IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-003820

BETWEEN	FEATHERSTONE PARK DEVELOPMENTS LTD (IN REC AND LIQ) Plaintiff
AND	PETER MICHAEL BRADLEY First Defendant
AND	JEANETTE SUSAN BRADLEY Second Defendant
AND	DAVID DOMINIC RICE Third Defendant

Hearing: 26 May 2011

Appearances: K Davenport for Plaintiff
P J Morgan QC for First Defendant
C T Gudsell QC for Second Defendant
A Gilchrist for Third Defendant

Judgment: 31 May 2011 at 5:00 PM

JUDGMENT OF ASSOCIATE JUDGE BELL

This judgment was delivered by me on 31 May 2011 at 5:00 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

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[1] Featherstone Park Developments Ltd (in receivership and liquidation) sues the defendants, trustees of the Peter Bradley Family Trust, under a deed of acknowledgement of debt dated 20 July 2007. In that deed the trustees acknowledged that they were indebted to the company for $1,570,000. They undertook to repay that sum upon demand. They also promised to pay interest when interest was demanded by the company. The plaintiff has proved service of the demands on the defendants. The defendants have not paid. The plaintiff says that the amount repayable is the principal sum of $1,570,000 plus interest as at 29 March 2010 amounting to $219,957. The plaintiff applies for summary judgment for these sums plus costs.

[2] The Peter Bradley Family Trust was established under a deed dated 5 April 2003. The first defendant was the settlor. The three defendants are the trustees. The first and second defendants are husband and wife. The third defendant is a Papakura solicitor. He was an independent trustee and was not a beneficiary under the trust. The first and second defendants are principal beneficiaries. The trust deed also provides for final beneficiaries and discretionary beneficiaries. The trust deed is for a typical discretionary family trust.

[3] The deed of acknowledgment of debt given by the defendants was one of the measures put in place when Featherstone Park Developments Ltd borrowed funds from Auckland Finance Ltd in 2007. Auckland Finance Ltd was a subsidiary of South Canterbury Finance Ltd. In 2008 Auckland Finance Ltd amalgamated with South Canterbury Finance Ltd under Part 13 of the Companies Act 1993. In this judgment, "South Canterbury Finance Ltd" refers to both Auckland Finance Ltd and South Canterbury Finance Ltd.

[4] Featherstone Park Developments Ltd was undertaking development of a residential subdivision called the St Petersburg Estate on River Road on the northern outskirts of Hamilton. In March 2007, South Canterbury Finance Ltd offered to lend Featherstone Park Developments Ltd the sum of $12,340,000. The purpose of the loan was to:

[a] repay an existing project debt Featherstone Park Developments Ltd owed Marac Finance;

[b] complete the purchase of shares in Featherstone Park Developments Ltd from Tom Henry for $1,570,000;

[c] complete the 97-lot subdivision for $3,000,000; and

[d] pay the loan establishment facility fee of $220,000.

[5] The loan was drawn down on 20 July 2007. The loan was secured by a mortgage, a general security agreement, assignment of agreements for the sale of lots in the subdivision and a guarantee. The three defendants gave the guarantee as trustees of the Peter Bradley Family Trust.

[6] Before drawdown South Canterbury Finance Ltd required the plaintiff to obtain a deed of acknowledgement of debt from the purchasers of the Tom Henry shares. The commercial purpose was to assure South Canterbury Finance Ltd that the plaintiff had put in place a binding arrangement for recovery from the purchasers of the funds lent to them. The acknowledgment of debt given in response to that requirement is the deed the subject of the present proceeding.

[7] The plaintiff has put in evidence some of the documentation used by the South Canterbury Finance Ltd to record and secure the advances. These include a deed of guarantee and indemnity, acknowledgment by guarantors, certificate of trustees. As is standard with finance company documents, these tend to be thorough, detailed and drawn to protect the financier. The deed of acknowledgment of debt, by comparison, is a relatively simple document. McCaw Lewis Chapman, the lawyers acting for Featherstone Park Developments and the defendants, prepared it. Another document they prepared is the trustees' resolution to sign the deed of acknowledgment of debt to record the indebtedness by the trustees to Featherstone Park Developments Ltd.

[8] The deed of acknowledgment of debt contains these recitals:

3.1 The Debtors acquired shares in the Creditor from Tom Henry by virtue of an agreement for sale and purchase dated September 2006.

3.2 The Debtors paid to Tom Henry the sum of $1,500,000 on the 28th September 2006. The Debtors owe Tom Henry a further $70,000 to complete that transaction.

3.3 The Debtors used funds advanced from Lakeland Helicopters and secured by a deed of acknowledgment of debt dated [blank] to pay the funds set out in 3.2 above.

3.4 The Debtors are required to repay the funds advanced at 3.3 above, pay the balance of funds to Tom Henry set out in clause 3.2 above amounting to $70,000.

3.5 The Creditor has agreed to borrow money from Auckland Finance Ltd.

3.6 The Creditor has agreed to advance part of the funds to be borrowed under 3.5 above to the debtors amounting to $1,570,000 to pay the funds set out at 3.4 above.

3.7 The Creditor has requested Auckland Finance Ltd to credit Lakeland Helicopters' account at Face Finance Ltd to the sum of $1,570,000 (the Principal Sum) to enable the debtors to repay the amounts set out in 3.4 above.

[9] The defendants do not accept that the recitals are factually correct.

[10] The plaintiff put in evidence copies of agreements made in September 2006. In September 2006, Thomas Keith Henry entered into a written agreement with the first defendant to sell his shares and interest in three companies: Waihau Bay Holdings Ltd, Featherstone Park Developments Ltd and MBOPS Developments Ltd for $4,000,000. Of the $4,000,000, $1,570,000 was to be paid "upon signing the formal documents prepared by the parties' respective solicitors recording and giving effect to this transaction …".

[11] There were 120 shares in the plaintiff. Mr Bradley owned eighty before this agreement. Mr Henry owned the remaining forty.

[12] On 28 September 2006, Mr Bradley "trading as Lakeland Helicopters", as lender entered into a written deed with the trustees of the Peter Bradley Family Trust to lend $1,570,000, repayable upon demand.

