IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CIV-2014-454-118
[2015] NZHC 2775

BETWEEN	CANTARA LIMITED First Plaintiff	
	CANTARA FARMS LIMITED Second Plaintiff	
AND	BANK OF NEW ZEALAND Defendant	

Hearing: 29 May 2015

Counsel: D Vincent and N Davis for the Plaintiffs
L A O'Gorman for the Defendant

Judgment: 9 November 2015

JUDGMENT OF ASSOCIATE JUDGE SMITH

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[1] This is an application by the defendant (the Bank) for summary judgment on the claims made against it. It says that it has a complete defence to all of the claims, and that its defence should be upheld on the basis of the affidavits filed, without the need for a trial. In the alternative, it applies for an order striking out the plaintiffs' claims.

Introduction

[2] In 2008 the second plaintiff (Cantara Farms) borrowed $4.55 million from the Bank to buy a piece of farmland near Marton. The first plaintiff (Cantara) took a lease of the land from Cantara Farms after the purchase was settled and thereafter carried out a cropping business on the land. Cantara Farms had been incorporated specifically to acquire the land and lease it to Cantara.

[3] The plaintiffs say that it was a bad purchase — the land was not worth what they paid for it, and it was eventually sold at a loss of approximately $1.2 million. Cantara says that it made yearly losses working the land.

[4] The plaintiffs contend that the Bank actively promoted the purchase of the land to Cantara and represented that $4.55 million was a realistic purchase price for the land. They also contend that the Bank produced budget forecasts for the Cantara group which contained errors and generally failed to properly assess the financial position of the group. They claim that they relied on the forecasts, advice and budget information provided by the Bank in deciding to purchase the land.

[5] In their statement of claim filed on 1 October 2014, the plaintiffs allege that the Bank breached a contractual duty to Cantara to use reasonable care and skill in providing the budget figures. They also contend that the Bank made certain negligent misstatements on which they relied in deciding to purchase the land. In addition, they contend that the Bank was guilty of misleading or deceptive behaviour in contravention of the Fair Trading Act 1986 (FTA), and that the Bank was guilty of various breaches of a duty of care and of a fiduciary duty.

[6] In the breach of fiduciary duty cause of action, the plaintiffs contend that the Bank was guilty of subordinating Cantara's interests to its own interests, in circumstances where the Bank had assumed the role of business advisor to Cantara and its associated companies. The plaintiffs claim damages of $1,210,000 together with certain consequential losses, interest, and costs.

[7] The Bank says that its relationship with Cantara was no more than an ordinary banker/client relationship: it never "crossed the line" to become a business advisor to either of the plaintiffs. It says that the claims against it cannot possibly succeed and that it is entitled to immediate judgment.

Background

[8] At material times the directors of Cantara were Tim, Daniel, and Marion Whale. Prior to 2008, when the relevant events in the case occurred, the Whales had some experience in farming and the world of business. They had run

Cantara's farming business, and also a trucking business called Marton Carrying Company (2006) Ltd. There was also a trust known as the Cantara Trust. The group owned over 200 hectares of land, with stock, plant, machinery and equipment.

[9] The Bank had provided banking services to Cantara from 1999. From 2004 to the end of 2008 Mr Ellis of the Bank's Fielding office was the officer responsible for managing the Bank's relationship with the Whales and the Cantara group.

[10] Early in 2008 Cantara sold a block of land near Marton. Following the sale it had approximately $700,000 in cash to invest. The plaintiffs say that, following the sale, Mr Ellis proposed that Cantara should buy some land, and began promoting land purchases to the Whales.

[11] Mr Tim Whale says that in 2008 an agent from PGG Wrightsons approached the Whales to see if they would be interested in buying the land with which this proceeding is concerned. The land was then owned by Mr O'Shanassy, who was a customer of the Bank's Palmerston North office. For convenience I refer to the land which Cantara Farms later purchased from Mr O'Shanassy as the "O'Shanassy block".

[12] When PGG Wrightsons approached the Whales about the O'Shanassy block, the Whales were already familiar with Mr O'Shanassy — Cantara had been providing agricultural contracting services to him.

[13] On 16 June 2008 the Whales met with Mr Ellis. Also present were Ms Melanie Sargent, a solicitor and a trustee of the Cantara Trust, and Mr Lance Morrison, Cantara's accountant. One of the topics discussed at the meeting was the possibility of Cantara buying more land. It was agreed that Mr Ellis would prepare a discussion document on that subject.

[14] Mr Ellis visited the O'Shanassy block with Tim and Daniel Whale on 23 June 2008. The following day he circulated an email attaching a "discussion document". The stated purpose of the discussion document was to "give an indication of the Bank's requirements if [Cantara] sought to purchase more farmland". Mr Ellis

adopted a valuation figure of $4.5 million for the O'Shanassy block. In his evidence, he explained that the $4.5 million figure used in the discussion document was "assumed" to be a realistic purchase price for the O'Shanassy block for the purposes of providing an "indicative assessment", the figure being close to an "assumed $10,000 per acre".

[15] There was a further meeting between Mr Ellis and the Whales on 8 July 2008. Mr Morrison was also in attendance. The purpose of the meeting was to go over Mr Ellis' discussion document. The plaintiffs say that Mr Ellis told them in the course of the meeting that there was no need for them to obtain a valuation of the O'Shanassy block. The Bank does not dispute that a statement to that effect was made, but says that it meant only that it did not require a valuation of the O'Shanassy block for funding to be approved.

[16] The plaintiffs allege that Mr Ellis used the Bank's specialised knowledge of the rural property sector to propose the $4.5 million value for the O'Shanassy block, and that he also used that knowledge in assigning values to the Cantara group's own land holdings. They say that Mr Ellis told them that a purchase price of $4.5 million was "realistic" and that they could complete the purchase given the existing secured assets the group held.

[17] An unusual feature of Cantara Farms' purchase of the O'Shanassy block is that there were apparently no negotiations between the Whales and Mr O'Shanassy — Mr O'Shanassy's solicitors simply forwarded a form of agreement for sale and purchase to Cantara's solicitors. The plaintiffs contend that there must have been some contact between the Bank and Mr O'Shanassy, as Mr O'Shanassy's solicitor used the figure of $4.55 million in preparing the agreement for sale and purchase.

[18] On 10 August 2008, Mr Tim Whale sent to Mr Ellis certain financial particulars about Cantara to enable the Bank to carry out a financial analysis. The Bank then prepared an initial analysis of Cantara's income, cashflow, and borrowings for the 2008/2009 year (the "Bank analysis documents"). It sent the Bank analysis documents to Mr Tim Whale.

[19] The plaintiffs contend that the Bank's purpose in sending the Bank analysis documents to them was to assist Cantara's decision-making on the purchase of the O'Shanassy block. They characterise the Bank analysis documents as being "in the nature of financial advice from the Bank".[1]

[20] The Bank says that it had no such purpose in preparing the Bank analysis documents and copying them to Mr Tim Whale. It says that the analysis was carried out as part of its own internal decision-making process on the request for a loan to purchase the O'Shanassy block. It says that the reason the Bank analysis documents were provided to Mr Tim Whale was so that he could inform Mr Ellis if he believed there were any errors in the Bank analysis documents, or if he had any comments on the inputs or outputs.[2]

[21] Mr Ellis says that it was his understanding that while the Bank analysis documents were being prepared, a firm of agricultural consultants, Stantiall & Keeling, was preparing budgets for the Whales and Cantara in the event of the loan being approved. He does not say how he gained that understanding however, and counsel for the plaintiffs stated in his submissions that he has no knowledge of such budgets being prepared.

[22] Mr Tim Whale states in his evidence that he did not get a chance to properly review the Bank analysis documents because of a heavy workload and minor surgery that he underwent at about the time the Bank analysis documents were sent to him.

[23] Between 11 August and 20 August 2008, Mr Ellis amended his analysis of Cantara's financial position. He prepared a further analysis document for the Cantara group for the 2009/2010 year, and for a "sustainable year". These documents (the Revised Analysis) were not sent to Cantara or the Whales.

[24] The Revised Analysis made the following amendments to the Bank analysis documents:

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1 Mr Tim Whale's affidavit at [40].
2 Mr Ellis' affidavit at [18].

(1) the Bank analysis documents had mistakenly recorded the total land area being harvested by Cantara on a contract basis for three different farmers, as 700 hectares (the reference should have been to acres, not hectares). The area was reduced to 240 hectares in the Revised Analysis.

(2) income from the lease of a piece of land known as the "Whittington Block" was removed, as the Bank's understanding by the time the Revised Analysis was prepared was that Cantara did not intend to proceed with that lease (income from the Whittington Block had been included in Cantara's budget information provided by Mr Tim Whale on 10 August 2008).

(3) Contracting income from baling and mowing was reduced by a total of $29,250 (notwithstanding that higher figures had been provided by Cantara in its budget information).

[25] On 21 August 2008, the Bank approved the $4.55 million loan for the purchase of the O'Shanassy block. Cantara Farms was incorporated the next day, and very shortly thereafter Cantara Farms entered into the agreement to purchase the O'Shanassy block for $4.55 million plus GST. The Bank and the plaintiffs entered into an agreement for the $4.55 million loan on 5 September 2008, and the purchase of the O'Shanassy block was settled on 1 October 2008.

The plaintiffs' complaints

[26] The plaintiffs contend that the Bank had a direct interest in seeing the O'Shanassy block sold as it had been on the market for some time and the Bank held a mortgage over it. They submit that that interest put the Bank in a conflict position in providing advice to the Whales and Cantara.

[27] The plaintiffs also complain that they relied on financial forecasting carried out by the Bank (set out in the Bank analysis documents) which was wrong. While the Bank says that the forecasts were compiled for its own internal purpose (determining Cantara Farms' eligibility as a borrower), the plaintiffs say that it was

never made clear to them that the forecasts included in the Bank analysis documents should not be relied upon. Some pages of the documents comprising the Bank analysis documents contained disclaimers, but not the annual budget and data schedule pages where there were errors. The plaintiffs say that the disclaimers were insufficient for the Bank to avoid liability and that the very fact that the disclaimers were included on some pages suggests that the pages were expected to be provided to the customer.

