IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA587/2022
[2024] NZCA 684

BETWEEN	GEORGE CHARLES DESMOND KERR First Appellant	
	LOTHIAN PARTNERS CAPITAL LIMITED Second Appellant	
	GLENCOE LAND (JOINT VENTURE) LIMITED Third Appellant	
	GALT NOMINEES LIMITED Fourth Appellant	
	PYNE HOLDINGS LIMITED (IN RECEIVERSHIP) Fifth Appellant	
AND	BANK OF NEW ZEALAND Respondent	

Hearing:	2 October 2023 (further submissions received 19 December 2023)
Court:	Courtney, Katz, and Jagose JJ
Counsel:	J K Goodall KC and S J Nicolson for First Appellant G P Blanchard KC and J A Clark for Second to Fifth Appellants Z G Kennedy and H M Jacques for Respondent
Judgment:	19 December 2024 at 11.00 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence dated 11 September 2023 is granted.

B The application for leave to adduce further evidence dated 23 November 2023 is declined.

C The appeals are dismissed.

D **The appellants must together pay the respondent costs on an indemnity basis, together with usual disbursements, with the reasonable quantum of such costs to be fixed by the Registrar in the event that the parties do not agree.**

REASONS OF THE COURT

(Given by Katz J)

Table of Contents

Introduction

[1] Associate Judge Gardiner[1] entered summary judgment in the High Court against Mr George Kerr and a group of related corporate defendants (together, the appellants),[2] in the sum of approximately $65 million.[3] The Judge found that the appellants had no reasonably arguable defences to claims made against them by Bank of New Zealand (BNZ) arising out of two substantial loan facilities provided to Lothian Partners Capital Ltd (Lothian), the second appellant, and Pyne Holdings Ltd (Pyne Holdings), the fifth appellant.[4] The appellants now appeal.

Background

The appellants

[2] Mr Kerr, the first appellant, is currently the sole director of the other four appellants (collectively, the corporate appellants). More specifically:

(a) Mr Kerr has been the sole director of Lothian since its incorporation in November 2006.

(b) Mr Kerr was the sole director of Galt Nominees Ltd (Galt), the fourth appellant, from 8 December 1999 to 26 October 2010, when he was

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1 Now Justice Gardiner.
2 *Bank of New Zealand v Lothian Partners Capital Ltd* [2022] NZHC 2489 [liability judgment].
3 *Bank of New Zealand v Lothian Partners Capital Ltd* [2023] NZHC 196 [quantum judgment].
4 Except in relation to one relatively minor issue relating to the overdraft interest payable by the guarantors, which is addressed at [123] below.

replaced by Michael Tinkler of Burton Partners until 25 September 2019, when Mr Kerr again became sole director.

(c) Mr Kerr has been the sole director of Glencoe Land (Joint Venture) Ltd (Glencoe JV) since 22 May 2019. Prior to that, various other directors served on the board with Mr Kerr.

(d) Mr Kerr and Mr Tinkler were directors of Pyne Holding from the date of incorporation, in July 2008, until 1 October 2011. From then, Mr Kerr has been the sole director.

The lending facilities

[3] BNZ made a loan facility available to Lothian (the Lothian Facility) pursuant to an agreement dated 26 November 2008 (the Lothian Facility Agreement) with an available drawdown of up to $31.7 million. The Lothian Facility Agreement included guarantees from (amongst others) Mr Kerr, Galt and Pyne Holdings (the Lothian Guarantee). In addition, Glencoe JV also gave a guarantee and indemnity under a separate guarantee document (the Glencoe JV Guarantee).

[4] BNZ also made a loan facility available to Pyne Holdings (the Pyne Holdings Facility) pursuant to an agreement dated 28 May 2010 (the Pyne Holdings Facility Agreement) with an available drawdown of up to $20 million. The Pyne Holdings Facility was guaranteed by Mr Kerr personally (the Kerr Pyne Holdings Guarantee).

[5] For ease of reference, we will refer to Glencoe JV, Galt and Pyne Holdings collectively, in their capacity as guarantors, as "the corporate guarantors". Each of the facility agreements uses the term "obligors" to refer collectively to both the borrower and the guarantors under the relevant agreement, and we will do the same.[5]

[5] Pyne Holdings and Lothian are the primary obligors, as the borrowers under their respective facility agreements. The guarantors are secondary obligors who have committed to meet the debt obligations of the primary obligors in the event of default.

Defaults and enforcement

[6] The Lothian Facility expired on 31 May 2011. At the time, Lothian owed (according to BNZ's calculations) an outstanding balance of $24,994,230.14**,** consisting of principal and accrued interest.

[7] The Pyne Holdings Facility expired on 28 May 2013. At the time, Pyne Holdings owed (according to BNZ's calculations) an outstanding balance of $21,372,948.73, including principal, accrued interest, and commitment fees.

[8] BNZ elected to defer immediate enforcement action in favour of a cooperative approach involving an orderly realisation of the appellants' secured assets. As part of this process, BNZ engaged in extensive discussions and correspondence with Mr Kerr, who made various repayment proposals. Mr Kerr provided periodic updates as to how he intended to address the outstanding debts. These included plans to liquidate interests in Pyne Gould Corporation and to redevelop and sell various assets owned by the appellants. BNZ regularly sought updated information and repayment proposals from Mr Kerr, to ensure that meaningful progress was being made towards satisfying the outstanding debt obligations. Between November 2013 and June 2017, the guarantors made seven partial payments against the loan balances under the two facilities, totalling approximately $9 million.

[9] In February 2019, Mr Kerr proposed a settlement in relation to the debt owed under the Pyne Holdings Facility, which included a reduced interest rate and a waiver of overdraft fees. This and other proposals were exchanged on a "without prejudice" basis, with the aim of resolving the outstanding debt. Mr Kerr executed a proposed settlement deed in October 2019 on behalf of himself and the corporate appellants, which he sent to BNZ's lawyers. BNZ was unwilling to accept the settlement terms offered, however, and shifted its focus from negotiating a resolution to pursuing enforcement action.

[10] On 22 October 2020, BNZ issued formal demand letters to Lothian, Pyne Holdings, and each guarantor, requiring repayment of the outstanding balances. The following month, BNZ issued notices under the Property Law Act 2007 to Glencoe JV and Galt, pursuant to mortgages provided by these companies to secure

their guarantee obligations under the Lothian Facility. BNZ subsequently appointed receivers over these entities and initiated steps to sell the secured assets. Glencoe JV and Galt filed injunction proceedings to halt the sales but later discontinued those proceedings, leading to an indemnity costs award of $243,419.84 against them, in accordance with the terms of the Lothian Facility Agreement (the Costs Award).[6]

[11] On 29 April 2021, BNZ appointed receivers to Pyne Holdings to enforce its security and commence the recovery process against Pyne Holdings' assets.

The High Court decisions

[12] BNZ commenced summary judgment proceedings in May 2021 to recover the sums outstanding from the obligors under the facility agreements and the Costs Award.

[13] Summary judgment was opposed. It appears that neither Lothian nor Pyne Holdings had sufficient assets to meet the amounts owing under the facility agreements. Accordingly, the primary focus of argument in the High Court (and on appeal) was on the liability of the guarantors. Mr Kerr, Galt and Pyne Holdings (as guarantors) submitted in the High Court that they each had a tenable defence that BNZ's claims were time-barred under the Limitation Act 2010. Their primary argument was that, to the extent that Mr Kerr may have acknowledged liability in some of his communications with BNZ, he did so solely on behalf of Lothian and Pyne Holdings in their capacity as borrowers, not on behalf of the guarantors.[7] The appellants also argued that there were substantial disputes over the amounts owing under each facility.[8] Glencoe JV did not dispute that by making a part-repayment of the Lothian Facility, it had acknowledged liability as guarantor and created a fresh claim.[9]

[14] The first summary judgment hearing took place over two days on 13 and 14 December 2021. The hearing was adjourned part-heard to enable further evidence

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6 *Galt Nominees Ltd v Bank of New Zealand* [2021] NZHC 875 [Costs Award judgment]. We note for completeness, an addendum to the Costs Award judgment was issued on 28 April 2021 which had no impact on the award: *Galt Nominees Ltd v Bank of New Zealand* [2021] NZHC 922.

7 Liability judgment, above n 2, at [124]–[126].

8 At [6].

9 At [120].

relating to quantum to be filed. The hearing resumed on 29 March 2022 (for a day) to hear further argument on quantum issues.[10] The Judge delivered her decision on liability issues on 30 September 2022 (the Liability Judgment). Her decision on quantum issues was delivered on 15 February 2023 (the Quantum Judgment).[11]

[15] In the Liability Judgment, the Judge found that the appellants did not have any reasonably arguable defences to BNZ's claims, except on one issue relating to the guarantors' liability to pay default interest (discussed further at [123] below).[12] On the key issue of whether the claims against the guarantors were time-barred, the Judge found that Mr Kerr, on behalf of all of the obligors (not just the borrowers), had acknowledged liability in writing during the primary limitation period, giving rise to fresh claims that were not time-barred.[13] The Judge also found no reasonably arguable basis for the appellants' assertion that the amounts claimed by BNZ were inaccurate or uncertain.[14]

[16] The Judge subsequently quantified the sums owed by each appellant, as set out in the Quantum Judgment.[15]

The appeals

[17] The appellants appeal both the Liability Judgment and the Quantum Judgment. The key issue in relation to the Liability Judgment is whether the Judge erred in finding that it was not reasonably arguable that Mr Kerr's obligations under his guarantees were time-barred under the Limitation Act. In relation to the Quantum Judgment, the appellants argue that the Judge erred in finding that the various quantum issues they advanced in the High Court were not reasonably arguable. The appellants also argue that, due to the complexity of the subject matter, the summary judgment process was not appropriate for determining either quantum or liability. Rather, the Judge should have dismissed the summary judgment application and directed that the matter proceed to trial.

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10 At [332].
11 Quantum judgment, above n 3.
12 Liability judgment, above n 2, at [484].
13 At [283]–[284].
14 At [422]–[424] and [443].
15 Quantum judgment, above n 3, at [23].

Legal principles — summary judgment

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

> 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.

[19] This Court summarised the relevant principles in *Krukziener v Hanover Finance Ltd* as follows:[16]

> [26] 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 … 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 … 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 … 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 …

Did the Judge err in finding that Mr Kerr had acknowledged his personal liability as guarantor?

[20] The key issue on appeal from the Liability Judgment is whether the Judge erred in finding that Mr Kerr's limitation defence was not reasonably arguable. Although Galt and Pyne Holdings initially also appealed the Judge's findings that their limitation defences were not tenable, Mr Blanchard KC (counsel for the corporate appellants) informed the Court at the appeal hearing that this ground of appeal was no longer pursued.

