/Mr Robinson that would be occasioned by the entry of summary judgment and declinature of the third party leave application. In my "weighing of relevant interests" (*Druids Friendly Soc* (supra)), I find that this is not an exceptional case where justice favours the grant of leave. Mr Care/Mr Robinson are not "in the middle of a dispute between two parties" as in *Mian Importer & Exporter Ltd v Alderson Storage Company Limited* CP No. 596/87, Auckland High Court, 20 July 1987. Issues of credibility are unlikely to arise.

[53] Mr Care/Mr Robinson's defences can be ruled out. Accordingly I grant summary judgment for the plaintiff against Mr Care/Mr Robinson, jointly and severally, in the sum of $146,416.95 with interest at the rate of 20.75% per annum daily from 9 May 2017 until the date of payment and indemnity costs pursuant to the loan agreement. Counsel for the Plaintiff is invited to file a memorandum attesting to the interest sum for which judgment may be sealed and the amount of indemnity costs claimed.

M-E Sharp
District Court Judge