IN THE COURT OF APPEAL OF NEW ZEALAND

CA78/2016
[2017] NZCA 269

BETWEEN	ALLAN ROY MCCOLLUM, NANCY MARGARET MCCOLLUM AND TERENCE NEIL WALKER Appellants
AND	DAVID JOHN THOMPSON AND JOSEPHINE RUTH MACBETH Respondents

Hearing:	23 February 2017 (further mateial received on 16 March 2017)
Court:	Asher, Simon France and Peters JJ
Counsel:	B D Gustafson for Appellants W T Nabney for Respondents
Judgment:	28 June 2017 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The High Court order is quashed.

C The issues described at [89] are remitted back to the High Court for determination.

D Any issues relating to interest are to be determined in the High Court.

E The High Court is to determine the final amount owing in accordance with this judgment and its determinations of the issues described in C and D.

F There is no order as to costs in this Court.

G Costs in the High Court are to be determined in that Court in the light of this judgment.

REASONS OF THE COURT

(Given by Asher J)

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Introduction

[1] Two of the appellants, Mr and Mrs McCollum, are elderly and in 2011 had money to invest. They had a long-term involvement in farming, although in recent years not dairy farming. The other appellant, Mr Walker, is their friend. The respondents, Mr Thompson and Ms Macbeth, were involved in sharemilking a dairy herd. Mr Thompson had been involved in dairy farming from his childhood. They had borrowed money from ANZ Bank Ltd to finance their sharemilking business, but had fallen into arrears. ANZ had appointed receivers to take control of their herd. The respondents were going to lose their herd unless they could refinance.

[2] Ultimately the appellants agreed to lend $260,000 to the respondents. This was an amount sufficient to repay ANZ in full. A loan and security agreement was

drawn up on the Auckland District Law Society (ADLS) form, which provided for an interest rate of 15 per cent per annum. A memorandum of general terms and conditions for a general security agreement on the ADLS form was prepared and signed by the parties on 4 July 2011 (the GSA). It contained a list of 342 animals that were to be security for the loan. These were to be located at the property on which the respondents farmed at 120 South Head Road, Helensville. On or around 11 July 2011 the monies advanced by the appellants were used to repay ANZ. The respondents stayed on that farm for approximately a year and then moved to a different farm at 239 Onion Road, Horotiu.

[3] The loan was due for repayment on 8 July 2012. It was not repaid and there was interest owing. The McCollums visited the respondents but no agreement could be reached on a way forward. On 20 August 2012 the appellants, through their solicitors, wrote to the respondents advising them of their breach of the terms of the GSA. On 13 February 2013 they appointed receivers. The receivers were in fact the same receivers who had been previously appointed by ANZ, being Messrs Paul Manning and Kenneth Brown.

[4] Immediately upon their appointment the receivers proceeded to uplift various cows and heifers and to sell livestock. They uplifted 201 cows and 47 two-year-old heifers from the Onion Road property on 13 February 2013. The respondents accept that the 201 cows were subject to the GSA, but maintain that the 47 heifers were not.

[5] The appellants were not satisfied that the livestock collected from the Onion Road property comprised all of the animals subject to the GSA. They believed the respondents held further livestock at a property owned by Tamanu Farming Ltd on Otonga Valley Road near Raglan. Mr McCollum went to that property and uplifted a number of animals in September and October 2013. Tamanu Farming Ltd permitted this on the condition that the appellants paid it $6,200, a sum that it claimed was owed by the respondents for breaches of a lease. The respondents maintain that none of these animals were subject to the GSA.

[6] In April 2013 the receivers obtained valuations for the 201 cows they had uplifted from the Onion Road property. They sold these to the appellants in June 2013 at a price calculated in accordance with the valuations.

[7] The respondents acknowledge that they failed to repay the amount that they owed to the appellants and that the appellants were therefore entitled to appoint the receivers. They also acknowledge that the receivers were entitled to sell the 201 cows they uplifted from the Onion Road property. They claim, however, that the receivers breached their duty to obtain the best price reasonably obtainable for those cows at the time of the sale. They also claim that certain heifers and other stock were not listed in the GSA and were wrongly uplifted and thereby converted by the receivers as the appellants' agents. They claim the value of the stock taken and consequential losses. Their counterclaim for damages reflects these allegations.

Court proceedings

[8] The appellants commenced proceedings to recover the shortfall owed under the GSA in the High Court on 1 August 2014. The sum claimed was $116,423 plus interest. The respondents filed a statement of defence and raised a set-off and a counterclaim, making various allegations including those outlined at [7] above.

[9] The case was heard before Lang J on 28–30 September and 6 November 2015 and judgment was delivered on 28 January 2016.[1] Lang J considered first the amount that the appellants were entitled to claim, concluding the amount owed to them was $285,056. He then went on to consider whether the GSA provided the appellants with security over livestock other than that described in the list that had been attached to the GSA. He concluded that the GSA did not provide the appellants with security over livestock other than those described in the list, a conclusion now disputed by the appellants. However, the appellants accept Lang J's finding that the GSA did not extend to progeny of the original secured cows.

[10] The Judge made various findings as to whether the appellants had breached the terms of the GSA. He found that the respondents suffered loss in the sum of

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1 *McCollum v Thompson* [2016] NZHC 28.