[13] The plaintiff's case is that Mr Bradley made an agreement with Mr Henry. Under that agreement he was to pay $1,570,000 for Mr Henry's shares in the plaintiff. Mr Bradley paid Mr Henry $1,500,000 with funds borrowed from Face Finance Ltd. Mr Bradley's loan to the trustees for $1,570,000 was to finance the trustees' purchase of Mr Henry's shares. For the plaintiff's case it does not matter whether Mr Bradley bought the shares from Mr Henry and on-sold them to the trustees or he bought them in his name but on their behalf. The funds the plaintiff had borrowed from South Canterbury Finance Ltd were used by the trustees to repay the loan to Mr Bradley. The result was that the trustees owned the shares but owe the plaintiff $1,570,000.

[14] The defendants, especially the second defendant, disagree. They say that Mr Bradley remained the sole purchaser of the shares. The trustees did not become owners of the shares. They did not borrow any money from Mr Bradley. The funds lent by the plaintiff repaid Mr Bradley's debt to Face Finance. The trustees had no need to borrow from the plaintiff. Only Mr Bradley needed to borrow from the plaintiff. The recitals in the deed are an incorrect record of the transactions.

[15] On 22 February 2010, Featherstone Park Developments Ltd was placed in receivership and liquidation. The receivers are Peter Charles Chatfield and Stephen Rex Tietjens of Accru Smith Chilcott Ltd. The liquidators are Henry David Levin and Vivien Judith Madsen-Ries of Deloitte Ltd. The receivers have instigated the present proceeding.

[16] South Canterbury Finance Ltd has taken its own proceeding against the defendants. It has sued them under the guarantee they gave to secure the indebtedness of Featherstone Park Developments to South Canterbury Finance Ltd. The amount claimed in that proceeding (CIV-2010-463-333) is $16,425,604.73. The third defendant did not oppose South Canterbury Finance Ltd's application for summary judgment. South Canterbury Finance Ltd obtained judgment against the third defendant on the basis that he was liable only to the extent of the assets in the Peter Bradley Family Trust, but was not otherwise personally liable under the judgment. The first and second defendants opposed the South Canterbury Finance Ltd application for summary judgment. In a judgment of 3 December 2010

Associate Judge Christiansen dismissed the application for summary judgment against the first and second defendants on the basis that they had an arguable defence based on estoppel by convention. The second defendant also raised an argument as to mistake. At the request of South Canterbury Finance Ltd, Associate Judge Christiansen later heard separate argument on Mrs Bradley's mistake defence. He held that she had an arguable defence of common mistake in a judgment of 6 April 2011. South Canterbury Finance Ltd has appealed against both decisions.

[17] In this proceeding the first and second defendants initially filed notices of opposition and affidavits in opposition themselves, without legal representation. Those notices of opposition said that they had these defences:

[a] They had not been trustees of the trust since 2009;

[b] They were advised that the trustees had to sign the documents because the trust was a shareholder but in fact the trustees were not shareholders;

[c] While the first defendant had personally signed documents to buy shares in the company, he had not signed any documents for the trust to become a shareholder;

[d] The signatures on the deed of debt were obtained by mistake;

[e] The receivers appointed by South Canterbury Finance Ltd are bound by the actions, promises and agreements made by South Canterbury Finance Ltd. South Canterbury Finance Ltd had represented that the first defendant would not be required personally to be a guarantor and the trustees all relied on that representation when signing the documents;

[f] They were not separately advised as trustees;

[g] The plaintiff is estopped from proceeding because of an estoppel by convention;

[h] The plaintiff has "inherited" the agreement made by South Canterbury Finance Ltd with the defendants, whereby South Canterbury Finance Ltd agreed not to proceed to consider claiming until all the sections of the subdivision have been sold and a negligence claim has been taken against the plaintiff's former solicitors; and

[i] The sum being sued for is part of the amount that South Canterbury Finance Ltd is suing for. There would be double recovery if judgment were entered.

[18] The Bradleys have now instructed separate lawyers. The first defendant has filed a notice of additional grounds of opposition. Summarised briefly, this notice says that South Canterbury Finance Ltd is estopped from claiming any of the sums said to be due under the deed of guarantee. Details of the alleged estoppel are pleaded with the claim that it would now be unconscionable for South Canterbury Finance Ltd to sue for any of the sums. The notice says that it would be unconscionable now for the receiver to recover those sums for South Canterbury Finance Ltd and that the receiver is a privy of South Canterbury Finance Ltd.

[19] Mrs Bradley's lawyers have filed a new notice of opposition. That says that the deed of acknowledgment of debt does not provide a legal basis for a claim for relief against her. It says that the plaintiff and first, second and third defendants signed the deed of acknowledgment of debt under a common mistake. The common mistake is that the trustees did not receive funds advanced from Lakeland Helicopters for the purpose of buying shares in the plaintiff and that the trustees did not at any time hold shares in the plaintiff. The facts in the recitals to the deed were incorrect. The second defendant relies on the Contractual Mistakes Act 1977.

[20] The third defendant alleges a defence based on res judicata and issue estoppel and alleges abuse of process. He also says that he was induced to enter into the deed by mistake and relies on the Contractual Mistakes Act; that he was acting solely as a trustee of the Bradley Family Trust and has no personal liability to the plaintiff (a

matter said to be accepted by the plaintiff) and any liability of his should be Ltd to the assets of the Trust. He seeks rectification.

Summary judgment principles

[21] There is a convenient statement of the principles upon which plaintiffs' applications for summary judgments are decided in *Krukziener v Hanover Finance Ltd*[1] at [26]:

> The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappel* [1987] 1 NZLR 1; (1986) 1 PRNZ 183 (CA), 185 at [3]. The court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show that there is no defence, the defendant will have to respond if the application is to be defeated: *McLean v Stewart* (1997) 11 PRNZ 66 (CA). The court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponents, or is inherently improbable. *Eng Mee Yong v Letchunanan* [1980] AC 331, [1979] 3 WLR 373 (PC) 341, 381. In the end, the court's assessment of the evidence is a matter of judgment. The court may take a robust and realistic approach where the facts warrant it: *Dymock Corp v Patel* (1987) 1 PRNZ 84 (CA)

And at [27]:

> ... the defendant need not file a statement of defence. The onus remains on the plaintiff, and summary judgment will be denied if on the hearing of the application it appears there is an issue worthy of trial.

