

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA198/07
[2008] NZCA 187**

BETWEEN ANDREW MARK KRUKZIENER
 Appellant

AND HANOVER FINANCE LIMITED
 Respondent

Hearing: 16 June 2008

Court: Ellen France, Ronald Young and Miller JJ

Counsel: M A Gilbert for Appellant
 C R Carruthers QC and L A O'Gorman for Respondent

Judgment: 26 June 2008 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The respondent will have costs of \$3,000.00 and usual disbursements.

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] Mr Krukziener, a property developer, guaranteed a debt owed by Andrew Krukziener (No.1) Limited and Andrew Krukziener (No.2) Limited, to Elders Finance Limited (now called Hanover Finance Limited). On the basis that the two debtors had defaulted under a loan agreement, Hanover obtained summary judgment against him for outstanding indebtedness of \$4,159,386.61: HC AK CIV 2006-404-1667 5 April 2007.

[2] Mr Krukziener says that the debt is not yet due and payable, because he and the former Chief Executive of Hanover, Kerry Finnigan, agreed that it would fall due only on completion of a property development called The Wolfe, in which the debtors and another Hanover Group company, Axis Wolfe Developments Limited, were joint venturers. Hanover responds that the closely negotiated loan agreement reflects such agreement, but also provided for the loan to be accelerated on various events of default, including non-payment of rates.

[3] In this appeal, Mr Krukziener says it was not open to the Associate Judge to resolve the issue in Hanover's favour on a summary judgment application.

The narrative

[4] There was a longstanding relationship between Mr Krukziener and Elders Finance. For present purposes, the narrative begins on 15 December 2000, when various Krukziener entities, including Andrew Krukziener (No.1) Limited and Andrew Krukziener (No.2) Limited, entered into a loan agreement with Elders Finance relating to an existing debt.

[5] Following defaults under the loan agreement, statutory demands were served. That led to further agreements between the parties, in the form of a Project Management Agreement, a Stakeholders Agreement, and further loan and guarantee documents, on which the present claim is brought.

[6] The joint venture related to The Wolfe, which was to be a 27-level residential apartment complex constructed on land at 13 and 15 Albert Street, Auckland. Axis Wolfe Developments Limited was to receive 30 per cent of the profits. That would repay the Elders debt. Mr Finnigan, who swore an affidavit for Mr Krukziener, explains that from Hanover's perspective, the joint venture allowed it to secure repayment of an unsecured position that it was carrying in its books, while ensuring that it need not classify the loan as impaired or cease to treat interest accruing as income. Mr Krukziener maintains that because of losses he had suffered on another development, The Metropolis, his personal guarantee was of little value. That, and Hanover's desire to avoid treating the loan as impaired, led to Hanover's participation in the joint venture on commercial terms favourable to him.

[7] The parties to the Project Management Agreement were Mr Krukziener, Wolfe Developments Limited as Trustee of the Wolfe Development Trust, Axis Wolfe Developments Limited, Axis Property Group Holdings Limited, and Hanover Group Limited. The agreement recited that Krukziener and Wolfe Developments Limited had agreed to allow Axis Wolfe Developments Limited to participate in the project and to permit it to become the registered proprietor of the land. The argument added:

- G. Contemporaneously with this agreement the parties are to enter into, or procure the necessary parties to enter into the following documents:
 - a. Loan agreement between Andrew Krukziener (No.1) Limited and Andrew Krukziener (No.2) Limited (together the *Borrowers*), Krukziener and Aerovista Trustee Limited (as trustee of the Aerovista Trust) as guarantors and Elders recording the terms and conditions of the Debt (with the existing facility to the Borrowers (and others) dated 15 December 2000, as varied from time to time, and certain guarantees and securities given in relation thereto being repaid and/or released).

[8] The Project Management Agreement was executed on 22 November 2002, contemporaneously with a loan agreement and a guarantee. The parties to the latter documents were Elders Finance, Andrew Krukziener (No.1) Limited, Andrew Krukziener (No.2) Limited as guarantors, and Mr Krukziener and Aerovista Trustee Limited and Wolfe Developments Limited as guarantors.