$54,250 as a result of the failure by the receivers to obtain the best price reasonably obtainable at the time of sale for the 201 cows uplifted from Onion Road. He found that 47 heifers that were not subject to the GSA had been uplifted without the authority of the respondents and the appellants were liable in conversion. He also found that certain livestock uplifted from Otonga Valley Road were uplifted wrongly, and this is not in contention. Their value was $27,450. He then proceeded to calculate consequential losses in respect of the converted livestock at $110,880 and $50,160 for the 2013–2014 and 2014–2015 seasons respectively. These last figures are disputed by the appellants.

[11] In effect the judgment of Lang J was that the respondents continued to owe the appellants the sum of $26,606 plus interest after the set-off had been taken into account, rather than the $116,423 plus interest of 15 per cent and costs claimed. However, he also found that the respondents succeeded in their counterclaim for $238,690. Thus, the net result was favourable to the respondents.

[12] Lang J did not determine the question of costs, but indicated an initial impression that overall the respondents were the successful party. Costs in the High Court have not yet been determined.

Concessions

[13] In the hearing before us there was a significant concession on opening. The respondents accepted the appellants' submission that there were two further amounts that should have been included in calculating the secured debt as at 7 June 2013, but which were not included by the Judge. These were receivers' costs of $92,562.22 and default interest costs of $14,034.54 (a total of $106,596.76). Before us, therefore, the respondents accepted that adding those sums, and after the sale of the seized herd, the sum of $133,202.76 was owed to the appellants, subject to the counterclaim. We are grateful to counsel for having resolved at least this part of the dispute in advance of the hearing. After the hearing the respondents also agreed to deductions to the consequential losses that were awarded, which we refer to later.

[14] We now turn to the contentious issues.

First submission: the 47 heifers that were found to have been converted were not in fact converted

The argument, and the High Court decision

[15] Before Lang J the respondents maintained that the appellants' receivers wrongfully seized 54 two-year-old heifers from the Onion Road property. The Judge ultimately determined that there were in fact 47 animals in this category. These cows were all born after the parties had entered into the GSA. The Judge rejected the primary argument of the appellants in the trial before him that the GSA extended to the progeny of secured cows. The Judge's rejection of the progeny argument was not contested, and before us it was not argued that the heifers were amongst stock specifically defined in the GSA as security.

[16] The appellants also submitted in the High Court that the respondents' claim to damages for the appellants' conversion of the heifers could not succeed because the heifers had become further security by way of a demand made by the receivers after they had taken possession. That argument was rejected by Lang J. Before us, Mr Gustafson submitted that the Judge erred on this point, and that the appellants were entitled to demand a security interest in these animals, and did so twice. Mr Gustafson focussed on cl 17(i) of the GSA. This paragraph gave the appellants the right to demand a security interest in new collateral if they reasonably considered that the fair market value of the secured livestock had declined.

[17] Clause 17(i) of the GSA states:

> (i) **value of livestock**: if in the reasonable opinion of the security holder, the fair market value of the livestock has declined, the party granting the security will on demand provide the security holder with additional security to the satisfaction of the security holder or repay all or part of the secured monies.

[18] Clause 5(h) of the GSA provided that the respondents must promptly do all things necessary to secure the full benefits of the appellants' rights under the GSA. It reads:

> (h) **Further assurance**: If the security holder requires, the party granting the security must promptly execute and deliver to the

> security holder all assignments, transfers, security interests and any other agreements and documents, and do anything else which the security holder may deem necessary to:
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> (i) perfect title in any collateral; or
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> (ii) perfect a security interest created under this instrument; or
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> (iii) vest, or enable to vest, any collateral in the security holder, its nominee or purchaser; or
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> (iv) facilitate collateral realisation; or
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> (v) secure the full benefit of the security holder's rights under this instrument; and
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> (vi) do all things and execute all further instruments that may be required to assure the security holder of valid and binding legal interests in the collateral.

These clauses gave the appellants power to obtain further security, and indeed to obtain title in any security.

[19] Mr Gustafson relied on two letters that he argued constituted demands for further security in terms of cl 17(i). The first was a letter of 11 April 2013 from the receivers' and appellants' solicitors. It responded to a letter from the respondents' solicitors of 3 April 2013 which unfortunately was not produced and is not before us. The 11 April letter, which was addressed to the respondents' solicitors, concluded as follows:[2]

> 4. While having previously asserted that the 52–55 first time calvers are not secured by the GSA, your clients have yet to provide any evidence to support this assertion.
>
> 5. Once again, putting aside the 52–55 first time calvers for the moment and assuming the Receivers collected the 6 bulls and 13 cows, the Receivers and the security holder are of the opinion that the fair market value of the approximately 219 head of stock is not sufficient to repay all of the secured moneys. To make up this shortfall we, on behalf of the Receivers and the security holder, demand additional security to the satisfaction of the Receivers and the security holder.
>
> 6. While the Receivers and the security holder will accept the 52–55 first time calvers (assuming they are not secured by the GSA, which is disputed), there is still likely to be a considerable shortfall.

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[2] The "52–55 first time calvers" referred to are what we have called the 47 heifers.

> 7. In order that arrangements can be made to obtain additional security to the satisfaction of our client and the security holder, please provide us with a sworn statement of financial position from your client by Wednesday, 17 April 2013.

