IN THE SUPREME COURT OF NEW ZEALAND

SC 52/2010
[2010] NZSC 146

BETWEEN	GE CUSTODIANS Appellant
AND	BRUCE LEONARD BARTLE AND DOROTHY JUDITH BARTLE First Respondents
AND	BARTLE PROPERTIES LIMITED Second Respondent
AND	JONATHAN MATHIAS Third Respondent

Hearing:	20 and 21 October 2010
Court:	Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ
Counsel:	J A Farmer QC, B J Upton and M V Robinson for Appellant J G Miles QC, P J Dale and D W Grove for First and Second Respondents No appearance for Third Respondent
Judgment:	3 December 2010

JUDGMENT OF THE COURT

A The appeal is allowed and the orders made by the Court of Appeal are set aside.

B The case is remitted to the High Court for determination of issues reserved by that Court for further consideration.

C The appellant is awarded costs in this Court against the first and second respondents of $25,000 together with its reasonable disbursements to be fixed by the Registrar.

D The costs order made by the Court of Appeal is reversed.

REASONS

(Given by Blanchard J)

Introduction

[1] Section 120 of the Credit Contracts and Consumer Finance Act 2003 (the CCCF Act) permits, but does not require, a court to reopen a credit contract[1] if, in any proceedings, it considers that the contract is oppressive. Section 118 defines "oppressive" as "oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice".

[2] The central issue on this appeal is whether three loan contracts, and associated mortgages forming part of those contracts, between the first respondents, Mr and Mrs Bartle, as borrowers and the appellant, GE Custodians (GE), an unlimited company in the General Electric Corporation group, as lender, were oppressive and should be reopened in circumstances where GE says that it had no knowledge of any matter which would make any of the loan contracts oppressive or which should have put it on inquiry.

[3] In the High Court, Randerson J dismissed the Bartles' claim against GE, saying that he was not persuaded that there was any basis to conclude that the loan contracts were oppressive under the CCCF Act.[2] The Court of Appeal unanimously reversed that decision.[3] It declared the loan contracts oppressive and remitted the case to the High Court for consideration of the appropriate remedy.

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1 A contract under which credit is or may be provided: Credit Contracts and Consumer Finance Act 2003, s 7(1).

2 *Bartle v GE Custodians* HC Auckland CIV-2008-404-3460, 30 September 2009 at [343].

3 *Bartle v GE Custodians* [2010] NZCA 174, [2010] 3 NZLR 601 per William Young P and Hammond and Arnold JJ.

Facts

[4] Mr and Mrs Bartle were born in 1939 and 1940 respectively. In 2006 they owned a relatively modest unencumbered home near Whangarei. They had previously had an investment in real estate on the Gold Coast in Queensland but had not found that a happy experience and had sold out. They seem to have invested the proceeds of $65,000 with a bank on term deposit. Apart from the interest on that deposit, their only income was New Zealand Superannuation totalling $21,736 per annum.

[5] Unfortunately for the Bartles, they were enticed into what has become known as the Blue Chip investment scheme promoted by the Blue Chip Group, all the New Zealand companies in which are now insolvent. But it is important to be aware that in 2006 the Blue Chip Group appeared to a large and successful operation with numerous property interests and a stock exchange listing. The central figure in the group was Mr Mark Bryers. The board of directors of the parent company included several prominent independent directors.

[6] The Bartles, whom the High Court Judge described as a couple of normal intelligence but lacking sophistication in business matters,[4] were keen to utilise the equity in their home in order to obtain a higher level of income in their retirement. They considered raising a reverse equity mortgage but ultimately rejected that in favour of a proposal put to them by a Blue Chip salesman that they should buy a residential apartment in a large building then under construction in Symonds Street, Auckland, borrowing against their home and the apartment itself in order to do so. Blue Chip suggested that they would hold the apartment for about four years and it could then be sold into the rising Auckland property market, with profits being shared with Blue Chip. Blue Chip sales material made much of the fact that the Auckland property market had risen continuously for many years and projected a continuance of that phenomenon. Until the apartment was resold Blue Chip guaranteed to meet the shortfall on rental income (that is, it would subsidise the

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4 At [18].

mortgage outgoings) and would in addition pay the Bartles an income of $451 per fortnight. It was this additional income, plus their trust in Blue Chip's predictions about the rising property market, which seems to have motivated the Bartles to enter into the scheme, although in fact when the apartment was sold and the mortgages repaid they were to receive only a 10.1% share of the capital profits, with Blue Chip getting the rest.

[7] Before moving to explain how GE became the financier to the Bartles it is convenient to further describe how the proposal devised by Blue Chip was implemented. The Bartles were to purchase the apartment (from a vendor developer apparently independent of Blue Chip) for $552,000 but to borrow in that connection an aggregate amount of $629,566. So, unusually, they were to borrow $77,566 more than the price of the apartment. In the result there were three loan advances. The first, on 8 November 2006, when the Bartles had already unconditionally committed themselves to purchase the apartment but the apartment building was still in the course of construction, was for $137,484, secured only against the Whangarei home, which had a value for rating purposes of $235,000.[5] Blue Chip allocated $55,200 of the borrowing for the deposit on the apartment and another $55,200 for "working capital" of the joint venture between Bartles and Blue Chip". That sum was to be paid to Blue Chip. There was also a brokerage fee of $16,284 payable to Blue Chip. The rest was a provision for valuation and legal fees and disbursements to be incurred in connection with the scheme. The Bartles began to receive their fortnightly payments effectively from funds they themselves had provided as the "working capital".

[8] The second and third loans totalling $492,082 were drawn down together nearly 11 months later on 28 September 2007 when the purchase of the apartment was settled. $125,791 was secured under the original Whangarei mortgage and the balance of $366,291 was secured by a mortgage over the apartment. The borrower of the third loan was a company formed by the Bartles to buy the apartment, Bartle Properties Ltd, which is the second respondent to this appeal. But the Bartles gave GE a guarantee of their company's liability and that guarantee obligation was in turn

[5] This was the figure used for the purpose of the first loan. A valuation report at that time assessed the value at $393,000.

secured under the Whangarei mortgage. So effectively GE could have recourse to the Whangarei property, if necessary, for the whole amount of the aggregate borrowing.

[9] The later borrowing was split into two parts in order to keep the borrowings against each property (ignoring the guarantee liability) below 70% of the valuation of the security in each case. The reason for this will shortly emerge.