[28] The plaintiffs say that the Bank increased the expected yields from those contemplated by Mr Tim Whale in the financial information provided by him on 10 August 2008, and that in turn resulted in higher projected income levels from the O'Shanassy block. They say that the Bank actively applied its own judgment to the figures supplied by Cantara, increasing projected yields in order to increase the income the plaintiffs could expect to earn.

[29] The plaintiffs say that the errors were significant — the budget for the 2008/2009 year which was included in the Bank analysis documents showed a surplus when it should have shown a deficit. They contend that the Cantara group's assets and historical performance showed that the group could not then service further borrowing. While the Bank later corrected these errors (when it made its evaluation of the requested loan in the Revised Analysis), the corrected figures were not shown to the plaintiffs and the plaintiffs' attention was not drawn to the fact that the Bank had picked up and corrected the errors. The plaintiffs contend that the Bank allowed them to remain under the mistaken belief that the Bank analysis documents were correct.

[30] The plaintiffs submitted an affidavit affirmed by Ms Janette Walker, who had been a farmer in the Manawatu region between 2000 and 2005 and is now an advocate for farmers facing bank pressure or receivership. Ms Walker alleges that in the Manawatu, and also in Northland, the Bank engaged in aggressive financial product selling as it competed with other banks for market share. She states that, from cases she had worked on, bank managers prepared budgets for clients, saying in some cases that it did not matter if the budget was not correct or contained inflated expectations — just complete it so the credit department can approve it. She claims

to have seen budgets done for some farmers (particularly in Northland) by the Bank that were never going to work. She refers to the Bank's managers having monthly targets and receiving bonus payments on reaching certain targets, and to rural managers employed by the Bank actively soliciting customers' interest in purchasing particular farm properties which had come on the market for sale.

[31] Ms Walker states that, from her personal experience and from her "work in the banking sector" there was in the period from 2005–2008 a culture of rural staff employed by the Bank in the Manawatu actively recommending rural property purchases to their clients. She states that this was done under the guidance of the Bank's rural general manager based in Fielding. She says that she was herself approached by Bank's rural staff in 2004 to consider expanding her own farm business, and that the Bank offered to pay for her to attend a "grow your own business" seminar in Taupo. She did attend the seminar, and expanded her business with what she describes as dire consequences.

[32] In an affidavit filed in reply, Mr Ellis states that he does not believe that the Bank ever engaged in any improper conduct during the period. He denies that there was any culture of staff actively recommending rural property purchases to customers.

Summary judgment and strike-out applications by defendants

Principles applicable to defendants' summary judgment applications

[33] The Court may enter summary judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of can succeed.[3]

[34] The decision of the Court of Appeal in *Westpac Banking Corporation v M M Kembla New Zealand Limited* is authority for the following propositions:[4]

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3 High Court Rules, r 12.2(2).

4 *Westpac Banking Corporation v M M Kembla New Zealand Limited* [2001] 2 NZLR 298, (2000) 14 PRNZ 631 (CA), at [61]–[64].

(1) A defendant applying for summary judgment has the onus of proving the plaintiff cannot succeed. Usually, summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim.

(2) The Court must be satisfied that none of the claims can succeed: it is not enough that they are shown to have weaknesses.

(3) Summary judgment will only be suitable where all the material facts are not in dispute and can be put before the Court efficiently in affidavit form.

(4) The procedure may be inappropriate if the case is likely to turn on a judgment which can only be reached properly after hearing all the evidence at trial.

(5) Developing points of law may require the added context and perspective provided by a full trial.

Principles applicable to strike-out applications

[35] The following principles applicable to strike-out applications generally, were endorsed by the Supreme Court in *Couch v Attorney-General*:[5]

(1) Pleaded facts, whether or not admitted, are assumed to be true.

(2) The cause of action must be clearly untenable: the Court must be certain that it cannot succeed.

(3) The jurisdiction is to be exercised sparingly and only in clear cases.

(4) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.

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5 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] citing *Attorney-General v Prince* [1998] 1 NZLR 262 (CA).

(5) The Court should be particularly slow to strike out a claim in a developing area of the law.

[36] In an appropriate case, the Court may receive affidavit evidence on a strike-out application, but it will not attempt to resolve genuinely disputed issues of fact. Generally, affidavit evidence admitted on a strike-out application will be limited to matter which is undisputed.[6]

[37] If the Court concludes a cause of action clearly cannot succeed it may be struck out.

[38] Where an order is sought striking out a claim on the basis that the claim is out of time under a relevant limitation provision, the Court applies the approach laid down by the Supreme Court in *Murray v Morel*:[7]

> [33] … in order to succeed in striking out a cause of action as statute-barred, the defendant must satisfy the court that the plaintiff's cause of action is so clearly statute-barred that the plaintiff's claim can properly be regarded as frivolous, vexatious or an abuse of process. If the defendant demonstrates that the plaintiff's proceeding was commenced after the period allowed for the particular cause of action by the Limitation Act, the defendant will be entitled to an order striking out that cause of action unless the plaintiff shows that there is an arguable case for an extension or postponement which would bring the claim back within time.

The issues in this case

[39] The following issues arise:

(1) is it reasonably arguable for the plaintiffs that the Bank contracted with Cantara, on the terms pleaded by the plaintiffs, to provide the Bank analysis documents to Cantara?

(2) if so, is it reasonably arguable that Cantara Farms is entitled to enforce the contract?

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6 *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566.
7 *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721.

(3) if the answer to issue (1) is "yes", is it reasonably arguable for the plaintiffs that the Bank acted in breach of the contract in one or more of the respects pleaded by the plaintiffs?

(4) is it reasonably arguable for the plaintiffs that the Bank provided the advice on the merits of the purchase of the O'Shanassy block which the plaintiffs say the Bank provided?

(5) if the answer to issue (4) is "yes", is it reasonably arguable for the plaintiffs that the Bank assumed a duty of care to the first and/or second plaintiffs to exercise reasonable skill and care in giving the plaintiffs the advice?

(6) if the answers to issues (4) and (5) are both "yes", has the Bank shown that it is not reasonably arguable for the plaintiffs that the Bank acted in breach of the duty of care in one or more of the respects alleged by the plaintiffs?

(7) if the answers to issues (4), (5) and (6) are all "yes", do the plaintiffs have tenable arguments that (i) they relied on the Bank's advice and (ii) that they suffered loss as a result?

(8) is it reasonably arguable for the plaintiffs that the Bank owed them the fiduciary duties which the plaintiffs say were owed to them?

(9) if the answer to issue (8) is "yes", is it reasonably arguable for the plaintiffs that the Bank acted in breach of its fiduciary duties in one or more of the respects alleged by the plaintiffs, and that the plaintiffs suffered loss as a result?

(10) is it clear that the plaintiffs' claims under the FTA are out of time?

(11) if it is not clear that the plaintiffs' claims under the FTA are out of time, is it reasonably arguable for the plaintiffs that the Bank engaged

in misleading or deceptive conduct in one or more of the respects alleged by the plaintiffs and that the plaintiffs suffered loss as a result?

(12) is it reasonably arguable for the plaintiffs that the Bank owed them a duty of care to ensure that:

(i) the plaintiffs were aware that the Bank was not their advisor and was acting in its self-interest in authorising a loan to the plaintiffs to effect the purchase; or

(ii) the plaintiffs were advised to obtain and/or obtained, independent advice, particularly a valuation, prior to signing an unconditional contract for the purchase of the O'Shanassy block?

(13) if the answer to issue (12) is "yes", is it reasonably arguable for the plaintiffs that the Bank breached one or both of those duties in one or more of the respects alleged by the plaintiffs?

(14) if the answers to issues (12) and (13) are both "yes", is it reasonably arguable for the plaintiffs that the Bank's breaches of duty caused the plaintiffs loss by inducing them to purchase the O'Shanassy block at an over-value?

(15) if on the evidence produced the Bank has shown that it has a complete defence to all of the plaintiffs' claims, should the Court nevertheless exercise its discretion against the entry of summary judgment for the Bank?

[40] On the Bank's summary judgment application, the question will be whether, considering all of the evidence, the Bank has shown that it has a complete defence to all of the claims.

[41] I will address the Bank's application for summary judgment first. If the application is successful, that will be the end of the case; there will be no need to

address the strike-out application. If the Bank is not wholly successful with its summary judgment application, I will consider the strike-out application. The question there will be whether — assuming the various matters pleaded in the statement of claim are true — any of the plaintiffs' causes of action are so clearly untenable that they should be struck out.

Discussion and conclusions — summary judgment

Issues (1) — Is it reasonably arguable for the plaintiffs that the Bank contracted with Cantara, on the terms pleaded by the plaintiffs, to provide the Bank analysis documents to Cantara?

Issue (2) — If so, is it reasonably arguable that Cantara Farms is entitled to enforce the contract?

Issue (3) — If the answer to issue (1) is "yes", is it reasonably arguable for the plaintiffs that the Bank acted in breach of the contract in one or more of the respects pleaded by the plaintiffs?

[42] It will be convenient to deal with these issues together.

[43] The plaintiffs' breach of contract cause of action is concerned solely with the Bank's preparation of the Bank analysis documents and the provision of the Bank analysis documents to Cantara. The alleged contract is pleaded in the following terms:

> 31. The [Bank] contracted with [Cantara] to use reasonable care and skill in using the budget figures provided by it on 10 August 2008 to:
>
> 31.1 Prepare an annual budget showing the economic performance of the purchasing entity following purchase of the O'Shanassy block;
>
> 31.2 Use that budget to assess whether [Cantara] met the [Bank's] lending requirements for the provision of a loan for the purchase of the O'Shanassy block; and
>
> 31.3 To provide that budget to the plaintiffs to assist it with determining whether to proceed with the purchase.

[44] The plaintiffs say that the Bank analysis documents contained the following errors:

(1) Cantara's own budget analysis (provided to the Bank by Mr Tim Whale on 10 August 2008) had allowed for crop yields of 4.9-5.5 tons per hectare for barley and wheat. The Bank increased this projected yield to 6-6.5 tons per year.

(2) The Bank incorrectly recorded land areas harvested by Cantara as part of its contracting business (a reference to the Bank's error in adopting an area of 700 hectares for the relevant piece of land, instead of 700 acres).

(3) The Bank wrongly added projected income from an additional 140 hectares of land (relating to two contracting customers of Cantara) to the income information provided by Mr Tim Whale on 10 August 2008.

(4) The Bank incorrectly calculated Cantara's contracting revenue by failing to deduct $40,000, being the value of contracting work carried out on Cantara's own property.

