IN THE COURT OF APPEAL OF NEW ZEALAND

CA74/2014
[2015] NZCA 517

BETWEEN	THOMAS FREDERICK MAZLIN KING AND JUDITH RUTH KING Appellants
AND	PFL FINANCE LIMITED First Respondent
	CRAIG BEECROFT Second Respondent

Hearing:	14 October 2015
Court:	Harrison, Wild and Kós JJ
Counsel:	D G Chesterman and S R Carey for Appellants K M Quinn and S M Thompson for Respondents
Judgment:	5 November 2015 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B No order as to costs is made.

C Order made under s 45(5) of the Legal Services Act 2011 that had the appellants not been legally aided, they would have been liable for costs on a standard appeal on a band A basis, together with disbursements.

REASONS OF THE COURT

(Given by Kós J)

[1] A farm falls into receivership. The landowner had been served with the Property Law Act default notice, but the guarantors had not. The guarantors say they

were unaware of the notice until a few days before the receiver entered the property, and that they suffered loss thereby. Essentially because they could otherwise have averted sale of the property. Peters J disbelieved this evidence.

[2] The guarantors also say the receiver breached his duty under s 18(3) of the Receiverships Act 1993 by not pausing two to three weeks before ceasing trading. And that the loan agreement and receivership were oppressive. The Judge rejected those claims also.

[3] The guarantors now appeal.

Background

[4] The King family had farmed in the Kaituna Valley, near Havelock, since 1873. This century, however, it branched out. Disastrously. An initial foray into grape-growing in the Seddon Valley was successful. But in 2010 the Kings came to grief on a dairy conversion project near Ashburton.

[5] In 2008 a company controlled by the Kings had purchased land at Wakanui, near Ashburton, to convert to dairying. It borrowed $21 million from the ASB Bank Ltd. The loan was secured against the land in Wakanui and Havelock.

[6] The Wakanui venture did not succeed. The ASB appointed receivers in October 2010. Property Law Act notices were served in respect of both the Wakanui and Havelock land. In February 2011 the Kings sought an injunction to prevent sale of the Wakanui land. The application was dismissed by Chisholm J in March 2011.[1] He found there was no sound basis to be confident refinancing could occur. The Wakanui land was sold.

[7] The Kings still owed the ASB $10 million following that sale. The ASB now proposed to sell the Havelock land.

[8] The Kings retained a mortgage broker, a Mr Brough, to assist them refinance the ASB debt. This effort was doubly successful. First, negotiations between

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1 *King v ASB Bank Ltd* HC Christchurch CIV-2011-409-304, 30 March 2011.

Mr Brough, Mr King and the ASB resulted in the ASB accepting $3 million in settlement of the $10 million due to it. Secondly, while Mr Brough was unable to secure funding from a trading bank, he did manage to arrange a one-year interim financing facility from a second tier lender, PFL Finance Limited (PFL).

[9] This interim financing proceeded thus. Mr Brough referred the Kings to an Auckland solicitor with whom he worked, a Mr Ellis. Mr Ellis incorporated a company, Havelock Farms Ltd, in May 2011. The Havelock land was transferred to Havelock Farms.[2] Its sole director was the Kings' chartered accountant, a Mr Campbell. A trust company associated with Mr Ellis became the shareholder of Havelock Farms, but the shares were beneficially owned by the Kings. The livestock, plant and equipment on the Havelock land continued to be owned by the Kings. Mortgage securities were registered over the land, general securities were given over the livestock, plant and equipment, and personal guarantees were given by the Kings.

[10] PFL agreed to lend Havelock Farms $3.385 million for a year only. Its fee for this was five per cent up front ($169,250). It required the first three months' interest ($101,127) to be pre-paid and deducted. Mr Brough's fee ($37,500) was also deducted. None of this left much of the capital aside from the $3 million needed to pay the ASB. The interest rate payable was 11.95 per cent — or $33,709 per month — with the first such payment due on 15 November 2011. The penalty interest rate was 21.95 per cent.

[11] It was a very expensive short-term facility, and it reflected the Kings' adverse circumstances. Mr Brough set to work immediately to find a longer term lender to replace PFL. Without success, however.

[12] The Kings were also under pressure from other creditors. Three judgment debts now existed: to PGG Wrightson for $537,859, to Rhodes & Co for $42,688 and to Waitaki Fuels Ltd for $22,413. In addition they owed their accountant, Mr Campbell, some $30,000 or so. Apart from selling assets or borrowing more

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[2] Although immaterial for present purposes, the Havelock land was in three blocks: the home block (400 ha), the Long Valley block (242 ha) and the quarry block (16 ha).

money, they had limited sources from which to meet these debts. Their primary source of income was from milk supplied to Fonterra. In the meantime reinvestment in the Havelock farm was scaled back. When Mr King found out the scale of PFL's fee for the 12 month facility, he commented "there goes my fertiliser money". Little fertiliser was purchased between 2008 and 2012. On any view the Kings remained seriously undercapitalised to meet their current debt and operational commitments.