[10] The apartment was sold to Bartle Properties Ltd subject to a lease already in place to a Blue Chip subsidiary, ART Apartments Ltd. The lease was guaranteed by Blue Chip New Zealand Ltd. The term was for four years at a rent of $33,280 per annum.[6]

[11] The joint venture between the Bartles and another Blue Chip subsidiary, Blue Chip Joint Ventures Ltd, had a number of very unsatisfactory elements. It is unnecessary to mention more than three. First, although the Bartles were to receive only 10.1% of any capital gain over and above the amount necessary to discharge the mortgages, any capital loss was not to be borne by Blue Chip. Secondly, Blue Chip's guarantee was limited to indemnifying the Bartles against the interest (but not the capital) of their borrowings (including any increase in the interest rates) plus the payments of $451 per fortnight. These payments were effectively being funded by the Bartles themselves from the working capital. And Blue Chip Joint Ventures Ltd had a share capital of only $100. Thirdly, unbeknown to the Bartles, Blue Chip had an arrangement with the vendor of the apartment that it would pay Blue Chip a commission of 15% of the purchase price. There thus appears to have been a secret commission, which would presumably also have been unknown to the valuer who wrote a valuation report for the Bartles and the lender which valued the apartment at $527,545. This suggests that the true market value of the apartment may have been much less than the price the Bartles were paying of $552,000, which already included furniture said to have a value of $24,000. The High Court Judge found that the Bartles did not understand the joint venture arrangements.[7]

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6 Evidence was given that GST was payable by the lessor, reducing the net rent to $29,582 pa. The lessor's expenses also included a management fee of 10% of the gross rental.

7 At [127].

[12] The funding of the Bartles was arranged in this way. On the Bartles' behalf, Blue Chip approached a mortgage broker, Tasman Mortgages Ltd (TML)[8] with which Mr Bryers had an association[9] although it does not appear to have been part of the Blue Chip Group until March 2007 and then only briefly, for a majority shareholding (70%) was conditionally sold to the Lombard Group less than three months later and that transaction was settled on 6 August 2007.

[13] TML's business involved putting together loan applications and submitting them to a lender. The High Court Judge recalled that in 2004 its general manager said that it had arrangements with "all of the main funders" of loan finance.[10] One of them was GE, which acted as a custodian trustee. Another General Electric Group company, Australian Mortgage Securities (NZ) Ltd (AMS), received mortgage proposals introduced by TML, approved them on behalf of GE and took the steps necessary for the advances to be made. It then administered the loans for GE and institutions on whose behalf GE acted as a custodian trustee. In that role, AMS had in 2004 entered into a "Correspondent Deed" with TML. This was a detailed document which included a provision declaring that TML was an independent contractor and not an agent of AMS. The essence of the arrangement set out in the deed was that TML was given the right to prepare loan applications meeting certain prescribed criteria, to apply on GE's behalf to a mortgage insurer, Genworth Financial, and having arranged cover, to submit the application to AMS. AMS had an absolute right to decline such an application but, once it had approved a loan, instructions were given to GE's solicitors (in this case the Auckland firm Sanderson Weir) who prepared the loan contract and mortgage on GE's behalf and sent them to AMS, which forwarded them to a solicitor selected by the borrowers to act for them on the borrowing. The borrowers' solicitor was requested by AMS to act also as GE's solicitor on a limited retainer to investigate title to the security, arrange signing of documents, settle the mortgage advance and register the mortgage. After the loan amount was advanced and the mortgage registered, TML would then manage the

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8 Another company, Executive Mortgages Ltd, was at first involved but the case has proceeded on the basis that TML should be regarded as the facilitator of the loans.

9 He became a director on 5 September 2006.

10 At [173].

loan, if necessary taking steps to enforce the mortgage on GE's behalf if there was a default. It can be seen that in this way AMS/GE was outsourcing to TML all the functions which traditionally would have been personally undertaken by a lender, other than the decision to make the loan, the preparation of loan documentation and the making of the advance. The Correspondent Deed authorised TML to charge a borrower an establishment fee and to take a commission on the collection of interest paid under the loan.

[14] One of the types of loan for which TML was permitted to prepare and submit loan applications was designed to cater for borrowers whose income might be uncertain, perhaps because of fluctuations in the profitability or liquidity of a business, but who had an adequate margin of security for their proposed borrowing. In such a case GE would consider lending up to 70% of the value of the security without asking the borrowers for information about their level of income. The loan application was therefore in an abbreviated form, although accompanied by a property valuation, and could be processed very quickly by AMS. Such applications were known as "Fastdoc 70" applications. Lending of this kind relying on the security and mortgage insurance cover and not on the borrowers' personal covenants had become known as "asset lending". It was this form of borrowing for which TML submitted applications to AMS for all three loans sought by the Bartles from GE. In connection with all of them the Bartles supplied GE with a declaration that they could meet payments due under the loans and were not relying on GE to verify or review their financial position. TML also stated in a document accompanying the loan applications that it was not aware of, and had not been able to ascertain by reasonable inquiry, any reason or circumstance under which the borrowers might be "unable to pay in accordance with the terms set out in the loan contract or not without substantial hardship."

[15] For some unexplained reason, however, when the second and third applications were submitted in September 2007, TML did supply AMS with a statement of the Bartles' assets and liabilities which had been personally prepared and signed by the Bartles themselves. This appeared to show that the Bartles had

cash at that time of $98,000. It seems that this figure may have been erroneous and that the true figure may have been $48,000.

[16] GE was made aware of the Bartles' ages when considering all of the loan applications. In the first application their occupations were stated as "self-employed". In the subsequent applications they were each described as "self employed investor", with the period of such "employment" stated as 12 months. (It will be necessary to refer later to certain alterations made by TML personnel, without authority from the Bartles, to some details in the latter applications.) Before approving the second and third loans AMS asked TML about the Bartles' investments and was told that they had previously had some investment properties, which had been sold, and now had some term investments. AMS noted that the Bartles' payment history under the first loan was excellent and that they again had a clear credit check.

[17] The loans were all approved for a five year initial term during which interest only was payable.[11] Thereafter the principal sum was repayable in instalments with interest over a further 20-year term in the case of the first and second loans and a further 25-year term in the case of the third loan. The interest rates were 8.73% pa on the first loan and 9.86% and 9.66% pa on the second and third loans. The annual amount needed to meet these interest payments was thus in the vicinity of $61,000, as compared with a net rental from the apartment of less than half that amount. GE was not informed of the actual rental level but, as its counsel Mr Farmer QC accepted, it could easily have assessed the likely rental level for an apartment of this kind and location and seen that there was going to be a substantial shortfall. It was not aware of Blue Chip's involvement or its scheme and so was unaware of the subsidy for the shortfall.

