

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA172/2024
[2025] NZCA 618

BETWEEN

LIYUN CHEN
First Appellant

LC1521319 DEVELOPMENT CO
LIMITED
Second Appellant

AND

TAWA TRADE FINANCE LIMITED
Respondent

Hearing: 18 February 2025

Court: Katz, Grice and Powell JJ

Counsel: M J Tingey and B Han for Appellants
D J Chisholm KC for Respondent

Judgment: 26 November 2025 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must together pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Katz J)

Introduction

[1] This is an appeal against a decision of Associate Judge Taylor in the High Court at Auckland, granting summary judgment in favour of the respondent, Tawa Trade Finance Ltd (Tawa Trade), in respect of the amount outstanding under two loan agreements.

[2] Tawa Trade is a trade and commercial lender, providing second-tier (non-bank) lending services to property developers and others. The first appellant, Ms Liyun Chen, is the sole director and majority shareholder of the second appellant, LC1521319 Development Co Ltd (DevCo). Tawa Trade (as lender) entered into two six-month term loan agreements in 2022 with DevCo (as borrower) (Loan Agreements). Ms Chen, in both a personal and trustee capacity, guaranteed the borrowing.

[3] DevCo defaulted on both loans, following which Tawa Trade took enforcement action. A shortfall remained owing following that enforcement action. Summary judgment was granted in favour of Tawa Trade for \$1,111,939.06, together with interest at 28 per cent per annum and indemnity costs of \$17,617.21.¹

[4] Ms Chen and DevCo now appeal. The key issues on appeal are whether the Judge erred in finding that it was not seriously arguable that:

- (a) the Loan Agreements were consumer credit contracts under the Credit Contracts and Consumer Finance Act 2003 (CCCFA); and
- (b) Tawa Trade's conduct was oppressive under the CCCFA.

¹ *Chen v Tawa Trade Finance Ltd* [2024] NZHC 410 [judgment under appeal] at [98].

Further background

The Loan Agreements and the secured properties

[5] The first loan, in the sum of \$1,766,000, followed a loan offer dated 10 June 2022 and was formalised in a term loan agreement dated 17 June 2022 (First Loan Agreement). Relevant terms of the first loan offer included:

- (a) The term of the loan was six months.
- (b) The purpose was to “refinance properties located at ... Jeffs Road, Flatbush, Auckland, and ... Living Stream Road, Albany Heights, Auckland”. The Living Stream Road property was owned by DevCo (having been acquired on 22 January 2021). The Jeffs Road property was owned by Ms Chen, as trustee of the Royall Family Trust. That property appears to have initially been acquired by Ms Chen in her personal capacity in 2012 and subsequently transferred to her in her trustee capacity on 22 January 2021.
- (c) Ms Chen was required to provide unlimited personal guarantees.
- (d) The loan was to be secured by a general security agreement over DevCo’s property, and first registered mortgages over the Living Stream Road and Jeffs Road properties.
- (e) Loan to value ratios (LVR) were specified in relation to each property and conditions relating to GST were imposed to preserve those LVRs (as discussed further below at [44] to [50]).
- (f) The loan was required to be utilised “for general corporate purposes and not for personal or individual use”.

[6] Relevant terms of the First Loan Agreement included:

- (a) The drawdown was 17 June 2022 for a period of six months to 17 December 2022.

- (b) The standard interest rate was nine per cent per annum, increasing to a rate of 28 per cent per annum upon default. The drawdown amount, after deducting interest and fees, was \$1,612,472.

[7] Ms Chen executed two Deeds of Guarantee personally and as sole trustee of the Royall Family Trust.

[8] A second loan of \$442,000 was agreed following a loan offer dated 28 July 2022 and formalised in a term loan agreement dated 5 August 2022 (Second Loan Agreement). Relevant terms of the second loan offer included:

- (a) The loan term was six months, expiring on 5 February 2023.
- (b) The purpose of the loan was to “provide an equity release relating to ... Tipu Road, Flat Bush, Auckland ... whereby the proceed[s] [are] to be applied to pre-development work of projects of the Borrower”. That property was owned by Ms Chen personally.
- (c) Ms Chen was obliged to give unlimited personal guarantees.
- (d) DevCo and Ms Chen were obliged to grant “first ranking obligations and exclusive mortgage” over the Tipu Road property.
- (e) An LVR was specified in relation to the property and conditions relating to GST imposed to preserve that LVR (as discussed further below at [44] to [50]).
- (f) The loan was required to be used for “general corporate purposes and not for personal or individual use”.

