

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2009-004-890**

BETWEEN                      ARIANA CAILLEEN GEORGE AND  
   RODNEY LEE TE WAKA TOTO  
   HOLLAND  
   Plaintiffs

AND                                TEA CUSTODIANS (BLUESTONE)  
   LIMITED  
   Defendant

Hearing:            2 and 3 June 2009

Appearances: Plaintiffs in person  
                         D A Wood and N J Robertson for the Defendant

Judgment:        18 June 2009 at 3:30 p.m.

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**JUDGMENT OF WOODHOUSE J**

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*This judgment was delivered by me on 18 June 2009 at 3:30 p.m.  
pursuant to r 11.5 of the High Court Rules 1985.*

*Registrar/Deputy Registrar*

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Parties / Counsel / Solicitors:  
Ms A George and Mr R Holland, Auckland  
Mr D A Wood, Barrister, Auckland  
Ms N Robertson, Sanderson Weir, Solicitors, Auckland

[1] In February 2007 the plaintiffs, together with Mr Holland's mother, owned a property in Weymouth where they lived with their children. The property was subject to a mortgage to the National Bank securing a principal sum of approximately \$260,000.

[2] By an agreement dated 30 May 2007 the plaintiffs borrowed \$360,000 from the defendant (Bluestone). The loan was secured by first mortgage over the plaintiffs' home in Weymouth. The advance was used in part to repay the National Bank loan. The balance was applied in part payment for a franchise business purchased by Ms George and to meet other liabilities of the plaintiffs.

[3] Unfortunately, by around November 2007, the plaintiffs were getting behind with payments to Bluestone. Bluestone allowed an extended period to the plaintiffs for them to try to remedy their defaults, but the amount due increased over time. Bluestone issued a notice under the Property Law Act and, after allowing further time, arranged an auction for a mortgagee sale on 6 May 2009. At that date the total owing was approximately \$412,000.

[4] On 30 April 2009 the plaintiffs were granted an interim injunction to restrain the sale. This was on an ex parte application. On 5 May 2009 I heard an application by Bluestone to discharge the interim injunction. The evidence indicated that there was a serious issue to be tried, but the balance of convenience was against the plaintiffs. The latter difficulty was dealt with by scheduling an urgent fixture for the substantive claim, but allowing sufficient time, within that constraint, for the plaintiffs to adduce further evidence. This judgment deals with the substantive claim.

### **The plaintiffs' case in summary**

[5] The plaintiffs have applied for an order under the Credit Contracts & Consumer Finance Act 2003 (the Act) reopening the loan agreement with Bluestone. The plaintiffs seek a further order, upon reopening of the contract, to put them back into the position they were in with the National Bank loan, owing a principal sum of

\$260,000, as opposed to the total now owed under the Bluestone mortgage, which is well in excess of \$400,000.

[6] The plaintiffs statement of claim refers to s 218 of the Act. This is the section defining the meaning of “oppressive”. The Court’s power to reopen a contract is contained in s 120 of the Act. This gives a Court a discretion to reopen a credit contract in three circumstances. The plaintiffs did not refer to the particular circumstance relied on, but it is plain from their statement of claim, and the evidence, that they rely on s 120(c). This provision, so far as material, is as follows:

The Court may reopen a credit contract ... if, in any proceedings ... it considers that —

...

(c) a party has induced another party to enter into the contract ... by oppressive means.

[7] The plaintiffs’ contentions of fact are not clearly set out in their statement of claim. This probably happened because the plaintiffs acted for themselves. However, through Ms George the plaintiffs presented their case with competence and their principal contentions were made clear.

[8] The plaintiffs’ principal contentions were as follows. The application for a loan from Bluestone was made on behalf of the plaintiffs by a mortgage broker, Mr Dilks. It was alleged that an employee of Bluestone, Mr Harrison, advised Mr Dilks to provide false or misleading information to ensure that the loan application would be approved. It was alleged, in particular, that Mr Harrison advised Mr Dilks that the stated purpose of the loan should be changed to a loan for home improvements, and that false information was provided about Mr Holland’s employment and income. The plaintiffs said that there was failure by Bluestone to comply with its own lending criteria. The plaintiffs also said, in effect, that Bluestone made a loan to them knowing that they could not afford it. The plaintiffs contended that this conduct of Bluestone was in breach of reasonable standards of commercial practice and was, therefore, in term of s 118 of the Act, oppressive. The plaintiffs said that, had Bluestone not acted in this way, the plaintiffs would not have been granted the loan and their debt would only be the \$260,000 originally owed.