[13] Fonterra milk payments were made on the 20th of the month. Interest payments were due on the 15th. On 31 October 2011 the Kings and the directors of PFL, Messrs Kirk and Purchase, met at the farm. There was a discussion about moving the date for interest payments to the 23rd of the month. PFL was willing to do that. No final agreement was reached, however.

[14] The first interest payment of $33,709 was due two weeks later, on 15 November 2011. Havelock Farms defaulted on this obligation.

[15] On 29 November 2011 PFL served a notice under s 119 of the Property Law Act 2007 (PLA notice). It required rectification of the default within 20 working days. It provided that if that default was not thus remedied, the full amount secured by the mortgage would become payable and powers of entry into possession and sale would be exercisable.

[16] The PLA notice was served on Havelock Farms at its registered office, being the law firm of Mr Ellis. In breach of s 121(1) of the Property Law Act, however, it was not served on the Kings as guarantors.

[17] A part-payment of $20,000 was made to PFL on 21 December 2011. By then Havelock Farms had defaulted on its first two interest obligations.

[18] On 18 January 2012, PFL's solicitors emailed the PLA notice to Mr Ellis, copied also to Mr King's email address. The solicitors advised that the entire loan was due, demanded payment from guarantors and asked them to contact PFL. Mr King claimed that this was the first occasion he became aware that PFL had served a PLA notice on Havelock Farms.

[19] Another $10,000 was paid to PFL on 23 January 2012.

[20] By then, however, the die was cast. Havelock Farms had by now defaulted on its first three interest payment obligations. Mr Beecroft, the second respondent, was appointed receiver on 24 January 2012. He arrived at the farm at 8.00 am that day, accompanied by Messrs Kirk and Purchase from PFL, two insolvency practitioners and two dairy farmers who were assisting him, a Mr Carr and a Mr Roberts. The Kings were required to leave the property.

[21] The following day Mr Beecroft determined to cease trading. Livestock, plant and equipment were removed, secured, and eventually sold.

[22] Two days later, on 27 January 2012, Havelock Farms, under the control of the Kings, purported to sell the land to a Ms Lambert for $1. She was an associate of the Kings. She purported to grant a lease-back to the Kings, and registered caveats against the title of the land. Mr Beecroft had to initiate a proceeding to remove these, and in due course they lapsed. At about the same time as this sham transaction, but before the receiver could freeze the farming operation's bank account, the Kings emptied that account, withdrawing the remaining $19,890 in it.

[23] In March 2012, the Kings commenced the present proceeding.[3] So far as remains relevant, the Kings alleged that PFL had acted oppressively, that they had suffered damages as a result of PFL's failure to serve a copy of the PLA notice on them in accordance with s 121 of the Property Law Act, and that the receiver Mr Beecroft had acted in breach of his duty under s 18(3) of the Receiverships Act 1993 to exercise his powers with reasonable regard to the interests of the Kings.

[24] The relief sought under each cause of action was essentially the same: damages of $987,410 to replace their livestock, $350,000 or thereabouts to replace their plant and equipment, $2.5 million or thereabouts for loss of profits from dairying and beef stock operations, and recoupment of the costs incurred by the plaintiffs to attempt to refinance the debt ($82,500 approximately). Limitation of the

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[3] The Kings sued both in their personal capacities and as partners of the TFM and JR King partnership.

scope of the claim in this way reflects the fact that Havelock Farms does not allege any loss of value on sale of the land, the principal collateral for PFL's loan.

[25] Interim relief was sought. An interim injunction was granted on 30 March 2012. But on 3 May 2012 Keane J discharged that injunction.[4] An appeal by the Kings to this Court failed.[5]

[26] A four week trial ensued, concluding on 6 September 2013. On 19 December 2013 Peters J delivered a results judgment entering judgment for the respondents on each cause of action.[6] On 21 February 2014 Peters J issued a comprehensive reasons judgment.[7]

Issues on appeal

[27] Rule 42A of the Court of Appeal (Civil) Rules 2005 requires parties to an appeal to attempt to agree a list of issues, and to file that list five days before the hearing date. Where agreement cannot be reached, separate issues lists may be filed. Agreement was not reached in this case. The appellants filed a list of 30 issues. The respondents a list of nine. This disparity was most unhelpful. The Court's dissatisfaction was intimated ahead of the hearing. At the hearing a more sensible "joint abbreviated list" of five issues were handed up.

[28] In the event we consider this appeal gives rise to four issues:

(a) Did failure to serve the PLA notice on the Kings cause loss to them?

(b) Did the cessation of farming by the receiver breach his duty under s 18(3) of the Receiverships Act 1993?

(c) Did PFL act oppressively?

(d) Is PFL liable for any breach of receiver's duty?

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4 *King v PFL Finance Ltd* [2012] NZHC 882.
5 *King v PFL Finance Ltd* [2012] NZCA 385.
6 *King v PFL Finance Ltd* [2013] NZHC 3502.
7 *King v PFL Finance Ltd* [2014] NZHC 250 [Reasons judgment].

