**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2021-404-000795**
**[2022] NZHC 2489**

| | |
|---|---|
| BETWEEN | BANK OF NEW ZEALAND<br>Plaintiff |
| AND | LOTHIAN PARTNERS CAPITAL LIMITED<br>First Defendant |
| | GLENCOE LAND (JOINT VENTURE) LIMITED (IN RECEIVERSHIP)<br>Second Defendant |
| | GALT NOMINEES LIMITED<br>Third Defendant |
| | GEORGE CHARLES DESMOND KERR<br>Fourth Defendant |
| | PYNE HOLDINGS LIMITED (IN RECEIVERSHIP)<br>Fifth Defendant |

| | |
|---|---|
| Hearing: | 13, 14 December 2021 and 29 March 2022 |
| Appearances: | Z G Kennedy and N R Frith for Plaintiff<br>G P Blanchard KC for First, Second, Third and Fifth Defendants<br>J K Goodall, S J Nicolson and J Hansen for Fourth Defendant |
| Judgment: | 30 September 2022 |
| Reissued: | 17 October 2022 |

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**JUDGMENT OF ASSOCIATE JUDGE GARDINER**

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This judgment was delivered by Associate Judge Gardiner
on 30 September 2022 at 4.00 pm, pursuant to r 11.5 of the High Court Rules

Registrar / Deputy Registrar – Date: ………………………………..

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## Introduction

[1] Bank of New Zealand seeks summary judgment against the defendants, George Kerr and related companies, for approximately $62 million said to be owing under two loan facilities. The defendants are borrowers and/or guarantors under one or both facilities. They also indemnified BNZ for any losses arising out of a guarantor not meeting their obligations.

[2] BNZ also seeks to recover an indemnity costs award made by the Court in related injunction proceedings.

[3] Mr Kerr and two of the corporate defendants oppose summary judgment on the grounds that BNZ's claims are time-barred under the Limitation Act 2010. BNZ says that the claims are not time-barred, either because the defendants contracted out of the Limitation Act 2010 or because they acknowledged their liability in writing to BNZ, creating fresh claims.

[4] Additionally, the two corporate defendants involved in the injunction proceedings say that because their liability is limited to the value of their secured assets, which have already been realised by BNZ, they are not liable to pay the costs award. The other corporate defendants say this means they are not liable for the costs award as co-guarantors.

[5] A significant area of focus is the extent to which Mr Kerr is liable under his personal guarantees and indemnities. He maintains that any acknowledgements were made by or on behalf of the corporate defendants and not by him personally. BNZ disputes this and says that, in any event, if the actions under the guarantees are time-barred, Mr Kerr must indemnify the bank for its loss. Mr Kerr says that the indemnities are also time-barred.

[6] The defendants also oppose summary judgment on the basis that there is a substantial dispute over the amounts BNZ claims under both facilities. They maintain that there are serious errors and uncertainties in BNZ's calculations.

[7] Finally, Mr Kerr argues that summary judgment should be refused because he has a counterclaim for losses sustained when BNZ forced him to sell assets to make repayments on the facilities, based on what he says were inflated outstanding balances.

[8] In this judgment I first set out the factual background, BNZ's causes of action, the key clauses from the loan agreements and guarantees, and the issues to be resolved. I then deal with issues related to whether the defendants are liable to BNZ under the loan agreements, guarantees and indemnities. Next, I address the defendants' claim that the amounts claimed by BNZ are wrong or uncertain. Finally, I consider Mr Kerr's counterclaim.

**Factual background**

[9] On 26 November 2008, Lothian Partners Capital Limited (**LPC**) entered into a loan facility agreement with BNZ (the **LPC Facility Agreement**). LPC, Galt Nominees Limited (**Galt**), George Kerr and Pyne Holdings Limited (**PHL**) provided guarantees and indemnities for the facility. Glencoe Land (Joint Venture) Limited (**Glencoe JV**) also gave a guarantee and indemnity under a separate guarantee (**Glencoe JV Guarantee**).

[10] Mr Kerr is the sole director of LPC. He is also the sole director of Galt and has held that position since 25 September 2019. Prior to that, Mr Kerr was a director from 8 December 1999 to 26 October 2010, when he was replaced by Michael Tinkler of Burton Partners until 25 September 2019. Mr Kerr has been the sole director of Glencoe JV since 22 May 2019. Before that, there were various directors who served with Mr Kerr on the board.

[11] In addition to the guarantees, LPC gave specific security over a deposit account and PHL gave general security over all its assets. As security for the guarantee obligations, Galt gave BNZ a mortgage over coastal land at New Chums Beach in the Coromandel, and Glencoe JV gave BNZ a mortgage over land east of Arrowtown in the South Island.

[12] BNZ made available to LPC $31,700,000 pursuant to the terms and conditions in the LPC Facility Agreement.

[13] The facility was available for LPC to draw down from 26 November 2008 up until 30 days before the expiry date. The original expiry date was 10 January 2010. On 7 January 2010, the expiry date was extended to 10 January 2011.[1] On 29 March 2011, the expiry date was extended to 31 May 2011.

[14] On 28 May 2010, Pyne Holdings Limited (**PHL**) entered into a loan facility agreement with BNZ (the **PHL Facility Agreement**). PHL gave BNZ security over all its assets. Mr Kerr gave a guarantee and indemnity of PHL's borrowing (the **Kerr PHL Guarantee**).

[15] Mr Kerr has been the sole director of PHL (named Pyne Family Holdings Ltd until April 2010) since its incorporation in 2008.

[16] Under the PHL Facility, BNZ made available to PHL cash in the sum of $20,000,000. The facility was available to be drawn down from 28 May 2010 to 30 days before the PHL expiry date on 28 May 2013.

[17] LPC defaulted on the LPC Facility on its expiry on 31 May 2011 (the **LPC Expiry Date**). At that time, according to BNZ's calculations, $24.994,230.14 was owing. This amount comprised:[2]

(a) $23,903,277.98 in principal;

(b) interest of $1,090,952.16.

[18] PHL defaulted on the PHL Facility on 28 May 2013 (the **PHL Expiry Date**), with $21,372,948.73 owing, according to BNZ. This amount comprised:[3]

(a) $19,996,355.62 in principal;

(b) $936,593.11 in interest;

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[1] Affidavit of Dermot Michael Rodden affirmed 5 May 2021 [First Rodden Affidavit] at [12].
[2] At [30].
[3] At [33].

(c) $440,000 in unpaid commitment fees.

[19] Rather than take immediate enforcement action, BNZ engaged in lengthy discussions with Mr Kerr about repayment of the LPC and PHL Facilities.

[20] Between November 2013 and June 2017, part-repayments were made against the loan balances under both the LPC and PHL Facilities.

[21] On 22 October 2020, BNZ by its solicitors wrote to LPC, PHL and each of the guarantors, declaring events of default and making demand under the two facilities.[4]

[22] In November 2020, BNZ served notices under ss 118 and 119 of the Property Law Act 2007 on Glencoe JV and Galt pursuant to the mortgages granted to BNZ to secure their guarantee obligations under the LPC Facility. BNZ then appointed receivers to Glencoe JV and Galt and took steps to sell the secured assets. Glencoe JV and Galt brought injunction proceedings to prevent the asset sales. Ultimately, they discontinued the proceedings. BNZ was awarded indemnity costs of $243,419.84 under the terms of the facilities (the **Costs Award**).[5] BNZ seeks summary judgment for the Costs Award.

[23] BNZ appointed receivers to PHL on 29 April 2021. The bank issued these proceedings on 5 May 2021.

[24] On 19 May 2021, Glencoe JV's secured property was sold by mortgagee sale for $5,675,000. BNZ recovered net sale proceeds of $5,534,181.82. The sum was applied against the amount outstanding under the LPC Facility.[6]

[25] On 3 December 2021, BNZ received net sale proceeds from the sale of Galt's secured property of $2,051,501.80. This was applied against the amount owing under the LPC Facility.[7]

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4 Affidavit of Ennis John Young sworn 6 May 2021 [First Young Affidavit] at [41].

5 *Galt Nominees Ltd v Bank of New Zealand* [2021] NZHC 875.

6 Updating affidavit of Ennis John Young sworn 29 November 2021 [Second Young Affidavit] at [25].

7 Further updating affidavit of Ennis John Young sworn 8 December 2021 [Third Young Affidavit] at [6].

[26] After realisation of the secured assets, the amounts now claimed by BNZ are:[8]

(a) $29,713,901.21 under the LPC Facility Agreement and Glencoe JV Guarantee; and

(b) $32,198,186.89 under the PHL Facility Agreement and the Kerr PHL Guarantee.

**BNZ's statement of claim**

[27] BNZ pleads 18 causes of action.[9] Eight of the first 16 causes of action are essentially duplicative: BNZ seeks to recover against the borrowers (under the relevant facility agreements) and the guarantors (under their guarantees) in both debt and for breach of contract. BNZ says both causes of action are available because:

(a) the defendants assumed primary payment obligations (as opposed to obligations to indemnify or for costs) under the LPC and PHL Facilities and associated guarantees; and

(b) the defendants had contractual obligations either to pay BNZ the amounts owing at the relevant times (in the case of the primary borrowers) or to see to it that the primary borrowers met their respective repayment obligations.

[28] The final two causes of action are pleaded in the alternative to the primary causes of action. BNZ says that, under indemnities given by Mr Kerr, Mr Kerr is required to indemnify it for loss suffered if the defendants are correct that BNZ's claims are out of time.

**Legal principles – summary judgment**

[29] Rule 12.2(1) of the High Court Rules 2016 provides:

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8 At [9]; Second Young Affidavit at [31].

9 Amended statement of claim dated 29 November 2021.

> The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.

[30] The relevant principles governing a summary judgment application are well established and were not disputed by the parties:[10]

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

**Issues to be resolved**

[31] Determining whether the defendants have no defence to BNZ's claims that they are liable for the amounts said to be due and owing under the LPC and PHL Facilities involves these issues:

(a) Did the defendants contract out of the Limitation Act 2010?

(b) Did the defendants acknowledge their liability in writing to BNZ, creating fresh claims?

(c) Is BNZ's claim against Mr Kerr under the indemnities time-barred?

[32] Determining whether the defendants have no defence to BNZ's claim that they are liable to pay BNZ the Costs Award raises these issues:

(a) Is the Costs Award irrecoverable from Galt and Glencoe JV because their liability is limited to the value of their security properties?

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10 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26].

(b) If so, is the Costs Award irrecoverable against LPC, Mr Kerr and PHL?

[33] Whether the amounts said to be due and owing by BNZ are wrong or uncertain involves these issues:

(a) Who bears the onus of establishing that the amounts are wrong or uncertain and what is the correct threshold?

(b) Is there any merit to the specific issues the defendants identify in relation to the amount said to be due and owing under the PHL Facility?

(c) Is there any merit to the specific issues the defendants identify in relation to the amount said to be due and owing under the LPC Facility?

(d) Was BNZ entitled to charge unarranged overdraft interest?

[34] The final issue to determine is whether summary judgment should be declined because Mr Kerr has a counterclaim against BNZ that should be set off against BNZ's claim.

[35] Before considering these issues, I will set out the terms of the facilities, guarantees and indemnities, on which much depends.

## Relevant terms of the facilities, guarantees and indemnities

*The LPC Facility – LPC's obligation as Borrower to repay the loan*

[36] Clause 7.1 deals with LPC's obligation to repay the loan on the LPC Expiry Date:

> **Repayment:** the Borrower shall repay the Outstanding Moneys in full and in cleared funds by no later than 2.00pm on the Expiry Date.

[37] "Outstanding Moneys" is defined to mean the "Outstanding Amount" (the aggregate principal amount of all outstanding drawings), all interest (including default interest), fees, costs and other expenses owing by LPC to BNZ, and any other amounts owing by LPC to BNZ under the Transaction Documents.

[38] The "Transaction Documents" are defined as the LPC Facility Agreement, the "Security" and any other agreement or document that BNZ and LPC agree is a Transaction Document.

[39] "Security" means the documents listed in Schedule 5, each "Collateral Security" and any other documents BNZ agrees will constitute security for the purposes of the LPC Facility. The securities listed in Schedule 5 include a general security deed and a specific security deed from LPC over the "Deposit Account"; the Galt mortgage over New Chums Beach; and a general security deed from Pyne Family Holdings Ltd. The other Kerr-related companies who were Guarantors but are not defendants also gave mortgages over specific properties.

*Guarantees of LPC's borrowing by LPC, Mr Kerr, Galt and PHL*

[40] The Guarantee is found at cl 13 of the LPC Facility Agreement under the heading "Guarantee and Indemnity".

[41] Clause 13.1 contains the Guarantee, which is a cross-guarantee. It states that, subject to cl 13.2, "each Guarantor jointly and severally guarantees to the Lender the due and punctual payment by each other Guarantor of that other Guarantor's Guaranteed Indebtedness".

[42] Clause 13.2 limits the liability of some Guarantors to the value of their secured property. The only relevant Guarantor affected by this limitation is Galt, whose liability is limited to the value of the New Chums property.

[43] The Guarantors are identified at Schedule 1 to the LPC Facility Agreement. They include the Borrower (LPC), Galt, Mr Kerr, and PHL (at the time called Pyne Family Holdings Ltd). There were other companies related to Mr Kerr named as Guarantors who are not defendants in this proceeding because their liability was limited to the value of their security properties and the securities have been realised.[11]

[44] The term "Guaranteed Indebtedness" is defined at cl 1.1 as:

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11 Equity Partners Finance, Mokopeka Holdings Limited and Glencoe Station Limited.

> **"Guaranteed Indebtedness"** means, when used with reference to a Guarantor, all amounts of any nature which that Guarantor (whether alone, or jointly or jointly or severally with any other person (whether or not a Guarantor) is, or may at any time become, liable (whether actually or contingently) to pay to the Lender (whether alone, or jointly and severally with any other person) under the Transaction Documents and, when used without reference to a particular Guarantor, means the Guaranteed Indebtedness of the Guarantors collectively, and a reference to Guaranteed Indebtedness in either context includes any part of it.

[45] Clause 13.3 contains the indemnity. It states:

> **Indemnity:** Each Guarantor jointly and severally indemnifies the Lender against all costs, losses and liabilities (including legal expenses on a full indemnity basis and goods and services and similar taxes thereon) incurred or sustained by the Lender at any time as a consequence of:
>
> (a) any Guaranteed Indebtedness not being recoverable from the Guarantor under the guarantee given in clause 13.1; or
>
> (b) any monetary obligation of a Guarantor to the Lender under the Transaction Documents not being duly satisfied or performed by that Guarantor.

[46] The term "costs" is defined as "any charges, fees, commissions, indemnities, taxes, damages, losses, expenses (including without limitation, legal fees and expenses), liabilities, fines and penalties."

[47] Clause 13.4 addresses "Payment". It states that if a Guarantor does not pay all or part of its Guaranteed Indebtedness to BNZ by the due date for payment, each other Guarantor must pay the Guaranteed Indebtedness to BNZ (whether or not payment has been demanded).

[48] Under cl 13.9, "Liability", each Guarantor is liable under the Guarantee as a principal debtor and not merely a surety, and each of the Guarantor's obligations are unconditional and irrevocable.

*Glencoe JV's guarantee of LPC's borrowing*

[49] Glencoe JV guaranteed LPC's indebtedness to BNZ through the separate Glencoe JV Guarantee.

[50] The Guarantee is at cl 2.1 under the heading "Guarantee and Payment." It states:

> **Guarantee:** The Guarantor unconditionally and irrevocably guarantees to the Beneficiary the due and punctual payment of the Guaranteed Indebtedness as and when it becomes due and payable under the Transaction Documents (whether on the normal due date, on acceleration or otherwise) and the due observance and punctual performance of and compliance with the Obligations.

[51] Guaranteed Indebtedness means:

> … all indebtedness (whether on account of principal moneys, interest, bank fees or charges, taxes or otherwise) due, owing, payable or remaining unpaid by the Principal Debtor to the Beneficiary under the Facility Agreement and includes any part thereof;

[52] The "Principal Debtor" is LPC.

[53] The term "Obligations" is defined as:

> … all covenants, conditions, stipulations, representations, warranties, guarantees, undertakings, assurances, agreements and other obligations of any nature (whether present or future, express or implied, actual or contingent, secured or unsecured and whether incurred alone, severally, jointly and severally, as principal, surety or otherwise) of any Relevant Party to or for the Beneficiary under, or contemplated by, any of the Transaction Documents;

[54] A "Relevant Party" is:

> … the Guarantor, the Principal Debtor, and any other person (other than the Beneficiary) that is party to a Transaction Document;

[55] And "Transaction Documents" are defined as:

> … this Deed, the Facility Agreement, each Transaction Document (as defined in the Facility Agreement) and all other agreements setting out the terms of the Guaranteed Indebtedness, any document setting out the terms of Collateral Security and any other document that the parties agree will be a Transaction Document for the purposes of this Deed (and when used in relation to any particular person, means every Transaction Document to which that person is party);

[56] Clause 2.2 concerns "Payment" and provides:

> If, for any reason, the Principal Debtor defaults in the due and punctual payment to the Beneficiary of all or any of the Guaranteed Indebtedness, the

> Guarantor undertakes to pay the relevant amount to the Beneficiary on demand.

[57] By virtue of cl 3.1, Glencoe JV is deemed a principal debtor and not merely a surety.

[58] Under cl 8, Glencoe JV indemnifies BNZ if any of the Guaranteed Indebtedness is irrecoverable from LPC or from Glencoe JV under the Guarantee.

*The PHL Facility – PHL's obligation as Borrower to repay the loan*

[59] PHL's obligation to repay the PHL Facility is recorded in cl 6.1:

> **Repayment:** the Borrower shall repay each Drawing in cleared funds by no later than 2.00pm on the last day of the Interest period for the Drawing. Any Outstanding Moneys on the Expiry Date shall be repaid or paid (as the case may be) in full by no later than 2:00pm on that date.

[60] "Outstanding Moneys" is defined in the same way as it is in the LPC Facility Agreement.

*Mr Kerr's guarantee of PHL's borrowing*

[61] Mr Kerr's guarantee of PHL's indebtedness to BNZ is contained in the separate Kerr PHL Guarantee. The Guarantee is found in cl 2 under the heading "Guarantee, Indemnity and Payment." Mr Kerr is the only Guarantor of PHL's borrowing.

[62] The wording of the Guarantee at cl 2.1 is in all material respects the same as the Glencoe JV Guarantee:

> **Guarantee:** The Guarantor unconditionally and irrevocably guarantees to the Secured Party the due and punctual payment of the Guaranteed Indebtedness as and when it becomes due and payable under the Transaction Documents (whether on the normal due date, on acceleration or otherwise) and the due observance and punctual performance of and compliance with the Guaranteed Obligations.

[63] The Payment clause at 2.3 is a variation of the equivalent clauses in the LPC Facility Agreement and the Glencoe JV Guarantee, stating:

> **Payment:** If, for any reason, the Borrower does not pay all or any part of the Guaranteed Indebtedness to the Secured Party on or before the due date for

payment, the Guarantor shall pay the Guaranteed Indebtedness to the Secured Party on demand (whether or not demand for payment has been made on the Guarantor or any other person).

[64] The term 'Guaranteed Indebtedness' is defined as:

> … all Indebtedness (of whatever nature and whether present or future or actual or contingent and whether on account of principal moneys, interest, fees or charges, lax or otherwise) due, owing, payable or remaining unpaid by the Borrower to the Secured Party including without limitation under the Transaction Documents (in each case whether alone or together with any other or as principal, guarantor, surety or otherwise) and includes any part thereof.

[65] 'Guaranteed Obligations' is defined as:

> … all covenants, conditions, stipulations, representations, warranties, guarantees, undertakings, assurances, agreements and other obligations of any nature (whether present or future, express or implied, actual or contingent, secured or unsecured and whether incurred alone, jointly, severally, or jointly and severally, as principal, surety or otherwise) of the Borrower to or for the benefit of the Secured Party including without limitation under, or as contemplated by, each or any of the Transaction Documents.

[66] The indemnity is contained at cl 2.2:

> **Indemnity**: As a separate and additional indemnity under this Deed, the Guarantor unconditionally and irrevocably indemnifies the Secured Party against all costs incurred or sustained by the Secured Party at any time as a consequence of:
>
> (a) **Guaranteed Indebtedness**: any Guaranteed Indebtedness (or any amount which, if recoverable, would have formed part of the Guaranteed Indebtedness) not being recoverable or recovered from the Guarantor under the guarantee given in clause 2.1; or
>
> (b) **Monetary Obligation**: any monetary obligation of the Borrower to the Secured Party under the Transaction Documents not being duly satisfied or performed by the Borrower.
>
> This clause shall apply to any of the Guaranteed Indebtedness (or any amount which, if recoverable, would have formed part of the Guaranteed Indebtedness) which is not or may not be recoverable or recovered for any reason (whether or not within the Secured Party's knowledge) including any legal or equitable limitation, disability or incapacity of or affecting the Borrower, any other Relevant Party or any other person, any transaction relating to such moneys being or becoming at any time void, voidable, defective, or otherwise unenforceable and any other circumstances which allow the Borrower or the Guarantor to avoid paying such amounts, in whole or in part.

[67] The term "costs" is defined by reference to the PHL Facility Agreement as including: "any costs, charges, fees, commissions, indemnities, taxes, damages, losses, expenses (including legal fees and expenses on a full indemnity basis and goods and services and similar taxes thereon)".

[68] Under the heading "Guarantor as Principal Debtor", Mr Kerr's liability is deemed to be the liability of a principal debtor and not merely a surety.

## LIABILITY

### The defendants' time-bar defence

[69] Under s 11 of the Limitation Act 2010 (**the Act**), it is a defence to a money claim if a defendant proves that the date on which the claim is filed is "at least 6 years after the date of the act or omission on which the claim is based (the claim's **primary period**)".

[70] The defendants say that none of the Guarantees are on-demand guarantees, and as such, the relevant act or omission is the date of default by LPC and PHL.[12] They point to the terms of the Guarantees.

[71] Clause 13.4 of the LPC Facility Agreement provides that the Guarantee is triggered immediately upon payment default by LPC, without any requirement to make demand. The defendants submit that the immediate triggering of the Guarantee is supported by the principal debtor clause at 13.9 of the LPC Facility Agreement.

[72] While cl 2.2 of the Glencoe JV Guarantee seemingly requires a demand of Glencoe JV, Glencoe JV submits that the principal debtor provision at cl 3.1 obviates that requirement. It says that the effect of such clauses is to constitute the guarantor as a principal debtor such that demand is not a precursor to enforcement.[13]

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12 Mr Kerr's submissions dated 8 December 2021 at [15]–[16] and First, Second, Third and Fifth Defendants' submissions dated 8 December 2021 at [20].

13 Wayne Courtney, John Phillips and James O'Donovan (eds) *The Modern Contract of Guarantee, English edition* (3rd ed, Sweet & Maxwell, London, 2016) at [10-115].

[73] As regards the Kerr PHL Guarantee, the payment clause purports to contain a requirement for a 'demand', but immediately follows that with the words "whether or not demand for payment has been made on the Guarantor". Mr Kerr submits that there is therefore no requirement for a demand to trigger his guarantee of PHL's Indebtedness and Obligations. Further, that the requirement for a demand would have been obviated in any event by the presence of the principal debtor provision at cl 3.1, which means that on default the lender can take immediate steps against the guarantor.[14]

[74] The defendants say that it follows that the relevant "act or omission" for the purposes of the Act is the date(s) of default by LPC and PHL. LPC defaulted on the LPC Expiry Date on 31 May 2011. Accordingly, the defendants say that the primary period under the Act for claims against the Guarantors began on 31 May 2011 and expired on 31 May 2017. BNZ did not issue proceedings against the defendants until 5 May 2021. Thus, BNZ's claims against the Guarantors of the LPC Facility are time-barred.