[18] Whilst GE knew only that the first loan was for unspecified investment purposes, it was aware that the second and third loans were for the purchase of the apartment. A valuation of the apartment by a registered valuer at $527,545

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[11] There was a right of early repayment, subject to payment of certain charges calculated in accordance with a formula.

accompanied the second and third applications, as well as a valuation of the Whangarei house at $405,000.

[19] Blue Chip fulfilled all its obligations to the Bartles during the first year but it stopped making the fortnightly payments even before the second and third loans were drawn down and in February 2008 it ceased making monthly interest payments. As we have said, the New Zealand companies in the group are now insolvent. GE has exercised its power of sale over the apartment but it realised only about $250,000. GE is now seeking from the Bartles the balance outstanding, which appears likely to be in excess of the value of their Whangarei home.

[20] The Bartles had instructed a solicitor, Mr Mathias, to advise them in connection with the joint venture and the borrowings. He was not the Bartles' usual lawyer and had been recommended to them by a Blue Chip salesman because he was said to have an understanding of the Blue Chip scheme. He had in fact had a large number of such references to act for borrowers entering into joint ventures with Blue Chip. Nevertheless, Mr Dale, for the Bartles, confirmed to us that it had been accepted throughout the case that Mr Mathias was to be regarded as an independent lawyer. He did not act for Blue Chip in connection with the joint venture.

[21] Mr Mathias was joined as a defendant in this proceeding. Randerson J found that he was negligent in failing to explain to the Bartles the rather glaring disadvantages and risks of the Blue Chip scheme, in particular the risk that the apartment would not rise in value over the four-year period by an amount sufficient to cover the borrowings and might even decline, and the risk inherent in their dependence on the financial stability of Blue Chip, and especially of its subsidiary which was the party to the joint venture agreement. The Bartles have obtained from the High Court a liability judgment against Mr Mathias but the quantum of their damages has yet to be assessed. Mr Mathias is already bankrupt and, because of the number of claims against him by Blue Chip clients for whom he acted, his professional indemnity insurance is, we were told, likely to be inadequate.

The High Court judgment

[22] Referring to the pleaded causes of action, Randerson J recorded that it was said for the Bartles that GE knew or ought to have known that they had no means to repay the loans and that the loans constituted an unconscionable bargain or were oppressive under the CCCF Act. The Bartles had also pleaded that TML was the agent of GE and that the knowledge held by it as agent could be attributed to GE as principal.[12]

[23] Having outlined the facts and made a detailed determination that Mr Mathias was liable to the Bartles for his negligence, the Judge turned to consider the causes of action against GE. He said it was accepted on behalf of the Bartles that GE had no actual knowledge that the loans were for the purpose of the Blue Chip investment, nor of the terms of the joint venture agreement with Blue Chip, nor of any representations that might have been given by Blue Chip or Mr Mathias to the Bartles in connection with their investment. It had further been agreed that GE did not actually know that the Bartles would have insufficient income to support the repayment of the mortgage advances.[13]

[24] The Judge reviewed the arguments on agency, coming to the conclusion that TML was not the agent of AMS/GE. Its function was that of a non-exclusive originator of loan applications which it then submitted to AMS for approval.[14]

[25] The Judge further found that there was no evidence that TML had any knowledge of any representations made by the Blue Chip salesman and Mr Mathias. It had been accepted for GE that TML knew the loans raised by the Bartles were for the purpose of a Blue Chip investment but the Judge found that "there is no evidence of any greater knowledge on its part of the details of the investment such as the terms of the critical joint venture agreement".[15]

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12 At [11].
13 At [169].
14 At [276].
15 At [282].

[26] The Judge then moved to the issue of whether the loan contracts were an unconscionable bargain. He said there was no suggestion that the terms of the loans themselves were in any way oppressive or outside normal commercial practice. There was nothing to suggest that the Bartles' age or health were relevant factors or that they had any intellectual or other disability. On the other hand, he said, they were not experienced in business matters generally and had not been involved in any significant investment of the kind involved here. Their understanding of the structure, implications and risks associated with the investment was "far from complete".[16] They did not know, and were not advised, that the entire risk of the substantial borrowings would fall upon them if Blue Chip were to fail. Nor did they understand that there was a real risk that they would lose their home in that event.

[27] Without Blue Chip's undertaking to meet the costs and pay the mortgages, they could not possibly have met the payments due from their limited income and other resources. However, the Judge said, there were corresponding actual and potential benefits in the investment in the form of the fortnightly payments which would significantly enhance their income and the possibility of a minor share in any capital gain.[17] Moreover, the borrowings did not exceed 70% of the total value of the home and the apartment, and the Bartles had signed declarations that they could "comfortably afford all repayments".

[28] In these circumstances and given GE's lack of knowledge as to the Bartles' modest income the Judge was satisfied that there was nothing which ought to have put AMS/GE on inquiry in relation to the ability of the Bartles to meet their mortgage commitments. He noted that they were already unconditionally committed to the purchase of the apartment before the loan contracts were entered into. They could not settle without borrowed funds. GE had no reason to suppose that the purchase of the apartment was anything other than a normal property investment transaction. As well, Mr Mathias was providing independent legal advice. That was a material factor both as to the extent of any disability or disadvantage the Bartles may have been labouring under and as to whether GE had taken advantage of their

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16 At [289].
17 At [289].

disability or disadvantage.[18] The Judge referred to what Lord Brightman had said in giving the advice of the Privy Council in *O'Connor v Hart*:[19]

> An unconscionable bargain in this context would be a bargain of an improvident character made by a poor or ignorant person acting *without independent advice* which cannot be shown to be a fair and reasonable transaction. (emphasis added by the Judge)

Randerson J said that, without knowledge that the advice given by Mr Mathias was inadequate or wrong, GE was entitled to assume that Mr Mathias would properly advise the Bartles about the risks involved in the transaction, citing *Bank of Baroda v Rayarel*.[20]

[29] Randerson J rejected an argument that, because GE had instructed Mr Mathias on a limited retainer, the solicitor had become GE's agent, citing *Barclays Bank plc v Thomson*[21] in which a series of English cases against that proposition had been affirmed and Simon Brown LJ had said that knowledge acquired by solicitors whilst tendering independent advice to a signatory did not come to them as agents for the lenders because at that time their professional duty was owed to the signatory alone.[22]

[30] The Judge referred to criticisms of Fastdoc or asset lending, saying that it was easy to criticise loans of this type with the advantage of hindsight:[23]

> But the evidence establishes that loan products of this type were not uncommon at the time and suited borrowers who, to use Blue Chip's advertising material, were "asset rich but cash poor". In the buoyant property market prevailing at the time of these loans, investors could expect at least to recover their money from the sale of real estate if not to make a capital gain. But for the downturn in the market, which was a significant contributing factor in the collapse of the Blue Chip Group, the outcomes anticipated by the Bartles may have been realised.