[9] The agreement recited that the loan facility was a term loan up to the sum of \$4,035,735.71. The later advance was the date of the loan agreement, and the term of the loan was:

For a term from the Date of Advance to the date six months after the earlier of:

- (a) the date on which the Development Fee (as defined in the Project Management Agreement) has been paid in full in accordance with the Stakeholders Agreement; or
- (b) if the Project Management Agreement is terminated pursuant to clauses 11 or 13 thereof, the date of termination of the Project Management Agreement.

[10] The debtors also owned a property at 17 Albert Street, called Krukziener House, which was not included in the joint venture. The loan agreement provided that the debtors would pay any net surplus income from 17 Albert Street to Elders, after deducting all expenses. It acknowledged that projected cashflows did not show a net surplus, but such payments would be made as soon as any surplus was received. They would also begin to market that property as soon as possible. Failure to comply with this condition was to be a breach of the loan agreement.

[11] The loan agreement included a number of standard form terms relating to events of default. The outstanding amount of the loan, with any fees or interest, would become due and payable immediately on any event of default, whether or not within the control of the borrower or any guarantor. An event of default occurred if the borrower or any guarantor failed to observe or perform the secured obligations, which were defined extensively to include all obligations of the debtors or the guarantors to Elders Finance under any agreement or security. It is common ground that among the secured obligations was an implied covenant under cl 3 of sch 4 of the Property Law Act 1952 (repealed) that the debtor companies would punctually pay all rates relating to 17 Albert Street as they fell due. Other events of default included acts of bankruptcy.

[12] On taking title under the Project Management Agreement, Axis Wolfe Developments also granted a mortgage over 13 and 15 Albert Street to Elders

Finance. It is not necessary to refer to that, or to the Stakeholders Agreement, which addressed the control and disposition of the proceeds of the development.

[13] The guarantee was an orthodox all-advances guarantee under which the guarantors were also deemed to be principal debtors. The guarantors unconditionally and irrevocably guaranteed to the lender the due payment by the debtors of the guaranteed indebtedness and the due performance and compliance by the debtors with the guaranteed obligations.

[14] The Wolfe development did not proceed. There is a dispute about the reasons. Mr Finnigan, who has sworn an affidavit for Mr Krukziener, attributes it to complications relating to the ownership of a title, which were not of either side's making. Mr Krukziener offered a subsequent project which was commercially acceptable, but Hanover decided to opt for "a cleaner sale exit" involving the sale of the Albert Street properties and the acquisition of a development property in Ngapipi Road, Orakei, which could be sold or developed to assist in repayment of the loan. Mr Krukziener says that Wolfe Developments Limited put forward a number of viable development proposals all of which Axis failed to approve, in breach of its obligations qua joint venturer. He also says that the Ngapipi Road property has not been developed by the joint venture. These matters are the subject of separate litigation against Hanover.

[15] Mr Krukziener's evidence is that he and Mr Finnigan agreed that the loan could not be called up until six months after completion of the joint venture:

9. One of my conditions of entering into the joint-venture agreement was that Elders confirmed that it would take no action or proceedings in respect of the statutory demands. I would not have entered into the joint venture agreement or the second loan agreement without that confirmation and also confirmation that the loan would not be due and there would not be able to be defaults possible in the facility until six months after the completion of the joint venture. By seeking to accelerate the time for payment of the loan amount Hanover is breaching this fundamental term of the loan and joint venture agreement.

[16] Mr Finnigan explains that he negotiated the "commercial terms" of the joint venture and the loan agreement with Mr Krukziener:

3. In those negotiations I agreed that the documentation would reflect our agreement that the loan could not go into default until six months after the completion of the Wolfe Development or termination of the joint venture agreement as a result of any payment obligations or defaults by the borrowers. I note from reading the loan documentation now that this is not the case.

