Credit Contracts:

The Factors Going to Oppression

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Introduction

The Credit Contracts Act 1981 gives the courts jurisdiction to re-open oppressive credit contracts. In conjunction with the s 9 definition of oppression, s 11 provides a number of guidelines to be considered by the court in its deliberation pursuant to the jurisdictional triad of s 10. Although these guidelines are important and it will ill-behove a court to ignore them, they are by no means intended to be a code. Indeed, it is clear from the cases and from s 11 itself[1] that the guidelines of that section are only of a very broad nature. If applicable, they must be considered, but the court remains free to examine any other factors which it considers relevant. This paper examines and classifies many of the factors that have emerged to influence the judicial definition of "oppression".

Disadvantageous Terms

The cases illustrate that the fact that one party is disadvantaged by the terms of the contract is of itself insufficient to identify the contract as oppressive. As pointed out in *Italia Holdings Ltd v Lonsdale Holdings Ltd*,[2] a condition advantageous or disadvantageous to one party cannot be said *per se* to constitute oppression; it may amount to nothing more than the ordinary give and take of bargaining inherent in commercial transactions generally.

1 See especially s 11(2)(c).
2 [1984] 2 NZLR 1, 14.

This *laissez faire* attitude was expressed succinctly by Vautier J:[3]

> If the plaintiff considered the terms on which the loan was offered to be disadvantageous there was nothing to prevent it looking elsewhere for the funds it required. . . .

The fundamental principle upon which a contract can be re-opened is abuse of the relationship between the parties. Consequently, if a borrower is desperately seeking finance and the lender not only knows this but also attempts to take advantage of it, then any disadvantageous terms which are imposed upon the borrower may be deemed oppressive. The *laissez faire* attitude of not preventing the ordinary give and take of negotiating is therefore tempered in a case in which there has been an abuse of the bargaining relationship.[4] The most common terms complained of are those relating to the interest rate and the provision of security. Both are elements indicative of the risk factor attending the provision of credit and are closely linked.

Interest Rate

Although earlier legislation provided that interest rates could be considered immoral and therefore be prohibited,[5] under the Credit Contracts Act interest rates alleged to be in contravention of "reasonable standards of commercial practice" will not be considered oppressive merely because they are higher (even considerably higher) than rates offered by other lending institutions. In *Anderson v Burbery Finance Ltd*,[6] Gallen J stated that:[7]

> Although . . . the evidence suggests that the reduced rate [42%] was high and the penalty rate [84%] grossly so, that is not of itself enough. It is the abuse of the relationship which is the foundation of reopening.

The earlier approach looked to absolute values: the current approach abandons absolute concepts in favour of comparative ones. The parties are therefore free to determine their own bargain, subject only to certain necessary protections arising from inequalities or abuse of relationship and to the overall requirement to make detailed disclosure.

Extent of Security Provided

Pursuant to ss 11(1) and 11(2)(a) the court is to consider, inter alia, the "circumstances relating to the making of the contract". Such circumstances

3 Ibid; paraphrased and concurred with by Wylie J in *Shotter v Westpac Banking Corporation* [1988] 2 NZLR 316.

4 See infra at note 7 and accompanying text. There are dicta to this effect in *Italia Holdings Ltd v Lonsdale Holdings Ltd*, supra at note 2, at 1, 14 and 15. However, in this case, there was insufficient evidence before the Court to draw the conclusion that the plaintiff was in such a position.

5 Section 3 Moneylenders Act 1908.

6 [1986] 2 NZLR 20. Taken to the Court of Appeal on points not material to this discussion: [1988] 2 NZLR 196. Appeal dismissed.

7 Ibid, 27.

include a consideration of the relative value, extent and ranking of the security provided.[8] An excessive interest rate in a situation where there is clearly adequate security may influence the court to find oppression. On the other hand, evidence of a lack of adequate security may justify a higher rate of interest than would be deemed legitimate in a case where the security offered was sufficient. In this regard s 11(1) may be a significant factor in preventing the conclusion that the relevant term is oppressive. Alternatively, the existence of an apparent disadvantage may indicate nothing more than the ordinary give and take inherent in bargaining transactions. An excessive security or guarantee provision may therefore simply represent a perception by the lender of a greater than normal risk of non-payment, or by the borrower of expected profits that far outweigh such apparent disadvantages.

Exercise of Power

As with the existence of a disadvantageous term, the exercise or intended exercise of a power provided by the contract between the parties is by itself insufficient to justify a finding of oppression. In a case in which this issue arose, it was stated that:[9]

> A mere exercise of the mortgagee's power of sale . . . when the defaults have been remedied and payments under the mortgage are up to date, is not of itself oppressive behaviour unless there is some other oppressing factor or factors present.

