IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-5247
[2014] NZHC 2273

UNDER	The Insolvency Act 2006
IN THE MATTER	of the bankruptcy of Sirene Millar
BETWEEN	NZF MONEY LIMITED (In Receivership) Judgment Creditor
AND	SIRENE MILLAR Judgment Debtor

Hearing: 4 August 2014

Appearances: Mr M D Arthur and Mr J Marcetic for Judgment Creditor
Mr A M Swan for Judgment Debtor

Judgment: 19 September 2014

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***19.09.14 at 4 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Background

[1] This is an application by the applicant, Ms Millar, to set aside a bankruptcy notice dated 23 December 2013 which was served on her on 12 February 2014.

[2] The dealings that give rise to the present dispute were between the respondent, NZF Money Limited ("NZF"), and various companies which were the corporate vehicles of a property developer by the name of Mr R Nielsen ("the Nielsen companies"). The applicant is the wife of Mr Nielsen.

[3] The starting point of the account of what occurred is that NZF lent money by way of three loans to the Neilsen companies. They were:

a) Brick Street Properties Limited (the Brick Street Loan);

b) Pasadena Villas Queenstown Limited (the Pasadena Loan); and

c) Wakatipu Trustee Limited, as trustee of the Shotover Street Family Trust (the Shotover Street Loan).

[4] The Brick Street and Pasadena Loans were both entered into in mid-2008. The applicant was not a guarantor of either of those loans at the outset.

[5] The companies fell into arrears with their loans. Thereafter, the applicant and the Nielsen companies agreed that the companies' obligations should be reconfigured. This took the form of the Brick Street Loan being increased in amount and the re-payment date being deferred. As part of the consideration that NZF required for these variations, it required from the applicant a guarantee of Brick Street Property Limited's obligations under the varied loan from NZF, limited to $160,000 ("Brick Street Guarantee"). Under the Brick Street Guarantee, the applicant was also bound to guarantee the indebtedness of Pasadena Villas Queenstown Limited under the Pasadena Loan.

[6] As part of the restructuring, a further and new facility was granted to the trustee of the Shotover Street Family Trust. The applicant was also required to provide a guarantee of this advance to a liability amount of $160,000. This facility was entered into on the same day as the variation of the Brick Street Loan. The

Shotover Street Loan was secured by a mortgage over various properties, including a property in Shotover Street ("the Shotover Property").

[7] The applicant's guarantee of the Shotover Street Loan was contained in a guarantee document that was separate from and additional to the document by which she guaranteed the Brick Street and Pasadena loans.

[8] The applicant does not dispute that she entered into the guarantees described above.

[9] On 28 July 2010, one week after the above documents had been signed, Mr Whitney, the solicitor that acted for the applicant contacted Alexander Dorrington, the firm then acting for NZF, seeking a commitment that:

> … the Shotover St Family Trust guarantee and mortgage will be released on settlement of the sale of the Heritage management leases.

[10] The Heritage management leases referred to in that email was a reference to the assets owned by Little Rock Management Company Limited. This company gave guarantees to NZF for the Brick Street, Pasadena and the Shotover Street Loans.

[11] Mr Arthur, counsel for the respondent, submits that it was clear that Mr Nielsen and the applicant desired that the proceeds of the sale of those management leases should be applied first to the debt that was secured over the Shotover Property. That debt was only $160,000, so payment of this amount would remove NZF's mortgage over that property. At that stage, the respondent submits, and I accept, the Brick Street Loan stood at about $3 million, and the Pasadena Loan stood at about $1.8 million. I also accept that upon repayment in full of the Shotover Street Loan, the Shotover Property would not be encumbered by any other debt to NZF.

[12] Wakatipu Trustee Limited, as trustee of the Shotover Street Family Trust and as registered proprietor of the Shotover Property, had not guaranteed either the Brick Street or the Pasadena Loans.

[13] On 28 July 2010, Davina Vane of Alexander Dorrington replied to Mr Whitney confirming on behalf of NZF that:

> … the Shotover St Family Trust guarantee and mortgage will be released upon repayment of the $160,000.00, which will be paid from the sale of the Heritage Management leases.

[14] In fact that is what occurred. On 29 April 2011, the Shotover Street Loan was repaid from receipts from the sale of the management leases. When NZF received those funds on 29 April 2011, it applied them to repay in full the Shotover Street Loan (amounting to $173,603.64, including interest).

[15] The balance of the funds resulting from the sale of the leases, totalling $403,915.10, was applied against the Pasadena Loan.

[16] The respondent submits that the discharge of the Shotover Loan did not affect the fact that the applicant's obligations to NZF continued in respect of the Brick Street Loan and the Pasadena Loan.

