

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV 2017-404-2985
[2018] NZHC 2579**

BETWEEN ALPINE SOUTH FISHING LIMITED (in Receivership)
First Plaintiff

AND HYUN CHOI
Second Plaintiff

AND SANG HEE KIM
First Defendant

AND IAN ANDREW NELLIES & KEITH VINCENT HARRIS
(as Receivers of Alpine South Fishing Limited in
Receivership)
Second Defendants

Hearing: 06 June 2018

Appearances: I M Hutcheson for Plaintiffs
B Norling & A Cherkashina for Defendants

Judgment: 2 October 2018

JUDGMENT OF VAN BOHEMEN J

*This judgment was delivered by me on 02 October 2018 at 2.00pm
Pursuant to Rule 11.5 of the High Court Rules*

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Registrar/Deputy Registrar

Solicitors:
Small Law Firm Ltd, Auckland
Park Legal Ltd, Auckland
Norling Law Ltd, Auckland

[1] The question for the Court is whether to confirm an interim injunction made by consent on 19 December 2017 restraining the first defendant, San Hee Kim, and the second defendants, the receivers of the first plaintiff, Alpine South Fishing Ltd, from selling a house at 147 Roydale Avenue, Burnside, Christchurch in satisfaction of a debt said to be owed to Mr Kim by Alpine South Fishing and the second plaintiff, Hyon Choi. The Roydale Avenue property is owned by Alpine South Fishing and is occupied by Mr Choi and his wife.

Relevant background

[2] Mr Choi and Mr Kim are businessmen of Korean origin who have lived in or been active in New Zealand for over 25 years. Both also have continuing business interests in the Republic of Korea. This case concerns arrangements they agreed between each other and through Mr Kim's legal advisers in 2013 after discussions about going into business together. Mr Choi and Mr Kim have sworn affidavits setting out their understanding of those arrangements. Those affidavits paint a somewhat confusing picture. It is apparent that both men are more comfortable in Korean than English and both appear to regard their business relationship as personal and to have a loose regard for the corporate structures through which they gave effect to their business dealings.

[3] Mr Choi has been resident and in business in New Zealand for 35 years. His most recent business venture has been fisheries. Alpine South Fishing was one of the vehicles Mr Choi used for his fishing ventures. Mr Choi is the sole director and shareholder of Alpine South Fishing. Mr Kim says of himself that he is well-known to the Korean community as an investor in New Zealand businesses run by members of the New Zealand Korean community.

[4] In June 2011, Mr Kim's son, Hyeon Chul Kim, extended a loan of NZ\$150,000 to a company, Tu'ere Fishing Ltd, of which Mr Choi was a director. Mr Kim says the funds were advanced to Mr Choi personally rather than to Tu'ere Fishing. Mr Choi says that the loan arrangement was in fact with Mr Kim but the loan had been advanced by Mr Kim's son because Mr Kim was bankrupt at the time. Neither, however, disputes that the loan was made and has not been repaid in full.

[5] Soon after the loan was made, Tu'ere Fishing was put into voluntary administration and then into liquidation. Mr Choi says he felt under a moral obligation to repay Tu'ere Fishing's debt to Hyeon Chul Kim and that by November 2015, he had repaid NZ\$74,000, leaving a balance of unpaid principal of NZ\$76,000. Whether Mr Choi's obligation to repay the outstanding sum was legal or moral, and whether the obligation was owed to Mr Kim or Mr Kim's son, it appears to be common ground that the advance of \$150,000 to Tu'ere Fishing was to be included in the loan arrangements concluded between Mr Choi and Mr Kim in 2013.

[6] In 2013, Mr Choi and Mr Kim had discussions about going into business together. Initially, they discussed Mr Kim taking a stake in Mr Choi's fishing operations but Mr Kim decided, at least at the initial stage, to limit his involvement to providing funding.