The pleadings must therefore indicate and evidence must establish that, in the words of Wylie J, "it is the *manner* of exercise which must be shown to be oppressive, not the right or power itself."[10]

In Relation to Contractual Terms

An allegation of oppression will not be defeated by the fact that the defendant is exercising a contractual right. In *Robinson v United Building Society*, it was said that:[11]

> [T]he provisions of the Act and the cases decided under it, make it clear that the fact that a defendant is exercising contractual rights is not a reason for refusing relief. To the contrary, the Act clearly authorises granting of relief where a party is exercising a contractual right.

Nevertheless, if the contractual right is not oppressive, its mere exercise

8 See, for example, *Elia v Commercial & Mortgage Nominees Ltd* (1988) 2 NZBLC 103,296, 103,317. See also *Robinson v United Building Society* High Court, Dunedin. 7 May 1987 (CP 35/87) 5, 9-10. Tompkins J; noted in [1988] NZ Recent Law. For a pre-Credit Contracts Act example, see *Balkind v Ralph* [1918] NZLR 919, 931.

9 *Grose v Development Finance Corporation of New Zealand* (1987) 1 NZBLC 102,646, 102,650 per Williamson J.

10 *Shotter v Westpac Banking Corporation*, supra at note 3, at 325.

11 Robinson, supra at note 8, at 10.

will be no ground for relief:[12]

> If the contract itself is not oppressive the realisation of the security on the ground of default would not be oppressive ... [and] I do not see that making demand for the moneys payable or, in default, exercising rights conferred by the contract, would be oppressive in the absence of something objectionable in the manner of demand or the manner of exercise.

On the other hand, if the contractual terms were themselves found to be oppressive, "[t]hen the exercise of the powers conferred by the contract likely would also be oppressive."[13]

The exercise of a contractual power will not be found oppressive for the simple reason that the creditor chose to exercise the powers conferred by the non-oppressive terms of the contract, but because there existed other factors evidencing the existence of the requisite oppression.

Compared to Legal Entitlement

The court may also consider the exercise of a power vis-à-vis the legal entitlement to exercise it. In *Cambridge Clothing Ltd v Simpson*[14] the mortgagee had demanded, as a condition for accepting early repayment, six months' interest from the mortgagor. The mortgagor had, in the District Court, been successful in re-opening the mortgage contract. On appeal to the High Court counsel for the mortgagee successfully argued that insufficient weight had been given to the fact that the demand for six months' interest by the mortgagee in return for allowing early repayment should be considered in relation to the mortgagee's legal entitlement to demand interest for the full unexpired term.[15] That the amount claimed was "less than half of what Cambridge was legally entitled to"[16] was clearly relevant to the question of oppression.

Nevertheless, it may be oppressive to invoke one's full legal entitlement. In *Marac Finance Ltd v McKee*[17] the plaintiff, seeking to recover the balance owing in respect of a hire purchase agreement guaranteed by the defendant, was under no legal obligation to allow certain rebates in the calculation of the sum owing. This did not prevent re-opening of the contract. Although s 22(4) of the Hire Purchase Act 1971 entitled the plaintiff to deny the defendant certain rebates, such refusal could be an oppressive exercise of a legal power.

12 *Elia v Commercial & Mortgage Nominees Ltd*, supra at note 8, at 103,315. See also *Shotter v Westpac Banking Corporation*, supra at note 3, at 325.

13 Ibid.

14 [1988] 2 NZLR 340.

15 In the absence of express provision for early repayment in the mortgage contract, s 81(2) of the Property Law Act 1952 applied.

16 Supra at note 14, at 350.

17 (1988) 2 NZBLC 102,867.

Inequality of Bargaining Power

A primary factor in the consideration of whether a credit contract is oppressive is the relative bargaining power of the parties. The courts will be reluctant to deem oppressive a contract in which the parties were found to have been dealing on equal terms. The courts have examined such factors as business experience or expertise, the availability of independent legal advice, and the length of negotiations prior to reaching agreement. These factors will be discussed in turn.