[22] In this case, the plaintiff has established a prima facie case. It has proved that there was a deed of acknowledgment dated 20 July 2007 which was signed by the defendants, that the deed provides for payment of the principal sum of $1,570,000 on demand plus provision for interest, that a demand has been made, and that the defendants have not paid under the deed or under the demand. In the absence of any evidence from the defendants raising an arguable defence, the plaintiff would be entitled to judgment. The defendants have given evidence advancing defences. The legal onus remains on the plaintiff to show that they do not have arguable defences.

[1] *Krukzeiner v Hanover Finance Ltd* (2008) 19 PRNZ 162 (CA).

Receivership

[23] The plaintiff is in receivership. It is trying to enforce rights it believes it has under a deed of acknowledgment of debt. The defendants developed challenges to the company's proceeding, based on the facts that the company was in receivership and that South Canterbury Finance Ltd appointed the receivers.

[24] The defence submissions are that there is enough linkage between the plaintiff and South Canterbury Finance Ltd that defences alleged against South Canterbury Finance Ltd can also be raised against the plaintiff. As to that, the relationship between South Canterbury Finance Ltd and the plaintiff is that of a secured creditor and its debtor. South Canterbury Finance Ltd has exercised its powers under its general security agreement to appoint receivers. The receivers have used the powers available to them under the Receiverships Act 1993 and under the security under which they were appointed to issue the present proceeding in the name of the plaintiff. It is necessary to keep in mind the distinct identities of, firstly, the receiver and the plaintiff, and secondly, of the receiver, the plaintiff and South Canterbury Finance Ltd.

[25] In this proceeding, the matter in issue is the plaintiff's rights under the deed of acknowledgment of debt. Whether that deed of acknowledgment of debt is enforceable is determined by reference to the plaintiff's rights, in particular under the law that relates to that deed of acknowledgment of debt, which includes the law relating to deeds, the law of contract (including mistake and rectification), trusteeship law and the like. In determining those rights, it is irrelevant that the plaintiff is or is not solvent, is in or out of receivership or is in or out of liquidation.

[26] The defendants maintain that the actions of the receivers can in some way be tied to South Canterbury Finance Ltd and that the arguable defence of estoppel by convention that bars South Canterbury Finance Ltd from recovering under the guarantee also binds the receivers and would stop the plaintiff recovering under the deed.

[27] South Canterbury Finance Ltd may have an independent cause of action against the defendants, under the guarantee they signed, but those rights are not in issue in this proceeding.

[28] The fact that South Canterbury Finance Ltd has put the plaintiff into receivership does not make the plaintiff an agent of South Canterbury Finance Ltd. Nor are the receivers agents of South Canterbury Finance Ltd. The decision of Mackenzie J in *Cripps v Lake View Farm Fresh Ltd (In Receivership)*[2] is helpful guidance. The plaintiff relied on [13]-[19] of the decision. Those paragraphs deal with the ordinary situation, where the debtor company has not been placed in liquidation. In that situation the position is governed by s 6(3) of the Receiverships Act. The receiver is the agent of the grantor unless it is expressly provided otherwise in the deed of agreement or instrument by or under which the receiver is appointed.

[29] However, the position changes on liquidation. Mackenzie J says:[3]

> The common law position of a receiver, where the company is in liquidation, has in large measure been codified by section 31 of the Receiverships Act. Under that section, a receiver may be appointed or continue to act as a receiver and exercise all the powers of a receiver in respect of the property of the company that has been wound up or has been put into liquidation, unless the court orders otherwise. A receiver in those circumstances may act as the agent of the company only with the approval of the court or with the written consent of the liquidator. A receiver who is not able to act as the agent of the company does not, by reason only of that fact, become agent of the debenture-holder.

[30] Because the receivers retain the powers that they would otherwise have if the company were not in liquidation, they retain the power to issue proceedings in the name of the plaintiff to recover debts payable to the plaintiff. In doing so, under s 31 of the Receiverships Act, they are not agents of the plaintiff, but s 31(3) makes it clear that they likewise have not become the agents of South Canterbury Finance Ltd. The actions of South Canterbury Finance Ltd cannot be attributed to the receivers, just as the actions of the receivers cannot be attributed to South

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[2] *Cripps v Lake View Farm Fresh Ltd (In Receivership)* [2006] 1 NZLR 238 (HC) at [13]–[22].
[3] At [20].

Canterbury Finance Ltd. The conduct of South Canterbury Finance Ltd said to give rise to the estoppel by convention cannot be attributed to the plaintiff.

[31] The first defendant said that actions by one of the receivers, Mr Tietjens, were associated with conduct of South Canterbury Finance Ltd estopping it from claiming under its guarantee. One example given was a meeting in March 2010 where Mr Tietjens is quoted as saying that he had been instructed to keep away from pursuing the first and second defendants. Mr Tietjens disputes this, but in this summary judgment application I assume that Mr Bradley's evidence on the point might be preferred to Mr Tietjens'. The fact that Mr Tietjens might have been given these instructions does not give a defence. Mr Tietjens did not consider that he was bound by whatever he might have been told, because the plaintiff issued proceedings anyway. There is no evidence of the matters required to show an estoppel by convention, as set out by Tipping J in *National Westminster Finance NZ Ltd v National Bank of NZ Ltd*[4] the common assumption (of sufficient certainty) on which the parties have proceeded:

[a] each party's acceptance of the assumption as true;

[b] the intention that that assumption would affect their legal relations;

[c] acting on the assumption in reliance on it being true;

[d] detriment if the other party were to resile; and

[e] the unconscionability of allowing the other party to depart from the assumption.

[32] At the time of the meeting, the receivership had started and South Canterbury's alleged estopping conduct, the steps taken by South Canterbury Finance Ltd to save the subdivision without putting the plaintiff into receivership, was over. There is no evidence of any continuing estoppel by convention after the receivership started. Mr Tietjens' statement by itself or taken in connection with

[4] [1996] 1 NZLR 548 (CA).

what South Canterbury Finance Ltd is said to have done before receivership does not give rise to any estoppel binding the plaintiff.