[20] On 17 April 2013 the respondents' solicitors replied to the letter as follows:

> Our clients are of the opinion that the stock that is currently in the receivers possession exceeds the debt.
>
> By way of your letter of 11 April, it appears that the receivers do not think this is the case and that there will be a shortfall. We therefore assume that to make these statements the receivers have had to carry out a valuation of the stock that is in their possession. As you have provided no details in your letter of the current value of the stock or the perceived shortfall please provide us with this information and valuations that the receivers are relying on in making these assertions.
>
> I look forward to receiving this information.

[21] On 8 August 2013, the receivers wrote to the respondents and advised:

> If you are unable to settle this debt in cleared funds, McCollums and Walker require possession and legal title to all missing livestock plus the heifers currently held in Parakai.
>
> If you do not settle in full by 31 August 2013, the Secured Party will seek a declaratory order from the Court regarding the heifers, and will commence bankruptcy proceedings against you both.

[22] The Judge did not accept that there was a failure to provide additional security under cl 17(i) of the GSA. He did not consider that the letter of 11 April 2013 amounted to a demand that the respondents provide additional security.[3] Rather it was a request for further information so that the appellants could form an opinion as to whether they should require the respondents to provide additional security. Therefore, the respondents' failure to respond was not a breach of cl 17(i). He also said that the respondents did in fact respond to the letter on 17 April 2013 when their solicitors said that the respondents were of the opinion that the stock that was currently in the receivers' possession exceeded the debt. The appellants did not respond to that letter.

[23] It was not argued before us that the value of the livestock that were specifically secured under the GSA had not declined. The issue therefore must be

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3 *McCollum v Thompson*, above n 1, at [61].

whether either of these letters contained a demand for additional security in terms of the GSA, and whether the demanded security included the 47 heifers. There are then the further issues of whether, by that process, the heifers became security and whether any previous conversion was thereby cured. Mr Gustafson submitted this is what happened, and that the Judge was wrong to reject this argument.

Analysis

[24] Clause 17(i) of the GSA requires the security holder to:

> (a) have a reasonable opinion that the fair market value of the livestock has declined; and
>
> (b) make a demand for the additional security.

[25] The debtor is then obliged to provide additional security to the satisfaction of the lender.

[26] We note that the 11 April letter does not indicate compliance with the first requirement, because it stated that the security holder's opinion was that the fair market value of the stock that was held was insufficient to repay all the secured moneys. That is a somewhat different issue to whether the fair market value of the original security has declined. However, nothing turns on that in this case as it is obvious that the fair market value of the livestock had declined over the years and that this was the opinion of the appellants. More important is the issue on which counsel focused their submissions, whether there was a clear and unambiguous demand at the end of para five and in para six of the letter of 11 April.

[27] It is stated by the appellants' lawyers in para five of that letter that to make up the shortfall the appellants' lawyers demand, on behalf of the receivers and the security holder, additional security to the satisfaction of the receivers and the security holder. However at the start of this para it is stated "[o]nce again, putting aside the [heifers] for the moment …". It is not free from ambiguity, but it is one natural reading of this that the heifers, the status of which were in issue, were not included

in the demand. The other reading of this paragraph is that the putting to one side of the heifers only qualified the next sentence relating to the assessment of value, and that the last sentence was a general demand which included the heifers, the goal being to increase the value of the security held.

[28] It is then stated in para six that while the receivers and security holder "will accept" the heifers assuming that they are not secured by the GSA, there is still a shortfall. Plainly "accept" can only mean accept as security under the GSA. The appellants already had possession of the heifers and "accept" could relate to nothing else.

[29] The request that follows in the last paragraph for a sworn statement of financial position so that arrangements can be made to "obtain" additional security must be read as relating to additional security in excess of the stock that the receivers had in their possession. That stock included the heifers.

[30] Therefore we do not agree with Lang J's interpretation of this letter, and see it as a demand that the heifers become security.

[31] Although in the correspondence prior to 11 April 2013 the respondents' solicitors had protested at the repossession of the heifers, in their letter of 17 April 2013 they did not take any issue with the statement at para six in the letter of 11 April that the receivers and security holder would accept the heifers. Rather they disputed the question of a shortfall. They did not specify whether their own assessment of the shortfall included the heifers or not. The response of 17 April rather seems designed to sidestep the direct requests of the letter of 11 April.

[32] The letter of 8 August 2013 is consistent with the appellants regarding the heifers as part of the security. There is reference to obtaining a declaratory order from the Court regarding the heifers, presumably a declaratory order of title to the heifers, so they could be sold.

[33] We conclude there was a valid demand for the heifers to be included as additional security, and that they were so included. This means that this ground of appeal succeeds.

[34] The 47 heifers were seized unlawfully on 13 February 2013 but became additional security on 11 April 2013. It follows that the heifers were held by the receivers unlawfully, that is when they were not yet additional security, for only two months. We have had no submissions on consequential loss for that two-month period, and we therefore remit this matter back to the High Court.