[75] In relation to the PHL Facility, PHL defaulted on the PHL Expiry Date on 28 May 2013. Accordingly, the defendants say that the primary period for a claim against Mr Kerr as Guarantor began on 28 May 2013 and expired on 28 May 2019. As a result, BNZ's claim against Mr Kerr under the PHL Guarantee is also time-barred.

[76] BNZ does not dispute that the Guarantees are not on-demand guarantees. Nor does it dispute that where a guarantee is not an on-demand guarantee, the relevant "act or omission" is the date of default by the borrower.

[77] However, BNZ says that the parties contracted out of the Act, so the defence of time-bar is not available to the defendants.

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[14] Relying on *MS Fashions Ltd v Bank of Credit and Commercial International SA (in liq)* [1993] Ch 425 (CA) at 447.

**Did the defendants contract out of the Limitation Act 2010?**

[78] BNZ relies on cls 13.7 of the LPC Facility Agreement, 3.1 of the Glencoe JV Guarantee and 3.2 of the Kerr PHL Guarantee. It argues that these clauses exclude the application of the Act.

[79] Clause 13.7 of the LPC Facility Agreement states:

> **Liability not prejudiced**: Neither the liability of a Guarantor, nor any of the rights of the Lender under this Guarantee shall be affected or discharged by anything which, apart from this clause, might operate to affect or discharge the liability of, or otherwise provide a defence to, a Guarantor (whether or not known to, or done, or admitted to be done by a Guarantor of the Lender, or any other person).

[80] Clause 3.1 of the Glencoe JV Guarantee provides:

> **Principal Debtor**: The Guarantor's liability to the Beneficiary under this Guarantee is deemed to be the liability of a principal debtor, and not merely a surety and such liability will not be affected or diminished, nor will any security or guarantee provided by the Guarantor be released or discharged, by any act, omission or matter which, but for this clause 3.1 would have released the Guarantor wholly or partly from its liability to the Beneficiary including (without limitation):
>
> (a) Granting of Time: the granting of any time, credit, indulgence, waiver or other concession to any Relevant Party or any other person whether by the Beneficiary or any other person (whe ther or not at the request of the Relevant Party or other such person);
>
> (b) Insolvency: the dissolution of any Relevant Party or any other person or the appointment of any receiver, manager, administrator, inspector, trustee, statutory manager or other similar person in respect of any Relevant Party or any other person over the whole or any part of its or their respective assets or any step being taken towards such dissolution or appointment;
>
> (c) Change in Position; any Relevant Party or other person being party to an amalgamation, assignment for the benefit of creditors, scheme of arrangement, composition of debts, scheme of reconstruction or change in constitution, composition, slab.ls or control whether by reason of a change in constitutive documents or by incorporation or the death, incapacity, retirement, appointment or admission of any partner, trustee or other person;
>
> (d) Liability Ceasing: any liability of a Relevant Party or any other person ceasing from any cause whatever (including any release or discharge by the Beneficiary or by operation of law);
>
> (e) Other Agreements: any person providing or joining in providing any Transaction Document or other agreement, guarantee or security or the failure by any Relevant Party or any other person to provide, or It being incompetent

> to give, any Transaction Document or any other agreement, guarantee or security;
>
> (f) Other Obligations: any Transaction Document any other agreement, guarantee, or security in favour of the Beneficiary, or any right of the Beneficiary, at any time being or becoming in whole or in part void, voidable, defective or unenforceable for any reason or being released, discharged or varied in whole or in part;
>
> (g) Amendment: any amendment, waiver, compounding, compromise, release, abandonment, relinquishment or renewal of any Transaction Document or any other agreement, guarantee security, or any assets, or any rights of the Beneficiary against any Relevant Party or any other person ('change in circumstance') or any failure to notify any Relevant Party or such person of such change in circumstance; or
>
> (h) Enforcement: the enforcement of, or failure to enforce (including1 without limitation, the failure to make a valid demand), any rights under any Transaction Document or any other agreement, guarantee or security or any law.

[81] The Kerr PHL Guarantee has the same provision at cl 3.2, with Mr Kerr deemed a principal debtor in the preceding cl 3.1.

[82] BNZ says that as it provided PHL, LPC and the Guarantors, including Mr Kerr, with additional time to repay the amounts owing under the LPC and PHL Facilities after their expiry, these clauses are engaged and their effect is to exclude the Act.

[83] Further, BNZ submits that these provisions are consistent with s 41 of the Act, which provides that no provision of the Act "makes ineffective, or prevents the enforcement of, an agreement that conflicts or is inconsistent with, or that modifies or prevents some or all of the operation or effects of, a defence under this Act." BNZ submits that the Act was not intended to change the position prior to the Act's commencement that gave parties the freedom to vary to time limits;[15] and s 41 expressly contemplates and permits agreements to contract out of its application.

[84] Additionally, BNZ says that s 41 does not require an agreement to be explicit that the parties are contracting out of the Act (i.e. by specifically referring to the Act). It says that s 41 is clear that "an agreement" that is merely inconsistent with the Act is enough to exclude or limit its operation.

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15 Chris Corry *Limitation Defences in Civil Cases: Update Report for the Law Commission* (NZLC MP16, 2007) at [166].

[85] The defendants advance several arguments for why these clauses do not exclude the operation of the Act. First, that their purpose is to ensure that any steps taken as between the lender and another party (borrower or co-obligor) will not release the guarantor, i.e. they render the guarantor a principal debtor. Their purpose is not to exclude the operation of the Act.

[86] Second, because BNZ's interpretation would result in the clauses operating as exclusion clauses overriding a statutory right, the *contra proferentem* rule applies and "clear and unambiguous language" is necessary for the exclusion to operate.[16] The defendants submit that the wording is nowhere near clear enough to override statutory rights under the Act. Clause 13.7 of the LPC Facility Agreement is vague and ambiguous, in the form of a boiler-plate provision, and makes no reference to the Act. In the absence of clear language, the clauses must be construed *contra proferentem*; that is, against BNZ as the party relying on them.

[87] They submit that the policy implications of a "wholesale and permanent exclusion of the limitation period" in a contract have not yet been considered in New Zealand. They highlight cases from the United States where they say it has been held that an agreement to permanently exclude a limitation statute is void on public policy grounds.[17] They submit that s 41 permits contracting out in the sense of parties agreeing to vary the limitation period rather than to permanently exclude it entirely.

[88] In response, BNZ contends that in New Zealand exclusion clauses are not interpreted *contra proferentem* but according to their natural and ordinary meaning. The bank submits that where the parties are commercial entities who received legal advice throughout, there is no basis for reading down the clauses which, on their natural and ordinary meaning, and consistent with s 41, exclude the Act.

[89] I will now set out my conclusions on these submissions.

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[16] Matthew Barber and Stephen Todd *Burrows, Finn and Todd on the Law of Contract in New Zealand* (online ed, LexisNexis) at [7.3.1].

[17] *First Nat Bank of Eastern Arkansas v Arkansas Development Finance Authority*, 870 SW 2d 400 at 402 (Ark CT Appeal, 1994), *Haggerty v Williams*, 84 Conn App 675 at 679-680 (2004), *T & N PLC v Fred S James & Co of New York Inc*, 29 F 3d 57 (2nd Cir, 1994), *Clarendon Nat'l Ins Co v Culley*, 2012 US Dist LEXIS 58067, *Collins v Environmental Systems Co*, 3 F 3d 238, 241-242 (8th Cir, 1993).

*Can parties to a contract exclude the operation of the Act entirely?*

[90] I was only referred to one New Zealand authority where contracting out of the Act was at issue or where the Court discussed s 41: *Lee v Mangapapa B2 Incorporation*.[18] That authority does not assist with the question before me.

[91] The predecessor to the 2010 Act, the Limitation Act 1950, had no provision enabling parties to contract out of or vary its application.[19] That said, the courts have upheld parties' agreed variation of the statutory limitation period. In *DHL International (NZ) Ltd v Richmond Ltd*, the Court of Appeal upheld a clause in which the parties had modified the statutory period by agreeing on a time limit of 30 days for notification of a claim.[20]

[92] In its 1988 report *Limitation Defences in Civil Proceedings*, the Law Commission noted that English limitation statutes and legislation based on those statutes, such as New Zealand's Limitation Act 1950, do not mention parties' ability to modify or exclude the statutory periods.[21] It observed however that case law recognises that contracting parties are free to stipulate that legal or arbitral proceedings must be commenced within a shorter period than that specified by legislation, and that this is not contrary to public policy.[22] The Commission stated further:[23]

> Although there is no substantial body of case-law suggesting that a contract to extend limitation periods is valid, we see no reason why parties to a dispute should not be able effectively to agree that a limitation defence not be taken for a particular period (or at all). This also follows from the nature of the limitation defence, which does not extinguish the underlying right, and may be waived by a defendant by simply choosing not to plea[d] passage of the limitation period as an affirmative defence.

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18 *Lee v Mangapapa B2 Incorporation* (2017) 140 Waikato Maniapoto MB 84 (140 WMN 83) at [37].

19 See J C Corry *The Laws of New Zealand — Limitation of Civil Proceedings* (online ed, LexisNexis) at [7] and n 2 and T Kennedy-Grant and M Weatherall *Kennedy-Grant and Weatherall on Construction Law — The Law of Contract* (online ed, LexisNexis) at [55,860] and n 27, citing English cases as examples of contracting out of a statutory limitation period: *Howe Sound School District No 48 v Killick Metz Bowen Rose Architects and Planners Inc* (2008) BCCA 195 and *Inframatrix Investments Ltd v Dean Construction Ltd* [2012] EWCA Civ 64.

20 *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 (CA).

21 Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, 1988) at [263].

22 At [263], referring to *Chitty on Contracts* (25th ed, vol 1) at [986] and [1891], citing *Atlantic Shipping Co Ltd v Louis Dreyfus & Co* [1922] 2 AC 250.

23 At [266].

[93] The Commission noted that some submissions made in response to its discussion paper expressed concern at the possibility of a more powerful party forcing a weaker party to agree to an “oppressive or unfair” limitation period. It decided however not to suggest law reform in this area.[24]

[94] A miscellaneous paper prepared a few years before the introduction of the 2010 Act, *Limitation Defences in Civil Cases: Update Report for the Law Commission*, also did not recommend preventing parties from contracting out of the Act.[25]

[95] There appears to have been no discussion at the time of the enactment of the Limitation Act 2010 around the introduction of s 41.

[96] Section 41 explicitly contemplates an agreement that “prevents some *or all* of the operation or effects of a defence under [the] Act.”[26] On the basis of those words, and in the absence of any authority on the issue, I conclude that it is theoretically possible for contracting parties to agree that a defence under the Act cannot be raised. However, for reasons which I will explain next, I agree with the defendants that it will need to be very clear from the words of the contract, read in their context, that this is what the parties intended.

*What is the correct approach to interpreting the clauses?*

[97] The clauses in question are different from many of the exclusion clauses dealt with in case law where one party’s liability is limited or excluded in specified circumstances. A typical clause may be one which limits or excludes a party’s right to seek damages for breach of contract by the other party. Here, on the meaning contended by BNZ, the clauses prevent the defendants from relying on a limitation defence. Despite that difference, both parties proceeded on the basis that case law and commentary concerning exclusion clauses was relevant.

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24 At [264]–[265].

25 Chris Corry *Limitation Defences in Civil Cases: Update Report for the Law Commission* (NZLC MP16, 2007) at [166].

26 (Emphasis added).

[98] Broadly, the Courts will approach the interpretation of an exclusion clause the same way that they approach the interpretation of any other contractual clause.[27] In other words, the Court will embark on the usual exercise of ascertaining the intention of the parties by asking what a reasonable third party informed of the relevant circumstances would consider the parties intended the words to mean (having regard to the context and background knowledge possessed by the parties at the time). These general principles of construction were most recently outlined by the Supreme Court in *Bathurst Resources Ltd v L & M Cole Holdings Ltd*,[28] reaffirming its earlier judgment in *Firm Pl 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand*.[29]

[99] At the same time, the Court will normally look for clear language or necessary implication before concluding that a party has agreed to "waive or limit a right of significance" under common law or statute.[30] As Asher J put it in a frequently cited passage from i-*Health Ltd v iSoft NZ Ltd*:

> [20] … in interpreting a limitation clause the interpretation exercise is like any other. However, because a limitation clause involves a party abrogating his rights at common law it is to be assumed that the parties will not have intended to limit liability unless clear and unambiguous language is used. I do not see this as involving an application of the contra proferentum rule. Rather, it results from the expectation that any reasonable person would have in interpreting the contract objectively, that no party will lightly limit its common law right to sue for damages.

[100] The Court of Appeal has endorsed this approach, again in a case where it was argued that the parties had surrendered their right to claim for damages under the terms of the contract (which prevented parties from bringing an action for a debt more than one year after the cause of action accrued).[31] The Court confirmed that:

> [32] … The approach to interpreting a limitation clause is like any other contractual interpretation exercise. The interpretation of the contract involves an inquiry as to what a reasonable and properly informed third party would

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27 *Dorchester Finance Ltd v Deloitte* [2012] NZCA 226 at [32]; *i-Health Ltd v iSoft NZ* Ltd HC Auckland CIV-2006-404-007881, 8 September 2010 at [20].

28 *Bathurst Resources Ltd v L & M Cole Holdings Ltd* [2021] NZSC 85.

29 *Firm Pl 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147. See also *Vector Gas Ltd v Bay of Plenty Energy* [2010] 2 NZLR 444 (SC), citing the principles of contractual interpretation referred to in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28.

30 *i-Health Ltd v iSoft NZ* Ltd HC Auckland CIV-2006-404-007881, 8 September 2010 at [45].

31 *Dorchester Finance Ltd v Deloitte* [2012] NZCA 226 at [33]–[34].

> consider the parties to mean.[32] The overall commercial context may be relevant.
>
> [33] Given the premise that an exclusion clause will enable a party to escape liability for a breach of a contractual promise, it will be assumed that a party will not have intended to limit liability unless clear and unambiguous language is used.[33] A court will ordinarily look for clear language or necessary implication before concluding that the right to claim for damages is extinguished. Such an intention will not be lightly attributed. The ultimate objective is to ascertain what the parties intended their words to mean in the particular factual context in which the contract was made.

[101] Recent decisions of this Court have echoed these comments.[34]

[102] As to whether the *contra proferentem* rule remains relevant, the authorities to which I was referred suggest that it continues to be invoked by the courts, but only where there is genuine ambiguity following the objective interpretative exercise described by the Supreme Court in *Bathurst Resources Ltd v L & M Cole Holdings Ltd.*

[103] In *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand*, the Supreme Court acknowledged the existence of the *contra proferentem* rule, citing *D A Constable Syndicate 386 v Auckland District Law Society Inc*.[35] In *D A Constable*, the Court of Appeal confirmed that in cases of genuine ambiguity, a court will resolve the ambiguity against the party who proffered the phrase. There, the rule was invoked in the interpretation of an insurance contract, with the Court finding the clause ambiguous and construing it in favour of the insured.

[104] In *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd*, the Court of Appeal interpreted a settlement negotiated by an insured and insurer where the insurer later argued that at the time of settlement both parties were mistaken about the measure of its entitlement.[36] The Court examined the exclusion clause in the settlement to

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32 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [4]–[5], [19]–[21], [61]–[64], [119] and [151]

33 *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 (CA) at 17–18; *Dairy Containers Ltd v Tasman Orient Line CV* [2004] UKPC 22, [2005] 1 NZLR 433 at [12]; *i-Health Ltd v iSoft NZ Ltd* [2011] NZCA 575, [2012] 1 NZLR 379 at [43]–[45]

34 See for example *JNJ Holdings Ltd v Kent Sing Trading Co Ltd* [2017] NZHC 3274 at [401] and *Winiata v Steedman* [2022] NZHC 502 at [22].

35 *D A Constable Syndicate 386 v Auckland District Law Society Inc* [2010] NZCA 237 at [69]–[70].

36 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67.

determine whether it had assigned the risk of any mistake to Prattley. It said the authorities reflected that:

> [62] … the object of interpretation is to ascertain the parties' presumed intention and give effect to it.[37] That remains true when an exclusion clause is in issue. A purposive or contextual interpretation does not require that the court first identify an ambiguity in the language; there may be cases, as in Shotover Mining, in which context and purpose make it clear that the general language of an exclusion clause cannot be taken literally. Any doubt may be resolved against the party benefiting from the exclusion. We note that it was not in issue before us that the contra proferentem rule survives as part of a court's interpretive toolkit.[38]

[105] The Court of Appeal agreed with the conclusion of this Court that the plain language of the settlement assigned the risk of a mistake to Prattley and there was no basis on which to read down those general words.

[106] In a recent case in this Court, *CBL Insurance Ltd (in liq) v Johnstone*[39], Gault J summarised the approach to interpreting exclusion clauses. He noted that the general method of contractual interpretation applies to exclusion clauses, but any lack of clarity must be resolved against the party seeking to exclude liability, citing *i-Health Ltd v iSoft NZ Ltd*. He observed that "in any event", the Court of Appeal stated in *Trustees Executors Ltd v QBE Insurance (International) Ltd* that genuine ambiguity must exist before the Court applies *contra proferentem*. Gault J went on to analyse the ordinary meaning of the exclusion clause in that case, concluding that the words were not ambiguous and so the plain meaning should apply.[40]

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37 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432 at [60].

38 *D A Constable Syndicate 386 v Auckland District Law Society Inc* [2010] NZCA 237, [2010] 3 NZLR 23 at [69]; *Tower Insurance Ltd v Skyward Aviation 2008 Ltd* [2014] NZSC 185, [2015] 1 NZLR 341 at [32]; and *QBE Insurance (International) Ltd v Wild South Holdings Ltd* at [18]. Compare *Bank of Credit and Commerce International SA (in liq) v Ali (No 1)* [2001] UKHL 8, [2002] 1 AC 251 at [66] per Lord Hoffmann, dissenting; and John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at 221–222.

39 *CBL Insurance Ltd (in liq) v Johnstone* [2021] NZHC 1393 at [89]–[92].

40 At [97]. See also *Stonewood Homes NZ (ChCh) Franchisor Ltd v Mettrick* [2017] NZHC 1659 at [21] where the Court held that the ordinary principles of contractual interpretation applied to guarantees and that where the words are ambiguous, *contra proferentem* applies and the clause should be resolved in favour of the guarantors; and *Farrand Orchards Ltd v Kerikeri Irrigation Company Ltd* [2020] NZHC 2840 at [42]–[44].

[107] I respectively take the approach of Asher J in *i-Health Ltd,* endorsed by the Court of Appeal in *Dorchester Finance Ltd v Deloitte*.[41] The clauses in question should be interpreted in the same way as any other – by seeking to ascertain the intention of the parties by asking what a reasonable third party informed of the relevant circumstances would consider the parties intended the words to mean, having regard to the context and background knowledge possessed by the parties at the time. Because the clause (under BNZ's interpretation) would abrogate a statutory right, it is to be assumed that the parties will not have intended to exclude that right unless clear and unambiguous language is used. As Asher J put it, this approach results from the expectation that any reasonable person would have when interpreting the contract objectively; that no party will lightly exclude their statutory right to raise a limitation defence. However, that is not to say that the ordinary and natural meaning of the words should be 'read down'. It simply means that clarity is required.

*The plain meaning of the words in their context*

[108] I find that the defendants have at least a reasonable argument that the clauses at issue do not clearly and unambiguously contract out of the Act, for the following reasons.

[109] First, the position of the clauses, at least in the Glencoe JV Guarantee and PHL Kerr Guarantee, supports the interpretation that their purpose is to ensure that any steps taken as between the lender and another party (borrower or co-obligor) will not release the guarantor. That is, they render the guarantor as principal debtor and have the effect of preventing equity operating to release the guarantor.[42]

[110] The relevant clause in the Glencoe JV Guarantee, cl 3.1 set out above, is headed "Guarantor as Principal Debtor". The words BNZ relies on as excluding the Act are part of a single sentence that deems the Guarantor a principal debtor and then provides

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41 *Dorchester Finance Ltd v Deloitte* [2012] NZCA 226.

42 At [206]. See *Regan v Brougham* [2017] NZHC 1091 at [21]–[22]; *Stonewood Homes NZ (ChCh) Franchisor Ltd v Mettrick* [2017] NZHC 1659 at [71]–[75]; and *Overton Holdings Ltd v Owens Properties Ltd* CA114/02, 24 October 2002 at [13]–[16]. For older but helpful discussions of such clauses, see *Bank of New Zealand v Baker* [1926] NZLR 462 (SC) and *Orme v De Boyette* [1981] 1 NZLR 576 (CA) at 579–581.

that the Guarantor's liability will not be released in any circumstances including those identified.

[111] The relevant clause of the PHL Kerr Guarantee, cl 3.2, is also found within a section headed "Guarantor as Principal Debtor". However, what is one sentence in the Glencoe JV Guarantee is divided into two separate clauses in the PHL Kerr Guarantee. Clause 3.1 deems the Guarantor a principal debtor. Clause 3.2 provides that the Guarantor's liability will not be released, including in the listed circumstances. BNZ submits that cl 3.2 must mean something different and additional to cl 3.1.

[112] However, the clause at issue is not placed within the "Guarantor as Principal Debtor" part of the LPC Facility Agreement. The relevant clause, 13.7, appears under the heading "Guarantee and Indemnity" with the sub-heading "Liability not prejudiced". The Guarantors are deemed principal debtors through a separate clause, 13.9.

[113] Second, there is considerable merit in the defendants' submission that the raising of a defence under the Act does not fall within the natural and ordinary meaning of the words used in these clauses.

[114] The Kerr PHL Guarantee provides that the Guarantor's liability will not be affected or diminished, nor will the Guarantee be released or discharged, by an act, omission or matter which "but for this clause 3.2 would have released the Guarantor wholly or partly from its liability". There is a credible argument that the Act does not operate to "release" a party from liability. Rather, it provides a defence that must first be pleaded. I consider this a reasonable argument that applies equally to the Glencoe JV Guarantee which, as noted, has substantially the same wording.

[115] The LPC clause states that neither the liability of a Guarantor, or rights of the lender, are "affected or discharged" by anything which "but for this clause, might operate to affect or discharge the liability of, or otherwise provide a defence to, a Guarantor". The defendants submit that the clause only applies to matters which would "affect or discharge liability" as this is the operative part of the clause, and the reference to "a defence" follows. They say that a limitation defence does not operate

to “affect or discharge liability”; it provides a defence that must first be pleaded. I consider that this submission is reasonably arguable.

[116] I find therefore that the defendants have at least a tenable defence that the parties did not contract out of the Act. Based on the words used and their placement in the documents, I do not consider that a reasonable third party would conclude that the defendants clearly intended to contract out of their statutory right to raise a limitation defence. It is relevant that these are boiler-plate provisions. The widespread exclusion by lenders of limitation defences to guarantors would be a matter of some general significance. In my view, and consistent with the authorities I have discussed, such wholesale exclusions would need to be clear and unambiguous. That is not the case here.

[117] Therefore, I proceed to the next issue on the basis that the Act applies.

**Did the defendants acknowledge their liability to BNZ, creating fresh claims?**

[118] The defendants who raise a defence of time-bar are Mr Kerr (as Guarantor of the LPC and PHL Facilities), Galt and PHL (as Guarantors of the LPC Facility).

