IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2021-409-7
[2023] NZHC 1849

UNDER	the High Court Rules 2016
IN THE MATTER	of a debt collection
BETWEEN	HEARTLAND BANK LIMITED Plaintiff
AND	KIWI FLAVOUR INFUSIONS LIMITED First Defendant
	WILFRED HOLDINGS LIMITED Second Defendant
	CAROLYN RUTH DARE WILFRED Third Defendant
	HARMON LYNN WILFRED Fourth Defendant

Hearing:	26 May 2023
Appearances:	C T Jolliffe and S M Judson for Plaintiff D R Weatherley for Third Defendant
Judgment:	17 July 2023

JUDGMENT OF ASSOCIATE JUDGE SKELTON

Introduction

[1] On 22 July 2021, the plaintiff, Heartland Bank Limited (Heartland) obtained an order for summary judgment against the third defendant, Mrs Carolyn Dare Wilfred in the total sum of $1,164,125.56. Mrs Wilfred's liability to Heartland arose:

(a) as a guarantor of debts owed by Kiwi Flavour Infusions Ltd (KFIL) to Heartland, pursuant to a Guarantee and Indemnity dated 20 July 2018, in respect of:

(i) a Term Loan Facility Agreement dated 20 July 2018 (first loan);

(ii) a Business Overdraft Facility Agreement dated 20 July 2018 (Business Overdraft);

(iii) a Term Loan Facility Agreement dated 14 May 2019 (second loan); and

(b) as a borrower under an Overdraft Facility Agreement dated 19 December 2012, as varied on 14 May 2019 (Personal Overdraft).

[2] Mrs Wilfred now applies to set aside the summary judgment order under r 12.14 of the High Court Rules 2016 on the basis that there has been or may have been a miscarriage of justice. In essence, she argues that she and her husband were pressured to enter into the second loan by Heartland.

Legal principles: setting aside summary judgment

[3] Rule 12.14 of the High Court Rules provides:

> **12.14 Setting aside judgment**
>
> A judgment given against a party who does not appear at the hearing of an application for judgment under rule 12.2 or 12.3 may be set aside or varied by the court on any terms it thinks just if it appears to the court that there has been or may have been a miscarriage of justice.

[4] In *Sinclair v Thomson*, Paterson J held that the following three factors will tend to be important when considering an application to set aside a judgment:[1]

(a) whether the defendant has a substantial ground of defence;

---

1 *Sinclair v Thomson* (2001) 15 PRNZ 187 at [18].

(b) whether the delay was reasonably explained; and

(c) whether the plaintiff would suffer irreparable injury if the judgment were set aside.

[5] However, as the Court of Appeal observed in *Russell v Cox*, these matters are not necessary pre-requisites to the exercise of the Court's discretion.[2] Rather, they are merely factors which on any application to set aside a judgment may generally be regarded as relevant to determining where the justice of the case lies.

[6] In *Equiticorp Finance Group Ltd v Cheah,* the Court of Appeal held that where a defendant seeks to set aside a summary judgment regularly obtained on the basis that they have an actual or arguable defence, it will normally be necessary for the defendant to adduce material which leads the Court to conclude that the plaintiff has not satisfied the Court that there is no defence to the claim.[3]

Background

[7] Mrs Wilfred is a director and shareholder of the second defendant, Wilfred Holdings Limited (WHL), and a director of Kiwi Flavour Infusions Limited (KFIL).

[8] WHL owned just under half of The Prenzel Distilling Company Limited (Prenzel). The other major shareholder, The Prenzel Distilling Company (1994) Limited, was owned by Christine and Hugh Steadman (the Steadmans), friends of Mrs Wilfred and her husband, Mr Harmon Wilfred, the fourth defendant.

[9] Heartland was a secured creditor of Prenzel and Mr Steadman was a guarantor of Prenzel's indebtedness to Heartland.

[10] On 21 May 2018, Prenzel was put into liquidation by shareholder resolution.

---

2 *Russell v Cox* [1983] NZLR 654 (CA) at 659.
3 *Equiticorp Finance Group Ltd v Cheah* [1989] 3 NZLR 1 (CA) at 8.