Legal principles — section 47(1)(a) of the Limitation Act

[21] Pursuant to s 47(1)(a) of the Limitation Act, if a claimant proves that, after the start date of a claim's primary limitation period, the defendant acknowledged to the claimant in writing a liability to the claimant, the claimant is deemed to have a fresh claim, arising on the date of the acknowledgement. As the Judge noted, the rationale

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16 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 (citations omitted).

for extending the limitation period if a debtor or guarantor acknowledges their liability during the primary limitation period is that it is:[17]

> … 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.

[22] After carefully reviewing the case law on s 47(1)(a), the Judge summarised the legal principles relating to acknowledgments of liability as follows:[18]

(a) an acknowledgement must made be in writing by the defendant (or their agent) to the claimant;[19]

(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);[20]

(c) there is no requirement for proven reliance by the claimant on the acknowledgment;[21]

(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;[22]

(f) if they acknowledge they owe something, it is immaterial that they dispute the correctness of the amount claimed;[23]

(g) on the other hand, if they acknowledge they owe a specific part of the amount claimed, their acknowledgement is limited to that part;[24]

(h) the acknowledgement must be read in the context of the document as a whole and all the surrounding circumstances.[25]

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17 Liability judgment, above n 2, at [123], quoting *Bradford & Bingley Plc v Rashid* [2006] UKHL 37, [2006] 1 WLR 2066 at [38] per Lord Walker.

18 Liability judgment, above n 2, at [149].

19 Limitation Act 2010, s 47(1).

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

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

22 *Bradford & Bingley Plc v Rashid*, above n 17, at [21]; *Dungate v Dungate* [1965] 1WLR 1477 (CA) at 1488; and *Good Challenger Navegante SA v Metal Export Import SA* [2003] EWHC 10 (Comm) at [59].

23 *Inicio Ltd v Tower Insurance Ltd*, above n 20, at [49], citing *Smith v Smith* [1926] NZLR 311 (SC).

24 *Eversons International Ltd (in liq) v Bionutrient Customs Ltd*, above n 21, at [30]; and *Bradford & Bingley Plc v Rashid*, above n 17, at [58].

25 *Inicio Ltd v Tower Insurance Ltd*, above n 20, 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].

[23] These principles are not in dispute on appeal, and we accept them as a helpful and accurate summary of the law. In the High Court, Mr Goodall KC had argued, on behalf of Mr Kerr, that Mr Kerr's subjective intentions were relevant to the correct interpretation of the alleged acknowledgments.[26] On appeal, however, it was common ground that the correct approach to interpretation of an alleged acknowledgement is purely objective, analogous to the approach to contractual interpretation (as the Judge found).[27]

The Liability Judgment

[24] Mr Kerr's position in the High Court was that he had never clearly and expressly acknowledged any personal liability to BNZ in his capacity as guarantor, as opposed to acknowledging the debts owed under the facilities on behalf of Lothian and Pyne Holdings in their capacity as borrowers.[28] Further, the facilities were intended to be self-amortising, with the principal being progressively reduced over time by the sale of properties. Mr Kerr says that in his various communications with BNZ he was only describing the asset realisation process underway to pay down the facilities, not acknowledging any personal liability.[29] Similarly, Galt and Pyne Holdings argued in the High Court that Mr Kerr did not acknowledge liability on behalf of either of them as guarantors of the Lothian Facility. Rather, Mr Kerr was speaking on behalf of the borrower, Lothian, and was merely providing information about secured assets Galt and Pyne Holdings held as guarantors.[30] As noted at [20] above, however, they no longer pursue their appeals of the Judge's findings that Mr Kerr acknowledged liability on their behalf, in their capacity as guarantors.

[25] The Judge undertook a comprehensive review of the relevant evidence, including, in particular: the communications relied on by BNZ as acknowledgments;[31] earlier and more recent communications that provided relevant context;[32] the negotiations regarding the settlement deed (and the terms of the settlement deed);[33]

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26 Liability judgment, above n 2, at [151].
27 At [152]–[153].
28 At [124].
29 At [125].
30 At [126].
31 At [163]–[175].
32 At [176]–[209].
33 At [210]–[221].

and part repayments that had been made during the period of 2013 to 2017 to reduce the amounts outstanding under the facilities.[34] Having done so, the Judge rejected Mr Kerr's characterisation of the relevant correspondence "as simply Mr Kerr providing the bank with information about planned asset realisations".[35] Rather:

> [226] … 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 [Lothian] Facility towards the end of the dialogue.

[26] The Judge considered the "only way" to interpret Mr Kerr's communications in context was that he was engaging with BNZ for all the obligors under the two facilities.[36] In the Judge's view, critical context for Mr Kerr's communications with BNZ during the period following the defaults included that:

(a) Under the Lothian Facility, each guarantor is jointly and severally liable to BNZ. Galt, Pyne Holdings and Mr Kerr were therefore individually and collectively liable for the obligations of each other as guarantors (and Lothian as borrower) under the Lothian Facility. On Lothian's default, they were obliged, individually and collectively, to immediately pay BNZ the outstanding balance owing on the Lothian Facility. Not paying BNZ placed them in default of their obligations as guarantors and susceptible to immediate enforcement action.[37] Glencoe JV guaranteed Lothian's indebtedness to BNZ through the separate Glencoe JV Guarantee, on equivalent terms.[38]

(b) Similarly, pursuant to the Kerr Pyne Holdings Guarantee, Mr Kerr had guaranteed to BNZ the payment of all of Pyne Holdings' indebtedness to BNZ under the Pyne Holdings Facility.[39] Upon Pyne Holdings' default, Mr Kerr was immediately obliged as guarantor to pay BNZ the

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34 At [222]–[223].
35 At [226].
36 At [227].
37 At [228]–[229].
38 At [230].
39 At [231].

> outstanding balance owing on the Pyne Holdings Facility. Not paying BNZ placed him in default of his obligation under the Kerr Pyne Holdings Guarantee and BNZ was entitled to take immediate enforcement action.[40]

[27] Against this background, it was of note that Mr Kerr was the only person to engage with BNZ from the time of the default until lawyers became involved many years later at the time the settlement deed was being negotiated. "No one else communicated with the bank for the corporate [g]uarantors."[41] The Judge noted that, in his communications with BNZ, Mr Kerr referred to "his facilities" and "his companies".[42] His communications were wide ranging and concerned all the obligors.[43] Given the context in which Mr Kerr's communications were made, the Judge found that:

> [240] … there is no credible basis for saying that [Mr Kerr] ought to have been understood as speaking only for the corporate [g]uarantors but not himself personally. With the corporate [g]uarantors, he was in default of the guarantee of [Lothian's] indebtedness from the [expiry date of the Lothian Facility]. It is common ground that demand was not required under the Kerr [Pyne Holdings] Guarantee, so he was in default of that guarantee from the [expiry date of the Pyne Holdings Facility].

[28] The Judge noted that, save for on two occasions (after lawyers had become involved), where Mr Kerr signed communications as a director of Pyne Holdings, Mr Kerr always wrote to BNZ as "George" and did not identify any specific capacity in which he was writing. The Judge found that:

> [241] … 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.

[29] As further background context, the Judge noted that in 2011 and 2012, Mr Kerr had sold personal assets to pay down the overdrawn facilities.[44] In her view, this demonstrated, as a further aspect of the broader context, that from the outset Mr Kerr

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40 At [232].
41 At [234].
42 At [234].
43 At [234].
44 At [243]–[256].

had behaved in a manner consistent with an acknowledgement of personal liability for the outstanding loan balances.[45]

[30] The Judge also referred, as part of the broader context, to the fact that communications were sent (and the presentations were provided) in circumstances in which it was clear that, following realisation of the secured assets, there would be a shortfall on the Lothian Facility.[46] The liability of Galt and Glencoe JV, however, was limited to the sale proceeds of various secured assets. Accordingly, only Lothian (as borrower) and Pyne Holdings and Mr Kerr (as guarantors) would be liable to BNZ for the outstanding balance, "so any acknowledgements from this time were acknowledgements of their liability as [g]uarantors."[47]

[31] The Judge observed that the public policy behind the acknowledgement rule was to encourage creditors to negotiate with a debtor and refrain from initiating legal proceedings, by removing the fear that the claim will become time-barred. Hence, if a creditor is encouraged to stay their hand by a debtor indicating that they consider themselves liable to pay the claim, the debtor should not be able to subsequently rely on that indulgence to raise a time-bar defence.[48] Viewing the communications through this lens, the Judge considered that it was "self-evident" that the purpose of Mr Kerr's acknowledgments in correspondence with BNZ after the two facilities went into default was to buy more time,[49] and:

> [278] … 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 [Limitation] Act is designed to address.

[32] The Judge concluded that Mr Kerr had acknowledged his personal liability as guarantor of both facilities, and also the liability of Lothian, Pyne Holdings and Galt as guarantors of the Lothian Facility, in the relevant communications.[50] Mr Kerr's

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45 At [257].
46 At [237].
47 At [237]
48 At [277], citing *Bradford & Bingley Plc v Rashid*, above n 17.
49 Liability judgment, above n 2, at [278].
50 At [258]–[259].

acknowledgments gave rise to fresh claims for limitation purposes, and BNZ's claims against Mr Kerr, Galt and Pyne Holdings were accordingly not time-barred.[51]

[33] The Judge, however, did not rely on the settlement deed in support of this finding. Rather, she found that Mr Kerr, Galt and Pyne Holdings (in their capacity as guarantors) had a reasonable argument that, viewed objectively, the statements in in the settlement deed "were not unequivocal acknowledgments of liability made by Mr Kerr".[52]

Mr Kerr's submissions on appeal

[34] The issue of whether Mr Kerr has an arguable limitation defence turns on the capacity (or capacities) in which he made any acknowledgments of liability to BNZ during the primary limitation period.

[35] Mr Goodall noted that under s 47(1)(a) of the Limitation Act, any acknowledgment of debt must specifically acknowledge "liability" to effectively restart the limitation period. It is not enough to acknowledge a debt; a debtor must acknowledge a liability to pay. Mr Goodall submitted that any acknowledgments Mr Kerr made in his communications with BNZ were made solely on behalf of the corporate guarantors and borrowers, not on behalf of Mr Kerr in his personal capacity as a guarantor of the facilities. Mr Kerr's interactions with BNZ were intended to address the financial status and repayment plans of Lothian and Pyne Holdings, as well as the corporate guarantors, as opposed to acknowledging Mr Kerr's personal liability under his guarantees.

[36] With reference to the specific documents relied on by the Judge, Mr Goodall submitted that none of them constituted an acknowledgement of Mr Kerr's personal liability as guarantor, because:

(a) There was no express acknowledgement or reference to Mr Kerr's personal position as a guarantor in any of the documents.

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51 At [283]–[284].
52 At [281].

(b) No demand had been made at that stage on Mr Kerr's personal guarantees.

(c) The emails referred only to assets of Lothian, Pyne Holdings and the corporate guarantors, some of which were in the process of being realised. None of the communications offered or suggested Mr Kerr's personal assets or funds were to be applied to repay BNZ.

