IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-3999

BETWEEN	BRANKA KRTOLICA Plaintiff
AND	WESTPAC BANKING CORPORATION Defendant

Hearing: 24 September - 3 October and 28 November 2007

Appearances: M Black and D Wood for the plaintiff
S Gollin and M Pascariu for the defendant

Judgment: 9 January 2008

JUDGMENT OF STEVENS J

This judgment was delivered by me on Wednesday, 9 January 2008 at 3pm pursuant to r 540(4) of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:
M Black, PO Box 1984, Shortland Street, Auckland
D Wood, PO Box 1452, Shortland Street, Auckland
S Gollin, Minter Ellison Rudd Watts, PO Box 2793, Wellington

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Introduction

[1] This is a case about a guarantee given by the plaintiff, Mrs Branka Krtolica, to the defendant, Westpac Banking Corporation. Mrs Krtolica has sought in various ways to avoid liability under that guarantee. The guarantee was in respect of money and obligations owed by Westpac's customer, the Seamart group of companies (Seamart). The guarantee was largely in standard form. It was for $1.95 million but was to reduce to $1.815 million and was to be released after five years provided certain conditions were met. Mrs Krtolica entered into the guarantee with the benefit of legal and accounting advice. She had experience of the business of Seamart both as an employee and through having previously been a director, as well as through her (recently ended) marriage to Mr Vojislav Krtolica, who was the sole continuing director.

[2] Mrs Krtolica's claims against Westpac largely concern the bank's alleged conduct in the period September 2003 to March 2006. In summary, the claims arise from what is described as an informal insolvency or receivership which was effectively controlled by Westpac. This was alleged to involve "excessive lending" and Westpac's participation in, and management of, a creditor preference regime in conjunction with Seamart. Westpac has filed a counterclaim in respect of the shortfall which followed a demand under the guarantee and the exercise of powers of sale in respect of the guarantee securities.

[3] At the time Westpac entered into the guarantee with Mrs Krtolica, Seamart was a new customer. Westpac received the same financial information about Seamart as was supplied to Mrs Krtolica through her accountant. The purpose of a term loan of $3.3 million made to Seamart at the same time was to enable the purchase of a factory property at Penrose and its development into a fish processing facility. This was known to Mrs Krtolica. The fish processing operation was to be on a much larger scale than previously undertaken and was intended to facilitate the supply by Seamart of the supermarkets belonging to Progressive Enterprises Ltd (Progressive). It was a business development venture that Mrs Krtolica supported.

[4] Westpac agreed to lend Seamart an additional $888,000 in September 2002 and documentation varying the lending arrangements was signed by Seamart, Westpac and Mrs Krtolica in January 2003. Mrs Krtolica also consented to an increase in the Seamart overdraft to $2 million in June 2003. However, by August 2003, Seamart was in financial trouble. Mrs Krtolica was made aware of the position (if she did not already have such knowledge) after the Seamart accounts had been transferred to the Asset Management Group (AMG) within Westpac. Seamart was required to obtain an independent appraisal of its financial position in September 2003 from PricewaterhouseCoopers (PwC). Such appraisal concluded that the equity and liquidity had eroded to the point where Seamart was insolvent.

[5] While the Seamart accounts were being monitored by the AMG, Westpac provided further funding to Seamart. Rather than placing Seamart into receivership, Westpac continued its financial support between September 2003 and March 2006. In this period, the Penrose fish processing factory developments were completed and in late 2004 a lease agreement of the Penrose site and a new supply agreement were entered into with Progressive. The Penrose factory was sold in June 2005 achieving an actual realisation of $6.27 million.

[6] By March 2006, it was clear that Seamart could not survive. Westpac appointed receivers as a result of the default by Seamart under its security agreements. Thereafter, Westpac made demand on Mrs Krtolica under the guarantee for $1.815 million plus accrued interest. Following the exercise of powers of sale in relation to securities over fishing quota and a residential property, a sum of $246,495.61 remained owing as at 24 September 2007. This is the subject of the counterclaim.

[7] For reasons that will be set out in detail in the judgment, none of Mrs Krtolica's claims have been made out. There will be judgment for the defendant in respect of all causes of action, as well as judgment on the counterclaim for the amount claimed, plus interest and costs.

Causes of action

[8] The amended statement of claim dated 6 August 2007 disclosed six causes of action. The first encompassed a construction point as to the scope of the guarantee itself. It alleged breach of the guarantee terms, as well as non-disclosure, oppression and connivance by Westpac. The second cause of action was based on the breach of fiduciary duty owed to Mrs Krtolica by Westpac. The third alleged the breach of a duty of care in tort by Westpac on a number of bases. Duress, unconscionability and/or undue influence by Westpac comprised the fourth cause of action. The fifth cause of action had a dual basis, alleging that Westpac was liable for its actions as a shadow director of Seamart and contending that it was an accessory to insolvent trading. Lastly, Mrs Krtolica alleged a breach of the provisions of the Fair Trading Act 1986 (FTA) by misrepresentation. The pleadings were, in many respects, less than elegant or instructive.

[9] In an endeavour to clarify the issues and limit the scope of the hearing, Mr Black was invited to provide a refined version of the causes of action. As a result, Mr Black filed a memorandum of further particulars on 1 October 2007 that further described the causes of action. These included the construction arguments in respect of the guarantee, the breaches of and excesses to the lending limits by Westpac, the non-disclosure, unconscionability and the FTA causes of action as well as the cause of action based on shadow directorship and reckless trading. The accessory and connivance claims were combined and the extra dimension of alleged dishonesty added. Mr Black stated that the action based on duty of care had been abandoned, except to the extent that there may under the common law of New Zealand be a tort of "deepening insolvency". Finally, any claim based on breach of fiduciary duty was abandoned.

Factual background

[10] Mrs Krtolica had completed a relationship property settlement with her former husband in December 2001. They had jointly owned, amongst other things, a home at 26 Churchill Road, Murrays Bay, fishing quota and Seamart. Under the

settlement agreement, Mrs Krtolica took ownership of the Churchill Road home and an allocation of the fishing quota. Mr Krtolica retained complete ownership of Seamart as his portion of the settlement.

[11] Mrs Krtolica had formerly been closely involved in the operation of the Seamart Group. She and Mr Krtolica set Seamart up in 1991 at premises on Pakenham Street in Auckland, moving shortly afterwards to 1 Fanshawe Street. Each owned half the shares. Seamart comprised a number of separate companies, involved in fish processing, retailing of fish and seafood, wholesaling of fish to restaurants and Progressive, and a bar and bistro. Seamart owned a small quota and leased more, which it in turn leased to others. Its fish and seafood were purchased from the leaseholders and other commercial fishing businesses. Mrs Krtolica's role prior to the relationship property settlement in late 2001 included quota management, wages and accounts payable. She did not work fulltime in the company, as she was raising three children. She was, however, intimately acquainted with the working of the business.

[12] Shortly after the relationship property settlement, Seamart undertook an expansion exercise with a view to obtaining a lucrative lease and supply contract with Progressive. A processing factory at 5 Autumn Place, Penrose (the Penrose factory) was purchased for the purpose. Seamart intended to carry out a major upgrade of the Penrose factory and to install a crumbing line.

[13] In order to fund the expansion, Seamart approached Westpac with which it had not previously had a relationship. Westpac was prepared to lend Seamart (Wholesale) Ltd an overdraft of $100,000 and Seamart Properties Ltd a wholesale term loan of $3.3 million. The loan was offered on the basis that Mrs Krtolica would provide a guarantee. During the negotiations surrounding the guarantee, she was represented by a solicitor, Mr Barrie Hopkins. Mr Hopkins wrote to Westpac on 27 June 2002, suggesting terms for the guarantee. These included the release of the Churchill Road property as security after payment of a set amount under the loan. Westpac responded on 28 June 2002 with a facilities letter sent to Seamart, outlining a compromise on some terms of Mrs Krtolica's guarantee and essentially

representing the final form of the terms of the loan to Seamart. These terms included an:

> An All Obligations Deed of Cross Guarantee and Indemnity to be granted from and between Seamart Wholesale Limited, Seamart Properties Limited and Seamart Restaurant Limited.

[14] Further, Seamart Properties Ltd was to grant a mortgage to Westpac over the Penrose factory. The facilities letter also outlined the scope of Mrs Krtolica's obligations:

> A limited Deed of Guarantee and Indemnity to be granted by Branka Krtolica in favour of WestpacTrust for the obligations of the Borrowers, with the principal amount limited to $1,950,000 plus 24 months interest and costs and charges, supported by the following tangible securities:
>
> - Registered First & Exclusive Mortgage over freehold residential property at 26 Churchill Rd, Murrays Bay. Certificate Title: NA930/260.
>
> - Mortgage over Fishing Quota.

[15] In a letter of 4 July 2002, Mr Hopkins informed Westpac that the terms contained in the facilities letter were acceptable to Mrs Krtolica and that no further amendments would be sought to the arrangements between Mrs Krtolica and Westpac.

[16] As well as receiving legal advice prior to signing the guarantee, Mrs Krtolica was given accounting advice. Her accountant was provided with Seamart's historic financial accounts and projected cashflows to June 2003. This was the same information as provided to Westpac. Given her knowledge of the business, Mrs Krtolica was familiar with such financial information. Moreover, she was aware of the purposes behind the acquisition of the Penrose factory and understood the commercial rationale for the expansion. She was in a position to make an informed decision about entering into the guarantee.

[17] On 24 July 2002, after having received the independent legal and accounting advice, Mrs Krtolica signed the guarantee. The sum of $1.95 million was to be reduced annually by the amount of principal paid and amortised, subject to the proviso that financial covenants had to be met and that Seamart was not to be in

default. Further, the exposure was to be reduced to $1.815 million on finalisation of the lease and supply agreement of the Penrose factory to Progressive. This was characterised as a "sinking lid" on the guarantee. The guarantee was to be released five years from the original draw down of the term loan. It was characterised as an all obligations guarantee, a concept to which I shall return.

[18] Part of the incentive to Mrs Krtolica was a monthly guarantee fee. Furthermore, she saw the expansion of Seamart as being in her children's best interests. She did not challenge the fact that she understood the nature and effect of the guarantee. The cross-guarantee was signed on 23 July 2002 and the mortgage was executed on the same date for a priority amount of $7 million.

[19] On 26 September 2002, Westpac sent Seamart a letter outlining a change in the lending facilities, in order to advance a further $888,000. A further cross-guarantee was required as security, this time worded as:

> An All Obligations Deed of Cross Guarantee and Indemnity to be granted from and between Seamart Holdings Limited, Seamart Wholesale Limited, Seamart Properties Limited, Seamart Restaurant Limited, Seamart Fish Receivers Limited, Vojislav Krtolica in his personal capacity, the trustees of the V Krtolica Family Trust and Seamart Processing Limited.

[20] Seamart Processing Ltd was another Seamart company incorporated in September 2002 to take on the processing activities at the Penrose factory. Mrs Krtolica signed the facilities letter of 26 September 2002 as her acceptance of the facility on the terms contained in the letter. The cross-guarantee referred to was signed on 19 December 2002. In January 2003, Mrs Krtolica signed a formal acknowledgement of further lending in the amount of $888,000 by Westpac to Seamart. In addition, she signed Deeds of Variation of Mortgage in respect of the Penrose factory, the Churchill Road property and her fishing quota, as well as a Memorandum of Variation of Mortgage over the Churchill Road property, increasing the priority sum secured over all properties from $7 to $10 million.

[21] On 8 April 2003, Mrs Krtolica signed a facilities letter from Westpac to Seamart acknowledging a $300,000 extension to the overdraft, which was intended to be repaid by 30 June 2003. The reason for this temporary extension was

explained in Westpac's Credit Approval Summary (CAS) of 4 April 2003, which stated that Seamart had to make an unbudgeted tax payment of $250,000 due in April. The additional funding was to be repaid from the anticipated sales of the Mt Albert and Mairangi Bay retail outlets owned by Seamart.

[22] In June 2003, Seamart's overdraft facility was increased to $2 million. Both Westpac and Seamart had the expectation that it would reduce to $1 million by August and to $800,000 by September 2003. Mrs Krtolica again signed the relevant facilities letter dated 23 June 2003. She did not have the benefit of legal advice at that time, her lawyer Mr Hopkins being out of the country. But after his return, he requested and was provided with financial information in respect of Seamart.

[23] The anticipated reduction did not occur. The account remained overdrawn by $2 million as at September 2003. It was at this time that Westpac referred the account to the AMG, specifically to the portfolio of Mr Graeme Hawkes. The AMG was referred to in evidence as the place to which "problem" or "substandard" business loans were transferred with the objective of protecting the bank's position and minimising or avoiding losses to Westpac. Seamart in fact requested a further temporary extension of the overdraft by $700,000. On 15 September 2003, the AMG recommended the immediate appointment of PwC as an investigative accountant. PwC's brief was to compile an urgent report with seven days, then a more detailed report shortly thereafter.

[24] On 23 September 2003, PwC completed an initial report as to the solvency of Seamart. In the first paragraph of the executive summary, PwC concluded that Seamart:

> …is now in the position whereby equity and liquidity have been eroded to the point where we believe, on the information provided to us, the trading companies within [Seamart] are insolvent.

[25] The PwC report outlined the extent of the financial problems that Seamart was facing at that time. PwC considered that Seamart required an immediate cash injection of $3.688 million, falling to $2.588 million should the then temporary extension to the overdraft become permanent. The report outlined that there appeared to be few internal controls on fundamental aspects of the business, such as

stock records and inter-company transactions. Management was said to be "under-resourced".

[26] Mr Krtolica appointed Mr Glenn Lange as general manager in September 2003. Mr Lange had a background in food processing management. Mr Lange's evidence was that he was aware from the outset that the company was in significant financial difficulty. He was the main contact for Westpac's representatives, particularly Mr Hawkes. Mr Lange further outlined his role as helping to manage creditors and working with Progressive in order to facilitate the proposed lease of the Penrose factory. The nature of the dealings between Mr Lange and Mr Hawkes with regard to Seamart's creditors will be discussed in more detail below. Mr Krtolica also played an active role in the business and was responsible for authorising the payment of debts and for various negotiations that were undertaken when Seamart was approached with offers to purchase the Penrose factory. Mr Krtolica did not give evidence at the trial.

[27] Mrs Krtolica also remained active in the business to some extent after providing the guarantee. For example, in a report on performance dated 28 May 2003, compiled by Ms Winsome Turnell, then the financial controller, it was noted that Mrs Krtolica had been employed for the purpose of "shop management". She attended a number of meetings with Westpac's representatives, who also kept her informed about Seamart's financial position. It is clear that from September 2003 Mrs Krtolica knew that Seamart was in serious financial difficulties. For example, she made reference at paragraph 36 of her brief of evidence to her knowledge that PwC was auditing Seamart and that "Seamart was in some financial difficulty". In a letter of 13 October 2003, Mr Hawkes specifically advised her that Seamart had breached some of its covenants and was in default of its loan facilities. He expressly reminded her that Westpac relied on the guarantee as security.

