

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA725/2023
[2024] NZCA 369**

BETWEEN CHRISTOPHER ALAN HOLMES
First Appellant

ANTHONY CHARLES RUSSELL
HANNON
Second Appellant

AND SENIOR TRUST CAPITAL LIMITED
Respondent

Hearing: 23 July 2024

Court: Mallon, Lang and Jagose JJ

Counsel: M D Pascariu and J C Murdoch for Appellants
M J Tingey and A Y Pan for Respondent

Judgment: 5 August 2024 at 1 pm

JUDGMENT OF THE COURT

- A The application for leave to file an amended notice of opposition to the application for summary judgment is declined.**
- B The appeal is dismissed.**
- C The first appellant must reimburse the respondent for its reasonable costs and disbursements on a solicitor and own client basis.**
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REASONS OF THE COURT

(Given by Lang J)

[1] This appeal concerns a claim by a financier to recover from the appellants, Mr Holmes and Mr Hannon, the amount said to be owing under a loan facility agreement for which they provided guarantees.

[2] In a judgment delivered on 3 November 2023, Associate Judge Lester entered summary judgment against both appellants.¹ They appealed against the Judge's decision. However, Mr Pascariu advised us at the commencement of the hearing that Mr Hannon has now entered into a settlement with the financier, Senior Trust Capital Ltd (Senior Trust). Mr Hannon therefore no longer pursues his appeal, and it is accordingly dismissed.

Background

[3] Senior Trust specialises in the provision of finance for property development projects. It agreed to provide a finance facility in the sum of \$3.35 million to a company called Roy's Bay Estate Ltd (in liq) (Roy's Bay) in November 2016.² Roy's Bay was undertaking a multi-unit property development on land situated near Wānaka. The project sought to create a luxury lifestyle retirement village in which individual units would be sold to purchasers.

[4] Mr Holmes was a shareholder and director of Roy's Bay whilst Mr Hannon indirectly held shares in the company through his family interests.

[5] The interest payable on the loan was to be capitalised and repaid together with the loan principal on a nominated date. Roy's Bay executed a second ranking mortgage in favour of Senior Trust by way of security for the loan in October 2015. Mr Holmes and Mr Hannon each entered into a Deed of Guarantee under which they guaranteed the company's obligations under the loan facility agreement.

[6] Roy's Bay encountered difficulties in completing the development. In May 2018 the loan agreement was varied so as to increase the facility to \$8.35 million. Senior Trust extended the date for repayment of the facility on three occasions so that

¹ *Senior Trust Capital Ltd v Holmes* [2023] NZHC 3108 [judgment under appeal].

² Roy's Bay's name was changed from Stoney Creek Terraces Ltd at an early stage. We simply refer to the company as Roy's Bay.

it was ultimately due to be repaid on 30 September 2021. However, Roy's Bay was unable to repay the facility on that date.

[7] By this stage, Roy's Bay was endeavouring to sell the land to meet its obligations to financiers. In October 2021, it entered into a conditional contract to sell the land for the sum of \$24 million to a company called S5 Consulting Group Ltd (S5). S5 subsequently became aware that the project had encountered resource consent issues and this led the parties to renegotiate the terms of the contract. In February 2022, they entered into a new agreement under which Roy's Bay agreed to sell the land to S5 for the reduced sum of \$22 million.³ Settlement of this agreement was scheduled to occur on 31 March 2022.

[8] After Roy's Bay failed to repay the facility Senior Trust decided to sell Roy's Bay's land using its powers of sale under the mortgage. It instructed real estate agents on 28 February 2022 and the agents marketed the land for sale by tender over a six week period during March and April 2022. Tenders closed on 12 April 2022.

[9] On 20 May 2022, Senior Trust entered into an agreement to sell the land for the sum of \$18 million to a company called Stoney Creek GCO Ltd (Stoney Creek). Stoney Creek was a subsidiary of S5. Under the agreement for sale and purchase, Senior Trust agreed to provide finance to Stoney Creek to enable it to complete the purchase of the property. Senior Trust completed the sale of the land to Stoney Creek on 5 August 2022.