[9] The relevant terms of the Second Loan Agreement included:

- (a) The drawdown date was 5 August 2022 for a term of six months expiring on 5 February 2023.

- (b) Standard interest was 10 per cent per annum and default interest accrued at the rate of 28 per cent per annum.

[10] Ms Chen guaranteed the company's obligations under the Second Loan Agreement pursuant to the existing guarantees both personally, and as trustee of the Royall Family Trust.

Breach, default, and enforcement

[11] Although Tawa Trade did not learn of it until February 2023, Ms Chen had already entered into an agreement (dated 4 February 2022) to mortgage any real property owned by herself to another financier, General Finance Ltd.² Due to this non-disclosure, DevCo was in breach of the conditions of the Loan Agreements from the outset. Tawa Trade's evidence is that it would never have advanced the loan funds had it been aware of the prior agreement to mortgage. General Finance lodged caveats against the Jeffs Road property on 3 February 2023 and the Tipu Road property on 3 May 2023.

[12] Both loans expired without repayment (on 17 December 2022 and 5 February 2023, respectively). Tawa Trade sent a letter of demand on 23 February 2023. Following DevCo's failure to remedy the default, in March 2023 Tawa Trade served notices under s 119 of the Property Law Act 2007 (PLA), which expired on 9 May 2023. Tawa Trade then proceeded to market the three secured properties for mortgagee sale.

[13] Tawa Trade sold the Jeffs Road property and the Tipu Road property by mortgagee sale in July 2023, with settlement occurring on 17 August 2023. The Living Stream Road property was not sold until earlier this year. There is still a significant shortfall outstanding on the loans.

The High Court proceedings

[14] DevCo and Ms Chen filed proceedings in the High Court against Tawa Trade, advancing wide-ranging causes of action. Significant damages were claimed, based

² *Chen v General Finance Ltd* [2023] NZHC 1329 at [6].

on alleged loss of profits from an intended property subdivision. Only the CCCFA claims are still pursued on appeal.

[15] Tawa Trade counterclaimed in debt for the shortfall owing under the Loan Agreements.

[16] The High Court found that none of the claims made by DevCo and Ms Chen were tenable, for reasons we summarise below. Tawa Trade was granted:³

- (a) defendant's summary judgment in respect of the claims made against it by DevCo and Ms Chen; and
- (b) summary judgment on its counterclaims in the sum of \$1,111,939.06 (as at 27 November 2023), plus default interest at 28 per cent per annum until payment in full.

Legal principles — summary judgment

[17] The principles applicable to both plaintiff's and defendant's summary judgments are well established. The onus was on Tawa Trade to show, on the balance of probabilities, that:

- (a) that Ms Chen and DevCo could not succeed on any of their pleaded causes of action;⁴ and
- (b) that Ms Chen and DevCo had no defence to Tawa Trade's counterclaim.⁵

[18] The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.⁶ The Court is entitled, however, to

³ Judgment under appeal, above n 1, at [98].

⁴ For a more detailed discussion of the principles relating to defendant summary judgment see: *Stephens v Barron* [2014] NZCA 82 at [9]; and *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [61]–[68].

⁵ *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26].

⁶ At [26], citing *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341. See also *Partners Finance and Lease Ltd v Richmond* [2019] NZHC 34, [2019] NZAR 168 at [62(d)] and [64(c)], citing *Harry Smith Car Sales Pty Ltd v Claycom Vegetable Supply Co Pty Ltd* (1978) 29 ACTR

examine and reject spurious defences or plainly contrived factual conflicts. “It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.”⁷ In other words, it can take a robust approach and enter judgment even where “there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court”.⁸

Is it arguable that the Loan Agreements are consumer credit contracts under s 11 of the CCCFA?

[19] The first issue on appeal is whether the Judge erred in finding the appellants’ argument that the Loan Agreements are consumer credit contracts under s 11 of the CCCFA to be untenable. The significance of this issue is that, if the Loan Agreements are consumer credit contracts, Tawa was required to meet the statutory disclosure obligations in respect of such contracts (which it did not). This would call into doubt Tawa’s entitlement to enforce the Loan Agreements or retain any interest charged under them.