[28] Mrs Krtolica's evidence was, however, that she did not know the full extent, depth or nature of the problems. In contrast, Mr Hawkes stated in evidence (which I accept) that Mrs Krtolica appeared to be knowledgeable about Seamart's financial position and was in touch with him requesting information about Seamart's position on a regular basis. Mr Hawkes' evidence was that Mrs Krtolica even worked for

Seamart at various times and held a signing authority, writing cheques on Seamart's behalf from time to time. In addition, her guarantee fee was dishonoured on a number of occasions due to the financial problems. As a result, I am satisfied that she would have been well aware of much of the detail of Seamart's financial position.

[29] From September 2003, it was obvious that the purchase of the Penrose factory had created significant financial difficulty for Seamart. When Mr Hawkes initially met with Mrs Krtolica, Seamart's exposure to Westpac stood at $7.043 million. This was comprised of the $3.1 million overdraft and $3.943 million owing on the term loans. Westpac decided not to make demand on the loans, partly because it was likely that the sale of the major asset, the Penrose factory, would have been on an untenanted basis. Seamart still had the opportunity for a profitable relationship with Progressive. It was thought that, if Westpac continued to provide Seamart with financial support, it would be able to trade through difficulties, given the past history of strong profits and the potential benefits from the operation of the Penrose factory.

[30] The installation of the crumbing line proved to be costly and took much longer to complete than had been expected. After various delays on the part of Progressive, a formal lease of the Penrose factory was finalised in October 2004. A valuation shortly after valued the Penrose factory at $6.5 million. A proposed supply arrangement with Progressive would further enhance prospects. By November 2005, Mr Krtolica had put the Penrose factory up for tender. Mr Hawkes advised Mrs Krtolica and her solicitor that a sale by Seamart was contemplated.

[31] Seamart sought to secure a sale of the Penrose factory between December 2004 and June 2005. In mid June, the Penrose factory sold for $6.8 million resulting in net proceeds of sale of $6,277,801.14. Westpac applied such amount first in full repayment of the overdraft which then stood at around $5.3 million. The balance of $977,801.14 was then held in a suspense account. This was done because Westpac wished to take a cautious approach as it had received a letter from Mr Hopkins dated 3 June 2005, contending that Mrs Krtolica's guarantee came to an end upon the sale of the Penrose factory. Westpac disputed this, but was in discussions with

Mrs Krtolica at the time regarding the extension of her guarantee for another five years.

[32] Following the sale of the Penrose factory, Seamart had two term loans outstanding to the bank totalling just under $3 million. Westpac was still concerned about the extent of Seamart's obligations to other creditors. Of particular concern was Seamart's indebtedness to the Inland Revenue Department (IRD) which Seamart had reported in February 2005 was "down to $250,000". By the end of June 2005, the IRD was owed close to $1 million and Seamart executives were in negotiations with officials regarding repayment arrangements. As at December 2005, Seamart owed the IRD $1.2 million.

[33] Eventually, receivers were appointed by Westpac in March 2006. The outstanding debt owed to Westpac at the time of receivership was in the vicinity of $3 million. Westpac made demand on Mrs Krtolica of $1,821,141.16. Subsequently, Westpac exercised its powers of sale over the Churchill Road property and the fishing quota, given under the mortgages that Mrs Krtolica had granted to the defendant in respect of those assets. This left $245,265.92 owing under the guarantee, in respect of which Westpac claims that interest is still accruing.

Events after September 2003

[34] In order to deal with Mrs Krtolica's claims regarding the alleged deepening insolvency and the allegation that Westpac executives were party to reckless trading, it is convenient to summarise the factual position regarding Westpac's lending to Seamart and its monitoring of the financial position between September 2003 and March 2006.

[35] In December 2003, Seamart came back to Westpac requesting a further funding of $250,000, as overdue creditors were pressing for repayment. At that point, a potential purchaser had indicated interest in the Penrose factory and on that basis Westpac granted the request on 12 December 2003. This took the total overdraft limit to $3.35 million. In January 2004, Seamart sold the Mairangi Bay

retail outlet. The proceeds of this sale were applied to the overdraft, bringing it back to $3.2 million.

[36] However, by March 2004, a major creditor was pressing for payment of $350,000 outstanding. To this end, Westpac granted further funding of $400,000. The basis for this decision, outlined in a CAS of 10 March 2004, was that other creditors were at that point supportive. Progressive was trialling the processing facilities at the Penrose factory and had expressed satisfaction with the way the arrangement was working.

[37] In July 2004, Seamart approached Westpac seeking a temporary extension to the overdraft of $300,000. Some creditors, including the IRD, had issued statutory demands and trading had dropped during the winter months. Pending finalisation of the agreement with Progressive, a temporary extension was granted by Westpac, on the basis that it would be cleared by 2 August 2004. Just before that deadline, Seamart asked for the temporary extension date to be pushed back as it was still suffering cashflow problems. Progressive had promised to inform Seamart and Westpac of its decision by the middle of the following week. Westpac agreed that the temporary extension could be pushed out to 18 August 2004. A CAS dated 13 August 2004 noted that Progressive had finally indicated the terms upon which it was prepared to enter a lease with Seamart. The first weekly payment of $25,000 was expected in early September and this was expected to ease the cashflow problems. Seamart requested an extension of the overdraft to $4.1 million. Westpac rejected this request. But, in anticipation of the Progressive payments, Westpac agreed to extend the time for repayment of the temporary extension to 30 September 2004.

[38] When the temporary extension was not repaid by 30 September 2004, Westpac reviewed Seamart's financial position. The supply agreement with Progressive had not yet been finalised which caused difficulty in forecasting Seamart's financial position. A CAS of 12 October 2004 compared the position of Seamart to that a year before:

> Creditors totalled $3.5m and the O/D was $3.1m this time last year (when file into AMG). Creditors have been reduced to $2.5m and our O/D is $3.9m.

[39] Therefore, Seamart's position had improved by about $200,000. Significantly, as the CAS noted, the composition of the creditors had changed, the IRD then being a major creditor. The IRD had agreed to accept a repayment plan. Seamart requested a further $700,000 on the overdraft in order to meet the initial repayment requirements of the IRD and to address the needs of other creditors. Because the supply agreement with Progressive was not yet in place, Westpac considered the financial forecast was unreliable. The extension was however granted, because of the security provided by the possibility of selling the now upgraded Penrose factory, which had increased in value due to the Progressive lease. Further, while Seamart had suffered losses of nearly $1 million over the last year, trading in the previous five months had shown a profit of $153,000.

[40] In November and December 2004, Progressive was slow in making payments under the lease. As a result, on 19 November 2004 Westpac temporarily loaned Seamart $100,000. That temporary loan was cleared. By 12 December, Mr Lange sought a further temporary excess of $300,000 because of slow payment by Progressive. That was to be cleared by 21 December 2004. However, in an Excess Management Report (EMR) of 22 December 2004, Mr Hawkes noted that the overdraft excess had not been cleared. Seamart was continuing to blame Progressive's slow payment, but Mr Hawkes recorded that the real reason was more likely to be the "lagged cashflow impact of recent poor trading months" and the fact that the company was in arrears with the IRD. That EMR specifically noted that:

> Account conduct is clearly unacceptable and plan is to have a meeting with Glen Lange and [Mr Krtolica] when Glen gets back from annual leave on 10/01/05. We also await details of factory property tender (that closed this week) and confirmation that the supply agmt with Progressive has finally been completed.
>
> Continued requirement for O/D excess beyond 10/01/05 will leave them with no option but to sell factory asap.

[41] On 31 December 2004, Westpac completed a Problem Loan Review Memorandum (PLRM) in respect of Seamart. The outlook on the supply agreement with Progressive was positive: the terms had been finalised but "the lawyers and the

holidays" had delayed documentation. It was expected to be signed at the end of January 2005, bringing in an extra $300,000 per annum for Seamart. There had been little interest in the factory. A different agent was appointed for the sale. However, Seamart was having problems again with slow payment by Progressive by 20 January 2005. The excess was now at $500,000 beyond the $4.6 million limit. Wages also needed to be paid. Progressive had promised $300,000 in two days time, and there was another $200,000 due from restaurant trade over the Christmas period. It is evident from documentation such as the PLRM that Westpac was actively and carefully monitoring Seamart's financial situation.

[42] On 8 February 2005, another EMR noted that the overdraft excess was $600,000 above the overdraft limit of $4.6 million. Progressive was still to pay Seamart the $300,000 it owed and the signing date for the supply agreement had been pushed out to mid-February. Seamart executives informed Westpac that the Mt Albert retail store had been sold for $400,000 and that the Penrose factory was under offer for $7 million. Significantly, Westpac was told that there were some arrears in payment to the IRD, but that the total IRD debt had been brought down to $250,000 from $800,000.

[43] On 25 February 2005, Seamart sought a further extension of the temporary overdraft to 18 March 2005, taking the total overdraft to $5.2 million. It had been due to expire on 28 February, but Seamart was unable to pay off the extension due to further slow payment from Progressive. Westpac considered that this problem was compounded by delays in invoicing Progressive due to a lack of office staff. But Westpac was assured that a new financial controller had been appointed and was due to start at the beginning of March. The previous quarter had shown a profit of $49,000 and a reduction in the total owed to creditors. The supply agreement was to be signed that day and the factory had been sold for $7 million, subject to due diligence and finance. The sale on the Mt Albert shop had fallen through, but it remained on the market. Westpac granted the further extension of the temporary overdraft.

[44] As noted, the sale of the Penrose factory was subsequently settled in June 2005, with net proceeds of $6.28 million. The proceeds were applied to the

overdraft, with the remainder put into a Security Realisation Account. A review of the financial position of Seamart at the end of June 2005 made Westpac aware of a significant problem: far from having reduced, the debt to the IRD was in the vicinity of $1 million. Seamart had asked for further overdraft funding to clear some of its debt. But Westpac stated in its PLRM of 30 June 2005 that it would await details from Seamart executives of the IRD's repayment requirements before committing to any extension or restructuring of the debt.

[45] At about this time, there was an ongoing debate with Mrs Krtolica over whether the sale of the factory released her guarantee obligations. Westpac did not accept that this was the position. It seems also that Mrs Krtolica herself accepted that this was not the case. She sought to sell the Churchill Road property and retain the proceeds at that point. Westpac resisted this proposal.

[46] On 7 July 2005, Seamart formally requested an overdraft of $150,000 to cover the cashflow requirements while the repayment of the IRD debt repayment was being organised. Westpac noted in a CAS of that date that if such extra sum was not provided, Seamart was likely to go to another lender to refinance the debt. As a result, the overdraft was granted to Seamart, on the condition that it be cleared by 1 August 2005.

[47] By 8 August 2005, Seamart was requesting that a further $50,000 be added to the overdraft to cover cashflow requirements while discussions with the IRD continued. This was granted to 1 September 2005, at which point there was to be a review of the updated financial information and documentation provided on a new deal with a developer to provide retail premises at a new fish market. On 1 September 2005, Westpac received another request from Seamart to leave the overdraft at $200,000. A verbal agreement had been reached with the IRD and documentation had been provided in respect of the new shop venture. The extension was only to be granted on a temporary basis pending the completion of the agreements.

[48] By 3 October 2005, the IRD had still not agreed in writing to the repayment arrangement, as it wished to secure Mr Krtolica's personal guarantee for the debt.

This caused Westpac difficulty in determining what to do next, such as debt restructuring. The financial forecast was for a cashflow profit of $1 million, but this was predicated on a $1.2 million increase in sales. A further short-term extension to the overdraft was granted. Mr Hawkes met with Mr Lange on 22 November 2005 and expressed the opinion that Mr Lange's priority should be to finalise the repayment arrangement with the IRD. In a CAS of the same date, there was optimism about the transfer of the retail business in that, while sales would not be at the same level in the new location, overheads would decrease. The next day, Mr Hawkes wrote to Mrs Krtolica to seeking to obtain an urgent answer on whether she was prepared to extend her guarantee.

[49] The stalemate on the guarantee extension remained for quite some time. As was noted by the new account manager at Westpac, Mr Graeme Wicht, in a PLRM of 31 December 2005 and a CAS of 12 January 2006, no agreement had been reached with Mrs Krtolica. The final CAS was completed on 1 March 2006. The position was the same, except that the stalemate with Mrs Krtolica meant that the commercial relationship had soured and litigation was contemplated. This led to Westpac appointing receivers on 21 March 2006.

[50] Mr Shaun Laffey, a retired banker, gave evidence for Mrs Krtolica concerning his views about Westpac's dealings with Seamart. I did not find his evidence particularly helpful and preferred to consider the facts themselves, as opposed to Mr Laffey's interpretation of them. Mr Laffey's evidence was that Westpac's involvement with Seamart between September 2003 and March 2006 led to greater creditor exposure by the end of that period. This was based on his analysis of the shareholders' equity in Seamart, which he considered worsened over the period. However, the basis of his evidence was the book values of Seamart rather than the realisable values over that 30 month period. As Mr Gollin submitted for Westpac, a better basis for analysis (and one which I prefer) is a comparison of the position at the beginning and end of the period.

[51] The summary set out above portrays the relationship between Westpac and Seamart and the basis for the decisions Westpac made to provide facilities to Seamart during that period. Comparing the financial position of Seamart as at

August 2003 with the situation as at receivership it is clear (and I so find) that there was no deepening insolvency during that period. The overdraft was extended from time to time, but was paid back by the application of the proceeds from the sale of the Penrose factory. The debt owed to unsecured creditors in fact decreased during that period. Mr Lane, an accountant instructed by Mrs Krtolica to review the position, noted that the initial PwC report showed that at 31 August 2003, the total of the amounts owing to unsecured creditors together with preferential claims stood at $4,587,554. However, at the date of receivership, the total had reduced to $3,933,971.

[52] Similarly, the debt owed by Seamart to Westpac remained relatively static when assessing the position as at the date of receivership against the position as at August 2003. Mr Lane's evidence showed that the total debt to Westpac at 31 March 2006 was $3,062,366, prior to any reduction in indebtedness out of the receivership and inclusive of the term loan. The debt as at 31 August 2006, exclusive of the term loan was estimated to be $2.4 million. When the term loan was added, the total indebtedness reached $6.4 million, supported at that stage by the asset of the Penrose factory. Mr Lane accepted in cross-examination that this was the case. The shortfall, had Seamart been placed in receivership in August 2003, would have been in the vicinity of $1.707 million to $4.419 million. Given the circumstances at the time, a shortfall at the higher end was more likely. The midpoint of the range as at August 2003 is $3.063 million – almost an identical figure to the indebtedness as at March 2006. I therefore conclude that, whilst Seamart may have been trading whilst insolvent during that period, there is nothing to suggest that there was a deepening insolvency. I find on the facts that Mrs Krtolica's allegation that the insolvency of Seamart deepened cannot be sustained.

The terms of the guarantee

[53] The guarantee itself, signed on 24 July 2002, contained a limitation clause providing that the priority amount was $1.95 million plus 24 months interest. The "Customer" was defined as being Seamart (Wholesale) Limited, Seamart Restaurant Limited, Seamart Properties Limited and Seamart Holdings Limited. The guarantee

is set out in cl 1 which refers to a request to Westpac to give credit to the customer. Further, it provided:

> In exchange for WestpacTrust doing either or both of those things, and by entering into this document, you guarantee that the Customer will pay to WestpacTrust on time, the Guaranteed Money referred to below (see clause 2).
>
> You also guarantee that the Customer will do what it is required to do under its Arrangements.
>
> WestpacTrust can demand that you, as well as, or instead of, the Customer, pay some or all of the Guaranteed Money when it is payable. You must then immediately pay that amount.
>
> If you do not pay an amount when WestpacTrust demands, then among other things:
>
> - WestpacTrust can sue you; *and/or*
>
> - If you have given a mortgage or other security which secures this Guarantee, WestpacTrust can enforce it (for example, if that security includes a mortgage over a house, WestpacTrust can sell the house).