The Judge concluded that Fastdoc loans were not inherently unconscionable. They carried a higher degree of risk in relation to the borrower's personal covenants than

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18 At [292].
19 *O'Connor v Hart* [1985] 1 NZLR 159 (PC) at 171.
20 *Bank of Baroda v Rayarel* [1995] 2 FLR 376 (CA) at 384–385 per Hirst LJ and 386 per Hoffmann LJ.
21 *Barclays Bank plc v Thomson* [1997] 4 All ER 816 (CA).
22 At 821, 826.
23 At [306].

in conventional lending. Slightly higher interest rates were charged. But the risk was mitigated by a lower loan to valuation ratio.[24]

[31] Randerson J found that the Blue Chip investment was undoubtedly an improvident transaction from the perspective of the Bartles. A GE witness had frankly accepted that GE would not have made the advances if it had been aware at the time of the Bartles' financial position. But, on the basis of its knowledge at the time, there was nothing improper about the advances. It was entitled in the circumstances to rely on the Bartles' declaration that they could meet the loan commitments:[25]

> It may be foolish or improvident for borrowers to enter into a transaction of this type when their means are insufficient to enable them to meet the loan commitments or where, in a case like the present, a third party on whom they depended proves to be unreliable. But the law does not intervene on the grounds of unconscionability in circumstances where the borrowers are of full capacity, the loan is on normal commercial terms and any relative weakness in bargaining power or lack of complete understanding can be addressed by the receipt of independent legal advice. In such circumstances, the lender is entitled to proceed on the assumption that the borrowers must take responsibility for their own actions. The position may be different if the lender has actual or constructive knowledge that the borrower cannot pay, but that is not the case here.

[32] The Judge then proceeded to the question of whether the loans were nevertheless oppressive under the CCCF Act.[26] He said that the issue of any possible oppression under the Act came down to the propriety of GE advancing substantial sums to the Bartles without taking any steps to investigate their income or to require TML to do so. He observed that the expression "breach of reasonable standards of commercial practice" in s 118 takes colour from the words that precede it and is to be interpreted as requiring proof of contractual terms, or the use of means to induce someone to enter into a credit contract, which are more than simply out of line with normal commercial practice.[27] After considering and distinguishing some Australian cases dealing with the Contracts Review Act 1980 (NSW) and ss 51AA

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24 At [308].
25 At [310].
26 At [312].
27 At [321].

and 51AC of the Trade Practices Act 1974 (Cth),[28] Randerson J said that as a general proposition he accepted that a lender who advanced money with actual or constructive knowledge that the borrower had no means to meet his or her commitments under the terms of the advance might in some circumstances be taken to have acted unconscionably and in breach of reasonable standards of commercial practice, but the existence of any such knowledge on the part of GE had not been established.[29] He had not been persuaded that there was any basis to conclude that the loan contracts were oppressive within the meaning of the CCCF Act.

The Court of Appeal

[33] In the Court of Appeal the three Judges delivered separate reasons in favour of allowing the Bartles' appeal.

[34] Hammond J said that the oppression remedy under the CCCF Act was intended to have "a wide ambit of application".[30] He identified three strands expressly included in the s 118 definition: abuse of power, unequal bargaining positions coupled with hard terms, and departure from standards acceptable to the community. He considered, however, that oppression under the Act "goes beyond the existing concepts in our jurisprudence".[31] The factors which persuaded him that there was oppression in this case were these. After five years there would be enlarged payments of both principal and interest which the Bartles would be unable to meet. The loan terms were for 25 years, for people who were 65-year-old pensioners. GE had "failed to look into the transactions which were vital for the loan to be serviced, and hence were indifferent to the Bartles' ability to meet their obligations".[32] GE's own evidence that the loan should not have been made was powerful evidence of a departure from reasonable standards. The Bartles had fragmented and incomplete knowledge so they were hopelessly handicapped from the start. While asset lending was not necessarily unconscionable per se, it had

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28 *Kowalczuk v Accom Finance Pty Ltd* [2008] NSWCA 343, (2008) 252 ALR 55; *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413, (2003) 11 BPR 20,841; and *Perpetual Trustee Co Ltd v Khoshaba* [2006] NSWCA 41, (2006) 14 BPR 26,639.

29 At [342].

30 At [51].

31 At [56].

32 At [68].

substantial potential for injustice. There were failures of comprehension on the part of both GE and the Bartles. TML was "operating an asset lending scheme for Blue Chip".[33] Even if it was not a full agent of GE, it was an agent for very important purposes, for instance servicing and enforcing the loan. The lender could not avoid the application of the CCCF Act by the interposition of an intermediary loan originator, particularly where there were "major agency functions" being performed by an intermediary.[34] GE could not rely on the Bartles having had legal advice which was "neither competent nor independent".[35]

[35] Arnold J commented that the Blue Chip scheme had serious defects and could only hope to work if in the short-term there was strong rental demand for apartments of the particular type with their prices increasing significantly and no significant increase in interest rates, and if Blue Chip could continue to persuade people to invest in its products.[36] It was vital to the investment that the Blue Chip Group did not collapse.