[37] In the absence of any express acknowledgment of personal liability by Mr Kerr, Mr Goodall submitted, it was wrong of the Judge to fall back on drawing inferences from the broader background context, particularly given the summary judgment context. Rather:

> Before any such finding can properly be made, discovery should first be given by BNZ of any internal emails, records and credit papers explaining what [BNZ] understood Mr Kerr to be communicating about his personal position. Furthermore, the communications above need to be put to Mr Rodden [a BNZ employee] in cross-examination to test whether or not he understood these communications constituted personal acknowledgments of liability by Mr Kerr.

Discussion

Suitability for summary judgment

[38] We will first address Mr Goodall's submission that the acknowledgment issue was not suitable for determination in a summary judgment context.

[39] Under s 47(1)(a) of the Limitation Act, an oral acknowledgment, or one inferred solely from conduct, would clearly not be sufficient. Rather, the Act expressly requires that an acknowledgment be "in writing". Further, the relevant document(s) must be construed objectively. Accordingly, the subjective views of Mr Kerr or Mr Rodden (or any other BNZ employee) as to what they may have believed Mr Kerr's communications to mean will not be relevant. Cross-examination of Mr Rodden on such issues (as the appellants submitted is required) will therefore not aid the interpretation exercise.

[40] The broader background context is, however, relevant to the interpretation exercise. As the Judge noted, BNZ contextualised the acknowledgments by providing an affidavit that contained the full record of communications between BNZ and Mr Kerr from 2012 to January 2019.[53]

[41] Mr Kerr had ample opportunity to furnish any supplementary contextual evidence, having sworn a total of seven affidavits. In his affidavit of 7 July 2021, Mr Kerr explained the nature of the lending arrangements between BNZ and Lothian and Pyne Holdings and detailed his various communications with Mr Rodden. He addressed each purported acknowledgment relied on by BNZ, provided context for his statements, and gave evidence as to the capacity in which he said he had made each acknowledgment. Mr Kerr identified only four additional pieces of correspondence that he saw as relevant to the interpretation exercise, which he provided. Of note, Mr Kerr did not point to any oral discussions that might provide further relevant context.[54] Nor do there appear to be any material factual disputes that could impact on the objective interpretation of the relevant documents. Even on appeal, Mr Kerr was not able to point to any further relevant evidence that might be available at trial that had not been available to the Judge at the summary judgment stage.

[42] The Judge was accordingly correct, in our view, to find that the limitation issue could appropriately be determined in a summary judgment context, based on the (extensive) material before the Court.

Limitation defence

[43] We turn now to Mr Goodall's substantive arguments on support of this ground of appeal, which largely mirrored the arguments advanced on behalf of Mr Kerr in the High Court. In our view, the Judge's reasons for rejecting those arguments are compelling. We have summarised the Judge's reasoning at [24]–[33] above and will not repeat that detail here. Having regard to those reasons, however, and our further comments below, we are firmly of the view that the Judge was correct to find

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53 At [158].
54 At [159].

that Mr Kerr did acknowledge liability to BNZ on behalf of all of the obligors (including himself as a guarantor) and not solely on behalf of the corporate obligors.

[44] We acknowledge that there was no express acknowledgement by Mr Kerr of his personal liability as a guarantor. However, that is not required. Rather, Mr Kerr's communications must be read in the context of each document, the contemporaneous documents as a whole, and the relevant surrounding circumstances. No particular words are required, and (as noted above) an acknowledgement can be broad and informal provided that, judged objectively, the words used indicate an admission of liability to the claimant.[55]

[45] As the Judge noted, the corporate obligors were all closely associated with Mr Kerr. In correspondence with BNZ, Mr Kerr used terms such as "my facilities" and "my companies". He is, or was previously, a director of each of the corporate obligors. He has been the sole director of Lothian since its incorporation in 2006 and the sole director of Pyne Holdings since October 2011. The facility agreements and associated documents were structured in a way that reflected this close association. Mr Kerr's obligations under the facility agreements and the Kerr Pyne Holdings Guarantee were inextricably intertwined with the obligations of the corporate obligors, as summarised at [26] above.

[46] As the Judge explained, the context in which Mr Kerr communicated with BNZ was that Mr Kerr and the corporate guarantors were immediately in default, and liable to BNZ for the outstanding balance of the Lothian Facility on a joint and several basis, from the date on which that facility expired. Mr Kerr was similarly in default on the Pyne Holdings Facility from the date that it expired. It is therefore not significant that at the time Mr Kerr was in communication with BNZ, no formal demand had been made on his personal guarantees. No such demand was required. On the contrary, Mr Kerr was liable from the dates of default and was accordingly as incentivised as the corporate guarantors (possibly more so, given the liability caps on Galt and Glencoe JV's guarantees) to ensure the outstanding Lothian and Pyne Holdings loan balances were paid.

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55 At [149(d)].

[47] We accept Mr Kennedy's submission on behalf of BNZ that it is highly significant that Mr Kerr was the only person to engage with BNZ regarding the outstanding loans and their repayment over the entire period from the defaults (in 2011 and 2013 respectively) until February 2019, when lawyers became involved. Throughout this time Mr Kerr did not differentiate himself from the corporate obligors at any stage. Rather, he signed his communications "George" on all but two occasions, and they were sent from his personal email address without any identifying corporate logos or email signatures. Mr Kerr consistently used possessive terms like "we" and "our" and collective language such as "we expect," "we understand," and "we wish to make a proposal" in his communications. Objectively, the use of such language strongly supports the inference that Mr Kerr was communicating on behalf of all of the obligors, not just the corporate obligors, in his communications with BNZ.

[48] If Mr Kerr had (subjectively) intended to exclude himself from the ambit of the broad acknowledgements he made, we would have expected to see such a limitation made clear in his communications. However, as the language set out above indicates, Mr Kerr generally communicated on a global basis. At no stage did he differentiate his personal position as a guarantor from that of the borrowers or corporate guarantors (all of whom no longer dispute that Mr Kerr acknowledged liability on their behalf).

[49] Although not constituting an acknowledgment in terms of s 47(1)(a) of the Limitation Act, the Judge was also entitled to have regard, as a further (relatively minor) aspect of the relevant background, that Mr Kerr sold some personal assets to reduce the outstanding balances shortly after the Lothian Facility went into default.[56]

[50] We also keep in mind (as did the Judge) the purpose of the acknowledgments rule in s 47(1)(a), as summarised in the quote at [21] above. When a debtor acknowledges a liability to pay, it is an admission that the creditor has a valid claim against them. Providing for the limitation period to restart in such circumstances protects creditors who may have refrained from initiating legal proceedings in reliance on the debtor's acknowledgment. This encourages constructive engagement between

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[56] At [242]–[256].

creditors and debtors, enhancing the prospects of an orderly approach to debt repayment and the realisation of secured assets, reducing the need for costly, inefficient, and unnecessary litigation. As this case demonstrates, the process of realising assets (secured or otherwise) can be protracted and complex. It will generally be in the best interests of both debtor and creditor to undertake the asset realisation process in an orderly way, ensuring the best possible recovery in the circumstances. The acknowledgments rule therefore promotes fairness and the orderly conduct of commercial affairs, ensuring that debtors or other obligors who acknowledge their liability cannot later evade their responsibilities by raising technical limitation defences.

[51] Mr Kerr engaged in a sustained, consistent pattern of communication with BNZ over a prolonged period regarding the outstanding debt and his proposals for repaying it. He assumed overall responsibility for ensuring repayment on behalf of the obligors and was their sole point of contact with BNZ following the defaults for almost eight years in respect of the Lothian Facility, and almost six years in respect of the Pyne Holdings Facility. The tone and content of Mr Kerr's communications indicated that he was speaking both for himself and "his" companies. Viewed objectively, the inevitable inference is that in the relevant communications, Mr Kerr acknowledged his personal liability as a guarantor of both facilities, in addition to acknowledging the liability of the corporate obligors. This occurred in a context where it would have been well understood by all involved that if Mr Kerr had ever suggested that he did not accept personal liability under his guarantees this would have almost certainly resulted in BNZ taking enforcement action against him. Provided satisfactory progress was being made, however, BNZ took a commercially pragmatic approach and did not pursue enforcement action against any of the obligors. This was an appropriate and reasonable course of action in circumstances where, viewed objectively, Mr Kerr had acknowledged liability on behalf of all the obligors, including himself. This is precisely the type of situation that s 47(1)(a) was designed for.

[52] In conclusion, it is our view that the Judge correctly applied settled legal principles in determining that it was not reasonably arguable that Mr Kerr did not acknowledge his personal liability as a guarantor in his communications with BNZ, but only acknowledged liability on behalf of the corporate obligors. Accordingly

(subject to our discussion of interest in the next section), Mr Kerr does not have an available limitation defence. Although Galt and Pyne Holdings abandoned their limitation ground of appeal at the appeal hearing, we note for completeness that the reasoning we have set out above in relation to Mr Kerr applies equally to them.

Did Mr Kerr's acknowledgments of liability extend to both principal and interest?

[53] Mr Kerr argued in the High Court that, to the extent he may have made any acknowledgements of liability, such acknowledgments extended to principal only, not interest. The Judge rejected this submission, as follows:[57]

> [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.

[54] The Judge referred to case law that establishes that if a debtor acknowledges they owe something, it is immaterial that they dispute the correctness of the amount claimed.[58] The Judge observed that:[59]

> [271] … It is indisputable that Mr Kerr acknowledged liability to pay *some* interest on the both the [Lothian] and [Pyne Holdings] Facilities.

On the basis of her review of the contemporaneous documents, the Judge found that Mr Kerr had acknowledged liability to pay interest but was negotiating to pay a lesser sum.[60]

[55] On appeal, Mr Goodall submitted (as he did in the High Court) that Mr Kerr's communications did not constitute acknowledgments extending to both principal and interest. He argued that Mr Kerr raised objections regarding the amount of interest due and sought discussions on interest terms, rather than affirming a binding obligation to pay interest. As the interest component was disputed, this necessarily limited any acknowledgment of liability to the principal alone.

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57 Emphasis in original.

58 At [271], citing *Inicio Ltd v Tower Insurance Ltd*, above n 20, at [49], which cited *Smith v Smith*, above n 23.

59 Liability judgment, above n 2 (emphasis in original).

60 At [272].

[56] The Judge analysed the relevant correspondence in detail at [263]–[272] of her judgment. We have reviewed those documents. They support the Judge's finding that Mr Kerr acknowledged liability to pay interest but sought to negotiate to pay a lesser sum than BNZ were seeking. To the extent that it may be arguable that Mr Kerr also disputed the correctness of the amount of interest claimed, that does not assist him. As the Judge pointed out, "if a debtor acknowledges they owe something, it is immaterial that they dispute the correctness of the amount claimed".[61] Rather, for an acknowledgment to be limited in amount, it must specifically record that limitation.[62] None of the relevant communications did so.