Damages

[35] Mr Gustafson argued that if the 47 heifers were converted, the Court should not award the respondents damages. He relied on *Campbell v Dominion Breweries Ltd* as authority for the proposition that the value of converted chattels should not be the measure of damages when the person who carried out the conversion has cross-claims arising out of, or connected to, the transaction.[4] In this case, given that there was a contractual obligation on the respondents to grant additional security, there should be no award of damages for the conversion of the heifers. This was a new point, raised for the first time in this Court.

[36] We consider this argument as it may be relevant if there are any losses arising from the two-month period when the receivers had the heifers, before the demand was made.

[37] We are unable to see how the decision of *Campbell v Dominion Breweries* assists the appellants. The case is authority for the proposition that, when A has a claim in conversion against B and B has a cross-claim against A arising out of the same transaction, B is entitled to set off or deduct the amount of the cross-claim from the full market value of the goods in calculating the damages owing to A for conversion.[5] Undoubtedly the appellants are entitled to set off or deduct the amount of their claims against any damages for conversion. But that is not the issue that we have been considering: whether there is any entitlement to set off or cross-claim

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4 *Campbell v Dominion Breweries Ltd* [1994] 3 NZLR 559, (1994) 2 NZConvC 191,865 (CA).
5 At 566.

under this head at all. The heifers were owned by the respondents and the appellants had no right to them until demand was made.

[38] Consequently, the receivers had no right to take possession of them on 13 February 2013. The action of the receivers in taking the 47 heifers without permission of the respondents constituted conversion for that two months. Insofar as there are any losses for that period, this ground of appeal fails.

Second submission: the Judge erred when awarding consequential losses being loss of profits for two milking seasons

[39] Given our conclusion that the heifers did become security on 11 April 2013, any losses will be very limited. Lang J, in considering consequential losses for the converted livestock on the assumption that they never became security, observed:[6]

> Furthermore, I did not take [the appellants' counsel] to dispute the proposition that a loss of income that would have been derived from milk produced by converted livestock is recoverable. It is clearly foreseeable and it also occurs as a direct result of the act of conversion.

[40] As we have set out above at [10], Lang J fixed consequential losses at $110,880 for the 2013–2014 season and $50,160 for the 2014–2015 season. This was largely in reliance on the evidence of Mr Thompson. There was no allowance made for the cost of producing the milk, in particular the milking costs. Nor did Lang J's calculation account for the fact that the respondents were sharemilking the heifers and would therefore only be entitled to half the profit.

[41] At our invitation counsel discussed the appropriate consequential losses. They filed a memorandum after the hearing. They reached agreement on some of the costs to be deducted, and we are grateful to them for their efforts. The most significant change is that the notional milk solid revenue calculated by Lang J is halved for each year to reflect the fact that the respondents were 50/50 sharemilkers. They agreed to losses as follows:

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6 *McCollum v Thompson*, above n 1, at [114].

5. Notional costs for each year 2013–2014 year:

    5.1 Share of milk solid Revenue as sharemilker: 44 x 300 x $8.40 = $110,880/2 = $55,440 gross receipts.

    5.2 Costs are $16,394.40.

    5.3 Consequential loss is reduced for the 2013–2014 season to $39,045.60.

6. Notional costs for each year 2014–2015 year:

    6.1 Share of milk solid Revenue as sharemilker: 38 x 300 x $4.40 = $50,160/2 = $25,080 gross receipts.

    6.2 Costs are $16,394.40.

    6.3 Consequential loss is reduced for the 2014–2015 season to $8,685.60.

[42] Given our finding that the 47 heifers did become security, these losses are not relevant now save possibly for the two-month period when the heifers were in the possession of the receivers but no demand had been made. The figures offer no breakdown showing losses for the period up to 11 April 2013. Further, they offer no breakdown of the losses, if any, arising from the taking of the Otonga Valley Road livestock. This issue will have to be determined in the High Court, and we return to this later at [86] of our judgment.

Third submission: the Judge erred in finding that the appellants had breached a duty under the Receiverships Act 1993

[43] Clause 25(b) of the GSA provides:

> (b) **Receiver agent of party granting the security:** Any receiver appointed by the security holder under clause 25(a) will be the agent of the party granting the security and the party granting the security alone is responsible for the receiver's acts and defaults and for the receiver's remuneration.

[44] In this Court Mr Gustafson sought to rely on this clause, submitting that Lang J erred by upholding the respondents' claim against the appellants concerning the breach of the receivers' duty, on selling the livestock, to obtain the best price reasonably obtainable at the time of sale under s 19 of the Receiverships Act 1993. He submitted in fact the receiver was not the agent of the appellants, but the agent of the respondents.

[45] It is correct that the receiver is usually the agent of the debtor, as is reflected in cl 25(b). However a secured party may also be liable for the actions of a receiver where the secured party interferes in the conduct of the receivership and gives directions to the receiver.[7] It is possible for an agent to have two principals.[8] Whether the actions of the lender in intervening in the receivership are sufficient to make the lender liable will involve questions of fact.

[46] The difficulty with Mr Gustafson's submission that the receiver was not the appellants' agent is that it runs entirely contrary to the way in which the case was pleaded and run in the High Court. The respondents' statement of defence and counterclaim at [15] said that "the receivers at all material times, acted as agent for the plaintiffs". At [22] it was further stated that "the receivers acting as agents for the plaintiffs" transferred possession of the stock. In the appellants' statement of defence to the counterclaim, [22] is admitted. Further, the appellants in their pleadings did not at any point take issue with the alleged agency. In addition, Mr McCollum said in evidence "[w]e left it to the receivers to do their job, that's why we appointed receivers." Mr McCollum was asked "[t]he receivers were acting as your agents?" He answered "yep".