[11] Shortly thereafter, WHL incorporated KFIL and, in July 2018, KFIL purchased the Prenzel business from the liquidators of Prenzel. KFIL funded the purchase by borrowing $400,000 from Heartland under the first loan.

[12] Subsequently, in February 2019, KFIL and the Wilfreds required additional credit. Heartland was prepared to grant overdraft facilities on the basis that the defendants would also assume liability for a residual debt of $206,000 owed by Prenzel to Heartland.

[13] Ultimately, the following additional borrowing was agreed:

(a) KFIL was granted:

(i) an extension of the Business Overdraft to $215,000 until 31 July 2019;

(ii) a new $206,368.05 loan facility to fully repay the Prenzel loan (second loan); and

(b) Mrs Wilfred and Mr Wilfred were granted:

(i) an extension of the Personal Overdraft by $50,000 until 31 July 2019.

[14] Mrs Wilfred expected to repay all loans from the proceeds of sale of shares she held in Serad Holdings Ltd, her family's food company, based in Canada. However, there have been delays in the sale of those shares.

[15] There was ongoing correspondence and communication between Heartland and the Wilfreds and their barrister during 2019 and into 2020, and initially there was agreement to extend the date for repayment of facilities.

[16] However, on 5 May 2020, Heartland advised that there would be no further extension of facilities beyond 31 May 2020 unless evidence was provided that the share sale transaction was close to being finalised.

[17] Ultimately, Heartland made demands for payment of the facilities in July and October 2020.

[18] Heartland obtained summary judgment against WHL, KFIL and Mr Wilfred on 13 May 2021. No opposition was filed and there was no appearance by any of the defendants.

[19] Heartland obtained summary judgment against Mrs Wilfred on 22 July 2021. No opposition was filed and there was no appearance on behalf of Mrs Wilfred.[4]

[20] Subsequently, on 10 June 2022, Heartland issued a bankruptcy notice against Mrs Wilfred.

Mrs Wilfred's argument for a substantial ground of defence

[21] The essence of Mrs Wilfred's argument is captured succinctly in her application to set aside the summary judgment dated 20 December 2022:

> The third defendant has a substantial ground of defence, namely that the plaintiff pressured the defendants to agree to take on additional lending…

[22] The focus of Mr Weatherley's submissions, on behalf of Mrs Wilfred, was on the provisions of the Credit Contracts and Consumer Finance Act 2003 (CCCFA).

[23] As I understand it, the argument is that Mrs Wilfred has an arguable defence based on "oppression" under pt 5 of the Act such that the Court may reopen the second loan arrangement under s 120 of the CCCFA. That section empowers the Court to reopen any credit contract if it considers that the contract is oppressive, a party has exercised a right or power conferred by the contract in an oppressive manner, or a party has induced another party to enter the contract by oppressive means.

[24] Mr Weartherley submits that it is not clear what would have happened in relation to the original lending had it not been for the imposition of the second loan.

---

[4] Mrs Wilfred's evidence is that she instructed her counsel at the time to oppose summary judgment and appear at the hearing, but that he was unable to do so due to serious weather events.

He notes that "there is no suggestion that the payments under the first term loan were not being made".

[25] Mr Weatherley submits that if there is an arguable defence in respect of the second loan, then that calls into question the default under the first loan. He submits that it is not possible, in the summary judgment context, to simply "hive off" the aspect of Heartland's claim relating to the second loan and vary the summary judgment obtained against Mrs Wilfred accordingly. Therefore, it would be appropriate to set aside the summary judgment order as a whole to enable consideration of all the circumstances and factors.

Oppression under the CCCFA

[26] Section 118 of the CCCFA defines "oppression" as follows:

> **118 Meaning of oppressive**
>
> In this Act, **oppressive** means oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice.

[27] In *GE Custodians v Bartle*, the Supreme Court confirmed that the scope of oppression under the Act is broader than the equitable doctrine of unconscionability (as no special disability needs to be proven), and that:[5]

> … the various words which together form the definition of the term "oppressive" all contain different shades of meaning but they all contain the underlying idea that the transaction or some term of it is in contravention of reasonable standards of commercial practice.