[29] Most attention was given by counsel to the first two of these issues.

Three preliminary points

[30] Before addressing these issues three preliminary points need to be addressed. They are the location of the burden of proof, the Judge's adverse credibility findings against Mr King, and the admissibility of discovered records prepared by the Kings' solicitor, Mr Ellis.

The burden of proof

[31] We start by reminding ourselves that at trial, and in this appeal, the onus of proof to demonstrate unlawful conduct and loss lay throughout on the Kings.

[32] On appeal, therefore, it would never be enough for the Kings to demonstrate that alternative factual conclusions could have been reached. It was necessary for them to establish that the factual theories they propose were more likely true than not. And that the Judge, in rejecting those theories, was wrong.[8]

The Judge's credibility findings

[33] A very significant difficulty lying in the path of the Kings in this appeal was the adverse credibility findings made by Peters J against Mr King. After considering six particular matters, the Judge said: "All of these matters have led me to doubt Mr King's evidence on any matter in dispute."[9] In contrast, the Judge found the respondents' witnesses Messrs Purchase, Kirk and Beecroft to be reliable witnesses, and their Messrs Carr and Roberts to be "excellent witnesses".[10]

[34] It is necessary that an adverse credibility conclusion be reasoned.[11] In this case the Judge gave six particular reasons. The first was the Judge had already considered and disbelieved Mr King's evidence as to the existence of a missing herd of late calving cows.[12] Secondly, and of central importance on this appeal, the Judge

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8 *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4].
9 Reasons judgment, above n 7, at [70].
10 At [71].
11 *Weymont v Place* [2015] EWCA Civ 289 at [29].
12 Reasons judgment, above n 7, at [46]–[53] and [63].

disbelieved Mr King's denial of knowledge of the PLA notice on or about 29 November 2011. After considering all the evidence, the Judge found that Mr and Mrs King knew by early December 2011 at the latest that PFL had served the PLA notice.[13] Thirdly, she accepted evidence given by a Mr Harrington, an ASB manager who had dealt with the Kings over the Wakanui venture, that Mr King and/or his son Alaistair had altered or fabricated correspondence and a budget passed between ASB and the Kings.[14] Fourthly, there was the entry into the sham transaction with Ms Lambert and the Kings' unlawful emptying of the farm bank account post-receivership but before it could be frozen by the receiver.[15] Fifthly, the Judge found that information provided to potential lenders was deliberately false as to the level of production achieved by Havelock Farms.[16] Sixthly, she found Mr King to be evasive under cross-examination.

[35] Before us Mr Chesterman sought to attack these individual findings. With one exception, we are unable to accept his criticism of the Judge's assessment. The Judge's analysis of the first matter, the alleged herd of late calving cows, was a careful one. Her conclusion drew materially upon the inconsistent herd numbers given by Mr King at various points (ranging between 50 and 142), and the absence of any reference to such a herd in affidavits he had sworn in support of the appellants' application for interim relief. Secondly, for reasons given later in this judgment, we are satisfied that the Judge's conclusion as to Mr King's knowledge of the PLA notice was correct, and that Mr King's assertion otherwise in evidence was false.[17] Thirdly, we accept Mr Chesterman's criticism of the third ground — the falsification of material passing between the ASB and Mr King (the evidence of Mr Harrington) — but only because that evidence cannot necessarily be attributed to Mr King (as opposed to his son Alaistair). Fourthly, the sham transaction with Ms Lambert (and the emptying of the bank account) are events that speak for themselves. Fifthly, although Mr Chesterman strived to challenge the Judge's conclusion in relation to milk production, we are not satisfied that the Judge's analysis on that point was wrong. Sixthly, we do not accept that the instance given

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13 At [64] and [121]–[139].
14 At [65]–[66].
15 At [67]. See [22] above.
16 At [68].
17 At [69]–[71] below.

by the Judge at [69] of her judgment as to evasion by Mr King was an isolated example. Our survey of the cross-examination demonstrates otherwise. Finally, although the Judge did not rely on this further point, her express rejection of the Kings' claim that PFL had represented that interest need not be paid in November and December was also a credibility-based conclusion, adverse to Mr King in particular.[18]

[36] The Judge of course had the witnesses before her, a unique advantage not shared by this Court. As the Chief Justice observed in *Austin Nichols & Co Inc v Stichting Lodestar,* where assessment of credibility is important an appeal Court may rightly hesitate to conclude that the tribunal of fact has got that wrong.[19] In *Teat v Willcocks* this Court said:[20]

> An appellate Court is likely to disagree with the credibility finding made by a trial Judge only in limited circumstances, such as where the finding is shown to be inconsistent with incontrovertible or uncontested factual material or is "glaringly improbable" or "contrary to compelling inferences".

On any view, this is not such a case.