[45] The plaintiffs plead that the Bank's breach induced Cantara Farms to purchase the O'Shanassy block, thereby causing it capital loss in the sum of $1.21 million. They also plead that the Bank's breach caused loss to Cantara by inducing it to authorise the purchase of the O'Shanassy block through Cantara Farms, and to undertake a cropping business on the O'Shanassy block which resulted in trading losses suffered in the period between 1 October 2008 and 30 August 2013.

[46] The statement of claim does not plead when the alleged contract is said to have been made, or whether it was made orally or in writing.

The Bank's submissions

[47] The Bank contends that there was no such contract: it says that the only contract between the parties was the loan agreement dated 5 September 2008. It contends that it had no duty, contractual or otherwise, to exercise care or skill in respect of the plaintiffs' purchasing decision, and says that the Bank analysis

documents were not in any event provided to Cantara in order to give advice to the plaintiffs. It further contends that Cantara Farms was not a party to the alleged contract and cannot rely on it.

[48] The Bank admits that the Bank analysis documents incorrectly recorded the land areas harvested by Cantara, but otherwise denies the matters pleaded by the plaintiffs as contract breaches.

The Plaintiffs' submissions

[49] In reply, Mr Vincent submits that the basic relationship between a banker and its customer is contractual in nature: where a customer requires a bank to undertake a task, and the bank agrees to perform that task, a contract is formed for the completion of the task. In such circumstances it is implied that reasonable care and skill will be used by the bank in undertaking the task, unless the circumstances exclude the implication of such a term.

[50] Mr Vincent points to the conflict in the parties' evidence on the purpose for which the Bank analysis documents were provided. While Mr Ellis says that Mr Tim Whale sent him the financial information to enable the Bank to consider advancing a loan, Mr Tim Whale says that Mr Ellis asked for the information "in order to provide the forecasts and projections to me". He submits that discovery and cross-examination will be necessary to properly explore the basis on which the information was provided, and whether the Bank, in accepting the information and providing the Bank analysis documents, implicitly agreed to act with reasonable care and skill in so doing.

Discussion and conclusions

[51] In my view the Bank has sufficiently shown that there was no stand-alone contract under which the Bank agreed to provide the Bank analysis documents to Cantara. There is simply no evidence to suggest that such a contract was made, as opposed to an exchange of information between the Bank and its customer made for the purpose of assessing whether a contract (the loan) should be made.

[52] The discussion document was clearly written for the purpose of giving an indication of the Bank's likely lending requirements if the Whales elected to proceed with the purchase. There is nothing in the evidence to suggest that a new contract was made at some time thereafter under which the Bank would act as business advisor in providing the Bank analysis documents to Cantara.

[53] When was this alleged contract made, and how was it made? What consideration did Cantara agree to provide for the provision of the Bank analysis documents? The plaintiffs have not provided answers to those questions, the answers to which are both fundamental to the existence of the claimed contract and within the plaintiffs' knowledge.

[54] The Bank analysis documents themselves do not support the existence of such a contract. The disclaimer which formed part of the Bank analysis documents includes the statement: "This report was prepared for Bank of New Zealand purposes only…" That language, and the disclaimer of responsibility which followed it, is not in my view consistent with the Bank assuming a contractual obligation to Cantara in respect of the accuracy of the Bank analysis documents.

[55] The absence of discovery from the Bank cannot have prevented Cantara from properly pleading when and how the alleged contract is said to have been made, and what consideration it agreed to provide. And there is nothing in the evidence which would justify an inference that such a contract must have been formed (as opposed to the parties completing preliminary steps in the process of deciding whether a loan application would be made, and if so whether it would be granted).

[56] Turning to issue (2), if there was no contract of the kind alleged between Cantara and the Bank, there is no contract Cantara Farms can enforce. Furthermore Cantara Farms did not exist at the time the Bank analysis documents were provided to Cantara, and there is no pleaded basis on which Cantara Farms could enforce contractual obligations entered into between the Bank and Cantara.

[57] The Bank therefore succeeds on issues (1) and (2). In those circumstances there is no need to consider issue (3).

Issue (4) — is it reasonably arguable for the plaintiffs that the Bank provided the advice on the merits of the purchase of the O'Shanassy block which the plaintiffs say the Bank provided?

Issue (5) — if the answer to issue (4) is "yes", is it reasonably arguable for the plaintiffs that the Bank assumed a duty of care to the first and/or second plaintiffs to exercise reasonable skill and care in giving the plaintiffs the advice?

[58] Again, it will be convenient to consider these two issues together.

[59] The plaintiffs rely on the Bank's ongoing relationship with Cantara and the Cantara trading group, and they plead that when Mr Wilson left to pursue other business interests in early 2008, Mr Ellis assumed the role of business advisor to Cantara and the Cantara Trading Group. They also rely on Mr Ellis' attendance at a number of meetings, the alleged undertaking by Mr Ellis to provide financial forecasts, scenarios, and other information in order to assist the plaintiffs in determining whether to purchase the O'Shanassy block, and Mr Ellis' alleged verbal support for a "realistic" purchase price of $4.5 million.

[60] The particular acts of the Bank which are said to constitute the "advice" are:

(1) providing verbal support for a realistic purchase price of $4.5 million at the meetings on 16 June 2008 and on 8 July 2008.

(2) the preparation and presentation of the discussion paper dated 24 June 2008, in which a security structure was proposed for the funding of the purchase of the O'Shanassy block.

(3) the provision of the Bank analysis documents on or about 11 August 2008, showing a trading surplus for the Cantara group following the purchase of the O'Shanassy block for $4,550,000.

[61] The Bank denies that it owed the pleaded duty of care to the plaintiffs and says that in any event it did not provide the pleaded advice.

Banks and negligent misstatement — general principles

[62] If a lending bank chooses to give advice to its customer/borrower about the quality of an investment, the bank *may* assume a duty in tort to give sound advice to the customer. If the bank does undertake to advise, the bank must exercise reasonable care and skill in giving the advice and will incur liability if the advice is given negligently.[8] A bank's liability for negligent advice may be negated by an appropriately worded disclaimer accompanying the advice.[9]

The Bank's submissions

[63] Ms O'Gorman submits that there is nothing in the evidence to support the claim that advice as to a realistic value was given for the purpose of advising Cantara and the Whales on the merits of the proposed transaction. Mr Ellis' statement that the Whales did not need to obtain a valuation is acknowledged to have been made, but it simply meant that *the Bank* did not need a valuation in order to approve the loan. Mr Tim Whale may have incorrectly assumed that Mr Ellis would perform an advisory role after Mr Wilson's departure, but there is no evidence of any discussion about that with Mr Ellis or within anyone else in the Bank. The Bank's position is that its relationship with the Whales and the Cantara group did not change following Mr Wilson's shift to Auckland.

[64] Ms O'Gorman further submits that the reference in the 24 June 2008 discussion document to the "assumption" that a purchase price of $4.5 million would be "realistic" cannot be regarded as advice in respect of the value of the O'Shanassy block. She notes that the discussion document expressly recorded that it was prepared "to give an indication of the Bank's requirements if [Cantara] sought to purchase more farmland", and that its purpose was to give "some indication of the impact on such a purchase to the Bank's security position". She submits that, in the context, the assumption about a realistic purchase price was for the purposes of assessing the Bank's requirements. She acknowledges that the discussion document did contain a proposed security structure, but submits that there was nothing unusual

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8 *Banbury v Bank of Montreal* [1918] AC 625 (HL) at 654, referred to in *Bank of New Zealand v Geddes* HC Auckland CIV-2008-404-8082, 28 May 2009 at [26].

9 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575 at 583.

about that in the context of what the Bank says was an ordinary lender/borrower relationship.

[65] Turning to the Bank analysis documents, Ms O'Gorman submits that the assertion that they were provided to Cantara for the purposes of advising the Whales on the prospective purchase lacks credibility. She refers to the disclaimer which appeared on at least some pages of the Bank analysis documents and to the fact that the Bank analysis documents were superseded by the revised analysis. She submits that if the Bank analysis documents had been intended to provide advice to Cantara and the Whales on the merits of the proposed transaction, the revised analysis would also have been sent to them. She further submits that the Bank did not have any information that was not already held by the plaintiffs and that the Bank analysis documents did not contain any assessment of the value of the O'Shanassy block.

[66] While the Bank analysis documents did address the value of the cropping business, but Ms O'Gorman submits it was unreasonable for Cantara to have relied on this advice when the Whales were themselves experienced farmers and business people, and Mr Tim Whale had arranged for Mr Massicks to prepare budgets for the Whales and Cantara in the event that the loan was approved. Furthermore, she submits, Mr Tim Whale acknowledged in his evidence that he did not properly review the Bank analysis documents. He undertook his own analysis of the value of the cropping business on the O'Shanassy block as set out in the financial information he provided to the Bank on 10 August 2008.

[67] Ms O'Gorman further submits that the alleged errors in the Bank analysis documents were all apparent on the face of those documents and Mr Tim Whale did not challenge Mr Ellis' evidence that the Revised Analysis would have been prepared following discussions with Mr Tim Whale about the Bank analysis documents. When the plaintiffs received information contained in the revised analysis after 17 October 2008, they did not take any issue with the fact that information contained in the revised analysis was different from that in the Bank analysis documents.

[68] The plaintiffs' evidence is effectively that, because the Bank supported the request for a loan (without a valuation of the property), they understood that the

Bank considered (and was advising them) that the O'Shanassy block was a good investment at a reasonable price. In fact the plaintiffs placed no reliance on the Bank analysis documents over and above reliance on the fact that the Bank had undertaken an analysis and was prepared to advance a loan. She submits that that is not a basis for a claim against the Bank.

[69] Overall, Ms O'Gorman submits that the Bank did not "cross the line" and assume the duties of an advisor. The Whales were not vulnerable: they were experienced farmers and business people who at all material times had the benefit of legal and accounting advice. Mr Ellis' attendance at meetings was entirely consistent with the parties being in an ordinary lender/borrower relationship. He was not involved in the plaintiffs' search for a new property, did not introduce the plaintiffs to the O'Shanassy block, and did not act as an intermediary in the agreement for sale and purchase.