[57] The Judge was accordingly correct to reject Mr Kerr's submission that his acknowledgments were of principal only and not of interest.

Did the Judge make errors in her assessment of quantum?

[58] In the High Court, the appellants challenged BNZ's calculation of the amounts outstanding on the Lothian and Pyne Holdings Facilities, based almost entirely on the expert evidence of Mr Steven Cornmell, a Managing Director in the global Expert Services practice of Kroll Advisory Ltd, London, United Kingdom.

The High Court decisions

[59] Both the Lothian Facility Agreement and the Pyne Holdings Facility Agreement include "prima facie evidence" clauses. For example, cl 17.2 of the Lothian Facility Agreement provided that certifications by the lender regarding amounts payable or other facts are prima facie evidence of the outstanding amount owed, in the absence of manifest error.[63] The certificates provided detailed breakdowns of the outstanding loan amounts, including principal loan balances, accrued interest (default and regular), commitment fees and other charges incurred under the Facility Agreements.

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61 At [271].

62 *Eversons International Ltd (in liq) v Bionutrient Customs Ltd*, above n 21, at [30]; and *Bradford & Bingley plc v Rashid*, above n 17, at [58].

63 Clause 15.2 of the Pyne Holdings Facility mimics this wording.

[60] The certificates were supplemented by extensive other evidence regarding quantum. For example, BNZ extracted and produced loan transaction data for both facilities in Excel spreadsheet form, from its internal systems. BNZ also provided bank statements for the Lothian and Pyne Holdings current accounts into which loan drawdowns were made. BNZ reproduced the bank statement data for the entire history of the current accounts into Excel spreadsheets. BNZ also filed several affidavits responding to the issues raised by Mr Cornmell on behalf of the appellants, including an affidavit by Matthew Keelty (a BNZ Senior Portfolio Performance Manager) and several affidavits from Ennis Young (BNZ's Regional Manager of Strategic Business Services, Risk). BNZ also provided evidence regarding the recoveries from mortgagee sales of secured properties and how these amounts had been applied towards the outstanding balances under the facilities.

[61] The Judge ultimately rejected each of the quantum issues raised by Mr Cornmell. On appeal, the appellants advanced the same challenges to quantum as they did in the High Court, with one exception.[64] We address each of these below, after first addressing the appellants' preliminary submission that the Judge's approach to the onus of proof was flawed.

Was the Judge's approach to the onus of proof flawed?

[62] BNZ argued in the High Court that the standard onus in summary judgment applications was altered contractually in this case, as both the Lothian and Pyne Holdings Facility Agreements included prima facie evidence clauses (as discussed at [59] above). The Judge, however, rejected BNZ's submission that such clauses place the onus on the borrower/obligor to disprove the correctness of the certified amounts.[65] Rather, she stated, the correct approach is that:[66]

> [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. 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

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64 A challenge to a $4,250,000 drawdown on the Pyne Holdings Facility was withdrawn following the appeal hearing, discussed below at [82].

65 Liability judgment, above n 2, at [356]–[361].

66 Footnotes omitted.

> 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.

[63] The appellants submitted on appeal that by requiring the appellants to identify specific issues to at least an arguable level, the Judge had taken an approach to the onus of proof that was too narrow.

[64] We find no error in the Judge's approach to the onus of proof. The Judge correctly summarised the relevant principles with reference to this Court's decision in *Krukziener* (see above at [18]–[19]).[67] As the Judge found, the onus is on BNZ to satisfy the Court that the appellants have no defence to the claims against them. However, as the learned authors of *McGechan on Procedure* observe, although ultimately the onus rests with the plaintiff to show that there is no defence, the circumstances may cause the evidentiary onus to shift to the defendant.[68] As Eichelbaum J explained in *Auckett v Falvey* (a specific performance claim for the sale of land):[69]

> On a summary judgment application, the onus is on the plaintiff to show that there is no defence. On the present facts, the plaintiffs are able to pass an evidential onus to the defendants by exhibiting the contract which on its face, entitles them to the remedy they now seek. The defendants are then in a position of having to demonstrate a tenable defence. However, the overall position concerning onus on the application is that at the end of the day the question is whether the plaintiffs have satisfied the Court as to the absence of a defence.

[65] If the evidence provided by the plaintiff is sufficient to convince the Court that there is no defence, then the defendant will obviously need to respond and raise an arguable defence in order to defeat the summary judgment application (or specific aspects of it, such as quantum).[70] However, the onus does not shift. It is the plaintiff

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67 *Krukziener v Hanover Finance Ltd*, above n 16, at [26]; and see also *Smalley v Williamson* [2023] NZCA 174 at [38].

68 Jessica Gorman and others *McGechan on Procedure* (looseleaf ed, Thomson Reuters) at [HR12.2.05].

69 *Auckett v Falvey* HC Wellington CP296/86, 20 August 1986 at 2.

70 *MacLean v Stewart* (1997) 11 PRNZ 66 (CA) at 5.

who must ultimately satisfy the Court that the defendant has no defence, with reference to all of the evidence before the Court. This is entirely consistent with the approach the Judge took.

The $4 million payment to an unknown account

[66] The most significant quantum issue relates to a $4 million payment made from Pyne Holdings' current account to an unknown account on 14 July 2010.

The evidence before the High Court regarding the $4 million payment

[67] In Mr Cornmell's report of 7 February 2022, he identified this as a transaction requiring further investigation, as follows:

> … I note that the bank statements produced by BNZ indicate that a payment of NZ$4 million was … made on 14 July 2010 … The payment is described as being in favour of Buddle Findlay, who I understand is a law firm in New Zealand used by Mr Kerr. However, the bank statement states that the NZ$4 million payment was made to account number 0985/9850000000/002, which I understand is an account operated by BNZ … [M]onies appear to have been paid to a BNZ account instead of the intended recipient, which, in this case, was a firm of lawyers. … [T]his appears very unusual to me as a payment apparently made to a law firm appears to have been paid, instead, to an account operated by BNZ. I have been unable to determine why this might have been the case. In my opinion, this matter requires further investigation and explanation.

[68] In response, Mr Young described the various transactions (several of them in excess of $3 million) that were made into and out of Pyne Holdings' current account on 14 July 2010, prior to the $4 million payment. Following these transactions, the balance remaining in the account was $4,041,761.15, most of which was then paid out, by the payment of $4 million to an unknown account, with the reference "BUDDLE FINDLAY". The unknown account was numbered 0985/9850000000/002. The word "BUDDLE" is noted in the particulars reference column on the relevant bank statement and the word "FINDLAY" is in the code reference column. Mr Young's evidence regarding this payment was that:

> … Mr Cornmell refers to the payment of $4,000,000 made out of [Pyne Holdings'] current account on 14 July 2010 … Mr Cornmell says that this payment was made to account number 0985/9850000000/002, which he says he understands to be a BNZ account. While 0985 is consistent with a BNZ branch number, the rest of the numbers are not consistent with BNZ

> accounts. It is not possible, on the basis of the information available, to know which account number the payment was made to.
>
> … The column reference under which the numbers 0985/9850000000/002 sit is the "other party name" column. Depending on the payment type (Same Day Cleared Funds ("SD"), Electronic Transfer ("ET"), computer banking ("PC") etc), the "other party name" field would be a party name, such as "BUDDLE FINDLAY" for SD transaction types for example, or a series of numbers if a PC or ET transaction type. Where a payment out of the current account was generated by the customer (for example on PC banking or through a teller), the field codes to the left in the [Pyne Holdings] Statement Spreadsheets, being "particulars", "code" and "reference", are completed either by the customer or on their instructions.
>
> In respect of the $4,000,000 payment to which Mr Cornmell refers, only the "particulars" and "code" have been completed, and they contain the words "BUDDLE FINDLAY". This shows that the payment was made by electronic transfer ("ET") on [Pyne Holdings'] instructions and was made with those particulars and code details, requested by [Pyne Holdings]. There is nothing to suggest to me that this payment was not made to Buddle Findlay and Mr Kerr could ask the firm for confirmation if in doubt.

The High Court decision

[69] In the Liability Judgment, the Judge stated that:

> [408] I find that the defendants have not presented a credible argument that the [Pyne Holdings] 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 [Pyne Holdings] from its current account with the particulars and code details of [Pyne Holdings'] law firm. This transfer occurred on the same day as another payment by [Pyne Holdings] to Buddle Findlay to make a capital contribution to Torchlight LP …

The first leave application

[70] The appellants have filed two applications seeking leave to adduce further evidence on appeal in relation to the $4 million payment:

(a) an application filed on 11 September 2023, prior to the appeal hearing (the first leave application); and

(b) an application filed on 23 November 2023, following the appeal hearing (the second leave application).

[71] The first leave application was accompanied by the proposed new evidence, namely two affidavits sworn by Karl Stolberger, a partner of Lowndes Jordan, the solicitors for Mr Kerr. Mr Stolberger's affidavits annexed copies of correspondence with Buddle Findlay that were said to relate to the $4 million payment. We admitted Mr Stolberger's evidence provisionally for the purposes of the appeal hearing. We reserved our final decision as to the admission of that evidence until delivery of this judgment.

[72] Mr Stolberger's evidence establishes that on Saturday 26 March 2022, almost seven weeks after Mr Cornmell had completed his final report identifying the $4 million payment as warranting further investigation, Mr Kerr emailed Buddle Findlay (Pyne Holdings' former solicitors) as follows:

> Hi - been a while - but we are trying to track through some old transactions - 2010/11/12
>
> Pyne holdings and was a client of yours and / or tinkler I recall , and the trust account below was the one we have on record.
>
> Can you check and confim this is the account Pyne holdings would have paid money into if required .

[73] Mr Stolberger deposes that Mr Kerr's email was an enquiry from him to Buddle Findlay regarding the $4 million payment from Pyne Holdings' current account. The email itself, however, is somewhat opaque. Rather unhelpfully, the copy that is in evidence does not include the trust account number that Mr Kerr is referring to. If Mr Stolberger is correct, however, that Mr Kerr's email is enquiring about the $4 million payment, then the bank account number Mr Kerr says is the trust account number that Pyne Holdings has "on record" must presumably be the 0985/9850000000/002 account number referred to in the evidence of Mr Cornmell and Mr Young. Evidence from Mr Kerr to clarify this would, however, have been helpful. The email does not include any enquiry regarding the $4 million payment and whether Buddle Findlay received it on or about 14 July 2010. The enquiry is limited to seeking confirmation that a particular account number was the one Pyne Holdings would have paid money into, if required. Further, Mr Kerr's email was sent only one working day before the quantum hearing on Tuesday 29 March 2022.