Consumer credit contracts under the CCCFA

[20] The CCCFA applies to all credit contracts, or transactions that are in substance or have the effect of a credit contract. A credit contract is a contract under which credit is, or may, be provided.⁹ Relevantly, “credit is provided under a contract if a right is granted by a person to another person to ... incur a debt and defer its payment”.¹⁰

[21] Credit contracts that are *consumer* credit contracts benefit from significantly stronger protections (including greater disclosure obligations) than most other credit

21 (SC).

⁷ *Partners Finance and Lease Ltd v Richmond*, above n 6, at [62(e)], citing *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 (HC). See also *Eng Mee Yong v Letchumanan*, above n 6, at 341; and *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 4.

⁸ *Partners Finance and Lease Ltd v Richmond*, above n 6, at [62(g)], citing *Jowada Holdings Ltd v Cullen Investments Ltd* CA248/02, 5 June 2003 at [28]. See also *Keung v Connolly* [2023] NZHC 2381 at [24].

⁹ Credit Contracts and Consumer Finance Act 2003, s 7.

¹⁰ Section 6(b).

arrangements. Consumer credit contract is defined in s 11, which sets out four cumulative criteria that must be satisfied:¹¹

11 Meaning of consumer credit contract

- (1) A credit contract is a **consumer credit contract** if—
- (a) the debtor¹² is a natural person; and
 - (b) the credit is to be used, or is intended to be used, wholly or predominantly for personal, domestic, or household purposes; and
 - (c) 1 or more of the following applies:
 - (i) interest charges are or may be payable under the contract:
 - ...
 - (d) when the contract is entered into, 1 or more of the following applies:
 - (i) the creditor, or one of the creditors, carries on a business of providing credit (whether or not the business is the creditor's only business or the creditor's principal business):
 - ...

[22] Other relevant provisions include:

- (a) s 11(1A), which relevantly provides that for the purposes of subs (1)(b) the predominant purpose for which the credit is to be used is the purpose for which more than 50 per cent of the credit is intended to be used;¹³
- (b) s 11(1B), which provides that the reference to intention in subs (1)(b) and (1A) is a reference to the debtor's intention; and

¹¹ Footnote added.

¹² Debtor is defined in s 5 of the Credit Contracts and Consumer Finance Act and relevantly includes "a person to whom credit has been provided...under a credit contract".

¹³ Section 11(1A)(a).

- (c) s 15, which relevantly provides that “a credit contract under which the debtor is a trustee acting in his or her capacity as a trustee of a family trust” is not a consumer credit contract.¹⁴

[23] Finally, s 13 contains an important presumption:

13 Presumption relating to consumer credit contract

In any proceedings in which a party claims that a credit contract is a consumer credit contract, it is presumed that the credit contract is a consumer credit contract unless the contrary is established.

The High Court decision

[24] It is common ground that the criteria in s 11(1)(c) and (d) are met in this case. The dispute focuses on whether the criteria in s 11(1)(a) and (b) are also met.

[25] The Judge found there was no consumer credit contract. The loan was clearly made to DevCo, and guaranteed by Ms Chen. The requirement that the debtor be a natural person, under s 11(1)(a), was therefore not met. The stated purpose of the loan was for corporate purposes and not individual or personal use, as expressly confirmed in the loan conditions. Therefore, the argument, under s 11(1)(b), that the loan was to be used, or was intended to be used, wholly or predominantly for personal, domestic, or household purposes, was also found to be untenable.¹⁵

The section 11(1)(b) argument

[26] We address the s 11(1)(b) argument first. Mr Tingey, counsel for the appellants, submitted that the Judge erred in finding the s 11(1)(b) argument to be untenable. He acknowledged that the loan documents expressly state that loan was provided for a corporate purpose and identify DevCo as the Borrower. He submitted, however, that the description of the parties’ roles and the stated purpose in the documents are not a conclusive declaration as required by s 14 of the CCCFA. Rather, the actual intended use of the funds (at least in part) was for the discharge of Ms Chen’s debt and/or guarantor obligations, which is a personal purpose.

¹⁴ Section 15(1)(c).

¹⁵ Judgment under appeal, above n 1, at [81].