Experience/Expertise

The relative business acumen and experience of the parties is likely to be examined.[18] The courts will be more reluctant to re-open a contract between two commercially experienced parties than one between a commercially experienced party and a party who has little or no experience in the raising (or supply) of capital. In particular, the courts to date have been more willing to re-open consumer rather than commercial transactions. Interference with the express provisions of the agreement is apparently not on the grounds of any perceived distinction between the two forms of transaction, but is rather due to an inequality between the comparative positions and status of the parties.[19] But if the otherwise weaker party (usually individual or non-institutional) has a significant degree of market experience, this is regarded as strengthening the relative position of that party to the extent that the parties may be seen to be operating on sufficiently equal terms. For example, in *Italia Holdings Ltd v Lonsdale Holdings Ltd* the defendant borrower was a property dealer who was "involved in extensive property dealings [and] had the expertise available." The allegations of oppression foundered.[20]

Independent Legal Advice

The courts have also demonstrated a tendency to re-open contracts in which the weaker party lacked the advantage of independent legal advice. Although a party may have very little business experience, the opportunity of independent legal advice may be sufficient to offset any imbalance between

18 See *Cambridge Clothing Ltd v Simpson*, supra at note 14, at 348-349 per Smellie J: "In my judgment, a party's business acumen . . . is relevant."

19 The Ministry of Consumer Affairs discussion paper *Consumers and Credit* (1988) has, however, recommended that an express distinction be made between consumer and commercial transactions, with legislative protections being applicable solely, or at least primarily, to the former.

20 Supra at note 2, at 15, 17 and 18. See also *Anderson v Burbery Finance Ltd*, supra at note 6, at 26: "Mr Cameron was no impecunious borrower desperate to obtain money on any terms [but was a] successful and established businessman engaged in extensive activities and . . . no stranger to borrowing." See also *Broadlands Finance Ltd v Armitage* (1984) 1 NZBLC 102,064.

the parties. The importance of this factor was recently recognised in *Cambridge Clothing*, in which it was stated that "the fact that the parties were on equal terms and separately legally represented were all factors to be taken into account."[21]

This approach may be questioned. Since persons usually enter into credit arrangements for some commercial gain or advantage, the extent to which legal advice compensates an otherwise disadvantaged debtor is to be doubted. Although purely legal advice is certainly an advantage to the otherwise struggling debtor, it is unlikely to transform an unequal position into one of relative equality. If any advice is to have this effect, it should (because of the general purpose for which finance is normally sought) be independent commercial advice; advice given on the commercial merits of entering into a contract such as that proposed. Nevertheless, this problem will seldom arise in practice, for many of those able to offer legal advice to intending debtors have some degree of commercial expertise. While the courts may in time come to regard commercial advice as of greater practical significance to the intending debtor than purely legal advice, the current situation in which they examine the availability of independent legal advice is acceptable if it is recognised that "legal advice" in this context is more precisely "advice as to both the legal and commercial realities of the given situation".

It should be noted that it is the *opportunity* of obtaining independent legal advice that is of concern to the courts, not whether the weaker party obtained, or even sought, such advice. Thus in *Smith v Sefton*[22] it was held that the lender ought not to be disadvantaged as a result of the borrower's failure to obtain independent legal advice. In the circumstances, the absence of such legal advice was held not to contravene reasonable standards of commercial practice and was therefore not oppressive.[23]

Length of Negotiations

The length of negotiations between the parties prior to a concluded agreement affects the ability of the party with less commercial expertise to compensate for its relative weakness. This factor was considered by the Court in *Italia Holdings Ltd v Lonsdale Holdings Ltd*:[24]

> [T]he concluding of an agreement for the sale and purchase of these sections between the plaintiff and the defendant became something which extended over a substantial period of time ... [The] land agent who introduced the plaintiff to the properties in question ... did so about one month before the plaintiff actually agreed to the transaction involving the purchase of these properties. That there was such a lapse is admitted by [the plaintiff's director]. He clearly, therefore, had the opportunity to obtain a valuation for the plaintiff and of

21 Supra at note 14, at 349.
22 (1986) 1 NZBLC 102,434.
23 See also *Jenkins v NZI Finance Ltd* High Court, Hamilton. 23 August 1988 (M 320/87) 38-39. Tompkins J.
24 Supra at note 2, at 17.

course the opportunity of discussing fully with the agent in question the matter of value.

It must be noted that, in addition to consideration of the length of negotiations, it was found that the plaintiff not only had sufficient expertise to assess the market value and potential of the properties in question, but also had available independent legal advice.[25] Nevertheless, the length of negotiations prior to the conclusion of a contract is a factor likely to be given some weight by the court.

Market Practice

As a Factor

Section 13 expressly provides that in any proceeding in which the court considers the re-opening of a credit contract pursuant to s 10, evidence as to market practice or contractual terms most commonly prevailing at the time in question shall be admissible. In addition, s 9, by reference to "reasonable standards of commercial practice", provides an implied requirement that such evidence should be admitted for the purposes of ss 9 and 10.