[28] In *Greenbank New Zealand Ltd v Haas*,[6] the Court of Appeal confirmed that evidence will almost always be needed to establish what reasonable standards of commercial practice are.[7]

[29] Section 124 of the CCCFA sets out a list of factors that the court must, to the extent applicable in the particular circumstances, have regard to in deciding whether

---

5 *GE Custodians v Bartle* [2010] NZSC 146; [2011] 2 NZLR 31 at [46], upholding what had been said by the Court of Appeal in *Greenbank New Zealand Ltd v Haas* [2000] 3 NZLR 341 (CA) at [24].

6 *Greenbank New Zealand Ltd v Haas*, above n 7.

7 At [24]–[25].

to exercise the power to reopen a credit contract. While I have considered all the factors, the submissions and evidence indicate that the following are likely to be particularly relevant in this case:

(a) all the circumstances relating to the making of the arrangement;[8]

(b) whether the creditor has complied with the lender responsibility principles in s 9C;[9]

(c) the relative bargaining power of the parties;[10]

(d) whether, before entering into the arrangement, the debtor obtained independent legal or other professional advice;[11]

(e) whether the creditor subjected the debtor to unfair pressure or tactics or otherwise unfairly influenced the debtor to enter into the arrangement and, if so, the nature and extent of that unfair conduct;[12] and

(f) whether the terms of the arrangement—

(i) allow the debtor to be reasonably able to comply with their obligations under the arrangement; and

(ii) are reasonably necessary to protect the interests of the creditor.[13]

Evidence

[30] The Wilfreds state in their affidavits in support of the setting aside application that, regarding the first loan, they understood from discussions with Mr Sean McMillan, Heartland's Property Finance and Operations Manager, that if $400,000 was paid to purchase the Prenzel business then the liquidators could repay

---

8 Credit Contracts and Consumer Finance Act 2003, s 124(1)(a).
9 Section 124(1)(b).
10 Section 124(1)(c).
11 Section 124(1)(f).
12 Section 124(1)(g).
13 Section 124(1)(l).

all the debts owed by Prenzel to Heartland, and Heartland would not have any further claims against Mr Steadman as a guarantor.

[31] The Wilfreds say that, when Mr Wilfred approached Heartland about extending overdraft facilities in February 2019, Mr McMillan advised that the loan account with Heartland was not closed and had a remaining balance of $206,000.

[32] Mrs Wilfred's case is that she and her husband were then put under pressure by Heartland to have KFIL take on the second loan to obtain the extensions on the overdrafts. The Wilfreds say that they had no option but to proceed with this arrangement. Mr Wilfred states in his affidavit that when he advised Mr McMillan that they were going to look elsewhere for credit, Mr McMillan:

> … promised that if we did not take his "offer" Heartland would put Hugh and Chris [Steadman] in bankruptcy. This after requiring the sale of their farm and business leaving them destitute while Hugh battled terminal cancer. Under this extreme duress, Carolyn and I decided to take the deal to keep Hugh and Chris out of bankruptcy and further distress.

[33] The Wilfreds also contend that the sale of Mrs Wilfred's shares formed the basis of the lending relationship with Heartland and that Heartland committed to support them until the shares were sold.

[34] Mr McMillan (on behalf of Heartland) refutes these claims in his affidavit. In summary he states that:

(a) the Wilfreds negotiated with the liquidators of Prenzel to purchase the business of Prenzel for $400,000;

(b) the Wilfreds already had a significant interest in Prenzel through WHL and they were interested in protecting their investment;

(c) Mr McMillan did not suggest that this amount would clear all debts owing by Prenzel to Heartland or that the Wilfred's purchase the business for this price, and there was always going to be a significant shortfall owing to Heartland;

(d) the lending was not conditional on repayment from the sale of the shares, and this was not the only source of repayment as Mrs Wilfred was receiving sizeable dividends from Serad;

(e) there was no pressure exerted by him on the Wilfreds and the discussions around the overdraft extension in April 2019 were undertaken by negotiation;

(f) at no point did Heartland commence any kind of recovery action against Mr Steadman (as guarantor) to recover the shortfall, including selling any property mortgaged to Heartland; and

(g) the Wilfreds obtained professional advice before entering into the second loan.