[17] In reply, Hanover filed an affidavit by Karen Dwyer, who was internal legal counsel for the Hanover Group at the time of the negotiations. She refers to the evidence of Mr Krukziener and Mr Finnigan and says that:

4. In my role as Legal Counsel for Hanover Group Limited I was the person who negotiated with Chapman Tripp (acting for Mr Krukziener and his companies) about the terms of the 22 November 2002 Loan Agreement and I arranged for execution of the document on behalf of Elders Finance Limited (now called Hanover Finance Limited). During that process I worked closely with my boss at the time Kerry Finnigan about the proposed terms of the agreement and the legal implications of those terms.
5. From my personal involvement in those negotiations I specifically recall an express discussion by the parties that the 22 November 2002 Loan would continue to include default and acceleration provisions which the lender would have the right to exercise even if the Project Management Agreement was not terminated.
6. On 21 November 2002, the day before the 22 November 2002 Loan Agreement was signed, Mr Krukziener telephoned Kerry Finnigan to finalise the terms of the loan agreement. I participated in that telephone conference call. We tried to include Shelley Hodge of Chapman Tripp who was acting for Mr Krukziener, [sic] but she was not available at the time. Attached and marked "A" is an email that I sent shortly before 6pm on 21 November 2006 to Chapman Tripp (copies to both Andrew Krukziener and Kerry Finnigan) which records the results of those telephone discussions.
7. As recorded in point 3 of that email, all normal enforcement provisions were to apply. In point 4 of that email I recorded the agreement between Andrew Krukziener, Kerry Finnigan and me that the lender was still to retain the right to accelerate the loan and demand payment in full upon an event of default.
8. These were the terms that were recorded the next day in the contract that was executed by the parties. Before providing the final execution copy to Mr Finnigan for his signature on behalf of Elders Finance Limited I reviewed the final form of that agreement to ensure that it was consistent with the understandings recorded in my email of 21 November 2006.

[18] In the email of 21 November 2006 to which Ms Dwyer refers, she advised Mr Krukziener's solicitor, Mr Tubman of Chapman Tripp:

The following is the result of the discussions between Andrew and Kerry:

...

4. **On demand.** We have agreed that neither loan will be on demand (but we will still retain the right to accelerate the loan and demand payment in full upon a default event).

Naturally, you will want to confirm these with Andrew. Could you give me a call after you have done this tomorrow morning, so that we can discuss finalising the documents?

[19] The email was copied to Mr Krukziener, and when the documents were executed on the following day Mr Tubman witnessed Mr Krukziener's signature to the guarantee and loan documents.

[20] The default on which Hanover relies to trigger the calling up of the loan relates primarily to non-payment of rates on 17 Albert Street. As at 21 December 2005 the debtors had failed to pay Auckland City Council rates (including penalties) of \$21,090.03 and Auckland Regional Council rates (including penalties) of \$182.91. A further default is alleged in relation to a separate loan from Structured Finance (New Zealand) Limited; that loan has since been paid. It is not in dispute that these were events of default in terms of the loan agreement as executed.

[21] In reliance on these defaults, notices under ss 92(1) and (6) of the Property Law Act 1952 were served on 23 December 2005 and 11 January 2006. Hanover says that, the defaults not having been remedied, the loan became due and payable on 3 February 2006.

The High Court hearing

[22] Mr Krukziener mounted six defences before Associate Judge Sargisson. He alleged set off, breach of an obligation to procure senior debt funding for the purchase of the Albert Street properties, failure to act in good faith as a joint venturer, failure to prove compliance with the legal obligations of a mortgagee making demand of a mortgagor and guarantor, failure to apply proceeds of sale of a

property appropriately, and estoppel. Of these, only the last survives for consideration on this appeal.

[23] The Associate Judge set out the principles relating to summary judgment. We will return to those below, noting that at this point only that there is no suggestion that she erred in her statement of the test. She set out the elements of promissory estoppel, and held that Mr Krukziener had not provided a credible evidential foundation for it. Her reasons were:

[80] First, Mr Finnigan's statement does not disclose a clear, unambiguous representation or promise. The statement describes a representation by Mr Finnigan in the course of his negotiating the "commercial" terms for inclusion in the written agreement. The representation dealt, in broad terms, with what the documented terms of the Hanover loan agreement would reflect on the matter of default.

[81] The representation did not extend to the precise wording of the default terms or with how Mr Finnigan proposed that the loan agreement would document the somewhat vague promise that until the occurrence of a particular event "the loan could not go into default ... as a result of any payment obligations or defaults by the borrowers". Further negotiation was plainly required to arrive at clear unambiguous terms for inclusion in the written contract to specify clearly what the promise actually meant and how it was to work. Mr Finnigan does not suggest otherwise.