[36] Arnold J found no basis for departing from Randerson J's assessment that while TML knew that the loans were being raised for a Blue Chip investment there was no evidence of any greater knowledge on its part of the details of the investment such as the terms of the critical joint venture agreement.[37]

[37] In discussing what might constitute oppression under the CCCF Act Arnold J said that reasonable standards of commercial practice provided the touchstone; that while evidence of commercial practice was relevant to the court's determination, the ultimate decision as to what constituted reasonable commercial practice was for the court, not the relevant industry; and that the oppression must emanate from, or be attributable to, the other party to the contract, in this case GE.[38] In his view the

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33 At [84].
34 At [88].
35 At [97]. Hammond J thought erroneously that the High Court had found a lack of independence on the part of Mr Mathias: see [94]. In this Court the respondents accepted that Mr Mathias had to be regarded as having been independent.
36 At [115].
37 At [129].
38 At [176].

scope of the oppression under the CCCF Act was broader than the equitable doctrine of unconscionability. A contract or conduct might be treated as oppressive under the CCCF Act even though the party whose conduct was said to be oppressive might be (subjectively) blameless because the party was simply following a common industry practice.[39] On the other hand, the Judge noted that the threshold for oppression should not be set too low lest sanctity of contract be unduly compromised and undesirable uncertainty introduced.[40]

[38] Arnold J said that when GE's arrangements for dealing with loans were considered against the background of the CCCF Act, in particular its protective purpose and the prohibition on contracting out which it contained,[41] there were three lines of analysis which each pointed to a conclusion that GE was properly responsible for any oppression. In each context TML's knowledge and/or conduct could be related back to GE, although the Judge accepted that none was "a perfect match".[42] First, TML did act on GE's behalf in important respects in compiling loan applications, including arranging insurance. It made or had the responsibility to make enquiries going to the issue of oppression. Secondly, as an alternative to agency, the matter could be approached on the basis of attribution, by analogy with its operation in relation to corporations.[43] Thirdly, GE might be responsible on the basis that, having adopted an outsourcing arrangement, it must live with the consequences if any CCCF Act oppression resulted. The Judge drew an analogy with the situation of a body charged with a statutory duty which was not entitled to delegate the duty but might procure someone else to perform it.[44] It would undermine the scheme and purpose of the Act if lenders could avoid its application by adopting lending processes and requirements that meant they could disclaim all personal knowledge of factors that, objectively, indicated the existence of oppression. Where the lender was wholly reliant on the borrower for an affordability assessment, the resulting loan arrangements were susceptible to the remedial

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39 At [177].
40 At [179].
41 Section 135.
42 At [192].
43 See *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC).
44 At [192](c).

provisions of the CCCF Act on the basis that this was an inherent risk of this type of lending process and to permit a lender to escape responsibility in such circumstances would significantly undermine the protective purpose of the CCCF Act.[45]

[39] Having reviewed cases in which there had been asset lending, the Judge concluded that it was capable of being oppressive, although not in every case.[46] It was oppressive in the present case, in his opinion, because, first, GE took little or no risk. The value of the securities significantly exceeded the value of the borrowing and GE was in any event insured for any shortfall. By contrast, the Bartles faced a high degree of risk. Fastdoc loans were for "self-employed" borrowers, which they were not. TML had inquiry responsibilities relevant to the question of whether the loans were affordable for the Bartles.[47] Secondly, there was the long-term nature of the loans. The Bartles' ability to meet their commitments depended almost entirely on their ability to sell the apartment in the relatively short-term at a handsome profit. The Judge said he was not suggesting that it was always unreasonable for lenders to make long-term loans to older people, but where they were being contemplated the lender needed to look closely at the borrowers' circumstances.[48] However, the key feature of the oppressive conduct was the asset lending, which had not been properly explained to the Bartles, who did not understand that they would be personally responsible for their total borrowings or might lose their home. Under the CCCF Act GE was at risk if it entered into lending that was oppressive:[49]

> In that sense, it had an obligation to avoid such lending. If it chose to rely on someone else to ensure that there was no oppression, such as a legal adviser, rather than turning its attention to that matter itself, it must take the risks associated with that, namely, that the person does not fulfil that role adequately. If the legal adviser does not fulfil the role adequately, the oppression remains. This is so, in my view, even if GE was entitled to expect that the legal adviser would give proper advice. Any other approach would severely undermine the policy of the CCCF Act.
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> In short, had Mr Mathias acted as a truly independent adviser it may be that no question of oppression could arise. But he did not, so GE derives no benefit from his involvement.[50]

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45 At [193]–[194].
46 At [216].
47 At [219]–[220].
48 At [222]–[223].
49 At [227]–[228].
50 See, however, fn 35 above.

[40] Arnold J considered that there was a proper basis to attribute TML's knowledge of the Bartles' financial position, retired status and limited or non-existent earning potential to GE from the outset. It had effectively delegated to TML a task which the CCCF Act assumed would be performed by a lender, namely that of considering whether a lending transaction is oppressive from the perspective of the borrower. GE was entitled to ask another entity to perform that function if it wished, but could not escape responsibility under the Act if that entity erred in a material way in fulfilling that function.[51]

[41] William Young P said that the transaction with Blue Chip was highly improvident for the Bartles. Improvidence of an investment made with borrowed money did not, by itself, justify a conclusion that the agreement to lend that money was oppressive. But there were additional considerations warranting the conclusion that the loan agreements were oppressive.[52] It was asset lending and, where that was to an elderly retired couple, reasonable standards of commercial practice required lender inquiry into whether a loan could be repaid without substantial hardship. The Bartles were "putting their house on the line". The certificates given by TML that it was not aware and could not ascertain by reasonable inquiry any reasons why, or circumstances in which, Mr and Mrs Bartle would not be able to repay the advance were false. Even cursory consideration of the investment plan would have identified the very substantial probability that they would only be able to repay the advance by selling their house.

[42] The President was of the view that TML's knowledge could be attributed to GE. There could be no doubt, he said, that TML acted as GE's agent in the management of mortgages. Rather less clear was whether it also acted as agent in relation to the origination of mortgages, and most particularly in respect of credit assessment.[53] It arranged mortgage insurance which required it to complete proposals. In doing so, it indisputably acted as agent for GE. So when TML gathered information relevant to the ability of Mr and Mrs Bartle to meet their mortgage obligations it was doing so at least in part as an agent for GE in the context

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51 At [230].
52 At [234].
53 At [243].

of the requirement for it to obtain mortgage insurance and, at the same time, to make proper disclosure to the insurer.[54] The idea that knowledge should be attributed to GE for some purposes but not others struck the President as a little artificial. In originating business for GE, he said, TML was representing, or standing in the shoes of, GE. The terms of the certificate which GE required of TML indicated GE wanted to know that there had been reasonable inquiry into the ability of borrowers to repay, an inquiry which could only be carried out by TML. Its functions were closely integrated into the credit assessment aspect of GE's lending business. It seemed reasonable to William Young P to conclude that when TML carried out its credit assessment functions it did so for and on behalf of GE so that its actions and particularly its knowledge could, for present purposes, be attributed to GE.[55] This, he said, was consistent with the scheme, purpose and policy of the legislation.