The Plaintiffs' submissions

[70] Mr Vincent relies on the following passage from Lord Reid in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* in support of his submission that a Bank will owe a duty of care to its customer:[10]

> … in all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable to do that, and where the other gave the information or advice when he knew or ought to have known that the enquirer was relying on him.

[71] He submits that in this case it is plain, or at least arguable, that the Whales and the Cantara group were trusting the Bank to exercise an appropriate level of care in preparing and providing the Bank analysis documents. He also submits that it was reasonable for the Whales and Cantara to repose that kind of trust in the Bank, and that the Bank ought to have known that Cantara was relying on it.

[72] Mr Vincent relies on the decision of the Federal Court of Australia in *Commonwealth Bank of Australia v Smith*[11] for the proposition that the fact that a

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10 *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, above n 9, at 583.

11 *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453 (FCA) at 476.

Bank may be acting in its own interests does not exclude a duty of care arising in an appropriate case. In that case the Federal Court noted that a lending bank may have created in the customer the expectation that it will advise in the customer's interests as to the wisdom of a proposed investment. That situation may arise where the customer may fairly take it that to a significant extent his interest is consistent with that of the bank in financing the customer for a prudent business venture.[12]

[73] *Smith* was a case where the respondents were inexperienced in the relevant level of business and had relied on the appellant bank as their financial advisor for a long time. They relied on advice given to them by the bank manager — who had a close knowledge of the hotel which was the subject of the relevant purchase agreement — that it was appropriate for them to pay the price requested by the vendor. The vendor was a customer of the bank and was also being advised by the bank. The respondents did not look to anyone apart from their bank manager for advice and the manager discouraged them from seeking accounting advice or consulting a hotel broker. He persuaded them that there was no point in negotiating with the vendor for a lower price or worrying about whether they had agreed to pay too much for the hotel.

[74] In dismissing the appeal from judgment of von Doussa J, the Federal Court considered that where a bank gives a customer advice on financial affairs, in addition to any contractual rights the customer might have, the relationship between the parties may be such as to found either a common law duty of care or a fiduciary duty or both.

[75] Specifically on the question of negligence the Court in *Smith* held that the bank had assumed the position of business advisor to the respondents in addition to acting in the interests of the bank. The bank was therefore under a duty to advise the respondents with due care and skill.

[76] In this case, the Cantara group had a long relationship with the Bank, and Mr O'Shanassy was also a customer of the bank, which itself held a mortgage over the O'Shanassy block. As in the *Smith* case, Mr Vincent says that the Bank was in a

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12 At 476.

conflict situation as it had an interest in maximising the amount Mr O'Shanassy would recover from a sale of the O'Shanassy block to ensure that its own mortgage over the O'Shanassy block could be promptly discharged. (While the Bank acknowledges that it held a mortgage over the O'Shanassy block, Mr Ellis' evidence is that he did not have responsibility within the Bank for the O'Shanassy loan, which was administered from the Bank's Palmerston North office (Mr Ellis was based in Feilding)).

[77] Mr Vincent submits that the reasonableness or otherwise of Cantara's reliance on the Bank analysis documents is a factual matter which should be resolved at trial. He submits that there is insufficient evidence before the Court to fairly determine the commercial experience the Whales may have had with farm purchases of this sort.

[78] With reference to the budgets which Mr Ellis understood were to be prepared by Mr Massicks, Mr Vincent stated in his submissions that these budgets were "entirely unknown to counsel". And while Cantara did have its accountant, Mr Morrison, and its solicitors available to provide assistance, Mr Morrison merely provided accounts for the Cantara group and did not advise or produce budgets for this transaction. The solicitors attended to the conveyance of the property but were not asked to advise on the wisdom of the transaction. The plaintiffs did not rely on other professionals who could have been called upon to assist because they relied on the Bank's advice and did not perceive the need for any further advice.

[79] On the disclaimer in the Bank analysis documents, Mr Vincent notes first that the plaintiffs' case goes beyond the provision of the forecasting information and includes reliance on the valuation advice allegedly provided by the Bank, and the Bank's failure to "require" the plaintiffs to obtain independent advice. Dealing directly with the disclaimer, he notes that it was in the form of a notice and was not a contractual disclaimer. He refers to a number of factors about the disclaimer which in his submission will require exploration at trial. One of those factors is what the disclaimer means when it refers to the "report" — the Bank analysis documents contained a number of reports, some of which did not have disclaimers. And on at least one page, material aspects of the disclaimer were not readable (hole punches, and the manner in which the document has been printed, have excluded aspects of

it). He submits that the pages are loose and that there are different forms of the documents that were amended.

[80] Mr Vincent refers to the decision of Associate Judge Gendall, as he then was, in *Armitage v Church*, a case in which the Associate Judge took the view that the application or otherwise of a disclaimer in a contract between a financial investment advisor and her client was not a matter which was suitable for determination on a strike-out or summary judgment application. On the wording of the disclaimer in that case the Associate Judge was satisfied that there was an arguable case that the clause could be construed so as to leave open liability for negligently provided advice.[13]

Discussion and conclusions

[81] I think it is reasonably arguable for the plaintiffs that Mr Ellis did provide "verbal support" for a realistic purchase price of $4.5 million. At least it is not clear (to the point where it is apparent that the Bank has a complete defence on the point) that the plaintiffs would not, with the aid of discovery and cross-examination, be able to show that Mr Ellis did so. The assumed value of $4.5 million underpinned the Bank's advice (in the discussion document of 24 June 2008) that Mr Ellis considered that the Bank could advance up to $3.15 million on the security of the O'Shanassy block (on the basis that the Bank could lend up to 70 per cent of the purchase price). Further, it is not suggested by either party that the figure of $4.5 million as a possible purchase price came from the Whales.[14]

[82] Similarly, the Bank did provide a discussion paper to Cantara proposing a security structure for the funding of the purchase of the O'Shanassy block and it did provide a written annual budget on or about 11 August 2008 forecasting a cashflow surplus to the Cantara group following the proposed purchase.

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13 *Armitage v Church* [2010] NZCCLR 28 at [36]. The terms of the disclaimer in that case expressly excluded liability for "any error or omission" but acknowledged that the defendants owed "responsibilities in connection with any material or advice given".

14 In his affidavit, Mr Ellis says that he took an assumed price per acre of $10,000 and applied that to the land area of the O'Shanassy block.

[83] On issue (4), then, I do not think it can be said that the Bank clearly has a complete defence to the negligent misstatement cause of action on the ground that it did not provide the alleged advice.

[84] But that is not to say that the Bank may not have a complete defence to the cause of action on the ground that it did not assume a duty of care to the plaintiffs in giving any advice it may be found to have given. That is the (separate) question raised by issue (5).

[85] I accept Mr Vincent's submission based on the passage from *Hedley Byrne* quoted at [70] above that the critical questions are whether the plaintiffs may be able to establish at trial (i) that the plaintiffs relied on the Bank to exercise care in giving advice to it on the merits of the proposed purchase, (ii) that it was reasonable for the plaintiffs to have relied on the Bank for that advice, and (iii) that the Bank gave the advice on the merits of the proposed purchase when it knew or ought to have known that the plaintiffs would rely on the advice in deciding whether to proceed with the proposed transaction.

[86] I do not think it is possible to conclude on the affidavit evidence that the plaintiffs did not place some reliance on what they took to be advice from Mr Ellis on the merits of the proposed transaction. That will be a matter for trial if the Bank's summary judgment application fails and the cause of action survives the Bank's strike-out application. The Whales would have been aware that Mr Ellis, in his role as "Agribusiness Manager" for the Bank, would have had an interest in local farmland and that he had personally inspected the O'Shanassy block. They may have believed that his assumption of the $4.5 million figure, although not the opinion of a registered valuer, did provide some "verbal support" for $4.5 million as a "realistic" price for the land. The more difficult question is whether or not the plaintiffs may be able to show at trial that it was *reasonable* for them to rely on Mr Ellis' statements.

[87] There is no basis in evidence which would justify a conclusion that, at the time the discussion document was sent on 24 June 2008, the parties' relationship was anything other than an ordinary banker/lender relationship, in which each party pursued its own interests. Mr Ellis' covering email specifically recorded that the

document had been prepared to give an indication of *the Bank's* requirements if Cantara sought to purchase more farmland (emphasis added). And in the document itself Mr Ellis recorded that he had been requested to present some scenarios "giving some indication of impact on such a purchase to the Bank's security position". The discussion document went on to discuss the Bank's various security requirements and put forward a revised security structure under which various other assets owned by members of the Cantara group (i.e. assets other than the O'Shanassy block) could be used to provide sufficient security for the Bank to advance part of the anticipated purchase price.

[88] It was in this context that Mr Ellis referred in the discussion document to his "assumption" that a purchase price of $4.5 million would be "realistic". In my view the use of the word "assumed" in this context clearly signalled to Mr Tim Whale that Mr Ellis was *not* offering firm advice on the value of the O'Shanassy block: he was merely setting out a particular assumption *the Bank* was likely to be prepared to work on in assessing any loan application.

[89] If any stronger statement was made by Mr Ellis at either of the meetings of 15 or 16 June 2008, Mr Tim Whale should have been disabused of any misconception about the extent to which he could rely on Mr Ellis' idea of the value of the O'Shanassy block by the terms of the 24 June 2008 discussion document (showing that the $4.5 million was only an assumption made by Mr Ellis for the Bank's purpose of assessing any loan application).

[90] All that is alleged to have been said on 8 July 2008 is that Mr Ellis told Mr Tim Whale and Mr Morrison that there was no need for them to obtain a valuation of the O'Shanassy block. In my view any such statement would have been entirely consistent with Mr Ellis approaching the value issue purely from the Bank's perspective. Mr Tim Whale was an experienced farm owner in the region, and Mr Morrison is a chartered accountant; they were clearly not inexperienced in business, and in my view the plaintiffs have no tenable argument that it was reasonable for them to have assumed, apparently without further enquiry, that Mr Ellis was providing them with valuation advice on which they were expected to

rely, rather than simply advising that the Bank did not require a valuation for lending purposes.

[91] I conclude that the plaintiffs have no tenable argument that it was reasonable for them to have relied on the pleaded statements about the value of the O'Shanassy block. That view is reinforced by Mr Tim Whale's evidence that, when it became apparent shortly before the agreement for sale and purchase was signed that the homestead would not form part of the purchase, Mr Ellis told him not to worry, as land values were going up all the time. While Mr Ellis denies making that statement, the implication of the statement, if made, is that Mr Ellis was acknowledging the possibility that the O'Shanassy block might then have been worth less than the $4.55 million purchase price.