[10] The sale of the land did not realise sufficient funds to enable the loan, including accrued default interest, to be repaid in full. By this stage Roy's Bay was in liquidation. Senior Trust then issued proceedings in the High Court seeking judgment against Messrs Holmes and Hannon as guarantors. This led to the judgment that is the subject of the present appeal.

³ The agreement in evidence is undated but the parties accept the agreement was entered into in February 2022.

The issues

[11] The appeal raises four issues. Two of these relate to the process by which Senior Trust sold the land to Stoney Creek. Mr Holmes does not challenge the marketing process Senior Trust undertook before it agreed to sell the land to Stoney Creek. However, he contends Senior Trust breached its equitable duty to act in good faith towards him when it entered into that transaction. He says that, by agreeing to sell the land to a subsidiary of S5 for \$18 million, Senior Trust undermined the existing unconditional agreement under which Roy's Bay had agreed to sell the land to S5 for the sum of \$22 million. Mr Holmes says he has suffered direct loss as a result of Senior Trust's actions because Senior Trust received considerably less from the sale of the land to Stoney Creek than Roy's Bay would have received if it had been able to complete the sale to S5.

[12] Notwithstanding this argument Mr Holmes does not contend, as he did in the High Court, that Senior Trust breached its statutory duty under s 176 of the Property Law Act 2007 to take reasonable care to obtain the best price reasonably obtainable at the date of sale. We are therefore not required to address that issue.

[13] Secondly, Mr Holmes contends that the Court cannot determine whether Senior Trust breached its equitable duty to him without knowing the terms on which it agreed to provide finance to Stoney Creek. Mr Holmes says that the finance Senior Trust provided to Stoney Creek may have resulted in Senior Trust receiving a financial benefit that should be taken into account in determining whether Mr Holmes remains indebted to Senior Trust.

[14] Thirdly, Mr Holmes contends that Senior Trust failed to prove the quantum of its claim to the required standard in the High Court. He says the calculations that Senior Trust relied upon in the High Court to prove the amount owing were defective because they did not accurately reflect the interest for which Mr Holmes was liable under the Deed of Guarantee.

[15] Finally, Mr Holmes seeks leave to file an amended notice of opposition to the application for summary judgment relying on oppression.⁴ He seeks to argue that the amount charged by Senior Trust for default interest was oppressive in all the circumstances.

Did Senior Trust breach its equitable duty to act in good faith when entering into the agreement to sell the property to Stoney Creek?

[16] In *Coltart v Lepionka & Company Investments Ltd* this Court, with reference to long-recognised authority, said that a mortgagee who exercises a power of sale under a mortgage owes equitable duties to the mortgagor to act in good faith and for a proper purpose.⁵ These duties complement the statutory duty in s 176 of the Property Law Act to exercise reasonable care to obtain the best price reasonably obtainable for the property.⁶

[17] The Court observed in *Lepionka* that the duty of good faith requires the mortgagee to use its powers for the predominant purpose of recovering its debt and not to act in a manner that unfairly prejudices or wilfully and recklessly sacrifices the interests of the mortgagor or a party claiming through it.⁷

[18] As we have already noted, Mr Holmes contends that Senior Trust failed to act in good faith by negotiating and concluding a new agreement for the sale and purchase of Roy's Bay's land with one of S5's subsidiaries. In order to successfully defend the application for summary judgment on this ground it would be necessary for it to be arguable that Senior Trust knew, at the time that it was negotiating with Stoney Creek, that Roy's Bay had entered into the earlier agreement to sell the land to S5 and that this contract remained in existence.

[19] One of Senior Trust's directors, Mr Jackson, provided three affidavits in support of Senior Trust's application for summary judgment. In his first affidavit he did not refer to the two contracts Roy's Bay had entered into to sell its land to S5. In

⁴ As defined in pt 5 of the Credit Contracts and Consumer Finance Act 2003.