[35] Mr John Yelverton, an Asset Manager for Heartland, has also provided an affidavit. His evidence is that:

> The Bank was prepared to grant further overdraft facilities to the Defendants on the basis that they would also assume liability for the residual debt of approximately $206,000 owing to the Bank by Prenzel Distilling. The Second Defendant was the majority shareholder of Prenzel Distilling.
>
> …
>
> The Bank's position has always reflected that support would not be indefinite and any extensions relied upon the Defendants' representations as to progress with the sale of the Serad Shares. In the Personal Overdraft Variation Disclosure dated 14 May 2019 … the Bank included a condition that an undertaking was required from Ms Dare Wilfred that the additional advance under the facility was to be repaid from her 2019 quarter 3 dividend in the event that the Serad Share sale wasn't completed prior to dividend release. This was intended to reflect the Bank's reliance on the sale of the Serad Shares in providing extensions and additional funds but also that repayment (in this case from dividends) was required in any event. It is my understanding that the Defendants continue to receive and are living off Serad dividends with no payment being made to the Bank.

[36] Mr Weatherley submits that the evidential disputes cannot be resolved in the summary judgment context. However, the Court is not bound to accept uncritically

all statements in affidavits. For example, it is relevant to consider whether statements made in affidavits are consistent with undisputed contemporary documents.[14]

Analysis

[37] Mr Weatherley raised four main arguments in his submissions that the second loan (or Heartland's conduct in relation to it) was oppressive:

(a) first, the contemporary documents support the Wilfreds' claims that Heartland pressured them into agreeing to the loan by threats of enforcing their rights against the Steadmans;

(b) second, the second loan amounted to the Wilfreds taking on a significant unrelated debt which provided no benefit to them;

(c) third, Heartland breached the lender responsibility principles in the CCCFA; and

(d) finally, Heartland knew or ought to have known that default would be inevitable if Mrs Wilfred was unable to complete the sale of her shares.

I will consider each of these submissions in turn.

Contemporary documents

[38] Mr Weatherley submits that it is not unreasonable to assume that Heartland would pursue remedies against the Steadmans and that this would be communicated to the Wilfreds in the course of the negotiation around the second loan. He also says the contemporary documents tend to support the Wilfreds' account.

[39] The first document relied on by Mr Weatherley is an email from Mr Wilfred to Mr McMillan dated 30 April 2019, during the course of negotiations for the second loan. In the email, Mr Wilfred states:

---

[14] See *McGechan on Procedure* (online ed, Thomson Reuters) at [HR12.2.08], citing *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 (HC) at 14.

Your Proposal:

9. In order to avoid having to write off the balance of the Steadman loan of $200,000 you have proposed that if we would assume the responsibility of that loan under agreed terms, you would grant us the additional $25,000 overdraft, provided all of the outstanding loans would be paid in full from Carolyns share sale

Our Counter-preproposal:

10. You will understand if we consider that your proposal is a bit out of balance. However, in order to assist Hugh and Chris in any further involvement or responsibilities in Heartlands $200,000 shortfall, and provide some balance to your proposal we would agree to the following:

    a. We will assume responsibility for the repayment of the $200,000 on the same terms provided to KFIL on the initial $400,000 fixed term loan.

    b. Heartland will provide an additional overdraft of $125,000 on the same terms as our existing personal $25,000 overdraft providing a total of $150,000. This additional amount would essentially prefund Carolyns annual 2019 dividend.

    c. In the unlikely event that the share sale closing date extends beyond third quarter, 2019, then the $125,000 additional overdraft will be repaid from said dividend as outlined in David Ballantynes update letter.

    d. The higher likelihood based upon our latest video conference update this morning is that Carolyns share sale will be completed sometime between May and June, 2019, causing all Heartland loans to be repaid.

[40] While Mr Wilfred refers to Heartland's proposal as being "a bit out of balance", this seems to be a reference to Heartland requiring the Wilfreds (through KFIL) to assume an additional liability of $206,000 in order to be granted an additional $25,000 overdraft. Mr Wilfred sought to "provide some balance" by counter-proposing that the overdraft be increased by $125,000, rather than the $25,000 initially requested.