Bruns v Appleyard[26] is an early example of a case in which conduct contrary to current market practice led to a finding that there was a serious question to be tried as to the existence of oppressive conduct. In awarding the injunction sought by the plaintiff mortgagor, it was held, inter alia, that the auctioneer's refusal to accept the bid of the mortgagor's friend at the mortgagee sale contravened reasonable standards of commercial practice.

Although in *Bruns v Appleyard* injunctive relief only was sought, the general approach taken by the courts is nevertheless illustrated. This is also seen, though with an opposite result, in *Shotter v Westpac Banking Corporation*.[27] Here, in considering the relevance of evidence as to current market practice, it was held that both the contract of guarantee and the demand issued were, in the circumstances, made in accordance with the normal standards of commercial practice, and that neither could therefore be termed oppressive under the Act.

In *Robinson v United Building Society*[28] the defendant, as a result of the plaintiffs' mortgage arrears, had issued a s 92 notice[29] on the plaintiffs. Although the plaintiffs paid the defendant several sums of money, the effect of which was that "when the application for interim injunction came before the court, ... the mortgage was, in all respects, up to date"[30] the defendant nevertheless elected to proceed with the mortgagee sale. The plaintiffs

25 Ibid, 17.
26 High Court, Auckland. 12 December 1983 (A 827/83). Chilwell J.
27 Supra at note 3.
28 Supra at note 8.
29 Property Law Act 1952.
30 Supra at note 8, at 4.

claimed that the defendant intended to exercise a right or power in an oppressive manner. The judge found that the plaintiffs had established an arguable case for relief under the Act. A factor of primary significance in this finding was the existence of affidavit evidence as to the standards of commercial practice with respect to rural mortgages. His Honour found that:[31]

> This is at least prima facie evidence, that in the current circumstances, to proceed with a mortgagee sale when all payments due under the mortgage have been made, is in contravention of reasonable standards of commercial practice.

Although in the cases cited above the relief sought was in the nature of interim injunctions, each is nevertheless illustrative of the approach likely to be taken by the courts on substantive issues.

Evidence of Market Practice

While it appears to be self-evident that evidence of market practice is admissible, such evidence cannot be useful unless actually introduced. This lesson to practitioners appeared most strikingly in *Cambridge Clothing Ltd v Simpson*.[32] The mortgagor, advising the mortgagee of the impending sale of the mortgaged property, requested from the mortgagee an indication as to the amount required to be repaid upon early redemption. After some delay and with settlement imminent, the mortgagee's solicitors advised that twelve months' interest would be required, although after subsequent negotiations a sum equivalent to six month's interest was agreed upon. It was held at first instance (by Graham DCJ) that the delay so described was not in accordance with the reasonable standards of commercial practice and that "the delay was deliberate and was intended to force [the mortgagor] to agree to pay the six month's interest 'in order to effect his sale'."[33] The High Court held on appeal that although the delay may have been inconvenient there was insufficient evidence to draw the inference that Cambridge was deliberately exploiting the situation.[34] Furthermore, Smellie J cited the judgment of Vautier J in *Italia Holdings Ltd v Lonsdale Holdings Ltd* as authority for the proposition that:[35]

> [E]xcept in the plainest of cases ... some evidence as to what the standards of commercial practice are [in any given case] would be necessary before the court could conclude that these standards were contravened.

In *Cambridge Clothing* no such evidence was adduced, it being clear that

31 Ibid, 9.

32 Supra at note 14.

33 Ibid, 344.

34 Ibid, 347-348.

35 Ibid, 348. See *Italia Holdings Ltd v Lonsdale Holdings Ltd*, supra at note 2, at 16. The phrase has been adopted in *Associated Telerad Servicing Co Ltd v NZ Finance Ltd* [1984] 2 NZLR 19, 24 per Barker J; see also Tompkins J in *Robinson v United Building Society*, supra at note 8, at 7-8; and "generally" by Wylie J in *Shotter v Westpac Banking Corporation*, supra at note 3, at 326.

evidence was necessary as the facts did not fall within the category of the "plainest of cases". Accordingly, it was held that the District Court Judge "acted on a wrong principle in that there was no or insufficient evidence to justify his conclusions."[36] Similarly, in *Didsbury v Zion Farms Limited* Wallace J noted that it was "unfortunate" that the plaintiff adduced no evidence concerning reasonable standards of commercial practice, evidence that His Honour "strongly suspected" would be available.[37]

It is therefore of some importance for counsel to recognise that, in order to rely on the phrase "reasonable standards of commercial practice", reliable evidence of such practice must be adduced, except only in "the plainest of cases". It is contended that this requirement applies both to affidavit evidence adduced in interim injunction applications, as in *Robinson*, and to oral evidence in cases such as *Cambridge Clothing*, where substantive issues are to be determined.