⁵ *Coltart v Lepionka & Company Investment Ltd* [2016] NZCA 102, [2016] 3 NZLR 36. See *Downsview Nominees Ltd v First City Corp Ltd* [1993] 1 NZLR 513 (PC) at 522–524.

⁶ See *Apple Fields Ltd v Damesh Holdings Ltd* [2001] 2 NZLR 586 (CA); and *Newport Farm Ltd v Damesh Holdings Ltd* [2003] UKPC 54, [2004] 1 NZLR 721.

⁷ *Coltart v Lepionka & Company Investment Ltd*, above n 5, at [54].

his second affidavit he responded to matters Mr Holmes and Mr Hannon had raised in the affidavits they filed in opposition to the application for summary judgment. Mr Holmes had referred in his affidavit to statements Mr Jackson had made in an affidavit he had sworn in January 2023 in another proceeding. In this proceeding Mr Hannon's wife applied unsuccessfully for an injunction preventing Senior Trust from exercising its power of sale under a mortgage she had given to it over a property that she owned (the injunction proceeding).⁸ The affidavit filed by Mr Jackson in the injunction proceeding did not form part of the evidence in the present proceeding. However, it appears that Mr Jackson had stated in that affidavit that Senior Trust believed the two contracts with S5 had been cancelled.

[20] In the affidavit filed in response to Mr Holmes' affidavit in the present proceeding Mr Jackson described his understanding of the position in relation to the earlier contracts as follows:

Mr Holmes at paragraph 13 criticises me for not having been directly involved in these negotiations between RBEL [Roy's Bay] and S5, yet providing evidence as to these matters, which according to Mr Holmes ultimately "heavily influenced" Tahana J in her decision to dismiss Mrs Hannon's application for an interim injunction against Senior Trust in January this year. He is correct that neither Senior Trust nor I had any involvement in the two failed agreements. However, they were brought to my attention after Mr Bendemski [a director of both S5 and Stoney Creek] approached Senior Trust directly in late 2021, seeking information about the [Roy's Bay] Land and the development as a whole due to Mr Holmes not being forthcoming with information. Mr Bendemski was angry about the lack of transparency from [Roy's Bay] regarding the consent status of the project, and the difficulties experienced by him in dealing with the Queenstown Lakes District Council as a result. Senior Trust did not interfere with S5's agreements in any way. From Senior Trust's perspective, it was in its interests to ensure that the RBEL Land was sold for as high an amount as possible so that it could be repaid. That is why during the mortgagee sale process Senior Trust and Bayleys pushed hard for higher offers, despite market feedback being in the low \$10 millions. In addition to attract a higher price, Senior Trust provided Stoney Creek with favourable funding terms.

...

[Roy's Bay] and S5's \$22m agreement

At paragraphs 14 and 15, Mr Holmes claims that I was wrong for stating that the \$22m agreement between [Roy's Bay] and S5 were cancelled. I note that this is what I was informed by Mr Bendemski. I also do not recall Mr Holmes

⁸ Tahana J dismissed this application in a judgment delivered on 19 January 2023: *Hannon v Senior Trust Capital Ltd* [2023] NZHC 16.

or Mr Hannon raising any issues about the \$22m agreement during Senior Trust's mortgagee sale process, or Senior Trust being told that [Roy's Bay] was pursuing the \$22m agreement in any way. As far as Senior Trust/I were concerned, the \$22m agreement had been cancelled for the same reason as the \$24m agreement – that [Roy's Bay] and Mr Holmes did not provide sufficient information when requested, and the development had been progressed in a way which made it unattractive for S5 to spend that level of investment.

[21] In summary, Senior Trust's position, as articulated by Mr Jackson, is that it only became aware of the two earlier contracts after Mr Bendemski told Mr Jackson about them in late 2021. Mr Jackson says Mr Bendemski also told him that both contracts had been cancelled. There is nothing in the evidence to contradict Mr Jackson's version of events. His evidence also gains support from the fact that neither Mr Holmes nor Mr Hannon stated in their affidavits filed in opposition to the application for summary judgment that they took any steps to bring the existence of the two earlier contracts to Senior Trust's attention. This is despite the fact that they would both have been aware by 30 September 2021 that Roy's Bay was unable to repay the loan facility on that date.