[27] More specifically, Mr Tingey submitted that the purpose of the first loan was to refinance prior loans of the appellants that were secured by the Jeffs Road and Living Stream Road properties. As the Jeffs Road property was owned by Ms Chen personally, the loan (or at least that part of it) must have been made to her and for her benefit, in order to release her personal obligation to repay her mortgage on Jeffs Road. The release of a previous personal debt due on a mortgage, he submitted, is a personal purpose that satisfies s 11(1)(b).

[28] Tawa Trade's written submissions (filed in advance of the hearing) pointed out that the Jeffs Road property was in fact owned by Ms Chen in her capacity as trustee of the Royall Family Trust, not in her personal capacity. As the evidence (including Ms Chen's own statements) clearly support that submission, Mr Tingey advanced a slightly different argument in his oral submissions. He accepted that the Jeffs Road property was owned by Ms Chen in her trustee capacity but submitted that she had nevertheless received a personal benefit from the first loan. He noted that pursuant to sch 2, cl 1.1(1) of the PLA, a mortgagor is required to "pay to the mortgagee the principal amount secured by the mortgage at the time and in the manner specified in the mortgage or any other instrument". Accordingly, he submitted, Ms Chen would have been personally liable to repay the mortgage, despite only holding the property in a trustee capacity. Hence, he submitted, she received a personal benefit from the first loan, which refinanced the previous borrowing on the Jeffs Road property.

[29] As for the second loan, Mr Tingey submitted that its purpose was to provide an equity release relating to the Tipu Road property, which was owned by Ms Chen personally. Since Ms Chen was the registered proprietor and entitled to the equity, the release and payment must have been made to her initially. The release of personal equity in a property, he submitted, is a personal purpose.

[30] Mr Tingey submitted that the specific conditions related to the LVR and GST in the two loan offers provide further support for the view that the loans were for personal purposes. The special conditions of the first loan offer provided:¹⁶

5. At all times, the Limit of the Loan must not exceed both 60% of the "as is" market value (*exclusive* GST) of [the Living

¹⁶ Emphasis added.

Stream Road property] AND 70% of the “as is” market value (*inclusive* GST) of [the Jeffs Road property]. The value of the Properties will be determined by a valuer appointed by the Lender. The Lender reserves the right to reduce LVR position, should any of the “as is” market value of Properties is not satisfactory to lending criteria, at the Lender’s sole discretion;

6. A letter written from a chartered accountant or solicitor to the Lender confirms if GST has been claimed in respect of the Properties prior to the Lender advances this loan;
7. At all times, the Guarantor will not register for GST and no GST is to be claimed in respect of the Properties during the term of this loan;

[31] Similarly, the special conditions of the second loan offer provided:¹⁷

5. At all times, the Limit of the Loan must not exceed 54% of the “as is” market value (*incl. GST*) of [the Tipu Road property]. The value of the Property will be determined by a valuer appointed by the Lender. The Lender reserves the right to reduce LVR position, should any of the “as is” market value of Property is not satisfactory to lending criteria, at the Lender’s sole discretion;
6. A letter written from a chartered accountant to the Lender prior to this loan advance confirming that GST has not and will not be claimed against the Property and any sale of the Property would not be a taxable supply; IRD tax obligations are up to date for the Borrower and Guarantor;
7. At all times, the Guarantor will not register for GST and no GST is to be claimed in respect of the Properties during the term of this loan. Any change of use effecting the tax status of the Property during the term of this loan will be a material and immediate breach of the Loan Agreement;

[32] Mr Tingey submitted that if the loans were for a general corporate purpose, the sale and purchase of the properties would normally be part of a taxable activity subject to GST. These conditions therefore demonstrated that the parties were treating the purpose of the loans as non-commercial.

[33] In summary, the appellants’ submission was that the substance of the lending was directed at refinancing Ms Chen’s personal liabilities and releasing her personal

¹⁷ Emphasis added.

equity, and thus the loans were intended to be used wholly or predominantly for personal, domestic, or household purposes, satisfying s 11(1)(b) of the CCCFA.

Our view

The purpose of the loans

[34] In our view, the Judge was correct to find that the claim that the loans were intended to be used wholly or predominantly for personal, domestic, or household purposes was untenable. The Borrower’s identity, the stated purpose of the loans, and the context of the transactions overwhelmingly point away from such a conclusion.