[54] Clause 2 was entitled "What is covered by this guarantee?" and provided:

> This document is a continuing guarantee and relates to all money which the Customer (whether alone or with one or more others) may owe to WestpacTrust now or in the future for any reason.
>
> This is the Guaranteed Money.
>
> At any time the Guaranteed Money will include:
> - Money which the Customer actually does owe or will owe WestpacTrust whether principal, interest or otherwise;
> - Money which WestpacTrust may claim from the Customer including debts assigned to the Customer by third parties;
> - Money which the Customer contingently owes WestpacTrust (money is contingently owed where the Customer has an obligation to pay WestpacTrust if something happens);
>
>   Examples of this include:
>   - A guarantee by the Customer of some other person's obligations including guarantee obligations of that other person;
>   - A promise by the Customer to pay costs if it repays a fixed rate loan early or to pay the legal costs WestpacTrust might pay if the Customer defaults;
>   - A promise to pay WestpacTrust if WestpacTrust suffers a loss or has to make a payment to someone else (for example under a letter of credit requested by the Customer or a bill of exchange issued at the request of the Customer);
> - Money which the Customer may become liable to WestpacTrust if something happens or is discovered, even where there is no existing obligation to pay it, so long as the liability of the Customer arises out of

or in relation to circumstances existing, foreseeable or contemplated at the time of the happening or discovery.
Examples of this include where WestpacTrust may later be able to sue the Customer for damages because of a breach of the warranty given to WestpacTrust by the Customer;

- Money (including money of the type set out in the above paragraphs of this clause 2) which the Customer would have owed WestpacTrust but for some legal problem. Examples of those legal problems are set out in clause 13 below.

The Guaranteed Money includes, in each case, any money which the Customer may owe together with one or more others.

[55] The nature of the obligation owed by Mrs Krtolica was outlined in cl 7 as follows:

> This document imposes upon you a principal obligation. In relation to your guarantee obligations you agree to perform the obligations of the Customer as if you were the Customer. This means that WestpacTrust can require you to pay the Guaranteed Money whether or not WestpacTrust has made demand on the Customer.
>
> Your liability under this document is independent and unconditional. It does not depend on any other right or obligation and is not subject to any condition. Your liability is not affected by anything which might otherwise release you from all or part of your obligations or limit them (if this clause was not in this document).
>
> *For example, your liability is not affected if:*
> - WestpacTrust does not exercise any of its rights against the Customer or anyone;
> - WestpacTrust makes an arrangement which takes away or limits its rights or freedom to exercise them, whether those rights concern the Customer or anyone;
> - WestpacTrust fully or partly discharges or releases any security, the Customer or anyone;
> - The Customer becomes bankrupt;
> - WestpacTrust gives the Customer or anyone time to pay or any other concession;
> - WestpacTrust makes any other transaction or arrangement with the Customer or anyone; *or*
> - WestpacTrust does not take any security or does not have security, even if that security was mentioned to you.
>
> *Anyone* includes anyone who signs this document. It will also include any other guarantor, anyone who gives security or anyone else.

[56] The scope of the obligation upon Mrs Krtolica is further informed by the provisions of cl 13, which stated as follows:

> If for any circumstances WestpacTrust might have no legal right to recover an amount of the Guaranteed Money from the Customer, or the Customer

might not owe an amount that would otherwise have been included in the Guaranteed Money.

For example, this might happen because:

- *the Customer might not have full legal capacity (like being under 20 years of age), might be bankrupt or might not have properly signed a document; or*

- *there may be some illegality affecting an arrangement.*

If, for any reason, that occurs, whenever WestpacTrust demands, you must pay that amount to WestpacTrust. That amount will be taken to be part of the Guaranteed Money for the purposes of this document.

This applies even if WestpacTrust should have known of the problem. It applies even if the Customer could never have been required to pay WestpacTrust.

Your obligation under this clause is a separate obligation from your obligations under Clause 1.

[57] Westpac also had the right to apply any money received from Seamart to reduce Seamart's debt in any way it saw fit. This was outlined in cl 10 as follows:

> Any money WestpacTrust receives to reduce the Customer's debts to WestpacTrust may be used to pay off any part of the Customer's debts WestpacTrust chooses.
>
> …
>
> WestpacTrust may open a separate or new account and credit payments received through that new account and not the account guaranteed by you, so you will remain liable for the full amount despite that payment.

[58] This clause also included a specific example:

> *For example, if the Customer owes WestpacTrust two amounts of money, if you have only guaranteed one of them, WestpacTrust can use money it receives from other sources towards paying the other one first.*

[59] Similarly, cl 16 stated that if Westpac had any other security, it was independent of the guarantee and did not affect Mrs Krtolica's liability. Specifically, cl 16 allowed Westpac to enforce the guarantee or the security in any order it wished.

[60] Clause 11 of the guarantee allowed Westpac to alter the arrangements between it and Seamart at any time without Mrs Krtolica's consent. That clause also allowed Westpac and Seamart to enter any new arrangement without consent.

However, this was subject to the express proviso that Mrs Krtolica would not be liable for any amount greater than the limit set on the guarantee. Clause 11 provided:

> WestpacTrust and the Customer or any Guarantor can enter into new arrangements with one another or change or replace the existing arrangements at any time. They may do whatever business they wish with each other. They do not have to get your consent to do those things.
>
> This document applies to any new and replacement arrangements and to any arrangements as changed. It does not matter that the guaranteed Money may increase because of the new and replacement arrangements, or changes.
>
> However, if a limit is set under clause 8, then you are not liable to pay any more than that limit and the other moneys referred to in clause 8, no matter what new arrangements or changes to existing ones are made.
>
> If no limit is set, then you are liable to pay all the Guaranteed Money including under new, replacement or changed arrangements.

[61] Clause 12 covered Westpac's disclosure requirements. Specifically, it required:

> WestpacTrust must provide to you a copy of this Guarantee and of all information, statements, and other matters disclosed to the Customer under the Credit Contracts Act 1981:
> - In respect of any controlled credit contract between the Customer and WestpacTrust to which this Guarantee applies;
> - When the Customer and WestpacTrust enter into a new controlled credit contract to which this Guarantee applies; and
> - When a controlled credit contract to which this Guarantee applies is modified in certain ways.
>
> These disclosure requirements relate to Arrangements entered into on or after 1 March 1999.
>
> Apart from the above,
> WestpacTrust does not have to do anything in relation to, or tell you of anything concerning, the Customer's:
> - Affairs;
> - Finances; *or*
> - Transactions with WestpacTrust.
>
> It is your responsibility to find these things out from the Customer.
> The above applies both before and after you sign this document.

[62] Clause 33 governed the scope of the rules and representations relating to the guarantee:

> You did not sign this document relying on any promises or statements made by WestpacTrust. It does not matter whether they were made in response to any question or not.

The only terms which apply to this document are contained:
- In it; *or*
- In another document signed by or on behalf of WestpacTrust by a person authorised by WestpacTrust.

[63] The only additional term included in Westpac's standard form guarantee document was cl 36. That outlined how the guarantee was to be reduced annually, on the basis of the amount of principal paid and amortised under the term loan facility granted to Seamart. It stated that the principal amount secured by the guarantee was to drop to $1.815 million on finalisation of the lease of the Penrose factory and the supply agreement with Progressive. It further outlined the five-year term of the guarantee. These terms were subject to the condition that Seamart complied with all covenants, a topic referred to later in more detail.

The issues for determination

[64] The case requires determination of some nine broad issues drawn from the pleaded causes of action and the clarification provided by Mr Black as summarised at [9] above. These issues are also consistent with the framework adopted by Mr Gollin in his closing submissions which Mr Black accepted provided a suitable basis for the required decision-making:

a) The guarantee

i) Does it extend to all liabilities to Westpac of each of Seamart Properties Ltd, Seamart (Wholesale) Ltd, Seamart Restaurant Ltd, Seamart Holdings Ltd and Seamart Processing Ltd, subject to the limit on the amount Mrs Krtolica's liability, namely, $1.815 million?

ii) Alternatively, is it restricted to a term loan liability of $3.3 million owing by Seamart Properties Ltd and an overdraft facility in favour of Seamart (Wholesale) Ltd, initially of $100,000 but subsequently increased by agreement with Mrs Krtolica to $2 million?

b) Was Westpac entitled to appropriate the proceeds of the sale by Seamart Properties Ltd of the Penrose factory to repay the overdraft, or should those proceeds first have been applied under equitable principles in reduction of the term loan debt?

c) Has Mrs Krtolica, by cl 7 of the guarantee (imposing liability on Mrs Krtolica as a principal debtor), contracted out of the application of equitable principles otherwise available to a guarantor?

d) What was the scope of Westpac's disclosure obligations?

e) Were Westpac's actions oppressive as regards Mrs Krtolica's position as guarantor, for the purposes of the Credit Contracts Act 1981 (CCA) or the Credit Contracts and Consumer Finance Act 2003 (CCCFA)?

f) Is Mrs Krtolica entitled to relief against the defendant for alleged misleading and deceptive conduct under the FTA?

g) Was Westpac by its conduct or actions prevented under the principles of waiver, acquiescence or estoppel from relying on Seamart's breaches of its loan covenants?

h) Was Mrs Krtolica entitled to a remedy under s 301 of the Companies Act 1993 for alleged liability by Westpac as "shadow director" for reckless trading.

i) Was Westpac liable as a constructive trustee, either as a consequence of dishonest assistance or knowing receipt?

The construction question

Submissions of counsel

[65] Mr Black submitted that the guarantee covered only the term loan of $3.3 million to Seamart Properties Ltd and not money advanced to Seamart under the overdraft facility other than that which was expressly agreed to by Mrs Krtolica. He submitted cl 2 of the guarantee did not contemplate liability for debt incurred through what is characterised as "excessive lending". An example of money owed to Westpac contingently as outlined in cl 2, is liability arising out of the circumstances existing, foreseeable or contemplated at the time of the happening or discovery. The interpretation urged on behalf of Mrs Krtolica was that this did not include liability for debts and liabilities arising out of the "extraordinary and unusual" choices by Westpac to lend once it was established that Seamart was insolvent in September 2003.

[66] Mr Black also submitted that Seamart Processing Ltd, the company bearing the bulk of Seamart's losses, was not covered by Mrs Krtolica's guarantee. It is correct that Seamart Processing Ltd was not one of the original companies (the "Customer") referred to in the guarantee. In fact, it was not incorporated until after the guarantee was signed. Mr Black contended that, while a cross-guarantee and deed of set-off including Seamart Processing Ltd was later signed by Seamart, the terms of the guarantee never included Seamart Processing Ltd's debts. This was because cl 33 limited the terms of the guarantee to those in the guarantee itself and to those documents signed by Westpac.

[67] Mr Gollin, counsel for Westpac, submitted that the effect of cl 2 of the guarantee was to create an express "all money" obligation. That obligation was inclusive of any money owed for any reason in the future. Any interpretation of cl 2 based strictly on an interpretation of "circumstances existing, foreseeable, or contemplated" is unhelpful and misleading, as that is only an example, inclusive rather than exhaustive.

[68] Further, the word Customer could not be limited to exclude Seamart Processing Ltd. The guarantee was intended to include companies in Seamart other than those obtaining the initial facilities, so that if in the future other facilities were offered, they would be covered. This view derived support from the fact that cl 11 anticipated changes to the arrangements between Westpac and Seamart. While Seamart Processing Ltd was not originally covered, Mrs Krtolica signed the facilities letter of 26 September 2002, outlining that a cross-guarantee would be required as a new security, including Seamart Processing Ltd. In any case, Mr Gollin submitted that Seamart Processing Ltd's debts were irrelevant as far as Mrs Krtolica was concerned, as her liability under the guarantee was fixed by the cap without considering what was owed by Seamart Processing Ltd.

Principles of interpretation

[69] The parties were agreed that the guarantee should be interpreted by reference to general contractual interpretation principles. Specifically, both parties cited *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 (HL) (adopted in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA)). Lord Hoffman outlined five principles of interpretation at 114-115:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The

> meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945.
>
> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said *in Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:
>
> > '… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'

[70] This approach, in relation to guarantees, has been endorsed by O'Donovan and Phillips in *The Modern Contract of Guarantee* (English ed 2003) at 5-05.

[71] Recently, the Supreme Court examined questions of contractual interpretation in *Wholesale Distributors Ltd v Gibbons Holdings Ltd* (2007) 5 NZ ConvC 194,493. The Court considered whether subsequent conduct could provide an aid to interpretation. While some members of the Court considered that it was not helpful to do so in that case, the overall opinion was that in certain circumstances it is permissible to do so. For example, Tipping J outlined at [53] the requirement that the subsequent conduct must be mutual or "shared":

> For good policy reasons the common law has consistently adhered to what is usually called an objective approach to contract interpretation. An objective inference from conduct in which the parties are mutually involved after they have contracted does not significantly depart from the conventional approach. I will call conduct in which both parties are involved, either actively or passively, mutual or shared conduct. Inviting inferences from the conduct of one party, in which the other party is not involved, would make a significant inroad into the need to ascertain objectively the shared intention of the parties as to their meaning. The words they have used, construed in the light of all the relevant and objective circumstances in which the parties have used them, must prima facie be the best guide to their meaning. But, if some mutual or shared post-contract conduct of the parties is objectively

> capable of shedding light on the meaning they themselves placed on the words in dispute, I consider more is to be gained than lost by allowing the court to take it into account.

Discussion

[72] On a basic analysis of the guarantee provisions, it is clear that the all money obligation referred to in cl 2 extends to all lending made to Seamart within the term of the guarantee and is not limited in scope to the wholesale term loan to Seamart Processing Ltd. The clause is in plain English and the meaning is clear. It relates to all money which the customer may owe now or for any reason in the future. The wording of the guarantee is not limited to the particular facilities which Westpac provided at the time, namely, the wholesale term loan of $3.3 million and an overdraft facility of $100,000. Consistently with this interpretation, the "Customer" whose obligations Mrs Krtolica was guaranteeing, was not defined by reference to the particular companies who obtained the initial facilities, i.e. Seamart Properties Ltd and Seamart (Wholesale) Ltd. The term "Customer" is defined in the guarantee to include Seamart Restaurant Ltd and Seamart Holdings Ltd, the other companies in the Seamart Group at that time. There would have been no good reason to include other group companies in that definition unless it were intended that the guarantee apply to facilities that might be provided to the group in the future.

[73] An interpretation of cl 2 that holds that the guarantee is not limited to the initial facilities, also draws further support from the provisions of cl 11 of the guarantee. This clause expressly provides:

> Westpac and the Customer or any Guarantor can enter into new arrangements with one another or change or replace the existing arrangements at any time. They may do whatever business they wish with each other …

[74] This is followed by a provision that the guarantee applies:

> …to any new and replacement arrangements and to any arrangements as changed.