[17] The respondent brought proceedings against Ms Millar in the District Court under the Brick Street Guarantee and on 22 July 2013, it obtained judgment in the sum of $231,523.86. That judgment was the basis for the bankruptcy notice which is the subject of the present application to set aside.

The dispute

[18] The applicant initially, and mistakenly, took the position that there had been only one guarantee, the Shotover Street guarantee, which had been discharged when the Shotover Street Loan was repaid. That overlooked the fact that she also guaranteed the Brick Street Loan and the Pasadena Loan.

[19] As a result, the application when initially filed was predicated upon there having been one guarantee given, and that because that loan had been satisfied, the judgment in the District Court should not have been entered against her.

[20] Ms Millar eventually accepted in her affidavit in reply that she had also executed the Brick Street Guarantee with that guarantee being limited to $160,000. The position she now took is stated in the following deposition:

> 6. It is my evidence that both guarantees, that is the Brick Street and Shotover guarantees guaranteed the same sums. They were not to guarantees for $160,000 each - the two guarantees guaranteed $160,000 in total.

[21] The applicant's evidence is that in negotiations leading up to the execution of the various guarantees it was agreed that her liability was to be limited to one guarantee securing the amount of $160,000. In particular, she refers to an exchange that took place between her husband and Mr Lockhart from NZF on 19 May 2010 which I shall refer to. The applicant deposes that as the $160,000 has been paid, both guarantees were discharged.

[22] In support of her argument, her counsel notes that the guarantees in respect of the Brick Street Loan and the Shotover Loan were entered into on the same date in July 2010 and both guarantees secured the sum of $160,000.

[23] However, this leaves the applicant in the position of having to deal with the fact that the respondent obtained a judgment in the District Court in respect of the Brick Street Guarantee. If that judgment were to be regarded as conclusive, grounds did in fact exist for the respondent to issue a bankruptcy notice based upon it.

[24] The difficulty that leaves the applicant with is that no appeal had been brought against the District Court decision.

[25] The arguments which counsel for the applicant puts forward are that the applicant is entitled to an order setting aside the bankruptcy notice because:

a) pursuant to s 17(7) of the Insolvency Act 2006, she could not use her cross claim as a defence in the proceeding in which the judgment was obtained; or

b) alternatively, the Court should exercise its inherent jurisdiction to set aside the bankruptcy notice to prevent an abuse of process.

[26] The applicant has commenced proceedings in the District Court to set aside the judgment obtained on the ground of fraud.

[27] The respondent says the applicant's application to set aside the bankruptcy notice by NZF is without merit as:

> 1.1 Procedurally, Ms Millar cannot obtain relief under the Insolvency Act 2006 because she alleges a defence, not a cross claim.
>
> 1.2 Ms Millar must therefore rely on the inherent jurisdiction of the Court to prevent abuse of its processes.
>
> 1.3 Exercise of the Court's jurisdiction is inappropriate in the circumstances. There is no abuse of process. The threshold is a very high one. The judgment is final unless there was conscious and deliberate dishonesty on the part of the plaintiff. Only fraud in the strict legal sense suffices.[1]

[28] By way of summary, I record my understanding that the argument that the applicant puts is in three parts:

a) There was an abuse of the court process in that:

   i) She had a defence to the Brick Street claim; or

   ii) That the judgment was obtained as a result of fraud.

b) The Court can set aside the bankruptcy notice pursuant to s 17 of the Insolvency Act.

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[1] *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 (SC) at [29].

[29] The applicant also asserts that even if she had been liable under the Brick Street Guarantee, funds which NZF had received was more than sufficient to extinguish that guarantee.

Approach to application

[30] The order in which I propose to deal with this matter is as follows. First, I will consider the argument that it is an abuse of process for the respondent to enforce the District Court judgment by means of a bankruptcy notice when the applicant has a defence based upon the argument that there was an agreement that one payment of approximately $160,000 would discharge both the Shotover Street and the Brick Street guarantees, thus leaving the applicant with no liability under either guarantee. If there is no such arguable defence, it cannot be an abuse of process on this ground to permit the respondent to enforce the judgment. As part of this determination, attention will be given to the question of whether it is not now too late for the applicant to raise the point because of considerations relating to the finality of judgments.

[31] The next point to be considered is whether assuming that the matters set out above amounts to a defence, does this entitle the applicant to an order setting aside the bankruptcy notice pursuant to s 17 of the Insolvency Act 2006. This involves issues concerning:

a) Whether s 17 is concerned with "cross claims" as opposed to defences, as defined in the Insolvency Act; and

b) Whether the matters which the applicant now seeks to raise could not have been raised in the District Court proceeding on which the judgment and in turn the bankruptcy notice were based.