[119] I note that the Borrowers, LPC and PHL, do not raise defences of time-bar. PHL does not appear to dispute that by making two part-repayments against the PHL Facility it acknowledged liability as Borrower, creating a fresh claim against it. [43]

[120] Glencoe JV also does not appear to dispute that by making a part-repayment of the LPC Facility, it acknowledged liability as Guarantor and created a fresh claim.[44]

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[43] On 5 May 2015, BNZ received part-payment of $1m from PHL in respect of the amounts outstanding under the PHL Facility: First Rodden Affidavit at [57] and DMR-1 0802. On 29 July 2016, BNZ received part-payment of $6,220.26 from PHL in respect of amounts outstanding under the PHL Facility: First Rodden Affidavit at [74] and DMR-1 0865.

[44] On 11 April 2017, BNZ received part-payment of $180,000 from Glencoe JV in respect of amounts outstanding under the LPC Facility. The $180,000 was the purchase price Glencoe JV received from the sale of part of its land to Glencoe Land Development Ltd. $63,983.50 of that amount was paid in reduction of the LPC Facility on 1 June 2017: First Rodden Affidavit at [78] and DMR-1 0981.

[121] BNZ says that its claims against Mr Kerr, Galt and PHL are not out of time because the Guarantors acknowledged their liability to BNZ for the guaranteed debt in writing, restarting the primary period.

[122] Section 47(1)(a) of the Act provides that if a claimant proves that, after the start date of a claim's primary period, the defendant acknowledges to the claimant in writing a liability to the claimant, the claimant is deemed to have a fresh claim on the day after the date or the latest of the dates on which the acknowledgement is given.

[123] The rationale is that it is "in the public interest that a debtor who acknowledges [their] debt, and so induces [their] creditor not to have immediate resort to litigation, should not then be able to claim that the debt is statute-barred because the creditor held [their] hand".[45]

[124] Mr Kerr, Galt and PHL each argue that they did not at any time acknowledge that they were liable to BNZ for the amounts outstanding under the LPC or PHL Facilities under their respective guarantees. Their main submission concerns Mr Kerr's capacity when he was communicating with BNZ. They argue that it is not enough to acknowledge a debt; a debtor must acknowledge a liability to pay. Where there is one borrower and one lender, an admission of a debt can be equated with an acknowledgment of liability. Here, however, Mr Kerr was wearing several different 'hats' and communicating with BNZ in several different capacities. Therefore, Mr Kerr submits, BNZ needs to point to something in which he clearly acknowledged personal liability as Guarantor, as distinct from liability of the Borrowers.

[125] Further, Mr Kerr deposes that the facilities were intended to be "self-amortising" facilities, that is, it was always intended that the facilities would be repaid through asset realisations.[46] Therefore, he says that rather than acknowledging his liability, when his emails to BNZ are placed in context, he was simply identifying assets that were to be realised to pay down the facilities. He claims that whenever he

[45] *Bradford & Bingley Plc v Rashid* [2006] UKHL 37 at [38].

[46] Affidavit of George Charles Desmond Kerr sworn 7 July 2021 [Third Kerr Affidavit] at [11] and [13].

referred to a corporate entity, an asset and a repayment, he was communicating that information on behalf of that entity, not in his personal capacity.

[126] Similarly, Galt and PHL say that there must be something in the acknowledgements to show that Mr Kerr was acknowledging liability for Galt and/or PHL as Guarantors of the LPC Facility. They say that Mr Kerr never did so. Rather, Mr Kerr spoke for the Borrower, LPC, and was merely providing information about assets they held as Guarantors.

[127] The defendants' secondary submission is that to the extent any acknowledgements were made, and except for the settlement deed discussed below, they only acknowledged liability to pay the principal amounts outstanding, not interest.

[128] Before considering these submissions, it is necessary to review the authorities for guidance on the correct approach to determining whether a statement is an acknowledgement for the purposes of s 47(1)(a) of the Act.

*The approach to determining whether a statement is an acknowledgement*

[129] There are only two New Zealand authorities concerning s 47(1(a), both decisions of Associate Judge Paulsen: *Inicio Ltd v Tower Insurance Ltd* and *Eversons International Ltd (in liq) v Bionutrient Customs Ltd*.

[130] In *Inicio*, Inicio brought proceedings in 2019 asserting that Tower Insurance had undervalued its insurance claim arising from damage to its property in the 2011 earthquake. It submitted that Tower had acknowledged its liability through a letter containing a written settlement offer in 2018, giving rise to a fresh claim under s 47.[47] The letter stated that Tower had reviewed Inicio's concerns that its insurance claim was settled without taking into account special features of the damaged property, and a quantity surveyor had quantified those features at $55,030.08. Tower said that based on the legal advice it had received, that amount "represent[ed] Tower's outstanding liability with your claim". Then, in a separate paragraph, Tower said it was prepared

[47] *Inicio Ltd v Tower Insurance Ltd* [2020] NZHC 90 at [10].

to make payment of $55,030.08 in full and final settlement of the claim. On its words, Associate Judge Paulsen found that the letter constituted an acknowledgement of liability. He rejected Tower's argument that it was simply an offer to settle a disputed claim for damages.[48]

[131] In *Eversons*, the liquidator of Eversons, which had gone into liquidation in 2018, made demand on Bionutrient for repayment of multiple sums Eversons had transferred to it in 2013 and 2014. It submitted that a letter from the director of Bionutrient in reply to the demand was an acknowledgement triggering s 47.[49] The letter read:

> Dear Andrew,
>
> In reply to your letter dated 24th October 2018, I wish to advise that Bionutrient Customs Limited did receive the payments as per your attached list.
>
> These were on forwarded to Australia and my company was only used as a vehicle to facilitate this. Accordingly Bionutrient Customs Limited does not have access to any funds in relation to these transactions.
>
> I therefore further advise it cannot make payment of $2,999,417.92 as requested.

[132] Associate Judge Paulsen concluded that the letter did not involve any express acknowledgement of liability and nor could any be inferred from the circumstances and the words used.[50] The liquidator had demanded "repayment" of the sums Everson had transferred Bionutrient, and Bionutrient simply provided explanations for those transactions and confirmed that it had no access to the funds. The Judge considered that Bionutrient's response contained assertions of fact, not an acceptance that Bionutrient was liable to repay Eversons even though it did not have the payments.

[133] Two cases under earlier versions of the Act also provide guidance. In *Frankton Gateway Apartments (2003) Ltd (in liq) v Sullivan*, when determining whether a statement was an acknowledgement under s 26 of the Limitation Act 1950, this Court said "the Court will examine what the document says in order to determine whether

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48 At [33]–[55].

49 *Eversons International Ltd (in liq) v Bionutrient Customs Ltd* [2020] NZHC 2989 at [32].

50 At [33]–[36].

or not it is an acknowledgement."[51] In that case, the liquidator of the plaintiff brought proceedings in 2011 seeking to recover advances the plaintiff had made to the defendant trustees prior to going into liquidation in 2004. It was argued that the claim was not time-barred because one of the defendants had acknowledged his indebtedness in the accounts for the trust up to 2007 and a deed of appointment of new trustees in 2011.[52] The accounts contained a statement of financial position which identified that a sum was owed to the plaintiff. The deed, which was signed by the defendant, stated that the investments and property as described in those accounts would vest in the new trustees and continuing trust. Although the accounts were not signed, Associate Judge Matthews held that the deed in combination with the accounts constituted an acknowledgement.[53]

[134] *Smith v Smith* was decided under the Statute of Limitations.[54] At that time, the law required there to be an acknowledgement of the debt coupled with a promise to pay. The acknowledgement by the defendant was as follows:

> Dear Bro-in-law –
>
> Yours with statement to hand last week. Would it put you to too much trouble to send me a list with dates of Wat's drawings and what he paid in. You say it won't be hard to understand, but when one does not expect such an amount to be owing, I feel I would like to see all the details. I can't understand why you did not put your claim through the solicitors when they were putting Wat's estate through. I know Wat did not expect such an amount to be owing. You knew he had that trouble, and yet you made no move to get a settlement in his lifetime. Hoping I am not putting you to too much trouble, and trusting both Mrs R and yourself are in good health. With kind regards, I am, yours truly, E Smith

[135] Sim J stated that:[55]

> Where there is a simple acknowledgement of a debt a promise to pay is implied therefrom. Where the acknowledge is coupled with other expressions, such a promise to pay at a future time or on a condition, or an absolute refusal to pay, it is for the Court to say whether these other expressions are sufficient to qualify or negate the implied promise to pay … If some debt is acknowledged, it is immaterial that the correctness of the amount claimed is disputed in the acknowledgement … And where the claim is for an account it is enough if there is an acknowledgement that an account is pending … Where

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51 *Frankton Gateway Apartments (2003) Ltd (in liq) v Sullivan* [2012] NZHC 2399.
52 At [48].
53 At [55]–[57].
54 *Smith v Smith* [1926] NZLR 311 (SC).
55 At 314–315.

> there is an unqualified admission that there is an unsettled account pending between two parties, which has to be examined, a promise to pay the balance when ascertained may be inferred from such an admission … The letter from the defendant does contain, I think, an acknowledgement sufficient to bring the case within these authorities.

[136] Authorities from the United Kingdom are also instructive. In *Bradford & Bingley Plc v Rashid*, the House of Lords considered whether statements made by a debtor, Mr Rashid, in two letters to the creditor constituted acknowledgements for the purposes of s 29(5) of the Limitation Act 1980.[56] In the first letter, an advice centre said on Mr Rashid's behalf:[57]

> Please find attached Mr Rashid's financial statement, which clearly indicates that at present he is not in a position to repay the outstanding balance, owed to you. However, my client requests that once his financial situation is stable, he will start to repay. This could be in year 2003/04.

[137] In a second letter, the advice centre stated:[58]

> I have informed my client, Mr M Rashid, of the contents of your letter. He is willing to pay approximately £500 towards the outstanding amount as final settlement. He is only able to afford this amount by borrowing from friends and family.

[138] The main issue on appeal was whether the written acknowledgements were inadmissible evidence pursuant to the 'without prejudice' rule. However, a subsidiary issue was whether either or both documents constituted an acknowledgement of Bradford & Bingley's claim within the meaning of the 1980 Act.

[139] Counsel for Mr Rashid submitted that unless there is an admission of a definite amount due, or an amount ascertainable by mere calculation, there is no acknowledgement within the statute. Lord Brown of Eaton-under-Heywood observed that there was some support for this argument in the view of Lord Denning MR in *Good v Parry,*[59] but that the issue was resolved by the Court of Appeal in the subsequent decision of *Dungate v Dungate.*[60]

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56 *Bradford & Bingley Plc v Rashid* [2006] UKHL 37.
57 At [46].
58 At [48].
59 *Good v Parry* [1963] 2 QB 418.
60 *Dungate v Dungate* [1965] 1WLR 1477 (CA).

[140] In *Dungate v Dungate,* the debtor's letter read, "Keep a check on totals and amounts I owe you and we will have account now and then … Sorry I cannot do you a cheque yet – terribly short at the moment". Holding this to be an acknowledgement of the claim, Diplock LJ said:[61]

> … an acknowledgement under this Act need not identify the amount of the debt, and may acknowledge a general indebtedness, provided that the amount of the debt can be ascertained by extraneous evidence.

[141] Russell and Sellers LJJ agreed, with Russell LJ stating that the words used in the letter were equivalent to the debtor stating "I owe you money". Not only was there an acknowledgement of the indebtedness, the quantum could also be established, as it had been, by extrinsic evidence.[62]

[142] In *Bradford & Bingley*, Lord Brown said:[63]

> Assume, for example, that a creditor seeks to recover an outstanding debt of £1,000, and the debtor, asserting that he has made a number of unreceipted cash payments and partial repayment, admits that he owes something but not as much as £1,000. It may be doubted whether Lord Denning would have regarded that as an acknowledgement, the precise sum owed being capable of ascertainment 'by calculation' and without 'separate agreement' of the parties. *Dungate v Dungate,* however, appears to me clear authority for holding that it *would be* an acknowledgement (although, had the debtor in fact admitted liability only for £500 rather than some unspecified sums short of £1,000, that in my opinion would constitute an acknowledgement of the claim only to the extent of £500 – see Kerr J's judgment in *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 1 WLR 565).

[143] Lord Brown concluded that *Dungate v Dungate* was rightly decided, confirming that "[a]cknowledgements are not confined to admissions of debts which are indisputable as to quantum as well as liability."[64] He concluded that each of the letters constituted a clear acknowledgement for the purposes of the 1980 Act.

[144] Similarly, Lord Hope of Craighead said he had no difficulty regarding the first letter as an acknowledgement of the claimant's claim within the meaning of the statute. He confirmed that the acknowledgement need not identify the amount of the debt and, referring to the judgment of Diplock LJ in *Dungate v Dungate*, an acknowledgement

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[61] At 1487.
[62] At 1488.
[63] *Bradford & Bingley Plc v Rashid* [2006] UKHL 37 at [58].
[64] At [60].

will be enough if the amount for which the debtor accepts legal liability can be ascertained by extrinsic evidence.

[145] He considered that the plain meaning of the words "the outstanding balance, owed to you" in the first letter was that the debtor was admitting he owed the claimant a sum of money which, for the time being, he was unable to pay. He considered that there could not be a clearer way of acknowledging that the defendant was under a legal liability to pay the outstanding balance. It was not disputed that the amount of the balance was capable of being determined by extrinsic evidence.[65]

[146] He considered that the wording of the second letter was slightly different, as it referred to "the outstanding amount", but the key to the meaning of that phrase lay in the use of the definite article. He considered that indicated that there was an amount representing the defendant's present state of indebtedness, which was readily ascertainable. He concluded that this letter too was an acknowledgement within the meaning of the statute.[66]

[147] The other members of the House of Lords agreed with the conclusions of Lord Brown and Lord Hope.

[148] In *Edginton v Clark*,[67] the English Court of Appeal said that it is not possible to set out any general rule as to what constitutes an acknowledgement; rather, whether a statement is an acknowledgement "depend[s] on the true construction of the document and all the surrounding circumstances."[68]

[149] In summary, the principles I discern from the statute and the New Zealand and United Kingdom authorities are:

(a) an acknowledgement must made be in writing by the defendant (or their agent) to the claimant;[69]

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65 At [22].
66 At [22].
67 *Edginton v Clark* [1964] 1 QB 367, [1963] 3 All ER 468.
68 At 158.
69 Limitation Act 2010, s 47(1).

(b) the acknowledgement can be made at any time after the start date of the claim's primary period (and need not be made during the primary period);[70]

(c) there is no requirement for proven reliance by the claimant on the acknowledgment;[71]

(d) no particular words are required, and the acknowledgement can be broad and informal provided that, judged objectively, the words used indicate an admission of liability to the claimant;

(e) in respect of a money claim, it is not necessary for the defendant to acknowledge the amount claimed or any other specific amount provided they acknowledge that they owe something, and the amount can be ascertained by extrinsic evidence;[72]

(f) if they acknowledge they owe something, it is immaterial that they dispute the correctness of the amount claimed;[73]

(g) on the other hand, if they acknowledge they owe a specific part of the amount claimed, their acknowledgement is limited to that part;[74]

(h) the acknowledgement must be read in the context of the document as a whole and all the surrounding circumstances.[75]

[150] The parties do not disagree on these basic principles.

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70 Section 47(1) and *Inicio Ltd v Tower Insurance Ltd* [2020] NZHC 90 at [36].

71 *Eversons International Ltd (in liq) v Bionutrient Customs Ltd* [2020] NZHC 2989 at [30].

72 *Bradford & Bingley Plc v Rashid* [2006] UKHL 37 at [21]; *Dungate v Dungate* [1965] 1WLR 1477 (CA) at 184; *Good Challenger Navegante SA v Metalexportimport SA* [2003] EWHC 10 (Comm) at p 199,200.

73 *Inicio Ltd v Tower Insurance Ltd* [2020] NZHC 90 at [49], citing *Smith v Smith* [1926] NZLR 311 (SC).

74 *Eversons International Ltd (in liq) v Bionutrient Customs Ltd* [2020] NZHC 2989 at [30] and *Bradford & Bingley Plc v Rashid* [2006] UKHL 37 at [58].

75 *Inicio Ltd v Tower Insurance Ltd* [2020] NZHC 90 at [36], citing *In re Flynn, decd (No 2)* [1969] 2 Ch 403 at 412 and *Heli Holdings Ltd v Helicopter Line Ltd* [2016] NZHC 976 at [726].

[151] The one point on which they disagree is the relevance of evidence of the subjective intention of the maker of the statement. Mr Kerr has sworn affidavits in which he states the capacity in which he made, and did not make, each of the alleged acknowledgements. Mr Goodall submits that this evidence of Mr Kerr's subjective intent when making the statements is admissible extrinsic evidence that provides context for his statements. The defendants place weight on Associate Judge Paulsen's statement in *Eversons* that when determining whether a written communication constitutes an acknowledgement, that communication "must be read as a whole and construed having regard to the circumstances under which it is written and *in the manner the writer intended to convey to the recipient*".[76]

[152] BNZ contends that the approach to interpretation of an alleged acknowledgement is a purely objective exercise, much like the approach to contractual interpretation.

[153] I agree with BNZ. To the extent that Mr Kerr provides evidence of background facts at the time he made the statements, that is relevant extrinsic evidence. The authorities are clear that the alleged acknowledgements must be read in their surrounding context. Such evidence might include other written or oral communications between Mr Kerr and BNZ, or other contextual facts known to both parties.

[154] However, Mr Kerr's evidence of what he meant or did not mean at any given point is not relevant to the interpretative exercise. An acknowledgement is a communication from one to another. The subjective uncommunicated intention of the maker of a statement does not form part of the acknowledgement. The acknowledgement must be judged on the words expressed, placed in their context, and from the point of view of a reasonable person. That is the approach taken in the authorities to which I have referred.

[155] This approach is consistent with the public policy behind the acknowledgement rule, which is to encourage creditors to give time to negotiate for payment of an admitted indebtedness without fear that the claim will become statute-

[76] At [30] (emphasis added).

barred.[77] The acknowledgement rule addresses the unfairness of a debtor who does not dispute their indebtedness and asks for more time to pay being able to then use that indulgence to rely on the statute.[78] It would undermine the policy behind the rule if a debtor could make a statement that, objectively speaking, conveyed the message that they admitted their liability; but then was able to raise a time-bar defence later by saying that is not what they meant at all.

*Are acknowledgements unsuitable for summary judgment?*

[156] Before continuing, I address the defendants' submission that the issue of whether the statements BNZ relies on are acknowledgements for the purposes of the Act is not suitable for summary determination. The defendants advance two reasons. First, it is important that the acknowledgements are assessed in the full context in which they were made. The defendants submit that the context is particularly important because Mr Kerr was acting in several different capacities over the period of the alleged acknowledgements. The defendants submit that direct evidence and cross examination is necessary for the Court to place his actions in context. Second, acknowledgements to overcome a time-bar where the party communicating is operating in different capacities is a novel area of law and involves a factual enquiry that is not appropriate in a summary judgment application.

[157] As to the first objection, it is relevant that an acknowledgement for the purposes of s 47 of the Act must be in writing. As noted, what is involved is an objective assessment of the written words used in the surrounding context. That will include background facts known to the parties. It is true that there is a risk in a summary judgment context that the Court will not have all the background facts before it in the way the Court will at trial.

[158] Against that, BNZ has placed the acknowledgements in their context by having Mr Rodden, Mr Kerr's contact at BNZ, file an affidavit setting out the full record of communications between BNZ and Mr Kerr from 2012 to January 2019. This involves

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77 *Bradford & Bingley Plc v Rashid* [2006] UKHL 37 at [38].
78 At [38].

a considerable volume of correspondence. In a second affidavit in reply, Mr Rodden provides further explanation and correspondence.

[159] Mr Kerr has had the opportunity to provide further contextual evidence. He has filed seven affidavits. In his affidavit sworn on 7 July 2021, he addresses the nature of the lending to LPC and PHL and his communications with Mr Rodden. He responds to each alleged acknowledgement, providing context for his statements and explaining the planned assets realisations and capital distributions. Additionally, he states the capacity in which he says he made each alleged acknowledgement. He only identifies four additional items of correspondence which he says are relevant to interpreting the alleged acknowledgements. He does not identify any oral discussions that he says provide context.

[160] When asked what contextual evidence the trial judge would have that is not before me, Mr Goodall identified BNZ's internal communications and file notes recording its understanding of the communications with Mr Kerr. I do not see how this information would be helpful to the objective exercise of determining whether a reasonable person would have understood the defendants to be admitting liability.

[161] Mr Goodall also submitted that the alleged acknowledgements should be put to Mr Kerr so he could respond and explain the capacity in which he was operating and in which he engaged with the bank. I have said what I think about that. In any case, Mr Kerr has done that in his 7 July 2021 affidavit.

[162] As to the second reason, it is correct that novel or developing points of law may require the context provided by trial to provide enough perspective.[79] However, as noted, the general principles applicable to the question of whether a statement is an acknowledgement for the purposes of the Act are largely agreed. Admittedly, none of the authorities referred to by the parties concern a situation where the maker of the statement could have been acting in different capacities. Yet in my view, this scenario does not call for a different approach to that established by the authorities. The question is still: would a reasonable person have understood from the words used, in

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[79] *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [62].

their context, that the maker of the statement was acknowledging liability, and if so, for whom?

*The alleged acknowledgements*

[163] In relation to the LPC Facility, the key acknowledgements BNZ relies on are:

(a) an email from Mr Kerr to Mr Rodden dated 13 March 2018;

(b) an email from Mr Kerr to Mr Rodden dated 22 June 2018;

(c) an email from Mr Kerr to Mr Rodden dated 30 August 2018;

(d) emails and presentations dated 12 and 13 November 2018;

(e) a settlement deed/repayment agreement dated 15 October 2019.

[164] In relation to the PHL Facility, the key acknowledgements relied on are:

(a) the email from Mr Kerr to Mr Rodden dated 22 June 2018;

(b) the email from Mr Kerr to Mr Rodden dated 30 August 2018;

(c) an email and presentation dated 23 November 2018;

(d) the settlement deed/repayment agreement dated 15 October 2019.

[165] There was six years of engagement between Mr Rodden and Mr Kerr before these alleged acknowledgements.[80] Before focusing on the key acknowledgements, I will briefly review these early communications because they provide important context.

[80] First Rodden Affidavit at [36]–[46].

*Early communications*

[166] In his introductory email to Mr Kerr on 14 June 2012, Mr Rodden stated that facilities extended to entities “related to you or associated with you” had expired or were in default. Mr Rodden explained that he and his colleague Rob Downie would manage the account relationship from then onwards.

[167] Mr Kerr responded that day:

> I will forward you the time step plan for exit of my companies from New Zealand.
>
> As part of this bnz is fully repaid.
>
> George

[168] Shortly after that, on 21 June 2012, David Cousins, Mr Rodden’s manager, wrote to Mr Kerr, copying Mr Rodden, recording the results of the bank’s review of Mr Kerr’s facilities and requesting a more detailed repayment proposal:

> Good afternoon George
>
> We refer to your recent emails in respect of various of your obligations to BNZ and note your intention to repay
>
> …
>
> Arrangements across a number of entities associated are in default. By way of summary, those in default include:
>
> <mime-attachment.gif>
>
> These facilities have been in arrears for a considerable period of time, with the Bank having allowed that time for you to remedy in an orderly manner. The current position is most unsatisfactory, and it is disappointing that despite the Bank’s patience that we are no closer to seeing this position rectified.
>
> Therefore, to ensure complete clarity on what you are proposing we consider, we now ask that you provide a more detailed payment proposal clearly setting out proposed timeframes, asset transactions and cash flows to repay the outstanding indebtedness …

[169] Mr Kerr responded that day from a personal email address setting out his “short term plan to restore my facilities.” He concluded:

> I had no intention of this taking this long – however it was a hostile takeover with many positives and a few negative consequences.