[75] One argument relied upon by Mrs Krtolica is what her counsel described as the "limitation and exclusory" wording in cl 2 of the guarantee. Such language, which appears in one of the examples of what is covered by the guarantee is

submitted to be indicative that the guarantee was limited to the wholesale term loan and the lending under the overdraft facility which Mrs Krtolica had expressly consented to. I disagree. In my view, the critical words are in the opening sentence to cl 2 which defined the Guaranteed Money. The clause then provided that Guaranteed Money would "include" certain types of money. One of the examples offered in the document is:

> - money which the Customer may become liable to WestpacTrust if something happens or is discovered, even where there is no existing obligation to pay it, so long as the liability of the Customer arises out of or in relation to circumstances existing, foreseeable or contemplated at the time of the happening or discovery.

[76] I conclude that such words do not restrict the definition of Guaranteed Money in cl 2. Rather, they serve to provide one example of a type of money for which the customer may become liable to Westpac and which would therefore be included within the definition of Guaranteed Money. This is plain from the use of the word "include". The clause then refers to three types of money so included and then by way of further amplification provides "Examples of this include …".

[77] Accordingly, the scope of the guarantee covered all monies owing to Westpac in the future by the Customer (as defined), subject to a limitation in the amount of Mrs Krtolica's liability and to the reduction in that amount pursuant to the provisions of cl 36. I agree with the submissions of Mr Gollin that the interpretation advanced on behalf of Westpac is apparent not only from the plain wording of the guarantee, but is also supported by the surrounding circumstances. These include the reference in the facility letter of 28 June 2002 to an all obligations deed of cross-guarantee to be provided by each of the members of the Seamart Group. There is also a statement in the solicitor's certificate dated 24 July 2002 by Mr Hopkins which makes reference to the guarantee as being "in respect of the obligations and liabilities from time to time of Seamart Properties Ltd, Seamart (Wholesale) Ltd, Seamart Restaurant Ltd and Seamart Holdings Ltd".

[78] Westpac also relied on the provisions of cl 7 of the cross-guarantee and the scope of the definition of Guaranteed Money in cl 2 of the guarantee. In particular, cl 2 includes all money which the Customer (whether alone or with one or more

others) in the future owes to Westpac. This specifically includes a guarantee by the customer of the obligations of some other persons.

[79] Neither do the various other arguments advanced on behalf of Mrs Krtolica in counsel's closing assist her on the construction point. For example, any reliance on the shareholders' agreement relating to Seamart Properties Ltd is misplaced. Westpac was not a party to such shareholders' agreement and is not bound by it. Moreover, any observations by Westpac executives commenting on the scope of the guarantee are not determinative. The construction issue is a matter of legal interpretation.

[80] Further, the fact that the company Seamart Processing Ltd was not listed in the guarantee as a "Customer" does not assist Mrs Krtolica. She knew that the expanded processing operation would be carried out by Seamart at the Penrose factory. She expected that such operation would be carried out by Seamart (Wholesale) Ltd whose obligations she was expressly guaranteeing. But further, she was aware that a new deed of cross-guarantee was being entered into by each of the Seamart companies listed as the Customer in the guarantee, and also by Seamart Processing Ltd. Such awareness arose from the 26 September 2002 facility letter which she signed, together with the cross-guarantee which Seamart Processing Ltd was to provide, and did, in December 2002.

[81] A further point is that Mrs Krtolica's guarantee was not called upon to meet the obligations of Seamart Processing Ltd to Westpac. The account of Seamart Processing Ltd was in credit when demand was made under the guarantee in early April 2006. Further, the proceeds of sale of the Penrose factory were not applied to satisfy the obligations of Seamart Processing Ltd in June 2005. The account of that company was in credit at that time and had been since September 2004. Importantly, at both times it was Seamart (Wholesale) Ltd and Seamart Properties Ltd which were indebted to Westpac. These entities were expressly covered by the guarantee.

[82] Finally, despite the careful and comprehensive submissions by Mr Black, none of the authorities cited by him support the submission that cl 2 of the guarantee should be read down in the manner in which he contends. I conclude that the two

cases which he relied upon, namely, *National Bank of New Zealand Ltd v West* [1978] 2 NZLR 451 (CA) and *Triodos Bank NV v Dobbs* [2005] 2 Lloyd's Law Reports 588 are distinguishable.

[83] Accordingly, for the reasons set out above, I conclude that as a matter of interpretation the guarantee extends to all liabilities to Westpac of each of Seamart Properties Ltd, Seamart (Wholesale) Ltd, Seamart Restaurant Ltd and Seamart Holdings Ltd, as well as Seamart Processing Ltd. The only limitation is to the extent of the agreed cap of $1.815 million. It follows that the guarantee is not restricted to the wholesale term loan of $3.3 million to Seamart Properties Ltd and the initial overdraft of $100,000.

Appropriation

[84] The issue for determination here is whether Westpac is entitled to appropriate the proceeds of the sale by Seamart Properties Ltd of the Penrose factory to repay the overdraft or whether those proceeds should have first been applied in reduction of the term loan debt. On this point, Westpac says that, even if the restricted interpretation of the scope of the guarantee contended for by Mrs Krtolica were upheld, nevertheless Westpac had a contractual right to appropriate the sale proceeds of the Penrose factory to satisfy other liabilities secured by the mortgage over the property, leaving the term loan liabilities extant.

Submissions of counsel

[85] Submissions on behalf of Mrs Krtolica regarding appropriation rested on the interpretation of the guarantee as relating only to the term loan facility. Mr Black submitted that, on the sale of the Penrose factory, Westpac should have applied the sale proceeds to the term loan to reduce Mrs Krtolica's liability, rather than applying it to any other part of Seamart's indebtedness.

[86] Mr Gollin submitted that Westpac was entitled to rely on cl 4.5 of the mortgage over the Penrose factory, which provided:

> 4.5 Use of money
>
> To the extent permitted by law, any money received or recovered by WestpacTrust, any Receiver or any Attorney under the mortgage may be used to pay off any part of the Secured Money WestpacTrust chooses.
>
> WestpacTrust may open a separate or new account and credit payments received to that new account so that you will remain liable for the full amount despite that payment.

[87] This clause aligns with cl 10 of the guarantee (see [57] and [58] above), which provided that any money Westpac received in reduction of Seamart's debt could be used to pay off any part of that debt.

[88] At first blush, this might seem to offend against the principle in *Pearl v Deacon* (1857) 1 De G & J 461 which is authority for the proposition that any payment is to be appropriated first to the secured debt the subject of the guarantee. But Westpac submitted that guarantors may contract out of this principle: see *Duncan Fox & Co v North and South Wales Bank* [1880] 6 AC 1 (HL), cited with approval by the Court of Appeal in *Bank of New Zealand v Baker* [1926] NZLR 462. In *Baker*, the Court held (at 476) that:

> Where a guarantee provides that a relationship as between guarantor and creditor is deemed that of creditor and principal, the effect is to exclude the application of the equitable principles which are otherwise available where liability is as a surety only.

[89] Both *Bank of New Zealand v Baker* and *Duncan Fox & Co v North and South Wales Bank* were referred to and applied by the Court of Appeal in *Pogoni v R & W H Symington & Co (NZ) Ltd* [1991] 1 NZLR 82 (CA). At 85, the Court noted that the question was purely one of construction to determine whether the surety's right to treat the guarantee as discharged has been effectively excluded.

[90] Mr Gollin submitted that the effect of cl 7 of the guarantee (see [55]) and cl 4.5 of the mortgage over the Penrose factory was to contract out of any such right. Mr Gollin also relied on *Chin Hoat Pty Ltd v National Bank of Australia Ltd* [1996] ANZ ConvR 188, where McLelland J stated that:

> The rule in *Pearl v Deacon* derives from, and is dependent upon, a surety's right of subrogation. However, that right, and the application of any

> derivative principle, may be negatived or qualified by contract between the surety and the creditor.

Discussion

[91] The fundamental problem for Mrs Krtolica is the assumption that the surety was only over the term loan of $3.3 million. I have already concluded that the indebtedness of Seamart in its entirety was covered by the terms of the guarantee. Therefore any application of the proceeds of the Penrose factory sale towards Seamart's indebtedness generally was in reduction of Seamart's liabilities, which were included under Mrs Krtolica's guarantee.

[92] But even if this interpretation of the guarantee were not correct and the restricted interpretation contended for by Mrs Krtolica applied, Westpac nevertheless relied upon a contractual right to appropriate the sale proceeds from the Penrose factory to satisfy other liabilities secured by the mortgage over that property, leaving the term loan liabilities in existence.

[93] Such argument turns on the effect of cl 7 of the guarantee under which Mrs Krtolica's liability was stated to be that of principal debtor. It follows that Mrs Krtolica thereby contracted out of any recourse to equitable principles that might be available to a surety. This includes the operation of the rule in *Pearl v Deacon.*

[94] I am satisfied that Westpac was entitled to, and did, exercise its contractual right of appropriation under cl 4.5 of the mortgage over the Penrose factory. Westpac was thereby permitted to apply the proceeds of sale received from the sale of that property by Seamart Properties Ltd first as to $5.3 million in satisfaction of the overdrawn account of Seamart (Wholesale) Ltd. Hence, even on Mrs Krtolica's restricted interpretation of the scope of her guarantee, her liability under the guarantee was preserved. Westpac's right to appropriate the proceeds from the sale of the Penrose factory was also secured by the provisions in cl 10. This provision was set out in plain English and provided an example of how such appropriation might work as set out at [58] above.

[95] Mr Black was critical of Westpac's action in depositing the balance of the proceeds of such sale, after paying Seamart (Wholesale) Ltd's overdraft debt, in a suspense or security realisation account. However, a further provision in cl 10 of the guarantee entitled Westpac to do this.

[96] Westpac later applied the funds held in the suspense account on 14 March 2006 to the balance owing on the second of the two term loans entered into with Seamart Properties Ltd. This reduced that loan to $457,279.71 at that time. Yet the sum of $2,447,700 remained owing as at March 2006 on the original term loan entered into in July 2002. This is of course in excess of the limit of $1.815 million owing under Mrs Krtolica's guarantee. Accordingly, even on the restricted interpretation of the scope of the guarantee, Westpac's contractual right of appropriation resulted in Mrs Krtolica remaining liable under her guarantee. The plaintiff's claims under the head of appropriation must therefore fail.

The tort of deepening insolvency

[97] Mrs Krtolica next contended that there was now a tort of deepening insolvency under the common law of New Zealand. This submission was not developed in any real depth in Mr Black's closing submissions. It was only in fact particularised in a memorandum of further particulars dated 1 October 2007. This was in the context of an abandonment of the causes of action of breach of fiduciary duty and any breach based on a duty of care tort to disclose to Mrs Krtolica, *inter alia*, any unusual and special financial arrangements or increases in debt and not to rely on the guarantee to recover any excessive lending to Seamart. All that survived in terms of a pleading of tortious liability was a duty as follows:

> Given Seamart's insolvency, to prevent any ongoing funding by [Westpac] after that date which had the consequence of perpetuating and participating in a deepening insolvency which increased the likelihood of the plaintiff's guarantee being relied upon and to the prejudice of all the creditors.

[98] Rather than elaborating on the possible policy reasons behind the need for, and justification of, such tortious liability, Mr Black largely relied on an article entitled "On Deepening Insolvency and Wrongful Trading" by Look Chan Ho [2005] JIBLR 426. This article discussed the "deepening insolvency" theory as a

basis for finding liability where a defendant's conduct either fraudulently or even negligently prolongs the life of a company thereby increasing the corporation's debt and exposure to creditors. The author referred to the decision in *Bondi v Citigroup* [2005] WL 975856, at *21 (NJ Super L 2005) where it was stated that:

> the contours of the tort [of deepening insolvency] appear to involve the *wrongful* prolongation of a business entity's life when it should otherwise be declared insolvent, resulting in damage caused by an unwarranted increase in debt.

[99] The author added in a footnote that "to an English lawyer, this sounds like wrongful trading under s 214 of the Insolvency Act 1986". In any case, the New Jersey Supreme Court concluded in *Bondi* that "There does not appear to be any reported authority … that validates deepening insolvency as an independent tort".

[100] In elaboration of the concept under discussion, Chan Ho referred at 429 to the rationale for a tort of deepening insolvency as follows:

> The deepening insolvency theory is premised on the recognition that the incurrence of further debt by an already terminally insolvent entity constitutes harm to the entity, although ultimately the loss would be passed on to the creditor. In other words, making an already insolvent corporation more insolvent through increased exposure to creditor liability is causing injury to the corporation. This is because although the increased debt exposure does not necessarily diminish the value of the corporation's existing assets, the incurrence of further (unsatisfiable) obligation is nevertheless harmful to the corporation.

[101] Apart from referring to the above article, Mr Black cited no other authority, particularly no New Zealand or Australian authority in support of such a tort. I am not prepared to conclude that at the present time such a tort is part of New Zealand law. Even had I been prepared to do so, the facts in this case simply do not provide the plaintiff with any foundation upon which to argue in favour of liability. I do not need to repeat the factual findings regarding deepening insolvency set out at [51]–[52] above.

Connivance – creditor preference regime

[102] Mr Black submitted that Westpac participated in, and was an accessory to, an ongoing creditor preference regime from September 2003, when Seamart first

became insolvent. This submission centred on an allegation that Westpac actively supported and participated in a scheme whereby certain creditors were paid to the prejudice and disadvantage of the general body of creditors in an ongoing insolvency. Irrespective of any prejudice caused by the conduct to Mrs Krtolica, Mr Black submitted that such conduct released her from her guarantee. It is necessary first to consider the factual context for this allegation.

Factual context

[103] The AMG at Westpac required regular reporting of financial information from Seamart. This was not abnormal, as the scope of the AMG's task was to monitor Seamart's position (and therefore Westpac's exposure) in order to enable executives to make informed decisions regarding the continuation or otherwise of the facilities. The state of the amounts owed to creditors heavily affected the extent of the overdraft. The provision by Seamart staff of creditor lists, such as they were, comprised a standard part of the reporting arrangement. Creditor lists were essential to working out the cashflow forecasts. As far as submitting all budgets to Westpac went, Mr Hawkes' evidence was not that he needed to approve them, but rather that he needed to them to monitor Seamart's financial position. In his words (at paragraph 123 of his statement of evidence), which I accept:

> The requirements of Seamart by Westpac extended only to Seamart reporting to the Bank so that the Bank was kept fully informed. At no time was Seamart required to seek prior approval from Westpac in any or all of the decisions that were made in regard to the day to day running of its business. Nor did Westpac direct Mr Krtolica or Seamart's management or staff as to how they were to carry on that business.

[104] Mr Lange's evidence was that there were discussions with Westpac executives after presenting creditor schedules listing which of the creditors were to be paid or not. Mr Lange stated in evidence that this happened at least three or four times a week. He claimed that Mr Hawkes preferred the payment of the main fish suppliers over other creditors as he considered them fundamental to the business continuing. Even where there was a decision made between Mr Lange and Mr Hawkes to pay a particular creditor, Mr Lange's evidence was that on occasion Westpac would even dishonour those payments of its own choice.