[92] Turning to the second alleged piece of "advice" on the merits of the transaction which Mr Ellis is alleged to have given, namely the proposing of a security structure in the 24 June 2008 discussion paper, I again conclude that the plaintiffs have no tenable argument that it was reasonable for them to treat the suggestion of a particular security structure in the discussion paper as advice on the merits of the proposed transaction. Mr Ellis made it plain that the document was concerned with *the Bank's* likely security requirements if a $4.5 million loan application was made. The security structure was not directly concerned with the merits of the transaction Cantara was contemplating, and it was for the Cantara group to decide whether security should be given over particular assets or particular guarantees should be given. Accordingly it would not have been reasonable for the plaintiffs to rely on it as having been advice on the wisdom of the underlying transaction.

[93] Turning to the Bank analysis documents, Mr Tim Whale's evidence is that there was an agreement for the Bank to provide "financial forecasting for us to assess the financial performance following the purchase of the land". Again the Bank denies that that was the purpose of the preparation and supply of the Bank analysis documents. There is no evidence of contemporaneous letters or emails (or notes made by any of the parties) recording the basis on which the financial

information was supplied to the Bank and the Bank provided the Bank analysis documents to the Cantara group.

[94] It is correct that in preparing the Bank analysis documents the Bank not only took the financial information provided by Mr Tim Whale — it processed that information and added to it. Mr Ellis acknowledges in his evidence that in preparing the Bank analysis documents he included certain income from harvesting services that he understood from his ongoing knowledge of Cantara's business would be provided to a local land owner who also happened to be an employee of the Bank. He also added information relating to harvesting income from another farmer who was a customer of the Bank at the time and for whom Mr Ellis was the relationship manager.

[95] The following disclaimer was set out on some (but not all) pages of the Bank analysis documents:

> This report was prepared for Bank of New Zealand purposes only and no warranty expressed or implied is given as to accuracy. This copy is for clients' information only and is not to be copied or used for any other purposes. Neither the Bank of New Zealand nor any person involved in the preparation of this report accepts any liability for any loss or damage that may directly or indirectly result from any advice, opinion, information, representation, or omission, whether negligent or otherwise, contained in this report.

[96] There is no doubt that a bank may, by notice, exclude liability to its client for negligence in giving advice to the client, by an appropriately worded notice.[15] In this case, the disclaimer expressly excludes liability for any loss or damage directly or indirectly resulting from negligence in any "advice, opinion, information, representation, or omission" contained in the report. On the face of it, that wording is sufficient to exclude liability insofar as it is said to arise out of alleged errors in the Bank analysis documents.

[97] I do not accept Mr Vincent's submission that there is an arguable issue over what constitutes the "report" to which the disclaimer refers. The principal pages comprised in the Bank analysis documents, including the "mixed cropping cashflow

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15 *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, above n 9, at 586.

forecast" and the "borrowing details" pages, contain the disclaimer under the prominent heading "IMPORTANT NOTICE". Other pages, including the page setting out assumptions for Cantara's contracting business, and the cropping assumptions, were incorporated by reference into the documents on which the disclaimer appears. In the case of the contracting assumptions, the income part of the mixed cropping cashflow forecast page includes the item "Contracting (see schedule)". The income figure incorporated in that cashflow forecast for contracting is the same as the "total funds received" figure appearing on the separate page on which the assumptions for the contracting business and cropping were set out. Other pages dealing with the projected annual budget for the 2008/2009 year appear to be working pages setting out the calculation of figures adopted in the mixed cropping cashflow forecast. For example, the "gross farm income" shown in the annual budget page (which did not contain a disclaimer) appears to be the same as the "gross income" figure adopted in the "mixed cropping cashflow forecast" — $2,724,086. Other pages of the Bank analysis documents also appear to be working pages, subsidiary to the principal reports.

[98] Overall, I consider that the various pages comprising the Bank analysis documents were intended to be read as a single "report" and in those circumstances I do not think it reasonably arguable for the plaintiffs that the disclaimer did not apply to incorrect statements which may have been made in individual pages on which the disclaimer did not appear.

[99] The fact that the disclaimer might be difficult to read on some of the pages which have been produced in evidence does not affect that view. The Bank analysis documents were in my view intended to be read as a single report and there is no suggestion in the evidence that different forms of disclaimer appeared within that report.

[100] Mr Vincent relies on *Armitage v Church*,[16] in support of the submission that it would not be appropriate to construe the disclaimer in the context of a summary hearing such as this: he submits that the proper construction of the disclaimer is a matter for trial where it can be considered in the context of the evidence as a whole.

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16 *Armitage v Church*, above n 13.

In my view *Armitage v Church* is distinguishable as in that case the financial advisors had acknowledged their "responsibilities in connection with any material or advice given".[17] There is no evidence of any such acknowledgment in this case, nor anything else to suggest that the terms of the disclaimer, including as they do a disclaimer of liability for any loss or damage caused directly or indirectly from any negligent advice, opinion or information contained in the report, might be construed in any way other than in accordance with their clear terms if the construction exercise were deferred until trial. In my view the disclaimer was sufficiently clear and prominent that it is not tenable for the plaintiffs to contend that it was reasonable for them to rely on the Bank analysis documents, or that in providing them with the Bank analysis documents the Bank assumed a duty to take care as to the accuracy of statements contained in the Bank analysis documents.

[101] I accept, too, Ms O'Gorman's submission that the Bank analysis documents addressed matters that were directly within the knowledge of Cantara and Mr Tim Whale, and it was for them to check through them. It is no answer for Mr Tim Whale to say that he didn't carefully read the Bank analysis documents — that simply raises the additional question of whether the plaintiffs relied on the Bank analysis documents at all.

[102] I do not think this case is anywhere close to the circumstances of the *Smith* case relied upon by Mr Vincent, where the respondents were inexperienced and had no other advisors, and the bank manager actively discouraged them from seeking independent advice in circumstances where the bank held a mortgage valuation which was significantly lower than the price the respondents were about to pay. Here the Bank did no more than indicate that it was working on an "assumed" value for lending purposes and it made clear in the 24 June 2008 discussion paper that its focus was on its own lending requirements. The Bank analysis documents contained a prominent disclaimer which made it clear that the documents had been prepared for the Bank's purposes and that they should not be relied upon by the plaintiffs.

[103] More generally, Cantara and the Cantara group were operating substantial businesses and had access to an array of external advisers. To suggest that the

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[17] At [36].

plaintiffs were in a vulnerable position vis-à-vis the Bank is simply not plausible, and the fact that the Bank's Palmerston North branch was also a lender to Mr O'Shanassy does not in my view affect the question of whether it was or was not reasonable for the plaintiffs to have relied on any advice which may have been negligently given by Mr Ellis. Whether Mr Tim Whale and the Cantara group acted reasonably in placing reliance on what Mr Ellis said to them must be assessed by reference to what they knew, not what they did not know.

[104] There is a further factor which weighs in the Bank's favour on the question of whether the Bank assumed a duty of care to the plaintiff as to the accuracy of material contained in the Bank analysis documents: the Bank does not appear to have been aware that the plaintiffs would rely on the accuracy of the cashflow forecasts contained in Bank analysis documents. Mr Ellis' evidence is that he understood Cantara was obtaining advice on budgets from Mr Massicks. That evidence was obviously important, and it was something which Mr Tim Whale could readily have answered in a reply affidavit if no such advice was sought. There was no reply evidence on the point. It was not enough for Mr Vincent to say in his submissions that no such advice was known to him.

[105] I note also that the Bank analysis documents included cashflow sensitivity analyses which considered the effects on the forecasts if revenue was lower or overheads higher than the figures allowed for in the Bank's projections. The sensitivity analyses clearly adverted to the possibility of significant losses rather than cashflow surpluses in the "worst case" scenarios.

[106] Considering all of the foregoing matters, I am of the view that the Bank has sufficiently shown that it has a complete defence on the negligent misstatement cause of action.

[107] Given the view to which I have come on this issue it is not necessary to address issues (6) and (7).

Issue (8) - is it reasonably arguable for the plaintiffs that the Bank owed them the fiduciary duties which the plaintiffs say were owed to them?

Issue (9) — if the answer to issue (8) is "yes", is it reasonably arguable for the plaintiffs that the Bank acted in breach of its fiduciary duties in one or more of the respects alleged by the plaintiffs, and that the plaintiffs suffered loss as a result?

[108] The alleged fiduciary duties are said to arise from the following facts:

(1) the close working relationship between the Bank and the Cantara trading group.

(2) Mr Ellis' alleged assumption of the role of business advisor to Cantara and the Cantara trading group.

(3) the Bank's knowledge that Cantara and the Cantara trading group were relying on the Bank's advice in the absence of Mr Wilson.

(4) the Bank's knowledge that Mr Tim Whale was unwell around the time of the purchase of the O'Shanassy block and was therefore vulnerable.

(5) Mr Ellis continuing to provide business advice to both plaintiffs after Cantara farms was incorporated.

[109] The plaintiffs say that the Bank breached its fiduciary duties towards them by:

(1) subordinating Cantara's interests to its own interests and to those of its client Mr O'Shanassy by providing poor advice on the merits of purchasing the O'Shanassy block;

(2) subordinating Cantara's interests to its own and to those of its client Mr O'Shanassy by misstating budget information so that its financial projections provided to Cantara were inaccurate; and

(3) failing to advise the plaintiffs about the inaccuracies in the Bank analysis documents.

The Bank's submissions

[110] Ms O'Gorman submitted that the relationship of banker and customer is not one where there will be a presumption of fiduciary relationship.[18] The focus is again on the question of whether advice has been given which might have resulted in the Bank "crossing the line" between a normal business relationship and a relationship of dominating influence.[19] The dividing line may be crossed if the Bank assumes an investment advice role and reliance by the customer is evident. All the circumstances will be relevant including whether the Bank introduced the parties, whether it advised the customer when in a situation of conflict, whether the customer was sophisticated, and whether the customer received independent professional advice.[20] The fact that the arrangement between the parties was of a purely commercial kind, and that they had dealt at arm's length and on an equal footing has been regarded as an important, if not decisive, fact in indicating that there is no fiduciary duty.[21]

[111] Ms O'Gorman referred to *Shotter v Westpac Banking Corporation* as an example of a case where there was a good, trusting, working relationship between the plaintiff and his local branch bank manager, during which there were frequent discussions on the plaintiff's business ventures. That close relationship was held not to give rise to any fiduciary relationship. There was no risk of the plaintiff being under the domination or influence of the bank as the plaintiff had a commercial background and had a firm of solicitors acting for him at all reasonable times.