[41] The email also states that the counter-proposal is "… to assist Hugh and Chris [Steadman] in any further involvement or responsibilities in Heartlands $200,000 shortfall".

[42] In my view, the email does not indicate that the Wilfreds were being pressured into the transaction by a promise or threat that Heartland would otherwise proceed to bankrupt Mr Steadman, as guarantor. The email refers to Heartland's proposal being "to avoid having to write off the balance of the Steadman loan" and Mr Wilfred refers to assisting the Steadmans with *any* further involvement or responsibilities in relation to the outstanding loan. These passages indicate that no specific recovery action against Mr Steadman had been discussed or threatened. Mr McMillan's evidence is that Heartland had not commenced any kind of recovery action against Mr Steadman at that time (or at any time) and, in particular, had not undertaken any mortgagee action in respect of the Steadmans' properties (as alleged by the Wilfreds). He states that there was no pressure exerted by him on the Wilfreds with regard to the further lending.

[43] My assessment is that Mr Wilfred's counter-proposal email forms part of a negotiation between Heartland and the Wilfreds with regard to the additional overdraft facilities. It is not apparent from the 30 April 2019 email that the Wilfreds considered that Heartland's proposal was "commercial extortion", or that the Wilfreds were under "extreme duress" and had no practical alternative but to agree to Heartland's proposal as they now contend. My assessment is that the Wilfreds chose to enter into the second loan arrangement in order to secure the additional overdraft facilities and to further assist their friends with regard to any further involvement and responsibilities to Heartland. The Wilfreds had a practical alternative in that they could have sought overdraft facilities from another provider.

[44] The other "contemporary" document relied on by Mr Weatherall is an email from Mr Wilfred to the Wilfreds' lawyer (at that time), Mr David Ballantyne. The email contains a draft email to Mr Yelverton for review by Mr Ballantyne. The date of the email is not clear, but Mr Weatherley submits that it is part of an exchange of emails in December 2019. The draft email to Mr Yelverton includes the following paragraph:

> Lastly, the credit committee is aware that in order to obtain the final critical $85k in overdraft increases personally and for KFIL, Sean McMillan forced us under considerable duress to take over Prenzel Distillery's left-over debt of $206k that was not under the original contractual obligation so that Heartland could eliminate this final amount due on the old Prenzel obligations. Although this was incredibly harsh, we were given no choice and did this under considerable duress with the understanding that Heartland would stay with us

> until Carolyn's share sale was completed, and would prevent Heartland from forcing our elderly best friends, Chris and Hugh Steadman (formerly guarantors of Prenzel) into bankruptcy at a time when they had lost their home and Hugh was gravely ill with what was believed to be terminal cancer. We sincerely hope that Heartland will honour this final unorthodox quid pro quo as full and final.

[45] This draft email is not contemporaneous with the second loan arrangement, and I do not consider that it is reliable evidence of oppression in relation to the arrangement. The draft email appears to have been composed nearly seven months after the second loan arrangement and at a time when extensions of the credit facilities and overdrafts were expiring, and Mr Wilfred was negotiating with Heartland for further extensions. There is no evidence that the draft email was ever sent to Mr Yelverton or Heartland. The paragraph referred to above can be contrasted with the following passage from an email from Mr Ballantyne to Mr Yelverton on 9 June 2020:

> As discussed yesterday, Mrs Dare Wilfred and Mr Wilfred remain committed to honouring KFIL's and their personal obligations with Heartland Bank. They have never resiled from these obligations, nor from their commitment to utilise the sale process of Mrs Dare Wilfred's share sale for this purpose.

[46] There is no reference in direct correspondence with Heartland during the period up to December 2022 of any duress in relation to the second loan arrangement because of Heartland promising to bankrupt Mr Steadman.

Unrelated residual debt

[47] Mr Weatherley submits that Heartland required the Wilfreds to assume liability for the residual debt owed by Prenzel ($206,000) which was otherwise unrelated to them.

[48] However, while there were no guarantees from the Wilfreds or any entity associated with them in respect of the residual debt, it was not entirely unrelated to them. WHL (owned by Mrs Wilfred) owned just under half of Prenzel, and owned all the shares in KFIL which took on the second loan.