[105] This was in direct conflict with Mr Hawkes' evidence. In terms of dishonouring payments made by Seamart to creditors, Mr Hawkes accepted that he personally was responsible for deciding whether to honour or dishonour the payments made by Seamart that caused Seamart to exceed its overdraft limit. He gave evidence (which I accept) that there was no preference or discrimination between any of the creditors, as Westpac simply dishonoured those payments made outside the limit of the overdraft. His explanation (which I also accept) of the regularity with which this occurred was the poor account management by Seamart. Mr Lange would often authorise payments to be made in anticipation of monies coming into the account from debtors, rather than waiting until the money cleared. There are various references to poor account management by Seamart in the CAS documentation – such as on 25 February 2005 - when it was noted that:

> Payments from Progressive continue to be slow, but situation is not helped by Seamart's inability to invoice for reimbursements of costs (e.g. wages) in a timely matter. Seamart are blaming problems on lack of office staff.

[106] Another example is provided in the PLRM 31 December 2003 which noted that part of the reason for the transfer to the AMG was poor management and poor systems at Seamart. Mr Black did not seriously seek to challenge such references. Lack of management focus at Seamart also seems to have been exacerbated by Mr Krtolica's absences overseas.

[107] Mr Hawkes strongly refuted the claim that he decided with Mr Lange which creditors were to be paid prior to the payments being made. He stated that Westpac was not involved in payment negotiations with creditors and that Seamart retained complete discretion in that regard. In respect of the specific allegation that Westpac preferred Seamart to pay the major fish suppliers, Mr Hawkes' evidence was that it was Seamart's practice to pay those creditors first, fish distribution being the backbone of the business. He accepted that he understood the practice was to give priority to those creditors, but maintained under cross-examination that that practice was Seamart's alone. The only basis on which Westpac discriminated in terms of dishonouring payments was for Seamart staff wages. I found Mr Hawkes to be a careful and reliable witness. Where his evidence differed from that of Mr Lange, I prefer and accept the evidence of Mr Hawkes.

[108] In this context, the email correspondence between Ms Amy An, Mr Lange's assistant, and Ms Cecilia Banuelos, Mr Hawkes' assistant, is instructive. It appears that, when Seamart had made payments over and above the overdraft limit, Ms Banuelos would contact Ms An to let her know that the overdraft had been exceeded. In so doing, she was diligently endeavouring to secure compliance by Seamart with its overdraft limits. In response, Ms An (often on Mr Lange's advice) would request that certain creditors be paid. As an example, on 16 September 2004, Ms Banuelos informed Ms An by email that the overdraft was over the limit by $115,000. By reply email, Ms An responded:

> Ok can we just pay
>
> Fish payment - $18,731
>
> E&B Management $15000
>
> Simnovich [sic] $15000
>
> and the rest of them can be dishonoured.

[109] The initiative in this and in other correspondence was coming, as one would expect, from the staff at Seamart. As the customer, Seamart was required to comply with the overdraft limits stipulated by Westpac. It was the commercial decisions of Seamart executives in terms of purchasing stock, incurring debts, running the business and dealing with creditors on a day to day basis which determined its financial performance. I am satisfied from the evidence that Westpac executives, and Mr Hawkes in particular, played no part in these aspects of Seamart's business.

Legal principles

[110] The basis of a claim of connivance is that a party has, by its conduct, prevented things that should have been done from being done, connived at their omission, or enabled the person to do what he ought not to have done, or leave undone what he ought to have done: *MacTaggart v Watson* (1835) 6 ER 1534 at 1540-1541 (CA). This connivance must be more than passive acceptance of the conduct of the principal debtor, as was outlined by Lord Kingsdown in *Black v Ottoman Bank* (1862) 15 ER 573 at 577 (PC).

[111] The Court of Appeal canvassed the history of connivance in *Westpac Securities Ltd v Dickie*, referring with approval at 663-664 to the judgment of Goff LJ in *Bank of India v Trans Continental Commodity Merchants Ltd* [1983] 2 Lloyd's Rep 298 at 301-302:

> But as a matter of principle I cannot accept Mr Murray's submission that a surety is discharged if a creditor acts towards the principal debtor in a manner which is irregular and prejudicial to the interests of the surety. Leaving aside what may be the special case of fidelity guarantees, I consider the true principle to be that while a surety is discharged if the creditor acts in bad faith towards him or is guilty of concealment amounting to misrepresentation or causes or connives at the default by the principal debtor in respect of which the guarantee is given or varies the terms of the contract between him and the principal debtor in a way which could prejudice the interests of the surety, other conduct on the part of the creditor, not having these features, even if irregular, and even if prejudicial to the interests of the surety in a general sense, does not discharge the surety.

[112] In *Westpac Securities Ltd v Dickie*, the appellant lent money to a company who advertised its association with the bank in its prospectus. It used the prospectus in selling subscriptions, for which each purchaser had to sign an individual guarantee. It was argued for the respondent that prospective purchasers would take assurance from the fact outlined in the prospectus that a reputable financial institution was associated with the project; and would be entitled to expect that the bank would exercise the degree of care and prudence that such an institution normally exercises in safeguarding its own interests. On that basis, the submission was put to the Court that, if a lender abandoned prudence and lent recklessly, knowing that there were serious questions as to a borrower's insolvency, then that would be irregular conduct such as to discharge the guarantor. The Court found, at 665, that it could not accept that submission:

> There is no basis for suggesting bad faith in this case, nor for suggesting connivance at the default, which of course was in the failure to repay, not in the receipt of the funds two years earlier. The defence could succeed in this case only if there are grounds for avoiding a guarantee other than those so clearly stated in the cases. Whether there be any such grounds, it is clear from the [*China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536] case that negligence towards the guarantor is not one. Still less can a failure by the creditor to be prudent for its own sake. And that in the end is all that has been able to be alleged against this creditor.

[113] There is a high threshold in proving connivance. Negligence alone is not enough. While Mr Black relied on *Black v Ottoman Bank* as authority for the

proposition that some negligence can amount to connivance, *Westpac v Dickie* (relying on *China and South Sea Bank*) held that the position in New Zealand is that negligence alone is not sufficient to amount to connivance.

Submissions of counsel

[114] Mr Black submitted that there was a creditor preference regime assisted or run by Westpac executives in concert with Seamart and that this was a proper basis for the claim of connivance.

[115] In reply, Mr Gollin submitted that the circumstances demonstrated a real intention on Westpac's part to help Seamart to trade through its problems, which was inconsistent with conniving to bring about a default on Seamart's part. Similarly, given that Mrs Krtolica's guarantee was capped, there could be no prejudice to Mrs Krtolica from any actions on the part of Westpac.

[116] Further, Mr Gollin submitted that given that Mrs Krtolica was a principal obligor, the equitable rights otherwise available to guarantors were denied her (as discussed above at [93]). As connivance and any applicable remedy were derived from equitable principles surrounding the relationship between guarantor and creditor, Mrs Krtolica could not rely on connivance.

Discussion

[117] The outcome of this claim is to be determined by the factual findings surrounding the alleged deepening insolvency and alleged creditor preference regime which, in this context, are somewhat interlinked. As to the first point, I have concluded on the evidence that Westpac, through the intervention of AMG, carefully monitored the financial position at Seamart after August 2003. It had a strong commercial incentive to do so, given its large exposure to Seamart. In addition to such oversight, it was requested at regular intervals between September 2003 and March 2006 by Seamart to make further advances. When such requests were made, these were thoroughly analysed and the outcomes are set out in the CAS, PLRM and EMR reports, examples of which are referred to at [34] to [52] above. I have found

that the resultant lending did not involve Westpac participating in a deepening insolvency.

[118] As to the second point, Mrs Krtolica claims that Westpac actively supported and participated in a scheme which saw certain creditors being paid to the prejudice and disadvantage of the general body of creditors. Mr Black has pointed to the increased exposure of Seamart to the IRD during the period in which Seamart continued to trade while insolvent. He contended that Westpac selectively dishonoured Mrs Krtolica's guarantee fee as evidence that Westpac had knowledge of and supported a creditor preference regime.

[119] However, I have concluded that the claims based on Westpac's alleged participation in a creditor preference regime cannot succeed. There is no need for me to repeat the factual findings at [103] – [109]. I agree with Mr Gollin's submission that a debtor is entitled to pay in preference whichever debts it chooses, provided that there is not an alienation with intent to defraud creditors: see *Re Sarflax Ltd* [1979] 1 Ch 592. There, Oliver J held at 600-602 that, where a debtor knew or had good grounds to suspect that it would not have sufficient assets to pay all its creditors in full, the mere preference of one creditor over another did not amount to an intention to defraud within the meaning of s 332(1) of the Companies Act 1948 (UK). The equivalent of this section is s 60 of the Property Law Act 1952. Section 60 provides that every alienation of property with intent to defraud creditors shall be voidable at the instance of the person thereby prejudiced. Thus, the section is concerned with setting aside certain transactions, rather than imposing liability on a third party for allegedly participating in or assisting a creditor preference regime. Interestingly, s 60 was not pleaded by Mrs Krtolica. Neither did her counsel seek to produce evidence at the trial that she had been prejudiced so as to give her standing to make such a claim.

[120] Mr Black cited various authorities which he relied upon to support the allegations regarding participation in a creditor preference regime. These authorities included *Re Bank of Credit & Commerce International SA (In Liq) [No 15]; Morris & Ors v Bank of India* [2004] 2 BCLC 279. He also cited *McKewan v Sanderson* [1875] LR 20 Eq 65; *Swan v Bank of Scotland* [1836] 10 Bligh (NS) 672 and

Coleman v Waller (1829) 3 W & J 212. I have considered these authorities and find that they are distinguishable from the present case in a number of respects.

[121] The greatest difficulty for Mrs Krtolica is that the evidence does not support the contention that Westpac was participating in, or supporting, an ongoing creditor preference regime being perpetrated by Seamart. As already noted, the amount owing by unsecured creditors reduced between September 2003 and March 2006. Other than with reference to the IRD debt, Mrs Krtolica provided no detailed breakdown to allow any analysis of the relative positions of individual creditors of Seamart. Moreover, the mere payment of one creditor before another by a company unable to pay all its creditors in full is not, without more, actionable: see *Re Sarflax Ltd.*

[122] So far as Westpac's position is concerned, Mr Hawkes was informed on a number of occasions by Seamart executives that generally creditors were supportive of Seamart and were content to receive payment under various types of payment arrangements. I accept Mr Hawkes' evidence on this aspect. Indeed, had the creditors not been supportive and willing to accept payment arrangements proposed by Seamart executives, one would have anticipated that Seamart would have been put into liquidation as a result of creditor action.

[123] Finally, with respect to the IRD, Westpac understood that Seamart had negotiated a payment arrangement in late 2004 and was making payments pursuant to that arrangement. As at February 2005, Westpac was informed by Seamart that the IRD debt had reduced from $800,000 in September 2004 to $250,000. This gave further credence to Westpac's belief that Seamart was adhering to the repayment arrangement. The first Mr Hawkes knew that the IRD debt had increased to around $1 million was at the end of June 2005. This is confirmed in an email which Mr Hawkes sent on 15 July 2005 in which he referred to "the financial position [of Seamart] now disclosed to us (re the IRD arrears and bad debts disclosure)", which he commented had changed or deteriorated from the financial position Westpac was aware of when discussion regarding Mrs Krtolica's guarantee began one month beforehand. Later, Mr Hawkes encouraged Seamart to enter into a new repayment

arrangement with the IRD and to be realistic in terms of its projections as to what it could afford to service. This was sage advice.

[124] For the above reasons, I conclude that Mrs Krtolica had no basis for alleging that there was in fact a creditor preference regime or that this was participated in, or supported by, Westpac. The claims of connivance by Westpac in that scheme must therefore fail.

Discharge of the guarantee – disclosure obligations

[125] There were several bases on which Mr Black submitted the guarantee should be discharged, including an alleged breach by Westpac of its disclosure obligations, oppression by Westpac and alleged breaches of the FTA.

Legal principles

[126] To set the opposing contentions on disclosure in context, it is clear that creditors have specific duties of disclosure to the guarantor under the CCCFA. In summary, these are contained in ss 24 and 25 of the CCCFA, and require initial disclosure of a copy of all of the terms of the guarantee and disclosure of certain key information (as outlined in Schedule 1 of the CCCFA). The creditor must also disclose certain information where the guarantor requests it. It is an offence to breach these sections of the CCCFA, as outlined in s 103, punishable by a fine not exceeding $30,000.

[127] At common law, there is no complete duty of disclosure by a creditor to a guarantor. In *Westpac Banking Corporation v McCreanor* [1990] 1 NZLR 580 at 582 (HC), Hardie Boys J outlined that a creditor only has to make disclosure where something has occurred between the creditor and principal debtor that the guarantor could not be expected to know. He cited a passage from *Hamilton v Watson* (1845) 12 Cl & Fin 109 at 199 (HL), where Lord Campbell stated:

> …unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure; and I should think that this might

> be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires.

[128] Tipping J cited this same passage in *Shivas v Bank of New Zealand* [1990] 2 NZLR 327 at 363 (HC). He distilled the proposition:

> Put more simply the proposition is that a bank as creditor is bound to disclose to the intending surety only something which has taken place between the bank and its customer which would not normally be expected.

[129] Such *dicta* emphasise that a disclosure only has to be made to an *intending* surety. This appears to exclude any continuing duty of disclosure. In *Westpac v Dickie* [1991] 1 NZLR 657 at 662, the Court of Appeal held that the effect of a failure to disclose material information can have serious consequences in certain circumstances:

> A creditor's failure to disclose to a guarantor a material fact known to him will vitiate the guarantee if the non-disclosure amounts to a misrepresentation.

Submissions of counsel

[130] Mr Black submitted that there was an ongoing obligation on Westpac to disclose "unusual factors" to the guarantor. This obligation was an illustration of equity intervening to prevent one party in a transaction obtaining an unfair advantage over another. By extension, he submitted that in principle there should be an obligation to disclose where there is a variation which affects the guarantee. He cited *Toronto Dominion Bank v Rooke* (1983) 3 DLR (4^{th}) 714 (BCCA) as authority for this proposition of a continuing duty of disclosure.

[131] Mr Gollin submitted that there was no such duty on Westpac to disclose the further advances to Mrs Krtolica. The only duty is to disclose unusual features prior to the guarantee having been entered into. Here, there were no unusual features at

the time the guarantee was entered into. The CCCFA, or its predecessor, the CCA, did not impose any continuing duty of disclosure either, as the guarantee was neither a controlled credit contract nor a consumer credit contract within the meaning of those statutes. Further, Mr Gollin referred to cl 12 of the guarantee (see [61]), which specifically stated that it was the guarantor's responsibility to find out any information concerning Seamart's affairs, finances or transactions with Westpac from Seamart itself.

[132] Mr Gollin acknowledged that a guarantee may be discharged where the principal obligation is varied, but he sought to distinguish that duty from any continuing duty of disclosure in respect of variation generally. He referred to *Lloyds TSB Bank Plc v Shorney* [2002] 1 FLR 81 (CA), where several increases in the principal obligation were made without disclosure to the guarantor, who had granted a mortgage in respect of a finite debt. While the guarantee purported to exclude the guarantor's equitable rights, the creditor was not entitled to put the guarantor in a position in respect of the debtor that she had not reasonably anticipated.

[133] The present case, in Mr Gollin's submission, was distinguishable from *Lloyds TSB Bank Plc v Shorney* because the guarantee was granted in respect of a term loan and a running account rather than a finite debt. The guarantee expressly anticipated that further facility advances might occur. Specifically, cl 11 stated that Westpac did not need Mrs Krtolica's permission to enter new arrangements or alter the arrangements with Seamart.