> The negative is we are dealing with your side of the bank
>
> The positive is that I control 77 per cent of 150m of Nta of PGC and 250m at Torchlight
>
> I will revert with a detailed plan ASAP
>
> George

[170] "PGC" refers to Pyne Gould Corporation Limited (**PGC**). PHL owned a substantial block of shares in PGC. These shares were the subject of the general security deed giving BNZ security in relation to the PHL Facility.[81] In around 2012, PHL's controlling shareholding in PGC was transferred to a New Zealand partnership, Australian Equity Partners Fun No.1 LP (**AEP LP**). In return, PHL acquired a proportionate interest in AEP LP as a limited partner. PHL received distributions from PGC via AEP LP.[82]

[171] On 17 July 2012, Mr Kerr emailed Mr Rodden, setting out his proposed repayment plan. In the email, he stated that he owned 77 per cent of PGC's 49 million in cash.

[172] On 1 August 2012, Mr Kerr asked whether BNZ was open to "proposals about accelerating repayment of all debt immediately…"

[173] On 24 December 2012, he stated: "It is my intention to facilitate the complete repayment of BNZ facilities as per previously advised path of an asset sale distribution…"

[174] On 8 July 2013, Mr Kerr wrote "I am keen to close out my relationship with nz and bnz, and expect this to be done tidily, very shortly."

[175] The correspondence between Mr Kerr and Mr Rodden continued and is exhibited to Mr Rodden's affidavit.[83] I resume the narrative in 2017.

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81 Third Kerr Affidavit at [34].
82 At [35] and [68].
83 First Rodden Affidavit.

*More recent communications*

[176] On 21 August 2017, Mr Kerr sent Mr Rodden an email from a personal email address. The email updated Mr Rodden in relation to expected payments towards the LPC Facility from the sales of the Galt New Chums property and part of the Glencoe JV property, and amounts expected from PGC. Mr Kerr wrote:

> On lpc – expect 13m of sales over next 120 days, in new chums and part glencoe
>
> On PGC, expect 5m on audit sign off shortly plus balance by capital return this year
>
> George

[177] Mr Kerr deposes that in this email he was advising on the funds that would become available following the asset sales and capital distribution described.

[178] On 13 March 2018,[84] Mr Kerr sent Mr Rodden an email from the same address providing an update on repayment of facilities, including the LPC Facility, ahead of their call.

[179] Under the heading "Pyne Trust", he wrote:

> 1. The judgment is due out between March 1 and June 1. We expect to win with Costs and damages
>
> 2. In the meantime we have been approached by Macquarie on behalf of the petitioners to negotiate a settlement agreement. The agreement is phase of finalising heads of agreement. The draft Deal sees an end to all proceeding and the exit of petitioners from partnership at price that implies 130m of damages and all costs
>
> 3. PGC Payment of 5m plus. For discussion re timing

[180] Under the heading "Lothian", he wrote:

> 1. Glencoe – one contract 3.5m just waiting on council – which is late but due this month. The second site at comparable price will then be sold.
>
> 2. New Chums. For discussion re price. 10m available subject to one issue.

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[84] First Rodden Affidavit at [91]–[92] and DMR-1 1031.

George

[181] On 14 March 2018, Mr Kerr sent Mr Rodden an email requesting updated loan balances for the LPC and PHL Facilities. Mr Rodden responded that day that the PHL balance was $33,480,505 plus accrued interest and fees of $174,870. He said that the LPC balance was $52,133,094 plus accrued interest and fees of $360,610.

[182] Mr Kerr responded that "LPC doesn't look right" and asked Mr Rodden to send the statements.

[183] On 22 March 2018, Mr Rodden emailed Mr Kerr attaching statements dating back to 2012, which he said were further than Mr Kerr would be able to go online. He also attached a table containing a breakdown of these sums with the interest rates.

[184] On 11 May 2018, Mr Rodden emailed Mr Kerr recording the information he needed for the new person involved in reviewing the facilities at NAB (BNZ's parent company). Mr Rodden asked Mr Kerr for an update including a timetable for payment.

[185] On 22 June 2018, Mr Kerr sent Mr Rodden an email from the same personal email address with the subject line "Payment Timetable — email 1". Under the heading "Pyne Holdings", he stated:

> 5m – 60 days from 29/6/18
>
> All balance within 12 months following.

[186] Under the heading "LPC", he stated:

> Sale of Glencoe in two parts
>
> 3.25m settled by 30/9/18
>
> 3.75m settled by 31/3/19
>
> Sale of New Chums
>
> 10m by 31-12-18
>
> Rump – to be discussed

[187] In a follow-up email the same day,[85] Mr Kerr stated:

> The full supporting information will be provided following 29/6.
>
> This however is the timetable which is locked up.
>
> This is just a workload issue, the supporting information covers further details, contract timing and so forth. But I am in final close with court process so would prefer a little more time to make sure that is all complete.
>
> George

[188] Mr Kerr deposes that he stated the "rump" was to be discussed because LPC had an issue with the LPC interest component.[86]

[189] On 10 August 2018, Mr Kerr emailed Mr Rodden to say that he would send him a repayment plan in a few days.

[190] Then, on 30 August 2018, Mr Kerr sent Mr Rodden an email from the same personal email address with the subject line "Facilities". He stated that "the judgment and the PGC and Torchlight financial results now allow the commencement of final pay down of LPC and PH." He then wrote:

> LPC
>
> Glencoe and New Chums both being sold within 90 days. All proceeds to LPC.
>
> We expect this to clear original principal balance of LPC over that period.
>
> We understand rump will be taken to PH.
>
> We wish to make a proposal on the interest
>
> Account to BNZ for consideration, subject to our performance on the principal account.
>
> I would like to discuss with you tomorrow your time to agree a figure at 9am your time.
>
> Pyne Holdings
>
> Refer next email
>
> George

85 First Rodden Affidavit at [96] and DMR-1 1039.
86 Third Kerr Affidavit at [46].

[191] Mr Kerr deposes that he used the heading "LPC" in this email to make clear that he was communicating with BNZ on behalf of LPC.

[192] In a separate email that day, Mr Kerr explained the price and timeline for sale of the secured Glencoe JV property. He said "so have arranged for the combined 7.5m to flow to LPC on the sale of Lot 1. The settlement date is in 30 days."

[193] In another email Mr Kerr sent Mr Rodden that day from the same personal email address with the subject line "PH", he wrote:

> The principal and interest is to be cleared in full from a tax free distribution from PGC.
>
> …
>
> Dermot, I am happy and relieved, we have got to this point, and I look forward to discussing details tomorrow.
>
> George

[194] Mr Kerr deposes that he was advising on behalf of PHL that a distribution would be made by PGC, which PHL would ultimately receive for its PGC shares, held via AEP, and would pay BNZ.[87]

[195] Mr Rodden deposes that he did not hear from Mr Kerr about any repayment proposals so he sent a follow-up email on 1 October 2018.

[196] On 25 October 2018, Mr Kerr sent Mr Rodden an email from the same personal address. It included an update on the PHL Facility, outlining how funds would be paid from PGC to PHL. The email also contained an extract from a statement in PGC's annual report regarding a share buyback, with the full annual report attached. The last few points of Mr Kerr's email read:

> 9. PGC has no need for the capital and plans to execute a off market share buyback to return to shareholders, immediately after receipt
>
> 10. In NZD, this is 54 cents a share, tax free.
>
> 11. Pyne holdings payout will be applied to repayment of its BNZ obligation
>
> George

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87 Third Kerr Affidavit at [68].

[197] Later that month on 30 October 2018, Mr Kerr sent Mr Rodden text messages with a further update on the PHL repayment proposal. He referred to a repayment presentation he was preparing and set out the relevant "data" concerning how the repayments would be made and in what amounts. He stated a capital distribution from Torchlight would deliver "enough cash for payoff of Pyne Holdings".

[198] On 9 November 2018, Mr Kerr sent Mr Rodden a text message saying that the repayment proposals would be with him on Friday UK time. He said that the proposals allowed for the full repayment of principal outstanding under the LPC Facility Agreement and the PHL Agreement and that "interest proposal made".

[199] Mr Kerr sent Mr Rodden a PowerPoint presentation on 12 November 2018 setting out the LPC repayment proposal. In this email, Mr Kerr stated that he had attached the Appendix covering LPC, which was Appendix D to the main PHL presentation.[88] The presentation includes the PGC logo on the top left corner. Mr Kerr says this was an error and he corrected it the next day.

[200] The presentation sets out the amount owing on the LPC Principal Account (the "02 Account") of $20,903,278, the amount of expected cash from asset sales (Glencoe JV property Lots 1 and 2 and Galt's New Chums North Head) of $13,200,000 and the resulting shortfall on the 02 Account of $7,703,278. It records that the "00 Account" (LPC's current account from which interest payments on the LPC Facility had been debited) was "For discussion". It then stated: "Shortfall to be debited to Pyne Holdings and cleared from PGC Distribution."

[201] The next day, Mr Kerr emailed Mr Rodden an updated version of the LPC presentation. The presentation is titled "Paydown Update for BNZ: November 2018" and contains a banner across the top reading "Lothian Partners Capital Limited." The only change to the previous day's presentation is that instead of the shortfall after sale of the secured assets being transferred to PHL, Mr Kerr says that "residual assets" will cover this sum, said to be New Chums Lots subject to consent.

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88 First Rodden Affidavit at [106] and DMR-1101.

[202] Mr Kerr deposes that additional lots were expected to become available as part of the New Chums development and those lots could be sold and used to clear the remaining principal.[89]

[203] On 15 November 2018, Mr Kerr sent Mr Rodden an email attaching a letter titled "Torchlight Fund LP Investor Letter September 2018". The letter recorded that the partnership was "well placed to unlock further gains and returns to Partners." Mr Kerr explained that the letter was to form an appendix to the PHL presentation to BNZ. He stated that the funds for repayment would come from Torchlight, but he accepted that PHL was obliged to repay the PHL Facility.

[204] On 23 November 2018,[90] Mr Kerr sent an email to Mr Rodden from the same address attaching a presentation for PHL, which he said "[p]rovides details on capital return from TLP to PGC and impact on Pyne Holdings". The reference to "TLP" is Torchlight.[91]

[205] The presentation is named "Presentation to Bank of New Zealand: November 2018" and marked with the headnote Pyne Holdings Limited. The first three pages concern Torchlight Fund LP. The fourth page is concerned with PGC, and records that the company will receive 70.4 per cent of the Torchlight Fund LP Distribution (said on the previous page to be AUD40m). The fifth page concerns PHL, and records that the Principal Account balance was $20,000,000. The presentation states that PGC would make an initial distribution to PHL of $20 million to pay down the principal account. The interest was said "to be agreed".

[206] Mr Rodden responded on 4 December 2018, thanking Mr Kerr for sending through the information in relation to repayment of the bank. He asked Mr Kerr what his proposal was regarding interest on the PHL and LPC Facilities. Mr Rodden reiterated that BNZ needed to "agree and have confidence in payment of principal", "payment of interest" and "agreed date/s for payment certainty."

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89 Third Kerr affidavit at [57](b).
90 First Rodden affidavit at [110] and DMR-1 1114 and DMR-1 1115.
91 Third Kerr affidavit at [72].

[207] On 12 February 2019, Mr Kerr sent Mr Rodden an email from the same personal email address with the subject 'PH'. It was marked 'without prejudice.' He proposed that the PHL principal be repaid from the proceeds of the first distribution from Torchlight within 30 days of 31 March 2019. He proposed a discounted payment of interest and requested a waiver of overdraft fees. Mr Kerr signed this email as "George Kerr, Director, Pyne Holdings Limited".

[208] Over a month later, Mr Kerr sent a further repayment proposal for the PHL Facility, again marked 'without prejudice' and using the PHL sign-off. BNZ then sought to clarify the proposals, including the repayment tranches and dates.

[209] From then, Mr Kerr's lawyers, Burton Partners, became involved, as did BNZ's lawyers. A significant quantity of correspondence was exchanged between the lawyers over 2019 and 2020 and between Mr Kerr and Mr Rodden. A considerable portion of this concerned drafts of a settlement deed concerning repayment of the LPC and PHL Facilities.

*The settlement deed*

[210] On 15 October 2019,[92] Mr Tinkler of Burton Partners sent an email to Minter Ellison Rudd Watts (acting for BNZ) attaching the draft deed. He noted that the deed contained changes from a previous version and attached a "compare version" highlighting amendments made to that earlier draft.

[211] Mr Tinkler's covering email referred to the agreement as being signed "by George and the Lothian entities". On the signing pages of the agreement, Mr Kerr had signed above the "signature of director" block and entered his name above the "name of director" block for each of his companies. He had also signed the deed personally.

[212] This deed was not signed by BNZ. BNZ says that the parties could not agree on the timing for repayments and BNZ's ability to recover if the defendants were to default on any payments. It says it ultimately rejected the offer in the agreement because Mr Kerr had unilaterally sought to amend material aspects. Mr Kerr claims

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[92] First Rodden Affidavit at [121] and DMR-1 1226; Affidavit of George Charles Desmond Kerr sworn 20 June 2021 [Second Kerr Affidavit] at 133–186.

that the agreement did not progress due to the intervention of the COVID-19 pandemic.

[213] BNZ relies on this deed as an acknowledgement for the purposes of the Act. BNZ describes it as a "repayment agreement". The document itself uses the term "settlement deed" and so I use that term.

[214] Mr Kerr is a party to the agreement and defined as the "Primary Guarantor". He is described in the background section as a joint and several Guarantor of the LPC Facility and sole Guarantor of the PHL Facility, both on an unlimited basis. The background also records that both LPC and PHL are in default under their facilities. The amount of principal payable under each facility is recorded and that interest and other amounts are payable but does not specify those amounts.

[215] The background relevantly records:

> The Parties agree to settle all matters relating to the repayment of the Total Indebtedness in accordance with the terms of this Deed.

[216] The agreement defines the Total LPC Indebtedness as the sum of $20,903,277.98 of principal; and amounts charged under the LPC Facility Agreement from time to time and any other amounts for which an Obligor is liable, less any payments already made under cl 3.1 of the deed. The Total PHL Indebtedness is described in similar terms, with the principal being $19,996,355.62. The Total Indebtedness is defined as the sum of the Total LPC Indebtedness and the Total PHL Indebtedness (excluding accrued and unpaid interest on completed payments).

[217] Clause 2.1 relevantly provides:

> **2.1 Acknowledgements by the Obligors**
>
> (a) Notwithstanding anything in any document to the contrary, LPC, the Primary Guarantor, the LPC Guarantors and GLJV each irrevocably and unconditionally acknowledge and agree that:
>
> (i) an Event of Default has occurred under the LPC Facility Agreement (and each acknowledges receipt of a notice of declaration from the Lender to that effect); and

(ii) if any of the payments listed in clause 3.1 are not made in cleared funds to the Lender by the relevant payment date (time being of the essence), the Lender will be immediately entitled to seek recovery of the Total Indebtedness by any means including, without limitation, calling on the Primary Guarantor's personal guarantee.

(b) Notwithstanding anything in any document to the contrary, PHL and the Primary Guarantor each irrevocably and unconditionally acknowledge and agree that:

(i) an Event of Default has occurred under the PHL Facility Agreement (and each acknowledges receipt of a notice of declaration from the Lender to that effect); and

(ii) if any of the payments listed in clause 3.1 are not made in cleared funds to the Lender by the relevant payment date (time being of the essence), the Lender will be immediately entitled to seek recovery of the Total Indebtedness by any means including, without limitation, calling on the Primary Guarantor's personal guarantee.

[218] Clause 2.2 reads:

**2.2 Acknowledgements of Debt**

Notwithstanding anything in any document to the contrary (and without limiting any of other obligations of the Obligors to the Lender):

(a) The Primary Guarantor irrevocably and unconditionally acknowledges that he is personally liable to the Lender for the Total Indebtedness.

(b) LPC, the LPC Guarantors and GLJV irrevocably acknowledge that they are (in the case of Galt Nominees Limited as Trustee of the Wainuiototo Trust, Equity Partners Finance Limited and Mokopeka Holdings Limited up to the amount of the limits of liability specified in clause 13.2 of the LPC Facility Agreement) jointly and severally liable to the Lender for the Total LPC Indebtedness; and

(c) PHL irrevocably and unconditionally acknowledges that it is liable to the Lender for the Total PHL Indebtedness.

[219] Clause 3.1 lists six payments to be made to BNZ by the Obligors on specified dates between late November 2019 and mid-January 2020, totalling the "settlement amount" of $60,914,633.

[220] Under cl 4, the bank's rights are reserved unless and until all payments are made, but the bank agrees to refrain from taking action to enforce any of these rights unless and until any of the payments under the deed are not made.

[221] Under cl 5, the Obligors' indebtedness under the LPC and PHL Facility Agreements would be deemed to be paid in full, if all the payments under cl 3 are made in time and two years have passed since the date of the final payment.

*Part-repayments*

[222] Over the period just reviewed, Guarantors of the LPC Facility made part-repayments to reduce the amount outstanding, including:

(a) $3,000,000 by Glencoe Land Development Limited on 4 November 2013;

(b) $679,405.57 by Mokopeka Holdings Limited on 3 March 2016;

(c) $3,178,699.40 by Equity Partners Limited on 23 February 2017;

(d) $180,000 by Glencoe JV on 11 April 2017; and

(e) $909,739.35 by Mokopeka Holdings Limited on 6 June 2017.

[223] PHL made two part-repayments to reduce the amount outstanding under the PHL Facility:

(a) $98,578.00 on 28 January 2015; and

(b) $1,000,000 on 5 May 2015.

*Did Mr Kerr acknowledge liability for the Guarantors?*

[224] The defendants' essential case is that when corresponding with BNZ, Mr Kerr only acknowledged liability for LPC and PHL as Borrowers for the outstanding moneys under the LPC and PHL Facilities. They deny that Mr Kerr acknowledged liability for any of LPC, Glencoe JV, Galt or himself as co-guarantors of the LPC Facility; or for himself as Guarantor of the PHL Facility. Further, that as the facilities were intended to be self-amortising, Mr Kerr was only ever describing the asset realisation process underway to pay down the facilities.

[225] I do not consider that to be a sustainable defence for the following reasons.

[226] First, I reject Mr Kerr's characterisation of the correspondence as simply Mr Kerr providing the bank with information about planned asset realisations. Certainly, there was an ongoing dialogue about *how* the two facilities would be repaid and when. But that information was conveyed in the context of an overarching acknowledgment of liability and a commitment to repay all outstanding moneys under the two facilities. Mr Kerr's early communications shortly after default were that it was his "intention to facilitate the complete repayment of BNZ facilities". That remained his message throughout, subject to the question raised about the amount of interest on the LPC Facility towards the end of the dialogue.

[227] Second, in my view, the only way to interpret Mr Kerr's communications in context is that he was engaging with BNZ for all the Obligors under the LPC and PHL Facilities and the associated Guarantees.

[228] To recap, the structure of the LPC Guarantee is that each Guarantor (LPC, Galt, PHL and Mr Kerr) jointly and severally guarantees to BNZ the due and punctual payment by each other Guarantor of that other Guarantor's "Guaranteed Indebtedness". The Guaranteed Indebtedness of one Guarantor means the Guaranteed Indebtedness of the Guarantors collectively. Further, if a Guarantor does not pay all or any part of the Guaranteed Indebtedness to BNZ on or before the due date for payment, each other Guarantor must pay the Guaranteed Indebtedness to BNZ.

[229] Therefore, Galt, PHL and Mr Kerr were individually and collectively liable for the obligations of each other as Guarantors (and LPC as Borrower) under the LPC Facility. On LPC's default on 31 May 2011, they were obliged, individually and collectively, to immediately pay BNZ the outstanding balance owing on the LPC Facility. A demand need not be made.[93] Not paying BNZ placed them in default of their obligations under the LPC Guarantee and susceptible to immediate enforcement action.

[93] LPC Facility Agreement, cl 13.4.

[230] Glencoe JV guaranteed LPC's indebtedness to BNZ through the separate Glencoe JV Guarantee on equivalent terms.

[231] Similarly, under the Kerr PHL Guarantee, Mr Kerr guaranteed to BNZ the payment of all PHL's indebtedness to BNZ under the PHL Facility. It is common ground that a demand was not required to trigger the Guarantee.

[232] On PHL's default on 28 May 2013, Mr Kerr was immediately obliged as Guarantor to pay BNZ the outstanding balance owning on the PHL Facility. As no demand was required, Mr Kerr was in default of his obligation under the Kerr PHL Guarantee and BNZ could take immediate enforcement action against him.

[233] Therefore, the context for Mr Kerr's communications was that he and the corporate Guarantors were in a position of default under their Guarantees from the LPC and PHL Expiry Dates. Further, he and the corporate Guarantors of LPC's indebtedness were jointly and severally liable for the obligations of each other under the LPC Guarantee.

[234] Against that backdrop, Mr Kerr was the only person to engage with the bank over the entire period after default until lawyers became involved to negotiate the settlement deed. No one else communicated with the bank for the corporate Guarantors. When communicating with BNZ Mr Kerr referred to 'his facilities' and 'his companies'. His communications were wide ranging and concerned all the defendant entities.

[235] Mr Kerr specifically acknowledged Glencoe JV and Galt's liability as Guarantors of the LPC Facility on several occasions. In the 22 June and 30 August 2018 emails set out above, Mr Kerr is referring to realising Glencoe JV and Galt's secured assets and applying the proceeds to the LPC Facility. So too the 12 November 2018 presentation. The only reason the assets were being realised was because the entities were Guarantors and their obligations as Guarantors were secured by these assets. There is no other way to interpret these communications other than as communications on their behalf as Guarantors of the LPC Facility.

[236] Indeed, Mr Kerr has conceded that he was speaking for Galt and Glencoe JV as Guarantors when he sent the 13 March and 22 June 2018 emails, and that he was not just engaged with the bank for LPC as Borrower.[94]

[237] As for LPC and PHL, the acknowledged position at this point in time was that even after realisation of the secured assets (of all the LPC Guarantors, not just Glencoe JV and Galt), the proceeds would be insufficient to pay the amount outstanding on the LPC Facility. Mr Kerr, PHL and LPC were the only LPC Guarantors who would remain liable for the remaining balance to BNZ following the land sales, so any acknowledgements from this time were acknowledgements of their liability as Guarantors.

[238] Mr Kerr specifically acknowledged PHL's liability as Guarantor of the LPC Facility in the August 2018 email when he stated that "the rump" would be transferred to PHL after the proceeds of the asset realisations were applied.

[239] Mr Kerr again specifically acknowledged PHL's liability as Guarantor of the LPC Facility in the November 2018 presentation where he stated that the shortfall on the principal account after sale of the secured assets would be "debited to Pyne Holdings and cleared from PGC Distribution."

[240] As for Mr Kerr himself, there is no credible basis for saying that he ought to have been understood as speaking only for the corporate Guarantors but not himself personally. With the corporate Guarantors, he was in default of the guarantee of LPC's indebtedness from the LPC Expiry Date. It is common ground that demand was not required under the Kerr PHL Guarantee, so he was in default of that guarantee from the PHL Expiry Date.

[241] With two exceptions where he signed off as a director of PHL, Mr Kerr always wrote to BNZ as "George". Otherwise, he never identified a specific capacity in which he was writing. The contention that he was not writing for himself when writing as "George" without specifying that he was acting in any corporate capacity is not persuasive.