[82] Secondly, there is no reason on the evidence to conclude that Mr Krukziener relied on the representation in the way he claims or that the final written agreement did not reflect the final position of the parties. The final agreement allowed for repayment of all of the principal and deferred interest at the conclusion of The Wolfe development or the earlier termination of the JVA. To that extent, the written agreement is consistent with Mr Finnigan's representation, but it retains standard terms providing for acceleration in the case of various incidents of default such as failure to pay insurance and rates on the mortgaged property at Albert Street. If, as Mr Krukziener contends, he viewed the representation as a fundamental term of the loan and joint venture agreements, he provides no plausible explanation for signing a loan agreement containing written terms that do not reflect accurately the terms of the representation.

[83] It is equally implausible that Mr Krukziener's solicitors at Chapman Tripp would not have raised objection to the retention of the standard default provisions before attending on his execution of the agreement. Yet there is no suggestion that the solicitors or Mr Krukziener disputed the standard default provisions or raised objection to them. Significantly, the agreement also states at clause 22 that it is an entire agreement and at clause 22.2 that it is paramount and will prevail over any offer or prior agreement. There is no suggestion in the evidence that objection was taken by Mr Krukziener or his solicitors to these terms either.

[84] There is however evidence from Ms Dwyer, Hanover's legal counsel, that she drew the attention of Mr Krukziener's solicitors to the standard default and acceleration provisions shortly before the agreement was signed. In her e-mail sent late in the afternoon of 21 November to Chapman Tripp and copied to Mr Krukziener and to Mr Finnigan, Ms Dwyer dealt specifically with the provisions as to default interest and noted that in all other respects normal enforcement provisions would apply. She noted that the loan would not be on demand but that Hanover would retain the right to accelerate the loan and to demand payment in full upon a default event. Had there been reservations that Mr Finnigan had not delivered on his promise then it is inconceivable that Chapman Tripp would not have objected and asked for the documentation to be amended before Mr Krukziener signed it. Had there been a mistake as to the contents of the documentation, then one would have expected Mr Krukziener to raise a defence based on rectification.

[85] There is, in the circumstances, no reason to suppose that there was an outstanding and operative promise which Mr Krukziener relied on at the time the contractual documents were signed which the parties failed to indicate in the documentation.

[86] Given my findings on the first two essential elements of the doctrine of promissory estoppel, it is not necessary for me to deal with the issue of detriment or unconscionability. However if I am wrong I respect of the first two elements, I am satisfied that there is no credible evidence that Mr Krukziener suffered any detriment as a result of Mr Finnigan's representation. It is helpful in this regard to set out Mr Finnigan's explanation of the context in which the JVA and the Hanover loan agreement were entered into. He explained that Hanover considered entering into the JVA as a means of securing repayment of an unsecured position it was carrying in its books and thereby avoiding the need to reclassify the loan as impaired or to suspend interest in the accounts. He said:

It was our anticipation that the joint venture agreement would make sufficient monies to repay the loan in full.

[87] There is no dispute that the two debtor companies welcomed the JVA as a means of enabling them to repay the Hanover loan. Under the JVA, Wolfe Developments was to procure the application of its development fee to reduce or repay in full the Hanover loan. In these circumstances, the Hanover loan and the JVA were a benefit to Mr Krukziener's companies and to Mr Krukziener himself. They were a means by which the companies could repay the Hanover loan and by which Mr Krukziener could avoid liability under the Hanover guarantee.

The appeal

[24] The appeal is brought on the basis that the affidavit evidence of Mr Krukziener and Mr Finnigan provided a clear evidential basis for defences of promissory estoppel, collateral contract, and rectification. The defence of promissory estoppel was included in Mr Krukziener's statement of defence, filed on

20 November 2006, but the defences of collateral contract and rectification are raised for the first time on appeal. It is said that the Associate Judge erred by resolving, on the basis of the affidavit evidence alone, a conflict of evidence between Mr Krukziener and Mr Finnigan on the one hand and Ms Dwyer on the other. For the appellant, Mr Gilbert, who did not appear in the High Court, contended that the Associate Judge should have rejected Mr Krukziener's evidence only if it was "inherently improbable".