[22] At the very latest, if the contract to sell the land to S5 was still in existence in April 2022, one would have expected either (or both) Mr Holmes and Mr Hannon to bring that fact to Senior Trust's attention as soon as they became aware Senior Trust had entered into the contract to sell Roy's Bay's land to Stoney Creek. The agreement between Senior Trust and Stoney Creek contained a condition permitting Senior Trust to terminate the contract if Roy's Bay redeemed the mortgage at any stage prior to the date of settlement. This meant that Roy's Bay's ability to complete the sale to S5 was not compromised by the fact that Senior Trust had also entered into a contract to sell the land to one of S5's subsidiaries.

[23] However, there is nothing in the evidence to suggest that Mr Holmes or Mr Hannon took steps to bring the existence of the earlier contracts to Senior Trust's attention either at this time or subsequently. Nor did Roy's Bay take any steps to enforce completion of either contract. The first time Roy's Bay appears to have turned its mind to the possibility of enforcing the sale of the property to S5 was in December 2022, when its solicitors wrote to the solicitors acting for S5 and Stoney Creek seeking to complete the transaction. A copy of this letter is not in evidence but it appears to have sought to enforce the first contract for the sale of the land for the

sum of \$24 million. The response from S5's solicitors on 30 January 2023 pointed out that the first contract had been superseded by the second contract for the sale of the property for \$22 million. S5's solicitors also pointed out that Roy's Bay had not been in a position to complete the transaction on 31 March 2022 as required by the second contract. By December 2022 it was in any event too late for Roy's Bay to resurrect the situation. Senior Trust had settled the sale of the land to Stoney Creek approximately four months earlier.

[24] It is also noteworthy that during the early part of 2022 Roy's Bay sought to obtain funding that would enable it to repay the sum owed to Senior Trust. It obtained a loan offer in April 2022 that resulted in it making a without prejudice offer to Senior Trust to pay a sum that was less than the amount then owing.⁹ In support of its application for finance Roy's Bay had advised the lender that it was in the process of selling sections that formed part of the land it had agreed to sell to S5 under the two contracts. This conduct is plainly inconsistent with any belief by Roy's Bay (and Mr Holmes) that the second contract with S5 still remained on foot in early 2022.

[25] Mr Holmes has never explained why the second contract with S5 was not settled on 31 March 2022 or why it eventually appears to have been treated by both parties as having been cancelled. Rather, the affidavit that he filed in opposition to the application for summary judgment contains the following paragraph:

With the benefit of hindsight I regret that we did not take more proactive steps to push S5 and Mr Bendemski to perform the \$22m agreement. It was an incredibly challenging time economically and personally. We were under immense pressure from Senior Trust and we were scrambling to achieve our preferred option, which was a refinancing proposal which would see us retain control of the business. Mr Bendemski can be difficult to deal with, and it seems that unbeknownst to us he and Senior Trust took steps to put together their own deal not long after the \$22m agreement was signed.

[26] We consider that Mr Holmes has failed by a considerable margin to demonstrate an arguable evidential basis for his claim, that Senior Trust knew of the continued existence of the second contract between Roy's Bay and S5 when it entered into and concluded the negotiations to sell the land to Stoney Creek. As Mr Jackson

⁹ The Judge permitted the without prejudice correspondence to be adduced in evidence in a pre-trial ruling that Roy's Bay has not sought to challenge on the present appeal: *Senior Trust Capital Ltd v Holmes* [2023] NZHC 2862 [pre-trial ruling].

points out in his affidavit, Senior Trust had an interest in obtaining the best price reasonably obtainable for the property because it wanted to be repaid in full if possible. If Senior Trust had known there was a realistic chance of the sale to S5 being completed, we have no doubt it would have encouraged Roy's Bay to endeavour to achieve that outcome.