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94 Third Kerr Affidavit at [40] and [47].

[242] Additionally, Mr Kerr acknowledged that his personal guarantees were engaged shortly after the LPC Facility went into default, when he sold some personal assets to reduce the outstanding balances.

[243] These facts are recorded in an email exchange between Mr Downie and Mr Kerr from 26 September 2011 which Mr Kerr has placed in evidence in support of his counterclaim. The exchange concerns Mr Kerr selling shares in Heartland Bank held by the Kerr Family Trust and Pyne Trust to pay down the PHL and LPC Facilities.

[244] In an email dated 26 September 2011 to Mr Downie, Mr Kerr said:

> This is the final amount of the top up to cover interest.[95]
>
> (note these shares held by Kerr family trust and or Pyne trust)

[245] In an email dated 4 October 2011, Mr Kerr wrote:

> Pyne Holdings is easily 250k in credit (will cross check one more time but as of yesterday) from Kerr family trust FNZC settlements alone. You should have received well over a million in the last few days…
>
> LPC: PLUS interest receivable from Glencoe (365,000) plus other KFT HNZ sold to UK.

[246] Mr Downie responded:

> Just for clarity, the following is what we have seen: $183k and $144k in Kerr FT plus the note today which indicates cash on the 6th Oct (circa $485k) to Kerr FT all of which is yet to be transferred to an excess account. Note as per my approvals I can't extend LPC until we have excess cleared.
>
> Outstanding as at today:
>
> PH $1,736,848.11
>
> LPC $1,949,874.60
>
> **TOTAL: $3,686,722.71**
>
> That would indicate that that is $812k that is in train to go towards some of the excess. I am unsure whether the extra to make $1 million or to clear PH excess in full. The KFT HNZ sold to UK, when does this hit an account and in which one is it being directed to.

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95 Affidavit of George Charles Desmond Kerr sworn 28 February 2022 [Kerr March Affidavit] at [14].

[247] On 12 October 2011, Mr Kerr emailed Mr Downie:

> What time suits for a call tomorrow. Happy to confirm the transfers re HNZ.

[248] On 18 October 2011, Mr Kerr wrote to Mr Downey:

> Rob
>
> There is no material sales required of HNZ for LPC or NAB.
>
> NAB gets $2.1 back from Pyne Trust.
>
> Kerr Family Trust gets the $500k from the other day plus a bit more intercompany back.

[249] On 22 December 2011, Mr Kerr wrote to Mr Downie:

> 1. I have today given instructions for funds to be transferred to PH from sale of HNZ. The amount will be confirmed overnight and will clear excess and provide headroom for redraw to Torchlight if required to settle RCL.
>
> 2. LPC. I have also begun to liquidate for LPC. Depending on whether required for RCL these will be applied as received or in any event by COB 2011.
>
> George

[250] Mr Downie replied:

> Can you provide visibility as to how the LPC excess will be cleared by COB 29/12? Also [a] quick question, you need $14m for the settlement and $3.5 as a w/c fac within TL. Can you delay the full $3.5m w/c until 29/12 and clear the LPC excess now?

[251] Mr Downie emailed Mr Kerr again on 8 February 2012 summarising the steps Mr Kerr said he would take and urgently asking for the funds. He wrote:

> Based on the last few days discussions and emails there seems to be the following in train:
>
> 1. Sell LPC assets in to PGC in a staggered manner
>
> 2. Sell New Chums
>
> 3. Selling $4m face value of HNZ shares
>
> Can you confirm which are actually happening and when the $2.7m will be either in LPC or sitting as a surplus within PH.

> Once I have LPC in order and can get all red flags removed I can then sit with you and discuss what is needed for the next step. From previous talks there is obviously liquidity readily available and as usual several targets you wish to use it for. I NEED THOSE FUNDS IN NOW.

[252] Later that month, on 29 February 2012, Mr Downie wrote again to Mr Kerr:

> Without LPC being in order please do not come to me with a request to allow:
>
> George Kerr interests in AEP to be included in PH facility
>
> Allow sale of HNZ shares with funds going to AEP
>
> Also do not put money in and expect an approval within a short space as I have not started it. I am supportive of the request but won't put it up until LPC is in order and have a few things on the go myself at the moment so need a runway.

[253] Mr Kerr replied the same day, writing:

> The request would be for PGC to go to AEP at end of process.
>
> HNZ can be swapped non-cash, but PGC requires sign off, unless mistaken?

[254] To this, Mr Downie responded:

> Technically yes and it can be played that way but still need the $2.8m in the tin to show you want to bank with us going forward rather than stretching creditors for over 18mths. There is nothing stopping the guarantee for LPC being called upon (from PH) to clear excess immediately.

[255] Finally, on 29 June 2012, Mr Kerr confirmed to Mr Downie:

> I have sold the required HNZ to a coinvest partner off market to deal with PH.
>
> With them now – will send details am.
>
> George

[256] In his affidavit, Mr Kerr confirms that he sold a substantial amount of Heartland shares held by PHL and "other entities related to me" to pay down the overdrawn LPC and PHL Facilities.[96] The basis for his counterclaim is that he would not have had to do so if BNZ had not overstated the principal and interest balances on the LPC and PHL Facilities.

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[96] Kerr March Affidavit.

[257] Therefore, the further critical context for the alleged acknowledgements is that at the outset Mr Kerr behaved in a way that was consistent with an acknowledgement that he was personally liable for the LPC and PHL balances.

[258] I conclude that Mr Kerr acknowledged his personal liability, and that of LPC, PHL and Galt as Guarantors of the LPC Facility, in the emails and presentations relied on by BNZ set out at [163] above.

[259] I also conclude that Mr Kerr acknowledged personal liability as guarantor of the PHL Facility in the emails and presentations relied on by BNZ set out at [164] above.

*Did the defendants only acknowledge principal and not interest?*

[260] Towards the end of the dialogue, Mr Kerr raised a question about the correctness of the amount of interest BNZ said was owing on the LPC Facility. Subsequently, he put a proposal to BNZ to pay a lesser amount of interest for both LPC and PHL Facilities.

[261] The defendants submit that this means that if they acknowledged liability, they only acknowledged liability to pay the principal owing on the two facilities and not the interest.

[262] This defence will certainly fail. The contemporaneous documents show that there was an acknowledgement of liability to pay principal and interest on both facilities, but with Mr Kerr proposing that there be a negotiation between himself and BNZ about *the amount* of interest to be paid.

[263] To recap, on 14 March 2018, when Mr Rodden confirmed the PHL and LPC balances, Mr Kerr responded that "LPC doesn't look right".

[264] In his 30 August 2018 email setting out a repayment plan for the LPC Facility, Mr Kerr said "We wish to make a proposal on the interest".

[265] In another email Mr Kerr sent Mr Rodden that day with the subject line "PH", he wrote:

> The principal and interest is to be cleared in full from a tax free distribution from PGC.

[266] The November 2018 presentation for LPC records that the amount of interest to be paid was "to be discussed." Thus, the amount was to be discussed but liability to pay *some* interest was acknowledged.

[267] Mr Rodden responded on 4 December 2018, asking Mr Kerr what his proposal was regarding interest on the PHL and LPC Facilities. He attached a table showing current interest rates and said:

> The best way to address the matter is for the bank to consider and agree interest rates for the 2 loans and backdate them to when default occurred. Attached is a spreadsheet that will accommodate any decision on backdated interest rates. Note that the individual interest rates can be changed where I have inserted 15%.

[268] In an email dated 21 January 2019, Mr Kerr asked Mr Rodden if he could call him at 9.00 am New Zealand time to "propose the interest rate to apply". In a text message also sent that day, Mr Kerr asked Mr Rodden the same question: "Could we have a call at 9.00 am your time to agree interest please?" Mr Rodden's response was "Okay. But any interest rate agreement will need to be based on all the other information. When. How."

[269] Mr Kerr responded:

> Yes, I understand that. In short, the PGC distribution at the end of the first quarter deals with other holdings principal – the property sales deal with LPC principal by June 30. The interest rate is variable and covered by a final distribution – but depends on what that number is.

[270] On 12 February 2019, Mr Kerr wrote, as director of Pyne Holdings, proposing to pay interest of $8.75 million on 17 October 2019. This amounted to a 10 per cent discount on the interest amount calculated using the actual rate of 6.9 per cent for Pyne Holdings. Again, liability to pay some amount of interest was acknowledged.

[271] Based on these documents, I am satisfied that the defence will fail for two reasons. First, the case law is clear that if a debtor acknowledges they owe something, it is immaterial that they dispute the correctness of the amount claimed.[97] It is indisputable that Mr Kerr acknowledged liability to pay *some* interest on the both the LPC and PHL Facilities.

[272] Second, Mr Kerr did not dispute the correctness of the amount claimed as such. Granted, he initially said that the LPC interest "does not look right". But he did not take that any further. Rather, subsequent correspondence involves Mr Kerr "proposing" to pay a lesser amount of interest than that claimed by BNZ. There is a distinction between disputing liability; and acknowledging liability but negotiating to pay a lesser sum. I consider that it is apparent from the documents that Mr Kerr was doing the latter.

*Is the settlement deed an acknowledgement?*

[273] The defendants applied to have this document excluded on the basis it was subject to 'without prejudice' privilege. Associate Judge Bell determined the application as a preliminary matter.[98] The Judge held that the privilege did not apply because there was no "dispute" capable of giving rise to the privilege. The defendants sought leave to appeal that judgment, but both Associate Judge Bell and the Court of Appeal declined leave on the basis that any appeal should be pursued by the defendants with any appeal of the summary judgment determination. To preserve the position in the meantime, the Court suppressed the judgment. I proceed on the basis that the document is admissible evidence.

[274] BNZ relies on the following aspects of the settlement deed as constituting an acknowledgement by Mr Kerr of his personal liability as Guarantor of both the LPC and PHL Facilities, as well as the liability of the other defined Obligors:

(a) Mr Kerr is a party and defined as the "primary guarantor";

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97 *Inicio Ltd v Tower Insurance Ltd* [2020] NZHC 90 at [49], citing *Smith v Smith* [1926] NZLR 311 (SC).

98 *Bank of New Zealand v Lothian Partners Capital Ltd* [2021] NZHC 2472.

(b) Mr Kerr is described as a joint and several Guarantor of the LPC Facility, and as sole Guarantor of the PHL Facility, both on an unlimited basis;

(c) at cl 2.1(a) and 2.1(b), Mr Kerr acknowledges an obligation to repay the Total Indebtedness if the agreed payments are not made on time and acknowledges that BNZ would have recourse to Mr Kerr's personal Guarantee;

(d) at cl 2.2, Mr Kerr acknowledges his liability for the Total Indebtedness;

(e) Mr Kerr signed the settlement deed in his personal capacity, as well as in his capacity as a director of LPC, PHL, Glencoe JV and Galt;

(f) Mr Kerr, as one of the Obligors, offers to procure the making of the payments set out in cl 3.1 of the deed, which constitute the agreed sum that would be paid in respect of the LPC and PHL facilities.

[275] The defendants say that the settlement deed does not constitute an acknowledgement under s 47 of the Act because:

(a) Mr Kerr only *offered* to give an acknowledgement (as a term of settlement) and an offer to give an acknowledgement, conditional upon something happening in the future, is not the same as an acknowledgement. It is conditional and qualified upon acceptance.

(b) The offer was not accepted, so the acknowledgement was never given.

[276] Against that, BNZ submits that the authorities provide that a rejected settlement offer can contain a valid and effective acknowledgement of liability. They rely on *Inicio Ltd v Tower Insurance Ltd*, summarised above at [130].[99]

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99 *Inicio Ltd v Tower Insurance Ltd* [2020] NZHC 90 at [50]–[51].

[277] To decide this, I find it helpful to return to the public policy behind the 'acknowledgement rule'. It is to encourage creditors to negotiate with a debtor and refrain from initiating legal proceedings by removing the fear that the claim will become statute-barred. And, if a creditor is encouraged to stay their hand by a debtor indicating that they consider themselves liable to pay the claim, preventing a debtor from using that indulgence to rely on the statute.[100]

[278] Viewed through that lens, the acknowledgements by Mr Kerr in his correspondence with Mr Rodden after the two facilities went into default have a different character to the purported acknowledgements in the settlement deed. It is self-evident that the purpose of his correspondence was to buy more time; to persuade BNZ to stay its hand and not appoint receivers or commence litigation as they were entitled to do under the Facilities and the Guarantees. These are therefore the very kind of acknowledgements that the rule in the Act is designed to address.

[279] The comments of Lord Hope of Craighead in *Bradford & Bingley* are apposite:[101]

> The Appellants' case is that one or other or both of these letters contains an acknowledgement for the purposes of s 29(5)(a) of the 1980 Act. The letters seem to me to provide all that is needed to satisfy this requirement. Why else, one might ask, were they written other than to acknowledge there is a claim that could still be maintained against the Respondent? The purpose of the first letter as to obtain time to pay, and the purpose of the second was to persuade the Appellants to accept a lesser sum in final settlement of an amount which was admitted tobe outstanding. The only explanation that can be given for writing to the Appellants in these terms is that the Respondent appreciated that there was a claim which they could still enforce against him. That was why he was seeking to find ways of avoiding that result. It seems to me that they provide a good example of an acknowledgement in writing of the kind that the statute contemplates. They contain an express and unequivocal admission of the existence of debt.

[280] However, the acknowledgements in the settlement deed have a different character. That document was prepared by BNZ's solicitors as part of an attempt to reach a final global resolution of all outstanding matters between BNZ and Mr Kerr. The contemplated deal was essentially that the Obligors agreed to a repayment plan that involved repayment of the full principal on the PHL and LPC Facilities. BNZ

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[100] *Bradford & Bingley Plc v Rashid* [2006] UKHL 37.
[101] *Bradford & Bingley Plc v Rashid* [2006] UKHL 37 at [36].

agreed to reduce the interest payable on both facilities significantly, from $31.2 million on the LPC Facility and $13.5 million on the PHL Facility to $11.2 million on the LPC Facility and $8.7 million on the PHL Facility. Further, BNZ agreed to waive the $936,000 service commitment fee on the LPC current account and the $440,000 commitment fee on the PHL current account.

[281] I consider that the defendants have a reasonable argument that viewed objectively, the statements in the deed were not unequivocal acknowledgements of liability made by Mr Kerr to gain more time and discourage BNZ from acting. I do not propose to go into whether Mr Kerr conceded anything of substance through the deed or whether it is in substance a 'repayment plan'. The fact that the acknowledgements were part of a self-described agreement prepared by BNZ's solicitors to "settle all matters" provides the defendants with an arguable defence that the statements were concessions made to achieve settlement, and not acknowledgements for the purposes of s 47 of the Act.

[282] I consider that *Inicio* needs to be read in the context of the acknowledgement in that case. The acknowledgement was contained in a letter that had two distinct parts. First, an unqualified acknowledgement that, "[b]ased on the legal advice we have received [the sum of $55,030] represents the extent of Tower's outstanding liability with your claim".[102] Then, separately, a settlement offer was made. Arguably, the earlier acknowledgement was unconnected with the settlement offer in the sense that it was not made as a concession in order to secure settlement.

*Conclusion – acknowledgements*

[283] I find that Mr Kerr, Galt and PHL do not have an arguable defence that the communications and presentations relied on by BNZ do not constitute acknowledgements giving rise to fresh claims against them under the LPC and PHL Guarantees.

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[102] *Inicio Ltd v Tower Insurance Ltd* [2020] NZHC 90 at [10].

[284] I find that Mr Kerr, Galt and PHL do have an arguable defence that they did not acknowledge liability under the Guarantees when the signed settlement deed was sent to BNZ.

**Is BNZ's claim against Mr Kerr under the indemnities time-barred?**

[285] BNZ claims against Mr Kerr under each of the indemnities given by him in respect of the LPC and PHL Facilities. These claims are in the alternative because they do not arise unless the Court finds that BNZ cannot recover the LPC Guaranteed Indebtedness and/or the PHL Guaranteed Indebtedness from Mr Kerr because he has a defence under s 11 of the Act.

[286] BNZ contends that these alternative claims are not time-barred because they arise, at the earliest, on the date any limitation defences arose. It says that if the defendants are correct that the primary period for claims under LPC Facility Agreement (including Mr Kerr's Guarantee) expired on 31 May 2017, the primary period for a claim under the Kerr LPC Indemnity commenced on 1 June 2017, being the date on which Mr Kerr's liability as Guarantor became "irrecoverable". Consequently, the claim – commenced on 5 May 2021 – is not time-barred.

[287] Similarly, BNZ says if the primary period for claims under the Kerr PHL Guarantee expired on 28 May 2019 as the defendants contend, then the primary period for a claim under the Kerr PHL Indemnity commenced on 29 May 2019, being the date on which Mr Kerr's liability as Guarantor became "irrecoverable".

[288] Under the indemnities, Mr Kerr agreed to hold BNZ harmless from loss caused by any of the Guaranteed Indebtedness not being recoverable from him. BNZ says that the losses it will sustain if that is the case are equivalent to the Guaranteed Indebtedness outstanding under the LPC and PHL Facilities. BNZ also claims for yet to be quantified costs of this proceeding to recover the Guaranteed Indebtedness from Mr Kerr.

[289] The defendants argue that under s 11 of the Act, the start date for the primary period is the date of the relevant "act or omission on which the claim is based". They submit that for a claim on the indemnities, this was when LPC omitted to pay the LPC

Facility on the LPC Expiry Date on 31 May 2011; and when PHL omitted to pay the PHL Facility on the PHL Expiry Date on 28 May 2013. They say that the limitation period on an indemnity commences whether or not it is possible to quantify loss.[103]

[290] The defendants contend that the expiry of the primary periods for claims on Mr Kerr's Guarantees is not the "act or omission" on which claims under the indemnities are based because:

(a) expiry of the primary period for a claim on the Guarantee is not an "act or omission", it is a circumstance or a legal consequence; and

(b) the expiry of the primary period is not the basis of the claim. The basis of the claim is the non-payment by LPC and PHL on the Expiry Dates. Without that "omission", there could be no "loss" to BNZ and no claims on the indemnity.

[291] I am not persuaded by this defence. In both the LPC and PHL indemnities, the trigger for the indemnity under cls 13.3(a) and 2.2(a) is the Guaranteed Indebtedness "not being recoverable from the Guarantor". That is the "act or omission" on which a claim under the indemnities is based. There is no claim under cls 13.3(a) or 2.2(a) until the Guaranteed Indebtedness is irrecoverable under the Guarantees. As the claims under the indemnities are made in the event BNZ is wrong, and the Guaranteed Indebtedness is irrecoverable from Mr Kerr as Guarantor because it is statute-barred, it follows that the primary period for claims under the indemnities arises only when a defence of time-bar bar prevents recovery under the Guarantees.

[292] I do not accept Mr Kerr's submission that the basis of the claims under the indemnities is non-payment by LPC and PHL because without that there would be no claim. Certainly, there would be no claim under the indemnities for loss equivalent to the Guaranteed Indebtedness if LPC and PHL had not defaulted on the facilities. But that default, while a necessary precondition, does not cause the Guaranteed Indebtedness to be irrecoverable from the Guarantors. The Guaranteed Indebtedness is only irrecoverable if the claims under the Guarantees are time-barred.

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103 *National House-Building Council v Fraser* [1983] 1 All ER 1090 (QB).

[293] Mr Kerr also says that BNZ is seeking to separate out one part of the indemnity (13.3 (a)) and use it to extend the limitation period by another six years. He submits that this is inappropriate because a claim could have been made from 31 May 2011 under 13.3(b) of the LPC indemnity and cl 13.1 of the Guarantee. Similarly, BNZ could have made a claim under the Kerr PHL indemnity under cl 2.2(b).

[294] The defendants have a reasonable argument that BNZ could have claimed under cls 13.3(b) and cl 2.2(b) when LPC and PHL defaulted (that being the Borrower not satisfying a Monetary Obligation under the Transaction Documents). BNZ appeared to accept that during the hearing. The primary period for such claims under cl 13.3(b) or cl 2.2(b) would appear to begin when the LPC and PHL Facilities went into default. But BNZ brings its indemnity claims under cl 13.3(a) and 2.2(a), alternatives to 13.3(b) and 2.2(b), and there can be no doubt that a claim under 13.3(a) and 2.2(a) arises when a claim under the Guarantee fails. Clause 13.3(a) of the LPC Indemnity is worded so that each Guarantor indemnifies the bank against the Guaranteed Indebtedness not being recoverable from *that* Guarantor.

[295] Clause 2.2 of the Kerr PHL Guarantee underscores this position. The reference to “legal or equitable limitation” could refer to limitation because of time-bar or a contractual limitation of liability. Either way, this clause makes clear that the indemnity applies to any Guaranteed Indebtedness which is irrecoverable *for any reason*, including *any circumstances* which allow the Borrowers or Guarantor *to avoid paying any such amounts*.

**Is the Costs Award irrecoverable from Galt and Glencoe JV because of the liability cap?**

[296] On 28 April 2021, this Court made the Costs Award in favour of BNZ in separate injunction proceedings. The Costs Award provided that BNZ was entitled to its indemnity costs of $243,419.84 from Galt and Glencoe JV. The Court declined to determine whether the Costs Award was subject to the limitations of liability in cl 13.2 of the LPC Facility Agreement and cl 20.1 of the Glencoe JV Deed of Guarantee.[104] The matter was reserved for enforcement of the Costs Award.

[104] As Venning J stated in the addendum to his costs judgment: *Galt Nominees Ltd v Bank of New Zealand* [2021] NZHC 922 at [16].

[297] BNZ says that its entitlement to costs is not subject to the limitations of liability in the Guarantees in the LPC Facility Agreement and Glencoe JV Guarantee. Those limitations are restricted to the Guarantee obligations i.e. the payment by Galt and Glencoe JV to BNZ of the Guaranteed Indebtedness. They do not apply to the other obligations of Galt and Glencoe JV, including to pay BNZ's enforcement costs, found at cl 25.2 of the LPC Facility Agreement and cl 17.1(b) of the Glencoe JV Guarantee.

[298] Galt and Glencoe say that BNZ's interpretation is wrong. The definition of "Guaranteed Indebtedness" in the LPC Facility Agreement includes "all amounts of any nature which that Guarantor … is, or may at any time become, liable … to pay to the Lender … under the Transaction Documents". The wording in the Glencoe JV Guarantee is to similar effect.

[299] Galt and Glencoe say that the limitation of liability provisions apply to *any* liability – costs or otherwise. They submit that the wording of the limitations is unequivocal: Galt's "liability is limited to the value of the PungaPunga Property" and Glencoe's "liability is limited to the value of the Glencoe Station Property".

[300] They emphasise that the limitation provisions apply "notwithstanding any other clause" in the LPC Facility Agreement and Glencoe JV Guarantee. In other words, the liability of Galt and Glencoe is limited to the value of the PungaPunga Property (the New Chums property) and the Glencoe JV Property, despite the enforcement costs clauses.

[301] It is common ground that Glencoe JV's liability to pay the Costs Award arises out of cl 17.1(b) if the Glencoe JV Guarantee. This provides that:

> **All costs**: Whether or not any Guaranteed Indebtedness is outstanding the Guarantor shall pay:
>
> (a) **Establishment Costs**: on demand all costs and any taxes thereon incurred by the Beneficiary in or in connection with the negotiation, preparation, execution and (as applicable) registration of this Deed and/or any amendment of, supplement to, or waiver in respect of, this Deed; and
>
> (b) **Enforcement Costs**: on demand all costs and any taxes thereon incurred by the Beneficiary in or in connection with forcing or protecting or endeavouring to enforce or protect any rights under this

> Deed and/or any amendment or supplement to or waiver in respect of this Deed.