[25] The respondent says that Mr Finnigan's statement discloses no clear, unambiguous representation; on the contrary, there is no inconsistency between the commercial terms as he described them and the inclusion of events of default. The defaults that led to acceleration of the loan had nothing to do with the joint venture. In any event, the written loan agreement, which was closely negotiated with the aid of solicitors, superseded those negotiations. Parol evidence is inadmissible to prove terms inconsistent with the agreement, and Mr Krukziener's evidence is not credible having regard to the written record.

Summary judgment principles

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

approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[27] Under r 141A the defendant need not file a statement of defence. The onus remains on the plaintiff, and summary judgment will be denied if on the hearing of the application it appears that there is an issue worthy of trial.

The conflict of evidence

[28] We accept Mr Gilbert's submission that there is a conflict of evidence. Mr Finnigan, supported by Mr Krukziener, says that he agreed the loan documents would reflect a commercial agreement that the loan "could not go into default" until six months after the development was completed. That is contradicted by the loan agreement and the evidence of Ms Dwyer, which is to the effect that Mr Finnigan and Mr Krukziener agreed, the evening before the documents were executed, that standard default terms would be included.

[29] Was a robust and realistic approach to the conflict of evidence warranted? In our view it was. The default terms were included in a commercial agreement drafted by solicitors. The attention of Mr Krukziener and his solicitor had been drawn to Elders' insistence upon them. There is no allegation of mistake or *non est factum*. Mr Krukziener makes no attempt to explain why he signed the agreement in circumstances where he and his advisors knew it was not consistent with a blanket prohibition on default before the term expired. There is no affidavit from the solicitor. In the circumstances, an explanation was called for. We accept Mr Gilbert's point that Ms Dwyer's evidence was filed in reply, and that Mr Krukziener had no right of rejoinder. But the explanation was so fundamental to his defence that there was no excuse for omitting it in the first place. Leave could also have been sought to file an affidavit by way of rejoinder. Had Mr Krukziener a cogent response to Ms Dwyer's evidence, and in particular her introduction of the email in reply, it is likely that the Associate Judge would have allowed him to advance it.

[30] We accept that the evidence indicates there was a commercial agreement that the loan would fall due six months after the development was completed. That was recorded in the loan agreement. However, the evidence is consistent with the negotiations continuing until the agreement was signed, with Elders insisting that the customary default provisions be included. Nor can the unqualified statement that the loan could not go into default be correct. The terms relating to 17 Albert Street envisaged that the agreement would be breached if any surplus income was not paid to Elders.

[31] We also accept that some of the default provisions seem inapt, notably those providing that the loan might be called up on an act of bankruptcy. Presumably the debtors had already committed such acts and would likely commit more given their straitened financial position. But that point merely highlights the absence of an explanation for signing the document in that form. The document itself clearly indicates that Mr Krukziener assumed the risk of such defaults.

Rectification

[32] Where the terms of an agreement do not accurately reflect the mutual intention and agreement of the parties, equity may rectify the record of the agreement so that it reflects the parties' true intention, and not that imperfectly recorded by the contract. The common intention must persist right up until the contract is signed: *Realty Services Holdings Ltd v Slater* (2005) 6 NZCPR 657 (HC). Proof of it may be established by reference to pre-contractual negotiations between the parties, and by other surrounding circumstances (*Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 at [55] (CA)), but if the proof put forward is inconclusive, then there is not sufficient material from which to find a common intention with which to rectify the contract.

[33] We agree with Mr Carruthers that rectification is not arguable. Far from demonstrating a common continuing intention that under no circumstances could the loan be called up before the development was completed, the evidence establishes that the default provisions were insisted on by Hanover and accepted by Mr Krukziener. In the circumstances, the defence is not arguable.

Collateral contract

[34] Evidence of what was said in negotiations is not normally admissible to contradict the terms of a written contract (the extrinsic evidence rule, so called because the evidence is extrinsic to the contract): *Edwards v O'Connor* [1991] 2 NZLR 542 at 548 (CA). That is so because pre-contract negotiations are normally irrelevant, except when used for the limited purpose of ascertaining what objectively observable facts, as opposed to intentions, must have been in the minds of the parties: *Eastmond v Bowis* [1962] NZLR 954 at 959 – 960 (SC), *Potter v Potter* [2003] 3 NZLR 145 at [34] (CA).