[33] The first defendant also relied on a second meeting with Mr Tietjens. He acknowledges that the meeting was on a without prejudice basis, but he deposed to matters discussed. The plaintiff objected under s 57 of the Evidence Act 2006 that these were communications intended to be confidential and made to try to settle a dispute. The first defendant said that the evidence could come in under s 57(3)(b) as it was evidence necessary to prove the existence of an agreement settling a dispute and the conclusion of the agreement is relevant in this proceeding. That submission relies on an estoppel by convention amounting to an agreement under this provision. The first defendant does not say that what was discussed led to a concluded agreement. It appears that what was discussed resulted in a proposal being made, but nothing further. Instead the first defendant claims that it is still evidence pointing to an estoppel by convention.

[34] There can be overlap of an estoppel by convention and a binding agreement. Both arise out of mutual assent. Aside from deeds, contracts require consideration. Estoppel by convention does not. As the first defendant does not rely on a concluded agreement, the issue is whether evidence of understandings reached in without prejudice discussions is subject to the privilege in s 57 when the understandings fall short of enforceable agreements. This is an invitation to admit evidence of partial understandings, arrangements that do not amount to agreements in law but might still bar a party from asserting his or her rights. "Agreement" in s 57(3) is an agreement settling a dispute. That means an enforceable agreement, not something less. The purpose of s 57 is to give protection to without prejudice communications so as to enhance the ability to resolve disputes. That protection is lost if the communications result in a settlement by agreement: the parties must have the opportunity to establish that an agreement was reached. The benefits of the protection given by s 57 would be lost if evidence could be given about understandings that are less than concluded agreements: parties in dispute could not negotiate on a without prejudice basis in confidence if what they discussed could be the subject of evidence because it was claimed to be an understanding amounting to an estoppel, even though it fell short of a concluded agreement settling the dispute.

The uncertainty whether what was discussed might later be used in court, even though there was not an enforceable agreement settling the dispute, would inhibit parties' willingness to open up on a without prejudice basis. Confining s 57(3) to enforceable agreements provides a more certain measure, that better meets the purpose of the section. As the evidence of the first defendant about the second meeting is not necessary to prove the existence of an agreement settling a dispute, because it is not contended that there ever was such an agreement, under s 53 of the Evidence Act the plaintiff is entitled to invoke the privilege under s 57.

[35] Apart from the two meetings, there is no evidence to support the first defendant's defence of estoppel by convention.

[36] The first defendant also referred to s 18(2) of the Receiverships Act:

> A receiver must exercise his or her powers in a manner he or she believes on reasonable grounds to be in the best interests of the person in whose interests he or she was appointed.

[37] No doubt the receivers believe that by suing in the name of the plaintiff to collect sums they believe are due to the plaintiff under the deed of acknowledgment of debt, they are acting in the interests of South Canterbury Finance Ltd. The first defendant's argument is that "on reasonable grounds" allows the court to control the receivers' exercise of their powers in this proceeding. Section 18(2) states a duty owed to the appointor. I do not see any basis for a defendant in a proceeding taken by the company in receivership to raise the duty in s 18(2) as a defence. If the debt is enforceable by the company out of receivership, it does not become unenforceable by reason of the receivership, whatever the wisdom of a receiver's decision to enforce the debt. The defendant, as a debtor of the plaintiff, does not have standing to challenge the wisdom of the receiver's decision. Further, I do not see any basis on which it could be contended that the receivers are in breach of their duty to South Canterbury Finance Ltd under s 18(2) by taking the present proceeding to realise an asset of the plaintiff.

Res judicata, issue estoppel and abuse of process

[38] The defendants rely on the proceedings that South Canterbury Finance Ltd has taken against the defendants. They referred to the estoppel by convention and mistake defences that Associate Judge Christiansen found arguable. The third defendant also referred to the judgment South Canterbury Finance Ltd had obtained against him as being Ltd to the assets of the family trust.

[39] For this judgment I assume that in a claim by South Canterbury Finance Ltd under the guarantee they signed, the first and second defendants have an arguable defence of estoppel by convention, as held by Associate Judge Christiansen. The question here is whether the fact that the first and second defendants established arguable defences to South Canterbury Finance Ltd's claim gives defences to the plaintiff's claim in this case. The defendants' arguments have referred to questions of res judicata, issue estoppel and abuse of process.

[40] The requirements for res judicata are not satisfied. Res judicata applies when there is a final decision on the merits. In the South Canterbury Finance Ltd case, there has not been a final decision on the merits. Associate Judge Christiansen dismissed South Canterbury Finance Ltd's application for a summary judgment. That decision means that South Canterbury Finance Ltd's claim has to go to a full defended hearing. A judgment after a full defended hearing on the merits will be a final decision. The dismissal of a summary judgment application does not determine the merits of the case finally. On the other hand, a successful summary judgment application serves as a final determination of the merits.

[41] The causes of action in the South Canterbury Finance Ltd proceeding and in this proceeding are different. The South Canterbury Finance Ltd case involves a claim under a guarantee given by the defendants in favour of South Canterbury Finance Ltd. The cause of action in this case is based on a deed of acknowledgment of debt given by the defendants to this plaintiff. Those are different causes of action. There cannot be cause of action estoppel.

[42] There can be no issue estoppel because no issues have been finally determined in the South Canterbury Finance Ltd case. This, in effect, repeats the finality question.

[43] If the South Canterbury Finance Ltd case were taken to a hearing and at that hearing it were found that the defendants' defences based on estoppel by convention or mistake were sound, those defences would not be of any use in this proceeding. Such findings would bind only South Canterbury Finance Ltd and its privies on those issues. They would not bind the plaintiff. South Canterbury Finance Ltd was not an agent of the plaintiff and the actions of South Canterbury Finance Ltd cannot be attributed to the plaintiff. The plaintiff is not a privy of South Canterbury Finance Ltd. It is a debtor of South Canterbury Finance Ltd. South Canterbury Finance Ltd has security for its debt. As a result that security it has appointed a receiver. The receiver is not acting as agent of South Canterbury Finance Ltd. The relationship of creditor and debtor is outside any rule as to privies, even if that rule is applied in a wide manner.[5] The fundamental point is that different rights are being enforced by different people in the South Canterbury Finance Ltd proceeding and the present proceeding.