[74] Buddle Findlay subsequently responded (on the day of the quantum hearing) that as Pyne Holdings was now in receivership, any request for information would need to come from its receivers. Mr Kerr did not make any follow up inquiries of Buddle Findlay or Pyne Holdings' receivers prior to the delivery of the Liability Judgment six months later, on 30 September 2022.

[75] A notice of appeal was filed in respect of the Liability Judgment in October 2022. In July 2023, 17 months after Mr Cornmell had first raised the issue of the $4 million payment, Mr Kerr's solicitors wrote to Buddle Findlay (copied to Pyne Holdings' receivers) asking that firm to check its records to see whether it had received a payment of $4 million on or about 14 July 2010. This was the first direct inquiry made by or on behalf of Mr Kerr as to whether Buddle Findlay was the recipient of the $4 million payment.

[76] Mr Kerr's submissions in support of his appeal were filed on 28 August 2023, prior to the requested information being provided by Buddle Findlay. On the issue of the $4 million payment, Mr Kerr's written submissions asserted that the definitive answer to whether Buddle Findlay received the $4 million payment could be determined from Buddle Findlay's bank statements. By entering summary judgment, he submitted, the Court had "prejudiced Mr Kerr's ability to obtain that confirmation".

[77] After a further exchange of correspondence, Buddle Findlay confirmed on 7 September 2023 (a few weeks prior to the appeal hearing) that:

> There was no such transaction on or about 14 July 2010 through the [Pyne Holdings] matter in our trust account.

[78] Following receipt of this confirmation, the appellants filed the first leave application. As noted above, this new evidence was admitted provisionally at the appeal hearing. Accordingly, the appellants' position at the appeal hearing was that Buddle Findlay was not the recipient of the $4 million payment.

[79] BNZ opposed the first leave application on various grounds, including that the proposed new evidence is not fresh, and could with reasonable diligence have been obtained prior to the High Court hearing. We accept that submission. As outlined

above, Mr Kerr's enquiries of Buddle Findlay regarding the $4 million payment were extremely belated.

[80] The usual approach of the courts in a summary judgment context is that it is only in exceptional circumstances that leave will be granted to adduce further evidence on appeal, given the need for finality.[71] Nevertheless (and by a fine margin) we have decided to grant leave to the appellants to adduce Mr Stolberger's affidavits and the annexed correspondence as further evidence on appeal, despite the lack of freshness of that evidence. Our reason is that it appears that the Judge's decision on the issue of the $4 million payment was likely predicated on the assumption that Buddle Findlay was the recipient. Given that there is now credible evidence that suggests otherwise, it is our view that it is in the interests of justice to admit that evidence.

The second leave application

[81] The second leave application was filed following the appeal hearing and relates to both the $4 million payment and the $800,000 payment discussed in the next section.

[82] By way of background, several weeks before the appeal hearing, BNZ was able to obtain a copy of Buddle Findlay's trust account records for Pyne Holdings for the relevant period. Those records apparently showed that Buddle Findlay had received a drawdown of $4,250,000 on behalf of Pyne Holdings on 25 June 2010. This confirmed the Judge's finding to that effect in the Liability Judgment — a finding that was subject to appeal. The records were not in evidence before us on appeal. Reference was made to them from the bar, however. In response, the Court suggested that counsel for BNZ show the records to counsel for the appellant, following the hearing. If the appellants accepted that the records established that the disputed $4,250,000 payment had indeed been paid to Buddle Findlay, this ground of appeal could be withdrawn. Counsel for the appellants subsequently filed a memorandum advising that the records had been provided and the ground of appeal relating to the $4,250,000 drawdown was no longer pursued.

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[71] *Leason v Attorney-General* [2013] NZCA 509, [2014] 2 NZLR 224 at [26]–[28].

[83] Following their review of the trust account records, the appellants also filed the second leave application. They seek leave to adduce the trust account records and also proposed affidavits from both Mr Cornmell and Mr Kerr explaining or referring to those records as further evidence in support of their appeals. Leave is also sought to file a short submission addressing the proposed new evidence. Unlike the first leave application, the second leave application was not accompanied by the proposed new evidence, even in draft form. Further, neither the second leave application nor the supporting memorandum provide any explanation as to what the gist of the proposed new evidence is. We infer, however, that Buddle Findlay's trust account records are likely to confirm that firm's previous advice that the $4 million payment was not paid into that firm's trust account.

[84] We already accept, on the basis of Buddle Findlay's letter of 7 September 2023 (which we have admitted), that our analysis should be approached on that basis. Accordingly, receiving a copy of Buddle Findlay's trust account records will not advance matters. Further, the second leave application is extremely belated. There is no evidence that Mr Kerr attempted at any stage to obtain a copy of Buddle Findlay's actual trust account records. Rather, as outlined above, he simply made a somewhat vague enquiry, one working day before the High Court quantum hearing, as to Buddle Findlay's trust account number. Then, 17 months after the date of Mr Cornmell's final report, Buddle Findlay was asked to check its records to see whether it had received a payment of $4 million on or about 14 July 2010. It is our view that, with reasonable diligence, Mr Kerr could likely have obtained a copy of Buddle Findlay's trust account records prior to the High Court hearing.

[85] In the circumstances, we are not persuaded that it is necessary, or in the interests of justice, to admit the proposed further evidence at this very late stage of the process. The interests of finality must prevail. We decline the second leave application accordingly.

Discussion

[86] We accordingly approach our analysis of the $4 million payment issue based on all of the relevant evidence that is before the Court, including the new evidence

that was the subject of the first leave application. The significance of the new evidence, Mr Goodall submitted, is that it supports Mr Cornmell's suggestion that it is possible that the $4 million was actually paid by Pyne Holdings to BNZ, in reduction of the amount owing on the Pyne Holdings Facility.

[87] Mr Cornmell stated in his report (as quoted at [67] above) that "I *understand* [this] is an account operated by BNZ" and that "monies *appear* to have been paid to a BNZ account instead of the intended recipient".[72] Nowhere in his evidence, however, does Mr Cornmell identify the evidential basis for this understanding. Mr Young's evidence (as quoted at [68] above) is that the first four digits of the number in the "other party" column of the $4 million payment on Pyne Holdings correspond with the number associated with a particular BNZ branch, but that the other numbers are not consistent with BNZ accounts. On the face of the relevant bank statement, it was his view that "[t]here is nothing to suggest to me that this payment was not made to Buddle Findlay and Mr Kerr could ask the firm for confirmation if in doubt".

[88] That the first four digits of the unknown account number are "consistent" with the identifier of a BNZ branch does not, of course, mean that the account owner must have been BNZ itself, rather than a bank customer of that branch. Further, if the account number was the number of one of BNZ's own bank accounts, it is reasonable to expect that Mr Young would have been able to confirm that. He did not. On the contrary, he suggested that Mr Kerr approach Buddle Findlay to ascertain whether that firm had received the payment. Accordingly, neither Mr Cornmell's evidence nor that of Mr Young provide a sufficient evidential basis to support Mr Cornmell's expert opinion that it is arguable that the $4 million payment was paid to BNZ in reduction of Pyne Holdings debt. Rather, the evidence simply establishes that the $4 million payment was made, on Pyne Holdings' instruction, to an unknown bank account. Mr Kerr (or whoever initiated this payment on behalf of Pyne Holdings) entered "BUDDLE FINDLAY" as the narration for the transaction in the code and reference fields, for reasons that are not clear.

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[72] Emphasis added.

[89] Other contemporaneous documents provide limited assistance. Mr Goodall did refer us, however, to two other payments that appear to have been made by Pyne Holdings to the same "unknown" bank account number in 2013. We have also identified several other similar payments to or from Pyne Holdings current account. Some of these payments appear to involve accounts with the same account number, but different suffixes. The relevant payments (including the $4 million payment) in chronological order are as follows:

(a) A computer banking payment of $200,000 from Pyne Holdings current account to account 0985/9850000000/004 on 9 February 2010 in which Mr Kerr (or whoever at Pyne Holdings initiated the payment) entered "KERR FAMILY TRUST" in the particulars, code and reference fields.

(b) A computer banking payment of $15,350.78 from Pyne Holdings current account to account 0985/9850000000/008 on 28 May 2010 (the drawdown date of the Pyne Holdings Facility) in which Mr Kerr (or whoever at Pyne Holdings initiated the payment) entered "BUDDLE FINDL AY LEGAL COSTS" as the narration in the particulars, code and reference fields.

(c) A further computer banking payment of $3,017,066.95 from Pyne Holdings current account into account 0985/9850000000/009 on the Pyne Holdings Facility drawdown date of 28 May 2010 in which Mr Kerr (or whoever at Pyne Holdings initiated the payment) entered "TO BUD FIN TRUST ACCOUNT" as the narration in the particulars, code and reference fields.

(d) The electronic transfer of $4 million from Pyne Holdings current account to account 0985/9850000000/002 on 14 July 2010 in which Mr Kerr (or whoever at Pyne Holdings initiated the payment) entered "BUDDLE FINDLAY" as the narration in the particulars and code fields.

(e) A computer banking payment of $7,250,000 *into* Pyne Holdings current account *from* account 0985/9850000000/002 on 28 May 2013 (the expiry date of the Pyne Holdings Loan Facility) in respect of which the transferor has entered "MATURING LOAN" as the narration in the particulars and code fields. This was then immediately followed by a payment of $7,257,818.08 *out of* Pyne Holdings' current account of $7,257,818.08 with an "MIP" reference and the other party name of "BNZ TERM LOAN". Mr Keelty explains in his affidavit that payments with such narrations are loan repayments.

(f) A computer banking payment of $12,746,355.62 *into* Pyne Holdings current account *from* account 0985/9850000000/001 on 28 May 2013 (the expiry date of the Pyne Holdings Loan Facility) in respect of which the transferor has entered "MATURING LOAN" as the narration in the particulars and code fields. This was then immediately followed by a loan repayment of $12,786,249.97 *out of* Pyne Holdings current account with an "MIP" reference and the other party name of "BNZ TERM LOAN".

[90] The first payment discussed above at [89(a)] (to the 004 account) preceded the establishment of the Pyne Holdings Facility by several months (albeit BNZ was providing banking services to Pyne Holdings at that time). The next two payments (to the 008 and 009 accounts) were initiated by Pyne Holdings on the drawdown date of the Pyne Holdings Facility. The next payment was the $4 million payment that is currently in issue. The final two payments were payments *from* the unknown account *into* the Pyne Holdings current account on 28 May 2013. Given that similar (slightly greater) sums were immediately paid on to BNZ as part repayments of the loan, it appears that the payments from the unknown account were likely made for the purpose of funding those loan repayments to the BNZ. We note that the account number that the two payments were received from on 28 May 2013 is exactly the same account number (including the 002 suffix) as the "unknown account" that the $4 million was paid into.

[91] It is also of note that Pyne Holdings included narrations referencing Buddle Findlay in respect of three of the four payments out of its current account to the unknown account or an apparently related account with a different suffix (including in relation to the $4 million payment). The fourth payment from Pyne Holdings current account to the unknown account included a narration referencing Mr Kerr's family trust.