[35] The Judge’s conclusion that the loans were for business purposes is strongly supported by the loan documents themselves and the surrounding factual context. First, as is apparent from the two written loan offers executed by Ms Chen, it was the company (not Ms Chen personally) that needed to refinance its existing borrowing and then, subsequently, to borrow further funds: “To provide an equity release ... whereby the proceed[s] [are] to be applied to pre-development work of projects of the Borrower.” Both loan offers included special conditions requiring the loans to be used “for general corporate purposes and not for personal or individual use”.

[36] The express purpose of the first loan was to refinance loans provided by previous lenders to DevCo that were secured by the Jeffs Road and Living Stream Road properties. It is therefore helpful to consider what the purpose of the previous loans were, given that Tawa Trade was effectively stepping into the shoes of the previous financier.

[37] The immediate previous financier was Goodmore Investments (New Zealand) Ltd (Goodmore).¹⁸ Goodmore had advanced funds to DevCo, RHC Property Investment Ltd (another company related to Ms Chen) and Ms Chen in her capacity as trustee of the Royall Family Trust (Goodmore Loan). The Goodmore Loan was secured by mortgages over four properties — Living Stream Road (owned by DevCo),

¹⁸ Another previous financier was General Finance Ltd, who made a loan to the Royall Family Trust and subsequently lodged a caveat over the Jeffs Road and Tipu Road properties: *Chen v General Finance Ltd* [2023] NZHC 1758 at [10] and [25].

Jeffs Road (owned by Ms Chen as trustee of the Royall Family Trust), Umbria Lane (owned by DevCo) and a portion of an allotment on Hillcrest Road (owned by RHC).¹⁹

[38] For the reasons set out in a judgment being delivered contemporaneously with this judgment, we have found that the Goodmore Loan was not a personal loan, as it was not to be used, or intended to be used, wholly or predominantly for personal, domestic, or household purposes.²⁰ Rather, the predominant purpose of the Goodmore loan was commercial, focusing on property development, subdivision, and investment.²¹ There is no evidence that the Goodmore loan was for the purposes of personal mortgage debt (for example to enable Ms Chen, in her personal capacity, to purchase a home). Rather, the Jeffs Road property was provided by Ms Chen as security for commercial borrowing by two corporate entities and the Royall Family Trust. The refinancing by Tawa Trade, therefore, was a refinancing of existing commercial borrowing, not of personal debt.

[39] As Guarantor, Ms Chen had certain obligations in relation to the repayment of Tawa Trade's debt. The same would apply to any company director or shareholder who personally guaranteed a company loan and provided security for that loan. Provision of such a guarantee (and the provision of associated security) does not, however, convert a commercial loan into personal borrowing.

[40] We further note that it is not in dispute that, as a matter of fact, the funds were advanced to DevCo. Ms Chen was not the direct recipient of any funds from Tawa Trade. Although not determinative, it is also of note that the loan offers expressly stated that the loan was to be utilised for general corporate purposes and not for personal or individual use.

[41] There is no dispute that the Living Stream Road property, the sole property owned by DevCo, was a development property. The appellants asserted in their amended statement of claim that it was valued at \$2.9 million (based on a three-lot subdivision). Damages were sought based on the appellants' alleged lost opportunity

¹⁹ *Chen v Goodmore Investments (New Zealand) Ltd* [2025] NZCA 617 at [6].

²⁰ At [30]–[38]. The two appeals were heard together, with Mr Tingey appearing as counsel for the appellants in both appeals.

²¹ At [34].

to subdivide the Living Stream Road property, as well as the other two secured properties, when DevCo was unable to refinance the Tawa Trade loans. A claim for lost profits arising out of DevCo's inability to pursue its property development goals is obviously inconsistent with the appellants' assertion that the Tawa Trade loans were wholly or predominantly for Ms Chen's personal, domestic, or household purposes. On the contrary, the appellants' damages claim reinforces the underlying commercial nature of the borrowing.

[42] As previously noted, Tawa Trade is a trade financier and commercial lender which, amongst other things, provides second-tier lending to property developers. DevCo, which is the borrower specified in the loan documentation, is a property development company. The fact that the company (not Ms Chen personally) is the Borrower is expressly pleaded by the appellants in their amended statement of claim. We note that loans to a company do not meet the requirements of a consumer credit contract, which require that the debtor be a natural person.