Reopening of oppressive credit contracts

[43] The power to reopen given to the court under Part 5 of the CCCF Act is conferred in relation to credit contracts and also, under s 119, in relation to collateral contracts and linked transactions. These are, first, any contract or arrangement that creates or provides for a security interest that is or may be taken in connection with the credit contract and, second, where it is a term of the credit contract that another contract or arrangement be entered into, any part of that other contract or arrangement that relates to the provision of credit to or the payment of money by the debtor under the credit contract. Section 119 requires that such collateral contracts or linked transactions be treated as forming part of the credit contract. They are therefore able to be reopened where oppression is established. In the present case, however, the credit contracts consisted only of the loan contracts and the mortgages over the home and the apartment. It was not a term of the credit contracts that any other contract or arrangement be entered into. The fact that credit would not be made available under the second and third loans unless title to the apartment was obtained did not mean that it was a term of those credit contracts that the apartment should be purchased.

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54 At [245]–[246].
55 At [249].

[44] Although the power of reopening is exercisable only in respect of credit contracts and collateral contracts and linked transactions, in reaching a view as to whether such contracts and transactions are oppressive the court is directed by s 124 to look beyond them to all the circumstances relating to their making, to certain specific matters of no relevance in the present case (such as whether an amount payable by a debtor is oppressive) and to "any other matters that the Court thinks fit". In some cases it would be quite unreal to try to determine whether a particular credit contract was oppressive just by looking at its terms alone. Any oppressiveness might exist only because of the circumstances in which an ex facie innocuous contract was entered into, including the terms of the transaction that the borrowing was facilitating. But, although the court must have regard to the full matrix of surrounding contracts and arrangements, unless s 119 applies to them it is not given power under the Act to reopen them if and when it reopens the credit contract. Again, that is understandable for there may well be third-party interests involved and the court should be able to achieve a just resolution for the debtor by setting aside or adjusting the credit contract itself in the exercise of the powers conferred by s 127.

[45] In this case there was nothing at all out of the ordinary about the terms of the loans themselves or of the securities over the home and the apartment. In particular, the rates of interest appear to have reflected market conditions. Instead, the case raises, apparently for the first time, the question of whether a credit contract can be found to be oppressive if the lender had no knowledge of matters external to it which might otherwise lead the court to the view that there was oppression. In no case of which we are aware under the CCCF Act or its predecessor, the Credit Contracts Act 1981, has it been contended that the lender was unaware of a circumstance material to the existence of oppression. In cases in which it is said that the terms of the credit contract itself (or of a collateral or linked contract or arrangement) are oppressive or that the lender itself has acted oppressively, it is unlikely that the lender will be able to deny knowledge of the factor or factors which are complained of. In contrast, in the present case, the oppression is said to arise from a combination of the personal situation of the Bartles and the arrangements they entered into with Blue Chip over

the purchase of the apartment. For its part, GE says that it had only limited knowledge of the former and none of the latter.[56]

[46] A credit contract or other transaction to which Part 5 of the Act applies may be reopened as oppressive when it might not necessarily have been set aside as unconscionable by a court of equity. For example, in equity it is necessary to show that the borrower was under a special disability or disadvantage. As Arnold J remarked, the scope of oppression under the Act is broader than the equitable doctrine of unconscionability.[57] That follows from the fact that the definition of "oppressive" is wider than unconscionable conduct and includes a "breach of reasonable standards of commercial practice". The Court of Appeal has correctly said in *Greenbank New Zealand Ltd v Haas* that the various words which together form the definition of the term "oppressive" all contain different shades of meaning but they all contain the underlying idea that the transaction or some term of it is in contravention of reasonable standards of commercial practice.[58] That sets an objective standard. A contract or course of conduct may therefore, as Arnold J also said, be treated as oppressive even though the party whose conduct is said to be oppressive may be (subjectively) blameless because the party is simply following industry practice. Where that practice is in breach of reasonable standards, compliance with it will not immunise a lender. It is for the courts rather than the industry to set the standard. But that assumes a situation in which the lender knows of the matter found to give rise to oppression or knows something which should have put it on inquiry.

[47] It would be an entirely different thing to impugn a credit contract as oppressive by reference to matters which were unknown to the lender or to an agent representing it in the transaction or in respect of which neither it nor its agent was put on inquiry as a result of something known. A lender cannot properly be said to have entered into a credit contract in breach of reasonable standards of commercial practice if what it did was in accordance with those standards in light of the facts of which it (or its agent) knew or ought to have known. None of the Australian cases

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56 In the analysis which follows no distinction is made between GE and AMS with the knowledge of AMS being treated as knowledge of GE.

57 At [177].

58 *Greenbank New Zealand Ltd v Haas* [2000] 3 NZLR 341 (CA) at [24].

on which the respondents relied goes any further. In fact, as Finn J commented in another case, *Australian Competition and Consumer Commission v Radio Rentals Ltd*, dealing with the prohibition on unconscionable conduct under the Trade Practices Act, the lender must "at least be aware of circumstances that would cause him or her or a reasonable person in his or her position to suspect from what is evident that that state of affairs may exist".[59] In our view, a credit contract should not be seen as oppressive unless the lender has a basis for knowing that to be so. If such a basis exists, however, the lender's failure to appreciate that the credit contract is oppressive will not excuse it and the contract may be reopened.

The independent lawyer

[48] Even when a lender has knowledge of circumstances which might otherwise cause it to suspect something about the borrower or the borrowing which might make the borrowing highly improvident, it will ordinarily be excused from making inquiry if it is also aware that the borrower is being advised about the transaction by an independent lawyer. The lender is entitled to assume that a lawyer instructed by the borrower will not have accepted that instruction if any conflict of interest exists and so will give dispassionate advice on whether and on what terms the borrower should proceed with the transaction, including the borrowing. The lender is also entitled to assume that the advice given to the borrower by the lawyer is competent advice and that the borrower has chosen to enter into the transaction on a fully informed basis, and so that all risks associated with it have been pointed out.

[49] It is not for the lender to question the competence or independence of the lawyer. Hoffmann LJ commented in *Bank of Baroda v Rayarel* that:[60]

> [T]he ... legal department [of a lender] is not obliged to commit the professional discourtesy of communicating directly with the solicitor's client and tendering such advice itself. Nor is it obliged to inform the solicitor of his professional duties. This will be a fortiori the case when the documents submitted by the bank to the [borrower's] solicitor contain a certificate that

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59 *Australian Competition and Consumer Commission v Radio Rentals Ltd* [2005] FCA 1133, (2005) 146 FCR 292 at [21].