The plaintiffs' submissions

[112] Mr Vincent also referred to *Shotter* in his submissions, noting Wylie J's observation that the question of whether a fiduciary relationship exists requires a

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18 Citing *Forivermor Ltd v ANZ Bank New Zealand* [2011] NZCA 129 at [61] and [62].
19 Citing *Shotter v Westpac Banking Corporation* [1988] 2 NZLR 316 (HC) at 324.
20 Citing *Taylor v Bank of New Zealand* [2011] 2 NZLR 628 (HC) at [127]
21 Citing *Alison v Westpac Banking Corporation* HC Wellington CP 59/93, 12 July 1996 at 40, citing *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41 at 70 and 119.

"meticulous examination of the facts". Mr Vincent submits that such an examination is beyond the scope of the Court in this application. He refers to the fact that the present case is concerned with the relationship between the plaintiffs and their bank manager in a rural setting where such relationships may be expected to be closer. He refers to *Commonwealth Bank of Australia v Smith* where the crucial incident of the fiduciary relationship was that there were conflicting interests between the two sets of customers of the bank.[22] He submits that it is arguable that the connection between Mr Ellis and Mr Tim Whale and the Cantara group in this case went beyond the ordinary banker/customer relationship, and that the plaintiffs reposed trust and confidence in the Bank and in the advice and information provided to them by the Bank.

[113] Mr Vincent further submits that it is reasonable to infer that the sale of the O'Shanassy block was motivated by Mr O'Shanassy being in financial difficulty. That inference is said to be justified by Mr Wilson's evidence that Mr O'Shanassy's farm had not been profitable some years earlier, and would have continued to make losses. The inference is also said to be supported by the fact that Cantara operated the land at a loss after the settlement of the 2008 purchase. Following the sale of the O'Shanassy block, Mr O'Shanassy continued farming in the region and in fact purchased a neighbouring farm for $3.5 million, leaving him with $1 million from the proceeds of the sale of the O'Shanassy block to Cantara Farms with which to repay debt.

Discussion and conclusions

[114] I accept Ms O'Gorman's submission that the focus is on whether any advice given by the Bank might have resulted in the Bank "crossing the line" between a normal business relationship and one in which the Bank had a dominating influence. All the circumstances will be relevant including whether the Bank introduced the parties, whether it advised the customer in a situation of conflict, and whether the customer was sophisticated and/or received independent professional advice.[23]

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22 *Commonwealth Bank of Australia v Smith*, above n 11, at 477.

23 *Taylor v Bank of New Zealand*, above n 20, at [127].

[115] In this case, the evidence does not show how the parties were introduced, although quite clearly someone must have told Mr O'Shanassy's solicitors that the Cantara group was interested in buying the O'Shanassy block and that they might be prepared to pay a figure in the vicinity of $4.5 million (otherwise, Mr O'Shanassy would not have gone to the trouble of having his solicitors send an agreement for sale and purchase to Cantara's solicitors). There is no evidence that the Bank participated in any negotiations, and Mr Ellis says that at the time the Whales were first considering purchasing the O'Shanassy block he was not aware that Mr O'Shanassy was a customer of the Bank. He had never been involved in services that the Bank provided to Mr O'Shanassy and never knew of his financial position. He acknowledges that he would have become aware that Mr O'Shanassy was a customer of the Bank's Palmerston North office when considering Cantara's request for finance for the purchase of the O'Shanassy block, as he would have seen that the Bank already had security over it.

[116] Mr Vincent's submissions relating to the Bank's motivations, and its alleged conflict arising from the fact that it was also a lender to Mr O'Shanassy, do not in my view go beyond the level of speculation. Mr Ellis has said on oath that he was not involved in the Bank's relationship with Mr O'Shanassy and that he was never aware of Mr O'Shanassy's financial position.

[117] I suspect it will frequently be the case that rural banks will find themselves asked to advance money for the purchase of farmland on which they already have a mortgage securing a loan to the vendor, and I do not think that it could be the case that in every such situation the Bank is to be regarded as being in a conflict of interest situation, particularly where the vendor's and purchaser's bank accounts are operated out of different branches of the Bank and the manager dealing with the purchaser's loan application has no knowledge of the financial affairs of the vendor. The existence of a conflict of interest does not of itself give rise to a fiduciary relationship. Rather, where a fiduciary relationship exists, one of the incidents of that relationship is to avoid a conflict of interest.

[118] Factors considered relevant to the existence or otherwise of a fiduciary relationship include whether the customer was sophisticated and whether the

customer received independent professional advice.[24] I do not consider it credible for the plaintiffs to suggest that they were unsophisticated in the world of farm ownership and business management. They had owned and operated farmland in the region for a number of years and operated a separate contracting business. They also operated the Marton Carrying Company. Their solicitor, Ms Sargent, was a trustee of the Cantara trust, and they had access to accounting advice from Mr Morrison if they required it. Contrary to Mr Vincent's submissions, I see no possible element of vulnerability in their position. They were experienced operators and would have understood perfectly well that when Mr Ellis told them he was working on an "assumed" value of $4.5 million for the O'Shanassy block, the figure was precisely that: an assumption which might or might not have been correct.

[119] Nor would there have been any secret over the fact that the Bank held a mortgage over the O'Shanassy block, given by Mr O'Shanassy. The agreement for sale and purchase was sent to Cantara's solicitors and it is improbable that they would not have obtained a search of the certificate of title to the O'Shanassy block very shortly after they became involved — the title would have shown Mr O'Shanassy's mortgage to the Bank.

[120] I accept that it may well have been the case that the Whales and the Cantara group relied upon the fact that the Bank was prepared to lend up to $3.15 million on the security of the O'Shanassy block as "evidence" that the Bank had reasonable grounds to believe that that was the value of the land. But it cannot be the case that every time a bank advises a customer that it is prepared to lend up to a particular sum for the purchase of land (based on the bank's assessment of the value of the land) the bank is to be taken as having "crossed the line" to become an advisor to its customer on the issue of what the land is worth.

[121] Turning to the Bank analysis documents, in the absence of proper financial statements and projections provided by the Cantara group advisors, it is understandable that the Bank would have produced its own projections, working from the handwritten figures provided by Mr Tim Whale. It is equally understandable in those circumstances that the projections comprised in the Bank

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[24] *Taylor v Bank of New Zealand*, above n 20, at [127].

analysis documents would have been sent to the Cantara group for checking. Those steps were entirely consistent with the Bank acting in its own commercial interests in assessing whether to grant the loan.

[122] I take into account, too, the fact that the discussion document provided on 24 June 2008 showed clearly that the Bank and the Cantara group were then operating in an orthodox, arm's-length commercial way. There is nothing in Mr Tim Whale's evidence on what subsequently occurred to suggest that any change was intended, such that the Bank assumed some responsibility to act in the interests of the Cantara group.

[123] Mr Ellis says that he understood that Mr Massicks was preparing budgets for the Whales and Cantara in the event of the loan being approved, but he does not say where he got that understanding. To the extent that this evidence might have been tendered in support of the proposition that Mr Tim Whale did arrange for Mr Massicks to prepare budgets, the evidence appears to be inadmissible hearsay. But on the issue of whether Mr Ellis was *aware* that the Cantara group was reposing trust and confidence in him and the Bank to give accurate business advice to them, I think Mr Ellis' evidence as to his belief that Cantara was having budgets prepared elsewhere *is* relevant and admissible. The evidence was not denied by Mr Tim Whale in his affidavit.

[124] I accept that there may have been a close working relationship between Mr Ellis and the Cantara group. But applying *Shotter v Westpac Banking Corporation*, I do not think the plaintiffs have an arguable case that they were "under the domination or influence" of the Bank: the Whales were experienced business people with access throughout to competent professional advice.[25]

[125] I do not consider that the affidavit of Ms Walker materially assists the plaintiffs. First, much of her evidence appears to be inadmissible hearsay, apparently resulting from statements made to her by farmers for whom she has acted as advocate. She does not give any details of her "personal experience" working with the Bank's rural staff in the period between 2005-2008. Her evidence does not

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[25] *Shotter v Westpac Banking Corporation*, above n 19, at 333.

appear to fall within any recognised category of expert evidence, and (to the extent that her evidence may have been tendered as the evidence of an expert) her affidavit does not comply with the requirements of sch 4 of the High Court Rules.

[126] Mr Vincent told me at the hearing that Ms Walker's evidence was intended to provide "flavour and background" to the plaintiffs' case, and that it may be regarded as similar fact evidence directed to the Bank's activities at the relevant time. But that does not answer the hearsay point — similar fact evidence, if it is relevant, must still be properly provided by direct evidence of the allegedly similar facts.

[127] More generally, I can see nothing untoward in a bank manager approaching a customer known to have substantial resources, to see if the bank can obtain more lending business from that customer. The critical question must be whether the bank's conduct has given rise to a relationship different from that of the ordinary relationship between a bank and its client, such as to create further and greater obligations.

[128] Ms Walker's evidence cannot assist on that question. What really matters is what *the plaintiffs* say about the extent of the Bank's influence in this particular case (and of course what the Bank says in reply). On that issue, Mr Tim Whale's evidence does not in my judgment come close to establishing that there was some dominating influence exerted by Mr Ellis which may have given rise to a fiduciary obligation. The plaintiffs were not babes in arms. They were obviously experienced in both farming and business, and had ample resources to call upon for such professional advice as they may have considered necessary.

[129] Having regard to all of the foregoing considerations, I am satisfied that the Bank has shown that it has a complete defence to the cause of action based on breach of fiduciary duty, on the ground that no fiduciary relationship existed.

[130] Having regard to the view to which I have come on issue (8), it is not necessary for me to answer issue (9).

Issues (10) — Is it clear that the plaintiffs' claims under the FTA are out of time?

Issue (11) — If it is not clear that the plaintiffs' claims under the FTA are out of time, is it reasonably arguable for the plaintiffs that the Bank engaged in misleading or deceptive conduct in one or more of the respects alleged by the plaintiffs and that the plaintiffs suffered loss as a result?