[302] In my view, this clause establishes a direct obligation on Glencoe JV to pay BNZ's enforcement costs. That is, the obligation arises independently of Glencoe JV's guarantee of LPC's indebtedness to BNZ found in cl 2.

[303] The limitation of liability provision is at cl 20.1 of the Glencoe JV Guarantee:

> LIMITATION OF LIABILITY
>
> The Beneficiary and the Guarantor acknowledge that, notwithstanding any other clause in this Deed the Beneficiary's liability is limited to the value of the Glencoe Station Property, which, for the avoidance of doubt, shall mean that upon the Beneficiary [sic][105] exercising its rights under each Security in respect of the relevant Property and receiving and retaining the proceeds of sale of such Property, the Guarantor **shall have no further personal liability under the Guarantee**.
>
> (emphasis added)

[304] I agree with the defendants that the words "notwithstanding any other clause in this Deed" mean that no other clause can override the limitation on Glencoe JV's liability contained within the clause.

[305] However, I do not accept that the words "liability is limited to the value of the Glencoe Station Property" can be read without the following explanation that this *shall mean* that upon the security being realised Glencoe JV "shall have no further personal liability *under the Guarantee*."

[306] "Guarantee" is a defined term, meaning "the guarantee by the Guarantor under clause 2". Clause 2 provides:

> **The Guarantee:** The Guarantor unconditionally and irrevocably guarantees to the Beneficiary the due and punctual payment of the Guaranteed Indebtedness as and when it becomes due and payable under the Transaction Documents (whether on the normal due date, on acceleration or otherwise) and the due observance and punctual performance of and compliance with the Obligations.

[307] Guaranteed Indebtedness means:

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[105] This must be an error and the correct word must be Guarantor.

> … all indebtedness (whether on account of principal moneys, interest, bank fees or charges, taxes or otherwise) due, owing, payable or remaining unpaid by the Principal Debtor to the Beneficiary under the Facility Agreement and includes any part thereof;

[308] The term "Obligations" is defined as:

> … all covenants, conditions, stipulations, representations, warranties, guarantees, undertakings, assurances, agreements and other obligations of any nature (whether present or future, express or implied, actual or contingent, secured or unsecured and whether incurred alone, severally, jointly and severally, as principal, surety or otherwise) of any Relevant Party to or for the Beneficiary under, or contemplated by, any of the Transaction Documents;

[309] A "Relevant Party" is:

> … the Guarantor, the Principal Debtor, and any other person (other than the Beneficiary) that is party to a Transaction Document;

[310] Therefore, under "the Guarantee" Glencoe JV guarantees LPC's payment of all indebtedness under the LPC Facility; and the performance by LPC, itself, and any other person of any other obligations owed to BNZ under the Transaction Documents. That includes its obligation under cl 17(1)(b) to pay the bank's enforcement costs.

[311] This guarantee of its own obligation under cl 17.1(b) to pay enforcement costs is limited by the liability cap, as the obligation arises out of "the Guarantee". But as noted at the beginning of this analysis, cl 17.1(b) imposes a direct obligation on Glencoe JV to pay BNZ's enforcement costs. That obligation does not arise out of the Guarantee. Therefore, in my view, the liability cap does not apply to this direct obligation.

[312] Turning to Galt, it is also common ground that Galt's liability to pay the Costs Award arises under cl 25.2 of the LPC Facility Agreement, which provides:

> **Enforcement Expenses**: each Obligor shall from time to time on demand reimburse the Lender for all costs and expenses (including legal fees) and any taxes thereon incurred in or in connection with the preservation and/or enforcement or attempted enforcement of any of the Lender's rights under the Transaction Documents.

[313] "Obligors" means the Borrower and the Guarantors, and "Obligor" means any of them.

[314] Therefore, as with Glencoe JV, there is a direct obligation on Galt, independent of the cross-guarantee at cl 13.1, to pay BNZ its enforcement costs.

[315] The cap on Galt's liability is contained at cl 13.2 of the LPC Facility Agreement:

> **Limited Liability**: The Lender, the Borrower and each guarantor acknowledge that, notwithstanding any other clause in this Agreement the liability of: … Galt Nominees Limited as trustee of the Wainuiototo Trust **under this guarantee** is limited to the value of the PungaPunga Property; … which, for the avoidance of doubt, shall mean that upon the Lender exercising its rights under each Security in respect of the relevant Property and receiving and retaining the proceeds of sale of such Property, the relevant Guarantor shall have no further personal liability **under the Guarantee**.
>
> (emphasis added)

[316] "Guarantee" is defined as the cross-guarantee at cl 13. Therefore, the limitation of liability applies only to the guaranteed obligations in cl 13.1:

> **Guarantee**: Subject to clause 13.2, each Guarantor jointly and severally guarantees to the Lender the due and punctual payment by each other Guarantor of that other Guarantor's Guaranteed Indebtedness.

[317] To recap, the term "Guaranteed Indebtedness" is:

> "Guaranteed Indebtedness" means, when used with reference to a Guarantor, all amounts of any nature which that Guarantor (whether alone, or jointly or jointly or severally with any other person (whether or not a Guarantor) is, or may at any time become, liable (whether actually or contingently) to pay to the Lender (whether alone, or jointly and severally with any other person) under the Transaction Documents and, when used without reference to a particular Guarantor, means the Guaranteed Indebtedness of the Guarantors collectively, and a reference to Guaranteed Indebtedness in either context includes any part of it.

[318] The defendants emphasise the fact that "Guaranteed Indebtedness" encompasses not just the Borrower's obligations to BNZ but any amounts of any nature which a Guarantor is liable to pay BNZ under the Transaction Documents. They say this includes the obligation on a Guarantor to pay BNZ's enforcement costs under cl 25.2.

[319] They are right, but that means that *for the purposes of the cross-guarantee* the liability of any of the Guarantors for the liability of another Guarantor, whether for

LPC's indebtedness or for any other obligation under the Facility Agreement (including the obligation pay enforcement costs), is capped to the value of their specified property. So, for example, the liability of Mokopeka Holdings Limited for Galt's Guaranteed Indebtedness (which encompasses its Guarantee of LPC's liability to pay Outstanding Moneys and its own liability to pay any enforcement costs demanded of it) is capped at the value of the Mokopeka Lifestyle Blocks Property.

[320] But none of that affects Galt's primary obligation under cl 25.2 to pay BNZ's enforcement costs on demand. That liability does not arise out of the Guarantee at cl 13.1. It is a direct obligation imposed on each Obligor.

[321] The statement in the limitation provision that "notwithstanding any other clause in the Agreement" the liability of Galt is limited to the value of the PungaPunga does not alter this analysis. That phrase applies to the liability of Galt "under the Guarantee". Had the parties intended otherwise, cl 13.2 would have recorded that *"the Guarantor shall have no further personal liability **under this Deed**"*.

**Is the Costs Award irrecoverable from LPC, Mr Kerr and PHL?**

[322] BNZ claims against Mr Kerr, LPC and PHL for the Costs Award based on cls 13.1 and 13.4 of the LPC Guarantee, namely as Guarantors of their co-guarantors' "Guaranteed Indebtedness".

[323] Mr Kerr, Lothian and PHL say that they cannot be liable for these costs for two reasons. First, the claims on the LPC Guarantee are time-barred. Second, even if the claim for costs is not time-barred, Galt and Glencoe JV are not liable to pay BNZ the Costs Award because the Guarantees of Galt and Glencoe JV are limited to the value of specific assets. Therefore, there is no liability to flow through to Mr Kerr, LPC or PHL as Guarantors.

[324] The claim against Mr Kerr, Lothian and PHL as Guarantors of Glencoe JV's obligation under cl 17(1)(b) of the Glencoe JV Guarantee to pay BNZ's enforcement cost must fail. They are not Guarantors of Glencoe JV's obligations under the Deed.

[325] However, I find that there is no credible defence to the claim against Mr Kerr, LPC and PHL for the Costs Award as co-guarantors of Galt's obligations under the LPC Facility Agreement.

[326] The second limb of their defence is unsustainable given my finding that the cap on Galt's liability does not apply to its primary obligation to pay enforcement costs under cl 25.2.

[327] The claim is not time-barred because Galt only becomes liable to pay enforcement costs on demand. The Costs Award was not made until 23 April 2021 and demand was made 19 March 2021. The claim against Galt is not time-barred and consequently nor is the claim against the Guarantors of that liability.

## QUANTUM

### Procedural matters

[328] Before addressing the substantive issues in relation to quantum, it is necessary to deal with some procedural matters.

[329] This summary judgment hearing was originally set down for two days. The defendants applied for an adjournment on the principal ground that they needed time to respond to material they had received from BNZ on 29 November 2021. Lang J dismissed that application on 7 December 2021.[106]

[330] On the morning of the hearing, Mr Kerr filed and served a substantial affidavit in which he identified what he considered to be errors made by BNZ in its loan accounting on both the PHL and LPC Facilities.[107] Annexed to his affidavit was an initial report from Kroll, an international accounting firm.

[331] Submissions on liability took place over the first hearing day. BNZ considered Mr Kerr's affidavit overnight, and the following morning advised that it was content to proceed on quantum and would file an affidavit replying to Mr Kerr's affidavit later

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106 *Bank of New Zealand v Lothian Partners Capital Ltd* [2021] NZHC 3339.

107 Affidavit of George Charles Desmond Kerr sworn 6 December 2021 [First Kerr December Affidavit].

that day. Shortly before the lunchtime adjournment, BNZ filed and served an unaffirmed but approved affidavit from Matthew Keelty of BNZ responding to Mr Kerr's evidence.

[332] Mr Goodall requested that the hearing be adjourned part-heard to enable him to take instructions from Mr Kerr and/or Kroll on the contents of Mr Keelty's affidavit. I granted an adjournment and made directions for the defendants to file and serve any further evidence concerning quantum, and for BNZ to file any further affidavit evidence in reply.[108]

[333] On 7 February 2022, the defendants filed and served an affidavit of Steven Cornmell, an expert forensic accountant with Kroll.[109] In the introductory part of his report attached to his affidavit, Mr Cornmell states that he has read a "large volume" of documents, including three affidavits of Mr Kerr,[110] the first affidavit of Mr Rodden,[111] three affidavits of Ennis Young of BNZ,[112] and the affidavit of Mr Keelty.[113] In addition, Mr Kerr provided him with a large bundle of documents, which are attached to his report.

[334] Mr Cornmell records that he was instructed to analyse the loan positions of LPC and PHL to understand the discrepancies (if any) in relation to the position put forward by BNZ, and to prepare an expert report for the Court proceedings. Specifically, to examine:

(a) the correct balances on the two loan facilities as at 25 November 2021, to include a full reconciliation of the loan accounts with the use of spreadsheets recording the drawdowns, repayments and interest on each of the two facilities, with reference to the supporting contemporaneous documents; and

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108 *Bank of New Zealand v Lothian Partners Capital Ltd* [2021] NZHC 3500.
109 Affidavit of Steven Joseph Cornmell affirmed 7 February 2022.
110 Dated 20 June 2021, 7 July 2021 and 11 December 2021.
111 Dated 5 May 2021.
112 Dated 6 May 2021, 29 November 2021 and 8 December 2021.
113 Dated 15 December 2021.

(b) the calculation of interest charged by BNZ to LPC and PHL, and the accounts to which that interest was charged.

[335] Mr Cornmell states that he has not undertaken any audit or verification work in relation to the information on which he relied. He relies on the documents and information provided to him as being accurate and genuine.

[336] Mr Cornmell also records that he was instructed to assume, for the purposes of his report, that BNZ was not entitled to charge overdraft interest in respect of the LPC and PHL Facilities.

[337] On 8 March 2022, BNZ filed and served an affidavit in reply to Mr Cornmell's evidence from Ennis Young.[114] Mr Young had sworn two previous affidavits, on 6 May 2021 and 29 November 2021.

[338] On 28 February 2022, Mr Kerr filed and served a further affidavit. This affidavit addresses two matters. First, the instructions he gave Mr Cornmell for the Kroll report, including:[115]

> In undertaking their analysis I asked Kroll to proceed on the basis of certain options and understandings including an assumption that BNZ was not entitled to charge overdraft interest in respect of the LPC and PHL facilities. I confirm that all of the understandings and assumptions recorded in the Kroll report accurately record my instructions to Kroll.
>
> Second, Mr Kerr outlines the basis for his counterclaim in relation to the 'forced' sale of shares in Heartland Bank by PHL and other entities related to him in late 2011/early 2012.

[339] BNZ seeks an order excluding the affidavit because it contains irrelevant and otherwise inadmissible evidence; and was filed in breach of earlier timetable directions.

[340] Mr Kerr has leave to file this late affidavit. I consider that it is in the interests of justice for the evidence to be admitted. In terms of the first part of the affidavit, it assists the Court to know what instructions Mr Kerr has given Mr Cornmell; and this

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[114] Affidavit of Ennis John Young affirmed 8 March 2022 [Young Reply Affidavit].
[115] Kerr March Affidavit at [9].

late evidence does not cause BNZ any real prejudice. They made submissions on this part of the affidavit at the hearing. I deal with the second part of the affidavit below when I consider Mr Kerr's counterclaim.

[341] Finally, on 15 June 2022, after the hearing on quantum on 28 March 2022, BNZ sought leave to adduce further evidence together with an updating affidavit of Mr Young. Mr Young explained that since the hearing, BNZ had been able to recover evidence directly concerning the defendants' contention that BNZ's records were defective and unreliable. The relevant evidence comprises a number of drawdown notices which Mr Kerr had asserted were never submitted to BNZ by PHL. Mr Young annexed those drawdown notices to his affidavit.

[342] The defendants object to BNZ being given leave to file this late evidence. First, on the basis that it is exceedingly late. Second, that it would be contrary to the summary judgment procedure to admit such late evidence to be adduced. Third, that BNZ had ample time, after Mr Cornmell's affidavit on quantum was served on 7 February and before the hearing, to locate any further evidence on which it wanted to rely. Fourth, admitting the proposed evidence would prejudice the defendant, who will be denied the opportunity to adduce evidence in response, including from Mr Cornmell.

[343] BNZ has leave to file this late affidavit evidence. The lateness of the evidence is explained by the fact that it was not until Mr Cornmell's affidavit of 7 February 2022 that BNZ knew of PHL's allegations that unauthorised drawdowns had been made on the PHL Facility without supporting drawdown notices. Mr Young explains that BNZ was unable to recover those records prior to the hearing because it involved searching email archives stored by NAB, BNZ's parent company in Australia. The interests of justice favour these documents being available to the Court because they go directly to allegations made by the defendants that BNZ wrongly recorded principal drawdowns on the PHL Facility. Further, the documents are contemporaneous documentary records and cannot in themselves be contentious. They are necessary to provide the full evidential picture to the Court.

[344] Finally, a word about the bank records referred to by Mr Cornmell and the BNZ deponents. BNZ's internal systems in place before the LPC and PHL Facilities expired did not store loan statements as such for each facility.[116] Rather, there were two sets of relevant records. First, loan transaction data, which BNZ has extracted and produced in Excel spreadsheet form for this proceeding. These spreadsheets are referred to as the 'loan spreadsheets'. Second, bank statements for the LPC and PHL current accounts into which loan drawdowns were made. LPC operated two current accounts – an 00 and an 01 account. PHL operated one current account – the 00 account. For the purposes of this proceeding, BNZ has reproduced the bank statement data for the entire history of the current accounts into Excel spreadsheets. These are referred to as the 'statement spreadsheets.'

[345] Mr Young and Mr Keelty have deposed that the data in the loan and statement spreadsheets is BNZ's original source data directly extracted from its systems, unchanged other than to add a 'running balance' column in the statement spreadsheets.

**Quantum according to BNZ**

[346] The LPC Facility expired on 31 May 2011 and the PHL Facility expired on 28 May 2013. At expiry:

(a) $24,994,230.14 was owing under the LPC Facility; and

(b) $21,372,948.73 was owing under the PHL Facility.

[347] Undisputed part-repayments were made on both facilities, as set out at [222] and [223].

[348] On 19 May 2021, Glencoe JV's secured property was sold by mortgagee sale for $5,675,000, of which BNZ recovered net sale proceeds of $5,534,181.

[349] On or about 30 November 2021, the Galt Property sold by mortgagee sale for $2,150,000. The sale settled on 3 December 2021 and BNZ received net sale proceeds

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[116] Second Young Affidavit at [10].

of $2,051,501.80, which it applied to reduce the amount owing under the LPC Facility.[117]

[350] As a result, BNZ calculates the amount owing as:[118]

(a) $29,713,901.21 under the LPC Facility Agreement and Glencoe JV Guarantee;

(b) $32,198,186.89 under the PHL Facility Agreement and Kerr PHL Guarantee.

**Quantum according to the defendants**

[351] Mr Cornmell challenges BNZ's calculation of the amounts owing on the LPC and PHL Facilities on the following bases:

(a) BNZ has made material errors in identifying the dates on which principal drawdowns were made on the PHL Facility;

(b) BNZ has made errors in calculating the amounts owing under the LPC and PHL Facilities and/or there is material uncertainty in relation to those amounts; and

(c) there is insufficient information to form a definitive view, or further investigations and explanations are required, in respect of certain transactions.

[352] Mr Cornmell assesses the balances at 25 November 2021 as "more likely":

(a) $24,683,493 on the LPC Facility; and

(b) $7,109,005 on the PHL Facility.

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117 Third Young Affidavit at [6].
118 Including default interest accrued to 26 November 2021.

[353] Before considering the specific issues raised by Mr Cornmell, I deal with an important preliminary issue.

**Who bears the onus of establishing that the amounts are wrong or uncertain?**

[354] BNZ submits that the usual threshold and onus in a plaintiff's summary judgment application has been contractually altered by the parties. Both the LPC and PHL Facility Agreements and associated Guarantees (as "Transaction Documents") contain prima facie evidence clauses.

[355] Clause 17.2 of the LPC Facility Agreement (in materially the same terms as cl 15.2 of the PHL Facility Agreement) provides:

> **17.2 Certificate:** A certification or determination by the Lender as to:
>
> (a) Amounts: any interest rate or exchange rate, amount payable under clauses 12, 14 or 16 or any other amount payable under any Transaction Document or any entry made in any account maintained by the Lender will (in the absence of manifest error) be **prima facie evidence of such amount**, rate or entry; or
>
> (b) Other Facts: any other fact relating to the Facility or any Transaction Document which might reasonably be expected to be within the Lender's knowledge, will be prima facie evidence of such fact,
>
> **in each case for all purposes including any legal action or proceedings**.
>
> (emphasis added)

[356] BNZ has provided the certification and determination required by the LPC and PHL Facility Agreements and related Transaction Documents. Therefore, it submits that the effect of these clauses is to place the onus on the defendants to prove that the certificates are incorrect.

[357] BNZ relies on the decision of the Court of Appeal of Western Australia in *Collopy v Commonwealth Bank of Australia.*[119] The Court was concerned with provision in the bank's instruments to give a certificate about the amount payable, which would be "sufficient evidence about the matter unless it was proved to be incorrect". The Court held that "the effect of these clauses was to place the onus on

[119] *Collopy v Commonwealth Bank of Australia* [2019] WASCA 97 at [58].

[the borrower] to demonstrate by acceptable evidence that the certificates were incorrect."

[358] BNZ also relies on the Supreme Court of Western Australia case *George 218 Pty Ltd v Bank of Queensland Ltd,* where the Court found that where a clause makes a certificate "prima facie" rather than "conclusive" evidence, the effect is to place the onus upon the guarantor to demonstrate by acceptable evidence that the certificate is incorrect.[120]

[359] Additionally, the bank refers to *Heartland Bank Ltd v Mahoney*, where this Court found that "the terms, under which certificates by Heartland solicitors stating the amounts due are conclusive unless manifestly wrong, mean that it is not necessary to check each calculation in all 73 pages of loan ledgers in evidence."[121]

[360] The defendants say BNZ's approach is fundamentally wrong because it would treat the certificates as being conclusive subject only to manifest error, rather than being only prima facie evidence. They say that approach would have the effect of reversing the onus on a plaintiff in a summary judgment application to prove the defendants have no arguable defence.

[361] I do not accept BNZ's submission that the certificates alter the usual onus in a plaintiff's summary judgment application.

[362] The sentence BNZ relies on from *Collopy v Commonwealth Bank of Australia* must be read in its context. The trial judge had entered judgment against the borrower for amounts owing pursuant to two loans. The borrower contended on appeal that the bank carried the onus to prove the relevant advances were made, and that the dates and amounts of the advances had to be specifically pleaded. The bank had responded that it was not able to provide all those particulars. It relied on the certificates.

[363] The issue on appeal was whether it was necessary for the bank to specifically plead, and be able to prove, the precise dates on which advances were made and the

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120 *George 218 Pty Ltd v Bank of Queensland Ltd* [2015] WASC 434 at [247].
121 *Heartland Bank Ltd v Mahoney* [2021] NZHC 1363 at [29].

amounts advanced on each date. The Court held that it was open to the bank to rely on the certification provisions in proving the amounts owing under each loan. If it was able to issue a certificate based on its current records of the amount owing on each loan, there was no imperative for the bank to be able to establish the date and amount of each advance.

[364] There are material differences between the circumstances of that appeal and this application. First, in *Collopy*, the provisions in the loan instruments provided that certificates were "sufficient evidence" of the amounts owing "unless it was proved to be incorrect". Here, the certificates are only prima facie evidence. Second, the borrower had not raised any specific issues with the certified amounts, rather the issue was whether the bank needed to plead and prove every advance. Third, the case was not an application for summary judgment.

[365] Similarly, care needs to be taken not to read the sentence quoted from *George 218 Pty Ltd v Bank of Queensland Ltd* in isolation from the main reasoning of the judgment. The Court was responding to a submission by the plaintiff that the bank had not established any amount to be owing, and therefore the amount owing was nil. The plaintiff submitted that the certificate needed to be an "informed certificate" *that is shown to be reliable*. The Court found that there was no basis for that submission in the text of the guarantees, and that if the bank was required to demonstrate the reliability of the certificate, the point of the certificate was lost. The Court noted that "[t]here is no evidence that the bank's records on which Mr Clark relied in signing the certificates was unreliable". Further, the plaintiff had not adduced any evidence showing the certificates to be incorrect. The plaintiff argued that the bank manager did not check the accuracy of the bank's computer record of the amounts owing, or its correspondence with its solicitors, before signing the certificate. The Court found that he was under no obligation to do so, and there was no evidence showing the bank's record of the debt to be incorrect.

[366] In my view, that case is authority for the proposition that a bank certificate is prima facie evidence of a debt. The bank does not need to demonstrate the reliability of the certificate any further unless the borrower adduces evidence showing the certificates to be incorrect.

[367] *Heartland Bank* was an application for summary judgment. The defendants, borrowers and guarantors, contested Heartland's calculations, especially default interest. Heartland Bank relied on certification provisions of the loan agreements, one of which said: "A certificate by Heartland of any amount payable under the Agreement is in the absence of manifest error, conclusive evidence for all purposes, including for all proceedings".

[368] The Judge noted that the affidavit from Heartland's asset manager in support of the application stated the amounts due and interest charged without providing any supporting accounting evidence. A second affidavit annexed copies of ledgers for each loan giving running totals from the start of each loan.

[369] *Heartland Bank* is distinguishable because the certificates were conclusive evidence of the amount payable in the absence of manifest error (as opposed to prima facie evidence). Additionally, the Judge did not directly address the issue of whether the certificates shift the onus onto the defendant, or the threshold is any different from usual. He simply found that because of the certificates "it was not necessary to check each calculation in the loan ledgers in evidence."