The admissibility of Mr Ellis's records

[37] The PLA notice was served on Mr Ellis' receptionist at 4.27 pm on Tuesday, 29 November 2011.[21] The same day, at 5.00 pm, Mr Ellis emailed Mr King. That email reads:

> Dear Tom
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> How did you get on with UDC today?
>
> Notwithstanding a request to PFL regarding the interest payment, it all fell on deaf ears. Please see enclosed a Property Law Act Notice just received.
>
> As you will see you are required to pay the interest at $33,708.96 and costs of $1,100.00 within 20 working days otherwise PFL will have the right to take matters further including calling for a mortgagee sale. Even though you have 20 working days to make the payment you would be well advised to pay it as soon as possible.

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18 Reasons judgment, above n 7, at [75]–[90].
19 *Austin Nichols & Co Inc v Stichting Lodestar*, above n 8, at [5].
20 *Teat v Willcocks* [2013] NZCA 162, [2014] 3 NZLR 129 at [31] (footnotes omitted).
21 Service was acknowledged in an email from Mr Ellis' receptionist sent to PFL's solicitors.

> I will shortly send to you a stroppy email from the solicitors for PGG Wrightsons. They want payment in full within the next few days otherwise …!

[38] Mr King did not access emails directly, as Mr Ellis would have known. So the email was also faxed to the Kings fax as part of a five page transmission — beginning at 5.10 pm and ostensibly concluding successfully at 5.12 pm. The Judge said it was a fair assumption that the four other pages included the two page PLA notice.[22] We agree.

[39] Next, at 5.15 pm there is a file note by Mr Ellis of a telephone conversation with "Tom" — i.e. Mr King. It reads:

> 29/11/11 5.15 pm
> Tom
> Just getting emails from
> me – Valuer coming tomorrow –
> Will get it done.
> Went over PLA & PFL
> Genl discuss

[40] Mr Ellis's telephone records were admitted in evidence. They showed a nine-minute call to the Kings' landline number either beginning or ending at 5.29 pm that afternoon. There is no issue as to the admissibility of these telephone records.

[41] Apparently without authority, Mr Ellis supplied copies of the email, fax and file note to Mr Brough. Mr Brough then supplied them to PFL. Although an argument was taken in the High Court that privilege had not been waived in these circumstances, the Judge found otherwise.[23] That point is not appealed and is no longer in issue.

[42] The respondents subpoenaed Mr Ellis. They sought to call him to give evidence of his discussions with the Kings. In particular, as to whether they were aware of the PLA notice served on Havelock Farms. But the appellants then objected to Mr Ellis giving such evidence — on the basis of legal professional privilege. The Judge upheld the objection. So Mr Ellis did not give evidence.

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22 Reasons judgment, above n 7, at [133].
23 At [135].

[43] The appellants also objected to receipt of the Ellis records on the basis that they were inadmissible hearsay. The Judge does not appear to have dealt with that objection explicitly. Implicitly however she rejected it.

[44] The appellants maintained the objection before us. Mr Chesterman put it this way in his submissions:

> The appellants suffered a double prejudice with the documents being relied on while at the same time not being able to examine Mr Ellis on them.

The primary rationale for the rule against hearsay is the inability to test the accuracy and credibility of the maker of the hearsay statement in cross-examination. There is some force, therefore, in Mr Quinn's riposte that the only reason the appellants were unable to cross-examine Mr Ellis was because they had prevented the respondents from calling him in the first place.

[45] Were these records inadmissible hearsay?

[46] We start with the 29 November email and facsimile.[24] The relevant part of these communications is the line, "Please see enclosed the Property Law Act Notice just received". Mr Quinn contended that the relevance of this evidence was simply to demonstrate the fact of the communication: that Mr King had been *told* that such a notice had been received.[25] Admitted for that limited purpose, it is not hearsay. Admitted for any other purpose it might be. However for reasons given below we consider that, to the extent they are hearsay, all three records are admissible in any case under ss 17 and 18 of the Evidence Act 2006.

[47] The remaining document is the file note recorded by Mr Ellis.[26] Its relevance lies in two parts: the statement, "Just getting emails from me". Presumably that is a reference to the facsimile version of the emails sent between 5.10 and 5.12 pm. That is probative of receipt of the notice. Secondly, the statement "Went over PLA and PFL". That is probative of both receipt and readership. Mr Quinn accepts that to that extent this file note was adduced to demonstrate the truth of its contents.

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24 See [37] and [38] above.

25 This was an essential part of showing that Mr King was aware that such a notice had been served — assuming the additional facts of (1) receipt and (2) readership could also be established.

26 See [39] above.

[48] We accept Mr Quinn's submission that these records are admissible under ss 17 and 18 of the Evidence Act. All are demonstrably reliable, being created contemporaneously by Mr Ellis. The email and facsimile were admissible to show he had sent such communications to Mr King, although they did not necessarily (without more) establish receipt and readership. As we have noted, the file note does suggest receipt and readership.