The alleged defence

[32] The question of whether the applicant had a defence to the effect that one payment of approximately $160,000 would discharge both guarantees, depends upon whether her contention is correct that the respondent agreed in the email exchange that such would be the case.

[33] It is therefore a matter of construing the meaning of the emails which are said to evidence the agreement in the usual way. The approach that is required was stated in the following terms by the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.[2] The following relevant passage from the judgment of Tipping J explains the position:[3]

> [19] The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

The steps leading up to the guarantees

[34] A number of reasons are relied on for the proposition that only one amount of $160,000 was guaranteed. First, a letter summarising a proposed loan dated 17 May 2010 was referred to. This letter was intended to set out the structure of the refinancing that had become necessary. It made reference to a guarantee from another Nielsen company, Waterview Trustee Limited, which was to be supported by a mortgage over property that the company owned at Edinburgh Terrace and a guarantee from the applicant limited to $150,000.

[35] The argument is that there was no mention of a second guarantee and this undermines any contention which the respondent might make that there were two amounts of $160,000 guaranteed.

[36] I interpolate, though, that the applicant herself accepts that she did give two guarantees and so it is beside the point to say that in the first instance she did not contemplate such an outcome. The real point is whether the intention was that while

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2 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.
3 At [19]-[20] (footnotes omitted).

there were two guarantees, they could be repaid by one payment of $150,000 or $160,000.

[37] The evidence upon which such a contention rests is essentially that in May 2010, again prior to the loan agreements and securities being drawn up and signed, that there was an exchange of emails between Mr Nielsen and Mr Lockhart from the respondent in which Mr Nielsen proposed and the latter agreed that there was a requirement that "we need to cap Sirene's Guarantee to any monies that you pay out to Guardian and/or Strategic Finance". Mr Lockhart then replied and said "I don't have a problem limiting Sirene's personal guarantee to $150k".

[38] On the face of it, the material just set out does not explicitly provide for one payment to discharge two guarantees. Ms Millar did not explain in her affidavit how the email exchange between Mr Nielsen and Mr Lockhart might have achieved such a result.

[39] In any case, this exchange took place some two months before the final securities were agreed to and drawn up.

[40] In circumstances where the parties plainly expected that there would be formal legal documents drafted to enshrine the eventual arrangements that they were going to come to, and having regard to the fact that the position stated in the emails could well have been overtaken by events as is not uncommon during the course of negotiations, it has to be said that the exchange of emails are equivocal in regard to what form the contract took.

[41] The Deed of Variation of Term Loan Agreement which was eventually entered into on 22 July 2010 as part of the refinancing arrangements carried forward the obligation under the Brick Street Loan. I interpolate that that document was the deed which evidenced the further advance to Brick Street Property Limited.

[42] As well, on 22 July 2010, some two months after the letter summarising the proposed loan, the term loan agreement under which the Shotover Street Family

Trust borrowed $160,000 was entered into. And as has already been mentioned, that loan agreement, as well, required a guarantee from the applicant.

[43] Both loan agreements were signed on the same day. They do not refer to each other and nor do the guarantees. The agreements were all prepared by solicitors. In those circumstances, it is difficult for the applicant to argue that despite the absence of any express provision limiting what would otherwise be the object of the words used in the guarantees, the Court should read the two guarantees conjunctively and in such a way that they were to be taken to refer to the same $160,000 liability.

[44] However the fact that at one point in the negotiations the parties may have evinced an intention to come to a particular agreement cannot be permitted to overcome the meaning of a contract that they eventually entered into, when properly construed.[4] The reason for this principle is obvious. The framework of the proposed contract can involve a process of negotiations and what the parties may have stated was the common intention at one point. However, this intention may have been rendered unsuitable by changes in circumstances or because of changes to the balance of advantages and detriments that had emerged by the time that the negotiations concluded and the parties executed their contract.

[45] Ms Miller also apparently relies upon an exchange of emails between her lawyer Mr Whitney and the respondent dated 28 July 2010. The background to this email was that funds were expected to be received from the sale of the Heritage management leases at the time when Mr Whitney sent the email. His email stated:

> Could you please advise how much the net advances that we will receive today and also confirm that the Shotover St Family Trust guarantee and mortgage will be released on settlement of the sale of the Heritage management leases.[5]

[46] The lawyer acting for the respondent confirmed the latter part of the arrangement. That however does not assist the applicant to demonstrate that the

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[4] See *Vector Gas Ltd,* above n 2, at [19].
[5] BD 142

separate guarantee obligation, that relating to the Brick Street Loan, was also to be discharged by the same payment.