[370] On a summary judgment application, the plaintiff bears the onus of satisfying the Court that the defendant has no defence. It may be that evidence adduced by the plaintiff in support of the application would, in the absence of response by the defendant, satisfy the Court that the defendant has no defence.[122] In my view, where loan instruments contain provisions that a certificate will be prima facie proof of the outstanding amount, the lender can rely on that certificate as proof and need not plead and prove every transaction. The defendant may adduce evidence directed at showing that they do have a defence, namely that the certified amount is incorrect. They need not prove that the amounts are incorrect but need only identify issues. That does not mean that the defendant can raise vague or spurious issues and broadly allege that there are uncertainties. The defendant must identify specific credible issues; but need only prove them to an arguable level. The ultimate question for the Court remains whether it is satisfied that the defendant has no defence.[123]

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[122] *MacLean v Stewart* (1997) 11 PRNZ 66 (CA) at 69.
[123] At 69.

[371] I now turn to the specific issues raised by Mr Cornmell and Mr Kerr.

**PHL Facility**

[372] The principal issue in respect of the PHL Facility is whether BNZ's determination of the principal balance owing at the PHL Expiry Date is accurate. Mr Cornmell focuses on the pre-expiry period and raises issues with several identified drawdowns from the facility.

[373] In doing so, Mr Cornmell assesses that the loan balance on the PHL Facility at the PHL Expiry Date was $6,390,467.20.[124] He makes that assessment by taking the amount BNZ has certified as owing at the PHL Expiry Date ($19,996,354.12) and deducting the following categories of transactions.

*Pre-expiry transactions – Activity prior to drawdown dates*

[374] At paragraph 5.2.1 of his report, Mr Cornmell says that contrary to statements by BNZ, there was activity on the PHL Facility before the 29 March 2012 and 20 April 2012 drawdowns. Mr Cornmell appears to refer to the evidence of Mr Rodden where he states that PHL made two drawdowns on the Facility on those dates. Mr Cornmell identifies eight drawdowns on the PHL Facility prior to those dates.[125]

[375] Mr Cornmell is correct that Mr Rodden's statement is not entirely accurate. Mr Young clarifies that there is no dispute by BNZ that there was activity on the PHL Facility prior to those dates, and the drawdowns identified by Mr Cornmell are correct.[126] Those drawdowns were continuously rolled over (that is, not repaid by PHL). The drawings referred to by Mr Rodden were the final two drawings on the facility after which no further deposits were made into the PHL current account to service interest.[127] Mr Young explains, with reference to the loan and statement spreadsheets, that the drawdown of $7,250,000 on 20 April 2012 was a "roll-up" of two earlier drawdowns of $3,750,000 and $3,500,000. The other drawdowns

124 Expert Report of Steven Cornmell dated 7 February 2022 at [5.2.11].
125 At [5.2.2].
126 Young Reply Affidavit at [25].
127 Young Reply Affidavit at [11].

identified by Mr Cornmell were "rolled up" into a drawdown of $12,726,355 on 29 June 2012.

[376] I cannot discern any dispute here that will have affected the PHL balance at the PHL Expiry Date.

*Erroneous $800,000 advance*

[377] At paragraph 5.2.3 of his report, Mr Cornmell says that BNZ gave PHL formal advice of a drawdown of $800,000 on 18 June 2010 with a maturity date of 20 December 2010, when "we have been unable to identify the receipt of this amount by PHL from the documentation provided to date by BNZ and Mr Kerr".

[378] Mr Young explains that this 'deal' was an error and the error was identified and corrected by BNZ on the same day. This is evidenced in the loan spreadsheets where $800,000 is shown as being drawn and repaid on 18 June 2010.[128] No payment of $800,000 is recorded in the statement spreadsheets and nor is there any interest charge recorded.

[379] I accept that this does not represent an error that will have affected the PHL balance on the PHL Expiry Date.

*Advance of $4,250,000 not proved*

[380] At paragraph 5.2.4 of his report, Mr Cornmell addresses a loan of $4.25 million BNZ says was made to PHL on 25 June 2010 with a maturity date of 23 September 2010. Mr Cornmell says that "we have been unable to confirm the receipt of this amount by PHL from our review of PHL's bank records."

[381] I consider that this issue is answered by correspondence put in evidence by Mr Kerr.[129] The correspondence begins with an email dated 25 June 2010 from Mr Kerr to Mr Downie at BNZ advising that PHL would like to invest an additional $4.25 million in Torchlight. Mr Kerr informs Mr Downie that Russell Naylor of

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[128] At [27].

[129] Affidavit of George Charles Desmond Kerr sworn 11 December 2021 [Second Kerr December Affidavit].

Naylor Partners would arrange a drawdown request for $4.25 million, to be paid to Buddle Findlay to take up the Torchlight commitment. He states:

> Given I am in Auckland and easy to execute – can we arrange drawdown today to go to Buddle Findlay by close of play today?

[382] In an email dated 25 June 2010 at 3.14 pm, Mr Naylor sent Mr Downie a 'drawdown notice' from Torchlight seeking a drawdown of $4.25 million.

[383] Mr Downie responded to Mr Tinkler (then of Buddle Findlay), asking that a BNZ drawdown notice in the correct form be completed by 4.30 pm that day. He required the notice to be executed in accordance with the PHL constitution before processing the drawdown. He asked Mr Kerr by email what drawdown period he wanted: one, two or three months. Mr Kerr responded three months. Mr Tinkler emailed a signed drawdown notice to Mr Downie and arranged for a copy of a Buddle Findlay trust account deposit slip to be sent to BNZ.

[384] In view of this correspondence, I conclude that this issue does not meet the threshold of a reasonably arguable error in the bank's calculations. There would be no record of receipt of the drawdown into PHL's current account if, as instructed by Mr Kerr, the sum was deposited into Buddle Findlay's trust account.

[385] As further corroboration, a bank confirmation dated 14 July 2010 annexed to Mr Kerr's affidavit[130] records PHL requesting an early break of the $4.25 million drawdown; that is, early repayment of $3,758,842.

[386] Mr Cornmell does not seem to have been given the above information by Mr Kerr. He says that he cannot speculate why a drawdown would be paid into an account controlled by BNZ and not for the benefit of PHL. He concludes that further investigation is required. However, he deducts $5.05 million from the PHL loan balance, along with corresponding interest, on account of this and the previous $800,000 issue.

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[130] Second Kerr December Affidavit.

*Drawdown of $642,829 not repaid*

[387] At paragraph 5.27 of his report, Mr Cornmell states that he "understands" that Mr Kerr forwarded funds and instructed BNZ to repay this amount in January 2012 but that BNZ did not execute this instruction. He does not state the basis for his understanding. Mr Cornmell deducts $642,829 from BNZ's PHL loan balance accordingly.

[388] Mr Kerr does not give direct evidence that he instructed BNZ to repay this drawing. He does not refer to this issue at all in his evidence. As a result, there is no factual foundation for Mr Cornmell's recalculation of the PHL balance on the PHL Expiry Date to exclude this amount.

[389] Mr Kerr's general statement that "all of the understandings and assumptions recorded in the Kroll report accurately record my instructions to Kroll" does not constitute factual evidence that Mr Kerr provided this instruction to BNZ.

[390] I find that this evidence falls short of establishing an arguable defence that the PHL loan balance is incorrect by this amount.

[391] Although my decision on this issue does not depend on it, I record that Mr Young deposes, with reference to the statement spreadsheets, that there were insufficient funds in PHL's current account to make this payment in any event.

*Deposits of $7,913,056 without drawdown notices*

[392] At paragraphs 5.2.8 to 5.2.10, Mr Cornmell addresses four drawdowns into PHL's account which he suggests were not accompanied by drawdown notices as required under the PHL Facility Agreement. A drawdown notice, completed by the borrower, specifies the amount to be drawn down and the interest period (discussed further below). The required form of drawdown notice is Schedule 2 to the PHL Facility.

[393] The four drawdowns allegedly without accompanying drawdown notices were:

(a) $3,500,000 on 14 July 2010;

(b) $3,750,000 on 14 July 2010.

(c) $163,056 on 23 August 2010;

(d) $500,000 on 26 October 2011.

[394] Mr Cornmell also notes at paragraph 5.2.10 of his report that three of the drawdowns immediately followed repayment of prior advances for the same sum. He states that this is unusual, and he would expect documentary evidence to confirm that the cash advances were properly authorised and agreed.

[395] Accordingly, Mr Cornmell deducts the total of the four drawdowns, $7,913,056, from BNZ's PHL loan balance at the PHL Expiry Date.

[396] It is apparent from Mr Cornmell's report that his deduction of these amounts from the loan balance is based on an instruction from Mr Kerr that he has no record of requesting these loans and he does not consider that he did in fact request them. In relation to the first drawdown of $3.5 million, Mr Cornmell says:[131]

> I understand that Mr Kerr has been unable to identify any drawdown request made in respect of this amount and that the funds were received…I am instructed that Mr Kerr considers that he did not request such a drawdown and that, as a result, it may have been granted by BNZ in error … If, as Mr Kerr alleges, no such drawdown request was made, then the result of this cash advance would be to incorrectly apply interest charges to PHL in respect of this amount.

[397] In relation to the following three drawdowns, he states that: "there also appear to be a number of alleged drawdowns included in the balance claimed by BNZ under the PHL facility where the evidence suggests an original loan balance was repaid but that a new advance was made *in circumstances where Mr Kerr did not request a drawdown*."

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[131] Expert Report of Steven Cornmell dated 7 February 2022 at [5.2.8].

[398] Concerning the $3.75 million, he says that he is instructed that Mr Kerr has no record of a request for the drawdown of this amount at this date.

[399] In relation to the drawdown of $163,056, he says that with no evidence that drawdown requests were made for those advances, he does not think those balances should be classified as part of an outstanding drawdown. He therefore deducted those from his calculation of the amount outstanding on the PHL Facility.

[400] Finally, with respect to the drawdown of $500,000, he says he understands that Mr Kerr considers he did not request the later drawdown of this amount and that the loan had been repaid. He also says:[132]

> I would expect documentary evidence to be available to confirm that the cash advance of 26 October 2011 was properly authorised and agreed. However, I have not been provided with such evidence at this stage and further information and investigation is required to determine whether the advance was requested. I understand Mr Kerr has been unable to identify any such evidence and is, again, of the view that no such request was made.

[401] The factual basis for Mr Cornmell's opinion, namely that Mr Kerr has not been able to identify drawdown requests for these sums and/or that he did not in fact request these drawdowns, is not established by Mr Kerr. Mr Kerr does not provide any direct evidence that he did not request these drawdowns. He does not address these drawdowns at all in his evidence. He only gives the generalised confirmation that the assumptions and understanding in Mr Cornmell's report *accurately recorded his instructions*.

[402] As Mr Cornmell's approach is based entirely on facts that have not been established or even touched on by Mr Kerr, I find that there is no basis for this amount being deducted from the PHL loan balance on the basis that the drawdowns were an error or are uncertain.

[403] Furthermore, the suggestion that Mr Kerr did not request the drawdowns when at the time he did not raise any issue with the funds being deposited into his current accounts, strains credibility. Mr Kerr has confirmed in evidence that he received bank

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132 Expert Report of Steven Cornmell dated 7 February 2022 at [5.2.10].

statements for the current accounts.[133] These are the accounts into which drawdowns were made, and from which repayments and accrued interest payments were automatically paid.

[404] Mr Young confirms, with reference to the statement spreadsheets, that with one exception only (the payment to Buddle Findlay discussed above) all of the drawdowns can be traced into PHL's current account and are recorded in the statement spreadsheets. Specifically:

(a) receipt of funds of $3,500,000 and $3,750,000 on 14 July 2010 is recorded in the PHL statement spreadsheet[134] followed by payments of $3,500,000 and $4,000,000 to Buddle Findlay on the same day;

(b) receipt of funds of $163,056.97 on 23 August 2010,[135] which followed repayment of the same amount on 28 May 2010, the effect of which was to restore PHL's current account from being overdrawn to having a $40,004.99 credit balance;

(c) receipt of $500,000 on 26 October 2010, which partially restored PHL's current account from overdraft, and further payments into the account and drawdowns on 28 and 31 October 2010 which brought the account into credit.[136]

[405] Additionally, since the hearing BNZ has located drawdown requests for the two most significant drawdowns. The documents are annexed to Mr Young's 'late' affidavit, discussed above:

(a) Drawdown of $3,750,000 on 30 June 2010. BNZ has located a drawdown request dated 30 June 2010, signed by one of PHL's directors. The drawdown request specifies an interest period of 90 days and states that the drawing is to be deposited into the trust account of

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133 Second Kerr December Affidavit; and see Second Rodden Affidavit at [16].
134 Second Young Affidavit at EJY-2 0089.
135 Second Young Affidavit at EJY-2 0089.
136 Second Young Affidavit at EJY-2 0091.

Buddle Findlay. It records that the drawing will be used to acquire shares in Fiordland Lobster Company.

(b) Drawdown of $3,500,000 on 14 July 2010. BNZ has located the drawdown request dated 14 July 2010, signed by a PHL director. The drawdown request does not specify an interest period. It again requests that the funds be deposited into Buddle Findlay's trust account and specifies that the drawing will be used for a limited partner capital contribution of $2.5 million to Torchlight Fund No 1 LP.

*$4,000,000 payment to unknown account*

[406] At paragraph 5.2.9 of his report, Mr Cornmell discusses the payment of $4,000,000 made from PHL's current account on 14 July 2010, described above. Mr Cornmell observes that the bank statement records that the $4,000,000 payment was made to an account number which he understands is an account operated by BNZ. He states that it appears unusual to him that a payment apparently made to a law firm appears to have been paid instead to an account operated by BNZ. As such, he does not identify an error, but simply says that the matter requires further investigation and explanation.

[407] Mr Young replies, with reference to the statement spreadsheet, that the prefix 0985 is consistent with a BNZ branch number, but the rest of the numbers are not consistent with BNZ accounts. He states that it is not possible, on the basis of the information available, to know which account number the payment was made to. [137] He confirms that the record of payment shows that the payment was made by electronic transfer on PHL's instructions, with particulars and code details "Buddle Findlay".

[408] I find that the defendants have not presented a credible argument that the PHL loan balance is incorrect by $4,000,000 or uncertain. Mr Kerr does not address this transaction in his evidence. There is no factual foundation for any question about this transaction. Rather, the contemporaneous record shows an electronic transfer by PHL

[137] Young Reply Affidavit at [35]

from its current account with the particulars and code details of PHL's law firm. This transfer occurred on the same day as another payment by PHL to Buddle Findlay to make a capital contribution to Torchlight LP (described at [404](a) above).

*Post-expiry transactions*

[409] The parties do not disagree on the quantum or effect of repayments made on the PHL Facility after the PHL Expiry Date.

*Commitment fee*

[410] At paragraph 5.2.19 of his report, Mr Cornmell says that BNZ has not explained the period to which the commitment fee of $440,000 relates, by reference to specific dates and the transactional record, except to state that it was prior to the PHL Expiry Date.

[411] Pursuant to cl 7.2 of the PHL Facility Agreement, PHL was required to pay BNZ a commitment fee of 2.20 per cent per annum on the facility limit of $20,000,000.[138] That fee was to be calculated daily from the date the PHL Facility Agreement commenced and paid quarterly in advance.

[412] Mr Young explains that BNZ charged PHL the commitment fee of $440,000 for the period 28 May 2010 to the PHL Expiry Date on 28 May 2013. From that date onwards the facility limit was no longer available to PHL, although PHL's drawdowns of $19,996,355.62 in principal were still outstanding.

[413] This commitment fee was the subject of negotiation by Mr Kerr in 2018/2019. Mr Kerr asked BNZ to waive the commitment fee. Mr Kerr does not say anything about this commitment fee in his evidence. There is no basis for suggesting that the commitment fee was charged in error or is uncertain.

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[138] First Young Affidavit at [54].

*Interest*

[414] At paragraphs 5.2.15 to 5.2.18 of his report, Mr Cornmell makes three deductions from the principal amount he says is owing ($6,390,467.20) relating to interest. First, he calculates interest which he says was wrongly charged and paid in respect of the transactions just discussed. He deducts interest of $1,088,103 from the principal.

[415] Then, he deducts overdraft interest of $257,612.64 charged by BNZ before the PHL Expiry Date. Critically, he states in his report at paragraph 1.2.5 that he has been instructed to assume, for the purposes of the report, *that BNZ was not entitled to charge overdraft interest in respect of the PHL and LPC facilities*. He makes a further deduction of $2,803.81 for interest charged by BNZ that would have been saved had BNZ not charged overdraft interest.

[416] This gives the "Adjusted net amount at Expiry Date" of $5,481,947.69. Mr Cornmell then calculates the interest post-expiry on this balance to 21 November 2021 of $2,731,855.78. Accounting for repayments post-expiry, he arrives at the total amount owing on the PHL Facility of $7,109,005.21.

[417] I have concluded that Mr Cornmell has not identified any errors, even to a reasonably arguable level, in BNZ's calculations of the principal amount owing on the PHL Facility at the PHL Expiry Date. There is no basis therefore for the deduction of $1,088,103.06 of interest.

[418] As to the deduction of overdraft interest, BNZ has clarified that it charged $235,851.53 in overdraft interest on the PHL current account from the date the facility became available to the PHL Expiry Date.[139] It claims that it was entitled to charge overdraft interest if the current account went into unarranged overdraft.

[419] BNZ says that in the interests of pragmatism and simplicity, and consistent with the discussions between BNZ and Mr Kerr in 2019, it is not claiming overdraft interest from the dates the PHL and LPC current accounts went into permanent

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[139] Second Young Affidavit [13](d).

overdraft. For PHL, this was on 20 April 2012. Instead, for the purposes of this proceeding, BNZ has applied simple interest from the permanent overdraft dates until the expiry dates, and thereafter at the default interest rate as per the Facility Agreements through to the present day.

[420] Accordingly, BNZ says that after recalculating the Outstanding Moneys to reflect this approach to interest, PHL paid only $102,611.38 of overdraft interest prior to when the current account went into permanent overdraft.[140]

[421] I will consider whether BNZ was entitled to charge overdraft interest on the PHL and LPC current accounts after I have considered the specific issues raised by Mr Cornmell relating to the LPC Facility.

*Conclusion – PHL Facility*

[422] Mr Cornmell has not identified any errors, even to a reasonably arguable level, in BNZ's calculations of the principal amount owing on the PHL Facility on the PHL Expiry Date. This is primarily because there is no factual foundation for his reassessment.

[423] Mr Cornmell does not identify any errors with post expiry transactions. The basis for the commitment fee is certain.

[424] As a result, I find that unless the defendants have a reasonable argument that BNZ was not entitled to charge overdraft interest, they do not have a defence that the amount calculated by BNZ as owing on the PHL Facility is incorrect or uncertain.

**LPC Facility**

[425] The defendants raise two errors in relation to the LPC Facility. First, Mr Cornmell suggests that BNZ may not have followed Mr Kerr's instructions with respect to the funding and use of a term deposit account which LPC was required to establish as a condition precedent to drawing on the LPC Facility (**Term Deposit Account**). Second, that BNZ wrongfully charged overdraft interest prior to expiry of

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140 At [13](d).

the facility and this meant payments were applied against that interest instead of the principal.

*Term Deposit Account*

[426] It is common ground that the Term Deposit Account was established to fund the payment of interest on drawings on the LPC Facility.

[427] The Term Deposit Account was initially funded with a deposit of $2,263,570.91 on 27 November 2008.[141] The next day, $200,021.07 of that term deposit was broken and paid into the LPC current account to return that account to credit after a payment of $31,800,000 was made from that account. That left a deposit balance of $2,063,570.91.

[428] Mr Kerr makes three complaints about the Term Deposit Account.[142] First, that the amount placed on deposit was only $2.5 million of the $5.7 million agreed with BNZ. Second, BNZ unilaterally applied the funds to the principal owing under the LPC Facility rather than interest as intended. Third, the funds in the Deposit Account were prematurely exhausted because BNZ wrongly charged overdraft interest on the current account.

[429] The first complaint is not sustainable. Mr Kerr was aware of the amount placed on term deposit on 27 November 2008. A bank statement marked for his attention annexed to his affidavit confirms that a deposit of $2,263,570.91 had been placed on deposit, direct debited from LPC's 01 current account. Furthermore, that on maturity on 24 February 2009, the maturity payment would be credited to LPC's current account.

[430] Mr Kerr also annexes a bank statement from the following day, which records the early break of the deposit by $200,000. This left a balance on deposit of $2,063,570 with a projected maturity payment in 89 days' time of $2,082,921.90.

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[141] Affidavit of Matthew Angland Keelty affirmed 15 December at [11].
[142] Second Kerr December Affidavit at [8], [75] and [80].

[431] If Mr Kerr wished LPC to put a greater amount in the Term Deposit Account, he could have arranged for LPC to be put in funds to facilitate that.

[432] On maturity of the deposit on 24 February 2009, a payment of $2,082,921.90 was paid into LPC's current account to pay interest. Mr Keelty explains that on the same day, $1,437,200.68 was placed back on deposit, as confirmed in a bank statement to Mr Kerr of that date.

[433] Mr Keelty explains that the term deposit continued to roll over every three months, with less being rolled over and placed on a new deposit each time until final maturity of $164,722.15 on 8 January 2010, which was not rolled over. Each time the term deposit matured, it was paid into the LPC current account. LPC used some of the funds to pay interest, with the balance being put back on term deposit for a further three months until the funds ran out.

[434] As to Mr Kerr's second complaint, there is no basis for the assertion that the funds in the Term Deposit Account were used to pay down principal. Mr Young confirms that the drawings on the LPC Facility were never repaid and all payments went towards interest.

[435] The third complaint, about the impact of overdraft interest, is addressed below.

[436] Mr Cornmell raises a further issue. At paragraph 5.3.18 to 5.3.20 of his report, he notes BNZ received a payment of $525,000 from Pyne Trust on 14 November 2008 with the instruction from Mr Kerr to "Please put in the DLU account for Lothian Partners". Mr Kerr deposes that "DLU" referred to 'Deposit Lock-up Account" or the Term Deposit Account. In an email to Mr Kerr dated 14 November 2008, Kylie Reardon of BNZ confirmed that "the NZD$525k has arrived into Pyne Trust and has been transferred to LPC DLU".

[437] On 27 November 2008, the day after the LPC Facility Agreement was signed, the original deposit of $2,263,570.91 was made into the Term Deposit Account from the LPC current account, into which the $525,000 had been deposited.

[438] The issue Mr Cornmell seems to raise is that the $525,000 was not transferred into the Term Deposit until 13 days after Mr Kerr's instruction.

[439] Mr Kerr does not address this transaction in his evidence.

[440] This seems like a trivial issue. The funds were held in LPC's current account for 13 days until the total sum of $2,263,570.91 was transferred into the Term Deposit Account to establish the term deposit, on 27 November 2008. LPC would have had the benefit of any interest accrued during this period. The transfer occurred the day after the LPC Facility Agreement was signed.

[441] At paragraph 5.3.20, Mr Cornmell suggests that two transactions on LPC's current account on 27 November 2008 require further investigation. They are a payment of $101,683.94 to LPC's current account and the return of $250,000 to Pyne Trust. These transactions occurred on the same date as the term deposit was made. Mr Cornmell concludes that it is impossible to determine whether the $525,000 intended by Mr Kerr to fund the term deposit account was in fact used to fund the other transfers on the same date. He concludes that if $525,000 was not paid into the term deposit account as instructed, that account was deprived of those funds to fund interest payments. The correct balance for the term deposit account would have been $2,588,570.91. The increased amount would have been sufficient to meet interest on the principal on rollovers issued on 22 April 2010 and a further rollover on 3 May 2010.