[49] Mr Chesterman submitted Mr Ellis was not "unavailable as a witness" for the purposes of s 18(1)(b)(i). We do not accept that submission. By reason of s 16(2)(e) of the Evidence Act, a person is "unavailable as a witness" if the person "is not compellable to give evidence". We do not consider compellability for the purposes of s 16(2)(e) to be wholly defined by ss 71 to 75 of the Act. Rather, we agree with the commentary in *The Evidence Act 2006: Act and Analysis* that s 16(2)(e) "may also result in the Court's treating witnesses who are excused from testifying … as 'unavailable'".[27]

[50] In conclusion, then, to the extent any of these records are hearsay evidence, they are admissible under s 18(1) of the Evidence Act.

Issue 1: Did failure to serve the PLA notice on the Kings cause loss to them?

[51] The respondents admit failure to execute service on the appellants as guarantors under s 121(1) of the Property Law Act. That does not render the PLA notice ineffective, as s 121(2) makes clear. There is no suggestion in this case, therefore, that the whole debt was not due, or that PFL was not entitled to appoint a receiver as a result of Havelock Farms' incontrovertible default, or ultimately to sell the land to clear a debt which at the time of receivership on 24 January 2012 exceeded $3.45 million.

[52] Section 121(3) of the Property Law Act provides however that there is a statutory cause of action available against PFL for any loss arising from its failure to effect service properly in accordance with s 121(1). It is that provision the Kings rely upon.

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[27] Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (3rd ed, Thomson Reuters, Wellington, 2014) at [EV16.05.01(4)] and [EV71.05].

[53] The Judge rejected that claim. Based on a careful analysis of the evidence she found that the Kings were aware that Havelock Farms had been served with the PLA notice by early December 2011 at the latest.[28] As a result the Judge said that she was satisfied that the cause of action could not succeed, and that any loss suffered by the Kings was not caused by PFL's failure to comply with s 121(1).

Submissions

[54] Mr Chesterman submitted that physical service of the PLA notice on the Kings was required, and that constructive notice would not suffice.[29] We do not understand that proposition to be contested. At best, Mr Chesterman submitted, the Ellis records simply informed Mr King that Havelock Farms had been served. That was not sufficient to constitute service upon the Kings. Again we do not understand that submission to be contested.

[55] Secondly, Mr Chesterman set about seeking to persuade us that Peters J was wrong to find that Mr King knew that Havelock Farms had been served. That depended, really, on exclusion of the Ellis records.[30] Without them the respondents could not establish that knowledge. The Kings' actions after 25 November 2011 indicated ignorance of the notice. Mrs King in particular had no knowledge of the PLA notice until 24 January 2012, according to her evidence. These submissions as to knowledge were contested by the respondents.

[56] Thirdly, Mr Chesterman submitted that the Kings had suffered the loss of the opportunity to protect their position by remedying the notified default which was only $33,709, together with $1,100 in costs. Payment of $20,000 had been made on 20 December 2011, leaving only $14,809 owing. Mr Chesterman submitted that the appellant could easily have laid their hands on that sum had they known about it. Again these submissions were contested by the respondents.

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28 Reasons judgment, above n 7, at [121]–[138].
29 Relying on *Sharp v Amen* [1965] NZLR 760 (CA).
30 As to which, see [37]–[50] above.

Analysis

[57] We deal first with the submission that the Kings could have remedied the default.

[58] As Mr Chesterman acknowledged, the claim that PFL was liable to the Kings under s 121(3) was really one for loss of opportunity. That is, loss of the opportunity to remedy Havelock Farms' default. But it depended on the Kings establishing on the balance of probabilities, three things. First, that they had an ability to remedy Havelock Farms default. Secondly, that they were deprived of that remedial opportunity by PFL's failure to serve the notice on them. Thirdly, that they have suffered losses of the kind set out above — damages of almost $1 million to replace their stock, $350,000 to replace their plant and equipment, loss of farming profits of some $2.5 million, and wasted refinancing costs of $82,500.[31] The Kings needed to prove all three of these things. But we consider they proved none of them.

[59] The Kings failed to prove that they had the ability to remedy Havelock Farms' default. It was in default as from 15 November 2011. If there is some uncertainty as to whether the Kings knew about service of the PLA notice (a matter we turn to later), there can be none that they knew Havelock Farms was in default. After all just two weeks earlier they had been discussing moving the interest payment date from 15 November 2011 to 23 November 2011. Both dates passed without any payment whatsoever. Likewise the second interest payment of $33,708 due on 15 December 2011 passed without payment.