[7] The discussion and implementation of these arrangements proceeded on two tracks. One track comprised direct discussions between Mr Choi and Mr Kim, sometimes conducted by email when Mr Kim was in Korea. The other track was the documenting of the loan arrangements by Park Legal, a law firm in New Zealand instructed by Mr Kim. The discussions between Mr Choi and Mr Kim were conducted in Korean. Those between Mr Choi and Park Legal were carried out in both English and Korean but all formal documents were prepared in English. Mr Choi did not obtain separate legal advice.

[8] One issue raised by Mr Choi is the extent to which he understood the nature of the documents prepared by Park Legal. Mr Choi says he relies on interpreters to understand matters fully. Mr Kim says Mr Choi's understanding of English is better than Mr Choi asserts.

[9] While, as noted below, there are matters on which Mr Choi and Mr Kim do not agree, there is no serious disagreement between them on the following:

- (a) In August 2013, Mr Kim agreed to loan funds to Mr Choi's fishing venture as a possible prelude to Mr Kim taking a 50 per cent stake in the venture.

- (b) The loan amount was KW 350,000,000 (very approximately NZ\$350,000). This sum was, on occasion, expressed as a combination of Korean won and New Zealand dollars, based on the rough conversion rate that Mr Choi and Mr Kim applied of NZ\$1.00 = KW 1000.
- (c) At Mr Choi's request, the loan amount was expressed as a combination of KW 200,000,000 and NZ\$150,000, the latter amount being intended, Mr Choi says, to represent the loan to Tu'ere Fishing.
- (d) At least one of the securities for the loan was the Roydale Avenue property which was understood to have a market value of NZ\$350,000 and over which there was a bank mortgage for NZ\$200,000.
- (e) On 22 August 2013, Mr Kim sent Mr Choi an email, which Mr Choi initialled and returned to Mr Kim, in which Mr Kim reiterated his willingness to discuss converting the loan to stock in two years' time and asked Mr Choi to make monthly payments to a bank account nominated by Mr Kim as follows:
 - (i) Regarding KW 150,000,000, NZ\$5,000 "from September as usual";
 - (ii) Regarding KW 200,000,000, KW 10,000,000.

Together, those payments meant Mr Choi was to make a combined monthly payment of KW 15,000,000 or NZ\$15,000.

- (f) Also on 22 August 2013 and following a telephone conversation between Park Legal and Mr Choi, Park Legal sent Mr Choi a set of loan documents for a loan of KW 350,000,000 for his consideration. This email included the following statement:

As I told you on the phone, the documents are a little complex and it is an important case. I would like to recommend you to get legal advice if it is possible.

- (g) On 23 August 2013, Mr Choi sent an email back to Park Legal asking that the loan amount be expressed as KW 200,000,000 and NZ\$150,000.
- (h) On 2 September 2013, Mr Choi signed and returned to Park Legal, the final set of loan documents that Park Legal had sent to Mr Choi on 1 September 2013. Mr Choi did not seek separate legal advice before signing and returning the documents.
- (i) The loan documents comprised:
 - (i) A term loan agreement between Mr Kim and Alpine South Fishing, with Mr Choi as guarantor, for the principal sum of NZ\$150,000 and KW 200,000,000 and for a term expiring on 31 August 2015;
 - (ii) A general security agreement between Alpine South Fishing and Mr Kim, with Mr Choi as covenantor, under which Alpine South Fishing granted a security interest over all Alpine South Fishing's personal and other property;
 - (iii) A general security agreement between Mr Choi and Mr Kim, under which Mr Choi granted a security interest over all Mr Choi's personal and other property;
 - (iv) A certificate of receipt of loan under which Mr Choi, as director of Alpine South Fishing, certified that Mr Kim had transferred NZ\$150,000 and KW 200,000,000 for Alpine South Fishing's use as provided for in the Term Loan Agreement.
- (j) Although no figures were included against the terms "higher interest rate" and "lower interest rate" in the box in Table A of the Annexure

Schedule to the Term Loan Agreement, it was recorded in Table A that interest commenced on 23 August 2013 with interest to be paid on the 22nd of every month until 22 August 2015, and in Table B that interest of 15,000,000 Korean won per month was to be paid on the 22nd of every month until 22 August 2015. The plaintiffs say this amounts to an interest rate of approximately 51.43 per cent per annum.