Nature and Extent of Default

Where the debtor alleges that the creditor's response to the debtor's default is oppressive, the court may consider the nature and extent of that default relevant to determining the oppressiveness of the lender's response. In *Grose v Development Finance Corporation of New Zealand*[38] this factor was considered by the court to be of some significance. A comparison of the facts in this case with those in *Udy v Kuzinas*[39] is worthwhile.

In *Udy v Kuzinas* a s 92 notice was issued upon the non-payment of an interest instalment under a mortgage agreement. The notice required remedy by 30 November 1982. However the sum to be paid under the notice was inadvertently sent to the wrong solicitors, and by the time the mistake was noticed the period had expired. The defendants, continuing with mortgagee sale proceedings, thereafter refused to accept the payments offered by the plaintiffs. The plaintiffs then sought to enjoin the exercise of the power of sale under the mortgage by means of an interim injunction. Issuing the injunction, Pritchard J took account of the inadvertent payment by the plaintiffs to the wrong solicitors together with evidence that the mortgagee's motive in continuing with the sale proceedings was simply to obtain repayment so as to re-invest at a higher rate of interest. His Honour held that continuation with

36 Supra at note 14, at 348.

37 High Court, Auckland, 22 February 1989 (CP 2501/88) 19-20. However, although it was "unfortunate", the adducing of such evidence was not, in the circumstances, essential as the plaintiff succeeded in his arguments with respect to the interpretation of the clause in question. Despite it being unnecessary for the judge to address the Credit Contracts Act arguments, the fact that he did so at some length affords weight to his conclusions with respect to those arguments.

38 Supra at note 9.

39 High Court, Rotorua. 9 February 1983 (A 1/83). Pritchard J.

the sale proceedings by the defendants was an oppressive exercise of a power conferred by the mortgage.

By contrast, Williamson J in *Grose v Development Finance Corporation of New Zealand* refused to grant an interim injunction, stating that, in this case:[40]

> The plaintiff's defaults giving rise to the exercise of the power of sale were not isolated ones or ones made by a mistake such as those that were present in the case of *Udy v Kuzinas*.

Indeed, as evident from the table of payments included in the judgment, the instalment payments were erratic (unlike those in *Udy v Kuzinas*). From these cases it can be concluded that the court is likely to refuse an injunction restraining the exercise of the power of sale conferred by the mortgage if the default upon which the defendant mortgagee's power of sale is based is of a serious nature, as in *Grose v DFC*. Conversely, *Udy v Kuzinas* illustrates that where the default is inadvertent or minimal, the court will be more inclined to grant the order.

The continued relevance of this factor was recently demonstrated in *Didsbury v Zion Farms Limited*,[41] in which the plaintiff's oversight in relation to the alteration of an automatic bank authority was likened to the plaintiff's inadvertence in *Udy v Kuzinas*, notwithstanding that the decision in *Udy v Kuzinas* was given on an application for an interim injunction.

Purpose of Loan

In the early case of *Italia Holdings Ltd v Lonsdale Holdings Ltd*, Vautier J noted that one of the factors to be considered by the court was the purpose of the loan. Was the loan intended to further the business interests of the borrower, was it for an urgent personal need, or was it to save the borrower "from the consequences of pressing creditors being prepared to wait no longer"?[42] Nevertheless, the purpose for which the loan is sought is generally of little significance in the face of more direct evidence indicating oppressive terms in the contract or an oppressive exercise of a power under that contract. Despite this, the cases do illustrate that the factor is relevant,[43] at least where other factors do not themselves establish or dismiss the existence of oppression.

The Lender's Actions and/or Attitude

The general attitude of the lender, as evidenced by the lender's actions or

40 Supra at note 9, at 102,650.

41 Supra at note 37, at 20.

42 Supra at note 2, at 18.

43 See also *Gibson v Dealer Discounting (Canty) Ltd* (1984) 1 NZBLC 102,051, and *Anderson v Burbery Finance Ltd*, supra at note 6, at 26: "[Mr Cameron] was borrowing the funds for the purposes of business expansion and operation." See also *Cambridge Clothing Company Ltd v Simpson*, supra at note 14, at 349-350 per Smellie J.

presumed motive, may also be an element of oppression. This factor was referred to by Woodhouse J in *Adams v Paul's Properties Ltd*,[44] and, with respect to the provisions of the Credit Contracts Act 1981, was cited in both *Italia Holdings Ltd v Lonsdale Holdings Ltd*[45] and *Anderson v Burbery Finance Ltd*.[46] It has appeared in subsequent cases in a variety of forms.