[60] The Kings were well aware of that. There was a conversation between Mr Purchase and Mrs King on 28 November 2011. We accept it is probable that in the course of that conversation Mrs King apologised for the failure to pay and said that payment would be made. The Judge also accepted evidence that Mr Brough intervened (at PFL's instigation) and raised the default with Mr King on the same day. On the following day there was the telephone conversation between Mr Ellis and Mr King, within an hour of the PLA notice being served on Mr Ellis. Mr King denied in evidence that such a telephone conversation had occurred. The Judge

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[31] See above at [24].

plainly did not believe him, and nor do we given the file note and the sheer improbability that Mr Ellis had a nine-minute conversation with somebody at the Kings' number at that time without this issue arising. If the Judge found it inconceivable that Mr Ellis would not have discussed service of the PLA notice during that telephone conversation,[32] it beggars any rational belief that Mr Ellis would not have discussed the existence of the default with Mr King. Finally there is the uncontroverted evidence from the Kings' accountant, Mr Campbell (who gave evidence for them), that he had told Mr King on 2 December 2011 that payments would need to be brought up to date to avoid PFL taking action. That followed a conversation between Mr Campbell and PFL's Mr Purchase the previous day, and several emails from Mr Purchase on the morning Mr Campbell spoke to Mr King.[33]

[61] As we have noted already, on 20 December the Kings made payment of $20,000 towards the default. But a shortfall remained of over $46,000 together with penalty interest. Havelock Farms then failed to make the third interest instalment of a further $33,708 on 15 January 2012. Given what had happened at Wakanui, the Kings would have been well aware of the importance of timely payment, and the potential consequences of not making it. On their own evidence a profound silence simply prevailed throughout this period of default — allegedly because of electronic communication difficulties in the Kaituna Valley. That also beggars rational belief, and the Judge did not accept the Kings' evidence on this point. Nor do we.

[62] On 23 January 2012, when (on their evidence) they certainly knew all about the PLA notice, a payment of just $10,000 was made towards a shortfall that thereafter still exceeded $70,000, plus penalty interest.

[63] The only rational inference available from these events is that neither Havelock Farms nor the Kings had the means or the ability to remedy the defaults.

[64] Mr Chesterman sought to counter this inference by reliance on Mr King's evidence that the partnership could have "accessed cash of $300,000 to $350,000

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32 Reasons judgment, above n 7, at [134].

33 Mr Purchase's evidence, not contradicted by Mr Campbell, was that the latter did not return his (numerous) calls or emails after 5 December 2011. It will be recalled that Mr Campbell was also the sole director of Havelock Farms.

within a week or two of being notified of an urgent issue with PFL". That sum comprised principally the anticipated proceeds of sale of stock owned by the Kings and their sons, at least some of which was subject to the general security obligation to PFL. The Kings' only cash was $20,000 from a Fonterra cheque of $41,900 which it received on 20 January 2012. By then, Havelock Farms had defaulted on the third interest payment due on 15 January 2012. Interest arrears continued to compound. By the time of receivership they exceeded $70,000 plus penalties.

[65] This evidence raises a question which we put on a number of occasions to Mr Chesterman, but which he was unable to answer. If Havelock Farms and the Kings were in a position to repay the defaults, which they knew about at the latest by 2 December 2011 (on Mr Campbell's evidence), why did they not do so? And why did they not do so on 18 January 2012,[34] instead of just paying $10,000 — still not meeting fully even just the November arrears? Any responsible and concerned debtor in that position, and in a position to rectify the default, would immediately do so, on the basis that injunctive relief would be easier to gain if execution occurred regardless. Mr Chesterman accepted that, and again had no answer.

[66] We find that neither the Kings nor Havelock Farms had the ability to remedy the latter's defaults on or after 15 November 2011. By reason of the initial default, the whole of the debt was due. We go on to find later in this judgment that neither the Kings nor Havelock Farms had the ability, in the short term suggested, to refinance that debt. We explain the reasons for the latter conclusion in our analysis of Issue 2.[35]

[67] We conclude that PFL's breach of s 121(3) did not deprive the Kings of a real opportunity to remedy the default. Certainly they did not demonstrate that that was so on the balance of probabilities.

[68] Viewed thus, the question of whether the Kings knew of the PLA notice and its contents is not a decisive one.

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[34] That being the date Mr King admits becoming aware of the PLA notice: see [18] above.
[35] Beginning at [83] below.

[69] But in our view the Judge's findings on knowledge, explicitly rejecting as incredible Mr King's evidence that he was unaware of the PLA notice until 18 January 2012, cannot be assailed. In context and in particular, we accept the Judge's finding that on 29 November 2011 Mr Ellis conveyed to Mr King the existence of the notice. No other inference could legitimately be drawn from the evidence, but in particular from the content of the file note and the fact of the contemporaneous nine-minute telephone call to the Kings.

[70] Exactly when Mrs King knew about the notice is less clear. But it plainly was earlier than the 24 January 2012 date she gave in evidence. On 20 January 2012 she signed an authority explicitly referring to the PLA notice. It is likely she was aware of it well before that date, given Mr King's knowledge. In the end the exact date is immaterial.

[71] It follows that even if the Kings had the ability to remedy the default, they were not deprived of the opportunity to remedy the default by the failure to serve the PLA notice on them.

Conclusion

[72] The answer to Issue 1, therefore, is "No".

Issue 2: Did the cessation of farming by the receiver breach his duty under s 18(3) of the Receiverships Act 1993?