(k) In Table C of the Annexure Schedule to the Term Loan Agreement, the security for the Agreement was stated to be:

- (i) A second mortgage over the Roydale Avenue property;
- (ii) All the present and after acquired properties of Alpine South Fishing;
- (iii) All the present and after acquired properties of Mr Choi.

(l) Even before the loan documents had been signed, Mr Kim had begun advancing funds as directed by Mr Choi. The advances were not made directly to Alpine South Fishing but to accounts nominated by Mr Choi. Mr Kim says he did not know the names of the account holders.

(m) The advances made by Mr Kim were:

- (i) 9 August 2013: KW 43,146,873 to Shinji Fishing Ltd;
- (ii) 26 August 2013: KW 50,000,000 (NZ\$50,000) to Eureka Fishing Ltd;
- (iii) 2 September 2013: KW 106,853,127 to Shinji Fishing;
- (iv) 23 December 2013: NZ\$20,000 to Eureka Fishing;
- (v) 28 January 2014: NZ\$10,000 to Eureka Fishing;

- (vi) 28 January 2014: NZ\$40,000 to Eureka Fishing.

- (n) While Mr Choi alleges that the advances made on 28 January 2014 were separate from the earlier advances and had nothing to do with Alpine South Fishing (which Mr Kim disputes), the total amounts advanced by Mr Kim, including the outstanding balance from the loan to Tu'ere Fishing, were:
 - (i) KW 200,000,000 (comprising advances to Shinji Fishing and Eureka Fishing);
 - (ii) NZ\$146,000 (comprising advances to Tu'ere Fishing and Eureka Fishing).

These sums do not include interest.

- (o) By payments of KW 20,000,000 and KW 30,000,000 on 24 April 2014 and 18 July 2014 respectively, Shinji Fishing repaid KW 50,000,000 to Mr Kim.

[10] As a consequence, the following sums were owed to Mr Kim:

- (a) KW 150,000,000 (for advances to Shinji Fishing and Eureka Fishing);
- (b) NZ\$146,000 (for advances to Tu'ere Fishing and Eureka Fishing).

[11] On 3 March 2017, Mr Kim appointed receivers over the assets of Alpine South Fishing. Discussions between the receivers and Mr Choi aimed at resolving the issues between Mr Kim and Mr Choi were unsuccessful.

[12] On 24 July 2017, the receivers issued a notice under s 119 of the Property Law Act 2007 (PLA notice) notifying Alpine South Fishing it was in default to Mr Kim under the mortgage over the Roydale Avenue property for the non-payment of \$260,394.50, which sum was comprised of:

- (a) \$82,000, being the balance of principal due on 15 April 2012;
- (b) NZ\$180,394.50, being the balance of the loan of KW 150,000,000 converted to New Zealand dollars.

[13] While the sums in the PLA notice differ from those stated at [10], they are consistent with those amounts. The differences are:

- (a) The lesser sum owing in respect of the loan for \$150,000;
- (b) The exchange rate used for the conversion of Korean won which, in the case of the PLA notice, appears to use the official exchange rate.

The sums stated in the PLA Notice do not contain any interest component.

[14] On 26 September 2017, the receivers sold the *RV Ocean Fresh*, a vessel owned by Alpine South Fishing, for \$75,000 plus GST. As a consequence, and based on the sums in the PLA notice, the remaining debt owed to Mr Kim, not including interest, was NZ\$185,394.50.

[15] On 12 December 2017, Mr Choi filed this application for an interim injunction restraining the receivers from selling the Roydale Avenue property. Interim orders were made by consent on 19 December 2017 and have been renewed at various times by consent pending the determination of the application.