No Notice of Increased Interest

An example where the actions and attitude of the lender have assumed significance is *Grose v Development Finance Corporation of New Zealand*.[47] The lender purported to charge increased interest on the balance of an outstanding amount without notice to the borrower. The borrower sought an interim injunction to restrain the lender from exercising its power of sale under the mortgage, on the grounds that the lender's actions, including the purported increase in interest rate, were oppressive. It was held that although the interest rate increase may in itself have been an unreasonable exercise of power, and may have indicated a deleterious attitude by the defendant toward the plaintiff, on the facts it had no relevance to the exercise of the power of sale in this case. The power of sale had been exercised upon the defaults made by the plaintiff borrower prior to any purported increase in interest. Nevertheless, in proper circumstances, it is submitted that a purported increase in interest rates without notice to the borrower could evidence an oppressive exercise of power by the lender and at the least "may indicate an attitude [sic] by the [lender] towards the [borrower]."[48]

No Notice of Reversing an Indicated Concession

In *Marac Finance Ltd v McKee*[49] the plaintiff had indicated to the defendant that certain concessions would be made as to the amount owing pursuant to a guaranteed hire purchase agreement, but had then issued proceedings claiming the full amount. It was held to be oppressive conduct to have issued such proceedings without having first given the defendant notice that unless he made prompt payment, the plaintiff's concession in allowing the rebates would not be available. Smellie J spoke in more general terms in *Lydney Investments Ltd v CFC Commercial Financial Ltd*:[50]

> [W]ithin the area of a substantial question to be resolved there would appear to be within the statutory provisions that I have referred to ample room for the Court to ... give consideration to the absence of any notice, *either* as required by the document *or* in fact....

44 [1965] NZLR 161, 171.
45 Supra at note 2, at 13.
46 Supra at note 6, at 26.
47 Supra at note 9.
48 Ibid, 102,650.
49 Supra at note 17.
50 High Court, Auckland. 2 June 1988 (CP 1057/88) 6. Smellie J. Emphasis added.

Although made in the context of an application for an interim injunction, the statement quoted serves to demonstrate the emergence of principles of lender fairness and good faith that clearly go beyond the pre-Credit Contracts Act era, in which the express or implied provisions of the contract in question circumscribed judicial enquiry.

Breach of Faith with the Contract

If the conduct of the defendant lender evinces a breach of faith with respect to any of the fundamental conditions upon which the security was given, evidence of such breach may be sufficient to found an order re-opening the contract. In *Manion v Marac Finance Limited*, Bisson J stated that the[51]

> conduct [of the lenders] was unjust because they broke faith with the basic condition on which the applicants gave security over their motel property. Their conduct was burdensome to the applicants because the [lenders] sought to have recourse to the security over the applicants' property when they should, in keeping with the fundamental terms of the credit contract have had recourse to a replacement security over the [farm] property.

The distinction made between the terms "unjust" and "burdensome" suggests that, on the facts, the attempted recourse by the lenders to the applicants' property instead of to the replacement property was not of itself oppressive. This action, although burdensome, was not unjustly burdensome, and presumably would not, of itself, have led to the re-opening of the contract. However in this case the lender's conduct, by breaking faith with the basic condition upon which the applicants gave the security over their property, allowed a finding of the requisite unjust element. Consequently, the jurisdiction to re-open was exercised.

Deliberate Delay

In *Cambridge Clothing Company Ltd v Simpson*,[52] the lender's delay was considered to be a significant factor both at first instance and on appeal to the High Court, although differing conclusions were reached. In this case, the facts of which have been discussed,[53] the company's delay in replying to Simpson's request was found at first instance not to be in accordance with reasonable standards of commercial practice. Graham DCJ concluded that "the delay was deliberate and was intended to force Simpson to agree to pay the six months' interest in order to effect his sale."[54] However, on appeal, Smellie J held that although the delay may have been inconvenient, there was insufficient evidence to suggest that Cambridge was deliberately exploiting the situation.[55]

51 (1986) 1 NZBLR 102,498, 102,503.
52 Supra at note 14.
53 See supra in text at note 14.
54 Ibid, 344.
55 Ibid, 347-348.