[47] The Judge, who did not address the issue specifically, appeared to assume that the receivers were the agents of the appellants, as he awarded damages against the appellants for the losses arising from the actions of the receivers.[9] Throughout the judgment he attributes the consequences of the actions of the receivers to the appellants.[10] The Judge at one point in the judgment, relating to the receivers' failure to obtain the best price for the livestock they had uplifted, referred to the ability of the receivers "as the defendants' agents" to seek information from other sources.[11] This sentence is inconsistent with the tenor of the rest of his judgment, which is that the appellants were responsible for the receivers' actions.

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7 See the discussion in Peter Blanchard and Michael Gedye *The Law of Private Receivers of Companies in New Zealand* (LexisNexis, Wellington, 2008) at 38–40.

8 *Standard Chartered Bank Ltd v Walker* [1982] 1 WLR 1410 at 1418; and *American Express International Banking Corp v Hurley* [1985] 3 All ER 564 at 571.

9 *McCollum v Thompson*, above n 1, at [119].

10 For example at [2], [10], [80], [95] and [99].

11 At [76].

[48] Unsurprisingly, it was not in contention before us that in the High Court no issue was taken with the proposition that, at all material times, the receivers were the agents of the appellants. As we have set out, the judgment of Lang J proceeded on that basis.

[49] Mr Gustafson did not apply to amend the appellants' pleadings. He submitted that there is a body of law that suggests a party may reverse their position on a matter of law (as opposed to a matter of fact) on appeal. He argued that the admissions in the pleadings were not fatal to such a reversal.

[50] In *Motor Vehicle Dealers Institute Inc v UDC Finance (1991) Ltd* it was held that there is a discretion to permit a new point to be taken on a point of law.[12] It was stated:[13]

> The Court will not generally allow matters to be raised on an appeal which were not argued in the Court below, but the matter is one of discretion. The issue in the present case is one of law which has been fully argued before us. If we are satisfied that the charging order nisi should not have been granted, no useful purpose would be served by allowing it to remain until the matter can be raised again on the application to make it absolute, or until a fresh application to set aside can be brought.

[51] In *Motor Vehicle Dealers Institute Inc* it appeared that the evidence heard in the Court below was sufficient to decide the new point raised on appeal. Likewise, in *Duff v Commissioner of Inland Revenue* this Court allowed a new point to be taken on appeal, noting that the evidence in the Court below was "fairly comprehensive" and sufficient to enable the Judge to decide the factual point relevant to the new argument.[14]

[52] Although there is no absolute bar to the raising of a new point in this Court, a party may be prevented from doing so by the Court in the exercise of its discretion. In *R v Civil Service Appeal Board, ex parte Bruce (Attorney-General intervening)*, an applicant who had deliberately abandoned a point on the advice of counsel and was seeking to resuscitate it and have further evidence admitted on appeal was not

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12 *Motor Vehicle Dealers Institute Inc v UDC Finance (1991) Ltd* [1994] 1 NZLR 659 (CA).
13 At 664.
14 *Duff v Commissioner of Inland Revenue* [1982] 2 NZLR 710 at 725 (CA).

permitted to do so.[15] In *Savill v Chase Holdings (Wellington) Ltd* the appellant sought to raise an argument on appeal that was different to the position that it had taken in the High Court.[16] McMullin J stated:[17]

> The fact that the point was not raised is not fatal to it being taken on appeal *if the pleadings and the evidence leave it open to be taken*. Mr Camp, whose client Chase Holdings was directly affected by the argument, contended that further evidence would have been called and different questions asked of existing witnesses had the point been raised in the High Court. And, he said, issues of estoppels and rectification would also have been raised.
>
> … It is difficult to see how Chase Corporation would have dealt with the point now raised by Mr Young had it been pleaded or otherwise signalled as an issue at the trial. *But the real possibility that the Chase Group would have shaped its case to deal with the specific point cannot be ignored. For that reason it would be wrong to allow the appellants to introduce it into the case at this stage.*

[53] When an appellant seeks to reverse a pleaded admission, the appeal court would need to give leave to amend, and in doing so would need to be satisfied that there is no significant prejudice. This does not turn on any particular rule of pleading, or on the distinction between matters of law and fact. It is because an appellate court, just like a trial court, must ensure in applying the relevant rules that the conduct of proceedings is procedurally fair. It is not fair to allow a new tack if there is a real possibility that the party affected by the change of position will be materially disadvantaged.

[54] The unfairness stems from the fact that if the party opposing the raising of the new point would, on an objective assessment, have fairly wished to run the case differently in the trial court had the point been raised, the appeal court cannot provide that opportunity without ordering a new trial. To put a party to the delay and expense of a new trial because something that could have been raised in the trial court was not raised would be unjust. Indeed, it would run against the principle that litigation should be final, and it would bring the administration of justice into disrepute.

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15 *R v Civil Service Appeal Board, ex parte Bruce (Attorney-General intervening)* [1989] 2 All ER 907 (CA).

16 *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257 (PC).