[131] A right to claim compensation for loss or damage suffered as a result of misleading or deceptive conduct in trade, was conferred at material times by s 43 of the FTA.

[132] The plaintiffs rely on the following representations allegedly made by Mr Ellis, as constituting misleading or deceptive conduct under the FTA:

> 44.1 An asking price for the O'Shanassy block of around $4,500,000 was "realistic";
>
> 44.2 [the Bank's] financial projections indicated that [Cantara's] revenue would be in surplus rather than deficit for the 2008/2009 financial year if the purchase proceeded;
>
> 44.3 The purchase of the O'Shanassy [block] would be financially viable and/or beneficial to the plaintiffs.

[133] The plaintiffs say that those representations were misleading or deceptive in the following respects:

> 45.1 $4,500,000 was not a "realistic" valuation of the O'Shanassy [block] in the economic climate of the time when the rateable valuation was $4,025,000 and the property was being sold without its dwelling.
>
> 45.2 The purchase of the O'Shanassy [block] was made to appear financially viable for the plaintiffs when that was not the case through:
>
> 45.2.1 The [Bank's] budget projections which contained inaccuracies as [set out at [44] above]; and
>
> 45.2.2 The [Bank's] approval of the loan application based on the inaccurate financial projections.

[134] The loss claimed is the capital loss suffered by Cantara Farms on the sale of the O'Shanassy block in August 2013, together with consequential losses allegedly suffered by the plaintiffs (including a "break fee" of $29,000 charged by the Bank on the early discharge of the Bank's mortgage over the O'Shanassy block when it was

sold in August 2013). No claim is made under this cause of action for recovery of Cantara's trading losses.

[135] Under s 43(5) of the FTA as it stood in 2008, an application for an order under s 43 was required to be made within three years from the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.[26]

[136] In this case, the proceeding was filed on 1 October 2014. If and to the extent the plaintiffs discovered (or ought to have discovered) the loss or damage (or the likelihood of loss or damage) before 1 October 2011, their claims under the FTA will be statute-barred.

[137] In *Commerce Commission v Carter Holt Harvey Ltd* the Supreme Court held that the reference to "likelihood" refers to knowledge of losses that are likely to arise in the future, and that "likely" means more probably than not.[27] Time starts to run when the applicant for relief discovers or ought to discover that some more than minimal loss or damage has already occurred or is likely to occur in the future (without the need for any greater specificity as to the nature or amount of that loss or damage).

[138] The majority in *Carter Holt Harvey* stated that time should not start running when past loss is just a mere possibility, or something that could well have happened. Nor should the commencement of the three year period be deferred until past loss is a near certainty. The question to be answered is when did the plaintiffs become aware that it was more probable than not that they had suffered loss.[28]

[139] As for the meaning of "ought reasonably to have been discovered" in s 43(5), the majority in *Carter Holt Harvey* held that what the Court must consider is whether a reasonable person, situated as the claimant was, ought to have known that

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[26] Following amendments made to the FTA in 2013, the same limitation provision now appears at s 43A of the FTA.

[27] *Commerce Commission v Carter Holt Harvey Ltd* [2009] NZSC 120, [2010] 1 NZLR 379.

[28] At [31].

loss had occurred.[29] The majority considered that "if an intending plaintiff knows that some more than minimal loss or damage is likely to have resulted from a probable contravention, it is by no means unreasonable to require them to make all necessary further inquiries and file their application within three years of acquiring that knowledge."[30]

[140] Mr Vincent submits that for the FTA claim to be out of time the Bank would need to show that the plaintiffs knew, on the balance of probabilities, that they would suffer significant loss on resale of the O'Shanassy block. He submits that Mr Wilson's evidence does not justify any such conclusion: while Mr Wilson provides indicative values of capital assets, he does not purport to provide a comprehensive valuation. Mr Vincent submits that it was only when they sold the O'Shanassy block that the plaintiffs knew, with the certainty required by *Carter Holt Harvey*, that the Bank had misled them as to value.

[141] I am satisfied that the likelihood of loss or damage of the kind now claimed by the plaintiffs reasonably ought to have been discovered more than three years prior to filing these proceedings.

[142] Mr Wilson, Cantara's farm business advisor prior to 2008 and from October 2008 onwards, says that he was aware as early as October 2008 that the purchase of the O'Shanassy block had put the plaintiffs in a difficult position. In his evidence, he states:

> After my meeting with the Whales at the farm on 17 October 2008 at which Justin Ellis was present, I realised that the business had been put in a very difficult position through the purchase of the O'Shanassy property to the extent that from that point on the business focus has been on trying to obtain a break even from a cashflow perspective. It was recognised that the level of debt associated with the purchase of the O'Shanassy property was unsustainable for the business. It was unrealistic and not feasible for the business to ever reduce debt through retained earnings.

[143] Implicit in that evidence is a recognition that any budget projections which forecast a surplus following the acquisition of the O'Shanassy block would most likely not be met. To the extent that the Bank may have represented that the

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29 At [29].
30 At [34].

purchase of the O'Shanassy block would be financially viable for the plaintiffs, then, the fact that this was apparently not the case was known to the plaintiffs as early as late 2008. In the language of *Carter Holt Harvey*, the "probable contravention" relating to financial viability was then known, and questions over the revenue-producing capacity of the O'Shanassy block, and consequently its value, were then obvious topics for further enquiry by the plaintiffs.

[144] Mr Wilson's recognition in late 2008 that the level of debt associated with the acquisition of the O'Shanassy block was "unsustainable", coupled with the trading losses which Cantara in fact incurred in the years immediately following the acquisition, leave no room for doubt that the plaintiffs ought to have discovered that some "more than minimal" loss or damage had probably occurred as a result of the alleged misrepresentation as to financial viability before 1 October 2011.

[145] A further point, relating to the value of the O'Shanassy block and whether $4.55 million plus GST represented fair value in 2008, is that Mr Tim Whale says in his affidavit that when the agreement for sale and purchase was received from Mr O'Shanassy's solicitors it showed that the homestead and some land were to be retained by the vendor. Mr Tim Whale goes on to say:

> This threw off the rating valuation for the property and made it of little relevance to the value of the land…and also reduced the value of the land we were buying, which [Mr Ellis] knew…[Mr Ellis] told us not to worry as land values were going up all the time.

[146] That evidence suggests that Mr Tim Whale was aware at the time of the agreement that the O'Shanassy block might not then have been worth the $4.55 million plus GST which Cantara Farms agreed to pay for it. He appears to have put that aspect of the matter on one side on the basis of Mr Ellis' alleged assurance that the value would rise.

[147] In his evidence, Mr Ellis refers to letters written by Mr Wilson on 22 September 2009 and 16 October 2009 which recorded that Cantara Farms was then considering selling the O'Shanassy block. The letters disclose that the O'Shanassy block was then only valued at $3.7 million. Mr Ellis says, and the

plaintiffs do not dispute, that the O'Shanassy block was in fact put on the market on 25 September 2009.

[148] I conclude that any loss arising from the $4.55 million purchase price for the O'Shanassy block having been "unrealistic" ought to have been discovered by late 2009 at the latest. The apparent absence of any negotiation between the Whales and Mr O'Shanassy over the purchase price, the removal of the homestead from the land to be transferred (apparently not long before the agreement was made), Mr Ellis' alleged advice that Mr Tim Whale should not worry because "land values were going up all the time", Mr Wilsons October 2008 conclusion that the debt level was unsustainable, and the $3.7 million valuation figure as at September/October 2009 referred to by Mr Wilson, were in combination sufficient to put the plaintiffs on notice that they had probably paid more than market value for the O'Shanassy block when they bought it. A reasonable party in the position of the plaintiffs would have followed up and obtained valuation advice as to whether the $4.55 million paid for the O'Shanassy block *was* a "realistic" price as at the date of the agreement to purchase it.[31]

[149] To the extent that the plaintiffs' claims under the FTA depend on alleged inaccuracies in the Bank analysis documents, Cantara and the Whales had those documents prior to the purchase, and if they had read the Bank analysis documents carefully at the time they had sufficient knowledge to pick up any inaccuracies. Any inaccuracies in alleged advice given by the Bank should therefore have been discovered within the three year period in s 43(5) of the FTA.

[150] Considering the evidence overall, I am satisfied that the plaintiffs' claims under the FTA are so clearly statute-barred that they can be regarded as an abuse of process.[32] The Bank has sufficiently shown that it has a complete defence to the plaintiffs' claims under the FTA.

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[31] I do not understand Mr Vincent to be submitting that loss was not actually suffered until the land was resold in August 2013; as I understand it, the argument is that the plaintiffs did not have *knowledge* of the capital loss (of the kind required by *Carter Holt Harvey*, above n 27) until the land was eventually resold. Actual loss would have been suffered as soon as Cantara Farms, relying on Mr Ellis' alleged representation as to the "realistic" price, paid more for the land than it was worth: *Davys Burton v Thom* [2008] NZSC 65, [2009] 1 NZLR 437 at [46].

[32] *Murray v Morel*, above n 7, at [33].

[151] In view of my findings on issue (10), there is no need to consider issue (11).

Issue (12) — is it reasonably arguable for the plaintiffs that the Bank owed them a duty of care to ensure that: (i) the plaintiffs were aware that the Bank was not their advisor and was acting in its self-interest in authorising a loan to the plaintiffs to effect the purchase; or (ii) the plaintiffs were advised to obtain and/or obtained, independent advice, particularly a valuation, prior to signing an unconditional contract for the purchase of the O'Shanassy block?

Issue (13) — if the answer to issue (12) is "yes", is it reasonably arguable for the plaintiffs that the Bank breached one or both of those duties in one or more of the respects alleged by the plaintiffs?

Issue (14) — if the answers to issues (12) and (13) are both "yes", is it reasonably arguable for the plaintiffs that the Bank's breaches of duty caused the plaintiffs loss by inducing them to purchase the O'Shanassy block at an over-value?