[442] Mr Kerr is silent on this issue.

[443] I do not consider that this point raises an arguable error or uncertainty because Mr Kerr had oversight and control over the LPC accounts, including the amount of funds in the current account to transfer to the Term Deposit Account. He will have known, or should have known, the current account balance at the time he gave the instructions for these payments. In any case, ultimately the amount placed on Term Deposit to fund interest payments was within his control.

*Interest*

[444] At paragraph 5.3.28 of his report Mr Cornmell states that he has been instructed to assume that overdraft interest of $1,874,331.93 charged to the LPC Facility between 28 November 2008 and the LPC Expiry Date of 31 May 2013 was incorrectly charged. Mr Cornmell identifies certain consequences of this error both pre and post expiry.

[445] First, at paragraphs 5.3.5 to 5.3.7 of his report, Mr Cornmell identifies payments totalling $890,676.31 made on LPC's current account between 1 December 2008 and 27 September 2010 to meet overdraft interest charged. Mr Cornmell assumes that these funds should have been applied to reduce the principal outstanding balance, rather than to pay overdraft interest. He calculates that but for this error, the principal loan outstanding on the LPC Facility Agreement would have been $23,012,601.67 at the LPC Expiry Date, compared to the $23,903,277.98 claimed by BNZ.

[446] Additionally, again on the assumption that BNZ was not entitled to charge overdraft interest, Mr Cornmell contends that if funds used to satisfy overdraft interest charges had instead been used to reduce the outstanding loan balance, the principal loan outstanding on the LPC Expiry date would be $22,697,424.47; the difference of $315,177.20 being the total amount of overdraft interest charged to the account from 28 November 2008 to 31 May 2011.

[447] Mr Cornmell then proceeds at paragraph 5.3.30 to calculate what he says the loan balance at 28 November 2021 would have been if the effect of all overdraft interest is reversed on the dates it was charged to the account. He states that this is the most accurate way of reversing the effect of the interest. Taking the principal outstanding at expiry as calculated by him (after deducting the overdraft interest and effect of that interest) of $22,697,424.47, he then deducts the amount of overdraft interest charged to 22 May 2011 ($315,177). The remaining overdraft interest is deducted on the date it is incurred, which has the effect of reducing the interest charges on the account to $1,045,110 and, after default interest and application of the proceed of sale of the Galt property, results in a final net balance of $24,683,493.10. This contrasts with BNZ's calculation of the amount owing of $29,713,901.22.

[448] BNZ says that LPC was required to maintain its current account in credit and BNZ was entitled to charge overdraft interest if it went into unarranged overdraft. The payments identified by Mr Cornmell were made at times that LPC had allowed its current account to fall into overdraft and the payments were required to pay the overdraft interest and return the account to credit.

[449] Further, BNZ has clarified that it originally charged $1,875,003.32 in overdraft interest on the LPC current account from the date the LPC Facility became available to the LPC Expiry Date.[143] However, for the same reasons described in relation to the PHL Facility, in this proceeding BNZ is not claiming overdraft interest from when the LPC current account went into permanent overdraft on 22 July 2010. Instead, it has recalculated interest from that date at simple interest until the LPC Expiry Date, and thereafter at default interest as per the LPC Facility Agreement through to the present day.

[450] Accordingly, BNZ says that after that recalculation, LPC paid only $216,401.46 of overdraft interest, up until when the current account went into permanent overdraft.[144]

[451] I now turn to the essential issue in dispute: whether BNZ was entitled to charge overdraft interest.

**Was BNZ entitled to charge overdraft interest?**

[452] The defendants submit that, as a matter of law, BNZ was not permitted to charge overdraft interest when the LPC and PHL current accounts went into unarranged overdraft. They contend that the bank was obliged to only claim default interest under the terms of the LPC and PHL Facility Agreements.

*Simple interest*

[453] Under cl 6.1 of the LPC Facility Agreement, LPC was required to select the duration of the first interest period relating to each drawing in the drawdown notice

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143 Second Young Affidavit at [13](d).
144 Second Young Affidavit at [13](d).

for that drawing. The duration of each interest period would be either 30, 60, 90 or 180 days or, if LPC failed to nominate the length of the interest period, as determined by BNZ. The first interest period began on the initial drawdown date. Interest periods for each successive interest period were to be the same as the preceding interest period unless LPC notified BNZ in writing, in which case the interest period was as notified.

[454] Pursuant to cl 6.2, LPC was required to pay all unpaid interest accrued on a drawing during the relevant interest period on the last day of the relevant interest period or, where the interest period exceeded 90 days, each day falling at 90-day intervals.

[455] The applicable interest rate charged over the relevant period was calculated in accordance with cl 6.3 of the LPC Facility Agreement, being the base rate for each interest period plus the agreed margin. The margin was 2.25 per cent per annum.

[456] Under cl 6.4, interest was to:

(a) accrue daily from (and including) the first day of the relevant interest period to (but excluding) the last day of that period; and

(b) be calculated based on a year of 365 days, and the actual number of days elapsed.

[457] Interest did not compound prior to the LPC Expiry Date.

[458] BNZ was required to notify LPC of each rate of interest determined under cl 6, but failure to do so did not relieve LPC of its obligation to pay the interest.

[459] The PHL Facility Agreement contains comparable provisions. The only discernible difference is that if PHL did not select an interest period for a drawdown, the period would be 30 days.

[460] The obligation to pay interest on each drawing on the final day of the relevant interest period is at cl 5.2 of the PHL Facility Agreement.

*Default interest*

[461] Under cl 16.1 of the LPC Facility Agreement, default interest was charged during any period beginning on the due date for payment of any sum due and payable under the LPC Facility Agreement and ending on the date on which the obligation to pay was discharged. During such period, the outstanding balance accrued default interest at the base rate plus the margin of 2.25 per cent plus 2 per cent per annum (i.e. simple interest plus 2 per cent).

[462] Under cl 16.2, default interest was due and payable without the need for demand at the end of each period by which it was calculated, and if not paid, was compounding.

[463] The PHL Facility default interest clauses at 14.1 and 14.2 of the PHL Facility Agreement are expressed in similar terms.

[464] Mr Young deposes that although these clauses entitled BNZ entitled to charge default interest on interest that LPC, PHL and the Guarantors failed to pay on each interest payment date, it chose not to do that. Instead, BNZ charged default interest from 2.00 pm on the LPC Expiry Date of 31 May 2011 and the PHL Expiry Date of 28 May 2013, being the date on which the Borrowers and Guarantors were obliged to pay all "Outstanding Moneys".[145]

[465] Default interest continues to accrue on the "Outstanding Moneys" and accrued default interest.

*Unarranged overdraft interest*

[466] LPC operated two current accounts – an '00' and an '01' account. PHL operated one current account – the '00' account. Drawings on the relevant facilities were deposited into the current accounts.

[467] BNZ automatically debited the current accounts with the interest due under cls 6.2 and 5.2 of the LPC and PHL Facility Agreements respectively. The current

145 First Young Affidavit at [17] and [32].

accounts would occasionally go into overdraft following this process. At a certain point, the current accounts became permanently overdrawn.

[468] BNZ claims that it was authorised to automatically debit the current accounts with interest due and payable under the facilities by the 'Debit Account' provisions at cl 19 of the LPC Facility and at cl 17 of the PHL Facility:

> Without limiting any other provision of this Agreement, if the Borrower defaults in its obligations to pay moneys pursuant to a Transaction Document, **the Borrower authorises the Lender in its discretion to debit any account which the Borrower may have with the Lender with the whole or any part of the amount which the Borrower has failed to pay** notwithstanding that the moneys outstanding may be recorded in any other account. **The Borrower also authorises the Lender to open a current account where one does not presently exist in the name of the Borrower with the Lender and to debit the Borrower's account with the whole or any part of such moneys which the Borrower has failed to pay**. The debiting of an account by the Lender shall not relieve the Borrower of its obligations under the Transaction Documents. The Lender is also authorised (a) to break the term of any deposit and (b) to convert moneys or moneys owing in one currency to another for the purposes of this clause 17.
>
> (emphasis added)

[469] BNZ says if the current accounts went into unarranged overdraft as a result of direct debits to pay interest, it was entitled to charge unarranged overdraft interest. The bank derives its authority from the "Account Operating Authority" forms for the current accounts. These forms were signed by Mr Kerr when he opened the current accounts for LPC and PHL on 14 November 2008 and 16 December 2008 respectively. These are standard forms which include a 'declaration' signed by the account owner that BNZ's Standard Terms and Conditions have been read and understood and that these and any specific terms notified by BNZ apply and are binding. The declaration also states:

> Where the bank acts upon a facsimile, telephone, email or other electronic instruction which appears, to its reasonable satisfaction, to have been made in accordance with the authorities held by the Bank (the "Instruction"), to the extent permitted at law, you indemnify the Bank against all losses, claims and expenses that the bank may incur by reason of acting upon the instruction, without further authority or enquiry. The bank may debit the account(s) above with all such claims and expenses, whether such account(s) is or may become overdrawn as a result. In the event that such account(s) becomes overdrawn, you will pay interest at the rate(s) normally charged by the bank. Any payment the bank makes in accordance or purported accordance with the Instruction shall be conclusive evidence that the bank was liable to make such payment.

[470] BNZ submits that this clause means that to the extent that the bank complies with automated instructions, including to repay drawdowns or interest on drawdowns, the bank is entitled to debit them to the current accounts even if that causes the current account to become overdrawn, and in that event the bank is entitled to charge interest at the rates normally charged by the bank.

[471] In response, the defendants submit:

(a) The levying of overdraft interest at 20 per cent per annum was contrary to the express terms of the Facility Agreements. The parties agreed specifically on the interest to be charged on drawdowns and in the event of default, at simple interest plus 2 per cent (an average default rate of 4 to 7 per cent per annum).

(b) The reason overdraft interest was levied was because BNZ debited the LPC and PHL's current accounts with unpaid interest. Its authority to process those debits could only arise under the Facility Agreements. However, as discussed above, the parties agreed expressly on the default interest rates paid. There was no authority to circumvent those rates and charge higher amounts.

(c) The debit account provisions of the Facility Agreements cannot be used to subvert the agreed interest rates. They are essentially set-off clauses, enabling monies outstanding on the loans to be recouped from balances in other accounts. They do not permit BNZ to debit an account with no money so it can recover a higher rate of interest.

(d) If the debit provisions did enable overdraft interest to be charged, Mr Kerr and the other defendants can seek relief under ss 120 and 127 of the Credit Contracts and Consumer Finance Act 2003. Those provisions enable relief whenever a party is seeking to exercise a right "in an oppressive manner". Ultimately, this is not an issue that can be determined on a summary judgment application.

[472] In my view, the defendants blur the distinction between the interest rates agreed to apply to drawdowns under the LPC and PHL Facilities (simple and default interest) and the obligation to pay overdraft interest at the bank's usual rate on the current accounts under the separate terms and conditions applicable to those accounts. These terms and conditions were not part of the Facility Agreements. As such, the current accounts, and the terms and conditions governing their operation, sit alongside but separate to the loan facilities established and governed by the Facility Agreements.

[473] To expand on that point, I consider that the debit account clauses clearly gave BNZ authority to debit interest payable under the Facility Agreements from the current accounts of LPC and PHL. There can be no serious argument about that.

[474] Further, there is no basis for imposing the qualification advanced by the defendants that there must be money in the account from which the debit is made. That is not an interpretation available on the plain and ordinary meaning of the words.

[475] Moreover, and critically, the conduct of BNZ and Mr Kerr does not support such an interpretation. There is no dispute that Mr Kerr opened the current accounts intending that loan funds would be drawn down into these accounts and interest would be paid at the end of each relevant interest period from these accounts by way of direct debit.

[476] Mr Kerr has put in evidence a sample of the drawdown notices he received from BNZ for each loan drawdown. The drawdown notices confirm that the funds would be credited to LPC/PHL's current account and record the following details:

(a) the amount of principal drawn down;

(b) the applicable interest rate;

(c) the interest period (expressed as 'the term');

(d) the maturity date;

(e) the total interest payable for that interest period.

[477] Each drawdown notice states that principal and interest payments will be direct debited from the current account.

[478] Therefore, Mr Kerr was aware that at the end of each interest period a known amount would be debited by BNZ from LPC and PHL's current accounts. There is no evidence from Mr Kerr that this was not how he expected interest on the facilities to be paid.

[479] If there were insufficient funds in the current accounts to cover the direct debit, the current accounts went into unarranged overdraft. In that event, BNZ's Standard Terms and Conditions applied; and the agreement contained in the Account Operating Authority that "[i]n the event that such account(s) becomes overdrawn, you will pay interest at the rate(s) *normally charged by the bank*." Mr Kerr agreed to these terms when he opened the current accounts.

[480] In addition to receiving drawdown notices informing him of the amount of interest that would become payable at the end of each interest period, and that the interest would be debited from the current accounts on that date, Mr Kerr received regular bank statements for the current accounts. These statements will have shown the debit payments being made, the current accounts going into overdraft, and the overdraft interest rate being applied. Mr Rodden has put in evidence a sample of recent bank statements for the current accounts for LPC and PHL in 2018 which record the overdraft interest rate for the LPC 01 current account as the base rate of 10.450 per cent per annum plus 10 per cent, and for the PHL 00 account 20.450 per cent per annum.[146]

[481] During the terms of the facilities, Mr Kerr did not raise any issue about the current accounts going into overdraft or the bank charging overdraft interest when that occurred. There is nothing in Mr Kerr's conduct at the time to suggest that he expected that interest on the principal drawdowns would only be debited from the current accounts when they were in funds and, if so, how interest would otherwise be paid.

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[146] Affidavit of Dermot Michael Rodden in Reply affirmed 5 August 2021 [Second Rodden Affidavit] at [16].

[482] I find therefore that there can be no serious argument that BNZ was not entitled to debit the LPC and PHL current accounts to pay interest under the facilities and charge overdraft interest at the bank's usual rate if the current accounts became overdrawn. This was not a circumvention of the agreed interest rates under the facilities, but rather exactly what the facilities and the current account terms provided. Further, Mr Kerr raised no objection at the time suggesting that he expected the accounts to be managed any differently.

*Are the Guarantors liable for overdraft interest?*

[483] Although I do not consider the defendants have a defence that BNZ was not entitled to charge overdraft interest, I do consider that the Guarantors have a potential defence that they are not liable as Guarantors *of the facilities* for this overdraft interest.

[484] As mentioned, the Guarantors guaranteed the due and punctual payment of all amounts payable to BNZ *under the Transaction Documents*. The Transaction Documents are the Facility Agreements, the Securities and any other documents agreed to be Transaction Documents. I have not seen any evidence that Mr Kerr and BNZ agreed that BNZ's Standard Terms and Conditions or the authorities governing the current accounts were to be Transaction Documents. Nor did BNZ advance that proposition. Therefore, there seems to be an argument that the Guarantors have not guaranteed PHL and LPC's obligations to pay overdraft interest on their current accounts under these documents.

[485] Accordingly, my orders will be that LPC and PHL are liable for the full sums claimed by BNZ, including any overdraft interest charged and now claimed. That interest was rightly charged.

[486] However, summary judgment against the LPC Facility Guarantors and Mr Kerr as Guarantor of the PHL Facility must exclude any overdraft interest charged and claimed on the current accounts.

## Mr Kerr's counterclaim

[487] Finally, Mr Kerr argues that summary judgment should be declined because he has a counterclaim that should be set off against any judgment against him.

[488] The counterclaim was not pleaded in the defendants' notice of opposition to the application for summary judgment but signalled by Mr Kerr in his affidavit sworn on 28 February 2022, after the liability hearing but before the quantum hearing.

[489] As noted earlier, BNZ objects to this evidence. It says that the defendants have not pleaded a counterclaim or set-off in the proceeding, so Mr Kerr's evidence is irrelevant; set-off is not available to the defendants as a defence to BNZ's summary judgment application as each of the relevant agreements contained a no-set-off clause; and BNZ would be prejudiced if the affidavit is admitted, as there is insufficient time for it to consider and respond to it before the hearing.

[490] I will admit Mr Kerr's evidence because it provides essential context for consideration of his submission that summary judgment should be declined because of the counterclaim.

[491] The classic statement of the principle behind equitable set-off is found in *Grant v NZMC Ltd*:[147]

> The principle is, we think, clear. The defendant may set-off a cross-claim which so affects the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim into account. The link must be such that the two are in effect interdependent; judgment on one cannot fairly be given without regard to the other; the defendant's claim calls into question or impeaches the plaintiff's demand. It is neither necessary, nor decisive, that claim and cross-claim arise out of the same contract.

[492] In his affidavit, Mr Kerr describes a counterclaim he says he intends to make against BNZ in relation to his sale of shares in Heartland Bank in 2011. Mr Kerr explains that 'his interests' were the largest shareholder in Heartland Bank. Mr Kerr says that based on Mr Cornmell's expert analysis, BNZ significantly overstated claims for principal and interest on the PHL and LPC Facilities. He alleges that as a direct

[147] *Grant v NZMC Ltd* [1989] 1 NZLR 8 (CA) at 12.

result, PHL and his related entities were required to sell their stakes in Heartland Bank at a substantial discount to pay down the facilities. He says that they were required to exit their stakes in Heartland at an average price of around 45 cents per share, compared with a price of $2.30 per share at the time he swore his affidavit. In addition, dividends were forgone. He alleges that had BNZ correctly managed and communicated the PHL and LPC balances, he would never have needed to sell these shares.

[493] In support of his counterclaim, Mr Kerr has put in evidence correspondence with Mr Downie at BNZ between September 2011 and February 2012. Key parts of this correspondence are set out at [244] to [256]. It is clear from the correspondence that Mr Kerr and Mr Downies were corresponding about both facilities. The emails record that Mr Kerr arranged for Heartland Bank shares held by the Kerr Family Trust and other entities under his control to be sold down to part pay the LPC and PHL Facilities.

[494] I do not consider that this foreshadowed counterclaim provides me with any reason to decline to order summary judgment. It is based on Mr Cornmell's assessment that the correct balance on the PHL Facility at the PHL Expiry Date was $6,390,467.20, rather than the amount certified by BNZ of $19,996,354.12, and his assessment that the correct loan balance on the LPC Facility on the LPC Expiry Date was $22,697,424.47 as opposed to $23,903,277.98.

[495] I have found there is no substance to that assessment. The LPC and PHL loan balances were not overstated by BNZ.

[496] I note that even on Mr Cornmell's assessment, based on the assumption that BNZ was not entitled to charge overdraft interest, the amount of principal outstanding on the LPC Facility at the relevant time was $22,697,424.47. The LPC Facility had expired on 31 May 2011 and LPC and the Guarantors were in default.

[497] Accordingly, I do not consider that Mr Kerr's purported counterclaim provides me with a reason to decline to order summary judgment.

**Conclusions**

[498] I have found that the defendants have no defence to BNZ's claims that they are liable as Guarantors for the amounts due and owing under the LPC and PHL Facilities, concluding that:

(a) the defendants did not contract out of the Limitation Act 2010; and

(b) they acknowledged their liability in writing to BNZ, giving rise to fresh claims.

[499] I have also found that Mr Kerr has no defence to the claims against him under his indemnities in relation to the LPC and PHL Facilities. However, as I find him liable as Guarantor, it is not necessary to make orders against him under the indemnities.

[500] I have concluded that Galt and Glencoe JV's obligation to pay the Costs Award is not subject to the liability cap in the LPC Facility Agreement. As a result, LPC, Mr Kerr and PHL are liable to pay the Costs Award as Guarantors.

[501] I have found that the usual onus involved in a plaintiff's application for summary judgment application is not altered by the terms of the Facility Agreements.

[502] I have concluded that there is no merit to the defence that the amounts said to be due and owing by BNZ are wrong or uncertain. The specific issues identified by the defendants do not meet the threshold of being reasonable arguable, mainly because there is no factual foundation for Mr Cornmell's expert assessment.

[503] I have also found that the defendants do not have a defence that BNZ was not entitled to charge unarranged overdraft interest. However, I consider that the Guarantors have an arguable defence that they did not guarantee the Borrowers' obligations to pay overdraft interest on their current accounts.

[504] As a result of the conclusion that the balances according to BNZ at the facility expiry dates were correct, I find that there is no basis for Mr Kerr's counterclaim that

he was required to sell shares to pay down the facilities based on inflated loan balances.

**Orders**

[505] I enter summary judgment against LPC in relation to:

(a) the first cause of action in relation to the LPC Facility;

(b) the second and third causes of action for the Costs Award;

(c) contractual interest on the above sums in accordance with the terms of the LPC Facility Agreement;

(d) reasonable solicitor client costs pursuant to cls 16.4 and 25.2 of the LPC Facility Agreement.

[506] I enter summary judgment against Glencoe JV in relation to:

(a) the fourth and fifth causes of action for the LPC Guaranteed Indebtedness, quantified to exclude overdraft interest charged on the LPC current account, and with enforcement limited to the value of the Glencoe JV property realised at mortgagee sale;

(b) the sixth and seventh causes of action for the Costs Award;

(c) contractual interest on the above sums in accordance with the terms of the Glencoe JV Guarantee;

(d) reasonable solicitor client costs pursuant to cl 17.1 of the Glencoe JV Guarantee.

[507] I enter summary judgment against Galt, Mr Kerr and PHL in relation to:

(a) the eighth and ninth causes of action for the LPC Guaranteed Indebtedness, quantified to exclude overdraft interest charged on the

LPC current account, and with enforcement against Galt limited to the value of the Galt property realised at mortgagee sale;

(b) contractual interest on the above sum in accordance with the terms of the LPC Facility Agreement;

(c) reasonable solicitor client costs pursuant to cls 16.4 and 25.2 of the LPC Facility Agreement.

[508] I enter summary judgment against Galt in relation to:

(a) the 10th and 11th causes of action for the Costs Award;

(b) contractual interest on the above sum in accordance with the terms of the LPC Facility Agreement;

(c) reasonable solicitor client costs pursuant to cls 16.4 and 25.2 of the LPC Facility Agreement.

[509] I enter summary judgment against Mr Kerr and PHL in relation to:

(a) the 12th and 13th causes of action for the Costs Award;

(b) contractual interest on the above sum in accordance with the terms of the LPC Facility Agreement;

(c) reasonable solicitor client costs pursuant to cls 16.4 and 25.2 of the LPC Facility Agreement.

[510] I enter summary judgment against PHL in relation to:

(a) the 14th cause of action in relation to the PHL Facility;

(b) contractual interest on the above sum in accordance with the terms of the PHL Facility Agreement;

(c) reasonable solicitor client costs pursuant to cls 14.4 and 21.2 of the PHL Facility Agreement.

[511] I enter summary judgment against Mr Kerr in relation to:

(a) the 15th and 16th causes of action for the PHL Guaranteed Indebtedness, quantified to exclude overdraft interest charged on the PHL current account;

(b) contractual interest on the above sum in accordance with the terms of the Kerr PHL Guarantee and the PHL Facility Agreement;

(c) reasonable solicitor client costs pursuant to cls 2.2 and 13.1(b) of the Kerr PHL Guarantee.

[512] BNZ is to file a memorandum and affidavit within **20 working days** quantifying the Guaranteed Indebtedness less any overdraft interest charged and claimed for each of the LPC and PHL Facilities, together with a complete draft order.

[513] The defendants may file a memorandum and an affidavit in response identifying any issues with the quantification of the orders by BNZ within a further **15 working days**.

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Associate Judge Gardiner