[9] I heard evidence for the plaintiffs from Ms George, Mr Holland and Mr Dilks. For Bluestone there was evidence from Mr Harrison, and from two other Bluestone employees or former employees, Anna Roderick and Peter Wood. Anna Roderick was operations manager for Bluestone and had some telephone discussions with Ms George which the plaintiffs say are relevant to their allegations about the conduct of Mr Harrison. The other Bluestone witness, Mr Wood, is the chief executive officer of a company which manages the mortgages owned by Bluestone. For four years until May 2006 Mr Wood was executive general manager of Bluestone. He gave general evidence relating to Bluestone's lending procedures together with evidence, based on Bluestone's business records, relating to the loan to the plaintiffs.

### **The broad sequence of events**

[10] I will outline the main events generally by reference to contemporaneous documents. Further evidence directed to the plaintiffs' specific contentions will be dealt with under headings related to the relevant contention.

[11] On 13 February 2007 Ms George entered into an agreement to purchase a business. The business is described in the agreement as a "TouchNZ Franchise". It was a franchise relating to advertising. The price was \$105,000, of which \$70,105 related to what is described in the agreement as "intangible assets". A deposit of \$50,000 was required.

[12] Ms George approached the National Bank for a further loan to purchase the business. The bank declined the application. Ms George said that the National Bank consultant she spoke to advised her that it would be better that she and Mr Holland not proceed with purchase of the franchise business because the consultant considered that Ms George and Mr Holland could not afford to borrow further money.

[13] Ms George advised Mr Padfield that the application to the National Bank had been declined. Mr Padfield then referred the plaintiffs to a mortgage broker, Mr Dilks. Mr Dilks was known to Mr Padfield through a business relationship.

[14] Mr Dilks, on behalf of the plaintiffs, applied to a number of companies for a loan. No application was successful until the application to Bluestone.

[15] Mr Dilks' application to Bluestone, on behalf of the plaintiffs, was made by fax dated 12 April 2007. The first page of this fax was Mr Dilks' letter of application to Bluestone. The letter included the following:

Purpose	85% LVR home loan on property 8 Honey Pl, Weymouth, Auckland. Current Loan \$273k with national bank wanting to refinance to \$385,000. Property with valuation at \$445,000.
Stability	Rodney and Ariana long term married with two dependents Ariana is a school teacher of 14yrs and Rodney a field technician drilling specialist 12 yrs. They have a beautiful home in Weymouth which needs enhancing throughout.

[16] The fax had 47 pages of supporting documents. These included bank statements and other documents recording Ms George's income as a teacher and Mr Holland's income as a field technician working for Geovert Limited.

[17] On receipt of the application Bluestone opened a form of diary. Notes were made in the diary relating to the progress of the loan application. It was not in issue that all dealings with Bluestone were made on behalf of the plaintiffs by Mr Dilks. There are a number of entries from 12 April 2007 to 1 May 2007 recording contact between Bluestone employees and Mr Dilks relating to items of information required, but with nothing of relevance to the present claim.

[18] The first relevant entry was on 2 May 2007. Part of it was as follows:

Clients would like to re-finance & top up to complete home improvements.

...

Finance with Bluestone will assist clients with their home improvements.

There was no entry prior to this relating to the purpose of the loan. There is no subsequent entry in Bluestone's diary, or in any other Bluestone document, indicating a loan purpose other than to re-finance and for home improvements.

[19] There was a separate entry in Bluestone's diary for 2 May 2007 recording Ms George's income as a teacher and Mr Holland's income as a drill offsider for Geovert Limited. This information was provided with the original application submitted by Mr Dilks, or subsequently by him.