[73] The pleaded case for the appellants was that Mr Beecroft breached his duties under s 18(3) of the Receiverships Act by prematurely shutting down the farm operation without taking steps to form an independent or informed view on that decision (including by consulting further with the Kings), failing to consider the viable alternatives to the conduct of the receivership other than shutting down the farm operation, conducting the receivership in a way that removed from the Kings any reasonable opportunity to remedy the default and failed to consider that they would be more likely to be able to repay the indebtedness through refinancing should the farm continue in production.

[74] The Judge considered closely the conduct of the receivership and the basis on which Mr Beecroft determined, on 25 January 2012, to cease trading.

[75] Peters J considered that the primary obligation of the receiver under s 18(2) was to exercise his powers in a manner believed to be in the best interests of the appointing creditor. The obligation imposed by s 18(3), on which the Kings relied, was secondary. The interests of the appointing creditor were to have priority.[36]

[76] After a detailed discussion of the evidence (in which she expressly preferred the evidence of Mr Carr (given for the respondents) the Judge concluded that Mr Beecroft did not breach the duties imposed on him by s 18(3).[37]

Submissions

[77] Mr Chesterman submitted that the Judge unduly narrowed the ambit of s 18(3). It did not impose a secondary obligation, but rather required a balancing of the interests of the appointing creditor and those persons named in s 18(3).

[78] The interests of neither party in fact required the farm to be shut down immediately. Expert evidence suggested that the receiver should have consulted in more detail with the Kings before deciding to shut it down. What Mr Chesterman describes as "uncontested evidence" proved a breach of s 18 — including the decision to evict the Kings without putting in place replacement management, removing farm machinery on the first day, failing to consult with the Kings or local advisers (but rather using advisers not experienced in the local farm area) and the taking of inadequate inventories.

[79] Tested on these propositions in argument, and asked specifically what the receiver ought to have done, Mr Chesterman submitted that Mr Beecroft ought to have paused for "two to three weeks". Proper inquiries would have established that the farm assets (and in particular the land and livestock) were less impaired than Mr Beecroft's first impression. Pausing thus would have given the Kings an opportunity to present a refinancing package to enable termination of the

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[36] Reasons judgment, above n 7, at [155]–[156].
[37] At [181].

receivership and retention of the farm livestock, plant and equipment in their existing form.

Analysis

[80] Section 18 of the Receiverships Act provides:

> **18 General duties of receivers**
>
> (1) A receiver must exercise his or her powers in good faith and for a proper purpose.
>
> (2) A receiver must exercise his or her powers in a manner he or she believes on reasonable grounds to be in the best interests of the person in whose interests he or she was appointed.
>
> (3) To the extent consistent with subsections (1) and (2) of this section, a receiver must exercise his or her powers with reasonable regard to the interests of—
>
> (a) The grantor; and
>
> (b) Persons claiming, through the grantor, interests in the property in receivership; and
>
> (c) Unsecured creditors of the grantor; and
>
> (d) Sureties who may be called upon to fulfil obligations of the grantor.
>
> (4) Where a receiver appointed under a deed or agreement acts or refrains from acting in accordance with any directions given by the person in whose interests he or she was appointed, the receiver—
>
> (a) Is not in breach of the duty referred to in subsection (2) of this section; but
>
> (b) Is still liable for any breach of the duty referred to in subsection (1) and the duty referred to in subsection (3) of this section.
>
> (5) Nothing in this section limits or affects section 19 of this Act.

[81] Section 18 codifies a receiver's duties. The wording of s 18(2) and (3) is perfectly clear. The receiver's primary duty is to act in the best interests of the appointing creditor. To the extent consistent with that primary duty, the receiver must exercise his or her powers with reasonable regard to the interests of sureties. Only in this sense does it require a balancing of competing interests. If the course desired by a surety is inconsistent with the best interests of the creditor, the receiver

is not bound to adopt it. If it may be consistent with those interests, he must have regard to it (although even then he may, acting reasonably, still reject it).

[82] Mr Chesterman's argument was that the receiver acted precipitately and failed to consult. He should have traded on for two to three weeks. Had he done so he would have gained further information affecting his appreciation of the value of the secured land and stock.

[83] The false premise of that argument is that doing so would have altered the decision to sell. Havelock Farms had been served with a PLA notice, had not rectified its default and (as a result) the whole of the loan was now due — a sum of $3.45 million or so. Necessarily this required either (1) sale of the secured assets (primarily the land) or (2) the Kings putting forward a satisfactory refinancing package that would avert the need for sale and enable termination of the receivership. The effect of s 18(3) would be to require the receiver to act reasonably and accept a refinancing package — if that were a real possibility — in lieu of selling the land if consistent with the best interests of PFL. In context that was simply a question of providing equivalent economic value.

[84] The receivership was lawful. It was a reality always overhanging the choices available. Trading on beyond three weeks was not a third option — and Mr Chesterman did not suggest otherwise to us. Unless refinancing was readily available, Havelock Farms' land would have to be sold to repay the debt. In that event the Kings' livestock and plant would have to be relocated. Given the terms of the general security agreements entered by the Kings, the receiver was certainly entitled to seize these assets. It is not suggested otherwise. Furthermore, during the initial three week period of the receivership the stock and plant was secure (and in the case of the stock, now being fed properly). As Mr Quinn observed, it had not evaporated. Had a refinancing proposal been advanced in the two to three week window, it could have been returned (and credit given for such of it as had been disposed of in that time).