Discussion

[134] I agree with Mr Gollin's submissions regarding the statutory obligations on Westpac. The plaintiff has not established that there were any breaches by Westpac in terms of its statutory disclosure requirements at the time the guarantee was entered into in July 2002. Moreover, Mrs Krtolica has not shown that Westpac breached any obligation at that time of the nature described by Lord Campbell in *Hamilton v Watson*, namely, something which has taken place between the bank and its customer which would not normally be expected. The fact is that there was nothing of this type which had occurred between Westpac and Seamart. At the time Mrs

Krtolica entered into her guarantee, there was no prior relationship between Westpac and Seamart because Seamart was a new customer. Mrs Krtolica had the benefit of legal and accounting advice. Seamart's credit risk at the time was, in the light of its then recent financial performance, in no sense other than normal.

[135] Clause 12 of the guarantee required Westpac to make disclosure of certain types of subsequent dealings. These relate, for example, to any "new controlled credit contract" to which the guarantee applied. It was not seriously contended by Mrs Krtolica that any dealing of this type had been transacted between the party and none has emerged from the evidence.

[136] Other than such statutory based obligations, it is important to note that cl 12 of the guarantee provided:

> …
>
> Apart from the above, WestpacTrust does not have to do anything in relation to, or tell you of anything concerning, the Customer's:
> - affairs;
> - finances; *or*
> - transactions with WestpacTrust.
>
> It is your responsibility to find these things out from the Customer.
> The above applies both before and after you sign this document.

[137] But the question remains whether Westpac had any ongoing duty of disclosure. Mr Gollin accepted that, of the authorities cited by Mr Black, only *Toronto Dominion Bank v Rooke* supported the submission that there was an equitable duty of disclosure extending beyond the time at which the guarantee was entered into.

[138] *Toronto Dominion Bank v Rooke* has been cited and relied upon in subsequent Canadian case law: see for example *Collum v Bank of Montreal* (2004) 242 DLR (4^{th}) 510 (BCCA).

[139] The position is similar in the United States: see for example, *Georgia Pacific Corp v Levitz* 716 P 2d 1057 (1986). But, while these cases have been mentioned in O'Donovan and Phillips *The Modern Contract of Guarantee* (Aus 3 ed 1996) at 126 and in the English edition of O'Donovan and Phillips at 4-15 – 4-16, they have not

yet been adopted in any Australian or English case law. In fact, the English edition suggests that any continuing duty to disclose unusual circumstances might create several issues (at 4-15):

> If *Toronto Dominion Bank v Rooke* were correct, it would mean that the creditor could not rely on a clause in the guarantee precluding the guarantor's discharge on the ground of variation of the principal contract, unless the creditor had disclosed all unusual facts at the date of a variation. Furthermore, if the continuing duty extends beyond cases of variation of the principal, the creditor would need to assess whether particular facts were unusual at all stages after the execution of the guarantee, for example, when granting further advances pursuant to a loan facility agreement.

[140] This would plainly be an onerous obligation. The concern expressed by Lord Campbell in *Hamilton v Watson*, with whom I respectfully agree, was that bankers would never obtain sureties if disclosure obligations were pitched too high. It is significant that Mr Black cited no New Zealand case that has applied *Toronto Dominion Bank v Rooke*. My own research has revealed no such case. On the current state of the authorities I do not consider that there is a continuing duty of disclosure.

[141] This is not to say that, should there be some material (uncontemplated) alteration to the principal obligation, there may not be grounds for discharge of the guarantee. However, in the present case the possibility of alterations to the wholesale term loan facility was contemplated by the parties. This was expressly provided for in cl 11 of the guarantee referred to at [60]. Moreover, despite the effect of cl 11, Mrs Krtolica's consent was in fact obtained when several of the further advances were made.

[142] Accordingly, Mrs Krtolica's claims based on any alleged failures by Westpac to disclose to her the further advances to Seamart cannot succeed.

Oppression

[143] Oppression was pleaded as part of the first cause of action under a sub-heading to that cause of action. From such pleadings, it is not easy to discern the gravamen of Mrs Krtolica's claims. Paragraph 28(u) of the amended statement of

claim pleaded that Westpac acted oppressively pursuant to Part 5 of the CCCFA or the CCA. Oppression was not listed as having been retained as a cause of action in the further particulars of 1 October 2007. However, that document continued to have reference to the CCCFA under the guise of unconscionability. In the closing submissions for Mrs Krtolica, Mr Black made brief mention of oppression, this time as being related to unconscionability. In essence, Mr Black submitted that Westpac acted in an oppressive and unconscionable manner by its conduct in "perpetuating an ongoing insolvency and where it acted improperly in supporting and participating in the creditor preference regime". Factually therefore, Westpac's conduct post-August 2003 and its alleged involvement in the creditor preference regime must determine these allegations.

[144] Mr Gollin correctly submitted that Mrs Krtolica had failed to specify exactly what features of the conduct were oppressive. He further submitted that there was in any event no factual foundation for a claim of oppression or unconscionability.

Legal principles

[145] The parties seemed to agree that the CCA applied in respect of the guarantee rather than the CCCFA, as it was signed prior to the CCCFA coming into force and Westpac had not elected otherwise, as it was entitled to do under s 142 of the CCCFA. However, the definition of oppressive behaviour is the same under either enactment. In s 9 of the CCA, oppressive is defined as:

> …means oppressive, harsh, unjustly burdensome, unconscionable, or in contravention of reasonable standards of commercial practice.

[146] Whether a credit contract is oppressive depends on several matters, as noted in *Didsbury v Zion Farms Ltd* (1989) 1 NZ ConvC 190,229 at 190,237 (HC):

- The relative status of the parties
- The nature and extent of the default
- The way in which the default arose
- The implications for the borrower
- The attitude of the lender

- The existence of a collateral purpose
- The general appearance of the contract throughout.

[147] In *Shotter v Westpac Banking Corporation* [1988] 2 NZLR 316 at 326 (HC), Wylie J held that oppressive and the other words contained in the definition must mean something more than "unfair". It was also accepted in *Greenbank New Zealand Ltd v Haas* [2000] 3 NZLR 341 (CA) that where the conduct of a financier falls below the reasonable standards of commercial practice, its conduct may be deemed oppressive. Tipping J stated at [24]:

> 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. In a sense that phrase gives the underlying commercial rationale for the earlier words or phrases. Something which is, for example, unjustly burdensome must necessarily be regarded as being in contravention of reasonable standards of commercial practice; similarly with something harsh. To determine whether a contract or term is oppressive within any of the words or phrases in the definition, it is necessary to have some basis of comparison. In the context the comparator can only be what would be expected or acceptable in terms of reasonable standards of commercial practice. Something which is in accordance with such reasonable standards could hardly be held to be oppressive. Conversely something which is not in accordance with (i.e. in contravention of) such standards is, by definition, oppressive. It is therefore important, unless the oppressive aspect is beyond rational dispute, for the Court to be properly informed how the contract or term measures up against reasonable standards of commercial practice.

Discussion

[148] The conduct relied upon by Mrs Krtolica to found the claim of oppression has already been determined to be within the bounds of normal or reasonable standards of commercial practice where a company has become insolvent. The alleged creditor preference regime was no more than careful monitoring and measured lending assistance provided by Westpac to Seamart in order to protect its position as a major creditor. Moreover, so far as the alleged perpetuation of an ongoing insolvency is concerned, I have already determined that there is nothing in Mrs Krtolica's allegations.

[149] To the extent that the allegation of oppression purports to challenge the conduct of Westpac at the time the guarantee was provided, I have concluded that

there is no factual basis for oppression. The guarantee was in standard form. It has been widely used by Westpac and its terms and conditions are consistent with reasonable standards of banking practice. Further, the correspondence between the parties, through Mrs Krtolica's solicitor, demonstrated that this was a normal commercial transaction. Mrs Krtolica, again through her solicitor, negotiated a guarantee fee, illustrating the arm's length nature of the transaction. Further, Mrs Krtolica is an experienced businesswoman who had the same financial information regarding Seamart as was available to Westpac. Her legal and accounting advisors were independent professionals who could have advised her to accept or reject the proposed guarantee. Moreover, following the negotiations various express terms were inserted for her benefit at the end of the standard form guarantee.

[150] In the light of the above factors, I conclude that there was nothing inherently harsh or oppressive about Westpac's conduct. This was a standard bank guarantee in understandable and clear terms. With regard to the terms and conditions themselves, there was nothing inherently harsh or oppressive about them. Finally, I find that there was nothing regarding Westpac's management of Seamart's account (as the customer) which was in any way in contravention of the test of reasonable standards of commercial practice referred to by Tipping J in *Greenbank New Zealand Ltd*.

[151] Accordingly, for the above reasons, Mrs Krtolica's claims based on oppression cannot succeed.

Fair Trading Act claims

[152] The amended statement of claim pleaded that Westpac had made representations to Mrs Krtolica that were misleading and or deceptive within the meaning of the FTA. The alleged misrepresentations were outlined at paragraph 58 as follows:

> (a) The terms and extent of the banking facilities it would provide to Seamart and which were supported by the Plaintiff's guarantee;

(b) By the Defendant failing to disclose relevant and material information concerning Seamart's financial exposure and those events which would materially affect the Plaintiff's guarantee liability;

…

[153] The third alleged misrepresentation referred to in the amended statement of claim related to the scope of the guarantee, the deepening position of insolvency and the creditor preference regime. In the closing submissions, specific allegations of misrepresentation were made, namely, that Westpac omitted to disclose:

a) The true financial position of Seamart (as at 19 June 2003) when it sought Mrs Krtolica's approval of the overdraft limit extension;

b) That Seamart's quasi equity ratio was below 20% when the plaintiff agreed to the overdraft limits, when the 23 June 2003 letter required the company to maintain a quasi equity ratio of at least 30%;

c) That the overdraft facility did not reduce as per the 23 June 2003 letter, but actually increased in excess of agreed limits;

d) The incorporation of Seamart Processing Ltd into the lending under Mrs Krtolica's guarantee; and

e) That all of the defendant's advances to Seamart were captured by Mrs Krtolica's guarantee.

[154] Mr Gollin submitted that any failures by Westpac to disclose cannot have been misleading in law. Neither did they in fact mislead Mrs Krtolica. Specifically, the letter of 23 June 2003 was said to provide an accurate, factual representation of the position with respect to the overdraft at that time. Westpac was then unaware of Seamart's true financial position and it did not know that the quasi equity ratio had dropped below 20%. Further, there was evidence that Mrs Krtolica and her solicitor had met with Westpac on a number of occasions and been provided with correct information. On at least one occasion when she was present, Seamart sought an increase of $700,000 in the overdraft.

[155] Westpac submitted that Mrs Krtolica must have known of Seamart Processing Ltd's existence, given that she signed the facilities letter of 26 September 2002, joining that company in the general security agreement and in the all obligations guarantee given by Seamart. She signed the deeds of variation relating to that facilities letter in January 2003, which referred to Seamart Processing Ltd. Further, she signed the facilities letter of 23 June 2003, which included that company in the group set off agreement. Finally, there was no misleading omission in failing to inform her of other increases in the overdraft facility, because there was no obligation on Westpac to do so. This is discussed earlier in this judgment at [136]-[141].

[156] Mr Gollin also submitted that there was no proof of loss due to these alleged post-contractual misrepresentations. From July 2002, when the guarantee was signed, the lending to Seamart was already in excess of the cap on Mrs Krtolica's guarantee of $1.815 million. That position was the status quo, irrespective of any further lending or advances.

Legal principles

[157] Section 9 of the FTA provides:

> 9 Misleading and deceptive conduct generally
>
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[158] This is an objective test of fact, having regard to the circumstances in which the conduct occurred and the person or persons likely to be affected by it. There must further be proof of a causal nexus between the misleading conduct and the loss or damage suffered: *Savill v NZI Finance Ltd* [1990] 3 NZLR 135 at 143 (CA). Tipping J outlined the approach to determining whether there was a breach of s 9 in *AMP Finance NZ Ltd v Heaven* (1997) 8 TCLR 144 at 152 (CA). In summary, this involves consideration of three questions, namely, whether:

a) the conduct was capable of being misleading;

b) the plaintiff was in fact misled by that conduct; and

c) it was reasonable for the plaintiff to have been misled by that conduct.

[159] The alleged misrepresentation is by silence – a failure to disclose information. To this end, it has been established that for the conduct to amount to misrepresentation, there must first be a legal obligation to divulge it. In *Mills v United Building Society* [1988] 2 NZLR 392 at 406, Sinclair J in the High Court noted:

> It is also insufficient to establish a breach of our s 9 to prove that the conduct complained of may result in confusion. Normally it will only amount to conduct which is misleading or deceptive if it conveys, in all the circumstances of the case, a misrepresentation. Mere silence will depend upon the circumstances as to whether that silence will constitute conduct which is misleading or deceptive. In [*Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) 68 ALR 77], Bowen CJ at p 84 adopted a statement from a case back in 1878 namely *Ward v Hobbs* (1878) 4 App Cas 13:
>
> > The general rule, both of law and equity, in respect of concealment, is that mere silence with regard to a material fact, which there is no legal obligation to divulge, will not avoid a contract…

Sinclair J's decision was later upheld by the Court of Appeal.

Discussion

[160] Addressing the allegations as finally distilled by Mr Black, I do not consider that Mrs Krtolica has established that the letter of 23 June 2003 was misleading or deceptive. I find that it contained an accurate and factual statement of the overdraft facility limits and the way in which Westpac expected that the overdraft facility would decrease. Such information was accurate at the time it was sent to Mrs Krtolica. Moreover, at that time Westpac was not aware of Seamart's true financial position or the fact that the quasi equity ratio was below 20%. Such information was not made known to Westpac until August 2003 following release of material compiled by Lock and Partners, Seamart's accountants.

[161] Considering the position from Mrs Krtolica's point of view, I am not satisfied that she was in fact misled by any information contained in the 23 June 2003 letter, nor that it was reasonable for her to have been misled in any way by its contents. I accept the evidence of Mr Schalk Pienaar, a senior manager in Westpac's Corporate Business Banking team, that he met with Seamart personnel including Mr Krtolica and also with Mrs Krtolica in late July 2003 and in August 2003. These meetings were to discuss the fact that Seamart's financial position was causing concern for Westpac. Further, a summary of the liabilities that Mrs Krtolica was guaranteeing was provided to her solicitor. She acknowledged in cross-examination that such information had been provided. Information provided to Mrs Krtolica through her solicitor in early August 2003 recorded that the reduction in overdraft due as at 31 July 2003 had not occurred. Mrs Krtolica acknowledged in evidence that she had received this information. At the time Mrs Krtolica did not raise any concern or comment to Westpac that the overdraft facility had not decreased.

[162] Moreover, Mrs Krtolica acknowledged attending a meeting on 5 August 2003 with her solicitor, Seamart's solicitor Mr Holmes and Seamart's accountant Mr Massey. That gave her the opportunity to request information direct from Seamart, its solicitor and its accountant regarding the financial position, including the level of the overdraft facility.