[92] The person who initiated the various payments out of Pyne Holdings' current account to the unknown account (presumably Mr Kerr) and entered the relevant narrations, would presumably be the person best placed to explain who the owner of the 0985/9850000000 accounts (with their various suffixes) is. Similarly, Mr Kerr would presumably be the person best placed to explain why payments were made from the unknown account to Pyne Holdings' current account on 28 May 2013 to fund the (partial) repayment of the Pyne Holdings Facility. Unfortunately, however, Mr Kerr does not specifically address the challenged $4 million transaction, or any of the other transfers we have referred to above, in his evidence. Indeed, as Mr Kennedy pointed out, Mr Kerr has not even deposed that he does not know the identity of the recipient of the $4 million payment or asserted that Pyne Holdings did not receive any pecuniary benefit from it. Mr Kerr's evidence is simply silent on the issue. Nor does anyone else from Pyne Holdings provide any factual evidence regarding the $4 million payment.

[93] It is also of note that Mr Kerr received bank statements for Pyne Holdings' current account. Yet, prior to Mr Cornmell suggesting that this transaction warranted further investigation in his report, neither Mr Kerr nor Pyne Holdings had ever raised any issue with BNZ regarding it.

[94] Ultimately, in our view, nothing turns on the fact that Pyne Holdings' payment of $4 million was made to an unknown recipient rather than Buddle Findlay, as the narration entered by Mr Kerr (or someone else at Pyne Holdings) stated. Rather, the critical issue is whether Pyne Holdings has adduced sufficient evidence to raise at least a tenable argument that the $4 million payment was made to BNZ, in reduction of the Pyne Holdings Facility. In our view, it has not.

[95] In conclusion, although our reasoning differs in some respects from that of the Judge (due to the admission of further evidence on appeal), the outcome is the same. The Judge was correct to find that the appellants had not raised a credible argument that the Pyne Holdings' loan balance was incorrect by $4 million or was otherwise uncertain.

The $800,000 drawdown in the Pyne Holdings Facility

[96] Mr Cornmell stated in his report that it appeared that an $800,000 loan had been recorded by BNZ as having been granted to Pyne Holdings on 18 June 2010, but that sum did not appear to have been received by Pyne Holdings.

[97] In his affidavit in reply, Mr Young explained that:

> That deal was in error and the error is corrected in the Loan Spreadsheets [in] the exhibit bundle to my Second Affidavit, where $800,000 is shown as being drawn and repaid on the same date. The final entry on 18 June 2010 shows this $800,000 being repaid. The interest due on each recorded transaction is zeroed off in the final column. I have reviewed the Statement Spreadsheets [in] the exhibit bundle to my Second Affidavit and I confirm that there is no payment of $800,000 recorded in [Pyne Holdings]'s current account on that date, nor is there any interest charge recorded. As a result, this transaction has no impact on [Pyne Holdings]'s indebtedness.

[98] In light of Mr Young's evidence, the Judge found that:[73]

> [379] I accept that this does not represent an error that will have affected the [Pyne Holdings] balance on the [expiry date of the Pyne Holdings Facility].

[99] On appeal, Mr Goodall submitted that the Judge erred in accepting Mr Young's evidence, as he is not an independent expert. Further, the data Mr Young referred to was not obvious to a layperson. In our view, there is no merit in this submission. The issue was a factual one and Mr Young was well placed to explain the $800,000 payment, with reference to BNZ's business records. This was not a matter that required evidence from an independent expert. Mr Young's explanation is supported by the relevant loan spreadsheet. No interest was charged. Pyne Holdings' current account also shows there is no payment record on that date, or any interest recorded.

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[73] Liability judgment, above n 2.

[100] Mr Goodall also expressed concern that Mr Cornmell had not had an opportunity to respond to Mr Young's evidence, the implication being that if he had had the opportunity, Mr Cornmell would have (or might have) found fault with Mr Young's explanation. We note, however, that Mr Kerr did not seek to adduce any further evidence from Mr Cornmell on this issue in the first leave application, which was restricted solely to further evidence relating to the $4 million payment. It was not until the second leave application (discussed at [81]–[85] above) that an application was made to adduce further evidence from Mr Cornmell on the issue of the $800,000 payment, albeit not in response to Mr Young, but arising out of Mr Cornmell's review of Buddle Findlay's trust account records.

[101] As noted above, the proposed evidence was not provided with the second leave application, and the supporting memorandum does not explain, even at a high level what the proposed new evidence is. As with the $4 million payment, however, we find it difficult to see how Buddle Findlay's trust account records could materially assist the Court in relation to the $800,000 payment. There is no dispute between the parties that Pyne Holdings did not draw down the sum of $800,000 and that that sum should not form part of the balance owing under the Pyne Holdings Facility. Rather, the issue is whether it is reasonably arguable that the sum of $800,000 was erroneously added by BNZ to the loan balance owing under that facility. Mr Young's unequivocal evidence is that the payment was made in error, immediately reversed, and does not form part of the outstanding loan balance. He has referred to relevant documentation to support this. We fail to see how Buddle Findlay's trust account records (as opposed to BNZ's internal records) could materially assist the Court on this issue. Further, as noted at [84] above, the second leave application is extremely belated. Mr Kerr made no effort to obtain Buddle Findlay's trust account records prior to either the High Court hearing or the appeal hearing. We are accordingly not persuaded that it is in the interests of justice to grant leave to file further evidence on this issue. The interests of finality must prevail.

[102] In conclusion, for the reasons we have outlined, the Judge was correct to find that there was no tenable argument that the outstanding balance owed under the Pyne Holdings Facility is over-stated by $800,000 (plus interest).

The $163,056.97 and $500,000 drawdowns in Pyne Holdings Facility

[103] Mr Cornmell initially identified four drawdowns on the Pyne Holdings Facility (totalling $7,913,056) which he could not find drawdown notices for. He accordingly deducted these drawdowns from his calculation of the amount owing under that facility. He suggested that three of the payments were unusual, in that they followed repayment of prior advances for the same sum.

[104] Drawdown notices were subsequently located for the two most significant drawdowns. Accordingly, only two of the drawdowns are still queried on appeal:

(a) a drawdown of $163,056.97 on 23 August 2010; and

(b) a drawdown of $500,000 on 26 October 2011.

[105] The Judge observed in relation to the (original four) queried drawdowns that:

> [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. …

[106] Similarly, in relation to the three drawdowns which followed prior to repayments, the Judge noted Mr Cornmell's evidence that:[74]

> … there also appear to be a number of alleged drawdowns included in the balance claimed by BNZ under the [Pyne Holdings] 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*.

[107] The Judge found that the factual basis for Mr Cornmell's opinion, namely that Mr Kerr had not been able to identify drawdown requests for the challenged sums and/or that he did not in fact request these drawdowns, had not been established.[75] Specifically, Mr Kerr did not provide any direct evidence that he had not requested

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74 At [397] (emphasis in original).
75 At [401].

these drawdowns. Indeed, he did not specifically address these drawdowns at all in his evidence. The Judge concluded that:

> [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 [Pyne Holdings] loan balance on the basis that the drawdowns were an error or are uncertain.

[108] The Judge also found that the suggestion that Mr Kerr did not request the drawdowns "strain[ed] credibility" in circumstances where he had not raised any issue at the time with the funds being deposited into Pyne Holdings' current account.[76] She noted that Mr Kerr had confirmed in evidence that he received bank statements for the current accounts into which the drawdowns were made, and from which repayments and accrued interest payments were deducted.[77]

[109] With reference to the two drawdowns that remain in issue on appeal, the Judge noted that both of these payments can be traced into Pyne Holdings' current account and are recorded in the statement spreadsheets. Specifically:[78]

> (b) receipt of funds of $163,056.97 on 23 August 2010, which followed repayment of the same amount on 28 May 2010, the effect of which was to restore [Pyne Holdings'] current account from being overdrawn to having a $40,004.99 credit balance;
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> (c) receipt of $500,000 on 26 October 2010, which partially restored [Pyne Holdings'] current account from overdraft, and further payments into the account and drawdowns on 28 and 31 October 2010 which brought the account into credit.

[110] On appeal, Mr Goodall submitted that whether these drawdowns were requested is a matter that can only be resolved following discovery.

[111] We find the Judge's reasoning to be compelling. Although Mr Kerr appears to have told Mr Cornmell he did not request these drawdowns (or the other two drawdowns in respect of which drawdown notices have now been located) he has not expressly referred to these specific transactions in any of his affidavits. Nor has he disputed that Pyne Holdings received the relevant funds or deposed that he did not

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76 At [403].
77 At [403].
78 At [404] (footnotes omitted).

request these specific drawdowns. There is accordingly an insufficient evidential foundation for Mr Cornmell's expert opinion on this issue. In any event, as the Judge observed, it strains credibility to suggest that Mr Kerr did not request the drawdowns given he raised no issues with the funds being deposited into Pyne Holdings' current account at the time, and Pyne Holdings subsequently paid interest on those sums without protest. The Judge was accordingly correct, in our view, to find that Mr Kerr had not raised an arguable defence in relation to these two payments.

The $525,000 payment for the "dlu account"

[112] This issue was addressed in Mr Goodall's written submissions on behalf of Mr Kerr. At the hearing, Mr Goodall advised that he did not wish to spend any time on this issue, given that it relates to only about 13 days' worth of interest, which apparently comes out at about $1,000. Nevertheless, as Mr Kerr did not formally abandon this aspect of the appeal, it is necessary for us to address it.

[113] On 14 November 2008, BNZ received a payment of $525,000 with the instruction from Mr Kerr to "please put in the dlu account for lothian partners". Kylie Reardon of BNZ emailed Mr Kerr back on the same day to confirm the "NZD $525k has arrived into Pyne Trust and has been transferred to LPC DLU". The funds were deposited into Lothian's current account.

[114] Twelve days later, on 26 November 2008, the Lothian Facility was established. Under the Lothian Facility Agreement, a condition precedent to any drawdowns was that Lothian deposit $2,200,000 into a "Deposit Account" (which is a defined term in the agreement). The funds in the Deposit Account secured Lothian's obligations under the Lothian Facility Agreement. In the event of a default, BNZ was entitled to apply or transfer the funds in the Deposit Account to satisfy any outstanding payment obligations of Lothian. BNZ was required to pay interest to Lothian on the balance maintained in the Deposit Account, subject to the terms specified in the agreement. On 27 November 2008, Lothian transferred $2,263,570.91 from its current account into the Deposit Account, presumably to meet the condition precedent.

[115] Mr Cornmell queried in his report whether the funds had been deposited into the correct account. He stated (without identifying the source of his information) that:

> I understand that "DLU" refers to the "Deposit Lock Up", that is, the Term Deposit Account.