17 At 307 (emphasis added).

[55] We accept Mr Nabney's submission for the respondents that had the agency point been taken in the High Court the respondents would have undoubtedly run their case differently and further evidence would have been adduced to show that, despite the term in the GSA, the receivers were the appellants' agents. There is already some indication in the evidence that the appellants were involved in the receivership and in instructing the receivers. But this was not an area of fact or law that was developed, because of the concession at the trial.

[56] We therefore do not permit Mr Gustafson to reverse the appellants' position from that taken in the High Court because it will unfairly prejudice the respondents. Even if he had sought to amend the pleadings we would have refused leave. Therefore this ground of appeal fails.

Fourth submission: the Judge erred in not allowing for payment of debt

[57] Mr Gustafson argued that the Judge failed to make allowance for the appellants' payment of the respondents' debt to Tamanu Farming Ltd. The amount was $6,200 and it was for damages arising from a breach of a lease by the respondents. The appellants had to pay this amount so they could obtain access to and uplift the stock at Otonga Valley Road. Mr Gustafson argued that such a payment was clearly included in the definition of "secured monies" in cl 2(a)(vii) of the GSA:

> (a) In this instrument, "**the secured moneys**" means:
>
> …
>
> (vii) payment made by the security holder for any property or services acquired by or provided to the party granting the security or to any one or more of them or to any other person for the accommodation of the party granting the security.

[58] The appellants argued that to not include the $6,200 payment as "secured moneys" would provide a windfall to the respondents at the expense of the appellants.

[59] The Judge concluded that the appellants were not entitled to seize the stock, and could not therefore claim reimbursement from the respondents for any costs incurred in doing so.[18]

[60] We consider that this decision of Lang J was correct. He recorded that the appellants had not sought to argue in the hearing before him that the livestock uplifted from the Otonga Valley Road property was subject to the security created by the GSA.[19] Therefore, cl 2(a)(vii) did not apply. This ground of appeal must fail. We also note the statement of Mr Thompson in his brief that a debt was not in fact owed in that amount, and that the real debt was $800.

Fifth submission: margin of sale at an undervalue too small to warrant set-off

[61] Mr Gustafson argued that even if there was a sale in breach of s 19 of the Receiverships Act, the price that the herd should have achieved but for the receivers' breach was so small as to be within the margin for a forced sale of assets. He relied on the decision of *Agio Trustees Co Ltd v Harts Contributory Mortgages Nominee Co Ltd*.[20]

[62] We reject this submission. The point does not appear to have been argued before Lang J and there is certainly no part of his judgment that deals with it. He found that the average sale price when the cows were sold by the receivers was just over $1,015 per head with a total sale price of $204,200 (plus GST) for 201 cows. The Judge ultimately found that it should have been not less than $1,550 per head in respect of the 159 cows that were in calf and $21,000 in total for the 42 cows that were not in calf. Less $9,000 in advertising costs, the total sale price should have been $258,450 (plus GST). The difference between the total sale prices of $204,200 and $258,450 as found by Lang J is, in our calculation, a shortfall of approximately 21 per cent. This difference is significant, and damages should follow.

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18 *McCollum v Thompson*, above n 1, at [14].

19 At [102].

20 *Agio Trustees Co Ltd v Harts Contributory Mortgages Nominee Co Ltd* (2001) 4 NZ ConvC 193,480 at 193,507 (HC).

Further issues

[63] For the sake of completeness, we deal with two further issues. The appellants in their written submissions submitted that the effect of the respondents' concessions concerning the amount owed to the appellants was that the respondents are not entitled to consequential losses in respect of the converted livestock. The appellants' reasoning was:

(a) Taking into account the respondents' concessions, the outstanding indebtedness after the heifers were sold on 7 June 2013 was $133,202.76.

(b) As found by Lang J, the value of the converted livestock was $77,650.

(c) When the value of the converted livestock is set off against the outstanding indebtedness as at 7 June 2013, the claim of $77,650 for the converted livestock is extinguished, leaving an outstanding indebtedness of $55,552.76 as at 7 June 2013.

(d) The milking season does not begin until August of each year. As at 7 June 2013, the respondents had the full value of the converted animals by way of set-off against the outstanding indebtedness. There could therefore be no loss of profits.

(e) The amount owed to the appellants is therefore $55,552.76.

[64] However, Mr Gustafson did not include this point in his one-page summary presented to this Court during the hearing. Instead, he focussed on the quantum of the consequential losses. The parties subsequently reached agreement on the quantum of consequential loss. That issue cannot be taken further.

[65] The appellants also argue that they are entitled to interest at a rate of 15 per cent on the outstanding indebtedness from 7 June 2013 to the present. The respondents give the rather vague response that the High Court was right not to take

into account any interest given the Court's findings on other matters in relation to conversion.

[66] Lang J dealt with the matter of interest as follows:

> [120] As the above table demonstrates, the defendants continued to owe the plaintiffs the sum of $26,606 after the plaintiffs had acquired the 201 cows secured by the GSA. Given that fact, interest continues to run in accordance with the term loan agreement on that sum from 30 May 2013 until the date of payment. I leave it to counsel to determine that amount by agreement. If they are unable to reach agreement they have leave to file concise memoranda dealing with that issue.
>
> [121] Counsel did not address me in relation to the issue of interest that might be payable in respect of any of the sums awarded on the counterclaim. Counsel should endeavour to reach agreement regarding that issue, but have leave to file concise memoranda dealing with that issue as well.