[163] As already noted, Mrs Krtolica was aware that the Seamart account had been referred to Westpac's AMG in September 2003. Mr Hawkes met with Mrs Krtolica on 10 September 2003. Mr Hawkes' evidence, which I accept, made it clear to Mrs Krtolica that Westpac had concerns about the then financial position and that receivership was a likely outcome. Significantly, at the meeting with Mr Hawkes an increase in the overdraft facility of $700,000 was requested by Seamart in Mrs Krtolica's presence. She did not object to this course. The information discussed at such a meeting meant that Mrs Krtolica was well aware of the seriousness of Seamart's financial position. Her presence at the meeting is also inconsistent with the claim that she believed that the overdraft limit had decreased by this date.

[164] With respect to the allegation that Westpac did not disclose that Seamart Processing Ltd was incorporated into the lending by Westpac to the Seamart group, I find no evidential basis to support this. In fact, Seamart Processing Ltd was referred to in the facilities letter of 26 September 2002 that Mrs Krtolica signed. She also signed deeds of variation of securities in January 2002 having had the benefit of legal advice. Seamart Processing Ltd was listed with other Seamart companies as those entities to which Westpac had provided financial accommodation and might do so in the future. Further, Mrs Krtolica signed a facilities letter dated 23 June 2003 referring to Seamart Processing Ltd, along with other Seamart companies. (See also the findings in respect of Seamart Processing Ltd's inclusion in the guarantee at [68]).

[165] Finally, I find that there was no misleading or deceptive conduct by Westpac in relation to any failure to advise Mrs Krtolica of increases in Seamart's overdraft limit from September 2003. There was no legal duty to provide such disclosure. Moreover, the terms of the guarantee made it clear that it did not have to do so.

[166] Even if I were wrong and there were misrepresentations by Westpac, I find that Mrs Krtolica has suffered no loss arising from them. Her liability under the guarantee was capped at $1.815 million. The original facilities granted in July 2002 remained outstanding and were already well in excess of the capped figure.

[167] For the reasons set out above, I conclude that Mrs Krtolica's claims under the FTA cannot succeed.

Waiver, acquiescence and estoppel

[168] The next question for determination is whether Westpac is, by its conduct or actions, prevented under the principles of waiver, acquiescence and estoppel from relying on Seamart's breaches of its loan covenants. Mrs Krtolica contended that, because Westpac continued to provide facilities to Seamart, largely by way of overdraft, even though the group was in breach of its loan covenants and its equity ratios, it should not be able to call in the guarantee in reliance on those breaches.

Factual background

[169] Westpac, through Mr Hawkes, informed Mrs Krtolica in September and October 2003 that it was concerned about the financial position of Seamart as had emerged from the initial PwC report dated 23 September 2003. Such concern was repeated in a letter from Mr Hawkes to Mrs Krtolica dated 13 October 2003. The letter relevantly stated:

> The Bank remains concerned over the financial position of the Seamart group.
>
> They have breached various financial covenants, and as a result, are in default of their loan facilities. The Bank, at this stage, has not taken any enforcement action in respect of those defaults, but continues to reserve its rights in respect of those defaults.
>
> This letter serves as notice to you, as guarantor, that the Bank continues to fully rely on your guarantee as security, and that clause 36 of the guarantee does not currently apply, due to the defaults of Seamart mentioned above.

[170] Also relevant to this claim are the provisions of cl 36 of the guarantee which provide:

> WestpacTrust confirms that:
>
> (i) the principal amount secured by the Guarantee will be reduced on an annual basis by the amount of principal paid and amortised to the Wholesale Term Loan Facility during the preceding 12 month period;
>
> (ii) the principal amount secured by the Guarantee will be reduced to $1,815,000 on the finalisation to WestpacTrust and its solicitors' satisfaction of the lease agreement and supply agreement between Seamart Properties Limited and Progressive Enterprises Limited in respect of property at 5 Autumn Place, Penrose, Auckland (certificate of title 84D/775, North Auckland Registry);
>
> (iii) the Guarantee will be released on the fifth anniversary of the date of the drawdown of the Wholesale Term Loan Facility;
>
> PROVIDED THAT (i), (ii) and (iii) above are conditional upon WestpacTrust being satisfied that Seamart Properties Limited is complying with all financial and other covenants (together "Covenants") under the Wholesale Term Loan Facility Agreement and Security Documentation and that the Borrower will continue to comply with the Covenants. If an Event of Default or Potential Event of Default has occurred (i) (ii) and (iii) above will not apply.
>
> The above provisions in this clause 36 apply notwithstanding the limitation amount inserted on page 1 of this document.

> In this clause 36 (including, where applicable, in these definitions):
>
> "Event of Default" has the same meaning as in the Wholesale Term Loan Facility Agreement;
>
> "Potential Event of Default" has the same meaning as in the Wholesale Term Loan Facility Agreement;
>
> "Security Documentation" means all documents creating or evidencing a security or guarantee in favour of WestpacTrust for the obligations or liabilities from time to time of Seamart Properties Limited, Seamart (Wholesale) Limited or Sea Mart Restaurant Limited.
>
> "Wholesale Term Loan Facility" means the term loan facility of $3,300,000 made available by Westpac under the Wholesale Term Loan Facility Agreement;
>
> "Wholesale Term Loan Facility Agreement" means the loan agreement between Seamart Properties Limited and WestpacTrust under which WestpacTrust has agreed to make a loan facility of 3,300,000 available to Seamart Properties Limited.

Legal principles

[171] Waiver of a contractual condition, as distinct from waiver as a defence, has been defined in *New Zealand Railways Corporation v Fletcher Development and Construction Ltd* (1990) 1 NZ ConvC 190,464 at 190,467 (CA) as occurring:

> …where the party entitled to insist on strict compliance with provisions as to time leads the other party to understand or assume that such provisions will not be insisted upon. This may occur when the party otherwise entitled to insist on adherence to a stipulation as to time does some act inconsistent with his continued insistence on strict compliance.

[172] Burrows, Finn and Todd in *Law of Contract in New Zealand* (3 ed 2007) discusses the essential elements of waiver at 8.3:

> What is essential is that there have been words or conduct indicating that the party who is entitled to insist on the fulfilment of a condition is no longer insisting on such fulfilment. …Any waiver must be adequately communicated to the other party…

[173] Mr Gollin relied on *Connor v Pukerau Store Ltd* [1981] 1 NZLR 384 (CA), which cited the Privy Council decision of *Neylon v Dickens* [1978] 2 NZLR 35 as the leading New Zealand authority on waiver. Cooke J (as he then was) in *Connor* described *Neylon* at 386 as requiring for waiver "clear and unequivocal evidence" of

an "unambiguous representation" by the party alleged to have waived a contractual requirement. This makes it clear that the intention to waive must be made known to the other party.

[174] In Mr Gollin's submission, *Connor* is also authority for the proposition that, in order for waiver to be established, there should be some action in reliance on the representation to the party's detriment (see *Connor* at 387). However, it seems that this may be the case only in situations where a party has waived a right to determine a voidable contract, rather than a promissory condition: see Burrows, Finn and Todd at 8.3.

Submissions of counsel

[175] The parties agreed that there were breaches of the loan covenants by Seamart. Mr Black submitted that, while Seamart was in breach of the loan covenants, Westpac waived its rights in respect of those breaches by continuing to loan money to Seamart. As a result, Westpac cannot rely on those covenant breaches in relation to the guarantee. Essentially, the argument was that the waiver of those rights and acquiescence in respect of Seamart's conduct (the ongoing breaches) prevented Westpac from relying on cl 36 of the guarantee. The result was that any funds paid to Westpac by Seamart from 2004 should have been applied in reduction of the debt that Mrs Krtolica had guaranteed.

[176] Mr Gollin submitted that Westpac made it clear to Mrs Krtolica that, because of the breaches of the covenants, the provisions of cl 36 did not apply. Mr Gollin relied in particular on a letter dated 13 October 2003 from Mr Hawkes to Mrs Krtolica quoted at [168] above. This position continued to apply from October 2003 down to the date of receivership in March 2006.

[177] Mr Gollin submitted that this claim was really a factual question about the operation of cl 36, rather than an issue of waiver or estoppel. In Westpac's submission, some principal was paid and amortised before Seamart defaulted. In any case, after Seamart's initial breach of the covenants, only a further $46,000 in principal was paid in reduction of the debt. Once Seamart became insolvent in July

2003 (committing an event of default within the meaning of the term loan facility agreement), cl 36 was no longer operative.

[178] The second factual issue is whether there was an event of default. There is a definition of event of default in the term loan agreement and in cl 5.1 of the general security agreement provided by Seamart Properties Ltd. Such definition included the insolvency of that company or any related party. It is accepted that each of the Seamart companies was insolvent by August 2003 and this continued until the appointment of receivers.

Discussion

[179] This claim may be dealt with quite shortly. Mrs Krtolica would need to show a representation by Westpac by words and conduct and that such representation was relied upon by her. In fact, as demonstrated by the letter of 13 October 2003 the contrary is the case. I accept that Westpac specifically reserved its position in writing in relation to cl 36 of the guarantee. Therefore, because of the factual aspects already referred to cl 36 was inoperative from August 2003. Even if there had been a representation by Westpac, I am not satisfied that there was any evidence to establish that any such representation had been communicated by Westpac to Mrs Krtolica or relied upon by her.

[180] Accordingly, the plaintiff's claims based on waiver, acquiescence or estoppel cannot succeed.

Shadow directors

[181] The term "director" is defined in s 126 of the Companies Act 1993. For present purposes s 126 relevantly provides:

> 126 Meaning of "director"
>
> (1) In this Act, director, in relation to a company, includes—
>
> (a) A person occupying the position of director of the company by whatever name called; and

(b) For the purposes of sections 131 to 141, 145 to 149, 298, 299, 301, 383, 385, 386A to 386F, and clause 3(4)(b) of Schedule 7,—

(i) A person in accordance with whose directions or instructions a person referred to in paragraph (a) of this subsection may be required or is accustomed to act; and

(ii) A person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act; and

(iii) A person who exercises or who is entitled to exercise or who controls or who is entitled to control the exercise of powers which, apart from the constitution of the company, would fall to be exercised by the board; …

[182] Hence, s 126(1)(b)(i) and (ii) make provision for a form of directorship known as shadow directorship. That is, a person who directs or has the power to direct the actions of the appointed director or directors. At issue in this case is whether it has been established that Westpac, in the position of creditor, can act and has acted as a shadow director of the principal debtor.

[183] There is no direct case law in New Zealand dealing with the concept of shadow directorship. The judgment of Millett J in *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 covers the English approach to determining shadow directorship. The equivalent provision is s 251 of the Insolvency Act 1986 (UK), which provides:

> "Shadow director" in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act…

[184] Millett J went on to say at 183:

> A de facto director, I repeat, is one who claims to act and purports to act as a director, although not validly appointed as such. A shadow director, by contrast, does not claim or purport to be a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. To establish that a defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether de facto or de jure; (2), that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed to so act. What is needed is first, a board of directors claiming and purporting to act as such; and secondly, a pattern of behaviour in which

> the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others.

[185] *Re Hydrodam* was cited in *Fatupaito v Bates* [2001] 3 NZLR 386 (HC), but for the purpose of differentiating between *de facto* and *de jure* directors. It was not alleged in that case that the defendant was acting as a shadow director. Rather, the plaintiff relied on s 126(1)(b)(iii) and s 126(1)(c) to allege that the defendant was a director of the company.

[186] Both counsel emphasised in closing the English decision of *In re PFTZM Ltd* [1995] BCC 280. In that case, a group of bankers and financiers refinanced a company that ran a hotel and country club, taking a 125 year lease of the premises as security and leasing it back to the company for 25 years. When it became clear that the rent could not be paid, it was agreed between the company and financiers that the managing director would stay in place but not draw a salary until the company made a profit. Two of the financiers were also to attend weekly management meetings concerning the trading of the business. This went on for two years until the company went into liquidation. It was alleged that those financiers acted as shadow directors by their heavy involvement during the company's insolvency. However, Judge Paul Baker QC found at 290-291 that:

> In this case the involvement of the applicants here was thrust upon them by the insolvency of the company. They were not accustomed to give directions. The actions they took, as I see it, were simply directed to trying to rescue what they could out of the company using their undoubted rights as secured creditors.

[187] It has been suggested that, depending upon the facts of a particular case, it is possible for a creditor bank to act as a shadow director. This is argued, for example, in Markovic, "Banks and Shadow Directorships: Not an 'Almost Entirely Imaginary' Risk in Australia" Journal of Banking & Finance Law & Practice 9(4) Dec 1998:284-303. Whilst it is undoubtedly possible for liability to be imposed on a bank under s 126(1)(b) of the Companies Act, it will all depend upon the facts of the case.

Submissions of counsel

[188] Mr Black submitted that Westpac, in running the creditor preference regime, was acting as a shadow director of Seamart, thus opening itself to liability under the reckless trading provisions of the Companies Act. Mr Gollin's response was that the day to day contact between Westpac and Seamart was with Mr Lange, who by his own evidence was not a director. There was no evidence of a relationship between Westpac and Mr Krtolica (the sole director) in which Mr Krtolica was accustomed to act in accordance with Westpac's instructions. Mr Krtolica was responsible, in Westpac's submission, for all the strategic and policy aspects of running Seamart: he negotiated the lease and supply agreement with Progressive, dealt with the sale of the Penrose factory and initiated proposals for relocation of the Fanshawe Street operations.

Discussion

[189] It is apparent from the facts as I have found them that Westpac did not take a directive or instructing role in Seamart's business during the period of insolvency. Certainly the AMG was concerned to protect to the best of its ability the significant lending Westpac had made to Seamart, but there was no suggestion that Mr Krtolica, as director, was taking directions or instructions from Westpac. The factual findings negate the suggestion that Westpac executives, and Mr Hawkes in particular, gave Seamart directions or instructions as to which creditors to pay. In the words of Judge Baker QC in *re PTFZM* at 292, Westpac's officers:

> …were not acting as directors of the company; they were acting in defence of their own interests.

[190] For the sake of completeness, I find as a fact that Mr Krtolica was not a person who was required or accustomed to act on the directions or instructions of any executive or employee of Westpac. Given that Mr Krtolica did not give evidence, it was always going to be difficult for Mrs Krtolica to succeed in demonstrating that the shadow director requirements of s 126(1)(b) of the Companies Act had been met. Mrs Krtolica sought to achieve this by means of the evidence of Mr Lange who was general manager of Seamart from September 2003.

But I also find that Mr Lange's evidence was not such as to persuade me that the sole director of Seamart, Mr Krtolica, was required or accustomed to act in accordance with the directions or instructions of Westpac in such a way as to constitute Westpac a director in terms of s 126(1) of the Companies Act.

[191] On this question, I prefer the evidence of Mr Hawkes. He was clear that neither he nor any other Westpac representative gave directions or instructions to Mr Krtolica. Certainly, on the evidence, Mr Krtolica was neither required nor accustomed to act in accordance with any such directions or instructions. I accept Mr Hawkes' evidence in this regard. Accordingly, there is no basis for concluding that Westpac was, or became, a shadow director of Seamart.

[192] Such evidence as there was concerning the actions of Mr Krtolica indicated that he exercised his own independent judgment in all areas of the business. For example, he approached key potential investors including First Eastern Finance. His was the decision to reject the offer of $7 million by Moana Fisheries for the Seamart business. He was the person at Seamart responsible for negotiating the lease and supply agreement with Progressive. His was the responsibility for all strategic and policy decisions.