By "Term Deposit Account", we understand Mr Cornmell to be referring to the Deposit Account established pursuant to the Lothian Facility Agreement.

[116] In response, Mr Young explained in his affidavit that BNZ's customer accounts have nicknames provided by the customer. At the relevant time, Lothian's current account had the nickname "LPC DLU". The $525,000 was accordingly deposited into Lothian's current account, in accordance with Mr Kerr's instructions to "please put in the dlu account for lothian partners".

[117] The Judge understood the focus of Mr Cornmell's evidence to be that there was a 13-day delay in transferring the $525,000 from the current account into the Deposit Account. She stated that:

> [440] This seems like a trivial issue. The funds were held in [Lothian'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. [Lothian] would have had the benefit of any interest accrued during this period. The transfer occurred the day after the [Lothian] Facility Agreement was signed.

[118] In our view, the Judge was correct to find that the appellants had not raised a tenable argument in relation to this issue. Mr Young's evidence that the term "LPC DLU" was a nickname for the current account, provided by the customer, is supported by copies of bank statements for Lothian's current account which have "LPC DLU" recorded on the top left corner of the page. Mr Kerr has not given any evidence on this transaction and there is accordingly no evidential basis for Mr Cornmell's suggestion that Mr Kerr's instruction was that the relevant payment be made to the Deposit Account rather than the current account. Further, at the time of the payment, the Lothian Facility Agreement had not yet been entered into and, accordingly, no Deposit Account under that facility had yet been established. Finally, as the Judge noted (and Mr Goodall appeared to accept in his oral submissions) this is a trivial issue.

Was BNZ entitled to charge Lothian and Pyne Holdings interest on their current accounts at BNZ's unarranged overdraft rate?

[119] The appellants argued in the High Court that BNZ was not entitled to charge overdraft interest on Lothian's and Pyne Holdings' current accounts, pursuant to the current account operating authorities signed by Mr Kerr on behalf of Lothian and Pyne Holdings. Rather, they submitted, the (lower) default interest rates specified in the facility agreements applied and those interest rates should have been charged if the current accounts went into unauthorised overdraft.

[120] The Judge rejected this submission, stating that:

> [472] In my view, the defendants blur the distinction between the interest rates agreed to apply to drawdowns under the [Lothian and Pyne Holdings] 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.

[121] The Judge observed that the debit account clauses in the facility agreements gave BNZ the clear authority to debit interest payable under the facility agreements from the current accounts of Lothian and Pyne Holdings and that there could be "no serious argument about that".[79] If, as a consequence, the current accounts went into overdraft, BNZ had the right to charge unarranged overdraft interest on the current accounts under the account operating authorities for those accounts, which were signed by Mr Kerr for Pyne Holdings and Lothian.[80] Those authorities provided that "[i]n the event that such account(s) becomes overdrawn, you will pay interest at the rate(s) *normally charged by the bank*".[81] The Judge noted that Mr Kerr agreed to those terms when he opened the current accounts.[82]

[122] The drawdown notices received by Mr Kerr made it clear that principal and interest would be direct debited from the current accounts. Mr Kerr received regular bank statements for the current accounts, which would have shown the debit payments

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79 At [473].
80 At [479].
81 At [479] (emphasis added).
82 At [479].

being made, the current accounts going into overdraft, and the overdraft interest rate that was being applied. Mr Kerr did not raise any issue about the overdraft or the overdraft interest at the time of the relevant deductions.[83] The Judge concluded that:

> [482] I find therefore that there can be no serious argument that BNZ was not entitled to debit the [Lothian and Pyne Holdings] 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.

[123] The Judge found, however, that the guarantors had an arguable defence that they were not liable for overdraft interest, as they were guarantors of the Lothian and Pyne Holdings' Facilities.[84] The overdraft obligations arose, however, under the current account operating authorities which were not defined as "Transaction Documents" under the facility agreements.[85]

[124] Ultimately, when it came to quantifying the final sums claimed (against all of the appellants, including Lothian and Pyne Holdings as borrowers) BNZ chose to exclude any unpaid overdraft interest charged after the permanent overdraft dates. Hence, the only overdraft interest claimed by BNZ was allocated as paid before the current accounts entered permanent overdraft.[86]

[125] Accordingly, in the Quantum Judgment, the Judge found that it was not necessary to make any further deductions from the amounts claimed from the guarantors to reflect her finding in the Liability Judgment that it was arguable that the guarantors' liability for the guaranteed indebtedness did not extend to interest charged on the Lothian and Pyne Holdings current accounts. This was because any current account overdraft interest charged to Lothian and Pyne Holdings had been paid by deposits into the accounts, up until when the accounts went into permanent overdraft.[87]

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83 At [481].
84 At [483].
85 At [484].
86 Quantum judgment, above n 3, at [19].
87 At [20]–[21].

This necessarily involved all overdraft interest charged to the accounts being paid up to that time:

> [20] … As BNZ does not seek to recover any overdraft interest charged after the permanent overdraft dates and has recalculated the sums claimed to exclude this interest, it follows that the outstanding amounts claimed by BNZ do not contain any element of overdraft interest.
>
> …
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> [22] What the facility balances would have been had overdraft interest not been charged to and paid by [Lothian] and [Pyne Holdings] is irrelevant. In my substantive judgment I found that BNZ was entitled to charge the borrowers overdraft interest under the terms of the current accounts. The residual question was whether the guarantors had guaranteed the borrowers' obligations to pay overdraft interest. As it turns out, the question does not arise because BNZ does not now claim any unpaid overdraft interest from the borrowers.

[126] We find no error in the Judge's analysis. There is no dispute that BNZ was contractually entitled to deduct the interest owing on the facilities from Pyne Holdings and Lothian's current accounts, respectively. This was done on the interest payment dates provided for in the agreements. As a result of these deductions, Pyne Holdings and Lothian did not default on their interest obligations under the facility agreements — on the contrary, interest was paid as required, on the specified due dates. Accordingly, no obligation to pay default interest arose under the terms of the facility agreements. However, because Mr Kerr did not always ensure that there were sufficient funds in the current accounts to pay the required interest, those accounts periodically went into unauthorised overdraft when the interest payments due under the facility agreements were deducted. This situation was covered by the account operating authorities for the current accounts, which provided for interest to be paid at BNZ's unarranged overdraft interest rate when this occurred.

[127] The Judge was accordingly correct to find that the appellants had not raised a tenable argument in relation to this issue.

Was it appropriate for the Judge to deal with quantum in a summary judgment context?

[128] As an overarching issue, Mr Goodall submitted that the Judge should have exercised her residual discretion to decline summary judgment, given discovery had not yet been provided. Specifically, he submitted, discovery and cross-examination

are necessary to enable the appellants to interrogate BNZ's data extraction processes. This may identify deficiencies in that process that have given rise to errors or uncertainties. Mr Goodall also referred to Mr Cornmell's evidence that:

> … BNZ appear to have made a number of errors within their calculation of the amount actually owed under the loan facilities. Whilst I have been able to identify a number of specific issues with BNZ's calculations, and have provided my current view as to the amounts that may be owed under the two facilities below, I am not able to form a definitive view as to the precise amounts owed under either facility. This is because the lack of key documentary evidence to support BNZ's position and the lack of an explanation in respect of the discrepancies that I identify means that there is material uncertainty in respect of the ultimate balances. I consider that further investigation and explanations are required to understand transactions identified in the course of our work and in order to form a definitive view on the amounts outstanding.

[129] We observe first that we have upheld the Judge's findings that none of the alleged "errors" identified by Mr Cornmell have a sufficient evidential foundation or are otherwise seriously arguable. As for the appellants' criticisms of BNZ's data extraction process, Mr Young provided a detailed explanation of the process that was followed in his evidence. The Judge summarised the relevant evidence as follows:[88]

> [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 [Lothian] and [Pyne Holdings] Facilities expired did not store loan statements as such for each facility. 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 [Lothian] and [Pyne Holdings] current accounts into which loan drawdowns were made. [Lothian] operated two current accounts — an 00 and an 01 account. [Pyne Holdings] 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.

[130] None of the specific quantum issues raised by the appellants (which we have addressed in some detail above) support the contention that BNZ's data extraction process may have been flawed, or that the information generated from that process is

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88 Footnote omitted.

inaccurate or uncertain. As Mr Young explained, it is the original source data, extracted from BNZ's systems. Mr Kerr has deposed that he has in his possession extensive contemporaneous documentation regarding the facilities. However, he has not produced any documents that directly contradict BNZ's data or otherwise support the assertion that BNZ's it is incorrect or unreliable.

Conclusion on quantum issues

[131] The Judge carefully analysed each of the alleged quantum errors, recognising that at the summary judgment stage, the appellants were only required to show that there was specific, credible evidence of errors, rather than prove such errors conclusively. None of the alleged errors, however, reached the reasonably arguable threshold. We have upheld those findings. In the circumstances, the Judge did not err in entering summary judgment.

Is the Costs Award recoverable?

Background

[132] In November 2020, BNZ issued notices under ss 118 and 119 of the Property Law Act to Glencoe JV and Galt in relation to mortgages securing their guarantee obligations under the Lothian Facility. BNZ subsequently appointed receivers to Glencoe JV and Galt and initiated steps to sell the secured assets. Glencoe JV and Galt filed injunction proceedings to halt the asset sales but later withdrew those proceedings. This resulted in the Costs Award.[89]

[133] The Judge rejected the submission that recovery of the Costs Award from Glencoe JV and Galt is barred on a proper interpretation of the limitation of liability provisions in the guarantees, for reasons we explain further below.

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[89] Costs Award judgment, above n 6.

The relevant contractual provisions — Glencoe JV

[134] Glencoe JV's liability to pay the Costs Award arises out of cl 17.1(b) of the Glencoe JV Guarantee. Glencoe JV is "the Guarantor" in that document and BNZ is "the Beneficiary". The "Principal Debtor" is Lothian. Clause 17.1(b) provides that:

> 17.1 **All costs**: Whether or not any Guaranteed Indebtedness is outstanding, the Guarantor shall pay:
>
> …
>
> (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.

[135] Glencoe JV relies on the following limitation of liability provision at cl 20.1 of the Glencoe JV Guarantee:[90]

> **20. LIMITATION OF LIABILITY**
>
> 20.1 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 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.*

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

> 2.1 **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.

[137] "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

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90 Emphasis added.

> by the Principal Debtor to the Beneficiary under the Facility Agreement and includes any part thereof[.]

[138] "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[.]

[139] A "Relevant Party" is:

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

The relevant contractual provisions — Galt

[140] Galt's liability to pay the Costs Award arises under cl 25.2 of the Lothian Facility Agreement, which provides:

> 25.2 **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.

[141] The "Lender" is BNZ. The "Obligors" means the Borrower (Lothian) and the Guarantors (which include Galt, Mr Kerr, Glencoe JV and Pyne Holdings). "Obligor" means any one of them. "Guarantee" is defined as "the cross-guarantee set out at cl 13, given by the Guarantors in favour of the Lender". The Guaranteed obligations are set out in cl 13.1:

> 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.