Key areas of disagreement between Mr Choi and Mr Kim

[16] Mr Choi and Mr Kim do not agree on the following:

- (a) Whether Mr Choi understood the nature of the obligations in the loan document signed by Mr Choi on 2 September 2013;
- (b) Whether it had been agreed between Mr Choi and Mr Kim that interest was payable on the loan;

- (c) Whether the monthly payments to be made to Mr Kim were payments of principal and interest or interest only;
- (d) Whether it had been agreed between Mr Choi and Mr Kim that other assets of Alpine South Fishing and Mr Choi, including the *RV Ocean Fresh*, should be security for the loan;
- (e) Whether the advances of NZ \$50,000 made by Mr Kim to Eureka Fishing on 28 January 2014 were separate from the other advances and had nothing to do with Alpine South Fishing as alleged by Mr Choi;
- (f) Whether the loan documents were binding because Mr Kim has not produced copies that have been signed by Mr Kim;
- (g) Whether the receivers were validly appointed;
- (h) Whether the PLA notice was properly served on Alpine South Fishing;
- (i) Whether the sum realised by the receivers for the *RV Ocean Fresh* was fair and reasonable.

[17] Mr Choi says these matters need to be resolved in the substantive proceeding Alpine South Fishing and Mr Choi have brought against Mr Kim and the receivers and that the Roydale Avenue property should not be sold until the claims in the substantive proceeding have been heard and decided.

[18] For reasons that will become apparent, it is not necessary to address the detail of these matters for the purposes of this judgment. It is relevant, however, to record the essential differences between Mr Choi and Mr Kim over interest and over whether assets other than the Roydale Avenue property were to be securities for the loan.

[19] On interest, Mr Choi states in his affidavit of 11 December 2017 that in a telephone conversation between himself and Mr Kim in early August 2013, Mr Kim told Mr Choi that he did not want any interest rate recorded in the loan documentation because he did not want to pay income tax in New Zealand. However, the statement

refers only to the recording of an interest rate and does not support an assertion that it had been agreed that interest was not payable. For his part, Mr Kim denies that he “refused” to impose interest on the loan and says that Mr Choi had proposed, and he had accepted, the monthly payments of interest.

[20] On the other securities, the exhibits to the affidavits show that Mr Choi was aware from early August 2013 that Mr Kim intended the fishing quota held by Alpine South Fishing and Alpine South Fishing’s vessel to be included as securities. Mr Choi provided relevant details of those assets, as well as information regarding the Roydale Avenue property, to Park Legal as Park Legal were preparing the loan documents.

[21] Mr Choi relies on a statement in Mr Kim’s email to him of 22 July 2013 that Mr Kim had “told the lawyer Mr Lee to stop working on matters in regards to the vessel and to work on the house quicker” as amounting to an agreement that only the Roydale Avenue property was to be the only security for the loan. Mr Kim points out that his statement was made after various exchanges between Mr Choi and Park Legal about Mr Choi’s inability to provide registration details for the *RV Ocean Fresh* because at that time it was under repair and unregistered. Mr Kim says it was always his intention that he wanted all valuable assets held by Alpine South Fishing and Mr Choi to be securities for the loan.

Principles applicable on application for an injunction

[22] The principles to be applied on an application for an injunction are well established and are accepted by the parties:¹

- (a) Is there a serious question to be tried?
- (b) Where does the balance of convenience lie?
- (c) As a check, where does overall justice lie?

¹ See, for example, *Roseneath Holdings Ltd v Grieve* [2004] 2 NZLR 168 (CA) at [35] – [37] and *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90 at [12].

Is there a serious question to be tried?

[23] As stated by Lord Diplock in *American Cyanamid Co v Ethicon Ltd*, and confirmed by the Court of Appeal in *NZ Tax Refunds Ltd v Brooks Homes Ltd*, there is a serious question to be tried if a claim is not frivolous or vexatious.²

[24] The plaintiffs allege four causes of action in their statement of claim:

- (a) Non est factum – that is, that the security documents prepared by Park Legal were of a substantially different character from those Mr Choi had expected as a result of his discussions with Mr Kim;
- (b) Breach of the Fair Trading Act 1986 – on the basis that Mr Kim was in trade and has engaged in misleading and deceptive conduct;
- (c) Contractual mistake in terms of the Contractual Mistakes Act 1977 – namely, that the extent of the plaintiffs’ liability under the General Security Agreements was a mistake because the intended security for the loan from Mr Kim was only the Roydale Avenue property;
- (d) Relief under the Court’s inherent equitable jurisdiction on the basis the security documents were unconscionable and the interest rate was oppressive.