[20] By 2 May 2007 Ms George was no longer employed as a teacher. She had resigned from her teaching position in anticipation of commencing the franchise business. There appears to be no record that this information was passed on to Bluestone.

[21] Mr Holland's employment with Geovert had ended at around the end of March 2007. Information was obtained by Bluestone in that regard and Bluestone sought further information from Mr Dilks relating to Mr Holland's employment and income. On 7 May 2007 a document was signed by Mr Holland. This was a standard form Bluestone document described as "self-certified income declaration". This declaration was obviously sought by Bluestone because Mr Holland was no longer employed by Geovert. The blank declaration form must have gone from Bluestone to Mr Dilks, because there were no direct dealings between either of the plaintiffs and Bluestone until after the advance was made. At around this time Mr Dilks received advice from the plaintiffs that Mr Holland was considering setting up a tow truck business. In relation to that proposal Mr Dilks received advice from Bluestone that Mr Holland would have to get GST registration.

[22] Handwritten entries on the Bluestone income declaration include Mr Holland's name, a GST number, and a monthly income of \$6,200. There was conflicting evidence in relation to this document from Ms George and Mr Holland on the one hand and Mr Dilks on the other. Ms George and Mr Holland said that the form was brought to their home by Mr Dilks and filled in in his presence. Ms George and Mr Holland said that Mr Holland signed the document in blank and Mr Holland then left the room. Ms George said that the name "Rodney Holland", handwritten at the beginning of the form was written by Mr Dilks. Ms George said the remaining handwriting was hers. This included Mr Holland's GST number and the monthly income of \$6,200.

[23] Ms George said that Mr Dilks advised her to insert the monthly figure of \$6,200 as an estimate of the monthly income from the franchise. Ms George said that she questioned Mr Dilks as to why the franchise income was being put in the form when the franchise income would be hers but the form was in Mr Holland's name. Ms George said that Mr Dilks advised her that it did not matter whether Mr Holland filled in the form or whether she filled it in.

[24] Mr Dilks disputed this evidence. He said he had no recollection of going to the plaintiffs' home for this form to be completed and had no particular recollection of it in general. The copy in evidence records that it was faxed from Clendon Library on 7 May 2007 at 10:52 a.m. The transmission from Clendon Library suggests that the completed form was sent from a fax machine near the plaintiffs' home. It is not recorded where the document was faxed to at 10:52 a.m., but just after 2:00 p.m. the same page was faxed from Mr Dilks' fax number, as he acknowledged. The recipient of the fax is not recorded, but it was obviously sent to Bluestone. There were five further pages sent by Mr Dilks. The cover sheet is missing. The remaining four pages are copies of bank statements for Mr Holland recording, amongst other things, income from Geovert Limited over the period November 2006 to February 2007 at \$1,870.50 per fortnight. The pages of the bank statements do not have any fax transmission data from Clendon Library. There was no evidence as to how they came into Mr Dilks' possession.

[25] I do not consider it necessary to make any final determination as to precisely how the income declaration was completed and who was responsible for the information. This is because there is no reasonable conclusion open on this evidence that will assist the plaintiffs in their case against the defendants. At best from the plaintiffs' point of view, based on the evidence from Ms George, she knowingly allowed herself to be persuaded to put misleading information in the document about Mr Holland's income. At the time the document was signed Mr Holland had no income. And if the remainder of Ms George's evidence is accepted as correct, against Mr Dilks' evidence, this by itself would lead me to conclude that I could not rely on any other evidence from Mr Dilks. I will come to other aspects of Mr Dilks' evidence.

[26] There are Bluestone diary entries on 9 May clearly related to the income declaration in Mr Holland's name. These include a note that the "loan product type" had been changed to "business easy". This is the "loan product" for a self-employed borrower. Further entries include the following:

Settlement condition – GST rego.

Rodney is now a self employed truck driver, he is currently contacting [sic] to his old employer Geovert, income self certified is \$6,200 net per month, [sic] as I can see \$1,870.50 going into his bank account each fortnight this is the amount I have used.

The income figure of \$1,870.50 is the fortnightly income credit from Geovert Limited recorded in the bank statements sent by Mr Dilks with the income declaration.