[47] The question of what the parties, or indeed their lawyer, might have understood was to be the effect of the arrangement is irrelevant. Therefore any personal or subjective view that the applicant might have had about what the effect of the contract would be is not on point. If one is therefore driven back to consider only the words which were used in the exchanges between the lawyers, the submission for the respondent has to be accepted that there was no reference to the payment of the Shotover Street Loan discharging the other guaranteed liability which the applicant had undertaken. So far as the email exchange is concerned, it does not say anything at all about there being an agreement that both guarantees would be discharged on the payment of one of the debts which the guarantees secured. Subjective views about what the contract meant, as the passage from Tipping J's judgment in *Vector Gas* makes clear, are irrelevant.

[48] Because this is a matter of contractual interpretation, the Court should, and is able to, come to its own view about what the contractual documents and the email exchange meant. There is no room for arguing that there is an arguable or substantial dispute that an alternative meaning might be given to the expressions which the parties used when engaging in contract. If there is no defence that the applicant could raise, even if she is now able to relitigate the District Court proceeding, there can be no question of there being an abuse of process.

[49] There is little doubt that when the term loans were actually documented, the result was that the respondent obtained from the applicant a guarantee of Brick Street Property Limited's obligations under the varied loan from NZF, and Pasadena Villas Queenstown Limited's obligations, limited to $160,000 as well as a guarantee for the same amount in relation to the Shotover Street Loan.

[50] While I accept that it may have been Mr Nielsen's intention that when the original term loan was being considered, there should be a cap placed upon the applicant's liability so that she will be liable to pay no more than $150,000 or

$160,000 under the guarantee or guarantees that expectation was not carried into effect when the guarantees in their final form were executed.

[51] The principal evidence which is advanced to establish the proposed defence is that of Mr Whitney. Mr Whitney's evidence, though, was based on the mistaken assumption that the Shotover Street Family Trust gave a second mortgage over the Shotover Property that it owned as security for the Brick Street Loan. This is not evidenced by the loan documents which have been placed before the Court. Mr Whitney did not produce in evidence any other documents having the effect that he has described.

[52] The correct position as stated in the evidence of Neale Jackson that the applicant did not receive a mortgage over the Shotover Property as security for the Brick Street Loan. There was a mortgage over the Shotover Property that Ms Miller guaranteed. She gave a separate guarantee of the Brick Street Loan. In the absence of an express wording in contractual documents, it seems unlikely that the Court would construe the arrangements to have the effect that discharge of the Shotover mortgage would not only satisfy the Shotover Guarantee but, also, the Brick Street Guarantee. The exchange of emails between the lawyers on 28 July 2010 simply confirmed that the funds shortly to be expected from sale of the Heritage management leases would be used to make a payment of $160,000 that would be sufficient to discharge the Shotover mortgage and the guarantee which the applicant had provided for that mortgage. I do not agree that the email exchange implicitly went further so as to agree that payment of the $160,000 of the Shotover mortgage would also have the effect of discharging the guarantee that the applicant had given in relation to the Brick Street Loan.

[53] Nondisclosure of the arrangements in regard to the Shotover mortgage, therefore, assuming it occurred as alleged, would have had no effect on the claim against the applicant and the District Court which was based on the Brick Street Loan. Once that is appreciated, suggestions that a potential defence was fraudulently suppressed cannot be viewed as having any weight.

[54] For that reason, the argument that the Court ought to prevent further enforcement of the debt by means of the bankruptcy notice to avoid a miscarriage of justice or an abuse of process is similarly to be viewed as being without substance.

Is it possible for the District Court judgment to be set aside?

[55] In case my conclusion on the first issue is wrong, that there is no arguable defences available to the applicant which is based upon substantive grounds, I will further consider whether it would now be open to the applicant to apply to set the District Court judgment aside on what are essentially grounds relating to defects in the process leading up to the entry of judgment.

[56] Because these grounds are concerned with the question of whether the plaintiff concealed a defence from the defendant, accordingly it will be necessary to re-traverse the question of whether there was any substantive defence as part of deciding the abuse of process question that this part of the judgment is concerned with. The essence of the position which the defendant takes on the issue now being discussed is that she had an arguable defence to the District Court summary judgment proceedings, that she did not know about it, that the plaintiff did have the requisite knowledge of matters which could have amounted to a defence but fraudulently suppressed that information. This part of the judgment is concerned with the principles which are applicable where a defendant attempts to call into question a judgment on the type of grounds that are advanced here and then to examine the alleged fraudulent conduct that is alleged in the light of the requirements of the principles.