60 *Bank of Baroda v Rayarel* [1995] 2 FLR 376 at 386. Hoffmann LJ was addressing the situation of a guarantor but his words apply equally to a borrower.

> she has been advised of the effect of the document and her right to have independent legal advice.

Notwithstanding this, however, there may be exceptional cases, as the Court of Appeal noted in *Wilkinson v ASB Bank Ltd*:[61]

> But if an outside observer, knowing only what the financier knows, would conclude that the solicitor's independence has been compromised, the financier may not be able simply to rest on the certificate. And, if the financier had good reason to believe that the solicitor was unaware of crucial facts, known to the financier, about the transaction and the risk to which the [borrower] was being exposed, consultation with the solicitor may well not have allayed the suspicion of undue influence or misrepresentation. Therefore, before accepting a certificate the financier may sometimes need to ensure that the advising solicitor had access to certain information.

It added:

> There may be rare cases where the substance of the transaction or a term of the [loan] or security is so disadvantageous that no solicitor could properly advise signature. A financier will be unwise in these exceptional circumstances to rely upon the appearance of independent advice. At the very least, it should consider obtaining a certificate from the independent solicitor that the particular matter has been pointed out to the [borrower].

[50] In other than such unusual cases the presence and role of an independent solicitor for the borrower will discharge the lender from the need to make inquiry. As a consequence, unless the lender or its agent already has knowledge of circumstances which render the lending in breach of reasonable standards of commercial practice the credit contract on which the borrower had independent legal advice should not be treated as oppressive under Part 5.

This case

[51] Approached in this way, the present case can be resolved by asking what GE and/or TML (if it was GE's agent) knew about the Bartles and their dealings with Blue Chip in connection with the apartment; and then by considering whether, in light of that knowledge of or attributed to GE, the credit contract was oppressive.

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61 *Wilkinson v ASB Bank Ltd* [1998] 1 NZLR 674 (CA) at 692.

[52] GE knew throughout that the Bartles were of retirement age. But in 2006 when the first loan of $137,484 was made they described themselves as self-employed rather than as retired or superannuitants. GE had at that time no knowledge of what income beyond universal superannuation they might be receiving or whether they had other assets. That loan was well within ordinary lending limits on a loan to valuation ratio. The borrowing was for unspecified investment purposes. The interest rate was unexceptional. The potential term was a long one for people of the Bartles' age but it must have seemed unlikely that the right of early repayment would never be exercised. The advance was made on the basis of the asset alone (the Bartles' home) and without regard to their (unknown) income. But in the particular context that would not in itself make the loan oppressive in the sense of being in breach of reasonable standards of commercial practice.

[53] Most importantly, the Bartles were being advised by a lawyer, Mr Mathias, whose independence was not put in issue in the case. Furthermore, as Randerson J concluded, and the authority to which he referred provided support,[62] the fact that he was also instructed by GE to carry out the mechanical functions of receiving the advance and registering the security documents did not mean that in advising the Bartles about signing the credit contract and mortgage Mr Mathias was not acting for them in an independent capacity.

[54] GE knew nothing of Blue Chip's involvement. TML knew that the Bartles were borrowing for the purpose of "a Blue Chip investment" but, as the Judge said, there was no evidence of any greater knowledge on TML's part of the details of the investment. In particular, it has not been shown that TML knew of the terms of the joint venture agreement. No witness from TML was called to give evidence about TML's state of knowledge when any of the loans were made. In the absence of such evidence it would be quite wrong to speculate about what further knowledge TML

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62 *Barclays Bank plc v Thomson* [1997] 4 All ER 816 (CA).

may have had about Blue Chip generally or about the particular transaction.[63] It too was entitled at that time, on the basis of the evidence before the Court, to take the view that the Bartles were being fully informed and competently advised by Mr Mathias.

[55] We have concluded that there was nothing known to GE (or TML) when the first loan was advanced which made it in breach of reasonable standards of commercial practice.

[56] By the time the subsequent loans were made GE had some knowledge of the Bartles' asset/liability position. It already knew that they had the home (then valued at $405,000) and it was told they were, through Bartle Properties Ltd, buying the apartment, which was valued at $527,545. So they had real estate assets of roughly $930,000 to support loans totalling roughly $630,000.

[57] GE was aware that the annual interest expense on the loans would be about $61,000. It could have estimated the likely income from the rental of the apartment at about half that amount, so that it could have seen that there would be a substantial shortfall. It did not know about Blue Chip's agreement to subsidise any shortfall. It would have suspected from the asset and liability statement signed by the Bartles that their income was limited to superannuation plus whatever they could earn from a bank term investment.

[58] On the other hand, it would have seemed from that statement that the Bartles had cash and term deposits of $98,000 available to put towards the shortfall, thereby covering it for at least three years.[64] GE would also have been aware that the property market in New Zealand in general and in Auckland in particular was buoyant. It could take the view, correctly, that the Bartles were anticipating that the

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[63] Mr Bryers of Blue Chip was a director of TML when the first loan was made but it was not then a member of the Blue Chip group. It was not suggested that his knowledge of Blue Chip could be attributed to TML. It was not gained in his capacity as a director of TML. It is not clear from the evidence whether he remained a director at the time of the second and third loans (by which time also TML was no longer a subsidiary of Blue Chip).

[64] The loans officer who approved the second and third loans gave evidence but was not questioned about the statement. There was no evidence about whether TML appreciated that the assets may have been incorrectly listed and that there may have been only $48,000.

value of the apartment would appreciate considerably over a three-year period and that they would be able to re-sell into the rising market and emerge with a profit. GE might have had a concern that the Bartles would be overly dependent on a continuance of a rise in property values. But, against this, it knew that they had punctually met all their payment obligations on the first loan and were again being independently advised.

[59] The amounts being advanced in September 2007 totalled approximately $492,000. Thus, even if the apartment were to drop in value, someone looking at the situation without the benefit of our present hindsight might well have considered at that time that the borrowing did not necessarily put the Bartles at risk of losing their home. The apartment was not in fact listed in the asset summary. Because GE had not previously had such a summary, it may have appeared to it that payments of unknown amount already made on the apartment were also not being included. However that may be, GE could legitimately take the view that these were matters on which the Bartles were being advised by Mr Mathias and that they were not putting their home at such risk that inevitably they were going to lose it. The borrowing would not therefore have appeared to have had the entirely improvident character of the transactions described in the Australian cases discussed in the reasons of the Courts below, where there appears to have been no independent legal advice for the borrowers and, in each case, the borrowers' home was the only asset over which the loan was secured and was bound to be lost if the purpose of the investment failed.