[27] A letter dated 8 May 2007 was sent by the Inland Revenue Department to Mr Holland advising him of a GST registration with the new GST number. This was the GST number recorded on the income declaration, obviously earlier provided by telephone. The business address for Mr Holland's proposed tow truck business was the residential address of the plaintiffs.

[28] On 10 May 2007 Bluestone sent a fax to Mr Dilks which stated, amongst other things:

We confirm the loan has been unconditionally approved, based on the information submitted.

[29] On the same date Bluestone sent a letter to the plaintiffs at their home address. This advised the plaintiffs that the loan had been unconditionally approved and, in effect, that the offer of a loan was open for three months. There was a paragraph as follows:

**Important:** If you decide to borrow from us, you must rely only on the information contained in the formal loan agreement, which will be sent to you in due course. This sets out the final terms of your loan, which overrides this approval, and by signing it you agree that you have not relied on any promises that are not contained in the formal loan agreement itself. You acknowledge that your decision to borrow from us is based on your own assessment of the loan product. If this is not the case, you should tell us now. We recommend that you seek professional advice before signing any documents. If your circumstances change to the extent that we feel



completion of the matter would be undesirable, we have the right to cancel this conditional approval at any time.

[30] The letter referred, in bold, to a “**Loan Approval Schedule**”, enclosed with the letter. The loan approval schedule recorded information relating to the loan, including the principal, interest rate of 13.04% per annum and monthly payments estimated at \$3,913. The schedule also stated that the loan purpose was “home improvement”.

[31] The plaintiffs accepted the loan offer. They signed the loan agreement and other necessary documents in Mr Dilks’ presence. The signed documents were sent to Bluestone. Bluestone declined to proceed unless the plaintiffs signed the documents in the presence of a lawyer. They were referred to a lawyer by Mr Dilks. The loan documents were completed in the presence of the lawyer on 30 May 2007. The loan agreement was initialled on each page by the plaintiffs and signed by them. The loan purpose is recorded in the agreement as “home improvements”. The right provided by the Act to cancel within three working days is recorded in the agreement. There is a statement at the conclusion of the agreement which includes the following:

By signing this loan agreement, each of you have made the following declarations:

- 1 You have carefully read this loan agreement including the terms and conditions. You understand it establishes a legal contract between you and the lender. If you have any questions, ask before you sign.

[32] The money was advanced on completion of the loan documents. The existing loan from the National Bank was repaid and, it appears, \$50,000 was paid on account of the purchase price of the franchise with the balance used for other purposes.

[33] The franchise business was not a success. Ms George sought repayment from the franchise vendor. The vendor made various proposals, and a refund of \$20,000 was received by Ms George.

[34] Because of the failure of the franchise business, and the fact that Mr Holland was unemployed, the plaintiffs were unable to keep up their payments. On 1

November 2007 Ms George contacted Bluestone. Matters then proceeded as broadly outlined at the beginning of this judgment.

**Was there a change to the stated purpose of the loan?**

[35] Mr Dilks' evidence-in-chief, contained in a written witness statement, consisted of five short paragraphs. What Mr Dilks said about the purpose of the loan was as follows:

- 2) I was told by Mathew Harrison to change the purpose of the loan to Home Improvements as criteria involved in approving the loan on this basis is [sic] a lot simpler and quicker than the criteria required to approve a loan for business purposes.
- 3) Based on the advice of Mathew Harrison, I proceeded to change the purpose of the loan to home improvements.

[36] Before considering the question whether Mr Dilks was told by Mr Harrison to change the purpose of the loan, it is necessary to consider other evidence on this topic in a little more detail. The plaintiffs contend that the stated purpose was changed from refinancing to provide additional funds to purchase the franchise to refinancing to provide additional funds for home improvements. There is no record of any application having been made recording the purpose as refinancing to purchase the franchise. The purpose expressly stated in the 12 April application, recorded at [15] above, was "refinance". In the second paragraph of Mr Dilks' fax there is also the reference to "enhancing" the plaintiffs' home. In answer to questions from me, Mr Dilks was unable to explain the reason for that statement. There was the following exchange:

Would you look at page 358... yes your Honour.