[44] A second argument, after res judicata, is that the proceeding may be an attempt to re-litigate something that has already been determined or was open to be determined in the earlier proceeding - this proceeding is abusive on that account. *Spencer Bower & Handley Res Judicata* refers to this as the extended res judicata doctrine. The plaintiff relies on the dictum of Lowry CJ in *Shaw v Sloan* at 387:[6]

> The entire corpus of authority in issue estoppel is based on the theory that it is not an abuse of process to re-litigate a point where any of the requirements of the doctrine is missing.

In this case I have found that there is more than one requirement of the doctrine missing.

[45] Under the approach of Lowry CJ, it is open to the plaintiff to bring the present proceeding without the matters aired in the South Canterbury Finance Ltd

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[5] See K R Handley *Spencer Bower and Handley Res Judicata* (4 ed, Lexisnexis, London, 2009) at 147-156.
[6] *Shaw v Sloan* [1982] NI 393 (CA).

proceeding standing in its way. I find nothing abusive in the plaintiff exercising its right under the deed of acknowledgment of debt in its favour, whatever findings may have been or might be made against South Canterbury Finance Ltd in its own proceeding on its deed of guarantee. *Spencer Bower & Handley* gives examples where abuse has been found at 316-319. This case does not, in my judgment, approach any of the examples where abuse was found. To find abuse in this case would go outside the line of cases where proceedings have been found to be a vexatious relitigation of matters already determined.

No estoppel by convention

[46] Leaving aside the res judicata and the abuse of process points, there is nothing in the claims of estoppel by convention that might apply between South Canterbury Finance Ltd and the defendants that give the defendants a defence against the claim by the plaintiff against them under the deed of acknowledgment of debt. The actions of South Canterbury Finance Ltd are not to be attributed to the plaintiff. If there is any estoppel by convention, it estops only South Canterbury Finance Ltd. It does not estop the plaintiff in this case. The persons bound by an estoppel by convention include successors in death or bankruptcy, perhaps also successors in title.[7] They do not include debtors of a creditor, even if the creditor has put the debtor into receivership.

[47] When the conduct alleged against South Canterbury Finance Ltd is removed from consideration, there is nothing in the actions of the receivers that could give an arguable claim of estoppel, promissory or by convention. The defendants do not have an estoppel defence.

Trustees' retirement

[48] The defendants say that they had retired as trustees in 2009. Resignation as trustees does not bring to an end any liability they might be under. They entered into the deed of acknowledgment of debt in 2007 when they were trustees. If they

[7] Piers Feltham, Daniel Hochberg and Tom Leech *Spencer Bower Estoppel by Representation* (4 ed, Lexisnexis, London, 2004) at [VI.3.1]–[VI.3.32].

incurred any liability then, they remain under that liability notwithstanding their resignation.

Lack of independent advice

[49] The first defendant also says that he was not separately advised as a trustee. The deed of acknowledgment of debt was prepared by McCaw Lewis Chapman who acted for both the plaintiff and the defendants. The first defendant was the sole director of the plaintiff at the time of the deed of acknowledgment of debt. When signing documents for South Canterbury Finance Ltd, he signed a waiver of the right to seek independent legal advice. He also signed a separate authority in favour of McCaw Lewis Chapman acknowledging that that firm was acting for both the plaintiff and him, that it had advised him to obtain independent legal advice and that he had chosen not to. In contracting with the plaintiff, he did not need to have separate independent legal advice. There is nothing in his argument as to lack of independent legal advice.

First defendant's mistake assertion

[50] The first defendant also refers to a mistake when the documents were signed. His assertions of mistake are relevant to the defence raised by the second defendant. It is alleged that the second defendant was never meant to be a shareholder and only the first defendant was intended to be a shareholder. The allegations of mistake do not assist the first defendant because, in signing the documents, he knew that he was always intended to be a shareholder and to be liable for repayment of the debt in the deed.

[51] After consideration of all the matters raised by the first defendant, the plaintiff has satisfied me that the first defendant does not have any defence to the allegations against him. The plaintiff is entitled to summary judgment against the first defendant.

Second defendant – mistake defence

[52] The second defendant adopts the arguments of the first defendant. In addition she says that she has a defence of mistake under the Contractual Mistakes Act 1977. She says that there were common mistakes under s 6(1)(a)(ii) in that:

> All the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake ...

[53] The mistakes were that all the parties to the deed believed that the trustees owned forty shares in the plaintiff, whereas Mr Bradley had bought them in his own right, and that the trustees had bought the shares using funds advanced by Mr Bradley (as Lakeland Helicopters) to whom the trust was indebted, when the trust was not in fact indebted to Mr Bradley, who had used the $1,570,000 to buy the shares himself.

[54] Mrs Bradley relies on the recitals to the deed as setting out incorrect statements of fact. She says that those recitals disclose the mistaken basis on which the parties made their agreement. In summary, she says that the recitals were incorrect and that Mr Bradley alone owned the shares because:

[a] The agreement for sale and purchase of the shares was between Mr Henry and Mr Bradley only. There was no agreement for the trustees to take title to the shares;

[b] Earlier arrangements for the trust to become owners of the shares did not eventuate;

[c] The trustees did not in fact borrow from Mr Bradley, as provided in the loan agreement of 28 September 2006. Mr Bradley had borrowed from Face Finance and the funds advanced by the plaintiff, (borrowed from South Canterbury Finance Ltd) went to Face Finance to repay Mr Bradley's borrowing, not to repay Mr Bradley for funds he had advanced to the trustees;

[d] There is no evidence of any transfers of shares in favour of the trust. There is evidence of a transfer of shares from Mr Henry to Mr Bradley;

[e] Mr Bradley is registered as holder of the forty shares formerly owned by Mr Henry in the company's register of shareholders. The share register is prima facie evidence of legal title under s 89(1) of the Companies Act; and

[f] There was no resolution of the trustees to become owners of the shares.

[55] In response to points raised by the plaintiff and to explain that mistakes were made in the deed's recitals, she says that the Companies Office records showing that the trustees owned the shares are in error. The company's own share register takes priority as a record of title. The documentation of the drawdown of the loan from South Canterbury Finance Ltd, including the deed of acknowledgement of debt, was prepared in a rush.