[27] It also needs to be borne in mind that the sale by Senior Trust to Stoney Creek was different in significant respects to the sale by Roy's Bay to S5. The latter applied to the whole of the land owned by Roy's Bay and contained extensive warranties by the vendor. The former excluded any warranties by the vendor and required the purchaser to purchase the property on an "as is where is" basis. Two sections, each worth approximately \$800,000, were also excluded from the sale. The fact that the purchase price paid by Stoney Creek was considerably less than that contained in the agreement with S5 is partly explained by these factors.

[28] We consider the evidence establishes that Senior Trust was motivated throughout by a desire to sell the land to repay the loan owing by Roy's Bay. This is reflected in the fact that it conducted a marketing campaign that Mr Holmes does not challenge. It is also noteworthy that Stoney Creek initially offered to pay \$12.5 million for the land but Senior Trust was eventually able to persuade it to increase its offer to \$18 million. We therefore consider the transaction bears all the hallmarks of a mortgagee genuinely trying to obtain the best price it could for land that was not particularly easy to sell. We see no evidence arising out of the sale process to suggest that Senior Trust sought to harm the interests of either Roy's Bay or the appellants as guarantors through the negotiations that led to the sale to Stoney Creek.

[29] For these reasons, which largely mirror those given by the Judge, we are satisfied Mr Holmes has failed to establish that Senior Trust arguably breached its equitable duty to act in good faith when it entered into the negotiations with Stoney Creek.

Was it necessary for the High Court to have information about the terms of the loan by Senior Trust to Stoney Creek?

[30] Mr Holmes did not advance this argument in the High Court and Mr Pascariu did not fully develop it in either his oral or written submissions on appeal. It appears to rest on the proposition that Mr Holmes is entitled to credit for any additional financial benefit that Senior Trust obtained through the loan that it made to Stoney Creek to enable it to complete the purchase of Roy's Bay's land. The Judge was therefore wrong to enter summary judgment against him when he had no information about the terms of the loan by Senior Trust to Stoney Creek.

[31] However, there is no evidence to suggest that the loan to Stoney Creek resulted in Senior Trust receiving a financial benefit greater than that which it could reasonably be expected to receive from a loan of this type. Rather, Mr Jackson says that the loan to Stoney Creek was on favourable terms. We take this to mean terms that were favourable to Stoney Creek rather than Senior Trust. This would not be surprising given that Senior Trust's motivation for selling the land lay in its desire to obtain repayment of the loan owing by Roy's Bay.

[32] More importantly, we have difficulty in understanding how Mr Holmes could be entitled to credit for any benefit Senior Trust might receive from the loan it made to Stoney Creek. In effect Senior Trust was replacing one loan with another. It was entitled to negotiate the loan to Stoney Creek on terms that it considered commercially appropriate in the circumstances. Further, Stoney Creek was a commercial entity well able to reach its own view as to the reasonableness of those terms. We can see no obvious reason why it would agree to provide Senior Trust with a financial benefit over and above that which was reasonable in the circumstances. Nor, as a matter of principle and logic, do we see any reason why Mr Holmes should be entitled to share in any benefit Senior Trust may have received from the loan it made to Stoney Creek.

[33] It follows that we do not consider it was necessary for the High Court to have details of the loan in order to enter summary judgment against Mr Holmes. This ground of appeal fails as a result.

Did Senior Trust establish the quantum of its claim to the required standard?

[34] By way of background in relation to the issue of quantum, we gratefully adopt the following passage from the Judge's decision:¹⁰

[55] The statement of claim seeks judgment in the sum of \$3,429,259.52 as the outstanding debt under the loan agreement and its variations.

[56] Interest is sought in the following terms:

B. Default interest of 20.8% per annum (calculated daily and compounding monthly) on the sum at (A) above from 20 April 2021 to the date of payment in accordance with clause 4.5 of the Loan Agreement, and the First to Third Variations; and

[57] The principal sum for which judgment is sought is pleaded as being principal of \$402,955.39 and interest as at 31 March 2023 of \$3,026,304.13. In response to that pleading, Messrs Holmes and Hannon in their statement of defence say they have insufficient knowledge of and therefore deny that pleading.