[85] The only relevant question then becomes whether the failure of the receiver to trade on over this two to three week period unreasonably precluded the second

alternative in [83] above – refinancing by the Kings – thus also precluding the receivership being terminated. Again this is really a loss of a chance claim.

[86] No concrete refinancing proposal was ever presented by the Kings, let alone within the first two to three weeks of the receivership. That is the short answer to this issue. The chance lost was a mere chimera.

[87] Even before default the Kings had been seeking to refinance, via Mr Brough, but without success. The Kings had an unenviable credit record, and their actions in suing their previous creditor, the ASB, cannot have helped. The ASB, of course, had been left $7 million short on the Wakanui venture. The Kings had now defaulted on Havelock Farms' very first interest payment to PFL. And the next two as well. They would have been bound to disclose these defaults, and the ASB default, to a prospective refinancier. They had failed to communicate with PFL about either impending default or a refinancing solution. A new financial consultant, a Mr Deobakhta, had been on the job since early December. Also without success. No refinancing proposal emerged in January 2012. None emerged *after* receivership either. Mr Behringer's evidence (for the Kings) that they represented a "neutral risk" for refinancing, and would readily gain it at 7–8 per cent (when, pre-default, the best they could get was 11.95 per cent from PFL — and refinancing had not proved possible in the intervening three months), was demonstrably unpersuasive. The same may be said of the evidence of Mr Deobakhta.

[88] We are satisfied that by 24 January 2012 the Kings and their farming entities were unbankable. And that, given their recent credit history and the unprofitability of their farming operations, no prudent lender would have entertained an application to refinance their distressed loan. We are not persuaded, therefore, that the Kings had demonstrated a realistic prospect of refinancing within the first three weeks of receivership, on the balance of probabilities.

[89] It follows that any deferral of action by the receiver would not have altered the inevitability of the Havelock land, together with livestock, plant and equipment, being sold, and the farming operation being brought to an end. No three week pause, and no greater level of consultation or research, would have averted that. Absent

refinancing, the farming operation was going to end. It follows that the losses claimed by the Kings cannot be attributed to the receiver, even if he had acted in breach of s 18(3).

[90] In any event, and essentially for the reasons given by the Judge at [142] to [179] of her judgment, we are unpersuaded that any breach of duty was proved upon the evidence.

Conclusion

[91] The answer to Issue 2, therefore, is "No".

Issue 3: Did PFL act oppressively?

[92] We can be brief on the third issue.

[93] The Kings had pleaded that particular terms of the loan and the manner of exercise of PFL's powers under the loan and securities were oppressive in terms of s 118 of the Credit Contracts and Consumer Finance Act 2003.

[94] Given the findings made by the Judge as to default, knowledge and due performance in those circumstances of the receiver's s 18(3) duties, she considered the circumstances did "not come close" to establishing a case of oppression.[38]

Submissions

[95] Sensibly, Mr Chesterman did not labour this issue. He submitted that two aspects of PFL's conduct were oppressive. First, its failures in communication and service following Havelock Farms' default on 15 November 2011. Secondly, the conduct of the receivership, preventing the Kings refinancing.

Analysis

[96] There is nothing in either point. The second we have rejected already. As to the first, PFL's failure to serve the Kings was regrettable, but it did not excuse

[38] Reasons judgment, above n 7, at [97].

Havelock Farms' default or alter its liability to PFL. Nor did it alter PFL's entitlement, when the PLA notice incontrovertibly served on Havelock Farms expired, to appoint a receiver. It may have altered PFL's ability to pursue the Kings personally, and it may conceivably have given rise to a claim under s 121(3) of the Property Law Act. The first did not occur, and the second the Judge (and we) have rejected. The Kings were aware of the notice, regardless of non-service, and failed to take adequate steps to rectify Havelock Farms' default or to avert a lawful receivership. PFL cannot be criticised for its efforts to communicate with the Kings. The Kings simply failed to respond to those efforts.

Conclusion

[97] The answer to Issue 3 is also "No".

Issue 4: Is PFL liable for any breach of receiver's duty?

[98] We can be briefer still on the fourth issue. Inasmuch as no breach of receiver's duty occurred, and no loss could have arisen from any such breach, this issue need not be addressed further.

Result

[99] The appeal is dismissed. This appeal lacked merit. So did the underlying claim. This might have been a case deserving increased costs, but we heard no argument on that proposition and the appellants are legally aided. We therefore make no order as to costs.

[100] However, and as requested by the respondents, we make an order under s 45(5) of the Legal Services Act 2011 that had the appellants not been legally aided, they would have been liable for costs on a standard appeal on a band A basis, together with disbursements.

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