The plaintiffs' pleading

[152] In their statement of claim the plaintiffs refer to the alleged conflict between the interests of the plaintiffs and those of Mr O'Shanassy. The plaintiffs then plead:

> 49. The relationship between the defendant and the plaintiffs placed on the defendant a duty of care towards the plaintiffs to ensure that:
>
> 49.1 The plaintiffs were aware that the defendant was not their advisor, and was acting in its self-interest in authorising a loan to the plaintiffs to effect the purchase; and
>
> 49.2 The plaintiffs were advised of, and/or obtained, independent advice, particularly a valuation, prior to signing an unconditional contract for the purchase of the O'Shanassy block.

The duties owed by a bank to its customer in negligence — general principles

[153] A bank does not ordinarily owe its customers any general duty to furnish careful advice on business or banking transactions, whether in contract or tort, unless it specifically undertakes to do so. The mere fact that there may have been a close relationship between a bank and its customer does not, of itself, give rise to any general duty of care. The appropriate question is whether the bank can be taken to

have "crossed the line" and impliedly assumed the duties of an advisor in addition to those of a mere banker.[33]

[154] As Asher J noted in *Bank of New Zealand v Geddes*, banks in New Zealand will examine a transaction from the point of view of their own purposes. In doing so they take on no duty to the person who is seeking the loan to advise or warn. In an ordinary lender/borrower transaction, the relationship is commercial, with the two sides openly having different interests that they compromise in a bargain for their mutual financial advancement — the bank to make interest on the advance, and the customer to have the use of the money.[34]

The Bank's submissions

[155] Ms O'Gorman notes that this cause of action is based on an alleged positive duty to provide advice to the plaintiff. She submits that, because the Bank did not "cross the line", and assume the duties of a business advisor because of its relationship with the plaintiffs, no duty of care of the kind alleged arose. She submits that the relationship between the Bank and the plaintiffs was always an arm's-length relationship, with both sides openly having different interests. She submits that, while Mr Tim Whale may have incorrectly assumed that Mr Ellis would perform an advisory role after Mr Wilson's departure, there is no evidence of any discussion of this with Mr Ellis or anyone else from the Bank.

The plaintiffs' submissions

[156] Mr Vincent accepted in his oral submissions that the starting point is that a bank ordinarily has no duty to advise a customer on the merits of a proposed transaction. He submitted, however, that the Bank knew things that the plaintiffs did not: it likely knew the financial performance of Mr O'Shanassy, and it likely knew the value of the neighbouring land that Mr O'Shanassy was proposing to purchase. He submits that both sets of information had a direct bearing on the value of the O'Shanassy block, and neither were shared with the plaintiffs. He submits that the particular knowledge held by the Bank created a duty on it to warn the plaintiffs of

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33 *Forivermor Ltd v ANZ Bank New Zealand Ltd*, above n 18, at [56]; *Fortes v Bank of New Zealand* [2014] NZCA 346 at [13].

34 *Bank of New Zealand v Geddes*, above n 8, at [23] and [25].

the need for independent advice and that its own advice was not independent. He noted that provision of advice by a bank will, by its nature, stop the customer from obtaining independent advice because the customer considers that it has already received that advice.[35]

[157] Mr Vincent also referred to *Shotter v Westpac Banking Corporation* where Wylie J had found that there was a duty of explanation, warning or recommendation of separate advice in respect of the guarantee with which that case was concerned.[36]

Discussion and conclusions

[158] In my view the Bank was never under any duty to advise the plaintiffs that it was acting in its own self interest in authorising the loan. That is the ordinary default position in a banker/customer relationship, and it must have been obvious to Cantara and the Whales when they read the discussion document of 24 June 2008 that the document had been written solely from the Bank's perspective as lender. And the Bank analysis documents clearly stated (in the disclaimer) that the report had been prepared for the Bank's purposes only.

[159] The principal issue following the provision of the discussion document on 24 June 2008 was when and how the Whales and the Cantara group apparently came to believe that Mr Ellis had moved from being their banker to the position of an advisor in whom they were entitled to repose trust and confidence. There is no evidence of any such move, and nothing in the evidence which might have justified a belief by the Whales that Mr Ellis was doing anything more than continuing to act in the Bank's best interests. Accordingly I conclude that the duty of care pleaded by the plaintiffs at paragraph 49.1 of their statement of claim is not seriously arguable. For the same reasons as those given above in relation to issue 8, the plaintiffs were or should have been aware that the Bank was acting in its own self-interest, and not in their interests.

[160] Nor do I consider it reasonably arguable for the plaintiffs that the Bank owed them a duty to advise them to obtain independent advice (particularly valuation

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35 Referring to *Commonwealth Bank of Australia v Smith* above n 11, at 476.

36 *Shotter v Westpac Banking Corporation*, above n 19, at 336.

advice) before they signed the agreement for sale and purchase. Mr Ellis indicated that he would "assume" $4.5 million was a realistic price for the O'Shanassy block, and it was surely for the plaintiffs, as experienced local farmers and business people, to satisfy themselves that the proposed purchase price was a fair one. The price payable for the O'Shanassy block should have been right at the front of any list of enquiries a prospective purchaser would have made, quite apart from whatever might or might not have been Mr O'Shanassy's financial position. The issue of the price to be paid for the O'Shanassy block was so obviously a fundamental consideration for the plaintiffs that the Bank was entitled to assume they would take appropriate steps to satisfy themselves on price, and not simply rely on a figure Mr Ellis made clear was only an assumption.

[161] I think the plaintiffs must also fail on this issue on the ground that Mr Tim Whale apparently did become aware, before the agreement for sale and purchase was signed, that Cantara Farms would be getting less for its $4.55 million than Mr Tim Whale had thought it would be getting. If he considered that $4.55 million was a realistic price for the O'Shanassy block including the homestead, it follows that the O'Shanassy block without the homestead would have been worth less. The ultimate mischief alleged is that Cantara Farms paid significantly more for the O'Shanassy block than it was worth, but it appears that Mr Tim Whale was aware at the time of the purchase that the price was probably higher than market but elected to proceed anyway (presumably in the belief that prices were likely to rise, a fundamentally speculative matter on which the plaintiffs could not reasonably have relied upon the Bank).

[162] Finally, counsel did not draw my attention to any authority that there exists a duty of care upon a bank to advise a customer to obtain independent advice absent a fiduciary relationship or a situation giving rise to issues of unconscionability.

[163] In those circumstances, I consider it is not reasonably arguable for the plaintiffs that the Bank owed the duty pleaded at para 49.2 of the statement of claim, or that if any such duty was owed it caused the plaintiffs' loss.

[164] I accordingly conclude that the Bank has a complete defence to the plaintiffs' cause of action in negligence simpliciter.

Issue (15) — if on the evidence produced the Bank has shown that it has a complete defence to all of the plaintiffs' claims, should the Court nevertheless exercise its discretion against the entry of summary judgment for the Bank?

The plaintiffs' submissions

[165] Mr Vincent submits that the Court's discretionary power to decline to enter summary judgment is unrestricted but acknowledges that there is little scope for the exercise of the discretion against granting judgment when there is no suggestion of injustice.[37] The authors of *McGechan on Procedure* note that in the majority of cases, once the Court is satisfied that the defendant has no defence there will be no room for the exercise of the discretion to decline summary judgment.[38] They state, however, that the residual discretion may be invoked to avoid oppression or injustice to a defendant where:

(1) the proceeding includes the actions or possible liability of a third party which is not before the court;

(2) the proceedings are such that the opportunity should be given to allow discovery or other interlocutory applications to be concluded;

(3) the circumstances of the case disclose unusual features, the presence of which leaves the Court to conclude that the entry of summary judgment would be oppressive or unjust; or

(4) the combination of complex issues of fact and law justify the dismissal of the application for summary judgment, whether in the exercise of the discretion or because the Court cannot be satisfied that the defendant has no defence.

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37 Citing *Sudfedlt v UDC Finance Ltd* (1987) 1 PRNZ 205 (CA) at 209.

38 *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR12.2.11].

[166] Mr Vincent submits that there are unique aspects to this case that warrant the matter proceeding to trial. He refers to material conflicts of fact that he says can only be resolved at trial and submits that the case requires discovery so that the plaintiffs can fairly ascertain the extent of the Bank's knowledge of Mr O'Shanassy's position and assess both the internal correspondence of the Bank and its email and other correspondence with the plaintiffs.

[167] Mr Vincent says that the plaintiffs want to test their claim through discovery first and then in Court.

Discussion and conclusions

[168] I am not satisfied that there is any reason to decline to enter summary judgment in this case. Whether a contract was formed between the plaintiffs and the Bank as pleaded is an issue wholly within the plaintiffs' knowledge: if such a contract had existed they ought to have been able to plead it properly without any need for discovery.

[169] Similarly, whether it was reasonable for Mr Tim Whale and the Cantara group to have relied upon Mr Ellis' statements concerning the value of the O'Shanassy block and/or the suggested security structure are questions which are concerned with what the plaintiffs knew at the time, not with what they might find on discovery. The disclaimer in the Bank analysis documents was sufficiently clear that it can be construed adequately in the context of the present application, without the need for discovery.

[170] Likewise, I consider the position sufficiently clear on the breach of fiduciary obligation and negligence causes of action that there is no reason to defer the entry of summary judgment to enable the plaintiffs to obtain discovery from the Bank. The evidence is also sufficiently clear that the Fair Trading Act claims are out of time that there is no justification to decline to enter summary judgment on the basis that further documents relevant to that cause of action might turn up on discovery.

[171] In essence, the plaintiffs' submission that they need discovery so that their claims can be properly ventilated is a request to be allowed to investigate through the

discovery process what is no more than speculation about the Bank's relationship with Mr O'Shanassy, to see if they can construct a case. In *Ferrymead Tavern v Christchurch Press Co Ltd*, Master Venning (as he then was), noted that, while the onus is on the defendant seeking summary judgment to satisfy the Court that the plaintiffs have no answer to the defence, it is not sufficient for the plaintiffs to raise general issues as possible answers without some foundation. The discharge of the defendant's onus is not to be frustrated by the opposing party raising hypothetical difficulties.[39]

[172] I conclude that there is no reason to decline to enter summary judgment for the Bank. In those circumstances there is no need to consider the Bank's alternative strike-out application.

Orders

[173] I make the following orders:

(1) I enter summary judgment for the Bank.

(2) The plaintiffs are to pay the Bank's costs on a 2B basis, plus disbursements as fixed by the registrar.

Associate Judge Smith

[39] *Ferrymead Tavern v Christchurch Press Co Ltd* (1999) 13 PRNZ 616 at [66] and [67].