There's an item "stability" and the final sentence "they have a beautiful home in Weymouth which needs enhancing throughout"... yes your Honour.

What's the point of that observation... I don't know your Honour. I think I'm – you are right, I don't know. I think it would obviously maybe – I don't know.

That's your fax with the original application isn't it... yes yes it is.

[37] Mr Dilks conducted all dealings with Bluestone on behalf of the plaintiffs. There was no contact between either of the plaintiffs and any employee of Bluestone until after the loan agreement was entered into. The only contemporaneous record of a stated purpose is Mr Dilks' fax of 12 April 2007. I am satisfied that Mr Dilks' intention was to convey the impression that the surplus after repayment of the existing loan would be used for home improvements.

[38] Subsequent dealings between Mr Dilks and Bluestone employees, recorded in Bluestone's diary notes, contain no reference to refinancing for the purpose of buying the business. They do refer to refinancing for home improvements.

[39] Mr Dilks acknowledged in evidence that he had knowingly made a false representation to Bluestone that the purpose of the loan was to borrow additional funds to make home improvements. He knew that the reason for refinancing was to provide additional funds to enable Ms George to complete the purchase of the franchise business. That was the reason why Mr Padfield had referred the plaintiffs to Mr Dilks.

[40] Mr Dilks was the plaintiffs' agent. That is clearly borne out by the evidence. There is no evidence that would make Bluestone liable for Mr Dilks' conduct, as an agent of Bluestone. The only basis upon which Bluestone might have a responsibility for misstating the purpose of the loan would be if there was evidence of some form of improper dealing between Mr Dilks and Bluestone's employee, Mr Harrison, before Mr Dilks submitted the application. It is this relationship which is at the heart of the plaintiffs' contention.

[41] There is no contemporaneous document recording any dealings between Mr Harrison of Bluestone and Mr Dilks. However, Ms George gave evidence that she was advised by another Bluestone employee, Anna Roderick, that Mr Harrison had had some involvement with the plaintiffs' loan. Ms George said she received this advice from Ms Roderick when Ms George telephoned Bluestone about the difficulties the plaintiffs were having in making payments under the loan agreement. From the diary notes it appears that Ms George's discussion or discussions with Ms Roderick occurred in January 2008.

[42] Ms George's evidence-in-chief, taken from her witness statement, as to Ms Roderick's references to Matthew Harrison, was as follows:

11. Anna [Roderick] advised Ariana [George] that she knew of the problems that Matthew [Harrison] had had with the approval of the loan.

14. Anna also said that our property valuation was \$450,000. Anna then advised that Matthew [Harrison] had required Rodney [Holland] to get a GST No. as he was operating a tow truck from his residential address [in Weymouth].

[43] Ms Roderick said that she did not recall making any statement to Ms George about Mr Harrison, in respect of the matters Ms George referred to or otherwise. Ms Roderick said that she did not think she would have referred to Mr Harrison. This was because her statements over the telephone to Ms George were made after she, Ms Roderick, had referred to Bluestone's diary notes, and these do not contain reference to Mr Harrison. And Ms Roderick did not recall any discussion with Mr Harrison at the time.

[44] Ms George was critical of Bluestone for failing to have any record, made by Ms Roderick, of Ms George's telephone discussions with Ms Roderick. There is a diary note, for 18 January 2008, although it was not recorded by Ms Roderick. This did not refer to the matters relied on by the plaintiffs, but to issues arising out of the default by the plaintiffs under the loan agreement. It should also be recorded that Ms George did not produce any note made by her of the discussions she had with Ms Roderick.

[45] It is unnecessary for me to determine whether Ms Roderick did make the statements to Ms George that Ms George says she made. This is because Ms George did not say that she had been told by Ms Roderick that Mr Harrison told Mr Dilks to alter the purpose of the loan from business purchase to home improvements. There was, therefore, no evidence from this source of any improper dealing between Mr Harrison and Mr Dilks in respect of the purpose of the loan.