[25] The substantive relief the plaintiffs seek is:

- (a) As order setting aside the General Security Agreements;
- (b) A direction that the appointment of the receivers was invalid;
- (c) An inquiry into damages flowing from the invalid appointment of the receivers;

² *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL) at 407; *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90 at [12].

(d) Such other relief as the Court deems just.

[26] It is apparent from the pleadings, therefore, that the plaintiffs do not seek to set aside the Term Loan Agreement or assert that the Roydale Avenue property was not an agreed security for the loan. Their principal attack is on the breadth of the General Security Agreements and the interest rate.

Non est factum

[27] As said by Mr Norling, counsel for Mr Kim and the receivers, non est factum can be raised as a defence to a claim for enforcement of a contract. It is not a cause of action in itself. On that basis alone, it is doubtful that the plaintiffs can succeed under this heading. However, assuming they can persuade the Court that non est factum can be a cause of action in its own right, they must then prove that the loan documentation signed by Mr Choi was fundamentally different from the agreement he believed he was signing and, if it was, that he had not been careless in failing to take reasonable precautions in the execution of the document.³

[28] While it is not for the Court at this stage to resolve the conflict in the evidence over whether Mr Choi understood the loan documents he signed, the evidence in the two affidavits sworn by Mr Choi and the affidavit sworn by Mr Kim is not in Mr Choi's favour. While there is disagreement over interest and the securities for the loan, the other essential elements of the loan documents signed by Mr Choi are consistent with the email, in Korean, that Mr Kim sent to Mr Choi on 22 August 2013 and which Mr Choi countersigned and sent back to Mr Kim. These are: the amount of the loan, the period of the loan, the identification of the Roydale Avenue property as security for the loan, and the monthly repayments of KW 15,000,000.

[29] In addition, there is room for doubt about Mr Choi's claimed lack of understanding of English given that he has lived and operated businesses in New Zealand for 35 years, he proposed an amendment to one of the loan documents, and provided his own English translations of some of the emails exchanged between

³ *Saunders v Anglia Building Society* [1971] AC 1004 (HL). per Lord Read at 1016; *Gadhri v 0760815 B.C. Ltd* (2010) BCSC 521.

Mr Kim and himself exhibited to his affidavit. Also relevant is the fact Mr Choi had had drafts of the loan documents for 10 days before signing and returning the final versions to Park Legal and did not seek separate legal advice, despite being advised by Park Legal to do so when they sent him the drafts.

[30] Accordingly, I consider the prospects of the plaintiffs succeeding with this cause of action are low. Nonetheless, other relevant evidence might be adduced at the hearing. The affidavits of both Mr Choi and Mr Kim are not easy to comprehend in various respects. This may reflect, at least in part, the difficulty of putting their recollections and thoughts into English. I do not consider it appropriate, therefore, to conclude that the claim is frivolous or vexatious and for that reason accept there is a serious question to be tried.

Fair Trading Act

[31] The plaintiffs have not put forward any evidence to support their allegation that Mr Kim was “in trade”. They rely instead on Mr Kim’s affidavit in which he says he is known in the Korean community as a well-established investor who supports businesses based in New Zealand that are owned by Korean migrants, and has given loans to Mr Choi and other Koreans in the past. It is questionable whether that provides an adequate foundation for a finding that Mr Kim was “in trade” for the purposes of making the loans to the plaintiffs.

[32] Assuming that hurdle can be surmounted, the plaintiffs must establish, in terms of the Supreme Court’s decision in *Red Eagle Corp Ltd v Ellis*, that the conduct of Mr Kim or Park Legal as Mr Kim’s agents, examined objectively, was deceptive or misleading in the circumstances.⁴ The evidence so far adduced in the affidavits is not strong. In that regard, I do not accept the submission by Mr Hutcheson, counsel for the plaintiffs, that the disagreements over the interest rate and the nature of the security for the loan clearly make out the plaintiffs’ claim.