Lender responsibility principles

[49] Mr Weatherley also relies on the lender responsibility principles in s 9C of the CCCFA. In particular, he relies on s 9C(3)(a)(i) and (ii). These provisions provide that the lender is to make reasonable inquiries before entering into an agreement to provide credit so as to be satisfied that it is likely that the credit or finance provided will meet the borrower's requirements and objectives, and that the borrower will make the payments under the agreement without suffering substantial hardship. Mr Weatherley submits that these provisions are relevant to the second loan arrangement because the arrangement involved increasing the Personal Overdraft which is a consumer credit contract.

[50] Mr Weatherley submits that there is no evidence to suggest that Heartland made such reasonable inquiries, and that it must have been obvious to Heartland that Mrs Wilfred would not have been able to pay back the additional lending without the share sale proceeding. He submits that it is at least arguable that Heartland induced Mrs Wilfred to enter into the agreement by oppressive means or alternatively exercised its right and power to extend the credit limit in an oppressive manner.[15]

[51] Even if the lender responsibility principles are applicable to the second loan arrangement, I do not accept this submission. It is apparent from Mr Wilfred's email to Mr McMillan dated 30 April 2019 (discussed above at [39]) that there was discussion and information exchanged between the parties as to the Wilfreds' requirements and objectives in seeking the additional overdraft facilities. Mr Wilfred states in that email:

> Our personal request on 10 April was for an additional $25,000 added to our current overdraft of $25,000 for a total of $50,000. In return for that amount we committed to make Carolyns next dividend available that is due third quarter this year and has been approximately CDN $105,000 in the last 3 years. Thats approximately NZD120,000 rounded up. That was sufficient to cover our separate living costs and expenses both in New Zealand and overseas for Carolyn as illustrated in our 2018 budget provided to the CRA and copied in our proposal to you.

---

15 Sections 9C(3)(e) and 9C(4)(d) of the CCCFA.

[52] It is also apparent from the 30 April 2019 email that payment of the additional lending was not dependent on the share sale proceeding. It states that in the "unlikely event that the share sale closing date extends beyond the third quarter, 2019", the additional overdraft would be repaid from "Carolyns annual 2019 dividend".

[53] This position is confirmed by the facility agreement for the second loan and the Variation Disclosure for the increase to the Personal Overdraft, which both include a condition precedent that Heartland was to be provided with an undertaking from Mrs Wilfred that the additional funds advanced were to be "repaid from her circa $341,000 dividend due Quarter 3 2019 in the event the Serad Holdings Limited share sale hasn't completed prior to the dividends release".

[54] While there is no evidence that such an undertaking was provided, there is evidence of further assurances being given to Heartland that a significant dividend would be paid in September 2019. In an email from Mr Wilfred to Mr McMillan dated 28 August 2019, Mr Wilfred states:

> Meanwhile … has received a copy of this year's dividend instruction letter from CRA to Serad (see attached) providing for Carolyn to receive the full dividend this year less 25% withholding. This is a big deal! Based upon Carolyn's previous year's gross dividend of CDN$340,000 … the net amount this year being allowed by CRA to Carolyn after withholding is CDN$255,000.
>
> Serad has agreed to release the dividend in mid to late September 2019. Although we certainly expect to complete the share sale by the end of September at the latest, making the September dividend essentially a moot point, it is still there as a fall back in case the closing date slips a bit further … .

[55] The evidence is that the share sale was not the only source of repayment for the second loan arrangement.

Default was inevitable

[56] Mr Weatherley submits that similar facts to the present case arose in *Wake Up Commercial Ltd v Extension Capital Ltd.*[16] That case involved an application for an interim injunction. The Court found that there was a serious question to be tried as to

---

16 *Wake Up Commercial Ltd v Extension Capital Ltd* [2022] NZHC 1824.

whether or not a loan was an oppressive credit contract. The Court found that given the terms of the loan, and the financial position of the applicant when the loan was issued, the applicant could never have met its liability and default was inevitable.[17]

[57] However, on the basis of the evidence referred to above (at [52]-[54]), I am not satisfied that at the time of the second loan in May 2019, it was apparent that Mrs Wilfred could never have met the additional liability and default was inevitable. To the contrary, it was understood between the parties that the substantial dividend payment expected in the third quarter of 2019 would be used to pay the additional borrowing if the share sale was further delayed. The Wilfreds continued to provide assurances to Heartland with regard to the receipt of the dividend and that it would be used to repay the additional borrowing.