[43] Even if we were to accept that it is arguable that Ms Chen was a debtor in both her personal and trustee capacities under the Loan Agreements, in addition to Devco, this would not assist with meeting the s 11(1)(b) requirement. Under the CCCFA a company (Devco) is not a natural person. Similarly, loans made to a family trust by a financier are not consumer credit finance.²² Therefore (at best) only that portion of the loan that Mr Tingey says must have been used to discharge Ms Chen's existing personal borrowing over Tipu Road (the sole property owned by her personally) could arguably have been used for personal purposes. It is apparent from the "valuations" set out in the appellants' own pleading, however, that the Tipu Road property was the least valuable of the three properties provided as security for the loans, so the predominance test in s 11(1)(b) would not be met.

The GST issue

[44] Nor do we accept that the special conditions regarding LVR and GST (set out at [30] and [31] above) support the argument that the loan to DevCo was predominantly personal in nature.

²² Credit Contracts and Consumer Finance Act, s 15(1)(c).

[45] By way of context, Yizhong (Allen) Xu, the sole director and shareholder of Tawa Trade, explained in his (unchallenged) affidavit evidence that Tawa Trade's understanding was that DevCo, as the Borrower, was the company carrying on business. Ms Chen was only a guarantor of the two loans. Tawa Trade wanted to ensure that the properties that provided security for Ms Chen's guarantees maintained their LVR, to ensure the adequacy of the security. This could be prejudiced, however, if Ms Chen subsequently registered for GST. Specifically, if GST were claimed by Ms Chen as Guarantor in respect of the two properties owned by her (one in a personal capacity and one in a trustee capacity) the LVR position for those properties (Jeffs Road and Tipu Road) would exceed the limit specified in the offer letters. Tawa Trade would not have agreed to advance funds on that basis.

[46] This evidence, and the plain meaning of the clauses themselves, supports Mr Chisholm KC's submission for Tawa Trade that the purpose of the GST conditions was simply to maintain the LVR of the properties securing the guarantee. Ms Chen as Guarantor was obliged to agree not to register for GST and not claim GST in respect of those properties during the term of the loan. Of note, the LVR conditions differentiate between the Living Stream Road property owned by DevCo (where the market value for LVR purposes is assessed on a GST exclusive basis) and the LVR conditions for the two properties that provide security for Ms Chen's guarantee (where the market value for LVR purposes is assessed on a GST inclusive basis). The GST restriction only concerned the properties owned by Ms Chen, in order to maintain the LVRs.

[47] Although the letter from the chartered accountant referred to in special condition 6 (quoted above at [30] and [31]) of each loan offer is not in evidence, we infer that it was confirmed that Ms Chen had not claimed GST in respect of the purchase of either the Jeffs Road property or the Tipu Road property, given that the loan funds were advanced. Nor is there any evidence that Ms Chen was registered for GST; that she wished to (or intended) to claim GST on the sale of the properties; or that she raised any concerns regarding the GST restriction at the time she entered into the loan agreement. Neither of the properties were sold during the term of the loan.

[48] Significantly, it was the company carrying on the business in respect of which the loan was advanced, not the guarantors. There was no restriction on the company claiming GST on its legitimate business expenses. The guarantors, however, were not carrying on business. Rather, their role in the transaction was to provide security to support their guarantees of the loans being made to the company. The special conditions regarding GST simply preserved the LVR position in respect of the properties supporting the guarantees.

[49] In conclusion, for the reasons outlined, we are satisfied that the Judge did not err in finding that the argument that the Tawa Trade loans were intended to be used wholly or predominantly for personal, domestic, or household purposes to be untenable and s 11(1)(b) was not satisfied.

[50] As all four of the requirements in s 11(1) must be met in order for a contract to be a consumer credit contract, it is not necessary for us to consider in further detail whether it is arguable that “the debtor” for the purposes of s 11(1)(a) was a natural person. As the requirement in s 11(1)(b) is not met, this ground of appeal necessarily fails.

Is it arguable that Tawa Trade engaged in oppressive conduct?

[51] The next issue on appeal is whether the Judge erred in finding that the argument that Tawa Trade had engaged in oppressive conduct in relation to the loans was untenable.