[67] It seems that the appellants may well be entitled to interest on the outstanding amount under the GSA. However, the respondents are likely to claim interest on their counterclaim. As we have no figures or detailed submissions, and no specific High Court findings to consider, we make no order as to interest. Interest should be settled between the parties, but if not interest will have to be determined in the High Court.

Summary

[68] We now summarise the net result of our findings, adopting the same layout as did Lang J in his summary:[21]

Claim		
Amount of claim (unchanged from judgment)	$285,056.00	
Plus agreed costs (new)	$106,596.76	
		$391,652.76

[21] *McCollum v Thompson*, above n 1, at [119].

Less value of cows sold by receivers at price they should have received (unchanged from judgment)	$258,450.00	
		$133,202.76
Counterclaim		
Value of livestock from Otonga Valley Road	$27,450.00	
		$27,450.00

Claim	$133,202.76
Counterclaim	$27,450.00

[69] There is a considerable difference between the end figures in this Court and the High Court. The amount owed by the respondents to the appellants is $133,202.76 rather than $26,606, and the amount owed by the appellants to the respondents under the counterclaim is reduced from $238,690 to $27,450. The net difference is $105,752.76 in the appellants' favour, rather than $212,084 in the respondents' favour.

Costs

[70] The appellants are clearly the successful party. We would in the ordinary course of events award the appellants standard costs on a band A basis with usual disbursements in this Court.

[71] Mr Nabney submitted that costs should not be awarded against the respondents because they are legally aided persons. Section 45 of the Legal Services Act 2011 provides:

> **45 Liability of aided person for costs**
>
> (1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.

(2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.

(3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:

(a) any conduct that causes the other party to incur unnecessary cost:

(b) any failure to comply with the procedural rules and orders of the court:

(c) any misleading or deceitful conduct:

(d) any unreasonable pursuit of 1 or more issues on which the aided person fails:

(e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:

(f) any other conduct that abuses the processes of the court.

(4) Any order for costs made against the aided person must specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.

(5) If, because of this section, no order for costs is made against the aided person, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability.

…

[72] Section 46 enables a successful opponent of an aided person to seek recovery of specified costs from the Legal Services Commissioner.

[73] There has been nothing particularly exceptional about this litigation. Debtors have got into difficulties. The debtors have raised a number of defences, set-offs and cross-claims, some of which have been upheld on specific issues. The respondents, while largely unsuccessful in this Court, have not failed entirely and indeed rightly succeeded in the High Court on some issues. In relation to the matters listed in s 45(3), which are directed to the conduct of the aided person, there has been no misconduct by the respondents which would amount to any exceptional circumstance.

[74] Indemnity costs were also sought on the basis of a contractual provision in the GSA requiring the respondents to pay the security holders' legal costs. Clause 29(a) of the GSA states:

> (a) **Costs payable by the party giving the security:** The party granting the security *must pay* to the security holder upon demand, *the security holder's legal costs (as between solicitor and client)* for:
>
> …
>
> (ii) **costs on default:** *legal services arising from or relating to any default under this instrument* or the enforcement or exercise or attempted enforcement or exercise of any of the security holder's rights, remedies and powers under this instrument (including the giving or attempted giving of any notice under the Property Law Act 1952 or any enactment in substitution for that Act, the inspection and valuation of the land and, if the security holder is a solicitor's nominee company, the cost of compliance by the relevant solicitor with the Solicitors Nominee Company Rules 1988 or any similar rules in relation to the matters mentioned in this paragraph (ii));
>
> …
>
> (v) **legal costs of security holder:** legal services relating to the protection of the security holder's security interest under this instrument (including the investigation of any claim relating to the land which might affect that interest).
>
> (Emphasis added.)

[75] Under r 53E(1)(b) of the Court of Appeal (Civil) Rules 2005, indemnity costs may be ordered for a party's actual costs and disbursements. A ground for doing so under r 53E(3)(e) is where "a party claiming costs is entitled to indemnity costs under a contract or deed". Therefore there may well have been a basis for a claim for the appellants' reasonable legal costs under this head.[22]

[76] However, we are satisfied that s 45 of the Legal Services Act applies to all orders for costs, whether they are for standard costs, increased costs or indemnity costs. A party to a contract containing a clause relating to costs always has the ability to make a claim in respect of those costs in contract. That is not however the

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[22] Only reasonable legal costs can be claimed. See *Frater Williams & Co Ltd v Australian Guarantee Corp (NZ) Ltd* (1994) 2 NZ ConvC 191,873 at 191,887 (CA).

issue that is before us. What is sought is an order for costs under this Court's jurisdiction to award costs, and s 45 applies.

[77] The purpose of s 45 is to reduce, but not eliminate entirely, the risk that a legally aided person, if unsuccessful in the litigation, may be required to pay substantial costs despite having limited means. This promotes access to justice by ensuring that persons of limited means are not deterred from pursuing or defending claims by the prospect of an obligation to pay costs that they cannot afford to meet.[23]

[78] The matters listed in s 45(3) relate to the conduct of the legally aided person. As we have set out, without considering cl 29(a) of the GSA, the conduct of the respondents in this case does not fall within any of the types of conduct listed in s 45(3).