Reckless trading

[193] Despite my finding that Westpac was not, and did not become, a shadow director of Seamart, I go on to consider whether, had it been so, its actions would have amounted to reckless trading. Section 135 of the Companies Act 1993 provides:

> 135 Reckless trading
>
> A director of a company must not—
>
> (a) Agree to the business of the company being carried on in a manner likely to create a substantial risk of serious loss to the company's creditors; or
>
> (b) Cause or allow the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors.

[194] The leading decision on s 135 is that of *Mason v Lewis* [2006] 3 NZLR 225 (CA). The Court, in a judgment given by Hammond J, outlined at [51] that:

> The essential pillars of the present section are as follows:
>
> - the duty which is imposed by s 135 is one owed by the directors to the company (rather than to any particular creditors);
>
> - the test is an objective one;
>
> - it focuses not on a director's belief but rather on the manner in which a company's business is carried on, and whether that modus operandi creates a substantial risk of serious loss; and
>
> - what is required when the company enters troubled financial waters is what Ross [*Corporate Reconstructions: Strategies for Director's Duties* (1999)] accurately described as a "sober assessment" by the directors, we would add of an ongoing character, a to the company's likely future income and prospects.

Submissions of counsel

[195] Mr Black submitted that, in permitting Seamart to carry on business while insolvent between September 2003 and March 2006, Westpac created a substantial risk to Seamart's creditors. In opposing that contention, Mr Gollin submitted that as at September 2003, Westpac had only two choices: to put Seamart into receivership or to extend the credit facility. In choosing to extend the credit facility, there was no element of agreeing to a course of conduct likely to cause a substantial risk of serious loss to Seamart's creditors. There was potential for Seamart to trade out of its difficulty in the form of the relationship with Progressive and the potential for a valuable lease and supply agreement, increasing the value of the Penrose factory. This was a legitimate business decision.

Discussion

[196] I agree with Mr Gollin's submission on this point. Westpac's decision to extend further credit to Seamart in September 2003 was a practical decision with a sound commercial basis. It cannot reasonably be said to be reckless or to amount to the business of Seamart being carried on in a manner likely to create a substantial risk of serious loss to Seamart or its creditors.

[197] To elaborate on the above findings, Westpac elected to support Seamart's continued trading after September 2003. Such decision was based on a range of factors, including the fact that the building of the Penrose factory was almost completed and the fact that Westpac's understanding was that the retail shops were profitable. The appointment of receivers would have destroyed any ongoing value of Seamart's business, particularly the retail shops. Moreover, Progressive expressed its full support of Seamart and was prepared to enter into the formal supply agreement already referred to. Finally, the Penrose factory would have been sold on an untenanted basis which would have undoubtedly produced a significant loss in the value of the property. Plainly, the ability of Seamart to formalise the lease and the supply agreement with Progressive was dependent upon Seamart continuing to trade.

[198] I find that each of the decisions by Westpac to extend credit to Seamart was based on sound considerations at the time. Such lending was intended to enhance the likelihood that the value of the Penrose factory would be increased and that the overdraft facility would ultimately be repaid. I conclude that the assessments that Westpac made at the relevant times were reasonable and "sober", in terms of *Mason v Lewis*, on an ongoing basis. Objectively, the decisions made by Westpac in extending credit could not be characterised as other than legitimate.

Section 301 Companies Act 1993

[199] Finally, I do not consider that Mrs Krtolica would be entitled to recover for any reckless trading under s 301 of the Companies Act. That section provides:

> 301 Power of Court to require persons to repay money or return property
>
> (1) If, in the course of the liquidation of a company, it appears to the Court that a person who has taken part in the formation or promotion of the company, or a past or present director, manager, administrator, liquidator, or receiver of the company, has misapplied, or retained, or become liable or accountable for, money or property of the company, or been guilty of negligence, default, or breach of duty or trust in relation to the company, the Court may, on the application of the liquidator or a creditor or shareholder,—
>
> (a) Inquire into the conduct of the promoter, director, manager, administrator, liquidator, or receiver; and
>
> (b) Order that person—

> (i) To repay or restore the money or property or any part of it with interest at a rate the Court thinks just; or
> (ii) To contribute such sum to the assets of the company by way of compensation as the Court thinks just; or
>
> (c) Where the application is made by a creditor, order that person to pay or transfer the money or property or any part of it with interest at a rate the Court thinks just to the creditor.
>
> (2) This section has effect even though the conduct may constitute an offence.
>
> (3) An order for payment of money under this section is deemed to be a final judgment within the meaning of section 17(1)(a) of the Insolvency Act 2006.
>
> (4) In making an order under subsection (1) against a past or present director, the Court must, where relevant, take into account any action that person took for the appointment of an administrator to the company under Part 15A.

[200] It is clear that causation, culpability and duration are factors relevant to the exercise of s 301: see *Fatupaito v Bates* at [111]. In assessing compensation under s 301 for a breach of s 135, Miller J said in *Kings Wharf Coldstore Ltd (in rec and in liq) & Ors v Wilson & Ors* HC WN CIV 2001-485-954 1 November 2005 at [113]:

> The obligations of a director to the company are fiduciary in nature, so it is appropriate to assess compensation under section 135 on an equitable basis. That is, the essential task is to compensate whatever real loss or detriment the company may have suffered, subject to equitable discretionary consideration of "conscience, fairness and hardship and other features such as laches and acquiescence": *Chirnside v Fay* [2004] 3 NZLR 637 at [66], [67], citing Somers J in *Day v Mead* [1987] 2 NZLR 443, 462. This approach is consistent with s 301, which allows the Court to order such compensation as it thinks just.

[201] Mr Gollin submitted that, even should there have been a breach, there could be no recovery for Mrs Krtolica on the basis that there was no loss to her and that there was no deterioration in the financial position of Seamart between September 2003 and March 2006. I consider this submission is persuasive. It is clear from my findings at [29] that Mrs Krtolica's guarantee would have been fully called upon as at September 2003 and this position did not change. Further, my findings at [51]-[52] show that Seamart's insolvency did not deepen over that period. In fact, the position of the creditors improved somewhat.

[202] Accordingly, even if Mrs Krtolica had established (contrary to the above findings) that there was a basis for holding that Westpac was a shadow director, and if there had been (again contrary to the findings at [195]-[197]) a basis for finding reckless trading, there would have still been serious hurdles in terms of causation and culpability to overcome. It is therefore unlikely that the discretion set out in s 301 of the Companies Act to inquire into the conduct of Westpac would have resulted in any recovery for Mrs Krtolica.

[203] For the above reasons, Mrs Krtolica's claims based on shadow director liability and ss 135 and 301 of the Companies Act cannot succeed.

Dishonest assistance and knowing receipt

[204] In his closing submissions, Mr Black belatedly contended that liability might be imposed upon Westpac for dishonest assistance and knowing receipt. It seems that the basis for such claims is that Westpac is liable as a constructive trustee. Mr Black did not seek leave to amend his claim pursuant to r 187 of the High Court Rules. Had he done so, leave (which is highly discretionary, particularly at such a late stage) is unlikely to have been granted.

[205] However, in case the matter goes further, it is convenient that certain observations are now made. The first is that Mrs Krtolica's claims were initially, through the course of various pleadings, quite wide ranging. Several attempts were made during the trial to have Mr Black refine the claims to the matters truly in issue. Such efforts were not entirely successful, given that this new claim emerged in closing submissions.

[206] Second, during oral argument in closing, I pressed Mr Black to provide particulars of any "dishonest assistance" for which Westpac was responsible. None were forthcoming. Then, in his memorandum dated 3 December 2007 covering outstanding points, Mr Black stated:

> The Plaintiff clearly pleaded "accessory liability" in undertaking the Seamart preference regime. This does not of itself require consideration of any "dishonest" accessory liability. Liability arises as an accessory in itself.

[207] It seems from the failure to provide particulars of dishonesty and the above statement that the concept of dishonest assistance was not pursued. I therefore concentrate on knowing receipt. This is a form of equitable liability to compensate for loss caused by a third party receiving the benefit of another's breach of fiduciary duty with actual or constructive knowledge of that breach. But it is first necessary that there be a trust obligation or a fiduciary duty which has been breached. In this context, it is noted that Mr Black had abandoned any claim based on breach of fiduciary duty: see [9] above.

[208] Characterising the allegations in the absence of any pleadings is a challenge. But Mrs Krtolica's principal claim appears to rest on an assertion that the proceeds of the sale of the Penrose factory received by it were either paid to it in breach of a fiduciary duty owed by Seamart's director Mr Krtolica to Seamart's creditors, or alternatively that such proceeds were held by Seamart on trust for Seamart's creditors and repaid by Seamart to Westpac in breach of such trust. If that is truly what is contended, the legal difficulties in advancing the claim are immediately apparent for the following reasons.

[209] A fiduciary duty owed by directors is to the company. A director, merely by virtue of his holding the position of director, does not owe any duty to the creditors of the company: see *Kuwait Asia Bank EC v National Mutal Life Nominees Ltd* [1991] 3 NZLR 457 (CA). Moreover, the duty imposed on directors by s 135 of the Companies Act, as discussed above, is one which is owed to the company rather than to particular creditors: see *Mason v Lewis* at [51]. I agree with the submission by Mr Gollin that the observations of Cooke J (as he then was) in *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 (CA), are probably obiter and can be understood as recognising that in the context of insolvency, the duties of directors to the company would encompass having regard to the interests of creditors, rather than in terms of a duty owed directly to the creditors.

[210] Mr Gollin also submitted that a company does not hold its assets on trust for creditors, even when insolvent, in the same way that a solvent company does not hold its assets on trust for shareholders. Mr Gollin added that the references in *Kinsela v Russell Kinsela Pty Ltd* (1986) 4 NSWLR 722 to the assets of an insolvent

company being "in a practical sense" the assets of the creditors rather than those of the shareholders, are not to be translated into a principle that the assets are held in trust for creditors. Hence, creditors do not have a beneficial interest in the assets of an insolvent company. Rather, they have a right to participate *pari passu* in receiving a dividend in a liquidation representing the proceeds of realisation by the liquidator of those assets.

[211] Mr Gollin also submitted that, even if it were possible to sustain the argument that an insolvent company holds its assets on trust for its creditors, any such claim must be subject to the prior rights of secured creditors. Mrs Krtolica's allegation in this context focussed on the receipt by Westpac of the proceeds of the sale of the Penrose factory. But those proceeds followed the sale of an asset over which Westpac held a mortgage security. Accordingly, Westpac's rights as a secured creditor prevailed over the claims by unsecured and preferential creditors.

[212] Finally, Mr Gollin referred to the authorities cited by Mr Black in closing (see *Inland Revenue Department Commissioner v Goldblatt & Anor* [1972] 1 Ch 498 and *Re Pearl Maintenance Services Ltd* [1995] 1 BCLC 449) and his submission that the "underlying principle" applied to the current facts. However, what this submission overlooked was that each of these cases involved the debenture holder receiving funds from receivers which the receivers were under a statutory duty to pay to preferential creditors. In the present case, however, Seamart was not in receivership at the time the proceeds of sale of the Penrose factory were received by Westpac. Accordingly, each of the cases was distinguishable.

[213] Third parties can be liable for breaches of trust and fiduciary duty where they meddle in the affairs of the trust in such a way as to take on the role of trustee, or receive trust property as a consequence of a breach of trust of a trustee or fiduciary. For example, in *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41 (CA) two men had contracts with a boat yard to sell their boats on commission. When the boats were sold, the entire sale price was paid into the boat yard's overdrawn bank account. The owners were not paid. The responsible banking officer knew that the boat yard held many boats "on behalf of" other owners for sale and was aware that not all amounts paid into the account could be considered the boat yard's money and

therefore be freely dealt with. Richardson J (as he then was) held that the boat yard had breached its fiduciary duty to the two boat owners. He then considered whether the bank could or had knowingly assisted that breach of fiduciary duty at 52:

> Clearly then a banker will not be permitted to profit through a misapplication by a customer of funds entrusted to the customer if it has notice of the breach of fiduciary duty. In accepting the cheque and crediting it against the customer's private overdraft it is advancing its personal interest in the transaction. In those circumstances what if anything short of express knowledge that the depositor was committing a breach of fiduciary duty is sufficient?
>
> …
>
> In a case such as the present what must be established is that the bank had actual or constructive knowledge (i) that the money it received was the property of the plaintiffs and (ii) that the payment of those moneys into the overdrawn account of Aqua Marine was a breach of fiduciary duty on that company's part.

[214] The issue of constructive knowledge is a topic that has been revisited by the courts on a number of occasions. However, that is not an issue that needs to be determined in the present case, as there is a more fundamental problem with this claim. There has been no suggestion that Seamart or its director owed a particular fiduciary duty to the other creditors to hold the proceeds of the sale of the Penrose factory on trust. It is clear that, during the course of an insolvency, a director must look to the interests of the company's creditors. This is exemplified by s 135 of the Companies Act, requiring that the director of a company must not agree to carry on the business or allow the business to be carried on so as to cause a substantial risk of serious loss to the creditors. However, that section does not impose a fiduciary duty owed to the creditors themselves. As was said by Cooke J in *Nicholson v Permakraft* at 249, the duties of directors are owed to the company, but:

> …may require the directors to consider *inter alia* the interests of creditors. For instance creditors are entitled to consideration, in my opinion, if the company is insolvent, or near-insolvent, or of doubtful solvency, or if a contemplated payment or other course of action would jeopardise its solvency.

[215] Mrs Krtolica's claim that Westpac received payments from Seamart in preference to the IRD or any other creditor (or received such payments to a greater extent than it was entitled) is an issue which is more properly addressed by a

liquidator. Under s 292 of the Companies Act, a liquidator is empowered to set aside as voidable transactions having the effect of a creditor receiving more than that creditor would otherwise have received in a liquidation. But that is a claim for a liquidator to bring. It is not a claim for Mrs Krtolica or a creditor.

[216] It will be apparent from the above, that had leave been granted to Mrs Krtolica to pursue a claim based on knowing receipt she would have faced extraordinary difficulties. I do not consider that it is necessary for me to add to an already long judgment by dealing further with these matters.

[217] For the sake of completeness, however, I should add that, even if Mrs Krtolica had not abandoned any allegations of dishonesty (contrary to the comments by Mr Black quoted in [206] above). I conclude that there was simply no factual basis for any finding that Westpac is liable for dishonest assistance. What Westpac did was to receive, pursuant to its mortgage security over the Penrose factory, the net proceeds of sale. The value of the Penrose factory had, as I have already found, been enhanced by virtue of the provision by Westpac of further financial support to Seamart from September 2003 onwards. Without the provision of such financial support the value of the asset would be unlikely to have increased. There is no proper basis for contending that Westpac's continued financial support of Seamart through the overdraft and the subsequent appropriation of the net proceeds of sale of the Penrose factory to clear overdraft debt was either dishonest or could be characterised as Westpac receiving funds with actual or constructive knowledge of any breach of trust or breach of fiduciary duty.

Result

[218] For the above reasons, all of the claims brought by Mrs Krtolica must fail. There will be judgment for Westpac in respect of all causes of action. Further, there will be judgment for Westpac on the counterclaim for $245,265.92 plus interest and costs.

[219] So far as costs are concerned, these should be on a Category 2 Band B (2B) basis. No doubt counsel can settle the amount payable. It would only be if either

party wished to argue that the award should be other than on a 2B basis that the matter need come back to me.

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Stevens J