The issue of delay as evidence of an oppressive exercise of power was also a factor in the earlier case of *Broadlands Finance Ltd v Armitage*.[56] Here the defendants claimed that the dilatory commencement of an indemnity action against the defendant as guarantor was oppressive. However, upon consideration of the defendants' obvious business experience, the lack of prejudice occasioned by this delay to either of the defendants, and the beneficial consequence of the delay in permitting clarification of a difficult ownership question, Chilwell J came to the conclusion that in the circumstances "[i]t is difficult to appreciate how oppression by that delay begins to arise."[57]

By contrast, in *Didsbury v Zion Farms Limited*[58] Wallace J noted that one of the factors indicating the existence of an oppressive exercise of power was that the power was exercised so as to be conducive to continuing confusion regarding the alleged basis of that power. Factors contributing to this "continuing confusion" were the defendant's delay in responding to repeated requests from the plaintiff for clarification and the "very brief letters from the Defendant's solicitors which did not make any attempt to clarify the basis upon which the Defendant was exercising the power."[59]

The cases suggest that any circumstances of delay are likely to be examined to determine whether on the facts they evince an oppressive attitude. Intending lenders must either act promptly throughout, or ensure that such delays as may arise are not in contravention of reasonable standards of commercial practice. If deliberate delaying tactics are found to have been employed, the exercise of power or contractual term in question may be deemed oppressive and the contract may be re-opened.

Reliance on Breach Unknown at Time of Lender's Act

In *Lydney Investments Ltd v CFC Commercial Finance Ltd*[60] the plaintiff borrowed $135,000 from the defendant in order to purchase a boat. At the time the loan was made, the plaintiff gave to the defendant an authority against the plaintiff's bank for the automatic payment of monthly instalments. However, through an oversight in the defendant's office the authority was not forwarded to the bank as intended. When the oversight became apparent, the plaintiff indicated to the defendant that it was not in a position to make immediate payment of the three instalments in question. An officer of the defendant told the plaintiff that the loan would have to be either rewritten or extended: the plaintiff was not told that the defendant might treat the agreement as being in default and call up the total amount owing under the agreement. Shortly after, that officer left the employ of the defendant. Other

56 Supra at note 20.
57 Ibid, 102,078.
58 Supra at note 37.
59 Ibid, 21.
60 Supra at note 50.

officers of the defendant refused to recognise the indication given earlier. The defendant then elected to exercise its rights under the agreement and (after some difficulty) repossessed the vessel.

Although counsel for the defendant, in the plaintiff's application for an interim mandatory injunction, conceded that there was a serious question to be tried as to whether the statements of the former officer amounted either to a variation of the loan agreement or provided the foundation for a promissory estoppel, he submitted that there was nevertheless a strong ground for refusing the relief sought. Defence counsel argued that at the time of the repossession the plaintiff was in breach of the loan agreement in that the insurance policy on the launch did not correspond with the insurance provisions of the loan agreement. Specifically, the launch was not insured in the name of the plaintiff, nor had the insurance company been notified of the defendant's interest in the launch.

Although it was common ground that the defendant became aware of the breach of the insurance provisions only *after* repossession had taken place, the defendant argued that the fact of the default, whether or not it was known to the lender, was the event which triggered the repossession and call up rights.

Smellie J held that there was a serious issue to be resolved in respect of both the default in payment and the default under the insurance provisions. Nevertheless, his Honour took the opportunity to unequivocally state that:[61]

> [R]elying upon a fall-back position relating to the insurance default which was unknown at the time of the repossession strikes me as being unconscionable.

Ulterior Motive

As noted above, one of the factors considered in *Udy v Kuzinas*[62] was the mortgagee's motive for continuing with mortgagee sale proceedings. The mortgagee sought to obtain repayment so as to re-invest at a higher rate of interest. This, along with the circumstance of an inadvertent payment to the wrong solicitors, supported the finding that continuation of sale proceedings constituted an oppressive exercise of the power conferred by the mortgage. Similarly, it was stated in *Robinson v United Building Society*:[63]

> In the end, there must be a suspicion that the defendant has not stated its true reason. If that is a desire to recover its money so that it can lend it again at a higher rate of interest, that may well be considered unconscionable.