[33] Although it suits Mr Choi’s purposes to say he was misled or deceived in his understanding of the interest arrangements and the nature of the securities, it would

⁴ *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28].

seem improbable that he did not expect to pay interest on what was clearly a commercial arrangement between himself and Mr Kim, or that he was under any misunderstanding as to Mr Kim's intention that all Alpine South Fishing's assets should be securities for the loan. The fact that interest was to be paid on the 22nd of every month was recorded in the Annexure to the Term Loan Agreement, which the plaintiffs do not seek to set aside in their prayers for relief.

[34] Whether or not the *RV Ocean Fresh* was separately identified in the loan documents, it is apparent from the correspondence leading up to Mr Kim's email of 22 August 2013 that Mr Choi knew the assets of Alpine South Fishing, including the company's fishing quota and fishing vessel, were to be included as securities. Moreover, given that the amount of the loan, not including interest, was for NZ\$350,000, it is also unlikely that Mr Kim would have agreed to a loan secured only against the Roydale Avenue property. According to the instructions Mr Kim sent to Park Legal on 8 August 2013 to prepare the loan documentation, Mr Kim understood from Mr Choi that Alpine South Fishing's equity in the Roydale Avenue property was of the order of \$150,000.

[35] For these reasons, I doubt the plaintiffs' prospects of success under the Fair Trading Act. Again, however, I accept there may be evidence at the substantive hearing that sheds greater light on the matter. For this reason, I refrain from concluding that the claim is frivolous or vexatious and that there is no serious question to be tried under this cause of action.

Contractual Mistakes Act

[36] As Mr Norling has pointed out, the Contractual Mistakes Act 1977 was repealed with effect from 1 October 2017 by the Contract and Commercial Law Act 2017. Section 6 and clause 3, Schedule 1 of the Contract and Commercial Law Act provide that s 24 applies to any contract made on or after 21 November 1977. In any event, in all material respects, s 24 of the Contract and Commercial Law Act repeats s 6 of the Contractual Mistakes Act.

[37] In the context of this dispute, the key requirements of the sections are that:

- (a) Mr Choi's decision to enter into a contract was influenced by a material mistake and that mistake was known to Mr Kim, or that Mr Choi and Mr Kim were both influenced in their decisions to enter into the contract by the same mistake; and
- (b) The mistake resulted in a substantially unequal exchange of values or conferred a benefit on Mr Kim, or imposed an obligation on Mr Choi that was substantially disproportionate to the benefit conferred or the obligation imposed.

[38] In support of this ground, Mr Hutcheson submits, without further explanation, that there was a common mistake as to the extent and liability of the intended security as supported by the emails exchanged between Mr Kim and Mr Choi. The brevity and generality of that submission do not assist.

[39] Mr Norling analysed the evidence in terms of s 24 of the Contract and Commercial Law Act and submitted that there is no evidence that Mr Kim knew or had cause to suspect that Mr Choi was mistaken as to the meaning of the loan documents or that there was a substantial unequal exchange of value. Accordingly, Mr Norling submits there is no serious question to be tried under this cause of action.

[40] There is force in Mr Norling's submission. On the other hand, this is again a case where the evidence at trial may shed greater light on the matter and for that reason I refrain from concluding that there is no serious question to be tried under this cause of action.

Inherent equitable jurisdiction

[41] As set out in Mr Hutcheson's submissions, the essence of this claim is that the interest rate is oppressive. Mr Hutcheson says this factor, combined with the circumstances of the preparation and presentation of the loan documents, Mr Choi's limited understanding of English, his reliance on Mr Kim's Korean speaking lawyers, an absence of independent advice and a claimed inexperience in business, strongly support this claim.

[42] There is much that could be contested in that submission. However, given the conflict of evidence over interest and the very high rate of interest set out in the Term Loan Agreement, I accept that the claim is not frivolous or vexatious and that there is a serious question to be tried.