Oppression under the CCCFA

[52] Under pt 5 of the CCCFA the court has the power to reopen all oppressive credit contracts. Specifically, under s 120(b) the court may reopen a credit contract if it considers a party has exercised a right or power conferred by the contract in an oppressive manner. Oppressive is defined to mean “oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice”.²³ It is a high threshold. There must be something more than mere unfairness

²³ Section 118.

or a consequence that is generally associated with the exercise of a remedy by a creditor.²⁴

[53] One of the factors the Court is required to take into account in deciding whether to reopen a credit contract is whether the contract is a consumer credit contract,²⁵ reflecting that the primary purpose of the CCCFA is to “protect the interests of *consumers* in connection with credit contracts, consumer leases, and buy-back transactions”.²⁶ Nevertheless, the Court is also able to reopen a commercial contract, although oppressive conduct will often be significantly more difficult to establish in an arm’s length commercial context.

The pleadings

[54] The allegations of oppressive conduct that are specifically pleaded are that:

- (a) Tawa Trade failed to provide requested information to the proposed new lender and, as a result, the appellants were unable to refinance, consequentially losing the opportunity to subdivide and develop the secured properties.
- (b) The appellants were not allowed to claim GST.

[55] In addition, Ms Chen relied on two further grounds of oppression in her High Court submissions. These appear to be pleaded, in broad terms, albeit not expressly relied on as particulars of oppressive conduct. The first was that Tawa Trade should have taken steps to remove a caveat that General Finance had placed on the Jeffs Rd property. The second was that:

It is clearly that defendant tried to used business loan interest and fees rate onto the criteria of private and home loan criteria by not allow to claim GST and did not provide assistance under business loan.

²⁴ *Bank of New Zealand Ltd v Fernando* [2021] NZHC 2595 at [83], citing *Shotter v Westpac Banking Corp* [1988] 2 NZLR 316 (HC) at 322; *AXA New Zealand Nominees Ltd v 10 Gilmer Ltd (in rec)* HC Wellington CIV-2011-485-1572, 6 December 2011 at [24]; and *Italia Holdings (Properties) Ltd v Lonsdale Holdings (Auckland) Ltd* [1984] 2 NZLR 1 (HC). See also *Taylor v Westpac Banking Corporation* (1996) 7 TCLR 177 (CA) at 184.

²⁵ Credit Contracts and Consumer Finance Act, s 124(1)(e).

²⁶ Section 3(1) (emphasis added).

The High Court decision

[56] The Judge found that the appellants had failed to put credible evidence of oppressive conduct before the Court, and that none of the alleged grounds of oppression were tenable. As only two grounds of oppression were pursued on appeal, we will focus on the Judge's reasoning in relation to those two issues.

[57] First, the Judge rejected the claim that Tawa Trade had imposed (presumably higher) business interest rates on what was actually a personal or private refinancing loan. The Judge found that the loan was not a private or personal loan but had been provided to DevCo for business or corporate purposes. It was therefore not oppressive to apply business interest rates to the loan. The Judge further noted that the appellants had the option to accept or reject the rates that had been offered.²⁷

[58] As for the requirement in the loan agreements that the guarantors not claim GST on the sale of the secured properties, the Judge found that this was legitimately implemented to protect the LVR of the lending and did not amount to oppressive conduct.²⁸

Our view

Unequal bargaining power?

[59] Mr Tingey submitted that, in assessing the issue of oppression, the Court should take into account the relative bargaining power of the parties as a result of the Ms Chen's limited understanding of English, and that the appellants had no independent legal or professional advice.

[60] We give little weight to that submission. As we have found above, these were business loans to a property development company. Ms Chen was an experienced property developer, with a property development background in China. She claimed to have considerable experience in property development, with her main business in New Zealand being said to be land banking and purchasing properties with

²⁷ Judgment under appeal, above n 1, at [81]–[82].

²⁸ At [82].

development potential or further development potential.²⁹ Further, she is no stranger to litigation relating to financial and property development issues, having been “embroiled in substantial litigation with financiers” for some time,³⁰ including through her ex-partner, Mr Lau.³¹ There is nothing to suggest that Ms Chen was vulnerable or unable to adequately protect her own interests in her negotiations with Tawa Trade regarding the refinancing of previous business loans to DevCo.

[61] Similarly, there is no evidence from Ms Chen to support her counsel’s submission that she did not take independent legal or professional advice in relation to these loans. The only two documents that required witnessing were the guarantees, but both of these were witnessed by the appellants’ solicitor, Chuanqin Peter Sun. It appears that Ms Chen therefore either had the benefit of legal advice, or the opportunity to seek it if she wished to do so.