[58] The loan agreement between [Roy's Bay] and Senior Trust contains the following clause:

The certificate of the Lender as to the rate or amount of interest payable pursuant to this Agreement shall be conclusive and binding upon the Borrower except in the case of manifest error or fraud.

[59] The guarantee in issue in this proceeding contains the following provision:

Certificate conclusive: Any certificate setting out the amount of the Moneys Hereby Secured signed by a director, the secretary, solicitor or any officer of the Lender shall, save for manifest error, be conclusive as between the Covenantor and the Lender as to the amount owing by the Covenantor to the Lender under this deed and the Covenantor shall pay the money stated in any certificate as being due despite any dispute existing as to whether or how much money is payable to the Lender by the Covenantor.

[60] This proceeding was commenced on 26 April 2023. On 17 April 2023, a notice of demand was sent to Messrs Holmes and Hannon. The letter of demand records it is a certificate as to the monies owing to Senior Trust in accordance with cl 2.5 of the guarantee. That letter set out the amounts referred to at [57] above. It provided six pages of statements which list what are described as being "sales" but are in fact charges of interest. The statements do not include a running balance. There is a document called a "General Ledger" covering the period 31 March 2023 to 17 April 2023.

¹⁰ *Senior Trust Capital Ltd v Holmes*, above n 1 (footnotes omitted).

[61] The 17 April 2023 demand claims principal as at 18 April 2023 to take into account that the sale proceeds of another secured property were received on 14 April 2023. Interest however was calculated to 31 March 2023.

[62] The notice of opposition filed by Messrs Holmes and Hannon did not take issue with the quantum of the claim. Mr Holmes, in his affidavit in opposition, said as follows:

Amount alleged to be owing

51. Senior Trust's application for summary judgment states at paragraph 2(vi) that the total debt outstanding at the time of the application is \$3,429,259.52. In support of this proposition, Mr Jackson's affidavit merely appends a statement issued to Roy's Bay Estate Limited, dated 31 March 2023.
52. As a consequence of the matters set out above in this affidavit, I do not accept that the sum sought is payable. Further, there is insufficient information to establish whether the underlying calculations are correct, or on what basis this specific sum is claimed. For example, it is far from clear that Senior Trust has correctly recorded and applied interest, were it ultimately to be payable.

[35] Mr Holmes has now refined his argument on appeal from that advanced in the High Court. He contends that the notice of demand and the statement of claim have failed to accurately calculate the quantum of default interest he is required to pay under the deed of guarantee. Mr Pascariu points out that the loan facility agreement required Roy's Bay to pay default interest calculated and capitalised on a daily basis. However, the Deed of Guarantee required Mr Holmes to pay default interest calculated on a daily basis but capitalised at the end of each month. Mr Pascariu contends that the notice of demand and statement of claim failed to calculate interest in accordance with the formula contained in the Deed of Guarantee. He points out that Mr Jackson confirmed in his reply affidavit that the claim for interest is based on the monthly invoices and statements that were provided to Roy's Bay's accountants until the debt fell into dispute. Mr Pascariu therefore contends it is likely that the claim for default interest has been calculated and capitalised daily as provided for under the loan facility agreement but not under the Deed of Guarantee.

[36] The important point for present purposes is that both the loan facility agreement and the Deed of Guarantee required default interest to be calculated on a daily basis. They differed only on the frequency of capitalisation. The monthly

statements and general ledger attached to the notice of demand served on Mr Holmes after completion of the sale to Stoney Creek show interest being charged in a lump sum on the last day of each calendar month. This appears to have been in accordance with the terms of the Deed of Guarantee.

[37] Mr Holmes had the opportunity to raise this issue in the notice of opposition and affidavit that he filed in the High Court. In his affidavit Mr Holmes disputed the amount claimed by Senior Trust in general terms but did not allege that Senior Trust had capitalised default interest on a daily basis. If he wished to advance his concern about the calculation of default interest he ought to have done so in his affidavit and notice of opposition so that Senior Trust could respond to it with evidence on the point.