[35] Extrinsic evidence is admissible to establish a collateral contract, which may supplement or vary the principal agreement in ways that do not contradict its primary purpose: *Lysnar v National Bank of New Zealand Ltd* [1935] NZLR 129 (PC), *A M Bisley & Co Ltd v Thompson* [1982] 2 NZLR 696 (CA). In a commercial transaction between experienced parties who are legally represented, strong and unequivocal evidence is needed to warrant an inference of a common understanding that was not expressly recorded: *Air New Zealand Ltd v Nippon Credit Bank Ltd* [1997] 1 NZLR 218 at 225 (CA).

[36] We accept Mr Carruthers' submission that the defence is not arguable. The agreement that Mr Krukziener alleges is far from unequivocal and would contradict central terms of the loan agreement, namely the circumstances in which Elders would be able to accelerate the loan.

Promissory estoppel

[37] Promissory estoppel was traditionally concerned with promises to refrain from exercising pre-existing contractual rights: *Ajayi v R T Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326 (PC). The promise had to be clear and unequivocal: *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] 1 AC 741 at 768 (HL). The legal rights were suspended, and might be resumed on giving notice, so long as the promisee could resume its former position: *Motor Oil*

Hellas (Corinth) Refineries SA v Shipping Corporation of India [1990] 1 Lloyd's Rep 391 at 399 (HL).

[38] Following the decisions of the High Court of Australia in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, promissory estoppel is no longer confined to promises affecting pre-existing rights. However, the departure from a voluntary promise is not unconscionable in itself, even if detriment results. Rather, equity responds to the defendant creating or encouraging an assumption in the plaintiff, and its knowledge that the plaintiff will rely on the assumption to its detriment. The plaintiff must have been led to believe that the promise would affect or result in legal relations; thus a promise made in negotiations that are subject to contract will not lead to an estoppel: *Waltons Stores* at 406 and 422. Lastly, equity does not intervene to satisfy the promise, but to avoid the detriment. These requirements in the current authorities, as the High Court recognised, are seen as necessary to preserve the law of contract as the principal mechanism for the enforcement of promises.

[39] In this case, Mr Krukziener would have it that a representation was made in pre-contractual negotiations, and that to Hanover's knowledge he acted to his detriment by entering into the contract on terms inconsistent with the representation. He relies on the negotiations, in other words, not to show a voluntary promise to refrain from existing pre-existing rights, nor to show that Hanover promised to create a new legal relationship, but to contradict the contract that followed the negotiations.

[40] In these circumstances, Mr Gilbert recognised that the defence of promissory estoppel faces difficulties. Even if true, the facts asserted by Mr Krukziener could not establish a promissory estoppel. The doctrine is concerned with circumstances in which the Court will enforce a voluntary promise to create legal relations, or to refrain from exercising pre-existing legal rights. Where negotiations result in a contract, the promises exchanged are no longer voluntary, and the question whether the contract will be enforced falls to be determined under the law of contract. We conclude that the defence of promissory estoppel is not available in law.

[41] We observe in passing that contract law permits enforcement of pre-contractual representations that induce contracts in certain circumstances. Mr Krukziener does not invoke s 6 of the Contractual Remedies Act 1979, which provides that a party to a contract may treat a pre-contractual representation as a term where it induced that party to enter the contract. But the plaintiff cannot claim that he was induced to enter the contract where he knew the representation to be untrue. In this case, the evidence is that Mr Krukziener signed the contract knowing that it included standard default provisions.

Quantum

[42] Mr Gilbert pointed out that quantum has been disputed from the outset. The 2000 loan agreement provided that Elders estimated the loan at \$4,516,495. The 2002 loan agreement provided for a term loan of up to \$4,035,735.71, and included a schedule in which that figure had been specified on an E & OE basis.

[43] However, quantum was not argued before the Associate Judge, nor was it referred to in the notice of appeal, which relied only on the evidential grounds addressed above. Schedules of indebtedness produced before the Associate Judge were not reproduced in the Case on Appeal. In the circumstances, it is too late to raise the issue now.

Decision

[44] The appeal is dismissed.

[45] The respondent will have costs of \$3,000.00 and usual disbursements.

Solicitors:
Gilbert Walker, Solicitors, Auckland for the Appellant
Buddle Findlay, Solicitors, Auckland for the Respondent