The interest rates issue

[62] On the issue of interest rates and other fees, the pleaded claim (as set out at [54] above) is that the oppression arose from business interest rates being charged on a personal loan. For the reasons set out previously, we have found the argument that the loan was for predominantly personal purposes to be untenable.

[63] It was not pleaded, in the alternative, that even if it was a business loan the interest rates and fees were nevertheless still oppressive. On appeal, however, Mr Tingey advanced this new argument. No evidence, however, has been provided to support it.

²⁹ See *Chen v Goodmore Investments (New Zealand) Ltd*, above n 19, at [4].

³⁰ *Chen v Goodmore Investments (New Zealand) Ltd* [2024] NZHC 2655 at [2].

³¹ See, as examples: *Chen v Auckland Weihao Investments Ltd* [2020] NZHC 2450, (2020) 21 NZCPR 409; *Chen v Auckland Weihao Investment Ltd* [2021] NZHC 156, (2021) 21 NZCPR 826; *Chen v Auckland Weihao Investment Ltd* [2021] NZHC 2247; *Chen v Auckland Weihao Investment Ltd* [2021] NZHC 306; *Chen v Auckland Weihao Investment Ltd* [2021] NZHC 2271; *Chen v Auckland Weihao Investment Ltd* [2021] NZCA 657; *Chen v Auckland Weihao Investment Ltd* [2022] NZSC 24; *Chen v General Finance Ltd* [2023] NZHC 1329; *Chen v General Finance Ltd* [2023] NZHC 1758; *Chen v Tawa Trade Finance Ltd* [2023] NZHC 1333; *Chen v Tawa Trade Finance Ltd* [2023] NZHC 1801; *Chen v Tawa Trade Finance Ltd* [2023] NZHC 2156; and *General Finance Ltd v Lau* [2023] NZHC 3417.

[64] Mr Chisholm submitted that a mere assertion in counsel's appeal submissions that the interest rates charged were oppressive does not constitute evidence. Rather, the allegation should have been pleaded and supporting evidence provided of the interest rates charged on business loans by other second-tier lenders. This would have enabled Tawa Trade to address this allegation in its reply evidence. He submitted that the appellants' failure to follow such a course, instead raising this argument for the first time in its appeal submissions, has prejudiced Tawa Trade. We accept that submission and decline to grant leave to the appellants to raise this new argument, for the first time, on appeal.

[65] We note, however, that even if we had permitted the appellants to belatedly raise this new argument, there is simply no evidence before the Court (expert or otherwise) regarding the appropriate interest rates and fees for second-tier lending of this nature, relative to the level of risk involved. In addition to the need to plead the oppressive conduct relied upon, expert evidence would normally be required to support a claim of this nature. In the absence of such evidence the appellants have failed to provide a sufficient evidential basis to support a tenable argument that the interest rates and fees charged were oppressive.

[66] The allegation in the statement of claim (as addressed in the High Court) was that Tawa Trade had charged business interest rates on a personal loan. We have found that the Judge was correct to find that the loan was not for predominantly personal purposes and accordingly the pleaded ground of oppression cannot succeed.

The GST issue

[67] Mr Tingey's next submission was that the GST provisions in the loan offers were oppressive as the consequence of them was that GST could not be claimed on the purchase of the relevant properties, but (legally) GST would still be payable on the sale of them as a deemed taxable activity. He submitted that this effectively was an additional 15 per cent cost of borrowing.

[68] Our discussion of the LVR/GST issue at [44] to [49] above applies equally in this context. For the reasons we have outlined previously, the Judge was correct to find that there was nothing oppressive about Tawa Trade procuring Ms Chen's

agreement as Guarantor that GST would not be claimed on the sale of the properties secured by her guarantee. Further, there is no evidence to suggest that LVR/GST conditions impacted on the company (the Borrower) in respect of its business activities in any way, as a matter of fact.

Costs

[69] Although Tawa Trade is entitled to have costs quantified on a solicitor and client basis in accordance with the loan agreements and guarantees, for reasons of cost efficiency it simply sought costs for a standard appeal on a band A basis.

Result

[70] The appeal is dismissed.

[71] The appellants must together pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:

Essence Law Ltd, Auckland, for Appellants

Claymore Partners Ltd, Auckland, for Respondent