Principles

[57] The ability of a party who has not appealed against an adverse judgment to later contend that it is not bound by that judgment is limited. The position was explained by the Supreme Court in *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* in the following terms:[6]

[6] *Commissioner of Inland Revenue,* above n 1, per McGrath J (footnotes omitted).

> [28] The principle of finality in litigation gives rise to a rule of law that makes conclusive final determinations reached in the judicial process:
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> > Unless a judgment of a Court is set aside on further appeal or otherwise set aside or amended according to law, it is conclusive as to the legal consequences it decides.

[58] In relation to the fraud exception to the principle of finality in litigation, the Court said:

> [29] In cases brought under the fraud exception, only fraud in the strict legal sense will suffice: equitable fraud or lack of frankness does not qualify. In Lord Wilberforce's word:
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> > There must be conscious and deliberate dishonesty, and the declaration must be obtained by it.
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> And as Lord Simon said in *The Ampthill Peerage*, citing a passage in the leading text on res judicata:
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> > Where the allegation, or the evidence, of the suggested fraud is inconclusive, or wanting in precision, or such as to give rise to no more than surmise, suspicion, or conjecture, the affirmative answer fails, and the estoppel is not displaced.
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> [30] In New Zealand, the Court of Appeal has confirmed that claims based on suspicion are not allowed and has said that the fraud alleged must go to the heart of the judgment. To ensure these requirements are all met in any fresh proceeding challenging the finality of a judgment on this ground, the law sets strict requirements as to pleading in a case brought under the fraud exception.
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> [33] Where the claim alleging fraud is based on allegations concerning facts discovered since the judgment concluding the litigation, it must be shown they were not discoverable with reasonable diligence at the time of the previous proceeding. The same requirements of freshness, materiality and cogency that are imposed for admissibility of new evidence on appeal must be met. Evidence that was available at the time of trial, and could reasonably then have been adduced, will only be considered in special circumstances.…

[59] The result is that apart from circumstances where fraud is present, or where a successful appeal was brought against the judgment, a party will be bound by it.

[60] A central question in this case is whether there is an arguable case that the District Court judgment was obtained by fraud.

[61] Mr Arthur, counsel for the respondent, submits that an application to set aside a judgment must be based upon actual fraud and nothing less will suffice. I agree

that that submission is correct. Mr Swan for the applicant does not submit otherwise.

[62] The only possible rider that I would add is that it was recognised by the House of Lords in *The Ampthll Peerage* that:[7]

> To impeach a judgment on the ground of fraud it must be proved that the court was deceived into giving the impugned judgment by means of a false case known to be false or not believed to be true or made recklessly without any knowledge on the subject. No doubt, suppression of the truth may sometimes amount to suggestion of the false. But, short of this, lack of frankness or an ulterior or oblique or indirect motive is insufficient. [emphasis added]

[63] The applicant did not put forward any detailed analysis of what the fraud in this case consisted of. It is implicit in the submissions, of course, that the fraud alleged broadly arose from a failure on the part of the respondent to disclose in the District Court proceedings evidence about the email discussions, details of how NZF dealt with the management lease proceeds and possibly the earlier loan offer, which the respondent had a duty to bring to the attention of the Court.

[64] I consider that fraud for the purpose of the present discussion will not be established unless it can be demonstrated that NZF knew of the existence of the evidence, and knew that it would, if placed before the Court, give rise to a substantial defence available and, further, that the applicant deliberately suppressed that evidence.

[65] There is no general obligation on the part of a party in the position of NZF to provide to its opponent matters that might give rise to a defence on the part of the opponent and to put that evidence before the Court in a case for the purpose of assisting the other party to establish a defence or answer to the party's claim. The way in which the adversarial justice system functions is inconsistent with such a requirement.

[66] It is necessary to go further though and consider the situation where, in a hypothetical case, a party's opponent has not put forward a defence and the

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[7] *The Ampthill Peerage* [1977] AC 547 (HL) at 591 per Lord Simon (citation omitted).

circumstances suggest to the party that there is evidence which could be influential in establishing grounds for rebutting its case. In that case there will have to be an examination of the two alternative possibilities that arise. One is that the party knew that its opponent's failure to put forward the evidence in rebuttal was because the opponent did not know about that evidence and did not have access to it. Alternatively, the party may have known that the opponent had the information in its possession and had elected not to use the information as part of its response to the party's claim.