[142] "Guaranteed Indebtedness" is defined as:

> … when used with reference to a Guarantor, all amounts of any nature which that Guarantor (whether alone, or jointly or jointly and 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.

[143] The cap on Galt's liability is contained at cl 13.2 of the Lothian Facility Agreement:[91]

> 13.2 **Limited Liability**: The Lender, the Borrower and each Guarantor acknowledge that, notwithstanding any other clause in this Agreement the liability of:
>
> (a) 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*.

The Liability Judgment

[144] Glencoe JV argued in the High Court that the Costs Award was subject to the limitation of liability cap in cl 20.1 of the Glencoe JV Guarantee. Hence its "liability is limited to the value of the Glencoe Station Property" which applies "notwithstanding any other clause in this Deed".[92] As the Glencoe Station Property had already been realised by BNZ, Glencoe JV submitted, it had no further liability to the BNZ and could not be ordered to meet the Costs Award.

[145] The Judge rejected this submission. She found that cl 17.1(b) of the Glencoe JV Guarantee (relating to enforcement costs) established a *direct* obligation on Glencoe JV to pay BNZ's enforcement costs. That obligation arose independently of Glencoe JV's separate guarantee of Lothian's indebtedness to BNZ found in cl 2.[93] The words "notwithstanding any other clause in this Deed" in the limitation of liability provision (cl 20.1) meant that no other clause could override the limitation on Glencoe JV's liability contained within cl 20.1.[94] However, the words "liability is

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91 Emphasis added.
92 Liability judgment, above n 2, at [299]–[300].
93 At [301]–[302].
94 At [304].

limited to the value of the Glencoe Station Property" had to be read together with the following explanation that this "*shall mean* that upon the security being realised Glencoe JV 'shall have no further personal liability *under the Guarantee*'".[95] The liability limitation was therefore restricted to the Guarantee obligations, namely the payment by Glencoe JV to BNZ of the Guaranteed Indebtedness. Glencoe JV's obligation in cl 17.1(b) was a separate, and direct, contractual obligation requiring Glencoe JV to pay BNZ's costs of taking enforcement action against Glencoe JV.[96] That direct obligation did not arise under Glencoe JV's Guarantee of Lothian's (or any other obligor's) obligations under the Lothian Facility Agreement or the Transaction Documents.

[146] A similar analysis applied to Galt's obligation to pay enforcement costs. The Judge found that cl 25.2 of the Lothian Facility Agreement imposed a direct obligation on Galt, independent of the cross-guarantee at cl 13.1, to pay BNZ its enforcement costs.[97] The limitation of liability applied to the liability of Galt "under the Guarantee".[98] The liability to pay enforcement costs does not arise out of the Guarantee, however, as it is a direct obligation imposed on Galt.[99]

[147] In the High Court, BNZ also claimed against Mr Kerr, Lothian and Pyne Holdings for the Costs Award, as guarantors of their co-guarantors' "Guaranteed Indebtedness".[100] The Judge found that:

(a) The claim against Mr Kerr, Lothian and Pyne Holdings under the Glencoe JV Guarantee must fail as none of the parties are guarantors of Glencoe JV's obligations under that deed.[101]

(b) Mr Kerr, Lothian and Pyne Holdings were, however, co-guarantors of Galt's obligations under the Lothian Facility Agreement. As the cap on Galt's liability did not apply to its primary obligation to pay

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95 At [305] (emphasis in original).
96 At [314].
97 At [320].
98 At [321].
99 At [320].
100 At [322].
101 At [324].

enforcement costs under cl 25.2, there was no credible defence to the claim against Mr Kerr, Lothian and Pyne Holdings for the Costs Award as co-guarantors of Galt's obligations under the Lothian Facility Agreement.[102]

(c) The claim against Mr Kerr, Lothian and Pyne Holdings as co-guarantors of Galt's obligations under the Lothian Facility Agreement was not time-barred because Galt only became liable to pay the enforcement costs on demand. The Costs Award was not made until 23 April 2021 and demand was made November 2021.

The appellants' submissions on appeal

[148] In relation to cl 20.1 of the Glencoe JV Guarantee, the appellants relied (as they had in the High Court) on the phrase "notwithstanding any other clause in this Deed the Beneficiary's liability is limited to the value of the Glencoe Station Property". They further submitted that the first part of cl 20.1 should be interpreted independently of the second part (which commences with the phrase "for the avoidance of doubt"). Approaching interpretation of the clause in this way would circumvent the obvious difficulty posed by the concluding words of the clause, which provide that following the sale of the secured property, "the Guarantor shall have no personal liability *under the Guarantee*".

[149] A similar argument was advanced in relation to the limitation of liability clause in the Lothian Facility Agreement (cl 13.2). In addition, the appellants noted that the first part of the clause states that:[103]

> … notwithstanding any other clause in this Agreement the liability of … [Galt] as trustee of the Wainuiototo Trust *under this guarantee* is limited to the value of the PungaPunga Property …

[150] The appellants emphasised that the word "guarantee" in this sentence is not capitalised. They submitted that the word "guarantee" in this sentence does not therefore refer to Galt's defined obligations under "the Guarantee" (as defined) but

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102 At [325]–[327].
103 Emphasis added.

actually refers to all of Galt's obligations under the Lothian Facility (including its obligation to pay enforcement costs).

[151] Finally, the appellants submitted that the claim to recover the Costs Award was time-barred.

Discussion

[152] We have summarised the Judge's analysis at [144]–[147] above. In our view, the Judge was correct to find that BNZ's entitlement to recover the Costs Award is not constrained by the liability limitations set out in the Lothian Facility Agreement and the Glencoe JV Guarantee, for the reasons she gave. The limitation of liability clauses must be read as a whole. It is not appropriate to effectively ignore the second part of each clause when interpreting the first part, as required on the appellants' approach. Interpreted holistically, it is clear that the limitations of liability apply solely to the Guarantee obligations, namely the payment of the Guaranteed Indebtedness by Galt and the Glencoe JV to BNZ. They do not extend to other obligations of Galt and the Glencoe JV, such as their distinct and separate obligations to meet BNZ's enforcement costs under cl 25.2 of the Lothian Facility Agreement and cl 17.1(b) of the Glencoe JV Guarantee. Those obligations pertain to costs directly caused by Glencoe JV and/or Galt (in resisting enforcement) rather than any indebtedness owed by the borrowers to BNZ under the facility agreements.

[153] Nor, in our view, is there any significance in the fact that the word "guarantee" in the first part of cl 13.2 of the Lothian Facility Agreement is not capitalised. This is clearly just a typographical error. Clause 13 is headed "GUARANTEE AND INDEMNITY". Clause 13.1 sets out the terms of the Guarantee. Although the word "guarantee" is inconsistently capitalised in cl 13, in several places, there is nothing to support the view that this was intentional, and that the parties intended the term "guarantee" to also include within its scope the separate and distinct contractual obligation to pay enforcement costs. Rather, both "guarantee" and "Guarantee" are clearly intended to refer to the Guarantee given in cl 13.1. Indeed cl 13.3, which also does not capitalise the word "guarantee", expressly refers to "the guarantee given in

clause 13.1". It is simply not tenable that the words "this guarantee" in cl 13.2(a) were intended to refer to anything other than the "Guarantee" referred to in cl 13.1.

[154] The Judge's interpretation also accords with commercial common sense. The Costs Award relates to Glencoe JV and Galt's own conduct in seeking an injunction to stop BNZ realising its security, and then abandoning that course of action, in circumstances where the Guaranteed Indebtedness far exceeds the value of the Galt and Glencoe JV's secured properties. Yet, on the appellants' interpretation, they could expose BNZ to unlimited enforcement costs without any risk of costs exposure. Such an outcome is inconsistent with both the terms of the agreements and commercial common sense.

[155] Finally, given our finding on Galt's liability, the Judge was also clearly correct to find that the Costs Award was recoverable against Mr Kerr, Lothian and Pyne Holdings as co-guarantors of Galt's obligations under the Lothian Facility Agreement. Further, the claim is not time-barred. Galt only became liable to pay the enforcement costs on demand. The Costs Award was not made until 23 April 2021 and demand was made some time after that.

Other issues

[156] In an interlocutory judgment dated 21 September 2021, Associate Judge Bell determined that the settlement referred to at [9] above was part of debt restructuring negotiations and therefore not subject to the privilege in s 57 of the Evidence Act 2006.[104] The appellants challenged this finding, in the context of their appeal against the Liability Judgment. It is not necessary for us to address the issue however, as it can have no impact on the outcome of this appeal. Specifically, the Judge found in the Liability Judgment that Mr Kerr, Galt and Pyne Holdings had an arguable defence that they did not acknowledge liability under the Guarantees when the signed settlement deed was sent to BNZ.[105] Accordingly, the Judge's finding that Mr Kerr, Galt and Pyne Holdings had acknowledged their liability was not based on the settlement deed.

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104 *Bank of New Zealand v Lothian Partners Capital Ltd* [2021] NZHC 2472 at [61].
105 Liability Judgment, above n 2, at [281].

BNZ has not appealed the Judge's finding that the settlement deed did not constitute an acknowledgment. Accordingly, nothing turns on this issue.

[157] It is also not necessary for us to address the appellants' assertions that the Judge erred in finding that the indemnity claims against them were not time-barred. The indemnity claims were advanced in the alternative. These claims would only arise if the appellants' limitation ground of appeal in relation to the acknowledgments was successful.[106] We have found, however, that there is no merit to the limitation ground of appeal.

[158] Finally, it is also not necessary for us to address BNZ's argument that the appellants contracted out of the Limitation Act. Again, this was advanced as an alternative argument, in the event that the appellants succeeded on their limitation ground of appeal. As they have not, it is not necessary for us to address this alternative basis for supporting the Liability Judgment.

Costs on appeal

[159] BNZ seeks indemnity costs for the appeal in accordance rule 53E(3)(e) of the Court of Appeal (Civil) Rules 2005 and its entitlement to recover indemnity costs under the relevant contracts.

[160] The appellants, on the other hand, submitted that if their appeals were unsuccessful, costs should not be awarded on an indemnity basis because the issues raised by the appeal were significant and warranted judicial clarification.

[161] BNZ has been entirely successful in this appeal. There is no basis for declining to award indemnity costs to BNZ, in accordance with its entitlement under the relevant contracts.

Result

[162] The application for leave to adduce further evidence dated 11 September 2023 is granted.

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[106] At [285].

[163] The application for leave to adduce further evidence dated 23 November 2023 is declined.

[164] The appeals are dismissed.

[165] The appellants must together pay the respondent costs on an indemnity basis, together with usual disbursements, with the reasonable quantum of such costs to be fixed by the Registrar in the event that the parties do not agree.

Solicitors:
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