[56] In further development of her argument she says that because the trustees did not become owners of any shares in the plaintiff, all parties were mistaken as to the basis on which they entered into the agreement. The burden the trustees assumed was substantially disproportionate to any benefit they received. The deed did not provide expressly or impliedly for the defendants to carry the risk of the mistake. This covered the matters to be established under s 6(1) of the Contractual Mistakes Act and Mrs Bradley says she has an arguable defence and case for relief under the Act.

[57] The plaintiff counters that the defendants did become owners of the shares sold by Mr Henry and therefore there could be no mistake. The plaintiff relies on the following matters:

[a] In May 2007 the plaintiff's accountant, Stuart Wilson, (who is in public practice) notified the Companies Office that the trustees had

become shareholders and this was recorded in the Companies Office records;

[b] On 25 June 2007 Mr Wilson wrote to South Canterbury Finance Ltd enclosing a copy of the Companies Office listing for the plaintiff. The letter said that the listing shows that the sole director is Peter Bradley and the shareholders are Peter Bradley and his family trust. letter does not refer to the share register maintained by Mr Wilson;

[c] The financial statements for the plaintiff for the year ended 31 March 2007 prepared by Mr Wilson record that the Peter Bradley Family Trust is a shareholder. As director Mr Bradley signed the annual report that he had not acquired or disposed of an interest in shares in the company during the year;

[d] The financial statements for the plaintiff for the year ended 31 March 2008 prepared by Mr Wilson record that the Peter Bradley Family Trust is a shareholder. As director Mr Bradley signed the annual report that he had not acquired or disposed of an interest in shares in the company during the year. The statement of financial position records the loan of $1,570,000 as "Bradley Trust Share Loan";

[e] The financial statements for the year ended 31 March 2009 are to similar effect, save that the indebtedness of the trustees to the plaintiff has increased; and

[f] McCaw Lewis Chapman (who had not acted on the sale by Tom Henry) used information supplied by Kelly Bradley, daughter of the first and second defendants, and by Mr Wilson. Ms Bradley had a power of attorney for her father and worked for the plaintiff.

[58] Other evidence that supports the plaintiff's case is:

[a] In September 2006 the Bradleys planned for the Family Trust to become a shareholder. They instructed their Whakatane lawyers who opened a file for that. Mrs Bradley's evidence that that did not eventuate is belied by the provisions of the deed. The loan contract of September 2006 is consistent with this intention;

[b] The loan documentation prepared by South Canterbury Finance Ltd's lawyers initially showed Mr Bradley as sole guarantor. There was later a specific change to make the trustees guarantors. The change resulted from information given by McCaw Lewis Chapman;

[c] In addition to the deed of acknowledgement of debt, the defendants signed extensive other documents as trustees: a deed of guarantee, an acknowledgement of guarantors, a certificate of trustees, a resolution of trustees. The first and second defendants signed the documents at the offices of McCaw Lewis Chapman. A lawyer witnessed their signatures. They cannot have failed to appreciate that they were signing as trustees and that the trust was deeply involved in the transactions. The reason for the trust's involvement was its shareholding;

[d] In their initial affidavits Mr and Mrs Bradley acknowledge that on signing they were told that the trust was a shareholder; and

[e] Mr Rice, one of the trustees, is a lawyer. He must have appreciated that the trustees were signing because they were shareholders of the plaintiff.

[59] The recitals in the deed of acknowledgement of debt support the plaintiff's case that the trustees owned the shares and therefore borrowed from the plaintiff to repay the loan to Peter Bradley/Lakeland Helicopters. The recitals constitute an estoppel by deed. *Spencer Bower Estoppel by Representation* says:[8]

[8] At [VIII.12.1, 201].

> For a party to be estopped by a deed, he or his predecessor must have executed a deed on which the estoppel raiser is entitled to maintain an action against him containing a statement whose truth he or his predecessor agreed to admit for the purposes of the deed.

[60] The statements in the recitals bind the parties contractually. They are not entitled to say that what they have agreed to be the fact is true, unless there is some way by which the recitals can be set aside. Before the Contractual Mistakes Act, equity would not hold parties to recitals if there was a common mistake. In *Greer v Kettle*[9] Lord Maugham said:

> Estoppel by deed is a rule of evidence founded on the principle that a solemn and unambiguous statement or engagement in a deed must be taken as binding between parties and privies and therefore as not admitting any contradictory proof. It is important to observe that this is a rule of common law, though it may be noted that an exception arises when the deed is fraudulent or illegal. The position in equity is and was always different in this respect, that where there are proper grounds for rectifying a deed, e.g., because it is based upon a common mistake of fact, then to the extent of the rectification there can plainly be no estoppels based on the original form of the instrument. It is at least equally clear that in equity a party to a deed could not set up an estoppel in reliance on a deed in relation to which there is an equitable right to rescission or in reliance on an untrue statement or an untrue recital induced by his own representation, whether innocent or otherwise, to the other party ... The decision of Lord Romilly in *Brooke v Haymes*[10] is even more closely in point, and it may be added that the statement of the law in that case appears never to have been doubted. The headnote begins as follows: "A party to a deed is not estopped in equity from averring against or offering evidence to controvert a recital therein contrary to the fact, which has been introduced into the deed by mistake of fact, and not through fraud or deception on his part." ...

[61] If equity could relieve against mistakes of fact in recitals, there seems no reason in principle why the Contractual Mistakes Act cannot be used in the same way. That supports the approach taken by the second defendant.

[62] At [VIII.16.1],[11] *Spencer Bower Estoppel by Representation* sets out defences to an estoppel by deed, including:

> (2) The deed is to be rectified, as by mistake it does not record the true agreement of the parties or to be avoided because it was executed under a common mistake. Rescission will not, however, be available if the court interprets the recital as agreement to admit the relevant facts for the purposes

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[9] [1938] AC 156 (HL) at 171.
[10] LR 6 Eq 25 (Chancery).
[11] *Spencer Bower Estoppel by Representation*, at 204.

> of the transaction whether it is right or wrong, and, secondly, if the parties so acted on the mistake that it would be inequitable to allow rescission.