[38] Similar issues regarding quantum arose during the hearing in the High Court. These prompted the Judge to observe:¹¹

[72] It is not satisfactory that the issue as to quantum was not raised in the notice of opposition. The extent of Mr Holmes' objection to quantum in his affidavit, did not go beyond the bare assertion set out at [62] above, nor were objections developed in Mr Bullock's written submissions. The points raised orally by Mr Bullock at the hearing concerned detail Mr Tingey could not be expected to reply to without prior notice. There is no suggestion that Messrs Holmes or Hannon, or their solicitors, wrote seeking details of how the debt was made up.

[39] In the absence of evidence to suggest that Senior Trust has capitalised interest on a daily basis we are not prepared to examine that issue further.

Should Mr Holmes be permitted to amend his notice of opposition to include a ground based on oppression?

[40] Mr Holmes now seeks to argue that the terms of the loan facility were oppressive in all the circumstances. In order to advance this argument, he requires leave to amend his notice of opposition to the application for summary judgment.

[41] Not surprisingly, Mr Holmes did not deal with this issue in his affidavit filed in opposition to the application for summary judgment. However, Mr Pascariu explained in his submissions that Mr Holmes seeks to advance the argument based on

¹¹ Judgment under appeal, above n 1.

oppression solely on the ground that Senior Trust has wrongly calculated the default interest he is required to pay under the Deed of Guarantee. We have already determined that this argument cannot succeed. It follows that the argument based on oppression must also fail. Leave to file an amended notice of opposition to the application for summary judgment is accordingly declined.

Other matters

[42] We deal finally with some miscellaneous issues raised by Mr Pascariu in his oral argument even though they were not included in the notice of appeal.

[43] The first of these relates to the fact that Senior Trust did not serve a notice under s 119 of the Property Law Act on Roy's Bay and the appellants as guarantors before it marketed the land and entered into the agreement to sell it to Stoney Creek. It did so on 22 May 2022, two days after it had entered into the agreement to sell the land to Stoney Creek. However, as Mr Tingey pointed out in response, a mortgagee is only required to give notice under s 119(1) before it exercises one of the powers specified in s 119(2). Section 119(2)(c) is the power of sale. We accept Mr Tingey's submission that a mortgagee exercises a power of sale when it enters into an unconditional agreement for the sale of the mortgaged property. In the present case the agreement was at all times conditional on Roy's Bay not redeeming the mortgage prior to the date of settlement. Roy's Bay had not redeemed the mortgage by 5 August 2022 when settlement occurred. We therefore see no merit in Mr Pascariu's argument on this point.

[44] Mr Pascariu also questioned the figures used by Senior Trust when it sought repayment of the shortfall from the guarantors in April 2023 following completion of the sale to Stoney Creek. However, he did not develop this argument and it overlooked the fact that Senior Trust was required to apply part of the sale proceeds to repay the loan owing to the party holding a first mortgage over the property. We therefore take this issue no further.

Costs

[45] The Deed of Guarantee contains a clause requiring Mr Holmes to reimburse Senior Trust for all reasonable costs, charges and expenses (including legal fees and disbursements computed on a solicitor and own client basis) that it incurs in connection with the enforcement or attempted enforcement of its rights or remedies under the deed.¹² Mr Holmes is to reimburse Senior Trust for its reasonable costs and disbursements calculated on a solicitor and own client basis.

Result

[46] The application for leave to file an amended notice of opposition to the application for summary judgment is declined.

[47] The appeal is dismissed.

[48] The first appellant must reimburse the respondent for its reasonable costs and disbursements on a solicitor and own client basis.

Solicitors:
Hamilton Locke, Auckland for First Appellant
Couch Harlowe Kovacevich, Auckland for Respondent

¹² Court of Appeal (Civil) Rules 2005, r 53E(3)(e).