Legal or other professional advice

[58] Another factor to be taken into account in considering whether there is an arguable defence of oppression, is whether Mrs Wilfred obtained independent legal or other professional advice before entering into the second loan arrangement.[18] Both Mrs Wilfred and Mr Wilfred acknowledge in their affidavits that, before entering into the second loan arrangement, they obtained advice from their lawyer (Mr Ballantyne), Mr Brenton Hunt (an accountant and financial advisor) and Mr Wayne Bailey (a financial advisor). They say that the advice they received was to obtain additional credit from another provider.

[59] The Wilfreds say that they did not do so because of the "extreme pressure" they were put under by Heartland to enter into the arrangement to avoid bankruptcy proceedings against Mr Steadman. However, as I have found above, I am not satisfied that the Wilfreds were put under extreme pressure, nor that they considered they had no alternative but to agree to enter into the second loan arrangement.

---

17 At [14]–[16].

18 Credit Contracts and Consumer Finance Act 2003, s 124(1)(f).

Summary

[60] For the reasons set out above, and having regard to relevant factors in s 124 (at [29]), I am not satisfied that Mrs Wilfred has established that she has a substantial ground of defence based on oppression under pt 5 of the CCCFA.

Economic duress

[61] The issue of economic duress was raised at the hearing in Ms Jolliffe's submissions on behalf of Heartland because Mrs Wilfred's application states that Heartland "pressured" the Wilfreds and because of the references to "extreme duress" and "extreme pressure" in the affidavits provided by Mr and Mrs Wilfred.

[62] Mr Weatherley did not address economic duress in his written or oral submissions. He confirmed during the hearing that Mrs Wilfred's case to set aside summary judgment is based on oppression under the CCCFA, and she is not relying on economic duress. However, for completeness, I will briefly consider the issue of economic duress.

[63] Contractual duress is the imposition of improper pressure by threats (whether of physical injury or economic pressure) that coerce a party to enter a contract. Contracts that have been procured by duress are voidable at the discretion of the coerced party, unless that party has subsequently affirmed the contract.[19] Ms Jolliffe refers to the two-stage test for economic duress in *McIntyre v Nemesis DBK Ltd*:[20]

(a) first, there must be the exertion of illegitimate pressure; and

(b) secondly, if illegitimate pressure is established, it must have compelled the "victim" to enter the contract.

[64] Regarding the first stage, examples of illegitimate pressure are a threat to breach a contract, or a threat to disclose information that would discredit the other party.[21] However, the exertion of pressure, on its own, does not amount to duress. The

---

19 *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463 (CA) at [19].
20 At [20]–[21].
21 At [30]–[31].

Court in *McIntyre* recognised that "pressure (and even threats) is commonly exerted in commercial dealings".[22]

[65] Regarding the second stage, the Court in *McIntyre*[23] adopted the approach of Lord Scarman in *Universe Tankships Inc of Monrovia v International Transport Workers Federation*:[24]

> Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical [alternative]…

[66] Ms Jolliffe submits that there was no illegitimate pressure in this case and that the Wilfreds had a practical alternative to entering into the second loan arrangement. Ms Joliffe emphasised that:

(a) Mrs Wilfred is a businesswoman;

(b) she had professional advice;

(c) the discussions around the second loan were a negotiation;

(d) at the time of the second loan, Heartland had not taken any recovery action against the Steadmans and, in particular, had not sought to sell any mortgaged property (contrary to the allegations made by the Wilfreds);

(e) Mrs Wilfred had a practical alternative in that she could seek lending from another provider;

(f) the terms of the facilities are well documented and known to the parties; and

---

22 At [26].
23 At [66].
24 *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366, at pg 400; see also *Pharmacy Care Systems Ltd v Attorney-General* (2004) 17 PRNZ 308 (SCNZ), at [96].

(g) up until December 2022, Mrs Wilfred did not dispute her liability to Heartland, including in respect of the second loan.