[63] The second sentence states a limit to the exercise of the equitable power to rescind. There are similar limitations under the Contractual Mistakes Act:

[a] Firstly, under s 6(1)(c):

> Where the contract expressly or by implication makes provision for the risk of mistakes, the party seeking relief or the party through or under whom relief is sought, as the case may require, is not obliged by a term of the contract to assume the risk that his belief about the matter in question might be mistaken;

[b] The court's residual discretion whether to grant relief under s 6(1):

> A Court *may* in the course of any proceedings or on application made for the purpose grant relief under section 7 of this Act to any party to a contract. [Emphasis added.]

[64] If the parties have contracted on the basis of the facts set out in the recitals, whether they are right or wrong in fact, then the parties have accepted the risk of being wrong, and they cannot ask to be relieved from their mistake.

[65] The circumstances leading up to the signing of the deed of acknowledgement of debt help in ascertaining whether the parties accepted the risk of the recitals being wrong. There was not a debate as to the correctness of conflicting versions, such as the one heard in argument in this case. But there was something else that focused on the ownership issue. South Canterbury Finance Ltd wanted to know the identity of the purchasers of the shares, who were being financed out of loan made to the plaintiff. Its lawyers, Grove Darlow, made a number of requests to McCaw Lewis Chapman, which is recorded in:

[a] An email of 30 April 2007 asking who was buying the shares;

[b] An email of 2 May 2007, "…we need to view the contract for the purchase of the shares from Tom Henry…";

[c] A letter of 14 May 2007 setting out settlement requirements including the agreement for sale and purchase of shares from Tom Henry and copy of settlement statement;

[d] Further general follow up requests by email on 28 May and 5 June 2007;

[e] A letter of 22 June 2007 to South Canterbury Finance Ltd noted requirements that had not been met, including copies of the agreement for sale and purchase of shares from Tom Henry and a copy of settlement statement. A copy was sent to McCaw Lewis Chapman;

[f] A letter of 10 July 2007 to McCaw Lewis Chapman noting the same. McCaw Lewis Chapman's response of 11 July 2007 enclosed a copy of the Companies Office search, which by now showed the Peter Bradley Family Trust as shareholder;

[g] An email of 16 July 2007, "…With regard the purchase of the shares from Thomas Henry we still need the agreement for the purchase of the shares, a copy of the settlement statement, and a copy of the shareholder agreement between the parties…" In reply on 18 July 2007 McCaw Lewis Chapman sent copies of the heads of agreement between Thomas Henry and Peter Bradley and the loan agreement between Peter Bradley and the trustees;

[h] On 19 July 2007 an email by Grove Darlow asked for the name of the trust the shares were held under, and for preparation of a guarantee to be given by the trustees. McCaw Lewis Chapman replied with information about the Peter Bradley Family Trust; and

[i] In another email on the same day, Grove Darlow said that South Canterbury Finance Ltd required a guarantee from the new directors and a deed of acknowledgement of debt between the plaintiff and the borrowers/shareholders.

[66] There is no evidence that anyone referred to the register held by Stuart Wilson to ascertain the shareholders. Instead Stuart Wilson and McCaw Lewis Chapman had identified the trustees as purchasers of the shares.

[67] The company and its shareholders had to establish who were the shareholders to receive the loan from the plaintiff and to repay it. That decision had to be made to allow the plaintiff to draw down the loan from South Canterbury Finance Ltd. The decision that the trustees of the family trust were the shareholders is found in the trustees' resolution of 20 July 2007 to record the debt of $1,570,000 owed to the plaintiff and in the recitals in the deed of acknowledgement of debt. The recitals are not just narrative recording how the trustees obtained title. They are performative in that they establish that the trustees are shareholders. What might have been open to debate and conjecture before then was put beyond doubt and dispute by the recitals. In signing the deed, Mr Bradley acknowledged that the shares he had bought from Mr Henry belonged to the trustees and he was to be repaid. The effect of the trustees' signing was to ratify unanimously the steps taken to obtain title to the shares. While Mr Bradley might be shown as holding the legal title to the forty shares in the shareholders' register, he held them on trust and could be compelled to transfer them to the trustees.

[68] A purist might object that recitals are meant to be descriptive only, with words of conveyance and words creating obligations to be set out in the main body of a deed. Of course that is good practice. But the court must interpret the deed even if good practice has not been followed.[12] An interpretation which held that despite the recitals the ownership of the shares sold by Mr Henry was still moot and it was still open to the parties to contend that the ownership might be other than as set out in the deed would fly in the face of the clear purpose and wording of the deed.

[69] In raising her defence of mistake, the second defendant is trying to revisit the decision made in July 2007 that the trustees were the shareholders to receive the loan from the plaintiff. The answer to Mrs Bradley's mistake plea is that there was no

[12] See Lord Bridge in *Mitsui Construction Co Ltd v A-G of Hong Kong* (1986) 33 Build LR 1 (PC) at 14.

mistake, because the deed's effect was that, whatever the position may have been before the deed, it was now established that the trustees owned the forty shares Mr Henry had sold. In terms of the Contractual Mistakes Act, under the deed the trustees accepted the risk that even if what had been done up until then had not been effective to make them trustees, they now were shareholders. If Mrs Bradley did not understand that that was the effect of what she signed, that was a mistake in interpretation under s 6(2)(a) for which she cannot claim relief.

[70] It would in any event be inequitable to allow relief under the Act. The deed of acknowledgement of debt was put in place to allow the lending by South Canterbury Finance Ltd to proceed. The plaintiff incurred a liability to South Canterbury Finance Ltd for $1,570,000 to fund the loan to the trustees. The trustees knew this (they also signed a guarantee to South Canterbury Finance Ltd) and consented to the plaintiff incurring its liability on the basis that it could have recourse to them under the deed. It is inequitable for the trustees to now assert that what they signed in their deed is not to be accepted. Relief should be denied under the discretion given in the Act.