[60] It is necessary to ask, however, whether it has been shown that TML knew materially more than GE when the second and third loans were made. The answer is that the evidence does not reveal that TML had any extra knowledge of significance on the question of oppression. It was alleged in particular by the Bartles that TML knew that the Bartles were retired people, yet they altered the loan applications in certain respects after they were signed by the Bartles by writing in their occupations as "self employed investors". The finding in the High Court was, however, that this

alteration was not inaccurate or misleading.[65] Another alteration was to the term of the loans that were being sought (30 years being altered to 25 years for the period over which principal and interest would be paid). That was quite immaterial and both TML and GE would have seen it as such. In saying this, we do not condone the action of a TML staff member in altering the documents. That action was not however intended to mislead or prejudice anyone, nor did it do so. Importantly, the making of the alterations clearly does not indicate any greater knowledge of a material kind on the part of TML.

[61] The conclusion which we reach is that neither GE nor TML knew of any matter which made the advancing of any of the loans in breach of reasonable standards of commercial practice or otherwise oppressive, nor of any matter which should have led to further inquiry. We accept that the position might have been different if the Bartles had not been represented by an independent solicitor. However, as we have said, although Mr Mathias's competence was put in issue in the High Court and he was found to have been negligent, his independence was not the subject of challenge, as Mr Dale confirmed to us in response to questioning from the Bench. In that circumstance GE (and TML) were entitled to proceed on the basis that Mr Mathias would properly advise the Bartles.

[62] Since TML's knowledge has not been shown to have been materially greater than that of GE, it is unnecessary for us to consider whether TML did in fact act as GE's agent in connection with the loan applications or whether its knowledge should be attributed to GE on some other basis. We should however say that we have some reservation about approaching the question of attribution by analogy with the attribution to a corporation of knowledge possessed by one of its officers, as suggested by Arnold J in the Court of Appeal. Indeed, counsel for the respondent, while arguing for agency, expressly did not attempt to support the Court of Appeal's conclusions on that other basis.

[63] How then did the Court of Appeal, in error as we think, come to a contrary view on the question of oppression? In large part it was because two members of

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[65] At [238].

that Court treated Mr Mathias as if he had been found by the High Court not to have been independent, whereas Randerson J had actually said that he provided independent (but negligent) advice to the Bartles. The Court of Appeal's erroneous view of the role of the lawyer appears to have led Hammond J to say that GE had failed to look into the transactions and to characterise GE as having been indifferent to the Bartles' ability to meet their obligations. But why should it look into matters further when the Bartles had their own legal advice and, with that advice, had chosen to give GE certificates as to their ability to meet payments due on the loans and stating that they were not relying on GE to verify or review their financial position? He referred to evidence from a GE witness that if the real facts had been known to it, it would not have lent the money. The short point is, however, that it did not know them then, and nor did TML.[66] Hammond J also stigmatised TML as having operated an asset-lending scheme "for Blue Chip". Our review of the evidence reveals nothing which could provide any foundation for that opinion. The Judge may have meant to say "for GE" but, if so, in the absence of something putting TML on inquiry about the improvident character of the Bartles' purchase of the apartment, that would take matters no further.

[64] Arnold J rested his reasoning on what he termed three lines of analysis which made GE responsible for any oppression. The first was that in some respects TML had acted on GE's behalf. The second was the analogy he drew with attribution in relation to corporations and the third was a policy conclusion that, having outsourced to TML the function of preparing loan applications, GE must live with the consequences of any oppression which resulted. The immediate problem with each line of analysis is that it assumed that TML had been shown to have knowledge of circumstances giving rise to oppression. Contrary to Arnold J's view also, the borrowing could not be said to be oppressive merely because GE took little or no risk and the Bartles faced a high degree of risk. That was surely a matter for the independent solicitor. The Judge's criticism of asset lending in the circumstances of the case, which he regarded as "the key feature of the oppressive conduct", depended upon his treatment of Mr Mathias as not "a truly independent advisor". The risk for the Bartles would not have been so obvious to GE (or TML), on the basis of what

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[66] A credit contract is not oppressive if it would not have been considered oppressive at the time, and in the circumstances, that it was made or performed: s 123.

they actually knew at the relevant times, that the competence of Mr Mathias should have been questioned by them and further inquiry made, leading to revelation of the detail of the unsound Blue Chip scheme. On what they knew at the time, without hindsight, this was not a case where the transaction would have appeared so disadvantageous that no solicitor could advise the Bartles to proceed. Arnold J also criticised the long-term nature of the loans but does not appear to have taken account of the Bartles' right to repay at any time.

[65] William Young P attributed to GE the knowledge of TML, apparently assuming that it had been found to have had material extra information about the Bartles and the Blue Chip scheme and, in any event, had an obligation to make further inquiries despite the fact that the Bartles were being independently advised. We have given our reasons for not accepting that view.

Result

[66] We find ourselves in general agreement with the careful reasoning of Randerson J, whose judgment in the High Court should be restored. The appeal must be allowed with costs to the appellant in this Court and the Court of Appeal.

[67] This result is hard for the Bartles, whose rights against those responsible for their predicament, Blue Chip and Mr Mathias, may be of limited value. But it would be quite wrong to hold GE culpable for what has occurred in circumstances in which the Bartles were throughout being given advice by a lawyer whose independence must be accepted and where GE was not aware of, nor put on inquiry about, any matter which rendered any of the loans in breach of reasonable standards of commercial practice. If the Court were to do this it would require lenders to take responsibility for matters of which they neither knew nor should have known. They would be unable to proceed on the basis of what borrowers chose to reveal to them, and would have to conduct an investigation into the affairs of the borrowers lest there be something which might render the transaction liable to reopening. They would have to decline to lend at all or to incur additional expense which would certainly be passed on to the borrowers, regardless of the fact that the borrowers were being advised by a lawyer. That would be both inefficient in economic terms

and productive of unfairness to lenders if they failed to discover something which was later found to make the loan oppressive.

[68] Whilst the Bartles are deserving of much sympathy, it was they who chose to put their faith in Blue Chip and their chosen lawyer. They expressly disavowed reliance on GE. It would make bad law if they could now hold GE responsible for what has occurred.

Solicitors:
Simpson Grierson, Auckland for Appellant
Ellis Law, Auckland for First and Second Respondents