[46] The only evidence comes from Mr Dilks. Mr Dilks' evidence that he was told by Mr Harrison to change the purpose of the loan needs to be weighed against evidence from Mr Harrison. Mr Harrison acknowledged that he would have spoken

to Mr Dilks on a number of occasions over the relevant period. He said that this would have occurred in his capacity as a business development manager for Bluestone. As a business development manager his job was to market Bluestone to mortgage brokers. Mr Harrison also acknowledged that he had met Mr Dilks approximately eight years ago through Mr Harrison's former job. The original contact was when Mr Harrison was an account manager for an insurance company and Mr Dilks was a member of a group of brokers with whom Mr Harrison dealt.

[47] As a Bluestone business development manager, Mr Harrison said he dealt with in excess of 50 brokers every month. Mr Harrison accepted that he may very well have spoken to Mr Dilks about general aspects of an application for a loan to Bluestone. But Mr Harrison firmly denied the proposition that he had suggested to Mr Dilks that the purpose of the loan application for the plaintiffs be changed from an application to provide funds to buy a business to an application for home improvements. Mr Harrison said he "had no knowledge that the loan was being required for any purpose other than the purpose Paul Dilks had submitted ... I also had no knowledge that Ariana George and Rodney Holland were investing in a franchise business".

[48] Faced with the conflict between the evidence of Mr Dilks and Mr Harrison I prefer the evidence of Mr Harrison for several reasons. The first reason is one of credibility. As earlier recorded, Mr Dilks acknowledged that he knowingly submitted a false application so far as the loan purpose was concerned. He was unable to provide a satisfactory answer to my question as to why he referred to the need for enhancement of the plaintiffs' home in his application. And in respect of the income declaration, discussed at [21] to [25] above, even if Mr Dilks had not done everything that Ms George said he did, Mr Dilks must have known that the information he was passing on as to Mr Holland's income was at best unreliable. But he nevertheless passed it on. Against this, there was nothing to indicate lack of credibility on Mr Harrison's part, or material unreliability. The second reason why I prefer Mr Harrison's evidence is that, as Mr Harrison pointed out, there was no significant reason why it would have been better for the loan to be for the purpose of home improvements as opposed to purchase of the business. Thirdly, there was no

evidence indicating that Mr Harrison would have derived any benefit by persuading Mr Dilks to present a false application.

[49] For these various reasons I am not persuaded that there was any inappropriate conduct by Mr Harrison, or any other employee of Bluestone, in relation to the purpose of the loan.

### **Information about Mr Holland's employment and income**

[50] Mr Dilks, in his witness statement, said the following:

- 4) Mathew Harrison told me, income checks had been done on Ariana and Rodney and they had found that Rodney was not employed at Geovert, and had not been employed there since 2006.
- 5) Mathew then told me to ask Rodney and Ariana to apply for GST registration for the tow truck business Rodney was operating from their home.

[51] Mr Harrison's evidence on this topic was as follows:

20. I recall the underwriting team contacting me to advise that there was a requirement for a product change as Rodney was not an employee of Geovert Limited but an independent contractor working with Geovert. I understand that Ariana George has alleged that Rodney Holland was unemployed at the time of the application and had a tow truck without a winch. I had no knowledge of Rodney's alleged unemployment and had no knowledge about his tow truck operation or its lack of a winch.
21. I understood from the underwriting team that Rodney was an independent contractor. From the information that I was presented then Rodney Holland would have been categorised as self employed and therefore at this point the applicable product type would have changed to a Business Easy product which requires an income projection statement to be completed along with GST registration. These steps were required as part of the origination specifications for the Business Easy product. I can recall having a conversation with Paul Dilks to advise him of the new requirements associated with this loan product but I reiterate that I had no knowledge about Rodney [sic] employment issues or about the state of his tow truck.

[52] Ms George provided an affidavit in addition to her witness statement. This included the following statement relevant to the present topic:

36. It is my belief, that the issue of GST registration should never have been entered into or indeed required. After income checks highlighted Rodney was not in employment at Geovert, Tea Custodians Bluestone should not have proceeded further. They were aware the affordability was not there. What they did do however was find another way to justify approving the loan as they were quite aware there was sufficient security which they would inevitably realize on our property. This conduct is therefore “Oppressive” in the context of Part 5, Section 118 of the Credit Contracts and Consumer Finance Act 2003.