[71] The plaintiff also argued that there was not a substantially disproportionate obligation incurred under s 6(1)(b)(ii). The argument ran that as the trustees owed Mr Bradley/Lakeland Helicopters $1,570,000 under the loan agreement of 15 September 2006, the deed refinanced their debt and they were no worse off. That presupposes that the plaintiff's case that the trustees owned the shares already, independently of the deed, is correct. Apart from the deed and trustees' resolution which put the matter beyond doubt, I regard the ownership of the shares as contentious and not open to a summary judgment decision in favour of the plaintiff. I therefore do not accept that part of the plaintiff's case.

[72] The plaintiff has shown that Mrs Bradley does not have a defence based on the Contractual Mistakes Act. In coming to that conclusion, I differ from the decision of Associate Judge Christiansen in the claim by South Canterbury Finance Ltd on the guarantee where he found that Mrs Bradley had a defence of mistake on grounds similar to those she has advanced in this application. It does not appear in

that case arguments were advanced on the effect of the recitals of the deed of acknowledgement of debt, a matter I have found decisive.

[73] To the extent that she relies on the defences of her husband, I also find that she does not have an arguable defence. The plaintiff is entitled to summary judgment against the second defendant.

The third defendant - rectification

[74] The third defendant is an independent trustee without any expectation of any beneficial interest under the family trust. As the deed is drawn he is personally liable. The plaintiff cites *Helvetic Investment Corporate Pty Ltd v Knight*[13] for the propositions that a trustee who enters into a contract will normally incur unLtd personal liability unless by appropriate language or express stipulation such liability is restricted; and a mere description of the capacity in which he contracts as that of trustee is insufficient to exclude full personal liability. The third defendant does not dispute this.

[75] Instead he says that the deed should be rectified to limit his liability to the assets of the trust. His evidence is that his participation in the family trust was always on the basis that he did not incur any personal liability under any contract he entered into as a trustee. The other trustees always accepted that. He says that Mr Bradley's acceptance of that also goes to the plaintiff's acceptance of that because Mr Bradley was the sole director of the plaintiff at the time of the deed. He gives evidence of other cases where his liability for debts incurred by him as trustee for the Peter Bradley Family Trust was expressly Ltd to the assets of the trust. One example he gives is the guarantee the trustees gave South Canterbury Finance Ltd.

[76] The third defendant refers to *Dundee Farm Ltd v Bambury Holdings Ltd*[14] for authority that it is sufficient to find a common continuing intention in regard to a particular aspect of the agreement, and to Tipping J in *Westland Savings Bank v Hancock*:[15]

[13] (1984) 9 ACLR 773 (NSWCA).
[14] [1978] 1 NZLR 647 (CA) at 651.
[15] [1987] 2 NZLR 21 (HC) at 30.

> Having considered these discussions and the cases I am of the view that some outward expression of accord is not necessary but that before rectification can be ordered the Court must be satisfied that the following points are established:
>
> (1) That, whether there is in antecedent agreement or not, the parties formed and continued to hold a single corresponding intention on the point in question.
>
> (2) That such intention continued to exist in the minds of both or all parties right up to the moment of execution of the formal instrument of which rectification is sought.
>
> (3) That while there need be no formal communication of the common intention by each party to the other or outward expression of accord, it must be objectively apparent from the words or actions of each party that each party held and continued to hold an intention on the point in question corresponding with the same intention held by each other party.
>
> (4) That the document sought to be rectified does not reflect that matching intention but would do so if rectified in the manner requested.

[77] I also bear in mind that Tipping J made it clear that a case for rectification is always hard to prove:[16]

> It is always emphasised in rectification cases that the proof of an antecedent common intention which ex hypothesi conflicts with the written instrument sought to be rectified must be convincing. The position was well put by Brightman LJ in *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077 at p 1090 where his Lordship said:
>
> > The standard of proof required in an action of rectification to establish the common intention of the parties is, in my view, the civil standard of balance of probability. But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself. It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties' intention because it is a document signed by the parties.

[78] In this case the plaintiff has to show that a claim for rectification is not arguable. There are two relevant factors. It is standard practice to provide in loan agreements, mortgages, guarantees and similar security documents to be signed by

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[16] *Westland Savings Bank v Hancock*, at 27.

independent trustees that they will not be personally liable. South Canterbury Finance Ltd's documents reflect this. The plaintiff's lawyers commented that it is customary to include such provisions. It is so common that it may well have become a custom. It is arguable that the parties contracted against a customary usage that such an exclusion of liability should be part of the deed.

[79] Next, it is also arguable that a course of dealing had developed between Mr Rice and the Bradleys that if Mr Rice were to be required as trustee of the Peter Bradley Family Trust to enter into contracts, his liability should be Ltd to the assets of the trust. That course of dealing extended to contracts with entities in which the Bradleys had an interest. Such a course of dealing might be the common continuing intention that would allow Mr Rice to say that the deed does not accurately record that intention.

[80] I do not ignore the difficulties Mr Rice will face in trying to establish his case for rectification. Not the least is that as an experienced solicitor he would have known to look for express words excluding his personal liability. But at this stage I cannot say that his defence seeking rectification will not succeed.

Res judicata

[81] Mr Rice also claims res judicata on the basis that South Canterbury Finance Ltd obtained judgment against his only to the extent of the trust assets. That plea is not available to him. There are different causes of action based on different contracts between different parties. The decision in the South Canterbury Finance Ltd case does not stand in the way of the plaintiff proceeding against Mr Rice personally any more than it prevents recovery against Mr and Mrs Bradley.

Disposition

[82] I give judgment against the first, second and third defendants for $1,570,000 plus interest of $219,957.00.

[83] The third defendant is liable under the judgment only to the extent of the assets of the Peter Bradley Family Trust. The plaintiff's claim against the third defendant personally is to go to a defended hearing on the merits in the normal way.

[84] The first and second defendants will pay the plaintiff costs on the 2B basis. If the parties cannot agree costs, they may file memoranda and I will fix costs on the papers. The plaintiff should file a memorandum within 5 working days and the defendants within a further 5 working days.

[85] Costs on the plaintiff's application against the third defendant are reserved. That is because the application against him was fought primarily on his personal liability. As the plaintiff did not succeed on that question, normal practice of reserving costs on a plaintiff's unsuccessful application is followed.

[86] Interest on all judgments and orders will run at 5% per annum.

[87] The Registrar is to convene a case management conference for the continuation of the claim against the third defendant.

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R M Bell
Associate Judge