It is submitted that the suggestion or even the proof of such an underlying motive should not of itself justify, nor even be considered as a factor, in finding oppression. To do so would be to intrude unduly upon the essential contractual principles of certainty and freedom to contract. Moreover, it is

61 Ibid, 7.
62 Supra at note 39.
63 Supra at note 8, at 10.

surely within "reasonable standards of commercial practice" for lenders to wish to exit from contractual obligations in order to free their capital when they have the opportunity of doing so legally and in accordance with their contracts. Ulterior motives or collateral purposes should only be tested against the "reasonable standards of commercial practice". Nevertheless, a distinction between ulterior motives simpliciter and those which are unreasonable has not yet been drawn in the cases, and even those ulterior motives in accordance with commercial practice have, in some cases, been relevant to a finding of oppression. The applicability of this factor should be closely considered by counsel.

Profits made by the "Oppressed" Party

In *Cambridge Clothing Company Ltd v Simpson*,[64] Smellie J found that a factor tending to negate oppression was the profit made upon resale by Mr Simpson, the party allegedly oppressed by the actions of the appellant company. In this case, a property was sold for $1,300,000 only twenty-one months after being purchased for $450,000, representing a profit of $850,000. Although the judge at first instance failed to consider the magnitude or even the existence of this profit,[65] on appeal Smellie J accepted the submission of Mr Dugdale (as counsel for the appellant) that the resale price of the property was indeed relevant. In a paragraph dealing exclusively with this issue, Smellie J categorically stated:[66]

> [T]he handsome resale price of the property was a relevant factor to which weight should have been given. If the 'oppressive' feature of the exercise of the right to claim interest is confined to a 'contravention of reasonable standards of commercial practice', then in deciding whether or not it would be reasonable to ask for interest when the original mortgage back presumably assisted Simpson to purchase in the first instance and was granted at a favourable rate of interest at the end of negotiations on equal terms, then surely the fact that the mortgagee was coming out of the transaction very nicely would be relevant. . . . So again I am of the view that the Judge in the Court below fell into error in refusing to take those matters into account.

This, with respect, is surely the correct approach. It must remain open for the courts to consider the extent to which the exercise of a power or the terms of a contract can be oppressive when the very party alleging to have been oppressed is, in spite of such "oppression", able to benefit significantly from the transaction. Such an approach, furthermore, falls within the scope of s 11(2)(c). Again, all the circumstances of the case must be considered.

Breach of Disclosure Requirements

Finally, it should be noted that non-compliance with the disclosure

64 Supra at note 14.
65 Ibid, 345.
66 Ibid, 349.

provisions of Part II of the Act may not alone constitute oppression. It was submitted in *Patrikios Holdings Ltd v United Fisheries Ltd*[67] that the defendant lender had acted oppressively by attempting to enforce a credit contract when there had not been initial disclosure. The plaintiff's argument was based upon s 24, which prohibits the enforcement by any person except the debtor of a contract in which the required disclosure has not been made. However, the argument was rejected, for it was said that although the defendant may have breached s 24, the act of breaching this section cannot be said to be "exercising a right or power in an oppressive manner in accordance with s 10 because it is clearly a right or power which the defendant did not have."[68] Non-compliance with the disclosure provisions will not *per se* be oppressive.

Conclusion

The re-opening provisions of the Credit Contracts Act 1981 appear to threaten the twin pillars of certainty and freedom of contract, but the dire consequences widely predicted upon the introduction of the Act have not been apparent. Indeed, after some seven years in force it is clear that the courts have exercised their exceptionally wide discretionary powers with restraint. Although a diverse range of factors has emerged to influence the courts in the exercise of their discretion, a "golden thread" is apparent. The fundamental principle upon which the re-opening discretion may be exercised is abuse of the relationship between the parties. If this relationship has been manipulated, distorted, or otherwise abused, the contract is liable to be re-opened as oppressive, whether of term or exercise of power. The factors discussed above serve to indicate both the existence and the degree of such abuse. However, with recent trends broadening the scope of liability in respect of many commercial relationships, most notably in the area of directors' duties, it remains to be seen how far this basic principle will accommodate a changing general perception of the overall lender-borrower relationship.

Lender liability may in future merge or coalesce into a quasi-fiduciary liability, with actions measured not only against the factors evidencing an abuse of the parties relationship but incorporating also principles of good faith and fairness. Since the coming into force of the Credit Contracts Act 1981, lender liability is clearly no longer limited by reference to the terms, express or implied, of the loan contract. The Act and its case law provide for the re-opening of contracts in which an abuse of the lender-borrower relationship is evident. Only the future will show the extent to which the "public" principles of good faith and fairness may be grafted onto the still "private" principles of that relationship.

67 (1986) 1 NZBLC 102,422, 102,433.
68 Ibid.