[67] While it very much depends upon the actual facts in each case, in general terms, the party in the first example ought to disclose the material. The party in those circumstances ought not to put a case to the Court which makes no mention of the evidence that the opponent does not know about. To fail to do so would not only risk an injustice to the opponent but would also result in the court decision making process being corrupted. Such a party will not have adhered to the obligation that any party giving evidence to the court has, which is not to give evidence that is knowingly misleading. In some circumstances, a party who was knowingly responsible for such a state of affairs would generally be guilty of fraud. While the outcome in any particular case would depend on the facts of the particular case, in general terms, to omit to mention known facts that could convincingly rebut the factual foundation on which a party's case rests, would be dishonest. The party would be putting forward evidence that it knows is misleading. Of course, a party is not obliged in every case to put forward every item of evidence that it knows about which, if accepted, would contradict its own case. Exceptions must apply in the case of evidence that can fairly be viewed as tendentious, dependent on faulty memory or the source of which is a person who has a history of fraudulent behaviour, to give some examples.

[68] The summary judgment process carries with it particular risks of occurrences of the kind under discussion because the usual balance brought to the process by virtue of the discovery rules is not present. Instead, the Court is dependent upon an assurance contained in the affidavit of the plaintiff that the other side has no defence to the claim (or that the defence proves the plaintiff has no cause of action available that can succeed). To knowingly give an incorrect affidavit in the circumstances

where there is evidence upon which an arguable defence could be based is likely to amount to fraud. Careful consideration is required before a party puts forward the necessary averment in a summary judgment case that the opposing party does not have a defence. An arguable defence cannot be dismissed simply on the basis that the deponent considers that the court is likely to take the view that contrary evidence is unconvincing. That is because the court hearing the summary judgment application can only resolve disputes of fact in quite limited circumstances.

[69] By contrast, though, there are circumstances in which mere possession of information the opponent might wish to use, but does not know about, cannot amount to fraud.

[70] First, it has to be borne in mind that the party does not have any obligation to consider and come up with possible defences that the defendant opponent might conceivably have open to it. As I have already said above, such an approach would be inconsistent with the adversarial nature of litigation. However I consider that unless the party is able to conscientiously come to the view that there is no chance of a particular class of evidence being provided, this being evidence that could found a defence, then there is likely to be an obligation to bring that information to the notice of the opponent. Alternatively the party to the proceeding may be obliged not to proceed further without disclosing the material.

[71] Another case that warrants mention is where a defence consists of a combination of factual and legal contentions and where the party may while broadly acknowledging the existence of the facts, not disclose them because it is clear that even if accepted as factually correct, those facts do not provide a platform for a sustainable legal proposition which would be available to the opponent.

[72] The present case is one where there is present a number of grounds upon which it was open to the respondent to proceed on the basis that the matters which the defendant claims amounted to an arguable defence would not properly have been viewed by the court as having such an effect. That provided its own justification for the respondent not laying out the evidence for the benefit of the applicant and/or including it in the evidence which it put before the court. The respondent has said

that all of the documents which the applicant now draws attention to were in the possession of her or her solicitors prior to the summary judgment proceeding in the District Court. There is one class of documents which the applicant says she has not seen before but they are irrelevant to the question of whether the applicant had a defence of the kind which she now asserts. That is a defence which is based upon the fact that the contractual arrangements between the parties contained in the loan documents, or upon email exchanges, were to the effect that one payment of $160,000 would pay off both the Shotover Loan and the Brick Street/Pasadena loan. As well, the respondent was fully justified in taking the view that the material in question did not give rise to an arguable defence available to the applicant. The fact that in this proceeding I have come to the view that the emails and the loan offer did not have any contractual significance is consistent with the bona fide position which the respondent took.

[73] It is my view that it is sufficient for a party in the position of the applicant to establish that there are substantial grounds for supposing that an application to the court below to set aside the judgment on the grounds of fraud could succeed. In such a circumstance, it would be for the lower court to make its own decision about whether its own judgment should be set aside on the grounds of fraud. That is not the task of this Court. However this Court ought not to impede a creditor exercising its rights unless there are proper grounds for doing so. Setting aside a bankruptcy notice or even deferring a decision to do so where only insubstantial or frivolous grounds put forward would be wrong in principle.

[74] The approach outlined in the preceding paragraphs is also consistent with authority to which Mr Arthur referred me in the following submission which he made:

> 24. Not only must that high threshold be met, the dishonesty must have had a real effect on the hearing which led to the judgment. The fraud exception requires the affected party to show "that his or her ability to mount an effective case was compromised by the fraudulent conduct of the other party".[8]

[8] *Commissioner of Inland Revenue,* above n 1, at [32].

[75] I accept that that submission is correct.