[43] My overall conclusion, therefore, is that, notwithstanding my doubts about the strength and ultimate prospects of success, the causes of action raised by the plaintiffs raise serious questions to be tried to the extent the claims advanced are not frivolous or vexatious.

Balance of convenience

[44] Mr Hutcheson submits that the balance of convenience lies with the plaintiffs because the loss of the residential home of Mr Choi and his wife cannot be compensated with money whereas the defendants' claim is only for money. That submission does not address some key considerations.

[45] First, the Roydale Avenue property is owned by Alpine South Fishing, not Mr Choi or his wife. That they use it for their residential home cannot be a reason for restraining its sale where it has been used as a security for a loan and the loan remains unpaid.

[46] Secondly, whatever the disagreements between Mr Choi and Mr Kim, including those over interest, the nature of the securities for the loan, and the sale price of the *RV Ocean Fresh*, there is no disagreement that:

- (a) Mr Kim advanced approximately \$350,000 to companies nominated by Mr Choi in implementing their agreement that Mr Kim would advance KW 200,000 and NZ\$150,000 to Mr Choi / Alpine South Fishing;
- (b) Despite repayments and leaving aside the question of interest, at least \$150,000 of the principal of the debt remains outstanding;
- (c) It was always understood by Mr Choi that the Roydale Avenue property was to be a security for the loan.

[47] Thirdly, it was acknowledged at the hearing that the remaining equity in the Roydale Avenue property is of the order of \$150,000, that Mr Choi has no assets other than shares in Alpine South Fishing and Alpine South Fishing has no assets other than the Roydale Avenue property. It follows that the Roydale Avenue property is the only asset available to meet the outstanding balance of the loan.

[48] Fourthly, despite the various matters raised in the pleadings and the evidence about Mr Choi's understanding of the loan documents, the plaintiffs' prayers for relief do not challenge the validity of or seek to set aside the Term Loan Agreement under which the loan was made and the Roydale Avenue property was identified as a specific security for the loan.

[49] It follows that, irrespective of whether or not the plaintiffs succeed with their substantive claims, they remain liable to Mr Kim for at least \$150,000 of principal and the Roydale Avenue property is the only asset available to satisfy that debt. Accordingly, there is nothing to be gained by delaying the sale of the Roydale Avenue property. As pointed out by Mr Norling, it is also relevant in this context that the undertaking as to damages provided by the plaintiffs was given by Mr Choi personally.

[50] In addition, if I am wrong in the above analysis and the result of the substantive hearing is that the receivers were wrongly appointed or should not have sold the Roydale Avenue property, damages are still an adequate remedy bearing in mind that the property is owned by Alpine South Fishing and not by Mr Choi.

[51] For these reasons, I am satisfied the balance of convenience lies with the defendants and that an interim injunction restraining the sale of the Roydale Avenue property would not be appropriate.

Overall justice

[52] As the Court of Appeal said in *NZ Tax Refunds Ltd v Brooks Homes Ltd*, the overall justice assessment is essentially a check on the position that has been reached

following the analysis of the issues of serious question to be tried and balance of convenience.⁵

[53] I am satisfied that the overall justice of the case does not require the issue of an interim injunction. The balance of convenience lies in favour of the defendants. In addition, while I have not concluded that the claims advanced by the plaintiffs are frivolous or vexatious, for the reasons I have given I consider the prospects of success on any of the claims to be low. It is apparent from the evidence and submissions of the plaintiffs that they have raised as many issues as possible, some with only passing relevance to the pleadings, to forestall the conclusion that they have defaulted on repaying the principal of the loan made by Mr Kim and that sale of the Roydale Avenue property is the inevitable consequence.

Costs

[54] The defendants are entitled to costs on a 2B basis. If the parties cannot agree costs, the defendants may apply by memorandum of no more than four pages filed and served not later than 30 October 2018. The plaintiffs shall have until 20 November 2018 to file and serve any memorandum in reply of no more than four pages.

G J van Bohemen J

⁵ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90 at [47].