[79] The factors listed in s 45(3) are non-exhaustive. The provision states that "the court may take account of, *but is not limited to*" the listed factors.[24] Is the existence of cl 29(a) an exceptional circumstance in terms of s 45(2)?

[80] We do not consider the existence of a contractual provision relating to costs to be an exceptional circumstance. Although s 45(3) does not limit the consideration of exceptional circumstances to the conduct of an aided person, that appears to be the focus of the exception. There is no reference in s 45(3) to background circumstances in existence prior to the litigation, such as contractual terms. It is always open to a litigant to make claims for indemnity costs in contract, rather than to seek them as Court costs, but this avenue has not been pursued by the appellants.

[81] A similar situation was considered by this Court in *Laverty v Para Franchising Ltd*.[25] The appellants, who were legally aided, were unsuccessful in the High Court. In that Court, it was ordered that the appellants pay costs, notwithstanding that they were legally aided.[26] It was determined that there were exceptional circumstances which justified the costs award. Among those exceptional

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23 *Laverty v Para Franchising Ltd* [2006] 1 NZLR 650 (CA) at [19].
24 Emphasis added.
25 *Laverty v Para Franchising Ltd*, above n 23.
26 *Para Franchising Ltd v Walop No 3 Ltd* HC Napier CP36/99, 3 May 2004.

circumstances was the fact that the respondent had a contractual entitlement to recover indemnity costs.

[82] In this Court the award was overturned. McGrath J considered that the existence of the indemnity clause was not a sufficiently exceptional circumstance:[27]

> To the extent that a contractual stipulation provides a different basis for payment of costs of legal proceedings it cannot carry significant weight in the exercise of the Court's discretion. To treat that factor otherwise would frustrate the statutory purpose of facilitating access to legal services.

[83] The Court noted that the respondents could have pursued costs under the indemnity clause as contractual damages. They had not done so. McGrath J considered that, even if they had, the claim may have been frustrated by the scheme and purpose of the predecessor to s 45:[28]

> It is arguable that the statutory policy of facilitating access to justice, by ensuring aided persons are not required to meet costs beyond what is reasonable for them to pay other than in exceptional circumstances, would be frustrated if it could be by-passed by contractual agreement.

However, McGrath J left the point open, noting that the issue is probably best resolved by amending legislation.[29] We do not need to consider it, as there is no claim in contract for damages based on cl 29(a). In *Laverty v Para Franchising Ltd* the end result was that costs were limited to the unsuccessful parties' respective contributions to legal aid, and the Court specified the amount of costs that would have been awarded under the equivalent to s 45(4) of the present Act.[30]

[84] Therefore, we do not consider that the existence of the indemnity clause is an exceptional circumstance justifying an award against the legally aided respondents. When we specify the costs that would have been payable we will not specify indemnity costs based on the contractual indemnity. That is a matter of contract between the parties and not for the Legal Services purse.

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27 *Laverty v Para Franchising Ltd*, above n 23, at [30].
28 At [47].
29 At [49].
30 At [48].

[85] We do not have sufficient information to rule on costs in the High Court. On the merits, it is possible that had all the appellants' arguments been raised and made in that Court, and others dropped, the case would never have had to proceed. There may have been *Calderbank* issues. There may have been exceptional circumstances in that Court. The matter of costs in the High Court must be remitted back to the High Court to determine, taking into account the decision in this Court.

Remittance back

[86] The material before us does not break down the losses caused by the taking of possession of the Otonga Valley Road livestock, the wrongful taking of which was not contested before us. Indeed, it may be that there were no consequential losses for the Otonga Valley Road livestock as distinct from the 47 heifers. Nor does the material before this Court enable us to assess the loss consequent upon the taking of the 47 heifers for the two months prior to the demand. Therefore we will have to remit these issues of quantum back to the High Court (although we would hope that the parties can reach agreement, as they did generally for consequential loss in respect of all the livestock in their memorandum of 14 March 2017).

Result

[87] The appeal is allowed.

[88] The High Court order is quashed, and in substitution we make the following findings:

Claim		
Amount of claim (unchanged from judgment)	$285,056.00	
Plus agreed costs (new)	$106,596.76	
		$391,652.76
Less value of cows sold by receivers at price they should have received (unchanged from judgment)	$258,450.00	
		$133,202.76

Counterclaim		
Value of livestock from Otonga Valley Road	$27,450.00	
		$27,450.00

Claim	$133,202.76
Counterclaim	$27,450.00

[89] We remit the case back to the High Court for a final determination of the quantum of loss arising from first, the premature taking of the 47 heifers before they became security on 11 April 2013; and second, the taking of the Otonga Valley Road livestock.

[90] Any issues relating to interest are to be determined in the High Court.

[91] The High Court is to determine the final amounts owing in accordance with this judgment and its determinations of the issues described in [89] and [90].

[92] There is no order as to costs in this Court. However, for the purposes of ss 45(5) and 46 of the Legal Services Act we specify that, had the respondents not been legally aided, we would have ordered them to pay the appellants costs for a standard appeal on a band A basis and usual disbursements.

[93] Costs in the High Court are to be determined in that Court in the light of this judgment.

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