[67] Overall, for the reasons set out above in relation to oppression, and for the reasons outlined by Ms Jolliffe, I am not satisfied that Mrs Wilfred has a substantial ground of defence based on economic duress.

Delay

[68] It is not disputed that Mrs Wilfred did not appear, and was not represented, at the hearing when summary judgment was entered against her by default. The evidence is that, on 19 July 2021, her counsel, Mr Ballantyne, was instructed to appear at the hearing on 22 July 2021. However, Mr Ballantyne did not appear for reasons related to the flooding in Nelson at that time.

[69] While that explains Mrs Wilfred's lack of representation at the summary judgment hearing, it does not explain the subsequent and significant delay in applying to set aside summary judgment. The application was filed on or around 20 December 2022, some 17 months after the summary judgment order was made.

[70] Mr Weatherley submits that:

(a) between July 2021 and December 2022, Mrs Wilfred's efforts were more closely focussed on completing the share sale which she considers to be a necessary precondition for any repayment of Heartland;

(b) although summary judgment was entered on 22 July 2021, Heartland did not issue the bankruptcy notice until 10 June 2022;

(c) the issue of bankruptcy proceedings triggers a number of risks for Mrs Wilfred:

(i) interference with Mrs Wilfred's ability to sell her shares (as advised by Mrs Wilfred's Canadian lawyers);

(ii) significantly affect her ability to return to New Zealand to be reunited with her husband;

(d) it is these risks which has triggered Mrs Wilfred's desire to set aside the underlying summary judgment.

[71] However, it is apparent from the email correspondence appended to Mr Weatherley's submissions that Heartland's solicitors raised the issue of bankruptcy proceedings with Mrs Wilfred's Canadian lawyers in November 2021. Mrs Wilfred's Canadian lawyers provided an undertaking regarding the sale proceeds of the shares the following month. Then, on 28 March 2022, Heartland's solicitors advised the Canadian lawyers that they had instructions to issue a bankruptcy notice and asked the Canadian lawyers to confirm whether they were authorised to accept service.

[72] The Wilfreds contend they are the victims of commercial extortion and only entered into the second loan arrangement under extreme duress. Given those contentions, it is reasonable to expect that the preparation of a defence to Heartland's summary judgment proceedings and the instruction of counsel would not be left until just before the hearing. After summary judgment was entered by default without Mrs Wilfred having been represented at the hearing, it is reasonable to expect that an application to set aside the summary judgment order would be promptly made. However, even after Heartland's solicitors advised that they had instructions to issue a bankruptcy notice in late March 2022, there was a further delay of nine months before the application to set aside was filed.

[73] Overall, I do not consider that the delay in making the application to set aside the summary judgment order has been reasonably explained.

Irreparable injury

[74] Finally, Heartland contends that if an order was made setting aside the summary judgment order against Mrs Wilfred in its entirety, then it would suffer irreparable injury in that it would be required to take steps to apply for judgment on the loans again.

[75] Mr Weatherley submits that there would be no irreparable injury to the plaintiff because, although there may be delay, this could be dealt by an award of costs and interest if the plaintiff was ultimately successful in obtaining summary judgment on the loans a second time.

[76] I accept that Heartland would be unlikely to recover all of the costs it has incurred if the summary judgment order is set aside in its entirety, and Heartland is required to start the process of obtaining judgment again. However, I do not consider this to be a determinative factor.

Conclusion

[77] Ultimately, under r 12.14, the issue is whether it appears to the Court that there has been or may have been a miscarriage of justice.

[78] Having considered all the factors set out above, and for the reasons set out above, I am not satisfied that there has been or may have been a miscarriage of justice in this case.

Result

[79] Mrs Wilfred's application to set aside the summary judgment order obtained against her by default on 22 July 2021 is dismissed.

[80] Heartland has been successful in defending Mrs Wilfred's application and my preliminary view is that Heartland is entitled to costs on a 2B basis. I encourage the parties to endeavour to agree costs. However, if that is not possible, then memoranda may be filed (not exceeding five pages) and I will determine costs on the papers.

Associate Judge Skelton

Solicitors:
Anthony Harper, Christchurch for Plaintiff
Young Hunter, Christchurch for First to Third Defendants