[76] With one exception, it is the uncontradicted evidence of the respondent that all of the evidence which is arguably the basis for the proposed defence that the applicant now puts forward was in the possession of her or her solicitor. The exception is described at paragraph [10] of the applicant's affidavit in reply. There she says that the payment to the Pasadena loan (this is information relating to how the proceeds from the management leases were applied) disclosed in Mr Jackson's affidavit was the "first time I have been made aware of this … I have never seen this document nor was it disclosed at the District Court".

[77] However, there is no basis upon which to suggest that the fact that Heritage paid off part of the Pasadena Loan from the sale of the management rights is in any way relevant to the question of whether the applicant was liable under the Brick Street Loan guarantee. There was no obligation on the plaintiff and the District Court to do more than verify that the plaintiff had a liability under that guarantee up to $160,000 without being required to provide the detailed figures as to how the larger debt that the principal debtor owed, of which the $160,000 was but part, was made up. Once the plaintiff has provided the affidavit verifying the claim, the defendant is required to provide some evidential foundation for the defences which are raised otherwise the plaintiffs verification will stand unchallenged and ought to be accepted unless it is blatantly wrong[9]. Therefore, the apparent criticism that the applicant makes that she was not provided with information about a credit item which went toward reducing the extent of the liability which she had guaranteed does not advance her case.

[78] Secondly, the nature of the evidence is not such that it would be plain to the respondent that it had relevance in the proceedings in the sense that it could reasonably be viewed as giving rise to a defence which the applicant could have put forward in the proceedings. To the contrary, the proposed defence is barely arguable and certainly not one that enjoys substantial prospects of success. The merits of the proposed defence have already been discussed above.

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[9] *McBeth v AGC* [1992] 3 NZLR54, at 59.

[79] The key point though is that the applicant who had legal advice, signed agreements which did not have the effect of limiting her liability to $160,000. When judging the propriety with which the respondent did or did not act, close attention has to be given to the fact that the respondent obtained executed documents that took a different form from the position that was referred to in negotiations in May 2010. Given that that was the case, it seems unlikely that without some additional evidence, the applicant would be able to establish that the relevant officers of the respondent behaved dishonestly in not taking steps to put before the District Court documents in their possession which showed that at one point in the negotiating process the applicant or Mr Nielsen had reached an agreement with Mr Lockhart which was different from the arrangement that was eventually embodied in the formal legal documents that the applicant executed.

[80] NZF has explained its position which is essentially that it rejects any suggestion that there was an arrangement that one payment would discharge both guarantees. On that assumption, NZF says that it was not obliged to refer to this evidence which the applicant claims would have assisted her to mount her defence in the District Court.

[81] In the absence of explicit evidence on the point, the applicant has to demonstrate that an arguable case of fraudulent conduct can be inferred from the events that occurred, contemporary documents and the probability based upon the foregoing that her claim of fraud has substance. I do not consider that she is able to do so. The fact that the respondent was silent on the issue of the alleged defence is wholly explicable on the basis that it does not amount to an arguable defence. The documents only represented one exchange that took place during the process of negotiating the restructuring and any intent to reach an agreement of the kind that the applicant has referred to was not carried forward into the executed documents in which their agreements were ultimately enshrined. Further, the failure to disclose the details around how the management lease proceeds were applied to the various loans also cannot be considered as fraudulent conduct.

[82] In any case, because the applicant had undisputed access to the relevant documents which she says were falsely suppressed, there is missing the additional

element that the dishonesty resulted in judgment being entered against her. The documents, the emails, emanated from and were received on her behalf by her husband. An alternative way of viewing this element of the case is that there cannot be any dishonest suppression of documents for the purposes of the other party's case where that party is known to have the documents in his or her own possession. A party in the position of the respondent cannot be under any obligation to check to ensure that the applicant still has copies of the relevant documents, still less that she appreciates their significance as the possible foundation for a defence.

The repayment defence

[83] An alternative defence upon which the defendant says that the bankruptcy notice can be set aside takes the form of the following argument which Mr Arthur summarised in the following way:

> 51. On 29 April 2011, the Shotover Street Loan was repaid from receipts from the sale of the "*Heritage Villas management leases*" which Mr Whitney refers to in his affidavit. Those leases were owned by Little Rock Management Company Limited. When NZF received those funds on 29 April 2011, it applied them to repay in full the Shotover Street Loan (amounting to $173,603.64, including interest).
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> 52. The balance of the funds, totalling $403,915.10, was applied against the Pasadena Loan.
>
> 53. Ms Millar accepts that the fact that the balance of $403,915.10 went to the Pasadena Loan, rather than the Brick Street Loan, had no impact on her liability under her guarantee of the Brick Street Loan
>
> 54. But Ms Millar, for the first time in paragraph 12 of her affidavit of 17 July, appears to put forward an additional and alternative argument that this payment of $403,915.10 had the effect of discharging her liability under the guarantee that she gave in respect of the Brick Street and Pasadena Loans.
>
> 55. This argument is not developed in her submissions. It appears to be based on the simple arithmetic that $403,915.10 is greater than $160,000, being the limit of her guarantee.
>
> 56. The argument is misconceived. The Brick Street Guarantee was not limited to the *first* $160,000 to be repaid under the loan. It was merely limited to $160,000 (plus costs and interest): see clauses 1.1 (definition of "Liability Amount") [ABD V1/98] and 2.7 ("Liability Limit") [ABD V1/101]. That is, NZF could at no time recover more than $160,000 plus interest and costs under the Brick Street Guarantee. The limitation does not mean that the guarantee is

discharged as soon as NZF recovered at least $160,000 from any other source.

57. The balance of the Brick Street Loan at that time ($3.2 million) was such that a reduction of $403,915.10 would not have reduced the balance below the guaranteed level ($160,000).

[84] I accept that the submissions which Mr Arthur has made on this point are correct. The correct approach to assessing whether any liability under the Brick Street Guarantee ever came into existence is to enquire whether after accounts had been taken between the respondent and the borrower, and after making provision for any repayments, there was still an unmet liability remaining. If there was, as indeed was the case here, the respondent would be able to look to the guarantor for repayment. That is what the respondent has done in the circumstances of this case. It is attempting to recover up to the limit of the guarantee the unrecovered portion of the Brick Street Loan. My conclusion is that there is nothing in this point which the applicant has raised that could have supported an arguable defence against the respondent's claim in the District Court.

Section 17 Insolvency Act

[85] I will next deal briefly with the question of whether the bankruptcy notice can be set aside on the grounds of s 17 of the Insolvency Act.

[86] Even if it were possible to set aside a bankruptcy notice on the basis of an arguable defence, the applicant would still have to negotiate the requirement that it was a matter that could not have been raised at trial. There is no doubt that the defence could have been raised. There was no legal impediment to doing so.[10] Nor was there any factual reason why the defence could not have been put forward. It appears that the argument that the applicant now puts forward for not having raised the issue is that she had forgotten that she had the documents in her possession upon which the defence could have been raised, namely, the emails and the loan offer. While there may have been other documents which were not in her possession, being those that I have referred to at paragraph [76] they are not material to any defence or cross claim that might have been available to the applicant. That in my view would not suffice as a ground for setting aside the bankruptcy notice.

[10] See *Hardie v Booth* [1992] 1 NZLR 356 (HC).

[87] I intend to be guided by the following statement of principle contained in *Hardie v Booth* that:[11]

> In *Clark v UDC Finance Ltd* [1985] 2 NZLR 636 Casey J held that an applicant under r 41 must show: (1) that he has a genuine triable counterclaim, set-off or cross-demand; and (2) that it is such that he could not have set it up in the action in which the relevant judgment was given. His Honour referred to the following passage from the decision of Lockhart J in *Re Brink, ex parte Commercial Banking Co of Sydney Ltd* (1980) 30 ALR at p 437:
>
> > The words "that he could not have set up in the action or proceeding in which the judgment or order was obtained" mean "which he could not by law set up in the action": see *Re Jocumsen* [(1929) 1 ABC 82] at p 85; *Re a Debtor* [1914] 3 KB 726, per Avory J, at 730; *Re Stokvis* (1934) 7 ABC 53, especially per Lukin J at 57, where His Honour said: "I take a counter-claim, set-off, or cross demand which could not be set up as one which, from point of time or from its nature, or from absence of empowering provisions, or from positive inhibition so to do, could not be set up in the particular case in which judgment was obtained . . . Mere failure to take advantage of the opportunity can hardly be said to be inability."

[88] In that case, Tipping J dismissed the application to set aside the bankruptcy notice because his Honour was not satisfied that the applicant was "either legally unable or factually unable to set up in the action the claims which he now says exceed the amount of the judgment debt.[12]

[89] As well there is the further difficulty which Mr Arthur points out that s 17 does not refer to a mere defence that could not have been raised in the proceeding upon which the judgment was based. It refers only to cross claims.

Result

[90] The result is that the application to set aside the bankruptcy notice is dismissed. The parties should confer on the matter of costs and if they are unable to agree, they are to file memoranda not exceeding five pages on each side within 15 working days of the date of this judgment.

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[11] At 361 per Tipping J
[12] At 362.

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J.P. Doogue
Associate Judge