[53] I have already discussed the principal evidence relating to this topic. I am not persuaded, on the question of fact, that Mr Harrison, or any other employee of Bluestone, knew that Mr Holland had no income. The evidence available to me in fact indicates that the plaintiffs were involved, at least to some extent, in knowingly passing on information to Bluestone which indicated that Mr Holland had a reasonably substantial income.

[54] This conclusion also means that the plaintiffs have not established broader contention to the effect that Bluestone should not have granted the loan because Bluestone knew the plaintiffs could not afford it.

### **Failure by the plaintiff to comply with its own lending criteria**

[55] Ms George submitted that Bluestone knowingly acted contrary to a provision in the loan agreement and to provisions in a Bluestone document called “origination specifications”. The latter document is a 33 page specification for Bluestone staff providing detailed directions for processing loan applications.

[56] The provision in the loan agreement was as follows:

#### **Goods and Services Tax Warranty**

In your application for the loan you have advised us that if you or any other person who gives a Mortgage were to sell the Property or Properties given a security, neither you nor that other person providing a Mortgage would be liable to pay GST on the sale price. This is because either you are not registered (nor required to be registered) for GST or if you are registered, no part of the Property is used by you for a taxable activity.

[57] The plaintiffs placed considerable weight on this provision. Ms George's submission was that Bluestone knew that Mr Holland had become registered for GST with the address of his tow truck business recorded as the plaintiffs' home. Bluestone did know that Mr Holland was registered for GST. A copy of the Inland Revenue Department's registration advice was sent to Bluestone, and this advice is addressed to Mr Holland at the plaintiffs' home. But there is no evidence establishing, on the balance of probabilities, that Bluestone knew that the home was being used for the tow truck business. There is evidence that, at least down to the present time, there was no breach of this provision because no registered or registerable GST activity was being conducted from the home. The plaintiffs' argument in this regard therefore fails on the facts. In consequence it is unnecessary to consider a legal difficulty for the plaintiffs underlying their argument. That would be that they were seeking to rely on breach of a provision of the loan agreement that the plaintiffs, not Bluestone, were required to comply with.

[58] I am satisfied that the GST point does not provide grounds for reopening the contract. There is also no evidence of any material breach by Bluestone employees, in the light of the information available to Bluestone employees, of Bluestone's internal directions to its staff for processing loans in the origination specifications.

### **Inducement**

[59] The plaintiffs' application to reopen the loan agreement must fail for the reasons dealt with to this point. The claim would also fail because the plaintiffs have not established that they were induced to enter into the loan agreement as a result of any of the conduct of Bluestone that they complain about.

[60] They were not induced to enter into the loan as a result of Bluestone's recording that the purpose of the loan was to carry out home improvements. The plaintiffs were in fact made aware, before they were committed to the loan, that Bluestone was proceeding on the understanding that the loan was sought for home improvements.



[61] The plaintiffs were not induced to enter into the loan as a consequence of the information provided to Bluestone relating to Mr Holland's employment or his tow truck business, or the GST registration. All of the information in that regard was passed on to Bluestone by the plaintiffs themselves.

[62] The plaintiffs proceeded with the loan with full knowledge that they would be unable to afford to make the payments unless the franchise business produced substantial income. That was their choice. They were not influenced in it by anything which Bluestone did or failed to do. It was not Bluestone's responsibility to protect the plaintiffs from their own investment decisions in respect of which Bluestone had no involvement. Regrettably the business did not succeed. Even more regrettably the likely consequence of this is that the plaintiffs will lose the home where they live with their children. But these outcomes have not arisen from any wrongful conduct of Bluestone.

### **Result**

[63] The claim is dismissed.

[64] I assume that the mortgage will contain provision for costs. If Bluestone seeks an order for costs, memorandum should be filed with a copy served on the plaintiffs. Any reply for the plaintiffs should be made four weeks after service of the memorandum on them.

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Peter Woodhouse J